UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 13-35474; 13-35519

UNITED STATES OF AMERICA; SUQUAMISH INDIAN TRIBE; SAUK-SUIATTLE TRIBE; STILLAGUAMISH TRIBE; HOH TRIBE; JAMESTOWN S'KLALLAM TRIBE; LOWER ELWHA BANK OF KLALLAMS; PORT GAMBLE BAND CLALLAM; NISQUALLY INDIAN TRIBE; NOOKSACK INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; UPPER SKAGIT INDIAN TRIBE; TULALIP TRIBES; LUMMI INDIAN NATION; QUINAULT INDIAN NATION; SUQUAMISH INDIAN TRIBE; PUYALLUP TRIBE; CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION; QUILEUTE INDIAN TRIBE; MAKAH INDIAN TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; MUCKLESHOOT INDIAN TRIBE,
Plaintiffs/Appellees,

v.

STATE OF WASHINGTON,
Defendants/Appellants,

PROFESSOR AMICUS BRIEF IN SUPPORT OF PLAINTIFFS/APPELLEES

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INTERESTS OF AMICI CURIAE[1]

Amici are professors who research, write and teach in the areas of Indian law, property, and natural resources law. In particular, *amici* are experts in the area of treaty construction. As Indian law is a complex area of jurisprudence, largely rooted in the common law, Indian law scholars have an interest in ensuring consistent and accurate application of legal precedent. Consistency is also important for the areas of natural resources and property law, which intertwine with treaty rights in many cases.

The amici are as follows:

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[1] No party's counsel authored this brief in whole or in part and no person other than the amici curiae contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. Proc. 29(c)(5). All parties have consented to the filing of this amicus brief.

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ARGUMENT

In its opening brief, the state of Washington claims that Indian treaties are interpreted in a manner similar to statutes, by ascertaining the plain meaning of the text. State Br. at 25. In support of this claim, the State cites cases involving the interpretation of 20th century international treaties with foreign nations. *Id.* (citing *Abbott v. Abbott*, 560 U.S. 1, 5, 10 (2010) (stating that interpretation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction should begin with its text) and *Medellin v. Texas*, 552 U.S. 491, 506-07 (2008) (interpreting the 1963 Vienna Convention on Consular Relations by looking to the text of the treaty, the drafting history, and the postratification understanding). The State uses these cases to argue that since the Plaintiffs' treaties do not explicitly provide the Tribes with either a right to a fishery free of physical obstructions, or a more general right to protection of fish, such a right does not exist. State Br. at 27-28 (claiming that "the Tribes here argue for a treaty right that finds no basis in the plain language . . . of the treaties" because "[o]n its face, the right of taking fish in common with all citizens does not include a right to prevent the State from making land use decisions that could incidentally impact fish"). There are, however, several obvious flaws in the State's argument.

Indian treaties are not interpreted in the same manner as 20th century international treaties. Beginning with the U.S. Supreme Court's decision in

Worcester v. Georgia, 31 U.S. 515, 551-57 (1832), the Court has consistently held that treaties must be interpreted as the Indians would have understood them, with all ambiguities resolved in their favor, and liberally construed in favor of preserving Indian rights. *See, e.g.*, *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). Even in recent years, while the Court has emphasized the plain meaning of *statutes*, it has continued to give significant weight to the Indian canons of construction when interpreting the United States' *treaty* obligations to tribes. *Compare Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172, 194 n.5, 196 (1999), *with Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). And regardless, the Plaintiffs' treaties, which expressly reserve the right of taking fish, cannot be "plainly" interpreted to allow the State to render that right a nugatory by obstructing the passage of fish through barrier culverts.

Second, the Supreme Court has long acknowledged in the context of fishing rights that an Indian treaty "was not a grant of rights to the Indians, but a grant of rights from them, -- a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). Thus, a specific right need not be included in an Indian treaty for it to have been retained by the tribe; in fact, the exact opposite is true. If the United States intended to eliminate a right held by the tribe, it must have explicitly done so in the treaty. This is known by Indian law scholars as the

"reserved rights doctrine," and it has served as the basis for not only the Supreme Court's jurisprudence relating to tribal treaty fishing rights described in the Appellees' Response Brief, but also for an analogous line of cases where tribal water rights were deemed preserved even though they were not explicitly referenced in a treaty or agreement. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). Because there is no provision in the Plaintiffs' treaties that states the Tribes have relinquished the right to a fishery free of obstructions, that right has been retained.

Finally, in this case the Tribes have established that they have a right to a fishery free of culverts – physical obstructions that block salmon from swimming upstream to their spawning locations. To find in the State's favor, this court would have to interpret Indian treaty rights even more narrowly than private easements. In the common law, a private person seeking to obtain the right to fish on the land of another would acquire a type of easement, sometimes known as a profit á prendre. Like other property rights, express easements include several implied rights. While the precise contours of those rights vary from state to state, they all require the servient landowner to ensure an easement remains unobstructed. *E.g.*, *Harvey v. Crane*, 48 N.W. 582, 583 (1891) (noting that an easement "gives to the grantee not only a right to an unobstructed passage at all times over defendant's lands, but also such rights as are incident or necessary to the enjoyment of such

right of passage"). Easements also prevent the servient property owner from developing the land in a manner that would unreasonably interfere with the easement holder's rights. *E.g.*, *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 516 N.W.2d 410, 416-18 (Wis. 1994) (holding that 1896 grant of hunting and fishing rights on another's land was an enforceable easement and precluded the development of a twenty-unit condominium complex); *Kritzman Development v. Walden Properties, LLC*, 2008 WL 1958997, *5 (Mich. Ct. App. 2008) (concluding that the construction of a residential subdivision on the servient property "would clearly interfere and be inconsistent with the [hunting] rights granted in the 1929 indenture").

Treaty rights are not merely easements subject to the variability of state law. But the fact that some states would grant and easement holder the very relief the Tribes are requesting demonstrates that this is not an "open-ended duty" that "lacks . . . precise legal formulation" or would create enormous implementation problems for the State. State Br. at 35-40. The treaty canons of construction and the reserved rights doctrine compel this court to recognize that the right to take fish at all usual and accustomed places includes the right to ensure that those fisheries are free from obstructions.

I. COURTS INTERPRET INDIAN TREATIES USING SPECIAL CANONS OF CONSTRUCTION, NOT THE SO-CALLED "PLAIN MEANING"

When interpreting Indian treaties, courts "look beyond the written words," *Mille Lacs*, 526 U.S. at 196, and instead, apply the Indian canons of construction. The first of these canons states that Indian treaties are interpreted as the Indians would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). This rule was created because treaties were written and negotiated in English, even though few if any tribal members understood the language. This language barrier forced tribes to rely on interpreters provided by the United States. *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *Worcester*, 31 U.S. at 551. Unfortunately, these interpreters often had their own conflicting agendas, and/or difficulties in translating the treaty's terms into Native languages. Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 Am. Indian L. Rev. 111, 115-16 & n.24 (2008-09) (noting that certain concepts, such as fee patents or the sale of land, may not have been capable of being translated into Native languages); *United States v. Bouchard*, 464 F.Supp. 1316, 1323 (W.D. Wis. 1978) (noting that certain translators lacked the familiarity with Native languages necessary to provide an accurate translation). If the terms of the treaty and their technical effects were not adequately explained to the tribes, it is the non-Indians, represented by the United States, that should bear this burden. *Choctaw Nation*,

119 U.S. at 28 ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.").

The second and third canons of construction state that treaty provisions are to be liberally construed in favor of preserving tribal rights, and any ambiguities are to be resolved in favor of the tribes. *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("in the Government's dealings with the Indians construction [of treaties] is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in [their] favor"). Indian tribes were not represented by lawyers trained in U.S. law during negotiations. Instead, the United States played the dual and conflicting role of negotiator for its own interests, and trustee for the tribes' interests. The Supreme Court has repeatedly held that we should assume federal negotiators acted in good faith and sought to fulfill their fiduciary duties to Indian tribes by preserving tribal rights wherever possible. *Shoshone Tribe*, 304 U.S. at 117 ("transactions between a guardian and his wards are to be construed favorably to the latter, [and] doubts, if there [are] any . . . [should] be resolved in favor of the tribe"); *Choctaw Nation*, 119 U.S. at 28 ("The recognized relation between the parties to this controversy . . . whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as

justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection").

The Indian canons of construction, however, are not purely benevolent creations of the federal courts. Many Indian treaties were negotiated and executed by tribal persons who did not have the authority to do so. Other treaties were signed under duress or after the Indian signatories had been incapacitated by alcohol. *E.g.*, Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753, 823 n.411 (1992); Charles Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows, or Grass Grows Upon the Earth" – How Long a Time Is That?*, 63 Cal. L. Rev. 601, 610-12 (1975). In such cases, the federal courts have still enforced the terms of the treaty rather than returning the parties to their *ex ante* positions, which would be the result in contract actions. *United States v. Michigan*, 471 F.Supp. 192, 258 (W.D. Mich. 1979).

The canons should play a significant role in the interpretation of treaties with the Pacific Northwest tribes that are part of this litigation. These treaties were not even translated into the tribes' Native languages. Instead, the Chinook jargon, a trade language, was used. This jargon was limited to only 300 words, and it did not include the equivalent of many of the key words contained in the treaties. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443

U.S. 658, 667 n.10 (1979) (hereinafter, *Fishing Vessel*); Charles F. Wilkinson, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 11 (2000). *See also* Carpenter, 33 Am. Indian L. Rev. at 124-31 (discussing problems with translating the Pacific Northwest treaties and with determining the Indian understanding of those treaties). In addition to these serious language issues, the treaties were executed by persons whose authority to do so, in some cases, was uncertain. In earlier decisions, the Supreme Court has admitted that federal negotiators "aggregate[ed] certain loose bands into designated tribes," and appointed many of the so-called chiefs who signed the treaties. *Fishing Vessel*, 443 U.S. at 664, n.5.

The negotiations make clear, however, that the tribes would only sign the treaties if they were assured that their fisheries would be protected because fish "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381. They were provided such assurances. Governor Stevens, for example, told the Indians gathered at Point-No-Point to negotiate the treaty: "This paper secures your fish." *Fishing Vessel*, 443 U.S. at 667 n.11. Indian people would not have understood the treaty to permit the state of Washington to erect barriers preventing fish from swimming upstream to their spawning locations, and they would certainly not have agreed to such a limitation on their right to take fish. *Tulee v. Washington*, 315 U.S. 681, 684 (1942) (noting

during treaty negotiations, "the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes"). Given the importance of the fishing right to these Pacific Northwest tribes, the Supreme Court has previously made clear that it will not interpret the treaties in a way that would give the Indians "merely the chance . . . occasionally to dip their nets into the territorial waters." *Fishing Vessel*, 443 U.S. at 679.

The State claims that treaty language whereby the Tribes "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them" compels, by its plain language, the interpretation that all development was sanctioned by the treaties, even development that completely destroyed the Plaintiffs' fisheries.[2] State Br. at 28. Treaty rights, however, are not to be abrogated in a "backhanded way." *Menominee Tribe v. United States*, 391 U.S. 404 (1968). The State points to no

[2] This is similar to an argument that the state of Minnesota made in *Mille Lacs*. In that case, the Supreme Court refused to find that an 1855 treaty with the United States abrogated the Band's 1837 usufructuary rights despite language in the former treaty that "the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the territory of Minnesota or elsewhere." *Mille Lacs*, 526 U.S. at 195. The Court noted that the United States knew how to abrogate usufructuary rights when this was its aim, and it pointed to a treaty with the Sault Ste. Marie Band which stated "[t]he said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's secured to them by the treaty of June 16, 1820." *Id.* at 195-96 (citing Treaty with the Chippewa of Sault Ste. Marie, Art. 1, 11 Stat. 631).

record sources that demonstrate such a convoluted legal interpretation was held by the United States, let alone explained to the Indians during treaty negotiations. Interpreting the treaty in this manner would therefore violate the canons of treaty interpretation. *Id.* *See also Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them").

II. RESERVED RIGHTS TO FISH ARE USUFRUCTORY PROPERTY RIGHTS THAT INCLUDE VARIOUS IMPLIED RIGHTS TO SUPPORT THE EXERCISE OF THE FISHING RIGHT

Another principle of treaty interpretation ignored by the State is the reserved rights doctrine. The Court developed this doctrine in *United States v. Winans*, when it was asked to decide whether the treaty right to take fish included the right to access fishing locations even after title to the shore had been granted to private persons. 198 U.S. 371, 379 (1905). In *Winans*, those private persons argued that as real property owners, they had the right to exclude others from entering their lands, even if it meant the Indians were prevented from reaching their fishing locations. *Id*. *See* Stoebuck and Whitman, THE LAW OF PROPERTY § 7.1 (West 2000) ("To some jurisprudents the essence of private property is the right to exclude others"). After all, the patents they had received from the United States said nothing about an easement for access to Indian fishing rights.

Without relying on any specific treaty language, the Court held that the right to fish "imposed a servitude upon every piece of land as though described therein" and that the Indians had "the right of crossing [private lands] to the river," *Winans*, 198 U.S. at 381. The Court reasoned that the reserved easement followed from the principle that Indian treaties are not "a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted." *Id.* Thus, under the *Winans* rationale, courts need not look to treaty language *conferring* access to a tribe if the tribe was the original owner of an area and the access is necessary to fulfill the reserved right. Instead, the inquiry looks to whether the tribe *surrendered* such rights by treaty, or through other congressional action.

Just a few years after *Winans*, the Supreme Court extended the doctrine outside of the context of Indian fishing rights. In *Winters v. United States*, a decision authored by the same Justice (McKenna) who penned the Court's decision in *Winans*, the Court held that treaties and agreements with Indian tribes must be interpreted liberally, and therefore, when lands were reserved by an 1888 agreement for the Fort Belknap Reservation, water rights for the Indians were also reserved by necessary implication.[3] 207 U.S. 564 (1908). The agreement

[3] Indian water rights cases contain two different components: the Indian-law-based reserved rights doctrine, and the State-law-based prior appropriation doctrine. The reserved rights doctrine is used to demonstrate that the tribe implicitly reserved water rights in the amount necessary to effectuate the purposes of the treaty or agreement (e.g., fishing rights, permanent homeland). The state-law-based prior

contained no mention of water rights, and the defendants argued that if the tribe was considered to have retained those rights the land it had ceded would be dry and worthless. The Court, citing *Winans*, still held for the tribe:

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters, -- command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences . . .

Id.

The Court followed *Winters* in the more recent case of *Arizona v. California*, concluding that "[i]t is impossible to believe that when [Congress and the Executive Department created the reservations] they were unaware . . . that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." 373 U.S. 546, 598-99 (1963). In essence,

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appropriation doctrine establishes how existing water should be divided in years of shortage. Said another way, the reserved rights doctrine is about the existence and quantification of the right, while the prior appropriation doctrine addresses water shortages in particular years by giving priority to earlier appropriators. Because treaties and agreements with tribes generally occurred prior to 1900, in most cases, tribes are the earliest users of water and can preclude any subsequent appropriators – even upstream appropriators – from diminishing their water right in times of scarcity.

both decisions recognized water rights were necessarily implied to fulfill the purposes of the tribes' reserved lands.

Since *Winans* and *Winters*, both the Supreme Court and lower federal courts have rendered dozens of decisions applying the reserved rights doctrine to different treaty provisions. *E.g.*, *Shoshone Tribe*, 304 U.S. at 117 (holding that a treaty, which set aside a reservation for the "absolute and undisturbed use and occupation" of the Indians, resulted in tribal ownership of the mineral rights beneath those lands, noting that "[t]he treaty . . . contains nothing to suggest that the United States intended to retain for itself any beneficial interest in them"); *Grand Traverse Band v. Michigan Dep't of Natural Resources*, 141 F.3d 635, 639 (6th Cir. 1998) (holding that treaty fishing right included "the right of transient anchoring of commercial vessels" and noting that treaties are interpreted to "reserve to the Tribes all rights necessary to effectuate the purpose of the Treaty"). In the specific context of Washington treaty fishing rights, the Court has held that tribal members need not obtain a state license prior to engaging in fishing activities. In *Tulee* v. *Washington*, the State had argued that such a license was required, because the State had the authority to regulate Indian conduct off-reservation, the treaty did not explicitly state that Tribal members could fish free of state regulation, and the license laws did not discriminate against the Indians. 315 U.S. 681, 683-84 (1942). The Court rejected the State's arguments, holding that

while the acquisition of a license may be both convenient and fair, it could not be reconciled with the tribe's understanding of the treaty. *Id.* at 685.

Similarly, this Circuit has held that treaty fishing rights include the reserved right to a quantity of water necessary to support the treaty fishery, even though the treaty contained no explicit mention of such water rights. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). *See also Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1034 (9th Cir. 1985) (requiring release of water from irrigation system in order to preserve salmon eggs in time of drought); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49 (1981) (allowing allocation of water for Tribes' spawning grounds, noting that "permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life"); *Confederated Salish & Kootenai Tribes v. Flathead Irrig. & Power Project*, 616 F.Supp. 1292 (D. Mont. 1985) (approving preliminary injunction halting non-Indian diversion in order to protect tribal fisheries pending state court general stream adjudication) (affirmed by this Court, in *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987); *Department of Ecology v. Yakima Res. Irr. Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (recognizing Yakama Nation's reserved rights to instream flow for support of tribal fishing rights).

In *Adair*, this Court held that the Tribe's water rights were sourced not in the prior appropriation doctrine that governs general water rights law in the western United States, but rather, the reserved rights doctrine of *Winans*. The Tribe's right was distinct in that it was a non-consumptive right. *Adair*, 723 F.2d at 1410-11, 1413.

This reserved right includes not only water of a specific quantity, but also water of a particular quality. Thus, the Spokane Indians have a reserved right to a water temperature below sixty-eight degrees Fahrenheit to support native trout. *United States v. Anderson*, 591 F.Supp. 1, 5 (E.D. Wash. 1982). Similarly, this Court affirmed an injunction against irrigation practices that increased the salinity of water used by the San Carlos Apache to irrigate their traditional crops, which are salt-sensitive.[4] This Court adopted the opinion of the district court, which found that although upstream irrigation practices were not the *sole* cause of increased salinity, it was enough that they contributed significantly. *United States v. Gila Valley Irrigation Dist.*, 920 F.Supp. 1444, 1453–45 (D. Ariz. 1996) *aff'd sub nom. United States v. Gila Valley Irrigation Dist.*, 117 F.3d 425 (9th Cir. 1997).

[4] The Tribe had a reserved right to cultivate its traditional crops. *United States v. Gila Valley Irr. Dist.*, 920 F. Supp. 1444, 1454 (D. Ariz. 1996) *aff'd sub nom. United States v. Gila Valley Irrigation Dist.*, 117 F.3d 425 (9th Cir. 1997).

This case is controlled by *Winans* and *Winters*. It would make no sense to interpret the treaty to prevent the State and private persons from excluding Indians from their fishing locations (whether through the ownership of private lands or the operation of a fish wheel), yet allow the State and private persons to exclude the fish from these locations. *Winters* recognizes that a treaty right is useless if the reserved resource lacks the essential elements it needs to exist. Just as crops depend on water for irrigation, salmon depend on their annual migration patterns for survival. Enjoining the State to provide a more natural, fish-passable flow of water through the culverts is no different from requiring the release of water to preserve salmon eggs or to maintain the water temperature needed to preserve trout.

The state of Washington claims, however, that "the treaties' principal purpose [was the] opening up of the region to settlement," and therefore, the treaty right of taking fish "does not include a right to prevent the State from making land use decisions that could incidentally impact fish." State Br. at 27-28. The State claims that no one thought "that development could impact fish runs." State Br. at 1. There are serious flaws with this argument.

First, while the *United States'* purpose in negotiating the treaty was to open this area to settlement, it is the intention of both parties – not solely the United States' intentions – that govern treaty interpretation. *Fishing Vessel*, 443 U.S. at

675-76. The principal purpose of the *Tribes* in negotiating the treaty was to preserve their way of life, including their fisheries. If the state of Washington can unilaterally deplete the fish population through obstructions such as the culverts at issue in this case, the Tribes' purpose cannot be fulfilled.

Second, the United States also knew how to ensure that the Tribe's usufructuary rights would be required to yield to development. In certain treaties, the U.S. provided that hunting and fishing rights remained only until specified settlement or development occurred. In fact, the U.S. included this type of limitation on the shellfishing and pasturing rights in the Plaintiff Tribes' treaties, by stating that the Tribes' right did not extend to shellfish beds "staked or cultivated by citizens" or pasturing on "open and unclaimed" land. *E.g.*, 1855 Treaty of Point No Point, Art. 4, 12 Stat. 933. No other such limitation was included in the same treaties' *fishing* clause. Consequently, any claim that the Tribes' rights should be diminished by development of the area cannot stand.

III. EVEN PRIVATE EASEMENTS INCLUDE IMPLIED RIGHTS, SUCH AS THE RIGHT TO BE FREE FROM OBSTRUCTIONS AND UNREASONABLE INTERFERENCE

The state of Washington's argument – that the tribes cannot possess the right to a fishery free of obstructions unless that right is explicitly mentioned in the treaty – is even narrower than many state courts would interpret private property interests. Private persons can own the right to fish or hunt on the land of another.

This is considered a type of easement, sometimes referred to as a profit á prendre.[5] Easements are construed much more narrowly than Indian treaty rights. *See, e.g.*, *Hanson v. Fergus Falls Nat. Bank et al.*, 65 N.W.2d 857 (Minn. 1954) (Knutson dissenting) (noting that "the right to hunt on the premises of another should be strictly construed and may not be extended beyond the grant"). Yet despite this, easements include a number of implied rights.

For example, the owner of a profit á prendre has the implied right to access the servient (burdened) land, even if that right of access is not explicitly mentioned in the grant. Dukeminier et al, PROPERTY 774 (7th ed. 2010) (describing the right of access implied with a profit á prendre as an irrevocable license). Additionally, the servient estate holder may not obstruct the easement in any way. *Warsaw v. Chicago Metallic Ceilings, Inc.*, 676 P.2d 584, 588-89 (Cal. 1984) (upholding injunction requiring the removal of a warehouse constructed on a portion of a prescriptive easement, which obstructed use by dominant); *Consolidated*

[5] The First Restatement of Property placed profits completely within the law of easements, but the Third Restatement separated easements and profits into two different categories while acknowledging that the same legal rules applied to both interests. *Compare* RESTATEMENT OF PROPERTY § 450, comments f, g (1944), *with* RESTATEMENT OF PROPERTY (THIRD) – SERVITUDES § 1.2, comment e (2000). It is not surprising, therefore, that some states refer to the right to hunt and fish on the land of another as an easement, while others refer to the same right simply as a profit. *United States v. 126.24 Acres of Land*, 572 F.Supp. 832 (W.D. Mo. 1983) (easement), *Fairbrother v. Adams*, 378 Atlantic Reporter 2d 102, 104 (Vt. 1977) (profit); *Dawson v. Fling*, 396 P.2d 599, 601 (Colo. 1964) (profit); *Thomas v. Fin & Feather Club*, 171 S.W. 698 (Tex. 1914) (easement).

Amusement Co., Ltd. v. Waikiki Business Plaza, Inc., 719 P.2d 1119, 1123 (Haw. Ct. App. 1986) (preventing servient owner from erecting structures on portion of easement even when such structures did not prelude dominant owner's continued use); *Langhorst v. Riethmiller*, 368 N.E.2d 328, 330 (Oh. Ct. App. 1977) (holding that "the owner of the servient estate has no right to erect a fence across an easement or along the middle line thereof so as to obstruct the same"); *Stamm v. Kehrer*, 720 P.2d 1194, 1196-97 (Mont. 1986) (fence and unlocked gate across easement obstructed dominant owner's use). If an obstruction exists, the easement owner has a right to remove it himself or require the servient owner to remove it. Gerald Korngold, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 145 (2d ed. 2004). *See also Ironwood, L.L.C. v. JGB Properties*, 99 A.D.3d 1192 (N.Y. 4th Dep't 2012) ("It is well settled that the owner of a servient estate may be required to remove obstructions to an easement"); *Avery v. Colonial Pipeline Co.*, 444 S.E.2d 363, 365 (Ga. Ct. App. 1994) (holding that easement for underground natural gas pipeline included "the implied right to cut trees and shrubbery on their easements and to side-cut tree limbs and shrubbery which overhang the easements" to enable a visual aerial inspection).

The Tribes' fishing rights are not easements dependent on state law; they are federally protected treaty rights. Nevertheless, the fish passage barrier culverts in

this case are analogous to obstructions within an easement, and as such, they would be prohibited under many state laws. *See Grand Traverse Band*, 141 F.3d at 639 & n.9 (comparing Indian fishing rights to easements and profits and noting that "for purposes of this appeal . . . we find easement law instructive").

There are, however, also broader grounds found in the law of easements that could, by analogy, protect the Tribes' treaty resources. Servient landowners are prohibited from developing their property in a way that would unreasonably interfere with the easement holder's rights. Korngold at 143 (noting that "[t]he law assumes this duty of the servient owner not to interfere [with reasonable use of the easement], even when none is expressed in the easement document"); 100 Am. Jur. Trials 337, § 9 (2013) (collecting cases). With respect to profits that allow hunting or fishing on the lands of another, this rule is typically applied to create an implied right to protection of fish and wildlife populations. For example, in *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, the Wisconsin Supreme Court considered whether an 1896 grant of hunting and fishing rights on 400 acres of adjoining land was an enforceable easement that precluded the development of a twenty-unit condominium complex. 516 N.W.2d 410, 412-13 (Wis. 1994). The court held that the development would unreasonably interfere with the easement holder's rights. Among other things, the court noted that it would be more difficult to hunt on the property because "hunters would face increased risk of inadvertently

shooting a person," and the development would "reduc[e] the number of wild animals that inhabit the property" due to increases in cars, boats, and people. *Id.* at 417-18. *See also Kritzman Development v. Walden Properties, LLC*, 2008 WL 1958997, *5 (Mich. Ct. App. 2008) (concluding that the construction of a residential subdivision on the servient property "would clearly interfere and be inconsistent with the [hunting] rights granted in the 1929 indenture"); *Wechsler v. People*, 147 A.D.2d 755 (N.Y. App. 1989) (noting that servient landowner "has the right to use its land in any manner that does not unreasonably interfere with the rights of the owner of the easement" to hunt and fish).[6]

The fact that several state courts have managed to implement this implied right to protection of fish and wildlife populations in the context of easements belies the State's argument that such rights are ill-defined and unworkable. Furthermore, rather than suggest a more variable "reasonableness" test, the Tribes have instead suggested that the fishery be protected only to the point necessary to supply the Tribes' moderate living needs. This approach is consonant with the

[6] Several English and Irish cases also held that the servient landowner could not develop the property in a way that would unreasonably impair hunting and fishing rights. *See, e.g., Boyle v. Holcroft*, 1 Irish Rep. 245 (1905) (holding that servient landowners could not erect a barbed wire fence that made it virtually impossible for the plaintiff, who held fishing rights, to take fish); *Pattison v. Gilford*, 43 Law J. Rep. (N.S.) Chanc. 524 (1874) (holding that the issuance of an injunction was not necessary to prevent the servient landowner from developing his property into a number of residential villas, which would impair the plaintiffs' right to hunt on the property, because the defendant was on notice that the court would protect the plaintiff's shooting rights against the planned development).

intent of both of the parties during treaty negotiations. The Tribes wanted to ensure that they could continue to rely on fish as a mainstay of their diet and for the commercial trade. The United States was eager to develop the area, but as a trustee, certainly did not want to see the Tribes become dependent on the United States for their basic needs.

CONCLUSION

For the foregoing reasons, the *amici* support affirmance of the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word and set in 14-point Times New Roman type style.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 6,478 words, excluding the parts of the brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain this word count.

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