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 MODOC POINT IRRIGATION DISTRICT; MOSBY FAMILY TRUST; TPC, LLC; SPRAGUE RIVER WATER RESOURCE FOUNDATION, INC.; AND FORT KLAMATH CRITICAL HABITAT LANDOWNERS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a 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."

2. Whether the district court erred in dismissing the State's equitable defenses against the federal government where the federal government signed these treaties in the 1850s, for decades told the State to design culverts a particular way, and then filed suit in 2001 claiming that the culvert design it provided violated the treaties it signed.

3. Whether the district court's injunction violates federalism and comity principles by requiring Washington to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon and Plaintiffs showed no clear connection between culvert replacement and tribal fisheries.

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Pursuant to Supreme Court Rule 37 the Modoc Point Irrigation District; Mosby Family Trust; TPC, LLC; Fort Klamath Critical Habitat Landowners, Inc.; and Sprague River Water Resource Foundation, Inc. (collectively "*amici* Modoc Point" or "*amici*") respectfully submit this brief as *amici curiae* in support of Petitioner State of Washington.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici and their members consist of small and family-owned businesses that operate cattle ranches in Klamath County, Oregon. Their ranches are located either within the former Klamath Indian Reservation that was set aside under the 1864 treaty between the United States and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians (Klamath Tribes), 16 Stat. 707 (Klamath Treaty); or, in some cases, on lands outside of the former Reservation that were either ceded by the Klamath Tribes in the Klamath

[1] Counsel of record for all parties received written notice, either by letter or by email, at least ten days prior to the due date of the intention of *amici* to file this brief. Petitioner has filed a blanket consent to filing of *amici* briefs. The Solicitor General has provided a written consent to the *amici* Modoc Point. Respondent Tribes have also provided written consent to the filing of this brief. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel represent that no party to this case nor their counsel authorized this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Treaty or in the subsequent Cessions Agreement of 1901 (Cessions Agreement). 34 Stat. 325, 367; *see Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755-61 (1985) (*ODFW*).

Similar to the State of Washington's long-running "environmental servitude" litigation regarding the Stevens Treaties, *amici* are trapped in decades-long litigation with the United States in which the federal government asserts instream water rights to support "healthy and productive" habitat in support of the Klamath Tribes' non-exclusive treaty fishing rights.

While the Klamath Treaty and the Stevens Treaties both incorporate fisheries components they were expressed by different wording and were developed under different regional and historical contexts. Nevertheless, since the 1970s, litigation over the fisheries purposes in the Stevens Treaties and the Klamath Treaty has resulted in the treaties being increasingly entangled and melded, placing the State of Washington and *amici* in strikingly similar predicaments. The Ninth Circuit Court of Appeals' decision below reflects a culmination of this entanglement.

By ignoring the history and context surrounding the individual treaties, the Ninth Circuit adopted a singular focus on non-exclusive tribal fishing rights to the derogation of other primary purposes expressed in the various treaties, such as the cession of land as well as the development of agriculture and modern civilization.

In the decision below, the Ninth Circuit found that the Stevens Treaties impliedly promised that "the number of fish would always be sufficient to provide a 'moderate living' to the Tribes[,]" and expressly founded that holding in part based on its holding in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) *cert. denied*, 419 U.S. 1019 (*Adair II*). In *Adair II*, the Ninth Circuit held that the Klamath Treaty entitled the United States, as trustee for the Klamath Tribes, "the amount of water necessary to support [the Tribes'] hunting and fishing rights as currently exercised [on former reservation lands] to maintain the livelihood of Tribe members." *Id.* at 1414;[2] *see* Pet. App. 93a-94a. The holding in *Adair II* was in turn founded, in part, on this Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*), interpreting the Stevens Treaties. *See Adair II*, 723 F.2d at 1414-15. Relying on *Adair II* and this Court's reserved water right doctrine, the panel below erroneously implied a retroactive 'environmental servitude' burdening lands that were ceded in the Stevens Treaties, an approach that improperly rewrites the treaties; and, in doing so

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[2] To be clear, the scope of *Adair II* was limited to instream water rights on former reservation lands that the Klamath Tribes and its Trustee sold to the United States and now consist of the Klamath Marsh National Wildlife Refuge. *See*, *infra*. However, as explained below, the State of Oregon subsequently applied the *Adair II* decision to grant tribal instream water rights burdening *amici*'s private lands that were severed from the reservation as allotments under the General Allotment Act or as Termination Act sales.

ignores subsequent Congressional enactments. *See generally ODFW*, 473 U.S. 753; Brf. of Pet. at 15, 32.

The concept of an implied environmental servitude over ceded, allotted or sold lands is not supported by the text, context or history of the treaties. Further, it interferes with the attainment of the other equally important purposes established in the treaties. While the treaties included provisions to provide economic stability for the tribes, only part of the economic stability purpose was based on the continuation of a subsistence lifestyle. Another equally important economic component was the development of an agrarian lifestyle. Likewise, the treaty purposes also included the ceding of all right, title and interest of the tribes as to their claims on large expanses of land – cessions that were important to the United States in order to allow for the subsequent development of the ceded lands, unencumbered by aboriginal rights. *See* Brf. of Pet. at 7.

Amici submit this brief to request that the Court disentangle, reject and reverse the Ninth Circuit's rewrite of the applicable treaties. The Court should draw a bright line holding that environmental servitudes simply do not exist on ceded, allotted, and sold lands, or lands otherwise no longer owned by the tribes. Alternatively, the Court should find that the environmental servitude recognized by the Ninth Circuit is overbroad and unworkable because it fails to balance other primary treaty purposes. The Court should also make clear the availability of equitable defenses to those, such as the State of Washington and *amici*, who are subject to the claims by the United States for the

recognition and enforcement of tribal encumbrances over lands ceded by an Indian Tribe, or otherwise developed or sold in accordance with the various acts of Congress.

STATEMENT OF THE CASE

While *amici* adopt the State of Washington's Statement of the Case, *amici* present the following discussion to provide greater depth on the historical and procedural background relative to the body of Ninth Circuit precedents that underlie the decision below.

Article I of both the Stevens Treaties, and the Klamath Treaty, begin with unequivocal statements, varying slightly in form but identical in substance, declaring that the tribes "cede," "relinquish," and "convey" to the United States all their "right," "title," "interest" and "claim" to "all of the country" "claimed" or "occupied" by them. *See* Brf. of Pet. at 4 (citations omitted); 16 Stat. 707 (Klamath Treaty). In *ODFW*, this Court recognized that "general conveyances" which reference 'all right, title and claim' to the described property "unquestionably" carry with them whatever special rights the Indians previously possessed over such ceded lands. *ODFW*, 473 U.S. at 766.

However, some of the referenced treaties reserved "from the lands above ceded" a tract of land for the "use and occupation" of the aforesaid tribes, including the "exclusive right of taking fish" from the streams within (and, in some cases, bordering) the reservation. *See*,

e.g., 12 Stat. 951 (Treaty with the Yakima); 16 Stat. 707 (Klamath Treaty). In addition, the Stevens Treaties uniquely included a provision providing that it "is further secured to said [tribes] the right of taking fish at all usual and accustomed places, in common with citizens of the United States[,]" *see*, *e.g.*, 12 Stat. 951 (Treaty with the Yakima), a provision that is absent from the Klamath Treaty.

In 1905, in *United States v. Winans*, this Court held that the Stevens Treaties' securing of a right to fish at usual and accustomed places "was not a grant of right to the Indians, but a reservation of those not granted[,] thereby 'impos[ing] as a servitude upon every piece of land as though described therein.'" *United States v. Winans*, 198 U.S. 371, 381 (1905) (*Winans*). Following *Winans*, through the 1970s, this Court issued several decisions defining the scope of that servitude. For example, in addition to the access right recognized in *Winans*, in *Puyallup Tribe v. Dept. of Game of Washington*, this Court subsequently found that the servitude also preempted certain state fishing regulations. *Puyallup Tribe v. Dept. of Game of Washington*, 391 U.S. 392, 399 (1968)). Likewise, in *Fishing Vessel*, this Court narrowed the servitude by limiting treaty Tribes' to "a fair share of the available fish." *Fishing Vessel*, 443 U.S. at 685. Importantly, in *Fishing Vessel*, this Court affirmed the imposition of a firm ceiling on the treaty Tribes' "fair share" of fish at 50% in order to avoid "frustrating the treaty right of 'all other citizens of the Territory.'" *Id.* at 686. As this Court explained:

> [a]s in *Arizona v. California*, [373 U.S. 546 (1963)] and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.

Id.

In contrast to the Stevens Treaties, the Klamath Treaty did not reserve any off-reservation fishing rights. Rather, the Klamath Treaty provided that the Klamath Tribes would have "exclusive" fishing rights within the confines of the land reservation the United States set apart as a "residence" for them in the Treaty. The Klamath Reservation later became fragmented as lands were sold by the Klamath Tribes or allotted by the United States under the General Allotment Act. Eventually the balance of the Reservation was terminated and sold under the Termination Act. However, in the 1970s the Ninth Circuit declared that despite the sale and termination of the reservation lands, the Klamath Tribes retained non-exclusive hunting and fishing rights on some of the former Klamath Reservation lands. *See generally Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974) (*Kimball I*); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (*Kimball II*).

Historically, the Klamath Reservation initially consisted of 1.9 million acres the United States "set apart as a residence" for the Klamath Tribes from the 22 million acres that the Tribes ceded in the treaty. *See*

ODFW, 473 U.S. at 755; 16 Stat. 707 (Klamath Treaty). Subsequently, it was discovered that 617,000 acres of the land described in the Klamath Treaty had been erroneously excluded from the reservation. *ODFW*, 473 U.S. at 757. By agreement the Klamath Tribes ceded those acres under the 1901 Cessions Agreement, which was ratified by Congress in 1906. 34 Stat. 325, 367. This Court in 1985 expressly found that, since the 1901 Cessions Agreement lands were ceded with the same unequivocal language as the other 20 million acres that had been ceded free and clear of encumbrances under the Klamath Treaty, the Cessions Agreement's "general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed." *ODFW*, 473 U.S. at 766.

Of the lands remaining within the Klamath Reservation after the 1901 Cessions Agreement, approximately 25% passed under the Treaty and General Allotment Act (28 Stat. 388) from tribal to individual Indian ownership and were developed for irrigated agriculture. *Adair II*, 723 F.2d at 1398. Over time, many of these lands passed on to non-Indians. *Id.* In many cases, this agricultural development was undertaken with the assistance, design and direction of the U.S. Indian Irrigation Service in fulfillment of the Klamath Treaty, the General Allotment Act, and/or the 1901 Cessions Agreement. For example, in the 1901 Cessions Agreement the parties specifically agreed that some of the funds from the purchase would be expended to support agricultural practices on the remaining Klamath Reservation lands:

> [proceeds from the sale] shall be expended for the benefit of said Indians . . . in the drainage and irrigation of their lands, and the purchase of stock cattle for issue to said Indians, and for such other purposes as may, in his opinion best promote their welfare[.]

34 Stat. at 367-68.

As described in more detail in the Modoc Point *et al.*'s Brief in Support of Petitioner's Writ of Certiorari (Modoc Cert. Brf.), *amici* Modoc Point Irrigation District, TPC, LLC, Mosby Family Trust and numerous members of Fort Klamath Critical Habitat Landowners and Sprague River Resource Foundation own thousands of irrigated acres that were allotted, ceded or sold by the Klamath Tribes within the Wood River, Sprague River and Williamson River valleys of Klamath County, Oregon. Some of those lands, and the irrigation systems benefiting these lands, were developed and funded by the Indian Irrigation Service. Modoc Cert. Brief at 4-7. In addition, the United States purchased approximately 70% of the reservation lands from the Klamath Tribes under the Termination Act, and are now held as part of the Winema National Forest and the Klamath Marsh National Wildlife Refuge. *Id.* Following the termination of the federal land reservations designated for tribal purposes, disputes arose about what, if any, treaty-reserved fishing rights survived thereafter.

In *Kimball I*, the Ninth Circuit held that tribal members who withdrew from the tribe nevertheless retained non-exclusive treaty right to hunt, trap and fish

free of state regulations on the former reservation lands, including land purchased from the Tribe by the United States and now included within the national forest system or wildlife refuge system as well as on privately-owned land on which hunting, trapping, or fishing was permitted. *Kimball I*, 493 F.2d at 569.[3] In *Kimball II*, the Ninth Circuit clarified that the court construed the termination of the reservation to convert the Klamath Tribes' hunting and fishing rights from exclusive to non-exclusive (i.e., in common with other citizens), similar to the "usual and accustomed places" fishing rights secured by the Stevens Treaties as recognized by this Court in *Puyallup*. *Kimball II*, 590 F.2d at 774; *id.* at 776-77 (relying on several of this Court's precedents governing the Stevens Treaties).[4]

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[3] The Ninth Circuit based its decision, in part, on Public Law 280 and this Court's decision in *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-12 (1968) (*Menominee*). *See Kimball I*, 493 F.2d at 567-68. However, in *Menominee* this Court was interpreting the preservation of the right to hunt and fish free of state regulation on lands that had been transferred at termination to the Menominee Tribe pursuant to that termination agreement. In other words, following termination the Menominee Tribe owned the land that was formerly held in trust. In contrast, the Klamath Tribes and its trustee First National Bank, sold the land remaining in the reservation free of any encumbrances. Those parts acquired by the United States were later designated for national forest and wildlife refuge purposes. In light of this Court's later decision in *ODFW* that the exclusive right to hunt and fish could not survive off the reservation once the reservation was terminated (*id*. at 769-70), it is therefore questionable whether *Kimball I* remains good law.

[4] Subsequently, in *ODFW* this Court found that the Treaty did not provide for off-reservation fishing rights on lands the Klamath Tribes ceded or subsequently sold unencumbered in

Through roughly the mid-1970s, litigation concerning the fisheries purposes of the treaties focused on where the rights could be exercised and the extent to which states could regulate tribal harvests. However, on the heels of those disputes, a new brand of litigation emerged. The United States and tribes began to seek to have the courts recognize environmental servitudes for the support of the tribes' nonexclusive harvest rights against private landowners and the State of Washington.

In 1976, the United States initiated litigation against the State of Washington, arguing that the Stevens Treaties' fisheries purpose impliedly imposed a duty on the State to not impair fish habitat. Although the Ninth Circuit initially rejected such an "environmental servitude" concept because it had no basis in the treaties or precedent, *United States v. Washington*, 694 F.2d 1374, 1375, 1377 & n.7, 1380-82, 1387 (9th Cir. 1982), it subsequently vacated both that opinion and the district court's declaratory relief, while leaving open the possibility of future litigation on the subject. *See United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*).

Meanwhile, on September 29, 1975, the United States also sued private landowners in the Upper

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the 1901 Cessions Agreement. Because the lands the tribes sold following termination were also without encumbrance, it is questionable therefore whether the *Kimball* line of cases remain good law, or for that matter whether they are still an appropriate foundation for the *Adair II* decisions or whether *Adair II* itself is still good law.

Williamson River Basin of Klamath County, Oregon, including predecessors of TPC, LLC and the Mosby Family Trust, to establish an implied water right to support the Klamath Tribe's exercise of their non-exclusive hunting and fishing rights, as recognized in the *Kimball* cases. *See United States v. Adair*, 478 F. Supp. 336, 341 (1979) (*Adair I*). Relying on this Court's decision in *Winans*, the Oregon district court held that the United States, as trustee for the Klamath Tribes, was entitled to a water right with a "time immemorial" priority date to support the Klamath Tribes' non-exclusive hunting and fishing rights, stating: "if the preservation of these rights requires that the Marsh be maintained as wetlands and that the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessary to achieve those results." *Id.* at 345-46.

In *Adair II*, the Ninth Circuit affirmed the district court, but with a notable modification. Private landowners that were parties to the litigation, which included some of *amici*'s predecessors, expressed concern that the district court's ruling would subject the former Reservation lands to a "wilderness servitude" in favor of the Klamath Tribes. *Adair II*, 723 at 1414. Relying on this Court's decision in *Fishing Vessel*, the Ninth Circuit stated that it did "not interpret the district court's decision so expansively."

> We interpret [the district court's ruling to] confirm to the Tribe *the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the*

> *livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864*. We find authority for such a construction of the Indians' rights in the Supreme Court's decision in [*Fishing Vessel*]. [. . .] As limited by the "moderate living" standard enunciated in *Fishing Vessel*, we affirm the district court's decision that the Klamath Tribe is entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights.

Id. at 1414-15 (emphasis added).

As discussed in *amici*'s brief in support of Petitioner's writ of certiorari, following the Ninth Circuit decision in *Adair II*, and related litigation, the United States and Tribes filed claims in Oregon's Klamath River stream adjudication (Klamath River Adjudication) for instream water rights on practically all the fish-bearing streams flowing within or bordering the boundaries of the former reservation, including on streams flowing through *amici*'s private agricultural land. *See* Modoc Cert. Brf. at 1-8. Although that litigation has taken numerous twists and turns,[5] and remains ongoing, the State of Oregon's water right adjudicator ultimately found that *Adair II*'s incorporation of the "moderate living standard" from this Court's earlier decision in *Fishing Vessel* was "irrelevant" to the quantification of water rights and, instead, chose

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[5] *See United States v. Adair*, 187 F. Supp. 2d 1273, 1278 (D. Or. 2002); *United States v. Braren*, 338 F.3d 971, 976 (9th Cir. 2003).

to quantify the Tribal instream claims based on a "healthy and productive habitat" standard. *See id.* Under that standard, the United States, as trustee for the Tribes, was awarded instream water rights on streams throughout all the former reservation, including through *amici*'s private ranches, at levels that leave, in most years, little to no water available for *amici*'s *Winters*-based, Treaty-derived, 1864-priority agricultural water. Based upon this ruling, until the Klamath River Adjudication runs its course in the Oregon courts, the OWRD is regulating the water within the Klamath River Basin based on a "healthy and productive habitat" water right having "time immemorial" priority over all other treaty purposes. *See* Modoc Cert. Brf. at 2.

Amici are still engaged in litigation with the United States regarding the sweeping instream water rights the State of Oregon adjudicator awarded based on a novel "productive habitat" standard, which litigation includes challenges to that standard as well as to *Adair II* itself. Notably, in *Adair II*, the Ninth Circuit expressly rejected what it referred to as a "wilderness servitude" requiring habitat restoration to 1864 levels, relying on this Court's decision in *Fishing Vessel*. Yet, in the decision below, the Ninth Circuit relied on *Adair II* to affirm the district court's injunction requiring the State of Washington to replace hundreds of culverts, built decades ago, in order to restore fish habitat to undefined historical levels in the hopes of achieving undefined increases in fish populations. Expressly relying on *Adair II* and the federal reserved water right

doctrine, the Ninth Circuit held that "even in the absence of an explicit promise, we . . . infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. The panel effectively found that non-exclusive treaty fishing rights impliedly carry with them environmental servitudes over lands no longer owned by the Tribes.

Notwithstanding the long-standing assurance by the Ninth Circuit to private irrigators that its decision in *Adair II* did not require restoration of unrealistic pre-treaty environmental conditions, *in the decision below*, the Ninth Circuit implied the existence of just such an environmental servitude into the Stevens Treaties.

SUMMARY OF THE ARGUMENT

This Court has previously underscored that the treatment of the Stevens Treaties and Klamath Treaty fisheries language, as with all treaties, must be based on the historical record and considered in the context of the treaty negotiations to discern what the parties intended by their choices. This review of parties' intent and purposes is central to the interpretation of the treaties. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (*Mille Lacs*). The decision below reflects a trend within the Ninth Circuit of improperly focusing on one treaty purpose to the derogation of other treaty purposes.

Two long standing principles frame treaty interpretation: first, treaties are to be liberally construed in favor of Native Americans, and, secondly, they are to be interpreted in a way to reserve to the Tribes all rights necessary to effectuate the purpose[s] of the Treaty. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 n.2 (1968); *Winters v. United States*, 207 U.S. 564, 575-77 (1908) (*Winters*). As an irreducible minimum the treaties are to be interpreted in a manner that gives full effect to all treaty purposes, not a singular focus on one purpose to the injury of the other provisions of the treaties. Likewise, it is a long-standing canon of treaty interpretation that wording of treaties with the Indians are not to be construed in a manner to their prejudice. *Menominee*, 391 U.S. at 406 n.2. This canon is equally applicable to interpretations that serve to elevate one treaty purpose to the prejudice of the others.

In the case of the Stevens Treaties and Klamath Treaty, the federal government is actively seeking to have the courts rewrite treaty purposes and obligations by imposing an environmental servitude that threatens to significantly affect management over lands

previously allotted,[6] ceded,[7] or sold by the either the tribes[8] or its members without encumbrance. The environmental servitude recognized by the panel below is not supported by the treaties' text, context and history. Further, it also tramples upon other treaty purposes, including adoption of an agrarian way of life and the ceding of lands unencumbered. As a result, the panel's decision effectively contradicts the express terms of the treaties, Congressional mandates and the prior rulings of this Court. For these reasons the ruling should be reversed.

The Court should hold that environmental servitudes simply do not exist on lands ceded, allotted, or sold by an Indian tribe, or on lands otherwise no longer

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[6] Allotted lands represent those lands that were allotted to individual tribal members under a treaty or under the provisions of the General Allotment Act (24 Stat. 388) and amendments thereto. Under this Court's holding in *U.S. v. Powers*, 305 U.S. 527, 532 (1939), the allotment carried with it a share of the reservation's reserved water right. Some of the *amici*'s members represent Indian successors to these allotments either through family member estates or through purchase. Other *amici* members are non-Indian purchasers of allotted lands.

[7] As used herein the word "ceded" represents those lands ceded under an Indian treaty or with respect to the Klamath Indian Tribe, it also refers to the lands covered under the 1901 Cessions Agreement (ratified by Congress Act of June 21, 1906, ch. 3504, 34 Stat. 325, 367). *See ODFW*, 473 U.S. at 760-61.

[8] The Klamath Termination Act (68 Stat. 718) allowed each adult member of the Klamath Tribe an opportunity to withdraw from or remain in the tribe. Once a member withdrew they were entitled to a share of the tribal assets, with former reservation lands to be sold to provide the funds sufficient to pay the withdrawing members. The lands sold are referenced herein as the lands "sold by the tribe."

owned by the tribe, for two primary reasons. First, the Court should hold that such implied servitudes do not exist because they are not expressly reserved in the applicable treaties and they are not supported by any *implied* reserved right doctrine endorsed by this Court. Second, the Court should hold that recognition of such a servitude is inconsistent with other purposes expressed in the applicable treaties and subsequent Congressional actions and policies. Alternatively, even if the Court were to find that an environmental servitude may be implied as a component of non-exclusive treaty fishing rights, the Court should hold that equitable defenses are available to litigants like the State of Washington and *amici*, to limit the remedies available to the United States when seeking to establish and enforce treaty rights on behalf of Indian tribes.

ARGUMENT

A. There is No Legal or Historical Basis for Implying an Environmental Servitude on Former Tribal Lands.

The panel below conceived of the claimed right of an environmental servitude over ceded lands as an implied subcomponent of the expressly reserved non-exclusive Treaty right to *access* and *harvest* fish. It is not. The claimed implied environmental servitude over ceded or sold lands cannot be legally, or logically, implied from the express right to access and harvest fish. In order for such an intrusive encumbrance to exist over the millions of acres the various tribes ceded,

allotted or sold, the servitude had to of been expressly reserved. This Court's precedents preclude the creation of rights or servitudes that are not reserved by an Indian tribe in a cession or sale of land. *ODFW*, 473 U.S. at 768-69. Accordingly, this Court should reverse the decision below and hold that non-exclusive treaty-reserved fishing rights do not carry with them the distinct right for an environmental servitude, bearing similarities to a conservation easement, over lands the Tribes ceded or sold, or are otherwise no longer part of a tribal land reservation.

The panel's decision rests on a misguided understanding and application of this Court's federal reserved water right doctrine. Relying on its own decision in *Adair II* and this Court's decision in *Winters*, the panel found that it was appropriate to "infer" a promise that the State of Washington would not unduly impair fish habitat in order to "support the purpose" of the Stevens Treaties. Pet. App. 93a-94a (citations omitted). The federal reserved water right doctrine however lends no support to the panel's implication of such an environmental servitude.

The federal reserved water right doctrine rests on this Court's rare, and carefully-reached, *assumption* that Congress intends to reserve the amount of water necessary to fulfill the primary purpose of a federal land reservation. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other

areas, that the United States intended to reserve the necessary water."). As water rights in the Western United States are traditionally appurtenant to land, this assumption of Congressional intent makes sense when Congress reserves a tract of land for a primary purpose that necessarily requires water for its fulfillment. *See, e.g.*, *Winters*, 207 U.S. at 577; *Arizona v. California*, 373 U.S. 546, 596-601 (1963) (*Arizona*); *Cappaert v. United States*, 426 U.S. 128, 143-46 (1976) (*Cappaert*).

In *Winters*, *Arizona* and *Cappaert*, the implied water rights were applied to lands that were part of a federal reservation, upon which appurtenant rights could legally, and logically, attach. For example, *Winters* recognized treaty agricultural water rights necessary to achieve the agricultural purposes of the Fort Belknap Indian Reservation; *Arizona* recognized that agricultural water rights were essential and appurtenant to Indian Reservations; and *Cappaert* recognized a right to maintain the level of a pool within a National Monument. None of these cases are relevant to the claimed right of an implied environmental servitude over lands that are neither owned by an Indian tribe, nor presently reserved for a tribal purpose by the United States.

Unlike the legal and historical foundations that underlie this Court's reserved water right doctrine, there is no support in the context or history of the Stevens Treaties to assume that the parties intended to encumber ceded, allotted or sold lands with an environmental servitude for the propagation of fish. Indeed,

at the time of the treaties, it is unlikely that such a construct would have even been legally-cognizable – much less in the contemplation of the parties.[9] Thus, in the absence of the express reservation of such a servitude, there is no basis to judicially imply one, *ad hoc*, over lands ceded or sold by an Indian tribe. *See ODFW*, 473 U.S. at 766-67, 769-70.

That the Ninth Circuit veered off on a tangent grounded in this Court's federal reserved water right doctrine is, unfortunately, not surprising due to its misguided decision in *Adair II*. While the dissenting opinion in the Ninth Circuit's denial of *en banc* review in the present case regarded *Adair II* to be "unremarkable" in holding that the Klamath Tribes were entitled to water rights "on their reservation[,]" in fact that is not what the Ninth Circuit held at all. Pet. App. 26a. At the time *Adair II* was decided, the Klamath Tribes had no reservation. Rather, 25% of the reservation had been allotted and subsequently transferred to Klamath Indians and non-Indians alike, to be used for irrigated agriculture. Most of the remaining lands were subsequently purchased by the United States from the tribes for inclusion into a national wildlife refuge and a national forest. *Adair II*, 723 F.2d at

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[9] The legal construct advanced by the United States and Tribes in this case might be legally-cognizable as a conservation easement today. However, the Uniform Conservation Easement Act, which has been adopted by approximately half the states, was not drafted until 1981. *See* Burnett, King, The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee, 2013 Utah L. Rev. 773. Such a legal construct would not have been legally-cognizable at the time of the Stevens Treaties.

1419. Given there was no tribal reservation at the time of the *Adair II* decision, the Ninth Circuit did not imply a water right attached an Indian reservation. Rather, the court described the Klamath Tribes' implied water rights to support their hunting and fishing rights to be "virtually unique" because the court found that the rights arose from the Tribes' non-exclusive hunting and fishing rights themselves as opposed to being attached to the tribes' ownership of land or a Congressional land reservation. *Id.* at 1418 n.31.

The Ninth Circuit found it inconsequential that Congress terminated the Klamath Tribes' reservation and purchased it for a national forest and wildlife refuge because the court had previously found, in *Kimball I*, that the Tribes' treaty fishing and hunting rights nevertheless persisted as non-exclusive rights, in common with other citizens, over those former reservation lands. *Kimball I*, 493 F.2d at 569. Thus, presumably because the Ninth Circuit's *Kimball* decisions construed the Stevens Treaty-Tribes' non-exclusive fishing rights to be analogous with those of the Klamath Tribes, the panel below found no impediment in its caselaw to finding that the Stevens Treaties implied reserved environmental servitudes over lands ceded in the Stevens Treaties. In *Adair II*, the Ninth Circuit found that the Klamath Tribes' "hunting and fishing rights carry with them an implied reservation of water rights" that were "virtually unique," and which allowed them "to prevent other appropriators from depleting the streams" where it is necessary to protect the tribes' "current exercise" of treaty fishing rights. *Adair II*, 723

F.2d at 1408, 1414-15 & n.31. Similarly, in the decision below, the Ninth Circuit found that the Stevens Treaties tribes' fishing rights carry with them an implied right to prevent the State of Washington from blocking fish habitat with culverts to support the tribes' treaty fishing rights.[10]

Both the decision below, and *Adair II*, reflect a view held by the Ninth Circuit that this Court's federal reserved water right doctrine permits courts to infer implied servitudes over ceded, allotted or sold lands when the servitudes may be construed as being supportive of non-exclusive treaty fishing rights. This Court should reject the Ninth Circuit's reasoning, expressed in *Adair II* and then extended further in the decision below, because such rights are neither supported by the treaties nor this Court's precedents. The Court should hold that such environmental servitudes are simply not encompassed within the non-exclusive treaty fishing rights held by the various tribes over lands the tribes ceded or sold.

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[10] Indeed, in *Adair II*, the Ninth Circuit foreshadowed future litigation regarding environmental servitudes for the support of non-exclusive treaty fishing rights, commenting: "[f]or a thoughtful argument that this case *understates* the scope of tribal reservations by treaty of an interest in an environmentally sensitive resource, see Comment, *Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries*, 61 Ore. L. Rev. 93 (1981)." *Adair II*, 723 F.2d at 1415 n.23 (emphasis added). In other words, in *Adair II*, the Ninth Circuit was aware of the environmental servitude concept but rejected the broad view of implying environmental servitudes, yet, in this case, seemingly embraced such an approach.

This Court's precedents are clear that the Stevens Treaties' tribes' non-exclusive fishing rights encompass a special *right to access* usual and accustomed places and a special *right to harvest* fish free of state regulation as to methods and limits, except as necessary for conservation. The express treaty right to fish is, fundamentally, about harvesting fish free of state regulation; the right is not, under any rational conception or interpretation, concerned with restricting state and private use or development of ceded or sold lands or lands that are reserved for other, non-tribal purposes. The claimed right of an environmental servitude implicates private property rights and the state's traditional role over a vast array of policy areas, including land use and the development of infrastructure as basic as the roads at issue in this case. The Court should hold that an environmental servitude is not an implied component of the kind of non-exclusive treaty rights to access and harvest fish that are at issue in this case.

B. Implication of an Environmental Servitude Improperly Rewrites the Balance of Purposes Expressed in the Various Indian Treaties.

This Court has long recognized that treaties with the various Indian tribes are to be interpreted in a manner that would be consistent with reservation of the land for the use of the tribe. As such, the treaties carry with them a promise that the United States would support the various purposes of the treaties and not single out one purpose to the injury of the others.

Accordingly, even if the Court were to consider implying an environmental servitude to fulfill the fisheries purpose of the Stevens Treaties, that implied servitude would run afoul of the text and historical context of the treaties; as well as Congress' subsequent revisions, by elevating the fisheries purposes over other primary treaty purposes. The Ninth Circuit adopted a singular fisheries'-centric focus over all other treaty purposes. By narrowly focusing on the Stevens Treaty tribes' non-exclusive fishing rights, the court thereby ignored the other treaty purposes – *e.g.*, removing tribal encumbrances on the ceded lands and, in many cases, the adoption of an agrarian lifestyle.[11] The Court failed to

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[11] It is likely that one of the reasons the Ninth Circuit frequently ignores competing primary treaty purposes is because of this Court's decision in *Winans*, *supra*. *Winans* suggested that, because the off-reservation fishing right "secured" in the Stevens Treaties was a "reservation of [rights] not granted[,]" the tribes' rights were be construed as being essentially a retained aboriginal right. Relying on *Winans* in *Adair II*, the Ninth Circuit found that the implied water rights supporting the Klamath Tribes' hunting and fishing rights was, therefore, entitled to a "time immemorial" priority date, elevating it above the primary purpose expressed in the Klamath Treaty of developing agriculture, which the Ninth Circuit found was entitled to an 1864 priority date, based on the date of the Klamath Treaty. *Adair II*, 723 F.2d at 1412-14. The Ninth Circuit did so despite the fact that the Klamath Treaty provided: "the following-described tract, *within the country ceded by this treaty*, shall, until otherwise directed by the President of the United States, *be set apart as a residence* for said Indians, [and] held and *regarded as an Indian Reservation*." 16 Stat. 707 (emphasis added). Similarly, the Stevens Treaties provide that the "right of taking fish . . . *is further secured to* said Indians *in common with all citizens* of the Territory." *See* 10 Stat. 1132. In both cases, however, the plain text indicates that rights established for the tribes were, in fact, granted by the United

give meaning and effect to such other treaty purposes and in doing so likewise failed to adopt a sensible construction that avoids the absurd result that negated other equally important treaty purposes. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345-46 (1998) (*Yankton*).

In *Washington*, the Ninth Circuit opined that even if the treaty did not expressly promise that the treaties would secure an adequate supply of fish forever, it would infer such a promise. Pet. App. 93a. From that inferred promise, it then extrapolated into the treaties an implied environmental servitude to achieve an undefined and open-ended quantity of fish.

In doing so, the Ninth Circuit effectively amended away the treaty provision wherein the tribes "cede, relinquish, and convey . . . of all their right, title and interest in and to the lands . . . " It further rewrote the treaty by retroactively imposing an implied environmental servitude burden and a restoration requirement over these same ceded lands.

As a foundation for inferring both the promise and the environmental servitude, the court relied upon *Winters*, wherein in the face of silence in the treaty which created the Fort Belknap Reservation, this Court inferred a reservation for water sufficient to

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States following the *complete* cession of land, and the *complete* extinguishment of aboriginal title. However, this Court has previously clarified that the rights in *Winans* are to be construed in the tenor of all the purposes of the treaty. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 n.16 (1945).

support the treaty's agricultural purposes. *Winters*, 207 U.S. at 576.

Since *Winters*, this Court has recognized that a federal reservation of land carries with it the right to use water as necessary to serve the reservation's purposes. However, this Court has also recognized that the federal right, "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *New Mexico*, 438 U.S. at 700.

Winters has long been the standard upon which tribal reserved water rights were implied to support tribal purposes. However, seldom have the courts been faced with choosing between treaty purposes as is presented in the current case. In the present case the Ninth Circuit not only inferred a promise of an environmental servitude to support fisheries over other purposes, it also inferred a promise that the number of fish and game would always be plentiful enough to meet the Washington tribes' fishery harvest aspirations. Pet. App. 94a.

The conflict is not in the treaty language but in the failure to even attempt to strike a balance in how multiple co-equal treaty purposes are to be achieved. The Ninth Circuit simply chose to ignore the other essential purposes expressed in the treaties. Further, it ignored that, subsequent to the treaties, Congress expressly modified the treaties through allotment policies, agricultural development, and termination. The Ninth Circuit's rewrite of the treaties serves to impugn the Congressional intent underlying the subsequent

cession, allotments, developments, and the sale or termination of reservation lands. *See ODFW*, 473 U.S. at 720*; Brendale v. Yakima* 492 U.S. 408, 422-24 (1989) (*Brendale*); *Yankton*,[12] 522 U.S. at 345-47 (1998). The concept of an implied habitat protection servitude over ceded or allotted lands ignores, and effectively interferes with, the attainment of the agricultural purposes, as well as the other essential purposes expressed in the treaties.

As this Court recognized in *Fishing Vessel*, "it simply was not contemplated that either party [to the Treaty] would interfere with the other's fishing rights. The parties accordingly did not see the need, and did not intend, to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen." *Fishing Vessel*, 443 U.S. at 668. Although the Court was referring to conflict between Indian and non-Indian fishing rights, the statement is equally applicable to conflicts between Indian fishing rights and post-treaty settlement and development, water use, and a host of other potential land use and natural resource conflicts across the lands ceded by the tribes through treaties. In other words, the parties similarly never intended one purpose would negate or diminish the other expressed purpose.

Though poorly defined, the Ninth Circuit's construction of the Stevens Treaties threatens to establish

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[12] For example, in the Cessions Agreement Congress expressly approved development of irrigation and drainage project. (Cessions Agreement 34 Stat. at 368), actions inconsistent with the approach the Ninth Circuit has taken in the present case.

a precedence for *de facto* conservation or environmental easements over streams capable of supporting tribal fisheries. It has the potential to be extrapolated to any treaty reserving a right to hunt, fish or gather. The court's construction is not only potentially far-reaching, it is also in contravention of this Court's prior decisions in *ODFW*, *Brendale*, and *Yankton*. While these cases involved treaties other than a Stevens Treaty, it illustrates the far-reaching conflicts the Ninth Circuit's language creates with the other treaties.

In *ODFW* this Court held that when tribal land is sold or ceded in a "general conveyance" the conveyance unquestionably carries with it all appurtenant fishing rights. *Id.* at 766. *See Mille Lacs*, 526 U.S. at 201-02 (the 1864 Treaty provided the Tribe the exclusive right of taking fish in the streams and lakes, included in the reservation . . . that right could not consistently survive off the reservation on the lands the Tribe had sold) (*see also Klamath and Modoc Tribes v. U.S.*, 436 F.2d 1008, 1020 (1971)) (sales of tribal lands were not encumbered by any restrictions).

Of particular relevance to the *amici*, is that contemporaneously with the Klamath Termination Act, and in preparation for sale of tribal lands the Interior Department Solicitor addressed the same issue – the impact of cession or sale on the treaty fishing rights – and likewise concluded that:

> "the fishing rights of the members do not continue with respect to land which are sold

> because such sold land is no longer retained tribal land or a part of the Indian reservation. The Klamath Tribe was given only exclusive fishing rights within the reservation. In the opinion of this office, it is considered that it was the intent of Congress that the land which is sold should be conveyed in fee simple and not be impressed with an encumbrance in the nature of fishing rights in favor of remaining tribal members."

Opinion of Solicitor May 20, 1955 (62 I.D. 186, 201-202 M-36284, pp. 1651, 1677)) (http://thorpe.ou.edu/sol_opinions/p1651-1675.html and http://thorpe.ou.edu/sol_opinions/p1676-1700.html) (last accessed 1-20-18). (Solicitor Opinion).[13]

In other words, lands that were allotted to a tribal member or, otherwise sold or ceded by an Indian tribe were divested at termination free and clear of any appurtenant fisheries rights, restrictions, servitudes or

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[13] The canons of construction applicable in Indian law provide that statutes are to be construed liberally in favor of Indians, and that ambiguous provisions interpreted to their benefit, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). However, these general canons do not survive in the face of clear Congressional intent to the contrary. *Rosebud Sioux Tribe*, 430 U.S. 584, 587 (1977). In administering the Klamath Termination Act, the Solicitor's opinion as to the interpretation of the legislation is also subject to the canon that deference be afforded under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-45, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). While the canons may intersect, in at least the Ninth Circuit the courts have held that the liberal construction canon must give way to agency interpretations of a statute that deserve *Chevron* deference. *Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997).

encumbrances unless expressly reserved. Yet, notwithstanding this Court's clear precedence in *ODFW*, and the Interior Department's understanding at the time of the sale of the former reservation under the Klamath Termination Act, the Ninth Circuit's decision below threatens to impose over these same ceded or sold lands an implied environmental servitude. A view that runs counter to the plain language and historical context such that it would eviscerate Congressional express purposes in the ceding, allotment and sale of the lands. *See Yankton*, 450 U.S. at 346.

As noted earlier, this Court has previously ruled that when an Indian tribe cedes lands, it does so free of all encumbrances except those expressly reserved. In *ODFW*, this Court explained that:

> The Treaty language that ceded that entire tract . . . stated only that the Tribe ceded "all their right, title, and claim" to the described area. Yet that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation. Presumptively, the similar language used in the 1901 Cessions Agreement should have the same effect.

ODFW, 473 U.S. at 766.

While in *ODFW*, this Court acknowledged that the language ceding lands in the 1901 Cessions Agreement was somewhat analogous to the off-reservation right "of taking fish at all usual and accustomed places, in common with citizens of the Territory" (*Id.* at n.15) that is found in the treaties addressed in *Puyallup*, it

nonetheless found that with respect to the ceded lands that the fishing rights did not survive on the ceded lands after the cession. *ODFW*, 473 U.S. at 769-70.

However, in the present case the Ninth Circuit implied from the Stevens Treaties' off-reservation rights to access and fish at usual and accustomed fishing places, an additional environmental servitude applicable from the mouth to the headwaters of every stream that supports or contributes to the support of anadromous Columbia River fish – whether on or off reservation – is to impose a servitude on ceded, as well as allotted or tribal sold lands, in a manner that conflicts with prior Supreme Court precedence.

The Ninth Circuit has retroactively imposed a potentially far-reaching encumbrance that is counter to the express cessions within the treaties; injures one or more of the primary purposes within the treaties; creates a conflict with past Congressional actions; and conflicts with the rulings of this Court. The reach of the Ninth Circuit's opinion touches on not just the State of Washington's road culverts, rather it extends to all lands and activities within the Columbia River Basin including all private, tribal and public land activities on ceded lands, allotted lands, and current and former reservation lands.

The courts need to be mindful and consider all the treaty purposes in total in determining what, if any, implied rights should be imputed. When that principle is applied here, it is clear that the parties to the treaties could not have been intended or contemplated

such a far-reaching servitude. It threatens to subject any land use activity sanctioned by the State of Washington, or for that matter a private party, that might potentially affect fish populations, to claims for violation of the tribes' treaty rights. *Amici* urge the Court to reject the Ninth Circuit's far-reaching and retroactive rewriting of the various treaties.

C. The Ninth Circuit's Decision Frustrates Justifiable Expectations on Former Tribal Lands.

This case presents an important question regarding the application of equitable defenses when parties such as the State of Washington and *amici* are subjected to claims by the United States seeking to establish tribal rights over former tribal lands. Frequently, in such litigation, the United States seeks refuge in Ninth Circuit precedents broadly stating that "laches or estoppel is not available to defeat Indian treaty rights." *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983). The Court should overrule this line of Ninth Circuit precedent and hold that the *remedies available* to the United States and/or tribes to enforce treaty rights may be limited by equitable defenses. *See* Brf. of Pet. at 29, 47.

Like the State of Washington, *amici* have been treated extraordinarily unfairly by the federal government, in its prosecution of litigation seeking to enforce treaty obligations to the detriment of *amici* and its members. As explained *supra*, the United States allotted former Klamath reservation lands for agricultural

purposes to the various tribal members in order to achieve the agricultural development goals of the treaty, as well as in fulfillment of the General Allotment Act. Over time, the United States, as trustee of the tribes, then authorized sale of many of those allotments to non-Indians such as *amici* and their members, or their predecessors. Congress furthered those policies by authorizing irrigation projects (*e.g.*, Modoc Point Unit, Sand Creek Unit, Agency Unit and Spring Creek Unit) that are now owned by *amici* and their members. For the federal government to now seek to destroy the productivity and value of those agrarian lands and irrigation projects, by denying them water in an attempt to benefit the non-exclusive tribal fishing rights, is inequitable and unfair.

As reflected in the Interior Solicitor memos discussed herein and in *amici*'s brief in support of certiorari, the federal government further promoted *amici* and their predecessors to rely on the federal government's support for keeping previously allotted lands in productive use. *See* Modoc Cert. Brf. at 17-18, 23. The federal government expressly promised it would support those lands having water rights under the authority of the Klamath Treaty. Nevertheless, like the State of Washington, *amici* have heretofore been expressly precluded in the Klamath Water Adjudication from raising equitable defenses to limit the remedies available to the United States to fulfill the federal government's trust obligations to the Klamath Tribes on the exact same basis as the State of Washington was prohibited in this case.

The Ninth Circuit's imposition of an environmental habitat servitude and restoration requirement on agrarian developments involving former Reservation lands or on developments on ceded lands is exactly the disrupting type of action that this Court sought to avoid in *City of Sherrill,* and to which it applied an equitable balance. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005).

The Court should hold that equitable defenses are available in cases of this nature, where the federal government seeks to have courts recognize and enforce novel implied treaty rights on behalf of Indian tribes that disrupt long-held, justifiable expectations concerning issues such as land use and private property rights.

CONCLUSION

The Ninth Circuit improperly implied an environmental servitude over lands long ago ceded by the various tribes. In doing so it adopted a singular focus on one of the treaty's purposes to the injury of those who relied upon the other treaty purposes and is counter to the subsequent rulings by this Court as well as

subsequent Congressional enactments. The Court should reverse the decision of the Ninth Circuit below.

Respectfully submitted,

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March, 2018.