

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON,)
) Petitioner,)
) v.) No. 17-269
UNITED STATES, ET AL.,)
) Respondents.)

Pages: 1 through 77

Place: Washington, D.C.

Date: April 18, 2018

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	NOAH PURCELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ALLON KEDEM, ESQ.	
7	On behalf of the Respondent	
8	United States	34
9	ORAL ARGUMENT OF:	
10	WILLIAM M. JAY, ESQ.	
11	On behalf of the Respondents	
12	Suquamish Indian Tribe, et al.	53
13	REBUTTAL ARGUMENT OF:	
14	NOAH PURCELL, ESQ.	
15	On behalf of the Petitioner	71
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 17-269, Washington versus
5 the United States.

6 Mr. Purcell.

7 ORAL ARGUMENT OF NOAH PURCELL

8 ON BEHALF OF THE PETITIONER

9 MR. PURCELL: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The State of Washington wants to
12 protect salmon and has voluntarily spent
13 billions of dollars to achieve that goal. Our
14 objection is the unworkable treaty right the
15 Ninth Circuit announced. Respondents have
16 abandoned that court's reasoning here, but the
17 alternative theories that they offer were not
18 addressed by the courts below and cannot
19 support the judgment. So this Court should
20 reverse or, at most, should clarify what legal
21 rule the treaties impose and then remand to the
22 district court to apply it.

23 CHIEF JUSTICE ROBERTS: I think you
24 mean at least, right?

25 MR. PURCELL: Well, sorry, we'd prefer

1 that you reverse. Sorry, how you want to
2 clarify -- yeah, at most, at least. Sorry.
3 Sorry, Mr. Chief Justice. You -- you're the
4 better oral advocate on all of this, I'll
5 stipulate that.

6 The central question, though, is what
7 legal standard the treaties apply -- impose.
8 And, again, the Respondents have abandoned the
9 rule that the Ninth Circuit advanced and -- and
10 rightly so, and instead they're arguing a new
11 theory. But even under that theory, the
12 treaties would regulate virtually every
13 significant human activity off reservation, and
14 federal courts in the Northwest would be
15 regulating -- essentially would be imposing
16 environmental laws, would be the primary
17 environmental regulators, rather than leaving
18 most decisions to state and federal
19 policymakers, as should be the case.

20 JUSTICE SOTOMAYOR: In the courts
21 below during the argument in the Ninth Circuit,
22 you said the Stevens Treaty would not prohibit
23 Washington from blocking completely every
24 salmon stream into Puget Sound. Basically, the
25 right to take fish, to you, means the right to

1 take fish if you decide you want to provide
2 fish. Is that correct?

3 MR. PURCELL: I -- I remember that
4 answer well, Your Honor, and that was a mistake
5 at oral argument about how our theory --

6 JUSTICE SOTOMAYOR: So what is your
7 position now? When can you and how much can
8 you block fish?

9 MR. PURCELL: So, Your Honor, we
10 believe that to show a treaty violation, the
11 tribes should have to show four things: That a
12 state barrier is causing a large decline in a
13 particular river and that it's not justified by
14 substantial compelling interests.

15 JUSTICE SOTOMAYOR: I don't know -- I
16 don't know that it's a large decline. I think
17 it has to be a material decline, no?

18 MR. PURCELL: Well, it --

19 JUSTICE SOTOMAYOR: Every -- every --

20 MR. PURCELL: The precise word, Your
21 Honor, we're less concerned about than that it
22 be a meaningful decline, because, otherwise, as
23 I was saying, the concern is that there are
24 many, many things that affect salmon, Your
25 Honor, from zoning decisions to climate change

1 to transportation, and if you don't set the bar
2 at least at some reasonable level, then --

3 JUSTICE SOTOMAYOR: Well, don't you
4 think the court below did?

5 MR. PURCELL: No, Your Honor, the
6 court below explicitly said that Respondents
7 did not need to show anything about the -- to
8 quantify the effect of state culverts on salmon
9 and -- and just said that any diminishment is a
10 treaty violation. And under that rule, that's
11 why courts applying the treaties will be --

12 JUSTICE SOTOMAYOR: Well, it didn't
13 quite do that, because, as I looked at its
14 remedy, it -- it chose not to have you fix
15 culverts that were -- were degradating the
16 fish, but it said they can wait until the
17 normal life of the culvert ends.

18 MR. PURCELL: Your Honor, that --

19 JUSTICE SOTOMAYOR: And so --

20 MR. PURCELL: Sorry.

21 JUSTICE SOTOMAYOR: And it also gave
22 you leeway, rather substantial leeway, 200
23 culverts, I think, or over 200, not to fix at
24 all. So what the court does -- did was take
25 your plan and accelerate it. You made the

1 judgment already.

2 MR. PURCELL: Your Honor, the court
3 told us we could defer until the end of the
4 useful life culverts that had less than 200
5 meters upstream of useful habitat.

6 So the -- the -- those are culverts
7 that will make extremely little difference to
8 be replaced, and each one costs several million
9 dollars. So that's --

10 JUSTICE SOTOMAYOR: And the court
11 excluded those?

12 MR. PURCELL: Well, the court said
13 that those are the ones we could do at the end
14 of the useful -- at the end of the useful life.
15 The court --

16 JUSTICE SOTOMAYOR: Yeah, well, that
17 means, because if you don't do it then --

18 MR. PURCELL: Fair enough, Your Honor.

19 JUSTICE SOTOMAYOR: -- it's going to
20 fall down. So --

21 MR. PURCELL: My -- my point is the
22 court did not exclude ones even where there's
23 another barrier 10 yards upstream or 10 yards
24 downstream that the state does not control.

25 So we have to replace culverts even

1 where no salmon can reach them. And that is an
2 utter waste of public funds and -- and -- and
3 unreasonable even under the Respondents' theory
4 here.

5 JUSTICE SOTOMAYOR: But they gave you
6 the discretion to exclude those?

7 MR. PURCELL: No. The -- the judge
8 said that we could defer culverts blocking
9 10 percent of the habitat.

10 But that -- that -- the problem is
11 that that doesn't -- it measures it in exactly
12 the wrong way. So we could -- we could --

13 JUSTICE SOTOMAYOR: It gave you the
14 choice to measure it.

15 MR. PURCELL: No, no. It measures by
16 how much habitat is upstream regardless of
17 other barriers. So the state is more
18 incentivized under this ruling to replace a
19 culvert that has 10 miles of habitat upstream
20 even if there are five downstream barriers that
21 prevent any salmon even from reaching the state
22 barrier. So --

23 JUSTICE SOTOMAYOR: I think your
24 adversaries told me that there aren't hardly
25 any culverts downstream, that virtually all of

1 them are upstream from you.

2 MR. PURCELL: I don't think they would
3 characterize it that way, and if they would,
4 it's incorrect, Your Honor. We showed in -- in
5 our reply brief, at the end of our reply brief,
6 a sample of 315 state culverts; 220 had
7 downstream barriers. So it's not -- it's --
8 it's true that many more barriers may be
9 upstream, but there are still hundreds and
10 hundreds downstream.

11 And that -- this all highlights, Your
12 Honor, the -- the first treaty point, that the
13 -- the Respondents should have to prove the
14 effect of specific state culverts on particular
15 rivers. And that just was completely glossed
16 over by the district court here.

17 The -- the fact that a tribe -- each
18 tribe has its own separate treaty fishing
19 rights and its own historic fishing places.
20 And a tribe near Seattle might well be able to
21 show that culverts on a stream near Seattle are
22 affecting its right of taking fish. That
23 doesn't say anything about the effect of
24 culverts on the Olympic peninsula hundreds of
25 miles away, where the culvert might be in a

1 completely different place in the watershed,
2 there might be different species of salmon,
3 there might be other habitat issues, and that
4 the district court didn't just -- just didn't
5 require at all that -- that type of evidence
6 about the effect on particular rivers.

7 And that's also crucial under this
8 Court's decision in Fishing Vessel, where the
9 Court said that the treaty right of -- of
10 sharing fish is measured on a river-by-river
11 basis.

12 So -- so it's really crucial that the
13 analysis be done in that more precise way.

14 JUSTICE SOTOMAYOR: I -- I'm just
15 still having a hard time. As I understood it,
16 the district -- the district court essentially
17 took your plan of remediation that was going to
18 take 99 years, and it condensed it to 17. So
19 it took all of your own studies and your own
20 decisions about priority and what needed to be
21 done on what time level and what studies needed
22 to be done to accelerate what projects faster
23 than others, and gave you the opening to come
24 back and tell them why you were wrong and why
25 something should be deferred or not. And you

1 just didn't participate in the injunction.

2 So why should we remand to do
3 something you refused to do when given the
4 opportunity?

5 MR. PURCELL: First of all, Your
6 Honor, the Ninth Circuit was incorrect when it
7 said we refused to participate in the
8 injunction. The -- the plaintiffs filed a
9 proposed injunction. One week later, we filed
10 a post-trial brief that raised every single
11 objection I'm raising here today. If you look
12 at Joint Appendix 28, it's Docket Entry 663,
13 the -- the -- the filing itself is not in the
14 appendix, but it's available on PACER. And if
15 you read it, you'll see we raised every single
16 objection I'm raising here. We also raised
17 them at closing argument several months later.

18 Three years passed, and the district
19 court entered the exact injunction that
20 Respondents had asked for, without -- without
21 addressing any of the concerns we raised. And
22 so -- so it's just not right; the Ninth Circuit
23 was just incorrect when it said that -- that we
24 had not participated. We --

25 JUSTICE ALITO: Could you say -- could

1 you say again what -- what you think the
2 standard is? The treaty talks about the right
3 of taking fish.

4 MR. PURCELL: Yes.

5 JUSTICE ALITO: What do you think that
6 means?

7 MR. PURCELL: Well, it's clear that it
8 guarantees three important rights, Your Honor,
9 this Court has recognized: A right to access
10 historic fishing places. That's Winans. A
11 right of fair share of the available fish.
12 That's Fishing Vessel. And then a right to be
13 free of certain types of state actions that are
14 not justified by substantial public interest.

15 And -- and applied here, we think that
16 means that the -- the plaintiffs need to show
17 that state barriers are causing a large decline
18 in a particular river and that it's not
19 justified by substantial public interest.

20 JUSTICE ALITO: And what do -- what is
21 the difference between that and the federal
22 government's position about substantially
23 degrading the supply of salmon?

24 MR. PURCELL: Well, Your Honor, for
25 one thing, it's not -- I'm not -- I'm not sure

1 whether they would limit their rule to
2 obstructions. And -- and we think that that's
3 important because the parties stipulated early
4 in this case, at Petition Appendix 173 to 74,
5 that that's all this case was about. So that's
6 one potential difference. It's also what all
7 the briefing here is focused on.

8 JUSTICE ALITO: All right. But as to
9 this case, which involves -- supposed
10 obstructions --

11 MR. PURCELL: Right.

12 JUSTICE ALITO: -- that's not a
13 difference between the two positions.

14 MR. PURCELL: Okay. I just -- I just
15 wanted -- that's important.

16 So, second, the way they've defined
17 substantial degradation here, it -- it -- as we
18 explained in our brief, that the highest
19 estimate they gave of the effect of culverts on
20 salmon is a fraction of 1 percent of historic
21 harvests. So, if you define it that way, it
22 just -- the treaties become a catch-all
23 environmental statute that will regulate every
24 significant activity in the Northwest, so --

25 JUSTICE ALITO: So what -- again, what

1 -- they say substantial degradation, and you
2 say what?

3 MR. PURCELL: We -- we said large
4 decline, Your Honor. But, again, I'm not --

5 JUSTICE ALITO: A large decline.

6 MR. PURCELL: I'm not being -- I don't
7 want to be picky about the word. The word is
8 less important to us than the concept that it
9 be meaningful. And --

10 JUSTICE KAGAN: What does it mean?

11 JUSTICE ALITO: Well, I don't
12 understand what either of those things means.
13 I don't know whether it's substantial
14 degradation or a large decline.

15 MR. PURCELL: Well, it -- it has to be
16 more than -- than a fraction of 1 percent of
17 historic harvests or 5 percent of recent
18 harvests. We think, for example, certainly a
19 decline of half the salmon would certainly
20 easily qualify, but they haven't alleged -- you
21 don't -- I don't think you need to --

22 JUSTICE KAGAN: I mean, do you have a
23 number in your head?

24 MR. PURCELL: Well, again, I think
25 that a decline of half or anything approaching

1 half would obviously be a large decline, a
2 substantial decline, but certainly something
3 between 1 and 5 percent is not a substantial
4 decline. And --

5 JUSTICE GORSUCH: Well, 5 percent is
6 often deemed a material number in other
7 contexts of law. So why wouldn't it be here?

8 MR. PURCELL: Well, Your Honor --

9 JUSTICE GORSUCH: A 5 percent decline
10 in stock price or something like that is often
11 used as a point of reference in -- in
12 securities law, for example.

13 MR. PURCELL: Several points about
14 that, Your Honor. First of all, the -- the
15 5 percent was -- we were just saying that's
16 5 percent from very recent harvest levels. So
17 that essentially holds against the state every
18 other thing that has reduced salmon numbers,
19 including federal dams and many, many other
20 actions. So, essentially, it's saying --

21 JUSTICE GORSUCH: Well, now that's a
22 causation argument as opposed to a materiality
23 argument. They're two different elements.

24 MR. PURCELL: Fair enough. I guess
25 what I'm saying is that the denominator

1 matters. When you measure from is important.
2 And what the plaintiffs are asking me to do is
3 to say when we file our lawsuit, it's -- it's
4 causing 5 percent of the decline.

5 JUSTICE GORSUCH: Again, I understand
6 the causation argument. There might be other
7 causes for the 5 percent decline and -- and
8 you'd want to argue those. But is 5 percent,
9 if they could show that 5 percent is
10 attributable to the culverts, would that
11 suffice to -- to satisfy you?

12 MR. PURCELL: I don't think it --

13 JUSTICE GORSUCH: And, if not, I guess
14 I'm where Justice Kagan is. What's -- what's
15 your number?

16 MR. PURCELL: Well, again, I think,
17 you know, something approaching half would
18 obviously qualify. I don't think 5 percent
19 should suffice because otherwise, again, the
20 range of things that --

21 JUSTICE GORSUCH: So the -- so the
22 treaty --

23 MR. PURCELL: -- will affect 5 percent
24 of the salmon --

25 JUSTICE GORSUCH: -- the treaty, which

1 guarantees the right to all usual and customary
2 fishing grounds, really means half of them?

3 MR. PURCELL: No, no, no. No, that's
4 -- that's not what I mean at all, Your Honor.
5 We're talking about measuring in a particular
6 river what has the decline been.

7 JUSTICE ALITO: I don't even
8 understand why it's -- why decline or
9 degradation matters. Suppose that there were
10 more salmon than anybody knew what to do with
11 and then there was -- the state did something
12 that caused a decline. Would -- would that be
13 a violation of the treaty?

14 MR. PURCELL: I don't think that would
15 be a violation even under the Respondents'
16 theory, Your Honor. I don't -- I don't think
17 that would be, no. And -- and -- and -- and
18 that recognizes the crucial other piece of
19 language that -- that is in the treaties, is
20 that the treaties ceded control of the
21 off-reservation land to the future government
22 to regulate in the public interest.

23 And so the government has to have the
24 ability to make some types of decisions, even
25 if they affect the treaty fishing right when

1 there are substantial interests involved.

2 JUSTICE GORSUCH: I guess that's --
3 for me, I think that's really where the case
4 boils down, and -- and -- and I'm struggling
5 with that. Right? You -- you assert that you
6 have rights to pursue other public goods and
7 that those can outweigh the treaty,
8 effectively.

9 And -- and -- and so any violation of
10 these culverts has to be weighed against the
11 benefits they provide to other persons. But --
12 but -- but doesn't that potentially eliminate
13 the treaty altogether, and doesn't -- wouldn't
14 it defeat it entirely?

15 The point of a treaty I -- I would
16 have thought would have been to -- to freeze in
17 time certain rights and -- and to ensure their
18 existence in perpetuity, regardless of what
19 other social benefits a later municipality
20 might be able to claim.

21 MR. PURCELL: Your Honor, we're not
22 saying at all that they outweigh the treaty.
23 We're saying that the treaty recognized -- in
24 the treaty, it recognized that there were other
25 interests, that there were -- the future

1 government would regulate the off-reservation
2 land. And it's just not plausible that the --
3 that the parties intended that the tribes would
4 be --

5 JUSTICE GORSUCH: Surely, it
6 allowed -- the whole point of the treaty was to
7 give up land. I understand that.

8 But it -- I don't see anything in the
9 treaty -- maybe you can point it to me, maybe
10 I'm just missing it textually -- anything in
11 the treaty that says: Ah, and your rights to
12 those usual and customary grounds and stations
13 is limited by, and may be completely
14 eliminated, if necessary, to meet other
15 domestic interests that a municipality might
16 have, which is, I think, the position you're
17 taking, I think, before this Court.

18 MR. PURCELL: Not exactly, Your Honor.
19 The treaty right -- first of all, there's the
20 cession language. There's the right in common.

21 And then, if you look at this Court's
22 decisions in the Puyallup cases, this Court
23 said that the state could completely shut down
24 fishing, if necessary, for important state
25 interests.

1 That case was only about conservation,
2 but the principle has to be broader, like,
3 things like public safety or public health.

4 JUSTICE GORSUCH: Why?

5 MR. PURCELL: Well, for example --

6 JUSTICE GORSUCH: Why does it have to
7 be broader? I would have thought a treaty
8 would have been the supreme law of the land and
9 would have overridden any municipal interests
10 and --

11 MR. PURCELL: We're saying it
12 considered those. It considers those. And so,
13 for example, the state sometimes has to shut
14 down all shellfish -- shellfish harvesting,
15 excuse me, because of elevated bacteria levels
16 in the water. And that affects Indian and
17 non-Indian shellfish harvesters.

18 And, obviously, that affects the right
19 of taking fish. The state's saying no one can
20 harvest any shellfish right now. And I can't
21 imagine that the other side would say that's a
22 treaty violation, you know.

23 JUSTICE BREYER: I don't understand
24 what we're -- this discussion. I'm having
25 trouble for this reason: I thought that the

1 district court had said -- and I can't get the
2 number -- but that since treaty times, the
3 number of the fish have declined alarmingly.

4 MR. PURCELL: Yes.

5 JUSTICE BREYER: I don't know what
6 "alarmingly" is supposed to refer to, but I
7 think probably a lot.

8 MR. PURCELL: Yes.

9 JUSTICE BREYER: Then in the --
10 there's a Finding 161 where he says, if you
11 look at the whole watershed, the water -- the
12 -- the -- barrier culverts are accounting for 6
13 to 13 percent of the decline. And if you look
14 at the tributaries, it's 44 percent to
15 58 percent.

16 All right. When I read something like
17 that, I thought, well, that's a lot, so I don't
18 have to worry about that issue. Now -- now --

19 MR. PURCELL: Well --

20 JUSTICE BREYER: -- now you're going
21 to tell me why I do have to worry about it.

22 MR. PURCELL: I will.

23 JUSTICE BREYER: Then I went and
24 looked at what the court of appeals held, and
25 it said we're not -- if there's an act of God

1 or some good reason, you know, so on and so
2 forth, we're not saying you have to replace it,
3 but we are saying where -- where nothing like
4 that is -- is present, you do. Okay? On this
5 schedule, which is the schedule -- now do I
6 have it all wrong? Yes? Okay. You can --

7 MR. PURCELL: I don't want to say you
8 have it all wrong, Your Honor.

9 JUSTICE BREYER: What have I got?

10 MR. PURCELL: But you have some parts
11 of it wrong.

12 So two things. Number one, that was a
13 study of a single river and it was a study of
14 all barriers on that river, not state culverts.

15 JUSTICE BREYER: Yeah, but, I mean, I
16 can't go back and review -- I can, but, I mean,
17 it's pretty hard to start reviewing the details
18 of a district court record --

19 MR. PURCELL: Well, it --

20 JUSTICE BREYER: -- unless there's
21 something that you've told the court of appeals
22 and told everybody else this is clearly wrong
23 and so forth, which I haven't found.

24 MR. PURCELL: But the -- the district
25 court didn't make any finding that that was a

1 sort of across-the-board effect. It was just
2 citing a study about one river. And in that
3 river, the effect of all barriers, not state
4 culverts, all barriers was 6 to 13 percent of
5 -- of the salmon.

6 JUSTICE BREYER: They said that was
7 the whole watershed. So, apparently, you're
8 saying that if, in fact, I looked at the
9 record, I would discover that you showed it was
10 very much lower -- in fact, that number is
11 wrong -- and, therefore, don't make this
12 finding, and it's clearly erroneous and that
13 the court of appeals didn't consider it and
14 that we should reverse on that ground.

15 Now I haven't found that in your
16 brief, I take it.

17 MR. PURCELL: That's -- that's not
18 what I'm saying, Your Honor. I'm saying if the
19 district court had said I'm analyzing -- I
20 believe that was about the Skagit River -- I'm
21 analyzing the Skagit River, and the Skagit
22 River state culverts are causing 35 percent of
23 the decline in salmon runs.

24 We're saying that might well be a
25 treaty violation if there weren't good reasons

1 why -- if there weren't substantial
2 justifications of public interest for those
3 culverts.

4 And -- and -- but that's not at all
5 what the district court did. The district
6 court didn't say anything about the effects,
7 other than citing that one study about
8 particular rivers or particular places, and --
9 and it varies dramatically.

10 I mean, just as that --

11 JUSTICE KAGAN: But, General --

12 MR. PURCELL: -- as that finding of
13 fact shows, the effect in tributaries is
14 dramatically different than the effect in
15 larger bodies of water.

16 JUSTICE KAGAN: General, just to take
17 you back to Justice Gorsuch's question, because
18 I think you just gave an answer and it went
19 something like this: It said if there were a
20 30 percent decline and it wasn't for good
21 reason, then there would be a treaty violation.

22 So now we have a number. It says
23 30 percent. But -- but -- but you are
24 continually putting in this, and it has to be
25 reasonable, it has to be unjustified, there

1 can't be any reason why the state is doing what
2 it's doing. And -- and like Justice Gorsuch,
3 I'm wondering where that is in the treaty.

4 MR. PURCELL: Well, I think it's in
5 the -- in the cession language, in the "in
6 common with" language --

7 JUSTICE KAGAN: What -- what language
8 are we pointing to?

9 MR. PURCELL: The -- the fact that the
10 tribes ceded control over off-reservation land
11 to the future government to regulate.

12 And, Your Honor, if you don't adopt
13 that --

14 JUSTICE KAGAN: But this is -- I mean,
15 that cuts against you, General, because this is
16 a compact, a contract, made into federal law in
17 which the Indians gave up a very substantial
18 thing. It gave up all their land.

19 MR. PURCELL: Right.

20 JUSTICE KAGAN: And it got something
21 in return, which is the right to take fish.

22 MR. PURCELL: Absolutely. And we're
23 saying there would need to be very substantial
24 public interest, but at least that should be
25 considered. So, for example, under the other

1 side's theory, every single hydroelectric dam
2 in Washington, Oregon, and Idaho --

3 JUSTICE KAGAN: But where does this
4 public interest theory come in in the treaty?
5 I thought this was an agreement. I give you my
6 land. You give me the right to take fish. And
7 -- and let's just even make it narrower here.
8 The right -- I -- I have the right that you
9 will not put up obstructions on these streams
10 such that I can't take fish.

11 MR. PURCELL: Well, Your Honor, if --
12 if the rule is narrowly limited like that, it's
13 much less problematic for the state, but
14 there's also not -- the findings would not
15 support that rule, and it would outlaw every
16 dam in the Northwest. So it's -- it's
17 inconsistent with the parties' long-standing
18 behavior.

19 The federal government built and
20 licensed dams throughout the Northwest for
21 decades starting in the early 1900s that
22 completely obstructed rivers and decimated
23 salmon populations, often over the state's
24 objection. So, if they're right that all you
25 need to show is an obstruction and that -- some

1 level of decline, every single one of those
2 dams is a treaty violation. Now those aren't
3 state dams.

4 JUSTICE SOTOMAYOR: They -- they could
5 --

6 MR. PURCELL: We're not --

7 JUSTICE SOTOMAYOR: We've had cases
8 that have basically said, the example you used
9 -- if we're going to regulate fishing for the
10 purposes of ensuring that there isn't
11 degradation of fish, bacteria, some other form
12 of fishing that -- that would be more harmful
13 than -- than your catch, we've said that's
14 okay, but if you're going to degradate for the
15 benefit of the landowners, as opposed to the
16 people entitled to the fish, that you can't do
17 that because you have to make sure that the
18 Indians receive their fair amount of the -- of
19 the catch.

20 MR. PURCELL: Well --

21 JUSTICE SOTOMAYOR: So your
22 substantial public need is not creating that
23 difference for me.

24 MR. PURCELL: Okay. Well --

25 JUSTICE SOTOMAYOR: It's -- it's not

1 defining what type of public need is -- is
2 proper.

3 MR. PURCELL: Right. And that's fair
4 enough, Your Honor. We think that to -- to
5 define that, courts -- the district court could
6 look at factors like those that Respondents
7 have cited under the common law. Is this a
8 total barrier? What are the public benefits of
9 it? Was it justified by law? Was it
10 authorized by law? Those sorts of things.

11 But to be -- and just is it -- is
12 taking it out going to require a waste of
13 public funds, as many of the culverts here
14 would?

15 JUSTICE SOTOMAYOR: Well, I'm sorry,
16 if -- if you could have built this bridge in a
17 way to permit the free flow of fish, you seem
18 to be saying that you can get out of that
19 obligation merely because you wanted to spend
20 less money.

21 MR. PURCELL: No, not at all, Your
22 Honor. Not at all. We're -- we're saying we
23 might well -- under the theory I'm saying,
24 there are -- I'm confident there are culverts
25 that we've already taken out that would have

1 violated this test. And they -- they had --
2 you know, they -- they were blocking a
3 significant number of fish on a particular
4 river and there was -- cost-wise, it -- there
5 was no good reason to leave them in.

6 I -- I'm -- I'm not saying we will
7 always win under this test. I think, for
8 example, the dams the federal government
9 recently removed on the Elwha River, which will
10 bring back more salmon than all the culverts in
11 this case combined, is the estimate, those were
12 -- probably violate this test that I'm saying.
13 I'm not trying to set out a test the tribes can
14 never meet.

15 My point is just they haven't met
16 either this test or -- or even their own test
17 in the -- in the district court. The district
18 court didn't apply this test because it wasn't
19 before him. He didn't even find that the --
20 that the state's barrier culverts were all
21 obstructions under the theory they're advancing
22 here because half the state's barrier culverts
23 are only partial obstructions. And this --

24 CHIEF JUSTICE ROBERTS: Which -- which
25 test did you say the district court did not

1 consider?

2 MR. PURCELL: The -- the idea that --
3 that -- as I understand their theory here, it's
4 that obstructions that cause a substantial
5 degradation are a treaty violation. And -- and
6 the phrase "substantial degradation" doesn't
7 appear anywhere in the Ninth Circuit opinion,
8 the briefing to the Ninth Circuit, the district
9 court opinion. And -- and also, the way
10 they've defined obstruction here is -- is
11 essentially under the common law. And the
12 common law allowed partial barriers, that's
13 very clear.

14 And -- and that just wasn't at issue
15 in the district court. So at least half of the
16 barriers that -- that are what we define as
17 barrier culverts under state policy allow many
18 fish to pass, up to 90 -- a barrier can be up
19 to 90 -- sorry, a culvert can be up to
20 90 percent passable and -- and the state still
21 has made a policy choice to define that as a
22 barrier culvert that we are going to remove at
23 some point --

24 JUSTICE BREYER: Well --

25 MR. PURCELL: -- but that doesn't make

1 it a treaty violation.

2 JUSTICE BREYER: -- the common law
3 cases that we were able to find say things like
4 -- there's a good Massachusetts case here -- I
5 just say it's good because it's from
6 Massachusetts.

7 (Laughter.)

8 JUSTICE BREYER: But it says that
9 impeding "the passage of fish into the lakes or
10 ponds, where they by instinct prepare for
11 multiplication of the species" is a nuisance.
12 And it doesn't say that -- you know, it doesn't
13 use a quantitative measurement.

14 MR. PURCELL: Well, but, Your Honor,
15 as we explained in our reply brief -- and we
16 would have addressed this more in the opening
17 brief had we known this was going to be an
18 issue -- but in our reply brief, we did our
19 best to summarize the common law also -- there
20 are three important differences between the
21 theory they're advocating here and the common
22 law. The common law approved -- did not -- if
23 a barrier was for a public benefit, it was not
24 automatically a nuisance.

25 Number two, the common law did not

1 prohibit total barriers. And we've cited
2 several treatises about that and cases. And
3 number --

4 JUSTICE BREYER: They are -- but he
5 hasn't. I mean, what's worrying me about this
6 is I'm not sure what the disagreement is. It
7 seems to me there is no disagreement, perhaps,
8 on the common law tradition that a nuisance
9 could consist of simply blocking fish from
10 coming up a river into your area. And then it
11 seems to me the Indians ought to have at least
12 as much right as a person had under the common
13 law, given the treaty. And then we seem to be
14 arguing about what counts as an amount.

15 And when I read through the briefs, I
16 came away with the impression, well, whatever
17 the amount is, there's certainly a lot of fish
18 being blocked by the culverts. Now -- now --
19 now, suddenly here, I think, well, you're
20 arguing, no, no, there weren't a lot. There
21 were just a few. And I don't know quite how to
22 deal with that argument.

23 MR. PURCELL: Your Honor, in part,
24 that's because the Respondents have completely
25 changed the theory of the case from what the

1 Ninth Circuit ruled to what they've argued in
2 their -- in their response brief here. And so
3 it's really only our reply brief that addresses
4 the arguments they're making now.

5 In the Ninth Circuit and the district
6 court, the argument was any diminishment from
7 historic harvest levels is -- is a treaty
8 violation. And that's essentially what the
9 district court found and what the Ninth Circuit
10 upheld. So what we're saying now is at the --
11 at least, I'll say at least, at least there
12 should be a remand for application of this --
13 of this new theory because there's all sorts of
14 evidence that wasn't relevant before that would
15 be relevant now, like the fact about partial
16 barriers, the fact that, as I said, half of the
17 state's "barrier culverts" allow many fish to
18 pass.

19 And the district court just adopted
20 our list, which we made for good policy
21 reasons, but that -- but it doesn't mean that a
22 partial barrier is a treaty violation just
23 because, you know, 10 percent of fish can't get
24 through it.

25 So if there's -- if the Court, you

1 know, has concerns about the -- the details of
2 -- of the facts and such, keep in mind the
3 district court found liability, of -- the state
4 had violated the treaties, on summary judgment.
5 I mean, the -- the district court held us
6 liable on summary judgment. So saying the
7 factual issues essentially don't matter, back
8 in 2007, the whole trial was just about the
9 remedy.

10 So -- so, I mean, you know, if -- if
11 the Court disagrees with the rule we're saying
12 here and it wants to adopt some version of
13 theirs, the appropriate course would be to
14 remand with direction to the district court.

15 And if I may reserve the remainder of
16 my time.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Kedem.

20 ORAL ARGUMENT OF ALLON KEDEM

21 ON BEHALF OF THE RESPONDENT UNITED STATES

22 MR. KEDEM: Mr. Chief Justice, and may
23 it please the Court:

24 When the United States promised the
25 tribes federal protection for their preexisting

1 right to take fish, that included more than
2 just the hollow promise of access to fisheries
3 that could be blocked off and emptied of their
4 salmon.

5 I'd like to start by taking head-on
6 the state's suggestion that we've changed our
7 position in this litigation, and I don't want
8 to mince words. The United States has never
9 asked for and did not receive a ruling
10 guaranteeing to the tribes a moderate living
11 from their fisheries.

12 JUSTICE GORSUCH: Well, you may not
13 have sought it, but isn't that what the Ninth
14 Circuit panel did?

15 MR. KEDEM: It's not. And let me run
16 you through what we understand to be the Ninth
17 Circuit's ruling.

18 JUSTICE GORSUCH: Please.

19 MR. KEDEM: If you look at the
20 beginning of the discussion section, page 86a
21 of the Petition Appendix, you'll see that the
22 Ninth Circuit posed the relevant question as
23 follows: Whether the state was correct "that
24 it has no treaty-based duty to refrain from
25 building and maintaining barrier culverts."

1 It then spends the next six pages
2 refuting that argument based on the text of the
3 treaty, the understanding of the parties, this
4 Court's case law.

5 Then six pages later, on 92, the court
6 says: "Even if the treaties did not contain
7 such protection explicitly, the court would
8 infer it." And then two pages later, we get
9 the infamous sentence in which "moderate
10 living" makes its first appearance.

11 So, at best, we're talking about
12 something that supports an alternative holding.

13 It's also not what the parties argued
14 for. The state takes about a half dozen
15 quotations out of context from more than 1,000
16 pages of record and briefing.

17 If you want to know what the United
18 States has asked for throughout this entire
19 litigation, look at our demand for judgment.
20 On page 62 of the Joint Appendix, you'll see
21 that the very first thing that we asked for was
22 a declaration -- this is the wrong one -- the
23 very first thing that we asked for is a
24 declaration that the state had an obligation
25 under the treaties "to refrain from degrading

1 the fishery resource." That is the basis of
2 the district court's ruling on page 27 --

3 CHIEF JUSTICE ROBERTS: Well, there's
4 --

5 JUSTICE KAGAN: When you say --

6 CHIEF JUSTICE ROBERTS: -- there's an
7 awful lot in your brief about the common law
8 nuisance theory supporting the prohibition on
9 physical barriers. That wasn't presented
10 before, was it?

11 MR. KEDEM: No. That is our evidence
12 in support of what we took to be the central
13 position that we've been arguing this whole
14 time. And our point --

15 CHIEF JUSTICE ROBERTS: Well, it's
16 pretty prominently featured, and it's -- the --
17 the state makes the argument that, well, there
18 are exceptions or what the common law theory of
19 nuisance with respect to barriers inhibiting
20 access to fish is a complicated question.

21 And you don't just say, well, it's a
22 nuisance, so you win. There are responses.
23 And they have not had an opportunity to test
24 those. There hasn't been any evidence
25 presented addressing those arguments. And I

1 wonder if that means that we ought to send it
2 back and let the courts who haven't had that
3 opportunity yet have that opportunity.

4 MR. KEDEM: No, Your Honor. You could
5 put aside all of the specifics of the common
6 law. It really just goes to the central
7 question that's been at the heart of this case;
8 namely, whether there is any substantive
9 protection for the tribe's fisheries against
10 actions to harm them. That is a --

11 JUSTICE GINSBURG: And on that basic
12 point, can you explain -- the treaty language
13 gives -- gives the tribes the right to take
14 fish in common with all citizens.

15 MR. KEDEM: That's correct.

16 JUSTICE GINSBURG: Why does that mean
17 anything more than simply what rights
18 non-Indians enjoy, Indians also enjoy? That
19 is, you could read it as a provision for
20 non-discrimination against Indians, but you
21 read it as much more than a non-discrimination
22 provision, right?

23 MR. KEDEM: That's correct. Taking
24 just the words, you could read it as an equal
25 access provision. This Court in Fishing

1 Vessel, however, found it unequivocal that the
2 state was wrong in advancing an equal access
3 argument there, that it provided some greater
4 protection which the state now seems to concede
5 -- concede includes substantive protection
6 against harm that substantially degrades the --
7 the tribes' fisheries.

8 We also build in arguments not just
9 based on the common law but based on the course
10 of dealing between the parties, representations
11 that were made to the tribes, substantive
12 representations, this paper secures your fish,
13 where Governor Stevens referred to the tribes
14 as "his children" and said "I want for you the
15 same things that I would want for my own
16 children."

17 JUSTICE ALITO: Do the dams that the
18 -- do the dams that the federal government has
19 built on the lower Snake River and the lower
20 Columbia River violate the treaty?

21 MR. KEDEM: So you're going to hear me
22 say a number of times today the state didn't
23 argue that or it's not in the record. And it's
24 not because I'm trying to duck your question.
25 I always have a second response.

1 It's because there are certain legal
2 issues that are not as developed either
3 factually or in terms of legal concepts as we
4 might expect at this stage. The answer is no.

5 First of all, there are many federal
6 dams that are built with what are known as fish
7 ladders. These are structures that are built
8 in to allow the fish to pass either around the
9 dam or over the dam.

10 There are some instances where fish
11 ladders are just not feasible. And in many of
12 those instances, the United States has
13 compensated the tribe for their harm to the
14 fisheries, either through the Indian Claims
15 Commission or, in many cases, through federal
16 legislation.

17 JUSTICE ALITO: There are articles
18 claiming that they have caused more damage to
19 salmon than anything else.

20 MR. KEDEM: There -- there are some
21 dams and we don't --

22 JUSTICE ALITO: Did you say what's
23 good for the State of Washington is not good
24 for the federal government?

25 MR. KEDEM: That's not correct. In

1 many instances, the United States has
2 repeatedly provided compensation. They have
3 paid monetary compensation. They have put in
4 fish ladders. They have put in hatcheries.

5 And in some cases, the Army Corps of
6 Engineers actually uses barges to transport
7 young salmon down the river to go around the
8 dam so they don't get hurt by it.

9 We have taken extraordinary efforts to
10 remediate some of the problems that have been
11 caused by some of these federal dams.

12 JUSTICE KAGAN: Mr. Kedem, in your
13 earlier --

14 JUSTICE GINSBURG: What about the
15 state's argument that -- that the state was
16 simply doing what the United States said was
17 okay? It built these culverts in -- in --
18 consistent with federal standards and, in some
19 cases, with federal permits, right?

20 MR. KEDEM: That is not correct. What
21 they point to is a general engineering manual
22 that has charts and tables which say that if
23 you have this much headwater and a pipe of this
24 diameter, you end up with this amount of
25 outflow.

1 It's about flood management. It says
2 nothing about wildlife. It says nothing about
3 treaty rights.

4 They also point to a general permit
5 under the Clean Water Act which, again, is just
6 a blanket permit granted in advance. It
7 doesn't take account or purport to take account
8 of local conditions.

9 The government doesn't review
10 individual culverts for every single state road
11 around the country. So there's no reason, even
12 assuming that the state could find that the
13 government was estopped as a result of this,
14 there's no basis for claiming that the state
15 was required by federal law to build the
16 culverts as they did.

17 CHIEF JUSTICE ROBERTS: Could we --

18 MR. KEDEM: And, in fact --

19 CHIEF JUSTICE ROBERTS: Go ahead.

20 MR. KEDEM: In fact, they have changed
21 the design of their culverts to allow for fish
22 passage. There's no reason that they couldn't
23 have done so from the beginning.

24 JUSTICE SOTOMAYOR: Could you go back
25 to --

1 CHIEF JUSTICE ROBERTS: Did I
2 understand you to -- go ahead.

3 JUSTICE SOTOMAYOR: I'm sorry. Can
4 you go back to the Chief Justice's original
5 question? Your adversary is saying that the
6 district court did not apply the definition of
7 substantial, appreciable, material degradation,
8 so we should send it back for it to make that
9 first determination, which of these culverts
10 substantially degrade, materially degrade,
11 you've got to tell me what the right word is,
12 okay?

13 MR. KEDEM: Sure.

14 JUSTICE SOTOMAYOR: And, second, that
15 they did not weigh whatever and however we
16 define substantial public interest. And -- and
17 I'm still troubled by --

18 MR. KEDEM: Right.

19 JUSTICE SOTOMAYOR: -- their refusal
20 to give me a definition of that that would not
21 give them free rein to design things that will
22 degrade materially a run, only because they
23 want to help some other landowner.

24 MR. KEDEM: Right. So starting first
25 with substantial degradation, I pointed you to

1 page 270 of the Petition Appendix where the
2 district court talked about "significantly
3 degrades."

4 The district court made extensive
5 factual findings at 157 to 162 of the Petition
6 Appendix that there was substantial degradation
7 caused by the state's barrier culverts to the
8 tribe's fisheries. And those -- those findings
9 have not been challenged as clearly erroneous
10 here.

11 JUSTICE KAGAN: Well, when you use
12 that term, do you have a number in your head?

13 MR. KEDEM: So we don't have a number.
14 I think you are talking about harm that is both
15 durable and appreciable, meaning the type of
16 thing that shows up year after year, despite
17 normal fluctuations.

18 The district court didn't use a number
19 -- population number approach. It instead used
20 a habitat-focused approach. And that made
21 sense because there were extensive findings
22 that there is a direct connection between the
23 health of the fisheries and the populations of
24 salmon.

25 It also connected that to the amount

1 of benefit that you would get -- and this is at
2 166 to 168 of the Petition Appendix -- from
3 remediating the habitat.

4 CHIEF JUSTICE ROBERTS: I just want to
5 get back to -- it was a while ago, but I -- I
6 understood you to say that Clean Water Act
7 permits do not take account of local
8 conditions?

9 MR. KEDEM: The Clean Water Act permit
10 that we're talking about, the only thing that
11 the state has pointed to, is a blanket permit
12 that's granted in advance, and it says
13 generally that you need to take account of
14 these things, but it doesn't review individual
15 culverts. It doesn't give a thumbs up or a
16 thumbs down to particular culverts.

17 CHIEF JUSTICE ROBERTS: To take
18 account of these things. What are -- what are
19 "these things"?

20 MR. KEDEM: Well, it sometimes
21 mentions threats to wildlife or treaty
22 obligations, but it doesn't, again, in advance
23 tell you that you have, in fact, complied.
24 Talking about --

25 JUSTICE KAGAN: Mr. Kedem, when you

1 read from the government's prayer from relief,
2 as I heard it, it didn't have anything to do
3 with obstructions or dams --

4 MR. KEDEM: That's --

5 JUSTICE KAGAN: -- or culverts
6 particularly.

7 MR. KEDEM: That's elsewhere in the
8 sentence.

9 JUSTICE KAGAN: So you are arguing
10 only with respect to obstructions today, is
11 that correct?

12 MR. KEDEM: That's certainly all
13 that's at issue here. We are not denying that,
14 in theory, you could have some other harmful
15 action by the state or someone else that also
16 substantially degrades the fisheries, but
17 that's obviously not at here. And
18 quintessentially, we're talking about
19 obstructions.

20 JUSTICE KAGAN: And what is your view
21 of the state's right under the treaty to take
22 account of other public interests?

23 MR. KEDEM: So we would describe it in
24 the way that this Court did in the Puyallup
25 trio, which is that the state can enact

1 non-discriminatory measures that are aimed at
2 protecting the resource.

3 So, in the example that my friend gave
4 about poisoning of shellfish or other fish,
5 that would be an action that the state could
6 take to reasonably protect the resource.

7 JUSTICE GORSUCH: Where does that --

8 MR. KEDEM: That doesn't mean, however
9 --

10 JUSTICE GORSUCH: Where does that come
11 from, though? Because you pointed us to the
12 common law of nuisance.

13 MR. KEDEM: Yeah.

14 JUSTICE GORSUCH: And there it appears
15 to be, from my first read, a defense that
16 there's another public good unrelated to the
17 resource that might outweigh the -- the
18 problems of the nuisance and -- and diminish
19 it.

20 So where --

21 MR. KEDEM: Not as a general --

22 JUSTICE GORSUCH: -- where do you --
23 where do you get your rule from?

24 MR. KEDEM: So the common law does not
25 allow that as a defense as a general matter.

1 JUSTICE GORSUCH: Okay.

2 MR. KEDEM: They cite the Woolrych
3 Treatise.

4 JUSTICE GORSUCH: Yes.

5 MR. KEDEM: If you look at the very
6 next sentence in that treatise --

7 JUSTICE GORSUCH: Yes.

8 MR. KEDEM: -- it makes very clear
9 that an obstruction is not a nuisance simply
10 because, on balance, you think it does more
11 good than harm.

12 Instead, what it says is, and if you
13 read the cases that support the treatise, that
14 if there is a way to build whatever structure
15 you want to put in the water in such a way that
16 it does not obstruct -- usually, the cases are
17 talking about navigation, but, presumably, it
18 would apply as well to fish -- if you can do
19 so, then it is a nuisance to fail to do so.
20 And that is --

21 JUSTICE ALITO: Are these cases
22 involving actions taken by private parties or
23 by governmental authorities?

24 MR. KEDEM: Pardon?

25 JUSTICE ALITO: Are these nuisance

1 cases cases involving actions taken by private
2 parties or by the government?

3 MR. KEDEM: By and large, they're
4 actions taken by private parties, but what the
5 --

6 JUSTICE ALITO: Do you think it's
7 clear that the same standard applies to --
8 under the common law, the same standard would
9 apply to things that were done by the
10 sovereign?

11 MR. KEDEM: I think what you would
12 need under the common law is a legislative
13 enactment saying that whatever would otherwise
14 be a nuisance is not a nuisance. We don't have
15 that certainly from the federal government
16 here. We also don't have anything of the sort
17 from the state here.

18 And also --

19 CHIEF JUSTICE ROBERTS: Any of these
20 issues discussed in the court of appeals?

21 MR. KEDEM: Pardon?

22 CHIEF JUSTICE ROBERTS: Any of these
23 issues discussed in the court of appeals?

24 MR. KEDEM: Not with respect to the
25 common law. But, again, we're not arguing that

1 the Stevens Treaty incorporates the common law
2 in all of its particulars. But it does go to
3 the central question of whether there is
4 substantive protection for the tribes'
5 fisheries.

6 We're not also resting solely on the
7 common law. We're pointing to the course of
8 negotiation between the parties, the fact that
9 Washington's organic statute required that any
10 structure put into a river or stream ensure
11 fish passage. We're also relying on this --
12 this Court's own cases, which have recognized
13 that protection of the resource is the central
14 concern of these treaties.

15 If I could move to this 1 percent of
16 historic harvests number that my friend gives,
17 I think that's wrong both on the numerator and
18 on the denominator.

19 For the numerator, he's talking about
20 a 200,000 fish figure that, first of all, the
21 district court did not credit and, second of
22 all, comes from a 1997 state agency report that
23 was based on 250 linear miles of habitat being
24 opened up. But, here, we're talking about
25 approximately four of -- four times that much,

1 1,000 linear miles.

2 Moreover, with respect to the
3 denominator, we're not talking about historical
4 harvests. We're talking about: What would
5 happen absent the action that is being
6 challenged? And, here, absent the state's
7 barrier culvert, there would be a substantial
8 increase in the fish population.

9 JUSTICE SOTOMAYOR: What do we look at
10 to -- to see that the district court looked at
11 that figure, the substantial increase?

12 MR. KEDEM: So I think, for the
13 benefits that you would get, you would look to
14 pages 166 to 168 of the Petition Appendix. If
15 you want to know about the harms, that would be
16 at 157 to 162.

17 Finally, my friend brought up the idea
18 of partial obstructions. That is a forfeited,
19 waived, and meritless argument. It's forfeited
20 because it was raised for the first time in the
21 reply brief before this Court. It's waived
22 because it's contrary to the joint stipulation
23 of the parties on which the district court
24 relied using the state's own definition of what
25 it means to be a barrier culvert. And it's

1 meritless because there is no such thing as a
2 10 percent barrier. So --

3 CHIEF JUSTICE ROBERTS: So his
4 argument was waived because he didn't make it
5 until it got to this Court?

6 MR. KEDEM: Pardon?

7 CHIEF JUSTICE ROBERTS: The argument
8 you're talking about was waived by your friend
9 on the other side because it wasn't raised
10 until it got to this -- until the case got to
11 this Court?

12 MR. KEDEM: If you're making a new
13 argument as to why it was that the district
14 court abused its discretion, that is the type
15 of argument that you would normally expect at a
16 minimum to be brought up in the court of
17 appeals, if not in the district court itself.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 JUSTICE ALITO: I mean, I --

21 JUSTICE GINSBURG: Did the United
22 States pick up any of this tab? I mean, the
23 principal state's objection is the cost to the
24 state. And the United States has some
25 complicity in what went on.

1 MR. KEDEM: The United States pays
2 tens of millions of dollars directly to the
3 state, in addition to all of the other efforts
4 that it has -- it has undertaken to mitigate
5 harms and to compensate the tribes.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Jay.

9 ORAL ARGUMENT OF WILLIAM M. JAY
10 ON BEHALF OF THE RESPONDENTS
11 SUQUAMISH INDIAN TRIBE, ET AL.

12 MR. JAY: Mr. Chief Justice, and may
13 it please the Court:

14 If the promise made by the United
15 States in exchange for millions of acres of the
16 tribes' land means anything in terms of
17 substantive protection of the fishery, it
18 protects against a threat to the fishery like
19 these, a threat that obstructs fish from
20 getting to the usual and accustomed fishing
21 grounds where the tribes have a right to fish
22 and that substantially degrades the fish
23 population.

24 And the idea that the state or a
25 locality or even the United States can simply

1 disregard that based on an agency's or an
2 individual local government's balancing of its
3 own perceived public interest against the
4 promise made by the president, ratified by the
5 Senate, is simply not consistent with the
6 promises in the treaty or the background of the
7 treaty.

8 JUSTICE ALITO: I hate to keep asking
9 the same question, but is "substantial" -- does
10 "substantial degradation" mean a number or
11 "significant degradation" mean a number? And,
12 if so, what is the number?

13 MR. JAY: I don't think it means a
14 hard and fast number. I think it is something
15 that you would look at in context, in context
16 of the particular species, in context of the --
17 of the strength of the species at a particular
18 time. So I think that that would be something
19 that you would determine, factually, in the
20 context of one fish species versus another.

21 But in this case, the district court
22 found -- and I would look in particular at 162a
23 of the Petition Appendix. Without giving a
24 number, it said that the state's culverts are
25 so numerous and cover so large an area that

1 they are creating a significant total impact
2 throughout the case area on the fishery.

3 JUSTICE ALITO: I mean, the -- the --
4 the -- what -- what happens here -- happened
5 here, may or may not meet any definition of
6 "significant" or "substantial." That's not the
7 -- my question. But I -- I just don't see how
8 that can mean anything other than a number.
9 And I still haven't gotten any answer that
10 seems to give any substance to this.

11 So you say it varies from fish species
12 to fish species?

13 MR. JAY: Well, I think that it -- it
14 takes account of what kind of question you were
15 asking. I mean, Justice Gorsuch's question
16 mentioned the idea that -- that 5 percent can
17 be material in the context of securities fraud.

18 We are not asking the Court to adopt,
19 you know, the idea that 5 percent is material
20 in all contexts, but we are -- it would be a
21 context -- it would be sensitive to the context
22 of a fishery. It would be -- it would have to
23 be, as my friend Mr. Kedem said, it would have
24 to be something durable; in other words, not
25 something that is simply washed out in the next

1 year's returning fish population. And it would
2 -- and it would have to be something that
3 materially affects the fish population --

4 JUSTICE KAGAN: So when you say --

5 MR. JAY: -- year after year.

6 JUSTICE KAGAN: -- "materially
7 affects," is that just a kind of it can't be de
8 minimis, but if it's not de minimis, then, yes,
9 there's an obligation?

10 MR. JAY: It certainly can't be de
11 minimis. I mean, in our -- the parties have
12 not tried to draw the line between de minimis
13 and substantial in this case, I think precisely
14 because the state was litigating the case all
15 along, not on the ground that its culverts were
16 not having a substantial impact, but on the
17 ground that it had no duty to refrain from
18 having such an impact because the fishery was
19 not protected in any subsequent way --

20 JUSTICE BREYER: I don't know --

21 MR. JAY: -- by the treaty.

22 JUSTICE BREYER: -- if we can decide a
23 global standard for all of the Indian problems,
24 but the question presented here -- there are
25 three questions: One, was the scope of the

1 remedy too much; the second question is whether
2 the government has to contribute in light of
3 its equitable situation.

4 But the first question was whether the
5 treaty right of taking fish in common with all
6 citizens guaranteed that the number of fish
7 would always be sufficient to provide a
8 moderate living to the tribes. That's the
9 question presented.

10 Now you and the others have argued,
11 and I did -- it is true that the judge in the
12 lower court specifically denied that you --
13 they were imposing that standard. They said:
14 We're not doing that.

15 But they think they were doing that.
16 Maybe they didn't say it, but they were. All
17 right. What do you recommend we do?

18 MR. JAY: We recommend that you look
19 at what the injunction says and affirm it,
20 because the injunction says nothing about a
21 moderate living. The liability determination
22 on which the injunction rests says, at page
23 263, that the court specifically "need not
24 address what is a moderate living," because --
25 and, again, now here I would turn to page

1 271 -- the district court bases its liability
2 ruling on what it called a narrow duty -- I'm
3 sorry, "a narrow directive to refrain from
4 impeding fish runs in one specific manner."

5 That is not a moderate living holding.
6 So we don't think that the state's
7 characterization of the Ninth Circuit's opinion
8 is correct, but you don't -- you can simply
9 write in your opinion that the judgment is
10 affirmed and that you -- you don't agree with
11 the state's characterization where if it --

12 CHIEF JUSTICE ROBERTS: But do you --
13 do you agree with that, that it guarantees a
14 moderate living, regardless of what you think
15 the court said in the injunction? Is that the
16 standard that you want us to adopt?

17 MR. JAY: It's not. We -- we have
18 characterized the idea of a moderate living as
19 a defense that the state could have raised but
20 did not. What we ask is that the -- and what
21 we obtained from the district court is an
22 injunction prohibiting the state from taking
23 affirmative action to obstruct and thereby
24 degrade the fishery.

25 CHIEF JUSTICE ROBERTS: Well, but you

1 just told me you want us to affirm an
2 injunction that specifies a moderate living.

3 MR. JAY: No. No, Your Honor.

4 CHIEF JUSTICE ROBERTS: No?

5 MR. JAY: There's not a word about
6 moderate living in the injunction. Not a word.

7 CHIEF JUSTICE ROBERTS: Well, where
8 did the words come from?

9 MR. JAY: Historically or in this
10 case?

11 CHIEF JUSTICE ROBERTS: In this case.

12 MR. JAY: In this case, the -- as
13 Mr. Kedem walked you through, the Ninth Circuit
14 has two hold -- two pieces of its analysis
15 starting at 1 -- at 158 and it -- and it --
16 that's not right -- starting at 58 and
17 continuing on until it gets to a place where it
18 says even if the treaty did not make this
19 express promise and even if there weren't the
20 express promises by Governor Stevens in the
21 negotiation, even if we would infer such a
22 promise and analogizing to the Winters
23 doctrine, that is the section from which the
24 state derives the supposed moderate living
25 holding, but -- and we think that the analogy

1 to the Winters doctrine actually helps to
2 refute that.

3 The Winters doctrine is a doctrine
4 whereby, when Congress creates an Indian
5 reservation, it doesn't expressly make
6 provision for water. If water is necessary to
7 -- to fulfill the purpose of the reservation,
8 it's inferred. But if there's --

9 CHIEF JUSTICE ROBERTS: So if we were
10 to write an opinion in this case, you would
11 have no objection if it said that there is no
12 moderate living standard at issue here?

13 MR. JAY: We would have no objection
14 to that at all.

15 JUSTICE KAGAN: And just so I
16 understand it, you're saying that that was not
17 at issue. You never raised it and the district
18 court never considered it?

19 MR. JAY: The district court says, at
20 163, that it's not considering it. The state
21 says, at Footnote 75 of its summary judgment
22 brief, that it is not raising the moderate
23 living defense. That -- that's absolutely
24 correct.

25 And -- and for that reason, we -- what

1 we think the Court should focus on is the --
2 the actual basis for the injunction, the
3 liability ruling and then the injunction itself
4 and whether the injunction is an abuse of
5 discretion.

6 CHIEF JUSTICE ROBERTS: And how would
7 you phrase that, if not moderate living? What
8 would be the determine -- what would be the
9 standard that you think should be applied in
10 interpreting the injunction?

11 MR. JAY: In interpreting the
12 injunction? Well, we think that the reason an
13 injunction was justified in this case is
14 because the state has violated the treaty by,
15 one, putting barrier culverts in the streams
16 that prevent salmon and other anadromous fish
17 from getting to the usual and accustomed
18 fishing grounds, all of which -- all of which
19 are places where the state -- the tribes have a
20 right to fish.

21 And, second, those blockages -- those
22 same blockages are what is degrading the
23 fishery in a substantial way. And that --

24 JUSTICE ALITO: Do your clients agree
25 with the United States that the dams that were

1 built by the United States are in compliance
2 with the treaty?

3 MR. JAY: So let me -- let me give
4 just a conceptual answer. The -- not all dams
5 block fish passage. I mean, as my friend Mr.
6 Kedem said and as is reflected in Section 18 of
7 the Federal Power Act and its predecessor going
8 back to 1906, various executive agencies have
9 had the power to require fishways, you know,
10 devices for ensuring fish passage around dams.

11 So simply saying there were dams is
12 not in any way to say there was an obstruction
13 to fish passage.

14 JUSTICE ALITO: Yeah, I understand
15 that, but there are particular dams on
16 particular rivers, and I wonder if your clients
17 have a position as to whether those are in
18 compliance with the treaty, as the government
19 has told us this morning.

20 MR. JAY: Well, what I can say is that
21 when the federal government has built dams
22 without ensuring fish passage, that the federal
23 government quite appropriately has paid
24 compensation to the Indian tribes in exchange
25 for the destruction of its usual and accustomed

1 fishing grounds and the inability to take fish
2 there.

3 So, certainly, a dam or another
4 obstruction that blocks a usual and accustomed
5 fishing ground can be a violation, but there's
6 nothing in the record in this case, because it
7 has not been litigated, about particular dams
8 that don't meet that standard.

9 My friend from the state talked about
10 the idea that the state's -- some of the
11 state's barriers are partial barriers, and
12 there are a number of things I'd like to say
13 about that.

14 First is the idea that the common law
15 did not prohibit partial barriers to passage.
16 That is simply incorrect. I think that this is
17 discussed in detail at pages 17 to 20 of the
18 Law Professors' amicus brief.

19 On page 20, it says it is at this
20 point clear -- this is in the -- in the
21 1800s -- that partial barriers to fish passage
22 are prohibited as well. And that is not
23 surprising, because a barrier to fish passage
24 is an obstruction, even if a single
25 particularly strong fish can get upstream.

1 Now there's -- I would be happy to go
2 into great detail about what the tests should
3 be, but in this case, you don't have to get
4 into that because the state stipulated --
5 stipulated expressly to -- to the definition of
6 barrier culverts. And that is why the
7 injunction in this case is tailored to, number
8 one, streams that are suitable for salmon only;
9 number two, barrier culverts using the state's
10 own definition only; number three, barrier
11 culverts that block a significant stretch of
12 habitat.

13 And it has a fourth safeguard as well,
14 which is that the state can decline to
15 remediate up -- up to 10 percent of the
16 habitat, which we think could add up to more
17 than 200 yards --

18 JUSTICE BREYER: But there's still 600
19 -- there are about 600 and something left.
20 Suppose they discover --

21 MR. JAY: Five-hundred something.

22 JUSTICE BREYER: Because that's a lot
23 of them, when they go out there, that there are
24 like five culverts somewhere which would be
25 unbelievably expensive to change, and,

1 moreover, it would really save only three fish
2 or something.

3 Now suppose that they find that out.
4 Can they go back into the district court and
5 say: Judge, we would like you to modify this
6 in respect to those five?

7 MR. JAY: That's exactly what, at page
8 125, of the Petition Appendix you will see that
9 the court of appeals underscored, that the
10 district court retains equitable discretion
11 under this Court's cases, applying Rule 60, to
12 modify the injunction if changed circumstances
13 warrant it.

14 And the -- the court of appeals said
15 that it's confident that the district court,
16 which has supervised this case, these
17 proceedings, and this injunction for a long,
18 long time will exercise its discretion
19 appropriately.

20 JUSTICE KAGAN: Do -- do you think,
21 Mr. Jay, that this -- that these treaty
22 obligations differ at all from the reigning
23 common law principles? And, if so, how?

24 MR. JAY: I agree with what Mr. Kedem
25 said, that the common law is a guide to what

1 the -- to what the treaties' protected right of
2 taking fish means. I think that the reason
3 that it is a guide and not -- not a
4 codification rests in the fact that it is a
5 treaty between the United States and the Indian
6 tribes.

7 The Indian tribes, of course, were not
8 thoroughly familiar with the English common
9 law, but what the tribes did understand was
10 that obstructions to the salmon fishery were a
11 threat to the continued survival of the -- of
12 the species. That's why the tribes themselves
13 had adopted the practice of removing
14 obstructions to permit the survival.

15 JUSTICE KAGAN: But what I'm really --

16 MR. JAY: My second point --

17 JUSTICE KAGAN: -- asking is when you
18 look at the common law and you look at this
19 treaty, do you see any difference between the
20 two --

21 MR. JAY: The -- the --

22 JUSTICE KAGAN: -- and where would
23 that difference be?

24 MR. JAY: The principal difference, I
25 think, is on this point that Mr. Purcell

1 brought up, the idea that there could be some
2 public interest balancing. Now we don't -- we
3 agree with Mr. Kedem that that's not what the
4 common law says writ large about nuisance, but
5 it is true that nuisance was a common law
6 creation.

7 The legislature could supersede
8 nuisance in particular instances by passing a
9 statute saying this shall not be a nuisance.
10 The state and locale -- and local governments
11 don't have the power to do that because this
12 right of taking fish is secured by a federal
13 treaty.

14 So it's not that the treaty embodies
15 only a promise that you will have the right of
16 taking fish so long as the state and local
17 governments decide not to abrogate it. Only
18 Congress can abrogate a treaty with the Indian
19 tribes, and that certainly makes sense, given
20 the exchange that is effected by these
21 treaties.

22 The problem --

23 JUSTICE SOTOMAYOR: Mr. Jay, what do I
24 look at? I know the district court made
25 certain findings about the costs of

1 remediation. The state has always said it's
2 \$2.13 billion. I know the district court said
3 that wasn't true, that, on average, the
4 remediation of 12 or 15 culverts to date have
5 cost, on average, \$600,000.

6 MR. JAY: Right.

7 JUSTICE SOTOMAYOR: What can I look at
8 to tell me what the cost is projected to be? I
9 -- I just need a realistic number, and I wasn't
10 sure I got it from anybody.

11 MR. JAY: Yeah. I think, Your Honor,
12 you've looked at the right parts of the
13 opinion. I would also point you to 119a where
14 the court of appeals explains why the state's
15 total estimate is "demonstrably incorrect."

16 JUSTICE SOTOMAYOR: Six hundred
17 million dollars is still a lot of money.

18 MR. JAY: I don't think it would be
19 \$600 million, I mean, but --

20 JUSTICE SOTOMAYOR: There are 600 --
21 I'm on average.

22 MR. JAY: Right, it's --

23 JUSTICE SOTOMAYOR: Six hundred
24 culverts, you're right, he -- he said it was
25 like \$650,000 per culvert, so you're right,

1 maybe half that. It's still a lot of money.

2 MR. JAY: It -- it is a lot of money.
3 Of course, in the context of the state's
4 transportation budget, in -- at that figure, we
5 think it's about a half a percent of the
6 state's transportation budget. But I think --

7 JUSTICE SOTOMAYOR: And I know there's
8 some federal money coming.

9 MR. JAY: There is federal money
10 coming in. There are -- there are other
11 sources of funding as well that are remediating
12 both state and local and private culverts, but
13 I think that, when looking at the cost, I think
14 what you have to see is that much of the cost
15 comes not from like the designing of the
16 culvert or the -- what kind of culvert you put
17 in but the choice to remediate the culvert.

18 Now -- and it's very important to
19 notice that Washington State has had a law
20 requiring fish passage. And the attorney
21 general of Washington opined in 1950 -- 1950 --
22 that culverts installed by the State Highway
23 Department under state roads had to meet those
24 requirements for fish passage.

25 So, if the state decided not to do

1 that and to install non-compliant culverts,
2 culverts that blocked fish passage, and it's
3 going to cost, you know, a fairly substantial
4 sum to remediate them, the state bears a -- a
5 fair amount of that responsibility itself.

6 Now, ultimately, the district court in
7 its discretion looked at those costs, looked at
8 the state's argument about whether it would be
9 worthwhile, balanced the equities, and
10 concluded that the balance of the harms tipped
11 substantially in the tribes' favor and in the
12 favor of the public interest.

13 And I think that this is well brought
14 out by the non-Indian fishermen's brief, both
15 commercial and recreational fishermen, who
16 explain in detail why it's very consistent with
17 the public interest to resolve this problem on
18 the tailored scale -- tailored timetable that
19 the district court set out.

20 Thank you, Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Purcell, you have five minutes
24 remaining.

25

1 REBUTTAL ARGUMENT OF NOAH PURCELL

2 ON BEHALF OF THE PETITIONER

3 MR. PURCELL: Thank you, Mr. Chief
4 Justice.

5 I'd like to make three points. First,
6 counsel for the United States pointed you to
7 paragraph 4.1 at Joint Appendix 62a. I'd urge
8 you to turn to it and look at it.

9 He -- he stopped reading part way
10 through. It says, "has a duty not to build or
11 maintain culverts in a way that deprives the
12 tribes of a moderate living from fishing."

13 Moderate living came from their --
14 that's their complaint. That's the equivalent
15 of their complaint in this case. The district
16 court understood their complaint that way, if
17 you look at Petition Appendix 250a. He
18 described their claim as seeking a moderate
19 living from fishing.

20 The phrase "moderate living" appears
21 dozens of times in the briefs to the Ninth
22 Circuit. The phrase "substantial degradation"
23 doesn't appear a single time in any brief to
24 the Ninth Circuit. That was not the argument.

25 So I raise that point not to emphasize

1 that -- that they should be barred from raising
2 that argument here but just to emphasize that
3 if the Court's going to adopt some version of
4 that test, really the appropriate --

5 JUSTICE BREYER: Some -- the sentence
6 says, "in the context of state culverts that
7 appreciably degrade fish passage and interfere
8 with the tribe's ability to obtain a
9 moderate" -- so they have to do both: One,
10 appreciably inter -- degrade fish passage; and
11 two, also interfere with the moderate standing.

12 Isn't that what it says?

13 MR. PURCELL: That's what they
14 claimed, Your Honor.

15 JUSTICE BREYER: Well, that's what it
16 seemed to me to say.

17 MR. PURCELL: The -- the district
18 court essentially said the moderate living
19 standard -- any decline from that is a
20 violation. And all the factual findings
21 they're citing, Your Honor, keep in mind that
22 was after the district court had already held
23 that the state violated the treaties.

24 The -- the violation finding was on
25 summary judgment. And what the district court

1 said -- I encourage you to turn to actually the
2 same page that Mr. Jay said, Petition Appendix
3 263a, the district court said, "the tribes find
4 that harvests have been diminished, together
5 with the logical inference that a significant
6 portion of this diminishment is due to blocked
7 culverts, is sufficient to support a finding of
8 a treaty violation." So --

9 JUSTICE SOTOMAYOR: Counsel, I -- I --
10 you know, I -- I have read the language. I
11 don't understand exactly why the district court
12 did it. I think the circuit court tried to
13 clarify it.

14 But, as I understand things, the
15 Indians are entitled to 50 percent, but we have
16 said it doesn't have to be more than a moderate
17 living. So it could be less than 50 percent of
18 whatever the catch is.

19 Am I correct on that?

20 MR. PURCELL: In Fishing Vessel, the
21 Court said the tribe -- each side is entitled
22 to half the available fish.

23 JUSTICE SOTOMAYOR: Right. And
24 unless?

25 MR. PURCELL: Unless less than that is

1 sufficient to provide a moderate living.

2 JUSTICE SOTOMAYOR: Exactly. As I
3 understand what the government said to me
4 earlier, you stipulated that a moderate living
5 wasn't at issue. So you weren't claiming, I
6 don't think, as a defense that the existing
7 catch was more than sufficient or exceeded a
8 moderate living by so much that we didn't have
9 to fix the culverts because of that reason.

10 MR. PURCELL: We said we would not
11 dispute that the tribes were not currently
12 earning a moderate living from fishing. And
13 that's why --

14 JUSTICE SOTOMAYOR: So --

15 MR. PURCELL: -- the district court
16 said I don't need to define this term.

17 JUSTICE SOTOMAYOR: So it doesn't
18 really matter. Once there's significant
19 degradation, that means they're not getting
20 50 percent of what they need.

21 MR. PURCELL: No, Your Honor. This
22 Court in Fishing Vessel said 50 percent is the
23 maximum, even if it's less than the tribe's
24 moderate living needs. That's what the Court
25 said in Fishing Vessel.

1 JUSTICE SOTOMAYOR: Yes, but -- but
2 what I'm saying to you is, if you stipulated
3 that they're not making a moderate living,
4 they're still entitled to 50 percent of the
5 undegradated catch.

6 MR. PURCELL: That's not what the
7 Court held in Fishing Vessel at all, Your
8 Honor. The Court held 50 percent of the
9 currently available catch. If that had been
10 the rule, they would have been entitled to
11 every single fish -- the -- the -- the
12 undegradated catch, Your Honor, would be tens
13 of millions of salmon. And it's undisputed
14 that -- that -- that the -- the runs have
15 declined vastly long before the state built any
16 culverts. That's -- that's not what the Court
17 said.

18 JUSTICE SOTOMAYOR: Then my words are
19 -- are wrong. They caught X amount. If the
20 proof is that Y amount would have happened
21 absent the obstruction, they're entitled to
22 50 percent of Y amount. I don't care what
23 caused the decimation.

24 MR. PURCELL: Again, that's not the
25 Court -- the approach the Court took in Fishing

1 Vessel. And if the Court's going to remand
2 with some sort of direction that the district
3 -- I would urge the Court that if you're going
4 to say some version of that, the appropriate
5 course is to remand to the district court
6 because the district court just did not
7 consider these arguments. The district
8 court -- it's -- I mean, we didn't waive the
9 idea that these aren't all obstructions. That
10 wasn't an issue.

11 The definition -- the common law
12 definition of obstruction was never raised in
13 the district court by the other parties. We
14 had no opportunity to make that point.

15 We did in our post-trial brief, again,
16 at Joint Appendix 28, we argued extensively
17 about the flaws in the injunction.

18 Every single flaw -- Justice Breyer
19 asked, why can't we go back to the district
20 court? We already pointed out all of these
21 flaws to the district court and -- and he
22 ignored them and entered the exact injunction
23 that they proposed.

24 And -- and so that's -- that's the
25 concern. It flips the burden of proof on its

1 head to say, okay, we're going to assume that
2 all state barrier culverts, regardless of where
3 they are or anything about the river or
4 anything like that, is a violation, and then
5 you can go back and ask for relief.

6 I see my time has expired. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:08 p.m., the case
10 was submitted.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Official

\$	9,18,23 55:16,19 50 [7] 73:15,17 74:20,22 75:4,8,22 53 [1] 2:12 58 [2] 21:15 59:16	advanced [1] 4:9 advancing [2] 29:21 39:2 adversaries [1] 8:24 adversary [1] 43:5 advocate [1] 4:4 advocating [1] 31:21 affect [3] 5:24 16:23 17:25 affecting [1] 9:22 affects [4] 20:16,18 56:3,7 affirm [2] 57:19 59:1 affirmative [1] 58:23 affirmed [1] 58:10 agencies [1] 62:8 agency [1] 50:22 agency's [1] 54:1 ago [1] 45:5 agree [5] 58:10,13 61:24 65:24 67:3 agreement [1] 26:5 Ah [1] 19:11 ahead [2] 42:19 43:2 aimed [1] 47:1 AL [4] 1:6,23 2:12 53:11 alarming [2] 21:3,6 ALITO [20] 11:25 12:5,20 13:8,12,25 14:5,11 17:7 39:17 40:17,22 48:21,25 49:6 52:20 54:8 55:3 61:24 62:14 alleged [1] 14:20 ALLON [3] 1:19 2:6 34:20 allow [5] 30:17 33:17 40:8 42:21 47:25 allowed [2] 19:6 30:12 already [4] 7:1 28:25 72:22 76:20 alternative [2] 3:17 36:12 altogether [1] 18:13 amicus [1] 63:18 amount [9] 27:18 32:14,17 41:24 44:25 70:5 75:19,20,22 anadromous [1] 61:16 analogizing [1] 59:22 analogy [1] 59:25 analysis [2] 10:13 59:14 analyzing [2] 23:19,21 announced [1] 3:15 another [4] 7:23 47:16 54:20 63:3 answer [5] 5:4 24:18 40:4 55:9 62:4 anybody [2] 17:10 68:10 apparently [1] 23:7 appeals [9] 21:24 22:21 23:13 49:20,23 52:17 65:9,14 68:14 appear [2] 30:7 71:23 appearance [1] 36:10 APPEARANCES [1] 1:16 appears [2] 47:14 71:20 Appendix [15] 11:12,14 13:4 35:21 36:20 44:1,6 45:2 51:14 54:23 65:8 71:7,17 73:2 76:16 application [1] 33:12 applied [2] 12:15 61:9 applies [1] 49:7 apply [6] 3:22 4:7 29:18 43:6 48:18 49:9	applying [2] 6:11 65:11 appreciable [2] 43:7 44:15 appreciably [2] 72:7,10 approach [3] 44:19,20 75:25 approaching [2] 14:25 16:17 appropriate [3] 34:13 72:4 76:4 appropriately [2] 62:23 65:19 approved [1] 31:22 approximately [1] 50:25 April [1] 1:10 area [3] 32:10 54:25 55:2 aren't [3] 8:24 27:2 76:9 argue [2] 16:8 39:23 argued [4] 33:1 36:13 57:10 76:16 arguing [6] 4:10 32:14,20 37:13 46:9 49:25 argument [30] 1:13 2:5,9,13 3:4,7 4:21 5:5 11:17 15:22,23 16:6 32:22 33:6 34:20 36:2 37:17 39:3 41:15 51:19 52:4,7,13,15 53:9 70:8 71:1,24 72:2 arguments [4] 33:4 37:25 39:8 76:7 Army [1] 41:5 around [4] 40:8 41:7 42:11 62:10 articles [1] 40:17 aside [1] 38:5 assert [1] 18:5 Assistant [1] 1:19 assume [1] 77:1 assuming [1] 42:12 attorney [1] 69:20 attributable [1] 16:10 authorities [1] 48:23 authorized [1] 28:10 automatically [1] 31:24 available [4] 11:14 12:11 73:22 75:9 average [3] 68:3,5,21 away [2] 9:25 32:16 awful [1] 37:7
1	6 [2] 21:12 23:4 60 [1] 65:11 600 [3] 64:18,19 68:20 62 [1] 36:20 62a [1] 71:7 663 [1] 11:12		
	6		
	7		
	71 [1] 2:15 74 [1] 13:4 75 [1] 60:21		
	8		
	86a [1] 35:20		
	9		
	90 [3] 30:18,19,20 92 [1] 36:5 99 [1] 10:18		
	A		
	a.m. [2] 1:14 3:2 abandoned [2] 3:16 4:8 ability [2] 17:24 72:8 able [3] 9:20 18:20 31:3 above-entitled [1] 1:12 abrogate [2] 67:17,18 absent [3] 51:5,6 75:21 Absolutely [2] 25:22 60:23 abuse [1] 61:4 abused [1] 52:14 accelerate [2] 6:25 10:22 access [5] 12:9 35:2 37:20 38:25 39:2 account [7] 42:7,7 45:7,13,18 46:22 55:14 accounting [1] 21:12 accustomed [4] 53:20 61:17 62:25 63:4 achieve [1] 3:13 acres [1] 53:15 across-the-board [1] 23:1 act [5] 21:25 42:5 45:6,9 62:7 action [4] 46:15 47:5 51:5 58:23 actions [6] 12:13 15:20 38:10 48:22 49:1,4 activity [2] 4:13 13:24 actual [1] 61:2 actually [3] 41:6 60:1 73:1 add [1] 64:16 addition [1] 53:3 address [1] 57:24 addressed [2] 3:18 31:16 addresses [1] 33:3 addressing [2] 11:21 37:25 adopt [5] 25:12 34:12 55:18 58:16 72:3 adopted [2] 33:19 66:13 advance [3] 42:6 45:12,22		
	2		
	20 [2] 63:17,19 200 [4] 6:22,23 7:4 64:17 200,000 [1] 50:20 2007 [1] 34:8 2018 [1] 1:10 220 [1] 9:6 250 [1] 50:23 250a [1] 71:17 263 [1] 57:23 263a [1] 73:3 27 [1] 37:2 270 [1] 44:1 271 [1] 58:1 28 [2] 11:12 76:16		
	3		
	3 [1] 2:4 30 [2] 24:20,23 315 [1] 9:6 34 [1] 2:8 35 [1] 23:22		
	4		
	4.1 [1] 71:7 44 [1] 21:14		
	5		
	5 [14] 14:17 15:3,5,9,15,16 16:4,7,8,		

<p>Basically [2] 4:24 27:8 basis [4] 10:11 37:1 42:14 61:2 bears [1] 70:4 become [1] 13:22 beginning [2] 35:20 42:23 behalf [1] 1:18,21,22 2:4,7,11,15 3:8 34:21 53:10 71:2 behavior [1] 26:18 believe [2] 5:10 23:20 below [4] 3:18 4:21 6:4,6 benefit [3] 27:15 31:23 45:1 benefits [4] 18:11,19 28:8 51:13 best [2] 31:19 36:11 better [1] 4:4 between [10] 12:21 13:13 15:3 31:20 39:10 44:22 50:8 56:12 66:5,19 billion [1] 68:2 billions [1] 3:13 blanket [2] 42:6 45:11 block [3] 5:8 62:5 64:11 blockages [2] 61:21,22 blocked [4] 32:18 35:3 70:2 73:6 blocking [4] 4:23 8:8 29:2 32:9 blocks [1] 63:4 bodies [1] 24:15 boils [1] 18:4 both [5] 44:14 50:17 69:12 70:14 72:9 BREYER [20] 20:23 21:5,9,20,23 22:9,15,20 23:6 30:24 31:2,8 32:4 56:20,22 64:18,22 72:5,15 76:18 bridge [1] 28:16 brief [17] 9:5,5 11:10 13:18 23:16 31:15,17,18 33:2,3 37:7 51:21 60:22 63:18 70:14 71:23 76:15 briefing [3] 13:7 30:8 36:16 briefs [2] 32:15 71:21 bring [1] 29:10 broader [2] 20:2,7 brought [4] 51:17 52:16 67:1 70:13 budget [2] 69:4,6 build [4] 39:8 42:15 48:14 71:10 building [1] 35:25 built [9] 26:19 28:16 39:19 40:6,7 41:17 62:1,21 75:15 burden [1] 76:25</p>	<p>catch-all [1] 13:22 caught [1] 75:19 causation [2] 15:22 16:6 cause [1] 30:4 caused [5] 17:12 40:18 41:11 44:7 75:23 causes [1] 16:7 causing [4] 5:12 12:17 16:4 23:22 ceded [2] 17:20 25:10 central [5] 4:6 37:12 38:6 50:3,13 certain [4] 12:13 18:17 40:1 67:25 certainly [9] 14:18,19 15:2 32:17 46:12 49:15 56:10 63:3 67:19 cession [2] 19:20 25:5 challenged [2] 44:9 51:6 change [2] 5:25 64:25 changed [4] 32:25 35:6 42:20 65:12 characterization [2] 58:7,11 characterize [1] 9:3 characterized [1] 58:18 charts [1] 41:22 CHIEF [34] 3:3,9,23 4:3 29:24 34:17,22 37:3,6,15 42:17,19 43:1,4 45:4,17 49:19,22 52:3,7,18 53:6,12 58:12,25 59:4,7,11 60:9 61:6 70:20,21 71:3 77:7 children [2] 39:14,16 choice [3] 8:14 30:21 69:17 chose [1] 6:14 Circuit [16] 3:15 4:9,21 11:6,22 30:7,8 33:1,5,9 35:14,22 59:13 71:22,24 73:12 Circuit's [2] 35:17 58:7 circumstances [1] 65:12 cite [1] 48:2 cited [2] 28:7 32:1 citing [3] 23:2 24:7 72:21 citizens [2] 38:14 57:6 claim [2] 18:20 71:18 claimed [1] 72:14 claiming [3] 40:18 42:14 74:5 Claims [1] 40:14 clarify [3] 3:20 4:2 73:13 Clean [3] 42:5 45:6,9 clear [5] 12:7 30:13 48:8 49:7 63:20 clearly [3] 22:22 23:12 44:9 clients [2] 61:24 62:16 climate [1] 5:25 closing [1] 11:17 codification [1] 66:4 Columbia [1] 39:20 combined [1] 29:11 come [4] 10:23 26:4 47:10 59:8 comes [2] 50:22 69:15 coming [3] 32:10 69:8,10 commercial [1] 70:15 Commission [1] 40:15 common [33] 19:20 25:6 28:7 30:11,12 31:2,19,21,22,25 32:8,12 37:7,18 38:5,14 39:9 47:12,24 49:8,12,25 50:1,7 57:5 63:14 65:23,25 66:8,18 67:4,5 76:11</p>	<p>compact [1] 25:16 compelling [1] 5:14 compensate [1] 53:5 compensated [1] 40:13 compensation [3] 41:2,3 62:24 complaint [3] 71:14,15,16 completely [7] 4:23 9:15 10:1 19:13,23 26:22 32:24 compliance [2] 62:1,18 complicated [1] 37:20 complicity [1] 52:25 complied [1] 45:23 concede [2] 39:4,5 concept [1] 14:8 concepts [1] 40:3 conceptual [1] 62:4 concern [3] 5:23 50:14 76:25 concerned [1] 5:21 concerns [2] 11:21 34:1 concluded [1] 70:10 condensed [1] 10:18 conditions [2] 42:8 45:8 confident [2] 28:24 65:15 Congress [2] 60:4 67:18 connected [1] 44:25 connection [1] 44:22 conservation [1] 20:1 consider [3] 23:13 30:1 76:7 considered [3] 20:12 25:25 60:18 considering [1] 60:20 considers [1] 20:12 consist [1] 32:9 consistent [3] 41:18 54:5 70:16 contain [1] 36:6 context [10] 36:15 54:15,15,16,20 55:17,21,21 69:3 72:6 contexts [2] 15:7 55:20 continually [1] 24:24 continued [1] 66:11 continuing [1] 59:17 contract [1] 25:16 contrary [1] 51:22 contribute [1] 57:2 control [3] 7:24 17:20 25:10 Corps [1] 41:5 correct [10] 5:2 35:23 38:15,23 40:25 41:20 46:11 58:8 60:24 73:19 cost [6] 52:23 68:5,8 69:13,14 70:3 cost-wise [1] 29:4 costs [3] 7:8 67:25 70:7 couldn't [1] 42:22 counsel [7] 34:18 52:19 53:7 70:22 71:6 73:9 77:8 country [1] 42:11 counts [1] 32:14 course [6] 34:13 39:9 50:7 66:7 69:3 76:5 COURT [108] 1:1,13 3:10,19,22 6:4,6,24 7:2,10,12,15,22 9:16 10:4,9,16 11:19 12:9 19:17,22 21:1,24 22:18,21,25 23:13,19 24:5,6 28:5 29:17,18,25 30:9,15 33:6,9,19,25 34:3,5,11,14,23 36:5,7 38:25 43:6</p>	<p>44:2,4,18 46:24 49:20,23 50:21 51:10,21,23 52:5,11,14,16,17 53:13 54:21 55:18 57:12,23 58:1,15,21 60:18,19 61:1 65:4,9,10,14,15 67:24 68:2,14 70:6,19 71:16 72:18,22,25 73:3,11,12,21 74:15,22,24 75:7,8,16,25,25 76:3,5,6,8,13,20,21 court's [9] 3:16 10:8 19:21 36:4 37:2 50:12 65:11 72:3 76:1 courts [6] 3:18 4:14,20 6:11 28:5 38:2 cover [1] 54:25 creates [1] 60:4 creating [2] 27:22 55:1 creation [1] 67:6 credit [1] 50:21 crucial [3] 10:7,12 17:18 culvert [11] 6:17 8:19 9:25 30:19,22 51:7,25 68:25 69:16,16,17 culverts [57] 6:8,15,23 7:4,6,25 8:8,25 9:6,14,21,24 13:19 16:10 18:10 21:12 22:14 23:4,22 24:3 28:13,24 29:10,20,22 30:17 32:18 33:17 35:25 41:17 42:10,16,21 43:9 44:7 45:15,16 46:5 54:24 56:15 61:15 64:6,9,11,24 68:4,24 69:12,22 70:1,2 71:11 72:6 73:7 74:9 75:16 77:2 currently [2] 74:11 75:9 customary [2] 17:1 19:12 cuts [1] 25:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. [3] 1:9,20,22 dam [6] 26:1,16 40:9,9 41:8 63:3 damage [1] 40:18 dams [18] 15:19 26:20 27:2,3 29:8 39:17,18 40:6,21 41:11 46:3 61:25 62:4,10,11,15,21 63:7 date [1] 68:4 de [4] 56:7,8,10,12 deal [1] 32:22 dealing [1] 39:10 decades [1] 26:21 decide [3] 5:1 56:22 67:17 decided [1] 69:25 decimated [1] 26:22 decimation [1] 75:23 decision [1] 10:8 decisions [5] 4:18 5:25 10:20 17:24 19:22 declaration [2] 36:22,24 decline [25] 5:12,16,17,22 12:17 14:4,5,14,19,25 15:1,2,4,9 16:4,7 17:6,8,12 21:13 23:23 24:20 27:1 64:14 72:19 declined [2] 21:3 75:15 deemed [1] 15:6 defeat [1] 18:14 defense [5] 47:15,25 58:19 60:23 74:6 defer [2] 7:3 8:8 deferred [1] 10:25</p>
---	---	---	--

Official

<p>define [6] 13:21 28:5 30:16,21 43:16 74:16</p> <p>defined [2] 13:16 30:10</p> <p>defining [1] 28:1</p> <p>definition [8] 43:6,20 51:24 55:5 64:5,10 76:11,12</p> <p>degrade [1] 27:14</p> <p>degradate [1] 6:15</p> <p>degradation [14] 13:17 14:1,14 17:9 27:11 30:5,6 43:7,25 44:6 54:10,11 71:22 74:19</p> <p>degrade [6] 43:10,10,22 58:24 72:7,10</p> <p>degrades [4] 39:6 44:3 46:16 53:22</p> <p>degrading [3] 12:23 36:25 61:22</p> <p>demand [1] 36:19</p> <p>demonstrably [1] 68:15</p> <p>denied [1] 57:12</p> <p>denominator [3] 15:25 50:18 51:3</p> <p>denying [1] 46:13</p> <p>Department [2] 1:20 69:23</p> <p>deprives [1] 71:11</p> <p>derives [1] 59:24</p> <p>describe [1] 46:23</p> <p>described [1] 71:18</p> <p>design [2] 42:21 43:21</p> <p>designing [1] 69:15</p> <p>despite [1] 44:16</p> <p>destruction [1] 62:25</p> <p>detail [3] 63:17 64:2 70:16</p> <p>details [2] 22:17 34:1</p> <p>determination [2] 43:9 57:21</p> <p>determine [2] 54:19 61:8</p> <p>developed [1] 40:2</p> <p>devices [1] 62:10</p> <p>diameter [1] 41:24</p> <p>differ [1] 65:22</p> <p>difference [8] 7:7 12:21 13:6,13 27:23 66:19,23,24</p> <p>differences [1] 31:20</p> <p>different [4] 10:1,2 15:23 24:14</p> <p>diminish [1] 47:18</p> <p>diminished [1] 73:4</p> <p>diminishment [3] 6:9 33:6 73:6</p> <p>direct [1] 44:22</p> <p>direction [2] 34:14 76:2</p> <p>directive [1] 58:3</p> <p>directly [1] 53:2</p> <p>disagreement [2] 32:6,7</p> <p>disagrees [1] 34:11</p> <p>discover [2] 23:9 64:20</p> <p>discretion [6] 8:6 52:14 61:5 65:10,18 70:7</p> <p>discussed [3] 49:20,23 63:17</p> <p>discussion [2] 20:24 35:20</p> <p>dispute [1] 74:11</p> <p>disregard [1] 54:1</p> <p>district [60] 3:22 9:16 10:4,16,16 11:18 21:1 22:18,24 23:19 24:5,5 28:5 29:17,17,25 30:8,15 33:5,9,19 34:3,5,14 37:2 43:6 44:2,4,18 50:21 51:10,23 52:13,17 54:21 58:</p>	<p>1,21 60:17,19 65:4,10,15 67:24 68:2 70:6,19 71:15 72:17,22,25 73:3,11 74:15 76:2,5,6,7,13,19,21</p> <p>Docket [1] 11:12</p> <p>doctrine [4] 59:23 60:1,3,3</p> <p>doing [5] 25:1,2 41:16 57:14,15</p> <p>dollars [4] 3:13 7:9 53:2 68:17</p> <p>domestic [1] 19:15</p> <p>done [5] 10:13,21,22 42:23 49:9</p> <p>down [6] 7:20 18:4 19:23 20:14 41:7 45:16</p> <p>downstream [5] 7:24 8:20,25 9:7,10</p> <p>dozen [1] 36:14</p> <p>dozens [1] 71:21</p> <p>dramatically [2] 24:9,14</p> <p>draw [1] 56:12</p> <p>duck [1] 39:24</p> <p>due [1] 73:6</p> <p>durable [2] 44:15 55:24</p> <p>during [1] 4:21</p> <p>duty [4] 35:24 56:17 58:2 71:10</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [3] 7:8 9:17 73:21</p> <p>earlier [2] 41:13 74:4</p> <p>early [2] 13:3 26:21</p> <p>earning [1] 74:12</p> <p>easily [1] 14:20</p> <p>effect [9] 6:8 9:14,23 10:6 13:19 23:1,3 24:13,14</p> <p>effected [1] 67:20</p> <p>effectively [1] 18:8</p> <p>effects [1] 24:6</p> <p>efforts [2] 41:9 53:3</p> <p>either [5] 14:12 29:16 40:2,8,14</p> <p>elements [1] 15:23</p> <p>elevated [1] 20:15</p> <p>eliminate [1] 18:12</p> <p>eliminated [1] 19:14</p> <p>elsewhere [1] 46:7</p> <p>Elwha [1] 29:9</p> <p>embodies [1] 67:14</p> <p>emphasize [2] 71:25 72:2</p> <p>emptied [1] 35:3</p> <p>enact [1] 46:25</p> <p>enactment [1] 49:13</p> <p>encourage [1] 73:1</p> <p>end [5] 7:3,13,14 9:5 41:24</p> <p>ends [1] 6:17</p> <p>engineering [1] 41:21</p> <p>Engineers [1] 41:6</p> <p>English [1] 66:8</p> <p>enjoy [2] 38:18,18</p> <p>enough [3] 7:18 15:24 28:4</p> <p>ensure [2] 18:17 50:10</p> <p>ensuring [3] 27:10 62:10,22</p> <p>entered [2] 11:19 76:22</p> <p>entire [1] 36:18</p> <p>entirely [1] 18:14</p> <p>entitled [6] 27:16 73:15,21 75:4,10,21</p> <p>Entry [1] 11:12</p> <p>environmental [3] 4:16,17 13:23</p>	<p>equal [2] 38:24 39:2</p> <p>equitable [2] 57:3 65:10</p> <p>equities [1] 70:9</p> <p>equivalent [1] 71:14</p> <p>erroneous [2] 23:12 44:9</p> <p>ESQ [5] 1:22 2:3,6,10,14</p> <p>essentially [8] 4:15 10:16 15:17,20 30:11 33:8 34:7 72:18</p> <p>estimate [3] 13:19 29:11 68:15</p> <p>estopped [1] 42:13</p> <p>ET [4] 1:6,23 2:12 53:11</p> <p>even [20] 4:11 7:22,25 8:3,20,21 17:7,15,24 26:7 29:16,19 36:6 42:11 53:25 59:18,19,21 63:24 74:23</p> <p>everybody [1] 22:22</p> <p>evidence [4] 10:5 33:14 37:11,24</p> <p>exact [2] 11:19 76:22</p> <p>exactly [5] 8:11 19:18 65:7 73:11 74:2</p> <p>example [8] 14:18 15:12 20:5,13 25:25 27:8 29:8 47:3</p> <p>exceeded [1] 74:7</p> <p>exceptions [1] 37:18</p> <p>exchange [3] 53:15 62:24 67:20</p> <p>exclude [2] 7:22 8:6</p> <p>excluded [1] 7:11</p> <p>excuse [1] 20:15</p> <p>executive [1] 62:8</p> <p>exercise [1] 65:18</p> <p>existence [1] 18:18</p> <p>existing [1] 74:6</p> <p>expect [2] 40:4 52:15</p> <p>expensive [1] 64:25</p> <p>expired [1] 77:6</p> <p>explain [2] 38:12 70:16</p> <p>explained [2] 13:18 31:15</p> <p>explains [1] 68:14</p> <p>explicitly [2] 6:6 36:7</p> <p>express [2] 59:19,20</p> <p>expressly [2] 60:5 64:5</p> <p>extensive [2] 44:4,21</p> <p>extensively [1] 76:16</p> <p>extraordinary [1] 41:9</p> <p>extremely [1] 7:7</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact [12] 9:17 23:8,10 24:13 25:9 33:15,16 42:18,20 45:23 50:8 66:4</p> <p>factors [1] 28:6</p> <p>facts [1] 34:2</p> <p>factual [3] 34:7 44:5 72:20</p> <p>factually [2] 40:3 54:19</p> <p>fail [1] 48:19</p> <p>Fair [6] 7:18 12:11 15:24 27:18 28:3 70:5</p> <p>fairly [1] 70:3</p> <p>fall [1] 7:20</p> <p>familiar [1] 66:8</p> <p>fast [1] 54:14</p> <p>faster [1] 10:22</p> <p>favor [2] 70:11,12</p> <p>feasible [1] 40:11</p> <p>featured [1] 37:16</p>	<p>federal [23] 4:14,18 12:21 15:19 25:16 26:19 29:8 34:25 39:18 40:5,15,24 41:11,18,19 42:15 49:15 62:7,21,22 67:12 69:8,9</p> <p>few [1] 32:21</p> <p>figure [3] 50:20 51:11 69:4</p> <p>file [1] 16:3</p> <p>filed [2] 11:8,9</p> <p>filing [1] 11:13</p> <p>Finally [1] 51:17</p> <p>find [5] 29:19 31:3 42:12 65:3 73:3</p> <p>Finding [6] 21:10 22:25 23:12 24:12 72:24 73:7</p> <p>findings [6] 26:14 44:5,8,21 67:25 72:20</p> <p>first [16] 9:12 11:5 15:14 19:19 36:10,21,23 40:5 43:9,24 47:15 50:20 51:20 57:4 63:14 71:5</p> <p>fish [70] 4:25 5:1,2,8 6:16 9:22 10:10 12:3,11 20:19 21:3 25:21 26:6,10 27:11,16 28:17 29:3 30:18 31:9 32:9,17 33:17,23 35:1 37:20 38:14 39:12 40:6,8,10 41:4 42:21 47:4 48:18 50:11,20 51:8 53:19,21,22 54:20 55:11,12 56:1,3 57:5,6 58:4 61:16,20 62:5,10,13,22 63:1,21,23,25 65:1 66:2 67:12,16 69:20,24 70:2 72:7,10 73:22 75:11</p> <p>fisheries [9] 35:2,11 38:9 39:7 40:14 44:8,23 46:16 50:5</p> <p>fishermen [1] 70:15</p> <p>fishermen's [1] 70:14</p> <p>fishery [9] 37:1 53:17,18 55:2,22 56:18 58:24 61:23 66:10</p> <p>fishing [23] 9:18,19 10:8 12:10,12 17:2,25 19:24 27:9,12 38:25 53:20 61:18 63:1,5 71:12,19 73:20 74:12,22,25 75:7,25</p> <p>fishways [1] 62:9</p> <p>five [4] 8:20 64:24 65:6 70:23</p> <p>Five-hundred [1] 64:21</p> <p>fix [3] 6:14,23 74:9</p> <p>flaw [1] 76:18</p> <p>flaws [2] 76:17,21</p> <p>flips [1] 76:25</p> <p>flood [1] 42:1</p> <p>flow [1] 28:17</p> <p>fluctuations [1] 44:17</p> <p>focus [1] 61:1</p> <p>focused [1] 13:7</p> <p>follows [1] 35:23</p> <p>Footnote [1] 60:21</p> <p>forfeited [2] 51:18,19</p> <p>form [1] 27:11</p> <p>forth [2] 22:2,23</p> <p>found [6] 22:23 23:15 33:9 34:3 39:1 54:22</p> <p>four [3] 5:11 50:25,25</p> <p>fourth [1] 64:13</p> <p>fraction [2] 13:20 14:16</p> <p>fraud [1] 55:17</p> <p>free [3] 12:13 28:17 43:21</p> <p>freeze [1] 18:16</p> <p>friend [7] 47:3 50:16 51:17 52:8</p>
--	--	--	---

<p>55:23 62:5 63:9 fulfill ^[1] 60:7 funding ^[1] 69:11 funds ^[2] 8:2 28:13 future ^[3] 17:21 18:25 25:11</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gave ^[9] 6:21 8:5,13 10:23 13:19 24:18 25:17,18 47:3 General ^[10] 1:17,19 24:11,16 25: 15 41:21 42:4 47:21,25 69:21 generally ^[1] 45:13 gets ^[1] 59:17 getting ^[3] 53:20 61:17 74:19 GINSBURG ^[4] 38:11,16 41:14 52: 21 give ^[8] 19:7 26:5,6 43:20,21 45:15 55:10 62:3 given ^[3] 11:3 32:13 67:19 gives ^[3] 38:13,13 50:16 giving ^[1] 54:23 global ^[1] 56:23 glossed ^[1] 9:15 goal ^[1] 3:13 God ^[1] 21:25 goods ^[1] 18:6 GORSUCH ^[2] 15:5,9,21 16:5,13, 21,25 18:2 19:5 20:4,6 25:2 35:12, 18 47:7,10,14,22 48:1,4,7 Gorsuch's ^[2] 24:17 55:15 got ^[7] 22:9 25:20 43:11 52:5,10, 10 68:10 gotten ^[1] 55:9 government ^[17] 17:21,23 19:1 25:11 26:19 29:8 39:18 40:24 42: 9,13 49:2,15 57:2 62:18,21,23 74: 3 government's ^[3] 12:22 46:1 54:2 governmental ^[1] 48:23 governments ^[2] 67:10,17 Governor ^[2] 39:13 59:20 granted ^[2] 42:6 45:12 great ^[1] 64:2 greater ^[1] 39:3 ground ^[4] 23:14 56:15,17 63:5 grounds ^[5] 17:2 19:12 53:21 61: 18 63:1 guaranteed ^[1] 57:6 guaranteeing ^[1] 35:10 guarantees ^[3] 12:8 17:1 58:13 guess ^[3] 15:24 16:13 18:2 guide ^[2] 65:25 66:3</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habitat ^[9] 7:5 8:9,16,19 10:3 45:3 50:23 64:12,16 habitat-focused ^[1] 44:20 half ^[12] 14:19,25 15:1 16:17 17:2 29:22 30:15 33:16 36:14 69:1,5 73:22 happen ^[1] 51:5 happened ^[2] 55:4 75:20 happens ^[1] 55:4 happy ^[1] 64:1</p>	<p>hard ^[3] 10:15 22:17 54:14 hardly ^[1] 8:24 harm ^[5] 38:10 39:6 40:13 44:14 48:11 harmful ^[2] 27:12 46:14 harms ^[3] 51:15 53:5 70:10 harvest ^[3] 15:16 20:20 33:7 harvesters ^[1] 20:17 harvesting ^[1] 20:14 harvests ^[6] 13:21 14:17,18 50:16 51:4 73:4 hatcheries ^[1] 41:4 hate ^[1] 54:8 head ^[3] 14:23 44:12 77:1 head-on ^[1] 35:5 headwater ^[1] 41:23 health ^[2] 20:3 44:23 hear ^[2] 3:3 39:21 heard ^[1] 46:2 heart ^[1] 38:7 held ^[5] 21:24 34:5 72:22 75:7,8 help ^[1] 43:23 helps ^[1] 60:1 highest ^[1] 13:18 highlights ^[1] 9:11 Highway ^[1] 69:22 historic ^[6] 9:19 12:10 13:20 14: 17 33:7 50:16 historical ^[1] 51:3 Historically ^[1] 59:9 hold ^[1] 59:14 holding ^[3] 36:12 58:5 59:25 holds ^[1] 15:17 hollow ^[1] 35:2 Honor ^[36] 5:4,9,21,25 6:5,18 7:2, 18 9:4,12 11:6 12:8,24 14:4 15:8, 14 17:4,16 18:21 19:18 22:8 23: 18 25:12 26:11 28:4,22 31:14 32: 23 38:4 59:3 68:11 72:14,21 74: 21 75:8,12 however ^[3] 39:1 43:15 47:8 human ^[1] 4:13 hundred ^[2] 68:16,23 hundreds ^[3] 9:9,10,24 hurt ^[1] 41:8 hydroelectric ^[1] 26:1</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>Idaho ^[1] 26:2 idea ^[10] 30:2 51:17 53:24 55:16, 19 58:18 63:10,14 67:1 76:9 ignored ^[1] 76:22 imagine ^[1] 20:21 impact ^[3] 55:1 56:16,18 impeding ^[2] 31:9 58:4 important ^[8] 12:8 13:3,15 14:8 16:1 19:24 31:20 69:18 impose ^[2] 3:21 4:7 imposing ^[2] 4:15 57:13 impression ^[1] 32:16 inability ^[1] 63:1 incentivized ^[1] 8:18 included ^[1] 35:1 includes ^[1] 39:5</p>	<p>including ^[1] 15:19 inconsistent ^[1] 26:17 incorporates ^[1] 50:1 incorrect ^[5] 9:4 11:6,23 63:16 68: 15 increase ^[2] 51:8,11 Indian ^[11] 1:23 2:12 20:16 40:14 53:11 56:23 60:4 62:24 66:5,7 67: 18 Indians ^[6] 25:17 27:18 32:11 38: 18,20 73:15 individual ^[3] 42:10 45:14 54:2 infamous ^[1] 36:9 infer ^[2] 36:8 59:21 inference ^[1] 73:5 inferred ^[1] 60:8 inhibiting ^[1] 37:19 injunction ^[22] 11:1,8,9,19 57:19, 20,22 58:15,22 59:2,6 61:2,3,4,10, 12,13 64:7 65:12,17 76:17,22 install ^[1] 70:1 installed ^[1] 69:22 instances ^[4] 40:10,12 41:1 67:8 instead ^[3] 4:10 44:19 48:12 instinct ^[1] 31:10 intended ^[1] 19:3 inter ^[1] 72:10 interest ^[11] 12:14,19 17:22 24:2 25:24 26:4 43:16 54:3 67:2 70:12, 17 interests ^[7] 5:14 18:1,25 19:15, 25 20:9 46:22 interfere ^[2] 72:7,11 interpreting ^[2] 61:10,11 involved ^[1] 18:1 involves ^[1] 13:9 involving ^[2] 48:22 49:1 isn't ^[3] 27:10 35:13 72:12 issue ^[8] 21:18 30:14 31:18 46:13 60:12,17 74:5 76:10 issues ^[5] 10:3 34:7 40:2 49:20,23 itself ^[4] 11:13 52:17 61:3 70:5</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JAY ^[36] 1:22 2:10 53:8,9,12 54:13 55:13 56:5,10,21 57:18 58:17 59: 3,5,9,12 60:13,19 61:11 62:3,20 64:21 65:7,21,24 66:16,21,24 67: 23 68:6,11,18,22 69:2,9 73:2 Joint ^[5] 11:12 36:20 51:22 71:7 76:16 judge ^[3] 8:7 57:11 65:5 judgment ^[8] 3:19 7:1 34:4,6 36: 19 58:9 60:21 72:25 Justice ^[162] 1:20 3:3,10,23 4:3,20 5:6,15,19 6:3,12,19,21 7:10,16,19 8:5,13,23 10:14 11:25 12:5,20 13: 8,12,25 14:5,10,11,22 15:5,9,21 16:5,13,14,21,25 17:7 18:2 19:5 20:4,6,23 21:5,9,20,23 22:9,15,20 23:6 24:11,16,17 25:2,7,14,20 26: 3 27:4,7,21,25 28:15 29:24 30:24 31:2,8 32:4 34:17,22 35:12,18 37: 3,5,6,15 38:11,16 39:17 40:17,22</p>	<p>41:12,14 42:17,19,24 43:1,3,14,19 44:11 45:4,17,25 46:5,9,20 47:7, 10,14,22 48:1,4,7,21,25 49:6,19, 22 51:9 52:3,7,18,20,21 53:6,12 54:8 55:3,15 56:4,6,20,22 58:12, 25 59:4,7,11 60:9,15 61:6,24 62: 14 64:18,22 65:20 66:15,17,22 67: 23 68:7,16,20,23 69:7 70:20,21 71:4 72:5,15 73:9,23 74:2,14,17 75:1,18 76:18 77:7 Justice's ^[1] 43:4 justifications ^[1] 24:2 justified ^[5] 5:13 12:14,19 28:9 61: 13</p>
		<hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[23] 14:10,22 16:14 24:11, 16 25:7,14,20 26:3 37:5 41:12 44: 11 45:25 46:5,9,20 56:4,6 60:15 65:20 66:15,17,22 KEDEM ^[50] 1:19 2:6 34:19,20,22 35:15,19 37:11 38:4,15,23 39:21 40:20,25 41:12,20 42:18,20 43:13, 18,24 44:13 45:9,20,25 46:4,7,12, 23 47:8,13,21,24 48:2,5,8,24 49:3, 11,21,24 51:12 52:6,12 53:1 55: 23 59:13 62:6 65:24 67:3 keep ^[3] 34:2 54:8 72:21 kind ^[3] 55:14 56:7 69:16 known ^[2] 31:17 40:6</p>	
		<hr/> <p style="text-align: center;">L</p> <hr/> <p>ladders ^[3] 40:7,11 41:4 lakes ^[1] 31:9 land ^[8] 17:21 19:2,7 20:8 25:10, 18 26:6 53:16 landowner ^[1] 43:23 landowners ^[1] 27:15 language ^[7] 17:19 19:20 25:5,6,7 38:12 73:10 large ^[10] 5:12,16 12:17 14:3,5,14 15:1 49:3 54:25 67:4 larger ^[1] 24:15 later ^[5] 11:9,17 18:19 36:5,8 Laughter ^[1] 31:7 law ^[39] 15:7,12 20:8 25:16 28:7,9, 10 30:11,12 31:2,19,22,22,25 32:8, 13 36:4 37:7,18 38:6 39:9 42:15 47:12,24 49:8,12,25 50:1,7 63:14, 18 65:23,25 66:9,18 67:4,5 69:19 76:11 laws ^[1] 4:16 lawsuit ^[1] 16:3 least ^[9] 3:24 4:2 6:2 25:24 30:15 32:11 33:11,11,11 leave ^[1] 29:5 leaving ^[1] 4:17 leeway ^[2] 6:22,22 left ^[1] 64:19 legal ^[4] 3:20 4:7 40:1,3 legislation ^[1] 40:16 legislative ^[1] 49:12 legislature ^[1] 67:7 less ^[8] 5:21 7:4 14:8 26:13 28:20</p>	

<p>73:17,25 74:23 level [3] 6:2 10:21 27:1 levels [3] 15:16 20:15 33:7 liability [4] 34:3 57:21 58:1 61:3 liable [1] 34:6 licensed [1] 26:20 life [3] 6:17 7:4,14 light [1] 57:2 limit [1] 13:1 limited [2] 19:13 26:12 line [1] 56:12 linear [2] 50:23 51:1 list [1] 33:20 litigated [1] 63:7 litigating [1] 56:14 litigation [2] 35:7 36:19 little [1] 7:7 living [26] 35:10 36:10 57:8,21,24 58:5,14,18 59:2,6,24 60:12,23 61:7 71:12,13,19,20 72:18 73:17 74:1,4,8,12,24 75:3 local [6] 42:8 45:7 54:2 67:10,16 69:12 locale [1] 67:10 locality [1] 53:25 logical [1] 73:5 long [4] 65:17,18 67:16 75:15 long-standing [1] 26:17 look [19] 11:11 19:21 21:11,13 28:6 35:19 36:19 48:5 51:9,13 54:15,22 57:18 66:18,18 67:24 68:7 71:8,17 looked [7] 6:13 21:24 23:8 51:10 68:12 70:7,7 looking [1] 69:13 lot [9] 21:7,17 32:17,20 37:7 64:22 68:17 69:1,2 lower [4] 23:10 39:19,19 57:12</p>	<p>means [12] 4:25 7:17 12:6,16 14:12 17:2 38:1 51:25 53:16 54:13 66:2 74:19 measure [2] 8:14 16:1 measured [1] 10:10 measurement [1] 31:13 measures [3] 8:11,15 47:1 measuring [1] 17:5 meet [5] 19:14 29:14 55:5 63:8 69:23 mentioned [1] 55:16 mentions [1] 45:21 merely [1] 28:19 meritless [2] 51:19 52:1 met [1] 29:15 meters [1] 7:5 might [11] 9:20,25 10:2,3 16:6 18:20 19:15 23:24 28:23 40:4 47:17 miles [4] 8:19 9:25 50:23 51:1 million [3] 7:8 68:17,19 millions [3] 53:2,15 75:13 mince [1] 35:8 mind [2] 34:2 72:21 minimis [4] 56:8,8,11,12 minimum [1] 52:16 minutes [1] 70:23 missing [1] 19:10 mistake [1] 5:4 mitigate [1] 53:4 moderate [28] 35:10 36:9 57:8,21,24 58:5,14,18 59:2,6,24 60:12,22 61:7 71:12,13,18,20 72:9,11,18 73:16 74:1,4,8,12,24 75:3 modify [2] 65:5,12 monetary [1] 41:3 money [6] 28:20 68:17 69:1,2,8,9 months [1] 11:17 Moreover [2] 51:2 65:1 morning [1] 62:19 most [3] 3:20 4:2,18 move [1] 50:15 much [11] 5:7 8:16 23:10 26:13 32:12 38:21 41:23 50:25 57:1 69:14 74:8 multiplication [1] 31:11 municipal [1] 20:9 municipality [2] 18:19 19:15</p>	<p>new [3] 4:10 33:13 52:12 next [4] 3:4 36:1 48:6 55:25 Ninth [17] 3:15 4:9,21 11:6,22 30:7,8 33:1,5,9 35:13,16,22 58:7 59:13 71:21,24 NOAH [5] 1:17 2:3,14 3:7 71:1 non-compliant [1] 70:1 non-discrimination [2] 38:20,21 non-discriminatory [1] 47:1 non-Indian [2] 20:17 70:14 non-Indians [1] 38:18 normal [2] 6:17 44:17 normally [1] 52:15 Northwest [4] 4:14 13:24 26:16,20 nothing [5] 22:3 42:2,2 57:20 63:6 notice [1] 69:19 nuisance [17] 31:11,24 32:8 37:8,19,22 47:12,18 48:9,19,25 49:14,14 67:4,5,8,9 number [29] 14:23 15:6 16:15 21:2,3 22:12 23:10 24:22 29:3 31:25 32:3 39:22 44:12,13,18,19 50:16 54:10,11,12,14,24 55:8 57:6 63:12 64:7,9,10 68:9 numbers [1] 15:18 numerator [2] 50:17,19 numerous [1] 54:25</p>	<p>opinion [6] 30:7,9 58:7,9 60:10 68:13 opportunity [5] 11:4 37:23 38:3,3 76:14 opposed [2] 15:22 27:15 oral [9] 1:12 2:2,5,9 3:7 4:4 5:5 34:20 53:9 Oregon [1] 26:2 organic [1] 50:9 original [1] 43:4 other [27] 8:17 10:3 15:6,18,19 16:6 17:18 18:6,11,19,24 19:14 20:21 24:7 25:25 27:11 43:23 46:14,22 47:4 52:9 53:3 55:8,24 61:16 69:10 76:13 others [2] 10:23 57:10 otherwise [3] 5:22 16:19 49:13 ought [2] 32:11 38:1 out [11] 28:12,18,25 29:13 36:15 55:25 64:23 65:3 70:14,19 76:20 outflow [1] 41:25 outlaw [1] 26:15 outweigh [3] 18:7,22 47:17 over [5] 6:23 9:16 25:10 26:23 40:9 overridden [1] 20:9 own [10] 9:18,19 10:19,19 29:16 39:15 50:12 51:24 54:3 64:10</p>
M		O	
<p>made [10] 6:25 25:16 30:21 33:20 39:11 44:4,20 53:14 54:4 67:24 maintain [1] 71:11 maintaining [1] 35:25 management [1] 42:1 manner [1] 58:4 manual [1] 41:21 many [12] 5:24,24 9:8 15:19,19 28:13 30:17 33:17 40:5,11,15 41:1 Massachusetts [2] 31:4,6 material [5] 5:17 15:6 43:7 55:17,19 materiality [1] 15:22 materially [4] 43:10,22 56:3,6 matter [4] 1:12 34:7 47:25 74:18 matters [2] 16:1 17:9 maximum [1] 74:23 mean [25] 3:24 14:10,22 17:4 22:15,16 24:10 25:14 32:5 33:21 34:5,10 38:16 47:8 52:20,22 54:10,11 55:3,8,15 56:11 62:5 68:19 76:8 meaning [1] 44:15 meaningful [2] 5:22 14:9</p>	<p>N</p> <p>namely [1] 38:8 narrow [2] 58:2,3 narrower [1] 26:7 narrowly [1] 26:12 navigation [1] 48:17 near [2] 9:20,21 necessary [3] 19:14,24 60:6 need [13] 6:7 12:16 14:21 25:23 26:25 27:22 28:1 45:13 49:12 57:23 68:9 74:16,20 needed [2] 10:20,21 needs [1] 74:24 negotiation [2] 50:8 59:21 never [5] 29:14 35:8 60:17,18 76:12</p>	<p>objection [7] 3:14 11:11,16 26:24 52:23 60:11,13 obligation [3] 28:19 36:24 56:9 obligations [2] 45:22 65:22 obstruct [2] 48:16 58:23 obstructed [1] 26:22 obstruction [8] 26:25 30:10 48:9 62:12 63:4,24 75:21 76:12 obstructions [13] 13:2,10 26:9 29:21,23 30:4 46:3,10,19 51:18 66:10,14 76:9 obstructs [1] 53:19 obtain [1] 72:8 obtained [1] 58:21 obviously [4] 15:1 16:18 20:18 46:17 off-reservation [3] 17:21 19:1 25:10 offer [1] 3:17 often [3] 15:6,10 26:23 Okay [9] 13:14 22:4,6 27:14,24 41:17 43:12 48:1 77:1 Olympia [1] 1:18 Olympic [1] 9:24 Once [1] 74:18 one [16] 7:8 11:9 12:25 13:6 20:19 22:12 23:2 24:7 27:1 36:22 54:20 56:25 58:4 61:15 64:8 72:9 ones [2] 7:13,22 only [11] 20:1 29:23 33:3 43:22 45:10 46:10 64:8,10 65:1 67:15,17 opened [1] 50:24 opening [2] 10:23 31:16 opined [1] 69:21</p>	<p>P</p> <p>p.m. [1] 77:9 PACER [1] 11:14 PAGE [10] 2:2 35:20 36:20 37:2 44:1 57:22,25 63:19 65:7 73:2 pages [6] 36:1,5,8,16 51:14 63:17 paid [2] 41:3 62:23 panel [1] 35:14 paper [1] 39:12 paragraph [1] 71:7 Pardon [3] 48:24 49:21 52:6 part [2] 32:23 71:9 partial [8] 29:23 30:12 33:15,22 51:18 63:11,15,21 participate [2] 11:1,7 participated [1] 11:24 particular [16] 5:13 9:14 10:6 12:18 17:5 24:8,8 29:3 45:16 54:16,17,22 62:15,16 63:7 67:8 particularly [2] 46:6 63:25 particulars [1] 50:2 parties [12] 13:3 19:3 36:3,13 39:10 48:22 49:2,4 50:8 51:23 56:11 76:13 parties' [1] 26:17 parts [2] 22:10 68:12 pass [3] 30:18 33:18 40:8 passable [1] 30:20 passage [15] 31:9 42:22 50:11 62:5,10,13,22 63:15,21,23 69:20,24 70:2 72:7,10 passed [1] 11:18 passing [1] 67:8 pays [1] 53:1 peninsula [1] 9:24</p>

<p>people ^[1] 27:16 per ^[1] 68:25 perceived ^[1] 54:3 percent ^[37] 8:9 13:20 14:16,17 15:3,5,9,15,16 16:4,7,8,9,18,23 21:13,14,15 23:4,22 24:20,23 30:20 33:23 50:15 52:2 55:16,19 64:15 69:5 73:15,17 74:20,22 75:4,8,22 perhaps ^[1] 32:7 permit ^[6] 28:17 42:4,6 45:9,11 66:14 permits ^[2] 41:19 45:7 perpetuity ^[1] 18:18 person ^[1] 32:12 persons ^[1] 18:11 Petition ^[10] 13:4 35:21 44:1,5 45:2 51:14 54:23 65:8 71:17 73:2 Petitioner ^[6] 1:4,18 2:4,15 3:8 71:2 phrase ^[4] 30:6 61:7 71:20,22 physical ^[1] 37:9 pick ^[1] 52:22 picky ^[1] 14:7 piece ^[1] 17:18 pieces ^[1] 59:14 pipe ^[1] 41:23 place ^[2] 10:1 59:17 places ^[4] 9:19 12:10 24:8 61:19 plaintiffs ^[3] 11:8 12:16 16:2 plan ^[2] 6:25 10:17 plausible ^[1] 19:2 please ^[4] 3:10 34:23 35:18 53:13 point ^[18] 7:21 9:12 15:11 18:15 19:6,9 29:15 30:23 37:14 38:12 41:21 42:4 63:20 66:16,25 68:13 71:25 76:14 pointed ^[5] 43:25 45:11 47:11 71:6 76:20 pointing ^[2] 25:8 50:7 points ^[2] 15:13 71:5 poisoning ^[1] 47:4 policy ^[3] 30:17,21 33:20 policymakers ^[1] 4:19 ponds ^[1] 31:10 population ^[5] 44:19 51:8 53:23 56:1,3 populations ^[2] 26:23 44:23 portion ^[1] 73:6 posed ^[1] 35:22 position ^[6] 5:7 12:22 19:16 35:7 37:13 62:17 positions ^[1] 13:13 post-trial ^[2] 11:10 76:15 potential ^[1] 13:6 potentially ^[1] 18:12 Power ^[3] 62:7,9 67:11 practice ^[1] 66:13 prayer ^[1] 46:1 precise ^[2] 5:20 10:13 precisely ^[1] 56:13 predecessor ^[1] 62:7 preexisting ^[1] 34:25 prefer ^[1] 3:25 prepare ^[1] 31:10</p>	<p>present ^[1] 22:4 presented ^[4] 37:9,25 56:24 57:9 president ^[1] 54:4 presumably ^[1] 48:17 pretty ^[2] 22:17 37:16 prevent ^[2] 8:21 61:16 price ^[1] 15:10 primary ^[1] 4:16 principal ^[2] 52:23 66:24 principle ^[1] 20:2 principles ^[1] 65:23 priority ^[1] 10:20 private ^[4] 48:22 49:1,4 69:12 probably ^[2] 21:7 29:12 problem ^[3] 8:10 67:22 70:17 problematic ^[1] 26:13 problems ^[3] 41:10 47:18 56:23 proceedings ^[1] 65:17 Professors' ^[1] 63:18 prohibit ^[3] 4:22 32:1 63:15 prohibited ^[1] 63:22 prohibiting ^[1] 58:22 prohibition ^[1] 37:8 projected ^[1] 68:8 projects ^[1] 10:22 prominently ^[1] 37:16 promise ^[6] 35:2 53:14 54:4 59:19,22 67:15 promised ^[1] 34:24 promises ^[2] 54:6 59:20 proof ^[2] 75:20 76:25 proper ^[1] 28:2 proposed ^[2] 11:9 76:23 protect ^[2] 3:12 47:6 protected ^[2] 56:19 66:1 protecting ^[1] 47:2 protection ^[8] 34:25 36:7 38:9 39:4,5 50:4,13 53:17 protects ^[1] 53:18 prove ^[1] 9:13 provide ^[4] 5:1 18:11 57:7 74:1 provided ^[2] 39:3 41:2 provision ^[4] 38:19,22,25 60:6 public ^[22] 8:2 12:14,19 17:22 18:6 20:3,3 24:2 25:24 26:4 27:22 28:1,8,13 31:23 43:16 46:22 47:16 54:3 67:2 70:12,17 Puget ^[1] 4:24 PURCELL ^[80] 1:17 2:3,14 3:6,7,9,25 5:3,9,18,20 6:5,18,20 7:2,12,18,21 8:7,15 9:2 11:5 12:4,7,24 13:11,14 14:3,6,15,24 15:8,13,24 16:12,16,23 17:3,14 18:21 19:18 20:5,11 21:4,8,19,22 22:7,10,19,24 23:17 24:12 25:4,9,19,22 26:11 27:6,20,24 28:3,21 30:2,25 31:14 32:23 66:25 70:23 71:1,3 72:13,17 73:20,25 74:10,15,21 75:6,24 purport ^[1] 42:7 purpose ^[1] 60:7 purposes ^[1] 27:10 pursue ^[1] 18:6 put ^[7] 26:9 38:5 41:3,4 48:15 50:10 69:16</p>	<p>putting ^[2] 24:24 61:15 Puyallup ^[2] 19:22 46:24</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify ^[2] 14:20 16:18 quantify ^[1] 6:8 quantitative ^[1] 31:13 question ^[16] 4:6 24:17 35:22 37:20 38:7 39:24 43:5 50:3 54:9 55:7,14,15 56:24 57:1,4,9 questions ^[1] 56:25 quintessentially ^[1] 46:18 quite ^[3] 6:13 32:21 62:23 quotations ^[1] 36:15</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise ^[1] 71:25 raised ^[9] 11:10,15,16,21 51:20 52:9 58:19 60:17 76:12 raising ^[4] 11:11,16 60:22 72:1 range ^[1] 16:20 rather ^[2] 4:17 6:22 ratified ^[1] 54:4 reach ^[1] 8:1 reaching ^[1] 8:21 read ^[10] 11:15 21:16 32:15 38:19,21,24 46:1 47:15 48:13 73:10 reading ^[1] 71:9 realistic ^[1] 68:9 really ^[9] 10:12 17:2 18:3 33:3 38:6 65:1 66:15 72:4 74:18 reason ^[11] 20:25 22:1 24:21 25:1 29:5 42:11,22 60:25 61:12 66:2 74:9 reasonable ^[1] 6:2 reasonably ^[1] 47:6 reasoning ^[1] 3:16 reasonless ^[1] 24:25 reasons ^[2] 23:25 33:21 REBUTTAL ^[2] 2:13 71:1 receive ^[2] 27:18 35:9 recent ^[2] 14:17 15:16 recently ^[1] 29:9 recognized ^[4] 12:9 18:23,24 50:12 recognizes ^[1] 17:18 recommend ^[2] 57:17,18 record ^[5] 22:18 23:9 36:16 39:23 63:6 recreational ^[1] 70:15 reduced ^[1] 15:18 refer ^[1] 21:6 reference ^[1] 15:11 referred ^[1] 39:13 reflected ^[1] 62:6 refrain ^[4] 35:24 36:25 56:17 58:3 refusal ^[1] 43:19 refused ^[2] 11:3,7 refute ^[1] 60:2 refuting ^[1] 36:2 regardless ^[4] 8:16 18:18 58:14 77:2 regulate ^[6] 4:12 13:23 17:22 19:1 25:11 27:9</p>	<p>regulating ^[1] 4:15 regulators ^[1] 4:17 reigning ^[1] 65:22 rein ^[1] 43:21 relevant ^[3] 33:14,15 35:22 relied ^[1] 51:24 relief ^[2] 46:1 77:5 relying ^[1] 50:11 remainder ^[1] 34:15 remaining ^[1] 70:24 remand ^[6] 3:21 11:2 33:12 34:14 76:1,5 remediate ^[4] 41:10 64:15 69:17 70:4 remediating ^[2] 45:3 69:11 remediation ^[3] 10:17 68:1,4 remedy ^[3] 6:14 34:9 57:1 remember ^[1] 5:3 remove ^[1] 30:22 removed ^[1] 29:9 removing ^[1] 66:13 repeatedly ^[1] 41:2 replace ^[3] 7:25 8:18 22:2 replaced ^[1] 7:8 reply ^[6] 9:5,5 31:15,18 33:3 51:21 report ^[1] 50:22 representations ^[2] 39:10,12 require ^[3] 10:5 28:12 62:9 required ^[2] 42:15 50:9 requirements ^[1] 69:24 requiring ^[1] 69:20 reservation ^[3] 4:13 60:5,7 reserve ^[1] 34:15 resolve ^[1] 70:17 resource ^[5] 37:1 47:2,6,17 50:13 respect ^[5] 37:19 46:10 49:24 51:2 65:6 Respondent ^[3] 1:21 2:7 34:21 Respondents ^[11] 1:7,23 2:11 3:15 4:8 6:6 9:13 11:20 28:6 32:24 53:10 Respondents' ^[2] 8:3 17:15 response ^[2] 33:2 39:25 responses ^[1] 37:22 responsibility ^[1] 70:5 resting ^[1] 50:6 rests ^[2] 57:22 66:4 result ^[1] 42:13 retains ^[1] 65:10 return ^[1] 25:21 returning ^[1] 56:1 reverse ^[3] 3:20 4:1 23:14 review ^[3] 22:16 42:9 45:14 reviewing ^[1] 22:17 rightly ^[1] 4:10 rights ^[7] 9:19 12:8 18:6,17 19:11 38:17 42:3 river ^[18] 5:13 12:18 17:6 22:13,14 23:2,3,20,21,22 29:4,9 32:10 39:19,20 41:7 50:10 77:3 river-by-river ^[1] 10:10 ivers ^[5] 9:15 10:6 24:8 26:22 62:16 road ^[1] 42:10</p>
--	--	---	---

<p>roads [1] 69:23 ROBERTS [27] 3:3,23 29:24 34:17 37:3,6,15 42:17,19 43:1 45:4,17 49:19,22 52:3,7,18 53:6 58:12,25 59:4,7,11 60:9 61:6 70:21 77:7 rule [10] 3:21 4:9 6:10 13:1 26:12, 15 34:11 47:23 65:11 75:10 ruled [1] 33:1 ruling [6] 8:18 35:9,17 37:2 58:2 61:3 run [2] 35:15 43:22 runs [3] 23:23 58:4 75:14</p>	<p>16:9 26:25 showed [2] 9:4 23:9 shows [2] 24:13 44:16 shut [2] 19:23 20:13 side [3] 20:21 52:9 73:21 side's [1] 26:1 significant [9] 4:13 13:24 29:3 54: 11 55:1,6 64:11 73:5 74:18 significantly [1] 44:2 simply [10] 32:9 38:17 41:16 48:9 53:25 54:5 55:25 58:8 62:11 63: 16</p>	<p>61:14,19 63:9 64:4,14 67:10,16 68:1 69:12,19,22,23,25 70:4 72:6, 23 75:15 77:2 state's [22] 20:19 26:23 29:20,22 33:17 35:6 41:15 44:7 46:21 51:6, 24 52:23 54:24 58:6,11 63:10,11 64:9 68:14 69:3,6 70:8 STATES [22] 1:1,6,14,21 2:8 3:5 34:21,24 35:8 36:18 40:12 41:1, 16 52:22,24 53:1,15,25 61:25 62: 1 66:5 71:6 stations [1] 19:12 statute [3] 13:23 50:9 67:9 Stevens [4] 4:22 39:13 50:1 59:20 still [9] 9:9 10:15 30:20 43:17 55:9 64:18 68:17 69:1 75:4 stipulate [1] 4:5 stipulated [5] 13:3 64:4,5 74:4 75: 2 stipulation [1] 51:22 stock [1] 15:10 stopped [1] 71:9 stream [3] 4:24 9:21 50:10 streams [3] 26:9 61:15 64:8 strength [1] 54:17 stretch [1] 64:11 strong [1] 63:25 structure [2] 48:14 50:10 structures [1] 40:7 struggling [1] 18:4 studies [2] 10:19,21 study [4] 22:13,13 23:2 24:7 submitted [2] 77:8,10 subsequent [1] 56:19 substance [1] 55:10 substantial [30] 5:14 6:22 12:14, 19 13:17 14:1,13 15:2,3 18:1 24:1 25:17,23 27:22 30:4,6 43:7,16,25 44:6 51:7,11 54:9,10 55:6 56:13, 16 61:23 70:3 71:22 substantially [6] 12:22 39:6 43: 10 46:16 53:22 70:11 substantive [5] 38:8 39:5,11 50:4 53:17 suddenly [1] 32:19 suffice [2] 16:11,19 sufficient [4] 57:7 73:7 74:1,7 suggestion [1] 35:6 suitable [1] 64:8 sum [1] 70:4 summarize [1] 31:19 summary [4] 34:4,6 60:21 72:25 supersede [1] 67:7 supervised [1] 65:16 supply [1] 12:23 support [5] 3:19 26:15 37:12 48: 13 73:7 supporting [1] 37:8 supports [1] 36:12 Suppose [3] 17:9 64:20 65:3 supposed [3] 13:9 21:6 59:24 SUPREME [3] 1:1,13 20:8 Suquamish [3] 1:23 2:12 53:11 Surely [1] 19:5</p>	<p>surprising [1] 63:23 survival [2] 66:11,14</p>
S			
<p>safeguard [1] 64:13 safety [1] 20:3 salmon [25] 3:12 4:24 5:24 6:8 8:1, 21 10:2 12:23 13:20 14:19 15:18 16:24 17:10 23:5,23 26:23 29:10 35:4 40:19 41:7 44:24 61:16 64:8 66:10 75:13 same [6] 39:15 49:7,8 54:9 61:22 73:2 sample [1] 9:6 satisfy [1] 16:11 save [1] 65:1 saying [29] 5:23 15:15,20,25 18:22, 23 20:11,19 22:2,3 23:8,18,18,24 25:23 28:18,22,23 29:6,12 33:10 34:6,11 43:5 49:13 60:16 62:11 67:9 75:2 says [20] 19:11 21:10 24:22 31:8 36:6 42:1,2 45:12 48:12 57:19,20, 22 59:18 60:19,21 63:19 67:4 71: 10 72:6,12 scale [1] 70:18 schedule [2] 22:5,5 scope [1] 56:25 Seattle [2] 9:20,21 second [7] 13:16 39:25 43:14 50: 21 57:1 61:21 66:16 section [3] 35:20 59:23 62:6 secured [1] 67:12 secures [1] 39:12 securities [2] 15:12 55:17 see [10] 11:15 19:8 35:21 36:20 51: 10 55:7 65:8 66:19 69:14 77:6 seeking [1] 71:18 seem [2] 28:17 32:13 seemed [1] 72:16 seems [4] 32:7,11 39:4 55:10 Senate [1] 54:5 send [2] 38:1 43:8 sense [2] 44:21 67:19 sensitive [1] 55:21 sentence [4] 36:9 46:8 48:6 72:5 separate [1] 9:18 set [3] 6:1 29:13 70:19 several [4] 7:8 11:17 15:13 32:2 shall [1] 67:9 share [1] 12:11 sharing [1] 10:10 shellfish [5] 20:14,14,17,20 47:4 show [7] 5:10,11 6:7 9:21 12:16</p>	<p>since [1] 21:2 single [10] 11:10,15 22:13 26:1 27: 1 42:10 63:24 71:23 75:11 76:18 situation [1] 57:3 six [4] 36:1,5 68:16,23 Skagit [3] 23:20,21,21 Snake [1] 39:19 social [1] 18:19 solely [1] 50:6 Solicitor [2] 1:17,19 someone [1] 46:15 sometimes [2] 20:13 45:20 somewhere [1] 64:24 sorry [9] 3:25 4:1,2,3 6:20 28:15 30:19 43:3 58:3 sort [3] 23:1 49:16 76:2 sorts [2] 28:10 33:13 SOTOMAYOR [38] 4:20 5:6,15,19 6:3,12,19,21 7:10,16,19 8:5,13,23 10:14 27:4,7,21,25 28:15 42:24 43:3,14,19 51:9 67:23 68:7,16,20, 23 69:7 73:9,23 74:2,14,17 75:1, 18 sought [1] 35:13 Sound [1] 4:24 sources [1] 69:11 sovereign [1] 49:10 species [8] 10:2 31:11 54:16,17, 20 55:11,12 66:12 specific [2] 9:14 58:4 specifically [2] 57:12,23 specifics [1] 38:5 specifies [1] 59:2 spend [1] 28:19 spends [1] 36:1 spent [1] 3:12 stage [1] 40:4 standard [11] 4:7 12:2 49:7,8 56: 23 57:13 58:16 60:12 61:9 63:8 72:19 standards [1] 41:18 standing [1] 72:11 start [2] 22:17 35:5 starting [4] 26:21 43:24 59:15,16 State [70] 1:17 3:11 4:18 5:12 6:8 7:24 8:17,21 9:6,14 12:13,17 15: 17 17:11 19:23,24 20:13 22:14 23: 3,22 25:1 26:13 27:3 30:17,20 34: 3 35:23 36:14,24 37:17 39:2,4,22 40:23 41:15 42:10,12,14 45:11 46: 15,25 47:5 49:17 50:22 52:24 53: 3,24 56:14 58:19,22 59:24 60:20</p>	<p>61:14,19 63:9 64:4,14 67:10,16 68:1 69:12,19,22,23,25 70:4 72:6, 23 75:15 77:2 state's [22] 20:19 26:23 29:20,22 33:17 35:6 41:15 44:7 46:21 51:6, 24 52:23 54:24 58:6,11 63:10,11 64:9 68:14 69:3,6 70:8 STATES [22] 1:1,6,14,21 2:8 3:5 34:21,24 35:8 36:18 40:12 41:1, 16 52:22,24 53:1,15,25 61:25 62: 1 66:5 71:6 stations [1] 19:12 statute [3] 13:23 50:9 67:9 Stevens [4] 4:22 39:13 50:1 59:20 still [9] 9:9 10:15 30:20 43:17 55:9 64:18 68:17 69:1 75:4 stipulate [1] 4:5 stipulated [5] 13:3 64:4,5 74:4 75: 2 stipulation [1] 51:22 stock [1] 15:10 stopped [1] 71:9 stream [3] 4:24 9:21 50:10 streams [3] 26:9 61:15 64:8 strength [1] 54:17 stretch [1] 64:11 strong [1] 63:25 structure [2] 48:14 50:10 structures [1] 40:7 struggling [1] 18:4 studies [2] 10:19,21 study [4] 22:13,13 23:2 24:7 submitted [2] 77:8,10 subsequent [1] 56:19 substance [1] 55:10 substantial [30] 5:14 6:22 12:14, 19 13:17 14:1,13 15:2,3 18:1 24:1 25:17,23 27:22 30:4,6 43:7,16,25 44:6 51:7,11 54:9,10 55:6 56:13, 16 61:23 70:3 71:22 substantially [6] 12:22 39:6 43: 10 46:16 53:22 70:11 substantive [5] 38:8 39:5,11 50:4 53:17 suddenly [1] 32:19 suffice [2] 16:11,19 sufficient [4] 57:7 73:7 74:1,7 suggestion [1] 35:6 suitable [1] 64:8 sum [1] 70:4 summarize [1] 31:19 summary [4] 34:4,6 60:21 72:25 supersede [1] 67:7 supervised [1] 65:16 supply [1] 12:23 support [5] 3:19 26:15 37:12 48: 13 73:7 supporting [1] 37:8 supports [1] 36:12 Suppose [3] 17:9 64:20 65:3 supposed [3] 13:9 21:6 59:24 SUPREME [3] 1:1,13 20:8 Suquamish [3] 1:23 2:12 53:11 Surely [1] 19:5</p>	<p>surprising [1] 63:23 survival [2] 66:11,14</p> <p style="text-align: center;">T</p> <p>tab [1] 52:22 tables [1] 41:22 tailored [3] 64:7 70:18,18 talked [2] 44:2 63:9 talks [1] 12:2 tens [2] 53:2 75:12 term [2] 44:12 74:16 terms [2] 40:3 53:16 test [10] 29:1,7,12,13,16,16,18,25 37:23 72:4 tests [1] 64:2 text [1] 36:2 textually [1] 19:10 theirs [1] 34:13 themselves [1] 66:12 theories [1] 3:17 theory [16] 4:11,11 5:5 8:3 17:16 26:1,4 28:23 29:21 30:3 31:21 32: 25 33:13 37:8,18 46:14 there's [25] 7:22 19:19,20 21:10, 25 22:20 26:14 31:4 32:17 33:13, 25 37:3,6 42:11,14,22 47:16 56:9 59:5 60:8 63:5 64:1,18 69:7 74:18 thereby [1] 58:23 therefore [1] 23:11 they've [3] 13:16 30:10 33:1 thoroughly [1] 66:8 though [2] 4:6 47:11 threat [3] 53:18,19 66:11 threats [1] 45:21 Three [7] 11:18 12:8 31:20 56:25 64:10 65:1 71:5 throughout [3] 26:20 36:18 55:2 thumbs [2] 45:15,16 timetable [1] 70:18 tipped [1] 70:10 today [3] 11:11 39:22 46:10 together [1] 73:4 took [4] 10:17,19 37:12 75:25 total [4] 28:8 32:1 55:1 68:15 tradition [1] 32:8 transport [1] 41:6 transportation [3] 6:1 69:4,6 treaties [13] 3:21 4:7,12 6:11 13: 22 17:19,20 34:4 36:6,25 50:14 67:21 72:23 treaties' [1] 66:1 Treatise [3] 48:3,6,13 treatises [1] 32:2 treaty [57] 3:14 4:22 5:10 6:10 9: 12,18 10:9 12:2 16:22,25 17:13, 25 18:7,13,15,22,23,24 19:6,9,11, 19 20:7,22 21:2 23:25 24:21 25:3 26:4 27:2 30:5 31:1 32:13 33:7,22 36:3 38:12 39:20 42:3 45:21 46: 21 50:1 54:6,7 56:21 57:5 59:18 61:14 62:2,18 65:21 66:5,19 67: 13,14,18 73:8 treaty-based [1] 35:24 trial [1] 34:8</p>

Official

<p>Tribe ^[8] 1:23 2:12 9:17,18,20 40:13 53:11 73:21</p> <p>tribe's ^[4] 38:9 44:8 72:8 74:23</p> <p>tribes ^[22] 5:11 19:3 25:10 29:13 34:25 35:10 38:13 39:11,13 53:5,21 57:8 61:19 62:24 66:6,7,9,12 67:19 71:12 73:3 74:11</p> <p>tribes' ^[4] 39:7 50:4 53:16 70:11</p> <p>tributaries ^[2] 21:14 24:13</p> <p>tried ^[2] 56:12 73:12</p> <p>trio ^[1] 46:25</p> <p>trouble ^[1] 20:25</p> <p>troubled ^[1] 43:17</p> <p>true ^[4] 9:8 57:11 67:5 68:3</p> <p>trying ^[2] 29:13 39:24</p> <p>turn ^[3] 57:25 71:8 73:1</p> <p>two ^[10] 13:13 15:23 22:12 31:25 36:8 59:14,14 64:9 66:20 72:11</p> <p>type ^[4] 10:5 28:1 44:15 52:14</p> <p>types ^[2] 12:13 17:24</p>	<p>varies ^[2] 24:9 55:11</p> <p>various ^[1] 62:8</p> <p>vastly ^[1] 75:15</p> <p>version ^[3] 34:12 72:3 76:4</p> <p>versus ^[2] 3:4 54:20</p> <p>Vessel ^[8] 10:8 12:12 39:1 73:20 74:22,25 75:7 76:1</p> <p>view ^[1] 46:20</p> <p>violate ^[2] 29:12 39:20</p> <p>violated ^[4] 29:1 34:4 61:14 72:23</p> <p>violation ^[18] 5:10 6:10 17:13,15 18:9 20:22 23:25 24:21 27:2 30:5 31:1 33:8,22 63:5 72:20,24 73:8 77:4</p> <p>virtually ^[2] 4:12 8:25</p> <p>voluntarily ^[1] 3:12</p>	<p>worry ^[2] 21:18,21</p> <p>worrying ^[1] 32:5</p> <p>worthwhile ^[1] 70:9</p> <p>writ ^[1] 67:4</p> <p>write ^[2] 58:9 60:10</p>
U	W	Z
<p>ultimately ^[1] 70:6</p> <p>unbelievably ^[1] 64:25</p> <p>undegradated ^[2] 75:5,12</p> <p>under ^[21] 4:11 6:10 8:3,18 10:7 17:15 25:25 28:7,23 29:7,21 30:11,17 32:12 36:25 42:5 46:21 49:8,12 65:11 69:23</p> <p>underscored ^[1] 65:9</p> <p>understand ^[14] 14:12 16:5 17:8 19:7 20:23 30:3 35:16 43:2 60:16 62:14 66:9 73:11,14 74:3</p> <p>understanding ^[1] 36:3</p> <p>understood ^[3] 10:15 45:6 71:16</p> <p>undertaken ^[1] 53:4</p> <p>undisputed ^[1] 75:13</p> <p>unequivocal ^[1] 39:1</p> <p>UNITED ^[22] 1:1,6,13,21 2:8 3:5 34:21,24 35:8 36:17 40:12 41:1,16 52:21,24 53:1,14,25 61:25 62:1 66:5 71:6</p> <p>unjustified ^[1] 24:25</p> <p>unless ^[3] 22:20 73:24,25</p> <p>unreasonable ^[1] 8:3</p> <p>unrelated ^[1] 47:16</p> <p>until ^[6] 6:16 7:3 52:5,10,10 59:17</p> <p>unworkable ^[1] 3:14</p> <p>up ^[19] 19:7 25:17,18 26:9 30:18,18,19 32:10 41:24 44:16 45:15 50:24 51:17 52:16,22 64:15,15,16 67:1</p> <p>upheld ^[1] 33:10</p> <p>upstream ^[7] 7:5,23 8:16,19 9:1,9 63:25</p> <p>urge ^[2] 71:7 76:3</p> <p>useful ^[4] 7:4,5,14,14</p> <p>uses ^[1] 41:6</p> <p>using ^[2] 51:24 64:9</p> <p>usual ^[6] 17:1 19:12 53:20 61:17 62:25 63:4</p> <p>utter ^[1] 8:2</p>	<p>wait ^[1] 6:16</p> <p>waive ^[1] 76:8</p> <p>waived ^[4] 51:19,21 52:4,8</p> <p>walked ^[1] 59:13</p> <p>wanted ^[2] 13:15 28:19</p> <p>wants ^[2] 3:11 34:12</p> <p>warrant ^[1] 65:13</p> <p>washed ^[1] 55:25</p> <p>WASHINGTON ^[13] 1:3,9,17,18,20,22 3:4,11 4:23 26:2 40:23 69:19,21</p> <p>Washington's ^[1] 50:9</p> <p>waste ^[2] 8:2 28:12</p> <p>water ^[9] 20:16 21:11 24:15 42:5 45:6,9 48:15 60:6,6</p> <p>watershed ^[3] 10:1 21:11 23:7</p> <p>way ^[16] 8:12 9:3 10:13 13:16,21 28:17 30:9 46:24 48:14,15 56:19 61:23 62:12 71:9,11,16</p> <p>Wednesday ^[1] 1:10</p> <p>week ^[1] 11:9</p> <p>weigh ^[1] 43:15</p> <p>weighed ^[1] 18:10</p> <p>whatever ^[5] 32:16 43:15 48:14 49:13 73:18</p> <p>whereby ^[1] 60:4</p> <p>Whereupon ^[1] 77:9</p> <p>whether ^[10] 13:1 14:13 35:23 38:8 50:3 57:1,4 61:4 62:17 70:8</p> <p>whole ^[5] 19:6 21:11 23:7 34:8 37:13</p> <p>wildlife ^[2] 42:2 45:21</p> <p>will ^[13] 3:3 6:11 7:7 13:23 16:23 21:22 26:9 29:6,9 43:21 65:8,18 67:15</p> <p>WILLIAM ^[3] 1:22 2:10 53:9</p> <p>win ^[2] 29:7 37:22</p> <p>Winans ^[1] 12:10</p> <p>Winters ^[3] 59:22 60:1,3</p> <p>without ^[4] 11:20,20 54:23 62:22</p> <p>wonder ^[2] 38:1 62:16</p> <p>wondering ^[1] 25:3</p> <p>Woolrych ^[1] 48:2</p> <p>word ^[6] 5:20 14:7,7 43:11 59:5,6</p> <p>words ^[5] 35:8 38:24 55:24 59:8 75:18</p>	Z
V		