NO. 13-35474

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 *AMICI CURIAE* KLAMATH CRITICAL HABITAT LANDOWNERS, INC.; MODOC POINT IRRIGATION DISTRICT; MOSBY FAMILY TRUST; SPRAGUE RIVER WATER RESOURCE FOUNDATION, INC.; and TPC, LLC IN SUPPORT OF STATE OF WASHINGTON'S PETITION FOR REHEARING/REHEARING EN BANC

DOMINIC M. CAROLLO, OSB NO. 093057

Yockim Carollo LLP
P.O. Box 2456
430 SE Main Street
Roseburg, Oregon 97470
Phone: (541) 957-5900

Attorney for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Amici Curiae Klamath Critical Habitat Landowners, Inc.; Modoc Point Irrigation District; Mosby Family Trust; Sprague River Water Resource Foundation, Inc.; and TPC, LLC; states that they do not issue shares to the public and have no parent corporation or subsidiaries.

DATED this 22nd day of August, 2016.

Respectfully submitted,

/s/ Dominic M. Carollo

Dominic M. Carollo, OSB #093057
Yockim Carollo LLP
430 SE Main St.
P.O. Box 2456
Roseburg, OR 97470
(541) 957-5900

Of Attorneys for Amici Curiae

TABLE OF CONTENTS

CASES

TABLE OF AUTHORITIES

I. INTRODUCTION[1]

The panel's opinion recognizes a new, sweeping, and ill-defined implied fish habitat protection servitude for the benefit of the Appellee Tribes' treaty fishing rights. In doing so, the panel condones the federal government's and Tribes' attempt to enhance Indian Treaty fisheries at the expense and burden of states, local governments, small businesses and private citizens. The panel's decision, and the precedents underlying it, should be reconsidered. At a minimum, the case law impliedly expanding express treaty rights is in desperate need of clarification. The Court should grant rehearing.

II. INTERESTS OF AMICI

Amici and their members consist largely of small or family-owned businesses that operate cattle ranches in Klamath County, Oregon, many of which are within the former Klamath Indian Reservation. *See* Amici's Motion to Appear. Amici, like the State of Washington, find themselves subject to an overwhelming and unfair burden to account for past policy choices of the federal government. Here, the panel required Washington to spend billions to replace culverts the federal government designed; likewise, amici's lives have been turned upside-down by the State of Oregon's application of this Court's decision in *United States*

[1] No party's counsel authored this brief in whole or in part and no person other than the amici curiae contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. Proc. 29(c)(5).

v. Adair, 723 F.2d 1394 (9th Cir. 1983) (*Adair II*)—the case upon which the panel rests its decision.

In 2013, the Oregon Water Resources Department ("OWRD") adjudicator, awarded practically the entire natural stream flow during the summer irrigation seasons on streams within the former Klamath Indian Reservation to the Klamath Tribes based on an implied "productive habitat" standard that this Court vacated on jurisdictional grounds in *United States v. Braren,* 338 F.3d 971 (9th Cir. 2003) (*Braren*). In most cases, the ruling left little or no water to satisfy available amici's water rights, many of which arise under the Klamath Treaty itself.

Similarly, in this case, the panel recognized an implied right to have fish habitat restored and maintained to an undefined level that assures "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Opinion at 31.[2] Like the "productive habitat" standard applied against amici, the panel created a rule for implied treaty rights that is so expansive, so ill-defined, so disruptive and so unfair that it dwarfs the impact of the primary treaty rights to fish. Whereas the Supreme Court capped the Tribes' share of harvestable fish at 50%,[3] the State of Washington has been ordered to replace all barrier culverts and, in amici's case, the Klamath Tribes have been awarded practically all the water in

[2] *United States v. Washington*, No. 13-35474, 2016 WL 3517884 (9th Cir. June 27, 2016).

[3] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*).

the streams. In short, the implied rights are completely incongruous with the primary treaty right to fish. The gravity of the ruling warrants en banc consideration.

III. SUMMARY OF THE ARGUMENT

The Court should grant rehearing for two principal reasons. First, the concept of an implied habitat protection right, vaguely recognized in *Adair II* and then extended by the panel in this case, should be reconsidered and rejected. In *Fishing Vessel*, the Supreme Court recognized that "it simply was not contemplated that either party [to the Treaty] would interfere with the other's fishing rights […] nor was future regulation foreseen." 443 U.S. at 668. Although the Court was referring to conflict between Indian and non-Indian fishing rights, the statement is equally applicable to conflicts between Indian fishing rights and post-treaty settlement and development, private property rights, water use, and a host of other potential land use and natural resource use conflicts. Though poorly-defined, the panel's rule threatens to establish *de facto* conservation easements over streams capable of supporting anadromous fish in the absence of an express reservation of such a right in the Treaty, in contravention of the Supreme Court's decision in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) ("*ODFW*"). The Court cannot create and add new treaty rights that were neither expressly reserved by Treaty, nor even contemplated, by the parties. Expanding treaties is the purview of Congress, not the courts.

Second, even if the Court decides to create treaty rights by implication, amici implore the Court to provide workable legal definitions and standards for application and quantification of such implied treaty rights. The extent of implied treaty rights must be balanced with all the purposes of the treaties from which they arise, not merely the single purpose of Indian fishing rights. The ill-defined rule adopted by the panel fails to balance the Tribes' treaty fishing rights with the equally valid Treaty purposes of establishing the Washington Territory, opening the Territory to settlement and, ultimately, making the Territory eligible for statehood, on equal footing with the original thirteen, including control over its navigable waters.[4] In amici's case, quantification of an implied water right for fisheries threatens to defeat a primary purpose of the Klamath Treaty: the development of agriculture. The panel's recognition of an implied habitat protection servitude that can be enforced to guarantee a "sufficient" number fish—regardless of the severity or infringement on other treaty purposes—is simply not a valid construction of the treaties as a whole. Rehearing is warranted to reject or modify that rule.

IV. BACKGROUND AND INTERESTS OF AMICI

In 1864, the Klamath and Modoc Indians Tribes (Klamath Tribes) entered into a treaty with the United States in which the Tribes ceded all the "country

[4] *See United States v. Oregon*, 295 U.S. 1 (1935); *Montana v. United States*, 450 U.S. 544 (1981).

claimed by them" and, in return, the United States "set apart as a residence" a reservation. 16 Stat. 707. In Article II of the treaty, the federal government expressed an intention to "promote the well-being of the Indians, advance them in civilization, and especially in agriculture…." *Id.* (Art. II). The treaty prohibited entry or settlement of non-tribal members on the reservation and gave the tribes the "exclusive right of taking fish" within the reservation. *Id*. (Art. I).

In 1887, Congress fundamentally changed the terms of treaties setting apart Indian Reservations when it passed the General Allotment Act. The Act "end[ed] the tribal and nomadic life of the Indians by allotting a portion of reservation lands in severalty to each Indian residing on a reservation, and selling off the excess lands." *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir 1969). Section 7 of the Act entitled allottees to a "just and equal distribution" of available reservation water to irrigate their allotments. 25 U.S.C. § 381. In furtherance of Section 7, in 1908, Congress provided authorization and funds for the Secretary of Interior to assist with the construction, operation, and maintenance of water projects on allotted lands. 35 Stat. 70. As part of that effort, in 1918 and 1919, the U.S. Indian Irrigation Service filed applications with the State of Oregon for the appropriation of "practically all the available water" within the Reservation from the Williamson, Wood, Sycan and Sprague Rivers and their tributaries to irrigate approximately 144,592 acres of land. *See United States v. Adair*, 478 F. Supp. 336, 340 (D. Or. 1979) (*Adair I*); *see also* Figure 1, below.

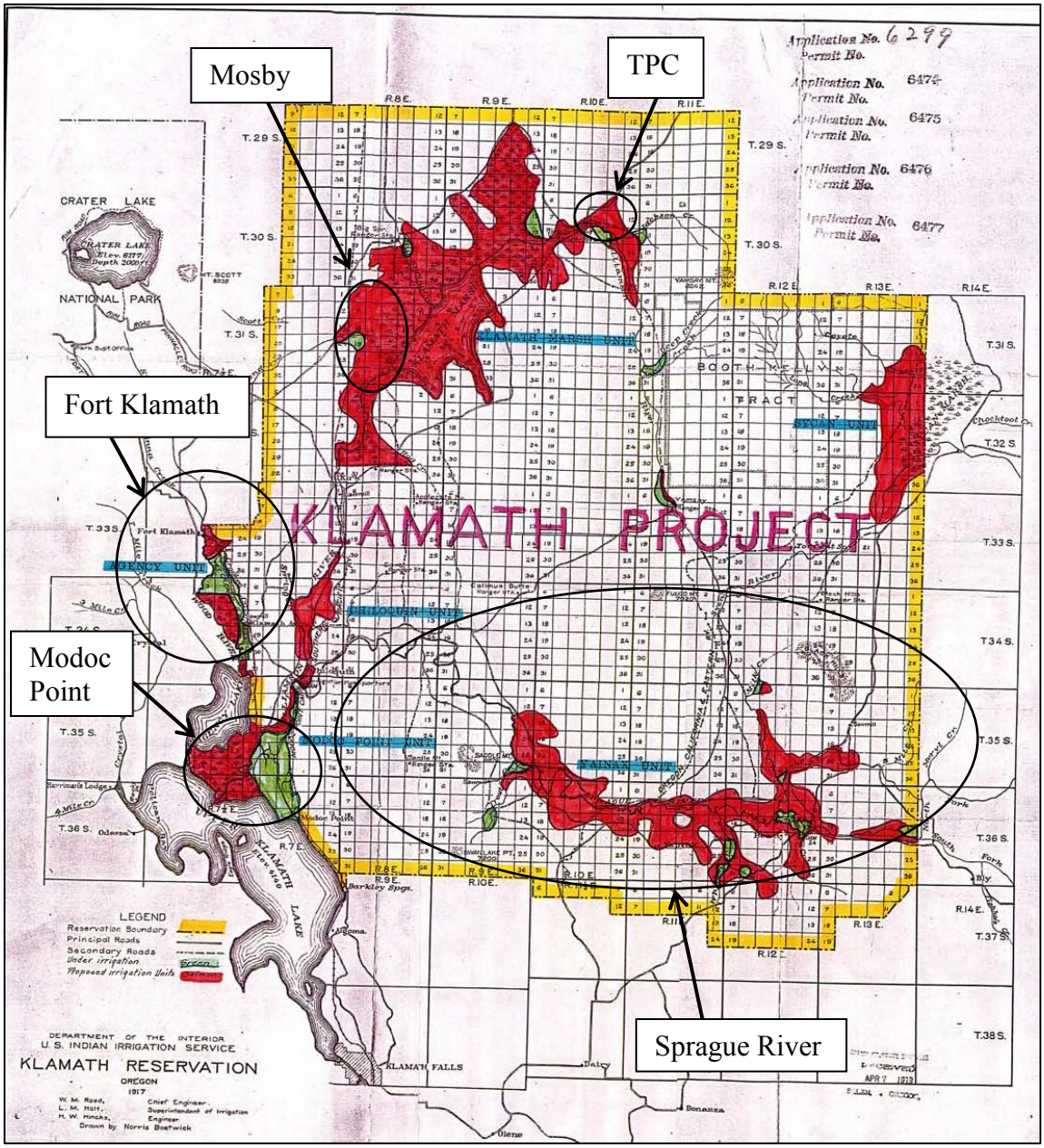

Figure 1: Copy of 1917 map filed by the U.S. Indian Irrigation Service with the Oregon State Engineer, with boundary of former Klamath Reservation in yellow, developed irrigation in green, planned irrigation development in red. Approximate locations of amici and/or their members' ranches have been added by counsel.

Under the General Allotment Act, "approximately 25% of the original Klamath Reservation passed from tribal to individual Indian ownership" and "[o]ver time, many of these individual allotments passed into non-Indian

ownership." *Adair II*, 723 F.2d at 1398. Amici Modoc Point Irrigation District, Mosby Family Trust, and TPC, LLC—and numerous members of amici Fort Klamath Critical Habitat Landowners, Inc. and Sprague River Water Resource Foundation, Inc.—own thousands of acres of those allotted lands. *See* Figure 1. Several of them are also successors to U.S. Indian Irrigation Service projects, including the Modoc Point, Sand Creek, Spring Creek, and Agency Projects.

For decades, the federal government supported the development of irrigation within the former reservation by both Indians and non-Indians alike. In fact, in 1958, the Solicitor for the United States Department of Interior stated that the Department would "support the rights of Indian landowners and third party purchasers of Klamath [Reservation] lands as having"[5] water rights under the Klamath Treaty of 1864; i.e., what would later be known as "*Walton* rights." *See Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). However, the United States changed course in 1975 when it filed suit on behalf of the Klamath Tribes to establish an implied water right to support the Tribes' exercise of hunting and fishing rights on the Klamath Marsh and the Upper Williamson River, above Kirk Reef. *See Adair I*, 478 F. Supp. 336.

Adair I went to this Court on appeal based, in part, on concerns of private irrigators that the district court's recognition of an implied water right to support

[5] *See* http://thorpe.ou.edu/sol_opinions/p1826-1850.htm (last visited August 18, 2016).

fisheries would "require a restoration of an 1864 level of water flow." *Adair II*, 723 F.2d at 1414-15. However, this Court held that it did not interpret the district court's opinions "so expansively" and held that the Tribes' implied water right consisted instead of "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members." *Id.* The United States assured this Court in its briefing in *Adair II* that recognizing such an implied treaty right would not conflict with agricultural water use.[6] As it turns out, the United States grossly misled the Court.

Following this Court's decision in *Adair II*, and related litigation,[7] the United States and Tribes filed claims in Oregon's stream adjudication for instream water rights on practically all the fish-bearing streams flowing within and bordering the former reservation. In a preliminary evaluation of the claims, the Oregon Water Resources Department interpreted *Adair II* to entitle the Klamath Tribes "that amount of unconsumed water flowing through [each described reach] as of September 27, 1979, the date of [the district court's decision]." *See United States v. Adair*, 187 F. Supp. 2d 1273, 1278 (D. Or. 2002) (*Adair III*). Unsatisfied

[6] In its briefing, the United States asserted that the private defendants' fear that "all appropriations by other parties in the litigation are necessarily barred" was "misleading" and went on to state: "Fish and Wildlife Service does not anticipate the Refuge needs will adversely affect existing upstream users of water. In short, the record does not support defendants' assumption that water uses for agriculture and domestic purposes are inconsistent with fish, wildlife, and flora needs." Brief for the United States at pp. 36-38, *United States v. Adair*, Nos. 80-3229, 80-3245, 80-3246, 80-3257 (Filed December, 1980).

[7] *See U.S. v. Oregon*, 44 F.3d 758 (9th Cir. 1994).

with that interpretation of *Adair II*, the United States went back to federal court to seek clarification. *Id.* The district court held that the moderate living standard had "limited application" to quantifying the implied water right and set a habitat-based floor: "[i]n no event shall the adjudicator quantify or reduce the Tribal water right to a level below that which is necessary to support productive habitat." *Id.*

On appeal, this Court vacated *Adair III*, finding that "the United States and the Tribes seek a clarification of the *Adair* standard to determine if the Preliminary Evaluation announced the correct standard. That question can only be answered when the Adjudication is complete." *Braren*, 338 F.3d at 976. The Court directed the district court to "enter an order staying all federal proceedings pending completion of the Oregon Adjudication and related appellate review." *Id.*

The Oregon Adjudication completed in March, 2013, with the filing of the Order and Determination with the Klamath County Circuit Court. *See* Or. Rev. Stat., Chapter 539. In the Order, the adjudicator chose to measure the Tribal instream claims based on the "healthy and productive habitat" standard from the vacated decision in *Adair III*. The adjudicator found that the *Adair II*'s "moderate living standard" was "irrelevant" to the quantification of water rights and that it was "an issue for resolution by the United States District Court or other court of general jurisdiction, not this tribunal."[8] Under the "productive habitat" standard,

[8] *See* https://www.oregon.gov/owrd/ADJ/ACFFOD/KBA_ACFFOD_05334.PDF (Proposed Order by ALJ for Wood River; see pp. 21-22);

the adjudicator awarded the United States Bureau of Indian Affairs instream water rights at levels that leave, in most cases, no water available for irrigation in most years, even for the 1864 priority date *Walton* water rights held by amici and many of their members. Following the issuance of the Order, which took immediate effect in 2013, there was a complete shut off of Upper Basin irrigators based on a call for enforcement of the Tribal instream claims.[9]

Amici and their members have filed exceptions against the Order, which remain pending in Klamath County Circuit Court. It may take as many as ten years for the adjudication to be completed, including appellate review.

V. ARGUMENT

A. The Court Should Reconsider and Reject the Concept of Implied Habitat Protection Rights for Treaty Fishing Rights.

As the Supreme Court recognized in *Fishing Vessel*, there can be no doubt that, in reserving fishing rights for Indian Tribes, neither the Tribes nor the federal

---

https://www.oregon.gov/owrd/ADJ/ACFFOD/KBA_ACFFOD_05334.PDF (Final Order by Adjudicator for Wood River adopting in part the Proposed Order) (last visited August 22, 2016).

[9] *See* "Klamath Tribes assert water rights, shutting off irrigation to some ranches," http://www.oregonlive.com/environment/index.ssf/2013/06/klamath_tribes_assert_water_ri.html (last visited August 19, 2016). A tentative settlement agreement provided amici some relief over the last three irrigation seasons. However, because their agreement was contingent upon the legislation of the separate Klamath Basin Restoration Agreement, amici and their members are under an imminent threat of another complete shut off in 2017, and beyond. *See* "Klamath Basin: Water pact crumbles in Congress after years of work," http://www.oregonlive.com/mapes/index.ssf/2015/12/klamath_basin_water_pact_crumb.html (last visited August 19, 2016).

government contemplated or anticipated that such fishing rights created with them an implied servitude on the quantity and quality of fish habitat. As such, the panel in this case had no basis to create such rights by implication. Indeed, in *ODFW* the Supreme Court held that when tribal land is sold or ceded in a "general conveyance" the conveyance carries with it all appurtenant rights, except those expressly reserved. 473 U.S. at 766, 774. In other words, lands that are sold or ceded by an Indian Tribe are divested free and clear of any appurtenant rights, servitudes or other encumbrances—except those expressly reserved. And yet, the panel in this case recognized an implied habitat protection servitude appurtenant to all the anadromous fish bearing streams in Washington State. The panel's ruling directly conflicts with *ODFW*.

In the Stevens Treaties, the only express servitude reserved was the right to fish at "usual and accustomed places," a right uniquely and specifically written into the Treaties. However, it is a gross distortion of the Treaties, and one that conflicts with *ODFW*, to imply from the reservation to access and fish at usual and accustomed fishing places an additional—and far more onerous—appurtenant servitude applicable from the mouth to the headwaters of every stream that supports anadromous fish in Washington State. Under *ODFW*, in order for such an

appurtenant servitude to exist, it had to be expressly reserved in the Treaties.[10] In the absence of such a reservation, the streams in Washington State are free of Treaty encumbrances for the express right of the Tribes to access, and fish at, usual and accustomed fishing places.

The same rationale applies to this Court's decision in *Adair II*. In *Adair II*, decided prior to *ODFW*, this Court conceptualized the Tribes' implied water right "as the entitlement … to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." 723 F.2d at 1411. In other words, the Court recognized a servitude to maintain a flow of water through the streams that pass through the ranches of amici and their members, despite the fact that lands were divested from the reservation free and clear of any such express encumbrance. Under *ODFW*, the Court cannot

[10] To the extent the United States and the Tribes believe that such habitat servitudes or conservation easements are necessary for restoring Tribal fisheries, the appropriate and just remedy is the federal acquisition of land and conservation easements to fulfill their obligations to the Tribes under existing federal programs (or new federal programs, with the aid of Congress). The answer is not to sue states, local governments, small business and private citizens seeking to establish "implied" servitudes which have no express basis in the Treaties.

create an implied habitat protection servitude over property that was sold or ceded by the Tribes without any such reservation.[11]

Amici urge the court to reconsider and reject the concept of implied habitat protection rights for the support of Indian fishing rights.

B. Should the Concept of Implied Habitat Protection Rights Stand, Amici Urge the Court to Clarify Those Rights

In its petition for rehearing/rehearing en banc, the State of Washington urges the Court to modify or clarify the "unworkable" rule issued by the panel in this case. Amici submit that what they have been through since this Court's decision in *Adair II* amply demonstrates, in practice, just how unworkable the concept of an implied habitat protection servitude really is. Amici have literally been through decades of litigation to determine what this Court meant by "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members." *Adair II*, 723 F.2d at 1414-15. The

[11] Although the panel also relied upon *Winters v. United States*, 207 U.S. 564 (1908), both this case and *Adair II* are unlike *Winters* and other cases decided under the implied federal reserved water right doctrine. In *Winters*, *State of Arizona v. State of California*, 373 U.S. 546, 599 (1963) and *Cappaert v. United States*, 426 U.S. 128, 138 (1976) the implied rights the Supreme Court recognized applied to lands that were part of a federal reservation land holding, upon which appurtenant rights could legally attach. *Winters* recognized rights appurtenant to the Fort Belknap Indian Reservation; *Arizona* recognized water rights appurtenant to five different Indian Reservations; and *Cappaert* recognized a right to maintain the level of a pool within a National Monument. Whereas, here, the panel in this case and the panel in *Adair II* recognized an implied right appurtenant to lands that were ceded by the Tribes, in direct contravention of *ODFW*.

State of Oregon threw up its hands and simply rejected the standard in favor of a "healthy and productive habitat" standard, a standard this Court vacated in *Braren*. Similarly, the panel in this case seems to have announced an implied right to protect habitat to the extent necessary to guarantee a certain number of fish.

The primary deficiency of a standard governed by the productivity of a habitat is its ambiguity. Ultimately, that ambiguity gives a blank check to the United States and certain Tribes to advocate for any level of protection they desire. Under this paradigm, Washington has been ordered to spend billions to repair culverts; and amici find themselves under the imminent and constant threat of having no water available to satisfy their water rights.

Moreover, the panel's rule fails to balance in any way the broader purposes of the Treaties at issue or Indian treaties in general. One of the purposes of Indian treaties is the cessation of land for settlement, which, under *ODFW*, must be assumed to be free of encumbrances unless expressly reserved. It is inconceivable that the Supreme Court, in carefully deciding to award the Tribes a maximum allocation of 50% of the harvestable fish in *Fishing Vessel*, would have conceived that the same fishing right also carried with it a sweeping right to enjoin all of the fish blocking culverts on all the anadromous fish streams in Washington State. The result is too drastic and lopsided to be a plausible construction of the Treaties.

Similarly, with respect to amici, application of a "productive habitat" standard to the former Klamath Reservation has led to an even more dramatically

lopsided result. The Klamath Tribes were awarded so much water that it largely defeats an entire purpose of the Treaty, to develop agriculture on the reservation. It is inconceivable that, in directing the Department of Interior to develop irrigation under General Allotment Act, Congress could have intended an implied water right to support fisheries that trumps another primary purpose of the treaty: agriculture.

Thus, if the concept of an implied habitat protection servitude is to stand, the State of Washington, other states, local governments, private citizens and amici need and deserve reconciliation of this implied right with the broader purposes of the treaties under which they arise. The current state of the law is unworkable and inequitable.

VI. CONCLUSION

Based on the foregoing, amici respectfully submit that the Court should grant rehearing.

DATED this 22nd day of August, 2016.

Respectfully submitted,

/s/ Dominic M. Carollo
Dominic M. Carollo, OSB #093057
Yockim Carollo LLP
430 SE Main St.
P.O. Box 2456
Roseburg, OR 97470
(541) 957-5900

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it was prepared using Times New Roman 14-point typeface and contains 4148 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

DATED this 22nd day of August, 2016.

/s/ Dominic M. Carollo

Dominic M. Carollo, OSB #093057
Yockim Carollo LLP
430 SE Main St.
P.O. Box 2456
Roseburg, OR 97470
(541) 957-5900

Of Attorneys for Amici Curiae