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PROTECTING WATER QUALITY THROUGH TRIBAL TREATY FISHING RIGHTS:

AN ANALYSIS OF IDAHO'S FISH CONSUMPTION RATE

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Abstract

Salmon remain an integral part of culture, religion, and subsistence for tribes in the Pacific Northwest, which, unsurprisingly, results in more salmon consumed by tribal members than other groups in the area. Because of this increased consumption, human health impacts from toxins in the fish are higher for tribal populations.

Fish consumption rates are set as a part of Water Quality Standards under the Clean Water Act, in order to protect human health. This article addresses whether the Columbia River tribes can use their treaty fishing rights to require more stringent water quality standards in Idaho.
This article asserts that tribal treaty rights include a right to the protection of human health. If eating salmon in traditional quantities is dangerous, this is a violation of tribal treaty fishing rights. As such, there is an obligation to regulate

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water quality in Idaho at more stringent levels to protect tribal treaty rights and the health of tribal. Ultimately, this article concludes that tribal treaty rights include not only the right to allocation and abundance of resources, but also the right to the protection of the quality of those resources.

I. Introduction

For thousands of years, the Columbia River contained the most abundant salmon runs on the planet. Salmon have shaped the lives of Pacific Northwest tribal members since time immemorial. Water pollution, along with dams, habitat loss, and over-harvest have reduced these salmon runs to a fraction of their historic levels and have resulted in salmon full of toxins.[2]

Salmon remain an integral part of culture, religion, and subsistence for tribes in the Pacific Northwest. When the federal government began treaty negotiations in the 1850s, the tribes sought to ensure that the Columbia River treaties would preserve the right to fish in their "usual and accustomed" fishing grounds.[3] However, this right has been far from secure. For example, in the

[2] *Brief Overview of Salmon Decline and Recovery in Columbia Basin*, CASCADE FISHERIES, https://www.ccfeg.org/salmondecline (last visited Dec. 1, 2019).

[3] In 1855, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes and Bands of the Yakama Nation each entered into a treaty with the US government, ceding millions of acres of their lands to the United States in exchange for reservation of particular rights that were

1970s "fish wars" broke out in Washington State, stemming from loss of access to traditional fishing areas for tribes along the Nisqually River. These protests and clashes between state officials and tribal members culminated in the "Boldt Decision," which guaranteed tribes 50% of the harvestable catch.[4] A case arising out of Oregon adopted the same rule,[5] guaranteeing Columbia River Treaty tribes (including the Nez Perce Tribe in Idaho) 50% of the harvestable catch of fish in the river.

To uphold tribal treaty fishing rights, there must be fish to catch. However, the question remains: do tribes' treaty rights guarantee certain quality along with quantity of fish? Taken further, can treaty rights truly be upheld if consuming fish puts tribal members at risk? Polychlorinated biphenyls (PCBs), mercury, and other toxins can accumulate in fish tissue.[6] These toxins are then passed on to those eating the fish, putting certain groups who eat larger amounts at even greater risk. Salmon play an important role in culture and tradition with Pacific Northwest tribes, which, unsurprisingly, results in more salmon consumed by tribal members than other groups in the area. Because of this increased consumption, human health impacts from toxins in the fish are higher for tribal populations.[7]

Fish consumption rates are set as a part of Water Quality Standards under the Clean Water Act (CWA), which serve to protect human health.[8] An individual's fish consumption rate is the expected quantity of fish consumed per unit of time (i.e. per day or per week).[9] Both Oregon and Washington have increased their fish consumption rates within the past several years. However, Idaho still has a drastically low fish consumption rate for the state, and the Columbia River overall faces significant water quality issues and severely declining fish runs.[10] This article addresses whether the Columbia River tribes can use their treaty fishing rights to require more stringent water quality standards

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guaranteed to continue after their treaty was signed. This included the right to harvest fish in all the tribes' usual and accustomed areas (both on and off their reservations). *The Founding of CRITFC*, COLUMBIA RIVER INTER-TRIBAL RIVER COMMISSION, https://www.critfc.org/about-us/critfcs-founding/ (last visited Sept. 22, 2020).

[4] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

[5] Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).

[6] DEP'T OF ECOLOGY STATE OF WASH., FISH CONSUMPTION RATES TECHNICAL SUPPORT DOCUMENT (2013), https://fortress.wa.gov/ecy/publications/documents/1209058.pdf.

[7] NAYAK L. POLISSAR ET AL., U.S. ENVTL. PROT. AGENCY, *Foreword* to A FISH CONSUMPTION SURVEY OF THE NEZ PERCE TRIBE (2016), https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/fish-consumption-survey-nez-perce-dec2016.pdf.

[8] Clean Water Act, 33 U.S.C. § 1251(a)(2) (2018).

[9] U.S. ENVTL. PROT. AGENCY, HUMAN HEALTH AMBIENT WATER QUALITY CRITERIA AND FISH CONSUMPTION RATES: FREQUENTLY ASKED QUESTIONS (2013), https://www.epa.gov/sites/production/files/2015-12/documents/hh-fish-consumption-faqs.pdf.

[10] *Brief Overview of Salmon Decline and Recovery in Columbia Basin*, *supra* note 2.

in Idaho.[11] Ultimately, this article concludes that tribal treaty rights include not only the right to allocation and abundance of resources, but also the right to the protection of the quality of resources.

Section II provides background and analyzes the specific language of the Columbia River Treaty, as well as relevant treaty fishing rights case law. This section also explains how water quality standards, including fish consumption rates, are set. Section III compares fish consumption rates for Oregon, Washington, and Idaho. Section IV covers the legal tools that could be used to address Idaho's fish consumption rate. This section argues that the federal trust doctrine, the CWA, and other federal mandates such as Executive Order 12898, can require more stringent water quality standards to ensure the health of those who eat salmon.

This article asserts that courts need to recognize that tribal treaty rights include a right to the protection of human health. If eating salmon in traditional quantities is dangerous, this is a violation of tribal treaty fishing rights. People who have lived on this land since time immemorial are endangering their health simply by eating their traditional and culturally significant food. The state of Idaho and the federal government through the Environmental Protection Agency (EPA) are failing to protect an entire people, and are breaking the 1855 treaty between the United States and the tribes. There is an obligation to regulate water quality in the Columbia River, and in Idaho specifically, at more stringent levels to protect tribal treaty rights and the health of tribal populations that eat salmon and other fish.

II. Background

A. A Brief History of Tribal Treaty Fishing Rights

Article VI of the United States Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[12] From 1778 to 1871, the United States and American Indian tribes signed over 500 treaties.[13] Since making those treaties, every one of them has been violated, changed, or nullified.[14] Nevertheless, treaties remain a crucial tool in how tribes can legally protect their rights and resources. In 2013, the United Nations High Commission for Human Rights issued a statement stating "even when signed or otherwise agreed more than a century ago, many treaties

[11] The arguments made in this paper could be extended to tribes in Washington as well, as Washington's Water Quality Standard has loopholes that effectively make the standard less protective than Oregon's, even though on paper they appear the same. This paper focuses on Idaho specifically, but the arguments would also hold true for Washington.
[12] U.S. Const. art. VI, cl. 2.
[13] Helen Oliff, *Treaties Made, Treaties Broken*, PARTNERSHIP WITH NATIVE AM.: BLOG (Mar. 3, 2011), http://blog.nrcprograms.org/treaties-made-treaties-broken/.
[14] *Id.*

remain the cornerstone for the protection of the identity, land and customs of Indigenous Peoples, determining the relationship they have with the state. They are thus of major significance to human rights today."[15]

Treaties are a bargained-for exchange between sovereigns. *United States v. Winans,* a landmark treaty fishing rights case, upheld the principle that a treaty is not a grant of rights to a tribe, but a grant of rights from them and a reservation of those rights not granted.[16] This is the idea of inherent sovereignty, or the reserved rights model of treaty interpretation: what is expressly written in a treaty is what has been ceded and everything else not mentioned in the treaty is retained by the tribes.

When interpreting treaty rights, it is important to ask how important a certain right was when the treaty was signed, and how important that right remains today. To determine this, the text of the treaty is first analyzed, as well as the surrounding circumstances of the signing.[17] If neither of those are clear, experts can be used.[18] Canons of construction are also an important component in treaty rights analysis. The canons are judicial rules used by courts to help interpret treaties. The canons are: (1) any ambiguity in treaty language should be interpreted in favor of the Indians; (2) controversial terms should be interpreted as the Indians would have understood; and (3) treaties should be interpreted liberally in favor of the Indians.[19] To extinguish tribal treaty rights, there must be clear and convincing evidence that Congress abrogated the treaty.

1. 1855 Columbia River Treaties

In 1885, several treaties were signed between the United States and the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation.[20] Each of these treaties contained provisions guaranteeing the right to take fish both on reservation land and at their usual and accustomed fishing places. For example, the Treaty of 1855 between the federal government and the Nez Perce tribe, specifically guaranteed: "The exclusive right of taking fish in all the streams running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory."[21]

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[15] Press Release, U.N. Human Rights Office of the High Comm'r, U.N. Rights Chief Navi Pillay Urges States to Do More to Respect Treaties with Indigenous Peoples (Aug. 7, 2013), https://www.un.org/esa/socdev/unpfii/documents/ip-day/2013/ohchr.pdf.
[16] United States v. Winans, 198 U.S. 371 (1905).
[17] NEIL JESSUP NEWTON, FELIX COHEN & ROBERT ANDERSON, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 113 (2012).
[18] *Id.*
[19] *Id.* at 113-114.
[20] *The Founding of CRITFC*, *supra* note 3.
[21] Treaty with the Nez Perces, Nez Perces-U.S., June 11, 1855, 12 Stat. 957.

Notes from the 1855 Treaty Council at Walla Walla and other Treaty negotiations reflect not only the notion of inherent tribal sovereignty over the fish and the land, but also that the tribes would not have signed the treaty without "first receiving assurances that these rights, including the right to fish, would be protected into the future."[22] All the treaties signed with the Columbia River Treaty Tribes contain language either identical or nearly identical to the Nez Perce treaty in terms of treaty fishing rights.

Despite the strong language in these treaties, tribes along the Columbia River have struggled to enforce these rights. Federal, state, and local governments all encroached on these 1855 Treaty rights, culminating in the permanent flooding of Celilo Falls in 1957 when the Dalles Dam was completed.[23] Continually declining salmon runs across the Pacific Northwest led to conflicts between tribal and non-tribal fishers, eventually leading to the "fish wars" in the 1960s and 70s. The protests that arose from the fish wars were a direct result of loss of access to traditional fishing grounds. Soon after, court cases began to reaffirm the tribe's treaty fishing rights.

In *United States v. Oregon*, the court ruled that tribal treaty fishing rights meant that tribes were entitled to a fair share of the harvestable catch.[24] In *United States v. Washington,* Judge Boldt ruled that tribes were entitled to half of the harvestable catch—a "fair share."[25] As the opinion states, "[b]y dictionary definition and as intended and used in the Indian treaties and in this decision 'in common with means sharing equally the opportunity to take fish at usual and accustomed grounds and stations . . . ."[26] Soon after, an Oregon court reached the same decision, holding that the Columbia River Treaty Tribes were entitled to half of the harvestable catch of fish in their usual and accustomed fishing grounds.[27]

It has also been held that the treaty fishing clause in the treaties was intended to reserve more than "merely the chance . . . occasionally to dip [the Indians'] nets into the territorial waters."[28] In holding that the Indians reserved a unique and valuable fishing right, and that the State has an obligation to repair culverts which block fish passage, in 2017, the court in *United States v.*

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[22] POLISSAR ET AL., *supra* note 7, at 3.

[23] *Celilo Falls*, COLUMBIA RIVER INTER-TRIBAL RIVER COMM'N, https://www.critfc.org/salmon-culture/tribal-salmon-culture/celilo-falls/ (last visited Sept. 12, 2020).

[24] Sohappy v. Smith*,* 302 F. Supp. 899 (D. Or. 1969). United States v. Oregon is an umbrella name for decades of litigation, all starting with Sohappy v. Smith. The parties to U.S. v. Oregon include: the states of Washington, Oregon, and Idaho; the United States; the Shoshone-Bannock Tribes, the Confederated Tribes of the Warm Springs of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes and Bands of the Yakama Nation.

[25] United States v. Washington*,* 384 F. Supp. 312, 343 (W.D. Wash. 1974).

[26] *Id.*

[27] Sohappy v. Smith*,* 529 F.2d 570 (9th Cir. 1976).

[28] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979); *see also* United States v. Washington, 853 F.3d 946 (9th Cir. 2017). Washington v. Washington State Commercial Fishing Vessel later evolved into United States v. Washington after years of ongoing litigation.

Washington, emphasized that the treaty language provided for a "right of taking fish" which would be "secured" by the treaties.[29] It is an important distinction that it is the right of *taking* fish which is secured. The right to take fish implies a right to eat the fish.

These court decisions confirm that the right to harvest fish was an important guarantee when the treaties were signed and remains so today. The right to catch and harvest fish in the tribes' usual and accustomed treaty grounds was never abrogated, and therefore remains in effect today. The legal issue tribes are currently facing is not whether they have a treaty right to harvest half of the fish, but whether this treaty right protects them from consuming fish and shellfish with higher than average toxin levels.

B. How Water Quality Standards are Set

The CWA sets water quality standards to limit the amount of toxins that are allowed in waterways, and in turn the fish. Water quality standards are state, territorial, tribal,[30] or federal provisions of law approved by the EPA.[31] These standards set the desired condition of the water and how that condition will be achieved and protected.[32] The emphasis is to protect a wide range of uses such as recreation, fishing, scenic enjoyment, and species and ecosystem protection. The water quality standards also protect human and aquatic life and health. Ultimately, water quality standards are the legal basis for controlling and limiting pollutants entering the waters of the United States (WOTUS).

The core components of water quality standards are designated uses of a water body, criteria to protect designated uses, and antidegradation requirements to protect existing uses and high quality or high value waters.[33] Designated uses require states, territories, and tribes to specify goals for how certain water bodies will be used, and to set criteria accordingly.[34] The criteria must consider the value and use for public water supplies, propagation of fish and wildlife, and recreation, agricultural, and industrial purposes.[35]

Under Section 303(c)(2)(A)[36] of the CWA, states and tribes must designate all uses as either "existing uses" or "attainable" under the fishable/swimmable standard set in Section 101(a)(2).[37] Existing uses are those that have been attained at some point since 1975. Attainable uses are those that

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[29] *Id.* at 961 (emphasis added).
[30] For the purposes of this memo, when a tribe or something tribal is mentioned in terms of water quality standards, they are tribes that have been authorized by the EPA.
[31] *What are Water Quality Standards*, EPA, https://www.epa.gov/standards-water-body-health/what-are-water-quality-standards (last visited Dec. 1, 2019).
[32] *Id.*
[33] Clean Water Act, 33 U.S.C. § 1313 (2018).
[34] *Id.* § 1313(b)(2)(A).
[35] *Id.*
[36] *Id.* § 1313(c)(2)(A).
[37] *Id.* § 1251(a)(2).

can be made "fishable/swimmable" without substantial and widespread economic and social impact.[38] Broadly, "fishable/swimmable" means that water quality must be at a level that "provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water."[39] More specifically, EPA interprets "fishable," under section 101(a) of the CWA to include "designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish."[40] In other words, "fishable" means not only that fish and shellfish prosper in a waterway, but also that they can be safely consumed by humans. This interpretation of the water quality standards satisfies the requirement that the standards protect public health, as outlined in section 303(c)(2)(A).[41]

States, territories, and tribes adopt water quality criteria to protect the designated uses of a water body. Water quality criteria can be numeric (e.g., the maximum pollutant concentration levels permitted in a water body) or narrative (e.g., criteria that describes the desired conditions of a water body as "free from" certain negative conditions). States, territories, and authorized tribes typically adopt both numeric and narrative criteria to form water quality standards.[42] These water quality standards then must be approved by the EPA.

Water quality standards also determine the "safe" level of pollutants that wastewater treatment plants can discharge into water bodies. The standards are based on several factors designed to protect human health. One factor is fish consumption rate. A second is cancer risk level.

1. Fish Consumption Rate

An individual's fish consumption rate is the expected quantity of fish consumed per unit of time (i.e. per day or per week). For a population of a state, there is a range of fish consumption rates, with the average fish consumption rate being used to set how much pollution is allowed in the water. This is because the amount of toxins that are consumed from fish and shellfish determines how much pollution can be allowed in the water while still protecting human health.

EPA guidelines currently recommend that states use a default value of 22 grams per day, a rate that protects up to the 90th percentile of people in the United States, but also notes that individual states where fish is eaten more frequently—like in the Pacific Northwest—should have a higher rate.[43] A fish consumption rate is an important factor in determining water quality standards because the

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[38] *Id.*
[39] Office of Water, U.S. Envtl. Prot. Agency, WQSP-00-03, EPA's Recommendations on the use of Fish and Shellfish Consumption Advisories (2000), https://www.epa.gov/sites/production/files/2015-01/documents/standards-shellfish.pdf.
[40] *Id.*
[41] 33 U.S.C. § 1313(c)(2)(A).
[42] *What are Water Quality Standards*, *supra* note 31.
[43] OFFICE OF WATER, U.S. ENVTL.PROT. AGENCY, EPA 823 B 17 001 2017, WATER QUALITY HANDBOOK: CHAPTER 3: WATER QUALITY CRITERIA 9-10 (2017), https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter3.pdf.

more fish that people eat, the more toxins they consume, and the more they are at risk for developing cancer and other diseases. What is considered "safe" for someone who only eats fish once a month might be harmful to someone who eats fish daily or weekly.

Ultimately, the problem with most recommended fish consumption rates is that the rate generally underestimates the amount of fish consumed by many residents, such as tribal members. The resulting effect is that fish and shellfish contain more toxins than are acceptable to protect the entire population of the state. Tribal members are exposed to dangerous levels of toxins due to the amount of fish they consume.

2. Cancer Risk Level

The second component of a fish consumption rate analysis is cancer risk level. A cancer risk level is the additional lifetime risk for developing cancer due to being exposed to a pollutant.44 To promulgate human health criteria under Section 304(a) of the CWA, the EPA uses the 10-6 (i.e. 1 in 1,000,000) risk level for water quality standards, meaning that 1 in 1,000,000 people will likely develop cancer.45 However, it is stated in the Water Quality Standards Handbook that when states and tribes develop their own criteria a 10-5 (i.e. 1 in 100,000) may be acceptable for the general population, depending on the particular circumstances in the region.46 The EPA further states that the selection of the cancer risk level should involve consideration of other associated exposure to toxins (other than through the consumption of fish) and whether the resulting criteria, in combination with the exposure assumptions, would expose the populations to a cancer risk higher than 10-5.

III. Comparison of Fish Consumption Rates

A. Oregon

Oregon was the first of the three states to increase its fish consumption rate from the previously nationally recommended rate of 17.5 grams per day.[47] In 2011, EPA approved revised water quality standards for toxic pollutants in Oregon based on an increased fish consumption rate of 175 grams per day.

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[44] *Id.*
[45] *Id.*
[46] For example, coastal states generally eat more fish than other states, and states with higher percentages of tribal members or other groups who consume fish as a large part of the diet.
[47] 17.5 g/day was recommended before the current 22g/day recommendation was adopted by the EPA. U.S. Envtl. Prot. Agency, Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health 1-12 (October 2000), https://www.epa.gov/sites/production/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf.

Oregon proposed changes to the State's criteria for toxic pollutants in 2004 and was contacted by the Umatilla Indian Reservation with the concern that the 17.5 grams per day rate used to set the criteria was not enough to adequately protect the health of tribal members.[48] Accordingly, the Umatilla Tribes and the EPA agreed to conduct a public process to review the fish consumption rate. This led to the recommended rate of 175 grams per day, which the EPA approved., This higher rate serves to better protect human health in the State by reducing the amount of allowable pollution in the waterways. Oregon's health criteria are based on a cancer risk level of 10^{-6}.[49]

B. Washington

Washington has recently been at the center of disagreements regarding its fish consumption rate. In 2016, after years of research and input from tribal nations in the state, the EPA finalized water quality standards based on a fish consumption rate of 175 grams per day and a cancer risk level of 10^{-6}. However, in 2017, several industry parties filed petitions with the EPA to rescind the current standards.[50] This issue is ongoing, with EPA announcing a final rule to roll back Washington's standards for certain human health criteria in April of 2020.[51] Ongoing litigation is underway.

C. Idaho

Idaho's fish consumption rate is drastically lower than both Oregon and Washington. In 2012, the EPA rejected Idaho's 2006 proposed water quality standards, which increased the fish consumption rate from 6.5 grams per day to 17.5 grams per day and set the cancer risk level at 10^{-6}. The rejection was based on the EPA's belief that the 17.5 grams per day fish consumption rate was not adequate to protect residents of Idaho. Further, the EPA identified several sources of information on local and regional fish consumption that Idaho did not consider when setting the fish consumption rate.[52] According to the EPA, the information from these sources suggested that fish consumption among some Idaho population segments is greater than the estimated 17.5 grams per day.[53]

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[48] Letter from Michael A. Bussell, Dir., Office of Water and Watersheds, U.S. Envtl. Prot. Agency, to Neil Mullane, Adm'r, Water Quality Div., Dep't of Envtl. Quality 2 (Oct. 17, 2011), https://www3.epa.gov/region10/pdf/water/or-tsd-hhwqs-transmittal-ltr-2011.pdf.

[49] OR. DEP'T OF ENVTL. QUALITY, HUMAN HEALTH CRITERIA ISSUE PAPER: TOXICS RULEMAKING 16 (2011), https://www.oregon.gov/deq/FilterDocs/shhToxicCritIssue.pdf.

[50] Press Release, Earthjustice, *Trump EPA Targets Washington State Clean Water Standards* (Apr. 11, 2019), https://earthjustice.org/news/press/2019/trump-epa-targets-washington-state-clean-water-standards.

[51] *Statement from Ecology director on EPA rolling back water quality standards* - WASHINGTON DEP'T OF ECOLOGY. QUALITY https://ecology.wa.gov/About-us/Get-to-know-us/News/2020/Statement-on-EPA-rolling-back-water-quality-standa. (last visited Sept. 21, 2020).

[52] *Water Quality: Docket No. 58-0102-1201 - Final Rule,* IDAHO DEP'T OF ENVTL. QUALITY https://www.deq.idaho.gov/58-0102-1201. (last visited Dec. 1, 2019).

[53] *Id.*

In 2014, the EPA proposed updates to its national Section 304(a) criteria, based on a new fish consumption rate of 22 grams per day, and other increased standards. In 2015, Idaho began a fish consumption survey of Idaho residents. At the same time, Nez Perce and Shoshone-Bannock tribal members began similar surveys to inform the Idaho Department of Environmental Quality (DEQ) about tribal fish consumption.[54] Later in 2015, as a result of the surveys, Idaho proposed a 66.5 grams per day fish consumption rate update, with a cancer risk level lowered to 10^{-5}. The EPA approved these new standards in April of 2019.

While the fish consumption rate was raised, the cancer risk level was "lowered" from 10^{-6} to 10^{-5}, which in effect means that there is an allowable risk of cancer of 1 in 100,000 individuals instead of 1 in 1,000,0000. Therefore, the impact of "lowering" the cancer risk level is that even with the increased fish consumption rate, there is substantively no change. The increased risk of people who may get cancer means that the allowable toxins in fish stays relatively the same, thus continuing to disproportionately impact tribal members and other segments of the population who consume more fish than average.

Many tribal members, tribal communities, and local organizations expressed concern when Idaho proposed its 2015 water quality standards. For example, Columbia River Inter-Tribal Fish Commission (CRITFC) submitted a letter to Idaho DEQ, on behalf of its member tribes—the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe—condemning the Idaho water quality standards as insufficient to protect tribal health. The letter states:

> DEQ has proposed water quality standards for Idaho's waters that were calculated using substantially reduced levels of protection for tribal people as compared to the general population. Idaho's choice to limit the protection levels for tribal populations in Idaho threatens treaty guaranteed fishable waters and has resulted in weaker water quality standards than proposed by all other states and tribal governments in the region. . . . The policy choice of using the average consumption rate for tribal populations is not acceptable. Tribal populations, as the most sensitive members of the target population should be protected to no less than the level that is proposed for the general population.[55]

The National Congress of American Indians also submitted a formal letter opposing the then proposed standards and fish consumption rate. This letter cited

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[54] *Id.*

[55] Letter from Babtist Paul Lumley, Exec. Dir., Columbia River Inter-Tribal Fish Comm'n, to Paula Wilson, Idaho Dep't of Envtl. Quality 1, 3 (Nov. 4, 2015), https://www.deq.idaho.gov/media/60177538/58-0102-1201-critfc-comment-1115.pdf.

the fish consumption surveys conducted by the tribes, and asserts that the water quality standards are inadequate to adequately protect tribal health.[56]

The Nez Perce Tribe released its own heritage fish consumption rate report in late 2016. This report, done as part of a larger fish consumption survey of all federally recognized tribes in Idaho, addressed the inadequacies of the 2015 fish consumption rate approved by Idaho. The report stated that the Tribe's primary objective in conducting the study is to "support development of more stringent water quality standards that are protective of tribal members' consumption of fish," because the Tribe's culture has always been intimately tied with fishing and fish in general.[57] The report looked at various sources to determine the Tribe's historic consumption rate. The report further concluded that current tribal consumption is lower than the historic levels only because fewer salmon runs currently exist and many fish species are either nearing extinction or are in "seriously depressed conditions."[58] Additionally, although it is difficult to quantify, it is likely that recent harvests have been at less than 1% of historic levels.[59] The report estimated that the traditional consumption rate per person was 373 grams per day.[60]

Although 373 grams per day is the historic rate, the report states that it may be used to "support a development of water quality standards that protect human health."[61] This rate is what the tribal treaties aimed to protect, as the treaties explicitly promised the right to take fish.[62] The tribes would have understood that this promised right to take fish guaranteed that they could fish in the quantities sufficient to support their cultural and subsistence needs. The historic rate is noticeably higher than Idaho's proposed rate, meaning that Idaho's rate is not high enough to support the Tribe's health under their traditional consumption of fish.

IV. Legal Tools for Addressing Idaho's Fish Consumption Rate

Idaho's current water quality standards are insufficient to protect tribal health. Therefore, the question remains of how Columbia River Treaty tribes could legally act to require Idaho to enact more stringent water quality standards. There are several legal doctrines that the tribes could use in support of their argument that the fish consumption rate must be higher. The first is the federal trust responsibility that the United States has with federally recognized tribes, and along with that, the Columbia River tribes' federally recognized treaty rights.

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[56] Nat'l Cong. of Am. Indians, Res. #SD-15-034, *Opposing Idaho's Proposed Water Quality Standards and Fish Consumption Rate* (2015), http://www.ncai.org/resources/resolutions/opposing-idaho-s-proposed-water-quality-standards-and-fish-consumption-rate.

[57] POLISAR ET AL., *supra* note 7, at 1.

[58] *Id.* at 6.

[59] *Id.* (historic levels being those prior to 1855).

[60] *Id.* at 25.

[61] *Id.* at 1.

[62] Treaty with the Nez Perces, *supra* note 21.

Second, the tribes could use the CWA to require either the EPA or Idaho, or both, to address the issue. Third, several other federal mandates, such as Executive Order 128983 and the EPA's 2014 Environmental Justice Plan, could be used to further support the argument that the water quality standards must be stringent enough to protect the health of tribal members.

A. Federal Trust Doctrine

The federal government bears a special obligation to protect the interests of tribes. The concept of a federal trust relationship with tribes evolved from treaties, statutes, and later case law, which upheld the federal trust doctrine. Generally, in early treaties the federal government obtained land from tribes and in return promised to set aside reservation lands and respect tribal sovereignty as well as protect and provide for the tribes' well-being.[63]

One of the earliest cases, *Cherokee Nation v. Georgia,*[64] decided in 1831, upheld the concept that tribes are not considered foreign nations, but instead are "domestic dependent nations."[65] Consequently, the United States has a trust relationship with the tribes, similar to that of a "ward and its guardian."[66] Further, the Court in *United States v. Minnesota* held that the government "has a real and direct interest" in the guardianship it exercises over the Indian tribes; "the interest is one which is vested in it as a sovereign."[67] In 1977, the Senate Report of the American Indian Policy Review Commission emphasized:

> The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.[68]

The Indian trust doctrine is a cornerstone of Indian law, offering protection for tribes in their dealings with states, the federal government, and non-Indians in general.[69] This duty of protection has been reinforced in several different court decisions. For instance, in *National Indian Youth Council v. Andrus,* a New Mexico court expressed the trust doctrine as a duty to act in the

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[63] *American Indians and Alaska Natives-The Trust Responsibility*, ADMIN. FOR NATIVE AMS. (Mar. 19, 2014), https://www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-the-trust-responsibility.
[64] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[65] *Id*. at 26.
[66] *Id*. at 27.
[67] United States v. Minnesota, 270 U.S. 181, 194 (1926).
[68] *American Indians and Alaska Natives-The Trust Responsibility*, *supra* note 63.
[69] *See* WILLIAM H. RODGERS, ENVIRONMENTAL LAW IN INDIAN COUNTRY (2005).

best interest of tribes.[70] In *Seminole Nation v. United States,* the federal government's duty was to demonstrate the highest "fiduciary" standards and to "display moral obligations of the highest responsibility and trust.[71]" Then, in *Babbitt v. Oglala Sioux Tribal Public Safety Dep't,* the court described the duty as one to act as a friend and protector.[72] Finally, in *Morton v. Mancari,* the Supreme Court sought to give meaning to the "unique obligation" owed to tribes.[73]

All these interpretations of the federal trust responsibility make it clear that the federal government has a special and unique duty to tribes, particularly to protect what was enshrined in the treaties it signed. Indeed, the government's duty to protect treaty resources, such as fish, fits squarely within courts' interpretation of the federal trust doctrine.

This trust relationship has already been recognized by the EPA. In 1984, the agency enacted a policy for the "Administration of Environmental Programs on Indian Reservations." This policy states that the agency must work with tribes on a government-to-government basis and that, in carrying out EPA responsibilities in Indian reservations, the EPA's fundamental objective is to protect human health and the environment. Therefore, the "keynote of this effort will be to give special consideration to Tribal interests in making Agency policy."[74] The policy then lists several key objectives to meet this goal, saying "the Agency in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments"[75]—further specifying that the EPA recognizes the trust responsibility—and "will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations."[76]

Additionally, in 2016, the EPA enacted a policy on "Consultation and Coordination with Indian Tribes," as guidance when discussing tribal treaty rights. This policy recognizes the importance and obligation that the EPA has towards respecting treaty rights, stating that in instances when EPA decisions may affect tribal treaty rights, the EPA must consult with the relevant tribes. The policy also directs the EPA to ensure that its actions do not conflict with treaty rights and to protect treaty rights and resources whenever possible.[77] Therefore, EPA, as a federal agency, has a duty to uphold the treaty rights of the tribes under the federal trust doctrine.

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[70] Nat'l Indian Youth Council v. Andrus, 501 F. Supp 649, 683 (D.N.M. 1980).
[71] Seminole Nation v. United States, 316 U.S. 286, 296 (1942).
[72] Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1383 (10th Cir. 1999).
[73] Morton v. Mancari, 417 U.S. 535 (1974).
[74] William D. Ruckelshaus, U.S. ENVTL. PROT. AGENCY, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf.
[75] *Id.*
[76] *Id.*
[77] Memorandum from Gina McCarthy to all EPA employees (Dec. 1, 2014), https://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreatyrightsmemo2014.pdf.

Additionally, courts have applied the trust responsibility in upholding an agency action, an application that sets a higher standard for agency dealings with tribes or resources. For example, in *Parravano v. Masten,* to protect tribal fishing rights the court upheld an emergency regulation limiting non-Indian fishing.[78] This holding could be expanded to mean that the EPA has a duty to require a higher water quality standard under the CWA to ensure that fish consumption rates also protect tribal health when they consume salmon under their treaty protected rights.

The Supreme Court has held that the Eleventh Amendment prohibits Indian Nations from suing states in federal court, even for treaty violations, unless the state waives its sovereign immunity. However, the United States can sue a state for treaty violations on behalf of the tribe due to the trust relationship.[79] This means that if the tribes decided to bring legal action in federal court under the trust responsibility, the tribe would need to ask the federal government to intervene and sue the state of Idaho and Idaho DEQ. The lawsuit would argue that the state violated the tribes' treaty rights by having too low water quality standards, which are not enough to protect tribal member's health. The lawsuit would be for treaty rights violations, but would be brought by the United States on behalf of the tribes under the federal trust responsibility doctrine. To uphold the treaty rights, the EPA would need to reject Idaho's water quality standards and require the state to enact more stringent standards. Alternatively, the EPA may need to set the standards for Idaho.

A second option would be for the tribes to bring a lawsuit directly against the EPA, arguing that EPA's approval of Idaho's water quality standards violates the federal government's tribal trust responsibility because the EPA is an agency of the federal government. This option is likely the stronger one under the Trump administration because the EPA has actively rolled back several environmental regulations and is trying to block the state of Washington from strengthening its water quality standards.[80] Therefore, the tribes bringing a claim against the EPA for violating the trust relationship is more likely to succeed than asking the federal government to sue on their behalf against the State of Idaho.

B. Tribal Treaty Fishing Rights

Regardless of who tribes sue, the federal government is required to step in to protect tribal treaty rights. The tribes would first have to demonstrate that their treaty rights are being violated.

Tribal fishing is a recognized treaty right in the Pacific Northwest. Treaties with the federal government have guaranteed the right of tribal members

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[78] Parravano v. Masten, 70 F.3d 539, 545 (9th Cir. 1995).
[79] This may give tribes an advantage, as the Supreme Court generally gives deference to the party the United States "sides" with in the argument. The federal government also has more resources compared to tribes, which is beneficial for potentially drawn out and expensive lawsuits.
[80] Earthjustice, *supra* note 50.

to "take fish" at their usual and accustomed grounds. A century's worth of federal case law has established that these treaty rights are permanent in nature. *United States v. Winans* is the leading decision on tribal treaty rights, reaffirming that the right to take fish is a clearly protected treaty right.[81]

It is clear that the treaty language specifically says that these tribes retain the right of taking fish and courts have upheld this right. However, what good is the right of taking fish if the fish are toxic? In order to uphold treaty rights, it must be determined what the right of taking fish means and how tribes would have understood it at the time of treaty signing.

When courts interpret treaty rights, the Indian canons of construction apply. The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians,[82] and that all ambiguities be resolved in their favor.[83] In addition, treaties and agreements should be construed as the Indians would have understood them,[84] and tribal property rights and sovereignty should be preserved unless Congress's intent to the contrary is clear and unambiguous.[85] For the Columbia River Treaty Tribes specifically, fish have always played an important role in tribal culture and practice. The degree to which these tribes were culturally intertwined with fish and fishing was recognized in the treaties signed between the Tribes and the federal government. The Treaty of 1855, the main treaty for the Columbia River tribes, specifically guaranteed "the exclusive right of taking fish in all the streams running through or bordering said reservation,[86]" as well as "the right of taking fish at all usual and accustomed places in common with citizens of the Territory.[87]" The tribes likely assumed that the right to take fish meant that (1) there would be fish to catch in the first place, and (2) that the fish would be safe to consume in their traditional amounts. The tribes would not have assumed that the fish would be toxic and dangerous to their health.

Courts have upheld the first assumption that it is implied through treaty language that there would still be fish to catch as part of the secured right to take fish. As the court in *United States v. Washington* explained, when signing the Stevens' treaties, the tribes would have reasonably understood that they were promised, in Governor Stevens' words, "food and drink . . . forever.[88]" In this case, the court rejected the State's argument that the treaty right to take fish did not guarantee that fish would be available. Instead, the court stated that the tribes

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

[82] *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their behalf").

[83] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor").

[84] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) ("we interpret Indian treaties to give effect to the terms as the Indians would have understood them").

[85] *See id.* (*"*Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.").

[86] Treaty with the Nez Perces, *supra* note 21.

[87] *Id.*

[88] United States v. Washington, 853 F.3d 946, 964 (9th Cir. 2017).

would have "reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them."[89] Ultimately, the court explained that the right to take fish also included abundant fish runs and their habitat.[90] Arguably, it is not a stretch to take this argument a step further and say that the abundance of fish runs includes the fish being present and healthy enough for consumption.

The court also cited back to *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, where the Supreme Court wrote that during treaty negotiations the vital importance of the right to take fish was repeatedly emphasized by both sides, and that "it is accordingly inconceivable" that either party would have agreed to a treaty which would allow future tribal members to not have any meaningful use of their right to fish.[91] The court also emphasized that the treaty language provided for a "right of taking fish" which would be "secured" by the treaties.[92] It is an important distinction that it is the right of *taking* fish which is secured. The right to take fish implies a right to eat the fish. Without fish to consume, the right to take fish is meaningless, and the treaty promises to allow tribes to catch fish at their usual and accustomed fishing grounds are void.

The tribes would have the option to sue the EPA for violating tribal treaty fishing rights when it approved Idaho's proposed fish consumption rate. Ultimately, fish that is unhealthy for consumption at traditional levels is a violation of tribal treaty fishing rights and tribal treaties are the supreme law of the land.[93] Therefore, in order to uphold treaty rights, federal agencies, including the EPA, must interpret the state's designated uses under the CWA to include the ability to catch and consume fish in accordance with cultural practices.

C. Clean Water Act

When Idaho proposed the new standards, DEQ wrote a letter stating that "EPA has approved Idaho's designated uses, finding them to be consistent with the CWA and federal regulations. Therefore, DEQ has no obligation to adopt

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[89] *Id.*
[90] *Id.*
[91] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055 (1979).
[92] *Id.* at 678 (emphasis added).
[93] *See Worcester v. Georgia*, 31 U.S. 515, 559–560 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.").

criteria to protect for some kind of unsuppressed subsistence level of fish harvest and consumption."[94] This is incorrect.

The CWA itself focuses on protecting human health. Section 101(a)(2) of the CWA establishes a national goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable."[95] The EPA has interpreted the "fishable" language in this section to refer not only to protecting water quality so fish are able to survive, but also so that humans can safely consume them.[96] Therefore, to be consistent with Section 101(a)(2), the applicable criteria for "fishable" must protect the fish themselves while also protecting human health when they consume the fish.[97] Section 303(c)(2)(A), among other things, requires water quality standards to protect the public health.[98] Ultimately, the CWA sets a threshold for setting water quality standards and protecting designated uses. The EPA cannot authorize water quality standards that fail to protect fishable waters.

The CWA is intended to protect all peoples' health.[99] The Act does not specify that only protecting 90% of the population is enough to fulfill its purpose. Instead, the CWA routinely states that "human health" and "public health" are the focus of setting water quality standards. Therefore, it is not in line with the primary goal of the Act to have entire portions of the population exposed to high levels of toxins when consuming fish that live in its regulated waters.

In Oregon, Washington, and Idaho, harvesting and eating fish, including for subsistence by tribes, is a "designated use" of the waters of the state and must be protected under the CWA. The history, culture, and character of all three states is deeply connected to salmon and shellfish harvesting. Tribal members, recreational fishers, Asian and Pacific Islanders, and commercial fishing families eat higher amounts of fish and shellfish than other populations, amounting to more than 66.5 grams per day.[100] EPA's guidance states that for developing water quality criteria a 10^{-5} cancer risk level is a generally acceptable risk but that the agency recommends states use a 10^{-6} level for both the general population and highly exposed groups, such as tribes.[101] Under the CWA goal of protecting public health, a fish consumption rate of 66.5 grams per day, and a cancer risk level of 10^{-5} is inadequate, because it fails to protect tribal health. Therefore, the EPA violated the CWA when it approved Idaho's standards.

Additionally, when the EPA approved the standards, it did not follow its treaty rights guidance document, which asserts that when the EPA makes decisions which impact tribes, it shall ensure that its actions do not conflict with

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[94] Idaho Dept. of Envtl. Quality, Idaho Human Health Criteria Update Justification and Compliance with the Clean Water Act 15 (2015), https://www.deq.idaho.gov/media/60179450/58-0102-1201-human-health-criteria-justification-compliance-clean-water-act-1216.pdf.
[95] Clean Water Act, 33 U.S.C. § 1251(a) (2018).
[96] U.S. Envtl. Prot. Agency, *supra* note 9.
[97] *Id.*
[98] 33 U.S.C. § 1313(c)(2)(A).
[99] Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078 (D. Idaho 2000); *see also* 92 Cong. House Debates 1972, FWPC72 Leg. Hist. 9.
[100] Earthjustice, *supra* note 50.
[101] OFFICE OF WATER, *supra* note 43.

treaty rights and shall protect those rights when it has the discretion to do so. As stated above, the treaties signed by the Columbia River tribes contain a protection of the resource to be consumed in culturally significant levels without harming human health of tribal members.

In a recent CWA case involving tribes in Maine, the court made clear that tribal fish consumers should be considered as part of the target population when states determine human health criteria. Excerpts from EPA's decision regarding Maine's abilities to set water quality standards state that: "EPA concludes that to protect the function of these waters to preserve the Tribes' unique culture and to provide for the safe exercise of their sustenance practices, EPA must interpret the fishing use to include sustenance fishing" and that "if the State does submit a new or revised water quality standards that would interfere with the Tribes' reserved fishing right, EPA has authority under the CWA to ensure that the Tribes' fishing right is protected."[102]

The controversy in Maine started when the EPA failed to act on proposed standards submitted by the state. In 2014, a federal court ordered the EPA to either approve or disapprove the standards. The EPA partially approved and disapproved the standards in 2015. The EPA disapproved some of the standards because it determined that the criteria did not adequately protect all designated uses, including tribal fishing. In 2016, the EPA proposed federal water quality standards which included a fish consumption rate of 286 grams per day, as opposed to Maine's proposed 32.4 grams per day. Both proposed a cancer risk level of 10^{-6}.

Ultimately, as indicated by the case in Maine, if a state's human health criteria do not protect both the right to safely harvest and consume a treaty protected resource, then EPA believes it has the authority, and the duty, to disapprove standards that do not protect tribal rights. Therefore, Idaho must enact standards that will result in water quality that allows tribes to safely consume fish taken pursuant to tribal treaty rights.

Because Idaho submitted inadequate water quality standards, and the EPA approved them, the tribes could sue the EPA directly for violating treaty rights and the federal trust obligation, as well as for violations of the CWA. The EPA has the authority to set water quality standards if it finds that the state is not adequately protecting human health. The tribes could point to the unhealthy levels of toxins ingested by tribal members, and their treaty fishing rights, to force the EPA to impose more stringent standards.[103]

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[102] U.S. Envtl. Prot. Agency, Analysis Supporting EPA's February 2, 2015 Decision to Approve, Disapprove, and Make No Decision on, Various Maine Water Quality Standards, Including Those Applied to Waters of Indian Lands in Maine 12, 31 (2015), https://turtletalk.files.wordpress.com/2015/02/2015-2-2-me-wqs-epa-decision-letter-attachment-a.pdf; *see also* Letter from Curtis Spalding, EPA Regional Administrator to Patricia W. Aho, Commissioner of Maine Department of Environmental Protection (Feb. 2, 2015), https://www.epa.gov/sites/production/files/2016-04/documents/me_let_020215.pdf.

[103] This action will likely prove somewhat difficult with the current administration, as the EPA just approved the water quality standards earlier in 2019, but a court could interpret that the EPA

Ultimately, when water quality standards are submitted for approval, the EPA may decide that part or all of a state, territory, or authorized tribe's water quality standards do not meet the requirements of the CWA. In this case, the EPA approved Idaho's water quality standards, but was incorrect in doing so because they do not meet the standards for protecting human health set forth in the Act. The tribes should sue EPA for violating the CWA to obtain injunction relief to require that the agency rescind its approval and instruct Idaho to promulgate a higher standard to protect tribal health.

D. Other Federal Laws and Mandates

While the federal trust doctrine and the CWA are the strongest legal tools the tribes have for achieving a higher fish consumption rate, there are several other laws and regulations they could use to further support the tribes' argument that Idaho's water quality standards are not strong enough.

Idaho's water quality criteria, specifically its fish consumption rate and the cancer risk level, are based on a policy that sets the protection levels for the general population at 95%. That percentage only protects the average tribal member, which is inadequate.[104] Public health standards seek to protect most of the population, not just the average person. The position Idaho has taken to set a lower cancer risk level and hazard equivalent for tribal populations is counter to several federal laws aimed at preventing unequal impacts on vulnerable populations.

For example, Title VI of the 1964 Civil Rights Act states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[105] Title VI coverage includes federal programs delegated to the states, including the CWA. Therefore, when CWA programs and sections are implemented, they cannot discriminate against certain groups of people. A fish consumption rate that is unequal in protecting the health of tribal members versus non-tribal members is arguably discriminative. In this vein, there is a potential civil rights claim the tribes could bring against the EPA, along with a treaty rights violation and CWA claim.

Second, Executive Order 12898, which is focused on environmental justice, directs federal agencies to identify and address, to the greatest extent practicable, the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations.[106] The delegated authority that states have under the CWA falls within the scope of the Executive Order because a federal agency has final approval over the state's proposed water quality standards. Additionally, in 2014, the EPA implemented

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approved the standards in error and order the Agency to enact federal standards that are stringent enough to protect tribal health or require Idaho to set stronger standards.

[104] Lumley, *supra* note 55.

[105] Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (2018).

[106] Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

an environmental justice plan which directs the agency to incorporate principles of environmental justice into EPA rules and presumably consider environmental justice when reviewing and approving any rules or standards the agency considers.[107]

Environmental justice is the concept that all people are entitled to fair treatment and consideration when environmental laws are developed and implemented. The primary focus of environmental justice is to avoid disproportionate harm to marginalized populations who have a greater risk of exposure to health hazards. For tribes in the Pacific Northwest, "their cultural, spiritual, economic and sustenance practices create opportunity for greater exposure to toxic chemicals that are discharged to water" and accumulate in fish they later consume.[108] Under the principles of environmental justice, it is the duty of federal and state agencies to minimize risk to minority and low-income populations when enacting CWA regulations.

Ultimately, the EPA failed to properly incorporate Executive Order 12898 as well as the EPA's environmental justice plan when approving Idaho's proposed water quality standards. Compliance is not enforceable in a lawsuit on its own but would strengthen the tribe's argument that the EPA failed in its federal trust responsibility when it approved Idaho's proposed standards.

V. Conclusion

Overall, salmon are one of the most important cultural and economic resources for tribes along the Columbia River. It is well established that the Columbia River Treaties were intended to provide protection of the tribe's fishing rights. There is a strong argument that tribal treaty rights include not only allocation and abundance of a resource, but also protection of the quality of a resource.

The Columbia River tribes have several legal tools to force Idaho to enact more stringent standards. First, their treaties, and the federal trust doctrine, require that the EPA protect fish at a level that is safe for tribal consumption. Second, the CWA mandates that human health be protected. Third, several other laws and mandates, such as Executive Order 12898 and EPA's environmental justice plan, require that agencies consider tribal populations' unique cultural and historical practices when enacting environmental regulations.

Ultimately, EPA and the State of Idaho, need to recognize that if eating salmon in traditional quantities is dangerous to human health, it is a violation of tribal treaty fishing rights. Therefore, the federal government and states have an obligation to regulate water quality in the Columbia River, and in Idaho specifically, at more stringent levels to ensure that their actions do not infringe upon tribal treaty rights.

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[107] *Id.*
[108] Lumley, *supra* note 55.