Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest

Lauren Goschke*

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I. INTRODUCTION

> *Our ancestors biggest fear, what they feared most at treaty time, was a loss of the ability to hunt, fish, and gather foods like they'd always done. That's why they asked for these things to be included in the treaty.* – Warm Springs Tribal Member[1]
>
> *The first foods are the most important thing to us. When we lay out the first foods on the table it is like laying out your life, because the first foods are what sustain you.* – Umatilla Tribal Member[2]

In the beginning, Creator gave gifts to the people, and one gift was Wiwnu, the huckleberry. The huckleberry is considered the chief of all berries. They are small, tart, edible, purple fruits that grow throughout the Northwest. The berries are a sacred food. Yakima oral tradition says "the huckleberries know everything, they do nothing wrong."[3] Native people care for Wiwnu by harvesting only what is needed and by periodically burning the huckleberry fields. In return, Creator ensures that the berries return each year.[4] Huckleberries play an important role in tribal cultural identity. The huckleberry is a first food, one of five foods that have fed and sustained Northwest tribes since time immemorial.[5] Each summer tribes celebrate the harvest of the first ripe huckleberries with a feast.[6] Tribal members describe huckleberries as "a part of us, a part of our culture. They are as much a part of us as our fingers or our toes."[7] The great cultural, economic and social value of the huckleberry led to almost all of the Northwest tribes specifically reserving the right to gather berries outside of the reservation in their treaties with the United States.[8]

1. Interview with Warm Springs Tribal Member, Madras, Or. (2009) (transcript on file with author).

2. Interview with Umatilla Tribal Member, Pendleton, Or. (2008) (transcript on file with author).

3. Andrew Fisher, *The 1932 Handshake Agreement: Yakama Indian Treaty Rights and Forest Service Policy in the Pacific Northwest*, 28 W. HIST. Q. 186, 186 (Summer 1997).

4. VIRGINIA BEAVERT, THE WAY IT WAS: ANAKU IWACHA: YAKIMA INDIAN LEGENDS 66 (1974).

5. The other four foods are salmon, elk, deer, and cous. ANDREW FISHER, SHADOW TRIBE, THE MAKING OF COLUMBIA RIVER INDIAN IDENTITY 17 (2010).

6. *Sahaptin Language Lesson,* SPILYAY TYMOO (Warm Springs Or.), Aug. 12, 1999, at 6, http://oregonnews.uoregon.edu/lccn/sn93050507/1999-08-12/ed-1/seq-6.pdf.

7. Interview with Umatilla Tribal Member, Pendleton, Or. (2009) (transcript on file with author).

8. *See e.g.*, Treaty with the Yakima, June 9, 1855, 12 Stat. 951 ("*the* exclusive right to taking fish . . . at all usual and accustomed places . . . together with the privilege of hunting, gathering roots and berries"); Treaty with the Walla Walla, Cayuse, Etc., June 9, 1855, 12 Stat. 945 ("the exclusive right of taking fish . . . the privilege of hunting,

Both Indian and non-Indian people gather huckleberries. Historically, the berries were important to both groups mainly as a source of food, but today, the berries are increasingly sought after for their commercial value.[9] Non-Indian people may harvest huckleberries recreationally or commercially to supplement their livelihood. Tribal people harvest huckleberries because they are an important piece of their ceremonies, and going to the huckleberry fields during harvest time is an important cultural tradition. The varied interest in berry harvest has led to conflict between Indians and non-Indians over huckleberry use and management. Adding to the problem is the decline in the size of the huckleberry fields under United States Forest Service ("USFS") management. As the commercial market for huckleberries continues to grow, and huckleberry habitat continues to shrink, competition for huckleberries has intensified. Tribes with treaty rights to gather feel that non-Indian commercial harvesters are having a harmful impact on their treaty rights and have asked that the USFS take action to protect the huckleberry fields and their treaty rights. Tribes with treaty gathering rights have suggested that the best way to manage the huckleberry fields while protecting tribal treaty rights is through co-management of the fields by tribes and the USFS.

Tribal members cannot fulfill their obligation to Creator to protect the huckleberries, without the ability to make substantive decisions over huckleberry management. The traditional huckleberry gathering sites are located on lands owned and managed by the USFS. Currently, tribes that gather on USFS lands have no management authority over those lands; they can only influence federal policy and management decisions through consultation, not collaboration or co-management. This means that tribes lack the power to substantively influence how the USFS manages huckleberries. However, tribes have the power to drive management decisions as equal co-managers alongside federal agencies because the treaties and the trust responsibility guarantee this right. Tribes need the ability to engage substantively with those who control access to, and the availability of, the resources to ensure that treaty rights remain meaningful.

gathering roots and berries . . . in common with the citizens is also secured to them"); Treaty with the Middle Oregon Tribes, June 25, 1855, 12 Stat. 963 ("the exclusive right of taking fish . . . at all other usual and accustomed places . . . also the privilege of hunting, gathering roots and berries") [hereinafter Treaties].

9. Kara Briggs, *High Huckleberry Demand Hurts Tribes*, THE SPOKESMAN REV. (Aug. 1, 2006), http://www.spokesman.com/stories/2006/aug/01/high-huckleberry-demand-hurts-tribes/.

The legal precedent supports tribal co-management. Throughout the Northwest, tribes have engaged in successful co-management with state and federal agencies to protect marine resources such as salmon and shellfish.[10] Tribes have also coordinated with federal agencies on issues related to plant gathering, but these gathering agreements have generally resulted in informal policy statements rather than formal co-management agreements.[11] A truly equal co-management agreement would acknowledge that the treaties give the tribes the right to manage off-reservation treaty resources. Federal agencies should support co-management agreements because they have a trust responsibility to uphold treaty obligations, which include sharing decision-making authority over the management of off-reservation treaty resources.[12]

Courts have not fully addressed how treaty-gathering rights should be interpreted, but the courts have ruled on the management implications of the treaties on off-reservation hunting and fishing treaty rights.[13] The lessons from those cases can be used to inform future decisions related to huckleberries and tribes' right to co-manage other shared off-reservation resources. Rather than undergo lengthy and costly litigation to determine the scope of gathering rights on off-reservation lands, tribes and federal agencies should model their efforts on existing co-management frameworks that have been used successfully to manage other off-reservation treaty resources.

Addressing tribal use of huckleberries in the Northwest is complicated by the fact that there are over forty tribes throughout the Northwest that traditionally harvest huckleberries.[14] The traditional huckleberry fields are concentrated in the mid-Columbia region, specifically within the Gifford Pinchot National Forest.[15] Though all of

10. NW INDIAN FISHERIES COMM'N, TRIBAL NATURAL RESOURCES MANAGEMENT, A REPORT FROM THE TREATY INDIAN TRIBES IN WESTERN WASHINGTON (2016), http://nwifc.org/publications/annual-report/.

11. *See* Fisher, *supra* note 3, at 186-217.

12. U.S. FOREST SERV., UNITED STATES FOREST SERVICE MANUAL 1563.03, 14 (2012) (stating that the Forest Service must manage Forest Service lands and resources on which tribal treaty rights exist in coordination with tribes to fulfill their trust responsibility to the tribes).

13. *See, e.g.,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (upholding off-reservation reserved rights of Milles Lac Band of Chippewa Indians); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (affirming off-reservation reserved rights fisheries of numerous tribes located in Washington state); Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979) (recognizing off-reservation reserved rights of the Klamath Tribes).

14. Kim E. Hummer, *Manna in Winter: Indigenous Americans, Huckleberries and Blueberries*, 48 HORTSCIENCE 413, 415 (April 2013).

15. Cheryl Mack, *A Burning Issue: American Indian Fire Use on the Mt. Rainer Forest Reserve*, 63 FIRE MGMT TODAY 20, 20 (Spring 2003).

these tribes have similar experiences, this Note focuses on three of the largest tribes in the mid-Columbia basin, the Confederated Tribes and Bands of the Yakama ("Yakama"), Confederated Tribes of Warm Springs ("Warm Springs"), and the Confederated Tribes of the Umatilla Indian Reservation ("Umatilla"). Each of these tribes signed the Stevens treaties.[16] For purposes of this Note, the term "tribes" will refer only to these three tribes. Although the principles of huckleberry management can generally be extended to all tribes that signed the Stevens treaties, tribes not party to the Stevens treaties may not have reserved the right to gather and therefore, may not have the same gathering rights as these three tribes.

This Note begins Section II by examining the historical underpinnings of Indian law that inform the basis for interpreting Indian treaties. Section III focuses on how courts have allocated treaty-protected resources and whether courts recognize or require tribal management of off-reservation resources. Section IV evaluates existing law used to regulate tribal members' exercise of off-reservation treaty rights. Section V assesses historic and modern conflicts between Indians and non-Indian harvesters and the existing agreements that are used to manage these competing interests, and it suggests that the huckleberry is a good case study for the challenges associated with management of off-reservation treaty-protected gathering resources. Section VI considers whether legal precedent, the trust responsibility, and the treaties compel the USFS to do more than consult with the tribes. Section VII suggests that existing intertribal management organizations are good models for developing new co-management regimes on USFS lands. Ultimately, this Note proposes that tribes with reserved treaty rights can and should engage in substantive cooperative management with the federal government to manage huckleberries on federal lands.

II. THE BASIS OF TREATY INTERPRETATION: FOUNDATIONS OF INDIAN LAW

The right to off-reservation treaty resources flows from the treaties. Interpreting the treaties can be challenging; treaty negotiations were conducted in multiple languages and tribal members were often forced to sign under duress and because of this the intent of the parties can be difficult to construe. As a result, courts and federal land management agencies that manage treaty-protected resources must navigate a sea of complex legal, political, and historical issues to determine the

16. Treaties, *supra* note 8.

applicability of treaty rights today.[17] A basic understanding of the history of Indian land ownership, treaty rights, and the trust responsibility is necessary to understand the complexities inherent in treaty resource management.

The Marshall Trilogy, a group of Supreme Court cases, set forth the foundation for three critical principals of Indian law as they pertain to control over land and resources, treaty rights, tribal sovereignty, and the trust relationship.[18] These cases establish how power over tribal affairs is distributed between state, federal, and tribal governments.[19] These cases also build the foundation for recognition of tribal sovereignty and form the basis for the trust responsibility, a doctrine that is at the heart of the relationship between the federal government and the tribes.[20] Almost two centuries after these cases were decided, the trilogy continues to shape federal Indian law today.

A. Aboriginal Title

The first case in the Marshall Trilogy, *Johnson v. McIntosh,* laid the foundation for the unique sovereign-to-sovereign relationship between tribes and the United States government.[21] The legal basis for this decision was the "doctrine of discovery," a European legal doctrine stating that when a European country discovered land not previously claimed by another European county, the discoverer gained property rights to that land, regardless of prior occupation by non-European peoples.[22] Upon discovery, the discoverer held the exclusive right to acquire the property rights of the native inhabitants. In *Johnson,* Justice Marshall held that, upon discovery, Indians and Indian tribes lost their right to sell their land to any other entity than the United States. [23]

Despite the doctrine of discovery, Indians retained significant property rights over their land. These rights were what Marshall called "a

17. Off-reservation treaty rights may be subject to federal, state, and tribal authority depending on the circumstance, and these authorities may overlap and conflict.

18. Johnson v. M'Intosh*,* 21 U.S. 543 (1823); Cherokee Nation v. Georgia*,* 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1831). Professor Charles Wilkinson was the first to describe these cases as a trilogy. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987).

19. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 431 (1993).

20. *Cherokee Nation*, 30 U.S. at 17; *Worcester*, 31 U.S. at 555.

21. *Johnson,* 21 U.S. 543.

22. *Id.* at 573-74.

23. *Id* at 587 ("Discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest").

right of occupancy" and are generally referred to as aboriginal title. These rights are what made it necessary for the United States to enter into treaties with Indian nations to acquire the title to Indian land.[24] Aboriginal title refers to a certain set of property rights, namely, the right to use and occupy the land.[25] The United States could not own the land until it acquired aboriginal title through either purchase or conquest.[26]

In some instances, tribes were able to negotiate for off-reservation rights on their ceded lands in exchange for conveying aboriginal title.[27] Use rights include, for example, the right to hunt, fish, and gather on ceded lands.[28] Any rights not relinquished by the tribes were reserved to them,[29] meaning aboriginal rights remain with the land unless the rights were extinguished by "plain and unambiguous" congressional intent to do so.[30] In extinguishing aboriginal title to off-reservation lands, treaties also extinguished off-reservation hunting, fishing, and gathering rights, unless a treaty, statute, or executive order explicitly or implicitly reserved these rights.[31] For example, in the Northwest, the treaties were used to retain extensive off-reservation rights.

B. Trust Responsibility

After addressing land ownership issues, Marshall clarified the political relationship between tribes and the United States.[32] In *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), the court characterized tribes as semi-sovereign domestic dependent nations.[33] The tribes' status as "dependent nations" meant that the tribes retained some sovereign rights while the federal government held in trust other aspects of tribal property and, as a result, must act in the best interest in the tribes as trustee, including managing and protecting treaty-protected resources on public

24. *Id*. at 573-74. (Native property rights were "in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired").

25. *Id.*

26. Seneca Nation v. New York, 206 F. Supp. 2d 448, 504 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*, 547 U.S. 1178 (2006) ("Once aboriginal title is extinguished by the sovereign, the owner of the underlying fee title or right of preemption obtains fee simple absolute title to the land.")

27. United States v. Winans*,* 198 U.S. 371, 380-81 (1905) (holding that Indian treaties do not involve a grant of rights *to* the Indians, but were rather a grant *from* them, and therefore, Indians reserved all those rights not granted to the United States by treaty).

28. *M'Intosh*, 21 U.S. at 573; *see also* Mitchel v. United States, 34 U.S. 711 (1835).

29. *Winans,* 198 U.S. at 380–81.

30. *See* Solem v. Bartlett*,* 465 U.S. 463, 472 (1984).

31. FELIX COHEN, HANDBOOK ON FEDERAL INDIAN LAW §18.01 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK].

32. *Cherokee Nation,* 30 U.S. 1 (1831).

33. *Id*. at 17.

lands.[34]

Under the trust relationship, the federal government has a duty to manage trust resources, engage in government-to-government consultation, and honor treaty obligations.[35] The Supreme Court has analogized the relationship between the federal government and the tribes to one between a trustee and a beneficiary.[36]

> In carrying out its treaty obligation with the Indian tribes, the Government is something more than a mere contracting party. . . . [I]t has charged itself with moral *obligations of the highest responsibility and trust*. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by *the most exacting fiduciary standards*.[37]

The federal government has a responsibility as trustee to act in the best interest of the tribes in protecting the rights, assets, and property of Indian tribes and tribal members.[38] The Supreme Court has held that the federal government can be held liable for breach of its duties as trustee.[39] Some courts have held that the federal government's fiduciary responsibility extends to management of tribal land and resources[40] and creates an affirmative duty to protect the availability of and access to off-reservation treaty-protected resources.[41] However, other courts have rejected tribal challenges to government action based on the trust responsibility absent a statute or regulation imposing trust regulations on the government.[42]

34. *See, e.g.,* Kandra v. United States, 145 F. Supp. 2d 1192, 1204 (D. Or. 2001) (concerning federal timber harvests and their effects on treaty hunting rights); FREEMONT J. LYDEN & LYMAN H. LEGTERS, NATIVE AMERICANS AND PUBLIC POLICY (1992).

35. *See* COHEN'S HANDBOOK, *supra* note 31, §5.05[2]; No Oilport! v. Carter, 520 F. Supp. 334, 371–72 (W.D. Wash. 1981).

36. Seminole Nation v. United States, 316 U.S. 286 (1941).

37. *Id*. at 296–97 (emphasis added).

38. United States v. Mitchell, 463 U.S. 206, 226 (1983); COHEN'S HANDBOOK, *supra* note 31, §5.05[1][b].

39. *See* United States v. Navajo Nation, 537 U.S. 488, 490 (2003).

40. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972); Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990) (finding that the Secretary has a fiduciary duty to preserve and protect the tribal fishery).

41. *See* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies,* 39 UTAH L. REV. 355, 362–63 (2003); *See also* Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, 517 (2005).

42. *See* United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 546 (1980) and United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224 (1983). Under the Mitchell line of cases, "[U]nless there is a specific duty that has been placed on the government with respect to Indians, [the trust] responsibility is discharged by the agency's compliance with

Both lines of reasoning recognize that tribes and the federal government have a "special relationship"[43] that the United States unequivocally has a responsibility to protect the rights and resources of Native American people.[44] The trust responsibility is well recognized in both law and policy.[45] Virtually every law enacted by Congress regarding Indians and tribes has cited to, and found its support in, the federal government's trust obligation.[46]

Today, disputes rarely concern the *existence* of the trust doctrine but rather its *scope*.[47] Tribes advocate for a broad reading of the trust responsibility, but this interpretation has had mixed success in court.[48] Although some courts interpret the trust responsibility narrowly, Congress and executive agencies continue to support a broad interpretation of the federal trust responsibility as a matter of public policy.[49]

C. Treaty Rights

When treaties so provide, they guarantee rights to hunt, fish, and gather on non-reservation lands.[50] Treaties are the "supreme law of the

general regulations and statutes not specifically aimed at protecting Indian tribes."

43. *See* COHEN'S HANDBOOK, *supra* note 31, §5.04[3][a].

44. *See e.g.*, 25 U.S.C. § 3101 (finding that "the United States has a trust responsibility toward forest lands"); 25 U.S.C. § 3701(finding that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes").

45. *Mitchell II,* 463 U.S. at 225; COHEN'S HANDBOOK, *supra* note 31, §5.04[3][a].

46. *See e.g.*, 25 U.S.C. § 1301 (2012) (finding that the United States has a trust responsibility toward forest lands); 25 U.S.C. § 3701 (2012) (finding that the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes).

47. *See e.g.*, Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129, 1132 (9th Cir. 2015) (requesting that the court clarify the scope of the tribe's treaty right); for a broad description of how courts have assessed the scope of treaty rights. *See generally* Bradley Nye, Comment, *Where do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest,* 67 WASH. L. REV. 175 (1992).

48. *See e.g.,* United States v. Navajo Nation, 556 U.S. 287 (2009); *but see* United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003). *See also* Curtis G, Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. U.L. REV. 1069 (2006).

49. *See e.g.*, Press Release, U.S. Dep't of Interior, Secretary Jewell's Order Affirming American Indian Trust Responsibilities, (Aug. 20, 2014), https://www.doi.gov/news/pressreleases/secretary-jewell-issues-secretarial-order-affirming-american-indian-trust-responsibilities.

50. *See generally* United States v. Winans, 198 U.S. 371 (1905); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

land" and override contrary state law.[51] A treaty is a contract between two sovereign governments, an Indian nation and the United States.[52] Typically the provisions of a treaty define the boundaries of the reservation, the amount of land ceded to the federal government, and in some circumstances, off-reservation rights.[53] The Supreme Court has held that treaties are "not a grant of right to the Indians, but a grant of rights from them—a reservation of those not granted."[54] In the Northwest, tribes used their treaties to ensure continued access to resources on the vast areas of land ceded to the United States. This concept, known as the "reserved rights doctrine," means that unless tribes expressly ceded a right, they retain that right. The reserved rights doctrine is especially important in the Northwest where tribes explicitly reserved the right to access and use off-reservation resources because the reserved rights doctrine gives tribes an additional layer of protection over off-reservation treaty resources.[55]

The importance of a tribe's ability to hunt, fish, and gather is recognized by the Supreme Court.[56] Preserving access to treaty resources was, and is, the payment the United States made to gain title to Indian land. In particular, Indians sought to reserve in particular the right to hunt, fish, and gather because these activities were central to maintaining their livelihood and way of life. Treaties, like the ones signed in the Northwest that explicitly reserve the right to hunt, fish, and gather on ceded tribal lands have been held to include the right to access the areas where hunting, fishing and gathering occurred before the treaty was signed.[57] The reserved rights doctrine is at the heart of present day recognition and protection of off-reservation rights.[58]

When a treaty right to a resource is challenged, courts look to the language of the treaties to determine whether the right exists. Courts use the Indian canons of construction to interpret the language of the treaties.[59] The canons are a method of interpretation intended to compensate for language differences and unequal bargaining power between the parties at treaty time.[60] Treaties are to be construed as the

51. U.S. CONST. art. VI, cl. 2.

52. *Id.*; Worcester v. Georgia, 31 U.S. 515 (1832).

53. Menominee Tribe v. United States, 391 U.S. 404, 404 (1968).

54. *Winans* 198 U.S. at 381.

55. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247–48 (1985).

56. *Winans* 198 U.S. at 381.

57. *Id.* (finding that the treaties create a "servitude" on lands that were used for aboriginal fishing).

58. *Id.*

59. *See* COHEN'S HANDBOOK, *supra* note 31, §2.02(2).

60. Worcester v. Georgia, 31 U.S. 515, 559 (1831); *see also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 659

tribes or their representatives would have understood them at the time the treaty was signed.[61] Courts read ambiguities in treaties by looking "beyond the written words to the larger context that frames the treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[62] For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* the court read a treaty clause reserving the right to fish at "usual and accustomed places" as including the right to fifty percent of the salmon in the state of Washington.[63] The treaties are the basis for determining the extent of off-reservation tribal hunting, fishing and gathering rights. For courts to construe the treaties as the Indians would have understood them at the time, courts will look to the past to examine how and where tribes exercised their rights before the treaty was signed.[64]

III. TRIBAL RIGHTS TO TREATY-PROTECTED OFF-RESERVATION NATURAL RESOURCES

Tribes throughout the Northwest used their treaties to reserve their right to continue to hunt, fish, and gather.[65] The reservation clause in each of these treaties is virtually identical, guaranteeing tribes "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . together with the privilege of hunting, gathering roots and berries . . . upon open and unclaimed land."[66] Treaties that contain this clause are called the "Stevens Treaties" because they were negotiated by Isaac Stevens, a man who was hired to extinguish all Indian title in Northwest as quickly as possible to open up land for white settlers seeking to homestead on that land.[67] Within a year Stevens had negotiated ten treaties and gained title to most land in Washington, Idaho, Oregon and Montana, often leaving the tribes with small, typically undesirable, reservations.[68]

(1979).

61. Tulee v. Washington*,* 315 U.S. 681, 684-85 (1942); Yakima v. Confederated Tribes, 502 U.S. 251, 269 (1992) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed in favor of the Indians, with ambiguous provisions interpreted to their benefit.'").

62. Minnesota v. Mille Lacs Band of Chippewa Indians*,* 526 U.S. 172, 196 (1999).

63. 443 U.S. 658 (1979).

64. Mille Lacs Band of Chippewa Indians, 526 U.S. at 201–02.

65. Treaties, *supra* note 8.

66. *Id.*

67. KENT D. RICHARDS, ISSAC I. STEVENS: YOUNG MAN IN A HURRY 98 (1979).

68. Francis Haines, *Problems of Indian Policy*, 41 PAC. NORTHWEST Q. 203, 206

Through his interactions with the tribes, Stevens and his staff determined that the Indians would more readily sign the treaties if they were allowed to continue to hunt, fish, and gather at their traditional places.[69] Ensuring that the tribes would retain these rights was the easiest way to get the tribes to agree.[70] The history of the treaty negotiations shows how important these rights were to the Indian people at this time, and this has been important in interpreting the provisions of the treaties in modern times.

Notably, federal land management agencies such as the USFS, the National Park Service, and the Bureau of Land Management own and manage many of the ceded lands where tribes continue to exercise their treaty right to hunt, fish and gather. The Stevens Treaties generally restrict the location of off-reservation fishing to "usual and accustomed places," and off-reservation hunting and gathering to "open and unclaimed lands."[71] Courts have interpreted the "usual and accustomed" clause to include "every fishing location where members of a tribe customarily fished from time to time at and before treaty times."[72] Courts define "open and unclaimed lands" as lands within the tribes' aboriginal territory that are both publicly owned and not obviously occupied.[73]

Although the extent of a tribe's ability to make use of "open and unclaimed lands" for gathering has not been litigated, courts have looked at when lands are considered "open and unclaimed" for treaty purposes. Generally, the courts have held that tribes may exercise their treaty rights on "open and unclaimed" land as long as their treaty use is compatible with the stated management objective for that land.[74] For example, in *United States v. Hicks*, the court held that tribes could no longer exercise their treaty right to hunt in Olympic National Park because the park was created, in part, to protect elk populations.[75] The court held that because the park's purpose was incompatible with the exercise of the tribe's treaty rights, the park lands could not be considered "open and unclaimed" for treaty hunting purposes. However, it did not decide how

(1910).

69. Kent Richards, *The Stevens Treaties of 1854-1855*, 106 OR. HIST. Q. 342 (2005).

70. HAZARD STEVENS, THE LIFE OF ISAAC INGALLS STEVENS 454, 459, 464, 468, 472, 475 (1900).

71. COHEN'S HANDBOOK, *supra* note 31, §18.04[e][i].

72. United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash., 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975)**,** *cert. denied,* 423 U.S. 1086 (1976), *reh'g denied,* 424 U.S. 978 (1976).

73. State v. Buchanan, 138 P.2d 186 (Wash. 1999); State v. Tinno, 497 P.2d 1386, 1390–91 (Idaho 1972).

74. United States v. Hicks, 587 F. Supp. 1162, 1166 (W.D. Wash. 1984).

75. *Id.*

the park's purpose would affect fishing or gathering in the park.[76] Future abrogation of treaty rights will not be upheld by the courts unless it is clear that Congress intended to abrogate the treaties.[77] While some public lands have been designated for purposes inconsistent with treaty rights, most public lands have management purposes that are consistent with the exercise of off-reservation treaty rights. For example, courts have held that USFS lands are "open and unclaimed lands" under the treaties and therefore the tribes may exercise their treaty rights on those lands.[78] Since most important huckleberry fields are located on USFS lands, this means that the tribes should be able to exercise their treaty gathering rights in those areas.

Tribes argue that the realization of their off-reservation treaty rights is necessary for their cultural well-being.[79] Treaty resources, particularly traditional foods, are an integral part of tribal cultural traditions, such as the first food feast.[80] Cultural traditions like the first foods feast cannot persist without access to huckleberries. Huckleberries do not grow on either the Warm Springs or Umatilla reservations. These reservations are on dry prairie lands, not in the mountains where the berries grow. Tribes living on these reservations rely heavily on the continued access to gathering areas on USFS lands to continue their cultural traditions.

Historically, tribes throughout the Northwest would travel to the traditional berry fields near Mount Adams in the summer and stay there through the summer, harvesting berries for the winter.[81] Berry picking was an important social and cultural activity. Tribes made sure that their treaties reserved the right to off-reservation berry picking so that they could continue to harvest. However, when these tribes have tried to use

76. *Hicks*, 587 F. Supp. 1162. The opinion is of dubious validity because the legislation creating the park did not expressly abrogate tribal hunting rights and the legislative history gave no indication that Congress intended to abrogate the right. Thus, under controlling principals of Indian law, the lack of a clear showing of congressional intent to abrogate means that the treaty was not abrogated and that treaty rights continue to apply in the park. *See* H. Barry Holt, *Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and* United States v. Hicks, 16 ENVTL. L. 207 (1985).

77. COHEN'S HANDBOOK, *supra* note 31, §18.07[3].

78. *Buchanan*, 978 P.2d at 1081-81; State v. Arthur, 261 P.2d 135, 141 (Idaho 1953) (finding that national forest lands are open and unclaimed as defined by the Nez Perce treaty).

79. Jason W. Anderson, *The World is Their Oyster? Interpreting the Scope of Native American Off-Reservation Shellfish Rights in Washington State*, 23 SEATTLE UNIV. L.R. 145, 146 (1999).

80. First food feasts are held to celebrate the season's food and signal to tribal members that the season for collecting that food is "open" to all tribal members. *See e.g.,* BARBARA DILLS & PAULETTE D'AUTEUIL-ROBIDEAU, COLUMBIA RIVER DEF. PROJECT, IN DEFENSE OF CHE WANA: FISHING RIGHTS ON THE COLUMBIA RIVER (1987).

81. Cheryl Mack & Richard McClure, *Vaccinium Processing in the Western Cascades*, 22 J. OF ETHNOBIOLOGY 35, 39-40 (2002).

their treaty right to the huckleberries to ensure tribal access to, and the long-term persistence of their traditional huckleberry fields, they have met resistance from non-Indian huckleberry users.[82]

Conflict between Indians and non-Indians over access to and the use of off-reservation treaty resources in the Northwest has been most public in the context of fisheries management. Disagreement over the allocation, harvest, and management of fish and shellfish are some of the most well-publicized and heavily litigated conflicts over the scope of off-reservation treaty rights. The economic and cultural importance of salmon to both Indians and non-Indians has led to intense clashes over salmon management. States, tribes, and the federal government fought to exercise control over access to salmon fisheries. A number of courts have addressed conflicts over these resources. The precedent set in these cases are important indicators for predicting the way courts might adjudicate future conflicts over off-reservation treaty rights, including any related to huckleberry gathering.

A. Half the Resource: The Fishing Cases

The first major case to address off-reservation allocation of treaty-protected resources was *United States v. Winans*.[83] In *Winans*, the Supreme Court held that tribes with treaties that reserved the right to "tak[e] fish at all usual and accustomed places" guaranteed those tribes access to their usual and accustomed places, even if they were on private land.[84] *Winans* held that private property rights did not preclude tribal treaty rights.[85] The case held that tribes' ability to exercise their treaty rights was "not much less necessary to the existence of Indians than the atmosphere they breathed."[86] Although the full force of *Winans* was not felt until almost seventy years later, when it played an important role in determining the allocation of salmon in between Indians and non-Indians in the State of Washington, the case nonetheless set an important precedent for later cases interpreting the scope of off-reservation treaty rights.[87]

82. REBECCA T. RICHARDS & SUSAN J. ALEXANDER, U.S. DEP'T OF AGRIC., PNW-GTR-657, A SOCIAL HISTORY OF WILD HUCKLEBERRY HARVESTING IN THE PACIFIC NORTHWEST 8 (Feb. 2006).

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

84. *Id.* at 381.

85. *Id.* at 380–81.

86. *Id.* at 381.

87. United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash., 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975)**,** *cert. denied,* 423 U.S. 1086 (1976), *reh'g denied,* 424 U.S. 978 (1976).

The right to exercise treaty rights on off-reservation lands is not absolute.[88] In three cases known collectively as the *Puyallup* cases, the Supreme Court expanded the power of the state to regulate off-reservation treaty hunting, fishing, and gathering activities.[89] The outcome of these cases led to increased conflicts between Indian and non-Indian fishermen in Washington, both of which felt that their group was not getting their fair share of the salmon.[90] Fights over who had the right to fish, and whether that right should be limited by the state, erupted between the two groups, eventually leading to violent conflicts.[91] As the conflicts over salmon intensified, riots and demonstrations became commonplace.[92] Once fishermen started going to jail, tribes and the state decided to take the conflict to court, to be decided once and for all.[93]

United States v. Washington, better known as the "Boldt Decision," was intended to clarify the scope of the tribal treaty right to fish.[94] The case examined the extent of tribal fishing rights and held that the "in common with" language of the Stevens Treaties reserved to the Indians the right to fifty percent of the salmon.[95] This landmark decision was a victory for the tribes, not only because their right to a significant portion of the fish was recognized, but also because Judge Boldt recognized the treaties as the supreme law of the land over and above states' rights and the rights of private property owners. He recognized the treaties as the powerful and applicable documents they are, even 100 years after they were negotiated.[96] The treaties, and the rights they reserved, still meant something. The Boldt Decision set a powerful precedent for subsequent cases determining the allocation of treaty-protected resources between Indians and non-Indians.

The Boldt Decision drew heavy criticism from non-Indians because

88. *See, e.g*., United States v. Hicks, 587 F. Supp. 1162 (W.D. Wash. 1984).

89. Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968); Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977).

90. Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 41, 44–45 (2006).

91. CHARLES WILKINSON, MESSAGES FROM FRANKS LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2006).

92. *Id* at 38-41.

93. *Id* at 49.

94. *See United States v. Washington*, 384 F. Supp. 312 (W.D. Wash., 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975)**,** *cert. denied,* 423 U.S. 1086 (1976), *reh'g denied,* 424 U.S. 978 (1976).

95. *Id.*

96. *Id*.

it gave tribes' substantial access to and control over salmon.[97] Subsequent litigation was prolific as non-Indian advocates brought case after case in Washington courts, hoping to overturn the Boldt Decision.[98] In 1979, the Supreme Court accepted one of these cases for review in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*[99] The Supreme Court, using the Indian canons of construction, upheld Judge Boldt's interpretation of the "in common with" treaty language, and affirmed his decision that up to fifty percent of the salmon belonged to the tribes.[100]

The Boldt Decision rejected the state's argument that the treaties only guaranteed tribes a right of access to their traditional fishing areas. Instead, the court held that the treaties gave the tribes a right to the fish itself, in addition to a right of access.[101] By giving control over half of the salmon to the tribes, Judge Boldt's decision ensured that state and federal agencies would have to engage with tribes on issues related to fisheries management. To ignore the tribes would mean that the state and federal government would not be involved in the management of half the fish. The Boldt Decision, therefore, essentially required state, tribal, and federal governments to engage in co-management of the salmon fishery.

The treaty clause at issue in the Boldt Decision also reserves a right to gather. Though the right to gather applies on "open and unclaimed lands" rather than "usual and accustomed places," the "open and unclaimed" clause of the Stevens Treaties has been interpreted more broadly than the "usual and accustomed clause."[102] Therefore, the precedent set in the Boldt Decision should apply to huckleberries as well as salmon, because the right to huckleberries is broader than the right to salmon. Additionally, as the Boldt Decision recognized a right to access to the resource, and a right to a significant portion of the resources itself, the same should apply to huckleberries. Such an application could and should result in a similar co-management agreement between tribes and the federal government over huckleberries. Since huckleberries are also a

97. For an analysis of newspaper articles after the Boldt Decision, *see generally* Bruce G. Miller, *The Press, the Boldt Decision, and Indian-White Relations*, 17 AM. INDIAN CULTURE AND RES. J. 75 (1993).

98. United States v. Washington, 573 F.3d 701 (9th Cir. 2009); United States v. Suquamish Indian Tribe, 901 F.2d 772, 773 (9th Cir. 1990); United States v. Washington, 730 F.2d 1314 (9th Cir. 1984); *see also*, ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 123 (2009) (describing litigation subsequent to the Boldt Decision).

99. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

100. *Id.* at 685.

101. *Id.*

102. COHEN'S HANDBOOK, *supra* note 31, §18.04[2][e][iii].

treaty-protected resource, the precedent from the Bolt Decision should apply to them as well, and co-management should result.

B. Gathering Rights: The Shellfish Cases

Following the precedent set by Judge Boldt, other Washington courts began to recognize additional substantive rights to treaty-protected off-reservation resources.[103] Some Stevens Treaties include a clause commonly referred to as the "Shellfish Proviso," which says that Indians may take fish at all usual and accustomed grounds and stations but that they "shall not take shell fish from any beds staked or cultivated by citizens."[104] The tribes argued that the right to take shellfish was the same as the right to fish, and should be interpreted in the same way, recognizing that tribes had the right to fifty percent of the shellfish in the state. Shellfish farmers argued that tribes should not have rights to shellfish on private land.[105] On December 20, 1994, district court Judge Rafeedie extended the reasoning of the Boldt Decision to shellfish, holding that Stevens Treaty Tribes had reserved, through the treaties, the right to up to fifty percent of the harvestable shellfish, even on private lands.[106] On appeal, the Ninth Circuit substantially upheld the district court's decision.[107] This was arguably the first time that any court had made a decision on the allocation of off-reservation, treaty-protected *gathering rights*.[108]

The Ninth Circuit held that the treaty right to gather shellfish was no different than the treaty right to fish for salmon.[109] The court ruled that the shellfish clause of the treaty should be interpreted the same way as the fishing clause, giving fifty percent of the harvestable shellfish to the tribes.[110] The proviso was interpreted as retaining shellfish harvesting rights throughout Washington's beaches because these were the areas that were used by the Indians at treaty time and the tribes that signed the treaty would have expected the shellfish clause to protect their right to

103. *See generally* Michael C. Blumm & Brent M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 462-500 (1998).

104. United States v. Washington (*Shellfish III*), 157 F.3d 630 (9th Cir. 1998).

105. United States v. Washington (*Shellfish I*), 873 F. Supp. 1422, 1430 (W.D. Wash. 1994); United States v. Washington (*Shellfish II*), 898 F. Supp. 1453, 1457 (W.D. Wash. 1995).

106. *See Shellfish I,* 873 F. Supp. at 1429.

107. *Shellfish III*, 157 F. Supp. at 646-56.

108. *Id.*

109. United States v. Washington, 135 F.3d 618, 639–40 (9th Cir. 1998).

110. *Shellfish III,* 157 F. Supp. at 645–48.

gather shellfish in their traditional places.[111] This decision is important because it is the first time that Judge Boldt's ruling on treaty reserved fishing rights was extended to protect the right to a species other than fish. It was also the first time the court addressed how treaty rights applied to a species that was *gathered,* rather than hunted or fished.

Courts will likely extend the line of reasoning from the fishing and shellfish cases to huckleberries; recognizing that treaty rights not only protect access to the resource, but the right to a significant amount of the resource. Like the right to fish and gather shellfish, tribes who signed the Stevens Treaties explicitly reserved the right to gather berries. In the management of fish and shellfish, courts have granted tribes access to and the right to fifty percent of the resource.[112] It should follow then, that tribes who reserved the right to gather berries should also be guaranteed access to their traditional berry picking fields and a have an exclusive right to fifty percent of the huckleberry resource.

C. Expanding Precedent to Compel Co-Management of Huckleberries

Conflict between Indians and non-Indians over access to and the use of off-reservation treaty resources in the Northwest has arisen mainly in the context of fisheries management. Disagreements over the allocation of fish and shellfish and their harvest and management are some of the most well publicized and heavily litigated conflicts regarding the scope of off-reservation treaty rights. The cultural importance of salmon to both Indians and non-Indians led to intense clashes over salmon management. States, tribes, and the federal government fought to exercise control over access to salmon fisheries. A number of courts have attempted to address problems arising from conflicting interests in fisheries management. The precedent set forth in these cases carry important implications for the way courts might adjudicate all conflicts over the exercise of off-reservation treaty rights, including any related to huckleberry gathering.

As with salmon and shellfish, treaties protect huckleberries. Like salmon and shellfish, huckleberries are in high demand. Like fish and

111. *Id.* at 643 (the court held that any natural shellfish beds that had been improved by private owners along with any artificial shellfish beds created by the state were open to Indian gathering. The court found that the only place that Indians could be excluded from exercising their treaty right to gather shellfish was in artificial shellfish beds created by private owners, because those beds would not have been accessible to Indians at the time of treaty making).

shellfish, the right to gather berries is reserved in the treaties. The precedent from the salmon and shellfish cases should similarly be extended to protect huckleberries and tribal rights to huckleberries. In interpreting the scope of a treaty right, a court may look to the past to see if the treaty resource was important at the time of treaty negotiations to understand if the tribes would have meant to protect their rights to that resource.[113] If a court were to interpret whether there is a treaty right to huckleberries, it is likely, given the huckleberry's historical importance, that huckleberries would receive the same protections they have given salmon and shellfish.

Tribes' right to manage a significant portion of their treaty-protected resources exists because tribes have a substantial interest in the success and viability of treaty resources. Tribal concerns related to management of land and resources have not diminished in the years since they signed the treaties, if anything, their interest in protecting those resources has increased. American Indians have endured the systematic denial of their rights to land, resources, self-determination, and sovereignty. Despite this, they have held onto their lands and continue to fight for the protection of their resources. It is only through the sheer will of Indian people and their tireless commitment to the advancement of tribal sovereignty that the tribes have forced the government to recognize their treaty rights. It is through these efforts over time that the federal government has been forced to fulfill the promises made in the treaties. The recognition of tribes' sovereignty has been precipitated, in large part, by the tribes themselves. Tribal sovereignty is now recognized in congressional mandates, presidential priorities, federal government policies, and legislation that support tribes and their right to self-determination and active participation in addressing treaty obligations.[114]

American Indians and tribal governments play an increasingly influential role in the way that their treaties are interpreted. Tribes have staff, resources, expertise, and the ability to regulate and manage off-

113. *See Shellfish I,* 873 F. Supp. at 1437.

114. Exec. Order No. 13,175, 3 C.F.R. 67249 (Nov. 6, 2000). On November 6, 2000, President Clinton signed Executive Order 13175, which called on each federal agency both to consult with tribes whenever considering policies that have tribal implications and to maximize use of agency discretion and waivers in response to tribal concerns. Executive Order 13175 created a communicative standard of practice between tribes and federal agencies. On November 5, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies, Subject: Tribal Consultation (Nov. 5, 2009), which again emphasized the importance of consultation and collaboration between tribes and federal agencies and required each agency to submit a plan to implement Executive Order 13175. Presidential Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

reservation treaty rights, and have done so successfully.[115] Tribal management plans and strategies can and should be used to manage berries on federal lands. Integrating tribal management with federal management would ensure that the federal government would meet their obligations under the trust responsibility and would create an effective, comprehensive co-management regime that would adequately protect treaty resources on USFS lands.

IV. REGULATING OFF-RESERVATION GATHERING RIGHTS

Treaties give tribes a federally-protected right to reserved resources. Treaty resources may be found on state, federal, or private land. Although tribes, states, and the federal government may have some overlapping authority to regulate off-reservation hunting, fishing, and gathering, tribal regulation of members' off-reservation activities preclude state regulations[116] and compliment federal regulation, unless federal regulations show a clear intent to limit the tribe's power. Tribal regulatory jurisdiction arises both from the tribes' retained inherent sovereignty and from treaties.[117] Tribal governments regulate how tribal members may exercise their treaty rights on off reservation lands.

Congress, under the Indian Commerce Clause, has plenary authority over regulating tribal treaty natural resources.[118] Congress and federal agencies have taken little direct action affecting gathering generally, and huckleberries in particular. [119] In the case of states, the courts would find,

115. For example, the Northwest Indian Fisheries Commission employs over 40 scientists, including fisheries biologists, microbiologists and environmental data specialists. *Staff Directory*, NORTHWEST INDIAN FISHERIES COMMISSION, http://nwifc.org/about-us/staff-directory/ (last visited May 9, 2016).

116. "The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource. Additionally, state regulation must not discriminate against the Indians . . . ." United States v. Washington, 384 F. Supp. 312, 333.

117. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) (stating "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status").

118. This power is based on the Commerce, Treaty, and Supremacy Clauses of the United States Constitution.

119. *See* COHEN'S HANDBOOK, *supra* note 31, §18.07(3)[b]. Although Congress has the power to extinguish Indian hunting and fishing rights, a court will not recognize an extinguishment of these vital rights unless Congress has clearly expressed an intention to eliminate them. In *Menominee Tribe v. United States,* the Supreme Court held that the Menominee tribe retained hunting and fishing rights even though Congress had terminated the reservation, since the termination statute did not mention hunting and fishing rights. Menominee Tribe v. United States, 391 U.S. 404, 415–17 (1968) (Stewart,

as they have in the fishing and hunting cases, that state regulation conflicting with treaty gathering rights would be preempted by the treaty.[120] Beyond that, however, the issue of state regulation has not come up since states have not taken on the task of regulating treaty plant gathering, including huckleberries.

Tribal sovereignty gives a tribe the power to regulate tribal members when they exercise their treaty-protected hunting, fishing, and gathering rights on off-reservation lands. Tribal courts may exercise both civil and criminal prosecution over Indians who violate tribal laws.[121] Tribes have policy and laws in place to control members' exercise of off-reservation rights. For example, the Confederated Tribes of the Warm Springs ("Warm Springs") resource management plan states:

> The creator gave Native Americans the land and the laws live in the land. We will live in balance with the land and will never use more of our natural resources that can be sustained forever. Several hundred generations have relied on the land and its resources. Integrated management combines and understanding of tribal values with the knowledge to assess the natural world. The longhouse says that water, salmon, deer, roots, and berries are the most important thing to our well-being.[122]

The code requires Warm Springs members to harvest the berries in "accordance with tribal custom and tradition," both on and off-reservation.[123] The tribal council may revoke or suspend the hunting, fishing, or gathering rights of members who violate the terms of the Warm Springs Tribal Code.[124]

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") tribal code also addresses protection and management of huckleberries and other first foods.[125] Like Warm Springs, the CTUIR value first foods and have developed their natural resource restoration

J., dissenting).

120. U.S. CONST. art. VI, cl. 2. (stating that treaties are the supreme law of the land.); *See generally*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Antoine v. Washington, 420 U.S. 194 (1975).

121. *See* United States v. Winans, 198 U.S. 371 (1905); *See also* United States v. Felter, 546 F. Supp. 1002, 1022–1023 (D. Utah 1984), *aff'd*, 752 F.2d 1505 (10th Cir. 1985).

122. WARM SPRINGS TRIBAL CODE, Ch. 490, Protection and Management of Archaeological, Historical, and Cultural Resources, at 7.

123. *Id.*

124. *Id.*

125. *First Foods Policy Program*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, http://ctuir.org/tribal-services/natural-resources/first-foods-policy-program (last visited March 2, 2016).

and monitoring plans around protecting and managing the first foods.[126] For example, the CTUIR's Department of Natural Resources' mission is:

> To protect, restore, and enhance the First Foods—water, salmon, deer, cous, and huckleberry—for the perpetual cultural, economic, and sovereign benefit of the CTUIR. We will accomplish this utilizing traditional ecological and cultural knowledge and science to inform: 1) population and habitat management goals and actions; and 2) natural resource policies and regulatory mechanisms.[127]

The CTUIR have made it an official policy to "reaffirm and reacquaint all federal agencies with their trust responsibility to the Confederated Tribes."[128] The CTUIR believe that the trust obligation requires the federal government to work together with the tribe to provide proper and adequate management of the first foods.[129] Doing so ensures an optimum level of trust protection over the foods that are important to the tribe.

The CTUIR and Warm Springs tribal codes show how tribes integrate their cultural knowledge and values into management and regulation of off-reservation resources. Tribes are in an excellent position to educate non-Indians on traditional tribal land management, particularly as it relates to huckleberries. The federal government should engage in co-management with the tribes because the tribes have the knowledge and expertise to best manage these resources since the tribes have managed the huckleberry fields for centuries.[130] Additionally, tribes

126. KRISTA L. JONES ET AL., UMATILLA RIVER VISION (2008) http://www.ykfp.org/par10/html/CTUIR%20DNR%20Umatilla%20River%20Vision%20100108.pdf. Eric Quaempts, Stacy Schumacher and Cheryl Shippentower, *Using First Foods to Direct Natural Resources Restoration and Monitoring,* CTUIR DEPARTMENT OF NATURAL RESOURCES, http://students.washington.edu/jklm/Huckleberry_Summit_2007/Poster.pdf (last visited May 9, 2016).

127. *Fisheries*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, http://ctuir.org/tribal-services/natural-resources/fisheries (last visited June 10, 2016).

128. *Id.*

129. *See e.g.* Letter from Eric Quaempts, Director, Dep't of Nat. Res. 2 (March 17, 2009) https://prod.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007476.pdf ("Tribal consultation is the cornerstone of the trust responsibility owed the tribes by the federal agencies. Failing to mandate tribal consultation for project which may impact treaty reserves resources is a significant oversight.").

130. For example, the tribes want to reintroduce fire in the huckleberry fields to encourage berry growth. *See e.g.* Richard Cokle, *Tribes Base Land-Management Strategies on Protecting 'First Foods,'* THE OREGONIAN (Feb. 27, 2009), http://www.oregonlive.com/environment/index.ssf/2009/02/confederated_tribes_of_the_uma.html; *See also*, Jack McNeel, "*First Nations Save First Foods: Northwest Tribes Seek to Restore Historic Fish Runs,"* INDIAN COUNTRY TODAY (April 7, 2014), http://indiancountrytodaymedianetwork.com/2014/04/07/first-nations-save-first-foods-

already have policies, management plans, and enforcement mechanisms in place to manage treaty resources.[131] These tribal management frameworks can be transferred to federal lands. Existing tribal land management systems can be used as a tool to protect culturally important plants and gathering places because tribal codes recognize the cultural importance of the plants and reflect years of traditional knowledge in managing these resources. Integration of tribal regulations by the USFS would acknowledge tribes' rights to participate in a sincere and effective co-management regime with the federal government. Tribes have the capacity to manage off-reservation treaty resources. They have the scientific staff, the historical experience, and the cultural imperative to manage huckleberries in a sustainable manner. Federal agencies, such as the USFS, will benefit from tribal co-management. Tribes will be able to provide the staff and expertise in areas where the USFS traditionally lacks management focus and staff. Additionally, instead of working independently of the tribes, the tribes and the USFS will be able to work together to regulate the resource. This would reduce the administrative burden of the program on the USFS and recognize the tribes' right to manage their treaty resource.

V. CASE STUDY OF OFF-RESERVATION TREATY RIGHTS: THE HUCKLEBERRY

A. Cultural Importance of Huckleberries

> *[E]ven the old, almost helpless Indian, would rather go to the berry patches than stay at home on three full meals a day.*[132]

A first foods celebration precedes each season's harvest.[133] At the ceremony the very first salmon, deer, huckleberry, or root of the season is offered to the whole tribe.[134] Prior to the ceremony, only a few members of the tribe may harvest that season's food. Only after the first foods feast, after everyone in the tribe has had a chance to taste that season's food, can all members hunt, fish, or gather that season's food for his or her own family.

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northwest-tribes-seek-restore-historic-fish-runs-154312?page=0%2C1.

131. *See* WARM SPRINGS TRIBAL CODE, Ch. 490, Protection and Management of Archeological, Historical, and Cultural Resources, at 7; CONFEDERATED TRIBES OF THE UMATILLA FISH AND WILDLIFE CODE, ch. 1-15, http://ctuir.org/fish-and-wildlife-code (last visited April 2, 2016); REV. YAKAMA NATION WILDLIFE CODE, Title XXXII (2005).

132. Fisher, *supra* note 3, at 195.

133. FISHER, *supra* note 5, at 17.

134. RICHARDS & ALEXANDER, *supra* note 82, at 8.

The women of the tribe are responsible for picking and preserving enough berries to last through the year and into the next berry season. [135] Tribal members collect the berries, then dry them and store them for the winter.[136] It is important that the women collect enough berries because these berries are served at other important events, such as births, deaths, and marriages throughout the year.[137] Historically, members of these tribes would travel to the berry fields and spend a majority of their summer there.[138] This was an important social and cultural activity. Tribes treat these huckleberry fields as a sacred place, a place where their mothers, and their mother's mothers, went to gather berries.[139]

No one has ever successfully domesticated huckleberries, which means they can only be harvested from the areas where they grow wild.[140] Huckleberries generally grow on the lower slopes of mountains, in mid-alpine regions, where there are cold winters and hot summers.[141] Huckleberries are commercially valuable, but their inaccessibility makes them costly to acquire. Commercial sellers often use contract huckleberry picking crews because harvesting the wild berries is tedious and taxing work. These large crews of pickers work seasonally in the berry fields, picking as many berries as they can, as fast as they can. This often results in destructive harvesting techniques, such as raking the plant or digging up the entire plant.

Tribes made sure that their treaties reserved the right to off-reservation berry picking.[142] However, when these tribes have tried, in modern times, to exercise their treaty right to huckleberries to ensure the long-term persistence of the huckleberry resource, they have met resistance from non-Indian huckleberry users.[143] The conflict over huckleberries is not new but has intensified with the increased value of the berry alongside the decreasing availability of the berry. As early as

135. *Id.* at 10.

136. Hummer, *supra* note 14, at 414.

137. Fisher, *supra* note 3, at 214.

138. RICHARDS & ALEXANDER, *supra* note 82, at 9.

139. Anna King, *For Some Tribes, New Year's Foods Provide A Sacred Link To The Past*, NPR, (Jan. 1, 2012), http://www.npr.org/sections/thesalt/2012/01/01/144012425/for-some-tribes-new-years-foods-provide-a-sacred-link-to-the-past.

140. DANNY L. BARNEY, GROWING WESTERN HUCKLEBERRIES 2 (1999), https://www.cals.uidaho.edu/edcomm/pdf/BUL/BUL0821.pdf.

141. DON MINORE, U.S. DEP'T OF AGRIC., U.S. PNW-RP-143, THE WILD HUCKLEBERRIES OF OREGON AND WASHINGTON—A DWINDLING RESOURCE (1972).

142. *See e.g.,* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 700 (1979).

143. Becky Kramer, *Competition For Huckleberries Creating Fights Among Pickers*, THE SEATTLE TIMES (July 25, 2015, 5:46 PM), http://www.seattletimes.com/seattle-news/northwest/competition-for-huckleberries-creating-fights-among-pickers/.

1933, a district ranger for the USFS wrote that, "[t]he value of huckleberries gathered on the Cabinet National Forest last year alone considerably exceeded the total grazing, special use, and timber receipts for several years past."[144] Another ranger wrote that in this same year he estimated that about 60,000 gallons of huckleberries were harvested in his forest.[145] Forest managers began to see that there was a need to manage the huckleberry fields, because there were so many people out in the woods picking berries and because the conflicts between Indian and non-Indian harvesters were becoming a management problem.[146]

Early twentieth century records show that Native Americans who went to visit their traditional off-reservation huckleberry harvesting sites found the berry fields overgrown by forest vegetation or overgrazed by sheep.[147] Other difficulties included "objection to the commercialization of a sacred food," "pushy and insensitive whites," and theft of berries from elderly Indian women.[148] As more people came to the huckleberry fields, conflict followed.

Tensions between Indians and non-Indians began to grow.[149] As historians Rebecca Richards and Susan Alexander describe it, the flood of non-Indians into traditional Native American picking areas created, "unprecedented, competitive pressure for berries while augmenting concerns that the commercialization of the sacred huckleberry that had been created for the Yakama's survival was no longer being respected."[150] The Great Depression led to an increase in non-Indian use of the huckleberry fields, as displaced workers picked berries to sell to supplement their income.[151] Tribes decided that they needed to engage with the USFS to address the issues in the huckleberry fields.

Some non-Indians believed that Indians only asked for exclusive huckleberry picking sites so that they could pasture their horses for free on USFS land.[152] Many non-Indians believed, as some still do today, that the huckleberry sites were so abundant that it was irrational for Native Americans to ask for an exclusive gathering area.[153] Federal officials did not see a need to set aside Indian only harvest areas because there appeared to be enough huckleberries for everyone.[154] But the conflicts

144. RICHARDS & ALEXANDER, *supra* note 82, at 25.
145. *Id.*at 28.
146. *Id.*at 39
147. Fisher, s*upra* note 3 at 196.
148. *Id.*
149. RICHARDS & ALEXANDER, *supra* note 82, at 44-45.
150. *Id.*
151. Fisher, s*upra* note 3, at 200-01.
152. *Id*. at 197
153. Kramer, *supra* note 143.
154. Fisher, s*upra* note 3, at 208.

did not subside, and eventually, the parties came together to resolve the conflict.

B. Commercial Use and The Handshake Agreement

Yakama Chief Yallup met with Forest Supervisor J.R. Burkhart in 1932 to try and resolve the issues in the huckleberry fields and to discuss the problems that tribes saw with the USFS's management of the huckleberry fields.[155] Problems included concerns over the impact of so many non-Indians in the huckleberry fields, the continued protection of the Yakama's treaty rights, and fears about elderly Indian women's access to the berry fields.[156] Yallup began the meeting by remarking:

> This is my land. I own it. Time beyond time, long as the old men remember, my young men have come here to hunt . . . . my old squaws have gathered the berries. When whites came, still we hunted here and picked the huckleberries. Whites gave us a treaty that it should be so. Now in the last two years whites as thick as the needles on the firs have driven our old squaws from the berry fields . . . . our treaty, signed in 1855, gives us the right to hunt, fish, and gather berries for all time in our usual and accustomed places. So let the white man leave. This is our land![157]

The two discussed potential solutions, and eventually reached an agreement, known as the "Handshake Agreement," in which the USFS agreed to set aside 2,800 acres and three campsites in the Gifford Pinchot National Forest for exclusive Indian use during the huckleberry season.[158] The Handshake Agreement guaranteed that the Yakama would have the right to access huckleberries in the set aside area without competition from non-Indians.[159] This agreement was the first of its kind and was unique in that it acknowledged Indian religious traditions and cultural practices. Although the USFS was unsure of whether they had the legal authority to formally recognize the agreement, the agency took informal measures to protect the reserved area.[160] Burkhart and his successors would periodically meet with Yallup and other Indian leaders to reaffirm the agreement.[161] Though not formal policy, the agreement

155. *Id*. at 205.

156. *Id*.

157. *Id*.

158. *Id*. at 206.

159. *Id*. at 205 (Bruckhart knew that the exclusive use area would be difficult to enforce, but set aside the area for the sake of the elderly Indian women).

160. *E.g.*, rangers denied campfire permits to whites applying for Indian camps and posted signs (which still exist) marking the area reserved for Indians. *Id.* at 206.

161. *Id*. at 208.

decreased the conflict between Indians and non-Indians.

The Handshake Agreement still exists. It was committed to paper in 1990, and today, the agreement has been formalized in the Gifford Pinchot National Forest's Forest Plan.[162] The Handshake Agreement set-aside area is unique, but it does not need to be. The Agreement is an example of what can occur if an agency and a tribe come together. For tribes who are dealing with issues stemming from increased pressure on huckleberries and overharvest of the huckleberry fields, the Handshake Agreement is a model of agency and tribal cooperation. The Yakama Handshake Agreement has, "afforded the Yakamas a degree of protection unknown on other national forests."[163] The policy shows that there is precedent for cooperation and that the USFS and Indian tribes can work together to put policies in place to protect huckleberries and tribes' treaty rights to huckleberries.

C. Huckleberry Management on USFS Land

Traditionally Indians maintained the size and productivity of the huckleberry fields through prescribed burning.[164] Without disturbances such as wildfires that clear space for huckleberry growth, other vegetation eventually crowds out the berries.[165] As a result of the USFS's proficiency in suppressing wildfires, the size of the tribes' traditional huckleberry fields have dwindled due to overcrowding by timber and competition from other forest vegetation.[166]

In 1969, wild huckleberry fields occupied about 160,000 acres throughout Oregon and Washington, and a gallon of huckleberries was worth about three dollars.[167] By 1979, the huckleberry fields had dwindled to 100,000 acres, while the price for a gallon of huckleberries jumped to ten dollars a gallon.[168] Huckleberries had become an extremely valuable resource.[169] The loss of the huckleberry fields would

162. U.S. FOREST SERV., GIFFORD PINCHOT NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN 19 (1990).

163. Fisher, *supra* note 3, at 189.

164. Virtually every tribe managed with fire before the arrival of Europeans. ROBERT BOYD ET AL., INDIANS, FIRE AND LAND IN THE NORTHWEST 255-76 (1999).

165. DON MINORE, ALAN W. SMART & MICHAEL DUBRASICH, U.S. DEP'T OF AGRIC., PNW-93, HUCKLEBERRY ECOLOGY AND MANAGEMENT RESEARCH IN THE PACIFIC NORTHWEST 1 (1979).

166. MINORE, *supra* note 141, at 7.

167. *Id*. at 3.

168. RICHARDS & ALEXANDER, *supra* note 82, at 57.

169. MARGARET G. THOMAS & DAVID R. SCHUMANN, INCOME OPPORTUNITIES IN SPECIAL FOREST PRODUCTS—SELF-HELP SUGGESTIONS FOR RURAL ENTREPRENEURS 18 (1993), http://www.fpl.fs.fed.us/documnts/usda/agib666/agib666.htm.

have a serious social and economic impact on Indians and non-Indians alike.[170] Accordingly, the USFS developed a number of management techniques to try and protect the huckleberry fields.[171] Management strategies have included fencing out grazing animals, removal of encroaching trees, herbicide treatment, and prescribed fire.[172]

Currently, the USFS manages huckleberries as non-timber forest products ("NTFP").[173] NTFPs are commercial products, other than timber, that are harvested from the forest.[174] NTFPs include, but are not limited to, fruits, nuts, medicinal plants, bark, cones, and decorative plants.[175] Some commonly collected NTFPs include wild mushrooms, huckleberries, ferns, tree boughs, mistletoe, maple syrup, honey, and medicinal products such as cascara bark and ginseng.[176]

The USFS, the nation's largest public forestland management agency, has regulatory authority over much of the huckleberry habitat in the Northwest.[177] The USFS has traditionally focused mainly on timber management and fire suppression, with few resources allocated to the comparatively low value products such as NFTPs. However, as forest users have increased their harvest of NTFPs to match the demand for those products, the USFS has begun to both recognize the commercial value of the NFTPs and the need to regulate and manage the use and harvest of NTFPs. The intense demand for some NTFPs such as mushrooms and berries, has compelled the agency to begin actively managing NTFPs in certain regions, particularly the Northwest.[178] Demand for NTFP comes from international communities, local consumers, and Indian tribes, and all these interests converge in the Northwest, making NTFP management an important emerging issue in

170. *Id.*

171. The USFS's Pacific Northwest Research Station funded experiments of factors affecting huckleberry production in southwestern Washington and northwestern Oregon during the 1970s with the objective of enhancing huckleberry production. *See* MINORE ET AL., *supra* note 165, at 1.

172. *Id.*

173. *Forest Product Permits*, U.S. DEP'T OF AGRICULTURE: USFS FLATHEAD NATIONAL FOREST, http://www.fs.usda.gov/main/flathead/passes-permits/forestproducts (last visited May 1, 2016).

174. REBECCA J. MCLAIN & ERIC T. JONES, U.S. DEP'T OF AGRIC., PNW-GTR-655, NONTIMBER FOREST PRODUCTS MANAGEMENT ON NATIONAL FORESTS IN THE UNITED STATES 8 (Oct. 2005).

175. *See generally* Jim Chamberlain et al., *Non-Timber Forest Products*, 48 FOREST PROD. J. 10 (Oct. 1998).

176. *Id.*

177. Becky K. Kerns et al., *Huckleberry Abundance, Stand Conditions, and use in Western Oregon: Evaluating the Role of Forest Management*, 58 ECON. BOTANY 668, 669 (2004).

178. RICHARDS & ALEXANDER, *supra* note 82, at 84.

the region.[179] NTFP management has important ecological, social and legal implications, and access to, as well as the management of NTFP resources in the Northwest directly impacts the treaty-protected rights of tribes in the region.[180]

The USFS's approach to land management focuses mainly on their most high-value product, timber.[181] However, the demand for huckleberries and huckleberry products has increased the berries' value.[182] Outside of Indian communities, huckleberries are popular as a regional food product, marketed to tourists as iconic of the Northwest, similar to maple syrup in the Northeast.[183] Huckleberries are widely commercialized throughout Idaho, Montana, Washington, and Oregon.[184] As sales of huckleberries continue to grow, commercial harvesters have put pressure on the USFS to expand the availability of huckleberries, while native communities and recreational harvesters have asked the USFS to limit or control the extent of huckleberry gathering.[185] Many tribal gatherers fear that without the USFS's intervention, the huckleberry fields will suffer a fate not unlike the "tragedy of the commons," meaning that without regulation the commercial harvesters will use the huckleberry fields to their exhaustion.[186]

Tribal members are concerned that the increasing popularity of huckleberries will impact the future availability of the berries for their use.[187] They remember the impact of non-Indian harvesters during the Great Depression and fear they are seeing history repeat itself. Tribes want to manage the huckleberry as they did before treaty time, and argue that the treaties reserve the right to have huckleberries in addition to the

179. Kathryn A. Lynch & Rebecca J. McLain, U.S. DEP'T OF AGRIC., PNW-GTR-585, ACCESS, LABOR, AND WILD FLORAL GREENS MANAGEMENT IN WESTERN WASHINGTON'S FORESTS 4 (July 2003).

180. *See* BEAVERT, *supra* note 4.

181. Eric T. Jones, Non Timber Forest Products: Considerations for Tribal Forestry Paper Presentation at the Intertribal Timber Council Meeting, (June 2000).

182. Kara Briggs, *High Huckleberry Demand Hurts Tribes*, SPOKESMAN REVIEW (Aug. 1, 2006), http://www.spokesman.com/stories/2006/aug/01/high-huckleberry-demand-hurts-tribes/.

183. Matthew S. Carroll et al., *Somewhere Between: Social Embeddedness and the Spectrum of Wild Edible Huckleberry Harvest and Use*, 68 RURAL SOC. 319, 320 (Sept. 2003).

184. Shannon H. Jahrig et al., *Montana's Huckleberry Industry*, 35 MONT. BUS. Q. 2, 3-5 (Summer 1997).

185. Kramer, *supra* note 143.

186. Danny L. Barney, *Prospects for Domesticating Western Huckleberries*, 2 SMALL FRUITS REV. 15, 18 (2003).

187. Anna King, *Northwest Tribes Celebrate Sacred Foods That Are Becoming Scarce*, KUOW NEWS (Aug. 3, 2009), http://www2.kuow.org/program.php?id=18104 (Umatilla tribal member describing berry fields as "picked clean" before tribal members get to the fields to harvest).

right to harvest berries. The tribes want their rights protected. They want something like a modern-day Handshake Agreement that not only reserves particular areas or times for Indian harvest but also reserves the right to co-manage the resource to ensure the long-term viability of the huckleberry fields.

The huckleberry's important role in Native American society complicates the problem over huckleberry harvest and management because, in addition to determining the economics and science of management, the USFS must include the impact of management on treaty rights. Improperly regulating huckleberry harvest could impinge upon the tribes' treaty-protected rights to the berries. But it is not just tribes that value the long-term sustainability of the resource; non-Indian personal and commercial harvesters have an interest in the protection and continued productivity of the huckleberry fields. Long-term sustainability of the berry fields is critical to the cultural and economic existence of all three groups.

D. Contemporary Issues in Huckleberry Management

> *When we meet with the tribe's cultural committee, the issue of huckleberries comes up. There's a concern from the tribes that there are a lot of people picking huckleberries in the cultural places, and that's an issue that we [the USFS] needs to work on.* – Umatilla National Forest Employee[188]

By the late 1990s, some Forest Service units began to manage NTFP harvest more actively by issuing permits for commercial huckleberry pickers.[189] Although permit terms are not standardized, generally permits limit the total gallons a harvester may gather in a given season and describe acceptable harvesting techniques. However, the permitting system has had limited, if any, success in mitigating conflict. Permits do not limit where harvest can occur or when harvest may occur. Most conflicts between Indian and non-Indian pickers are over time of harvest, accessibility of the resource, and crowding in particular areas. Under the permitting system, tribal elders' access to the berries, competition between wildlife and humans, cultural conflict between user groups, and the fear that the USFS will not protect tribal treaty rights all remain unaddressed.

The Indians of the Northwest have used natural resources as a way to sustain their communities, families, and cultures since time

188. Interview with USFS Employee, Umatilla National Forest (2009) (transcript on file with author).

189. RICHARDS & ALEXANDER, *supra* note 82, at 84.

immemorial. Yet non-Indians have also used these resources to support their livelihoods. As the demand for NTFPs grows, while supply remains static or decreases, Indians and non-Indians need to find ways to allocate treaty resources like huckleberries in ways that respect tribal rights, while also recognizing varied interest in the resource. One way to address the problem is through co-management. The co-management agreements used to manage other treaty resources can serve as a good model for how groups with competing interests can come together to manage a resource. It is unclear however, if these co-management organizations would arise organically. The existing co-management groups formed after decades of litigation through a court order that required Indians and non-Indians to come together to allocate these resources.[190] To avoid litigation, tribes, federal agencies, and other groups interested in huckleberry management may want to consider creating a similar co-management arrangement to address issues in huckleberry management.

Access to, and availability of, treaty resources has been particularly contentious because both Indians and non-Indians have a strong cultural interest in the resources. Both groups feel that, if they lose control over the resource, they not only lose the resource, but also a way of life. Where allocation and conservation measures fail to account for cultural considerations, conflict ensues.[191] The USFS faces a challenge in determining how to best allocate limited natural resources between groups with different interests. Because gathering is a time for tribal members to connect to their traditional ways and maintain their cultural institutions, access to and availability of the resource is particularly important to Indians.[192]

For USFS management and regulation of huckleberries to be effective, management plans must take into account the cultural importance of the resources at issue. Co-management agreements between diverse user groups may be the best way to incorporate cultural considerations into resource management. That way, instead of a court determining which group gets what resource, user groups can work together to identify which issues are most important and address those. With the power of the treaties, tribes should be in a position to ask for, and receive, co-management authority. However, working with other user groups would allow the tribes' right to co-management to proceed with fewer roadblocks, because the groups will have worked through

190. *See Shellfish III*, 157 F.3d 630, 686–687 (9th Cir. 1998).

191. Jennifer Sepez-Aradanas, *Treaty Rights and the Right to Culture, Native American Subsistence Issues in US Law,* 14 CULTURAL DYNAMICS 2, 143 (July 2002).

192. Fisher, *supra* note 3, at 28.

their competing issues early in the process.

Until recently, issues related to NFTP gathering were relatively uncontroversial; however, the huckleberry could easily become one of the main sources of conflict between Indian and non-Indian interests in the future. Off-reservation treaty resources present a unique challenge to federal land managers in determining how to accommodate public use of public lands, while also meeting the federal trust responsibility to tribes.

The precedent set in the salmon and shellfish cases of Oregon and Washington can serve as a useful framework for USFS managers in addressing the huckleberry management issue in the Northwest because it is the same treaties, the same tribes, and the same state that is involved. Tribes who have reserved the right to gather berries on "open and unclaimed lands" should be guaranteed co-management responsibility of traditional gathering fields on federal lands. Furthermore, empowering tribes with co-management authority over treaty-protected resources would support precedent recognizing that treaties grant tribes substantive rights to off-reservation treaty-protected resources.[193] For tribes to realize fully their right to the resource, robust and healthy huckleberry fields must exist. With the tribes' traditional knowledge and commitment, co-management would ensure that the berries exist for Indian people now and in the future.

VI. EXISTING APPROACHES TO MANAGEMENT OF OFF-RESERVATION TREATY-PROTECTED RESOURCES ON USFS LANDS

> *In the past, when the tribal representatives would complain to the USFS about regulation and protection of treaty resources such as fish or berries, the Forest Service would just throw up their hands and say we can't do anything. No one would act until a judge handed down a decision. Then everyone would say ok, we go with that. Because the treaty is very general in its terms, the way it gets figured out by land managers is usually through the courts.* - Forest Service

193. *See* United States v. Winans*,* 198 U.S. 371, 381 (1905) (establishing that Indians could not be excluded from their traditional fishing grounds); United States v. Washington, 384 F. Supp. 312, 344 (W.D. Wash., 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975)**,** *cert. denied,* 423 U.S. 1086 (1976), *reh'g denied,* 424 U.S. 978 (1976) (guaranteeing equal allocation of fish between tribes and non-tribal interests); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979) (ensuring the tribe has can have as much fish as necessary to have a moderate living).

Employee[194]

There is no comprehensive management policy for tribal gathering or NTFP management on USFS land. The USFS's piecemeal approach makes it difficult for tribes and other interested parties to predict how the USFS will address tribal gathering rights on any given project. The agency has attempted to create nationwide guidelines that manage the harvest of NFTPs, but the regulations have been not been implemented—in part, because the regulations did not adequately address treaty rights.[195]

A. Forest Service Regulatory Mechanisms

Regulations promulgated under the National Forest Management Act[196] and the Multiple Use Sustained Yield Act guide natural resource management on USFS lands.[197] The USFS manages national forests land for a variety of values including "outdoor recreation, range, timber, watershed, wildlife, and fish."[198] Although a mandate to manage NTFP could be read into this mission, there is no explicit law requiring the USFS to do so.[199]

The USFS is working to exert more control over harvests and harvesters of NTFPs in response to increasing concerns over the effect of NFTP harvest on resource sustainability.[200] In addition to sustainability concerns, there are questions of tribal treaty rights, as well as concerns over access and property rights. In an attempt to address these issues, national forests with heavy NTFP harvests have developed permitting programs.[201] Permits are used to try and assess how much harvest is occurring and control the impact of harvest on the resource.[202] But

194. Interview with USFS Employee, Umatilla National Forest (2009) (transcript on file with author).

195. News Release, U.S. Dep't of Agric., Forest Serv. Press Office, Vilsack to Delay Special Forest Products and Forest Botanical Products Final Rule (Jan. 28, 2009), http://www.usda.gov/wps/portal/usda/usdahome?printable=true&contentid=2009/01/0031.xml [hereinafter Vilsack to Delay Special Forest Products and Forest Botanical Products Final Rule].

196. National Forest Management Act of 1976, 16 U.S.C. § 1601 (2000).

197. Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1960).

198. *Id*. at § 528.

199. *See* Ritchie C. Vaughan, John F, Munsell, and James L. Chamberlain, *Opportunities for Enhancing Nontimber Forest Products Management in the United States*, 111 J. OF FORESTRY 26 (2013).

200. JERRY SMITH, LISA K. CRONE & SUSAN J. ALEXANDER**,** U.S. DEP'T OF AGRIC., PNW-GTR-822, A U.S. FOREST SERVICE SPECIAL FOREST PRODUCTS APPRAISAL SYSTEM: BACKGROUND, METHODS, AND ASSESSMENT 5 (2010).

201. *Id*. at 8.

202. DAVID PILZ ET. AL., U.S. DEP'T OF AGRIC., PNW-GTR-710, ECOLOGY AND

permitting systems are not required, and many forests have not implemented them.[203] Federal regulation of NTFPs is decentralized; each forest or region decides how to manage public use of NTFP resources. This inconsistency across USFS units makes it difficult to address NTFPs on a regional or national basis. The USFS recognized that this inconsistency made NTFP management difficult, and so, the agency attempted to create a nationwide NTFP management plan.

In 1999, Congress included a rider on the 2000 Appropriations Act that was intended to be the first piece of national legislation aimed specifically at improving and standardizing NTFP management on USFS land.[204] Titled a "Pilot Program of Charges and Fees for Harvest of Forest Botanical Products," the legislation required the USFS to charge the fair market value for NTFP permits and also required the USFS to ensure that NTFP harvest was sustainable.[205]

In 2000, Congress directed the Secretary of Agriculture to initiate the pilot program to test whether requiring harvesters to have permits and whether collecting fees for the commercial harvest and sale of forest botanical products would help ensure the sustainability of NTFP harvest.[206] Two years later, in 2002, the USFS submitted a proposal to the Office of Management and Budget asking that they be allowed to develop regulations that would permanently implement the NTFP program that would guide the USFS in the administration of NTFPs.[207] In 2004, in an effort to develop new regulations, the USFS reviewed their existing manual and handbook direction related to NFTP management.[208] Upon review, the agency began to draft a rule to address agency-wide NFTP management.[209]

That same year, the USFS began consulting with tribes on the

MANAGEMENT OF COMMERCIALLY HARVESTED MORELS IN WESTERN NORTH AMERICA 85 (2007).

203. For example, on some forests, individuals may harvest limited quantities of huckleberries for personal use under a free use permit, but berries harvested under a free use permit may not be sold. Harvesters of larger quantities of berries are expected to obtain a commercial huckleberry permit from each national forest in which they plan to harvest huckleberries.

204. SMITH ET. AL., *supra* note 200, at 1; Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 106-113, § 339, 113 Stat.1535 (2000).

205. *Id.*

206. *Id.*

207. Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, 72 Fed. Reg. 59,496 (proposed Oct. 22, 2007) (to be codified at 36 C.F.R. pt. 223).

208. U.S. DEP'T OF AGRIC., FOREST SERVICE HANDBOOK 2409.18 ch. 80, p. 23, 26 (2008).

209. This rule was never published, but was intended to change direction in U.S. DEP'T OF AGRIC., FOREST SERVICE HANDBOOK 2409.18 ch. 80.

proposed NTFP rule. The consultation sessions generated great interest from the tribes. Although the tribes were engaged throughout the process, they had concerns with the provisions of proposed rule.[210]

The tribes' comments reflected their concerns that the rule did not respect treaty rights. Tribes were worried that the rule was too restrictive on the free use of NTFP by tribal members, that the rule would disrupt the existing informal agreements between tribes and the USFS, and that the rule did nothing to address the tribes' concerns about access to harvesting areas by elder tribal members.[211] For these and other reasons, tribal members opposed approval of the rule.

The proposed rule was published in the federal register on October 22, 2007, and interested parties were given sixty days to submit their comments.[212] Tribes, tribal members, and other groups advocating for tribal interests sent in so many comments that the USFS extended the comment period for an additional thirty days.[213] The USFS amended the proposed rule based on the comments they received over the ninety days, and was prepared to release a final rule in late December of 2008.[214] The USFS intended the rule to regulate the sustainable free use, commercial harvest, and sale of special forest products and forest botanical products from National Forest lands.[215] Initially the rule was set to go into effect on January 28, 2009, but continuing concerns over the lack of buy in from tribes and tribal members led the USFS to push the date back once again.[216] The USFS must consult with tribes before taking a major federal action to ensure that the rule protects treaty rights and American Indian tribal trust resources.[217] The administration felt that the comments on the rule showed the USFS had not adequately consulted with the tribes and as a result decided to delay the rule's release until further

210. Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, Comments on the Proposed Rule and Changes Made in Reponses, 73 Fed. Reg. 79,367 (Dec. 29, 2008) (to be codified at 36 C.F.R. pt. 223).

211. *Id.*

212. Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, 72 Fed. Reg. 59,496.

213. Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, 74 Fed. Reg. 5,107 (Jan. 29, 2009) (to be codified at 36 C.F.R. pt. 223) (delaying the effective date of the rule 30 days).

214. Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, Comments on the Proposed Rule and Changes Made in Reponses, 73 Fed. Reg. 79367.

215. 36 C.F.R. § 223 (2016).

216. Obama's Chief of Staff, Rahm Emanuel, published a memorandum to the heads of the agencies involved that requested that the USFS delay the effective date of the rule. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,435 (Jan. 26, 2009).

217. 36 C.F.R. § 223.240 (2016).

consultation was done.[218]

Later that year, the USFS decided to delay the final rule's effective date indefinitely to allow additional time to respond to the comments received during the reopened comment period and to consider potential changes to the final rule.[219] The USFS received almost 200 additional comments on the rule, mostly from Indian tribes and organizations representing Indian tribes.[220] Some comments asked whether other laws, such as the American Indian Religious Freedom Act, were considered in the process. Other comments raised concerns about the rights of tribes with state, but not federal, recognition and unrecognized tribes.[221] Tribes wanted to make certain that the NTFP harvest rule would not impinge upon Native Americans' treaty right to gather. In the face of these numerous concerns, the rule was reconsidered, and further action on the rule has been indefinitely delayed.

One USFS employee working on the project characterized the comments this way:

> We had over one hundred comments when we first put the regulations in the Federal Register, mostly from the tribes. I was the author of the first regulations and the tribes got to review them before the general public did. The tribes kept saying, 'this is not going to work with our treaty rights, and 'this regulation is trumping our treaty.'[222]

Even if the rule had moved forward, it would not have affected treaty rights. Native American groups argued that their treaty rights supersede any right that the USFS has to regulate tribal harvest of NTFPs, including huckleberries.[223] The USFS said the rule would not interfere with treaty rights because tribal members would be exempt

218. Vilsack to Delay Special Forest Products and Forest Botanical Products Final Rule, *supra* note 195.

219. Notice of Delay of Effective Date for Proposed Rule Changes Relating to Sale and Disposal of National Forest System Timber, 74 Fed. Reg. 26,091 (June 1, 2009) (to be codified at 36 C.F.R. pt. 223, 261).

220. U.S. Forest Service, *Consultation Q and A for Service*, *Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products*, May 2013, http://www.fs.fed.us/spf/tribalrelations/documents/bundledconsultation/SpecialForestProducts/ConsultationQandA_SFP_FBP_DraftRevisedFinalRule_May2013.pdf.

221. Vincent Shilling, *U.S. Forest Service Attempting to Regulate Gathering of Plant Materials*, INDIAN COUNTRY TODAY (Mar. 3, 2009) http://indiancountrytodaymedianetwork.com/2009/03/03/us-forest-service-attempting-regulate-gatheringr-plant-materials-82203.

222. Interview with USFS Employee, Portland, Or. (2009) (transcript on file with author).

223. Shilling, *supra* note 221.

from paying for permits. But tribal members wanted their treaties to be recognized for more than the right to not be charged for harvesting their treaty resources. They want their own harvesting area and to be able to manage the areas where huckleberries grow. Treaties have been recognized as including a right to co-management in the fishing and shellfish cases; the same co-management authority should be honored for other treaty-protected resources. The USFS can and should extend the same right to tribes to co-manage huckleberries and other plant resources. The NTFP regulations did not support tribal co-management, and as a result, the tribes did not support the regulation.

The USFS intended the regulations to create a consistent policy across USFS offices, but due to tribal concerns, the USFS never put the regulations in place. As a result, local offices make NFTP management decisions. In place of a formal rule, the USFS offices independently develop permitting rules and may also enter into informal agreements, called Memoranda of Understanding ("MOU"), with interested parties to guide NTFP policy. Some forests have entered into MOUs with local tribes that create and encourage cooperative management of NTFPs between the agency and tribe.

B. USFS Memoranda of Understanding

The USFS uses informal policy statements, such as MOUs, to create a framework for USFS employees to be used when developing projects in relation to NTFP harvest on USFS land. MOUs can be used to describe how local collaboration, issue resolution, and local implementation of regulations may occur. MOUs are used to set policy goals, but they are not binding; they are merely informal agreements that indicate that the tribes and the USFS are willing to work together. If the USFS wants to manage outside of the bounds of the MOU, they may. MOUs, though informal, have been successful as a stopgap measure for managing NTFPs where formal regulations do not exist.

MOUs allow the USFS to collaborate with tribes without setting formal policies that could have substantial legal and public policy implications. Though the MOUs have short-term usefulness, in the long run, the treaties require that the USFS and the tribes join in more formal agreements. MOUs are not a sufficient replacement for a government-to-government agreement because they can be modified at any time. An agreement between an agency and a tribe is only useful if it can be enforced if violated. However, until more formal agreements can be created, MOUs continue to facilitate cooperation between tribes and federal agencies.

MOUs on the Gifford Pinchot National Forest, which has management authority over many of the largest huckleberry fields in the Northwest, describe how tribes will exercise treaty rights in the national forest but does not require the USFS to take any site-specific actions to ensure that the treaty obligations are met. However, MOUs are useful in that they acknowledge the special relationship between the USFS and the tribes. A MOU can be used to encourage collaboration or to emphasize the importance of joining in meaningful consultation with the tribes before taking an action that may affect their resources.

MOUs are insufficient to protect treaty rights because they do not provide the tribes with any substantive authority over treaty resources or guarantee that treaty rights will be effectively protected. MOUs can build relationships between tribes and the USFS, but they do not go far enough. Law and policy must recognize that the tribes' treaties give the tribes more than the power to consult with federal agencies through a MOU. The treaties give the tribes the right to real decision-making authority and input on management decisions that impact treaty resources and the power to manage treaty-protected NFTPs on USFS lands as co-managers.

VII. THE CASE FOR CO-MANAGEMENT

> *There are three sovereigns in the government-to-government relationship: tribes, states, and the U.S. Government. Those three sovereigns need to work together to solve problems with three principles—honesty, open-mindedness, and willingness.*[224]

Tribes expect to meaningfully participate in the management of off-reservation resources as sovereign governments with co-management authority. Federal agencies, to fulfill the trust responsibility, must substantively engage in the management of treaty resources. Co-management is important both because it recognizes tribal sovereignty and because it fulfills the trust responsibility. Tribal co-management has been described as

> [The] practice of two (or more) sovereigns working together to address and solve matters of critical concern to each. Co[-]management is not a demand for a tribal veto power over federal

224. U.S. FOREST SERV. OFFICE OF STATE AND PRIVATE FORESTRY, US-600, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS 1 (1997), http://www.fs.fed.us/spf/tribalrelations/pubs_reports/NationalResourceGuide.shtml (Remarks by Chief William Burke, CTUIR, at the Opening Ceremony for the USDA National American Indian Heritage Month).

> projects, but rather a call for an end to federal unilateralism in decision[-]making affecting tribal rights and resources. It is a call for a process that would incorporate, in a constructive manner, the policy and technical expertise of each sovereign in a mutual, participatory framework.[225]

Co-management can be used as a tool to help people understand each other and can bring tribes and agencies together to achieve common goals. Public lands are often located near to tribal lands, but despite their proximity, many federal land managers know little about how USFS management regimes impact Native American rights, values, and culture.[226] Co-management would require that tribes and agencies cooperate and coordinate with one another. Through this process both parties will begin to understand the values and goals of the other group. As USFS managers begin to understand why the availability of treaty resources is so critical for tribes, they may begin to understand the motivation behind the push for co-management.

Furthermore, when determining natural resource policy for management of treaty-protected resources on public lands, it is important to consider that the USFS and Native American resource managers do not necessarily think about management problems in the same way. For Indians, huckleberries are more than just a fruit; they are a gift from Creator they must protect.[227] Huckleberry management is important both as an exercise of tribal treaty rights and as an aspect of continuing tribal culture. Tribes have a deeply rooted interest in the health and long-term sustainability of the huckleberry fields. By contrast, for the USFS, the huckleberry is considered a low-value product. Because of that, huckleberry management may not be allocated as many agency resources such as higher value products like timber. The difference in management priorities results in an unbalanced approach to huckleberry management that is unsatisfactory to the tribes. A substantive co-management agreement between the two groups is necessary and would be useful in resolving this discrepancy. Such agreements would allow these two disparate worldviews to come together to reach a mutually agreeable management policy that is amenable to both sides. Encouraging collaboration through informal agreements like MOUs is not a sufficient fix both because the treaties require more and because guidance is not law. Without substantive authority to act as co-managers, tribes are

225. Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 284–85 (2000).

226. BEAVERT, *supra* note 4.

227. Interview with Warm Springs Tribal Member, Madras, Or. (2008) (transcript on file with author).

unable to exercise their treaty right to gather and the USFS is unable to fulfill the trust responsibility it owes to the tribes.

A. Co-Management Empowers All Parties to Meaningfully Participate in the Management and Allocation of Treaty Resources

Litigation over the scope of tribal treaty rights as they apply to fish have led to innovative and cooperative co-management arrangements between federal, state, and tribal governments.[228] Across the United States, tribes have taken on an increasingly significant role in co-managing treaty resources. These collaborative groups address a range of treaty issues, including salmon management in the Northwest and wild rice management in the Great Lakes.[229] In each of these ventures, tribes successfully asserted their right to manage off-reservation treaty-protected resources.[230] In each instance, tribes have worked cooperatively with state and federal agencies to successfully protect those resources. Tribal and intertribal agencies are able to provide federal management agencies with well developed resource management plans that offer unequalled technical, cultural, and legal expertise to state and federal agencies. Tribes have the capacity to contribute substantially to the protection and rehabilitation of treaty resources, and the federal government has an obligation to let them do so. Tribes ask that federal agencies uphold their treaty obligation by recognizing tribes as equal co-managers of off-reservation treaty-protected resources.[231]

The aforementioned fish and shellfish harvesting cases resulted in successful co-management regimes in part because courts forced that result. Each decision either mandated or strongly encouraged tribes, states, and the federal government to work together to manage the disputed resource. Litigation is expensive, time consuming, and

228. The Columbia River Inter-Tribal Fish Commission represents the Yakama, Warm Springs, Umatilla, and Nez Perce tribe, all of whom have treaty rights along the Columbia River. *See* COLUMBIA RIVER INTER-TRIBAL COMMISSION, www.critfc.org. The Northwest Indian Fisheries Commission represents twenty tribes in the state of Washington; *See Member Tribes,* NORTHWEST INDIAN FISHERIES COMMISSION, www.nwifc.org.

229. The Northwest Indian Fisheries Commission manages tribal Salmon in the Pacific Northwest. *See generally* www.nwifc.org. The Great Lakes Indian Fish and Wildlife Commission represents eleven tribes in Michigan, Wisconsin and Minnesota; *See Boozhoo*, GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION, www.glifwc.org.

230. *See generally* Ed Clay Goodman, *Protecting Habitat for Off-Reservation Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279 (2000).

231. *Id.* at 344.

adversarial; it shifts the focus of talks away from the parties' commonalities and instead highlights disagreements and creates animosity. The fishing and shellfish cases serve as a reminder that non-litigious options may provide the most favorable and effective resolution of rights conflicts.[232] As Indian fishing activist Billy Frank aptly observed, "we spent hundreds, perhaps thousands of hours arguing before a federal court over whose data was more accurate. . . . All that time and money spent in court was wasted. It could have been better spent protecting and rebuilding the resource."[233] Agreements and compacts are more efficient and less costly than litigation and can spread the responsibility of managing resources between parties and keeps groups from becoming adversarial prior to cooperation. Co-management regimes can work to resolve distrust between managing parties.[234] For example, the Northwest Indian Fisheries Commission, as part of their commitment to co-management, states that it will seek "cooperation first to avoid litigation."[235] Courts have upheld and encouraged co-management agreements.[236] These agreements can and should be used as a model for how the USFS can join with tribes on issues related to huckleberry management.

B. The USFS May Delegate Management Authority over Huckleberries to Tribes

Some USFS officials suggest that the agency has not entered into co-management agreements because they have no legal authority to do so. It is true that under the non-delegation doctrine, federal agencies may not delegate away their entire authority to make decisions, but agencies may delegate away some authority so long as the agency retains final decision-making power and no inherent federal functions are delegated away.[237]

232. Anderson, *supra* note 79, at 171.

233 Northwest Indian Fisheries Commission News, 2 (Spring 2014) http://nwifc.org/w/wp-content/uploads/downloads/2014/04/NWIFC-Mag-Spring-2014.pdf.

234. Zoltan Grossman, *Unlikely Alliance: Treaty Conflicts and Environmental Cooperation Between Native American and Rural White Communities*, 29 AM. INDIAN CULTURE AND RES. J. 21, 21 (2005).

235. Northwest Indian Fisheries Commission News, *supra* note 233.

236. *See, e.g.,* Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 934 (8th Cir.1997), *aff'd*, 526 U.S. 172 (1999).

237. Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 15-16 (D.D.C. 1999); Riverbend Farms v. Madigan, 958 F.2d 1479, 1488 (9th Cir. 1992); *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 111 (1990).

Tribes are not asking for complete management authority over huckleberries, they are asking that the agency take their input on management decisions seriously and give it the same weight as the USFS opinion on huckleberry management. Co-management is not a "demand for a tribal veto power over federal projects, but rather, a call for an end to federal unilateralism in decision-making affecting tribal rights and resources."[238] Co-management envisions a process that incorporates the political and technical expertise of the tribes and the USFS in a collaborative, participatory framework. This level of engagement is required by the trust responsibility.[239] The tribes, with their inherent interest in preserving and perpetuating the huckleberry, their scientists, their stories, and their years of experience living with and harvesting the berries, are the ideal partners for USFS collaboration. Doing so will create long-lasting, substantive results that will benefit tribes, the USFS, and the general public.

In the huckleberry fields, tribal members continue to practice their culture by gathering and continuing a traditional way of life.[240] Most of the traditional huckleberry harvesting areas are found on USFS land. For many tribes, those fields are the only sources of huckleberries because the berries do not grow on the flat, dry, bottomlands where many reservations are located. This means that if the berry fields on USFS lands were to disappear because of poor management practices, some tribes would no longer have access to their sacred huckleberries. A treaty right to gather is meaningless if there is nothing to gather. The loss of huckleberry fields would be similar to the loss of a treaty right. It is imperative that the USFS work with the tribes to manage huckleberry habitat to protect the long term sustainability of the resource.

Even though national forests are open to the public, the agency may put restrictions on the use of National Forest land. As resources dwindle and commercial pressure on huckleberries continues to grow, the USFS has a responsibility to develop policies to effectively manage and diffuse conflicts between Indians and non-Indians over huckleberry harvesting. Co-management agreements are the best way to do so.

238. Goodman, *supra* note 230, at 284–85.

239. *Id.*

240. Joseph P. Flood & Leo H. McAvoy, *Voices of My Ancestors, Their Bones Talk to Me: How to Balance US Forest Service Rules and Regulations with Traditional Values and Culture of American Indians*, 14 HUM. ECOLOGY REV. 76, 81 (2007).

C. Existing Co-Management Regimes as Models for Huckleberry Management

Encouragingly, co-management agreements are gaining popularity as the idea of strong tribal management authority over resources on public lands begins to take hold. Over the past few decades an "increasing number of Indian tribes have exercised their sovereignty by entering into intergovernmental agreements with federal and state environmental agencies regarding natural resources and wildlife."[241] The USFS maintains that it is good public policy to work cooperatively with tribes as opposed to taking an adversarial position and litigating to resolve conflicts.[242] Recognizing the tribe's right to collaboratively manage resources, rather than limiting them to consulting on USFS plans could resolve disputes without litigation. Multiple tribes are interested in collaborating with the USFS on huckleberry management. Many of the interested tribes already participate in established intertribal resource management groups that work cooperatively with the USFS to address other treaty issues.

The Columbia River Intertribal Fish Commission ("CRITFC") is a good model of co-management. The CRITFC was created to implement the salmon resource-sharing concept required by treaty and the Boldt Decision. Created in 1977, it consists of four tribes with treaty-protected interests in salmon.[243] The tribes that make up the CRITFC are the Nez Perce, Umatilla, Warm Springs, and Yakama, some of the same tribes that have an interest in co-managing huckleberries on USFS land. The Commission coordinates fisheries management and supplies technical expertise and intertribal representation in state and federal regional planning, policy, and decision-making activities.[244] In 1988, the CRITFC collaborated with states and the federal government to address conflicts over salmon in the Columbia River. The negotiations led to the cooperative Columbia River Fish Management plan, which gives tribes an active role in salmon management.[245] The plan promotes "effective

241. Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty?,* 15 BUFF ENVT'L L. J. 97, 105 (2008).

242. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

243. Norman Dale, *Getting to Co-Management: Social Learning in the Redesign of Fisheries Management in* CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES, 52-53 (1989).

244. *See CRITFC Mission & Vision*, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, http://www.critfc.org/about-us/mission-vision.

245. CRITFC, Wy-Kan-Ush-Mi Wa-Kish-Wit 2014 Update, COLUMBIA RIVER FISH MANAGEMENT PLAN (2014) http://plan.critfc.org/assets/wy-kan-update.pdf.

tribal and state co-management and facilitate enforcement by ensuring compatibility of tribal and state law."[246] Other state and tribal management agreements have used this plan as a model, and the plan is an excellent model for huckleberry management.[247]

Co-management of huckleberries by an intertribal management group such as CRITFC allows both tribes and the USFS to meet their objectives. The tribes could educate the USFS more fully on tribal treaty rights and exercise true control over the management decisions made for the trust resources. The USFS could fully meet their trust responsibility to the tribe by working with the tribe to actively manage treaty resources. A co-management approach could help strengthen government-to-government relationships between the United States and tribes, and over time could engender a relationship based on mutual trust and experience that would enable better resource management into the future.

Intertribal groups like the CRITFC are willing and able to take on co-management responsibilities. Tribal governments are capable and effective in developing, monitoring, and implementing natural resource management regimes over tribal treaty resources such as huckleberries. Co-management regimes will do more than encourage consultation and informal agreements; co-management will generate concrete, legally enforceable agreements between the tribes and the federal government, placing them on equal footing as managers of treaty-protected resources. Only then will native people have a real influence over how their treaty rights are managed.

VIII.CONCLUSION

Federal agency personnel working with tribes report finding themselves wishing for a more practical understanding of the legal and political concepts that define the unique trust relationship between the federal government and tribes.[248] Employees are generally aware of the trust responsibility but are unsure what steps they need to take to ensure that the trust relationship is fulfilled.[249] Alternatively, tribal members wish that federal agencies would honor their commitments to consult with tribal governments, to consider tribal rights in developing management plans, and to incorporate tribal information when making

246. CRITFC, COLUMBIA RIVER FISH MANAGEMENT PLAN § IV (E)(1).

247. The plan was amended and approved by the court in 1988. United States v. Oregon, 699 F. Supp. 1456 (D. Or. 1998).

248. U.S. FOREST SERV. OFFICE OF STATE AND PRIVATE FORESTRY, *supra* note 224, at 1.

249. *Id.*

policy decisions.[250] Often, federal agencies and tribes may have different management goals and priorities. This may put the two groups in conflict with one another. However, more commonly, they have similar goals in managing trust resources. A co-management approach to treaty resource management could help to resolve conflicts and use the expertise of both groups to develop culturally and ecologically sound management plans for treaty resources.[251]

The co-management approach to salmon management has been enormously successful.[252] There is no reason that other co-management arrangements should be any different. Throughout the Northwest, there are pre-existing, co-operative, interdisciplinary, intertribal groups, such as the CRITFC, that are interested in working with the USFS to address first foods management. Such an arrangement would best serve Indian tribes, the federal government, and the berries themselves. If agencies and tribes can collaborate jointly on all treaty resource management decisions, the tribes will be able to fully recognize their treaty rights and the agencies their trust responsibilities to the tribes.

250. Kimberly M. TallBear, *Understanding the Federal/Tribal Relationship and Barriers to Including Tribes in* ENVIRONMENTAL DECISION MAKING, INTERNATIONAL INSTITUTE FOR INDIGENOUS RESOURCE MANAGEMENT (2001).

251. *See e.g.*, Grace A. Wang et al., *Heritage Management in the U.S. Forest Service: A Mount Hood National Forest Case Study*, 15 SOC'Y & NAT. RES. 359, 366 (2002).

252. Amanda Cronin & David Ostergren, *Tribal Watershed Management: Culture, Science, Capacity and Collaboration,* 31 AM. INDIAN Q. 87, 90-91 (2007); Evelyn Pinkerton, *Translating Legal Rights into Management Practice: Overcoming Barriers to the Exercise of Co-Management*, 51 HUM. ORG. 330, 339 (1992).