TO: Midwest Environmental Associates  
FROM: Lawyers for Good Government  
RE: Legal avenues for Enforcing Tribal Treaty Rights  
DATE: February 28, 2022

I. INTRODUCTION AND SCOPE

Midwest Environmental Associates has asked L4GG to research case law to identify where harm to habitat, including protected species and degradation of water quality and quantity has been successfully shown in order to clarify legal avenues for enforcing tribal treaty rights.

The scope of this memo does not include a summary of the canons of tribal treaty construction, nor does it include a detailed analysis of the Seventh Circuit case law affirming the existence of tribal treaty rights within the ceded territories. As noted below, the body of case law summarized below collectively holds that habitat protection is a component of tribal treaty rights. However, due to a variety of complex factors, including historical interpretation of underlying treaty rights, other laws or legal instruments at issue (e.g. water rights compacts), and procedural history, there is wide variation in how each court reached its holding. The summary of each case below includes the information that we believe is pertinent to a potential legal avenue for enforcing tribal treaty rights related to harm to habitat.

II. EXECUTIVE SUMMARY

The right to protection of habitat in ceded tribal territories naturally flows from the legitimate expectation that tribes had when they reserved usufructuary rights in each applicable treaty at the time of land cession, namely that there would be sufficient resources available to ensure that those reserved rights were meaningful. In 1905, the US Supreme Court established this underlying principle in its Winans decision,¹ which became the legal foundation for the recognition and protection of hunting and fishing rights within ceded tribal territories. Despite the Winans decision, most of these rights were ignored by courts until litigation in the late 1960s and 1970s created a resurgence in judicial acknowledgement of long-standing tribal rights. From this period forward, courts began to recognize treaty rights in the ceded territories. In the Seventh Circuit, tribal rights litigation during this period brought by certain Ojibwe tribes in Northern Wisconsin: 1) affirmed the existence of usufructuary rights within the ceded

¹ United States v. Winans, 198 U.S. 371, (1905) (prohibiting non-Indian actions that would have deprived tribal members of the ability to take fish pursuant to reserved rights).
territories,\textsuperscript{2} 2) decided what types of ceded territory activities tribal members could engage in,\textsuperscript{3} and 3) drew limits around the State’s ability to regulate tribal rights.\textsuperscript{4} With one notable exception,\textsuperscript{5} most of the case law in the Seventh Circuit, does not appear to advance the aforementioned legal principal of a right to habitat protection within the ceded territories.

In a landmark decision in 2017, the Ninth Circuit in \textit{U.S. v. Washington}\textsuperscript{6} (the “Culverts Case,” summarized below), confirmed that habitat protection is a component of treaty rights. Prior to the \textit{Culverts Case}, tribes had successfully exercised their usufructuary rights to win some form of habitat protection, from maintenance of water levels for fish populations to denial timber harvest permits (these cases, along with the \textit{Culverts Case}, are summarized in Section III.). Although these cases were not decided in the Seventh Circuit, understanding the general themes and conclusions from this body of law will help inform tribes in the Seventh Circuit looking to assert treaty rights to habitat protection. While the scope and substance of each tribe's usufructuary rights are unique to that tribe and their applicable treaty with the United States government, three general conclusions can be drawn from an analysis of this case law.

1. The more direct, precise, and quantifiable the facts are establishing that the State’s action caused the harm, and the clearer the connection between the harm and the relief sought, the more likely the claim will succeed.
2. While rights may be recognized, the actual relief granted by the court will depend on the status of harm (e.g. potential vs. actual).
3. Public or private ownership of infrastructure or land where harm occurs and the extent of State involvement has an impact on whether relief is available and in what form.

Each conclusion in analyzed in more detail in Section IV.

\textbf{III. SUMMARY OF RELEVANT CASE LAW}


\textbf{Facts:} Over the course of many decades, road builders constructed culverts within the Case Area, a portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, to allow the streams to flow underneath roads. State-owned barrier culverts blocked access to approximately 1,000 linear miles of stream, comprising almost 5 million square meters of salmon habitat.

\textsuperscript{2} \textit{Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt}, 700 F.2d 341 (7th Cir. 1983).
\textsuperscript{3} \textit{Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin}, 653 F. Supp. 1420 (W.D. Wis. 1987)
\textsuperscript{5} \textit{Menominee Indian Tribe v. Thompson}, 161 F.3d 449 (7th Cir.1998) (where tribe claimed, inter alia, the right to fish for sturgeon off of the reservation because manmade dams prevented tribal members from exercising their treaty rights, the court found that the applicable treaty reserved no such usufructuary rights and denied tribe’s request for equitable relief in the form of a declaration of off-reservation fishing rights).
\textsuperscript{7} The Supreme Court was equally divided when it affirmed the Culverts decision and therefore the decision does not create precedent binding courts outside of the Ninth Circuit.
Harm: Reduction in salmon and tribal harvests had damaged tribal economies and had caused cultural and social harm to the tribes in addition to the economic harm.

Relief granted: Permanent injunction requiring the State of Washington to repair or replace most of its high-priority barrier culverts within seventeen years, and to repair or replace the remaining culverts at end of their sustainable life or during other road construction projects undertaken for independent reasons.

Reasoning: “Thus, even if Governor Stevens had made no explicit promise, we would infer...a promise to “support the purpose” of the Treaties. That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a “moderate living” to the Tribes. Just as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes’ right of access to their usual and accustomed fishing places would be worthless without harvestable fish.”

Takeaway: The USSC created a clear right to habitat protection when actual harm was shown and forced the State to take action to redress the harm.

2. Baley v. United States, 942 F.3d 1312 (Fed. Cir. 2019)

Facts: In 2001, due to drought conditions, the Bureau of Reclamation (the Bureau) temporarily halted water deliveries to Klamath Project users to: (1) protect three endangered fish species and (2) fulfill its trust obligations to various tribes. Subsequently, a group of farmers sued, claiming that the Bureau had, among other things, violated their water rights under Klamath River Basin Compact between California and Oregon.

Harm: Claim was made by farmers and irrigation districts that water deliveries impacted their farming operations, suggesting that their state water contracts were senior to tribal fishing rights.

Relief Granted: As the Bureau had acted in accordance with tribal rights, the tribes did not seek relief, but rather defended their rights against relief being granted to the plaintiff farmers. Ultimately, the court denied relief to the plaintiffs by deciding that the tribes' reserved water rights were senior to class of farmers' rights to irrigation water.

Reasoning: “At the bare minimum, the Tribes’ rights entitle them to the government's compliance with the [Endangered Species Act] in order to avoid placing the existence of their important tribal resources in jeopardy.”

Takeaway: In addition to using tribal rights, tribes can consider using the Endangered Species Act and other environmental laws to protect habitat on tribal lands.


Facts: A proposed new oil pipeline would originate at a terminal dock in Port Angeles, Washington, where the crude oil would be unloaded from tankers arriving from Alaska and pumped into the pipeline. In Port Angeles, the project called for the pipeline to cross beneath Puget Sound and then to continue to head east terminating in Minnesota, where it would connect with an existing pipeline system.
**Harm:** Oil pipeline construction would threaten and interfere with the treaty fishing rights of tribes guaranteeing a share in anadromous fish runs. The pipeline had the potential to leak or rupture as it crossed Puget Sound and various other rivers in Washington with anadromous fish runs. The harm claim was that the Project would increase the level of oil tanker traffic in the Straights of Juan de Fuca, thereby increasing the potential for oil spills and significant impacts to anadromous fish species.

**Relief Granted:** In lawsuit to block the construction of the oil pipeline, the court denied the defendant’s motion for summary judgment, finding that an issue of fact existed as to whether project would violate Indian treaty rights.

**Reasoning:** “A generalized trust responsibility does not exist in the abstract, but rather only arises from a statute, treaty or executive order. Here, unquestionably, the treaties involved place substantial duties upon the United States. Because, as previously discussed, there exists an issue of fact as to whether at least one of those duties has been breached, it is not possible at this time to determine whether the trust responsibility which arises as a result of the treaties has been fulfilled.”

**Takeaway:** Tribal treaty rights can be successfully used as basis to block oil pipeline construction even when no basis is found under the Public Utility Regulatory Policies Act, the National Environmental Policy Act, the Mineral Lands Leasing Act, the Endangered Species Act, or the Coastal Zone Management Act.


**Facts:** The United States Army Corps of Engineers planned to dam Catherine Creek, in Northeastern Oregon, for flood control, irrigation and recreation purposes.

**Harm:** Some of the tribal fishing stations on Catherine Creek would be inundated by the reservoir created by the proposed dam. Such flooding would deprive tribal members of their right to occupy the fishing stations. Further, the dam would prevent all wild fish from swimming upstream.

**Relief Granted:** The court issued a declaratory judgment against the construction and operation of the Catherine Creek Dam.

**Reasoning:** “In order to nullify treaty rights in this way, Congress must act expressly and specifically. The right to destroy Indian rights will not be inferred from a general project authorization such as that for this dam. Congress authorized this project in 1965 without knowing that the dam would affect treaty rights. The Corps of Engineers' first knowledge of the existence of fishing rights in the area came in 1972. Therefore, the Congress has not authorized the taking of Indian fishing rights for the Catherine Creek Project.”

**Takeaway:** Federal authorizations under the Clean Water Act can be nullified if direct and significant harm to tribal rights can be shown.

**Facts:** Regulation was issued by the Secretary of the Interior to establish the basis on which water will be provided during the succeeding twelve months to the Truckee-Carson Irrigation District.

**Harm:** The regulation would have diverted water that would otherwise have flowed into Pyramid Lake, located on the tribe’s reservation and adversely affected spawning habitat for the cui-ui, a fish relied upon by tribal members in the exercise of their treaty reserved fishing rights.

**Relief Granted:** The court enjoined the Secretary from authorizing the diversion of water through regulation.

**Reasoning:** “In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake. The United States, acting through the Secretary of Interior, “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”

**Takeaway:** Tribal rights can be exercised to materially alter federal water use policy implementation.

6. **Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033-34 (9th Cir. 1985)**

**Facts:** The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. But artificially high irrigation releases caused the salmon to misjudge spawning. The district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. Impacted irrigation districts filed suit, arguing that the court lacked jurisdiction because its order exceeded the scope of authority reserved in the 1945 consent decree establishing water rights in the region.

**Harm:** Approximately 60 redds would be exposed and destroyed if water flows were not maintained.

**Relief Granted:** As the district court had acted in accordance with tribal rights, the tribes did not seek relief, but rather defended their rights against relief being granted to the irrigation district. The Ninth Circuit Court of Appeals held that the district court was empowered to issue orders directing allocation of water within the Yakima River system to maintain water flow for the protection of tribal fishing rights.

**Reasoning:** The court did not provide much detail in how it arrived at its decision, only stating: “because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate the treaty rights of the Yakima Nation, appellants’...argument also fails.”

**Takeaway:** Consent decrees and other contracts cannot be interpreted to adjudicate or amend tribal treaty rights unless explicitly stated.

**Facts:** The United States Forest Service adopted forest plans for the Fremont and Winema Forests to establish, among other things, the timber sale targets for a 10 to 15-year period.

**Harm:** Harvesting of the eight timber sales would have adversely impact the resources upon which tribal treaty rights depend. The tribes are particularly concerned with the destruction and degradation of prime old-growth habitat for species, including the mule deer, on which the tribes depend for their subsistence and way of life.

**Relief Granted:** The court granted a preliminary injunction prohibiting the salvage logging that would affect wildlife resources within the tribes’ former reservation.

**Reasoning:** “In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources….Moreover, the federal government has a substantive duty to protect “to the fullest extent possible” the Tribes' treaty rights, and the resources on which those rights depend.”

**Takeaway:** Suggests a procedural duty on part of US Government to confer with Tribes for any decision that will impact treaty resources and a substantive duty to protect tribal treaty rights.

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**IV. ANALYSIS AND CONCLUSIONS**

1. The more direct, precise and quantifiable the facts establishing that the State’s action caused the harm, and that the relief sought will redress such harm, the more likely the claim will succeed.

In the district court litigation that preceded the *Culverts Case*, the court stated:

“The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.”

Later, the tribes successfully showed that 807 culverts blocked approximately 1,000 miles of stream or 4,800,000 square meters of habitat which caused the reduction of salmon population and tribal harvest. The Ninth Circuit went further stating that “in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. This decision was based on extensive factual evidence presented in the district court. Such evidence included a 1997 report prepared for the Washington State Legislature by two of the State agency defendants in this case that stated, “[f]ish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington.”

The formula for success in the *Culverts Case* was presenting precise and articulable facts showing that the State’s actions—building and maintain barrier culverts—did in fact cause or

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substantially contribute to the harm alleged—reduction in salmon population and tribal harvest—and further that the remedy sought—removal of barrier culverts—would redress the harm. The question before the court in the Culverts Case was much narrower than in the preceding litigation, where the court, in what became known as the Orrick decision, held that treaty-protected fishing rights included the right “to have the fishery habitat protected from man-made despoliation” but did not reach the issue of what remedy a violation of that right would require or whether the State was actually violating that right. The Orrick decision was overturned, in part, because it was too broad and open-ended and perhaps because a precise remedy was not ordered. How, for example, should the State precisely be required to protect the fish habitat from man-made despoliation?

To illustrate using a hypothetical, assume that evidence exists showing that tribal fishing harvests are significantly reduced due to the State’s use of an herbicide to control certain invasive species. A challenge to the State’s use of herbicide may be successful because it involves a fact-specific, narrow inquiry similar to the Culverts reasoning. By contrast, a claim brought against the United States Coast Guard related to its regulations governing the release of freighter ballast water (often the source of invasive species) would likely be more difficult to win. It likely would be difficult to trace the harm to the State action of promulgating regulations and to show that ballast water discharge caused the introduction of the invasive species. Similarly, it may be difficult to show a connection between a reduced hunting and fishing grounds resulting from man-induced climate change. Instead, tribes may have more success citing a particular activity (pipeline, construction, etc.) that is directly impacting a clear tribal right.

2. Relief granted will depend on the status of harm (e.g. potential vs. actual)

In cases where the State action is proposed and the harm has not yet accrued, the relief sought is typically of a procedural nature, such as the denial of a permit or a failure to comply with a particular environmental review process. In many of the cases summarized above, such as Baley, No Oilport!, Confederated Tribes, and Klamath Tribes, tribes filed actions to prevent State action that had the potential to infringe upon treaty rights or to defend actions that provided protection from infringement. The proper legal avenue to follow depends on a number of factors, including the particular regulatory process applicable to the proposed State action. However, what these cases show is that courts have consistently found that tribal treaty rights must be adequately considered during the review, permitting or rulemaking process. Unfortunately, using this approach requires tribes to be vigilant in tracking upcoming regulations, rules, and projects that could impact their tribal rights. It is also important to note that in many of these cases, the relief granted will be procedural in nature, which may not afford tribes with long term protections.

In cases where the harm exists and results from previously sanctioned State activity, the evidentiary burden is higher (as discussed above), but, if successful, the relief sought may be more desirable and long-lasting. In the Culverts Case, the court determined that monetary damages alone would not be enough to address the harm and that injunctive relief—specifically, requiring the State to correct most of its high-priority barrier culverts within seventeen years, and

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to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reason—was the only appropriate remedy.

3. **Public or private ownership of infrastructure or land where harm occurs and the extent of State involvement has an impact on whether relief is available and in what form.**

The Seventh Circuit held that tribal usufructuary rights do not extend to private land and cannot be infringed upon by private actors.11 Therefore, some form of State involvement is required for successful relief. For example, in reviewing a proposal for an oil pipeline that runs across both privately owned land and public land located within a ceded territory, tribes would be limited to challenging only the portion of the pipeline (and the State’s involvement in the environmental review and permitting process) running across the public land. In cases where the State action is not the cause of the harm, tribes can use a regulatory approval process such as a Clean Water Act from the US Army Corps of Engineers or an Endangered Species Act from NOAA Fisheries or the US Fish and Wildlife Service as the regulatory hook to show State/federal involvement. In this instance, the relief sought will depend on the regulatory process itself.

Engaging in the regulatory process allows tribes to use treaty rights to require State and federal agencies to impose more restrictive conditions during permitting or to deny a permit altogether to protect tribal treaty rights. When agencies fail to adequately consider tribal treaty rights, tribes can litigate for the protection of those resources and their habitat in court. Whether the proposed government action was to approve a dam, harvest timber, or water diversion, tribes have found success in asserting their treaty rights to enjoin the government from approving such actions.

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11 *Sokaogon Chippewa Cnty. v. Exxon Corp.*, 805 F. Supp. 680, 706 (E.D. Wis. 1992), aff’d, 2 F.3d 219 (7th Cir. 1993).