

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 76

Place: Washington, D.C.

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

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Washington, D.C.

Wednesday, April 18, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:
NOAH PURCELL, Washington State Solicitor General,
Olympia, Washington; on behalf of the Petitioner.
ALLON KEDEM, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of Respondent United States.
WILLIAM M. JAY, ESQ., Washington, D.C.; on behalf of
the Respondents Suquamish Indian Tribe, et al.

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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're the better
4 oral advocate on all of this, I'll stipulate
5 that.

6 The central question, though, is what
7 legal standard the treaties apply -- imposed.
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 remember that answer
4 well, Your Honor, and that was a mistake at
5 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 tribe 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: Well, I don't know
16 -- I don't know that it's a large decline. I
17 think 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 JUSTICE SOTOMAYOR: Uh-huh.

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

11 JUSTICE SOTOMAYOR: And the court
12 excluded those?

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

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

19 MR. PURCELL: Fair enough, Your Honor.

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

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

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

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

8 MR. PURCELL: No. The -- the judge
9 said that we could defer culverts blocking
10 10 percent of the habitat. But that -- that --
11 the problem is that that doesn't -- it measures
12 it exactly the wrong way. So 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: Well, 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 Respondents should have to prove the effect of
14 specific state culverts on particular rivers.
15 And that just was completely glossed over by
16 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 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 arguments 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 --

10 MR. PURCELL: Uh-huh.

11 JUSTICE ALITO: -- supposed
12 obstructions --

13 MR. PURCELL: Right.

14 JUSTICE ALITO: -- that's not a
15 difference between the two positions.

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

1 Northwest, so --

2 JUSTICE ALITO: So what -- again, what
3 -- they say substantial degradation, and you
4 say what?

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

7 JUSTICE ALITO: A large decline.

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

12 JUSTICE KAGAN: What does it mean?

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

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

24 JUSTICE KAGAN: I mean, do you have a
25 number in your head?

1 MR. PURCELL: Well, again, I think
2 that a decline of half or anything approaching
3 half would obviously be a large decline, a
4 substantial decline, but certainly something
5 between 1 and 5 percent is not a substantial
6 decline. And --

7 JUSTICE GORSUCH: Five percent is
8 often deemed a material number in other
9 contexts of law. So why wouldn't it be here?

10 MR. PURCELL: Well, Your Honor --

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

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

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

1 MR. PURCELL: Fair enough. I guess
2 what I'm saying is that the denominator
3 matters. When you measure from is important.
4 And what the plaintiffs are asking me to do is
5 to say when we file our lawsuit, it's -- it's
6 causing 5 percent of the decline.

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

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

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

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

23 JUSTICE GORSUCH: So the -- so the
24 treaty --

25 MR. PURCELL: -- will affect 5 percent

1 of the salmon --

2 JUSTICE GORSUCH: -- the treaty, which
3 guarantees the right to all usual and customary
4 fishing grounds, really means half of them?

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

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

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

25 And so the government has to have the

1 ability to make some types of decisions, even
2 if they affect the treaty fishing right when
3 there are substantial interests involved.

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

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

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

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

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

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

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

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

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

1 interests.

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

5 JUSTICE GORSUCH: Why?

6 MR. PURCELL: Well, for example --

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

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

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

24 JUSTICE BREYER: I don't understand
25 this discussion. I'm having trouble for this

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

5 MR. PURCELL: Yes.

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

9 MR. PURCELL: Yes.

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

16 When I read something like that, I
17 thought, well, that's a lot, so I don't have to
18 worry about that issue. Now -- now you're
19 going to tell me why I do have to worry about
20 it.

21 MR. PURCELL: I will.

22 JUSTICE BREYER: Then I went and
23 looked at what the court of appeals held, and
24 it said we're not -- if there's an act of God
25 or some good reason, you know, so on and so

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

6 MR. PURCELL: I don't want to say
7 you've got it all wrong, Your Honor.

8 JUSTICE BREYER: What have I got?

9 MR. PURCELL: But you've got parts of
10 it wrong.

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

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

18 MR. PURCELL: Well, it --

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

23 MR. PURCELL: But the -- the district
24 court didn't make any finding that that was a
25 sort of across-the-board effect. It was just

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

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

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

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

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

1 justifications of public interest for those
2 culverts.

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

9 I mean, just as that --

10 JUSTICE KAGAN: But, General --

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

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

21 So now we have a number. It says
22 30 percent. But -- but -- but you are
23 continually putting in this, and it has to be
24 reasonless, it has to be unjustified, there
25 can't be any reason why the state is doing what

1 it's doing. And like Justice Gorsuch, I'm
2 wondering where that is in the treaty?

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

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

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

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

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

18 MR. PURCELL: Right.

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

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

1 in Washington, Oregon, and Idaho --

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

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

17 The federal government built and
18 licensed dams throughout the Northwest for
19 decades starting in the early 1900s that
20 completely obstructed rivers and decimated
21 salmon populations, often over the state's
22 objection. So, if they're right that all you
23 need to show is an obstruction and that -- some
24 level of decline, every single one of those
25 dams is a treaty violation. Now those aren't

1 state dams.

2 JUSTICE SOTOMAYOR: They -- they could

3 --

4 MR. PURCELL: We're not --

5 JUSTICE SOTOMAYOR: We've had cases
6 that have basically said, the example you used

7 --

8 MR. PURCELL: Uh-huh.

9 JUSTICE SOTOMAYOR: -- if we're going
10 to regulate fishing for the purposes of
11 ensuring that there isn't degradation of fish,
12 bacteria, some other form of fishing that --
13 that would be more harmful than -- than your
14 catch, we've said that's okay, but if you're
15 going to degradate for the benefit of the
16 landowners, as opposed to the people entitled
17 to the fish, that you can't do that because you
18 have to make sure that the Indians receive
19 their fair amount of the -- of 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 -- I'm confident there are culverts that
25 we've already taken out that would have

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

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

13 JUSTICE BREYER: And it doesn't say
14 that -- you know, it doesn't use a quantitative
15 measurement.

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

1 automatically a nuisance.

2 Number two, the common law did not
3 prohibit total barriers. And we've cited
4 several treatises about that and cases. And
5 number --

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

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

25 MR. PURCELL: Your Honor, in part,

1 that's because the Respondents have completely
2 changed their theory of the case from what the
3 Ninth Circuit ruled to what they've argued in
4 their -- in their response brief here. And so
5 it's really only our reply brief that addresses
6 the arguments they're making now.

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

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

1 through it.

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Kedem.

21 ORAL ARGUMENT OF ALLON KEDEM

22 ON BEHALF OF THE RESPONDENT UNITED STATES

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

25 When the United States promised the

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

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

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

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

19 JUSTICE GORSUCH: Please.

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

1 building and maintaining barrier culverts."

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

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

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

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

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

1 under the treaties "to refrain from degrading
2 the fishery resource." That is the basis of
3 the district court's ruling on page 2 --

4 JUSTICE KAGAN: When you say --

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

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

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

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

1 back and let the courts who haven't had that
2 opportunity yet have that opportunity.

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

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

14 MR. KEDEM: That's correct.

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

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

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

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

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

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

24 It's because there are certain legal
25 issues that are not as developed either

1 factually or in terms of legal concepts as we
2 might expect at this stage. The answer is no.

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

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

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

18 MR. KEDEM: There -- there are some
19 dams and --

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

23 MR. KEDEM: That's not correct. In
24 many instances, the United States has
25 repeatedly provided compensation. They have

1 paid monetary compensation. They have put in
2 fish ladders. They have put in hatcheries.

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

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

10 JUSTICE KAGAN: Mr. Kedem, in your
11 earlier --

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

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

24 It's about flood management. It says
25 nothing about wildlife. It says nothing about

1 treaty rights.

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

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

15 CHIEF JUSTICE ROBERTS: Could we --

16 MR. KEDEM: And, in fact --

17 CHIEF JUSTICE ROBERTS: Go ahead.

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

22 JUSTICE SOTOMAYOR: Could you go back
23 to --

24 CHIEF JUSTICE ROBERTS: Did I
25 understand you to -- go ahead.

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

11 MR. KEDEM: Sure.

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

16 MR. KEDEM: Right.

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

22 MR. KEDEM: Right. So starting first
23 with substantial degradation, I pointed you to
24 page 270 of the Petition Appendix where the
25 district court talked about significantly

1 degrades.

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

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

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

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

23 It also connected that to the amount
24 of benefit that you would get -- and this is at
25 166 to 168 of the Petition Appendix -- from

1 remediating the habitat.

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

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

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

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

23 JUSTICE KAGAN: Mr. Kedem, when you
24 read from the government's prayer for relief,
25 as I heard it, it didn't have anything to do

1 with obstructions or dams --

2 MR. KEDEM: That's --

3 JUSTICE KAGAN: -- or culverts
4 particularly.

5 MR. KEDEM: That's elsewhere in the
6 sentence.

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

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

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

21 MR. KEDEM: So we would describe it in
22 the way that this Court did in the Puyallup
23 trio, which is that the state can enact
24 non-discriminatory measures that are aimed at
25 protecting the resource.

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

5 JUSTICE GORSUCH: Where does that --

6 MR. KEDEM: That doesn't mean, however
7 --

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

11 MR. KEDEM: Yeah.

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

17 So where --

18 MR. KEDEM: Not as a general --

19 JUSTICE GORSUCH: -- where do you get
20 your rule from?

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

23 JUSTICE GORSUCH: Okay.

24 MR. KEDEM: They cite the Woolrych
25 Treatise.

1 JUSTICE GORSUCH: Yes.

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

4 JUSTICE GORSUCH: Yes.

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

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

18 JUSTICE ALITO: Are these cases
19 involving actions taken by private parties or
20 by governmental authorities?

21 MR. KEDEM: Pardon?

22 JUSTICE ALITO: Are these nuisance
23 cases cases involving actions taken by private
24 parties or by the government?

25 MR. KEDEM: By and large, they're

1 actions taken by private parties, but what the
2 --

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

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

15 And also --

16 CHIEF JUSTICE ROBERTS: Any of these
17 issues discussed in the court of appeals?

18 MR. KEDEM: Pardon?

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

21 MR. KEDEM: Not with respect to the
22 common law. But, again, we're not arguing that
23 the Stevens Treaties incorporates the common
24 law in all of its particulars. But it does go
25 to the central question of whether there is

1 substantive protection for the tribes'
2 fisheries.

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

12 If I could move to this 1 percent of
13 historic harvest number that my friend gives, I
14 think that's wrong both on numerator and on the
15 denominator. For the numerator, he's talking
16 about a 200,000 fish figure that, first of all,
17 the district court did not credit and, second
18 of all, comes from a 1997 state agency report
19 that was based on 250 linear miles of habitat
20 being opened up. But here we're talking about
21 approximately four -- four times that much, a
22 thousand linear miles.

23 Moreover, with respect to the
24 denominator, we're not talking about historical
25 harvests. We're talking about: What would

1 happen absent the action that is being
2 challenged?

3 And here, absent the state's barrier
4 culvert, there would be a substantial increase
5 in the fish population.

6 JUSTICE SOTOMAYOR: What do we look at
7 to -- to see that the district court looked at
8 that figure, the substantial increase?

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

14 Finally, my friend brought up the idea
15 of partial obstructions. That is a forfeited,
16 waived, and meritless argument. It's forfeited
17 because it was raised for the first time in the
18 reply brief before this Court.

19 It's waived because it's contrary to
20 the joint stipulation of the parties on which
21 the district court relied using the state's own
22 definition of what it means to be a barrier
23 culvert. And it's meritless because there is
24 no such thing as a 10 percent barrier. So --

25 CHIEF JUSTICE ROBERTS: So his

1 argument was waived because he didn't make it
2 until it got to this Court?

3 MR. KEDEM: Pardon?

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

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

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

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

23 MR. KEDEM: The United States pays
24 tens of millions of dollars directly to the
25 state, in addition to all of the other efforts

1 that it has -- it has undertaken to mitigate
2 harms and to compensate the tribes.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Jay.

6 ORAL ARGUMENT OF WILLIAM M. JAY
7 ON BEHALF OF THE RESPONDENTS
8 SUQUAMISH INDIAN TRIBE, ET AL.

9 MR. JAY: Mr. Chief Justice, and may
10 it please the Court:

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

21 And the idea that the state or a
22 locality or even the United States can simply
23 disregard that based on an agency's or an
24 individual local government's balancing of its
25 own perceived public interest against the

1 promise made by the President, ratified by the
2 Senate, is simply not consistent with the
3 promises in the treaty or the background of the
4 treaty.

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

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

18 But in this case, the district court
19 found -- and -- and I would look in particular
20 at 162a of the Petition Appendix. Without
21 giving a number, it said that the state's
22 culverts are so numerous and cover so large an
23 area that they are creating a significant total
24 impact throughout the case area on the fishery.

25 JUSTICE ALITO: I mean, the -- the --

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

8 So you say it varies from fish species
9 to fish species?

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

15 We are not asking the Court to adopt
16 the -- the idea that 5 percent is material in
17 all contexts, but we are -- it would be a
18 context -- it would be sensitive to the context
19 of a fishery. It would be -- it would have to
20 be -- as my friend Mr. Kadem said, it would
21 have to be something durable; in other words,
22 not something that is simply washed out in the
23 next year's returning fish population. And it
24 would -- and it would have to be something that
25 materially affects the fish population --

1 JUSTICE KAGAN: So when you say --

2 MR. JAY: -- year over year.

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

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

17 JUSTICE BREYER: I don't know --

18 MR. JAY: -- by the treaty.

19 JUSTICE BREYER: -- if we can decide a
20 global standard for all of the Indian problems,
21 but the question presented here -- there are
22 three questions: One was the scope of the
23 remedy too much, the second question is whether
24 the government has to contribute in light of
25 its equitable situation.

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

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

12 But they think they were doing that.
13 Maybe they didn't say it, but they were. All
14 right. What do you recommend we do?

15 MR. JAY: We recommend that you look
16 at what the injunction says and affirm it
17 because the injunction says nothing about a
18 moderate living. The liability determination
19 on which the injunction rests says, at page
20 263, that the court specifically "need not
21 address what is a moderate living", because --
22 and, again, now here I would turn to page
23 271 -- the district court bases its liability
24 ruling on" what it called a narrow duty -- I'm
25 sorry, "narrow directive to refrain from

1 impeding fish runs in one specific manner."

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, but you
23 just told me you want us to affirm an
24 injunction that specifies a moderate living.

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

1 CHIEF JUSTICE ROBERTS: No?

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

4 CHIEF JUSTICE ROBERTS: Well, where
5 did the words come from?

6 MR. JAY: Historically or in this
7 case?

8 CHIEF JUSTICE ROBERTS: In this case.

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

24 The Winters doctrine is a doctrine
25 whereby when Congress creates an Indian

1 reservation, it doesn't expressly make
2 provision for water. If water is necessary to
3 -- to fulfill the purpose of the reservation,
4 it's inferred. So if there's --

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

9 MR. JAY: We would have no objection
10 to that at all.

11 JUSTICE KAGAN: And just so I
12 understand it, you're saying that that was not
13 at issue. You never raised it and the district
14 court never considered it?

15 MR. JAY: The district court says, at
16 163, that it's not considering it. The state
17 says, at footnote 75 of its summary judgment
18 brief, that it is not raising the moderate
19 living defense. That's absolutely correct.

20 And for that reason, we -- what we
21 think the Court should focus on is the -- the
22 actual basis for the injunction, the liability
23 ruling and then the injunction itself and
24 whether the injunction is an abuse of
25 discretion.

1 CHIEF JUSTICE ROBERTS: And how would
2 you phrase that, if not moderate living? What
3 would be the determine -- what would be the
4 standard that you think should be applied in
5 interpreting the injunction?

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

15 And, second, those blockages, those
16 same blockages are what is degrading the
17 fishery in a substantial way.

18 And that --

19 JUSTICE ALITO: Do your clients agree
20 with the United States that the dams that were
21 built by the United States are in compliance
22 with the treaty?

23 MR. JAY: So let me -- let me give
24 just a conceptual answer. The -- not all dams
25 block fish passage. As my friend Mr. Kadem

1 said and is reflected in Section 18 of the
2 Federal Power Act and its predecessor going
3 back to 1906, various executive agencies have
4 had the power to require fishways, you know,
5 devices for ensuring fish passage around dams.

6 So simply saying there were dams is
7 not in any way to say there was an obstruction
8 to fish passage.

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

15 MR. JAY: Well, what I can say is that
16 when the federal government has built dams
17 without ensuring fish passage, that the federal
18 government quite appropriately has paid
19 compensation to the Indian tribes in exchange
20 for the destruction of its usual and accustomed
21 fishing grounds and the inability to take fish
22 there.

23 So certainly a dam or another
24 obstruction that blocks a usual and accustomed
25 fishing ground can be a violation, but there is

1 nothing in the record in this case, because it
2 has not been litigated, about particular dams
3 that don't meet that standard.

4 My friend from the state talked about
5 the idea that the state's -- some of the
6 state's barriers are partial barriers, and
7 there are a number of things I'd like to say
8 about that.

9 First is the idea that the common law
10 did not prohibit partial barriers to passage.
11 That is simply incorrect. I think that this is
12 discussed in detail at pages 17 to 20 of the
13 law professors' amicus brief.

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

21 Now, there's -- I would be happy to go
22 into great detail about what the tests should
23 be, but in this case you don't have to get into
24 that because the state stipulated, stipulated
25 expressly to -- to the definition of barrier

1 culverts. And that is why the injunction in
2 this case is tailored to, Number 1, streams
3 that are suitable for salmon only; Number 2,
4 barrier culverts using the state's own
5 definition only; Number 3, barrier culverts
6 that block a significant stretch of habitat.

7 And it has a fourth safeguard as well,
8 which is that the state can decline to
9 remediate up -- up to 10 percent of -- of the
10 habitat, which we think could add up to more
11 than --

12 JUSTICE BREYER: But there's still 600
13 -- about 600 and something left. Suppose they
14 discover --

15 MR. JAY: Five-hundred something.

16 Because that's a lot of them, and they
17 go out there, that there are like five culverts
18 somewhere which would be unbelievably expensive
19 to change, and, moreover, it would really save
20 only three fish or something.

21 Now, suppose that they find that out.
22 Can they go back into the district court and
23 say: Judge, we would like you to modify this
24 in respect to those five?

25 MR. JAY: That's exactly what at page

1 125 of the Petition Appendix, you will see that
2 the court of appeals underscored that the
3 district court retains equitable discretion
4 under this Court's cases, applying Rule 60 to
5 modify the injunction if changed circumstances
6 warrant it.

7 And the court of appeals said that
8 it's confident that the district court, which
9 has supervised this case, these proceedings,
10 and this injunction for a long, long time will
11 exercise its discretion appropriately.

12 JUSTICE KAGAN: Do -- do you think,
13 Mr. Jay, that this -- that these treaty
14 obligations differ at all from the reigning
15 common-law principles? And, if so, how?

16 MR. JAY: I agree with what Mr. Kedem
17 said, that the common law is a guide to what
18 the -- to what the treaties protected right of
19 taking fish means. I think that the reason
20 that it is a guide and not a -- not a
21 codification rests in the fact that it is a
22 treaty between the United States and the Indian
23 tribes.

24 The Indian tribes, of course, were not
25 thoroughly familiar with the English common

1 law, but what the tribes did understand was
2 that obstructions to the salmon fishery were a
3 threat to the continued survival of the -- of
4 the species. That's why the tribes themselves
5 had adopted the practice of removing
6 obstructions to permit the survival.

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

8 MR. JAY: My second point --

9 JUSTICE KAGAN: -- asking is when you
10 look at the common law and you look at this
11 treaty, do you see any difference between the
12 two --

13 MR. JAY: The -- the --

14 JUSTICE KAGAN: -- and where would
15 that difference be?

16 MR. JAY: The principal difference, I
17 think, is on this point that Mr. Purcell
18 brought up, the idea that there could be some
19 public interest balancing. Now we don't -- we
20 agree with Mr. Kadem that that's not what the
21 common law says writ large about nuisance, but
22 it is true that nuisance was a common-law
23 creation.

24 The legislature could supersede
25 nuisance in particular instances by passing a

1 statute saying this shall not be a nuisance.
2 The state and locale -- and local governments
3 don't have the power to do that because this
4 right of taking fish is secured by a federal
5 treaty.

6 So it is not that the treaty embodies
7 only a promise that you will have the right of
8 taking fish so long as the state and local
9 governments decide not to abrogate it. Only
10 Congress can abrogate a treaty with the Indian
11 tribes and that certainly makes sense, given
12 the change that is effected by these treatise.

13 The problem --

14 JUSTICE SOTOMAYOR: Mr. Jay, what do I
15 look at? I know the district court made
16 certain findings about the costs of
17 remediation. The state has always said it's
18 \$2.13 billion. I know the district court said
19 that wasn't true, that on average the
20 remediation of 12 or 15 culverts to date have
21 cost, on average, \$600,000.

22 MR. JAY: Right.

23 JUSTICE SOTOMAYOR: What can I look at
24 to tell me what the cost is projected to be? I
25 just need a realistic number. And I wasn't

1 sure I got it from anybody.

2 MR. JAY: Yeah. I think, Your Honor,
3 you've looked at the right parts of the
4 opinion. And I would also point you to 119(a)
5 where the court of appeals explains why the
6 state's total estimate is "demonstrably
7 incorrect."

8 JUSTICE SOTOMAYOR: \$600 million is
9 still a lot of money.

10 MR. JAY: I don't think it would be
11 \$600 million, I mean, but --

12 JUSTICE SOTOMAYOR: There are 600 --
13 I'm on average.

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

15 JUSTICE SOTOMAYOR: 600 culverts,
16 you're right, he said it was like \$650,000 per
17 culvert, so you're right, maybe half that.
18 It's still a lot of money.

19 MR. JAY: It is a lot of money. And,
20 of course, in the context of the state's
21 transportation budget, at that figure we think
22 it's about a half a percent of the state's
23 transportation budget. But I think --

24 JUSTICE SOTOMAYOR: And I know there
25 is some federal money coming.

1 MR. JAY: There is federal money
2 coming in. There are -- there are other
3 sources of funding as well that are remediating
4 both state and local and private culverts, but
5 I think that when looking at the cost, I think
6 what you have to see is that much of the cost
7 comes not from the designing of the culvert or
8 the -- what kind of culvert you put in, but the
9 choice to remediate the culvert.

10 Now -- and it's very important to
11 notice that Washington state has had a law
12 requiring fish passage. And the attorney
13 general of Washington opined in 1950, 1950,
14 that culverts installed by the State Highway
15 Department under state roads had to meet those
16 requirements for fish passage.

17 So if the state decided not to do that
18 and to install non-compliant culverts, culverts
19 that blocked fish passage, and it's going to
20 cost, you know, a fairly substantial sum to
21 remediate them, the state bears the -- a fair
22 amount of that responsibility itself.

23 Now ultimately the district court in
24 its discretion looked at those costs, looked at
25 the state's argument about whether it would be

1 worthwhile, balanced the equities, and
2 concluded that the balance of the harm tipped
3 substantially in the tribe's favor and in favor
4 of the public interest.

5 And I think that this is well brought
6 out by the non-Indian fishermen's brief, both
7 commercial and recreational fishermen, who
8 explain in detail why it's very consistent with
9 the public interest to resolve this problem on
10 the tailored scale -- tailored timetable that
11 the district court set out.

12 Thank you, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Purcell, you have five minutes
16 remaining.

17 REBUTTAL ARGUMENT OF NOAH PURCELL
18 ON BEHALF OF THE PETITIONER

19 MR. PURCELL: Thank you, Mr. Chief
20 Justice.

21 I'd like to make three points. First,
22 counsel for the United States pointed you to
23 paragraph 4.1 at Joint Appendix 62a. I'd urge
24 you to turn to it and look at it.

25 He -- he stopped reading part way

1 through. It says, "has a duty not to build or
2 maintain culverts in a way that deprives the
3 tribes of a moderate living from fishing."

4 Moderate living came from their --
5 that's their complaint. That's the equivalent
6 of their complaint in this case. The district
7 court understood their complaint that way, if
8 you look at Petition Appendix 250a. He
9 described their claim as seeking a moderate
10 living from fishing.

11 The phrase "moderate living" appears
12 dozens of times in the briefs to the Ninth
13 Circuit. The phrase "substantial degradation"
14 doesn't appear a single time in any brief to
15 the Ninth Circuit. That was not the argument.

16 So I raise that point not to emphasize
17 that they should be barred from raising that
18 argument here, but just to emphasize that if
19 the Court is going to adopt some version of
20 that test, really the appropriate --

21 JUSTICE BREYER: Some -- the sentence
22 says, "in the context of state culverts that
23 appreciably degrade fish passage and interfere
24 with the tribe's ability to obtain a
25 moderate" -- so they have to do both; one,

1 appreciably inter-degrade fish passage; and
2 two, also interfere with the moderate standing.

3 Isn't that what it says?

4 MR. PURCELL: That's what they
5 claimed, Your Honor.

6 JUSTICE BREYER: Well, that's what it
7 seemed to me it says.

8 MR. PURCELL: But the district court
9 essentially said the moderate living standard,
10 any decline from that is a violation. And all
11 the factual findings they are citing, Your
12 Honor, keep in mind, that was after the
13 district court had already held that the state
14 violated the treaties.

15 The -- the violation finding was on
16 summary judgment. And what the district court
17 said, I encourage you to turn to actually the
18 same page that Mr. Jay said, Petition Appendix
19 263a, the district court said "the tribe's find
20 that harvests have been diminished, together
21 with the logical inference, that a significant
22 portion of this diminishment is due to blocked
23 culverts is sufficient to support a finding of
24 a treaty violation." So --

25 JUSTICE SOTOMAYOR: Counsel, I -- I --

1 you know, I have read the language. I don't
2 understand exactly why the district court did
3 it. I think I think the Circuit Court tried to
4 clarify it.

5 But, as I understand things, the
6 Indians are entitled to 50 percent, but we have
7 said it doesn't have to be more than a moderate
8 living. So it could be less than 50 percent of
9 whatever the catch is.

10 Am I correct on that?

11 MR. PURCELL: Yeah. In Fishing
12 Vessel, the Court said the trial -- each side
13 is entitled to half the available fish.

14 JUSTICE SOTOMAYOR: Right. And unless
15 --

16 MR. PURCELL: Unless less than that is
17 sufficient to provide a moderate living.

18 JUSTICE SOTOMAYOR: Exactly. As I
19 understand what the government said to me
20 earlier, you stipulated that a moderate living
21 wasn't at issue. So you weren't claiming, I
22 don't think, as a defense that the existing
23 catch was more than sufficient or exceeded a
24 moderate living by so much that we didn't have
25 to fix the culverts because of that reason.

1 MR. PURCELL: We say we would not
2 dispute that the tribes were not currently
3 earning a moderate living for fishing. And
4 that's why --

5 JUSTICE SOTOMAYOR: So --

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

8 JUSTICE SOTOMAYOR: So it doesn't
9 really matter. Once there's significant
10 degradation, that means they're not getting
11 50 percent of what they need.

12 MR. PURCELL: No, Your Honor, this
13 Court in Fishing Vessel said 50 percent is the
14 maximum, even if it's less than the tribe's
15 moderate living needs. That's what the Court
16 said in Fishing Vessel.

17 JUSTICE SOTOMAYOR: No, but what I'm
18 saying to you is if you stipulated they're not
19 making a moderate living, they're still
20 entitled to 50 percent of the undegradated
21 catch.

22 MR. PURCELL: That's not what the
23 Court said in Fishing Vessel at all, Your
24 Honor. The Court held 50 percent of the
25 currently available catch. If that had been

1 the rule, they would have been entitled to
2 every single fish -- the -- the -- the
3 undegradated catch, Your Honor, would be tens
4 of millions of salmon. And it's undisputed
5 that -- that -- that the -- the runs have
6 declined vastly long before the state built any
7 culverts. That's not what the Court said.

8 JUSTICE SOTOMAYOR: Then my words are
9 -- are wrong. They caught X amount. If the
10 proof is that Y amount would have happened
11 absent the obstruction, they're entitled to
12 50 percent of Y amount. I don't care what
13 caused the decimation.

14 MR. PURCELL: Again, that's not the
15 Court -- the approach the Court took in Fishing
16 Vessel. And if the Court's going to remand
17 with some sort of direction, that I would urge
18 the Court that if you're going to say some
19 version of that, the appropriate course is to
20 remand to the district court because the
21 district court just did not consider these
22 arguments.

23 The district court -- I mean, we
24 didn't waive the idea that these aren't all
25 obstructions. That wasn't an issue.

1 The definition -- the common law
2 definition of obstruction was never raised in
3 the district court by the other parties. We
4 had no opportunity to make that point.

5 We did in our post-trial brief, again,
6 at Joint Appendix 28, we argued extensively
7 about the flaws in the injunction.

8 Every single flaw -- Justice Breyer
9 asked, why can't we go back to the district
10 court? We already pointed out all of these
11 flaws to the district court and -- and he
12 ignored them and entered the exact injunction
13 that they proposed.

14 And -- and so that's -- that's the
15 concern. It flips the burden of proof on its
16 head to say, okay, we're going to assume that
17 all state barrier culverts, regardless of where
18 they are or anything about the river or
19 anything like that, is a violation, and then
20 you can go back and ask for relief.

21 I see my time has expired. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 12:08 p.m., the case
25 was submitted.)

Official - Subject to Final Review

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