

No: 13-35474

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

UNITED STATES OF AMERICA, ET AL.,

Appellees,

v.

STATE OF WASHINGTON,

Appellant.

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

No. CV 70-9213
Subproceeding 01-1
The HONORABLE RICARDO S. MARTINEZ
United States District Court Judge

APPELLEE INDIAN TRIBES' RESPONSE TO WASHINGTON'S PETITION FOR
REHEARING AND REHEARING EN BANC

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I. INTRODUCTION

More than 150 years ago, our Nation promised the tribes of western Washington that, in exchange for vast cessions of land, it would secure their “right of taking fish at usual and accustomed grounds and stations.” *E.g.*, Treaty of Point Elliott, 12 Stat. 927 (1859). This promise binds the State of Washington. *United States v. Winans*, 198 U.S. 371, 381-82 (1905). And more than forty years ago, this Court held that “neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed.” *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975). Yet the State now claims that it is free under those Treaties to block the entry of salmon into every stream in the Puget Sound basin, destroying their fish. *United States v. Washington*, 827 F.3d 836, 849-50 (9th Cir. 2016) (Dkt. 115-1).

The unanimous Panel carefully dissected and rejected that claim, *id.* at 850, as had the district court. ER 42 (Memorandum and Decision).¹ As a result, 1,000 miles of stream now blocked by state road culverts will be re-opened by 2030. 827 F.3d at 853, 865. The State tries to paint the consequences as dramatic but, as the Panel explained in detail, its complaints of “billions” in cost that “make no

¹ In this brief, Excerpt of Record is “ER,” Supplemental Excerpt of Record is “SER,” the district court’s Findings of Fact are “FF,” and its Conclusions of Law are “CL.” Citations to the docket refer to the page number at the bottom of the page.

difference” to fish are flatly contradicted by the record. *Id.* at 858-62. State agencies have already deemed fish passage at these culverts to be feasible, cost-effective, and critical to the recovery of depleted salmon runs. *Id.* The judgment merely requires that the corrections be timely and their designs effective. *See id.* at 857, 863.

The Panel’s decision obeys this Court’s dictate in *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc) (“Phase II”), that the contours of the State’s duty not to destroy the subject matter of the Treaties be delineated in the context of specific State actions -- here, the State’s operation of barrier culverts. Far from conflicting with precedent, the decision faithfully follows the course charted by the Treaties and by a century of Supreme Court and Ninth Circuit case law. The Petition should be denied.

II. STATEMENT OF THE CASE

The Tribes and Territorial Governor Isaac Stevens negotiated the relevant treaties in 1854 and 1855. 827 F.3d at 841. The Tribes, whose diet, commerce, and culture depended on fish, insisted upon and received a commitment from Governor Stevens that ceding their lands would not impair their fisheries. *Id.* at 846, 851-52. Decades of state resistance to Indian treaty fishing ensued, prompting repeated federal court rebukes. *Id.* at 841-45.

The federal government filed *United States v. Washington* in 1970 to resolve issues raised by the increasing scarcity of fish, including whether the Tribes are entitled to a share of each year's harvest, *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979) ("*Fishing Vessel*"); whether that share included fish produced in state hatcheries, *United States v. Washington*, 384 F. Supp. 312, 344-45 (W.D. Wash. 1974); and whether the State has a duty not to interfere with the supply of fish by degrading fish habitat, *id.* at 328. The case was bifurcated, with the habitat and hatchery fish issues to be addressed in Phase II. *Id.*; *United States v. Washington*, 459 F. Supp. 1020, 1072 (W.D. Wash. 1976).

The district court decided Phase I in 1974. It allocated half the harvest of each run to the Tribes, *id.* at 343, who were taking barely two percent due to State and private interference. *Fishing Vessel*, 443 U.S. at 669 n.14, 676 n.22. The court retained jurisdiction to resolve future treaty fishing disputes, such as the present one. 384 F.2d at 389.

This Court affirmed, *United States v. Washington*, 520 F.2d 676, but the State disregarded the decisions, requiring the district court to assume management of the fisheries. *See Fishing Vessel*, 443 U.S. at 692-93. This Court again affirmed, *Puget Sound Gillnetters Ass'n v. U.S. Dist. Court*, 573 F.2d 1123 (9th Cir. 1978). The Supreme Court also affirmed, holding that the Treaties secure the

Tribes “an interest in the fish runs themselves,” and a right to the actual “taking” of fish “rather than merely the ‘opportunity’ to try to catch” them. 443 U.S. at 677-78. It agreed that the Tribes had understood they “would forever be able to continue the same . . . fishing practices as to time, place, method, species and extent,” *id.* at 667 (internal quotation marks omitted), subject only to non-Indians’ right to fish “in common” with the tribes, *id.* at 668 and n. 12. According to the Court,

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 686. To accommodate non-Indian fishing “in common,” the Tribes’ annual share was capped at half the available fish. *Id.* The Court expressly avoided comment on pending Phase II issues. *Id.* at 688 n. 30.

The district court decided Phase II in 1980, recognizing a State duty not to degrade habitat and thereby impair the Tribes’ ability to obtain a moderate living by fishing. *United States v. Washington*, 506 F. Supp. 187, 208 (W.D. Wash. 1980). The decision, however, addressed no particular habitat degradation and specified no remedy. *Id.* The court also found the Tribes entitled to an equal share of hatchery fish. *Id.* at 197.

A panel of this Court affirmed on the hatchery fish issue and recognized a State duty not to destroy habitat, but defined it differently than had the district court. *United States v. Washington*, 694 F.2d 1374, 1377, 1380 (9th Cir. 1982). On rehearing en banc, this Court again affirmed the Tribes' right to a share of hatchery fish, but vacated the habitat decision as too "imprecise in definition and uncertain in dimension," given the lack of tribal challenge to specific State actions and the corresponding lack of concrete duties and relief. 759 F.2d at 1357. Far from holding that the State was free to destroy the habitat necessary to supply the Tribes with fish, however, this Court made plain that the State's duties should be defined in the context of particular State actions:

The legal standards that will govern the State's precise obligations and duties under the treaty . . . *will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.*

Id. (emphasis added).

This subproceeding of *United States v. Washington* is such a case. It was filed by the Tribes in 2001, and the United States joined in the claims. 827 F.3d at 847. As directed by Phase II, the Tribes challenged specific State action: operating culverts that impede the passage of salmon into their freshwater spawning and rearing grounds. On summary judgment, the district court found that the more than 1,000 state barrier culverts significantly impair tribal harvest and violate State treaty obligations. ER 8-9. In the remedy phase, a voluminous record confirmed

the harmful effects of state culverts and the feasibility of correcting them. *See* ER 8-42.

In 2013, the court issued its opinion and nearly 200 findings of fact. *Id.* It found that correcting all the state barriers would take a century or more at the State's current pace. ER 32 (FF 28). The court enjoined the State to instead correct its most significant barriers within 17 years. ER 3 (¶ 6). The rest must be corrected when the State replaces or rebuilds them for other reasons, or when state fish passage laws require. ER 3-4 (¶¶ 7, 8).

The State appealed. In a thorough and careful opinion by Judge Fletcher, the Panel unanimously affirmed. It faithfully applied the interpretive rules and understanding of treaty purpose set forth in *Fishing Vessel* and earlier cases. 827 F.3d at 849-53. The Panel rejected the State's "remarkably one-sided view of the Treaties," *id.* at 851, which would permit the State to block every salmon stream regardless of the effect on tribal fisheries, *id.* at 849-50. It found that result irreconcilable with Governor Stevens' express promise that the Treaties would "secure[] your fish" forever, *id.* at 851, and inconsistent with the doctrine that treaty rights implicitly encompass subsidiary rights necessary to effectuate their purpose, *id.* at 852.

Carefully addressing the State's claims that barrier removal would have limited benefit and a high cost, the Panel concluded that the State had simply

misrepresented the evidence, much of it from its own experts, that culvert correction is highly cost-effective and critical to salmon recovery. *Id.* at 858-62. The Panel further found that the injunction allows the State substantial latitude to delay corrections that may have less benefit. For all these reasons, the Panel rejected the State’s claims of overbreadth and abuse of discretion. *Id.* at 857.

III. REASONS FOR DENYING THE PETITION

The State argues that the Panel decision conflicts with this Court’s en banc decision in Phase II, and that it will have far-reaching consequences despite its fact-bound nature. Petition for Rehearing/Rehearing En Banc, Dkt. # 117 (“Petition”) at 3. The State’s arguments fundamentally mischaracterize the Tribes’ treaty rights, the holding in Phase II, and the implications of the Panel decision.

A. The Panel’s Recognition of a Treaty Duty to Remove Barrier Culverts Creates No Conflict in Authority.

Relying on *Fishing Vessel*’s “central principle” that Indian treaty resource rights reserve “so much as, but no more than, is necessary to provide the Indians with . . . a moderate living,” 827 F.3d at 846, and on the present inability of the Tribes to obtain a moderate living by fishing, the Panel ruled that the State’s barrier culverts violate its obligations to the Tribes under the Treaties. *Id.* at 853. The State hinges its claim of a precedential conflict on this Court’s statement in Phase II that “*Fishing Vessel* did not hold that the Tribes were entitled to any

particular minimum allocation of fish.” Petition at 8 (quoting *United States v. Washington*, 759 F.2d at 1359). As discussed above, however, Phase II dealt with two separate issues—the State’s duty not to interfere with the natural supply of fish by degrading habitat, *id.* at 1357, and the Tribes’ entitlement to harvest a share of hatchery fish, *id.* at 1357-60. The passage quoted by the State comes from the *hatchery* portion of the opinion, and deals with harvest allocation, not the interference with supply that is at issue here.

In the harvest allocation context, it makes sense to say that the Tribes are not entitled to “any particular minimum allocation.” Natural fluctuations in productivity preclude the assurance of any *particular* harvest—half of the returning run may yield no fish or a boatload. But that is a far cry from saying that the Treaties secure no rights and impose no duties at all related to the supply of fish.

This Court’s Phase II decision is emphatically to the contrary. In the same paragraph of the hatchery discussion on which the State relies, this Court recognized “*Fishing Vessel*’s holding that *the Tribes are entitled under the treaty to an ‘adequate supply of fish,’*” *id.* at 1358 (emphasis added), and relied on that holding as “support[ing] the inclusion of hatchery fish in the [Tribes’] allocation,” *id.* This Court continues to recognize such an entitlement. *United States v. Washington*, 573 F.3d 701, 704 (9th Cir. 2009) (“[T]he treaty fishing right . . .

exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes.” (internal quotation marks omitted)). The State completely ignores this language in Phase II and the entitlement that it describes.

The State likewise ignores this Court’s reasoning in Phase II, that the Tribes are entitled to a share of hatchery fish partly as mitigation for non-Indian destruction of habitat and wild runs: “For the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the Treaty.” *Id.* at 1360. If the Tribes had no rights relating to the supply of fish, the State would owe the Tribes no such mitigation.

The State’s argument also contradicts the habitat portion of the Phase II opinion. In vacating the district court’s declaration of a generalized duty of habitat protection, this Court stated that “[t]he legal standards that will govern the State’s precise obligations and duties under the treaty . . . will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.” *Id.* at 1357. That directive would make no sense if this Court had simultaneously determined that the Tribes have no rights pertaining to the availability of fish, and that the State can therefore never be subject to a duty of habitat protection. The State’s claimed conflict rests on a fundamental misreading of Phase II and provides no basis for en banc review.

The Panel’s opinion follows directly from *Fishing Vessel*. The Panel invoked *Fishing Vessel*’s reliance on Governor Stevens’ explicit promise that “[t]his paper secures your fish.” 827 F.3d at 851 (quoting *Fishing Vessel*, 443 U.S. at 667 n.11). The Indians, the Panel concluded, did not understand such assurances to “allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise.” *Id.*

The Panel also correctly relied on *Winters v. United States*, 207 U.S. 564 (1908), and *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), in holding that, even if Governor Stevens had not made an explicit promise, one would be inferred to “support the purpose of the Treaties,” 827 F.3d at 852 (internal quotation marks omitted), because the Tribes’ right “would be worthless without harvestable fish,” *id.* *Adair* is an especially apt example, as it recognized an implied right to sufficient stream flows—that is, sufficient fish habitat—to provide the tribe a moderate living through fishing. 723 F.2d at 1409. The State’s Petition nowhere addresses these cases.

The State once recognized that the “moderate living” standard applies to its habitat duties. It argued to the district court in Phase II that the Tribes’ “treaty entitlement is to a quantity of fish sufficient to supply their needs for a moderate

income,” SER 145, and that “nonnatural reductions in fish runs . . . would not violate any Indian right to take fish so long as there continue[] to exist fish in sufficient quantities to meet the treaty fishermen’s needs.” SER 146-147. Now, relying only on the vacated panel decision in Phase II, the State attacks the moderate living standard as unworkable and proposes alternatives. Petition at 11. But the State never proposed those standards to the Panel. Leaving the infirmities of its alternatives aside, the State has made no attempt to identify “extraordinary circumstances” that would justify such circumvention of panel review. *See United States v. Patzer*, 284 F.3d 1043, 1045 (9th Cir. 2002) (quoting *Escobar Ruiz v. I.N.S.*, 813 F.2d 283, 285–86 (9th Cir. 1987)).

Nor is there merit to the State’s objection that the moderate living standard is too fickle, and changes with factors like the daily price of fish. See Petition at 11. Short-term changes do not determine whether tribal fishers can forever make a livelihood by fishing. The moderate living standard is keyed to long-term changes like the dwindling away of tribes or abandonment of their fisheries. *See Fishing Vessel*, 443 U.S. at 686-87. In any case, the moderate living standard has long been accepted and applied by the courts. *See, e.g., United States v. Washington*, 873 F. Supp. 1422, 1445 (W.D. Wash. 1994), *aff’d in relevant part*, 157 F.3d 630 (9th Cir.

1998) (economic evidence failed to show that Tribes had attained a moderate living and needed no allocation of shellfish).

As with the rest of its opinion, the Panel's reference to the moderate living standard conflicts with no precedent and does not warrant en banc rehearing.

B. Recognizing a Treaty Duty in the Narrow Context of State Culverts Raises No Issues of Exceptional Importance.

Shorn of its ill-founded claim of a conflict, the State's Petition presents no basis for en banc review. The State makes a perfunctory suggestion that this case is of "exceptional importance," arguing that the Panel has created an "ill-defined new treaty right." Petition at 3. But as demonstrated above, the Panel's opinion hews closely to precedent, including the explicit directive in Phase II to evaluate treaty habitat duties case-by-case, on their particular facts. 827 F.3d at 852-53.

The Panel decision accordingly addresses only the affirmative activity of the State as land owner, in maintaining barrier culverts that directly impair completion of the salmon life cycle. *Id.* at 853. That activity significantly diminishes the range and abundance of salmon, *id.*, at a time when "salmon stocks in the Case Area have declined 'alarmingly'" and "[t]he consequent reduction in tribal harvests has damaged tribal economies, . . . left individual tribal members unable to earn a

living by fishing, and . . . caused cultural and social harm to the Tribes. . . ." *Id.* at 848. The importance of the decision is circumscribed by these facts.

Nor can a plausible claim be made that the decision will have exceptional impacts on the State. No new state programs are required. The scale and function of the highway system are unchanged; it only needs to incorporate well-known culvert designs already preferred by state agencies. ER 4 (¶ 9; ER 15 (FF 3.40); ER 37 (FF 50). And, while the injunction takes the essential step of accelerating the most significant corrections, it does not require that the State correct any more culverts than it would otherwise, because state law already requires fish passage when a culvert is replaced or rebuilt, WASH. REV. CODE 77.57.030, as every culvert eventually will be due to road reconstruction and natural aging. ER 26 (FF 3.122); ER 16 (FF 3.48); ER 27 (FF 3.131).

The State nevertheless claims that it will have "to spend billions" to comply. Petition at 1. However, the Panel's painstaking analysis of the record led it to conclude that "Washington's cost estimates are not supported by the evidence" because the State used inflated per unit costs that are contradicted by its own data; ignored the availability of substantial federal funding; and wrongly attributed all costs to the injunction, rather than just the "marginal costs attributable to an accelerated culvert correction schedule." 827 F.3d at 862; ER 41 (CL17). The

State has no response to the Panel’s rejection of its exaggerated claims, and they should be disregarded.

In sum, the Panel created no new treaty right; it resolved a single lawsuit based on particular facts, precisely as envisioned by this Court thirty years ago in Phase II. Nothing in the Panel’s judicious delineation of the State’s treaty duties warrants en banc review.

C. The State’s Fact-Dependent Challenges to the Injunction Reveal No Conflict with Precedent or Any Issue of Exceptional Importance.

Before the district court, “Washington declined to participate in the formulation of the injunction” 827 F.3d at 858. It nevertheless challenges the injunction as overbroad and unsupported by the evidence. These fact-bound attacks do not satisfy the criteria for en banc review. The Panel decision does not conflict with *Stormans Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), cited by the State, Petition at 2-3, 15. The Panel reviewed the injunction for overbreadth exactly as *Stormans* requires. 827 F.3d at 858-60. And the State does not attempt to argue that the details of the injunction are of extraordinary importance. It simply repeats overbreadth arguments debunked by the Panel, which concluded that “Washington misrepresents the evidence and mischaracterizes the district court’s order.” 827 F.3d at 858.

The State first asserts that there is not “any evidence that any particular state culvert or group of culverts has reduced the number of fish” in tribal fishing places. Petition at 16. But as the findings show, the State has proclaimed for decades that barrier culverts diminish salmon production. 827 F.3d at 858-60; ER 16 (FF 3.50); ER 21-22 (FF 3.89); ER 27 (FF 3.131); ER 30 (FF 20); SER 65. Its agencies have warned that correction of culvert barriers is critical to salmon recovery, SER 6.2, and their scientists have agreed that protecting habitat is “pointless” if salmon are denied access to and from the sea. SER 49-50. The State has never claimed that its barrier culverts, unlike all others, benefit fish. Based on this extensive record, the district court found that “State-owned barrier culverts . . . have a significant total impact on salmon production.” ER 31 (FF 27).

The Panel scrutinized this record and found no error. 827 F.3d at 858-61. Remarkably, the State faults the Panel’s reliance on the *State’s* 1997 report that the habitat blocked by state culverts—about one-third of the area identified today—could produce 200,000 more adult salmon annually. Petition at 17-18; 827 F.3d at 857; *see* ER 28 (FF 4); ER 559. But that report was admitted into evidence without limitation by the court. The Panel was correct to consider it.

The State next argues that the injunction requires some corrections that “will make no difference” because some barrier culverts owned by others remain on those streams. Petition at 3, 15-16. As a state biologist testified, however, the

current presence of non-State barriers does not mean that fixing State barriers should wait. SER 193-194 (122:25-123:11). In nearly ninety percent of such cases, the State’s barrier is the one downstream, and the key to opening the watershed. ER 210. State law requires fish passage at all those culverts, as it has throughout Washington’s history, Washington Laws 1889-90, pp. 107-08, *codified as amended at* WASH. REV. CODE §§ 77.15.320, 77.57.030; ER 16 (FF 3.48-3.49); and the State has set deadlines for barrier correction by some landowners. WASH. ADMIN. CODE 222-24-051(2), 051(6)(a). Hundreds of non-state barrier culverts are being corrected—of the more than 3,600 culvert corrections statewide from 2000 to 2008, SER 17, less than 600 were state-owned. *See* ER 18-19 (FF 3.68; FF 3.70)(405 barriers eliminated by Dept. of Natural Resources 2001-09; one by state Parks); ER 623 (135 corrections by Transportation Dept. in 2000-2008). The State mentions none of this in its Petition.

Moreover, and as the Panel explained at length, the injunction allows the State to postpone hundreds of lower priority corrections. 827 F.3d at 857. Its Department of Transportation may defer reopening any combination of culverts that collectively block ten percent of the “significant reaches” of blocked habitat, until state law or a highway project require correction. *Id.* at 856-57, 860; *see* ER 3-4 (¶¶ 6, 8); ER 22 (FF 3.94). That may encompass as many as 230 corrections.

827 F.3d at 860, 862.² The Department may similarly defer reopening *all* the “insignificant” reaches (less than 200 meters each), 827 F.3d at 857—another 183 culverts. ER 118 (¶¶ 11.13-14). Thus, nearly *forty per cent of the barriers in the case area may remain* until the State chooses to correct them. *See* 827 F.3d at 860-62; ER 31 (FF 27) (1114 total culverts).

The district court, in sum, crafted a nuanced injunction that addresses the serious harm that state culverts cause, but gives the State substantial leeway in prioritizing and scheduling corrections. The Panel thoroughly reviewed the district court’s order. The State’s attacks on both Courts’ work are record-bound, and belied by that record. They fall far short of justifying en banc review.

D. Dismissal of the State’s Cross-Request Against the United States Does Not Warrant En Banc Review.

The State’s cross-request, seeking to increase the current federal funding for state culvert corrections, was properly dismissed. 827 F.3d at 855. The Tribes join the United States’ response on that issue.

² The State complains that the injunction defines “significant reach” without regard to the presence of other barrier culverts. Petition at 15-16. But that is required by the State’s Barrier Assessment Manual, which the district court adopted. ER 3 ¶8; ER 22 (FF 3.94). The State disregards other culverts because the State assumes they are temporary. SER 218-219 (11.16:24-17:18).

IV. CONCLUSION

The State here asserts that, whatever was said or understood on the Treaty grounds, it is free to block every stream in Puget Sound, destroying the Tribes' right to take fish in and from those streams. It is the State's radical position—not the Panel's opinion—that contravenes precedent. The Panel's unanimous decision simply applies established principles of Indian treaty fishing law to the particular facts of State culverts, and affirms an injunction that requires as little of the State as needed to achieve timely and effective fish passage. En banc review of such a careful, fact-bound, and limited opinion is not appropriate.

Respectfully submitted this 29th day of September, 2016.

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By: s/ MASON D. MORISSET, WSBA # 273
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By: s/ HAROLD CHESNIN, WSBA # 398
Attorney for the Upper Skagit Tribe

**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULES 35-4 AND 40-1**

I certify that pursuant to Circuit Rule 40-1, the attached answer to Appellant State of Washington's Petition for Rehearing/Rehearing En Banc is proportionately spaced, has a type face of 14 points or more and contains 4,197 words.

Dated this 29th day of September, 2016.

s/ John C. Sledd
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Gamble S'Klallam, Sauk-Suiattle, Squaxin
Island, Stillaguamish and Suquamish Tribes

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2016, I electronically filed THE APPELLEE INDIAN TRIBES' RESPONSE TO WASHINGTON'S PETITION FOR REHEARING AND REHEARING EN BANC 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 29th day of September, 2016.

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