Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 RSM Subproceeding No. 09-01 MAKAH INDIAN TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: AUGUST 31, 2012 ORAL ARGUMENT REQUESTED

The Makah Indian Tribe (Makah) moves for partial summary judgment that: (1) it has standing to seek an adjudication of the location of the Pacific Ocean usual and accustomed fishing places of the Quileute Indian Tribe (Quileute) and the Quinault Indian Nation (Quinault); and (2) in Final Decision # I, the Court's finding that Quileute and Quinault had usual and accustomed fishing places in "adjacent" Pacific Ocean waters did not specifically determine the location of those places (with the exception of certain beaches and river mouths) and did not include waters more than three miles offshore. This motion is based upon the declarations of Russell Svec and Stephen Joner and the records and files herein.

1. Statement of the Case.

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Makah commenced this subproceeding requesting "a determination of the usual and accustomed fishing grounds of [Quileute] and [Quinault] in the Pacific Ocean, to the extent not specifically determined in Final Decision # I." Makah Request for Determination (RFD) at p. 1, ¶ 1 (Dec. 4, 2009) (Dkt. # 1 / 19451). In support of its request, Makah alleged that, in Final Decision # I, the Court determined that Quileute and Quinault had usual and accustomed fishing grounds in the Pacific Ocean, but did not define the precise boundaries of those grounds, and that the Court's decision was limited to waters within the jurisdiction of the State of Washington, *i.e.*, to waters within three miles of shore. *Id*. at p. 2, ¶¶ 3.a.i and ii.

Quileute admitted Makah's allegations that the Court did not define the precise boundaries of Quileute ocean usual and accustomed fishing grounds in Final Decision # I, and that the Court's decision was limited to waters within three miles of shore. Quileute Answer and Affirmative Defenses at p. 2, ¶¶ 3 and 4 (Mar. 16, 2010) (Dkt. # 19562). Quinault admitted that the Court did not define the precise western boundary of Quinault's usual and accustomed ocean fishing grounds and that the Court's decision was limited to waters within the State's jurisdiction. Quinault Answer and Affirmative Defenses at 2, ¶ 3(a)(ii) (Feb. 10, 2010) (Dkt. # 19533). Quileute and Quinault have since reiterated their position that the Court's findings in Final Decision # I were limited to waters within the State's territorial jurisdiction. *See* Quileute Response to Motion for Reconsideration at 3 (Feb. 24, 2012) (Dkt. # 102 / 19982); Quinault Response to Motion for Reconsideration at 5 (Feb. 24, 2012) (Dkt. # 101 / 19981).

Nevertheless, Quileute and Quinault each moved to dismiss Makah's RFD alleging, among other things, that Makah lacked standing. Quileute Motion to Dismiss at pp. 10-17 (June 15, 2010) (Dkt. # 53 / 19617); Quinault Motion to Dismiss at pp. 12-16 (June 15, 2010) (Dkt. #

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51 / 19615). The Court denied both motions. Order on Motions to Dismiss at pp. 1, 5 (Sept. 28, 2011) (Dkt. # 86 / 19835). With respect to Makah's standing, the Court explained:

> Pursuant to both the original Paragraph 25 and the modification, this Court retained jurisdiction to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I." Pursuant to the same provision, **any party** may invoke this Court's jurisdiction to make this determination. This provision sets a fairly low bar for establishing standing, which the Makah have met by asserting that the Quinault or the Quileute may interfere with their exercise of treaty fishing rights in the Pacific whiting, salmon, blackcod, and halibut fisheries.

Id. at 4 (citation omitted; emphasis in original).

The Court also rejected Quinault's assertion that Makah's RFD was barred by laches, finding that Quinault had "not alleged sufficient facts with respect to the delay or the injury they will suffer for the Court to apply this equitable doctrine." *Id*. The Court added, however, that Quinault was wrongly concerned about the need to produce evidence about the location of their ocean fishing places. *Id.* at 4-5. The Court stated:

> The Court views this dispute as one regarding Judge Boldt's use of the term 'adjacent' in both the Quinault and Quileute U&A's. Thus there is a template for this subproceeding in the prior proceedings regarding the Suquamish U&A in the dispute between the Upper Skagit Indian Tribe and the Suquamish Indian Tribe. The Court there determined that the only evidence that would be considered is what was in the record that was before Judge Boldt. Therefore the Quinault need look no further than the record for the evidence that will enable them to respond to the Request for Determination.

Id. (citations omitted).

The Court clarified its ruling in response to a motion for reconsideration filed by three other tribes. *See* Order on Motions for Reconsideration (Mar. 14, 2012) (Dkt. # 104). Those tribes "expressed concern over the statement that '[t]he Court there determined that the only evidence that would be considered is what was in the record that before Judge Boldt.'" *Id*. at 1-2. In response, the Court stated:

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> The Court hereby clarifies that this evidentiary standard applies to proceedings under Paragraph 25(a)(1) of the Permanent Injunction. The Makah Indian Tribe also invoked Paragraph 25(a)(6) of the permanent injunction in the Request for Determination. Dkt. # 1. This section empowers the Court to determine the "location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I (referring to *United States v. Washington*, 384 F. Supp. 312). In such a proceeding it may be necessary to consider additional evidence regarding usual and accustomed fishing area. The Court's prior Order did not properly distinguish between these two standards, and inadvertently omitted Paragraph 25(a)(1) from the conclusion.

Id. at 2. However, while the Court held that Makah had "properly invoked" its jurisdiction under Paragraph 25(a)(1) *and* 25(a)(6), it adhered to its previous view of this subproceeding "as addressing the meaning of the term 'adjacent' as used by Judge Boldt in describing the Quinault and Quileute U&A's." *Id*. Accordingly, the Court stated that the subproceeding "shall proceed under Paragraph 25(a)(1), and evidence shall be limited to the record that was before Judge Boldt." *Id*.

The parties held a Rule 26(f) conference on April 13, 2012, and filed a Joint Status Report and Discovery Plan on May 11, 2012 (Dkt. # 114 / 20023). On the basis of the Court's orders, the parties expressed the belief that "discovery can be limited and the meaning of Judge Boldt's findings can be determined by the Court on motions for summary judgment without an evidentiary hearing, unless there are issues of fact raised by expert testimony." *Id.* at p. 2. However, Quileute and Quinault and the Hoh Indian Tribe (Hoh) also stated they intend to continue challenging Makah's standing to seek an adjudication of their ocean fishing grounds. *Id*. at p. 5. Accordingly, the parties agreed "that initial disclosures and discovery should address the issue of standing and, if it cannot be resolved on motion for summary judgment, the issue will need to be the subject of an evidentiary hearing." *Id*.

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Makah brings this motion for partial summary judgment on its standing and the meaning of Judge Boldt's findings regarding Quileute and Quinault ocean fishing grounds. For the reasons discussed below, both issues can be resolved on the basis of undisputed facts and judgment rendered as a matter of law. As set forth in the Joint Status Report, *id*. at pp. 5-6, it is Makah's position that, if the Court determines that Judge Boldt's findings did not "specifically determine" a western boundary for Quileute and Quinault's ocean fishing grounds or a northern boundary for Quileute's ocean fishing grounds, the Court should hold further proceedings in this subproceeding pursuant to Paragraph 25(a)(6) to make such determinations.

2. **Summary Judgment Standards.**

Under Fed.R.Civ.P. 56(a) and (b), a party claiming relief may move for summary judgment on all or part of the claim at any time until 30 days after the close of all discovery. The judgment sought should be rendered if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In the ordinary case, in evaluating the evidence to determine whether there is a genuine issue of fact, the Court should draw all inferences supported by the evidence in favor of the non-moving party. *E.g., Walls v. Central Contra Costa Transit Authority*, 653 F.3d 963, 966 (9th Cir. 2011). However, in a Paragraph 25(a)(1) proceeding, on motion for summary judgment the Court "may resolve conflicting inferences and evaluate the evidence [before Judge Boldt] to determine Judge Boldt's intent." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 n.9 (9th Cir. 2010).

3. Makah Has Standing to Seek a Determination of the Location of Quileute and Quinault Ocean Usual and Accustomed Fishing Grounds.

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In its Order on Motions to Dismiss, this Court held that Paragraph 25 "sets a fairly low bar for establishing standing [in this subproceeding], which the Makah have met by asserting that the Quinault or the Quileute may interfere with their exercise of treaty fishing rights in the Pacific whiting, salmon, blackcod, and halibut fisheries." Dkt. # 86 / 19835 at 4. At this stage of the proceedings, Makah no longer relies on the allegations in its RFD but submits evidence to establish its standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (elements of standing "must be supported in the same way as any other matter on which the plaintiff has the burden of proof, *i.e* with the manner and degree of evidence required at the successive stages of the litigation").

Although Makah will submit additional evidence in the event of an evidentiary hearing on standing, it believes the following, undisputed facts are sufficient to establish its standing now. As Quileute and Quinault have observed, the critical issue is whether Makah had standing at the time it filed its RFD on December 4, 2009. *See Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) (standing is determined as of the date of filing the complaint); Quileute Motion to Dismiss at p. 11 (Dkt. # 53) (same); Quinault Reply re Motion to Dismiss at p. 12 (Aug. 5, 2010) (Dkt. # 19645) (same).

a. Factual Background Regarding the Pacific Whiting Fishery.

Makah has participated in a treaty fishery for Pacific whiting since 1996. Joner Decl., ¶ 2. In Makah's usual and accustomed grounds the fishery takes place in marine waters about seven to 40 miles offshore, but would take place at least 14 to 20 miles offshore off of the Quileute and Quinault Reservations (with the majority of the catch occurring more than 20 miles offshore). *Id*. As of January 2008, no other tribe had participated in the fishery. *Id*.

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Based on Makah's requests the National Marine Fisheries Service (NMFS) had made annual treaty allocations of Pacific whiting that had been harvested exclusively by Makah. *Id*. Those allocations, of up to 17.5 percent of the U.S. optimum yield level, were the subject of extensive litigation but were ultimately upheld by this Court and the Ninth Circuit. *Id*.[1]

In 2008, both Quileute and Quinault announced their intent to participate in the whiting fishery. *Id*., ¶¶ 7, 10, 17, 20-23, 25, 27. Makah, Quileute and Quinault met on several occasions in May 2008 to discuss the fishery but were unable to agree upon an intertribal management plan. *Id*., ¶ 14. Quileute and Quinault each rejected a proposed plan that would have provided separate harvest guidelines for each tribe, insisting that they were entitled to fish under the *total* treaty allocation. *Id*., ¶¶ 11, 13, 14, 19, 22, 24-26.

Pacific whiting migrate from south to north in the spring. *Id.*, ¶ 3. As a result, Quileute and Quinault could, potentially, harvest whiting before they reach Makah's fishing grounds. *Id*., ¶ 7. To prevent a race for fish with tribes that could harvest the fish first, Makah prepared a lengthy submission to the Pacific Fishery Management Council (PFMC) requesting that separate amounts be set aside for each tribe participating in the fishery. *Id*., ¶ 15.

The PFMC met in June 2008. *Id.*, ¶ 21. Quinault announced it would not enter the fishery until 2010, but Quileute again stated it intended to enter the fishery in 2009. *Id.*, ¶¶ 17, 20. The PFMC recommended that NMFS adopt an overall treaty set-aside for the 2009 fishery, with separate amounts to be managed by Makah and Quileute. *Id*., ¶ 21. In response, Quileute

[1] *See Washington v. Dailey*, 173 F.3d 1158 (9th Cir. 1999); *Midwater Trawlers Cooperative v. United States Department of Commerce*, 139 F.Supp.2d 1136 (W.D. Wash. 2000), *aff'd in part, rev'd in part and remanded*, 282 F.3d 710 (9th Cir. 2002); *United States v. Washington*, 143 F.Supp.2d 1218 (W.D. Wash. 2001); *Midwater Trawlers Cooperative v. United States Department of Commerce*, 2003 WL 24011242 (W.D. Wash. 2003), *aff'd*, 393 F.3d 994 (9th Cir. 2004).

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and Quinault repeatedly objected to any provision for separate management amounts for each tribe, asserting that it amounted to an improper intertribal allocation. *Id*., ¶¶ 22, 24-26.

In March 2009, NMFS adopted the PFMC's recommendation and established separate management amounts for Makah and Quileute in 2009. *Id.*, ¶ 37. NMFS explained that:

> Without clear management targets for each tribe, a race for fish may occur as whiting migrate from south to north, reaching the Quileutes['] usual and accustomed fishing areas (U&A) before they reach the Makah U&A. A race for fish could result in excessive bycatch of overfished species, and the closure of other groundfish fisheries.

Id. However, NMFS informed the tribes that, in the future, it would determine *only* an overall treaty allocation and would not make any intertribal allocation. *Id*., ¶¶ 31, 34, 38. NMFS believed that it would be necessary for the tribes themselves to agree upon an intertribal allocation or other management measures to prevent a race for fish. *Id*., ¶¶ 31, 38.

NMFS also informed the tribes that, in light of Quileute and Quinault's intent to enter the fishery, it was initiating a process to determine the total Indian treaty entitlement in the whiting fishery, a determination that had not been necessary while Makah was the sole participant in the fishery. *Id*., ¶¶ 29, 30. As part of that process, NMFS prepared a technical scientific paper setting forth available information on the distribution of whiting relative to the tribes' usual and accustomed fishing grounds, and Makah engaged an outside consultant and participated in meetings to evaluate and respond to NMFS' paper. *Id*., ¶¶ 43, 45, 46, 52.

For purposes of identifying the location of Quileute and Quinault's usual and accustomed fishing grounds, NMFS' scientific paper relied on the regulatory boundaries NMFS had adopted to accommodate Quileute and Quinault ocean fisheries. *Id*., ¶ 48. Those boundaries had been adopted as an interim accommodation to Quileute and Quinault and did not purport to reflect a determination of their actual usual and accustomed grounds; indeed, when

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they were adopted Quileute and Quinault insisted there was no factual or legal basis for the western boundary adopted by NMFS. *See* United States' Response to Tribal Motions to Dismiss at 3-7 (July 15, 2010) (Dkt. # 58 / 19633) (explaining background and purpose of regulatory boundaries); *see also* Makah Response to Motions to Dismiss (Dkt. No. 59 / 19634) at 32-36 (discussing regulatory boundaries). As alleged by Makah and admitted by Quileute and Quinault, NMFS established the western boundary by simply extending Makah's adjudicated western boundary due south. Makah RFD (Dkt. # 1 / 19451) at pp. 4-5, ¶ 3.b.iv); Quileute Answer (Dkt. # 19562) at p. 3, ¶ 10; Quinault Answer (Dkt. # 19533) at p. 3, ¶ 3(b)(iv). Because of the shape of the coast, the boundary is *40 to 50* miles offshore in the Quileute area and *50 to 60* miles offshore in the Quinault area, *id*., far beyond the admitted three-mile limit of the Court's usual-and-accustomed-grounds findings in Final Decision # I.

Despite initially stating it would have one boat in the 2009 fishery with a projected harvest of 4,000 to 8,000 metric tons (mt), and then stating it would have three or four boats in the 2009 fishery with a projected harvest of up to 24,000 mt, Quileute – without explanation – did not participate in the 2009 fishery. Joner Decl., ¶ 17, 22, 23, 25, 32, 41, 42. However, throughout 2009 both Quileute and Quinault: (1) continued to inform NMFS and Makah that they intended to enter the fishery; (2) corresponded and met with NMFS to discuss their entry into the fishery, the development of tribal management plans for the fishery, and the development of training programs for tribal whiting fishermen; and (3) participated actively in NMFS' process to determine an overall treaty allocation. *Id.*, ¶¶ 35, 36, 41, 45, 46, 47, 49-52, 55. From the beginning, Quileute and Quinault premised their entry into the whiting fishery on the claim that whiting migrate through their usual and accustomed grounds. *Id.*, ¶¶ 11, 18, 27,

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36, 45. In the context of NMFS' efforts to determine an overall treaty share, Quinault specifically requested that NMFS determine the harvestable amount of whiting within Quinault's "Usual and Accustomed harvest area," while Quileute expressed concern that NMFS' approach might underestimate the whiting that migrates through its "U&A in any given year." *Id*., ¶¶ 36, 45.

In providing information to and scheduling meetings with the Tribes, NMFS specifically sought to accommodate Quileute and Quinault's entry into the fishery in 2010. *Id*., ¶¶ 43, 44, 46, 47. At no time in 2009 (or since then) did Quileute or Quinault inform Makah that they had abandoned their plans to enter the whiting fishery or that they were willing to agree to anything but a single, overall tribal allocation. *Id*., ¶ 56.

In sum, by the time Makah filed its RFD in December 2009, Quileute and Quinault each had stated repeatedly that they intended to enter the fishery, had the right to fish on the total treaty allocation, and would not agree to separate management amounts for each tribe. NMFS had made a separate allocation to Quileute for the 2009 fishery, but had informed the tribes that, in the future, it would make only on overall allocation for all of the tribes, leaving the determination of any intertribal allocation to the tribes to work out among themselves. And, relying on its interim regulatory boundaries for Quileute and Quinault fisheries, NMFS had begun a process to determine the overall treaty share for all of the coastal tribes, and was actively meeting with Quileute and Quinault to facilitate their entry into the fishery. Thus, when Makah filed its RFD, Quileute and Quinault's stated intent to enter the fishery had already required Makah to devote its resources to efforts to negotiate an intertribal management plan and to protect its fishery in proceedings before the PFMC and NMFS. Also, as NMFS had

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recognized, Makah would need to devote further efforts to negotiating an intertribal allocation or management plan in order to prevent a race for fish, protect the Makah fishery from prior interception by Quileute and Quinault, and avoid excessive bycatch of overfished species. And, Makah was already engaged in and would need to devote additional resources to participate in NMFS' process to determine an overall treaty allocation, a process that had been triggered by Quileute and Quinault's stated intent to enter the fishery and that was based on interim boundaries for Quileute and Quinault's fishing areas that Makah believed to be erroneous.

b. Factual Background Regarding the Blackcod, Halibut and Treaty Troll Fisheries.

Makah, Quileute and Quinault participate in treaty fisheries for blackcod and halibut and a treaty troll fishery for chinook and coho salmon. Svec Decl., ¶¶ 2, 6, 11. During the five-year period preceding the filing of Makah's RFD (*i.e.*, from 2005 to 2009), Makah, Quileute and Quinault were the only tribes participating consistently in the treaty blackcod fishery (Hoh had small landings in 2005 and 2006, but none thereafter). *Id.*, ¶¶ 2, 5. The fishery takes place in waters from 12 to 40 miles offshore, and is managed under a single quota or set-aside established by NMFS each year. *Id.*, ¶¶ 3, 4.[2] To co-manage the fishery, Makah has entered into a series of management agreements with Quileute and Quinault. *Id.*, ¶ 4. Those agreements allocate a portion of the overall treaty set-aside to each tribe for its own, separately managed fisheries, and a portion to all three tribes for a competitive fishery. *Id.* The amounts allocated to Quileute and Quinault for their own separately managed fisheries, and the amounts

[2] *See also* Subproceeding 89-3-04, Verbatim Report Proceedings at 43 (Dec. 16, 2005) (Dkt. # 28 / 18279) (testimony of Quileute Natural Resources Director that blackcod and halibut "are definitely located outside of the three-mile area, so in order to access . . . that resource, you go outside the three miles generally).

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harvested by Quileute and Quinault in the competitive fishery, reduce the amounts available to Makah for its fishery. *Id*., ¶ 5.

During the same five-year period, Makah, Quileute, Quinault and other tribes participated in the treaty halibut fishery. *Id*., ¶ 6. According to Makah tribal fishermen, the Quileute fishery takes place, at least in part, within the southern portion of Makah's usual and accustomed grounds, in waters about 12 to 20 miles (or farther) offshore. *Id*. The Quinault fishery is likely located at even greater offshore distances. *Id.*[3] The entire treaty halibut fishery is managed under a single quota established by NMFS each year. *Id*., ¶ 7. Makah has engaged in extensive negotiations and litigation with Quileute, Quinault and the other halibut tribes regarding the management of this fishery. *Id*. From 2005 through 2009, 75 percent of the total allocation was apportioned for separate management by (1) Makah, (2) Quileute, (3) Quinault, and (4) the other halibut tribes; the amounts apportioned to and harvested by Quileute and Quinault reduced the amounts available to Makah and the other participating tribes. *Id*., ¶¶ 7, 9.

Makah also participates in a treaty troll fishery for chinook and coho salmon. *Id*., ¶ 11. From 2005 through 2009, Quileute and Quinault were the only other participants in the fishery, although Quileute's landings were very limited in those years. *Id*., ¶¶ 11, 15. The Makah fishery takes places in waters from three to 35 or more miles offshore, and the Quileute and

[3] *See also* Subproceeding 91-1, Decl. of Kris Northcut at 2-3, ¶ 4 (May 20, 2011) (Dkt. # 19753) (declaration of Quileute harvest management biologist that Quileute fishermen must make a "60-mile journey" to access halibut); Subproceeding 91-1, Verbatim Report of Proceedings at 27 (Mar. 7, 2012) (Dkt. # 19991) (argument of counsel for Quinault that "the Quinault as well as the Quileute have to travel a very long distance to their halibut grounds, upwards of 40 miles from the coast"); *id.* at 32 (argument of counsel for Quileute that Quileute halibut fishermen "fish exclusively in the ocean and, as [counsel for Quinault] mentioned, we have a long way to go" and that it costs a lot to "make that long journey").

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Quinault fisheries likely take place at similar distances offshore. *Id.*, ¶ 11.[4] The fishery is managed under annual chinook and coho quotas established by NMFS, and must close when either the chinook or coho quota is reached or on September 15, whichever comes first. *Id.*, ¶ 12. The dual quotas make management of the fishery challenging: if the harvest of either species proceeds too rapidly, the quota for that species can be exhausted before the quota for the other species is fully utilized, but if the fishery is unduly restrained, the opportunity to fully harvest the quotas can be lost. *Id.*, ¶ 13. Makah has requested that Quinault restrain its fishery to help ensure that both quotas can be fully utilized, but it has been unwilling to do so, complicating management of Makah's fisheries. *Id.*, ¶ 14. In addition, because the tribes are fishing on common, overall treaty quotas, any harvests by Quileute and Quinault reduce the amounts available for harvest by Makah. *Id.*

In each of these fisheries – blackcod, halibut and treaty troll – Quileute and Quinault issued regulations in each year from 2005 through 2009 authorizing their members to fish in ocean waters with defined northern and southern boundaries, but with *no* limit on how far west they could fish in the ocean. *Id.*, ¶¶ 3, 6, 11. The regulations thus manifested an intent to fish in waters more than three miles offshore, *i.e.*, in waters in which Quileute and Quinault admit that the Court has not determined their usual and accustomed grounds. And, the northern boundary in the Quileute regulations was well to the north of the northernmost site for which there was any evidence of Quileute ocean fishing in the record before Judge Boldt. *See* note 9 below; Svec Decl., ¶ 16 and Exh. K.

[4] *See also United States v. Washington*, Transcript of Proceedings, Vol. XV at pp. 115-16 / 3505-06 (Sept. 13, 1973) (Dkt. # 416-O) (testimony of Quinault tribal chairman that "great majority" of ocean salmon harvest off the Quinault Reservation and Grays Harbor is more than three miles offshore and that, in 1973, the "fish have been out there 15, 20 miles and even beyond that almost the total summer").

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c. Legal Analysis.

Makah believes the foregoing facts are undisputed and that they establish its standing to seek a determination of the location of Quileute and Quinault fishing places in the Pacific ocean. The elements of standing are discussed in Makah's Response to Quileute and Quinault's Motions to Dismiss (Dkt. # 59 / 19634) at 49-54. Makah must establish that, when it filed its RFD, (1) it had suffered, or faced an imminent threat of, an injury in fact (2) caused by Quileute and Quinault that (3) would be redressed by the Court's determination of the location of their ocean fishing grounds. *See, e.g., Covington v. Jefferson County*, 358 F.3d 626, 637-38 (9th Cir. 2004). The requisite "injury-in-fact" need not be severe; as the Ninth Circuit recently held, an employee's allegation that he had "generalized anxiety and stress" as a result of the theft of a company laptop was sufficient to confer standing. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010). And, "'[e]ven a small probability of injury is sufficient to create a case or controversy – to take a suit out of the category of the hypothetical – provided of course that the relief sought would, if granted, reduce the probability.'" *Massachusetts v. EPA,* 549 U.S. 497, 525 n.23 (2007).

One of the bedrock principles of this case is that a treaty tribe may only exercise off-reservation treaty fishing rights within its usual and accustomed fishing places. *See, e.g., United States v. Washington*, 384 F. Supp. at p. 402, ¶ 25 (exercise of treaty fishing right "limited . . . by the geographical extent of the usual and accustomed fishing places"), p. 407, ¶ 17 (same). As a result, Quileute and Quinault may only participate in the treaty whiting, blackcod, halibut, and ocean troll fisheries for chinook and coho salmon in those Pacific Ocean waters that comprise their usual and accustomed fishing grounds.

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Makah has alleged, and Quileute and Quinault have admitted, that the Court in Final Decision # I did not determine the precise location of their offshore fishing grounds, and that the Court's decision was limited to waters within three miles of the coast. However, the whiting, blackcod and halibut fisheries all take place well beyond the three-mile line, and the ocean troll fishery takes place at least in part beyond that line. Thus, Quileute and Quinault's ability to participate in these fisheries is tied directly to the location of their usual and accustomed fishing grounds more than three miles offshore.

Quileute and Quinault's stated intent to participate in the whiting fishery, and their actual participation in the blackcod, halibut and ocean troll fisheries have real and direct consequences for Makah – requiring Makah to negotiate intertribal management agreements and to co-manage the fisheries with Quileute and Quinault, and reducing the available harvest to Makah to the extent of Quileute and Quinault's participation in those fisheries. These consequences are more concrete and severe than the "generalized anxiety and stress" that was sufficient to establish standing in *Krottner, supra,* and are sufficient to give Makah standing to seek a determination of the location of Quileute and Quinault's ocean fishing places, on which their ability to participate in these fisheries depends.

In the whiting fishery, Quileute and Quinault's stated intent to participate in the fishery required Makah to enter into negotiations with Quileute and Quinault regarding intertribal management of the fishery beginning in 2008 and to participate in a difficult scientific and legal determination regarding the overall treaty share in the fishery beginning in 2009 – a matter that, after protracted litigation, had been settled as long as Makah was the only participant in the fishery. These consequences give Makah a "concrete and particularized" stake in Quileute and

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Quinault's intended participation in the fishery and, therefore, in the location of their ocean fishing places, that is sufficient to confer Article III standing. *E.g. Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81, 183 (2000). Moreover, because whiting migrate from south to north in the spring, Quileute and Quinault's stated intent to enter the fishery posed a credible threat to Makah harvests, which is also sufficient to establish Makah's standing. *See Krottner*, 628 F.3d at 1143 (credible threat of harm that is both real and immediate and not conjectural or hypothetical is sufficient to meet injury-in-fact requirement for standing).

In the blackcod and ocean troll fisheries, Quileute, Quinault and Makah were the only tribal participants in the three years preceding the filing of Makah's RFD, so amounts allocated to and/or harvested by Quileute and Quinault had a direct and immediate effect on the harvests available to Makah. In the halibut fishery, amounts apportioned to and harvested by Quileute and Quinault reduced the amounts available to Makah and other tribes. In all of these fisheries, Quileute and Quinault's participation required intertribal co-management and necessitated the negotiation of intertribal management agreements. In all of these respects Quileute and Quinault's participation in these fisheries caused "injury in fact" to Makah, giving it standing to seek a determination of the ocean fishing places on which their participation in these fisheries depends.

As noted above, in its order denying Quileute and Quinault's motions to dismiss, this Court held Paragraph 25 "sets a fairly low bar for establishing standing, which the Makah have met by asserting that the Quinault or the Quileute may interfere with their exercise of treaty fishing rights in the Pacific whiting, salmon, blackcod, and halibut fisheries." Order on Motions

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to Dismiss at 4 (Dkt. # 86 / 19835). The facts of this case illustrate why this is so, and why standing has *never been raised* as a defense in prior U&A disputes. Because the Stevens treaties give the tribes a collective right to harvest up to 50% of the available harvest of each stock of fish that pass through one or more tribal usual and accustomed fishing areas, *see, e.g., Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685 (1979), each of the tribes has a direct and significant interest in ensuring that other tribes fishing on the same stocks of fish are doing so *within* their usual and accustomed fishing grounds. No tribe should be required to co-manage its fisheries, enter into intertribal management agreements, and suffer reductions in the harvest available to it as a result of fishing by another tribe *outside* of its usual and accustomed fishing grounds. *Cf. United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 431 (9th Cir. 2000) (district court properly exercised jurisdiction to determine usual and accustomed grounds in those areas where Muckleshoot "manifested an intent to" fish).

4. In Final Decision # I, the Court Did Not Specifically Determine the Location of Quileute and Quinault Ocean Usual and Accustomed Fishing Grounds, and Did Not Determine Whether or to What Extent Quileute and Quinault Had Such Grounds More than Three Miles Offshore.

a. The Court's Findings.

In Final Decision # I, the Court made the following findings regarding Quileute and Quinault usual and accustomed fishing places:

> 108. Before, during and after treaty times, the usual and accustomed fishing places of the Quileute and Hoh Indians included the Hoh River from the mouth to its uppermost reaches, its tributary creeks, the Quileute River and its tributary creeks, Dickey River, Soleduck River, Bogachiel River, Calawah River, Lake Dickey, Pleasant Lake, Lake Ozette, *and the adjacent tidewater and saltwater areas*. In aboriginal times the Quileute Indians utilized fishing weirs where salmon were caught along the Quillayute River. In 1861 James G. Swan encountered fish weirs about a mile up from the bend of the Quillayute River near its mouth and about a mile further upstream. *Along the adjacent Pacific Coast Quileutes caught smelt, bass, puggy, codfish, halibut,*

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> *flatfish, bullheads, devilfish shark, herring, sardines, sturgeons, seal, sea lion, porpoise and whale*. [FPTO §§ 3-78, 3-83, 3-84; Exs. USA-20, pp. 31-32; USA-22, pp. 11-21, 25-29; USA-31e, pp. 218-232; USA-53, App. I]
>
> 120. The usual and accustomed fishing places of the Quinault people within the case area at treaty time included the following rivers and streams: Clearwater, Queets, Salmon, Quinault (including Lake Quinault and the Upper Quinault tributaries), Raft, Moclips, Copalis, and Joe Creek. *Ocean fisheries were utilized in the waters adjacent to their territory.* [Ex. USA-53, p. 24 and App. 1; USA-31e, pp. 205-214, 233-235A]
>
> 121. The Quinault also have important fisheries which were shared with other tribes to the south and east of the boundaries of the case area, especially Grays Harbor and those streams which empty into Grays Harbor. [Ex. USA-53, p. 24 and App. 1 and 2; Tr. 2817, *l* 3 to 2818, *l* 19]

384 F. Supp. at 372, 374-75 (emphasis added).

These findings made it clear that Quileute and Quinault had usual and accustomed fishing grounds in specifically defined inland waters and in "adjacent" ocean waters, but did not purport to determine the location or distance offshore of the ocean fishing grounds. A contemporaneous dictionary defines the term "adjacent" in relevant part as "**1 a:** not distant: NEARBY <the city and ~ suburbs> **b:** having a common border <~ lots>." Webster's New Collegiate Dictionary (G. & C. Merriam Co. 1973-77). In using the term "adjacent," Judge Boldt indicated that Quileute and Quinault ocean fisheries were near (or not distant from) their inland fisheries, but did not determine *how* near (or far).

Where Judge Boldt intended to determine specifically the location of offshore fishing grounds, he did so explicitly. As the Ninth Circuit has observed, "Judge Boldt used specific geographic anchor points in describing other tribes' U&As. . . . From this it is reasonable to infer that when he intended to include an area, it was specifically named in the U&A." *Upper Skagit*, 590 F.3d at 1025. This was true in the ocean as well as in Puget Sound. In describing Makah fishing places, Judge Boldt stated they extended "out in the ocean to an area known as

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Swiftsure." 384 F. Supp. at 364 (FF 65).[5] The absence of any similar "geographic anchor point[]" in Judge Boldt's descriptions of Quileute and Quinault's ocean fishing places indicates he did not intend to specifically determine their location or distance offshore.

Moreover, the Court's reference to ocean places in the Quileute and Quinault findings should be read in light of the geographic limits of the case area at the time the Court issued Final Decision # I. The very first paragraph of the Court's decision stated that "[t]he case area is *that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area*, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, *and the offshore waters adjacent to those areas*." *Id*. at 328 (emphasis added). This description limits the case area to a portion of the State of Washington, including certain offshore waters *within* the State. The Court made this clear in Conclusion of Law # 7:

> This case is limited to the claimed treaty-secured off-reservation fishing rights of the Plaintiff tribes as they apply to areas of the Western District of Washington within the watersheds of Puget Sound and the Olympic Peninsula north of Grays Harbor, and *in the adjacent offshore waters which are within the jurisdiction of the State of Washington*. The subject matter of this case is limited to the application of those rights to the anadromous fish which are in the waters described, including such fish as are native to other areas.

Id. at p. 400, ¶ 7 (emphasis added).[6]

The "adjacent offshore waters which [were] within the jurisdiction of the State of Washington" were those within three miles of shore. *See* 384 F. Supp. at p. 386, ¶ 185 (finding

[5] The Court later made a more specific determination of the location of Makah's offshore fishing grounds, defining them by latitude and longitude, in a separate proceeding focused on Makah ocean places. *See United States v. Washington*, 626 F. Supp. 1405, 1467-68 (W.D. Wash. 1982) (FF 346), *aff'd*, 730 F.2d 1318 (9th Cir. 1984).

[6] The Court has since relaxed both the geographic and species limitations set forth in Final Decision # I. *See* Makah Response to Motions to Dismiss at 10-16 (Dkt. # 59 /19634).

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State could not completely control ocean harvest of chinook and coho "because most of these fish are caught in waters beyond *the state's jurisdictional three-mile limit*") (emphasis added); p. 390, ¶ 204 (finding State had authority to impose limitations on salmon fishing "within the three-mile limit"); *see also* Exhibit JX-2a (Joint Biological Statement) at p. 100, § 2.12 ("Each State has jurisdiction to manage and control fisheries in its territorial waters, which extend for three miles into the Pacific Ocean (43 U.S.C. §§ 1301 – 1315).").

Since the case area extended only three miles offshore, it can be inferred that Judge Boldt's findings only encompassed waters within three miles offshore. Indeed, the Court's findings regarding Quinault fishing grounds show that, when the Court intended to make a finding regarding a tribe's usual and accustomed grounds outside the case area, it did so explicitly. In Finding of Fact 120, the Court described the "usual and accustomed fishing places of the Quinault people *within the case area*," while in Finding of Fact 121 it described additional fisheries Quinault shared with other tribes "to the south and east of the boundaries of the case area." 384 F. Supp. at 374-75 (emphasis added). In contrast to Finding of Fact 121, nothing in Finding of Fact 108, describing Quileute fishing grounds, or Finding of Fact 120, describing Quinault fishing grounds, suggests the Court intended to make a finding regarding grounds outside of the case area.

b. The Evidence Cited by the Court.

This reading of the Court's findings is supported by a review of the evidence before the Court. The focus of the inquiry is on the specific evidence cited by the Court in its findings. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 450-51 (9th Cir. 2000) (district court did not err in relying on specific evidence cited by Judge Boldt and not considering other evidence

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that had been presented to Judge Boldt); *Muckleshoot*, 235 F.3d at 434 ("most relevant evidence" in determining meaning of Judge Boldt's finding consists of the documents referenced in the finding). Here, with the exception of certain sites at the mouths of rivers and certain beaches, none of the evidence cited by the Court identified the location of Quileute or Quinault offshore fishing grounds, and none refers to fishing more than three miles offshore.

The Court cited three sections from the Final Pretrial Order (FPTO) and portions of Exhibits USA-20, USA-22, USA-31e and USA-53 in its Quileute finding (No. 108) and portions of Exhibits USA-53 and USA-31e in its Quinault finding (No. 120). 384 F. Supp. at 372, 374. We attach copies of these items as Exhibits A – E hereto.

i. Quileute.

The first section of the FPTO cited by the Court (§ 3-78) discusses an August 1, 1861, exploratory trip by James Swan "up the Quillayute River." Exh. A at 44. In addition to describing in-river fishing, Swan stated "there was at the mouth of the river 'the greatest abundance of smelts I have ever seen, and plenty of tom cod, just like those taken in Boston harbor.' The Indians took the smelt by means of large hand nets." *Id.* at 45. This section does not mention fishing in the ocean beyond "the mouth of the river," much less fishing more than three miles offshore.

The other sections of the FPTO cited by the Court (§§ 3-83 and 3-84) contain language nearly identical to that in the Court's finding, *see* Exh. A at 46, "and [are], therefore, not very helpful" in interpreting the finding. *See Muckleshoot*, 235 F.3d at 434. Like the Court's finding, neither section identifies the distance offshore of Quileute fishing grounds or refers to fishing more than three miles offshore. *See* Exh. A at 46.

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Exhibit USA-20 was Dr. Barbara Lane's summary report. On the pages cited by the Court (pages 31-32), she stated that "[t]he principal fisheries of the Quil-leh-ute were Ozette Lake, Lake Dickey, the Dickey River, Quileute River, Hoh River, and their tributaries, as well as the saltwater adjacent to their territory." Exh. B at 31-32. On page 32 Dr. Lane stated that "[t]he principal fisheries of the Hoh branch of the Quileute were on the Hoh River from its upper reaches to its mouth and on the tributaries thereto. The saltwater fisheries were in the area adjacent to Hoh territory." *Id.* at 32.[7] In addition, she stated:

> The Hoh were primarily dependent on salmon for their staple food. Although they had a summer troll fishery in the coastal water, they relied on the fall runs in the river for their winter stores. The upriver fisheries were of strategic importance. The bulk of the fall salmon were taken by means of weirs set in the river.

Id. In these passages Dr. Lane did not specify ocean locations or identify the distance offshore at which Quileute or Hoh ocean fisheries took place.

Exhibit USA-22 was Dr. Lane's "Anthropological Report on the Identity, Treaty Status and Fisheries of the Quileute and Hoh Indians." *See* Exh. C. In Finding 108, the Court cited pages 11-21 and 25-29 in this report. From pages 11 to 14, Dr. Lane discusses fisheries on the Quileute River, Quileute reliance on fish as a food staple, and the manner in which the Quileute prepared salmon and steelhead. The first and most extensive reference to ocean fishing is found in the following passage on pages 14:

> Frachtenberg (MS. Q1. 3:57) records an account of Quileute fishing given September 1, 1916, by Arthur Howeattle.

[7] We discuss evidence regarding Hoh usual and accustomed grounds given Quileute's contention that its usual and accustomed grounds are co-extensive with Hoh's, *see* Joint Status Report (Dkt. # 114 / 20023) at 3, but take no position on that issue at this time. For evidence to the contrary, *see, e.g.*, Exh. USA-22 (Exh. C hereto) at 29 (statement of Mary Ward, wife of Sextas Ward, that "the Hoh Indians were a separate tribe of Indians from the Quileute" and that Quileute and Hoh "recognized each other[']s fishing places, that is, the Quileutes would not interfere with those owned by the Hohs and the Hohs would not interfere with those of the Quiluete").

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> Quiluetes used to fish in rivers, lakes and ocean. In the river they caught salmon, trout, flounder, suckers; in the lakes they caught xaca°a ɬ (like a sucker, but broad mouth) lo°otɬ'oɬ (like xaca°a ɬ but larger); in the ocean they fished for smelt, bass, puggy, cod-fish (rock, red, ling-cod), halibut, flatfish, bullheads, devil-fish, shark, herring, sardines, sturgeon, seal, sea-lion, porpoise, and whale.
>
> Fishing grounds in river were the property of individual families; those in lakes and ocean common property. . .
>
> Most of the fishing was done in the river and the best seasons were spring (March, April and May) and fall (August, September and October). . . . .

This passage is the apparent source for the list of ocean fisheries in Finding 108, but does not indicate the location of these fisheries or how far offshore they took place, and Dr. Lane herself did not address those issues. Instead, she followed this passage with a discussion of fishing gear used on the Quileute and Hoh river systems and ritual precautions taken to assure continued salmon runs, referring in passing to Swan's discussion of "the Quileute surf-smelt fishery." *Id*. at 15-16.

At pages 16-17, Dr. Lane's report contains the following discussion under the heading "USUAL AND ACCUSTOMED FISHING SITES":

> Some usual and accustomed fishing sites have been mentioned in the historical data presented earlier in this report. A full discussion of such sites is not included herewith because that information has been provided in detail in Indian Claims Commission Docket #155. Fishing sites on the Quileute and Hoh river systems have been plotted on maps and described in accompanying tables entered as Plaintiff's Exhibit 72-74. Additional information on traditional fishing sites is provided in Appendix I of this report, which contains the depositions of Sextas Ward and Benjamin Harrison Sailto, taken at La Push, Quileute Reservation, October 15, 1941.

To the extent the historical data in Dr. Lane's report addressed usual and accustomed fishing sites, they did so with respect to sites on the Quileute and Hoh river systems (including the mouth of the Quileute River), *see* Exh. C at 11-13, but did not address offshore sites or the distance offshore at which the Quileutes fished. As discussed below, Plaintiff's Exhibit 73 in

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Indian Claims Commission (ICC) Docket # 155 (the only ICC exhibit attached to Dr. Lane's reports and the only one referenced by Judge Boldt in his findings) and the Ward and Sailto depositions shed additional light on Quileute ocean fisheries, but do not identify the locations of those fisheries or the distance offshore at which they took place, and contain no reference to fishing more than three miles offshore.

On page 17 of her report, Dr. Lane presented several conclusions, including the following:

> 3. The principal fisheries of these people [the people who lived on the Quileute and Hoh river systems in 1855] included the Hoh River from its mouth to the uppermost reaches, as well as the numerous tributary creeks; the Quileute River and the rivers tributary to it, Dickey River, Bogachiel River, Calawah River, and numerous other tributary streams and creeks. Additional fisheries were located in the lakes of the area, such as Lake Ozette and Lake Dickey, Pleasant Lake and others. Further, important fisheries existed in the tidewaters and adjacent saltwater.

Again, Dr. Lane did not specify the location or distance offshore at which fisheries in the "adjacent saltwater" took place, and did not assert that they occurred more than three miles from shore.

At pages 18-21 of her report, Dr. Lane reproduced the transcript of Benjamin Harrison Sailto's October 15, 1941, deposition. According to the transcript, Mr. Sailto was a member of the Quileute Tribe who was about 88 years old at the time of his deposition, indicating he was born around 1853. His deposition contains the following references to fishing, sealing and whaling in the ocean:

> Says that La Push was the principal village of the Quileute although a lot of them lived along the various rivers. . . . The smelt were caught in the ocean along the beach in front of the village of La Push but some were also caught north of the river on the ocean and also south of the ocean [*sic*] down as far as the country of the HOH Indians.

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> When they were fishing away from the permanent villages they erected temporary houses in which they dried the fish and clams that they found at various spots along the beaches. . . .
>
> Most of the villages were permanent but at certain times of the year, when the weather was good, the Indians would visit the Indians living at the lower villages. When they went down to these other places, they would trade the things they had for what the people at those places had to offer them. In this way they obtained a supply of whale oil which the people who live up the river could not get. . . .
>
> First saw white man when I was about 25 years old, which was before I was married. . . . After I was married I used to hunt for seals. The Indians would catch seals by spearing them from their canoes which was the same way they hunted whales in the ocean.

These passages refer to catching smelt "in the ocean along the beach" in front of La Push and to the north and south of the Quileute River, and to drying fish and clams "found at various spots along the beaches," but do not discuss offshore fisheries or the distance at which they took place. They also refer to sealing, in which Mr. Sailto engaged beginning sometime after 1875 (after he was married), and to whaling in the ocean, but do not identify the location of or state how far offshore the Quileutes went in these pursuits.[8]

At pages 25-29 of her report, Dr. Lane reproduced the transcript of Sextus Ward's October 15, 1941, deposition. Mr. Ward was about 90 years old at the time, indicating he was born around 1850. His deposition contains the following references to fishing, sealing and whaling in the ocean:

> The Indians lived at these various villages all the year round except when they came to the main Quileute Village at La Push for a change. I used to come with my parents when I was a child but after I grew up I would leave home to come down to the beach at La Push to hunt seals and whales. . . .

[8] It is important to note that evidence of whaling and sealing cannot, in any event, support a finding of usual and accustomed *fishing* grounds. *See United States v. Washington*, 626 F. Supp. at 1467 (FF 345), *aff'd*, 730 F.2d at 1318.

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> The Indians that lived at SHU-A-WAH [Mr. Ward's permanent home, on the headwater of the Sol Duck River] obtained the principal part of their food supply at a fish trap located near the village. They did not find it necessary to go elsewhere for fish because they caught plenty of fish in this trap. They did, however, come down to the beach along the ocean to catch smelt and dry them so that they could take them back to their village to be used as a change of food. The smelt were caught in front of the Indian Village of La Push.
>
> They also caught seals out in the ocean, using the village of La Push as their headquarters. . . .
>
> When I was a boy there were no white people here. The Indians who lived along the ocean did not have as much fish as those who lived in the villages upstream and, therefore, they would exchange dried whale, clam, and seal meat for dried fish. . . .
>
> The Indians who lived at these two places [on the river] used to come down to the village of La Push on the beach for the purpose of going whale hunting and catching smelts. . . .

These passages again refer to coming "down to the beach along the ocean to catch smelt," state that smelt were caught "in front of the Indian Village of La Push," and refer to "coming down to the village of La Push on the beach for the purpose of going whale hunting and catching smelts." Mr. Ward also referred to "catching seals out in the ocean." He did not mention any offshore fisheries and did not indicate where or how far offshore the Quileutes went in hunting whales and seals.

The Court next cited Exhibit USA-31e, pages 218-32. This exhibit contains 1942 affidavits of Mr. Sailto, Mr. Ward and others, apparently based on their 1941 depositions. *See* Exh. D. The information regarding fishing, sealing and whaling in the ocean is very similar to that presented in the depositions; for example, in his affidavit Mr. Ward states that, at certain times of the year, the Indians living in villages along the rivers:

> would visit the Indians at other places or else come down to the main village at LaPush for festivities and to obtain a supply of the different kinds of fish food which they could not obtain at their own fishing places; that when they visited these other places they

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> traded some of the fish they caught for the things that the people had at the places they were visiting; that they would catch smelt in the ocean along the beach in front of La Push as well as far south as the country occupied by the Hoh Indians; that in addition to smelt the Indians who lived at La Push would also catch whales and seals in the ocean[.]

Id. at 225. Like the 1941 deposition transcripts reproduced in Dr. Lane's report, the affidavits in Exh. USA-31e do not discuss offshore fisheries or identify the distance offshore at which the Quileutes hunted whales or seals.

Finally, the Court cited Exh. USA-53, App. I, in support of Finding 108. Exhibit USA-53 was Dr. Lane's report on "The Identity, Treaty Status, and Fisheries of the Quinault Tribe of Indians." *See* Exh. E. There is no Appendix "I", but Appendix 1 consists of (1) "Petitioner's Exhibit 73" in ICC Dockets 155 and 242, a map depicting Quileute, Hoh, Queets and Quinault village sites and fish traps; and (2) two documents marked as Petitioners' Exhibit No. 73(a) in the same ICC Dockets, one entitled "Description of Quinault Villages Shown on Pet. Ex. 73," and the other "Description of Quileute Villages Shown on Petitioners' Exhibit 73." As noted above, Dr. Lane stated in her report on the Quileute and Hoh:

> A full discussion of [usual and accustomed fishing] sites is not included herewith because that information has been provided in detail in Indian Claims Commission Docket #155. Fishing sites on the Quileute and Hoh river systems have been plotted on maps and described in accompanying tables entered as Plaintiff's Exhibit 72-74.

Exh. C at 16-17.

Exhibit 73 – the map of village sites and fish traps – identifies fourteen Quileute and Hoh sites on the Pacific Coast. The descriptions of these sites in the second document marked Exhibit 73(a) contain references that characterize five of the coastal sites as whaling stations (Nos. 4, 6, 8, 9, and 46). Site No. 7 is characterized as a sea fishing station, while No. 5 is described as a place where "residents fished along the shore during the summer." Two sites,

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Nos. 8 and 9, are described as villages where "bottom fishing" took place, as well as having been used to obtain "other seafood." Hair seal hunting is mentioned in the description of site No. 5, while site No. 47 is linked to "sea hunting." One site, No. 10, is described as a "fishing village." Five of the coastal locations, Nos. 13, 44, 45, 48, and 49, have no stated food procurement association.[9]

It is reasonable to infer that Dr. Lane's conclusion and the Court's finding that the Quileute had usual and accustomed fishing grounds in "adjacent" saltwater had reference to saltwater adjacent to the various coastal sites from which the Quileute engaged in "sea fishing," "bottom fishing" and the like. This exhibit thus appears to identify sites to which Quileute ocean fishing places were "adjacent," but does not provide any evidence of the direction or distance from these coastal sites at which such places were located. Put another way, neither the map labeled Petitioner's Exhibit 73 nor the description of the sites in Petitioners' Exhibit 73(a) indicate where or how far the Quileutes travelled from these sites in the pursuit of ocean fisheries, and neither provides any evidence of fishing more than three miles offshore.

In sum, the evidence cited by the Court in Finding 108 confirms its apparent meaning. The Court found that the Quileute had usual and accustomed fishing grounds in "adjacent" saltwater, but did not purport to specifically determine the location of those grounds or find that

[9] As described in Exhibit 73a, the northernmost Quileute coastal site (No. 4), was located at "the site of present Swedish Memorial, on the coast opposite the lower end of Lake Ozette," and was "a small settlement used as a whaling station and also as an intermediate point in the travel of parties from locations on the Quillayute River to the Ozette Lake fishing villages." *See also* Exh. C hereto at 29 ("when the Indians went up to Ozette Lake to fish they went up in the ocean in their big canoes to a point where the lake was closest to the ocean and . . . from there to the lake they would carry their belongings"). Moving south, the next coastal site (No. 5) was "a site from which the residents fished along the shore during the summer season" and "an important hair sealing station," where permanent houses were located. Still farther south, Site No. 6 was a "whaling village about one mile southeast of Jagged Island," while Site No. 7 was a "sea fishing village about one mile north of Cape Johnson." The latter is the northernmost site associated with offshore fishing in Exhibit 73a. However, Quileute's fishing regulations authorize fishing in ocean waters that lie well north of *all* of these sites. *See* Svec Decl., ¶ 16 and Exh K.

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they extended beyond the three-mile limit of the case area. The Court could not have done so because, with the limited exception of certain beaches and river mouths, the evidence simply did not address these matters.

ii. Quinault.

In its Quinault finding (No. 120), the Court first cited Exhibit USA-53, page 24. As noted above, this exhibit was Dr. Lane's report on the Quinault and is attached hereto as Exhibit E. On page 24 Dr. Lane provided the following conclusions regarding Quinault fishing places:

> The principal fisheries of these people included the following rivers and streams: Clearwater, Queets, Salmon, Quinault (including the lake and upper tributaries), Moclips, Copalis, and Joe Creek. The Quinault also shared fisheries in Gray's Harbor and some of the streams draining into it. Ocean fisheries were utilized in the waters adjacent to their territory.

In this passage, Dr. Lane did not identify what fisheries took place in the ocean, specify their location, or state how far offshore they occurred. The only other reference to ocean fisheries in her report is found in the following passages (which were not cited by the Court):

> In their whaling, surf smelting and other ocean fisheries, the Quinault used the waters adjacent to their territory, primarily from the Queets River area south to Gray's Harbor.
>
> While the foregoing [we have omitted Dr. Lane's extensive description of inland fishing areas] reflect the major fishing areas utilized by the Quinault at treaty times, the list is not necessarily complete, nor does it pretend to be exhaustive. More detailed information on fishing sites is included in Appendix 1 and Appendix 2. Detailed descriptions of gear are provided in Appendix 3.

Id. at 23. Although these passages provide some additional information regarding Quinault ocean fisheries, with the exception of "surf smelting" they (1) do not identify those fisheries, and (2) provide no information regarding the regularity or distance offshore at which these fisheries took place. Moreover, as noted, they were not cited by the Court in support of its finding.

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The Court also cited Appendix 1 to Dr. Lane's report, one of the appendices she said included more detailed information on Quinault fishing sites. As discussed above, Appendix 1 consists of Petitioners' Exhibits 73 and 73a from ICC Dockets 155 and 242. The description of Quinault villages in the first document marked Petitioners' Exhibit 73a (at pp. 3-4) identifies a site along the coast that were used to harvest razor clams and mussels (No. 43), two sites where the Indians fished for silver salmon (No. 44, at the former mouth of the Moclips River, where the fish were taken principally by spearing, and No. 46a, "a village favored for silver salmon fishing"), sites "for clamming and surf fishing" (Nos. 45 and 46), a "[s]ea fishing and clamming site" (No. 47), "the most important clam-digging base of the Quinault" (No. 48), and a "fishing camp on an island in Grays Harbor" (No. 49). These descriptions do not indicate whether fishing for silver salmon took place in the ocean or at the mouths of rivers, and do not indicate where or how far offshore the Indians traveled for "sea fishing."

The Court did not cite Appendix 3 to Dr. Lane's report – excerpts from a Quinault ethnology by Ronald Olson – but it contains additional information regarding Quinault ocean fisheries. At pages 36-38, Olson states: smelt and candlefish "were taken in the surf on the beach"; halibut, cod, rock cod, sea bass, and sole were caught with hook and line and "could be taken anywhere along the coast within six miles of shore" (but only from June to September because calm weather was essential); flounders "might be taken in the ocean in the same way, but more frequently they were caught in the lower miles of the river; and herring "were taken anywhere within a mile of the beach." This passage might have supported a finding that the Quinault fished up to six miles offshore, but that figure is not mentioned in the Court's finding and, as noted, the Court did not cite this passage (or any part of Appendix 3) in its finding. It is

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also important to note that Olson's statement that certain species "*could* be taken anywhere along the coast within six miles" did not indicate whether those fish were in fact taken at such distances or how often they were taken. *See Muckleshoot*, 235 F.3d at 434-35 (evidence must establish "regularity" of fishing activities).

The portions of Exhibit USA-31e cited by the Court (pages 205-214 and 233-235A) contain a joint 1942 affidavit of Johnny Shale and Jack Sam and a 1941 report on Quinault usual and accustomed fishing grounds (the latter is also reproduced in Appendix 2 to Dr. Lane's report; it is the other Appendix Dr. Lane identified as providing more detailed information on fishing sites). *See* Exh. D hereto. The Shale and Sam affidavit mentions that the Queets Indians (a band affiliated with Quinault) caught smelt in the Pacific Ocean at a place now called Brown's Point, but does not otherwise mention ocean fisheries. *Id.* at 205-214. The report on Quinault usual and accustomed fishing grounds addresses inland fishing places and contains no reference to ocean fisheries. *Id*. at 233-235A.

In sum, the evidence cited by the Court in support of its finding that Quinault utilized ocean fisheries in waters adjacent to their territory identified two sites utilized for silver salmon fishing, but did not indicate whether such fishing occurred at river mouths or out in the ocean, and a single site that was used for "sea fishing," but did not indicate where or how far the Indians traveled from that site when engaged in such fishing. The limited nature of this evidence confirms the apparent meaning of the Court's finding: while the Court found that the Quinault utilized ocean fisheries in waters adjacent to their territory, it did not purport to specifically determine the locations at which such fisheries took place and did not find that such fisheries extended beyond the three-mile limit of the case area. As noted, there was evidence in

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the record that the Quinault may have fished in ocean waters up to six miles offshore. However, because the Court did not mention the six-mile figure or cite that evidence in its finding, the finding cannot reasonably be interpreted as extending beyond the three-mile case-area limit.

c. Other Evidence before the Court.

In *Muckleshoot*, 235 F.3d at 431 the Ninth Circuit considered the meaning of Judge Boldt's finding that the Indian ancestors of the present-day Muckleshoot Indian Tribe had usual and accustomed fishing places "primarily" in specifically identified inland waters and "secondarily in the saltwater of Puget Sound." The district court had held that Muckleshoot's saltwater fishing places were limited to Elliott Bay and enjoined Muckleshoot from fishing in other saltwater areas. *Id.* at 432. On appeal, the Ninth Circuit found that the evidence cited by Judge Boldt in support of his finding "indicate[d] that the Muckleshoot's ancestors were almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods." *Id.* at 434. Further, "[i]nsofar as they conducted saltwater fishing, the referenced documents contain[ed] no evidence indicating that such fishing occurred with regularity anywhere beyond Elliott Bay." *Id.*

The Ninth Circuit added that this conclusion was "buttressed by other evidence before Judge Boldt." *Id.* In particular, the Court noted that Dr. Lane's reports made a general distinction between downriver (or saltwater) tribes and upriver tribes, and described Muckleshoot's ancestors as "'upriver' people." *Id.* The Ninth Circuit then concluded:

> The Muckleshoot's ancestors may have occasionally conducted saltwater fishing beyond Elliott Bay. But it is important to remember that Judge Boldt was deciding the 'usual and accustomed' fishing grounds under the provisions of the Treaties. Isolated or infrequent excursions beyond Elliott Bay do not meet the 'usual and accustomed' standard. The documents listed in Finding 76 do not indicate the existence of saltwater fishing beyond Elliott Bay that was more than "incidental" or "occasional."

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Id. at 434-35 (footnote omitted).

As discussed above, in the pages from Dr. Lane's reports cited by Judge Boldt, Dr. Lane stated that the "principal fisheries" of the Quileute and Hoh were in inland waters. *See* Exh. USA-20 (Exh. B hereto) at 31-32. She said that, notwithstanding a coastal troll fishery, Hoh's upriver fisheries "were of strategic importance" and that the "bulk of the fall salmon," on which the Hoh relied for their winter stores, were taken in the river. *Id*. at 32. Even the Howeattle account, which provided the most extensive discussion of Quileute ocean fishing, noted that "[m]ost of the fishing was done in the river." Exh. USA-22 (Exh. C hereto) at 14. Similarly, Dr. Lane stated that the "principal fisheries" of the Quinault were located in inland waters. Exh. USA-53 (Exh. E hereto) at 24.

As in *Muckleshoot*, Quileute and Quinault's principal reliance on inland fisheries is buttressed by other evidence before Judge Boldt. Thus, in her report on Quileute and Hoh, Dr. Lane stated:

> As between the Makah and the Quileute there were *striking differences* in basic economy. The Makah owned extensive halibut grounds, while the Quileute *relied primarily on salmon and steelhead taken in their long and extensive river systems.*

Exh. USA-22 (Exh. C hereto) at 4 (emphasis added). Similarly, in her report on Quinault, Dr. Lane wrote that "[s]almon (including steelhead) were the most important single source of food for the Quinault," and were available year-round in the Quinault River and other streams in prodigious quantities. Exh. USA-53 (Exh. E hereto) at 11-12, 16-20. Indeed, nearly her entire discussion of Quinault fishing was devoted to Quinault's inland salmon fisheries, with only a brief and very general reference to "surf smelting and other ocean fisheries" on the next to the last page of the report and to "ocean fisheries" in the conclusion. *See id.* at 11-24.

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The primary importance of inland fishing to Quileute and Quinault helps explain why Dr. Lane's reports and the other evidence cited by Judge Boldt provided detailed information on the location of inland fisheries, while not providing specific information on the location of offshore fisheries – and no information of the distance offshore at which such fisheries took place. On this record, it makes sense that Judge Boldt would find that Quileute and Quinault had usual and accustomed fishing places in saltwater within the case area – *i.e.*, within three miles of shore – but would not purport to "specifically determine" the location of those places, leaving that determination for future proceedings under Paragraph 25.

5. Conclusion.

For the foregoing reasons, the Court should enter an order finding that: (1) Makah has standing to seek an adjudication of the location of Quileute and Quinault's Pacific Ocean usual and accustomed fishing places; and (2) in Final Decision # I, the Court's finding that Quileute and Quinault had usual and accustomed fishing places in "adjacent" Pacific Ocean waters did not specifically determine the location of those places (with the exception of certain beaches and river mouths) and did not include any waters more than three miles offshore. The Court should retain jurisdiction over this subproceeding to specifically determine the location of those places pursuant to Paragraph 25(a)(6).

Dated: August 8, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2012 I electronically filed the foregoing Makah Indian Tribe's Motion for Partial Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter which are registered with the Court's CM/ECF filing system.

Dated: August 8, 2012.

ZIONTZ, CHESTNUT, VARNELL,
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