

No. 13-35474

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA, et al.,

*Plaintiffs-Appellees,*

v.

STATE OF WASHINGTON,

*Defendant-Appellant.*

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On Appeal from the U.S. District Court for the  
Western District of Washington (Ricardo S. Martinez, J.)  
Case No. CV-70-9213 401 WJ/LFG

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**UNITED STATES' RESPONSE IN OPPOSITION TO APPELLANT'S  
PETITIONS FOR REHEARING AND REHEARING *EN BANC***

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## INTRODUCTION & SUMMARY OF ARGUMENT

The State's request for rehearing *en banc* is based on erroneous contentions that the panel defined a "new" treaty right inconsistent with this Court's ruling in *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (*en banc*), and that the panel decision represents a "momentous change" in the law that is "terribly unfair." Pet. 1-4. In fact, the panel decision is wholly consistent with that *en banc* decision, and faithfully follows this Court's instruction in that case to apply established rules of treaty construction to "concrete facts" to determine whether there have been treaty violations. Those facts here showed that the State has acted affirmatively to build and maintain barrier culverts under its roads that block approximately 1,000 linear miles of streams suitable for salmon habitat, and that several hundred thousand additional salmon would be available to the Tribes if the culverts are repaired or replaced to allow free passage of fish. Panel Opinion ("Op.") 32-33. The State itself has recognized the need to replace and repair the culverts at issue. Op. 43-44. Moreover, the injunction affirmed by the panel affords the State considerable flexibility in carrying out the needed work, further undermining its claim of unfairness. Op. 41-59.

In the 1850s, Indian Tribes in the Pacific Northwest entered into the Stevens Treaties under which they relinquished most of their territory in what is now western Washington State in exchange for small homelands and the preservation of the Tribes' aboriginal fishing rights at traditional fishing grounds within their ceded lands. Both the United States and the Tribes viewed the reservation and protection of the Tribes' off-reservation fishing rights as critical elements of the Treaties, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 (1979)

(*Fishing Vessel*). In essentially identical language, each of the Treaties provided for “[t]he right of taking fish, at all usual and accustomed grounds and stations. . . in common with all citizens of the Territory.” ER 44-45.

The meaning of the right to take fish has been extensively litigated, including in this Court and the Supreme Court. This case, fully consistent with earlier decisions interpreting the fishing clause, addresses the specific question of how the Treaties should be implemented where culverts under State roads destroy or diminish fish runs available for tribal harvest by blocking or hindering the passage of anadromous fish to and from tribal fishing grounds. The district court ruled that the Treaty fishing right imposes a duty on the State to refrain from building or maintaining fish-blocking culverts that impermissibly interfere with fish passage and survival, thereby significantly impacting the Tribes’ right to take fish and ability to sustain themselves by fishing. As the panel found, that ruling is fully supported by the historical context and understanding of the signatory parties of the Treaties, well-established canons of treaty interpretation, more than 100 years of precedent addressing the fishing clause, and an extensive factual record. The panel properly affirmed dismissal of the State’s counterclaims against the United States as they sought affirmative relief without a waiver of sovereign immunity and plainly did not qualify as claims for recoupment. Finally, the panel properly affirmed a flexible injunction that requires the State to address the worst barrier culverts on a reasonable schedule necessary to ensure that the State acts expeditiously to correct a situation that violates Treaty promises. Nothing in the panel decision conflicts with any decision of this Court or raises any question of exceptional importance that warrants *en banc* consideration.

## STATEMENT

From time immemorial, the Treaty Tribes have used and relied on fish for commercial, subsistence, and ceremonial purposes. *See Fishing Vessel*, 443 U.S. at 669. The Treaty negotiators were well aware of “the vital importance of the fisheries” to the Tribes and the necessity of preserving the Tribes’ right to take fish throughout the ceded lands. *Id.* at 666. Thus, the Tribes were invited by them “to rely and in fact did rely heavily on the good faith of the United States to protect that right.” *Id.* at 667 & n.11 (the Indians were assured that “[t]his paper secures your fish”).

**Earlier Proceedings.** In 1970, the United States, on its own behalf and as trustee for several of the Tribes, sued the State in federal district court, seeking declaratory and injunctive relief under the Treaties’ fishing rights clause. The district court separated the claims into two phases. In *Phase I*, the district court established the locations of the Tribes’ “usual and accustomed” fishing grounds and held that the Tribes could take up to 50% of the harvestable fish from those grounds. *United States v. Washington*, 384 F. Supp. 312, 327 (W.D. Wash. 1974) (*Washington I*), *aff’d*, 520 F.2d 676 (9th Cir. 1975); *see also Fishing Vessel*, *supra* (affirming subsequent injunction).

In 1976, the United States and the Tribes initiated *Phase II*, which involved two components, the “hatchery fish issue” and “the environmental issue.” *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980) (*Washington II*); *see United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (*en banc*) (*Washington III*). On the hatchery fish issue, the district court held that the Treaty right extends to all fish taken in the Tribes’ historic fishing areas, including those released into public waters from State-operated hatcheries. 506 F. Supp. at 195-202. With respect to the environmental

issue, the court held that the Treaties impose on the State a duty “to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.” *Id.* at 208.

On appeal, this Court initially upheld the district court’s judgment, but modified the court’s ruling on the environmental issue. *See United States v. Washington*, 694 F.2d 1374 (9th Cir. 1982). Subsequently, this Court granted rehearing and vacated the *Phase II* panel decision. Sitting *en banc*, the Court affirmed the judgment on the hatchery issue, determining that equitable considerations and *Fishing Vessel’s* ruling that the Tribes are entitled to an “adequate supply of fish” under the Stevens Treaties support the inclusion of hatchery fish in the Tribes’ allocation. *Washington III*, 759 F.2d at 1358-60. The Court vacated the declaratory judgment on the environmental issue concluding that it was “contrary to the exercise of sound judicial discretion” to declare a sweeping right of habitat protection absent a concrete fact situation. *Id.* at 1357-58. While this Court did not dispute that the State has Treaty-based environmental obligations, it held that the legal standards that will govern the State’s precise duties “will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.” *Id.* The Court explained (*id.*):

If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts. In 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.

**Culverts Proceeding.** In 2001, consistent with this Court’s *en banc* decision, the Tribes filed a Request for Determination seeking declaratory and injunctive relief against the State. The Tribes, joined by the United States, sought to enforce a duty on

the State to “refrain from diminishing, through the construction or maintenance of culverts under State owned roads and highways, the number of fish that would otherwise return to or pass through the tribes’ usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes’ ability to earn a moderate living from the fishery.” ER 1013-14; *see also* ER 1008-21.

Answering that there is “no treaty-based right or duty of fish habitat protection as described” in the Request, the State also filed a cross-request raising a counterclaim seeking a declaration that the United States had violated its own duty to the Tribes under the Treaties and seeking an injunction that would require the United States to modify or replace its own barrier culverts on tribal fishing grounds. ER 998-1001. The district court dismissed the counterclaim, and later denied the State’s request to file an amended cross-request, on grounds that the United States had not waived its sovereign immunity and that the State lacked standing to assert Treaty-based claims against the United States on behalf of the Tribes. ER 56-59, 62-65.

Granting summary judgment for the Tribes and the United States, the district court concluded that this dispute presented the “concrete facts” missing in *Washington III* to warrant issuance of a declaratory judgment. ER 49. The court declared first, that “[t]he right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest,” and second, that “the State of Washington currently owns and operates culverts that violate this duty.” ER 54.

The district court conducted bench trials in 2009 and 2010 to determine the



appropriate remedy and issued an injunction in 2013. ER 1, 8. The court found that correction of barrier culverts is a cost-effective and scientifically sound method of restoring habitat that “provides immediate benefit in terms of salmon production.” ER 34, Findings of Fact (“FF”) 38. In 1997, the Washington Department of Fish & Wildlife (“WDFW”) and the Washington State Department of Transportation (“WSDOT”) reported that WSDOT culverts alone blocked an area of 1.6 million square meters of fish habitat, which they estimated would produce 200,000 additional adult salmon each year. ER 559. Based on WDFW records, the court found that at the time of trial, State-owned culverts blocked access to about 1,000 miles, nearly 5 million square meters of habitat. ER 28, 31-32 (FF4, 27). The court also found that the “consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes.” ER 29 (FF10). At the rate the State was addressing those barrier culverts, “it would take the State more than 100 years to replace the ‘significantly blocking’ WSDOT barrier culverts that existed in 2009.” ER 32, FF28.

The district court issued an injunction that ordered the State to prepare a list of culverts under State-owned roads within the case area that are salmon barriers, using methodology compiled by the WDFW. ER 2. It required WDFW, Washington Department of Natural Resources, and Washington State Parks to provide fish passage through all their barrier culverts on the list by October 31, 2016, the date by which these agencies were already expected to correct such culverts. ER 3. It ordered the WDOT to correct many of its high-priority barrier culverts within 17 years, allowing deferral of some under certain conditions, and to correct the reminder at the

end of the culverts' useful life or in connection with other highway projects. ER 3.

In a unanimous panel decision, this Court affirmed the district court's ruling of a Treaty violation, the dismissal of the counterclaims, and the grant of the injunction. Reviewing the history of the Treaties and principles of treaty construction, the Court held that the Tribes' fishing right imposes a duty on the State to refrain from constructing and maintaining culverts under State roads that block or restrict passage of anadromous fish to and from traditional tribal fishing grounds. Op. 7-33. In so ruling, the Court found important a showing that State culverts blocked at least 1,000 miles of streams suitable for salmon habitat, and that if these culverts were modified to allow fish passage, several hundred thousand additional mature salmon each year would be available to the Tribes, whose members currently cannot obtain a moderate living from fishing. Op. 32-33. The Court also affirmed dismissal of the State's counterclaims on sovereign immunity grounds. Op. 37-39. Finally, the Court rejected the State's arguments regarding injunctive relief, finding that there was sufficient evidence to show that State-owned barrier culverts have a substantial adverse effect on salmon, the injunction was not an undue intrusion into State government affairs, and the scope of the injunction was consistent both with general equitable principles and remedial principles that apply in the context of Indian treaties. Op. 40-58.

## **ARGUMENT**

### **I. The ruling that the State's maintenance of fish-blocking culverts violated the Stevens Treaties is correct and consistent with decisions of this Court and the Supreme Court.**

Looking to the historical evidence and tribal dependence on fishing, both the Supreme Court and this Court have found it inconceivable that either party to the

Treaties agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed grounds to fish. *See United States v. Winans*, 198 U.S. 371, 381-82 (1905). The “right of taking fish” in the Treaties, well established as a reservation of the Tribes’ pre-existing rights, recognizes a property interest in the tribes and requires that Indian fishing at these grounds be given special protection, which cannot be reconciled with State barrier culverts impermissibly and significantly interfering with the Tribes’ treaty rights and ability to sustain a livelihood from their fisheries. The ruling here that the Treaties impose a duty on the State to refrain from maintaining fish-blocking culverts is fully consistent with the historical intent and understanding of the signatory parties, a century of precedent interpreting the fishing clause, and the “concrete facts” of this specific case.

Contrary to the State’s argument (Pet. 1, 7) that the panel “adopts a rule that this Court rejected *en banc* thirty years ago,” the panel’s ruling is fully consistent with this Court’s rulings in *Washington III*. The State’s alleged conflict is based on a fundamental misreading of that opinion and the panel’s decision here.

As explained above, this Court in *Washington III* considered two discrete *Phase II* components: treaty obligations relating to “hatchery fish” and to “environmental degradation.” *See supra* at pages 3-4. The State seizes (Pet. 1, 6, 8-9) upon a phrase in *Washington III* that the Tribes are not “entitled to any particular minimum allocation of fish,” 759 F.2d at 1359, to support its claim that the Treaties allegedly do not impose any duty on the State to refrain from actions that would prevent anadromous fish from reaching tribal fisheries. *See Op.* 24-26. But, this Court plainly did not imply by this phrase, when read in proper context, that the State may leave no fish for the

Tribes by blocking salmon-bearing streams in traditional fishing areas. To the contrary, the reference to a minimum allocation was made in the portion of *Washington III* that upheld the district court's ruling that hatchery fish must be included in the Tribes' treaty *allocation* or apportionment of fish, not in the context of any question involving degradation of fish habitat. 759 F.2d at 1358-59.

In so ruling, the *en banc* Court strongly re-affirmed the relevance of several canons of construction that the panel utilized here. The *en banc* Court found that the Treaties must be interpreted in light of canons that “call for promoting the treaties’ central purposes; construing treaties as they were originally understood by the tribal representatives, rather than according to legal technicalities; resolving ambiguities in favor of the Indians; and interpreting the treaties in the Indians’ favor.” 759 F.2d at 1358. The *en banc* Court ultimately found that *Fishing Vessel* did “strongly support” that the Tribes are entitled to an “adequate supply of fish” and to the inclusion of hatchery fish, 759 F.2d at 1358, but for a slightly different reason than the one cited by the district court in that case. Rather than holding that the Tribes “were entitled to any particular minimum allocation of fish,” the Court found that *Fishing Vessel* “mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less,” and it is “[t]his limitation on the amount of fish allocable to the Tribes [that] highlights the need to permit them to share equitably in the hatchery fish.” *Id.* at 1359. Thus, this Court’s statement about why *Fishing Vessel* supported the inclusion of hatchery fish in the Tribes’ allocation was plainly not intended to establish legal principles for future environmental degradation claims, nor to suggest either a fixed minimum allocation or a depleted

fishery from which to harvest.

On the degradation issue, *Washington III* held 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.” 759 F.2d at 1357. Thus, far from conflicting, the panel’s decision here is faithful to the ruling in *Washington III* that “clearly presumes some obligation on the part of the State” not to interfere with treaty fisheries, but requires that such duty be defined by the factual context of a particular dispute. Op. 32; ER 49. Here that dispute is narrowly restricted to State-owned culverts that block or hinder fish passage in traditional tribal waters and the specific facts underlying that dispute.

*Washington III* also supports the approach taken by the panel of examining the purpose and likely understanding of the parties in defining the Treaty right as not “allow[ing] the government to diminish or destroy fish runs.” Op. 29. After carefully reviewing the Treaty negotiations and rulings of the Supreme Court and this Court, the panel found that “[t]he Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them.” *Id.*

Contrary to the State’s suggestion, the panel did not rule that the legal effect of this understanding is to “guarantee the tribes a certain quantity of fish.” Pet. 2; *see also* Pet. 9 (suggesting that the panel ruled that the Treaties “guaranteed the tribes a minimum quantity of fish”). Instead, as noted above, the panel recognized that the measure of the State’s duty under the Treaties here depends “‘on all the facts presented’ in the ‘particular dispute’ now before us.” Op. 32, quoting *Washington III*,

759 F.2d at 1357.<sup>1</sup> Here, those facts showed that the State “has acted affirmatively to build and maintain barrier culverts under its roads.” *Id.* The facts further showed:

The State’s barrier culverts within the Case Area block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost 5 million square meters. If these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year. Many of these mature salmon would be available to the Tribes for harvest.

Op. 32-33. In addition, there is no dispute that “salmon now available for harvest are not sufficient to provide a ‘moderate living’ to the Tribes.” Op. 33. Thus, it was the facts that the State’s culverts block significant salmon habitat, and that replacement or modification of the culverts would allow the production of several hundred thousand additional mature salmon to meet the Tribes’ needs, that undergirded the district court’s decision and the panel’s affirmation of that decision. There is no merit to the State’s mischaracterization of the decision (Pet. 3) as holding that “anything that affects the tribes’ ability to make a ‘moderate living’ from fishing” will be a treaty violation, as it ignores the panel’s express recognition and application of *Washington III*’s ruling that the State’s duty must depend on concrete facts underlying a dispute.

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<sup>1</sup> The amicus brief of Idaho and Montana correctly recognizes that the panel’s decision was based on the “‘all facts presented’ in the ‘particular dispute’” prong of *Washington III*, rather than the hatchery fish ruling of that case. Br. 5 (quoting Op. 32). But the amici States’ recitation (*id.*) of the pertinent facts omits the critical one found by the district court and affirmed by the panel that “[t]he State’s barrier culverts within the Case Area block approximately 1,000 linear miles of streams suitable for salmon habitat.” Op. 32. These amici also argue that an implied right to prevent the States from blocking fish streams and depriving Treaty Tribes of fish “could arise only if those [treaty fishing] clauses required maintaining a minimum level of harvestable fish,” Br. 9, but they never explain the basis of that conclusion. None of the prior cases that have found implied rights in these Treaties have relied on the existence of a right to some minimum level of harvestable fish, nor does the panel decision, as discussed above.

Moreover, in an eleventh hour attempt, the State argues (Pet. 10-11) that this Court should grant rehearing to define the treaty duty more precisely than the panel did. With this request, the State apparently attempts to pull back from its hardline position that no treaty duty would prevent the State from blocking every salmon-bearing stream in the case area. Op. 24-26. The State had the opportunity to shape the remedies adopted by the district court, but declined to do so below. Op. 42. In any event, the State provides no legal or factual basis for the alternatives now proffered. Nor does it explain how they are any more “workable, equitable, and reconcilable with precedent” than that articulated by the panel. Pet. 11. The panel’s ruling, by contrast, is based on an exhaustive legal analysis of Treaty fishing rights and the State’s duty as defined by the specific and concrete facts of this case.

Here it was the nature and the destructive consequences of the State’s actions on the Tribes’ ability to harvest fish that justified the injunction requiring the State to replace or modify culverts that block fish passage. That result is consistent with decisions of the Supreme Court and this Court holding that the Treaty parties would have understood that the Tribes were reserving the right of taking fish to meet present and future tribal needs and not “merely the chance” for them to “dip their nets” into Treaty waters and net “virtually no catch at all.”<sup>2</sup> *Fishing Vessel*, 443 U.S. at

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<sup>2</sup> Amici Klamath Critical Habitat Landowners, *et al.* seek to overturn not only the panel’s decision but also this Court’s decision in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), which would undercut the Klamath River general stream adjudication currently pending in a state court in Oregon. Br. 1-2. Amici’s attempt to litigate the standard for quantification of the Klamath Tribe’s water rights in this case must be rejected. This Court, at these irrigators’ prior urging, expressly sent that question to the state tribunal for resolution and where those proceedings are ongoing. *See United States v. Braren*, 338 F.3d 971 (9th Cir. 2003); Br. 8-9. Moreover, the arguments made

*Cont.*



679, 677 n.22; see *United States v. Winans*, 198 U.S. 371 (1905) (Treaties entitled Indians to protection from a private landowner who monopolized the fishery by catching salmon through use of a State-licensed fish wheel). No further review is warranted.

## **II. The dismissal of the State’s counterclaim does not warrant rehearing.**

The State next claims (Pet. 4) that “[t]he panel rejected the State’s counterclaim based on a mischaracterization of the State’s request.” The State argues (Pet. 12) that its counterclaim “was seeking to recoup some of the costs of replacing culverts” based on allegations that the United States had contributed to the problem of culverts blocking fish-bearing streams. In fact, the panel properly understood the nature of the State’s claims and correctly held that the United States’ filing of this suit did not waive its sovereign immunity. Op. 37-39. The State does not claim that the ruling conflicts with any decision of this Court, nor that any questions related to the dismissal are of exceptional importance. In any event, the ruling was correct.

The panel noted the rule that “when the United States files suit, consent to counterclaims seeking offset or recoupment will be inferred,” Op. 37, citing *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970), but properly found that the State’s counterclaim was not one for offset or recoupment. The State clearly stated in its Answer that its counterclaim sought injunctive relief. ER 999-1000 (seeking both a

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by amici rests on a broad and incorrect reading of *Oregon Dep’t of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). Br. 3, 11-13. The treaty considered in *ODFW* is quite different from the Stevens Treaties as the former reserved a large reservation for the Klamath Tribe and made no provision for off-reservation fishing rights. Under the Stevens Treaties, the right of taking fish at all usual and accustomed grounds was expressly not limited to the small reservations created by the Treaties, and hence *ODFW* has no application. Amici also neglect to mention that the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-02 (1999), sharply limited the ruling in *ODFW* to the facts of that case.



“prohibitory injunction” barring the United States from constructing and maintaining fish blocking culverts and a “mandatory injunction” requiring the United States to identify, fix, and maintain fish-blocking culverts). In its opening brief to this Court, the State repeated this characterization, stating “the United States seeks declaratory and injunctive relief against the State, and the State likewise seeks declaratory and injunctive relief against the United States.” Br. 45-46; *see also* Reply Br. 36 (same).

As the panel noted, the United States did not seek monetary relief against the State. Op. 38. Hence, even if the State were allowed to reformulate its counterclaim at this late date as one seeking only a monetary award for the costs of compliance with the injunction, the claim would not be one for “set off or recoupment to defeat or diminish the sovereign’s recovery,” but instead one for “affirmative relief” against the United States, and thus barred by sovereign immunity.<sup>3</sup> *Id.*, quoting *Agnew*, 423 F.2d at 514. Rehearing is unwarranted.

### **III. The panel was not required to order a narrower injunction.**

The State claims that affirming the injunction was an “abuse of discretion” (Pet. 3, 18) because it allegedly “require[s] the State to waste money on culverts that will make no difference.” The State asks that the *en banc* Court “demand a narrower injunction” that would be “tailored to fixing state culverts where there is evidence that replacing the culvert will return salmon to a tribal fishing ground.” Pet. 18.

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<sup>3</sup> As the district court also ruled (ER 58), and the panel affirmed (Op. 39), the State may not assert a treaty-based claim on behalf of the Tribes. Hence, the State lacks standing to bring a counterclaim maintaining that the United States’ actions regarding culverts violate the Stevens Treaties. Concluding that this case “is radically different” from *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the panel also affirmed (Op. 35-36) the district court’s dismissal of the State’s waiver defense. The State does not here challenge those rulings.

This highly fact-bound challenge ignores voluminous evidence supporting the injunction (*see* Op. 40-59), and presents no issue meriting *en banc* review. As the panel noted, “Washington declined to participate in the formulation of the injunction on the ground that it had not violated the Treaties and that, therefore, no remedy was appropriate.” Op. 42. Nevertheless the district court carefully considered issues regarding effectiveness and impacts on the State and “took into account the facts that culvert correction is not the only factor in salmon recovery.” Op. 48. The injunction provides significant flexibility: it allows WSDOT to delay remediation until the end of the useful life of culverts on streams with less than 200 meters of accessible salmon habitat, allows up to 17 years for remediation of those with 200 meters or more of such habitat, and provides for deferral on up to 10 percent of the latter group. Op. 41.

In response, the State points only to evidence showing the existence of other man-made barriers, and to an isolated statement by one of its declarants (ER 629) that about one-third of the State’s identified barrier culverts are on streams with no other man-made barriers affecting anadromous fish. But the declarant ventured no opinion on whether the mere existence of other barriers on many streams suggested that fixing the State’s culverts would have little effect. It was not an abuse of discretion to require the State to remedy its barrier culverts notwithstanding the fact that streams may contain other man-made barriers, many of which are also in the process of being repaired or replaced by other responsible entities. Supplemental ER 17.

## CONCLUSION

For the foregoing reasons, the petitions for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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SEPTEMBER 29, 2016  
90-2-0-670/1

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this Response complies with the requirements of Fed. R. App. P. 32 and 40(b), and Ninth Circuit Rule 40-1(a), because it has been prepared in 14-point Garamond, a proportionally spaced font, and it does not exceed 15 pages.

/s/ Evelyn S. Ying  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2016, I electronically filed the foregoing United States' Response in Opposition to Appellant's Petitions for Rehearing and Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users..

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