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Essay
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ENVIRONMENTAL CHANGE, CULVERTS, AND THE "RIGHT OF TAKING FISH" UNDER THE STEVENS TREATIES

In 2018, the U.S. Supreme Court affirmed without opinion a judgment that requires the State of Washington to replace hundreds of highway culverts that hinder fish passage. It was the result of a 40-year litigation strategy that tribal advocates pursued with the goal of establishing a treaty-based, broadly-applicable rule of law prohibiting fish habitat degradation. This Essay examines the history of treaty fishing rights litigation in the Pacific Northwest, federal policies that encouraged settlement and environmental alteration, and the culvert litigation and its aftermath. The Essay concludes that the culvert litigation did not establish a broad rule of law, and proposes that engagement with state political and administrative processes is a more effective way for tribes to achieve public policy goals.

ESSAY CONTENTS

*985 I. THE STEVENS-PALMER TREATIES

For untold centuries, native peoples in what Americans call the "Pacific Northwest" depended on fish, game, wild plants, and trade for their livelihood. [1] Lewis and Clark and other explorers noted the abundant salmon in the Columbia River area. [2] Fish, especially salmon, sustained the native peoples. [3] Indian people today still retain that deep connection to the landscape and the food it produces. [4]

In 1846, the United States and Great Britain settled their claims to the Oregon Country and set the international boundary at the forty-ninth parallel. [5] Congress organized the Oregon Territory as a government in ***986** 1848. [6] The Oregon Territory Act provided "[t]hat nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and

such Indians." [7] Congress then authorized the negotiation of treaties with the Indian tribes for "lands lying west of the Cascade Mountains." [8] But before any treaties were completed, the Oregon Donation Land Act had thrown open the land to settlement and induced non-Indians to migrate and take up land claims. [9] Territorial officials negotiated some treaties with tribes south of the Columbia River in 1851, but those treaties were never ratified. [10] The need for treaties intensified as more settlers arrived, and Congress created Washington Territory in 1853 out of a portion of Oregon Territory. [11]

Isaac Stevens was appointed Superintendent of Indian Affairs for Washington Territory, which stretched over what are now the States of Washington and Idaho and part of the State of Montana. [12] Between December 1854 and July 1855, he and his Oregon counterpart, Joel Palmer, negotiated ten treaties in which Indian tribes ceded land to the United States in exchange for money, goods, and services. [13] Stevens was instructed to clear ***987** title to the lands and to collect the Indians on reservations, where they would be taught farming and trades. [14] The Indians and federal officials agreed, however, that the Indians should be able to continue gathering traditional foods outside the reservations. All ten treaties contain a provision substantially similar to this:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands .... [15]

Today, the U.S. government recognizes twenty-five modern tribes as political successors to the tribes that entered into the Stevens-Palmer Treaties. [16]

***988 II. TREATY-RESERVED EASEMENT OF ACCESS TO OFF-RESERVATION USUAL AND ACCUSTOMED FISHING PLACES**

After the treaties were executed, there were plenty of fish for a while, and Indians continued to take fish as they always had. As settlers moved in, however, many of the old fishing places were on lands owned by non-Indians, some of whom denied the Indians access. [17]

After canning became commercially possible in the 1860s, demand for canned salmon soared, and so did fishing by non-Indians--first in the Columbia River, and then in Puget Sound. [18] Settlers and canneries installed fish wheels and traps in the channels where salmon migrated--the very places where Indians had always fished. [19] Along the Columbia River, conflict arose when private land owners sought to prevent Indians from crossing their land or fishing at the wheel sites. [20] The Washington Territorial Supreme Court, and later the U.S. Supreme Court, ruled that the land owners could not exclude the Indians. The Court held that the treaty language securing a right of taking fish "at all usual and accustomed places" reserves for the Indians an easement to get to and take fish at the usual and accustomed places in the lands the Indians ceded to the United States, even though the land may have passed into private ownership. [21]

***989 III. STATE CONSERVATION REGULATION**

By the 1880s, overfishing by non-Indians was already depleting some salmon runs in the Columbia River. [22] By 1915, the same thing was happening in Puget Sound. [23] State legislatures tried to control overfishing by enacting time, place, and manner regulations. Did these state conservation laws apply to treaty Indians? Under the Supremacy Clause of the U.S. Constitution, federal statutes and treaties "shall be the supreme law of the land," preempting contrary state law. [24] But the Stevens-Palmer Treaties do not mention states. What is the relationship between the treaties and state laws for salmon conservation?

That question demanded an answer when the Washington Legislature enacted the first comprehensive state Fisheries Code in 1915.[25] Two cases soon came before the Washington Supreme Court, which ruled that treaty Indians were fully subject to state law.[26] But that was not the end of the story. The states of Oregon, Idaho, and especially Washington spent the next sixty years litigating whether, and to what extent, the Stevens-Palmer treaties preempted state fishing regulations as applied to treaty Indians taking fish at usual and accustomed places.[27]

Ultimately, the U.S. Supreme Court ruled that the treaties preempt *some* state laws--those that are discriminatory and not necessary for the conservation of fish.[28] But when are state regulations discriminatory? That question was litigated in the 1960s and 1970s, most famously in the Boldt[29] Decision.

*990 IV. THE BOLDT DECISION

Indians historically fished in rivers, with winter villages often located at the mouths of major rivers. As non-Indian motorized fishing boats moved out into the salt water, they could intercept migrating salmon before the fish got to Indian fishing places in the rivers.[30] State regulators encouraged non-Indian salt water fisheries, and then sought to restrict fishing in the rivers--including tribal fishing--in order to allow enough fish to reach the spawning grounds and reproduce.[31]

In 1968, the United States sued the State of Oregon, alleging that Oregon's Columbia River fisheries management practices were discriminatory because they allocated most of the available salmon catch to fisheries located downstream of Indian fishing places. The United States contended that the treaties required Oregon to allow a "fair and equitable share" of Columbia River salmon runs to pass upstream to the fishing places of four treaty tribes.[32] Judge Robert Belloni agreed.[33] *United States v. Oregon* remained an open case for fifty years, until the court administratively closed it in 2018.[34]

The United States filed a similar lawsuit against the State of Washington in 1970, this one involving the entire Puget Sound region, much of Washington's Pacific Ocean coast, and by 1973, fourteen tribes and six treaties.[35] The United States' legal theory was the same as it had been in *United States v. Oregon*--the State could regulate treaty Indian fishing for conservation, but regulations that failed to provide the tribes with an opportunity to take a fair and equitable share of fish could not be justified as conservation-based.[36] The case was assigned to Judge George H. Boldt.

The parties offered several different interpretations of the treaties. The United States contended that the State could regulate treaty fishing "to the ***991** extent necessary to protect the fishery resource,"[37] but that the treaties also entitle the tribes to a "fair" or "equitable" share of fish.[38] The Washington Department of Fisheries, which regulated salmon, took a somewhat similar position.[39] The tribes contended that the State could regulate treaty fishing only as a last resort to prevent destruction,[40] and that the treaties entitled them to take as many fish as they needed "for a subsistence and livelihood."[41] The Washington Department of Game, which regulated steelhead trout as a "game fish," contended that the State could regulate for conservation, defined broadly, and the treaties did not require any allocation to tribal fisheries.[42]

The case was tried to the court in 1973. Judge Boldt hoped the final outcome "[would] provide a means for all of us, Indians and non-Indians, of coming together as citizens in common of the United States, and acting like brethren in that wonderful relationship."[43]

Judge Boldt issued a decision in February 1974, and an injunction implementing it six weeks later.[44] Following precedent, he ruled that the State could regulate fishing by treaty Indians only if the regulations were "reasonable and necessary for

conservation"[45] and nondiscriminatory.[46] But he also concluded that state regulations were nondiscriminatory only if they provided treaty Indians with an opportunity to take a share of fish not needed for spawning.[47] Treaty tribes could also regulate fishing by their own members.[48]

In devising an equitable remedy to implement the declared treaty right to a fair share, Judge Boldt concluded that equal shares were fair. He enjoined the State from regulating its fisheries in a manner that would fail to ***992** make half the harvestable fish available to tribal fisheries.[49] This would require drastic cuts in non-Indian fishing.[50] Judge Boldt retained jurisdiction to help the parties resolve problems that might arise in the implementation of his decision.[51] *United States v. Washington* remains an open case today, though most of the active litigation in the twenty-first century has been intertribal.[52]

The State appealed, and the Ninth Circuit affirmed.[53] Initially, the U.S. Supreme Court denied review, but it took up the case after the Washington Supreme Court disagreed with Judge Boldt's rulings and created a conflict between the state court and federal court interpretations of the treaties.[54]

In the U.S. Supreme Court, the tribes urged the Justices to adopt the livelihood-based treaty interpretation they had originally advanced at trial.[55] They argued that "the tribes are entitled to an opportunity to catch sufficient fish to enable them to earn a livelihood as well as satisfy their subsistence and ceremonial requirements."[56]

The Supreme Court did not adopt the tribes' interpretation, rejecting the contention "that the treaties had reserved a pre-existing right to as many fish as their commercial and subsistence needs dictated."[57] Instead, agreeing with Judge Boldt, the Court held, "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish."[58]

But the Court was mindful of the Tribes' economic dependence on fishing. It gave considerable weight to the Tribes' historic dependence on salmon when it reviewed the equitable remedy Judge Boldt had ordered to ***993** implement the treaty right to a "fair share."[59] The Court agreed that equal shares were equitable, in part because of "the Indians' reliance on the fish for their livelihoods."[60] The Court said, however, that if a tribe were to turn to new economic pursuits or dwindle in population, the trial court in its equitable discretion could reduce the portion allocated to that tribe because the "livelihood" of the tribe might not reasonably require fifty percent, and an equal division would be unfair to non-Indians.[61] Thus, the Court held that "a livelihood--that is to say, a moderate living"--defines the maximum tribal share, not the minimum as the Tribes had urged.[62]

The State accepted the Supreme Court's *Fishing Vessel* decision,[63] and, during the 1980s, tribal and state leaders worked out a process for cooperative management of their fisheries.[64] It remains in place today.[65]

*994 V. POPULATION GROWTH AND INFRASTRUCTURE DEVELOPMENT CREATE ENVIRONMENTAL CHALLENGES FOR SALMON

After the 1850s, the non-Indian population of Washington Territory grew at first at a modest pace.[66] That changed when the federally-chartered Northern Pacific Railway completed its line to Tacoma in 1883.[67] Suddenly, it was easy for people to immigrate to Washington from elsewhere. Washington Territory's population was about 75,000 in 1880.[68] Ten years later, it was almost 360,000.[69] By 2010, Washington State's population exceeded 6.7 million, including about 61,000 tribal members.[70]

The land cessions in the treaties "furthered the national program of transforming wilderness into populous, productive territory."[71] Farms, cities, smelters, and factories were established, sometimes with inadequate pollution controls. Forests became neighborhoods. Ports, canals, railroads, and highways were built to promote commerce and defense readiness. Rivers

were rerouted and dredged, watersheds replumbed, hills flattened, and wetlands filled. Irrigation transformed desert into farmland. [72] Hydroelectric dams, most federally-built or federally-authorized, were installed, providing cheap, clean electricity and driving prosperity. [73] Federal ***995** legislation and policies aided these transformations. [74]

This development altered, erased, or blocked access to much of the habitat on which salmon depended for reproduction and survival. [75] By 1940, it was well-known that environmental changes were causing salmon runs to decline. [76] Federal officials recognized a possible tension with the "right of taking fish" in the Stevens-Palmer treaties. In a 1948 report about hydropower development in the Columbia River and its tributaries, the United States Army Corps of Engineers explained:

> The Indian Service believe that the courts will hold that the treaties vested a property right in the annual fish migrations similar to that in the real estate upon which the fishing sites are located. The import and ramifications of such a holding are manifest. It is not believed that the treaties guarantee, or were intended to guarantee, annual fish migrations in the [Columbia] river, in perpetuity, or that damages will be paid by the Federal Government for any diminution of these runs from whatever cause ensuing. If it is found that the Indians do in fact have a property right in the fishery itself--i.e., the fish--then any circumstance, or activity, tending to diminish the runs, including commercial fishing, or general industrialization of the area, will result in a cause of action on the part of the Indians. There has been a steady decline in the magnitude of the annual fish migrations in the Columbia River for many years. This decline is believed by experts to have resulted from a number of causes, including overfishing, stream pollution, unscreened diversions, and general industrialization of the area. [77]

Indians affected by declining salmon runs sued the United States but did not prevail. For example, in 1952, Indians who fished at Celilo Falls on the Columbia River sued the United States for reductions in the annual runs caused by the ongoing construction of The Dalles Dam. [78] The case was ***996** dismissed for failure to state a claim. [79] Later, a similar suit for injunctive relief against the federal contractor working on John Day Dam also failed, [80] as did the Skokomish Tribe's suit against the United States for the government's failure to prevent damage from a municipal power project. [81]

In 1951, the Yakama Nation filed a petition before the Indian Claims Commission (ICC), seeking damages for reductions in salmon runs caused by the federal government's construction of the Grand Coulee and Bonneville Dams and by its mismanagement of irrigation projects in the Yakima River basin. [82] The ICC never issued a decision on the merits; the claim was dismissed with prejudice as part of a bundled settlement of four separate claims. [83] The Yakama Nation's dismissal of the fisheries claim was part of the consideration for the United States' agreement to pay monetary compensation on two land claims. [84] The United States later explained that "the monetary judgment entered by the ICC was not intended as payment of the [fisheries] claims made in Docket No. 147." [85]

This was the background for Phase II of *United States v. Washington*.

VI. PHASE II OF *UNITED STATES V. WASHINGTON*

The Boldt Decision left some questions unanswered. Some tribal parties in *United States v. Washington* alleged in their 1971 complaints that the treaties impose on the State a duty to regulate uses of fish habitat so as to prevent conditions that deprive the tribes and their members of sufficient fish for the maintenance of their livelihood. [86] Those environmental issues were set aside for later determination in "Phase II" of the litigation. [87]

The United States did not initially support the tribal habitat claims. One federal attorney informed tribal counsel that the Justice Department would not authorize such claims "in the advance of a precise delineation of the ***997** nature of such claims and an analysis of the basis for contending that particular types of acts or omissions by the state or its officials violate treaty rights of the Indians." [88] He asked "whether pressing [environmental] claims in this proceeding at this time is the best means of achieving the desired environmental protection or whether other means are preferable--such as participation in administrative or other proceedings involving specific environmental activity." [89] According to one author, "[f]ederal officials feared additional lawsuits to determine who--the federal government, the [S]tate, private companies, or individuals--had done the damage in specific cases." [90] Eventually, the United States did agree to support tribal habitat claims against the State of Washington, but "only when the tribes agreed not to sue for damages suffered in previous losses of fish caused by destructive environmental policies." [91]

In 1976, the United States and the tribes activated "Phase II" of *United States. v. Washington* by filing amended and supplemental complaints. [92] Unlike the 1970 tribal complaints, these new complaints did not advocate a "livelihood"-based interpretation of the treaties; [93] instead, they alleged that the State had a broad treaty-based duty not to undertake or authorize actions that "significantly and adversely affect fish habitat and which directly or indirectly reduce the number or quality of fish available to treaty Indians." [94] In 1980, the court granted the plaintiffs' motion for summary judgment and held that the treaties implicitly imposed on the State a duty not to impair fish habitat, but the court rejected the plaintiffs' proposed standard. [95] Misreading ***998** the remedy section of the Supreme Court's *Fishing Vessel* opinion as a declaration of law, [96] the court concluded that the "treaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs." [97] Therefore, the "duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs." [98]

The State appealed. [99] The case was first heard by a three-judge panel of the Ninth Circuit, which rejected the district court's reasoning. The panel emphasized that the district court had misread *Fishing Vessel* as holding that the treaties guarantee the tribes a moderate living from fishing. [100] The panel articulated another standard, apparently based on co-tenancy concepts from property law. It said the treaties impose on the State, the United States, and the tribes an obligation to take reasonable steps to preserve and enhance the fishery. [101] The panel said Indians and non-Indians must share equally the losses from reasonable, non-discriminatory development because "[t]his is what the Supreme Court necessarily intended by holding that the Indians are entitled to a *share* of the *available* fish." [102]

The United States and the tribes sought rehearing *en banc*. [103] First, the Ninth Circuit, sitting *en banc*, concluded that it lacked appellate jurisdiction and dismissed the appeal. [104] After the State requested rehearing, a divided eleven-member court issued a *per curiam* opinion withdrawing its earlier dismissal and vacating the trial court's judgment on the environmental issue ***999** as contrary to the exercise of sound judicial discretion. [105] The court said any environmental litigation under the treaties must await "concrete facts which underlie a dispute in a particular case." [106]

Tribal strategists spent the next fifteen years looking for the right "concrete facts" for a test case to return the treaty habitat issue to court. [107]

VII. FISH PASSAGE AND ROADS IN WASHINGTON

Under the common law of nineteenth-century America, it was a public nuisance to obstruct fish passage. [108] Congress embodied that principle in statute when it created the Oregon Territory in 1848. Section 12 of the Oregon Territory Act recognized the migratory lifeways of salmon, and provided:

> That the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, 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. [109]

When Washington became a state in 1889, fish passage became and still is a state-law mandate. [110] To carry out this law, state scientists have conducted research about the environmental needs and swimming abilities of fish. [111]

***1000** In the early twentieth century, automobiles created a national demand for better roads. [112] Congress responded by creating a partnership with states. The 1916 Federal Aid Highway Act provided for partial federal funding of highways that states would construct to federal design standards under federal oversight. [113] This is still the pattern for federal highway legislation today. States must conform to federal requirements to receive federal highway funding. [114] Washington assented to the 1916 Federal Aid Highway Act in 1917. [115]

From the outset, Congress directed that "culverts shall be deemed parts of the respective roads covered by the provisions of this Act." [116] Federal agencies developed and provided guidance to state highway departments regarding culvert design. [117] Early culvert designs focused on the hydraulic characteristics of culverts--the capacity of the culvert to allow passage of flowing water without damage to the road. [118] They did not focus on designing culverts to ensure unrestricted fish passage.

Washington relied on the federally-supplied design guidance in building its highways and culverts. [119] But by 1990, state fish biologists had anecdotal information that some culverts in the state highway system did not provide adequate fish passage. [120] They notified the Washington State Department of Transportation (WSDOT) about this. [121] In 1991, WSDOT and the Department of Fisheries (WDFW) got funding from the Legislature to remove six known fish passage barriers and to work cooperatively to identify ***1001** additional fish barriers in the state highway system and prioritize them for removal. [122]

WSDOT and WDFW initiated a systematic inventory of culverts on WSDOT rights-of-way and began replacing culverts that blocked fish passage as funds were appropriated. [123] During the 1990s, the agencies developed procedures for evaluating culverts for fish passage, methodologies for assessing the affected fish habitat, means for managing the data they collected, and new culvert design methods for better fish passage. [124] The agencies found many more fish passage barriers than they had anticipated. [125] Virtually all of the culverts that they identified as fish passage barriers in the state highway system had been designed according to federal standards. [126] At no time did the federal government notify the state that culverts designed pursuant to the federal standards might violate treaty fishing rights. [127]

Since 1992, WSDOT and WDFW have published reports nearly every year about their ongoing efforts to make state highway culverts fish-passable. [128] Tribal strategists read the reports and decided they provided ideal "concrete facts" to return the habitat claim to court. [129]

VIII. THE CULVERT CASE

In June 2000, twenty-one tribes sent a letter to the Washington Attorney General informing her that they intended to initiate a new lawsuit claiming that the state's culverts violated six of the Stevens Treaties. [130] The letter said ***1002** litigation could be avoided if the State would acknowledge in a court order "that it has a duty pursuant to the Stevens treaties to refrain from degrading the fish habitat by blocking access to salmon spawning and rearing habitat through the construction and maintenance

of fish blocking culverts ... to the extent that the tribes' ability to achieve a moderate living from fishing is impaired." [131] State and tribal officials met and then pursued mediation. But negotiations failed because the tribes demanded that the State stipulate to the existence of some treaty-based environmental-protection duty of indeterminate scope. [132]

A. *District Court Proceedings*

In January 2001, the United States joined the tribes in initiating Subproceeding 01-1 of *United States v. Washington*. The tribes relied for their factual allegations on reports that WSDOT and WDFW had published in the 1990s about the State's culvert program for the state highway system. They sought to recapture the rule that the district court had announced in 1980 before the Ninth Circuit vacated it, [133] asking the court to declare:

> The "right of taking fish," secured to the plaintiff tribes in the Stevens Treaties, imposes a duty upon the State of Washington to refrain from diminishing, through the construction or maintenance of culverts under State owned roads and highways, the number of fish that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes' ability to earn a moderate living from the fishery. [134]

The State denied that it had violated the treaties and asserted that the United States was barred by equitable principles from seeking relief, given that the culverts were designed to federal standards or installed under federal permits. [135] The court granted the United States' pre-discovery motion to strike those defenses. [136] The court urged the parties to discuss settlement, ***1003** and stayed the case while two years of settlement negotiations occurred. [137]

After negotiations again failed, the parties engaged in discovery, and the State and tribes cross-moved for summary judgment on whether the culverts violated the treaties. [138] The trial court granted the tribes' motion and denied the State's. [139] The court found it undisputed that "fish harvests have been substantially diminished," and drew a "logical inference that a significant portion of this diminishment is due to the blocked culverts ...." [140] The court acknowledged that nothing in the treaties' text prohibited State actions that incidentally affected salmon runs for "[i]t was not deemed necessary to write any protection for the resource into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." [141] But the court concluded that statements made by federal negotiators at some treaty councils "carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource," and found that "the building of stream-blocking culverts" is a "resource-degrading activit[y]." [142] The court declared that the treaties impose "a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." [143] The court "further declare[d] that the State of Washington currently owns and operates culverts that violate this duty." [144]

In their motion, the tribes had asked the court to declare that the measure of the State's duty was the "Tribes' ability to earn a moderate living from their fisheries." [145] But the court did not do that. It declined to define "moderate living" because that was a measure created by the Supreme Court, not a term in the treaties, and no party had asked the court to define it. [146] Shortly thereafter, the parties stipulated that "the issue of whether the Tribes are or are not making a moderate living from their treaty fishery is not an issue in this sub-proceeding." [147]

***1004** After more unsuccessful settlement negotiations and more discovery, the court took seven days of testimony in 2009 in the remedy phase of the case. [148] The court granted the State's motion in limine to exclude testimony on fish production

potential and deemed the tribes' attempt to quantify the effects of state culverts on salmon runs and tribal fisheries as "too speculative." [149] The plaintiffs then presented their case as though it were a legislative hearing, providing general evidence about harms that poorly-constructed culverts can cause, but never tying that evidence to the State's culvert inventory and repair programs or their effects on any specific watershed, salmon run, tribe, or fishery, and never tying that evidence to the injunction the plaintiffs wanted. [150]

One might reasonably ask why the tribes had not gone to the legislature to seek better funding for WSDOT's culvert program instead of litigating a case that was already almost nine years old.

The State presented evidence about its culvert programs, other State salmon recovery efforts, and costs. The State argued that its programs were scientifically-based, that culverts were only one of many factors affecting salmon, that the relative importance of state culverts to salmon varied from watershed to watershed, and that decisions about salmon recovery were best left to the parties working collaboratively. [151] The State also objected to the plaintiffs' proposed injunction as overbroad and unsupported by science. [152]

After a three-year silence, the court asked the parties for an update in 2013. [153] Having received it, the court adopted many of the plaintiffs' generalized proposed findings of fact and signed the plaintiffs' proposed injunction, ordering the State to remove more than eight hundred fish passage barrier culverts in the state highway system by 2030. [154]

1005 B.** ***Ninth Circuit Proceedings

The State appealed, and the Ninth Circuit affirmed. [155] Based on statements Isaac Stevens made in 1854-1855, the panel held that the treaties included an implied promise "that there would be fish sufficient to sustain" the tribes. [156] The panel also said that even if Stevens had not made these statements, it would "infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." [157] The court found that "[s]almon now available for harvest are not sufficient to provide a 'moderate living' to the Tribes," and that "several hundred thousand additional mature salmon would be produced every year" if the State's blocking culverts were replaced--findings not made by the district court. [158] On that basis, the panel concluded that "Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties" by "act [ing] affirmatively to build and maintain barrier culverts under its roads." [159] The panel affirmed the district court's dismissal of the State's equitable defenses [160] and held that the injunction was not overbroad or inequitable. [161]

The panel did not explain what it meant by "moderate living" or the source of the extraordinary obligation to restore salmon habitats that it imposed on the State. The State had even asked the plaintiffs in discovery what they meant by "moderate living." [162] How is it different from the "livelihood" standard that Judge Boldt and *Fishing Vessel* rejected? How many fish are required? Has any tribe ever achieved a moderate living from fishing? How can the State know when it is not violating the treaties? No one could answer those questions. [163]

The State sought rehearing en banc, which the court denied. [164] Nine judges filed an opinion disagreeing with the denial, describing the panel ***1006** opinion as a "runaway decision" that had "discovered a heretofore unknown duty" in the treaties. [165] The State then filed a Petition for Writ of Certiorari in the U.S. Supreme Court, which was granted. [166]

C. ***United States Supreme Court Proceedings***

In the Supreme Court, the tribes and the United States filed separate briefs, but both abandoned "moderate living" as the measure of a treaty-based habitat duty, denying that they had advocated it and that the Ninth Circuit had relied on it. [167] The State also shifted its position. And while briefing was underway, Justice Kennedy recused himself, leaving only eight Justices to decide the case. [168]

Law professors filed an amicus brief urging that the treaties incorporate a concept from English common law that a right of fishery includes standing and rights to ensure passage of fish to the fishery and beyond for spawning. [169] It is reasonable to ask whether litigation might have been avoided had the tribes offered that theory in 2000 during pre-litigation settlement talks. A treaty-based fish passage easement might have been viewed as consistent with state law and policy. But that was not the tribes' theory in 2000. They sought a portable rule of law--a broad, treaty-based, environmental-protection duty that they could apply in other contexts and against other defendants. [170]

Thus, by the oral argument, the Court faced a confusing set of issues that bore little relationship to the Ninth Circuit decision or to the actual facts and history of the case. [171] Without Justice Kennedy, the Court was unable to ***1007** reach a decision and deadlocked 4-4. It ordered "[t]he judgment is affirmed by an equally divided Court." [172]

Now what?

IX. ENGAGEMENT WITH STATE PROCESSES: A BETTER STRATEGY?

When the Supreme Court issued its one-sentence order in June 2018, eighteen years had passed since the tribes had notified the State of their intent to sue. What had been accomplished?

Between 1985 and 2000, tribal advocates searched for the right "concrete facts" for a test case to recapture the broadly-applicable "moderate living"-based rule of law that the district court had announced in 1980 before it was vacated by the Ninth Circuit. [173] Did they get that in the culvert litigation? It seems doubtful. In the Supreme Court, the tribes and the United States emphasized that the case presented only a narrow issue about culverts, and disavowed "moderate living" as the basis for a broad treaty habitat duty. [174] The Environmental Protection Agency has asserted that the Ninth Circuit merely "recognized that any environmental obligations stemming from the treaty-reserved fishing right will depend on the particular circumstances, and declined to establish a broad habitat protection subsidiary right." [175] The district court too said its ruling was narrow, though its reasoning was not. [176]

***1008** The litigation leaves the State with an injunction that requires it to spend billions of state dollars to replace culverts, some in watersheds with many other problems, including other fish passage barriers. Is this injunction returning more fish to tribal fisheries? No one is asking that question or collecting data that might answer it. Is this a good strategy for achieving the shared goal of healthy salmon populations and abundant fisheries? [177]

More to the point, is an eighteen-year lawsuit a good way to make public policy? Are there better strategies?

Tribes in Washington State have been successful in state processes that took much less time and treasure than the culvert litigation. In the state legislature, tribes have secured favorable tax and human services legislation that has withstood challenge in the state courts. [178] Tribes have successfully used state law in administrative proceedings and courts. For example, tribes helped to defeat proposed crude-by-rail terminals at the Port of Grays Harbor and at the Port of Vancouver on the Columbia River. [179] Tribes may also take note of the success of environmental advocates in achieving passage of ballot initiatives. [180]

Federal attorney George Dysart asked in 1974 "whether pressing [treaty environmental] claims in this proceeding at this time is the best means of achieving the desired environmental protection or whether other means are preferable--such as participation in administrative or other proceedings involving specific environmental activity."[181] His words retain wisdom today.

Footnotes

a1 Fronda Woods recently retired from the Washington Attorney General's Office, where she worked since 1989. Her practice has focused on Indian law, including fishing, tax, and criminal jurisdiction issues. She has been involved in litigation in federal and state trial and appellate courts, including the Ninth Circuit Court of Appeals, the Washington Supreme Court, and the United States Supreme Court. She has spoken frequently at seminars on Indian law topics and is a long-time contributor to the *American Indian Law Deskbook* (Thomson Reuters). Her article *Who's in Charge of Fishing?*, published by the Oregon Historical Society in 2005, won honorable mention for the Society's annual Joel Palmer Award. Ms. Woods is a graduate of Harvard Law School and the University of Washington. The opinions expressed herein are solely those of the author and are not necessarily shared by anyone else.

1 *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 350-51 (W.D. Wash. 1974) (describing hunting, fishing, and gathering practices of Northwest Indian peoples); EUGENE S. HUNN, NCH'I-WÁNA: "THE BIG RIVER" ch. 4 (1990) (describing seasonal food-gathering practices of mid-Columbia River peoples).

2 *See* Joseph M. Craig & Robert L. Hacker, *The History and Development of the Fisheries of the Columbia River*, 49 BULL. U.S. BUREAU FISHERIES 133, 139-41 (1938), https://spo.nmfs.noaa.gov/sites/default/files/pdf-content/fish-bull/fb49.4.pdf ("Much information concerning the Indian fishing operations is available in the accounts of the early explorers, such as Lewis and Clark, who entered the Columbia Basin by way of the Salmon River and journeyed down the Snake and the Columbia to its mouth in 1805-6 .... From these and other sources it is evident that in their original state the Indians ... depended to no small extent upon fish, particularly salmon, as an important part of their food supply."). Salmon are migratory. *Salmon and Steelhead Co-management*, WASH. DEP'T FISH & WILDLIFE, https://wdfw.wa.gov/fishing/tribal/co-management (last visited Apr. 22, 2019).

3 Craig & Hacker, *supra* note 2, at 139.

4 *See generally* HUNN, *supra* note 1 (providing an "accessible, contemporary ethnographic account" regarding Plateau Indian culture); FIRST FISH, FIRST PEOPLE: SALMON TALES OF THE NORTH PACIFIC RIM (Judith Roche & Meg McHutchison eds., 1998) (presenting a collection of "contemporary writers and storytellers whose traditional cultures flourished on the shores and river banks around the North Pacific Rim where salmon have been coming home to spawn for millions of years").

5 Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, Gr. Brit-U.S., June 15, 1846, 9 Stat. 869 (ratified July 17, 1846, proclaimed Aug. 5, 1846).

6 Act of Aug. 14, 1848, ch. 178, 9 Stat. 323, 323 (1848).

7 *Id*.

8 Act of June 5, 1850, ch. 16, 9 Stat. 437, 437 (1850).

9 Act of Sept. 27, 1850, ch. 76, §§ 4-9, 9 Stat. 496, 497-99 (1850); *see also* William G. Robbins, *Oregon Donation Land Act*, OR. ENCYCLOPEDIA, https://oregonencyclopedia.org/articles/oregon_donation_land_act/#.XFOLMi2ZOgQ (last updated Mar. 17, 2018) (describing provisions and effects of Oregon Donation Land Act).

10 *See* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 44 n.9 (1946) ("In 1851 Dart and Palmer negotiated treaties with nineteen tribes other than respondents. None of these treaties was ratified ....").

11 Act of Mar. 2, 1853, ch. 90, 10 Stat. 172, 172 (1853); *see also* United States v. Washington, 384 F. Supp. 312, 354-55 (W.D. Wash. 1974) ("By the Act of March 2, 1853, 10 Stat. 172, Congress organized the Washington Territory out of the Oregon Territory .... On December 26, 1853, Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory, wrote to the Commissioner of Indian Affairs suggesting the necessity of making treaties with the Indians west of the Cascade Mountains.").

12 *See generally* KENT D. RICHARDS, ISAAC I. STEVENS: YOUNG MAN IN A HURRY 96-98 (1993) (describing legislation creating Washington Territory and Isaac Stevens' appointments as Governor and Superintendent of Indian Affairs for the territory); ROBERT E. FICKEN, WASHINGTON TERRITORY 19 (2002) (Washington Territory's "original boundary left the [Columbia] river at the 46th parallel, running direct to the Rocky Mountains"); *id*. 24 (noting that, in 1853, President Pierce appointed Isaac Stevens as governor and superintendent of Indian affairs for Washington Territory).

13 Treaty with Nisquallys, Nisqually-U.S., Dec. 26, 1854, 10 Stat. 1132 [hereinafter Treaty of Medicine Creek]; Treaty with the Dwámish &c. Indians, Dwámish-U.S., Jan. 22, 1855, 12 Stat. 927 [hereinafter Treaty of Point Elliott]; Treaty with the S'Klallams, S'Klallams-U.S., Jan. 26, 1855, 12 Stat. 933 [hereinafter Treaty of Point No Point]; Treaty with the Makah Tribe, Makah-U.S., Jan. 31, 1855, 12 Stat. 939; Treaty with the Walla Wallas, U.S.-Walla Walla, June 9, 1855, 12 Stat. 945; Treaty with the Yakamas, U.S.-Yakama, June 9, 1855, 12 Stat. 951; Treaty with the Nez Percés, Nez Percé-U.S., June 11, 1855, 12 Stat. 957; Treaty with Indians in Middle Oregon, U.S.-Walla Walla-Wasco, June 25, 1855, 12 Stat. 963; Treaty with the Qui-Nai-Elts, Quileute-U.S., Jan. 25, 1856, 12 Stat. 971 [hereinafter Treaty of Olympia]; Treaty with the Flatheads, Flathead-U.S., July 16, 1855, 12 Stat. 975. The Senate ratified the Medicine Creek Treaty in 1855, and the others in 1859. Stevens and his staff prepared reports and journals to accompany the treaties when they transmitted them to the Secretary of the Interior as part of the ratification process. Most of these documents are available in EDWARD G. SWINDELL, REPORT ON SOURCE, NATURE, AND EXTENT OF THE FISHING, HUNTING, AND MISCELLANEOUS RELATED RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON (1942), https://www.sos.wa.gov/library/publications_detail.aspx?p=116 (last visited Oct. 6, 2018) [hereinafter SWINDELL]. *See, e.g.*, *id*. at 458-60 (providing the "Digest of Treaty Concluded at Medicine Creek, Territory of Washington, between Gov. Isaac I. Stevens, Superintendent of Washington Territory, and the Nisqually, Puyallup, etc."). The journal of proceedings for the Nez Percé, Yakama, and Walla Walla Treaties is also available at Gustav Sohon, *Arrival of the Nez Perce Indians to Wallawalla Treaty, May 1855*, U. IDAHO LIBR., https://www.lib.uidaho.edu/mcbeth/governmentdoc/1855council.htm (last visited Oct. 6, 2018). A partial transcript of the journal of proceedings for the Flathead Treaty is available in Albert J. Partoll, *The Flathead Indian Treaty Council of 1855*, 29 PAC. NW. Q. 283, 284-312 (1938).

14 Kent D. Richards, *Historical Antecedents to the Boldt Decision*, 4 W. LEGAL HIST. 69, 75-76 (1991); *see generally* RICHARDS, *supra* note 12, chs. 8, 9 (describing treaty councils involving Stevens and the tribes).

15 Treaty of Medicine Creek, *supra* note 13, at 1133. Similar or identical provisions are in the Treaty of Point Elliott, *supra* note 13, at 928; Treaty of Point No Point, *supra* note 13, at 934; Treaty with the Makah Tribe, *supra* note 13, at 940; Treaty with the Walla-Wallas, *supra* note 13, at 946; Treaty with the Yakamas, *supra* note 13, at 953; Treaty with the Nez Percés, *supra* note 13, at 958; Treaty with Indians in Middle Oregon, *supra* note 13, at 964; Treaty of Olympia, *supra* note 13, at 972; and Treaty with the Flatheads, *supra* note 13, at 976.

16 Nooksack (Point Elliott), Lummi (Point Elliott), Upper Skagit (Point Elliott), Swinomish (Point Elliott), Sauk-Suiattle (Point Elliott), Stillaguamish (Point Elliott), Tulalip (Point Elliott), Suquamish (Point Elliott), Muckleshoot (Medicine Creek and Point Elliott), Puyallup (Medicine Creek), Nisqually (Medicine Creek), Squaxin Island (Medicine Creek), Skokomish (Point No Point), Port Gamble S'Klallam (Point No Point), Jamestown S'Klallam (Point No Point), Lower Elwha Klallam (Point No Point), Makah (Makah), Quileute (Olympia), Hoh (Olympia), Quinault (Olympia), Yakama (Yakama), Warm Springs (Middle Oregon), Umatilla (Walla Walla), Nez Percé (Nez Percé), and Salish and Kootenai (Flathead). Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).

17 *See* United States v. Taylor, 13 P. 333 (Wash. Terr. 1887) (holding that settler has no right to prevent Indians from crossing his land to get to ancient fishing place); SWINDELL, *supra* note 13, at 67 n.1 (observing that settlers had excluded coastal Indians from some fishing places).

18 *See* Peter Knutson, *The Unintended Consequences of the Boldt Decision*, CULTURAL SURVIVAL (June 1987), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/unintended-consequences-boldt-decision ("[W]ith the development of a Puget Sound canning industry in the late nineteenth century, salmon became a commodity; the relatively limited pressures generated by the needs of subsistence and barter were supplanted by the demands of the international capitalist economy.").

19 *See* United States v. Ala. Packers' Ass'n, 79 F. 152, 155 (C.C.N.D. Wash. 1897) (noting that though cannery traps occupied Lummi usual and accustomed fishing stations and prevented Indians from fishing, it is "unreasonable to suppose that all the public lands in Washington Territory adjacent to waters where fish may be taken are, by the fifth article of the [Point Elliott] treaty, permanently impressed with an easement").

20 *See* George W. Gordon, Report Upon the Subject of the Fishing Privileges etc. Guaranteed by Treaties to Indians in The Northwest, With Recommendations in Regard Thereto 9, 11, 12 (Jan. 19, 1889) (Bureau of Indian Affairs transcription, 1986) (describing trespass claims landowners had filed against Indians).

21 Seufert Bros. Co. v. United States, 249 U.S. 194, 199 (1919); United States v. Winans, 198 U.S. 371, 381-82 (1905); United States v. Taylor, 13 P. 333, 334-35 (Wash. Terr. 1887). *See also* United States v. Washington, 157 F.3d 630, 646 (9th Cir. 1998) (explaining that tribes have a right to take shellfish on privately-owned tidelands because "the Supreme Court has made clear that the Tribes' fishing rights in their usual and accustomed places are not diminished by private ownership of those lands"); United States v. Brookfield Fisheries, 24 F. Supp. 712, 713, 716 (D. Or. 1938) (describing Yakama and Umatilla Tribes' rights of access to Celilo Falls); Seufert Bros. Co. v. Hoptowit, 237 P.2d 949, 951-52 (Or. 1951) ("[E]xercise of these latter rights [of taking fish] necessarily demanded that a right of ingress and egress be afforded them over lands adjacent to such fishing places; it was a right logically incidental to those rights expressly reserved; it was a right in the adjoining land, and a continuing right.").

22 Craig & Hacker, *supra* note 2, at 151, 165, 196.

23 JAMES A. CRUTCHFIELD & GIULUIO PONTECORVO, THE PACIFIC SALMON FISHERIES: A STUDY OF IRRATIONAL CONSERVATION 126 (1969); *see also* Vail v. Seaborg, 207 P. 15, 16 (Wash. 1922) ("It is a well-known fact that the salmon industry of the state is rapidly disappearing ....").

24 U.S. CONST. art. VI.

25 *See generally* Fisheries Code, ch. 31, 1915 Wash. Sess. Laws 67 (codifying fishery regulations).

26 State v. Towessnute, 154 P. 805, 807, 809 (Wash. 1916) (considering the Yakama Treaty); State v. Alexis, 154 P. 810, 810 (Wash. 1916) (considering the Point Elliott Treaty).

27 *See generally* Charles A. Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1252-53 (1969) (summarizing developments in treaty fishing practices law); Fronda Woods, *Who's in Charge of Fishing?*, 106 OR. HIST. Q. 412, 416, 431 (2005), https://www.fws.gov/leavenworthfisheriescomplex/who_in_charge_fishing%20(1).pdf (last visited Oct. 9, 2018) (discussing cases to include years 1915-1975).

28 Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 392 (1968) ("The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved."); Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973) (holding that a state regulation prohibiting the use of traditional Indian nets to fish for steelhead in the Puyallup River was discriminatory); Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 177 (1977) (upholding a state regulation allocating to treaty net fishery forty-five percent of the natural steelhead run available for taking).

29 United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

30 Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington at 15, United States v. Washington, No. C70-9213 (W.D. Wash. May 14, 1973) (submitted by Washington Departments of Fisheries and Game and U.S. Fish and Wildlife Service and admitted as Joint Exhibit 2a, Aug. 24, 1973); *see also* Frach v. Schoettler, 280 P.2d 1038, 1040-41 (Wash. 1955) (upholding state law aimed at controlling offshore fisheries).

31 *See* Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169, 172-74 (9th Cir. 1963) (discussing Oregon regulators' fisheries management rationale).

32 Complaint at 3, United States v. Oregon, Civil No. 68-513 (D. Or. Sept. 13, 1968); United States v. Oregon/Sohappy v. Smith, Civil Nos. 68-513/68-409 at 20 (D. Or. Feb. 24, 1969) (pretrial order).

33 Sohappy v. Smith, 302 F. Supp. 899, 907-08 (D. Or. 1969).

34 *See* Order Granting the Parties' Request for Clarification and Amending the Order Approving 2018-2027 *United States v. Oregon* Management Agreement, United States v. Oregon, No. 3:68-cv-0513 (D. Or. May 21, 2018), ECF No. 2629. The State of Washington intervened in 1974. United States v. Oregon, Civil No. 68-513 (D. Or. April 29, 1974) (order granting leave to intervene).

35 Complaint for Declaratory Judgment and Injunction at 2-3, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (No. 70-9213).

36 *Id*. at 3-4.

37 United States v. Washington, Civil No. 70-9213 at 99 (W.D. Wash. Aug. 24, 1973) [hereinafter Final Pretrial Order] (final pretrial order).

38 Complaint for Declaratory Judgment and Injunction, *supra* note 35, at 4.

39 Final Pretrial Order, *supra* note 37, at 87.

40 *Id*. at 105.

41 *Id.*; *see also id*. at 109 ("[I]t was then necessary and is now necessary that this off reservation fishing right be reserved to maintain a livelihood for the Yakimas."); [Tribes'] Complaint for Declaratory and Injunctive Relief at 6-7, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) [hereinafter Tribes' Complaint] (alleging that state regulation of treaty Indian fishing is contrary to "intent of the treaties in that the tribes and their members are unable to harvest sufficient fish for maintenance of a livelihood and culture").

42 Final Pretrial Order, *supra* note 37, at 79.

43 Transcript of Final Arguments at 4598, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (No. 70-9213).

44 *Washington*, 384 F. Supp. at 312.

45 *Id*. at 333.

46 *Id*.

47 *Id*. at 342-45, 401-03.

48 *Id*. at 340-42; *see also* Settler v. Lameer, 507 F.2d 231, 231 (9th Cir. 1974) (holding that the Yakima Nation could regulate fishing by its own members at off-reservation usual and accustomed places).

49 *Washington*, 384 F. Supp. at 343-44, 413-19.

50 *Id*. at 420; *see also generally* Jack Richards, *The Economic Impact of the Judge Boldt Decision* (March 3, 1975), in U.S. COMM'N ON CIVIL RIGHTS, AMERICAN INDIAN ISSUES IN THE STATE OF WASHINGTON, HEARING HELD IN SEATTLE, WASHINGTON, OCTOBER 19-20, 1977, VOLUME II: EXHIBITS, 460, 466-71 (1977) (noting a decrease in fishing of non-treaty fishermen after the Judge Boldt decision).

51 *Washington*, 384 F. Supp. at 405, 408.

52 *See, e.g.*, Makah Indian Tribe v. Quileute Indian Tribe, 873 F.3d 1157 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 106 (2018); United States v. Washington, 573 F.3d 701, 707 (9th Cir. 2009) ("This claim by one tribe against others to allocate fish is, as the district court said, far afield from the treaty dispute between the United States on behalf of the Indian tribes and the State of Washington in which the underlying decree issued ....").

53 United States v. Washington, 520 F.2d 676, 677 (9th Cir. 1975).

54 Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977), *cert. granted*, 439 U.S. 909 (1978); Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977), *cert. granted*, 439 U.S. 909 (1978); United States v. Washington, 573 F.2d 1118 (9th Cir. 1978), *cert. granted*, 439 U.S. 909 (1978); Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for the W. Dist. of Wash., 573 F.2d 1123 (9th Cir. 1978), *cert. granted*, 439 U.S. 909 (1978).

55 Brief of Respondent Indian Tribes at 158, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (Nos. 77-983, 78-119, 78-139).

56 *Id*.

57 *Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. at 670.

58 *Id*. at 684-85.

59 *Id*. at 684 ("It is in this sense that treaty and nontreaty fishermen hold 'equal' rights. For neither party may deprive the other of a 'fair share' of the runs.").

60 *Id*. at 685.

61 *See id*. at 685-87 (noting that the district court based its allocation, "subject, of course, to the 50% ceiling," on its conclusion that Indians historically "depended heavily on anadromous fish as a source of food, commerce, and cultural cohesion," and will be "modified in response to changing circumstances").

62 *Id*. at 686-87, 686 n.27.

63 *See* Puget Sound Gillnetters Ass'n v. Moos, 603 P.2d 819, 821 (Wash. 1979) (granting State's motion for order affirming that the State has authority to manage fisheries in a manner that recognizes Indian treaty fishing rights as defined by the United States Supreme Court and subsequent orders).

64 For a variety of perspectives about the Boldt litigation and its aftermath, see William G. Clark, *Fishing in a Sea of Court Orders: Puget Sound Salmon Management 10 Years after the Boldt Decision*, 5 N. AM. J. FISHERIES MGMT. 417, 417 (1985) (describing the success of Puget Sound salmon management through the judicially created "unique fishery management system" where the State of Washington and 21 Indian tribes use agreed procedures for "estimating run sizes and setting escapement goals" to maintain the salmon runs and share the harvest fairly); ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND 243 (1998); TROVA HEFFERNAN, WHERE THE SALMON RUN: THE LIFE AND LEGACY OF BILLY FRANK, JR. 173-74 (2012) (noting that non-Indians were "disheartened" by the Supreme Court's decision to uphold the Boldt decision and "the salmon is the loser" as the number of fish diminished); JOHN C. HUGHES, SLADE GORTON: A HALF CENTURY IN POLITICS 127 (2011) ("Gorton's opposition to the Boldt Decision helped propel him to the U.S. Senate. Over the next 20 years, the tribes viewed his repeated efforts to limit their sovereign immunity as an attempt to settle the score."); ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 128-29 (2009) (describing tribal governments as "[n]o longer invisible" and having "increased capabilities and stature" post-Boldt litigation).

65 *See* United States v. Washington, 18 F. Supp. 3d 1082, 1083-1122 (W.D. Wash. 1985) (adopting the Puget Sound and Hood Canal Salmon Management Plans); United States v. Washington, 19 F. Supp. 3d 1252, 1256-67 (W.D. Wash. 1997) (adopting stipulation and order concerning co-management and mass marking); Order Granting the Parties' Request for Clarification and Amending the Order Approving 2018-2027 *United States v. Oregon* Management Agreement, United States v. Oregon, No. 3:68-cv-0513-MO (D. Or. May 21, 2018), ECF No. 2629 (clarifying that the court retains ancillary jurisdiction over the matter and enforcing the terms of the Management Agreement through an amendment of a previous order); *see generally* Fronda Woods, *Who's in Charge of Fishing?*, 106 OR. HIST. Q. 412 (2005) (discussing the relevant cases and highlighting the impact of numerous court decisions that led to cooperative fisheries management).

66 *See* FICKEN, *supra* note 12, at 10 (comparing the impact of the Donation Act where the greater increase in population occurred south of the Columbia, but the population of the settlers north of the river also increased due to the Act).

67 *Id*. at 154; *see also* Act of July 2, 1864, ch. 217, 13 Stat. 365 ("An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route").

68 FICKEN, *supra* note 12, at 167.

69 *Id*. at 167. Washington became a state in 1889. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676; Proclamation No. 8, Nov. 11, 1889, 26 Stat. 1552.

70 *Census 2010*, WASH. OFFICE OF FIN. MGMT., https://www.ofm.wa.gov/washington-data-research/population-demographics/decennial-census/census-2010 (last visited Jan. 28, 2019) (providing that the apportionment population for Washington state in 2010 is 6,753,369); Justin Mayo & Lynda V. Mapes, *Census: As Casinos Prosper, Many Go Home To Reservations*, SEATTLE TIMES (May 7,

2011, 9:22PM), https://www.seattletimes.com/seattle-news/census-as-casinos-prosper-many-go-home-to-reservations/ (stating that there are 61,582 people enrolled in Washington tribes).

71 Tulee v. Washington, 315 U.S. 681, 682-83 (1942).

72 *See The Story of the Columbia Basin Project*, U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, https://www.usbr.gov/projects/pdf.php?id=219 (last visited Feb. 2, 2019) (discussing the Columbia Basin Project and how it transformed the Columbia Basin, making it more habitable, navigable, and better for farming).

73 *See* WOODY GUTHRIE, *Grand Coulee Dam*, *on* COLUMBIA RIVER COLLECTION (Rounder Records 1988) (1941) (discussing "Uncle Sam['s]" plan to build the Grand Coulee Dam to promote industry and farming); WOODY GUTHRIE, *Talking Columbia*, *on* COLUMBIA RIVER COLLECTION (Rounder Records 1988) (1941) (discussing the manufacturing power of Bonneville and other dams built for or authorized by "Uncle Sam"). Approximately two-thirds of Washington's electricity comes from hydropower. *See Fuel Mix Disclosure*, WASH. STATE DEP'T OF COMMERCE, https://www.commerce.wa.gov/energy/fuel-mix-disclosure (last visited Jan. 27, 2019) (showing that 67.68% of electricity sold by Washington's retail electric utilities in 2016 came from hydroelectric generation).

74 *See, e.g.*, Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at Federal Power Act, 16 U.S.C. § 791a et seq. (2012)) (establishing a Federal Power Commission to oversee navigation improvements, development of hydropower, and use of public land), Act of July 11, 1916, ch. 241, 39 Stat. 355 (providing federal aid for state highways), Act of June 25, 1910, ch. 382, 38 Stat. 630, 666 (authorizing construction and continued improvement of locks connecting Puget Sound and Lake Washington).

75 *See* DAVID R. MONTGOMERY, KING OF FISH: THE THOUSAND-YEAR RUN OF SALMON 2-3 (2003) (describing how changes to the landscape have contributed to the decline in salmon populations).

76 *See* Craig & Hacker, *supra* note 2, at 134-36, 189-95 (describing how environmental conditions, including rising water temperatures and lack of vegetation, adversely affected the fish populations in the Columbia River system).

77 H.R. DOC. NO. 81-531 app. Q, at 2952 (1950).

78 Brief of Appellant at 3-4, Thompson v. United States, 215 F.2d 744 (9th Cir. 1954) (No. 13790).

79 Thompson v. United States, 215 F.2d 744, 745 (9th Cir. 1954).

80 Transcript of Oral Opinion on Motion to Dismiss at 17, Thompson v. Morrison-Knudsen Co., Civ. No. 1412 (E.D. Wash. Aug. 21, 1959).

81 Skokomish Indian Tribe v. United States, 410 F.3d 506, 510-11 (9th Cir. 2005) (transferring treaty-based claim against United States to Court of Federal Claims); Skokomish Indian Tribe v. United States, 115 Fed. Cl. 116, 131 (2014) (dismissing for lack of subject matter jurisdiction under 28 U.S.C. § 1500).

82 Petition at ¶¶ 13, 14, 16, Yakima Tribe of Indians v. United States, No. 147 (Ind. Cl. Comm. 1951).

83 Statement and Additional Findings of Fact on Compromise Settlement at 76, 80, 89, 91, Yakima Tribe of Indians v. United States, 20 Ind. Cl. Comm. 76 (Ind. Cl. Comm. 1968) (Nos. 47, 147, 160, 164).

84 *Id*.

85 Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1325 (Wash. 1993).

86 Tribes' Complaint, *supra* note 41, at ¶¶ 25-27, 29, 1.f; *see also* Complaint in Intervention of Lummi Indian Tribe ¶ 8, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (alleging similar harms to interests of the intervenor Lummi Tribe).

87 *See* United States v. Washington, 384 F. Supp. 312, 328 (W.D. Wash. 1974) (describing the claims to be considered in "phase II" of litigation).

88 Letter from George D. Dysart, Assistant Reg'l Solicitor, U.S. Dep't of the Interior, to All Plaintiffs' Counsel in *United States v. Washington* (April 11, 1974).

89 *Id*.

90 FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 139 (1986).

91 *Id*.

92 The United States filed its amended complaint on August 17, 1976. Amended & Supplemental Complaint for Declaratory Judgment at 1, United States v. Washington, Civil No. 70-9213 (W.D. Wash. Aug. 17, 1976), Doc. No. 2352. Additionally, the United States filed its supplemental complaint on November 11, 1976. Supplemental Complaint for Declaratory Judgment at 7, United States v. Washington, Civil No. 70-9213 (W.D. Wash. Nov. 11, 1976), Doc. No. 2623.

93 *See* Complaint for Declaratory Judgment and Injunction at 3, United States v. Washington, Civil No. 70-9213 (W.D. Wash. Sept. 18, 1970) (indicating that commercial fishing provides an important part of the tribe's "livelihood").

94 Amended & Supplemental Complaint For Declaratory Judgment at 5, United States v. Washington, Civil No. 70-9213 (W.D. Wash. Aug. 17, 1976), Doc. No. 2352; *see also* Supplemental Complaint for Declaratory Judgment at 6, United States v. Washington, Civil No. 70-9213 (W.D. Wash. Nov. 11, 1976), Doc. No. 2623 (using similar language to describe the negative impacts to "fish habitat and the number or quality of fish available to Treaty Indians"); Amended and Supplemental Complaint for Declaratory Judgment at 5-6, United States v. Washington, Civil No. 70-9213 (W.D. Wash. Sept. 16, 1976), Doc. No. 2490 (repeating the allegations from earlier complaints about the reductions to "number or quality" of available fish).

95 *See* United States v. Washington, 506 F. Supp. 187, 205-08 (W.D. Wash. 1980) ("[T]he scope of the State's environmental duty must be ascertained by examining the treaty-secured fishing right rather than by selecting a desirable standard that has been imposed by Congress in a different context."); *id*. at 203 ("[T]he Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.").

96 *See id*. at 193 (referencing the *Fishing Vessel* decision as "emphasizing that the crucial determinant of the tribes' treaty share is that quantity of fish sufficient to provide a moderate standard of living").

97 *Id*. at 208.

98 *Id.*; *see also* Amended Judgment at 2, United States v. Washington, Civil No. 70-9213, (W.D. Wash. Jan. 12, 1981), Doc. No. 7390 ("The State has a correlative duty ... to refrain from degrading or authorizing others to degrade the fish habitat to the extent that would deprive the Tribes of their moderate living needs ...."). In *No Oilport! v. Carter*, 520 F. Supp. 334, 372 (W.D. Wash. 1981), the court applied this ruling to a federal approval of an oil pipeline project.

99 United States v. Washington, 694 F.2d 1374, 1375 (9th Cir. 1982).

100 *See id*. at 1377 & n.7, 1380, 1382, 1387 (highlighting the issues with the district court's improper interpretation and reliance on *Fishing Vessel*).

101 *See id*. at 1375 n.1 ("The State's obligation derives from the obligation of the United States under the treaty."); *id*. at 1381, 1386 (elaborating further on the court's interpretation of the obligations imposed by the treaty); *id*. at 1389-90 (Reinhardt, J., concurring) ("At its most basic level, the treaty guarantees that the interests of the Indians are given appropriately serious consideration in the democratic process.").

102 *Id*. at 1382 (majority opinion).

103 For a description of the Phase II litigation and related events up to this point, see COHEN, *supra* note 90, at 137-41 (1986).

104 United States v. Washington, (9th Cir. Dec. 17, 1984) (en banc) (withdrawn and replaced by 759 F.2d 1353 (9th Cir. 1985) (en banc)).

105 United States v. Washington, 759 F.2d 1353, 1354, 1357 (9th Cir. 1985) (en banc).

106 *Id*. at 1357.

107 *See* discussion *infra* Section VIII (discussing "the Culvert case").

108 *See, e.g.*, Boatwright v. Bookman, 24 S.C.L. (Rice) 447, 450-52 (1839) (stating that all obstructions and impediments to free passage and navigation of a public river would be public nuisances); Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 245 (1828) (ruling on a corporation's claim that a right to abate a mill-dam is a nuisance because it obstructs the navigation of a stream); Shaw v. Crawford, 10 Johns. 236, 238 (N.Y. Sup. Ct. 1813) (ruling that every impediment to the natural course and the natural use of rivers and streams becomes a public nuisance); Stoughton v. Baker, 4 Mass. (3 Tyng) 522, 528-29 (1808) (limiting an owner's right to a water-mill or dam so that sufficient and reasonable passage-way shall be allowed for the fish). *But see* Dep't of Fisheries v. Chelan Cty. Pub. Util. Dist. No. 1, 588 P.2d 1146, 1146 (Wash. 1979) (limiting the enforceability of a statute that attempted to codify the common law rule by requiring dam owners to maintain fish passage).

109 Oregon Territory Act, ch. 178 § 12, 9 Stat. 323, 328 (1848).

110 1889-90 Wash. Sess. Laws 107-08 (making it a misdemeanor to own, construct, or maintain "any dam or other obstruction across any stream in this state which any food fish are wont to ascend, without providing a suitable fishway or ladder for the fish to pass over such obstruction") (codified as amended at WASH. REV. CODE §§ 77.15.320, 77.57.030 (2008)); *see also* Creveling v. Wash. State Dep't of Fish & Wildlife, 177 P.3d 136, 136-38 & n.1 (Wash. Ct. App. 2008) (affirming an administrative order to remove a stream obstruction that failed to meet the requirements of the Revised Code of Washington section 77.57.030).

111 Declaration of Paul Sekulich, Ph.D. ¶¶ 47-50, United States v. Washington, Civil No. 70-9213, Subproceeding 01-1 (W.D. Wash. Oct. 15, 2009) [hereinafter Sekulich Declaration]; *see also* WASH. ADMIN. CODE §§ 220-660-020, 190, 200 (2018) (implementing provisions that reflect the "current and best science, technology, and construction practices related to the protection of fish life," including designs for water crossing structures over fish-bearing waters and fish passage improvement structures).

112 *See* Richard F. Weingroff, *Federal Aid Road Act of 1916: Building the Foundation*, 60 PUB. ROADS, no. 1, Summer 1996 (Fed. Highway Admin., Washington, D.C.) (discussing public demand for federal funding to improve roadways in response to the rise in automobiles).

113 Act of July 11, 1916, ch. 241, §§ 6, 7, 39 Stat. 355, 357-58.

114 *See* 23 U.S.C. §§ 106, 109, 114, 119, 150 (2017) (providing procedures and standards guiding federal approval and oversight of state construction projects in the Interstate System and National Highway System); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 12-474, HIGHWAY INFRASTRUCTURE: FEDERAL-STATE PARTNERSHIP PRODUCES BENEFITS AND POSES OVERSIGHT RISKS 3-10 (2012) (describing history and operation of federal-aid highway programs).

115 1917 Wash. Sess. Laws 260 (codified as amended at WASH. REV. CODE § 47.04.050 (2018)).

116 Act of July 11, 1916, Pub. L. No. 64-156, ch. 241, § 2, 39 Stat. 355-59.

117 *See* Declaration of Matthew J. Witecki in Support of Washington's Motion for Summary Judgment ¶¶ 2-3, United States v. Washington, Civil No. 70-9213, Subproceeding 01-1 (W.D. Wash. Aug. 14, 2006) [hereinafter Witecki Declaration] (stating that the Washington Department of Transportation adhered to the Federal Highway Administration's standards regarding culvert design, and that Witecki's review of other state highway agencies' manuals showed they utilized the Federal Highway Administration's standards as well); David R. Levin, *Federal Aspects of the Interstate Highway Program*, 38 NEB. L. REV. 377, 393-94, 396 (1959) (summarizing the highway design requirements set forth in the Geometric Design Standards for the National System of Interstate and Defense Highways).

118 Declaration of Robert Barnard, P.E. ¶ 5, United States v. Washington, Civil No. 70-9213, Subproceeding 01-1 (W.D. Wash. Feb. 20, 2010) [hereinafter Barnard Declaration].

119 Witecki Declaration, *supra* note 117, ¶ 2.

120 *See* Sekulich Declaration, *supra* note 111, ¶ 6 (discussing the creation of the "Unresolved Fish Passage Problems" database to track fish passage barriers).

121 Witecki Declaration, *supra* note 117, ¶ 4.

122 Transportation Budget for Period Ending June 30, 1993, ch. 15 § 22(3), 1991 Wash. Sess. Laws 2661.

123 Sekulich Declaration, *supra* note 111, ¶ 7.

124 *Id*. ¶¶ 15, 19-20; Barnard Declaration, *supra* note 118, ¶¶ 3, 9; Declaration of Paul J. Wagner in Lieu of Direct Testimony ¶ 12, United States v. Washington, Civil No. 70-9213, Subproceeding 01-1 (W.D. Wash. Apr. 2, 2009) [hereinafter Wagner Declaration].

125 Wagner Declaration, *supra* note 124, ¶ 24. In 2018, WDFW estimated that there were 18,000 to 20,000 barriers to salmon and steelhead statewide, of which fewer than ten percent were in the state highway system. *Compare id.*, *with Conservation: Fish Passage Program*, WASH. DEP'T OF FISH & WILDLIFE, https://wdfw.wa.gov/conservation/habitat/fish_passage (last visited Oct. 17, 2018).

126 Witecki Declaration, *supra* note 117, ¶ 5; Wagner Declaration, *supra* note 125, ¶ 10.

127 Wagner Declaration, *supra* note 124, ¶ 10.

128 *Id.*, ¶ 33. The 2019 report is available on the Washington Department of Transportation Website. *Improving Fish Passage*, WASH. DEP'T OF TRANSP., http://www.wsdot.wa.gov/Projects/FishPassage/default.htm (last visited Oct. 7, 2019). Some prior reports are available from the Washington State Archives page. *Washington State Archives - Digital Archives*, WASH. SEC'Y OF STATE, https://www.digitalarchives.wa.gov (follow "Search: Detailed Search" hyperlink, then select "Publications, State Government Agencies" from the Record Series drop-down and search the Publication Title field for "fish passage progress report") (last visited Oct. 17, 2018).

129 Request for Determination at Ex. A ¶ F, United States v. Washington, Civil No. 70-9213, Subproceeding 01-1 (W.D. Wash. Jan. 12, 2001) [hereinafter Exhibit A].

130 Exhibit A, *supra* note 129. The Western District of Washington did not initiate electronic filing until 2004, but the court has made all pre-2004 documents from the culvert case available on PACER.

131 *Id*.

132 State of Washington's Answer ¶ 1.4, United States v. Washington, No. C70-9213, Subproceeding 01-1 (W.D. Wash. Mar. 16, 2001), ECF No. 9.

133 United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980) ("[T]reaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs," thus the state, the United States, and third parties have a duty "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs."), *vacated in part*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

134 Request for Determination ¶ 4.1, United States v. Washington, No. C70-9213, Subproceeding 01-1 (W.D. Wash. Jan. 12, 2001), ECF No. 1.

135 State of Washington's Answer ¶¶ 5.13-5.22, 6.3-6.7, United States v. Washington, No. C70-9213, Subproceeding 01-1, (W.D. Wash. Mar. 16, 2001), ECF No. 9.

136 United States v. Washington, 19 F. Supp. 3d 1317, 1340 (W.D. Wash. 2000).

137 Stipulation and Order Directing Negotiation of Coordinated Plan to Repair Culverts, United States v. Washington, No. C70-9213, Subproceeding 01-1 (W.D. Wash. Mar. 27, 2002), ECF No. 108.

138 Washington's Motion for Summary Judgment, United States v. Washington, No. C70-9213, Subproceeding 01-1 (W.D. Wash. Aug. 14, 2006), ECF No. 287; Tribes' Motion for Summary Judgment (W.D. Wash. Aug. 14, 2006), ECF No. 295.

139 United States v. Washington, 20 F. Supp. 3d 828, 899 (W.D. Wash. 2007).

140 *Id*. at 895.

141 *Id*. at 898.

142 *Id*.

143 *Id*. at 899.

144 *Id*.

145 Plaintiff Tribes' Motion for Summary Judgment at 1, United States v. Washington, 20 F. Supp. 3d 828, No. C70-9213, Subproceeding 01-1, (W.D. Wash. 2007), ECF No. 295.

146 *Washington*, 20 F. Supp. 3d at 894-95.

147 Notice of Withdrawal of Washington's Motion in Limine Re Moderate Living Expert Testimony at 1, United States v. Washington, No. C70-9213 (W.D. Wash. Aug. 27, 2007), ECF No. 396; Notice of Withdrawal of Tribes' Motion in Limine Re: Moderate Living at 1, United States v. Washington, No. C70-9213 (W.D. Wash. Aug. 27, 2007), ECF No. 397.

148 United States v. Washington, 20 F. Supp. 3d 986, 1000 (W.D. Wash. 2013).

149 Order on Motions in Limine at 3-4, United States v. Washington, No. CV 9213RSM (W.D. Wash. Oct. 8, 2009), ECF No. 607.

150 *See* Plaintiffs' Proposed Findings of Fact with Citations to the Record at 29-38, United States v. Washington, No. C70-9213 (W.D. Wash. Jan. 29, 2010), ECF No. 659 (explaining the harm caused by poorly-constructed culverts and referencing evidence to support those assertions).

151 *See* State of Washington's Proposed Findings of Fact and Conclusions of Law at 4-6, United States v. Washington, No. C70-9213 (W.D. Wash. Jan. 29, 2010), ECF No. 658 (arguing that "[s]almon recovery" is a "complex problem" that requires a collaborative approach including different groups, and stressing that "[e]ach watershed is unique").

152 State of Washington's Post-Trial Brief at 26, United States v. Washington, No. C70-9213 (W.D. Wash. Feb. 5, 2010), ECF No. 663.

153 *See* Order on Supplemental Briefing at 1-3, United States v. Washington, No. CV 9213RSM (W.D. Wash. Jan. 11, 2013), ECF No. 733 (providing a history of the litigation since 2001 and requesting "updated information regarding the State of Washington's efforts, since June of 2010, to repair and replace culverts").

154 United States v. Washington, 20 F. Supp. 3d 986, 1013-25 (W.D. Wash. 2013); *Federal Court Injunction for Fish Passage*, WSDOT (last visited Feb. 1, 2019), https://www.wsdot.wa.gov/Projects/FishPassage/CourtInjunction.htm. In June 2018, WSDOT reported that it had corrected fifty-five barriers since the injunction was entered in 2013. Eleven were corrected in 2017 at an average cost of $3.2 million per culvert, all from state taxpayers. Susan Kanzler et al., *WSDOT Fish Passage Performance Report*, WSDOT, IX, 24, 31 (June 30, 2018). The Washington Legislature appropriated $100 million for fish passage barrier removal under the injunction during the 2019-2021 biennium. 2019 Wash. Sess. Laws 3555.

155 United States v. Washington, 853 F.3d 946, 951-52, 979-80 (9th Cir. 2017).

156 *Id*. at 964.

157 *Id*. at 965.

158 *Id*. at 966.

159 *Id*.

160 *Id*. at 966-68.

161 *Id*. at 970-78.

162 Tribes' Answers to Interrogatories at 41-42 (attached to Declaration of Mary E. Jones, United States. v. Washington, Civil No. C70-9213, Subproceeding 01-01, (W.D. Wash. Aug. 14, 2006), ECF No. 292.

163 Tribes' Answers to Interrogatories, *supra* note 162, at 40-46, 96-104; United States' Answers to Interrogatories at 37-42, 104-05, 169-77 (attached to Declaration of Mary E. Jones, United States. v. Washington, Civil No. C70-9213, Subproceeding 01-01 (W.D. Wash. Aug. 14, 2006), ECF No. 292).

164 United States v. Washington, 864 F.3d 1017, 1018 (9th Cir. 2017).

165 *Id*. at 1023-24.

166 Washington v. United States, 138 S. Ct. 735 (2018) (mem.).

167 Brief for the Tribal Respondents at 21, 24, 44-45, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269); Brief for the United States at 35-36, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269); Transcript of Oral Argument at 35-36, 57-61, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269).

168 Washington v. United States, 138 S. Ct. 1832, 1833 (2018) (mem.).

169 Brief of Amici Curiae Law Professors in Support of Respondents at 1, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269).

170 *See* Exhibit A, *supra* note 129 (stating the requested relief); William Fisher, Note, *The Culverts Opinion and the Need for a Broader Property-Based Construct*, 23 J. ENVTL. L. & LITIG. 491, 511 (2008) ("[I]t is likely that the tribes will rely upon the [culvert summary judgment] ruling and argue that it should be expanded to cover other environmental harms to fish and fish habitat."); Mason D. Morisset & Carly A. Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation*, BELLWETHER: SEATTLE J. ENVTL. L. & POL'Y. 29, 49 (Spring 2009) (explaining that tribes filed the culvert case "claiming that the state has a treaty-based duty to preserve fish runs and habitat sufficiently for the tribes to earn a 'moderate living'"). Mr. Morisset represented the Tulalip Tribes in the culvert litigation. Exhibit A, *supra* note 129, at 4.

171 The tribes' brief included two photographs that they said were pictures of state culverts. Brief for the Tribal Respondents at 12-13, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269). In fact, one was a photo of a non-state culvert before it was replaced in 2012 with funding from a state grant. *Lambert Creek Burial Removal Project*, WASH. STATE RECREATION & CONSERVATION OFFICE, https://secure.rco.wa.gov/prism/search/projectsnapshot.aspx?ProjectNumber=01-1219 (last visited Oct. 19, 2018). The other photo depicted a culvert whose ownership was uncertain. Exhibit AT-010, Declaration of Lawrence J. Wasserman at 18, 36, United States v. Washington, No. C70-9213, Subproceeding 01-1 (W.D. Wash.) (admitted Oct. 13, 2009).

172 Washington v. United States, 138 S. Ct. 1832, 1833 (2018) (per curiam).

173 *See* Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 16-17 (2017) ("Between 1985 and 2001, the tribes searched for factual settings that would satisfy the Ninth Circuit's demand for concrete evidence on the habitat issue."); Morisset & Summers, *supra* note 170, at 53 (describing the culvert decision as "an important step in a tribal legal strategy more than thirty years in the making").

174 Brief for the Tribal Respondents at 16, 21, 40, 44, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269); Brief for the United States at 35-36, 40, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269); Transcript of Oral Argument at 35-36, 57-61, Washington v. United States, No. 17-269 (April 18, 2018).

175 U.S. Environmental Protection Agency, Technical Support Document, EPA Approval of the State of Idaho's New/Revised Human Health Water Quality Criteria for Toxics and Other Water Quality Standards Provisions Submitted on December 13, 2016 at 27 n.52 (April 4, 2019), https://www.epa.gov/sites/production/files/2019-04/documents/04042019_cover_letter_approval_of_deq_human_health_criteria_signed.pdf (last visited May 3, 2019).

176 United States v. Washington, 20 F. Supp. 3d 986, 1022 (W.D. Wash. 2013); United States v. Washington, 20 F. Supp. 3d 828, 899 (W.D. Wash. 2007). *But see* Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The* Martinez *Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653, 653 (2009) (describing the district court as having "affirmed that the treaty fishing right prohibits habitat-damaging activities that prevent tribes from earning a moderate living through fishing"); Morisset & Summers, *supra* note 170, at 52 (describing the district court decision as having "far-reaching implications for Indian treaty rights").

177 See *Governor's Salmon Recovery Office*, WASH. STATE RECREATION & CONSERVATION OFFICE, https://www.rco.wa.gov/salmon_recovery/gsro.shtml (last visited Oct. 19, 2018), for a description of some of Washington's salmon recovery programs.

178 *See, e.g.*, 2014 Wash. Sess. Laws 1015-16, ch. 207, § 5 (codified at WASH. REV. CODE ANN. § 84.36.010) (property tax exemption), upheld in City of Snoqualmie v. King Cty. Exec. Dow Const., 386 P.3d 279, 281 (Wash. 2016); 2011 Wash. Sess. Laws 1956, ch. 309 (codified at WASH. REV. CODE ANN. ch. 13.38) (Washington State Indian Child Welfare Act); 2007 Wash. Sess. Laws 2425-26,

2434-35, ch. 515 §§ 19, 31 (codified as amended at WASH. REV. CODE§ 82.38.310) (fuel tax agreements), upheld in Auto. United Trades Org. v. State, 357 P.3d 615 (Wash. 2015); 2013 Wash. Sess. Laws 1440, ch. 242 (tribal school compacts).

179 Quinault Indian Nation v. Imperium Terminal Servs., LLC, 387 P.3d 670, 680 (Wash. 2017) (remanding for further review of proposal at Port of Grays Harbor); *In re Tesoro Savage, LLC*, Report to the Governor on Application No. 2013-01, 3 (Wash. Energy Facility Site Evaluation Council Dec. 19, 2017) (recommending denial of application at Port of Vancouver); Gov. Jay Inslee decision letter re Tesoro Savage Application (Jan. 29, 2018), available at http://www.efsec.wa.gov/Tesoro-Savage.html (concurring with the Council's recommendation to reject the application at Port of Vancouver).

180 *See, e.g.*, 1989 Wash. Sess. Laws 5, ch. 2 (Initiative Measure No. 97, Model Toxics Control Act) (exemplifying a policy measure aimed at the "right to a healthful environment").

181 Letter from George D. Dysart, *supra* note 88.

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