Nos. 98-1026, 98-1028, 98-1039 and 98-1052

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON, PETITIONER
v.
UNITED STATES OF AMERICA, ET AL.

PUGET SOUND SHELLFISH GROWERS, PETITIONER
v.
UNITED STATES OF AMERICA, ET AL.

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

LARRY B. AND SHIRLEE ALEXANDER, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "right of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens," reserved by respondent Indian Tribes in the Stevens Treaties, entitles the Tribes to take an equitable measure of the harvestable shellfish of every species found within their customary fishing areas, except as limited by the shellfish proviso.

2. Whether the treaty "right of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens" entitles the Tribes to harvest shellfish on private lands and to gain access to private uplands for the purpose of exercising shellfishing rights in the absence of access by other means.

3. Whether the court of appeals correctly applied the "moderate living" doctrine of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

4. Whether the court of appeals correctly interpreted the shellfish proviso, which excludes the Tribes from taking shellfish from "beds staked or cultivated by citizens."

5. Whether the court of appeals correctly refused to apply the doctrine of laches to bar this suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-49) is reported at 157 F.3d 630. The opinions of the district court are reported at 873 F. Supp. 1422 (Pet. App. 51-93), 898

F. Supp. 1453 (Pet. App. 95-134), and 909 F. Supp. 787 (Pet. App. 135-148). Additional opinions of the district court (Pet. App. 153-162) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1998. The petitions for rehearing were denied on September 25, 1998. Pet. App. 8-9. The petitions for a writ of certiorari in Nos. 98-1026 and 98-1039 were filed on December 22, 1998, and the petitions in Nos. 98-1028 and 98-1052 were filed on December 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1854 and 1855, respondent Indian Tribes of what is now western Washington State entered into the Stevens Treaties,[1] under which they relinquished their right to most of their territory in exchange for periodic monetary payments, small parcels of land set aside for their exclusive use, and certain other guarantees, including the preservation of their aboriginal fishing rights throughout their ceded lands in Puget Sound. In essentially identical language, each of the Treaties provided:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians,

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[1] The treaties are known as the "Stevens Treaties" because Isaac Stevens, the Governor and Superintendent of Indian Affairs for the Washington Territory, was directly involved in their negotiation. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979). Each of the Tribes in this litigation (see Pet. App. 9 n.1) is the successor-in-interest to one or more of those treaties, which include the Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; the Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; the Treaty of Point No Point, January 26, 1855, 12 Stat. 933; the Treaty with the Makah, January 31, 1855, 12 Stat. 939; and the Treaty of Olympia, July 1, 1855, 12 Stat. 971. See Pet. App. 169-209.

> in common with all citizens of the Territory, * * *: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens[.]

Pet. App. 12; see, *e.g.*, *id.* at 170.

Both the United States and the Tribes viewed protection of the Tribes' fishing rights on the ceded lands as an essential ingredient of the Treaties. See Pet. App. 10-11; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665-668 (1979) (*Fishing Vessel*). From time immemorial, the Tribes have used and relied on fish, including shellfish, for commercial, subsistence, and ceremonial purposes. See *ibid.*; see also *United States* v. *Winans*, 198 U.S. 371, 381 (1905) (fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed"). At the time of the Treaties, the Indians took an enormous variety of fish, including over 100 species of shellfish. Shellfish were particularly important to the Tribes because of their dependability and accessibility, especially when other sources of food became temporarily scarce. S.E.R. 1033-1034. The Tribes traded shellfish with other Indians and with non-Indians, supplying most of the non-Indian settlers' fish, including clams and oysters. *Fishing Vessel*, 443 U.S. at 666 nn. 7 and 8; E.R. 54-55.

By treaty time, a shellfish cultivation industry had begun to develop in the Washington Territory. The United States treaty negotiators were familiar with the practices of that industry, modeled after the older, larger, and more developed industry on the East Coast.[2] Pet. App. 11. The industry was based primarily on the planting or transplanting of shellfish, primarily oysters, in artificial beds.

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[2] In the mid-nineteenth century, shellfishing was a major industry that employed a large number of people. It was regularly covered by the popular press, and its practices were generally known to the public. S.E.R. 116.

Shellfish farmers also commonly stored market-sized shellfish in beds that did not naturally contain the kind of shellfish being stored, and they identified the boundaries of those man-made storage areas by marking them with stakes extending above the surface of the water. *Ibid.* The popular literature, professional treatises, government studies, and state shellfish laws of the time all confirm a basic fact of the mid-19th century shellfish industry: natural oyster beds, then considered "the common property of the people," *id.* at 61, were not staked or cultivated, *id.* at 61-66.

Fish, including shellfish, were exceptionally abundant and were considered inexhaustible at treaty time. Pet. App. 11. The United States negotiators thus believed that preserving the Tribes' off-reservation fishing rights would not interfere with the rights of citizens. The negotiators, aware of the thriving shellfish industry on the East Coast, assumed that development on Puget Sound also would not interfere with the Tribes' exercise of their treaty fishing rights. *Ibid.* The treaty negotiators, in keeping with their pledge to preserve for the Indians their ancient fisheries, wrote those assurances into the fishing rights provision of the Stevens Treaties. See *id.* at 27.

2. For years following the Treaties, the Indians continued to harvest a majority of the shellfish resource. During that period, the Washington territorial government continued to observe the public's general right of taking shellfish from natural beds and to recognize private ownership rights only in the products of artificial shellfish beds. After its admission to the Union in 1889, however, Washington took two courses of action that, in combination, increasingly excluded the Indians from the shellfish resource. First, the State gradually began selling off its tidelands, including some of the most productive for shellfish production, to private owners. The "vast majority" of those tidelands are now privately owned. Pet. App. 12. Second,

around the turn of the century, Washington modified state law to give private property owners exclusive rights to shellfish found on natural beds. *Ibid.* Thus, even though the Tribes dominated natural shellfisheries for decades following the Treaties, non-Indians gradually came to monopolize them as increasing numbers of those shellfisheries fell into private hands.

In addition, the shellfish resources of Puget Sound and their availability for human consumption have diminished as a result of tideland development and pollution. Native shellfish have declined dramatically and have been largely replaced by foreign species introduced into the area after the Treaties. Pet. App. 12.[3] This litigation, initiated by the Tribes and the United States, is the consequence of the increasing competition for, and depletion of, the shellfish resource. When this suit was filed, the Tribes' harvest of shellfish had diminished to a tiny percentage of the non-Indian harvest.

3. In 1970, the United States, on its own behalf and as trustee for several of the Tribes, sued the State of Washington in federal district court, seeking declaratory and injunctive relief under the fishing rights provision of the Stevens Treaties. Following extensive pretrial proceedings and a lengthy trial, the district court established the locations of the Tribes' "usual and accustomed" fishing grounds and ruled that the Tribes' treaty rights entitled them to take

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[3] For example, native littleneck clams have been replaced substantially by an introduced species, manila clams, which constituted more than 80% of the total clam harvest in Puget Sound during the years 1988-1990. Pet. App. 12. In addition, the intertidal populations of geoduck clams and crabs, once abundant enough for commercial fisheries, have continued to decline. S.E.R. 996, 1009. Today, most of those species, along with octopus, sea urchins and sea cucumbers, are found in deep waters. See Wash. Pet. 4-5; S.E.R. 970.

up to 50% of the harvestable fish from those grounds.[4] *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (*Washington I*), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The district court's ruling met substantial resistance from the State and spawned numerous other lawsuits that ultimately reached this Court, where the district court's interpretation of the Treaties was affirmed. See *Fishing Vessel*, *supra*.

4. In 1989, sixteen Indian Tribes, later joined by other Tribes and the United States, followed a procedure established in *Washington I* and sought a declaration of the nature and scope of their off-reservation shellfishing rights under the Treaties and injunctive relief to enforce those rights. Pet. App. 14. Several other groups subsequently intervened in the action: the Puget Sound Shellfish Growers; the Alexander group and Adkins group of private tideland owners; and a group of private property owners affiliated with the United Property Owners of Washington (UPOW).

After extensive pretrial proceedings, followed by a trial lasting three weeks, the district court issued its decision. Pet. App. 51-93. Finding that "shellfish" are "fish" within the meaning of the Stevens Treaties, the district court concluded that the prior decisions of this Court and the lower federal courts over the past 90 years interpreting the Tribes' treaty fishing rights apply fully to shellfish. Accordingly, the district court ruled that the Treaties entitle the Tribes to take an equitable portion of the harvestable shellfish of every species found within the usual and accustomed fishing

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[4] In its original fishing rights decision, the district court endeavored to resolve almost every issue of fact and law concerning the Tribes' "right of taking fish" at their "usual and accustomed" fishing areas under the Treaties. See 384 F. Supp. at 328-331. Thus, the trial and decision included evidence of tribal fishing for many types of fish, including shellfish, although the relief requested and granted was limited to anadromous fish. See *id.* at 312-423.

areas identified in *Washington I*, except as expressly limited by the shellfish proviso. *Id.* at 51-59.

Turning next to the proviso, the district court "interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time." Pet. App. 77. After a thorough review of the historical evidence relating to that issue, the district court determined that the treaty negotiators viewed "natural" beds and "staked or cultivated" beds as mutually exclusive categories, and it concluded that the proviso was intended to exclude the Tribes from artificial, but not natural, shellfish beds. *Id.* at 59-79.

The district court then directed the parties to design a joint implementation plan for the Tribes' shellfish rights under the Treaties. After the parties failed to reach consensus on a plan, the court held a second trial. The district court issued an implementation decision and an implementation plan that, among other things, imposed specific restrictions on the Tribes' ability to harvest shellfish on private properties and set forth dispute resolution procedures using a special master. Pet. App. 95-134.

5. The State, together with the intervening commercial shellfish growers and private property owners, appealed. The United States and the Tribes cross-appealed from several rulings made by the district court in its implementation decision.

The court of appeals first affirmed the district court's basic interpretation of the Treaties. It concluded that the right of taking shellfish is coextensive with the right of taking other kinds of fish, and that, under the line of authority culminating in this Court's decision in *Fishing Vessel*, the Tribes may take an equitable portion of shellfish of every species found anywhere within their customary fishing areas, except as limited by the shellfish proviso. See Pet. App. 17-25. The court of appeals then affirmed the

district court's interpretation of that proviso, holding, among other things, that petitioners' contrary interpretation violates "black-letter canons" of treaty construction and "is totally inconsistent with the United States' avowed intention to preserve for the Indians their ancient fisheries." Pet. App. 27-28 (internal quotation marks omitted). Although the court reviewed for clear error the district court's findings on certain predicate facts (such as the practices of the mid-19th century shellfish industry and the familiarity of the treaty negotiators with those practices), it "review[ed] de novo whether the district court reached the proper conclusion as to the meaning of the [proviso] given those findings," *id.* at 16, and then independently determined that the district court's interpretation was in fact "correct," *id.* at 26.

The court of appeals reversed portions of the district court's implementation decision, which the United States and the Tribes had challenged in their cross-appeals. The court held, among other things, that the district court had abused its discretion by applying notions of equity to redefine the treaty term "cultivated" so as to limit the Tribes' rights to shellfish from the commercial shellfish Growers' properties. That interpretation, the court reasoned, would result in abrogation of the Tribes' treaty right. Pet. App. 29-32. Rejecting other arguments of the United States and the Tribes, however, the court concluded that "only those Growers' beds that exist solely by virtue of the natural propagation of the species are subject to a full fifty-percent harvest allocation." *Id.* at 34. Thus, where the Growers had enhanced shellfish production on natural beds, the Tribes are entitled to a share only of "the pre-enhanced sustainable shellfish production from those beds." *Id.* at 34-35 & n.12. That allocation analysis, however, does not apply to the

Growers' artificial beds, which the shellfish proviso wholly excludes from the Tribes' treaty rights. *Id.* at 35.[5]

ARGUMENT

Two points of agreement among the parties are essential to a proper understanding of this case. First, the district court found that shellfish are "fish" within the meaning of the Stevens Treaties (see Pet. App. 52, 56-57), and petitioners have acquiesced in that ruling. Second, petitioners present no claim that the Tribes wish to exercise fishing rights in geographical areas where they had historically engaged in no fishing at all. The boundaries of the Tribes' "usual and accustomed" fishing grounds were set in *Washington I*, and all shellfish beds at issue are located within those boundaries. See Pet. App. 19-20, 57-58. The question here is whether the Tribes may take certain *kinds* of fish—shellfish—in those same geographic areas, along with the other kinds of fish that they are unquestionably entitled to take there. See *id.* at 19; *id.* at 57-58; see also Alexander Pet. 18.

As discussed more fully below, the parties' agreement on those two matters is largely dispositive of this case. Because shellfish are "fish," these petitions present few issues that are not squarely resolved, in the Tribes' favor, by this Court's existing decisions construing and enforcing the Stevens Treaties. Petitioners' basic position is that the Tribes' "right of taking fish" under the Treaties must yield in critical respects to the sale of the "vast majority" (Pet. App. 12) of tidelands in Washington State to private owners. In

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[5] Judge Beezer concurred separately to express, among other things, his concerns over the private shellfish Growers' property rights, the law of the case on the meaning of the fishing rights provision of the Stevens Treaties, and the appointment of a special master to resolve disputes under the implementation plan adopted by the lower courts. See Pet. App. 42-49.

Fishing Vessel, however, this Court held (or, more precisely, reaffirmed) that "[t]he contingency of the future ownership of the lands * * * was foreseen and provided for" (443 U.S. at 680 (quoting *United States* v. *Winans*, 198 U.S. 371, 381 (1905)) when the Treaties were signed; that the Treaties provided for that contingency in part by entitling the Tribes to "cross[]" and "occupy" private property when exercising their "right of taking fish" (*id.* at 680-681 (quoting *Winans*, 198 U.S. at 381)); that neither side to this dispute "may rely on the State's regulatory powers or on property law concepts to defeat" rights under the Treaties (*id.* at 682); and that the "equitable measure" of fish the Tribes are entitled to take under the Treaties "should initially divide the harvestable portion * * * into approximately equal treaty and nontreaty shares," subject to reduction upon a fact-specific showing that "tribal needs may be satisfied by a lesser amount" (*id.* at 685). Those holdings decide virtually every dispute in this case, except for the meaning of the shellfish proviso. And, as discussed below, the court of appeals' interpretation of that proviso is correct, and its precedential significance is confined to this case alone. Further review is therefore not warranted.

1. a. Petitioners contend (State Pet. 12-18; Growers Pet. 26-28) that the Tribes' right to take shellfish should be confined to the species that they took at the time of the Treaties and further confined to the exact places where those species were then found. Again, this is not a dispute about the geographical reach of the Tribes' "usual and accustomed grounds" for fishing in general, which have long been held to include all areas at issue, including "deep water" areas. See Pet. App. 159; see also *id.* at 19-20. Instead, petitioners contend that the Treaties give the Tribes access to those areas for purposes of taking many kinds of fish (such as salmon and herring) but not others (in particular, not certain species of shellfish).

As an initial matter, the factual premise of that claim—that the Tribes traditionally took few shellfish and never in deep water (see Wash. Pet. 21)—is very much disputed, although petitioners do not make that clear. At treaty time, the Tribes had long taken many species of shellfish, both for their own consumption and for commercial purposes. See, *e.g.*, Pet. App. 10. Moreover, the Tribes introduced substantial evidence at trial that their shellfishing activities extended to deep water areas, despite the assumption to the contrary in the State's petition. See Tribes C.A. Br. 88-92. Finally, although the State repeatedly uses the term "deep water shellfish" (see, *e.g.*, Pet. 21) as though it identified particular species (which, the State erroneously suggests, the Tribes could never have taken), many species of shellfish can and often do exist naturally in both intertidal and deep waters. See note 3, *supra*.

Even apart from those threshold factual problems, however, petitioners' species-based construction of the Stevens Treaties is without merit. The Treaties reserve the Tribes' preexisting and plenary "right of taking fish," subject only to the proviso against taking shellfish from beds "staked or cultivated" by non-Indians. Had the treaty negotiators intended to limit that general right to the species and harvest methods used at treaty time, despite inevitable changes in fish populations, they would have made that clear, and they would not have chosen the word "fish," which has "perhaps the widest sweep of any word the drafters could have chosen," Pet. App. 18, and which "fairly encompasses every form of aquatic animal life," *id.* at 57. Even if the treaty language were in any respect ambiguous, which it is not, it is hornbook law that ambiguities in Indian treaties "are to be resolved in favor of" the Indian signatories, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), a principle that this Court has repeatedly applied in

cases involving interpretation of the Stevens Treaties. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 679.

Nor can support for petitioners' approach be derived from the judicial decisions upon which they rely. Petitioners focus on this Court's observation in *Fishing Vessel* that "securing" fishing rights is "synonymous with 'reserving' rights previously exercised." 443 U.S. at 678. But, as the Court added in the next sentence, the "right previously exercised," on which this Court placed a "broad gloss" (*id.* at 679), is defined as the general right of tribal members "to meet their subsistence and commercial needs by taking fish from treaty area waters" (*ibid.*). That is precisely the right that the Tribes seek to exercise here, and nothing in *Fishing Vessel* suggests that the right should be subdivided and limited on the basis of species. See also *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968).[6] Similarly, petitioners' position draws no support from *Seufert Brothers Co.* v.

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[6] The State also notes that, as quoted in the background section of *Fishing Vessel* (see 443 U.S. at 667), the district court had observed in *Washington I* that, under their Treaty, "the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising." 384 F. Supp. at 381. But nothing in *Washington I*, much less *Fishing Vessel*, supports the notion that Indian fishing rights could be subject to *limitations* based on species. To the contrary, in a passage of *Washington I* that petitioners fail to cite, the district court held that the Tribes' treaty right "is not limited as to species of fish, the origin of fish, the purpose or use or the time or manner of taking," and that the treaties "do not prohibit or limit any specific manner, method, or purpose of taking fish." 384 F. Supp. at 401, 402. That determination was based on the district court's finding that, historically, "Indian fishing was not limited to any species. They took whatever species were available at the particular season and location." *Id.* at 350- 352. The district court's legal conclusions in *Washington I* were affirmed in all respects in *United States* v. *Washington*, 520 F.2d 676, 693 (9th Cir. 1975), and were left undisturbed in *Fishing Vessel*.

United States, 249 U.S. 194 (1919). Cf. Wash. Pet. 18; Growers Pet. 26-28. The issue in that case was not the content of the Tribes' "right of taking fish," but the boundaries of the Tribes' "usual and accustomed" grounds for exercising that right. The two issues are distinct, and, as noted, the latter is not presented here.[7]

Finally, the State contends (Pet. 19-21) that the courts below improperly applied the apportionment or "moderate living" standard set forth in *Fishing Vessel*, and that allocation of shellfish resources must depend on the "historic

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[7] The State contends (Pet. 16-17) that the decision below conflicts with decisions holding that certain other Indian treaties pose no obstacle to prosecution of individual Indians who violate a federal criminal prohibition on the commercial sale of eagle feathers. See *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc), on remand to 762 F.2d 674 (8th Cir. 1985), rev'd in part, 476 U.S. 734 (1986); *United States* v. *Top Sky*, 547 F.2d 486 (9th Cir. 1976). There is no such conflict. In those cases, the courts concluded that the Indians neither understood nor intended that their treaty right would encompass a right to sell eagles commercially, and that they in fact "deplored" the practice. *Top Sky*, 547 F.2d at 487-488; *Dion*, 752 F.2d at 1264. Here, by contrast, the historical evidence establishes that the Tribes took virtually all species of fish, including shellfish, available to them for commercial, subsistence, and other purposes, and that the Indians understood the Stevens Treaties to reserve their right to take all kinds of fish, including shellfish, at their usual and accustomed fishing areas. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 665-668. Finally, the district court decisions upon which the State relies (Pet. 15) actually support the legal conclusion that the Tribes' fishing right is not limited by species or harvest methods. See *United States* v. *Michigan*, 471 F. Supp. 192, 260 (W.D. Mich. 1979) (holding that the Indians' right to fish "is not a static right" and "is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking"), modified, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band* v. *Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wisc. 1987) (holding that the Tribes are not confined to "fishing methods their ancestors relied upon at treaty time" and concluding that "[t]he method of exercise of the right is not static" and, therefore, the Tribes may take advantage of improvements in the fishing techniques they used at treaty time).

dependence" of the Indians on each species of shellfish. See also UPOW Pet. 27-29. Again, however, the Tribes reserved their preexisting, plenary "right of taking fish." That right naturally includes the ability to adjust their fishing practices to accommodate changes in fish populations over time.[8]

Despite petitioners' claims to the contrary (*e.g.*, Wash. Pet. 19-21), the court of appeals followed the allocation methodology set forth in *Fishing Vessel*. In that case, the Court held that "an equitable measure of the common [fishing] right should initially divide the harvestable portion * * * into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." 443 U.S. at 685; see also *id.* at 686 n.27 ("[s]ince the days of Solomon, [a 50-50] division has been accepted as a fair apportionment of a common asset").[9] The court of appeals' determination here that tribal needs cannot be "satisfied by a lesser amount" of naturally occurring shellfish (Pet. App. 32-33 & n.11) was factbound and correct.[10] Indeed, the court's approach was, if anything,

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[8] It is beyond dispute that fish resources in the treaty areas are far below treaty time levels (see *Fishing Vessel*, 443 U.S. at 668-669), largely because of extensive non-Indian fishing and other activities. It also bears repetition that, at treaty time, the Tribes relied extensively on shellfish for commercial purposes and for their own consumption.

[9] By way of example, the Court suggested that a lesser amount might be appropriate where a tribe "dwindle[s] to just a few members" or "find[s] other sources of support that lead it to abandon its fisheries." 443 U.S. at 687.

[10] The court of appeals properly upheld the district court's determination that the Tribes "lag significantly behind other residents of the State of Washington in their overall standard of living." Pet. App. 33. That factbound issue warrants no further review. There is also no merit to UPOW's contention (Pet. 28-29) that the district court failed to consider casino revenues in its analysis. The court of appeals concluded that, even if it had considered tribal income from casino operations, it would have

less generous to the Tribes than they might have hoped, since the court excluded the Tribes both from any share of the harvest covered by the shellfish proviso (see *infra*), *and* from any share of the portion of shellfish on *natural* beds whose existence is attributable to the efforts of non-Indians. See *id.* at 33-34.

b. The private landowner petitioners contend (Alexander Pet. 12-19; UPOW Pet. 14-19) that, because the Treaties grant the Tribes the right of taking fish "in common with" all citizens, they do not authorize the Tribes "to harvest shellfish on private tidelands from which the general public is lawfully excluded" (Alexander Pet. 19). That claim is also foreclosed by this Court's decisions.

In *Winans*, the Court rejected the argument that "the Indians acquired no rights but what any inhabitant of the Territory or State would have," explaining that such a result would constitute "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." 198 U.S. at 380. More than 70 years later, the State of Washington argued in *Fishing Vessel* that the Stevens Treaties guaranteed the Tribes nothing more than an "equal opportunity" to harvest fish in competition with the increasing numbers of non-Indians. See 443 U.S. at 676-677 & n.22. This Court again rejected that argument, which it considered virtually a "matter decided" by *Winans* and other decisions (*id.* at 679), and reaffirmed the Tribes' substantive right to an equal share of the harvestable fish (*id.* at 685):

> 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

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concluded that the district court's findings were not clear error. Pet. App. 33 n.11.

> deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

Id. at 676 (citation omitted).[11] More generally, the Court held, "[t]he contingency of the future ownership of the lands * * * was foreseen and provided for" (*id.* at 680) when the Stevens Treaties were signed; the Treaties provided for that contingency both by entitling the Tribes to take a fair share of the harvestable fish and by granting them access to private lands for that purpose. *Id.* at 680-681.[12]

Petitioners argue that those prior holdings are inapplicable because the fish at issue in those cases were anadromous fish rather than shellfish. But that distinction, to the extent that it has any significance here at all, cuts against petitioners' position. Under the line of decisions culminating in *Fishing Vessel*, the Tribes' right of access to private property indisputably "include[s] the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets" (see Pet. App. 24), as well as a right "of erecting temporary buildings" for curing the fish (*Winans*, 198 U.S. at 381; see also *Seufert*, 249 U.S. at 197-199). By contrast, the decisions below sharply limit the Tribes' right of access to private property within the same "usual and

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[11] Petitioners suggest (Wash. Pet. 7; Alexander Pet. 2; UPOW Pet. 14) that only about 50% of the State's tidelands are privately owned. That is simply incorrect. The evidence at trial, much of it provided by the State's own witnesses (see, *e.g.*, S.E.R. 337- 338, 572-573; see also *id.* at 999-1002), confirms the courts below were correct in finding that the "vast majority" of tidelands are now in private hands. Pet. App. 12, 73.

[12] Petitioner UPOW suggests (Pet. 10) that the Treaties themselves bar the Tribes from entering private lands, citing a provision of one of the Treaties giving the Tribe a right "to reside upon any land * * * claimed or occupied" by non-Indians "if with the permission of the owner or claimant." But the right of the Tribes to "reside" on privately owned land is, of course, not at issue here.

accustomed" fishing grounds for purposes of taking shellfish. For example, the Tribes are generally limited to five days of shellfish harvesting per year (Pet. App. 38); they may not gain access to privately owned uplands except where they demonstrate an inability to gain access "by boat, public road, or public right of way" (*id.* at 37-38, 146); and they must comply with a variety of important notice, surveying, and time-of-day restrictions (*id.* at 125-133). The right to make such minimal incursions on private property is included within, and pales in comparison to, the much broader rights of access repeatedly affirmed by this Court.

Petitioners also seek to distinguish shellfish from other kinds of fish on the theory that the common law deemed shellfish to be part of the property on which they are located. That argument is both incorrect on its own terms and irrelevant. First, under the overwhelming weight of precedent at the time of the Treaties, natural shellfish beds were part of the common fishery and were therefore subject to harvesting by the public. See Pet. App. 25, 61-64; see also *Smith* v. *Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855); *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413-414 (1842). Moreover, whatever the status of the common law then or now, this Court has repeatedly held that non-Indians may not rely on "property law concepts" to defeat the Tribes' right of taking fish under these federal treaties. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 682. For that reason, UPOW's reliance (Pet. 19-21) on several early 20th century Washington Supreme Court decisions regarding state law property issues is misplaced. Indeed, those decisions do not address the federal rights guaranteed by the Stevens Treaties.

Petitioners' reliance (*e.g.*, UPOW Pet. 14-15) on *Antoine* v. *Washington*, 420 U.S. 194 (1975), and *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985), is equally without merit. In *Antoine*, this Court did not even address whether the Indians were entitled to hunt on

private land under the agreement at issue there, because that issue was not presented by the case. 420 U.S. at 207-208 n.11. In *Klamath*, the treaty language at issue, unlike the language of the Stevens Treaties, confirmed that the tribal usufructuary rights in question were meant to exist only "within the limits of the reservation." 473 U.S. at 766; see *id.* at 766-768. Nothing in that decision calls into doubt this Court's seven decades of consistent interpretation of the Stevens Treaties. For similar reasons, there is no merit to petitioners' reliance (*e.g.*, Alexander Pet. 14-15) on various lower court decisions involving other Tribes with different usufructuary rights under different treaty language. See, *e.g.*, *Lac Court Oreilles Band* v. *Wisconsin*, 760 F.2d 177, 182 (7th Cir. 1985); *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 952 F. Supp. 1362, 1378 (D. Minn.), aff'd, 124 F.3d 904, 933-934 (8th Cir. 1997), cert. granted, No. 97-1337 (June 8, 1998) (argued Dec. 2, 1998). Indeed, in *Mille Lacs* the Tribes at issue did not seek access to private lands that were not open to members of the public, and in *Lac Court* the Tribes similarly did not assert rights of access to private lands as a general matter.

Relying on *Winans* and *Seufert*, petitioners separately contend (UPOW Pet. 16-17; Alexander Pet. 15-18) that the Tribes should be required to demonstrate historic use of a given trail before following it over private lands. Neither *Winans* nor *Seufert* supports that argument. The degree or type of evidence necessary to establish a right of access was not at issue in either case. Rather, both cases stand for the settled proposition that Indians have a right of access over private property to effectuate their treaty fishing rights. Although there had been open and notorious use of the private land at issue in *Winans* and *Seufert*, the Court in each case noted that fact only in passing and did not treat it as a necessary basis for its holding. See *Seufert*, 249 U.S. at 197-199; *Winans*, 198 U.S. at 381-384. To the contrary,

Winans broadly states that the Treaties "fix[] in the land such easements as enables the [fishing] right to be exercised." *Id.* at 384. Moreover, in *Fishing Vessel*, the Court reaffirmed that the Tribes' right "to cross private lands" was a right that "non-Indians do not have," 443 U.S. at 676 n.22, a characterization that forecloses petitioners' suggestion that the right is confined to easements acquired under ordinary common-law principles through open and notorious use over time. Indeed, the dissent in *Fishing Vessel* recognized that the right is "a 'servitude' upon all non-Indian land" (*id.* at 701 (Powell, J.)), which "entitle[s] the Indians to trespass on any land when necessary to reach their traditional fishing areas" (*id.* at 703 (Powell, J.)).

Finally, the Tribes' right of access to privately owned uplands is substantially limited by the requirement, which the court of appeals affirmed (Pet. App. 37-38), that the Tribes first "demonstrate the absence of access by boat, public road, or public right of way" (*id.* at 37). Thus, the extent to which exercise of these treaty rights will actually result in the Tribes' access to private uplands is circumscribed and uncertain at this time.

c. Petitioners further contend (Wash. Pet. 22-27; Growers Pet. 20-28; Alexander Pet. 20-23) that construing the Treaties to permit the Tribes to take shellfish in their "usual and accustomed" fishing grounds would violate the "equal footing" doctrine. That argument is also foreclosed by this Court's precedents.

Under the equal footing doctrine, the federal government is presumed to have held tidal and submerged lands under navigable waters in trust for future States, such that, upon achieving statehood, each State assumes sovereign title to those lands on an "equal footing" with the established states. See *Montana* v. *United States*, 450 U.S. 544, 551 (1981); see also *Shively* v. *Bowlby*, 152 U.S. 1 (1894). The court of appeals found (Pet. App. 20-23) that the doctrine is inappli-

cable here because the fishing rights at issue are aboriginal rights reserved by the Tribes rather than federal rights once held and then conveyed by the United States, and because application of the doctrine has focused on actual ownership of lands, and ownership is not at issue here. Petitioners take issue with each of those rationales, but the short answer to their "equal footing" claim is that this Court has already squarely rejected it, as the court of appeals also explained (*id.* at 22).

As discussed above, this Court held in *Winans*, as it would reaffirm in *Fishing Vessel* decades later, that the Treaties entitle the Tribes to "cross[]," "occupy," and indeed "erect[] temporary buildings" on private land for the purpose of exercising their traditional fishing rights, and that the Treaties "impose[] a servitude upon every piece of land," public or private, for the exercise of those rights. 198 U.S. at 381. The Court specifically repudiated a challenge based on the equal footing doctrine, explaining that "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.'" *Id.* at 384. There can thus be no challenge here to the "servitudes" the Tribes enjoy on private land in their "usual and accustomed" fishing places. And it makes little sense to suggest that the equal footing doctrine draws distinctions among the kinds of fish the Tribes may harvest in those same places.[13]

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[13] Petitioners seek to escape the precedential significance of *Winans* by suggesting (*e.g.* Wash. Pet. 25) that, under the shellfish proviso, the Tribes' right to take shellfish is more temporary than their right to take other kinds of fish. That argument, however, depends on a challenge to the case-specific determination by both courts below (Pet. App. 27-28, 69-73) that the proviso was written to secure continued protection for the Tribes' traditional right to take shellfish from natural beds. See *infra*. That determination distinguishes this case from *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), in which the

2. The only significant issue in this case that is not controlled by existing legal precedent is the meaning of the shellfish proviso, which bars the Tribes from taking shellfish from "any beds staked or cultivated by citizens." The court of appeals' interpretation of that proviso was correct, and the precedential significance of that interpretation is limited to this case, because no similar language appears in any other treaty of which we are aware. Further review is therefore not warranted.

a. After conducting an exhaustive evaluation of the proviso's drafting history and purpose (Pet. App. 58-78), the district court interpreted the proviso to exclude the Tribes from artificial shellfish beds but not from natural beds. *Id.* at 77- 78. The court found, among other things, that natural shellfish beds at treaty time were reserved by law for public use (*id.* at 61-64), that they "were almost never 'staked' or 'cultivated'" (*id.* at 65), that the treaty negotiators were familiar with industry practices in both the East Coast and in Washington Territory (*id.* at 65-66), and that they understood "natural" beds and "staked or cultivated" beds to be mutually exclusive categories (*id.* at 77-78). See also pp. 3-4, *supra* (describing historical practice of "staking" and "cultivating"). The court of appeals upheld that conclusion, reasoning that the district court's extensive analysis was "correct" (*id.* at 26); that a construction of the proviso excluding the Tribes from natural shellfish beds on private property would "effectively eliminate the Tribes' right to take shellfish under the Treaties" (*id.* at 27); that such a construction would thus "provid[e] 'an impotent outcome to

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treaty right at issue *was* designed to be temporary. See also *Ward* v. *Race Horse*, 163 U.S. 504, 515 (1896) (addressing "temporary and precarious" rights). Indeed, the *Repsis* court itself cited that factor as its basis for distinguishing the rights at issue in that case from the fishing rights reserved in the Stevens Treaties. See 73 F.3d at 991.

negotiations and a convention which seemed to promise more, and to give the word of the nation for more'" (*id.* at 27-28 (quoting *Winans*, 198 U.S. at 380)); and that it would "cast[] aside black-letter canons" of treaty interpretation (*id.* at 28).

The Growers (Pet. 18-19) and private landowners (see, *e.g.*, Alexander Pet. 23-26) argue that the court of appeals construed the phrase "any beds staked or cultivated" too narrowly. The relevant question, however, is what the treaty parties intended by the language they borrowed from shellfish industry usage at the time of the Treaties. The evidence introduced at trial concerning that language's meaning within the industry was not, as petitioners repeatedly suggest, confined only to the "intricacies of east coast state law" (Growers Pet. 19; see also Wash. Pet. 28; Alexander Pet. 25), but also included west coast practices as well, industry treatises, articles in the popular press, and the writings of the treaty negotiators themselves. Pet. App. 60-71. In addition, the lower courts considered the post-treaty conduct of the parties and correctly concluded that nothing in the post-treaty materials proffered by petitioners outweighs the "compelling evidence" (*id.* at 59) that the negotiators intended to exclude only artificial shellfish beds from the Tribes' shellfishing rights (*id.* at 74-75).[14]

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[14] UPOW claims (Pet. 22) that its interpretation of the shellfish proviso draws support from a letter written in 1905 by the Commissioner of Indian Affairs, who opined that lessees of tidelands containing natural clam beds could exclude treaty Indians from them. Pet. App. 211-213. As the district court correctly observed, the letter "has no relevance to the appropriate interpretation of the Shellfish Proviso," because the Commissioner based his determination *not* on the language of the proviso, but on an interpretation of the "in common with all citizens" clause of the Treaties. *Id.* at 76. That interpretation was rejected in *Winans* 45 days after the letter was written. See 198 U.S. at 379-382.

b. Petitioners argue that the court of appeals created a "conflict" with other circuits by deferring to some of the district court's predicate findings on the meaning of the shellfish proviso. See Growers Pet. 11-18; Wash. Pet. 27-29; Alexander Pet. 26-27. There is no such conflict, and the matter does not warrant this Court's review.

As an initial matter, the extent to which the court of appeals "deferred" to any of the district court's findings is unclear. Although the court did state that a "deferential standard" was appropriate for "the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators," it independently held that "the district court's reasoned analysis of the Proviso *is correct*"; it "adopted [the district court's] analysis as [its] own"; and it further explained that petitioners' interpretation of the shellfish proviso violates principles of treaty construction and "is totally inconsistent with the United States' avowed intention to preserve for the Indians their ancient fisheries." Pet. App. 26, 27 (emphasis added, internal quotation marks omitted). The court thus made clear that its holding did not turn on deference to the district court's subsidiary findings. For that reason alone, this case would be an inappropriate vehicle for addressing any question about the proper standard of review for appellate courts in resolving predicate factual disputes relating to treaty interpretation.

Moreover, there is no conflict between any aspect of the opinion below and the decisions from other courts of appeals upon which petitioners rely. See, *e.g.*, Growers Pet. 13-14. In none of those cases did the appellate court address any

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UPOW is also incorrect in asserting (Pet. 22) that the United States excludes treaty Indians from federal beaches (which in any event are not at issue in this lawsuit). The Tribes and the federal government have historically been able to work out arrangements for tribal shellfishing on federal tidelands. See, *e.g.*, S.E.R. 489-493.

dispute relating to the standard of review. Indeed, the interpretive issue in those cases did not rest on any facts in dispute, and they therefore did not involve any question of appellate deference to findings of fact. Rather, the decisions stand only for the undisputed proposition, which the court of appeals in this case explicitly endorsed (Pet. App. 16), that a treaty's ultimate meaning is subject to de novo review.

Finally, petitioners are plainly mistaken if they are contending, as they sometimes appear to be (*e.g.* Wash. Pet. 27), that appellate courts may never apply deferential review to *any* predicate finding of fact made by a district court in the course of treaty interpretation. Many kinds of legal determinations—from the construction of contracts to the voluntariness of confessions—rest in part on predicate factual findings, and it is undeniably appropriate for courts of appeals to review those findings deferentially. See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985); Fed. R. Civ. P. 52(a).[15] Here, the parties disputed a variety of factual matters relevant to the meaning of the shellfish proviso, including highly fact-specific issues concerning the practices of the mid-19th century shellfish industry and the familiarity of individual treaty negotiators with those practices and the terms used to describe them. See, *e.g.*, Pet. App. 61-66. A court of appeals commits no error in deferring to a district court's findings on such issues. Indeed, in construing the

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[15] As this Court noted in *Fishing Vessel*, "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." 443 U.S. at 675. In interpreting contracts, courts routinely treat the parties' intent as an issue of fact subject to deferential review. See, *e.g.*, *ATACS Corp.* v. *Trans World Communications, Inc.*, 155 F.3d 659, 665 (3d Cir. 1998); *Servicios Comerciales Andinos, S.A.* v. *General Elec. Del Caribe, Inc.*, 145 F.3d 463, 469 (1st Cir. 1998); *NRM Corp.* v. *Hercules, Inc.*, 758 F.2d 676, 682 (D.C. Cir. 1985); cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982).

fishing rights clause of the Stevens Treaties, this Court in *Fishing Vessel* deferred to, and relied on, the district court's factual findings regarding the understanding of the Indians and the United States at the time of treaty negotiations. See 443 U.S. at 666-668, 674-685.

3. The Growers (Pet. 28-30) and the Alexander petitioners (Pet. 27) contend that laches defeats the Tribes' assertion of shellfishing rights. That claim is without merit. Petitioners cite no decision of any court that is inconsistent with the disposition of their laches claim below (see Pet. App. 28). To the contrary, this Court has consistently rejected the application of laches against a Tribe or the United States when either brings suit to enforce Indian or federal rights. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. 343, 350-351 (1939) (defenses based on delay in bringing claims such as laches are inapplicable to enforce Indian rights); *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926); *Cramer* v. *United States*, 261 U.S. 219, 234 (1923); *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917). Indeed, neither the Growers nor the Alexander petitioners present any claim that laches bars the United States from bringing this suit in its sovereign capacity on behalf of the Tribes. For that reason alone, their laches claim is not properly presented, for it is entirely unclear how it would benefit petitioners if laches were applied to the Tribes' claims alone.

In any event, even if it were otherwise appropriate to consider the doctrine of laches in this context, petitioners' reliance on that doctrine would still fail on the facts of this case. The Tribes did not, as the Growers suggest (Pet. 29), "long ignore[]" their treaty rights. At treaty time, and for many years thereafter, "the Indians harvested the majority of the shellfish resource." Pet. App. 12.; see also *Fishing Vessel*, 443 U.S. at 675. As a result of increasing population

pressures as well as state laws and policies, including Washington's sale of the "vast majority" (Pet. App. 12) of its tidelands into private ownership, the Tribes were gradually displaced from the shellfish fishery, until it became necessary to institute this lawsuit. The Tribes do not seek compensation for any period of exclusion from treaty lands. Thus, any delay in the filing of this lawsuit has in fact inured to the benefit of the Growers.[16]

4. The Growers contend (Pet. 5-6, 9, 29) that the court of appeals' decision imperils their investments in their shellfish farms. That contention is immaterial to the meaning of these Treaties and in any event is highly overstated as a factual matter. First, the decision below confines the Tribes to a share only of those shellfish that exist "solely by virtue of the natural propagation of the species" (Pet. App. 34), and denies them all rights to any portion of the shellfish harvest that is attributable to the Growers' efforts (*id.* at 34-35). Similarly, the Growers are entitled to all shellfish on artificial beds, which are wholly excluded from treaty rights under the shellfish proviso. Therefore, because nearly all of the Growers' oysters and mussel beds are artificial, nearly all such beds are reserved to them.

Oysters and mussels constitute approximately 66% of the total value of shellfish commercially harvested from the Washington tidelands. See PL-988, Table 50. Thus, even if the existence of all other shellfish were attributed solely to natural, unaided propagation—an (incorrect) assumption that would obviously benefit the Growers—the maximum proportion of the shellfish value to which the tribes might be

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[16] Petitioner UPOW contends in passing (Pet. 19) that "all tribal claims were extinguished * * * because most of these Tribes were paid in full under the Indian Claims Commission for all previously uncompensated interests in lands." As the court of appeals determined (Pet. App. 29), that claim is without merit. See also Gov't C.A. Br. 80-83.

entitled from the Growers' properties is half of 34%, or 17%. Again, even that latter figure greatly overstates the impact that honoring the Tribes' treaty rights will have on the Growers, since many clams are the product of enhanced production techniques and are therefore excluded from the Tribes' treaty rights.

* * * * *

This Court granted certiorari in *Fishing Vessel*—even though there, as here, "the principal issue involved [wa]s virtually a 'matter decided' by our previous holdings" (443 U.S. at 679)—only "[b]ecause of * * * widespread defiance of the District Court's orders" and an ongoing and irreconcilable "conflict between the [Washington] state and federal courts" concerning the matters at issue (*id.* at 674). Here there is no such conflict, and there are no practical exigencies that would require this Court's intervention. On the basis of an enormous factual record, the lower courts have succeeded in bringing this case to a correct and fair resolution, under which the Tribes retain the fishing rights they were promised and non-Indians retain both a fair share of all naturally occurring shellfish and an absolute entitlement to every single shellfish whose existence is attributable to their efforts. No further review is warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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