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 FOR THE TRIBAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Washington violated a treaty "right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens," by constructing hundreds of barrier culverts that block salmon from reaching usual and accustomed fishing grounds and that cause many to die before they can reproduce.

2. Whether Washington can assert an equitable defense against the United States based on the theory that the United States made the State use these culvert designs.

3. Whether the district court's injunction is consistent with the court's equitable discretion.

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BRIEF FOR THE TRIBAL RESPONDENTS

The Indian Tribes of western Washington made a bargain with the United States in the 1850s: they would give up vast amounts of their land, so long as they could keep in perpetuity "the right of taking fish, at all usual and accustomed grounds and stations, … in common with citizens of the Territory." Their fishery meant life to them, spiritually as well as materially. They accordingly signed a series of treaties "securing" that right as part of the bargain.

The right is no longer secure. In hundreds of locations, petitioner Washington has redirected salmon-bearing streams through manmade culverts under state roads. Many of Washington's culverts are impassable to salmon, even though since before the Treaties Washington law has required any structure in a salmon-bearing stream to allow the fish to pass. Because of Washington's barrier culverts, many of the fishing grounds protected by the Treaties—and millions of square meters of fish habitat along hundreds of stream miles—are cut off from the sea. The salmon fishery is degrading significantly. Past a certain tipping point, the decline could become irreversible.

Fixing the culverts is entirely feasible, using technology that Washington itself helped design. The State has known of the barriers for decades, yet responded so slowly that, left to its own devices, it would have taken 100 years to fix just the existing problems.

The State's widespread blockage is a clear violation of the Treaties, and the district court adopted a targeted strategy to alleviate it: Washington must fix culverts that block significant lengths of stream, but it may do so on a schedule that gives it most of two decades. In many cases, Washington can defer repairs until the culvert reaches the end of its useful life and must be replaced anyway.

Although Washington tries to portray it as extreme, the injunction does no more than necessary to remedy blockages that violate the Treaties. Washington, by contrast, argued below that the Treaties give the Tribes *no protection* against having their fishery choked off:

> "[Y]ou could block every salmon stream in the Sound?"
>
> "Your honor, the treaties would not prohibit that."

Pet. App. 88a. Washington now tries to back away from its absolutist position, but fails to show how its widespread stream blockages are consistent with *any* plausible conception of the "right of taking fish." Washington tries to blame the federal government, but the United States never told Washington that its culverts were suitable for fish passage, compliant with the Treaties, or legally required.

Compounding its obstinacy, Washington refused to propose any alternative injunctive provisions to the district court, yet now comes to this Court with picayune and fact-bound complaints about its terms. Washington has shown no abuse of discretion.

STATEMENT

A. The Tribes Have Depended On Salmon For Centuries.

Salmon begin and end their lives with a long journey. They are anadromous fish, spending much of their lives in the ocean but born in freshwater streams. After their juvenile period, young salmon travel downstream to the ocean. And every salmon, if it survives long enough, will make the arduous trip, perhaps hundreds of miles, back upriver to the same stream where it was born. There salmon reproduce and die. J.A.472a-473a.

The journey, both downstream and upstream, is crucial to salmon's survival. Salmon feed heavily and grow rapidly only in the ocean, but to reproduce, they must return to freshwater streams with gravel beds. J.A.473a. Salmon that do not make it downstream to the ocean, and then back upstream to their birthplace, will die without reproducing.

The Indian Tribes of western Washington have depended for centuries on the seasonal return of six species of salmon (including steelhead, formerly considered a trout). Fishing was, and is, central to their way of life. Every one of the Tribes has continued to fish at its historic grounds, even as fishing has become more difficult. Pet. App. 133a.[1]

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[1] The tribal respondents here ("Tribes") are the Confederated Tribes and Bands of the Yakama Nation, Hoh Indian Tribe, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Lower Elwha Klallam Tribe, Lummi Nation, Makah Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Tribe, Puyallup Tribe, Quileute Indian Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin

"Salmon" is, literally, synonymous with food to the Tribes. J.A.692a ("[I]n [the Quinault] language the word for salmon is the equal word for 'food.'"). At the time of the Treaties, "fish were vital to the Indian diet," and salmon and steelhead were the Tribes' "most important item of food." *United States v. Washington*, 384 F. Supp. 312, 350, 368, 372 (W.D. Wash. 1974).[2] Fish shortages "imperiled their food supply and caused near starvation." *Id.* at 351. Tribes dried and preserved fish to store against hard times. *Id.* at 351, 368.

But salmon in particular are not *just* food; they are central to the Tribes' belief system and sense of community and identity. *E.g.*, J.A.520a, 693a. Salmon form an integral part of tribal ceremonies—"for name givings … for deaths, for burials, for recognitions, for birthdays." J.A.693a; *see* J.A.692a ("Our songs, our ceremonies, our subsistence coincide with the salmon."). Tribes perform the First Salmon ceremony, a religious rite, to ensure that the salmon return, J.A.143a-144a, and the salmon symbolizes the central "religious concept of the interdependence and relatedness of all living things." *Washington*, 384 F. Supp. at 351, 382; 10/13/09 Tr. 51.

In short, fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905).

Island Tribe, Stillaguamish Tribe of Indians, Suquamish Indian Tribe, Swinomish Indian Tribal Community, Tulalip Tribes, and Upper Skagit Indian Tribe.

[2] The district court here incorporated many findings of fact from this 1974 decision (referred to as "Final Decision #1"). *E.g.*, Pet. App. 132a.

B. The United States Expressly Agreed To Preserve The Tribes' Right Of Taking Fish.

With the signing of the Oregon Treaty in 1846, American settlement of the Pacific Northwest began in earnest, and the United States sought to acquire land from the Indian Tribes. The Tribes' primary concern was preserving their fishery. That became the basis of a bargain whereby the Tribes ceded nearly all their lands but kept their "right of taking fish," "secured" by the treaty clause at issue here.

Congress first established the Oregon Territory in 1848, then separated out the Washington Territory in 1853. The territorial organic statutes began by preserving "the rights of person or property now pertaining to the Indians in [the combined] Territory." Act to establish the Territorial Government of Oregon, ch. 177, § 1, 9 Stat. 323 (1848). In addition, Congress safeguarded the fishery by forbidding any obstruction of "streams … in which salmon are found" that did not "allow salmon to pass freely up and down." *Id.* § 12, 9 Stat. 328; Act to establish the Territorial Government of Washington, ch. 90, § 12, 10 Stat. 177 (1853).

Isaac Stevens became Washington's first territorial governor and Superintendent of Indian Affairs. Governor Stevens proceeded to negotiate a series of treaties with the Indian Tribes of the region (the "Treaties" or "Stevens Treaties").

A crucial element of each treaty negotiation was preserving the tribal fisheries. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 677 (1979) (*Fishing Vessel*). During

the negotiation of the Treaty of Point-No-Point, for example, the Indians worried about "how they were to feed themselves once they ceded so much land," and one cautioned, "We may become destitute." J.A.128a. The Tribes were much more concerned about retaining their fishing rights than their land. *E.g.*, *Washington*, 384 F. Supp. at 363, *cited in Fishing Vessel*, 443 U.S. at 668. Many expressed views like the statement made by one Makah: "He was willing to sell his land: all he wanted was the right of fishing." Ex. MK-M-26, at 3, *United States v. Washington*, No. 9213 (W.D. Wash. Aug. 16, 1983) (transcribed minutes of Treaty of Neah Bay).

Governor Stevens convinced the Tribes to cede their lands by promising to preserve their existing fishing rights, both on and off their reservations, in perpetuity. The government negotiators recognized that doing so "was necessary for the Indians to obtain a subsistence." J.A.130a. The governor thus assured the Tribes that they would "not have simply food and drink now but that [they would] have them forever." Pet. App. 129a. Perhaps most plainly, he told one group of tribes:

> "Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? … This paper is such as a man would give to his children and I will tell you why. This paper gives you a home.… *This paper secures your fish*.

Fishing Vessel, 443 U.S. at 667 n.11 (emphasis added).

"[T]he governor's promises that the treaties would protect that source of food and commerce were

crucial in obtaining the Indians' assent." *Id.* at 676. And the governor made those promises purposefully. He was under strict instructions to contain the treaties' cost, and he recognized that Indians left destitute without their food source would require support from the public treasury. Pet. App. 177a; J.A.130a.

Governor Stevens's promises were embodied in the Treaties' fishing clauses. The Treaty of Medicine Creek provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with citizens of the Territory, and of erecting temporary houses for the purpose of curing ….

Art. III, 10 Stat. 1133 (Dec. 26, 1854). The corresponding language in the other treaties varies only slightly. *Fishing Vessel*, 443 U.S. at 674 n.21. The Tribes retained other rights, such as "hunting [and] gathering roots and berries," "on open and unclaimed lands." Art. III, 10 Stat. 1133. Some Tribes also expressly reserved the exclusive "right of taking fish" within the boundaries of their own reservations.[3]

In exchange, the Tribes agreed to cede "their right, title, and interest" to enormous portions of their "lands and country." Art. I, 10 Stat. 1132. They would thenceforth occupy only small reservations.

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[3] *E.g.*, Treaty with the Yakama, art. III, 12 Stat. 953 (June 9, 1855).

C. For a Century, This Court Has Interpreted The Fishing Clauses To Preserve Tribal Rights And Forbid Washington's Attempts To Violate Them.

By 1900, the development of canning sparked a boom in the salmon market. Soon non-Indian fishermen were forcing the Tribes away from their traditional fishing sites and catching enormous numbers of salmon, leaving little for the Tribes and damaging the fishery. Pet. App. 70a-71a. Washington began asserting its regulatory power in a discriminatory manner to prevent the Tribes from fishing. Wash. Br. 9 n.8. "As a result of the State's hostility to off-reservation fishing, the Indians' share of the overall catch was relatively small." Pet. App. 76a; *see id.* at 73a-76a.

This Court has held, repeatedly, that this pattern of conduct violated the Treaties, in several respects.

Fish Passage: When private landowners used a series of state-licensed "fish wheels" to intercept and capture nearly all passing salmon, this Court held that they impermissibly infringed the Tribes' right of taking fish. Non-Indians cannot take "exclusive possession of the fishing places," *Winans*, 198 U.S. at 382; the fish wheels impermissibly left no fish "available to Indian fishermen upstream." *Fishing Vessel*, 443 U.S. at 681 (explaining *Winans*).

This obligation to allow fish passage is reciprocal: even where Tribes have *exclusive* fishing rights (within the boundaries of their reservations), they cannot use that position to "interdict completely the migrating fish run." *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 176 (1977) *(Puyallup III*).

Upstream fishing rights must be respected by Indians and non-Indians alike.

Access: When private landowners acquired property by the tribal fishing grounds, this Court held that the Tribes retain a continuing right of access to the river. *Winans*, 198 U.S. at 381. Private landowners "had notice of these Indian customary rights by the reservation of them in the treaty." *Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919).

Impermissible Conditions: When Washington forbade Indians from fishing unless they paid a state license fee, this Court held that "a fair construction of the treaty" would not permit the State to exact fees "as a prerequisite" to "exercising the very right [the Indians'] ancestors intended to reserve." *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

Conservation, But No Discrimination: When Washington banned net fishing (in which only Indians engaged), but allowed recreational fishing ("entirely [taken over] by non-Indians"), for steelhead, this Court found impermissible "discrimination" against Indians. *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) *(Puyallup II*). The State had "grant[ed], in effect, the entire run to the [non-Indian] sports fishermen." *Id.* at 46-47. What the State *can* do is impose nondiscriminatory regulations "in the interest of conservation." *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968) *(Puyallup I).*

Each of these holdings flowed from the Tribes' secured "right of taking fish," informed by the clear

understandings of that right communicated during the Treaties' negotiation.

D. The United States Files This Litigation To Protect The Fishery.

The *United States v. Washington* litigation has focused from the outset on ensuring that the Tribes' rights under the Treaties are not just an empty right of access, but an actual "right of taking fish." Washington has resisted that conclusion for decades.

The first phase involved interpreting the phrase "in common with all citizens of the Territory." Washington's Game Department contended that the Treaties gave the Tribes no allocation of the fishery, just an opportunity to go fishing, and allowed non-Indians to catch as many salmon as they could, even if the Tribes got none. In *Fishing Vessel*, this Court squarely rejected that argument. The Court concluded that the "right of taking fish" means more than "merely the 'opportunity' to try to catch" fish at particular locations. 443 U.S. at 678. The anadromous fishery is akin to a harvest, and "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish" at those locations. *Id.* at 684-685.

A fair share, the Court explained, starts with a 50/50 division between tribal and non-tribal fishing. 443 U.S. at 686. That tribal share represents "a maximum but not a minimum allocation"; the fishing clause secures to the Tribes "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Id.*

E. The State's Barrier Culverts Block Fish Passage And Threaten The Fishery.

This litigation addresses a specific threat to the salmon fishery. Many of the tributaries in the relevant watersheds are now obstructed by roadways built across streambeds. In many places, the stream passes under the roadway through a manmade culvert, and a large number of these culverts are impassable to fish—preventing salmon from migrating to the ocean and returning, as they must to reproduce. By stipulation, this case focuses exclusively on those "barrier culverts"—culverts that prevent fish from passing. Pet. App. 159a, 173a.

The State itself has recognized that its barrier culverts "obstruct habitat" and contribute to significant declines in the salmon population. 1997 Wash. Sess. Laws 2356; *see* Pet. App. 147a. State reports have repeatedly acknowledged that "a serious problem to salmonid production in Washington is impassable road culverts. In numerous cases, miles of productive freshwater anadromous fish habitat have been blocked from anadromous fish by a single barrier road culvert." J.A.612a; *see also* J.A.427a-428a ("Fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to health salmonid stocks in Washington."); J.A.602a, J.A.622a.

Poorly designed or maintained culverts can block fish passage in many ways. For example, a badly designed culvert can end up significantly higher than the eroding streambed:

J.A.532a, 662a (culvert on Nooksack River tributary). Salmon can jump, but they cannot fly. Culverts like this turn into one-way streets. Pet. App. 161a.

Other design flaws also create culvert barriers. For instance, if a culvert is too narrow or too smooth, the water is forced through too fast for fish to pass upstream. J.A.648a. Deficient culverts can also become clogged with debris. Pet. App. 161a; J.A.646a-647a.

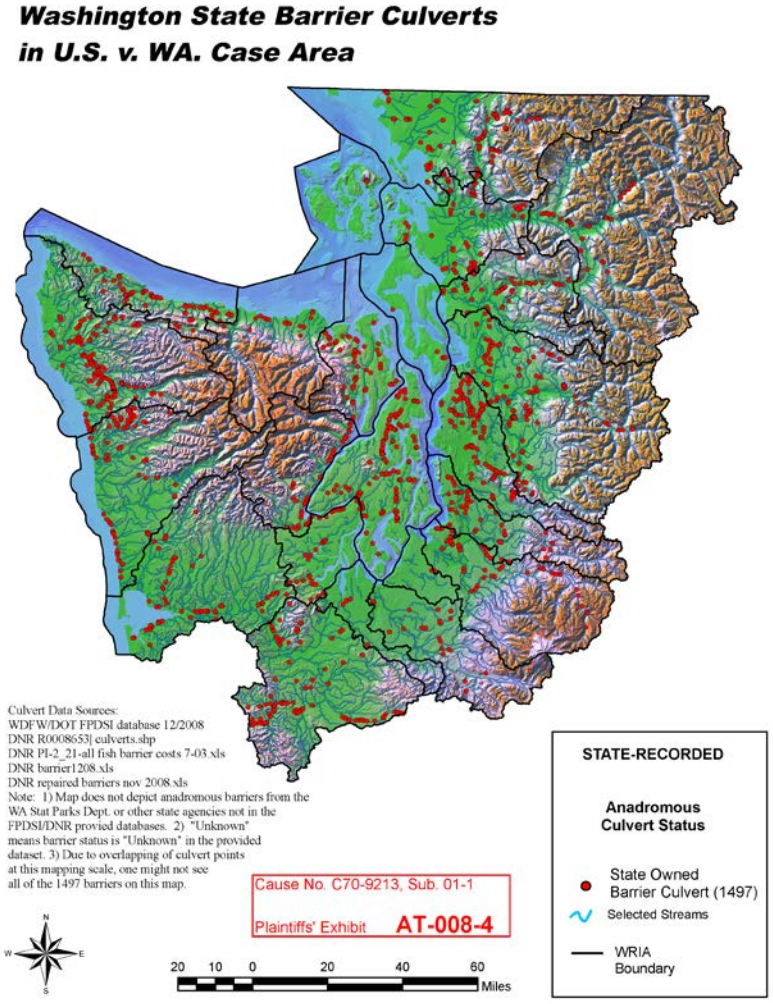
When a barrier culvert cuts off the upstream portion of the stream from the ocean, the salmon cannot return to the upstream watershed to

reproduce. The result can be the extirpation of an entire local salmon population. Pet. App. 160a-161a; J.A.405a-406a, 407a-408a. Salmon encountering a blockage do not just turn around and find new homes elsewhere; they keep trying in vain to get up that stream until they die, like the stranded fish here:

J.A.240a.

As of the trial, the State was responsible for *hundreds* of barrier culverts blocking "significant habitat" throughout western Washington—more than any other single landowner. Pet. App. 162a. Many interpose a blockage between "usual and accustomed" tribal fishing grounds and the ocean. Thus, state-owned barrier culverts prevent anadromous fish from reaching places where the Tribes expressly reserved the right to take those fish. Take, for example, the culvert depicted above from the Nooksack River system, which blocks fish from

reaching usual and accustomed fishing grounds of the Nooksack Tribe. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978); *see, e.g.*, *Washington,* 384 F. Supp. at 359, 367, 368, 372 (finding that many tributaries and "uppermost reaches" were usual and accustomed fishing places).



J.A.288a-289a.

These "State-owned barrier culverts are so numerous and affect such a large area that they have had a significant total impact on salmon production." Pet. App. 162a; *see id.* at 160-162a, 176a. To take just one example, the district court found that when population decline on tributaries was analyzed in the Skagit River watershed (the largest tributary of Puget Sound), *44 to 58%* of the loss of salmon production was attributable to barrier culverts. *Id.* at 161a. Throughout the area subject to the Treaties, salmon are in decline; many stocks "are depressed, in danger of extinction, or already extinct." *Id.* at 136a.

Conversely, *removing* a barrier culvert is one of the most productive and immediately effective measures to support the fish population. Usually barrier removal results in "rapid response by colonizing salmon," J.A.402a, 422a-425a, often "within weeks of restoring access," C.A.S.E.R.18. As the district court observed in a colloquy with an expert, repairing culverts provides "the biggest bang for [the] buck" of any restoration measure. J.A.689a.

F. The District Court Formulates Targeted Equitable Relief, And The Court of Appeals Affirms.

The United States and the Tribes brought this proceeding to compel Washington to remedy the problem effectively, after a mediation made clear that Washington would not do so voluntarily. J.A.42a-43a. The district court found that the State was on pace to take "more than 100 years" to correct its blocking culverts. Pet. App. 160a-161a, 163a.

1. Washington initially pointed the finger at the United States. Contending that the State's culvert designs complied with federal guidance and accordingly "satisfied any treaty obligation," J.A.78a, Washington asserted "waiver and/or estoppel." J.A.86a-87a. The district court struck those defenses, because they cannot be asserted against the United States. Pet. App. 274-275a.

2. After extensive fact-development, the parties cross-moved for summary judgment on liability. By stipulation, they limited the case to "only those culverts that block fish passage," and only "under State-owned roads." Pet. App. 253a. The district court concluded that Washington had violated the Treaties. *Id.* at 249a-271a.

Washington did not deny that many of its culverts blocked fish passage, Pet. App. 255a, and the Tribes "produced evidence of greatly diminished fish runs." *Id.* at 256a. Because "culverts block fish passage so that they cannot swim upstream to spawn, or downstream to reach the ocean, those blocked culverts [we]re responsible for some portion of the diminishment." *Id.*

The only remaining question was whether the Treaties forbid such blockages. Washington insisted that they do not. The district court, however, identified "a narrow directive to refrain from impeding fish runs" by "building or maintaining culverts [so] as to block the passage of fish upstream or down, to or from the Tribes' usual and accustomed fishing places." Pet. App. 271a; *accord id.* at 263a-264a. The court grounded that holding in the promise that the Treaties would protect the fishery and would not allow "actions that would significantly

degrade the resource." *Id.* at 264a, 270a. The court specifically held that it was *not* creating an affirmative duty to protect fish runs, but merely a duty to refrain from blocking them "in one specific manner." *Id.* at 271a.

3. The parties proceeded to a seven-day trial on remedy. Washington refused the district court's invitation to propose appropriate terms. Instead, Washington took the position that the Treaty violation warranted *no* equitable relief, except perhaps monitoring what the State was already doing.

The district court adopted a tailored injunction, giving Washington considerable flexibility. The court allowed the State to defer correction of nearly half of the roughly 1,000 barrier culverts subject to the injunction. Pet. App. 238a; J.A.225a-226a, 758a. First, Washington may defer correction of any culvert that would result in less than 200 lineal meters of habitat gain, until the culvert reaches the end of its useful life or is part of a highway construction project. Pet. App. 237a-238a. Second, Washington may defer correction of some of the remaining 817 barrier culverts, totaling up to 10% of the potential habitat gain, for any reason. *Id.* at 238a. That alone will exempt a substantial number of culverts—up to 25% of the total. *See id.* at 114a; C.A.E.R.220-232.

The Court found that the best technical solution was one developed by Washington agencies, called "stream simulation." Pet. App. 137a-138a. That design (which uses a wider culvert with a simulated streambed inside) offers superior fish passage and habitat benefits. *Id.* It costs little more than the

alternative culvert model once the decision to install a new culvert has been made. *Id.* at 151a; C.A.S.E.R.204-205, 210-211. And it is cost-effective in the long term, because stream-simulation culverts are less likely to become barriers again. Washington itself prefers stream simulation or bridges. Pet. App. 170a-171a.

The court gave careful consideration to the impact on the State's transportation budget (which under the state constitution is segregated from other budget items, Pet. App. 172a), and it allowed the State to defer costs over many years. In the process, the court rejected Washington's cost estimate of $2.3 million per culvert. *Id.* at 170a. The court also noted that many culvert-replacement projects have been undertaken as part of other highway-improvement projects (*id.* at 171a), allowing certain costs to be spread. J.A.614a.

Ultimately, the court determined, "State-owned barrier culverts are so numerous and affect such a large area that they have a significant total impact on salmon production." Pet. App. 162a. The district court thus concluded that equitable relief is warranted to alleviate that impact. *Id.* at 176a-179a. The State did not seek to stay the injunction.

4. The court of appeals affirmed. Pet. App. 68a-126a. Rejecting the State's position that the right of taking fish is satisfied even if the State destroys the fishery, the court relied on Governor Stevens's promises "that 'this paper secures your fish,' and that there would be food 'forever.'" *Id.* at 92a. The court held that the Tribes could not have understood there to be "a qualification that would allow the

government to diminish or destroy the fish runs." *Id.* at 91a.

In the alternative, the court observed that it would have reached the same result even without Governor Stevens's express promises. The court reasoned that just as establishing an Indian reservation can by implication promise enough water to irrigate it, the Stevens Treaties intended to secure the fishery. Pet. App. 94a.

Separately, the court rejected Washington's attempt to revive its equitable defense, and held that the particular terms of the injunction were not an abuse of discretion. Pet. App. 96a-99a, 104a-126a.

5. Washington sought rehearing, which was denied. Senior Judge O'Scannlain submitted a statement respecting the denial of rehearing. Pet. App. 17a-41a. The circuit judges on the panel concurred in the denial, *id.* at 6a-17a, explaining that they had "h[e]ld only that the State violated the Treaties when it acted affirmatively to build roads across salmon bearing streams, with culverts that allowed passage of water but not passage of salmon." *Id.* at 10a-11a. The panel members disclaimed any holding that the Treaties protect the Tribes' moderate living "against all State-caused diminutions." *Id.* at 10a.

SUMMARY OF ARGUMENT

I. Washington's barrier culverts violate the Treaties for two reasons. First, blocking the waterways prevents salmon and other anadromous fish from reaching, or returning to, upstream areas where the Tribes have the express right to take fish.

Second, cutting off anadromous fish from large portions of the habitat where they reproduce and their young grow causes a substantial degradation of the fishery, which undermines the right of taking fish at all Treaty-protected grounds, both upstream and downstream. Either ground requires affirmance here. While Washington criticizes aspects of the court of appeals' reasoning, it never confronts the basis for the judgment of liability: the widespread blockage of fish passage violates the Tribes' "right of taking fish."

A. The Treaties "secure" the Tribes' "right of taking fish." The text, negotiating history, and legal backdrop of the Treaties all confirm that the secured right protects the Tribes' fishery, not just the opportunity to "dip their nets" into empty waters. *Fishing Vessel*, 443 U.S. at 679.

For centuries, "taking fish" has meant actually capturing fish, and the Treaties reflect that ordinary meaning. The right of taking fish is no longer "secured" when the Tribes are deprived of their fishery. The context and negotiating history of the Treaties confirm that point: the Tribes were intensely focused on whether they could continue to support themselves by fishing, and Governor Stevens assured them that they would, promising, "This paper secures your fish." *Fishing Vessel*, 443 U.S. at 667 n.11.

For those reasons, in *Winans*, this Court construed the Treaties to require removal of fish wheels that took all the salmon from a river, preventing fish from passing upstream to tribal fishing grounds. The only difference here is that Washington's culverts do not even harvest the fish, but strand them to die.

Background common-law principles further inform "the right of taking fish" and confirm that the Treaties forbid significant degradation of the fishery. Treaties are imbued with a guarantee of good faith between the contracting sovereigns; based on that guarantee, such agreements are construed to protect the basis of the bargain, rather than to give one party the power to destroy it. At common law, an interest in a fishery included an enforceable right to protect it from blockage or substantial degradation. The sovereign rights secured to the Tribes should not be construed to be any less robust.

B. So understood, the Treaties clearly prohibit Washington's widespread blockages. The State's barrier culverts prevent fish from reaching "usual and accustomed" places where the Tribes have a right to fish. That sort of direct interference with fish passage has been actionable for centuries. And Washington itself has acknowledged the blockages' profoundly deleterious consequences for the salmon population. Entire runs have already been extirpated. The district court therefore correctly determined that Washington had violated the Treaties.

C. Washington focuses on the court of appeals' invocation of the concept of a "moderate living," which this Court explained in *Fishing Vessel* is a *limit* on the Treaties' protection of the Tribes' fishery. But that concept is not the basis of the Tribes' claim here, of the liability decision, or of the injunction. It is undisputed that the Tribes are not earning a moderate living from the fishery, but this litigation does not seek to provide them with one.

Instead it seeks to remedy the State's invasion of the Tribes' "right of taking fish."

D. Washington no longer defends the proposition that it can block every salmon-bearing tributary of Puget Sound without implicating the Treaties. But because of the barrier culverts' widespread and direct interference with the fishery, Washington cannot identify any conception of "the right of taking fish" that would protect the fishery from destruction and yet leave Washington's barriers untouched.

II. Washington's assertion of "waiver and/or estoppel" against the United States provides no basis for reversal. Such defenses may not be invoked against the sovereign, and they certainly may not be invoked on the basis Washington proposes. The United States did not compel Washington to adopt culvert designs that were impassable to salmon. Nor did the United States assure the State that it was in compliance with the Treaties. Instead, Washington complains that the United States did nothing to stop the State from violating the Treaties. That is no equitable defense at all.

III. The remedy the district court imposed was well within its equitable discretion. Washington does not even mention the abuse-of-discretion standard, and it mounts a handful of fact-specific criticisms of the injunction that should have been aired in the district court. Washington refused to participate in crafting the injunction and its belated pursuit of these fact-bound issues is inappropriate here.

ARGUMENT

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

I. Washington's Barrier Culverts Violate The Treaties By Blocking Fish Passage To Tribal Fishing Grounds And Substantially Degrading The Fishery.

It is undisputed that barrier culverts constructed and maintained by the State block salmon from passing upstream to their spawning and rearing grounds, and the district court held it was "inescapable" that such blockages "substantially diminish[]" fish harvests in the Tribes' traditional fishing grounds. Pet. App. 256a, 263a. The district court thus recognized that the State's liability turns on whether the Treaties impose *any* obligation on the State not to block fish passage or otherwise degrade the fishery. *Id.* at 256a, 270a-271a.

Below, Washington took the remarkable position that the answer is no—that the State "could block every salmon-bearing stream feeding into Puget Sound" without even *implicating* the Tribes' treaty "right of taking fish." Pet. App. 87a-88a. The State now disavows that extreme interpretation (Wash. Br. 2, 41-42) and concedes that the Treaties protect the fishery after all. But it cannot explain why

conceding that point does not concede the case, given the undisputed evidence that supports the liability judgment.

Instead, the State devotes its brief *entirely* to challenging the Ninth Circuit's supposed recognition of a "new right" for the Tribes to demand a "moderate living" from fishing. *See* Wash. Br. 1-2, 27-29, 30-45. It is undisputed that the Tribes are *not* earning a moderate living from the fishery, *see* Part I.C, *infra*, but that is not the basis of the Tribes' claim. Indeed, the circuit judges on the panel rejected Washington's reading of their decision, explaining that the panel did "not hold that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances"; rather, the State is liable under the Treaties because it "acted affirmatively to build … barrier culverts that block the passage of salmon, with the consequence of substantially diminishing the supply of harvestable salmon." Pet. App. 10a.

In any event, Washington's critiques of the Ninth Circuit's *opinion* provide no basis to reverse the *judgment*. The judgment is what this Court reviews, *e.g., Camreta v. Greene*, 563 U.S. 692, 704 (2011), but Washington does not even address it. This Court should affirm that judgment because the State has invaded the "right of taking fish" "secured" by the Treaties by blocking fish passage to tribal fishing grounds and significantly degrading the fishery.

A. The "Right of Taking Fish" "Secured" By The Treaties Protects The Fishery Itself.

1. "In interpreting treaties," the Court "begin[s] with the text … and the context in which the written words are used." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-1509 (2017) (citation omitted). Here, the text of the Treaties directly supports the Tribes' claim against the State for installing and maintaining barriers to fish passage. The Treaties provide that:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.

Art. III, 10 Stat. 1133. Several key terms inform the scope of this clause and make clear that it protects the Tribes' fishery, not just their physical access to fishing places.

First, the Treaties do not convey fishing rights to the Tribes, but rather "secure" rights that the Tribes already possessed, making those rights "certain" or "beyond hazard." 2 Noah Webster, *American Dictionary of the English Language* 66e (1828) (*Webster's Dictionary*) (defining "secure"). Use of the term "secure" reflects the fact that the Treaties did not "grant … rights to the Indians," but instead conveyed "right[s] *from them*" to the United States. *Winans*, 198 U.S. at 381 (emphasis added).

Second, the right secured is the Tribes' ability to "tak[e] fish," *i.e.*, to "get [them] into [their] power." 2 *Webster's Dictionary* 88h (giving the example "to *take* fishes with nets, or with hook and line"); *see also Babbitt v. Sweet Home Chapter, Communities for*

Great Or., 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) (noting this usage of "take" is "as old as the law itself"); 2 William Blackstone, *Commentaries on the Laws of England* 411 (1769) (describing the right of "pursuing, and taking" wild animals). This right of taking fish necessarily preserved the Tribes' ability to actually harvest fish, not merely to access an empty fishery. As this Court explained, "[b]ecause the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a 'reservation' of that right as merely the chance … occasionally to dip their nets into the territorial waters." *Fishing Vessel*, 443 U.S. at 678-679.[4]

Third, the secured right of taking fish extends to "all" of the Tribes' "usual and accustomed grounds and stations." Thus, each Tribe's members may take fish only from the waters that comprised usual and accustomed grounds and stations at Treaty time, but may not be deprived of their right of taking fish at any of those grounds and stations.

Taken together, these aspects of the text demonstrate that the Tribes retained not just a right of access, but a right actually to capture fish. Depriving the Tribes of any fish to take, but instead allowing them access to an empty river, would not comply with the Treaties.

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[4] Washington pays little attention to the text. One amicus brief acknowledges the accepted meaning of "take," but then advances an interpretation irreconcilable with it, based on the unsupported argument that because the right of taking fish is carried out at particular places, it must be limited to a right to access those places. Business Br. 7.

2. For more than a century, this Court has read the fishing clause to secure important and judicially enforceable protection for the Tribes' right to take fish. Those prior interpretations are entitled to great weight, because *stare decisis* is especially powerful in the treaty context given the important reliance interests at stake. *See Clark v. Allen*, 331 U.S. 503, 516 (1947).

In *Winans*, for example, the Court addressed whether non-Indians holding title to lands adjacent to the fishery could use state-licensed "fish wheels"—"device[s] capable of catching salmon by the ton and totally destroying a run of fish," *Fishing Vessel*, 443 U.S. at 679—to block tribal members from taking fish. *See Winans*, 198 U.S. at 382. The United States argued that under the applicable treaty, the Tribe had retained a "servitude" over its traditional fishing grounds, requiring the United States and its successors to "preserve" the fishery for the Tribe and ensure that tribal fishermen could both access the grounds and take fish. U.S. Br. at 51, 54, *Winans*, *supra* (O.T. 1904, No. 180). This Court agreed, holding that the Treaty "imposed a servitude" and prohibited non-Indians from using devices such as fish wheels to secure "exclusive possession of the fishing places." 198 U.S. at 381-382. The Court remanded for a remedy in accordance with the Solicitor General's suggestion that the fish wheels be removed or their operation heavily curtailed, allowing fish to escape upstream for tribal fishing. *Id.* at 384; *see also Fishing Vessel*, 443 U.S. at 681 (discussing *Winans*); U.S. Br. at 54-55, *Winans, supra.*

Washington and its *amici* contend that *Winans* established only that Tribes have a right of "access to traditional fishing places." Wash. Br. 30; *see, e.g.*, Business Br. 7-18. But that narrow reading does not fit with the Treaties' text or the Court's reasoning. The Treaties secure the right of *taking* fish; restrictions on access are impermissible because they interfere with that right, not because the Tribes have a separate right to go and look at the water. And just as land-based obstructions prevent the Tribes from taking fish at their usual and accustomed fishing grounds, so too do water-based obstructions that block the fish from reaching those grounds. The remand order in *Winans* illustrates this point, as the Court recognized that the fish wheels infringed the Tribe's treaty rights not only by blocking its members from fishing, but also by preventing fish from passing upstream to the Tribes' usual and accustomed grounds. 198 U.S. at 384.

Fishing Vessel confirms this understanding of *Winans* and the Treaties, as this Court rejected Washington's argument that the Treaties provide the Tribes only an "equal opportunity" to fish in the treaty waters. 443 U.S. at 679. Instead, the Court held that the treaty language unambiguously "secure[d] the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id.* And the Court made clear that it would violate the Tribes' "right of taking fish" in common with non-Indians to let non-Indians engage in fishing practices that would leave the Tribes with "virtually no catch at all." *Id.* at 676 n.22. The same reasoning applies here: the Tribes cannot "take" fish from empty waters, whether they are empty because of

overharvesting by non-Indians or impediments installed by the State.

3. The Treaties' negotiating history leaves no doubt. To secure the Tribes' agreement, the United States expressly represented that the Treaties would protect their fishery. If the Treaties allowed the Tribes' fishing rights to be undermined as Washington has done here, those assurances would have been worthless. That is not how this Court construes an agreement between sovereigns.

a. "A treaty is in its nature a contract between … nations" rather than an ordinary "legislative act." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233, (2014) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.)). Thus, the Court (even Members skeptical of legislative history in construing statutes) regularly considers the context of a treaty's negotiation and adoption, to promote interpretations "consistent with the shared expectations of the contracting parties." *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (citation omitted); *id.* at 660 (Scalia, J., dissenting) (agreeing with this principle); *accord Medellin v. Texas*, 552 U.S. 491, 507 (2008). Particularly where (as here) the parties to a treaty did not share a common language or legal heritage, the Court often looks to the treaty's "negotiating history" to supplement its textual analysis. *Air France v. Saks*, 470 U.S. 392, 400 (1985).

This Court applies this basic approach when interpreting treaties between the United States and Indian tribes, but with a special refinement: "Indian treaties are to be interpreted liberally in favor of the Indians." *Minnesota v. Mille Lacs Band of Chippewa*

Indians, 526 U.S. 172, 200 (1999). In doing so, the Court aims to give "effect to the terms" of a treaty "as the Indians themselves would have understood them." *Id.* at 196. This rule derives from "the unique trust relationship between the United States and the Indians," *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), as well as the American negotiators' "superior knowledge of the language in which the treaty is recorded," *Fishing Vessel*, 443 U.S. at 676; *see id.* at 667 n.10 (noting severe translation difficulties in the negotiation). And because the rule long predates these Treaties, *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552-553 (1832) (Marshall, C.J.); *id.* at 582 (M'Lean, J., concurring), it provided the legal backdrop against which the President and Senate acted when signing and consenting to the Treaties.

b. Here, the historical evidence shows unequivocally that the Tribes entered into the Treaties because they understood that their ability to harvest fish at their usual and accustomed grounds and stations would be "secured" and respected by the United States. Governor Stevens explicitly assured them of it.

All the Tribes "shared a vital and unifying dependence on anadromous fish." *Fishing Vessel*, 443 U.S. at 664-665 & n.6; *see* pp. 3-4, *supra*. The Tribes thus feared that relinquishing so much land would leave them unable to sustain themselves by fishing. The United States assured them that their fishing rights would be protected. As Governor Stevens pledged to one group of Tribes, "This paper secures your fish." *Fishing Vessel*, 443 U.S. at 667 n.11. Governor Stevens likewise promised another

Tribe that entering into the treaty would ensure that they would simply have" food and drink now but that [they] may have them forever." J.A.132a; *see* Pet. App. 129a, 177a. And Governor Stevens and his advisors *wanted* to preserve the Tribes' "continued exploitation of their accustomed fisheries"; they had instructions to keep the Treaties' costs down by ensuring that the Tribes could meet their own needs. *Fishing Vessel*, 443 U.S. at 666 & n.9; *see also* Pet. App. 266a-269a; J.A.127a-130a.

In short, "the Tribes were personally assured during the negotiations that they could safely give up vast quantities of land" and still "be certain that their right to take fish" and sustain their societies "was secure." Pet. App. 270a. Those assurances amply support construing the fishing clause to protect against "actions that would significantly degrade the resource." *Id.*

4. Washington's reading of the Treaties is also unsustainable because it allows the frustration of one of the central subjects on which the parties agreed: to secure a "right of taking fish" that would help sustain the Tribes even after their relocation to reservations.

As contracts between sovereigns, the Treaties incorporate the background rule that each sovereign is bound by a mutual obligation of "good faith." 2 Emer de Vattel, *The Law of Nations* § 280, at 251 (Joseph Chitty ed. 1883) (1758) ("[A]s good faith ought to preside in conventions, they are always interpreted on the supposition that it actually did preside in them."). The Court has long applied this principle in interpreting Indian treaties, as it also follows from the "duty of protection" the United

States owes to Indian Tribes as the discovering sovereign of previously inhabited lands. *Worcester*, 31 U.S. (6 Pet.) at 552 ("Protection does not imply the destruction of the protected."); *see also United States v. Payne*, 264 U.S. 446, 448 (1924) (recognizing that the United States was "bound by every moral and equitable consideration to discharge its trust" pursuant to the treaty "with good faith and fairness"). The obligation of good faith precludes reading a treaty so as to let one party deprive the other of the benefit of its bargain. Rather, a treaty must be "interpreted in such a manner as that it may have its effect, and not prove vain and nugatory." *De Geofroy v. Riggs*, 133 U.S. 258, 270 (1890) (quoting 2 Vattel § 283, at 253).

Good faith does not allow the United States (or a State) to interfere with the Tribes' secured right of taking fish. The Tribes ceded their lands only after securing their fishery. No good-faith reading would allow the United States, or a State, to destroy that fishery. *See* 2 Horace Smith & C.G. Addison, *Addison on Contracts* 576-577 (8th ed. 1883) (*Addison*) (to enforce "good faith," the grant of an estate, interest, or incorporeal property right such as a watercourse carries an implied but enforceable promise that the grantor will "do nothing to annul or avoid such [a] grant" such as "stopp[ing] up the watercourse"); *Amidon v. Harris*, 113 Mass. 59, 64-65 (1873) (recognizing the "well established" rule that one who grants a right "will do no act to interfere with, prevent or diminish the full enjoyment of the right granted").

In fact, in the reciprocal context, this Court has already recognized that the Treaties should not be

read to authorize actions that could undermine the common fishing rights of Indians and non-Indians. In *Puyallup III*, this Court held that a Tribe could not exercise on-reservation fishing rights to "interdict completely the migrating fish run" and thus "completely destroy" the shared fishing resource. 433 U.S. at 176 & n.15. As the Court explained, the Treaties did not provide the Tribe with a right to take actions on its own land that would "totally frustrate … the [fishing] rights of the non-Indian citizens of Washington recognized in the Treaty." *Id.* at 176. There is no principled reason not to apply this rule reciprocally. *See Fishing Vessel*, 443 U.S. at 684-685.

Likewise, this Court has construed other agreements between the United States and Indian Tribes to ensure that the Tribes can actually exercise the rights that they retain. In *Winters v. United States*, 207 U.S. 564 (1908), the Court held that an agreement creating a reservation should be interpreted to retain water rights that were needed to make the reservation a viable home for the Tribe, *id.* at 576-577. As the Court explained, the agreement should be construed to "support the purpose" rather than "defeat it" by leaving the Indians with "valueless" arid land. *Id.*

The reasoning of *Winters* fully applies here; indeed, this case is more compelling. In *Winters*, the Court concluded that reserved water rights were *implicit* in the parties' agreement. Here, the Treaties *expressly* secure the Tribes' "right of taking fish." Protecting the fishery from obstructions and significant

degradations follows directly from the reserved right.[5]

5. The common-law foundation of the relevant Treaty terms confirms that the Tribes' "right of taking fish" includes protection against substantial interference with that right, especially barriers to fish passage. *See United States v. Arredondo,* 31 U.S. 691, 743 (1832) (relying on a "settled principle of the common law" in construing a treaty). As sovereign treaty partners, the Tribes should receive no *less* protection for their fishing right than the common law provided to private individuals. *See Winans*, 198 U.S. at 380.

a. At common law, impediments to "the passage of fish up the river by means of dams or other obstructions" were considered "a nuisance." 3 James Kent, *Commentaries on American Law* 411 (4th ed. 1841). Indeed, barriers to fish passage were "reprobated in the earliest periods of our law," back to Magna Carta. *Weld v. Hornby* (1806) 103 Eng. Rep. 75, 76, 7 East 196, 198 (K.B.).

Weld, a leading English case, sustained an action for nuisance to eliminate an obstacle to fish passage. The defendant had replaced a permeable brushwood weir with a stone weir, blocking salmon passage upstream and wrongfully preventing the plaintiff from taking fish. *Id.* at 75-76, 196-197; *see* John M. Gould, *Treatise on the Law of Waters* § 187, at 328

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[5] The State insists (at 39-40) that *Winters* should be limited to its facts, *i.e.*, the reservation of water rights for lands. That arbitrary distinction ignores that this Court relied on *Winters* and its progeny in *Fishing Vessel*, 443 U.S. at 684, 686, and *Winters* itself relied on the interpretation of the Treaties in *Winans*, 207 U.S. at 577.

(1883) (discussing *Weld* and other similar cases from England and Ireland); *Earl of Kintore v. Pirie* (1906) UKHL 838, 839, 43 Scottish L. Rep. 838, 839 (Lord Davey) (affirming the right of fishery owners to bring an action based on diversion of the watercourse, and holding "that no interference shall be made which materially obstructs the passage of fish").

American courts and state legislatures embraced this common-law rule, recognizing that riparian owners could not use their land "so as to injure the private rights of others" and in particular could not "impede the passage of fish up the river by means of dams or other obstructions." Joseph K. Angell, *A Treatise on the Law of Watercourses* § 85, at 83 (7th ed. 1854). For example, the Supreme Judicial Court of Massachusetts explained that the "ancient common law" doctrine articulated in cases like *Weld* bars riparian owners from "hinder[ing] the passing" of fish upstream. *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199, 207 (1827). Other American courts likewise recognized that the "free passage" of fish "is secured by the common law." *Parker v. People*, 111 Ill. 581, 592-595 (1884) (collecting decisions). Reviewing one of those state decisions, this Court recognized that blocking fish passage harms "[f]ish rights below" the obstruction as well as those above, because fish blocked from migrating upstream "will soon cease to frequent the stream at all." *Holyoke Co. v. Lyman*, 82 U.S. 500, 519 (1872).

Thus, at the time the Treaties were adopted, it was generally accepted in this country that "[t]he owner of a fishery ha[d] a right to have the fish come to his fishery in the ordinary course of nature, and any person doing any act which may interfere with such

right may be restrained." Stuart A. Moore & Hubert S. Moore, *The History and Law of Fisheries* 168 (1903) (*Law of Fisheries*). And Congress had specifically adopted a fish-passage requirement for the Territory. *See* p. 5, *supra.*

The tribal fishing rights here are protected property rights, *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), as well as "the supreme Law of the Land," U.S. Const. Art. VI, cl. 2. But under Washington's approach, they would nevertheless be entitled to *less* protection than both the common law and Territorial law provided to private individuals. "This [would] certainly [be] an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans,* 198 U.S. at 380.

b. The scope of the rights secured by the Treaties is also informed by the nature of the property interest that the Tribes retained, which this Court called a "servitude." *Winans*, 198 U.S. at 381. The common-law analogue was a "*profit à prendre*" (also known as a "right of common"), a legal interest "in the land of another," including "to catch fish." 2 Blackstone 32; *see id.* at 34 (the "[c]ommon of *piscary*" provides "a liberty of fishing in another man's water").

At common law, the owner of a *profit à prendre* could not only "bring an action for trespass," but also "maintain an action … for nuisance" based on a material disruption to the fishery. *Fitzgerald v. Firbank*, (1897) 2 Ch 96, 101-102 (Lindley, L.J.). For example, in *Fitzgerald*, the Court of Appeal held that the owner of a *profit à prendre* could bring an action for nuisance against a railway contractor who had

discharged clay and gravel into the fishery. The discharge not only drove away fish but also damaged their spawning beds, preventing the plaintiff from "exercising" his right "to take away fish." *Id.* at 97, 100-102 (Lindley, L.J.); *id.* at 102-03 (Lopes, L.J.); *id.* at 103-104 (Rigby, L.J.); *see also Law of Fisheries* 167 ("An action will lie for the disturbance of a fishery … and an injunction may be granted[.]").

Accordingly, the common-law backdrop of the Treaties confirms that the Tribes' "right of taking fish … in common with" non-Indians, protects more than access to the fishery or even a fair share of the harvest—it protects against actions that "tend[] to destroy a private right of fishing" by "irreparabl[y]" damaging the fishery. Gould §§ 184-185, at 327.

6. The State insists (at 34-35) that the Treaties should be read not to protect the fishery because the parties (incorrectly) assumed that the supply of salmon was "inexhaustible." But both parties plainly understood that obstructions to fish passage were antithetical to a right of taking fish.

When Congress created the Oregon and Washington Territories, shortly before Governor Stevens negotiated the Treaties, it reaffirmed the longstanding common-law rule by barring any obstruction in salmon-bearing streams unless salmon could "pass freely up and down." *See* p. 5, *supra.* The author of that language explained that "there was now a valuable fishery in Oregon, and unless some care was taken of it, it would be lost. For the want of care, by the erection of a dam, &c., in the Connecticut river, the salmon, which formerly had been very valuable there, had been driven out." Cong. Globe, 30th Cong., 1st Sess. 1020 (Aug. 1,

1848) (Rep. Grinnell). That fate "might be avoided in this Territory, with care, without expense," by preserving fish passage. *Id.*

The Tribes likewise recognized that disruptions to salmon migration would threaten their fishery and, thus, their livelihood. J.A.140a-144a. Indeed, "[a] theme in local Indian mythology" of the time concerned "a period in the past in which malevolent individuals blocked streams to prevent the salmon coming up." J.A. at 372-373, *Fishing Vessel, supra* (from the report of Barbara Lane, Ph.D., exhibit USA-20); *see also* J.A.141a-142a (expert testimony describing tribal mythology that promised "swift retribution" to those who blocked salmon passage). The Tribes themselves regularly removed impediments to salmon migration in order to keep the fishery healthy. For example, the Tribes sometimes harvested fish using weirs, which "could easily kill all of the migrating fish" if left in place. J.A.142a. But the Tribes avoided degrading the fishery by keeping weirs clean and "periodically lift[ing] [them] to permit migrating fish to move upstream." *Id.*

Every aspect of the text and context confirm that the United States and the Tribes agreed to protect the fishery as the Indians' "source of food and commerce." *Fishing Vessel*, 443 U.S. at 676. The Treaties cannot be read to permit the fishery's destruction.

B. The District Court Correctly Found The State In Violation Of The Treaties.

The State is bound to follow the Treaties, which are "the supreme Law of the Land." U.S. Const. Art. VI,

cl. 2. The United States had unquestioned authority, "while it held the country as a territory, to create rights which would be binding on the States." *Winans*, 198 U.S. at 381-383. Yet the State has violated the Treaties by installing and maintaining barrier culverts that block salmon from passing upstream to the Tribes' usual and accustomed fishing grounds. In addition, the barrier culverts have violated the Treaties by preventing salmon from reaching their spawning grounds, resulting in significant degradation to the fishery. Each of these direct interferences with the Tribes' fishing rights provides ample basis to affirm.

1. The State objects (at 43-45) that the court of appeals supposedly applied "ill-defined" standards in affirming the liability judgment. But Washington's violation of the Treaties is straightforward. This is a fish-blockage case involving the sort of direct impediment to fish passage that common-law courts have redressed for centuries. *See* pp. 34-36, *supra*. As the district court noted, "[t]he State does not dispute the fact that a certain number of culverts under State-owned roads present barriers to fish migration." Pet. App. 255a. In fact, by stipulation, this proceeding includes "*only* those culverts that block fish passage under State-owned roads." *Id.* at 253a, 260a (emphasis added).

The district court found that, as of trial, state barrier culverts blocked approximately 1,000 miles of upstream salmon habitat. Pet. App. 157a. The court also found that "[c]ulverts which are improperly designed, installed, or maintained may *completely bar* salmon from access and cause local extirpation of a run." Pet. App. 161a (emphasis added). As a

result, State barrier culverts downstream are directly obstructing fish passage to many of the Tribes' usual and accustomed fishing grounds upstream. Pet. App. 271a.[6]

It is hard to imagine a more fundamental abridgment of the Tribes' right of taking fish at *all* usual and accustomed grounds and stations. The district court predicated liability on this "narrow" ground, directing the State "to refrain from impeding fish runs in [this] one specific manner." Pet. App. 271. This Court likewise may resolve liability on this basis alone.

2. The State's barrier culverts have also significantly degraded the fishery as a whole. This material interference with the Tribes' secured right of taking fish violates the Treaties.

a. The relevant facts are not in dispute. "State-owned barrier culverts are so numerous and affect such a large area that they have a significant total impact on salmon production." Pet. App. 162a. As the district court found, salmon harvests have "declined precipitously, … particularly in the last few decades," with many salmon stocks now "depressed, in danger of extinction, or already extinct." Pet. App. 136a, 157a, 167a, 175a, 253a-254a & n.3. The court recognized, based on the undisputed facts, that "a significant portion of this diminishment is due to the

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[6] In discussing remedy Washington contends that others, too, are barring fish passage on some of the same streams. *See* Part III.B, *infra*. Washington correctly does not contend that those other culverts affect *liability*. At common law, a defendant was liable for blocking fish passage whether or not "there are other obstructions in the river." *Leys, Masson & Co. v. Forbes*, (1831) 5 W. & S. 384, 393 (H.L. Scot.). So too under the Treaties.

blocked culverts which cut off access to spawning grounds and rearing areas." Pet. App. 160a-162a, 176a, 256a, 263a.

How the culverts cause these severe negative impacts is no mystery. Salmon need access to and from the sea to survive: salmon "spawn in freshwater, migrate to the sea, and return to spawn again in fresh water." Pet. App. 131a; *see* p. 3, *supra*. As the district court concluded, barrier culverts directly interfere with this process. Pet. App. 175a. The State itself has repeatedly recognized that its barrier culverts "obstruct habitat," sometimes "many miles" above a culvert, and contribute to significant declines in the salmon population. 1997 Wash. Sess. Laws 2356; J.A.427a-428a; *see* Pet. App. 147a; J.A. 612a; p. 11, *supra*.

b. The State and its *amici* contend that recognizing liability here would open the floodgates to challenges against any land or water uses that might affect "fish abundance." Wash. Br. 32; *see also* American Forest Br. 16; Business Br. 22.[7] The

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[7] *Amici*'s argument that adhering to the Treaties would "undermine Washington's water-rights regime" and deny water to "future users" (Business Br. 26-27) is particularly ill-founded. Washington, like other prior-appropriation states, has long considered tribal claims to "water for the preservation of fishing rights" in its comprehensive water-rights adjudications. *State Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1317 (Wash. 1993). And it is unsurprising that treaty rights from the 1850s would have priority over claims by "future users." Thus, affirming the judgment in this case would not affect the status quo.

Other *amici* argue that the decision below affects EPA's implementation of the Clean Water Act. But their complaint centers on EPA's estimates regarding tribal subsistence consumption of fish (and hence of toxins). American Forest Br.

injunction here does not depend upon any such broad conception of liability. This case involves Washington's large-scale, direct interference with the treaty right, with hundreds of barrier culverts blocking hundreds of miles of habitat. *See* p. 11, *supra*.

Affirming liability on these facts does not require reading the Treaties to regulate every development decision, or even every activity that might impact the salmon population. Instead, the relevant question is whether a particular type of activity significantly degrades the fishery to the point that it materially interferes with the Tribes' secured right of taking fish. Small-scale, isolated activities that might affect salmon, but not significantly degrade the fishery, do not satisfy this standard.

The limits on what the Treaties prohibit follow directly from what kind of the rights the Treaties secure. At common law, the owner of a *profit à prendre* in a fishery could sue for nuisance to protect the fishery from degradations that would undermine his right of taking fish. Pp. 36-37, *supra*. But the law of nuisance did not let plaintiffs invoke the court's equitable authority in order to redress "trifles" or other minor, transitory infringements. H.G. Wood, *A Practical Treatise on the Law of Nuisances* § 7, at 15-16 (2d ed. 1883). Rather, the defendant's action had to "work material … injury and damage" to the plaintiff's property interest, so as to actually compromise the "use and enjoyment" of the property. *Id.* § 4, at 7 & n.2. Likewise, the

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11-14 & n.2. Those estimates do not turn on whether the Treaties protect the fisheries; in Maine the fisheries are not even treaty-based.

contractual duty of good faith inherent in treaties, pp. 31-32, *supra*, bars one sovereign from taking action to "annul or avoid" the benefit the agreement grants to the other sovereign. 2 *Addison* 577. Actions that have minor effects on some fish will not rise to this level.

c. Aside from its parade of horribles, the State also insists (at 32-35) that the Treaties should not be construed to limit off-reservation land use in any way, given the text ceding the Tribes' "right, title, and interest." *Accord* Business Br. 8. Washington and its *amici* treat the Treaties as if the Tribes ceded a freestanding right to engage in unrestricted "development." Not so: the general cession came with specific qualifications, as the text and *Winans* both make clear. That is why this Court has recognized that "private owners … had notice of these Indian customary rights by the reservation of them in the treaty." *Seufert Bros.*, 249 U.S. at 199.

Washington's argument is irreconcilable with *Winans*, in which the Court held that the Treaties *do* "impose[] a servitude" on the off-reservation land that reserves certain "rights" to the Tribes. 198 U.S. at 381. Washington tries to explain this holding away by arguing (at 33) that the off-reservation easements recognized in *Winans* supposedly were "explicit." But the Treaties do *not* explicitly refer to any "right of access." P. 28, *supra*. Rather, the *Winans* Court read the right of taking fish to encompass a right of access across private lands, to "give effect to the treaty." 198 U.S. at 381.

Here the Treaties' off-reservation applicability is even clearer. The Treaties permanently and explicitly "secure[]" the right of taking fish, including

at "grounds and stations" outside reservations. Art. III, 10 Stat. 1133. And there is no "private development" exception. Where the Treaties qualified one of the Tribes' retained rights, they did so expressly. For instance, the Tribes' rights "of hunting" or "gathering roots and berries" apply only to "open and unclaimed lands." *Id.* Thus, the Tribes do not have a continuing right to hunt on lands that are no longer "open and unclaimed." No such restrictions apply to the Tribes' right of taking fish: the "comprehensive language" of the fishing clause (*Seufert Bros.*, 249 U.S. at 199) extends to all of the Tribes' "usual and accustomed" grounds and stations *regardless* of whether they remain "open and unclaimed."

C. Washington's Complaints About The "Moderate Living" Standard Are Misplaced.

Washington and its *amici* insist that the court of appeals recognized what they call a "new treaty right," which supposedly guarantees the Tribes a moderate living from salmon fishing in perpetuity. But the moderate-living standard articulated in *Fishing Vessel* for harvest allocations is not the basis of the Tribes' treaty claim here. The Tribes are not arguing that the State has an affirmative duty to ensure a fishery robust enough to sustain the Tribes. And the injunction says nothing about restoring a moderate living.

Rather, the moderate-living standard acts as a *check* on the State's liability—a potential defense against breaches of the Treaties. Washington never invoked the defense here, and the facts would not support it.

In *Fishing Vessel*, the Court held that the right of taking fish "in common with" non-Indians entitles the Tribes to take up to 50% of the annual salmon harvest, subject to downward adjustment if a lesser share would satisfy tribal needs. 443 U.S. at 685-687. Thus, if the Tribes were earning a moderate living from the fishery despite Washington's barrier culverts, the Tribes could not argue that the culverts had substantially degraded the fishery in violation of the Treaties. But Washington declined to argue that the Tribes are earning a moderate living from the fishery (C.A.S.E.R.136 n.75), and the district court found that salmon declines have "damaged tribal economies" and "left individual tribal members unable to earn a living by fishing" (Pet. App. 157a-158a).

The State does not contest these factual findings because it cannot. But it tries to undercut them by asserting, without context, that the Tribes "take millions of salmon annually." Wash. Br. 1, 8, 40. It is undisputed, however, that salmon harvests have declined by millions of salmon per year over the last several decades and that both tribal and non-tribal fishing economies have been decimated as a result. Pet. App. 132a-133a, 175a, 183a-186a. The decline has been particularly significant for chinook, coho, and steelhead, J.A.200a-203a, the most valuable salmon species. Moreover, as the State concedes (at 8), the total harvest numbers do not address the fact that various "salmon populations are ailing," which has left Tribes unable to take fish from *all* of their usual and accustomed grounds and stations.

Trying another tack, the State suggests that a significant decline in fish harvests is no great loss for

the Tribes because the Treaties contemplated that they would learn "blacksmithing, carpentry, and farming." Wash. Br. 33. But the historical record makes clear that the negotiators intended to provide opportunities to integrate into the non-Indian economy *without* requiring the Tribes to relinquish the role of fishing in their way of life. Traditional and new ways of living were to form "a single, compatible whole." J.A.127a-129a. The Tribes were told that the Treaties "required no choosing between fishing and farming," and that they did not need "to give up their old modes of living and places of seeking food'" as part of their bargain. J.A.128a-129a. That is why the Treaties protected the right of taking fish *permanently*.

D. The State Fails To Identify Any Treaty Interpretation That Would Protect The Fishery From Destruction Without Also Requiring Affirmance Here.

Washington previously acknowledged where the logic of its interpretation leads: it admitted to the court of appeals that, on its reading, it could destroy the fishery by blocking *all* salmon from passing upstream without even implicating the Tribes' treaty rights. *See* p. 2, *supra*. In this Court, Washington has tried mightily to walk back that answer, but it cannot provide a coherent treaty interpretation that avoids endorsing that absurd result but still enables the Court to rule in its favor. As the district court recognized (Pet. App. 256a), if the Treaties impose

any protections for the fishery, then they are necessarily violated by the State's actions here.[8]

The State protests that a ruling in its favor would not jeopardize the fishery, and it points (at 9-10 & n.9, 42 & n.31) to "numerous state and federal laws" that ostensibly "protect salmon from destruction." But the State fails to explain how laws postdating the Treaties by a century or more could inform the scope of the Tribes' *treaty* rights. Ultimately, the State suggests that the Tribes should trust the State's beneficence, as it disclaims (at 2) any "desire[]" to destroy the salmon fishery and notes (at 43) that its own citizens benefit from healthy salmon populations. The Treaties, however, secure the Tribes' *right* of taking fish. They do not leave the Tribes "at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Moreover, history shows that despite the State's current pledge of good faith, it has often pursued its own interests at the expense of the Tribes' treaty rights: "For more than 100 years, the State … deliberately and systematically prevented the Tribes from engaging in the off-reservation fishing promised under the Treaties." Pet. App. 7a.[9]

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[8] Notably, Washington's *amici* accept this consequence of a ruling for the State, even as the State strains to avoid it. *See, e.g.*, Idaho Br. 15-16 (arguing that the Treaties provide no protection against development that "destroy[s] the fish runs").

[9] Washington argues (at 36-37) that the United States may have violated the Treaties in the past, but identifies no reason why *the State* would therefore be insulated from liability. Washington purports to rely on the course of dealing between "the parties," but it points to no evidence that *the Tribes* acquiesced in actions that "decimated salmon populations in areas covered by the Treaties." Moreover, actions by federal

As for protections provided by *the Treaties*, the State relies primarily on the possibility that federal courts have *in rem* jurisdiction over the fishery to allocate the annual harvest, and so may prevent destruction of the fishery in order to protect their own jurisdiction over the *res* (the fish). *See* Wash. Br. 41-42. This suggestion is hard to square with the State's complaints about the burdens imposed by ongoing judicial supervision of fishing in Puget Sound. *See* Wash. Br. 15-16; Idaho Br. 31-32. And there is no textual or other basis to surmise that the Treaties protected federal-court jurisdiction over the fishery in lieu of protecting the fishery itself. Indeed, Congress had not yet even established general federal-question jurisdiction in the 1850s. *See Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 459 (1894).

In any event, the State's *in rem* theory would support affirmance here, as the case Washington relies on (at 42) makes clear. In *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) (Kennedy, J.,), the court of appeals affirmed the district court's authority to enjoin tribal fishing to preserve a salmon run, because the salmon population had "severely declined" and the fishery was "in jeopardy." *Id.* at 1010-1014. The findings here are indistinguishable.[10]

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employees (especially those without direct responsibility for implementing the Treaties) are no basis to defeat the Tribes' treaty rights. *See* Part II, *infra.*

[10] The State also suggests (at 42) that it could not destroy the fishery because doing so "would necessarily involve some degree of discrimination against tribes" given their "historical reliance on salmon." *Id.* But if destroying the fishery discriminates against the Tribes because of their reliance on salmon, then so

II. The District Court Correctly Dismissed Washington's Insubstantial Equitable Defense.

Washington argues that even if it has violated the Tribes' treaty rights, the lower courts should have allowed it to resist relief by asserting (unidentified) "equitable defenses" against the United States. Washington's answer pleaded "waiver and/or estoppel" (J.A.86a-87a), but this Court has never allowed such a defense to an action by the United States to enforce federal law. And these inadequate allegations should not be the first.

A. Inaction By Government Employees Does Not Estop The United States.

Washington cites no case from this Court in which a defendant successfully invoked an equitable defense to bar a suit by the United States to enforce federal law. To the contrary: the Court has "reversed every finding of estoppel that [it has] reviewed," often summarily. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422-423 (1990). If individual government employees could make promises that immunize a violation of federal law, "the rule of law [would be] undermined." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).

Indeed, this Court has rejected far more plausible attempts to defeat Indian claims by estopping the federal government. The Court has repeatedly held that even the formal issuance of a land patent cannot estop the government. *Cramer v. United States*, 261

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does blocking fish passage or otherwise significantly degrading the fishery.

U.S. 219 (1923); *Winans*, 198 U.S. at 382. The Court made short work of the estoppel argument in *Winans*: "[t]he Land Department could grant no exemptions from [the Treaty's] provisions." *Id.* In *Cramer*, the claim of estoppel was stronger, because the Indians' prior claim to the patented land derived only from an *implied* grant. Nevertheless, this Court held that the patent was "unauthorized and could not bind the government; much less could it deprive the Indians of their rights." 261 U.S. at 234. Here, by contrast, the Tribes' rights are formally enshrined in a treaty, and there can be no settled expectations to the contrary. *Seufert Bros.*, 249 U.S. at 199.[11]

Washington relies mostly on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), a case brought by Indian Tribes—*not* the United States—seeking to restore aspects of sovereignty after almost two centuries, over original reservation land repurchased on the open market. *Sherrill* is triply inapposite. This case deals with *present-day* impediments to the Treaty-protected "right of taking fish." That right implicates none of the "repose" issues that the sovereignty claim in *Sherrill* did. 544 U.S. at 218-219. And the Tribes have been invoking that right (on the water and in court) for more than 150 years.[12] Indeed, in the district court,

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[11] Washington does not discuss *Cramer*. *Amici* argue that in *Cramer* the Interior Department's "settled government policy" trumped the land patent. Idaho Br. 27-28 (quoting 261 U.S. at 229-230). A federal treaty is a far more "settled" policy.

[12] The Second Circuit has applied *Sherrill* to the federal government on the incorrect theory that a claim brought by the United States as trustee for Indians is a claim "in the nature of private rights." *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005). As the United States explains, enforcing

Washington never framed its argument as one about timeliness; it cannot smuggle in such an argument now by obscuring which "equitable defenses" it claims.

B. The Federal Government Is Not Responsible For Washington's Treaty Violations.

Washington's defenses are spurious in any event. In arguing (at 46, 50-51) that "[t]he federal government" "required that culverts be built to federal specifications," and "directed the State to build culverts as it did," Washington cannot plausibly claim that a federal agency actually *required* it to block fish passage. That is because it never happened.

Washington contended below that it based its state "Hydraulics Manual" governing culvert design on a Federal Highway Administration (FHWA) publication, "Hydraulic Engineering Circular #10," J.A.100a-101a ("Circular #10"), and this state manual was then approved by FHWA, J.A.119a. Washington averred that it "reasonably concluded that by approving or failing to object to the State's culvert design and maintenance, the FHWA had determined that the design and maintenance satisfied any treaty obligation." J.A.78a. But Washington has since admitted that FHWA never said that the *national* "federal design standards were sufficient to meet the fish passage" requirements of the Treaties. J.A.735a. FHWA did not even consider the question. J.A.119a. And "[t]o constitute an

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compliance with the Nation's solemn treaty obligations is no mere "private right."

estoppel by silence there must be something more than an opportunity to speak. There must be an obligation." *Wiser v. Lawler*, 189 U.S. 260, 270 (1903). Washington identifies none.

Nor did the federal government require Washington to use any particular culvert design. Circular #10 is nothing more than a set of charts showing the calculated discharge flows for culverts with particular characteristics. It concerns sufficiency for flood control, not fish passage. Washington has admitted that FHWA did not "preclude[] the State from modifying the design standards to accommodate local conditions," J.A.735a, as Washington later did when it identified fish-passage problems with its designs. J.A.101a.

In short, the United States neither compelled Washington to use any particular culvert design nor told Washington it would comply with the Treaties if it did. There is thus no basis for an estoppel, much less for an unprecedented estoppel against the government.

III. Washington's Fact-Specific Criticisms Of The Injunction Lack Merit.

The district court's approach to remedying the Treaty violation was both flexible and appropriate. Although the State nitpicks the remedy in this Court, it refused to propose alternatives in district court. Pet. App. 8a-9a, 107a; *see* C.A. Oral Arg. 55:58 ("We did oppose the entry of any injunction; we did not propose a narrower injunction."). The district court nevertheless thoroughly balanced the equities, considered issues of cost and benefit, adopted a formula that allows the State to defer a large

number of culvert repairs until much later, and gave the State more time to comply than the United States recommended (*see* J.A.63a-64a). The court also drew on more than a decade's experience in presiding over this litigation.

Washington does not even mention the applicable standards of review; it just contends that the evidence supporting the district court's key findings are "no[t] persuasive" or not "very compelling." Wash. Br. 56, 58. But rote invocations of federalism do not excuse the State from the applicable standards. Washington never identifies a "very obvious and exceptional showing of error," as necessary to second-guess "concurrent findings of fact by two courts below." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *see also* Fed. R. Civ. P. 52(a)(6). Nor does it identify any abuse of discretion in the remedy itself.[13]

A. The Record Demonstrates A Clear Connection Between The State's Barrier Culverts And Their Impact On Salmon.

Washington argues that the United States and the Tribes submitted "no persuasive evidence" of "a clear connection between culverts and tribal harvests." Wash. Br. 56, 57. The district court found to the contrary, with ample support.

1. The district court found that state-owned barrier culverts have "a significant total impact on salmon production." Pet. App. 162a. Specifically,

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[13] Indeed, given the posture and fact-bound nature, the Court may wish to dismiss this question presented as improvidently granted. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (partial dismissal).

"[t]he construction and operation of culverts that hinder free passage of fish has reduced the quantity and quality of salmon habitat, prevented access to spawning grounds, reduced salmon production in streams in the Case Area, and diminished the number of salmon available for harvest by Treaty fishermen." Pet. App. 176a; *see also, e.g.*, Pet. App. 158a, 160a-162a, 177a. Those findings were amply supported by evidence, *see, e.g.*, J.A.407a, 431a, 673a; C.A.S.E.R.31, including evidence prepared by the State itself, J.A.603a, 612a; p. 11, *supra*.

Rather than trying to show clear error in these factual findings, Washington does not mention them. Instead, it complains (at 57) about *the court of appeals'* reference to a document that, Washington says, the district court never cited. But a quibble about the court of appeals' decision does not undercut the district court's findings or the State's clear admissions on the subject.

Washington also notes (at 56-57) that harvests have fluctuated. But no one disputes that multiple factors influence salmon populations. The question is whether barrier culverts are among them. The district court properly found that they are. Indeed, the State's own witness admitted that "if [anadromous fish] cannot reach spawning and rearing areas, … even healthy fish stocks decline to levels that cannot support utilization objectives and even levels of extinction." J.A.739a. And, by stipulation, this case focuses *entirely* on culverts that block fish passage, including to spawning and rearing areas. Pet. App. 253a.

2. The State also contends that "systemwide relief" is inappropriate absent culvert-by-culvert proof of

fish loss. Wash. Br. 57-58. But as the district court correctly explained, injunctive relief does not turn on "quantify[ing]" the per-culvert fish loss with mathematical precision. Pet. App. 175a, 256a. Indeed, witnesses testified at trial that assessing fish-passage benefits programmatically would "make more sense[]" than a culvert-by-culvert evaluation, J.A.709a, which would ignore the "cumulative effects [that] can accrue across a variety of watersheds," Pet. App. 114a.

Washington contends (at 56-57) that despite these findings, culvert-by-culvert proof is *required* by *Lewis v. Casey*, 518 U.S. 343 (1996). But in *Lewis*, the plaintiffs sought systemic changes across all of a state's prisons despite demonstrating only *two* instances of constitutional injury. *Id.* at 346-349, 356. The Court recognized such proof was "patently inadequate." *Id.* at 359. In so holding, the Court did not require the kind of one-for-one limitation on equitable relief that Washington is demanding.

Here, the State itself counts *1,000* fish-blocking culverts. J.A.225a-226a. Not only do they block passage on individual streams (which alone suffices to establish a violation of the Treaties, pp. 39-40, *supra*), they also have systemic effects on the salmon population "in every watershed within Puget Sound." J.A.673a. And the injunction is reasonably tailored to remedy both types of violations, because it applies only to culverts actually impassable to fish. That is exactly what injunctive relief is supposed to do—restore the wronged parties "to a position they would have enjoyed absent" the violations. *E.g.*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). The district court was not required to find a complete, freestanding

Treaty violation at individual culverts; determining a remedy for the camel's broken back does not have to entail separate litigation over each straw.

B. The District Court Gave The State Sufficient Flexibility To Prioritize Culvert Repairs.

Washington also complains that the injunction is overbroad because some state-owned culverts are either upstream or downstream of culverts that the State does not own. Washington insists that repairing these culverts "will have no impact." Wash. Br. 53-54. That is wrong for multiple reasons. *See* Pet. App. 110a-112a. And in any event, the injunction gives Washington flexibility to defer a substantial number of culvert replacements.

1. Washington fails to mention that the overwhelming majority of non-state-owned barrier culverts are *upstream* from state-owned barriers. In other words, the first barrier between the ocean and the river habitat is usually a state-owned barrier culvert. J.A.397a (of the 1590 non-state-owned barriers that are on the same stream as a state-owned barrier, 1370 are upstream). Washington invokes (at 53) one creek with 36 non-state culverts, but *all 36* are at least half a mile *upstream* of the one state culvert. Pet. App. 111a; C.A.E.R.204. The potential impact from repairing the state culvert is apparent.

2. As to the relatively small number of state barrier culverts with other culverts downstream, the State is wrong to suggest that replacing them will have "no impact." To begin with, the large majority of the downstream culverts (in one analysis, almost

70%) allow partial passage of fish—meaning that some salmon can get as far as the state-owned culvert and are blocked there. Pet. App. 111a; J.A.779a-780a; C.A.E.R.211.

Moreover, contrary to its position in this Court, the State itself has regularly pursued replacement projects even when there is a non-state-owned culvert downstream. *See, e.g.*, J.A.737a-738a (State's witness testifies that project with one non-state culvert downstream is "a good project" because of the "significant amount of habitat upstream"); C.A.E.R.196; *see also* J.A.329a (similar). That makes good sense because the downstream barriers may well be replaced. Indeed, those barriers *violate state law*, which has required fish passage since before automobiles were invented. The State could have enforced that law, civilly or even criminally. Pet. App. 139a-140a; J.A.294a-295a, 612a. It cannot use its own non-enforcement to excuse its own blockages. And even if it lacked enforcement power, Washington has long said that it works cooperatively with other entities to address their barriers. J.A.384a (noting "opportunities to work with other entities to fix several culverts or habitat problems at once"); C.A. S.E.R. 33 (cooperative projects between WDFW and counties); C.A.E.R.125; Pet. App. 155a-156a.

Thus, in evaluating the benefits from replacing a barrier culvert, it makes sense to focus on distance to a permanent barrier rather than a remediable one. The State follows this approach in formulating its own Priority Index, as its scientists treat those non-state, man-made barriers as "transparent, … as if all those barriers would be corrected at some point in time." Pet. App. 110a-111a (quoting J.A.696a). The

district court reasonably adopted the same approach, particularly because the record demonstrates that the federal government, Tribes, and private landowners have all taken significant steps toward remediating their own barrier culverts—with state culvert correction encouraging private landowners to fix their own barrier culverts. J.A.414a-415a ($10 million in restoration projects by one Tribe since 1994); J.A.780a; Pet. App. 149a (timber-purchaser projects).[14]

3. The district court gave Washington ample flexibility to address the handful of state culverts whose correction would not affect salmon passage if other blockages remain. The injunction permits the State to defer indefinitely the correction of all barrier culverts with less than 200 meters of habitat gain, *plus* culverts that would collectively open up less than 10% of the total habitat. Pet. App. 238a. Washington has made no effort to demonstrate that the leeway afforded by this provision would not completely solve the hypothetical non-state-barrier problem. The State's own figures show that it will likely be able to defer more than 200 culverts under that provision. *Id.* at 114a-115a. The State has never argued, much less presented evidence to show, that downstream culverts totally cut off more than

[14] Washington protests (at 54) that it does not use the Priority Index to determine the order of culvert replacement. What matters is that, in an index the State deems "a good tool for comparing the relative benefits of different projects," the State disregards other manmade barriers "because we don't know when the others might be fixed." J.A.300a, 308a. Washington does not assume that they will *never* be fixed, as it insists the district court was required to do.

200 of the state-owned barrier culverts. *See id.* at 111a.

If 10% was not enough flexibility, the time for the State to object was *before the injunction was issued*. But the State did not offer any more permissive alternative in the trial court. *See* ECF No. 663, at 28. Particularly in light of the State's strategic decision to sit out the discussion, the district court did not abuse its discretion by providing the degree of flexibility that it did.

C. The State's Cursory Complaints About Cost And Equitable Balancing Are No Basis To Reverse.

Finally, the State disagrees (at 54-55, 58-59) with how the district court considered costs and balanced the equities. These contentions mostly depend on other arguments refuted above (*e.g.*, that the compliance costs will be "wasted," and that the equities are with the State because the fault lies with the United States).

To the extent Washington is arguing that cost is an independent basis for reversal, it persists in advancing a figure of $2 billion required by 2030. Two courts have already found that estimate baseless, and the State does not even attempt to argue that this finding is clearly erroneous, much less "obvious[ly] and exceptional[ly]" so. *Graver Tank*, 336 U.S. at 275; *see* Pet. App. 16a, 118a-120a, 170a. Washington overstates both the number of culverts requiring replacement and the average cost of a replacement. Pet. App. 119a (calling Washington's extrapolation "demonstrably incorrect"). Judge O'Scannlain acknowledged that

the range of costs in the findings is well below the estimate that the State sticks to. *See* Pet. App. 18a n.1. And the costs are spread over nearly two decades. The state transportation budget was nearly $10 *billion* for each two-year period, and is growing. *Id.* at 171a.

Furthermore, the injunction requires the State to "accelerate the pace of barrier correction" that is already required, not to spend money on something it planned never to fund. Pet. App. 177a-178a; *see also* Pet. App. 119a-120a, C.A.E.R.697-699. And the designs the injunction specifies (stream-simulation culverts and bridges) are the State's own stated preference "where feasible," which is all the injunction requires. J.A.226a; Pet. App. 239a-240a.

These expenditures will benefit the State and its citizens (as well as the Tribes). Indeed, the State has repeatedly said that it sees $4 in benefits for every dollar spent on culvert corrections. J.A.427a, 440a-441a, 617a. Stream-simulation culverts in particular "offer superior fish passage and habitat benefits" because they are "less likely … to become fish passage barriers in the future." Pet. App. 170a.

Moreover, while Washington complains about the federal role in creating the problem, it fails to mention that it receives substantial sums from the federal government to pay for fish-passage projects. Pet. App. 171a.

Finally, the State reargues the equities in two cursory sentences (at 59) asserting its own lack of culpability. That is not really an equitable argument; the injunction is not punishment, but remediation. Equitable balancing weighs the cost to

the State transportation budget against the harm to the Tribes and the public interest. And the district court acted well within its discretion in concluding that "[t]he balance of hardships tips steeply toward the Tribes." Pet. App. 177a. The culverts' continued degradation of the salmon fishery causes the Tribes a significant and ongoing injury—not just to their economies, but also to their spiritual needs and way of life. *Id.* It also harms the public interest, including non-Indian commercial and recreational fishing. *Id.* at 178a. And it dishonors a solemn commitment of the United States.

Allowing the State to maintain its preferred glacial pace for fixing culverts may well cause the degradation of the fishery to pass a tipping point, beyond which this remarkable resource can no longer recover. The promise of a permanently secured right of taking fish would then be broken beyond repair. The district court granted injunctive relief to ensure that remediation will not come too late.

* * * * *

Despite the exaggerations of Washington and its *amici*, this case is straightforward. The Treaties secure the right of taking fish, at all usual and accustomed grounds. Washington's barrier culverts undermine that right by preventing the fish from getting to their spawning grounds—and to the Tribes' fishing grounds. The district court's equitable decree is an appropriate means of remedying, over time, that violation of the Treaties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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