**The Use of Historical Law in Treaty Rights Cases**

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## I. Introduction

Treaty usufructary rights, such as hunting, fishing, and gathering rights, are constitutionally protected property rights.[1] In interpreting them, courts look to the negotiating parties' understanding of the rights at the time the treaty was entered into. With respect to treaties between the United States and tribal governments, the Indian parties' understanding is considered the more important because, under the canons of construction for interpretation of Indian treaties, treaties are to be interpreted liberally in favor of the Indians with ambiguities being resolved in their favor.[2] Nonetheless, the understanding of the United States negotiators is also important. It can be thought of as a floor for the scope of the right such that the right should not be interpreted in a more restrictive way than the United States negotiators understood it.

Thus, although the canons of construction for Indian treaties teach us that the treaties should be interpreted based on the Indians' understanding, which will generally provide for a broader construction, attorneys preparing treaty rights cases on behalf of tribes should also research, and consider developing expert testimony on, the United States negotiators' understanding of the right at issue in the context of the particular treaty that is being litigated. There are several reasons that such research should be seen as a crucial part of any treaty rights case. First, the understanding of the United States negotiators is "part of the larger context that frames the treaty," and the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*[3] instructed that this context, "including the history of the treaty, the negotiations, and the practical construction adopted by the parties"[4] is an important tool for treaty interpretation. Secondly, given the relatively greater prevalence of written records on the United States' side, determining the intent of the United States negotiators is likely to be a much more straightforward task, and that intent may be determinable with a greater level of certainty than the Indian negotiators' intent. Third, conservative judges and justices may be instinctively more comfortable enforcing the United States negotiators' intent because that intent would yield results that were predictable at treaty time. While this last concern should not

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[1] *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

[2] *See, e.g.,* 1-2 *Cohen's Handbook of Federal Indian Law* § 2.02[1] (2017).

[3] 526 U.S. 172 (1999); *see also Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (considering the context of a treaty's negotiation and adoption to ensure interpretations "consistent with the shared expectations of the contracting parties").

[4] *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196.

 

necessarily drive case strategy, it is an important consideration that should be carefully weighed and analyzed in consultation with one's clients. Especially for attorneys, one of the most accessible clues to the United States negotiators' intent is the historical law on the subject of the treaty right that was in place at the time the particular treaty was negotiated.

In two recent treaty rights cases heard in the Supreme Court that I was involved in–in one as counsel for a party and in the other as counsel for an amicus–the decision was made to use historical law to illustrate how the right would have been viewed at treaty time. One of these cases was the Culverts Case,[5] in which I represented the Muckleshoot Indian Tribe, and the other was *Herrera v. Wyoming*, a treaty hunting case that has been argued before the Supreme Court and which is currently pending. In *Herrera*, my client, the Muckleshoot Tribe, appeared as one of the amici Pacific and Inland Northwest Treaty Tribes, a group that filed a brief in support of Mr. Hererra, a Crow hunter.

## II. The Culverts Case.

The Culverts Case was brought by twenty-one tribes against the State of Washington in 2001. The case concerns the scope of the Tribes' treaty right "take fish at all usual and accustomed grounds and
stations."[6] In the case, the Tribes challenged the State's failure to make the culverts (in other words, the pipes under road crossings) that it owned passable for salmon, including all species of salmon at all life stages, as a violation of their treaty right to fish. The case was a second incarnation of a much earlier claim that the treaties between the United States and the Washington tribes contained a habitat protection component. The Tribes had initially filed this earlier declaratory judgment claim in 1970 along with the Boldt case.[7] At first, the claim was upheld, but the Ninth Circuit, in an en banc decision, ultimately held that it was not ripe for decision, explaining that "[t]he legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."[8] The damage to salmon runs caused by improperly designed state-owned culverts presented those "concrete facts."

In the Culverts Case, the Tribes were granted summary judgment by the district court in 2007,

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[5] *Washington v. United States*, 584 U.S. __, 138 S. Ct. 1832 (2018).

[6] *See, e.g.,* The Treaty of Medicine Creek, Art. III, 10 Stat. 1133 (Dec. 26, 1854).

[7] Alan Stay, *Focus on Indian Law: Habitat Protection and Native American Treaty Fishing in the Northwest*, 63-Nov. FED. LAWYER 20, 21 (Oct/Nov 2016).

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

followed by a permanent injunction in 2013.[9] The Ninth Circuit affirmed in 2016,[10] and the Supreme Court affirmed by an equally divided court in 2018.[11]

Historical law, including both statutory law and common law, fit almost seamlessly with the Tribes' arguments in the Culverts Case, because prohibitions on blocking the passage of fish, especially anadromous fish, date back to the Magna Carta,[12] with statutes and cases voicing the prohibition frequently around the time the treaties were negotiated and beyond.[13] Nonetheless, the Tribes did not make arguments based on historical law until the Ninth Circuit. The Tribes' brief to the Ninth Circuit panel contained a single paragraph describing the concurrence of historical law prohibiting blockage of fish runs with the decision of the court below.[14] The Tribes' response to the States' request for en banc review did not include a discussion of this historical law, but historical law did feature prominently in the Supreme Court merits briefing in the Tribes' brief, the United States' brief, and in a law professors' amicus brief.

### A. The Tribes' and the United States' Merits Brief in the Supreme Court.

The Tribes' brief on the merits in the Supreme Court devoted roughly two pages to historical law relating to prohibitions on blocking fish passage.[15] Specifically, the Tribes' brief discussed the fact that a common law action for nuisance was available to riparian owners injured by a blockage of fish passage,[16] and proceeded to briefly discuss English and Scottish cases from the 1800s and early 1900s.[17] Next, the discussion turned to state cases in the United States from approximately the same

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[9] *United States v. Washington*, 20 F. Supp. 3d 828, 889 (W.D. Wash. 2007); *United States v. Washington*, 20 F. Supp. 3d 986, 1023 (W.D. Wash. 2013).

[10] *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016), *as amended* 853 F.3d 946 (9th Cir. 2017).

[11] *Washington v. United States*, 584 U.S. __, 138 S. Ct. 1832 (2018).

[12] Magna Carta ¶ 33 (1215) (requiring removal of fish weirs).

[13] *See, e.g.,* Joseph K. Angell, Treatise on the Law of Watercourses 82-83 (5th ed. 1854); Holyoke Co. v. Lyman, 82 U.S. 500, 509 (1872); Boatright v. Bookman 1 Rice 447 (S.C. Ct. App. 1839).

[14] Answering Brief of Appellant-Cross-Appellee Indian Tribes, *United States v. Washington*, No. 13-35474, Docket No. 55-1, at 20-21 (Jan. 21, 2014).

[15] Brief for the Tribal Respondents, *Washington v. United States*, No. 17-269, 2018 WL 1557066, *34-*37 (March 26, 2018).

[16] *Id.* at 34 (citing 3 J. Kent, *Commentaries on American Law* 411 (4th ed. 1841)).

[17] *Id.* at *34-*35.

time period, as well as the territorial laws applicable to the area at the time of the treaties.[18] It closed with a discussion of the concept of a profit à prendre and specifically the common of piscary, a common law concept that bears some similarities to the Tribes' right to fish off-reservation under the Stevens Treaties.[19]

The United States' approach to discussing common law and utilizing it as persuasive authority was quite similar to that of the Tribes.[20]

### B. The Law Professors' Amicus Brief in the Supreme Court.

An amicus brief supporting the Tribes, which was filed by a group of property, natural resources, and federal Indian law professors, was largely devoted to explaining the historical law relating to prohibitions on blocking fish passage, and, consequently, it discussed the same issues as did the Tribes' and United States' briefs but in greater depth.[21] This brief also did important work for the Tribes in refuting the somewhat simplistic view of common law fishing rights presented by a group of amici that supported the State, namely the Business, Home Building, Real Estate, and Farming Organizations.[22]

The law professors' brief built on the historical law discussion in the Tribes' brief in several important ways. In additional to providing a much more in-depth explication of the English and Scottish cases and legislation that perhaps served as models for the American cases and legislation,[23] one such way was in its discussion of the remedies available for blockages of fish passage both at common law and under historical statutes, including the modification or removal of the offending structure.[24]

A second, crucial contribution was the law professors' discussion of the legislative history of the

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[18] *Id.* at *36.

[19] *Id.* at *36-*37.

[20] Brief for the United States, *Washington v. United States*, No. 17-269, 2018 WL 1479470, *26-*27 (March 26, 2018).

[21] Brief of Amici Curiae Law Professors in Support of Respondents, *Washington v. United States*, No. 17-269 (Apr. 2, 2018).

[22] Brief for Business, Home Building, Real Estate, and Farming Organizations as Amici Curiae Supporting Petitioner, *Washington v. United States*, No. 17-269, 2018 WL 1225508, *9-*11 (March 5, 2018).

[23] Brief of Amici Curiae Law Professors in Support of Respondents, *Washington v. United States*, No. 17-269, at 13-20 (Apr. 2, 2018).

[24] *Id*. at 6-7 (discussing *Holyoke Co.*, 82 U.S. at 509, and other cases).

relevant provision in the Oregon Territorial Act.[25] The Oregon Territory originally included what is now Washington, and the provisions of the Oregon Territorial Act were incorporated into the Act to establish the Territorial Government of Washington, so long as not inconsistent with anything in the latter act, when the Washington Territory was carved out of the Oregon Territory.[26] The Oregon Territory Act importantly included a prohibition on any obstruction of "streams … in which salmon are found" that failed to "allow salmon to pass freely up and down."[27] The Law Professors' brief explained the origin of this provision, specifically its insertion into the bill at the request of a Massachusetts Representative named Joseph Grinnell.[28] Representative Grinnell explained the need for this prohibition as follows:

> there was now a valuable fishery in Oregon, and unless some care was taken of it, it would be lost. For the want of care, by the erection of a dam, &c., in the Connecticut river, the salmon, which formerly had been very valuable there, had been driven out. This might be avoided in this Territory, with care, without expense.[29]

This bit of history was immensely important to contextualizing the treaty fishing right in the ethos of the time. If non-Indians at treaty time were concerned about the loss of fisheries, and this concern was reflected in the law that governed the treaty area, then presumably the treaty negotiators could have anticipated that measures may be needed to protect the Indian fishery. Moreover, the State had argued that, because salmon runs were believed to be "inexhaustible" at the time the treaties were negotiated, no protection for the fishery resource had been built into the treaties.[30] This argument was flawed because a right can logically carry implied, accessory rights with it even if no one expected the implied rights to be necessary. Nonetheless, this legislative history of the Oregon Territory Act obviated the need for the Court to examine the question of whether implied rights must be intended in some conscious way.

### C. The Culverts Case in the Supreme Court.

As it turned out, Justice Kennedy recused himself from the Culverts case before the briefing was

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[25]Act of Aug. 14, 1848, § 12, 9 Stat. 323, 328.

[26]Act to establish the Territorial Government of Washington, ch. 90, § 12, 10 Stat. 177 (1853).

[27]Act of Aug. 14, 1848, § 12, 9 Stat. 323, 328.

[28]Brief of Amici Curiae Law Professors in Support of Respondents, *Washington v. United States*, No. 17-269, at 27 (Apr. 2, 2018) (citing Cong. Globe, 30th Cong., 1st Sess. 1020 (1848)).

[29]Cong. Globe, 30th Cong., 1st Sess. 1020 (1848).

[30]Brief for the Petitioner, *Washington v. United States*, No. 17-269, 2018 WL 1083741, at *7 (Feb. 24, 2018).

completed, and the eight remaining Justices divided equally on the case, resulting in an affirmance of the Ninth Circuit decision favoring the Tribes.[31] Because of this, it is impossible to say with any certainty how individual judges voted and what arguments they were persuaded by. Nonetheless, the oral argument sheds some light on what mattered to the Justices, and, if it is any guide at all, several of the Justices were extremely interested in historical law and its implications for the case. A couple of examples are discussed below. Unfortunately, however, attorneys arguing before the Court did not appear to remember that historical law had been raised in the Ninth Circuit, and the perceived newness of the arguments based on it appeared to give Chief Justice Roberts considerable pause.[32] At one point, the Chief Justice went so far as to state: "And I wonder if that [failure to raise common law below] means that we ought to send it back and let the courts who haven't had that opportunity yet have that opportunity."[33]

Turning to more substantive discussions of the common law, Justice Breyer seemed particularly interested in the role of historical law in the case. He questioned the State's Solicitor General Neil Purcell extensively about it and then noted:

> And then it seems to me the Indians ought to have at least as much right as a person had under the common law, given the treaty. And then we seem to be arguing about what counts as an amount.
>
> And when I read through the briefs, I came away with the impression, well, whatever the amount is, there's certainly a lot of fish being blocked by the culverts.[34]

Thus, although oral argument is never a definitive guide as to what a court opinion will hold, it appears that Justice Breyer was persuaded by the analogy to historical law. Justice Kagan also appeared quite interested in the argument, asking Willy Jay, the attorney for the Tribes, what the difference between the common law right and the treaty right would be during his rebuttal.[35]

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[31] *Washington v. United States*, 584 U.S. __, 138 S. Ct. 1832 (2018).

[32] Oral Argument Trans., 37-38, 49, *Washington v. United States*, No. 17-269 (Apr. 18, 2018) (questioning of Mr. Kedem, the attorney for the United States); *see also id.* at 31, 33 (Mr. Purcell, for the State, arguing that the State did not know the common law would be addressed and stating that "the Respondents have completely changed their theory of the case from what the Ninth Circuit ruled to what they've argued in . . . their response brief here").

[33] *Id.* at 37-38.

[34] *Id.* at 31-33.

[35] *Id.* at 65-66.

Although Chief Justice Roberts does not tend to rule in favor of tribes as a rule,[36] one has to wonder if it would have made a difference to him if he had known that the historical law issues were raised in the Ninth Circuit. Despite this unfortunate oversight, at least two Justices appeared to find the arguments based on historical law compelling, and this fact tends to suggest that tribes are likely to be well-served by including those arguments in treaty rights cases, when available.

## III. *Herrera v. Wyoming*.

The *Herrera* Case is currently pending before the Court, which heard argument on January 8, 2019.[37] The case is an appeal from a criminal prosecution of a Crow citizen for hunting within Bighorn National Forest. The Wyoming courts rejected his defense that he was hunting subject to his Tribe's reserved treaty right to hunt on "unoccupied lands of the United States . . . ."[38]

In this case, historical law received much less attention than in the Culverts Case, being raised only in a single Supreme Court amicus brief, so it is impossible to know whether the subject will even come to the Court's attention. Nonetheless, the historical common law that my co-authors and I raised in the brief we drafted on behalf of Pacific and Inland Northwest Treaty Tribes could be very helpful in supporting tribal treaty hunting rights, including those of the Crow Tribe. In *Herrera*, the Wyoming appellate court[39] had relied on a Tenth Circuit decision[40] holding, among other things, that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land" and therefore that the National Forest was not subject to treaty hunting under the Crow Tribe's 1868 Treaty.[41] My co-authors and I utilized historical American common law allowing hunting except on lands that were either actually settled or fenced and cultivated to show that lands such as a National Forest would not have been considered occupied at the time that the Crow Treaty was entered into.[42] This liberal approach to hunting stemmed from the United States' rejection of Great Britain's elitist rules

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[36] *See, e.g., Ann E. Tweedy, Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 700 n.252 (2009).

[37] "Herrera v. Wyoming," SCOTUSblog, available at https://www.scotusblog.com/case-files/cases/herrera-v-wyoming/.

[38] Treaty with the Crows, 1868, Article 4, 15 Stat. at 650.

[39] *Herrera v. Wyoming*, CV 2016-242, slip op at 17-18 (4th Jud. Dist.Wyo. Apr. 25, 2017).

[40] *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995).

[41] *Id*. at 993.

[42] Brief of Pacific and Inland Northwest Treaty Tribes as Amicus Curiae in Support of Petitioner, *Herrera v. State of Wyoming*, No. 17-532, 2018 WL 4381215, *9-*12 (Sept. 11, 2018).

regarding hunting in favor of a more populist approach.[43]

As with the use of historical law in the Culverts Case, the common law we discussed as counsel for amici in *Herrera* helps reinforce the justice of a broader interpretation of the treaty right than might be employed if the treaty were viewed solely through a contemporary, Anglo-centric lens. Moreover, a common law analogy is likely to appeal to conservative Justices who often worry about upsetting non-Indians' settled expectations[44] because such an analogy shows the treaty right to be congruent with historical expectations.

## IV. Further Considerations Relating to the Use of Historical Law in Treaty Rights Cases.

Despite the potential benefits of the use of historical law in treaty rights cases, tribal clients may be reluctant to rely on it. One reason is that it may seem that relying on historical law diminishes the importance of the canons of construction for interpreting Indian treaties[45] and the centering of the Native point of view that these canons effect. Moreover, there are strong justifications for the canons. Most tribes were at a severe disadvantage in negotiating their treaties due to diminished numbers resulting from disease or settler encroachment, language barriers, and cultural differences.[46] Often, their unequal bargaining power was exacerbated by the approach the negotiators for the United States took to the process. For instance, Governor Isaac Stevens, who negotiated the treaties at issue in the Culverts Case insisted on conducting the negotiations in Chinook Jargon, a pidgin trade language of only approximately 500 words, rather than having interpreters who would translate his words into the Native languages of the tribes he was negotiating with.[47] Other examples abound.[48] The canons, then, are a measure to promote justice in interpreting treaties that many or most tribes negotiated in extremely difficult circumstances. Tribal clients may want to preserve, and have their attorneys advocate for, the application of the canons and the hard-

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[43] *Id*. at *10-*11 (citing THOMAS A. LUND, AMERICAN WILDLIFE LAW at 24, 810 (1980)).

[44] *See, e.g.,* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129,130-31 (2012).

[45] For a description of the canons, *see* 1-2 *Cohen's Handbook of Federal Indian Law* § 2.02[1] (2017).

[46] *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

[47] *See, e.g.,* CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 11 (2000).

[48] *See, e.g., United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979) (noting that a treaty at issue in that case "was imposed by subtle, invidious and incidious [sic] negotiators who sought only signatures without regard for whether they were a product of free consent."), *modified in part*, 653 F.2d 277 (6th Cir.1981); Tweedy, *supra* note 44, at 147-153 (describing the appropriation of the Black Hills and the dismantling of the Great Sioux Reservation).

won recognition of their perspective that the canons embody rather than point to yet another representation of an Anglo point of view. Such concerns need to be carefully weighed in the context of individual cases against the potential comfort that pointing to the common law can provide, especially to conservative judges and justices.

## V. Conclusion

The historical law is an important and under-utilized tool in treaty rights cases. It has the advantage of providing comfort to judges and justices who worry about upsetting non-Indian expectations, but there are drawbacks to the use of the common law as well, particularly the fact that its use may appear to implicitly diminish the importance of the canons of construction for the interpretation of Indian treaties.