

Nos: 13-35474; 13-35519

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, ET AL.,
Appellees,

v.

STATE OF WASHINGTON,
Appellant.

On Appeal From the United States District Court For The
Western District of Washington

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

ANSWERING BRIEF OF THE
APPELLEE-CROSS-APPELLANT INDIAN TRIBES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for the Appellee-Cross-Appellant Confederated Tribes and Bands of the Yakama Indian Nation, Hoh Indian Tribe, Jamestown S’Klallam Tribe, Lower Elwha Klallam Tribe, Lummi Nation, Makah Tribe, Muckleshoot Indian Tribe, Nisqually Tribe, Nooksack Tribe, Port Gamble S’Klallam Tribe, Puyallup Tribe, Quileute Tribe, Quinault Nation, Sauk-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, The Tulalip Tribes and the Upper Skagit Tribe certify, on information supplied by each of the named 21 Appellee-Cross-Appellants, that none of them has a parent corporation(s) and no publicly-held corporation owns stock in any of the 21 Appellee-Cross-Appellant Tribes or Nations.

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I. INTRODUCTION

Salmon are central to the diet, economy, culture and religion of Washington's Indian tribes. In the 1850s, the Tribes ceded vast areas to the United States in the "Stevens Treaties." In exchange, they sought security for their all important fisheries. The Treaties accomplished this by promising them "the right of taking fish at all usual and accustomed grounds and stations . . . in common with citizens," *E.g.*, Treaty of Medicine Creek, Art. III, 10 Stat. 1132. As the Supreme Court and this Court have held for more than a century, the meaning was clear: non-Indians could also fish, but would never interfere with the Tribes' ability to sustain themselves by fishing.

This appeal tests the treaty promise. The State argues that the Treaties grant it the right to maintain road culverts that block salmon from passing upstream into more than 1,000 miles of the Tribes' traditional waters, enough habitat to produce hundreds of thousands of fish each year. The Treaty parties would never have understood their agreements to grant the State such a right. Their intent was to preserve tribal fisheries, and they shared traditions of protecting fish passage. One hundred years of precedent confirms that the Treaties protect against obstructions to fish and tribal fishing sites. The summary judgment declaring that these culverts violate the Treaties should therefore be affirmed.

After a lengthy remedy trial, the court found that, left to its own devices, the

State would not reopen these streams to fish for 100 years, if ever. It enjoined the State to ensure salmon passage at new culverts and to complete correction of the worst highway barriers within seventeen years. The injunction is as deferential to the State as possible, while ensuring timely and effective abatement of these obstructions to fish passage and treaty rights. The injunction should also be affirmed.

II. JURISDICTIONAL STATEMENT

The Tribes adopt Appellant's Jurisdictional Statement.

III. ISSUES PRESENTED FOR REVIEW

(1) When Washington tribes ceded their land by treaty but reserved the "right of taking fish at usual and accustomed places," did they understand that they were granting a future state the right to block fish passage under its roads, so that fish would not be produced upstream and could not be taken there or elsewhere?

(2) Did the district court err in concluding that the exclusion of salmon from 1,000 miles of stream infringes on the Tribes' treaty right to take fish from those streams?

(3) Has the State demonstrated that the district court's findings that (a) losing millions of square meters of habitat significantly reduces salmon populations; (b) restoring access to blocked habitat is the highest priority in salmon habitat restoration; and (c) the State will use its \$9.9 billion biennial Transportation

Budget, rather than its limited General Fund, to correct highway culverts, are illogical, implausible, or without support in the record?

(4) Did the district court abuse its discretion in enjoining the State to provide fish passage, using effective designs, when it builds or replaces culverts; to correct the most significant barriers by 2030; and to take steps to prevent the recurrence of such barriers?

IV. ADDENDUM

An addendum containing the text of pertinent statutory and regulatory provisions is attached at the end of this brief.

V. STATEMENT OF THE CASE

A. Procedural History and Rulings to be Reviewed.

The United States and Washington treaty tribes filed this case in 1970 to challenge the State's regulation of treaty fisheries and its impairment of those fisheries by obstruction of streams on which tribes have treaty fishing rights. *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975) [hereinafter *Boldt*].

In Phase I of the case, the district court enjoined much state regulation of treaty fishing and apportioned the harvest to allow sufficient fish for tribal needs. *Id.* at 342-44, 401-02, 414-19. The Supreme Court largely ratified the district court's allocation, holding that the Tribes could take up to 50% of the harvest in

their usual and accustomed waters (U&A).¹ *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686-87 (1979) [hereinafter *Fishing Vessel*].

In Phase II, the district court declared the State's general 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 State appealed, and this Court, in the second of two en banc opinions, vacated the declaratory judgment as "contrary to the exercise of sound judicial discretion," absent a factually specific demand for relief. *United States v. Washington*, 759 F.2d 1353, 1356 (9th Cir. 1985) (per curiam en banc) [hereinafter *Phase II*]. Far from rejecting any duty of the State to protect against degradation of fish habitat, however, this Court held that "the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute." *Id.*

In 2001, the Tribes filed the present sub-proceeding seeking redress for culverts under state roads that prevent salmon from entering upstream portions of

¹ Tribal U&A collectively includes all, or substantially all, waters in the Case Area. See *Boldt*, 384 F. Supp. at 353, 359-82, 402; *United States v. Washington*, 459 F. Supp. 1020, 1039-42, 1048-49, 1059 (W.D. Wash. 1978); *United States v. Washington*, 626 F. Supp. 1405, 1441-43, 1467 (W.D. Wash. 1985). The Case Area is all of western Washington west of the Cascade Mountains and north of the Columbia River watershed. *Fishing Vessel*, 443 U.S. at 670 n.15.

tribal U&A, thereby reducing potential annual salmon production by hundreds of thousands of fish. ER 1008-16.² The court found that assurances by federal treaty negotiators that the Treaties would not harm tribal fisheries “would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.” ER 53. It also found that the State’s culverts block salmon from use of 1,000 miles of stream in the Case Area, ER 28 (FF4), and that under the State’s current programs, those barriers would not be corrected for more than a century, if ever. ER 32 (FF28); ER 33 (FF31a).³

The court held that the State has violated a “narrow and specific treaty-based duty,” ER 42 (CL19), “to refrain from building or operating culverts . . . that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” ER 54. The court enjoined the Washington State Department of Transportation (WSDOT) to correct its most significant barriers within seventeen years and the state natural resource agencies to do so by 2016 (an existing state law deadline). The State appeals both the summary judgment order

² In this brief, Excerpt of Record is “ER,” Supplemental Excerpt of Record is “SER,” Finding of Fact is “FF,” and Conclusion of Law is “CL.” Citations to the docket refer to the ECF header page number.

³ The district court’s opinion contained two Findings of Fact numbered 31; in this brief, “31a” and “31b” demarcate the first and second of them, respectively.

and the injunction.⁴ ER 1-7, 8-42, 54.

B. Statement of Facts

1. Salmon Are Vital to the Tribes.

In 1854 and 1855, Territorial Governor Isaac Stevens negotiated treaties with tribes throughout Washington. *Fishing Vessel*, 443 U.S. at 661 n.2, 666. As the district court found here, salmon were of “vital importance” to those Tribes. ER 9 (FF2). Governor Stevens and other federal negotiators promised the Tribes they would retain access to their fisheries after treaties were signed, and be able to feed themselves from their fisheries “forever.” ER 9 (FF1). Each treaty accordingly provides, in similar language, that “[t]he right of taking fish, at all usual and accustomed grounds and stations, is . . . secured to said Indians, in common with all citizens of the Territory.” *E.g.*, Treaty of Medicine Creek, Art. III, 10 Stat. 1132 (*see* Dkt. 25 at 81). .

The court found that these promises were “crucial” in obtaining the Indians’ cession of millions of acres of land. ER 9 (FF2). Consequently, it is “inconceivable” that either party to the Treaties intended that the Indians be excluded from meaningful use of their accustomed places to fish. ER 10 (FF2). More than 150 years later, salmon continue to be of vital importance to tribal

⁴ The Tribes conditionally cross-appealed certain evidentiary rulings, but now have pending an uncontested motion to dismiss the cross-appeal. SER 1-4; SER 5-6.

livelihood, diet, and cultural identity. ER 11-12 (FF 3.6, 3.7, 3.13). These findings are undisputed.

2. State Barrier Culverts Reduce Salmon Harvests.

Today, the abundance of salmon available for tribal harvest has been “greatly reduced,” ER 11 (FF3.10), and the areas open to tribal fishing have “decreased significantly.” ER 11 (FF3.9). The precipitous decline in salmon abundance has continued since Judge Boldt’s 1974 decision. ER 28 (FF7-8). Tribes cannot harvest sufficient salmon to meet their needs and provide a livelihood to members who wish to fish for a living. ER 29 (FF13). Decreased abundance has forced the Tribes to greatly curtail their fisheries, and meant that fewer tribal members engage in fishing. ER 29 (FF9-10). Young tribal members have lost opportunities to learn fishing from experienced elders. ER 29 (FF11). Diminished harvest has affected tribal ceremonial life, in which salmon play a key role. ER 29 (FF12). Tribal fishers have suffered economically and emotionally as harvest declines have made it impossible to support their families. ER 29 (FF9-11).

The decrease in salmon production in the Case Area is directly related to the loss of salmon habitat, ER 29 (FF14), including losses from culverts that block fish from reaching spawning grounds. ER 30-31 (FF20-26); ER 889 (¶31) (explaining the five common conditions at culverts that create fish migration barriers).

Because salmon are anadromous—spawning in freshwater and eventually going to sea to mature—access to freshwater habitat is critical to their perpetuation. ER 10 (FF3.2-3.5); SER 49-50.2. State-owned barrier culverts are so numerous and affect such a large area that they have a significant impact on salmon production. ER 31-32 (FF27).

As of early 2013, the Washington Department of Fish and Wildlife (WDFW) and the Washington Department of Natural Resources (DNR) had identified 1,129 state-owned anadromous fish barrier culverts in the Case Area, of which at least 854 blocked a significant reach (at least 200 meters) of habitat upstream.⁵ These culverts prevent fish from reaching 1,000 miles of stream within tribal U&A. ER 33-34 (FF 27). Barrier culverts “have a negative impact on spawning success, growth and survival of young salmon, upstream and downstream migration, and overall production.” ER 30 (FF20). In fact, culverts that are improperly designed, installed or maintained have caused local extirpation of salmon stocks.⁶ ER 31 (FF24).

In 1997, WSDOT reported to the Washington state legislature that WSDOT

⁵ WDFW defines a “significant reach” as, generally, 200 lineal meters or more. ER 22 (FF3.94). The 1,129 barriers include 1,000 owned by WSDOT, of which 817 affect a significant reach, ER 118; 19 owned by WDFW, of which 14 affect a significant reach, ER 33 (FF31b); 87 total owned by DNR, ER 33 (FF32); and 27 owned by State Parks, of which 23 affect a significant reach. ER 34 (FF34).

⁶ Salmon of the same species, originating in the same area and returning to spawn at the same time of year, are a “stock.” ER 12 (FF3.18).

culverts alone blocked 249 miles and over 1.6 million square meters of habitat, sufficient to produce 200,000 additional adult salmon each year. ER 559. By 2009, additional inventory efforts had identified three times as much habitat—a total of 1,000 miles and nearly five million square meters—above WSDOT barriers.⁷ ER 28, 31-32 (FF 4, 27). These findings are undisputed. The number of additional adult salmon that could be produced from State-obstructed habitat is thus much greater than the 200,000 estimated in 1997.

3. Correction of the State’s Barrier Culverts Increases Salmon Production.

Correction of fish passage barrier culverts is a cost-effective and scientifically sound method of restoring habitat. ER 34 (FF38); SER 68; SER 8. It quickly increases production as salmon rapidly re-colonize newly opened areas. *Id.* According to WSDOT, “[o]nce . . . problem culverts are corrected, the benefits to fish habitat are real and immediate.” SER 18. And WDFW finds “it is clear the benefit to salmonid production increases with the number of culvert repairs per year.” SER 10. Tribal and State biologists agree that removing fish passage barriers is “essential” if salmon populations are to recover. SER 24; ER 1105-06 (barrier correction provided “biggest bang for [the] buck”); SER 20 (“crucial”); SER 6.2 (“critical”).

⁷ Other state agencies’ barriers blocked over 195 miles more. SER 214:9-23; 215:9-12 *and* SER 35.

As the State’s Fish Passage Task Force reported, fish passage barriers are a “key factor in the wild salmon equation” and “[c]learly, the creation of new barriers must be prevented and the rate of barrier correction must be accelerated if Washington wild salmon and trout stocks are to recover.” ER 21-22 (FF3.89). Indeed, the State and tribes long ago agreed that to engage in other habitat protections “while not providing free access for the adults or unhindered outmigration for the juveniles, would, of course, be pointless.” SER 49-50.

4. Current State Efforts Will Not Correct the Last State Barrier Culvert for 100 Years, If Ever.

Despite recognition of the problem, State corrections have been halting. For nearly twenty years, beginning in 1991, WSDOT had a goal of correcting all its barrier culverts within twenty years. SER 22, 65, 72, 74, 86. By 2009, the agency no longer had any deadline. ER 22 (FF3.91). From 1997 to 2009, it attempted 225 barrier culvert corrections statewide, of which 176 met fish passage standards. SER 74.2.

Between 2009 and 2011, WSDOT completed just 24 barrier culvert replacements in the Case Area. ER 32 (FF28). At that rate, assuming no additional culverts become barriers, it would take the State “more than 100 years” to replace WSDOT’s culverts that blocked significant reaches in 2009. *Id.* But the number of known barrier culverts has *increased* since 2009, ER 32 (FF29), and as a result, “under the current State approach, the problem of WSDOT barrier culverts

in the Case Area will never be solved.” ER 33 (FF31a).

VI. SUMMARY OF THE ARGUMENT

At the treaty councils in the 1850s, tribal negotiators demanded, received, and relied upon the promise of the United States that signing treaties and permitting non-Indian settlement of their lands would not harm their fisheries. The parties intended the Treaties to secure the Tribes’ ability to forever sustain themselves by fishing. The treaty promise, securing to the Tribes “the right of taking fish at usual and accustomed grounds and stations” was essential consideration for the Tribes’ cession of millions of acres of land.

Today, empty streams and empty nets belie that promise. Salmon runs have plummeted; many are locally extirpated or completely extinct. Tribes cannot meet their needs for fish. At tribal ceremonies, fish now come from a freezer or a can. Despite ancient tribal and Anglo-American traditions barring obstructions to fish passage, more than 1,100 state culverts block salmon from 1,000 miles of Case Area streams. Above those culverts lie almost 5 million square meters of salmon habitat, capable of producing hundreds of thousands more harvestable adult fish each year.

The central question in this appeal is whether the Treaties granted a future state the unfettered right to maintain such culverts and to exclude salmon from streams within the Tribes’ fishing grounds. The district court found answer to that

question in seven Supreme Court and many lower court decisions regarding the interpretation and purpose of the Treaties, and in a substantial, uncontested record. The purpose of the treaty fishing clause to sustain tribal livelihoods is clear, as is its essential role in securing tribal agreement to the Treaties. The biological damage wrought by barrier culverts is plain in the record. The harm to tribal culture and economy from the depletion of salmon runs is not disputed. Despite long awareness of the problem, state correction efforts have been so slow that current barriers will not be fixed in this century, if ever.

The court could only decide as it did: state culverts that seal salmon out of the streams they need to survive and multiply are inconsistent with the purpose and promise of the Treaties. This decision is but one small step further on a century-long path of Supreme Court and Ninth Circuit cases holding that the “right of taking fish” prohibits all manner of obstacles to the exercise of that right, without requiring that each obstacle be enumerated in treaty text.

The State’s appeal strays far from that precedential path, guided by technical rules of contract interpretation rather than the parties’ shared intent. The State compounds its errant course with the inverted understanding that all tribal rights, not preserved in so many words, were extinguished by the Treaties. It gives history scant attention. Ultimately, the State’s argument arrives in a place remote from precedent, where miles of water are fishless, and the Tribes’ recourse is

merely the equal of any citizen's, to petition the State in its graces to cease blocking the streams. This would indeed be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans*, 198 U.S. 374, 380 (1905). The district court properly rejected these misguided arguments, and declared that the Treaties impose a duty on the State not to maintain culverts that block salmon from waters upstream of state roads.

The court turned to equity to shape an "adjustment and accommodation" between the Treaties and the State's roads. *Id.* at 384. Relying on extensive findings, it enjoined the State to make newly built culverts passable to fish. It scheduled the gradual elimination of current barriers, while permitting most to be corrected at times demanded by existing state fish passage laws. The injunction curtails use of fish passage designs that fail to pass juvenile fish, and provides that barriers found in the future must be corrected in a reasonable time. In unchallenged findings, the court rejected the cost estimates on which the State's arguments on appeal rely. The court agreed with the State's former budget director that fears of significant impacts to state programs were speculative and unwarranted.

This injunction, which defers repeatedly to existing state culvert correction programs and policies, is no abuse of discretion. The State's objections to it are

underlain by quite a different principle, which the State candidly announced: the court failed to defer to the State's priorities. Dkt. 25 at 69-70. Such a failure is no blemish on a federal court enforcing federal treaty rights. The decision and injunction should be affirmed.

VII. ARGUMENT

A. Standard of Review.

This Court reviews both a grant and denial of summary judgment *de novo*. *Kuba v. I-A Agr. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). “A party opposing summary judgment is entitled to the benefit of only *reasonable* inferences that may be drawn from the evidence put forth,” and “threadbare conclusory statements” cannot support such inferences. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1985) (emphasis in original).

Conclusions of law are reviewed *de novo*. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004). Findings of fact are reviewed for clear error. Fed.R.Civ.P. 52(a)(6). Findings may only be reversed if “illogical, implausible, or without support in inferences that may be drawn from

the facts in the record.” *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). The clear error standard applies whether the findings rest on credibility determinations, documentary evidence, or inferences from other facts. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.*

Discretionary components of a permanent injunction, including its scope, are reviewed for abuse of discretion. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). “[T]he decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

B. The State Violated Its Duty Under the Treaties by Maintaining Barrier Culverts that Interfere with the Tribal Right To Take Fish.

The district court held that “[t]he State’s duty to maintain, repair or replace culverts which block passage of anadromous fish . . . is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed.” ER 42 (CL19); ER 54. In construing the Treaties, it properly discerned the parties’ intent and purpose by applying established canons of construction to undisputed evidence and to findings of

historical fact and conclusions of law in prior precedents that are, in many instances, law of the case here. Decisions by the Supreme Court and this Court lead inexorably to the district court's conclusion that the State cannot deprive Tribes of treaty-secured rights to their ancient fisheries by building and maintaining culverts that obstruct fish passage and deplete those fisheries. The court's conclusion follows the path charted by this Court in *Phase II* and should be upheld.

1. The Uncontested Evidence Shows That the Signatories Intended the Treaties to Protect Tribal Fisheries from Non-Indian Obstruction.

The goal of treaty interpretation is to determine the parties' intent from the treaty text, its context, and the history of negotiations. *United States v. Washington*, 157 F.3d 630, 642-43 (9th Cir. 1998). The Treaties "must be construed . . . in the sense in which they would naturally be understood by the Indians." *Fishing Vessel*, 443 U.S. at 676; *Winans*, 198 U.S. at 380. "[I]t cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against . . . them." *Winters v. United States*, 207 U.S. 564, 577 (1908). The courts accordingly look "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) (internal quotations omitted).

Applying these interpretive rules to the Stevens Treaties, the Supreme Court has found it “inconceivable” that the parties “agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.”⁸ *Fishing Vessel*, 443 U.S. at 676.

The parties’ intent and purpose—and especially the Indian understanding—has controlled interpretation of the “right of taking fish” since the Supreme Court first construed it in *Winans*, 198 U.S. at 381-82. In *Winans*, non-Indian fishers monopolized a fishing site and the harvest, and prevented the Indians from crossing private land to the river. The Court found that, because salmon had been “not much less necessary to the existence of the Indians than the atmosphere they breathed,” and the Tribes had unfettered rights to take those fish, they could only have understood the Treaty’s fishing clause to guarantee them both fish and fishing places. *Id.* at 380-81. Similarly, in *Seufert Brothers Co. v. United States*, it held that the Indians understood the Treaty to preserve the right to fish as they had habitually done—on both sides of the river—and so it did. 249 U.S. 194, 198-99

⁸ The emphasis on Indian understanding compensates for potential miscommunication and overreaching on the treaty grounds. *Fishing Vessel*, 443 U.S. at 675-76. The Treaties were negotiated by people who shared no common language and little common experience. *See, e.g., United States v. Confederated Tribes of the Colville Reservation*, 606 F.3d 698, 701, 708 (9th Cir. 2010). The federal negotiators wrote the treaties, which they alone could read, in a language they alone understood. *Id.* Their interpreter explained the treaty terms, using the Chinook trade Jargon—a 300-word patois not adequate for diplomacy. *Fishing Vessel*, 443 U.S. at 667 n.10.

(1919). And in *Tulee v. Washington*, state licensing requirements were held inapplicable to treaty fishers because the Indians understood the Treaties to secure their continued right to fish in accordance with their “immemorial customs.” 315 U.S. 681, 684-85 (1942). *See also United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975) (affirming Judge Boldt’s allocation of the fishery because that is what the Tribes “would have expected” in response to scarcity).

It is undisputed here that, at the time of the Treaties, the Indians’ dependence on their fisheries was near absolute. *Boldt*, 384 F. Supp. at 350 (FF3). Salmon fueled their diet and economy and shaped their culture. *Id.* at 350-51 (FF3-7). They fished and took fish wherever they could, from the open Pacific to the headwater streams. *Id.* at 352-53 (FF10-14). It is no surprise then that the future of tribal fisheries proved central to the treaty negotiations. They were “giving up a valuable right to land,” and in exchange sought “the assurance they could continue to fish without interference from the whites coming into their ancestral lands.” *United States v. Washington*, 774 F.2d 1470, 1480 (9th Cir. 1985). Tribal leaders held out for a commitment, good against all comers, that signing the Treaties would not diminish their supply of fish. *Winans*, 198 U.S. at 381-82 (fishing right “intended to be continuing against the United States and its grantees as well as against the State and its grantees”); *United States v. Washington*, 873 F. Supp. 1422, 1437 (W.D. Wash. 1994) [hereinafter *Shellfish I*], *aff’d in relevant part*, 135

F.3d 618 (9th Cir. 1998). “[A] guarantee of permanent fishing rights [was] an absolute predicate to entering into a treaty.” *Shellfish I*, 873 F. Supp. at 1437; *Boldt*, 384 F. Supp. at 381 (FF156); ER 966-67 (¶9).

Governor Stevens met the Tribes’ concerns with explicit, unconditional promises. *Shellfish I*, 873 F. Supp. at 1435; *Boldt*, 384 F. Supp. at 355 (FF20). He gave assurances that the government intended them to continue to support themselves through fishing, and that the Great Father “wants you to take your fish.” ER 967 (¶10). “[Y]ou shall not have simply food and drink now but . . . forever.” ER 9 (FF1), ER 967, 969-70 (¶¶ 10, 14). Stevens was unequivocal about the effect of the proposed treaty, telling the tribes: “This paper secures your fish.” *Fishing Vessel*, 443 U.S. at 667 n.11. The Indians “relied on these promises and they formed a material and basic part of the treaty and of the Indians’ understanding” of its meaning. *Boldt*, 384 F. Supp. at 381 (FF156).

The State identifies nothing in the Tribes’ experience that would have led them to expect the State to obstruct streams and deplete the runs, or to have understood that the treaty right to fish could be defeated in this manner. Their leaders required, and their mythology taught, that fishing weirs must be opened to let fish upstream, or the runs would fail. *Id.* at 357 (FF28); SER 93 (¶¶5- 6); ER 53. They had seen white farms and sawmills, roads and settlement, but the salmon remained abundant. *Id.* at 355 (FF20); SER 105-107 (¶¶4-7), ER 13 (FF3.26).

There is no evidence in the record that the Tribes were told that the Treaties would in any way impair their fishing, beyond that non-Indians could fish as well. *Boldt*, 384 F. Supp. at 357 (FF26). It beggars the imagination that the Tribes, dependent on fish and assured on highest authority that their fisheries would be unimpaired, would have understood the Treaties as ceding to the future state the power to block the waterways in which salmon live and the Tribes fish. To the contrary, as the district court concluded, the “assurances [made to the Tribes] would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.” ER 53.

The federal negotiators did not understand the Treaties any differently, and the State put no evidence before the district court that they did. They, like the Indians, believed the resource was inexhaustible if properly cared for. ER 969-70 (¶¶13-14); ER 9 (FF1); SER 105 (¶4). And like the Tribes, the non-Indians had an ancient tradition of prohibiting obstructions to fish passage, stretching back to the Founders and even to Magna Carta. *E.g.*, John F. Hart, *Fish, Dams, And James Madison: Eighteenth-Century Species Protection and The Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 292-99 (2004); *Kewee v. Lyman*, 82 U.S. 500, 509-10 (1872); *Barclay R.R. & Coal Co. v. Ingham*, 36 Pa. 194, 201 (Pa. 1860) (on origins in Magna Carta). A prohibition on blocking salmon streams was

in the Act creating Oregon Territory, Act of August 14, 1848, 9 Stat. 323, § 12, from which Washington Territory was later split. Act of March 2, 1853, 10 Stat. 172, § 12; *see also* ER 16 (FF3.48-3.49) (on Washington fish passage laws).

Permitting the State to exclude fish from streams would have undercut Governor Stevens' goals. Stevens intended the Treaties to forestall friction between the Tribes and non-Indian settlers. *Boldt*, 384 F. Supp. at 355 (FF19). But that did not mean that "Indians would relinquish their ancient fishing grounds on demand." *Shellfish I*, 873 F. Supp. at 1436. Stevens sought to minimize conflict by restricting the Indians' homes to their reservations, while allowing them "liberty of motion" to fish off-reservation as they had before. *Id.*; *Fishing Vessel*, 443 U.S. at 699-700. He also wanted to assure that fishing — not federal rations — could meet tribal needs, ER 968-69 (¶¶11-12), and he wanted to undergird a new economy in which Indians would work and fish, and salmon fisheries would hold an important role. *Id.* (¶¶12, 14); *Shellfish I*, 873 F. Supp. at 1436, 1439. Governor Stevens recognized that, in allowing non-Indian settlement, "[i]t never could have been the intention of Congress that Indians should be excluded from their ancient fisheries." *Fishing Vessel*, 443 U.S. at 666 n.9; ER 967 (¶10).

The district court accordingly was correct in concluding "it was . . . the government's intent, and the Tribes' understanding, that [the Tribes] would be able to meet their own subsistence needs forever" from their fisheries; that they

assumed the Tribes’ “cherished fisheries would remain robust forever;” and that they would not have understood the Treaties to authorize State culverts that block fish passage and thereby erode tribal fisheries. ER 52-53, ER 9 (FF1). The undisputed historical facts and legal precedent allow for no other conclusion.

2. The Determination that State Barrier Culverts Violate the Treaty Follows From a Century of Precedent and the Undisputed Evidence.

The district court held that: “In light of [the] affirmative assurances given the Tribes as an inducement to sign the Treaties, together with the Tribes’ understanding of the reach of those assurances, . . . the Treaties do impose a duty upon the State to refrain from building or maintaining culverts in such a manner as to block the passage of fish upstream or down, to or from the Tribes’ usual and accustomed places.” ER 54. Far from creating a new right, Dkt. 25 at 34, the court faithfully applied the lesson taught by decisions dating back to *Winans*: the purpose of the fishing clause is to provide sufficient fish to meet tribal needs, and the Treaties must be construed to fulfill that purpose. The uncontested evidence in this case demonstrates that barrier culverts defy that purpose and violate the State’s duty.

a. The Treaties Protect Against Non-Indian Obstruction of the Tribes’ Ability to Meet Their Needs By Fishing.

For over a century, the Supreme Court and this Court have required an “adjustment and accommodation” in order to “give effect to” the treaty purpose

when the actions of non-Indians obstruct fish or tribal fishing sites. *Winans*, 198 U.S. at 381, 384; *Fishing Vessel*, 443 U.S. at 681. *Winans* involved non-Indian fish wheels that scooped salmon from the river by the ton and threatened the run. *Fishing Vessel*, 443 U.S. at 679. The wheels’ owners also held adjoining land and would not allow tribal fishers access to the river. *Winans*, 198 U.S. at 379-80. The accommodation ordered by the court included both access and removal of some wheels so fish could “escape and be available to Indian fishermen upstream.” *Fishing Vessel*, 443 U.S. at 681.

In *Department of Game v. Puyallup Tribe*, where state regulations banned fishing with nets—the Tribes’ favored gear—the Court required an apportionment of harvest to tribal fisheries, so downstream non-Indian sport fishers would not “entirely preempt” the catch. 414 U.S. 44, 48-49 (1973) [hereinafter *Puyallup II*]; see also *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392, 396 (1968) [hereinafter *Puyallup I*]. In *Fishing Vessel*, the Court’s “adjustment and accommodation” required an allocation of harvest between Indians and non-Indians in order to remedy non-Indians’ take of 98% of the fish. 443 U.S. at 676 n.22, 681. And in *Phase II*, this Court rejected state efforts to deny Tribes a share of hatchery fish, produced to mitigate for diminished populations. 759 F.2d at 1358-59.

The results in these cases depended on the challenged activity’s interference with the Tribes’ ability to sustain themselves through fishing, not on the particular

manner of the obstruction. In each circumstance, the Court concluded that the “right of taking fish” at usual and accustomed grounds and stations implies duties necessary to fulfill the Treaty purpose. In doing so, the Court rejected the same protest the State lodges here—that by remedying a novel obstacle to the Treaty purpose, it was creating a new “right.” Compare, e.g., *Fishing Vessel*, 443 U.S. at 670-71 (rejecting State’s argument that Treaties secured only the right to access and freedom from state license fees addressed in previous decisions), with Dkt. 25 at 33-35, 43-45. The pattern in this precedent is plain, that the Tribes’ right is one of actually “taking” fish, *Fishing Vessel*, 443 U.S. at 678, not the mere opportunity to fish in streams rendered fishless by non-Indian activities. The Treaty right protects against all manner of obstructions to the fish and to the successful use of tribal fishing sites.

Applying these same principles, this Court has held that a treaty-reserved right to take fish impliedly reserves water necessary to fulfill that purpose, that is, water sufficient to keep streams suitable for fish reproduction and tribal harvest. In *United States v. Adair*, the Court held that the tribe reserved the waters needed to “secure to the Tribe a continuation of its traditional . . . fishing lifestyle,” and rejected the argument that this would impose a “wilderness servitude” on ceded lands. 723 F.2d 1394, 1409-10, 1414 (9th Cir. 1983). Similarly, in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Court affirmed a

decision protecting the Yakama Nation's treaty fishing rights by enjoining water withdrawals that would destroy salmon eggs before they could hatch. 763 F.2d 1032, 1033-34 (9th Cir. 1985); *see also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds) (citing *Fishing Vessel*, 443 U.S. at 665, and *Winans*, 198 U.S. at 381). The Washington Supreme Court has similarly implied a reservation of instream water to fulfill the purpose of the Yakama Nation's treaty right to take fish. *Dep't of Ecology v. Yakima Reservation Irrig. Dist. (Acquavella II)*, 121 Wash.2d 257, 276-77 (Wash. 1993).

Just as the Treaties prohibit fences or fish wheels that obstruct the fisheries, and diversions of water the fish need to survive, they preclude state barrier culverts that deny salmon access to their spawning and rearing places and to tribal fishing sites. Fish passage is fundamental to fulfillment of the Treaty purpose to maintain tribal fisheries forever. A century of precedent accordingly precludes the State from maintaining these obstructions.

The State nevertheless argues that its culverts break no treaty duty because the Treaties secure the Tribes only a share of whatever fish might happen to remain. Dkt. 25 at 39. This assessment of the Treaties' purpose and effect was rejected in *Fishing Vessel*. 443 U.S. at 685-86. The Court there referred to its decision in *Winters*, where the tribe's express reservation of farmland necessarily

implied reservation of enough water to live by farming. *Id.* at 684. It found the same principle applicable to reserved rights to take fish—they must reserve enough fish for tribes to live by fishing. *Id.* at 685-87.

The central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures 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 685-86 (citing *Winters*, 207 U.S. at 576, and *Arizona v. California*, 373 U.S. 546, 598-601 (1963)). Thus, the quantity of fish the Tribes have a right to take is keyed to the Treaty purpose of providing “a volume of fish which is sufficient to the fair needs of the tribes.” *United States v. Washington*, 573 F.3d 701, 704 (9th Cir. 2009) (citing *Boldt*, 384 F. Supp. at 401 (CL20)); *see also Phase II*, 759 F.2d at 1358 (tribes entitled to “adequate supply of fish”).

The State would distill all of *Fishing Vessel* to a single phrase: the Tribes have a right only to “a fair share of the *available* fish.” Dkt. 25 at 39 (emphasis in original). But the Tribes could never be assured of a livelihood if non-Indians could put their thumbs on the scales this way. The Court did not invest the word “available” with the weight the State attributes to it, or suggest that “available” describes only those fish left over after the State shrinks the streams and the runs. That would have resolved, *sub silentio*, the issues then pending in *Phase II*. *See Fishing Vessel*, 443 U.S. at 688 n.30 (acknowledging *Phase II* pending in the district court). Rather, the Court used “available” interchangeably with

“harvestable,” to mean fish not needed as spawners to replenish the run. *See id.* at 670 n.15, 684-85; *Boldt*, 384 F. Supp. at 343. That is how the State interpreted “available,” prior to the culverts dispute: the “treaty entitlement is to a quantity of fish sufficient to supply their needs for a moderate income.” SER 145, 147-48.

b. Uncontested Evidence Shows That State Barrier Culverts Obstruct the Fish and Tribal Fisheries.

Following this precedent, the district court held that State barrier culverts are a significant impediment to achieving the Treaty purpose. The effects of barrier culverts on salmon fisheries are straightforward and uncontested. As the parties agreed in a joint exhibit over 40 years ago, salmon need access to and from the sea to survive; without it, production will be affected. SER 111. Indeed, they agreed that protecting other aspects of salmon habitat without free access would be “pointless.” SER 111-112. State reports have documented that barrier culverts are a common cause of lost production, SER 6.3, 19-20, 65, 68, 127, 129-131, and that barriers to fish passage are one of the “major factors” limiting salmon recovery. ER 796. State biologists have described these culverts as a “significant threat” to fish, SER 66, 132, the removal of which is a “critical component in the effort to restore wild salmon.” SER 6.2.

All this evidence was before the district court, and the State disputed none of it. The State agreed that its barrier culverts affect abundance, SER 89, and even assumed that salmon would be “more plentiful after all the culverts are fixed.”

SER 135; *see also* ER 21-22, 27 (FF 3.89, 3.131) (agreeing at trial that barrier culverts must be corrected if salmon stocks are to recover). Thus, the district court found it “inescapable” that if salmon cannot enter the streams to reproduce and grow, the number of salmon will decline and there will be fewer for Tribes to catch. ER 47.

The court also had evidence, from the State’s own biologists, that fixing just the WSDOT barrier culverts known in 1997 could open habitat enough to produce an additional 200,000 adult salmon annually. ER 559; *see also* ER 28 (FF4) (by 2009, State barriers were known to block three times as much habitat). The State offered no evidence at summary judgment to show this conclusion was incorrect or lacked credibility. Instead, it offered its subjective opinion that its culverts have no “more than a minor effect” on tribal fisheries. SER 137. But the deposition statements cited by the State for that assertion said no such thing—neither mentioned the 200,000 figure nor stated that culverts have only a minor effect. SER 137 n.104; SER 140 (34:16-35:13); SER 143 (52:15-18). Thus, the State’s complaint that the district court lacked evidence of the magnitude of the loss caused by barrier culverts is incorrect and unavailing. Dkt. 25 at 19-20, 24.

The State’s complaint that the Tribes have not shown, and the district court did not quantify, the *relative* magnitude of loss from state culverts, compared to other human-induced losses, is irrelevant. Dkt. 25 at 46-48. Nothing in *Winans*,

Fishing Vessel or their progeny suggests that the State may interfere with treaty fishing so long as other interferences are greater. Nor is there any evidence in the record that, because other things also hurt treaty fisheries, the State's elimination of 1,000 miles of habitat that could produce hundreds of thousands of adult salmon annually does not.⁹

It is undisputed that the supply of fish today is inadequate to meet the Tribes' needs. ER 29 (FF9-13); SER 136 n.75 (State assumed Tribes are not earning a moderate living); see *United States v. Washington*, 157 F.3d at 651-52 (State failed to prove that existing fish supply met tribal needs). State culverts are a significant barrier to obtaining that Treaty purpose. The district court properly held that the State violated its duty to refrain from diminishing the Tribes' fisheries by building and maintaining culverts that block salmon passage.

3. The State's Arguments That Its Culverts Violate No Treaty Duty Are Without Merit and Foreclosed by Precedent.

The State attacks the district court's conclusions regarding the Treaty parties' intent, the import of the Treaty language, and the nature of its duty not to interfere with the Tribes' right of taking fish. The bases of those attacks have been

⁹ The State's contention that the Tribes did not establish a "baseline" number of salmon from which to measure subsequent diminishment is equally irrelevant. Dkt. 25 at 47. The Tribes are not seeking to recover some previously lost quantity of salmon that must be measured. They are seeking only prospective restoration of whatever quantity the State's culverts have been eliminating, so they will have an opportunity to take them. That amount can be precisely restored by removing the barrier.

previously and decisively rejected by the Supreme Court and this Court.

a. The Treaty Parties Would Not Have Understood the Treaties to Allow Non-Indian Settlement to Gradually Displace Tribal Fisheries.

Having offered no historical evidence, the State now fabricates a history, in which the sole purpose of the Treaties was to foster white settlement. Dkt. 25 at 37-38. This hypothesis, that white settlement can erode treaty rights, was rejected long ago: “The passage of time and the changed conditions affecting the water courses . . . cannot erode the right.” *Boldt*, 384 F. Supp. at 401 (CL22); *Winans*, 198 U.S. at 381-82; *Shellfish I*, 873 F. Supp. at 1437 (rejecting argument that non-Indian waterfront settlement on private beaches could allow “the gradual exclusion of Indians from natural shellfish beds, a result clearly unwanted and unintended by the parties to the Treaties”); cf. *Lac Courte Oreilles Band of Lake Chippewa Indians v. Voigt*, 700 F.2d 341, 356 (7th Cir. 1983) (federal intent to promote settlement could not disrupt treaty fishing rights because “it does not really address what the *Indians* believed the treaty to mean”). The expectation was that tribes and their fisheries would co-exist with and even enhance non-Indian development.¹⁰ *E.g.*, *Shellfish I*, 873 F. Supp. at 1439; ER 52; *Winters*, 207 U.S. at 576-77.

When the Treaty parties agreed to limit tribal reserved fishing rights, they

¹⁰ That expectation is consistent with the facts in this case, showing that a modern highway system and unobstructed and robust tribal fisheries can co-exist when simple, well-known culvert technologies are employed. *See infra* at 36-37.

said so explicitly in the Treaties. Thus, the Treaties prohibit Indians from taking shellfish from “staked or cultivated [beds],” *United States v. Washington*, 157 F.3d at 639, and fishing rights are limited to “usual and accustomed” fishing places. *E.g.*, Treaty of Medicine Creek, Art. III, 10 Stat. 1132 (*see* Dkt. 25 at 81). In contrast, there is not even a hint in the Treaties that the fishing right was subject to defeasance over time at the hands of non-Indian settlement. *See Shellfish I*, 873 F. Supp. at 1430 (“Defendant[s] ask the Court to impose a limit on the ‘right of taking fish’ without pointing to any treaty language in support of that interpretation.”).

The only authority the State cites for assigning primacy to “settlement” over Treaty fisheries is dicta from a district court decision rejecting a tribal claim *for damages* against dams that harmed tribal fisheries. Dkt. 25 at 37 (citing *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 814 (D. Idaho 1994)). *Idaho Power’s* theory of settlement primacy was simply wrong. The Supreme Court squarely held in *Winans* that the fishing rights the Indians understood to be preserved forever are to be protected in the face of non-Indian settlement, not destroyed by it. *Winans*, 198 U.S. at 381. And even *Idaho Power* acknowledged the availability of *equitable* actions, such as this one, requiring “mitigation or protection” of tribal fishing rights. *Idaho Power*, 847 F. Supp. at 806-07, 810, 817; *cf. Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005) (en banc) (equitable relief, but not money damages, allowable for third party harm to treaty

rights).

b. The Treaties' Silence Regarding Barrier Culverts Cannot Be Construed To Defeat the Purpose of the Treaties.

Although couched in terms of “plain language,” the State’s real claim is that Treaty silence regarding state barrier culverts must be construed against the Tribes, leading to the “obvious conclusion” that the State is free to eliminate tribal fishing places and reduce harvests. Dkt. 25 at 41. The proper conclusion is to the contrary—the Treaties need not itemize every aspect of the Tribes’ rights for those rights to be protected. The “treaty [is] not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted,” and silence thus indicates tribal rights are reserved. *Winans*, 198 U.S. at 381; *see also United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 353-54 (1941).

In *Winans*, although the Treaty was silent regarding access across private land, fishing at that site required such access, so the Treaty secured it. *Winans*, 198 U.S. at 381-84. Fish wheels, too, were not in the Treaty text, but were subject to removal to allow the Tribes a harvest. *Fishing Vessel*, 443 U.S. at 681. Similarly, in *Winters*, the Supreme Court held that the treaty reserved the right to sufficient water to support farming on reservation lands notwithstanding silence in the treaty regarding such a right. *Winters*, 207 U.S. at 576-77. The Stevens Treaties say nothing about prohibiting state license fees, nor about allocating harvest to deal

with scarcity, yet the Treaties have been held to require both. *Tulee*, 315 U.S. at 684-85; *Fishing Vessel*, 443 U.S. at 684-85. These cases make clear that the express “right of taking fish” is all the language needed to preclude State barrier culverts, given their significant interference with that right.

The cases cited by the State do not undercut this conclusion or require that every treaty duty be expressed in plain treaty language. Dkt. 25 at 35-37. *United States v. Choctaw Nation* stated only that where the plain words of an Indian treaty “so clearly exclude” an implication “that a different meaning cannot be attached to them without doing violence to the words used,” that text controls. 179 U.S. 494, 536 (1900). *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe* and *Menominee Indian Tribe of Wisconsin v. Thompson* held only that hunting and fishing rights outside the tribes’ reservations were precluded by express language that ceded all tribal interest in that land, without the express reservation of rights that both courts noted are in the Stevens Treaties. *Klamath*, 473 U.S. 753, 755, 774 (1985); *Menominee*, 161 F.3d 449, 461 (7th Cir. 1998). In *Oklahoma Tax Commission v. Chickasaw Nation*, the claimed treaty right was subject to “a clear geographic limit in the Treaty,” unlike here, where there is no express permission to the State to block salmon streams or reduce tribal harvest. 515 U.S. 450, 466 (1995). Lastly, *Gros Ventre Tribe v. United States* involved a claim that the United States had breached its trust duty to a tribe because of inadequate environmental

regulation on lands in which the tribe had reserved no treaty rights at all. 469 F.3d 801, 803, 813 (9th Cir. 2006). In short, none of the cases cited by the State stand for the proposition that silence in the Treaties should be construed to defeat the purpose of the expressly reserved right to take fish.

In the end, the State discards the canons of construction and the purpose of the Treaties in favor of the *Restatement of Contracts*. Dkt. 25 at 40. But the Treaty parties would not have understood that fine points of contract law could undercut the “sacred entitlement” of the Treaties. *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998). As *Fishing Vessel* reaffirmed, the Treaties must be construed, “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.” 443 U.S. at 676; see *United States v. Rickert*, 188 U.S. 432, 443 (1903) (“The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract[.]”).

The State’s principal contractual argument, that the plain language of the Treaties precludes the Tribes’ claim, is peculiar. Dkt. 25 at 37-41. The right of taking fish is reserved—in plain language—from the Article ceding land. Therefore, in contrast to the cases cited by the State, *supra*, the cession of land does not restrict the treaty fishing right. *Winans*, 198 U.S. at 380-81. The State’s argument would permit it to deprive the Tribes of the fish that were a principal

benefit of the Treaty bargain, and was properly rejected by the district court. ER 51.

The State also argues the Treaty parties' failure to foresee how state culverts would bleed fish stocks is not a "mutual mistake" warranting contract rescission. Dkt. 25 at 40. The Tribes, however, do not seek to rescind the Treaties, but to enforce them, and neither Indians nor non-Indians can claim the right to destroy the resource. Rather, the parties' mutual expectation that fish would remain abundant supports a reading of the Treaties that fulfills that expectation. *Winters*, 207 U.S. at 576-77 (ambiguities "will be resolved from the standpoint of the Indians," in determining "between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it"); *Shellfish I*, 873 F. Supp. at 1438 (holding Stevens' understanding that shellfish were inexhaustible, and his failure to perceive conflict between tribal harvest and non-Indian waterfront ownership, were grounds to permit tribal harvest on private beaches rather than to foreclose it).

Contrary to the State's suggestion, the district court's decision does not turn back the clock to 1855 or intrude on state land use authority. Dkt. 25 at 41-42, 44; Dkt. 33 at 18-21. It does not stop the building of roads or culverts, or any other land use decision. ER 39 (CL2), ER 42 (CL19). It requires only that culverts under those roads do not block fish passage, ER 8, an outcome that is entirely

practicable with current fish passage designs. In short, the Tribes have neither sought nor gained “veto” power over land use decisions. Dkt. 25 at 49, 41; Dkt. 33 at 18.

**c. Neither Lack of Discriminatory Intent, Nor
“Incidental” Diminishment of Fish Runs, Validate the
State’s Barrier Culverts.**

The State argues that a Treaty duty not to obstruct fish passage at State culverts is unnecessary because the State already has an “anti-discrimination” obligation that precludes it from concentrating the adverse effects of development on “treaty fish runs.” Dkt. 25 at 44-45. The fallacy of the State’s argument is apparent from the mere use of the term “treaty fish runs.” There is no such thing. Every run of salmon is shared, and therefore the effect of blocking fish from streams is inherently non-discriminatory because it shrinks the number of harvestable fish for everyone. Even the State cannot come up with a plausible example of “discriminatory” barrier culverts. The notion that it could somehow “concentrat[e] barrier culverts in the case area while building only non-barrier culverts outside the case area” is absurd. Dkt. 25 at 45.

Under this theory, the State would be free to utterly destroy salmon populations so long as it injured Indians and non-Indians alike. The extremity of this position is notable. The State’s paradigm would never provide the “meaningful protection [of] tribal fishing rights” the State claims for it. *Id.* at 45.

And far from being “well grounded in precedent,” *id.*, the State’s non-discrimination proposition recycles the same “equal opportunity” argument rejected many times in the past. In each of its seven Stevens Treaties cases, the Supreme Court has “more or less explicitly rejected the State’s ‘equal opportunity’ approach.” *Fishing Vessel*, 443 U.S. at 679. “Whatever opportunities the treaty assures Indians with respect to fish are admittedly not ‘equal’ to, but are to some extent greater than, those afforded other citizens.” *Id.* at 676 n.22. The State’s argument that it satisfies its duties so long as its fish passage barriers injure *both* Indians and non-Indians ignores the bargain the Indians struck, which was to secure their fish, not equal treatment. *Fishing Vessel*, 443 U.S. at 666-67; *see also Phase II*, 759 F.2d at 1366 n.2 (Nelson, J., concurring in part and dissenting in part).

The State’s use of the *Puyallup* and *Fishing Vessel* cases as support for its non-discrimination proposal flips that line of cases on its head. *See* Dkt. 25 at 44. These cases hold that the State can regulate treaty fishing *for conservation* so long as those regulations are necessary and non-discriminatory. *Puyallup I*, 391 U.S. at 399; *Puyallup II*, 414 U.S. at 48; *Puyallup Tribe v. Dep’t of Game*, 433 U.S. 165, 175-77 (1977) [hereinafter *Puyallup III*]; *Fishing Vessel*, 443 U.S. at 682-84 (summarizing *Puyallup* trilogy). They do not stand for the perverse proposition that the State can *destroy* fish populations, so long as the despoliation injures

Indians and non-Indians alike. The Treaties permit neither the State nor the Tribes to destroy the fish. *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975) (“[N]either the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed.”); *see also Puyallup III*, 433 U.S. at 176 (acknowledging that the Tribe may not “interdict completely the migrating fish”).

In a similar vein, the State repeatedly complains that the district court’s decree will reach any state action that “might *incidentally* reduce fish runs.”¹¹ *E.g.*, Dkt. 25 at 48 (emphasis added). But the determinative question in treaty fishing cases has never been whether non-Indians act with the avowed purpose of harming tribal fisheries, but whether the act comports with the Tribes’ understanding and the parties’ purpose in the Treaties. This Court and the district courts have recognized that treaty fishing rights protect against water withdrawals that would “incidentally” render streams uninhabitable by fish, *see Adair*, 723 F.2d at 1409-10, and *Kittitas*, 763 F.2d at 1033-34, *supra* at 25-26, and against construction that would “incidentally” destroy fishing sites. *See Muckleshoot v. Hall*, 698 F. Supp. 1504, 1504, 1517 (W.D. Wash. 1988) (enjoining construction of marina that would occupy U&A and interfere with tribal fishing); *Umatilla v. Alexander*, 440 F.

¹¹ If by “incidental” the State means that the Treaty would reach even “minor” salmon depletion resulting from state barrier culverts, that interpretation does not reflect the facts in this case, in which the record shows hundreds of thousands of fish may be lost each year to them. ER 559.

Supp. 553, 555 (D. Or. 1977) (proposed dam would “deprive the Indians of their right to occupy the fishing stations and . . . prevent all wild fish from swimming upstream”).

Moreover, this Court has already rejected the State’s suggestion that interference with treaty fisheries is permissible so long as it is non-intentional. In *Phase II*, the Court admonished that “purpose[ful]” interference would prompt “immediate correction and remedial action by the courts” consistent with existing case law; “[i]n other instances, the measure of the State’s obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute.” *Phase II*, 759 F.2d at 1357 (emphasis added). The Court thus recognized that the Treaties protect against more than just deliberate interference with tribal fisheries. Here, the district court found a significant harm to the Tribes’ fisheries caused by state barrier culverts, and correctly held that the State violated its duty under the Treaties.

4. Barrier Culverts’ Interference with Treaty Fishing Presents the Factual Context This Court Required in *Phase II*.

In *Phase II*, the Tribes sought a declaration of a broad duty not to interfere with treaty fishing through habitat degradation, but failed to seek application of that duty to any particular interference. *Phase II*, 759 F.2d at 1356. Refusing to affirm a “general admonition” issued in the abstract, the Court vacated the declaratory judgment to allow the State’s duties to be announced based on “all of

the facts presented by a particular dispute” in future litigation. *Id.* at 1357. This Court’s hesitation to “announce legal rules imprecise in definition and uncertain in dimension” reflected its concern that decisions divorced from factual context necessarily leave parties uncertain as to their legal responsibilities. *Id.*; *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1056-57 (9th Cir. 2008); *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 593-94 (6th Cir. 2009) (citing *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89–90 (1947)).

Here, the Tribes challenged a specific state action based on concrete facts showing that over 1,100 state barrier culverts physically obstruct salmon from completing their natural life cycle in 1,000 miles of streams, reducing salmon production potential by hundreds of thousands of adult fish annually and significantly harming tribal fisheries. Based on those facts, the district court narrowly tailored its finding of a treaty violation and the State’s obligation to remedy the effects of those barrier culverts. ER 1-7, 54. This result is faithful both to *Phase II* and to our common law tradition, which requires later courts to analyze closely whether “apparently controlling authority” is actually applicable to a case involving different facts. *See, e.g., Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001); *Keweenaw*, 569 F.3d at 593-94 (explaining the “nuances and variations” of the “specific facts” of individual cases are what “mold the [common] law”).

The State now complains that the district court's narrowly tailored decision does not provide a general rule that will resolve claims it speculates tribes may bring in the future. Dkt. 25 at 48-50. It attempts to recast the case as a factually unbounded dispute over the "innumerable state actions (or inactions)" that harm tribal fisheries, and as a general attack on state salmon restoration plans. Dkt. 25 at 49, *passim*. This case, however, is about stopping the present harm that State-owned barrier culverts do to salmon populations and tribal fisheries. Anything beyond that would be "an opinion advising what the law would be on a hypothetical state of facts," and would therefore be incapable of "precise resolution." See *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727, 730 (9th Cir. 1988) (citing *Phase II*, 759 F.2d at 1357). The State's demand that the district court formulate from the facts of this single case a general rule applicable to all future cases threatens far more mischief than it might prevent.

The State's objection to a supposed lack of "sideboards" accordingly amounts to a request that the Court convert the district court's narrow, detailed findings and conclusions into the type of general admonition rejected in *Phase II*. Whether, on some other set of facts, the State would be found to violate the Treaties or the Tribes would be found entitled to injunctive relief is not before the Court.

The law, moreover, is replete with doctrines that stand between a complaint

and a remedy, and that protect the State from unbounded liability. Dkt. 33 at 18, 20, 21. For example, ripeness would be a consideration in challenges to land use plans or zoning regulations. Similarly, the causation and redressability prongs of standing pose significant barriers to any treaty-based challenge to greenhouse gas emissions. If a plaintiff survived a motion to dismiss, it would ultimately need to prove that the challenged state activity proximately caused a violation of the treaty fishing right. *See Elk v. United States*, 87 Fed. Cl. 70, 89 (Fed. Cl. 2009) (applying proximate cause standard to Indian treaty claim); *United States v. Washington*, 506 F. Supp. at 208 (same); *Phase II*, 759 F.2d at 1367 (Ferguson, J., concurring) (same). Then, equitable principles, including the significance of harm, the balance of equities and the public interest, would dictate whether an injunction was warranted. In this case, however, the district court's judgment comports with each of these doctrines and the award of injunctive relief was an appropriate exercise of the district court's discretion.

C. The Injunction Preserves State Discretion and Adopts the Minimum Provisions Needed to Timely and Effectively Eliminate State Barrier Culverts.

Once a state violation of federal rights is shown, “federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief.” *Horne v. Flores*, 557 U.S. 433, 450 (2009). The scope of a district court's equitable enforcement powers “is broad, for breadth and flexibility are inherent in

equitable remedies.” *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011); *Stone v. City & County of S.F.*, 968 F.2d 850, 861 (9th Cir. 1992) (“Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights.”). The district court’s injunction does not overextend these powers. It has six, straightforward elements. The State must:

- (1) Build new culverts to pass fish, ER3 (§4);
- (2) Schedule corrections so about half the current WSDOT salmon barriers in the Case Area are made passable by 2030 (and correct the rest when they wear out or are replaced), ER 3-4 (§§6-8), and correct other agencies’ barriers by 2016, ER 3 (§5);
- (3) Use fish passage designs as effective as the stream simulation method, ER 4 (§9), or the best feasible passage where extraordinary site conditions or an emergency make stream simulation infeasible, ER 4-5 (§§9-10);
- (4) Continue to identify culverts that become barriers, and correct them within a reasonable time, ER 2-3, 5 (§§ 3, 11);
- (5) Take “reasonable steps” to maintain its culverts to prevent new fish barriers, ER 5 (§12); and
- (6) Monitor and evaluate the effectiveness of these efforts, ER 5 (§12).

The State frames its argument as a legal challenge, rooted in federalism, but it emphasizes factual issues of fisheries harm, correction benefits, and costs. The unchallenged findings show that barrier culverts harm fisheries, and their correction brings prompt, cost-effective relief. The injunction should be affirmed as a necessary step to vindicate federal Indian treaty rights.

1. The State's Broad Obstruction of Fishing Rights and Inadequate Response Make an Injunction Necessary.

The State argues that no injunction is needed because of its “great strides” in correcting barriers on its own, Dkt. 25 at 73, and, paradoxically, because there is little benefit to correcting them. *Id.* at 60-63. It is wrong on both counts.

WSDOT started its culvert correction program in the early 1990s. ER 17 (FF3.55). It still has 817 barrier culverts in the Case Area that block more than the 200 meters of habitat, ER 32-33 (FF30), which the State considers a “significant reach” of habitat. ER 22 (FF3.94). Between 2009 and 2011, after the district court declared that these culverts violate treaty rights, WSDOT corrected a mere twenty-four. ER 32 (FF28). At that rate, WSDOT would need over a century to finish the job. *Id.* Indeed, because WSDOT is fixing barriers more slowly than it finds new ones, ER 32 (FF29), they may remain forever. ER 33 (FF31a). State natural resource agencies have more than 100 anadromous fish barrier culverts in the Case Area. ER 33-34 (FF 32, 34, 36). They face a 2016 state deadline to correct them, ER 34 (FF35), which they may not meet. ER 17 (FF3.59); ER 19 (FF3.70); ER 34 (FF34).

The laggard pace is accompanied by other shortcomings. The State lacks barrier identification and hydraulic design criteria sufficient to ensure juvenile fish passage. SER 232-233 (41:4-24, 46:13-47:7); SER 222-223 (124:23-125:6); *see* ER 15-16 (FF3.44-3.45), ER 20 (FF3.77), ER 22 (FF3.93), ER 30 (FF21). It also

lacks needed monitoring and maintenance programs to prevent recurring barriers. SER 220-221 (121:13-122:22); SER 226-227 (129:20-130:11); SER 209 (158:5-25); SER 211 (160:5-20).

The State argues that its good faith forestalls an injunction, Dkt. 25 at 59, citing *Tuttle v. Arlington County School Board*, 195 F.3d 698, 708 (4th Cir. 1999). *Tuttle* said only that, absent bad faith, a state should get a hearing on its own remedial plans. *Id.* Here, the district court held eight days of hearing, and then asked how long the State would need to develop its own remedial plan. State's counsel did not answer that question, but told the court it should not entertain any injunction. SER 154 (62:9-19). Given that response, it was no abuse of discretion to issue an injunction.

The State argues that the injunction is “overbroad,” claiming there was no showing of significant harm from or meaningful benefit in correcting its culverts. Dkt. 25 at 60-63. It contests a single Finding of Fact: “State-owned barrier culverts are so numerous and affect such a large area that they have a significant total impact on salmon production.” *Id.* at 60-61; *see* ER 31-32 (FF27). To be clearly erroneous, this finding must reek of error like “a five-week-old, unrefrigerated dead fish.” *E.g., United States v. Bussell*, 504 F.3d 956, 962-63 (9th Cir. 2007). It carries no such tang.

The State does not deny that its barrier culverts are “numerous and affect . . .

a large area,” ER31-32 (FF27), so the State’s challenge must rest on the word “significant.” To the State, losing 200,000 fish a year is “miniscule.” Dkt. 25 at 61-62. Not so to the Tribes, for whom salmon are “the foundation of who we are.” SER 217 (96:8-24). With fisheries so limited that ceremonial salmon must sometimes come from a can, having hundreds of thousands more fish would be significant indeed. *See* ER 29 (FF12); SER 239 (73:3–25); SER 238 (57:4-10).

Multiple findings highlight the significance of the harm. *E.g.*, ER 30 (FF20) (fish passage barriers reduce productivity and overall production, and eliminate some populations); ER31 (FF25)) (barrier culverts responsible for 44% to 58% of the historic loss of production in Skagit River tributaries). *None* of these findings is disputed by the State, which has itself determined that it is “clear the benefit to salmonid production increases with the number of culvert repairs per year.” SER 10. Those findings must therefore be taken as true. *E.g.*, *United States v. Arreguin*, 453 F. App’x 678, 679-80 (9th Cir. 2011); *Wiley v. Epps*, 625 F.3d 199, 218 (5th Cir. 2010). They are sufficient to support the injunction.¹²

The State seeks to minimize the damage its culverts cause by mounting a *post hoc* challenge to the credibility of its own 1997 report to the Legislature, ER

¹² The State’s claim that the federal biologist, Dr. Roni, testified that culvert corrections have no measurable benefit, is absurd. Dkt. 25 at 63. Cross-examined about a hypothetical, he testified that the hypothetical did not reflect reality or the scale of benefit that could be obtained by correcting state culverts. SER 186-187 (195:16-196:17).

559, that the habitat blocked by WSDOT culverts could produce 200,000 more fish annually. Dkt. 25 at 61. But the testimony of the report's principal author, Dr. Paul Sekulich, confirmed that re-opening that habitat could produce 200,000 additional adult salmon. ER 1094-95. And the figure would be much higher today, when three times as much habitat is known to be blocked by state culverts in the Case Area. *Compare* ER 559 (1.6 million m² in 1997) *with* ER 28 (FF4) (4.8 million m² in 2009). The State says it never intended that report “to represent how many fish *would be* produced,” but only to convince the Legislature to fund culvert corrections. Dkt. 25 at 61 (emphasis added). That this report was intended to convince the Legislature of the “real benefit” of culvert spending—which it did—does not make it unsuitable to convince the district court. ER 1095 (133:5-9).

Elsewhere, Dr. Sekulich has written that, on average, one more salmon could be gained from every two lineal meters of reopened stream, and that the harvest benefits greatly exceed the costs of correction. SER 11-13 (benefit exceeds cost by a factor from 2.93:1 to 4.12:1). He described his analyses as “measurement of potential project benefits” in order to “maximize . . . stock recovery,” SER 15, and he testified that his scientific methods were the best he could think of. SER 227.1-227.3 (132:6-20; 134:17-135:9). In other words, when state scientists told legislators that hundreds of thousands more fish might be produced, it was because they expected barrier corrections to produce them. Their work supports the

Finding that state culverts have a “significant” effect on production.

The State points to barrier culverts owned by others on some streams as a reason not to fix its own. Dkt. 25 at 63, 73. Neither facts nor equity favor this argument. Where state and non-state barriers have been found on the same stream, nearly 90% (1,370 out of 1,590) of the non-state barriers are above the state culverts. ER 210. Where non-state barriers are downstream, nearly 70% (152 out of 220) are partial barriers, meaning that some fish pass and will be blocked at the state culvert above. ER 211. State law requires fish passage at all these culverts. ER 16 (FF3.48-3.49); WASH. REV. CODE §§ 77.57.030, 77.15.320. Hundreds of non-state barrier culverts are being corrected. SER 17. State biologists agree that the presence of these other barriers does not mean the State should not correct its own. SER 193-194 (122:25-123:11). The State disregards such barriers in calculating the “priority index” (used for some WSDOT corrections) because otherwise it would be assuming that these barriers “would never be fixed.” SER 218-219 (116:24-117:18). The district court should not have to assume that they are permanent either.

The State’s argument that “equity . . . played no role” in the injunction because the court did not reduce the State’s obligation in light of barriers of different ownership is waived. Dkt. 25 at 73. The State did not ask for such a provision at trial—it rejected any injunction. *See, e.g., United States v. Carlson,*

900 F.2d 1346, 1349 (9th Cir. 1990) (argument not raised in trial court waived).

Moreover, the court did not ignore the federal role—it found that the United States funds the State’s culvert corrections.¹³ ER 27 (FF3.132), ER 28 (FF3.134); ER 33-34 (FF33), ER 37 (FF52). It is the State that ignores equity, by seeking to deny the Tribes relief on the grounds that others, many subject to state control, also have barrier culverts.

The State also argues that “there was no showing of injury across the entire case area,” and area wide relief is an abuse of discretion. Dkt. 25 at 62 (citing *Lewis v. Casey*, 518 U.S. 343, 359 (1996)). This argument is a non-sequitur; where no state barrier culverts exist, no relief has been ordered. Where one does exist, fish passage *is* an issue and tribes have lost the right of taking fish from above the barrier. Area-wide relief is required because the State’s barrier culverts are scattered like pox all over western Washington, SER 36, and fish that would spawn in those streams migrate far and wide. SER 51-60. The injunction is in full concert with the principles of *Lewis* regarding area-wide relief, *see Lewis*, 518 U.S. at 360 (district court’s injunction against a state should not “grant[] a remedy beyond what was necessary to provide relief”), and “demands [no] more of state officials than is required by federal law.” *See* Dkt. 25 at 58 (citing *Clark v. Coye*,

¹³ The State appeals the orders dismissing its defense of waiver by federal officials and its counterclaims to enjoin federal barrier culverts. ER 68, 70-71. The Tribes join the United States’ arguments on those matters.

60 F.3d 600, 604 (9th Cir. 1995)).

2. The Order Requiring Timely, Effective, and Permanent Removal of Barrier Culverts Preserves State Flexibility and Respects Principles of Federalism.

The State challenges the injunction as inconsistent with principles of federalism. Dkt. 25 at 73-75. Federalism, however, does not entitle the State to violate treaties that are the supreme law of the land. *See Plata*, 131 S. Ct. at 1928-29 (“Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into [state] administration.”). “The question is not whether the relief . . . is expensive, or difficult to achieve, but whether the same vindication of federal rights could have been achieved with less involvement by the court in directing the details.” *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010).

The simplicity, flexibility, and respect for existing state programs exhibited in the injunction here defy comparison to the cases cited by the State. *See* Dkt. 25 at 58-59. In *Horne v. Flores*, the district court erroneously ordered statewide school reform based on events in a single district. 557 U.S. at 470-72. It mandated a study to determine the proper appropriation to fund the reforms, and imposed millions of dollars in contempt citations for the legislature’s failure to make the appropriations. *Id.* at 441-42. In *Association of Community Organizations for Reform Now v. Edgar*, the court reversed parts of an injunction that unnecessarily

restated, in different words, the already detailed terms of the federal motor-voter law, and then went beyond the statute and required the state to delegate legislative powers to a state-appointed election czar. 56 F.3d 791, 797-98 (7th Cir. 1995).

In contrast, the district court here gave state interests full consideration, and the injunction reflects appropriate deference to state programs. The State can continue using its current inventory data and barrier assessment methodology, despite their shortcomings. ER 2 (¶2). It can keep its present Prioritization Index, ER 3-4 (¶¶8), and its 2016 deadline for correcting DNR, WDFW, and State Parks culverts. ER 3 (¶5). The injunction requires no changes in state law or state permitting or contracting processes, demands no new state officer or program, and specifies no funding method or amount.

The injunction does require two critical changes: 1) ensuring that barriers are eliminated in a reasonable time and do not recur, and 2) limiting use of culvert designs that do not effectively pass fish. But the injunction provides significant flexibility.¹⁴ It gives the State seventeen years to open WSDOT culverts that each block a “significant reach” of habitat, ER 3 (¶6); ER 22 (FF3.94), but WSDOT can, for any reason, defer fixing any combination of the “significant reach” barriers

¹⁴ The State cites *Stone* for the proposition that courts must “devise the least intrusive option available” and “minimize interference” with state programs, but the injunction here resembles the flexible provisions of the injunction affirmed in *Stone*, not the vacated provision overriding a state law. See Dkt. 25 at 73, 58 (citing *Stone*, 968 F.2d at 864, 861).

that do not total more than 10% of the habitat blocked by all such barriers. ER 3-4 (¶8). The State can defer all culverts that individually block under 200 meters of habitat. ER 3 (¶7). These provisions permit WSDOT to defer correction of all but 577 of its roughly 1,200 barrier culverts in the Case Area as of 2009. SER 196-197 (138:10–139:13); ER 220-232; ER 18 (FF3.63).

The injunction's terms regarding fish passage design also provide flexibility. It sets a default design known as "stream simulation," ER 4 (¶ 9), which represents the current best design fish passage science. ER 15 (FF3.40); ER 37 (FF50); SER 26. But the State can use any other design that provides equivalent fish passage and habitat benefits. ER 4 (¶9). If such designs are infeasible due to an emergency or extraordinary site conditions, the best feasible design is to be used. ER 4-5 (¶10).

The State objects that stream simulation is more expensive, and posits that other designs "often work well." Dkt. 25 at 67. The court, however, found that "stream simulation culverts offer superior fish passage and habitat benefits," ER 37 (FF50), and they are preferred by WSDOT and recommended by WDFW and the National Marine Fisheries Service. ER 15 (FF3.40); ER 37 (FF50). The added cost of stream simulation is small once the decision to install a new culvert has been made. SER 210-211 (159:13–160:4); SER 204-205 (115:12-116:1) ("[T]he guardrail probably costs more than the culvert."); *see* ER 24 (FF3.108) (DNR "no

slope” culvert averaged \$41,000; stream simulation averaged \$54,000). Because stream simulation culverts are less likely to become barriers in the future, ER 37 (FF50), long-term cost savings are possible.

The State does not challenge these findings as clearly erroneous. It argues that the court abused its discretion by “substituting its technical judgment for that of the experts.” Dkt. 25 at 72. But the court’s decision to give greater weight to one expert’s judgment over another’s where, for example, they disagreed about the effects of the no-slope design is well within the discretion of a judge sitting as the finder of fact. *Compare* SER 39 with SER 29-30 (§7). “[D]ifficult predictive judgments regarding the likely effects of court orders . . . necessarily must be made by courts when those courts fashion injunctive relief. . . . [T]hey are factual questions and should be treated as such.” *Plata*, 131 S. Ct. at 1942.

To prevent a recurrence of barriers, the injunction also contains a bare-bones requirement that the State make “ongoing efforts” to identify newly developed barriers and provide passage within a “reasonable period of time.” ER 2-3, 5 (¶¶ 3, 11). This was not an abuse of discretion. *See* Dkt. 25 at 64. A district court may issue an injunction to avoid recurrent violations. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 854-55 (9th Cir. 1995). The district court found changes in a stream may cause “[c]ulverts that are not fish passage barriers when installed [to] become barriers over time,” ER 27 (FF3.125), so that periodic re-assessment

of barrier status is needed.¹⁵ ER 20 (FF3.76). Recurrence of barriers would perpetuate the violation of the Tribes' rights, and the State lacks comprehensive programs to prevent this. *See* ER 27 (FF 3.126-3.127); SER 209 (158:5-25). If circumstances change and the State is reliably identifying and timely correcting any new barriers, it will be free to seek a modification of the injunction.¹⁶ *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1982).

The State challenges the district court's finding that fixing "human-caused barriers is recognized as the highest priority for restoring salmon habitat in the Case Area." Dkt. 25 at 65 (citing ER 28 (FF5)). The significance of the alleged error is not readily apparent, given the overwhelming evidence that correcting the State's barrier culverts is critical and could increase salmon production by hundreds of thousands of fish. *See, e.g.*, ER 559; *supra* at 10-11. In any case, the finding is well supported in the record. Habitat biologist Mike McHenry testified

¹⁵ The State cites *Midgett*, a case in which a mere handful of bus lift malfunctions could not "support an inference that Plaintiff face[d] a real and immediate threat of *continued, future* violations of the ADA in the absence of injunctive relief," *Midgett v. Tri-County Metro. Transp. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir. 2001)) (emphasis in original), for the notion that courts must exercise restraint before enjoining state programs. *See* Dkt. 25 at 58. Here, the record shows over 1,100 state culverts are barriers and indicates that inevitable natural processes are likely to generate more barriers in the future.

¹⁶ The State is incorrect that relief regarding future-discovered barrier culverts was unavailable due to the scope of the case stipulation. Dkt. 25 at 64. The stipulation excluded culverts that adversely affect ecological conditions but are not barriers to fish passage, ER 960-962, not unknown and future barriers. *See* ER 45-46.

that “correction of human caused barriers is generally recognized as the second highest priority for restoring habitats used by Pacific salmon (following the protection of existing functional habitats).” ER 586. Because protection of *existing* habitat is not the same as *restoring* habitat, the court was justified in finding that correcting barriers is the highest priority for habitat restoration. Mr. McHenry also said, in response to a question from the court: “[W]hen you’re going to restore a place like this, you need to go after the barriers first.” SER 230 (33:20-34:5). The federal biologist, Dr. Roni, similarly testified that, after protecting against loss of habitat, the first focus is on reconnecting habitats isolated by culverts and other barriers. SER 177 (157:20-24). These unrebutted statements amply support the court’s finding.

The State further argues that no injunction was necessary because it has a comprehensive plan addressing all aspects of salmon recovery, which the court should have respected. Dkt. 25 at 64, 67. The former head of WDFW testified, however, that there is not yet any such plan. He said that preparing one would require watershed by watershed analyses, and fisheries agencies “just haven’t had the money and the personnel to get it done.” SER 190-191 (85:14-86:7). What the State has are Endangered Species Act plans for Puget Sound chinook and Hood Canal summer chum. ER 725-726 (¶¶21-22); SER 235 (115:14-22). Even those plans are aspirational, not enforceable, ER 28 (FF3.133), and so cannot replace an

injunction. The State's argument that the cost of complying with the injunction will rob other salmon recovery efforts of funding is unsupported by reference to the record and is purely speculative. Dkt. 25 at 65.

3. The Court Properly Assessed The Equities Of Requiring That The Most Significant State Barrier Culverts Be Made Passable.

The State devotes its greatest attention to the alleged cost of vindicating the Tribes' rights, contending the district court abused its discretion because it "failed to consider cost." Dkt. 25 at 67-73. The court's extensive findings disprove that claim. Moreover, an injunction to cease deprivations of federal rights is not invalid merely because it requires the State to spend money to comply. *Milliken v. Bradley*, 433 U.S. 267, 277 (1977).

Rather than meet its burden to prove the court's cost findings are clearly erroneous, the State argues direct from the record. But "[c]ounsel are not free, on appeal, to ignore the district court's findings and argue the facts de novo." *United States v. DeLeon*, 444 F.3d 41, 50 n.6 (1st Cir. 2006). The State's failure to address the findings is most evident in its repeated assertion that the injunction will cost WSDOT \$2.3 million per culvert. Dkt. 25 at 28, 68. The district court rejected that figure as inconsistent with the historical costs of stream simulation repairs. ER 36 (FF48). Those actual costs averaged \$658,639. *Id.* The court also discounted a state report that recent corrections cost \$1.8 million each because one-

third of the corrections appeared to be part of larger highway projects, for which the State has admitted it cannot separately track the culvert costs. ER 36-37 (FF49), ER 24-25 (FF3.111). The Findings thus rejected the State's claimed \$2.3 million cost and accepted the historic costs in Finding 48. ER 36. Having failed to challenge these findings of fact as clearly erroneous, the State has waived any such challenge. *Arreguin*, 453 F. App'x at 679-80.

The State's cost argument also ignores that state law requires barrier culverts to be corrected in any case. ER 41 (CL17). When culverts age and no longer pass water reliably, they must be replaced and fish passage must be provided under state law. ER 26 (FF3.122) ("hydraulic design life" is 30-80 years); WASH. REV. CODE § 77.57.030; ER 16 (FF3.48); ER 27 (FF3.131). Thus, the court properly weighed, not the total cost of building passable culverts, but the "marginal costs attributable to an accelerated culvert correction schedule." ER 41 (CL17). Although the findings and the record do not show what those marginal costs will be, they will be considerably less than the State's presumed average cost.

The State relies on its flawed perception of the relevant costs to argue that the injunction will have inequitable budget impacts. Dkt. 25 at 68-71. It argues that it should only be ordered to correct "its highest priority barrier culverts within available funding." Dkt. 25 at 75. Such an order would leave enforcement of federal treaty rights in the discretion of state budget writers, and perpetuate the

exclusion of salmon from 1,000 miles of stream. *See, e.g., Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (state budget deficit does not excuse ongoing violations of federal law).

Furthermore, the State’s predicted impacts—from cuts in low-income health care to “millions of drivers” at risk on the highways—is both hyperbolic and, as the State’s former budget director testified, speculative. SER 168-169 (68:16-69:22); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (“court[s] need not consider public consequences that are ‘highly speculative’”); *Harris v. Bd. of Supervisors, L.A. County*, 366 F.3d 754, 766 (9th Cir. 2004) (public interest favored injunction where cuts to state programs “much more speculative than the probable injury” plaintiffs would suffer).

The actual budget impacts from the timely reopening of WSDOT’s barriers will depend on legislative taxation, borrowing, and spending decisions. Those choices cannot be foretold, but the district court concluded that “[t]he State has the financial ability to accelerate the pace of barrier correction.” ER 41 (CL17). This is correct—the cost of accelerated culvert corrections will be a sliver of the \$9.9 billion biennial Transportation Budget. ER 37-38 (FF54); *see, e.g., Collins v. Brewer*, 727 F. Supp. 2d 797, 813-14 (D. Ariz. 2010), *aff’d sub nom., Diaz v.*

Brewer, 656 F.3d 1008 (9th Cir. 2011) (burden placed on state where budgetary shortfalls were speculative and small in relation to overall health budget).

The court concluded that increased spending on barrier correction “will not adversely affect state programs such as education or social welfare.” ER 41 (CL17). The State does not contest this conclusion, but challenges the related Finding of Fact that money will not be taken from social services or education to fund WSDOT culvert repairs. Dkt. 25 at 69 (citing ER 38 (FF56)). Its sole identified evidentiary support is a chart showing that a few percent of its transportation revenue could legally be allocated to social programs. *Id.* (citing ER 159). This says nothing about likely use of those revenues and does not prove clear error.

The unchallenged findings and the record support the district court’s conclusion that welfare and other non-transportation programs will likely be unaffected. Those programs are in the Operating Budget, and supported by the General Fund. SER 80-83. The Transportation Budget is separate from the Operating Budget, ER 37-38 (FF54), and has its own dedicated revenue sources. ER 38 (FF57); ER 26 (FF3.120); ER 37 (FF53); ER 37-38 (FF54). Historically, the General Fund has not been used to support the Transportation Budget. SER 165 (53:1-9); *see* ER 22-23 (FF3.97). Thus, accelerated WSDOT culvert corrections will most likely be funded through the Transportation Budget, and will

not draw on the General Fund. As Mr. Moore testified, the General Fund, then, is not that relevant to transportation spending. SER 165 (53:21-24). Within the Transportation Budget, the unchallenged finding is that culvert correction would not compromise safety and mobility programs. ER 38 (FF60). Furthermore, the district court concluded the public interest favored an injunction because “[a]ll fishermen, not just Tribal fishermen, will benefit from the increased production of salmon,” which will benefit the Washington economy. ER 42 (CL18); *Stormans*, 586 F.3d at 1140 (requiring consideration of public interest before grant or denial of injunction).

The State may argue that the loss of 1,000 miles of stream and hundreds of thousands of fish per year is insignificant, despite its own biologists’ statements to the contrary. But the deprivation of access to fishing in so much of the Tribes’ usual and accustomed areas, and the loss of so many fish, are of great significance to the Tribes and the treaty rights they traded their lands for. The district court committed no error in enjoining the State to end its obstruction of those rights.

VIII. CONCLUSION AND RELIEF SOUGHT.

More than 150 years ago, Governor Stevens promised the assembled leaders of Washington Indian tribes, “This paper secures your fish.” Half a century later, the Supreme Court set down interpretive rules to ensure fidelity to that promise. Applying those rules, courts time and again have ruled that the Treaties secure

more than an opportunity to fish; they protect the Tribes' right to enough fish to live by fishing. That right is deeply encumbered by State culverts that barricade 1,000 miles of stream and thwart tribal harvest of all they might produce. The Tribe respectfully requests that the Court affirm the summary judgment and the injunction against state barrier culverts in all respects.

Respectfully submitted this 21st day of January, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and with this Court's January 10, 2014, ORDER Granting the Unopposed Motion of the Plaintiffs/Appellees-Cross-Appellants Indian Tribes for leave to file an oversized joint second brief on cross-appeal of 15,400 words. Dkt. No. 53. The brief contains 15,152 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated this 21st day of January, 2014.

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STATEMENT OF RELATED CASES

The following four appeals pending in this Court arise out of the same case in the district court as this appeal, although they do not involve related issues:

1. *Lower Elwha Klallam Indian Tribe, et al., v. Lummi, et al.*, 12-35936
2. *Tulalip Tribes v. Suquamish Indian Tribe*, 13-35773
3. *United States v. Washington*, No. 13-35925
4. *United States v. Washington*, No.13-35928

Dated this 21st day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2014, I electronically filed this Brief and the Supplemental Excerpts of Record with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

Dated this 21st day of January, 2014.

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Addendum to Appellee-Cross-Appellant's Brief

United States of American, et al., v. State of Washington

Case Nos. 13-35474, 13-35519

TABLE OF CONTENTS

Except for the following, all applicable statutes, etc., are contained in the addendum of the State of Washington:

Statutes

1. Act of August 14, 1848, 9 Stat. 323, §12 ADD-01

2. Act of March 2, 1853, 10 Stat. 172, §12 ADD-02

3. RCW 77.15.320 ADD-03

4. RCW 77.57.030 ADD-04

Rules

5. Fed. R. Civ. Pro. 52(a)(6) ADD-05

United States, and faithfully to discharge the duties of their respective offices; which said oaths, when so taken, shall be certified by the person by whom the same shall have been taken, and such certificates shall be received and recorded by the said secretary among the executive proceedings; and the chief justice and associate justices, and all other civil officers in said Territory, before they act as such, shall take a like oath or affirmation, before the said governor or secretary, or some judge or justice of the peace of the Territory, who may be duly commissioned and qualified; which said oath or affirmation shall be certified and transmitted by the person taking the same, to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded, in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and fifteen hundred dollars as superintendent of Indian affairs. The chief justice and associate justices shall each receive an annual salary of two thousand dollars. The secretary shall receive an annual salary of fifteen hundred dollars. The said salaries shall be paid quarter-yearly, from the dates of the respective appointments, at the treasury of the United States; but no such payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the session thereof, and three dollars each for every twenty miles' travel in going to and returning from said sessions, estimated according to the nearest usually travelled route. And a chief clerk, one assistant clerk, a sergeant-at-arms, and door-keeper, may be chosen for each house; and the chief clerk shall receive five dollars per day, and the said other officers three dollars per day, during the session of the legislative assembly; but no other officers shall be paid by the United States: *Provided*, That there shall be but one session of the legislature annually, unless, on an extraordinary occasion, the governor shall think proper to call the legislature together. There shall be appropriated annually the sum of fifteen hundred dollars, to be expended by the governor to defray the contingent expenses of the Territory, including the salary of a clerk of the executive department; and there shall also be appropriated, annually, a sufficient sum to be expended by the Secretary of the Territory, and upon an estimate to be made by the Secretary of the Treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the governor and secretary of the Territory shall, in the disbursement of all moneys intrusted to them, be governed solely by the instructions of the Secretary of the Treasury of the United States, and shall semi-annually account to the said Secretary for the manner in which the aforesaid [sum] moneys shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by said legislative assembly for objects not specially authorized by the acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

SEC. 12. *And be it further enacted*, 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.

SEC. 13. *And be it further enacted*, That the sum of ten thousand dollars be, and is hereby appropriated, to be expended under the direction of the President of the United States, in payment for the services and expenses of such persons as have been engaged by the provisional government of Oregon in conveying communications to and from the

Salary of gov-
ernor &c.

Salary of sec-
retary.

Compensation
of members of
legislative assem-
bly.

Officers of leg-
islative assembly.

Proviso as to
sessions of leg-
islature.

Provision for
contingent ex-
penses.

Salmon leaps
not to be ob-
structed.

Appropriations
for services and
expenses of ex-
presses,
And for pres-
ents to Indians.

THIRTY-SECOND CONGRESS. SESS. II. CH. 90. 1853.

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the duties of their respective offices, which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken; and such certificates shall be received and recorded by the said Secretary among the executive proceedings; and the Chief Justice and Associate Justices, and all other civil officers in said Territory, before they act as such, shall take a like oath or affirmation before the said Governor or Secretary, or some judge or justice of the peace of the Territory who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the Secretary, to be by him recorded as aforesaid; and afterwards, the like oath or affirmation shall be taken, certified and recorded in such manner and form as may be prescribed by law. The Governor shall receive an annual salary of fifteen hundred dollars as Governor, and fifteen hundred dollars as Superintendent of Indian affairs. The Chief Justice, and Associate Justices, shall each receive an annual salary of two thousand dollars. The Secretary shall receive an annual salary of fifteen hundred dollars. The said salaries shall be paid quarterly, from the dates of the respective appointments, at the Treasury of the United States; but no such payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the session thereof, and three dollars each for every twenty miles' travel in going to and returning from said sessions, estimated according to the nearest usually travelled route. And a chief clerk, one assistant clerk, a sergeant-at-arms, and door-keeper, may be chosen for each house; and the chief clerk shall receive five dollars per day, and the said other officers three dollars per day, during the session of the legislative assembly; but no other officers shall be paid by the United States: *Provided*, That there shall be but one session of the legislative assembly annually, unless, on an extraordinary occasion, the Governor shall deem it expedient and proper to call the legislature together. There shall be appropriated, annually, the sum of fifteen hundred dollars, to be expended by the Governor, to defray the contingent expenses of the Territory, including the salary of a clerk of the executive department; and there shall also be appropriated, annually, a sufficient sum to be expended by the Secretary of the Territory, and upon an estimate to be made by the Secretary of the Treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the Governor and Secretary of the Territory shall, in the disbursement of all moneys intrusted to them, be governed solely by the instructions of the Secretary of the Treasury of the United States, and shall, semi-annually, account to the said Secretary for the manner in which the aforesaid sums of money shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by said legislative assembly for objects not specially authorized by the acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

Salaries.

One session annually, only.

Contingent expenses.

Instructions as to disbursement of money to be followed.

SEC. 12. *And be it further enacted*, That the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.

Existing laws in said territory continued in force so far as applicable.

SEC. 13. *And be it further enacted*, That the legislative assembly of the Territory of Washington shall hold its first session at such time and

First session of legislative assembly.

RCW 77.15.320

**Unlawful failure to provide, maintain, or
operate fishway for dam or other obstruction
— Penalty.**

(1) A person is guilty of unlawful failure to provide, maintain, or operate a fishway for dam or other obstruction if the person owns, operates, or controls a dam or other obstruction to fish passage on a river or stream and:

(a) The dam or obstruction is not provided with a durable and efficient fishway approved by the director as required by RCW 77.57.030;

(b) Fails to maintain a fishway in efficient operating condition; or

(c) Fails to continuously supply a fishway with a sufficient supply of water to allow the free passage of fish.

(2) Unlawful failure to provide, maintain, or operate a fishway for dam or other obstruction is a gross misdemeanor. Following written notification to the person from the department that there is a violation, each day of unlawful failure to provide, maintain, or operate a fishway is a separate offense.

[2009 c 333 § 4; 2000 c 107 § 241; 1998 c 190 § 54.]

RCW 77.57.030

Fishways required in dams, obstructions — Penalties, remedies for failure.

(1) Subject to subsection (3) of this section, a dam or other obstruction across or in a stream shall be provided with a durable and efficient fishway approved by the director. Plans and specifications shall be provided to the department prior to the director's approval. The fishway shall be maintained in an effective condition and continuously supplied with sufficient water to freely pass fish.

(2)(a) If a person fails to construct and maintain a fishway or to remove the dam or obstruction in a manner satisfactory to the director, then within thirty days after written notice to comply has been served upon the owner, his or her agent, or the person in charge, the director may construct a fishway or remove the dam or obstruction. Expenses incurred by the department constitute the value of a lien upon the dam and upon the personal property of the person owning the dam. Notice of the lien shall be filed and recorded in the office of the county auditor of the county in which the dam or obstruction is situated. The lien may be foreclosed in an action brought in the name of the state.

(b) If, within thirty days after notice to construct a fishway or remove a dam or obstruction, the owner, his or her agent, or the person in charge fails to do so, the dam or obstruction is a public nuisance and the director may take possession of the dam or obstruction and destroy it. No liability shall attach for the destruction.

(3) For the purposes of this section, "other obstruction" does not include tide gates, flood gates, and associated man-made agricultural drainage facilities that were originally installed as part of an agricultural drainage system on or before May 20, 2003, or the repair, replacement, or improvement of such tide gates or flood gates.

[2005 c 146 § 903; 2003 c 391 § 1; 1998 c 190 § 86; 1983 1st ex.s. c 46 § 72; 1955 c 12 § 75.20.060. Prior: 1949 c 112 § 47; Rem. Supp. 1949 § 5780-321. Formerly RCW 77.55.060, 75.20.060.]

Notes:

Part headings not law -- 2005 c 146: See note following RCW 77.55.011.

Severability -- 2003 c 391: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2003 c 391 § 8.]

Effective date -- 2003 c 391: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 20, 2003]." [2003 c 391 § 9.]

Federal Rules of Civil Procedure Rule 52

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

- (1) ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.
- (2) ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.
- (3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.
- (4) ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings.
- (5) ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.
- (6) ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) **Amended or Additional Findings.** On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) **Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).