Nos. 13-35925 and 13-35928

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff,

and

HOH INDIAN TRIBE; QUILEUTE INDIAN TRIBE; QUINAULT INDIAN NATION, Plaintiffs - Appellants,

MAKAH INDIAN TRIBE, Plaintiff - Appellee,

v.

STATE OF WASHINGTON, Defendant - Appellee,

JAMESTOWN S'KLALLAM TRIBE and PORT GAMBLE S'KLALLAM TRIBE, Real-party-in-interest.

On appeal from the United States District Court Western District of Washington at Seattle, Nos. 2:09-sp-00001-RSM, 2:70-cv-09213-RSM
The Honorable Ricardo S. Martinez
United States District Court Judge

PLAINTIFF-APPELLANT HOH INDIAN TRIBE'S REPLY TO APPELLEE MAKAH INDIAN TRIBE'S RESPONSE BRIEF, STATE'S ANSWERING BRIEF, S'KLALLAM TRIBES' BRIEF

Craig J. Dorsay
DORSAY & EASTON LLP
1 S.W. Columbia Street, Suite 440
Portland, OR 97258-2005
Phone: (503) 790-9060
craig@dorsayindianlaw.com

Lea Ann Easton
DORSAY & EASTON LLP
1 S.W. Columbia Street, Suite 440
Portland, OR 97258-2005
Phone: (503) 790-9060
leaston@dorsayindianlaw.com

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1. Introduction.

The Makah Indian Tribe's Answering Brief (hereinafter "Makah Brief") provides support for the Hoh Indian Tribe's arguments on appeal. Makah's arguments highlight why the Hoh Tribe should be a full party to subproceeding 09-01 in the district court, and why the Hoh Tribe's sovereign immunity – in addition to the sovereign immunity of the Quileute Indian Tribe and the Quinault Indian Nation (hereinafter "Q&Q Tribes") – requires that the subproceeding be dismissed. For the most part, Makah's Brief is not responsive to the arguments made in the Hoh Tribe's Opening Brief. Hoh will reply only to those Makah arguments that require clarification or a response. The S'Klallams' Brief as a "Real Party in Interest" is duplicative and its legal citations are inaccurate. The State's Brief raises no legal issues of note.

2. Argument: Reply to Makah Brief.

The Makah Tribe has made the Hoh Tribe's case for Hoh. Hoh argued in its Opening Brief that it should have been included as a full party in the subproceeding in district court because it is a signatory to the same treaty as the Q&Q Tribes and will be affected by any decision defining those treaty rights for the Q&Q Tribes. In its Answering Brief, in virtually every discussion, Makah lumps the Hoh Tribe in with the Q&Q

Tribes in discussing treaty rights. *E.g.*, Makah Brief at 12-15. In its substantive arguments, the Makah Tribe includes Hoh with the Q&Q Tribes[1] in arguing that "the tribes" have waived their sovereign immunity, *id.* at 4, 15, 17, that their waivers of sovereign immunity extend to inter-tribal disputes, *id.* at 44-46, that the geographical scope of the waiver that allegedly extends into the ocean under federal jurisdiction includes Hoh, *id.* at 48-50, that the Hoh Tribe has expressly consented to adjudication of its ocean treaty fishing U&A, *id.* at 52, and that Hoh has also allegedly invoked the district court's jurisdiction to enforce its treaty rights out in the ocean. *Id.* at 51. While Makah asserts that it is seeking no relief against Hoh, *id.* at 2, it also alleges that Hoh has been fully able to raise all defenses and to appeal all adverse determinations against it, *id.* at 62, and that Hoh's claims and defenses should be denied.

Makah cannot have it both ways. It cannot argue on one hand that Hoh has no standing to complain about Makah's treaty rights claims against the Q&Q Tribes or to defend itself against such claims on the ground that it has not named Hoh as a responding party or made any claims directly against Hoh, and then argue that all of Hoh's defenses to

[1] The Hoh Tribe will refer collectively in this brief to the Hoh, Quileute and Quinault Tribes, the three signatories to the Treaty of Olympia, as the "QTA Tribes."

such claims fail on the merits and should be denied. This is why the Hoh Tribe has argued throughout this matter that it is entitled to be a full party in subproceeding 09-01, and has the right to make and defend its own treaty status. Any substantive decision in subproceeding 09-01 that interprets treaty rights under the 1855 Treaty of Olympia, 12 Stat. 971, will of necessity also interpret and define the Hoh Tribe's rights under that same treaty. It is only because of the current structure of Paragraph 25 of the Permanent Injunction in *U.S. v. Washington* that the Makah Tribe can prevent the Hoh Tribe from exercising its full legal rights under the Federal Rules of Civil Procedure.[2] The actions of the Makah Tribe and the decisions of the district court have adversely affected the Hoh Tribe's legal rights, and the court's orders must be overturned.

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[2] In its Opening Brief, the Hoh Tribe referred to the district court's Supplemental Paragraph 25 Order of November 9, 2011, DKT. #19893, for this point. HER90 – HER92. One of the other counsel to *U.S. v. Washington* has pointed out that there is a subsequent district court Paragraph 25 Order, dated November 20, 2012, Dkt. #20254. The Hoh Tribe was aware of the 2012 Order. This most recent ¶25 Order addressed issues regarding electronic filing of pleadings in the wrong subproceedings, and in either the main proceeding or the correct subproceeding instead of in both (there are different docket numbers for the main proceeding and for each subproceeding). This 2012 Order did not change any other substance of the Paragraph 25 procedures, and the Hoh Tribe therefore used the Orders where each of these substantive procedures and terms was first used. The language of the 2011 and 2012 Paragraph 25 Orders on "Interested Parties" is identical.

The Makah Tribe's primary argument is that the QTA Tribes have "expressly" waived their sovereign immunity for the Makah Tribe's present action against the Q&Q Tribes because, when the three tribes intervened in the main *U.S. v. Washington* proceeding in 1971 and asked the district court to adjudicate the

existence of their treaty right to take fish, they did not expressly limit the geographical area of their treaty claim to fish at usual and accustomed places. Makah Brief at 5-7, 43, 49. Makah equates failure to specifically limit with an unlimited express waiver. This is not the law. There are several problems with Makah's argument on this issue.

First, Makah's argument fails to incorporate basic legal principles. When a party seeks to intervene in an existing case, as Makah, Hoh, Quileute, Quinault and other tribes did in *U.S. v. Washington*, they take the proceeding as they find it and are not permitted to enlarge the issues and jurisdiction already before the court. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 497 (1944)(" one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding."); *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D.Cal. 1954) (" the intervener still

must take the main suit as he finds it, . . . but only in the sense that he cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell."; "Of course this does not mean that Rules 24 and 13 purport to enlarge the jurisdiction of this court.") .

Makah argues that it was not until two years after the QTA Tribes intervened in *U.S. v. Washington* that the district court allegedly first limited the case to adjudication of treaty fishing rights in areas that are within the jurisdiction of the State of Washington. Makah Brief at 7. Makah ignores the fact, however, that the court's jurisdiction in the case was never geographically broader than this. The jurisdiction of the district court in *U.S. v. Washington* was limited by the original Complaint in the case filed by the United States. Complaint, Dkt. #1, Sept. 18, 1970. That Complaint expressly limited the jurisdiction invoked by the United States to "the western portion of the State of Washington" and "any waters over which the State of Washington has jurisdiction." *Id.*, ¶ 3, p. 3, ¶ 13, p. 8. The complaints in intervention filed a year later by the QTA Tribes could not, under the legal principle just discussed, expand the jurisdiction of the case beyond state territorial boundaries. This jurisdictional limitation was inherent in the case from the date the Complaint was filed. The district

court's final pre-trial order issued on August 24, 1973, Dkt. #353, QER 92, confirmed this jurisdiction. The court's 1973 pre-trial order and *Decision I* in 1974 were not limitations of pre-existing broader jurisdiction exercised by the district court; they were statements of existing jurisdiction.

Once Makah's primary argument is eliminated, its other arguments are exposed as a house of cards. Makah argues that because there is no geographic limitation on the QTA Tribes' claim of treaty fishing U&A (and voluntary waiver of sovereign immunity by bringing the claim), and because the QTA Tribes have agreed that inter-tribal disputes are within the jurisdiction of the district court, there must be jurisdiction over Makah's ocean treaty fishing rights claims against the Q&Q Tribes. Makah then cherry-picks statements made by the QTA Tribes during over 40 years of court proceedings and 20,000 plus pleadings filed, taking many of them out of context. Hoh will not respond to that part of Makah's brief because it has no legal significance to the issues being appealed. Such statements do not constitute an express waiver of the QTA Tribes' sovereign immunity, and there are just as many if not more statements to the contrary. It would serve no useful purpose to get into a battle over

who can find the most quotes that might be argued as an implied acknowledgment of waiver of tribal sovereign immunity.

One statement highlighted by Makah illustrates the absurdity of this task. If every statement in this long-running case is taken at its face value, without any context, then the jurisdiction of the district court in *U.S. v. Washington* is unlimited. For example, Makah quotes a statement of the district court made in its 1994 shellfish decision, *U.S. v. Washington*, 873 F.Supp. 1422, 1427 (W.D.Wash. 1994): "*Washington I* was decided in 1974. At that time, the Court reserved jurisdiction to hear other unresolved issues arising out of the Stevens Treaties." Makah Brief at 11-12. According to Makah, this statement means that the district court has ongoing jurisdiction over any Stevens Treaty issue, anywhere, without any species or geographical limitation. *Id.* This means that the district court has jurisdiction over treaty hunting claims, treaty gathering claims, treaty monetary damage claims, and any other potential treaty claim, even though such claims have never been previously raised. This logical extension of one statement by the district court exposes the fallacy of Makah's argument. Such a result would fly in the face of well-established sovereign immunity principles and other legal precedent. Even Makah – Hoh believes – is not arguing that the district court has jurisdiction to hear

a brand new case raising treaty hunting rights claims. By Makah's own argument, however, since such a claim is not expressly excluded, it must be expressly included. There is no merit to Makah's argument.

Makah does not refute the basic fact that the district court has never expressly taken jurisdiction over ocean treaty fishing U&A in the absence of voluntary consent by the tribe involved – in *U.S. v. Washington*, only Makah. Makah does not answer the discussion in Hoh's Opening Brief showing that while the district court from time-to-time has considered the impact of ocean fishing on adjudicated treaty fishing rights within the geographic case area, this does not mean that the district court has jurisdiction to directly adjudicate ocean treaty fishing U&A. The fact that other courts have transferred cases to *U.S. v. Washington* or stated in dicta that other claims should be raised in *U.S. v. Washington* was not a determination by the district court in *U.S. v. Washington* that it had actual jurisdiction over ocean treaty fishing rights, and did not prevent the QTA Tribes or other tribes from raising defenses available to them in subsequent *U.S. v. Washington* subproceedings, including the defense of sovereign immunity. Second, until now, the district court has never specifically ruled that it has jurisdiction in *U.S. v. Washington* to determine treaty ocean fishing U&A area. Makah's brief cites many

anecdotal references from the over 20,000 pleadings in the case where ocean treaty fishing is mentioned or "considered," but the basic fact remains that neither the district court nor this Court have ever previously, specifically addressed or ruled that the federal court in *U.S. v. Washington* has properly exercised jurisdiction to adjudicate treaty ocean fishing rights. Instead, Makah's argument is that the district court has extended its jurisdiction to the treaty ocean fishery by implication, because of the periodic references to that fishery that appear from time to time in the case record.

All of the examples cited by Makah, however, are consistent. The district court retained authority to take the ocean treaty fishery into account – to consider the impact of the ocean fishery – when harvesting, migration, or other activity had an impact on the adjudicated treaty fishery within the case area. As Makah notes in its Response Brief, this consideration occurred a number of times. *E.g.*, Makah Brief at 9-12. But never in any of these proceedings, although the district court had numerous opportunities and even though adjudication of ocean U&A would have been helpful to overall resolution of the specific proceeding, did the district court ever attempt to adjudicate ocean treaty fishing U&A or decide that it had jurisdiction to do so.

One example cited by Makah for the proposition that the QTA Tribes allegedly, expressly consented to jurisdiction for adjudication of their ocean treaty fishing U&A actually shows the contrary - that the district court expressly did not exercise jurisdiction over ocean treaty fishing U&A. The example also supports Hoh's argument that the district court's collateral consideration of the ocean treaty fishery was not the exercise of jurisdiction over such fishery as part of *U.S. v. Washington.*

First, Makah asserts that the Judge Boldt's determination of QTA U&A in *Decision I* included the ocean fishery because Judge Boldt used the terms "adjacent tidewater and saltwater areas" and "ocean fisheries . . . in the waters adjacent to their territory," and the term "adjacent" is not "explicitly limited" to the ocean area under State jurisdiction. Makah Brief at 8.[3] Makah noted that Judge

Boldt made an equitable adjustment in the non-treaty ocean fishery in "marine areas closely adjacent to, but beyond the territorial waters of the state," *id.* (*citing Decision I,* 384 F.Supp. at 416), as an indication that the

[3] Makah also notes that the district court in *Decision I* made one finding regarding Quinault U&A outside the case area as defined by the district court at that time. Makah Brief at 8, lines 1-3. Hoh already addressed this subject in its opening brief, at pages 36-37. The finding in question involved Grays Harbor. That area was outside the case area as originally defined by the district court, but was within the area of State territorial jurisdiction – along the Washington Coast.

district court has always exercised jurisdiction over the ocean fishery beyond state jurisdiction. Makah then cites a decision of this Court for the argument that the Indian "*treaty* ocean fishery" was also explicitly included under the district court's authority in *U.S. v. Washington* as well, because this Court stated that the district court could also take the "close-in" treaty ocean fishery into account in making an equitable allocation of fish between treaty and non-treaty fishers. Makah Brief at 9, *citing Puget Sound Gillnetters Ass'n v. U.S. Dist. Crt.*, 573 F.2d 1123, 1129 at n.7 (9th Cir. 1978), *aff'd in part, vacated in part, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In actuality, this Court's decision in *Puget Sound Gillnetters* supports the QTA Tribes' position that the district court, while taking the ocean fishery "into consideration" from time-to-time, has never exercised jurisdiction over that fishery in *U.S. v. Washington*. The Ninth Circuit first affirmed the authority of the district court to include the non-Indian "close-in" ocean fishery in "estimat[ing] the total opportunity available to non-treaty fishers," and noted that including these numbers would increase the opportunity for treaty fishers "in Puget Sound and the coastal

streams." 573 F.2d at 1129 (emphasis added).[4] The Court followed up this statement by concluding: "Fish reach the tribal fishery after passing through the areas of heaviest nontribal fishing. . . . If the nontribal fishery were not limited, the tribal fishery would never have the opportunity to take its full share . . . . Preserving the tribal opportunity requires limiting the nontribal opportunity." *Id.* at 1129-30 (emphasis added).

A brief review of these quotations refutes Makah's assertion that the language shows that the district court had taken express jurisdiction over the treaty ocean fishery, and that the 9th Circuit has affirmed the district court's jurisdictional conclusion. If the district court had included the "close-in" ocean treaty fishery in the subject matter of U.S. *v. Washington*, this Court would not have affirmed the authority of the district court to restrain the close-in non-treaty fishery in order to allow fish to "reach" the treaty fishery, because the fish would already be in the treaty fishery. The restraint was necessary to allow the ocean fish to "reach the tribal fishery" because the tribal fishery determined by the district court only included the fishery within state territorial waters. The district court could use ocean fishery harvest numbers to estimate fishing

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[4] This is where the Court notes that the district court can also, if appropriate, take into account the small close-in treaty ocean fishery in estimating total fishing opportunity, if appropriate. *Id.* at n.7.

opportunity to equitably allocate the case area fishing harvest between treaty and non-treaty fishers, but the district court never exercised direct jurisdiction over the ocean treaty fishery itself. Makah's own argument demonstrates conclusively that its argument is wrong.

Contrary to Makah's assertions, therefore, this Court has never directly addressed and decided that the district court has continuing jurisdiction in *U.S. v. Washington* to exercise jurisdiction over ocean treaty fishing and to determine ocean treaty fishing U&A area. The fact that the Ninth Circuit stated in the case where Makah voluntarily consented to adjudication of its ocean treaty fishing U&A that the case was within the continuing jurisdiction of the district court, where no one argued or contested that jurisdiction, is dicta at best. Makah Brief at 11 (*citing U.S. v. Washington*, 730 F.2d 1314, 1316 (9th Cir. 1984)). The statement in question is a statement made without any direct consideration of the issue.

Makah makes a number of other arguments regarding the QTA Tribes' alleged waiver of sovereign immunity for adjudication of ocean treaty fishing U&A. All of these arguments are based on the premise that the Hoh Tribe has already refuted – that the QTA Tribes expressly waived their sovereign immunity from suit for ocean treaty fishing because they

did not expressly limit treaty claims in their complaints in intervention to the geographic area within state jurisdiction. Once this argument disappears, so does the basis for Makah's other arguments on this subject.

For example, Makah argues that the QTA Tribes expressly agreed to adjudication of their ocean treaty fishing U&A in the "sunset order" entered by the district court in 1993. Makah Brief at 28-29, 45-46. The district court proposed ending the case at that time, but the tribes opposed the court's proposal. In that order, the district court retained jurisdiction to modify the original decree in *U.S. v. Washington* as necessary. According to Makah, since the QTA Tribes expressly waived their sovereign immunity for adjudication of ocean fishing treaty rights by not expressly limiting the scope of their intervention in their complaints in intervention, by agreeing to continue the case they also agreed to adjudication of ocean treaty fishing U&A in the future. Makah Brief at 45-6. In actuality, since the QTA Tribes never agreed to ocean fishing jurisdiction, the district court's 1993 sunset order is what it purports to be – a continuation of the court's existing jurisdiction within the case area, not an expansion of the court's jurisdiction into an entirely new area and subject.

Makah's other arguments on this issue have the same problem, and do not require a response in this brief.

Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710 (9th Cir. 2002, is not to the contrary. Makah asserts that Q&Q expressly asserted in briefs in that case that the district court in *U.S. v. Washington* would have jurisdiction to adjudicate their ocean treaty fishing U&A. Hoh does not think that is what the Q&Q Tribes' amicus brief in that case says, but Q&Q Tribes, which actually submitted that brief, are better positioned to discuss what they intended. Hoh states only that there is no statement by Q&Q expressly acknowledging that the court in *U.S. v. Washington* would have jurisdiction to adjudicate their ocean treaty fishing U&A. The brief states only that the plaintiff in the case could "attempt" intervention in *U.S. v. Washington*, but it does not say that Q&Q could not or would not raise all relevant and appropriate defenses, including sovereign immunity. The *Midwater Trawlers* case and decisions are primarily directed at the proposition that that case was not the appropriate forum to adjudicate Q&Q's ocean treaty fishing rights, and that the tribes had not waived their sovereign immunity in that case. The availability of another forum to adjudicate such rights was not a

factor in the Court's sovereign immunity discussion. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

Makah's arguments regarding denial of the Hoh Tribe's Rule 24(a) motion to intervene in the subproceeding do not add anything new to the discussion that requires a separate response. Makah Brief at 60-62. First, the Makah Brief does not even mention or discuss those portions of the district court's decisions on this issue that limited Hoh's participation to the filing of briefs. The only motions that Hoh has filed in Subproceeding 09-01 have been directed at its own party status, or appealing issues like sovereign immunity which Hoh believes it affects it directly.

Second, even if Makah were right that Hoh is entitled to "fully participate" in the subproceeding, Hoh would still be limited to the issues raised by Makah – the extent of Quileute's and Quinault's U&A. Makah Brief at 61. Hoh still could not raise its own treaty rights claims, even though they arise out of a common set of operative facts and law, except by initiating its own separate subproceeding (where to do so, it would have to voluntarily waive its sovereign immunity). Makah's argument is the same thing as saying that in a contract dispute involving ten contractual parties, one party can sue just two of the other contractual parties while preventing the other seven parties from litigating their own

rights and claims under the same contract. This argument is not the law, makes no sense, and is completely contrary to the efficient administration of justice. Hoh was entitled to intervene under Rule 24 in Subproceeding 09-01 to fully protect and litigate its rights and claims.

3. Argument: Reply to Port Gamble and Jamestown S'Klallam Tribes' Brief.

The S'Klallam Tribes' Brief includes an incomplete discussion of the law of tribal sovereign immunity that is not helpful, and which contains misleading or inaccurate characterizations of the holdings of the cases cited.

For example, the S'Klallams argue that the Supreme Court in *Oklahoma Tax Comm. v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1981) affirmed the general rule that when a tribe brings or intervenes as a plaintiff in a suit, it submits to "the broad equitable power of the court to shape relief among the parties". S'Klallam Brief at 6, n.3. That is not what *Citizen Band Potawatomi* says at all; in fact, it says the exact opposite. The Court rejected the State's claim that by seeking an injunction against a state tax assessment, the Tribe waived its immunity from State counterclaims regarding the subject. 498 U.S. at 509. It rejected the State's claims that to the extent its claims were compulsory

under Fed.R.Civ.Proc. 13(a), the district court did not need an independent basis to decide those claims. *Id.*

Another example is the S'Klallam's citation to this Court's decision in *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998), for the proposition that initiation of a lawsuit establishes a broad consent to court jurisdiction and a broad voluntary waiver of the initiating tribe's sovereign immunity. S'Klallam Brief at 6. First, the S'Klallams neglect to cite or discuss all of the cases cited and discussed in the Hoh Tribe's Opening Brief that disagreed with this contention or interpreted it narrowly. Hoh Brief at 29-33. Second, the S'Klallams omit the subsequent, more focused holding of the Court in *In re White* that narrowed and clarified the general statement quoted in the S'Klallam's Brief. The Ninth Circuit held, citing *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989); *Pit River Home and Agric. Coop Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1999); and *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994), as follows:

> These cases are unhelpful, however, as they have to do with whether a waiver of sovereign immunity in one action with one set of parties or issues extends to a different action with different issues or parties. Here, the case is the same, the parties are the same, the debt is the same, and the issue is the same.

In re White, 139 F.3d at 1272. Ocean treaty fishing rights and U&A are different issues than treaty fishing within the area of State jurisdiction in *U.S. v. Washington*. *In re White* stands for a different proposition than the S'Klallams cite it for.

The S'Klallams other discussions suffer from similar discrepancies.

S'Klallams' discussion regarding 28 U.S.C. §1367 is also unavailing. It is difficult to discern exactly what point the S'Klallams are trying to make in this discussion. The Ninth Circuit in *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998)(the "Shellfish" case) rejected district court jurisdiction over damage claims by shellfish growers against tribes on sovereign immunity grounds, but allowed jurisdiction over damage claims against individual tribal members. *Id.* at 656-57. Individual tribal members have always been subject to suit in treaty rights actions and are not protected by tribal sovereign immunity. *Puyallup Indian Tribe v. Dept. of Game*, 433 U.S. 165, 171-72 (1977). The Shellfish decision would seem to stand for the proposition that the supplemental jurisdiction mandates of 28 U.S.C. §1367 do not override the strong judicial principle of tribal sovereign immunity, even where a dispute arises out of the same "nucleus [sic] of operative facts." S'Klallam Brief at 9. The holding of the Shellfish decision allowing damages claims

against individual fishers is irrelevant to whether a tribe retains its sovereign immunity. S'Klallams' claim that this part of the Shellfish decision "appears to be a rather broad ruling" is contradicted by the language of the decision itself.

Contrary to the S'Klallams' arguments, the law is clear that procedural mandates such as 28 U.S.C. §1367 and Fed.R.Civ.Proc. 13(a)(mandatory counterclaims) "cannot abridge, modify or enlarge any substantive right," include the substantive sovereign right to immunity from suit. *Chemehuevi Indian Tribe v. Cal. State Bd. of Equal.*, 757 F.2d 1047, 1053 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (quoting 28 U.S.C. §2072); *Citizen Band Potawatomi*, *supra*, 498 U.S. at 509-10. The Shellfish decision reached a similar conclusion regarding 28 U.S.C. §1367. S'Klallams' argument on this issue has no merit.

S'Klallams' citation to 28 U.S.C. §1367 does, however, support the Hoh Tribe's contention that it is entitled to full party status in Subproceeding 09-01 pursuant to the Federal Rules of Civil Procedure. Section (a) states specifically that the district court shall have supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under

Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." Under this provision, the district court's refusal to include the Hoh Tribe's rights under the same treaty, to limit the proceeding only to the rights of the Quileute and Quinault Tribes under the same treaty, and to deny the Hoh Tribe full party status was error. The limitation language on Hoh's participation in this subproceeding was clear on its face, and prohibited Hoh from exercising all of its rights under the Federal Rules of Civil Procedure.

Finally, the S'Klallams recitation of asserted "interests" in Sub-proceeding 09-01 reinforces Hoh's argument that the S'Klallams have an insufficient interest in this case to confer standing to appeal, or to participate fully in Subproceeding 09-01. S'Klallam Brief at 13-14. First, S'Klallams claim an interest in any procedural ruling in this case regarding the extent of waiver of tribal sovereign immunity, or in public interest considerations in denying a stay. These are interests shared by every federally recognized Indian tribe in the nation, but surely every tribe does not have a right to intervene and participate in the present case. The Hoh Tribe likewise has a general legal interest in every case that is taking place around the country that may affect the law of tribal sovereign

immunity or the interpretation of federal treaty rights generally, but this interest does not give the Hoh Tribe a legal right to participate directly in those cases.

Second, the S'Klallams argue that any decision in Subproceeding 09-01 may potentially dilute their treaty rights and claim, without any citation, that this is "a known irreparable harm." *Id.* Hoh does not know this, and such harm is entirely speculative at this point. The Ninth Circuit in *Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993), rejected the Tulalip Tribes similar claim of "sufficient interest" for dilution of treaty fishing allocations and an interest in the preservation of existing law, finding those interests too speculative. The Court also held that "[a]n economic stake in the outcome of the litigation, even if significant, is not enough." *Id.*

The S'Klallams then assert that if their interest is not recognized, the QTA Tribes will be able to "preempt the entire fishery" and destroy the S'Klallams treaty fishing rights within the case area. S'Klallam Brief at 14. This argument is nonsense. There is well-established precedent in *U.S. v. Washington* involving the tribes participating in this case holding that "inside tribes" may bring an action to protect their treaty fishing rights within the case area from the adverse impact of tribal fishing

outside the case area. *U.S. v. Washington*, 626 F.Supp. 1470, 1470-71 (W.D. Wash. 1983). This is the route the S'Klallams should follow once Subproceeding 09-01 is completed (if it proceeds) and harm to S'Klallams' treaty fishing allocation is actually threatened. The S'Klallams should not be permitted to intervene or participate now based on speculative fear about what might occur at some point in the future.

4. Argument: Reply to State's Answering Brief.

The Hoh Tribe has already addressed most of the arguments made in the State of Washington's Answering Brief ("State Brief"), and will not repeat that discussion here. Hoh responds to one argument made by the State in its brief.

The State argues in its Brief that it has regulatory jurisdiction over fishing beyond the three mile limit. State Brief at 14-16. There are at least two problems with this argument. First, it expressly contradicts the district court's ruling in *Decision I*. Judge Boldt explicitly ruled that the State did not have regulatory jurisdiction beyond the three-mile limit. *E.g.*, 384 F.Supp. at 386 ("At the present time, the Department of Fisheries cannot completely control the ocean harvest of chinook and coho salmon because most of these fish are caught in waters beyond the state's jurisdictional three-mile limit."); 416 ("in order to approach more nearly the principle of

equal sharing, the fish which Indian treaty fishermen shall have an opportunity to catch shall include not only an equal share of the total number of fish of any species which are within the regulatory jurisdiction of the State of Washington but 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 . . . .")(emphasis added). These holdings are the law of the case and binding on the State.

Second, the State makes this argument for the first time on appeal, and it is thus not properly before this Court.

5. Conclusion.

Based on the foregoing discussion and on the Hoh Tribe's Opening Brief, the Court should conclude that Subproceeding 09-01 is foreclosed by the QTA Tribes' sovereign immunity because it is a proceeding outside the continuing jurisdiction of the district court in *U.S. v. Washington*. Enough is enough. The proceeding initiated 44 years ago to protect treaty fishing from infringement by the regulatory authority of the State of Washington was not an open-ended license to litigate any action in the future that is somehow linked to the exercise of treaty rights. Ocean treaty fishing is a separate matter from treaty fishing within the jurisdiction of the State of Washington. If parties want to initiate action to

resolve ocean treaty fishing claims, they should be required to file a new lawsuit where all relevant claims and defenses can be raised and resolved.

If the Court permits this matter to go forward, the Court should require the district court to grant the Hoh Tribe's Rule 24(a) motion to intervene in the proceeding as a full party, and to address and litigate the rights of the Hoh Tribe as well as those of the Quinault and Quileute Tribes. The Hoh Tribe should be able to raise all appropriate defenses to such action.

RESPECTFULLY SUBMITTED this 10th day of April 2014.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

By s/ Lea Ann Easton
Lea Ann Easton

1 S.W. Columbia Street, Suite 440
Portland, OR 97258-2005
Phone: (503) 790-9060
Fax: (503) 790-9068
E-Mail: craig@dorsayindianlaw.com
leaston@dorsayindianlaw.com
Attorneys for Plaintiff-Appellant Hoh Indian Tribe

STATEMENT OF RELATED CASES

Plaintiff-Appellant Hoh Indian Tribe is aware of the following related cases pending in the Court that would be deemed related to this case under Ninth Circuit Rule 28-2.6: *Lower Elwha Klallam Indian Tribe v. Lummi Nation*, No. 12-35936, *Tulalip Tribes v. Suquamish Indian Tribe*, No. 13-35773, and *United States v. Washington* (In re Culverts), No. 13-35474. These appeals arise out of the same underlying district court proceeding, but involve unrelated disputes and are separate district court subproceedings (Nos. 2:11-sp-00002-RSM, 2:05-sp-00004-RSM, 2:01-sp-01-RSM).

Dated this 10th day April 2014.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Signature s/ Craig J. Dorsay

Attorney for Hoh Indian Tribe, Plaintiff-Appellant

Date April 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 10th day of April 2014.

By: s/ Craig J. Dorsay
Craig J. Dorsay
Of Attorneys for Plaintiff-Appellant
Hoh Indian Tribe