No. 09-820

FEB 10 2010

In The
Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION,

Respondents.

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

BRIEF IN OPPOSITION OF LUMMI NATION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does an upland owner commit a trespass when she refuses a request by the owner of the tidelands to remove rock rip rap that is located on the tidelands?

2. Under the "common enemy" doctrine, can an upland owner deprive a tideland owner of its vested right to the benefits of an ambulatory tidal boundary by placing rock rip rap to permanently "fix" the location of the tidal boundary?

3. Does *stare decisis* militate against revisiting the issue of tidelands ownership on the Lummi Reservation, when three prior cases in the Ninth Circuit have held that the State of Washington does not own the tidelands, and the State declined to assert ownership in this proceeding?

4. Was an Executive Order, signed by President Grant and authorized by Congress when it ratified the Treaty of Point Elliott, sufficient to reserve title to tidelands on the Lummi Reservation to the United States in trust for the Lummi Nation?

5. Is it a violation of Section 10 of the RHA for an upland owner to refuse to remove shore defense structures that were originally erected on the uplands, but are now located seaward of the mean high water mark due to movement of the boundary between upland and tideland?

6. Did the District Court abuse its discretion in issuing an injunction under the RHA?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner has correctly identified the parties to the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Lummi Nation is a federally recognized Tribe of American Indians. It has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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MISCELLANEOUS

JURISDICTION

Petitioner correctly states the basis for this Court's jurisdiction.

TREATY, EXECUTIVE ORDER & STATUTORY PROVISIONS AT ISSUE

This case involves interpretation of the Treaty of Point Elliott, an 1873 Executive Order issued by President Grant, Section 4 of Washington's statehood act, and the Rivers and Harbors Act, 33 U.S.C. §401 *et seq*. The Treaty is set out verbatim in this Brief starting at page App-1. The Executive Order is set out verbatim in this Brief starting at page App-14. The text of the relevant provisions of the Rivers and Harbors Act are set out in Petitioner's Brief starting at App-109.

The relevant part of Section 4 of Washington's statehood act provides:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.
>
> . . . .

> *Sec. 4.* . . . That the people inhabiting said proposed States to agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . .

Washington et al. Statehood Act, Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.

ERRORS IN PETITION FOR CERTIORARI

In accordance with Supreme Court Rule 15(2.), Lummi notes the following misstatements made by Petitioner in her Petition:

1. Petitioner asserts that Lummi is claiming "an unrecognized right to perpetual erosion". *Cert. Petition at 17.* That statement is both incorrect and misleading. Lummi does not claim a "right to erosion". Lummi claims that an adjoining uplands owner cannot unilaterally alter an inherent aspect of Lummi's title: the natural right to an ambulatory boundary.

2. Petitioner states:

> [W]hen an upland owner's property increases through the deposit of alluvion (or reliction), it is not at the expense of the tideland owner. The tidelands simply move (in this case, to the west) from their former location.

Cert. Petition at 17-18. This statement is both misleading and factually incorrect. Offshore currents and other erosive forces may prevent the seaward boundary of the tidelands from moving offshore when the upland accretes. This can cause the area of the tidelands to be diminished on both the landward and the seaward sides when the upland accretes. Moreover, structures such as Petitioner's bulkhead and rock rip rap change the natural dynamics of the beach in many ways that are harmful to the tidelands. Bulkheads and other shore-armoring devices can degrade nearshore habitats that provide food for fish, including salmon. Spawning areas for certain species of fish may be lost due to removal of fine sediments from the intertidal zone. *Lummi App-50 to 53*; *Lummi App-56 to 59*. Shore defense structures can also reduce the amount of shoreline area available for use by fish, shellfish, marine mammals and other marine life, and change the slope of the beach due to the "scouring" effect of bulkheads. *Id.* When the slope of the beach increases, the area of the tidelands is reduced, because tidelands are measured by the intersection of tidal elevations with the slope of the beach. *Id.* The District Court specifically found

that Lummi was losing tidelands as a result of the homeowners' shore defense structures:

> Here, Defendants' shore defense structures do not result in merely incidental injury. Rather, these structures deny the United States and the Lummi Nation land that would otherwise accrue to them through erosion.

Petitioner's App-68.

3. Petitioner states that her bulkhead and rip rap were originally erected on her own land, not in the tidelands. *See, e.g., Cert. Petition at 2, 6.* Although this possibly is true as to the wooden bulkhead, there was conflicting evidence below as to whether Petitioner's rip rap originally was placed above or below the mean high water mark. The District Court did not resolve this question, but simply assumed for purposes of decision that all of Petitioner's structures were originally placed above the mean high water mark, and that erosion of the beach in the area of the rip rap had resulted in some of the rocks being located below mean high water. *Petitioner's App-65.*

4. Petitioner states that mean high water "intersects Homeowners' riprap during some periods and not during others". *Cert. Petition at 6.* Lummi has not been able to find any evidence in the record below that supports this statement. The only evidence in the record on the location of the Petitioner's riprap in relation to mean high water is a 2002 survey submitted by Plaintiffs, which shows that a

portion of Petitioner's rip rap is seaward of mean high water. *ER 231 at page 8.*

5. Petitioner asserts that she was not a member of the Sandy Point homeowner's association that executed the tidelands lease. *Cert. Petition at page 10 n. 4.* Lummi has not been able to find any evidence in the record below to support this statement. Moreover, Petitioner's statement is misleading. Petitioner does not, and cannot, dispute that the tidelands adjacent to her home were included in the 1963 tidelands lease, *Lummi App-29 to 37*,[1] and she admits that she and her predecessor in title erected a seawall and placed rip rap on the beach both during the term of the Lease, and after it expired. *Cert. Petition at 5-6.* Whether Petitioner was a member of the Sandy Point homeowner's association is irrelevant.

6. Petitioner claims that the Court of Appeals "criticize[d] the Homeowners for failing to reach a settlement with the Lummi Nation", and asserts that this criticism was "outrageous". *Cert. Petition at 10.* However, the statements to which Petitioner refers were not critical of Petitioner. At Petitioner's App-28, the Court of Appeals merely pointed out that its ruling on the trespass claim did not necessarily require removal of the shore defense structures, since the Homeowners still had the option of entering into a

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[1] The lease covers tidelands adjacent to Government Lot 1, Section 17, in which Petitioner's vacation home is located. *Lummi App-34.*

new lease with Lummi, and Lummi was willing to accommodate them. At Petitioner's App-44, the Court of Appeals pointed out that it had no choice but to rule on the merits since the parties were unable to reach an agreement. There is nothing outrageous about either of these statements.

STATEMENT OF THE CASE

This case presents no issues meriting review by this Court. The courts below applied well-settled rules governing littoral boundaries and ownership of lands reserved to Indian Tribes to a set of unique facts involving a small Indian Reservation on the coast of Washington state. Petitioner is simply unhappy with a result the law requires her to accept.

A. Overview.

Petitioner is the owner of a waterfront vacation home within the Sandy Point development, located on the Lummi Reservation near Bellingham, Washington. In 1963, a homeowners association leased the tidelands surrounding Sandy Point from the Lummi Nation ("Lummi"). The lease included the tidelands adjacent to Petitioner's vacation home. As required by federal law (25 U.S.C. §415), the lease had a maximum term of 25 years, but the homeowners association was granted an option to renew for an additional 25 years. The lease specifically authorized upland landowners to fill tidelands and erect

bulkheads on the beach to protect their property. The lease also required the landowners to remove those structures if the lease should ever expire without renewal.

During the term of the lease many Sandy Point homeowners erected bulkheads or seawalls and placed large rocks on the beach. Petitioner's predecessor in title erected a wooden bulkhead in 1977. Petitioner purchased her home in 1980. She added rock rip rap seaward of the bulkhead in 1982 and again in 1993. Rip rap consists of irregularly shaped rocks of varying size that are placed in an array in front of a structure or shore bank. Seawater that would otherwise strike the structure or bank first encounters the jumble of rock, which dissipates some of the force of the water by breaking up the waves and allowing the water to flow into the spaces among the rocks.

Over the years, the Sandy Point shoreline has eroded, in part because the structures erected by the Sandy Point owners themselves tend to create a "scouring" action that carries sand away from the beach. It is uncontested that Petitioner's rip rap was, no later than 2002, seaward of the mean high water mark and therefore within Lummi's tidelands.

The tidelands lease expired in 1988, and Lummi's repeated offers to renew it were rejected. In March 1988, the Lummi Nation sent a letter to the Homeowners, informing them (1) that the lease was expiring, and (2) that if they elected not to exercise the

option to renew the lease, any encroaching shore defense structures would have to be removed. Years of fruitless discussion followed, during which time Petitioner reinforced her rip rap by adding additional rock. *Cert. Petition at 6.* In January 2001, the United States sent a letter informing Homeowners that they would be sued if they did not remove their rip rap. When they refused, the United States filed suit in the District Court for the western district of Washington, alleging, *inter alia,* a trespass claim and a violation of the RHA. Lummi intervened as a Plaintiff, to protect its interests in the tidelands.

B. Rulings Below on the Trespass Claim.

Both the District Court and the Court of Appeals ruled in favor of Lummi and the United States on the trespass claim. The Court of Appeals began its analysis by reaffirming that the tidelands adjacent to the Lummi Reservation were reserved to the United States in trust for Lummi:

> Prior quiet title actions make clear that President Grant's executive order was sufficient to prevent ownership from passing to Washington. In ***United States v. Romaine***, the United States sought to quiet title against individuals who had bought Lummi tidelands from the state of Washington. 255 F. 253, 253 (9th Cir. 1919). This court held the president's executive order to be decisive and rejected an argument that the reservation extended only to the high-water mark.

Id. at 259-60. ***Romaine*** noted that when Washington was admitted as a state, it disclaimed any right and title

> to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Id. at 260 (quoting Act of Feb. 22, 1889, ch. 180, §4, 25 Stat. 676, 677). ***United States v. Milner***, 583 F.3d 1174, 1184 (9th Cir. 2009). The Court of Appeals went on to discuss ***United States v. Stotts***, 49 F.2d 619 (W.D.Wa. 1930), which quieted title to the Lummi tidelands in the United States, and ***United States v. Washington,*** 969 F.2d 752, 755-56 (9th Cir. 1992), where the "the state [of Washington] took the position that the Lummi reservation extends to the low-tide line and did not claim the tidelands." ***Milner***, 583 F.3d at 1184. After noting that the state of Washington had expressly declined to claim ownership of the tidelands and intervene in the present case, the Court of Appeals pointed out that *stare decisis* "applies with special force to decisions affecting title to land" and concluded that there was "no reason . . . to overturn 90 years of precedent, especially when the supposed title holder has declined to claim ownership". *Id.* at 1185. The Court of Appeals rejected Petitioner's

argument that the State of Washington acquired ownership of the tidelands at statehood under the "equal footing" doctrine. *Id.* at 1185-86.

After confirming title in the United States, the courts below applied the well-settled rule that the boundary between upland and tideland is ambulatory, moving as the shoreline accretes and erodes. 583 F.3d at 1187. The Court of Appeals pointed out that the right to an ambulatory boundary is a vested property right:

> [B]oth the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Id. at 1188.

The Court of Appeals specifically followed the rule set out in ***County of St. Clair v. Lovingston,*** 90 U.S. 46, 68-69 (1874):

> The riparian right to future alluvion is a vested right. It is an inherent and essential

> attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property.

It is this inherent and essential attribute that Petitioner now asks this Court to change.

The courts below rejected Petitioner's argument that she had somehow "fixed" the ambulatory boundary when she erected her shore defense structures:

> The Homeowners have the right to build on their property and to erect structures to defend against erosion and storm damage, but all property owners are subject to limitations in how they use their property. The Homeowners cannot use their land in a way that would harm the Lummi's interest in the neighboring tidelands. Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation. The Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary

> and prevent accretion benefitting the Homeowners.

Id. at 1189-90. The Court of Appeals also rejected the argument that the "common enemy" doctrine allows an upland owner to "fix" the boundary. 583 F.3d at 1188-89.

Based on the foregoing, the courts below concluded that Petitioner's rock rip rap was encroaching on Lummi's tidelands, 583 F.3d at 1191, and would have to be removed unless Petitioner entered into a new agreement with Lummi.

C. Rulings Below on the Rivers and Harbors Act Claim.

The courts below held that Petitioner had violated the Rivers and Harbors Act by failing to remove her rip rap from the navigable waters of the United States. 583 F.3d at 1191-94. Lummi was not involved in this claim.

D. Petitioner's Appeal.

All of the Homeowner-Defendants except Petitioner have either executed, or are in the process of negotiating, new tideland use agreements with the Lummi Nation. Petitioner alone seeks review by the Supreme Court of the rulings on both the trespass and RHA claims.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Trespass Claim.

One hundred and twenty years ago, this Court held:

> Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

Jefferis v. East Omaha Land Co., 134 U.S. 178, 188 (1890). The Court of Appeals faithfully followed this principle:

> Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume. *See* ***Jefferis v. East Omaha Land Co.***, 134 U.S. 178, 189, 10 S.Ct. 518, 33 L.Ed. 872 (1890); ***California ex rel. State Lands Comm'n v. United States***, 805 F.2d 857, 864 (9th Cir. 1986); ***United States v. Boynton***, 53 F.2d 297, 298 (9th Cir. 1931). The uplands owner loses title in favor of the tideland owner – often the state – when land is lost to the sea by erosion or submergence. The

> converse of this proposition is that the littoral property owner gains when land is gradually added through accretion, the accumulation of deposits, or reliction, the exposure of previously submerged land. *See* ***County of St. Clair [v. Lovingston],*** 90 U.S. at 68-69, 23 Wall. 46; ***Jefferis,*** 134 U.S. at 189, 10 S.Ct. 518; 65 C.J.S. Navigable Waters § 95 (2009). These rules date back to Roman times, and have been noted in Blackstone's Commentaries and many other common law authorities and cases.

583 F.3d at 1187.

Petitioner does not cite any authority holding to the contrary, and cannot dispute that this has been the law for at least 120 years. Instead, she asks this Court to overrule this long-standing precedent and create a new rule that an uplands owner can, by erecting shore defense structures, unilaterally deprive the tideland owner of its vested right to the benefits that may accrue from an ambulatory boundary. For a multitude of reasons, this Court should refuse to entertain Petitioner's request.

A. The Court of Appeals decision is very limited in scope and impact.

Contrary to the cries of alarm and doom that fill Ms. Sharp's Petition, the factual context of this case is unique. The case presents a federal question only because it involves tidelands beneficially owned by an Indian tribe within an established Indian

Reservation. That situation is not even typical of Indian Reservations located in western Washington state. *Compare* ***United States v. Aam,*** 887 F.2d 190, 196-97 (9th Cir. 1989) (tidelands not included in Suquamish reservation) *and* ***Skokomish Tribe v. France***, 320 F.2d 205, 210 (9th Cir. 1963), *cert. denied,* 376 U.S. 943 (1964) (tidelands not included in Skokomish reservation). To the best of Lummi's knowledge, no comparable facts exist in "the entire City of New Orleans, Boston's Back Bay, major portions of San Francisco, San Jose and Seattle" as Petitioner theorizes. *Cert. Petition at 14.*

Contrary to Petitioner's assertion, *Cert. Petition at 12 n. 6,* where tidelands owned by the State or private persons are involved, state law will determine the incidents and consequences of property ownership, including doctrines such as adverse possession that can be used to stabilize titles where fill and bulkheads have been placed in privately owned tidelands or tidelands owned by the State. *See, e.g.,* ***Borax Consolidated Ltd. v. Los Angeles***, 296 U.S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.") As to land where title is held by or derived from the United States, state law will often be borrowed as the rule of decision:

> Controversies governed by federal law do not inevitably require resort to uniform federal rules. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law

> should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand.

California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 283 (1982) (citations omitted). Only in the rare case will local law not govern, and the Court of Appeals decision below therefore will necessarily have very limited application elsewhere.

B. The Court would have to overrule more than 120 years of littoral boundary law and *Wilson v. Omaha Indian Tribe* to grant the relief Petitioner seeks.

Petitioner concedes that ***Wilson v. Omaha Indian Tribe***, 442 U.S. 653, 678 (1979), mandates consideration of state law in real property cases on Indian reservations,[2] and that the Washington Supreme Court has expressly rejected the common enemy doctrine where sea water is involved. ***Grundy v. Thurston County***, 155 Wn.2d 1, 10 (2005).[3]

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[2] In ***Wilson***, the Court held that the local law *(there, the law of Nebraska)* of accretion and avulsion should be considered when deciding whether the Omaha Tribe or the State of Nebraska owned certain riparian land on the Omaha Reservation. The Court reasoned that, although the determination of titles to reservation lands is a matter of federal law, "federal law should incorporate the applicable state property law to resolve the dispute", 442 U.S. at 678, unless an overriding federal interest requires use of a uniform federal rule.

[3] In ***Grundy***, the owner of land on the coast increased the height of a seawall, which in turn caused seawater to surge onto

(Continued on following page)

Nonetheless, Petitioner appears to ask this Court to (1) adopt the common enemy doctrine as a matter of federal common law and (2) apply that new rule here. In order to do so, this Court would have to overrule ***Wilson*** and its progeny, as well as the long line of cases holding that the boundary between upland and tideland is ambulatory.

The Court would also have to contort the logic behind the common enemy doctrine. As the Court of Appeals explained, the "common enemy" doctrine does not fit in the context of littoral boundaries:

> On the one hand, the injury complained of is not the diversion of water onto the tidelands; rather, it is the physical encroachment of the shore defense structures themselves. . . . On the other hand, the rule is inapposite because the water is not acting as a "common enemy" of the parties involved. The tide line is an inherent attribute of the properties at issue, since it dictates where the tidelands end and the uplands begin. That the boundary is ambulatory does not make it a common enemy, since any movement seaward or landward is to the benefit of one party and the detriment of the other.

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a neighbor's land. After the neighbor filed a private nuisance action, the owner asserted a "common enemy" defense, claiming a right to deflect sea water by any means. The Washington Supreme Court rejected the defense, and held that the common enemy doctrine did not apply to seawater. 155 Wn.2d at 10.

583 F.3d at 1189. Where erosion and accretion are natural and normal events that affect property boundaries, the action of the water is neither an "enemy" common to both parcels nor the type of extraordinary event to which the doctrine is applicable. Indeed, the ambulatory boundary can been seen as a "friend" to the property owner who receives the accretion.

C. State law was properly adopted here.

Petitioner does not explain why it was error for the Court of Appeals to adopt state law as the rule of decision; she just asks this Court to establish a different federal rule. However, this Court has already rejected the argument that a uniform federal rule is necessary in cases such as this:

> [W]e perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of State, rather than federal, law. . . . ***We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting State law would adversely affect [federal interests]."***

Wilson, 442 U.S. at 673 *(emphasis added; citation omitted)*. Petitioner has not identified ***any*** federal interests that might be adversely affected by refusing to apply the "common enemy" doctrine to seawater, nor are there any obvious ones.[4]

D. The "common enemy" rule has been rejected by courts around the country.

Petitioner asserts that the Court of Appeals "announced a startling change in the common law" when it refused to apply the "common enemy" doctrine. *Cert. Petition at 15.* That is not true. As the Court of Appeals pointed out, courts all around the country have rejected the "common enemy" doctrine:

> Many jurisdictions have dispensed with the [common enemy] doctrine altogether and instead apply a rule of reasonableness, under which "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." *[String citation omitted.]* While Washington has retained the doctrine, it has modified the rule so that property owners

[4] In ***California ex rel. State Lands Comm'n v. United States***, 457 U.S. 273 (1982), the Court followed ***Wilson***, but concluded that significant federal interests present in that case militated in favor of application of a federal rule that differed from state law. That is not true here.

> must exercise due care by "acting in good faith and avoiding unnecessary damage to the property of others," *[citation omitted]* and by making the rule inapplicable to sea water. *Grundy,* 117 P.3d at 1094. It is far from clear, then, that the common enemy rule, as advocated by Homeowners, is even the dominant view.

583 F.3d at 1189 n. 10.

E. The new rule Petitioner seeks does not fairly balance the equities.

Implicit in Petitioner's request for a new rule of law is the notion that her use of the uplands for a vacation home is more valuable than the uses to which the tidelands may be put. Lummi strongly disagrees, for the reasons stated by the Court of Appeals in its decision below:

> [W]e decline to hold that the use of uplands is inherently more valuable than the use to which tidelands can be put. As was already noted, the tidelands have played an important role in the Lummi's traditional way of life, and in most other areas, the tidelands are held by the state in trust for the public. *See* ***Illinois Central R.R. Co. v. Illinois***, 146 U.S. 387, 436-37, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). These interests are substantial, and the uses they represent are not obviously less productive. *See* ***Shively v. Bowlby***, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331 (1894) ([Lands under tide waters]

> are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.)

583 F.3d at 1188. The uplands and tidelands both have value, and the rule applied by the courts below recognizes that important fact. There is no reason to grant review.

F. The facts do not support Petitioner's argument and do not justify granting the Petition.

Petitioner claims that the Court of Appeals "assume[d] that the property line [between upland and tideland] ignores the existing structure and, instead, permeates it and places the boundary as if the structure had never existed." *Cert. Petition at 16.* However, insofar as Petitioner's rip rap is concerned, this was not an assumption, because Petitioner's rip rap does not, in fact, form a solid barrier against the sea. The rocks are irregularly sized and shaped. There are spaces between them. The tide still flows around them, through the spaces between them, and beyond the rocks themselves. Thus, Petitioner's rip rap does not stop the tide and does not arrest the boundary. The boundary between Petitioner's uplands and Lummi's tidelands remains ambulatory as a matter of fact to this day. Thus, even ***if*** there were some merit to the argument that an impermeable barrier to the sea "fixes" the boundary

line, Petitioner would not be entitled to the benefit of such a rule under the facts of this case.

G. Petitioner can maintain her shore defense structures simply by executing a new tidelands agreement.

Petitioner tries to create the impression that she will lose her vacation home to the sea unless certiorari is granted. However, Lummi has always remained ready and willing to enter into a new tidelands agreement with Petitioner, which would permit Petitioner to maintain and improve her shore defense structures as needed. The sea may eventually take Petitioner's vacation home, but only as a result of natural forces and Petitioner's refusal to take a readily available alternative to protect her own interests to the extent possible.

Petitioner claims that she has "always been willing to pay the tideland owner for the fair market value" of the tidelands she is using, but she couples that assertion with her claim that Washington state is the true tideland owner. *Cert. Petition at 11 n. 5.* In any event, that assertion is not supported by the record below, nor was any evidence introduced below as to what constitutes "fair market value" in this case.

Petitioner seems to think that she is entitled to decide what price Lummi should charge for the use of its property. *Cert. Petition at 10-11.* To the contrary, Lummi is free to charge whatever it deems

reasonable, taking into account the benefit Petitioner derives from her use of the tidelands, the consequent loss of use Lummi will suffer, Lummi's reliance on fisheries, and the adverse effect shore defense structures have on fish habitat. Petitioner's suggestion that Lummi is asking a confiscatory amount of rent is rebutted by the fact that other tideland owners have accepted Lummi's terms. Indeed, resolution of this dispute by agreement would likely promote Petitioner's property values.

The decisions of the courts below on the trespass claim do not present any new or novel questions, are consistent with well-settled law, and have limited application elsewhere. In order to give Petitioner the relief she seeks, this Court would have to overrule 120 years of established precedent, and apply a common law rule that is being widely rejected by the courts. There is no reason to grant certiorari as to the trespass claim.

II. Ownership of the Tidelands.

The courts below concluded that the tidelands within the Lummi Reservation are owned by the United States in trust for Lummi, not by the State of Washington under the "equal footing" doctrine. Petitioner asks this Court to grant certiorari because this ruling was contrary to prior decisions of this Court. *Cert. Petition at 33, 35, 36.* This request should be denied, because Petitioner has failed to demonstrate that the Court of Appeals created new law or

that a conflict exists among the circuits. She argues only that the courts below incorrectly concluded that the equal footing doctrine had been satisfied. That is *per se* insufficient to justify review by this Court.

A. The bases for the Court of Appeals decision.

As a preliminary matter, Petitioner claims that there were three bases for the Court of Appeals decision on the ownership issue, *Cert. Petition at 34,* when in fact there were only two. The Court of Appeals held:

1. The ownership issue has been decided in favor of Lummi and the United States in three prior Ninth Circuit cases, and the doctrine of *stare decisis*, which applies with extra force in the case of issues affecting property titles, militates against revisiting that issue at this late date. 583 F.3d at 1183-1185.

2. Even if the ownership issue were revisited, it would be decided the same way under present "equal footing" caselaw. 583 F.3d at 1185-1186.

Petitioner claims that the Court of Appeals also relied on the fact that the State of Washington was not a party to the proceeding. *Cert. Petition at 35.* That is not true. The Court of Appeals expressly ruled in Petitioner's favor on this point, holding that

Petitioner was free to assert that the State owned the tidelands:[5]

> The United States argues that the Homeowners cannot assert Washington state's title in the tidelands because in a trespass action "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person", and the Homeowners do not claim to be in privity with the state. . . . However, this applies where the plaintiff is the one in possession and, in moving for partial summary judgment on the issue of ownership, the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the tidelands.

583 F.3d at 1183 n. 7.

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[5] By noting this holding, Lummi does not concede that the conclusion by the Court of Appeals was correct. The State of Washington is certainly bound by the quiet title decisions in the prior cases. It is difficult to see how Petitioner's ability to litigate the ownership issue could be greater than the entity she claims to be the owner. Nonetheless, the Court of Appeals did allow Petitioner to argue in favor of state ownership even though the state was not a party to the case and had declined to assert ownership in its own right.

B. The Court of Appeals correctly held that the doctrine of *stare decisis* precludes relitigation of the ownership issue here.

The doctrine of *stare decisis,* which precludes relitigation of issues previously decided, applies with special force in proceedings involving title to land:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it change. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.

Minnesota Mining Co. v. National Mining Co., 70 U.S. 332, 334 (1865).

Here, Petitioner admits, as she must, that there are three prior cases expressly holding that the United States owns the Reservation tidelands in trust for Lummi. *Cert. Petition at 34 n. 15.* In ***United States v. Romaine***, 255 F. 253 (9th Cir. 1919), the Court of Appeals rejected the argument that the State of Washington succeeded to title of tidelands on the perimeter of the Lummi Reservation by virtue of the "equal footing" doctrine, and held that the United States holds title in trust for Lummi. Petitioner attempts to distinguish ***Romaine*** on the grounds that different tidelands, which were expressly reserved in the Treaty of Point Elliot, were at issue there. However, the ***Romaine*** court did not reject the equal footing doctrine as a source of state title on the grounds that the specific lands in question were part of the island reserved in the Treaty. It rejected the equal footing doctrine because the Executive Order reserved all the tidelands described therein from the state for an appropriate public purpose (creation of an Indian Reservation). Additionally, it held that Congress approved the reservation when it required Washington to forever disclaim all right and title to "all lands lying within said limits owned or held by any Indian or Indian tribes" when Washington was admitted to the Union. *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676, cited in* ***Romaine***, 255 F. at 260. ***Romaine*** unquestionably resolved the issue Petitioner attempts to raise here.

United States v. Stotts, 49 F.2d 619 (W.D.Wash. 1930), was the second case to hold that the United

States holds title to the Lummi tidelands. Petitioner claims that ***Stotts*** is inapposite because "it is not clear where the tidelands in that case were located or whether they were reserved by the Executive Order alone." *Cert. Petition at 35 n. 15.* However, the evidence below conclusively proved that the lands at issue were located along Sandy Point, in the portion of the Reservation added by the 1873 Executive Order. *Lummi App-15, 20-21.*

In ***United States v. Washington***, 969 F.2d 752, 753 (9th Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993), the State of Washington conceded that it has no claim to the lands above the low water mark. Petitioner attempts to distinguish this case as well, but even Petitioner cannot dispute that the State of Washington made the concession relied upon by the Court of Appeals.[6]

Given (1) that no less than three prior cases[7] have held that the United States, not the State of

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[6] The State also declined an invitation by the Homeowners to intervene in the present proceeding to assert State title to the tidelands.

[7] Only a year after ***Stotts*** was decided, the Court of Appeals issued a decision in yet another quiet title case involving Lummi Reservation tidelands. In ***United States v. Boynton***, 53 F.2d 297 (9th Cir. 1931), the defendant generally conceded tribal ownership of the tidelands, arguing only that the meander line of the upland surveys was a fixed boundary line, which was not affected by subsequent erosion or accretion. The Court of Appeals rejected that contention, as did the courts in the present case.

Washington, owns the tidelands on the Lummi Reservation, and (2) that the State of Washington accepts that ruling and no longer claims ownership of the tidelands, the Court of Appeals correctly applied the doctrine of *stare decisis.* Petitioner now asks this Court to overturn a ruling that has stood for over 90 years, and upon which the United States, the Lummi Nation, and the State of Washington have relied to conduct their affairs, without giving any reason for the Court to do so. *Stare decisis* cannot be so easily ignored:

> Time and time again, this Court has recognized that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *[Citations omitted.]* Adherence to precedent promotes stability, predictability, and respect for judicial authority. . . . [W]e will not depart from the doctrine of *stare decisis* without some compelling justification.

Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197, 202 (1991). There is no such justification here.

C. The courts below followed *Idaho v. United States* and correctly concluded that the State of Washington did not acquire title to the tidelands at statehood under the "equal footing" doctrine.

Petitioner admits that the Court of Appeals correctly relied on the two-part test from ***Idaho v.***

United States, 533 U.S. 262 (2001), and similar cases, to determine whether the tidelands passed to the State of Washington under the "equal footing" doctrine. *Cert. Petition at 36.* That test is:

> (1) Whether there was an intent to include land under navigable waters *within the federal reservation*, and
>
> (2) If so, whether Congress intended to defeat the future State's *title* to the submerged lands.

533 U.S. at 273 *(emphasis added).*

Petitioner concedes, as she must, that the first part of the test is satisfied: the tidelands were expressly included in the legal description in the Executive Order that created the Lummi Reservation. Petitioner objects only to the rulings on the second part of the ***Idaho*** test. Petitioner's objections are not well-taken.

The Lummi Reservation was created by the Treaty of Point Elliott, *12 Stat. 927.* Congress was aware of the importance of fishing to the Northwest Indians like Lummi, because the Treaty reserved an exclusive right of fishing for the Tribes within the area and boundary waters of their reservations, as well as reserving to the Tribes the right to off-reservation fishing "at all usual and accustomed grounds and stations". ***United States v. Washington***, 384 F. Supp. 312, 332 (W.D. Wa. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). Given the central role of the beaches in tribal

life, the universal dependence of the Lummis on tideland resources, and the fact that many of the allotments authorized by the Treaty would be located away from the beaches, *Lummi App-41 to 47,* Indian ownership and use of the beaches was necessary for the Reservation to be successful. The Treaty set aside all the lands within the Reservation for the Indians' "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands," *12 Stat. 927 at Art. 2.*

Article 7 of the Treaty provided that the "President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to . . . such other suitable place within said Territory as he may deem fit." *12 Stat. 927 at Art. 7.* Congress approved the discretionary power that Article 7 conferred on the President when it ratified the Treaty in 1859. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress." ***Dames & Moore v. Regan***, 453 U.S. 654, 668 (1981).

In 1873, President Grant exercised his delegated power to add the Sandy Point area to the Reservation and to make it plain that the Reservation boundary extended to "the low water mark on the Gulf of Georgia", explicitly encompassing the tidelands at

issue here.[8] *Executive Order, 12 Stat. 928.* If there were no intent to include the tidelands, the description would have run to the high water mark, which is the landward boundary of tidelands. And there was no reason to include tidelands at the edge of the Reservation if there was no intention to reserve those tidelands for the future use of the Indians.

Since President Grant's intent to reserve the Lummi tidelands for the sole benefit of the Indians was "made plain" from the face of the Executive Order, the Executive Order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside . . . submerged lands in the Reserve". *See* ***Alaska v. United States (Arctic Coast),*** 521 U.S. 1, 45 (1997). When the State of Washington was admitted to the Union in 1889, Congress required the State, as a condition of statehood, to disclaim any interest in any lands "owned or held by any Indian or Indian Tribe" until the United States had extinguished the Indians' title. *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.*[9]

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[8] The Executive Order expressly noted that much of the land within the legal description was "a part of the island already set apart by the second article of the treaty". *12 Stat. 928.*

[9] "[The State of Washington shall] forever disclaim all right and title . . . to all lands within said limits owned or held by any Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said

(Continued on following page)

There would have been no reason for Congress to require the new state to disclaim interests in submerged lands on Indian reservations unless Congress intended to continue President Grant's reservation of those tidelands for the benefit of the Tribes.

Petitioner argues that the Court of Appeals made "a radical departure from this Court's jurisprudence" by relying on allegedly "boilerplate"[10] disclaimer language in Washington's statehood act. *Cert. Petition at 36.* However, as Petitioner admits in a footnote, the ***Idaho*** Court relied in part on a similar "boilerplate" disclaimer to find that the United States, not the State of Idaho, owned submerged lands on the Coeur d'Alene reservation in trust for the Coeur d'Alene Tribe. *Cert. Petition at 37 n. 18.* And in ***Arctic Coast,*** the Court considered similarly broad language in a proviso that related to unnamed wildlife refuges: "[provided] [t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife. . . . " 521 U.S. at 55. Petitioner claims that ***Arctic Coast*** supports her position, but does not explain how this generalized reference to "lands withdrawn or otherwise set apart as wildlife refuges" is any more specific

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Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.* Parallel language was included in Washington's Constitution, Art. XXVI, as required by the Enabling Act.

[10] Congress included similar disclaimers in several statutes admitting other states to the Union.

than "lands owned or held by Indians or Indian tribes".

But even if prior decisions of this Court had not given effect to "boilerplate" disclaimers, the federal courts are not free to ignore statutory language simply because Congress has used it frequently. The focus of the inquiry should be on whether the meaning of the language is clear and the application of the language to the situation is certain. While there undoubtedly could be situations where it might be difficult to know whether specific lands were in fact "owned or held by an Indian or Indian tribe" at the time of statehood, this is not such a case. ***Idaho*** and ***Arctic Coast*** control here, and there is no need to grant certiorari to address this issue yet again.

III. The Rivers and Harbors Act Claim.

Lummi did not participate in this claim below, and therefore does not respond to the Petition for Certiorari on this claim, except as to the propriety of the injunction issued by the District Court.

A. There is no conflict among the lower courts on the issue of whether the District Court has discretion to issue an injunction under the Rivers and Harbors Act.

Petitioner claims that the Court of Appeals held that an injunction is "automatic" when the RHA has been violated. *Cert. Petition at 31.* That is not true.

The District Court's issuance of the injunction was clearly an exercise of discretion, and the Court of Appeals held that the District Court did not abuse its discretion. 583 F.3d at 1193-94. The District Court issued the injunction only after considering a number of factors, including the nature of the interest to be protected, the degree and kind of wrong, and the practicability of the remedy. *Petitioner's App-60 to 70.*

Petitioner also argues that the District Court should have balanced the equities before issuing the injunction. *Cert. Petition at 31 to 32.* However, none of the cases cited by Petitioner require the courts to do so before issuing an injunction under §406 of the RHA. ***State of South Carolina ex rel. Maybank v. South Carolina Electric & Gas Co.***, 41 F. Supp. 111, 118-19 (E.D.S.C. 1941), held only that the issuance of an injunction under the RHA is discretionary:

> When section 406 provides that the removal of prohibited structures 'may be enforced by the injunction of any district court' . . . , the Congress intended that . . . the district court . . . should exercise discretion in each instance in determining . . . whether an injunction should be granted. The Congress did not intend that it should be mandatory . . . on the district court to grant an injunction in every suit.

In ***United States v. Bailey***, 467 F. Supp. 925 (E.D.Ark. 1979), the district court exercised its discretion to deny injunctive relief based on inequitable conduct by the United States. Neither case mentions

balancing the equities, and ***United States v. Stoeco Homes, Inc.***, 498 F.2d 597, 611 (3rd Cir. 1974), expressly holds that balancing the equities is not required:

> No balancing of interest or need to show irreparable injury is required when an injunction is sought under §12 [of the RHA] to prevent erection or seek removal of an unlawful structure.

There is no conflict for this Court to resolve.

B. Petitioner left the District Court no choice but to grant injunctive relief.

As noted in the preceding paragraph, Congress intended to give the district courts discretion when it came to issuing injunctions under the RHA. Here, the District Court exercised its discretion to grant injunctive relief requiring Petitioner to remove her encroaching shore defense structures. This exercise of discretion was more than reasonable, given Petitioner's inequitable conduct here. Petitioner placed shore defense structures on Lummi's tidelands during the term of the Lease, or near those lands knowing that the location would soon be overtaken by the ambulatory boundary. She then refused to renew the lease on the grounds that her shore defense structures had unilaterally "fixed" the previously ambulatory boundary in her favor. Lummi could have similarly resorted to self-help and removed the rip rap that is sitting on its lands. Instead, it sought a

court resolution of the matter. Given the importance Petitioner places on being able to maintain her shore defense structures in the tidelands, and the loss of use of, and damage to, the tidelands that Lummi suffers from Petitioner's continued use of the tidelands, and Petitioner's refusal to enter into a use agreement with Lummi, there was no other remedial option open to the District Court.

The decision to grant injunctive relief was consistent with existing law and justified by the circumstances. A grant of certiorari would be neither necessary nor appropriate.

CONCLUSION

Petitioner chose to purchase a vacation home that was improvidently located too close to a shoreline that has been eroding for many years. Both she and her predecessor in title took advantage of the 1963 tidelands lease with Lummi to protect that home with shore defense structures. When that lease expired, Petitioner elected not to renew. Instead, she tried to get the benefit of the tidelands for nothing, claiming that shore defense structures built with Lummi's permission had somehow deprived Lummi of its ownership of the tidelands.

While it is certainly true that Petitioner will be better off if she can use Lummi's property free of charge, the courts below correctly concluded that the law does not allow Petitioner to unilaterally deprive

Lummi of its vested property rights in the tidelands. The solution, which has always been available to Petitioner, is to negotiate an agreement with Lummi for the use of its tidelands.

The issues presented here are unique to tidelands held in trust for tribes within established Indian Reservations. The parade of horribles conjured up by Petitioner and by amicus curiae below are fictional. Since this case presents no national issue on which this Court's resolution or guidance is needed, the Petition for Certiorari should be denied.

Dated: January 10, 2010.

Respectfully submitted,

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