Honorable Ricardo Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et. al.* Petitioners, vs. STATE OF WASHINGTON, *et. al.* Respondents.	NO. C70-9213 RSM Subproceeding No. 09-1 QUINAULT INDIAN NATION'S RESPONSE TO THE MAKAH INDIAN TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT Noted: December 14, 2012

The Quinault Indian Nation submits this response to the Makah Indian Tribe's Motion for Partial Summary Judgment (Makah Motion). Dkt. 125. The Makah motion should be denied and a judgment entered that the Court's determination in Final Decision No. 1 of the Quinault ocean usual and accustomed fishing grounds adjacent to the coast of Washington extends at least three miles offshore to the limit of the case area, and that any controversy regarding the extent of Quinault fishing grounds in the ocean beyond the three mile limit of the case area is outside of the scope this action. Quinault further incorporates the arguments made by the Quileute Indian Tribe (Quileute) and Hoh Indian Tribe (Hoh) in response to the Makah Motion.

I. STATEMENT OF THE CASE

The Makah Indian Tribe (Makah) filed a Request for Determination asking this Court to determine: (1) the western boundary of the Quinault (and Quileute) Pacific Ocean usual and

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accustomed fishing area, and (2) the northern boundary of the Quileute's usual and accustomed fishing grounds. Makah's Request for Determination (RFD), Dkt. 1 at 10. Makah alleged the western boundary is between five and ten miles from shore. *Id.* at 2-3, 9 (¶ 3.c.ix), and 10 (¶ 4).

Quinault and Quileute moved to dismiss Makah's suit on a number of grounds, including lack of jurisdiction, sovereign immunity, standing, and laches. (Quinault and Quileute's respective motions to dismiss) Dkt. 51 and 53. The motions were denied. Dkt. 86. This Court ruled the issue in this subproceeding was the interpretation of Judge Boldt's use of the term "adjacent" in his findings describing the Quinault and Quileute's adjudicated ocean usual and accustomed fishing areas, and the only evidence it would consider was the record before Judge Boldt when he entered his findings. *Id.* at 5.

In its later Order on Motions for Reconsideration this Court clarified and reaffirmed its previous Order. It reiterated that the case "shall proceed under Paragraph 25(a)(1), and evidence shall be limited to the record that was before Judge Boldt." Dkt. 104 at 2.

Makah now moves for a partial summary judgment. Makah concedes the evidence shows Quinault likely fished at least six miles from shore. Makah Motion, Dkt. 125 at 31-32. It contends that Judge Boldt did not determine the location of Quinault's (and Quileute's) ocean usual and accustomed fishing grounds or whether those grounds extended more than three miles offshore. *Id.* at 17, 32. Makah asserts this Court "should" specifically determine the location of those places under Paragraph 25(a)(6). *Id.* at 5, 34. To that end, it asks this Court to rule, as a matter of law, it has standing to adjudicate the Pacific Ocean western boundary of Quinault and Quileute's usual and accustomed fishing places. *Id.* at 1.

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Summary judgment is only appropriate if the evidence, when viewed in the light most favorable to the non-moving party, shows there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The moving party has the burden of establishing the absence of a genuine issue of fact on each material issue. *Celotex Corat v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). All reasonable inferences supported by the evidence are drawn in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). The question is "whether the evidence is so one-sided that one party must prevail as a matter of law." *Id. at* 477 U.S. 251-52.

II. JUDGE BOLDT'S FINDINGS WERE LIMITED TO THE CASE AREA, WHICH THE MAKAH ADMIT, AND THE EVIDENCE SHOWS THOSE FINDINGS DETERMINED QUINAULT'S FISHING GROUNDS ENCOMPASS AT LEAST THE CASE AREA: A RULING CONFIRMED BY THE EVIDENCE AND AN ORDER DISMISSING THE CASE AS TO QUINAULT SHOULD BE ENTERED

It is Makah's burden to show Judge Boldt's findings are ambiguous or he intended something other than the apparent meaning. If Makah clears that hurdle, it must then prove there was no evidence before Judge Boldt showing Quinault fished in waters that are the subject of this subproceeding. *Upper Skagit v. Washington,* 590 F.3d 1020, 1023 (2010). Judge Boldt's findings must be read in light of the facts of the case. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir.2000); *Upper Skagit Indian Tribe*, 590 F.3d at 1024.

Quinault disagrees with Makah that Quinault traditionally fished only six miles from shore. Quinault, however, agrees with Makah that the case area only includes the ocean waters under the jurisdiction of the State of Washington, and Judge Boldt's finding is limited to the case area. Makah Motion, Dkt. 125 at 19-20, 31-32, 34; Makah RFD, Dkt. 1 at 2 ¶ 3.a.ii. Makah's

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concession in both its RFD and its current motion, that Quinault's ocean fishing grounds extend beyond the case area but that Judge Boldt's findings were limited to the case area, leaves nothing for this Court to interpret. Therefore, this case should be dismissed as to Quinault.

Even absent Makah's concessions, the law and a cursory review of the evidence compel the same result. The scope of *United States v. Washington* is expressly limited to implementation of the treaty fishing rights of the plaintiff tribes within the geographic area defined by the Court in the Pretrial Order and Final Decision No. 1 as the "case area."

> This case is limited to the claimed treaty-secured fishing rights of the plaintiff tribes, as they apply to areas within the Western District of Washington, within the watersheds of Puget Sound and the Olympic Peninsula north of Gray's Harbor, and in the **adjacent offshore waters which are within the jurisdiction of the State of Washington**.

Dkt. 353, Final Pretrial Order at 5 (emphasis added). This geographic limitation is incorporated into the Court's conclusions of law and decree. *United States v. Washington,* 384 F.Supp. at 312, 327-28, 400 (1974) (the case area includes "adjacent offshore waters which are within the jurisdiction of the State of Washington"); *see also Id.* at 405 (case area is "outside boundaries of Indian reservations and areas of exclusive *federal jurisdiction"*) (emphasis original).

It is undisputed the case area extends only three miles from shore. Makah Motion, Dkt. 125 at 19-20.[1] In language tracking the Court's definition of the ocean waters included within the case area, but without limitation as to a western boundary, Judge Boldt found the Quinault and Quileute possessed ocean fisheries "along the adjacent Pacific Coast" (Quileute) and in the ocean waters "adjacent to their territory" (Quinault). 384 F.Supp. 312 at 372, 374-75.

[1] *See* 384 F.Supp, at 386 (Judge Boldt found the State could not completely control the ocean salmon harvest because most were caught beyond the State's three mile jurisdictional limit).

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The evidence before Judge Boldt, however, shows that Quinault's usual and accustomed fishing ground in the Pacific Ocean adjacent to its territories and freshwater fisheries extends offshore beyond the three mile case area. Judge Boldt relied in large part on Dr. Lane's *Anthropological Report on the Identity, Treaty Status and Fisheries of the Quinault Tribe of Indians* (Ex. USA-53) in reaching his findings. 384 F.Supp. at 374-75.[2] In her report, Dr. Lane explains:

> The principal fisheries of these people [descendants of the 1855 Quinault and associated bands] included the following rivers and streams: Clearwater, Queets, Salmon, Quinault (including Lake Quinault and the Upper Quinault tributaries), Raft, Moclips, Copalis, and Joe Creek. The Quinault also shared fisheries in Gray's Harbor and some the streams draining into it. Ocean fisheries were utilized in the waters adjacent to their territory.[3]

Ex. USA-53 at 24 (emphasis added).

Dr. Lane provides context to the phrase, "ocean fisheries were utilized in the water adjacent to their territory." She states "In their [Quinault] whaling,[4] 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." Ex. USA-53 at 23; s*ee also,* Ex. USA-53, Appendix 1 (map). Dr. Lane also reported the Quinault regularly traveled to the Columbia River, and fished on these expeditions. Ex. USA-53 at 14-15; *see* Ex. USA-31(e) at 233-234 (1942 Department of Interior

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[2] Judge Boldt found Dr, Lane's reports "authoritative" and "reliable." 384 F. Supp. at 350.

[3] Judge Boldt's finding, that Quinault's ocean fishing ground includes those waters "adjacent to their territory," mirrors Dr. Lane's report. *United States v. Washington*, 384 F.Supp. at 374-75 (Finding of Fact 120).

[4] At treaty time whale were considered fish and whaling was recognized as a fishery. *See Knight v. Parsons*, 1 Spr. 279, 777, 14 F. Cas. 776, 777 (D. Mass. 1855) (referring to whales as fish); *Parkersburg & O. R. Transat Co. v, City of Parkersburg*, 107 U.S. 691, 2 S.Ct. 732, 738 (1883) (statute exempting vessels employed in "whale or other fisheries" from tax); *New Jersey Steamboat Co. v. Collector*, 85 U.S. 478, 491 (1873) (same); *United States v. Morris,* 39 U.S. 464, 476 (1840) ("whale fishery"); *see also Unites States v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994) ("Fish is a word which fairly encompasses every form of aquatic animal life.").

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report, where Quinault officials described the location of their usual and accustomed fishing area as the Pacific Coast "south to the Columbia River").

Dr. Lane's report in turn relies, in part, on Ronald L. Olson, *The Quinault Indians,* University of Washington, Publications in Anthropology, Volume 6, No. 1, 1936, parts of which Dr. Lane appended to her report. Ex. USA-53 (Appendix 3). Olson indicates the Quinault fished the open ocean for halibut, cod, rock cod, sea bass and sole. *Id.* at 36-38.[5] In her report on the Makah, Dr. Lane stated the Makah, who also fished the open ocean, imported their large ocean going canoes from the Indians of Vancouver Island, and in turn traded these same large ocean going canoes to their neighbors the Quileute and Quinault. Ex. USA 21 at 12-17. [6]

Dr. Lane also testified that Quinault had additional usual and accustomed fishing grounds and stations outside the case area. The one area she identified with particularity was Grays Harbor and its watershed. She qualified her testimony, however, stating her listing of that additional watershed did not mean her report should be considered an "exhaustive" list of all the Quinault's usual and accustomed fishing grounds because she understood the Court would not determine any of Quinault's treaty fishing areas outside the case area. Tr. 2817-2818; *see also* Ex. USA-53 at 23 ("While the foregoing reflect the major fishing areas utilized by the Quinault at treaty times, the list in not necessarily complete, nor does it pretend to be exhaustive").

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[5] Dr. Lane submitted a subsequent report authored in 1977 showing the Quinault fished 25 to 50 miles from shore. *Midwater Trawlers Cooperative v. U.S. Department of Commerce*, 139 F.Supp. 2d. 1136, 1144 (W.D. Wash. 2000). In his declaration Russell Svec opines Quinault likely fish for halibut in excess of 20 miles from shore "since the depth contours at which halibut are found are farther offshore as one moves south along the coast." Svec Decl. at 3 ¶ 6. The evidence shows Quinault fished for halibut at treaty time, and logic dictates that ocean "depth contours" have not changed in the years since the treaty was signed.

[6] According to Olson, the Quinault used these canoes to harvest whales and seals at a distance from 12 to 30 miles from shore. Olson, *The Quinault Indians*, Volume 6, No. 1, 1936 at 44-45, 68.

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Shortly after the entry of Final Decision 1, the Court recognized Grays Harbor and its watershed as also part of Quinault's usual and accustomed fishing areas based solely on the Court's initial Finding of Fact 121. *United States v. Washington,* 459 F.Supp. 1020, 1038, 1097-98 (W.D. Wash. 1978). Significantly, the area is within the territorial jurisdiction of the State of Washington. *Id.*; *see e.g.* Ex. USA-53, Appendix 1. And, its inclusion was merely an implied modification of the pretrial order to conform it to the evidence actually presented. *Puget Sound Gillnetters Ass'n v. U. S. Dist. Court for W. Dist. of Wash.*, 573 F.2d 1123, 1130-32 (9th Cir. 1978).[7] Importantly, the Court recognized Quinault had other usual and accustomed fishing areas outside the case area. It concluded none of its orders prohibited Quinault "from exercising treaty rights at usual and accustomed grounds and stations outside the case area." 459 F.Supp. at 1038.

Although Makah admits Judge Boldt's findings only encompass the case area, it asserts without foundation, "[t]he 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 the inland fisheries, while not providing specific information on the location of offshore fisheries." Makah Motion, Dkt. 125 at 34. Makah attempts to rewrite history that Makah itself recognized when it articulated the real reason why the coastal tribes did not provide "detailed information" on the location of offshore ocean fisheries.

In support of its post-Final Decision 1 request for a determination of its ocean usual and accustomed fishing area in ocean waters outside the case area, Makah explained that none of the

[7] Vacated sub nom. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 99 S. Ct. 3055 (1979) modified sub nom. *Washington v. United States*, 444 U.S. 816, 100 S. Ct. 34 (1979).

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tribes presented any evidence to Judge Boldt concerning their ocean fisheries outside the case area except in an "implied or peripheral way" because treaty fishing rights in ocean waters outside the State's three mile jurisdiction were not part of the case, and fisheries in the ocean beyond the case area were unregulated when the case was litigated.

> In Final Decision One we went to the waters under the jurisdiction of the State of Washington. That is what the case was about and we are not relitigating those, we are not going into that again.
>
> 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.

Dkt. 3407 at 5 (lines 11-25), at 6 (lines 1-3) (transcript of September 7, 1977) (emphasis added).

> The "case area" originally included the "off-shore waters adjacent" to the watersheds of the Olympic Peninsula north of the Grays Harbor watershed. However, at the time of Final Decision I, little evidence concerning off-shore ocean places was presented. At the time, and at the present, the State of Washington, against whom the litigation was brought, did not have jurisdiction beyond three (3) miles from the Washington shore. However, subsequently, the United States Congress enacted the so-called "200-Mile Jurisdiction Act" (Public Law 94-265, The Fisheries Conservation and Management Act of 1976). This Act vests fishing regulation jurisdiction in the United States Government, Department of Commerce, up to 200 miles from the shores of the State of Washington. Thus it has become important for the Makah Tribe to clearly establish its usual and accustomed places within that fishing zone.

Dkt. 2893 at 2.

Makah was right. The limited case area, the controversy at issue (Washington State's regulation of off-reservation fishing), the lack of regulations governing ocean fisheries, and the evidence showing Quinault's usual and accustomed ocean fishing ground extended oceanward beyond the case area, show the only logical and legal conclusion is the same one Makah reached

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about its own ocean fishing area: Judge Boldt did not determine the western boundary of Quinault's ocean fishing area because it was not an issue in the case, and he intended his findings to only address the offshore waters within the jurisdiction of the State of Washington because that was all that was necessary to resolve the issues in the case.[8]

Makah also infers that by using the term "adjacent" Judge Boldt meant ocean waters "near (or not distant from) their [Quinault and Quileute's] inland fisheries, but [Judge Boldt] did not determine how near or far." Makah Motion, Dkt. 125 at 18. The record shows, however, that when Judge Boldt intended "adjacent" to mean akin to "nearby" he said so:

> 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.

384 F. Supp. 312, at 344 (emphasis added).

If Judge Boldt intended "adjacent" to mean "nearby" he would have used similar language, and described the Quinault's marine fishing areas as "closely adjacent to but beyond the territorial waters of the State." Instead, he used the broader "adjacent to their territory." Given the evidence, he necessarily meant adjacent to encompass the extent of the case area, three miles off shore. Makah's contention is specious at best.

The evidence before Judge Boldt shows that the Quinault usual and accustomed fishing ground extended in the open ocean beyond the case area. Because Quinault's fishing ground

[8] Quinault had no incentive or reason to discover, gather and present evidence of its ocean treaty fishing grounds outside the case area, or request a finding related to those grounds. Moreover, such evidence was irrelevant.

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extended offshore beyond the limited geographic scope of this case it was unnecessary for Judge Boldt to establish its western boundary, and he did not attempt to do so.

In context, and in light of the evidence, Judge Boldt's "adjacent" findings encompass the Pacific Ocean within the case area (up to three miles from shore) but were not intended to determine a western boundary outside the case area. Makah not only agrees, it fails to show the finding is ambiguous. Based on the evidence and Makah's admissions, there is no dispute for this Court to decide. This Court should rule that Quinault's ocean fishing ground as determined in Final Decision No. 1 extends oceanward at least to the three mile limit of the case area, and that Final Decision No. 1 does not determine the full extent of Quinault' ocean fishing ground beyond the case area. An order should be entered dismissing any further claims as to Quinault.[9]

III. MAKAH'S REQUEST THAT THIS COURT FIND IT HAS STANDING TO ADJUDICATE QUINAULT'S OCEAN FISHING GROUNDS BEYOND THE CASE AREA SHOULD BE DENIED

a. *Makah's standing argument is irrelevant and contrary to its previous position.*

"This dispute is one regarding Judge Boldt's use of the term 'adjacent' in both the Quinault and Quileute U&A's." Dkt. 86 at 4. 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.[10] Despite these unequivocal rulings, Makah contends "if the Court determines that Judge Boldt's findings did not 'specifically determine' a western boundary for Quileute and Quinault's ocean fishing

[9] Makah makes an additional claim regarding Quileute's northern boundary. Quinault takes no position on that claim.

[10] In addition, deletion of that part of the Order that read, "because the western boundary of the Quinault and Quileute U&A's were not specifically determined in Final Decision I" is evidence this Court does not intend to enter supplemental findings on the issue of Quinault and Quileute's federally recognized ocean fishing grounds outside the case area.

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grounds…the Court should hold further proceedings in this subproceeding pursuant to Paragraph 25(a)(6) to make such determinations." Makah Motion, Dkt. 125 at 5 (emphasis added). Because Makah hopes this Court will entertain further proceedings, despite its prior rulings, it asks for a ruling that it has standing to "seek adjudication of the location of the Quileute and Quinault's Pacific Ocean usual and accustomed fishing places" beyond the case area. Makah Motion, Dkt. 125 at 34.

Makah sought a determination of its own ocean treaty fishing grounds beyond the case area because it believed it was necessary after the United States assumed exclusive jurisdiction in 1976 over ocean fisheries up to 200 miles from shore. Fishery Conservation and Management Act (FCMA), 16 U.S.C. §1801-1882. Unlike Makah, however, Quinault ultimately determined it was unnecessary for it to do the same.[11] Quinault and Quileute took a different path. They reached an accommodation with their treaty partner, the United States, under the FCMA.[12] Quinault's treaty is self-executing so there was, and still is, no need or legal requirement for a judicial determination of the meaning of that treaty before Quinault exercises its reserved rights, and Makah cannot cite any contrary authority. *See Washington v. Washington Commercial and*

[11] Because Makah's request was outside its territorial jurisdiction, the State of Washington expressed limited interest in the Makah request, (Dkt. 14951 at 6 (ll 15-18)), and it was unopposed by the other tribes.

[12] From 1978 to 1986, salmon regulations specified the northern and southern boundaries for each coastal tribe's ocean fishing ground, but there was no limit on how far west the tribes could fish, effectively recognized tribal rights to fish to 200 miles offshore. *See e.g.*, 45 Fed. Reg. 50764, 50770 (July 30, 1980); 48 Fed. Reg. 21135, 21145 (May 11, 1983). Since 1987, based on evidence submitted by Quinault and Quileute, federal fishing regulations for all fisheries in the ocean outside the case area recognize the same limits of Quinault's ocean fishing grounds, which the Secretary of Commerce adopted in the 1996 groundfish Framework Regulation. *See* 52 Fed. Reg. 17264, 17271-72 (May 6, 1987); 61 Fed. Reg. 28786, 28795 (June 6, 1996); 64 FR 24087 (May 5, 1999); 50 C.F.R. § 300.64; 50 C..F.R. §660.706. In *Midwater Trawlers Co-operative v. Department of Commerce*, 282 F.3d 710, 715 (9th Cir.), the court affirmed that recognition.

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Passenger Fishing Vessel Ass'n, 443 U.S. 658, 693 n.33 (1979) (treaties are self-executing on the contracting parties as soon as ratified); *see also Midwater Trawlers Cooperative* 139 F.Supp, 2d. at 1143-1144 (the court defers to the treaty parties' interpretation).

Furthermore, in the past Makah affirmatively recognized the right of Quinault, Quileute, and Hoh Tribes to participate in the blackcod fishery in federally managed ocean waters, which Makah asserts takes place 12 to 40 miles from shore. Svec Decl. at 1-2 ¶ 3; *See* Dkt. 15529 ¶ 2 at 1-2 (Quinault, Quileute, Hoh and Makah "possess" the right to participate in blackcod fishery in the Pacific Ocean); *see also* Schumacker Decl. at 6 ¶15 (1994 testimony of coastal tribes). The right to fish blackcod in federally managed waters at least 40 miles from shore, also includes the right to take halibut, salmon and whiting in those same waters. *See United States v. Washington,* 157 F.3d 630, 644 (9th Cir.1998) (treaty fishing right not limited by species).

Moreover, for decades Quinault has entered into management plans with Makah, and other tribal co-managers, regarding the halibut, blackcod, and salmon fisheries. Makah has never questioned Quinault's right to fish those species beyond five to ten miles off shore, or that its exploitation of those fishery harmed Makah's treaty rights. Makah's current claim of injury, and suggestion this Court "should" convert the issue into the Quinault's right to fish in federally managed waters, under federal regulations, is disingenuous.

As shown, Judge Boldt did not attempt establish a western boundary of the Quinault's ocean usual and accustomed ocean fishing grounds because the evidence showed that regardless of how far off shore, that boundary was clearly beyond the three-mile case area. The location of Quinault's fishing ocean fishing grounds outside the case area is irrelevant to the issue of the

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meaning of Judge Boldt's "adjacent" finding used to describe Quinault's ocean fishing grounds within the case area. To determine that would require consideration of new and additional substantive evidence, contrary to this Court's explicit ruling that the evidence "shall be limited to the record that was before Judge Boldt," and is outside of the scope of this action established in the Final Pretrial Order, Conclusions of Law and Decree and this Court's orders. Makah's motion for summary judgment on standing to litigate that issue should be denied.

b. *Makah's argument improperly requests this Court reconsider its previous orders.*

There are other equally compelling reasons to deny Makah's motion. First, Makah's motion is a spirited, but misguided and procedurally improper invitation for this Court to reconsider and reverse its prior orders brought under the guise of a summary judgment motion on the standing issue it raises. Makah did not seek reconsideration of those orders[13] or appeal those orders, and the rulings should be considered the law of the case. *See United States v. Lummi Indian Tribe,* 235 F.3d 443, 452 (9th Cir. 2000) (a court is generally precluded from reconsidering an issue previously decided in the identical case). This Court should decline Makah's improper invitation to reconsider its orders, and if for no other reason it should deny Makah's motion.

c. *Makah's request is jurisdictionally barred.*

Second, it is long established that a tribe's waiver of its sovereign immunity cannot be implied, and where it is based on its voluntary participation in litigation, the scope of the waiver is limited to the issues necessary to decide the action. *McClendon v. United States*, 885 F.2d

[13] Motions to reconsider must be filed within fourteen days of the order. Local Rule 7(h)(2).

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627, 630 (9th Cir.1989). Like Makah, when Quinault intervened in this case it was for the sole purpose of obtaining a judicial determination of its off reservation treaty fishing rights within the State's jurisdiction, and protection of those rights from infringement by the State. Fishing areas outside the State's jurisdiction were simply not part of the case, as Makah has admitted. Quinault has never put the issue of its off-reservation treaty fishing grounds in ocean waters outside the case area before this Court in this case.

In its treaty with the United States Quinault reserved the right to fish in all usual and accustomed fishing grounds. 12 Stat. 971 (July 1, 1855); 384 F.Supp. at 332. The treaty did not limit that reserved right to specific ocean areas, in part because those areas could not have been determined with precision. 384 F.Supp. at 333. After its treaty partner, the United States, assumed jurisdiction over ocean fisheries up to 200 miles from shore, Quinault presented evidence showing at treaty time it fished at least 25 to 50 miles from shore, and based on that evidence an accommodation was reached with the United States' Secretary of Commerce limiting Quinault's ocean treaty fishing grounds to within that general area. *Midwater Trawlers*, 139 F.Supp. at 1144. The United States has recognized those ocean fishing grounds for over 25 years without any challenge by Makah. *See* 52 Fed. Reg. 17264, 17271-72 (May 6, 1987).

Makah's real complaint is with the long-established federal regulations recognizing that accommodation, which it contends this Court should now allow it to challenge. A challenge to regulations implemented under 16 U.S.C. §1801, et. seq. can be brought under the Administrative Procedure Act. *Alaska Trojan Partnership v. Guitierrez*, 425 F.3d 620, 627 (9th Cir.2005). "It is not clear, however, that a challenge to the federal regulation of ocean fishing

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could be brought in *Washington*." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir.1990). The Secretary of Commerce is not a party, and the "suit concerns only fishing regulations promulgated by the State of Washington." *Id.*[14] Makah does not cite any authority for the legal proposition this Court's jurisdiction in this case encompasses a challenge to the federal regulations adopted by the Secretary of Commerce proscribing the limits of Quinault's ocean fishing grounds outside the case area, and under federal jurisdiction, absent Quinault's consent.

Quinault had never put the issue of its ocean fishing grounds beyond the geographic limits of the case area established in the Pretrial Order and Decree, and which are under the exclusive jurisdiction and regulation of its treaty partner the United States, before this Court. Makah's request is barred by Quinault's sovereign immunity, and beyond the scope of this case.

d. *The basis for this Court's prior rulings cannot be separated from its orders limiting this subproceeding to an interpretation of Judge Boldt's findings.*

Third, this Court's rulings on Quinault and Quileute's motions to dismiss the Makah RFD are inexorably tethered to the rationale underlying those orders. In their motions Quinault and Quileute argued that Makah's unprecedented request was barred on the basis of sovereign immunity. Dkt. 51 at 9-12; Dkt. 53 at 21-26. In rejecting that argument, this Court cited *United States v. Washington,* 626 F.Supp. 1405, 1471 (W.D. Wash 1985), for the general proposition Quinault and Quileute waived their immunity with respect to intertribal disputes. Dkt. 86 at 3. In that case the Court found Makah waived its immunity because it consented to a "full

[14] *See United States v. Washington*, 573 F.3d 701,709 (9th Cir. 2009) (the point of the initial lawsuit was to protect Indian treaty rights from state infringement).

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adjudication" of its own treaty rights, which of course Makah did with its post-Final Decision 1 request for determination of its treaty rights in ocean waters outside the case area.[15] Moreover, that case involved the intertribal allocation of salmon based on each tribes' "adjudicated" fishing rights. *Id. at* 1470-71.

This Court also cited Quinault's and Quileute's opposition to the proposed "Sunset Order," where they joined in the argument that the tribal parties in this case "waived their sovereign immunity at least to the extent that modification[s] of the original decrees are necessary." Dkt. 86 at 3 (citing Dkt. 13234 at 7) (emphasis added). Judge Boldt's findings, however, are part of the original decree, unlike Quinault and Quileute's federally recognized and regulated fishing grounds outside the case area. *See* 384 F.Supp. at 405 (judgment and decree based on findings of fact and do not apply to areas under exclusive federal jurisdiction).

Similarly, this Court did not address Quinault's well-founded contention Makah's decades long delay in challenging the United States' recognition and regulation of Quinault's ocean fishing grounds was barred under the doctrine of laches. Dkt. 51 at 17-19. Instead, this Court summarily dismissed that argument finding it "misapprehends what evidence will be considered here" because "the Quinault need look no further than the record for the evidence that will enable them to respond to the [Makah] Request for Determination." Dkt. 86 at 4-5. Adjudication of Quinault's federally recognized ocean fishing grounds outside the case area would, however, require consideration of new evidence. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1360 (9th Cir.1998). If that somehow now becomes the issue, as Makah

[15] *United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984).

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claims it "should," this Court's reason for denying the motion to dismiss Makah's RFD under the laches doctrine, is legally and logically unsupported.

In sum, this Court's rationale for denying the Quinault's motion to dismiss the Makah RFD is inapplicable and legally unsupported if contrary to its uncontested orders the issue now becomes Quinault's federally recognized ocean fishing grounds outside the case area. Makah's request should be denied. If, however, this Court is inclined to entertain Makah's standing issue, it will also need to revisit its rulings denying Quinault and Quileute's motions to dismiss Makah's RFD. Dkt. 51 at 9-22, and Dkt. 53 at 10-26 (incorporated herein).

e. *Makah does not establish it's standing as a matter of law.*[16]

Notwithstanding the above, the factual assertions Makah makes in support of its standing argument are disputed, and do not establish Makah has standing as a matter of law. For this separate reason, its motion should be denied.

The party asserting standing must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent ("injury in fact"), that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To meet the "injury in fact" element Makah must first show an invasion of a legally protected interest. *Id.* at 561.

Quinault, Quileute and the United States' are the parties to the Treaty of Olympia. 12 Stat. 971 (July 1, 1855). Makah have a separate treaty. 12 Stat. 939. Under its treaty, Makah

[16] Although Makah asserts it has established standing it claims "standing has never been raised as a defense in prior U&A disputes." Makah Motion, Dkt. 125 at 17. The reason is obvious. In the almost 40 year history of this case no other tribe has ever sought to litigate another tribe's fishing grounds outside the case area. What Makah seeks is simply unprecedented.

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only has a treaty right to take one-half the harvestable surplus fish passing through its usual and accustomed fishing grounds. *Passenger Fishing Vessel*, 443 U.S. at 685-86. It has no property ownership in the fish. *Midwater Trawlers Cooperative* 139 F.Supp. 2d. 1145 (citations omitted). Additionally, the treaties were not intended to protect another tribe's right to an allocation of the treaty share of fish. *See* Order on Motion for Reconsideration, Dkt. 18728 at 3 (treaty language does not confer upon on tribe the right to an allocation of the treaty share of fish vis-à-vis another tribe); *see e.g. United States 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."). There is no legal basis to find that by merely exercising its federally recognized right to fish in federally managed and controlled ocean waters Quinault, who is not a party to the Makah treaty, illegally interferes with or harms Makah's treaty fishing rights.

Whiting

Even if Makah could establish a legally protected interest, it fails to establish a concrete and particularized injury that is actual or imminent. Quinault has never been allocated a share of the whiting fishery, has not entered the fishery, and if it were to enter the fishery there is no basis to infer Makah's opportunity to harvest its treaty share of whiting in its usual and accustomed fishing area will be effected. Schumacker Decl. at 8-9 ¶ 20, 22. *See Midwater Trawlers Co-operative v. Department of Commerce*, 282 F.3d 710, 715-16 (9th Cir.) (fishing organizations did not have standing to challenge the Hoh, Quinault and Quileute's federally recognized and regulated ocean fishing rights because those tribes were not allocated any whiting).

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Furthermore, since 1999, the United States' annual tribal whiting allocations have not been based on Makah's 50% share of the harvest available in its usual and accustomed fishing grounds, as Makah admits (Dkt. 81 at 3-4), but instead on Makah's "statement of need for their tribal fishery." *See e.g.* 75 Fed. Reg. 11,829, at 11,830 (Mar. 12, 2010).[17] In 2009, the year Makah filed its RFD, at Makah's request the National Marine Fisheries Service (NMFS) adopted a whiting tribal allocation that set aside 8,000 metric tons for Quileute's needs, based on Quileute's stated intent to enter the fishery that year, in addition to a 42,000 metric tons set aside for Makah's needs. Makah Motion, Dkt. 125 at 7-9; 74 FR 9874, 9875 (March 6, 2009); 50 CFR 660.385. Makah then announced its "intent" to harvest only 23,789 of its 42,000 metric ton set-aside, and asked that the remaining 18,211 metric tons "be reapportioned to the non-tribal" instead of the Quileute fishery. Joner Decl. at 18 ¶39; 74 Fed. Reg. 20620, 20623 (May 5, 2009). Makah admits that "it is not always possible for Makah to harvest its full whiting allocation" and it only harvested 100% of its requested whiting set aside in 2006. Joner Decl. at 2-3 ¶2, 6.

Makah now tacitly concedes it cannot establish any injury based on its initial theory its whiting harvest will be reduced if Quinault or Quileute enter the fishery. Its injury claim now rests on its efforts to negotiate a whiting management plan, and need to participate in the process to determine an overall treaty allocation.[18] Makah Motion, Dkt. 125 at 10-11.

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[17] Makah admits it has not even requested more than 17.5% of the resource in its 16-year history in the fishery. Makah Response to State Mot. For Recons., Dkt. 81 at 3-4.

[18] Makah summarizes its "injury" as follows: "[W]hen 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." Makah Motion, Dkt. 125 at 10. "Makah would need to devote further efforts to negotiating an intertribal allocation or management plan…" *Id.* at 11. "Makah has already engaged in and would need to devote additional resources to participate in the NMFS process to determine an overall treaty allocation…" *Id.*

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First, Makah participates in the "process" of determining a treaty allocation regardless of whether Quinault or Quileute enters the fishery. *See* 50 CFR § 660.50(d)(1) and (2).[19] Second, Quinault attempted to avoid the necessity of an intertribal allocation agreement. Quinault requested federal regulators to determine the harvestable amount of whiting specifically available within the Quinault's ocean fishing grounds should Quinault decide to enter the fishery, but NMFS instructed the tribes it was their responsibility to negotiate a management plan if Quinault or Quileute entered the fishery. Joner Decl. at 14-15, ¶ 31, at 16 ¶ 36 (Exhibit T).

Makah cites no authority for the proposition that its desire for a management plan to ensure a cooperative fishery because the federal government refuses to determine the harvestable fish in each tribe's fishing grounds is a concrete and particularized injury that establishes its standing to adjudicate the other tribes' federally recognized fishing grounds. *See United States v. Washington,* 573 F.3d at 708 ("Intertribal allocations of fisheries have historically been a matter for the tribes to resolve amongst themselves, as sovereigns."). Instead, Makah relies on *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) to support its claim. Makah Motion, Dkt. 125 at 14-15. *Krottner* lends no support to Makah.

Krottner involved the theft of a laptop containing the names, addresses, and social security numbers of Starbucks' employees. The employees alleged negligence and breach of implied contract under the theory Starbucks had a duty to protect their personal information, and

[19] "An allocation, set-aside or a regulation specific to the tribes shall be initiated by a written request from a Pacific Coast treaty Indian tribe to the Regional Administrator..." 50 CFR § 660.50(d)(1) . "… the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus." 50 CFR § 660.50(d)(2) .

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because it breached that duty they suffered the risk of future identity theft. *Krotter*, 628 F.3d at 1141-1142. The *Krotter* court found "on these facts" the risk of identity theft based on the stolen laptop containing the employee's personal information was a credible threat of real and immediate harm for the purposes of standing. *Krotter,* 628 F.3d. at 1143.

This suit, of course, is not brought under a negligence or breach of contract theory. Quinault does not owe Makah a recognized legal or contractual duty to protect Makah's fisheries. Quinault has never entered the whiting fishery, and if it did there is no basis to infer Makah's opportunity to harvest what it claims are its needs, or even its treaty share of whiting in its usual and accustomed fishing grounds, will be affected. Makah's reliance on *Krotter* is misplaced.

Halibut, Blackcod and Treaty Troll [20]

For years Makah, Quinault, and the tribes exploiting the fisheries, have entered into management agreements with respect to the salmon, blackcod and halibut fisheries. *See* Svec Decl. at 2 ¶ 4, 3-4 ¶ 7; Jorgensen Decl. at 6 ¶ 9; Schumacker Decl. at 5, 7 ¶ 11, 17. Those agreements have been based, in part, on each tribe's ocean fishing grounds as recognized by federal regulations. Jorgensen Decl. at 8-9 ¶ 13; Schumacker Decl. at 6 ¶ 16. Makah has never questioned Quinault's fishing rights in federally managed waters in negotiating those agreements, or complained Quinault's participation harms its opportunity to take fish within its

[20] It is noted that despite Makah's claim it suffers an "injury in fact" because of Quinault's participation in the halibut, blackcod, and salmon fisheries in its RFD Makah merely mentions those fisheries in passing. Dkt. 1 (3.d.) at 10. Furthermore, Makah's assertion it did not seek determination of the Hoh ocean fishing grounds because Hoh has not "threatened" to exercise its right to fish for whiting, (Dkt. 1 at 2, n.1) should be viewed as an admission Makah does not seriously believe it as suffered any real harm by Quinault's long participation in those fisheries.

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treaty fishing grounds. *Id.* Indeed, in the past Makah affirmatively recognized Quinault, Quileute, and Hoh's right to participate in the blackcod fishery in those waters. Dkt. 15529 ¶2 at 1-2. Furthermore, Makah would still need to negotiate management plans in these fisheries with Hoh and other tribes if Quinault did not participate in those fisheries.

Makah's own proffered evidence shows Quinault and Quileute have only harvested a small fraction (1% to 5%) of the treaty troll coho and chinook, with Makah taking the rest. Svec Decl. at 7 ¶ 15; Jorgensen Decl. at 4-6 ¶ 5, 6. During the relevant years, the tribal quota of chinook has not even been reached. Jorgensen Decl. at 4-6 ¶ 5, 6. The coho quota was met or exceeded in only 2007 and 2009. *Id.*[21] There is no evidence that the relatively small percentage of the quota taken by Quinault is harvested beyond five to ten miles from shore, and the data suggests the fish may be taken even closer to shore. Jorgensen Decl. at 8 ¶ 12. Even if Quinault's ocean fishing ground was limited to five to ten miles from shore, as Makah asserts it should be, Makah would still need to negotiate a management plan with Quinault because Quinault harvests some, if not a majority, of the fish within ten miles from shore.

Furthermore, the treaty quotas are based, in part, on the combined federally recognized tribal fishing grounds, including Quinault's recognized ocean fishing area, and the tribes' historic harvests. Jorgensen Decl. at 8-9 ¶ 13. Quinault's extremely limited participation in the fishery

[21] The fish harvested by Quinault, Quileute and Hoh was less than the total number of coho Makah harvested over the quota in 2007. Jorgensen Decl. at 6 ¶ 7.

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does not diminish the fish available for harvest by Makah, and may benefit Makah by ensuring a higher treaty quota. Jorgensen Decl. at 9 ¶ 14.[22]

Makah admits the treaty blackcod treaty fishery is managed under an annual set-aside established by NMFS, and for over a decade it has entered into agreements with Quinault and Quileute to exploit the fishery. Svec Decl. at 2 ¶ 4; Schumacker Decl. at 6 ¶ 15, at7 ¶ 19. When establishing the set aside NMFS uses the federally recognized ocean treaty fishing area for all the coastal tribes. Schumacker Decl. at 6 ¶ 15. Makah historically harvests approximately 60% of the set-aside although its ocean usual and accustomed area comprises only about 18.5 % of the total treaty fishing area used to establish the set-aside. Schumacker Decl. at 6 ¶ 15, at 7 ¶ 17. Makah's blackcod opportunity actually benefits based on Quinault and Quileute's federally recognized ocean fishing grounds outside the case area by increasing the fish available for it to harvest. Schumacker Decl. at 7 ¶18.

Makah admits that under the management plan entered into by all the halibut treaty tribes, and not just the coastal tribes, the halibut treaty allocation is apportioned into competitive sub-fisheries. Svec Decl. at 3-5 ¶ 7-9. It claims the amounts harvested or apportioned to Quinault and Quileute reduced the amounts available to it and other tribes. Makah Motion, Dkt. 125 at 16.[23]

[22] Although Makah claims that because Quinault has been unwilling to restrain its chinook fishery to ensure enough fish remain to fully harvest the coho quota, it is Makah that is unwilling to agree to management measures to obtain a fuller harvest of late arriving coho. Jorgensen Decl. at 7 ¶ 10, 11.

[23] No other halibut fishing tribe has joined in Makah's request, and Makah fails to show how it alone would be affected in the competitive halibut fishery.

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The halibut fishery is also based on the entire fishing areas of all the participating tribes, including the Quinault and Quileute federally recognized ocean fishing grounds. Schumacker Decl. at 4 ¶ 8. Makah's usual and accustomed fishing area only comprises 22.84% of the total Pacific Ocean treaty areas and is a significantly smaller proportion of the total treaty area, yet it harvests over 50% of the total coastal tribes' tribal harvest. Schumacker Decl. at 4-5 ¶ 10-11. If the Quinault and Quileute's federally recognized ocean treaty fishing grounds were not included in establishing the treaty share of halibut, as with blackcod, the treaty share would likely be adjusted significantly downward reducing the amount of harvestable halibut available for Makah as well as the other tribes. Schumacker Decl. at 5- 6 ¶ 13. Because halibut is a competitive fishery, there is no evidence that any halibut not harvested by either Quinault or Quileute would result in a greater Makah harvest or harvest opportunity. And, even absent Quinault's participation, Makah would still need to negotiate management plans with the other halibut tribes.

In sum, Makah fails to establish the absence of a genuine issue of fact that it has suffered injury because Quinault exercises the federally recognized limits on its fishing rights outside the case area in waters under the exclusive jurisdiction of the United States, in the fisheries managed by the United States. In the event this Court entertains the standing issue Makah raises, which it clearly should not, Makah's request for summary judgment on that issue should be denied.

IV. CONCLUSION

For the above reasons, this Court should deny the Makah Indian Tribe's Motion for Partial Summary Judgment on the irrelevant standing issue it raises. And, because there is no

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real controversy over the interpretation of Judge Boldt's "adjacent" findings, this Court should enter a ruling that Quinault's ocean fishing ground as determined in Final Decision No. 1 extends oceanward at least to the three mile limit of the case area, and that Final Decision No. 1 does not determine the full extent of Quinault' ocean fishing ground beyond the case area. This Court should enter an order dismissing the further claims in this subproceeding that relate to the extent of Quinault's ocean fishing grounds beyond the case area.

DATED this 10th day of December 2012.

s/ Eric Nielsen
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2012, I filed the foregoing document, QUINAULT INDIAN NATION'S RESPONSE TO THE MAKAH INDIAN TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT, with the Clerk of the Court using the CM/ECF system, which will send notice to all parties registered in the system on this matter.

s/ Eric Nielsen

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