The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, Defendant.	NO. C70-9213 Subproceeding 01-1 (Culverts) WASHINGTON'S MOTION FOR SUMMARY JUDGMENT, AND ARGUMENT IN SUPPORT **NOTE ON MOTION CALENDAR: SEPTEMBER 29, 2006**

I. MOTION

The Plaintiffs allege that the State of Washington is violating six Indian treaties because it is repairing culverts on state-owned lands at a pace they say is too slow. They ask the Court to declare a legal principle identical to the one the State successfully appealed in Phase II of *United States v. Washington* over 20 years ago.[1] The Plaintiffs chose state-owned culverts that block fish passage as the factual vehicle for this test case, but barrier culvert correction is not their primary concern. The real issue is a legal one: Are the lands the Plaintiff Tribes ceded in six Indian treaties over 150 years ago burdened by an implied

[1] *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980), *rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

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servitude requiring current land owners to avoid impairing the Tribes' ability to earn a "moderate living" from fishing?

The Plaintiffs' proposed legal principle fails as a matter of law. The alleged treaty-based servitude has no support in the treaty language. The Plaintiffs inappropriately attempt to transform a limit on equitable relief into a new treaty right. The legal declaration they request fails to satisfy the Ninth Circuit's 1985 directive in this case. Finally, the Court should apply equity to bar the claims of the United States.

The State recognizes the importance of habitat to healthy fisheries. The Plaintiffs are not without a remedy should actions by others threaten to destroy their fisheries. Because the Court retains continuing *in rem* jurisdiction over the fishery *res* in *United States v. Washington*, the Court may, in egregious cases, enjoin actions that would have the effect of destroying the *res*.[2] This is not such a case. The State's culvert repair programs are benefiting the fishery, not destroying it.

The State moves for an order of summary judgment dismissing the Tribes' Request For Determination and the United States' Response to Request For Determination. There is no genuine issue of material fact, and the State is entitled as a matter of law to a judgment in its favor. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).[3]

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[2] *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979); *see United States v. Washington*, Civil No. 70-9213, Subproceeding 01-1, Order Granting United States' Mot. For Recons. and Mot. To Dismiss State's Cross-Req. For Determination at 8 & n.2 (W.D. Wash. Oct. 26, 2001) (Doc. No. 17231/90).

[3] The State recognizes that the treaties are federal laws that can preempt conflicting state laws. U.S. CONST. art. VI, cl. 2; *see Antoine v. Washington*, 420 U.S. 194, 204-05 (1975). Treaties can preempt the application of state laws outside Indian reservations even where there is only an indirect effect on the exercise of a treaty right. *See Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 688-89 (2005). In rare instances, that might include laws that affect fish habitat. *Cf. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (White, J.). The Plaintiffs in this case did not plead preemption, however.

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II. FACTS

A. Prior Proceedings in *United States v. Washington*

This lawsuit, pending since 1970, is about the "right of taking fish" secured in six treaties[4] to Indian Tribes whose "usual and accustomed grounds and stations" are in Western Washington.[5] *United States v. Washington* was the culmination of decades of conflict about whether and to what extent the treaties preempt state regulation of fishing by treaty Indians.[6] Before trial, the Court separated the claims into two parts: (I) the extent to which the treaties preempt state regulation of Indian fishing and entitle the Tribes to a share of fish, and (II) whether the treaties require the State to refrain from and prevent degradation of fish habitat. The first part ("Phase I") went to trial in 1973. The Court reserved for later determination in "Phase II" the "[e]nvironmental issues requiring affirmative relief."[7]

1. Phase I: A Treaty Right to a Fair Share of Harvestable Fish

Phase I produced the "Boldt decision," *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The Court held (1) state fishing regulations that are not necessary for conservation conflict

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[4] The treaty provision in question, as set forth in the Medicine Creek Treaty, says "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 Nisquallys (Medicine Creek Treaty), Art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854) (Attachment 1 hereto). The other treaties involved in *United States v. Washington* contain a substantially similar provision. Treaty With the Dwámish Indians (Treaty of Point Elliott), Art. V, 12 Stat. 927, 928 (Jan. 22, 1855); Treaty With the S'Klallams (Treaty of Point No Point), Art. IV, 12 Stat. 933, 934 (Jan. 26, 1855); Treaty With the Makah Tribe, Art. IV, 12 Stat. 939, 940 (Jan. 31, 1855); Treaty With the Yakamas, Art. III ¶ 2, 12 Stat. 951, 953 (June 9, 1855); Treaty With the Qui-Nai-Elts, Art. III, 12 Stat. 971, 972 (July 1, 1855). The treaties to which *amici* Umatilla, Nez Perce, and Warm Springs Tribes are parties also contain a substantially similar provision, as does the treaty to which the Salish and Kootenai Tribes of Montana is a party. Treaty With the Walla-Wallas, Art. I, 12 Stat. 945, 946 (June, 9, 1855); Treaty With the Nez Percés, Art. III ¶ 2, 12 Stat. 957, 958 (June 11, 1855); Treaty With Indians in Middle Oregon, Art. I ¶ 3, 12 Stat. 963, 964 (June 25, 1855); Treaty With the Flatheads, Art. III ¶ 2, 12 Stat. 975, 976 (July 16, 1855).

[5] The *United States v. Washington* "case area" includes Washington watersheds that drain into Puget Sound, Grays Harbor, and the Pacific Ocean north of Grays Harbor. *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974); *United States v. Washington*, 459 F. Supp. 1020, 1097 (W.D. Wash. 1977).

[6] *See Who's In Charge of Fishing?*, 106 OREGON HISTORICAL QUARTERLY 412 (Fall 2005), http://www.historycooperative.org/journals/ohq/106.3/.

[7] Final Pretrial Order § 12-3 (Doc. No. 353); *see U.S. v. Washington*, 384 F. Supp. at 328.

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with the treaties and are therefore preempted and unenforceable against treaty Indians,[8] and (2) the treaty right being "in common with" other people, the Tribes are entitled to a fair and equitable share of harvestable fish. State fishing regulations that fail to provide the Tribes with a fair share conflict with the treaties and are preempted.[9] Ultimately, the United States Supreme Court affirmed these legal principles in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 674-85 (1979).

The Boldt decision was very controversial, but most of the controversy had to do with the remedy, not the law. In devising an equitable remedy to implement the Tribes' right to a fair share of harvestable fish, the Court set the tribal share at 50%, in part because of the Tribes' historic dependence on fishing for food and commerce.[10] That meant non-Indian fisheries had to be severely curtailed, resulting in several years of turmoil. The Supreme Court generally affirmed the 50% remedy but was sensitive to the concerns of non-Indians, making some adjustments in the sharing formula and leaving the door open for future adjustments.[11] In particular, the Court said the State may seek a sharing adjustment if a Tribe turns to "other sources of support" and does not need 50% for a "livelihood" or "moderate living."[12]

2. Phase II: The Rise and Fall of a Treaty-Based Habitat Servitude

In 1976, the United States and the Plaintiff Tribes activated "Phase II" of *United States v. Washington.* They alleged that the State had a treaty-based duty to avoid taking or authorizing actions that "significantly and adversely affect fish habitat and which directly or indirectly reduce the number or quality of fish available to treaty Indians."[13] The Plaintiffs

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[8] *United States v. Washington*, 520 F.2d 676, 684-86 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Among other things, the court enjoined enforcement of certain fishing gear laws. 384 F. Supp. at 415.

[9] *U.S. v. Washington*, 520 F.2d at 687-88; *see Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976).

[10] *U.S. v. Washington*, 384 F. Supp. at 343-44, 416-17, *aff'd*, 520 F.2d at 687-90.

[11] *Fishing Vessel*, 443 U.S. at 685-89.

[12] *Fishing Vessel*, 443 U.S. at 686-87; *see* Fed. R. Civ. P. 60(b)(5).

[13] Doc. No. 2352 at 5, Doc. No. 2490 at 5, Doc. No. 2623 at 6, 7.

moved for summary judgment on that question, urging that "the treaties, in a sense, impose an 'easement' on all waterways used by salmon and steelhead in their migrations."[14]

In 1980, the Court granted the motion and held that the treaties implicitly imposed on the State a duty not to impair fish habitat.[15] Misreading the remedy section of the Supreme Court's *Fishing Vessel* opinion as a declaration of law, the Court concluded that the "treaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs."[16] Therefore, said the Court, the "duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs."[17] Though Judge Orrick did not use the word "servitude," commentators and courts have recognized that his ruling effectively declared an environmental servitude encumbering the lands that the Tribes ceded in the treaties.[18]

The State appealed. The case was first heard by a three-judge panel of the Ninth Circuit, which rejected the trial court's reasoning.[19] The panel repeatedly emphasized that the trial court had misread *Fishing Vessel*, and that an environmental servitude had no basis in precedent.[20] Instead, the panel advanced an alternative theory—that the treaties impose on the State, the United States, and the Tribes an obligation to take "reasonable steps" to preserve and enhance the fishery.[21] The panel did not clearly explain its rationale, but it apparently relied on

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[14] Doc. No. 5542 at 15 (copy filed with Washington Association of Counties' Memorandum).

[15] *United States v. Washington*, 506 F. Supp. 187, 205-07 (W.D. Wash. 1980); *see id.* at 203.

[16] *U.S. v. Washington*, 506 F. Supp. at 208; *see id.* at 193.

[17] *U.S. v. Washington*, 506 F. Supp. at 208; Am. J. (Jan. 12, 1981) (Doc. No.7390).

[18] Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, 363 (2001); Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 Or. L. Rev. 771, 778 (1988); *see Skokomish Indian Tribe v. United States*, 410 F.3d 506, 527 (9th Cir. 2005) (en banc) (Berzon, J., dissenting), *cert. denied*, 126 S. Ct. 1025 (2006); *United States v. Washington*, 694 F.2d 1374, 1381, 1384, 1389 (9th Cir. 1982), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

[19] *United States v. Washington*, 694 F.2d 1374, 1377 (9th Cir. 1982).

[20] *Id.* at 1375, 1377 & n.7, 1380-82, 1387.

[21] *Id.* at 1374, 1375 & n.1, 1381, 1386, 1389-90 & n.1.

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a different property-based concept—that the State and the Tribes share a cotenancy in the fishery resource.[22]

The cotenancy idea has its own problems. Though the Ninth Circuit has used a cotenancy analogy to explain state/tribal sharing of harvestable fish, it has emphasized that the State and the Tribes "do not share a cotenancy" or any other property interest in the fish.[23] No party in this case advocates the reasoning of the Phase II panel decision. In any event, as explained in the Washington Association of Counties' Memorandum in Support of the State's Motion For Summary Judgment, cotenancy principles do not support the Plaintiffs' claims.

The United States and the Tribes were granted rehearing *en banc*. First, the *en banc* court concluded that it lacked jurisdiction over the environmental issue and dismissed the appeal. Then the State sought rehearing. Finally, a divided eleven-member court issued an opinion vacating the trial court's judgment of an environmental servitude as contrary to the exercise of sound judicial discretion because it was decided without a factual context:

> The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.[24]

Since then, no court has endorsed the idea that any Indian treaty embodies an implied environmental servitude.[25]

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[22] *Id.* at 1375, 1381.

[23] *U.S. v. Washington*, 520 F.2d at 685, 687; *see Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct.*, 573 F.2d 1123, 1128 & n.3 (9th Cir. 1978). In *Gillnetters*, Justice Kennedy, then on the Ninth Circuit, pointed out the limitations of a cotenancy analogy. 573 F.2d at 1134-36 (Kennedy, J., concurring).

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

[25] *Cf. Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc) (no treaty right to damages for destruction of fisheries caused by hydroelectric project), *cert. denied*, 126 S. Ct. 1025 (2006); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994) (same result); *In re SRBA*, Case No. 39576, Subcase No. 03-10022, Order on Mots. Summary J. of State of Idaho, Idaho Power, Potlatch Corp., Irrigation Dists., and Other Objectors Who Have Joined and/or Supported Various Mots. (Idaho Dist. Ct., Nov. 10, 1999) (no treaty right to instream flows for fish), *available at* http://www.srba.state.id.us/FORMS/sumjudg.PDF.

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B. Washington State Culverts

The context for this litigation is state-owned road culverts. No material facts are in dispute. Most state-owned culverts do not block fish passage, but some currently do. The State is working to improve fish passage through its blocking culverts, but the task is not yet completed. For purposes of this motion, the State assumes that fish will be more plentiful after all the culverts are fixed.

Washington State law requires fish passage through human-made structures in streams, such as culverts.[26] The Washington Department of Fish and Wildlife (WDFW) has developed guidance for culvert design and for identifying culverts that block fish passage. The guidance is updated as new science becomes available.[27] The Plaintiffs have used the WDFW guidelines for their own culvert work.[28]

Most state-owned culverts in Washington are in the state highway system, which the Washington State Department of Transportation (WSDOT) manages, or on state forest lands managed by the Washington State Department of Natural Resources (DNR). WDFW and Washington State Parks also have some culverts within their lands. These agencies are working to bring all of their culverts in fish-bearing streams into conformance with the WDFW standards. Their work is but one component of a statewide effort to restore healthy salmon populations.[29]

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[26] 1889-90 Wash. Laws pp. 107-08, *codified as amended at* Wash. Rev. Code §§ 77.15.320, 77.57.030 (2005); *see* 1949-51 Wash. Op. Att'y Gen., No. 304 (July 19, 1950).

[27] Decl. of Donald Haring ¶ 10.

[28] Klochak Dep. 19:24-20:23, 55:17-56:6, 59:22-60:1 (July 21, 2006); *see* Decl. of James Doyle ¶¶ 3, 8 (Nov. 1, 2004, Doc. No.17798/165); Decl. of Robert Metzger ¶¶ 3, 8 (Nov. 1, 2004, Doc. No.17799/165); U.S. Answers to Interrogs. 82, 96, 98, 100, 123; Tribes' Answers to Interrogs. 4, 12, 13; Fox Dep. 35:18-25 (June 29, 2006); McHenry Dep. 17:22-18:8, 22:1-3 (May 8, 2006). Dr. Martin Fox, one of Plaintiffs' experts, criticized WDFW's culvert design methods, but as of June 2006 he had done no field work to determine whether any culverts had the hypothetical defects he described. Fox Dep. 13:17-14:12; 16:20-22; 24:2-5. Copies of all discovery cited materials cited herein are attached to the Declaration of Mary E. Jones Re: Washington's Motion For Summary Judgment.

[29] *See generally* 70 Fed. Reg. 76445 (Dec. 27, 2005); 70 Fed. Reg. 20531 (Apr. 20, 2005).

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1. Washington State Highway Culverts

During the 20th century, Congress made it a national priority to develop highway infrastructure in the United States. The federal-state partnership created by the federal aid highway laws has played a major role.[30] Washington accepted the Federal-Aid Highway Act in 1917,[31] and today all Washington state highway routes are federal-aid highways as described in 23 U.S.C. § 103.[32] They provide crucial access for economic development within the Plaintiff Tribes' reservations and elsewhere.[33] The Tribes invite the public to use state highways to travel to tribal casinos and other businesses.[34]

Until the early 1990s, WSDOT designed state highway culverts according to the guidelines and standards promulgated by the Federal Highway Administration. The Federal Government never suggested that WSDOT's adherence to federal design guidelines would violate the Tribes' treaty rights. Nor has the Federal Government ever alleged that Washington has failed to maintain its federal-aid highways adequately.[35]

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[30] *See generally* U.S. DEPARTMENT OF TRANSPORTATION, AMERICA'S HIGHWAYS 1776-1976: A HISTORY OF THE FEDERAL AID PROGRAM (1976); *Siuslaw Concrete Constr. Co. v. Wash. Dep't of Transp.*, 784 F.2d 952, 953 (9th Cir. 1986) (describing general operation of federal-aid highways program). Background information is available at the Federal Highway Administration web site, http://www.fhwa.dot.gov/infrastructure/history.htm.

[31] 1917 Wash. Laws ch. 76 (codified as amended at Wash. Rev. Code §§ 47.04.050 - .070, 47.08.020).

[32] U.S. Answer to Req. Admis. 23.

[33] *See Citizens For Safety & Env't v. Wash. State Dep't of Transp.*, 2004 WL 2651499 (Wash. App. 2004) (upholding state highway access permit for Muckleshoot Tribe's White River Amphitheatre); 56 Fed. Reg. 22068 (May 13, 1991) (notice of environmental review of Tulalip Tribe's proposal to construct I-5 interchange "to provide crucial access to the Tulalip Reservation for a major tribal economic development project").

[34] Nooksack http://www.nooksackcasino.com/map/index.html; Lummi http://www.lummi-nsn.org/econ_development.html; Upper Skagit http://www.washingtonspremierresortgroup.com/; Swinomish http://www.swinomishcasino.com/; Stillaguamish http://www.angelofthewinds.com/directions.html; Tulalip http://www.tulaliptribes-nsn.gov/business.asp; Muckleshoot http://www.muckleshoot.nsn.us/; Puyallup http://www.emeraldqueen.com/directions.html; Nisqually http://www.redwindcasino.com; Squaxin Island http://www.squaxinisland.org/frames.html; Skokomish http://www.theluckydogcasino.com/frame.htm; Suquamish http://www.clearwatercasino.com/location.html; Port Gamble S'Klallam http://www.pointnopointcasino.com/information.html; Jamestown S'Klallam http://www.7cedarscasino.com/gettinghere.html; Quileute http://www.quileuteoceanside.com/; Quinault http://www.quinaultbeachresort.com/directions.html; *see* Jones Dep. 67:18-68:3 (July 24, 2006).

[35] Decl. of Matthew J. Witecki; U.S. Answer to Interrog. 186.

The Washington State Highway system contains about 7000 miles of roadways, out of about 83,000 total miles of public roads in the state.[36] Thousands of culverts underlie these highways. Most state highway culverts allow fish to pass freely. Long before this subproceeding was filed, the State accelerated its efforts to find and fix those that do not. In 1991, the Legislature directed WSDOT and WDFW "to identify, estimate costs of, and prioritize additional fish barrier removal projects on state highways."[37] The agencies identify existing barriers on the state highway system and estimate how much fish habitat might be restored if they were removed. They have developed a "Priority Index" to rank existing barriers for correction and to ensure that available funds are spent efficiently. WSDOT has invested about $7 million in culvert inventories since 1991, and completed its inventory of barrier culverts within the *United States v. Washington* case area in 2005. Virtually all of the culverts identified as barriers were designed according to the Federal Government's design standards.[38]

Using the more fish-friendly culvert designs developed by WDFW, WSDOT had already repaired many fish-blocking culverts when this subproceeding was filed in 2001. WSDOT and WDFW have published progress reports approximately annually since 1992.[39] WSDOT uses a three-part approach to repair identified fish passage barriers: (1) WSDOT repairs barriers that it encounters in regular construction projects; (2) under the Environmental Retrofit Program, WSDOT uses a dedicated appropriation to fix particular high priority barriers not expected to be encountered during regular construction or maintenance; and (3) through maintenance protocols, WSDOT monitors culverts to ensure that they achieve durable and efficient fish passage and do

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[36] Decl. of Paul Wagner (Aug. 2006) ¶ 4.

[37] 1991 Wash. Laws 1st sp. sess., ch. 15, § 22(3).

[38] Decl. of Paul Wagner (Aug. 2006) ¶¶ 8, 9; Decl. of Matthew J. Witecki ¶ 5. In their requests for relief, the Plaintiffs ask the court to order the State to complete an inventory of its *U.S. v. Washington* case area culverts within 18 months of the date of judgment. Tribes' Req. For Determination (RFD) ¶ 4.4 (Doc. No. 17033); U.S. Resp. to RFD ¶ 4.5 (Doc. No. 17036). That request is now moot.

[39] The May 2006 report is attached as Exhibit A to Mr. Wagner's August 2006 declaration and is also available at http://www.wsdot.wa.gov/environment/fishpass/state_highways.htm.

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not become barriers over time. WSDOT recently opened a laboratory where scientists conduct research on fish passage through culverts.[40]

Fixing barrier culverts is expensive. Since 1991, the WSDOT has spent over $21 million in construction dollars on dedicated funding fish passage barrier projects, with the cost per culvert averaging about $540,000 during the past five years. This investment has eliminated 63 high priority barrier culverts and opened access to over 411 miles of stream habitat to fish. In addition to the dedicated fund correction projects, the WSDOT since 1991 has removed 117 additional fish passage barriers during the course of routine road construction and maintenance work, which has opened up many more miles of habitat.[41]

Much of the money for culvert repairs on state highways comes from state fuel taxes. The 2005 Legislature approved an increase in the State's motor vehicle fuel tax and substantially increased the amount of money appropriated for barrier culvert repairs and other transportation projects.[42] According to current financial plans, the WSDOT expects to spend $69 million for the dedicated culvert correction program over the next 12 years.[43]

2. Washington State Forest Road Culverts

Washington State owns 2.1 million acres of forest lands, about half of it within the *United States v. Washington* case area. Much of the land was acquired at statehood by grant from the United States to be held in trust for the support of public education and other public purposes.[44] DNR manages most of the State's forest lands and sells timber from them. DNR's forest road system contains approximately 12,000 road miles statewide. DNR completed a fish passage inventory of its roads in 2000. Only about 18% of DNR's culverts were identified as barriers to

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[40] Decl. of Paul Wagner (Aug. 2006) ¶¶ 6, 10-13.

[41] Decl. of Paul Wagner (Aug. 2006) ¶¶ 10, 11.

[42] 2005 Wash. Laws chs. 313 (transportation appropriations), 314 (transportation revenue).

[43] Decl. of Paul Wagner (Aug. 2006) ¶ 10.

[44] Enabling Act of Feb. 22, 1889, §§ 10, 11, 14, 16, 17, 25 Stat. 676, 679-81; *see* 1996 Wash. Op. Att'y Gen. No. 11.

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fish passage. In accordance with the state "Forests and Fish" law, DNR plans to remove or repair them by July 1, 2016.[45] Planning and repairs are underway. From calendar year 1999 through calendar year 2005, DNR removed 543 inventoried fish barriers, at a cost of over $4.9 million. During calendar years 2004 and 2005, DNR averaged 82.5 fish barrier corrections per year. An estimated 686 barriers within the *United States v. Washington* case area remain to be corrected.[46]

3. Washington Department of Fish and Wildlife Culverts

WDFW owns or manages over 800,000 acres of land and more than 600 water access sites throughout the State of Washington. WDFW began an inventory of all fish passage and fish screening structures on its lands in 1997. The WDFW inventories within the *United States v. Washington* case area are complete. Efforts to remove, repair, or replace fish passage barriers are underway. WDFW plans to correct all fish passage barriers on its lands by July 1, 2016. Money for culvert remediation on WDFW lands comes from state legislative appropriations and state and federal grants.[47]

4. Washington State Parks Culverts

About 200,000 acres of land in Washington are within state parks. Parks has inventoried the culverts in all but two of its parks within the case area and expects to complete a statewide inventory in 2006. Statewide, about 120 culverts have been identified as fish passage barriers. Parks expects to repair or remove all of its fish-blocking culverts by July 1, 2016. Money for culvert remediation comes from state legislative appropriations.[48]

C. The Plaintiffs Revive Phase II by Filing This Subproceeding

In January 2001, the Plaintiffs used the State's 1997 progress report on state highway culverts as a source of "concrete facts" for bringing the Phase II environmental servitude issue

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[45] *See* Wash. Admin. Code §§ 222-24-010, 222-24-050, 222-24-051; Wash. Rev. Code § 76.09.370.

[46] 2d Decl. of Alex Nagygyor.

[47] Decl. of Donald Haring ¶¶ 2-5, 7.

[48] Decl. of Michael J. Allen.

back to court.[49] They now ask this Court to declare that the State has a treaty-based legal duty not to "impair the Tribes' ability to earn a moderate living from the fishery,"[50] the same environmental servitude that Judge Orrick declared in 1980 and that a Ninth Circuit panel rejected in 1982. The Plaintiffs say the State is violating that alleged duty because it has some culverts that block fish passage and is not fixing them fast enough.[51]

III. ARGUMENT

A. The Plaintiffs' Proposed Legal Rule Fails as a Matter of Law.

The Plaintiffs' proposed servitude fails as a matter of law. The alleged treaty-based "moderate living" duty burdening the case area lands (1) is unsupported by the treaty language, (2) inappropriately attempts to transform a limitation upon an equitable remedy into a new treaty right, and (3) fails to satisfy the Ninth Circuit's 1985 *en banc* directive.

1. The Treaty Language Does Not Support the Plaintiffs' Proposed Environmental Servitude.

a. No Language in the Treaties Can Reasonably Be Construed as Reserving an Environmental Servitude.

As the Tribes' discovery responses, the Ninth Circuit, and commentators recognize, the Plaintiffs essentially claim that the treaties reserve to the Tribes an implied "negative easement or negative servitude"[52] requiring current landowners to avoid doing anything that might adversely affect fish abundance in the case area.[53] Such a servitude would burden all public

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[49] Tribes' RFD ¶¶ 3.6, 3.7; U.S. Resp. to RFD ¶ 3.6.

[50] Tribes' RFD ¶ 4.1; U.S. Resp. to RFD ¶ 4.1.

[51] Tribes' RFD ¶¶ 3.9, 4.2; U.S. Resp. to RFD ¶¶ 4.2, 4.3.

[52] Tribes' Answer to Interrog. 70.

[53] *See* Tribes' Answer to Interrog. 73; *Skokomish*, 410 F.3d at 527 (Berzon, J., dissenting in part); *United States v. Washington*, 694 F.2d 1374, 1381 (9th Cir. 1982), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc). *See also* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 470 & n.308 (1998); Gary D. Meyers, United States v. Washington (Phase II) *Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OR. L. REV. 771 (1988); Brian J. Perron, *When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it out Empty: The Case for Money Damages When Treaty-Reserved Fish Habitat is Degraded*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 784, 814-18 (2001); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355 (2001). *Cf.* WASHINGTON REAL PROPERTY DESKBOOK

and private lands in the case area, including those owned by *amici* counties, not just those currently owned by the State.

No language in the treaties can be construed as reserving such a right. In Article I of each treaty, the Tribes expressly "cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them," except for the land interests expressly reserved in the treaties.[54] The easements that the Tribes did reserve are explicitly identified in the treaties. All six treaties in this case guarantee tribal members reasonable access to "usual and accustomed" fishing places.[55] The Medicine Creek and Yakama Treaties guarantee to the party Tribes a right of "free access" from their Reservations "to the nearest public highway."[56] But none of the treaties includes an express environmental easement or servitude.

Courts have rejected prior attempts to read into the treaties words or concepts that are not supported by express language.[57] For example, in a case involving destruction of fisheries

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§ 107.4 (3d ed. 1996) (Conservation Easements); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §§ 1.6, 8.5 (2000) (describing "conservation servitudes"); Wash. Rev. Code § 64.04.130 (interests in land for conservation).

[54] Medicine Creek Treaty, Art. I, 10 Stat. at 1132; Point Elliott Treaty, Art. I, 12 Stat. at 927; Point No Point Treaty, Art. I, 12 Stat. at 933; Makah Treaty, Art. I, 12 Stat. at 939; Yakama Treaty, Art. I, 12 Stat. at 951; Quinault Treaty, Art. I, 12 Stat. at 971. *See Tulee v. Washington*, 315 U.S. 681, 682-83 (1942) (Yakama Treaty "cession which furthered the national program of transforming wilderness into populous, productive territory"); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 197 (1919) ("treaties were negotiated in a group for the purpose of freeing a great territory from Indian claims, preparatory to opening it to settlers"); *United States v. Winans*, 198 U.S. 371, 384 (1905) ("extinguishment 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"); *U.S. v. Washington*, 384 F. Supp. at 355 ("principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area").

[55] Medicine Creek Treaty, Art. III, 10 Stat. at 1133; Point Elliott Treaty, Art. V, 12 Stat. at 928; Point No Point Treaty, Art. IV, 12 Stat. at 934; Makah Treaty, Art. IV, 12 Stat. at 940; Yakama Treaty, Art. III ¶ 2, 12 Stat. at 953; Quinault Treaty, Art. III, 12 Stat. at 972. *See Winans*, 198 U.S. at 381; *Seufert Bros.*, 249 U.S. at 199; *United States v. Washington*, 157 F.3d 630, 654 (9th Cir. 1998).

[56] Medicine Creek Treaty, Art. II, 10 Stat. at 1132; Yakama Treaty, Art. III, ¶ 1, 12 Stat. at 953; *see Citizens For Safety & Env't v. Wash. State Dep't of Transp.*, 2004 WL 2651499, *1 & n.1 (Wash. App. 2004) (noting Muckleshoot Tribe's treaty right of access to state highway for its White River Amphitheatre).

[57] *E.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465-66 (1995) (refusing to imply off-reservation preemptive effect under 1830 treaty); *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-74 (1985) (refusing to imply off-reservation fishing rights under 1864 treaty and 1901 agreement); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 & n.16 (1978) (refusing to imply tribal criminal jurisdiction over non-Indians under Point Elliott Treaty); *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir.

and fish habitat in the Skokomish River, the Ninth Circuit rejected the Skokomish Tribe's attempt to read an implied private right of action for damages into the Point No Point Treaty.[58] Similarly, the courts repeatedly rejected the Plaintiffs' arguments that the treaties occupy the field of regulation of Indian fishing, because the treaties contain no broad preemptive language.[59] And, crucial to this case, courts have refused to imply easements or servitudes into the treaties, such as the one claimed here.[60]

The treaties contain no environmental servitude language because the treaty makers did not intend to create an environmental servitude. They had no reason to. They assumed the fisheries would be inexhaustible, and had no reason to fear that development of the ceded lands would change that.[61]

2005) (refusing to imply that an 1854 treaty created a tribal reservation); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 461-62 (7th Cir. 1998) (refusing to imply a right to a proportion of sturgeon catch under 1854 treaty); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482-83 (D.C. Cir. 1995) (refusing to imply a duty that U.S. file water rights claims on Tribes' behalf under 1868 treaty); *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 2 F.3d 219, 223-24 (7th Cir. 1993) (refusing to imply promise to create a reservation under 1854 treaty); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963) (refusing to imply that Skokomish Reservation included tidelands); *Duwamish Tribe v. United States*, 79 Ct. Cl. 530, 577-80 (1934) (refusing to imply a duty that United States provide Indians with allotments under Medicine Creek, Point Elliott, and Point No Point Treaties).

[58] *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1025 (2006). One court has relied on *Skokomish* to dismiss the Klamath Tribes' claims for damages to treaty fishing rights caused by a fish-blocking dam. *Klamath Tribes v. Pacificorp*, 2005 WL 1661821 (D. Or. 2005), *appeal pending* (9th Cir. No. 05-36010).

[59] *Puyallup Tribe v. Wash. Game Dep't*, 391 U.S. 392, 398 (1968) (*Puyallup I*) (because "Treaty is silent as to the mode or modes of fishing that are guaranteed," the state may regulate those modes "in the interest of conservation"); *U.S. v. Washington*, 520 F.2d at 682 n.2 (*Puyallup I* foreclosed argument that the treaties preempt all state regulation of treaty fishing); *see Tulee v. Washington*, 315 U.S. 681, 684 (1942) ("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").

[60] *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (White, J.), *id.* at 447 (Stevens, J.) (no implied "equitable servitude" in Yakama Treaty entitling Yakama Nation to control use of non-Indian land in "open" area of Yakama Reservation); *U.S. v. Washington*, 694 F.2d at 1381 (rejecting Tribes' treaty-based claim of a "comprehensive environmental servitude"), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc); *United States v. Vulles*, 282 F. Supp. 829, 831-32 (D. Mont. 1968) (no implied easement across private land to get to "open and unclaimed lands" under Flathead treaty), *rev'd on other grounds*, 437 F.2d 177 (9th Cir. 1971) (Tribe had prescriptive easement under state law); *see Klamath Tribes v. Pacificorp*, 2005 WL 1661821 (D. Or. 2005) (Tribes' claim that fish-blocking dam trespassed upon treaty fishing rights did not allege an invasion of an interest in land).

[61] *Fishing Vessel*, 443 U.S. at 669 (at treaty time, fish "had always been thought inexhaustible"); *id.* at 675 ("great abundance of fish" at treaty time); *United States v. Washington*, 873 F. Supp. 1422, 1438 (W.D. Wash. 1994) ("United States negotiators believed that the supply of fish, including shellfish, was abundant and

The treaties are contracts between the United States and the Tribes.[62] The treaty makers' unexpressed assumptions do not create a contractual promise of inexhaustible fisheries. The law of contracts—including treaties—provides no remedy to parties who fail to contemplate or inaccurately speculate about future conditions.[63] The treaty makers' inability to predict the future gives this Court no basis to rewrite the treaties by implying an environmental servitude that for 150 years has been unrecognized.[64]

Under the Indian canons of construction, ambiguous language in treaties is construed in favor of the Tribes.[65] But the canons are rules of construction, not rules of law.[66] They do not permit courts to read into treaties language that is not there, or to contradict express language.[67] Where, as here, treaty language is plain, the canons do not apply.[68] In all six treaties at issue here, the Tribes expressly ceded *all* their right, title, and interest except for what was expressly

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seemingly inexhaustible"); Report of Prof. Richard White at 48, 109-110 (Oct. 2005) (Tribes' expert). The court has ordered that the experts' reports shall be their direct testimony at trial. Stipulated Am. Pretrial Scheduling Order at 5 (May 23, 2005) (Doc. No. 17795/199). For purposes of this motion, the State assumes that all of the facts in the Tribes' expert reports, including Professor White's, are true.

[62] *Skokomish*, 410 F.3d at 510-11, 512; *see Fishing Vessel*, 443 U.S. at 675.

[63] RESTATEMENT (SECOND) OF CONTRACTS § 151 & cmt. a (1981); 27 RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 70:3 – 70:5 (4th ed. 2003).

[64] *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466-67 (1995) (rejecting treaty interpretation that treaty makers "likely gave no thought to"); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice").

[65] *E.g.*, *Fishing Vessel*, 443 U.S. at 675-76.

[66] *Chickasaw Nation v. United States*, 534 U.S. 84, 93-95 (2001); *Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997); *Shields v. United States*, 698 F.2d 987, 990 (9th Cir. 1983).

[67] *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *United States v. Choctaw Nation*, 179 U.S. 494, 531-33 (1900); *see Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15-16 (2001); *Skokomish*, 410 F.3d at 517 n.9 ("the requirement that we interpret statutes and treaties broadly in favor of Indian tribes cannot be extended to reach cases where a particular interpretation could not have been contemplated by the parties").

[68] *Choctaw*, 318 U.S. at 432; *Menominee*, 161 F.3d at 457; *Duwamish*, 79 Ct. Cl. at 580; *see United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992).

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reserved.[69] The Court must accept the treaties as they were written. Nothing in the treaties can be construed as reserving an environmental servitude in the case area lands.[70]

b. The Treaty Language Does Not Support "Moderate Living" as the Measure of Any Servitude.

In their pleadings, the Plaintiffs assert that the scope of their proposed servitude is a duty to avoid impairing the Tribes' ability to earn a "moderate living from the fishery."[71]

But the Plaintiffs are unable to define the term "moderate living." They cannot say how many fish or how much income the Tribes need for a "moderate living from the fishery."[72] They cannot say whether any Tribe has *ever* earned a "moderate living from the fishery."[73] They cannot say whether any Tribe could ever earn a "moderate living from the fishery" in the future even if this Court were to order all the relief requested.[74] All they can say

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[69] Medicine Creek Treaty, Art. I, 10 Stat. at 1132; Point Elliott Treaty, Art. I, 12 Stat. at 927; Point No Point Treaty, Art. I, 12 Stat. at 933; Makah Treaty, Art. I, 12 Stat. at 939; Yakama Treaty, Art. I, 12 Stat. at 951; Quinault Treaty, Art. I, 12 Stat. at 971.

[70] In his 1980 decision, Judge Orrick did not identify any treaty language as being the source of the treaty habitat right he declared. He simply said that such a right was "implicitly incorporated in the treaties' fishing clause." *U.S. v. Washington*, 506 F. Supp. at 203; *see id.* at 205 & n.67.

[71] Tribes' RFD Intro., ¶ 4.1, ¶ 4.2, & Ex. A; U.S. Resp. to RFD ¶¶ 4.1, 4.2; *see also* U.S. Answers to Interrogs. 25, 27, 30, 37; Tribes' Answers to Interrogs. 30, 32, 33, 46, 70, 73, 77, 93, 143.

[72] U.S. Answers to Interrogs. 38, 40-42, 105, 169–175, Req. Produc. 26; Tribes' Answers to Interrogs. 40-45, 96-102; Kinley Dep. 142:20-143:9 (Apr. 27, 2006); Loomis Dep. 112:20-113:12 (June 13, 2006); Morganroth Dep. 122:15-123:4 (Apr. 5, 2006). The Plaintiffs say "moderate living" relates to commercial fishing, but they acknowledge that markets fluctuate. Tribes' Answers to Interrog. 68, Req. Admis. 20, 21; U.S. Answer to Req. Produc. 29; Kinley Dep. 66:12-67:5; Ladley Dep. 77:2-3 (Apr. 25, 2006); Loomis Dep. 79:2-80:13; Morganroth Dep. 82:2-20; Moses Dep. 36:1-12, 39:7-18, 55:4-23, 58:12-25, 75:3-77:3 (May 3, 2006); Zischke Dep. 38:4-21(Apr. 17, 2006). If "moderate living" depends on the prices tribal fishermen get for their catch, the number of fish needed to sustain a "moderate living" will change daily.

[73] U.S. Answer to Interrogs. 173, 174; Tribes' Answer to Interrog. 100. The United States speculates that the Tribes "frequently earned a moderate living from their fisheries until the mid to late 19th Century." U.S. Answer to Interrog. 174. But courts have already rejected a right to maintain 19th Century conditions. "Indian tribes do not have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of settlers and the resulting development of the land." *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 808 (D. Idaho 1994); *see id.* at 819.

[74] U.S. Answer to Interrogs. 169, 171; Tribes' Answer to Interrogs. 96, 98.

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is that the Tribes are not now earning a "moderate living from the fishery,"[75] and that, because there will be more fish after the State fixes all its culverts, the State is violating the treaties.

Again, the treaties are contracts. An enforceable contract provision "must be sufficiently definite to enable the courts to give it an exact meaning."[76] The term "moderate living" appears nowhere in the treaties, and none of the parties to the treaties can say what it means to earn a "moderate living from the fishery."[77] The term is inherently ambiguous. How many tribal members are guaranteed a "moderate living?" All who have historically fished commercially? All who might someday choose to fish commercially? All tribal members? Does the guarantee extend to situations where economic conditions render attainment of a "moderate living" from commercial fishing impossible?[78]

The Plaintiffs cannot answer such questions. Yet they ask the Court to imply a "moderate living"-based duty into their contracts and enforce it against the State, a non-party,[79] without offering the Court any way to tell whether the State has fulfilled the duty.[80]

A court will not enforce a missing contract or treaty provision, nor will it enforce a provision whose meaning it cannot determine.[81] The Court should reject the Plaintiffs' attempt

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[75] U.S. Answers to Interrogs. 38, 39, 175, Req. Produc. 26, 32; Tribes' Answer to Interrogs. 39, 102. The State assumes for purposes of this motion that the Tribes currently are not earning "a moderate living from the fishery" as that term is used in ¶ 4.1 of the Request For Determination.

[76] 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:18 (4th ed. 1990).

[77] U.S. Answers to Interrogs. 38, 40-42, 171, 173, Req. Produc. 26; Tribes' Answers to Interrogs. 40-45, 100; Kinley Dep. 142:20-143:9; Morganroth Dep. 122:15-123:4.

[78] Some of the Tribes' witnesses testified in their depositions that economic opportunities for tribal members have expanded in recent decades, while the number of tribal members who choose to make a living by commercial fishing has fallen. Jones Dep. 134:10-13; Ladley Dep. 24:20-25:21; 65:17-66:2; Morganroth Dep. 90:12-94:11; Moses Dep. 36:1-12, 79:22-81:10; Rawson Dep. 80:11-83:5 (May 22, 2006); *see* Jones Dep. 28:3-18, 39:18-24, 49:11-50:6.

[79] The State is not a party to the treaties. *Skokomish*, 410 F.3d at 513; *see* U.S. CONST. art I, § 10.

[80] *See* Tribes' Answer to Interrog. 40, 45.

[81] *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (contract is enforceable only if its terms are reasonably certain); *Armstrong v. Rohm & Haas Co.*, 349 F. Supp.2d 71, 79-80 (D. Mass. 2004) (defendant's alleged promise to supply Plaintiffs with "all the work they could handle" was too vague for court to enforce); *Kruse v. Hemp*, 121 Wash.2d 715, 853 P.2d 1373 (1993) (remedy of specific performance was inappropriate where terms of real estate contract were indefinite); *State v. Nason*, 96 Wash. App. 686, 690-92, 981 P.2d 866,

to do that in this case. The alleged "moderate living from the fishery" servitude is not in the treaties and is too vague to be enforced.

2. The "Moderate Living" Phrase Comes From the Court's Equitable Remedy in *Fishing Vessel*, Not the Treaties.

The Plaintiffs say their "moderate living" rule comes from the Supreme Court's opinion in *Fishing Vessel*.[82] In *Fishing Vessel*, the Court reviewed and generally upheld the 1974 "Boldt decision" in Phase I of *United States v. Washington*. In Part IV of its opinion, 443 U.S. at 674-85, the Supreme Court set forth its legal analysis. The Court said the treaty language securing a "right of taking fish . . . in common with all citizens" means the Tribes and nontreaty fishermen have a common right "to take a fair share of the available fish."[83] In Part V of its opinion, 443 U.S. at 685-92, the Supreme Court examined the equitable remedy to implement that right. The Court considered whether the remedy Judge Boldt had ordered, a 50/50 sharing of the harvestable fish, was a proper exercise of judicial discretion. For the most part, the Court said it was, but the Court recognized that, like any equitable remedy, the injunction could be modified in the future to accommodate changing circumstances.[84] In particular, a Tribe's economic circumstances might change. The Court said that, if in the future a Tribe does not need 50% of the harvestable fish for a "livelihood," or "moderate living," such a large allocation might be unreasonable, and the State may ask the court for an adjustment.[85]

868-69 (1999) (court would not enforce contract where there was no meeting of the minds); 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:18 (4th ed. 1990).

[82] U.S. Answer to Interrog. 168; Tribes' Answer to Interrog. 95; *but see* U.S. Answer to Interrog. 35.

[83] *Fishing Vessel*, 443 U.S. at 684-85.

[84] 443 U.S. at 685-87; *see* Fed. R. Civ. P. 60(b)(5); *United States v. Washington*, 394 F.3d 1152, 1162 (9th Cir. 2005) ("the allocation of natural resources between treaty tribes and others cannot help but be an ongoing venture"), *cert. denied*, 126 S. Ct. 1025 (2006); *United States v. Washington*, Subproceedings 83-6/90-1, Order Re: Status Conference (W.D. Wash. May 2, 1996) (Doc. No. 15727) ("trial in this matter will be limited to determining whether the petitioning tribes can demonstrate the existence of changed circumstances under Fed. R. Civ. P. 60(b) sufficient to warrant altering the way in which equitable allocation is made").

[85] 443 U.S. at 685-87. In *U.S. v. Washington* Subproceeding 89-3, the State urged that a remedy allocating 50% of the harvestable shellfish to the Tribes would be unfair, in part because the Tribes were already

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The Supreme Court did not declare that the treaties secure to the Tribes a substantive treaty right to a "moderate living from the fishery." Substantive rights, and the remedies to protect them, are two different things.[86] The "moderate living" concept was part of the Court's *remedy* analysis. Indeed, it was a limitation on Judge Boldt's remedy. This Court should reject the Plaintiffs' attempt to transform the "moderate living" remedy limitation into a substantive legal right.

3. The Plaintiffs' Legal Theory Does Not Meet the Ninth Circuit's Directive.

When it first vacated the Phase II judgment, the Ninth Circuit instructed that any legal rules governing the State's obligations under the treaties should be announced only "when their consequences are known and understood in the case before the court."[87] The Plaintiffs' requested "moderate living" declaration fails to meet that directive. Because the Plaintiffs cannot define "moderate living," they provide the Court no way to know or understand the consequences of declaring a duty that depends on the "tribes' ability to earn a moderate living from the fishery."[88] The Plaintiffs request exactly what the Ninth Circuit discouraged—a legal rule that is "imprecise in definition and uncertain in dimension."[89]

Plaintiffs have again confused rights and remedies. The Ninth Circuit was not inviting the Plaintiffs to return to court to ask for a specific *remedy* based on "concrete facts which underlie a dispute in a particular case," such as an injunction to fix culverts. The Ninth Circuit said any *legal standards* would "depend for their definition and articulation upon concrete facts."[90] The Plaintiffs have no "concrete facts" about the "moderate living" legal standard

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enjoying a "moderate living." The court concluded that the State failed to meet its burden of proof to show that a 50/50 remedy would be inequitable. *United States v. Washington*, 157 F.3d 630, 651-52 (9th Cir. 1998).

[86] *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213 (2005).

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

[88] *See* Tribes' RFD ¶ 4.1 & Ex. A at 3; U.S. Resp. to RFD ¶¶ 4.1, 4.2, 4.3.

[89] *U.S. v. Washington*, 759 F.2d at 1357. *See id.* at 1361 (Ferguson, J., concurring) ("it is impossible to perceive what is meant by . . . 'moderate living needs'").

[90] *U.S. v. Washington*, 759 F.2d at 1357.

they advocate. Because they have no evidence about "what is meant by . . . 'moderate living needs,'"[91] or how "a moderate living from the fishery" has anything to do with culverts, "the record is inadequate to support the extent of relief sought" by the Plaintiffs.[92] The Court should reject their claim, just as the Ninth Circuit rejected it 21 years ago.

B. The Court Should Allow Equitable Defenses Against the United States.

The Court has previously stricken the State's equitable defenses,[93] but the State asks the Court to reconsider in light of recent case law developments. The United States Supreme Court and the Second Circuit have ruled that equity can bar relief on tribal land claims that would disrupt settled land ownership and governmental authority.[94] This case involves such a claim. A newly-created servitude would disrupt the settled expectations of current landowners in Western Washington.[95] As a matter of equity, it should not be enforced in this case. The Plaintiff United States encouraged, financed, authorized, provided culvert design standards for, and generally participated in the design, construction, and maintenance of the federal-aid highways and other roads involved in this case.[96] Now, the United States says the same infrastructure violates the treaties. The United States cannot now say "never mind." It has waived the ability to enforce any environmental servitude in this case. The Court should allow the State's defenses of waiver and estoppel against the United States.

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[91] *U.S. v. Washington*, 759 F.2d at 1361 (Ferguson, J., concurring).

[92] *U.S. v. Washington*, 759 F.2d at 1356.

[93] Order Granting United States' & Den. Washington's Mots. For J. (Sept. 6, 2001) (Doc. No.17220/85). The State's allegations regarding its equitable defenses are set forth in State of Washington's Answer and Cross and Counter Requests For Determination ¶¶ 5.1 – 5.10, 5.12 – 5.22 (Doc. No.17109).

[94] *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021 (2006); *Seneca-Cayuga Tribe v. Aurelius*, 233 F.R.D. 278, 281-82 (N.D.N.Y. 2006); *Cayuga Indian Nation v. Village of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005).

[95] For recommendations about how Tribes might use a favorable decision in this case, *see* O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 284-86 (2003).

[96] *See* Decl. of Matthew J. Witecki; U.S. Answers to Interrogs. 82, 186, 188, Req. Admis. 23.

C. The Court Already Has Equitable Power to Enjoin Destruction of the Fishery *Res*, but this Case Does Not Present a Situation For Use of That Power.

The treaties will not be meaningless if this Court rejects the Plaintiffs' proposed servitude. This Court already has power to prevent destruction of the fishery. In its continuing jurisdiction to implement the Boldt decision, this Court has custody of the fishery *res* in what is analogous to a *quasi in rem* proceeding, and may enjoin interference with that custody.[97] The Court may, in an extreme case, enjoin imminent destruction of the fish[98] or order emergency protective measures.[99] This is not such a case.

The State's culvert repair programs are opening up fish habitat, not destroying it. In the state highway system alone, the State has opened up hundreds of miles of stream habitat over the past 15 years.[100] Several Tribes recognize that the State has fixed culverts of concern to them.[101] The State has provided funds to the Plaintiffs to fix particular non-state-owned culverts, including at least one owned by the Federal Government.[102] Damage from a culvert failure on state-owned land near the Makah Reservation is being repaired with state funds.[103]

Nor can the Plaintiffs show that culverts have more than a minor effect on the Tribes' collective fisheries.[104] Salmon respond to many factors, and their numbers fluctuate from year

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[97] *Fishing Vessel*, 443 U.S. at 692 n.32; *United States v. Oregon*, 657 F.2d 1009, 1015-16 (9th Cir. 1981); *see United States v. Washington*, Subproceeding 01-1, Order Granting United States' Mot. For Recons. and Mot. To Dismiss State's Cross-Req. For Determination at 8 & n.2 (W.D. Wash. Oct. 26, 2001) (Doc. No. 17231/90).

[98] *U.S. v. Oregon*, 657 F.2d at 1016; *United States v. Oregon*, 913 F.2d 576, 583 (9th Cir. 1990).

[99] *See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1035 (9th Cir. 1985).

[100] Decl. of Paul Wagner (Aug. 2006) ¶¶ 10, 11.

[101] Tribes' Answers to Interrogs. 2 (Feb. 2005 answer), 82 (Hoh), Req. Produc. 1 (Feb. 2005 response); Klochak Dep. 77:2-79:2; McHenry Dep. 57:25-58:10; Morganroth Dep. 99:5-9, 121:12-122:4; Wasserman Dep. 96:2-5 (Apr. 11, 2006); *see* Wagner Decl. Exhibit A at 31 (Skobob Creek project).

[102] Tribes' Answers to Interrogs. 132-35; Decl. of James Doyle (Doc. No.17798/165); Decl. of Robert Metzger (Doc. No.17799/166); Klochak Dep. 81:3-9; Ladley Dep. 62:18-63:7.

[103] Tribes' Answer to Interrogs. 82, 135.

[104] *See* Fox Dep. 34:16-35:13; Ladley Dep. 52:15-18.

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to year.[105] Many salmon stocks in Western Washington are healthy, but the Tribes choose not to harvest them because of poor markets for their catch.[106] Tribal and non-tribal harvests on weaker stocks have fallen because of efforts to curb overfishing,[107] not because of any quantifiable effects of culverts. Some tribal fisheries are constrained to protect Canadian salmon stocks, which are not affected by culverts in Washington.[108]

The Plaintiffs themselves use WDFW's culvert inventory protocols and culvert design guidelines. They complain only that the State is not fixing culverts at the pace they would like.[109] That is not a matter in which the Court should intervene. In their depositions, the Plaintiffs' experts acknowledged that blocking culverts are not the primary factor limiting salmon production in the case area.[110] Many factors affect fish abundance, few of which the State—or this Court—can control.[111]

The State respectfully suggests that the task of allocating funds between competing needs is best addressed by the legislative process, and that the Court should defer to those processes.[112] The Tribes have a great deal of access to the state political process and can make their voices heard in state budget planning if they choose to. In 2006, for example, they received a $2.5 million appropriation to participate in forest habitat conservation planning.[113]

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[105] Ladley Dep. 68:11-22; Wasserman Dep. 42:11-45:19 (Apr. 11, 2006); *see* Tribes' Supp. Resp. to Req. Admis. 40; *U.S. v. Washington*, 384 F. Supp. at 351.

[106] Ladley Dep. 76:22-77:5; Moses Dep. 55:4-56:6; Rawson Dep. 95:7-19, 100:7-16; Zischke Dep. 38:4-13.

[107] Rawson Dep. 96:4-13, 124:12-127:25.

[108] Kinley Dep. 48:8-23, 74:2-76:13, 90:4-13; Rawson Dep. 36:9-38:9; 42:6-16; Zischke Dep. 44:9-14.

[109] *See* n.28 *infra*; Tribes' RFD ¶¶ 3.9, 4.5 & Ex. A at 2-3.

[110] Ladley Dep. 87:2-89:22; McHenry Dep. 39:2-19; Wasserman Dep. 76:13-77:13; 103:8-104:13; Zischke Dep. 48:3-50:15.

[111] *See* U.S. Answer to Req. Admis. 2.

[112] *See Olmstead v. Zimring*, 527 U.S. 581, 597 (1999) (court must consider "resources available to the State" and "State's obligation to mete out those services equitably"); *U.S. v. Washington*, 384 F. Supp. at 417 (Inj. ¶ 16) (state shall act "consistent with availability of funds").

[113] 2006 Wash. Laws ch. 372, § 126(51).

They are represented in the Washington State Legislature, on a state board that sets standards for state-owned forest roads, and on a state board that allocates funds for salmon recovery projects.[114] They play a large role in salmon recovery planning.[115]

The Plaintiffs have no evidence that the State of Washington is doing anything that poses an immediate, irreparable threat to the fishery *res* in the Court's custody. The Plaintiffs themselves have culverts that block fish passage.[116] The United States says the Court should not intervene in its own culvert-fixing programs because "these efforts, uncoerced by litigation, will have significant benefits to the fishery."[117] The United States can hardly say the State's more extensive and aggressive culvert repair programs will not. There is no basis for the Court to exercise its protective equitable powers in this case.

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[114] Tribes' Resp. Req. Admis. 23–34.

[115] 70 Fed. Reg. 76445 (Dec. 27, 2005) (notice re Puget Sound Salmon Recovery Plan) and internet links cited therein; 71 Fed. Reg. 15666, 15675 (March 29, 2006) (proposed rule re Puget Sound steelhead); *see* U.S. Answer to Interrog. 32; Tribes' Answer to Interrog. 34. Some tribal web sites describe state/tribal cooperation in habitat protection and restoration. Squaxin Island http://www.squaxinisland.org/frames.html; Skokomish http://www.skokomish.org/frame.htm; Port Gamble S'Klallam http://www.pgst.nsn.us/content/natural_resources/habitat/index.htm; Jamestown S'Klallam http://www.jamestowntribe.org/natural_resources.htm.

[116] Pl. Tribes' Answer to Wash. State's Counter RFD ¶ 13 (Doc. No. 17139); Decl. of Richard W. Sowa (Oct. 29, 2004) (Doc. No. 17800/167); Decl. of James Doyle (Nov. 1, 2004) (Doc. No.17798/165); Decl. of Robert Metzger (Nov. 1, 2004) (Doc. No.17799/165); Klochak Dep. 79:6-10, 80:23-81:2; Zischke Dep. 63:9-64:21; U.S. Answer to Req. Admis. 1; *see* U.S. Answer to Wash. State's Cross-RFD ¶ 10 (Doc. No. 17195); Fox Dep. 39:21-25.

[117] U.S. Opp. to Washington's Mot. Leave to Set Up Countercl. By Amendment at 4 n.6 (Doc. No.17796/163).

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IV. CONCLUSION

The Plaintiffs claim that the treaties impose upon the State a duty "to refrain from diminishing, through the construction or maintenance of culverts under State owned roads and highways, the number of fish that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes' ability to earn a moderate living from the fishery."[118] That claim is legally unsupportable and must be rejected as a matter of law.

There is no genuine issue for trial, and the State is entitled as a matter of law to a judgment dismissing the Request For Determination and the United States' Response to Request For Determination.[119]

DATED this 14th day of August, 2006.

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[118] Tribes' RFD ¶ 4.1; *see* U.S. Response to RFD ¶ 4.1.

[119] *See, e.g., Celotex Corp v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*; 809 F.2d 626, 630-32 (9th Cir. 1987); Fed. R. Civ. P. 56.