No. _____

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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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." 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 1850's, 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; Port Gamble S'Klallam Tribe; Lower Elwha Klallam Tribe; Lummi Nation; Makah Tribe; Muckleshoot Indian Tribe; Nisqually Indian Tribe; Nooksack 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

The Ninth Circuit's opinion below adopts a treaty interpretation already rejected by this Court, conflicts with decisions of this Court and other circuits, and creates a massive new treaty obligation that will "significantly affect natural resource management throughout the Pacific Northwest." App. 41a. This Court should grant certiorari.

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[.]" *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 & n.21 (1979) (*Fishing Vessel*). This Court has interpreted this language many times, and has held that it guarantees the signatory tribes three key rights: (1) access to traditional fishing places, *United States v. Winans*, 198 U.S. 371, 381-82 (1905); (2) freedom from some state fishing regulations, *Puyallup Tribe v. Dep't of Game of Washington*, 391 U.S. 392, 399 (1968); and (3) "a fair share of the available fish," up to 50% of each salmon run, *Fishing Vessel*, 443 U.S. at 685. Exercising these rights, western Washington tribes take roughly 1.5 million salmon annually. App. 183a-86a. And the State of Washington has spent hundreds of millions of dollars to preserve salmon for the benefit of tribes and all residents. App. 32; Ninth Circuit Excerpts of Record (ER) 136, 148, 739-40.

In 2001, the federal government and several tribes sued the State (a non-party to the treaties) claiming the treaties create an additional right never

recognized by this Court: to force Washington to replace culverts under state roads that restrict fish passage. The Ninth Circuit ruled in their favor. It interpreted *Fishing Vessel* to guarantee "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." App. 94a. And it concluded that state culverts impair this right. The Ninth Circuit denied rehearing en banc over the objection of nine judges. App. 1a-57a.

The panel's unworkable treaty interpretation conflicts with this Court's decision in *Fishing Vessel*. There, the Tribes argued that the treaties entitled them to enough fish to meet "their commercial and subsistence needs." *Fishing Vessel*, 443 U.S. at 670. The federal government disagreed, arguing "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). This Court "agree[d] with the Government." *Id.* at 685. Thus, as the en banc Ninth Circuit previously explained: "*Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish." *United States v. Washington*, 759 F.2d 1353, 1359 (9th Cir. 1985) (en banc). The panel here nonetheless held that the treaties promised there would always be enough fish "to provide a 'moderate living' to the Tribes," App. 94a, "turn[ing] *Fishing Vessel* on its head," App. 24a.

The panel also rejected the State's equitable defenses, citing prior Ninth Circuit opinions holding that equitable defenses are unavailable when the federal government brings treaty claims on behalf of tribes. App. 96a-99a. That holding is contrary to this

Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and Second Circuit cases applying that decision. And it was remarkably unfair here, where 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.

The sweeping injunction imposed here also conflicts with this Court's holdings 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." App. 37a. A federal court ordering a state to spend money on projects that will make no difference flies in the face of federalism and comity principles.

Finally, this Court's review is necessary because this case is exceptionally important. Replacing culverts will cost Washington billions of dollars, but that is only the beginning of the problem. "[P]laintiffs could use the panel's decision to demand the removal of dams and attack a host of other practices," and these concerns "extend[] far beyond the State of Washington," because the same treaty language is found in treaties with tribes in Idaho, Montana, and Oregon. App. 28a-29a. The ruling thus creates an ill-defined "environmental servitude" across the entire Pacific Northwest, intruding deeply into States' fiscal and policy decisions. The Court should grant certiorari.

OPINIONS BELOW

The amended and final Ninth Circuit decision below is reported at 853 F.3d 946 (2017). App. 58a-126a. The order denying rehearing en banc is reported at 2017 WL 2193387 (May 19, 2017). 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 found at App. 17a-41a. An opinion concurring in denial of review en banc by judges W. Fletcher and Gould is found at App. 6a-17a.

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

JURISDICTION

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

STATUTES

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

> The said tribes and bands of Indians 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 Nisqualli, Puyallup Etc. 1854 (Medicine Creek Treaty), arts. I, III, 10 Stat. 1132, 1133 (Dec. 26, 1854, ratified Mar. 3, 1855, proclaimed Apr. 10, 1855).[1]

STATEMENT OF THE CASE

A. Historical Treaty Negotiations and Salmon Runs

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

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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).

ceded to the United States "all their right, title, and interest" in the lands they occupied while reserving their 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, art. III, 10 Stat. at 1133.[2] At the time, there were roughly 7,500 Indians in western Washington, the area covered by the treaty claims at issue in this case. *Fishing Vessel*, 443 U.S. at 664.

Salmon are anadromous fish, meaning they hatch in fresh water rivers and streams, "migrate to the ocean where they are reared and reach mature size, and eventually complete their life cycle by returning to the fresh-water place of their origin to spawn." *Id.* at 662. "At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people." *Id.* at 675. Salmon runs were "considered inexhaustible[.]" *United States v. Washington*, 157 F.3d 630, 640 (9th Cir. 1998). 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'

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[2] Language in the other treaties is similar. *See supra* note 1; Treaty with the Walla-Walla, Etc., 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).

experience gave them reason to believe that would be necessary." App. 269.

Unfortunately, overharvesting by non-Indians showed that salmon were, in fact, an exhaustible resource. By the early 1900's—long before the State built any highways—salmon runs in western Washington had declined precipitously. App. 70a. Scarcity led to litigation over the meaning of the treaty right.[3]

B. This Court's Decisions Interpreting the Treaty Right

The first case to reach this Court 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 on the Columbia River in Washington and erected large fish wheels, excluding the Indians from that fishing site. The United States sued to enjoin the landowners from interfering with the Indians' treaty rights. This Court held that the landowners could not exclude the Indians from traditional fishing places. *Id.* at 381. "[T]he 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 Brothers Co.*, 249 U.S. at 199 (same holding as to land in Oregon).

This Court next addressed whether the treaties preempted state fishing regulation. In *Tulee v. Washington*, 315 U.S. 681 (1942), this Court held that the Yakama Treaty preempted a state license fee as

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[3] *See generally* Fronda Woods, *Who's In Charge of Fishing?*, 106 Or. Hist. Q. 412 (2005), https://www.fws.gov/leavenworthfisheriescomplex/who_in_charge_fishing%20(1).pdf.

applied to a Yakama Indian fishing at a traditional place. The Court held that "such 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 the treaty." *Tulee*, 315 U.S. at 685. The Court added that "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 dictum became a holding in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 399 (1968), where the Court held that the Medicine Creek Treaty did not preempt state police power "expressed in nondiscriminatory measures for conserving fish resources." When the *Puyallup* case reached the Court again after remand, this Court held that state regulations that barred Indians from using traditional fishing nets were discriminatory, and therefore 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. When the *Puyallup* case reached this Court a third time, this Court 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* litigation was pending, the United States and a number of tribes initiated this case by suing the State of Washington in federal court. 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. *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." *Id.* 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. 312, 401 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In devising an equitable remedy to implement the Tribes' right to a fair share of the harvests, the court set the tribal share at 50%. *Id.* at 343-44, 416.

After the Washington Supreme Court issued rulings conflicting with the district court's orders, this Court consolidated several cases and granted review. *See Fishing Vessel*, 443 U.S. at 669-74. This Court generally affirmed the district court's approach, holding 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 recognized that, 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. *Fishing Vessel*, 443 U.S. at 685-87.

After this Court's remand 38 years ago, the case never ended. Instead, the district court kept the case open and created a process for filing "sub-proceedings," dozens of which have since been filed, many of them intertribal disputes. *See generally United States v. Washington*, 573 F.3d 701, 704-05, 709-10 (9th Cir. 2009) (describing this process and one particular intertribal dispute). Thus, "[j]udges in the Western District of Washington have now been regulating fishing in the Puget Sound for 35 years, with the aid of a Fishery Advisory Board that the court created," and "the court has become a regulatory agency perpetually to manage fishing." *Id.* at 709.

C. Facts and Proceedings in this Case

In 2001, the federal government and 21 tribes filed a new "sub-proceeding" in *United States v. Washington*. They alleged that the treaties promised the Tribes they would always be able to earn a "moderate living" from fishing and that culverts under state roads that impede fish passage violate this promise. App. 250a; ER 1002-15. They sought declaratory and injunctive relief against the State. ER 1002-15.

1. 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. App. 77a, 209a-13a, 221a-26a (examples of culverts). Culverts are often

necessary in Washington because of the abundance of streams, and their costs vary widely depending on culvert type, stream conditions, and highway size and location.

Washington began building culverts in meaningful numbers when it accepted Congress's invitation to participate in the federal-aid highway program roughly 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). Congress created a partnership where the federal government provides partial funding for highways and states construct 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. *See generally* David R. Levin, *Federal Aspects of the Interstate Highway Program*, 38 Neb. L. Rev. 377 (1959); Richard F. Weingraff, Federal Highway Administration, *100th Anniversary–An Evolving Partnership*, 78 Public Roads No. 4 (2014). 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"). The federal government specified designs for highway culverts and distributed culvert engineering guidance to state highway departments. Levin, 38 Neb. L. Rev. at 393-96; ER 664. The Army Corps of Engineers also issued nationwide permits specifying conditions

under which road culverts are approved under Section 404 of the Clean Water Act without further processing. *See* 33 C.F.R. §§ 323.4, 323.4-3(a)(3) (1978). The Corps issued individual permits for many other culverts under 33 C.F.R. § 323.4-4 (1978).

Washington relied on the federal design standards, guidance, and permit conditions in building its culverts. ER 664, 989-90, 1082. Until the mid-1990s, virtually all state highway culverts in Washington were built to federally-supplied design standards. ER 665. At no time did the federal government notify the State that it would be violating treaty rights by using federal culvert designs or complying with federal permits. ER 665; App. 96a-97a.

By 1968, Washington had completed nearly all of its approximately 7000-mile state highway system. ER 312. But the State has continued to modify, expand, and update highways, and builds culverts in doing so.

In the 1990s, state scientists concluded that federal culvert designs were often inadequate to pass fish because they increased water velocity or turbidity, could become blocked by debris, or for other reasons. The State began identifying fish-barrier culverts under state highways and replacing them. App. 141a, 147a, 153a, 195a; ER 837. Washington became a national leader in developing new culvert designs that better pass fish and received awards from the federal government for its leadership in addressing fish passage. App. 137a, 144a; ER 117, 675-76, 840, 879-83.

Since 1991, Washington has spent over $135 million to remove barrier culverts in the state highway system.[4] This is in addition to the cost of culverts replaced as part of larger highway projects or in other state roads. App. 149a-52a, 169a. The State has also spent hundreds of millions of dollars on other salmon recovery efforts. *See* App. 155a-56a; ER 148-49, 659.

State-owned culverts are a small fraction of the barrier culverts in Washington. App. 203a. Federal, tribal, and local governments, as well as private landowners, have also built roads that include barrier culverts. Such culverts are ubiquitous in Washington, and the total number is unknown. ER 593, 1030, 1045. There is no exhaustive inventory of non-state culverts, but non-state barrier culverts outnumber state barrier culverts by at least 3 to 1, and in some watersheds by as much as 36 to 1. App 203a; ER 196-209, 407-555. Because there are so many non-state culverts, the State has focused its highway culvert replacement efforts on streams with no other barriers, where replacing the state barrier may actually open access to habitat. ER 630-31, 671.

2. District Court Proceedings

Despite its role in designing and permitting culverts under Washington highways, in 2001 the federal government joined 21 tribes in initiating this "sub-proceeding," claiming that the State's culverts

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[4] Wash. State Dep't of Transp., *WSDOT Fish Passage Performance Report*, Table 2 (June 30, 2017), http://www.wsdot.wa.gov/publications/fulltext/projects/FishPassage/2017FishPassageAnnualReport.pdf.

violate the federal treaties signed in 1854-1855. The State denied that the treaties imposed the alleged duty and asserted that the United States and the tribes were barred by equitable principles from seeking relief related to culverts designed to federal standards or installed under federal permits. ER 989-90, 995-96. The trial court granted the United States' motion to strike those defenses, ruling that the State could not use them to defeat the United States' action to enforce tribal treaty rights. App. 274a-75a.

In 2006, the parties cross-moved for summary judgment on whether the treaty imposed the duty alleged. The trial court granted the tribes' motion and denied the State's. App. 249a-72a. The court found that "fish harvests have been substantially diminished" since 1985, and drew a "logical inference that a significant portion of this diminishment is due to the blocked culverts[.]" App. 254a, 263a. The court acknowledged that nothing in the treaties' text prohibited state actions that incidentally impacted 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." App. 269a. But the court concluded that statements made by the United States' treaty negotiators at some of the 1854-1855 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." App. 270a. The court declared:

> [T]he right of taking fish, secured to the Tribes in the Stevens Treaties, imposes 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. The Court further declares that the State of Washington currently owns and operates culverts that violate this duty.

App. 271a.

The court held a trial on the proper remedy in 2009. App. 128a. The court granted the State's motion in limine to exclude as "too speculative" the tribes' estimates of how many salmon were "lost" because of state-owned culverts. App. 245a-47a. The court also directed the parties to submit proposed Findings of Fact and Conclusions of Law. 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 particular tribe's fisheries, or any 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.

In 2013, the court adopted without change an injunction submitted by the United States and the Tribes, ordering the State to replace any state-owned barrier culvert that "has 200 lineal meters or more of salmon habitat upstream to the first *natural* passage barrier," regardless of any man-made barriers

surrounding the state culvert. App. 237a (emphasis added). Thus, the State must replace its culverts even if non-state barriers upstream and/or downstream from the state culvert prevent salmon from reaching it. App. 37a.

3. Ninth Circuit Proceedings

A panel of the Ninth Circuit affirmed. App. 58a-126a. The panel found a treaty right to demand culvert removal based not on the treaty language itself, but rather on statements made by Isaac Stevens, the United States' lead treaty negotiator, to the effect that he wanted the treaties to secure the Tribes' access to food forever. App. 91a. Based on these statements, the panel found a promise that the federal government would ensure "that there would be fish sufficient to sustain" the Tribes. App. 92a. The panel also said that even if Stevens had not made these statements, it would simply "infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." App. 94a.

Finding 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—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." App. 95a-96a.

The panel also affirmed the district court's ruling that equitable defenses were unavailable, holding that this Court's decision in *City of Sherrill* was inapplicable. App. 96a-99a.

Finally, the panel affirmed the district court's injunction, holding that it was not overbroad or inequitable because the State recognized before the case was filed that replacing some culverts was a good idea. 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. App. 123a-25a.

4. En Banc Proceedings

The State petitioned for rehearing en banc, which the Ninth Circuit denied. 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. App. 17a-41a.

Describing the panel opinion as a "runaway decision" that had "discovered a heretofore unknown duty" in the treaties, the nine dissenting judges urged that the panel opinion made "four critical errors." 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. App. 21a-26a.

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

Third, in Part IV, the dissenting judges urged that the panel opinion defied this Court's decision in *City of Sherrill*, and 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. 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 impact on salmon. App. 36a-41a.

REASONS THE PETITION SHOULD BE GRANTED

A. The Ninth Circuit's Decision Conflicts with this Court's Decisions About How to Interpret these Treaties and How to Interpret Treaties Generally

Petitions for certiorari often claim that a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). But this case presents a uniquely troubling example of such a conflict: the panel's decision interprets a federal treaty in a way that rejects this Court's prior reading of the exact same language in this very case. The panel opinion also

conflicts more generally with this Court's holdings on treaty interpretation. Both conflicts warrant certiorari.

1. The Ninth Circuit's Decision Conflicts with This Court's Decision in *Fishing Vessel*

The Ninth Circuit held that these treaties "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." App. 94a. The panel claimed that *Fishing Vessel* supports this conclusion. App. 92a; *see* App. 7a-9a. In truth, *Fishing Vessel* rejected this unworkable standard. This Court should grant certiorari to resolve this conflict.

In *Fishing Vessel*, the parties advanced competing positions. The Tribes "contended that the treaties had reserved a pre-existing right to as many fish as their commercial and subsistence needs dictated." *Fishing Vessel*, 443 U.S. at 670. "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. *See, e.g.*, *United States v. Washington*, 759 F.2d 1353, 1359 (9th Cir. 1985) (en banc) ("*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) (describing *Fishing Vessel* as holding that the tribes were "entitled to an equal measure of the harvestable portion of each run . . . adjusted downward if tribal needs could be satisfied by a lesser amount"), *cert. denied*, 546 U.S. 1090 (2006); *Midwater Trawlers Co-operative v. Dep't of Commerce*, 282 F.3d 710, 719 (9th Cir. 2002) (same); *see also* App. 21a-25a.

Fishing Vessel is therefore irreconcilable with the panel's opinion. 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," 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." *Fishing Vessel*, 443 U.S. at 670. Instead, the Court

held that the Tribes were entitled to at most one-half of each run, even if that amount was less than their "needs dictated." *Fishing Vessel*, 443 U.S. at 686 ("[T]he 50% figure imposes a maximum but not a minimum allocation."). It cannot be the case that the treaties promised the Tribes both a "moderate living" from fishing and a "maximum" of 50% of each run; one opinion has to give, and in our system, it is the lower courts that are supposed to follow this Court's holdings. App. 24a ("[T]he panel opinion turns *Fishing Vessel* on its head.").

The panel's opinion is not only irreconcilable with precedent, it is also unworkable. The panel's opinion would mean that the State's ability to comply with the treaty would depend on a range of factors over which the State has no control, from natural fluctuations in salmon runs to salmon prices to what other income tribal members earn. It also leaves fundamental questions about the treaties' meaning unanswered, including whether the new "moderate living" guarantee grows with the Indian population in western Washington (which was roughly 7,500 at treaty time but is much larger today) and whether it grows as overall standards of living change.

The Court should grant certiorari to resolve the important conflict between its own reading of these treaties in *Fishing Vessel* and the panel's contrary reading. Resolving that conflict will determine whether the panel's basis for compelling billions in spending on culvert repairs is justified. Addressing this conflict would also allow the Court to examine if there is any treaty-based right to compel the State to restore salmon habitat to increase salmon returns. While the State does not believe the treaties contain

any such right (nor that it is necessary to read one in, given the State's own strong incentives to preserve salmon runs and the federal government's vast powers to adopt laws regulating and funding habitat protection and restoration), the State proposed to the Ninth Circuit a number of narrower possible rules it could consider instead of the unsupportable "moderate living" standard. *See, e.g.*, Dkt. 25 at 34-35, Dkt. 118 at 10-11; *see also, e.g.*, *United States v. Washington*, 694 F.2d 1374, 1377 n.7 (9th Cir. 1982) ("environmental degradation that has a discriminatory effect on Indians is barred under *Puyallup I* if authorized or caused by the State"), *vacated*, 759 F.2d 1353 (9th Cir. 1985). Granting certiorari would allow this Court to consider these alternatives itself while making clear that the extreme rule adopted by the panel is irreconcilable with this Court's precedent.

2. The Panel's Holding Conflicts with this Court's Holdings on Treaty Interpretation

Even setting aside the direct conflict with *Fishing Vessel*, the panel's opinion conflicts with this Court's holdings about treaty interpretation. By inferring a massive commitment nowhere mentioned in the treaties, never contemplated by the parties, and never recognized by the parties during the decades after the treaties, the panel ignored this Court's direction.

This Court has held that Indian treaties "cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw*

Nation of Indians v. United States, 318 U.S. 423, 432 (1943). On this basis, this Court has repeatedly rejected treaty interpretations never agreed to by the parties. *See, e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466-67 (1995); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 769-74 (1985).

Here, in declaring this massive new right and obligation, the panel never explained how the treaty "right of taking fish . . . in common with all citizens," could equate to a guarantee that "the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." And the panel entirely ignored the treaty agreement that the Tribes would "cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them." *E.g.*, Medicine Creek Treaty, art. I, 10 Stat. at 1132. The panel made no attempt to reconcile this language with the import of its holding: that the Tribes silently retained a right to control land use decisions and State policies in the ceded territory that could affect salmon.

The panel instead looked to reported statements of treaty negotiators and the alleged implications of those statements. It is true that when construing ambiguous treaty language, courts can look "to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). But even looking to those materials here cannot justify the panel's conclusion. As the dissent from the denial of rehearing pointed out, this Court considered the exact same

statements by negotiators in *Fishing Vessel* but still rejected the Tribes' position that the treaties promised as many fish as their "needs dictated." *Fishing Vessel*, 443 U.S. at 670. App. 25a. And the district court here reaffirmed that the parties did not intend "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." App. 269a.

The "practical construction adopted by the parties" also contradicts the panel's holding that State culverts violate the treaties if they incidentally restrict fish passage. *Mille Lacs Band*, 526 U.S. at 196. The federal government funded and provided designs for these culverts, until the State itself improved the designs. The Tribes agreed in the treaties that roads could be built. *E.g.*, Medicine Creek Treaty, art. II, 10 Stat. at 1133. And for over a century after signing the treaties, the federal government built dams that restricted or entirely blocked fish passage. *See, e.g.*, *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1020-21 & nn. 2-5 (1983). Clearly, the federal government did not understand the treaties to prohibit such projects.

Finally, the panel's alternative theory for inferring this treaty right, based on cases finding implied water rights in treaties, is also inconsistent with this Court's precedent. *See* App. 92a-94a (citing *Winters v. United States*, 207 U.S. 564 (1908)). This Court considered these same cases in *Fishing Vessel*, 443 U.S. at 685-86, but still declined to adopt the Tribes' position. More broadly, these cases rely on the idea that when the United States created Indian reservations, it must have intended to reserve water sufficient to make the reservations viable. *See, e.g.*,

Cappaert v. United States, 426 U.S. 128, 139 (1976). Here, there is no need or basis to infer such a right because: (1) the State already has strong incentives to preserve salmon runs because it shares the runs equally with the Tribes; and (2) the federal government has broad power to protect salmon without adding a new right to this treaty, whether through laws, regulations, or funding decisions. As the dissenting judges observed, if lower courts "read these cases broadly to mean that we *can and should* infer a whole host of rights not contained in the four corners of tribal treaties, the possibilities are endless" for creating new rights. App. 26a.

In short, the panel's holding that the treaties implicitly guaranteed a moderate living from fishing was an effort "to remedy a claimed injustice," *Choctaw Nation*, 318 U.S. at 432, not a plausible interpretation of the treaty language or the parties' intent. This Court should grant certiorari to rectify the conflict between the Ninth Circuit's approach and this Court's directions on treaty interpretation.

B. The Ninth Circuit's Decision Conflicts with Decisions of this Court and the Second Circuit on the Availability of Equitable Defenses to Treaty Claims

The Ninth Circuit opinion also warrants review because it conflicts with decisions of this Court and the Second Circuit concerning equitable defenses.

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), 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 such as laches defeated the tribe's attempt to enjoin the city from imposing property taxes on the newly reacquired land. *See also Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (agreeing with intervenor United States that disputed lands were within tribe's treaty reservation, but "express[ing] no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax [non-Indian businesses]").

The Second Circuit applied *City of Sherrill* to hold that laches barred all remedies for disruptive treaty-based Indian land claims brought by tribes and by the United States on their behalf. *Oneida Indian Nation of New York v. Cty. of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 565 U.S. 970 (2011); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *see Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165 (2d Cir. 2014) ("it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility"), *cert. denied*, 135 S. Ct. 1492 (2015).

The Ninth Circuit decision conflicts with *City of Sherrill* and the Second Circuit decisions applying it. The Ninth Circuit brushed aside *Sherrill* because *Sherrill* involved different facts—tribal rights within an "abandoned reservation." App. 99a. But, as the dissenting judges recognized, "*Sherrill* made clear that laches can apply to Indian treaty rights, [so] it should not matter whether a party is seeking to apply laches in the context of sovereignty over land or the

enforcement of rights appurtenant to land (the ability to fish)." App. 35a. Having rejected *Sherrill* with a meaningless distinction, the panel then applied old Ninth Circuit precedent to hold that equitable defenses cannot be used to defeat a suit by the United States to enforce Indian treaty rights. App. 97a-98a. But the Second Circuit has held exactly the opposite under *Sherrill*. *Oneida Indian Nation of New York*, 617 F.3d at 129; *Cayuga Indian Nation of New York*, 413 F.3d at 278-79; App. 34a.

The Ninth Circuit's refusal to consider equitable defenses merits review. The State has compelling equitable defenses available, if they could only be considered. As detailed above, the federal government funded, authorized, provided designs for, and/or granted permits for the very culverts it now says are treaty violations. ER 664, 1082. Before supplying the funds, design standards, and permits, the federal government was required to consider the Tribes' treaty fishing rights. *See Nance v. Envtl. Prot. Agency*, 645 F.2d 701, 710, 711 (9th Cir. 1981) ("It is fairly clear that any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes."), *cert. denied*, 454 U.S. 1081 (1981). As the dissent noted: "Given the United States' involvement in designing the culverts and its long acquiescence in their existence, one might suppose that an equitable doctrine . . . would bar suit by the United States." App. 33a. And if equitable doctrines bar suit by the United States, the Tribes could not separately sue the State

because of the State's sovereign immunity. App. 35a (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997)). This Court should grant certiorari to address this issue.

C. The Ninth Circuit's Decision Conflicts with Prior Decisions of this Court about the Proper Scope of Injunctive Relief

Even if the Ninth Circuit's approach to treaty interpretation and equitable defenses were consistent with this Court's holdings, the injunction it affirmed is not. This Court should grant certiorari to address the conflict between its precedent about the proper scope of injunctive relief (especially against sovereign States) and the breathtakingly broad injunction the Ninth Circuit affirmed here.

This Court has held that injunctions are extraordinary remedies, should be narrowly tailored to redress only conduct that violates federal law, and should be issued only after careful consideration of their public impacts. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *Winters v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Moreover, when a plaintiff seeks a federal injunction against a state, "appropriate consideration must be given to principles of federalism." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). "Federalism concerns are heightened when," as here, "a federal court decree has the effect of dictating state or local budget priorities." *Horne v. Flores*, 557 U.S. 433, 448 (2009). And when there is a "patently inadequate basis for a conclusion of systemwide violation," it is error to impose "systemwide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996).

At least three aspects of the Ninth Circuit opinion conflict with these principles.

First, the panel ordered the State to replace culverts even when doing so will make no difference to salmon. The panel ordered the State, by 2030, to replace any state-owned highway barrier culvert that "has 200 lineal meters or more of salmon habitat upstream to the first *natural* passage barrier," regardless of any man-made barriers surrounding the state culvert. App. 104a (emphasis added), 237a. Thus, the State must replace its culverts even if other man-made barriers upstream and/or downstream prevent salmon from reaching the state culvert. App. 37a. In other words: "[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." App. 37a. This flaw permeates the injunction because: (1) roughly 90% of state barrier culverts are upstream or downstream of other barriers, ER 629; (2) state-owned culverts are less than 25% of known barrier culverts, ER 1045; and (3) in many watersheds, non-state barrier culverts drastically exceed state-owned culverts, by up to 36 to 1. ER 196-211, 407-555; *see* App. 203a.

Ordering the State to replace culverts that will make no difference flies in the face of basic principles of federalism and federal court jurisdiction. Injunctive relief is supposed to address violations of federal law,

not a court's policy preferences, yet the Ninth Circuit never explained how a State culvert could possibly violate the treaties if no salmon can reach it in the first place. And it is untenable for the Ninth Circuit to order the State to spend money replacing such culverts when the expense will come at the cost of state funding for other priorities, potentially including salmon restoration efforts that could actually have an impact. *See, e.g.*, *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.").

Second, the injunction requires replacement of state culverts throughout western Washington without any evidence that any particular culvert or group of culverts has reduced the number of fish that would otherwise reach tribal fishing areas. The panel ignored this lack of evidence, instead relying on the generalized claim that "hundreds of thousands of adult salmon will be produced by opening up the salmon habitat that is currently blocked by the State's barrier culverts." App. 115a. But the evidence does not support that claim.

As the panel acknowledged, salmon numbers in Washington first declined dramatically in the early 1900's (because of overharvesting), long before the State began building highways or culverts. App. 70a; ER 970-71. And there is no clear relationship between the number of state highway culverts and salmon

populations. Washington's state highway system has been essentially the same size since the 1960's, *see* ER 312, 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* ER 267; App. 183a-88a (tribal harvests).

In nonetheless concluding that "hundreds of thousands of adult salmon will be produced by" replacing "the State's barrier culverts," App. 115a, the panel relied primarily on a 1997 report to the Washington Legislature, App. 108a-09a. But the district court—the factfinder—rejected the use of that report to predict "lost" salmon as unreliable and never cited it in its findings of fact. App. 245a-47a, 130a-73a. 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." App. 247a. Thus, the Ninth Circuit relied on exactly the sort of conjecture that provides a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis*, 518 U.S. at 359.

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 (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 the federal role in designing and permitting these culverts, the State's own recognition of and efforts to address (before any federal intervention) the potential problems federal culvert designs could pose for salmon, and that the State has for decades "spent millions of dollars on programs specifically designed to preserve, to protect, and to enhance the salmon population." App. 28a n.8. Unfortunately, rather than recognizing these equitable factors on the State's side, the panel made this case an example of how "no good deed goes unpunished." *Winters*, 555 U.S. at 31.

In sum, this Court's directives should have counseled the panel to limit any injunction to the narrowest needed, to carefully avoid imposing unnecessary costs on the State, and to consider the equities in fashioning relief. The panel departed from all of these core principles, and this Court should grant certiorari to direct the Ninth Circuit to, at the very least, bring the scope of the injunction in line with this Court's precedent.

D. This Case is Exceptionally Important

While much about this case is hotly contested, its importance is not. Even setting aside the immense costs the decision will impose on the State for replacing culverts (many of which will make no difference), the decision would warrant this Court's review.

This case began in 1970, and the panel's decision ensures that it will never end. As the nine judges objecting to the denial of rehearing pointed out: "The panel opinion fails to articulate a limiting legal principle that will prevent its holding from being used to attack a variety of development, construction, and farming practices, not just in Washington but throughout the Pacific Northwest." App. 19a. The panel essentially reasoned that: (1) tribes have a right to a moderate living from fishing; (2) they currently are not earning a moderate living from fishing; (3) State culverts play some role in reducing the number of fish available; therefore (4) State culverts violate the treaties. App. 27a-28a. But as the dissent pointed out, the same reasoning could be used to demand any number of changes in longstanding governmental and private practices, from "the removal of dams" to altering farming practices to the elimination of century-old water rights. App. 28a. Tribal advocates agree, noting that: "[T]he tribes have established a winning strategy . . . pick one of the myriad activities that degrade salmon habitat, connect the degradation to the depressed salmon populations . . . and assert that diminished salmon numbers prohibit the tribal harvest from providing tribal members a 'moderate living.'" Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The* Martinez *Decision Supplies a Resounding Judicial Reaffirmation*, 49 Nat. Resources J. 653, 700-01 (Summer 2009); Mason D. Morisset & Carly A. Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation*, Seattle J. Envtl. L. 29, 54 (Spring 2009), law.seattleu.edu/Documents/bellweth

er/2009spring/MorissetSummers.pdf (describing the import of the district court's rulings as being that "any factor that is 'a cause' of [salmonid] diminishment may be subject to injunctive relief"). Moreover, "the future reach of this decision extends far beyond the State of Washington," as "the same fishing rights are reserved to tribes in Idaho, Montana, and Oregon." App. 29a.

In short, there is near universal agreement that "[t]he panel opinion's reasoning . . . is incredibly broad, and if left unchecked, could significantly affect natural resource management throughout the Pacific Northwest[.]" App. 41a. *See also* Michael C. Blumm, *Treaty Fishing Rights and the Environment; Affirming the Right to Habitat Protection and Restoration*, 92 Wash. L. Rev. 1, 5 (Mar. 2017) (counsel for one of tribes' amici noting that "the decision's implications beyond Washington and beyond state-owned road culverts portend significant future changes in land and water-use management in the Northwest"). Whether one thinks that massive change in law is good or bad, it should at least be addressed by this Court.

CONCLUSION

The panel opinion creates an expansive new treaty right contrary to this Court's precedent, ignores this Court's holdings about equitable defenses and

injunctive relief, and imposes an unworkable rule that provides no clear standard to guide Washington (or other States covered by these treaties) and that virtually guarantees that this case will never end. The Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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