The Scope of the Indian Habitat Conservation Right after the Culvert Decision

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THE SCOPE OF THE INDIAN HABITAT CONSERVATION RIGHT AFTER THE CULVERT DECISION
by
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Submitted in partial fulfillment of the requirements of the
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Michigan State University College of Law
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INTRODUCTION

In August of 2007, the United States District Court for the Western District of Washington was again confronted with the issue of treaty-mandated habitat protection.1 This case, (the “Culvert Decision”) and the many years of litigation that preceded it, revolved around language in the “Stevens Treaties,” in which several Indian tribes (collectively referred to as the “Tribes”) were promised that “[t]he right of taking fish, at all usual and accustomed grounds and stations, [was] further secured to said Indians, in common with all citizens of the Territory.”2 While the tribes’ right to take fish was judicially recognized in prior litigation, their right to ensure that fish were available to take was not definitively recognized. This decision acknowledges that right and mandates that the State of Washington take certain actions to prevent destruction of the habitat of the fish.

In making its determination, the district court insisted that its action does not impose a broad environmental servitude. It also insisted that its decision does not impose an affirmative duty on the state to undergo whatever action is necessary to protect the fish. However, in recognizing that the treaty-based “right to fish” necessarily includes a “right to ensure that fish are available to take,” the court is recognizing a right that is reminiscent of a limited conservation servitude, or habitat protection easement. However, instead of defining the scope of the servitude at the outset, the court is simply allowing the servitude to take form over time on a case-by-case basis. While this case is promising for Indian tribes and Indian law in general, we cannot be sure whether the district court’s rationale will be adopted by other courts. Moreover, the case could still be appealed.

This comment will analyze the Culvert Decision and the litigation that preceded it in an attempt flesh out a framework that would be applicable to other tribes that are trying to protect their reserved rights. Part I gives a brief history of the litigation that preceded the Culvert Decision. Part II examines the Culvert Decision, exploring the Court’s rationale for recognizing a right, but not a broad environmental servitude. Part III discusses a framework for recognizing a habitat-conservation servitude. Part IV provides ideas for giving definition to the habitat protection right.

I. BACKGROUND OF LITIGATION PRECEDING THE CULVERT CASE

The litigation around the Stevens Treaties is extensive. For longer than a century, courts have been called upon to interpret the treaties and flesh out the treaty rights that current Indian tribes hold. One of the most interesting aspects of the treaties and the ensuing litigation is the rich history that must be studied in order to understand the treaties from a contextual basis.

A. The Stevens Treaties

In 1854 and 1855, Isaac Stevens, the first governor of Washington Territory and the first Indian superintendent of the Washington Territory, negotiated several treaties with tribes indigenous to the Pacific Northwest. Six of these treaties retained fishing rights for the tribes with the following words: “[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.” These treaties are commonly referred to as the “Stevens Treaties.”

Stevens’ goal was fairly simple; as an agent for the United States, Stevens set out to obtain as much land as possible from the tribes of the Northwest, expending the least amount of

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3 Id. at 191.
4 Id. at 189.
United States resources possible. By the end of the treaty negotiations, the Tribes ceded an estimated sixty-four million acres of land to the United States.\(^5\) In return, the Tribes were compensated monetarily as well as with supplies such as blankets and blacksmith shops.\(^6\) In addition to the money and goods that the tribes received in exchange for ceding their title to the land, the also Tribes reserved certain rights.\(^7\) The right of taking fish in common with non-Indians at their usual and accustomed grounds is one of the most important rights reserved by the tribes; it is also the subject of over a century of litigation.\(^8\)

During the treaty negotiations, both the tribes and Stevens acknowledged the importance of fish to the tribes. In fact, prior to the treaty negotiations, Stevens discussed the necessity of preserving the tribes’ fishing rights with his advisors.\(^9\) During treaty negotiations, Governor Stevens reiterated the intent to preserve the tribes’ fishing rights in the following speech.

\begin{quote}
Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does a father not give his children a home? … This paper secures your fish. Does not a father give food to his children?\(^10\)
\end{quote}

As referenced in the treaty negotiations, salmon were an integral part of the lives of Indian tribes located in the Pacific Northwest.\(^11\) Salmon served not only as a primary food source for the Tribes, but also served as the basis of their economic system.\(^12\) Moreover, salmon were at the center of the tribes’ religion and culture.\(^13\) Considering the importance of the salmon


\(^{7}\) Mulier, supra note 5, at 41.

\(^{8}\) Id.

\(^{9}\) Lewis, supra note 6, at 288.


\(^{11}\) Lewis, supra note 6, at 288.

\(^{12}\) Lewis, supra note 6, at 288.

\(^{13}\) Lewis, supra note 6, at 288.
to the Tribes, it is not surprising that relinquishing their right to the fish was a non-negotiable item when entering into treaties with the United States.

Nonetheless, the Tribes have not simply enjoyed their reserved right as their ancestors probably anticipated when they signed the treaties. Instead, they have endured years of deprivation of their rights. It has only been through prolonged litigation, that the Tribes’ rights are finally being honored, at least to some extent.

B. Judicial Recognition of Treaty-Based Right to Take Fish

Courts have already recognized two property rights inherent in the “right to take fish.” First, courts recognized that the tribes had a property right to access “usual and accustomed” fishing grounds. Second, courts recognized that the tribes had a property right to an allocation of the fish population. The third right, which should also be seen as a property right, is the habitat protection right which was litigated in the recent Culvert Decision.

1. The Access Right

In 1905, the Supreme Court first addressed the issue of the right to take fish under the Stevens Treaties in United States v. Winans. The controversy arose after the Winans brothers installed fishwheels at some of the “usual and accustomed” fishing grounds of the Yakima Indians; the fishwheels were precluding Yakima access to the fishing grounds. The specific issue in front of the Court was whether non-Indian property owners could exclude Indians from their land, therefore precluding access to “usual and accustomed” fishing grounds. The Court looked at the context within which the treaties were made. The Court recognized that the treaties did not confer the right to fish upon the Indians; instead, it was a right that they already

15 Id.
16 Id.
possessed before the treaties. Furthermore, it was a right that the tribes did not relinquish during treaty negotiations. Specifically, the Court noted that:

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted.

The Court ruled in favor of the Indians and found that the treaty imposed a perpetual servitude on land that provided access to the Indians “usual and accustomed” fishing grounds. Therefore, the tribes, as the holders of the servitude, could go onto privately held land to exercise their treaty fishing rights.

2. The Allocation Right

More than fifty years after the treaty access right was recognized in Winans, courts were faced with a second treaty-right, the issue of allocation. While Winans held that tribes had a right to access fish via privately owned lands, it did not address the issue of how many fish the tribes had a right to. The first courts to address the issue of a treaty-based allocation right, recognized the right in broad, vague terms. For example, in Sohappy v. Smith, the court held that the tribes are entitled to a “fair share of the fish.” In Puyallup II, the court held that fish must be “fairly apportioned” between Indian and non-Indians. The decision that defined the allocation-right with specificity was the 1974 “Boldt Decision.”

17 Id.
18 Id. at 381.
19 Id. at 381-82 (“the Indians were given a right in the land, the right of crossing it to the river, the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.”)
In 1974, Judge Boldt, a federal judge for the Western District of Washington issued an opinion that dramatically affected the Indians’ treaty right to take fish. Commonly referred to as the “Boldt Decision,” the opinion was extremely detailed and is considered Phase I of an ongoing stream of litigation that has stretched out over a quarter of a century. In his opinion, Judge Boldt interpreted the vague term of “fair apportionment” as the right to 50% of the salmon harvest.23

Judge Boldt issued his opinion in response to the United States’ request for declaratory judgment and injunctive relief to define the scope of the treaty fishing rights and require the state to issue regulations to protect that right.24 The United States raised three issues: 1) allocation of the salmon harvest, 2) allocation of hatchery fish, and 3) protection of the habitat of the fish. Judge Boldt bifurcated the issues into two phases.25 Phase I considered the allocation of the salmon harvest. Phase II, dealing with the hatchery fish issue and habitat protection were reserved for future litigation.

During the Phase I litigation, Judge Boldt heard testimony from a total forty-nine witnesses, including Indian and non-Indian witnesses.26 In addition, the federal government’s anthropologist presented extensive evidence.27 In his analysis of the Phase I allocation issue, Judge Boldt relied on two primary factors. First, he also relied on the plain language of the treaties, specifically, the clause that read “in common with;” Judge Boldt interpreted the phrase based on the dictionary definitions at the time of the treaties.28 Second, he relied on his interpretation of how the Indians would have understood the terms at the time that they entered

23 Id.
24 Id.
25 Id.
27 Id.
28 Id. at 11.
into the treaties. Judge Boldt held that the treaty tribes were entitled to 50% of the salmon, steelhead, and other fish catch. He also defined the breadth of the tribal right. “The right secured by the treaties to the Plaintiff tribes is not limited as to the time or manner of taking, except to the extent necessary to achieve preservation of the resource and to allow non-Indians to fish in common with treaty right fisherman outside reservation boundaries.”

3. The Habitat Protection Right

Judge Boldt did not rule on the issue of whether the tribes have a right to prevent habitat degradation. This issue was addressed in subsequent litigation by Judge Orrick who found that the tribes did have an “implied right to environmental protection of the fish habitat” and that the “correlative duty imposed on the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.”

In analyzing the facts of this case, Judge Orrick distinguished the environmental issue from the allocation issue that was addressed in Phase I. The 50/50 allocation between treaty and non-treaty fisherman was derived from the express language of the treaty, supplemented with the parties’ intentions and surrounding circumstances. In contrast, the treaties do not expressly mention the environmental issue. Consequently, Judge Orrick found that the “right to have the

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29 Id. at 11-12.
30 Id. at 11. The 50-50 allocation is more complex than it appears on its face. For example, it requires that the term “harvestable fish” is defined. Harvestable fish does not include certain categories of fish, such as, fish that Indians catch on the reservations, fish the Indians catch to fulfill ceremonial or subsistence needs, or catch necessary for escapement. See Cohen at 12.
31 Id. at 12.
32 Id. at 12, quoting U.S v. Washington, 384 F. Supp. at 343.
33 United States v. Washington (Phase II), 506 F. Supp. 187, 208 (W.D. Wash. 1980). Judge Orrick also considered the “hatchery issue” which was raised in Phase I but reserved for judgment in Phase II.
34 Id. at 194-95.
35 Id. at 195.
fishery habitat protected from man-made despoliation” was “implicitly incorporated in the
treaties’ fishing clause.”36

Judge Orrick went on to list the special canons of construction that must be used when
analyzing Indian treaties. “Indian treaties must be interpreted so as to promote their central
purposes.”37 Treaties must be read “in light of the common notions of the day and the
assumptions of those who drafted them.”38 “The treaty must … be construed, not according to
the technical meaning of its words, but in the sense in which they would naturally be understood
by the Indians.”39 “Any ambiguities must be resolved in the Indians’ favor.”40

Judge Orrick’s reasoning was basically that without a habitat right, the overall treaty right
to take fish would be meaningless and would eventually result in a “right to dip one’s net into the
water . . . and bring it out empty.”41 His reasoning was based on the trend of continual
deterioration of fishing production habitat in Washington streams which was leading to a
significant decline in the salmon population.42 Judge Orrick included the following quotation in
his opinion:

A century ago, salmon abounded in the Pacific Northwest. Almost every
accessible area, even in the deep interior, nurtured crops of salmon which
renewed themselves as they had for millennia. However, in the Twentieth
Century, the urbanization and intensive settlement of the area, the rapid
development of water power, lumbering and irrigation and the pollution of the
watersheds reduced the quality and the amount of accessible spawning grounds.
These activities also reduced the rearing capacity of the streams.43

36 Id. at 203.
37 Id. at 195 (citing United States v. Winans, 198 U.S. 371 (1905).
38 Id. at 195, (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
39 Id. at 195 (quoting Washington, Phase I, 443 U.S. at 675-76 and Jones v. Meehan, 175 U.S. 1, 11 (1899).
40 Id. at 195, (citing Antoine v. Washington, 420 U.S. 194, 199 (1975) and Choctaw Nation v. Oklahoma, 397 U.S.
620, 631 (1970)).
42 Id. at 203.
43 Id. (quoting United States Fish and Wildlife Service, Washington Department of Fisheries, and Washington
Department of Game, Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and
Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington (1973)).
Judge Orrick recognized that Governor Stevens led the Indians to believe that the treaties confirmed their right to “continue fishing in perpetuity” and that “the settlers would not qualify, restrict, or interfere with their right to take fish.” He also pointed out that the “most fundamental prerequisite to exercising the right to take fish is the existence of the fish to be taken.” In order to have fish available to be taken, their habitat must exist. The fish must have access to and from the sea; have an adequate supply of good-quality water; have sufficient gravel for spawning and egg incubation; have an ample supply of food; and have shelter. The court concluded that human activities have seriously degraded the fish habitat by altering these conditions.

C. The Ninth Circuit’s Inconclusive Discussion of Whether the Right to Take Fish Includes an Implied Right to Enforce Habitat Protection

On appeal, the Ninth Circuit reviewed Judge Orrick’s decision. The circuit court did not agree with Judge Orrick’s decision or reasoning on the environmental issue. The Court determined that the treaties do not “guarantee an adequate supply of fish to meet the Tribes’ moderate living needs.” Nor do they create an absolute right to relief from all State or State-authorized environmental degradation of the fish habitat that interferes with a tribe’s moderate living needs. However, the Ninth Circuit did not conclusively reject the idea of a duty owed to the Tribes by the State to protect the salmon habitat or to at least refrain from destroying it. Instead, the court found a reciprocal obligation by both the tribes and the State. Specifically, the

44 Id.
45 Id.
46 Id. (citing United States Fish and Wildlife Service, Washington Department of Fisheries, and Washington Department of Game, Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington (1973)).
47 Id.
48 United States v. Washington, 694 F.2d 1374 (9th Cir. 1983).
49 Id. at 1375.
Court found that “when considering projects that may have a significant environmental impact, both the State and the Tribes must take reasonable steps commensurate with the respective resources and abilities of each to preserve and enhance the fishery.”

Three years later, the Ninth Circuit vacated the decision regarding habitat protection. En banc, the court found that the declaratory judgment on the environmental issue was not sufficiently concrete or precise. Even though the Ninth Circuit vacated the earlier decision, the analysis contained in the decision may still be applicable. After all, the court vacated the prior decision due to lack of sufficient facts. Therefore, it is possible that the Ninth Circuit’s original opinion will continue to have guidance.

1. The Ninth Circuit’s Recognition of a “Mutual Obligation”

Essentially, the Ninth Circuit recognized an undefined mutual obligation between the Tribes and the State regarding environmental protection; however, it disagreed with the scope of the right that Judge Orrick found in his decision. The Ninth Circuit rejected the idea that the tribes have any “absolute right to any particular level of fish supply established by the treaty.” However, the Ninth Circuit did not foreclose the idea of an environmental right.

The Ninth Circuit framed its interpretation of the environmental right as one that “looks toward cooperative stewardship” and one that requires the State and the tribes to take “reasonable steps” to preserve and enhance the fishery. The Court was careful to point out that the obligation extended to State projects and State permits; however, the obligation does not extend to private permittees beyond compliance with their permit. The Court described its

51 United States v. Washington, 694 F.2d at 1375.
53 Id.
54 Id. at 1381.
55 Id.
56 Id. at FN 15.
approach as one that is more specific than the “comprehensive environmental servitude” established by Judge Orrick. The Court characterized its interpretation of the treaty as putting environmental restraints on activities in the case area, but “channel[ing] the inquiry into adverse effects on treaty fish runs in a way that is more reasonable and more equitable to all.”

2. The Ninth Circuit’s Objections to Judge Orrick’s Proposed Environmental Right

The Ninth Circuit categorized its objections to the Judge Orrick’s proposed environmental right into four main areas. First, the Ninth Circuit was troubled by a lack of precedent for the right. Second, the Court felt that there was a lack of theoretical or practical necessity for the right. Third, the Ninth Circuit described the environmental right as an “unworkably complex standard of liability.” Fourth, the Court was concerned with the potential of “disproportionately disrupting essential economic development.”

a. Lack of Precedent

The Ninth Circuit disagreed with Judge Orrick’s application of Fishing Vessel to find precedent for an environmental servitude. This Court applied the holding of Fishing Vessel to this case as requiring losses that result from reasonable development to be shouldered equally by treaty and non-treaty fisherman. Therefore, the Ninth Circuit reasoned that a problem would only arise if a pattern of development was harming treaty fish runs without harming non-treaty fish runs. As long as the destruction to the fish habitat was occurring equally, in a non-discriminatory fashion, the Tribes could not invoke any right to prevent the destruction.

b. Lack of Theoretical or Practical Necessity

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57 Id. at 1381.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id. at 1382.
63 Id.
The Ninth Circuit also felt that an environmental servitude was simply unnecessary. First, the Court reasoned that malicious or reckless disregard for the effects that State projects would have on the fishery would be barred under the discriminatory regulation standard that was set forth in *Puyallup* if the effects led to a “drastic decline in available fish.”64 Second, the Court reasoned that the environmental servitude was unnecessary because it is not in the State’s interest to allow for the decline of the fish population.65

c. Unworkably Complex Standard of Liability

The Ninth Circuit criticized Judge Orrick’s definition of the habitat protection right as being “unworkably complex.”66 Specifically, the Court addressed the burden that the tribes would have to show that a proposed action would degrade the fish habitat and that the state was the proximate cause of such degradation.67 The Court felt that the causal link stemming from one state project was just too remote to the possible degradation of the fish habitat since many projects could contribute to the degradation.68 In addition to the complications in determining the causal chain, the Court felt that the necessity to compute the moderate living standard was simply too much of a burden on a court reviewing the matter.69

d. Potential of Disproportionately Disrupting Essential Economic Development

The Ninth Circuit was also concerned about the disruption that a conservation servitude could have on state activities. The Court described the state permitting process as one designed to balance state interests in environmental protection against state interests in allowing

64 *Id.* at 1384.
65 *Id.* “Each additional fish the hatcheries produce benefits all fisherman, Indians and non-Indians alike. Thus, unless the State is to abandon the very powerful non-Indian constituency, the prospect of drastic State-caused decline in the anadromous fishing runs of the case area is chimerical.”*Id.* at 1384.
66 *Id.* at 1387.
67 *Id.* at 1388.
68 *Id.*
69 *Id.*
development. The environmental servitude, the Court explained, would place the highest priority on avoiding potential impact to the fisheries that would reduce the tribal members’ income. Moreover, the environmental servitude would affect all state or state-authorized activities affecting the environment.

II. SUMMARY AND ANALYSIS OF THE CULVERT DECISION

In 2001, the United States and several Indian tribes from the Northwest initiated the case that resulted in the “Culvert Decision”. The case was brought in response to the direction of the Ninth Circuit to bring forth a sufficient factual basis for confirmation of the Tribes’ treaty-based habitat protection right. The United States and the Tribes filed a Request for Determination against the State of Washington “to enforce a duty upon the State of Washington to refrain from conducting and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced, which in turn reduces the number of fish available for harvest by the Tribes.”

The state of Washington constructed culverts rather than bridges in many places where roadways cross rivers and streams. The State acknowledged that many of the culverts were blocked, not allowing the free passage of migrating fish. The Tribes alleged that culverts under state owned roads were blocking more than 400,000 square meters of productive spawning grounds. A culvert is a tube-like structure that is constructed under roadways to divert water and prevent flooding. The State of Washington conducted studies that showed that improperly maintained culverts prevent salmon from accessing productive spawning grounds. See Brian A. Schartz, Fishing for a Rule in the Sea of Standards: A Theoretical Justification for the Boldt Decision, 15 N.Y.U. Env’tl. L.J. 314, note 2; see also Lewis supra note 6, at 281-82.

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70 Id.
71 Id.
72 Id.
74 Id.
75 United States v. Washington (Culvert Decision), 2007 WL 2437166 * 3. A culvert is a tube-like structure that is constructed under roadways to divert water and prevent flooding. The State of Washington conducted studies that showed that improperly maintained culverts prevent salmon from accessing productive spawning grounds. See Brian A. Schartz, Fishing for a Rule in the Sea of Standards: A Theoretical Justification for the Boldt Decision, 15 N.Y.U. Env’tl. L.J. 314, note 2; see also Lewis supra note 6, at 281-82.
habitat and greater than 1.5 million square meters of productive rearing habitat. Overall, the Tribes stated that the removing the blockages from the culverts would result in an annual increase of 200,000 fish.

It this case, the parties conceded that neither the Tribes nor Governor Stevens anticipated that there would be a lack of fish. Because of the abundance of fish in the region, there was no indication that supply would be a problem. From the Indian perspective, there was no reason to believe that the supply of fish would be a problem. Indian culture was conservationist-minded and included protection of the fish runs and streams.

However, the fish supply did decrease, and drastically. Currently, many populations are extinct, in danger of extinction, or at the very least, severely depressed. Traditional ceremonies often must rely on fish that are bought instead of caught. Moreover, fewer young tribal members are entering the fishery which is creating a break in the link of passing down of tribal customs from one generation to the next.

A. The Tribes’ Arguments

The Tribes sought equitable relief from “state-owned culverts that block hundreds of miles of streams capable of producing hundreds of thousands of fish, half of which the tribe would have a treaty right to harvest.” Specifically, the Tribes sought a “declaration that so long as they are not attaining a moderate living from their fisheries, the Treaties prohibit the State

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77 Id.
78 Id.
80 Brief for Plaintiffs at 4.
81 Id. (citing 1997 Washington Fish Passage Task Force Report).
82 Id.
83 Brief for Plaintiffs at 5.
84 Brief for Plaintiffs at 2.
from maintaining culverts that restrict salmon access and reduce the numbers of fish available for tribal harvest."85

The tribes overarching argument was that the courts had already established that the Stevens Treaties do not allow the subject matter of the treaty to be destroyed.86 More specifically, the tribes argued that the treaties “reserved to the tribes the right to actually harvest fish, free of state interference,”87 arguing that the language of the treaties was that “they would share their fisheries with non-Indians, but the treaties would never allow non-Indians to interfere with the tribes ability to sustain themselves by fishing.”88 The tribes argued that during the negotiation of the treaties, while most tribes were willing to cede most of their land, they were not willing to give up their fish since it was the mainstay of their existence.89

The tribes presented evidence of the understanding of the Indians and the United States during the treaty negotiations. Governor Stevens understood that fish were essential to the Tribes. The Supreme Court took notice of Stevens’s understanding in Fishing Vessel when it stated that “[i]t could never have been the intention of Congress that Indians should be excluded from their ancient fisheries.”90 There were a number of reasons that Stevens intended for the tribes to continue on as self-sufficient fisherman. One, allowing the tribes to continue as self-sufficient communities took the burden of supporting them off of the U.S. Government. In addition, Stevens recognized that the tribes were providing fish for settlers of the region. Therefore, Stevens had his own self-motivating interests for agreeing that the tribes would

85 Id.
86 Brief for Plaintiffs at 6 (citing United States v. Washington, 520 F.2d 676, 685(9th Cir. 1975).
87 Id.
88 Brief for Plaintiffs at 1.
89 Brief for Plaintiffs at 3, (citing United States v. Washington, 873 F. Supp. 1422, 1437 (W.D. Wash. 1994) (“Whatever land concessions they made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty.”)
90 Id. (citing Fishing Vessel, 443 U.S. at 666 (quoting Stevens)).
continue to have the right to take fish which logically included that right to insure that the fish were there to take.

B. The State’s Arguments

The State of Washington argued that the primary concern of the Tribes was not the factual culvert issue, but instead a legal issue of whether the land that the Tribes ceded was “burdened by an implied servitude requiring current land owners to avoid impairing the Tribes’ ability to earn a ‘moderate living’ from fishing.” The State argued that the legal issue failed as a matter of law for three reasons. First, the State argued that the treaty language does not expressly provide for an environmental servitude, therefore, one does not exist. Second, the State argued that the Tribes were attempting to create a new treaty right out of a limitation on an equitable remedy. Third, the State argued that recognition of an environmental servitude is not consistent with the Ninth Circuit’s en banc decision.

The State’s argument regarding the treaty language hinged on the fact that the treaties did not expressly provide for an environmental servitude. The State supported their argument by introducing evidence that at the time of the treaty, fish was abundant. Therefore, the State argued that neither the tribes nor the United States would have had any reason to include servitude to protect the fish because there was not indication that they needed to be protected. The State also argued that just because a party inaccurately speculates about future conditions, it does not afford the party a remedy. The State mentioned the Indian canons of construction,

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91 Brief for Defendants at 1.
92 Brief for Defendants at 9.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
however, it did not apply them to the treaty language; it instead dismissed the canons as only applying to explicit language. 98

The State failed to recognize that the Moderate Living Standard is a standard that was set forth by the United States Supreme Court; the State instead interpreted the provision under contract law. The State argued that since the term “Moderate Living Standard” was not in the treaties themselves, and that the term is ambiguous, then the term unenforceable. 99 The State argued that the “Moderate Living Standard” was not a right, but instead, a remedy that the Supreme Court used. 100

Finally, the State argued that the Ninth Circuit en banc decision dictates that the Moderate Living Standard fails. In addition, the State argued that equitable defenses should bar the tribes’ claim of an environmental servitude because it would “disrupt the settled expectations of current landowners in Western Washington.” 101

The State argued that the only equitable power that the Court has is to enjoin “imminent destruction of the fish or order emergency protective measure.” 102 Basically, the State claimed that it is only is an “extreme case” that the Court may make such a directive. 103 Therefore, the State argued that since the condition of the culvert does not constitute an extreme case, the State was entitled to summary judgment on the matter. 104

C. The Court’s Analysis and Decision

The District Court correctly rejected the majority of the State’s arguments. It rejected the argument that the tribes do not hold at least some sort of right to protect habitat; it rejected the

98 Id.
99 Id.
100 Brief for Defendants at 15.
101 Brief for Defendants at 16.
102 Id.
103 Id.
104 Id.
argument that the Tribes do not have a right regarding habitat degradation; and it rejected the argument that the Moderate Living Standard is an inappropriate standard to measure the right by.

1. The Ninth Circuit did Not Preclude Finding a Treaty-based Habitat Right

Judge Martinez did not agree with the State’s argument that the habitat right issue was already rejected by the Ninth Circuit. Instead, he reasoned that “the court’s order did not contain broad and inclusive language necessary to reject the idea of a treaty-based duty in theory as well as practice. Instead, the Court found that the declaratory judgment on environmental issues was imprecise and lacking in a sufficient factual basis.”\(^{105}\) Furthermore, Judge Martinez concluded that the court’s language “clearly presumes” that the State has an obligation that would be defined by “concrete facts presented in a particular dispute.”\(^{106}\) However, in finding that the Tribes had produced sufficient factual information needed for a narrowly-crafted declaratory judgment, Judge Martinez distinguished this from a “broad environmental servitude.”\(^{107}\)

2. Tribes Have a Treaty-Based Right to Habitat Protection

In the Culvert Decision, Judge Martinez recognized that the Indian Canons of Construction were the appropriate guidelines for finding a duty on behalf of the State to “refrain from blocking fish access to spawning grounds and rearing habitat.”\(^{108}\) He noted that when interpreting the treaty, the court must construe the language “in the sense in which” the Indians would have understood it, and not by the technical meaning of the words.\(^{109}\) Applying this standard, Judge Martinez recognized that the treaties secured the right to take fish in addition to the mere right to have access to the fish.\(^{110}\) Judge Martinez relied on the expert opinions that

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\(^{106}\) Id. at *5.
\(^{107}\) Id.
\(^{108}\) Id. at *6.
\(^{109}\) Id.
\(^{110}\) Id. at *8.
were part of the litigation, including the opinion of a historian\textsuperscript{111} who testified about the treaty negotiations and the focus from both sides on the fish as central to the Tribes’ way of life.\textsuperscript{112} For example, an interpreter during the negotiations reassured the Tribes that they were “not called upon to give up their old modes of living as places of seeking food, but only to confine their houses to one spot.”\textsuperscript{113} Judge Martinez also pointed out that it likely just as important for the United States that the Tribes’ retained their rights to the fish because it “was necessary for the Indians to obtain subsistence,” so that the United States would not incur costs to feed the Indians.\textsuperscript{114} Finally, the negotiators outright promised the tribes that they “shall not have simply food and drink now but that you may have them forever.”\textsuperscript{115}

Judge Martinez concluded that because the Tribes had received multiple assurances that their right to take fish was secure, even after they agreed to give up extraordinary amounts of land, that there was an implied promise that the United States would not degrade the fish.\textsuperscript{116} If the assurances were not accompanied by the implied promise, then they were meaningless.\textsuperscript{117}

3. \textit{The Moderate Living Standard may be an Appropriate Standard by which a Habitat Right is Measured}

Judge Martinez outright rejected the State’s argument that the moderate living standard cannot be a measure of a habitat right because the Treaty did not include the term.\textsuperscript{118} Judge Martinez pointed out that the term “moderate living” was developed by the Courts; therefore, obviously it was not included in the Stevens Treaties, since it is part of the courts’ interpretation
of treaties. Judge Martinez further explained that that the court would be responsible for any further definition of the term if it was necessary, not the Tribe. Furthermore, he was satisfied that the moderate living standard had been met by the fact that the tribes showed that fish harvests were substantially diminished and that there was a logical inference that a significant portion of the diminishment was caused by the blocked culverts.

III. ESTABLISHING AND DEFINING THE HABITAT PROTECTION RIGHT

Although a court could doctrinally find that habitat servitude exists, the Ninth Circuit and the District Court in the recent Culvert Decision reject the terminology. However, both courts recognized that the treaties provided the Indian Tribes with some sort of right as to protecting the species who were the subject of their reserved rights. Neither court fully addressed the scope of the right; therefore, the actual parameters of that right are yet to be fully determined.

A. Proper Application of the Indian Canons of Treaty Interpretation combined with Analysis of Environmental Servitudes Leads to an Implied Habitat Easement

Treaties with Indian Tribes are not merely contracts between two parties. Instead, they are agreements between sovereigns and are therefore part of the supreme law of the land. Moreover, considering the context within which the treaties were made, mainly the inferior position that tribes were put in during the negotiation of the treaties, the Supreme Court set forth special canons of construction that courts must use when interpreting treaties with Indians.

119 Id.
120 Id. at *6.
121 Id.
122 See U.S. Constitution, Article VI, cl. 2.
1. *The Indian Canons of Construction*

It is a well established doctrine that courts must interpret treaties between the United States and Indians in light of special canons of construction. The Indian Canons of Construction provide that courts must, 1) interpret treaties as the Indians understood them; 2) interpret treaties in favor of the Indians; and 3) resolve all ambiguities in favor of the Indians.

2. *Environmental Servitudes*

One technique that conservationist have started using in earnest over the past twenty years is that of placing a conservation easement, also referred to as a conservation servitude, on a piece of property. The conservation servitude is usually in the form of a negative easement in that it prevents the property owner from engaging in certain activities on his land. The holder of the easement is usually a land trust, a conservation organization, or a state or local government. The easement runs with the land and in most cases, is designed to survive in perpetuity.

The Third Restatement of Property defines conservation servitude as

a servitude created for conservation or preservation purposes. Conservation purposes include retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply.

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124 Id. See also Judith C. Royster and Michael C. Blumm, NATIVE AMERICAN NATURAL RESOURCES LAW, p 105. See also, Felix S. Cohen’s Handbook of Federal Indian Law 221-222 (Rennard Strickland, ed. 1982)

125 The use of conservation easements as an environmental conservation tool has become extremely popular in recent years. Currently, more than 5 million acres are protected by conservation easements. See Land Trust Alliance, *National Land Trust Census*, available at http://www.lta.org/aboutlt/census.shtml (last visited Dec. 21, 2006) [hereinafter LTA, Census].

126 A servitude may take the form of an affirmative covenant or a restrictive covenant. An affirmative covenant brings with it an affirmative duty for the owner of the underlying land to do something. Conversely, a negative covenant requires that the landowner refrain from doing something. See *Restatement (Third) of Property, Servitudes*.

127 *Restatement (Third) of Property, Servitude*, § 1.6 (emphasis added).
The intent of the parties to create a servitude may be either express or implied and “[n]o particular form of expression is required.” According to the commentary, “[t]o avoid unfairness, American courts generally seek to ascertain and give effect to the intentions of the parties, even though imperfectly expressed.” The intent to create a servitude may be inferred from the terms or the circumstances surrounding the conveyance of another interest in land.

A servitude may be found based on the inferred intent of the parties to the conveyance. “The inference may be based on the language used in the conveyance, the object of the transaction, the use of the property made prior to severance, the language used in referring to maps or boundaries, or restrictions imposed on the conveyed land.” Overall, “the inference is based on the conclusion that, under the circumstances, it is reasonable to infer that the parties intended to create a servitude but failed to give full expression to their intent.”

In situations where there is no basis for concluding that the parties intended to create a servitude, for example, if neither party knew a servitude was needed, a servitude may be implied on the basis of public policy. The underlying policy is to avoid economic waste. “Meeting the reasonable expectations of landowners and purchasers, and arriving at results that are fair to all parties, are very important considerations.”

3. Application of the Indian Canons of Construction to the Treaties Could Result in finding an Environmental Servitude

By properly applying the Indian Canons to the Stevens Treaties, considering the law of servitudes, a court should find implied habitat conservation servitude. According to the first

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128 RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 2.2
129 Id. id. § 2.2 Commentary
130 Id. id. § 2.2(e).
131 Id. id. § 2.2(e).
132 Id. id. § 2.2(e).
133 Id. id. § 2.2(e).
134 Id. id. § 2.2(e).
135 Id. id. § 2.2(e).

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canon, courts must interpret the reserved right as the Indians would have understood it. Because the fishing rights were essential to the survival of the tribes, it is unlikely that they knowingly gave up the right to ensure that the subject of the right was protected. Therefore, there are essentially two options. First, the tribes may not have included an explicit right to protect the habitat because it did not seem necessary due to the abundance of resource. Alternatively, it is possible that the tribes did not include express language because they felt that habitat protection was already implicitly included in the right to take fish.

Courts could find that the tribes assumed that their express reserved fishing right implicitly included a habitat conservation servitude. The language of the treaties does not expressly state that a habitat conservation servitude was reserved; however, servitudes do not need to be express to be enforceable. A servitude may be implied and may be inferred from the terms or circumstances surrounding a conveyance in land.

When reviewing the circumstances surrounding the treaties and the conveyance of land under the treaties, the treaties must be construed as the Indians would have understood them. In the litigation surrounding the Steven’s Treaties, both parties seemed to concede that neither party thought that the resources were in any danger of depletion. There are two ways to construe this concession. First, it could lead to the conclusion that the tribes did not recognize a need to reserve a habitat servitude because it was inconceivable that the resource could be depleted. Under this scenario, the tribes must have believed that the resources would be replenished

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136 Supra note 114.
137 If this is the case, a court will be less likely to find an implied conservation servitude. See RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 2.2
138 Supra note 118.
139 Supra note 121.
140 Supra note 114.
infinitely, otherwise their perpetual fishing rights would have been limited. Therefore, the tribes would not have understood that the treaty reserved an implied habitat servitude.

An alternate conclusion was that the tribes did not retain an express servitude because they understood it to be implicitly included in their express reserved right to fish. Although it is unlikely that the Indians involved in the treaty negotiations were familiar with the term “servitude,” the concept of conservation was certainly familiar. Conservation was, in fact, embedded in the culture of the tribes of the Pacific Northwest. While it is plausible that the non-Indians involved in the treaty negotiations viewed the fish population as perpetual, it is likely that the tribal members, on the other hand, didn’t require explicit conservation provisions in the treaties because conservation was inherent in their culture. There was simply no need to spell out preservation or conservation protection. Therefore, it is very possible that the tribes assumed that white settlers would live in a fashion that was consonant with conservation principles that could be termed as a habitat servitude. Because conservation was inherent in Indian culture, it is conceivable that the tribes assumed that a right to protect the resource that was the subject of their reserved usufructuary rights was included in their reserved right.

141 There is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty. It is perfectly clear, however, that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations, and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.” United States v. Washington State Commercial Passenger Fishing Vessel, 443 U.S. 658, 666-67 (1979).

142 There are several examples of tribal customs and activities that demonstrate that conservation was embedded in the tribes’ culture and practices. For example, the tribes prepared the environment for the coming of the annual coming of the salmon by ensuring that rivers and streams were free of rubbish and food scraps. The tribes also prohibited the bailment of canoes into the rivers. Tribal practice also prohibited fisherman from taking more fish than they needed and when the fish were running, fishermen would open their nets periodically to let some fish escape. See Cohen, supra note 26, at 24.

143 Conservation was not a separate concept, but rather one that was embedded in tribal culture. For example, the environmental preparations that were made for the coming of the salmon were accompanied by spiritual rituals as well. Id.
According to the Indian Canons the treaty must be construed in favor of the tribes and any ambiguities must be resolved in their favor.\textsuperscript{144} It is clear that the treaties did not include an express provision for a habitat servitude. However, it is not clear whether the reserved fishing right includes an implied habitat servitude. Therefore, the treaties are at the least ambiguous as to whether an implied environmental servitude exists, and any ambiguity must be resolved in the favor of the tribe. Therefore, the Canons on Construction dictate that a habitat servitude is recognized; otherwise, the reserved fishing right that was intended to survive perpetuity will be rendered useless a mere one hundred and fifty years after its creation. Less than two centuries is hardly equivalent to perpetuity by any stretch of the imagination.\textsuperscript{145}

IV. GIVING FORM TO THE HABITAT PROTECTION RIGHT

Although Judge Martinez in the Culvert case insisted that he was not creating a “broad environmental servitude” as feared by the State of Washington, he did provide relief to the plaintiff tribes. So, what was the right that the Judge was enforcing? It may not be what the court termed a “broad environmental servitude” requiring the State or individual property owners to restore the fish habitat to the treaty-time pristine condition; however, the court is recognizing a treaty right which is still best recognized as a servitude, or as a negative easement. However, since the courts are reluctant to use the terminology, it may be best referred to as simply a “habitat protection right.” Regardless of the label, the right still needs to be defined.

\textsuperscript{144} See text accompanying note 124.

\textsuperscript{145} It is possible that neither party to the treaties included a habitat servitude because both parties truly believed that the resource was infinite, regardless of human action. In situations where there is no basis for concluding that the parties intended to create a servitude, for example, if neither party knew a servitude was needed, a servitude will only be found on the basis of public policy. However, according to the Restatement of Property, the underlying policy is to avoid economic waste. Therefore, while arriving at results that are fair to all parties is an important consideration, meeting the reasonable expectations of purchasers and landowners is also a concern which could outweigh the expectations of the Indian tribes. \textsuperscript{See} \textbf{Restatement (Third) of Property, Servitudes} § 2.2 Comment (f).
When the Ninth Circuit refused to grant the tribes relief in 1985, the Court did not preclude the idea of a habitat right. Instead, the Court refused to define the right without a sufficient factual base. The Culvert Decision represents the first step in constructing the scope of the right. However, although the Culvert Decision provides that first point on the map of what will be the habitat protection right, there are many points left to be addressed. The most obvious parameters that need to be addressed are 1) the geographic scope of the habitat conservation servitude, or habitat protection right, and 2) the measurement of the conservation servitude, or habitat protection right.

A. Geographic Scope

One issue with defining the implied habitat right is determining the geographic bounds of the right. The most logical option is to consider the territory ceded by the individual tribe as the geographic boundary. This option would be consistent with the courts’ analysis of other aspects of the treaty rights and consistent with the Indian canons of construction. It is also consistent with the concept of a habitat conservation servitude.

Judge Martinez did not specifically discuss the geographic scope of a habitat right in the Culvert Decision since he was faced only with the specific issue of state-owned culverts. Therefore, what we can take from that case is that there is at least one court that considers state-owned land is within the geographic scope of a habitat right.

The geographic scope of the habitat protection right should be defined as including the entire geographic area that the Indians ceded by treaty. It is the most logical approach for various reasons. First, the habitat right is not a right that the Indian tribes were given; it was a

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146 United States v. Washington, 759 F. 2d 1353 (1985) (9th Cir. en banc).
147 Id.
right that they retained on all of the land they ceded.\textsuperscript{149} Second, for the habitat right to have real meaning it must extend to a large land base and defining the right by land ceded is the most logical approach.

The treaties did not grant fishing rights to the tribes. Nor did they grant a habitat protection right to the tribes.\textsuperscript{150} Instead, both rights were right that the tribes held pre-treaty negotiations and merely memorialized with the treaties.\textsuperscript{151} The distinction between a right that is granted and a right which is retained, or reserved, is critical. Before the tribes ceded astounding acres of land, they had certain property rights. When they ceded the land, they gave up only those rights that were explicitly set forth in the treaties. All other rights were retained. While the tribes relinquished many rights to the vast acres they ceded, they did not relinquish the right to fish at their ordinary and accustomed fishing grounds. Implicit in that right is the right to ensure that fish are available to take. Therefore, by recognizing a habitat protection right over the entire ceded territory, courts will merely honor the agreement between the tribes and the United States treaty-makers by recognizing a right that was retained.

Defining the habitat protection right as covering the breadth of the ceded territory makes sense from a modern-day perspective as well. An ecosystem is not defined by man-made property ownership boundaries. Instead, an ecosystem spans across vast areas of land and water. Therefore, by limiting the habitat right to certain parcels of land defined by ownership, for example, if the right were limited only to state action on state land, the right would have little significance.

\textbf{B. Parameters for Determining which Activities Violate the Habitat Conservation Right}

\textsuperscript{149} See text accompanying note 7.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
Beyond the geographic scope of the right, there are other parameters that must be articulated. Specifically, the measurement of the habitat conservation servitude or habitat protection right must be defined. One option is to use the moderate living standard to as a baseline for measuring the right. More specifically, tribes would have the right to prevent habitat degradation if the population of a certain species was in danger of dropping below the moderate living standard. Another potential option is to use an “unreasonable interference” standard. With this more ambiguous standard, the tribe would have the ability to take action if there was unreasonable interference with the habitat of the underlying species that are the subject of the reserved treaty right.

1. Moderate Living Standard

The Moderate Living Standard is a judicial doctrine that the Supreme Court announced in 1979 in *Fishing Vessel*. In this case, the Court was reviewing the lower court’s allocation of fish between Indian and non-Indian fisherman. Although the Court agreed with the lower court’s allocation of approximately 50% of the fish to the tribes, it qualified that right with the Moderate Living Standard. The Moderate Living Doctrine provides a second tier cap on the maximum amount of fish that the tribes are entitled to. They are entitled to 50% of the fish, unless tribal needs can be met by a lesser amount. If so, then the tribe is only entitled to that lesser amount.

Although the *Fishing Vessel* court’s definition of “tribal needs” included tribal commercial and ceremonial needs in addition to subsistence needs, other courts have

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153 Id.
154 Id.
155 Id.
interpreted the term differently. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* (“LCO”), the district court for the western district of Wisconsin went through the exercise of calculating the Moderate Living Standard for the tribe. In doing so, the court determined that the modern equivalent of the Chippewa’s “traditional tribal needs” was that of “zero savings.” Therefore the Moderate Living Standard was the equivalence of subsistence living, but nothing more. At least one commentator suggests that the application of the Moderate Living Standard in this way is creating a doctrine that is inherently unfair to Indians and treaty-based fishing rights.

By equating the moderate living standard with the traditional tribal living standard, the court [in *LCO*] restricted the tribal share to the amount that would provide tribal members with a living standard commensurate with that of their ancestors. Ironically, this may operate as a disincentive to economic growth and development by foreclosing the possibility of significant economic success. Additionally, by assessing moderate living in terms of monetary income only, the [LCO] court failed to consider other factors, such as infant mortality and life expectancy rates, which are all appropriate to a moderate living analysis.

However, if the doctrine is applied less restrictively and more in line with the Supreme Court’s interpretation in *Fishing Vessel*, it may be a good alternative for defining one of the parameters of the habitat protection right. A less restrictive approach would not reduce treaty share below the level that is required to fulfill a tribe’s subsistence, ceremonial, and commercial needs.

2. *Unreasonable Interference*

Another option is to define the right using an unreasonable interference standard. This standard has been applied to servitudes. For example, the Restatement of Property allows a

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158 *Id.* See Johnson, *supra* note 156.
159 See Johnson, *supra* note 156.
160 Johnson, *supra* note 156, at 575.
161 *Id.*
162 See Johnson, *supra* note 156, at 585.
property owner to use the property as she wishes as long as it does not unreasonably interfere with the “enjoyment of the servitude.”\textsuperscript{163} In addition, the Ninth Circuit emphasized the need for a “reasonableness” factor in assessing the obligation that the state would have to protecting the fish habitat.\textsuperscript{164}

The inherent complication with defining a habitat right by an “unreasonable interference” standard is the vagueness of the term. The vagueness would leave courts free to interpret the parameters of reasonable on a case by case basis. Currently, this would not provide any certainty to tribes or to states as to which actions will be considered reasonable. However, the flexibility that future courts would enjoy due to the vague standard may be the precise reason why the Ninth Circuit favored such an approach.

C. Potential Challenges in Defining the Scope of the Habitat Conservation Right

1. Intrusion on States’ Activities

One potential challenge in recognizing and defining a habitat easement is the potential intrusion on state activities. For example, in the Culvert Case, the State argued vehemently against the recognition of any environmental servitude fearing that it would put upon the State the duty to restore habitat back to treaty-time pristine conditions. Doctrinally, there is an argument that tribes do have a right to have the land restored back to the condition it was in at the time of the treaty. However, that is not the only circumstance in which a habitat easement can be defined. Indeed, if the Moderate Living Standard is used to define the easement, the duty to restore land to the nineteenth century condition is not relevant.

In addition, there is debate over whether a duty to “refrain from degrading or authorizing others to degrade” the habitat of the subject of a usufructuary right would represent and

\textsuperscript{163} \textit{Restatement (Third) of Property, Servitudes}, § 4.9.
\textsuperscript{164} United States v. Washington, 694 F.2d at 1388.
extraordinary limitation on state authority. However, “[r]elations between Indians and the federal government have always been the exclusive domain of the federal government – the states are excluded, unless Congress acts to include them.”

Furthermore, although states may fear that recognition of a habitat right, or easement, may unduly burden state autonomy, states must remember that treaties are the supreme law of the land. The State of Washington is bound to carry out the terms of the treaties under the Supremacy Clause, which imposes an obligation on the state to carry out the provisions of the treaties. Moreover, there are many things that may tread on state autonomy. For example, states are bound to enforce various federal environmental laws. While states may fear that the implementation burdens the state, they still must enforce the laws.

2. Public Policy Considerations with Respect to Individual Landowners

Another concern with imposing an environmental easement on the property that was ceded by the treaties is that private landowners may be unexpectedly disadvantaged by the obligations of the easement. This is a valid concern. However, the fact remains that the agreements between the United States government and the Indian tribes existed long before the current property owners took title to their property. Moreover, the recognition of a habitat easement does not mandate that draconian results will occur. Landowners will not lose ownership of their land and in many cases will not be affected by the easement at all.

In addition, even if recognition of an easement did result in unexpected disadvantage for landowners that reason alone should not preclude a court from recognizing the treaty right. After all, this would not be the first time that a court has recognized an easement on a parcel of land that was individually owned and where the owner had no prior knowledge of the easement. In

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166 Id. (J. Nelson & J. Skopil dissenting)
167 U.S. CONST. ART. VI, CL. 2; see also United States v. Washington, 759 F.2d at 1355.
1884, a private landowner, Frank Taylor, was involved in a suit brought by members of the Yakima Nation. The Yakima members were litigating their right to enter onto private land to litigate their treaty-based right to take fish at their accustomed fishing sites. The court found that the Yakima members did indeed have a right to enter onto private property to exercise that right. Moreover, the court implied that there was servitude on the land which would not have been extinguished by the Homestead Act. Without doubt, this holding resulted in unexpected disadvantage to the landowners. However, it also upheld the treaty that the United States had made with the Yakima Nation.

The United States Supreme Court also recognized a servitude where one had not been recognized previously. In Winans, the issue was whether members Yakima could enjoin non-Indian use of fishing wheels that prevented the Yakima from fishing at their customary sites by monopolizing the entire river. The Court discussed the treaty-based fishing rights and distinguished between rights that are granted and rights that are reserved. The fishing rights were rights that the tribes had at the time that they entered into the treaties; they were not rights that were granted to the tribes by the treaties. Therefore, the Court recognized that the tribes had reserved a property right. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude on every piece of land as though described therein. The contingency of future ownership of lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land, - the right

169 Id.
170 Id.
171 Id.
172 See Mulier, supra note 5, at 46 “From the standpoint of the non-Indian property owners . . . the outcome of [this case] must have been startling.”
173 United States v. Winans, supra note 14; see also Mulier, supra note 5.
174 Id. at 664.
175 Id.
176 Id.
of crossing it to the river, - the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.\footnote{35 United States v. Winans, \textit{supra} note 14, at 381.}

Without a doubt, the Supreme Court’s holding in \textit{Winans} resulted in unexpected disadvantage to landowners; however, the holding was necessary to uphold the treaty that the Yakima had made with the United States.

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\V.
\textbf{CONCLUSION}

The “right to take fish” under the Steven’s Treaties has been a heavily litigated for over a century. During that time, courts have given definition to the right in the form of a right to access certain lands in perpetuity, a right to take a certain allocation of fish, and an undefined right to enforce protection of the habitat of the fish. This latest right, the right to enforce protection of the habitat of the fish, is still in its infancy and will certainly develop over time. Currently, courts reject the notion that the treaties impose a “broad environmental servitude.” However, courts agree that the treaties memorialized some sort of habitat protection right. That right is best characterized as a limited habitat conservation servitude, defined by the moderate living standard and extending over all lands that were ceded by the treaty.