COMMENTS

The World Is Their Oyster? Interpreting the Scope of Native American Off-Reservation Shellfish Rights in Washington State

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I. INTRODUCTION

In the mid-nineteenth century, Territorial Governor and Superintendent of Indian Affairs Isaac Stevens led a mission to negotiate treaties with the Native American[1] tribes of the Pacific Northwest. The mission resulted in several treaties, collectively known as the Stevens Treaties, including four with the tribes of the Washington Territory in 1854 and 1855.[2] While the primary purpose of the Stevens Treaties was to extinguish Indian claims to the lands of the Territory and clear the way for settlement,[3] the treaty drafters included language in the treaties reserving to the tribes various off-reservation rights, including the promise that

> [t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with

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1. The terms "Native Americans," "Indians," and "tribes" are used interchangeably in this Comment to refer to American Indian tribes.

2. United States v. Washington, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999) [hereinafter *Shellfish III*]. The decision affirmed district court opinions, United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994) [hereinafter *Shellfish I*] and United States v. Washington, 898 F. Supp. 1453 (W.D. Wash. 1995) [hereinafter *Shellfish II*]. The four treaties were: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 939; Treaty of Olympia, July 1, 1855, 12 Stat. 971. *Shellfish III*, 157 F.3d at 640 n.2.

3. *Shellfish III*, 157 F.3d. at 639 (quoting *Shellfish I*, 873 F. Supp. at 1436).

> all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, that they *shall not take shellfish from any beds staked or cultivated by citizens*. . . .[4]

The tribes deemed off-reservation rights necessary to their food supply because reservation lands did not contain adequate hunting or fishing grounds.[5] Salmon were of great importance to the tribes for ceremonial, subsistence, and commercial purposes.[6] The treaty negotiators recognized this need as they drafted the treaties and included language protecting access to off-reservation food sources.[7]

Salmon fishing rights remain particularly important to the tribes[8] and have been affirmed by the courts.[9] After the courts recognized fishing rights, the tribes sought a declaration of their shellfish harvesting rights. The courts interpreted the right to take shellfish, such as oysters, clams, mussels, and crustaceans, as among the rights secured by the treaties by virtue of the presence of the "beds not staked or cultivated by citizens" restriction, known as the "Shellfish

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4. Treaty of Medicine Creek, December 26, 1854, art. III, 10 Stat. 1132 (emphasis added).

5. *See* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 432 (1998); BARBARA A. LANE, POLITICAL AND ECONOMIC ASPECTS OF INDIAN-WHITE CULTURE CONTACT IN THE MID-19TH CENTURY 15 (1973). "To throw the fishing tribes of the coast back upon the interior, even were the measure possible, would destroy them." *Id.* (quoting a report by George Gibbs dated March 5, 1854).

6. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979) (citations omitted):

> Although in some respects the cultures of the different tribes varied . . . all of them shared a vital and unifying dependence on anadromous fish. Religious rites were intended to insure the continual return of the salmon and the trout; the seasonal and geographic variations in the runs of different species determined the movements of the largely nomadic tribes. Fish constituted a major part of the Indian diet, was used for commercial purposes, and indeed was traded in substantial volume. The Indians developed food-preservation techniques that enabled them to store fish throughout the year and to transport it over great distances.

See also United States v. Winans, 198 U.S. 371, 381 (1905): "[The fishing right was] not much less necessary to the existence of the Indians than the atmosphere they breathed."; United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974) [hereinafter *Boldt Decision*]: "[A] primary concern of the Indians[,] whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food, particularly salmon. . . ."; LANE, *supra* note 5, at 6, 11-12, 15.

7. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 700 (1979) [hereinafter *Fishing Vessel*]: "The negotiators apparently realized . . . that restricting the Indians to relatively small tracts of land might interfere with their securing food."

8. *See* LANE, *supra* note 5, at 40; Northwest Indian Fisheries Commission, *Treaty Indian Tribes and the Endangered Species Act* (last modified March 22, 1999) <http://nwifc.wa.gov/esa>.

9. *See* discussion *infra* Part II.C.

Proviso."[10]

Several factors contributed to sharp declines in tribal shellfish harvesting in the decades following the treaty signing. For instance, the number of beaches open for harvesting decreased as the State of Washington sold most of its tidelands to private parties and extensive settlement and waterfront development followed.[11] Consistent with this activity, state statutes, regulations, and policies limited tribal harvesting both directly and indirectly.[12] Thus, off-reservation tribal shellfish harvesting essentially ended relatively soon after the treaties were signed. Then, well over a century later, the tribes asserted in court that the Stevens Treaties secured to them the right to harvest shellfish from all beaches within their usual and accustomed fishing grounds, including those cultivated by shellfish growers or otherwise occupied by private landowners.

The courts essentially upheld the tribes' claims, upsetting the expectations of Washington's tideland owners and commercial shellfish growers, who had never been notified of the tribal rights. The Ninth Circuit Court of Appeals affirmed a district court opinion declaring that the treaties allow tribal members to take up to fifty-percent of the harvestable shellfish from all beaches, including those privately owned.[13] In reaching their conclusions, the courts relied on traditional rules of treaty interpretation, which command deference to reasonable treaty interpretations that favor the tribes.[14] However, courts should not exercise such deference with indifference to impacts on fundamental rights of non-Indians.

The courts recognized that although a court "cannot use equitable principles in interpreting the Treaties, it can use them in deciding how to implement the Treaties (*i.e.*, how the tribes will be allowed to exercise their previously interpreted rights)."[15] However, the courts did not adequately address the extent to which the treaty interpretation rules and precedents they purported to follow allowed them to mitigate the impact of their decision on the innocent parties affected by their rulings. Courts interpreting tribal rights should employ equitable measures that adequately address the impact of their deci-

10. *Shellfish I*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994).

11. Brief for Plaintiffs at 5-6, *Shellfish I*, 873 F. Supp. 1422 (No. CV 9213 – Phase I, subproceeding No. 89-3).

12. *Id.* On *public* rights to harvest shellfish, see generally Ralph W. Johnson, Craighton Goeppele, David Jansen, & Rachael Paschal, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 571-74 (1992).

13. *Shellfish III*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

14. *See* discussion *infra* Part II.B.

15. *Shellfish III*, 157 F.3d at 654.

sions, especially where such measures do not diminish the tribal rights involved. Recognizing a degree of unfairness and potential for hostile encounters, the district court used its powers of equity to create a plan to control potential inconvenience and damage.[16] However, because the resulting conclusion had substantial consequences for the property rights of non-Indians, the court should have further extended the reach of its equitable powers and created an implementation plan that preserved these rights, especially because this could be accomplished without affecting the tribal share of shellfish or negating the treaty signers' intent.

This Comment explores the shellfish issue in light of the Stevens Treaties and their historical context, the rules of treaty interpretation, the relevant treaty fishing cases, and the recent court decisions on the shellfish issue. Part II.A explores the magnitude of the debate, the historical background of the case, and identifies the parties involved and their diverging interests. Part II.B describes the traditional methods and rules of treaty interpretation and recognizes their application in this case. Part II.C examines the treaty fishing cases that established much of the precedent that governed the shellfish case. Part II.D outlines the relevant holdings of the district and circuit courts in the shellfish case. Part III.A scrutinizes the courts' holdings in the case, finds that the courts' analyses were cursory and subjective, and concludes that the courts should have considered alternative resolutions that would have offered enhanced protection of the interests of all parties without violating prior case law. Finally, Part III.B concludes the discussion with a solution that could have better served all of the parties while remaining consistent with the law of the case.

II. BACKGROUND

A. Large Parties, High Stakes

Shellfish are embedded upon tidelands that constitute the front yards of many of Washington's waterfront homeowners and the farmlands and livelihood of its commercial shellfish growers. The shellfish decision presents a unique situation for all of the parties involved, as tribes now have a right to enter private lands and take half of the harvestable shellfish. This aspect of the decision limits the right of shellfish growers and tideland owners to exclude others from their property and the fruits of their labor. Hypothetically, if government decided to *grant* a right as broad as the courts declared, the grant pre-

16. *See infra* note 73.

sumably would be struck down as unduly impairing the right of property owners to exclude others. As the Supreme Court has periodically noted, the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[17] However, the special nature of these treaties[18] and circumstances of the case make such a result possible even though it compels shellfish growers and tideland owners to cope with an intrusion on their property rights of constitutional magnitude—indeed, offensive to fundamental principles of fairness.

The unpleasantness of the Ninth Circuit's decision is augmented by the fact that the notion of a claim of right affecting private property was unasserted and unknown to the tideland owners and shellfish growers for over a century.[19] Because the rights involved were broad and fundamental, the parties involved were large and persistent. The primary interested parties in the shellfish case were the State of Washington and Washington's Native American tribes,[20] shellfish growers, and tideland owners.

1. Tideland Owners

The district court recognized that tideland owners were "innocent purchasers" with respect to tribal shellfish rights affecting their property.[21] Neither the original settlers nor future generations of property owners were aware of any outstanding claims of access to their property for shellfish harvesting. No such claim was ever asserted publicly until the tribes filed their lawsuit. As the district court acknowledged, "the State of Washington . . . sold [to] the public tidelands without notice . . . of the preexisting tribal fishing rights, and . . . the United States . . . permitted such sales to occur without taking steps to secure [the tribal] fishing rights."[22] Thus, the scope of these rights was not clearly defined, and since the time of initial settlement, property values, lifestyles, and land development have not

17. Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

18. *See* discussion *infra* Part II.B.

19. Furthermore, shellfish were not involved in any of the prior tribal rights cases. Brief of Intervenor-Defendant/Appellant 26 Tideland and Upland Private Property Owners at 4, *Shellfish III*, 157 F.3d 630 (Nos. 96-35014, 96-35082, 96-35142, 96-35196, 96-35200 and 96-35223) [hereinafter *Brief of Tideland and Upland Private Property Owners*].

20. The court declared shellfish harvesting rights for eighteen tribes—the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha S'Klallam, Jamestown S'Klallam, Suquamish, Swinomish, Hoh, Stillaguamish, Suak Suiattle, and Quileute. *Shellfish III*, 157 F.3d at 638 n.1.

21. *Shellfish II*, 898 F. Supp 1453, 1457 (W.D. Wash. 1995).

22. *Shellfish I*, 873 F. Supp. 1422, 1429 (W.D. Wash. 1994).

reflected the existence of a broad tribal shellfishing right. Many of the homes in residential waterfront communities on Washington's Puget Sound and Hood Canal, for example, are built within feet of seawalls and high tide levels, putting the beach and shellfish beds within steps of the front door.

Some 200,000 of these property owners occupy about half of Washington's 2,000 miles of salt-water shoreline.[23] Although some residents harvest shellfish from their beaches for personal use, public or tribal harvesting has been neither commonplace nor routinely permitted on privately owned beaches. Thus, the announcement of a third-party right to take shellfish has been an unwelcome surprise for these residents, who are inclined to fear disruption of their lifestyles and substantial intrusion on their property rights as they have been perceived for decades.[24] As a result, shellfish populations may be in danger as some tideland owners choose to remove shellfish from their beaches to avoid tribal harvesting.

2. Commercial Shellfish Growers

The concerns of the shellfish growers were congruent with those of other tideland owners, with the addition of substantial impacts upon their business ventures. Their loss is more critical and more easily measured: tribal harvesting depletes their shellfish beds and their profits. Any amount of tribal harvesting constitutes a loss of potential profit for a shellfish grower, as his own harvest will decrease. No farmer wants to see the fruits of his labor gratuitously exploited, regardless of whether a legitimate right to do so exists. Because the profit margin of most growers is modest already, the cost of heightened efforts in enhancing beds to produce enough extra shellfish to offset tribal harvesting might be fatal to some shellfish businesses.[25] Furthermore, the protections that the court did afford shellfish growers involve substantial burdens, as growers must expend their own resources to determine the tribes' share of their shellfish.[26]

3. Native American Tribes

Although shellfish are not as economically important to the

23. Florangela Davila, *Shellfish Ruling Threatens Growers*, SEATTLE TIMES, April 6, 1999, at B1; Petition for Writ of Certiorari, Washington v. United States, 67 U.S.L.W. 3437 (No. 98-1026).

24. *See Brief of Tideland and Upland Private Property Owners*, *supra* note 19, at 16-19.

25. *See* Dick Steele, *State at Fault for Dispute Between Indians and Shellfish Growers*, SEATTLE POST-INTELLIGENCER, February 10, 1998, at A9.

26. *See* discussion *infra* Parts II.D.3. and III.A.

tribes as salmon, they are nonetheless valuable to the tribes for commercial and subsistence purposes.[27] Court interpretation and declaration of tribal rights provide current authority and definiteness, allowing the tribes to exercise and capitalize on their rights as interpreted by the courts. After the courts affirmed their rights to salmon, the tribes inevitably faced further opposition when they attempted to gather shellfish from private tidelands, because of the impact on tideland owners and shellfish growers. Thus, the shellfish lawsuit, which began as a subproceeding to the original fishing rights case that resulted in the famous *Boldt Decision*,[28] was another step in the tribes' quest to gain the most favorable interpretations of the treaties possible.

B. The Treaty Process and Rules of Interpretation

Treaties with indigenous tribes typically define rights to unique, valuable resources and have important and far-reaching terms. Thus, such treaties have special standing in the law, and their unique character has prompted the creation of special rules of interpretation. Significantly, treaties with Native Americans are not viewed as agreements by which the United States *granted* rights to the tribes, but agreements by which the tribes *reserved* certain rights unto themselves and granted others to the United States.[29] It is also vital to note that because treaties are made pursuant to the Constitution, the Supremacy Clause mandates that treaty terms preempt any conflicting state laws.[30]

Also fundamental to the standing of treaties in relation to other laws is the unique context in which the treaties were drafted and signed. Although evidence indicates that both the United States and the tribes negotiated the Stevens Treaties in good faith,[31] there is no question that the tribes were at a comparative disadvantage. The primary interest of the government's treaty negotiators was to facilitate settlement.[32] To that end, the negotiators organized small bands of Indians into tribes and appointed as chiefs members who were more receptive to settlers.[33] The negotiators drafted the treaties in English

27. LANE, *supra* note 5, at 6; Northwest Indian Fisheries Commission, *Tribal Shellfish Resource Management* (last modified April 14, 1999) <http://nwifc.wa.gov/shellfish>.

28. *Boldt Decision*, 384 F. Supp. 312 (W.D. Wash. 1974).

29. *See* United States v. Winans, 198 U.S. 371, 381 (1905). ("[The treaties] reserved rights . . . to every individual Indian, as though named therein.").

30. U.S. CONST. art. VI, § 2; Worcester v. Georgia, 31 U.S. 515 (1832).

31. *See Fishing Vessel*, 443 U.S. 658, 667 (1979); *infra* note 101.

32. *See* LANE, *supra* note 5, at 24-25; Blumm & Swift, *supra* note 5, at 428-29. *See also* discussion *infra* Part III.A.2.

33. *Fishing Vessel*, 443 U.S. at 664 n.5. During the winter, tribes formed villages that were

and explained the provisions to the tribes in Chinook Jargon,[34] which was not understood by many of the Indians present.[35] Tribal rights cases recognize that "Chinook Jargon, a trade medium of limited vocabulary and simple grammar, was inadequate to precisely express the legal effects of the treaties, although the general meaning of treaty language could be explained."[36]

Because of the unique properties of treaties and the need to compensate for the overall poor bargaining position of the tribes in the treaty-making process, courts developed treaty interpreting rules known as the Canons of Treaty Construction (Canons).[37] The courts in the shellfish case relied on these and other judicially-endorsed canons.[38] The traditional Canons require (1) interpretation of treaties as the Indians would have understood them,[39] (2) interpretation of ambiguities in treaty language in favor of the Indians,[40] and (3) clear expression of abrogation of treaty rights before it will be inferred.[41]

Other canons of construction expressly endorsed by the district court provide that "the practical construction adopted by the parties,

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noted by chief or councils. and leadership was "task oriented." LANE, *supra* note 5, at 8, 28.

34. The Chinook Jargon was a trade language or *lingua franca* with a small vocabulary and simple grammar. Due to the existence of many different tribes with completely distinct languages throughout the Pacific Northwest, some sort of common language was necessary for trade and communication among the tribes. That language was Chinook Jargon, which was in wide use from as far north as what is now British Columbia to as far south as what is now the southern Oregon coast and inland along the Columbia River. With the arrival of white traders, words from French, Spanish, and English were incorporated into the jargon. *See generally* GEORGE GIBBS, A DICTIONARY OF THE CHINOOK JARGON, OR TRADE LANGUAGE OF OREGON (1863); FREDERICK J. LONG, DICTIONARY OF THE CHINOOK JARGON (1909); W.S. PHILLIPS under the pseudonym EL COMANCHO, THE CHINOOK BOOK (1913); EDWARD HARPER THOMAS, CHINOOK, A HISTORY AND DICTIONARY OF THE NORTHWEST COAST TRADE JARGON (1935).

35. *Fishing Vessel*, 443 U.S. at 667 n.10; *Boldt Decision*, 384 F. Supp. at 356; LANE, *supra* note 5, at 28-29.

36. *Boldt Decision*, 384 F. Supp. 312, 356 (W.D. Wash. 1974).

37. The Canons were essentially the creation of Chief Justice John Marshall, whose reasoning in Worcester v. Georgia, 31 U.S. 515 (1832), an early Supreme Court interpretation of Indian treaty rights, gave rise to universal guidelines for treaty interpretation.

38. *See Shellfish I*, 873 F. Supp. 1422, 1428-29 (W.D. Wash. 1994); *Shellfish III*, 157 F.3d 630, 642-43 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999). *See generally* Angela R. Hoeft, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. J. 203, 236-40 (1995). The Canons have been the subject of recent criticism because of the difficulty of ascertaining the tribes' understanding of the treaties and the reliance on non-Indian scholars for historical context. *See id.* at 248-55. These concerns and others are alleged to be the cause of unpredictable results in the courts. *Id.* at 254-55. However, the courts have not adopted alternative interpretive tools, and the Canons are still widely followed today.

39. Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

40. Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

41. Confederated Tribes of Chehalis Washington, 96 F.3d 334, 340 (9th Cir. 1996).

namely post-treaty conduct, may be viewed to help determine the meaning of the treaty,"[42] and that "when the parties could have more easily expressed a particular intent by an alternative choice of words, the chosen words can be interpreted NOT to express that intent."[43]

In applying the Canons, a court must first look to the intent of the parties with respect to the natural and ordinary meanings of treaty terms.[44] If the terms are ambiguous, the court may resort to extrinsic evidence and surrounding historical circumstances.[45]

C. Precedential Fishing Cases

None of the fishing or other tribal rights cases predating the shellfish case specifically considered a right to harvest shellfish. Nevertheless, at least three significant decisions dealing with Indian treaty rights to anadromous[46] fish are fundamentally important to the shellfish case.

1. *United States v. Winans*

The first case is *United States v. Winans*,[47] decided by the Supreme Court in 1905, before severe declines in salmon runs began to occur. The Winans brothers operated fishing wheels, "device[s] capable of catching salmon by the ton and totally destroying a run of fish . . . .,"[48] on the Columbia River under license from the state. In doing so, they excluded Indians from catching fish in the area. The excluded Indians asserted their fishing rights in federal district court, but their case was dismissed.[49] The Supreme Court reversed the dismissal, holding that the property rights federal and state governments granted landowners did not preempt the treaty fishing right.[50] Thus,

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42. *Shellfish I*, 873 F. Supp. at 1429 (citing Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943)).

43. *Shellfish I*, 873 F. Supp at 1429 (citing Choctaw & Chickasaw Nations v. United States, 179 U.S. 494, 538 (1900) (emphasis in original)).

44. *Shellfish I*, 873 F. Supp. at 1429 (citing *Chocktaw & Chickasaw Nations*, 179 U.S. at 531).

45. *Id.*

46. "Anadromous" describes fish that swim up rivers from the ocean to breed, such as salmon.

47. 198 U.S. 371 (1905).

48. *Fishing Vessel*, 443 U.S. 658, 679 (1979).

49. *See* United States v. Winans, 73 F. 72 (C.C.S.D. Wash. 1896).

50. *Winans*, 198 U.S. at 382:

> [The treaties] imposed a servitude upon every piece of land as though described therein. . . . The contingency of future ownership of lands . . . was foreseen and provided for; in other words, the Indians were given a right in the land. . . . It makes no difference . . . that the patents issued by the [Land] Department are absolute in form. They are subject to the treaty as to the other laws of the land.

Winans was fundamentally important in the shellfish case because it established that Indians could not be excluded from their traditional fishing grounds based merely on private property rights. However, *Winans* did not further attempt to define the nature or scope of the treaty fishing right, making subsequent disputes inevitable.

2. The Boldt Decision

The fishing rights dispute climaxed in June 1974, when Judge George Hugo Boldt of the United States District Court for the Western District of Washington handed down the famous and controversial "Boldt Decision," which established an equal sharing principle for allocating fish.[51] The Boldt Decision resolved a suit initiated by several Native American tribes against the State of Washington, in which the tribes sought a declaration of treaty fishing rights.[52] Many tribes joined the suit, as well as the State Department of Fisheries, the State Game Commission, and an association of commercial fishing companies.[53]

The tribes had been excluded from traditional fishing grounds by property owners, previous state court decisions, and state regulations, and they were generally prevented from catching fish. Salmon populations, considered virtually inexhaustible in the 1850s, had dwindled considerably—a circumstance that was apparently unanticipated by the treaty signatories.[54] Nonetheless, these dwindling populations created a need for a method of allocating the now scarce resource fairly and within the language of the treaties.

Fundamentally, equal sharing means a fifty-percent share for the tribes of each run of fish that passes through tribal fishing areas. Judge Boldt interpreted the treaty language establishing fishing rights "in common with all citizens of the territory" as entitling the tribes to half of the fish passing their "usual and accustomed" fishing grounds.[55] This decision was a landslide victory for a tribal population amounting to only one percent of the state's population.[56] Boldt defined anadromous fish, which includes salmon, as "any fish which

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51. *Boldt Decision*, 384 F. Supp. 312 (W.D. Wash. 1974).

52. *See id.*

53. *See id.*

54. *Fishing Vessel*, 443 U.S. at 669:

> [I]t is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

55. *Boldt Decision*, 384 F. Supp. at 343.

56. Alex Tizon, *25 Years After the Boldt Decision: The Fish Tale That Changed History*, SEATTLE TIMES, February 7, 1999, at A1.

spawns or is artificially produced in freshwater, reaches mature size while rearing in saltwater and returns to freshwater to reproduce. . . ."[57] He declared that the right to take anadromous fish from the tribes' usual and accustomed places was secured by the treaties, but never mentioned in his opinion that shellfish or any water-dwellers other than anadromous fish may have been encompassed by the treaty.

Boldt also established the locations of the "usual and accustomed [fishing] grounds and stations" of each of the tribes involved. He defined the grounds as the freshwater and saltwater areas in Western Washington that the Indians at treaty time understood to be covered by this term and declared specific areas demonstrated by the tribes as such grounds.[58] Although Boldt never mentioned shellfish in his opinion, this decision was important in the shellfish case because it established the approach for allocating fishing resources among Indians and non-Indians as well as the locations of the traditional fishing grounds, both of which the shellfish courts held apply to shellfish.[59]

3. *Fishing Vessel*

In the third significant case, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*[60] (*Fishing Vessel*), the U.S. Supreme Court reviewed several state and federal Indian fishing rights decisions. Most importantly, the Court upheld Boldt's equal sharing principle.[61] *Fishing Vessel* further defined the tribal share as only "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."[62] This statement created the "moderate living doctrine," which allows for reductions of a tribe's share if its needs are satisfied by a lesser amount. Thus, the Court intended the fifty-percent share of fish to be a maximum amount, and no minimum was set.[63]

Based on the treaty language and the context and character of anadromous fish, the Court held that the tribal fishing right was not

57. *Boldt Decision*, 384 F. Supp. at 405.

58. *Id.* at 406.

59. *Shellfish III*, 157 F.3d 630, 644 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

60. 443 U.S. 658 (1979).

61. *Id.* at 685.

62. *Id.* at 686.

63. *Id.* In the shellfish case, the Ninth Circuit did not address the moderate living doctrine even though the appellants argued that some of the tribes have met and exceeded the loosely-defined moderate living standard through casino gambling profits and other reliable income sources. *Brief of Tideland and Upland Private Property Owners* at 48-61.

merely a right of access to catch fish, but a right to a share of each run of anadromous fish passing through established tribal fishing grounds.[64] The court reasoned that because the right is held in common with non-Indians and reserved by the Indians unto themselves, a right to a share made more sense than a right of access.[65] The state had argued that a "common fishery" at common law was "merely a nonexclusive right of access."[66] However, the Court held that the treaty language securing a "right of taking fish" was "particularly meaningful in the context of anadromous fisheries—which were not the focus of the common law—because of the relative predictability of the harvest," making it logical to infer a right to a share rather than a right of access.[67]

Finally, the Court affirmed that, under the Constitution's Supremacy Clause, "neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share [of fish]. . . ."[68] It further reasoned that such concepts should not apply because they would not have been understood or anticipated by the Indian treaty signers.[69] *Fishing Vessel* was important in the shellfish case primarily because it affirmed and explicated Boldt's allocation approach and provided guidance from the Supreme Court in treaty fishing rights interpretation.

D. The Shellfish Decision

On December 20, 1994, Judge Rafeedie, who inherited continuing jurisdiction over the Western Washington treaty fishing matters from Judge Boldt, extended the reasoning of the anadromous fishing cases to shellfish, allowing the tribes up to a fifty-percent share of harvestable shellfish, subject only to the court's interpretation of the treaty's Shellfish Proviso.[70] On September 25, 1998, a three-judge panel[71] for the United States Court of Appeals for the Ninth Circuit

64. *Fishing Vessel*, 443 U.S. at 686.

65. *Id.*

66. *Fishing Vessel*, 443 U.S. at 678 n.23.

67. *Id.* at 678. This statement leaves an opening for interpretation in the shellfish case, because shellfish are not free-swimming like anadromous fish. Because shellfish do not move through or away from fishing grounds, it seems senseless to speak of shellfish in terms of a right of access versus a right to a share.

68. *Id.* at 682.

69. *Id.* at 677-78.

70. *See Shellfish I*, 873 F. Supp. 1422 (W.D. Wash. 1994).

71. Circuit Judges Lay (visiting from the Eighth Circuit Court of Appeals), Trott, and Beezer heard the case. Judge Trott wrote the court's opinion, and Judge Beezer wrote a concurring opinion.

substantially upheld Judge Rafeedie's decision. The court declared the shellfish right to be "coextensive with the right of taking fish," allowing Indians to "take shellfish of every species found anywhere within the Tribes' usual and accustomed fishing areas, except as expressly limited by the Shellfish Proviso."[72] To soften the blow of its fateful decision, the district court used its equitable powers to establish various restrictions on the tribes in exercising the right it declared, and the Ninth Circuit upheld the restrictions.[73]

The courts dealt with many issues during the course of the shellfish litigation, but four fundamental issues warrant consideration in a discussion of the proper scope and nature of the treaty right: (1) the question of whether shellfish may be characterized as "fish" for the purpose of treaty interpretation; (2) the interpretation of the Shellfish Proviso; (3) the application of the Proviso to shellfish growers; and (4) the application of the Proviso to tideland owners generally.

1. Are Shellfish Fish?

The Ninth Circuit agreed with the district court's decision that the treaty fishing right is inclusive of all species of fish and shellfish.[74] The circuit court essentially approved Judge Rafeedie's reasoning in *Shellfish I* that "[i]f the right of taking 'fish' did not include shellfish, the entire shellfish proviso would serve no purpose."[75] However, this conclusion does not resolve the issue of whether shellfish should be

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72. *Shellfish III*, 157 F.3d 630, 645 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

73. *Shellfish II*, 898 F. Supp. 1453 (W.D. Wash. 1995); *Shellfish III*, 157 F.3d at 655. The implementation plan is long and complex. Essentially, before harvesting from a nongrower beach, the tribes must survey shellfish beds to ascertain whether the population is sufficient to support a tribal harvest. The survey information is then shared with the property owner and the Washington Department of Fish and Wildlife. Tribes must also notify a tideland owner of the type of harvest (commercial, ceremonial, or subsistence), the quantity of shellfish to be taken, and the dates and times of the harvest. Additionally, a tribe must provide contact information for the tribe member responsible for the harvest. Tribal harvesters may only cross privately owned uplands upon a showing of necessity. Tribal harvesting is restricted to no more than five days per year on nongrower beaches with less than 200 feet of shoreline, with an additional day permitted for each additional 50 feet of shoreline. The court established further protections for shellfish growers. A grower may entirely prohibit tribes from harvesting natural clams underneath artificially cultivated oyster beds, regardless of whether oysters are present. Furthermore, growers may unilaterally modify a tribe's harvest plan and dictate how a harvest will be conducted if the plan is not compatible with their normal farming operations.

74. *Shellfish III*, 157 F.3d at 643. The court rejected the State of Washington's argument that the fishing right is limited to species harvested before the treaty signing. Quoting Judge Boldt's 1974 decision, the court held that "[t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use or the time or manner of taking. . . ." *Id.* (quoting *Boldt Decision*, 384 F. Supp. 312, 401 (W.D. Wash. 1974)).

75. *Shellfish I*, 873 F. Supp at 1429. "This interpretation is consistent with the principle that a treaty 'should be interpreted so as not to render one part inoperative.'" *Id.* (quoting Colautti v. Franklin, 439 U.S. 439, 392 (1979)).

treated the same as anadromous fish under the treaties. The circuit court also affirmed that the "usual and accustomed grounds and stations" are the same for shellfish as they are for fish, noting that establishing grounds for each species of fish would be unduly burdensome.[76] The Ninth Circuit also rejected the argument that shellfish are distinct from anadromous fish because they are part of the land rather than the water.[77] Ultimately, all attempts by the defendants and intervenors to distinguish anadromous fishing rights from shellfishing rights failed. The court also disposed of arguments that public harvesting was or was not permitted at treaty time by pointing out that "whatever the status of the state law at the time of the Treaties or today, the Treaties represent the supreme law of the land and give to the Tribes the right to take shellfish from private tidelands."[78]

In a concurring opinion, Ninth Circuit Judge Beezer expressed dissatisfaction with the outcome of the case, essentially supporting the contention that shellfish should be considered separately from anadromous fish for the purpose of treaty interpretation.[79] The Supreme Court reasoned in *Fishing Vessel* that the fishing right must be a right to a percentage of the fish rather than a right to attempt to fish at the traditional grounds.[80] This approach was necessary because otherwise the nets and rods of non-Indian fishermen could decimate the population of a fish run in a particular season before it ever reached the tribal fishing ground.[81] However, Beezer noted that unlike anadromous fish, shellfish are immobile and do not migrate or even move significantly along beaches. No fishing device or fishing practice could impede their arrival at tribal fishing grounds.[82]

Beezer concluded that the circuit court, in its limited jurisdiction, could not distinguish the shellfish case and render a more logical holding without running afoul of Supreme Court precedents set in *Fishing Vessel* and *Winans*.[83] He noted, however, that the argument that "shellfish beds, unharvested in the nineteenth century, were 'usual and accustomed' tribal fishing grounds in 1854 . . . strains even

76. *Shellfish III*, 157 F.3d at 644.

77. *Id.* at 647. *But see* McKee v. Gratz, 260 U.S. 127, 135 (1922) (holding that shellfish, "having a practically fixed habitat and little ability to move are truly in the possession of the owner of the land in which they are sunk. . . .").

78. *Shellfish III*, 157 F.3d at 647 (citing *Fishing Vessel*, 443 U.S. 658, 682 (1979)).

79. *Id.* at 657.

80. *Fishing Vessel*, 443 U.S. at 675.

81. *Id.* at 679-81.

82. *Shellfish III*, 157 F.3d at 658 (Beezer, J., concurring).

83. *Id.* at 657, 659. As the Ninth Circuit majority opinion recognizes, "[i]t must be remembered that we are a court of limited jurisdiction." *Id.* at 657.

the deferential canons of Indian treaty interpretation."[84] Finally, he suggested that the Supreme Court distinguish "between migratory fish and shellfish; between fish runs and static fishing grounds; and between natural shellfish and cultivated shellfish."[85]

2. The Shellfish Proviso

Perhaps the most crucial issue of treaty interpretation involved in the shellfish dispute is the meaning of the terms "staked" and "cultivated" in the Shellfish Proviso.[86] The substantial majority of Judge Rafeedie's district court opinion deals with interpreting these terms.[87] The Ninth Circuit, without significant examination, accepted the district court's definitions of staked and cultivated, holding that the only beds staked or cultivated are wholly artificial beds.[88] The district court had accepted extrinsic evidence and historical context to define the terms staked and cultivated.[89] The shellfish growers argued that the terms included any beach "surrounded by stakes, or in some fashion improved by human labor. . . ."[90] The intervening property owners, on the other hand, argued that "staked" was used in its "frontier sense" and meant "claimed as private property."[91]

The district court accepted the definitions advanced by the tribes as reflecting the use of these terms in the East Coast's shellfishing industry at treaty time.[92] According to these definitions, "staked" referred to the storage of harvested shellfish until shipment in areas marked with stakes. "Cultivated" referred to beds created by "removing oysters from their natural beds to areas where they could grow more rapidly, or by placing shells or other material to harden the bottom and thereby facilitate the setting of the oysters."[93] Thus, in this context, the terms staked and cultivated would refer only to beds created artificially by shellfish growers.

Consistent with these definitions, the district court held that by the Proviso's terms, the negotiators "intended only to exclude Indians from artificial, or planted, shellfish beds; they neither contemplated nor desired that Indians would be excluded from natural shellfish

84. *Id.* at 657.
85. *Id.* at 659.
86. Treaty of Medicine Creek, December 26, 1854, art. III. 10 Stat. 1132.
87. *See Shellfish I*, 873 F. Supp. 1422 (W.D. Wash. 1994).
88. *Shellfish III*, 157 F.3d 647-48, (citing *Shellfish I*, 873 F. Supp. at 1441).
89. *See Shellfish I*, 873 F. Supp. 1422, 1432-41.
90. *Shellfish I*, 873 F. Supp. at 1431.
91. *Id.*
92. *Id.* at 1431-32.
93. *Id.* at 1432, 1441.

beds."[94] Therefore, the court concluded, the "private property owners' natural beds are not 'staked or cultivated'; thus natural beds, if any, located on privately owned tidelands, are part of the tribal fishery."[95] Judge Rafeedie reasoned that the sole purpose of the Shellfish Proviso was to protect Washington's "fledgling oyster industry" by prohibiting Indians from harvesting shellfish from artificially created beds. He therefore rejected competing interpretations of the Proviso because they did not characterize the Proviso as "narrowly tailored" to serve this purpose.[96] For instance, a more general interpretation of "staked" would "protect activities, such as tideland ownership, wholly unrelated to the oyster industry."[97] Although Governor Stevens undoubtedly envisioned a thriving shellfish industry in Puget Sound, as agreed by the parties in the case,[98] the court offered no basis for concluding that this was the only purpose of the Shellfish Proviso.[99]

The district court also looked to the record of the treaty negotiation to support its conclusion that the treaty signers did not intend the Proviso to result in the exclusion of the tribes from privately owned shellfish beds.[100] The court noted that the treaty negotiators, including Governor Stevens, assumed a paternal role toward the Indians in a good faith effort to protect and provide for them and would not have intended to exclude the tribes from any of their fishing grounds.[101] Furthermore, the court pointed to the fact that the record of the negotiations shows an absence of any protest by the tribes to the Shellfish Proviso:

> The guarantee of fishing rights was a sine qua non of the Indi-

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94. *Id.* at 1441.

95. *Id.*

96. *Shellfish I*, 873 F. Supp. at 1437-38.

97. *Id.* at 1438. This statement seems to ignore inherent dependence upon tideland leasing or ownership by shellfish growers. *See* discussion *infra* Part III.A.2.

98. *Id.* at 1437.

99. *See id.*

100. *Id.* at 1437.

101. *Id.* The circuit court quotes the following statement by Governor Stevens to the Tribes during negotiations as evidence of this point:

> I think that the paper is good and that the Great Father will think so. Are you not my children and also the children of the Great Father? What will I not do for my children and what will you not for yours? Would you die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a Doctor to teach and cure you. Is that not fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish, you can hunt, gather roots and berries. Besides it says you shall not drink whiskey and does not a father prevent his children from drinking the fire water?

Shellfish III, 157 F.3d 630, 648 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

> ans' participation in the Treaties. The evidence indicates that the Treaties were read and explained section by section to the Indians during the negotiation process. Yet the minutes reveal no instance where the Indians resisted the Shellfish Proviso.[102]

Thus, the court concluded, because the tribes likely would have protested had they understood the treaty to mean their exclusion from traditional harvesting grounds, the Proviso had no such meaning.[103] Ultimately then, the court decided that the Proviso excludes the tribes only from shellfish beds that are artificially created by shellfish growers.

3. Shellfish Growers

Some shellfish growers enhance existing natural shellfish beds, in addition to creating wholly artificial beds. The Ninth Circuit rejected the district court's exclusion of the tribes from these enhanced beds, which it had termed "de facto artificial beds." The court held that the district court had used equitable principles to interpret the treaty, which is not permissible.[104] Instead, the district court should have applied equitable principles to limit the tribes' harvest from growers' shellfish beds to a "fair share."[105] Thus, the court decided that the tribes are entitled to fifty percent of the portion that would exist absent the grower's enhancement.[106] The burden of determining preenhancement quantities is placed on the growers, who must determine the portion of the harvest that is due to their labor.[107] Although this method protects growers by preventing tribe members from unfairly reaping the fruits of their labor, the burden is immense and, in the absence of scrupulous record keeping, allocation would largely be based on speculation.

4. Tideland Owners

The courts essentially held that the Shellfish Proviso affords tideland owners with naturally occurring shellfish no protection whatsoever. Subject only to the procedures implemented by the district court, tribes covered by the treaties are entitled to half of the naturally

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102. *Shellfish I*, 873 F. Supp. at 1435-36.

103. *Id.* at 1436.

104. *Shellfish III*, 157 F.3d. at 651 (applying United States v. Choctaw Nation, 179 U.S. 494, 532-33 (1900)). The district court itself recognized this in *Shellfish I*: "In reaching its decision, the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public. . . ." 873 F. Supp. at 1429.

105. *Shellfish III*, 157 F.3d. at 651.

106. *Id.* at 652.

107. *Id.* at 653.

occurring shellfish on any beach within their traditional grounds as defined by Judge Boldt.[108] The courts did not address whether this means a right to half of the shellfish on a given beach or a right to half of the shellfish on all included beaches. Under either interpretation, a tribe's decision to harvest from a particular beach impacts the owner of that beach rather than others, and tideland owners whose beds contain the most shellfish are most likely to see their beaches harvested by tribes.

III. ANALYSIS

A. Reexamining the Shellfish Decision

The district court's reasoning and support for its interpretation were weak considering the broad implications of the court's decision for property owners and shellfish growers. The Ninth Circuit essentially affirmed the decision without critical analysis of important issues. Although the Canons of Treaty Interpretation call for deference toward the tribes in deciding between alternative interpretations where treaty language is ambiguous, deference does not decree victory in every case interpreting the scope of tribal rights.[109] Furthermore, although the Canons prescribe deference, they do not support that extrinsic evidence or definitions be given greater weight than historical context and other circumstantial evidence specific to the treaty-making process.

The shellfish courts scarcely considered circumstances evidencing the intent of the treaty-signing parties and the historical context of the treaties, both of which are instrumental under the Canons of Treaty Interpretation. If not for the deferential Canons, the courts

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108. *Id.* at 646.

109. *Shellfish I*, 873 F. Supp. 1422, 1428 (W.D. Wash. 1994). "[The] canons of construction . . . do not give the court license to interpret a treaty according to the Indians' preferences." *Id. See also* David J. Bederman, *Revitalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994). "Treaty interpretation is bankrupt because of unbridled deference." *Id.* at 954. "Resort to extrinsic evidence of the parties' intent . . . is meant to be only an exceptional occurrence." *Id.* at 973.

> Adherence to the text of a treaty appears to be an intuitively obvious approach to construction. But it is not as easy as it seems, and American courts are frequently accused of being too quick to look behind the text of a treaty and thus to ignore the plain meaning of the words. This criticism is wholly justified. The unfortunate tendency to deviate from the text has persisted, despite Supreme Court pronouncements that if a treaty's language is clear, no other means of interpretation may be employed. This stricture is easily defeated by announcing that an article is capable of more than one meaning. Such a finding sends a court quickly away from the text.

Id. at 965 (footnotes omitted).

may have had to grapple more seriously with conflicting possible interpretations, some of which may have insulated tideland owners and shellfish growers from tribal harvesting concerns. Bearing this in mind, when an important decision is made under such a deferential standard, a court should explore whether it could employ equitable measures to resolve the situation favorably to all parties involved. Thoughtful consideration of the intent and understanding of the parties, the context of the treaties, and the fishing case precedents reveals alternative reasonable interpretations of the treaties.

1. Intent and Understandings of the Parties

The district court and circuit court both professed regard for the established rules of treaty interpretation, but devoted little attention to the method of interpretation they require. For instance, the courts' attention to the tribes' and treaty drafters' probable understanding of the Shellfish Proviso was scant, even though this understanding is instrumental under the Canons. Rather than looking first to the understandings of the parties to the treaties, as called for by the Canons, the district court accepted extrinsic evidence as the basis for its definition of the terms "staked" and "cultivated."[110] Under the Canons, a court should first analyze the intent and understandings of the parties and then only look to extrinsic evidence if necessary.[111]

Although the minutes of the treaty negotiations reveal no discussion of the Proviso,[112] it seems reasonable that the tribes would have understood the Proviso as excluding them from shellfish beds farmed by settlers and from tidelands claimed and occupied by settlers, not as reserving a right to them. In fact, it seems peculiar that the tribes would have expected that the treaty would entitle them not only to enter the lands of settlers to take shellfish, but to take shellfish from beds created or improved by commercial growers. Such confrontation would be inconsistent with the intent and nature of the treaties, in which the tribes promised "to be friendly with all citizens" and "to commit no depredations on the property of such citizens."[113] Thus, silence in the treaty negotiations regarding the Proviso was neither inexplainable nor surprising.

Dismissing the possibility that the tribes understood the treaties as excluding them from all developed lands, the courts accepted the argument, based on extrinsic evidence, that because the terms

110. *See Shellfish I*, 873 F. Supp. at 1431-36.
111. *See id.*
112. *See id.* at 1436.
113. Treaty of Medicine Creek, December 26, 1854, Art. VIII, 10 Stat. 1132.

"staked" and "cultivated" were used in the East Coast shellfishing industry at treaty time to refer to artificially created beds, the treaty drafters intended the terms to have this meaning.[114] This conclusion seems dubious in light of the Canons of Treaty Construction and the Supreme Court's proposition in *Fishing Vessel* that "the treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but *in the sense in which they would naturally be understood by the Indians.*"[115] Given the Indians' lack of knowledge about the culture and practices of the settlers generally, it can hardly be supposed that the tribes were acquainted with the practices of the East Coast shellfishing industry at treaty time. Furthermore, the negotiators explained the treaty terms in the unrefined Chinook Jargon, in which it would have been difficult or impossible to convey a technical meaning of any of the treaty terms.

It is also unlikely that the tribes distinguished between lands on the basis of public or private ownership at the time the treaties were negotiated.[116] More realistically, tidelands that were occupied and used and tidelands adjacent to lands that were occupied and used were seen as off-limits.[117] Thus, regardless of the drafters' intent, the tribes probably understood the terms as providing that they would not harvest shellfish from the lands of the settlers. As illustrated by the treaty language regarding and cases interpreting treaty *hunting* rights, the parties ordinarily intended off-reservation tribal rights to be exercised on unsettled and undeveloped lands, not on developed, private lands near the homes of the settlers.[118]

Similarly, in *McKee v. Gratz*,[119] the Supreme Court held that a common understanding as to "*unenclosed and uncultivated* land" is that "it is customary to wander, shoot, and fish at will *until the owner sees fit to prohibit it*," and that this conclusion is more securely established where statutory prohibitions of certain acts are limited to "*enclosed and cultivated land.*"[120] In the shellfish case, the treaty draws a similar distinction by prohibiting tribal shellfish harvesting from "beds staked or

114. *Shellfish III*, 157 F.3d 630, 647-48 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

115. *Fishing Vessel*, 443 U.S. 658, 676 (1979) (citing Jones v. Meehan, 175 U.S. 1, 11 (1899)) (emphasis added).

116. *See generally* Bradley I. Nye, Comment, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175 (1992).

117. *See id.* at 192-93 (proposing a similar principle for determining whether lands are "open and unclaimed" under the hunting provisions).

118. *See id.* at 188

119. 260 U.S. 127 (1922).

120. *Id.* at 136 (emphasis added).

cultivated," giving rise to an inference that harvesting from tidelands not staked or cultivated was allowed. Just as the tribes could distinguish between open land and developed land, they could distinguish between open beaches and staked or cultivated beaches.

Regardless of the tribes' understandings of the treaty terms, it is doubtful that even Governor Stevens or his assistant George Gibbs had knowledge of the practices of the East Coast shellfishing industry or would have used technical terms to define the tribes' treaty rights. As the Court in *Fishing Vessel* footnoted when refuting an argument that the fishing right was appurtenant to specific parcels of real property,

> [T]hese [water law] concepts were [not] understood by, [n]or explained to, the Indians. Indeed, there is no evidence that Governor Stevens understood them, although one of his advisers, George Gibbs, was a lawyer. But even if we indulge in the highly dubious assumption that Gibbs was learned in the intricacies of water law, that he incorporated them in the treaties, and that he explained them fully to the Indians, the treaty language would still be subject to the different interpretations presented by the parties to this litigation.[121]

Because Governor Stevens' trade was surveying and Gibbs' was law and ethnology, it seems that the negotiators would have been likely to associate the word "staked" with meanings similar to staking the boundaries of property, staking a claim of ownership, or survey staking, and the word "cultivated" with farming shellfish beds. These meanings seem far more natural and ordinary in this context than the technical definitions the courts accepted, and were used in the less technical sense even in the shellfish industry.[122] Notes written by a commission formed by Stevens and Gibbs to make treaties with the Indian tribes of the Washington Territory state the fishing rights provision as reserving "the rights of fishing at common and accustomed places if further secured to them: Proviso against stated or fenced claims."[123] Although this early draft of the standard treaty fishing rights provision does not mention shellfish, the "stated or fenced

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121. *Fishing Vessel*, 443 U.S. 658, 678 n.23 (1979).

122. *See, e.g.*, Lewis Blue Point Oyster Cultivation Co. v. J. Marvin Briggs, 229 U.S. 82, 86 (1913): "The cultivation of oysters . . . has become an industry of great importance . . . [oyster beds] are parceled out among those owning the bottom or holding licenses from the state, and marked off by stakes indicating the boundaries of each cultivator."

123. REPORT ON SOURCE, NATURE, AND EXTENT OF THE FISHING, HUNTING, AND MISCELLANEOUS RELATED RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON [hereinafter TRIBAL RIGHTS REPORT], United States Department of the Interior, Office of Indian Affairs, Division of Forestry and Grazing (1942), at 325.

claims" language may illustrate the nonsignificance of the later choice of the words "staked or cultivated" for the proviso that eventually applied to shellfish harvesting.

Recall that, according to the rules of treaty interpretation, courts must first look to the intent of the parties with respect to the natural and ordinary meanings of treaty terms.[124] Here, both the tribes and the treaty negotiators sought to achieve peaceful coexistence.[125] As the district court found, the United States "believed that guaranteeing the Indians fishing rights would not in any manner interfere with the rights of citizens."[126] Ultimately, the negotiators thus intended the Shellfish Proviso to ensure that the rights of citizens would be protected.

In addition, the treaty language does not support the courts' decisions allowing the tribes to take half of the shellfish that would have been present in a shellfish grower's enhanced bed prior to cultivation. The Shellfish Proviso explicitly prohibits tribal harvesting from all cultivated beds—it makes no provision for harvesting shellfish from beds that are enhanced and farmed although previously natural. The courts placed the burden of establishing the pre-enhancement shellfish populations on the growers, even though ordinarily the party asserting a treaty right must prove that right.[127] As Ninth Circuit Judge Beezer noted, "[t]he district court, after hearing testimony, determined that it 'would be very difficult—if not impossible—to develop a 'snapshot' of existing shellfish beds at the time commercial development commenced on the Growers' property.'"[128] Thus, the burden placed on the shellfish growers is onerous, and it threatens their ability to protect their harvests from being unfairly depleted.

Finally, in light of the actions and practices of the parties following treaty signing, the courts seemingly disregarded the principle that the "*practical construction* adopted by the parties" is important in treaty interpretation.[129] In other words, the manner in which the par-

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124. *Shellfish I*, 873 F. Supp. 1422, 1429 (W.D. Wash. 1994) (citing *Chocktaw & Chickasaw Nations*, 179 U.S. 494).

125. *See* discussion *infra* Part III.A.2.

126. *Shellfish I*, 873 F. Supp. at 1436. *See also* TRIBAL RIGHTS REPORT, *supra* note 123, at 330 ("It was also thought necessary to allow them to fish at all accustomed places, since this would not in any manner interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence.").

127. *See Shellfish III*, 157 F.3d 630, 658-59 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999) (Beezer, J. concurring).

128. *Id.* at 659 (citing *Shellfish II*, 898 F. Supp. at 1462).

129. Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943) (emphasis added).

ties behaved following the execution of the treaties should have been instrumental in interpreting the intended meanings of the terms. In the 135 years between the treaty signing and the tribes' assertion of their claim to shellfish, private parties purchased tidelands from the State of Washington without notice of any tribal rights affecting their title.[130] Washington began selling its tidelands when it became a state in 1889.[131] In 1895, it passed legislation authorizing private purchase of tidelands, even when they contained shellfish beds.[132] Then, in 1905, the United States Commissioner of Indian Affairs wrote a letter-opinion to a state agency advising that "Indians should not be permitted to trespass upon the tide lands leased from the state . . ." and that, under the treaties, they could take fish and shellfish only from lands used in common with the state's citizens.[133]

For 135 years, including the first century of Washington's statehood, the tribes never publicly asserted a right to harvest shellfish from private tidelands. Sales and leases, development, and cultivation have all occurred without reflecting any awareness of a tribal right to shellfish, and property values were based on clear titles. Ultimately, however, the court's decision placed a cloud upon titles that property owners considered to be clear for well over a century. Thus, the post-treaty actions of both the tribes and the settlers seem to indicate clearly the interpretation intended by the treaty signers and the interpretation adopted and adhered to by the parties.

2. Context of the Treaties

The context and background of the treaties also suggest alternative interpretations of the treaties. For instance, Judge Rafeedie's reasoning that the sole purpose of the Shellfish Proviso was to protect the shellfish industry seems to conflict with the actual purpose of the treaties in light of historical context. The court's statement that a broad interpretation of "staked" would "protect activities, such as tideland ownership, wholly unrelated to the oyster industry"[134] ignores the fact that the shellfish industry is inherently dependent upon tideland ownership.[135] The Shellfish Proviso was probably written to protect both the shellfish industry and to establish clear titles to private property. Even though Governor Stevens approached the treaty negotiations in

130. *Shellfish II*, 898 F. Supp. 1453, 1457 (W.D. Wash. 1995).

131. *Shellfish I*, 873 F. Supp. at 1440.

132. *Id.*

133. *Id.* at 1440-41.

134. *Shellfish I*, 873 F. Supp. at 1438.

135. Shellfish growing for profit generally takes place on tidelands that are privately owned or leased from the state.

good faith and with a benevolent approach,[136] his chief interest was in clearing the way for settlement by protecting the interests of the arriving settlers and preventing future conflicts between the settlers and the tribes.[137]

Soon after Governor Stevens arrived in the Washington Territory in 1853, he wrote a letter to the Commissioner of Indian Affairs, George Manypenny, suggesting that "prompt measures be taken to arrange with these Indians terms as to the purchase of their lands, in order that the settlements which are sure to be made in the coming years in great numbers may meet with no hindrance for this cause."[138] To this end, the treaties were executed to "provide for peaceful and compatible coexistence of Indians and non-Indians in the area."[139] As the Supreme Court has recognized, "[b]y thus separating the Indians from the settlers, it was hoped that friction could be minimized."[140] As noted above, each of the treaties contained an article including language providing that the tribes "promise[d] to be friendly with all citizens [of the United States], and pledge[d] themselves to commit no depredations on the property of such citizens."[141] The treaties also restricted the tribes to hunting only upon "open and unclaimed lands," and restricted them from taking shellfish from beds "staked or cultivated by citizens."[142] The treaty negotiators constructed each of these provisions to protect the interests and activities of the incoming settlers from interference in every possible way without completely excluding the Indians from their sources of food.

In this context, it seems unlikely that Governor Stevens, as he was clearing the way for settlement, would have inserted a clause in the treaties limiting the scope of the settlers' title as to excluding Indians. Furthermore, it would have been irrational for him to believe such a large concession was necessary in obtaining signatures from the

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136. *See supra* note 101 and accompanying text.

137. *Boldt Decision*, 384 F. Supp. 312, 355 (W.D. Wash. 1974).

138. *Brief of Tideland and Upland Private Property Owners* at 10 (citing Stevens' letter to Commissioner George Manypenny, December 6, 1853). On April 4, 1854, Manypenny replied to Stevens, writing: "With you, I feel anxious that Congress should immediately make provision for extinguishing the Indian title to lands in Washington Territory." *See also* LANE, *supra* note 5, at 25.

139. *Boldt Decision*, 384 F. Supp. at 355 (W.D. Wash. 1974). "The United States was concerned with forestalling friction between Indians and settlers and between settlers and the government." *Id.* This notion was confirmed by the Supreme Court in *Fishing Vessel*: "The primary purpose of the six treaties negotiated by Governor Stevens was to resolve the growing disputes between the settlers claming title to land in the Washington Territory . . . and the Indians." *Fishing Vessel*, 443 U.S. 658, 699 (1979). *See also* LANE, *supra* note 5, at 44.

140. *Fishing Vessel*, 443 U.S. at 669.

141. Treaty of Medicine Creek, December 26, 1854, Art. VIII, 10 Stat. 1132.

142. *Id.*

tribes, or that shellfish were of such necessity to their subsistence. Shellfish were of less importance to the tribes for subsistence purposes than salmon.[143] Thus, it seems incredible that Stevens, even in his benevolent manner toward Indians, would have forever burdened the title and property rights of the settlers and inhabitants of the territory he governed simply to allow the tribes to collect shellfish, a relatively modest source of food, from the private property that he sought to protect from Indian interference. Indian trespass onto private property to collect shellfish would surely cause the type of friction and conflict that Stevens sought to prevent.[144]

Certainly, if Stevens did consider such a burdensome provision necessary or desirable, he and his lawyer-assistant Gibbs could have drafted the treaty provisions more clearly. For example, they might have written something like "the tribes may enter private property for the purpose of taking shellfish." Recall the treaty-interpreting canon adopted by the courts that "when the parties could have more easily expressed a particular intent by an alternative choice of words, the chosen words can be interpreted NOT to express that intent."[145] To comply with this rule, the courts might have decided that, because the negotiators could have more easily expressed an intent to allow the tribes to take shellfish from private beaches, the treaty terms must not be interpreted to express this intent. Because the parties undoubtedly anticipated significant waterfront and tideland development, which would be incompatible with tribal shellfish harvesting, clearer drafting would have been especially likely had they intended tribal harvesting to occur on private lands.

It also seems reasonable that, just as the tribes understood that with increasing settlement the amount of open and unclaimed land available for hunting would decrease,[146] they understood that the tide-

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143. *See* LANE, *supra* note 5, at 6.

144. Evidently, the courts' broad interpretation of shellfish rights has inspired this sort of conflict: "'This thing is creating more and more animosity with each ruling,' says Dale Briggle, a retired IBM engineer who runs a tackle shop . . . 'I hear people saying, "If they come on my beach, they're liable to end up with some dead Indians."'" Ross Anderson, *Look Who's Clamming in My Yard*, SEATTLE TIMES, February 15, 1998, at B1. On conflict in the fishing rights context generally, see *Boldt Decision*, 384 F. Supp. at 329:

> More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

145. *Shellfish I*, 873 F. Supp 1422, 1429 (W.D. Wash. 1994) (citing *Choctaw & Chickasaw Nations*, 179 U.S. at 538) (emphasis in original).

146. The obviousness of this point was explained by the court in United States v. Hicks, 587 F. Supp. 1162, 1167 (W.D. Wash. 1984):

lands open for shellfish harvesting would decrease. Thus, it is not particularly surprising that the tribes would not object to the provision had they understood it as excluding them from privately developed lands of settlers, because the tribes expected their rights to be limited by future land ownership, occupation, and development. The district court's reasoning that the absence of tribal protest to the Shellfish Proviso in treaty negotiations and Governor Stevens' paternal tone are evidence that the tribes understood the Proviso as only excluding them from artificially created shellfish beds is feeble. The Proviso was likely written not only to end and prevent conflict, but to protect property owners' titles and rights to exclusive use.

3. Fishing Case Precedents

In the anadromous fish cases, as with other decisions interpreting tribal rights, the courts did not devise remedies or implementation restrictions to significantly mitigate the effects of their rulings. Although the shellfish courts properly looked to *Winans*, *Boldt*, and *Fishing Vessel* as precedent for the shellfish case, the treaty right involved here is more demanding of the private property owner and shellfish grower than the rights asserted by the parties in the fishing cases. In those cases, the tribes' rights to a share of fish was protected, and their ability to exercise those rights was guaranteed.[147] It seems far more intrusive into the realm of fundamental private property rights, however, to allow tribes to take shellfish from private lands. Purposefully entitling the tribes to such a right would have been no less intrusive than entitling Indians to hunt and gather roots and berries from occupied and claimed private lands, rather than restricting the tribes to "open and unclaimed" lands.[148]

Moreover, the anadromous fish cases involved free-swimming anadromous fish, not the stationary shellfish involved here. The courts held that the "usual and accustomed grounds" for shellfish are the same as for anadromous fish,[149] even though in some areas the traditional salmon fishing grounds observably lack substantial shellfish populations. This conclusion seems questionable because the fishing

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> The circumstances surrounding the negotiation of the Treaty, together with the Treaty language itself describing the lands available for Indian hunting, compel a conclusion that the lands available for Indian hunting would change with the times. Homesteading as well as other kinds of settlement inimical to hunting were destined to occur and were contemplated at the time of the Treaty's negotiations.

147. *See Winans*, 198 U.S. 371 (1905); *Boldt Decision*, 384 F. Supp. 312 (W.D. Wash. 1974); *Fishing Vessel*, 443 U.S. 658 (1979).

148. *See* Treaty of Medicine Creek, December 26, 1854, art. III, 10 Stat. 1132.

149. *Shellfish III*, 157 F.3d 630, 644 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

grounds are based on the behavior of migratory fish, while shellfish are generally sedentary and concentrated in specific areas. The courts held that the grounds could not differ by species but, as Ninth Circuit Judge Beezer noted, the percentage-based approach is rooted in the migratory nature of anadromous fish and not necessarily applicable to shellfish embedded on a beach.[150]

Thus, considering the fundamental nature of the rights involved in this case, the courts should have fashioned an implementation plan that preserved the rights that Washington's private landowners reasonably believed were guaranteed by their titles. While courts may not interpret the treaties in a way that is inconsistent with the treaty language or prior caselaw guaranteeing tribal rights, nothing limits the extent of a court's powers of equity in providing for how the rights will be implemented and exercised. Because the courts employed a rule of construction requiring deference to the tribes' favored interpretation, the courts' consideration of alternative interpretations was minimal. In light of this fact, a court making such a sweeping determination should not only seek ways to soften the impact of such a decision, but should also consider alternative resolutions of the conflict.

B. A Solution Overlooked?

Ultimately, the shellfish case should serve as an additional reminder that negotiation and settlement may provide the most favorable and effective resolution of rights conflicts. Legal commentators recommend negotiations between federal and state governments and indigenous tribes as a preferable alternative to litigation.[151] Also, Washington's tideland owners and shellfish growers suggest that the state's government is obligated to facilitate such negotiations due to its ignorance of tribal rights and failure to notify property owners of tribal rights when it sold its tidelands as private property.[152] They have also suggested that the state pay to enhance shellfish beds on public tidelands for tribal harvesting or purchase additional tidelands to provide alternative sites.[153] About half of Washington's tidelands are publicly

150. *Shellfish III*, 157 F.3d at 658 (Beezer, J. concurring).

151. *See, e.g.*, Michael A. Burnett, *The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations*, 19 SUFFOLK TRANSNAT'L L. REV. 389, 432-33 (1996).

152. *See Best Tribal Shellfish Plan Honors Private Property*, SEATTLE TIMES, April 7, 1999, at B4; Florangela Davila, *Shellfish Ruling Threatens Growers*, SEATTLE TIMES, April 6, 1999, at B1; *Shellfish Dispute Still Needs Settling*, TACOMA NEWS TRIBUNE, April 6, 1999, at A12.

153. *See id.*

owned,[154] and nearly every Indian reservation in Western Washington includes significant tidelands.[155] Furthermore, a court declaration of settlement defining the scope of the shellfish right as up to fifty percent of the shellfish from beaches that are open and unoccupied or from public tidelands might be more consistent with the treaty intent and understanding of the parties.[156] As Judge Beezer stated in his concurring opinion,

> Exclusive use of private tidelands by commercial growers should not deprive the Tribes of their treaty share of shellfish; the Tribes could be allocated half of the naturally occurring shellfish without disturbing the hard-earned and long-held property rights of private growers. Shares of the shellfish taken, of course, need not be determined by the place where the shellfish are taken. Thus, a tribal share of shellfish could come from reservation land, government land or private tidelands acquired by the tribe.[157]

Beezer also properly observed that *Fishing Vessel* allows such an outcome, as it held that "fish taken by treaty fishermen off the reservations and at locations other than 'usual and accustomed' sites . . . [are] to be counted as part of the Indians' [treaty] share."[158] Thus, consistent with prior case law, beaches that are farmed for shellfish or adjacent to lands developed with homes and other signs of occupation and staking of boundaries could have remained off-limits to tribal harvesters. This outcome would not only have been consistent with prior case law, the rules of treaty interpretation, the treaty language, and the understandings of the treaty-signing parties, it would also have protected the rights of all parties involved.

IV. CONCLUSION

The shellfish case brought to the legal and social forefront property rights conflicts that were, for the most part, unanticipated by the state and its property owners. The United States and the tribes

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154. *Brief of Tideland and Upland Property Owners* at 20.

155. UNITED STATES DEPARTMENT OF THE INTERIOR, GEOLOGICAL SURVEY, STATE OF WASHINGTON (1982).

156. Such a solution was contemplated in settlement negotiations between the State and the tribes in 1995, but an agreement was never reached. *See* Rob Carlson, *Shellfish Deal May Provide Simplest Solution*, TACOMA NEWS TRIBUNE, June 27, 1995, at B3. The Ninth Circuit recognized these efforts, noting that "[t]he parties have apparently made sincere efforts to settle this dispute; we hope that our decision assists and renews that effort." *Shellfish III*, 157 F.3d 630, 657 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376 (1999).

157. *Shellfish III*, 157 F.3d at 659 (Beezer, J., concurring) (footnote omitted).

158. *Fishing Vessel*, 443 U.S. 658, 687 n.29 (1979).

intended the treaties to prevent conflict between Indians and settlers, not to generate it. In April 1999, the United States Supreme Court denied a petition for a writ of certiorari to review the Ninth Circuit's decision.[159] Ultimately, the tribes are unquestionably entitled to harvest shellfish off-reservation. However, the courts in the shellfish case should have considered ways to temper the consequences of a decision in favor of the tribes because the decision has significant impact on other parties. Reestablishing tribal rights becomes difficult when these rights conflict with other longstanding rights. Although negotiation and settlement may produce the best remedy, courts are under an obligation to consider reasonable alternative resolutions to rights conflicts, especially when such resolutions protect tribal rights and minimize the impact on non-Indians of reestablishing those rights.

159. *Shellfish* III, 157 F.3d 630, cert. *denied*, Washington v. United States, 119 S. Ct. 1376 (1999).