No. 17-269

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

In a series of treaties, the federal government promised northwest Indian tribes "[t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens[.]" This Court has held that this language guarantees the tribes "a fair share of the available fish," meaning fifty percent of each salmon run, revised downward "if tribal needs may be satisfied by a lesser amount." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685 (1979).

In this case, the Ninth Circuit held that the treaties instead guaranteed "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. On that basis, the panel held that the treaties require Washington to replace culverts under state roads that restrict salmon passage. The court ordered the State to replace hundreds of culverts, at a cost of several billion dollars, even though it is undisputed that: (1) the federal government—the lead Plaintiff—specified the design and granted permits for the overwhelming majority of culverts at issue, and (2) many culvert replacements will have no benefit for salmon because of other non-State owned barriers to salmon on the same streams.

The questions presented are:

1. Whether the treaty "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens" guaranteed "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes."

2. Whether the district court erred in dismissing the State's equitable defenses against the federal government where the federal government signed these treaties in the 1850s, for decades told the State to design culverts a particular way, and then filed suit in 2001 claiming that the culvert design it provided violated the treaties it signed.

3. Whether the district court's injunction violates federalism and comity principles by requiring Washington to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon and Plaintiffs showed no clear connection between culvert replacement and tribal fisheries.

PARTIES

Petitioner is the State of Washington, which was the defendant at trial and appellant at the Ninth Circuit.

Respondents are the United States of America; Confederated Tribes and Bands of the Yakama Nation; Hoh Indian Tribe; Jamestown S'Klallam Tribe; Lower Elwha Klallam Tribe; Lummi Nation; Makah Tribe; Muckleshoot Indian Tribe; Nisqually Indian Tribe; Nooksack Tribe; Port Gamble S'Klallam Tribe; Puyallup Tribe; Quileute Indian Tribe; Quinault Indian Nation; Sauk-Suiattle Tribe; Skokomish Indian Tribe; Squaxin Island Tribe; Stillaguamish Tribe of Indians; Suquamish Indian Tribe; Swinomish Indian Tribal Community; Tulalip Tribes; and Upper Skagit Indian Tribe. Respondents were the plaintiffs at trial and the appellees at the Ninth Circuit.

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INTRODUCTION

In 1854 and 1855, the federal government signed treaties with many northwest Indian tribes protecting their "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens[.]" This Court has interpreted this clause many times, holding that it guarantees the signatory tribes three key rights: (1) access to traditional fishing places, (2) preemption of certain fishing regulations, and (3) "a fair share of the available fish," up to half of each salmon run. Exercising these rights, Washington tribes take millions of salmon annually.

In this case, the Ninth Circuit announced a new right, broader than any previously recognized. The court held that the treaties implicitly promised "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. The court held that the State of Washington was violating this right because some culverts under state roads impede salmon access to potential habitat. Although the federal government—the lead Plaintiff—specified the design of and granted permits for the very culverts it now claims violate the treaties, the court rejected the State's attempt to raise equitable defenses. And the court ordered the State to spend vast sums replacing culverts even though many replacements will not benefit salmon at all. This holding suffers from three flaws warranting reversal.

First, nothing in the text, the negotiating history, the parties' understanding, or this Court's precedent supports the notion that the treaties promised a moderate living from fishing. That untenable standard makes it impossible to measure

compliance, would likely render illegal many past actions that impacted salmon (such as federal dams), and would make virtually any significant future land use decision in the Pacific Northwest subject to court oversight to determine treaty compliance. It is also unnecessary. Washington already has every incentive to protect salmon for the benefit of all Washingtonians, including tribal members, and the United States has extensive powers to protect salmon. And contrary to the Ninth Circuit's fears, the State neither claims nor desires a right to "destroy" salmon fisheries. The treaties and countless state and federal laws would prevent that.

Second, the Ninth Circuit erred in affirming dismissal of the State's equitable defenses. It held that equitable defenses are unavailable when the federal government brings treaty claims on behalf of tribes. Pet. App. 96a-99a. That holding ignored this Court's precedent and was remarkably unfair. The federal government specified how the State should build culverts, granted permits for their construction, and then decades later sued the State, saying that those same culverts violated treaties the federal government entered 150 years earlier.

Finally, the sweeping injunction imposed here ignores constitutional limits on the proper scope of injunctive relief against States. "[T]he injunction requires [Washington] to replace or repair all 817 culverts located in the area covered by the Treaties without regard to whether replacement of a particular culvert actually will increase the available salmon habitat." Pet. App. 37a. A federal court ordering a state to spend money on projects that will make no difference flies in the face of federalism principles.

OPINIONS BELOW

The amended, final Ninth Circuit decision below is reported at 853 F.3d 946 (2017). Pet. App. 58a-126a. The order denying rehearing en banc is reported at 864 F.3d 1017 (2017). Pet. App. 1a-57a. An opinion respecting denial of rehearing en banc by Judge O'Scannlain, and joined in full by judges Kozinski, Tallman, Callahan, Bea, Ikuta, and N.R. Smith, and joined as to all but part IV by judges Bybee and M. Smith, is at Pet. App. 17a-41a. An opinion concurring in denial of review en banc by panel judges W. Fletcher and Gould is at Pet. App. 6a-17a.

The district court's summary judgment ruling is reported at 20 F. Supp. 3d 828 (W.D. Wash. 2007). Pet. App. 249a-72a. The district court's injunctive rulings are reported at 20 F. Supp. 3d 986 (W.D. Wash. 2013). Pet. App. 127a-79a, 235a-42a. The district court's order striking the State's equitable defenses is reported at 19 F. Supp. 3d 1317 (W.D. Wash. 2001). Pet. App. 273a-82a. The district court's supplement to memorandum and decision and its order on motions in limine are unreported. Pet. App. 180a-234a; 243a-48a.

JURISDICTION

The order denying rehearing en banc issued on May 19, 2017. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

The treaties at issue in this case provide, in substantially identical language:

> The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them[.]

Each treaty also provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory . . . .

Treaty with the Nisquallys, Puyallup Etc. 1854 (Medicine Creek Treaty), arts. I, III, 10 Stat. 1132, 1133 (Dec. 26, 1854, ratified Mar. 3, 1855, proclaimed Apr. 10, 1855) (JA 786a, 788a).[1]

STATEMENT

A. Historical Salmon Runs and Treaty Negotiations

In 1854 and 1855, the United States negotiated eleven treaties with Indian tribes in what are now the

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[1] *See also* Treaty with the Dwámish Etc. Indians (Point Elliott Treaty), arts. I, V, 12 Stat. 927, 928 (Jan. 22, 1855, ratified Mar. 8, 1859, proclaimed Apr. 11, 1859); Treaty with the S'Klallam (Point No Point Treaty), arts. I, IV, 12 Stat. 933, 934 (Jan. 26, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty with the Makah, arts. I, IV, 12 Stat. 939, 940 (Jan. 31, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859); Treaty with the Yakama, arts. I, III, 12 Stat. 951, 953 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859); Treaty with the Qui-nai-elt, Etc. (Olympia Treaty), arts. I, III, 12 Stat. 971, 972 (Jan. 25, 1856, ratified Mar. 8, 1859, proclaimed Apr. 11, 1859).

states of Idaho, Montana, Oregon, and Washington. *See generally Seufert Bros. Co. v. United States*, 249 U.S. 194, 196-97 (1919). In the treaties, the tribes ceded to the United States "all their right, title, and interest" in the lands they occupied while reserving a right to continue fishing at traditional locations: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory . . . ." Medicine Creek Treaty, arts. I, III, 10 Stat. at 1132, 1133 (JA 786a, 788a).[2]

This case involves six of those treaties that were signed by tribes that historically fished in western Washington, from Grays Harbor northward (this "Case Area" is shown at JA 286a, 287a, 530a).[3] At treaty time, about 7,600 Indians lived in western Washington, a fraction of the present Indian population. *United States v. Washington*, 384 F. Supp. 312, 352 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th

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[2] *See supra* n.1; Treaty with the Walla-Walla, art. I, 12 Stat. 945, 946 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 11, 1859); Treaty with the Nez Percés, art. III, 12 Stat. 957, 958 (June 11, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty with the Tribes of Middle Oregon, art. I, 12 Stat. 963, 964 (June 25, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859); Treaty with the Flatheads, Etc., art. III, 12 Stat. 975, 976 (July 16, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

[3] *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 n.2 (1979) (listing treaties at issue in this case and tribes that signed them); *id.* at 670 n.15 (describing case area).

Cir. 1975).[4] Salmon were one of their primary food sources. *United States v. Washington*, 384 F. Supp. at 406.

Salmon hatch in fresh water rivers and streams, migrate to the ocean to mature, and return to their fresh-water place of origin to spawn. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 (1979) (*Fishing Vessel*). Natural conditions cause salmon runs to fluctuate, and "the Indians' harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation." *United States v. Washington*, 384 F. Supp. at 351.

At the treaty negotiations, a primary concern of the Indians "was that they have freedom to move about to gather food, particularly salmon[.]" *Id*. at 355. They relied on the federal negotiators' assurances that they would be able to continue their off-reservation fishing practices, while understanding that non-Indians would also be allowed to fish at Indian fishing locations. *Id.*; *Fishing Vessel*, 443 U.S. at 667-68.

For the federal government the "principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of

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[4] Today, the 21 Plaintiff Tribes have approximately 43,000 enrolled members. Washington State Senate Governmental Operations Committee, *Indian Tribes in Washington State: Brief Summary* (Nov. 20, 2014), https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=IxyKR26odSQ&att=false.

Indians and non-Indians in the area." *United States v. Washington*, 384 F. Supp. at 355. In the negotiations, "[t]he United States was also a surrogate for future states. It wanted to remove the cloud of Indian sovereign control from most of the West so that new states could govern most lands within their boundaries free of complications with Indians." Charles Wilkinson, *American Indians, Time, and the Law* 101 (Yale Univ. Press 1987).[5]

"At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people." *Fishing Vessel*, 443 U.S. at 675; *id.* at 668 (same). Indeed, although the salmon runs varied from year to year, they were "thought inexhaustible." *Id.* at 669; *see* Pet. App. 135a. Thus, as the trial court found: "It was not deemed necessary to write any protection for the [salmon] into the treat[ies] because nothing in any of the parties' experience gave them reason to believe that would be necessary." Pet. App. 269a.

B. Salmon Runs Declined Over Time, Often Due to Federal Actions

Unfortunately, salmon abundance has declined over time as the human population has exploded, so that the "resource has now become scarce." *Fishing Vessel*, 443 U.S. at 669. A number of salmon populations in western Washington remain healthy,

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[5] *See also United States v. Winans*, 198 U.S. 371, 384 (1905) ("[E]xtinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the Territory."); *Tulee v. Washington*, 315 U.S. 681, 682 (1942) (describing federal goals); *Seufert Bros.*, 249 U.S. at 197 (same).

Pet. App. 136a; JA 258a, 583a, and western Washington tribes take roughly 2.5 million salmon annually, JA 247a. But other western Washington salmon populations are ailing, with four listed as threatened under the Endangered Species Act. Pet. App. 167a; 50 C.F.R. § 223.102 (2016); JA 255a-57a.

Many factors have reduced salmon runs, including habitat alteration, hydropower development, overharvesting, and climate change. Pet. App. 121a, 130a, 132a, 174a: JA 252a-53a, 279a-82a, 490a-97a, 586a, 672a, 799a-805a. The federal government contributed significantly to these problems.

For example, the Federal Power Commission granted licenses for hydroelectric dams throughout Washington, some of which destroyed salmon runs. *See, e.g.*, *City of Tacoma v. FERC*, 460 F.3d 53, 61-62 (D.C. Cir. 2006) (describing "devastating drop in the fish populations" caused by federally-licensed dam in 1924). The U.S. Army Corps of Engineers dredged harbors and straightened rivers that flowed into Puget Sound, destroying salmon habitat. *See* JA 496a; Pet. App. 130a.[6] And the Corps of Engineers constructed locks connecting Lake Washington to Puget Sound, destroying the river into which the lake had previously flowed, along with its salmon runs and Indian fishing places. *United States v. Washington*, 384 F. Supp. at 367; Pub. L. No. 61-264, 36 Stat. 630,

[6] *See also Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) (describing Corps' straightening of Puyallup River); *Commercial Waterway Dist. 1 v. Permanente Cement Co.*, 61 Wash. 2d 509, 511, 379 P.2d 178 (1963) (describing Corps' dredging of Duwamish Waterway).

666 (1910); *In re Westlake Ave.*, 66 Wash. 277, 119 P. 798 (1911) (describing federal role).

C. Washington State's Efforts to Preserve and Restore Salmon

Salmon have long been a vital part of Washington's economy and culture, with tens of thousands of Washingtonians employed in the fishing industry and hundreds of thousands more engaging in recreational salmon fishing.[7] Since the earliest days of salmon scarcity, Washington has taken steps to preserve and restore salmon runs, devoting enormous effort and billions of dollars to this goal.

Salmon numbers in Washington first declined in the late 1800s and early 1900s as technological advances led to overfishing. *Fishing Vessel*, 443 U.S. at 668-69; JA 132a-33a; *United States v. Washington*, 384 F. Supp. at 352. In response, the State—not the federal government—enacted laws and regulations to protect the fishery. *See, e.g.*, *Vail v. Seaborg*, 120 Wash. 126, 130, 207 P. 15 (1922) (describing state fishing regulations enacted in response to the "well-known fact that the salmon industry of the state is rapidly disappearing").[8] In the decades since, the State has enacted many laws to protect salmon

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[7] *See, e.g.*, https://wdfw.wa.gov/publications/00464/.

[8] The State acknowledges and regrets that some of these regulations discriminated against Indians. *Fishing Vessel*, 443 U.S. at 669. The State has created a process to allow Indians convicted of criminal fishing offenses during that time to vacate their convictions. *See* Wash. Rev. Code § 9.96.060(4).

specifically and the State's natural environment generally.[9]

The State has also operated hatcheries—the first built in 1895—to replace fish lost through overharvesting and environmental change. *United States v. Washington*, 759 F.2d 1353, 1359-60 (9th Cir. 1985) (en banc). The State has invested over $1 billion in hatchery programs, and operates dozens of hatcheries today, at an annual cost of roughly $30 million.[10]

Washington has long been a leader nationally in preserving and restoring fish habitat. The legislature has enacted comprehensive laws to choose, fund, and implement programs and projects that improve conditions for salmon. *See, e.g.*, Wash. Rev. Code 77.85; Wash. Rev. Code 77.95; Wash. Rev. Code 90.71; JA 313a-15a. Overseen by the Governor's Salmon Recovery Office, local organizations develop regional salmon recovery plans. Wash. Rev. Code §§ 77.85.090, .150; JA 272a-73a. The locally-developed plans call for a variety of habitat restoration projects. JA 272a-73a. In 2007, the National Marine Fisheries Service adopted Washington's recovery plans for salmon in the Puget Sound region. 72 Fed. Reg. 2493-02 (Jan. 19, 2007); 72 Fed. Reg. 29121-02

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[9] *See, e.g.*, Salmon Recovery Act, Wash. Rev. Code 77.85; Salmon Enhancement Program, Wash. Rev. Code 77.95; State Environmental Policy Act, Wash. Rev. Code 43.21C; State Shoreline Management Act, Wash. Rev. Code 90.58; Growth Management Act, Wash. Rev. Code 36.70A; Water Pollution Control, Wash. Rev. Code 90.48; Construction Projects In State Waters, Wash. Rev. Code 77.55.

[10] *See* https://wdfw.wa.gov/hatcheries/overview.html.

(May 24, 2007). A State website tracks salmon recovery actions, https://stateofsalmon.wa.gov//.

The State also created a Salmon Recovery Funding Board that awards grants to tribes, local governments, and private landowners for salmon projects. Wash. Rev. Code §§ 77.85.110-.140; Pet. App. 155a-56a; JA 273a-75a, 315a. Since its creation in 1999, that Board has awarded over $586 million in grants for salmon recovery projects.[11] Other State programs provide support for other salmon habitat restoration projects. JA 276a-79a, 415a; *see* Wash. Rev. Code § 76.13.150 (assistance to small forest landowners in removing fish passage barriers).

The State has also worked with tribes to oppose construction of certain fish-blocking dams, to have certain dams removed, and to secure protection for salmon in the federal licenses issued for others. *See, e.g.*, *PUD 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 703 (1994) (describing State permit conditions on dam "to protect salmon and steelhead runs" on the Dosewallips River); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 322-33 (1958) (describing State's 10-year effort to block dams on the Cowlitz River because of effects on salmon); *City of Tacoma v. State*, 121 Wash. 448, 451, 209 P. 700 (1922) (describing state objection to dam because "the proposed dam . . . will destroy, or seriously damage, the propagation of salmon" in the Skokomish River); JA 271a-72a; https://www.nps.gov/

[11] https://www.rco.wa.gov/grants/eval_results.shtml#srfb.

olym/learn/nature/elwha-ecosystem-restoration.htm (describing tribal, state, and federal partnership to restore salmon in the Elwha River after removal of two dams).[12]

In recent decades, the State has worked closely with Tribes to conserve and enhance salmon runs. State law requires state agencies to establish government-to-government relations with Indian tribes. Wash. Rev. Code 43.376. Tribal leaders and staff serve on the Salmon Recovery Funding Board,[13] the Puget Sound Partnership,[14] the Ecosystem Coordination Board,[15] the Fish Barrier Removal Board,[16] the Cooperative Monitoring, Evaluation, and Research Committee,[17] the Timber, Fish, and Wildlife Policy Committee,[18] and boards of Regional Fisheries Enhancement Groups.[19] The State has awarded numerous grants to tribes to participate in salmon recovery efforts, including $8.7 million in 2018 to

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[12] *See also* 80 Fed. Reg. 4546-01 (Jan. 28, 2015) (describing tribal/state plans to enhance Elwha River salmon).

[13] *See* https://www.rco.wa.gov/boards/srfb_profiles.shtml#Troutt.

[14] *See* http://www.psp.wa.gov/index.php.

[15] *See* Wash. Rev. Code § 90.71.250(2)(d).

[16] *See* Wash. Rev. Code § 77.95.160(1).

[17] *See* Wash. Admin. Code § 222-12-045(2)(b)(i).

[18] *See* Wash. Admin. Code § 222-12-045(2)(b)(ii).

[19] *See* JA 275a.

eight of the Plaintiff Tribes and a tribal cooperative.[20] Pet. App. 155a-56a; JA 274a-75a, 415a. The State regularly collaborates with tribes on important decisions affecting salmon. *See, e.g.*, JA 254a, 263a-64a, 272a-73a, 279a, 584a, 593a-94a, 687a.[21]

D. Prior Decisions Interpreting the Treaties

This Court has interpreted the treaty language at issue here many times.

The first case was *United States v. Winans*, 198 U.S. 371 (1905). In the 1890s, non-Indian landowners fenced off a trail to a traditional Indian fishing place in Washington and erected large harvesting machines called "fish wheels." The United States sued, and this Court held that the landowners could not exclude the Indians from traditional fishing places. *Id.* at 381. The Court ruled that "the Indians were given a right in the land, the right of crossing it to the river, the right to occupy it" for fishing purposes. *Id.*; *see also Seufert Bros.*, 249 U.S. at 199 (same holding as to land in Oregon).

This Court next ruled that the treaties preempted a state license fee applied to a Yakama Indian. *Tulee v. Washington*, 315 U.S. 681 (1942). "[S]uch exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of

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[20] https://www.rco.wa.gov/doc_pages/press/2018/177.shtml.

[21] *See also, e.g.*, 72 Fed. Reg. 2493-02 (Jan. 19, 2007) (adopting Puget Sound Chinook recovery plan developed by state, tribes, and others); 72 Fed. Reg. 29121-02 (May 24, 2007) (adopting Hood Canal summer chum recovery plan developed by tribes, state, and others).

the treaty." *Tulee*, 315 U.S. at 685. However, "the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish[.]" *Id*. at 684.

That statement in *Tulee* became a holding in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968), where the Court held that the Medicine Creek Treaty did not preempt state power "expressed in nondiscriminatory measures for conserving fish resources," *id.* at 399. When that case returned a few years later, this Court held that state regulations that barred Indians from using fishing nets at traditional fishing sites were discriminatory and thus preempted because they effectively allocated the entire steelhead catch to non-Indians. *Dep't of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973). The Court remanded so that the available fish could be "fairly apportioned between Indian net fishing and non-Indian sports fishing[.]" *Id*. at 48-49. The third *Puyallup Tribe* case upheld an allocation of "45% of the annual natural steelhead run available for taking to the treaty fishermen's net fishery." *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165, 177 (1977).

In 1970, while the *Puyallup Tribe* litigation was occurring, the United States and a number of tribes initiated this case, which focused first on allocating the fish available. The United States alleged that the right of taking fish entitled the Tribes to a fair share of the salmon passing their traditional fishing places. *See Fishing Vessel*, 443 U.S. at 670. The Tribes, however, contended that the treaties entitled them "to

as many fish as their commercial and subsistence needs dictated." *Fishing Vessel*, 443 U.S. at 670. The district court agreed with the United States and held that the treaty right, being "in common with" other people, entitles the Tribes to a fair share of available fish. *United States v. Washington*, 384 F. Supp. at 401. The court set the tribal share at 50%. *Id.* at 343-44, 416.

This Court consolidated several cases for review, *see Fishing Vessel*, 443 U.S. at 669-74, and generally affirmed the district court's interpretation. The Court held that the right of taking fish "in common" means "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish." *Id.* at 684-85. Agreeing with the United States, the Court said equal shares were "equitable," but, like any equitable remedy, the injunction could be modified for changed circumstances. For example, if in the future a tribe did not need 50% of the available fish for a "livelihood" or "moderate living," that allocation might be unreasonable, and the State could ask for a downward adjustment. *Id*. at 685-87.

After this Court's remand 39 years ago, the case never ended. In 1980, responding to a request by the tribes and the United States, the district court declared that the treaties implicitly imposed on the State a duty not to impair fish habitat. *United States v. Washington*, 506 F. Supp. 187, 205-07 (W.D. Wash. 1980). It read *Fishing Vessel* to require "a sufficient quantity of fish to satisfy [] moderate living needs." *Id.* at 208. A Ninth Circuit panel rejected that reasoning: the "environmental servitude" imposed by the district court had no basis in the treaties or

precedent. *United States v. Washington*, 694 F.2d 1374, 1375, 1377 & n.7, 1380-82, 1387 (9th Cir. 1982). Rather, the State, United States, and tribes were equally obligated to take "reasonable steps" to preserve and enhance the fishery. *Id.* at 1374, 1375 & n.1, 1381, 1386. The en banc court then reviewed the panel decision, also rejecting the district court's reasoning. "*Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish. Instead, *Fishing Vessel* mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less." *United States v. Washington*, 759 F.2d at 1358-59. It declined to announce a broad rule governing salmon habitat, saying that "the State's precise obligations and duties under the treaty . . . will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case." *Id.* at 1357.

Since 1985, dozens more "sub-proceedings" have been filed, mostly intertribal disputes. *See generally United States v. Washington*, 573 F.3d 701, 704-05, 709-10 (9th Cir. 2009) (describing the sub-proceeding process and one intertribal dispute). "Judges in the Western District of Washington have now been regulating fishing in the Puget Sound for 35 years," and "the court has become a regulatory agency perpetually to manage fishing." *Id.* at 709. As detailed next, this sub-proceeding began in 2001.

E. Facts and Proceedings in this Case

1. Roadbuilding and Culverts in Washington

Culverts are engineered structures that allow streams to pass under roads, and they can range from simple pipes to "stream simulation" designs that mimic natural stream conditions. Pet. App. 77a, 209a-13a, 221a-26a (examples of culverts); JA 385a-88a. Culverts are often necessary for roads in Washington because of the abundance of streams, and their costs vary widely depending on culvert type, stream conditions, and highway size and location. *See* Pet. App. 214a-17a.

Washington began building highway culverts in large numbers when it accepted Congress's invitation to participate in the federal-aid highway program a century ago. *See* Act of July 11, 1916, ch. 241, 39 Stat. 355; 1917 Wash. Sess. Laws, page no. 260 (codified as amended Wash. Rev. Code § 47.04.050). In the early 20th century, automobiles created a demand for better roads. *See generally* Richard F. Weingroff, Federal Highway Administration, *Federal Aid Road Act of 1916: Building the Foundation*, 60 Public Roads No. 1 (1996). Congress responded by creating a partnership with States. The federal government provided partial funding for highways if states constructed them to federal design standards under federal oversight. *E.g.*, Pub. L. No. 85-767, § 106, 72 Stat. 885, 892 (1958) (codified as amended at 23 U.S.C. § 106); Act of July 11, 1916,

ch. 241, § 6, 39 Stat. at 357-58.[22] Today, all Washington state highways are federal-aid highways as described in 23 U.S.C. § 103. *See* Wash. Rev. Code § 47.17.001.

Federal law has long treated culverts as integral parts of the highways covered by federal-aid laws. Act of July 11, 1916, ch. 241, § 2, 39 Stat. at 356 ("culverts shall be deemed parts of the respective roads covered by the provisions of this Act"); 23 U.S.C. § 101(a)(11)(B) ("highway" includes "drainage structure . . . in connection with a highway"). The federal government specified designs for highway culverts and distributed culvert engineering guidance to state highway departments. JA 100a-01a, 119a; Levin, 38 Neb. L. Rev. at 393-96. The Corps of Engineers issued nationwide permits specifying conditions under which road culverts are approved under the Clean Water Act. *See* 33 C.F.R. §§ 323.4, 323.4-3(a)(3) (1978). The Corps also issued individual permits for culverts under 33 C.F.R. § 323.4-4 (1978).

Washington relied on federal design standards, guidance, and permit conditions in building its culverts. JA 78a-79a, 100a, 375a. Until the mid-1990s, virtually all state highway culverts in Washington were built to federally-supplied design standards. JA 101a, 375a. The federal government never

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[22] *See generally Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 417-21 (1935) (describing extensive federal involvement in state highway construction); David R. Levin, *Federal Aspects of the Interstate Highway Program*, 38 Neb. L. Rev. 377 (1959); Richard F. Weingroff, Federal Highway Administration, *100th Anniversary–An Evolving Partnership*, 78 Public Roads No. 3 (2014).

suggested that the State would be violating treaty rights by using federal culvert designs or complying with federal permits. JA 101a, 375a.

By 1968, this federal-state partnership had completed nearly all of the approximately 7000 miles of state highways currently present in Washington. JA 179a-80a, 398a. But the State has continued to modify, expand, and update highways, and it builds and replaces culverts in doing so.

In the 1990s, state scientists concluded that federal culvert designs were often difficult for fish to pass because they increased water velocity or turbidity, became blocked by debris, or for other reasons. JA 373a-75a. The State began identifying fish-barrier culverts under state highways and replacing them. Pet. App. 141a, 147a, 153a, 195a; JA 295a, 297a. Washington became a national leader in developing new culvert designs that better allow fish passage, receiving awards from the federal government for its breakthroughs. Pet. App. 137a, 144a; JA 224a, 373a, 389a-90a.

As of 2013, the State had inventoried more than 3,000 culverts in the state highway system. Within the *United States v. Washington* "Case Area," the State found 817 culverts that partially or totally blocked 200 meters or more of potential salmon habitat. Pet. App. 142a, 164a; JA 225a-26a, 324a-25a. State scientists developed a formula, known as the "Priority Index," to enable decision-makers to compare different culvert projects. Pet. App. 145a; JA 302a-08a. The formula considers how much habitat is upstream from a state culvert, the cost of replacing the culvert, and whether the culvert is a

partial or total barrier, but it does not consider other factors such as whether other barriers (like dams) block some of the upstream habitat or whether the habitat is degraded in other ways. Pet. App. 247a; JA 308a-09a, 311a. In part because the formula omits these other factors, it does not dictate the order in which the State replaces culverts. Pet. App. 145a; JA 308a, 328a-29a, 384a-85a.

The State has two processes for correcting state highway culverts. First, it corrects culverts as part of other highway construction projects that improve safety and capacity. Pet. App. 148a; JA 370a, 376a-77a. Second, the State created a separate budget in 1991 for stand-alone "fish passage projects," the first in the nation. Pet. App. 148a; JA 377a-78a. Between 1991 and 2013 the State corrected 256 barrier culverts in the state highway system, improving salmon access to over 850 miles of stream habitat statewide. JA 226a, 394a-95a.

To date, the State has spent over $174 million on stand-alone culvert projects in the state highway system.[23] Costs have increased significantly over time as the State tackles increasingly complex culvert replacements, with the average cost of stand-alone projects completed in 2016 at $2.3 million,[24] and in

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[23] *See* note 25 *infra*; Washington State Dep't of Transp., *WSDOT Fish Passage Performance Report*, Table 2 (June 30, 2017), https://www.wsdot.wa.gov/publications/fulltext/projects/FishPassage/2017FishPassageAnnualReport.pdf.

[24] *See id*. Table 2.

2017 at $3.4 million.[25] The State has also replaced many other culverts as part of larger highway or road projects, without separately identifying culvert correction costs. Pet. App. 149a-52a, 170a.

State-owned culverts are a small fraction of the barrier culverts in Washington. Pet. App. 203a. Federal, tribal, and local governments, as well as private landowners, own roads with barrier culverts. JA 97a, 121a-22a, 416a, 439a, 638a-39a. Though the total number is unknown, the state Fish Barrier Removal Board estimates 40,000 fish passage barriers in Washington.[26] Non-state barrier culverts outnumber state barrier culverts in some watersheds by as much as 36 to 1. Pet. App. 203a; JA 285a, 397a, 439a, 444a-45a. Because there are so many non-state barriers, the State has focused its culvert replacement efforts on streams with no other barriers, where replacing the state barrier actually provides additional habitat for salmon. Pet. App. 269a; JA 328a-29a, 384a.

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[25] *See id*. Table 3; WSDOT project pages: https://www.wsdot.wa.gov/Projects/I5/FisherCreekFP/default.htm; https://www.wsdot.wa.gov/Projects/SR531/EdgecombCreekFishPassage/default.htm; https://www.wsdot.wa.gov/Projects/I90/nforkissaquahcrkfishpassage/default.htm; https://www.wsdot.wa.gov/Projects/SR202/LittleBearCreek/default.htm; https://www.wsdot.wa.gov/Projects/SR900/greenckfishbarrier/default.htm; https://www.wsdot.wa.gov/Projects/US101/MatriottiCrkRmvFishBarrier/default.htm; https://www.wsdot.wa.gov/Projects/SR112/NordstromCrkRmvFishBarrier/default.htm; https://www.wsdot.wa.gov/Projects/SR504/woostercrkfishpassage/default.htm.

[26] https://wdfw.wa.gov/about/advisory/fbrb/.

Washington's highways benefit all Washingtonians, including tribal members. State highways support a range of tribal enterprises.[27] For example, 16 of the 21 Plaintiff Tribes operate casinos, virtually all within a short distance of state highways.[28] The Tribes invite the public to use state highways to travel to tribal casinos, golf courses, resorts, luxury hotels, retail stores, and other businesses.[29]

2. District Court Proceedings

In 2001, the federal government joined 21 tribes in initiating this "sub-proceeding," claiming that State culverts violate the treaties by reducing the number of salmon in Washington waters. JA 41a-64a; *see* Pet. App. 127a. The State denied that it had violated the treaties and asserted that the United States was barred by equitable principles from seeking relief given that the culverts were designed to federal standards or installed under federal permits. JA 78a-83a, 86a-87a. The trial court granted the

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[27] *See, e.g.*, *Citizens For Safety & Env't v. Washington Dep't of Transp.*, 2004 WL 2651499 (Wash. Ct. App. 2004) (upholding state highway permit for Muckleshoot Tribe's amphitheatre).

[28] *See* https://www.wsgc.wa.gov/tribal-gaming/casino-locations.

[29] *See, e.g.*, http://www.washingtontribes.org; Jamestown S'Klallam Tribe, https://www.7cedarsresort.com/; Muckleshoot Indian Tribe, http://www.muckleshoot.nsn.us/government/tribal-enterprises.aspx; Suquamish Indian Tribe, https://www.whitehorsegolf.com/contactus/directions/; Swinomish Indian Tribal Community, http://www.swinomishcasinoandlodge.com/form/contact-us; Tulalip Tribes, https://www.tulalipresortcasino.com/Home/Directions, http://www.premiumoutlets.com/outlet/seattle/about.

United States' pre-discovery motion to strike those defenses. Pet. App. 274a-75a. After this Court decided *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the State asked the district court to reconsider its order striking equitable defenses. *See* JA 7a. The district court declined without comment. *See* Pet. App. 249a-72a.

In 2006, the parties cross-moved for summary judgment on whether the culverts violated the treaties. The trial court granted the tribes' motion and denied the State's. Pet. App. 249a-72a. The court found that "fish harvests have been substantially diminished," and drew a "logical inference that a significant portion of this diminishment is due to the blocked culverts[.]" Pet. App. 263a. The court acknowledged that nothing in the treaties' text prohibited state actions that incidentally affected salmon runs: "[i]t was not deemed necessary to write any protection for the resource into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." Pet. App. 269a. But it concluded that statements made by federal negotiators at some treaty councils "carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource," and found that "the building of stream-blocking culverts" is a "resource-degrading activity." Pet. App. 270a. The court declared that the treaties impose "a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." Pet. App. 271a. The court "further declare[d] that the

State of Washington currently owns and operates culverts that violate this duty." Pet. App. 271a.

The court held a trial on the remedy in 2009. Pet. App. 128a. The court granted the State's motion in limine to exclude as "too speculative" the tribes' evidence estimating how many salmon were "lost" because of state-owned culverts. Pet. App. 245a-47a. The court also directed the parties to submit proposed Findings of Fact and Conclusions of Law. *See* JA 25a. The State argued that the plaintiffs had not demonstrated entitlement to an injunction, in part because there was no evidence of any connection between state culverts and the amount of salmon available to any tribe, or evidence that an injunction would increase any tribe's salmon catch. The State asked the court to let the state's culvert-removal program remain in place as part of a multi-faceted regional salmon recovery strategy. *See* JA 26a, 28a.

In 2013, the court adopted without change an injunction submitted by the United States and the Tribes. The injunction orders the State to replace any state-owned barrier culvert within the Case Area that "has 200 lineal meters or more of salmon habitat upstream to the first *natural* passage barrier," regardless of human-made barriers surrounding the state culvert. Pet. App. 237a (emphasis added). Thus, the State must replace its culverts even if other barriers upstream or downstream prevent salmon from reaching it. Pet. App. 37a. The court required the State to replace culverts with bridges or "stream simulation" culverts—the most expensive options—barring extraordinary circumstances, Pet. App. 239a,

even though less-costly designs have been approved for passing salmon by the National Marine Fisheries Service under the Endangered Species Act, Pet. App. 139a, 168a.

3. Ninth Circuit Proceedings

The State appealed, and the Ninth Circuit affirmed. Pet. App. 58a-126a. Based on statements made by Isaac Stevens, the United States' lead treaty negotiator, the panel held that the treaties included an implied promise "that there would be fish sufficient to sustain" the Tribes. Pet. App. 92a. The panel also said that even if Stevens had not made these statements, it would "infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a.

The court found that "[s]almon now available for harvest are not sufficient to provide a 'moderate living' to the Tribes," and that "several hundred thousand additional mature salmon would be produced every year" if the State's blocking culverts were replaced—findings not made by the district court. Pet. App. 95a-96a. On this basis, the panel concluded that "Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties" by "act[ing] affirmatively to build and maintain barrier culverts under its roads." Pet. App. 95a-96a.

The panel affirmed the district court's dismissal of the State's equitable defenses, distinguishing this Court's decision in *Sherrill*. Pet. App. 96a-99a.

Finally, the panel affirmed the district court's injunction, holding that it was not overbroad or inequitable. Pet. App. 104a-23a. The panel added that "an injunction enforcing Indian treaty rights should not be viewed in the same light" as an injunction to enforce other federal laws or constitutional rights, and may broadly intrude into state affairs. Pet. App. 124a-25a.

4. En Banc Proceedings

The State petitioned for rehearing en banc, which the Ninth Circuit denied. Pet. App. 6a. Judge O'Scannlain, joined by eight judges as to all but part IV, and by six judges as to part IV, filed an opinion respecting the denial of rehearing en banc. Pet. App. 17a-41a. Describing the panel opinion as a "runaway decision" that had "discovered a heretofore unknown duty" in the treaties, the dissent urged that the panel opinion made "four critical errors." Pet. App. 17a-19a.

First, the panel misread *Fishing Vessel* as holding that the treaties guarantee the Tribes enough salmon for a "moderate living." *Fishing Vessel* held only that the treaties secure to the Tribes a fair share of available fish, up to 50%, not a guaranteed quantity. Pet. App. 21a-26a.

Second, the dissent noted the absence of evidence connecting state culverts with tribal fisheries. Pet. App. 27a-29a. It pointed out that the panel's "overly broad reasoning" turns any activity that affects fish habitat into a treaty violation and turns federal courts into environmental policymakers. Pet. App. 28a-32a.

Third, in Part IV, the dissent urged that the panel opinion ignored *Sherrill*. It suggested that an equitable doctrine such as laches could bar relief because of the United States' involvement in designing the culverts and its long acquiescence in their existence. Pet. App. 32a-36a.

Finally, the dissent explained that the injunction was overbroad because it requires the State to spend large sums on culvert removals that will have no effect on salmon. Pet. App. 36a-41a.

SUMMARY OF ARGUMENT

Three fundamental errors infect the lower court opinions in this case and independently warrant reversal.

First, the extraordinarily broad new treaty right declared by the Ninth Circuit has no basis in the treaties' text, the parties' understanding, history, or precedent. It is also unnecessary and unworkable.

The treaties promise "[t]he right of taking fish . . . in common with all citizens[.]" The Ninth Circuit "inferred" from this language a "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. This new right is untethered from the treaty text, and as applied by the Ninth Circuit, runs contrary to the treaty text. The court held that this new right allows the signatory tribes to demand removal of off-reservation culverts (and presumably other development) that may affect salmon. But in the treaties the tribes expressly "cede, relinquish, and convey . . . all their right, title, and interest in and to the lands[.]" JA 786a. This Court has made clear that

even in liberally construing treaties in favor of Indians, courts should not invent terms or contradict other terms.

Because this new right is untethered from the text, the Ninth Circuit sought to justify it based on the parties' intentions. But as the district court correctly held, the parties did not intend "to write any protection for the [fish] into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." Pet. App. 269a.

The Ninth Circuit also sought to justify its ruling based on this Court's decisions in *Fishing Vessel*, 443 U.S. 658, and *Winters v. United States*, 207 U.S. 564 (1908). But *Fishing Vessel*, 443 U.S. at 670, rejected the Tribes' argument "that the treaties had reserved a pre-existing right to as many fish as their commercial and subsistence needs dictated," instead adopting the federal government's position that the treaties promised "a fair share of the available fish," capped at half of each salmon run, *id.* at 685-86. And the *Winters* doctrine, which deals with implied water rights appurtenant to an Indian reservation, cannot justify the Ninth Circuit's ruling. While this Court has held that implying water rights is essential to achieve the purpose of an Indian reservation, there is no similar necessity here to create an implied right to control off-reservation activity. The State already has powerful incentives to preserve salmon runs (which are shared equally with the Tribes) and the federal government already has vast regulatory and spending powers to protect salmon.

The new treaty right is also unworkable. Neither respondents nor the lower courts have defined a "moderate living" from fishing, e.g., whether it is based on 1855 standards or today's standards, on the size of the Indian population at treaty time or the vastly larger population today, etc. This amorphous rule makes it impossible for the State and others to know what past actions might have violated the treaties and be subject to challenge and what future actions are allowed under the treaties.

The lower courts' second error was dismissing the State's equitable defenses against the federal government. The federal government now claims that the State's highway culverts violate treaties the federal government signed. But the federal government *provided the design* for the culverts and granted federal permits for them. Understandably, the State invoked equitable defenses to bar the United States from seeking relief.

The Ninth Circuit affirmed dismissal of these defenses on two flawed rationales. The court first reasoned that allowing equitable defenses to treaty claims would abrogate treaty rights, which only Congress can do. But equitable defenses do not abrogate treaty rights; they affect what remedies are available to enforce those rights. *Sherrill*, 544 U.S. at 213. The court next reasoned that equitable defenses to treaty claims are available only in the precise context presented in *Sherrill*. But *Sherrill* and this Court's other cases refute that idea. And the rationale for allowing equitable defenses is even more compelling here. *Sherrill* involved a tribe's attempt to regulate land within its historic reservation, land that the State purchased in violation of federal law. This

case involves a challenge to State conduct that was approved by the federal government and occurred off-reservation, where the tribes ceded control.

Finally, even if this Court concludes that the Ninth Circuit properly interpreted the treaties and dismissed the State's equitable defenses, it should vacate the overbroad injunction here. The injunction orders the State to replace its culverts even if other man-made barriers (such as federal or private culverts) entirely prevent salmon from reaching the State culvert. The injunction thus orders the State to waste money on culverts that have no impact on salmon. It also forces the State to spend vast sums replacing culverts without evidence that doing so will meaningfully improve tribal fisheries given the many other factors that affect salmon. And although injunctions are supposed to take equity into account, this injunction ignores the stark inequity of the federal government using a treaty it signed to force the State to bear the entire cost of replacing culverts that the federal government designed.

ARGUMENT

A. The Treaties Guarantee Important Rights, But Not a Particular Standard of Living from Fishing

Over the last century, this Court has held that the Stevens Treaties guarantee the signatory tribes three key rights: (1) access to traditional fishing places, *Winans*, 198 U.S. at 381-82, (2) preemption of certain state fishing regulations, *Puyallup Tribe*, 391 U.S. 392, and (3) "a fair share of the available fish,"

Fishing Vessel, 443 U.S. at 685. In this case, the Ninth Circuit recognized a new right broader than any previously declared. The court "infer[red] a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. This new right lacks support in the treaties' text, the negotiating history, the parties' understanding, and precedent. It is also unnecessary and unworkable. This Court should decline to recognize this new right 160 years after the Treaties were signed.

1. The Ninth Circuit's Inferred Right is Unsupported by Treaty Language

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott v. Abbott*, 560 U.S. 1, 10, (2010) (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)). The same is true for Indian treaties. The "starting point for any analysis" of Indian treaties "is the treaty language itself . . . interpreted in light of the parties' intentions[.]" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999); *see also Fishing Vessel*, 443 U.S. at 675 (a treaty "between the United States and an Indian tribe, is essentially a contract between two sovereign nations").

Although "treaties should be construed liberally in favor of the Indians," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) (quoting *Cty. of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226, 247, (1985)), they "cannot be re-written or expanded beyond their clear terms," *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). This Court has therefore rejected claims that lacked support in treaty

language. *See, e.g., Chickasaw*, 515 U.S. at 466 ("[L]iberal construction cannot [overcome] a clear geographic limit in the Treaty."); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 769-74 (1985). Indeed, in interpreting this very clause, this Court held that because "the Treaty is silent as to the mode or modes of fishing that are guaranteed," the treaties allowed nondiscriminatory state regulation of fishing methods. *Puyallup Tribe*, 391 U.S. at 398.

Applying this principle here, no text in the Stevens Treaties guarantees a permanent standard of living from fishing. The only clause the Ninth Circuit cited in concluding otherwise was "[t]he right of taking fish . . . in common with all citizens[.]" But nothing in that language says or implies "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes," as the Ninth Circuit held. Pet. App. 94a. Instead, this Court has held that the language means that "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens." *Fishing Vessel*, 443 U.S. 684-85.

Indeed, inferring a promised standard of living that implicitly secures power to limit off-reservation development contradicts clear treaty language. This reading would mean that the Treaties reserved what the Tribes have called an implied "negative easement or negative servitude" in all of the ceded lands, JA 109a, requiring current landowners to avoid development that might affect fish abundance. But the Treaties foreclose the servitude Respondents claim. The Tribes "cede, relinquish, and convey to the

United States, all their right, title, and interest in and to the lands and country occupied by them[.]" JA 786a. It is impossible to write broader language disclaiming proprietary and sovereign control. Meanwhile, the only easements affecting off-reservation lands created by the treaties are explicit. For example, the treaties explicitly guarantee tribal members access to "usual and accustomed" fishing places, preserving a servitude of access to known fishing sites recognized by this Court more than a century ago. *Winans*, 198 U.S. at 381; *Seufert Bros.*, 249 U.S. at 199. Some of the treaties explicitly guaranteed access to the public highway nearest the reservation. Medicine Creek Treaty art. II, 10 Stat. at 1133 (JA 787a-88a); Yakama Treaty, art. III, 12 Stat. at 953. But none include language granting the Tribes a right to control development in the future State. Instead, the cession in the treaties was intended to "further[] the national program" of allowing development. *Tulee v. Washington*, 315 U.S. 681, 682 (1942).

The treaty language also contradicts the notion that the tribes would make a living solely from fishing. Five of the treaties promise that the United States would send teachers of blacksmithing, carpentry, and farming, and help "break up a sufficient quantity of land for cultivation" within their reservations. *E.g.*, Medicine Creek Treaty, arts. V, X, 10 Stat. at 1133, 1134 (JA 789a, 791a-92a). Rather than restrict Indians to fishing, the treaties intended "to diversify [the] Indian economy[.]" *United States v. Washington*, 384 F. Supp. at 355; *see* JA 126a-27a, 130a-31a (describing diversity of treaty-time economic interaction between Indians and non-Indians and United States' desire to perpetuate it).

The Ninth Circuit's inferred promise of a moderate living from fishing and an implicit power to control off-reservation development are thus directly contrary to the Treaties' text, and "liberal construction cannot save the Tribe's claim." *Chickasaw Nation*, 515 U.S. at 466.

2. The Ninth Circuit's Inferred Right is Unsupported by History and Understanding

The negotiating history of the treaties and the parties' understanding also provide no support for implying a promised standard of living from fishing or an implicit servitude controlling State highways.

First, neither party intended the treaties to prohibit development that might affect salmon because neither side understood that salmon abundance might meaningfully decline—salmon "had always been thought inexhaustible." *Fishing Vessel*, 443 U.S. at 669; *see* JA 131a-32a, 139a. As the district court correctly held, the parties did not intend "to write any protection for the [fish] into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." Pet. App. 269a.

Despite this uncontroverted finding, the Ninth Circuit held that the parties intended to guarantee the Tribes a moderate living from fishing. It based this conclusion on statements by Isaac Stevens at some treaty councils to the effect that he wanted the treaties to secure the Tribes' access to salmon. Pet. App. 91a-92a. But Stevens' statements do not support an Indian understanding of control over off-reservation development that incidentally affects

salmon, because neither side understood that future development could meaningfully impact salmon runs. JA 131a-33a, 136a-39a. Both assumed that guaranteeing access to usual and accustomed fishing places would suffice to guarantee the Tribes' access to salmon. *Fishing Vessel*, 443 U.S. at 668; JA 128a-30a. This Court has repeatedly refused to turn incorrect assumptions into binding intentions. *See, e.g.*, *Chickasaw Nation*, 515 U.S. at 466-67 (rejecting treaty interpretation that treaty makers "likely gave no thought to"); *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) ("expectations alone" cannot overcome statutory text); *Solem v. Bartlett*, 465 U.S. 463, 468-69 (1984) ("[W]e have never been willing to extrapolate from this [mistaken] expectation a specific congressional purpose."). Because the impact of development on salmon is something the parties "gave no thought to," the Ninth Circuit erred by inferring a promise contrary to treaty language. *Chickasaw Nation*, 515 U.S. at 466-67.

Second, the Ninth Circuit's inferred duty contravenes the United States' primary purpose in negotiating the treaties: "to remove the cloud of Indian sovereign control . . . so that new states could govern most lands within their boundaries." Charles Wilkinson, *American Indians, Time, and the Law* 101 (Yale Univ. Press 1987); *Fishing Vessel*, 443 U.S. at 661-62 (federal purpose was "[t]o extinguish" Indian land claims in Western Washington). By contrast, the State's interpretation would not defeat the Tribes' purpose of protecting "their right to take fish at usual and accustomed places." *Id.* at 667. As detailed below, the State has strong incentives to preserve salmon runs for the benefit of all Washington residents.

Third, interpreting the treaties to guarantee a particular standard of living from fishing and control over the ceded lands runs contrary to the parties' understanding of the treaties as demonstrated by their own behavior. *See Choctaw Nation*, 318 U.S. at 431-32 (interpreting treaty based on "the practical construction adopted by the parties"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) ("historical perspective casts substantial doubt upon" tribe's claim that treaty provided criminal jurisdiction over non-Indians). By the late 1800s, Washington salmon runs were in decline. *Fishing Vessel*, 443 U.S. at 668-69 & n.13; JA 133a. Yet even after that point, the federal government—despite its trust obligation to the Tribes—took numerous actions that decimated salmon populations in areas covered by the Treaties, e.g., building or licensing dams and canals that wiped out entire fisheries. *See supra* pp. 7-8. The federal government took these actions while simultaneously enforcing the treaties in court on other issues, never asserting the duty claimed today. *See Winans*, 198 U.S. 371; *Seufert Bros.*, 249 U.S. 194; *United States v. McGowan*, 62 F.2d 955 (9th Cir.), *aff'd*, 290 U.S. 592 (1933); *United States v. Alaska Packers' Ass'n*, 79 F. 152 (C.C.D. Wash. 1897); *United States v. Brookfield Fisheries, Inc.*, 24 F. Supp. 712 (D. Or. 1938); *United States v. Taylor*, 3 Wash. Terr. 88, 13 P. 333 (1887).

If the treaties obligated the federal government to ensure for the Tribes a moderate living from fishing, it has breached that obligation for decades. *See* Pet. App. 102a; JA 116a-17a. And if the treaties were intended to empower the United States or tribes to compel salmon restoration by the State or others, that understanding was never revealed by the parties'

conduct. In short, neither the negotiating history of the treaties nor the parties' understanding of the treaty language supports the extraordinary new right the Ninth Circuit inferred here.

3. The Ninth Circuit's Inferred Right is Unsupported by Precedent

This Court's precedent does not support inferring a treaty right to a moderate standard of living from fishing. Respondents and the Ninth Circuit cite *Fishing Vessel* and *Winters* as supporting such a right. Neither does so.

a. The *Fishing Vessel* Court refused to measure the treaty right by a standard of living

Fishing Vessel rejected the very rule the Ninth Circuit adopted here. In *Fishing Vessel*, 443 U.S. at 670, the Tribes "contended that the treaties had reserved a pre-existing right to as many fish as their commercial and subsistence needs dictated." "The United States argued that the Indians were entitled either to a 50% share of the 'harvestable' fish that . . . passed through their fishing places, or to their needs, *whichever was less*." *Id*. (emphasis added) (footnote omitted). The State argued for a lesser tribal share. *Id*. This Court "agree[d] with the Government," *id*. at 685, holding that the treaties "secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas," *id*. at 679. The Court affirmed the district court's equitable allocation setting that share at 50%, but held that the share could be reduced in the future if a lesser share

were sufficient to "provide the Indians with a livelihood—that is to say, a moderate living." *Fishing Vessel* 443 U.S. at 686. Thus, "the 50% figure imposes a maximum but not a minimum allocation." *Id*.

Fishing Vessel thus made clear that the "moderate living" standard is an equitable limit the State could invoke in the future as a ceiling on the tribal share of the catch, not a floor on fish harvests that the treaties always guaranteed. Indeed, the Ninth Circuit repeatedly described *Fishing Vessel* this way, until this panel's opinion.[30]

Fishing Vessel is thus irreconcilable with the new right the Ninth Circuit created. If, as the panel held, the treaties "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes," Pet. App. 94a, this Court would have had to accept the Tribes' position in *Fishing Vessel*, that they were entitled to as many fish as their "needs dictated." Instead, the Court held that the Tribes were entitled to at most one-half of the "available" catch from each run, even if that amount was less than their "needs dictated." 443 U.S. at 686. It cannot be that the treaties promised the Tribes both a "moderate living" from fishing and a "maximum" of 50% of each run. As Judge O'Scannlain said, "the panel opinion turns *Fishing Vessel* on

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[30] *See, e.g.*, *United States v. Washington*, 759 F.2d at 1359 ("*Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish. Instead, *Fishing Vessel* mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less."); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 513 (9th Cir. 2005) (en banc) (same).

its head" and "reads out the 50% ceiling entirely." Pet. App. 24a. Rather than supporting the Ninth Circuit's rule, *Fishing Vessel* makes clear that the rule cannot be the law.

b. The implied water rights doctrine of *Winters v. United States* depends on circumstances absent here

Respondents and the Ninth Circuit have also cited the reserved water rights doctrine announced in *Winters v. United States*, 207 U.S. 564 (1908), to support the claimed treaty right to a moderate standard of living from fishing. This reliance is misguided for several reasons.

First, Respondents' claim is that the State's culverts violate the Stevens Treaties. But "the 'reserved rights doctrine' is a doctrine built on implication" from reserving lands, not treaty rights. *United States v. New Mexico*, 438 U.S. 696, 715 (1978). This Court has held that where the federal government set aside land for a federal purpose, such as an Indian reservation, it must have intended to set aside "that amount of water necessary to fulfill the purpose of the reservation," even if no treaty or statute says so. *Id.* at 700; *Cappaert v. United States*, 426 U.S. 128, 141 (1976). The Ninth Circuit's reliance on this doctrine tacitly concedes that nothing in the Stevens Treaties supports the right it declared. And implying such a right in considering this treaty-based claim would violate this Court's repeated admonition that it will not add rights to treaties. *Choctaw Nation*, 318 U.S. at 432; *Chickasaw Nation*, 515 U.S. at 466-67; *Klamath Indian Tribe*, 473 U.S. at 769-74.

Second, the circumstances do not exist for creating this type of implied right here. *Winters* applies only in the narrow context of reserving water rights—interests in real property appurtenant to land—for Indian reservations and other federal lands, and only where the Court has "concluded that without the water the purposes of the reservation would be *entirely defeated*." *New Mexico*, 438 U.S. at 700 (emphasis added). This case does not involve the unique necessity of securing water rights for federal lands, where the necessity was apparent as of the moment the lands were reserved. And declining to find an implied right to a moderate living would not "entirely defeat[]" the purpose of the treaties at all. The Tribes take millions of salmon annually. JA 247a. And even without this implied right, the State has strong incentives and a demonstrated commitment to preserve salmon runs, which the Tribes will continue to share in equally. Moreover, the federal government has broad power to protect salmon—through laws, regulations, and funding decisions—without inferring a new right in these treaties, and has already enacted many other laws (from the Endangered Species Act to the Clean Water Act) that protect salmon. *See* note 31 *infra*.

Finally, even the *Winters* doctrine itself provides no basis for the amorphous obligation the Ninth Circuit announced. In applying the *Winters* doctrine, this Court has rejected the view "that the quantity of water reserved should be measured by the Indian's 'reasonably foreseeable needs,'" finding this measure too indeterminate. *Arizona v. California*, 460 U.S. 605, 617 (1983).

The bottom line is that precedent contradicts, rather than supports, the Ninth Circuit's conclusion.

4. The Ninth Circuit's Inferred Right is Unnecessary

The Ninth Circuit's primary rationale for inferring this new treaty right and corresponding duty on the State seems to have been that it had to do so to limit the State's ability to destroy the fishery. That is "utter nonsense." Pet. App. 27a n.8. Prior court orders, the treaties, other laws, and the State's own self-interest and responsibility to its residents would prevent that.

In enforcing the Stevens Treaties, this Court has already articulated several principles that courts could use to prevent destruction of the fishery.

First, this Court has compared the district court's role in enforcing its harvest sharing orders under the Treaties to overseeing a "proceeding *in rem* . . . to apportion a fishery[.]" *Fishing Vessel*, 443 U.S. at 692 n.32. The court "may enjoin those who would interfere with" the court's custody of the res, here, the fishery. *Id.* Thus, if anyone acted to destroy the fisheries that are subject to allocation, the district court could enjoin such destruction.

For example, the Ninth Circuit, in an opinion by then-Judge Kennedy, upheld an injunction barring the Yakama Nation from catching any spring Chinook salmon in the Columbia River during a year when "precariously low numbers of that salmon were" returning and "the safe passage of every salmon was necessary to preserve the species." *United States v. Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981). The Tribe

argued that the court could not enjoin it from fishing under the treaties. The court disagreed, citing this Court's "analog[y] to an equitable action in rem" and explaining that "[s]ince the existence of the salmon was inextricably linked to the res in the court's constructive custody, the court was empowered to enjoin interference with that custody." *Oregon*, 657 F.2d at 1015-16.

This Court has also made clear that the State cannot discriminate against tribes in managing salmon. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 682 (recognizing State authority "to impose nondiscriminatory regulations"); *Dep't of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 48 (1973); *Puyallup Tribe*, 391 U.S. at 398 (holding that the State may restrict Tribes in "the manner of fishing . . . in the interest of conservation" so long as the regulation "does not discriminate against the Indians"). Because of the Tribes' historical reliance on salmon, a State decision to destroy the fishery would necessarily involve some degree of discrimination against tribes, and could be enjoined on that basis as well.

Beyond these already-recognized protections, numerous state and federal laws protect salmon from destruction.[31] The notion that the State could choose to destroy the fishery absent the Ninth Circuit's right

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[31] **Federal laws:** *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251-1388; Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891d; Endangered Species Act, 16 U.S.C. §§ 1531-1544; National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h.

State Laws: *See* note 9 *supra*.

is thus nonsensical and provides no basis for writing a new promise into the treaties.

Perhaps most importantly, it would be utterly contrary to the State's own interests to destroy salmon fisheries. Salmon are vital to Washington's people, culture, and economy. The State has voluntarily spent billions of dollars to preserve and restore salmon runs, and has updated its practices to best protect salmon as scientific understanding has changed. The State continues to spend vast sums to preserve and restore salmon entirely apart from the spending required under the injunction in this case. *See supra* pp. 10-13. There is simply no need to create a massive, ill-defined new treaty right.

5. The Ninth Circuit's Inferred Right is Unworkable

In declaring an implied "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes," the Ninth Circuit created an unworkable standard. Pet. App. 94a. This rule makes it practically impossible to measure treaty compliance, and it exposes a whole range of activities to challenge under a highly indeterminate standard.

Neither the Ninth Circuit nor any Respondent has provided a workable definition of "a moderate living" from fishing. In discovery, the State asked the Tribes and the federal government to define the term. Both refused. JA 105a-06a, 117a-18a. They could not say how many fish or how much income would suffice, how the right would be measured, or even whether any signatory tribe had ever earned a "moderate living" from fishing. JA 105a-06a, 109a-10a, 117a-18a, 120a, 123a. Similarly, in

announcing this new right, the Ninth Circuit never explained whether the Treaties promised "a moderate living" by 1855 standards or by today's standards, whether the right was limited to the Indian population at treaty time or extended to today's much larger Indian population, or whether the right would fluctuate with salmon prices or other income Tribes earned.

This Court has consistently rejected such ill-defined standards. *See, e.g., Arizona v. California*, 373 U.S. 546, 600-01 (1963) (rejecting standard "measured by the Indians' 'reasonably foreseeable needs'" because "[h]ow many Indians there will be and what their future needs will be can only be guessed"). A nebulous rule is particularly problematic here because of the range of human activities that can affect salmon. As Judge O'Scannlain pointed out, "the panel's opinion could open the door to a whole host of future suits" seeking "to demand the removal of dams and attack a host of other practices that can degrade fish habitat (such as logging, grazing, and construction)." Pet. App. 28a-29a. JA 799a-806a. Such uncertainty as to what violates the treaties harms everyone. *See, e.g.*, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (plurality opinion) ("Uncertainty of this kind would not further the interests of either the Tribe or the . . . government and would be chaotic for landowners.").

The State is committed to respecting treaty fishing rights, and has dramatically improved its relationships with Washington tribes since this Court last interpreted these treaties *See*, *e.g.*, *United States v. Washington*, 157 F.3d 630, 657 (9th Cir. 1998)

("This case has come a long way since the 1970's when a 'total lack of meaningful communication' led to 'deep distrust' between the parties."); Pet. App. 251a ("The parties have cooperated fully with one another throughout these proceedings . . . ."); *supra* pp. 11-13. But the State should not be paralyzed in its decision-making by a standard that is impossible to define, especially when that standard has no basis in the treaties' text, the parties understanding, or precedent. This Court should reject the Ninth Circuit's expansive new implied right and recognize that existing protections are more workable, more democratic, and more in line with federalism concerns and the proper role of courts.

B. The State Should Be Allowed to Raise Equitable Defenses Against the Federal Government

Early in this case, the State asserted several equitable defenses against the federal government. Had the State prevailed as to those defenses, the case would have ended, because the Tribes would have been unable to overcome the State's sovereign immunity without the United States. Pet. App. 35a ("[O]nly the United States could bring suit against Washington for alleged culvert violations because Washington is protected by sovereign immunity against suit from the Tribes." (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997))). But the district court dismissed the State's equitable defenses at the pleading stage, Pet. App. 274a-75a, and the Ninth Circuit affirmed, Pet. App. 97a-99a. These rulings are contrary to this Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and they rely on the mistaken

premise that equitable defenses abrogate treaty rights. This Court should reverse so that the State can pursue its powerful equitable defenses.

1. Powerful equities support the State given the federal role in designing and approving the culverts at issue

In this case, the federal government is suing the State of Washington for implementing a federal roadbuilding program to federal standards. The inequity is evident.

A century ago, the federal government began encouraging States to build highways, and it provided funding to do so if States built them to federal standards. *See supra* pp. 17-18. The federal government treated culverts as integral parts of highways and required that culverts be built to federal specifications. *See supra* pp. 18-19; JA 100a-02a, 119a; Levin, 38 Neb. L. Rev. at 393-96. Virtually every highway culvert at issue in this case was built to specifications provided by the federal government. JA 78a, 101a, 375a. The federal government also provided permits for many of the culverts at issue under the Clean Water Act. JA 78a-79a.

At every step in this process—encouraging highway construction, providing culvert designs, and granting culvert permits—the federal government was supposed to ensure that its actions complied with its treaty obligations. *See, e.g.*, *United States v. Payne*, 264 U.S. 446, 448 (1924) (United States must "discharge its trust with good faith and fairness"). But throughout the many decades in which the federal government undertook these actions, it never

informed the State that it might be breaching treaty obligations by building culverts in compliance with federal law. JA 101a, 375a. Indeed, when the State changed its culvert designs in the 1990s, it was on the State's own initiative. JA 101a, 375a. Until this case, the federal government never said a word against the State's culverts, even though it has been actively enforcing the treaty fishing right since the 1880s.

2. Equitable defenses limit remedies, not treaty rights

Despite these compelling equities in the State's favor, the Ninth Circuit held that the State was categorically barred from asserting equitable defenses. Its primary rationale was that only Congress can abrogate treaty rights, and "Congress has not abrogated the Stevens Treaties." Pet. App. 97a (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). This reasoning misunderstands the nature of equitable defenses.

An equitable defense to relief *does not* abrogate a treaty. Whether a substantive treaty right exists is distinct from what remedies may be available to vindicate it. *Sherrill*, 544 U.S. at 213 ("The distinction between a claim or substantive right and a remedy is fundamental." (quoting *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1467 (10th Cir. 1987))). Thus, even if a treaty right exists, equity may limit or bar relief. *Id.* In this way, equitable defenses are, by definition, less harsh than abrogation. *See Oneida Cty. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 262 (1985) (Stevens, J., dissenting) (an "equitable defense to the instant claim is less harsh than a straightforward application of the limitations

rule"). That is why this Court and others have routinely applied equitable defenses to limit treaty-based relief, without pausing over the Ninth Circuit's fiction that such defenses abrogate treaties. *See, e.g.*, *Sherrill*, 544 U.S. 197; *Oneida Indian Nation of New York v. Cty. of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

3. This Court's precedent supports the availability of equitable defenses here

With the abrogation canard resolved, the only question becomes whether a defendant can ever raise equitable defenses against a treaty claim. This Court's precedent resolves the answer in the State's favor.

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), this Court explained that it is "well established" that equitable defenses can "bar long-dormant claims for equitable relief." *Id.* at 217; *see also Oneida Cty.*, 470 U.S. at 256 (Stevens, J., dissenting) (noting that this Court "has always applied the equitable doctrine of laches when Indians or others have sought, in equity, to set aside conveyances made under a statutory or common-law incapacity to convey"). There, a tribe purchased land within the boundaries of its historic reservation that had been held by non-Indians (and thus subject to state and local taxation) for many decades. This Court held that equitable doctrines defeated the tribe's attempt to enjoin the city from imposing property taxes on the newly reacquired land. *Sherrill*, 544 U.S. at 221. The Court relied on a number of circumstances, including the tribe's "long delay in

seeking equitable relief against New York or its local units," *id.* at 221, the "long history of state sovereign control over the territory," *id.* at 214, and the disruption that state and local government would face if the claim were allowed, *id.* at 217. The Court invoked these considerations even though the parties had not briefed equitable defenses, demonstrating the power of such defenses. *Id.* at 214 n.8.

Sherrill does not stand alone in demonstrating the availability of equitable defenses to treaty claims. *Sherrill* itself cited many cases applying equitable doctrines to tribal claims, *id.* at 215-19, and this Court has in other cases assumed that such defenses can limit relief, *see, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (agreeing with intervenor United States that disputed lands were within tribe's reservation, but reserving "whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax [non-Indian businesses]").

This Court has also recognized in other contexts that federal action or inaction may limit later Indian claims. For example, in *Nevada v. United States*, 463 U.S. 110 (1983), the Court held that a tribe's claim for additional water under the *Winters* doctrine was barred by the federal government's failure to present the argument decades earlier in related litigation about the quantity of water reserved, even though the tribe itself had not been a party. *Id.* at 135. Similarly, in *Arizona v. California*, 460 U.S. 605 (1983), this Court held that a tribe could not relitigate the extent of its reserved water rights even where it alleged that the United States had inadequately represented its interests in prior

litigation and the tribe had not been a party. *Arizona*, 460 U.S.at 626-27 ("As a fiduciary, the United States had full authority to bring the *Winters* rights claims for the Indians and bind them in the litigation."). Surely, if the United States can limit a tribe's later claims for relief by failing to pursue a remedy in prior litigation, it can waive such relief by failing to bring litigation at all.

Despite this case law, Respondents contend that equitable defenses are categorically unavailable here, and the Ninth Circuit agreed. They claim that *Sherrill* is essentially limited to its facts, and that this case differs factually from *Sherrill*. These arguments fail.

Sherrill made clear that it was applying settled principles, not announcing a rule good for one case only. *See, e.g.*, *Sherrill*, 544 U.S. at 214 (relying on "standards of federal Indian law and federal equity practice"); *id.* at 217 ("The principle that the passage of time can preclude relief has deep roots in our law[.]"). And the other cases cited above and in *Sherrill* confirm that the availability of equitable defenses extends beyond *Sherrill*'s precise facts. Thus, any factual distinctions from *Sherrill* go to whether the State's equitable defenses should prevail on the merits, not whether the State can raise them at all.

In any event, the factual distinctions between this case and *Sherrill* make equitable defenses even more compelling here. In *Sherrill*, the State had violated federal law for decades by purchasing land from the Oneida Tribe, *id.* at 204-05, whereas here the

federal government directed the State to build culverts as it did. While *Sherrill* involved administrative burdens in collecting taxes and zoning, this case involves the huge practical and financial burdens of tearing out existing road infrastructure the public uses every day. Perhaps most importantly, while *Sherrill* involved claims within the tribe's historic reservation lands, Respondents here seek to regulate land use outside of reservations, in areas where the Tribes "cede[d], relinquish[ed], and convey[ed] . . . all their right, title, and interest in and to the lands[.]" Medicine Creek Treaty, art. I, 10 Stat. at 1132; JA 786a. If anything, such claims threaten to be more disruptive than claims to reservation lands. And if equity can limit a treaty claim to reservation land itself, surely it can limit other types of claims.

Respondents have also argued that this case differs from *Sherrill* because the treaties here have been the subject of litigation for over a century. But the same was true in *Sherrill*, where litigation seeking compensation for the Tribe's land began in 1893. *Sherrill*, 544 U.S. at 207. And the history of litigation over these Treaties actually supports the availability of equitable defenses here. Since the 1880s, and throughout subsequent decades, the federal government has brought many cases to enforce the Stevens Treaties. Yet at the same time, the federal government was encouraging Washington's highway construction, directing the State's culvert design, and issuing permits for the culverts, saying that they

complied with federal law.[32] Given that the federal government spent decades suing to enforce the treaties while simultaneously providing the design and permits for the State's culverts, the State's reliance interests are clear. *Cf. Sherrill*, 544 U.S. at 217 ("It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.").

In short, if there are to be further proceedings in this case, the Court should allow the State to raise equitable defenses.

C. The Broad, Systemwide Injunction Here Ignores this Court's Legal Rules Limiting Injunctive Relief

Even if this Court finds that the Ninth Circuit properly interpreted the treaties and dismissed the State's equitable defenses, it should vacate the injunction here. Injunctions are supposed to be extraordinary remedies tailored to redress only violations of federal law. *E.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). When the defendant is a State, "appropriate consideration must be given to principles of federalism," *Rizzo v. Goode*, 423 U.S. 362, 379 (1976),

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[32] The federal government was also building dams in areas covered by the Stevens Treaties that completely or partially blocked salmon runs. *See, e.g.*, *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 516-17 (9th Cir. 2010); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1020-21 & nn.2-5 (1983).

especially where "a federal court decree has the effect of dictating state or local budget priorities," *Horne v. Flores*, 557 U.S. 433, 448 (2009). The injunction here violates these principles in several ways.

1. The injunction requires the State to replace culverts that will have no impact

The injunction forces the State to replace culverts where doing so will make no difference to salmon. It requires the State, by 2030, to replace any state-owned highway barrier culvert that has "200 lineal meters or more of salmon habitat upstream from the culvert to the first *natural* passage barrier." Pet. App. 237a (emphasis added), *see id.* at 104a. Thus, the State must replace its culverts even if other man-made barriers upstream or downstream prevent salmon from reaching the state culvert or a traditional tribal fishing place. As Judge O'Scannlain explained, "the injunction requires [Washington] to replace or repair all 817 culverts located in the area covered by the Treaties without regard to whether replacement of a particular culvert actually will increase the available salmon habitat." Pet. App. 37a.

This flaw permeates the systemwide injunction. Roughly 90% of state barrier culverts subject to the order are upstream or downstream of other non-State barriers. *See* JA 327a-28a, 348a-51a. In many watersheds, non-state barrier culverts drastically exceed state-owned barrier culverts, by up to 36 to 1. *See* JA 285a, 397a, 439a, 444a-45a; ER 196-211, 407-555; Pet. App. 203a. Thus, a significant portion of the culverts that the injunction requires the State to replace will have no impact.

Injunctive relief is supposed to address violations of federal law, yet the lower courts never explained how a State culvert could possibly violate the treaties if no salmon can reach it. Respondents have argued previously that the State's own "Priority Index" formula does not consider the presence of other man-made barriers in a stream, so the lower courts simply followed the State's methodology. US BIO 24. But this contradicts the record which shows that the Priority Index does not dictate the order in which the State replaces culverts. Pet. App. 145a (Finding 3.78), 169a (Findings 44-47); JA 328a-29a, 384a-85a. Rather, the State focuses its efforts on culverts in streams without other barriers. JA 328a-30a, 384a; *see* Pet. App. 169a (Finding 46). And even if the State did choose, as a policy matter, to replace its culverts regardless of other barriers, that choice would not convert such culverts into treaty violations that a federal court could order replaced. "'[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation.'" *Horne*, 557 U.S. at 450 (first alteration ours) (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)).

2. The injunction requires the State to waste precious funds that could be better spent on other salmon-recovery efforts

An injunction requiring expenditures that correct no violation of federal law would be problematic as to any defendant, but is especially problematic where the defendant is a State. *See Rizzo*, 423 U.S. at 379; *Horne*, 557 U.S. at 448. Here,

the problem is even worse because the injunction requires massive State expenditures that will come in part at the expense of more effective salmon recovery programs.

The injunction here will force the State to spend vast sums replacing culverts. It requires the State to replace culverts with bridges or "stream simulation" culverts (the most expensive options), Pet. App. 239a, even though less-costly designs comply with the Endangered Species Act, Pet. App. 139a, 168a. Operating under the injunction, in 2016 the State's average cost for replacing a highway culvert was $2.3 million, *see supra* pp. 20-21, and the cost has been increasing every year for a variety of reasons. JA 388a-389a. The State currently projects that complying with the injunction will cost over $2 billion by 2030.[33]

While those numbers alone are troubling, even worse is that much of the money will be wasted on projects that open no new habitat to salmon because of other barriers, as detailed above. Explaining to state taxpayers why they must pay to replace a culvert when a federal, private, or tribal culvert prevents any fish from reaching it is no easy task. This is especially so because the State currently spends money on a variety of other salmon recovery

[33] *See* WSDOT presentation to Joint Transportation Committee, Sept. 14, 2017, http://leg.wa.gov/JTC/Meetings/Documents/Agendas/2017%20Agendas/Sept%202017%20Meeting/WSDOT_Culverts.pdf.

efforts (such as stormwater management projects) whose budgets will undoubtedly suffer if the State's finite budget suddenly has to absorb vastly increased spending on culverts. *See* Pet. App. 152a; JA 279a-83a, 358a-59a, 378a; *cf. Horne*, 557 U.S. at 448 ("When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."). There is no basis in this Court's precedent for ordering such wasteful reallocation of State funds.

3. The injunction requires the State to replace culverts even where there is no evidence that the culvert has impacted tribal harvests

The lower courts ordered the State to replace its culverts throughout western Washington without evidence that any particular culvert or group of culverts has reduced the number of fish that would otherwise reach tribal fishing areas. This was a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996).

Plaintiffs presented no persuasive evidence of a relationship between the number of state highway culverts and salmon harvests. Washington salmon runs first declined dramatically in the late 1800s (because of overfishing), long before the State began building highways or culverts. Pet. App. 70a; JA 132a-33a. Washington's state highway system has been essentially the same size since the 1960s,

JA 179a-80a, 398a, but salmon harvests in western Washington have fluctuated enormously since then, reaching a high of nearly 11 million fish in 1985, dropping to a low of under 900,000 fish by 1999, and then rebounding to over 4 million fish by 2003. *See* JA 204a-05a, 211a, 247a.

Despite this lack of a clear connection between culverts and tribal harvests, the Ninth Circuit concluded that "hundreds of thousands of adult salmon will be produced by" replacing "the State's barrier culverts." Pet. App. 115a. It based this claim primarily on a 1997 report to the Washington Legislature. Pet. App. 108a-09a; JA 426a-30a. But the district court—the factfinder—rejected use of that report to predict "lost" salmon as unreliable and never cited it in its findings of fact. Pet. App. 245a-47a, 130a-73a.[34] The district court noted that in suggesting how many salmon could be produced by removing barrier culverts, the report ignored all other factors, "such as the presence of other, non-[state] culverts, other habitat modifications, and many other environmental factors." Pet. App. 247a. Thus, the Ninth Circuit relied on exactly the sort of conjecture that is insufficient to support "a conclusion of systemwide violation and imposition of systemwide relief." *Lewis*, 518 U.S. at 359.

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[34] In opposing certiorari, the Tribes claimed that the district court cited this report in Finding of Fact 3.89, Pet. App. 147a. Tribal BIO 32. This is incorrect. The 1997 report cited in FF 3.89 was a different report by the Fish Passage Task Force, not the report misused by the Ninth Circuit panel. *See* JA 314a; SER006.1-006.3.

Respondents may claim that it would have been too difficult to prove the effect of state culverts on specific salmon runs. But the State itself has done the work of identifying its barrier culverts. And Respondents did present evidence about a few specific culverts, it just wasn't very compelling because the State had already replaced nearly all of them. *Compare* JA 189a, 534a-37a, 679a-83a (identifying barrier culvert on Red Cabin Creek) *with* Pet. App. 225a, 231a, JA 228a-29a (showing that this culvert was replaced by a bridge in 2011). Respondents' inability to prove the effect of culverts in any measurable way is a failure of proof, not a reason to abandon normal limits on injunctive relief. Moreover, when this Court held forty years ago that the tribes were entitled to a "fair share" of the available salmon, it made clear that this right is "calculated on a river-by-river, run-by-run basis." *Fishing Vessel*, 443 U.S. at 671. If there is a treaty right to habitat restoration to achieve a moderate living from salmon, there is no reason it should be measured in a different way.

4. The injunction ignores the equities, forcing the State to shoulder the entire burden of fixing problems created largely by the federal government

Finally, the injunction ignores the stark inequity of the federal government using a treaty it signed to force the State (a nonparty) to bear the entire cost of replacing culverts that the federal government designed and permitted.

"[W]hen a district court" considers a request for injunction, its "function is 'to do equity and to mould each decree to the necessities of the particular case.'" *Monsanto Co.*, 561 U.S. at 174-75 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). That imperative should have carried extra weight here given that the defendant is a State. *Rizzo*, 423 U.S. at 379. And there are strong equities on the State's side, including: (1) the federal role in designing and permitting these culverts, (2) other federal actions (such as building dams) that drastically reduced the number of salmon the Tribes could harvest, (3) the State's efforts to address (before any federal intervention) the potential problems federal culvert designs could pose for salmon, and (4) that the State has for decades voluntarily "spent millions of dollars on programs specifically designed to preserve, to protect, and to enhance the salmon population." Pet. App. 28a n.8. An equitable injunction would have considered these factors in establishing the State's responsibilities; the injunction here ignores them.

In sum, if the Court does not reverse on other grounds, it should at least vacate the injunction. If any injunction is required, the Court should direct that it be: (1) tailored to address only culverts that can have an impact, (2) based on evidence that replacing a specific culvert or set of culverts will actually return a meaningful number of salmon to a tribal fishing area, (3) crafted in light of the State's limited resources and to avoid wasting public funds, and (4) cognizant of the equities.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

RESPECTFULLY SUBMITTED.

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