Stevens Treaties and Water Quality

On November 28, 2016, at the end of the Obama Administration, the Environmental Protection Agency ("EPA") published a final rule revising certain federal water quality criteria applicable to the State of Washington (the "Washington Rule") under the Clean Water Act (CWA). 81 Fed. Reg. 85,417 (Nov. 28, 2016). Concurrent with the Washington Rule, EPA also disapproved of 143 of the human health water quality criteria submitted by Washington in August 2016. *Id.* at 85,419.

In rejecting Washington's water quality standards and deriving the water quality criteria for certain toxic pollutants imposed by the Washington Rule, EPA used a fish consumption rate (FCR) of 175 grams per day ("g/day") – a dramatic increase from the FCR of 6.5 g/day used to support the water quality criteria previously applicable in Washington. EPA identified tribal members as the target population for protection under its water quality analysis because the agency concluded that (1) it has "an obligation to ensure that its actions do not conflict with tribal treaty rights," and (2) tribal members in Washington have the "treaty-reserved right to take fish for subsistence purposes" under the Stevens Treaties between the federal government and certain Western Washington tribes from the 1850s. *Id.* at 85,422-23. Accordingly, EPA determined that water quality criteria derived from the new 175 g/day FCR were "necessary" to protect tribal members practicing a "subsistence lifestyle" at an unsuppressed rate of fish consumption, pursuant to their fishing right under the Stevens Treaties. *Id.* at 84,425.[1]

On February 21, 2017, a consortium of industry groups submitted a petition to EPA seeking reconsideration of the Washington Rule on a range of technical and legal grounds. To date, EPA has not acted on the petition for reconsideration. Nor has the Washington Rule yet been challenged in court.

This memorandum first discusses the Washington Rule's misguided reliance on the Stevens Treaties in disapproving of Washington's water quality standards and imposing the substantially more stringent federal water quality criteria. Specifically, EPA's reliance on the Western Washington Tribes' "right" to take fish under the Stevens Treaties to justify dramatic changes in applicable water quality criteria – a de facto "environmental servitude" – cannot be reconciled with established law. There is a well-developed body of law from the Supreme Court and the Ninth Circuit interpreting the Stevens Treaties, which is clear that ***the Stevens Treaties do not guarantee any level of subsistence*** in the taking of fish and do not establish an

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[1] The estimated self-identified population of American Indians/Native Alaskan in Washington state is about 132,000, out of a total population of more than 7.38 million people. *See* https://www.ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-trends/population-race. It is uncertain if more than a very small percentage of that number (or if any tribal members at all) are genuinely engaged in subsistence fishing for salmon or any other species of fish as tribal members might have been multiple centuries ago. In 2000, respondents to the federal census for the first time were allowed to check more than one race category, which allowed for the tabulation of persons of multiple races including American Indian/Native Alaskan, estimated at 348,463.

"environmental servitude" or subsidiary rights requiring any level of water quality – let alone the extremely conservative levels that EPA set under the Washington Rule. Instead, the Stevens Treaties only allow tribal members to share in the commercial take of the same fish available to other citizens of Washington. Thus, the Stevens Treaties cannot be leveraged to govern water quality standards applicable throughout the state. The U.S. Supreme Court is likely to further reinforce this principle in the Washington State culvert litigation this June.

Second, this memorandum discusses the unique state and federal statutory regime that governs the regulation of so-called "Indian waters" in Maine, which is currently the subject of ongoing litigation brought by the State of Maine in 2014 against the EPA. *See Maine v. Pruitt*, No. 1:14-cv-264-JDL (D. Me. 2014). We explain why that case, which involves unique statutory rights, has no bearing on EPA's ability to reconsider the Washington Rule in light of the agency's fundamentally flawed interpretation of the Stevens Treaty fishing right. While EPA has decided in the Maine litigation that it will continue defending its authority to require heightened water quality standards for Indian waters in that state, ***that case is not relevant to EPA's reconsideration of its misinterpretation of the Stevens Treaties underlying the Washington Rule because Maine has a nationally unique tribal-state relationship resulting from land claim settlement agreements that are implemented under a set of state and federal statutes enacted in 1980.***

I. The Fishing Right Under the Stevens Treaties

In 1854 and 1855, the United States signed 10 treaties with more than two dozen tribes in the Pacific Northwest, which are known as the Stevens Treaties after Isaac Stevens the first Governor of the Washington Territory. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979) (*Fishing Vessel*). Each of these treaties provides that "[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 . . ." *See United States v. Washington*, 694 F.2d 1374, 1375 (9th Cir. 1982). The meaning of this fishing right has been the subject of extensive litigation, including at least six cases decided by the Supreme Court.[2]

In stretching to achieve the Obama Administration's policy goals to expansively interpret both federal agency trust and treaty obligations to tribes and its own environmental protection

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[2] *See, e.g.*, *United States v. Winans*, 198 U.S. 371, 381-82 (1905) (the Stevens Treaties guarantee access to traditional fishing places); *Puyallup Tribe v. Dep't of Game of Washington*, 391 U.S. 392, 399 (1968) (Stevens Treaties tribes are free from certain state fishing regulations) (*Puyallup I*); *Fishing Vessel*, 443 U.S. at 685 (Stevens Treaties tribes are entitled to "a fair share of the available fish" up to 50% of each salmon run). *Dep't of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) (*Puyallup II*) (the Stevens Treaties do not permit tribes to take an unlimited number of fish and the state may regulate the taking of fish for conservation purposes); *Puyallup Tribe v. Dep't of Game of Washington*, 433 U.S. 165, 177 (1977) (*Puyallup III*) (the Stevens Treaties tribes' "exclusive right" to take fish passing through their reservations does not permit tribes to destroy the rights of other citizens of the Territory). Both *Puyallup II* and *III* hold that the state can regulation on and off reservation fishing in the interest of conservation. *Puyallup III* upheld the state's method of limiting the Stevens Treaties tribes' taking of fish.

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authorities, ***EPA misconstrued the "right of taking fish" under the Stevens Treaties in two fundamental ways.*** First, the fishing right under the Stevens Treaties does not guarantee any level of tribal subsistence in the taking of fish. Second, the Ninth Circuit has been clear that the Stevens Treaties fishing right does not establish an "environmental servitude" requiring State agencies to avoid potential environmental effects on the fishery at the expense of other interests, including economic. Accordingly, there is no implied, subsidiary right under the Stevens Treaties to any level of water quality.

A. The Stevens Treaties Establish a Right To A "Fair Share" of "Available" Fish, Not a Subsistence Right

In the Washington Rule, EPA asserted that "[r]elevant case law, including Supreme Court precedents, confirms that the treaty-reserved right to take fish includes the right to take fish for subsistence purposes." 81 Fed. Reg. at 84,423. The only Supreme Court case cited by EPA for this proposition is *Fishing Vessel*. *Id.* at n. 58. EPA quotes dictum in *Fishing Vessel* 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, shared with millions of other citizens, occasionally to dip their nets into the territorial waters" and that "the phrasing of the clause clearly avoids placing each individual Indian on equal footing with each individual citizen of the State." *See Fishing Vessel*, 443 U.S. at 678-79.

The Obama Administration's EPA misread *Fishing Vessel* as establishing a broad subsistence right under the Stevens Treaties, when in fact *Fishing Vessel* does the opposite. Indeed, the tribes in *Fishing Vessel* actually argued, as EPA does in a footnote in the Washington Rule, that the treaties entitled them to enough fish to meet "their commercial and subsistence needs."[3] *Id.* at 670. The federal government disagreed with the tribes and argued that "the Indians were entitled either to a 50% share of the 'harvestable' fish that . . . passed through their fishing places, or their needs, *whichever was less*." *Id.* (emphasis added). The Supreme Court "agree[d] with the government" and held that the Stevens Treaties' right of taking fish "in common" means "both sides have a right, secured by treaty, to take a fair share of the *available fish*." *Id.* at 684-85 (emphasis added). As the Ninth Circuit later emphasized, "*Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish." *United States v. Washington*, 759 F.2d 1353, 1359 (9th Cir. 1985) (en banc).

The Ninth Circuit recently ruled that the State of Washington violated the Stevens Treaties' "promise of a moderate living" when it "acted affirmatively to build roads across salmon bearing streams, with culverts that allowed the passage of water but not passage of salmon." *See United States v. Washington*, 864 F.3d 1017, 1020 (9th Cir. 2017) (denial reh'g en banc). The reference in this case to a "promise of a moderate living" does not create a subsistence right under the Stevens Treaties.

First, while the term "moderate living" appears in *Fishing Vessel*, the holding of *Fishing Vessel* is clear – and the Ninth Circuit has applied it consistently – that the tribes are not entitled

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[3] In fact, the tribes take millions of salmon annually, and in our modern economy, tribal commercial landings far outpace use of the fisheries for food for tribal members.

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to "any particular minimum allocation of fish." *United States v. Washington*, 759 F.2d at 1359. Indeed, the "treaties do not . . . guarantee an adequate supply of fish to meet the Tribe's moderate living needs." *United States v. Washington*, 694 F2d at 1375. *See also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 513 (9th Cir. 2005) (en banc) (*Fishing Vessel* held that the tribes were "entitled to an equal measure of the harvestable portion of each run . . . adjusted downward if tribal needs could be satisfied by a lesser amount."). Second, in the culvert case the Ninth Circuit made clear that its opinion applies only to physical barrier culverts and that it "does not hold that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances" nor "that the promise is valid against all human-caused diminutions, or even against all State-caused diminutions." *United States v. Washington*, 864 F.3d at 1020.

Of course, the Supreme Court has granted review of the Ninth Circuit's decision in the culvert case, strongly signaling that the Supreme Court will weigh in and further limit any expansive interpretation of the Stevens treaties' rights. Argument is now scheduled in the Supreme Court on April 18, 2018. Before the Supreme Court, the State of Washington has challenged the Ninth Circuit's finding that a "promise of moderate living" under the Stevens Treaties requiring the removal of barrier culverts as irreconcilable with the Supreme Court's holding in *Fishing Vessel* which makes clear that the tribes are only entitled to their share of *available* fish.

B. The Stevens Treaties Do Not Create a Subsidiary Right to any Level of Water Quality

Having misconstrued the Stevens Treaties and *Fishing Vessel* to construct a subsistence right, EPA then went on to also wrongly conclude that "the tribes' ability to take fish for their subsistence purposes under the treaties would be substantially affected or impaired if it were not supported by water quality sufficient under the CWA to ensure that tribal members can safely eat the fish for their own subsistence." 81 Fed. Reg. at 85,423. EPA makes clear that the entire basis for imposing the Washington Rule's dramatically heightened federal water quality criteria is this newly found subsidiary right to water quality sufficient to protect tribal members who might exercise a (non-existent) treaty subsistence right: "EPA's consideration of treaty-reserved fishing rights within the framework of the CWA leads to the conclusion . . . that the human health uses for waters in Washington include subsistence fishing, as informed by the tribe's legally protected right to continue to take fish for subsistence purposes." *Id.*

In support of its assertion that the Washington Rule "is consistent with federal Indian law principles addressing subsidiary treaty rights," EPA relies on a letter issued at the tail end of the Obama Administration from the Obama Administration's Solicitor for the Department of the Interior (DOI) to the EPA's General Counsel, entitled "Maine's WQS and Tribal Fishing Rights of Maine Tribes," dated January 30, 2015 (the "Tompkins Letter"). *Id.* at n. 39. DOI provided this letter to EPA in connection with the evaluation of Maine's proposed water quality standards "within waters set aside for federally recognized tribes under applicable state and Federal law for uses including sustenance fishing." Tompkins Letter at 1. Although the Tompkins Letter cites *Fishing Vessel* and other cases concerning the Stevens Treaties, it does not actually analyze the fishing right under the Stevens Treaties. Nevertheless, EPA found that the Tompkins Letter's "discussion of tribal rights and water quality has relevance to tribes with reserved fishing rights in Washington." 81 Fed. Reg. at 85,423 n. 39. In particular, EPA relied on the Tompkins

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Letter's reference to "several court decisions, including Supreme Court decisions interpreting the reserved fishing right in the Stevens Treaties, which have held that fishing rights for tribes encompass subsidiary rights that are necessary to render those rights meaningful." *Id.* But, as discussed above, no such case law exists, and therefore EPA's reliance on the Tompkins Letter to fashion a subsidiary right to water quality in Washington under the Stevens Treaties is misplaced. Accordingly, EPA's legal analysis of this issue is fatally flawed.

First, the Tompkins Letter makes clear that federally recognized tribes in Maine "are subject to a unique framework established by" state and federal Indian claims settlement acts, including with respect to the meaning of a "sustenance" fishing right under those statutes. Tompkins Letter at 1, 4-5. As discussed further below, this unique statutory framework under the Maine settlement acts is inapposite to the Stevens Treaties' "in common" fishing right for a "fair share" of the available harvest.

Second, the Tompkins Letter acknowledges that "[w]e are not aware of any case law" addressing "how tribal fishing rights intersect with EPA's authority under the Clean Water Act to approve or disapprove State WQS." *Id.* at 7. Thus, far from being "consistent with federal Indian law principles addressing subsidiary treaty rights," EPA's conclusion that the Stevens Treaties fishing right encompasses a subsidiary right to any level of water quality is completely unsupported by any direct authority or legal precedent in Indian law.

Finally, in the absence of any clear legal authority or precedent, the Tompkins Letter, and in turn EPA in the Washington Rule, rely on the construction of an implied, subsidiary right to water quality extended from cases concerning issues such as tribal members' access to fishing sites, federally reserved rights to water quantity, physical barriers to fish migration, and irrigation. For example, both the Tompkins Letter and EPA cite the dictum in *Fishing Vessel* that tribes with reserved fishing rights are entitled to something more than "merely the chance to dip their nets into the territorial waters." *Fishing Vessel*, 443 U.S. at 679. This is of course true, and in the case of *Fishing Vessel*, as discussed above, the Supreme Court found that Stevens Treaties tribes are entitled to "a fair share of available fish," up to 50% of each salmon run. *Id.* at 685. This "fair share" is a far cry, however, from determining that a treaty fishing right from the 1850s governs the establishment of water quality criteria for an entire states across a multitude of uses, rather than the CWA's well-established cooperative federalism model and mature, technically sophisticated statutory and regulatory framework.

In fact, the Ninth Circuit in interpreting the bounds of the Stevens Treaties' fishing right has ruled that the right does not create an "environmental servitude" that prevents any State or State-authorized "environmental degradation of the fish habitat that interferes with a tribe's moderate living needs." *United States v. Washington*, 694 F.2d at 1375. The Ninth Circuit rejected interpreting the Stevens Treaties' fishing right to encompass an environmental servitude because of, among other things, "its potential for disproportionately disrupting essential economic development." *Id.* at 1381, 1388-89. The Ninth Circuit, necessarily and appropriately, recognized that a treaty fishing right from the 1850s cannot take absolute precedence over the broad range of other environmental, economic, scientific and social considerations that must be balanced in implementing a regulatory regime governing complex matters such as establishing appropriately protective human health water quality criteria for the state of Washington.

II. EPA's Defense of its Authority to Establish WQS in Maine Does Not Implicate Reconsideration of the Washington Rule

The state-tribal relationship in Maine is unique in the United States and was established pursuant to two interlocking state and federal Indian claims settlement acts, the Maine Implementing Act (MIA), 30 M.R.S. §§ 6201 – 6214 (2015) and the Maine Indian Land Claims Settlement Act (MICSA), 25 U.S.C. §§ 1721 – 1735 (2012) (collectively, the "1980 Acts"). The 1980 Acts extinguished claims Maine tribes had made to vast tracts of land in the state, granted certain tribes federal recognition, and provided significant funding for the tribes. The 1980 Acts also "extended state authority well beyond what is customary for Indian tribes elsewhere in the United States." *Maine v. Johnson*, 498 F.3d 37, 42 (1st Cir. 2007). Specifically, the 1980 Acts "make Maine law generally applicable to all of the Maine tribes and tribal lands," with the narrow exception that some tribes reserve authority over "internal tribal matters." *Id.* at 46.

The Maine water quality standards case involves active litigation between Maine and EPA, ongoing since 2014, regarding EPA's authority to regulate water quality for so-called Indian waters in that state. At its core, the Maine case is about whether, under the 1980 Acts, EPA has any authority to set water quality standards for Indian waters, including on the basis of protecting the Maine tribe's statutory right to "sustenance fishing." Maine contends that under the 1980 Acts and *Maine v. Johnson*, Maine has statewide authority to regulate all water quality, including with respect to Indian waters, and the EPA lacks the authority to establish separate water quality standards for Indian waters on any basis including to protect "sustenance fishing."

While on the surface, the Maine case appears similar to the Washington Rule in that both matters involve questions about whether a tribal fishing right implicates a subsidiary right to more protective levels of water quality imposed by EPA, the matters are distinct in the critical respects discussed below. Accordingly, ***EPA's decision to continue to defend in court Maine's legal challenge to its WQS for Indian waters in Maine has no bearing on the EPA's reconsideration of the Washington Rule's establishment of dramatically heightened water quality criteria to protect the Stevens Treaty fishing right*** (which for the reasons discussed above lacks any basis in Indian law.)

First, the postures and venue of the Washington Rule and the Maine case are different. The Maine case has been in litigation since 2014. A decision for the United States to reverse course in ongoing litigation, that is under a unique set of authorities and that involves a unique history among the parties and the court, is different and potentially more complicated than, on an administrative petition for agency reconsideration of the rule, fully evaluating the legal merits of a policy-driven rule finalized late in the Obama Administration.

Second, the dispute in Maine concerns the relative regulatory authority between Maine and EPA – *i.e.*, whether EPA, in light of the 1980 Acts has any authority to set standards specifically for Indian waters in Maine. While there are questions about whether EPA, as a matter of administrative law, appropriately exercised its authority to disapprove of Washington's water quality criteria, reconsideration of the Washington Rule does not present the same type of

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fundamental jurisdictional issues under the idiosyncratic statutory framework applicable in Maine.[4]

Third, the 1980 Acts applicable in Maine are nationally unique and completely distinct from the Stevens Treaties, particularly on the scope and nature of their respective fishing rights. No matter what role "sustenance" fishing plays under the Maine statutes, ***the Stevens Treaties do not grant any form of "subsistence" or "sustenance" right,[5] but instead allow only the commercial take of the same fish available to other citizens in Washington***. Section 6207(4) of the MIA specifically provides that members of certain Maine tribes "may take fish, within the boundaries of their reservations, *for their individual sustenance* . . ." MIA, 30 M.R.S. § 6207(4) (emphasis added). EPA relied on this provision to identify a "sustenance fishing" designated use as justification for the water quality standards applied to Indian waters in Maine. Final Rule Promulgating Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466, 92,468 n.8. Maine challenges the validity of EPA's interpretation of Section 6207(4) and its use to support the imposition of heightened water quality standards for Indian waters in Maine. Specifically, the State demonstrated that the phrase "for their individual sustenance" was a limited exemption from otherwise applicable fish and game requirements regulating the taking of fish, and it was used to differentiate between commercial fishing and fishing for individual consumption—not to provide a new right to a minimum amount of fish. Therefore , the operative statutory authorities under the MIA in Maine are completely distinct from the Stevens Treaties' right to fish at "usual and accustomed grounds and stations."

In fact, the Washington Rule imposes heightened federal water quality criteria on the entire state of Washington, because the Stevens Treaties' fishing right applies to off reservation fishing by tribal members. The Maine case, however, is narrower because EPA's Maine water quality standards rule only applies to Indian waters and is expressly limited to sustenance purposes. *See* 81 Fed. Reg. at 92,466 ("The [EPA] is finalizing federal Clean Water Act (CWA) water quality standards (WQS) for certain waters under the state of Maine's jurisdiction, including human health criteria to protect sustenance fishing designated use in waters in Indian lands and in waters subject to sustenance fishing rights under the Maine Implementing Act (MIA).").[6] Because the Washington Rule applies broadly within the state, including to waters outside of Indian reservations, and therefore its effects are much more substantial, EPA should proceed with reconsideration of the Washington Rule regardless of the ongoing litigation in Maine concerning Indian waters only.

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[4] Additionally, the Washington Rule expressly applies only to those waters within the state's jurisdiction, and not to waters within Indian country. 81 Fed. Reg. at 85,422. *See also* Stevens Treaties (providing an "exclusive" right to tribes to fish within their reservations).

[5] In its Washington Rule, EPA stated that "sustenance" and "subsistence" would be used interchangeably. 81 Fed. Reg. at 85,421 n. 21.

[6] *See also Penobscot Nation* v. *Mills*, 861 F.3rd 324, 333 (1st Cir. 2017) (citing Section 6207(4) of the MIA, "the [MIA's] sustenance fishing provision refers to 'Indian reservations,' not just the 'Penobscot Indian Reservation,' as it applies 'within the boundaries' of both the Passamaquoddy Tribe's and the [Penobscot] Nation's respective reservations").

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III. Conclusion

For the reasons discussed above, EPA should proceed with reconsideration of the Washington Rule, including on the grounds that the rule misconstrues the Stevens Treaties to grant tribes both a subsistence fishing right as well as a subsidiary right to any level of water quality deemed necessary to make the treaty fishing right meaningful. Moreover, the Maine litigation, which involves a governing statutory framework unique to Maine that is narrower in scope and is completely different from the Stevens Treaties, does not inhibit EPA's ability to reconsider the Washington Rule.

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