

**In The
Supreme Court of the United States**

—◆—
STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF OF MODOC
POINT IRRIGATION DISTRICT;
MOSBY FAMILY TRUST; TPC LLC;
SPRAGUE RIVER WATER RESOURCE
FOUNDATION; AND, FORT KLAMATH
CRITICAL HABITAT LANDOWNERS,
INC. AS AMICI CURIAE IN SUPPORT OF
PETITIONER'S WRIT OF CERTIORARI**

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**MOTION FOR LEAVE TO
FILE BRIEF *AMICUS CURIAE***

Amici curiae Modoc Point Irrigation District; Mosby Family Trust; TPC LLC; Sprague River Water Resource Foundation; and, Fort Klamath Critical Habitat Landowners, Inc., respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). *Amici* timely notified counsel of record for all parties that it intended to submit the attached brief more than ten days prior to filing. Counsel for petitioner has consented to the filing of this brief. Not all Counsel for respondents have provided a position on *amici's* request for consent, necessitating the filing of this motion.

Amici and their members consist of small and family-owned businesses that operate cattle ranches in Klamath County, Oregon, which ranches are located either within the former Klamath Indian Reservation that was created under the 1864 treaty between the United States and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, or on other lands ceded by the Klamath Tribes.

This case presents an issue of considerable practical importance, and *amici curiae* are particularly well-suited to provide additional insight into the broad implications of the decision below upon landowners and land management activities across the country.

Similar to the State of Washington in *State of Washington v. United States*, *amici* are trapped in a decades-long litigation with the United States over the

reach of the fisheries component of an Indian treaty as it applies to the relative rights to water and whether the fisheries component also imposes productive habitat requirements on landowners.

With respect to both the Klamath Treaty and the Washington treaties at issue in the current case, the federal government is actively seeking to rewrite treaty obligations to impose an environmental servitude that will significantly affect management over lands previously allotted, ceded, or sold by the tribes or its members without encumbrance.

Amici's experiences not only underscore the practical implications of the Ninth Circuit's decision but also demonstrate that *amici* are exceptionally well-positioned to elaborate on these implications for the Court's benefit. *Amici* therefore seeks leave to file the attached brief of *amicus curiae* urging the Court to grant the petition.

DATED: September 20, 2017

Respectfully submitted,

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Modoc Point Irrigation District; Mosby Family Trust; TPC, LLC; Fort Klamath Critical Habitat Landowners, Inc.; and, Sprague River Water Resource Foundation, Inc., respectfully submit this brief as *amici curiae* in support of Petitioner’s writ of certiorari.¹



INTERESTS OF *AMICI CURIAE*

Amici and their members consist of small and family-owned businesses that operate cattle ranches in Klamath County, Oregon, which ranches are located either within the former Klamath Indian Reservation created under the 1864 treaty between the United States and the Klamath and Modoc Tribes and Ya-hooskin Band of Snake Indians (“Klamath Tribes”) (16 Stat. 707) (“Klamath Treaty”); or, on other lands ceded by the Klamath Tribes.

Similar to the State of Washington in *State of Washington v. United States*, 853 F.3d 946 (2017) *order denying rehearing en banc* 2017 WL 2193389 (May 19, 2017), *amici* are trapped in decades-long litigation with the United States over the reach of the fisheries

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 consented to the filing of this brief. Counsel for respondents did not provide a position on *amici*’s request for consent. 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.

component of an Indian treaty. In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 419 U.S. 1019, the Ninth Circuit found that the Klamath Treaty inferred a time immemorial water right to support hunting and fishing rights. *Id.* at 1414. The *Adair* court prioritized the water for fisheries with the caveat that the actual application and quantification was left to the State of Oregon’s pending adjudication. *United States v. Braren*, 338 F.3d 971, 972-73 (9th Cir. 2003). While the adjudication is pending in the Oregon courts, at the administrative level, the Oregon Water Resources Department (“OWRD”) adopted the federal government’s arguments that Indian treaties which reserve hunting and fishing rights to Indian tribes also impliedly guarantee the water necessary to provide “healthy and productive” habitat. Notwithstanding that, in *Adair*, the Ninth Circuit sought to assure private irrigators that its decision did not recognize a “wilderness servitude” in favor of the Klamath Tribes. *Adair*, 723 F.2d at 1414-1415. Until the adjudication runs its course in the Oregon courts, the OWRD is regulating² the water within the Klamath River Basin based on “healthy and productive habitat” water rights having priority over all other uses.³

² Under ORS 539.170, while the Klamath River Adjudication is pending in the State of Oregon’s circuit court, the division of water from the Klamath River is made in accordance with the order of the OWRD Director.

³ See also https://www.oregon.gov/owrd/ADJ/ACFFOD/KBA_ACFFOD_05334.PDF (Proposed Order by ALJ for Wood River; see pp. 21-22) (last visited September 15, 2017); https://www.oregon.gov/owrd/ADJ/ACFFOD/KBA_ACFFOD_05334.PDF (Final Order

With respect to both the Klamath Treaty and the Stevens Treaties at issue in the current case, the federal government is actively seeking to have the courts rewrite treaty obligations to impose an environmental servitude that threatens to significantly affect management over lands previously allotted,⁴ ceded,⁵ or sold by the tribes⁶ or its members without encumbrance. In the Ninth Circuit decision below, the panel ignored its own wilderness servitude language in *Adair* and instead interpreted the case to recognize an “inferred . . . promise of water sufficient to ensure an adequate supply of game and fish.” Pet. App. 93a.

by Adjudicator for Wood River adopting in part the Proposed Order) (last visited September 15, 2017).

⁴ 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, 59 S. Ct. 344 (1939), the allotment carried with it a share of the reservation’s reserved water right. *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981).

⁵ 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 McLaughlin Agreement (Cession Act of 1901) (ratified by Congress Act of June 21, 1906, ch. 3504, 34 Stat. 325, 367). *See ODFW v. Klamath Indian Tribe*, 473 U.S. 753, 760-61, 105 S. Ct. 3420 (1985).

⁶ 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.”

Modoc Point Irrigation District (“Modoc Point”) is a special district organized under Oregon Revised Statute Chapter 545. The District provides irrigation services for 57 Indian and non-Indian owners of approximately 4,610 acres of mostly allotted lands within the boundaries of the former Klamath Indian Reservation. Modoc Point is the successor to the Modoc Point Unit of the Klamath Indian Irrigation Project that was designed, funded and constructed by the United States Indian Irrigation Service⁷ between 1890 to 1920 to provide irrigation on the reservation. (See 35 Stat. 798-99) (authorizing Secretary of Interior to assist with the construction, operation, and maintenance of water projects on allotted lands). The Chiloquin Dam and other irrigation facilities in the Modoc Point Unit were subsequently transferred to Modoc Point in 1973 pursuant to the 1954 Klamath Termination Act (68 Stat. 718).⁸ See *Klamath Tribe Claims Comm. v. United*

⁷ The federal government has been involved with Indian irrigation since the Colorado River Indian Irrigation Project was authorized in 1867. In the early 1900’s, Congress began authorizing funding for construction of numerous Indian irrigation projects in the Western United States. At that time, the Indian Irrigation Service led construction and early administration of the projects. Statement of Lawrence S. Roberts, Principal Deputy Assistant Secretary – Indian Affairs U.S. Department of the Interior Before the Senate Committee on Indian Affairs Oversight Hearing on Irrigation Projects in Indian County (September 10, 2014) (https://www.doi.gov/ocl/hearings/113/irrigationprojects_091014) (last accessed 9/17/17).

⁸ Section 13(a) of the 1954 Act authorized the Secretary to transfer the “care, operation and maintenance” of irrigation works to water users associations or irrigation districts. *Klamath Tribe Claims Committee v. U.S.*, 97 Fed. Cl. 203 (Fed. Cl. 2011).

States, 106 Fed. Cl. 87, 89-90 (Fed. Cl. 2012), *aff'd*, 541 F. App'x 974 (Fed. Cir. 2013). During the 2017 irrigation season, Modoc Point's water use has been prohibited for more than half of the season based on a water right call for fulfillment of the United States' instream habitat water rights on the lower Williamson River. The District has no subsidiary organizations and it has no parent organizations.

Mosby Family Trust ("Mosby") owns the Bar Y Ranch, consisting of more than 6,500 acres along the Williamson River. These lands were for the most part originally either allotted land or former tribal lands that were acquired from Indian allottees or were sold unencumbered by any restrictions by the Klamath Tribes under the Klamath Termination Act.⁹ *Klamath and Modoc Tribes v. U.S.*, 436 F.2d 1008, 1020 (Ct. Cl. 1971). Several hundred acres of the Bar Y Ranch are irrigated with water rights from the Sand Creek Unit of the Klamath Indian Irrigation Project. (See Approving an Order of the Secretary of the Interior Cancelling Irrigation Charges Against Non-Indian Owned Lands Under the Klamath Indian Irrigation Project, Oregon Sen. Report 1350, 88th Cong. 2d Sess. (1964) (Sen. Report 1350)). The creators of the Mosby Family Trust

⁹ Tribal lands sold under the Termination Act as fringe units, grazing units and/or farm lands were sold to the highest bidder without limitation on use. The sales were not encumbered by any restrictions as to use. As the Court of Claims has noted, "there is no reason to believe that their disposition was other than a good faith effort by the defendant to realize their full value for the Indians." *Klamath and Modoc Tribes v. U.S.*, 436 F.2d 1008, 1020 (Ct. Cl. 1971).

were parties in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (“*Adair*”), a case relied upon by the Ninth Circuit in the present case. In June 2017, the Trust received a notice from OWRD prohibiting them from irrigating for the rest of the irrigation season based on a water right call for fulfillment of the United States’ water rights for the hunting and gathering rights on the Klamath Marsh and its time immemorial fisheries instream habitat rights on the Williamson River. The Trust has no subsidiary organizations or parent organizations.

TPC, LLC (“TPC”) is an Oregon limited liability corporation organized under Oregon Revised Statute Chapter 63. It owns a cattle ranch along the upper Williamson River above the Klamath Marsh. The ranch consists of allotted and/or lands sold by the Tribe. TPC’s predecessors, including the Brarens, were parties to the *Adair* litigation. See *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003). In 2017 TPC was prohibited from irrigating during most of the entire irrigation season, including as of the date this brief was filed, based on a United States call for the fulfillment of its Klamath Marsh water rights. TPC has no subsidiaries or parent organizations.

Fort Klamath Critical Habitat Landowners, Inc. (“Fort Klamath”) is an Oregon non-profit corporation organized under Oregon Revised Statutes Chapter 65 to facilitate research and legal advocacy regarding water rights of the Wood River Valley watershed and other water bodies to protect people and water resources; and, to educate and involve the public in

sustaining water rights. Its members include numerous family-owned and operated ranches that own lands that abut the Wood River and its tributaries in the Wood River Basin. Some of Fort Klamath's members are part of the Agency Unit of the Klamath Indian Irrigation Project that was funded and developed by the Indian Irrigation Service commencing in 1900. (*See* Sen. Report 1350). In 2017, Fort Klamath members received notices from OWRD that prohibited them from irrigating during the entire month of May based on a call for fulfillment of the United States' time immemorial fisheries instream water rights for the Wood River. Fort Klamath has no subsidiaries or parent organizations.

Sprague River Water Resource Foundation, Inc. ("Sprague River") is an Oregon non-profit corporation organized under Oregon Revised Statutes Chapter 65 dedicated to the protection of sustainable agriculture and the sustainable use of water resources in the Sprague River Valley and lower Williamson River in Klamath County, Oregon. Sprague River's members irrigate from the Sprague River and its numerous tributaries, as well as other tributary streams to the lower Williamson River. Its members own lands upstream of the former Klamath Indian Reservation on lands ceded by the Klamath Indian Treaty; or, on allotted lands within the former Klamath Indian Reservation. Some of Sprague River's members hold water rights that are part of the Spring Creek Unit of the Klamath Indian Irrigation Project that was funded and developed by the Indian Irrigation Service. During 2017, Sprague

River members' water use on former reservation and off-reservation lands was prohibited for more than half of the irrigation season based on a call for fulfillment of the United States' time immemorial fisheries in-stream water rights on the lower Williamson River and lower Sprague River. There are no subsidiary or parent organizations, and it has no shareholders.

Application of the precedence established in *Washington v. United States* threatens to exacerbate *amici's* ability to defend their water rights and ways of life. *Amici* and their members have already had their water use drastically curtailed in order to satisfy the sweeping instream water rights awarded to the United States that are currently in effect while the final resolution of the Klamath River Adjudication winds its way through the Oregon courts. See *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003). While *amici* emphatically disagree with the State of Oregon's quantification and will continue to pursue its arguments in Oregon's adjudication, the Ninth Circuit's decision in this case must be overturned.

The Court should grant certiorari to address the exceptionally important issues raised by the Ninth Circuit's creation of the ill-defined environmental servitudes that threaten to impact not only *amici*, but also have sweeping effects on private property rights throughout the West.



INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a far-reaching decision by the Ninth Circuit that sets a dangerous precedence for re-writing Indian treaties throughout the Western United States. The decision not only undermines the purposes of the historic Indian treaties and this Court’s prior rulings; it also ignores that Congress subsequently modified the Indian treaties.

In *State of Washington v. United States*, the Ninth Circuit was called upon to address the language of the fishing clause found in the various Stevens Indian Treaties,¹⁰ wherein the tribes were expressly guaranteed the “right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” Pet. App. 68a.

Although these treaties did not expressly promise that the “number of fish would always be sufficient to provide a moderate living to the Tribes”, the Ninth Circuit nonetheless inferred such language into the treaties. Pet. App. 94a. Based upon this implied promise, the court concluded that building and maintaining barrier culverts were activities that negatively impact the fish populations and were therefore in violation of

¹⁰ The ten treaties negotiated by Governor of Washington Territory Isaac Stevens are known as the “Stevens Treaties” and are predominately associated with lands within the former Washington Territory and include parts of the current states of Montana, Idaho, and Washington.

Washington’s obligations to the tribes under the treaties. Pet. App. 96a.

As the dissent correctly identified, the Ninth Circuit’s holding that actions that negatively impact the fish population, irrespective of whether the actions occur on ceded, allotted or reservation lands, represents a new implied treaty obligation that sets up a dangerous precedence, “. . . one that could be used to challenge activities that affect wildlife habitat in other western states . . .” Pet. App. 19a.

The danger in this new habitat protection servitude is not only its broad and unfettered scope, but also its adverse impacts on the other purposes within the various treaties.

The Ninth Circuit’s expansive view of the fisheries purpose ignores that the treaties had other co-equal purposes (*e.g.*, ceding of off-reservation lands;¹¹ support

¹¹ For example, the Point Elliott Treaty (12 Stat. 927) contains the following language:

The said tribes and bands of Indians hereby **cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country** occupied by them, bounded and described as follows: . . . (Article I) (emphasis added).

This is similar but not identical to the cession language that is found in Article I of the Klamath Treaty:

. . . The tribes of Indians aforesaid **cede to the United States all their right, title, and claim** to all the country claimed by them . . . (Klamath Treaty Article I) (emphasis added).

of tribal members cultivation and other agrarian practices).¹² Further, it also ignores that, as with other treaties, Congress subsequently modified many Indian treaties (*e.g.*, General Allotment Act of 1887 (24 Stat. 388) (“Dawes Act”); 1901 Klamath Cession Agreement; and, Klamath Termination Act). These modifications reflect Congressional purposes that would be thwarted by the Ninth Circuit’s holding that any activity that

¹² The Point Elliott Treaty provided that the United States was to pay a specified sum:

To enable the said Indians to remove to and settle upon their aforesaid reservations and to **clear, fence, and break up a sufficient quantity of land for cultivation**, . . . (Article 13) (emphasis added). This right of cultivation was found in other treaties to carry with it a share of reservation’s water. *U.S. v. Powers*, 305 U.S. at 532.

While similar to the Point Elliott Treaty with respect to cultivation of the land, other treaties refer to the agriculture purpose slightly different. For example, the Klamath Treaty contained the express provision that the expenditures thereunder were:

In consideration of, and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, . . . all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, . . . , who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education. (Klamath Treaty Article II) (emphasis added).

negatively impacts fish populations on or off reservations is a violation of the fisheries provision of the treaty.

The Ninth Circuit arbitrarily adopted a fisheries centric focus that is at the expense of the other purposes established in the respective treaties, thereby burdening states, local governments, small businesses, Indian, and Non-Indian landowners beyond the original scope of the treaties or the cessions and allotments made thereafter.

In elevating the treaties' fisheries purposes over the other treaty purposes, the Ninth Circuit establishes a dangerous and undefined precedence that could be applied to any treaty with a fishery component – no matter the fisheries involved. In building on *Adair's* implied water right to support hunting, fishing and gathering, the Ninth Circuit is continuing on its path of expanding the reach of the treaties to include habitat servitudes onto the ceded and other off reservation lands.

Further, the Ninth Circuit's servitude ruling runs counter to the unencumbered nature under which the former Tribal lands were ceded or conveyed. In doing so it creates a precedent with national significance that reaches far beyond the treaties at issue in this case.

This Court has previously addressed this issue and found that the treaties provide no support for tribal authority to regulate hunting and fishing on land owned by non-Indians. *See ODFW v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Montana v.*

United States, 450 U.S. 544, 560 (1981); *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 174 (1977).

The panel's decision effectively contradicts the express terms of the treaties, Congressional mandates and the prior rulings of this Court, and for these reasons the petition for writ of certiorari should be granted.



ARGUMENT

A. The Ninth Circuit's Decision Is Extremely Broad Reaching and Effectively 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. Accordingly, the treaties carry with them a promise that the United States would support the various purposes of the treaties.

The Ninth Circuit, however failed to follow this promise when it adopted a singular fisheries' centric focus in interpreting the treaty purposes. By narrowly focusing on access to an adequate supply of fish, it ignored the other treaty purposes – *e.g.*, removing tribal encumbrances on the ceded lands and the adoption of an agrarian lifestyle.

The Ninth Circuit opined that even if the treaty did not expressly promise that the treaties would secure fish such that there would therefore be food forever, it would infer such a promise. Pet. App. 93a. From that inferred promise, it then extrapolated into the treaties an implied habitat servitude as therefore necessary to achieve an undefined and open-ended quantity of fish. In *Washington*, the Ninth Circuit effectively amended the treaty provision wherein the tribes “cede, relinquish, and convey . . . of all their right, title and interest in and to the lands . . .” to now retroactively add a habitat servitude encumbrance over these same ceded lands.

As a foundation for inferring both the promise and the habitat servitude, the court relied upon *Winters v. United States*, 207 U.S. 564 (1908), wherein in the face of similar silence in the treaty which created the Fort Belknap Reservation, this Court inferred a reservation for water sufficient to support the treaty’s agricultural purposes. *Id.* 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 purposes of federal reservations. 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.**” *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (emphasis added).

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 *United States v. Washington*.

One of the few cases to address this choice was *Adair*, wherein the Ninth Circuit addressed the question of how to allocate water between the Klamath Indian Treaty's twin fisheries and agrarian purposes – both of which were designed to afford the Tribal members a means by which to support themselves. In *U.S. v. Washington*, the Ninth Circuit relied on its earlier *Adair* decision for the proposition that a primary purpose of the Klamath Treaty was to “secure to the Tribe a continuation of its traditional hunting and fishing.” Pet. App. 93a. It also noted that in *Adair*, it found that this primary treaty purpose would have been defeated without a continual flow of water and therefore inferred a promise of water sufficient to ensure an adequate supply of game and fish and established a priority for these instream purposes over other water uses. Pet. App. 93a.

However, in the present case, the Ninth Circuit went beyond merely inferring a promise of water to support fisheries, it inferred a promise that the number of fish and game would always be plentiful enough to meet the Washington tribes' desired fishery harvest objectives. Pet. App. 93a-94a.

The conflict is not in the treaty language but how the Ninth Circuit chose to interpret the treaty intent when called upon to strike the balance in how the treaty purposes are achieved. The Ninth Circuit

simply chose to ignore that subsequent to the treaties, allotments of Indian reservations to individual Indians, as well as the transfer of these allotments to non-Indians, have been found to carry with them a share of the reservation's federal reserved water rights, *U.S. v. Powers*, 304 U.S. at 532; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49-51 (1981).

The concept of an implied habitat protection servitude over ceded lands, interferes with the attainment of this agricultural purpose.

As this Court recognized in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ("*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." 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.

Though poorly-defined, the Ninth Circuit's construction of the Stevens Treaties threatens to establish a precedence for *de facto* environmental servitudes over streams capable of supporting anadromous fish – or for that matter on any stream anadromous or not –

and has the potential to be extrapolated to any treaty wherein there is language reserving a right to hunt, fish or gather.

The construction is not only far reaching, it is also in contravention of this Court's decision in *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 105 S. Ct. 3420 (1985) ("*ODFW*"). While *ODFW* involved a treaty other than a Stevens Treaty, it illustrates the far-reaching conflicts the Ninth Circuit's decision creates with other treaties.

Indeed, 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 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, of which some were purchased by the *amici*, 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 lands 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, 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 9-16-17).

In other words, lands that were allotted, sold or ceded by an Indian tribe are divested free and clear of any appurtenant rights, restrictions, servitudes or encumbrances unless expressly reserved. Yet, notwithstanding this Court’s clear precedence, and, the Interior Department’s understanding at the time of the Klamath Termination Act sale of the former reservation, the Ninth Circuit has now imposed over these same ceded or sold lands an implied habitat protection servitude appurtenant to all the anadromous fish bearing streams.

This new environmental servitude establishes a precedence that could open the door for its extrapolation into a wide range of Indian treaties irrespective of their individualized circumstances.

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:

“[b]efore the 1864 Treaty was executed, the Tribe claimed aboriginal title to about 22 million acres of land. The Treaty language that

ceded that entire tract – except for the 1.9 million acres set apart for the Klamath Reservation – 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 Cession Agreement should have the same effect.” p. 766.

While in *ODFW*, this Court noted that the language ceding lands in the 1901 Cession 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” that is found in the treaties addressed in *Puyallup Tribe v. Dept. of Game of Washington*, 391 U.S. 392, 88 S. Ct. 1725 (1968) and in *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905), *ODFW* at n.15 it nonetheless found that with respect to the ceded lands the fishing rights did not survive on the ceded lands after the cession. (*ODFW* pp. 765-66).

By comparison, in the Stevens Treaties, the express servitude reserved was the right to fish at “usual and accustomed places” (“fishing clause”), a right unique to the Stevens Treaties. However, to imply from the Stevens Treaties’ right to access and fish at usual and accustomed fishing places, an additional habitat servitude applicable from the mouth to the headwaters of every stream that supports anadromous fish in Washington State – whether on or off reservation, is to impose a habitat servitude on ceded, as well

as allotted or tribal sold lands, in a manner that conflicts with prior Supreme Court precedence. Under *ODFW*, in order for such an appurtenant servitude to exist, it had to be expressly reserved in the treaties or existed as an encumbrance in the Tribal, allotments, patents or other deeds.

The Ninth Circuit has improperly retroactively imposed a far-reaching habitat encumbrance that is counter to the express cessions 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 but all private and public land activities on ceded lands, allotted lands, and lands sold by the Tribes. In doing so it creates a precedence that has the potential to be applied to any treaty with reserved fishing elements.

Amici urge the Court to accept the writ of certiorari to address this far-reaching and retroactive re-writing of the various Indian treaties.

B. Should the Concept of Implied Habitat Protection Rights on Ceded Lands Stand, *Amici* Urge the Court to Clarify Those Rights.

In its petition for writ, the State of Washington urges the Court to modify or clarify the unworkable and expansive environmental servitudes issued by the Ninth Circuit in this case. *Amici* submit that what they have been through since the Ninth Circuit's decision in

Adair amply demonstrates, in practice, just how unworkable the concept of an implied instream habitat protection servitude really is.

Amici have literally been through decades of litigation to determine from similarly vague references what the Ninth Circuit meant by “the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members.” *Adair*, 723 F.2d at 1414-15.

Notwithstanding, the *Adair* court’s adoption of the amount necessary as currently exercised to maintain the livelihood standard it left to the states for the actual application and quantification. *United States v. Braren*, 338 F.3d 971, 972-73 (9th Cir. 2003). However, this application and quantification while simple on its face is simply unworkable when applied in the context of a water basin-wide habitat servitude.

The primary deficiency of a standard governed by the productivity of a habitat is its ambiguity and open-ended nature. Its reach is not just limited to culverts but extends to any activity that has a potential to reduce fish numbers from some undefined potential level.

Moreover, as discussed *supra*, the Ninth Circuit’s rule fails to provide a mechanism to balance in any way the broader purposes of the treaties at issue or Indian treaties in general. For example, it is inconceivable that Congress in promoting the treaty’s cultivation and agrarian purposes would at the same time deny the water necessary to productively irrigate lands.

Likewise, it is unlikely that this Court in *Fishing Vessel*, would have conceived that awarding a right to a maximum allocation of 50% of the harvestable fish would also have carried with it a sweeping right to enjoin all of the fish blocking culverts on all the anadromous fish streams in Washington State or any other state wherein the rivers contribute to the Columbia River.

If the Ninth Circuit's concept of an implied habitat protection servitude is to stand, this implied right must be reconciled with the broader purposes of the treaties under which they arise. As it is now applied, it is unworkable and inequitable.

The petition for cert should be granted to address the vague and unworkable environmental servitude that, if left in its current state, will have far reaching significance throughout the West.

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

In its petition for writ, the State of Washington urges the Court to modify or clarify the "unworkable" rule issued by the Ninth Circuit in this case. As noted earlier, it is inconceivable that this Court, in carefully deciding to award the Tribes a maximum allocation of 50% of the harvestable fish in *Fishing Vessel*, would have conceived that the same fishing right also carried with it a sweeping right to enjoin all of the fish blocking culverts on all the anadromous fish streams in Washington State.

Even if it were a plausible construction of the treaties, it is clearly inequitable given that in ceding the lands under the treaties, the tribes conveyed all of their right, title and interest. This Court previously ruled that when the tribe “ceded all their right, title and claim”, 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.” *ODFW* p. 766.

Prior Interior Department opinions with respect to a non-Stevens Treaty also illustrate the inequitable nature of the ruling.

The Solicitor’s Opinion prior to the sale of the former Klamath Indian Reservation was that termination of an Indian reservation would terminate the fishing rights thereon. The 1955 Solicitor Opinion expressly stated that the former reservation lands when sold were no longer encumbered by the fishing right under the treaty (Opinion of Solicitor).

Further, the very irrigation projects that were funded and developed by the Indian Irrigation Service to promote the cultivation and agrarian purposes of the treaties and allotments (*e.g.*, Modoc Point Unit, Sand Creek Unit, Agency Unit, and Spring Creek Unit of the Klamath Indian Irrigation Project) would now years later be subject to an environmental habitat servitude that limits the utility of these projects.

By granting a broad sweeping environmental servitude, the Ninth Circuit also ignored past congressional changes to the treaties, for example, with

respect to the Klamath Termination Act, approximately “seventy-eight percent of the Tribes’ members (1,660 of 2,122) chose to withdraw” from the Klamath Tribe. It was in part to satisfy the obligation to pay these withdrawing members their share of the Tribal assets that the tribal lands were sold. *See Klamath Tribe Claims Committee v. U.S.*, 106 Fed. Cl. 87, 89 (2012). In such circumstances, it would be inequitable to adopt an unquantified wide-ranging fisheries habitat servitude.

It is exactly situations of this nature which must weigh heavily as this court found in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005):

This Court has observed in the different, but related, context of the diminishment of an Indian reservation that “[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use,” may create “justifiable expectations.” *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977); accord *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (“jurisdictional history” and “the current population situation . . . demonstrat[e] a practical acknowledgment” of reservation diminishment; “a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area” (internal quotation marks omitted)). 544 U.S. at 216.

The Ninth Circuit's imposition of an environmental habitat servitude on these lands and irrigation projects 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. The Ninth Circuit erred in not acknowledging that its wide-sweeping environmental servitude over ceded lands is a serious disruption of justifiable expectations of subsequent purchasers of the ceded lands, allotments or of former reservation lands. This Court's decision in *City of Sherrill* is applicable to address the inequity of the ruling.

This Court should grant certiorari to address the errors in the Ninth Circuit decision, a decision if left unchanged will have widespread precedential impact.



CONCLUSION

For the foregoing reasons, the State of Washington's writ of certiorari should be granted.

Respectfully submitted,

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September 20, 2017