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Off-Reservation Treaty Hunting Rights, the Restatement, and the Stevens Treaties

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OFF-RESERVATION TREATY HUNTING RIGHTS, THE RESTATEMENT, AND THE STEVENS TREATIES

Ann E. Tweedy*

Abstract: The underdevelopment of the law of off-reservation treaty hunting and gathering poses challenges for treatises like the groundbreaking Restatement of the Law of American Indians (“Restatement”). With particular attention to sections 83 and 6 of the Restatement, this Article explores those challenges and offers some solutions for dealing with them in subsequent editions of the Restatement. Specifically, this Article explores the potential usefulness of historical law in interpreting treaties, the need to tie treaty interpretation to the language of the treaty when an explicit right is at issue, the proper application of the reserved rights doctrine and the Indian canons, and how the canons should be applied in the face of conflicting tribal interests. This piece also celebrates the successes of those two sections and of the Restatement in general.

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INTRODUCTION

As noted above, this Article focuses on sections 83 and 6 of the Restatement of the Law of American Indians.¹ To a lesser degree, it also focuses on section 5.² Section 83 concerns off-reservation tribal usufructuary rights, and section 6 addresses the canons of construction for interpretation of treaties between the United States and Indian tribes. Section 5 contains foundational information about treaties between Indian tribes and the United States.³ This Article comments on the strengths of these Restatement sections while also identifying areas where changes or additional development would be helpful.

Much of this Article focuses on hunting rights, although gathering and fishing rights are also addressed. The primary focus is on off-reservation treaty rights (as opposed to off-reservation rights recognized via statute or executive order), and most of the analysis is of the Stevens Treaties. The Stevens Treaties are a group of treaties negotiated by Isaac Stevens, the governor of Washington Territory, with tribes in the Northwest in the mid-eighteen fifties.⁴ His charge was to “extinguish all Indian title in [the] Northwest as quickly as possible to open up land for white settlers”⁵ With respect to usufructuary rights, the Stevens Treaties “contain similar and often identical provisions.”⁶

The jurisprudence of off-reservation treaty hunting and gathering rights is under-developed. There are likely several reasons for this. One reason relating to the gathering context is that there are few—if any—readily accessible treaty gathering cases that delineate the metes and bounds of the treaty right to gather under specific treaties,⁷ even though gathering

1. See RESTATEMENT OF THE L.: THE L. OF AM. INDIANS §§ 6, 83 (AM. L. INST., Proposed Official Draft 2021).

2. See *id.* § 5.

3. See *generally id.* §§ 5, 6, 83.

4. 1 FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 18.04[2][e][ii] (Nell Jessup Newton ed., 2017) [hereinafter COHEN’S HANDBOOK].

5. Lauren Goschke, Note, *Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest*, 27 COLO. NAT. RES., ENERGY & ENV’T L. REV. 315, 326 (2016) (citing KENT D. RICHARDS, ISAAC I. STEVENS: YOUNG MAN IN A HURRY 98 (1979)).

6. COHEN’S HANDBOOK, *supra* note 4, § 18.04[2][e][ii].

7. See Goschke, *supra* note 5, at 327 (“[T]he extent of a tribe’s ability to make use of ‘open and unclaimed lands’ for gathering has not been litigated”); *id.* at 319 (“Courts have not fully addressed how treaty-gathering rights should be interpreted”). Some cases do address the treaty gathering right in a general way, however. See, e.g., *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362, 1365 (D. Minn. 1997), *aff’d*, 526 U.S. 172 (1999) (discussing whether an 1855 treaty terminated hunting, fishing, and gathering rights).

remains a central cultural practice for many tribes.⁸ With respect to hunting cases, the fact that such cases often originate with state court criminal charges and then proceed through the state court system⁹ is undoubtedly one of the key reasons for the under-development of the law in this area.

One of the problems with having treaty rights issues defined through criminal cases is that treaty rights issues are invariably complicated, ideally calling for expert anthropological and historical evidence relating to both cultural practices and the understandings of relevant terms at treaty-time.¹⁰ Individual treaty hunters are likely to be ill-equipped to

8. See, e.g., Goschke, *supra* note 5, at 317, 339 (describing the sacredness of huckleberries for many tribes in the Northwest); Nathan Frischkorn, *Treaty Rights and Water Habitat: Applying the United States v. Washington Culverts Decision to Anishinaabe Akiing*, 11 ARIZ. J. ENV'T. L. & POL'Y 34, 36 n.3 (2020) (describing the sacredness of wild rice to the Anishinaabe peoples of the Great Lakes region); see also TULALIP TRIBAL CODES, tit. 8, § 8.15.030 (2022), <https://www.codepublishing.com/WA/Tulalip/#!/Tulalip08/Tulalip0815.html#8.15> [<https://perma.cc/55FG-3NN7>] (requiring a tribal permit for on-reservation harvest of “forest products,” which are defined to include trees, berries, mushrooms, and similar items); *id.* § 8.15.020(10) (defining “forest product”). Interestingly, gathering has—at least for some Native cultures—been traditionally associated with women, see Goschke, *supra* note 5, at 339, 341, whereas hunting was traditionally associated with men, although some women now engage in treaty hunting. See Ann E. Tweedy, *Tribes, Firearm Regulation, and the Public Square*, 55 U.C. DAVIS L. REV. 2625, 2653–54 (2022).

9. See, e.g., *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686 (2019) (addressing the treaty-rights defense of a Crow tribal member who was convicted in state court for off-season hunting in the Bighorn National Forest in violation of state law); *Antoine v. Washington*, 420 U.S. 194 (1975) (examining whether state hunting laws could be applied to regulate Native defendants, one of whom was a member of the Confederated Indian Tribes of the Colville Reservation, who claimed hunting rights under an agreement between the Tribes and the United States that had been ratified by Congress).

10. A good example of a well-litigated treaty-rights case is the sub-proceeding of *United States v. Washington* in which tribes and the United States litigated tribal shellfish rights under the Stevens Treaties against the State of Washington and various groups of shellfish growers and private property owners. 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd in part & rev'd in part*, 135 F.3d 618 (9th Cir. 1998). Expert testimony addressed in this district court opinion concerned such issues as whether Governor Stevens envisioned establishment of an oyster industry in Puget Sound, *id.* at 1437, whether “the United States expected that there would be extensive development of the tidelands,” *id.* at 1439, whether individual Indians or tribes protested alienation of tidelands, *id.* at 1441, the economic status of tribes and tribal members in light of the judge-made allocation standard allowing for tribal shares of fisheries to be reduced if they earned more than necessary to secure a “moderate living,” *id.* at 1446, the location of one tribe’s usual and accustomed fishing areas at treaty time, *id.* at 1447, and successorship of a modern day federally recognized tribe to certain treaty signatories, *id.* at 1448.

The parties’ filings as well as district court orders further elucidate the scope of expert testimony that the parties offered in the case. For example, in their Joint Tribal Memorandum in Opposition to Defendants’ Motion to Limit Expert Testimony on Scope and Extent of Tribal Use of Shellfish and Shellfishing Locations, plaintiff tribes explained, in defending against the State’s request to limit the tribes’ expert testimony, that they needed to present anthropological testimony both on the general importance of shellfishing to the tribes and on each tribe’s usual and accustomed shellfishing areas. Joint Tribal Memorandum in Opposition to Defendants’ Motion to Limit Expert Testimony on Scope

provide that evidence. This circumstance is due in part to the fact that the expense of hiring expert witnesses may make expert testimony unobtainable¹¹ and in part to the fact that an indigent treaty hunter charged by the state may or may not be entitled to an attorney at the state's expense under the Sixth amendment.¹² As a result, individual treaty hunters are often unable to put forward the best possible case, which in turn tends to lead to rulings on the scope of treaty rights that are less-than-ideal.¹³

and Extent of Tribal Use of Shellfish and Shellfishing Locations at 2–3, *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (No. 9213). The trial court ultimately denied the defendant's attempt to limit tribal expert testimony, noting that the court was "frankly astonished that the State of Washington thought it necessary to file such a motion." Order Denying State's Motion In Limine to Limit Expert Testimony at 1, *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (No. CV 9213). The State of Washington itself offered the testimony of no fewer than ten expert witnesses, including historians, anthropologists, public health experts, ethnohistorians, and economists. Defendant State of Washington's Submission of Written Direct Testimony of Expert Witnesses, *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (No. 09213).

For an example of successful use of expert testimony in a criminal case in which the defendant relied on treaty fishing rights as a defense, see Sammy Matsaw, Dylan Hedden-Nicely, & Barbara Cosens, *Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe's Understanding*, 50 ENVTL. L. 415, 445 (2020) (discussing State v. Tinno, 497 P.2d 1386 (Idaho 1972)); see also *United States v. Skeet*, No. 21-CR-00591 MV, 2022 WL 3701593, at *10 (D.N.M. Aug. 26, 2022) (accepting and relying on the Navajo defendant's proffered written anthropological evidence regarding commercialization of goods and services at treaty time over the United States' objection and noting that "courts frequently turn to precisely this type of evidence to evaluate the existence of treaty rights").

11. Procuring expert testimony in general is widely understood to be an expensive undertaking. See, e.g., Daniel L. Rubinfeld & Joe S. Cecil, *Scientists as Experts Serving the Court*, 147 DAEDALUS 152, 153 n.6 (2018) (discussing a 1999 survey of federal judges and attorneys regarding problems with expert testimony and noting that the second-most cited problem was "[e]xcessive expense of party-hired experts"; accord Thomas C. Ries & Kathryn E. Hummel, *Establishing Earnings Potential & Employability Without an Expert*, 36 FAM. ADVOC. 28, 28 (2018) ("Almost every divorcing couple encounters considerable financial stress. . . . Discretionary funds to hire an attorney, let alone to pay for the cost of an expert witness, often are unavailable.").

12. The Sixth Amendment requires states to provide attorneys to indigent defendants only when there is a possibility of imprisonment. *United States v. Bryant*, 579 U.S. 140, 140 (2016), as revised (July 7, 2016) ("The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed . . ."). Some state hunting violations are classified as infractions and thus would not trigger the constitutional right to counsel, see WASH. REV. CODE § 77.15.160(2)(c), and some criminal hunting violations are punished by a fine—similarly not triggering the right to counsel. See WASH. REV. CODE § 77.15.420. While individual states may have broader rights to counsel than that required by the Sixth Amendment, Washington law, for example, does not appear to cover hunting violations more broadly than the Sixth Amendment requires. WA ST CR LTD JURIS. CrRLJ 3.1, as amended 2022 WASHINGTON COURT ORDER 0031 (C.O. 0031). As might be expected, then, treaty hunters occasionally proceed pro se. See, e.g., *State v. Miller*, 102 Wash. 2d 678, 689 P.2d 81 (1984) (reflecting that one of the hunters charged in the case was proceeding pro se).

13. See, e.g., *State v. Chambers*, 81 Wash. 2d 929, 932, 934–36, 506 P.2d 311, 313–15 (1973) (upholding the conviction of a Yakama tribal member for unlawful hunting and rejecting his arguments on appeal, including his contentions (1) that his witness, who was a current member of the Yakama Tribal Council and who would have testified as to the interpretation of the treaty in 1855 by

Having different states deciding treaty-rights issues also has resulted in a lack of uniformity within the body of law.¹⁴ Moreover, state court decisions are not binding but would be persuasive authority, a circumstance that leads to uncertainty about what the law is. To complicate matters further, some individual state courts have been openly hostile to the exercise of treaty hunting rights.¹⁵

Another possible reason for the under-development of the law of off-reservation treaty hunting rights is more practical—perhaps treaty fishing has been more visible than treaty hunting, leading to fishing rights having come to the fore much earlier.¹⁶ Or perhaps the fact that treaty fishing rights have been relatively lucrative at times, in some areas of the country,¹⁷ is what has caused treaty fishing rights to become fleshed out

the Indian signatories, was unlawfully excluded and (2) that the court’s instruction to the jury to the effect that “open and unclaimed” meant not in private ownership and lacking indicia of private ownership was erroneous); *see also* State v. McMeans, Nos. 33515-1-III, 33516-0-III, 2016 Wash. App. LEXIS 2024, 195 Wash. App. 1038 (Aug. 9, 2016) (unpublished opinion) (rejecting a Yakama tribal member’s claim of religious exemption from state hunting laws). Notably, the defendants in *Chambers* and *McMeans* did not offer testimony of experts such as anthropologists, historians, or ethnohistorians whom courts are likely to perceive as persuasive.

14. *See* COHEN’S HANDBOOK, *supra* note 4, § 18.04[2][e][iii] (citing and discussing State v. Buchanan, 138 Wash. 2d 186, 208–11, 978 P.2d 1070, 1081–82 (1999), and State v. Cutler, 708 P.2d 853, 859 (Idaho 1985)).

15. *See, e.g.*, Order on State’s Request for Post-Remand Issue Preclusion, Wyoming v. Herrera, CT 2014-2687; 2688, 16 (Wyo. Cir. Ct. 4th Dist. Jun. 11, 2020) (ruling that the defendant was precluded under a prior case from arguing that the Bighorn National Forest was “unoccupied” within the meaning of the treaty despite the ruling of the United States Supreme Court in his favor on the issue of whether creation of the National Forest rendered the land categorically occupied), *rev’d* Herrera v. Wyoming, CV 2020-273 (Wyo. 4th Dist. Dec. 3, 2021); *see also* Herrera v. Wyoming, 587 U.S. ___, 139 S. Ct. 1686, 1697 (2019) (holding that the defendant was not precluded from arguing that he had a treaty right to hunt in the Bighorn National Forest).

16. Part of the reason that treaty fishing has been more visible is that Native fishers, particularly those in the Pacific Northwest, engaged in a civil rights movement to fight to get their treaty fishing rights recognized in the 1960s and 1970s, and their actions were often met with violence. *See, e.g.*, Richard Duwors, *Documents from the Indian Fishing Rights Controversy in the Pacific Northwest*, 99 PAC. NW. Q. 55, 55 (2008) (describing fish-ins in the Pacific Northwest in the 1960s and 1970s and the extensive press coverage that they received). On the flip side, those who oppose treaty fishing rights have sometimes started their own violent campaigns against tribal fishers. *See, e.g.*, Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc., 759 F. Supp. 1339, 1344-1346 (W.D. Wisc. 1991) (discussing protestors’ violent interference with Lac Du Flambeau Band members’ exercise of their treaty right to spear fish); *see also* BRIAN L. PIERSON, THE SPEARFISHING CIVIL RIGHTS CASE: LAC DU FLAMBEAU BAND V. STOP TREATY ABUSE-WISCONSIN 2 (2009), [https://glifwc.org/minwaajimo/Papers/3%20-%20Pierson%20--%20The%20Spearfishing%20Civil%20Rights%20Case%20\(GLIFWC\).pdf](https://glifwc.org/minwaajimo/Papers/3%20-%20Pierson%20--%20The%20Spearfishing%20Civil%20Rights%20Case%20(GLIFWC).pdf), [<https://perma.cc/TXE5-J3YK>]. In a more practical vein, activities on the open water are likely to be more visible than those like hunting that are often conducted in remote wooded areas.

17. Compare Dominic P. Parker, Randal R. Rucker, & Peter H. Nickerson, *The Legacy of United States v. Washington: Economic Effects of the Boldt and Rafeedie Decisions*, in UNLOCKING THE WEALTH OF INDIAN NATIONS (Terry L. Anderson ed., 2016) (estimating the gross revenues that

through extensive litigation in the federal courts. By contrast, although there have been a few federal cases regarding treaty hunting,¹⁸ the law of off-reservation treaty hunting rights remains in relative infancy.

The under-development of the law relating to treaty hunting and gathering rights poses challenges for the newly minted Restatement of Law of the American Indians, given that Restatements generally seek to accommodate two impulses—that of “recapitulat[ing] the law as it presently exists” and that of “reformulat[ing] it, thereby rendering it clearer and more coherent”¹⁹ With less precedential law to address, reformulating and recapitulating become much more difficult. To be sure, there is significant overlap between off-reservation treaty hunting, gathering, and fishing rights, and the Restatement sensibly groups the three sets of rights together. However, there are legal issues unique to the hunting and gathering contexts that remain troublingly under-developed. This Article proposes changes to wording and additional development of some tenets in the Restatement that will, if adopted, assist courts in evaluating claims of off-reservation treaty hunting and gathering rights in particular, as well as off-reservation treaty usufructuary rights more broadly.

As mentioned above, many of the comments in this Article focus on section 83 of the Restatement, titled “Off-Reservation Hunting and

collectively were earned by treaty fishers after the Boldt decision, until the crash of the salmon fisheries due to environmental factors in the 1990s, and the gross revenues that treaty fishers collectively earned as a result of the Shellfish decision), with *Treaty Hunting Rights FAQ*, NW. INDIAN FISHERIES COMM’N, <https://nwifc.org/about-us/wildlife/treaty-hunting-rights-faq/> [https://perma.cc/P3CV-ZBF6] (“Indian tribes allow their members to hunt to meet their ceremonial and sustenance needs. All [member] tribes prohibit hunting for commercial purposes.”). The Boldt decision, *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9th Cir. 1975), was the foundational decision recognizing the treaty fishing rights of tribes in Western Washington. See, e.g., Phil Dougherty, *The Boldt Decision*: United States v. State of Washington, HISTORYLINK.ORG (Aug. 24, 2020), <https://www.historylink.org/file/21084> [https://perma.cc/3AY3-NP5B] (describing the foundational quality of the trial court decision affirming the existence of treaty fishing rights for tribes in Western Washington and noting that it is commonly referred to as “The Boldt Decision”). The decision recognizing the treaty rights of tribes in Western Washington to harvest shellfish, *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff’d in part & rev’d in part* 135 F.3d 618 (9th Cir. 1998), is referred to as “the Rafeedie Decision.” *The Rafeedie Decision*, NW. INDIAN FISHERIES COMM’N, <https://nwifc.org/about-us/shellfish/rafeedie-decision/> [https://perma.cc/NK5Y-4UZ3].

18. See, e.g., *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997) (affirming the continued existence of treaty hunting, fishing and gathering rights under an 1837 Treaty), *aff’d* 526 U.S. 172 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wisc. 1990) (upholding tribal members’ hunting and trapping rights on lands ceded by treaty).

19. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS at ix (AM. L. INST., Proposed Official Draft 2021).

Fishing Rights.”²⁰ One of the primary arguments of this piece is that some of the uncertainty regarding off-reservation treaty hunting and gathering rights can be alleviated by reading that section in conjunction with section 6, entitled “Canons of Construction of Indian Treaties,” and to a lesser extent section 5, “Indian Treaties with Indian Tribes.”²¹ This Article also suggests additions and changes to these three sections in future editions and makes some general comments about the three sections. A substantial number of the comments focus on treaty hunting and gathering rights, although some are equally applicable to treaty fishing rights. Because the bulk of the author’s prior practice was devoted to representing Coast Salish tribes, many of the examples discussed relate to the Stevens Treaties.

Part I addresses section 83, discussing first, in I.A, the broad and inclusive scope of section 83 of the Restatement and then, in I.B, explaining the problematic overbreadth of section 83’s suggestion that off-reservation usufructuary rights are limited to a tribe’s ceded lands.

Part II explores possibilities for further development of sections 5 and 6 of the Restatement. II.A explores the possible addition to section 5 of a statement that treaty interpretation should begin with the language of the treaty. II.B, C, and D relate to section 6. II.B uses an example from the negotiation of the Stevens Treaties to provide further support for the canon delineated in section 6(b) that Indian treaties must be interpreted the way that Indians themselves understood them when they were negotiated and signed. II.C recommends expanding the discussion in section 6(c) (and particularly Comment d) of the surrounding circumstances and history of a treaty to explicitly include a discussion of the potential importance of laws that were in place at the time a treaty was negotiated and signed. Finally, II.D recommends that the Reporters’ Notes for section 6 be modified to explain more precisely how and whether to apply the canons for Indian treaty interpretation to situations in which tribal interests conflict.

I. SECTION 83

Section 83, entitled “Off-Reservation Hunting and Fishing Rights,” states in full that: “[c]ertain Indian treaties, statutes, and Executive orders guarantee rights to Indian tribes, including the rights to hunt, fish, gather, farm, and travel on lands ceded by the tribe to the United States, subject to federal plenary power.”²²

20. *Id.* § 83.

21. *Id.* §§ 5, 6.

22. *Id.* § 83.

I.A explores different aspects of the admirable breadth of this Section. I.B discusses the erroneous suggestion in the section that such usufructuary rights are uniformly limited to ceded lands.

A. *The Broad Scope of Section 83*

One of the most important aspects of section 83 is its breadth, which exists along a number of axes. One aspect of this broad scope concerns the source of federal recognition of off-reservation usufructuary rights. The section acknowledges that off-reservation usufructuary rights can be recognized by “treaties, statutes, and Executive orders.”²³ In federal Indian law, off-reservation usufructuary rights are often simply assumed to be based on treaties, and an unfortunate dichotomy can arise between treaty and non-treaty tribes.²⁴ It is crucial that the Restatement acknowledges that other types of laws, including executive orders, may also reserve such rights. Congress prohibited further treaty-making with tribes in 1871, so many tribes that might have otherwise had treaties with the United States instead have reservations based on executive orders.²⁵ Recognizing the possible existence of usufructuary rights based on statutes and executive orders in the Restatement is also a matter of equity given that, even before 1871, the Senate unfairly refused to ratify many treaties that tribes had negotiated with the federal government; these refusals were often made on the basis that the treaties were perceived as too generous to the tribes.²⁶ The result was that tribes gave up their lands under the pretense of these treaties in some cases and, in others, faced

23. *Id.*

24. See, e.g., Brayden Jack Parker, ‘Cornerstone upon Which Rest All Others’: Utilizing Canons of Statutory Interpretation to Confirm an Enforceable Trust Duty for Native American Health Care, 90 GEO. WASH. L. REV. 237, 250–52 (2022) (comparing the results of breach of trust claims in the healthcare context made by a treaty tribe (the Rosebud Sioux) with those made by a non-treaty tribe (the Quechan Tribe)). For an example of a litigant’s arguments (which were rejected by the Ninth Circuit) that fishing rights cannot arise from an executive order because such an interpretation would demean treaty rights, see *Parravano v. Babbitt*, 70 F.3d 539, 544–45 (9th Cir. 1995).

25. 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, 658 (2009) (citing and discussing 25 U.S.C. § 71 (2006)); see also EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 34 (2021).

26. See, e.g., Ronald Spores, *Too Small a Place: The Removal of the Willamette Valley Indians, 1850–1856*, 17 AM. INDIAN Q. 171, 178 (1993) (noting that the thirteen treaties that Anson Dart had negotiated with Oregon Indians by 1851 were never ratified because they were perceived as “too generous” on the basis that they accorded the tribes reservations within their traditional territories, rather than removing them as settlers wanted); Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 214 & n.44 (1991) (noting that the United States negotiated eighteen treaties with California tribes and that the Senate then refused to ratify them on the bases that they set aside too much land for the tribes and that the costs of annuities and services to be provided pursuant to them were too expensive).

intense encroachment and violence, and, at least initially, they received nothing in return.²⁷ Because of these extreme historical injustices, it is all the more important that executive order tribes be treated equitably in cases where executive orders reference off-reservation usufructuary rights.

It is possible that, as more cases are litigated regarding off-reservation rights, courts may draw some distinctions between off-reservation usufructuary rights based on treaties and statutes and those based on executive orders.²⁸ However, it is to be hoped that courts will follow the Ninth Circuit's lead in holding, as a general matter, that, "when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise."²⁹

Another sense in which section 83 is broad in scope is in its list of rights that may be exercised off-reservation under a treaty, statute, or executive order. The Restatement goes beyond the standard fare of hunting, fishing, and gathering rights to include the less frequently addressed rights to farm and travel.³⁰ This inclusiveness adds value to the Restatement and demonstrates a thoughtful attempt to cover as many as possible of the variations among treaties.

B. *Section 83's Reference to Ceded Lands Is Inaccurate for Some Treaties*

One aspect of section 83 that is inaccurate for some tribes is its suggestion that the exercise of off-reservation rights is limited to "lands ceded by the tribe to the United States . . ."³¹ The Stevens Treaties, negotiated with and signed by tribes in the Pacific and Inland Northwest between 1854 and 1856,³² do not limit hunting, fishing, or gathering rights

27. Spores, *supra* note 26, at 179–80; Paschal, *supra* note 26, at 214.

28. For example, it is conceivable that a court could hold that a servitude on private property to access a fishery cannot be based solely on rights recognized in an executive order, although such a servitude has been held to arise by treaty. *Cf.* United States v. Winans, 198 U.S. 371, 381 (1905) (describing treaty fishing rights as imposing a "servitude" on private lands for purposes of access).

29. *Parravano*, 70 F.3d at 545.

30. For a discussion of a treaty that explicitly includes a right to travel, see generally *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 586 U.S. ___, 139 S. Ct. 1000 (2019).

31. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 83 (AM. L. INST., Proposed Official Draft 2021).

32. *See* Br. for Pac. and Inland Nw. Treaty Tribes as Amici Curiae in Supp. of Pet'r at 1, *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686 (2019) (No. 17-532), 2018 WL 4381215, at *1 (defining Stevens Treaties); Mariel J. Combs, United States v. Washington: *The Boldt Decision Reincarnated*, 29 ENVTL. L. 683, 687 (1999). The Quinault Treaty, also referred to as the Treaty of Olympia, was the last Stevens Treaty to be signed, with some tribal signatories signing in July 1855 and others in

to ceded lands. Rather, the hunting, fishing, and gathering clauses in those treaties typically state, as shown in this example from the Treaty of Point Elliott, that:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.³³

Thus, in contrast to treaties in the Great Lakes area,³⁴ there is no mention of ceded lands in the Stevens Treaties. The enunciation of the usufructuary rights in the Stevens Treaties does demonstrate other important limitations as to the lands and waters that these rights may be exercised upon—significantly, as we see here, the right of taking fish is limited to “usual and accustomed grounds and stations” and the hunting and gathering rights are limited to “open and unclaimed lands.”³⁵

Grafting an additional ceded lands limitation onto the Stevens Treaties would serve to circumscribe the treaty rights in a way that is not hinted at in the treaty language itself. This contravenes the general principle of treaty interpretation that the starting point should be the language of the treaty.³⁶ The Supreme Court in *McGirt v. Oklahoma*³⁷ recently reaffirmed the impermissibility of imposing limitations on tribal rights that cannot be

January 1856. See *Quinault Treaty*, WASH. STATE HIST. SOC'Y, https://web.archive.org/web/20090506221543/http://washingtonhistoryonline.org/treatytrail/treaties/timeline/treaty_10.htm [https://perma.cc/5NJS-46LL]; see also *Treaty Timeline Summary*, WASH. STATE HIST. SOC'Y, <https://web.archive.org/web/20090506145842/http://washingtonhistoryonline.org/treatytrail/treaties/timeline/timeline.htm> [https://perma.cc/LP9W-GU5Y] (but note that the timeline erroneously lists Quinault Treaty as having been signed in January 1855).

33. Treaty of Point Elliott, art. 5, Jan. 22, 1855; see also *State v. Buchanan*, 138 Wash. 2d 186, 199–200 & n.6, 978 P.2d 1070, 1076–77 & n.6 (1999) (noting that the same language is included, with slight variation, in all of the Stevens Treaties).

34. COHEN'S HANDBOOK, *supra* note 4, § 18.04[2][e][iii] (citing Treaty with the Chippewa, July 29, 1837, art. 5, 7 Stat. 536).

35. See, e.g., Treaty of Point Elliott, art. 5, Jan. 22, 1855 (“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.”).

36. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (“Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself.”); see also *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1701 (2019) (“Treaty analysis begins with the text . . .”).

37. 591 U.S. ___, 140 S. Ct. 2452 (2020).

found on the face of the applicable treaty or statute.³⁸

Moreover, as section 6 of the Restatement explains, the canons of construction for Indian treaties require that they be “liberally interpreted in favor of the relevant Indian tribes to give effect to the purposes of the treaty.”³⁹ This requirement would be turned on its head if a geographical limitation were read into a treaty beyond those limitations that are already present in the text. We can see this particularly in the hunting and gathering context because the lands subject to hunting and gathering rights are those that are “open and unclaimed.”⁴⁰ The category of open and unclaimed lands is one that is subject to change (and in many cases, shrinkage) as more land becomes occupied or cultivated.⁴¹ To add a

38. See, e.g., Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at “the Far End of the Trail of Tears”?*, 37 GA. STATE UNIV. L. REV. 739, 756–57 (2021) (discussing *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)). While the Court’s recent decision in *Oklahoma v. Castro-Huerta* does not show anywhere near the same solicitude for tribal sovereignty as does the decision in *McGirt*, see generally, *Oklahoma v. Castro-Huerta*, __ U.S. __, 142 S. Ct. 2486 (2022); Elizabeth Hidalgo Reese, *Conquest in the Courts: Without Having to Sign a Treaty or Fight a War, A 5-4 Majority Handed the States Presumptive Power over Indian Lands*, THE NATION (July 6, 2022), <https://www.thenation.com/article/society/supreme-court-castro-huerta/> [https://perma.cc/BJ5D-KPF9], *Castro-Huerta*’s analysis is divorced from basic Indian law principles and precedent and therefore should not be read more broadly than its context of criminal jurisdiction over non-Indians. See *Castro-Huerta*, 142 S. Ct. at 2511, 2521 (Gorsuch, J., dissenting) (noting that the Court’s declaration of its holding “comes as if by oracle” and that “its mistakes need not—and should not—be repeated”); Reese, *supra* (explaining that the “opinion is unmoored from the key cases of federal Indian law and divorced from the realities of American history”). Moreover, the opinion does not speak specifically to treaty interpretation and does not deal with usufructuary rights, so the opinion does not address questions of treaty interpretation or the scope of usufructuary rights. See generally *Castro-Huerta*, 142 S. Ct. 2486. Finally, one of the primary bases of the holding in *Castro-Huerta* was the Court’s view that allowing state prosecution of non-Indians would not infringe tribal rights of self-government. *Castro-Huerta*, 142 S. Ct. at 2501. A narrow interpretation of usufructuary rights would contravene tribal rights, including the tribal right to regulate off-reservation treaty rights. Thus, the reasoning in *Castro-Huerta*, even if extended to other contexts, does not narrow *McGirt*’s holding with respect to matters that do affect tribal self-government. See *id.*

39. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6 (AM. L. INST., Proposed Official Draft 2021).

40. See, e.g., Treaty of Medicine Creek, art. 3, Dec. 26, 1854, <https://goia.wa.gov/tribal-government/treaty-medicine-creek-1854> [https://perma.cc/9K8K-Z78A] (recognizing signatory tribes to have the “privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands”).

41. See *United States v. Hicks*, 587 F. Supp. 1162, 1164 (W.D. Wash. 1984) (stating, in reference to the Stevens Treaties, that, “as settlement by non-Indians occurred, lands upon which the Indians could exercise their hunting privilege would diminish”). In other words, if a 100-acre undeveloped area that consisted of meadows and woods was turned into a large housing development, that area would presumably no longer be subject to treaty hunting rights. While it is possible that particular parcels of land that are developed (or in the parlance of the Stevens Treaties, become enclosed and claimed) could later revert back to being open and unclaimed, it seems likely that most land that loses its open and unclaimed character will remain enclosed and claimed at least semi-permanently.

Notably, the Donation Land Claim Act of 1850, which included the lands that later became part of

requirement that is not found in the treaties themselves that the open and unclaimed lands be within ceded territory would be unduly restrictive and could lead to drastic curtailment of the hunting right. This is particularly problematic given that Isaac Stevens, who negotiated the Stevens Treaties on behalf of the United States, appears to have wanted to ensure that the tribes with whom the United States entered treaties would continue to be self-sufficient through the exercise of usufructuary rights.⁴²

When the canons of construction for Indian treaties are used in conjunction with the doctrine of reserved rights,⁴³ which conceptualizes “an Indian treaty as a grant of rights from a tribe to the United States, rather than a cession of all tribal rights to the United States, which then granted back certain concessions to the tribe,”⁴⁴ rights that do not appear clearly on the face of a treaty may nonetheless be held to exist by implication. The combined effect of the reserved rights doctrine and the canons is exemplified in the district court’s determination in *United States v. Michigan*⁴⁵ that the right to “hunt” in a treaty should be read to include a right to fish, both because the applicable tribes were engaged in fishing at treaty time and did not give that right up in the treaty and because the term hunting can be read broadly to include fishing.⁴⁶ *United States v. Michigan* is thus one example of how a treaty can be read broadly to accord with the Indian treaty signatories’ understanding even though the

the Washington Territory, required “white settler[s]” to “reside[] upon and cultivate[]” land for four years in order to claim it. Donation Land Claim Act of 1850, ch. 76, § 4, 9 Stat. 496, 497; *see also* William L. Lang, *Creation of the Washington Territory, 1853*, OREGON ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/washington_territory_1853/#.YwG2pXbMKM8 [<https://perma.cc/YB2J-E9ZX>]. Individuals could claim 320 acres and married couples could claim 640 acres. Donation Land Claim Act of 1850, *supra* (for purposes of the Act, “white” persons included those who were half or less Native). *Id.*

42. *See, e.g.*, *United States v. Washington*, 853 F.3d 946, 961 (9th Cir. 2017) (quoting Stevens’ statement that “I want that you shall not have simply food and drink now but that you may have them forever.”), *aff’d by an equally divided court*, *United States v. Washington*, ___ U.S. ___, 138 S. Ct. 1832 (2018).

43. As explained in *United States v. Winans*, the reserved rights doctrine views a treaty “not [as] a grant of rights to the Indians, but [as] a grant of rights from them—a reservation of those not granted.” *United States v. Winans*, 198 U.S. 371, 381 (1905). The reserved rights doctrine is discussed in section 5(b) of the Restatement of the Law of American Indians. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 5(b) (AM. L. INST., Proposed Official Draft 2021). Section 5(b) states that “Indian treaties constitute reservations of rights by Indian tribes, not a grant of rights to Indian tribes.” *Id.*

44. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 402 (1993); *see also* Michael C. Blumm & James Brunberg, “Not Much Less Necessary . . . Than the Atmosphere They Breathed”: *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RES. J. 489, 490 (2006); *see also supra* note 43 and sources cited therein.

45. 471 F. Supp. 192 (W.D. Mich. 1979).

46. *Id.* at 213.

language, if read narrowly and in isolation from the context of the negotiations, would not necessarily lead to the same conclusion. The canons' purpose is to be fair to the tribal signatories, given the power imbalance and language barriers that most tribal treaty signatories faced.⁴⁷

Similarly, the reserved rights doctrine is intended to acknowledge that tribes came to the bargaining table with the full panoply of sovereign rights and only ceded, through a treaty or other document, rights that were explicitly given up.⁴⁸ Neither the canons nor the reserved rights doctrine should be used to narrow treaty language or to write limitations into the text of the treaty that are not present on its face.⁴⁹ When the text of a treaty does speak to a question, as with the right to hunt on open and unclaimed lands, the meaning of the treaty terms should be the focus,⁵⁰ specifically as understood by the tribal parties and as liberally interpreted in their favor.⁵¹ Additional restrictions having nothing to do with those terms should not be read in, and neither the canons nor the reserved rights doctrine creates a license to do so.

Another indication that adding a ceded lands limitation to the Stevens Treaties' off-reservation usufructuary rights provisions would be improper is that courts have not interpreted the treaties to have such a restriction. For example, in the foundational decision in *United States v. Washington*,⁵² Judge Boldt, in interpreting the fishing rights provisions in the Stevens Treaties, did not apply any ceded lands limitation, instead defining "usual and accustomed grounds and stations" to include "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat

47. See e.g., *Winans*, 198 U.S. at 380–81 (“[W]e will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,’ and counterpoise the inequality ‘by the superior justice which looks only to the substance of the right, without regard to technical rules.’”) (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886)); WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 132 (7th ed. 2020) (describing the purposes of the Indian law canons as being “[t]o compensate for the disadvantage at which the treaty-making process placed the tribes, and to help carry out the federal trust responsibility”).

48. See Frickey, *supra* note 44, at 402; accord Bethany R. Berger, *Natural Resources and the Making of Modern Indian Law*, 51 CONN. L. REV. 927, 936 (2019) (discussing the significance of the holding on reserved rights in *Winans*).

49. This conclusion is a logical extension of the purposes of the reserved rights doctrine and the canons, which are to protect tribal sovereignty and tribal treaty signatories' justified expectations. See *supra* notes 47–48 and accompanying text.

50. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (“Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself.”).

51. See RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6 (AM. L. INST., Proposed Official Draft 2021).

52. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

of the tribe”⁵³ In the same decision, Judge Boldt, relying on the expert testimony of anthropologist Dr. Barbara Lane,⁵⁴ identified “Grays Harbor and those streams which empty into Grays Harbor” as part of the Quinault Tribe’s usual and accustomed fishing area⁵⁵ even though Grays Harbor and the associated streams were located south of the lands that Quinault ceded in its treaty with the United States.⁵⁶

In the hunting and gathering context, unlike in the fishing context, there is no foundational decision interpreting the meaning of the relevant language in the Stevens Treaties. However, even a Washington State Supreme Court decision, *State v. Buchanan*,⁵⁷ which, as further discussed below, is problematic due to its approach of limiting treaty rights in a way that contravenes the text of the treaty, the canons, and the reserved rights doctrine,⁵⁸ acknowledges that tribal hunting rights under the Stevens Treaties can extend beyond ceded lands.⁵⁹

It is likely that the broad reference to ceded lands in section 83 is simply an oversight than can be remedied in subsequent editions of the Restatement by replacing it with a more nuanced discussion of the fact that some treaties limit the exercise of off-reservation usufructuary rights to ceded lands whereas others do not.

II. POSSIBILITIES FOR FURTHER DEVELOPMENT OF SECTIONS 5 AND 6

Section 5 of the Restatement addresses treaty-making with tribes generally, including the authority under which treaties with tribes were entered into by the United States government, the reserved rights doctrine, the permanence of treaties absent federal abrogation or consensual modification, and other issues.⁶⁰

Section 6 of the Restatement of the Law of American Indians concerns

53. *Id.* at 332.

54. *Id.* at 375; see also *Barbara Lane Passes Away*, NW. TREATY TRIBES (Jan. 24, 2014), <https://nwtreatytribes.org/barbara-lane-passes-way/> [<https://perma.cc/A24J-BQVV>].

55. *Washington*, 384 F. Supp. at 374–75.

56. Quinault Treaty, art. 1, Jan. 25, 1856, <https://goia.wa.gov/resources/treaties/quinault-treaty-1856> [<https://perma.cc/PM66-N4RW>].

57. *State v. Buchanan*, 138 Wash. 2d 186, 978 P.2d 1070 (1999).

58. See *infra* section II.A.

59. *Buchanan*, 138 Wash. 2d at 203, 978 P.2d at 1078 (limiting tribal hunting rights to lands that were either ceded by the applicable tribe or can be shown to have been traditionally used by the tribe for hunting). The decision is problematic because, although it does not limit off-reservation hunting solely to ceded lands, it does impose alternative requirements not rooted in the treaty language (that the land be either ceded or traditionally used for hunting by the tribe). *Id.*

60. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 5 (AM. L. INST., Proposed Official Draft 2021).

the canons of construction relating to Indian treaties. Prefaced by an overarching summary sentence, the section lays out in full the major canons of construction for Indian treaties:

A treaty must be liberally interpreted in favor of the relevant Indian tribes to give effect to the purpose of the treaty. Ordinary rules of construction do not apply. Courts apply the following canons of construction:

- (a) Doubtful or ambiguous expressions in a treaty must be resolved in favor of the relevant Indian tribes;
- (b) An Indian treaty must be construed as the Indians understood it at the time of the treaty negotiation;
- (c) An Indian treaty must be construed by reference to surrounding circumstances and history.⁶¹

Both section 5 and section 6 provide excellent foundational information about treaty-making with tribes generally and about the canons. At the same time, further developing the Comment and Reporters' Notes in section 6, and, to a lesser extent, those in section 5, could be very helpful to courts in dealing with both more novel treaty questions and those—like hunting rights—that have been addressed in contradictory ways by different courts.

Section II.A recommends adding to section 5 of the Restatement a discussion of the importance of starting treaty interpretation with the language of the treaty. Section II.B uses the negotiation of the Stevens Treaties to illustrate the importance of the canon, addressed in section 6(b) of the Restatement, that treaties be interpreted according to the Indian signatories' understanding. Section II.C recommends adding a discussion of the potential importance of historical law as a treaty interpretation tool to section 6(c) of the Restatement, which explains how surrounding circumstances and history are utilized in treaty interpretation. Finally, section II.D recommends revising the Reporters' Notes in section 6 of the Restatement to more precisely address how and whether courts should apply the canons when contemporary tribal interests conflict. Specifically, section II.D explains that it is the interests of treaty signatories at treaty-time that are relevant to the analysis, rather than the present-day interests of non-signatory tribes.

A. *The Reserved Rights Doctrine in Section 5 and the Importance of Beginning Treaty Interpretation with the Language of the Treaty*

Section 5 sets forth the reserved rights doctrine in subsection (b),

61. *Id.* § 6.

stating that “Indian treaties constitute reservations of rights by Indian tribes, not a grant of rights to Indian tribes.”⁶² As Restatement Comment c explains, this is a highly significant doctrine because it counsels that silence in the text of a treaty as to a specific tribal right that pre-exists the treaty should be interpreted to preserve that right. Thus, “[r]ights not addressed by Indian treaty provisions are presumptively reserved; courts should interpret silence in the treaty in light of the reserved-rights doctrine.”⁶³ One of the Restatement’s Illustrations of the doctrine explains that if a treaty reserved a right to fish from ceded lands until such lands were required for settlement, the tribal right to fish in Lake Michigan, adjacent to the ceded lands, would be preserved under the reserved rights doctrine because of the silence of the treaty with respect to exercising that right in Lake Michigan.⁶⁴

It is extremely useful to have the reserved rights doctrine illustrated in this way. In teaching, the author often finds that law students do not immediately understand the importance or effect of the doctrine from simply reading and discussing the language in *United States v. Winans*,⁶⁵ which is often cited as the origin of the doctrine.⁶⁶ At the same time, it would be helpful to include a discussion of an important corollary to the doctrine in the Comment on section 5, namely the dyed-in-the-wool principle that the starting place for treaty interpretation is the language of the treaty.⁶⁷ This principle is not uniquely applicable to Indian treaties, but rather is a broader principle of treaty interpretation.⁶⁸ Nonetheless, the principle warrants inclusion here. Including it would remind courts that, in contrast to the situation addressed in the reserved rights doctrine, which elucidates the continued vitality of tribal rights in the face of *silence* in treaty language, where there *is* treaty language on point with respect to a particular right, that language should govern, in conjunction with the Indian law canons. One might think that the principle goes without saying, but, unfortunately, as discussed in the majority opinion in *McGirt v.*

62. *Id.* § 5(b).

63. *Id.* § 5 cmt. c.

64. *Id.* cmt. c, illus. 2.

65. 198 U.S. 371, 381 (1905).

66. See Berger, *supra* note 48, at 936 (tying the reserved rights doctrine to *Winans*); Blumm & Brunberg, *supra* note 44, at 490; see also Lawrence R. Liebesman & Rafe Peterson, *The Scope and Significance of Tribal Reserved Rights*, in 3 L. OF ENVTL. PROT., at § 21:70 & n.2 (Envtl. L. Inst. ed., 2022). While the doctrine was first clearly laid out in *Winans*, it has roots dating back to the Marshall Trilogy. COHEN’S HANDBOOK, *supra* note 4, § 2.02[2].

67. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (“Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself.”).

68. See *id.* for an application of the rule outside of the context of Indian treaties.

Oklahoma and as illustrated by the dissent, judges sometimes seem willing to cabin tribal rights for practical reasons in ways that are not supported by the language of the applicable treaty or statute.⁶⁹ Because of this tendency, it would be useful for the Restatement to explicitly state that, where a treaty does lay out a specific right (as opposed to being silent about it), that language should be the starting point.

We can see the tendency to add restrictions to tribal rights that are not warranted by treaty language at work in the aforementioned Washington State Supreme Court case, *State v. Buchanan*. In that case, a Nooksack tribal member was arrested for hunting elk in a state wildlife area outside of the state-designated hunting season.⁷⁰ He claimed tribal treaty rights under the Treaty of Point Elliott as a defense.⁷¹ As discussed above, the tribes signatory to the Treaty of Point Elliott reserved the right to hunt on “open and unclaimed lands.”⁷² Rather than basing its decision squarely on the treaty language, the canons, and the question of whether the state wildlife area at issue should be considered “open and unclaimed,” the state supreme court instead accepted the state’s argument that it should read additional restrictions into the Treaty, viz., a limitation to only open and unclaimed lands that either (1) are within the areas ceded by the applicable tribe under the treaty or (2) constitute lands on which the treaty hunter or the tribe can prove that tribal members traditionally hunted.⁷³ This holding, which has been followed by the Oregon courts as well,⁷⁴

69. *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452, 2468–70 (2020); see *id.* at 2487–88, 2500 (Roberts, C.J., dissenting). The Court’s very recent decision in *Oklahoma v. Castro-Huerta* is widely regarded as disrespectful to tribal sovereignty. ___ U.S. ___, 142 S. Ct. 2486, 2517 (2022) (Gorsuch, J., dissenting); Reese, *supra* note 38. These criticisms are well-taken. One of the ways the opinion arrives at its almost perfunctory result is through what could be termed the sleight of hand of proclaiming that its holding does not infringe tribal sovereignty. See *Castro-Huerta*, 142 S. Ct. at 2500. Because of its approach, *Castro-Huerta* is not ostensibly a decision that interprets language narrowly in an applicable treaty so as to cabin tribal rights. See *supra* note 38 and sources cited (discussing *Castro-Huerta*). But see *Castro-Huerta*, 142 S. Ct. at 2514 (Gorsuch, J., dissenting) (suggesting that the Court’s holding is at odds with relevant “treaties and statutes”). Nonetheless, it cannot be denied that the majority opinion is part of the class of Supreme Court decisions that fails to take adequate account of tribal interests. See *id.* at 2522–24; see also Tweedy, *supra* note 25, at 683, 688 (noting that the Court often “appears unwilling to give tribal interests genuine weight or to make the effort necessary to grasp the genuine import of tribal interests” and discussing cases in which the Court refuses to seriously grapple with the tribal interests involved, including *Plains Com. Bank v. Long Fam. Land & Cattle*, 554 U.S. 316 (2008), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)).

70. *State v. Buchanan*, 138 Wash. 2d 186, 192, 978 P.2d 1070, 1073 (1999).

71. *Id.* at 193, 978 P.2d at 1073.

72. *Id.*; see also Treaty of Point Elliott, art. V, Jan. 22, 1855.

73. *Buchanan*, 138 Wash. 2d at 203, 978 P.2d at 1078. A more textually-based approach would be to hold that there is not a geographical limit for the hunting right or that the geographical range for hunting rights is the entire Washington Territory, given that the tribes were ceding some rights within the Territory while retaining others.

74. See *State v. Bronson*, 372 P.3d 560, 566–67 (Or. App. 2016).

contravenes both the reserved rights doctrine and the principle that the language of the treaty should be the starting point of treaty interpretation. It also conflicts with the principle that treaty provisions should be interpreted so as not to render other language in the same treaty surplus.⁷⁵

The *Buchanan* Court's holding violates the reserved rights doctrine because it reads silence in the treaty as to whether the hunting right is confined to a specific geographical area against the tribe.⁷⁶ The opinion contravenes the principle that the language of the treaty, in conjunction with the Indian canons, governs interpretation because it adds geographic qualifiers to the right that are not supported by the enunciation of the right in the treaty. Again, the treaty itself contains no geographical restriction and solely limits the right to lands of a certain character, namely those that are "open and unclaimed."⁷⁷ Finally, the *Buchanan* Court's addition of a geographical limitation relating to historical use to the hunting right threatens to render the "usual and accustomed" language that modifies the fishing right superfluous in violation of the anti-surplusage canon.⁷⁸

As described above, the American Law Institute's addition of language to the Comment for section 5 in a subsequent edition could be very helpful to courts facing treaty interpretation questions. Specifically, language to the effect that a necessary corollary of the reserved rights doctrine is that restrictions on treaty rights must have a textual basis and that the text of the treaty is a core component of treaty interpretation would help guide courts in interpreting treaties and would provide a stronger basis for

75. See, e.g., *Canadian St. Regis Band of Mohawk Indians v. New York*, Nos. 5:82-CV-0783, 5:82-CV-1114, 5:89-CV-0829, 2022 WL 768669, at *5 (N.D.N.Y. Mar. 14, 2022) (describing the anti-surplusage canon utilized in statutory interpretation and applying it to interpret a treaty).

76. As explained in the earlier discussion of the reserved rights doctrine and the canons, see *supra* notes 39–51 and accompanying text, the reserved rights doctrine requires recognition of rights to continue pre-existing practices in the face of silence in a treaty (such as the silence in the treaty at issue in *United States v. Michigan* as to fishing rights). *Id.* However, when a treaty is not silent as to a particular right, the language of the treaty, interpreted liberally based on the canons, is dispositive. See *supra* notes 50–51 and accompanying text.

77. Treaty of Point Elliott, art. V, Jan. 22, 1855; accord Clifford E. Trafzer, *The Legacy of the Walla Walla Council, 1855*, 106 OR. HIST. Q. 398, 404 (2005) (quoting Governor Stevens's response "to Indian concerns about the United States taking the livelihood of the people," in which he affirmed that "'you will be allowed to go to the usual fishing places and fish in common with the whites and to get roots and berries and to kill game on land not occupied by whites; all this outside the Reservation.'") (emphasis added).

78. *Buchanan*, 138 Wash. 2d at 203–04; see also *United States v. Hicks*, 587 F. Supp. 1162, 1164 (W.D. Wash. 1984) (contrasting the geographical restrictions qualifying the fishing right in the Stevens Treaties with the lack of such restrictions attendant upon the hunting right); *Canadian St. Regis Band of Mohawk Indians v. New York*, Nos. 5:82-CV-0783, 5:82-CV-1114, 5:89-CV-0829, 2022 WL 768669, at *5 (N.D.N.Y. Mar. 14, 2022) (discussing the anti-surplusage canon and utilizing it for treaty interpretation); accord *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) (rejecting a proposed interpretation of a treaty provision because of its inconsistency with other provisions of the treaty as well as its inconsistency with the spirit of both that treaty and subsequent treaties).

rejecting litigants' arguments that restrictions relating to express treaty-rights should be read into treaties in the absence of any supporting text.

Even absent such modifications in future editions of the Restatement, the reserved rights discussion in section 5 will assist courts in interpreting off-reservation treaty rights under section 83, reminding them that silence in the treaty language relating to the exercise of off-reservation usufructuary rights cuts in favor of the tribe.

B. Section 6, Comment c, and the Indian Understanding of the Treaties

Section 6(b) sets out the canon pertaining to the Indian understanding of the treaty, which requires that “an Indian treaty . . . be construed as the Indians understood it at the time of the treaty negotiation.”⁷⁹ Comment c explains the reasoning behind this requirement:

Operative Indian-treaty language is always in English, not the language of the Indian tribes affected. Courts presume that Indian-treaty negotiators did not speak, understand, or read English, although some did. Moreover, translators often performed poorly. In several instances, Indian tribes executed treaties with improper translations. Accordingly, a treaty must be construed not in a technical, legal sense, but as the Indians understood it at the time the treaty was negotiated. Evidence of this understanding is provided, inter alia, by oral statements made by Indians and to the Indians by the federal government negotiators.⁸⁰

This canon is very well-established,⁸¹ although the degree of the Court's reliance on it has fluctuated, with its being used less robustly in some cases and relied on extensively in others.⁸²

The Comment speaks of the fact that often the “Indian-treaty negotiators did not speak, understand, or read English” and that “translators often performed poorly.”⁸³ The Stevens Treaties provide a poignant example to support this Comment. As Judge Boldt explained in

79. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6(b) (AM. L. INST., Proposed Final Draft 2021).

80. *Id.* § 6 cmt. c.

81. *See generally* 1 COHEN'S HANDBOOK, *supra* note 4 § 2.02[1].

82. *Compare* Tweedy, *supra* note 38, at 786 & n.251 (discussing the late Justice Scalia's approach to the canons of construction for Indian treaties), *with* 1 COHEN'S HANDBOOK, *supra* note 4 § 2.02 n.4 (collecting examples of Supreme Court cases in which the Court applied the canon requiring interpretation of Indian treaties as the Indians understood it).

83. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6 cmt. c. (AM. L. INST., Proposed Final Draft 2021).

upholding the treaty fishing rights of tribes who signed the Stevens Treaties:

The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.⁸⁴

The fact that the Stevens Treaties were translated from English into a crude and impoverished trade language and—worse yet—one that some tribal negotiators did not understand, demonstrates the importance and necessity of this canon and the accuracy of Restatement Comment c. Given the limitations of Chinook Jargon, there can be no justification for parsing the English terms used in the treaties in a narrow technical manner. Rather, the Indians' understanding, which may be gleaned in some instances from oral statements made by the tribal negotiators and oral promises made to them, must take precedence.⁸⁵ While this example is specific to the Stevens Treaties, there are numerous examples of language barriers in the context of negotiation of other treaties as well.⁸⁶

84. *Washington*, 384 F. Supp. at 330; see also Alexandra Harmon, *Indian Treaty History: A Subject for Agile Minds*, 106 OR. HIST. Q. 358, 366 (Fall 2005) (acknowledging that United States officials were well aware of the fact that “explaining the treaty terms in the crude Chinook trade jargon would greatly oversimplify them.”).

85. See, e.g., Trafzer, *supra* note 77, at 404 (discussing statements made by tribal negotiators at the Walla Walla Treaty Council, as recorded in the minutes, including statements by two Cayuse Chiefs stressing the importance of the Earth to their way of life, and Governor Stevens's response that “you will be allowed to go to the usual fishing places and fish in common with the whites and to get roots and berries and to kill game on land not occupied by whites”); see also *United States v. Skeet*, No. 21-CR-00591 MV, 2022 WL 3701593, at *6 (D.N.M. Aug. 26, 2022) (discussing the treaty negotiations between the Navajo and the United States and particularly Navajo Chief Barboncito's expression of the need for tribal members to leave the reservation to hunt and the United States negotiator's assurances that they would be able to do so).

86. See Charles Wilkinson & John Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows Upon the Earth—How Long a Time Is That?*, 63 CAL. L. REV. 601, 610 (1975) (“The Indian treaties were written only in English, making it a certainty that semantic and interpretational problems would arise. When several Indian tribes were involved, the government negotiators would sometimes use a language they believed to be common to all tribes but which in fact carried different meanings to each.” (footnotes omitted)); see also Matsaw et al., *supra* note 10, at 445 (discussing the importance of the use of linguistic experts to elucidate Indians' understanding of treaties and particularly addressing how reliance on such an expert positively affected the result in *State v. Tinno*, 497 P.2d 1386 (Idaho 1972)); Alyson Merlin, *Unenforced Promises: Treaty Rights As a Mechanism to Address the Impact of Energy Projects Near Tribal Lands*, 11 COLUM. J. RACE & L. 373, 379 (2021) (discussing the opinion in *Jones v. Meehan*, 175 U.S. 1, 11 (1899), which acknowledges the prevalence of language barriers in treaty negotiations between tribes and the United States).

C. *Section 6 and the Importance of Historical Law in Interpreting Treaties*

Section 6(c) sets forth the well-known canon for interpretation of Indian treaties that “[a]n Indian treaty must be construed by reference to surrounding circumstances and history.”⁸⁷ Comment d includes within the surrounding circumstances and history “the practical construction given [to] the treaty by the parties.”⁸⁸ From the United States’ side, part of that practical construction in many cases will undoubtedly be the laws that were in place at the federal and state or territorial levels at treaty-time that are in some way relevant to interpretation of the treaty terms.⁸⁹ For instance, in the context of off-reservation treaty hunting rights pertaining to open and unclaimed lands, such laws could well include those laws regarding which lands ordinary people could utilize for hunting at treaty-time. Given the likelihood that historical laws would inform at least the United States’ practical construction, it would be helpful for the Restatement to call out the potential importance of historical law in subsequent editions.

It is important to acknowledge, however, that over-emphasizing historical law could lead to unintended consequences. This is because historical law is more likely to inform the United States’ perspective than the tribal perspective, yet the tribal perspective is the one that is rightfully supposed to take precedence in treaty interpretation.⁹⁰ Historical law is

87. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6(c) (AM. L. INST., Proposed Final Draft 2021).

88. *Id.* § 6 cmt. d.

89. The time period at which a given treaty was entered into (or treaty-time) is the most relevant for treaty interpretation. *See, e.g.*, *United States v. Washington*, 873 F. Supp. 1422, 1432 (W.D. Wash. 1994), *aff’d in part, rev’d in part sub nom.* *United States v. Washington*, 135 F.3d 618 (9th Cir. 1998) (applying treaty-time definitions of the treaty terms “beds,” “staked,” and “cultivated” in construing Western Washington tribes’ shellfishing rights under the Stevens Treaties); *see also* *United States v. Skeet*, No. 21-CR-00591 MV, 2022 WL 3701593, *5–6 (D.N.M. Aug. 26, 2022) (rejecting United States’ evidence as to modern Navajo policy regarding the taking of migratory birds in favor of evidence of Navajo understandings of the treaty-protected rights at treaty time and noting the irrelevance of the United States’ proffered evidence for purposes of treaty interpretation); Combs, *supra* note 32, at 700 (noting that, in *Washington*, 873 F. Supp. at 1432, “[t]he court focused on what the Indians and the United States intended and understood at treaty time”).

90. *See, e.g.*, RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6(b) (AM. L. INST., Proposed Final Draft 2021) (“An Indian treaty must be construed as the Indians understood it at the time of the treaty negotiation.”); Ann E. Tweedy, *The Use of Historical Law in Treaty Rights Cases*, Materials from the ABA’s Section of Env’t, Energy & Res. 37th Water Law Conf., at 1–2 (May 6, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3375569 [<https://perma.cc/U8HG-3Y7M>] (explaining the potential usefulness of historical law to elucidate the United States’ perspective at treaty time and recognizing the potential dangers of over-emphasizing historical law given the higher importance of the tribal perspective under the canons of construction); *accord* Parker, *supra* note 24,

also relatively low-hanging fruit in that it is fairly easy to locate historical law from the United States, territories, and individual states.⁹¹ This ease of access could be a double-edged sword if obtaining historical law were prioritized over the more difficult and important work of providing evidence as to the tribal perspective.⁹² These caveats should be kept in mind in assembling treaty-rights cases, but, given the potential usefulness of historical law in prosecuting these cases, it would make sense to specifically reference it in the Comments or Reporters' Notes as a means of illuminating the practical construction that the parties (especially the United States) gave to the treaties.

Tribal parties have relied on historical law in litigating treaty cases regarding off-reservation usufructuary rights. Two recent examples illustrate its potential importance.

at 256–57 (arguing that “[r]eliance on historical sources [in treaty interpretation] is . . . problematic because the historical record is lacking. As the *Rosebud* dissent points out, ‘Sioux-authored records . . . are rare.’ Not only are jurists then tasked with using a limited historical record in deciphering treaty language, they are left to rely heavily on a record devoid of indigenous voices but filled instead with the voices of government agents”) (quoting *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1029 (8th Cir. 2021) (Kobes, J., dissenting); Parker, *supra* note 24, at 257 n.124 (arguing that the lack of Indigenous voices in historical records generally “is also problematic in the context of Indigenous canons, one of which . . . requires courts to interpret treaties in favor of how the consenting tribes would have understood the language.”).

91. Tweedy, *supra* note 90, at 1.

92. Experts such as historians and anthropologists are often able to shed light on the perspectives of tribal treaty signatories. See, e.g., *United States v. Washington*, 853 F.3d 946, 964 (9th Cir. 2017), *aff'd by an equally divided Court*, ___ U.S. ___, 138 S. Ct. 1832 (2018) (discussing a declaration by historian Richard White in which he explained (1) that, “during the negotiations for the Point-No Point Treaty, a Skokomish Indian worried aloud about ‘how they were to feed themselves once they ceded so much land to the whites’” and (2) “that during negotiations at Neah Bay, Makah Indians ‘raised questions about the role that fisheries were to play in their future.’”); see also *Washington*, 873 F. Supp. at 1437–38 (discussing use of expert testimony in the Shellfish Case). Even historical newspaper articles may, in some cases, elucidate Native perspectives at the time treaties were being negotiated. See Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 148, 162 (2012) (describing Native perspectives with respect to proposed takings of treaty-protected lands as reported in historical news articles in the 1870s and early 1900s); see also Fred L. Boalt, *White Man's Treaty Only A "Scrap of Paper"?: Old Indian Chief, 81, Goes to Law for Hunting Rights*, SEATTLE STAR 1, 5 (Sept. 11, 1915) (describing an encounter between Yakama Chief Sluiskin and Mount Rainier National Park rangers in which Chief Sluiskin and others were threatened with arrest for hunting and fishing in the park, and Chief Sluiskin responded by retrieving the treaty, signed sixty years before, from his pocket and further stated his intent, through an interpreter, to set up a test case). While Chief Sluiskin does not appear to have been a signatory of the treaty, he would have been about twenty-one years old when it was negotiated. Treaty of Walla Walla, June 9, 1855, <https://goia.wa.gov/tribal-government/treaty-walla-walla-1855> [<https://perma.cc/KRQX-HC2C>] (listing signatories); see also THEODORE CATTON, NATIONAL PARK, CITY PLAYGROUND: MOUNT RAINIER IN THE TWENTIETH CENTURY 56 (2006) (discussing the incident and implying that Chief Sluiskin was not a signatory). As a tribal member who was alive and a young adult at treaty time, Chief Sluiskin could be expected to have a strong understanding as to what the hunting, fishing, and gathering provisions meant to tribal signatories at treaty time.

1. *Historical Law and Off-Reservation Treaty Hunting Rights*

In *Herrera v. Wyoming*,⁹³ the author co-wrote an amicus brief on behalf of her client, the Muckleshoot Indian Tribe, and other Pacific and Inland Northwest Stevens Treaty Tribes.⁹⁴ These tribal amici argued that “[u]nderstanding the common law landscape helps deduce the intent of the United States, which, although entitled to less weight than the Indian signatories’ understanding, is part of the context of the treaty negotiations.”⁹⁵ Among the issues at play in *Herrera* was the question of whether the establishment of the Bighorn National Forest rendered the land upon which a Crow tribal member had been hunting categorically “occupied” within the meaning of the Crow treaty and thus ineligible for treaty hunting.⁹⁶ While the Court did not overtly rely on the tribal amici’s arguments, it did hold that the establishment of the national forest did not render the land categorically occupied so as to preclude treaty hunting in all portions of the forest.⁹⁷

In the *Herrera* case, the historical state and territorial laws were quite useful in supporting treaty hunting rights. For instance, as the amici tribes explained in their brief:

When the Indian Treaties were negotiated, there were no hunting laws in effect in the Western United States territories. Instead, lands free from settlement were open to hunting for all. This was a result of the United States’ rejection, at the time of the American Revolution, of English laws restricting the majority of English citizens from hunting.⁹⁸

The amici tribes went on to explain that “[t]he right to access lands for hunting was not necessarily limited by ownership; rather, active settlement was required to bar access,” citing two South Carolina cases in support of this argument.⁹⁹

The brief was directed at one of the questions presented in the *Herrera* case, namely whether the Bighorn National Forest constituted

93. 587 U.S. ___, 139 S. Ct. 1686 (2019).

94. Br. for Pac. and Inland Nw. Treaty Tribes as Amici Curiae in Supp. of Pet’r, *supra* note 32.

95. *Id.* at *10.

96. *Herrera*, 139 S. Ct. at 1700–01.

97. *Id.*

98. Br. for Pac. and Inland Nw. Treaty Tribes as Amici Curiae in Supp. of Pet’r, *supra* note 32, at *10 (citing Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 L. & HIST. REV. 351, 351 (2015) (noting that, in 1860, “most unfenced land in the United States was open to the wanderer”), and Eric T. Freyfogle, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 33 (2007) (noting that, historically in America, “[h]unting and fishing were rather freely allowed except in cultivated fields and around houses”).

99. *Id.* at *11.

“unoccupied lands of the United States” within the meaning of the Crow Treaty.¹⁰⁰ However, the historical common law landscape with respect to hunting is also relevant to the question at play in the Stevens Treaties as to what constitutes “open and unclaimed lands.” Under the common law, ownership of land was not a determinative factor in hunting laws at treaty-time—instead, as scholar Brian Sawers explains, “[u]ntil the late nineteenth century, open access was the norm in the United States.”¹⁰¹ This common law framework suggests that, similarly, the concept of “open and unclaimed” lands was likely not understood to be tied to ownership alone.¹⁰²

Noting that, “[i]n the West, an open range persisted the longest,” Sawers further documents that “hunting was an important part of the right to roam.”¹⁰³ Importantly for questions relating to treaty gathering rights, Sawers explains that “[m]any households also relied on unenclosed lands for gathering”¹⁰⁴ Sawers documents the gradual closing of the range beginning in the mid- to late-nineteenth century, a change of course that was fueled by various factors including the availability of cheaper fencing beginning in the 1870s.¹⁰⁵

For the Stevens Treaties, the fact that there were no hunting laws in place in the Washington Territory when the treaties were negotiated¹⁰⁶ and that there was a general right to roam recognized throughout the West and in most of the rest of the United States¹⁰⁷ helps inform the “practical construction” of the treaty negotiators who represented the United States.¹⁰⁸ Specifically, this legal framework reinforces the broad reading of the phrase “open and unclaimed lands” that other canons, such as that requiring that treaties be liberally interpreted in favor of Indian signatories,¹⁰⁹ also call for. Specific information about the tribal understanding could support a still broader interpretation. A broad interpretation informed by the tribal signatories’ perspective should take precedence over a narrower interpretation based on the United States’

100. *Herrera*, 139 S. Ct. at 1691.

101. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 *TEMPLE L. REV.* 665, 674 (2011).

102. *See id.*

103. *Id.* at 677.

104. *Id.* at 679.

105. *Id.* at 679–84.

106. Br. for Pac. and Inland Nw. Treaty Tribes as Amici Curiae in Supp. of Pet’r, *supra* note 32, at *10.

107. Sawers, *supra* note 101, at 674, 677.

108. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6, cmt. d (AM. L. INST., Proposed Final Draft 2021).

109. *Id.* § 6.

perspective under the canons of construction for interpreting Indian treaties. Nonetheless, the United States' perspective, as informed by historical law as well as more specific information, where available, should be seen as a floor for interpretation of treaty rights.¹¹⁰

Historical law that was in place when the treaties were negotiated is a source that is often absent from opinions on the scope of treaty hunting rights despite its obvious utility as an interpretive tool. For example, it plays no role in the opinion in *State v. Buchanan*¹¹¹ on the question of whether the state wildlife area at issue there should be understood to be subject to treaty hunting.¹¹² Nor is it relied upon in a federal district court case, *United States v. Hicks*,¹¹³ concerning the question of whether land comprising a national park should be considered "open and unclaimed."¹¹⁴ In *Hicks*, the district court, rather than looking to treaty-time context, including the practical construction adopted by the parties, held that the national park land was not open and unclaimed based in large part on: (1) practical concerns about the negative consequences of broadly allowing tribal hunting and (2) the federal laws setting aside the land for a park, as well as the associated legislative history.¹¹⁵ A focus on how treaty-time law regarding hunting potentially affected the United States' practical construction of the phrase "open and unclaimed" at treaty-time would have better accorded with the canons of construction and would have likely led to a more equitable result than a wholesale removal of over 900,000 acres¹¹⁶ in a remote area from the scope of the treaty hunting right.¹¹⁷

110. Tweedy, *supra* note 90, at 1.

111. 138 Wash. 2d 186, 978 P.2d 1070 (1999).

112. *Id.* at 211, 978 P.2d at 1082. The Washington State Supreme Court did hold that the state wildlife area was open and unclaimed on the basis of previous cases. *Id.*

113. 587 F. Supp. 1162 (W.D. Wash. 1984).

114. *Id.*

115. *Id.* at 1165–67.

116. Joe Yogerst, *Everything to Know About Olympic National Park*, NAT'L GEOGRAPHIC: TRAVEL (Aug. 12, 2019), <https://www.nationalgeographic.com/travel/national-parks/article/olympic-national-park> [<https://perma.cc/8PLE-FS9E>] (stating that Olympic National Park contains 922,650 acres).

117. For example, the court could have concluded, after additional fact-finding, that some parts of the park were no longer open and unclaimed but that others were, or it could have concluded, based on treaty-time context and signatory perspectives, that the entire park remained open and unclaimed. In accord with a more nuanced view than that which is evident in *Hicks*, in *Herrera v. Wyoming*, the Supreme Court determined that the Bighorn National Forest was not categorically occupied but accepted that later proceedings might show that certain parts of it were. *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1703 (2019).

The court in *Hicks* expressed concern about preserving the Roosevelt elk herd, a concern which apparently was a key reason for setting aside the park. *Hicks*, 587 F. Supp. at 1166. However,

Specifically calling out the potential utility of state, federal and territorial treaty-time law as a tool to elucidate the practical construction of treaty usufructuary rights from the United States' perspective in section 6 would be useful to courts and litigants who may otherwise struggle to discern either the United States' or the tribes' practical construction. This could be accomplished by a reference to treaty-time law in the Comment. Cases and commentary that rely on treaty-time law could also be referenced in the Reporters' Notes.¹¹⁸ Given the relative ease of discovering treaty-time law, this source may be of particular benefit to treaty hunters and gatherers who are criminally charged and who cannot afford to hire experts.

concluding that the entire Olympic National Park was not open and unclaimed was far from the only way to protect elk, assuming there was a valid conservation need to do so. For example, the federal government may regulate the exercise of tribal treaty rights in the face of a conservation need, *see, e.g.*, CANBY, *supra* note 47, at 576–77 (discussing *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004)), and it has regulated such rights in other circumstances as well, *see, e.g.*, 50 C.F.R. § 300.64 (2015) (regulating treaty tribes' commercial, ceremonial, and subsistence fishing for halibut in certain geographical areas). Deeming the entire park no longer “open and unclaimed” because of a concern about elk also seems like an unduly blunt tool for protecting an elk herd. Hunting of other species such as deer and mountain goats could be beneficial for the ecosystem. *See, e.g.*, Ted Rosen, *The Olympic Mountain Goats: The End of an Era*, ADVENTURES NW. MAG. (Sept. 20, 2018), <https://www.adventuresnw.com/the-olympic-mountain-goats-end-of-an-era/> [<https://perma.cc/63ZB-29Q9>] (discussing federal plan for destruction of some mountain goats and translocation of others due to ecological concerns); *see also Blacktail Deer*, NAT'L PARK SERV.: OLYMPIC NAT'L PARK WASH., <https://www.nps.gov/olym/learn/nature/black-tail-deer.htm#:~:text=Blacktail%20deer%20may%20be%20the,meadowlands%20down%20to%20river%20valleys> [<https://perma.cc/3D59-PHFY>] (describing the prevalence of blacktail deer in the park). Moreover, gathering rights are also dependent on open and unclaimed status yet their exercise poses no danger to elk.

An opinion more faithful to the hunting and gathering right reserved in the Stevens treaties appears to have been rendered by Solicitor Preston C. West in 1915 with respect to Mount Rainier National Park. CATTON, *supra* note 92, at 55–57. Based on “the long-standing principle in federal Indian law that required the courts to resolve all ambiguities of meaning in Indian treaties according to how they had been understood by the Indians,” West concluded that the Indian signatories would have understood “open and unclaimed” to mean “not settled upon or appropriated by claimants under the general land laws” and that they would not have understood creation of a National Park to render the land off limits for hunting. *Id.* at 56–57. Additionally, Solicitor West relied on the fact that the act setting aside the park did not specifically bar Indian hunting. *Id.* at 57. While the opinion was unfortunately ignored on the ground because it ran counter to then-current trends, including attempts to prevent Native Americans from engaging in off-reservation hunting, *id.*, the analytical approach adopted by Solicitor West is much more faithful to the canons and the general principles of treaty interpretation than the approach applied in *Hicks*. A similar faithfulness to treaty-time context is evident in *United States v. Skeet*, No. 21-CR-00591 MV, 2022 WL 3701593, at *6–7 (D.N.M. Aug. 26, 2022).

118. *See, e.g., infra* notes 135–40 and associated text (discussing the oral argument in the Culverts Case, *United States v. Washington*, __ U.S. __, 138 S. Ct. 1832 (2018) (per curiam), and the possibility of including a discussion of the case in the Reporters' Notes).

2. *Historical Law and the Treaty Habitat Right*

Comment d of section 83 of the Restatement addresses the habitat right that has been held to be implicit in off-reservation fishing rights (and which may exist in the context of other types of usufructuary rights as well).¹¹⁹ The thrust of the habitat right, which has been recognized in the Ninth Circuit as a corollary of the right to take fish under the Stevens Treaties,¹²⁰ is that a right to harvest a resource such as salmon includes a right to preclude the state from destroying the resource. In *United States v. Washington*,¹²¹ the case which definitively recognized the right and which is popularly known as the Culverts Case,¹²² the state action at issue was installation and maintenance of culverts under state roads that failed to pass all species of salmon at all life stages and at all water flow levels.¹²³

Litigation of the habitat right is another instance where tribes relied on historical law to establish the treaties' context and the parties' practical construction of the terms. After Justice Kennedy recused himself from the case in the Supreme Court, the justices split four-four, thereby affirming the Ninth Circuit decision in favor of the tribes and the United States.¹²⁴ As is the case generally with decisions made by an equally divided court, there is no Supreme Court opinion, and the Supreme Court decision affirming the Ninth Circuit lacks precedential value.¹²⁵

119. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 83, cmt. d (AM. L. INST., Proposed Final Draft 2021).

120. *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

121. 853 F.3d 946 (9th Cir. 2017).

122. See generally *United States v. Washington* (“*The Culverts Case*”), 2001-present, RODGERS ENVTL. L., 2d. § 1:20 (Nov. 2021 Update) (referring to *Washington*, 853 F.3d 946 as “*The Culverts Case*”); Michael C. Blumm & Jeffrey B. Litwak, *Democratizing Treaty Fishing Rights: Denying Fossil-Fuel Exports in the Pacific Northwest*, 30 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 1 (2019). A broad habitat right under the Stevens Treaties had previously been recognized by the district court in *United States v. Washington* in 1980, but the decision was vacated on appeal because the factual setting was not sufficiently concrete. *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980), *aff’d in part, vacated in part*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc) (“The 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”); Alan Stay, *Habitat Protection and Native American Treaty Fishing in the Northwest*, FED. LAWYER 20, 22 (Oct./Nov. 2016); see generally Peter C. Monson, *United States v. Washington (Phase II): The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469 (1982) (discussing district court decision in *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980)).

123. *Washington*, 853 F.3d at 971 (quoting district court decision).

124. Tweedy, *supra* note 90, at 3, 5–6.

125. See, e.g., Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 81 (2005) (noting the lack of precedential weight of such decisions); Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*,

The tribal plaintiffs in *United States v. Washington* relied on historical law regarding fish passage in both the Ninth Circuit and the Supreme Court, although the plaintiff tribes' (and their allies') analysis of such law was much more extensive in the Supreme Court.¹²⁶ Historical law was an excellent resource for the tribes in litigating the habitat right in the Culverts Case because laws prohibiting the blockage of anadromous fish runs date back to the Magna Carta.¹²⁷ Moreover, treaty-time treatises, statutes, and case law all confirmed that these prohibitions remained important at treaty-time.¹²⁸

As noted above, such laws do shed more light on the United States' perspective than the tribal perspective during treaty negotiations. However, use of historical law likely has the advantage of appealing to conservative justices who may be wary of treaties' having consequences that the United States negotiators would not have anticipated.¹²⁹ In the Ninth Circuit, the tribes included only a single paragraph on historical law in their briefing, whereas they devoted two pages of briefing to historical law in the Supreme Court, with the United States also addressing the topic in its briefing and an entire law professors' amicus brief focusing on historical law as well.¹³⁰

One of the key aspects of historical law relating to fish blockage was set forth in the law professors' amicus brief. The brief explored the legislative history of the Oregon Territory Act's prohibition on blocking streams, a prohibition which was then incorporated into the Act to establish the Territorial Government of Washington.¹³¹ The law professors' amicus brief explained that the fish blockage prohibition was added at the behest of a Massachusetts legislator who was concerned about the potential loss of the Oregon Territory's salmon fishery after having experienced the demolition of the Connecticut River fishery due to a dam and other causes.¹³²

Historical law was not mentioned in the Ninth Circuit decision,¹³³ and

SCOTUSBLOG (July 23, 2020) <https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/> [<https://perma.cc/FCR6-5B23>] (discussing the fact that members of the public do not learn how individual justices voted in per curiam cases generally).

126. Tweedy, *supra* note 90, at 3.

127. *Id.* (citing Magna Carta ¶ 33 (1215)).

128. *Id.* at 3–5.

129. *See id.* at 1.

130. *Id.* at 3–4.

131. *Id.* at 4–5 (citing Act of Aug. 14, 1848, § 12, 9 Stat. 323, 328, and Act to Establish the Territorial Government of Washington, ch. 90, § 12, 10 Stat. 177 (1853)).

132. *Id.* at 5 (citing Br. of Amici Curiae Law Professors in Supp. of Resp'ts at 27, *Washington v. United States*, __ U.S. __, 138 S. Ct. 1317 (2018) (No. 17-269)).

133. *See generally* *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

the Supreme Court, being equally divided, did not issue an opinion. Thus, it is impossible to know whether historical law was part of the reason that the habitat right under the Stevens Treaties was able to garner four votes in support. However, if oral argument is any guide to Supreme Court deliberations, it appears that the common law perspective provided by the Tribal Respondents, the United States, and the law professor amici was very important. Both Justice Breyer and Justice Kagan discussed and asked questions about the relationship between historical common law and the treaty right to not to have salmon runs harmed by stream blockages.¹³⁴ Troublingly, Chief Justice Roberts labored under the misperception that the issue of historical law had not been raised in the Ninth Circuit, an error that was left uncorrected by the parties.¹³⁵ With the Justices being equally divided, members of the public do not know for sure how each one ruled.¹³⁶ Assuming Chief Justice Roberts voted against tribal interests (he is not a justice who ordinarily rules in favor of tribes¹³⁷ and his mistaken belief that historical law was not previously raised may have made him unlikely to depart from his usual course), it is hard not to wonder if alerting the Chief Justice to the fact that the historical law argument had been raised below might have resulted in a fifth vote in favor of the habitat right. At any rate, the Justices' interest in the topic during oral argument clearly demonstrates the power and relevance of historical law in making treaty rights claims. Given the Justices' engagement with issues of historical law in the Culverts Case, including a discussion of its relevance in subsequent editions of the Restatement would be helpful to both courts and litigants. As noted above, a logical place for inclusion would be in section 6, comment d, which addresses the importance of "surrounding circumstances and history" in interpretation

134. Tweedy, *supra* note 90, at 6.

135. *Id.*

136. See generally Blackman, *supra* note 125 (discussing the fact that members of the public do not learn how individual justices voted in per curiam cases generally); Brendan I. Koerner, *What Happens in a SCOTUS Tie? How the Court Operates with a Justice Out Sick*, SLATE (Feb. 13, 2016), <https://slate.com/news-and-politics/2016/02/what-happens-in-a-supreme-court-tie.html>. [https://perma.cc/Q4RW-23GT] ("In the event of such a tie, the court typically issues what's known as a *per curiam* decision. The opinion in such a decision is issued under the court's name, as opposed to consisting of a majority and a minority opinion. Justices, however, may attach dissenting opinions to the *per curiam* decision if they like"); see also Arthur S. Leonard, *Chronicling A Movement: 20 Years of Lesbian/gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 415, 431 (2000) (discussing the fact that no one knows for sure how each Justice voted in the case of *National Gay Task Force v. Board of Education of Oklahoma City*, 470 U.S. 903 (1985) (per curiam), in which the Tenth Circuit's decision was affirmed by an equally divided Court).

137. See, e.g., Tweedy, *supra* note 38, at 778 & n.206 and sources cited therein (describing the rarity of Chief Justice Roberts' voting in favor of tribes).

of ambiguous treaties.¹³⁸ Given the focused questions and discussion in the oral argument for the Culverts Case in the Supreme Court, historical law could also be addressed in the Reporters' Notes, particularly in the portion addressing "the practical construction given the treaty by the parties."¹³⁹

D. Section 6 and Conflicting Tribal Interests

The wording of section 6 rightly suggests that the canons of construction for Indian treaties privilege solely the perspectives and interests of tribes who are signatory to the treaty at issue. This suggestion derives from the term "relevant Indian tribes" in the first sentence of the section: "A treaty must be liberally interpreted in favor of the *relevant* Indian tribes to give effect to the purpose of the treaty."¹⁴⁰ However, this precision gets lost in the Reporters' Notes, which too broadly state that: "Lower courts generally hold that '[w]e cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect [other tribal] interests.'"¹⁴¹

Because of the prevalence of inter-tribal disputes in the present day, it is important provide more specific and precise advice to courts about how to apply the canons for treaty interpretation when tribal interests conflict. A well-grounded and nuanced approach can be found in the Ninth Circuit's decision *Makah Indian Tribe v. Quileute Indian Tribe*.¹⁴² There, the court correctly distinguished between a situation involving "tribes claiming contradictory rights under the same statute or treaty" and one in which one interpretation of the treaty would favor signatory tribes and the other of which would favor the United States.¹⁴³ It held that the canons were indeterminate in the first instance but properly applied in the second, despite the Makah Tribe's argument that it would be disadvantaged in the present day by a broad reading of the Treaty of Olympia (to which it was not a party).¹⁴⁴ As the *Makah Indian Tribe* case makes clear, a non-signatory tribe should not be able to obviate the canons' application to a treaty by claiming that a narrow interpretation of the treaty would benefit

138. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 6 cmt. d. (AM. L. INST., Proposed Final Draft 2021).

139. *Id.* § 6 Reporters' Notes at 105 (citations omitted).

140. *Id.* § 6 (emphasis added).

141. *Id.* § 6 Reporters' Notes at 100 (citations omitted).

142. 873 F.3d 1157, 1164 (9th Cir. 2017).

143. *Id.*

144. *Id.*; see also *Six Tribes' Real Parties in Interest Principal Br., United States v. Washington*, 873 F.3d 1157 (9th Cir. 2017) (Nos. 15-35824 & 15-35827), 2016 WL 4194332, at *21–25.

it in the present day. Rather, the canons are concerned about treaty-time negotiations and understandings and about the perspectives of the signatory parties, particularly the signatory tribes.¹⁴⁵

Section 6's reference to "relevant tribes" does suggest that only signatory tribes' perspectives are of import in applying the canons. To avoid confusion, it would be beneficial to flesh out the discussion of the issue in the Reporters' Notes in subsequent editions of the Restatement and to include a discussion of the *Makah Indian Tribe* case.

CONCLUSION

Drafting and completion of the Restatement of the Law of American Indians was a monumental task, and the Restatement is certain to very quickly become an indispensable tool for courts considering federal Indian law issues. Focusing on the off-reservation usufructuary rights discussed in section 83 in particular, the breadth and inclusiveness of its coverage is an important strength. The illustrations used to elucidate the reserved rights doctrine in section 5 and the comprehensiveness of the Restatement's discussion of the Indian canons in section 6 are also certain to prove invaluable to courts and litigants. Additionally, there are many other aspects of the Restatement that will aid courts and litigants immeasurably in other areas that are beyond the scope of this Article.¹⁴⁶

This Article's suggestions for modest changes in future editions to the text, Comments, and Reporters' Notes for sections 83, 5, and 6, relating to the scope of off-reservation treaty rights, are made in the hopes that, if implemented, they will further assist courts in addressing treaty rights issues, particularly those for which there is no clear precedent. Because hunting and gathering issues are particularly prone to falling into that category, much of this Article has focused on them. Additionally, as someone who has spent many years poring over the Stevens Treaties, the author's examples and suggestions often spring from that background.

145. Six Tribes' Real Parties in Interest Principal Br., *supra* note 144, at *21–25.

146. *See, e.g.*, Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 WASH. L. REV. (forthcoming Oct. 2022) (explaining the importance of the Restatement's attention to legislation relating to federal Indian law).

