No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the "right of taking fish, at all usual and accustomed grounds and stations * * * in common with all citizens," reserved by respondent Indian Tribes in the Stevens Treaties, *e.g.*, Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133, imposes a duty on the State of Washington to refrain from building or maintaining culverts that directly block passage of a large number of anadromous fish to and from those grounds and that significantly diminish fish populations available for tribal harvest so that the Tribes cannot sustain a livelihood from their fisheries.

2. Whether the court of appeals correctly declined to apply the doctrines of waiver or laches to bar this suit, which addresses a treaty reserving rights and resources that pre-date the State, the scope of which has been in dispute for more than 100 years.

3. Whether the court of appeals correctly held that the district court did not abuse its discretion in enjoining the State to provide fish passage by addressing barrier culverts on a reasonable schedule necessary to ensure that the State acts expeditiously to remedy a violation of tribal treaty rights.

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OPINIONS BELOW

The amended order and opinion of the court of appeals (Pet. App. 58a-126a) are reported at 853 F.3d 946. Relevant opinions of the district court are reported at 20 F. Supp. 3d 986 (Pet. App. 127a-179a, 235a-242a), 20 F. Supp. 3d 828 (Pet. App. 249a-272a), and 19 F. Supp. 3d 1317 (Pet. App. 273a-282a).

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2017. A petition for rehearing was denied on May 19, 2017 (Pet. App. 1a-57a). The petition for a writ of certiorari was filed on August 17, 2017. The petition was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In 1804, Meriwether Lewis and William Clark set out to explore and map territory newly acquired by the United States in the Louisiana Purchase. As they traveled the last leg of their journey to the Pacific Ocean, they found the rivers "remarkably clear and crouded with salmon." 3 *Original Journals of the Lewis and Clark Expedition* 122 (Reuben Gold Thwaites ed. 1959). For the Indians they met there, these fish were "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States* v. *Winans*, 198 U.S. 371, 381 (1905).

1. From time immemorial, fishing has been central to the cultural, economic, and religious identity of the Indian tribes of western Washington. Each tribe "shared a vital and unifying dependence on anadromous fish," such as salmon, which "hatch in fresh water, migrate to the ocean where they are reared and reach mature size, and eventually complete their life cycle by returning to the fresh-water place of their origin to spawn." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662, 664 (1979) (*Fishing Vessel*). In addition to dictating the "movements of the largely nomadic tribes," and serving as "the great staple of their diet and livelihood," *id.* at 665 & n.6 (citation omitted), the fish also played an integral role in tribal religious life. "Indian religious ceremonies celebrated the first salmon of the run to encourage other fish to follow," J.A. 141a, and the tribes passed down stories designed to promote reverence for the fish and responsible stewardship of their fisheries. See J.A. 143a (Quinault legend warning of retribution for "greedy downstream" fishers); *ibid.* (Skokomish legend that overuse of fishing weirs would cause "the

salmon themselves [to] take offense"); see also J.A. 141a-144a.

In 1854 and 1855, under instructions from the Commissioner of Indian Affairs, Governor Isaac Stevens of the Washington Territory negotiated a series of treaties, known as the Stevens Treaties, with the tribes residing in what is now the western part of the State of Washington. J.A. 125a. In exchange for vast cessions of their territory, each tribe was promised a small reservation of land to serve as a permanent home, as well as the right to periodic monetary payments.

These treaties also guaranteed to each tribe a "right of taking fish." *Fishing Vessel*, 443 U.S. at 661-662 (citation omitted). Governor Stevens was well aware of "the vital importance of the fisheries" to the tribes. *Id.* at 666. He understood, too, that the tribes would not agree to give up their territory without a guarantee of their fishing rights as against "non-Indian settlers [who] might seek to monopolize their fisheries." *Ibid.* To that end, each of the Stevens Treaties contained a nearly identical reservation of rights:

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

Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133; see Pet. App. 68a.

2. For many years following the Stevens Treaties, the "Indians continued to harvest most of the fish taken from the waters of Washington." *Fishing Vessel*, 443 U.S. at 668. By the end of the nineteenth century, however, "non-Indians began to dominate the fisheries and eventually to exclude most Indians." *Id.* at 669. Washington enacted "discriminatory state regula-

tion[s]" designed to limit the tribes' access to their traditional fisheries, and increasing numbers of private and commercial fishing operations adopted "illegal exclusionary tactics." *Id.* at 669 & n.14. As the availability of salmon and other anadromous fish diminished, disputes over fishing rights proliferated between Washington and the tribes, which increasingly turned to the federal judiciary to protect their treaty rights. See, *e.g.*, *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Winans*, *supra*; see also *Fishing Vessel*, 443 U.S. at 669-670.

a. The State's efforts to prevent fishing by Indians at their traditional fisheries escalated in the 1960s, leading to widespread arrests and, in some cases, violence. Pet. App. 76a-77a. In 1970, the United States, on its own behalf and as trustee for several of the tribes, sued Washington in federal district court, seeking "an interpretation of the treaties and an injunction requiring the State to protect the Indians' share of the anadromous fish runs." *Fishing Vessel*, 443 U.S. at 669-670. Tribal plaintiffs joined the United States in the suit. The court bifurcated the proceedings. Pet. App. 78a.

In Phase I, the district court established the locations of the tribes' "usual and accustomed" fishing grounds and held that the tribes could take up to 50% of the harvestable fish from those grounds. *United States* v. *Washington*, 384 F. Supp. 312, 332-333, 343-344 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The court issued an injunction forbidding contrary state regulation, *id.* at 413-420, and it retained jurisdiction to address, in Phase II of the litigation, other unresolved issues arising out of the treaties, *id.* at 418-419.

The district court's ruling met substantial resistance from the State, and the Washington Supreme Court ruled that state agencies "could not comply with the federal injunction." *Fishing Vessel*, 443 U.S. at 672; see *id.* at 673 (Washington's "Fisheries [agency] was ordered by the state courts to abandon its attempt" to honor the injunction, and "the Game Department simply refused to comply"). This "widespread defiance of the District Court's orders" spawned additional litigation, which ultimately reached this Court in *Fishing Vessel*. *Id.* at 674.

There, the Court addressed the question whether the Stevens Treaties guaranteed the tribes only a right of "access to fishing sites 'in common with'" non-Indians (as Washington argued), or instead gave them "a right to harvest a share of the runs of anadromous fish," both on their reservations and at their traditional fisheries (as the United States and the tribes argued). 443 U.S. at 675. Based on "a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court's prior construction of the treaties," the Court concluded that the latter interpretation was correct. *Ibid.*; see *id.* at 675-685. The Court explained that, "[b]ecause the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a 'reservation' of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters." *Id.* at 678-679.

Next, the Court addressed the appropriate "equitable measure" for determining the tribes' share of the fish harvest. *Fishing Vessel*, 443 U.S. at 685. Based on the Court's "earlier decisions concerning Indian treaty rights to scarce natural resources," such as water, and

in light of apportionment standards rooted in the "Anglo-American common law," the Court determined that the tribes should be permitted to take up to a 50% share. *Id.* at 685-686 & n.27. But the Court emphasized that the 50% figure was a "maximum possible allocation," and that the actual amount should be "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Id.* at 686. Thus, should a tribe "dwindle to just a few members," or "find other sources of support that lead it to abandon its fisheries," then a lesser allocation might suffice. *Id.* at 687.

b. In 1976, the United States initiated Phase II of the litigation, seeking a determination, *inter alia*, that the Stevens Treaties guaranteed to the tribes "a right to have the[ir] fishery resource protected from adverse environmental actions or inactions of the State of Washington." J.A. 803a. The United States alleged that anadromous fish populations passing through the tribes' fisheries had been "substantially altered" by the activities of the State, J.A. 800a, including as a result of "[t]he improper placement of culverts," J.A. 806a. See J.A. 802a ("[M]igration routes have been restricted or blocked."); J.A. 806a ("[I]mproper culvert placement, size, or gradient will prevent the upstream migration of salmon and steelhead."). The district court ruled in favor of the United States, concluding that the right of the tribes under the treaties imposed on Washington a correlative duty "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs." *United States* v. *Washington*, 506 F. Supp. 187, 208 (W.D. Wash. 1980). The decision did not address the degradation of any particular habitat, however, nor did it specify any concrete remedy. See *ibid.*

The court of appeals vacated in relevant part. *United States* v. *Washington*, 759 F.2d 1353 (9th Cir.) (en banc) (per curiam), cert. denied, 474 U.S. 994 (1985). The court did not dispute that Washington was obligated under the treaties to refrain from actions that substantially degrade the tribes' fisheries. But it concluded that the district court, in granting relief against environmental degradation generally, had not sufficiently distinguished among "the myriad State actions that may affect the environment of the treaty area." *Id.* at 1357. The court of appeals determined that any further application of the tribes' treaty rights would have to await a future proceeding, in which the appropriate principles and remedies "w[ould] depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case." *Ibid.*

3. Washington maintains a statewide network of roads, many of which cross rivers and streams that salmon and other anadromous fish use to migrate between freshwater spawning grounds and the ocean. Culverts allow water to flow underneath the roads, "but many culverts do not allow fish to pass easily," and some "do not allow fish passage at all." Pet. App. 77a. So-called "barrier culverts" inhibit or prevent the natural migration of fish. *Ibid.*; see *id.* at 159a. A 1997 report by two state agencies, the Washington Department of Fish & Wildlife (WDFW) and the Washington State Department of Transportation (WSDOT), identified the use of barrier culverts as "one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington." J.A. 426a-427a. The report determined that culverts installed by WSDOT were, at the time of the report, blocking a "total potential spawning and rearing area" of more than 1.6 million square meters.

J.A. 430a; see Pet. App. 109a. Calling for the "identification and correction" of barrier culverts statewide, the report estimated that, at current funding levels, "it would take over 100 years to reach complete barrier resolution." J.A. 435a-436a.

a. In 2001, respondent Tribes filed a request for determination (similar to a complaint) in the Phase II proceeding, seeking declaratory and injunctive relief against Washington. J.A. 41a-58a. The Tribes requested an order requiring the State "to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced." J.A. 41a. The United States joined the proceeding, in its capacity as trustee for the Tribes, and sought an injunction calling on the State to identify and—within five years or another "necessary and just" period of time—replace state-maintained culverts that "degrade appreciably [the] passage of fish that otherwise would pass through usual and accustomed fishing grounds and stations so as to deprive the Tribes of the ability to earn a moderate living from the fishery." J.A. 63a.

In response, the State sought a declaration "that there is no treaty-based right or duty of fish habitat protection." J.A. 89a-90a. Washington also asserted various defenses, including waiver and estoppel. J.A. 86a-89a. Washington alleged that some of its barrier culverts had been built under highways funded in part by the United States, and that such culverts were "designed according to standards set or approved by the Federal Highway Administration" (FHWA), leading the State to believe "that by approving or failing to object to the State's culvert design and maintenance, the

FHWA had determined that the design and maintenance satisfied any treaty obligation." J.A. 78a.

b. The district court rejected the State's defenses, including waiver and estoppel. Pet. App. 273a-282a. The court determined that, under "binding authority" of this Court, the "acts of government agent[s]" cannot "constitute waiver of Indian rights" or estop the government so as to "defeat claims enforcing Indian rights." *Id.* at 274a.

On summary judgment, the district court ruled in favor of the Tribes and the United States on the issue of treaty rights. Pet. App. 249a-272a. Based on the text and negotiating history of the Stevens Treaties, the court concluded that the treaties promised the Tribes, which gave up nearly all of their land while securing protection for their right to take fish, "that neither the negotiators nor their successors would take actions that would significantly degrade the resource." *Id.* at 270a. The court further determined that "the building of stream-blocking culverts" may qualify as just such a "resource-degrading activit[y]." *Ibid.* The court explained, however, that the State's obligation to avoid substantially degrading the fish stocks passing through tribal fisheries "is not a broad 'environmental servitude' or the imposition of an affirmative duty to take all possible steps to protect fish runs," but instead is "a narrow directive to refrain from impeding fish runs in one specific manner." *Id.* at 271a.

c. In 2009 and 2010, the district court held a bench trial, limited by agreement of the parties to the effect of "culverts that block fish passage under State-owned roads." Pet. App. 173a; see *id.* at 128a. Based on extensive evidence, much of it uncontroverted, the court de-

termined that the State had violated "a narrow and specific treaty-based duty" to refrain from building or maintaining barrier culverts. *Id.* at 178a; see *id.* at 127a-179a.

First, the district court found that "habitat degradation" was a "primary cause" of the steep decline in fish stocks passing through tribal fisheries. Pet. App. 174a. In particular, the court found that barrier culverts installed and maintained by the State "are directly responsible for a demonstrable portion of the diminishment of the salmon runs." *Id.* at 175a. The court determined that improperly designed culverts have blocked the passage of fish, resulting in the loss of spawning and rearing habitats. *Id.* at 160a-161a; see *id.* at 160a ("[B]arrier culverts have a negative impact on spawning success, growth and survival of young salmon, upstream and downstream migration, and overall production."). One analysis of coho salmon in Skagit River tributaries, for instance, indicated that up to "58% of the loss of salmon production was attributable to barrier culverts." *Id.* at 161a.

The district court next found that "State action in the form of acceleration of barrier correction is necessary to remedy this decline in salmon stocks and remove the threats which face the Tribes." Pet. App. 177a. Action to remediate barrier culverts is the "highest priority for restoring salmon habitat," the court determined, due to the direct relationship between quality of habitat and salmon production. *Id.* at 157a. The court also found culvert remediation to be a "cost-effective and scientifically sound method" for restoring salmon habitat, "provid[ing] immediate benefit in terms of salmon production." *Id.* at 166a. Based on records from WDFW, the court determined that, at the time of trial, state-

owned culverts blocked access to about 1000 miles of streams, constituting nearly five million square meters of habitat. See *id.* at 156a-157a, 162a. But at the rate the State was addressing those barriers—eight per year between 2009 and 2011—"it would take the State more than 100 years to replace the 'significantly blocking' WSDOT barrier culverts that existed in 2009." *Id.* at 163a. The court further found that the number of known barrier culverts had in fact *increased* since 2009, as new barrier culverts were being built faster than existing ones were being corrected, *id.* at 163a-164a, indicating that "under the current State approach, the problem of WSDOT barrier culverts in the Case Area will never be solved," *id.* at 164a.

Finally, the district court determined that "[t]he balance of hardships tips steeply toward the Tribes in this matter." Pet. App. 177a. "The promise made to the Tribes that the Stevens Treaties would protect their source of food and commerce," the court explained, was "crucial in obtaining their assent." *Ibid.* Absent injunctive relief, it concluded, the Tribes will continue to sustain damage "not only economically but in their traditions, culture, and religion[,] interests for which there is no adequate monetary relief." *Ibid.* The court further found that the public interest would be served by "accelerat[ing] the pace of barrier correction," because "[a]ll fishermen, not just Tribal fishermen, will benefit from the increased production of salmon," and because "[t]he general public will benefit from the enhancement of the resource and the increased economic return from fishing." *Id.* at 177a-178a. The court accordingly found it appropriate to grant a permanent injunction "narrowly tailored to remedy [the] specific harms" alleged. *Id.* at 179a.

d. Following trial, the district court invited the parties to submit briefing on the proper scope of injunctive relief. Pet. App. 235a. The State declined to participate, however, "on the ground that it had not violated the Treaties and that, therefore, no remedy was appropriate." *Id.* at 107a.

The district court issued a permanent injunction requiring the State and its agencies to accelerate the pace of culvert remediation. Pet. App. 235a-242a. The injunction orders the State to prepare a list, using methodologies devised and adopted by WDFW, of barrier culverts under state-owned roads. *Id.* at 236a-237a. Culverts maintained by state agencies other than WSDOT were to be corrected by October 2016, the date by which those agencies were already expected under state law to correct such culverts. *Id.* at 237a; see *id.* at 148a-150a. With respect to barrier culverts maintained by WSDOT, the injunction orders remediation within 17 years of culverts with "200 lineal meters or more of salmon habitat upstream to the first natural passage barrier." *Id.* at 237a. For other, less-obstructive culverts, the injunction requires correction only "at the end of the culvert's useful life," or in connection with another highway project. *Id.* at 237a-238a. The injunction also grants the State permission to "defer correction" of WSDOT culverts that block up to 10% of total upstream habitat, subjecting those culverts to the more lenient end-of-useful-life schedule. *Id.* at 238a. Finally, the injunction allows the State to deviate from required design standards if it can establish, or the parties agree, that the standards are not feasible in light of particular "site conditions." *Id.* at 239a.

4. The State appealed but did not seek a stay of the injunction. As of February 2017, state agencies other

than WSDOT reported that they had largely completed correction of culverts subject to the injunction.[1]

a. The court of appeals affirmed. Pet. App. 58a-126a. At the outset, the court rejected the State's argument that it "has no treaty-based duty to refrain from building and maintaining barrier culverts" and even "has the right, consistent with the Treaties, to block every salmon-bearing stream feeding into Puget Sound." *Id.* at 86a-87a; see *id.* at 88a (State's attorney at oral argument stating "Your honor, the treaties would not prohibit that."). The court explained that "[t]he Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs." *Id.* at 91a; see *id.* at 91a-92a ("Governor Stevens did not make * * * such a cynical and disingenuous promise."). Examining the treaties' negotiating history, as well as this Court's interpretation of treaty-based fishing rights, the court held that the treaties prevent the State from rendering the Tribes' fishing rights "worthless" by constructing and maintaining culverts that block passage of anadromous fish to and from traditional tribal fishing grounds. *Id.* at 94a; see *id.* at 92a-94a.

Next, the court of appeals affirmed the rejection of Washington's equitable defenses. Pet. App. 96a-99a. Under longstanding precedents, the court explained, when the United States sues as a trustee for Indian tribes, it is not subject to laches, waiver, or estoppel based on the actions of government agents who purportedly have approved treaty violations. *Id.* at 97a-98a.

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[1] See Results Washington, *Fish Passage Barriers* (Feb. 13, 2017), https://data.results.wa.gov/reports/G3-2-2-c-Supplemental-Fish-Passage.

The court also declined to accept Washington's argument that those precedents had been "called in doubt" by *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005). Pet. App. 98a (citation omitted). In *City of Sherrill*, the Court rejected a tribe's attempt to invoke immunity from taxation for recently purchased land over which the tribe had not exerted sovereignty for 200 years. The circumstances of this case, the court of appeals explained, are "radically different from *Sherrill*," including because the Tribes have done nothing "to relinquish their rights under the Treaties"; they "have done nothing to authorize the State to construct and maintain barrier culverts"; and "Washington and the Tribes have been in a more or less continuous state of conflict over treaty-based fishing rights for over one hundred years." *Id.* at 99a.

Finally, the court of appeals rejected the State's arguments regarding the scope of injunctive relief. Pet. App. 104a-126a. The court concluded that "extensive evidence" supported the district court's finding that state-owned barrier culverts have a "significant adverse effect on salmon." *Id.* at 108a; see *id.* at 108a-109a. The State argued that correcting those state-owned culverts would not have a substantial impact "because of the presence of non-state-owned barrier culverts on the same streams." *Id.* at 110a. But the court rejected that argument for several reasons: First, the district court, in choosing to focus on state-owned culverts, "followed the practice of the state itself," *ibid.*; second, "almost ninety percent" of non-state barriers are upstream of state-maintained barriers, and more than two-thirds of downstream non-state barriers "allowed partial passage of fish," *id.* at 111a; and third, testimony and research on past culvert-removal projects showed that the

injunction would in fact provide an "immediate benefit" in a "cost effective" manner, *id.* at 113a. See *id.* at 108a-116a. The court also concluded the injunction was appropriate and consistent with equitable principles. *Id.* at 120a-125a.

b. The court of appeals denied rehearing en banc. Judge Fletcher, joined by Judge Gould, concurred in the denial, Pet. App. 6a-17a, and Judge O'Scannlain, joined at least in part by eight other judges, dissented, *id.* at 17a-41a.

SUMMARY OF ARGUMENT

The courts below properly concluded that the Stevens Treaties prohibit the State from imposing obstructions that substantially degrade or destroy the Tribes' traditional fisheries.

A. Since time immemorial, the Tribes have depended on their salmon fisheries, an annually renewable resource that they protected from obstructions. The Stevens Treaties, by "secur[ing]" to the Tribes the "the right of taking fish, at all usual and accustomed grounds and stations," assured the Tribes lasting federal protection for their preexisting right as they understood it. The Tribes relied on that protection when agreeing to cede almost all of their territory in return for small land reservations and fishing rights. And Governor Stevens viewed protecting tribal fisheries as key to his own goals of minimizing costs and avoiding subsidies for the Tribes. Neither party would have understood the treaties as protecting the Tribes' access to their traditional fisheries, yet permitting obstructions that substantially degraded those same fisheries.

Contemporaneous sources of law similarly protected fisheries against obstructions. The law of the Oregon Territory, later adopted for the Washington Territory,

prohibited obstructing rivers and streams. And under the common law, owners of land adjacent to streams through which migratory fish swam could not inhibit fish passage.

This Court's cases have also consistently interpreted the Stevens Treaties as protecting fish stocks against man-made causes of degradation. Neither the State nor the Tribes have been permitted to frustrate the treaties' goals by undermining the shared resource. That approach is consistent as well with this Court's decisions concerning reserved water rights, which have protected water access when necessary to the functioning of a reservation. The tribal salmon fisheries at issue here have historically been just as necessary to the Tribes.

The State's characterization of the rulings below as guaranteeing the Tribes "a permanent standard of living from fishing" (Br. 32) is inaccurate, as the district court explained, Pet. App. 280a. The relief requested by the United States and the Tribes, granted by the district court, and affirmed on appeal was limited to protection against affirmative actions of the State that substantially degraded tribal fisheries. The State's current litigating position—that courts may grant relief against those whose conduct might "destroy the fisheries" (Br. 41)—is largely consistent with that conclusion.

B. The State argues that relief is precluded here by the State's (unspecified) "equitable defenses," because it built many of the barrier culverts that block the Tribes' fisheries in reliance on federal funds and specifications. The State relied below on "waiver and/or estoppel," J.A. 86a-87a, but waiver is not an equitable defense, and the State abandoned its estoppel argument on appeal. In any event, the actions or inactions of government officials cannot preclude the United States

from seeking relief on behalf of Indians for violations of federal law.

Contrary to the State's argument, its equitable defenses are not supported by *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005), where this Court rejected a tribe's unilateral attempt to resurrect its inherent sovereignty that had lain dormant for 200 years. The United States was not a party in *City of Sherrill*, as it is here. Unlike the tribe in *City of Sherrill*, moreover, the Tribes have not slept on their rights. And they have appropriately sought relief in a judicial proceeding, alongside the United States, rather than attempting to act unilaterally, as in *City of Sherrill*.

The State's equitable defenses are also without merit. The FHWA provides all States with general guidelines for building culverts and funding for highways. But no federal statute or regulation *required* the State to use a particular model or prevented the State from making adjustments to take account of local conditions. Indeed, the State recently adjusted its culvert construction to facilitate fish passage.

C. The injunction in this case properly requires the State to accelerate its existing efforts to remove obstructions that substantially degrade or destroy tribal fisheries.

First, the record shows that replacing the State's barrier culverts will have a significant positive impact. The injunction requires replacement of barriers with 200 meters or more upstream to the first "natural passage barrier." Pet. App. 237a. The State argues that removing state-owned barriers will have no effect if other man-made barriers block the same stream. But non-state barriers tend to be clustered upstream—often far upstream—from the State's barriers, and

many non-state barriers allow partial fish passage. The injunction also gives the State flexibility to account for other obstructions when choosing which barriers to remediate and which to defer for correction. And there is no reason to assume that non-state barriers, which are illegal under state law, will always block streams; indeed, the record shows the opposite.

Second, "extensive evidence, much of it from the State itself," Pet. App. 115a, shows that the State's barrier culverts have substantially affected salmon harvests. State agency reports, expert testimony, and field studies all point to the same conclusion.

Third, the State's assertion that its money would be better spent on other (unspecified) salmon-recovery efforts is untimely, given the State's refusal in the district court to propose alternative relief. The State's assertion is also contradicted by record evidence showing that replacing barrier culverts is highly cost-effective and fast-working. The State offers no record support for its estimate, which the district court rejected, that replacement will cost $2.3 million per culvert, nor for its projection that complying with the injunction will cost more than $2 billion. Among other things, that figure misconstrues the injunction as requiring correction of *every* state-owned culvert, and it attributes *all* of the State's remediation costs to the injunction—even though the injunction merely accelerates efforts that the State would be required to undertake regardless.

Fourth, the district court appropriately balanced the equities, taking into account the interests of the State and its citizens as well as the Tribes (which the State ignores).

ARGUMENT

More than 150 years ago, in exchange for ceding millions of acres of land in western Washington and obtaining only small reservations, the Tribes secured federal protection for their pre-existing "right of taking fish." The courts below correctly held that the State has violated that right by building and maintaining culverts that prevent salmon from reaching the Tribes' traditional fisheries. Just as the State may not cut the Tribes off from their fisheries, neither may the State substantially degrade or destroy those fisheries by obstructing the salmon.

A. The "Right Of Taking Fish," Reserved To The Tribes Under The Stevens Treaties, Includes A Right Against Substantial Degradation Of Tribal Fisheries

Because a "treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations," any interpretation must seek to give effect to "the intention of the parties." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). But in recognition of the United States' "superior negotiating skills and superior knowledge of the language in which the treaty is recorded," this Court has construed Indian treaties "'not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Id.* at 675-676 (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899)); see *id.* at 667 n.10 (interpreter in Stevens Treaties negotiations used limited "'Chinook jargon' to explain treaty terms," and that jargon "was imperfectly (and often not) understood by many of the Indians") (citation omitted). This Court accordingly has looked "beyond the written words to the larger context that

frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citation and internal quotation marks omitted).

In this case, both text and context strongly support reading the Stevens Treaties as protecting tribal fisheries against substantial degradation caused by the State's barrier culverts. Just as the State cannot interfere with the right of tribal members to fish at their usual and accustomed grounds, neither can it render that right meaningless by obstructing and depleting the fish runs.

1. The treaty signatories intended to protect tribal fisheries from obstructions that would substantially degrade the resource

Prior to the Stevens Treaties, the Tribes possessed an unfettered right to draw salmon and steelhead from their traditional fisheries, a right "upon the exercise of which there was not a shadow of impediment." *United States* v. *Winans*, 198 U.S. 371, 381 (1905). But the Tribes knew as well that they would be unable to fish in perpetuity unless the resource was protected against overfishing. When Governor Stevens asked the Tribes to cede nearly all of their land, in return for a promise to secure their "right of taking fish," both sides thus understood that he was offering them more than just an opportunity to draw from ever-diminishing stocks.

a. Early explorers of the Oregon Territory left impressed by the fish-eating Indians they encountered. The taking of salmon, one reported, "seems to have been conceded to them as an inherent right, which no white man has yet encroached upon." H.R. Misc. Doc. No. 29, 30th Cong., 1st Sess. 27 (1848). The Tribes were,

of course, "almost entirely dependent upon salmon for their subsistence." *Ibid.* But they regarded the fish with more than mere "solicitude [for] and interest" in a food source; they looked upon it with "feelings of religious solemnity and awe." *Ibid.* Tribal rituals "endow[ed] the fish with supernatural qualities," and salmon drawn from early runs were venerated before the community in a "First Salmon ceremony." J.A. 143a; see J.A. 143a-144a ("The first fish was usually placed with its head pointing upstream so the rest of the salmon would continue upstream and not turn back to the sea.").

The Tribes' dependence on and reverence for salmon is reflected in their "develop[ment of] effective tools that managed this vital resource and protected it from depletion." J.A. 142a. The Tribes prohibited conduct that might deter the salmon from returning to traditional fishing grounds. See J.A. 141a ("Indian taboos discouraged disturbing stream beds and muddying waters during runs."); J.A. 143a ("No rubbish or food scraps were to be tossed in the river, no canoes were to be bailed out in it."). They also "mitigated the impact of their efficient fishing technologies on stocks" by implementing measures designed to let sufficient numbers of migrating fish pass through their fisheries unharmed. J.A. 142a. These measures were reinforced by legends. See J.A. 143a (Skokomish belief "that if they failed to open their weirs," the salmon "might take offense" and "not return the following year"); see also J.A. 142a. The Tribes thus saw themselves as stewards of a precious and vulnerable resource, with a shared responsibility to "ensure the continued abundance of the salmon fishery

on which they depended, encouraging the salmon to return year after year." J.A. 144a.

b. By the time Governor Stevens and his associates began negotiating with the Tribes, "whites and Indians on Puget Sound had been in steady contact for over twenty years." J.A. 126a. They were therefore keenly aware during the negotiations of the "vital" role that the tribal fisheries served. J.A. 127a. Negotiators sought to dissuade the Tribes from "retain[ing] a large amount of land," to which "they would be confined"; they explained instead that the Tribes should keep only a "small tract," along with the right to continue using their traditional fishing grounds. J.A. 129a. Governor Stevens also believed that advocating that combination—limited territory for the Tribes, paired with continued rights in their usual fisheries—would help him carry out "his very clear instructions to keep the cost of the treaty down." J.A. 130a; see *ibid.* ("By guaranteeing the Indians a right to their share of the bounty of the land, rivers, and Sound, the treaties would enable them to feed themselves at little cost to the government.").

Governor Stevens accordingly spoke to the Tribes in terms that made clear that he had no intention to disturb their traditional relationship to the salmon harvest. The Yakamas, for instance, were told that they "would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising." *Fishing Vessel*, 443 U.S. at 667 (citation omitted). Promises to other Tribes were similarly unequivocal. See *id.* at 667 n.11 ("This paper is such as a man would give to his children and I will tell you why. * * * This paper secures your fish[.]") (citation omitted); J.A. 128a-129a (interpreter "reassured the Indians

that they were 'not called upon to give up their old modes of living and places of seeking food'"). Governor Stevens thus told the Indians at the Port Elliott Treaty that a treaty with the government meant they would "not have simply food and drink now but that [they] may have them forever." J.A. 132a.

c. The language of the Stevens Treaties is consistent with the parties' understanding that the Tribes were obtaining protection against degradation of their fisheries by others. The treaties "secured" to the Tribes "[t]he right of taking fish, at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory." Treaty of Medicine Creek art. III. As this Court has explained, that provision "was not a grant of rights *to* the Indians, but a grant of rights *from* them—a reservation of those not granted." *Winans*, 198 U.S. at 381 (emphasis added); see *Fishing Vessel*, 443 U.S. at 678 ("The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previously exercised."). The Stevens Treaties thus preserved the Tribes' pre-existing "right of taking fish" at their traditional fisheries. The treaties merely added a "limitation" specifying that the right was no longer "exclusive," but would thenceforth be exercised "'in common with citizens of the Territory.'" *Winans*, 198 U.S. at 381.

Because the Stevens Treaties did not grant the Indians a new right, but instead "effect[ed] a reservation of a previously exclusive right," *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 176 n.16 (1977) (*Puyallup III*), the treaties must be read in a manner consistent with the Tribes' understanding of that pre-existing right. See *Fishing Vessel*, 443 U.S. at 678-679. And as described above, the Tribes understood that a

fishery's ongoing viability required "protect[ing] it from depletion." J.A. 142a. The Tribes therefore could not have heard Governor Stevens promise that the government would secure their fisheries "forever," J.A. 132a, without understanding that the government (and its successors) would refrain from taking actions to substantially degrade or even destroy those fisheries.

A contrary reading, moreover, would be inconsistent with the purposes of the Stevens Treaties. It would make little sense for the Tribes to secure protection for their right of access to traditional fisheries, yet allow obstructions preventing fish from traveling to those same fisheries or returning to their spawning grounds to perpetuate the species. The Tribes agreed to accept smaller reservations of land because they were assured that, in return, they would receive strong protection for their most precious and vital resource. See *Fishing Vessel*, 443 U.S. at 676 ("[T]he Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent."). For his part, Governor Stevens sought to ensure that even "after the huge cessions that the treaties proposed the Indians would still be able to feed themselves," thus avoiding the need for governmental subsidies. J.A. 132a; see J.A. 130a. To read the Stevens Treaties in a contrary manner, as promising the Indians "access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs," would accordingly be more than just "cynical and disingenuous." Pet. App. 91a-92a. It would contradict the very purposes for which the treaties were negotiated.

2. Contemporaneous sources of law protected fisheries against obstructions

The legal backdrop against which the Stevens Treaties were negotiated strongly supports the conclusion that the Tribes' "right of taking fish" included protection against obstructions that could destroy their fisheries. The Indians with whom Governor Stevens negotiated were not "learned lawyers," *Fishing Vessel*, 443 U.S. at 676 (citation omitted), and they likely were unaware of these legal principles. But they nevertheless would have expected, at a minimum, no *lesser* protection for their fishing rights than were enjoyed at that time by other "citizens of the Territory," with whom the Tribes were to share the fisheries "in common." Treaty of Medicine Creek art. III; see *Fishing Vessel*, 443 U.S. at 676 n.22 (tribal fishing rights under Stevens Treaties "are admittedly not 'equal' to, but are to some extent greater than, those afforded other citizens").

a. From the start, Congress recognized the existence of a "valuable fishery" in the Oregon Territory and took steps to ensure that the salmon there would not be "driven out" by obstructions. Cong. Globe, 30th Cong., 1st Sess. 1020 (1848). The Territory's Organic Act accordingly provided "[t]hat the rivers and streams of water in said Territory of Oregon in which salmon are found * * * *shall not be obstructed* by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams." Act of Aug. 14, 1848, § 12, 9 Stat. 328 (emphasis added). That provision was incorporated into the law of the Washington Territory shortly before the Stevens Treaties were negotiated, see Act of Mar. 2, 1853, § 12, 10 Stat. 177, a protection of which Governor Stevens was undoubtedly aware.

b. Protection against fishery-depleting obstructions also has deep roots in the Anglo-American legal tradition. British common law authorities recognized that possession of a fishery came with an implied "right" in the free passage of migratory fish. *Weld* v. *Hornby*, (1806) 103 Eng. Rep. 195 (K.B.) 199. The erection and use of stone weirs, "through which the fish could not insinuate themselves," were accordingly considered "as public nusances." *Id.* at 198-199; see J.B. Phear, *A Treatise on Rights of Water* 29-30 (London 1859) ("[T]he owner of the land * * * cannot do anything which shall sensibly affect the natural supply of fish in the parts of the stream belonging to other proprietors.").

Early American case law adopted the same view, which was understood to be "founded upon that universal principle of every just code of laws, *Sic utere tuo ut alienum non lædas*," *Commonwealth* v. *Chapin*, 22 Mass. (5 Pick.) 199, 207 (1827), that is, "Use your own property such that you do not injure another's." As the Massachusetts Supreme Judicial Court explained, "[t]he value of [a] fishery depends on the shoals of fish that enter the river to pass to the ponds above to cast their spawn: and if none were allowed to pass, the fishery would be of little value." *Stoughton* v. *Baker*, 4 Mass. (1 Tyng) 522, 527 (1808). Riparian land owners were thus obligated not to take any affirmative action to substantially inhibit fish migration, an obligation that applied regardless of whether the obstruction was upstream or downstream. See *Hart* v. *Hill*, 1 Whart. 124, 137 (Pa. 1836) ("The owner of the land * * * must not, even out of fishery season, do any act which will injure or destroy the fishery."); *Shaw* v. *Crawford*, 10 Johns. 236, 238 (N.Y. 1813) (per curiam) ("Every owner of a

mill-dam on a stream which fish from the ocean annually visit, is bound to provide a convenient passage way for the fish to ascend."); see also *Chapin*, 22 Mass. (5 Pick.) at 205.

By the time of the Stevens Treaties, these common law principles had gained near universal recognition in America. Those who acquired land adjacent to rivers and streams in which migratory fish passed thus held their property "subject to the qualification" that they could not use it "to impede the passage of fish up the river by means of dams or other obstructions." Joseph K. Angell, *A Treatise on the Law of Watercourses* 83 (Boston 1854); see 2 Francis Hilliard, *The American Law of Real Property* 145 (New York 1855) (similar); 3 James Kent, *Commentaries on American Law* 504 (New York 1854) (Such an "impediment was at common law a nuisance."); see also Humphrey W. Woolrych, *A Treatise of the Law of Waters* 170-171 (Philadelphia 1853). These authorities reinforce the conclusion that the Stevens Treaties, by securing the Tribes' rights in their traditional fisheries, also secured the usual legal protection against obstructions that would substantially degrade or destroy those fisheries. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (treaty must be construed "in light of the common notions of the day"); see also *Fishing Vessel*, 443 U.S. at 686 n.27 (construing Stevens Treaties consistent with traditional "presum[ptions]" under "Anglo-American common law").

3. Precedents of this Court confirm that the "right of taking fish" includes protection against substantial depletion of the fisheries

The past hundred years have seen repeated litigation over fishing rights under the Stevens Treaties. As a consequence, this Court has on a number of occasions

been called upon to interpret and apply the Tribes' "right of taking fish." Although the circumstances of these disputes have varied, the Court's decisions have consistently emphasized the need, in accordance with the treaties, to protect fish stocks against degradation of the Tribes' fisheries. And analogous Indian-law precedents, addressing access to other precious natural resources, have taken a similar approach.

a. This Court first addressed the Stevens Treaties in *Winans*. That case involved the use by non-Indians of "fish wheels," which were devices for drawing large numbers of salmon from the streams. 198 U.S. at 379. The Solicitor General, on behalf of the Yakama Tribe, argued that the fish wheels were capable of "catch[ing] salmon by the ton" and thus "rapidly diminishing the supply," *id.* at 372, and he urged the Court to impose limitations "as to their number, method and daily hours of operation," *id.* at 375. The owners of the fish wheels argued in response that the Yakama Treaty guaranteed the Indians only the right to equal treatment under state law; having obtained from the State valid licenses for the fish wheels, therefore, the owners claimed they could not be restrained in using the devices. *Id.* at 379.

This Court concluded that the Yakama Treaty would have meaningful effect only if it was interpreted as "reserv[ing]" for the Tribe's members a right to continue catching fish in their usual and accustomed fisheries. *Winans*, 198 U.S. at 381. The fish wheels, the Court explained, put that right in jeopardy. See *id.* at 382. The Court accordingly remanded for the Circuit Court to devise an "adjustment and accommodation" along the lines proposed by the Solicitor General. *Id.* at 384. As this Court later explained, that disposition "clearly included removal of enough of the fishing

wheels to enable some fish to escape and be available to Indian fishermen upstream." *Fishing Vessel*, 443 U.S. at 681; see U.S. Br. at 55, *Winans*, *supra* (No. 180) ("Certainly the wheels should not be permitted to create and maintain a monopoly until all the fish are gone.").

Also significant is a trio of decisions regarding the Treaty of Medicine Creek, signed by the Puyallup and Nisqually Tribes in 1854. In the first case, the question was whether the treaty allowed the State of Washington to ban use by the Tribes, at their traditional fisheries, of certain fishing nets for catching salmon and steelhead. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 397-398 (1968). The Court concluded that the treaty preserved the State's ability to enact "nondiscriminatory measures for conserving fish resources." *Id.* at 399. But it remanded to the lower courts to determine "[w]hether the prohibition of the use of set nets in these fresh waters was a 'reasonable and necessary' conservation measure," *id.* at 401 (citation omitted), and also whether the restrictions had been adopted in a manner that discriminated against the Indians, *id.* at 403.

Following remand, Washington reinstated "its total prohibition of net fishing for steelhead trout." *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44, 46 (1973) (*Puyallup II*). This Court invalidated the prohibition, concluding that the State had discriminated by barring "all Indian net fishing" while permitting "hook-and-line fishing" engaged in by non-Indian fishermen. *Id.* at 48. The Court remanded for a determination regarding "what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for per-

petuation of the species." *Ibid.* And the Court emphasized again that the State was authorized under the treaty to adopt nondiscriminatory measures to protect the fisheries shared by the Tribes and the State. See *id.* at 49 ("[T]he Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."); *id.* at 50 (White, J., concurring) ("[T]he Indian fishery cannot take so many fish that the natural run would suffer progressive depletion.").

Puyallup III involved yet another dispute over the Puyallup Tribe's treaty rights, this time regarding the State's authority to regulate fishing on the Tribe's reservation in order to protect the shared resource. 433 U.S. at 167. The Court concluded that the Tribe's members were subject to reasonable regulation for on-reservation fishing, at least insofar as the fishing occurred on land no longer owned by the Tribe. *Id.* at 173-177. But the Court emphasized, yet again, the importance of preserving the stock of fish, explaining that allowing the Tribe's members to take fish until the point of extinction would "totally frustrate * * * the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek." *Id.* at 176.

Finally, in *Fishing Vessel*, this Court held that the Stevens Treaties guaranteed to the Tribes a share of the salmon and steelhead that pass through their traditional fisheries, rather than merely an "equal opportunity" with non-Indians to attempt to catch fish. 443 U.S. at 676. The Court also determined that the Tribes were entitled to a 50% "equitable" share of "each run that passes through a 'usual and accustomed' [fishing] place." *Id.* at 685. Their 50% share, however, could be reduced if a lesser amount was sufficient to "assure[] that the Indians' reasonable livelihood needs would be

met." *Ibid.* That division, the Court explained, would appropriately "prevent [the Tribes'] needs from exhausting the entire resource and thereby frustrating the treaty right of all other citizens of the Territory." *Id.* at 686 (brackets and internal quotation marks omitted).

A common thread running through these decisions is the Court's recognition that the Stevens Treaties were intended to protect against the "progressive depletion" of treaty fisheries by human activity. *Puyallup II*, 414 U.S. at 50 (White, J., concurring). The Court has accordingly interpreted the Tribes' "right of taking fish" in light of that basic goal, ensuring that the Tribes have "meaningful use of their accustomed places to fish," *Fishing Vessel*, 443 U.S. at 676, while simultaneously preventing either the Tribes or non-Indians from engaging in behavior that might threaten the "perpetuation of the species," for the benefit of both. *Puyallup II*, 414 U.S. at 48. For the same reasons, the Tribes' right should be interpreted as including protection against substantial depletion of their fisheries through imposition of impassable obstructions by the State. Any other approach, this Court has recognized, would undermine the shared resource and "totally frustrate" the treaties' purpose. *Puyallup III*, 433 U.S. at 176; see *Winans*, 198 U.S. at 381 ("No other conclusion would give effect to the treaty.").

b. Interpreting the Tribes' "right of taking fish" as securing protection for their fisheries is also consistent with this Court's decisions concerning tribal water rights. In *Winters* v. *United States*, 207 U.S. 564 (1908), the Court held that the express reservation of land for the Fort Belknap Indian Reservation impliedly reserved a sufficient interest in water from the river to fulfill the purposes of the reservation. *Id.* at 576-577.

Without enough water to irrigate their land, the Court explained, the reservation would become "practically valueless" to the Indians, thereby "impair[ing] or defeat[ing]" Congress's reasons for creating it. *Ibid.* The Court accordingly upheld an injunction barring non-Indians from diverting upstream water that was required to irrigate reservation lands. *Ibid.*

Following *Winters*, other decisions of this Court have upheld the principle that when Congress creates an Indian reservation, it reserves for the tribe's use a quantity of water "necessary to accomplish the purposes for which the reservation was created." *Cappaert* v. *United States*, 426 U.S. 128, 139 (1976); see *Arizona* v. *California*, 373 U.S. 546, 599-601 (1963); *United States* v. *Powers*, 305 U.S. 527, 532-533 (1939). That principle, which derives in part from the assumption that Congress always "intend[s] to deal fairly with the Indians," applies absent statutory or treaty language to the contrary. *Arizona*, 373 U.S. at 600. For the same reasons, only a subsequent congressional enactment can divest the tribe of its water rights. See *Powers*, 305 U.S. at 533.

The *Winters* line of cases supports reading the Stevens Treaties to include protection for tribal fisheries against substantial depletion. The government well knew that the Tribes had a "vital and unifying dependence on anadromous fish." *Fishing Vessel*, 443 U.S. at 664. Such fish were no less important to them than irrigation was to the Indians on the Fort Belknap Reservation. And like other tribes whose water rights have been protected, the Tribes "were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect" their fisher-

ies. *Id.* at 667. Such protection was accordingly necessary "to carry out the purposes of the treat[ies]." *Id.* at 688. Indeed, unlike in *Winters*, where the reservation of water was implied, here the Stevens Treaties *expressly* secure the right of taking fish.

The State argues (Br. 39) that reliance on *Winters* here would be "misguided" for several reasons, but none is persuasive. The State first asserts (*ibid.*) that the *Winters* doctrine applies only to the "reserving [of] lands, not treaty rights." That is incorrect. In *Powers*, for instance, the Court held that tribal water rights were impliedly reserved under an 1868 treaty with the Crow Indians. See 305 U.S. at 528-529, 532-533. The Court upheld the Indians' rights because "nothing in the statutes after 1868 [was] adequate to show Congressional intent" to deny them access to "essential water * * * guaranteed by the Treaty." *Id.* at 533. Washington's argument, moreover, ignores that this Court relied on the *Winters* doctrine in *Fishing Vessel*, where it construed the Tribes' fishing rights under the Stevens Treaties to be consistent with a "like interpretation" applied in the water-rights context. 443 U.S. at 684; see *id.* at 685-686 (relying on *Winters* and *Arizona* in determining the appropriate allocation of the fish harvest).

Washington next contends (Br. 40) that, unlike the water rights at issue in *Winters*, "where the necessity was apparent as of the moment the lands were reserved," fishing rights are far less important to the Tribes and to "the purpose of the treaties." That contention simply cannot be reconciled with the historical record. See *Winans*, 198 U.S. at 381 (fishing rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed"); see also J.A. 128a. And Washington's further assertion (Br. 40)

that, even absent treaty protection, "the State has strong incentives and a demonstrated commitment to preserve salmon runs"—in addition to contradicting the detailed findings of the district court, see pp. 51-52, *infra*—has little bearing on the proper interpretation of treaties signed in 1854 and 1855. In any event, the Tribes' century-long experience with the State, see pp. 3-5, *supra*, shows that such incentives are not an adequate substitute for treaty protection.

Finally, Washington argues that *Winters* cannot support imposition of an "amorphous obligation" to protect the Tribes' fisheries because this Court in *Arizona* rejected, as too indeterminate, a proposed allocation of water equivalent to the Indians' "'reasonably foreseeable needs.'" Pet. Br. 40 (citation omitted). That argument, however, concerns the appropriate measure of the treaty right, not whether the treaty right exists as an initial matter.

4. The State mischaracterizes the decisions below as guaranteeing the Tribes a minimum standard of living

Throughout its brief, the State characterizes the rulings below (Br. 32) as having interpreted the Stevens Treaties to "guarantee[] a permanent standard of living from fishing." See Br. 34 ("moderate living from fishing"); see also Br. 26, 36, 37, 39. The State argues (Br. 31) that inferring such a guarantee would create an unworkable "new right," one which lacks support in the treaties' text and negotiating history, as well as this Court's precedents. But the State mischaracterizes the rulings below and ignores the actual scope of relief requested, granted, and upheld on appeal.

a. The current proceeding was initiated by the Tribes, which requested an injunction prohibiting the

State and its agencies "from constructing or maintaining any culverts beneath State highways that block passage of fish that would otherwise return to or pass through tribal usual and accustomed grounds and stations," as well as directing the State to remediate its barrier culverts to ensure "fish passage." J.A. 54a. The injunction requested by the United States was similar, seeking to require the State to cease building new culverts, and to replace existing ones, that "degrade appreciably [the] passage of fish that otherwise would pass through usual and accustomed fishing grounds and stations so as to deprive the Tribes of the ability to earn a moderate living from the fishery." J.A. 63a; see J.A. 63a-64a. The United States' injunctive request, although it used the phrase "moderate living," did not call on the State to *guarantee* a moderate living to the Tribes from fishing, nor to guarantee any other minimum standard. Rather, it requested that the State stop building or maintaining barrier culverts that "degrade appreciably" the Tribes' fisheries. J.A. 63a.

The district court correctly understood that no party was requesting the guarantee of a "moderate living." It criticized the State for proceeding "on a faulty premise by suggesting that the Tribes are suing to enforce their right to earn a moderate living." Pet. App. 280a. The court instead found it "clear" that "the plaintiffs are seeking to prevent the state from interfering with the treaty right of taking fish by affirmatively diminishing the number of fish available for harvest." *Ibid.* And the court granted an injunction—which never used the phrase "moderate living" or any equivalent—that ordered the State to undertake concrete steps closely tailored to that specific goal. *Id.* at 235a-242a.

The court of appeals upheld the injunction. Pet. App. 126a. The court explained that the injunction was necessary because the State had a "treaty-based duty to refrain from building and maintaining barrier culverts." *Id.* at 86a. The court did, at one point, state that the treaties included "a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes," *id.* at 94a (citation omitted), a statement that the State quotes repeatedly here (Br. i, 1, 25, 27, 31, 32, 38, 43). But Judge Fletcher, who wrote the panel opinion, explained at the rehearing stage that the opinion "does not hold that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances." Pet. App. 10a. Rather, he noted, the panel "h[e]ld only that the State violated the Treaties when it acted affirmatively to build roads across salmon bearing streams, with culverts that allowed passage of water but not passage of salmon." *Id.* at 10a-11a. In any event, the panel's statement could not alter its actual holding or the scope of relief ordered.

b. The State's mischaracterization of the decisions below is particularly notable because the State now largely appears to *agree* with the lower courts' construction of the Stevens Treaties. Relying on *Fishing Vessel*, the State maintains that a court "'may enjoin those who would interfere with' the court's custody of the res, here, the fishery. Thus, if anyone acted to destroy the fisheries that are subject to allocation, the district court could enjoin such destruction." Pet. Br. 41 (quoting 443 U.S. at 692 n.32). The State cites approvingly an injunction formerly upheld by the court of appeals that was designed to ensure "the safe passage of every salmon [that] was necessary to preserve the species." *Ibid.* (quoting *United States* v. *Oregon*, 657 F.2d

1009, 1011 (9th Cir. 1981) (Kennedy, J.)). And the State also argues (Br. 42) that "a State decision to destroy the fishery would necessarily involve some degree of discrimination against tribes, and could be enjoined on that basis as well."

Those arguments contradict the position that the State took earlier in this litigation, where it argued that it "ha[d] the right, consistent with the Treaties, to block every salmon-bearing stream feeding into Puget Sound." Pet. App. 87a; see *id.* at 88a (counsel's statement at oral argument). But the State's new position in effect aligns with the decisions below and the position of the United States and the Tribes. The district court found and the court of appeals agreed, see *id.* at 95a, that removal of state-owned barrier culverts was necessary to preserve salmon stocks against substantial depletion and thus to prevent "interfere[nce]" with tribal fisheries. Pet. Br. 41 (citations omitted). The State may dispute that its actions have caused such interference, but that at most constitutes a disagreement with the district court's factual findings regarding the effects of the State's barrier culverts, not a disagreement about the underlying legal obligation.

5. The State's other arguments concerning interpretation of the Stevens Treaties are unpersuasive

a. The State argues (Br. 32) that the Stevens Treaties cannot be read to afford substantive protection for the Tribes' fisheries in the absence of explicit treaty "text" to that effect. But the treaties were "not a grant of rights to the Indians," but rather a "reservation" of their pre-existing fishing rights. *Winans*, 198 U.S. at 381. As shown above, those pre-existing rights were understood to include protection against obstructions. See pp. 20-24, *supra*.

This Court has also refused, when interpreting Indian treaties, to "suppose[] that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government." *Winters*, 207 U.S. at 577. For instance, no explicit language in the Stevens Treaties promised the Tribes the right to a "share" of the salmon harvest, and yet the Court in *Fishing Vessel* found it "unambiguous" that such a right existed. 443 U.S. at 679. And *Fishing Vessel* recognized that right despite the negotiating parties' expectations that salmon stocks would forever remain "inexhaustible," *id.* at 669, showing that the State is wrong to assume (Br. 34) that the parties therefore could not have intended protection for the Tribes' fisheries.

For similar reasons, the State is wrong to rely (Br. 31-32) on other Indian-law precedents that have "rejected claims that lacked support in treaty language." Both cases cited by the State (*ibid.*) limited tribes' off-reservation rights based on treaty language that *expressly* granted rights only "within the limits of the reservation." *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 766 (1985); see *id.* at 767 (right to fish only in streams and lakes "included in said reservation") (citation omitted); *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 465 (1995) (right to property only "within their [*i.e.*, the tribe's] limits") (citation omitted). No similar treaty language limits the right invoked by the Tribes here.

b. The State argues (Br. 38) that the court of appeals' decision is "irreconcilable" with *Fishing Vessel* because the Court there "made clear that the 'moderate living' standard is an equitable limit the State could invoke in the future as a ceiling on the tribal share of the

catch, not a floor on fish harvests that the treaties always guaranteed." But *Fishing Vessel* described, as "the central principle" of allocation, the Tribes' right under the Stevens Treaties to "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." 443 U.S. at 686. In this case, the district court and the court of appeals determined that the Tribes had been rendered unable to achieve even a moderate living from their fisheries; that finding, along with many others, supported the conclusion that the State's barrier culverts had degraded those fisheries in violation of the Stevens Treaties. See Pet. App. 95a. *Fishing Vessel* is consistent with that conclusion.

c. The State asserts (Br. 43) that the decisions below are "unworkable" because no court or party has "provided a workable definition of 'a moderate living' from fishing." That argument rests on the same "faulty premise," just addressed, "that the Tribes are suing to enforce their right to earn a moderate living." Pet. App. 280a. The district court found it "unnecessary" to define the term here in light of the Tribes' showing that the State's barrier culverts have substantially degraded the fisheries, resulting in the "impairment of [the Tribes'] treaty rights." *Id.* at 263a. The State also ignores that the "moderate living" standard was articulated by this Court in *Fishing Vessel*, as a measure of the Tribes' fair allocation of the fish harvest. 443 U.S. at 686. That same standard has been applied by the lower courts since. See *United States* v. *Washington*, 157 F.3d 630, 651-653 (9th Cir. 1998), cert. denied, 526 U.S. 1060 (1999). In any event, the State now agrees that the treaties would support an injunction forbidding

the State "to *destroy* the fisheries." Pet. Br. 41 (emphasis added). Unless the State means that only the complete destruction of the fisheries would suffice, they offer no touchstone as an alternative to the "moderate living" standard this Court adopted.

d. Finally, the State argues (Br. 44-45) that the court of appeals' decision could be applied to prohibit a large "range of human activities that can affect salmon," leaving the State "paralyzed in its decision-making." Yet as Judge Fletcher explained on rehearing, the decision did not hold that the Stevens Treaties created a right "against all human-caused diminutions [in the salmon population], or even against all State-caused diminutions." Pet. App. 10a; see *id.* at 178a (rejecting notion that State's duty amounts to a "broad environmental servitude"). Rather, the courts below held only that the State may not, by obstructing fish passage, so degrade the Tribes' fisheries that its members are left "unable to harvest sufficient salmon to meet their needs." *Id.* at 158a. The ruling below thus is not "the imposition of an affirmative duty to take all possible steps to protect fish runs, * * * but rather a narrow directive to refrain from impeding fish runs in one specific manner." *Id.* at 271a.[2]

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[2] The State argues (Br. 36) that the interpretation of the Stevens Treaties adopted below "runs contrary to the parties' understanding of the treaties as demonstrated by their own behavior." The State points (*ibid.*) to various "actions" by the federal government that supposedly caused damage to tribal fisheries. Yet the actions cited by the State were initiated several decades—and in some cases a full century—after the treaties were signed. See Pet. Br. 8 & n.6 (citing a "federally-licensed dam in 1924" and the "straightening of Puyallup river" in the mid-1900s). They shed no light on the interpretive question at issue here.

B. The Courts Below Properly Rejected The State's Equitable Defenses

The State argues (Br. 45-52) that, even if it has violated the Tribes' rights under the Stevens Treaties, relief should nevertheless be denied because of conduct by the United States that renders such relief inequitable. The State claims that, when building many of its barrier culverts, it used federal highway funds and followed federal specifications; yet the State claims (Br. 47) that the United States "never said a word" about treaty rights until this litigation. The State's equitable defenses are foreclosed by directly applicable precedent, and in any event they are meritless.

1. The State's equitable defenses do not apply to the United States

As an initial matter, although the State repeatedly refers to its "equitable defenses," it never specifies *which* equitable defenses it means to invoke. In the district court, "Washington asserted a defense of 'waiver and/or estoppel.'" Pet. App. 96a. Yet waiver is not an equitable defense, see 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2946 (3d ed. 2013) (discussing equitable defenses to injunctive relief, but not waiver), and no government agent would have authority to waive the Tribes' treaty rights, see *Minnesota*, 526 U.S. at 202. As for estoppel, the court of appeals determined that the State abandoned that defense on appeal. See Pet. App. 96a.

Even assuming the State had preserved its estoppel argument, that argument would be foreclosed by this Court's precedents, which make clear that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not

sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). In *Utah Power & Light*, the United States sought injunctive relief against a power company that had, without legal authority, erected "dams, reservoirs, pipe lines, power houses, [and] transmission lines" on a federal forest reservation. *Id.* at 402. The company claimed that its actions had been authorized by "officers or agents of the United States," on whose permission the company had relied, and that the United States was therefore "estopped to question" the company's conduct. *Id.* at 408. This Court rejected that defense in a single sentence, quoted above, and it upheld the injunction. *Id.* at 409, 411.

Other decisions have applied the same principle, including where estoppel has been asserted against relief sought by the United States on behalf of Indian tribes. See *Cramer* v. *United States*, 261 U.S. 219, 234 (1923) ("The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights."); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 290 (1902) (estoppel inapplicable where company's timber logging, in violation of Indian treaty rights, was done "under the superintendence of a government agent, who personally directed what timber should be cut"). Accordingly, the State cannot claim (Br. 46) that the United States is foreclosed from obtaining relief on behalf of the Tribes because the State built its barrier culverts in reliance on federal funds, specifications, or permits.

Finally, the State's allegation (Br. 46) that the United States failed to object to the State's barrier cul-

verts, "throughout the many decades" in which the culverts were built and maintained, is essentially an invocation of the equitable defense of laches. Yet "laches is not imputable to the Government." *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824) (Story, J.); see *Utah Power & Light*, 243 U.S. at 409 (rejecting defendant's laches argument that "officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein"); *United States* v. *Beebe*, 127 U.S. 338, 344 (1888) ("[T]he United States are not * * * barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government."); *United States* v. *Thompson*, 98 U.S. (8 Otto) 486, 488-489 (1879). That principle, too, has been repeatedly invoked in the Indian-rights context. See *Board of Cnty. Comm'rs* v. *United States*, 308 U.S. 343, 351 (1939) (rejecting applicability of laches "to suits by the Government, whether on behalf of Indians or otherwise"); *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926).

2. This Court's decision in* City of Sherrill *does not support the State's defenses

The State nonetheless contends (Br. 48-52) that its equitable defenses are supported by this Court's decision in *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005). In *City of Sherrill*, the Oneida Indian Nation purchased, in the late 1990s, fee land that had been part of its historic reservation but had not been within the Nation's control for 200 years. *Id.* at 202. The Nation then asserted that its purchases had "unified fee and aboriginal title," such that the Nation could "now assert sovereign dominion over the parcels" to bar imposition of city taxes. *Id.* at 213. This

Court rejected the Nation's argument. Because the Nation had not exerted control over the land for two centuries, and because its reassertion of control after such a "long lapse of time" would upset "longstanding observances and settled expectations," the Court held that the Nation's attempt was foreclosed by principles of equity, particularly laches. *Id.* at 216-218; see *id.* at 216-221.

City of Sherrill does not assist the State here. Most notably, the United States was not a party there, and no equitable defense was applied against it. No reason exists, therefore, to believe that the Court had overturned, *sub silentio*, principles that have governed since before the Founding. See *Thompson*, 98 U.S. (8 Otto) at 489-490.

The State's argument here is also wholly unlike the rationale of *City of Sherrill*. There, an equitable bar was imposed against the same party (the Oneida Indian Nation) that had been found to have slept on its rights. In this case, by contrast, the State does not claim that the Tribes have done anything "to relinquish their rights under the Treaties," "to authorize the State to construct and maintain barrier culverts," or to "reviv[e] * * * disputes or claims that have long been left dormant." Pet. App. 99a. As *City of Sherrill* explained, laches is "principally a question of the inequity of permitting [a] claim to be enforced," 544 U.S. at 217-218 (citation omitted), and there would be nothing equitable about nullifying the Tribes' treaty rights.

City of Sherrill is fundamentally different in other respects as well. The Court repeatedly emphasized there that the tribe had sought to "unilaterally" reinstate its inherent jurisdiction, 544 U.S. at 203, 219, 220,

221, rather than availing itself of a more "proper avenue" for reestablishing its sovereignty—the federal land-into-trust process, *id.* at 221. Here, by contrast, the Tribes sought relief, alongside the United States, in an already-active federal judicial proceeding. Cases such as *Winans*, the *Puyallup* trio, and *Fishing Vessel* make clear that that was an appropriate path to vindicating treaty rights, and no other "avenue" for protecting those rights existed.

Finally, the State is wrong to argue (Br. 49) that application of *City of Sherrill* is supported by *Nevada* v. *United States*, 463 U.S. 110 (1983), and *Arizona* v. *California*, 460 U.S. 605 (1983). In those cases, the Court applied principles of issue preclusion (in *Nevada*, 463 U.S. at 145) and claim preclusion (in *Arizona*, 460 U.S. at 626) to claims that had been fully litigated, or could have been litigated, by the United States in prior suits that had become final. Those anti-relitigation principles have no application in the present circumstances.

3. Even if equitable defenses were available in this case, the State's defenses would not succeed

The State's equitable defenses are, in any event, meritless. The State asserts (Br. 30) that the United States "designed" its barrier culverts, but that is incorrect. The State claims to have modeled its culverts on a technical reference manual of the Federal Highway Administration entitled "Hydraulic Engineering Circular #10" (HEC#10). J.A. 375a.[3] But neither that nationwide reference manual, nor any federal law, required the State to replicate the culvert designs in HEC#10 or

[3] A now-superseded version of HEC#10 from 1972 is available at https://www.fhwa.dot.gov/engineering/hydraulics/pubs/hec/hec10.pdf.

"preclude[d] the State from modifying the design standards to accommodate local conditions, such as fish passage." J.A. 735a. The federal publication, moreover, provided only general "industry" standards "for the design of road culverts for hydraulic purposes," J.A. 375a, and it did not "contain[] any direction on how to construct a hydraulic fish passage culvert," J.A. 715a. See J.A. 734a (HEC#10 contains no directions "regarding the design criteria for fish passage"). As the manager of WSDOT's culvert-correction program testified, "the standards for fish passage that [WSDOT] uses are set by the State of Washington Department of Fisheries and *not by the Federal Highway Administration*." J.A. 715a (emphasis added). In fact, when the State recognized, in the 1990s, that some culverts modeled on HEC#10 "failed to provide for adequate fish passage," the State modified its design. J.A. 101a. In sum, the State cannot blame the United States for its own failure to address the fish-passage problem earlier.

Nor is there merit to the State's argument (Br. 46) that the United States cannot seek relief to vindicate the Tribes' treaty rights because the State built many of the culverts using federal funds. The Federal-Aid Highway Program (FAHP) allows the States to choose highway projects to receive federal financial assistance for planning, design, and construction. 23 U.S.C. 145(a). Although projects are completed using federal funds, the construction itself "shall be undertaken by the respective State transportation departments or under their direct supervision." 23 U.S.C. 114(a); see 23 U.S.C. 116(b) ("It shall be the duty of the State transportation department * * * to maintain" FAHP-funded projects.).

And while FAHP-funded projects in the National Highway System must meet minimum design standards,[4] those standards are general and flexible. The standards for "Bridges, Structures, and Hydraulics," 23 C.F.R. Pt. 650 (capitalization and emphasis omitted), do not require the States to use any particular design, and they expressly tell States to take account of "environmental concerns," 23 C.F.R. 650.115(a). Washington's receipt of federal highway funds thus cannot justify or excuse its construction of salmon-blocking culverts.[5]

Finally, the State errs in arguing (Br. 46-47) that the United States should be precluded from seeking relief here because of a long delay in asserting the Tribes' treaty rights. The United States initiated the present suit in 1970, when salmon had "become [so] scarce" that treaty fishermen could no longer sustain themselves from tribal fisheries. *Fishing Vessel*, 443 U.S. at 669. Even before that litigation culminated in this Court's *Fishing Vessel* ruling, the United States in 1976 initiated Phase II, in which it sought a determination that the Stevens Treaties guaranteed the Tribes "a right to have the[ir] fishery resource protected from adverse environmental actions or inactions of the State," J.A. 803a, and it identified "[t]he improper placement of culverts" as one example, J.A. 806a. That proceeding was

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[4] State culverts built under roads that are not in the National Highway System are not subject to federal standards. See 23 U.S.C. 109(*o*); 23 C.F.R 625.3(a)(2).

[5] The State's reliance (Br. 46) on the fact that some of its culverts received Clean Water Act permits is misplaced. The relevant permits, under Section 404 of the Act, see J.A. 78a, were unrelated to the State's treaty obligations. See Pet. App. 279a ("The duties imposed by each originate with different legal sources, and are measured by different legal standards.").

resolved in 1985, without any determination regarding the State's culverts. See pp. 6-7, *supra*. The United States joined this proceeding, which focuses exclusively on the culvert problem, in 2001. J.A. 64a. The United States thus has diligently pursued relief on behalf of the Tribes, and its conduct cannot be compared to the 200-year lapse at issue in *City of Sherrill*.

C. The Injunction Provides Appropriate Relief To Redress The Treaty Violation

Having determined that the State violated the Tribes' treaty rights, the district court issued an injunction requiring the State to accelerate existing efforts to remediate its barrier culverts, while also giving the State ample discretion to implement the injunction in the least-costly and most-efficacious manner. The State "declined to participate in the formulation of the injunction on the ground that it had not violated the Treaties and that, therefore, no remedy was appropriate." Pet. App. 107a. Now, although the State does not identify any clearly erroneous finding of fact, the State nevertheless argues that the injunction was overly broad and inappropriate. The State's arguments are meritless and are refuted by the record.

1. The record shows that replacing the State's barrier culverts will have a substantial impact

The State argues (Br. 53) that the injunction "forces the State to replace culverts where doing so will make no difference to salmon." Because the injunction accelerates remediation for state-owned barrier culverts with "200 lineal meters or more of salmon habitat upstream to the first *natural passage barrier*," Pet. App. 237a (emphasis added), the State claims (Br. 53) that replacement is required even though "other man-made

barriers upstream or downstream prevent salmon from reaching the state culvert or a traditional tribal fishing place." The State's argument is unpersuasive for several reasons.

First, trial evidence showed that non-state barriers tend to be highly clustered upstream from state-owned barriers, so that the State's remediation efforts will allow the salmon access to significant upstream habitat. Where a stream has "both state and non-state barriers," almost 90% of the non-state barriers are upstream of the state-owned barriers. Pet. App. 111a; see J.A. 97a (map showing state barriers on main stems of streams, with other barriers clustered upstream). Even for the minority of non-state barriers that are downstream, most (69%) permit partial "passage of fish." Pet. App. 111a. And as for the other barriers, many state-owned culverts are downstream from only one (20%) or two (10%) non-state barriers, and a plurality (38%) are downstream from *no* non-state barriers. J.A. 445a.

Second, no evidence supports the State's assertion (Br. 53) that replacement of a downstream state-owned barrier "will have no impact" if another man-made barrier exists upstream. Many of the upstream non-state barriers allow partial fish passage, such that eliminating downstream barriers will produce immediate "habitat" benefits. J.A. 779a-780a. And even where non-state barriers block *all* fish passage, they are often far upstream. For instance, on a creek touted by the State as having 36 non-state barriers and only one state-owned barrier, "the nearest non-state barrier is almost a half mile upstream." Pet. App. 111a. The State's own expert testified that correcting a barrier culvert produces a real "benefit" even where the distance to the

next upstream barrier is "short." J.A. 704a. And a different witness for the State also agreed that the presence of non-state barriers upstream is no excuse for failing to correct state-owned barriers downstream. J.A. 754a.

Third, the injunction allows the State to account for the presence of upstream non-state barriers when deciding which of its own barriers to prioritize. The State may defer correcting high-priority culverts (*i.e.*, those blocking more than 200 lineal meters of habitat) that account for up to 10% of "total blocked upstream habitat." Pet. App. 115a. If the State makes "the amount of blocked habitat" the "sole criterion," evidence shows that the State would be permitted to defer remediation of approximately 230 state-owned culverts. *Ibid.* And, of course, the State may defer correction of *all* low-priority culverts until the end of the culvert's useful life, or until an independently undertaken highway project would require replacement anyway. *Id.* at 114a.

Fourth, and perhaps most fundamentally, the State's argument is based on an implicit assumption that other barrier culverts upstream of its own will never be replaced. Nothing in the record supports that assumption. To the contrary, state law requires landowners to remove obstructions, see Wash. Rev. Code Ann. §§ 77.15.320, 77.57.030 (West 2010), and the presence of illegal upstream barriers cannot justify the State in leaving its own barriers in place downstream. In fact, at the time the injunction was issued, hundreds of non-state barriers were being corrected each year, J.A. 633a, and "experience" shows that state action often encourages private landowners to "tak[e] care of their [own] culverts." J.A. 780a. But to realize full benefits

from removing those private barriers, state-owned barriers must also be corrected. J.A. 755a. That is why the State's "priority index" ignores other man-made barriers, rather than treating them as if they were natural barriers. Pet. App. 110a-111a; J.A. 697a. The State correctly notes that "the Priority Index does not *dictate* the order in which the State replaces culverts," Br. 54 (emphasis added), but the State does rely on the index "to help decision-makers prioritize culverts for correction," even if case-specific adjustments are sometimes made, Pet. App. 145a.

2. The record contains ample evidence that barrier culverts have affected salmon harvests

The State asserts (Br. 56-58) that "no persuasive evidence" connects barrier culverts to declining salmon harvests. That assertion is contradicted by "extensive evidence, much of it from the State itself." Pet. App. 115a. A state-agency report identified road culverts as "one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington." J.A. 427a. Other evidence showed the same. See Pet. App. 161a (analysis of coho salmon in Skagit River tributaries indicating that up to "58% of the loss of salmon production was attributable to barrier culverts"); *id.* at 162a (testimony that barriers can have a "devastating" effect on salmon populations) (citation omitted); see also *id.* at 160a (barriers "reduc[e] productivity and eliminat[e] some populations") (citation and emphasis omitted). Evidence also persuasively showed that correcting barriers—thereby reconnecting habitats—has been proven to have a "high probability of success" for improving salmon populations. J.A. 774a; see Pet. App. 113a ("There's an immediate access and immediate benefit to additional habitat when we replace a culvert.");

id. at 111a-112a (describing positive results from culvert-removal projects on the Stillaguamish and Lower Elwha Rivers).

In response, the State notes (Br. 56-57) that salmon populations declined in the late 1800s "because of overfishing," that the State's highway system "has been essentially the same size since the 1960s," and that salmon harvests "fluctuated enormously" between 1985 and 2003. Yet those facts at most[6] provide circumstantial evidence for the district court's view "that culvert correction is not the only factor in salmon recovery." Pet. App. 114a; see *id.* at 132a. They do not undermine the court's basic finding that "[f]ish passage barrier culverts have a negative impact on spawning success, growth and survival of young salmon, upstream and downstream migration, and overall production." *Id.* at 160a. And they certainly do not show that the court's finding to that effect was clearly erroneous.

3. Nothing in the record supports the State's untimely suggestion that funds would be better spent on other salmon-recovery efforts

Despite having refused to participate in formulating the injunction in the district court, Pet. App. 107a, the State now argues (Br. 55) that its money could be better spent on other—unspecified—"salmon recovery programs." Extensive trial evidence, however, showed that replacing barrier culverts is highly "cost effective" and has "immediate benefit." Pet. App. 113a; see *ibid.* ("the cost per smolt produced is relatively low"); J.A. 689a (barrier replacement provides "the biggest bang for

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[6] Even if the State's highway system has not grown much since the 1960s, the number of state-owned barrier culverts has continued to increase. See Pet. App. 164a.

your buck"); J.A. 782a (expert identified "reconnecting" habitats as highest financial priority). Evidence also showed that barrier replacement has a faster "response time" than other salmon-recovery measures. J.A. 775a; see *ibid.* (study showing that salmon recolonization begins "within a week" of removing obstructions); *ibid.* ("other techniques might take decades before we see [a] response").

The State estimates (Br. 55) that replacing each culvert will cost approximately $2.3 million. But the State supports that figure (Br. 20 n.24) with a citation to extra-record materials that the State itself created. At trial, the State offered a similar estimate, which the district court rejected as inconsistent with the record, noting that the State's "actual cost of construction" has averaged approximately $660,000 per replacement. Pet. App. 170a; see *id.* at 119a (noting that State's own witness listed figure far less than $2.3 million, which itself "could not be confirmed").

The State's projection (Br. 55) that complying with the injunction "will cost over $2 billion" is again supported only by extra-record material—this time, what looks to be a slide-show presentation. See *id.* at 55 n.33. The State produced a similar estimate below, but the court of appeals noted that it was "demonstrably incorrect." Pet. App. 119a. In addition to relying on the same inflated per-culvert estimate discussed above, the $2 billion figure incorrectly assumed that the State would be required to replace "all 817 of the state-owned barrier culverts," ignoring that the injunction permits the State to defer correcting hundreds of its "more costly culverts." *Ibid.* The State's estimate also erroneously assumed that *no* culvert-replacement efforts would occur if not for the injunction, ignoring that the

injunction merely accelerates efforts that the State would be required to undertake "in any case." *Ibid.* Finally, the estimate ignored millions of dollars that the State has received annually in federal funding for barrier correction. *Id.* at 120a; see *id.* at 171a.[7]

4. The district court correctly found that the balance of equities favors providing a remedy for the State's treaty violations

Finally, the State's assertion (Br. 58-59) that the district court ignored the equities in crafting the remedy in this case is contradicted by the court's decision. Pet. App. 176a-179a; see *id.* at 120a-121a. The court simply reached a result with which the State disagrees. The State's one-sided account of the relevant equities (Br. 59), moreover, omits any mention of the Tribes' treaty rights or the State's role in degrading tribal fisheries.[8] Yet the court found that the Tribes "have been harmed economically, socially, educationally, and culturally by the greatly reduced salmon harvests that have resulted from State[-]created or State-maintained fish passage barriers." Pet. App. 176a. That harm is "ongoing," and the State's efforts to address it thus far "have been in-

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[7] As the district court found, nothing supports the State's assertion (Br. 56) that other salmon-recovery efforts (or other vital services) will suffer as a result of the injunction. See Pet. App. 122a-123a, 171a-173a.

[8] The State also suggests (Br. 58) that the injunction is inappropriate because the State is a "nonparty" to the Stevens Treaties. That suggestion is incorrect. See *Winans*, 198 U.S. at 381-382 (treaty rights were "intended to be continuing against the United States and its grantees as well as against the state and its grantees"); see also *Fishing Vessel*, 443 U.S. at 692 n.32 (injunction appropriately applied to "nontreaty fishermen").

sufficient." *Ibid.* The court also found that the injunction would serve "the public's interest," by restoring salmon stocks upon which all its citizens rely. *Id.* at 178a. In sum, as the court of appeals noted, "[i]t was not an abuse of discretion to require the State to pay for correction of its own barrier culverts." *Id.* at 120a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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