No. 17-1592

In the Supreme Court of the United States

MAKAH INDIAN TRIBE,

Petitioner,

v.

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Stevens Treaties reserve to tribes the "right of taking fish at *all* usual and accustomed grounds and stations." That right "fairly encompasses every form of aquatic animal life." *United States v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994), *aff'd in relevant part*, 157 F.3d 630, 643 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

The federal government first set 40-mile ocean treaty fishing boundaries for the Quileute Tribe and Quinault Nation in 1986 after reviewing evidence of where the Tribes customarily caught aquatic animals, including whales and seals. 50 C.F.R. § 301.19 (1986). After a 23-day trial nearly three decades later, the trial court reached substantially the same conclusion, finding that Quileute's and Quinault's usual and accustomed areas extended 40 and 30 miles offshore, respectively. Consistent with long-established law, the trial court defined unitary, non-species-specific boundaries for these areas, and found that such boundaries corresponded with how these Tribes and the United States understood the Treaty of Olympia.

The question presented is:

Whether the Ninth Circuit properly affirmed the trial court's "extensive factual findings" and corresponding legal conclusions that the "right of taking fish at *all* usual and accustomed grounds and stations" in the Treaty of Olympia includes the grounds and stations where Quileute and Quinault customarily caught whales and seals.

PARTIES TO PROCEEDINGS

Petitioner and the Washington Department of Fish and Wildlife ("WDFW") incorrectly characterized the parties to this proceeding. The Tulalip Tribes, who participated as an interested party in the trial court but did not participate in the Ninth Circuit, was omitted from Petitioner's and WDFW's parties lists. The United States was *not* a plaintiff in this proceeding. Though the United States and multiple tribes were plaintiffs in the original 1970 complaint in *United States v. Washington*, only Makah is a plaintiff in this particular proceeding. Under the permanent injunction in *United States v. Washington*, a party (here, the Makah Tribe) who files a Request for Determination is effectively the plaintiff in such proceedings, and the subjects of the Request (here, the Quileute Indian Tribe and Quinault Indian Nation) are effectively the defendants. All other parties are "interested parties." Because they did not seek a determination of Quileute's and Quinault's Pacific Ocean usual and accustomed grounds and stations, the United States and all tribes other than Quileute and Quinault listed by Petitioner (as well as the Tulalip Tribes) were "interested parties" in this proceeding in the trial court and "real parties in interest" in the Ninth Circuit (so named because there is no "interested party" designation in the Ninth Circuit). WDFW participated as an interested party at trial but deemed itself an appellant in the Ninth Circuit over various tribes' objections.

CORPORATE DISCLOSURE STATEMENT

The Quileute Indian Tribe and Quinault Indian Nation are federally recognized Indian tribes. They do not have parent corporations, and no publicly held corporation owns stock in either Tribe.

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INTRODUCTION

This is a narrow, fact-bound case about the geographic scope of the Quileute Tribe's and Quinault Nation's treaty fishing areas in the Pacific Ocean under the Treaty of Olympia. That scope depends on how the treaty parties—the United States and these Tribes—understood the "right of taking fish at *all* usual and accustomed grounds and stations."

After hearing weeks of trial testimony and reviewing hundreds of exhibits, the trial court found that all parties to the Treaty of Olympia understood it to include *all* usual and accustomed grounds and stations, including those where the tribes customarily caught finfish, mollusks, crustaceans, whales, and seals. Pet. App. 121a-124a. The Ninth Circuit affirmed. Petitioner contests these fact-bound rulings, insisting that courts should exclude those grounds and stations where Quileute and Quinault customarily caught whales and seals in determining "all usual and accustomed grounds and stations."

Despite Makah and the Washington Department of Fish and Wildlife ("WDFW") raising the same arguments three separate times, no court or judge has supported their position. The Ninth Circuit unanimously affirmed the trial court's "extensive factual findings," and it denied Makah and WDFW's petitions for rehearing and rehearing *en banc* without any judge requesting a vote. Pet. App. 3a, 167a. The challenged rulings are fact-dependent, create no conflict, and are unlikely to recur.

Petitioner wrongly claims that these rulings "expanded" Quileute and Quinault's boundaries. In fact, for nearly 30 years prior to the trial court's order, federal regulations set the boundaries 40 miles offshore, and the rulings below *reduced* them.

The fact-specific decisions below do not satisfy the criteria for certiorari. To sidestep that problem, Makah concocts three broad legal questions on treaty interpretation. But the courts below followed long-established Supreme Court precedent and half a century of *United States v. Washington*-specific case law on these questions, including a strikingly similar subproceeding wherein the Ninth Circuit affirmed that the treaty fishing right "fairly encompasses every form of aquatic animal life." *United States v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994) ("*Shellfish I*"), *aff'd in relevant part*, 157 F.3d 630, 643 (9th Cir. 1998) ("*Shellfish II*"), *cert. denied*, 526 U.S. 1060 (1999) ("*Shellfish III*"). Given the breadth of the rights reserved to these tribes, courts "have never required species-specific findings of usual and accustomed fishing grounds." *Shellfish II*, 157 F.3d at 644.

Not only is there no conflict, two of Makah's questions are not outcome-determinative, and Makah does not allege a circuit split on the third. While the continued right to take fish from their customary ocean areas has profound cultural and economic significance to Quileute and Quinault, it lacks exceptional importance for those outside these Tribes.

The petition should be denied.

STATEMENT

A. The Stevens Treaties

Before European contact, hunting, fishing, and gathering were vital to Indian life. These activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Numerous treaties, including the Stevens Treaties in the Washington Territory, reserved such usufructuary rights to tribes in perpetuity. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 817 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999) (citing treaties).

From 1854 to 1856, the United States entered into eight Stevens Treaties with tribes in Washington Territory.[1] These treaties are named after Governor Isaac Stevens, who was assigned to treat with tribes in the Territory. While the United States sought to open the Territory for settlement, the tribes' principal concern in executing these treaties was securing a means of supporting themselves once the treaties took effect. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 667-68, 678-80 (1979) ("*Fishing Vessel*"). The treaties addressed this concern by reserving the tribes' existing usufructuary rights in perpetuity:

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[1] Medicine Creek, 10 Stat. 1132 (1854); Point Elliott, 12 Stat. 927 (1855); Point-No-Point, 12 Stat. 933 (1855); Treaty of Neah Bay, 12 Stat. 939 (1855); Yakama, 12 Stat. 951 (1855); Nez Perce, 12 Stat. 957 (1855); Treaty of Olympia, 12 Stat. 971 (1856); Hellgate, 12 Stat. 975 (1855).

> The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands.

See, e.g., Pet. App. 9a-10a.

In the treaty negotiations, the treaty commissioners "nowhere indicated that the Indians' existing activities would be restricted or impaired by the treaties." *Id.* at 15a; *see also Fishing Vessel*, 443 U.S. at 667, 668 n.12. Among the most important promises was the treaty fishing right, which guaranteed that the tribes would retain the same rights of "tak[ing] *any* species, without limit," from their "usual and accustomed grounds and stations" that they enjoyed before the treaties. *Shellfish II*, 157 F.3d at 644.

Because the "vast majority of Indians at the treaty councils did not speak or understand English," the United States' promises were made through interpreters, who translated from English to a simplified "Chinook Jargon" that many of the Indians did not understand. *United States v. Washington*, 384 F. Supp. 312, 356 (W.D. Wash. 1974) ("*Decision I*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom. Fishing Vessel*, 443 U.S. 658. "Having only about three hundred words in its vocabulary," the Jargon could convey "only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ." *Id.* at 330. Tribal

interpreters would then translate the Jargon as best they could into the tribes' languages, which were quite different. Pet. App. 35a.

B. This Dispute

1. Quileute's And Quinault's Ocean Boundaries Have Been Substantially Unchanged For Decades

The federal government first set 40-mile ocean usual and accustomed area boundaries for Quileute and Quinault in 1986, after reviewing evidence of their customary ocean harvests. 50 C.F.R. § 301.19 (1986). The 40-mile regulatory boundaries defined the western extent of Quileute's and Quinault's usual and accustomed areas for nearly 30 years.

During all this time, Makah, Quileute, Quinault, and non-tribal entities like amicus have been participating in commercial ocean fisheries for salmon, crab, halibut, and black cod. The tribes harvest from a collective 50% allocation, while non-tribal entities harvest from a separate 50% allocation.

Quileute and the Hoh Tribe[2] first expressed interest in the whiting fishery nearly 20 years ago, and Makah agreed to their entry, but proposed allocating ten times more whiting to itself than to its neighboring tribes. 64 Fed. Reg. 1341, 1341-42 (Jan. 8, 1999); 65 Fed. Reg. 221, 248 (Jan. 4, 2000).

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[2] Hoh is the third tribal signatory to the Treaty of Olympia. Amicus wrongly asserts that the rulings below will lead to more tribes litigating ocean-water areas. Amicus Br. 3-4. Makah, Quileute, Quinault, and Hoh are the only Washington tribes with treaty fishing rights in the ocean.

When Quileute and Quinault later asked for a meaningful harvest opportunity (though still a lower allocation than Makah's), Makah filed this proceeding, seeking to reduce their boundaries to only five miles offshore. Since Makah has a 40-mile boundary, this outcome would make it the *only* Washington tribe with commercially viable treaty ocean fisheries of any sort.

Quileute and Quinault have never entered the whiting fishery.

2. Trial Court Decision

After a 23-day trial featuring testimony from 11 witnesses and 472 exhibits comprised of thousands of pages, Pet. App. 30a, the trial court made well-supported findings of fact and applied long-established law in an 83-page order. It concluded that Quileute's usual and accustomed area extended 40 miles offshore and that Quinault's extended 30 miles offshore. *Id.* at 129a.

The trial court made findings on the areas where Quileute and Quinault caught whales, finfish, and seals at treaty time. It did not parcel each Tribe's usual and accustomed area into species-specific sub-areas, as "a tribe's [usual and accustomed area] for the harvest of any one aquatic species is coextensive with its [usual and accustomed area] for any other aquatic species." *Id.* at 124a (citing *United States v. Washington*, 19 F. Supp. 3d 1126, 1130 (W.D. Wash. 1994)). This "oft explained" principle stems from the tribes' reservation of their preexisting "'right to take *any* species, without limit.'" *Id.* at 120a, 124a (quoting *Shellfish I*, 873 F. Supp. at 1430). Because the treaty fishing right

"'encompasses every form of aquatic animal life,'" *id.* at 121a (quoting *Shellfish I*, 873 F. Supp. at 1430), courts have never "require[d] species-specific findings for usual and accustomed fishing grounds," *id.* at 120a.

The trial court found that Makah's treaty shed no light on the meaning of the Treaty of Olympia because it was "negotiated by different individuals and in different contexts." *Id.* at 124a. Colonel Simmons, who negotiated the Treaty of Olympia, "lacked the authority to tailor provisions in the way Governor Stevens was able to do" with Makah's treaty. *Id.* Neither Quileute nor Quinault was present at Makah's treaty council. *Id.* at 34a.

The trial court relied on extensive evidence that *both* the United States *and* the signatory Tribes understood the Treaty of Olympia's fishing provision to include all areas where the Tribes customarily took aquatic species. *Id.* at 35a-42a, 121a-129a. Based on the treaty commissioners' use of *fish*, contemporary dictionaries, and other evidence showing that a capacious use of the term was in broad use at that time, the court confirmed that in 1855, *fish* encompassed all aquatic species. *Id.* at 38a, 40a-42a, 121a-123a. The Tribes would have accordingly translated the fishing right to encompass aquatic animals generally. *Id.* at 37a-42a, 121a-124a. The evidence the court relied on included treaty records; writings of the treaty commissioners; expert linguistic analysis of the four languages used in the negotiations; legislation; newspaper articles; court decisions; and letters and journals of Indian agents and early settlers, all of which supported that the Treaty right encompassed all aquatic animals, including sea mammals.

3. Ninth Circuit Decision

The Ninth Circuit affirmed in relevant part. Applying the relevant law to the "considerable evidence" from the trial, the Ninth Circuit held that the trial court "properly looked to the tribes' evidence of taking whales and seals to establish the [usual and accustomed areas] for the Quileute and Quinault and did not err in its interpretation of the Treaty of Olympia." Pet. App. 20a-21a.

To resolve the meaning of *fish*, the Ninth Circuit looked to the trial court's "extensive factual findings of the treaty negotiators' intent." *Id.* at 15a. Substantial evidence showed that *all parties* to the Treaty of Olympia understood it to include sea mammals. *Id.* at 15a-20a. Thus, the Ninth Circuit did not rely on the canon of treaty construction deferring to the tribal signatories. *Id.* at 14a.

The court rejected Makah's argument that the "mere existence of different words" or cultural practices for different species meant that certain rights were silently abrogated. "[T]hat the tribes had distinct [words] available does not undermine what terms were actually utilized," as was demonstrated by the extensive evidence at trial. *Id.* at 18a.

The Ninth Circuit also found that Makah's treaty did not affect the rights reserved in the Treaty of Olympia, which was negotiated with different tribes by a different commissioner without authority to "tailor" the language. *Id.* at 12a & n.3.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Or Split In Authority

Makah asks this Court to review fact-bound holdings that the Treaty of Olympia reserves to Quileute and Quinault *all* usual and accustomed areas, not just those where they took finfish and shellfish.[3] But those holdings follow half a century of prior adjudications specifically relying on non-finfish species. Moreover, the result in this case would not change even if Makah were correct on its first two of three alleged legal errors (it is not).

First, the court below expressly stated that it would reach the same result even without the canon. Because the district court already fully examined the intent of *all* parties to the Treaty, there is no merit to Makah's assertion that "[a] determination that the Indian canon was inapplicable" would "require the district court to reconsider its decision." Pet. at 25.

Second, comparison of the Treaty of Olympia with other Stevens Treaties would not change the outcome. The lower courts already found that the promises made in other contemporaneous Stevens Treaties were consistent with those made to Quileute and Quinault in the Treaty of Olympia, and that the "tailoring" in Makah's treaty language conferred no additional substantive rights.

Third, courts have repeatedly rejected Makah's final argument that the lower courts should have

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[3] Below, Makah contended that only finfish should be considered in such determinations. Pet. App. 31a. It now revises its position to include shellfish. Pet. at 9, 13.

disassembled the Tribes' reserved rights into species-specific pieces. Makah alleges no circuit split, because no authority for its argument exists.

A. For Half A Century, Courts Have Relied On Non-Finfish Species To Determine Usual And Accustomed Areas

Since Judge Boldt's initial decision over 40 years ago, tribes' "usual and accustomed grounds and stations" have encompassed *all* such areas, including areas where tribes caught non-finfish species like shellfish and sea mammals.

In determining Quileute's usual and accustomed areas in state-regulated waters,[4] Judge Boldt expressly relied on evidence of taking "seal, sea lion, porpoise and whale." Pet. App. 11a (quoting *Decision I*, 384 F. Supp. at 372). Contrary to what it now argues, Makah previously acknowledged in *Shellfish* that "sea mammal[]" harvest areas composed "portions of [Quileute's] area." *Compare* Pet. at 9 n.1 *with* CA9 *Shellfish* Makah et al. Br., 1996 WL 33455969, at *82 (1996); Pet. App. 127a-128a. Judge Boldt also relied on whaling and sealing evidence to determine Makah's usual and accustomed areas in state-regulated waters. *Decision I*, 384 F. Supp. at 363; Pet. App. 127a-128a. In adjudicating Lummi's usual and accustomed areas, he relied on shellfish evidence. *Decision I*, 384 F. Supp. at 360. In 1975 and 1981, seven usual and accustomed areas were adjudicated without referencing *any* species.

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[4] *Decision I* did not adjudicate federal-water usual and accustomed areas, as only state-regulated waters were at issue.

United States v. Washington, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978); *United States v. Washington*, 626 F. Supp. 1405, 1441-42 (W.D. Wash. 1985). Two usual and accustomed area determinations in 1983 relied on shellfish. *United States v. Washington*, 626 F. Supp. at 1442. In 1984, Skokomish's primary right determination (priority fishing rights in overlapping usual and accustomed areas) relied on sea mammal and water fowl evidence. *Id.* at 1489. Tulalip's 1985 usual and accustomed area determination relied on clams. *Id.* at 1529. Upper Skagit's 1994 usual and accustomed area adjudication was based only on shellfish. *Shellfish I*, 873 F. Supp. at 1449-50.

Courts "have never required species-specific findings" in adjudicating usual and accustomed areas, *Shellfish II*, 157 F.3d at 644, so Makah has no basis to claim that courts have "never" adjudicated portions of those areas based on non-finfish species.

B. The Lower Courts Correctly Construed The Treaty Language

1. No Conflict Exists

At the same time Makah cautions that treaties cannot be rewritten, Pet. at 17, it asks this Court to graft a species-specific limitation on "usual and accustomed grounds and stations" and a temporal limitation on the "right of taking fish." This Court rejected such a rewriting of the treaties in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968): "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."[5] But "there is no language in the Treaties to support [this] position: the Treaties make no mention of any species-specific . . . restrictions on the Tribes' rights." *Shellfish II*, 157 F.3d at 643.

The Treaty of Olympia does not limit these Tribes to taking only "*usual and accustomed* fish" at "usual and accustomed *finfishing and shellfishing* grounds and stations," as Makah wishes. Makah's contention that tribes' reserved rights are limited on a species-specific basis is "plainly inconsistent with the language of the Treaties, the law of the case, and the intent and understanding of the signatory parties." *Id.* The treaty language is "adapted to th[e] purpose" of reserving all rights not expressly granted. *Winans*, 198 U.S. at 381. "[B]ecause the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation." *Shellfish II*, 157 F.3d at 644 (quoting *Shellfish I*, 873 F. Supp. at 1430).

Makah complains that the courts below disregarded other treaties, Pet. at 20, but admits that the lower courts *did* consider the context and negotiations of other treaty councils, including Makah's treaty language, as part of their historical analyses, *id.* at 13-14. Makah's true complaint is with those courts' *findings* as to the relevance of Makah's treaty.

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[5] In *Puyallup*, the Court looked to precedent on states' authority to regulate treaty fishing, *id.* at 398-99, but did not construe a treaty by comparing it with other treaties, as Makah claims, Pet. at 20-21.

The lower courts did not "ignor[e] key textual differences" in Makah's treaty, *id.* at 16; rather, they found that these differences were *not* key. Specifically, Makah's treaty language was not indicative of the Treaty of Olympia's meaning because it was negotiated "by different individuals and in different contexts." *See* Pet. App. 12a & n.3, 124a. Makah's claim that the Ninth Circuit "flouted" established law by "putting all the weight on [the] . . . Indian understanding and simply disregarding the language of the treaties," Pet. at 20, is controverted by the Ninth Circuit's analysis of Makah's treaty and its clear holding that it would reach the same result *without* the Indian canon. Pet. App. 12a & n.3, 14a. The Petition does not even mention, much less attempt to rebut, the lower courts' well-supported finding that the additional language in Makah's treaty represented non-substantive "tailoring." *Id.* at 12a n.3, 37a, 124a.

Makah struggles to devise a conflict, ultimately citing cases that are either inapposite or stand for the opposite proposition. For example, this Court expressly stated that in *Oregon Department of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985), it did not construe the subject treaty by comparison with another tribe's treaty or "based *solely* on the bare language of the [treaty]." *Mille Lacs*, 526 U.S. at 202. "Rather, to reach [its] conclusion about the meaning of that language, [the Court] examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words," as such review is "central to the interpretation of treaties." *Id.*

In *Mille Lacs*, the Court cautioned that construing one tribe's treaty based on another tribe's treaty was improper. *Id.* at 202. Each treaty must be construed based on its unique historical record, so as to "give effect to the terms as the Indians themselves would have understood them." *Id.* at 196, 202 (citing *Fishing Vessel*, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81). Notably, a subsequent treaty with the *same Band* did not abrogate the Band's reserved usufructuary rights, as it was "devoid of" the express language required to abrogate such rights. *Id.* at 195.[6]

Nor did the Court compare treaties in *Johnson v. Geralds*, where the issue was a treaty's effect on *reservation* land, and the Court made a passing reference to the Winnebago treaty in noting that treaties affecting *off-reservation* ceded lands are "not unusual." 234 U.S. 422, 436-37 (1914).

Makah next resorts to two cases construing international treaties, *Rocca v. Thompson*, 223 U.S. 317 (1912) and *United States ex rel. Neidecker v. Valentine*, 81 F.2d 32 (2d Cir. 1936). Different rules of construction apply to international treaties, as they are executed by "high contracting parties" empowered to "choose apt words" reflecting their intent. *Rocca*, 223 U.S. at 332. In contrast, parties to Indian treaties were "not on an equal footing, and that inequality is to be made good" by special rules of construction for such

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[6] Reciting the rule that abrogation of treaty rights requires express language, *id.* at 195-96 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970)), the Court provided an example of such language, but did not construe the Band's treaty by comparing it with other tribes' treaties.

treaties that defer to the understanding of "this unlettered people." *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832)).

There is likewise no conflict with *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017), *Fishing Vessel*, 443 U.S. at 675, and *Absentee Shawnee Tribe of Indians v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988), which stand for the proposition that courts should consider all treaty parties' intent. The courts did so here. The Court in *Fishing Vessel* properly looked to prior *precedent* on treaty construction, but *construed* the treaties at issue based on the trial record, which substantiated the plaintiff tribes' claim that they shared consistent understandings of their treaties. 443 U.S. at 667, 668 n.12, 676.

2. Makah Relies On Flawed Premises

Makah's argument that this Court should resolve the Treaty of Olympia's meaning by comparing "two Treaties involving different parties" has been dismissed by this Court as "a fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. As the trial court found and the Ninth Circuit affirmed, Makah's treaty was negotiated by different individuals with different authority in a different context, making it irrelevant to the Treaty of Olympia. Pet. App. 12a, 124a.

But even if the treaties *were* compared, this case would not end differently. The premise that the additional language in Makah's treaty represents a special

right bestowed on Makah and no other tribe is contradicted by both fact and law.

A. The additional language in Makah's treaty functions not as a separate right but as *reassurance* of the right *already included* in "taking fish." As Judge Boldt observed, Governor Stevens felt he needed "to *reassure* the Makah that the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits." *Decision I*, 384 F. Supp. at 363 (emphasis added). Likewise, a Bureau of Indian Affairs report on the "source, nature and extent" of Stevens Treaty usufructuary rights analyzed Makah's treaty and reported that "[w]hile [whaling and sealing] no doubt would have been considered as having been indicated by implication [in 'taking fish,'] specific provision therefor was included to allay the fears of the Makah tribe." Quileute ER 4448, CA9 Dkt. 48-19 (BIA Report). The lower courts here affirmed that the language was a non-substantive "tailoring" for Makah. Pet. App. 12a n.3, 37a, 124a.

B. The language in the Stevens Treaties' usufructuary provision differs, but "[n]ot all of the differences between treaties can be attributed to differing degrees of importance that tribes attached to various resources." *Id.* at 36a-37a. No court has held that differences in the language of the usufructuary provision effect a difference in rights; abrogation of such rights instead depends on the signatory tribe's understanding. Four examples illustrate this point.

i. Only three Stevens Treaties expressly add that "[t]he exclusive right of taking fish in all the streams running through or bordering [the]

reservation *is further secured to [the] Indians*; *as also* the right of taking fish at all usual and accustomed places." 12 Stat. 975, Art. 3 (emphasis added); *see also* 12 Stat. 951, Art. 3; 12 Stat. 957, Art. III. But Judge Boldt held that this textual difference did not mean the other Stevens Treaties lacked these exclusive rights. *Decision I*, 384 F. Supp. at 332 & n.12. These treaties "explicitly include[] what apparently is implicit in each of the [other] treaties." *Fishing Vessel*, 443 U.S. at 698 (Powell, J., dissenting).

ii. In *Anderson v. Evans*, 371 F.3d 475, 499 (9th Cir. 2004), the Ninth Circuit rejected Makah's assertion that its treaty was the only one including whales, noting that whales could be included in the other coastal tribes' "less specific treaty language."

iii. Yakama's treaty lacks the proviso prohibiting taking shellfish staked or cultivated by citizens. To determine whether that treaty reserved shellfish, the district court looked to Yakama's understanding, noting that it would "not infer a limitation on the 'right of taking fish' without compelling evidence." *Shellfish I*, 873 F. Supp. at 1447. The court found that Yakama would not have understood its treaty to reserve shellfishing rights. *Id.*

iv. Because some Stevens Treaties provided that the fishing right was to be exercised in common with the "citizens of the United States," while others used "citizens of the Territory," Washington State argued that the latter treaties did not bind citizens outside Washington. The Ninth Circuit disagreed, holding that this language was "interchangeable"; a "narrower interpretation would defeat the intent and purpose of

the treat[ies]." *United States v. Washington*, 774 F.2d 1470, 1481 (9th Cir. 1985).

Finally, the Treaty of Olympia reserves "all" usual and accustomed grounds and stations, but Makah's treaty does not. Pet. at 1-2. Makah surely agrees that it did not reserve only *some* usual and accustomed areas. If such textual differences truly reflected "separate things and separate pursuits," *id.* at 19, courts would not have repeatedly held otherwise.

C. The commissioners' broad assurances to the tribes at the various Stevens Treaty councils were the same. They nowhere indicated that sea mammal grounds and stations were excluded, instead promising that the treaties did not require the tribes "to give up their old modes of living and places of seeking food." Pet. App. 16a, 38a (Point-No-Point treaty council). "[T]he Indians . . . were not to be restricted to the reservation, but were to be allowed to procure their food as they had always done." *Id.* at 20a, 39a (Chehalis River council). "[A]s for food, you yourselves now, as in time past, can take care of yourselves." *United States v. Washington*, 20 F. Supp. 3d 828, 898 (W.D. Wash. 2007) (Point Elliott council). The tribes at both the Makah and Chehalis River councils demanded whales, and Stevens assured them the treaties included that right. Makah ER 483-484, 491, 493-494, CA9 Dkt. 24-3 (Makah treaty and Chehalis minutes); Pet. App. 38a-39a. Governor Stevens also recounted that the Point Elliott Treaty tribes "take salmon and catch whale and make oil." *State v. Moses*, 483 P.2d 832, 851 (Wash. 1971).

3. The Courts' Construction Was Correct

Treaties must be construed "in accordance with the meaning they were understood to have by the tribal representatives at the council." *Tulee v. Washington*, 315 U.S. 681, 684 (1942). The treaty language "should never be construed to [the Indians'] prejudice." *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902) (quoting *Worcester*, 31 U.S. (6 Pet.) at 582). This rule has on four occasions "been explicitly relied on by th[is] Court in broadly interpreting these very [Stevens] treaties in the Indians' favor." *Fishing Vessel*, 443 U.S. at 676 (citing *Tulee*, 315 U.S. 681; *Seufert Bros. v. United States*, 249 U.S. 194 (1919); *Winans*, 198 U.S. 371). In all seven cases in which this Court has construed the fishing clause, it has placed a "broad gloss" on the right.[7] *Id.* at 679.

Courts must not restrict the fishing right's "comprehensive language" by using an "artificial meaning which might be given to it by the law and by lawyers," *Seufert Bros.*, 249 U.S. at 199, including the "'double sense' [of the language] which might some time be urged against" the signatory tribes, *Winters v. United States*, 207 U.S. 564, 577 (1908).

Contemporary dictionaries provided two possible meanings for the word *fish*. Used narrowly, *fish* included only those aquatic animals that "breathe by means of gills, swim by the aid of fins, and are oviparous [*i.e.*, lay eggs]." Pet. App. 10a, 40a. Used broadly in accordance with the "popular understanding" at treaty time, *fish* included all aquatic animals—

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[7] The Court has never granted certiorari to an intertribal dispute in *United States v. Washington*.

including whales and seals. *Id.* Significantly, the narrow definition would exclude shellfish.

English speakers have long used *fish* in its broad sense. Ishmael teaches that "the whale is a fish." Herman Melville, *Moby Dick* 148 (Harper & Bros. 1851). Blackstone writes that the common law granted the King "the right to royal fish, which are whale and sturgeon." 1 W. Blackstone, Commentaries *290. This Court, too, has described whales as "fishes." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286 (1997). "For all the purposes of common life, the whale is called a fish, though natural history tells us that he belongs to another order of animals." *In re Fossat*, 69 U.S. (2 Wall.) 649, 692 (1864) (argument of counsel); *cf. Nix v. Hedden*, 149 U.S. 304, 307 (1893) ("Botanically speaking, tomatoes are the fruit of a vine. . . . But in the common language . . . these are vegetables"); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 17 & n.62 (2015) ("Deer" formerly meant an "animal of any kind").

Under this Court's precedents, ambiguities in treaties must be resolved by "look[ing] beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). The courts below did just that to determine whether the Treaty of Olympia uses *fish* in the narrow or the broad sense.

Examining the text of the Treaty to discern "whether the Treaty employs the narrow or broad definition" of *fish*, the Ninth Circuit noted that the

shellfish proviso excepting certain kinds of shellfish from the right of taking *fish* "tends to point to a broader definition of fish." Pet. App. 11a (citing *Shellfish II*, 157 F.3d at 643). The parties' use of "capacious" language in the usufructuary right further reflected its intended breadth. *Id.* Had "'the Treaty parties intended to limit the harvestable species, the parties would not have chosen the word "fish,"' because that word has 'perhaps the widest sweep of any word the drafters could have chosen.'" *Id.* (quoting *Shellfish II*, 157 F.3d at 643). Though these facts alone strongly suggested that the Treaty of Olympia used *fish* in its broad sense, the Ninth Circuit concluded that it was ambiguous. *Id.* at 10a-11a.

To resolve the meaning of the fishing provision, the lower courts looked to the Treaty negotiations, historical context, and the construction adopted by the parties. The minutes from the Treaty of Olympia council were lost, but Quinault participated in, and Quileute members observed, the earlier failed Chehalis River council with Governor Stevens. *Id.* at 35a-36a. Colonel Simmons later completed the treaty with Quileute, Quinault, and Hoh as the Treaty of Olympia. *Id.*

The courts found that Governor Stevens did not mince words in his broad promises to the assembled Tribes at Chehalis River. The Tribes demanded whales multiple times, and Stevens assured them that "[a]s to whales they were theirs." *Id.* at 38a-39a; Makah ER 491, 493-94, CA9 Dkt. 24-3 (Treaty minutes). He "made no distinction between the Tribes' right to take beached whales and to hunt for swimming whales." Pet. App. 39a. Stevens also referred to whales as *fish*.

Id. at 38a. Thus, the commissioners employed the broad use of the term *fish* that was in popular use in 1855.

Stevens did not tell the Tribes that *any* species was excluded. *Id.* at 15a, 123a. As a Chinook jargon-speaking witness observed, the Tribes were told they "were to be allowed to procure their food as they had always done." *Id.* at 20a, 39a.

The Jargon and Quileute- and Quinault-language terms that were most likely used to translate the treaty fishing right encompassed at least aquatic species, just as the popular English use of *fish* did in the mid-1800s. *Id.* at 17a-18a, 40a-42a, 121a-123a. There were no terms in the Jargon or tribal languages that could differentiate between taxonomic groupings, such as sea mammals, shellfish, and finfish. *Id.* at 17a, 41a-42a. The Tribes reasonably understood that "the treaty reserved to them the right to take aquatic animals, including shellfish and sea mammals, as they had customarily done." *Id.* at 42a.

In post-treaty years, government agents encouraged Quileute and Quinault to continue taking sea mammals. *Id.* at 19a, 42a. For instance, Quileute's Indian agent urged it to "continue your fisheries of salmon and seals and whales as usual," and offered to help provide implements for these "fisheries." *Id.* at 42a.

The lower courts' exhaustive review of the treaty language and the signatories' understanding amply supported their conclusion that all parties to the Treaty understood the fishing right to encompass

areas where the Tribes customarily caught whales and seals. *Id.* at 17a-19a, 37a-42a, 121a-124a. Makah failed to show "that the district court's findings were erroneous, let alone clearly erroneous." *Id.* at 18a.[8]

Makah's competing theory of the "plain meaning" of *fish* is anything but plain, landing somewhere between the two meanings provided by contemporary dictionaries. Under Makah's theory, *fish* had a narrow meaning, but not so narrow as to include only oviparous, fin-swimming, gill-breathing animals, yet not so broad as to include cetaceans and pinnipeds, but not so narrow as to exclude crustaceans and mollusks. That tortured definition of *fish* is nowhere to be found in the vast trial record.

In urging the Court to use the "double sense" of *fish* against Quileute and Quinault, based on a technical "taxonomic distinction that they did not draw," Pet. App. 128a, Makah seeks to achieve the very thing this Court has prohibited for nearly 200 years.

The lower courts' sound refusal to graft unstated restrictions into the Treaty of Olympia does not conflict with the decision of any court.

C. The Indian Canon Is Inconsequential

Makah spends much of its Petition urging this Court to adopt what the Ninth Circuit described as

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[8] WDFW argues incorrectly that the Ninth Circuit applied the wrong standard of review. WDFW did not raise this argument in its petition for rehearing. The Ninth Circuit correctly reviewed findings of the parties' understanding for clear error, and application of law to those findings *de novo*. *See Shellfish II*, 157 F.3d at 642.

a "seemingly limitless rule that the Indian canon" deferring to the tribal signatories' understanding "is inapplicable whenever another tribe would be disadvantaged." Pet. App. 13a-14a. But neither lower court found the canon dispositive. "[W]e would reach the same conclusion without a beneficial preference, as the evidence alone supports a broad interpretation of the Treaty language." *Id.* at 14a; *see also id.* at 37a-42a, 121a-124a.

Even if the lower courts had relied on the canon (they did not), their rulings pose no conflict. This case does not involve a "tribe and a class of . . . tribal members" *from the same tribe* as in *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). The question to be resolved is the intent of the *treaty parties*, and that question does not change based on the identity of the challenger. Makah's approach would defeat the canon's purpose of mitigating the tribes' treaty-time bargaining disadvantage, *Jones v. Meehan*, 175 U.S. 1, 11 (1899), by treating similarly-situated tribes, who all faced this *treaty-time* disadvantage, differently based on whether they *modernly* compete with other tribes. This exception would swallow the canon whole, as most tribes modernly compete in some fashion with other tribes.

None of the cases to which Makah cites stands for the proposition that a tribe who is not a signatory to a treaty can suspend the Indian canon simply by disagreeing with the signatories' understanding. Instead, each of these cases involved disagreement among tribes who claimed rights *under the same treaty or statute*. *See Cherokee Nation v. Norton*, 241 F. Supp. 2d

1374, 1380, 1383 (N.D. Okla. 2002) (canon did not apply to a treaty governing the status of the Cherokees and Delawares, because those tribes disagreed on its meaning).[9] The canon does not apply *in that circumstance* because a treaty cannot be construed according to the signatories' understandings if those understandings conflict. Pet. App. 14a.

This is not so with non-signatory tribes. In *Seufert Brothers*, this Court construed Yakama's treaty in accordance with the tribe's understanding that it retained fishing rights "in the [waters] of another tribe," despite the appellant's claim that the treaty did not allow that outcome. 249 U.S. at 195-96, 198-99. The Court observed that the treaty "was with the government, not with [the other tribe]." *Id.* at 197.

Nor is it true that Stevens Treaties must be construed "as a *group*." Pet. at 23-24. Neither case cited by Makah supports this proposition. *United States v. Washington*, 143 F. Supp. 2d 1218, 1220 (W.D. Wash. 2001) says nothing about construing treaties as a group. Multiple treaties were construed in *Fishing Vessel* at the request of all the signatory tribes, who shared the same understanding of their treaties. 443 U.S. at 667, 668 n.12, 676-77.

Going further adrift, Makah argues that this "group" interpretation is done because the tribes share a common allocation of fish. Pet. at 24. Makah conflates the unrelated doctrines of the Indian canon and equitable allocation. Application of the canon to determine

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[9] The court in *Baker v. John*, 982 P.2d 738, 745, 752 (Alaska 1999), *applied* the canon with the support of all involved tribes.

the *existence* of the right in the first instance does not depend on whether the tribes will have to *apportion* the resource if the right *does* exist. Equitable allocation principles determine such apportionment, but do not apply to treaty construction. Thus, when this Court applied the canon in *Fishing Vessel* in determining the tribes' *right* to fish, it was immaterial that the tribes would later have to *share* the resource.

If the United States and the Tribes had conflicting understandings of the Treaty of Olympia, the courts below would have appropriately relied on the Indian canon. Pet. App. 12a-14a. It is hornbook law that if treaty language is ambiguous, a court must look not to other treaties, but to the tribal signatories' understanding. *Mille Lacs*, 526 U.S. at 200, 202.

Makah complains that upholding this long-established canon will spur litigation in contexts such as gaming. Pet. at 25. But this case does not involve construing statutes like the Indian Gaming Regulatory Act, and regardless, the canon is inconsequential to the outcome.

D. There Is No Conflict With The Reserved Rights Doctrine

1. Makah Admits There Is No Conflict

Stevens Treaties are reservations of rights, and the tribes' rights therefore do not depend on enumeration of particular species in the treaties. All rights not expressly granted away by the tribes are reserved to them. *Fishing Vessel*, 443 U.S. at 678-80. Makah's claim that the "right of taking fish at all usual and accustomed [areas]" is a narrow and static right that secures

only the species-specific harvests the tribes had in 1855 has been rejected by every court to consider the issue. Makah does not allege a circuit split exists.

In 1974, Judge Boldt held that the fishing right "is not limited as to" species, origin, purpose, use, or the "time or manner of taking" fish. *Decision I*, 384 F. Supp. at 401. Thus, *every* usual and accustomed area is a location where tribes "presently have[] the right to take fish." *Id.* at 332. Importantly, "Judge Boldt's original determination of the Quileute's [usual and accustomed area] relied on evidence of harvesting sea mammals." Pet. App. 11a (citing *Decision I*, 384 F. Supp. at 372). Judge Boldt later held that tribes' usual and accustomed areas for herring were co-extensive with such areas for other species, even though herring is not available throughout those areas. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978) ("*Herring*"). So too for hatchery fish, even though such fish did not *exist* at treaty time. *United States v. Washington*, 759 F.2d 1353, 1359 (9th Cir. 1985) ("*Hatchery*"). Nor must a tribe prove it took whiting at treaty time in order to take it throughout its customary areas today. *Midwater Trawlers Co-op. v. U.S. Dep't of Commerce*, 282 F.3d 710, 716-17 (9th Cir. 2002).

The sole conflict Makah alleges with respect to the reserved rights doctrine is *Fishing Vessel*. Pet. at 25. But Makah successfully urged the courts to reject this exact claim in *Shellfish*. CA9 *Shellfish* Makah et al. Br., 1996 WL 33455969, at *71-85. There, the State argued that "the Supreme Court's statement in *Fishing Vessel* that 'securing' fishing rights is 'synonymous

with "reserving" rights *previously exercised*' " limits the tribes' reserved rights to the species-specific areas used at treaty time. *Shellfish II*, 157 F.3d at 643 (quoting *Fishing Vessel*, 443 U.S. at 678). Just as Makah now claims that Quileute and Quinault do not have the right to take finfish in deep waters where they took sea mammals at treaty time, in *Shellfish* the State claimed that tribes had no treaty right to take shellfish in deep waters where they did not take shellfish (but took other aquatic species) at treaty time. *Id.*

The courts held that the State's argument fundamentally misconstrued the tribes' reserved rights:

> The fact that some species were not taken before treaty time—either because they were inaccessible or the Indians chose not to take them—does not mean that their *right* to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.

Id. at 644 (quoting *Shellfish I*, 873 F. Supp. at 1430). "A more restrictive reading of the Treaties would be contrary to the Supreme Court's definitive conclusion that the Treaties are a 'grant of rights from' the Tribes." *Id.* (quoting *Winans*, 198 U.S. at 380).

The *Shellfish* trial court further held that *fish* "fairly encompasses every form of aquatic animal life," and that courts have "never focused on a particular species of fish in determining the Tribes' usual and

accustomed grounds and stations." *Shellfish I*, 873 F. Supp. at 1430-31.[10] The Ninth Circuit affirmed: "usual and accustomed [areas] do not vary by species of fish" and courts "have never required species-specific findings" in adjudicating such areas. *Shellfish II*, 157 F.3d at 644. This Court denied certiorari. *Shellfish III*, 526 U.S. 1060.

2. The Courts Below Correctly Applied The Reserved Rights Doctrine

Invoking *Winans*, *Decision I*, *Herring*, *Midwater Trawlers*, and *Shellfish*, the trial court observed that "[s]ince [*Decision I*,] courts interpreting the Stevens Treaties have declined to require species-specific findings" for usual and accustomed areas, consistent with the reserved rights doctrine. Pet. App. 118a-121a. As Quileute and Quinault "did not explicitly relinquish the right to continue" their traditional practices, they "reserved the right to continue to fish" for aquatic resources "as they had always done, in the locations where they were accustomed to harvest aquatic resources," including whales and seals, "at and before entering into their treaty." *Id.* at 123a. Apart from the shellfish proviso prohibiting tribal harvest of shellfish from beds staked or cultivated by citizens, "there is no indication anywhere in the language of the treaty or the evidence surrounding the negotiations of an intent

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[10] These rulings relied not only on plain language, but also the Indian canon, reserved rights doctrine, and law of the case. *Compare* CA9 *Shellfish* Makah et al. Br., 1996 WL 33455969, at *63 and *United States v. Washington*, 18 F. Supp. 3d 1172, 1217-19 (W.D. Wash. 1991) *with* Pet. at 21 n.5.

to circumscribe this most important of usufructuary rights." *Id.*

Acknowledging Quileute's and Quinault's pre-treaty custom of taking various ocean species, including sea mammals, *id.* at 18a-19a, the Ninth Circuit too held that the reserved rights doctrine "favors reading the 'right of taking fish' to include" these preexisting rights, *id.* at 20a (citing *Shellfish II*, 157 F.3d at 644). The Tribes "sought to preserve their entire subsistence cycle," and the commissioners promised that the Treaty reserved that right, "nowhere indicat[ing] that the Indians' existing activities would be restricted or impaired by the treaties." *Id.* at 15a-16a. The trial court thus "properly looked to the tribes' evidence of taking whales and seals to establish the[ir] [usual and accustomed areas]." *Id.* at 21a.

It is undisputed that Quileute and Quinault customarily took aquatic animals 40 and 30 miles offshore. The Treaty reserves "*all* usual and accustomed" areas. Makah points to no language in the Treaty of Olympia that expressly abrogates *any* of those areas. The lower courts correctly applied the reserved rights doctrine in concluding that Quileute and Quinault reserved the right of taking fish at grounds and stations where they caught whales and seals, not just those grounds and stations where they caught finfish and shellfish. There is no conflict.

II. The Rulings Below Are Unaffected By The Fact-Bound Result In *Makah* And Square With *Shellfish*'s Treaty Interpretation

In its determination of its usual and accustomed areas in waters under federal control, Makah failed to substantiate its claims that it *customarily* took sea mammals 100 miles offshore at treaty time, and that the court should infer that it also took salmon during these "regular" whaling and sealing trips.

The United States disputed both the frequency of Makah's sea mammal harvests beyond 40 miles and the reasonableness of Makah's proposed inference. "Because they could tow whales, it may well be that for whaling [Makah] *occasionally* ventured as far as 90 or 100 miles. But salmon would have to be carried in the canoes all the way back to the villages, which would be much more difficult to do." *Makah* U.S. Suppl. Memo. at 4-5 (emphasis added). "[T]here is no support for contending that these were *familiar* locations used frequently and *customarily*." *Id.* at 5 (emphasis added). The United States did not raise treaty interpretation.

The district court held that although Makah proved customary harvest of ocean species 40 miles offshore at treaty time, "later 19th Century reports" of Makah's travel farther offshore did not reflect customary, treaty-time activity. *United States v. Washington*, 626 F. Supp. at 1467.

On *de novo* review of the summary proceeding below, the Ninth Circuit found that Makah failed to prove that it *customarily* harvested any species beyond 40 miles offshore. *United States v. Washington*, 730 F.2d

1314, 1317-18 (9th Cir. 1984) ("*Makah*"). As Makah's own expert opined, Makah did not go farther than 40 miles until *after* 1855, when "altered circumstances," "as for example in the seal fishery," forced them to. *Id.* at 1316. The court held that although Makah "probably were *capable* of traveling to 100 miles from shore in 1855," and "*may have* canoed that far for whale and seal or simply to explore," "*it is not clear how frequently*."[11] *Id.* at 1318 (emphasis added). "These facts do not show that their *usual and accustomed* fishing areas went out 100 miles in 1855," and provided "no basis for an inference that they *customarily* fished" that distance at treaty time. *Id.* (emphasis added).

The Ninth Circuit has reiterated that *Makah* turned not on species, but on Makah's failure to prove the requisite frequency of harvest at treaty time. Pet. App. 9a (citing *United States v. Lummi Tribe*, 841 F.2d 317, 320 (9th Cir. 1988)). In fact, outside of three isolated fishing banks, no evidence *except* sea-mammal harvest supported Makah's 40-mile boundary. As WDFW conceded, there was not "much, if any, evidence of actual [fin]fishing" by Makah in the 45 miles south of the halibut bank in the northwest corner of its usual and accustomed area. WDFW CA9 Br. 39-40. Treaty interpretation was not at issue. "*Makah* did not explicitly or implicitly decide the question of what role whaling and sealing evidence plays in a [usual and accustomed area] determination, let alone address the Treaty of Olympia." Pet. App. 9a.

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[11] This finding defeats Makah's attempt to reargue its 1984 evidence by claiming it proved it "customarily" harvested sea mammals beyond 40 miles offshore. Pet. at 10.

In contrast, the Ninth Circuit and the United States *did* address treaty interpretation in *Shellfish*, rejecting any species limitation. When Washington State petitioned for certiorari, the United States emphasized that a "species-based construction of the Stevens Treaties is without merit." *Shellfish* U.S. Opp'n Br. 11 (March 1999), *available at* https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-1026.98-1028.98-1039.98-1052.resp.opp.pdf. Specifically:

> 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," and which "fairly encompasses every form of aquatic animal life[.]"

Id. (citations omitted). "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." *Id.* (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973)).

The United States' actions in this case are consistent with these prior statements on the Treaty meaning. The United States has been an "interested party" in this proceeding since the outset. *See supra*

at ii. It filed briefs in the district court regarding procedural issues, but never opposed Quileute and Quinault's adjudicated areas, did not appeal the district court's decision, did not join Makah in requesting rehearing by the Ninth Circuit, and did not seek certiorari. Nor has the United States objected to the courts' inclusion of non-finfish harvest areas, including sea mammal harvest areas, in numerous usual and accustomed area adjudications over the past half century. *See supra* at 10-11.

III. This Case Lacks Exceptional Importance

The result in this case is crucial to the livelihoods and cultural identity of Quileute and Quinault members, but it lacks importance outside these Tribes. Quileute and Quinault have been harvesting aquatic animals in these ocean areas since before treaty time, including commercially fishing up to 40 miles offshore pursuant to regulations enacted 32 years ago. The trial court reduced Quinault's boundary to 30 miles, and the Ninth Circuit's reversal of the longitudinal-line boundaries reduced both Tribes' areas. The only change to these Tribes' boundaries in the past 32 years was a *reduction* by the courts below.[12] While Makah complains about the size of these areas, its own adjudicated area is greater than the size of Delaware and Rhode Island combined.

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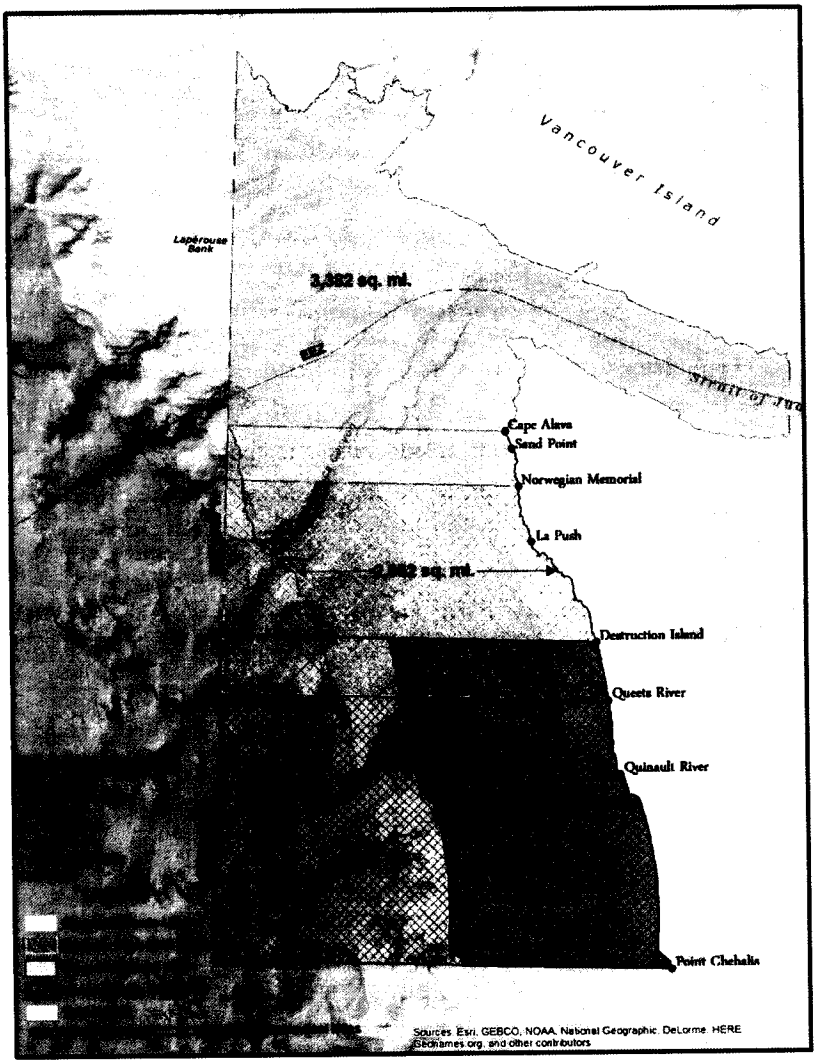
[12] Quileute and Quinault have appealed the boundary orders after remand because they conflict with applicable law and factual findings, but their proposed boundaries on appeal still represent a significant reduction compared to the original regulatory boundaries.



Quileute Tribe, Marine U&A Comparison, https://quileutenation.org/natural-resources/09-1/map/ (last visited July 23, 2018).

Because the tribal allocation for all fisheries is capped at 50% of the harvestable fish, the other 50% remains allocated to non-tribal fishers such as

amicus.[13] Quileute and Quinault take nothing from the non-tribal allocation. And, even if they did not fish in the salmon, halibut, and black cod fisheries, other tribes would take the full tribal allocation, making ouster of these two Tribes a zero-sum game for non-tribal fishers. Notably, neither Tribe has expressed interest in entering the whiting fishery since 2013. 78 Fed. Reg. 14259, 14259-60 (March 5, 2013).

The decisions below mark no departure from half a century of usual and accustomed area determinations, and in particular from Quileute's 1974 determination relying on evidence of harvesting seals, sea lion, porpoises, and whales. Makah asserts that other tribes will now attempt to "extend their fishing boundaries based on marine mammal harvests," Pet. at 33, but *Shellfish* confirms that all prior usual and accustomed area determinations *already included* all harvest evidence, including of marine mammals, 157 F.3d at 643-44; Pet. App. 120a-121a. No such attempt has been made in the three years since the trial court's decision. *Cf.* Amicus Br. 12 (citing cases involving unrelated issues).

On the other hand, if this Court were to rule that tribes must adjudicate species-specific grounds and stations, all adjudications in the 50-year history of

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[13] Amicus wrongly claims that Quileute and Quinault could exceed the 50% tribal share. Amicus Br. 6. Amicus bewails the impact to other ocean fisheries and the impact of a future 70,000 metric-ton tribal allocation. *Id.* at 7-8. But these Tribes have fished in other ocean fisheries 40 miles offshore for decades, and tribal allocations have already reached over 70,000 metric tons, 83 Fed. Reg. 3291, 3292 (Jan. 24, 2018)—with so little impact that amicus was apparently unaware.

United States v. Washington would have to be redone, as none of them were species-specific. *Shellfish II*, 157 F.3d at 643-44; Pet. App. 120a-121a.

Makah's position would have other extreme consequences. It would force tribes to rely on only those species they caught at treaty time, in species-specific places, despite fluctuations in species' availability. Preventing tribes from relying on other available species, as they did at treaty time, not only conflicts with long-established precedent, it would cause conservation problems.

Despite Petitioner's exaggerations, this case is straightforward. The exhaustive evidence at trial conclusively established that all parties to the Treaty understood it to reserve *all* "locations where [the tribes] were accustomed to harvest aquatic resources," Pet. App. 123a, consistent with the treaty language. The decisions below do not expand the boundaries established for Quileute and Quinault by their treaty partner (the United States) over 30 years ago. Although Makah is denied the ocean monopoly it hoped to achieve by undoing these long-established boundaries and nearly 200 years of Supreme Court law on treaty interpretation, the end result is preservation of the *status quo*. This case meets none of the criteria for certiorari.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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