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Highway Culverts, Salmon Runs, and the Stevens Treaties: A Century of Litigating Pacific Northwest Tribal Fishing Rights

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Highway Culverts, Salmon Runs, and the Stevens Treaties: A Century of Litigating Pacific Northwest Tribal Fishing Rights

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The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.[1]

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* J.D. expected, 2019, Alexander Blewett III School of Law at the University of Montana; B.A. in History, 2007, Yale University. This piece grew out of my application Case Note for the *Public Land & Resources Law Review*, in which I was able to combine my longstanding passion for fishing and fisheries with developing interests in Environmental and Indian Law via a truly remarkable case. When the Supreme Court agreed to hear that case at the beginning of 2018, I was thrilled to be offered a chance to further analyze the dispute and its underlying issues. I would like to thank Professors Michelle Bryan, Monte Mills, and Hillary Wandler of the Alexander Blewett III School of Law at the University of Montana; the amazing editors and staff of the *Public Land & Resources Law Review*, especially Jonah Brown, Sarah Danno, and Ben Almy; and my dad, who sparked my love for the beauty of salmonids and the waters they inhabit.

1. Treaty with the Nisqualli, Puyallup, Etc. art. 3, Dec. 26, 1854, 10 Stat. 1132.

I. INTRODUCTION

Isaac Stevens, Superintendent of Indian Affairs and Governor of Washington Territory from 1853 to 1857, negotiated a series of treaties with Pacific Northwest Indian tribes, especially during 1854 and 1855. Through the Stevens Treaties (Treaties), regional tribes granted significant swaths of their historic lands to the United States, particularly in present-day Washington State (Washington or the State) , in exchange for limited land reservations and protections of traditional fishing rights, *both on and off the reservations*.[2] Language conveying those reserved rights (the Fishing Clause), excerpted above, remained largely identical across all Treaties.[3] While short and consistent, the Fishing Clause has been controversial from the start. For more than a century it has sparked conflicts over fishing privileges, government duties, and treaty interpretation.[4]

When the Treaties were signed, massive regional salmon populations—often considered endless—were central to Pacific Northwest tribal life, important for not only sustenance but also commerce and culture.[5] Salmon are anadromous fish, meaning they mature and spend most of their adult lives in the ocean but return to freshwater streams in their historic ranges to spawn.[6] As highways spread across Washington during the twentieth century, culverts were installed so streams could pass under roads.[7] Those passages earned the moniker "barrier culverts" because while allowing water to flow through, they often prevent mature salmon from moving upstream to spawn or juvenile salmon (smolt) from moving seaward to grow.[8] Combined with factors like commercial

2. United States v. Washington, 827 F.3d 836, 841 (9th Cir. 2016) (emphasis added).
3. *Id.*
4. *Id.*
5. United States v. Washington, 20 F. Supp. 3d 986, 1001 (W.D. Wash. 2013).
6. *Washington*, 827 F.3d at 845.
7. *Id.*
8. *Id.*

overharvest and dam construction, culverts directly contributed to precipitous salmon stock declines over the past 150 years.[9]

In 2001, twenty-one Tribes (the Tribes) filed a Request for Determination in federal district court alleging Washington had violated and continued to violate Treaty fishing rights by inhibiting salmon movement throughout vital freshwater habitat.[10] That 2001 Request for Determination was not a new case, but rather another chapter in litigation that began in 1970 when the United States, pursuant to its trust obligation and hoping to end a century of conflict, first sued Washington on behalf of the Tribes.[11] That first decision enabled either side to "invoke the continuing jurisdiction of the district court to resolve disputes 'concerning the subject matter of [that] case'" by filing a Request for Determination with the clerk of court laying out relevant facts and the resolution sought.[12]

The long-running legal battle experienced another wait after the 2001 Request until, in 2007, the district court directly attributed decreased salmon populations to barrier culvert propagation.[13] The court thus held the State was in violation of its obligation under the Treaties, particularly the Fishing Clause, though it took another six years before the court issued an injunction forcing Washington to start fixing the harmful culverts.[14] Washington subsequently appealed to the Ninth Circuit Court of Appeals, which in a June 2016 decision affirmed both the district court's decision and propriety of its injunction.[15] Approximately a year later, in August

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9. *Washington*, 20 F. Supp. 3d at 1002, 1013.

10. Request for Determination, U.S. v. Washington, Civ. No. C709213 (W.D. Wash. 2001). The Tribes included the Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and Muckleshoot Indian Tribe.

11. *Washington*, 827 F.3d at 845 (citing United States v. State of Washington, 384 F. Supp. 312, 327–28 (W.D. Wash. 1974)) [hereinafter *Washington I]*.

12. *Id*. at 847 (citing *Washington I.*, 384 F. Supp. at 419).

13. *Id.* at 841.

14. *Id.*

15. *Id.* at 841, 849–65.

2017, Washington filed a petition for certiorari, which was granted on January 12, 2018.[16] The United States Supreme Court heard oral arguments in this case on April 18, 2018.

II. EARLY TREATY YEARS AND ORIGINS OF CONFLICT

Stevens Treaties have inspired more than a century of litigation, but underlying conflicts date back even further, to the arrival of white settlers in the Washington territory during the 1800s.[17] By the late 1800s, settlers blocked many of the Tribes' traditional fishing sites on the Pacific coast and Puget Sound, along with the Columbia River and its tributaries.[18] Because regional Tribes were intensely reliant on vast salmon populations for not only sustenance, but also cultural, religious, and economic life, losing access to their fishing sites created dire hardships.[19] The Fishing Clause served to acknowledge and provide for the Tribes' dependence on fisheries; as Indians gave up land, they needed to retain rights to traditional fishing sites and their salmon harvests.[20]

Despite the Treaties, most Tribes found both access to fishi A duty to protect salmon populations and habitat ng sites and the volume of fish available severely restricted by the turn of the 20th century.[21] Related litigation, a case called *United States v Winans*, first reached the United States Supreme Court around that same time in 1905.[22] In *Winans*, the Yakima Tribe complained that two brothers completely barred Indians from a traditional fishing site while using large mechanized fish wheels to monopolize massive salmon harvests.[23] The Court held that the Yakimas were entitled to an easement across the Winans' land allowing access to

16. Pet. for Writ of Cert., Aug. 17, 2017, No. 17-269.
17. *Id*. at 841–42.
18. *Id*.
19. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 665 (1979).
20. *Id*. at 666.
21. *Washington*, 827 F.3d at 842.
22. United States v. Winans, 198 U.S. 371 (1905).
23. *Id*. at 380.

their "usual and accustomed" fishing site, and that the Treaty barred use of mechanical fish wheels.[24]

In the century following *Winans*, the Tribes, State, and United States regularly contested Treaty matters in court, particularly the Fishing Clause.[25] Washington's state courts consistently read those as narrowly as possible, minimizing tribal fishing rights while expanding State regulatory powers and opportunities for commercial fishermen.[26] Their rulings largely reject tribal requests for access, licensing law exceptions, or any type of state liability for drastic salmon population declines.[27]

For example, in the 1916 Washington Supreme Court case *State v. Towessnute*, a Yakima Indian charged with fishing without a license off his reservation defended that he had been fishing at one of his Tribe's usual and accustomed places.[28] Under the Treaty, such actions were supposedly protected; the United States Supreme Court in *Winans* had reinforced tribal rights to traditional fishing grounds and even granted Indians easements across non-Indian private property to usual and accustomed fishing grounds.[29] The Washington Supreme Court, on the other hand, called the entire Treaty a "dubious document" and rejected the Indian's defense.[30] While bound to the *Winans* holding granting Indians easements to traditional fishing grounds, Washington's Supreme Court held that the State could simultaneously restrict Indian fishing rights through regulation.[31]

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24. *Id.* at 383.

25. See State v. Towessnute, 154 P. 805 (Wash. 1916); State v. Alexis, 154 P. 810 (Wash. 1916); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Washington v. Tulee, 109 P.2d 280 (Wash. 1941); and Tulee v. Washington, 315 U.S. 618 (1942), among other related cases.

26. *Washington*, 827 F.3d at 843–45.

27. *Id*.

28. *Towessnute*, 154 P. 805 at 805–06.

29. *Winans*, 198 U.S. at 380.

30. *Towessnute*, 154 P. at 806.

31. *Id.* at 809. The court relied on three main contentions, attempting to tie all of them together in its holding. First, they alleged Washington had fewer rights as a territory than as a state, meaning Stevens Treaties and the rights they conferred on Indians lost significant weight when Washington achieved statehood. Second, they called out the "Equal Footing" doctrine, which guaranteed states admission to the union on the same political level as the original colonies. Finally,

Subsequently, Washington steadily implemented policies via legislation, ballot initiatives, and court decisions making it increasingly difficult for Indians to fish at all, much less using traditional methods at their usual and accustomed places.[32] Washington constructed rules in ways that favored mostly white, commercial fishermen harvesting salmon from the ocean, while making it nearly impossible for Indians to traditionally fish in freshwater rivers and streams.[33] In 1907, for example, the State banned all off-reservation fishing above the tide line unless done by hook and line.[34] Because Indians traditionally fished with traps and nets, the prohibition effectively overruled the Fishing Clause.[35]

From voter initiatives banning traditional fishing gear to aggressive expansion and enforcement of statewide licensing laws, Washington continued attacking treaty-based fishing rights into the second half of the twentieth century.[36] By the 1960s and 70s, with Indians essentially limited to fishing on reservations, Tribes began resisting via "fish ins" and other protests dubbed "fish wars."[37] That proved the federal government's breaking point as well because in 1970, the United States filed its first suit against Washington on behalf of the Tribes to defend the Treaties and Fishing Clause.[38] Nearly half a century later, that litigation remains unsettled.

III. THE TRIBES TAKE ON THE STATE

The United States brought its initial 1970 federal case against the State, alleging violations of the Treaties and Fishing Clause, in the Western District of Washington.[39] Given the number of parties and

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they claimed the police power belonged to Washington, and that trumped the legal power of any easement.

32. *Washington*, 827 F.3d at 843–45.
33. *Id*. at 843.
34. *Id.* citing Wash. Sess. Laws, Ch. 247, § 2 (1907).
35. *Id.*
36. *Id.* at 843–45.
37. *Id*. at 844–45.
38. *Id*. at 845.
39. *Id*. (citing *Washington I.*, 384 F. Supp. at 327–28).

potential parties—particularly the various tribes—and a desire to avoid more never-ending conflict, that court suggested:

> that so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest in treaty fishing rights in this judicial district be brought into the case either as parties or as amicus curiae; and that every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in this case.[40]

Judge Boldt hoped that by devoting time to joining parties, isolating issues, and conducting research at the outset, the legal proceedings would "at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do."[41] While the Judge's motivations were noble, the case's continued active presence in the judicial system more than forty years later shows that they were largely for naught.

That first suit against Washington alleging violation of Stevens Treaties and the Fishing Clause (again, "*Washington I*," as briefly discussed earlier) yielded what is popularly known as the "Boldt decision," which divided the case into two phases.[42] In Phase I, Judge Boldt held the Fishing Clause guaranteed the Tribes one half of the proportion of annually harvestable fish. In Phase II, Judge Boldt held the fishing clause also guaranteed the Tribes a "right to have the fishery habitat protected from man-made despoliation."[43] The Ninth Circuit, however, vacated Phase II, finding the harms allegedly violating Treaty fishing rights—environmental despoliation and human-caused degradation of salmon habitat—too vague.[44] That court held:

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40. *Washington I*, 384 F. Supp. at 328.

41. *Id*. at 330.

42. *Washington*, 827 F.3d at 845–46.

43. United States v. State, 506 F. Supp. 187, 203 (W.D. Wash. 1980) [hereinafter *Washington II*].

44. United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (en banc) [hereinafter *Washington III*].

> the legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.[45]

Despite overturning a broad State environmental duty to protect fisheries, the Ninth Circuit emphasized the State may still have environmental obligations under the fishing clause of the Treaties; the Tribes and the United States could potentially prevail in litigation over such obligations, though they would have to point with greater specificity at a discreet harm to salmon or habitat caused directly by State actions.[46]

The Tribes saw an opportunity to do just that in 2001 when they filed a request for determination seeking "to enforce a duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced."[47] The United States joined that suit on behalf of the Tribes, seeking a permanent injunction forcing Washington to "repair, retrofit, maintain, or replace" culverts that "degrade appreciably" the passage of fish within five years.[48]

Washington and its State agencies named as defendants argued the Treaties did not convey any right to the Tribes regarding fish habitat, nor did it establish a corresponding State duty to protect fish habitat.[49] Next, Washington alleged that because the targeted culverts diverted streams underneath highways funded in part with federal money and approved by federal agencies, it was justified in its belief that such culverts complied with the Treaties (waiver defense).[50] Third, Washington noted that the United States also operated culverts impeding fish migration and that it should not have to comply with Treaty duties if they did not also apply to

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45. *Id*. at 1357.
46. *Id*.
47. *Washington*, 827 F.3d at 847.
48. *Id*.
49. *Id*. at 847.
50. *Id*.

the federal government.[51] Finally, Washington counter-claimed the United States violated its duty under the Treaties and filed an injunction forcing replacement of its own problematic culverts.[52]

The district court granted summary judgment in favor of the United States and the Tribes. Unlike in *Washington III*,[53] here the United States and Tribes demonstrated "concrete facts" showing that culverts caused direct harm to the salmon fisheries statewide.[54] Because the court held that Washington had a duty to protect not only traditional tribal fishing rights, but also the fish stocks and habitats enabling those rights to be utilized for sustenance and commerce, it found discreet harm caused by culverts, which were clearly the property and responsibility of the State.[55]

Seeking a solution, the district court held a bench trial in 2009 and 2010, after which the district court had to determine an appropriate practical remedy—a challenging and time-consuming task.[56] In 2013, the district court finally issued both a Memorandum and Decision in favor of the Tribes and a permanent injunction.[57] The injunction, proposed by the Tribes in 2010 before Judge Martinez signed off on it in 2013, gave specific directions to Washington and its associated agencies as to how they should deal with the culvert problem.[58]

Judge Martinez highlighted the myriad benefits of correcting these issues in his Memorandum and Decision to support the injunction, stating, "the public interest will not be disserved by an injunction. To the contrary, it is in the public's interest, as well as the Tribes' to accelerate the pace of barrier correction. All fishermen, not just tribal fishermen, would

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51. *Id*. at 848.
52. *Id*.
53. 759 F.2d 1353.
54. *Washington*, 827 F.3d at 848.
55. *Id.*
56. *Id*. *See* United States v. Washington, 20 F. Supp. 3d 986 (W.D. Wash. 2013) (compilation of major post-trial substantive orders) [hereinafter *Washington IV*].
57. *Washington*, 827 F.3d at 857. *See Washington IV*, 20 F. Supp. 3d at 1000–25.
58. *Washington IV*, 20 F. Supp. 3d at 1023–25.

benefit."[59] He also justified the need for the injunction by noting recent developments and a desire for rapid action:

> An injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty Promises. The reduced effort by the State over the past three years, resulting in a *net increase* in the number of barrier culverts in the Case Area, demonstrates that injunctive relief is required at this time to remedy Treaty violations.[60]

Quoting Governor Stevens himself, who said, "I want that you shall not simply have food and drink now but that you may have them forever," the court held that salmon stocks have declined precipitously in recent decades, habitat degradation is a primary cause of that decline, culverts contribute notably to habitat degradation, and the result to the Tribes has been economic, cultural, and social harm.[61] The accompanying injunction directed the State to list all problem culverts and to correct those within various timeframes.[62]

Washington appealed the district court's decision to the Ninth Circuit Court of Appeals on several grounds. Most robust among those, it objected to the district court's interpretation of the Treaties, claiming those imposed on it no duty related to barrier culverts. The State also objected to the overruling of its waiver defense, alleging that the United States had earlier opportunities to step in and either raise concerns about culvert construction or stop it altogether.

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59. *Id.* at 1022.
60. *Id*. (emphasis added).
61. *Washington*, 827 F.3d at 848 (citing *Washington IV* at 1000-22).
62. *Id.* at 848–49 (citing *Washington IV* at 1023-25).

IV. THE NINTH CIRCUIT'S 2016-2017 DECISION

A. A duty to protect salmon populations and habitat

In its appellate brief, Washington rejected a reading of the Treaties that would impose upon it any sort of duty to protect fish habitat. It claimed the language was clear and unambiguous, stating, "on its face, the right of taking fish in common with all citizens does not include a right to prevent the State from making land use decisions that could incidentally impact fish."[63] The State advocated a reading of the Treaties based on "plain language" and "historical interpretation," in which they have no duty involving fish habitat.[64]

The court disagreed with Washington's analysis, calling their view of the Treaties "misconstrue[d]" and "remarkably one-sided."[65] While Washington argued the principal purpose of the Treaties was to facilitate white settlement of the Northwest, the court rejected that notion entirely, instead holding their principal purpose was to ensure Indians could support themselves. For Pacific Northwest Tribes, salmon were key to survival. As early as *Winans*, the United States Supreme Court recognized that "the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."[66]

The *Winans* court finished evaluating this argument by noting that even though in building and maintaining barrier culverts, Washington did not act "for the primary purpose or object of affecting or regulating the fish supply," those actions still harmed the fishery.[67] The court found that Washington's culverts directly resulted in a loss of roughly five million square meters of salmon habitat, including 1,000 linear miles of streams,

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63. Brief of Appellant State of Wash., 27–-28, Oct. 7, 2013, 13-35474, 13-35519.

64. *Id.* at 27, Brief of Appellant State of Wash., 27, Oct. 7, 2013, 13-35474, 13-35519.

65. *Id*. at 851–-52.

66. *Winans*, 198 U.S at 371, 381. (1905).

67. *Washington*, 827 F.3d at 853.

and that salmon populations were currently not sufficient to provide for the Tribes as promised by the Treaties.[68] The court thus held Washington had a duty under the Treaties regarding maintenance of salmon habitat, and their use of barrier culverts violated that duty.[69]

B. The United States did not waive its ability to allege a Treaty violation

Washington's second argument on appeal hinged on the United States' failure to contest a 1999 state "Forest and Fish Report," in which it addressed many issues regarding fish and roads.[70] The State therefore contended that the federal government, via the National Marine Fisheries Service (NMFS) and Federal Highway Administration, inferentially approved the State's proposed actions as not in violation of the Treaties.[71]

The Ninth Circuit assertively rejected this argument. While the United States was a party in this action, the court noted they brought this action on behalf of the Tribes and the rights at issue belonged to the Tribes alone under the Treaties.[72] Therefore, the United States' actions or lack thereof on Washington highway proposals had no bearing on infringement of tribal Treaty rights. Only Congress may abrogate Treaties. Here, they remain in full force.[73]

After rejecting all of the State's attempted arguments against the outcome of the 2009-10 bench trial and 2013 decision, on June 27, 2016, a three-judge panel of the Ninth Circuit Court of Appeals affirmed the district court, further justified the injunctive relief, and denied any stay, suggesting a major victory for the Tribes.[74] While this opinion included many notable elements, three in particular stood out. First, the panel not only affirmed that the Treaties established valid off-reservation tribal fishing rights "at all usual and accustomed grounds and stations," and that

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68. *Id*.
69. *Id*.
70. *Id.*
71. *Id.* at 853–854.
72. *Id*. at 854.
73. *Id.*
74. *Id*. at 849–65.

those remain in force today,[75] but also recognized an implied guarantee of sustainable fish populations in those traditional places:

> The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise. The 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.[76]

Second, the panel held Washington's constructing hundreds of barrier culverts blocking roughly 1,000 miles of salmon habitat a "concrete fact" showing the State "acted affirmatively" by installing those culverts.[77] Thus, even absent deliberate efforts to harm salmon, the panel still found Washington in violation of its Treaty obligations via use of barrier culverts.[78]

Finally, the panel rejected Washington's claims that both distinctions between federal and state actions combined with collaboration between federal and state actors waived the Tribes' complaint. The State alleged that because the Washington State Department of Natural Resources (WSDNR) consulted with federal authorities regarding proposed fixes of fish habitat problems, ostensibly including barrier culverts, the State could reasonably assume the National Marine Fisheries Service had signed off on those proposals as reasonable under any federal treaties.[79] Washington supplemented this contention with two similar points: first, that many state highways with barrier culverts were built partly with federal funds, and second, federal administration of permitting

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75. *Id*. at 849 (quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 (1979)).

76. *Washington*, 827 F.3d at 851.

77. *Id*. at 852–53.

78. *Id*. at 853.

79. *Id*. at 853–54.

under the Clean Water Act and Endangered Species Act never raised red flags about culvert problems.[80] Responding to all of those, the panel explained that federal-state interactions did not influence the validity of the Treaties, that the Tribes had never acted in any way to give up their treaty rights, and that the Tribes never authorized actions that would substantially harm salmon stocks.[81]

On January 12, 2018, the United States Supreme Court granted Washington's petition for certiorari in this case, adding yet another round of arguments to this longstanding legal conflict.

V. FROM CIRCUIT TO SUPREME: EXHAUSTING REMEDIES AND PETITIONING FOR CERTIORARI

A. The Ninth Circuit's Final Word

On May 19, 2017, the United States Court of Appeals for the Ninth Circuit issued an order that 1) summarized the facts of the case and previous decisions, using that to support its denial of both the petition for panel and *en banc* rehearings; 2) provided a high-level overview, though not an official dissent, explaining what it would take to legally overturn the existing decisions, and 3) gave a brief commentary criticizing the judges advocating for rehearings as perpetrating misconceptions about the functionality of the appellate courts.

B. Denial of Rehearing Requests

In a circuit as large as the Ninth, its remarkably rare to get all judges to agree on any one thing. Petitions for rehearing are no different in that regard. Despite the judges' collegiality and mutual respect, they sometimes disagree on the proper outcome for a case. Hence, dissatisfied parties can petition for a rehearing *en banc* even if they have lost at every level until that point.[82] Such rehearings are not guaranteed, however; in the Ninth Circuit, a case must receive votes from a simple majority of non-

80. *Id*. at 854–55.

81. *Id*.

82. Pub. Info. Office, *Ninth Circuit En Banc Procedure Summary*, Media Advisory (U.S. Cts. for the Ninth Circuit, S.F., Cal.), February 10, 2017 (contact David Madden).

recused judges to earn that privilege. Two unique considerations further complicate this process: the vote results are anonymous, and senior judges are not allowed to participate in the *en banc* proceedings unless they sat on the case's original three-judge panel.

C. Washington Petitions for Writ of Certiorari

By mid- 2017, having lost in front of Judge Martinez, Chief Judge of the District Court for the Western District of Washington, failed to rally any of Judges Fletcher, Gould, and Ezra of the Ninth Circuit Panel to their cause, and struck out in advocating for a Ninth Circuit panel or *en banc* rehearing, counsel for the State of Washington faced an unenviable position. Despite everything, however, Washington determined to press on, filing a Petition for Writ of Certiorari to the United States Supreme Court on August 17, 2017.[83] This launched a brand-new wave of submissions, back-and-forth discussion, and argument over this same topic, one of the many that has confounded not only lawyers, but also politicians, tribal members, commercial and recreational anglers, Washington residents, state engineers, wildlife biologists, and even economists. Members of these groups are thus lining up as amici on either side as this case affects them.

VI. BRIEFING BEFORE SUPREME COURT ORAL ARGUMENTS

Washington's Petition for Certiorari initiated preparation at the Supreme Court level, and the docket steadily began to grow as the requisite motions, responses, and replies, along with supplemental procedural pieces, arrived from Washington (Petitioner) on the one side, and both the Tribes and the United States (Respondents) on the other.[84] After Washington filed its petition, it took roughly four months for all requisite elements to arrive; with the filing of Washington's *Reply To Briefs In Opposition* on December 11, 2017, the stage was set for review and decision.[85] Two days later, the collected materials were distributed to each Justice, giving them slightly more than three weeks for review during one

83. Pet. for Writ of Cert., Aug. 17, 2017, No. 17-269.
84. Docket, No. 17-269, Aug. 21, 2017.
85. Reply to Br. in Opp'n, Dec. 11, 2017, No. 17-269.

of the busiest and most hectic seasons of the year before they would have to officially take up the issue as a group, deciding its fate during one of the Court's regularly scheduled Friday conferences.

Against long odds, on January 12, 2018, the Supreme Court granted Washington's Petition for Certiorari.[86] In the order announcing that decision, the cert news was actually not even the headline; rather, it was buried beneath an announcement that "[t]he motion of Modoc Point Irrigation District, et al. for leave to file a brief as *amici curiae* is granted."[87] Both Petitioners and the lawyers at MODOC Point returned home happy that evening.

A. Brief for the Petitioner: Washington Aims for a More Favorable Outcome

The Supreme Court's decision to review the *United States v. Washington* case breathed new life into Defendant-Petitioners, their counsel, and their supporters. While undoubtedly exciting for that group, the result also meant that Washington would need to prepare and submit new documents, most importantly their opening brief as petitioners, explaining why all of the lower courts, including the Ninth Circuit, had gotten this decision wrong.[88] Only six weeks after their petition was granted, Washington submitted a 78-page Brief for the Petitioner on February 24, 2018, laying out its case advocating reversal of the Ninth Circuit's decision.[89] Not simply repeating the arguments they made—and which two federal courts had rejected—in earlier proceedings, Petitioners

86. United States v. Washington, 138 S. Ct. 735 (2012) (mem.); *October Term 2016: Statistics as of June 28, 2017*, U.S. Sup. Ct. J., Oct. 2016, at II, https://www.supremecourt.gov/orders/Jnl16.pdf. While data fluctuates from year to year, the chance of a Petition for Certiorari being granted in any Supreme Court term tends to hoover right around 1%.

87. *Miscellaneous Order List: 583 U.S.*, U.S. Sup. Ct. Ord. List, Jan. 12, 2018, at p.1, https://www.supremecourt.gov/orders/courtorders/011218zr_3d9g.pdf.

88. Pet'rs' Br., Feb. 24, 2018, No. 17-269.

89. Docket No. 17-269, Aug. 21, 2017.

redirect their focus and substantially tweak their primary contentions from how they were previously presented.[90]

First, regarding tribal rights under Stevens Treaties, the State focuses almost exclusively on "[w]hether the treaty 'right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens' guaranteed 'that the number of fish would always be sufficient to provide a "moderate living" to the tribes.'"[91] Compare this to the first query Washington posed in materials for the Ninth Circuit, in which the State questioned proper treaty interpretation on a much broader level and contended that nothing in the Stevens Treaties prevented "incidental" land-use decisions by the government that carried a mere possibility of impacting fish populations.[92]

Next, Washington asserted that the Treaties' plain language said nothing about caring for salmon habitat, meaning they could never have any obligations in that regard toward the affected tribes.[93] This suggests Petitioner expects the Supreme Court to be more receptive to this argument than the Ninth Circuit Panel, which robustly rejected the argument. Specifically, after ample discussion, the panel "conclude[d] that in building and maintaining barrier culverts within the Case Area, *Washington has violated and is continuing to violate its obligation to the Tribes under the Treaties*."[94] It arrived at this determination by examining how the Tribes would have understood the Treaties and Fishing Clause at the time of their enactment, quoting the words of Isaac Stevens himself, and perhaps most important for this setting, citing multiple relevant and controlling Supreme Court holdings.[95]

The second and third questions presented provide arguments in Washington's favor not based on the Treaties or tribal rights. Question two asks whether the federal government could legitimately require culvert removal by Washington given that federal authorities entered into

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90. Pet'rs' Br. at i, Feb. 24, 2018, No. 17-269.

91. *Id*.

92. Br. Appellant St. of Wash., at 27–28, Oct. 7, 2013, Nos. 13-35474, 13-35519.

93. *Id*.

94. *Washington*, 827 F.3d at 853 (emphasis added).

95. *Id*. at 849–853 (citing *Fishing Vessel*, 443 U.S. at 675-77; and *Winans*, 198 U.S. at 381).

Stevens treaties, and federal authorities also told the State to design its culverts precisely in the way now being challenged.[96] Again, a comparison with prior proceedings provides interesting insights. In this case, though, it is not the differences between earlier arguments and this one, but rather the similarities that is curious. Petitioner made almost this exact same claim, which seemed to be Washington's weakest, in front of the Ninth Circuit to no avail.[97] As the Ninth Circuit explained, the federal government's actions toward Washington's state government do not bear on this litigation; the United States is a named party only inasmuch as it is assisting with representation of tribes and tribal interests.[98] At its root, this case is between a consolidated group of Tribes and Washington State for harms the latter allegedly caused the former. Even if the United States somehow enabled or conspired with Washington to facilitate those harms, it would not change the fact that Washington's policies and actions are those on trial here, not those of the federal government.[99]

Finally, Petitioner questions the actions of earlier courts in evaluating and deciding on these matters. In particular, Washington suggests the fixes they are required to undertake due to the district and appellate decisions are both unfair, claiming they will not solve the alleged problem but cost a great deal.[100] This could wind up a fascinating discussion point, particularly as it relates to the *Fishing Vessel* case.[101] The two sides take starkly opposing views on the precedent that case set, with Washington contending that the "moderate living" standard of tribal fish harvest was a maximum, while Respondents instead arguing it should be a floor. Considering this litigation in a broader sense, this question could reinforce one of the primary aspects of the Tribes' complaints: fish populations are nowhere near robust enough to provide a moderate living, much less a minimal or barebones one, to those Tribes. That detail of *Fishing Vessel* thus seems an odd, and possibly ill-advised, focus for Washington in this situation.

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96. Pet'rs' Br. at i-ii, Feb. 28, 2018, No. 17-269.
97. *Washington*, 827 F.3d at 853–854.
98. *Id.*
99. *Id.*
100. Pet'rs' Br. at i-ii, Feb. 28, 2018, No. 17-269.
101. *Washington*, 827 F.3d at 864-865.

B. Briefs for the United States and Tribal Respondents: The Courts Already Did Things Right

Counsel for the United States and Tribes faced a task far different from those representing Washington in this appeal. Lawyers for both respondents need not convince the Supreme Court of errors or oversights, neither must they determine what about their case failed to win over those preceding judges.[102] Moreover, as respondents they have the luxury of having seen Petitioners' brief in advance of finalizing their own, enabling them to directly address anything surprising or compelling. Overall, these briefs seek to clearly and compellingly show that "[t]he courts below properly concluded that the Stevens Treaties prohibit the State from imposing obstructions that substantially degrade or destroy the Tribes' traditional fisheries."[103] The Tribes echo that exact same sentiment to open their argument, but in greater detail and shorter chunks:

> Barrier culverts cut off salmon from places where the Tribes have the right to take fish. They also prevent salmon from returning from the ocean to reproduce, substantially degrading the tribal fishery. For both reasons, the district court correctly held that Washington has violated the Treaties. And the court properly exercised its discretion to remedy that violation through an order that gives the State both time and flexibility to fix the problem.[104]

Like Washington's brief, both the United States and Tribes open with relevant historical background—the United States' brief's first sentence takes the reader all the way back to the Lewis and Clark Expedition and Louisiana Purchase[105]—and an overview of prior proceedings, which are quite extensive in these particular circumstances.

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102. U.S. Br., March 26, 2018, No. 17-269; Resp'ts' Br., March 26, 2018, No. 17-269.

103. U.S. Br. at 15, March 26, 2018, No. 17-269.

104. Resp'ts' Br. at 23, March 26, 2018, No. 17-269.

105. U.S. Br. at 2, March 26, 2018, No. 17-269.

The Tribes do not reach quite as far back in their brief, instead first focusing on the Stevens Treaties, particularly the fishing rights they secured to regional Tribes and the current insecurity of those rights.[106]

Finally, the "moderate living" idea or issue, which Washington paid particular attention to in its own brief, receives considerable corresponding discussion in both respondents' briefs. Reading Washington's commentary in isolation could convince a clerk or justice that the Ninth Circuit had at least somewhat erred in its opinion by misconstruing the "moderate living" standard and how it applied in these circumstances. Counsel representing the Tribes and authoring their brief thus strongly refute that idea:

> [T]he State devotes its brief *entirely* to challenging the Ninth Circuit's supposed recognition of a "new right" for the Tribes to demand a "moderate living" from fishing. It is undisputed that the Tribes are *not* earning a moderate living from the fishery, but that is not the basis of the Tribes' claim. Indeed, the circuit judges on the panel rejected Washington's reading of their decision, explaining that the panel did "not hold that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances"; rather, the State is liable under the Treaties because it "acted affirmatively to build ... barrier culverts that block the passage of salmon, with the consequence of substantially diminishing the supply of harvestable salmon."[107]

Immediately after this explanation, the Tribes' brief reminds readers that disagreeing with the appellate court's *opinion* would still not adequately justify reversing its *judgment.*[108]

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106. Resp'ts' Br. at 1, March 26, 2018, No. 17-269.

107. Resp'ts' Br. at 24, March 26, 2018, No. 17-269 (internal citations omitted).

108. *Id.*

Throughout these submitted documents, both the United States and the Tribes consistently reiterate the major findings in their favor from earlier decisions, particularly:

1) The "Right" described in the Fishing Clause of the Treaties as "secured" does not grant Tribes any new rights, but instead protects existing ones: not only the opportunity to fish, but also a guarantee of the fishery's continued health and existence. [109]

2) Washington had violated and was still violating the Treaties, simply through the ongoing presence and use of barrier culverts.[110]

3) The District Court did not buy Washington's attempts to show an equitable defense, largely by pointing to both interaction and lack thereof between Federal and State authorities in various contexts. The issue at hand in this line of cases is Washington's violations of the Treaties, not the federal government's violations or even similar actions.[111]

C. Amici

Despite fairly limited media coverage, especially when this case was granted certiorari, it is clear that people, groups, and even governments across vast swaths of the country held some sort of interest or stake in its outcome. [112] Significant numbers have demonstrated this by seeking leave to file *amici* briefs on behalf of one side or the other, even when the case was only being considered for Supreme Court review.[113] Some of the most vested include: the American Forest & Paper Association and National Mining Association; the Washington State Association of Counties and Association of Washington Cities; Business, Home Building, Real Estate, Farming and Municipal Organizations; the Pacific Legal Foundation, the MODAC Point Irrigation District, and an aggregation of states: Idaho, Kansas, Louisiana, Maine, Montana, Nebraska, and Wyoming.[114]

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109. *Id.* at 25–26; U.S. Br. at 19–24, March 26, 2018, No. 17-269.
110. *Id.* at 38–44; U.S. Br. at 51–52, March 26, 2018, No. 17-269.
111. *Id.* at 49–52; U.S. Br. at 41–45, March 26, 2018, No. 17-269.
112. Docket No. 17-269, Aug. 21, 2017.
113. *Id*.
114. *Id*.

VII. LOOKING FORWARD

Had this case been denied certiorari and ended with the 2016-17 Ninth Circuit Opinion, its outcome would have represented a clear victory for the Tribes. Now, having been heard by the Supreme Court, the conclusion is once more in flux. What impact may this decision have, both in the Pacific Northwest and elsewhere? That will depend how the vote goes.

Option 1: The court splits 4–4. Justice Kennedy recused himself quite late in these proceedings—less than a month before oral arguments––due to a conflict not caught during the normal screening process.[115] If the court splits down the middle as a result, the evenly-divided court would affirm the most recent 2016-17 Ninth Circuit decision and injunction without an opinion, precedential weight, or bar on future reconsideration.

Option 2: A majority of justices vote to affirm the Ninth Circuit's 2016-17 decision. This would have the same immediate result as option one, but with the addition of precedential value, a written opinion, and possibly dissents and/or concurrences.

Option 3: A majority of justices vote to overturn some or all aspects of the Ninth Circuit's 2016-17 decision. This outcome probably has the most mystery surrounding it, as the impact would heavily depend on which part or parts of the Ninth Circuit decision the Supreme Court overturns, along with what instructions the Supreme Court in terms of precedential law and how it should be applied.

Under either Option 1 or 2, the current situation in Washington will likely not change much, if at all. Notably, Washington is moving forward with culvert fixes mandated under the Ninth Circuit decision and injunction. While much work remains, at least some progress is being made in replacing problematic culverts. Moreover, the Washington Department of Transportation has updated project lists and cost estimates accordingly and now maintains an informational website exclusively providing information about these changes.[116]

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115. Letter from Clerk of Court Scott S. Harris to Noah G. Purcell, William M. Jay, & Noel J. Francisco (March 23, 2018), *in Re: No. 17-269, Washington v. United States, et al.*

116. *Improving Fish Passage*, Wash. St. Dep't of Transp., wsdot.wa.gov, https://www.wsdot.wa.gov/Projects/FishPassage/default.htm (last visited, April 19, 2018).

This decision could also pave the way for further cases regarding degraded salmon habitat in the region. So long as Tribes isolate a concrete action taken by target defendants and describe with specificity how that action has negatively impacted salmon or their range, such complaints may prevail in the courtroom based on this precedent. Because the Ninth Circuit read the Treaties to include a duty on both Washington and the United States to not only protect access to salmon via traditional fishing methods and locations, but also ensure adequate populations of those salmon, the Tribes could allege other infringements of the Treaties based on that latter duty. For example, a logical next step may be for the Tribes to challenge federally owned and managed culverts in the region, something directly addressed in this decision. Alternatively, if Tribes could identify a specific practice in Puget Sound or other coastal areas that negatively impact salmon returns, they may be able to seek an injunction on this precedent.

A related aspect of this result is the creation of a spectrum between concrete, actionable environmental harms and undefined ones that cannot be redressed via the Stevens Treaties. Standing in stark contrast to their 1985 *Washington III* decision, the Ninth Circuit here determines that the use and maintenance of barrier culverts constitutes a *particularized*, *solvable* treaty violation. What else could be a concrete, fixable harm? Tribes could consider an even larger-scale run at this matter reminiscent of *Massachusetts v. EPA*.[117] The reason the Tribes triumphed here while the Ninth Circuit vacated similar proceedings in 1985 is relatively simple: specificity. The 1985 Court "held that the issue was too broad and varied to be resolved in a general and undifferentiated fashion, and that the issue of human-caused environmental degradation must be resolved in the context of particularized disputes."[118] That begs the question, given advances in climate and environmental science, what else may fit in that category?

With modern understanding of climate change, particularly science quantifying human impacts, could the Tribes now craft a successful complaint alleging that climate change is infringing upon their Treaty rights related to salmon? Provided they could identify and articulate

117. 549 U.S. 497 (2007).
118. *Washington*, 827 F.3d at 846.

"concrete facts" as to actions harming salmon or their habitat, supported by scientific evidence, *United States v. Washington* suggests that Tribes could triumph on an even larger scale, at least based on current interpretation of these nearly-170-year-old treaties.