No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR BUSINESS, HOME BUILDING, REAL ESTATE, AND FARMING ORGANIZATIONS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE*

Amici are organizations that represent businesses, home builders, real-estate professionals, and farmers in Washington State and around the country.

* No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Petitioner has entered a blanket consent to the filing of amicus briefs, and letters of consent from respondents to the filing of this brief are on file with the Clerk.

The Association of Washington Business (AWB) is Washington State's Chamber of Commerce and the principal representative of the State's business community. AWB is the State's oldest and largest general business membership federation, representing the interests of approximately 8000 Washington companies who, in turn, employ more than 700,000 employees, approximately a quarter of the State's workforce. AWB's members are located in all areas of Washington, represent a broad array of industries, and range in size from sole proprietorships to large corporations that do business around the world.

The National Association of Home Builders (NAHB) is a Washington, D.C.–based trade association whose mission is to enhance the climate for housing and the building industry. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they account for 80% of all homes constructed in the United States.

The Building Industry Association of Washington is the State's association of home builders and related companies that provide products and services for residential building construction and remodeling. It has 7800 members across the State.

The Montana Building Industry Association is a trade association founded in 1968 to promote and protect the building industry. It represents approximately 1500 builders and affiliated small businesses.

The Oregon Home Builders Association is the voice of Oregon's residential and light-commercial construction industry. It has nearly 3000 member companies repre-

senting more than 196,000 jobs and over $3 billion in the Oregon economy.

The Master Builders Association of King and Snohomish Counties is a trade organization of professional home builders and related professionals. With nearly 2800 member companies from all facets of housing construction, it is the largest local home builders' association in the United States.

Washington REALTORS® is a trade association of approximately 20,000 licensed real-estate brokers. It represents their interests, and those of Washington's homeowners and businesses, on a variety of issues affecting residential and commercial real estate.

The Washington State Farm Bureau is a voluntary, grassroots advocacy organization representing the social and economic interests of farm and ranch families in Washington State. It includes more than 47,000 member families.

The Idaho Farm Bureau Federation is a non-profit organization representing approximately 78,000 Idaho families. Its members live and work in each of Idaho's 44 counties and represent all commodities grown in Idaho. It includes a substantial number of livestock producers who graze on public lands.

The Montana Farm Bureau Federation is the State's largest agricultural organization, representing 30 county farm bureaus. It provides a voice for agricultural producers in legislative, legal, and other areas affecting agriculture.

The Oregon Farm Bureau is a grassroots advocacy organization founded in 1919 to represent the social and economic interests of Oregon's farming and ranching families in the public policy arena. It has farming and

ranching members in all 36 Oregon counties, with a total of 65,000 member families statewide.

This case presents the question whether treaties providing Indian tribes in the Pacific Northwest the "'right of taking fish, at all usual and accustomed grounds and stations'" also guarantee "that the number of fish [will] always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 86a, 94a (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674, 686 (1979) (*Fishing Vessel*)). The Ninth Circuit answered that question in the affirmative. In so holding, it affirmed a sweeping injunction compelling the State of Washington to remove or replace highway culverts that allegedly impair salmon habitat and reduce the number of salmon available for tribal fishing. The court's reasoning is not confined to culverts but will affect land-use and water-allocation decisions throughout the West. Amici therefore have a significant interest in the resolution of this case.

SUMMARY OF ARGUMENT

This case involves the interpretation of treaties that Territorial Governor Isaac Stevens negotiated on behalf of the United States with Indian tribes in the Pacific Northwest in 1854 and 1855. All of the treaties contain similar clauses providing that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory." Treaty with the Nisqually (Treaty of Medicine Creek), art. 3, Dec. 26, 1854, 10 Stat. 1133. The Ninth Circuit held that "[t]he Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing

places, but also that there would be fish sufficient to sustain them." Pet. App. 92a. For that reason, the court "infer[red] a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." *Id.* at 94a (quoting *Fishing Vessel*, 443 U.S. at 686). Because the State's decision "to build and maintain barrier culverts under its roads" had "diminish[ed] the supply of fish," the court concluded that "in building and maintaining barrier culverts * * * Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties." *Id.* at 95a-96a. It therefore affirmed an injunction compelling the State of Washington to spend billions of dollars removing or altering those culverts.

The Ninth Circuit's interpretation is contrary to the text of the treaties, which guarantee only a right to access "usual and accustomed grounds and stations" for the purpose of taking fish. At common law, fishing rights were understood to be interests in real property tied to particular locations, not rights in the fish themselves. Because fish were viewed as an inexhaustible resource, fishing-rights treaties ensured access to places where fishing could occur. There was no need to guarantee a particular quantity of fish. While the assumption of inexhaustibility proved incorrect, that does not authorize a court to insert into the treaties a guarantee that the parties did not negotiate.

The Ninth Circuit's decision is also contrary to prior interpretations of the treaties by this Court and by the political branches. Although this Court has construed the treaties several times, it has never suggested that they contain a guarantee of a particular quantity of fish. And Congress and the Executive Branch have repeated-

ly taken actions—most notably, constructing or authorizing dams that have wiped out entire fisheries—that are inconsistent with such a guarantee.

Finally, the Ninth Circuit's interpretation of the treaties raises serious federalism concerns. While the court's decision is nominally limited to highway culverts, its reasoning is far broader. If tribes have a right to ensure that States maintain a particular number of fish for tribal interests, then few activities in the West will escape judicial superintendence at the behest of tribes. The construction of culverts is not the only human activity that can harm salmon. Almost all land-use decisions affect fish habitat directly or indirectly, as does the withdrawal of surface or underground water under state-law water-rights regimes. Even if the treaty language were ambiguous, it should not be read to displace the State's traditional authority to regulate land use and water rights.

ARGUMENT

A. The Ninth Circuit's interpretation is contrary to the text of the treaties

In interpreting treaties, this Court "begin[s] with the text of the treaty and the context in which the written words are used." *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1508-1509 (2017) (quoting *Volkswagenwerk AG* v. *Schlunk*, 486 U.S. 694, 699 (1988)). For treaties with Indian tribes, as for of other kinds of treaties, "the starting point for any analysis * * * is the treaty language itself." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999). Here, the starting point should also be the ending point. The treaties all contain similar clauses providing that "[t]he right of tak-

ing fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory." Treaty of Medicine Creek, art. 3, 10 Stat. 1133. That language does not confer the right that the Ninth Circuit identified: "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a (quoting *Fishing Vessel*, 443 U.S at 686).

1. The treaties guarantee a "right of taking fish," and in the nineteenth century, "take," as applied to wild animals, had the same meaning it does today: "to get possession of (as fish or game) by killing or capturing." *Webster's Third New International Dictionary of the English Language* 2330 (1976); see also *Geer* v. *Connecticut*, 161 U.S. 519, 523 (1896); 2 William Blackstone, *Commentaries* 411 (1766). The treaties thus protect the ability to engage in the act of catching fish, an act that necessarily occurs at a particular place. By protecting the right to fish in "all usual and accustomed grounds and stations," the treaties guarantee access to those places for the purposes of fishing. Treaty of Medicine Creek, art. 3, 10 Stat. 1133. In doing so, they "impose[] a servitude upon every piece of land as though described therein," allowing Indians to access or occupy private property as necessary to fish at traditional fishing grounds, regardless of the ownership of those grounds. *United States* v. *Winans*, 198 U.S. 371, 381-382 (1905); see also *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 199 (1919).

Nothing in that right, which is tied to particular locations, suggests a power to regulate the non-fishing activities of the State in other locations. Such a power would be inconsistent with Article I of the treaties, under

which the tribes "cede[d], relinquish[ed], and convey[ed] to the United States *all their right, title, and interest* in and to the lands and country occupied by them." Treaty of Medicine Creek, art. 1, 10 Stat. 1132 (emphasis added). If the "right of taking fish" dictates how States are to manage road construction on State land, then the cession, relinquishment, and conveyance cannot reasonably be said to include "all the right, title, and interest" the Indians had to the ceded lands.

2. The Ninth Circuit suggested that a treaty provision limited to a right of access to traditional fishing grounds would have been "cynical and disingenuous." Pet. App. 91a-92a. That suggestion ignores the principle that treaty language "must be read in light of the common notions of the day." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Under the legal regime that prevailed at the time the treaties were signed, such a provision would have provided meaningful and important guarantees to the tribes.

During the nineteenth century, reservation Indians were sometimes prohibited from engaging in off-reservation travel. Some treaties explicitly restricted such travel. See, *e.g.*, Treaty with the Utah, art. 7, Dec. 30, 1849, 9 Stat. 985. The federal government often prevented Indians from leaving reservations without a permit. See, *e.g.*, U.S. Dep't of the Interior, *Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 24 (1892); U.S. Dep't of the Interior, *Fifty-Seventh Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 86 (1888). Similarly, some States enacted legislation prohibiting off-reservation travel without permits. See, *e.g.*, Act of July 20, 1858, ch. 44, § 2, 1858 Minn. Laws

104; Act of Feb. 27, 1845, ch. 80, § 10, 1845 Mo. Laws 578. By securing the right to access "usual and accustomed grounds"—many of which were off-reservation—the signatory tribes ensured that they would not be so restricted but instead would have the right "to leave the reservation whenever they choose" in order to fish. U.S. Dep't of the Interior, *Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 50 (1863).

In addition, the treaties contemplated that the ceded lands might be sold to private owners, and they ensured that those owners could not impair access to fishing grounds. As this Court has recognized, by granting a right of access, "[t]he contingency of the future ownership of the lands therefore was foreseen and provided for; in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned." *Winans*, 198 U.S. at 381. That "right was intended to be continuing against the United States and its grantees as well as against the state and its grantees." *Id.* at 381-382. The treaties thus ensured access to traditional fishing grounds regardless of property ownership.

3. The Ninth Circuit's interpretation also fails to take account of the treaties' language specifying that the right to fish is "in common with all citizens of the Territory." Treaty of Medicine Creek, art. 3, 10 Stat. 1133. The reference to a common right to fish drew on an established body of common-law fishing jurisprudence that informs the interpretation of the treaties.

At common law, the right of fishing was understood as an interest in real property. The right was associated with ownership of the land beneath or adjacent to the waters where it would be exercised, and it was a kind of

easement, severable from the ownership of the land and capable of being freely transferred. See 3 James Kent, *Commentaries on American Law* 329 (1828). In the case of navigable waters, the right of fishery was vested in the State as an incident of its ownership of the submerged lands under navigable waters. See *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284-287 (1997); *Shively* v. *Bowlby*, 152 U.S. 1, 57-58 (1894). That right was held by the State as a public trust. *Smith* v. *Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855); *Martin* v. *Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 413-418 (1842).

Three features of common-law fishing rights are particularly relevant here. First, common fishery rights on public waters were not exclusive. No one person or group of persons was entitled to exclude others or monopolize the fishery in waters subject to a common right of fishing. An exclusive right to fish was considered a "*private* right of fishery," and such rights were "confined to fresh water rivers." 3 Kent, *Commentaries* 331-332 (emphasis added). By contrast, "the right of fishing in the sea, and in the bays and arms of the sea, and in navigable or tide waters * * * is a right *public and common* to every person." *Id.* at 331-332 (emphasis added); see *id.* at 336.

Second, the right granted by the treaty, like all rights of fishery recognized at the common law, was attached to real property—the "usual and accustomed grounds and stations." But by its nature, such a right did not consist of an interest in the fish themselves. Cf. *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership."). The right therefore did not

establish a cognizable interest in activities outside the boundaries of the "usual and accustomed grounds."

Third, as a public right, the common right of fishery was subject to regulation by the State. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 631 (2013) (noting that the "power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty'") (quoting *United States* v. *Alaska*, 521 U.S. 1, 5 (1997)); 3 Kent, *Commentaries* 332 ("[I]t is everywhere agreed, that this common right is liable to be modified and controlled by the municipal law of the land."). The State's regulatory authority over its fisheries included the power to limit the right to fish to its own citizens. *McCready* v. *Virginia*, 94 U.S. 391, 395 (1876). That power is critical in this context because, in 1855, reservation Indians were not treated as citizens. *Elk* v. *Wilkins*, 112 U.S. 94, 100 (1884); see Act of June 2, 1924, ch. 233, 43 Stat. 253 (extending citizenship to Indians). In the absence of the treaty guarantee, the State therefore could have prohibited reservation Indians from fishing altogether. By providing that the right to fish was to be held "in common with the citizens of the territory," the treaty prohibited States from discriminating against the tribes in its management of fisheries. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205 (noting that the Court has "repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation"). It did not guarantee any particular quantity of fish.

4. In a footnote in *Fishing Vessel*, this Court suggested that the "in common with" language did not refer to common-law fishery concepts. 443 U.S. at 677 n.23.

In reaching that conclusion, the Court reasoned that the United States had used similar language in fishing treaties with Britain, and that those treaties "gave each signatory country an 'equal' and apportionable 'share' of the take of the treaty areas." *Ibid.* Although the Court cited diplomatic correspondence concerning those treaties, the cited correspondence did not relate to an apportionment of the total number of fish, but only to ensuring equal access. See H.R. Exec. Doc. No. 84, 46th Cong., 2d Sess. 2 (1880) (describing "the alleged interference with American fishermen" who suffered "expulsion from [the] inshore fishery" in Fortune Bay, Newfoundland); 5 *American State Papers (Foreign Relations)* 528 (1823) ("The transactions which gave rise to this controversy occurred * * * when several fishing vessels of the United States, on the coast and within the strictest territorial jurisdiction of the island of Newfoundland, were ordered away.").

Because fish stocks were seen as an "inexhaustible repository," there was no reason for nineteenth-century treaties to guarantee a particular quantity of fish or even a particular share of the total catch, and fishing-rights treaties were not understood to do so. John Quincy Adams, *The Duplicate Letters, The Fisheries and the Mississippi* 185 (2d ed. 1823); see Lawrence Juda, *International Law and Ocean Use Management* 17 (1996) ("At least into the mid-nineteenth century, writers in the field of international law continued to reflect the view that the living resources of the oceans were inexhaustible."). It was much later, "as fishery technology became more sophisticated, and as total fishing effort continued to expand," that it became necessary to limit the total catch and apportion it among the participating

nations. Juda, *International Law and Ocean Use Management* 20. Only near the beginning of the 20th century did nations begin to sign treaties intended to regulate fishing in order to conserve—and apportion—a scarce resource. See, *e.g.*, Convention Between the United States and Great Britain for the Preservation of the Halibut Fishery of the Northern Pacific Ocean, Mar. 2, 1923, 43 Stat. 1841; Juda, *International Law and Ocean Use Management* 72 (explaining that the Halibut Convention "set a precedent for later agreements and constituted explicit recognition of the potential for commercial exhaustion of fish stocks"). The treaties at issue here, like other treaties of their era, were not aimed at resource conservation but at guaranteeing access to fishing grounds.

B. The Ninth Circuit erred in departing from the treaties' text based on its view of their purpose

A key premise of the decision below is that "[t]he Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them." Pet. App. 92a. Although the parties may have believed that the number of fish would be sufficient, it does not follow that the treaties contain a promise to that effect.

1. At the time the treaties were signed, the parties viewed salmon as an inexhaustible resource—an understandable view given the improbability of seriously depleting fish stocks using pre-industrial technology. As this Court has observed, "when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a

resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce." *Fishing Vessel*, 443 U.S. at 669. Because the parties assumed that fish would always be abundant, guaranteeing such abundance would never have occurred to them. They did not imagine a future in which new fishing, shipping, and canning technologies would eventually deplete fish stocks, nor did they consider whether development on the ceded lands might need to be constrained in order to ensure that enough fish would be available. Although the parties' assumption about the inexhaustibility of the salmon population proved incorrect, that is not a reason for a court to supply a missing term that the parties did not negotiate.

This Court has repeatedly held that the interpretation of a treaty is governed by its text, not by a court's speculation as to how the parties would have resolved other matters to which they "likely gave no thought." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995). Thus, as Justice Story explained, the Court may not "supply a *casus omissus* in a treaty, any more than in a law." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821). Instead, it must "find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, [its] duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." *Ibid.*

In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court applied that principle in concluding that the United Nations Convention Relating to the Status of Refugees, Jan. 31,1967,19 U.S.T. 6223, which pro-

hibits the expulsion of refugees, does not apply extraterritorially. The Court acknowledged that the parties to the Convention "may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape," and that "such actions may even violate the spirit" of the Convention. *Id.* at 183. But it explained that "a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent." *Ibid.*

The interpretive principle at issue is familiar in the context of statutory construction, which, like treaty construction, often entails interpreting a "compromise between groups with marked but divergent interests." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002). In construing a statute, the Court's role is to apply the text, not to "to revise clear statutory terms that turn out not to work in practice." *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2446 (2014). Instead, the Court's "task is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989); accord *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004). As the Court recently explained, even when "the text as written creates an apparent anomaly as to some subject it does not address," a Court may not "disregard clear language simply on the view that * * * Congress must have intended something broader." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033-2034 (2014) (internal quotation marks omitted). Thus, "while it is of course [the Court's] job to apply faithfully the law Congress has written, it is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of spec-

ulation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

2. Those principles are fully applicable to treaties with Indian tribes. *United States* v. *Choctaw Nation*, 179 U.S. 494, 533 (1900) (citing *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 71-72). The Ninth Circuit emphasized that a court construing an Indian treaty must "look beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" Pet. App. 89a (quoting *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196); accord *Fishing Vessel*, 443 U.S. at 675-676 (Treaties are to "be construed * * * in the sense in which they would naturally be understood by the Indians.") (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899)). But even when construing Indian treaties, courts cannot alter treaty terms "to meet alleged injustices." *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945). Courts cannot "by mere interpretation or in deference to [a] view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words." *United States* v. *Choctaw Nation*, 179 U.S. at 532. "[E]ven Indian treaties," in other words, "cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943). The Ninth Circuit erred in doing just that.

3. The Ninth Circuit relied on this Court's cases involving reserved water rights, which, it said, support reading the treaties as if they contained "a promise to 'support the purpose' of the Treaties." Pet. App. 93a-94a (quoting *Winters* v. *United States*, 207 U.S. 564, 577 (1908)). That reasoning reflects a misreading of the water-rights cases.

This Court has held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); see also *United States* v. *New Mexico*, 438 U.S. 696, 699-700 (1978); *Winters*, 207 U.S. at 576–577. To infer a reserved water right, the Court must "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved, and conclude[] that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700.

In all of the cases in which this Court has identified an implied water right, the right at issue has been associated with a federal land reservation. For example, *Winters* involved water rights appurtenant to the Fort Belknap Indian Reservation, where, without water, "civilized communities could not be established." 207 U.S. at 576. Similarly, *Cappaert* implied a right to an underground pool appurtenant to Devil's Hole National Monument, which had been set aside to preserve a "peculiar race of desert fish" that required the water to survive. 426 U.S. at 141; accord *Arizona* v. *California*, 373 U.S. 546, 596 (1983) (reservation of lands for Indian tribes

"reserved not only land, but also the use of enough water * * * to irrigate the irrigable portions of the reserved lands").

Here, instead of carefully examining the right and the "specific purposes for which the *land* was reserved" by the government, *New Mexico*, 438 U.S. at 700 (emphasis added), the Ninth Circuit inferred "a promise to 'support the purpose' of the *Treaties*" in general, Pet App. 93a-94a (emphasis added). The court concluded that a principal purpose of the treaties was to provide the tribes a means for support through an adequate supply of salmon. *Id.* at 91a. But the implied-reservation-of-water doctrine turns on the purpose of the reservation of land; it is not a license to engage in a broad inquiry into the purpose of the treaty as a whole. The Ninth Circuit's approach finds no support in this Court's cases.

C. The Ninth Circuit's interpretation is contrary to prior interpretations of the treaties by this Court and by the political branches

1. Although this Court has had several occasions to interpret the "right of taking fish" clause in the Stevens Treaties, it has never held that a state government must limit off-reservation land development to increase the number of available salmon. Instead, the Court has interpreted the treaties to provide a right of access to the tribes' usual and accustomed fishing grounds for the purpose of fishing. In *Winans*, for example, the Court held that the treaties "imposed a servitude upon every piece of land" used as a traditional fishing ground. 198 U.S. at 381. The Court has also held that the right of access cannot be made subject to the payment of a state license fee. *Tulee* v. *Washington*, 315 U.S. 681, 684

(1942). At the same time, the Court has recognized that the treaties leave an important role for state regulation. For example, in *Puyallup Tribe* v. *Department of Game of Washington*, 391 U.S. 392, 398 (1968), the Court held that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

More recently, in *Fishing Vessel*, the Court stated that it would interpret the "right of taking fish" as guaranteeing a right to "some of the large quantities of fish that will almost certainly be available at a given place at a given time." 443 U.S. at 677-678. In other words, the Court read the treaties to "secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id.* at 679. It ultimately concluded that the tribal share can be no more than 50%, subject to modification based on changing circumstances. *Id.* at 686-687.

As explained above, the decision in *Fishing Vessel* represented a departure from the treaty text, which guarantees only a right of access, not a particular share of the total number of fish. See *Puget Sound Gillnetters Ass'n* v. *United States District Court*, 573 F.2d 1123, 1134 (9th Cir. 1978) (Kennedy, J., concurring) (noting that "the rationale for the apportionment rule * * * remains somewhat obscure"), vacated, 443 U.S. 658 (1979). This case does not require the Court to reconsider *Fishing Vessel*, however, because even in that case the Court merely read the treaties to guarantee "a share of each run of fish," however large that run may be. 443 U.S. at 679. It did not hold that the State must ensure

that each run has a particular number of fish in it; still less did it interpret the treaty language to require the State to regulate activities unrelated to fishing in a certain manner because of indirect effects on fishing. In that respect, the Ninth Circuit's interpretation represents a major expansion of the right recognized in *Fishing Vessel*.

2. The Ninth Circuit's interpretation is also inconsistent with the construction given the treaties by the political branches. "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). The political branches can adopt an interpretation of a treaty not just through formal statements, but also through "their own practical construction of it." *Factor* v. *Laubenheimer*, 290 U.S. 276, 295 (1933). Here, the federal government's conduct shows that historically it has not maintained the treaty interpretation the Ninth Circuit adopted below.

As the State explains (Pet. Br. 8-9, 36), the federal government has taken many actions that have harmed salmon populations—most dramatically, building or licensing dams that have wiped out entire fisheries. See *Northwest Res. Info. Ctr., Inc.* v. *Northwest Power & Conservation Council*, 730 F.3d 1008, 1011 (9th Cir. 2013) ("[T]he extensive system of hydroelectric dams in the Columbia River Basin has been a major factor in the decline of some salmon and steelhead runs to a point of near extinction.") (internal quotation marks omitted). The effect of the dams on the salmon population was well understood at the time the dams were built. See, *e.g.*, B.M. Brennan, Director, Dep't of Fisheries, State of

Washington, *Report of the Preliminary Investigations Into the Possible Methods of Preserving the Columbia River Salmon and Steelhead at the Grand Coulee Dam* 3 (1938) (explaining that the Grand Coulee Dam "destroys the spawning grounds of the San Poil, Spokane, Kettle, Colville and Clark Fork rivers" and "eliminates 1,140 lineal miles of stream from the area available to the spawning fish"). Those activities therefore demonstrate that the political branches have adopted a "practical construction" of the treaties that does not prohibit development that adversely affects salmon populations. *Factor*, 290 U.S. at 295.

D. The Ninth Circuit's decision subjects the State to a poorly defined and intrusive obligation

The Ninth Circuit did not explain how to determine what constitutes enough salmon "available for harvest" that would be "sufficient to provide a 'moderate living' to the Tribes." Pet. App. 95a (quoting *Fishing Vessel*, 443 U.S. at 686). It is difficult to see how any court could do so. If the treaties guarantee a continuing right to enough fish to provide a moderate living, the required number of fish would vary with a tribe's population, with standards of living, with salmon prices, and with other income the tribe earned. What constitutes a moderate living could change from year to year, as could the number of fish required to maintain that standard of living.

The vagueness and unworkability of the approach adopted by the Ninth Circuit is itself a reason to doubt that the treaties mandate that approach. In addition, the breadth of the decision below raises serious federalism concerns because it intrudes on the State's traditional authority to regulate land use and water rights.

Those federalism concerns are an additional reason to reject the Ninth Circuit's interpretation. See *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014).

The Ninth Circuit panel stated its holding in superficially narrow terms: "[W]e conclude that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties." Pet. App. 126a. And in the order denying rehearing, two judges from the panel described the court's decision as "[c]abin[ed] * * * [by] a careful, detailed description of the facts presented." *Id.* at 12a (W. Fletcher, J., and Gould, J., concurring in the denial of rehearing en banc). But the court's reasoning is in no way limited to that factual context, and the consequences of the decision will extend far more broadly. Barrier culverts are not the only obstacle to sustaining anadromous fish populations. Many human activities affect salmon runs, and therefore the Ninth Circuit's decision will affect far more than just culverts. It also threatens to displace state regulation of land use and water rights.

1. The U.S. Fish and Wildlife Service has determined that "[t]he biggest threat to salmon today is the loss and degradation of habitat." U.S. Fish & Wildlife Service, *Salmon of the West: Why are Salmon in Trouble?—Poor Habitat*, http://www.fws.gov/salmonofthewest/poorhabitat.htm. The decision below will therefore have implications for every land-use or development decision that could affect salmon habitat. That includes almost all development decisions, for as the Washington State Conservation Commission (WSCC) has explained, "[r]iparian zones are impacted by all types of land use practices." Carol J. Smith, Washington State Conserva-

tion Commission, *Salmon Habitat Limiting Factors in Washington State* 127 (2005). For example, the WSCC has determined that "[r]iparian functions are impaired by * * * direct removal of riparian vegetation, roads and dikes located adjacent to the stream channel, road crossings, agricultural/livestock crossings, unrestricted livestock grazing in the riparian zone, and development in the riparian corridor." *Ibid.* In addition, salmon can be harmed by "[h]uman-caused alterations in basin hydrology" resulting from "changes in soils, decreases in the amount of forest cover, wetlands, and riparian vegetation, and increases in impervious surfaces, sedimentation, and roads." *Id.* at 174. Thus, according to the WSCC, "[h]ydrologic impacts to stream channels can occur at relatively low levels of development." *Ibid.*

Federal, state, and local governments currently regulate development projects. During the permitting process, they require compliance with a host of environmental and land-use laws; thereafter, they require proper mitigation of environmental impacts. For example, the Clean Water Act prevents developers from dredging or filling navigable waters and wetlands without a permit and requires them to obtain permits for their stormwater runoff. 33 U.S.C. 1342(p), 1344. Washington State requires local governments to make land-use decisions based on adopted policies aimed at preventing or reducing impacts to fish habitats from development in critical areas or along shorelines. See, *e.g.*, Wash. Rev. Code §§ 36.70A.030(5), 36.70A.060(2) (requiring counties and cities to develop policies and development regulations to protect critical areas, including fish habitat); *id.* § 90.58.080 (directing local governments to develop shoreline master programs to regulate shoreline use and

modification); Wash. Admin. Code § 173-26-201(2)(c) (discussing importance of ecological functions of shorelines, particularly for anadromous fish, in development of shoreline master programs); *id.* § 173-26-231(2)(d) (requiring local governments to "assure that shoreline modifications individually and cumulatively do not result in a net loss of ecological functions," including fish habitat).

The Ninth Circuit's decision adds another layer of requirements—compliance with treaty rights—to the demands of federal and state law. Despite significant federal, state, and local regulation, the vast majority of land-development activities will affect stream flows, water quality, or salmon habitat to some extent by altering the natural state of the environment. Under the reasoning of the court below, those activities therefore have the potential to infringe a tribe's treaty right to enough fish to sustain a "moderate living," especially if they are assessed on a cumulative basis. Because the Ninth Circuit articulated no standards to limit the treaty right it identified, the extension of its decision to land-use regulation will be limited by little but the creativity of regulators and plaintiffs and the equitable discretion of the district court.

2. The Ninth Circuit's decision will also affect the diversion of surface water and the withdrawal of groundwater. Salmon require sufficient streamflows for adults to locate their natal streams, pass to their upstream spawning grounds, and spawn, as well as for juveniles to migrate to the ocean. See *National Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935 (9th Cir. 2008); *Pacific Coast Fed'n of Fishermen's Ass'ns* v. *Gutierrez*, 606 F. Supp. 2d 1122, 1135 (E.D. Cal. 2008). Indeed, streamflow is one of the "critical drivers of ju-

venile salmonid growth, movement, survival, and reproduction." Annika W. Walters, et al., *Interactive Effects of Water Diversion and Climate Change for Juvenile Chinook Salmon in the Lemhi River Basin (U.S.A.)*, 27 Conservation Biology 1179, 1180 (2013). Human-caused diversion of water from rivers and streams can lead to declines in salmon populations and has been found to have "substantially interfer[ed] with salmonid migration in the Columbia River Basin since the nineteenth century." Nathan Baker, *Water, Water, Everywhere, and at Last A Drop for Salmon? NRDC v. Houston Heralds New Prospects Under Section 7 of the Endangered Species Act*, 29 Envtl. L. 607, 619 (1999).

Following the Ninth Circuit's logic, just as the presence of barrier culverts on Washington roads would render "the Tribes' right of access to their usual and accustomed fishing places * * * worthless without harvestable fish," so too might insufficient streamflows. Pet. App. 93a-94a. Tribes therefore would have a treaty-based guarantee of a flow in streams and rivers sufficient to support a salmon population that is large enough to provide treaty Indians a "moderate living."

As noted above, this Court has held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138; *Winters*, 207 U.S. at 576-577. But this Court has not applied the doctrine to infer a water right based on other treaty purposes not tied to reserved land. Applied to water rights, the Ninth Circuit's decision would extend beyond the narrow reserved-water-rights doctrine

enunciated by this Court. It would instead establish a much broader implied water right that is appurtenant not to a tribe's reservation but to all usual and accustomed fishing grounds.

Applied in that context, the decision below would severely undermine Washington's water-rights regime. Like most western States, Washington follows the prior-appropriation doctrine and the "first in time, first in right" priority system. That system is "founded on the idea that at some point the water in a stream or lake will be insufficient to satisfy all potential users, and that the rights of those who have already appropriated water to a beneficial use will be superior to any later appropriators." *Swinomish Indian Tribal Cmty.* v. *Washington State Dep't of Ecology*, 311 P.3d 6, 15 (Wash. 2013). Under Washington law, a senior water right is "entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants." *Postema* v. *Pollution Control Hearings Bd.*, 11 P.3d 726, 734 (Wash. 2000) (quoting *Longmire* v. *Smith*, 67 P. 246, 249 (Wash. 1901)); see also Wash. Rev. Code § 90.03.010 (codifying the "first in time, first in right" principle).

The Ninth Circuit has previously ruled that a tribally held reserved water right for aboriginal fishing uses would have a priority date of time immemorial. *United States* v. *Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). Such a priority date has the potential to displace every other water right lawfully created and recognized under Washington law. If tribes have an implied reserved water right for enough streamflow to support a quantity of fish that would provide for a "moderate living" for each tribe in each of the tribes' usual and accustomed places, there may be no surface

water left in Washington to allocate to future users. Similarly, if there is not enough water to support the tribes' implied reserved water rights, then junior users whose rights infringe the tribes' water rights could see their perfected state-law water rights disappear.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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