Nos: 13-35474; 13-35519

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,

Appellees,

v.

STATE OF WASHINGTON,

Appellant.

On Appeal From The United States District Court For The
Western District Of Washington

No. CV 70-9213
The Honorable RICARDO S. MARTINEZ
United States District Court Judge

BRIEF OF APPELLANT STATE OF WASHINGTON

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I. INTRODUCTION

In 1854 and 1855, the United States negotiated a series of treaties with northwest Indian tribes in which the tribes ceded much of their land in exchange for monetary payments, reservation lands, and "[t]he right of taking fish, at all usual and accustomed grounds." At the time, no one thought that salmon runs were exhaustible or that development could impact fish runs. The treaties accordingly did nothing to restrict such development, instead ceding "all [of the tribes'] right, title, and interest in and to the lands."

Over a century and a half later, the United States and several tribes sued the State of Washington—a non-party to the treaties—arguing that it is violating the treaties because some culverts that carry water under state roads restrict fish passage. Although the federal government provided designs and funding for many of these culverts, and issued permits for their construction, it now claims that their existence breaches an implicit obligation in the treaties.

The district court acknowledged that nothing in the treaties was intended to restrict development that incidentally impacts fish runs: "It was not deemed necessary to write any protection for the [fish] into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." Excerpts of Record (ER) 53. Nonetheless, the court held that the

treaties implicitly "impose[d] upon the State a duty to refrain from diminishing fish runs." ER 47. This holding ignores the treaties' plain language and this Court's precedent, and would impose a sweeping, undefined new duty upon the State (and potentially other non-parties to the treaties).

The district court also rejected the State's argument that the United States had waived its claim by: (1) designing, funding, and permitting these culverts; and (2) taking its own actions that dramatically reduced northwest salmon runs. That ruling was incorrect at the time, and is unsupportable in light of subsequent precedent.

Based on sovereign immunity, the court also dismissed the State's counterclaims. The State argued that if the treaties impose a duty to maintain fish runs and not build culverts that impair fish passage, the State should be allowed to recoup some of the costs of compliance from the United States because it specified the culvert design and caused much of the decline in salmon runs. The court's dismissal of these claims was error because "a counterclaim may be asserted against a sovereign by way of set off or recoupment[.]" *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970).

Finally, in imposing an extraordinarily broad injunction, the district court ignored the facts, the equities, and Supreme Court precedent. The court

ordered the State to replace hundreds of culverts, at a cost of nearly $2 billion, even though many of the replacements will have little or no impact because of other culverts (including federal culverts) up or downstream. The court also assumed, based on a misunderstanding of the state budget, that its order would have no impact on other state programs. In fact, it will directly impact vital state programs and may reduce funding available for other salmon recovery efforts, which the State has voluntarily spent hundreds of millions of dollars on in recent years. In short, the scope of the injunction was an abuse of discretion.

The State asks this Court to reverse the district court's holding for the Plaintiffs and instead order judgment for the State, as the treaties create no duty to avoid non-discriminatory actions that incidentally impact fish runs. Even if the Court concludes there is a duty, however, it should remand to the district court for consideration of the State's waiver defense and counterclaim, or at least with instructions to dramatically narrow the scope of its injunction.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (action under treaty), § 1345 (United States as plaintiff), and § 1362 (tribe as plaintiff for controversy under treaty).

This Court has jurisdiction under 28 U.S.C. § 1291 (appeal of final decision) and/or § 1292(a)(1) (interlocutory appeal of injunctive relief).

The district court issued its permanent injunction on March 29, 2013. ER 1-7. The State filed its notice of appeal on May 28, 2013, within the time allowed by Federal Rule of Appellate Procedure 4(a)(1)(B)(i). ER 98-99.

III. STATEMENT OF ISSUES PRESENTED

(1) Given that the plain language of the treaties provides no guarantee against development that might incidentally impact fish and that the parties had no reason to negotiate such a rule because they believed the fisheries were inexhaustible, does the treaty right of "taking fish" impose upon the State a duty to refrain from actions that might incidentally impact fish quantity or to restore diminished fish runs?

(2) Does the district court's imposition of liability on the State based solely on a "logical inference" that state-owned culverts are responsible for a

"significant portion" of fish diminishment violate this Court's requirement of a precise legal formulation to define the scope of any treaty-based duty?

(3) Because the United States approved and funded the State's barrier culverts and has taken many actions that have reduced salmon runs, did the district court err in dismissing the State's waiver defense as a matter of law?

(4) Where the State's counterclaims arose from the same transaction as the Plaintiffs' claims and the State sought the same type of relief sought by the Plaintiffs, did the district court err in dismissing the counterclaims?

(5) Did the district court abuse its discretion in ordering an injunction requiring the State to divert $100 million annually from other programs and prioritize culvert repair over other vital state programs, including other salmon recovery efforts?

The pertinent constitutional provisions, treaties, statutes, and regulations are included in an addendum to this brief.

IV. STATEMENT OF THE CASE

In 1970, fourteen tribes and the federal government sued the State of Washington under the Medicine Creek treaty and five other treaties containing language that 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[.]" *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 & n.21 (1979) ("*Fishing Vessel*"). The "usual and accustomed" fishing grounds of the Plaintiff tribes are in a Western Washington "case area" comprised of 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. 1978).

The original trial judge, Judge Boldt, separated the Tribes' claims into two "phases." Phase I involved the extent to which the treaties preempt state regulation of Indian fishing and entitle the Tribes to a share of the fish. Phase II addressed whether the treaties require the State to prevent degradation of fish habitat. Phase I went to trial in 1973. Phase II was reserved for later determination. *U.S. v. Washington*, 384 F. Supp. at 328.

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

Phase I produced the "Boldt decision," which held: (1) state fishing regulations unnecessary for conservation are preempted as applied to treaty Indians; and (2) the treaty right being "in common with" all citizens, the Tribes are entitled to a fair share of harvestable fish. *U.S. v. Washington*, 384 F. Supp. 312, *aff'd*, 520 F.2d 676 (9th Cir. 1975). Ultimately, the Supreme Court affirmed these legal principles, concluding: "Both sides have a right, secured by treaty, to take a fair share of the available fish." *Fishing Vessel*, 443 U.S. at 684-85.

In determining what constitutes a fair share of fish, the district court set the tribal share at 50%. *U.S. v. Washington*, 384 F. Supp. at 343-44, 416-17, *aff'd*, 520 F.2d at 687-90. On review, the Supreme Court viewed 50% as a ceiling, which could be reduced if a lesser quantity was sufficient to meet the Tribes' "moderate living" needs. *Fishing Vessel*, 443 U.S. at 685-89.

B. Phase II: Rise and Fall of a Treaty-Based Right to Habitat Protection

In 1976, the Tribes and the United States activated Phase II of the litigation. *United States v. Washington*, 506 F. Supp. 187, 202 (W.D. Wash. 1980). The district court granted summary judgment to the Tribes, holding that the treaties implicitly imposed upon the State a duty not to impair fish habitat.

Id. at 205-07. The court reached its conclusion by interpreting the Supreme Court's opinion in *Fishing Vessel* as reserving to the Tribes "a sufficient quantity of fish to satisfy their moderate living needs." *Id.* at 208.

The State appealed. The case was first heard by a three-judge panel of the Ninth Circuit, which rejected the trial court's reasoning. *United States v. Washington*, 694 F.2d 1374, 1377 (9th Cir. 1982). The panel emphasized that the district court had misread *Fishing Vessel* and that the "environmental servitude" imposed by the district court's decision had no basis in the treaties or precedent. *Id.* at 1375, 1377 & n.7, 1380-82, 1387. Instead, the panel concluded that the treaties impose on the State, United States, and the Tribes equally an obligation to take "reasonable steps" to preserve and enhance the fishery. *Id*. at 1374, 1375 & n.1, 1381, 1386.

This Court then heard the case en banc and again vacated the district court's judgment, saying: "Contrary to certain statements in the district court's opinion, the Supreme Court in *Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish. Instead, *Fishing Vessel* mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less." *United States v. Washington*, 759 F.2d 1353, 1358-59 (9th Cir. 1985) (*en banc*). The

Court also found that the district court had erred by issuing a broad declaratory judgment, saying: "The legal standards that will govern the State's precise obligations and duties under the treaty . . . will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case." *Id.* at 1357.

C. Revival of Phase II

In 2001, the Tribes and the United States revived Phase II through the filing of a request for determination in the original 1970 proceeding. ER 1002-21. A request for determination functions like a complaint and initiates a sub-proceeding within the 1970 lawsuit. *United States v. Washington*, 573 F.3d 701 (9th Cir. 2009). In this instance, the request for determination alleged that the treaties impose a duty on the State to replace state road culverts that degrade fish habitat. ER 1013-14.

On cross motions for summary judgment, the district court ruled that the treaties impose a duty on the State to "refrain from building or maintaining culverts in such a manner as to block the passage of fish upstream or down, to or from the Tribes' usual and accustomed fishing places." ER 54. Although the Tribes presented no evidence demonstrating the extent to which state-

owned "barrier culvers" diminish tribal fish harvests, the court inferred "that a significant portion of this diminishment is due to the blocked culverts." ER 50.

A seven-day bench trial took place in 2009 to determine the appropriate remedy. Three and a half years after trial, the court issued a permanent injunction. ER 1-7. The injunction requires the State to replace over 150 culverts within the case area by October 31, 2016. ER 3 (¶ 5); 128-29 (¶ 5); 138 (¶ 5); 142 (¶ 6). The State must replace another 800-plus culverts within 17 years.[1] ER 3 (¶ 6); 119 (¶ 10). The State must replace these culverts with bridges or "stream-simulation" culverts, which are the most costly replacement options, and must re-replace any repaired culvert that fails in the indefinite future. ER 4-5 (¶¶ 9, 11); 570 (¶ 24); 673-74 (¶¶ 36-40). The State may use a different option only when the more costly options are infeasible because of emergency or extraordinary site conditions. ER 4-5 (¶ 10). The injunction contains all of the relief the Plaintiffs requested, except that the Plaintiffs would have given the State twenty years to replace its culverts whereas the court instead gave the State seventeen years. ER 152 (¶ 6). The State now appeals.

[1] Under certain conditions, however, the State may defer correction of certain culverts that cumulatively block no more than 10% of potential upstream habitat. ER 3-4 (¶ 8).

V. STATEMENT OF FACTS

A. State-Owned Culverts

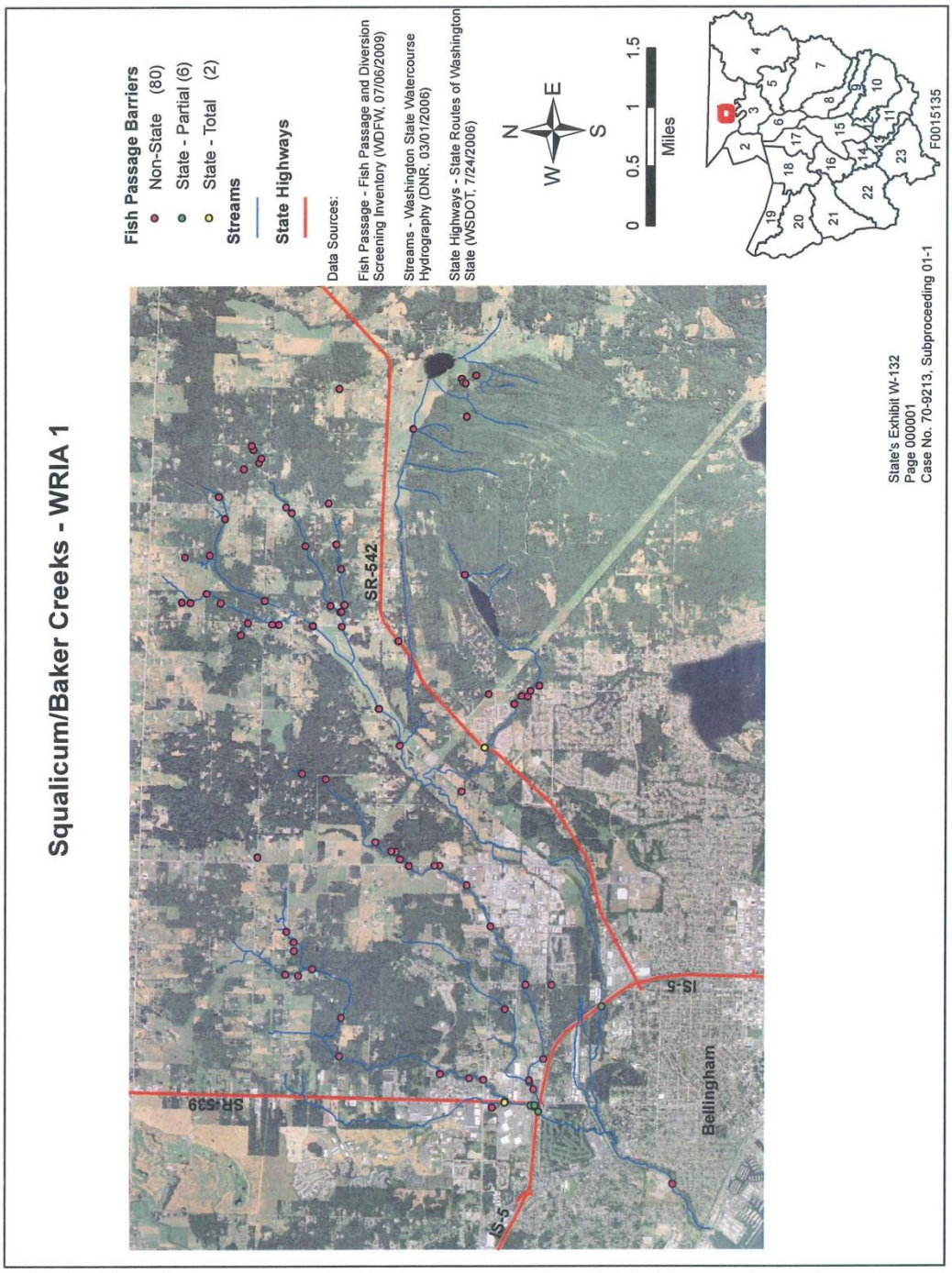
Many of the roads in Washington are state-owned and managed by one of four state agencies. The Department of Natural Resources (Natural Resources) maintains forest roads on 2.1 million acres of forest lands. ER 563 (¶ 7). The State Parks Department (State Parks) maintains roads within about 200,000 acres of state parks. ER 978 (¶ 2). The Department of Fish and Wildlife (Fish & Wildlife) maintains roads on 550,000 acres of land that it owns or manages. ER 633 (¶ 21). Finally, the Washington State Department of Transportation (WSDOT) maintains 7,044 miles of state highways. ER 663 (¶ 6). Of the four state agencies, WSDOT maintains the most heavily-used and complex road system.

Roads in Western Washington must frequently cross water, which often requires construction of culverts. ER 14 (¶ 3.29). A culvert that fails to pass fish is often referred to as a barrier culvert. Barrier culverts can be total, meaning that they block all fish passage, or partial, meaning that they block only some fish passage. ER 840 (¶ 16); 293 (¶ 4.6). The United States provided funding and permits for most of the State's barrier culverts, which

were designed to federal design standards. ER 989-90 (¶¶ 5.14-5.16); 665 (¶ 10); 1081-82 (Wagner at 106:13-107:11).

Federal, tribal, local, and private culverts also block fish. ER 1045 (Benson at 108:2-108:18); 1030 (Roni at 174:5-174:21). State-owned culverts are less than 25% of known barrier culverts, and in some places, the known non-state culverts exceed the number of state-owned culverts by up to a factor of 36 to 1.[2] ER 1045 (Benson at 108:2-108:8); 196-211; 407-555 (potential fish barriers in case area, "owner type" column). For example, as shown in this map of Squalicum Creek, there are eight state-owned barriers compared to eighty other barriers.

[2] Because no systematic inventory of non-state barrier culverts exists, the actual number of non-state barriers is likely higher than currently known. ER 1045 (Benson at 108:2-108:18).


Squalicum/Baker Creeks - WRIA 1
Fish Passage Barriers
Non-State (80)
State - Partial (6)
State - Total (2)
Streams
State Highways
Data Sources:
Fish Passage - Fish Passage and Diversion Screening Inventory (WDFW, 07/06/2009)
Streams - Washington State Watercourse Hydrography (DNR, 03/01/2006)
State Highways - State Routes of Washington State (WSDOT, 7/24/2006)
N
W
E
S
0
0.5
1
1.5
Miles
SR-542
SR-539
I5-5
I-5
Bellingham
State's Exhibit W-132
Page 000001
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B. Fish Runs and Tribal Harvests

Following the Boldt decision in 1974, tribal salmon harvests increased steadily for a number of years, leading to a period of over-harvesting by both tribal and non-tribal fishers, accompanied by a decline in overall harvests in the 1980's. ER 266-67; 276-82; 725 (¶ 21). Fluctuations in harvest are caused by many factors, some human-caused and some naturally occurring. ER 288 (¶ 2.3). Overharvest, habitat alteration, poor hatchery practices,[3] and hydropower development are some of the human-caused factors responsible for reducing the fish available for tribal harvest since treaty time. ER 11 (¶ 3.10); 717-18 (¶ 7). Barrier culverts of all ownerships may have also played some role, at least for some species and in some watersheds. ER 850-52 (¶¶ 42-46); 1129 (McHenry at 159:10-159:13); 1123 (McHenry at 153:4-153:24); 1113-15 (Rawson at 117:5-119:23); 1037 (Koenings at 66:16-66:24). However, the extent to which state-owned barrier culverts are a cause of the decline has not been established. ER 1116 (Rawson at 120:4-120:20).

The State has a comprehensive plan addressing all aspects of salmon recovery. ER 723-37 (¶¶ 17-50). In 1999, the legislature created a board that

[3] Hatcheries are "fish farms" where fish are born and reared in captivity and then released. Both the State and the Tribes use hatcheries to increase the number of fish available for harvest. ER 729-30 (¶¶ 30-33).

has funded hundreds of salmon habitat restoration projects within the case area. ER 733 (¶ 41). The State has also contributed funds for estuary restoration projects, removed fish blocking dams, and worked with Canada on habitat issues for salmon that cross international borders. ER 731-32 (¶¶ 35-38); 734-36 (¶¶ 44-49); 125-26. The State is protecting wild salmon through improved harvesting and hatchery practices, and participated in the negotiation of a treaty with Canada to protect shared stocks from over-harvest. ER 725-28 (¶¶ 21-28); 729-30 (¶¶ 30-33). Through 2012, the State had granted nearly $200 million in state funds to salmon recovery efforts, not including over $100 million spent on replacing state-owned barrier culverts (discussed in the next section). ER 659; 148-49.

C. Washington's Barrier Culvert Programs

In 1991, based on a growing recognition that fixing barrier culverts could help some fish runs, Fish & Wildlife and WSDOT began identifying barrier culverts under state highways. ER 296 (¶ 6.8); 837 (¶ 7); 627 (¶ 7). Fish & Wildlife subsequently began identifying its own barrier culverts, as did State Parks and Natural Resources. ER 297 (¶¶ 6.9-6.11); 633-34 (¶ 22); 566-67 (¶¶ 14-16). As a result, the State has created comprehensive lists of state-owned barrier culverts and evaluated many of them to help planners determine

the order in which to fix them. ER 842-43 (¶¶ 21-22). The State has increased its funding for barrier identification and repair in every State budget since 1991, and has appropriated over $100 million of taxpayer dollars for this effort to date.[4] ER 136.

Washington is the only state that has comprehensively identified its barrier culverts, gaining national recognition for its approach. ER 1073 (Wagner at 30:8-30:18). Washington is also the first state to develop a stand-alone, separately-funded fish passage barrier correction program for highways. ER 667 (¶ 18).

Additionally, Washington is recognized as a national leader in culvert design. ER 879-80 (¶ 3). For decades, the Federal Highway Administration published hydraulic culvert designs that constituted the industry standard. ER 664 (¶ 9). WSDOT, like other states, followed this federal standard for nearly all of its culverts. ER 665 (¶ 11); 1081-82 (Wagner at 106:13-107:14). In the early 1990s, however, WSDOT learned that some culverts designed under

[4] The State has spent much more on culvert inventory and repair than $100 million. However, because costs for culvert repair are frequently not broken out as separate project costs, it is impossible to precisely quantify the amount spent. ER 610 (n.2); 146 (¶ 3). The $100 million figure reflects only money that has been appropriated to WSDOT through its environmental "I-4" budget. ER 608-09 (¶ 23); 1060-62 (Wagner at 9:25-11:2); 1026-27 (Carpenter at 98:23-99:2).

federal standards were barriers to fish. ER 665 (¶ 10). In 1999, a Washington State engineer developed the stream simulation design. ER 882-83 (¶ 9). This design mimics the natural stream and is very effective in passing fish. ER 883 (¶ 10). Washington's stream simulation design, or variations of it, have been adopted by federal fish agencies, the Federal Highway Administration, the United States Forest Service, and other states. ER 897-98 (¶¶ 71-73); 566 (¶ 13). That said, the Forest Service's road budget is severely underfunded, ER 579-80, and even tribal experts agree that the State is doing a better job than the United States in addressing barrier culverts on forest roads. ER 1104 (McHenry at 16:14-16:22).

Before the injunction, Fish & Wildlife and Natural Resources were already on schedule to fix all of their barrier culverts by October 31, 2016. ER 131 (¶ 16); 143 (¶ 12). Barriers under state highways are more costly and complex to fix and often present logistical issues, such as the need to re-route traffic during a repair. ER 1049 (Nagygyor at 66:14-66:19); 1029 (Carpenter at 102:7-102:25). For those reasons, and despite a marked increase in the rate of repairs, (ER 621), WSDOT cannot be certain when it will complete all of its culvert repairs. By 2013, WSDOT had repaired 250 culverts, thereby providing access to 749 miles of potential habitat previously blocked by partial

or total barriers. ER 621-23; 118-19 (¶ 9). The Federal Highway Administration recently gave two excellence awards to WSDOT for its leadership in addressing fish passage. ER 117 (¶ 3).

WSDOT estimates that its remaining culvert repairs will average $2.3 million per project. ER 1069-71 (Wagner at 26:12-28:2). Under that estimate, WSDOT's repairs alone will cost the State approximately $1.88 billion over the seventeen years of the injunction. ER 118 (¶ 8) (noting 817 barriers as of 2013). This amounts to almost $235 million per biennium, which is over twice the amount appropriated to WSDOT for culvert repairs for the entire period of 1991 through 2012. ER 134 (¶ 4); 136.

It is impossible to fund these repairs without shifting funds away from other state programs. ER 655-56 (¶¶ 38-39); 606 (¶¶ 18-19). Moreover, a near-exclusive focus on culverts could impair other components of salmon recovery, in part because funding that would be available for those other components may need to be diverted to culvert repair. ER 737-39 (¶¶ 51-54). The United States, the Tribes, and the State all agree that salmon recovery needs to be addressed comprehensively rather than through a single-minded focus on culverts. ER 737-40 (¶¶ 51-57); 1110-11 (Rawson at 114:4-115:4); 1033-34 (Roni at 194:17-195:8).

VI. SUMMARY OF ARGUMENT

Courts interpret treaties in accordance with their plain language, using the drafting history and post-ratification understanding as guides to what the language means. In this case, the relevant treaties reserve to the Tribes the right of taking fish in common with all citizens. Neither that language, nor anything in the negotiating history of the treaties or their post-ratification understanding, granted the Tribes a right to force third parties (such as the State) to avoid development that incidentally impacts fish or to restore fish runs that have diminished for a variety of reasons. Rather, "[b]oth sides have a right, secured by treaty, to take a fair share *of the available fish*." *Fishing Vessel*, 443 U.S. at 684-85 (emphasis added). The district court erred in declaring a broader right that finds no basis in the treaties.

Of course, the State may not take discriminatory actions aimed at destroying tribal treaty rights, but that is not what is alleged or what happened here. Rather, the federal government and the Tribes contend that when the State built culverts under state-owned roads—in full compliance with federal design standards—it violated some implicit promise in the treaties not to take actions that incidentally impact the quantity of salmon. The treaties have never been interpreted to include such a promise, and reading them to include one

would expand the treaties enormously, potentially creating causes of action for any activity that could incidentally impact salmon—anything from greenhouse gas emissions to local zoning rules. Such a broad reading of the treaties is unsupportable and unwise.

If this Court nonetheless concludes that an implied treaty-based duty exists, it should find that the United States waived its ability to assert this duty on behalf of the Tribes. Virtually all of the culverts at issue in this case were designed according to federal standards and partially funded by the United States. The district court, however, dismissed the State's waiver defense as a matter of law based on its erroneous conclusion that waiver cannot be raised as a defense when the United States asserts tribal treaty rights. That conclusion is untenable in light of a subsequent Supreme Court decision. Thus, if a treaty-based duty exists, the Court should remand to the district court for consideration of the State's waiver defense.

This Court should also remand for consideration of the State's counterclaims. When the United States files a lawsuit, it waives its immunity to counterclaims grounded in recoupment. Here, the State filed recoupment counterclaims, alleging that its own liability should be reduced because of the United States' actions in funding and approving the State's barrier culverts, in

maintaining federally-owned barrier culverts, and in harming salmon runs itself. The district court dismissed the counterclaims based on its erroneous conclusion that they were not true recoupment claims because the State sought injunctive relief. However, there is no rule against recoupment claims that seek injunctive relief. Rather, the only rule is that the counterclaim must seek the same type of relief sought by the United States, as here.

Finally, the court abused its discretion by granting sweeping injunctive relief against the State. The Supreme Court has developed several federalism principles that must be applied before entering an injunction against a state. Namely, the district court was required to give deference to the State's institutional competence, to not substitute its budgetary judgment for that of the State, to fashion the least intrusive remedy possible, and to fashion relief that was no broader than necessary to address any treaty violation. The district court's expansive injunction disregards all of these principles.

In entering the injunction, the court also ignored crucial facts and equities. Most importantly, the court erred in concluding that the billions of dollars in culvert funding required by its order would have no impact on other state programs. In truth, the court's order will have substantial impacts on other state programs, including salmon restoration programs, without any

evidentiary showing that the order will meaningfully increase salmon populations. This was an abuse of discretion.

VII. ARGUMENT

A. Standard of Review

This Court reviews the district court's summary judgment ruling de novo. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 652 (9th Cir. 2002). This Court reviews the district court's grant of a permanent injunction under three standards: legal conclusions are reviewed de novo; factual findings are reviewed for clear error; and the scope of the injunction is reviewed for abuse of discretion. *Id.* at 653.

The State also appeals an order dismissing its waiver defense. ER 69-79. The order is unclear as to whether the motion was granted under rule 12(c) (motion for judgment on the pleadings) or 12(f) (motion to strike). ER 79. An order granting a 12(c) motion for judgment on the pleadings is reviewed de novo. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). This Court also reviews de novo an order granting a 12(f) motion to strike where, as here, the order is based on a pure legal issue (whether the waiver defense is barred as a matter of law). *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010).

Last, this Court reviews de novo the district court's dismissal of the State's counterclaims under rules 12(b)(1) and (6). *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); ER 60-68.

B. The Treaties Impose No Duty on the State to Refrain From Development That Might Incidentally Impact Fish

In 1854 and 1855, the United States, represented by territorial Governor Isaac Stevens, negotiated a series of treaties with several northwest Indian tribes. *Fishing Vessel*, 443 U.S. at 661-62 & n.2. The federal government's principal purpose in negotiating the treaties was to extinguish Indian claims to land in what is now Washington State. *Id.* at 661-62; *U.S. v. Washington*, 384 F. Supp. at 355.

A critical component of the Stevens Treaties was the reserved "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." *Fishing Vessel*, 443 U.S. at 662. Supreme Court precedent establishes that the right of taking fish encompasses three separate types of rights. First, tribal fishers have the right to access their usual and accustomed off-reservation fishing grounds. *United States v. Winans*, 198 U.S. 371, 381-82 (1905). Second, tribal fishers have the right to be free from state regulation unless such regulation is non-discriminatory and for

conservation purposes. *Puyallup Tribe v. Dep't of Game of Washington*, 391 U.S. 392, 398 (1968); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Third, the Tribes have the right "to take a fair share of the available fish" *Fishing Vessel*, 443 U.S. at 684-85, meaning up to 50% of the available fish from each salmon run, *id.* at 685-87.

In this case, the district court essentially declared a fourth right: the right to prevent the State from making development decisions that might incidentally impact fish, and to force the State to restore fish runs that have diminished through a combination of natural and human causes. In its summary judgment decision, the court described this right as imposing a duty on 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." ER 54. Although the court claimed its ruling was a "narrow directive," ER 54, its reasoning could give the Tribes a right to restrain any non-discriminatory development that might impact salmon. Moreover, given the lack of evidence as to what portion of fish diminishment, if any, state-owned culverts have caused, the court's order effectively imposes a duty on the State to restore salmon runs to some

unspecified level. Such a duty finds no support in the plain language or historical interpretation of the treaties.

1. Courts Interpret Treaties in Accordance With Their Plain Language, and the Plain Language of the Stevens Treaties Does Not Support the Duty Imposed by the District Court

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott v. Abbott*, 560 U.S. 1, __, 130 S. Ct. 1983, 1990 (2010) (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)). This textual focus is appropriate because a treaty "between the United States and an Indian tribe[] is essentially a contract between two sovereign nations." *Fishing Vessel*, 443 U.S. at 675. When the negotiating parties have not been at war, it is assumed that the treaty was negotiated at arms' length. *Id.* In interpreting these very treaties, the Supreme Court has said that "[t]here is no reason to doubt that this assumption applies." *Id.* For these reasons, although *ambiguous* treaty provisions are generally resolved to the benefit of tribes, *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985), it has long been the law 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); *see also Gros Ventre Tribe v. United States*, 469 F.3d

801, 813 (9th Cir. 2006) ("Whatever duty exists at law today must be expressly set forth in statutes or treaties.").

Applying this rule of law, courts have consistently rejected interpretations that the drafters gave no thought to or that are inconsistent with a treaty's plain language. For example, in construing an 1864 treaty and subsequent 1901 agreement with the Klamath Tribe, the Supreme Court rejected the notion that the Tribe had reserved off-reservation fishing rights because such an interpretation was inconsistent with the plain language of the agreements. *Klamath Indian Tribe*, 473 U.S. at 769-74. In another example, the Court rejected the Chickasaw Nation's argument that a treaty prohibited Oklahoma from imposing income tax on tribal members employed by the Tribe. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). The Court concluded that the Tribe's interpretation was inconsistent with clear language in the treaty and was likely not considered by the signatories. *Id.* at 466-67.

In construing a Stevens Treaty, this Court rejected a claim by the Skokomish Indian Tribe for damage to their fisheries and tribal lands arising from operation of a hydroelectric project by the City of Tacoma. *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc), *cert*

denied 546 U.S. 1090 (2006). This Court concluded that the language of the treaty did not support a damages claim against a non-contracting party. *Id.* at 513. *See also Menominee Indian Tribe of Wisconsin v. Thompson,* 161 F.3d 449, 457-62 (7th Cir. 1998) (plain language of treaties does not support Tribe's claim that they reserved off-reservation fishing rights and a right to a specific proportion of fish).

The Idaho District Court, in interpreting one of the Stevens Treaties, rejected a damages claim of the Nez Perce Tribe against a power company that operates dams on the Snake River, resulting in a diminishment of fish runs. *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994). The court analyzed numerous cases that have interpreted the Stevens Treaties and ultimately concluded that the treaty does not guarantee against a decline in fish abundance. *Id.* at 810. The court noted that the only way to provide such a guarantee would be to prevent all kinds of development. *Id.* "The Stevens treaties simply do not provide the Tribe with such assurance or protection." *Id.*

Likewise, the Tribes here argue for a treaty right that finds no basis in the plain language or historical interpretation of the treaties. On its face, the right of taking fish in common with all citizens does not include a right to prevent the State from making land use decisions that could incidentally impact

fish. Rather, such an interpretation is contrary to the treaties' principal purpose of opening up the region to settlement. *U.S. v. Washington*, 520 F.2d at 682; *Tulee*, 315 U.S. at 682; *Seufert Bros. Co. v. United States*, 249 U.S. 194, 197 (1919). It is also contrary to plain treaty language, whereby the Tribes "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them." *Winans*, 198 U.S. at 377. Indeed, even the district court found that the parties did not "write any protection for the [fish] into the treaty." ER 53.

The district court, however, disregarded the treaties' plain language and principal purpose, instead relying in large part upon the 1980 district court Phase II decision. ER 47-49. Although the 1980 decision was vacated, the district court reasoned: "The [Ninth Circuit] did not find fault with the district court's analysis on treaty-based obligations[.]" ER 48-49. This Court did, however, find fault with the district court's analysis. Specifically, the en banc Court held: "*Contrary to* certain statements in the district court's opinion, the Supreme Court in *Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish." *U.S. v. Washington*, 759 F.2d at 1358-59 (emphasis added). Thus, the district court was simply incorrect to rely on the vacated 1980 decision.

The district court also misapplied the Supreme Court's decision in *Fishing Vessel*. ER 50-52. The court concluded that the treaties protect the right to "**take** fish, not just the right to fish," and therefore, the State has a duty to ensure that there are enough fish to take. ER 52 (emphasis in original). However, *Fishing Vessel* explicitly holds that the Tribes have a right "to take a fair share of the *available* fish." *Fishing Vessel*, 443 U.S. at 684-85 (emphasis added). *Fishing Vessel* does not support the notion that the State has a duty to avoid actions that incidentally impact the number of fish available or to restore fish runs to a certain unspecified level.

In short, the plain language of the treaties does not support the right declared by the district court, and the new right is contrary to the treaties' principal purpose of opening up the land for settlement. The court's summary judgment ruling should be reversed, and summary judgment should instead be granted to the State.

2. The Drafting History and Post-Ratification Understanding of the Treaties Confirm That the Treaties Do Not Prohibit Development Decisions That Could Incidentally Impact Fish

"Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification

understanding[.]" *Medellin*, 552 U.S. at 506-07 (internal quotation marks omitted) (citing, among other cases, *Choctaw Nation*, 318 U.S. at 431-32). Here, these sources confirm that the treaties did not grant the Tribes power to prevent the State from taking actions that could incidentally impact fish.

When the treaties were negotiated, fish "were exceptionally abundant and considered inexhaustible[.]" *United States v. Washington*, 157 F.3d 630, 640 (9th Cir. 1998). Treaty negotiators believed that this abundance would perpetually continue, having no reason to believe that fish would later become scarce. ER 969-70 (¶¶ 13-14).

This historical understanding explains why the treaties do not restrict development or require the parties to restore fish runs if they subsequently diminish. None of the negotiating parties believed fish stocks would diminish and, therefore, they did not negotiate for a contingency plan. Since treaties are contracts, this failure to contemplate future conditions cannot now form the basis for relief. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 675 (tribal treaty is a contract); *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 248 (9th Cir. 1989) ("A prediction or judgment about events in the future is not the kind of mutual mistake of fact that permits rescission of an agreement.") (citing *Restatement (Second) of Contracts* § 151, cmt. a (1981)).

In its summary judgment decision, the district court acknowledged that "[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." ER 53. However, rather than reach the obvious conclusion that the treaties therefore do not guarantee protection of the resource, the court instead concluded that the negotiating parties' mistaken belief of an inexhaustible fishery means that the Tribes must have retained an unwritten right to prohibit actions that could impact fish, and to compel third parties (like the State) to restore fish runs if they fall below a certain unspecified level. In other words, the court impermissibly expanded the treaties beyond their clear terms to remedy a perceived injustice. *Choctaw Nation*, 318 U.S. at 432 (courts may not expand the language of treaties to address alleged inequities).

The court's error is further demonstrated by the extent to which it calls into question the State's primary and traditional land use authority. Whenever possible, federal laws are interpreted to avoid significant federalism questions, such as impingement on traditional state authority. *See Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001); *Menominee Indian Tribe*, 161 F.3d at 457 (treaties are congressional

acts akin to statutes). Absent a clear statement from Congress, courts will not presume intent to interfere with the states' substantial sovereign powers under the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Regulation of land use is a "quintessential state and local power" such that there needs to be a clear statement of Congress to authorize "an unprecedented intrusion" into this traditional state authority. *Rapanos v. United States*, 547 U.S. 715, 738 (2006). *See also* 23 U.S.C. § 145(a) (states have sovereign rights to determine their highway priorities).

Over the course of several decades, the State made numerous development decisions resulting in the State's current infrastructure of roads and highways. In granting a new treaty right to the Tribes, the district court significantly intruded into the State's traditional land use powers, ignoring that in the treaties the Tribes ceded "all their right, title, and interest in and to the lands." Because no clear statement from Congress supports this unprecedented intrusion, the court erred in imposing a duty on the State that penalizes decades of development decisions. Nothing in the negotiating history or post-ratification understanding of the treaties supports this new right.

3. The Lack of a Treaty Right Does Not Leave the Tribes Unprotected

Rather than basing its decision in the language or post-ratification understanding of the treaties, the district court determined that creating a right against incidental harm to salmon habitat was necessary to fulfill the purpose of the treaties. This is exactly the sort of interpretive approach the Supreme Court has rejected. *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) ("It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians."). Moreover, such a result-oriented reading of the treaties is unnecessary.

Even absent a treaty-based obligation to preserve salmon runs, the State has every incentive to protect this vital natural resource to the greatest extent reasonably possible. Salmon are vital to Washington's economy, its culture, its diet, and its recreation, and the State has spent hundreds of millions of dollars over the last two decades—since long before the district court's injunction—to preserve and restore salmon runs. There is no need to create a new treaty right to ensure the State's commitment to protecting and restoring salmon runs.

Moreover, the Supreme Court has made clear that Tribes do have some protection from harm to salmon runs under the treaties, but the protection is only against State actions that *discriminate* against tribes. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 682 (recognizing State authority "to impose nondiscriminatory regulations"). As the Court made clear, "neither party may deprive the other of a 'fair share' of the runs." *Id.* at 684. *See also Puyallup Tribe*, 391 U.S. at 398 (holding that, because the treaties do not explicitly protect any particular fishing methods used by tribes, the State may restrict tribes in "the manner of fishing . . . in the interest of conservation," so long as the regulation "does not discriminate against the Indians"). In *Nez Perce Tribe*, the Idaho District Court applied this same rule in interpreting the Stevens treaties. 847 F. Supp. at 809. The court rejected the idea that Tribes "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." *Id.* at 808. Instead, the court correctly held that a violation would occur only if the adverse effects of development were concentrated on treaty fish runs. *Id.* at 809.

This distinction makes eminent sense. When the State makes decisions that may incidentally impact salmon, it has every incentive to provide the best protections reasonably possible for salmon (applying the science of the time) to ensure the maximum possible salmon harvest for all state residents. If, however, the State made decisions that discriminated against tribal fishing rights while protecting non-tribal fishers, the State would be "depriv[ing] the [Tribes] of a 'fair share' of the runs" by protecting only the non-tribal portion. *Fishing Vessel*, 443 U.S. at 684. For example, if the State had concentrated barrier culverts in the case area while building only non-barrier culverts outside the case area, then the Tribes might be entitled to relief.

This anti-discrimination standard is thus well grounded in precedent and does not require judicial creation of a new treaty right, yet it provides meaningful protection to tribal fishing rights. It is also a clear and workable legal test, in conformance with this Court's requirements, unlike the test adopted by the district court here.

C. The Open-Ended Duty the District Court Imposed Lacks the Precise Legal Formulation Required by This Court, Enormously Expands the Treaties, and Could Create Liability for Any Action That Might Impact Fish

The district court's declaration of a new treaty right finds no support in the treaties' language or post-ratification understanding. Even if it did,

however, this Court has made clear that any obligation under the treaties must be precisely defined. "It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary . . . to announce legal rules imprecise in definition and uncertain in dimension." *U.S. v. Washington*, 759 F.2d at 1357. Rather, courts must offer "precise legal formulation" of clear rules based "on all of the facts presented by a particular dispute." *Id.* The district court's order falls short of this requirement.

Most importantly, the district court placed no sideboards on the State's legal obligations under the treaties. The court never even attempted to identify what portion of reduced fish runs are caused by state-owned barrier culverts, instead holding that the State had to replace all of its partial and total barrier culverts because of "the logical inference that a significant portion of [fish] diminishment" can be attributed to them. ER 50. This low bar prompted one of the Tribes' counsel to note that the decision "establishes a low burden of proof for tribes to prove that a factor is 'a cause' of diminishment."[5]

Setting aside the lack of evidence to support this finding, the ruling suffers from two crucial flaws: it never defines "significant diminishment," and

[5] Mason D. Morisset & Carly A. Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation*, 1 SEATTLE J. OF ENVTL. L. & PL'Y 29, 53-54 (2009).

it opens to challenge any action by non-parties to the treaty where a "logical inference" can be drawn that the action diminishes fish runs.

As to the first flaw, the court neither articulated a baseline for measuring diminishment nor defined what qualifies as "significant diminishment." For example, is the relevant measurement of diminishment from the time of the treaties? If so, there is no evidence in the record to establish what that baseline is. Alternatively, the court could have measured diminishment from the 1974 issuance of the Boldt opinion, but tribal salmon harvests have actually increased since then. ER 46 n.3. A third option, which seems to be what the district court had in mind, ER 46, is to measure diminishment from the recent salmon harvesting peak of the mid-1980's. But that is an inappropriate measure given that most of the culverts at issue existed long before that time, and thus could not have been a significant cause of diminishment since then. Moreover, overharvesting by both tribes and non-tribal fishers was one key cause of declines in some salmon runs since then. ER 725 (¶ 21); 267; 276-82.

The lack of a baseline is compounded by the district court's failure to define a "significant" portion of diminishment or even to attempt to quantify what portion of diminishment, if any, is due to state-owned culverts. ER 47. If the State or another non-party to the treaty has taken some action that reduces

fish harvests by 5%, has it violated the treaty? Or is 1% enough? And from what starting point?

The court's standard of a "significant portion of fish diminishment" is exactly the type of imprecise legal formulation that this court rejected in its en banc opinion. Even one of the Tribes' counsel acknowledged that the lack of a clear standard "may give rise to future challenges concerning the ambiguity of the extent of the State's duty."[6]

Although the district court claimed that its decision was "not a broad 'environmental servitude' . . . but rather a narrow directive to refrain from impeding fish runs in one specific manner," ER 54, the legal principle the court relied upon and the standard it articulated are anything but narrow. The court's imprecise standard means that the State (and other non-parties) could be sued over any actions that might incidentally reduce fish runs.

This is no idle fear. Several commentators have breathlessly described the expansive scope and future implications of the district court's decision. Some have called it "a monumental step toward securing the right to habitat

[6] Morisset, *supra* note 5 at 54, 59.

protection" under the treaties,[7] another described it as creating a broad "right to protection from environmental degradation,"[8] and yet another remarked that it confirms that "federal and state governments may be held to account for the actions they take—or permit others to take—that significantly degrade the treaty resource."[9] Indeed, one of the Tribes' counsel described the decision as creating a "habitat protection element in the Treaties" that extends to the re-licensing of dams, the State's regulatory decisions, and culvert repair by private landowners and local governments.[10]

There are innumerable state actions (or inactions) that could incidentally impact fish quantity, everything from zoning rules to pollution limits. The treaties were never intended to give Tribes veto rights over all such State policy decisions.

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[7] 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, 689 (2009).

[8] Katheryn A. Bilodeau, Comment, *The Elusive Implied Water Right For Fish: Do Off-Reservation Instream Water Rights Exist To Support Indian Treaty Fishing Rights*, 48 IDAHO L. REV. 515, 545 (2012).

[9] Catherine A. O'Neill, *Fishable Waters*, Vol 1 AM. INDIAN L. J. 181, 202 (Spring 2013). *See also, e.g.*, William Fisher, Note, *The Culverts Opinion And The Need For A Broader Property-Based Construct*, 23 J. ENVTL. L. & LITIG. 491, 511 (2008) (describing this case as a "stepping stone toward the establishment of either: (1) a broad duty, such as that originally established by the district court in Phase II, or (2) several narrow duties . . . directed at specific activities that harm fish passage and habitat").

[10] Morisset, *supra* note 5 at 53, 56.

This Court has previously noted that "this case has become a Jarndyce and Jarndyce, with judges dying out of it and whole Indian tribes being born into it." *United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009). If the district court's decision stands, this Dickensian litigation will persist through future lawsuits involving the nature and extent of the Tribes' right to restoration of fish runs, a right nowhere found in the treaties. This Court can avoid that result by rejecting the district court's unworkable standard, reversing its summary judgment decision, and instead adopting the workable non-discrimination standard applied to these treaties by the Supreme Court and other courts.

D. The District Court Erred in Dismissing the State's Waiver Defense

On motion of the United States, the district court dismissed fifteen of the State's affirmative defenses, including the State's defense that the federal government's claims are barred by waiver.[11] ER 70-71. Since the United States filed its motion on the pleadings, the district court had to accept the factual allegations in the State's answer as true. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

[11] If the United States is barred, then the suit must be dismissed because the State has sovereign immunity from claims brought solely by the Tribes. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-69 (1997) (states are immune from tribal suit unless an exception to immunity applies).

The State premised its waiver defense on numerous factual allegations. To begin with, most barrier culverts under state highways were not only funded in part by the United States, but were built to federal design standards. ER 989-90 (¶ 5.14). In fact, states *must* follow federal design standards to obtain federal funding. 23 U.S.C. § 109(a)-(c). From the inception of the federal highway program, Congress directed that "culverts shall be deemed parts of the respective roads covered by the provisions of this Act." Act of July 11, 1916, ch. 240, § 2, 39 Stat. 355, 356; *see* 23 U.S.C. § 101(a)(11) ("highway" includes a "drainage structure . . . in connection with a highway").

In addition to designing and funding the culverts it now claims are illegal, the United States also granted Clean Water Act permits to construct the culverts. ER 990 (¶¶ 5.15-5.16). Before granting the permits, the federal government was required to determine that the permitted activities would not impair treaty fishing rights. *Pyramid Lake Paiute Tribe of Indians v. Dep't of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (U.S. fiduciary obligations to tribes apply to all federal government actions); *Northwest Sea Farms, Inc. v. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (fiduciary obligation applies to Clean Water Act permits). Moreover, the United States approved the State's plan for addressing fish barriers on forest roads and

promised not to impose additional requirements on forest roads absent unforeseen or extraordinary circumstances. ER 986-87 (¶¶ 5.2-5.5). *See generally* ER 986-92 (¶¶ 5.2-5.20) (additional assertions supporting waiver).

The State had no opportunity to conduct discovery on its waiver defense or to present evidence of waiver at trial because the district court dismissed the defense as a matter of law. In doing so, the court concluded that there is "binding authority that forecloses Washington's attempt to use waiver or estoppel defenses in this case." ER 70. The court then cited cases that, in fact, do not bar the State's waiver defense.

The three Ninth Circuit cases cited by the district court held that estoppel and laches could not be asserted against the United States when it asserts tribal treaty claims. ER 70-71 (citing *United States v. Washington*, 157 F.3d 630; *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956)). These cases never addressed the separate defense of waiver, but even if they had, the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), calls these decisions into doubt even as to estoppel and laches. In *Sherrill*, the Supreme Court denied the Oneida Indian Nation injunctive relief because of its long delay in pursuing its claims coupled with the justifiable

expectations of those who had settled upon and developed the land. *Id.* at 215-20.

Recognizing that *Sherrill* "dramatically altered the legal landscape," the Second Circuit has applied *Sherrill* to deny subsequent tribal claims on equitable grounds, and has held that the United States is subject to the same equitable defenses. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273, 278-79 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006). *See also Oneida Indian Nation of New York v. Cnty. of Oneida*, 617 F.3d 114, 129 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011) (equitable defenses barred possessory land claims asserted by the United States and Oneida Indian Nation).

In sum, this Court has never held that the defense of waiver is barred when the United States asserts tribal treaty rights, and the Supreme Court's recent decision and decisions of the Second Circuit make clear that the defense is available. Thus, if the Court concludes that a treaty right exists, it should remand to the district court for consideration of the State's waiver defense.

E. The District Court Also Erred in Dismissing the State's Counterclaims

The State filed counterclaims against the United States based on its: (1) approval, funding, and permitting of barrier culverts; (2) ownership of barrier

culverts within the case area; and (3) numerous actions that reduced salmon runs in the case area. ER 997-98 (¶¶ 7.1-7.6). The United States moved to dismiss the counterclaims based on sovereign immunity. The district court originally denied the motion, finding that, by filing suit, "the United States has necessarily made relevant Washington's equitable claims, which very well may go to the heart of any remedy the court might provide." ER 82. On reconsideration, however, the court reversed itself and dismissed the claims based on its conclusion that the State could not counterclaim for injunctive relief. ER 64-65. This conclusion was erroneous.

When the United States files a lawsuit, the defendant may assert counterclaims by way of a set-off or recoupment. Charles A. Wright, et al., *Federal Practice & Procedure*: Civil 2d § 1427 ("[W]hen the United States institutes an action, defendant may assert by way of recoupment any claim arising out of the same transaction or occurrence as the original claim . . . ."); *Agnew*, 423 F.2d at 514; *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 932 n.16 (9th Cir. 2009). Recoupment claims are in the nature of a defense arising from the same transaction that led to the United States' lawsuit. *Bull v. United States*, 295 U.S. 247, 262 (1935).

To be allowed, a recoupment counterclaim must: (1) arise from the same transaction as the plaintiff's suit; (2) seek the same kind of relief as the plaintiff's suit; and (3) seek an amount not in excess of plaintiff's claim. *Berrey v. Asarco, Inc.*, 439 F.3d 636, 645 (10th Cir. 2006); *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029, 1035 (E.D. Wash. 2009). Contrary to the district court's ruling in this case, a defendant is not barred from seeking declaratory and injunctive relief if the United States also seeks declaratory and injunctive relief. Rather, the relevant inquiry is whether the defendant seeks the same type of relief sought by the United States. Indeed, by seeking injunctive relief, the United States assumed the risk that its position could be rejected and that it also could be bound by an adverse order. *See United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981).

Here, the State's counterclaims meet the three-part test. As to the first part, the federal government claims that the State diminished salmon runs by building fish-blocking culverts, and the State counterclaims that the United States: funded, approved, and issued permits for those same culverts; owns its own barrier culverts; and has diminished salmon runs in other ways. As to the second part, the United States seeks declaratory and injunctive relief against

the State, and the State likewise seeks declaratory and injunctive relief against the United States. ER 998-1000 (¶¶ 8.2-8.13). Third, the State's claims are not in excess of the United States' claims, but rather, as the district court acknowledged, "the essence of the State's request is that its own liability should be reduced because of alleged federal actions[.]" ER 65.

The State's counterclaims are "in the nature of a defense" arising from the same transaction, and are therefore permissible. *Bull*, 295 U.S. at 262. Thus, if this Court concludes that a treaty-based duty exists, it should remand for consideration of the State's counterclaims in addition to its waiver defense.

F. The District Court Abused Its Discretion by Granting Sweeping Relief That Significantly Intrudes Into Operations of State Government Without Adequate Evidentiary Support

To obtain injunctive relief, the Tribes needed to show: (1) they have suffered an irreparable injury; (2) remedies available at law are insufficient to compensate for the injury; (3) equitable relief is warranted considering the balance of hardships between the parties; and (4) the public interest would not be disserved by the injunction. *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007). "[T]here is no rule requiring automatic issuance of a blanket injunction when a violation is found." *Id.* Rather, injunctions are extraordinary remedies and courts must pay close attention to any public

consequences before granting such relief. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008).

Here, the district court gave the Plaintiffs the exact injunction they asked for on an even tighter schedule than they requested. The court imposed the costliest schedule and design standard, granting no deference to the State's budgetary decision to fund culvert repair at a level that does not impair other important state programs. The court ignored the State's undisputed evidence that less expensive design options are effective, thereby substituting its technical judgment for that of state engineers. The court further disregarded the State's expertise by elevating culvert repair above all other strategies that make up the State's comprehensive salmon recovery plan. These errors together constitute an abuse of discretion.

1. Federal Courts Must Apply Federalism Principles Before Issuing an Injunction Against a State

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 principles encompass both comity and institutional competence. *Stone v. City and Cnty. of San Francisco*, 968 F.2d 850, 860 (9th Cir. 1992). The comity interest demands a proper respect for state functions and a recognition that our government functions best when

states can perform their separate functions in their own ways. *Id.* Respect for institutional competence involves deference to state officials charged with making policy decisions. *Id.*

"Federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities." *Horne v. Flores*, 557 U.S. 433, 448 (2009). Because states "have limited funds," "[w]hen a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Id.* In fashioning relief, it is therefore improper for a court to substitute its own budgetary judgment for that of state officials. *Id.* at 455.

When injunctive relief is warranted, "federal courts should always seek to minimize interference with legitimate state activities[.]" *Stone*, 968 F.2d at 861; *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 850 (9th Cir. 2001) (federal court must exercise restraint when plaintiff seeks injunctive relief against non-federal agency). A district court abuses its discretion if it orders relief that demands more of state officials than is required by federal law. *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995).

Highly detailed injunctions are especially suspect. For example, the Seventh Circuit struck down a detailed injunction requiring Illinois to come

into compliance with the federal "motor voter" law, finding that the lower court failed to exhibit "adequate sensitivity" to federalism principles. *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995). Rather than treat the state like an "outlaw" through imposition of a detailed injunction, the district court should have simply enjoined Illinois to comply with the law. *Id.* Injunctions that invite "protracted federal judicial supervision . . . are last resorts, not first." *Id. See also Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 708 (4th Cir. 1999) (district court abused its discretion by imposing injunction that required adoption of a specific policy without any reason to suspect bad faith or abdication of responsibility by government officials).

From this case law, four general principles emerge as to injunctive relief against states. First, the remedy must be no broader than necessary to address the federal law violation. Second, courts must grant deference to a state's institutional competence and subject matter expertise. Third, courts must take cost into consideration and not substitute their budgetary judgment for that of the state. And finally, relief must be fashioned so that it is the least intrusive into state governmental affairs. The district court's injunction here contravenes all of these principles.

2. The District Court's Injunction Is Far Broader Than Necessary to Remedy Any Demonstrated Harm

"[B]ecause [i]njunctive relief . . . must be tailored to remedy the specific harm alleged, [a]n overbroad injunction is an abuse of discretion." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (citation omitted) (internal quotation marks omitted). The district court's injunction is overbroad in several respects.

First, and most importantly, the court ordered replacement of nearly every state-owned barrier culvert within the case area without any specific showing that those culverts have significantly diminished fish runs or tribal fisheries, or that replacing them will meaningfully improve runs. All parties agree that the decline in salmon is attributable to numerous natural and manmade causes throughout their complex life cycle. ER 11 (¶¶ 3.8, 3.10). The Tribes presented no evidence that state-owned culverts are a significant cause of the decline. To the contrary, their expert testified that he had no idea what type of habitat pressure contributed most to the decline of salmon in the case area. ER 1116 (Rawson at 120:4-120:20). Despite that complete failure of proof, the district court found that state-owned culverts "have a significant total impact on salmon production." ER 31 (¶ 27). This finding was clearly

erroneous. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (court abuses its discretion if it bases its decision on clearly erroneous findings).

Rather than prove causation, the Tribes argued that causation can be inferred from a statement in a 1997 report to the legislature in which state agencies asserted that WSDOT culverts, statewide, block "enough wetted stream area to produce 200,000 adult salmonid annually." ER 559. It is undisputed, however, that it was not the authors' intent to represent how many fish would be produced if WSDOT's culverts were fixed. ER 1094-95 (Sekulich at 132:6-133:15). Rather, their objective was to encourage the legislature to fund WSDOT's barrier correction program, and they succeeded: the legislature boosted funding by more than 50%. ER 1095 (Sekulich at 133:5-133:9); 620. Ironically, the State's effort to do the right thing for salmon ended up being the Tribes' sole "proof" that culverts cause fish diminishment. As the Supreme Court observed, "no good deed goes unpunished." *Winter*, 555 U.S. at 31.

Moreover, even if that hortatory statement represented an actual promised increase in salmon numbers available for harvest, 200,000 additional salmon would be an increase of less than 5% above recent case-area harvest levels and just 1.9% above the high harvest levels of 1985. ER 267 (4,386,498

fish harvested in 2003 and 10,721,068 fish harvested in 1985). Additionally, the 200,000 estimate was statewide (ER 559), so the increase in just the case area would be significantly smaller. Thus, Plaintiffs' best evidence was a hypothetical statement indicating a minuscule increase in salmon harvests. This is exactly the sort of limited evidence that provides a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996). *See also Missouri v. Jenkins*, 515 U.S. 70, 90-99 (1995).

The district court further erred by ordering relief throughout the entire case area. Area-wide relief is not warranted absent a showing that the State's actions caused area-wide harm. *See, e.g., Lewis*, 518 U.S. at 349. Here, there was no showing of injury across the entire case area. To the contrary, the health of salmon stocks varies widely throughout the case area, with many areas having healthy salmon runs.[12] ER 719-21 (¶¶ 10-11); 822-33. Also, the quality of fish habitat varies widely across the case area, and access to habitat is not an issue in certain watersheds. ER 872-73 (case area consists of Water

[12] For example, there are no endangered or threatened salmon on the Washington coast except for Lake Ozette sockeye, which are limited to one small watershed partially within the Olympic National Park where there are few, if any, state-owned barrier culverts. ER 719-20 (¶ 10); 556.

Resource Inventory Areas (WRIAs) 1-23); 1123 (McHenry at 153:4-153:24); 1129 (McHenry at 159:10-159:13); 1037 (Koenings at 66:16-66:24).

The district court not only lacked evidence that state-owned barrier culverts have significantly harmed salmon runs or tribal fisheries generally, but it also lacked evidence that ordering the culvert replacements it did would increase salmon runs. For example, a study by the United States' expert demonstrated that repair of barrier culverts alone will not have a significant impact on salmon restoration. ER 1031-32 (Roni at 175:20-176:14); 181, 191. Moreover, state-owned culverts are less than 25% of known barrier culverts, and in some places, non-state culverts outnumber state-owned culverts by a factor of 36 to 1. ER 1045 (Benson at 108:2-108:8); 196-209. Any benefit from fixing a state-owned culvert will not be realized if fish are blocked by other culverts in the same stream system. ER 847-48 (¶ 31); 1092-93 (Sekulich at 117:20-118:4); 1075-76 (Wagner at 100:17-101:16). Additionally, the habitat upstream of barrier culverts varies widely in quality. In more urban areas, habitat can be highly degraded and fish may be unable to use it for reasons unrelated to barrier culverts. ER 848 (¶ 35); 1118-19 (Walter at 162:7-163:4).

Finally, notwithstanding this Court's admonition "that institutional reform injunctions were meant to be temporary solutions, not permanent interventions," (*U.S. v. Washington*, 573 F.3d at 710), the injunction requires the State to perpetually find and replace future barrier culverts. This also was an abuse of discretion. To begin with, this relief never should have been available, as the parties stipulated that no actions would be required as to culverts that were not barriers as of the date the court entered its final order. ER 961 (¶ 3). Even if the parties had not made that stipulation, "[t]he Constitution does not establish the district courts as permanent administrative agencies," yet that is exactly the role the district court took on here. *U.S. v. Washington*, 573 F.3d at 709.

3. The District Court Failed to Defer to the State's Expertise

The State has concluded—and the Tribes agree—that a comprehensive approach to preserving and restoring salmon runs is the most productive and cost-effective. For that reason, the State has spent years developing and implementing a comprehensive plan aimed at all categories of human activity that affect salmon. ER 723-37 (¶¶ 17-50); 655 (¶ 37). The State has committed hundreds of millions of dollars to the plan's implementation, and the plan is working. ER 739-40 (¶ 57); 1039-40 (Koenings at 80:10-81:23);

769-70; 775-82; 795-800. The district court concluded, however, that "correction of human-caused barriers is recognized as the highest priority for restoring salmon habitat in the Case Area." ER 28 (¶ 5). On that basis, the court ordered injunctive relief focused solely on culverts, even though the cost of the injunction will likely reduce funding available for other salmon restoration efforts. The court's finding was clearly erroneous, and its approach was an abuse of discretion.

In concluding that fixing culverts is "the highest priority for restoring salmon habitat in the Case Area," ER 28 (¶ 5), the court cited the declaration of tribal expert Mike McHenry. Mr. McHenry said no such thing.

What Mr. McHenry actually stated in his declaration was that fixing culverts is an important component of a combined strategy for restoring salmon that also includes conservation easements, purchases of functional habitat, improved land use regulations, active habitat restoration, and reductions in fishing mortality. ER 591. In his live testimony, Mr. McHenry repeatedly acknowledged that fixing culverts is not a silver bullet. ER 1123 (certain species are less impacted by barrier culverts); 1127 (numerous factors impact salmon production); 1129 (barrier culverts are not a factor in many watersheds); 1099 (new habitat should not be opened up without addressing

hatchery issues). The only time that Mr. McHenry testified that fixing culverts provided the most "bang for the buck" was in reference to a discrete example where his tribe fixed seventeen of thirty-one barriers in the Salt Creek watershed. ER 1105-06 (33:14-34:8). However, after those seventeen barriers were fixed, the tribe determined that other habitat projects were more important than correcting the remaining fourteen barriers. ER 1102 (McHenry at 14:2-14:25). Mr. McHenry never testified that correcting barriers is generally the highest priority for salmon restoration.

Likewise, no other expert testified that culvert repair should have primacy over other restoration strategies. Rather, they all agreed with Mr. McHenry that a comprehensive plan is the best way to achieve salmon recovery. ER 1121 (Wasserman at 127:3-127:25); 1110 (Rawson at 114:7-114:23); 1096-97 (Sekulich at 141:18-142:2); 1037-38 (Koenings at 66:5-67:13; 1043-44 (Koenings at 84:13-85:23); 737-39 (¶¶ 51-56). As noted above, the State already has such a plan and has spent hundreds of millions of dollars implementing it. As noted by one of the State's experts, however, a near-exclusive focus on culverts could harm the State's overall salmon recovery efforts because it could divert funding from other aspects of the comprehensive plan. ER 737-38 (¶¶ 51-53). The court's finding that the

"correction of human-caused barriers is recognized as the highest priority for restoring salmon habitat in the Case Area" is thus clearly erroneous because the record contains no evidence supporting it. *Stormans*, 586 F.3d at 1119 (finding is clearly erroneous if there is no evidence to support it or it is implausible in light of the entire record).

In short, the court abused its discretion by relying on a clearly erroneous finding of fact to adopt its own preferred approach to salmon recovery—a single-minded focus on culverts. The court should instead have respected the approach adopted by the State and endorsed by experts on both sides—a comprehensive plan addressing all human impacts on salmon habitat in the most cost-effective way possible.

4. The District Court Failed to Consider Cost and Equitable Factors in Fashioning Relief

In three crucial respects, the district court failed to consider cost and equitable factors in fashioning relief. First, the court ignored the real impacts the injunction will have on other state programs. Second, the court ordered the State to use the most expensive culvert design, even though other, less expensive designs often work well to allow fish passage. Third, the court failed to balance the equities by forcing the State to shoulder the entire expense

of culvert repair when the United States and the Tribes maintain their own barrier culverts. These errors were another abuse of discretion.

As to the first issue, WSDOT estimates that its culvert repairs required by the injunction will cost approximately $1.88 billion, or roughly $117 million per year of the injunction.[13] ER 1069-71 (Wagner at 26:12-28:2, estimated repairs are $2.3 million apiece). In the 2011-13 biennium, the legislature appropriated about $15 million per year for WSDOT culvert repairs. ER 146 (¶ 4). Thus, the injunction will require the State to devote roughly $100 million per year more than it otherwise would have to culvert repair. This at a time when the State faces recurring budget shortfalls in the billions of dollars and has already made deep and painful cuts to subsidized health insurance for low income workers, K-12 schools, higher education, and basic aid for persons unable to work. ER 1023-25 (Moore at 13:24-15:15); 650-51 (¶ 19); 658. The State's significant budget shortfalls prompted even one of the

[13] We focus on WSDOT repairs because the other state agencies were already on track to fix their barrier culverts by 2016. The fact that the other agencies were going to meet this deadline demonstrates just how unnecessary the court's injunction is with respect to those agencies. *Tuttle*, 195 F.3d at 708 (absent bad faith or abdication of responsibility, court should have taken less intrusive step of monitoring and reviewing plans).

Tribes' counsel to acknowledge that "[t]he State's enormous budget deficits . . . reveal an underlying difficulty with injunctive relief[.]"[14]

The district court brushed aside this concern, finding that the separation of the State's transportation budget from its operating budget "ensures that money will not be taken from education, social services, or other vital State functions to fund culvert repairs." ER 38 (¶ 56). This conclusion was clearly erroneous, however, and is akin to concluding that enormous unexpected medical costs will not impact a family's vacation spending because the family maintains a separate "vacation account." Although it is true that some of the money in the transportation budget can only be used for transportation under the state constitution (Wash. Const. art. II, § 40), several hundred million dollars in the transportation budget come from revenues that could instead be used for general fund needs. ER 159 (chart showing revenue that is not constitutionally dedicated, including tolls and taxes other than gas tax). Additionally, the legislature can divert general fund revenues to transportation projects, and could be forced to do so if the costs of the injunction interfere with crucial transportation needs. Thus, the amount allocated between the two funds is largely a matter of legislative prioritization. The district court

[14] Morisset, *supra* note 5 at 60.

effectively required the State to alter its priorities, devoting far more money to culvert repair and far less to other important issues. *Horne*, 557 U.S. at 448 (when federal court order requires appropriation for one state program, money from other programs is often diverted).

Moreover, even if culvert repair costs were funded entirely from the transportation budget, this would necessarily push aside other transportation projects designed to promote public safety and mobility. ER 656 (¶ 39); 606 (¶¶ 18-19); 611-12 (¶ 32). The injunction could even delay transportation programs that benefit salmon, like stormwater and sediment cleanup programs. ER 609 (¶ 24).

In balancing the hardships to the parties, this substantial expense to the State and corresponding cuts to other programs must be measured against Plaintiffs' inability to demonstrate that state-owned culverts have any effect on tribal fisheries or that replacement of state-owned culverts will restore fish runs. Ultimately, the State may pay an enormous amount for this one salmon recovery strategy for little to no ultimate benefit, especially if other salmon recovery strategies are postponed to afford the injunction. By misunderstanding the State's budget and ignoring the injunction's cost, the district court miscalculated the balance of hardships between the parties.

The district court also ignored that the public interest is disserved by the budgetary impacts to other state programs resulting from this injunction. Before granting an injunction, the district court was required to give due weight to the "serious consideration of the public interest . . . that has already been undertaken by the responsible state officials in Washington[.]" *Stormans*, 586 F.3d at 1140. The court, however, gave no weight to the State's position, undisputed by the Tribes, that the public interest is best served by a comprehensive salmon recovery strategy. The court also disregarded the injunction's impact of diverting money from other programs.

The second way in which the district court ignored cost concerns was by requiring the State to use the most expensive designs for nearly all culvert replacements. The injunction requires the State to use a full-span bridge or stream simulation culvert except for those "rare circumstances" where these designs are infeasible due to emergency or extraordinary site conditions. ER 4-5 (¶¶ 9-10).

The court imposed this design standard despite undisputed evidence that hydraulic, no-slope, and stream simulation designs can all effectively pass fish. ER 633 (¶ 20); 890-92 (¶¶ 41, 47, 50); 901 (¶¶ 80-81); 932-44; 951; 673 (¶ 38); 569-70 (¶ 23). Although fish agencies generally prefer the stream

simulation design, both Fish & Wildlife and the National Marine Fisheries Service accept the other design methods. ER 241-44 (Endangered Species Act consultation and biological opinion); 115 (¶ 7). Stream simulation culverts are the most expensive and sometimes can be much more expensive than other alternatives. ER 673-74 (¶¶ 38-40); 684-90; 570 (¶ 24); 1067-68 (Wagner at 19:6-20:10); 1048 (Nagygyor at 33:3-33:23). Because culvert design is complex and site specific, flexibility in design is crucial. ER 895-96 (¶¶ 66-68); 957-59; 710-711 (¶ 47); 1087-88 (Wagner at 112:18-113:14). The court abused its discretion by substituting its technical judgment for that of the experts, ignoring the costs it was imposing.

Third, the court erred by ignoring equitable principles. These principles, such as the United States' own actions harming salmon, are properly factored into any grant of relief, especially when the relief requested would force state taxpayers to bear the cost of the United States' actions. *Brooks v. Nez Perce County*, 670 F.2d 835, 837 (9th Cir. 1982).

Here, the district court understood that it needed to consider these principles and repeatedly promised to do so. ER 67 ("equitable principles will no doubt play a role in whatever relief the court fashions"); ER 59 ("in fashioning a remedy, the Court could apply equitable principles to require that

federal culverts which block fish runs be repaired as well"). However, equity ultimately played no role, as the State alone was burdened with the entire cost of culvert repair. The court made no exceptions for culverts that were funded and approved by the United States, or for culverts surrounded by barrier culverts owned by other entities, including the United States and the Tribes. The court also placed no responsibility on the Plaintiffs to fix their own barriers. The court's disregard of cost and equity constitutes an abuse of discretion.

5. The District Court's Injunction Impermissibly and Significantly Intrudes Into State Government Operations

In fashioning relief, the court was required to devise the least intrusive option available. *Stone*, 968 F.2d at 864. Instead, the court did the opposite.

At the outset, it is important to note that the State was making great strides in repairing culverts before any federal court intervention. By trial, WSDOT had inventoried culverts on all state highways, developed and implemented a prioritization scheme, corrected 236 barrier culverts, and opened up over 700 miles of habitat. ER 622-23; 1064-65 (Wagner at 13:16-14:12). After trial, WSDOT fixed an additional 24 barriers in the case area, opening up 64 miles of potential habitat. ER 118-19 (¶ 9); 120. Also, Natural Resources and Fish & Wildlife have already corrected hundreds of barrier

culverts and are both on track to fix all of their barriers by 2016. ER 128-29 (¶ 5); 131 (¶ 16); 143 (¶ 12).

Despite the State's leadership and progress in culvert repair, the court ordered WSDOT to fix hundreds of culverts, some in streams with good habitat and others in streams with poor habitat. It also required repair of numerous culverts that are both upstream and downstream of non-state owned culverts, and thus are likely to make little, if any, difference. Indeed, a large representative sample of WSDOT barrier culverts found that about 90% of them are upstream or downstream of other barriers. ER 629 (¶ 11). Additionally, the amount of potential habitat WSDOT recovers through each barrier correction will rapidly decline as WSDOT moves down its prioritization list. ER 119 (¶ 10). For example, WSDOT can open up half of the remaining blocked habitat by fixing about one-fifth of the 800-plus culverts required to be replaced under the injunction. ER 119 (¶ 10); 121-22. And because the other state agencies are already on track to repair their culverts by 2016, the court ordered them to do exactly what they are already doing.

Under these circumstances, there was no need for the court to issue a detailed and expensive injunction that sets an inflexible and tight schedule for culvert repair. Since the State is neither acting in bad faith nor shirking its

responsibility, the court's first step should have been to order the State to comply by fixing its highest priority barrier culverts within available funding. *See U.S. v. Washington*, 384 F. Supp. at 417 (requiring State to take certain actions "consistent with availability of funds"). The court could have resorted to more detailed measures if the State halted its barrier corrections or failed to make appropriate progress. Instead, the court leapt to the most onerous remedy, violating the requirement that it fashion the narrowest relief possible.

The court's onerous and unnecessary injunction offends each of the federalism principles developed by courts: (1) the remedy is broader than needed to correct any treaty violation; (2) the court failed to give deference to the State's institutional competence and its subject matter expertise in salmon restoration; (3) the court substituted its budgetary judgment for that of the State and impermissibly ignored cost concerns; and (4) the court's remedy was the most intrusive rather than least intrusive option. For these reasons, the injunction should be reversed even if the district court's summary judgment decision stands.

VIII. CONCLUSION

The State respectfully asks the Court to reverse the district court decision granting summary judgment to the Plaintiffs. The treaty right of taking fish does not encompass a right to block the State from non-discriminatory actions that could incidentally impact fish quantity or to force the State to restore fish runs that have diminished for a variety of reasons. Thus, it is the State that is entitled to summary judgment.

If the Court disagrees, the injunction should still be vacated as an abuse of discretion and this matter should be remanded to the district court for consideration of the State's waiver defense and counterclaims.

RESPECTFULLY SUBMITTED this 7th day of October, 2013.

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ADDENDUM

Washington State Constitution

ARTICLE II
LEGISLATIVE DEPARTMENT

SECTION 40 HIGHWAY FUNDS. All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:

(a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;

(b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;

(c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section:
Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles. [**AMENDMENT 18,** 1943 House Joint Resolution No. 4, p 938. Approved November, 1944.]

BY AUTHORITY OF CONGRESS.

THE

Statutes at Large and Treaties

OF THE

UNITED STATES OF AMERICA.

FROM

DECEMBER 1, 1851, TO MARCH 3, 1855,

Arranged in Chronological Order;

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS ON THE SAME SUBJECT.

EDITED BY

GEORGE MINOT, ESQ.,

COUNSELLOR AT LAW.

VOL. X.

BOSTON:

LITTLE, BROWN AND COMPANY.

1855.

FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Title.

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth-day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

Cession to United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

Reservation for said tribes.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be

set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

Removal thereto.

Roads may be constructed.

ARTICLE III. 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, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Rights to fish.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Payments for said cession.

How applied.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Expense of removal, &c.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

Removal from said reservation.

Ante, p. 1044.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities not to be taken for debts.

Stipulations respecting conduct of Indians.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Intemperance.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Schools, shops, &c.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employées, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

Slaves to be freed.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Trade out of the limits of the U. S. forbidden.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Foreign Indians not to reside on reservation.

Treaty, when to take effect.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]
Governor and Superintendent Territory of Washington.

QUI-EE-METL, his x mark. [L. S.]
SNO-HO-DUMSET, his x mark. [L. S.]
LESH-HIGH, his x mark. [L. S.]

SLIP-O-ELM,	his x mark.	[L. S.]
KWI-ATS,	his x mark.	[L. S.]
STEE-HIGH,	his x mark.	[L. S.]
DI-A-KEH,	his x mark.	[L. S.]
HI-TEN,	his x mark.	[L. S.]
SQUA-TA-HUN,	his x mark.	[L. S.]
KAHK-TSE-MIN,	his x mark.	[L. S.]
SONAN-O-YUTL,	his x mark.	[L. S.]
KL-TEHP,	his x mark.	[L. S.]
SAHL-KO-MIN,	his x mark.	[L. S.]
T'BET-STE-HEH-BIT,	his x mark.	[L. S.]
TCHA-HOOS-TAN,	his x mark.	[L. S.]
KE-CHA-HAT,	his x mark.	[L. S.]
SPEE-PEH,	his x mark.	[L. S.]
SWE-YAH-TUM,	his x mark.	[L. S.]
CHAH-ACHSH,	his x mark.	[L. S.]
PICH-KEHD,	his x mark.	[L. S.]
S'KLAH-O-SUM,	his x mark.	[L. S.]
SAH-LE-TATL,	his x mark.	[L. S.]
SEE-LUP,	his x mark.	[L. S.]
E-LA-KAH-KA,	his x mark.	[L. S.]
SLUG-YEH,	his x mark.	[L. S.]
HI-NUK,	his x mark.	[L. S.]
MA-MO-NISH,	his x mark.	[L. S.]
CHEELS,	his x mark.	[L. S.]
KNUTCANU,	his x mark.	[L. S.]
BATS-TA-KOBE,	his x mark.	[L. S.]
WIN-NE-YA,	his x mark.	[L. S.]
KLO-OUT,	his x mark.	[L. S.]
SE-UCH-KA-NAM,	his x mark.	[L. S.]
SKE-MAH-HAN,	his x mark.	[L. S.]
WUTS-UN-A-PUM,	his x mark.	[L. S.]
QUUTS-A-TADM,	his x mark.	[L. S.]
QUUT-A-HEH-MTSN,	his x mark.	[L. S.]
YAH-LEH-CHN,	his x mark.	[L. S.]
TO-LAHL-KUT,	his x mark.	[L. S.]
YUL-LOUT,	his x mark.	[L. S.]
SEE-AHTS-OOT-SOOT,	his x mark.	[L. S.]
YE-TAHKO,	his x mark.	[L. S.]
WE-PO-IT-EE,	his x mark.	[L. S.]
KAH-SLD,	his x mark.	[L. S.]
LA'H-HOM-KAN,	his x mark.	[L. S.]
PAH-HOW-AT-ISH,	his x mark.	[L. S.]
SWE-YEHM,	his x mark.	[L. S.]
SAH-HWILL,	his x mark.	[L. S.]
SE-KWAHT,	his x mark.	[L. S.]
KAH-HUM-KLT,	his x mark.	[L. S.]
YAH-KWO-BAH,	his x mark.	[L. S.]
WUT-SAH-LE-WUN,	his x mark.	[L. S.]
SAH-BA-HAT,	his x mark.	[L. S.]
TEL-E-KISH,	his x mark.	[L. S.]
SWE-KEH-NAM,	his x mark.	[L. S.]
SIT-OO-AH,	his x mark.	[L. S.]
KO-QUEL-A-CUT,	his x mark.	[L. S.]
JACK,	his x mark.	[L. S.]
KEH-KISE-BE-LO,	his x mark.	[L. S.]
GO-YEH-HN,	his x mark.	[L. S.]

SAH-PUTSH, his x mark. [L. S.]
WILLIAM, his x mark. [L. S.]

Executed in the presence of us: —

M. T. SIMMONS,
Indian Agent.

JAMES DOTY,
Secretary of the Commission.

C. H. MASON,
Secretary Washington Territory.

W. A. SLAUGHTER,
1st Lieut. 4th Infantry.

JAMES McALISTER,
E. GIDDINGS, jr.,
GEORGE SHAZER,
HENRY D. COCK,
S. S. FORD, jr.,
JOHN W. McALISTER,
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W. H. PULLEN,
P. O. HOUGH,
E. R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter*,
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit: —

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
"*March* 3, 1855.

Consent of Senate.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS,
"*Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L. S.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:

W. L. MARCY, *Secretary of State.*

23 U.S.C. § 101(a)(11)

United States Code Annotated
Title 23. Highways

§ 101. Definitions and declaration of policy

(a) Definitions.--In this title, the following definitions apply:

(11) Highway.--The term "highway" includes--

(A) a road, street, and parkway;

(B) a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure including public roads on dams, sign, guardrail, and protective structure, in connection with a highway; and

(C) a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

23 U.S.C. § 109(a)-(c)

United States Code Annotated
Title 23. Highways

§ 109. Standards

(a) In general.--The Secretary shall ensure that the plans and specifications for each proposed highway project under this chapter provide for a facility that will--

(1) adequately serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance; and

(2) be designed and constructed in accordance with criteria best suited to accomplish the objectives described in paragraph (1) and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State transportation departments. Such standards, as applied to each actual construction project, shall be adequate to enable such project to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary, under section 106 of this title, of the plans, specifications, and estimates for actual construction of such project. Such standards shall in all cases provide for at least four lanes of traffic. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System to such standards. The Secretary shall apply such standards uniformly throughout all the States.

(c) Design criteria for National Highway System.--

(1) In general.--A design for new construction, reconstruction, resurfacing (except for maintenance resurfacing), restoration, or rehabilitation of a highway on the National Highway System (other than a highway also on the Interstate System)

may take into account, in addition to the criteria described in subsection (a)--

(A) the constructed and natural environment of the area;

(B) the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; and

(C) access for other modes of transportation.

(2) Development of criteria.--The Secretary, in cooperation with State transportation departments, may develop criteria to implement paragraph (1). In developing criteria under this paragraph, the Secretary shall consider--

(A) the results of the committee process of the American Association of State Highway and Transportation Officials as used in adopting and publishing "A Policy on Geometric Design of Highways and Streets", including comments submitted by interested parties as part of such process;

(B) the publication entitled "Flexibility in Highway Design" of the Federal Highway Administration;

(C) "Eight Characteristics of Process to Yield Excellence and the Seven Qualities of Excellence in Transportation Design" developed by the conference held during 1998 entitled "Thinking Beyond the Pavement National Workshop on Integrating Highway Development with Communities and the Environment while Maintaining Safety and Performance"; and

(D) any other material that the Secretary determines to be appropriate.

23 U.S.C § 145(a)

United States Code Annotated
Title 23. Highways

§ 145. Federal-State relationship

(a) Protection of State sovereignty.--The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 13,407 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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Signature s/ LAURA J. WATSON

Attorney for Appellant - State of Washington

Date Oct 7, 2013

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no other proceedings related to the present appeal in other tribunals. However, several other sub-proceedings have been filed and continue to be filed under the master case filed in 1970. Some of those unrelated sub-proceedings may be pending in this Court.

DATED this 7th day of October, 2013.

s/ LAURA J. WATSON
LAURA J. WATSON, WSBA #28452
Deputy Solicitor General
(360) 664-0869

9th Circuit Case Number(s) 13-35474; 13-35519

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Oct 7, 2013 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ LAURA J. WATSON

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) _____ .

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