The 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 QUILEUTE INDIAN TRIBE'S RESPONSE TO MAKAH INDIAN TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: Friday, January 4, 2013 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Court ruled on September 28, 2011, and March 14, 2012, that this subproceeding is limited to addressing the meaning of "adjacent" as used by Judge Boldt to describe the Quinault and Quileute usual and accustomed ("U&A") fishing grounds at issue in *U.S. v. Washington*, 384 F. Supp. 312 (1974) ("Final Decision I"). As such, the action "shall proceed under Paragraph 25(a)(1)," not Paragraph 25(a)(6), "and the evidence shall be limited to the record that was before Judge Boldt." Dkt. #104 at 2:14-18.

Nearly a year after the September 2011 Order and four months after the deadline passed for reconsideration of the March 2012 Order, Makah filed for summary judgment on two issues that disregard the Court's prior rulings: (1) whether Makah has standing to *adjudicate* Quileute and Quinault's usual and accustomed ocean fishing grounds under *Paragraph 25(a)(6)*; and (2) whether Final Decision I specifically determined the location of Quileute and Quinault's usual and accustomed fishing grounds in the Pacific Ocean. Both of these issues have already been conclusively resolved, leaving nothing for this Court to decide.

But Makah goes a step further by using the uncontested issue of whether Judge Boldt defined Quileute's ocean U&A (he did not) as a pretext for arguing the extent of Quileute's treaty time fishing activities. For 17 pages of its brief, Makah mischaracterizes the limited evidence presented in 1974 of Quileute's fishing activities within the case area as proof that Quileute did not fish beyond the case area. That is a ruse. Makah argued in conjunction with the adjudication of its own ocean U&A that "at the time of Final Decision I, little evidence concerning off-shore ocean places was presented. . . . [because] the State of Washington, against whom the litigation was brought, did not have jurisdiction beyond three (3) miles from the Washington shore." King Decl., Ex. A (Mem. in Supp. of Req. for Determination, Attachment 2 to Makah Renewed Request at 2:8-11, Dkt. #7736 (Aug. 7, 1981)).

Makah's motion suffers from procedural and substantive failures that require it be denied, including the following:

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1. Makah's motion should be denied as an untimely request to reconsider the Court's orders that this case must proceed as an interpretation of Judge Boldt's finding under Paragraph 25(a)(1). L.C.R. 7(h)(1).

2. Makah's motion should be stricken for departing from the Court's orders that the case is limited to interpreting Judge Boldt's findings.

3. Even if the Court reaches the issue of standing, Makah has offered no evidence of an "injury in fact" or that this proceeding could redress Makah's alleged injury. Quileute's participation in the ocean fisheries has not, and will not, harm Makah's treaty fishing rights, nor is Makah's participation in co-management of the fisheries a cognizable harm.

4. Quileute and Quinault admitted in their pleadings that Judge Boldt did not define the Western boundaries of the tribe's usual and accustomed ocean fishing grounds. There is no controversy to be resolved and Makah's motion should be denied as futile and moot.

Quileute further incorporates the arguments made by the Quinault Indian Tribe ("Quinault") and Hoh Indian Tribe ("Hoh") in response to Makah's motion.

Makah is the dominant participant in most of the Pacific coast treaty fisheries, where it operates a 100-boat fleet to harvest the largest proportions of halibut, blackcod, salmon and whiting. By contrast, Quileute's fleet consists of five boats. Quileute poses no threat to Makah's vast fishing enterprise, either now or in the future. Makah did not move for summary judgment on the meaning of "adjacent," nor are the parties situated to present that issue to the court for resolution.[1] Makah's motion should be denied.

II. PROCEDURAL BACKGROUND

A. Makah Seeks to Determine Quileute and Quinault's Treaty Rights.

Makah filed this Request for Determination on December 4, 2009. Dkt. #1. Makah sought to determine the boundaries of Quileute and Quinault usual and accustomed fishing grounds beyond three miles (the Final Decision I case area) in the Pacific Ocean, "which Makah currently believes is approximately 5 to 10 miles offshore, and the northern boundary of Quileute

[1] The timing and nature of Makah's motion also contradicts the parties' agreement to cooperate in the submittal of cross-motions for summary judgment by March 29, 2013, with expert reports due by February 15, 2013.

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usual and accustomed fishing grounds, which Makah currently believes is a line drawn westerly from the vicinity of the Norwegian Memorial." *Id*. 10:12-15.

On March 17, 2010, Quileute answered Makah's Request for Determination, wherein Quileute **admitted** that "[t]he Court did not define the precise boundaries of these Pacific Ocean usual and accustomed fishing grounds in Final Decision I. Moreover, 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." Dkt. #37, ¶4.

B. Quileute and Quinault Moved to Dismiss Makah's Request for Determination.

On June 15, 2010, Quileute and Quinault filed motions to dismiss Makah's RFD on grounds that Makah lacks standing to assert its claims, Makah's claims are not ripe for adjudication, and Makah's claims are barred by laches and by the doctrine of tribal sovereign immunity. Dkt. ##51, 53. On September 28, 2011, the Court denied the motions to dismiss but also instructed the parties regarding how this subproceeding would proceed:

> *The Court views this dispute as one regarding Judge Boldt's use of the term 'adjacent' in both the Quinault and Quileute U&As.* 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. [Cite.] The Court there determined that the only evidence that would be considered is what was in the record that was before Judge Boldt. [Cite.] Therefore the *Quinault need look no further than the record for the evidence that will enable them to respond to the Request for Determination.*

Dkt. #86 at 5:3-11 (emphasis added). The Court ruled that this action would proceed as an "interpretation" of Judge Boldt's findings under Paragraph 25(a)(1). The Court stated in its conclusion, however, that jurisdiction was "properly invoked by the Makah under section (a)(6) of Paragraph 25 of the permanent Injunction[.]" *Id*. 5:13-15.

C. The Court Clarified that Makah's Request for Determination Would Proceed as an Interpretation Under Paragraph 25(a)(1) Only.

On October 12, 2011, the Muckleshoot, Suquamish, and Lummi tribes moved for reconsideration of the order denying Quinault and Quileute's motions to dismiss. Dkt. #88. The

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tribes sought clarification that an interpretation under Paragraph 25(a)(1) is limited to the evidentiary record before Judge Boldt. *Id*. On February 24, 2012, Quileute and Quinault also requested that the Court confirm that Makah's RFD would proceed as an *interpretation* action under *Paragraph 25(a)(1)*. Dkt. #101, 102.

On March 14, 2012, the Court reaffirmed, but also clarified its prior rulings:

> As the Court has stated previously, it views this subproceeding as addressing the meaning of the term "adjacent" as used by Judge Boldt in describing the Quinault and Quileute U&As. Order on Motions to Dismiss, Dkt. # 86, p. 5. Therefore it *shall proceed under Paragraph 25(a)(1)*, and evidence shall be limited to the record that was before Judge Boldt.

Dkt. #104 at 2:14-18; emphasis added.

III. ISSUES PRESENTED

1. Whether Makah's motion should be denied as an untimely request to reconsider the Court's Orders that this subproceeding is limited to addressing the meaning of "adjacent" as used by Judge Boldt to describe the Quinault and Quileute U&As fishing grounds at issue in Final Decision I.

2. Whether the Court should strike Makah's motion for disregarding that this subproceeding is limited to addressing the meaning of "adjacent" as used by Judge Boldt to describe the Quinault and Quileute U&As fishing grounds at issue in Final Decision I.

3. Whether Makah's motion should be denied because Makah has offered no evidence of an "injury in fact" or that this proceeding can redress Makah's alleged injury.

4. Whether Makah's motion should be denied because there is no controversy regarding the fact that Judge Boldt did not define the precise boundaries of the tribes' usual and accustomed ocean fishing grounds.

IV. EVIDENCE RELIED UPON

This opposition brief relies upon the Declarations of Mel Moon, Kris Northcut, and Lauren J. King including all exhibits thereto, and all pleadings on file in this matter.

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V. LEGAL ARGUMENT

A. The Court Should Strike Makah's Motion as an Untimely and Improper Request for Reconsideration.

The Court ruled on September 28, 2011 and March 14, 2012 that this action is limited to interpreting Judge Boldt's use of the term "adjacent" in Final Decision I. *Six months* after the Court made its rulings, Makah is now asking the Court to reconsider these rulings (in a veiled partial summary judgment motion) and find that the subproceeding may proceed as an "adjudication" under Paragraph 25(a)(6). Makah's request is untimely and should be denied. L.R. 7(h)(1) (motions for reconsideration must be brought within 14 days). Further, Makah has specified no grounds for reconsidering these orders. *Id*. (the moving party must "point out with specificity the matters which it believes were overlooked or misapprehended by the court").

The Court should deny Makah's partial summary judgment motion as an untimely and improper motion for reconsideration.[2]

B. The Court Should Strike Makah's Summary Judgment Motion for Disregarding the Court's Prior Rulings.

The Court limited this subproceeding under Paragraph 25(a)(1) to an interpretation of the term "adjacent" as used in Final Decision I. Makah now seeks different relief under Paragraph 25(a)(6) based on an open-ended evidentiary record. Motion for Partial Summary Judgment, Dkt. #20063 (Aug. 8, 2012) ("MPSJ" or "Makah's motion"). This departure from the Court's prior rulings is grounds to strike Makah's motion in its entirety.[3] *See*, *e.g.*, *U.S. v. Washington*, Subproceeding 05-3, Order on Pending Motions, Dkt. #187 (striking Upper Skagit's Motion for

[2] The Court's decision to limit this case to an "interpretation" of Final Decision I under Paragraph 25(a)(1) constitutes the law of the case. *See Edifecs Inc., v. TIBCO Software Inc.*, 2011 WL 1045645, at *2 (W.D. Wash. 2011) (citing *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000)) (a court is generally precluded from reconsidering an issue previously decided by the same court). There is no basis for departing from the law of the case absent substantially different evidence supplied by Makah, a change in controlling authority, or the need to correct a clearly erroneous decision which would work a manifest injustice. *See Kimball v. Callahan*, 590 F.2d 768, 771-72 (9th Cir. 1968).

[3] As discussed below in Section G, if this Court chooses to depart from the law of the case and entertain Makah's request to adjudicate three other tribes' ocean U&As (Hoh must be included by necessary implication) beyond the case area and without those tribes' consent, the jurisdictional and equitable doctrines those tribes asserted must be thoroughly examined. Moreover, full discovery on these issues must be afforded.

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Summary Judgment); *Spurlock v. F.B.I.*, 69 F.3d 1010, 1016 (9th Cir. 1995) (a district court possesses inherent power over the administration of its docket); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (courts have inherent power to disregard abusive filings); *Mazzeo v. Gibbons*, 22010 WL 3910072, at *3 (D. Nev. Sept. 30, 2010) ("[A] district court has the inherent power to strike a party's submissions other than pleadings."); *Calkins v. Shapiro & Anderson, L.L.P.*, 2005 WL 3434718, at *3 (D. Ariz. Dec. 13, 2005) (district court has inherent authority to strike motions and other submissions).

In addition, Makah was not content to seek "standing" to conduct an adjudication of the Quileute and Quinault ocean U&As. Rather, Makah used 17 pages of its motion to argue that the Quileute and Quinault ocean U&As only extend to waters "nearby" the shore. MPSJ at 17:15-34:9. The location of Quileute and Quinault's ocean U&As beyond three miles offshore exceeds the confines of the Final Decision I case area and Judge Boldt's findings. Such superfluous matters waste the time and resources of this Court and the parties. Makah's motion should be stricken. *See*, *e.g.*, *Mazzeo*, 22010 WL 3910072, at *3; *Garrett*, 425 F.3d at 841; *Calkins*, 2005 WL 3434718, at *3; *Spurlock*, 69 F.3d 1010 at 1016.

Quileute also moves to strike the portions of the Joner and Svec declarations filed in support of Makah's motion that are not based on personal knowledge (Joner Decl., 9:16-17; Svec Decl., 4:16-18 and 5:7-10); inadmissible hearsay (Joner Decl., 6:17-7:1, and 9:17-18;); or violate the best evidence rule (Joner Decl., ¶¶ 6-32, 34-41, 43-51, and 53-55; Svec Decl., ¶¶ 3-6, 11, 15, and 16). *See* L.C.R. 7(g) (requests to strike shall be included in the responsive brief and will be considered with the underlying motion).

C. Makah Has No Standing to Seek an Adjudication of Quileute's Ocean U&A.

This subproceeding is limited to interpreting Judge Boldt's use of the term "adjacent" in Final Decision I. However, even if the action involved an "adjudication" under Paragraph 25(a)(6), Makah lacks standing to seek such relief. Unlike establishing standing at the pleading stage, Makah now has the burden to support its allegations with actual evidence. *Lujan v.*

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Defenders of Wildlife, 504 U.S. 555, 561 (1992) (standing must be proven at summary judgment with actual evidence); *see also* Fed. R. Civ. P. 56(a). Further, all inferences drawn from the evidence must be viewed in the light most favorable to Quileute, as the nonmoving party.[4] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992). In addition, under Federal Rule of Civil Procedure 56, Makah has the burden of establishing that there are no material issues of disputed fact regarding its alleged standing. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (to carry its ultimate burden of persuasion on summary judgment motion, the moving party must persuade the court that there is no genuine issue of material fact).

Makah has not presented, and cannot present, evidence to establish its standing to seek an adjudication of Quileute's ocean U&A. Such a showing requires evidence that: (1) Makah has suffered an "injury in fact"; (2) there is a causal connection between Makah's alleged injury and the conduct complained of; and (3) Makah's alleged injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 561 (describing the "irreducible constitutional minimum of standing"). Makah can satisfy none of these criteria.

1. Makah Has Suffered No Injury In Fact.

The "injury in fact" requirement for standing requires proof of an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 561. Makah alleges that if Quileute's ocean U&A is not limited to prevent Quileute from participating in the ocean fisheries, Makah will suffer reduced amounts of fish "available for harvest" and the nuisance of having to participate

[4] Citing *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 n.9 (9th Cir. 2010), Makah argues that "in a Paragraph 25(a)(1) summary judgment proceeding, the Court 'may resolve conflicting inferences and evaluate the evidence [before Judge Boldt] to determine Judge Boldt's intent.'" MPSJ at 5:19-22. However, Makah moved for partial summary judgment under Paragraph 25*(a)(6)*. In *Upper Skagit*, the Ninth Circuit ruled that "the decision in this Subproceeding must be made on the record that was before Judge Boldt, augmented only by evidence of contemporaneous understanding of ambiguous terms" and where "a trial on the merits would reveal no additional relevant facts." 590 F.3d at 1025 n.9. Makah requests partial summary judgment on its standing to seek adjudication under Paragraph 25(a)(6), and the court must draw all inferences in favor of the non-moving party.

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in cooperative fisheries management. *See* MPSJ at 15-17. Neither of these "harms" actually exists and both are insufficient to constitute an injury in fact.

a. Makah's Treaty Rights Cannot be Harmed by Quileute's Participation in the Salmon, Blackcod, and Halibut Fisheries.

Makah mischaracterizes Quileute's *participation* in the salmon, blackcod, and halibut fisheries as *interference* with Makah's treaty fishing rights.[5] Makah's treaty rights only allow Makah to take one-half of the "harvestable" surplus fish passing through *its* usual and accustomed fishing grounds. *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 685-86 (1979). Makah's treaty does not entitle it to capture all of the fish "available for harvest."

The available harvest from the blackcod and halibut fisheries is determined by reference to *all* coastal tribes' ocean U&A fishing areas, including those of Quileute, Hoh, and Quinault. This total ocean U&A for the coastal fishing tribes is meant to fulfill all four coastal tribes' treaty rights. Makah's treaty does not grant it the right to harvest in other tribes' U&As, nor does it give Makah exclusive access to allocations meant for *all* treaty tribes. *See also U.S. v. Lower Elwha Tribe,* 642 F.2d 1141, 1144 (9th Cir. 1981) ("[T]he tribes reasonably understood themselves to be retaining no more and no less of a right vis-a-vis one another than they possessed prior to the treaty."). In fact, Makah has championed the principle in prior disputes:

> [W]e have referred to the total "treaty share," and not just a "Makah" share, because the federal regulations explicitly recognize that 12 tribes possess treaty halibut rights. If there were no other tribes with treaty halibut rights, . . . Makah alone would have an independent right to up to 50% of the halibut available for harvest *in its usual and accustomed grounds* under the Treaty of Neah Bay.[6]

King Decl., Ex. B (Makah's Reply Memorandum in Supp. of Mot. for Partial Summ. J. and in

[5] *See* Order on Motions to Dismiss, Dkt. No. 86 / 19835 at 4 (describing the bar for standing as "interfere[nce] with [Makah's] exercise of treaty fishing rights in the Pacific whiting, salmon, blackcod, and halibut fisheries.").

[6] Makah also notes in its 1991 Reply Memorandum that "all 12 halibut tribes [including Quileute] made factual representations to and obtained recognition of their treaty rights from the Federal regulators," and that no party had challenged any tribe's rights, despite that the *U.S. v. Washington* court "invited any party . . . who wished to challenge the treaty right of any halibut fishing tribe to commence a proceeding in that case 'forthwith' if it believed that the tribe did not have such a right." *Id.* at 16, n.16 (citing Subproceeding 89-2, Decision and Order re Cross-Mots. for Summ. J. at 2-3 n.1, Dkt. # 11/596 (Feb. 15, 1990)) (emphasis in original).

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Opp'n to Oregon's Cross-Mot. For Partial Summ. J., *Makah v. Mosbacher*, No. C85-1606M, Dkt. #244 at 14:4-10 (Nov. 8, 1991) (underlining in original; other emphasis added)).

Moreover, fishing data does not support Makah's purported injury. Makah's ocean U&A constitutes 29% of the coastal tribes' ocean fishing area. Northcut Decl. ¶¶ 14, 25. The ocean U&As for Quileute and Quinault make up the remaining 71%.[7] *Id*. However, Makah's harvests in each of the halibut and blackcod fisheries have always exceeded 29% of the coastal halibut and blackcod harvest. Makah has harvested almost all of the treaty troll allocation.

Halibut Fishery (coastal harvest)				
Year	Makah	Quileute	Quinault	Hoh
2005	**64%**	10%	26%	0%
2006	**70%**	9%	21%	0%
2007	**66%**	14%	20%	0%
2008	**66%**	13%	21%	0%
2009	**70%**	11%	19%	0%
Blackcod Fishery				
Year	Makah	Quileute	Quinault	Hoh
2005	**67%**	7%	25%	1%
2006	**55%**	8%	36%	0%
2007	**65%**	10%	25%	0%
2008	**59%**	6%	35%	0%
2009	**54%**	4%	42%	0%

Salmon Troll Fishery					
	Makah	Quileute	Quinault	S'Klallam	Hoh
2005	**94%**	0%	6%	0%	0%
2006	**99%**	0.5%	0.5%	0%	0%
2007	**98%**	0%	2%	0%	0%
2008	**96%**	0%	4%	0%	0%
2009	**94%**	0%	6%	0%	0%

Northcut Decl. ¶¶ 5, 17-19, 25-26.

In the blackcod and halibut fisheries, Makah participates pursuant to agreed management plans. From 2005-2007, the halibut management plan guaranteed Makah at least 46% of the

[7] Hoh's U&A lies within Quileute and Quinault's U&As and is therefore excluded for purposes of this analysis.

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total tribal allocation.[8] Northcut Decl. ¶ 18. The blackcod management plan, in place since 1997, guaranteed at least 27.5% of the total tribal allocation to Makah. Northcut Decl. ¶ 26. In the treaty troll fishery, Makah harvests enormous quantities of ocean salmon before the fish reach the inland river systems on which other tribes reply, including Quileute. Without question, Makah is the dominant treaty fishing interest in the Pacific Ocean, with harvests outstripping those of the other coastal tribes by orders of magnitude. Far from being harmed, Makah has received a windfall from its ability to harvest from an overall allocation based on all the coastal tribes' ocean U&As, rather than on an allocation based only on its own ocean U&A.

b. Makah Has Not Been and Will Not be Harmed Regarding its Harvest of Whiting.

Quileute has never entered the whiting fishery. Dkt. #1. Makah operates alone in the tribal whiting fishery, rarely harvesting its full allocations. Moon Decl. ¶¶ 7, 10-11. The remainder is returned to non-treaty harvesters, leaving over 82% of the fishery to non-tribal participants. *Id*. Makah can therefore state no injury attributable to Quileute relating to the whiting fishery. Nonetheless, Makah claims that "generalized anxiety and stress" is sufficient to confer standing, citing *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010). That is not the holding in *Krottner*. There, the Ninth Circuit reiterated that a plaintiff must demonstrate it is "immediately in danger of sustaining some direct injury" that is both "real and immediate." *Id.*; *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 44 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2395, 182 L. Ed. 2d 1021 (2012) (denying standing in a similar situation due to a lack of actual evidence of immediate injury and emphasizing that a "string of hypothetical injuries do not meet the requirement of an 'actual or imminent' injury."). Quileute poses no such threat.

Since 1999, the National Marine Fisheries Services ("NMFS") has issued annual tribal whiting allocations based on a "statement of need" from the participating tribes. *See, e.g.*, 75

[8] The governing plan in the halibut fishery has since changed. Makah's harvests from 2010-2012 have ranged from 65 to 85 percent of the coastal halibut harvest. Quileute's harvests were 0.6%, 1.9%, and 4.3% of the tribal allocation, respectively (2010-2012). Northcut Decl. ¶ 19.

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Fed. Reg. 11,829, at 11,830 (Mar. 12, 2010); Moon Decl. ¶ 9. In December 2009, when Makah filed its RFD, Makah had received an allocation of 42,000 metric tons (mt). *See* 74 Fed. Reg. 9,874, at 9,875 (Mar. 6, 2009). Despite this allocation, Makah reported that same month its "intent to harvest only 23,789 mt of its 42,000 mt set-aside and asked that the remaining 18,211 mt be reapportioned to the non-tribal sectors of the fishery." 74 Fed. Reg. 20,620, at 20,623 (May 5, 2009). Makah ultimately harvested even less – 22,389 mt. Moon Decl. ¶ 11.

Makah's whiting catch in 2009 continued the pattern from 2007 and 2008, when Makah failed to reach its allocation by significant margins. Moon Decl. ¶ 11. In fact, during its 16-year history in the whiting fishery, Makah "has not sought to harvest the full 50% treaty entitlement in the Pacific whiting fishery; Makah has requested no more than 17.5% of the available harvest in any year." Makah Resp. to State Mot. For Recons., Dkt. # 81 at 4:15-18.

Makah also acknowledges that when Quileute requested that NMFS provide for its participation in the whiting fishery in 2009, NMFS *increased* the total tribal allocation by providing an additional 3% to Quileute: "[T]he Commerce Department has *increased* the treaty allocation (and made a corresponding reduction in the non-treaty allocation) to accommodate Quileute's stated intent to participate in the fishery." Dkt. # 81 at 5:26-6:4 (June 20, 2011) (emphasis added); *see also* Moon Decl. ¶ 23. As discussed above, the tribal whiting fishery is not a saturated fishery; it is allocated based on need. The coastal tribes have never come close to *requesting* their 50% share of the resource, let alone harvesting it. *See* Joner Decl. ¶ 6, Moon Decl. ¶¶ 11, 25.

There is no realistic possibility that Quileute's participation in the whiting fishery could affect Makah's share. Quileute's requests have increased the treaty allocation and increased the amount of harvest available to Makah. Makah has failed to show any harm.

c. Fishery Co-Management Does Not Harm Makah.

Makah also claims standing because Quileute's current and future participation in tribal fisheries may require Makah to participate in co-management negotiations. MPSJ at 15-17.

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However, the mere existence of other fishery participants does not create an economic "injury-in-fact," even if it involves cooperative management of ocean fisheries. *See, e.g.*, *Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462, 1465 (D.C. Cir. 1989) (standing required proof of economic injury); *Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (where injury is not obvious, plaintiff must plead both injury and cause with specificity); *Sault Ste. Marie Tribe of Chippewa Indians v. U.S.*, 288 F.3d 910, 916, n.6 (6th Cir. 2002) (standing required proof of economic injury).

Quileute's participation in the salmon, blackcod, and halibut fisheries has never interfered with Makah's exercise of its treaty fishing rights, and Makah has offered no evidence to the contrary. While Quileute has never participated in the whiting fishery, Makah has failed to show any evidence of imminent harm to its treaty rights in that fishery. Furthermore, even if Quileute's ocean fishing U&A were limited to 5-10 miles (which it is not), Quileute would still participate in the tribal salmon and halibut fisheries.[9] Northcut Decl. ¶¶ 6-7, 21-22. Co-management is a fact of life in the tribal fisheries.

2. This Action Cannot Redress Makah's Alleged Harm.

Makah has the burden of providing evidence that adjudicating Quileute's ocean U&A will redress its claimed injuries in this action, including any supposed injury to Makah's treaty fishing rights and from being required to participate in fishery co-management. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008). Makah cannot show that a favorable result in this action will redress either of these alleged harms.

a. Reducing the Quileute and Quinault U&As Will Actually Reduce Makah's Harvest of Blackcod and Halibut.

The amount of fish "available for harvest" by Makah in the blackcod and halibut fisheries is determined by reference to *all* ocean U&A area for the coastal tribes, including Quileute and

[9] While halibut are not available in large quantities within 5-10 miles of shore, they are available in limited quantities, and Quileute would still participate in the fishery, despite a smaller allocation and drastically reduced harvest. Northcut Decl. ¶ 21.

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Quinault. Northcut Decl. ¶¶ 12-13, 15, 23-24. By comprising 71% of the area upon which halibut and blackcod allocations are based, Quileute and Quinault's current ocean U&As increase the total amount of fish available for harvest by Makah. The opposite is also true. If the Quileute and Quinault U&As are slashed, as Makah proposes, the total amount of fish "available for harvest" by Makah decreases.

If Makah gets what it asks for in its RFD, Quileute and Quinault's westerly ocean fishing boundaries will be reduced from 40 miles west to 5-10 miles west. Because the tribal allocation in the halibut and blackcod fisheries is set by reference to the overall tribal ocean U&A, reducing Quileute and Quinault ocean areas will also reduce the tribal allocation. Northcut Decl. ¶¶ 14-16, 20, 27. To simplify, if the total tribal allocation is 15 fish, that allocation is set by reference to Quinault (6 fish), Quileute (6 fish), and Makah (3 fish) U&As. Because all tribes fish off of a common, overall allocation, the harvest "available to" Makah is 15 fish. But the total tribal allocation is not intended for Makah to harvest alone. If Quileute and Quinault were removed from the fishery, their U&As (12 fish) would be eliminated from the total tribal allocation. The harvest available to Makah would be reduced (to 3 fish), but Makah's treaty rights would be unaffected, and Makah would still receive the allocation that its U&A allows (3 fish).

b. Reducing the Quileute and Quinault U&As Will Not Prevent Their Participation in the Salmon Fishery and Will Not Prevent Other Harvesters From Taking Whiting South of Makah's Ocean U&A.

Adjudicating the Quileute ocean U&A at 5-10 miles offshore, as Makah requests, will not prevent *non-tribal* harvesters from harvesting what would otherwise be Quileute's "share" of whiting in the area south of Makah's U&A. Moon Decl. ¶¶ 9-11. Thus, eliminating Quileute's participation in the whiting fishery does not give rise to standing, because non-tribal harvesters would (and currently do) cause the same "harm." *See Sierra Club v. Salazar*, 2012 WL 4498230 (D.D.C. Oct. 2, 2012) (if the requested relief only eliminates one path to injury, leaving an

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alternative path, the relief cannot be the basis for standing).[10]

The whiting fishery allocates whiting to tribes based on need, rather than on the typical 50/50 treaty/non-treaty structure. *See, e.g.*, 75 Fed. Reg. 11,829, at 11,830 (Mar. 12, 2010) ("Since 1999, the tribal allocation has been based on a statement of need for [the participating tribes'] tribal fishery."). The whiting fishery is managed under a full utilization structure, meaning that the goal is to execute the fishery until every last fish is harvested. Moon Decl. ¶¶ 9-11. Amounts remaining in the tribal fishery have been re-apportioned to and harvested by non-tribal harvesters. 75 Fed. Reg. 11,829, at 11,831. As Makah admits, it has not requested more than 17.5% of the resource in its 16-year history in the fishery:

> [T]o date, Makah has not sought to harvest the full 50% treaty entitlement in the Pacific whiting fishery; Makah has requested no more than 17.5% of the available harvest in any year and thus has left 82.5% or more of the harvest to the non-treaty fishery each year.

Makah Response to State Mot. For Recons., Dkt. # 81 at 4:15-18 (June 20, 2011). Under this management structure, even if Quileute or Quinault never participate in the whiting fishery, whiting would still be fully harvested by the non-tribal fleet, the majority of which operate south of Makah's ocean U&A. Thus, regardless of whether Quileute participates in the fishery, the vast majority of the whiting would still be harvested south of Makah's U&A. Moon Decl. ¶ 11.

c. Makah Will Not Escape Co-Management of the Tribal Fisheries Regardless of the Outcome of this Subproceeding.

The other alleged "injury" claimed by Makah is its obligation to participate in co-management of the tribal fisheries. However, a favorable decision for Makah would not alleviate its responsibility to co-manage fisheries with its neighbors. *First*, Makah must negotiate with Quileute and Quinault in the salmon and halibut fisheries, regardless of a favorable result in this action. Those fisheries take place within the 5-10 mile range Makah claims as Quileute's U&A.

[10] In *Sierra Club*, the plaintiffs challenged the delisting of a piece of land from the National Register of Historic Places because of potential coal mining. *Id*. at *1. The court held that plaintiffs lacked standing because mining could still proceed under existing regulations, even if the land was placed back on the National Register. *Id*. at *12.

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Northcut Decl. ¶¶ 6-7, 21-22. *Second*, regarding co-management of the halibut fishery, Makah must still work with the Jamestown and Port Gamble S'Klallams, Lower Elwha, Suquamish, Skokomish, Tulalip, Nooksack, Swinomish, and Lummi tribes. In sum, this subproceeding cannot insulate Makah from the necessary (and non-injurious) task of co-managing the tribal fisheries. *Third*, Makah would still have to negotiate and co-manage with the non-treaty sector of the whiting fishery.

D. The Motion Should be Denied Because it is Undisputed That Judge Boldt Did Not Purport to Define the Western Boundaries for the Quileute and Quinault Ocean U&As.

Quileute and Quinault admitted in their pleadings that Judge Boldt did not define the Western boundaries of the Quileute and Quinault U&As. There is no controversy. Regardless, Makah inexplicably moves for summary judgment on this issue. Makah has burdened the Court with a summary judgment motion on a non-issue in order to "fire the first shot" in the evidentiary battle over the Quileute and Quinault ocean U&As. This type of gamesmanship should not be allowed and Makah's motion should be denied.

E. Makah's Premature Attempt to Adjudicate Quileute's U&A Should be Rejected.

It is undisputed that Quileute's western boundary is beyond the original case area and, therefore, was undefined. Even so, Makah devotes 17 pages to this uncontested issue. MPSJ, pp. 17:15-34:9. Makah's purpose is obvious: It intends to start *adjudicating* Quileute's ocean U&A in this motion, despite the Court's rulings that this action is not proceeding under Paragraph 25(a)(6). As discussed above, the portion of Makah's motion that addresses Quileute's ocean U&A beyond the case area should be stricken. With that said, if the Court is inclined to consider Makah's claims, they should also be rejected on the merits. Briefly, and with the reservation that additional discovery and briefing is necessary if the Court elects to expand the scope of this subproceeding into an adjudication under Paragraph 25(a)(6), Quileute responds to Makah's attack on its ocean fishing U&A below.

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1. Ocean Fishing U&As Were Not at Issue in Final Decision I.

Final Decision I only addressed ocean waters extending three miles from the Washington coast because neither the United States government nor the States claimed jurisdiction beyond that point at that time. As a result, the tribes participating in Final Decision I, including Makah, were not required to (and did not) present comprehensive evidence of their ocean fishing U&As beyond the case area. In its request to adjudicate its ocean fishing U&A in 1977, Makah stated:

> [We are not] talking about or requesting a finding as to usual and accustomed places in the zero to three mile fishing zone. . . .
>
> What we are dealing with, then, is the nature of the Makah fishery in the ocean, *which was not dealt with the Makahs or any other tribe in Final Decision One*, except in a kind of implied or peripheral way as it may have happened to come up, but we did not deal with that problem in Final Decision One because it was a case against the State of Washington dealing with its rights and powers within its jurisdiction. *Since it has no jurisdiction in the ocean we didn't deal with that problem and since in fact nobody had jurisdiction at that time we simply didn't address the problem of ocean fisheries*.

King Decl., Ex. 2 (Transcript of Sept. 7, 1977 Proceedings before the Magistrate, Attachment 5 to Makah Renewed Request at 5:11-6:3, Dkt. #7736 (Aug. 7, 1981)) (emphasis added).

There was no state or federal jurisdiction over waters beyond three miles until 1976, when Congress passed the Fisheries Conservation and Management Act ("FCMA"), which vested fishing regulation jurisdiction in the United States Department of Commerce up to 200 miles from the shores of the State of Washington. After the FCMA was passed, the Ziontz firm (on behalf of Makah) commissioned Dr. Barbara Lane to prepare a report on Makah's traditional offshore fisheries in order to seek a determination of Makah's ocean U&A.[11] The need for additional reports regarding Makah's offshore fisheries (*i.e.*, those outside the case area) confirms that that Final Decision I did not address such matters.

[11] The Ziontz firm represented Quileute from 1971 until the early 1980s, and the firm was responsible for submitting all the evidence supporting Quileute's usual and accustomed fishing places in Final Decision I. After the enactment of the FCMA, Dr. Lane drafted reports on both Makah and Quileute's traditional offshore fisheries. The Ziontz firm opened a file called "Quileute Ocean Places" in 1977. King Decl., Ex. C at 6 (Letter from M. Slonim to D. West, Feb. 25, 2010). Dr. Lane prepared her report on "Traditional Marine Fisheries of the Quileute and Hoh Indians" that same year. Gathering additional evidence on ocean fisheries would not have been necessary if the evidence that the Ziontz firm submitted on behalf of both Quileute and Makah in Decision I were sufficient to show ocean U&As.

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The factual record regarding ocean fishing was limited in Final Decision I because it was irrelevant, not because it does not exist. In fact, as described below, the Ninth Circuit recognized as early as 1946 that Quileute harvested in the ocean at the 100-fathom line, which generally falls 25-50 miles from the Washington coast. *See* Joner Decl., Dkt. #20064 at ¶ 2.

2. Quileute's History of Sealing and Whaling Supports an Expansive Ocean Fishing U&A.

Makah suggests that ocean fishing U&As cannot be determined by reference to sealing and whaling practices (because such evidence was not considered in their own U&A). There is no such bright-line rule. First, no court has ever determined that sea mammals are not included within the fishing right. Second, Makah's treaty and treaty negotiations were different than Quileute's. Third, there was an intervening change in the law relaxing the species limitations in Decision I. *See U.S. v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994)). Fourth, there is evidence that all sea life, including sea mammals, were considered as "fish" at treaty times.

As the Ninth Circuit recognized in 1946, fish and sea mammals from the Pacific Ocean formed an important part of the Quileute diet and economy:

> From time immemorial their home was the village at the mouth of the Quillayute River. . . . A part of their food was the meat of the sea-going mammals, whales, the sea lions and the pelagic seals moving in the Pacific to and from the Pribilofs. Unlike the Eskimos, with their closed-in decked kayaks, they hunted these mammals in the rough waters of the Pacific in open canoes. Obviously they had been an aboriginal sea-faring people of great daring and skill in seeking their meat food and skins for their clothing. . . .
>
> The pelagic fur bearing seal herd, after mating on the Pribilofs, moves south along the 100 fathom line off the western coast of North American, passing by the State of Washington. The herd was threatened with extinction by hunters whose vessels followed its migrations. In 1894, within five years of the reservation of the Quillayute lands, a statute was enacted regulating such sealing. From such regulation were excepted Indians 'dwelling on the coast of the United States', who carry on pelagic sealing 'in canoes or undecked boats propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, or manned by more than five persons each, in the manner heretofore practiced by the said Indians. * * * ' Act April 6, 1894, c. 57, 28 Stat. 52.
>
> The Congress thus recognized and approved a long established practice of these Indians. . . .

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Moore v. U.S., 157 F.2d 760, 762-63 (9th Cir. 1946), *cert. denied*, 330 U.S. 827, 67 S. Ct. 867, 91 L. Ed. 1277 (1987) (King Decl. Ex. D).

In its treaty, Quileute is guaranteed "[t]he right of taking fish at all usual and accustomed grounds and stations" and of "hunting . . . on all open and unclaimed lands." These rights are intended to preserve Quileute's customary practices of taking fish, as well as whales, seals, and other sea mammals. Even the United States government characterized whaling and sealing as "fisheries" during treaty times. The district court in *Moore* cited an exhibit memorializing a conference held at the Quileute village on August 21, 1879, wherein Captain Charles Willowby, the Indian Agent for Quileute at the time, promised:

> 'I will write to Washington and recommend that lands be reserved for you as was promised you by Col. Simmons. I want you to continue your *fisheries* of salmon and seals and whales, *as usual*.'

U.S. v. Moore, 62 F. Supp. 660, 668 (D.C. Wash. 1945) (King Decl., Ex. E); *see also Knight v. Parsons*, 1 Spr. 279, 777, 14 F. Cas. 776, 777 (D. Mass. 1855) ("It has long been decided that, in the whale *fisheries*, the crew have no specific property in the oil, but only a right to the proceeds of the oil; and the contract in this case seems to give the owners the right to sell the *fish*, and the crew have only a pecuniary claim, calculated upon the amount of *fish* caught."); *U.S. v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994) ("'Fish' [is] a word which fairly encompasses every form of aquatic animal life."). Quileute's treaty would be rendered absurd if the court interpreted it as reserving the tribe's rights to hunt and fish, but somehow excluding sea mammals from those rights. In sum, if Quileute's ocean U&A is adjudicated (which should not occur here), evidence of whaling and sealing will be integral to that adjudication.

3. Quileute's Northern U&A Boundary Must Reflect the Northern and Southern Travels of Quileute's Ocean Fisherman.

Makah also complains that Quileute regulations improperly permit its fishermen to fish up to a northern boundary at Sand Point. This complaint is baseless. MPSJ at 13:19-23 ("the northern boundary in the Quileute regulations was well to the north of the northernmost [fishing

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village] site . . . in the record before Judge Boldt."). Federal regulations have recognized that boundary since the 1980s. *See* 50 C.F.R. § 660.324(c)(2)) (recognizing Quileute's U&A as that portion of the FMA between **48°07.60′ N. latitude (Sand Point)** and 47°31.70′ N. latitude (Queets River) and east of 125°44′ W. longitude). The federal government has never altered these boundaries, and Quileute has adhered to them in issuing its fishing regulations. Moon Decl., ¶ 5-6.

Moreover, Quileute fishermen, like their Makah counterparts, customarily fished both north and south of their villages at treaty times. A Makah elder, Harry McCarthy, Sr., testified in 1977 that Quileute traveled as far north as Tatoosh Island and beyond for ocean fishing:

> A: The Quileutes used to come over to Tatoosh to camp at a place they called Midway, it is halfway between from the lighthouses to Neah Bay. That is where they camped and they fished by this time the Quileutes before they got their breakwater in.
> Q: To your knowledge, would the Quileutes go north of that line, would the Quileutes go north of Tatoosh Island to fish?
> A: Yes.
> Q: Do you know how far they went?
> A: No.

King Decl., Ex. A (Transcript of Sept. 7, 1977 Proceedings before the Magistrate, Attachment 5 to Makah Renewed Request at 25:6-17, Dkt. #7736 (Aug. 7, 1981)). Makah's attack on Quileute's northern boundary is therefore baseless, as Makah's own elders cannot corroborate Makah's assertions.

4. Makah's Definition of "Adjacent" is Inconsistent with Judge Boldt's Usage of the Term.

This is not the time to litigate what Judge Boldt meant by describing Quileute's ocean fishing U&A as "adjacent [to] the Pacific Coast." Nonetheless, Makah's premature attempt to define "adjacent" as limiting the western boundary of Quileute's ocean U&A is so wrong and misleading that a short response is needed. MPSJ at 18:13-19.

First, the dictionary definition of "adjacent" is not remotely conclusive, as "the precise and exact meaning of adjacent is determined principally by context in which it is used and the

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facts of each particular case or by the subject matter of which it applies." *City of St. Ann v. Spanos*, 490 S.W.2d 653, 655–56 (Mo. Ct. App. 1973) (en banc) (finding "contiguous" synonymous with "adjacent"). Judge Boldt's use of the term "adjacent" in Final Decision I demonstrates that he did not intend "adjacent" to mean "nearby," as Makah wishes. Instead, when Judge Boldt intended "adjacent" to mean "nearby," he said it clearly:

- "[T]he fish which Indian treaty fishermen shall have an opportunity to catch shall ... also include an additional amount or quantity of fish … caught by non-treaty fishermen in marine areas **closely adjacent to, but beyond the territorial waters of the state**, or outside the jurisdiction of the state although within Washington waters."

- "It is uncontroverted in the evidence that substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas **closely adjacent to and within the state of Washington**, primarily by non-treaty right fishermen."

- "An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas **closely adjacent to but beyond the territorial waters of the State**, or outside the jurisdiction of the State, although within Washington waters."

U.S. v. Washington, 384 F. Supp. at 344, 416 (emphasis added). Judge Boldt did not find that Quileute and Quinault fished in marine areas "closely adjacent to but beyond the territorial waters of the State." Instead, he held that they fished "along the adjacent Pacific Coast." He did not intend "adjacent" to mean "nearby" with respect to Quileute and Quinault's ocean fishing.

Second, in maritime law, "adjacent" means "next to, with nothing of the same kind intervening." As used by NOAA, "[t]he exclusive economic zone (EEZ) of the U.S. extends 200 nautical miles from the territorial sea baseline and is *adjacent to* the 12 nm territorial sea of the U.S." King Decl., Ex. F [NOAA, "US Maritime Limits and Boundaries']; see also *The Z R-3*, 18 F.2d 122, 124 (W.D. Wash. 1927) ("many men are employed during the fishing season upon the fishing grounds in the Pacific Ocean *adjacent* to the United States and Alaska, and the rule … is wholesome in its operative effect, and affords a basis of safety for investment in, and conduct of, fishing enterprises *in these remote zones*.") (emphasis added). In sum, "adjacent" within the

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context of Final Decision I simply means "at least" three miles off the Washington coast. There is nothing more that it *could* have meant in 1974.

F. The Federal Government has Recognized Quileute's Ocean U&A for More Than 25 Years.

The FCMA, enacted in 1976, requires that the federal government promulgate fishery management plans ("FMPs"), which must account for "the 'nature and extent' of any 'Indian treaty fishing rights,'" as determined by the Secretary of Commerce. *See Midwater Trawlers Co-op v. U.S. Dep't of Commerce*, 139 F. Supp. 2d 1136, 1143 (W.D. Wash. 2000) (citing 16 U.S.C. § 1853(a)(2)). Thus, under the FCMA, the federal government had to determine the "nature and extent" of Indian fishing rights in the ocean to whatever extent they overlapped with federally-managed fisheries.

The federal government has recognized Quileute ocean U&A fishing rights in the Pacific Ocean for over 25 years. In the mid-1980s, the federal government determined that Quileute's ocean U&A extends westward approximately 40 miles from the shore (the "federal lines"). *See* 51 Fed. Reg. 16471, 16472 (May 2, 1986); 52 Fed. Reg. 172964, 17271-72 (May 6, 1987).[12] In *Midwater Trawlers*, Judge Rothstein recounted the basis for these boundary determinations:

> [A] 1985 opinion of the Regional Solicitor for the Department of the Interior found evidence that the Hoh, Quileute, and Quinault engaged in fishing activities **out to 25 to 50 miles**. Report on Indian Treaty Right to Fish for Halibut from Lawrence E. Cox, Acting Regional Solicitor to Stanley Speaks, Portland Area Director, Bureau of Indian Affairs (April 1985) … The U & A areas established in the salmon and halibut regulations were issued shortly after the Regional Solicitor's 1985 opinion.

139 F. Supp. 2d at 1144 (citations omitted) (emphasis added); *see also* Moon Decl., Ex. A.

In 1996, a group of non-tribal commercial fishing interests, and the States of Washington and Oregon, challenged the federal government's groundfish regulations that "employed the same boundaries for the U&A areas of the Hoh, Quinault, and Quileute regarding Pacific whiting that [had] been used for years without objection in the federal salmon and halibut regulations."

[12] Specifically, the regulations defined Quileute's fishing area as having a western boundary of 125º44'00" (approximately 40 miles offshore), and a northern boundary of 48º01'1" N. latitude (westward from Sand Point).

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Midwater Trawlers, 139 F. Supp. 2d at 1144; 61 Fed. Reg. 28786 (1996); 61 Fed.Reg. 34570 (1996). The plaintiffs alleged that no coastal tribe (including Makah) had treaty rights to fish in the ocean beyond three miles, and that it was unreasonable for the Secretary to recognize ocean treaty fishing rights of the Quileute, Quinault, and Hoh absent a judicial adjudication of those tribes' ocean U&As. Judge Rothstein rejected those contentions, holding that:

- "The Secretary did not act arbitrarily and capriciously in extending the usual and accustomed fishing areas beyond the three-mile territorial limit of Washington's coast";
- "[a]bsent extraordinarily strong evidence to the contrary, the court will defer to the treaty parties' interpretation";
- "[t]reaties are self-executing and obligatory on the contracting parties as soon as they are ratified," and thus a court adjudication was not a necessary predicate to realizing the rights reserved by the tribes under the Treaty of Olympia.

Id. at 1143-44. These determinations were upheld on appeal to the Ninth Circuit. *See Midwater Trawlers Co-op v. U.S. Dep't of Commerce*, 282 F.3d 710, 718 (9th Cir. 2002) (remanding on other grounds).

The federal government has used the same federal lines to define the Quileute U&A for other federally-managed species, including "coastal pelagic species" (66 Fed. Reg. 44,986, at 44,987 (Aug. 27, 2001); 50 C.F.R. § 660.518(b) (2009)) and "highly migratory species" (69 Fed. Reg. 18,453, at 18,456 (Apr. 2, 2004); 50 C.F.R. § 660.706(c) (2009)).

In sum, the federal government recognized Quileute U&A fishing rights at approximately 40 miles from shore for over 25 years. Quileute, in turn, has relied for over 25 years on the existence of its fishing rights in the Pacific Ocean as recognized by the federal lines and the Court orders and decisions upholding those lines. This Court has: (1) upheld the specific boundaries embodied in the federal lines; (2) instructed that it would defer to the treaty parties' interpretation of a treaty; and (3) held that the Treaty of Olympia is self-executing and thus U&A rights need not be adjudicated under *U.S. v. Washington* in order to be recognized. Makah has no right or basis to interfere with Quileute's ocean fishing rights.

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G. Quileute has not Consented to an Adjudication of its Ocean U&A Beyond the Case Area in Final Decision I.

Quileute has worked with its treaty partner, the federal government, to determine the scope of its ocean fishing rights. Quileute has never asked any court to adjudicate its ocean U&A *outside* the case area in Final Decision I, and this Court has never taken additional evidence to adjudicate a tribe's ocean U&A except when that tribe requested the determination.

Judge Boldt decided a case brought against the State of Washington to interpret off-reservation treaty fishing rights *within* Washington's territorial jurisdiction. *U.S. v. Washington,* 384 F. Supp. at 327, n. 1 & 2, 407 (1974); *see also*, *U.S. v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009) ("The point of the lawsuit … filed was to protect Indian treaty rights from state infringement, not to sort out competing tribal claims."). The suit was not brought to determine treaty rights in waters *beyond* Washington's jurisdiction. As this Court held in Subproceeding 12-1, "the Court retained jurisdiction in this case for limited and express purposes." Dkt. #34 at 4:13 (Dec. 5, 2012). The Court's limited view of the scope of this proceeding led to the denial of Quileute and Quinault's jurisdictional and laches challenges at the pleading stage. Dkt. # 51, 53, and 86 at 4-5.

This Court recently observed that continually revisiting Judge Boldt's decisions, "besides being extremely burdensome and expensive, is a fundamentally futile undertaking. The truth is not knowable. 'This exercise is not law, and is not a reliable way to find facts, so it is hard to see why courts are doing it. . . .'" Dkt. #34 at 4:19-22 (quoting *U.S. v. Washington*, 590 F. 3d 1020, 1026 (9th Cir. 2010) (in dissent)). Moreover, "it is hard to see why the court still displaces state and federal fish management agencies." *U.S. v. Washington*, 573 F. 3d 701, 710-11 (9th Cir. 2009). Thus, if this Court chooses to revisit the federal government's findings regarding Quileute and Quinault's ocean U&As, it should address the equitable and jurisdictional bars that these tribes asserted in their motions to dismiss.

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VI. CONCLUSION

Makah's motion presents nothing for this Court to resolve. The Court has ruled (and the time for reconsideration has passed) that this action will proceed under Paragraph 25(a)(1) to interpret Judge Boldt's use of the term "adjacent." There will be no "adjudication" of the Quileute and Quinault U&As under Paragraph 25(a)(6). Further, there is no dispute regarding Judge Boldt not having defined the Western boundaries of the Quileute and Quinault ocean fishing U&As – he did not. These are the only matters raised by Makah's motion and they have been resolved. Makah's motion should be denied.

DATED this 10th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will notify all parties in this matter who are registered with the Court's CM/ECF filing system of such filing.

DATED this 10th day of December, 2012.

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