No. 17-269

In The Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, MONTANA, NEBRASKA, OKLAHOMA, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONER

LAWRENCE G. WASDEN
Attorney General
STEVEN L. OLSEN
Chief of Civil Litigation
CLAY R. SMITH
Counsel of Record
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Email: clay.smith@ag.idaho.gov

Counsel for Amici Curiae States

[Additional Appearances on Inside Cover Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

DEREK SCHMIDT
Attorney General
STATE OF KANSAS

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

JANET T. MILLS
Attorney General
STATE OF MAINE

BILL SCHUETTE
Attorney General
STATE OF MICHIGAN

TIM FOX
Attorney General
STATE OF MONTANA

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

BRAD D. SCHIMEL
Attorney General
STATE OF WISCONSIN

PETER K. MICHAEL
Attorney General
STATE OF WYOMING

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INTEREST OF THE AMICI CURIAE STATES

The interest of the amici curiae states rests on perhaps the most basic tenet of the United States Constitution: the several States retain primary responsibility in our Union for ensuring that the interests of all their residents are protected. U.S. Const. amend. X. Discharging that responsibility requires them to make often difficult choices about how best to use their limited fiscal resources. Whatever balance they strike inevitably displeases some, with their political and occasionally judicial branches providing the mechanism for restriking that balance. Although federal law can limit the States' sovereign authority, U.S. Const. art. VI, cl. 2, stringent preemption standards apply to Congressional action when it legislates "in a field which States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indian treaties – like those here – can alter this standard because they must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1889). "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

This case involves, as an immediate matter, the last of those principles. The Ninth Circuit has plainly "expanded" the fishing clause in the Stevens treaties "beyond [its] clear terms" as definitively construed by

this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (*Fishing Vessel*), to imply what a prior Ninth Circuit panel and commentators characterize as an "environmental servitude." Pet.App. 29a. The Ninth Circuit approved a district court injunction that effectively seizes federal judicial control over the Washington State Highway system but leaves the fiscal burden on the State to the tune of a billion-plus dollars, thereby ignoring federalism-based limitations on injunctive relief repeatedly endorsed by this Court.

While the Ninth Circuit decision eviscerates internal governance by one State over one program, it writes a script for subjecting a broad swath of regulation by States, including the amici curiae, to like servitudes. Two-thirds of the States contain Indian reservations or other Indian country established by treaty or statute. Conference of W. Att'ys Gen., *American Indian Law Deskbook* § 5:16, at 331 (West 2017). Tribal fishing, hunting, and gathering rights, both on and off reservation, exist in many of them. Under the Ninth Circuit's reasoning, a servitude on state land-use (and other) regulation can be *implied* to avoid negative impacts on such rights through generally applicable, non-discriminatory regulation (as the Washington culvert program concededly is). The amici's concerns are not apocalyptical. The Environmental Protection Agency (EPA) has relied on the decision below to impose federal, rather than state, water quality standards (WQS) in Maine and Washington insofar as they applied to waters where it deemed subsistence

fishing or sustenance rights existed. The amici States ask this Court to reject the Ninth Circuit's unprecedented foray into commandeering state decision-making processes over land use regulation or other areas of traditional state responsibility.

SUMMARY OF THE ARGUMENT

1. States have a fundamental sovereign interest in treaty or statutory provisions affecting natural resources being applied consistently with their plain scope and not expanded to create wholly new rights. The Ninth Circuit opinion breaks ground by interpreting the Stevens treaties' fishing clause to prohibit States or presumably other local governmental entities from taking land use or other regulatory actions, or to compel such entities to undo past actions, that may adversely affect the amount of the harvestable fish – i.e., imposing an "environmental servitude." The Ninth Circuit's expansive interpretation is doubly troubling because it directly conflicts with *Fishing Vessel*'s authoritative construction that the treaty provision's twin purposes are to provide access to aboriginal fishing grounds and to apportion otherwise available harvestable fish between tribal members and nonmembers. *Fishing Vessel* used the "moderate living" standard only as a limit on the tribal share, not a treaty-secured entitlement which Washington must take remedial action to help achieve. The Ninth Circuit then compounded its misreading of *Fishing Vessel* by failing to identify any standard, other than a

subjective ad hoc assessment, against which to determine the types of state, local government or private activity that may infringe impermissibly on the fishing clause. The appropriate standard, however, is clear: The fishing clause protects tribal fishers from governmental or private conduct that interferes with their opportunity to harvest an equitable share of the otherwise available fish. The Ninth Circuit additionally erred in relying on reserved water right doctrine as support for its interpretation of the fishing clause. This Court's relevant precedent leads to precisely the opposite conclusion because both *Fishing Vessel* and the reserved rights doctrine have as their objective equitable distribution of extant natural resources. Lastly, the Ninth Circuit's reasoning has far-reaching impact as reflected by EPA's recent reliance on it in imposing federal water quality standards under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1388, based upon statutory and treaty fishing rights in Maine and Washington and by the spate of academic commentary on the district court's and the Ninth Circuit's decisions that recognizes their far-reaching implications.

2. The United States' pre-2001 conduct plainly falls within the scope of laches, waiver and estoppel as those equitable defenses are defined under federal common law. Washington has constructed culverts as part of its road building activities for many decades. In that regard, the Washington State Department of Transportation (WSDOT) partnered with the Federal Highway Administration (FHWA) in these activities and used FHWA culvert design standards as a

condition of federal funding. Washington eventually improved upon those standards, with the FHWA eventually adopting the Washington improvements for use on federal lands. Washington additionally received CWA permits in connection with its culvert construction. Notwithstanding this lengthy partnership and regulatory compliance, the Ninth Circuit rejected as a matter of law Washington's waiver and estoppel defenses against the United States as categorically foreclosed by *Cramer v. United States*, 261 U.S. 219 (1923). In so doing, it confined *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (*Sherrill*), to claims brought by tribes over long-abandoned lands and created a conflict with decisions from the Second Circuit. The facts here, which involve the attempt by the United States to impose liability on a State for sovereign activity that the federal government had actively participated in over many years, provide ample justification for extending *Sherrill* beyond claims raised by a tribal sovereign. This Court's holding in *Cramer*, in contrast, arose from a failure by agency employees to adhere to established departmental policy in leasing a parcel of land to a railroad, not from decades-long federal-state cooperation to further the public interest. If the first question is resolved negatively to Washington's position, this matter should be remanded to the lower courts for consideration of its equitable defenses on the basis of a full evidentiary record.

3. The district court issued, and the Ninth Circuit affirmed, an expansive permanent injunction that departs from settled boundaries on appropriate

coercive relief against States or their officials for several reasons. First, the relief ordered massive changes to the state culvert system under a single, general criterion, not through a culvert-specific assessment of benefit and cost. It thus violates the core requirement that injunctive relief be tailored as narrowly as possible to remedying the conduct that causes the legal wrong. Second, the injunction's elaborate detail, broad scope and exorbitant cost replace Washington's ongoing efforts to remediate its culverts' impact on salmon passage with ongoing judicial management. The relief ignores limits on the federal judiciary's injunctive powers to control a State's sovereign authority over its governmental programs and, necessarily, how and when state funds are expended. Third, neither the district court nor the Ninth Circuit considered the equitable considerations raised by Washington in its waiver and estoppel defenses in fashioning the relief. This Court has made clear that even when such defenses do not constitute a complete bar to injunctive relief, they retain relevance to the scope of such relief. At the least, therefore, the permanent injunction should be vacated, and the case remanded for further proceedings to fashion relief consistent with the Court's opinion.

ARGUMENT

I. THE NINTH CIRCUIT'S IMPLICATION OF AN ENVIRONMENTAL SERVITUDE FROM THE TREATY FISHING PROVISION BOTH CONFLICTS WITH *FISHING VESSEL* AND, IF UPHELD, WILL BE EXTENDED TO A BROAD RANGE OF STATE AND LOCAL GOVERNMENT REGULATORY DECISION-MAKING

A. Isaac I. Stevens and Joel Palmer, then Superintendents of Indian Affairs for Washington and Oregon Territories, entered into ten treaties with Pacific Northwest Indian tribes between December 1854 and July 1855, each of which reserved on- and off-reservation hunting, fishing and other usufructuary rights in largely comparable language. *See, e.g.*, Treaty with Nisquallys (Treaty of Medicine Creek), art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854) ("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.").[1] The fishing rights reserved under the Stevens treaties exist in Idaho, Montana, Oregon and Washington. Their scope and application have spawned substantial litigation over the last half century, with much of it now centered in two federal district court proceedings – this case and *United States*

[1] Isaac Stevens signed seven of the treaties alone, including the Treaty of Medicine Creek. Joel Palmer signed one treaty alone. They jointly signed two treaties. *See American Indian Law Deskbook* § 9:13, at 647 n.1. All contain identically or similarly-worded fishing clauses and are referred to as the Stevens treaties in this brief.

v. Oregon, No. 3:68-cv-513-KI (D. Or.). One Ninth Circuit panel, comparing the litigation below to the generations-long Chancery will dispute in *Bleak House*,[2] observed that "this case has become a Jarndyce and Jarndyce, with judges dying out of it and whole Indian tribes being born into it." *United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009). The panel further observed that "the Constitution does not establish the district courts as permanent administrative agencies." *Id.*

Notwithstanding the length of the *United States v. Washington* proceeding below, this Court has addressed issues arising from it only in *Fishing Vessel*. Six decisions construing the fishing clause, however, preceded *Fishing Vessel*. *United States v. Winans*, 198 U.S. 371, 381-82 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198 (1919); *Tulee v. Washington*, 315 U.S. 681, 685 (1942); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968) (*Puyallup I*); *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (*Puyallup II*); and *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 177 (1977) (*Puyallup III*). The decisions, while separated by over 70 years and applying the fishing clause in differing factual contexts, share a common thread: All construed the clause as reserving tribal access to historic fishing places and to harvest a share of available fish. The Ninth Circuit re-wrote this Court's construction by imposing a burden on the State to increase the *amount* of harvestable fish; i.e., it

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[2] Charles Dickens, *Bleak House* (Bradbury & Evans 1853).

augmented the share-of-the-pie entitlement with a duty to increase the pie's size. Only this departure from the Court's consistent construction of the clause allowed the Ninth Circuit to create the environmental servitude that lies at the heart of this case.

B. Beginning with the *Puyallup* trilogy, the issue took on its modern shape of accommodating the competing demands of Indian and non-Indian fishermen to salmon and steelhead runs. As this Court would later state in *Fishing Vessel*, "it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce." 443 U.S. at 669.

Puyallup I addressed Washington's power to enforce against treaty fishermen a generally applicable prohibition of using set nets in fresh water streams or their mouths where, as one state expert testified, returning adults often milled and entire runs became vulnerable to harvest. 391 U.S. at 401. This Court upheld the State's right to establish "'reasonable and necessary'" conservation measures but left to Washington state courts resolution in the first instance of whether the net prohibition satisfied that standard consistently with the "in common with" requirement of the treaty fishing clause. *Id.* at 401-02. When the dispute returned in *Puyallup II*, the conservation issue had been winnowed down to whether a prohibition of all set net fishing – a traditional form of tribal fishing

– on the Puyallup River violated the "in common with" requirement. The Court found discrimination "because all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed." 414 U.S. at 48. It remanded for expert estimation of "what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species" and counseled that "[i]f hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned." *Id.* *Puyallup III* completed the litigation's cycle, affirming a state court judgment that limited the number of steelhead available for harvest by Indian net fishing as the river passed through the Puyallup Reservation. 433 U.S. at 176 ("Though it would be decidedly unwise, if Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migrating fish run and 'pursue the last living (Puyallup River) steelhead until it enters their nets.' . . . In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek.") (citation and footnote omitted).

Fishing Vessel built directly upon the *Puyallup* trilogy in construing the fishing clause and left no doubt about the clause's meaning. 443 U.S. at 682-84.

This Court characterized as "totally foreign to the spirit of the negotiations" the contention, proffered by one state agency, that the phrase "in common with" simply meant "[t]hat each individual Indian would share an 'equal opportunity' with thousands of newly arrived settlers" to fish. *Id.* at 676. Rather, "the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id.* at 679. The Court buttressed this conclusion, explaining that the *Puyallup* cases "clearly establish[ed] the principle that neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share of each covered run of *harvestable* anadromous fish." *Id.* at 682 (emphasis added). Turning to the question of what the "share" should be, this Court "agree[d] with the Government that an equitable measure of the common right should initially divide the *harvestable* portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id.* at 685 (emphasis added). It even defined the term "harvestable" as the "amount of fish" remaining after "subtracting from the total number of fish in each run the number that must be allowed to escape for conservation purposes." *Id.* at 670 n.15.

This Court then turned to determining the "lesser amount" that would warrant a reduction of the treaty share of the harvestable anadromous runs. It credited

the federal district court's basic apportionment formula of "starting with a 50–50 division and adjusting slightly downward on the Indians' side when it became clear that they did not need a full 50%." 443 U.S. at 685. The Court stressed "the 50% figure imposes a maximum but not a minimum allocation." *Id.* at 686. "[T]he 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.* The Court criticized the dissent on this point, noting that "[b]ecause the 50% figure is only a ceiling, it is not correct to characterize our holding 'as guaranteeing the Indians a specified percentage' of the fish." *Id.* at n.27. It gave an example of when "changing circumstances" could warrant a downward adjustment – a reduction in tribal membership to a level that would make a "45% or 50% allocation an entire run that passes through its customary fishing grounds . . . manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish." *Id.* at 687.

Here, the nine-judge dissent from the Ninth Circuit's denial of en banc rehearing rightly reasoned that "the panel opinion turns *Fishing Vessel* on its head" by "impos[ing] an affirmative duty upon the State to provide a certain quantity of fish, which reads out the 50% ceiling entirely." Pet.App. 24a. This is so because the 50% limit accommodates the modern-era reality that

population increases and related economic development have caused, and likely will continue to cause, salmon populations insufficient to support a "moderate living" for treaty fishers, thereby necessitating an equal division of the diminished populations between non-treaty fishers and them. Implicit in the 50% ceiling is the absence of a treaty right to a specific *supply* of fish. Two panel-opinion members retorted that "there is nothing in the [*Fishing Vessel*] opinion that authorizes the State to diminish or eliminate the supply of salmon available for harvest." Pet.App. 10a. But that response misstated the dispositive issue: Whether the fishing clause, as definitively construed in *Fishing Vessel*, requires Washington to carry out its governmental functions so as not to adversely affect the supply of salmon. It plainly did not for the very reason that the rehearing dissent gave; i.e., the clause reserves to treaty fishers only an equitable share of the fishery otherwise available to all fishers in light of current day conditions, not a particular supply of fish.

The rehearing denial concurrence attempted to limit the potential breadth of the equitable servitude by disclaiming "that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances," or any intent to "hold that the promise is valid against all human-caused diminutions, or even against all State-caused diminutions." *Id.* Tellingly, though, the concurrence failed to articulate any standard upon which to distinguish those "diminutions" from Washington's culvert system. The panel opinion was equally unhelpful. *See* Pet.App. 95a ("The

'measure of the State's obligation' . . . depends 'on all the facts presented' in the 'particular dispute' now before us."). One can only conclude that the true measure is the length of the Chancellor's foot. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-33 (1999).

The district court's labored analysis reflects the ipse dixit quality of the Ninth Circuit's approach. The trial court reasoned that "[t]he State's duty to maintain, repair or replace culverts which block passage of anadromous fish [did] not arise from a broad environmental servitude against which the Ninth Circuit Court of Appeals cautioned" in *United States v. Washington*, 694 F.2d 1374, 1381 (9th Cir. 1982), *vacated on reh'g*, 759 F.2d 1353 (9th Cir. 1985) (en banc), because "it is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed." Pet.App. 178a. To be sure, the injunction pertains only to stream culverts, but the district court's explanation did not answer the real question of why stream culverts differ from other governmental (or non-governmental) activities that may negatively affect salmonid populations. For example, dams and related power-generating facilities exist throughout the Columbia River Basin and, according to federal government estimates, account for more than 40% of this Nation's total hydroelectric generation. U.S. Energy Info. Admin., Today in Energy (June 27, 2014), *available at* https://www.eia.gov/todayinenergy/detail.php?id=16891 (last visited Jan. 31, 2018). These facilities have

contributed significantly to the decrease in salmon and steelhead runs since pre-treaty times and to the listing of 13 salmonid evolutionarily significant units as threatened or endangered under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. *See, e.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 869-70 (D. Or. 2016). So, too, during the 90-year period between 1920 and 2010, the State of Washington's population grew from approximately 1.2 million to 6.7 million – or over 550% – with attendant infrastructure development and habitat loss. Wash. Office of Fin. Mgmt., State of Wash. 2017 Population Trends at 7 (Table 1), *available at* https://www.ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_poptrends.pdf (last visited Jan. 31, 2018). Nothing in the lower courts' lengthy decisions suggests how to separate the wheat from the chaff.

C. The failure of the Ninth Circuit and the district court to offer a reasoned, general standard contrasts sharply with the analysis in *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994). There, a Stevens treaty tribe sought damages against a power company for construction and maintenance of dams that diminished anadromous fish runs from their 1855 levels. The court rejected the proposition that "Indian tribes . . . have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of settlers and the resulting development of the land." *Id.* at 808. Rather, "[t]he Stevens treaties require that any development

authorized by the states which injures the fish runs be non-discriminatory in nature . . . but does not, however, guarantee that subsequent development will not diminish or eventually, and unfortunately, destroy the fish runs." *Id.* at 814.

The non-discriminatory standard applied in *Idaho Power* derives directly from this Court's decisions in the *Puyallup* trilogy and *Fishing Vessel* and supplies the level of analytical certainty essential to accommodating the Stevens treaties' fishing clause with the demographic and land use changes that would and did accompany non-Indian settlement of the Pacific Northwest. It also comports with this Court's construction of that clause in *Fishing Vessel* which fashioned an apportionment of fisheries severely diminished over time precisely because of those changes. A necessary predicate for the apportionment was recognition that the treaties reserved to the tribes not a specific supply of fish but an equitable share of the fish otherwise available for harvest. The fishing clause, in sum, protects tribal fishers from governmental or private conduct that interferes with their opportunity to capture an equitable proportion of extant fish runs. *See Fishing Vessel*, 443 U.S. at 681 (deeming "even more significant" than the access issue in *Winans* the case's "actual disposition" that involved, at least in the Government's briefing, proposed removal of fishing wheels used by non-Indian fishers to capture virtually the entire harvestable run). No evidence here suggests that discrimination against tribal fishing rights tainted the design and operation of Washington's culvert system. The

parties' admitted facts showed precisely the opposite; i.e., the State has long recognized the impact of culverts on anadromous species' migration and taken affirmative action through culvert design improvements to reduce that impact. Pet.App. 144a-156a. The court of appeals itself acknowledged this fact. Pet.App. 95a.

Nor does the reserved water rights doctrine enunciated initially in *Winters v. United States*, 207 U.S. 564 (1908), which the Ninth Circuit relied on for inferring a right to a supply of fish unaffected by subsequent demographic or land use changes, counsel a different standard. Pet.App. 92a-94a. *Winters* turned on the determination that the 1888 statute creating the Fort Belknap Indian Reservation impliedly reserved a water right adequate to effectuate the reservation's agrarian purposes and assigned the statute's enactment date as the priority date for prior appropriation purposes. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."). Here, in contrast, the question is whether a right to take fish from streams outside of a reservation imposes an affirmative duty upon a non-party to the treaty to restore some unknown number of salmon to the ecosystem. *Fishing Vessel* answers that question "no" because, as discussed above, it construed the fishing clause as reserving to the tribes only an entitlement to

an equitable share of available fish. Indeed, *Winters* and *Fishing Vessel* are entirely consistent in that regard because both addressed the appropriate distribution of an otherwise extant natural resource between Indian and non-Indian uses; i.e., *Winters* did not require Montana to create *more* water, just as *Fishing Vessel* did not require Washington to create more fish.

D. The Ninth Circuit's construction and application of the fishing clause have not only a Stevens treaty-specific impact but also substantially wider significance. The court's reasoning will lead inevitably to one result: claims for injunctive or other relief against States or their officials, state political subdivisions and private parties for any diminishment of anadromous fish runs, or other fish, shellfish, and wildlife harvested by tribal members. Commentary on the Ninth Circuit's decision leaves no doubt about its implications with respect to, inter alia, dams, water diversions increasing stream temperatures, timber harvests, grazing practices and sediment-producing construction projects.[3] Various commentators discussed in

[3] Michael C. Blumm, *Indian Treaty Fishing Rights and the Right to Habitat Protection and Restoration*, 92 Wash. L. Rev. 1, 30 (2017) ("Diversions that dewater streams can have much the same effects on fish migration as barrier culverts or dams. The dewatering of a tribe's usual and accustomed fishing ground would seem to be no less a treaty right violation as migration blockage by a structure in the stream."); Wesley James Furlong, *Restoring the Skagit River Delta: Habitat Restoration and Farmland Reclamation on Fir Island*, 38 Pub. Land & Resources L. Rev. 103, 132-33 (2017) ("Without interpreting the treaties as implying a *proactive* right to habitat protection, courts have nevertheless interpreted them as implying a *retroactive* right to remedy state

similar fashion the potential reach of the district court's 2007 decision (Pet.App. 249a) that laid the predicate for the 2013 injunction.[4] The expansive scope of the Ninth Circuit's decision thus cannot be denied.

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actions that have degraded habitat necessary for salmon survival to satisfy treaty tribes' moderate living needs. Seen another way, courts have imposed a duty on the State to remedy degraded habitats where tribes can show concrete evidence that the loss of habitat affects their right to take fish.") (footnote omitted); Anthony Moffa, *The Oil Sands of Time: Pipelines and Promises*, 22 Ocean & Coastal L.J. 111, 124-25 (2017) ("the United States, or at least the Ninth Circuit, has thus provided a model for the adjudication of situations where government projects come into conflict with indigenous rights to natural resources").

[4] *See* George William Van Cleve, *Saving the Puget Sound Wild Salmon Fishery*, 2 Seattle J. Envtl. L. 85, 118 (2012) ("Because the tribes could contend that each defendant government has an independent legal duty to observe and enforce tribal fishing rights, each government would, arguably, also have the responsibility to take steps to compensate for either inaction or inadequate action under the ESA by any other government engaged in ESA permit review, or related actions such as the provision of flood insurance, in order to ensure that treaty rights are adequately protected."); Katheryn A. Bilodeau, Comment, *The Elusive Implied Water Right for Fish: Do Off-Reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?*, 48 Idaho L. Rev. 515, 545 (2012) ("The holding in *Culverts* added a new dimension to the fishing litigation. With a sufficiently defined scope, treaty fishing language includes a right to protection from environmental degradation. A right to protection from the degradation of water quality in fish passages compels the presumption of water in fish passes. This is essentially an implied instream right."); Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The* Martinez *Decision Supplies a Resounding Judicial Reaffirmation*, Nat. Resources J. 653, 695-96 (2009) ("An 'unreasonable interference' in the context of the Stevens treaties is habitat degradation that results in decreased fish populations, which, in turn,

From a Stevens treaty perspective, this expansion of the fishing clause's scope has immense consequences given the treaties' geographical reach throughout the Pacific Northwest. But the Ninth Circuit's reasoning logically extends beyond the fishing clause to any usufructuary entitlement in those treaties. So, to use the Treaty of Medicine Creek, fishing is only one of several rights reserved under Article III. The entire article provides:

> 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: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

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prevents tribes from being able to make a moderate living from fishing. [¶] Thus, only activities that restrict tribes' ability to earn a moderate living from fish unreasonably interfere with the tribes' piscary profit.") (footnote omitted); William Fisher, Note, *The Culverts Opinion and the Need for a Broader Property-Based Construct*, 23 J. Envtl. L. & Litig. 491, 511 (2008) ("This case can also be viewed as a stepping stone toward the establishment of either: (1) a broad duty, such as that originally established by the district court in Phase II, or (2) several narrow duties (such as this one) directed at specific activities that harm fish passage and habitat.").

10 Stat. at 1133. Although certain other Stevens treaties do not include the proviso, they contain the remaining rights. Carried to its natural conclusion, the Ninth Circuit's reasoning imposes an environmental servitude that prevents States or their political subdivisions from taking actions that negatively affect hunting, gathering or pasturing privileges on "open and unclaimed lands" or failing to remediate past actions that did.

Beyond the Stevens treaties lies the effect of the Ninth Circuit's decision in other contexts. Recent EPA actions and final rules declining to approve Maine and Washington WQS and imposing federal WQS in their stead are likely harbingers. *See* 81 Fed. Reg. 92,466 (Dec. 19, 2016) (Maine); 81 Fed. Reg. 85,417 (Nov. 28, 2016) (Washington). Maine has a nationally unique tribal-state relationship with four tribes as a result of a 1980 settlement reflected in federal and state statutes (the Maine Indian Settlement Acts). *See id.* at 92,467. For the first time in February 2015, EPA interpreted those acts as implicitly requiring a new CWA tribal sustenance fishing designated use for unspecified Maine waters that Maine itself never adopted. *See id*. at 92,472, 92,478. In subsequent rulemaking, EPA built on this new interpretation as a basis for imposing federal WQS and cited the Ninth Circuit's decision for the proposition that "it would defeat the purposes of the [settlement acts] for the tribes in Maine to be deprived of the ability to safely consume fish from their waters at sustenance levels" (*id.* at 92,479-80):

> [T]he Ninth Circuit Court of Appeals recently determined that the right of tribes in the State of Washington to fish for their subsistence in their "usual and accustomed" places necessarily included the right to an adequate supply of fish, despite the absence of any explicit language in the applicable treaties to that effect. Specifically, the Court held that "the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."

Id. at 92,479 (footnote omitted). As to both Maine and Washington, EPA found the decision below, along with other cases, consistent with a Department of the Interior legal opinion "conclud[ing] that 'fundamental, longstanding tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right.'" *Id.* at 85,423 n.39, 92,479.

Proper application of *Fishing Vessel*, in sum, will remove the Ninth Circuit's decision as justification for this misunderstanding of Indian law generally and the Indian canons specifically. Treaties may reserve and statutes may create certain rights. The canons serve only to determine those rights, not to establish them where the parties or Congress has not. The Ninth Circuit in ignoring *Fishing Vessel* did the latter.

II. *SHERRILL* SHOULD BE EXTENDED TO THE EQUITABLE DEFENSES RAISED BY WASHINGTON TO THE UNITED STATES' CLAIM

"Laches is 'a defense developed by courts of equity to protect defendants against unreasonable, prejudicial delay in commencing suit.'" *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938). "The vital principle [for equitable estoppel] is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. 578, 560 (1879); *see also Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 233-34 (1958). These equitable defenses have clear relevance here given the United States' pre-2001 conduct.

To start, WSDOT adhered to hydraulic culvert designs published by the FHWA as a condition of federal funding until Washington itself developed design methods that improved upon the federal model. Federal agencies subsequently adopted the Washington design improvements for their own projects. Pet.App. 137a-139a. WSDOT has an ongoing program to remediate its salmon barrier culverts for which it has received excellence awards from the FHWA. Pet.App. 144a-155a; J.A. 224a, 390a. Washington also has received CWA permits under 33 C.F.R. § 323 with respect to its

culvert construction activities under which impacts to endangered or other fish must be considered. J.A. 78a-80a; *see* 40 C.F.R. §§ 230.30, 230.31. There is, as well, no dispute that Washington's road building activities, including culvert construction, have been ongoing for many decades. Pet.App. 139a-144a. Needless to say, tribal members and other state residents directly benefitted, and continue to benefit, from the state road infrastructure. The United States and the tribes could have challenged the State's actions as they were being undertaken or to bring proposed ameliorative measures to the state agencies' attention through government-to-government collaboration or asserted claims under statutes such as the CWA or the ESA.

The trial record thus contained substantial evidence that the United States partnered with Washington over many decades in culvert construction and maintenance. The Ninth Circuit nonetheless deemed the State's equitable defenses based, inter alia, on that partnership precluded as a matter of law "[b]ecause the treaty rights belong to the Tribes rather than the United States" and thus outside the federal government's prerogative to waive, relying on *Cramer v. United States*, 261 U.S. 219 (1923). Pet.App. 98a. It deemed this Court's decision in *Sherrill* inapposite because the present dispute did not involve a tribal claim to sovereignty over abandoned lands, a situation where the tribes themselves had authorized the state culvert program, or a revival of "disputes that have long been left dormant." Pet.App. 99a.

The Second Circuit, however, has reached the opposite conclusion. As it stated in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (9th Cir. 2005), "[w]e recognize that the United States has traditionally not been subject to the defense of laches" but immediately added that "this does not appear to be a *per se* rule." *Id.* at 278. The *Cayuga* court then endorsed a set of factors formulated by the Seventh Circuit in *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670 (7th Cir. 1995), governing application of laches to the United States: "first, 'that only the most egregious instances of laches can be used to abate a government suit'; second, 'to confine the doctrine to suits against the government in which . . . there is no statute of limitations'; and third, 'to draw a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights, and government suits to enforce sovereign rights, and to allow laches as a defense in the former class of cases but not the latter.'" 413 F.3d at 279; *see also Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 129 (2d Cir. 2010) ("*Cayuga* expressly concluded that the United States is subject to such defenses under circumstances like those presented here (i.e., a lengthy delay in asserting the relevant cause of action, the absence of an applicable statute of limitations for the great majority of this delay, and an intervention to vindicate the interests of an Indian nation)."). Each factor exists here. The Ninth Circuit panel did not even acknowledge those decisions' contrary holding – as the opinion dissenting from en banc rehearing discussed. Pet.App. 34a-35a.

This Court has declined thus far to adopt "'a flat rule that estoppel may not in any circumstances run against the Government.'" *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990). In *Richmond*, it chose to "leave for another day whether an estoppel claim could ever succeed against the Government" because "a narrower ground for decision" was adequate to resolve the case: Equitable estoppel can never serve as a basis to recover a "payment of money from the Public Treasury contrary to a statutory appropriation." *Id.* at 423-24. The present dispute, however, does not involve an affirmative attempt to gain some economic or other benefit from the United States or even Stevens treaties tribes. It arises from the United States' use of the Supremacy Clause to vindicate third-party rights against a sovereign State for conduct previously authorized by the federal government. Although the United States does not seek to restore tribal "sovereignty over land within the boundaries of an abandoned reservation[,]" it does raise "claims that have long been left dormant." Pet.App. 99a. Indeed, the facts here are more egregious than those in *Sherrill* because the government predicates its Supremacy Clause claim on culvert construction that it not only encouraged but affirmatively approved.

Nor does the Ninth Circuit's observation that this controversy differs from *Sherrill* because "Washington and the Tribes have been in a more or less continuous state of conflict over treaty-based rights for over one hundred years" pass the historical plausibility test. "From the very beginning of their dispossession in the

nineteenth century, the Oneidas unsuccessfully sought federal intervention to recover lands illegally taken by the State of New York." John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 Buff. L. Rev. 1001, 1004 (1998). The Oneida Nation filed its action seeking recovery of 250,000 acres of treaty-reserved land in 1970, the same year as this case began and over 30 years before the request for determination resulting in the present appeal. *See generally* Dale T. White, *Indian Country in the Northeast*, 44 Tulsa L. Rev. 365, 375 & n.69 (2008). Fifty years earlier, the United States on behalf of certain Oneida Nation members had filed successful ejectment action to recover 32 acres of improperly conveyed land. *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920). The panel opinion's "continuous state of conflict" comment simply failed to take account of the contentious relationship between the Oneidas and New York since the late Eighteenth Century.

Lastly, the Ninth Circuit's reliance on *Cramer* as establishing a per se rule against the availability of equitable estoppel against the federal government where it asserts a claim on a tribe's or tribal member's behalf in its trustee role reads too much into too little. Pet.App. at 97a. The United States there sought cancellation of a 1904 patent issued to a railroad insofar as it included land occupied by several Indians since 1859. This Court held that "settled government policy" supported the Indians' right of occupancy that "was definite and substantial in character and open to observation when the railroad grant was made." *Id.* at

229-30. It rejected the railroad's defense that "government [was] estopped from maintaining this suit by reason of any act or declaration of its officers or agents" in issuing the patents, reasoning that "since these Indians with the implied consent of the government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory." *Id.* at 234. Washington's defenses, however, arise out of a relationship in which the United States worked cooperatively over decades to foster state culvert construction activity – with the tribes' knowledge – because the culverts and related road system "were necessary aids to the development of the public lands" – i.e., they "facilitated communication between settlements already made, and encouraged the making of new ones, increased the demand for additional lands, and enhanced their value." *Cent. Pac. Ry. v. Alameda County*, 284 U.S. 463, 473 (1932). The government, moreover, engaged in precisely the same activity on federal lands, employing (like Washington) FHWA design standards before adopting the State's improved standards. This case thus differs radically from the *Cramer* situation in which agency employees acted in violation of longstanding administrative circulars and land decisions by issuing leases that effectively dispossessed Indians from their openly enclosed, improved property. *See Cramer v. United States*, 276 F. 78, 80 (9th Cir. 1921) (discussing Interior Department policies and rulings), *rev'd on other grounds*, 261 U.S. 219 (1923).

To paraphrase *Sherrill*, "[w]hen a party belatedly asserts a [treaty] right to [control sovereign activity], longstanding observances and settled expectations are prime considerations." 544 U.S. at 218. The Ninth Circuit erred in holding that *Cramer* stands as a categorical bar to Washington's waiver and estoppel defenses. If this Court resolves the first question presented against Washington, it therefore should remand for determination of those defenses with reference to a full factual record.

III. THE MANDATORY INJUNCTIVE RELIEF AWARDED BY THE DISTRICT COURT WAS NOT NARROWLY TAILORED TO REMEDYING THE PERCEIVED HARM, OFFENDED SETTLED FEDERALISM LIMITATIONS, AND FAILED TO GIVE ANY CONSIDERATION TO THE EQUITABLE DEFENSES RAISED BY WASHINGTON

The district court's March 2013 permanent injunction requires Washington, inter alia, to

- prepare within six months a list of all culverts under state-owned roads that are salmon barriers;
- assess and identify, on an ongoing basis, culverts under state-owned roads that become salmon barriers after the injunction's issuance;

- construct new culverts on case-area "salmon waters" in compliance with the injunction's standards;
- require by October 31, 2016 three of the four state agencies managing culverts to provide fish passage in compliance with the injunction's standards;
- require WSDOT within 17 years to provide fish passage in compliance with the injunction's standards on all culverts "if the barrier culvert has 200 lineal meters or more of salmon habitat upstream in the first natural passage barrier";
- require WSDOT to provide fish passage in compliance with the injunction's standards on culverts "having less than 200 lineal meters of upstream salmon habitat at the end of the culvert's useful life, or sooner as part of a highway project, to the extent required by other applicable law";
- provide fish passage when a corrected culvert fails to provide such passage or a new culvert is added to the list of salmon barrier culverts; and
- provide tribes with sufficient notice of the salmon barrier culvert inventory, newly identified barrier culverts and correction activities "to monitor and provide effective recommendations for compliance with the [injunction's] requirements."

Pet.App. 236a-240a. The injunction, as the preceding summary indicates, specifies not only what must be done but also dictates the culvert remediation standards themselves.[5] The district court, finally, retains "continuing jurisdiction over this subproceeding for a sufficient period to assure that the Defendants comply with the terms of this injunction." Pet.App. 240a-241a.

The injunction fits seamlessly within not only the 2009 Ninth Circuit panel's reference to Jarndyce and Jarndyce but also its concern over federal district courts taking on the role of an administrative agency.

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[5] Paragraph 10 of the injunction thus provides:

> In carrying out their duties under this injunction, the Defendants shall design and build fish passage at each barrier culvert on the List in order to pass all species of salmon at all life stages at all flows where the fish would naturally seek passage. In order of preference, fish passage shall be achieved by (a) avoiding the necessity for the roadway to cross the stream, (b) use of a full span bridge, (c) use of the "stream simulation" methodology described in Design of Road Culverts for Fish Passage (WDFW, 2003) or Stream Simulation: An Ecological Approach to Providing Passage for Aquatic Organisms at Road-Stream Crossings (U.S. Forest Service, May 2008), which the parties to this proceeding have agreed represents best science currently available for designing culverts that provide fish passage and allow fluvial processes. Nothing in this injunction shall prevent the Defendants from developing and using designs other than bridges or stream simulation in the future if the Defendants can demonstrate that those future designs provide equivalent or better fish passage and fisheries habitat benefits than the designs required in this injunction.

Pet.App. 238a-239a.

It subjects Washington's sovereign management of its highway culverts to tribal oversight and federal judicial control for potentially decades. The district court's coercive relief exacts a heavy toll from both state sovereignty and public coffers. The latter toll is staggering. The district court's findings on the remediation costs for WSDOT projects, while spare, suggest that they could range between $658,639 (for projects completed before the 2009 trial) and an estimated $1,827,168 (state expert estimate identified in the 2013 findings). Pet.App. 170a. As of March 2009, over 800 culverts under state roads had more than 200 meters of anadromous salmon habitat upstream. Pet.App. 142a. Washington can expect, therefore, to spend in excess of one billion dollars under even a conservative assumption that actual per-culvert cost falls within the average of those amounts ($1,242,903), not considering inflation.

Washington's brief, like the opinion dissenting from en banc rehearing, summarizes the injunction's palpable overbreadth. Br. of Petitioner at 53-54, 56-58; Pet.App. 36a-41a. Amici States believe that several points bear particular emphasis. *First*, the district court's findings effectively attribute to state culverts salmon population impacts even though (1) those pculverts constitute a small percentage of all salmon barrier culverts in the case area and (2) no evidence exists as to the ultimate increase in returning harvestable fish that the State's billion-dollar plus expenditure will generate. Multiple factors – *e.g.*, ocean conditions, non-case area harvest and non-culvert-related habitat constraints – affect

available harvest. As the rehearing dissent observed, "[g]iven the significant cost of replacing barriers, . . . being forced to replace even a single barrier that will have *no tangible impact* on the salmon population is an unjustified burden." Pet.App. 39a. Obviously enough, respondents focused on state culverts because they perceived them in gross as easy targets. But the federal court's extraordinary power to issue coercive relief against States and their officials must be tailored narrowly to matching every element of the relief to an identifiable and proportionate benefit. The district court simply did not engage in the requisite cost-benefit analysis on a culvert-by-culvert basis. *See Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) ("The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, . . . or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation[.]") (citation omitted).

Second, Washington has not ignored, and is not ignoring, improving culvert fish passage. In 1997, the state legislature established the Fish Passage Task Force, and since then "the state agencies have identified fish passage barriers under their roads and have

accelerated the rate of correction of such barriers." Pet.App. 147a (admitted facts ¶ 3.89). Two of the state agencies had "a goal of correcting their barrier culverts by July 2016[,]" with "the level of funding" as "[t]he primary factor determining the rate at which the State can correct fish barrier culverts." Pet.App. 148a (admitted facts ¶¶ 3.90 and 3.92). The district court's failure to defer to the state process does not square with this Court's admonition in the seminal *Rizzo v. Goode*, 423 U.S. 362 (1976):

> When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs[.]' . . . The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.'" [¶] When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.

Id. at 378-79 (citations omitted); *see Lewis v. Casey*, 518 U.S. 343, 385-86 (1996) (Thomas, J., concurring) ("Broad remedial decrees strip state administrators of

their authority to set long-term goals for the institutions they manage and of the flexibility necessary to make reasonable judgments on short notice under difficult circumstances. . . . At the state level, such decrees override the 'State's discretionary authority over its own program and budgets and forc[e] state officials to reallocate state resources and funds to the [district court's] plan at the expense of other citizens, other government programs, and other institutions not represented in court.'") (citations omitted). The highly prescriptive and extraordinarily costly mandatory injunction here embodies precisely the evils counseled against by the Court in *Rizzo* and Justice Thomas in *Casey*. It largely strips Washington of the sovereign power not only to balance competing fiscal demands but also to determine how best to carry out its culvert remediation process without officious oversight by the federal judiciary. *See supra* 31 n.5.

Third, the equitable considerations related to application of *Sherrill* carry significant weight even if not a complete bar to the United States' claim. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), illustrates the point. There, this Court declined to recognize the availability of a laches as a complete defense to a Copyright Act claim for damages brought within the three-year limitation period in 17 U.S.C. § 507(b). Reversing the Ninth Circuit, it held:

> Laches . . . cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches

> may bar at the very threshold the particular relief requested by the plaintiff. And a plaintiff's delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing the "profits of the infringer . . . attributable to the infringement."

134 S. Ct. at 1967. It added later that "[i]n extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable." *Id.* at 1977; *see also id.* at 1978 ("Should Petrella ultimately prevail on the merits, the District Court, in determining appropriate injunctive relief and assessing profits, may take account of her delay in commencing suit."). Neither the district court in fashioning the sweeping injunction nor the Ninth Circuit in approving it gave any thought, much less weight, to the federal government's involvement in the state culvert system's development or the unexplained delay in asserting a treaty violation. Instead, conversely to the *Petrella* Ninth Circuit panel, the lower courts simply ignored the equitable considerations raised by Washington once they found waiver and estoppel unavailable as complete defenses.

The district court injunction, in sum, should be vacated even if this Court resolves the first two questions presented against Washington. Its overbreadth trenches deeply upon settled federalism-based limits on such relief, and the lower courts failed to consider the appropriate scope of relief in light of the equitable

factors identified with respect to Washington's waiver and estoppel defenses.

CONCLUSION

The Court of Appeals' judgment should be reversed.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General
STEVEN L. OLSEN
Chief of Civil Litigation
CLAY R. SMITH
Counsel of Record
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Email: clay.smith@ag.idaho.gov

Counsel for Amici Curiae States

March 2018