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Opening Brief of Plaintiff- Appellee/Cross-Appellant Indian Tribes

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 96-35014, 96-35082, 96-35142,
96-35196, 96-35200, 96-35223

UNITED STATES OF AMERICA, et al.

Plaintiffs-Appellees/
Cross-Appellants

v.

STATE OF WASHINGTON, et al.

Defendants-Appellants/
Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

OPENING BRIEF OF PLAINTIFF-APPELLEE/ CROSS-APPELLANT INDIAN TRIBES

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SER	Supplemental Excerpt of Record
GER	Growers' Excerpt of Record
State Br.	Brief of the State of Washington
Growers Br.	Brief of the Puget Sound Shellfish Growers
Adkins Br.	Brief of Adkins, et. al.
Alexander Br.	Brief of Alexander, et. al.
UPOW Br.	Brief of United Property Owners
Appellants	The State of Washington, the Growers, Akdins, Alexander and UPOW
Respondents	The United States and the Tribes
Tribes	Nooksack, Lummi, Sauk-Suiattle, Upper Skagit, Swinomish, Stillaguamish, Tulalip, Puyallup, Muckleshoot, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwah S'Klallam, Makah, Quileute and Hoh Indian Tribes

Stevens Treaties or Treaties	Treaty of Medicine Creek, 10 Stat. 1132, Treaty of Point Elliott, 12 Stat. 927, Treaty of Point No Point, 12 Stat. 933, Treaty with the Makah, 12 Stat. 939, Treaty of Olympia, 12 Stat. 971
Treaty Fishing Rights Clause	"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed land: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter." (Treaty of Medicine Creek, Article III)

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 USC § 1331, § 1343(a)(3), § 1345, § 1362 and its continuing jurisdiction, 384 F. Supp. 312 at 408. This Court has jurisdiction pursuant to 28 USC § 1291. The tribes filed a notice of cross-appeal February 14, 1996, ER 355-357, within the time allowed by FRAP 4(a) and 28 USC § 2107(b).

STATEMENT OF ISSUES

1. Do the past ninety years of judicial interpretations of the "right of taking fish" apply to shellfish?

2. Did the district court err in finding that the treaty negotiators intended the proviso regarding beds staked or cultivated by citizens to prohibit tribal harvesting only from those shellfish beds created by citizens where no natural bed of the same species exists?

Cross-Appeal

3. Could the district court properly accord special treatment to commercial shellfish growers' existing shellfish beds by fashioning for them a second and broader definition of the term "cultivated?"

4. Did the district court clearly err in concluding that the minimum

density necessary for a successful commercial harvest of manila clams is 0.5 pounds per square foot?

5. Is the State of Washington a "citizen" that may create "staked or cultivated" beds of shellfish?

6. May tribes' exercise of the right of taking shellfish be limited for reasons other than the need for conservation or to ensure that non-Indians receive their share?

7. Are tribes required to seek advance approval from a court before exercising their right to use private property to reach usual and accustomed fishing grounds?

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9. May the State and intervenor private parties select three of four Special Masters appointed by the court to hear disputes between them and the tribes?

10. May damages be awarded against tribes that have not waived their sovereign immunity?

11. May damages be awarded against non-party tribal members?

12. Did tribes state a claim for relief pursuant to 42 USC § 1983?

STATEMENT ON ATTORNEYS FEES

The tribes seek attorneys fees pursuant to 42 USC § 1988.

STATEMENT OF THE CASE

The tribes adopt the United States' Statement of the Case.

SUMMARY OF ARGUMENT

From time immemorial, Indian people of western Washington have been fishing people. At treaty time they exploited virtually every aquatic animal in their environment, including over 100 species of shellfish. They used shellfish as a staple of their diet, in trade with Indians and non-Indians, as bait for other important fisheries, as tools and medicines, and for myriad other purposes. Shellfish were integral to their way of life. By the time of the treaties Indians also made use of plants and animals introduced by non-Indians, they took advantage of new technology as it became available, and they sold shellfish and other fish to new markets occasioned by the arrival of settlers.

During the treaty negotiations Indians insisted upon one overriding condition to their cession of millions of acres of lands: that they be allowed to continue their way of life as fishing people. The United States treaty

commissioners realized that making that promise was not only necessary in obtaining the tribes' consent to the treaties, but also served the United States' interests in keeping the cost of the treaties down and in ensuring that Indians would continue to supply shellfish and other fish to settlers.

During the treaty negotiations the United States commissioners repeatedly assured the tribes that they would not be excluded from their ancient fisheries. They wrote those assurances into the treaties, promising Indians that they would forever retain the "right of taking fish" at all their "usual and accustomed grounds and stations." Nothing during the treaty negotiations suggested that the right of taking fish would be limited to particular species, methods or markets then available. The tribes did agree to share their fisheries "in common with" citizens.

At the time of the treaties there were the beginnings of a shellfish cultivation industry at Shoalwater Bay. The United States treaty commissioners were familiar with that industry and with the larger, more established shellfish cultivation industry that had existed for many years on the east coast of the United States. They expected and desired that a similar industry would grow and prosper in the territory. They also knew that both

the nascent industry at Shoalwater and the east coast industry were based upon oyster beds that had been created by individuals, while natural beds of oysters were open for public harvest. At Shoalwater, Indians both harvested shellfish and observed non-Indians marking out artificial beds for their own use.

The United States commissioners understood that without specific legal protection for cultivated beds created by the industry, the public and Indians would exercise their rights to take whatever oysters they found, thus making a cultivation industry impossible. Accordingly, they wrote into the treaties a single exception to the tribes' right to take fish: "provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens."

They drew this language from the shellfish industry, knowing that it was commonly understood to refer only to artificial shellfish beds. In using such language they also knew that they were preserving tribes' rights to natural shellfish beds, hence keeping their word that, under the treaties, the tribes would not be excluded from their ancient fisheries.

Despite the voluminous briefing, then, this is a simple case. The district court held, and it is uncontested on appeal, that shellfish are part of

the right of taking fish, a decision that flows from the language of the treaties. The prior decisions of the Supreme Court, this Court, and the district court over the past 90 years interpreting the right of taking fish therefore apply fully to shellfish: the tribes are entitled to 50% of the harvestable shellfish of every species found anywhere within the areas they customarily used for fishing purposes.

The only issue unique to shellfish is the meaning of the proviso. The district court sought, in keeping with basic principles of treaty interpretation, to discern how the treaty negotiators would have understood the terms of the proviso as they were used in the shellfish industry. The court found as historical facts that the negotiators would have understood "staked" and "cultivated" to refer to artificial beds and that it is only artificial beds from which they intended to exclude tribes. These findings, which are barely even challenged by appellants, enjoy compelling support in the record, thus making this Court's task an easy one.

The district court reached these conclusions in its first decision by thoroughly analyzing the historical evidence of the intent and understanding of the parties and by carefully applying the prior precedents and rules for

interpretation of treaties. That decision resulted from a 13 day trial in which over 1200 documentary exhibits were admitted. Trial was preceded by extensive written discovery, 125 depositions, dozens of pretrial motions that narrowed and clarified the issues, the pretrial exchange of the written direct testimony of all 27 expert witnesses, and a detailed, comprehensive 125 page pretrial order (ER 71-195).

After its first decision the court asked the parties to agree on a plan of implementation. When the parties were unable to do so, it ordered a second trial to take place. In contrast to the careful preparation that attended the first trial, the second trial occurred after barely 2 months of preparation, was not preceded by any discovery (over the tribes' objections), or by any pretrial motions to narrow or clarify issues. Instead of a pretrial order that identified factual contentions, legal issues, witnesses and exhibits, the parties were directed only to exchange a list of witnesses and exhibits two working days before trial.

As a result, issues arose during, and even after, the hearing, without notice to the tribes, and the court made decisions that went beyond what any party had sought. Also in contrast to the first decision, the implementation

decision failed to consider or even mention historical facts, ignored both the general rules for treaty interpretation and the special canons for construction of Indian treaties, and ignored the court's own admonition in its first decision that it was obliged to make its decision based on the law and the facts, not on its own notions of the equities or to avoid inconvenience or hardship to any party.

The carefully prepared and solidly reasoned first decision should be affirmed in all respects. The hastily prepared and tried implementation decision took away significant aspects of what the court had held the tribes were entitled to as a matter of law: it was based on grave legal errors, clearly and obviously erroneous findings of fact, and abuses of discretion in a number of instances, requiring this Court to reverse or vacate several aspects of that decision.

ARGUMENT

I. STANDARD OF REVIEW.

The meaning of the treaty language is ultimately a question of law reviewed de novo. **See United States v. Washington**, 969 F.2d 752, 754 (9th Cir. 1992). The district court's interpretation of certain portions of that

language, particularly the phrase "beds staked or cultivated," rested on a number of critical findings of historical fact. Those subsidiary factual findings, whether based on oral or documentary evidence, may be set aside only if clearly erroneous. FRCP 52(a); **United States v. Skokomish Indian Tribe**, 764 F.2d 670, 673 (9th Cir. 1985); **United States v. Lummi Indian Tribe**, 841 F.2d 317, 319 (9th Cir. 1988).

Alexander and Adkins acknowledge this, Alexander Br. 28-29; Adkins Br. 28, though both seek to blunt the force of their acknowledgement. Alexander asserts that the crucial historical facts in this case "are largely undisputed." Alexander Br. 29. Appellants' briefing belies this contention, as they either ignore or dispute numerous critical findings. Adkins and UPOW, on the other hand, assert that findings regarding the "negotiators' intentions and expectations" are mixed issues of fact and law reviewed de novo. Adkins Br. 29-30; UPOW Br. 22. However, "[t]reating issues of intent as factual matters for the trier of fact is commonplace." **Pullman-Standard v. Swint**, 456 U.S. 273, 288 (1982) (refusing to carve out an exception to FRCP 52(a) for determinations of intent.) **Id.** at 287-288. **See also Tonry v. Security Experts, Inc.**, 20 F.3d 967, 971 (9th Cir. 1994).

Accordingly, where this Court has reviewed historical findings as to the intentions or expectations of those who negotiated Indian treaties, it has done so for clear error. This Court reviewed for clear error the district court's findings regarding Governor Stevens' and the Puyallup Tribe's intentions in negotiating an expansion of the Puyallup Reservation in 1856. **Puyallup Indian Tribe v. Port of Tacoma**, 717 F.2d 1251, 1260 n.8 (9th Cir. 1983). **See also, United States v. Aam**, 887 F.2d 190, 194 (9th Cir. 1989), and **Confederated Tribes v. Washington**, 96 F.3d 334 (9th Cir. 1996).

Adkins cites two decisions to support its assertion: **Lummi Indian Tribe**, 841 F.2d at 319, and **United States v. Washington**, 730 F.2d 1314, 1317 (9th Cir. 1984). Neither case, however, mentions the standard of review applicable to findings regarding the intentions or expectations of treaty negotiators. In neither case did this Court have occasion to review such findings, as the cases involved not the interpretation of treaty terms, but rather determinations as to where tribes customarily fished at treaty times (a determination this Court has classified as a mixed question of law and fact, as it involves the application of an established legal definition --

that of the term "usual and accustomed grounds and stations" -- to established facts). **See United States v. Washington**, 969 F.2d 752, 754-755, & n.2 (9th Cir. 1992).

This Court should review all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions, for clear error. It should then review, de novo, whether the district court reached the proper conclusion as to the meaning of the shellfishing proviso given those findings. **Aam**, 887 F.2d at 194.

II. RULES AND CANONS OF CONSTRUCTION.

A. The Parties' Intent Controls Treaty Interpretation.

Interpretation of Indian treaty language is subject both to general rules applicable to statutes, contracts and treaties, and to special canons applicable only to such treaties.[1] The basic goal of treaty interpretation is to "determine what the parties meant by the treaty [terms]." **Shoshone Indians v. United States**, 324 U.S. 335, 353 (1945); **see also, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n. (Fishing**

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[1] **See Sutherland Stat. Const.** §64.03 at 269 (5th ed. 1992); **United States v. Alvarez-Machain**, 504 U.S. 655, 663 (1992); **In Re Extradition of Howard**, 996 F.2d 1320, 1326 (1st Cir. 1993); **United States v. Kember**, 685 F.2d 451, 458 (D.C. Cir. 1982).

Vessel), 443 U.S. 658, 675 (1979); **United States v. Adair**, 723 F.2d 1394, 1409 (9th Cir. 1983). This analysis of the treating parties' intentions "begin[s] with the text of the treaty and the context in which the written words are used." **Eastern Airlines, Inc. v. Floyd**, 499 U.S. 530, 534 (1991) (internal quotations and citations omitted); **Air France v. Saks**, 470 U.S. 392, 396-397 (1985). Thus, courts seek to interpret the treaty language according to the "contemporary understanding" of the terms used by the treaty drafters, **Floyd**, 499 U.S. at 537, and "consistent with the shared expectations of the contracting parties." **Saks**, 470 U.S. at 399.

In doing so, courts frequently look beyond the treaty text to other sources casting light on the text's meaning. "'[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" **Floyd**, 499 U.S. at 535 (quoting **Choctaw Nation of Indians v. United States**, 318 U.S. 423, 431-432 (1943)); **see also**, **Saks**, 470 U.S. at 396 (same); **Oliphant v. Suquamish Indian Tribe**, 435 U.S. 191, 206 (1978) ("[Treaties] cannot be interpreted in isolation but must be read in light of the common notions of

the day and the assumptions of those who drafted them"). Under no circumstances, however, may the courts rewrite treaty terms to satisfy their notions of equity. **Choctaw, supra**, 318 U.S. at 432; **United States v. Choctaw and Chickasaw Nations**, 179 U.S. 494, 531-533 (1901).

B. Exceptions Within Treaties Are Narrowly Construed.

The shellfish proviso carves out an exception to the broader right of taking fish reserved by the tribes. "[I]n construing provisions . . . in which a general statement of policy is qualified by an exception, . . . the exception [is usually read] narrowly in order to preserve the primary operation of the provision." **Commissioner v. Clark**, 489 U.S. 726, 739 (1989); **EEOC v. Kamehameha Schools/Bishop Estate**, 990 F.2d 458, 460 (9th Cir. 1993) ("We construe the statutory exemptions narrowly . . ."); **Korherr v. Bumb**, 262 F.2d 157, 162 (9th Cir. 1958) ("where words of exception are used, they are to be strictly construed to limit the exception"); **Canadian Pac. Ry. Co. v. United States**, 73 F.2d 831, 834 (9th Cir. 1934); **Sutherland on Statutory Construction**, §20.22 (5th ed.) at 110 ("[a] proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute").

C. Other General Principles Of Treaty Construction.

It is also the rule that where an express exception to a general right is stated, no other exceptions will be inferred (*expressio unius est exclusio alterius*). **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, 507 U.S. 163, 168 (1993) (holding that the exception to notice pleading contained in FRCP 9(b) negated other exceptions. This rule is not a legal technicality, it is a matter of common sense:

> Although the expressio unius maxim has had widespread legal application, there is nothing peculiarly legal about it. It is a product of 'logic and common sense.' . . . It expresses the learning of common experience that when people say one thing they do not mean something else.

Sutherland § 47.24, at 228. **See also American Methyl v. EPA**, 749 F.2d 826, 835 (D.C. Cir. 1984).

Treaties should not be interpreted so as to render one part inoperative. **Colautti v. Franklin**, 439 U.S. 379, 392 (1979); 873 F. Supp. 1422 at 1429 (1994). Where the United States can accomplish an objective by clear and direct words, and where it has chosen to do so in similar or closely related circumstances in the past, courts have found the absence of those clear and direct words to suggest a lack of intent to accomplish the same purpose.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (" . . . the United States was competent to say . . . what it meant, as it had in the 1817 grant . . ."); **Williams v. Florida**, 399 U.S. 78, 97 (1970); **Crawford Fitting Company v. J.T. Gibbons, Inc.**, 482 U.S. 437, 442 (1987); **United States v. Henderson**, 746 F.2d 619, 622 (9th Cir. 1984).

Finally, where a term is found only once in a text, it can have only one meaning, not different meanings for different circumstances. **Ratzlaf v. United States**, 510 U.S. 135, 143 (1994); **Gonzales v. Barber**, 207 F.2d 398, 402 (9th Cir. 1953), **aff'd** 347 U.S. 637 (1954).

D. Special Canons Of Construction Apply to Indian Treaties.

Special canons also control the construction of Indian treaties. Most basic of these is that Indian treaties are construed broadly for the tribes' benefit, not narrowly to their prejudice; ambiguities are resolved in favor of the tribes. **See, e.g., McClanahan v. Arizona State Tax Comm'n.**, 411 U.S. 164, 174 (1973). These rules have been applied to the treaties at issue here. Thus, in **United States v. Winans**, 198 U.S. 371, 380-81 (1905), the Court said:

> we will construe a treaty with the Indians as 'that unlettered people' understood it, . . . 'look[ing] only to the substance of the right,

without regard to technical rules.'

As the district court recognized, **Winans** also stated the bedrock principle that the fishing rights here were neither given to tribes nor created by the treaties, but are pre-existing rights reserved by the tribes. **Id.** at 381.

In **Seufert Brothers Co. v. United States**, 249 U.S. 194, 199 (1919), the Court refused to adopt a restrictive view of the "comprehensive" treaty language. In **Tulee v. Washington**, 315 U.S. 681 (1942), the State of Washington advocated a narrow, restrictive reading of the fishing clause that would have allowed the State to charge Indians a fee to exercise their treaty fishing rights. The Court disagreed:

> In determining the scope of the reserved rights of hunting and fishing, **we must not give the treaty the narrowest construction it will bear**. . . .

Id. at 684-85 (emphasis added). To the contrary, the courts should give the tribes' rights a "broad gloss." **Fishing Vessel**, 443 U.S. 658, 679 (1979).

In its 1994 decision and in its principal pretrial rulings the trial court carefully observed and applied both the general and special rules for interpreting the treaties. In its implementation order, however, the court failed to mention, let alone apply, any of these rules.

III. BECAUSE SHELLFISH ARE FISH, PRIOR DECISIONS REGARDING THE RIGHT OF TAKING "FISH" APPLY TO SHELLFISH.

The district court held that shellfish are within the treaty right of taking "fish." ER 48-56; 873 F. Supp. at 1430. No one appealed from that determination and none may contest it now.[2]

The court reached its conclusion without reliance on the special canons for construction favoring Indian tribes because its "interpretation [was] compelled by the plain language of the Treaties." **Id.** The treaties reserve to the tribes the right of taking fish, but prohibit them from taking shellfish from certain locations. It "inevitably follows" that shellfish fall within the broader fishing right, because "[i]f the right of taking 'fish' did not include shellfish, the entire shellfish proviso would serve no purpose." **Id.** Because treaties should not be interpreted to render any section redundant, **Colautti v. Franklin**, 439 U.S. at 392, the right of taking fish necessarily includes shellfish.

The district court also pointed to the undisputed evidence that Indians

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[2] The State argued below that there was no treaty right to shellfish, ER 48-49, CR 12975-76, but now concedes that the "negotiators intended to allow treaty rights to shellfish . . . ." State Br. 22. **See also** State Br. n.6.

made extensive use of and depended upon shellfish at and before the treaties and that the United States negotiators were aware of that use and dependence. ER 54-55. There is no evidence that anyone at the treaty negotiations stated an intent to exclude shellfish from the reservation of fishing rights. As a result, the tribes' reserved shellfishing rights are limited only by the proviso. ER 53-54.

Additional compelling evidence supports the district court's decision, including the language of an 1854 treaty with Great Britain that treated shellfish as fish,[3] the contemporaneous understanding of the public in the 1850's that shellfish were fish,[4] the United States negotiators' specific reference to shellfish as fish,[5] prior Washington state,[6] federal,[7] and other

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[3] Reciprocity Treaty With Great Britain, Article 1, June 5, 1854, 10 Stat. 1089, relied upon in **Fishing Vessel**, 443 U.S. at 677 n.23.

[4] **E.g.,** SER 632-33; SER 835-43.

[5] **E.g.,** SER 743; SER 835-43.

[6] **E.g., State v. Courville**, 36 Wn.App. 615, 619, 676 P.2d 1011, 1014 (Div. 1 1983).

[7] **E.g., Martin v. Waddell**, 41 U.S. 367 at 410, 413, 414, 417 (1842) (using the term fishery for shell-fish as well as floating fish); **Smith v. Maryland**, 59 U.S. 71, 74-75 (1855).

state court[8] decisions that shellfish are fish, federal statutes that define fish as including shellfish,[9] the State of Washington's treatment of shellfish as fish for all other regulatory purposes,[10] the opinion of the state's Attorney General in 1947 that shellfish are included within the treaty right of taking fish,[11] and, finally, appellants' concessions in open court that "the State of Washington has long proceeded on the assumption that the treaties can legitimately be interpreted to include the right of taking shellfish." SER 1-4.

It is of crucial significance to this case that shellfish fall within the broader right of taking fish. As the district court held, because shellfish are fish, the scope and extent of the right of taking shellfish is governed by prior decisions regarding the right of taking other fish, excepting only the effect of the proviso regarding staked or cultivated beds. 873 F. Supp. at 1428-1430.

The meaning of the "right of taking fish," "at all usual and

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[8] **E.g., Moulton v. Libbey**, 37 Me. 472, 489-493, 59 Am.Dec. 57 (1854) (SER 1244); **State v. Hill**, 34 S.E. 432, 433, 125 N.C. 194 (1894); **State v. Hardy**, 104 N.H. 310, 185 A.2d 258 (1962).

[9] 16 USC § 1802(7).

[10] **E.g.,** RCW 75.08.011.

[11] SER 901-905 ("It is our belief that the right to take fish mentioned in the treaty includes the right to take shell fish, as well as swimming fishes....")

accustomed grounds and stations," and "in common with citizens," has become well-established through almost 100 years of judicial scrutiny of the Stevens treaties. Indeed, when the Supreme Court issued its seventh opinion regarding the meaning of the right of taking fish in **Fishing Vessel**, it described its decision as "virtually a 'matter decided'" by its six earlier decisions. 443 U.S. at 679.

Those decisions, along with the decisions of this Circuit and the district court, have conclusively resolved the following issues:

1) The treaties must be broadly construed according to special canons, as described above;

2) Tribes shall have the opportunity to take up to fifty percent of the harvestable fish, based on the "in common with" language of the treaties (**United States v. Washington**, 384 F. Supp. 312, 343 (W.D.Wash. 1974), **aff'd**. 520 F.2d 676 at 687 (9th Cir. 1975); **Fishing Vessel**, 443 U.S. at 685);

3) Admission of the State of Washington into the Union on an equal footing with the original states did not affect the tribes' reserved fishing rights (384 F. Supp. at 401; **Winans**, 198 U.S. at 383-83);

4) Treaty fishing rights are not lost by the sale of land into private property; state property laws do not supersede treaty rights (**Winans**, 198 U.S. at 381; **Fishing Vessel**, 443 U.S. at 684);

5) The right of taking fish is not limited as to species of fish or the origin of fish (384 F. Supp. at 401);

6) "Usual and accustomed grounds and stations" are both those specific locations and those broader areas which were customarily used for fishing purposes at treaty times (384 F. Supp. at 332); and

7) The treaties neither reserve nor prohibit any specific manner, method or purpose of taking fish. (384 F. Supp. at 407).

The "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens . . . ," is stated only once in each treaty. That language is a simple and direct statement that applies on its face to all "fish," without variation or differentiation. Because the right of taking fish is stated only once, it applies equally to all fish. Indeed, because there is a single express exception for shellfish beds staked or cultivated by citizens, no other implied exceptions are permissible. **Leatherman**, 507 U.S. at 168 (1993). As the district court noted, there is no treaty language

to support appellants' proposed limitations on the right of taking fish. 873 F. Supp. at 1430.

A. "In Common With" Has The Same Meaning For Embedded Shellfish On Private Property As For All Other Fish.

In **Winans**, the Supreme Court held that the treaties:

> . . . imposed a servitude upon every piece of land as though described therein. . . . The 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. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

198 U.S. at 381-382. **See also Fishing Vessel**, 443 U.S. at 676, n.22, 680-681. Despite this express holding, appellants argue that tribes have no right to take shellfish embedded in privately owned tidelands. They base this argument on the treaty language requiring tribes to share their right of taking fish "in common with" citizens, arguing that prior decisions are not binding because they dealt with anadromous fish.[12] They claim this distinction is significant because anadromous fish are "public" or "common" resources, whereas they assert shellfish embedded in privately owned tidelands are not.

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[12] They also base this claim on the proviso regarding staked or cultivated beds, an argument refuted in section IV.

However, the prior decisions unambiguously interpret "in common with" as that phrase modifies the tribes' right of taking **all** fish. Appellants' attempt to distinguish between public and private resources is not new; it was expressly rejected in **Fishing Vessel.**[13] Their distinction would violate both the ordinary principles of treaty interpretation and the special canons for construction of Indian treaties. Their distinction is also based on two false premises: that shellfish embedded in privately owned tidelands were not considered common resources at treaty times, and that the right of taking other fish does not implicate Indian use of private property. Finally, to prevail, appellants would have to establish, but cannot, that the district court's factual findings as to the intent and understanding of the parties to the treaties are clearly erroneous.

1. Appellants' Argument That The Tribes' Rights Are Limited To "Public" Resources Is Foreclosed By Prior Decisions.

The meaning of the right of taking fish "in common with citizens" has been conclusively determined. "In common with" was not understood by the

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[13] Intervenor appellants' repeated attempts to relitigate the past 22 years of decisions in this case are improper; intervenors take the case, and its prior rulings, as they find them. **Arizona v. California**, 460 U.S. 605, 615 (1983); **De Mesa v. Castro**, 844 F.2d 642, 645 (9th Cir. 1988).

Indians to place any meaningful limitations on tribal rights to take fish, but only to allow non-Indians the opportunity to share the tribes' fishing places. 384 F. Supp. at 357; **Fishing Vessel**, 443 U.S. at 668 n.12. As discussed below in section III E, "in common with" is also the basis for the courts' allocation of the fishery into 50% shares.

In **Fishing Vessel**, the State argued unsuccessfully that the right reserved by the tribes was merely a "public," i.e., "common" right. SER 92-3, 96 (the Indians reserved " . . . the same rights that citizens might enjoy in a common fishery.") The Supreme Court rejected the argument that "in common with" should be read as guaranteeing individual Indians only the same rights as individual non-Indians. **Fishing Vessel**, 443 U.S. at 677. It found that interpretation would be "totally foreign to the spirit of the negotiations" and thus concluded that the right of taking fish "in common with" citizens "secur[ed] an interest in the fish runs themselves." **Id.** at 676-677. The Court rejected the contention that tribes' rights were limited to "public" or "common" rights:

> [I]t was decided [below] that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which

seemed to promise more and give the word of the Nation for more. **Fishing Vessel**, 443 U.S. at 680, quoting **Winans**, 198 U.S. at 380 (brackets in original).

Winans is particularly apt because a primary issue there was whether the right of taking fish included the right to use and occupy privately owned lands. The Court expressly held that there was a right to use private property for treaty purposes. 198 U.S. at 381-382. The Supreme Court not only quoted **Winans** approvingly in **Fishing Vessel**, 443 U.S. at 680-681, it went further and summarized 70 years of consistent holdings flatly declaring that the State and its non-Indian citizens may not rely on state property law concepts to deprive tribes of their treaty fishing rights. **Id.** at 684. While the State takes a different position now, 17 years ago it conceded in **Fishing Vessel** that the treaty right encompassed a right to use private land. SER 96 (". . . the claims of private landowners were subject to the easement right created by the treaties for the benefit of the Indians"); 443 U.S. at 677 n.22.

Appellants' attempt to distinguish **Winans** and **Fishing Vessel** on the grounds they only addressed salmon completely misses the point. The nature of the fish resource being pursued was not the issue in **Winans** and

was not a basis for the decision. The issue was whether fish could be pursued on private land. The unequivocal answer was that they could.

If the right of taking fish were to depend upon whether the State chose to make lands public or private, the State would be able to control the scope of the rights reserved in treaties. In this case, the State has already sold 80% of the tidelands east of the mouth of the Strait of Juan de Fuca, SER 999-1000, 1002, it leases additional tidelands, SER 1002, SER 622-23, SER 339-41, and it claims that it may alienate all the rest at its whim.[14] SER 42, 43. Under appellants' theory, treaty fishing would exist only at the sufferance of the State. That theory has never been accepted and no reason exists to adopt it here.

2. "In Common With" Is Not Synonymous With "Public" or "Common" Rights.

Appellants' rely on an unstated exception to the right to take fish when they argue that the treaty only secures "public" or "common" rights. They admit that their argument requires the Court to **infer** that the right of taking

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[14] Appellants claim that the court was wrong about the percentage of Puget Sound tidelands privately controlled, Adkins Br. 7, Alexander Br. 41 n.8, but the court's finding of fact on this point is supported in the record and not clearly erroneous.

fish is limited to "common" resources and that the "right of taking fish" actually means the right of taking **"public"** fish. Adkins Br. 32. The treaties' plain language contain no such modifier and appellants seek this limitation "without pointing to any treaty language in support. . . ." 873 F. Supp. at 1430. The "right of taking fish" explicitly applies to "**all** usual and accustomed grounds and stations," not excluding those that become privately owned.

Appellants also cannot explain how an exception to the right of taking shellfish should be inferred for animals found on privately owned tidelands, when there is an express exception for shellfish found in beds staked or cultivated by citizens. Appellants' argument runs afoul of the logical principle of *expressio unius est exclusio alterius* -- express exceptions negate inferences of additional limitations. **Leatherman**, 507 U.S. at 168.

If all embedded shellfish subject to private claims are excluded by virtue of the "in common with" clause, then no purpose could be served by the express (and more limited) exception for beds staked or cultivated by citizens. **Colautti v. Franklin**, 439 U.S.at 392; 873 F. Supp. at 1429. That construction of "in common with" would thus render the proviso

"inoperative."

Furthermore, in the 1850's, where the United States intended to protect privately owned lands, it did so far more directly than by using the phrase "in common with." For example, Article 2 of the Reciprocity Treaty With Great Britain, June 5, 1854, grants British subjects the liberty to "take fish of every kind, except shellfish" "in common with the citizens of the United States," with the additional proviso that "they do not interfere with the rights of private property. . . ." Similarly, the United States explicitly protected private property rights in the Stevens treaties by making it lawful for Indians "to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner of claimant." **See, e.g.**, SER 763-68. When the United States wanted to limit Indians' rights to travel "in common with citizens of the United States," to **public** highways, it did so expressly. Treaty With The Yakimas, 12 Stat. 951, 953, Article III, ¶1.

The United States' failure to use such direct means here to restrict Indian use of private land, when it did so contemporaneously in these and other treaties, shows that it did not intend that result. **See Choctaw**, 397

U.S. at 631.

Moreover, appellants' attempt to give the single phrase "right of taking fish . . . in common with citizens" different meanings for different fish must fail, as words used only once in a text can have only one meaning. See, e.g., **Ratzlaf**, 510 U.S. at 143.

Finally, narrowing the scope of the treaties' plain language to the prejudice of the tribes through appellants' strained, technical insertion of an unstated inference, would be antithetical to virtually every canon for construing the terms of Indian treaties.

3. This Court Is Not Required To Re-Interpret The Settled Meaning Of The Treaty Terms By The Decision In *Cree v. Waterbury*.

Cree v. Waterbury, 78 F.3d 1400 (9th Cir. 1996), provides no support for appellants' assertion that the meaning of "in common with" should be reinterpreted as it applies to shellfish embedded in privately owned tidelands. Adkins Br. 54-56; Alexander Br. 34-37; State Br. 33. **Cree** held that the meaning of "in common with" for reserved fishing rights could not automatically be applied to the Yakamas' right "to travel upon all public highways" "in common with" citizens. 78 F.3d at 1402, 1405 n.5. Instead,

this Court held that the surrounding circumstances, including other treaty words, the historical context, the practical construction of the right, and the intentions of the parties, should be considered in interpreting "in common with" in the context of the right to travel on public highways. **Id**. at 1404.

Cree does not say, nor suggest, that it would be error to apply the fishing rights cases to interpret **fishing rights**. It would be extraordinary indeed to think that 90 years of detailed judicial findings and analysis of the words of the article reserving fishing rights, the historical context of those words, the practical construction of those words, and the intent of the parties, should all be scrapped in order to adjudicate anew the meaning of those words for each of scores of different species of fish. Appellants can only reach this amazing construction of **Cree** by assuming what they hope to prove, that when **Cree** says fishing rights, it means only **salmon** fishing rights. Neither **Cree** nor the treaties contain any such limitation.

Also, unlike the district court in **Cree**, the district court here reviewed the words of the treaties, their historical context, the practical construction of the words, and the intent of the parties. It found as a fact that the United States promised, and the Indians understood and relied on the promise, that

the right to take shellfish would continue to exist, limited only by the proviso regarding beds staked or cultivated:

> The Defendant's and intervenors' proposed interpretations are also generally consistent with the United States' purposes in entering the Treaties, **except in one important respect:** neither of these interpretations is consistent with the United States' avowed intention to preserve for the Indians their ancient fisheries. . . . [they would] permit[ ] the gradual exclusion of Indians from natural shellfish beds, a result clearly unwanted and unintended by the parties to the Treaties.

873 F. Supp. at 1437 (emphasis in original). Those factual findings are unchallenged by appellants and are fully supported by the record.

4. Development In Washington Was Neither Intended Nor Understood To Interfere With Indian Fishing Rights.

Appellants argue that the United States intended and the Indians understood that Indians would lose access to natural shellfish populations once the tidelands became privately owned or claimed by settlers. In support, they point to the United States' goal of preventing friction between Indians and settlers, the United States' intent to foster development of the tidelands, and the United States' intent to integrate Indians into the local economy. They also point to the Indians' own private property concepts and their understanding of the exclusive nature of non-Indians' private property rules. Finally, they argue that the post-treaty conduct of the United States

and Indians supports their interpretation.

Appellants ignore the district court's factual findings that Indians did not understand, and the United States did not intend, that the treaty would permit settlers' land claims to interfere with the tribes' continued access to shellfish. The court's findings are well supported in the record.

a. The United States' Intent To Prevent Friction Was Consistent With The Intent To Continue Tribal Shellfishing Rights.

The court found that the United States' goal of preventing friction did not mean the United States intended that "Indians would relinquish their ancient fishing grounds on demand by settlers." 873 F. Supp. at 1436-37. As appellants' expert admitted, Governor Stevens intended to prevent exclusion of Indians from their fishing grounds by whites who had taken Donation Act claims. Richards, SER 272. Appellants choose to ignore this evidence, but, like the district court here, the Supreme Court found it to be of crucial importance in interpreting the meaning of "in common with":

> It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter 'should be excluded from their ancient fisheries,' . . . and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

Fishing Vessel, 443 U.S. at 676.

b. Tideland Development Was Not Inconsistent With Continued Indian Shellfishing.

Neither the "prospect nor the fact of development" evidenced a United States intent to deprive tribes of access to shellfish through the use of the "in common with" language. 873 F. Supp. at 1438. Stevens did not perceive any conflict between development of tidelands and continued Indian rights to natural shellfish beds. The United States believed that shellfish populations were inexhaustible, so that development was unlikely to tangibly prejudice Indian shellfishing, and the United States negotiators were aware of thriving shellfish industries adjacent to fully developed East Coast cities. **Id.**

Appellants have not challenged these well supported historical findings, nor can they. In 1854 Isaac Stevens wrote to the Commissioner of Indian Affairs that the supply of clams in the Puget Sound was "inexhaustible." ER 706. That assessment was repeated almost 40 years later by the Washington State Fish Commissioner, who further noted that "[t]he clams are dug altogether, or nearly so, by Indians. . . ." SER 896-97.

In the 1850's, major shellfishing areas in the country were located in

very close proximity to highly developed cities. As one observer reported, "[t]he most important plantations are in the vicinity of the large centers of population. . . ." SER 893. New York, Boston, Baltimore, and New Haven all boasted thriving shellfishing activity, SER 895, with New York's population exceeding 500,000 in 1850, larger than the present-day population of Seattle. White, SER 128.

After reviewing this uncontroverted evidence, the district court concluded that when the United States encouraged and participated in the development of Puget Sound tidelands those actions were not inconsistent with its promise of continued Indian shellfishing.

c. Integration Of Indians Into The Economy Is Consistent With Continued Indian Shellfishing.

The district court found that the United States intended Indians to interact or integrate with settlers, but that the United States did not intend to "break down tribal affiliations of the Puget Sound Tribes and absorb the tribal members as individuals." 873 F. Supp. at 1439. The court also quoted from earlier findings in this case, upheld on appeal, that the United States' intent to "accomplish a transition of the Indians into western culture" was not an intent "to prevent the Indians from using the fisheries for

economic gain." 873 F. Supp. at 1438-39, quoting 384 F. Supp. at 355. Instead, the United States intended that, after the treaties, Indians would continue to supply shellfish to settlers, as well as continue to provide labor to and participate in the regional economy. 873 F. Supp. at 1439.

The United States' intent is reflected in Stevens' correspondence explaining that Indians should continue to take fish as part of their future "in the labor and prosperity of the Territory." ER 1052-1053. Part of his motivation was to keep the costs of the treaties down, as he was instructed, by permitting Indians to remain self-sufficient. ER 1047-48; SER 826, 830-31. Stevens also expressed the importance of continued Indian supply of shellfish to settlers. ER 1051. Appellants' own experts admitted these facts: ER 944-946, 999, 1011-1013.

The record therefore supports the court's findings. There was no intent to limit the tribes' access to natural shellfish. Rather, there was an intent that Indians would continue that access for their own subsistence, for commercial purposes, and to supply shellfish to non-Indians.

d. Indian Property Law Concepts Are Irrelevant.

Appellants argue that Indians' concepts of private property

demonstrate their understanding that they would lose access to shellfish embedded in privately owned tidelands. Alexander Br. 12, 39; Adkins Br. 13. However, Indians had private "ownership" of salmon and other fishing locations.[15] Lummi "maintained prosperous communities by virtue of their ownership of lucrative saltwater fisheries." 384 F. Supp. at 360. Lummi reef net sites "were owned by individuals who claimed proprietary rights by virtue of inheritance. . . ." **Id.** at 361. These "constituted very valuable properties to their native owners. . . ." **Id.** Similarly, Makah had rich halibut fisheries "by virtue of ownership of lucrative fishing banks respected by competing tribes. . . ." **Id.** at 363. **See also id.** at 352, 356-57, 378. This was conceded by appellants' expert. ER 982.

Despite the abundant evidence that some salmon fishing areas were held in various forms of "private ownership," neither this Court nor the Supreme Court has construed "in common with" to mean that tribes lose access to salmon fishing locations when they pass into non-Indian ownership. **See Winans**, 198 U.S. at 380-381; **Fishing Vessel**, 443 U.S. at 676 & n.22,

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[15] The varied and complex concepts Indian people had regarding private property were different than non-Indian concepts, varied from tribe to tribe, and were much less exclusive than non-Indian concepts. SER 1038-47.

681; 520 F.2d at 691 & n.6. No different result can be reached with respect to shellfish.

e. Indian And United States Post Treaty Actions Are Consistent With Continued Indian Shellfishing.

The court below reviewed appellants' arguments regarding the effect of post-treaty actions of the United States and Indians. The court found as a fact that they had little probative value because of remoteness in time from the signing of the treaties, or because of their irrelevance. For the reasons explained in section IV B(9), appellants cannot show these findings to be clearly erroneous.

5. There Was No Legal Or Factual Basis To Distinguish Shellfish From Other Fish At Treaty Time.

Appellants' underlying premise, that the United States negotiators understood shellfish had a different legal status than salmon in 1854, is incorrect. The district court properly found that shellfish were legally indistinct from other fish. 873 F. Supp. at 1430.

a. Embedded Shellfish Were A Common Resource At Treaty Times.

At the time of the treaties, shellfish were viewed as part of the

common fishery, as the district court recognized. 873 F. Supp. at 1439. Adkins' counsel twice conceded that at treaty times shellfish were a common resource. SER 140, 448. The evidence on this point is overwhelming.

Joseph Angell, in his authoritative 1847 Treatise On The Right Of Property In Tide Waters, concluded:

> The *prima facie* public and common right of piscary, is not confined to floating or swimming fish of every description, but extends to *shell-fish*. And it is not controverted by any authority, that the right of taking shell-fish on the *shore*, between high and low-water mark, is, in legal presumption, a common right.

SER 907 (italics in original, citations omitted). The Supreme Court equated shellfish to other fish as a matter of public right on several occasions. In **Martin v. Waddell**, 41 U.S. 367, 412 (1842), the Court observed that, at common law, the "people of England have regularly a liberty of fishing in the sea . . . as a public common of piscary, and may not . . . be restrained of it. . . ." That right applied "as well for shell-fish as floating fish," **id.** at 413, and had been "preserved in every other colony founded on the Atlantic borders. . . ." **Id.** at 414. **See also Smith v. Maryland**, 59 U.S. at 74-75. The State acknowledged this principle in **Fishing Vessel**, SER 95, although it repudiates it now.

Appellants' citation of contrary language in **Martin** is to the **dissenting** opinion, 41 U.S. at 433. Adkins Br. 45. Appellants also refer to **Den v. The Jersey Co.**, 56 U.S. 426, 432-33 (1853), where the Court described **Martin** as characterizing the rights to **planted** oysters as dependent on the title to the tidelands.[16] But **Den** followed **Martin**; it contains nothing suggesting that **natural** shellfish beds were not part of the common fishery. **Sequim Bay Canning Co. v. Bugge**, 49 Wash. 127, 94 P. 922 (1908), and **McKee v. Gratz**, 260 U.S. 127 (1922), also cited by appellants, are half a century or more after the treaties and irrelevant to the understanding of anyone at treaty time.

Appellants argue that when shellfish were found on privately owned tidelands, however, they ceased to be a common or public resource, and instead automatically became the private property of the tideland owner. Adkins Br. 43, Alexander Br. 44-45. As the district court concluded,

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[16] **Martin** was based on an 1824 New Jersey statute that allowed the exclusive use of the tidelands for growing and planting oysters, not for the harvest of natural shellfish beds. (The Act involved is identified at 41 U.S. at 379 and 408.) That act expressly excepted "all natural oyster beds," which were to be "set apart and designate[d] for public use. . . ." SER 1139-41. Thus the oysters which followed the title to the soil, as stated by the dissent in **Martin**, were only **planted** oysters, not oysters found in natural beds.

however, "the uniform common law at treaty time held that private ownership of a parcel of tideland did not include private rights to shellfish on that parcel." 873 F. Supp. at 1439. Again, the overwhelming weight of authority relied upon by the court supports its conclusion:

> There is no doubt, that the public have a right to take shell-fish on the shore, though the right of soil in the shore happens to be private property. To exclude the public from such fishing, there must be proved, besides the mere ownership of the soil of the shore, what is denominated a *several* fishery, or, in other words, a sole and exclusive right of fishery, in the riparian proprietor. Grant of the soil does not necessarily convey a peculiar privilege to fish between high and low-water mark, because all the king's subjects would have a right to fish there, unless a particular person was entitled to it by *specific* grant.

Angell, ER 1119 (italics in original).

Angell's conclusion is uniformly supported by treaty time case law. In **Peck v. Lockwood**, 5 Day 22 (Conn. 1811), (SER 1188-91), the Connecticut Supreme Court, drawing on centuries of English common law, held:

> . . . it is a right common to every subject, to enter upon the lands of the plaintiff [the landowner], betwixt high and low-water mark, and to take from thence shell-fish, by digging up the soil.

Id. at 28. This was not considered inconsistent with the landowner's title to the tidelands:

> This entry is not adverse to the plaintiff's title to the soil. It is not made with a view to affect such title. It is made only under a claim to fish, and not to occupy for any other purpose. It is a claim in perfect consistency with the plaintiff's title to the soil.

Id. at 25.[17] **See also, Weston v. Sampson**, 62 Mass. 347, 351, 353 (1851), (SER 1229-33), and **Moulton v. Libbey**, 37 Maine 472, 490 (1854), (SER 1244-60) ("[t]he fact that the soil [of a private tideland owner] between high and low water mark may be dug up or disturbed to take oysters and clams, would have no tendency to prove that they were not included in the [common fishery], . . . [S]hell-fisheries have ever been regarded as part of the public fisheries of England. . . .")

Appellants attempt to distinguish **Moulton** and **Weston** on the grounds that the landowners' title in those cases derived from a 1641 colonial ordinance which contained an "express reservation of the common fishery." Adkins Br. 47.[18] However, in neither **Moulton** nor **Weston** did the Court

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[17] Appellants claim **Peck** was overruled by **Chapman v. Kimball**, 9 Conn. 38 (1831), (SER 1218-21). However, **Chapman** explicitly reaffirmed **Peck**'s basic holding: "The doctrine of the case is unquestionably sound, that is, 'the right to take shell fish on the land of an individual between high and low water mark, is a common right.'" **Chapman**, 9 Conn. at 39. **Peck** was subsequently cited in **Smith v. Maryland**, 59 U.S. at 75.

[18] Because the 1641 Ordinance is unique to Massachusetts and Maine, (continued...)

mention such a reservation of rights, let alone base its reasoning on it. In both cases the courts based their holdings on common law principles. Nor does the **Opinion Of The Justices**, 365 Mass. 681, 313 N.E.2d 561 (1974), support appellants' claim that **Weston** and **Moulton** are based on the 1641 Colonial Ordinance. The Opinion indicates that even before the Colonial Ordinance it was understood that when title to tidelands was transferred to a private individual it was subject to the public's right of fishery:

> At common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in the Crown but subject to the rights of the public to use the coastal waters for fishing and navigation. [Citations omitted.] **When title was transferred to private persons it remained impressed with these public rights.**

Id. 365 Mass. at 684; 313 N.E.2d at 565 (emphasis added). **Bell v. Town of Wells**, 557 A.2d 168 (Me. 1989), also cited by appellants, followed the

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[18](...continued)
appellants seem to argue that cases from those states are not authoritative elsewhere. What is unusual about those states, however, is that the tidelands were given to the adjacent upland property owner in fee simple (by the 1641 Ordinance), not that the public's rights to fish from those tidelands are preserved nonetheless. If anything, the law from those states fully supports the district court's conclusion that it was unlikely that anyone would have anticipated massive sales of tidelands in the future Washington state, or if they had so anticipated, that they would have had any reason to think the public's rights to take shellfish would thereby be diminished.

Opinion Of The Justices from Massachusetts. It held that the pre-existing public rights reserved in the 1641 Ordinance were those stated in the Ordinance: navigation, fishing and fowling, **id.** at 174, and that fishing included digging for clams and other shellfish. **Id.** at 173.

Appellants' attempt to limit **Moulton** and **Weston** is flatly contradicted by **Proctor v. Wells**, 103 Mass. 216 (1869), (SER 1277-79), a case they fail to mention. The plaintiff landowner there brought suit against a member of the public for taking clams from his tidelands. His title derived from an 1844 conveyance from the town of Ipswich, not from the 1641 ordinance, **id.** at 216-17, but that fact made no difference to the reasoning or outcome of the case:

> The law which governs this case is well settled by repeated and carefully considered decisions of this court . . . [T]he right of fishing, not being an incident to the right of property in the soil, but a public right to take the fish, which, whether moving in the water or imbedded in the mud covered by it, depend upon the water for their nourishment and existence, is unaffected by the question whether the title in the land under the water is in the Commonwealth, in the town, or in private persons. **Coolidge v. Williams**, 4 Mass. 140. **Randolph v. Braintree**, Ib. 315. **Dill v. Wareham**, 7 Met. 438. **Weston v. Sampson**, 8 Cush. 347. **Lakeman v. Burnham**, 7 Gray, 437. **Commonwealth v. Bailey**, 13 Allen, 541.

Id. at 217-18.

Other cases cited by appellants give them no greater support. **Phillips Petroleum v. Mississippi**, 484 U.S. 469 (1988), noted that "even where tidelands are privately held -- public rights to use the tidelands for the purposes of fishing . . . etc., have long been recognized." **Id.** at 483 n.12. That case found that property owners could not rely on property interest expectations to defeat public rights in tidelands. **Id.** at 482.

Wooley v. Campbell, 37 N.J.L. 163 (1874), came twenty years after the treaties. It also involved oysters planted where there were only "a few scattered natural oysters," not a natural bed. **Id.** at 65. Thus this case does not appear to be inconsistent with the rule that prevailed in New Jersey and everywhere else at the time of the treaties. **See** section IV A(2)(b), **infra**. **State v. Cozzens**, 2 R.I. 561 (1850), was a decision based upon a statute in force in Rhode Island between 1844 and 1852 that permitted exclusive rights to natural shellfish beds, the single pre-treaty exception to the prevailing rule that title to tidelands did not automatically deprive the public of the right to take shellfish from that property. The district court did not consider that single exception, which disappeared two years before the treaties, to change the general understanding of the effect of ownership to land on public fishing

rights. 873 F. Supp. at 1434-35, 1437.

McKenzie v. Hulet, 4 N.C. 578 (1817), stands for nothing more than the fact that it was possible (although rare) for an exclusive fishery to be granted to an individual that would cut off the public's fishing rights. That exclusive fishery did not result merely from ownership of tidelands, however, it required a specific grant:

> . . . the right of shell-fishery on the shore may be separated from the ownership of the soil therein. . . . unless such owner, and the former owners of such soil, have immemorially excluded the public, by means of a several fishery, prescribed and proved, or founded in express ancient grant, the public right, by the common law of England, will prevail.

Angell, SER 908. This is clear not only from the authorities of that time, such as Angell, but also from later cases from North Carolina, which repeat the familiar rule regarding the public's rights to fisheries, including to shellfish from natural beds. **See, e.g., State ex rel. Rohrer v. Credle**, 369 S.E.2d 825, 828-31 (N.C. 1988).

Appellants' claims for differential legal treatment of embedded shellfish on private property are belied by the history of Washington State itself. In 1907, more than a decade after the State began selling its tidelands in Puget Sound, the Legislature passed a statute that would have given

private tideland owners exclusive rights to shellfish beds on their tidelands, provided they complied with certain requirements. SER 955-57. The Legislature's action shows that private tideland ownership was **not** considered to carry with it an automatic right to exclude the public from natural shellfish beds.

Governor Albert Mead vetoed the bill, saying in his Veto Message "Clams are fish. Fish are *ferae naturae*; therefore, wild animals." He went on to explain that the bill had to be vetoed because it not only interfered with the historic rights of the public to take shellfish from natural beds, but also failed "to recognize the sacred provisions of treaty rights" unless an exemption were included for Indians who "were dependent upon their harvests from the clam beds for a livelihood." SER 898-900.

Thus, at the time of the treaties and for decades thereafter, no legal distinction was drawn between shellfish embedded in privately owned tidelands and other varieties of fish. In the treaty negotiators' world, such shellfish were viewed as being part of the "common" fishery.

Finally, appellants rely on cases from Wisconsin and Minnesota that

have limited the exercise of treaty rights on private property.[19] Adkins Br. 33, 34, 38; Alexander Br. 42, 44, 49. However, the reserved fishing rights in the Stevens treaties have long been interpreted in **Winans** and **Fishing Vessel** to hold that fishing rights can be exercised on private property and that Indians did not understand they could be excluded from fishing simply because land was privately owned. Those decisions are controlling; Wisconsin and Minnesota decisions involving different treaty language and different factual backgrounds are not.

The Wisconsin and Minnesota cases are not authoritative for additional reasons. In neither case had the tribes sought access to private lands. **LCO I**, 700 F.2d at 365 n.14; **Lac Courte Oreilles Band v. Wisconsin (LCO IV)**, 653 F. Supp. 1420, 1431-32 (W.D.Wisc. 1987); **Mille Lacs**, 861 F.Supp at 836. The Seventh Circuit's statement that Chippewas would have understood their rights would be limited on lands needed for settlement was not only criticized by the district court as appellate fact finding in the

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[19] **Lac Courte Oreilles Band v. Voight**, 700 F.2d 341 (7th Cir. 1983) (**LCO I**), **Lac Courte Oreilles Band v. Wisconsin**, 760 F.2d 177 (7th Cir. 1985) (**LCO II**), **Lac Courte Oreilles Band v. Wisconsin**, 740 F. Supp. 1400 (W.D. Wisc. 1990) (**LCO III**), and **Mille Lacs Band v. Minnesota**, 861 F. Supp. 784 (D. Minn. 1994).

absence of a record, **LCO IV**, 653 F. Supp. at 1431-32, but declared to be incorrect as well. **Id.** Ultimately, the court permitted access to private property in certain circumstances. **Id.** at 1432. The decision in **LCO III** is also no help to appellants because if the tribe had been trying to exercise fishing rights (instead of trapping), the court recognized that private riparian ownership would not have been an obstacle. 740 F. Supp. at 1424-26. Lastly, appellants fail to mention another Chippewa treaty rights case where hunting and fishing rights were held **not** to be contingent on the ownership of land. **Sokaogon Chippewa Community v. Exxon Corp.**, 805 F. Supp. 680, 701 (E.D.Wis. 1992), **aff'd on other grounds**, 2 F.3d 219 (7th Cir. 1993).

b. Salmon Were Caught From Tidelands At Treaty Times.

Appellants' efforts to distinguish shellfish from other fish are grounded in a second faulty premise. The undisputed evidence establishes that salmon and other fish were taken by Indians from tidelands at treaty time. Appellants' experts, Richards, Boxberger, and Thompson, admitted that Indians used tidelands for beach seines, tidal impoundment traps, stake nets and reef nets. SER 269, 280, 283-84. The use of private tidelands for

salmon fishing was recognized by the district court both in this proceeding and in earlier proceedings. 873 F. Supp. at 1444; 384 F. Supp. at 352, 360-61, 370, 378. Thus, treaty rights to take shellfish are factually indistinguishable from rights to take salmon or other fish.

6. State Laws Cannot Bar Treaty Shellfishing From Private Tidelands.

While shellfish were considered a common resource at treaty times, appellants claim that today certain shellfish, such as clams and oysters, are necessarily a tideland owner's personal property as a matter of state law. Under the Supremacy Clause of the United States Constitution, federal rights reserved in treaties are not affected by later enactments of the states. **See, e.g., Antoine v. Washington**, 420 U.S. 194, 200-201 (1975). **Fishing Vessel**, 443 U.S. at 684 (state property law concepts cannot be used to deny the tribes the exercise of reserved fishing rights).

Washington's policy choice to prohibit public shellfishing on private lands may perhaps be applied to the non-treaty share, but it cannot be used to limit the tribes' fishing rights reserved by treaty. **See Washington Game Department v. Puyallup Tribe**, 414 U.S. 44 (1973) (**Puyallup II**) (attempt to limit treaty fishing to non-Indian methods held impermissibly

discriminatory) and **United States v. Washington**, 774 F.2d 1470, 1479 (9th Cir. 1985) (state law limits on **where** non-Indians could fish "represent management *choices*, made by the State" that could not deprive tribes of the opportunity to take fish) (italics in original).

In addition, intervenors merely assume that their title vests them with the right to exclude even non-Indians from shellfishing. **See** Growers Br. 25; Adkins Br. 43; Alexander Br. 48-53. However, whether private tideland owners in Washington State took title free of public shellfishing rights is not a settled question. **See**, Johnson, et. al., **The Public Trust Doctrine and Coastal Zone Management In Washington State**, 67 Wash. L. Rev. No. 3, 571-572 (1992).

In conclusion, appellants offer no basis for this Court to abandon the principle of *expressio unius est exclusio alterius*. Shellfish are fish, the tribal right of taking fish in common with citizens applies on private as well as public lands, and the treaties make no distinction between shellfish and other fish, except for the staked and cultivated bed proviso.

B. The Equal Footing Doctrine And *Shively* Presumption Do Not Apply To The Tribes' Right Of Taking Shellfish.

1. It Is Settled That The Equal Footing Doctrine Does Not Affect The Interpretation Of The Tribes' Treaty Fishing Rights.

Appellants would resurrect the long discarded proposition that the equal footing doctrine mandates resolving ambiguities in the treaty fishing right not in favor of tribes but in favor of the State. To define the right of taking shellfish, they argue, a court must apply the "strong presumption" against prestatehood United States conveyances that diminish a state's property interests and sovereignty over the beds of navigable waters. State Br. 55-56, 86; Growers Br. 25; Adkins Br. 36; Alexander Br. 51. Like every other federal court which has considered whether the equal footing doctrine applies to the tribes' fishing right, the court below disagreed. 873 F. Supp. at 1442-1445.

The equal footing doctrine is primarily used in disputes over the title to beds of navigable waters, **Nevada v. Watkins**, 914 F.2d 1545, 1555 (9th Cir. 1990), but tribes are not claiming ownership of privately held tidelands or the bedlands of Puget Sound. **See** Growers Br. 26. The tribes and United States seek a judicial determination of tribes' harvest rights in

existing shellfish resources and protection of that treaty right from diminishment by state law or obstruction by the State or individual citizens. The district court properly concluded this case is not a dispute over title. 873 F. Supp. at 1444.

The argument that the equal footing doctrine affects treaty fishing rights has been rejected before in this case:

> [A]dmission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

384 F. Supp. at 401. Therefore, in construing the right, it is proper to apply the rules of treaty interpretation without regard to the equal footing doctrine. **See, e.g., Fishing Vessel**, 443 U.S. at 675-676; **Settler v. Lameer**, 507 F.2d 231, 236, 239 (9th Cir. 1974).

Whenever state courts have relied on the equal footing doctrine in interpreting the fishing right, those decisions have either been reversed or had their reasoning rejected. **See State v. Tulee,** 7 Wn.2d 124, 132, 141-142, 109 P.2d 280 (1941), **rev'd sub. nom., Tulee v. Washington,** 315 U.S. 681 (1942); **State v. Antoine,** 82 Wn.2d 440, 452-454, 511 P.2d 1351

(1973), **rev'd and remanded sub. nom. Antoine v. Washington,** 420 U.S. 194 (1975). **See also, F. Cohen, Handbook of Federal Indian Law, 1982 edition (1982 Cohen)** at 469-470, & n.16, 20-21. Appellants have not cited a single federal court decision which holds that the equal footing doctrine constrains the tribes' treaty fishing right.

As the district court correctly noted, the use of private lands for treaty fishing is neither a novel situation nor one unique to the harvest of shellfish. 873 F. Supp. at 1444. As discussed above, section III A(5)(b), the right to take fish generally includes the use of private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets. It is too late for appellants to argue that the treaties "should not have been interpreted to reserve an easement for use of the Tribes. . . ." Adkins Br. 36. The Supreme Court has so interpreted them on several occasions, **Fishing Vessel**, 443 U.S. at 676 n.22, 680-681, and those holdings are binding here.

2. The Tribes' Treaty Fishing Rights Were Not A Grant From The United States.

The equal footing doctrine necessarily applies only to lands and interests in lands which the United States owned prior to statehood and could legally convey. 873 F. Supp. at 1443. A fundamental precept in construing

the tribes' fishing rights is that those rights do not derive from any grant by the United States. **Winans**, 198 U.S. at 381. They are aboriginal rights which the tribes reserved as a condition of entering into the treaties. In **Fishing Vessel**, the Supreme Court reiterated and reaffirmed this basic holding in **Winans**:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. **In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted.** And the form of the instrument and its language was adapted to that purpose. . . .

Fishing Vessel, 443 U.S. at 680 (emphasis added). Both this Court and the district court have continually relied upon that fundamental characteristic of the right in this case. **See, e.g.**, 520 F.2d at 684; 384 F. Supp. at 331-332; 873 F. Supp. at 1428-1429. **See also Adair**, 723 F.2d at 1412-1414 (". . . **The** rights were not created by the 1864 Treaty, rather the treaty confirmed the continued existence of these rights." **Id.** at 1414.)

None of the cases relied upon by appellants support the proposition

that the scope of the tribes' treaty fishing right is to be determined by applying the equal footing doctrine. The **Coeur D'Alene** and **Kalispel** cases both involved tribal claims to title to the bed of a navigable river, but in both cases this Court used the equal footing doctrine only to analyze claims based on asserted **grants** of lands to tribes. The doctrine was not used to analyze the tribes' aboriginal rights claims. **Coeur D'Alene Tribe v. Idaho**, 42 F.3d 1244, 1256-57 (9th Cir. 1994); **United States v. Pend Oreille County Public Utility Dist. No. 1**, 926 F.2d 1502, 1507-09 (9th Cir. 1991). In **Kalispel**, the district court had ruled that, if the Tribe established aboriginal rights to the riverbed, the United States would have been unable to convey ownership to the State and the equal footing doctrine's presumption would be inapplicable. **United States v. Pend Oreille County Public Utility Dist. No. 1**, 585 F. Supp. 606, 609-610 (E.D. WA. 1984).

Other courts have also recognized an analytical distinction between tribal claims of ownership of submerged lands based on aboriginal title and tribal claims based on a grant of title from the United States. In **Yankton Sioux Tribe of Indians v. South Dakota**, 796 F.2d 241, 244 (8th Cir.

1986), the equal footing doctrine applied and the State's claim of ownership prevailed because the Tribe's aboriginal title claim had not "ripened" before the United States acquired title. In **Montana v. United States**, 457 F. Supp. 599, 602 (W.D. Mont. 1978), prior to analyzing the tribal riverbed claim under the equal footing doctrine, the district court had also considered whether there was a meritorious claim of aboriginal title. It concluded that, "The Crows occupancy of the land now constituting the Crow Indian Reservation is not based upon aboriginal title from time immemorial." **Id.**

Appellants point to **Utah Div. of State Lands v. United States**, 482 U.S. 193 (1987), but **Coeur D'Alene, supra**, distinguished that case and rejected the sweeping assertion that the federal government cannot "reserve" submerged lands in a manner sufficient to overcome the equal footing doctrine. 42 F.3d at 1256. This Court pointed out that the term "reservation" can have different meanings and a different legal significance in different contexts. **Id.** Tribes' "reserved" fishing rights are not the same as disputes over whether the establishment of a particular Indian land "reservation" rebuts the presumption of state ownership of submerged lands. See Growers Br. 26 n.13; Adkins Br. 39-40.

The growers also point to **Massachusetts v. New York**, 271 U.S. 65, 89 (1926), to argue that a prestatehood conveyance can only be shown by an "unavoidable construction." Growers Br. 30. That case involved a grant by the United States and is inapposite.

The tribes' fishing right in this litigation is an aboriginal right which the United States secured by treaties but did not create or grant. The issue is not what the United States granted the tribes but what the tribes retained: what portion of their pre-existing rights were never relinquished and what portion was expressly ceded to the United States. **See Adair**, 723 F.2d at 1413. This case does not involve the scope of a prestatehood conveyance by the United States because the United States could not have conveyed the tribes' unrelinquished rights to fish to the State.

3. Applying The Equal Footing Doctrine Would Not Require A Rejection Of The Tribes' Treaty Shellfishing Claims.

a. The United States Had Sufficient Legal Justification To Secure Fishing Rights Which Would Restrict The Authority Of A Future State.

Even if the equal footing doctrine were applicable, no different interpretation of the tribes' fishing rights would result. In 1894 the Supreme

Court reaffirmed that the United States can make prestatehood conveyances of title:

> . . . whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

Shively v. Bowlby, 152 U.S. 1, 48 (1894).[20] In **Winans**, after interpreting the treaty fishing right as applicable to private lands without reference to the equal footing doctrine, the Court, in an alternative holding, applied the doctrine but concluded that the conditions stated in **Shively** for a prestatehood transfer were met:

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[20] At the time of the treaties the United States would not have considered itself powerless to convey interest in tidelands to an Indian tribe. **See** Growers Br. 31-32. **Shively v. Bowlby** discredited the notion that Congress lacked authority to make prestatehood conveyances of submerged lands, but it did not view its decision as stating a new legal principle. As to contrary dicta, the Court said, "it is evident" that that dicta "is not strictly true." 152 U.S. at 47. After discussing earlier cases, such as **Goodtitle v. Kibbe**, 9 How. 471, 478 (1850) and **Pollard v. Hagan**, 3 How. 212 (1845), the Court found that Congress "**has constantly** acted upon the theory . . . that the navigable waters and the soils **under them . . . unless in case of some international duty or public exigency**, shall be held by the United States in trust for the future States." **Id.** at 49-50 (emphasis added). The Court's characterization of federal power is inconsistent with appellants' claim that **Shively** made new law. **Id.** at 48.

> The elements of this contention and the answer to it are expressed in **Shively v. Bowlby**. . . . The power and rights of the states in and over the shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced. . . .
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> * * *
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> The extinguishment of the Indian title, the opening of the land for settlement, and preparing the way for future states, were appropriate objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

198 U.S. at 383-384.

Thus, the Supreme Court has authoritatively determined that the United States possessed the ability, under the equal footing doctrine, to agree to the reservation of fishing rights for the Stevens treaty tribes, including the fixing in the land of such easements as would enable the tribes to exercise those rights. The United States acted in response to a "public exigency," **Utah**, 482 U.S. at 197, and the equal footing doctrine posed no bar to its actions. That determination is controlling here. **See Puyallup Indian Tribe v. Port of Tacoma**, 717 F.2d 1251, 1260 (9th Cir. 1983) (addressing

Indians' concerns about lack of access to a historical fishery, in order to open the Puget Sound area for settlement without hostilities, constitutes a response to a "public exigency" within the meaning of **Shively v. Bowlby** and **Montana v. United States**, 450 U.S. 544 (1981)).

As discussed in greater detail below, the United States' assurances that tribes could continue to take fish, including shellfish, throughout their usual and accustomed areas, were critical in obtaining the tribes' agreement to give up millions of acres of land. The tribes accepted a nominal dollar payment, which the Supreme Court noted "would hardly have been sufficient to compensate them" unless a meaningful, valuable right of taking fish had been reserved. **Fishing Vessel**, 443 U.S. at 677. Thus, as **Winans** concluded, the United States had sufficient justification under **Shively** to secure the tribes' fishing rights.

Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995), and its interpretation of **Ward v. Race Horse**, 163 U.S. 504 (1896), relied on by the State, State Br. 54, underscores that point. The **Repsis** court specifically distinguished the effect the equal footing doctrine had on the Stevens' treaty fishing right, including the concomitant right of access onto private lands for

fishing purposes, because the fishing right was to be continuous and binding on the State and other United States' grantees. It pointed out **Winans**' holding that the equal footing doctrine was not a bar to securing the tribes' fishing right, including access to private lands. Quoting **Winans**, the Tenth Circuit noted that, "[t]he contingency of the future ownership of the lands, therefore, was foreseen and provided for." 73 F.3d at 991.

b. The Tribes' Hold An Express Right Of Taking Shellfish.

The presumption arising from the equal footing doctrine comes into play when an ambiguity exists as to United States' intent, not when the intent is express. State Br. 55-57; Growers Br. 25. **See Port of Tacoma**, 717 F.2d at 1261. Here the right of taking fish, including shellfish, is "definitely declared or otherwise made very plain" in the treaties. **Id.** at 1257 (citing **Montana v. United States**, 450 U.S. 544, 552 (1981)). The growers attempt to distinguish **Port of Tacoma, supra**, on the basis that the "land at issue is off-reservation." Growers Br. 30. The tribes are not seeking title to any off-reservation lands, of course, but the growers' argument has been rejected by this Court already. **See, e.g., Settler v. Lameer**, 507 F.2d at 236, 239.

The State acknowledges that the tribes' fishing right is an express right and that this Court has already ruled it is an express federal law which preempts most state regulation. **See** State Br. 53, quoting 520 F.2d at 684. The right of taking shellfish is within the broader right of taking fish and is therefore an expressly reserved right. The district court so found, ER 52, as did the Washington Court of Appeals. **State v. Courville,** 36 Wash. App. 615, 619, 676 P.2d 1011 (Div. 1 1983) (" . . . the reservation of a right to take shellfish in these treaties is confirmed by the express reference to shellfish in the treaty provision"). The express nature of the right distinguishes **Montana** and other equal footing cases upon which appellants rely.[21]

C. The "Right Of Taking Fish" Applies To All Species Of Shellfish.

The district court held that the "right of taking fish" is not limited to particular species of shellfish. 873 F. Supp. at 1430-31; ER 48-56, 57-63. The court refused to find limits on the fishing right not stated in the treaties:

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[21] **Oregon Dept. of Fish & Wildlife v. Klamath Tribe**, 473 U.S. 753 (1985), and **Western Shoshone National Council v. Molini**, 951 F.2d 200, 202 (9th Cir. 1991), and other cases cited by the State, State Br. 60-61, for the proposition that a treaty cession includes rights not expressly reserved, are therefore inapposite.

"the treaty Tribes' right to take shellfish is limited, if at all, only by the Shellfish Proviso," or by the moderate living doctrine, if applicable. 873 F. Supp. at 1427.

In holding that the treaty right applies to all species, the Court looked to: (a) the plain language of the treaties; (b) the canons of construction of Indian treaties; (c) the reserved rights doctrine established under **Winans**; and (d) the law of this case. The court also recognized the "extensive shellfishing" of the tribes at treaty times, ER 54-55, including exploitation of at least 114 varieties, using a wide variety of harvesting techniques.[22] Indeed, the tribes showed (and courts have determined) that this extensive record **understates** actual treaty-time harvest and use.[23]

The State argues that the district court erred -- that the treaty right to "fish" must be determined one species at a time. State Br. 28-29. It contends that the "right of taking fish" is a narrow and static right that "secures only fishing activities that were occurring at treaty time," **Id.** at 36, thus limiting tribes to species that were present and actually harvested in

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[22] **E.g.**, SER 1026; Wessen, SER 109-10.

[23] SER 1026-31; Wessen, SER 109-10; SER 1034-36; Lane, SER 133-34; **see also, e.g.**, 384 F. Supp. at 353, 626 F. Supp. 1405 at 1528.

1854. The consequences of the States' position would be extreme. For example, as discussed below, section III F, virtually all oysters and over 80% of the clams found in Puget Sound today are of species introduced to this area since the treaties; under the State's theory, tribes would lose access to most of the clams and oysters in Puget Sound.

The State is unable to support its static theory of reserved fishing rights with any treaty language or a single decision of any court. It presented no evidence that Indians understood or the United States intended that tribes' pre-existing rights would be restricted beyond the limits specified in the treaties. The State's tortured reading of the fishing clause would violate every canon of construction applicable to the interpretation of Indian treaties and its position is flatly refuted by the testimony of its own experts.

1. The State's Proposed Limitations Are Contrary To The Plain Language Of The Treaties.

Before entering into treaties with the United States, tribes had the right to take any species of shellfish, for any purpose, by any method, from any location, subject only to the rights of neighboring tribes. See, 873 F. Supp. at 1430; ER 61, 62. Appellants' expert conceded that no limits existed on the types of shellfish Indians could harvest. Richards, SER 270.

No treaty language limits the species of fish that can be taken to those taken regularly, frequently, or customarily at treaty times, or limits tribes to "traditional" gear or harvesting methods or to particular depths of water. This Court has so held. 520 F.2d at 691-92. Indeed, as the district court noted, the treaties simply reserve the right to take "fish," a term which has "perhaps the widest sweep of any word the drafters could have chosen," and which "fairly encompasses every form of aquatic animal life." 873 F. Supp. at 1430.

Thus, the "reservation of rights" doctrine established in **Winans** is "lethal" to the State's restrictive interpretation. ER 61. Under that doctrine, the fishing rights which tribes previously exercised "without a shadow of impediment" and expressly reserved in the treaty may be limited only by express language so stating. 873 F. Supp. 1430. No language in the treaties suggests Indians intended to grant away their right to take any species of fish or their right to use any harvest method they chose within their customary grounds. Under **Winans**, Washington's attempt to change what the Supreme Court called the "substance of the right" by reading unwritten restrictions into the fishing clause must fail.

The State's theory would place narrow restrictions not found in the treaties on the right of taking fish, but the Court "must not give the treaty the narrowest construction it will bear," **Tulee**, 315 U.S. at 684-85. Fishing rights must instead be given a "broad gloss." **Fishing Vessel**, 443 U.S. at 679. The State's attempt to add unstated limitations to the treaty language runs afoul of these canons of construction. The State's lengthy brief on this issue never mentions these canons; its narrow, prejudicial interpretation of the fishing clause is irreconcilable with them. The district court therefore properly refused to adopt that construction. 873 F. Supp. at 1430.

2. It Has Previously Been Decided That The Right Of Taking Fish Is Not Limited As to Species.

Both the district court and this Court have previously rejected limitations on species and method of harvest proposed by the State. In 1974, Judge Boldt held:

> The right secured by the treaties to the Plaintiff tribes is **not limited as to species of fish**, the origin of fish, the purpose or use, or the time or manner of taking. . . .

384 F.Supp at 401 (emphasis added); ER 61. The court added:

> The Stevens treaties do not prohibit or limit any specific manner, method, or purpose of taking fish. The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear

> subject only to restrictions necessary to preserve and maintain the resource.

Id. at 402.[24] These conclusions of law were affirmed "in all respects." 520 F.2d at 693. The State fails to explain why these prior holdings are not conclusive.

Tribes had a diverse maritime economy at treaty times. Although Judge Boldt focused on anadromous fish, he noted the tribes' "almost universal and generally paramount dependence upon the **products of an aquatic economy**" to sustain their way of life, 384 F. Supp. at 350 (emphasis added), and expressly found as a fact that:

> Aboriginal Indian fishing was not limited to any species. **They took whatever species were available at the particular season and location.** Many varieties [identifying 10 non-anadromous species] . . . were taken and were important to varying degrees as food and as items of trade.

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[24] The State overemphasizes "traditional" and underemphasizes "improvement" in this holding. The court's approval of "improvements" is explicitly subject "only" to restrictions necessary to preserve and maintain the resource. No limitation to "traditional" methods is found in the treaties, and tribes have never been barred from employing a modern fishing method because it did not constitute a traditional, albeit "improved," method. **See also, LCO IV**, 653 F. Supp. at 1430; **United States v. Michigan**, 471 F. Supp. 192, 260 (W.D.Mich. 1979).

Id. at 352-53 (emphasis added).[25]

Judge Boldt also found that, since treaty times, both Indians and non-Indians have adopted new fishing techniques and gear. **Id.** at 358. This was specifically recognized in the context of reef netting: "[a]boriginal 'reef netting' differs from present methods and techniques described by the same term" and "[m]odern gear incorporates numerous refinements and improvements including the addition of electric power to pull the nets." **Id.** at 360, 362.

The State has argued unsuccessfully before that the tribes' treaty right should be limited to fish customarily taken at treaty times. It argued that tribes did not reserve the right to take hatchery fish because they did not exist at treaty times. The district court rejected this approach, holding that hatchery fish are "fish" within the meaning of the treaties: "**No** court has implied any additional limitations based on the **species** or *origin* of the fish, or the purpose, manner, or timing of the taking." 506 F. Supp. at 198

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[25] Final Decision I granted injunctive relief only with respect to anadromous fisheries, but the court's findings and conclusions were not limited to anadromous fish. The court repeatedly recognized the importance of other species to tribes, including shellfish. **See, e.g.**, 384 F. Supp. at 360, 363, 372, and 380; 459 F. Supp. at 1048-49; 626 F. Supp. at 1467, 1489 and 1528.

(bolding added; italics in original). The court therefore refused to impose additional limits on the fishing right:

> The State . . . claim[s] that because hatcheries were neither in existence nor in the parties' contemplation when the treaties were signed, the Indians could not have reserved the right to take hatchery fish. This claim contravenes considerable case law and is directly refuted by **Winans**. . . .
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> Clearly, the treaties reserved to the tribes more than a share of the 1854 and 1855 salmon runs; they also reserved the right to share in all future runs.

Id. at 200. In an **en banc** opinion, this Court affirmed. 759 F.2d 1353, 1358-60 (9th Cir. 1985). The State's assertion that this decision stands for the proposition that "treaty time fishing fixes and defines the nature of the treaty right," State Br. 46, is astonishing.

The State's arguments here were also rejected in **United States v. Michigan**, 471 F. Supp. 192 (W.D. Mich. 1979), **aff'd**, 653 F.2d 277 (6th Cir. 1981):

> [T]**he** means used to fish were not restricted by the Treaty of **1836**. . . . The Indians' right to fish, like the aboriginal use of the fishery on which it was based, **is not a static right**. The reserved fishing right is not affected by the passage of time or changing conditions. The right is **not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking**. The right

> may be exercised utilizing improvements in fishing techniques, methods and gear. **It may expand with the commercial market** which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.

471 F. Supp. at 260 (emphasis added). **See also LCO IV**, 653 F. Supp. at 1430 (the method of exercise of the right is not static); **Mille Lacs Band of Chippewa Indians v. Minnesota**, 861 F. Supp. 784, 838 (D. Minn. 1994); **1982 Cohen** at 447 ("treaties are interpreted to allow Indians to hunt and fish for all resources now available **unless a species was specifically excluded in the treaties.**") **Id.** (emphasis added; references omitted).

Thus no Court has ever required a tribe to show "customary," "regular and frequent," or "usual and accustomed" treaty time **use** of a particular species or harvest method to establish a treaty entitlement.

The State cites several cases to support its argument that treaty time fishing practices fix and define the scope of tribes' rights today. None hold that tribes are limited to the species or harvest methods used at treaty time. Many of the cases define **where** the right may be exercised based upon treaty time practices, but that is unremarkable because the treaties expressly limit where tribes may fish to "usual and accustomed" grounds and stations. **Winans**, **Seufert v. United States**, 249 U.S. 194 (1919), **United States v.**

Taylor, 3 Wash.Terr. 88 (1887), **Umatilla v. Alexander**, 440 F. Supp. 553 (D.Or. 1977), and **Seufert v. Olney**, 193 F. 200 (C.C.E.D. Wash. 1911), are all of this category. Neither the holding nor the language of those cases support the State's claim that the treaties limit tribes to species caught at treaty time.

The State also maintains that tribes must be restricted to species and harvest methods customarily used at treaty times because the Supreme Court held in **Fishing Vessel**, 443 U.S. at 678, that "'securing' fishing rights [is] synonymous with 'reserving' rights previously exercised." But, as the Court also held, tribes have "always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters." **Id.** at 678-79. The uncontroverted evidence shows that tribes took virtually all species of shellfish throughout their usual and accustomed grounds, wherever they were accessible using the harvest technology available at that time. **See, e.g.**, SER 1057, 1059.

The State points to cases that refer to treaty time Indian practices, but language quoted by the State from these cases is entirely consistent with the district court's decision here. That the treaties "authorized the Indians to

continue to exercise their preexisting right to take fish," 506 F. Supp. at 200, does not suggest that those preexisting rights were limited to certain species or methods. Similarly, this Court's statement that Indians "retained the right to fish as they were accustomed," 520 F.2d at 685, State Br. 47, suggests that Indians retained the right to fish throughout their usual and accustomed places for any fish found within those areas -- as they were long accustomed to doing. What continued was the right to engage in the activity of fishing; no new fishing rights have been ordered by the district court here.

Proof of historical practices has served in this litigation to provide the background and circumstances against which the treaty is interpreted and applied. Courts refer to those practices to determine the parties' intent, not to impose a static right that would prevent tribes from adapting to new conditions. It is the starting point in understanding a way of life and requirements which were to be protected but which could change in response to changing circumstances. It has never served as a limitation on the tribes' "right of taking fish."

> Reference to facts at the time of treaties is the method used for determining the intent of the parties, **not as a means of limiting the**

> **right**. Thus, where Indians had a history of adopting new methods of pursuing and capturing fish, they will not now be limited to methods used at the time the treaty was signed, just as non-Indians are not so limited. Indians may employ modern boats, nets, and other techniques in the exercise of treaty-secured rights.

1982 Cohen at 447 (emphasis added).

This point was made in **Puyallup Tribe v. Department of Game** (**Puyallup I**), 391 U.S. 392, 398 (1968). In **Puyallup I**, the Puyallup and Nisqually tribes argued that the State had no power to prohibit the use of set nets in the mouths of rivers, even when necessary for conservation, because such methods were customary at treaty times. The Court disagreed:

> . . . the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the "usual and accustomed" manner*. But the treaty is silent as to the mode or modes of fishing that are guaranteed.

Id. at 398 (italics in original). Thus, the State's argument here that the treaties protect "usual and accustomed" fishing activities, State Br. 43, was rejected in **Puyallup I**.[26]

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[26] The district court has specifically rejected attempts in this case to limit the right of taking fish to the historical purposes or extent to which fish were taken at treaty times. For example, the court found in 1974 that fishing constituted a means of subsistence for the Stillaguamish Tribe. 384 F. Supp. at (continued...)

Finally, the State cites Paragraph G of Judge Boldt's Order for Program to Implement Interim Plan, 459 F. Supp. at 1038. State Br. 49-50. Paragraph G was part of a 1974 order establishing **interim** procedures to determine a wide variety of potential allocation and management questions. There is no indication that the Court intended to modify the **substantive** principle that the "right of taking fish" is not limited as to the species or origin of fish. Its reference to tribes having the opportunity to show the species taken at treaty time is not surprising, given that such evidence is useful to show the intent of the parties. Contrary to the State's assertion, Judge Boldt did not require proof of treaty time harvest of a particular species to show a right to take that species.

3. The United States Did Not Intend And The Tribes Did Not Understand The "Right Of Taking Fish" To Be Limited To Species And Harvest Methods Customarily Used At Treaty Times.

The State offered no evidence that the parties intended that Indians'

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[26](...continued)
379. When an attempt was made to limit present day fishing to subsistence purposes, the court said: "[t]hat finding merely sets forth the historical extent to which the Stillaguamish exercised their treaty fishing right. Nothing contained therein limits or precludes present-day commercial fishing activity by the Stillaguamish tribal members. . . ." 459 F. Supp. at 1068.

fishing rights would be limited to species taken and harvest methods utilized at treaty times.[27] In fact, appellants' own expert, Kent Richards, admitted that no such intent existed:

> Q. And the United States did not intend to exclude any species of fish from the fishing rights reserved by the tribes; is that correct?
>
> A. Well, the treaty simply says fishing; fish.
>
> Q. And by that language, the United States did not intend to exclude any species of fish from the fishing rights; is that correct?
>
> A. That would be my assumption, yes.

SER 270-71. Given the lack of evidence of intent to exclude any species of fish, and the lack of any such express limitation in the treaties, the district court properly concluded that no such intent existed. 873 F. Supp. at 1420.

Indeed, Indians' historical fishing practices included the expanding of their fishing effort to supply new markets, including the sale of clams and

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[27] The State cites testimony of James Clifton to argue that Indians' fishing rights were intended to be temporary. State Br. 38-39. Dr. Clifton's opinion was rejected by the district court, which found that the treaties were intended to be permanent, 873 F. Supp. at 1435. His opinion is also directly contrary to the holding in **Winans**, 198 U.S. at 381-82, that the Indians' right was "intended to be continuing against the United States and its grantees as well as the state and its grantees."

oysters to settlers, and the use of new technology. As Stevens told the Indians, "[before] they could not sell salmon, oysters and cranberries to the settlers for there were none. Well now you can sell those things. . . ." SER 653-54. At the Makah treaty negotiations, Stevens agreed to furnish the Indians with new fishing apparatus so that they would not merely continue but **develop** their fisheries. SER 644-45. Appellants' expert admitted that by the time of the treaties Indians were aware that new species of plants and animals were being introduced into the area and they were making use of those new species. Richards, SER 275-76. Thus neither the United States negotiators nor the tribes would have expected the treaty to freeze the Indians' rights as of 1855, other than the limitation to usual and accustomed areas.

The State argues, however, that the testimony of Dr. Lane, the tribes' and United States' expert, supports its theory. State Br. 38. The State points first to Dr. Lane's brief summary at trial of her extensive written testimony:

> . . . the members of the Stevens Treaty Commission understood the importance of **shellfish** to the Indians and their reliance on them for various things. And they were attempting, in my opinion, to secure to the Indians the continued use of **that resource** on which they relied.

ER 433 (emphasis added). On its face, Dr. Lane's testimony is directly contrary to the State's theory. Dr. Lane testified that the United States intended to secure to the Indians the right to take **shellfish**, not any particular class or category thereof.

Next, the State cites Dr. Lane's written testimony. State Br. 38. She states, however:

> . . . Indians understood that the treaties would not prevent them from continuing their use of and reliance on **shellfish**. It is my opinion that they would have been unwilling to sign the treaties if they had understood that they would be prevented from taking **any** shellfish where they were naturally found within the areas they were accustomed to use for fishing. My opinion is based on the importance of shellfish as a staple food for Indian people, its important role in trade with Indians and Whites, the post-treaty statements and actions of the Indians and the Whites, and the assurances given to the Indians by Stevens and others of the treaty commissioners that the Indians would be able to **continue to fish** after the treaties.

ER 1159 (emphasis added). Dr. Lane's testimony provides additional support for the court's findings.

D. "Usual And Accustomed Grounds And Stations" Cover Broad Geographic Areas And Do Not Vary By Species.

The district court held as a matter of law that "usual and accustomed grounds and stations" do not vary by species of fish. 873 F. Supp. at 1431. Prior determinations of tribes' "usual and accustomed" fishing places have

always been based upon broad, general areas customarily used by each tribe "for fishing purposes." They have "never focussed on a particular species of fish." **Id.** Evidence of taking particular species has been used to establish the breadth of fishing activity and area. This evidence has served as cumulative proof of fishing over a broad geographical range, not as a means of parceling fishing areas by species.

Notwithstanding these prior determinations, appellants contend that tribes must prove separate usual and accustomed areas for each species and that deep water areas are outside the usual and accustomed areas for shellfish. State Br. 36-37, 63-64; Growers Br. 33-38; Adkins Br. 56-57. However, the usual and accustomed areas that have already been adjudicated include deep water areas for almost all tribes. **See, e.g.**, 384 F. Supp. at 352-53.

Appellants' position should be rejected as inconsistent with the plain language of the treaties, contrary to the canons for construction of Indian treaties, contrary to the previous decisions of this and other courts, contrary to the facts, and impossible as a practical matter.

1. The Language Of The Treaties Provides, And The History Of The Negotiations Shows, That Tribes May "Fish" Within Their Usual And Accustomed Grounds And Stations.

The "right of taking fish" at "all usual and accustomed grounds and stations" preserves each tribes' pre-existing right to engage in the **activity** of fishing within a single, broad geographic area. That plain language does not suggest, much less mandate, that within the broad area each tribe used for fishing purposes, it must break down specific locations where each of dozens, or hundreds, of species of fish were taken.[28] Within those areas used for the activity of taking fish, tribes may fish for **any** species at any location. 873 F. Supp. at 1431. The plain language of the treaties is sufficient to overcome appellants' restrictive reading that requires "additional" limitations beyond those found on their face. **Choctaw**, 179 U.S. at 533. Even if the treaty language were considered ambiguous, the canons for construction of Indian treaties would preclude the narrow, prejudicial reading given by appellants.

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[28] "The Treaty never specifies the usual and accustomed ground for salmon, or the usual and accustomed grounds for mussels, the usual and accustomed grounds for clams, the usual and accustomed grounds for crabs, the usual and accustomed grounds for oysters." White, SER 131. **See also**, **Puyallup I**, 391 U.S. at 398.

This reading of the plain language is confirmed by the history of the treaty negotiations. The United States commissioners stated that it was "thought necessary to allow them to fish at all accustomed places. . . ." SER 637. Commissioner Simmons told the Indians at the Point No Point treaty negotiations that they could go "wherever else they pleased to fish. . . ." SER 640. Stevens himself told the Indians at the Grays Harbor negotiations "[w]e want you to take fish where you have always done so. . . ." SER 648. As appellants' expert admitted:

> The understanding of the treaty is consistent, i.e., that Stevens told the Indians that they could fish anywhere they were accustomed. Several Indian witnesses stated that if they had been told otherwise, they would never have signed the treaty.

Boxberger, SER 703. Dr. Lane concurred. ER 1159.

The court properly found that the right of taking any and all fish anywhere within each tribe's usual and accustomed areas was preserved by the treaties.

2. Prior Orders Of This And Other Courts Permit Tribes To Take Any Species Of Fish Found Anywhere Within Their Adjudicated Usual And Accustomed Grounds And Stations.

In 1974, the district court found that, within their usual and

accustomed fishing areas, Indians "took whatever species were available at the particular season and location." 384 F. Supp. at 352. Furthermore, within those areas, "Indian fishermen shifted to those locales which seemed most productive at any given time. . . ." **Id.** at 353. Thus, "Indian fishing practices at treaty times were largely unrestricted in geographic scope." **Id.**

> Therefore, the court finds and holds that **every fishing location where members of a tribe customarily fished** from time to time at and before treaty times, . . . is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, **the right to take fish.**

Id. at 332 (emphasis added). This Court affirmed these findings. 520 F.2d 676.

In its determination of tribes' fishing areas, the district court has looked to general fishing activates. For example, in deciding Tulalip usual and accustomed fishing places, the court held that the "determination of any area as a usual and accustomed fishing ground or station must consider . . . the petitioning tribe's . . . regular and frequent treaty-time use of that **area** for **fishing purposes**." 626 F. Supp. at 1531 (emphasis added), **aff'd sub nom. United States v. Lummi Tribe**, 841 F.2d 317 (9th Cir. 1988). **See also**, 626 F. Supp. at 1529 (ascertaining areas used **for fishing**

purposes). No court has required a tribe to prove separate usual and accustomed areas for each species of fish. Indeed, Judge Boldt and this Court reached the contrary conclusion:

> The only method providing a fair and comprehensive account of the usual and accustomed fishing places of the Plaintiff tribes is the designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs. Changes in water course do not impair the geographical scope of the usual and accustomed fishing places. Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes **in general** describe some of the freshwater systems and marine areas within **which the respective tribes fished at the time of the treaties and wherein those tribes . . . are entitled to exercise their treaty fishing rights today.**

384 F. Supp. at 402 (emphasis added), **aff'd**, 520 F.2d at 693.

The district court typically considers a broad array of fishing activities in determining the boundaries of usual and accustomed grounds and stations. For example, the court noted that in portions of its area Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish, shark, herring, **sardines**, and sturgeons, as well as sea mammals. 384 F. Supp. at 372. The court's determination for Tulalip relied on areas where they "fished and clammed," 626 F. Supp. at 1529, and included a discussion of

where "salmon, flounder, and other fish were speared" and where shellfish beds were located. **Id.** at 1528, **aff'd** 841 F.2d 317 (9th Cir. 1988). Lummi fishing was described as including salmon, halibut and shellfish. 384 F. Supp. at 360. **See also**, 626 F. Supp. at 1489 (for Skokomish, referring to salmon and "other species," clam digging, and "other shellfish gathering," and herring), **aff'd**, 764 F.2d 670 (9th Cir. 1985); 626 F. Supp. at 1442 ("Klallams regularly visited Hood Canal for fishing, shellfish digging. . . .")

Therefore, either explicitly or implicitly, every determination of usual and accustomed grounds and stations made by the district court during the course of this 26-year litigation has been based on evidence of the general areas where a tribe engaged in the activity of fishing, regardless of the species harvested. This is true despite the fact that not all fish are found in the same locations and despite the fact that some of the factual findings regarding locations of Indian fishing are specific to a single species or type of fish.

For example, when the district court first addressed herring, a non-anadromous fish, it found that tribes with previously adjudicated usual and

accustomed areas for anadromous fish were entitled to fish for herring throughout those previously determined usual and accustomed fishing areas. 459 F. Supp. at 1048-49. This occurred despite different migration patterns for herring and salmon, including the complete absence of herring from freshwater areas.[29] For tribes that did not have prior adjudications of usual and accustomed areas, only one set of boundaries was ever determined to apply to all their fishing activities. 459 F. Supp. at 1048-50, 1066 n.18.

More recently, the district court confirmed that five tribes have the right to fish for halibut within their previously adjudicated usual and accustomed fishing places. SER 47-59 (subproceeding 92-1). The State vigorously asserted that tribal usual and accustomed grounds for halibut should be different from previously adjudicated fishing grounds because halibut tend to be found in discrete "banks,"[30] SER 101-02, but the State's

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[29] The State claims (State Br. 64) that herring and salmon fishing were conducted in similar areas to explain the fact that the adjudicated areas are the same. That is ludicrous -- herring are non-anadromous and are not found in fresh water, a great deal of which is included in each tribe's usual and accustomed areas.

[30] The briefing on the motion became part of the record in this case when the cases were consolidated. SER 5-6.

approach was rejected.[31] SER 48.

In short, there have never been separate usual and accustomed grounds adjudicated for different species of fish. The Makah ocean fishing places case, cited by the growers, is not such a case. There, the district court determined that Makah customarily fished at treaty times 40 miles from shore, but not 100 miles. 626 F. Supp. at 1466-68, **aff'd**, 730 F.2d 1314, 1318 (9th Cir. 1984). But Makahs' adjudicated usual and accustomed fishing grounds were still determined with reference to multiple species of fish and cover one very broad general territory. The district court did not adjudicate separate fishing grounds for each species.[32] The Makah adjudication does not support the "beach by beach" approach requested by appellants here.

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[31] Ironically, and contrary to its position here, in that same brief the State argued that usual and accustomed grounds and stations for herring were the same as for salmon "because it was too difficult to determine with any degree of accuracy the extent of customary herring fishing areas." SER 100-01. The State's current approach would require multiple such exercises.

[32] The district court pointed out that "the principal subsistence of the Makah is drawn from the ocean and is formed of **nearly all of its products** . . ." The fish described among the Makah catch are halibut, salmon, cod, and "other kinds of fish," 626 F. Supp. at 1467; **see also** 384 F. Supp. at 364.

There would have been no reason to mention species other than salmon if usual and accustomed grounds and stations were being determined solely to apply to salmon. Tribal rights to take steelhead trout, all five species of salmon, herring, and halibut have been adjudicated for a single area comprising a tribe's usual and accustomed grounds and stations. The tribes did not reserve the right to take the fish they customarily took at the places they customarily took them -- they reserved the right **to fish** throughout the entire area they used for fishing purposes.

3. Separate Determinations Of Usual And Accustomed Areas For Each Species Are Impracticable.

The manner in which the phrase "all usual and accustomed grounds and stations" has been defined supports the conclusion that they refer to a broad, general fishing area, not distinct areas for different species:

> The tribes reserved the right to fish at "**all** usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indicates fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area; **"grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined.**

384 F. Supp. at 332 (emphasis added); **accord, Lummi Tribe**, 841 F.2d at 318. Thus, the district court and this Court have recognized that it would be impossible to list all grounds and stations customarily used by tribes for fishing purposes. **See, also**, 384 F. Supp. at 353; 459 F. Supp. at 1059; 730 F.2d at 1316; 626 F. Supp. at 1528, 1529, 1531. If it is impossible to make a complete inventory of areas customarily used for fishing purposes in general, obviously it is even less possible to do so on a species-by-species basis.

It is also impossible as a practical matter because of the huge number of species for which separate determinations would have to be made. The State classifies at least 142 different species of fish as food fish or shellfish. WAC 220-12-020. Numerous additional species are unclassified. Appellants' theory of separate species-by-species determinations would require a prohibitive expenditure of judicial resources. Nothing in the treaties suggests that hundreds of separate determinations must be made in order for each of the 20 Western Washington tribes to exercise their "right to take fish."

4. The Record Establishes Extensive Treaty-time Use Of Deep Water For Harvest Of Shellfish.

Incredibly, the State asserts that tribes did not harvest shellfish from deep water, a proposition it deems "uncontroverted." State Br. 67-68. The district court held before trial that, as a matter of law, the treaty shellfish right extends to deep-water areas within tribal "usual and accustomed grounds." It was therefore unnecessary for tribes to put in evidence of deep water use, but the record nonetheless contains substantial and persuasive evidence that tribes took shellfish from deep water at treaty times using a variety of techniques. The State completely ignores this unrebutted evidence, which includes evidence from its own expert witness.

The archeological evidence is consistent and overwhelming that tribal shellfish use has been persistent over time, widespread geographically, and covers an extraordinary diversity of species, including deep-water species. SER 1026-27. For example, evidence of deep water species such as red sea urchin and dentalium appear at the Ozette archeological site.[33] It was uncontroverted that much of the range of behaviors and technologies represented at Ozette were representative of the region. SER 111.

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[33] See SER 110-11, describing the significance of this site.

Furthermore, large red sea urchins, which favor deep, cold water, SER 790, were well-known, highly esteemed as food and "eaten by all of the people of Western Washington." Lane, SER 1055; SER 112.

Tribes possessed sophisticated deep water harvest technologies, which included fixed referent navigation to determine offshore locations, SER 791, highly sea-worthy canoes, and the use of stone weights rubbed with slug slime for deep water soundings to determine bottom conditions. SER 793. Dr. Renker described in detail three deep-water harvest techniques: kelp-line sinking, spearing, and breath-hold diving. **Id.** James Swan, writing in 1870, noted the use of kelp lines in deep water for sea urchin fisheries. SER 1055-56. The State's expert, Dr. Thompson, acknowledged deep water fisheries, particularly for sea urchins. SER 693-95, 698-700. She specifically acknowledged use of kelp line sinking, which yielded sea urchins from deep water "in great quantities." SER 695-97; 281-82. She also acknowledged that kelp lines could be tied together to reach deep areas, were used at treaty times to catch halibut from deep salt-water locations, and that she knew of no depth limitations on the use of kelp line sinking. SER 281-82.

Long spears were used, including those formed by stacking multiple 15-20 foot splints, for harvesting a variety of species, including urchins and dentalia, in deep water. SER 792. Deep spearing methods were noted by several commentators, including Gibbs and Drucker. SER 792-93. **See also**, SER 1051-52; 1049 (spears used for subtidal species including octopus, sea urchins, crabs and others.) Swimming species such as shrimp could also be taken in dip nets or basket scoops as both of these were aboriginal methods of taking other small fish. SER 1054. There was also evidence of breath-hold diving for fish in deep water, including for sea urchins, sea cucumbers and scallops. SER 796-97.

Tribes presented other substantial evidence showing harvest of subtidal species at treaty times. For example, geoduck, scallops, and octopus were used by Lummi. Suttles, ER 1071; Suttles, SER 181; James, SER 213. Squaxin Island harvest occurred in both the intertidal and subtidal areas. Poste, SER 206-08. Swinomish predecessors harvested free-swimming species of shellfish such as crab, sea urchin, octopus and sea cucumber, as well as embedded species. Onat, SER 1096. Upper Skagit took all available species wherever and whenever available, including sub-tidal and

free swimming species such as crabs, geoducks, shrimp, sea urchins, octopus, and sea cucumbers. SER 1098-1101; Williams, SER 186-87, 190-91. See also, SER 145-180; ER 506-507; SER 196; SER 189, 191.

Much of this evidence did not describe the exact depth at which such subtidal fishing took place, nor did it describe the exact technology used. However, in exercising their fishing rights, tribes may utilize improvements in fishing techniques and modern gear. 384 F. Supp. at 407. Further, they may fish in deeper waters than might have been necessary at treaty times. Thus, Judge Boldt found that because fish are no longer available to reef nets as close to shore as they had been, "now fish must be taken in deeper water." 384 F. Supp. at 361-62. Because the Lummi Tribe had a treaty right to fish with reef net gear within all of its usual and accustomed places, including areas deeper than those used for reef netting at treaty times, it was not limited to the shallow water areas where its members had traditionally reef netted. Id. at 404, aff'd., 520 F.2d at 691-692.

The State contends that "just as Makah's treaty right did not secure salmon fishing 100 miles offshore, the treaty right does not secure rights to harvest subtidal shellfish grounds, some 100's of feet deep." State Br. 52.

It is impossible to reconcile this assertion with the court's factual finding that Makahs customarily fished in waters 80 to 100 fathoms [480 to 600 feet] deep." 626 F. Supp. at 1467; **accord**, 730 F.2d at 1315.

The State presented nothing to contradict any of the above evidence or findings, but instead chooses now to ignore or misrepresent them.[34] The evidence establishes that Indian fishing practices were "unrestricted in geographic scope." 384 F. Supp. at 353. The State's suggestion, State Br. 67 and n.26, that this Court may "find" based on alleged uncontroverted facts that tribes have no right to deep-water shellfish is thus flawed for multiple reasons, including gross factual and legal errors, and the fact that the issues was resolved as a matter of law below.[35]

E. The Tribes Are Entitled To 50% Of All Harvestable Fish.

Reciting the rule of **Fishing Vessel**, 443 U.S. at 685-87, the district

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[34] The State cites the testimony of several tribal witnesses to show that tribes' harvests were all intertidal. State Br. 12-16. Those passages are merely examples of where tribes commonly took shellfish. The evidence ignored by the State shows that tribes were not limited to intertidal areas.

[35] If this Court decides -- despite the treaty language, canons of construction, reserved rights doctrine, factual record, and major practicality considerations -- that separate usual and accustomed places must be determined for each species for each tribe, the proper course would be to remand to the district court.

court held that tribes are presumptively entitled to a 50% allocation of all harvestable fish, but that this allocation could be reduced on a showing of a substantial change in circumstances such that 50% is not needed to provide tribes a "moderate living." 873 F. Supp. at 1445 and n.30. The court found as facts that no such change in circumstance has occurred, that tribes have not voluntarily abandoned their fisheries or dwindled to just a few members, nor have they acquired a sufficient standard of living from other sources. **Id.** at 1445-46. The court found instead that tribes "lag significantly behind" non-Indians in their "overall standard of living." **Id.** at 1446. The evidence for that was "uncontroverted." **Id.** The court therefore refused to adopt less than a 50% allocation.

Appellants challenge the legal basis for the court's conclusion, but those attacks are based on the misconception that the right of taking shellfish is divisible from, and judged by different standards than, the right of taking "fish." They are also based on a misreading of **Fishing Vessel**'s discussion of "moderate living." Appellants make no effort to refute the court's findings of fact. The court's conclusion must therefore be affirmed.

1. Allocations Do Not Vary By Species Of Fish.

The State asserts that the allocation of fish varies by species. State Br. 71-72. However, since the Supreme Court's decision in **Fishing Vessel,** a single allocation has always been set at 50% for all fisheries. In 1975, the court routinely applied the equal sharing principle to herring, holding that the rights to herring applied "to the same extent and subject to the same terms and conditions" as for anadromous fish. 459 F. Supp. at 1049. In **Makah v. Brown,** a different trial judge held that the equal sharing principle applied to halibut and concluded that the State had offered "no persuasive basis for applying a different rule for halibut than for salmon. . . ." SER 25, 52. Thus, the equal sharing principle has always been applied without any suggestion that its application could be varied by species.

2. The Court Does Not Have Wide Discretion To Change The Presumptive 50% Allocation.

The State asserts that a separate allocation for each species is subject to the court's unconstrained discretion to weigh "all" equitable considerations, however numerous and undefined they may be. State Br. 74. The State therefore argues that the tribes' allocation is not

presumptively set at 50% and the court erred by putting the burden on the State to show a change in circumstance to justify a change in the 50% allocation. State Br. 77. However, the State did not argue this proposed new "equitable" formula to the district court. It is raised for the first time on appeal and should therefore be disregarded. **See, e.g., Rothman v. Hospital Service of Southern California**, 510 F.2d 956, 960 (9th Cir. 1975).

The proposed new approach also runs counter to controlling case law and does violence to the treaty language. The treaty phrase from which the 50% share is derived, "in common with," is ignored. But, as Judge Boldt explained:

> By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means *sharing equally* the opportunity to take fish. . . .

384 F. Supp. at 343 (italics in original). In affirming the 50% allocation, this Court also concluded that tribes and the State are to be in a position of equality. 520 F.2d at 688. **See also** 774 F.2d at 1472, 1478, and 761 F.2d at 1408. The Supreme Court agreed that the treaty language, "in common with," supported a 50% allocation. 443 U.S. at 677-78 n.23.

The Supreme Court noted that in two earlier treaties with Great Britain, including one signed in 1854, the same "in common with" language was held to divide a fishery into equal shares between sovereigns. **Id.** The Court held "in common with" is the basis for equal sharing between tribal sovereign entities, on the one hand, and the non-tribal sovereign on the other:

> an equal division -- especially between parties who presumptively treated with each other as equals -- is suggested, if not necessarily dictated, by the word 'common' as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset. . . .

Id. at 686 n.27.

The State argues that the burden is on tribes to show that they need a 50% allocation, State Br. 76. The Supreme Court directed otherwise, saying that the allocation "will, upon proper submissions to the District Court, be modified. . . ." 443 U.S. at 687. The allocation having been set, the burden is on the State to show that it should be changed. **See also, Sohappy v. Smith**, 529 F.2d 570, 573 (9th Cir. 1976). This Court later characterized the Supreme Court's rulings in language little different than that used by the district court in this subproceeding:

> **Fishing Vessel** mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less.

United States v. Washington, 759 F.2d at 1359. **Compare**, 873 F. Supp. at 1431, 1445; 898 F. Supp. at 1457.

Although the State seeks to characterize the district court's 1974 allocation ruling as supporting its current, discretionary approach, its brief to the Supreme Court in **Fishing Vessel** characterized that ruling quite differently:

> From a survey of its original opinion, nothing could be more evident than that the District Court did not exercise any discretion in selecting its allocation formula. The District Court determined, as a matter of law, that the "in common with" language of the Stevens treaties meant that treaty Indians and all other citizens were to "**share equally** the opportunity to take fish," 384 F. Supp. at 343 . . . , and its 50-50 allocation formula followed from this determination.

SER 97 (emphasis in original).

In the same brief, the State similarly characterized this Court's pre-**Fishing Vessel** decisions as failing to account for the equitable, discretionary factors the State deemed relevant:

> One thing, however, is perfectly clear: Neither the District Court in selecting its allocation, nor the Ninth Circuit in affirming it, has engaged in the discretionary exercise that this Court has required when an accommodation between treaty and nontreaty fishing right is made

> necessary. (**See "Puyallup II" supra.**) Both courts have continued to indulge the fiction that the fishing controversy is essentially a dispute over sovereign prerogatives of the State of Washington and the various treaty tribes. As a result, both courts in their various considerations of the allocation issue have entirely ignored the equities of the individual fishermen affected by their decisions. This conceptualization of the controversy has masked the essential nature of the rights at issue - a right to be enjoyed by "every individual Indian," **United States v. Winans, supra**, at 381, "in common with **citizens** of the territory."

SER 98 (emphasis in original). In **Fishing Vessel**, the Supreme Court flatly rejected the State's premise:

> The referent of the "said Indians" who are to share the right of taking fish with "all citizens of the Territory" is not the individual Indians but the various signatory "tribes and bands of Indians" listed . . . Because it was the tribes that were given a right in common with non-Indian citizens, it is especially likely that a class right to a share of fish, rather than a personal right to attempt to land fish, was intended.

443 U.S. at 679.

The district court was therefore correct to start from the presumption that the tribes' allocation is set at 50%. The court was equally correct in putting the burden on the State to show a change in circumstances to change the 50% allocation.

3. The State's New Proposed Equitable Factors Have Been Rejected In This Case.

The State's examples of the considerations, conditions, and

prerequisites that would factor into establishing an allocation highlight how that approach deviates from the principles established in **United States v. Washington** and **Fishing Vessel**. For example, the State asserts that the treaty share depends on the extent of tribes' pretreaty use of each species. State Br. 71. This is inconsistent with the treaty intent that tribes be able to adapt their fishing to present day conditions, as other fishers do. **See** 384 F. Supp. at 401-402, 407. It is also nothing more than an indirect attempt to do what it cannot do directly -- limit the species of fish included within the treaty right. **See** 873 F. Supp. at 1430.[36]

The State suggests that whether a particular fishery was "developed" by non-Indians is another factor to be weighed in setting the allocation. State Br. 72. Nothing in the treaty language or negotiations supports this method of setting the allocation. The State's argument is also foreclosed by this Court's holding that treaty fishing rights extend to fish "developed" in State hatcheries. 759 F.2d at 1359.

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[36] The State would not limit the non-Indian share based on the extent of **their** pretreaty use, of course. If pretreaty use were the rule, non-Indians would be entitled to virtually no fish. **See Fishing Vessel**, 443 U.S. at 665 n.7 (". . . Indians caught most of the non-Indians' fish for them, plus clams and oysters.")

The State argues that adverse impacts on non-Indians who have been displaced from salmon fishing by the treaty right should be considered in setting allocations. State Br. 72-73. However, impacts on non-Indians are unavoidable when tribal rights are vindicated and enforced after years of illegal exclusion and interference. **See, e.g., United States v. Washington**, 645 F.2d 749, 756 (9th Cir. 1981). These impacts, even if severe, do not permit the Court to abandon the presumptive 50% allocation. **See Fishing Vessel**, 443 U.S. at 669 n.14 (impact of illegal regulation and exclusionary tactics by non-Indians irrelevant to the determination of tribes' fishing rights); **Washington State Charterboat Ass'n v. Baldrige**, 702 F.2d 820, 822-823 (9th Cir. 1983) (basing allocation on impacts to non-Indians was inconsistent with presumptive 50% share).

The "equitable" factors proposed by the State to set and reset allocations for each species conflict with the rules for setting the allocation for all fisheries established in **United States v. Washington.** Even if it had been property raised below, the State's approach would deserve rejection.

4. Moderate Living Does Not Require Annual Economic Audits Of Tribes And Their Members.

In the district court, the State advocated the definition of moderate

living advanced by their economist, Dr. Thomas: an average tribal household income that is at least one dollar over the poverty line, CR 18326 at 155, or enough to "insure freedom from destitution." **Id.** at 36. They now acknowledge that "moderate living" is a legal principle created by the Supreme Court in **Fishing Vessel**, not an economic principle. State Br. 77-78.[37]

The State now proposes that the district court should have been guided by either a definition of similar terms in a federal statute (42 USC § 5302(20)(A)) or by the following "principles:" that moderate living should be analyzed on a tribe-by-tribe basis, considering all economic activity and sources of funds of tribes and their members, and in light of numerous equitable factors applied with unfettered discretion, as discussed above. State Br. 78-83. The federal statute has to do with low and moderate income housing programs and has no relevance here. The State's "principles" ignore the Supreme Court's concern for wastage, are incorrect,

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[37] Despite the court's finding of fact that moderate living is not an economic term of art, 873 F. Supp. at 1446, based on the testimony of both economists, SER 353-54, 387, UPOW continues to advocate the poverty line standard of Dr. Thomas. That standard was rejected by the district court which found Thomas' methods flawed. 873 F. Supp. at 1446.

and would not provide a workable basis for adjusting the 50% allocation to account for changing circumstances.

a. "Moderate Living" Seeks To Avoid Wastage.

The Supreme Court affirmed the 50% allocation, in large part, because tribal needs would otherwise result in preemption of the resource that has now grown scarce. **Fishing Vessel**, 443 U.S. at 668-669, 686. However, the Court recognized that it was possible that a 50% allocation could so far exceed the fishery needs of the tribes that wastage of the resource could result.

This understanding of the Supreme Court's use of the term "moderate living" appears from the discussion in the opinion itself and from the Court's reference to the "central principle" of **Arizona v. California,** 373 U.S. 546 (1963), and previous cases involving reserved tribal water rights. 443 U.S. at 686. In **Arizona v. California**, a needs standard for reserved tribal water rights meant a measure of the productive capacity of tribes' reservation lands, not the sufficiency of per capita income that might be derived from full use of those lands. **Id.** at 600 (quantity of tribes' reserved water rights for agriculture based upon "practicably irrigable acreage" and not upon some

vague reasonably foreseeable economic need). Thus, in **United States v. Ahtanum Irrigation Dist.**, 236 F.2d 321, 337 (9th Cir. 1956), the quantity of reserved tribal water rights was not based upon some economic necessity standard, but, rather, upon the extent to which water could be productively used. Waste, rather than the amount of potential economic gain, was the limiting factor in allocating the use of a natural resource, and water use was halted when unnecessary for crop productivity. **Id.** at 340-41; **Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.**, 245 F. 9, 22-25 (9th Cir. 1917); **Pyramid Lake Paiute Tribe v. Morton**, 354 F. Supp. 252, 257-58 (D.D.C. 1973).[38]

This Court has acknowledged **Fishing Vessel**'s concern that wastage be avoided. **See** 774 F.2d 1470, 1478-79 (9th Cir. 1985) ("[t]he Supreme Court has recognized the importance of the full harvest and prevention of waste principles in **Fishing Vessel**. . . .") Indeed, the principle of preventing waste of a natural resource was applied in this case prior to

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[38] This concept has also served to allow non-Indians to use water reserved for a tribe during the time that the tribe was not putting the water to use, so long as the non-Indian use did not permanently deprive the tribe of reserved water it could put to use in the future. **Ahtanum Irrigation Dist.**, 236 F.2d at 326-27. **See also 1982 Cohen** at 595-96.

Fishing Vessel. **See** 384 F. Supp. at 384-85 ("while an over-harvest would impair its renewability, an under-harvest during a limited time it is available would result in an irreplaceable waste of the resource.")

The two examples that the Supreme Court gives for when a reduction in the allocation would be appropriate highlight the issue of waste of the resource. Allocation of 50% of the fishery resource to tribes that have dwindled to a few members, or have abandoned their fisheries, could result in the under-harvest of the resource and a concomitant waste. **See Fishing Vessel**, 443 U.S. at 667.

Here, the district court found as a fact that tribes have neither abandoned their fisheries nor dwindled to a few members. 873 F. Supp. at 1445 & n.31. No appellant challenges those findings. Indeed, it was uncontroverted that tribes fully exercise their rights to take fish. **See, e.g.**, SER 215.

It was appellants' expert's opinion that tribes can never earn a livelihood from their fisheries. SER 377-78. In fact, it was his opinion that tribes would never earn a livelihood from the exploitation of **all** the natural

resources referenced in the treaties. SER 378.[39] Thus, absent the substantial changes in circumstances described by the Supreme Court, tribes will never exceed a "moderate living" based upon those resources.

b. Allocations Cannot Be Established On A Tribe-By-Tribe Basis.

The State argues that allocations of fish must be established separately for each tribe. State Br. at 78-80. This position has no textual or evidentiary support and would be unworkable. Although each tribe is a separate sovereign with its own independent treaty rights, fish must be shared collectively. **See** 384 F. Supp. at 356-357; 384 F. Supp. at 400 (State's only concern whether "total harvest by all tribes exceeds 50%"); 459 F. Supp. at 1086 ("tribes as a whole must be assured 50%. . . .") How fish are shared between tribes in the first instance is for tribes alone to decide. **Fishing Vessel**, 443 U.S. at 671; 384 F. Supp. at 417. In any event, the reduction of one tribe's allocation would not benefit non-treaty fishers unless all tribes that fished on the same population had their allocation diminished.

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[39] Plaintiffs' expert economist, Mr. Meyer, estimated that per capita income from the harvest of all treaty reserved resources, including shellfish, would be less than $2,500 per year. SER 963; 259-60.

c. Moderate Living Relates Only To Tribal Fisheries, Not All Economic Activity.

A plain reading of the Supreme Court's discussion of the moderate living issue reveals that the "living" that the Court was referring to is only a living or livelihood derived from treaty reserved resources. The tribes would not have understood that some income ceiling was being placed upon their reliance on fishing. They were led to believe that in reserving their right to take fish, they would be able to rely upon their traditional way of life to support themselves and prosper. **Fishing Vessel**, 443 U.S. at 668. The Supreme Court's moderate living standard is directly tied to the livelihood to be achieved from the treaty resources.[40]

Appellants would have the district court engage in a far-ranging inquiry concerning all possible sources of income of tribal members and

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[40] The only discussion of an allocation standard remotely like "moderate living" since the decision in **Fishing Vessel** occurred in **Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin**, 653 F. Supp. 1420 (W.D. Wisc. 1987) and 686 F. Supp. 226 (W.D. Wisc. 1988). That case unequivocally held that the allocation of natural resources reserved by Chippewas may only be limited when Indians exceed a moderate living from those resources. 653 F. Supp. at 1426, 1432, 1435. The court held that even if tribes in Wisconsin harvested every natural resource reserved in their treaties to the fullest extent possible consistent with conservation principles, they would not even achieve a "modest living." 686 F. Supp. at 233.

tribal governments, in order to make a continuing detailed analysis of their precise economic circumstances. It is inconceivable that that was the Supreme Court's intent. The practical problems alone would be immense. For example, appellants have been consistently unable to articulate a remedy for reduction of the allocation if a narrow, income driven, standard is applied. Immediate questions arise: How would the reductions be implemented? Would the Court have to hold a hearing every year concerning whether the tribes' circumstances have changed in the previous year? How much change in circumstances would justify how much change in the allocation?

The implications of appellants' proposal should not be overlooked. Under their theory tribes retain their treaty right to fish only so long as they stay poor and avoid other economic pursuits. They assume that the United States intended tribes to be a permanent underclass whose share of the economic pie should not place them more than $1 above destitution. Fishing is converted into an occupation of last resort, rather than the foundation of Indian culture and society. The tribes bargained for the right to continue their dependence on fish as a way of life. Because fish are now scarce and

tribes must pursue other forms of livelihood, the State would deprive them of the few fish that remain. That turns the treaty promises upside down. The only question should be whether a 50% allocation would lead to wastage.

5. No Change In Circumstances Was Demonstrated, Even If Purely Economic Factors Are Considered.

The State and UPOW argue that all personal and tribal economic activity, on a tribe-by-tribe basis, must be considered as part of the moderate living standard. State Br. 78-81; UPOW Br. 49-61. Although the court did not specifically rule on whether such an analysis is necessary, it found that appellants could not prevail even if such an analysis were pursued. 873 F. Supp. at 1446. The court's findings of fact in support of that conclusion were based on "uncontroverted" evidence and the court's conclusion is therefore unassailable. 873 F. Supp. at 1446.

Mr. Meyer, plaintiffs' economist, testified as to the tribes' relative material circumstances. He used a multiple indicator approach: poverty rates, health, income and unemployment rates. SER 964. Each of these indicators demonstrate that tribes lag significantly behind all residents of the State of Washington:

1. Approximately one in three tribal members lives below the poverty level, a rate more than three times that of the general population for the State or the United States.

2. Indians endure health circumstances characterized by the State as "very poor," and by the American Indian Health Care Association as "alarmingly poor."

3. Tribal members' per capita incomes are less than one-half the per capita incomes of residents of the State or of the United States as a whole.

4. Tribal members suffer unemployment rates at least three times those of all residents of the State.

SER 961. This evidence was not challenged, Thomas, SER 351-52, and was incorporated into the court's findings of fact. 873 F. Supp. at 1446.

UPOW, and perhaps the State, continue to rely on the economic analysis of Dr. Thomas. 873 F. Supp. at 1446; UPOW Br. 49-61; State Br. 78. Dr. Thomas' methodology was severely criticized at trial as not based on sound economic and statistical science and riddled with unwarranted assumptions and major calculating errors. SER 386-407. That criticism went unrefuted. The district court properly found appellants' evidence flawed and unpersuasive. 873 F. Supp. at 1445, 1446.

Dr. Thomas compared his definition of moderate living with the

calculations he made of what he defined as tribal household income.[41] He used Census income data for Indian households and added what he called "tribal collective income" to the tribal household income. Then he compared his calculation of average tribal household income (which included both private money income and "tribal collective income") against his definition of moderate living (which was based only private money income but not non-tribal collective income).

Dr. Thomas' definition of moderate living is solely an income based definition. SER 358. However, he conceded that economists do look at other factors in comparing standards of living among different communities. SER 357-58. Mr. Meyer testified that a multiple indicator approach is superior when evaluating the relative material circumstances of different groups because that procedure reduces "risk of statistical or culturally based distortion that may be associated with sole reliance on a single measure." SER 964. **See also** SER 966 and SER 964 (State's usage of multiple indicators elsewhere).

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[41] He conceded that his definition was an abstract idea that understated the number of tribal households. SER 363. It was low by a factor of about 2.4 times, thus leading to a greatly inflated income per household. SER 398. **See also** SER 967.

Under Dr. Thomas' analysis, if the average household income of a community exceeds the poverty level by one dollar, that community would be said to have a moderate living. SER 359-60. Dr. Thomas acknowledged that a substantial number of households in a community could be below the poverty level, yet the community still be found to have a moderate living as he defines it. SER 360. His definition is meaningless because virtually any community would meet it. Out of 731 small and medium sized communities in the State of Washington, only three would not qualify for a moderate living. SER 388.

Dr. Thomas admitted that he did not know how the word "moderate" is used in statistics. SER 355. In statistics the term "moderate" is a measure of central tendency, that is, that the distribution of income spreads on both sides of the measurement. Meyer, SER 387. Because Dr. Thomas' definition proceeds from the poverty level to below a median income, it is not a measure of central tendency.[42] SER 387.

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[42] In addition, Dr. Thomas compared the average household income of a tribe to the median household income of non-Indians, two very different measures. Mr. Meyer criticized Dr. Thomas' comparison of averages with medians as totally inappropriate and simply not done by reputable statisticians. SER 391.

Dr. Thomas' inclusion of "tribal collective income" assumed that all expenditures by federal, state and local governments benefit Indians and non-Indians equally. SER 370-71; 705. However, he admitted that he had no basis for his assumption and had not conducted any investigations or collected any data that would support it. SER 370-71. His assumption was refuted on rebuttal. Meyer, SER 394-95.

Dr. Thomas also assumed that tribal members get more benefits from tribal governments than non-Indians receive from similar expenditures by federal, state and local governments. Yet Dr. Thomas did not determine whether, or to what degree his assumption was valid. He admitted that tribal expenditures are similar, for the most part, to expenditures by other governments. SER 366-67. Federal grants and contracts are the predominant source of funds for Indian tribes, SER 367, and over 90% of federal programs for Indians are programs that are either available to non-Indians or are components of larger federal programs available to others, including state and local governments. Meyer, SER 410. Dr. Thomas' assumption had no basis in fact.

Dr. Thomas also assumed that non-tribal members essentially derived

no more than 10% of the benefits from tribal governmental expenditures. SER 706. He conducted no investigations nor collected any data to support this assumption, which substantially understated benefits to non-members. Meyer, SER 402. For example, tribal expenditures on fish hatcheries produce fish that are allocated 50% to non-Indians. Meyer, SER 402-03.

Finally, "tribal collective income" is not actually distributed to tribal households, as Dr. Thomas admitted. SER 373. Dr. Thomas' redistribution of tribal expenditures is purely theoretical, as he conceded that federal funds, the predominant source of tribal expenditures, can only be used for the specific purpose for which the funds are provided. SER 367.

In summary, Dr. Thomas' allocation of tribal expenditures on a household by household basis does not comport with the real circumstances of the tribes. As Dr. Thomas ultimately recognized, no government in history has ever chosen to do what he assumed as a fundamental basis of his testimony.[43] SER 708.

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[43] Dr. Thomas also committed numerous calculating errors in his analysis that significantly affected his results. **See, e.g.**, Meyer, SER 398, 389-90, and 400-01. Using Dr. Thomas' methodology, but correcting for errors, including tribal collective income increased the average household income by about $1,400 per household per year. Meyer, SER 396-97. This would not change (continued...)

Appellants did not carry their burden to demonstrate that circumstances had changed so as to reduce the tribes' 50% share, even under appellants' theory of moderate living.

F. Appellants' Limitations On The Right Of Taking Shellfish Would Rob It Of Any Meaning.

Shortly before the first treaty was negotiated, Governor Stevens wrote:

> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of congress that Indians should be excluded from their ancient fisheries. . . .

ER 711. 125 years later, the Supreme Court quoted that language and concluded that "it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish." **Fishing Vessel**, 443 U.S. at 676. The Court went on to hold that the "in common with" clause guaranteed Indians a "right . . . to a fair share of the available fish." **Id.** at 685. It rejected the State's "equal opportunity" interpretation of that clause, noting that tribal salmon harvests, on that basis, would comprise only 2% of

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[43](...continued)
the conclusion that income for tribal households is significantly below that of all residents for the State of Washington. Meyer, SER 397. Nor would it affect the unemployment or health status of tribal members.

the salmon taken in the case area, an outcome it described as netting them "virtually no catch at all." **Id.** at 666-667, n.22.

The overwhelming percentage of shellfish harvested commercially today are shellfish that appellants would exclude from treaty harvests: those introduced into the area after the treaties; those taken from deep waters using technology not in existence at treaty times; or those for which no significant market existed in 1854. The uncontradicted evidence shows that, as with the replacement of salmon by hatchery fish, native shellfish populations have suffered huge losses and have been replaced to a large extent by species introduced into the area since 1854. Also, the State concedes that "99% of the populations of geoduck, urchin, cucumber, crab, shrimp, and other shellfish are found only in deep waters." State Br. 16. Under appellants' interpretation of the treaties, tribes would have a treaty right to harvest, at most, only their 50% of the remaining 1 percent of these resources. Notwithstanding their treaty rights, tribes would be left with "virtually no catch at all."

The right of taking shellfish, if not to be stripped of its meaning, must be read broadly enough to include 50% of the available harvest for all

species of shellfish found anywhere within a tribe's usual and accustomed grounds and stations, other than from beds staked or cultivated by citizens.

1. Dramatic Changes Have Occurred To Shellfish Populations Since Treaty Times.

In the 1850's, shellfish were considered to exist in limitless quantities in western Washington. 873 F. Supp. at 1438; ER 706. It is not contested that since that time massive changes have occurred to native shellfish populations. Native oyster production declined by 1989 to less than 1% of its former level as a result of non-Indian activities. SER 1004-05. Today, the native oyster "has been almost totally supplanted" by the Pacific oyster, which was intentionally imported in the 1920's for the express purpose of replacing the native oyster. SER 1006.

Geoduck clams were once found in sufficient abundance in tidelands for commercial fisheries, but non-Indian over-harvesting "caused severe reductions by the early 1920's." SER 992. The intertidal stocks have never recovered to the point where a commercial fishery is possible. Today "over 99% of the geoduck population and harvest occurs" in deep waters appellants would exclude from the treaty right. **Id.**

Similarly, "[o]ver 99% of the crab population and fishery harvest in

Puget Sound occur subtidally, and approximately 1% of the harvest . . . [takes] place in intertidal areas." SER 970. Intertidal populations "continue to decline in abundance in the face of recreational pressure." SER 1009.

Clam populations have also changed dramatically. Native littleneck clams comprised only about 18% of the total clam harvest in Puget Sound as of 1988-1990; the introduced species, manila clams, comprised about 82%. SER 971. As University of Washington Professor David Armstrong testified, the former "level of abundance of native littleneck clams has been curtailed by the now extensive populations of manila clams. . . ." SER 233-34. **See also** SER 307, 319-20.

The introduction of other plants and animals into western Washington since the treaties has also reduced the abundance of native species, with the potential for more and possibly devastating changes in the future. SER 1001. For example, introduced plants such as *Spartina alterniflora* have eliminated habitat for clams, shrimp, crab, and other shellfish. SER 984, 986; 1012-13.

In addition to the direct changes in shellfish abundance, there have

also been dramatic changes in the amount of shellfish that can safely be consumed. Chemical, industrial and urban-related pollution have caused the closure of numerous beaches. SER 989. As a result, over 25% of the potential commercial shellfish beds have been closed and 56% of the beaches used for public shellfish harvests have been classified by the State as restricted or threatened. **Id.** Professor Armstrong concluded that the prognosis for shellfish harvests is "dismal" in view of the expected heavy population growth. SER 990.

While native shellfish populations continue to decline, new species are flourishing and now dominate commercial harvests in the intertidal area of Puget Sound. SER 969-76. Large populations of shellfish that were formerly unreachable with available technology, or for which markets did not exist, have become available and valuable. SER 343-46.

In summary, the shellfish, other fishery resources, and non-Indian fisheries have not stood still since treaty times. In seeking to limit tribes to taking the species of shellfish they took at treaty times, and by the methods they took them, the State argues that non-Indian fishers may adapt to and take advantage of these changes but that the treaty shellfishing right must

remain static and become meaningless.

2. Appellants' Limitations Would Lead To Monopolization Of Shellfish Resources By Non-Indians.

The facts described above, each of which is undisputed by appellants, lead to the conclusion that if appellants' theory of the right of taking shellfish is adopted, there will be virtually no shellfish for tribes to harvest. The exclusion of all species not harvested at treaty times, including introduced species such as manila clams, would limit the tribes to a share of what is now less than 20% of the clams harvested commercially in Puget Sound, even before appellants' expansive interpretation of staked or cultivated beds. The exclusion of shellfish found in deep water would limit the tribes to a portion of less than 1% of the geoduck, sea urchins, sea cucumbers, crab, shrimp, scallops, squid and octopus. The State would put 94% of the total value of commercial shellfish harvest in Puget Sound from 1988 to 1990 outside of the treaty right. SER 970.

Non-Indians have adapted to new conditions by harvesting introduced species, exploiting new markets, and using new technology to harvest what they never could have harvested at treaty times. But appellants would prohibit the tribes, who reserved the right to take fish to avoid the

destruction of their way of life, from adapting to those changes. And appellants would have this Court ordain that result, not on the basis of any express provision in the treaties, but rather on the basis of language they would have the Court write into them.

Beyond any question, appellants' static theory of treaty rights would utterly destroy the tribal right to take shellfish. What little is left today would no doubt be gone tomorrow. This Court and the Supreme Court have repeatedly held that the purpose of these treaties must be given effect in light of present circumstances so as to ensure that they do not become meaningless scraps of paper:

> As the non-Indian population has expanded, treaty Indians have constituted a decreasingly significant proportion of the total population, catching a decreasing proportion of a fixed or decreasing number of fish. 'This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'

520 F.2d at 685, quoting **Winans**, 198 U.S. at 380. This Court has also recognized that non-Indians should not be permitted to replace treaty-protected fish with unprotected fish. 759 F.2d at 1358-60.

The same principles apply here. If the "right of taking fish" "in common with" is to have any meaning and if the purpose of those reserved

rights is to be fulfilled, tribes cannot be limited to harvesting the fragmentary remains of a tiny portion of a resource once thought inexhaustible. All species of shellfish within the tribes' usual and accustomed fishing places "must be included in the tribes' allocation in order to 'assure the Indians a share of the fish.'" Having suffered the loss of so much of what was once available, it would constitute the highest injustice if the tribes were barred, for reasons not found in the treaties, from partaking of those benefits that have accrued in the modern era, such as new gear, exploitation of fish at depths not possible or efficiently practicable at treaty times, or new markets unavailable at treaty times. Rejection of appellants' efforts to eviscerate the tribes' right to take fish is mandated by the prior decisions of this Court and the Supreme Court that have protected the "substance" of that right against all attempts by State and private interests to subvert it through limitations and restrictions not found expressly or implicitly in the treaties themselves.

IV. THE SHELLFISH PROVISO APPLIES ONLY TO TRIBAL HARVESTING FROM ARTIFICIAL SHELLFISH BEDS.

The Stevens Treaties reserve to the tribes the right of taking fish, including shellfish, but specifically except from this right the taking of

shellfish from "any beds staked or cultivated by citizens." Consistent with basic principles of treaty interpretation, **supra** Section II, the district court engaged in a careful and detailed analysis of the understanding of the term "beds staked or cultivated" at treaty time, "viewing the words as they would have been viewed by the parties who participated in the treaty negotiations," 873 F. Supp. at 1434. That examination yielded "compelling evidence," **id.** at 1429, that the contemporary understanding of "beds staked or cultivated" was that they were shellfish beds created by human activity where natural beds of that shellfish type did not exist.

Specifically, the district court found: (1) that the United States' negotiators drew the language of the shellfish proviso from the mid-nineteenth century shellfishing industry; (2) that in that industry, it was widely understood that staked or cultivated beds did not include natural beds of shellfish (an understanding shared by the public at large); (3) that the United States negotiators promised the tribes that under the treaties they would not be excluded from their ancient fisheries; (4) that the United States' negotiators viewed a prohibition on tribal harvesting from artificial beds as sufficient to facilitate the development of a thriving shellfishing

industry in Washington Territory; and (5) that the tribes relied on the United States' guarantees of continued access to their fisheries in consenting to the treaties. Far from being clearly erroneous, each of these findings is supported by overwhelming evidence. Taken together, they support but one conclusion -- "[w]hen the parties used [the] terms [of] the Shellfish Proviso, they intended only to exclude Indians from artificial . . . shellfish beds; they neither contemplated nor desired that the Indians would be excluded from natural shellfish beds." 873 F. Supp. at 1441.

A. The United States Intended That The Shellfish Proviso Would Prohibit Tribal Harvesting Only From Shellfish Beds Created By Citizens.

1. The Treaty Commissioners Took The Language Of The Shellfish Proviso From The Shellfish Industry.

To determine what the United States negotiators intended, the district court appropriately began "with the text of the treat[ies] and the context in which the written words are used." **Air France v. Saks**, 470 U.S. 392, 396-397 (1985). The context the court looked to was that of the shellfishing industry: it found that the treaty commissioners were familiar with the industry, and that the terms "staked" and "cultivated" had meanings well-known within it. Those findings are supported by overwhelming evidence.

Indeed, both expert historians concurred that the negotiators used the terms of the proviso as they were commonly used in the shellfishing industry.

a. The Treaty Commissioners Were Familiar With Shellfish Industry Practices.

The district court found that "there is no doubt that the United States treaty negotiators were generally familiar with the East Coast shellfish industry and its practices . . . [Furthermore] both George Gibbs and members of the signatory Tribes were familiar with the shellfishing practices occurring at Shoalwater Bay [in the Washington Territory] at treaty time." 873 F. Supp. at 1434. These findings, which appellants do not seriously controvert, enjoy compelling support in the record.

There is no dispute that the treaties were negotiated at a time when shellfishing had considerable importance in American life, one difficult for twentieth-century Americans to fathom. White, SER 116; 920-951; 919-19. George Gibbs, one of two major drafters of the treaties, SER 878, ER 49, grew up in the very heart of the shellfishing industry, having been raised on the East River in New York. White, SER 115-16; Richards, SER 689. After arriving in Washington Territory Gibbs twice travelled to Shoalwater Bay, the center of the territorial shellfishing industry. Richards, SER 690.

These visits yielded an 1854 report in which Gibbs described the settlers' practice of removing oysters from their natural beds and replanting them, a practice which he indicated was also prevalent in the "States" (which in 1854 could only be a reference to the east coast):

> The principal trade, so far, has been in oysters, which abound on the flats. They are taken up, during the low tides of summer, from their natural beds, separated and replanted, as in the States.

ER 1106-1113.[44]

There is similarly no dispute that Isaac Stevens enjoyed a background that brought him into close contact with the shellfish industry, Richards, SER 677-86, 689; White, SER 115-16. Appellants' expert historian, Professor Richards, concurred with respondent's expert, Professor White, on these points:

> Stevens and Gibbs were familiar with the practice of taking shellfish, particularly oysters, on the East Coast, in California, and in Washington by whites and Indians. . . . Gibbs was thoroughly familiar with both white and Indian use of oysters and clams and with the

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[44] In **Fishing Vessel**, the Supreme Court thought it a "highly dubious assumption" that Gibbs was familiar with the "intricacies of water law" on which the State predicated its salmon arguments. 443 U.S. at 67 n.23. Here, by contrast, there is no question that Gibbs was familiar with the shellfishing industry of the mid-nineteenth century: his writings provide direct evidence of that fact, both sides' experts agreed to it, and the district court so found.

oyster trade carried on out of Shoalwater Bay.

Richards, SER 689.

b. "Staked" And "Cultivated" Beds Were Widely Used Terms In The Treaty Time Shellfishing Industry.

The district court found "substantial evidence of the actual use of the terms 'staked' and 'cultivated' within the [treaty time] shellfish industry," 873 F. Supp. at 1432, and once again, the record fully supports this finding. By the 1850s, Americans had been creating "staked" and "cultivated" shellfish beds for many years.

Lieutenant M.P. DeBroca, who wrote a comprehensive study of the American cultivation industry for the French government in 1862, observed that Americans most commonly created cultivated beds by transplanting oysters from their natural beds to areas where they could grow more rapidly:

> American ostriculture, more simple than ours in all its details, consists in planting the mollusks on those parts of the coast where the submarine soil is best fitted by its nature to fatten them and promote their growth.

DeBroca, SER 893; White, SER 846-47. Transplanting of oysters began in the New York area in the early 1800's and spread quickly to other parts of the New England and mid-Atlantic coast, including Massachusetts, New

Jersey, Connecticut, and the Chesapeake Bay region. White, SER 848-52, 885. It was this practice of taking up oysters "from their natural beds, separat[ing], and replant[ing]," which George Gibbs described as having taken hold in the Washington Territory by the early 1850s. ER 1106.

By the 1850s Americans had also developed a second method of creating cultivated beds which involved the spreading of shells or other material in order to capture oyster spawn. Ingersoll, SER 752; White, SER 846-47, 852-54. Americans were also contemplating the cultivation of clams (statutes providing for oyster cultivation sometimes referred to clam cultivation as well), but little clam cultivation had yet taken place. White, SER 854.

In addition to creating cultivated shellfish beds, treaty-time Americans frequently created staked beds of shellfish. They did so by removing adult shellfish to readily-accessible locations close in to shore, where they staked them off and stored them until they could be shipped to market. The stakes enabled the public to distinguish between the oystermen's beds and other beds of shellfish. White, SER 855-62. Ernest Ingersoll, who "was the foremost expert on, and the first real historian of, the shellfish industry in

the United States during the nineteenth century," White, SER 844-45, described these staked beds in the following manner:

> Each proprietor of a space upon the flats chartered the services of a vessel . . . to go to some specified oyster-ground and purchase a certain number of bushels . . . When the vessel arrived home she anchored in the distant channel, and the oysters were unloaded to dories, 50 bushels to a dory. The dories then proceeded to the grounds, which had been already divided into rectangles a few rods square, by rows of stakes, and deposited a load of 50 bushels in each rectangle or "square."

SER 749-50.

This practice of creating staked shellfish beds for storage purposes had also spread to Washington Territory by the time of the treaties. Thus James Swan, a prominent Shoalwater Bay oysterman who hosted George Gibbs on his visits there, White, SER 123, described how in the early 1850s on the Bay "each oysterman ha[d] a bed which [was] marked by stakes driven into the flats, and [could] be reached at any time, either by foot at low water, or in boats at high tide." SER 657. Oysters were stored in these beds until a ship arrived. Then "the oystermen, white and Indian, would load oysters from the beds onto their scows and canoes and carry them out to the ships where they would be loaded for San Francisco." White, SER 872-77.

Those creating cultivated shellfish beds at treaty times frequently

delineated the boundaries of their beds as well, often with stakes or other markers. White, SER 113; 857-65. This use of markers was widely catalogued both in the popular press and in more detailed industry accounts. See, e.g., Ballou's Pictorial Drawing Room Companion, Sept. 9, 1855, SER 888; DeBroca, SER 893-94; White, SER 857-864. However, while staking represented the most common method of marking off a cultivated shellfish bed, cultivated beds were not always staked. Stakes could prove dangerous to navigation, particularly in deeper waters where cultivated beds were sometimes located, and other methods were therefore pursued. White, SER 113; 866. Thus, the first act passed by the Washington legislature regarding oyster cultivation provided that cultivated beds had to be marked off only "so far as is practicable," and authorized the use not only of stakes but of "other artificial marks" for this purpose. SER 1174, §2. Other jurisdictions similarly allowed for buoys or other markers to be used in lieu of stakes to identify the boundaries of cultivated beds.[45]

Thus, by the time of the treaties, "staked" shellfish beds and "cultivated" shellfish beds were familiar concepts for Americans. It was

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[45] See, e.g., SER 1152-55, § 18 (New Jersey); SER 1142-45, § 10 (Rhode Island).

there that they either grew shellfish (as in the case of a cultivated bed) or stored them (as in the case of a staked bed). Americans had been creating such beds for many years. White, SER 852; DeBroca, SER 892.

c. The District Court Properly Looked To The Shellfish Industry To Determine The United States Negotiators' Intentions.

The district court's interpretive mission was to "determine what the parties meant by the [shellfish proviso]." **Shoshone Indians v. United States**, 324 U.S. 335, 353 (1945); **Fishing Vessel**, 443 U.S. at 675. To ascertain the United States' intentions, the court properly sought to "interpret[] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time." 873 F. Supp. at 1441. The proviso addresses shellfish, the treaty commissioners who wrote it were well-versed in the practices and terminology of the shellfish industry, and to express their intentions they chose terms that were commonplace within that industry. The conclusion necessarily follows that the commissioners drew the language of the shellfish proviso from the shellfish industry, and intended the terms to be used according to their familiar industry meaning. Indeed, Professor Richards again concurred with

Professor White on this point:

> The "staked or cultivated" terminology was familiar to Stevens and Gibbs and no doubt to others with the possible exception of Doty who had never lived near the ocean. **Borrowing from the oysterman's terminology** the commissioners found a way of protecting settlers' livelihoods.

Richards, SER 691 (emphasis added).

2. "Staked or Cultivated" Beds Did Not Include Natural Beds Of Shellfish.

While mid-nineteenth century Americans frequently created staked or cultivated beds of shellfish, they could not do so anywhere. "Staked beds" and "cultivated beds" were widely understood not to include natural beds of shellfish:

> [T]he Tribes presented compelling evidence that only artificial beds were 'staked' and 'cultivated' at treaty time . . .
>
> * * *
>
> [T]he words 'any beds staked or cultivated by citizens' describe artificial shellfish beds created by private citizens.

873 F. Supp. at 1431, 1441. This finding was not based on "a technical definition," Alexander Br. 59, or "the intricacies of east coast shellfish law." Growers Br. 32. **See also** State Br. 85. Rather, the district court canvassed a wide range of sources, including not only legislative enactments and

judicial decisions, but also industry treatises, articles in the popular press, and, most importantly, the writings of the treaty commissioners themselves. It found that they consistently drew a sharp distinction between natural shellfish beds and the staked or cultivated beds created to store or grow shellfish. This factual determination again finds ample support in the record.

a. Historical, Popular And Industry Accounts, And The Treaty Commissioners Themselves, Distinguished Between Staked Or Cultivated And Natural Beds Of Shellfish.

Lieutenant DeBroca, who wrote the most "elaborate" description of the American oyster industry in the mid-19th century, SER 891, emphasized that oyster cultivation did not take place on natural oyster beds, which remained part of the common fishery:

> American ostriculture . . . consists in planting the mollusks on those parts of the coast where the submarine soil is best fitted by its nature to fatten them and promote their growth . . . Whatever may be the locality chosen by the planters, **they can in no case pursue their industry on the natural banks of oysters, the common property of the people**. . . .

SER 893 (emphasis added); 873 F. Supp. at 1432, 1434.[46] Similarly, Angell, in his authoritative 1847 Treatise, declared the prevailing law and practice of the time to be that oysters could not be staked or cultivated in places where they naturally grew:

> Oysters . . . may be taken and thus become the property of him who takes them, and if he plants them in a new place flowed by tide water, **visibly denoted, and where there are none naturally**, and for his own particular benefit, it is not regarded as an abandonment of his property in them.

SER 909 (emphasis added); 873 F. Supp. at 1433 n.9, 1434. And Ernest Ingersoll likewise described the "methods of oyster culture" prevalent at treaty times as taking place on non-natural beds. Thus, the East River oystermen who initiated the practice of capturing oyster spawn did so on "artificial beds or prepared receptacles." Ingersoll, SER 752. Meanwhile, those engaged in the more traditional practice of transplanting oysters did so

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[46] DeBroca noted in this regard that by a natural oyster bed he meant "a conglomeration of mollusca presenting a character of continuity. . . . As to places where, through accidental circumstances, isolated oysters have developed, they are not classed among the natural beds, since, if this were the case, the largest part of the submarine soil of the coast would be under interdiction and oyster culture would be impossible." SER 893. Professor White similarly testified that a natural bed was thought of as "a concentration of shellfish. It's not a scattering of shellfish. It's a concentration of shellfish which occurs without any purposeful human action." SER 113.

"**from the abundant natural beds along the shore to staked-in tracts off shore. . . .** " Ingersoll, SER 752 (emphasis added); 873 F. Supp. at 1432, 1441.

Ingersoll's voluminous treatise regularly distinguishes in this manner between staked or cultivated beds and natural beds. Indeed, as the district court noted, Ingersoll wrote a glossary of terms defining "**cultivate**" as "**[t]o raise oysters artificially from spawn, or from transplanted young.** See Plant." He further defined "plant" as "**[t]o place oysters on artificial beds**, intending them to survive the winter, attain full size, and spawn. See **Cultivate.**" And he provided as a second definition of "plant" "[a]n oyster which has been 'bedded,' **in distinction from one of natural growth.**" Ingersoll, SER 753-54 (emphases added). Thus, the first major historian of the American shellfish industry clearly thought of staked or cultivated shellfish beds as artificial beds.

The popular press also distinguished between staked or cultivated beds and natural beds at treaty times. For example, a March 12, 1853, article in the New York Herald stated that thirty years earlier "[n]early all [the oysters] that were brought to market [in that city] were procured from the

natural beds, for the benefits to be obtained from planting were but imperfectly understood by a few of the dealers, or entirely unknown to them." It had since been found, however, "that **by removing the oyster from its natural bed to an artificial one**, it could not only be increased in size, but improved in quality, and rendered fit for use at any period of the year." SER 920-51 (emphasis added).

This distinction between staked or cultivated and natural beds was not lost on the treaty commissioners or other settlers in Washington Territory. As the district court found, "[t]he practices at Shoalwater Bay were modelled after East Coast practice: oyster farmers cultivated oysters by transplanting them to artificial beds and under no circumstances did they 'stake' or 'cultivate' natural beds." 873 F. Supp. at 1435; White, SER 872-77. Thus, George Gibbs described the cultivation industry at Shoalwater Bay as involving the replanting of oysters taken "**from their natural beds as in the States.**" ER 1106 (emphasis added); 873 F. Supp. at 1434 (quoting Gibbs). In an 1853 letter, James Swan similarly described the oystermen's activities at Shoalwater as centering on the transplanting of oysters from their natural beds to the oystermen's own beds to spur their growth:

> There is no-one here engaged in the business who wishes to move the oysters out of the bay during the breeding season, but we want to collect them and plant them on our own beds, as by that means the oysters grow larger and are of finer flavor. The natural beds of oysters in this bay have great quantities of shells, muscles, cockles and scallop clams on them, and by taking the oysters up and separating them from these things, they have a chance to grow, and we have already found that when the beds have been thus worked the oysters have greatly improved.

SER 755-56; **see also** SER 889; 873 F. Supp. at 1434. Thus, ample support exists for the district court's finding that, consistent with practices elsewhere in the country, the Shoalwater oystermen were creating and cultivating artificial beds.

Remarkably, both Alexander and Adkins represent to this Court, as purportedly uncontested fact, that at Shoalwater Bay growers took over rich oyster beds and staked claims which excluded Indians. Alexander Br. 13-14, 41; Adkins Br. 18. Appellants make these assertions without acknowledging the district court's findings squarely to the contrary. 873 F. Supp. at 1435.

Their claim derives from Professor Richards' testimony that either shortly before or after the treaties the Shoalwater oystermen "whacked out" most, if not all, the natural beds of oysters, dividing those beds up among

themselves and excluding the Indians. See ER 920-926.[47] However, that testimony was thoroughly discredited at trial, as it flew in the face of the historical evidence (in their 400 pages of post-trial briefing appellants made no effort to defend it).

All first-hand accounts of Shoalwater Bay at treaty time described the oystermen as removing oysters from natural beds and planting them on their own staked beds for storage or improved growth. In addition to Gibbs and Swan, other early oystermen on the Bay recounted the process of bedding oysters harvested from the natural beds prior to selling them to market. Transcript of Interview With John Stillwell Morgan, SER 910-11; Letter of Charles Stevens, SER 912-16.

None of these first-hand accounts makes any reference to non-Indian oystermen appropriating natural beds of oysters to their own exclusive use or to Indians being excluded from the natural beds. Indeed, Swan wrote that "hundreds of Indians" would resort to Shoalwater Bay "to procure clams and crabs for their own eating, and oysters to sell to whites." SER 656. Similarly, William Tappan, a subagent in the Indian service, wrote to Isaac

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[47] They also rely on an isolated statement by Dr. Lane in a different case. That is addressed below, section IV C(3).

Stevens in 1854 that Indians on Shoalwater Bay were "well fed from the clam and oyster banks. . . ." SER 1115. Responding to Stevens' request for advice as to the upcoming treaty negotiations, Tappan recommended that the treaties retain for the Indians "free access" to those banks. SER 1116. These reports contradict Professor Richards' suggestion that Shoalwater Bay oystermen had successfully divided up most, if not all, the natural beds among themselves. The district court properly rejected that suggestion.[48]

In fact, the county records and other evidence showed that appellants' "whacks" were not created until after 1866, White, SER 431-36; Richards, SER 687; SER 762; 954; and were nothing more than planting beds, utilized in the traditional manner for the growing of small oysters to maturity. White, SER 436-41; SER 762; 758-61.

Thus, the historical record provides unambiguous support for the district court's finding that "[t]he oyster farming industry, as constituted at treaty time, was built on artificial beds." 873 F. Supp. at 1437. Treaty-time accounts of industry practices, whether found in the popular press or in

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[48] Professor Richards relied on three sources, none of which are reliable, both because they are based on recollections far removed in time from the relevant events, and because the authors were not present themselves and admitted the unreliability of their sources. White, SER 442, 444.

comprehensive treatises, in the writings of Washington Territory oystermen or in the reports of George Gibbs himself, all distinguished between staked or cultivated beds and natural beds of shellfish. The "contemporary understanding," **Eastern Airlines, Inc. v. Floyd**, 499 U.S. 530, 537 (1991), of a staked or cultivated bed was that it was an artificial bed of shellfish.

b. Legislation And Judicial Decisions Repeatedly Declared That Staked Or Cultivated Beds Could Not Include Natural Beds.

Like other treaty-time sources, the statutory and case law of the mid-nineteenth century drew a sharp distinction between staked or cultivated and natural shellfish beds. As the district court found, the legislatures and courts consistently provided that staked or cultivated beds could not include natural beds. 873 F. Supp. at 1433-1434; **see also id.** at 1433 n.12 (cataloguing laws and cases).

The district court's conclusion again finds overwhelming support in the historical record. The growers, the only appellants to address the law of staking or cultivating in any detail, concede that "most, but not all, states in the mid-nineteenth century prohibited oyster farmers from gaining exclusive control of natural shellfish beds by 'staking' or 'cultivating' those beds."

Growers Br. 7. That concession is accurate in all but one respect: at treaty times, **all** states that authorized the creation of staked or cultivated beds distinguished them from natural beds of shellfish.

In 1849, for example, the Maine legislature authorized the creation of staked or cultivated shellfish beds, but flatly declared that:

> Nothing herein contained shall be so construed as to authorize any person to appropriate to his own use, or to mark, stake off or enclose any natural oyster bed or in any wise to impair the common rights of citizens to any natural oyster bed, or to obstruct the free navigation of the waters aforesaid.

SER 1163-64, §§ 1-2.

Where other legislatures provided for the staking or cultivating of shellfish beds, they too distinguished between them and natural beds. **See** SER 1170-73, §3 (Connecticut, 1855); SER 1162, §10 (Massachusetts, 1848); SER 1156-61, §14 (Virginia, 1847); SER 1149-51, §§1, 3 (Connecticut, 1845); SER 1130-32, §XI (New York, 1813); SER 1139-41, §§1-2 (New Jersey, 1824); SER 1137-38, §§ 1, 3 (New Jersey, 1821). This was true not only on the east coast but in California as well, where the legislature enacted a statute in 1851 permitting individuals to plant oyster beds and to stake them off, but only on "any of the lands belonging to [the]

State below low-water mark, in which there is no natural growth thereof." SER 1165-66, §§ 1-3.

Courts too distinguished sharply between natural beds and those which could be staked or cultivated. In **Lakeman v. Burnham**, 7 Gray 437 (Mass. 1856), SER 1261-63, for example, the owner of tidelands encompassing natural clam flats transplanted additional clams to those flats, staked them off, and claimed the exclusive right to their harvest. The Massachusetts Supreme Court rejected the claim, stating that the landowner had proved no facts sufficient to defeat the "public right to the shell fishery in the flats . . . ." **Id.** at 441. **See also Phipps v. Maryland**, 22 Md. 380, 388-390 (1864), SER 1271-76 (construing Maryland statute providing for the bedding or sowing of oysters not to authorize appropriation of natural beds); **Decker v. Fisher**, 4 Barb. 592, 595 (N.Y. App. Div. 1848), SER 1224-28 (holding that planters could maintain a trespass action for removal of their oysters, but only because they had planted them on a bed without natural oyster growth); **Fleet v. Hegeman**, 14 Wend. 42, 45-46 (N.Y. Sup. Ct. 1835) (same), SER 1222-23; **State v. Taylor**, 27 N.J.L. 117, 120-123 (1858), SER 1264-70 (same); **Shepard v. Leverson**, 2 N.J.L. 369, 373

(1808), SER 1180-87, (oysters planted where natural bed exists are abandoned to the public).

Appellants dispute none of this. They raise only one challenge to the district court's finding that the legislatures and courts of the mid-nineteenth century distinguished between staked or cultivated and natural shellfish beds -- in Rhode Island, the growers and Alexander declare, the General Assembly enacted legislation in 1844 which countenanced the leasing of natural oyster beds for the planting of oysters. See Growers Br. 7-8; Alexander Br. 11, referring to Act of January 1844, §§ 9-10, SER 1142-45. This is true. However, what the appellants do not say is that in 1852, the General Assembly amended the statute to conform it to the general understanding that staked or cultivated beds could not encompass natural beds of shellfish:

> Said Commissioners shall not lease or renew any lease of any piece of land covered by the public waters of this State, as a private or several oyster ground or oyster fishery, for the planting of oysters, which is or shall be at the time of the application for said lease a natural oyster bed.

Act of January 1852, §§ 1-2, SER 1167-69.

Thus, the statute that the appellants claim destroys the uniformity of

the treaty-time understanding of cultivated beds had in fact been repealed by the time of the treaties. Contrary to the growers' assertions, it is not "the Tribes' argu[ment] that Governor Stevens rejected Rhode Island's practice of permitting natural beds to be staked or cultivated . . . ." Growers Br. 8. Instead, it was Rhode Island itself that rejected that practice, bringing its understanding of staked or cultivated beds back into conformity with the rest of mid-nineteenth century America.

Even while it was in effect, the 1844 Rhode Island statute constituted an isolated exception to the rule that staked or cultivated beds did not include natural shellfish beds. Appellants point to no other state law of general applicability authorizing the creation of staked or cultivated oyster beds where natural ones were found, and none exist. As the accounts of the treaty-time shellfishing industry detailed above (and the short-lived nature of the Rhode Island statute) overwhelmingly suggest, this anomalous legislation did not affect the common treaty-time understanding of staked or cultivated beds as artificial beds of shellfish.

Indeed, Joseph Angell, who published his authoritative **Treatise on the Right of Property in Tide Waters** in 1847, was also the reporter for

the Rhode Island Supreme Court from the 1820s to 1857. Richards, SER 683. The treatise, which is quoted **supra** page 133, expressed the common understanding that natural oyster beds could not be staked or cultivated, SER 909, and did so at a time when the 1844 Rhode Island statute was still in force. The repealed Rhode Island legislation was simply not the significant part of the legal landscape the growers would like it to be.

The growers would have this Court rule that an isolated exception like the 1844 statute makes it impossible to discern what the common understanding at treaty times was of the treaty terms, absent proof that the treaty commissioners explicitly rejected all variants on that understanding. This, of course, misstates the applicable principles of treaty interpretation. Textual construction would be an exercise in futility if a court could not settle upon an interpretation of a document's terms absent a finding that the drafters expressly disavowed all other definitions, no matter how anomalous or exceptional. Rather, the courts assume that in choosing their words, the drafters intended them to be accorded their familiar meaning, **Floyd**, 499

U.S. at 537, which is precisely what the district court did here.[49]

Washington Territory passed its first comprehensive statute governing the staking or cultivating of shellfish beds in 1861. In doing so, it followed states that had authorized the staking or cultivating of shellfish beds in the pre-treaty era, and codified the understanding prevalent in the Territory that only artificial shellfish beds could be staked or cultivated. Thus, the 1861 "Act to Encourage the Cultivation of Oysters" provided that citizens could "plant oysters in any bay or arm of the sea" for either growth or storage purposes (and recognized that some had already done so), but only if they delineated the oysters with stakes or other markers, and only if they planted them "where there [were] no natural beds of oysters. . . ." SER 1174. Additional statutes concerning the "cultivation of oysters" enacted in 1863, 1873 and 1877 likewise provided for the cultivation and staking only of non-

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[49] In the district court, the growers also claimed that New Jersey posed an exception to the otherwise universal distinction drawn between staked or cultivated and natural beds. They have apparently abandoned that claim, and for good reason. The 1820 statute they relied upon, SER 1133-36, § 12, as reenacted in 1846, was later construed as forbidding the staking off or cultivating of all natural oyster beds. **Townsend v. Brown**, 24 N.J.L. 80, 82, 86 (1853), SER 1234-43. In addition, as shown in the text, the New Jersey legislature and Supreme Court both frequently distinguished between natural shellfish beds and those that could be staked or cultivated.

natural beds. SER 1178-79, §§ 1-2 (1877); SER 1176-77, §§ 1-2 (1873); SER 1175 (1863). As the district court stated, these laws are notable because (like the laws passed by the states) they not only "provide[d] [for] separate treatment of natural and planted oyster beds," 873 F. Supp. at 1433, "permit[ting] the planting of oysters in areas except where natural oyster beds exist," **id.**, but, "by specifically recognizing property rights in planted oyster beds, impl[ied] that there was no common law property rights in **planted beds**, let alone natural beds, at or before treaty time." **Id.** (emphasis in original).[50]

The statutory and case law of the mid-nineteenth century lend strong support to the district court's conclusion regarding the meaning of the shellfish proviso. In their normal usage, "staked" and "cultivated" beds were artificial beds created by citizens for the purposes of storing or

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[50] As the district court noted, in 1864 the territorial legislature passed an act authorizing three named individuals to plant, cultivate and gather oysters on Totten's Inlet. The district court recognized that the grant conceivably gave the individuals property rights to natural oyster beds, but properly concluded that, even if this was the case, the "single grant to three individuals . . . [did not] constitute a significant part of the legal landscape in the Washington Territory." 873 F. Supp. at 1433.

growing shellfish. Such beds did not include natural beds of shellfish.[51]

3. By Excluding Tribes Only From Artificial Shellfish Beds, The United States Kept Its Word.

In writing the shellfish proviso in such a way as to preserve the tribes' access to natural beds, the United States commissioners honored the promise they made to tribes during the treaty negotiations. As the district court found, the commissioners promised

> the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

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[51] This does not mean, of course, that no restrictions existed on the public's access to natural shellfish beds. Professor White testified that a variety of restrictions existed on the right of the common fishery in the mid-nineteenth century, including restrictions as to residency, seasons, and instruments. There could also be (though these were rare) grants in severalty, expressly giving an individual complete property rights in a fishery. White, SER 418-19. However, none of these restrictions on the common fishery had any bearing on what was understood at treaty times to be a "staked" or "cultivated" bed. There is no suggestion in the historical record that mid-nineteenth century Americans considered shellfish beds open only to residents of a certain town, or open only during certain months, or open only to certain individuals possessing several grants, to be "staked" or "cultivated" simply by virtue of those facts.

873 F. Supp. at 1435. The district court found that the United States made this promise for several reasons, including: (1) to secure Indian consent to the treaties; (2) to ensure that Indians would not become dependent on the United States for their subsistence; (3) because they intended to act honorably towards the Indians; and (4) because they "believed that it never could have been the intention of Congress that the Indians should be excluded from their ancient fisheries and expressed among themselves the intention to preserve Indian fishing rights." 873 F. Supp. at 1436.

Appellants do not challenge these findings as clearly erroneous, nor could they. The record is replete with statements by Stevens and other commissioners that Indians' fishing rights would be preserved after the treaties. **See, e.g.**, SER 642 ("this paper secures your fish"); SER 637-41, 644-45, 647-54. Professor White testified to the United States' motivations in promising permanent, meaningful fishing rights, and the correspondence between Isaac Stevens and Commission of Indian Affairs Manypenny reflects those motivations. **See, e.g.**, White, SER 826-34; ER 1045-1049, 1050-1062.

Had the United States negotiators crafted the proviso in a manner

allowing for non-Indian appropriation of natural shellfish beds, they would have broken their promise -- the treaties would have sanctioned the exclusion of Indians from their ancient fisheries. Instead, by defining those areas that tribes could not harvest in terms commonly understood to refer to artificial shellfish beds, the negotiators kept their word. Because "[t]here is no dispute that the United States negotiators intended to act in good faith towards the Indians," 873 F. Supp. at 1435, the record of the treaty negotiations lends strong support to the district court's interpretation of the proviso.

4. The United States' Commissioners Viewed Protection Of Artificial Beds As Sufficient To Foster A Thriving Shellfishing Industry.

All agreed below that the United States commissioners "envisioned the development of a thriving oyster farming industry in the Puget Sound." 873 F. Supp. at 1437. The district court found no inconsistency between this goal and the commissioners' promises that the tribes would not be excluded from their ancient fisheries. "[T]he Tribes' proposed interpretation [of the shellfish proviso] . . . is wholly consistent with the notion of fostering the shellfish industry." **Id.** at 1438.

Appellants do not challenge this finding or the subsidiary findings on which it rests. Thus, they do not disagree that, at the time of the treaties, the states which enjoyed thriving cultivation industries adhered to the common distinction drawn between staked or cultivated and natural beds. "The oyster farming industry, as constituted at treaty time, was build on artificial beds." **Id.** Nor do they disagree that it was those states that served as a model for the treaty commissioners as they sought to foster the shellfish industry in the Washington Territory. "[T]he record is devoid of any evidence that Stevens or any of the United States' negotiators held any ideas of reforming industry practices." **Id.** From these findings the district court's conclusion logically follows: the treaty commissioners would have felt no need to place natural beds off-limits to Indian harvesting in order to facilitate a strong shellfishing industry in Washington Territory.

Conversely, the treaty commissioners had a strong incentive to prevent tribal harvesting from shellfish beds created by non-Indians. By the mid-nineteenth century, experience had shown that protection of private property rights in artificial shellfish beds was essential to the development of a viable cultivation industry. White, SER 411-17. In states like New York,

California, and parts of New Jersey, the industry had prospered as a result of adequate security in artificial beds. White, SER 413-14. In other states, however, inadequate legislative or judicial authorization for the staking or cultivating of beds, or inadequate enforcement of the rights so created, had hindered the industry's advancement. **Id.**; **see also** Ingersoll, SER 751. This was "[b]ecause in the mid 19th century, the public was unwilling to recognize by and large any private rights in fish or shellfish in navigable waters. The public instead tended to think that those fish and shellfish were open to capture under the usual fisheries." White, SER 412. Indeed, accounts of the shellfish industry from the late nineteenth and early twentieth century document that a viable cultivation industry failed to develop in many locations because of the inability of cultivators to obtain secure rights to their artificial beds. White, SER 412-17; SER 660; 662-65; 629.

If the treaty negotiators had not included any limitations on Indian shellfishing, tribes could have harvested planted or stored shellfish after the treaties even from beds properly marked out. Given their familiarity with the shellfish cultivation industry, and their desire that it prosper in the new territory, the United States negotiators naturally sought to avoid that result.

At the same time, by limiting the scope of the treaty exception to artificial beds, they followed the model adhered to in states with successful shellfishing industries, and kept their promise that tribes could maintain their reliance on their ancient fisheries in the post-treaty era.

B. Appellants' Interpretations Of The Treaty Commissioners' Intent Ignore The Historical Record.

Appellants do not demonstrate any of the district court's findings about the United States negotiators' intent to be clearly erroneous -- in fact, they barely bother to try, given the compelling supportive evidence in the record. Instead, they pursue two tacks in challenging the district court's conclusion. First, they use pejorative labels in an attempt to tar the court's opinion, calling it "technical" on the one hand, Alexander Br. 59, or "speculative" on the other. Growers Br. 32. It is neither. To reach its conclusion, the district court faithfully adhered to the basic rules of treaty interpretation (described above), examining a wide variety of treaty-time sources to determine the negotiators' understanding of the language they crafted.[52]

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[52] It is highly inaccurate for the growers to assert that the canon of construction that ambiguities should be resolved in the tribes' favor "is the be all and end all of [the tribes'] argument." Growers Br. 17. The tribes argue that, while the terms "staked" beds and "cultivated" beds are not clear (continued...)

Second, abandoning their burden of showing the district court's findings to be clearly erroneous, appellants make a series of arguments designed to divert this Court's attention elsewhere. Those arguments share two features in common: first, in contradiction of the basic canon demanding an examination of the words of the proviso in context, they pay no heed to the mid-nineteenth century understanding of staked or cultivated shellfish beds; second, far from reading the proviso "narrowly in order to preserve the primary operation of the" shellfishing right, **Commissioner v. Clark**, 489 U.S. 726, 739 (1989), they would, if accepted, lead to the total evisceration of that right.

1. This Case Cannot Be Decided Simply By Looking At Dictionaries.

The growers argue that this Court can determine the treaty negotiators' intentions simply by looking at mid-nineteenth century dictionaries. However, courts avoid an undue reliance on dictionaries, with the Supreme

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[52](...continued)
on their face to a twentieth century reader, the historical evidence demonstrates, unambiguously, that the treaty negotiators understood them to refer to artificial beds of shellfish. The district court agreed, finding the "plaintiffs' evidence as to the meaning of these words to be much more compelling and persuasive than the evidence opposed to it." 873 F. Supp. at 1429. The ambiguity canon is hardly the entirety of the tribes' argument.

Court specifically cautioning that "dictionary definitions may be too general for purposes of treaty interpretation," **Floyd**, 499 U.S. at 537. In the words of Judge Learned Hand:

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) **aff'd**, 326 U.S. 404 (1945).

These cautions have particular relevance here. The dictionaries cited by the growers define neither a staked shellfish bed nor a cultivated shellfish bed.[53] Instead, the growers would have this Court look at how dictionaries defined the words "staked" and "cultivated" in their generic sense, taken out of the shellfish context. The Supreme Court has flatly rejected this approach to textual construction, repeatedly declaring that treaty analysis must begin "with the text of the treaty **and the context in which the written words are used.**" **Floyd**, 499 U.S. at 534 (emphasis added) (quotation omitted); **Air France v. Saks**, 470 U.S. at 396-97 (1985) (same). **See also Shell Oil Co.**

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[53] That fact alone distinguishes the cases cited at Growers Br. 11, for in each of those cases the terms at issue could be found in a dictionary.

v. Iowa Dep't of Revenue, 488 U.S. 19, 25 (1988) ("the meaning of words depends on their context"); **Oliphant v. Suquamish Indian Tribe**, 435 U.S. 191, 206 (1978) ("[Indian treaties] cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.")

There is no mystery about the context in which the terms "staked" and "cultivated" are used in the treaties: the proviso refers to staked or cultivated **shellfish beds**. The district court found, moreover, that the treaty commissioners had the shellfishing industry in mind when they crafted the proviso and the record, as detailed above, provides overwhelming support for that conclusion. The only basis the growers set forth for ignoring the shellfishing context is Judge Boldt's finding, based on the historical record, that the negotiators used other treaty terms ("usual," "accustomed" and "common") as the treaty-time dictionaries defined them. Growers Br. at 12. That finding, however, provides no sanction for departing from the historical record, and casts no doubt on the district court's thoroughly documented findings as to the manner in which the treaty commissioners used the terms at issue here.

The fallacy of the growers' approach is well illustrated by the Treaty of Medicine Creek (one of the Stevens treaties at issue), which allows tribes to pasture horses on open and unclaimed lands, provided "that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter." SER 763-68. Treaty-time dictionaries define the verb to "alter" simply as to make some change or to vary something. **See, e.g.,** Webster's 1855 Dictionary, SER 1077-79. However, the treaty negotiators intended something far more specific when it came to horses: tribes would have to castrate stallions prior to pasturing them, as that was the widely understood meaning of "alter" in context. White, SER 421-23. To follow the growers' approach of unquestioning reliance on generic dictionary terms, then, can lead to the complete distortion of the treaties. Even the growers' expert admitted that exclusive reliance should not be placed on dictionaries. SER 274. The Court must look to the context in which the treaty terms were used, and this is no less true for the phrase "beds staked or cultivated" than it is for the term "alter."

Moreover, the generic definitions cited by the growers do not provide unambiguous support for their position. For example, an 1853 Webster

definition of "cultivate" is "to manure, plow, dress, **sow**, and reap," GER 71 (emphasis added), suggesting that cultivation requires planting, not simply improving on natural growth. In addition, the growers nowhere explain why, if this Court is to look simply to dictionary definitions, it should not look to Ernest Ingersoll's historical glossary of shellfishing terms which, as discussed above, defines the term "cultivate" as "rais[ing] oysters artificially from spawn, or from transplanted young. See Plant." SER 753.

For a variety of reasons, then, this Court should reject the growers' efforts to cast doubt on the district court's findings through the use of generic dictionary definitions.

2. The Treaty Proviso Prohibits Tribes From Harvesting Shellfish From "Any Beds Staked or Cultivated," Not Simply From Any Beds.

The first reason listed by the growers for rejecting the district court's interpretation of the shellfish proviso is that:

> the Treaty bars Indians from harvesting from '<u>any</u> beds staked or cultivated.' <u>Any</u> beds means <u>any</u> beds, and the simple language of the Treaty does not and cannot support the interpretation advanced by the Tribes.

Growers Br. 7. This is illogical. The treaty's use of the adjective "any" says nothing about the meaning of the phrase "beds staked or cultivated"

which that term modifies. The use of the term "any" simply means that there are no artificial beds that tribes can harvest. Faced with a clear record that the operative phrase "beds staked or cultivated" refers to artificial shellfish beds, the growers would simply wish that language away.

3. The Shellfish Proviso Does Not Bar Tribal Harvesting From All Shellfish Beds Found On Private Property.

In the district court, all appellants asserted that the shellfish proviso prohibits tribes from taking shellfish found on privately owned tidelands. Before this Court, appellants now locate that argument principally in the "in common with" language of the fishing clause, rather than in the "beds staked" language of the proviso. As discussed above, section III A, the "in common with" language provides no support for that argument.

Appellants' shift in focus is hardly surprising, however. At trial, they failed to adduce a single piece of evidence showing that mid-nineteenth century Americans considered a shellfish bed to be either "staked or cultivated" just by virtue of the fact that it was located on private property. As Professor White testified, there is simply no suggestion in the historical record that anyone at treaty times described all shellfish beds found on privately owned tidelands as being automatically "staked." SER 121a. The

district court therefore properly refused to equate the proviso with mere private ownership. Indeed, it concluded that treating private ownership of tidelands as constituting a staked shellfish bed would undermine the purpose of the proviso to foster a shellfish industry. 873 F. Supp. at 1438.

4. Central To The Interpretation Of The Shellfish Proviso Are The Mid-Nineteenth Century Understandings Of The Treaty Negotiators, Not What Those Understandings Could Have Been Under Different Circumstances.

Cognizant of the fact that "staked" and "cultivated" shellfish beds were widely understood in the mid-nineteenth century to be artificial beds of shellfish, Growers Br. 7, the growers argue that states could have done things differently (that is, no prohibition -- constitutional or otherwise -- prevented them from authorizing the appropriation of natural beds). **Id.** Even if true, that fact proves nothing. The central question in determining the treaty negotiators' intent is not what the states might have done, but what they in fact did. The actual practices are what supplied the words of the proviso with their meaning.[54] White, SER 126-37. Had things been

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[54] The growers' claim that Professor White agreed that states had the power to permit staking of natural beds, as Rhode Island briefly did, Growers Br. 40, is therefore inconsequential because it is what the state did that informed (continued...)

different, perhaps the language of the treaties would have been different as well. As the Supreme Court said ninety years ago in rejecting a similar attempt to interpret the treaty language based on what-might-have-been:

> The respondents urge an argument based upon the different capacities of white men and Indians. . . . The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess.

Winans, 198 U.S. at 382.

5. That Nineteenth Century Oystermen Performed A Variety Of Tasks Does Not Obviate The Distinction They And Others Drew Between Natural And Cultivated Shellfish Beds.

The growers assert that "[p]eople in the nineteenth century shellfish industry performed a wide variety of cultivation activities on shellfish beds in order to improve the shellfish growing on those beds," Growers Br. 13, but that says nothing about where they performed them. The growers then baldly claim that "[i]n no way were [the cultivators'] activities defined by

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[54](...continued)
peoples' understanding of the treaty terms. Professor White, who has received numerous awards for his historical work, including a MacArthur "genius" Fellowship, and who has been a finalist for the Pulitzer Prize, consistently maintained that the states distinguished between staked or cultivated and natural beds, and that the treaty negotiators did not intend to prohibit tribal harvesting of the latter. SER 886-87.

location." Growers Br. 14. That assertion, supported by not a single citation to the evidence, amounts to a blatant disregard of the district court's findings and the historical record on which they are based.

As discussed in detail above, a wide variety of treaty time sources, including the writings of George Gibbs, catalogue the fact that shellfish cultivation was strictly defined by location -- as the district court found, it did not take place on natural beds of shellfish. Thus, an individual who planted shellfish where a natural bed of that type already existed was not considered to have cultivated those shellfish, but rather to have abandoned them. **See supra** at section IV A(2). The growers nowhere mention any of these descriptions -- not even George Gibbs' -- because they have no answer for them.[55] Location is indeed crucial to defining staked or cultivated beds.

6. That The Treaties Use A Synonym For Artificial Beds Does Not Mean That Something Other Than The Synonymous Meaning Was Intended.

As pointed out **supra**, Section II, where the United States can

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[55] Even the late-nineteenth and early-twentieth century sources cited by the growers for the proposition that Americans engaged in a wide variety of cultivation activities make this point clear, as they continued to distinguish between the beds where cultivators performed their activities and natural beds. **See, e.g.**, SER 630 and 631; 667; 659.

accomplish an objective by clear and direct words, and where it has chosen to do so in similar circumstances in the past, courts have found the absence of those clear and direct words to suggest a lack of intent to accomplish the same purpose. **See, e.g., Choctaw Nation v. Oklahoma**, 397 U.S. 620, 631 (1970). The growers attempt to use this principle to their advantage, arguing that because the treaty negotiators could have proscribed tribal harvesting from artificial shellfish beds, the proviso must proscribe something else. Growers Br. at 7, 17-18. The flaw in the growers' argument is that they have identified no mid-nineteenth century treaty or statute using the term "artificial" in reference to shellfish beds, such that one would expect to see that term used again in the Stevens Treaties. Absent such use by the United States the growers' argument lacks all force.

There simply is no canon of construction saying that where the United States employs a term for which a synonym is available, it must intend something other than the synonymous meaning. Given the variety of ways in which the United States might, in the first instance, choose to express itself, that would be absurd. While the United States might have chosen words besides "staked" or "cultivated" to convey its meaning, that does not

suggest that it intended its selected terms to be understood in other than their usual fashion.

7. The Treaty Outline Casts No Light On The Parties' Intentions.

Alexander argues that an outline of the treaty prepared by the United States' commissioners "reflects the parties' intent to use the term 'staked' in its common meaning. . . . When the 'Heads of Treaties' was drafted, the Shellfish Proviso was outlined as a 'proviso against staked or fenced claims.'" Alexander Br. 56.

It is, of course, the final text of a treaty that reflects the parties' agreement, and it is to that text that courts look in discerning their intentions. The treaty outline in question here is a particularly unreliable guide to the parties' intent, for no one is certain what it says, let alone what it means. As Alexander admits, there are three possible ways in which the treaty commissioners' handwritten minutes can be read:

> The right of fishing at common and accustomed places is further secured to them: proviso against staked/stated/States or fenced claims.

Alexander Br. 15 & n.3. Thus, it is not apparent that the outline even uses the term "staked," let alone illuminates its meaning.

Moreover, it is far from clear that the outline proviso was the precursor of the treaty proviso. The outline proviso says nothing about either shellfish or cultivation. It is a proviso against certain types of claims, suggesting that it easily could be a notation of Stevens' desire that settlers staking out (or stating) Donation Act claims not be permitted to exclude the tribes from their ancient fisheries. **See supra**, page 114. The district court followed sound interpretive procedure in focusing on the text of the actual treaty.

8. Appellants' Interpretations Of The Proviso Create Impermissible Redundancies.

Appellants argue that the district court's interpretation of the shellfish proviso leads to redundancies in two different ways. First, the growers argue that, "by definition," the tribes' usual and accustomed grounds and stations do not include artificial beds of shellfish, so that construing the proviso to prohibit just the harvesting of such beds renders it superfluous. Growers Br. at 7, 18. This is incorrect because usual and accustomed grounds and stations define broad geographical areas used for fishing purposes. **See, e.g.**, 384 F. Supp. at 332. Within those usual and accustomed areas there exist many locations barren of natural shellfish beds.

Far from being redundant under the district court's interpretation, then, the proviso serves the vital purpose of fostering a viable shellfish industry by protecting artificial beds created within a tribe's usual and accustomed area.

The appellants also argue that, under the district court's interpretation, the proviso is internally redundant. They claim that while the district court, and Professor White, formulated a definition of a "cultivated" bed, they never formulated a definition of a "staked" one. Growers Br. 39; Alexander Br. 57-58. This is emphatically not the case. As Professor White testified, and as the district court found, "at treaty time, artificial beds contained shellfish deposited **for either growing or storage purposes** . . . . " 873 F. Supp. at 1441 (emphasis added). Professor White made it clear that while beds in which shellfish were placed for growth were referred to as cultivated beds, storage beds were not. White, SER 855-62, 887; White, ER 429-430. Thus, if the treaty negotiators had only prohibited tribal harvesting from cultivated beds, they would have left unprotected the numerous staked beds created by non-Indians for storage purposes (which were called staked beds because of the stakes used to delineate their boundaries). This would have been a particularly serious omission given the importance of such beds in the

fledgling Washington Territory. SER 657; 858-59 (describing the beds created in Shoalwater Bay to store oysters until ships bound for San Francisco arrived).

It is **appellants'** interpretations of the treaties that render portions of them mere surplusage. First, appellants define the "in common with" clause to mean that tribes cannot take shellfish from any beds that are not open to the public. Adkins Br. 35; Alexander Br. 32-33; State Br. 90. They then define "beds staked" to mean the same thing: that tribes cannot take shellfish from any beds either claimed or marked out for exclusive use, that is, beds that are not open to the public. State Br. 84 ("'staked' was intended to mean 'any beds' claimed for exclusive use by settlers); Growers Br. 39 ("'staked' meant the activity of marking off boundaries to show a claim of ownership"). Thus, under appellants' interpretations, the "in common with" and "beds staked" provisions are redundant.

Similarly, appellants' definition of "staked" beds as any beds claimed for exclusive use by non-Indians, State Br. 84, subsumes their definition of "cultivated" beds as any beds on which non-Indians have sought to control access or labored to improve the shellfish crop. State Br. 84; Growers Br.

13 & n.4. The growers' definition of cultivation is so broad, even including nothing more than controlling access to a bed, Growers Br. 13, n.4, that it subsumes "staked." Thus, appellants' interpretations not only fly in the face of the historical record, but fail to give effect to all portions of the treaty language. The district court properly rejected those interpretations.

9. The Parties' Post-Treaty Actions Do Not Alter The Clear Meaning Of The Treaty Terms.

While not as significant as the text, the "practical construction adopted by the parties" is a factor that the courts can look to in interpreting a treaty. **Choctaw Nation v. United States**, 318 U.S. 423, 432 (1943). The district court did just that, scrutinizing post-treaty events to see if they cast any doubt on its finding that the United States intended the proviso to apply only to artificial beds of shellfish. The court properly concluded that they do not. 873 F. Supp. at 1441.

a. Development.

Where a shellfish bed is destroyed, tribes lose the opportunity to fish it. Just as the damming of rivers does not curtail tribes' rights to surviving anadromous fish, there is no basis in the treaty language for concluding that because some shellfish beds have been destroyed, tribes cannot exercise their

rights with respect to ones that remain.

Appellants argue that it is illogical to construe the treaties to allow for the complete destruction of some shellfish beds, but not to allow for the exclusion of the tribes from natural shellfish beds not so destroyed. Growers Br. 24; Alexander Br. 40-41. The illogic is not apparent, and the assertion runs counter to the understanding prevalent at treaty times. No one in 1854 would have found it surprising that a person who could build on tidelands and destroy whatever shellfish might exist there did not, prior to such destruction, enjoy the automatic right to exclude others from the natural beds found on those tidelands. The Angell treatise makes exactly this point:

> By the customary law of Connecticut a riparian has the right of soil between high and low water mark so as to entitle him to construct wharves . . .; but before the soil has been so reclaimed, the right of fishing on the flat, it appears, remains in common.

Angell, SER 908.

Moreover, as the district court found, 873 F. Supp. at 1438-39, the treaty commissioners, and the post-treaty representatives of the United States, had no reason to think that tidelands development and the treaty promise that tribes could continue to harvest natural shellfish beds were incompatible. See section III A(4)(b), above. The historical record does not

support the contention that, just because the United States encouraged development, it must have promised the tribes something less than a meaningful right to harvest the natural shellfish beds that remain present in Puget Sound to this day.[56]

b. Alienation Of Natural Beds.

Appellants also argue that because, subsequent to the treaties, the territorial legislature granted citizens exclusive rights to natural beds (and because, subsequent to statehood, the State legislature did the same thing, with no objection from the United States), the treaty negotiators must not, in 1854, have intended to preserve for the tribes their rights to harvest the natural beds. Growers Br. 22-25; Alexander Br. 22-24. However, as the district court held, these actions did not take place until decades after the treaties, and thus cast little light on the intentions of the treating parties. 873 F. Supp. at 1440.

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[56] The issue in this subproceeding is which existing shellfish beds are subject to treaty harvest, not whether the treaty prevents habitat degradation. **See**, SER 7. Adjudication of treaty harvest rights is severable from the question whether the treaty imposes habitat protection obligations. This Court has ruled **en banc** in this case that the latter claims should be presented in the context of "concrete facts which underlie a dispute in a particular case." 759 F.2d at 1357. It is unnecessary and inappropriate to link habitat protection and harvest rights in this appeal.

The district court's holding is squarely in line with Circuit precedent. In **Swim v. Bergland**, 696 F.2d 712 (9th Circ. 1983), this Court decided that the Shoshone-Bannock Tribes had reserved the right under an 1898 agreement with the United States to graze their livestock on certain public lands despite the fact that, nine years after the agreement, United States officials had ordered them off. The tribes had not used the lands since then. **Id.** at 714.

This Court did not consider the United States' action to be evidence of an intent not to reserve grazing rights for the tribes in the 1898 agreement. To the contrary, it held that the fact that "[n]ot until 1907 did the Forest Service oust the Tribes from the grazing lands . . . is further indication that the Tribes did not believe they had given up these rights in 1898." **Id.** at 716. Here, it was not until nine-plus years after the treaties, in 1864, that the territorial legislature even arguably made its first exclusive grant of shellfish beds to three non-Indians in one small area. (As the district court found, it is "possible" that the grant encompassed natural beds, 873 F.Supp at 1433 n.11.) That grant hardly "constitute[d] a significant part of the legal landscape in the Washington Territory." 873 F. Supp. at 1433 n.11.

Before and after that grant, as discussed above, the territorial legislature enacted four shellfishing laws of general applicability (in 1861, 1863, 1873 and 1877), each of which provided for the staking or cultivating only of non-natural beds. It was not until twenty-five years after the treaties were signed, in 1879, that the territorial legislature first passed a general law allowing newly discovered oyster beds to be claimed.

It was entirely appropriate, then, for the district court to conclude that the probative value of the actions pointed to by appellants is minimal. For twenty-five years after the treaties, the territorial legislature acted in a fashion essentially consistent with the tribes' rights to take shellfish from natural beds. As in **Swim**, 696 F.2d 712, its subsequent legislation is too far removed in time to support the conclusion that the tribes were not supposed to enjoy such rights in the first place.

c. The 1905 Commissioner Of Indian Affairs Letter.

Appellants also point to a letter written in 1905 by the Commissioner of Indian Affairs opining that lessees of tidelands containing natural clam beds could exclude treaty Indians from them. They make two separate but related arguments: that the letter casts light on the intentions of the original

United States negotiators, Alexander Br. 43, and that it is an administrative interpretation of the treaty entitled to deference, Adkins Br. 34. Both claims fail for the same reasons.

First, it is absolutely clear that "[t]his correspondence has no relevance to the appropriate interpretation of the Shellfish Proviso." 873 F. Supp. at 1441. The Commissioner of Indian Affairs based his determination that the Indians could be barred from the clam beds not on the language of the proviso (which he does not discuss), but rather on an interpretation of "in common with." **See id.** at 1440-41 (quoting letter). As such, the letter serves neither as an administrative construction of the proviso, nor as a clue to the treaty negotiators' intentions regarding it. Moreover, the legal basis for the letter's interpretation of "in common with" was rejected by the Supreme Court forty-five days after it was written. **See Winans**, 198 U.S. at 379-82. Accordingly, the letter is entitled to no weight. **See Mission Indians v. American Management & Amusement, Inc.**, 840 F.2d 1394, 1405 (9th Cir. 1987) (courts do not defer to incorrect administrative interpretations).

Second, the letter is dated nearly a half century after the treaties and

hence entitled to even less weight than the actions of the territorial legislature. The passage of time also diminishes its relevance as an administrative construction of the treaty, for such interpretations are particularly deserving of deference when they are "contemporaneous one[s], made soon after the time of enactment." **Russ v. Wilkins**, 624 F.2d 914, 923 (9th Cir. 1980) (citing **Udall v. Tallman**, 380 U.S. 1, 16 (1965)); **see also Les v. Reilly**, 968 F.2d 985, 989 (9th Cir. 1992).

Third, the letter was written by someone who had no apparent basis for making any judgment about what the United States intended or the Indians understood by the terms of the treaty. There is no evidence that Commissioner Leupp did any investigation into the facts, had any legal training or advice, or otherwise did anything besides giving his unsupported opinion as to the meaning of the "in common with" language. This is far from the kind of informed opinion of a Department of the United States that might be entitled to deference.

Finally, the 1905 letter does not represent a consistent interpretation by the Commissioner of Indian Affairs. Eighteen years closer in time to the treaties, the then-Acting Commissioner rendered an opinion specifically

directed at the meaning of the shellfish proviso. He took the position that a non-Indian citizen could not lease tidelands from which treaty Indians harvested oysters because

> [b]y virtue of the treaty . . . such Indians were guaranteed the right of taking fish . . . with the provision that they could not take shell fish from any bed staked or cultivated by citizens. **Meaning by a fair interpretation at the date of the treaty.**

ER 1161-1163 (emphasis added). Thus, the view of the Commissioner of Indian Affairs in 1887 was that the treaty shellfishing right extended to all beds except those that had in fact been staked or cultivated by the time of the treaties.

The far more restrictive interpretation of the tribes' rights embodied in the 1905 letter is accordingly entitled to little deference. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." **I.N.S. v. Cardoza-Fonseca**, 480 U.S. 421, 446 n.30 (1987) (quotation omitted); **Beno v. Shalala**, 30 F.3d 1057, 1071 (9th Cir. 1994) (same).

Although the 1887 opinion is very favorable to the tribes (as few, if any, beds had been staked or cultivated in Puget Sound by 1855), neither

opinion is accurate and neither is entitled to deference. The district court properly disregarded both, and properly concluded that there exists nothing in the post-treaty material pointed to by appellants sufficient to outweigh the "compelling evidence," 873 F. Supp. at 1431, that the United States' negotiators intended to except only artificial beds out of the tribes' shellfishing rights.

C. Indians Understood The Treaties To Preserve Their Access To Natural Shellfish Beds.

The growers argue that Indians understood they could be excluded from natural beds by operation of the proviso. Growers Br. 19-22. They do not cite a single piece of evidence introduced in this proceeding to support this assertion. Instead, they rest on **dictum** from the district court in the 1980 proceeding that had to do with rights to hatchery produced salmon and on isolated statements made in connection with the case of **United States v. Aam**, 887 F.2d 190 (9th Cir. 1989). The factual findings made by the court below establish that Indians did **not** understand that the proviso would **cause** them to lose access to natural shellfish beds. Those findings are amply supported in the record. The statements in **Aam** and the hatchery case **dictum** are not to the contrary, particularly in light of the

"overwhelming evidence" that supports the court's decision.

1. Indians Did Not Understand The Proviso To Affect Their Access To Natural Beds.

The district court found as a fact that the Indians did not understand the shellfish proviso to permit their exclusion from natural shellfish beds. 873 F. Supp. at 1436. To the contrary, Indians unequivocally insisted on the right to continue fishing. **Id.** at 1442. The court based these findings on the statements made by the United States and the Indians during the treaty negotiations. **Id.** at 1436. **See, e.g.**, SER 640, 643-44. These findings were also supported by experts from both sides. **See** Boxberger, SER 702; Lane, SER 1037 (" . . . the Indians understood that they would be able to continue to rely on shellfish as they always had.") Prior findings of fact affirmed by this Court in this case are entirely consistent. **See, e.g.**, 384 F. Supp. at 333-34; 520 F.2d 676.

As discussed above, **see** section IV A(3), the United States negotiators made a "solemn promise that the Indians would have a permanent right to their ancient fisheries." 873 F. Supp. at 1436. Stevens and other United States negotiators repeatedly promised that the Indians' fishing rights would be preserved after the treaties. **See, e.g.**, SER 637-42, 644-45, 647-54.

The district court's finding is also confirmed by the earlier findings upheld in this case. **Fishing Vessel**, 443 U.S. at 676 (". . . the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent.")

All parties agree that the United States did not act to deceive the tribes, 873 F. Supp. at 1436, but rather that the United States intended to act honorably towards the Indians. **Id.** Thus the court found the Indians' understanding perfectly consistent with the United States' promise. **Id.**

No statement in the record of the treaty negotiations, or any other contemporaneous document, gives any hint that the Indians' right to take shellfish would disappear over time. Appellants have offered no such document. The only possible conclusion, in light of the agreement by all parties that the United States was not practicing a deception on the tribes, was that the Indians understood that they would continue to have rights to natural populations of shellfish.

The record of the treaty negotiations reflects that the treaties were read and explained section by section to the Indians during the treaty negotiations, as appellants' expert admitted and the court found. Richards, SER 688;

SER 636; 873 F. Supp. at 1436. Appellants give no reason why the well-known meaning of "beds staked and cultivated" could not have been explained to the Indians. They adduce no proof that it was not.

The court's findings regarding Stevens' explanations of the proviso to the Indians are consistent with what was occurring at Shoalwater Bay before the treaties. Appellants' expert, Richards, conceded that what happened at Shoalwater Bay before the treaties is a key to understanding Stevens' use of the treaty terms. Richards, SER 273-74. As discussed above, the court found that at Shoalwater Bay natural beds remained open to all, including Indians, both before and for years after the treaties. Because Puget Sound Indians came to Shoalwater Bay to fish and sell oysters to whites, any direct (or second hand) experience Indians would have had with non-Indian staking of shellfish beds would have come from those Shoalwater Bay practices. SER 1053, 1058. Such understanding would have been consistent with continued access to natural beds.

There is direct evidence that Stevens promised Indians continued access to shellfish beds at the Grays Harbor treaty negotiations. Nah-kot-ti and Moosmoos told Stevens that they "[w]anted to fish in Shoalwater Bay as

before. As also to take oysters." Stevens assured them that they "of course were to fish, etc. as usual." SER 650. Later Stevens told the Indians at the Grays Harbor negotiations they would be able to sell oysters to the settlers. SER 653-54. Such reassurances would have been duplicitous if the intent was to eliminate access to natural beds. His reassurances are also consistent with the advice he got from Indian agent Tappen that Indians should retain their access to natural shellfish beds. SER 1114-18; 1110-13; 379.

No record exists that Indians were told that the treaty permitted their exclusion from natural shellfish beds. All the direct evidence is to the contrary. Had such an explanation been made, it is a reasonable inference that the Indians would have protested such a loss of a valuable resource. 873 F. Supp. at 1442. Because no such protests were recorded, the court was justified in concluding that the Indians were not told that they could be excluded from natural beds.

2. Dictum In The Hatchery Case Is Not Contrary To The Court's Decision Here.

The growers argue that the district court's decision regarding the tribes' rights to take hatchery fish somehow supports the conclusion that the proviso was understood by the Indians to permit their exclusion from natural

beds. Growers Br. 19. The discussion of the shellfish proviso in that case was mere dictum, of course; the meaning of the shellfish proviso was not the issue before the court nor was it necessary to its decision. In any event, what the court said is fully supportive of the court's decision here:

> the function of the proviso was to enable non-Indian settlers **to establish** their own, exclusive ownership of shellfish beds and storage areas that might have otherwise belonged to the tribes.

506 F. Supp. at 200 (emphasis added).

As discussed above, the proviso allowed non-Indians to establish, or create, shellfish beds for their exclusive use. Absent the proviso, it was recognized that there would have been nothing to prevent Indians from taking any oysters or clams found on the tidelands within their usual and accustomed grounds and stations, staked, cultivated or otherwise, just as in many areas of the country without strong legal protection for staked or cultivated beds, the public felt itself free to take shellfish from such beds as part of the common right of fishing. Thus the hatchery fish decision is entirely consistent with the historical basis for the proviso as found by the

court in this proceeding.[57]

3. Dr. Lane's Statements Are Not Evidence That Indians Understood They Could Be Excluded.

Appellants argue that an isolated fragment of the testimony of Dr. Lane in a prior case (**United States v. Aam**, 887 F.2d 190, which involved only the Suquamish Tribe) shows that Indians understood that they could be excluded from natural shellfish beds as a result of the treaties. Growers Br. 20-21; Adkins Br. 16; Alexander Br. 13-14. Appellants focus on that statement because they have no actual evidence that Indians understood the proviso to provide for the elimination of their access to natural shellfish beds. As Dr. Lane candidly admitted, her statement in **Aam** was incorrect when it was made, it did not reflect her opinion then or now, and she knew of no evidence upon which her statement could be based. In short, she knows of no evidence for her statement in **Aam**, and appellants have pointed to none. Her admittedly mistaken statement is not by itself evidence of

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[57] The growers also attempt to import the reasoning of **United States v. Hicks**, 587 F. Supp. 1162 (W.D.Wash. 1984), a case about the privilege of hunting on "open and unclaimed land," into the treaty fishing rights context, to support their claim that tribes understood their rights were defeasible. Growers Br. 22 n.8. **Hicks** specifically distinguished between treaty fishing rights and hunting, **id.** at 1164, 1167, recognizing, as appellants apparently do not, that the language relating to each is significantly different.

anything. SER 137-38.

The growers also point to other statements by Dr. Lane in the **Aam** case regarding settlers filing donation act claims that included tidelands. Growers Br. 21; GER 19-20. Although there is no evidence in the record that such claims were honored or upheld, their possible existence is of no consequence. The possibility that settlers' donation act claims would interfere with tribal access to fishing areas prompted tribes to insist that their fishing rights be protected and motivated the United States to act quickly in making treaties, so that such interference could be prevented. This crucial fact is ignored by the growers, but it was relied upon heavily in **Fishing Vessel**, 443 U.S. at 666 & n.9. Thus reference to settlers' pre-treaty interference with tribal access to fishing areas is wholly unremarkable.[58]

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[58] The growers also point to the statement in the Suquamish Tribe's Petition for Rehearing in **Aam** that rights to take shellfish are defeasible by staking or cultivating. Growers Br. 22 n.8. The Suquamish statement is correct in some circumstances, but no help to the growers. Where shellfish are naturally present in low concentrations, such that no natural bed exists, tribes' rights to take the scattered shellfish can be lost if a citizen creates a staked or cultivated bed. 898 F. Supp. at 1461 n.15. This does not make the right to take shellfish from natural beds defeasible by staking or cultivating, nor is the Suquamish statement evidence of the Indians' understanding of the proviso.

4. Indian "Cultivation" Practices Are Irrelevant To Their Understanding Of The Treaties.

The growers rely on the report of Dr. Suttles for the proposition that "Indians 'owned' and 'cultivated' clam beds." Growers Br. 14. Suttles' testimony quoted a 1934 report by Stern that identified a single example of a clam bed identified as "cultivated" (in Sterns' words) which Stern described as "exceptional." ER 58. There is no evidence that this exceptional practice took place at treaty time, that it was carried out anywhere else or by any other Indians or tribe, or that it was known by other Indians. There is no evidence that any Indian would have considered this to be "cultivation," nor to relate this to anyone's understanding of the terms of the treaties.

The growers' reliance on Astrida Onat, Growers Br. 14, is equally misplaced. She stated that she had no treaty time evidence of cultivation and did not consider herself to have an expert opinion on the subject at all. SER 204.

Indian cultivation of agricultural crops does not support the claim that Indians understood the treaties to permit their exclusion from natural shellfish beds. The only crop cultivated by Indians at treaty times was the potato. White, 117-18. The cultivation of potatoes required planting of

seeds, (White, SER 119), as the growers admitted. CR 13822. Potato cultivation is therefore akin to cultivation of shellfish beds in that it creates a potato field through purposeful human action where none existed before. White, SER 423-433.

The growers claim Indians cultivated camas and carrots, but there is no evidence that such activity took place, let alone that it influenced what Indians understood about the treaty language. Growers Br. 15. They refer to the testimony of Dr. Onat, GER 34, but she never says camas was cultivated or that Indians thought of it as cultivation. Appellants' expert testified that a 1951 draft of a dissertation opined that at some unstated time some Nooksack Indians marked wild carrot plots with stones; the growers' transformation of that into evidence of treaty time Indian cultivation is wishful thinking. GER 48. The growers' final "evidence," Dr. Thompson's testimony of ownership rights to some camas beds by some northern tribes did not mention cultivation, GER 50, and is of equally little value.

D. The Treaties Do Not Prohibit Tribes From Harvesting Natural Clam Beds Found Beneath Staked Or Cultivated Oyster Beds.

The district court held that the treaties do not prohibit tribal harvesting

of natural clam beds found beneath staked or cultivated oyster beds. Even assuming the proviso applies only to artificial beds, the growers disagree.

The plain language of the treaties prohibits tribes only from harvesting "beds staked or cultivated." As the growers acknowledge, clams and oysters do not grow in the same bed -- "clams grow embedded in the beach, whereas oysters grow on top of the soil." Growers Br. 41. Accordingly, when tribal members harvest clams found beneath an artificial oyster bed, they are not taking any shellfish from the oyster bed. They are harvesting the subjacent clam bed, and nothing in the treaties prohibits them from doing so.

This conclusion finds strong support in treaty-time shellfishing practices. The district court found that in the mid-nineteenth century, a natural clam bed found underneath a staked or cultivated oyster bed was not considered to be part of that staked or cultivated bed:

> [T]he exclusive rights gained by one who had staked or cultivated an (artificial) oyster bed did not extend to the natural clam beds found beneath. It apparently was a common practice for Indians and other citizens to harvest clams legally from natural clam beds existing beneath artificial shellfish beds.

873 F. Supp. at 1442.

Nothing in the record contradicts this finding, let alone suggests clear error. As the district court noted, when treaty-time legislatures authorized the staking or cultivating of oyster beds, they regularly prescribed penalties for those entering upon the beds to take oysters, while enacting no prohibition against harvest of the clam beds underneath. **See, e.g.**, SER 1166, §4 (California, 1851); SER 1160, §14 (Virginia, 1847); 873 F. Supp. at 1442 n.25.

"In fact, many state laws . . . [expressly] protected the right of a citizen to take clams from beneath an artificial oyster bed." **Id.** For example, in authorizing individuals to stake or cultivate oyster beds, the 1844 Rhode Island legislature provided that:

> Nothing in [this] act . . . shall be so construed as to prevent any citizen of this State from digging clams or quahaugs on the shores of the public waters of this State, notwithstanding the provisions of this act, or any letting of the said shores as a private oyster ground.

SER 1146, §4. The 1855 Connecticut legislature did the same thing. SER 1173, §10; 873 F. Supp. at 1442 n.25.

In states where courts provided authorization for cultivation of oyster beds, they too declared that oystermen would not gain any special rights in

subjacent clam beds. Thus, far from deeming the cultivators of oyster beds cultivators of the clam beds below, the courts in New Jersey and New York stated unequivocally that the oystermen could not "interfere[] in any way with the [public's] right of fishing, or with the right of navigation, or any other right of the public in the waters. . . . " **State v. Taylor**, 27 N.J.L. 117, 123 (1858), SER 1264-70; **Fleet v. Hegeman**, 14 Wend. 42 (N.Y. Sup. Ct. 1835) (same), SER 1222-23; **see also Phipps v. Maryland**, 22 Md. 380, 389 (1864), SER 1271-76, (holding that Maryland statutes authorizing the planting of oysters did not effect any diminishment in the public's fishing rights). Indeed, in **Brown v. DeGroff**, 14 A. 219 (N.J. 1888), SER 1280-82, the New Jersey courts dismissed a suit brought by an oysterman against those harvesting the "natural clam-beds" found beneath his oysters on the grounds that "[t]he right to take shell-fish below high-water mark, from natural beds in the tide-waters of this state, is a part of the public right of fishery, which has been fully recognized and cannot now be controverted . . . ." **Id.** at 219-20.

In the face of the consistent distinction drawn between staked or cultivated oyster beds and the natural clam beds found underneath them, the

growers claim that the law at treaty times was not uniform. However, the 1824 New Jersey statute they cite did not provide that "taking clams under oysters constitutes a trespass." Growers Br. 42. Indeed, it contains no mention of clam harvesting. GER 86. Instead, like several other statutes of the day, it prohibited individuals from entering onto staked oyster lands and "commit[ting] any trespass thereon . . . " GER 86. As the district court noted, since "taking subjacent clams from artificial oyster beds was considered to be a public right, such action was not an unlawful interference with another's person, property, or rights; hence the action was not a trespass." 873 F. Supp. at 1442 n.25. Indeed, the New Jersey statute supplemented an act that made clear that oyster cultivation did not detract from existing fisheries. SER 1140, §1. Similarly, other statutes from treaty times that prohibited entering onto artificial oyster beds and committing a trespass thereon contained penalties for the taking of oysters, but not for the taking of clams. SER 1164, §2 (Maine, 1849); SER 1151, §2 (Connecticut, 1845).

The 1854 Washington statute (GER 77) also relied upon by the growers does not address the rights of the public to subjacent clam beds, but

instead concerns the general shellfishing status of disfavored non-residents, who had no entitlement at all to participate in the public fishery. When Washington Territory passed its first statute to encourage the cultivation of oysters in 1861, it followed the general pattern of granting oyster cultivators exclusive rights to bottoms for oyster purposes only. SER 1174, §§1, 3. The only other support the growers point to is Governor Stevens' desire to "prevent the Indians and whites from interfering with one another." Growers Br. 41. But it is established that Stevens sought to minimize Indian/non-Indian conflict by setting the question of the tribes' fishing rights at rest through the treaties. And in setting that question at rest, he chose not to deprive tribes of access to their ancient fisheries, but instead guaranteed their continued right to take fish, including shellfish, as they always had. That guarantee was crucial in obtaining Indian consent. **Fishing Vessel**, 443 U.S. at 676-677.

If Stevens had written the growers' position into the treaties, he would have gone far towards undermining his own promise. The surface area of tidelands covered by natural oyster beds in Washington is far smaller than the area of tidelands containing natural clam beds. This was true at treaty

times, SER 998, 1004, SER 897, and is the case to an even greater extent today, given the virtual destruction of the native oyster population discussed above. SER 1004-05. A treaty provision allowing non-Indians to plant oysters on tidelands barren of oysters and, in doing so, to claim the clam beds underneath, would permit the exclusion of tribes from large tracts of naturally rich clam beds. Indeed, the growers freely admit that "in many cases, [they] decide to farm oysters on top of tidelands that contain naturally occurring clams." Growers Br. 41.

While the growers claim that tribal harvesting of clams from beneath cultivated oysters "could severely damage or destroy their crops," Growers Br. 43, the record shows that such clams can in fact be harvested without injury to the oyster beds. Ron Teissere of the State Department of Natural Resources testified that commercial growers engage in such harvests, SER 252, and several of the growers admitted to doing so themselves. Rau, SER 300-03; Taylor, SER 332-33. Tribes have also done so. Veneroso, SER 513-14. In its implementation order, moreover, the district court provided that tribes may only harvest subjacent clam beds during that period of time between a grower's harvest of the overlying oyster bed and the replanting of

oyster seed. 898 F. Supp. at 1472. This restriction eliminates any potential for damage to the oyster crop.

Presented with a ruling that staking or cultivating an oyster bed carries with it the benefit of being able to deny the tribes access to natural clam beds, not only every grower, but every private tideland owner as well, would have an incentive to sprinkle oyster seed on top of clam-rich tidelands in order to defeat the tribes' right to take clams. Nothing in the treaty language, the treaty-time shellfishing practices informing that language, the repeated promises made by the negotiators for the United States, or the Indians' statements at the treaty councils countenances that result.

The district court's finding that clam beds beneath a staked or cultivated oyster bed are not part of the staked or cultivated bed should be affirmed.

E. Under Appellants' Arguments, The Proviso Swallows The Shellfishing Right.

As discussed in section II, **supra**, where a treaty or statute sets out a right and an exception to the right, the exception is typically read "narrowly in order to preserve the primary operation of the provision." **Commissioner v. Clark**, 489 U.S. 726, 739 (1989). Appellants, however, read the

shellfish proviso as completely eviscerating the shellfishing right. According to them, whenever a shellfish bed falls on private property, Alexander Br. 60, or has been claimed for exclusive use by non-Indians, State Br. 84, or has been marked off by stakes or other boundary-markers, Growers Br. 13, or has been in any way improved by human labor, Growers Br. 5, State Br. 84, the tribes may no longer harvest it.

There is no question that almost all shellfish beds in the case area would be off-limits to the tribes under these definitions. The vast majority of Puget Sound tidelands are privately owned. 873 F. Supp. at 1439. By the same token, the growers' own testimony is that harvesting alone can lead to significant improvement in the productivity of clam ground. SER 292. According to appellants, then, the United States intended, and the Indians understood, that the tribes would automatically lose their right to take shellfish from any beds dug properly by non-Indians. This sweeping interpretation flies in the face of the Indians' insistence that they retain their ability to take fish, including shellfish, and the United States' repeated promises that, under the treaties, they could continue to do so.

Far from construing the shellfish proviso with strict reference to the

shellfishing right, appellants' arguments would gut that right. Both the Supreme Court and this Court have counselled against such expansive readings of textual exceptions, repeatedly declaring that an exception must not be read to "swallow the rule." **Regents of University of California v. Public Employment Relations Board**, 485 U.S. 589, 600 (1988); **United States v. Powell**, 469 U.S. 57, 68 (1984); **Mansion v. United States**, 945 F.2d 1115, 1119 (9th Cir. 1991); **Townsel v. Contra Costa County**, 820 F.2d 319, 320 (9th Cir. 1987). Destructive as they are of the treaty shellfishing right, and contrary as they are to the district court's well-supported findings about the treaty negotiators' intentions, appellants' interpretations of the shellfish proviso should be rejected.

V. THE TREATY PROMISES REGARDING SHELLFISH ARE NOT DEFEATED BY THE PASSAGE OF TIME AND THE USE OF THE SHELLFISH BY OTHERS.

The growers admit, as they must, that binding precedent precludes their assertion of a laches defense, **see Swim v. Bergland**, 696 F.2d 712 (9th Cir 1983), but they request a "new law." Growers Br. 44. They urge this Court to approve years of illegal regulation and exclusion in disregard of an express treaty right and, based on the passage of time, to allow them

continued usurpation and monopolization of shellfish resources under color of state law. This claim must be measured against the law of laches as applied to the United States, as well as applied to tribes.

The rationale for protecting Indian treaty and other federal rights from time-barring defenses such as laches is deeply rooted in our jurisprudence. As early as 1821 laches was not permitted to defeat federal rights. **United States v. Hoar**, 26 F.Cases 329 (D.Mass. 1821). The federal government, as with the Crown of England, was exempt from time-barring defenses because the King, acting in his public capacity, could operate only through his agents. The "great public policy" of preserving public rights could not be defeated through the negligence of public officers. **Id.**, at 330. Three years later, the Supreme Court used the same rationale for holding that "laches is not imputable to the Government. . . . " **United States v. Kirkpatrick**, 22 U.S. 720, 735 (1824). The rights of the United States cannot be lost because its officers acquiesced in another's use of them, were guilty of laches, or delayed in asserting the federal rights. **United States v. California**, 332 U.S. 19, 40 (1947); **Utah Power & Light Co. v. United States**, 243 U.S. 389, 409 (1917), and cases cited therein.

Laches is similarly unavailable to defeat the United States' protection of Indian rights, however dilatorily exercised. **Board of County Commissioners v. United States**, 308 U.S. 343, 351 (1939), **United States v. Ahtanum Irrigation Dist.**, 236 F.2d 321, 334 (9th Cir 1956) ("No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses") (citations omitted). Individual Indian or tribal plaintiffs asserting rights in trust property are also not subject to state time-barring defenses. **Ewert v. Bluejacket**, 259 U.S. 129, 138 (1922), **Imperial Granite Co. v. Pala Band of Mission Indians**, 940 F.2d 1269, 1272 (9th Cir. 1991).

The rule prohibiting the loss of Indian property as a result of the failure of federal officers to assert tribal rights, or because of the passage of time is consonant with federal laws and policies which protect Indian property. Enforcement of the Indian Non-Intercourse Act, 25 USC §177, is an example. This 160 year old statute prohibits the acquisition of Indian lands or interests therein except through treaty or convention entered into pursuant to the Constitution. **Imperial Granite**, 940 F.2d at 1272; **Ahtanum Irrigation District**, 236 F.2d at 334. Since neither laches nor

adverse possession relies on a treaty or convention to convey title or usages to a trespasser, these doctrines cannot operate to divest Indian title or usage of the property. **Id.**

The growers cite the **dissenting** opinion in **Oneida County v. Oneida Indian Tribe**, 470 U.S. 226 (1985), Growers Br. 45, but the Court recognized that "[u]nder the Supremacy Clause, state-law time bars, **e.g.**, adverse possession and laches, do not apply of their own force. . . ." **Id.** at 240 n.13. The Court did not reach the laches claim because it had not been appealed, but it noted that such a claim would be "novel" and "would appear to be inconsistent with established federal policy. . . ." **Id.** at 244 n.16.

Even where the United States has encouraged non-Indians to improve desert lands using water which otherwise would irrigate Indian property, this Court refused to find the United States estopped from enforcing its promises to the Indians. **United States v. Walker River Irrigation Dist.**, 104 F.2d 334, 339-40 (9th Cir. 1939). When the United States claimed ownership of the bed of the marginal sea and moved to eject persons who had built improvements in reliance on titles issued by California, the Supreme Court was sympathetic to the potential losses, but nonetheless ruled that property

rights of the federal government could not be lost by the acquiescence of federal officials, through laches, or through the failure of these officers to act. **United States v. California**, 332 U.S. at 39-40.

Hardships to non-Indians cannot effectuate a loss of Indian treaty rights or other Indian property rights. In **Imperial Granite**, 940 F.2d 1269, the quarry company sought to validate an easement across tribal lands which it and its lessor had enjoyed for 44 years. Without the easement, the company's quarry was inaccessible, and its lease of no value. Nonetheless, this Court dismissed the action against the tribe, because rights in tribal property cannot be acquired by prescription. **Id.** at 1272. In **Swim**, this Court reinstated the Shoshone-Bannock Tribe's grazing rights in federal land upon which non-Indians had held federal grazing permits for over 70 years, notwithstanding the Tribe's acquiescence in its ouster from these lands. 696 F.2d at 718.

Earlier in this case, this Court affirmed the ruling that "[t]he mere passage of time has not eroded, and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold." 384 F. Supp. at 407. **See also** 384 F. Supp. at 401. This declaration is binding on

all appellants.

VI. THE TRIBES HAVE NOT BEEN "PAID OFF" FOR THEIR SHELLFISHING RIGHTS.

UPOW argues that tribes have been compensated for their shellfishing rights as a result of the decisions of the Indian Claims Commission (ICC). UPOW Br. 42-48. This argument is frivolous.

The ICC compensation issue was addressed in 1974. The State argued that decisions of the Court of Claims and the ICC had extinguished fishing rights of various tribes. The district court responded that those decisions had not

> constituted any repeal, relinquishment, modification or diminishment of [treaty] fishing rights secured to the Nooksack Indian Tribe.

459 F. Supp. at 1041. **See also id.** at 1040 (findings regarding Lower Elwha and Port Gamble S'Klallam Tribes). This decision was not appealed and is binding.

Secondly, the ICC itself refused to compensate tribes for the loss of their fishing rights. In **S'Klallam Indian Tribe v. United States**, 23 ICC 510, 512, unnumbered footnote (1970), the Commission held:

> there has been no treaty extinguishment by the [United States] of

> any of the [S'Klallam's] rights to fish in the tidelands. Article 4 of the 1855 Treaty specifically secured [fishing rights] to the plaintiff. . . .

Thus, UPOW's argument that the ICC decisions somehow bought out the tribes' fishing rights is refuted by the ICC itself.

Thirdly, the tribes never ceded their fishing rights to the United States. Since **Winans**, no court has characterized fishing rights as anything but a right reserved by tribes and not ceded to the United States. As a result, there was neither need nor jurisdiction for the ICC to examine the issue of adequacy of compensation, let alone calculate an award for inadequate compensation. **S'Klallam Tribe of Indians**, 23 ICC at 512, unnumbered footnote.

Finally, the ICC awarded damages only for lands which were under the exclusive control of the claimant tribe. **Duwamish Indians, et al. v. United States**, 79 Ct.Cl. 530 (1934). Vast portions of the Puget Sound uplands and islands were found by the Claims Court and the ICC to be shared areas among two or more tribes at treaty times. **See, e.g**, 26 ICC 371, 375 (1971) (Swinomish); 21 ICC 295, 298 (1969) (Squaxin); 17 ICC 1, 12-15 (1966) (Puyallup); and 3 ICC 479, 498-500 (1955) (Nooksack).

Thus, even had the ICC awarded damages for the loss of fishing rights for lands exclusively occupied by tribes, these awards would have left immense tracts of tidelands unaffected.

VII. RESPONSE TO AMICI.

The only issues of any significance raised by amici duplicate issues raised by appellants and are not separately addressed. The other issues are either addressed by the United States, and its response is incorporated by reference here, or are frivolous, and no response is necessary.

CROSS APPEAL ISSUES

VIII. THE DISTRICT COURT ERRED IN REWRITING THE SHELLFISH PROVISO FOR EXISTING GROWER BEDS.

In its implementation order, the district court formulated a second definition of the term "cultivated," one which applies only to existing grower beds. The district court did not base this redefinition on any additional evidence about the meaning of the treaty term. Instead, it declared that the redefinition was justified for equitable reasons and because of difficulties in proof. Supplying a single treaty term with two different meanings is basic legal error, and the justifications given by the district court do not withstand scrutiny. The district court's special treatment of existing grower beds

should be reversed.

A. Standard Of Review.

This Court reviews equitable orders under the abuse of discretion standard. Where an equitable decision is based on an error of law or a clearly erroneous factual finding, it is an abuse of discretion. **Foster v. Skinner**, 70 F.3d 1084, 1087 (9th Cir. 1995). The district court's decision barring tribes from existing grower beds was based on critical legal errors constituting an abuse of discretion.

B. The Implementation Plan Redefines The Shellfish Proviso As It Applies To Existing Grower Beds.

The district court rendered two principal opinions in this case. The purpose of the first was to interpret the shellfish proviso and its effect on the treaty shellfishing rights reserved by tribes. The purpose of the second was to "provide a framework for the implementation of . . . [those] rights. . . ." 898 F. Supp. at 1457.

In its treaty interpretation decision, the district court formulated a clear definition of the shellfish proviso. It found that "the words 'any beds staked or cultivated by citizens,' describe artificial shellfish beds created by private citizens." 873 F. Supp. at 1441. Accordingly, it held that "when

the parties used these terms in the Shellfish Proviso they intended only to exclude Indians from artificial, or planted, shellfish beds; they neither contemplated nor desired that the Indians would be excluded from natural shellfish beds." **Id.**

In keeping with that holding, the court repeatedly emphasized that the tribes have the right to harvest wherever natural shellfish beds exist. "[T]he gradual exclusion of Indians from natural shellfish beds [was] a result clearly unwanted and unintended by the parties to the Treaties," **id.** at 1437, and the parties chose words suitable for their purpose. "[U]nder no circumstances did [treaty time participants in the shellfish industry] 'stake' or 'cultivate' natural beds." **Id.** at 1435. Instead, they viewed "cultivation [as] the 'modification of natural conditions' occurring after the [shellfish] have been planted or transplanted in an artificial bed," and they understood that they "could not stake off and appropriate for private use a natural [shellfish] bed . . . . " **Id.** at 1432, 1434. "[O]nly artificial beds were 'staked' and 'cultivated' at treaty time." **Id.** at 1431.

Accordingly, the district court rejected the various interpretations of the shellfish proviso set forth by appellants, including the growers' position

that even a natural shellfish bed "in some fashion improved by human labor [is] off limits to the Indians." **Id.** Those interpretations did not conform to the clear treaty-time understanding of "staked or cultivated" beds as being artificial beds of shellfish, and paid no heed to "the United States' solemn promise that the Indians would have a permanent right to their ancient fisheries." **Id.** at 1436.

From the district court's first decision a simple rule of implementation followed. While the tribes may not, under the proviso, harvest "shellfish beds created by private citizens," **id.** at 1441, "natural beds [can] not," as the court put it in its implementation decision, "be staked or cultivated by [such] citizens." 898 F. Supp. at 1460. Non-Indians may exclude tribes only from shellfish beds that they have created where natural beds of that type do not exist, for tribes retained "the absolute right to take fifty percent of the shellfish from natural beds in [their] usual and accustomed grounds and stations." **Id.** at 1457.

The only major question that remained following the first decision was how to define the natural beds that non-Indians may not exclude the tribes from under the treaties. The district court answered this question at the

outset of its implementation decision. It held that "the evidence establishe[s] that the [treaty time] shellfish industry considered a 'natural bed' to be one that could support a commercial livelihood . . . [A] natural shellfish bed is a bed which is capable of sustaining a yield of shellfish that will support a commercial livelihood." **Id.** at 1460-1461.

The application of the treaties to growers' properties should, then, have been straightforward. Where growers have created oyster or clam beds where such shellfish did not previously exist in commercial densities, they have created cultivated beds that tribes have no right to harvest. By contrast, where growers' properties contain natural beds, tribes have the right to harvest them. As DeBroca put it at treaty times, "[w]hatever may be the locality chosen by the planters, they can in no case pursue their industry on the natural banks. . . . " SER 893.

In its implementation decision, however, the district court did not follow this course. It instead devised a second, "broader definition" of a "cultivated" bed that applies only to "**existing shellfish beds on the Growers' property**. . . . " 898 F. Supp. at 1462 (emphasis in original). With respect to these beds, the district court defined "cultivated" as any bed

improved by human labor -- precisely the definition the growers had set forth and the court had rejected in its treaty interpretation decision. **Cf.** 873 F. Supp. at 1431. It held that for such beds "the term 'cultivated' encompasses the wide range of techniques used by the growers to enhance production of shellfish on their property," including "planting, netting or seeding **pre-existing shellfish beds**," and "preventative efforts, such as predator control or rototilling in or around **pre-existing beds**." 898 F. Supp. at 1462 (emphases added). Thus, while as a general rule "natural beds [can] not be staked or cultivated by citizens," **id**. at 1460, and "the Tribes have the absolute right to take fifty percent of the shellfish from natural beds," **id**. at 1457, cultivation with respect to existing grower beds is a "broader" term, encompassing all manner of "positive, preventative and passive techniques . . . " **Id**. at 1462. Wherever growers have done anything to improve a natural bed, no matter what the density of that bed before they exerted any efforts over it, and no matter what effect their activities may have had, they have created "de facto" cultivated beds, **id**. at 1462 n.17, that they can monopolize.

In providing this second, expanded definition of the term "cultivated"

for existing grower properties, the district court violated a fundamental tenet of textual construction. Where a term is found only once in a text, both the Supreme Court and this Court have emphasized that it should be given the same meaning each time it is applied:

> A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a single formulation . . . the same way each time it is called into play.

Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (emphasis in original); **see also Gonzales v. Barber**, 207 F.2d 398, 402 (9th Cir. 1953) ("a term used in a statute cannot mean one thing for one situation and something else for a different situation") **aff'd** 347 U.S. 637 (1954). By giving a single word in the treaties ("cultivated") two different meanings, the district court ran afoul of this command. It committed basic legal error, and its redefinition of the term "cultivated" should be reversed. The district court did not base its additional definition of "cultivated" on anything in the historical record. Its second, broader definition is completely contrary to the "compelling" evidence, 873 F. Supp. at 1431, it relied upon in defining "cultivated" in the first instance. **See supra**, section IV A. The district court did not have before it any new historical evidence, nor did it perform a

reevaluation of the previous historical evidence regarding the intent of the United States' negotiators or the tribes' understanding. The court's implementation decision is entirely silent on those matters. Not a single word of the implementation decision is devoted to the historical evidence or the rules for interpreting the treaty language in light of that evidence. Indeed, there was no additional testimony or evidence presented at the implementation trial on those issues because they had already been decided.

In short, the district court's revision of its carefully reasoned and solidly based conclusion regarding the meaning of "cultivated," for reasons unrelated to the evidence, and purely for the benefit of commercial growers, is basic legal error.

C. Neither Of The District Court's Justifications For Redefining The Shellfish Proviso Is Legally Or Factually Valid.

The district court asserted that a second formulation of the term "cultivated" was "both necessary to effectuate an implementation plan and appropriate in light of equitable considerations . . . " 898 F. Supp. at 1461. Neither ground suffices to justify the court's assignment of a second meaning to a single treaty term.

1. The District Court Eliminated The Growers' Burden Of Proof.

The district court stated that it "would be very difficult -- if not impossible -- to develop a 'snapshot' of existing shellfish beds at the time commercial development commenced on the Growers' property," **Id.** at 1462, and used this as a reason for curtailing the tribes' rights. Even if the district court was correct about difficulties of proof surrounding the proviso, it committed grave error in citing such difficulties to the prejudice of the tribes.

"[T]he well-established rule [is] that a defendant who relies upon an exception to a statute made by a proviso or distinct clause, whether in the same section of the statute or elsewhere, has the burden of establishing and showing that he comes within the exception." **United States v. Freter**, 31 F.3d 783, 788 (9th Cir. 1994) (quoting **United States v. Green**, 962 F.2d 938, 941 (9th Cir. 1992)). The Supreme Court and this Court have so held repeatedly. **See, e.g., United States v. First City Nat'l Bank**, 386 U.S. 361, 366 (1967) ("[Defendants] carry the burden. That is the general rule where one claims the benefits of an exception to the prohibition of a statute"); **EEOC v. Kamehameha**, 990 F.2d 458, 460 (9th Cir. 1992)

("[w]e construe the statutory exemptions narrowly, and the [defendants] bear the burden of proving they are exempt") (citation omitted); **Prescott v. United States**, 973 F.2d 696, 702 (9th Cir. 1992); **United States v. Bell**, 742 F.2d 509, 511 (9th Cir. 1984); **United States v. Henry**, 615 F.2d 1223, 1234-35 (9th Cir. 1980).

Here, the treaties set forth an exception to the right to fish in the form of the shellfish proviso. It is the growers who claim the benefit of the proviso, and it is thus their burden to prove that their beds fall within its scope.[59]

Accordingly, the district court correctly placed the burden of proof on growers seeking to establish the existence of both new and existing artificial

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[59] This conclusion finds additional support in another well-settled rule. It is a "familiar principle that 'when the true facts relating to [a] disputed issue lie peculiarly within the knowledge of' one party, the burden of proof may properly be assigned to that party 'in the interest of fairness.'" **ITSI TV Prods, Inc. v. Agricultural Assns.**, 3 F.3d 1289, 1292 (9th Cir. 1993) (quoting **United States v. Hayes**, 369 F.2d 671, 676 (9th Cir. 1966)) (brackets in original); **see also, United States v. New York, N.H. & H.R.R. Co.**, 355 U.S. 253, 256 n.5 (1957) ("The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.") Here, the growers possess far more information about the natural state of their properties and their activities on them than do tribes who have been excluded from those properties, and it is their burden to prove the applicability of the proviso.

beds, 898 F. Supp. at 1470, 1471. But as to existing grower beds, the court failed to recognize the consequences of where the burden lies. If it had adhered to the principles consistently enunciated by the Supreme Court and this Court, it would have viewed any difficulties in establishing the applicability of the proviso to particular properties as something for the growers to surmount. Instead, believing the growers' burden was too heavy, the court did indirectly what it could not have done directly. It redefined "cultivated" in a manner that eliminated the growers' burden by reducing, to virtually zero, the standard growers have to meet to establish an existing bed as artificial (all they now have to show is that they have done **anything** to a bed to improve its productivity, by however small an amount). This allows growers to exclude tribes from essentially all their existing beds, regardless of whether they are natural or artificial. This was basic legal error.

The district court's reliance on difficulties of proof was an abuse of discretion for a second reason as well. The growers have not yet had to prove that any of their specific beds are artificial -- the purpose of the implementation proceedings was to establish the ground rules for establishing such proof. Thus, at the very least, it was premature for the district court to

conclude that it is impossible to distinguish between artificial and natural beds on the growers' properties. (The district court did not cite to any evidence supporting its summary assertion about the difficulties of proof.) Indeed, the record that has been established to date demonstrates that this is not so. The growers have already proved that they created many beds of shellfish that did not exist before. For example, the W.A. Smith Oyster Company established that all the beds on its property are artificial because there were no shellfish found on the property at the time of acquisition, SER 295-297, and the company has since planted both manila clams and pacific oysters there. SER 295, 297.

The other seven grower appellants established that the vast majority of the oyster beds found on their properties are artificial beds. Pacific oysters account for more than 99 percent of the total oyster production in Washington State, SER 1004-05, 1007, and with the principal exception of Hood Canal, those oysters usually do not naturally reproduce in Puget Sound. SER 285, 291; SER 1006. Accordingly, most of the Pacific oyster beds found on growers' properties exist as the result of their seeding activities, and are therefore artificial. Olympia oysters raised on dikes,

without which the oysters would not survive, SER 298-99, 314-18, and shellfish raised in bags placed on racks, or on longlines strung above the tidelands, or in PVC cylinders planted in the ground, or on long stretches of rope suspended from floating rafts, SER 286-90, SER 330-31, SER 585, all constitute artificial beds of shellfish that the tribes may not harvest.

On the other hand, Bill Taylor, the president of Taylor United, Inc., (which owns between 3,500 and 4,000 acres, SER 329, out of the 9,500 acres total owned by all growers in Puget Sound, SER 581, 620), admitted that a number of his company's properties would support natural shellfish beds even if the company had done nothing to them. SER 333. For example, he agreed that the company's properties in the Dosewallips, Suquamish Harbor, Little Skookum Inlet, Oakland Bay and Skokomish Flats areas would support "natural beds" of various shellfish species, even if the company was not carrying out any activities on those properties. SER 334.

Under the implementation decree, the tribes may not harvest even those beds, despite the fact that they are admittedly not artificial. In addition, where the State measures the density of shellfish on its property before leasing shellfish beds to growers, SER 244-45, SER 476-66, SER

1119, there should be no difficulty determining whether natural beds were present before a grower obtained the lease.

Thus, the district court was unduly hasty in pronouncing the impossibility of distinguishing between artificial and natural beds on the growers properties. Moreover, to the extent that difficulty does exist in making that distinction, basic burden of proof principles establish that the difficulty runs against the growers. It was incorrect, as a matter of law, for the district court to rewrite the shellfish proviso to eliminate that burden.

2. The Equities Do Not Support Rewriting The Proviso.

The district court cited "equitable considerations," 898 F. Supp. at 1461, as its second reason for giving the term "cultivated" a broader meaning with respect to existing grower beds:

> Also weighing in favor of a broader definition of 'cultivated' with respect to the Growers' property is the fact that the Court does not believe that the Tribes should benefit from the Growers' efforts. Permitting the Tribes to harvest fifty percent of the shellfish from de facto artificial beds would confer a windfall on the Tribes, and would neither protect nor encourage the growth of the shellfish industry.

Id. at 1462. Here again the court committed fundamental error. It is a cardinal rule of treaty interpretation that a court may not alter the terms of a treaty to satisfy its notions of equity. As Justice Story put it in his seminal

opinion in **The Amiable Isabella**, 19 U.S. (6 Wheat.) 1, 72 (1821), "[w]e are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice." The district court recognized this principle in its first decision:

> In reaching its decision, the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors. Indeed, the Court has no such power.

873 F. Supp. at 1429. A few days before the implementation trial, the court again recognized this principle, saying "[y]ou cannot diminish the treaty rights because of equitable factors, that would be rewriting the treaty." SER 66.

This rule has been faithfully adhered to in the context of Indian treaties, usually where the equities would otherwise weigh in favor of revising a treaty to benefit a tribe. "[E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice. . . ." **Choctaw**, 318 U.S. at 432; **see also Shoshone Indians v. United States**, 324 U.S. 335, 353 (1945) ("We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet

alleged injustices"); **Skokomish Indian Tribe v. France**, 320 F.2d 205, 207-208 (9th Cir. 1963). Presumably, the rule has no less force where the equities purportedly weigh in favor of non-Indians.

Not only did the district court violate the rule by rewriting the term "cultivation" on the basis of its view of the equities, but it relied on an "equitable consideration" which this Court has previously deemed invalid. In the proceeding regarding the tribes' right to take fish reared in hatcheries, the State argued that it had financed the hatchery production, and that the tribes would therefore be unjustly enriched if given a share. This Court emphatically rejected that argument:

> [T]o allow the source of funding to determine rights would permit the State to buy out treaty fishing rights, not by paying the Tribes, but rather by paying for the replacement of treaty-protected fish with unprotected fish. That which is prohibited directly may not be accomplished by other means.

759 F.2d at 1359 (citation omitted). Here, the district court allowed the source of funding to determine the tribes' treaty rights. According to its reasoning, wherever growers have expended money on natural beds, those beds (which would otherwise fall squarely within the tribes' shellfishing rights) are now off-limits to the tribes. The district court thus sanctioned the

very "buy out" of the tribes' treaty rights that this Court has expressly forbidden -- it allowed the growers to pay for the replacement of treaty-protected beds with unprotected beds.

The district court also overstated the extent of any "windfall" that would accrue to the tribes upon a straightforward application of the proviso. The district court apparently was concerned that the tribes would benefit from the fact that growers have enhanced some of their natural beds. However, growers initiated many of their farming activities, and in particular their clam farming activities, after they were put on notice of this proceeding. Edwards, SER 597-98, 600; Rau, SER 303-04. (Of course, the treaties themselves are sufficient notice of the tribes' rights. **Seufert Bros Co. v United States**, 249 U.S. 194, 199 (1919)). That growers have undertaken various clam farming activities only recently, and with full knowledge of the tribes' claims, cuts against the argument that it would be unfair to have tribes benefit incidentally from those efforts. This is particularly so since the effect of many of the growers' activities is short-lived. Thus, for example, the addition of clam seed to a natural bed may increase the density of that bed, but only for the 2 to 3 years until those

clams are harvested. SER 1015.

In its haste to prevent a tribal "windfall," the district court also overlooked the fact that tribes have not sought damages in this case. For decades growers have enjoyed a monopoly over many of the richest natural shellfish beds in Washington State, beds which tribes reserved a treaty right to harvest. The tribes have not attempted to recoup anything for those years of exclusion. Any benefit tribes will experience in the short-term from the fact that growers have enhanced the productivity of some shellfish beds will not come close to matching the benefits to growers from their years of exclusive harvesting. Thus, not only did the district court abuse its discretion by rewriting the term "cultivated" on the basis of equitable factors, but its examination of the equities was lopsided at best -- it failed to even consider equities running in the tribes' favor.

There is no doubt, of course, that the district court was authorized to take equitable considerations, as properly calculated, into account in fashioning its implementation plan. But such considerations can be used only to shape a remedy, not to diminish the rights the remedy is meant to effectuate. Equity operates within certain parameters, the most basic of

which is that "'[w]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" **Albemarle Paper Co. v. Moody**, 422 U.S. 405, 418 (1975) (quoting **Bell v. Hood**, 327 U.S. 678, 684 (1946)). Within the context of this case, this Court has made clear that 50% of the harvestable fish is an essential part of the "necessary relief" that any equitable plan (however broad the district court's discretion in formulating it) must secure:

> The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public. . . . [W]e propose to state only those fundamental legal principles which define the parties' respective rights. . . .
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> * * *
>
> [T]he fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds.

520 F.2d at 687-88.

Far from respecting this basic legal minimum, the district court's plan repudiated it. It not only failed to secure to tribes their fair share of shellfish found in natural beds on growers' property, but barred tribes from

those beds altogether (with the hypothetical exception of beds growers have left untouched).

The district court did not cite any cases to support the specific result it reached regarding the growers' property; none of the cases it discussed with respect to its equity powers in general yield that support. In **Yankton Sioux Tribe of Indians v. United States**, 272 U.S. 351 (1926), the Supreme Court did not deny the plaintiff tribe a remedy for the violation of its rights, or redefine those rights to do away with the violation. Instead, it expressly sanctioned a remedy which the tribe itself had agreed to. **Id.** at 355-58. In **Brooks v. Nez Perce County**, 670 F.2d 835, 836-838 (9th Cir. 1982), this Court affirmed a decree of the district court awarding plaintiff **injunctive relief in full**, and stated only that equitable factors could be considered in measuring the amount of damages plaintiff was also to receive. In **United States v. Imperial Irrigation District**, 799 F. Supp. 1052 (S.D.Cal. 1992), **appeal docketed**, 9th Cir. Nos. 92-55129, 92-55389, 92-55398, 92-55402, the district court opted to award the plaintiff monetary damages instead of injunctive relief, an outcome which the district court here properly recognized would not vindicate the tribes' rights, 898 F. Supp. at 1458-59,

and which indeed would be inconsistent with the entire course of this litigation. The final, and clearly the most pertinent, case cited by the district court was this Court's opinion affirming the original 1974 decision in this litigation. 520 F.2d 676. As discussed above, the district court's decision flatly violates that precedent.

In **Fishing Vessel**, the Supreme Court made clear that neither the State nor individuals could diminish tribes' treaty fishing rights by pointing to present-day circumstances. It noted that "illegal regulation" and "illegal exclusionary tactics by non-Indians," and the results of those conditions, were "irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century." 443 U.S. at 668-69 & n.14. Nor can these rights be lost by the mere passage of time. **Id.** at 669 n.14. The district court's decision here is squarely to the contrary, and sets a deeply troubling precedent. It stands for nothing less than (and will certainly be cited for) the proposition that a trial court, **having** found federal rights to exist (rights fully protected by the Supremacy Clause), may nevertheless refuse enforcement of those rights in order to avoid hardship or inconvenience to another party.

In the end, the district court did what no court may do. Based on its own notions of a socially desirable result, it eliminated the tribes' treaty rights with respect to existing grower beds. Only Congress, however, may abrogate treaty rights, and only by making absolutely clear its intention to do so. **United States v. Washington**, 641 F.2d 1368, 1371 (9th Cir. 1981). The district court's second definition of "cultivated" cannot stand.

D. The Impact Of Rewriting The Proviso Is Significant.

The district court suggested that barring tribes entirely from existing natural beds on growers' properties would not "unnecessarily imping[e]" on the tribes' rights to take shellfish because growers own or lease 9500 acres of tidelands in Puget Sound (a small fraction of the total). 898 F. Supp. at 1459. However, the **extent** of diminishment of the tribes' rights is irrelevant; tribes have a right to take fish at "**all**" their usual and accustomed places. The court may not limit those places to satisfy non-Indian interests, even where the tribes' ability to fully harvest its 50% is <u>not</u> affected, as it would be here. **See United States v. Oregon**, 718 F.2d 299, 304-305 (9th Cir. 1983); **Muckleshoot v. Hall**, 698 F. Supp. 1504, 1514-15 (W.D. Wash. 1988) ("No case has been presented to this Court holding that it is

permissible to take a small portion of a tribal usual and accustomed fishing ground, as opposed to a large portion, without an act of Congress, or to permit limitation of access to a tribal fishing place for a purpose other than conservation.")

Even if the impact of the ban on tribal shellfishing from existing grower beds were relevant, the appropriate consideration would be the relative quantity and quality of the growers' natural shellfish beds, not their total acreage. In this regard, it is undisputed that growers own the great majority of the productive natural beds in Puget Sound. As counsel for the State acknowledged, the evidence "shows that the growers' properties generally are those where the majority of these intertidal shellfish are found." SER 616.

Documents authored by the Washington State Department of Fisheries make this clear:

> The 1889-90 legislature authorized the sale of intertidal lands to private individuals. More than 70 percent of the tidelands [in Puget Sound] were sold before the practice was discontinued in 1969. **The best clam and oyster producing tidelands were quickly purchased by commercial shellfish growers** while upland owners frequently purchased adjacent tidelands along with uplands. . . .

SER 1024 (emphasis added); **see also** SER 1018 ("Many of the state beaches

available for public use today are relatively unproductive, due mainly to lack of suitable substrate for clam settlement and survival. Upon achieving statehood, the tidelands not adjacent to cities were offered for sale. **The more productive tidelands were bought by commercial clam and oyster growers, leaving the less productive lands in state ownership**" (emphasis added)). Even the growers admit the natural richness of their properties. **See, e.g.**, Rau, SER 305 and Gunstone, SER 322-27.

The effect of the district court's redefinition of the shellfish proviso was thus to bar tribes entirely from the best clam and oyster producing tidelands in the State. This significantly diminished the tribes' rights to take shellfish. Grounded as it is in legal error, and destructive as it is of tribes' treaty rights, the district court's formulation of a second meaning of the shellfish proviso for existing grower beds constitutes an abuse of discretion. The tribes ask this Court to hold that the shellfish proviso has only one meaning, as set forth in the district court's 1994 treaty interpretation decision.

IX. THE COURT'S DECISION THAT 0.5 POUNDS PER SQUARE FOOT OF MANILA CLAMS IS THE MINIMUM DENSITY NECESSARY TO ESTABLISH THAT A NATURAL BED EXISTS IS CLEARLY ERRONEOUS.[60]

The trial court's initial conclusion that a staked or cultivated shellfish bed could not lawfully be created where a natural shellfish bed of the same species existed, 873 F. Supp. at 1440, was critical. That ruling honored the intent of the treaty negotiators both that tribes would continue to have access to natural shellfish populations and that a commercial shellfish industry could develop, based on the creation of artificial beds.

The first decision did not define what concentration of shellfish constitutes a natural bed that cannot be staked or cultivated. Again, that decision is critical, because a threshold set too high would allow tribes to be excluded from good natural populations that they understood were preserved to them by the treaty, while a threshold set too low could frustrate development of the cultivation industry.

In its implementation order, the district court first defined a natural bed as "a bed which is capable of sustaining a yield of shellfish that will

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[60] This is a factual determination, subject to the clear error standard of review.

support a commercial livelihood." 898 F. Supp. at 1461. The tribes do not challenge that definition. With one important exception, the Court then left the parties to decide on a case-by-case basis the minimum quantity of each species of shellfish necessary to support a commercial harvest. **Id.** The tribes also agree that those decisions are appropriately left for later.

Finally, based on an exceptionally thin record, the trial court decided that for manila clams the "minimum quantity that will support a 'commercial livelihood' is at least .5 pounds of mature clams per square foot." **Id.** The tribes strenuously dispute this conclusion because it sets the threshold far too high. No evidence in the record supports the court's conclusion; to the contrary, the record shows successful commercial harvests at densities far below 0.5 pounds. The court's conclusion is clearly erroneous.

Although this may appear to be a trivial or technical dispute, it most emphatically is not. It is absolutely crucial to the fulfillment of tribes' treaty rights. Manila clams are the predominant species of clams in Puget Sound, accounting for 82% of the commercial catch, and that predominance is increasing. SER 971, 1001; 233-34, 307, 319. The district court's unrealistically high threshold for the existence of a natural bed will allow

tribes to be excluded from the vast majority of natural manila clam beds by non-Indian cultivation, precisely the result the treaties sought to avoid. As the tribes' offer of proof shows, 52 of 63 beds presently used or usable by tribes for sustained commercial harvests would be subject to cultivation under the 0.5 density standard. SER 78-79.

The tribes do not ask this Court to set the proper density. The tribes ask that the trial court's decision be vacated so that manila clams will be treated the same as all other species, with the parties either reaching agreement or having the matter resolved on a complete record.

A. The Record Before The Court Was Exceedingly Thin.

The district court's 1994 decision ordered the parties to develop implementation plans. 873 F. Supp. at 1450. No parties' proposed plan defined natural manila clam beds by a 0.5 pound standard -- or any other specific quantity.

The court later ordered the parties to list issues for the implementation trial. ER 261. No party identified the density necessary to constitute a natural shellfish bed of any species as an issue, nor was such an issue listed by the court for trial. **See** SER 55. The district court's **sua sponte** order

also prohibited all discovery before the implementation trial. ER 262. The tribes moved to reconsider the prohibition on discovery, arguing that unfair surprise could occur, CR 13954, but the motion was denied. SER 46.

The court directed the parties to exchange witness lists 2 working days before the implementation trial. CR 14037, at 41-43. No party identified any witness as to the density of any species of shellfish necessary for commercial harvest.

On the first day of the implementation trial the State served Defendants' Memorandum On Definition Of 'Natural Beds', CR 14032, where, for the first time, the State expressed its intent "to offer evidence of what constitutes sufficient abundance to make a bed of clams or oysters of commercial interest to harvesters today." **Id.** at 5. No specific density was proposed, however. It was not until closing argument that counsel for the State asserted, for the first time, that a "range" of 0.5 to 1.45 pounds of clams is the minimum density of clams necessary for commercial harvest, although he admitted that no fixed minimum density could be established. SER 617-19.

As a result of this surprise, only two exhibits in the entire record

contain data showing densities of manila clam beds. Exhibit W-075, a chart prepared by the State, shows densities for 7 manila and 5 native littleneck clam beds leased by the State to commercial growers. SER 1119. Exhibit PL-844 shows the density of one manila clam bed. SER 1068-1070. The only other evidence of manila clam bed density came from the testimony of 2 growers, Edwards, SER 590-96, and Rau, SER 577.

After learning post-trial that appellants sought a 0.5 pound standard, the tribes sought to have the record supplemented with deposition statements from commercial growers. SER 75-77. That request was denied. CR 14092. Later, after the district court's implementation decision adopted the 0.5 pounds standard, the tribes and United States moved to alter or amend the judgment or for a new trial, CR 14115-16, CR 14112-13, and submitted supporting declarations from biologists. SER 78-89. The court refused to consider the additional evidence and left the 0.5 pound standard unchanged. ER 339-40.

Thus, very little evidence was presented to the district court regarding the densities of natural shellfish beds used for commercial purposes. This resulted not from any lack of available evidence, which is plentiful, but from

the lack of notice that the issue would be addressed. The record evidence that does exist, however, shows the district court's decision to be clearly erroneous.

B. Commercial Clam Harvesting Has Routinely Been Successful At Lower Densities Than 0.5 Pounds Per Square Foot; There Is No Evidence That 0.5 Pounds Per Square Foot Is The Minimum Density Necessary For Successful Commercial Clam Harvesting.

No witness was asked for, or gave, an opinion as to the density of manila clams necessary for a successful commercial harvest. No document in evidence sets forth an analysis of what density is necessary for commercial success. In short, there is absolutely no evidence in the record stating that 0.5 pounds of manila clams per square foot is necessary to sustain a commercial harvest. To the contrary, there is solid evidence that much less than 0.5 pounds supports commercial manila clam harvests.

A Memorandum from the Washington Department of Natural Resources states that 6 to 13 clams per square foot is considered a commercial density. SER 1068. An average weight of a harvestable clam is .04 pounds (25 clams per pound). SER 670. Thus, .24 pounds per square foot is considered a commercial density in a leased bed situation, according

to the State's own sources. (As discussed below, the density would be even lower in a non-lease situation.)

One grower testified that the range of production from his commercial clam beds went as low as .25 pounds per square foot. Edwards, SER 596. He also testified that he produced 110,000 pounds of clams from 15 to 20 acres of ground, SER 590-94, a level of production equivalent to .125 to .165 pounds per square foot. Another commercial grower testified that about 200,000 pounds of clams, worth approximately $400,000, were commercially harvested during the pendency of this action from a 100 acre area at Samish Bay. SER 576-77. That is equivalent to a density of less than .1 pounds per square foot.

One of the parcels in the chart of commercially leased beds prepared by the State had a manila clam density of .21 pounds per square foot. SER 1119. This density was obviously considered sufficient for commercial purposes when the State and grower agreed to the lease. There is no evidence that it has been terminated or converted to a clam cultivation lease, as the State would have required if the natural clam density was too sparse to support a commercial harvest. See Teissere, SER 472-74, 476, 479.

Additional evidence demonstrates that .5 pounds is not the minimum commercial density. Exhibit PL-999 shows pounds and acres for manila and native littleneck clams combined for 5 beaches where the range of density was .195 to .29 pounds per square foot. SER 1080. Those beds were compared favorably to commercial beds. SER 606.

Thus, the evidence in the record establishes substantial commercial success at manila clam densities below 0.5 pounds. No statement or testimony exists in the record that at least 0.5 pounds of manila clams must be present per square foot in order to ensure commercial success. The court's decision on this point is clearly erroneous and should be vacated.

This conclusion is confirmed by the deposition testimony of growers and the declarations of shellfish biologists that were offered by the tribes to support their Rule 59 motion.

The deposition testimony from commercial growers directly establishes that 0.5 pounds is too high. For example, when asked "What's the density of a commercial clam beach?" William Taylor of Taylor United, by far the largest grower, answered "an eighth of a pound per square foot. . . . " SER 75. Later he added that "it can actually be even -- probably in smaller

quantities, even less quantities than that." **Id.** Glen Rau, another grower, said "I have marketed clam ground that produced as low as 3/10 of a pound average per square foot." SER 77. These statements by growers directly contradict the district court's conclusion.

The biologists' declarations also confirm that 0.5 pounds is far too high. One declaration explained that densities were below 0.5 pounds per square foot for 20 of the 27 beaches where clams are harvested for commercial purposes by four tribes. SER 79-80. At one of those 20 beaches, Dosewallips State Park, with a density of 0.22 pounds, tribes harvest 170,000 pounds of manila clams each year, making this the "primary source" of clams for those tribes' commercial harvests. **Id.**

Five of eight beaches managed by the Squaxin Island Tribe in Oakland Bay had densities between .13 and .38. SER 83. Those 5 beaches represent an average annual tribal harvest of over 125,000 pounds. **Id.** In one survey by the Washington Department of Natural Resources only one of 28 state and private beaches had a manila clam density in excess of 0.5 pounds per square foot. SER 88-89. This evidence substantiates what the record shows: 0.5 pounds is not the minimum density necessary for commercial

harvests of manila clam beds.

The tribes recognize that this Court will only overturn a factual finding of a district court when convinced that clear error was committed. Here, where the evidence in the record shows commercial harvests of manila clam beds at densities well below 0.5 pounds, and where the State and growers have both declared the commercial threshold to be lower, that standard has been met.

C. The Clam Density Evidence In The Record Is Not Probative Of The Minimum Necessary For Commercial Success.

The district court did not make clear what evidence it relied upon for its 0.5 pound conclusion, other than its general statement that "[e]vidence offered by the parties indicated that the minimum quantity for manila clams ranged from .5 pounds to 1.15 pounds. . . ." 898 F. Supp. at 1461. This suggests that the court relied on the State's chart showing densities for 7 leased manila clam beds. SER 1119. Seven beds is far too small and unrepresentative a sample of commercial beds to support a reliable finding of fact.

1. The Density Data Is Not Based On The Density Of Mature Clams.

The trial court defined the density necessary for commercial success in terms of **mature** clams. The tribes have no quarrel with measuring density on that basis. However, the density data relied on by the district court was **not** based on mature clams; the data in W-075 was based on the weights of **all** manila clams. SER 1070 (showing that the weights of small, medium, and large manila clams are added to get a total poundage per square foot).

This significantly inflated the densities of the beds in the district court's small sample. For example, the total density of manila clams for lease 20-011376 was 1.53 pounds per square foot. SER 1070. But the density of mature clams was only .33 pounds per square foot. **Id.** The balance (1.2 pounds) was attributed to small and medium size clams. Yet the district court apparently relied on the 1.53 pound figure in deriving a mature clam threshold for commercial harvesting. This was error of the most basic sort.

Had the density data in W-075 shown the density of mature clams only, the evidence before the court would have been dramatically different. Because the data was based on all size classes the data cannot support a

determination based only on mature clams. The district court's conclusion simply did not match the evidence.

2. The Density Data In The Record Is Too Small A Sample Of The Available Evidence To Be Probative.

Exhibits introduced by growers show an average of at least 7 manila clam beds per grower. SER 709-41. Using that conservative estimate, there are over 1800 manila clam beds on the 250 growers' properties in the case area. SER 620. In addition, 693 clam beaches exceeding 1,000 feet in length are under State management, SER 1122-29. There are also nine federally owned beaches where tribes commercially harvest manila clams. SER 1102-09.

In sum, there are likely over 2,000 beaches with manila clams in commercial quantities in the case area, without considering private non-commercial beaches. Density data is in evidence for fewer than ten such beaches and no testimony suggests that they are in any way representative of clam beds in Puget Sound. It is therefore impossible to fairly draw conclusions from the record about what level of density is necessary for commercial success.

Reliable and accurate conclusions cannot be made when they are

drawn from only a tiny sample of the available evidence. Small sample size has been described by the Supreme Court as a "typical" problem:

> Without attempting to catalog all the weaknesses that may be found in such evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 996-997 (1988). In **Mayor of Philadelphia v. Educational Equality League**, 415 U.S. 605, 620-21 (1974), the Court held that a sample size of 13 persons was too small to draw reliable conclusions.

In **Morita v. Southern California Permanente Medical Group**, 541 F.2d 217, 220 (9th Cir. 1976), a plaintiff's attempt to use an 8 person sample was rejected as "much too small." This Court stated that "statistical evidence derived from an extremely small universe, . . . has little predictive value and must be disregarded." **Id.** at 220. This Court has followed **Morita** on numerous occasions. **See, e.g., Knutson v. Boeing Co.**, 655 F.2d 999, 1001 (9th Cir. 1981) (the sample size was "so small as to have little, if any, probative value"); **Ward v. Westland Plastics, Inc.**, 651 F.2d 1266, 1270 (9th Cir. 1980) (proof was based on "an unreliably small sample"); and **White v. City of San Diego**, 605 F.2d 455, 461 (9th Cir.

1979). As stated in **Statistics In Litigation**, Richard A. Wehmhoefer, (McGraw-Hill 1985), at 98:

> It is a well-established fact among statisticians that a sample must be representative of the population from which it is drawn. Otherwise, valid inferences cannot be drawn. Among other things, the sample must be of adequate size. When the sample size is too small, the courts may rule that it cannot be used to support any significant conclusions.

Reliance on a small sample of data is particularly inappropriate where a broader set of data is easily available. **See, e.g., National Lime Ass'n v. EPA**, 627 F.2d 416, 434 n.52 (D.C. Cir. 1980) ("It is one thing to generalize from a sample of one when one is the only available sample, or when that one is shown to be representative . . . along relevant parameters. * * * It is another thing altogether to generalize from an extremely limited sample when a broader sample . . . can be readily obtained and when no showing of the representativeness of the sample is made.") (Citations omitted). **See also id.** at 454.

The sample size here, where density data was presented for fewer than ten manila clam beds out of perhaps 2,000 or more such beds, and where sufficient data is readily available, is simply too small to be probative of the minimum density needed for commercial viability.

3. The Density Data In The Record Is Not Probative Because Bias Exists That Favors Appellants.

Barnes and Conley, in **Statistical Evidence In Litigation**, under the heading "Nonrepresentativeness in Samples," state:

> Statistical conclusions based on sample estimates rely on the assumption that an unbiased attempt was made either to gather a sample as much like the population as possible in all relevant characteristics or to offer each item in the population an equal chance of being part of the sample.
>
> * * *
>
> Allegations of nonrandomness may arise . . . when the sampling is inadequate, or when the sample is designed either intentionally or by inattention so as to favor one party's view.

§6.18 at 292.

The Supreme Court and this Court have both recognized this principle in finding non-representative evidence to be of little or no probative value. **See, e.g., Watson**, 487 U.S. at 996 ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value") (citing **Hazelwood School Dist. v. United States**, 433 U.S. 299, 308 (1977)); **Sengupta v. Morrison-Knudsen Co.**, 804 F.2d 1072, 1075-76 (9th Cir. 1986) (the statistical evidence was based upon too small a sample (28 employees), and the pool of employees selected was not

the entire group that would have been affected); **Contreras v. City of Los Angeles**, 656 F.2d 1267, 1272 (9th Cir. 1981) ("use of statistical evidence 'is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn,'") (quoting **United States v. Ironworkers Local 86**, 443 F.2d 544, 551 (9th Cir. 1971)).

The manila clam beds for which density data was presented by appellants were "designed either intentionally or by inattention so as to favor" appellants' views. They are not representative of manila clam beds used for commercial purposes. A review of the clam beds selected by appellants for inclusion in Exhibit W-075 makes this evident.

a. The Density Data Is Biased Because It Is Based On Leased Beds Where The State Charges 31% Of The Value Of The Manila Clams, Thus Making The Density Necessary For Commercial Success Artificially High.

Each of the manila clam beds identified in W-075 is leased from the State at an annual rent of 31% of the value of the shellfish production. SER 248-49. In contrast, where Indian tribes harvest as a matter of treaty right, they pay no rent. Where shellfish growers own tidelands, they pay no rent.

The existence of a 31% lease rate requires a greater density of clams to produce a commercially viable operation than where rent is not a cost.

The State admitted the effect of its 31% rental charge on the density needed for successful commercial harvests when it described the evidence it would put before the court: "The State will offer evidence as to densities of clams **necessary to exact a commercial 31% lease rate** for state tidelands. . . . " CR 14032 at 5 (emphasis added). A 31% rental for the 7 leases in W-075 makes those beds unrepresentative of the densities necessary for commercial success where no 31% charge exists. That bias favors appellants, of course, because it makes the minimum density necessary to establish the existence of a natural bed higher by a factor of 31%.

b. The Density Data Reflects The Effect Of Enhancement That Adds Costs And Can Boost The Density Of Natural Populations.

The State estimates the size and density of natural populations of clams present on their leased tidelands in order to set the rental amount. That assessment is done both before a new lease is issued and when an existing lease is renewed or the rental for an existing lease is revalued. SER 244-46, 253-55, 472-73. Where a new lease is being issued, the density of

the clams present presumably reflects a purely natural population without any artificial enhancement. SER 247-49, 254. Once leased tidelands have been in the possession of a grower, however, the density of the natural shellfish populations may have increased through a variety of grower activities. SER 251, 256-58, 480-82. Of course, those activities can be costly, making the density necessary for commercial success higher than with a purely natural population. SER 760-75.

The evidence of manila clam density presented in exhibits W-075 and PL-844 do not generally show whether density is based on a new lease. At least some of the leases are renewal or revaluation leases, however, because PL-844 indicates that a harvest has already taken place. In addition, both the State and growers claimed that the data did not represent the densities of purely natural clam beds unaffected by grower activities. CR 14125 at 15; CR 14130 at 14.

The beds leased from the State are therefore biased towards higher densities (in addition to the 31% rental), because enhancement activities may have increased the density beyond natural levels, and because the cost of enhancement activities increases the density needed for commercial success.

The bias in the data makes the evidence not probative of the Court's finding.[61]

D. The Density Of Clams Needed For Commercial Success Varies Over Time Depending On Market Prices And Related Economic Questions.

The district court's decision is also erroneous because it fails to account for the fact that the density needed for commercial success will vary as market prices and costs vary. **See, e.g.**, Dewey, SER 293-94; Gunstone, SER 578; SER 675; CR 14032, at 5. Those changes can be sizeable. Market prices for manila clams increased by about 70% on average from 1986-1988 ($1.00 per pound) to 1991-1993 ($1.70 per pound). SER 1071. **See also** SER 1067. It was clear error to permanently assign a particular density to what is needed for commercial success.

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[61] The trial court may have been misled by the testimony of a state employee that the clam density data was based on purely natural beds. SER 244-48. The State also said it would present "evidence as to densities of clams necessary to exact a commercial 31% lease rate for state tidelands **(based on the lessee's harvest of naturally occurring shellfish from the lease lands)**." CR 14032 at 5 (emphasis added). After the decision, the State and growers claimed that the clam density data they had submitted in Exhibit W-075 did not in fact reflect the density of purely natural beds of clams, as discussed in the text. If the district court had had the benefit of that information earlier, its decision might well have been different.

E. The Density Of Clams In A Natural Bed Varies Over Time Due To Both Natural And Non-Natural Causes.

Natural shellfish beds are not static; they are subject to both natural and non-natural changes. These include, for example, temporary declines in populations due to freezing weather, disease, or harvest. **See, e.g.,** Armstrong, SER 222, 241; Harman, SER 603 (95% of razor clams killed by disease, then repopulated); SER 1017. This variability was reflected in the 19th century definitions of a natural bed. Those definitions generally looked at the densities in the past and future potential. **See, e.g.,** SER 959 ("at any time for 10 years previous . . ."); SER 953 ("areas which have formerly been such and whose present character indicates a reasonable likelihood that they may again become productive"); White, SER 125; SER 869-70.

All parties agreed on the variable nature of natural beds. **See,** SER 144 (grower); SER 669 (appellants' exhibit); SER 465-66, 468 (respondents' expert). The court also acknowledged that natural beds are not static. 898 F. Supp. at 1462. As a result, the growers admitted that natural beds should be defined as those areas that currently support a commercial quantity of a shellfish species or did so within the preceding five years. CR 14066 at 14 n.7. The State also agreed, CR 14032 at 5, and SER 469-70, and therefore

advocated that " . . . application of any quantitative definition of 'natural beds' in different circumstances can be addressed . . . **on a case-by-case basis.**" CR 14032 at 6 (emphasis added).

The court's decision fails to take into account what all parties agreed was a temporal component of the definition of a natural bed. This is clear error.

F. The Court Abused Its Discretion By Denying The Tribes' Motion To Alter Or Amend The Judgment Or For A New Trial.

The trial court's denial of the tribes' Rule 59 motion should be reversed as an abuse of discretion for three independent reasons: (1) appellants' change in theory during and after the implementation trial constituted unfair surprise, particularly where the tribes were forbidden all discovery, such that the tribes were deprived of a fair hearing; (2) the court's implementation decision is based on a manifest error of fact; and (3) the highly unusual circumstances here suggest that the need for finality is minimal and a remand should be ordered. **See generally**, Wright, Miller, and Kane, **Federal Practice and Procedure** § 2810.1 (2d ed. 1995).

1. The Court's Decision Is Manifestly Unjust Because Plaintiffs Were Unfairly Surprised By Appellants' Untimely Post-Trial Change In Theory.

This Court has long recognized that a party that is unfairly surprised by a claim or assertion made during or after a trial is entitled to relief, at least where a new hearing will produce evidence that could change the outcome. **Moylan v. Siciliano**, 292 F.2d 704, 705 (9th Cir. 1961). In **Ruiz v. Hamburg-American Line**, 478 F.2d 29 (9th Cir. 1973), this Court reversed the denial of a Rule 59 motion for abuse of discretion where a party was unfairly surprised by the revelation of a new theory during a trial, in circumstances where there was "exceedingly thin evidence in support of the verdict. . . . " **Id.** at 34. This case is particularly like **Ruiz** in that the evidence in support of the trial court's 0.5 standard is, at best, "exceedingly thin."

Other circuits have reversed denials of motions for new trials when the moving party was unfairly surprised by an adversary's untimely new position. **See, e.g., Conway v. Chemical Leaman Tank Lines**, 687 F.2d 108, 111 (5th Cir. 1982) (unfair surprise where plaintiffs had no adequate opportunity to prepare a response to a new theory); **Valdez v. Leisure**

Resource Group, Inc., 810 F.2d 1345, 1357 (5th Cir. 1987) (a party "will not be allowed to prevail on a theory of damages created on the eve of trial and never fairly introduced as such during trial").

The First Circuit reversed a denial of a motion for a new trial when a defendant introduced a new issue on the morning of the trial, as occurred here (the issue here not being fully revealed until the end of trial). **Q.E.R. v. Hickerson**, 880 F.2d 1178, 1182 (10th Cir. 1989). In **Ferrell v. Pierce**, 785 F.2d 1372 (7th Cir. 1986), after trial the defendant attempted unsuccessfully to introduce affidavits and other information that had been available at the time of the trial, which also occurred here. The Seventh Circuit reversed because "the issue to which the previously available evidence would be responsive had not been clearly and timely framed in the proceedings before the court" and thus the defendant had been unfairly surprised by "the new approach and focus" of the case. **Id.** at 1383. **See also Perez-Perez v. Popular Leasing Rental**, 993 F.2d 281, 287 (1st Cir. 1993) (defendant unfairly surprised by new theory introduced during trial); **Twigg v. Norton**, 894 F.2d 672, 679 (4th Cir. 1990) (new trial ordered when plaintiff waited until trial to disclose new theory of liability). The

facts here fall squarely within the circumstances considered sufficient to show abuse of discretion.

2. The Court Abused Its Discretion Because Its Ruling Was Based Upon A Manifest Error Of Fact.

An abuse of discretion occurs where the underlying decision is based on a manifest error of fact, regardless of unfair surprise. **Foster v. Skinner**, 70 F.3d 1084, 1087 (9th Cir. 1995). As described above, the court's finding is manifestly in error, given the lack of supporting evidence and given the contrary information in the record that commercial harvests in fact take place at densities far less on 0.5 pounds.

3. The Court Abused Its Discretion Because, Under The Unusual Circumstances Presented Here, There Was A Minimal Need For Finality.

A motion for a new trial should balance the need for finality against hearing a claim on its merits and avoiding an injustice. Wright, Miller and Kane, **Fed. Practice and Procedure Civil 2d**, § 2857 at 257. Where the interest in finality is "only slightly impinged, while the countervailing interest that justice be done [is] seriously at stake," it is proper to grant relief from a judgment. **Good Luck Nursing Home, Inc. v. Harris**, 636 F.2d 572, 577-78 (D.C. Cir. 1980). **See also Lussier v. Dugger**, 904 F2d

661, 667 (11th Cir. 1990) (reversing for abuse of discretion a district court's 10 day old order that was clearly incorrect; **Kotlicky v. U.S. Fidelity & Guaranty Co.**, 817 F2d. 6, 9 (2nd Cir. 1987).

Here the district court's 0.5 pound standard for manila clams obviously mistaken and the need for finality is minimal.

The court saw no need for finality as to quantifying the commercial density standard for oysters, mussels, native littleneck clams, soft shell clams, butter clams, horse clams, or any other species of intertidal shellfish. The court left those decisions for later, ER 289, and there would be no prejudice to any party to treat manila clams the same way. The court should have done so, given the minimal record, lack of direct evidence of minimum density, and the obvious wealth of information available from many years of grower and tribal experience with commercial clamming. It should have done so also because of the serious interests at stake.

Allowing non-Indians to stake or cultivate clams beds with populations below 0.5 pounds per square foot will effectively destroy most of the tribes' clam fisheries. Out of 63 commercial clam beds identified in the biologists declarations, 52 would be subject to cultivation by non-Indians. Because

manila clams now represent over 80% of the commercial clam harvest in Puget Sound, a percentage that is increasing, the loss of access to most manila clam beds will all but eliminate the tribes' clam fisheries. It was an abuse of discretion to permit that injustice when the need for finality is so minimal.

X. SHELLFISH BEDS ENHANCED BY THE STATE ARE NOT STAKED OR CULTIVATED BY CITIZENS.

The district court held that the term "citizens," in the proviso excluding tribes from beds "staked or cultivated by citizens," includes the State of Washington. 898 F. Supp. 1459-60. Although on its face the term "citizens" unambiguously refers only to natural persons, the court chose to give it a broader meaning for two reasons: first, because the State is acting on behalf of its citizens, **id.** at 1460, and second, because the court thought the equities weighed in favor of that interpretation. **Id.** at 1460 n.11. As a result, the State can stake or cultivate shellfish beds on public lands and exclude tribes. As an interpretation of the treaty language, the court's decision on this point is subject to **de novo** review. 969 F.2d at 754. The court made no findings of historical fact in support of its holding.

The district court failed to give the treaty language its plain meaning,

particularly in view of its historical context, it failed to read the proviso narrowly, and, to the extent the term is ambiguous, it resolved that ambiguity against the tribes. It also ignored the law of this case that the State cannot pay for fish to replace those lost as a result of non-Indian activities and then deny the tribes access to those replacement fish. For these reasons the court's holding should be reversed.

A. The Proviso Is Limited To Beds Staked Or Cultivated By *Citizens*.

On its face, the term "citizens" refers to private individuals. While the State argued below, and the district court agreed, that it also refers to individuals acting collectively through their government for public purposes, the context in which the word was used refutes this claim. As discussed above, the district court found, based on overwhelming evidence, that the purpose of the proviso was to protect a nascent **industry**, where individual citizens created artificial shellfish beds for their own exclusive use and benefit. In the court's words, " . . . to protect the fledgling oyster industry, Stevens might have felt it necessary to exempt artificial beds . . . [T]he Shellfish Proviso is narrowly tailored to do just that." 873 F. Supp. at 1437-38. Thus "the words 'any beds staked or cultivated by citizens,'

describe artificial shellfish beds **created by private citizens." Id.** at 1441 (emphasis added). This analysis is confirmed by Angell, in language quoted by the Court:

> Oysters . . . may be taken and thus become the property of him who takes them, and if he plants them in a new place flowed by tide water, visibly denoted, and *where there are none naturally*, **and for his own particular benefit**, it is not regarded as an abandonment of his property in them.

SER 909; 873 F. Supp. at 1433 n.9 (italics in original; boldface added).

The court did not review any historical information surrounding the context in which the words of the proviso were used, not did it give any reason for ignoring its clear finding that the proviso was conceived of as a method for protecting individual non-Indians pursuing a business. The proviso was not intended to protect state-financed general recreation programs. Viewed in its historical context, "citizens" unmistakably and clearly refers to private individuals creating artificial shellfish beds for commercial purposes, not to a governmental entity acting for non-proprietary reasons. The district court's decision is wrong as a matter of law.

B. The Court's Decision Violates The Canons Of Construction.

Even if "citizens" can be read as referring either to private individuals or to the State government, both normal rules of construction and the special canons applicable to Indian treaties require that the former meaning be adopted. As discussed in section II above, provisos, as exceptions to generally stated rights, are to be narrowly and strictly construed. The court below took the opposite approach, construing citizen extremely broadly. It likewise ignored the basic rule that ambiguities in Indian treaties should be resolved in favor of tribes, not the State. The inclusion of a state government within the term "citizens" is nothing if not a strained and technical reading of the word, yet technical meanings are to be avoided. **Fishing Vessel**, 443 U.S. at 675-76. The interpretation certainly is to the prejudice of the tribes, also in violation of the well-known canons. Unlike its first decision, the court failed even to mention, let alone apply, these rules and its failure to heed them requires reversal.

C. The Court May Not Balance Equities To Determine The Meaning Of Treaties.

As discussed above, section VIII C(2), whatever role equitable considerations may play in fashioning relief, they may not be used to

determine the meaning of treaties. Yet the district court did just that in concluding that "the benefits and efficiencies" of excluding shellfish beds enhanced by the State for recreational purposes outweighed the tribes' interests in access to such beds. 898 F. Supp. 1460 n.11. The court cannot use its notions of equity to choose whom to favor even in the case of ambiguous words in an Indian treaty. It has long been the rule that Indian treaties "cannot be rewritten or expanded" to satisfy notions of equity. **Choctaw**, 318 U.S. at 432. The court's expansion of "citizens" to include the State, for reasons of equity, was improper.

Even if it were proper to balance equities in determining the meaning of the treaty words, the court ignored prior precedent and came to the wrong conclusion. The evidence was undisputed that the overall purpose of the State's enhancement effort is to mitigate for the destruction of large quantities of native shellfish and the unavailability of huge shellfish areas due to pollution, development and public exclusion from private beaches. **See, e.g.,** SER 1019-22, 980, 986, 988-90, 994-95, 1004-05; SER 219-30, 335. As this Court held previously in this case, regarding hatchery fish, it "would be an inequity and inconsistent with the Treaty" to require the tribes

to bear all the burden of declines in fisheries, without sharing in the replacements provided by the State. 759 F.2d at 1360. The court's decision here would allow that inequity to occur.[62]

In addition, the State must treat treaty rights as an "obligation and interest to be promoted in the State's regulatory, management **and propagation** programs," 384 F. Supp. at 403 (emphasis added), and State funding for shellfish enhancement cannot be allowed to buy out the tribes' rights. 759 F.2d at 1359. Thus, the plain language of the treaties and the law of this case requires the propagation and planting of shellfish by the State to be included within the treaty right, particularly because such propagation is designed to replace shellfish lost by the actions of the State and its non-Indian citizens.

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[62] It would be ironic to permit the State to exclude publicly enhanced beds; until the court's decision, a second purpose for the State's enhancement was to provide shellfish opportunity to tribes. SER 132.

XI. THE DISTRICT COURT ERRED BY LIMITING THE TRIBES' ABILITY TO CROSS PRIVATELY OWNED UPLANDS TO FISH.[63]

The District Court prohibited tribal access across privately owned upland property to reach shellfishing areas unless "specifically requested from and granted by a Special Master," with permission to be refused unless "tribal members can demonstrate the absence of access by boat, public road, or public right of way." 909 F. Supp. at 793. This order is an unprecedented limitation on tribes' treaty fishing rights.

A. The District Court's Order Denied Tribes Due Process And Constitutes An Advisory Opinion.

The right of access across private lands for fishing is part of the treaty fishing right. **Winans**, 198 U.S. at 381. No appellant raised the issue of whether or how the inherent access right should be limited and the district court's first decision neither imposed nor discussed such limits. There was no evidence, no argument, and no briefing by any party requesting limitations on the right of access. The relief sought by appellants in the Pretrial Order did not include any limitations regarding access across upland

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[63] This issue involves both legal questions reviewable **de novo** and a factual determination reviewable for clear error.

property. ER 80-83. In short, the tribes and United States were not on notice that any appellant sought to prohibit or limit access across privately owned uplands, other than to the extent that the right of taking shellfish was denied in general.[64]

Although the treaties contain no limits on the tribes' methods of access, the tribes' proposed implementation plan included a proposal to accommodate concerns of private property owners by giving preference to access by water or public right of way. CR 13905 at 25. Appellants objected to this proposal on the grounds that the issue of the circumstances of access across private property had not been addressed in the 1994 decision, it was outside the issues presented, no evidence had addressed the issue, and no claim for relief had been stated regarding that issue. CR 13917 at 2. Adkins and UPOW then moved for a new trial in order to assert limitations on access across private property, claiming again that that question had not been before the court. CR 13933-34. Three days after the

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[64] In the Pretrial Order appellants did state as a legal issue the circumstances under which tribes could cross privately owned uplands to reach shellfishing grounds (ER 140), but they did not propose a prohibition nor any specific or general limits. Nor did they brief, argue, seek relief or present any evidence regarding that legal issue.

motion was filed and before the tribes could respond, the court denied the motion. SER 44-45.

A few days later, **sua sponte**, the court issued its Second Interim Order where it declared that, based on the evidence present in the record, the tribes' access to tidelands for shellfish purposes at treaty times was limited to water access. ER 260-61. The tribes' motion to reconsider this order (CR 13954-55) was denied. SER 46.

The tribes also sought to place the issue before the court in the implementation trial, CR 13966 at 5-6, but defendants' motion in limine to exclude that issue (CR 14013) was granted. SER 60-64. The tribes made offers of proof, but no evidence or argument was received by the court. SER 68-72. The tribes also raised the issue in their motion to alter or amend the judgment. CR 14115-16. In response, appellants again argued that the issue was outside the scope of the case by incorporating their earlier brief on that point. CR 14123 at 4 n.1.

The sua sponte order deprived the tribes and United States of any opportunity to present any briefing, argument or evidence on the question. Elemental due process requires that the parties be given an opportunity to be

heard. At a minimum, the court's decision should be vacated to permit the tribes and United States to be heard on the question before it is resolved. **Armstrong v. Manzo**, 380 U.S. 545 (1965).

In addition, because no case or controversy based on a specific dispute was before the court, its **sua sponte** order constituted an advisory opinion. Such opinions are beyond the court's jurisdiction. **Flast v. Cohen**, 392 U.S. 83, 94-97 (1968); **O'Neal v. City of Seattle**, 66 F.3d 1064, 1066 (9th Cir. 1995).

The court's decision was also contrary to the sound exercise of judicial discretion. This Court held, **en banc**, in this litigation, that:

> [t]he legal standards that will govern the State's precise obligations and duties under the treaty . . . will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.

759 F.2d at 1357. That decision vacated a declaratory judgment that announced general rules regarding the State's obligations that were "imprecise in definition and uncertain in dimension." **Id.**

That reasoning applies with equal force here. There is no guidance as to what would constitute an "absence" of access by other means: if no public road or right-of-way exists within 1/4 mile? Or within 1/2 mile? Or some

other distance? If water access would be hazardous, is it absent? Because no concrete facts underlying a specific dispute existed, the order was necessarily imprecise. As this Court said, "[p]recise resolution, not general admonition, is the function of declaratory relief." 759 F.2d at 1353.

B. The District Court's Order Is Wrong As A Matter Of Law And Fact.

As discussed above, section III A, the Supreme Court held unequivocally in **Winans** that the right to take fish includes the right to cross privately owned property to reach fishing grounds. No court in the 26 years of this litigation has ever placed any limits on that right, until now. The court's decision cannot be reconciled with **Winans**. Even the State admitted before the Supreme Court that the treaties include a right of access across private property for fishing purposes. 443 U.S. at 676 n.22.

Nor can it be reconciled with the Supreme Court's recognition that the treaties are self-executing in nature. **See, e.g., Fishing Vessel**, 443 U.S. at 693 n.33 (the argument that the treaties are not self-enforcing "was implicitly rejected in **Winans** and our ensuing decisions regarding these treaties, all of which assumed that the treaties are self-enforcing"). Requiring tribes to seek advance permission from a Special Master before

exercising treaty rights is fatally inconsistent with the self-executing nature of those rights.

The district court gave two reasons for its order: it "balanced the Tribes' right to fish against minimizing the intrusion on private property" because it sought to avoid conflict, and it found as a fact that at treaty times "Tribes had reached the tidelands by boat and not by land access." 909 F. Supp. at 791-92. Neither reason suffices as a matter of law and the factual finding is clearly erroneous.

1. It Was Error For The District Court To Define Tribes' Rights By Balancing Equities.

As discussed above, in section VIII C(2), and as the court recognized in its first opinion, 873 F. Supp. at 1429, a court may not determine the meaning or scope of tribes' treaty rights in order to avoid burdens on non-Indians. **See, e.g., Choctaw**, 318 U.S. at 432. It was particularly inappropriate here, where the court sought to minimize "conflict" with private property owners, because Governor Stevens expressly stated his intention that settlers' land claims should not interfere with tribes' access to their fisheries, a point emphasized in **Fishing Vessel**, 443 U.S. at 666 & n.9.

2. The Tribes' Method Of Access Is Not Limited To Those In Use In 1854.

As discussed above, sections III C and D, the treaties do not limit tribes to any particular "manner, method or purpose" of taking fish. 384 F. Supp. at 407. Their rights are not frozen at the fishing practices in use in 1854. It was therefore wrong as a matter of law for the court to limit the tribes to the means of access it found were in use at treaty times.

3. Tribes Used Land Access At Treaty Times.

The district court stated that "the evidence in this case indicated that the Tribes historically reached these beds by water access only." ER 260-61. However, there are numerous direct and indirect references in the record to use of uplands for access to shellfish, rather than water access.[65] The court's decision is simply unsupported by the record.

The use of land access as a common method to reach shellfishing areas was described by expert witnesses. Allan Richardson testified to several trails used by the Nooksack Tribe to reach shellfishing areas, SER

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[65] The tribes also made an offer of proof that contained substantial additional evidence that historically tribes did not depend solely on water access for purposes of taking shellfish. This offer was rejected. SER 68-72.

817-19, SER 168-69. Documentary exhibits also provide evidence of trails used by Nooksack to reach shellfishing areas. SER 823; SER 820-21 (listing Nooksack place names, where overland trails to saltwater are described).[66]

The Muckleshoot Tribe's expert witness, Lynn Larson, said in her written testimony that "upriver people traveled by canoe or used a web of trails . . . to reach shellfish beds. . . ." SER 799. **See also** SER 800-04, 814. This was confirmed on both direct and cross examination. SER 242 and 243. **See also** Lane, SER 1048 ("The Green River people came overland by trail to the Poverty Bay beaches on a trail which is recorded on a map made by George Gibbs in 1856"); Williams, SER 189-189a; Wright, SER 192-93; Judson, SER 625-27; Charles, SER 194-95.

The above evidence demonstrates that tribal access to shellfishing sites was in many cases by land, not solely by canoe. The tribes also offered abundant evidence to the district court that shellfishing took place directly from land sites. Use of such areas necessarily shows use of uplands for

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[66] Additional documentary exhibits were offered by Nooksack but they were not admitted. **See** SER 601-02.

purposes of reaching shellfishing beaches.[67] There is no question that tribes found it necessary to and did utilize upland areas to take shellfish at treaty times.[68] The court's finding to the contrary is clearly erroneous.

C. Appellants' Attempt To Place More Limits On Tribes' Access To Fisheries Must Be Rejected.

Appellants argue that **Winans** and **Seufert Bros. Co. v. United States**, 249 U.S. 194 (1919), stand for the proposition that tribes may cross private land to reach fishing grounds only where they can prove their treaty-time use of a specific property was "sufficiently open and notorious to put a private owner on notice of adverse use." Alexander Br. 64-65. **See also** Adkins Br. 58-60. In other words, tribes must establish a prescriptive right under the same state law standards as non-Indians. Appellants' reading of those cases is antithetical to their basic holding: that the treaties themselves are sufficient notice of the tribes' rights and those rights are **not** limited to

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[67] Examples of upland access include camping areas and villages used extensively for access to shellfish: James, SER 1088-89; James, SER 1094; SER 1090-93; SER 645-747; Miller, SER 185; SER 786-88; James, SER 211; SER 1082-86; SER 805-07, 810-15.

[68] The treaties also expressly provide for continued use of uplands securing a right "of erecting temporary houses for the purpose of curing. . . ." **See, e.g.**, ER 86.

the rights non-Indians have. That is the meaning they were understood to have in **Fishing Vessel**, 443 U.S. at 676 n.22, which further held that non-Indians "may not rely on property law concepts" to deny treaty rights. **Id.** at 684. **See also** 384 F. Supp. at 407, **aff'd**, 520 F.2d 767.

Appellants' attempt to force tribes to prove every ancient pathway and trail as a predicate to access today also fails to acknowledge that tribes are not limited to the means of access used in 1854 and that the court recognized that it is impossible to list all the specific areas customarily used by tribes at treaty times. **See, e.g.**, 384 F. Supp. at 353. It is therefore neither necessary nor possible to identify every specific land site used for access to shellfishing areas.

Appellants' requests for further limitations on the right of access must be rejected.

XII. THE DISTRICT COURT IMPOSED EXCESSIVE RESTRICTIONS ON TRIBAL FISHERIES.

A. The Court Erred In Restricting Treaty Fishing Based On Vague Notions Of Equity, Rather Than The Necessity Of Such Measures For Conservation Or Allocation.

At treaty time, there lay upon the tribes' aboriginal shellfishing rights "not a shadow of impediment." **Winans**, 198 U.S. at 381. After the treaty,

those rights exist in the shadow of an explicit obligation to fish "in common with citizens," the concomitant, implied obligation to conserve the resource, and the prohibition on taking shellfish from staked or cultivated beds. **Puyallup I**, 391 U.S. at 399, 402 n.14; 384 F. Supp. at 401. No previous court has found in the Stevens Treaties, or authorized in its orders, any additional impediments. **See Muckleshoot v. Hall**, 698 F. Supp. at 1515 (no case holds "that it is permissible . . . without an act of Congress, . . . to permit limitation of access to a tribal fishing place for a purpose other than conservation. . . ."). **See generally, 1982 Cohen**, pp. 446-462.

Even conservation and allocation measures have been closely scrutinized, and struck down if not reasonable, necessary, and non-discriminatory. **E.g., Puyallup II**, 414 U.S. at 45, 48; 384 F. Supp. at 402-03. This test has been applied equally to restrictions proposed by State regulators, the federal government, and private parties. **Muckleshoot v. Hall**, 698 F. Supp. at 1514; **see also**, SER 47-54 (federal regulations). It has been applied notwithstanding that fishing may affect or take place on private land. **Winans**, 198 U.S. at 381. The court's imposition of

restrictions on the tribes' treaty rights is an issue of law subject to *de novo* review.

The district court below imposed at least five restrictions which cannot survive scrutiny under this strict test. (1) For any private beach not controlled by a grower, § 7.2.3 of the Implementation Plan limits tribal harvest to five days per year, with some increase on larger lots. 898 F. Supp. at 1473. (2) If a grower decides that a tribe's proposed harvest plan is not "compatible with the grower's farming operation," the grower may unilaterally modify the plan, and have "the final word on how a tribal harvest will be conducted." **Id.** at 1470, § 6.2. (3) The grower may entirely prohibit harvest of natural clams underneath areas cultivated for oysters, even when no oysters are then present. **Id.** at 1471, § 6.4. (4) No harvest -- even minor subsistence clam digs -- may occur on non-grower private tidelands without a costly survey "to determine the existence of shellfish populations." **Id.** at 1472, § 7.1. (5) The "manner and method" of

such a survey must be "of the type currently in use by the State." **Id.** § 7.1.1.[69]

Needless to say, none of these limitations appear in the treaty, and, as will be shown below, none are necessary to conservation or allocation. These restrictions eclipse important aspects of treaty rights, make it extremely cumbersome and costly for tribes to take their share of shellfish in private lands, and perpetuate the unlawful exclusion of tribes from natural clam beds. In effect, the district court allowed the State's sale of tidelands to private owners to limit treaty fishing in ways the State could never accomplish directly. By so doing, the court ignored the clear direction of the Supreme Court that State property law concepts cannot be used to defeat the tribe's rights. **Fishing Vessel**, 443 U.S. at 682. These legal errors require reversal.

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[69] The tribes voluntarily proposed measures that would make their presence on private beaches more predictable and less obtrusive to landowners. These included actual notice of harvests, limits on biological survey visits and on the number of harvesters in each dig, and the availability of monitors or fisheries enforcement officers for each fishery. CR 14019 at 19-22. Voluntary acceptance of such measures does not authorize imposition of further restrictions. **See United States v. Oregon**, 718 F.2d 299, 304-05 (9th Cir. 1983) (tribes voluntarily limited fisheries; Court struck limitations imposed by State).

B. The Court Erred in Failing to Make Findings of Fact to Support Its Restriction of Treaty Fishing.

Neither the requirement for a survey in all cases on private lands, nor the insistence on State survey methods, nor the growers' veto power over tribal harvest plans, are supported by any factual finding.[70] This is not an insignificant, technical oversight. Adequate findings are "of the highest importance to a proper review" of an injunctive order; their absence is "serious error." **Mayo v. Lakeland Highlands Canning Co.**, 309 U.S. 310, 316, 60 S.Ct. 517, 520 (1940); **see, e.g., Heard v. Lowe**, 427 F.2d 846 (5th Cir. 1970) (reversing district court which enjoined city interference with free speech rights, but then imposed its own restrictions on their exercise, without supportive findings of fact).

Adequate findings are particularly important in this case, which involves long-running disputes over many valuable fisheries, and often serves as precedent for courts in other districts and states. **See**, Advisory Committee Notes on 1946 Amendment to Rule 52(a) ("Findings of fact aid

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[70] This lack of findings contrasts markedly with the district court's careful efforts in the treaty interpretation phase of this case. The opinion there is replete with detailed evaluations of the evidence, with equally explicit factual and legal conclusions.

in . . . defining for future cases the precise limitations of the issues and the determination thereon [and] . . . are an important factor in the proper application of the doctrines of res judicata. . . .") Had the court attempted to make the requisite findings, it would have recognized the dearth of supportive evidence and the absolute failure of its restrictions to meet the test of conservation necessity.

C. The Evidence Does Not Support A Finding That Surveys Are Needed Prior To Every Harvest.

No witness testified that a complete survey was needed in all cases to allocate or conserve the shellfish resource. The State requires such surveys only on the minority of public beaches where harvest pressure is great enough to justify the significant expense. Burge, SER 569-71; SER 1121; Cahalan, SER 561-62, 564-65. Diffuse, low-level harvests, such as characterize certain State recreational fisheries and tribal subsistence harvests, Veneroso, SER 502-03, are also less likely to raise conservation concerns. Veneroso, SER 547-48. Thus, while such surveys "would be useful," Toba, SER 471, at least "at some point," Veneroso, SER 517, they are not necessary.

Curiously, the district court appeared to recognize that such surveys

are not always needed. The Implementation Plan permits State and tribal harvest to proceed on public land without surveys, based on the managers' best estimates of shellfish populations and sustainable yield. 898 F. Supp. at 1465-66, § 2.5(a); **id.** at 1466, § 4.4(a). Private beaches do not require different treatment. In fact, the court imposed **no** survey obligations on private tideland owners, leaving them free to depopulate a beach, taking both theirs and the tribal share. The court made no finding and cited no evidence to support this discriminatory treatment of tribal harvest. This discrimination, and the total lack of factual support for the survey requirement, are grounds for reversal. **Puyallup II** 414 U.S. at 48.

D. The Evidence Does Not Support A Finding That Conservation or Allocation Demand Use Only of State Survey Methods.

The court required tribal surveyors to mimic whatever survey method is in use by the State. 898 F. Supp. at 1472, § 7.1.1. There is no factual finding that State survey methods are superior to those of the tribes. State and tribal shellfish managers and biologists uniformly testified that the tribes have the ability to survey on their own, with no need for the State to look over their shoulders. Veneroso, SER 518-19, Cahalan, SER 568. In fact,

the State utilized tribal input in developing its own survey methods, Cahalan, SER 563. Indeed, some tribal surveys involve considerably more intensive sampling than the State's, Armstrong, SER 610, which improves accuracy. Cahalan, SER 567. When viewed in light of the strict conservation necessity test, the evidence would not support a **State** requirement that tribes use only State methodology. It is no more supportive of a court order to do the same.

E. Permitting Growers To Veto Tribal Harvest Plans Is Inconsistent With The Law And Unsupported By The Evidence.

Appellants may not be allowed to "impair or qualify the treaty right by limiting its exercise to State-preferred times, manners, or purposes . . ." unless necessary for conservation or to protect the non-treaty share. 384 F. Supp. at 401-02. In giving growers a veto over tribal harvest plans the district court has unlawfully delegated to private parties the determination of when and how a federally secured treaty right may be exercised, a determination which even State and federal agencies are authorized to make only for conservation purposes. Section XII A, **supra**. The court placed no such limitations on the growers' authority. It gave the growers "the final

word" on how a tribal harvest will be conducted, 898 F. Supp. at 1470. It did instruct the growers to act in good faith and not to use their "final word" to deny tribes their share. **Id.** at 1471-72. These cautionary statements offer slim protection for tribes who choose to contest a growers action. Good faith is an elusive concept and difficult to prove. Moreover, while these instructions pay lip service to protecting the allocative aspect of the treaty right, they ignore entirely the established law that the treaties also protect tribes' wise use choices as to the purpose and manner of fishing. 384 F. Supp. at 401, 402.

The district court made no factual findings about the need for growers to have unilateral control over the time and method of tribal harvest for conservation or for any other legitimate purpose. The court did receive substantial evidence, however, regarding an alternative to the growers' veto, which would respect treaty rights but still achieve needed coordination of harvest between tribes and growers on uncultivated beds. The tribes proposed the negotiation of harvest plans which would allow for the flexible consideration of both sides' management objectives, and of factors unique to each bed. Veneroso, SER 504-06. Tribes have negotiated such harvest

agreements with State and Federal agencies, accommodating all parties' legitimate interests. Veneroso, SER 500-01, 518, 522-23. State and tribal witnesses agreed that tribes have the capability to effectively manage harvests under such agreements, and have done so. **E.g.**, Teissere, SER 339; Hovis, SER 336 (joint tribal-state technical team improved management of Park beaches); Veneroso, SER 197-200, 380-81; Herrera, SER 526-29; Peters, SER 539-46. Tribes are willing and able to do the same with the growers. Veneroso, SER 505, 507-12.

The same cannot be said of all the growers. Asked whether he would be willing to work with tribes to develop an implementation plan, one responded bluntly: "I am not interested, I don't think." Gunstone, SER 579-80. **See also** Taylor, SER 586, 588-89 ("I just don't want to be encumbered by tribes. . . . When you want to take the fruits of my labor, there isn't any time that's acceptable. . . .")

Particularly given such sentiments, the district court's rejection of the tribes' proposal in favor of giving the growers unfettered control over the exercise of treaty rights was legal error.

F. Neither The Law, The Court's Findings, Nor The Evidence Support A Requirement That Tribes Harvest Clams Beneath Artificial Oyster Beds Only If A Grower Does.

The district court restricted tribal harvest of clams beneath artificial oyster beds to the interval between harvest of the oysters and replanting with oyster seed. 898 F. Supp. at 1471. **See** section IV D. While such a requirement insures that growers' oyster crops will not be damaged, the court did not stop there. It provided that "where the Grower himself or herself does not harvest the underlying clams in order to protect a fragile oyster crop . . . the Grower need not allow tribal harvest. . . ." **Id.** The latter restriction applies even to the interval after the oysters are removed, and before new seed is planted, thus treating the clams as if they are beneath oysters that are no longer present.

What evidence could support this result the court did not say, but it surely is not supported by evidence regarding the fragility of the absent oysters. This ruling also flies resolutely in the face of the tribes' "absolute right to take fifty percent of the shellfish from natural beds in the Tribes' usual and accustomed grounds and stations." **Id.** at 1457. It converts federally-guaranteed rights into mere privileges, and gives private parties the

power to allow or disallow their exercise for any reason at all, be it business sense, personal whim, or animus toward treaty fishing. Tribes cannot be compelled to forego harvest, simply because the State (or its grower-citizens) decline to harvest themselves. **United States v. Washington**, 774 F.2d 1470, 1476 (9th Cir. 1985).

The court's order should be reversed.

G. Restricting Tribes To Five Days Harvest On Any Private Parcel Will Deny Tribes The Right To Take Half the Shellfish, Heavily Burden Tribal Harvest Management, And Serve No Valid Conservation Or Allocation Purpose.

The Court allowed tribes but five days annually to take their share of shellfish on any private, non-commercial parcel having less than two hundred feet of waterfront. 898 F. Supp. at 1473. One additional day is allowed for each additional fifty feet of parcel width. **Id.** The court made no finding that this was sufficient time for the tribes to take their share. The nearest thing to such a finding was the court's statement, at the close of the Implementation trial, that "Unless you are sitting on a mountain of shellfish, it appears that the average harvest for an average piece of property is not going to be lengthy or sustained." SER 611.

This vague "finding" lends no support to a restriction that applies as

much to mountains of clams as to molehills, and not merely to average harvests or property, but to every bed, whether fronting a small residential lot or on an expansive and deserted rural beach. It does not account for year-round subsistence needs nor the year-round commercial demands for shellfish. Peters, SER 530, 535-36. Nor does it support a conclusion that such a restriction is necessary for conservation or allocation. In fact, tribal shellfish biologists and managers presented uncontroverted testimony that there is no conservation reason for such a limit. Peters, SER 539; Veneroso, SER 552-53. They further testified that there are beaches now on which tribal harvest takes more than five days, Peters, SER 533; Veneroso, SER 550, and that, depending on the type of fishery and a variety of beach-specific factors, a five day limit could preclude tribes from taking their share. Veneroso, SER 525, 550-51; Peters, SER 532, 537.[71]

To consistently harvest their share from a private beach within five days, tribes would have to increase the number of harvesters, or the daily

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[71] The five day limit will have a particularly severe impact upon subsistence harvesting. Subsistence clam diggers may take only a few pounds for a meal; subsistence harvest limits may run from twenty-five to fifty pounds per day. Veneroso, SER 548; Forsman, SER 214. At these rates, five days is nowhere near enough to take half the resource from a good beach.

"bag limit." Peters, SER 531-32; Veneroso, SER 515. To meet the year-round demand for harvest under this restriction, Peters, SER 530, 535-36, they would have to open more beaches. Veneroso, SER 551-52. These steps would not come easily. More harvesters and beaches require more enforcement personnel, Peters, SER 532; Veneroso, SER 552, and may cause a more significant intrusion on landowners. Peters, SER 533. Higher bag limits make it more difficult for individuals to safely move product from the beaches by boat, Peters, SER 532-34, and increase the incentive for diverting subsistence clams to the commercial market, without the added public health protections that accompany commercial harvests. Veneroso, SER 515.

Under the Implementation Plan, each additional private beach opening must be preceded by issuance of a harvest regulation, notice to the owner, a costly and time-consuming population survey, the location of public access points, and, for commercial harvests, extensive pollution surveys. 898 F. Supp. at 1472-73. Surveys and harvests must be scheduled around the limited number of tides each year that are low enough for significant harvest, and comply with the court's order to avoid nighttime low tides

unless necessary. Veneroso, SER 549-550; Cahalan, SER 559-60 (21 to 37 such daylight tides annually). These efforts would add to the already difficult task of managing the resource and maintaining geographically and temporally dispersed harvest opportunity. Veneroso, SER 497-99; Peters, SER 538.

H. Conclusion.

As a package, the five restrictions discussed above reflect a disregard for the evidence, and for the law which the district court itself so carefully laid down in its first opinion. The restrictions will impose burdens on the exercise of treaty rights which are significant, widespread, and well-documented in the record. The corresponding benefits, on the other hand, accrue to a limited number of private landowners whose beaches contain enough shellfish to justify tribal harvests. SER 611 ("a good many of the property owners will not be affected to any great extent"), SER 612-13. This result is legal error that constitutes an abuse of the court's discretion. It should be reversed.

XIII. THE DISTRICT COURT ERRED IN PERMITTING DAMAGE AWARDS AGAINST TRIBES WHICH HAVE NOT WAIVED THEIR SOVEREIGN IMMUNITY AND AGAINST NON-PARTY TRIBAL MEMBERS.

The Implementation Plan provides that "[if], during any harvest, the Tribe . . . causes any damage to the Grower's property, . . . the Special Master can award appropriate damages." 898 F. Supp. 1471, § 6.2. The Master also may "assess damages against individual tribal members who damage private property. . . . " 909 F. Supp. at 794, § 9.2.5. In issuing this Order the district court has hurtled over the barrier of tribal sovereign immunity, trampled on the due process and jury trial rights of non-party tribal members, and overstepped the limits of federal court jurisdiction. These multiple legal errors demand reversal.

A. Damage Awards Against The Tribes Are Barred By Tribal Sovereign Immunity.

Tribes are not subject to a damage action absent a waiver of sovereign immunity. **See Santa Clara Pueblo v. Martinez**, 436 U.S. 49, 58 (1978). In its original Implementation Order, the court authorized damage awards against tribes in both § 6.2 and § 9.2.5. 898 F.Supp at 1471, 1476. On reconsideration, the court recognized that tribes cannot be sued without their

consent and that they did not waive their immunity from damage awards by suing for injunctive relief. 909 F. Supp. at 793. The court therefore modified § 9.2.5 to authorize damages against tribal members, but not against tribes. **Id.** at 793-94. The motion for reconsideration, and the court, apparently overlooked § 6.2, which still authorizes damage awards against tribes. That portion of § 6.2 must be vacated as a clear legal error. **Id.** at 793.

B. The Court Erred By Permitting Damage Awards Against Non-Party Tribal Members.

Authorizing damage awards against tribal members is equally in error. While individuals may be bound by orders affecting their "common public rights as citizens," in litigation to which their sovereign is a party, **City of Tacoma v. Taxpayers of Tacoma**, 357 U.S. 320, 341 (1958); **Fishing Vessel**, 443 U.S. at 692 n.32, the contemplated claims against tribal members have nothing to do with the common rights of state or tribal citizens. Nor do they involve their sovereigns' interests. On the contrary, they involve potential disputes between individual property owners and individual tribal members, over individual incidents of damage to individual pieces of private personal or real property.

The district court's order allows the Special Master to award compensation from tribal members who "damage private property during the exercise of fishing rights." 909 F. Supp. at 794, § 9.2.5. This sweeping remedy covers a vast expanse of conduct, with no definable borders. A tribal member may harvest an artificial oyster bed, for example. The resulting claim could be plead as a simple conversion action under local law. If that same harvester, arriving at the beach by boat, negligently collides with and damages the landowner's dock he has "damage[d] private property during the exercise of fishing rights," 909 F. Supp. at 794, § 9.2.5, but the owner's claim is for a simple tort, with no connection to this case or to the treaties, beyond the merest circumstance that it involves a tribal fisher.

Claims for trampled shrubs, damaged docks, or littered beaches would raise no federal question. **See, e.g., Knight v. United States**, 596 F. Supp. 543, 545 (M.D. Ga. 1984) (no federal question jurisdiction over common law torts claims, although against federal officials), **aff'd without op.**, 762 F.2d 1022 (11th Cir. 1985). Nor would such potential claims be within the court's ancillary jurisdiction, for they would not arise from the same "nucleus of operative facts" -- the reservation of fishing rights in the Stevens

Treaties -- that gave rise to plaintiffs' claims in this case. **United Mine Workers v. Gibbs**, 383 U.S. 715, 725 (1960). **See, e.g., New Jersey Dep't. of Envtl. Protection v. Gloucester Envtl. Mgmt. Servs. Inc.**, 719 F. Supp. 325 (D.N.J. 1989).[72]

A court may not subject anyone to its orders without notice and an opportunity to be heard. **See, e.g., Hansberry v. Lee**, 311 U.S. 32 (1940). Individual tribal members had neither. They were never made parties to this case and appellants' pleadings stated no claim for damages against them, or anyone else. The Pre-trial Order, which "shall control the subsequent course of the action," FRCP 16(e), is silent on the issue of damages for anyone's conduct, past or future. ER 139-142.

The district court's order on reconsideration, 909 F. Supp. at 793, gave the first notice that the court might order relief against individual tribal members. This is wholly inconsistent with the demands of due process.

The district court's decision also violates the right to a jury trial. The Order directs the Master to "hear and determine each dispute." 898 F.

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[72] The more current term, "supplemental jurisdiction," is not used, because the statute defining such jurisdiction, 28 USC § 1367, is inapplicable to actions such as this commenced prior to December 1, 1990. **Id.**, Statutory Note, citing Pub.L. 101-650, § 310(c).

Supp. At 1475, § 9.1. Allowing a Special Master to decide damage claims with no right to a jury trial is a plain violation of the Seventh Amendment rights of both tribal members and landowners. **Dairy Queen v. Wood**, 369 U.S. 469, 476, (1962) (right to jury trial for any claim for monetary relief); **Beacon Theatres v. Westover**, 359 U.S. 500, 510-511 (1959) ("only under the most imperative circumstances, circumstances which . . . we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims").

By referring damage claims to the Special Master, the district court has built a new judicial structure to house a broad but poorly defined class of claims against tribal parties and non-party tribal members. The doors to this structure should be locked by the Court of Appeals, before they ever open. Landowners' claims can be sheltered by existing state or tribal forums and laws.

XIV. THE PROCEDURE FOR APPOINTMENT AND REMOVAL OF SPECIAL MASTERS VIOLATES FRCP 53 AND DUE PROCESS.[73]

The court's implementation plan established a panel of four special masters, with one to be randomly selected to hear each dispute. 909 F. Supp. at 793. Two features of that plan are highly objectionable: appellants designate three of the four panel members, § 9.1, and special masters can be removed at the whim of the designating party without court approval, § 9.1.2. **Id.** at 793-794.

An impartial and independent decision maker is an absolute procedural due process requirement. **Schweiker v. McClure**, 456 U.S. 188, 195 (1981); **Gibson v. Berryhill**, 411 U.S. 564, 579 (1973). A special master is a judicial officer, **In re Gilbert**, 276 U.S. 6, 9 (1928), appointed by the court, FRCP 53(a), and the appointment must be above reproach. **Pacific Gas and Electric Co. v. Railroad Commission of California**, 142 F. Supp. 134, 135 (N.D. Calif. 1936). Where a special master is subject to removal at the displeasure of a party, however, the appointive powers of the court are compromised and the independence of the special master is open to

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[73] This issue is reviewable on an abuse of discretion standard.

doubt. Such doubts undermine the confidence of the litigants and the public in the impartiality of the judicial system. FRCP Rule 53(a) should not be read to permit a party to unilaterally remove a court-appointed special master.

The designation of three of the four panel members by appellants also calls into question the impartiality of the process. The district court defended its position on the basis that each party has a one-in-four chance of having its designee hear a dispute. 909 F. Supp. at 790-91. This ignores reality, however, because appellants have almost identical interests and are united in opposing the tribes. In real terms, tribes are at a significant disadvantage.

These aspects of the implementation plan should be changed.

XV. THE DISTRICT COURT'S DISMISSAL OF THE TRIBES' CIVIL RIGHTS AND ATTORNEYS FEES CLAIMS SHOULD BE REVERSED.

The tribes alleged, with the intention of seeking attorneys fees under 42 USC § 1988, that the State defendants had acted, under color of state law, to deprive tribes and their members of rights, privileges and immunities secured by the Due Process and Equal Protection clauses of the Constitution

and other laws of the United States, in violation of 42 USC § 1983. ER 8-11. The facts underlying these claims were admitted by the State in the pretrial order. ER 86-87. These claims were dismissed by the district court before trial, SER 9-13, in reliance on **United States v. Washington**, 813 F.2d 1020 (9th Cir. 1987). That decision held that no claim for declaratory and injunctive relief could be made under 42 USC § 1983 based on a violation of treaty rights until the rights were adjudicated and thus known and well delineated, notwithstanding the fact that the treaties are self-enforcing, **Fishing Vessel**, 443 U.S. at 693 n.33, and notwithstanding that a violation of the civil rights of any person under any other provision of United States law would be cognizable under 42 USC § 1983, whether the rights were previously adjudicated or not, excepting only the doctrine of qualified immunity for individuals sued for **damages**. Because the decision at 813 F.2d 1020 was wrongly decided, the tribes preserve this issue for possible **en banc** or Supreme Court review.

CONCLUSION AND RELIEF SOUGHT

For all the reasons stated above, the tribes ask that the district court's treaty interpretation decision be affirmed, that the implementation decision

be reversed in part and vacated in part, as described above, and that the orders denying the tribes' motion to alter or amend the judgment or for a new trial and the order dismissing the tribes 42 USC § 1983 claims, be reversed.

DATED this 21st day of October, 1996.

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STATEMENT OF RELATED CASES

The tribes know of no related cases other than those described in appellants' statements.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Opening Brief of Plaintiff-Appellee/Cross-Appellant Indian Tribes is proportionately spaced, has a CG Times typeface of 14 points, and contains 57,607 words.

Dated this 21st day of October, 1996.

Phillip E. Katzen

FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Title.

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth-day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

Cession to United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

Reservation for said tribes.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be

set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

Removal thereto.

Roads may be constructed.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Rights to fish.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Payments for said cession.

How applied.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Expense of removal, &c.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

Removal from said reservation.

Ante, p. 1044.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities not to be taken for debts.

Stipulations respecting conduct of Indians.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Intemperance.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Schools, shops, &c.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employées, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

Slaves to be freed.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Trade out of the limits of the U. S. forbidden.

Foreign Indians not to reside on reservation.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Treaty, when to take effect.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]

Governor and Superintendent Territory of Washington.

QUI-EE-METL, his x mark. [L. S.]
SNO-HO-DUMSET, his x mark. [L. S.]
LESH-HIGH, his x mark. [L. S.]

SLIP-O-ELM,	his x mark.	[L. S.]
KWI-ATS,	his x mark.	[L. S.]
STEE-HIGH,	his x mark.	[L. S.]
DI-A-KEH,	his x mark.	[L. S.]
HI-TEN,	his x mark.	[L. S.]
SQUA-TA-HUN,	his x mark.	[L. S.]
KAHK-TSE-MIN,	his x mark.	[L. S.]
SONAN-O-YUTL,	his x mark.	[L. S.]
KL-TEHP,	his x mark.	[L. S.]
SAHL-KO-MIN,	his x mark.	[L. S.]
T'BET-STE-HEH-BIT,	his x mark.	[L. S.]
TCHA-HOOS-TAN,	his x mark.	[L. S.]
KE-CHA-HAT,	his x mark.	[L. S.]
SPEE-PEH,	his x mark.	[L. S.]
SWE-YAH-TUM,	his x mark.	[L. S.]
CHAH-ACHSH,	his x mark.	[L. S.]
PICH-KEHD,	his x mark.	[L. S.]
S'KLAH-O-SUM,	his x mark.	[L. S.]
SAH-LE-TATL,	his x mark.	[L. S.]
SEE-LUP,	his x mark.	[L. S.]
E-LA-KAH-KA,	his x mark.	[L. S.]
SLUG-YEH,	his x mark.	[L. S.]
HI-NUK,	his x mark.	[L. S.]
MA-MO-NISH,	his x mark.	[L. S.]
CHEELS,	his x mark.	[L. S.]
KNUTCANU,	his x mark.	[L. S.]
BATS-TA-KOBE,	his x mark.	[L. S.]
WIN-NE-YA,	his x mark.	[L. S.]
KLO-OUT,	his x mark.	[L. S.]
SE-UCH-KA-NAM,	his x mark.	[L. S.]
SKE-MAH-HAN,	his x mark.	[L. S.]
WUTS-UN-A-PUM,	his x mark.	[L. S.]
QUUTS-A-TADM,	his x mark.	[L. S.]
QUUT-A-HEH-MTSN,	his x mark.	[L. S.]
YAH-LEH-CHN,	his x mark.	[L. S.]
TO-LAHL-KUT,	his x mark.	[L. S.]
YUL-LOUT,	his x mark.	[L. S.]
SEE-AHTS-OOT-SOOT,	his x mark.	[L. S.]
YE-TAHKO,	his x mark.	[L. S.]
WE-PO-IT-EE,	his x mark.	[L. S.]
KAH-SLD,	his x mark.	[L. S.]
LA'H-HOM-KAN,	his x mark.	[L. S.]
PAH-HOW-AT-ISH,	his x mark.	[L. S.]
SWE-YEHM,	his x mark.	[L. S.]
SAH-HWILL,	his x mark.	[L. S.]
SE-KWAHT,	his x mark.	[L. S.]
KAH-HUM-KLT,	his x mark.	[L. S.]
YAH-KWO-BAH,	his x mark.	[L. S.]
WUT-SAH-LE-WUN,	his x mark.	[L. S.]
SAH-BA-HAT,	his x mark.	[L. S.]
TEL-E-KISH,	his x mark.	[L. S.]
SWE-KEH-NAM,	his x mark.	[L. S.]
SIT-OO-AH,	his x mark.	[L. S.]
KO-QUEL-A-CUT,	his x mark.	[L. S.]
JACK,	his x mark.	[L. S.]
KEH-KISE-BE-LO,	his x mark.	[L. S.]
GO-YEH-HN,	his x mark.	[L. S.]

SAH-PUTSH, his x mark. [L. S.]
WILLIAM, his x mark. [L. S.]

Executed in the presence of us: —

M. T. SIMMONS,
Indian Agent.

JAMES DOTY,
Secretary of the Commission.

C. H. MASON,
Secretary Washington Territory.

W. A. SLAUGHTER,
1st Lieut. 4th Infantry.

JAMES MCALISTER,
E. GIDDINGS, jr.,
GEORGE SHAZER,
HENRY D. COCK,
S. S. FORD, jr.,
JOHN W. MCALISTER,
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W. H. PULLEN,
P. O. HOUGH,
E. R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter*,
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit: —

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
"*March* 3, 1855.

Consent of Senate.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS,
"*Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L. S.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:

W. L. MARCY, *Secretary of State.*