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TREATY RIGHTS AND WATER HABITAT:

APPLYING THE *UNITED STATES V. WASHINGTON* CULVERTS DECISION TO ANISHINAABE AKIING

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Abstract

In 2017, the Ninth Circuit Court of Appeals held that culverts installed by the state of Washington which reduce the habitat of treaty-protected salmon violate the treaty rights of Tribes in western Washington. That decision—part of the long-running United States v. Washington litigation—has since become known as the "Culverts Case." Broadly, that decision essentially holds that habitat protection is a component of treaty-protected rights to hunt, fish, and gather. This Article analyzes what habitat protection as a treaty right would mean for the water-based, treaty-protected resources—such as fish and manoomin (wild rice)—of the Anishinaabe Tribes in Minnesota, Wisconsin, and Michigan. This Article describes relevant treaties to determine what water-based resources those Tribes have treaty rights to, and analyzes relevant precedent that defines or limits the exercise or scope of those rights in state and federal courts. Through interviews with individuals who work with Tribes on issues pertaining to usufructuary rights, this Article identifies specific environmental threats to water-based treaty resources throughout the Great Lakes region. By analogizing those identified threats to the culverts at issue in United States v. Washington, this Article examines what habitat protection as a treaty right would mean in Anishinaabe Akiing.

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I. Introduction

In 2017, the Ninth Circuit Court of Appeals issued a decision that has since become known as the *Culverts Case*.[1] In that case, the court required the state of Washington to replace hundreds of culverts because those culverts were impeding salmon migration and thus infringing on the ability of Native American Tribes in western Washington to take fish at their "usual and accustomed places." This right to take fish at usual and accustomed places was a right reserved by the Tribes in treaties that they signed with the United States when ceding land to accommodate westward expansion of the developing country.

The Anishinaabe Tribes in what was to become the states of Michigan, Wisconsin, and Minnesota also signed treaties wherein they ceded land to the developing United States.[2] Like the

[1] United States v. Washington (*The Culverts Case*), 853 F.3d 946 (9th Cir. 2017), *aff'd sub nom.* Washington v. United States, 138 S.Ct. 1832 (2018) (mem.).

[2] The word Anishinaabe means simply "the People" and refers to the Ojibwe, Odawa, and Potawatomi Tribes of the Great Lakes region. Throughout this paper, I will use Anishinaabe where multiple Tribes, such as the Odawa and

Tribes in western Washington, the Anishinaabe also reserved the right to fish throughout ceded lands, as well as rights to hunt and gather resources such as wild rice (manoomin).[3] And like the Tribes in western Washington, the Anishinaabe have had to litigate those rights. Unlike the Tribes in western Washington, the Anishinaabe have not litigated the issue of whether the treaty-protected right to harvest includes the right to the protection of habitat on which the harvested resources rely. This Article examines what it might look like to apply the rationale of the *Culverts Case* to Anishinaabe Akiing, or the Upper Great Lakes region. Part II of this Article outlines the underlying principles of Federal Indian Law that must be considered in every case involving treaty rights. Part III delves into the history of the decades long *United States v. Washington* litigation, culminating with the 2017 *Culverts* decision. Part IV analyzes approaches that other courts have taken when deciding whether treaty-protected usufructuary rights include the right to habitat protection. Following that, Part V provides the relevant treaties that the Anishinaabe have entered into with the United States. That Part also includes a discussion of state and federal court precedent interpreting those treaties and the usufructuary rights that were reserved therein. This Article also includes the results of several interviews that I conducted with individuals who work with Tribes on treaty rights issues in the Upper Great Lakes region. Those interviews discuss current Tribal concerns about existing threats to the habitat of water-based, treaty-protected resources, providing concrete facts to which I apply the *Culverts* rationale in Part VI.

II. Principles of Federal Indian Law

> "While it cannot be denied that the government of the United States, in the general terms and temper of its legislation, has evinced a desire to deal generously with the Indians, it must be admitted that the actual treatment they have received has been unjust and iniquitous beyond the power of words to express. Taught by the government that they had rights entitled to respect; when those rights have been assailed by the rapacity of the white man, the arm which should have been raised to protect them has been ever ready to sustain the aggressor. The history of the government connections with the Indians is a shameful record of broken treaties and unfulfilled promises."[4]

Before discussing cases involving the relationship between habitat protection and treaty rights, it is important to first outline certain background principles that apply in all Indian Law

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Ojibwe, signed treaties together and thus have the same usufructuary rights. Where treaties were signed with the Ojibwe alone, I will refer to them as Ojibwe, or Chippewa. The phrase in the title of this paper, Anishinaabe Akiing, means "the Land to which the People belong," and refers to the historical territory of the Anishinaabe, or the Upper Great Lakes region. *See* WINONA LADUKE, CHRONICLES 6 (2016).

[3] Manoomin is the Anishinaabe word for wild rice. Manoomin is not only a treaty-protected resource for the Anishinaabe people but is also culturally important as a sacred food source. The Anishinaabe origin story relates that the Anishinaabe were instructed to travel west "until they found the place where food grows on water." *See* Codi Kozacek, *Where Food Grows on Water: Environmental and Human Threats to Wisconsin's Wild Rice*, CIRCLE OF BLUE (Aug. 4, 2011), https://www.circleofblue.org/2011/world/where-food-grows-on-water-environmental-and-human-made-threats-to-wisconsins-wild-rice/.

[4] United States v. Michigan, 471 F. Supp. 192, 201 (W.D. Mich. 1979) (quoting GOV'T PRINTING OFF., REPORT OF THE BOARD OF INDIAN COMMISSIONERS 7 (1870)).

cases. First, there are canons of construction that apply when interpreting all treaties, statutes, or executive orders in Indian Law cases.[5] Second, the federal government has a trust responsibility when making decisions that affect Native American Tribes. Third, Congress exercises plenary power over Tribes. Lastly, Tribes have inherent sovereignty, although the courts have placed limits on Tribal exercise of jurisdiction.

A. Canons of Construction

Over the years, federal courts have developed an interrelated set of doctrines that apply in Indian Law cases. While these doctrines were initially developed in cases involving the interpretation of treaties, the doctrines have since been applied to all issues of interpretation in Indian Law cases, including the interpretation of statutes, executive orders, and federal regulations.[6] The first Indian Law canon of construction requires that ambiguities in a treaty or statute be resolved in favor of the Indians.[7] If one interpretation would support the purpose of the treaty, and one would undermine that purpose, the court must follow the interpretation that would support the purpose for which the treaty was entered into.[8] However, there are limitations to this canon; for this canon of construction to apply, treaties must be actually ambiguous. If a treaty is not ambiguous, courts are not required to resolve the treaty in favor of the Indians.[9] Put simply, "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties;"[10] the "clearly expressed intent of Congress" cannot be disregarded if the treaty is unambiguous.[11] Furthermore, courts cannot analyze the legitimacy of a treaty, even where "a treaty is the product of bribery, fraud or duress or executed by representatives of minority factions of the signatory tribes."[12] Thus, many Indian law cases involving the canons of construction turn on the question of whether a treaty or statute is ambiguous.

A second—and related—canon of construction is that treaties and statutes must be construed liberally in favor of the Indians.[13] In a case involving hunting and fishing rights, the

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[5] FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 2.02 at 113–15 (Neil Jessup Newton, ed., 2012). *See also* Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172 (1999) (applying canons of construction to interpret a treaty, an executive order, and a statute in one case); Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995) (applying canons of construction to an executive order creating a reservation and a statute terminating that reservation).

[6] COHEN, *supra* note 5, § 2.02 at 113; *Mille Lacs III*, 526 U.S. at 172; *Parravano*, 70 F.3d at 554.

[7] *See* COHEN, *supra* note 5, § 2.02 at 113; *Mille Lacs III*, 526 U.S. at 200; Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341, 350 (7th Cir. 1983); United States v. Michigan, 471 F. Supp. 192, 251 (W.D. Mich. 1979); Winters v. United States, 207 U.S. 564, 576 (1908).

[8] *Winters,* 207 U.S. at 576.

[9] Menominee Indian Tribe of Wis. v. Thompson (*Menominee III*), 161 F.3d 449, 457 (7th Cir. 1998).

[10] Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

[11] Menominee Indian Tribe of Wis. v. Thompson (*Menominee II*), 922 F. Supp. 184, 199 (W.D. Wis. 1996).

[12] *Id.* at 203. *See also* Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

[13] *See* COHEN, *supra* note 5, § 2.02 at 113; Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172, 200 (1999); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341, 351 (7th Cir. 1983); United States v. Michigan, 471 F. Supp. 192, 251 (W.D. Mich. 1979).

Supreme Court declared that courts "must not give the treaty the narrowest construction it will bear."[14]

The third canon of construction is that treaties must be interpreted as they would have been understood by the Indians at the time the treaty was made.[15] In an oft-cited phrase, in 1899 the Supreme Court stated that:

> "the Indians, on the other hand . . . have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[16]

This canon has been applied since 1832 when it was first utilized by Chief Justice John Marshall.[17]

The canons of construction, taken as a whole, require courts in treaty rights cases to conduct a fact-intensive inquiry into the negotiation history and attendant circumstances of a particular treaty's signing or into a particular statute's legislative history and contemporaneous understanding.[18] The Supreme Court has declared the importance of "looking beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[19] While courts should apply the canons of construction in all Indian Law cases, they have not always done so consistently. Thus, the outcome of many Indian Law cases depends on how strictly the court applies the canons of construction.[20]

B. The Federal Trust Responsibility

The canons of construction are frequently described as being rooted in the federal trust responsibility.[21] The trust relationship between the federal government and Native American Tribes was created by the Supreme Court in 1831 when the Court decided that Native American Tribes were "domestic dependent nations" whose "relations to the United States resemble that of

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[14] Tulee v. Washington, 315 U.S. 681, 684 (1942).
[15] *See* COHEN, *supra* note 5, § 2.02 at 113; *Mille Lacs III*, 526 U.S. at 196; Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 675–76 (1979); United States v. Winans, 198 U.S. 371, 380 (1905).
[16] Jones v. Meehan, 175 U.S. 1, 11 (1899).
[17] Worcester v. Georgia., 31 U.S. 515, 582 (1832).
[18] *See generally* Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs I*), 861 F. Supp. 784 (D. Minn. 1994), *aff'd*, Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 124 F.3d 904 (8th Cir. 1997), *aff'd, Mille Lacs III*, 526 U.S. at 172; *United States v. Michigan*, 471 F. Supp. at 225–238; United States v. Bouchard, 464 F. Supp. 1316 (W.D. Wis. 1978), *rev'd by LCO I*, 700 F.2d at 341; United States v. Washington (*Boldt Decision*), 384 F. Supp. 312 (W.D. Wash. 1974).
[19] Choctaw Nation of Indians v. United States, 318 U.S. at 432.
[20] *Compare* Montana v. United States, 450 U.S. 544 (1981) (holding that Tribes have no authority to exercise regulatory jurisdiction over non-Indians within reservation boundaries) *with* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO IV*), 707 F. Supp. 1034, 1038 (W.D. Wis. 1989) (holding that Tribal regulation of members exercising usufructuary rights off-reservation preempts state regulation of the same).
[21] COHEN, *supra* note 5, § 2.02 at 116.

a ward to his guardian."[22] This trust responsibility has been interpreted in various ways, ranging from that of a full fiduciary duty[23] to merely requiring compliance with federal statutes.[24]

The trust relationship is especially important in cases involving environmental threats to Tribal resources. This relationship is more stringent than one between contracting parties and has created "moral obligations of the highest responsibility" that should "be judged by the most exacting fiduciary standards."[25] Courts have held that executive agencies must protect Tribes' treaty rights and resources "to the extent of [their] power."[26] However, rather than holding agencies to stringent fiduciary standards, some courts have held that compliance with statutes and regulations of general applicability is sufficient to fulfill the trust obligation, absent statutory imposition of a specific duty.[27] For example, courts sometimes conflate the federal trust responsibility owed to Tribes with federal responsibilities under generally applicable statutes, such as the Endangered Species Act.[28] The problem with this approach is that, in some circumstances, the federal trust responsibility becomes coterminous with the duty that the federal government owes to the general public. As scholars have noted, there may be a conflict of interest when the same entity is charged with acting in the best interest of the public and also acting in the best interest of Tribes.[29] While this interpretation of the trust responsibility reduces the obligation to one that is merely procedural rather than substantive, it appears to have become solidified as a judicial doctrine.

Where courts have interpreted the trust responsibility to be procedural rather than substantive, the procedure that is required—beyond complying with relevant statutes, such as environmental ones—is consultation.[30] The consultation requirement may be imposed by statutes or regulations.[31] However, consultation—being merely procedural—does not require an agency

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[22] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
[23] Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 333 (1995).
[24] North Slope Borough v. Andrus, 642 F.2d 589, 611 (D.C. Cir. 1980) (interpreting the trust responsibility to be "coextensive with the requirements of the various environmental statutes implicated in the case.").
[25] Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942).
[26] Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972); Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996).
[27] *See* Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006) (holding that the trust responsibility alone "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations."); *North Slope Borough,* 642 F.2d at 611 ("[W]e agree with the district court that a trust responsibility can only arise from a statute, treaty, or executive order."); *see also* Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement As A Reserved Right*, 30 ENVTL. L. 279, 301 (2000); *but see* Island Mountain Protectors, Nat'l Wildlife Fed'n, Assiniboine & Gros Ventre Tribes, & Fort Belknap Cmty. Council, 144 I.B.L.A. 168, 168 (1998) ("Compliance with Federal laws and regulations designed to protect the environment, however, does not satisfy BLM's general trust responsibility.").
[28] *See* Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 1999); Baley v. United States, 942 F.3d 1312 (Fed. Cir. 2019).
[29] *See, e.g.,* Royster, *supra* note 23, at 328.
[30] *Tribes v. United States*, 1996 WL 924509, at *8; *Island Mountain Protectors*, 144 I.B.L.A. at 185.
[31] *Tribes v. United States*, 1996 WL 924509, at *8; Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 HARV. C.R.-C.L. L. REV. 337, 375 (2018) ("Federal law provides meager consultation rights under procedural statutes like NEPA and the NHPA.").

to act in a Tribe's best interest.[32] The agency need only consult with the tribe, and it has fulfilled its procedural duty.[33] Thus, while a substantive trust responsibility would require the United States to act in the best interest of a Tribe in fulfillment of a fiduciary duty, a procedural trust responsibility does not apply such stringent standards. However, both Congress and executive agencies are required to act in good faith when dealing with Tribes.[34] While the Supreme Court formerly required federal courts to presume that Congress acted in good faith,[35] the Court has since retreated from that position.[36]

C. Congressional Plenary Power

Corollary to the guardian-ward relationship is congressional plenary power over Indian affairs.[37] This power is derived not only from the guardian-ward relationship, but also from two clauses in the United States Constitution: the Indian Commerce Clause and the Treaty Clause.[38]

Although congressional plenary power over Indian affairs is expansive, it does have its limits. First, only Congress can exercise plenary authority over Indian affairs; if the executive branch takes action in the arena of Indian affairs that exceeds the power Congress has delegated to the executive, such action is unconstitutional and void.[39] Second, while Congress can unilaterally abrogate treaties,[40] it can only do so if its intent is clear and unambiguous.[41] Thus, in cases involving the continued existence of treaty rights, the canons of construction apply not only to statutes or treaties creating such rights, but also to statutes and treaties purporting to abrogate

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[32] *See* Royster, *supra* note 23, at 346 (discussing a statute that "does not prohibit federal actions which adversely affect subsistence uses, but rather establishes a procedure that requires consideration of the impacts."); Anderson, *supra* note 31, at 376 ("The procedural aspects of environmental law and tribal consultation rights under federal law can only go so far. The procedural rights stand in stark contrast to cases litigated on the merits of interference with substantive treaty rights.").

[33] Of course, there is also a significant difference between consultation and consent.

[34] Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs I*), 861 F. Supp. 784, 826 (D. Minn. 1994); Northwest Ordinance, 1 Stat. 51, art. 3 (1787).

[35] Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

[36] United States v. Sioux Nation of Indians, 448 U.S. 371, 413 (1980). Certainly, the United States has not always acted in good faith when dealing with Tribes. *See generally* VINE DELORIA, CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (1988); DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970).

[37] United States v. Michigan, 471 F. Supp. 192, 252 (W.D. Mich. 1979); United States v. Kagama, 118 U.S. 375, 383-84 (1886).

[38] U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). U.S. CONST. art. II, § 2, cl. 2 ("[The president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .").

[39] *Mille Lacs I*, 861 F. Supp. at 823; Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341, 361 (7th Cir. 1983) (executive order void for exceeding Congressional delegation of plenary power).

[40] *See Lone Wolf,* 187 U.S. at 568.

[41] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172, 202 (1999); United States v. Dion, 476 U.S. 734, 739–40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."); Menominee Tribe of Indians v. United States (*Menominee I*), 391 U.S. 404, 412–13 (1968) ("While the power to abrogate those rights exists the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.").

such rights.[42] This is particularly important where the treaty rights at issue comprise vested property rights. Federal courts have repeatedly declared that treaty-protected usufructuary rights are property rights, and thus abrogation of these rights requires just compensation under the Fifth Amendment.[43] Lastly, congressional plenary power over Indian affairs may preempt state action.[44] This maxim holds true even when the subject matter being addressed would typically fall within the exclusive jurisdiction of the state.[45]

D. Inherent Sovereignty

State regulation is not only inhibited by Congress's plenary power. The Supreme Court has long held that states have no power to exercise jurisdiction within reservation boundaries.[46] Tribes have inherent sovereign authority to govern internal matters, subject only to Congress's plenary authority over Indian affairs.[47] This inherent sovereignty may even extend beyond a reservation's boundaries.[48]

However, Supreme Court precedent has limited Tribes' power to exercise criminal,[49] civil,[50] and regulatory[51] jurisdiction over individuals who are not members of that Tribe. In *Montana v. United States*, the Court held that Tribes may not exercise civil or regulatory jurisdiction over non-members unless the regulation falls into one of two exceptions.[52] Unlike state or federal jurisdiction, tribal jurisdiction is thus not directly tied to a geographic territory. Tribal regulatory jurisdiction—and state regulatory jurisdiction over tribal members—is more

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[42] *United States v. Michigan*, 471 F. Supp. at 262; *LCO I*, 700 F.2d at 354 ("[A] termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history." (emphasis in original)).
[43] U.S. CONST. amend. V; *Menominee I*, 391 U.S. at 413 ("We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying a property rights conferred by treaty.").
[44] *United States v. Michigan*, 471 F. Supp. at 265 ("A fundamental principle of federal constitutional law is that a state may not enact or enforce any statute or regulation in conflict with treaties between the United States and Indian tribes.").
[45] *Id.*
[46] *See, e.g.,* Worcester v. Georgia*.,* 31 U.S. 515, 589 (1832).
[47] *See, e.g.,* Williams v. Lee, 358 U.S. 217 (1959); *United States v. Michigan*, 471 F. Supp. at 262 ("Indian tribes retain all powers of self-government, sovereignty and aboriginal rights not explicitly taken from them by Congress.").
[48] Goodman, *supra* note 27, at 323 ("[D]ue to the complex relationship between Indian tribes and the United States, the exercise of tribal sovereignty in certain instances reaches outside the borders of the reservations, where the tribes provide governmental services to members living off-reservation, regulate the exercise of off-reservation hunting and fishing rights, exercise jurisdiction over child custody proceedings, and protect and control the disposition of Indian burials and burial goods.").
[49] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[50] Montana v. United States, 450 U.S. 544 (1981).
[51] Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).
[52] *Montana v. United States*, 450 U.S. at 566. A Tribe may exercise jurisdiction over a non-Indian if: (1) that individual has entered into a consensual relationship with the Tribe, or (2) the activity to be regulated "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." While *Montana* itself only applied to civil regulatory jurisdiction, the Court has extended it to civil adjudicatory jurisdiction. *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997).

directly linked to citizenship than it is to territory, at least as related to the exercise of usufructuary rights.

III. United States v. Washington

"The 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."[53]

Those twenty-seven words comprise what is perhaps the most litigated Indian treaty clause in American history. While the *United States v. Washington* litigation has been ongoing since 1970, conflicts between the state of Washington and Native American Tribes over treaty-protected fishing rights have been fought in the courts, the waters, and the public opinion for over one hundred years.[54] This section will briefly recount the history of *United States v. Washington* that led to the *Culverts* Decision in 2017.

A. Pre-Litigation

The modern fight for treaty-protected fishing rights did not begin in the courts. While there had been earlier court decisions pertaining to Indian fishing rights, the modern fight began in 1954 with an act of civil disobedience intended to directly challenge Washington's application of state fishing regulations to treaty fishing.[55] Beginning in the 1960s, tribal members and Native rights activists began a coordinated campaign of civil disobedience centered around "fish-ins" to bring attention to their treaty rights and to put pressure on Washington to cease enforcement of regulations against tribal members who were exercising those rights.[56] These fish-ins were accompanied by marches and protests at the state capitol.[57] These protests did not occur in isolation, as the 1960s and 70s were a time of increased Native American and civil rights activism throughout the country.[58] The response to the fish-ins—from both law enforcement and white fishers—was notably violent, with one Native activist being shot and dozens being arrested over the span of several years.[59] It was this background that led a U.S. Attorney to file *United States v. Washington* in 1970, just days after witnessing a violent confrontation between law enforcement and Native fishers.[60] In that suit, the U.S.—on behalf of the Tribes in Western Washington—

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[53] Treaty of Medicine Creek, art. 3, 10 Stat. 1132 (quoted in United States v. Washington (*Washington II*), 520 F.2d 676, 683 (9th Cir. 1975)).
[54] United States v. Washington (*The Culverts Case*), 853 F.3d 946, 954, 958 (9th Cir. 2017), *aff'd sub nom.* Washington v. United States, 138 S.Ct. 1832 (mem.).
[55] Bradley Shreve, "*From Time Immemorial": The Fish-in Movement and the Rise of Intertribal Activism*, 78 PAC. HISTORICAL REV. 403, 411 (2009).
[56] *Id.* at 404; Gabriel Chrisman, *The Fish-In Protests at Franks Landing*, UNIV. OF WASH. SEATTLE CIVIL RIGHTS AND LABOR HISTORY PROJECT (2008), https://depts.washington.edu/civilr/fish-ins.htm.
[57] Chrisman, *supra* note 56; Shreve, *supra* note 55, at 403. Fish-ins were modeled after the sit-in campaigns of Black civil rights protestors in the south.
[58] Shreve, *supra* note 55, at 434 (discussing the rise of the American Indian Movement).
[59] At one point non-native fishers seized a Makah fisher at gunpoint and destroyed his fishing gear. *Id.* at 413. At another point Native fishers armed themselves in response to the escalating violence. Chrisman, *supra* note 56. *See generally* Shreve, *supra* note 55, at 420-29.
[60] Chrisman, *supra* note 56.

asked the Federal District Court for the Western District of Washington for declaratory and injunctive relief from state interference with treaty-protected fishing.[61]

B. The Boldt Decision

Four years later, Judge Boldt delivered what has become one of the most cited opinions in cases involving off-reservation usufructuary rights.[62] Frequently referred to as the *Boldt Decision*, the ruling solidified what the Tribes had continuously asserted: that they had fishing rights reserved by the treaties they signed when they ceded most of the land in western Washington to the United States. Judge Boldt dove into the history behind the treaty, noting the language barriers inherent in its drafting[63] and "the universal importance of the fishery resource" to the Tribes who inhabited the area.[64] The judge concluded that the record overwhelmingly showed "that the treaty Indians pleaded for and insisted upon retaining the exercise of [fishing] rights as essential to their survival."[65] Applying the canons of construction, Judge Boldt declared that "[t]here is no indication that the Indians intended or understood the language 'in common with all citizens of the Territory' to limit their right to fish in any way."[66] Because "the fishing right was reserved by the Indians" it could not be qualified or restricted by the state, and state regulation would only be permitted if it was "necessary for conservation" and did not discriminate against treaty fishers.[67] As the opinion succinctly declared, "treaty fishing is a right, not a mere privilege."[68]

Judge Boldt's interpretation of the phrase "in common with" caused an uproar within the state of Washington.[69] He held that the phrase "in common with" meant that the Tribes and non-treaty fishers were entitled to equal shares of the fishery, and thus the Tribes were entitled to "the opportunity to take up to 50% [o]f the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations."[70] Judge Boldt noted that at the time of treaty negotiations, the way of life of the signatory Tribes was "heavily dependent" on fish, particularly salmon.[71] He also indicated that, even post-treaty, fish were an important part of the Tribes' lifestyle—both as a food source and as a cultural symbol—and that for some Tribes fishing was economically important.[72]

Throughout the opinion, Judge Boldt noted that actions by non-Indian fishers[73] and state law enforcement officers[74] had severely hampered Tribes' ability to exercise their treaty-protected

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[61] United States v. Washington (*Boldt Decision*), 384 F. Supp. 312, 327–328 (W.D. Wash. 1974).
[62] *Id.* at 312.
[63] *Id.* at 330.
[64] *Id.* at 332.
[65] *Id.* at 334.
[66] *Id.* at 333.
[67] *Id.*
[68] *Id.* at 337. *See also id.* at 332 ("[O]ff reservation fishing by other citizens and residents of the state is not a right but merely a privilege which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.")
[69] *See* Chrisman, *supra* note 56.
[70] *Boldt Decision*, 384 F. Supp. at 343.
[71] *Id.* at 355.
[72] *Id.* at 357.
[73] *Id.* at 365.
[74] *Id.* at 358, 374, 381.

fishing rights. Judge Boldt found that "enforcement of state fishing laws and regulations against treaty Indians . . . has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, [and] inhibition of cultural practices."[75] Finding that state officials treated treaty fishers differently than the state regulations provided for,[76] Judge Boldt declared that "state regulation of off reservation treaty right fishing is highly obnoxious to the Indians."[77]

To enforce regulations against treaty fishers after the *Boldt Decision*, the state was required to show that there were no alternatives; if any alternative was available—including regulations exclusively restricting non-treaty fishers—the state could not regulate treaty fishers.[78] The state was also required to manage the fishery in a way that attempted to ensure that fish reached the "usual and accustomed grounds and stations" in harvestable quantities.[79] Additionally, Judge Boldt held that the treaties did not prescribe "any specific manner, method or purpose of taking fish" and therefore the Tribes were not limited to traditional "techniques, methods and gear."[80] Ultimately, this decision was based on the United States Constitution:

> "Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state."[81]

C. Washington II

Neither side wasted time in appealing the decision.[82] The Ninth Circuit affirmed the factual findings of the *Boldt Decision*, noting that for the Tribes who were litigating their treaty-protected fishing rights "their diets, social customs, and religious practices centered on the capture of fish"[83] and that fishing remained "an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity."[84] The court also affirmed the preeminence of treaty-

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[75] *Id.* at 388.
[76] *Id.*
[77] *Id.* at 339. Judge Boldt provided a list of qualifications and conditions and declared that "any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof," if the Tribe was able to meet the qualifications and accept the conditions laid out in the opinion. *Id.* at 340. While the state had power to regulate off-reservation fishing by Tribes that did not meet the qualifications or accept the conditions, such regulation had to be "strictly limited to specific measures" that could be demonstrated "to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish." *Id.* at 342. Furthermore, state regulations could not discriminate against treaty fishing and were required to "[m]eet appropriate standards of substantive and procedural due process." *Id.* at 402. Enforcement of state regulations without making the requisite showing was itself an illegal action following the *Boldt Decision*, and several existing regulations were declared invalid as the state did not show them to be "reasonable and necessary." *Id.* at 333.
[78] *Id.*
[79] *Id.* at 346, 409, 411.
[80] *Id.* at 402.
[81] *Id.*
[82] The Tribes appealed, taking the position that the state had no authority to regulate treaty fishing at "usual and accustomed grounds and stations" under any circumstances. United States v. Washington (*Washington II*), 520 F.2d 676, 682 n. 2 (9th Cir. 1975).
[83] *Id.* at 682.
[84] *Id.* at 683.

protected fishing rights, stating that state conservation goals must be met by first restricting non-treaty fishers[85] and holding that treaties may preempt state law.[86] The Ninth Circuit agreed that Tribal self-regulation was preferable to state regulation[87] and engaged in a scathing analysis of the state's actions, noting that "[i]n treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory."[88]

D. Fishing Vessel

In 1979—nine years after the litigation was initiated—the case made its way to the United States Supreme Court.[89] The Supreme Court affirmed the finding that fish were important to the Tribes at the time of treaty-making—both for subsistence and commercial purposes[90]—and that the primary concern of the Tribes during treaty negotiations was protection of their right to fish.[91] Applying the canons of construction, the Supreme Court held that Judge Boldt had correctly resolved the phrase "in common with,"[92] stating that "the treaty guarantees the Indians more than simply the 'equal opportunity' along with all of the citizens of the State to catch fish, and it in fact assures them some portion of each relevant run."[93]

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[85] *Id. See also id.* at 686 ("[The state] may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. . . . Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction.").

[86] *Id.* at 684. ("[T]he state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations.").

[87] *Id.* at 686. In *Settler v. Lameer*, the Ninth Circuit affirmed the authority of the Yakima Nation—one of the Tribes "qualified to self-regulate" under the Boldt Decision—to self-regulate fishing by Tribal members, whether on or off reservation. 507 F.2d 231 (9th Cir. 1974). The court held that because the Yakima self-regulated its members who engaged in fishing at the time of treaty negotiations, it would be "unreasonable to conclude" that the tribe surrendered this control while reserving the right to fish. *Id.* at 236. The court reasoned that because the right was reserved by the Tribe as a communal right, the regulation of individual members exercising that right was an internal affair falling squarely within the realm of the Tribe's inherent sovereignty, concluding that the place where fishing occurred—off or on reservation—did not make regulation "any less an internal matter. The locus of the act is not conclusive." *Id.* at 237. The court further held that because "[t]he power to regulate is only meaningful when combined with the power to enforce," Tribal law enforcement officers had the authority to enforce the regulations off reservation. *Id.* at 238.

[88] *Washington II*, 520 F.2d at 685. One judge declared in concurrence that "it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten." *Id.* at 693 (Burns, J. concurring).

[89] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658 (1979). While this was not a direct appeal from the Boldt Decision and was rather an appeal from and a consolidation of several other contemporaneous proceedings—both in federal and state courts—it affirmed many of the holdings that were decided initially in the Boldt Decision.

[90] *Id.* at 665.

[91] *Id.* at 667.

[92] *Id.* at 675. The Court found the phrase to unambiguously require the construction given it by Judge Boldt.

[93] *Id.* at 681–682. *See also id.* at 683 ("[W]hat is material for present purposes is the recognition . . . that the treaty secured the Tribe's right to a substantial portion of the run, and not merely a right to compete with nontreaty fishermen on an individual basis.").

The Supreme Court then addressed equal opportunity in regards to state regulation, drawing on precedent holding that while "nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation."[94] In rejecting an equal protection argument brought by the state, the Court noted that the trust responsibility justifies differential treatment between Tribes signatory to treaties and non-treaty individuals.[95] In affirming the lower courts' decisions, the Supreme Court held that "in common with" ultimately meant that treaty fishers and non-treaty fishers were each entitled to 50% of the available harvest of fish[96] and neither side could deprive the other of its fair share.[97] However, the Court limited this doctrine, declaring that 50% was the maximum allocation to the Tribes, rather than the minimum, and introduced the "moderate living" standard: "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."[98]

The Court also recognized that Governor Stevens—who negotiated the treaties on behalf of the United States—repeatedly assured the Tribes that, not only would their rights to go fishing be protected, but that the supply of fish itself would be protected.[99] Because it would be difficult to earn a moderate living from fishing if fish populations were reduced to a low enough level, it only took one year for the question of the relationship between the moderate living standard and habitat protection to reach the district court.

E. The Orrick Decision

The issue of whether treaty-protected fishing rights include the right to the protection of fish habitat was first reached by the district court in 1980.[100] Frequently referred to as the *Orrick Decision*—after the judge who issued the opinion—this phase of *United States v. Washington* focused on two issues: (1) whether hatchery fish were allocable to the Tribes, and (2) "whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation."[101] In deciding the first issue, Judge Orrick concluded that hatchery fish must be allocable to the Tribes because to hold otherwise would jeopardize the Tribes' treaty-protected fishing rights.[102] On the second issue, Judge Orrick held that treaty-protected fishing rights

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[94] *Id.* at 682.

[95] *Id.* at 673, fn. 20 ("[T]his Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes, and has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'").

[96] *Id.* at 671.

[97] *Id.* at 684–685. The Supreme Court noted that "'[t]he state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.'" *Id.* at 696, fn. 36.

[98] *Id.* at 686.

[99] *Id.* at 676.

[100] United States v. Washington (*Orrick Decision*), 506 F. Supp. 187 (W.D. Wash. 1980).

[101] *Id.* at 190.

[102] *Id.* at 198–99. Because hatchery fish were becoming "an ever-increasing proportion of the total fish population" in western Washington—60% of all steelhead trout in 1980 were hatchery-raised—Judge Orrick found that excluding

included the right "to have the fishery habitat protected from man-made despoliation" because "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[103]

To reach this decision, Judge Orrick noted the abundance of fish throughout the treaty area prior to settlement and the devastating effects that urbanization and industrialization had on the fish populations.[104] He reasoned that:

> "[w]ere this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water [] and bring it out empty. Such result would render nugatory the nine-year effort . . . to enforce the treaties' reservation to the tribes of a sufficient quantity of fish to meet their fair needs."[105]

He did not reach the issue of what remedy that right would require or whether the state was violating that right, defining the duty that would be required by a right to environmental protection as

> "the duty to refrain from taking or approving actions which have a significant adverse impact on the treaty right fishery. . . . [Plaintiff] is merely asking that the State, in carrying out its regulatory authority over public or private actions with environmental impact, not authorize actions that will significantly damage or destroy the treaty guaranteed fishery."[106]

Ultimately, his decision was based on the moderate living standard that the Supreme Court had created in *Fishing Vessel*, noting that such a standard imposed a "correlative duty" on the state "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs."[107]

F. Washington IV and V

Judge Orrick's decision was short-lived. In 1982, the Ninth Circuit reversed the decision on the environmental habitat issue[108] and in 1985 vacated their entire discussion of that issue.[109] In both decisions the court affirmed Judge Orrick's decision on the hatchery issue, albeit on different grounds.[110]

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hatchery fish from the allocation would cause "[t]he tribes' share to steadily dwindle," subverting the purpose of the treaties. *Id.*

[103] *Id.* at 203.

[104] *Id*.

[105] *Id*.

[106] *Id*. at 205–07.

[107] *Id*. at 208.

[108] United States v. Washington (*Washington IV*), 694 F.2d 1374 (9th Cir. 1982), *on reh'g*, 759 F.2d 1353 (1985).

[109] United States v. Washington (*Washington V*), 759 F.2d 1353 (9th Cir. 1985).

[110] In *Washington IV*, the Ninth Circuit affirmed Judge Orrick's holding on the hatchery issue based on a lack of "State ownership of the fish once released, the competition between hatchery and natural fish for the same resources in a

In *Washington IV*, the court stated that there is no guarantee in the treaty that "there will always be an 'adequate supply of fish'"[111] and further found that there was "no absolute right to any particular level of fish supply established by the treaty."[112] While it was true that "there must be fish to give value to the right to take fish," the court found that maxim alone was insufficient to establish a right to habitat protection.[113] The court reasoned that *Fishing Vessel* established a right to a proportion of available fish, not a right to a set quantity of fish, and because any losses from habitat degradation would be borne equally by treaty and non-treaty fishers, a reduction in the total amount of fish available would not violate the allocation decreed by the Supreme Court.[114] Ultimately, the Ninth Circuit viewed the *Orrick Decision* as being too broad; the court was concerned about the imposition of a "comprehensive environmental servitude with open-ended and unforeseeable consequences."[115]

On rehearing, the Ninth Circuit vacated the discussion of environmental protection as being "contrary to the exercise of sound judicial discretion."[116] However, the court set in motion the culverts litigation when it declared that "[t]he legal standards that will govern the State's precise obligations and duties under the treaty . . . will depend for their definition and articulation upon *concrete facts which underlie a dispute in a particular case*."[117] The court reaffirmed that the state was bound by the treaties and that noncompliance would continue to be addressed by the courts.[118]

G. Washington VI

This issue did not come before a court again until 2007. Following the Ninth Circuit's decree in *Washington V*, the Tribes—and the United States as trustee on their behalf—developed the kind of concrete facts underlying a particular dispute that would allow them to bring the habitat

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given stream, and the mitigation function of the hatcheries." *Washington IV*, 694 F.2d at 1379. On rehearing, the Ninth Circuit affirmed the holding on the hatchery issue on four factors: "(1) the lack of State ownership of the fish once released; (2) the lack of any unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguished for other purposes; and (4) the mitigating function of the hatchery fish programs." *Washington V*, 759 F.2d at 1359. The court also noted that requiring "the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the Treaty." *Id*. at 1360.

[111] *Washington IV,* 694 F.2d at 1377.

[112] *Id*. at 1380.

[113] *Id*. at 1381.

[114] *Id*. at 1382. However, the Ninth Circuit did note that some activities that destroyed fish habitat may be foreclosed by the treaty-protected fishing rights. Because "[s]tate regulation cannot discriminate against the Indian fishery," granting permits for environmentally destructive projects in a way that concentrated the effects on "usual and accustomed grounds and stations" for the benefit of non-treaty fishing would be a prohibited course of action. *Id*. This rationale was grounded in state discrimination rather than in any environmental right. The court noted that "[r]eckless or malicious disregard for the effects of State projects on the fishery" which drastically reduced the amount of fish available to Tribal fishers "very likely would be barred under the 'discriminatory regulation' standard." *Id*. at 1385. However, this discussion was vacated on rehearing.

[115] *Id*. at 1381.

[116] United States v. Washington (*Washington V*), 759 F.2d 1353, 1357 (9th Cir. 1985).

[117] *Id*. (emphasis added).

[118] *Id*. Two justices found it "unthinkable that [the Indians] would have agreed to allow the State, or persons authorized by the State, to degrade the fish habitat in a way that would deprive them of their moderate living needs" and would have affirmed Judge Orrick's decision on the habitat issue. *Id*. at 1366 (Nelson, J. and Skopil, J., concurring in part and dissenting in part).

issue back to court. In *Washington VI*, the district court finally reconsidered the habitat issue when the plaintiffs challenged the state of Washington over culverts that diminished salmon habitat.[119]

In a consolidated order, Judge Martinez addressed the narrow issue of whether "culverts that block fish passage under State-owned roads" violated the Tribes' treaty-protected fishing rights.[120] In 2001, the Tribes and the United States filed for an injunction to force the state to "repair or replace any culverts that are impeding salmon migration to or from the spawning grounds."[121] After several years of negotiations, the parties reached a point where there was no longer a factual dispute. As the district court opinion proclaimed:

> "if culverts block fish passage so that they cannot swim upstream to spawn, or downstream to reach the ocean, those blocked culverts are responsible for some portion of the diminishment. . . . The issue then becomes a purely legal one: whether the Tribes' treaty-based right of taking fish imposes upon the State a duty to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage."[122]

This issue presented precisely the type of concrete facts in a particularized dispute that the Ninth Circuit had contemplated in *Washington V*. Judge Martinez noted the difference between this dispute and the initial litigation on the habitat issue.[123] This issue was narrow, fact-specific, and did not involve the "specter of a broad 'environmental servitude' so feared by the State."[124] Noting that "[i]t was thus the right to **take** fish, not just the right to fish, that was secured by the treaties,"[125] Judge Martinez found that the treaties imposed "a duty upon the State to refrain from building or maintaining culverts in such a manner as to block the passage of fish upstream or down, to or from the Tribes' usual and accustomed fishing places."[126] The opinion declared that this ruling was "necessary to fulfill the promises made to the Tribes" in the fishing clause of the treaties, concluded that Washington was violating its duty, and ordered further proceedings to determine an appropriate remedy.[127]

H. The Martinez Decision

In 2013, the issue returned to Judge Martinez's bench for determination of an appropriate remedy.[128] Judge Martinez determined that changes to waterways diminished both salmon populations and areas available for tribal fishers to engage in treaty fishing and that, since the

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[119] United States v. Washington (*Washington VI*), 20 F. Supp. 3d 828 (W.D. Wash. 2007).
[120] *Id*. at 845.
[121] *Id*. at 890.
[122] *Id*. at 892.
[123] *Id*. at 894.
[124] *Id*.
[125] *Id.* at 897 (emphasis in original).
[126] *Id.* at 899.
[127] *Id*.
[128] United States v. Washington (*Martinez Decision*), 20 F. Supp. 3d 986 (W.D. Wash. 2013), *aff'd,* United States v. Washington (*The Culverts Case*), 853 F.3d 946 (9th Cir. 2017).

signing of the treaty in 1855, "overharvest, habitat alteration, poor hatchery practices, and hydropower development" were the primary anthropogenic drivers of the decline in salmon available for harvest.[129] As previous courts had found, the court found that salmon were "an important part of the Tribes' history, identity, and culture."[130] Judge Martinez also found that more Tribal members would engage in fishing if salmon were more abundant, and that while Tribes were engaged in habitat restoration, "those efforts [we]re inadequate to meet tribal needs for salmon."[131] Moreover, these problems did not exist at the time of treaty negotiation.[132] Specifically, the court determined that there were 807 culverts blocking approximately 1,000 miles of stream or 4,800,000 square meters of habitat.[133] Noting that harvests—by treaty and non-treaty fishers alike—had declined since the *Boldt Decision*, and that this had caused economic, cultural, and social harm to the Tribes,[134] Judge Martinez stated that the Tribes "have suffered irreparable injury in that their Treaty-based right of taking fish has been impermissibly infringed" and placed the blame squarely on the reduction of habitat caused by state-owned culverts.[135]

Judge Martinez noted that monetary damages would be inadequate compensation for the cultural, social, and religious losses that the Tribes suffered.[136] Declaring that the state's duty was "a narrow and specific treaty-based duty," Judge Martinez issued an injunction, requiring the state to identify and replace those culverts that blocked fish passage.[137] This was not a requirement to immediately replace all culverts, but an order to draft a plan and prioritize replacement of culverts according to a set timeframe.[138] The court ruled that Washington was violating the treaties, and as such had abdicated its duty to the Tribes.

I. The Culverts Case

In the decision that has become known as the *Culverts Case*, the Ninth Circuit affirmed Judge Martinez's ruling.[139] The court recounted the history of this long-running litigation, noting its earlier decision requiring concrete facts in the context of a particularized dispute.[140] In analyzing how the Tribes would have understood the treaties at the time they were signed, the court noted that Governor Stevens assured the tribes that they would "be able to feed themselves and their families forever."[141] The court determined that "[t]he Indians reasonably understood . . . not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them."[142] Analogizing the issue to the reserved water rights doctrine, the court stated that even if there had been no explicit promise from Governor

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[129] *Martinez Decision*, 20 F. Supp. 3d at 1002.
[130] *Id*. at 1013.
[131] *Id*. at 1002
[132] *Id*. at 1003.
[133] *Id*. at 1013.
[134] *Id*.
[135] *Id*. at 1021.
[136] *Id*.
[137] *Id*. at 1023–24.
[138] *Id*.
[139] United States v. Washington (*The Culverts Case*), 853 F.3d 946 (9th Cir. 2017).
[140] *Id*. at 959, 965.
[141] *Id*. at 961.
[142] *Id*. at 964.

Stevens—which there was—the court would infer such a promise if necessary to fulfill the purpose of the treaties.[143]

In the *Culverts Case*, the court poignantly stated that "the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."[144] Based on the facts in the *Martinez Decision*, the court stated that culvert replacement would result in several hundred thousand more mature salmon annually, 50% of which would be available for Tribal harvest.[145] Based on the extensive factual evidence developed in the district court, the Ninth Circuit affirmed the *Martinez Decision*, concluding that "in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties."[146] The Ninth Circuit denied a petition for rehearing en banc,[147] and the *Culverts Case* was affirmed by an equally divided Supreme Court in 2018.[148]

Because the Supreme Court was equally divided, its decision does not create precedent binding courts outside of the Ninth Circuit.[149] The purpose of this Article is to explore what it might look to apply the Ninth Circuit's reasoning in other Circuits. The Ninth Circuit's decision in the *Culverts Case* has already led to dozens of academic articles and a plethora of speculation about where the next battle over treaty rights to habitat protection would be fought. However, the *Culverts Case* was not incredibly unique or original; on the contrary, that decision was preceded by a long line of cases affirming a relationship between habitat protection and treaty rights.

IV. Other Treaty-based Habitat and Usufructuary Rights Litigation

> "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

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[143] *Id*. at 965. While the full extent of the reserved water rights doctrine is beyond the scope of this paper, the doctrine essentially holds that where a reservation of water rights is necessary to fulfill the purpose of an Indian reservation, courts will infer such a reservation of water rights by implication. *See* Winters v. United States, 207 U.S. 564 (1908). This is especially important in the arid west, where water is scarce and water rights are governed by the regime of prior appropriation. ANTHONY D. TARLOCK & JASON A. ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 5.1 (2019 ed.). In prior appropriation states, water rights are governed by the maxim "prior in time, prior in right." *Id.* at § 5.31. When action is taken to establish a water right in prior appropriation states, the water right is given a priority date based on the time that water is diverted and put to use. *Id.* at § 5.32. In times of shortage, water users with a more recent priority date may have to curtail their usage so as not to infringe on the water rights of a senior rights holder. *Id.* at § 5.34. Under the reserved water rights doctrine, Tribal water rights are not only established by implication, but are also given a priority date correlative with the date the reservation was created. *Id.* at § 9.38. Thus, Tribal water rights tend to have priority over non-Tribal water rights. *Id.* at § 9.40.

[144] *The Culverts Case,* 853 F.3d at 965.

[145] *Id*. at 966. *See also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658 (1979).

[146] *The Culverts Case,* 853 F.3d at 979.

[147] United States v. Washington, 864 F.3d 1017 (9th Cir. 2017).

[148] Washington v. United States, 138 S. Ct. 1832 (2018). An interesting historical note demonstrating the long-running nature of this litigation is the fact that the court was equally divided because the same year that Justice Kennedy retired, he recused himself from the Supreme Court's decision in the Culverts Case due to the fact that he had participated in the 1985 *Washington V* decision. Don Jenkins, *Kennedy Recuses Himself from Washington Treaty Appeal*, CAPITAL PRESS (Mar. 27, 2018), https://www.capitalpress.com/state/washington/kennedy-recuses-himself-from-washington-treaty-appeal/article_d7a286eb-1ea0-5e53-9348-a62197558b88.html.

[149] *See* Durant v. Essex Co., 74 U.S. 107, 113 (1868).

> 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."[150]

Perhaps it should not be surprising that many of the cases litigating the right to habitat protection as a component of treaty rights, as well as those litigating the extent of usufructuary rights, arose in the Pacific Northwest and involved Tribes that were signatory to "Stevens Treaties"—treaties that included the same, or substantially similar, twenty-seven words at issue in *United States v. Washington*. This Part is broken down into two sections: the first analyzes cases involving Stevens Treaties, and the second analyzes other cases involving habitat as a treaty right.

A. Stevens Treaties Cases

Governor Stevens negotiated at least eleven treaties with Tribes in the Pacific Northwest between 1854 and 1855, many of which included an identical or substantially similar fishing clause.[151] The first time the United States Supreme Court interpreted the Stevens fishing clause was in 1905 in a case called *United States v. Winans*.[152] In that case, the Winans brothers had constructed a fish wheel at one of the Yakima Nation's "usual and accustomed" fishing places which prevented Yakima fishers from accessing the site.[153] The Court concluded that the Winanses had no right to preclude treaty fishers from exercising their fishing rights, even though the state had provided them a license to operate their fish wheel.[154] In so deciding, the Court relied on the reserved rights doctrine, which has been cited in usufructuary rights cases since: "the treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted."[155]

The right to fish was therefore not a right given to the Tribes by the United States, but rather a right that the Tribes retained for themselves and for individual Tribal members when they ceded land to the developing United States.[156] Because the Tribes had reserved the right to fish at "usual and accustomed places," the Court declared that Tribal members held an easement "upon every piece of land" as if it had been explicitly described in the treaty, and that this right was enforceable against individuals, the state, and the United States alike.[157] The Court also noted that while the state may be able to regulate that right, it was precluded from prohibiting the exercise thereof.[158]

Almost forty years later, the issue of state regulation came before the Court in *Tulee v. Washington* after a Yakima Tribal member was convicted of violating state game laws by fishing

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[150] United States v. Winans, 198 U.S. 371, 381 (1905).
[151] United States v. Washington (*Boldt Decision*), 384 F. Supp. 312, 330 (W.D. Wash. 1974).
[152] *Winans*, 198 U.S. at 371.
[153] *Id*. at 379.
[154] *Id*. at 384.
[155] *Id*. at 381.
[156] *Id.* In property law terms, the Tribes did not cede the entire bundle of property-rights sticks to the United States but kept the stick of usufructuary rights for themselves.
[157] *Id.* Note the analogy between the "implied easement" and the "implied reservation of water rights" discussed *supra* note 143. Just as a failure to infer a reservation of water rights would defeat the purpose of a reservation in an arid locale, failure to infer an easement to access "usual and accustomed" fishing sites would defeat the purpose of reserved usufructuary rights.
[158] *Id*. at 384.

off-reservation without a state license.[159] The Court held that while the state could impose "such restrictions of a purely regulatory nature concerning the time and manner of fishing . . . as are necessary for the conservation of fish," it could not charge Tribal members a fee for fishing off-reservation.[160] The Court reasoned that because the state's conservation goals could be accomplished by less restrictive methods, the imposition of fees could not "be reconciled with a fair construction of the treaty."[161]

Between 1968 and 1977, the Supreme Court decided a trilogy of cases determining the scope of the fishing clause as it pertained to the Puyallup Tribe. In *Puyallup I*, the Court had to decide whether Washington fishing laws prohibiting all net fishing in a "usual and accustomed place" were valid as applied to Puyallup fishers.[162] The Court noted that the Puyallup engaged in both subsistence and commercial fishing and that the treaty could not be construed in such a way that would limit the Tribes' fishing rights to the same privileges that other citizens have.[163] While the treaty reserved the right to fish at the "usual and accustomed places," it did not reserve the right to fish in the "usual and accustomed manner."[164] Therefore, while the right to fish at traditional sites could not be qualified by the state, the Court concluded that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[165]

Five years later the case returned to the Supreme Court. In *Puyallup II*, the Court had to decide if a complete ban on net fishing in the Puyallup River was discriminatory and thus violated treaty rights.[166] The Court held that the regulations were discriminatory because Indian fishing by net was completely foreclosed, while sport fishing—engaged in predominantly by non-Indians—was still allowed.[167] Four years after that decision, the case returned to the Supreme Court for the third time. In *Puyallup III*, the issue was whether the state had authority to regulate Tribal fishing both on- and off-reservation by limiting the total catch allowed by Tribal net fishing.[168] The Court held that the regulation was reasonable and necessary for conservation and that—because Congress had exercised its plenary power and granted Washington civil and criminal jurisdiction over reservations—the state could regulate Tribal fishing both on and off the reservation.[169] Thus the Puyallup trilogy of cases was concluded.

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[159] Tulee v. Washington, 315 U.S. 681, 682 (1942).
[160] *Id.* at 684.
[161] *Id.*
[162] Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 395–96 (1968).
[163] *Id*. at 396–97.
[164] *Id*. at 398.
[165] *Id.*
[166] Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 46–47 (1973).
[167] *Id.* at 48. In dicta, the Court made the statement that "[w]e do not imply that these fishing rights persist down to the very last steelhead in the river. . . . the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Id.* at 49.
[168] Puyallup Tribe, Inc. v. Dep't of Game of Wash. (*Puyallup III*), 433 U.S. 165, 167 (1977).
[169] *Id.* at 175. This case was decided two years before *Fishing Vessel* and the 50-50 allocation of the Washington fishery. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658 (1979)

However, there have been multiple other cases litigating treaty fishing rights in the Northwest that did not reach the Supreme Court. In a water rights case, the Ninth Circuit held that an implied reservation of water rights included a right to the amount of water necessary to sustain a Tribal fishery.[170] In that case, the water system at issue was located entirely within the boundaries of the reservation.[171] Similarly, the District Court for the Eastern District of Washington in a separate case held that because one of the purposes behind the creation of the Spokane Indian Reservation was to provide access to fishing grounds, and because the fishery required a sufficient quantity of water to maintain a specific water temperature, the Tribe had a reserved water right to maintain the fishery.[172]

While those two cases involved water necessary to maintain habitat for on-reservation fisheries, the maintenance of habitat for off-reservation fishing areas reserved under Stevens Treaties has also been litigated. *No Oilport! v. Carter* involved concerns about the impact oil pipeline construction would have on "usual and accustomed fishing places" in Puget Sound.[173] The Tribes with treaty-protected fishing rights in the area challenged the proposed project's Environmental Impact Statement (EIS) for failing to adequately consider impacts on treaty-protected fishing.[174] The Tribes' concerns were largely focused on the potential impact of an oil spill, although they also raised concerns about the destruction of salmon spawning grounds during construction.[175] The court held that while the EIS was adequate, the United States had a duty "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs."[176] Because a large oil spill would undoubtedly impact salmon habitat, the judge found that there was a genuine dispute as to whether construction of the project would "proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished."[177]

The Ninth Circuit also addressed a conflict between water rights for irrigation and the Yakima Nation's rights to maintain a fishery.[178] The lower court ordered a water reservoir to release a quantity of water sufficient to preserve salmon spawning grounds.[179] The Ninth Circuit held that the district court's order was a properly taken measure to protect Yakima fishing rights.[180] In another case, the District Court for the Western District of Washington enjoined the construction of a marina because it infringed on the Muckleshoot Indian Tribe's "usual and accustomed grounds and stations."[181] In that case, the court based its decision on the fact that treaty-protected fishing rights are property rights protected by the Fifth Amendment that can only be abrogated by express

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[170] Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981).
[171] *Id.* at 53.
[172] United States v. Anderson, 591 F. Supp. 1, 5, 8 (E.D. Wash. 1982); *aff'd in part*, *rev'd in part*, 736 F.2d 1358 (9th Cir. 1984).
[173] No Oilport! v. Carter, 520 F. Supp. 334, 356 (W.D. Wash. 1981).
[174] *Id.*
[175] *Id.*
[176] *Id.* at 371–372.
[177] *Id*. at 372. While the judge's decision was largely based on the subsequently reversed *Orrick Decision*, *No Oilport!* itself has never been overruled.
[178] Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist., 763 F.2d 1032 (9th Cir. 1985).
[179] *Id.* at 1033.
[180] *Id.* at 1034. *Cf.* Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council, 35 F.3d 1371, 1392 (9th Cir. 1994) (noting that "measures that would allow the extinction of Snake River fall chinook . . . may very well be inconsistent with the Yakima Nation's treaty reserved fishing rights.").
[181] Muckleshoot Indian Tribe v. Hall*,* 698 F. Supp. 1504, 1523 (W.D. Wash. 1988).

congressional authorization and that any taking thereof requires just compensation.[182] The court held that construction of the marina would require Tribal fishers to expend more time and money to maintain the same level of harvest due to the need to travel to other areas.[183] The court further ruled that while limits could be placed on Tribal fishing for conservation, impairment of the treaty fishery for any other reason would require Congressional authorization.[184]

In a similar case, the District Court for the District of Oregon held that a dam that would flood "usual and accustomed stations" could not be completed without specific congressional authorization.[185] While Congress authorized the project, it was unaware that treaty rights would be affected, and the court refused to infer an abrogation of treaty rights from a "general project authorization."[186] The court held that because the Tribes would be deprived of their treaty-protected fishing rights, and because Congress had not explicitly authorized the destruction of those rights, the Tribes were entitled to declaratory relief.[187] In another case before the District Court for the Western District of Washington, the court held that the Army Corps of Engineers fulfilled its trust responsibility and correctly denied a permit for a fish farm where the Corps determined that construction of the fish farm would impair treaty-protected fishing at the Lummi Nation's fishing grounds.[188]

The issue has also come before the Washington State Supreme Court.[189] In a water rights adjudication, the Court had to determine the Yakima Nation's reserved water rights to river flows for maintenance of salmon runs.[190] The Court noted that it could not balance competing interests in Indian water rights cases but also noted that it could not read ambiguities into statutory language for the benefit of the Tribes where the language of that statute is unambiguous.[191] The trial court had held that the Tribes "were entitled to the minimum instream flow which is necessary to maintain anadromous fish life in the river."[192] The court concluded that while the Tribe's fishing rights had been diminished, its treaty-reserved water rights had not been clearly abrogated by Congress and therefore were not extinguished.[193]

Tribes have not always been successful in such lawsuits, however. In 2005, the Ninth Circuit ruled against the Skokomish Indian Tribe when that Tribe tried to collect monetary damages for harm caused by a dam that blocked salmon runs.[194] The court distinguished the case from *Fishing Vessel* primarily on the difference between injunctive relief and damages.[195] The court also noted that while there was a legal basis for injunctive relief in treaty violation claims, there was no legal basis when suing a party other than the federal government for monetary

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[182] *Id.* at 1510, 1512.
[183] *Id.* at 1514–16.
[184] *Id*.
[185] Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 555–56 (D. Or. 1977).
[186] *Id.* at 555.
[187] *Id.* at 555–56.
[188] Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515 (W.D. Wash. 1996).
[189] State Dep't of Ecology v. Yakima Reservation Irr. Dist., 850 P.2d 1306 (Wash.1993).
[190] *Id.* at 1310.
[191] *Id.* at 1317.
[192] *Id.* at 1318–19.
[193] *Id*. at 1320–21.
[194] Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005).
[195] *Id.* at 513–14.

compensation for a violation of treaty rights.[196] Similarly, the District Court for the District of Idaho rejected a claim for monetary damages when the Nez Perce sued a private power company for damage caused to its usual and accustomed fishing grounds.[197] There, the court held that because the Tribe did not own the fish, because the Tribe could seek relief under environmental statutes, and because there was no precedent establishing a right to monetary damages, the Tribe had no legal basis for its claims.[198] The court further held that while the Tribe had a right to fish, it had no "absolute right to the preservation of the fish runs in their original 1855 condition,"[199] and that any relief must be sought from the United States, not from a private power company.[200]

In sum, when suing for injunctive relief from damage to habitat under the Stevens Treaties, Tribes have been relatively successful. Tribes have not been successful, however, when suing for monetary relief. Many of the decisions in favor of the Tribes were based—at least in part—on the language in the treaties that guaranteed access to "usual and accustomed grounds and stations."

B. Cases Involving Tribes without Stevens Treaties

Of course, many Tribes signed treaties with the United States that were not negotiated by Governor Stevens and that did not include an identical fishing clause.[201] However, many cases involving habitat protection as a component of treaty-protected fishing rights outside of the Stevens Treaties context also arose in the Pacific Northwest.

In another case involving water rights to support an on-reservation fishery, the District Court for the District of Columbia held that where it was necessary to ensure the maintenance of the Tribal fishery, the Secretary of the Interior was obligated to provide the Tribe with any water in excess of that which was already allocated to other parties; this holding was based on the Secretary's trust responsibility.[202] In so holding, the court noted that the fishery had been a principal source of the Tribe's livelihood and that one of the primary purposes of the reservation was the "maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee as a natural spawning ground for fish."[203]

In *United States v. Adair*, the Ninth Circuit had to determine whether water rights reserved to support a tribal fishery remained intact after federal termination of the Klamath reservation.[204] The court noted that one of the purposes for the creation of the reservation was the preservation of the Tribe's traditional lifestyle because of the historical importance of hunting and fishing to the Klamath Tribe and the language of the treaty granting Tribal members exclusive hunting and fishing rights within the reservation.[205] The court upheld the district court's finding that the

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[196] *Id.*
[197] Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994).
[198] *Id.* at 796–97, 807.
[199] *Id.* at 808.
[200] *Id.* at 811. However, the court in *Skokomish Indian Tribe* rejected a similar claim for monetary damages against the United States. *See Skokomish Indian Tribe*, 410 F.3d at 506.
[201] Indeed, many Tribes never signed a treaty with the United States.
[202] Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256, 265 (D.D.C. 1972), *supplemented,* 360 F. Supp. 669 (D.D.C. 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974).
[203] *Id*. at 254–55.
[204] United States v. Adair, 723 F.2d 1394 (9th Cir. 1983). Termination was a federal policy that aimed to hasten the assimilation of Native Americans into Euro-American society by ending federal recognition of Tribes, forcing liquidation of tribal assets and dissolving the trust relationship between the federal government and Tribes that were terminated. *See* COHEN, *supra* note 5, at § 1.06.
[205] *Adair,* 723 F.2d at 1409.

creation of the reservation impliedly reserved a water right sufficient to maintain the tribal fishery, noting that such a water right was a negative right in that it would prevent others from withdrawing water if doing so would harm the fishery.[206] Because the court had previously determined that the Klamath Tribe's fishing rights had survived the termination of the reservation, and because those rights would be defeated without maintaining a sufficient level of water, the court upheld the Tribe's right to the maintenance of an instream flow that would support the fishery.[207]

However, the Klamath Tribe continued litigating their usufructuary rights. In 1996, Klamath Tribes sued the U.S. Forest Service, alleging that proposed timber sales on the former reservation would destroy treaty-protected usufructuary rights.[208] The district court noted that while the trust responsibility created a procedural duty requiring agencies to consult with Tribes, courts also repeatedly confirmed that "the federal government has a substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend."[209] The court granted the Tribes' motion for an injunction for some—but not all—of the timber sales and required the Forest Service to ensure "that the resources on which the Tribes' treaty rights depend will be protected" before proceeding with any logging operations.[210]

In 1999, the issue of Klamath water rights came once again before the Ninth Circuit.[211] A group of irrigators filed suit after the Bureau of Reclamation and a dam operator revised the Link River Dam's operating agreement to provide more water to protect endangered species and treaty-protected fishing rights.[212] While the court conflated the United States' trust responsibility with its duty under the Endangered Species Act (ESA), the court did hold that the Bureau of Reclamation "has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators."[213]

In 2019, the issue came before the Court of Appeals for the Federal Circuit.[214] In that case, irrigators and farmers sued over a previous halting of water deliveries that had been conducted during a water shortage; that water was diverted downstream to meet federal trust obligations and responsibilities under the ESA.[215] The court recounted the history of litigation over Klamath water

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[206] *Id.* at 1410–11. *See supra*, note 143 for discussion of the reserved water rights doctrine.
[207] *Id.* at 1412. The court also noted that although much of the former reservation was federally held non-Indian land, the fishing rights were non-transferable and therefore the instream flows necessary to support those rights could not be put to any other use regardless of subsequent land ownership. *Id.* at 1418. The issue of state regulation of Klamath usufructuary rights came to the United States Supreme Court just two years later. *See* Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985). In 1901, the Klamath Tribe had signed an agreement to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" land outside the reservation boundaries. *Id.* at 760. The Tribe sued, seeking an injunction to prevent the state of Oregon from enforcing its fish and game laws against Tribal members in the ceded territory. *Id.* at 753. The Court held that the above language constituted a relinquishment of any usufructuary rights the Tribe had in the ceded lands, and thus any exercise of usufructuary activities was wholly and solely within the jurisdiction of the state. *Id.* at 768–69.
[208] Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *1 (D. Or. Oct. 2, 1996).
[209] *Id.* at *8.
[210] *Id.* at *9–10.
[211] Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 1999), *amended by* 203 F.3d 1175 (9th Cir. 2000).
[212] *Id.* at 1209–10.
[213] *Id.* at 1213–14.
[214] Baley v. United States, 942 F.3d 1312 (Fed. Cir. 2019).
[215] *Id*. at 1316.

and fishing rights, noting that downstream Tribes in California also have treaty-protected fishing rights in the Klamath River.[216] The court declared that "[a]t the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy,"[217] and that regardless of where the Tribes caught the fish, they had a right to water flows that would support the habitat of that fish.[218] Unfortunately, just as the Ninth Circuit had done 20 years before, the Federal Circuit conflated trust obligations with responsibilities under the ESA. However, the Federal Circuit ultimately held that the Tribes' rights to instream flows were superior to the rights of any upstream irrigators.[219]

In 1995, the Ninth Circuit also addressed the treaty-protected fishing rights of those downstream Tribes—the Hoopa Valley and the Yurok.[220] There, commercial fishers sued the Secretaries of Commerce and the Interior due to the Secretaries' decisions to reduce the commercial marine chinook harvest to ensure that sufficient levels of fish reached the Klamath River to provide for a Tribal harvest.[221] The Ninth Circuit upheld the Secretaries' decision, noting that "successful preservation of the Tribes' on-reservation fishing rights must include regulation of ocean fishing of the same resource" and that "the Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights."[222] This decision was based in part on the migratory nature of the fish.[223]

However, some courts have decided against habitat protection as a treaty right. The Ninth Circuit rejected a trust responsibility challenge to the Forest Service's approval of a gold mine, noting that while the Tribe had usufructuary rights in the affected area, the trust responsibility required no more from the agency than to fulfill its statutory obligation.[224] And in another case focused on water rights, the Ninth Circuit rejected a trust responsibility argument where acid drainage from mines located adjacent to reservation boundaries seeped onto the reservation and degraded the on-reservation water quality and held once again that compliance with environmental statutes fulfilled the federal trust responsibility.[225]

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[216] *Id.* at 1323.
[217] *Id.* at 1337.
[218] *Id.* at 1339.
[219] *Id.* at 1341.
[220] Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995).
[221] *Id.* at 541.
[222] *Id.* at 547.
[223] *Id.* at 548.
[224] Okanogan Highlands All. v. Williams, 236 F.3d 468, 478–79 (9th Cir. 2000). For a critique of this approach to the federal trust responsibility, see Part II.B., *supra*.
[225] Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006). *But see* Island Mountain Protectors, Nat'l Wildlife Fed'n, Assiniboine & Gros Ventre Tribes, & Fort Belknap Cmty. Council, 144 I.B.L.A. 168 (1998) (addressing the same mines and holding that "[c]ompliance with Federal laws and regulations designed to protect the environment, however, does not satisfy BLM's general trust responsibility."). In a non-treaty rights case, the Circuit Court of Appeals for the District of Columbia held that the Secretary of Interior did not violate his trust responsibility to the Inupiat Tribe in accepting bids for oil and gas leases in the habitat of the bowhead whale. North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980). Although the court noted the central importance of the whale for the subsistence and culture of the Inupiat Tribe, the court held that the trust responsibility did not rise above the level of protection required by the ESA, in part because the Tribe did not have a treaty with the United States, and in part because at that time there had been no proposed development on the leases so any disruption to habitat was speculative. *Id.* at 592–93.

The Idaho Supreme Court also rejected a treaty-based habitat claim in the context of a general stream adjudication.[226] Because the Coeur d'Alene Tribe acquiesced in the construction of hydropower facilities, the court held that its treaty rights did not provide it with a right to maintain the lake at a level necessary to support fish habitat.[227] While the court determined that the Tribe held a water right for instream flows within reservation boundaries,[228] the court also declared that the Tribe had no right to instream flows to support fish habitat off-reservation because the Tribe had "ceded all 'right, title, and claim which they now have, or ever had, to all lands[.]'"[229] However, in a different general stream adjudication, the federal District Court for the District of Montana exercised emergency jurisdiction during a severe drought to issue a temporary restraining order preventing the dewatering of streams which provided habitat for tribal fisheries.[230]

Just as with the Stevens Treaties cases, other Tribes have frequently been successful in seeking habitat protection as a treaty right when they seek injunctive or declaratory relief. As a practical matter, when federal actions are being challenged, Tribes' success unfortunately often seems to depend on the court's interpretation of the trust responsibility. Where the court upholds a strong fiduciary duty, Tribes are more likely to be successful. If the court conflates that trust responsibility with statutory duty, Tribes are only likely to win if the governmental action is found to be "arbitrary and capricious."[231]

V. Treaties and Precedent Relevant to the Upper Great Lakes Region

There are several treaties relevant to the discussion in this section. Because most treaties were signed before the now-extant states achieved statehood, the territory ceded under a treaty may span multiple states. Furthermore, because Michigan (Sixth Circuit), Wisconsin (Seventh Circuit), and Minnesota (Eighth Circuit) are all under the jurisdiction of different Federal Circuit Courts of Appeals, some treaties have been interpreted by multiple courts. This section is divided into subsections by state (circuit).

The first relevant treaty is the 1795 Treaty of Greenville.[232] While the Tribes ceded some land to the United States in that treaty, it is often viewed as a peace treaty rather than a land cession treaty. Article V of the treaty provided that "[t]he Indian tribes who have a right to these lands,

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[226] In re CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322 (Idaho 2019). A general stream adjudication is a court proceeding to determine all of the water rights in a given watershed; here, the Coeur d'Alene-Spokane River Basin.
[227] *Id.* at 350.
[228] *Id.* at 355.
[229] *Id.* at 359.
[230] Confederated Salish & Kootenai Tribes of Flathead Reservation v. Flathead Irr. & Power Project, 616 F. Supp. 1292 (D. Mont. 1985).
[231] *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). *See also* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101 (D.D.C. 2017) (remanding Environmental Assessment to the Corps for failing to adequately consider impacts of an oil spill on Tribe's hunting and fishing rights when permitting a pipeline).
[232] Treaty with the Wyandot, Etc., Aug. 3, 1795, 7 Stat. 49, *reprinted in* 2 INDIAN AFFAIRS, LAWS AND TREATIES 39–45 (Charles J. Kappler ed., 1904).

are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please."[233] Many Tribes signed the treaty, including representatives of the Odawa, Potawatomi, and Ojibwe.[234] Another peace treaty, the 1825 Treaty of Prairie du Chien, was negotiated by the United States to create a territorial boundary between the Sioux and the Anishinaabe, who were hostile to each other.[235] Article XIII of that treaty provides that signatory Tribes may allow reciprocal hunting rights on their lands with any of the other signatory Tribes.[236]

While there were several Anishinaabe land cession treaties signed prior to 1836, the first major relevant treaty was signed in 1836.[237] Known as the Treaty of Washington, this treaty was a land cession treaty that granted the United States the northwestern third of what is now Michigan's Lower Peninsula, the eastern half of Michigan's Upper Peninsula, and significant portions of Lakes Huron, Michigan, and Superior.[238] In Article III of this treaty, the Ojibwe and Odawa signatories specifically reserved several tracts of lands, several islands, and adjacent fishing grounds.[239] In Article XIII, the Tribes explicitly reserved "the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."[240] The following year, in the 1837 Treaty of St. Peters,[241] the Ojibwe ceded to the United States a large portion of land in what became eastern Minnesota and approximately the northwestern one-quarter of what became Wisconsin.[242] Article V of that treaty stipulated that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President."[243]

The United States would ultimately desire more Ojibwe lands, however. In 1842, the United States acquired the western half of Michigan's Upper Peninsula and the remaining Ojibwe lands in northern Wisconsin through the Treaty of La Pointe.[244] In Article II of that treaty, the Ojibwe reserved "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President."[245] The second Treaty of La Pointe was signed in 1854, ceding the "arrowhead" region of Minnesota in exchange for permanent

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[233] *Id.* at 42. The lands in question were the unceded areas of the Northwest Territory, including most of Michigan, Wisconsin, and Minnesota.
[234] *Id.* at 39.
[235] Treaty with the Sioux, Etc., Aug. 19, 1825, 7 Stat. 272, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 250–55 (Charles J. Kappler ed., 1904). Sioux is a shortened form of the Anishinaabe word Nadowessioux, which means "little snakes," and was a derogatory nickname that the Anishinaabe used to refer to the Lakota, Dakota, and Nakota peoples. *The Sioux*, University of Minnesota Duluth, https://www.d.umn.edu/cla/faculty/tbacig/studproj/a1041/mnansx1800/sioux.htm (last visited Apr. 30, 2021). As noted *supra*, note 2, Anishinaabe refers to the Ojibwe, Odawa, and Potawatomi Tribes of the Great Lakes region.
[236] 1825 Treaty with the Sioux, *supra* note 235, at 253–54.
[237] Treaty with the Ottawa, Etc., Mar. 28, 1836, 7 Stat. 491, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 450–56 (Charles J. Kappler ed., 1904).
[238] *See infra* Figure 1.
[239] 1836 Treaty with the Ottawa, *supra* note 237, at 451.
[240] *Id.* at 454.
[241] Treaty with the Chippewa, July 29, 1837, 7 Stat. 536, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 491–93 (Charles J. Kappler ed., 1904).
[242] *See infra* Figure 1.
[243] 1837 Treaty with the Chippewa, *supra* note 241, at 492.
[244] Treaty with the Chippewa, Oct. 4, 1842, 7 Stat. 591, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 542–45 (Charles J. Kappler ed., 1904).
[245] *Id.* at 542.

reservations.[246] Not only did the treaty state that "such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein," but the treaty also provided the signatory Tribes with significant amounts of "nets, guns, [and] ammunition."[247] Furthermore, the treaty reaffirmed entitlements and benefits provided under previous treaties.[248] And in 1855, at the second Treaty of Washington, the Ojibwe ceded the majority of their remaining lands, essentially the entire north-central portion of Minnesota.[249] While that treaty does not explicitly address usufructuary rights, it does begin with the declaration that signatory Bands "hereby cede, sell, and convey to the United States all their right, title, and interest in, and to" the ceded area.[250]

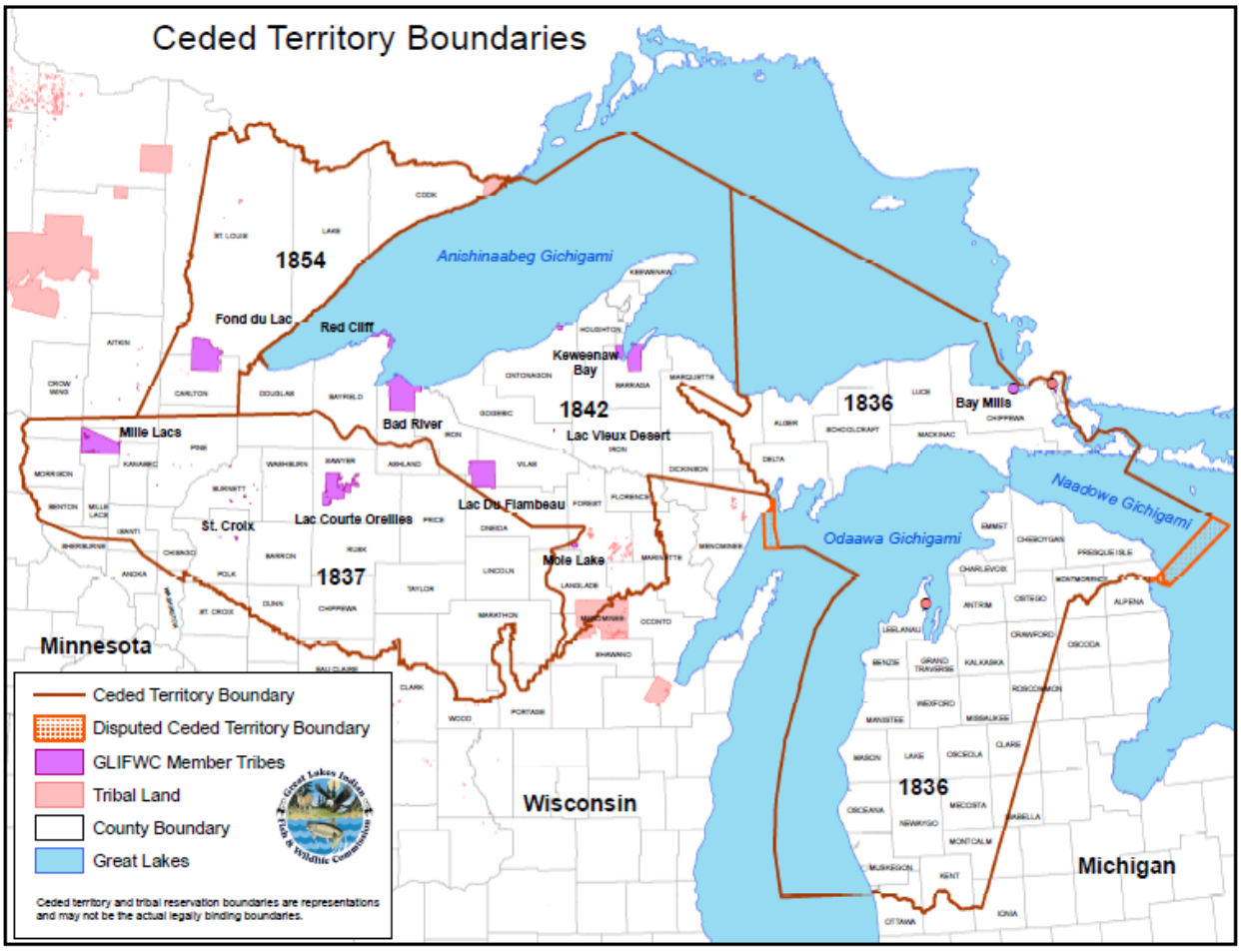

Figure 1.[251]

[246] Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 648–52 (Charles J. Kappler ed., 1904).
[247] *Id.* at 650.
[248] *Id.*
[249] Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 685–90 (Charles J. Kappler ed., 1904).
[250] *Id.*
[251] Map provided courtesy of the Great Lakes Indian Fish and Wildlife Commission.

A. Michigan (Sixth Circuit)

> "(F)ishing was our way of life, it was our livelihood, and fishing is our living, so we just had to fish."[252]

While the language of the Anishinaabe treaties is different than the language of the treaties in the Pacific Northwest, courts have strongly affirmed Anishinaabe fishing rights in Michigan waters, particularly in the Great Lakes. Just as the Tribes in Western Washington understood that they would "be able to feed themselves and their families forever,"[253] the Anishinaabe in Michigan understood that they would be able to fish "as long as the sun rose and the waters flowed."[254] Like the Tribes in Western Washington, the Anishinaabe in Michigan have treaty-protected rights to engage in both subsistence and commercial fishing, and those activities are central to both cultures. While the Anishinaabe treaties do not include "usual and accustomed grounds and stations" language, the Sixth Circuit has read that language into its interpretation of the treaties, in part because Michigan follows a zonal allocation, rather than the 50-50 allocation established in *Fishing Vessel*. Additionally, like reservations such as those for the Pyramid Lake Paiute and Spokane, discussed in Part IV above, Anishinaabe reservations were specifically located near traditional fishing grounds to provide the Tribes with continued access to those grounds. These facts, as elaborated below, provide enough similarities between the Tribes in western Washington and the Anishinaabe to support the application of the *Culverts Case* and other precedent to Anishinaabe Akiing. This section expounds on the precedent governing Anishinaabe treaty rights in the area that is now called Michigan.[255]

The issue first came to the Michigan Supreme Court in 1930, when an Ojibwe individual was arrested for fishing in Lake Superior in waters ceded under the Treaty of 1842, in violation of state game laws.[256] The court declared that regardless of any treaty provisions, the Ojibwe were subject to state game laws, "to the same extent as the general public."[257]

Forty years later, treaty fishing rights returned to the Michigan Supreme Court.[258] William Jondreau was arrested for illegally fishing in Lake Superior waters that had been ceded in 1842

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[252] United States v. Michigan, 471 F. Supp. 192, 225 (W.D. Mich. 1979). Don Parish, a member of the Bay Mills Indian Community, made this statement during the trial.

[253] United States v. Washington (*The Culverts Case*), 853 F.3d 946, 961 (9th Cir. 2017).

[254] *United States v. Michigan*, 471 F. Supp. at 238.

[255] While there were historically several Tribes present in southern Michigan, and many of those Tribes also signed treaties with the United States—some of which preserved hunting and fishing rights—the Sixth Circuit has held that Tribes which were removed from the Great Lakes region no longer hold fishing rights in the Great Lakes. Ottawa Tribe of Oklahoma v. Logan, 577 F.3d 634 (6th Cir. 2009) (holding that fishing rights in Lake Erie reserved under the Treaties of 1795, 1805, 1807, and 1817 were extinguished by Tribal "abandonment" pursuant to a removal treaty signed in 1831).

[256] People v. Chosa, 233 N.W. 205 (Mich. 1930), *overruled in part by* People v. Jondreau, 185 N.W.2d 375 (Mich. 1971).

[257] *Id.* at 207.

[258] This was around the same time that Tribes in the state of Washington were fighting for recognition of their treaty fishing rights. While the violence did not reach the same level in Michigan as it did in Washington, the reaction to Anishinaabe fishers exercising their treaty-protected rights was not entirely peaceful. "Confrontations have come close so far. Rock and bottle-throwing incidents, boat sinkings and swampings, torn and stolen gillnets and innumerable heated verbal exchanges along with pushing and shovings are the limit so far in the Charlevoix area. Coast Guard patrols had to protect Indian boats in some incidents. Both sides have armed themselves prior to this in Upper Peninsula incidents earlier, but no shots were fired." *United States v. Michigan*, 471 F. Supp. at 202 n.1.

adjacent to a reservation established by the Treaty of 1854.[259] Basing its conclusion on the Supremacy Clause of the U.S. Constitution,[260] the court stated that any state law or regulation in conflict with the treaty was invalid.[261] Applying the canons of construction, the court found that the right to fish included the right to fish in the waters at issue and held that state regulations were invalid as applied to "Indians who are protected by the Chippewa Indian Treaty of 1854."[262]
While *Jondreau* addressed the right to subsistence fishing, five years later the court had to determine whether treaty rights, this time in territory ceded under the Treaty of 1836, also applied to commercial fishing. In *LeBlanc*, the court held that "the Chippewa Indians did reserve fishing rights in the waters where defendant was arrested pursuant to the Treaty of 1836, that these fishing rights were not relinquished by the Treaty of 1855, and that the State of Michigan has limited authority to regulate those rights."[263] As it had done in *Jondreau*, the court applied the canons of construction and, after reviewing the historical record, decided that:

> "[g]iven the central position of fishing, both subsistence and commercial, in the Chippewa culture during the time period of the Treaty of 1836, there can be little doubt that the Indian stipulation in Article Thirteenth 'for the right of hunting on the lands ceded, with the other usual privileges of occupancy' was understood by the Chippewas to include the right to fish."[264]

The court also noted that while the reserved rights only lasted "until the land is required for settlement," there could be no doubt that the right to fish in the Great Lakes was not terminated by that clause because "the ceded water areas of the Great Lakes have obviously not been required for settlement."[265]

Michigan also argued that the Treaty of 1855 extinguished Ojibwe fishing rights.[266] Once again applying the canons of construction and reviewing the historical record, the court noted the silence of that treaty on those usufructuary rights and concluded that "[t]here is not the slightest indication . . . that the Treaty of 1855 would affect hunting or fishing rights reserved under the Treaty of 1836."[267] On the issue of state regulation of treaty fishing, the court followed the *Puyallup* rule, declaring that the state cannot "forc[e] treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens" and required the state to prove it would not be able to meet conservation goals by regulating non-treaty fishers before it regulated treaty fishers.[268]

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[259] People v. Jondreau, 185 N.W.2d 375, 376 (Mich. 1971).
[260] U.S. CONST. art. VI.
[261] *Jondreau*, 185 N.W.2d at 377.
[262] *Id.* at 378, 381.
[263] People v. LeBlanc, 248 N.W.2d 199, 202 (Mich. 1976).
[264] *Id.* at 205.
[265] *Id.* at 207.
[266] *Id.* at 209.
[267] *Id.* at 211.
[268] *Id.* at 215. The *Puyallup* rule provides that states may regulate treaty fishing only if such regulation is necessary for conservation and is non-discriminatory. *See* notes 162–165, *supra*. Just three years later, however, the Michigan Court of Appeals held that state regulation of commercial fishing in the Great Lakes was a necessary conservation

Three years later, the issue of treaty-protected fishing rights reached the federal courts. In an exemplary opinion that should serve as a model for how Indian law decisions are written, Chief Judge Fox interpreted the scope of Ojibwe fishing rights and the acceptable extent of state regulation under the 1836 and 1855 treaties.[269] In a thorough, 89-page opinion known as the *Fox Decision*, Judge Fox refused to dodge an honest analysis of the historical relationship between the United States and Native American Tribes.[270] After noting that a grant of land "extends only to those interests and rights specifically conveyed" and that a reservation of rights need not be explicit, Judge Fox declared that treaty language reserving hunting and "the other usual privileges of occupancy" in ceded lands was broad enough to include a reservation of fishing rights—for both subsistence and commercial fishing.[271] Judge Fox then observed that Tribes had been fishing in the Great Lakes for over 10,000 years, had traded fish with Europeans since Europeans first entered the region, and that the reservations were specifically located near traditional fishing grounds.[272] Based on these observations, the court then concluded that "the Ottawa and Chippewa Indians, and the plaintiff tribes as their successors, reserved an aboriginal right to fish in the waters of the Great Lakes ceded by the Treaty of 1836, which right they may exercise without regulation by the State."[273] This decision was based on the Supremacy Clause and the fact that "the State cannot regulate what federal law preempts."[274]

After so concluding, Judge Fox launched into a 28-page analysis of the historical record and the treaty negotiations to determine exactly how the Anishinaabe would have understood the treaties at the time of signing.[275] In that analysis, Judge Fox noted the centrality of fishing to Anishinaabe culture, the traditional fishing methods that were used in pre-treaty times, and the fact that before European contact, the Anishinaabe were part of a trade network that resulted in the fish they caught ending up as far away as the Gulf of Mexico.[276] Because this case involved not only

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measure and did not discriminate against treaty fishers. Michigan United Conservations Clubs v. Anthony, 280 N.W.2d 883 (Mich. App. 1979).

[269] United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979). The United States, exercising its trust responsibility, brought the lawsuit on behalf of the Bay Mills and Sault Ste. Marie Tribes of Chippewa Indians. *Id.* at 218.

[270] For example: "From the earliest times the United States has been ambivalent about its assumed role as trustee for the Indians, expressing noble sentiments executed by ignoble actions. During the 18th and 19th centuries the United States typically dealt with the Indians by treaty, as co-sovereign nations. Also typically, the United States secured Indian lands on terms which were little short of conquest and carried out the treaty in such fashion as to complete the vanquishment." *Id.* at 206. Furthermore, contrary to the courts in Menominee Indian Tribe of Wis. v. Thompson (*Menominee II*), 922 F. Supp. 184, 203 (W.D. Wis. 1996) and Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903), Judge Fox found that the treaties were "imposed by subtle, invidious and incidious negotiators who sought only signatures without regard for whether they were a product of free consent" and that there were significant language and cultural barriers to the free and informed negotiation of the treaties. *United States v. Michigan*, 471 F. Supp. at 216. Judge Fox also noted the conflict of interests present with treaty negotiators, who received over $250,000 in the treaties. *Id.*

[271] *Id.* at 213.

[272] *Id.* at 214–16.

[273] *Id*.

[274] *Id.* at 217. Both Bay Mills and Sault Ste. Marie had enacted Tribal fishing regulations governing subsistence and commercial fishing, which were subject to review by the Secretary of the Interior. *Id.* at 248.

[275] *Id.* at 220–248. *See supra* notes 15–17 and accompanying text for a discussion of this canon of construction.

[276] *Id.* at 221–225. "The prehistoric and historic record of the Upper Great Lakes shows a long evolutionary sequence extending back at least 12,000 years during which fishing in the Great Lakes has been of increasing importance to the Indian people of the treaty area. The nature of the fishery resource has helped to shape the Indian culture of this area." *Id.* at 221. "From that time onward, the commercial fishery as well as the subsistence fishery was important to the Indians. As is also indicated by the Indians' adoption of nets, the Indians' participation in commercial fishing as soon

subsistence but also commercial fishing rights, the finding that "the Indians of the treaty area were heavily engaged in commercial fishing at the time of the Treaty of 1836" was important.[277] Judge Fox ultimately found that in negotiating the 1836 treaty the Anishinaabe understood that "Michigan Indians could hunt and fish 'as long as the sun rose and the waters flowed'" and that "their aboriginal fishing rights would be continuing and undiminished in vitality, whatever might happen to their use of unreserved land."[278] Regarding the 1855 treaty, Judge Fox found that because that treaty was silent on fishing rights and the record of treaty negotiations made no mention of such rights, the fishing rights reserved under the 1836 treaty were undiminished by the 1855 treaty.[279]

As the Michigan Supreme Court had concluded in *LeBlanc*, Judge Fox concluded that fishing rights could not have been extinguished by white settlement "because these large bodies of water could not possibly be settled by homes, barns and tilled fields."[280] Judge Fox further concluded that it was clear that because the 1836 Treaty did not expressly relinquish fishing rights; because fishing was essential to the Anishinaabe in 1836 and relinquishment of those fishing rights "would have been tantamount to agreeing to a systematic annihilation of their culture;" and because the Anishinaabe "did not understand the treaty to limit their right to fish," the evidence conclusively established that the Anishinaabe reserved both commercial and subsistence fishing rights in the Great Lakes.[281]

In determining the scope of treaty-protected fishing rights, Judge Fox held that the rights could be exercised throughout the entire ceded territory and could not be "limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking."[282] Additionally, modern "improvements in fishing techniques, methods and gear" could be utilized and the treaty right "may expand with the commercial market which it serves."[283] In determining the acceptable scope of state regulation, Judge Fox held that because the 1836 treaty did not include the "in common with all citizens" language that was found in the Stevens Treaties, "Michigan [did] not have any

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as this opportunity presented itself, reveals that the Indians' participation in the Great Lakes fishery was never static, but evolved as new opportunities became available." *Id.* at 223. "In sum, in 1836, fishing in the waters of the Great Lakes for both subsistence and commercial purposes was extremely important to the Indians of the treaty area. [An expert witness] described the Indian fishery in 1836 as a 'vitally important resource for the survival of those people, and upon the advent of a commercial system, a means by which they made their principal living during a very difficult era' and as 'the primary cornerstone of their cultural being.'" *Id.* at 224.

[277] *Id.* at 223.

[278] *Id.* at 238. In addressing the treaty negotiations, Judge Fox found that "the Indians were cheated out of their land" and that "the negotiation of this treaty is rent through with deception, manipulation and double dealing." *Id.* at 226, 230.

[279] *Id.* at 246–247. The only mention of fishing rights in the 1855 treaty pertained to a fishery that was destroyed by the construction of a canal and docks.

[280] *Id.* at 253.

[281] *Id.* at 257–58. Judge Fox further declared that "[I]n view of the dismal history which generally surrounds the dealings of the United States with these first inhabitants of this land, and the history of this specific treaty negotiation, punctuated by numerous instances of underhanded and perfidious dealings with these trusting and gentle people, simple justice requires that this court begin to put an end to the unfairness which has plagued the Indians in their dealings with the white man from their first contact with him, and restore to the Indian that which was by nature his, and now by right also."

[282] *Id.* at 259–60.

[283] *Id.* at 260.

right to regulate Ottawa and Chippewa Indian fishing on the Great Lakes in exercise of their rights" and concluded that state regulation was preempted by both federal and Tribal regulations and by the fact that Tribal regulation of Tribal members is an exercise of inherent sovereignty.[284]

On appeal, the Sixth Circuit largely affirmed the *Fox Decision*.[285] That court disagreed with Judge Fox on the issue of state regulation, stating that the *Puyallup* rule, as applied in *LeBlanc*, was the correct statement of the law on state regulation of treaty-protected fishing rights.[286] The court did note, however, that "the Secretary of the Interior issued comprehensive regulations governing Indian fishing in the Great Lakes" between the time of the *Fox Decision* and the time that the Sixth Circuit heard the appeal and that those comprehensive federal regulations may preempt state law.[287]

In 1985, the Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa, Grand Traverse Band, the United States, the state of Michigan, and several fishing organizations negotiated an agreement on a fishery management plan and allocation.[288] The parties and the court settled on a zonal allocation plan because they determined that a 50-50 allocation—as had been stipulated in *Fishing Vessel*—would be unworkable due to variability in the fishery.[289] The court found that this plan would reduce conflict, improve long-term management and enforceability of regulations, and increase Tribal harvests when compared with a 50-50 allocation plan.[290]

Ten years later, federal courts had to consider whether treaty-protected fishing rights in zones that were set aside for exclusive Tribal use included a right of access. While the 1836 treaty does not include the "usual and accustomed grounds" language found in the Stevens Treaties, the fishing grounds at issue had been set aside for the Grand Traverse Band's (GTB) exclusive use

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[284] *Id.* at 270–71, 273–74, 280.

[285] United States v. Michigan, 623 F.2d 448 (6th Cir. 1980), *modified*, 653 F.2d 277 (6th Cir. 1981).

[286] *Id.* at 450. In a denial of Michigan's motion for a stay of judgement pending appeal, Judge Fox had held that the *Puyallup* rule was the wrong rule to apply in the case because there was no "in common with" language in the 1836 treaty and therefore no state regulation of the treaty-protected fishing right could be valid, that because of the lack of "in common with" language there would be no allocation necessary and the Anishinaabe fishers would be entitled 100% of the harvest if scarcity dictated, and determined that state regulations were discriminatory because non-treaty fishers were not regulated before treaty fishers and treaty fishers would be denied the use of their traditional gear (gill nets). United States v. Michigan, 505 F. Supp. 467, 467 (W.D. Mich. 1980). "The State of Michigan seeks all of the fish its non-treaty fishermen want and presently take. It then graciously offers the remainder to the Indians. A more effective denial of treaty rights can hardly be imagined. It must not be forgotten that the Indians preserved unabridged one hundred percent of their aboriginal right to take fish, while the State fishermen have only a privilege. This is the law of the Constitution." *Id.* at 496.

[287] *United States v. Michigan*, 623 F.2d at 449–50. The Sixth Circuit then remanded to the District Court to make a determination on the preemption issue. After the 1980 presidential election, the Secretary of the Interior let the regulations expire. United States v. Michigan, 653 F.2d 277, 278 (6th Cir. 1981). The Sixth Circuit modified their earlier opinion to keep the federal regulations in effect until the District Court made a decision on that issue, noting the federal government's trust responsibility and re-affirming their conclusion that the *Puyallup* rule was the correct rule absent preemptive federal regulations. *Id.* at 278–79. The rule on state regulation stated by the Sixth Circuit was that "[o]nly upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit state regulation." On remand, after Michigan informed the District Court that it did not intend to meet the burden of the *Puyallup* rule, Judge Fox held that treaty fishing in the Great Lakes waters within the 1836 ceded territory would continue to be governed by Tribal regulations, which incorporated the then-expired federal regulations. United States v. Michigan, 520 F. Supp. 207 (W.D. Mich. 1981).

[288] United States v. Michigan, 12 ILR 3079, 3079 (W.D. Mich. 1985).

[289] *Id.* at 3084–85.

[290] *Id.* at 3085. The initial consent decree was entered for a term of fifteen years. It was renegotiated in 2000, establishing new fishing zones. The current consent decree was up for renegotiation in 2020, but the COVID-19 pandemic delayed negotiations.

under the 1985 Consent Decree.[291] In *GTB v. MDNR*, the two marinas nearest to the Grand Traverse Band's fishing grounds refused to allow commercial fishing vessels to moor pursuant to state and municipal regulations.[292] The court declared that "[t]he GTB's treaty-reserved right to fish includes the right to access traditional fishing grounds" because "[t]reaty-reserved rights to access traditional fishing areas and catch fish are property rights protected by the United States Constitution."[293] In so concluding, the court analogized the situation to the *Winans* decision.[294] The court described the right to access fishing grounds as an easement—which was undisputed—and then set to determine whether the scope of the easement included access to improvements, such as marinas.[295] The court reasoned that because the fishing right itself was not static, neither should the right of access be.[296] In concluding that GTB held a "treaty-reserved right to access improvements to the marinas such as mooring slips. . . . protected under the Supremacy Clause of the United States Constitution," the court reasoned that "GTB fishers do not lose their right to access traditional fishing areas simply because circumstances demand that they employ particular fishing gear."[297] The court declared that "GTB fishers have the right under the treaties of 1836 and 1855 to 'transient' use of mooring slips and associated improvements" at the marinas to access traditional fishing grounds and ordered the municipalities and the state Department of Natural Resources to refrain from interfering with that right.[298] This ruling was based in part on the substantial increase in distance and travel time to the fishing grounds the use of any other marina would add, thereby increasing the time and energy that Tribal fishers would need to exert to achieve the same level of harvest—similar to the *Muckleshoot* case discussed above.[299]

The Sixth Circuit affirmed the district court's decision, reading "usual places" language into the treaty and noting that reservations were located adjacent to traditional fishing grounds.[300] That court affirmed the district court's finding of an implied easement, noting that the easement would apply even to privately owned lands.[301] The court declared this easement was required "because not only would a contrary result frustrate the purpose of the treaties, such a result would simply destroy all rights to commercially fish that were conveyed by them."[302] Thus, while the 1836 treaty did not explicitly reserve the right of access to "usual and accustomed places," the Sixth Circuit has interpreted the treaty to include such access as an impliedly reserved right.

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[291] Grand Traverse Band of Chippewa & Ottawa Indians v. Dir., Michigan Dep't of Nat. Res. (*GTB v. MDNR I*), 971 F. Supp. 282 (W.D. Mich. 1995), *aff'd,* Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Michigan Dep't of Nat. Res. (*GTB v. MDNR II*), 141 F.3d 635 (6th Cir. 1998).
[292] *Id.* at 286. At least one treaty fisherman was arrested for mooring his vessel at one of the marinas.
[293] *Id.* at 288.
[294] *See supra* notes 152–158 and associated text for a general discussion of the *Winans* doctrine.
[295] *GTB v. MDNR I*, 971 F. Supp. at 288–89.
[296] *Id.* at 289.
[297] *Id.* at 291, 289.
[298] *Id.* at 293.
[299] *Id.* at 291. *See supra* notes 181–184 and accompanying text for a discussion of the *Muckleshoot* case. The fishing areas at issue in *GTB v. MDNR I* are on one side of a peninsula; refusal of access to these marinas would have required treaty fishers to boat around the peninsula in order to access their fishing grounds, increasing travel time by five to ten hours.
[300] Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Michigan Dep't of Nat. Res. (*GTB v. MDNR II*), 141 F.3d 635, 637 (6th Cir. 1998).
[301] *Id.* at 639.
[302] *Id.* at 640.

In sum, both state and federal courts in Michigan have repeatedly affirmed the rights of the Anishinaabe to fish in the Great Lakes. The treaty-protected right includes the right to fish for both subsistence and commercial purposes, and Tribes have worked with the state to co-manage the resource. Rather than allocating the fishery pursuant to the moderate living standard, the Great Lakes fishery within Michigan waters is divided into discrete zones—some allocated exclusively to the Tribes, some open only to sport fishing, and some open to all fishing and all fishers—that are akin to the usual and accustomed grounds of the Pacific Northwest.

B. Wisconsin (Seventh Circuit)

> "Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in (the) country. It is hard to give up the lands. They will remain, and can not be destroyed but you may cut down the trees, and others will grow up. You know we can not live, deprived of our Lakes and Rivers; There is some game on the lands yet; and for that reason also, we wish to remain upon them, to get a living. Sometimes we scrape of the trees and eat of the bark. The Great Spirit above, made the Earth, and causes it to produce, which enables us to live."[303]

As in Michigan, Anishinaabe Tribes in Wisconsin reserved usufructuary rights when ceding land to the United States. As with both the Michigan Anishinaabe and the Washington Tribes, fishing is an important activity for the Wisconsin Anishinaabe, for both subsistence and cultural reasons. As in Michigan and Washington, Tribal leaders in what was to become Wisconsin stressed the importance of their usufructuary rights during treaty negotiations. As in Michigan and Washington, Anishinaabe in Wisconsin have historically engaged in both subsistence and commercial fishing. Additionally, wild rice is a culturally important resource, and wild rice beds can be analogized to fishing grounds because wild rice can only be harvested in fixed, discrete locations. Courts in Wisconsin built their interpretations of the treaties on the prior interpretations established by Michigan courts. And, as is the case for the Washington Tribes, the Anishinaabe in Wisconsin have a right to realize a moderate living from the exercise of their usufructuary rights which provides a legal basis for the application of the *Culverts Case*. This section describes the existence and extent of Ojibwe treaty rights, as interpreted by state and federal courts, in the place that is now called Wisconsin.

In what appears to be the first case on the issue, the District Court for the Western District of Wisconsin in 1901 held that state game laws did not apply to Tribal members fishing on the Bad River Reservation.[304] In 1908, however, the Supreme Court of Wisconsin held that state game

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[303] United States v. Bouchard, 464 F. Supp. 1316, 1323 (W.D. Wis. 1978), *rev'd sub nom.* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341 (7th Cir. 1983). Aish-ke-bo-gi-ko-she, an Ojibwe leader, made this statement during the 1837 treaty negotiations, after the United States' negotiator told the Ojibwe that the United States would not "buy[] land for a term of years," but would be willing to allow the Ojibwe to retain usufructuary rights on ceded lands.

[304] In re Blackbird, 109 F. 139 (W.D. Wis. 1901).

laws applied to Ojibwe fishing in Lake Superior because treaty fishing rights had been abrogated by statehood.[305]

The issue returned to the Wisconsin Supreme Court in 1972. In *State v. Gurnoe*, the court had to decide whether members of the Red Cliff and Bad River Bands retained fishing rights in Lake Superior under the Treaty of 1854, and if so, whether those rights could be regulated by the state.[306] The court noted the historical importance of fishing to the Lake Superior Ojibwe, and while a federal statute granted Wisconsin jurisdiction within the reservation, it explicitly excluded jurisdiction over the exercise of usufructuary rights.[307] The court reviewed the treaties and an 1850 Executive Order calling for the removal of Ojibwe Tribes from the territories ceded under the Treaties of 1837 and 1842 and concluded that the Removal Order had no effect on fishing rights retained under those treaties, particularly where those rights were reaffirmed in the 1854 treaty.[308] In concluding that the Bands retained the right to fish in Lake Superior, the court noted that the 1854 treaty was signed after Wisconsin's statehood and that a subsequent treaty can modify an earlier statute.[309] The court cited the Michigan Supreme Court's decision in *Jondreau* for its interpretation of how the Ojibwe would have understood the treaty at the time of signing, and held that the Ojibwe retained fishing rights in Lake Superior and that any state regulations must be reasonable and necessary for conservation.[310]

In 1978, the District Court for the Western District of Wisconsin made the first in a series of decisions that would come to define off-reservation treaty rights in Wisconsin. In *United States v. Bouchard*—one of the cases in a consolidated proceeding—the court was called on to determine whether the Lac Courte Oreilles Band of Ojibwe "have the right, pursuant to the treaties of 1837 and 1842, to hunt and fish on non-reservation lands in northern Wisconsin free from State regulation."[311]

The court analyzed the history of the treaty negotiations, noting the repeated statements made by Tribal leaders regarding the importance of hunting, fishing, and gathering, and the promises made by the U.S. negotiators that the Ojibwe would be permitted to remain on the ceded

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[305] State v. Morrin, 117 N.W. 1006 (Wis. 1908).
[306] State v. Gurnoe, 192 N.W.2d 892, 893 (Wis. 1972).
[307] *Id.* at 894, 896. The statute in question, Public Law 280, codified at 18 U.S.C. § 1162, was part of the federal termination policy. *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256, 265 (D.D.C. 1972).
[308] *Gurnoe*, 192 N.W.2d at 900. For an in-depth discussion of the 1850 Removal Order, *see* Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172, 202 (1999), *infra* Part V.C.
[309] *Gurnoe*, 192 N.W.2d at 900–901.
[310] *Id.* at 901–902. The Court also limited treaty fishing to those methods which were used by the Ojibwe in 1854. A few years later, however, the District Court for the Eastern District of Wisconsin held that "fishing methods, whether modern or aboriginal, are protected by the 1854 treaty." Peterson v. Christensen, 455 F. Supp. 1095, 1099 (E.D. Wis. 1978). Ten years after the *Gurnoe* decision, the Wisconsin Court of Appeals applied *Gurnoe* to inland lakes adjacent to a reservation. State v. Lowe, 327 N.W.2d 166 (Wis. Ct. App. 1982). The Wisconsin Court of Appeals has also held that closing an area of Lake Superior to all commercial—but not sport—fishing, is a reasonable and necessary regulation that is not discriminatory. State v. Newago, 397 N.W.2d 107 (Wis. Ct. App. 1986).
[311] United States v. Bouchard, 464 F. Supp. 1316, 1322 (W.D. Wis. 1978), *rev'd sub nom.* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341 (7th Cir. 1983). As happened in Washington and Michigan, Tribal members in the 1960s and '70s began directly challenging state fish and game laws in a direct assertion of their treaty-protected rights.

lands.[312] The court also considered the 1850 Removal Order, noting that the understanding of the Ojibwe was that they would only be removed if they caused conflict with white settlers.[313] Based on this evidence, the court concluded that "the removal order of 1850 was not authorized by the treaties of 1837 or 1842, was beyond the scope of the President's powers, and was without legal effect."[314] However, the court concluded that Ojibwe acceptance of reservations pursuant to the Treaty of 1854 terminated the usufructuary rights that had been retained in the 1837 and 1842 treaties, and thus the Lac Courte Oreilles Band had no such rights outside of the reservation boundaries.[315]

Five years later, the Seventh Circuit overturned the *Bouchard* decision in an opinion that is commonly referred to as the *Voigt Decision* or *LCO I*.[316] The Seventh Circuit recounted the facts developed in *Bouchard*, emphasizing that the United States first tried to persuade the Ojibwe to voluntarily remove—the Ojibwe resisted—and then tried coercing the Ojibwe to remove, with disastrous results.[317] In analyzing the Treaty of 1854, the court noted that signatory Bands located in the Minnesota Territory explicitly reserved usufructuary rights in the area ceded in that treaty, and that the Wisconsin Bands continued to hunt, fish, and gather throughout the ceded territories even after reservations were established.[318] The Seventh Circuit then outlined the canons of construction, noting that they apply not only to treaties but also to "act[s] of Congress that purport[] to extinguish treaty rights."[319] Because treaty-recognized usufructuary rights "depend neither on title nor right of permanent occupancy,"[320] the court declared that such rights could only be terminated by an explicit congressional statement or by an implicit congressional statement if the legislative history and surrounding circumstances clearly evidence an intent to abrogate the treaty rights.[321]

As in most treaty cases, the Seventh Circuit's decision turned on specific language; in the 1837 treaty, usufructuary rights were guaranteed "during the pleasure of the President," and the 1842 treaty recognized such rights "until required to remove by the President."[322] The Seventh

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[312] See *id.* at 1322–24. Furthermore, the primary purpose of the 1842 treaty was to secure for the U.S. a mineral district, particularly for copper and iron ore, rather than to simply secure land for settlement.
[313] *Id.* at 1327–28. For an in-depth discussion of the 1850 Removal Order, *see Mille Lacs III*, 526 U.S. at 172. *See also infra,* Part V.C.
[314] *Bouchard*, 464 F. Supp. at 1350.
[315] *Id.* at 1352, 1361.
[316] *LCO I*, 700 F.2d at 341.
[317] *Id.* at 344–47. In the late fall of 1850, in an effort to entice the Ojibwe to remove from Wisconsin, annuity payments were to be made at Sandy Lake, MN, rather than at La Pointe on Madeline Island, near what are now the Red Cliff and Bad River reservations. After waiting six weeks for the annuity payments to arrive, a three-day supply of food arrived in early December. Over 150 Ojibwe died from disease while waiting at Sandy Lake, and another 250 died on the return journey. Known as the Sandy Lake Tragedy, this event strengthened the resolve of the Ojibwe to never be removed from their homelands and spurred the Wisconsin Legislature to petition the President and Congress to allow the Ojibwe to remain in Wisconsin. *See* Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs I*), 861 F. Supp. 784, 805 (D. Minn. 1994); GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, SANDY LAKE TRAGEDY & MEMORIAL, www.glifwc.org/publications/pdf/SandyLake_Brochure.pdf. The Indian Agent for La Pointe remarked that the Ojibwe would "sooner submit to extermination" than be removed. *LCO I*, 700 F.2d at 348.
[318] *LCO I*, 700 F.2d at 348–49. While the 1854 treaty established permanent reservations for the Bands in the western portion of Michigan's Upper Peninsula (ceded in 1842), northern Wisconsin (ceded in 1837 and 1842), and northeastern Minnesota, it did so in exchange for the cession of the "arrowhead" region of Minnesota.
[319] *Id.* at 350–51.
[320] *Id.* at 352.
[321] *Id.* at 354.
[322] *Id.* at 355, 345.

Circuit, looking to the *Fox Decision* and *LeBlanc* for guidance, concluded that the Ojibwe leaders who signed the treaties would have understood that their rights could only be terminated if they were to harass white settlers, and thus abrogation for any other reason required express congressional intent.[323] Following this reasoning, the Seventh Circuit conducted a historical analysis, noting that "every crime of any magnitude which has been committed may be traced to the influence of the white man" and reached the same conclusion as the district court: "the 1850 [Removal] Order exceeded the scope of the 1837 and 1842 treaties and was therefore invalid."[324]

The Seventh Circuit reached a different conclusion on the meaning of the Treaty of 1854. Unlike the district court, the Seventh Circuit noted that silence in the 1854 treaty should not be construed to the Ojibwe's prejudice, particularly where they had explicitly reserved usufructuary rights in prior treaties.[325] The court noted that "the United States was well able to draft an explicit statement abrogating such rights" and concluded that the Lac Courte Oreilles Band's usufructuary rights were not terminated by the 1854 treaty, reversing the district court's decision.[326] The court limited its holding to public lands, declaring that usufructuary rights had been extinguished on land that was privately owned.[327]

In 1987, after the other Ojibwe Bands in Wisconsin intervened, the district court made determinations on several additional issues, including what types of activities Tribal members could engage in, the uses to which Tribal members could put harvested resources, and the boundaries within which Tribal members could conduct the activities.[328] The court found that the

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[323] *Id.* at 358.
[324] *Id.* at 361–62.
[325] *Id.* at 363.
[326] *Id.* at 364–65.
[327] *Id.* at 365. When the matter came back to the Seventh Circuit two years later, the court clarified that land which passed into private ownership and subsequently returned to public ownership would be open to the exercise of usufructuary rights, and that the exercise of such rights may be subject to some state regulation. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO II*), 760 F.2d 177 (7th Cir. 1985). Note the contrast between this limitation in *LCO I* and the holding in *Winans*. There may be more than one reason why the court limited its holding to public lands. First, unlike in *Winans*, the District Court in *Bouchard* largely focused on hunting, rather than fishing rights. United States v. Bouchard*,* 464 F. Supp. 1316, 1359–60 (W.D. Wis. 1978). The court may have been more reluctant about finding a reserved easement, given that the result would have been people carrying guns, rather than fishing poles and nets, across private lands. While fishing can be safely conducted in residential areas, hunting in residential areas poses a threat to public health and safety. Second, although the language "until the land is required for settlement" is not found in the 1837 treaty—the Treaty of 1836 included that language—the court in *Bouchard* found that the Ojibwe understood settlement to be the purpose of the treaty. *Id.* at 1359. The Seventh Circuit also emphasized that language when discussing the *LeBlanc* and *Fox* decisions. *LCO I,* 700 F.2d at 357, 365, n. 14. Lastly, unlike *Winans*, the treaty rights in this case were not limited to discrete locations, such as "usual and accustomed grounds," and therefore an implied easement would encumber the entire ceded territory. This outcome highlights the importance of the purpose, specific language, and Indian understanding of a specific treaty.
[328] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO III*), 653 F. Supp. 1420, 1423 (W.D. Wis. 1987). The Ojibwe bands with reservations in Wisconsin are the Red Cliff, Sokaogon (Mole Lake), Bad River, Lac du Flambeau, Lac Courte Oreilles, and St. Croix Bands of Ojibwe. The court was also asked to determine the allocation between Tribal members and nonmembers, as well as the state's authority to regulate. The court deferred on the allocation issue and held that state regulation which was reasonable and necessary for conservation was acceptable*. Id.* at 1435. The court held as an open question, to be determined at a later trial, "[w]hether state regulatory power extends to measures reasonable and necessary to the safety of all persons possibly affected by inconsistent uses of public lands." *Id.*

Ojibwe were engaged in both subsistence and commercial harvesting prior to signing the treaty.[329] In interpreting the Ojibwe's understanding of the treaties of 1837 and 1842, the court stated:

> "They were guaranteed the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living."[330]

Declaring simply that the Ojibwe Bands "enjoy greater rights to hunt, fish, and gather in the ceded territory than do non-Indians," the court held that the Bands have the right to use all of the resources that they had used at the time of the treaty signing, that they may harvest such at any time, and that the Ojibwe were not limited to traditional hunting and fishing methods or gear when exercising their treaty rights.[331] The Ojibwe Bands have a right to harvest for both subsistence and commercial purposes and, the court further held, if the Ojibwe Bands were able to prove that the exercise of usufructuary rights on private lands was necessary to achieve a moderate living, they would have a right to harvest on both private and public lands throughout the ceded territory.[332]

Later that same year, the court addressed the issue of state regulation, holding that state regulation was confined to "the least restrictive alternative available to accomplish its conservation purposes."[333] However, while the court held that the state had the power to regulate, the court also held that state regulation would be precluded by "effective tribal self-regulation of a particular resource or activity."[334] This holding reaffirmed Tribal authority to enact regulations governing

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[329] *Id.* at 1424. The court also noted the difference between the Ojibwe economic system and the European-American economic system: "As among Chippewa members, the Chippewa economy was a system of reciprocity. An important element of this system was sharing. The scarcer a resource became, the more willing the Chippewa were to share it. Another important aspect of their economy was that it lacked the profit incentive integral to western capitalism. The motive for the Chippewa in their working lives was to satisfy their immediate needs rather than to accumulate material goods and surpluses of food." *Id.* at 1425.

[330] *Id.* at 1426.

[331] *Id.* at 1429–30.

[332] *Id.* at 1430, 1432.

[333] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO IV*), 668 F. Supp. 1233, 1236 (W.D. Wis. 1987). The court also held that while the state could not regulate for every purpose, it could—in addition to regulating for conservation—"regulate the tribes' off-reservation treaty rights in the interest of public health and safety, 'provided the regulation meets appropriate standards and does not discriminate against the Indians.'" *Id.* at 1238–39 (quoting Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 398 (1968)). Such regulations were required to meet a three-part test: "First, the state must demonstrate that there is a public health or safety need to regulate a particular resource in a particular area. This requires a showing by the state that a substantial detriment or hazard to public health or safety exists or is imminent. Second, the state must show that the particular regulation sought to be imposed is necessary to the prevention or amelioration of the public health or safety hazard. And third, the state must establish that application of the particular regulation to the tribes is necessary to effectuate the particular public health or safety interest. Moreover, the state must show that its regulation is the least restrictive alternative available to accomplish its health and safety purposes." *Id.* at 1239. The court again deferred on the allocation issue, deciding that "[i]n the absence of any necessity for allocation, the tribes are not restricted to a moderate living as an upper limit on their take." *Id.* at 1240.

[334] *Id.* at 1241.

the off-reservation exercise of usufructuary rights by Tribal members and to enforce such regulations, provided that they did not directly conflict with state regulations.[335] The following year, the court addressed the moderate living standard in a separate opinion. Notably, after conducting an economic analysis, the court concluded that the Bands "have proven that they could not achieve this standard even if they were permitted to harvest every available resource in the ceded territory and even if they were capable of doing so."[336] Thus the moderate living standard imposed no limit on the amount of resources Tribal members could harvest. In 1989, the court again addressed Tribal regulation of off-reservation treaty harvests, holding that if the Tribes enacted regulations Wisconsin deemed reasonable and necessary, the state could not regulate off-reservation treaty harvests of walleye and muskellunge.[337] The court noted that Wisconsin's management goals were balanced with—and did not outweigh—the Tribes' treaty-protected harvest rights. [338]

As in Washington and Michigan, the white backlash to Tribal exercise of treaty rights was swift and violent. After the decision in *LCO I* , Tribal members began reviving a traditional fishing method that involved spearfishing walleye with torches at night, which was prohibited under state regulation.[339] White Wisconsin residents began gathering at the boat landings in protest and engaged in such conduct as assaulting Tribal members, hurling stones at Tribal fishers, hurling vile and virulent racial insults, damaging vehicles of Tribal members, publicly threatening Tribal members with violence and sexual assault, and circling the boats of treaty fishers at high speeds in an effort to both interfere with their ability to see walleye and to swamp their boats.[340] When the Tribe filed for an injunction—after five years of harassment—the district court concluded that "[the protestors'] own statements leave no doubt that much of the anti-spearing campaign is driven

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[335] *Id.* at 1242. The court further provided that to preclude state regulation, Tribal regulation must "adequately address legitimate state concerns in the areas of conservation of resources and public health and safety," and must include "effective enforcement mechanisms," a form of identification for Tribal members exercising usufructuary rights, and "a full exchange of relevant information between the plaintiff tribes and the state, including the exchange of scientific and management information as well as data on the harvest of any given resource in any given geographic area."

[336] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO V*), 686 F. Supp. 226, 227 (W.D. Wis. 1988).

[337] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VI*), 707 F. Supp. 1034, 1055 (W.D. Wis. 1989). The court also held that the state had the burden of proving that regulation of the treaty harvest was reasonable and necessary, and non-discriminatory. *Id.* at 1054–55. The court further stated that Wisconsin could only regulate treaty fishing if "conservation goals cannot be met by regulating the harvest of non-Indians." *Id.* at 1057–58.

[338] *Id.* at 1058. Declaring that the Tribes had "the right to take the full safe harvest of walleye and muskellunge from any lake they select" by any treaty-protected harvest method, the court enjoined Wisconsin from interfering with Tribal regulation of Tribal harvests of those species, provided that the Tribes enacted a management plan based in "biologically sound principles necessary for the conservation of the species being harvested. *Id.* at 1059–60. Two years later, Judge Barbara Crabb entered the final judgment in the then 13-year-old litigation, compiling the holdings of all the previous LCO rulings into one order. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO VII*), 775 F. Supp. 321 (W.D. Wis. 1991), *rev'd,* Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Wisconsin (*LCO VIII*), 769 F.3d 543 (7th Cir. 2014).

[339] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 759 F. Supp. 1339, 1343 (W.D. Wis. 1991).

[340] *Id.* at 1344–46.

by racial hostility toward Indians,"[341] and the Seventh Circuit, on appeal, declared that "the stench of racism is unmistakable."[342]

Nevertheless, after a lengthy court battle with the state and a short but vicious battle with the "deep-seated racism that existed in northern Wisconsin,"[343] the Ojibwe bands residing in what is now Wisconsin secured a reaffirmation of the rights to hunt, fish, and gather that they had explicitly retained 150 years prior and had exercised since time immemorial. Throughout the territory that the Ojibwe ceded in 1837 and 1842, their descendants have rights to hunt, fish, and gather, and those rights cannot be infringed on by the state so long as the Tribes enact and enforce all reasonable and necessary regulations.

C. Minnesota (Eighth Circuit)

"We would like to remain at Mille Lac. . . . We are perfectly satisfied to live where we are. We have some good land for farming purposes. We also have fish in the lakes, Wild Rice and game in abundance—And we make plenty of sugar."[344]

As in Michigan and Wisconsin, Anishinaabe Tribes in Minnesota reserved usufructuary rights when ceding land to the United States. As with the Michigan and Wisconsin Anishinaabe, and the Washington Tribes, fishing is an important activity for the Minnesota Anishinaabe for both subsistence and cultural reasons. As is the case with the other aforementioned Tribes, Anishinaabe in Minnesota stressed the importance of their usufructuary rights during treaty negotiations.[345] They have similarly engaged in both subsistence and commercial harvesting of fish. Again, wild rice is a culturally important resource for the Minnesota Anishinaabe, central to many of those Tribes. As was the case in Wisconsin, courts in Minnesota built their interpretations of the treaties on the prior interpretations established by earlier courts. Additionally, like the creation of reservations for the Pyramid Lake Paiute and Spokane discussed in Part IV above, one of the purposes of the treaties with the Minnesota Anishinaabe was to allow those Tribes to continue their pursuits of a traditional lifestyle. As is the case in Michigan and Wisconsin, these similarities provide a basis by which courts can apply the *Culverts Case* and other precedent. This section analyzes the interpretation that state and federal courts in what is now Minnesota have given treaty-protected usufructuary rights.

Early cases sought to affirm treaty rights to hunt, fish, and gather both on reservation and in areas that were formerly part of a reservation. In *Leech Lake v. Herbst*, the Leech Lake Band of Chippewa sought a declaratory judgment establishing their right to hunt, fish, and harvest wild

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[341] *Id.* at 1349.

[342] Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 991 F.2d 1249, 1263–64 (7th Cir. 1993).

[343] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 843 F. Supp. 1284, 1294 (W.D. Wis. 1994), *aff'd*, 41 F.3d 1190 (7th Cir. 1994).

[344] Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs I*), 861 F. Supp. 784, 819–20 (D. Minn. 1994). In the years after the signing of the 1855 treaty, white settlers continually encroached on the Mille Lacs reservation. Interracial tensions were especially exacerbated by Dakota and Ojibwe uprisings in Minnesota in 1862, and although the Mille Lacs Band refused to participate in the uprisings, the United States began discussing removal of the Mille Lacs Band to the newly established White Earth Reservation. In 1877, Shaboshkung, a leader of the Mille Lacs Band, informed the Commissioner of Indian Affairs of the Band's intent to stay at Mille Lacs; this quote is from Shaboshkung's statement.

[345] *Id.* at 795, 799, 814.

rice free from state regulation within the boundaries of the Leech Lake Reservation.[346] The Federal District Court for the District of Minnesota court held that those rights had been affirmed in the Treaty of 1855 that created the reservation, and while the state claimed those rights had been abrogated by a later congressional statute, the Tribe's on-reservation usufructuary rights had not been abrogated and were thus free from state regulation.[347] However, in a later case involving the Red Lake Reservation, the court held that the same statute, which involved a cession of land at Red Lake (the statute did not involve land cession at Leech Lake), abrogated the Red Lake Band's usufructuary rights in the areas ceded.[348] And in one of the few cases interpreting pre-1836 treaties with the Ojibwe, the Supreme Court of Minnesota held that treaties signed in 1795 and 1825 did not establish treaty-protected usufructuary rights.[349]

In 1990, the Mille Lacs Band of Chippewa Indians filed the complaint in a case that would ultimately bring the issue of Ojibwe usufructuary rights to the United States Supreme Court.[350] As the courts in Michigan and Wisconsin had done, the District Court for the District of Minnesota delved into the history of the relevant treaties; here, the 1837 and 1842 treaties.[351] The court also analyzed the history of the 1850 Removal Order[352] and the government actions that were taken contemporaneous with and immediately subsequent to that order. The court ultimately found that "the 1850 executive order was suspended and that it never applied to the Mille Lacs Band."[353] The Removal Order, issued by President Zachary Taylor in 1850, declared that:

> "[t]he privileges granted temporarily to the Chippewa Indians of the Mississippi [in the 1837 treaty] 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States . . . are hereby

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[346] Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).
[347] *Id.* at 1006. The statute in question was the Nelson Act of 1889, which was part of the federal allotment policy that sought to end Tribal practices of communal land ownership and parcel the land to individual owners.
[348] United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom*. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980). The Red Lake Band was not signatory to the 1855 treaty that established the Leech Lake Reservation; the Red Lake Reservation was established by a separate treaty in 1863.
[349] State v. Keezer, 292 N.W.2d 714 (Minn. 1980). This holding was applied by the Minnesota Court of Appeals in 2019. State v. Northrup, No. A19-0130, 2019 WL 6838485 (Minn. Ct. App. Dec. 16, 2019). While the Minnesota Supreme Court in *Keezer* also held that no off-reservation usufructuary rights existed anywhere in the state, that holding has been abrogated by *Mille Lacs*, *infra*. However, *Northrup* distinguished *Mille Lacs* on the proposition that because the earlier treaties were not land cession treaties, they merely recognized aboriginal rights and did not create treaty-reserved rights, and therefore any usufructuary rights were extinguished along with aboriginal title pursuant to the Treaty of 1855. Because the areas ceded in the treaties of 1836, 1837, 1842, and 1854 have been interpreted by multiple courts as establishing treaty-protected off-reservation usufructuary rights, the treaties of 1795 and 1825 would only be relevant in the areas that were covered by those treaties but not by the four later treaties. *See* Figure 1, *supra*, for a delineation of the ceded territories of the 1836, 1837, 1842, and 1854 treaties.
[350] Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994), *aff'd*, Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom.* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).
[351] *Id.* at 793–801. Because the treaties were signed before the creation of the states, the ceded territories do not align with state boundaries. Therefore, the court analyzed the same treaties that the District Court for the Western District of Wisconsin and the Seventh Circuit analyzed in the LCO cases. *See* Part V.B, *supra*.
[352] *Id.* at 803–11.
[353] *Id.* at 810–11.

> revoked; and all of the said Indians remaining on the land ceded aforesaid, are required to remove to their unceded lands."[354]

The Ojibwe strongly opposed the Removal Order and, although the government took steps to coerce the Ojibwe's acquiescence to removal,[355] it was never enforced.[356]

Rather than following through with the policy of removal, in 1854 the government negotiated a treaty for the cession of the remaining unceded Lake Superior Ojibwe Bands' lands in exchange for permanent reservations within the ceded territories.[357] The following year, in 1855, the federal government also signed a treaty with the Ojibwe Bands that lived away from Lake Superior in the interior of what is now Minnesota, referred to as the Ojibwe of the Mississippi.[358] Because the court had to determine if the 1855 treaty abrogated the usufructuary rights that had been reserved in the 1837 treaty, the court also took a deep dive into the history behind the earlier treaty.[359] Noting that the 1855 treaty provided for equipment—such as guns and traps—that could only be used if the Bands were exercising usufructuary rights, the court concluded that "neither the Chippewa nor the United States intended to extinguish the 1837 privilege in the 1855 treaty."[360] The court further noted that "at the same time the 1855 treaty was negotiated, the Mille Lacs Band was fighting to protect its wild rice crops. This indicates that the Band continued to rely on gathering to survive."[361]

In rejecting the state's arguments, the court relied heavily on the Seventh Circuit's analysis in *LCO I* of the relationship between the language "during the pleasure of the President" and the 1850 Removal Order, concluding that "[n]ot only is *Lac Courte Oreilles* convincing authority, but study of the much more complete record available in this case after a lengthy trial leads to the same conclusions."[362] The court noted that Congress—not the President—has plenary power over Indian Affairs and that "[o]nly Congress can abrogate an Indian treaty right by expressing that intention clearly and plainly."[363] Because Congress had not expressly acted, "[t]he 1850 executive order was not authorized by Congress or by the 1837 treaty and was therefore unlawful."[364]

While the state argued that the 1855 treaty abrogated off-reservation usufructuary rights, the court responded by noting that according to the Supreme Court"[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[365] Quoting *LCO I*, the court stated that usufructuary rights could only be extinguished by

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[354] *Id.* at 803–04.
[355] *See* GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, *supra* note 317 (discussing the Sandy Lake tragedy).
[356] *Mille Lacs I,* 861 F. Supp. at 810. "In June of 1852 Benjamin Armstrong accompanied a delegation of Chippewa led by Chief Buffalo to Washington, D.C. to urge President Fillmore to give them a document expressly canceling the 1850 executive order." *Id.* at 807. "In 1853 President Franklin Pierce took office. The Pierce administration replaced the removal policy with a policy of creating reservations for the Chippewa on lands ceded in earlier treaties." *Id.* at 808.
[357] *Id.* at 811.
[358] *Id.* at 812–13. While the 1855 treaty established the Mille Lacs Reservation, the Mille Lacs Band did not appear to have a representative at the treaty negotiations. *Id.* at 815, 812–13.
[359] *Id.* at 812–18.
[360] *Id.* at 817.
[361] *Id.* at 818.
[362] *Id.* at 823.
[363] *Id.* at 824.
[364] *Id.* at 826.
[365] *Id.* at 830 (quoting United States v. Dion*,* 476 U.S. at 739–40.)

the 1855 treaty if that treaty "'expressly refers to termination of the usufructuary rights or if the circumstances and legislative history surrounding the treaty make clear that Congress intended such an abrogation.'"[366] Noting the continued importance of traditional usufructuary activities to "the culture, lifestyle, and economy of Band members,"[367] and that the United States was capable of drafting language explicitly extinguishing usufructuary rights,[368] the court held that the 1855 treaty did not extinguish usufructuary rights in the 1837 ceded territory.[369]

Three years later, after the Wisconsin Bands of Ojibwe intervened, and after the case was consolidated with a separate case brought by the Fond du Lac Band, the court addressed the application of several state regulations to treaty harvesters and the issue of resource allocation.[370] Unlike other courts, the Minnesota District Court rejected the moderate living standard, holding that "the threshold issue is not whether the Bands have achieved a moderate standard of living, but what was the purpose and intent of the treaty, and what amount of resources are needed to fulfill such purpose and intent."[371] The court found that the purpose of the 1837 treaty "was to guarantee the Bands the right to continue a way of life based on hunting, fishing and gathering, and that such right is limited by the right of non-Indian harvesters to a fair share."[372] On a consolidated appeal, the Eighth Circuit affirmed the district court's decisions.[373]

In 1999, the case became the first modern case involving Anishinaabe usufructuary rights to reach the United States Supreme Court. In *Mille Lacs*, the Supreme Court affirmed the decisions

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[366] *Id.* at 830–31 (quoting Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 362 (7th Cir. 1983)).
[367] *Id.* at 831.
[368] *Id.* at 832.
[369] *Id.* at 833. Just as the court in the LCO cases had done, the court here limited the exercise of usufructuary rights to land that was open to the public for hunting and fishing, because the treaty language did not include a right of access. *Id.* at 836. Also, as courts in Michigan and Wisconsin had found, the court here found that the treaty allowed harvest for subsistence and commercial purposes, that Tribal harvesting was not limited to "any particular techniques, methods, devices, or gear," and that the state could only regulate if such regulations were reasonable and necessary and did not discriminate against treaty harvesters. *Id.* at 838. The court further held that the state could not regulate "if the Band can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs." *Id.* at 839.
[370] *See* Mille Lacs Band of Chippewa Indians v. Minnesota (*Consolidated Case*), 952 F. Supp. 1362 (D. Minn. 1997*), aff'd*, Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom.* Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172 (1999). The court had previously held that all bands who were signatory to the Treaty of 1837 had the right to harvest throughout the entire ceded territory, regardless of state boundaries. *Mille Lacs Band v. Minnesota*, Case No. 3-94-1226 (D. Minn. March 29, 1996) (unpublished decision). The Fond du Lac Band was signatory to the 1837 and 1854, rather than 1855, treaties. The court held that the Fond du Lac band retained usufructuary rights throughout both the 1837 and 1854 ceded territories. *Fond du Lac Band of Chippewa Indians v. Carlson,* No. 5-92-159 (D. Minn. Mar. 18, 1996) (unpublished decision). On the issue of state regulation, the court held that "the State's power to regulate Indian treaty rights is very narrow;" because the state is constrained by the Tribes' treaty rights, state regulation is only allowed if extinction of a species is imminent. *Consolidated Case*, 952 F. Supp at 1382. Even if state regulations meet the appropriate standards, the court held that the state was barred from regulating if the Tribe is able to "effectively self-regulate and the tribal regulations are adequate to meet conservation needs." *Id.* at 1384. The court also refused to order an allocation of resources, holding that "allocation is proper only when substantial or irreparable damage occurs to the right to harvest resources in light of the treaty." *Id.* at 1387.
[371] *Id.* at 1393.
[372] *Id.*
[373] *Mille Lacs II*, 124 F.3d at 904.

of the lower courts.[374] The Court agreed with the lower courts that the 1850 Removal Order had not been authorized by any act of Congress or by the terms of the 1837 treaty.[375] Analyzing language in the 1855 treaty that relinquished "all right, title, and interest . . . in, and to any other lands in the Territory of Minnesota," the Court noted that the treaty was "devoid of any language expressly mentioning—much less abrogating—usufructuary rights" and stated that "[t]hese omissions are telling."[376] Notably, the same Commissioner who negotiated the 1855 treaty negotiated another treaty in 1855 that "expressly revoked fishing rights that had been reserved in an earlier treaty."[377] Applying the canons of construction, the Court held that the language in the 1855 treaty "did not extinguish usufructuary rights, but rather it extinguished Chippewa land claims that [the Commissioner] could not describe precisely."[378] The Court also noted that just one year prior, the United States had negotiated a treaty with the Ojibwe that "expressly secure[d] *new* usufructuary rights."[379] The Court distinguished prior precedent involving similar language of relinquishment by noting that the "usufructuary rights under the 1837 Treaty existed independently of land ownership."[380]

The Court also addressed Minnesota's argument that the treaty rights were abrogated upon statehood. This argument was premised on *Ward v. Race Horse*, a case from 1896, where the Supreme Court had held that the creation of the state of Wyoming abrogated all treaty-protected usufructuary rights within that state.[381] The Court refuted this argument, distinguishing *Race Horse* by noting that subsequent cases have found that treaty rights are not incompatible with statehood and that, in some instances, state regulation of off-reservation usufructuary rights will be permissible.[382] In conclusion, the Court affirmed the holdings of the lower courts and held that neither the 1850 Removal Order, the 1855 treaty, nor Minnesota statehood terminated the usufructuary rights reserved by the Ojibwe in the 1837 treaty, and thus those rights, largely free from state regulation, exist to the present day.

D. Summary of Anishinaabe Usufructuary Rights

As noted in Parts III and IV above, the argument that treaty-protected usufructuary rights include a right to habitat is not a new or novel argument. While courts have been leery of accepting that argument in the abstract, courts have frequently reaffirmed the right to habitat protection as a

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[374] *Mille Lacs III*, 526 U.S. at 172.
[375] *Id.* at 190.
[376] *Id.* at 195.
[377] *Id.*
[378] *Id.* at 199.
[379] *Id.* (emphasis in original).
[380] *Id.* at 201. For a discussion of that precedent, Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), *see supra*, note 207 and associated text.
[381] *See* Ward v. Race Horse, 163 U.S. 504 (1896). While *Mille Lacs* did not expressly overrule *Race Horse*, the Supreme court has since repudiated the notion that treaty rights can be implicitly abrogated by statehood. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).
[382] *Mille Lacs III*, 526 U.S. at 204–05. In *United States v. Gotchnik*, the Minnesota District Court held that although Tribal members had a treaty right to fish in in the Boundary Waters Canoe Area Wilderness, federal regulations prohibiting the use of all motor vehicles were reasonable and necessary conservation measures and thus applied to treaty harvesters and non-treaty harvesters alike. *See* United States v. Gotchnik, 57 F. Supp. 2d 798 (D. Minn. 1999), *aff'd*, 222 F.3d 506 (8th Cir. 2000). However, regulations prohibiting the use of all motorized equipment (in this case, a powered ice auger) could not be applied to treaty fishers because the usufructuary rights were not limited to aboriginal equipment. The court thus distinguished between technology used for travel (not protected by treaty) and technology used to exercise the treaty right (protected).

component of treaty rights when that argument is proffered in the context of a fact-specific controversy. As highlighted in Parts V.A through V.C, there are significant similarities between the courts' interpretations of the treaties in Anishinaabe Akiing and those in western Washington. In both Michigan and Washington, courts have affirmed that the signatory Tribes understood the treaties to protect their usufructuary rights from the date of signing in perpetuity. Courts in Washington, Michigan, Wisconsin, and Minnesota have affirmed Tribes' rights to engage in both subsistence and commercial fishing while emphasizing the centrality of that activity to those cultures. Unlike the treaties with Tribes in Washington, treaties with the Anishinaabe do not include "usual and accustomed places" language, although the Sixth Circuit has read that language into the 1836 treaty as it pertains to traditional fishing grounds in the Great Lakes. Moreover, the zonal allocation plan followed by Michigan only strengthens the comparison between usual and accustomed fishing grounds and those in the Great Lakes. In Wisconsin, courts have applied the moderate living standard to Anishinaabe usufructuary rights, just as courts have done in Washington. Courts in Wisconsin and Washington have rejected state action that would infringe on the ability of Tribes to attain a moderate living, and courts in Washington, Michigan, Wisconsin, and Minnesota have rejected state regulation that would inhibit Tribal members from exercising their treaty-protected rights.

Additionally, courts in Michigan and Minnesota have stressed the importance—in the creation of reservations and the negotiation of the treaties—of the Tribes' ability to engage in traditional activities and lifestyles, just as the courts discussed in the cases involving the Pyramid Lake Paiute and Spokane Tribes. In both of those cases, the courts relied on that factor in affirming the rights that those Tribes had to the protection of fish habitat. Because of those similarities, it would not be a stretch for a court in the Upper Great Lakes region to reach the same conclusion: Tribal fishing rights include the right to the protection of habitat for those fish. While Tribes in the Pacific Northwest do not have treaty-protected rights to harvest wild rice, usufructuary rights are usufructuary rights, and the arguments for the protection of fish habitat are equally applicable to the arguments for protections of wild rice habitat. Indeed, wild rice beds are just as fixed and discrete in location as are usual and accustomed fishing grounds and stations.

While these treaties are not identical in language, they are similar in the rights that Tribes reserved. They are also similar in the interpretations that the courts have given them. This summary highlights similarities and differences between these sets of treaties, providing a legal basis by which courts in the Great Lakes region can apply the *Culverts Case* to Anishinaabe Akiing.

VI. Applying *United States v. Washington* to Anishinaabe Akiing

The *Culverts Case*, as well as other precedent, demonstrates that habitat protection is a component of treaty rights. In this Part, I apply the *Culverts Case* and prior precedent to the water-based, treaty-protected resources in the Upper Great Lakes region, namely fish and wild rice. As noted above, *United States v. Washington* requires a fact-specific dispute rather than imposing a broad right to habitat protection.[383] To develop this narrow, fact-specific inquiry, I interviewed five individuals who work with Tribes on treaty resource issues to identify specific threats to

[383] *See supra* Part III.F through Part III.I.

treaty-protected, water-based resources in the Upper Great Lakes region.[384] The two most important water-based treaty resources are fish and wild rice (manoomin). These interviews are important for three reasons. First, the interviews provide concrete facts and specific threats to which I can apply *United States v. Washington* and other precedent. Second, they include the voices of people who deal directly with these issues, provide a real-world connection to the analysis provided in this paper, and ensure that an Indigenous perspective is included. Lastly, one of the goals of this paper is to provide a resource that may help Tribes and Tribal advocates dealing with these issues. By interviewing people who are involved with the regulation of usufructuary rights and including their concerns about existing threats to the habitat of water-based, treaty-protected resources, the analysis can be tailored to reflect the actual issues that are likely to arise in future litigation concerning habitat protection as a treaty right in the Great Lakes region. While the issue of habitat protection as a treaty right has not been litigated in the Upper Great Lakes region, there are several potential avenues for advocacy on this issue.

There are multiple threats to fish and wild rice throughout the region. A major threat that the interviewees were concerned with is mining, both historic and proposed. Legacy disposal of mine wastes has long lasting impacts. For example, stamp sands near Gay, Michigan, threaten to envelop Buffalo Reef, which is a spawning ground for both lake trout and whitefish in Lake Superior.[385] These stamp sands—legacy waste from copper mining in Michigan's Keweenaw Peninsula—cover over 1,000 acres of shoreline and lakebed. If these stamp sands continue to migrate and cover Buffalo Reef, the Lake Superior fishery—both recreational and commercial—will be greatly diminished.

Mining is also a threat on inland lakes. Discharge from current mining operations—as well as from mining wastes—has the potential to negatively impact the water that both fish and wild rice rely on. As one interviewee noted, perfectly pure water can be just as harmful as acid mine drainage, because it upsets the natural chemical and biological balance of the water into which it is being discharged. Mining of both iron and sulfide ores has the potential to disrupt the habitat of fish and wild rice and is pervasive throughout the area due to sulfide copper, copper ore, and iron ore deposits. One problem caused by mining is sulfate pollution, which negatively affects wild rice. High levels of sulfate reduce the ability of wild rice to flourish.[386] Increased sulfate concentrations in water are a common result of mining discharges, and among the concerns identified by interviewees are proposals to loosen Minnesota's sulfate standards—which are currently protective of wild rice—and inadequate enforcement of existing sulfate standards.[387]

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[384] These individuals are scientists, lawyers, and policy analysts who work with Tribes and Tribal organizations in the Great Lakes region on hunting, fishing, and gathering issues. The interviews were conducted pursuant to ASU IRB Approval, STUDY00011400. For research involving human subjects, Native Americans are considered a vulnerable population due to historical abuses. For these reasons, the interviews were conducted on the condition of anonymity.

[385] *See Saving Buffalo Reef*, MICHIGAN DEP'T OF NAT. RES, https://www.michigan.gov/dnr/0,4570,7-350-79136_79236_80245_85494---,00.html (last visited Apr. 10, 2021); *Gay Stamp Sands*, MICHIGAN TECH. RESEARCH INST., https://mtri.org/stampsands.html (last visited Apr. 10, 2021).

[386] *See, e.g.,* John Pastor et al., *Effects of Sulfate and Sulfide on the Life Cycle of* Zizania Palustris *in Hydroponic and Mesocosm Experiments*, 27 ECOLOGICAL APPLICATIONS 321, 321–336 (2016) (finding that increasing concentrations of sulfate and sulfides reduces the viability of wild rice growth and development); A. Myrbo et. al., *Sulfide Generated by Sulfate Reduction is a Primary Controller of the Occurrence of Wild Rice (*Zizania Palustris*) in Shallow Aquatic Ecosystems*, 122 J. OF GEOPHYSICAL RES: BIOGEOSCI 2736, 2736–2753 (2017) (finding that "sulfate loading to surface water can have multiple negative consequences for ecosystems" that support wild rice habitat).

[387] *Cf.* Mary A. Pember, *Score One for Wild Rice*, INDIAN COUNTRY TODAY (Apr. 18, 2021), https://indiancountrytoday.com/news/score-one-for-wild-rice.

Where mining poses significant threats to wild rice or fish habitat, mining operations pose the type of particularized, fact-specific dispute that is required by the *Culverts Case* when analyzing habitat as a component of treaty rights. The threats from historic operations are posed largely by mine waste (tailings) sites and the potential for the discharge of contaminated or mineralized water that results if those sites are not wholly contained. Tailings sites that are located near wild rice beds may simultaneously threaten the habitat of both wild rice and any fish species present in nearby waters, either through ongoing discharge of polluted water or in the event of a containment breach resulting in a massive and sudden release of polluted water.

As noted in Part IV, Tribes have not had much success when suing for monetary damages in response to contamination; to be sure, monetary damages are also woefully inadequate to replace the loss of culture, tradition, and community that accompanies the loss of a wild rice bed or fishing location with which a Tribe has had a relationship with for centuries or millennia. However, if an affected Tribe seeks an injunction—as did the Tribes in the *Culverts Case*—they may be more successful. In the context of mining wastes, an injunction that follows the same rationale as the *Culverts Case* would require state agencies to remediate those sites that pose a direct and quantifiable threat to the wild rice harvests of a specific Tribe. To be sure, tailings sites—unlike culverts—may not be directly controlled by a state agency; they may be privately owned. However, state agencies are extensively involved in the mining process through permitting and regulation, from the initial mining proposal through monitoring long after the mine has closed. Even where existing regulations are intended to be protective of treaty-based resources, lax enforcement may be inadequate to prevent harm to those resources. This comprehensive state involvement may be enough to persuade a court that state agencies have a duty to ensure that treaty-protected rights and resources are not harmed by the manner in which that state agency chooses to exercise—or abdicate—its regulatory authority.

The duty imposed on state agencies would be even more applicable when the mining operation at issue is a current or proposed mine. With legacy mine wastes, the only options available are remediation or containment. With current mine sites, state agencies can modify permits or impose conditions on operation to ensure that treaty-reserved rights and resources are protected to the fullest extent possible. Where mining has been proposed, state agencies can require stringent protections before operations begin or can deny a permit altogether. There are examples of agencies denying permits due to the impacts that a project would have on treaty-protected resources.[388] Furthermore, requiring state agencies to maintain a specific chemical balance to protect habitat in the waters at issue can be analogized to precedent requiring that water be maintained at a specific temperature to maintain a Tribal fishery.[389] Tribes that choose to engage in the regulatory process can rely on their treaty-protected usufructuary rights to pressure state agencies to impose more stringent conditions during permitting than those agencies may otherwise impose or to deny a permit altogether. And where agencies fail to adequately consider Tribes' treaty-protected usufructuary rights, those Tribes can rely on existing precedent, such as the *Culverts Case*, to litigate for the protection of those resources and their habitat. As the Minnesota District Court noted in the *Mille Lacs* case, the purpose of the 1837 treaty "was to

[388] *See* No Oilport! v. Carter, 520 F. Supp. 334, 356 (W.D. Wash. 1981); N.W. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515 (W.D. Wash. 1996).
[389] *See* United States v. Anderson, 591 F. Supp. 1, 5–6 (E.D. Wash. 1982), *aff'd in part*, *rev'd in part,* 736 F.2d 1358 (9th Cir. 1984).

guarantee the Bands the right to continue a way of life based on hunting, fishing and gathering;"[390] state action or inaction that endangers that way of life would appear to be a direct and tangible violation of that treaty.

There is one case that is instructive on what a successful lawsuit against mining that threatens wild rice habitat would look like. The Sokaogon Chippewa Community at Mole Lake fought a decades long battle to prevent mining upstream of their reservation, using protests, litigation, and regulatory authority at various points in their fight to stop the Crandon Mine. The Sokaogon were not successful in court, in part because the land where the mine was proposed was privately owned; therefore, the Sokaogon did not have usufructuary rights on the land in question.[391] If the mine was proposed on public or state-owned land, or privately-owned land that was open to the public for hunting or fishing, the Tribe would have had usufructuary rights on the land. The court did not address the potential for pollution runoff to affect treaty-protected resources downstream from the mine site; if these resources were on public lands, the Tribe would have treaty-protected usufructuary rights on those lands.[392] While the Sokaogon were not successful on the issue in court, this case demonstrates areas where a Tribe might have success in court.

While much of the discussion of the threats that mining poses to wild rice is also applicable to fish habitat, it is helpful to use a concrete example to demonstrate the application of the *Culverts Case*. Returning to the example of the Gay Stamp Sands, protection of the treaty-protected fishery to the fullest extent possible would require complete remediation of the site. While the stamp sands do not impede fish passage in the way culverts do, they will impede the ability of fish to spawn if they continue to migrate and completely envelop the spawning grounds. In a case involving an environmental threat such as the stamp sands, it will be possible for Tribes to quantify the precise amount of harm posed by such a threat. For example, the Gay Stamp Sands are predicted to eventually cover at least 60% of Buffalo Reef, which is the spawning ground for 30% of all lake trout caught within 50 miles.[393] The Keweenaw Bay Indian Community (L'Anse Band of Ojibwe) is within the 50-mile radius and, as a Tribe that is signatory to the Treaties of 1842 and 1854, has reserved fishing rights in Lake Superior. Thus, it is possible for the Tribe to quantify the impact that the stamp sands would have on its fishery, much as the Tribes in the *Culverts Case* were able to precisely quantify the impacts of culverts on their fisheries.

Where destruction of habitat causes Tribal members to exert a significantly greater amount of time and energy to achieve a harvest, there is precedent to support the argument that the

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[390] Mille Lacs Band of Chippewa Indians v. Minnesota (*Consolidated Case*), 952 F. Supp. 1362 (D. Minn. 1997*), aff'd*, Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom.* Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172 (1999).

[391] Sokaogon Chippewa Cmty. v. Exxon Corp., 805 F. Supp. 680, 706 (E.D. Wis. 1992), *aff'd*, 2 F.3d 219 (7th Cir. 1993). While a significant portion of the lands on which the mine was proposed belonged to the county—and therefore were open to Tribal hunting, the county decided to sell the lands to the mining company, foreclosing Tribal hunting pursuant to *LCO I*. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (*LCO I*), 700 F.2d 341 (7th Cir. 1983).

[392] Ultimately, the Tribe decided to protect Rice Lake—a significant source of wild rice located completely within the reservation boundaries—by passing Water Quality Standards under the Clean Water Act's Treatment as State provisions. *See* Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001). Certainly, these provisions would not be helpful for Tribes seeking to protect off-reservation resources. The Tribe eventually purchased the proposed mine site in 2003, ending the potential for mining and the threat posed to their wild rice beds. Amy Rinard & Meg Jones, *Tribes' Purchase Ends Crandon Mine Tussle; Mining Company Says "Hostile Political Climate Doomed Project,"* MILWAUKEE J. SENTINEL, Oct. 29, 2003 at 1A.

[393] *Saving Buffalo Reef*, *supra* note 385.

destruction of that habitat is a violation of those Tribes' treaty rights.[394] A reduction in fish populations caused by failure to mitigate the stamp sands may cause Tribal fishers to exert more time and energy to achieve the same level of harvest. The Keweenaw Bay Indian Community could rely on that precedent to argue that failure to mitigate damage to the fishery is a violation of their treaty rights due to the extra time and energy that fishers must expend to achieve that same level of harvest.

Another threat to treaty-protected, water-based resources in the Upper Great Lakes region is oil transport. While oil extraction is not a threat in the area, oil pipelines run throughout the 1836, 1837, 1842, and 1854 ceded territories.[395] Currently, the potential for a devastating oil spill exists in Lakes Huron, Michigan, and Superior, as well as throughout countless inland lakes, streams, and rivers. Depending on where an oil spill occurred, the effects on wild rice beds and fisheries could be catastrophic.[396] There are old pipelines, as well as proposed pipelines, that threaten watersheds throughout the ceded territories. For example, the Bad River Band, whose reservation lies in the 1842 ceded territory, has recently attempted to eject a pipeline—Enbridge Line 5—from the reservation. The Bad River Reservation includes the Kakagon and Bad River Sloughs, a 12,000-acre wetland system that lies where the Bad River flows into Lake Superior and supports the largest wild rice beds in the Great Lakes.[397] Enbridge Line 5 runs from Superior, Wisconsin to Sarnia, Ontario, northeast of Detroit, Michigan. Due to the route of the pipeline, it threatens not only wild rice beds, but also Great Lakes and inland fisheries within both the 1842 and 1836 ceded territories. The company's proposed re-route of the pipeline would place it just outside the reservation, still within the Bad River watershed and still posing a threat to the same waters to which it currently poses a threat.[398]

Courts have held that agencies must consider treaty-protected usufructuary rights when permitting pipelines and that the consideration must include the impacts that an oil spill would have on those rights and resources.[399] However, the analysis is necessarily different when the pipeline is already in place and has been for many years, as is the case with Enbridge Line 5. Furthermore, an injunction requiring the replacement or removal of an oil pipeline will have a much greater impact—economically, to energy markets, and potentially environmentally—than the removal or replacement of culverts will.

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[394] *See* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988); Grand Traverse Band of Chippewa & Ottawa Indians v. Dir., Michigan Dep't of Nat. Res. (*GTB v. MDNR I*), 971 F. Supp. 282, 291 (W.D. Mich. 1995), *aff'd,* Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Michigan Dep't of Nat. Res. (*GTB v. MDNR I)*, 141 F.3d 635 (6th Cir. 1998).

[395] *See* Phil McKenna, *2 Key U.S. Pipelines for Canadian Oil Run Into Trouble in the Midwest*, INSIDE CLIMATE NEWS (Jun. 6, 2019), https://insideclimatenews.org/news/06062019/tar-sands-oil-pipeline-court-ruling-spill-risk-minnesota-michigan-enbridge-canada-climate-change. The article includes maps of oil pipelines in the Great Lakes Region.

[396] *See generally* INT'L JOINT COMMISSION SCI. PRIORITY COMMITTEE, POTENTIAL ECOLOGICAL IMPACTS OF CRUDE OIL TRANSPORT IN THE GREAT LAKES BASIN (2018).

[397] *Akiing: Where the Wild Rice Grows*, HONOR THE EARTH, http://www.honorearth.org/akiing_where_the_wild_rice_grows (last visited Apr. 10, 2021).

[398] *See* Chris Hubbuch, *Enbridge Withdraws Condemnation Request for Line 5 Reroute*, WISCONSIN STATE J. (Aug. 11, 2020), https://madison.com/wsj/news/local/environment/enbridge-withdraws-condemnation-request-for-line-5-reroute/article_3ae80514-1a7b-5844-ab7c-e3d2035e1692.html.

[399] *See* No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981); Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101 (D.D.C. 2017).

However, Tribes whose usufructuary rights and resources are placed at risk by the continued operation of oil pipelines may be able to successfully use the *Culverts* decision to advocate for replacement or removal of those pipelines. Wild rice beds are fixed in location and thus are limited in the locations where harvests can be taken. This fact makes a tight analogy with "usual and accustomed places," even though that language is not in the Anishinaabe treaties. While this is true for wild rice everywhere, this is especially true on the Bad River Reservation, where the Kakagon and Bad River Sloughs contain the largest wild rice beds in the Great Lakes. Any oil spill in the Bad River watershed would have significant impacts on the Bad River Band's ability to harvest wild rice.

Where the *Culverts Case* is likely to be most useful to Tribes seeking to preserve habitat of treaty-protected resources from the threat of an oil spill is in the context of fishing in those parts of the Great Lakes that fall within Michigan's jurisdiction. As noted in Part V.A, federal courts in Michigan have read usual and accustomed fishing grounds language into Tribal Great Lakes fishing rights to protect access to traditional fishing grounds,[400] and because Michigan uses a zonal allocation plan rather than a 50-50 allocation, treaty-protected fishing rights can only be exercised in limited, geographically fixed areas. An oil spill which threatens these fishing zones would be no less of an infringement on treaty rights than the culverts at issue in *Washington* were.

In Wisconsin and Minnesota, courts have not read "usual and accustomed" language into the treaties. However, this does not make Tribal harvests any less place-based than they are in Washington. Furthermore, because the District Court for the Western District of Wisconsin has determined that the Tribes could not achieve a moderate living even if they were allowed to harvest every single resource in the state, any destruction of habitat for those resources would further impede the Tribes' treaty-protected right to harvest resources in pursuit of a moderate living.[401] And the District Court in Minnesota found that the purpose of the 1837 treaty was to ensure that Tribes had the ability to engage in traditional activities; an oil spill within the 1837 ceded territory would jeopardize that ability.[402] To be sure, like mining operations, oil pipelines are not owned and operated by the state, while the culverts at issue in the *Culverts Case* are. However, the same argument that applies to mining applies here: state involvement through the regulatory process imposes a duty on the state to protect those rights that are guaranteed by treaty.[403] States exercise their regulatory authority through the permitting process where the activity to be permitted impermissibly interferes with treaty-protected usufructuary rights.

There are other threats posed to treaty-protected resources in the Upper Great Lakes region, such as dams, industry, and development. Dams can be harmful to both fish populations and wild rice habitat. Lake sturgeon—much like salmon—spawn in streams, spend most of their adult lives

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[400] *See* Grand Traverse Band of Chippewa & Ottawa Indians v. Dir., Michigan Dep't of Nat. Res. (*GTB v. MDNR I*), 971 F. Supp. 282 (W.D. Mich. 1995), *aff'd*, Grand Traverse Band of Ottawa & Chippewa Indians v. Dir. (*GTB v. MDNR II*), Michigan Dep't of Nat. Res., 141 F.3d 635 (6th Cir. 1998).

[401] *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (*LCO V*), 686 F. Supp. 226, 227 (W.D. Wis. 1988).

[402] Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom*. Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs III*), 526 U.S. 172 (1999).

[403] In Michigan, the Public Service Commission has regulatory authority over the siting of pipelines, as well as the authority to "control, investigate, and regulate" an entity engaging in oil transport. MICHIGAN DEPT. OF ENVIRONMENTAL QUALITY, MICHIGAN PETROLEUM PIPELINE TASK FORCE REPORT 29–30 (Jul. 2015), https://www.circleofblue.org/wp-content/uploads/2015/07/M_Petroleum_Pipeline_Report_2015-10_reducedsize_494297_7.pdf (quoting MCL 483.3). Minnesota, but not Wisconsin, follows a similar approach. The Pipeline and Hazardous Materials Safety Administration (PHMSA), a federal agency, has also given Minnesota oversight responsibility over interstate oil pipelines. *Id.* at 32–33.

in the Great Lakes, and migrate to the place of their birth to spawn.[404] Dams pose a clear threat to the life cycles of these fish, but dams can also threaten wild rice habitat. Wild rice only grows in areas where the water depth is between one and three feet, so any new dams that inundate wild rice beds are likely to prevent wild rice from growing there or to diminish the areas in which wild rice is able to grow.[405] Conversely, if an existing dam is supporting the water level necessary for wild rice, removal of the dam may destroy wild rice habitat. Industrial activities that discharge into waters may also harm fish populations or wild rice, depending on the location of the resource and of the discharge.

Like culverts, dams can reduce a significant amount of stream habitat by impeding fish passage. To be sure, the utility of the analogy depends on the nature of the fish. For migratory fish—such as sturgeon and salmon—dams, like culverts, can significantly reduce habitat and impede migration and harm the viability and health of fish populations. For fish that are not migratory, dams may be less of an impediment to habitat. Indeed, dams may provide some protection for fish populations from invasive species such as sea lamprey. However, where a Tribe has a treaty-protected right to harvest migratory fish, a court may be willing to enjoin any construction of new dams,[406] or to order a modification or removal of an existing dam to restore fish habitat. Where a dam is slated for removal, a court may be willing to enjoin the removal of that dam if the removal would expose treaty-protected fish to invasive species. Where Tribes seek to work with state agencies rather than litigate, Tribes can lean on their treaty rights to seek concessions from the state. Where state agencies choose to modify dam operations to accommodate fish habitat for treaty-protected species, there is precedent to support the agency's position if a party chooses to challenge that decision.[407]

Dams are not only a threat to fish habitat; they may also reduce the viable habitat for wild rice. Wild rice has an ecological niche, as noted above. Furthermore, unlike fish, wild rice is not mobile; it is fixed in location. Dams that flood wild rice beds will destroy the habitat of wild rice just as surely as they will impede the passage of fish. The Treaty of 1837 explicitly reserves the right to harvest wild rice throughout the ceded territory, just as the Stevens Treaties reserved the right to take fish. As Judge Martinez declared that "[i]t was thus the right to **take** fish, not just the right to fish, that was secured by the treaties,"[408] so too does the Treaty of 1837 reserve the right to **gather** wild rice. Furthermore, because wild rice only grows in discrete locations, the destruction of one wild rice bed may cause a significant reduction in one Tribe's harvest. Aside from the analogy that can be drawn between discrete, limited wild rice beds and "usual and accustomed places," destruction of a wild rice bed may also cause Tribal members to exert a significantly greater amount of time and energy to achieve a harvest. Likewise, if a dam is supporting a water level necessary for wild rice habitat, removal of that dam may cause Tribal

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[404] The population of lake sturgeon has been greatly reduced "as a result of overfishing, habitat loss, the construction of dams, and pollution." *Lake Sturgeon Biology and Population History in the Great Lakes*, U.S. FISH AND WILDLIFE SERV. (2016), https://www.fws.gov/midwest/sturgeon/biology.htm.
[405] Kozacek, *supra* note 3.
[406] *See* Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977). To be sure, this decision was largely based on the flooding of a "usual and accustomed station." Nevertheless, it does provide persuasive precedent in support of this position.
[407] *See* Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999).
[408] United States v. Washington, 20 F. Supp. 3d 828, 897 (W.D. Wash. 2007) (emphasis in original).

members to exert more time and energy to achieve a harvest. Any argument against the construction or removal of a dam will depend on the facts specific to that dam.

Lakeside developments can also harm fish populations. As an example, there was a proposal in Michigan to build a development on the Bond Falls Flowage; the proposal included the construction of piers on walleye spawning beds. While the proposed development was never completed, similar developments have the potential to directly harm treaty-protected resources and thus infringe on usufructuary rights that were reserved by Tribes in various land cession treaties. The *Culverts Case* may be applicable in situations such as these, where development encroaches on a discrete resource. This argument would likely fail in the 1836 ceded territory because the usufructuary rights in that area are terminated when the "land is required for settlement."[409] However, because that language does not appear in the 1837, 1842, and 1854 treaties, the *Culverts Case* is more applicable to development that significantly threatens habitat of discrete resources—such as walleye spawning beds or wild rice beds—within those ceded territories. Given the distinction between public and private land in *LCO I*, this argument would be limited to preventing development on public bodies of water.

Another threat is that of invasive species and agency response to those species. Some non-native species are intentionally introduced by state agencies, such as salmon that are released into Lake Superior. These non-native species compete with native species and thus have the potential to reduce the health and viability of populations of native species. Of course, this is a problem when Tribes have reserved rights to harvest those native species. Invasive species are those non-native species which are not intentionally introduced but present the same set of problems. However, the methods state agencies employ to address those problems may also cause unintended problems. For example, the use of herbicide to address Eurasian milfoil may harm wild rice and fish populations.[410]

Where these invasive species encroach on habitat of native species without the involvement of state action, it is unlikely that the *Culverts Case* could be used to provide any relief. However, where state action is involved, the *Culverts Case* may be of use when the threat to habitat is demonstrable and quantifiable. For example, state use of herbicides to combat invasive species that directly threatens fish populations or wild rice beds is the kind of fact-specific, narrow inquiry that the court based the *Culverts* decision on. For Tribes that choose to follow this approach, being able to demonstrate quantifiable impacts caused by that state action would be essential. Similarly, where Tribes can demonstrate that state stocking of non-native species—such as introducing salmon into the Great Lakes—reduces the viability of native fish populations, the *Culverts Case* may also be of utility. Contrary to threats posed by mining and oil pipelines, in both herbicide use and introduction of non-native species, the state is in direct control of the threat to the habitat of treaty-protected resources.

Another threat the interviewees identified was climate change. Climate change affects the temperature of the water, which can reduce the habitat of both fish and wild rice. Furthermore, as waters warm, the habitat range of species can shift. This is problematic because reservations and territories wherein Tribal members have usufructuary rights are static. As the range of these resources shifts due to climate change, Tribal members are left with an altered resource base on which they are able to exercise their treaty-protected rights. Such shifts and changes diminish the ability of some Tribes to collect traditional resources because the range within which those resources can be found shifts out of the ceded territories.

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[409] *See* 1836 Treaty with the Ottawa, *supra* note 237, at 451.

[410] Eurasian milfoil is a noxious weed which grows in water and may itself diminish or destroy habitat.

Some problems are not unique to the Great Lakes region. Pollution from industrial sources that results in mercury deposition may decrease the safety of fish consumption. This has been shown to be an especially pressing problem in Native American communities with levels of fish consumption that are much higher than the overall American average.[411]

For threats such as the bioaccumulation of mercury in fish and climate change, the *Culverts Case* is likely to be of little utility. Because the causes of these threats are multiple and diffuse, it is unlikely that a challenge to these threats would be able to produce the fact-specific, narrow inquiry required by the *Culverts Case*. Climate change and bioaccumulation of mercury are caused by the cumulative impacts of emissions from multiple sources, including state-owned, federally owned, and private entities. Thus, the *Culverts Case* is likely inapplicable to diminished harvests as a result of habitat destruction or loss of population viability caused by climate change and bioaccumulation of mercury due to an inability to prove causation by any single source.[412]

In sum, there are important principles that apply to any attempt by Tribes to use the *Culverts Case* to address loss of habitat for treaty-protected resources in the Upper Great Lakes region. In any case, the ability of Tribes to quantify the precise amount of damage caused to Tribal harvests and treaty-protected resources will be important. In the *Culverts Case*, part of the reason that the court sided with the Tribes is because they were able to show precisely how much habitat was destroyed by the culverts at issue, precisely how much fish populations and harvests were diminished as a result of the habitat destruction caused by the culverts, and how much of a benefit would be wrought by remediation. The same type of showing will be necessary for Tribes to succeed on the habitat issue in the Upper Great Lakes region, regardless of whether the activity being challenged is mining, pipelines, introduction or control of non-native species, or any other activity.

One of the challenges to applying the *Culverts Case* to the Upper Great Lakes region is the fact that none of the treaties include the "usual and accustomed places" language. It is probable that any state agency whose action is being challenged under this framework will argue that the *Culverts Case* does not apply because of the absence of that language. As noted above, the Sixth Circuit has read that language into the Treaty of 1836 as it applies to Great Lakes fishing. However, that rationale has not been applied to inland lakes or in Wisconsin or Minnesota. Tribes that seek to challenge state agency action using the *Culverts* framework may be able to counter this argument by demonstrating that a certain fishing location or a wild rice bed is a traditional harvest location that the Tribe has been using since time immemorial. Just as the United States

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[411] *See* Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L. J. 3 (2000) (discussing fish consumption as a pathway for exposure to toxins, including mercury, and noting that it is especially problematic for Tribes in the Pacific Northwest and Great Lakes regions).

[412] One of the biggest concerns shared by interviewees is the cumulative impacts of these various threats. Too often, such threats are viewed individually, with industry emphasizing the de minimis nature of any impacts. However, the actual result may be death by a thousand cuts. The cumulative impacts on treaty resources of these various environmental threats—even if each individual impact is de minimis—may greatly reduce Tribal harvest of resources that their ancestors insistently reserved a right to harvest. It is impossible to exercise a usufructuary right to harvest wild rice if there is no wild rice to harvest, and it is impossible to exercise a treaty-protected right to fish if there are no fish. While the court in *Washington V* rejected a broad treaty right to habitat protection, the fact is that every action which reduces the habitat of treaty-protected resources, reduces the resources themselves, or otherwise reduces Tribal harvest of those resources, is an infringement of the treaty-protected rights of Tribes and Tribal members.

Supreme Court has found an implied reservation of water rights where necessary to fulfill the purpose of a reservation, or an implied easement where necessary to fulfill the purpose of a treaty, so too should courts find that "usual and accustomed places" language was implied in the treaties where a resource—such as wild rice—only grows in a particular location. To find otherwise would be to render the treaty nugatory.

A related challenge is that while the geographic scope of the Stevens Treaties protects discrete locations, treaty-protected resources in the Upper Great Lakes region are diffuse throughout the ceded territories. As such, state agencies whose actions are challenged are likely to argue that the Tribes can harvest fish in a different lake or harvest wild rice in a different location, emphasizing the de minimis nature of their action on the overall treaty resource. Thus, while the challenged state action may entirely destroy the habitat for a given resource at one specific location, it can be argued that the action has a negligible impact on the resource in the ceded territory as a whole. It is important to note that this ignores the place-based relationship and knowledge that many Anishinaabe people have with their local and traditional harvesting grounds. Courts in Michigan, Wisconsin, and Minnesota have emphasized and discussed—sometimes at length—the cultural importance of fishing to the Anishinaabe.[413] The cultural harm caused by reduced salmon harvests was also one of the factors that the court looked at in the *Martinez* decision.[414] Furthermore, infringement of treaty-protected rights in one location that may appear negligible when compared to the ability to harvest throughout the ceded territory as a whole may cause specific Tribes or identifiable Tribal members to expend significantly more time and energy to achieve a comparable level of harvest, an outcome which some courts have declared is unacceptable.

Another, albeit weaker distinction that state agencies could attempt to make is to compare the migratory nature of the salmon in *Culverts* to the non-migratory nature of wild rice and some species of fish in the Upper Great Lakes region. While the migratory nature of salmon was indeed a part of the court's rationale in the context of culverts, the decision of the Ninth Circuit was based in much larger part on identifiable harm to treaty-protected rights and resources. Of course, there are also migratory fish in the Great Lakes, and even where harm is caused or threatened specifically to spawning beds of non-migratory fish, distinguishing *Culverts* on the basis of the migratory nature of the salmon is unlikely to be a meaningful distinction.

Another important caveat is that Tribes seeking to utilize the *Culverts Case* in the context of habitat protection litigation in the Upper Great Lakes region will need to show how the harm to habitat and resources is caused by state action. This is especially important when the challenged activity is privately owned and the role of the state is in permitting and enforcement. It is true that state regulations may not impermissibly infringe on treaty-protected usufructuary rights; states may only directly regulate those rights if the regulations are reasonable and necessary for conservation and are non-discriminatory. Even that ability may be limited where the Tribe has chosen to enact regulations governing harvests taken by its members, whether on or off the reservation. To be sure, direct regulation of harvesting is much different than state regulation of industrial activities, but an extension of that reasoning could be made that state permitting of activities which demonstrably harm the habitat of treaty-protected resources is an impermissible infringement of those treaty protected rights. As the issue of habitat protection as a treaty right has not been litigated in these courts, it is uncertain how they would react to any of these arguments.

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[413] *See supra* Part V.
[414] *See supra* Part III.H.

VII. Conclusion

After decades of litigation, the Ninth Circuit Court of Appeals required the state of Washington to take action to protect salmon habitat, a fish that Tribes in western Washington have a treaty-protected right to take. While this decision garnered a significant amount of attention, there have been several other cases where courts have ordered agencies to take action to protect the habitat of treaty-protected resources. State regulation of these rights is limited, and states are prohibited from impermissibly infringing on these rights.

While the issue of habitat protection as a treaty right has not been litigated in Anishinaabe Akiing, Tribes in the Upper Great Lakes region have also been fighting for decades to have courts recognize their treaty protected usufructuary rights. State and federal courts in Michigan, Wisconsin, and Minnesota have affirmed the existence of these rights, and the Sixth, Seventh, and Eighth Circuit Courts of Appeals, as well as the United States Supreme Court, have upheld such decisions. While these rights are not unlimited, Anishinaabe Tribes throughout the region have rights to hunt, fish, and gather throughout the territory that they ceded to the United States in the 19th Century. Tribes cannot exercise those rights if the resources that they harvest are diminished or destroyed, an inevitable outcome when the habitat of those resources is damaged.

Tribes, Tribal advocates, and intertribal organizations have identified many threats to the habitat of water-based, treaty-protected resources with which they are currently concerned. Many Tribes, however, are understandably wary of litigating the issue of habitat protection. Any time a Tribe brings a treaty rights case to court, they run the risk of having those rights diminished, as courts are not consistent in applying the principles of Federal Indian Law. Where courts do consistently and appropriately apply those principles, the rights of Tribes have been repeatedly affirmed. The *Culverts Case* adds to a growing body of case law that interprets those Tribal rights as inclusive of habitat protection. If Tribes decide to litigate this issue in the Upper Great Lakes region in the future, the *Culverts Case* provides sound persuasive precedent on which they may build a case in the effort to protect the manoomin and the fish throughout Anishinaabe Akiing.