

Columbia River Treaty Renewal and Sovereign Tribal Authority under the Stevens Treaty “Right-to-Fish” Clause

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David A. Bell*

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“The salmon was put here by the Creator for our use as part of the cycle of life. It gave to us, and we, in turn, gave back to it through our ceremonies . . . Their returning meant our continuance was assured because the salmon gave up their lives for us.”

—Carla HighEagle, Nez Perce¹

I. INTRODUCTION

Tribal members and early visitors tell and re-tell the stories of the grand Columbia River salmon runs with reverence and hope. “You could walk across their backs at Spokane Falls,”² or “... there [wa]s a continuous wave of them, more resembling a flock of birds than anything else in their extraordinary leap up the falls.”³ Prior to European settlement, salmon swam up the Columbia River reaching distant spawning grounds and ancient fishing sites in great numbers. Some estimates place their numbers at as many as 16 million fish per year, providing food and sustenance to all living things in the region.⁴ Today, those grand runs are gone. Dam construction and development on the Columbia reduced those salmon runs to estimates around 1.5 million fish of which about seventy five-percent are hatchery-raised fish.⁵ But for the tribes, the salmon remain part of religious ceremony, legends, diet, daily life, and existence. Tremendous amounts of human energy and money

1. Columbia River Inter-Tribal Fish Commission, *Words of Our Leaders*, CRITFC, RESTORE, CONSERVE PACIFIC NORTHWEST SALMON, <http://www.critfc.org/salmon-culture/we-are-all-salmon-people/> (last visited Feb. 23, 2015).

2. Matt Wynne, chair of Upper Columbia United Tribes, Columbia River Treaty Conference (Oct. 22, 2014).

3. Becky Kramer, *Spawning Hope*, The Spokesman Review, July 27, 2014 (quoting artist Paul Kane in 1848) <http://www.spokesman.com/stories/2014/jul/27/spawning-hope/>.

4. Bill M. Bakke, *Chronology of Salmon Decline in the Columbia River 1779 to the Present*, 1, <http://www.nativefishsociety.org/conservation/documents/chronocr-nwsalmondecline3-12-09.pdf> (last visited Mar. 21, 2015).

5. *When Salmon are Dammed*, PACIFIC STATES MARINE FISHERIES COMMISSION, <http://www.psmfc.org/habitat/salmondam.html> (last updated Apr. 4, 1997).

are devoted each year to the restoration of these ancient salmon runs and the river system that supports them.

The fifty-year-old Columbia River Treaty (“CRT”) between the United States and Canada, which added more dams and power production to the river, is subject to potential change or renewal as of September 2014. The tribes of the Columbia River view treaty renewal as an opportunity to improve or change the dams to benefit these salmon populations and habitat. The Columbia Basin Tribes Coalition⁶ (“Tribes”) has put the United States on notice regarding their sovereign authority in the Columbia River Basin and intent to use the CRT renegotiation to include ecosystem improvements.⁷ The original negotiation left all the Tribes out of the process; since then, they have had little influence on treaty implementation or changes to the flood control and hydropower generation goals of the original CRT.⁸ As treaty renewal approaches, however, the Tribes have been clear that they will not be left out of this round of negotiation.⁹

The Tribes believe the original CRT process was flawed because there was no input from the Tribes, nor respect for their treaties with the U.S. Government.¹⁰ The original CRT failed to account for the value and necessity of an intact ecosystem and has, since 1964, further degraded salmon fishing, river ecology, and the lives of the Columbia River Indian residents.

6. The Burns Paiute Tribe, the Coeur d’Alene Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Nation, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Cowlitz Indian Tribe, the Kalispell Tribe of Indians, the Kootenai Tribe in Idaho, the Nez Perce Tribe, the Fort McDermitt Paiute Shoshone Tribe, the Shoshone-Bannock Tribes of the Fort Hall Reservation, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, and the Spokane Tribe of Indians. (The author recognizes that each tribe has a separate enforceable treaty with the U.S. Government. To simplify this analysis, the use of “Tribes” will include all 15 tribes as these tribes have agreed to work together in the CRT renewal process. Because the tribes are also all Stevens Treaty tribes, the author believes the similarities allow for this simplification.)

7. Columbia Basin Tribes Coalition, *Common Views on the Future of the Columbia River Treaty*, UNITED STATES ENERGY ASSOCIATION (Feb. 25, 2010), [http://www.usea.org/sites/default/files/event-/Common % 20Views % 20 statement % 20NQ.pdf](http://www.usea.org/sites/default/files/event-/Common%20Views%20statement%20NQ.pdf) [hereinafter *Common Views*].

8. *Id.*

9. *Id.*

10. *Id.*

After more than one hundred years defending their treaty right-to-fish, the Tribes are now on a different footing for the possible treaty renewal or termination process that can occur anytime after September 2014. From the outset of treaty renewal planning, the Tribes have been included on the Sovereign Review Team¹¹ appointed by the U.S. Entity.¹² The Tribes' main initiative in the CRT renegotiation process is the inclusion of ecosystem-based management as a new treaty provision to benefit fish, wildlife, and plants.¹³ While inclusion in the CRT Sovereign Review Team is a positive starting point for the Tribes, it is no guarantee of direct influence of tribal sovereign power in the treaty process.

This paper will first provide a brief outline of the CRT, CRT background and procedure, and an evaluation of the Tribes' authority and position in the CRT renewal process. This evaluation necessarily includes a review of the Stevens Treaties, case law regarding those treaties, and other law that grants the tribes judicial or legislative power in the treaty making process. Next, this paper will argue, based upon caselaw regarding treaty provisions securing the right-to-fish in the Columbia River Basin, that the Tribes maintain sovereign authority in any negotiation impacting fish, fish habitat, or fishing on the Columbia River, including the CRT renewal process.

II. HISTORIC USE AND TRADITIONS OF NATIVE AMERICANS ON THE COLUMBIA RIVER

The Columbia River Basin ("Basin") covers 259,500 square miles.¹⁴ Approximately fifteen-percent of the Basin lies in Canada with

11. U.S. Army Corps of Engineers and Bonneville Power Administration, *Columbia River Treaty History and 2014/2024 Review*, 2, www.crt2014-2024review.gov/Files/Columbia%20River%20Treaty%20Review%20_revisedJune2014.pdf (revised June 2014) [hereinafter *CRT History and 2014/2024 Review*]. (The Sovereign Review Team consists of four states, eleven federal government agencies, and the fifteen tribes who are part of the Columbia Basin Tribes Coalition).

12. *CRT History and 2014/2024 Review* at 4. The U.S. Entity, which consists of the Administrator of the Bonneville Power Administration ("BPA") and the U.S. Army Corps of Engineers Northwestern Division Engineer, is charged with formulating and carrying out the operating arrangements necessary to implement the Columbia River Treaty in concert with the Canadian Entity.

13. *Common Views*, *supra* note 7, at 1.

14. *CRT History and 2014/2024 Review* at 2.

the remainder in the United States.¹⁵ The river crosses numerous Indian reservations, where at least fifteen U.S. tribes maintain land and fishing rights.¹⁶ While only fifteen-percent of the Basin lies in Canada, as much as fifty-percent of the peak river flow originates in Canada.¹⁷ This substantial flow from Canada creates a need for cooperation between both countries to regulate flows for flood control, generation of electricity, and other beneficial uses.¹⁸ This need for cooperation regarding river management was the basis of the 1961 Treaty governing the use of the river resource.

A. Historic Tribal Use of the Columbia River

Prior to the arrival of European settlers and trappers, Indian settlements were widely dispersed along the Columbia River and throughout Western Washington.¹⁹ The tribes occupying the Columbia River Basin relied on a wide diversity of animal and plant life for food, but all tribes were dependent upon the river and its fish, particularly salmon, to “sustain the Indian way of life.”²⁰ Salmon and steelhead fed the tribes, played a religious role, and were the basis of the Indian economy.²¹ The life cycle of the salmon, the fluctuations in fish populations, and the seasons were all factors that impacted the pre-European lifestyle of the tribes; the tribes literally followed the fish and waited for them to return in a yearly cycle.²²

All of the Tribes moved freely along the Columbia River, as there were no boundaries that determined where an Indian was allowed to fish.²³ As a general rule, individual Indians had primary fishing rights at the place where they lived or where they were born (natal rights).²⁴ While most groups fished near their villages in fall and winter, the spring and summer fishing areas were often distantly located and usually shared

15. *Id.*

16. *Common Views, supra* note 7, at 1.

17. *CRT History and 2014/2024 Review* at 2.

18. *Id.*

19. *United States v. Washington*, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) [hereinafter *Wash. I.*].

20. *Id.*

21. *Id.*

22. *Id.* at 350-351.

23. *Id.* at 353.

24. *Id.*

with other groups from other villages.²⁵ At the time of treaty negotiations George Gibbs, an attorney and interpreter for the U.S., noted that:

As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.²⁶

In every aspect of life, the tribes relied upon the Columbia River and all it provided for their society.

B. The Stevens Treaties

By 1846, the United States claimed the Oregon Territory (which encompassed the entire U.S. portion of the Columbia River Basin) by extinguishing all conflicting claims with Spain, Russia, and Great Britain regarding discovery and settlement of the territory.²⁷ After the settlement of those claims, the United States organized the Washington Territory out of the northern portion and appointed Isaac Stevens governor of the territory.²⁸

In December of 1853, Governor Stevens, also serving as the first Superintendent of Indian Affairs of the Washington Territory, wrote to the Commissioner of Indian Affairs regarding the need to make treaties with the Pacific Northwest tribes.²⁹ Governor Stevens subsequently received authority to proceed with treaty making in August 1854 and assembled a staff to negotiate with the Tribes.³⁰

At the negotiations, all of the Tribes voiced concern that creation of boundaries and reservations might limit their ability to gather food at their usual and accustomed places.³¹ Access to fishing for salmon and steelhead were particularly important.³² In response, Governor Stevens

25. *Wash. I*, 384 F. Supp. at 353.

26. *Id.*

27. *Id.* at 353-354.

28. *Id.* at 354.

29. *Id.*

30. *Wash. I*, 384 F. Supp. at 354.

31. *Id.* at 355.

32. *Id.*

and the treaty commissioners assured the Tribes they would be allowed to fish in their usual and accustomed places.³³ At the Point-No-Point Treaty negotiations, Governor Stevens spoke specifically about the fishing right reserved in exchange for the ceded lands:

Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish. Does not a father give food to his children?³⁴

To support his intentions, Governor Stevens included these provisions in the treaties by using the following (or similar) language in all nine “Stevens Treaties”: “[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing.”³⁵ This language has been interpreted as a reservation of the right-to-fish, the right to access fishing, and a right of shared fish in common with all other tribes.³⁶

C. Post Treaty Fishing Rights and the CRT

While the reserved rights were written into the treaties and fishing remained important to the Tribes, the right-to-fish slowly deteriorated under the pressure of development and change brought by the influx of European settlers at the turn of the century.³⁷ These rights were significantly diminished as non-Indian fisherman opened commercial fisheries in the Basin and the States of Oregon and Washington sought to regulate all off-reservation fishing.³⁸ As a result,

33. *Id.* at 350.

34. *See* United States v. Washington, 506 F. Supp. 187, 192 (W.D. Wash. 1980), *rev'd*, 759 F.2d 1353 (9th Cir. 1985).

35. *Wash. I*, 384 F. Supp. at 356. There is some variation in the actual language between the treaties. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 18.04[2][e][ii], 1169 n.39 (Neil Jessup Newton ed., 2012).

36. *See infra* Section IV.

37. *Wash. I*, 384 F. Supp. at 358-382.

38. *Id.*

the Tribes and tribal members faced competition in their own fisheries, arrest for off-reservation fishing, state closures of “usual and accustomed” fishing areas, and outright destruction of entire river channels and “usual and accustomed” fishing areas by the construction of dams, shipping channels, and other civil infrastructure.³⁹ It was during this time of significant development and destruction of fisheries and “usual and accustomed” places for tribal fishing, that the CRT was drafted, agreed upon by Canada, and ratified by the United States Congress.⁴⁰ The implementation of the CRT further degraded the fisheries by adding additional dams and power production to the river system.⁴¹ In keeping with most of the development and changes on the river that occurred at the time, no input from the Tribes was requested or used in the CRT development plans.⁴²

III. THE COLUMBIA RIVER TREATY

A. History of the Columbia River Treaty

The United States and Canada signed the original CRT agreement in 1961.⁴³ The two countries exchanged legislative ratifications clarifying the CRT and some protocol provisions in 1964.⁴⁴ The CRT governs hydropower and flood control on the 1,200 mile long Columbia River.⁴⁵ The treaty was designed to provide both countries with power and flood control benefits to be realized by the construction of three dams in Canada and authorization of another dam in the United States at Libby, Montana (on the Kootenai River, which originates in Canada, enters Montana, and then flows once more into British Columbia before returning to the United States).⁴⁶ The construction of the four new dams more than doubled the storage capacity of the

39. *Id.*

40. *Common Views, supra* note 7, at 1.

41. *Id.*

42. *Id.*

43. *CRT History and 2014/2024 Review* at 4.

44. See Exchange of Notes Constituting an Agreement Between Canada and the United States of America Concerning the Treaty Related to Cooperative Development of the Water Resources of the Columbia River Basin U.S.-Canada, Jan. 22, 1964, 15 U.S.T. 1555, 1964 WL 70231.

45. *Id.* at 4-5.

46. *CRT History and 2014/2024 Review* at 2; Columbia River Treaty, U.S.-Canada, art. II, XII, Jan. 17, 1961, 15 U.S.T. 1555 (Canadian Development and Kootenai River Development).

Columbia River system.⁴⁷

As part of the agreement, the U.S. paid for the three dams constructed in Canada to be used for flood control and hydropower generation.⁴⁸ The flood control portion of the payment was settled with an initial payment to Canada of \$64.4 million.⁴⁹ The hydropower generation payment was settled with a perpetual payment of one-half of the proceeds of all power generation from the water storage.⁵⁰ These proceeds, known as the “Canadian Entitlement,” are valued at approximately \$254 million per year.⁵¹ Unsurprisingly, the Canadian Entitlement is a contentious issue in renegotiation.⁵² The U.S. believes it has paid enough for the dams and that the power generation proceeds are too high; the Canadians believe the U.S. benefits are undervalued.⁵³ Both sides have hardened their positions as renewal approaches and the Canadian Entitlement, while a side note to this article, will likely be the issue that will cause termination or renewal of the CRT.⁵⁴

Finally, it is important to reiterate that the original CRT dealt solely with flood control and hydropower generation between the U.S. and Canada with no tribal consultation.⁵⁵ The Tribes were ignored.⁵⁶ The CRT completely failed to pre-determine the impacts on salmon, a healthy Columbia River and tributaries, and the treaty fishing rights and cultural sites of the Tribes protected under United States law and tribal treaties.⁵⁷

47. *CRT History and 2014/2024 Review* at 5, see also British Columbia, *Columbia River Treaty Review: Technical Studies [DRAFT]* COLUMBIA RIVER TREATY REVIEW (Mar. 11, 2013), <http://blog.gov.bc.ca/columbiarivertreaty/history/>.

48. *CRT History and 2014/2024 Review* at 5.

49. *Id.* at 5-6.

50. *Id.* at 6.

51. *Id.*

52. *Salmon en route: Canada and the United States Face Tough Negotiations*, THE ECONOMIST (June 7, 2014), available at, <http://www.economist.com/node/21603435/print>.

53. *Id.*

54. Jessica Robinson, *B.C. Energy Minister Says U.S. Has A Good Deal In Columbia River Treaty*, NW NEWS NETWORK (Oct. 22, 2014), <http://nwnewsnetwork.org/post/bc-energy-minister-says-us-has-good-deal-columbia-river-treaty>.

55. *Common Views*, *supra* note 7, at 1.

56. *Id.*

57. *Id.*

B. Treaty Termination or Renegotiation

The CRT was negotiated to last 60 years with no automatic termination date or renegotiation clause.⁵⁸ The agreement allows either party to terminate after a 60-year period, but requires ten years notice prior to termination, effectively making 2024 the earliest date either party could terminate.⁵⁹ Still, the idea of termination is not entirely accurate as several of the main flood control provisions of the treaty will continue regardless of termination or renegotiation and are permanent provisions for the useful life of the dams.⁶⁰ As of the date of publication of this article, neither party has moved for termination of the CRT.⁶¹

C. Treaty Renewal Governance

The CRT calls for two "entities" to implement the treaty — a U.S. Entity and a Canadian Entity.⁶² The U.S. Entity, created by the President through the United States Department of State ("State Department"), consists of the Administrator of the Bonneville Power Administration and the Northwestern Division Engineer of the United States Army Corps of Engineers.⁶³ The Canadian Entity, appointed by the Canadian Federal Cabinet, is the British Columbia Hydro and Power Authority.⁶⁴

The U.S. Entity is responsible for implementing the CRT.⁶⁵ As part of the treaty renewal process, the State Department also requested that the U.S. Entity create a regional recommendation for renewal.⁶⁶ The intent of the regional recommendation is to form a plan that will have broad regional support on the elements that Pacific Northwest stakeholders seek in a renewed CRT.⁶⁷

As part of this regional recommendation, the U.S. Entity recognized that the Basin tribes must be included in the renegotiation of

58. *CRT History and 2014/2024 Review* at 1-2.

59. *Id.*

60. *Id.*

61. *Columbia River Treaty 2014/2024 Review: Treaty Review: Process*, COLUMBIA RIVER TREATY, <http://www.crt2014-2024review.gov/Default.aspx> (last visited Mar. 22, 2015).

62. *CRT History and 2014/2024 Review* at 4.

63. *Id.*

64. *Id.*

65. *Id.* at 7-8.

66. *Id.* at 8.

67. *Id.*

the treaty.⁶⁸ The U.S. Entity organized the “Sovereign Review Team” to provide the Pacific Northwest regional recommendation to the Secretary of State for the U.S. Entity.⁶⁹ The Sovereign Review Team consists of the seats from four Northwestern states, 15 tribal governments, and the Northwest federal caucus (consisting of the federal agencies involved in treaty implementation).⁷⁰

The Tribes are working actively to shape the CRT renegotiation with protections for tribal culture and resources. At the outset of the CRT renewal process, the Tribes produced a document titled “Common Views on the Future of the Columbia River Treaty” outlining the Tribe’s mutual agreements regarding the future of the treaty.⁷¹

As part of their participation in the Sovereign Review Team, the Tribes prioritized ecosystem based management and tribal sovereignty, stating:

The Columbia Basin tribes’ interests must be represented in the implementation and reconsideration of the Columbia River Treaty. The Columbia River must be managed for multiple purposes, including -

- Respect for the sovereignty of each tribal government—each tribe has a voice in governance and implementation of the Columbia River Treaty.
- Tribal cultural and natural resources must be included in river management to protect and promote ecological processes—healthy and useable fish, wildlife, and plant communities.
- Integrate the tribes’ expertise of cultural and natural resources in river management.
- Equitable benefits to each Tribe in priority to other sovereign parties in Columbia River management.
- Respecting and preserving the benefits of settlement agreements with tribes.
- Recognize tribal flood control benefits.
- Protecting tribal reserved rights to current and future beneficial uses, in a manner consistent with ecosystem-

68. *Id.*

69. *Id.*

70. *Id.*

71. *Common Views, supra* note 7, at 1.

based management.⁷²

The driving ethos behind the “Common Views” is protection and recognition of the Tribes’ treaty rights, specifically the right-to-fish and the sovereign rights created by the Stevens Treaties.⁷³ The Tribes intend to use their authority to protect tribal, cultural, and economic resources under an ecosystem based management of the Columbia River Basin.⁷⁴

The U.S. Entity tasked the Sovereign Review Team with writing a regional recommendation that reflected the changes, if needed, to the CRT.⁷⁵ The Sovereign Review Team completed the recommendation and submitted it to the U.S. Entity on December 13, 2013.⁷⁶ The recommendation sets the treaty goals:

[T]o develop a modernized Treaty framework that reflects the actual value of coordinated power operations with Canada, maintains an acceptable level of flood risk and supports a resilient and healthy ecosystem-based function throughout the Columbia River Basin.⁷⁷

D. Analysis of Treaty Renewal Governance

The Sovereign Review Team letter⁷⁸ clearly reflects a unified position supporting the regional recommendation by all members of the Sovereign Review Team. In informal conversations with Yakama tribal members, Department of Interior Officials, and Northwest Power Council members, this author found the same unified sentiment among

72. *Id.* (emphasis added).

73. *Id.*

74. *Id.*

75. *U.S. Entity regional recommendation for the Future of the Columbia River Treaty after 2024*, COLUMBIA RIVER TREATY (Dec. 13, 2013), available at, [http://www.crt2014-2024review.gov/Files/Regional % 20 Recommendation % 20Final, % 2013 % 20DEC%202013.pdf](http://www.crt2014-2024review.gov/Files/Regional%20Recommendation%20Final,%202013%20DEC%202013.pdf) [hereinafter *Regional Recommendation*].

76. *Id.*

77. *Letter from U.S. Entity to United States Department of State* at 1 (Dec. 13, 2014), available at, <http://www.crt2014-2024review.gov/RegionalDraft.aspx>.

78. *Id.*; see also *Letter from Columbia Basin Tribes Coalition to John F. Kerry, Secretary of State* at 1-2 (Aug. 19, 2014), available at, <https://naiads.files.wordpress.com/2014/09/col-basin-tribes-letter-to-kerry-consultation-8-19-14.pdf> [hereinafter *Letter from Tribes to John Kerry*].

the Sovereign Review Team members.⁷⁹ All members expressed general approval and solid determination to work together and see the regional recommendation through the renewal process.⁸⁰ Matt Wynne of the Spokane Tribe spoke at a recent CRT conference in Spokane and expressed his amazement that the Tribes could set aside their differences to create a set of “Common Views” all 15 could agree upon.⁸¹ The Sovereign Review Team members’ agreement to incorporate ecosystem-based management into the final regional recommendation stands as another significant cooperative achievement. This achievement creates a tremendous amount of political pressure for acceptance of the recommendation and solid footing for the Tribe’s determination to see ecosystem-based management become a treaty provision.

As part of the Sovereign Review Team, the Tribes have been given significant authority to make a recommendation to the State Department. Nonetheless, because it is limited to a solely advisory capacity, such power can only be regarded as a diminished or token authority intended to give the Tribes a small ownership of the final decision to be made by the State Department. A significant question thus emerges: how will each tribe justify the dilution of authority of a mere “recommendation” with a team that includes 11 federal agencies (all of which actually represent the federal government) and four states when each tribe is itself a sovereign government operating under a treaty negotiated directly with the executive branch? So far, this tension in the relationship between the Tribes, the state sovereigns, and the federal agencies appears to have emerged positively in the unified regional recommendation.⁸²

The Tribes worked with all parties in the regional recommendation process and clearly support the final recommendation to the State Department.⁸³ A comparison between the “Common Views” document with the regional recommendation reveals a fairly similar final product and demonstrates that the Tribes were able to reach agreement with the other sovereigns involved in the process to support the recommendation.⁸⁴ This support is also reflected in a resolution passed

79. Notes from these conversations on file with the author.

80. *Id.*

81. *Id.*

82. See generally *Letter from U.S. Entity to State*, *supra* note 77, at 1; *Letter from Tribes to John Kerry*, *supra* note 78, at 1-2.

83. *Regional Recommendation*, *supra* note 75, at 1; *Letter from Tribes to John Kerry*, *supra* note 78, at 1-2.

84. *Id.*; *Common Views*, *supra* note 7, at 1.

by the National Congress of American Indians, recognizing that the benefits requested by the Tribes were incorporated in the regional recommendation.⁸⁵ Nonetheless, the question remains for the tribes: what does this regional recommendation actually mean when all fifteen Tribes maintain sovereign authority through their reserved fishing rights in regard to any federal action affecting Columbia River salmon and salmon habitat?

E. Current Status of the Renewal Process

The delivery of the regional recommendation to the Secretary of State and executive branch set in motion the next phase of review that will now be carried out by the State Department in consultation with the executive branch.⁸⁶ While the machinations for decision-making at the State Department are mostly unknown, it is expected that State will weigh the Sovereign Review Team recommendation and determine what is politically feasible in treaty renegotiation.⁸⁷ Further, the individual parties comprising the Sovereign Review Team stressed that they prefer to remain involved in the State Department review and decision regarding treaty renewal, but no meetings or procedure are currently planned to involve the sovereigns in the actual negotiation process.⁸⁸ In this final stage of the U.S. side of planning for CRT negotiation the Tribes have been left outside the process. Because they were included in the regional recommendation process it appears, at least at this point, that the State Department assumes that the Tribes are sufficiently involved. It is unlikely that this level of involvement or treatment will serve to meet the high standards set out in the treaties.

IV. TRIBES AND RENEGOTIATION OF THE TREATY

A. The Tribes, the Secretary of State, and the Executive

As a follow up to the regional recommendation, Tribes on the Sovereign Review Team sent a letter to Secretary John F. Kerry at the

85. *National Congress of American Indians Resolution #ANC-14-042* at 1, NATIONAL CONGRESS OF AMERICAN INDIANS, available at http://www.ncai.org/attachments/Resolution_ubvtPBXdjjHDOdomeyQVXuZFcPXncBTofySyqRPysdCUsuLuM_ANC-14-042.pdf (last visited Dec. 19, 2014).

86. *Id.* at 2.

87. *Id.*; see also *Letter from Tribes to John Kerry*, *supra* note 78 at 1-2.

88. *Id.* There is no current plan as of Feb. 23, 2015.

U.S. Department of State requesting government-to-government consultation between the Tribes and the U.S. to collaborate on the future of the CRT.⁸⁹

This letter acknowledges the sovereign authority issue directly and the Tribes explain their building frustration regarding the ambiguous authority granted through the regional recommendation.⁹⁰ In their letter, the Tribes remind the State Department of their obligation to consult with the Tribes at the leadership level in the treaty process.⁹¹ The Tribes' letter informs the Secretary that staff-level dialogue has been productive, but that it is not a substitute for government-to-government consultation.⁹² The letter draws a clear line emphasizing that, "[g]iven the implications associated with the disposition of the Treaty, this consultation must begin now, it must be transparent, it must be ongoing throughout your Department's entire process, and the outcome must be consensual between our governments."⁹³

It appears that the process has gone smoothly for the Tribes until this moment. Importantly, this letter makes it clear to the State Department and the executive that they are ignoring the Tribes' requests and that they must acknowledge their sovereign authority. As they look forward, the State Department and the Tribes appear to agree on the manner for proceeding, but the Tribes seem to doubt the intent of the State Department and the executive in the treaty negotiation process.⁹⁴ Cognizant of the history of the CRT, frustrated by the ambiguous nature of the regional recommendation, the Tribes are determined to assert their sovereign authority in the CRT renegotiation process.

B. What Authority do the Tribes have in CRT process?

The Tribes' firm position with the State Department demonstrates the confidence they hold in their treaties and the subsequent caselaw upholding their reserved rights. Still, because the CRT negotiation with Canada creates implications for conflicting treaties, many questions arise: what can the Tribes do? How much authority do they have in this process? Do they have direct government-

89. *Letter from Tribes to John Kerry, supra* note 78, at 1-2.

90. *Id.*

91. *Id.*

92. *Id.* at 1.

93. *Id.*

94. *Id.*

to-government authority to negotiate with the executive in the renewal process? The Tribes cite several reasons for their firm position in the Letter to Secretary Kerry, several of which will be further reviewed in this paper. They rely on “treaty reserved and other legally recognized rights and interests,” and argue that the government must uphold the trust relationship with the tribes even as it negotiates a treaty with another sovereign.⁹⁵ The Tribes’ points serve as guidelines in the exploration of tribal authority in the CRT renewal process.

All member Tribes of the Sovereign Review Team are Stevens Treaty tribes with treaties that include a “right-to-fish” clause as part of their “treaty reserved rights.”⁹⁶ An expansive body of caselaw has arisen based on this important treaty clause, and while only some of the Tribes were party to the litigation, all of the Stevens Treaty Tribes benefit from the treaty language that is now well-developed and clarified in federal caselaw.

V. TREATY RESERVED RIGHTS: THE FISHING RIGHT UNDER THE STEVENS TREATIES

In order to substantiate the claim that the Tribes have authority under their treaties to affect water use and fish habitat decisions in the Columbia River Basin, a review of the judicial decisions impacting the Stevens Treaties is necessary. The core of federal court cases surrounding the Stevens Treaties focus on the Columbia River and the “right-to-fish” clause in the treaties. The United States Supreme Court has granted strong treaty rights to the Stevens Treaty tribes and those rights have been successfully defended in repeated decisions, with *United States v. Winans*⁹⁷ followed by *United States v. Washington*,⁹⁸ and *Fishing Vessel*.⁹⁹

A. *The Right to Fish Cases*

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

United States v. Winans is the seminal case in the series of right-

95. *Id.* at 1.

96. *Wash. I*, 384 F. Supp. at 358-82.

97. 198 U.S. 371 (1905).

98. 520 F.2d 676 (9th Cir. 1975) [hereinafter *Wash. II*].

99. *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979) [hereinafter *Fishing Vessel*].

to-fish cases at the United States Supreme Court. At the turn of the century white settlers, including Lineas and Audubon Winans, purchased land along the Columbia River to develop commercial fisheries, an enterprise made only recently viable by advances in fish-catching technology.¹⁰⁰ The Winans purchased and set up a fish wheel on their private land at Celilo Falls on the Columbia River.¹⁰¹ With the wheel in place, the Winans caught fish and excluded the Indians from fishing the river where it met their land.¹⁰² In addition to being blocked from their accustomed fishing places, the Indians also found far fewer fish to catch due to the sheer technology of the wheels, which harvested nearly all of the salmon from the river at the point where the Winans fished the river.¹⁰³ This exclusion led to a crisis involving the Indians right-to-fish in their usual and accustomed places, potentially rendering their treaty rights meaningless.¹⁰⁴

After negative rulings at the district and circuit court, the U.S. Supreme Court granted certiorari and reversed to protect the Stevens Treaties tribes' right-to-fish.¹⁰⁵ The Court rejected the Winans' arguments regarding the treaty language:

[W]e will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules."¹⁰⁶

The Court used this analysis to review the circumstances of the treaty signing to determine the Tribe's understanding of the agreement.¹⁰⁷

There, the Court found that the fishing right and the right of access "were not much less necessary to the existence of the Indians than

100. *Winans*, 198 U.S. at 371, 382.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 384.

106. *Id.* at 380-81 quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886).

107. *Id.* at 381.

the atmosphere they breathed.”¹⁰⁸ Importantly, the Court pointed out that the treaties were not a grant of rights to the tribes, but a reservation of the rights the tribes *already* possessed.¹⁰⁹ The Court clearly understood that the Tribes had signed away significant amounts of land and given up considerable resources and that in exchange, the federal government had clearly meant to give the tribes substantial security in their already existing rights to food and traditional resources.¹¹⁰

Further, Justice McKenna explained that the fishing clause was a right to use the customary off-reservation fishing sites similar to past use with only some changes to those rights (such as sharing them in common with citizens of the territory).¹¹¹ The Court concluded that the Yakama tribe’s right to “fish in all usual and accustomed places” “in common with the citizens of the territory” was intended to be a “continuing” commitment by the United States and the State of Washington.¹¹² The Court further determined that the use of technology, here the fish wheels, to take all fish from the river, could not be used to exclude the tribes from the fishing right.¹¹³

Winans declares the Stevens Treaties secured a right-to-fish that included a right of crossing land to the river, a right to occupy that land, and to use it to the extent and purposes of fishing.¹¹⁴ *Winans* affirmed a fundamental reserved treaty right for tribal members to use and occupy riverfront lands at traditional fishing sites and is the touchstone of the right-to-fish and right of access reserved by the tribes under the Stevens Treaties.¹¹⁵

2. United States v. Washington, 520 F.2d 676 (9th Cir. 1975)

The so-called “treaty-fisherman” created as a result of the *Winans* decision was ensured a right-to-fish for tribal fisherman with traditional methods on traditional waters. Nevertheless, in the 70 years following the decision, the large-scale fishing operations in Washington placed continually increasing pressure on the salmon runs, steadily

108. *Id.*

109. *Id.*

110. *Id.* at 380-82.

111. *Id.*

112. *Id.* at 381-82.

113. *Id.* at 382.

114. *Id.*

115. *Id.* at 381-82.

squeezing treaty-fishermen out of the harvest.¹¹⁶ As a result, tribal members relying on salmon lost access to the resource that gave them food and income, and forced many to work in non-Indian industries.¹¹⁷ The conditions created by the fishing industry and the State of Washington created difficult living conditions for treaty-fishermen and subsistence tribes.¹¹⁸

These difficulties, by laying the groundwork for the Tribes to push back on the infringement of their fishing rights, lead to the “fish war” protests of the 1960s.¹¹⁹ The fight intensified during the 1960s, resulting in demonstrations and fish-ins by the tribes that eventually brought litigation.¹²⁰ After considerable pressure from the Tribes, the federal government finally filed suit against the State of Washington in 1970. The case went to federal court in Washington and was assigned to Judge George H. Boldt.¹²¹

Judge Boldt undertook an enormous task in his review of the case, receiving evidence from 49 experts and tribal members during three years of litigation and discovery.¹²² At trial, Judge Boldt held court six days a week including Labor Day to determine the “right-to-fish” issues and the historic tribal use of the Columbia River.¹²³ In 1974, Judge Boldt published a 99-page opinion including 253 findings of fact and 48 conclusions of law in the case finding that the Stevens Treaties reserved the Tribal fishing rights at issue.¹²⁴

At issue in *U.S. v. Washington* was the treaty fishing right as well as the quantification of the Indian and non-Indian shares of fish harvestable from the Columbia system. The Ninth Circuit Court of Appeals affirmed Judge Boldt, finding that the fishing right found in the

116. Ron J. Whitener, *The Personal Impact of the Boldt Case: A Tribute to Professor William H. Rodgers, Jr.*, 82 WASH. L. REV. 497, 501 (2007).

117. *Id.*

118. *Id.* at 501-02.

119. *Id.*

120. *Id.*

121. *Wash. I*, 384 F. Supp. 312. Judge George H. Boldt was a 1926 graduate of the University of Montana School of Law appointed judge in the Western District of Washington by Dwight D. Eisenhower in 1953.

122. Walt Crowley & David Wilma, *Federal Judge George Boldt Issues Historic Ruling Affirming Native American Treaty Fishing Rights on February 12, 1974*, KING COUNTY LIBRARY (Feb. 23, 2003), http://www.historylink.org/_content/printer_friendly/pf_output.cfm?file_id=5282.

123. *Id.*

124. *Wash. I*, 384 F. Supp. at 402.

treaties was a reserved right.¹²⁵ Applying *Winans*, the court determined “[t]he treaties [including the right-to-fish] were “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.”¹²⁶ The court further clarified the right-to-fish, finding the Tribes “granted the white settlers the right-to-fish beside them. In a sense, the treaty cloaks the Indians with an extraterritoriality while fishing at these locations.”¹²⁷

The court lamented the state of fishing for the treaty fisherman:

[A]s the non-Indian population has expanded, treaty Indians have constituted a decreasingly significant proportion of the total population, catching a decreasing proportion of a fixed or decreasing number of fish. “This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.”¹²⁸

The court determined that, because the treaties pre-empt all state regulation of Indian fishing, the State of Washington’s regulation of treaty-fishermen had failed.¹²⁹ The court also affirmed Judge Boldt’s determination that Indian fisherman were entitled to fifty-percent of each harvest of each run at their “usual and accustomed” fishing places.¹³⁰ The court agreed that the treaty language “in common with citizens of the territory”¹³¹ meant an *equal sharing*.¹³²

3. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)

Due to continuing and widespread state defiance after the *U.S. v. Washington* rulings, the Supreme Court granted certiorari in *Washington v. Washington State Commercial Passenger Fishing Vessel*

125. *Wash. II*, 520 F.2d at 684.

126. *Id.*

127. *Id.* at 685.

128. *Id.* at 685 (citing *Winans*, 198 U.S. at 380).

129. *Id.*

130. *Id.* at 688.

131. This language reads in some of the Stevens treaties: “in common with citizens of the United States.”

132. *Wash. II*, 520 F.2d at 688.

*Association*¹³³ to settle the meaning of the 1855 treaty fishing provisions.¹³⁴ *Fishing Vessel* involved yet another disagreement regarding the apportionment of fish taken from the river system through salmon harvests between Indians and non-Indians. Justice Stevens, writing for the Court, used the *Winans* analysis as the benchmark for the treaty fishing clause analysis. This three-part analysis consists of (1) the history of the treaty, (2) the negotiations surrounding the treaty, and (3) the practical construction adopted by the parties.¹³⁵

The Court held:

The language of the treaties securing a “right of taking fish . . . in common with all citizens of the Territory” was not intended merely to guarantee the Indians access to usual and accustomed fishing sites and an “equal opportunity” for individual Indians, along with non-Indians, to try to catch fish, but instead secures to the Indian tribes a right to harvest a share of each run of anadromous fish that passes through tribal fishing areas. This conclusion is mandated by *a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and, particularly, this Court's prior decisions construing the treaties.*¹³⁶

Justice Stevens determined that the Indians could not be denied “any meaningful use of their accustomed places to fish.”¹³⁷ Stevens found that any diminishment of the “right” was “totally foreign to the spirit of the negotiations” and “would hardly have been sufficient to compensate [the Tribes] for the millions of acres they ceded to the Territory.”¹³⁸ Further, the Court affirmed the removal of development that threatens the viability of Tribes fisheries and exclusion of Indians from the fisheries, referencing the *Winans* holding as “clearly includ[ing] removal of enough of the fishing wheels to enable some fish to escape

133. *Fishing Vessel*, 443 U.S. 658.

134. *Id.* at 667.

135. Chief Justice John Marshall, in the early days of the U.S. Supreme Court, interpreted treaties between the United States and the tribes, including the Stevens Treaties, in light of the special canons of construction for Indian treaties. *See, e.g., Fishing Vessel*, 443 U.S. at 676.

136. *Fishing Vessel*, 443 U.S. at 659 (emphasis added).

137. *Id.*

138. *Id.* at 677-78.

and be available to Indian fishermen upstream.”¹³⁹

In *Fishing Vessel*, the Court's rulings were based on the *impact* on the treaty resource caused by the loss of the fishing resource to commercial fishing and development. The Court could not support any further dilution of the Tribes' right-to-fish and determined, based on the history and negotiations of the treaty as well as the practical constructions adopted by the parties, that the tribes right-to-fish and take fish was a reserved treaty right and must be upheld.¹⁴⁰

*B. The Right to Fish Cases and How They May Impact CRT
Renegotiation*

Fishing Vessel resolved any dispute regarding the meaning of the fishing clause language in the Stevens Treaties. The case solidified many years of legal wrangling between the Tribes, the states, and the fishing industry. The Court's holdings upheld the groundwork laid by *Winans*, *U.S. v. Washington*, and the numerous other cases regarding the fishing right.¹⁴¹

Fishing Vessel may have also laid the groundwork for the Tribes to argue for an implied habitat right that could be used to argue for further protections on the Columbia River, including actions such as dam removal. The underlying argument is simple: the right to habitat for healthy salmon runs exists because without the habitat to support the fish in the river system, there would be no fish to catch.¹⁴² Justice Stevens' analysis of the impact of commercial fishing development considered under *Winans* includes the notion that there must be fish for the tribes to catch and any elimination of fish by technological or other means is similar to the “exclusion” of the tribes from fishing.¹⁴³

Presently, the CRT provisions concerning dams for flood protection and electricity generation similarly impact fish and fish habitat by reducing available habitat and taking fish. Ultimately, the operation of the dams excludes the tribes from catching fish and will continue to do so unless additional provisions or plans can be implemented to improve fish habitat and passage. This premise lays the groundwork for habitat

139. *Id.* at 681.

140. *Id.* at 678-79.

141. *Winans*, 198 U.S. 371; *Wash. II*, 520 F.2d 676.

142. See generally O. Yale Lewis III, Comment, *Treaty Fishing Rights: A Habitat Right As Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 281 (2003).

143. *Fishing Vessel*, 443 U.S. at 681.

rights under the right-to-fish clause and may be the strongest basis of authority for the Tribes to assert their sovereign authority in the Columbia River Treaty renegotiation. The Tribes must protect their right-to-fish because the CRT and its impacts are clearly affecting their ability to use that right.

VI. TRUST RELATIONSHIP AND EXECUTIVE ORDER CONSULTATION REQUIREMENTS

A. Duty to Consult and Coordinate

Under Executive Order 13175 (2000),¹⁴⁴ and “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications,” the State, acting for the executive, has a duty to consult with the Tribes regarding the CRT.¹⁴⁵ The duty to consult with tribal governments is a federal mandate and an Indian trust obligation.¹⁴⁶ The “Indian trust doctrine”¹⁴⁷ originated from the “Marshall Trilogy” of cases where Justice John Marshall “held that (1) tribes are “domestic dependent nations”; (2) as such, tribal sovereignty is subject to the overriding sovereignty of the federal government; but (3) the federal government must not haphazardly diminish tribal sovereignty, because ‘their relationship to the United States resembles that of a ward to his guardian.’”¹⁴⁸ The trust relationship places a duty on the federal government requiring all federal agencies to consult with tribes when a government decision may affect tribal interests; this duty was clarified

144. Reaffirmed by Presidential Memorandum on November 5, 2009 by President Barack Obama. See *Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation*, THE WHITE HOUSE (Nov. 5, 2009), available at, <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

145. Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000).

146. *Id.*

147. The trust doctrine was originally created in the Marshall Trilogy of cases and has been subsequently modified and changed through common law interpretations in the federal courts.

148. Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense against Tribal Sovereignty Incursion* 6-7, AMERICAN BAR ASSOCIATION (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)), available at, <http://apps.americanbar.org/buslaw/committees/CL121000pub/newsletter/201101/galanda.pdf> (Dec. 6, 2014).

and affirmed in Executive Order 13175.¹⁴⁹

In the past, the federal government neglected the duty to consult as a regular practice. For example, this same trust obligation existed at the time of the creation of the CRT. The Tribes were altogether ignored in that process. While the 2000 Executive Order has significantly improved the government's attention to the duty to consult, deficiencies in the fulfillment of this obligation are ongoing. The current process of CRT renewal demonstrates deficiencies at the State Department as the department has little or no policy or procedure in place to support their duty to consult.¹⁵⁰

Federal Indian law makes clear that treaties "must be interpreted as they [the tribes] would have understood them."¹⁵¹ At the time of signing, the tribes clearly must have understood that the treaty they were signing with Governor Stevens was the "supreme Law of the Land."¹⁵² As signers of the treaties, the Tribes must have expected at the time of signing that any changes or impacts to their reserved fishing rights would require additional counsels and discussions as grand and consequential as the counsel they participated in to sign away their rights to their ancestral lands.

Here, the CRT, the dams, and more than 100 years of decisions on the Columbia River have degraded the resource to a shadow of its former condition. Any decision to renew or renegotiate the CRT will further significantly affect the Tribes' right-to-fish for centuries and clearly triggers the trust duty to consult.¹⁵³ The State Department has a clear duty to consult and on failure to do so, the tribes may need to seek judicial remedies to enforce the treaty rights.¹⁵⁴

The Tribes specifically requested consultation regarding the CRT in their letter to Secretary John Kerry and the State Department

149. 65 Fed. Reg. FR 67249.

150. As of Feb. 23, 2015, the author can find no official policy for tribal consultation and implementation of Executive Order 13175.

151. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (internal citations omitted).

152. U.S. Const. art. VI, cl. 2.

153. *See generally* 65 Fed. Reg. 67249.

154. Remedies available to the tribes for failure to consult have been established in the federal common law. Due to the expansive discussion on this topic the author only notes here that remedies for enforcement may be available under the Administrative Procedure Act, injunction, writ of mandamus, as well as claims for treaty breaches. *See generally Federal Indian Consultation Right, supra* note 148, at 10-13.

dated August 19, 2014.¹⁵⁵ The State Department has not initiated the tribal consultation process to date.¹⁵⁶ In their letter, the Tribes outlined the State Department's failure to consult with them on the CRT to date, but to this author's knowledge have had no response from the Secretary as of February 23, 2015.¹⁵⁷

VII. CONCLUSIONS ON TRIBAL AUTHORITY AND THE CRT NEGOTIATIONS AND RENEWAL

At this point in the renewal process it appears the Tribes maintain a very powerful political position because they are united with all tribes, the states, and the federal agencies in the regional recommendation. Because all regional authorities seek the same outcome, it appears that the State Department and the executive branch will necessarily adopt the regional recommendation and will then negotiate with Canada for the addition of ecosystem-based protections in a renewed CRT.

If the State Department and the executive reject the regional recommendation and determine that ecosystem concerns must be left out of the renegotiation, the Tribes have clear treaty rights which must be addressed directly under consultation. If the federal government chooses to ignore the Tribes' requests and their authority under their reserved right-to-fish and other treaty rights in the CRT renewal process, the Tribes will have the option to seek judicial remedies. Based upon the outcome of the Tribes' one hundred years of struggle and litigation for those reserved treaty rights in the Columbia River Basin, the Tribes are likely to prevail. While federal Indian law litigation at the Supreme Court is a potentially hazardous undertaking, it is unlikely the Court would change or overturn the decisions affirming Tribal treaty rights in the Columbia River Basin. Further, litigation may only need to be the "big stick" that brings the State Department and the executive to the table. Nonetheless, litigation may be the only option if the Tribes are left with nothing more than the prospect of more damage to salmon and the Columbia River ecosystem in the future.

On a final note, putting all of the concerns about the CRT, ecosystem-based management, and tribal authority aside, the ultimate decisions on the CRT likely will involve money. While the U.S. may be

155. *Letter from Tribes to John Kerry, supra* note 78, at 1-2.

156. *Id.*

157. *Id.*

interested in adding ecosystem-based management into a renewed CRT, the real issue to renegotiate goes back to the Canadian Entitlement--and what the U.S. believes is an overpayment for flood protection. If the U.S. determines it is time to renew, it will likely be motivated by money and not the damage caused to the ecosystem. Nonetheless, the Tribes will still be able to use that opportunity to apply pressure for additional CRT changes benefitting salmon production and healthier habitat for the Columbia River in the future.

“My strength is from the fish; my blood is from the fish, from the roots and berries. The fish and game are the essence of my life. I was not brought from a foreign country and did not come here. I was put here by the Creator.”

—Chief Weninock, Yakama, 1915¹⁵⁸

158. Chief Weninock, *Words of our Leaders*, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/salmon-culture/tribal-salmon-culture/> (last visited Feb. 23, 2015).