Nos. 13-35925 and 13-35928

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs,

and

HOH INDIAN TRIBE, et al., Plaintiffs-Appellants,

MAKAH INDIAN TRIBE, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, Defendant-Appellee,

and

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

BRIEF OF REAL PARTY IN INTEREST PORT GAMBLE AND JAMESTOWN S'KLALLAM TRIBES RESPONDING JOINTLY TO THE BRIEFS OF APPELLANTS QUINAULT INDIAN NATION AND QUILEUTE INDIAN TRIBE, AND HOH INDIAN TRIBE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for the Port Gamble S'Klallam and Jamestown S'Klallam Tribes certifies that the two Tribes are federally recognized Indian tribes, that do not have any parent corporation, and that no publicly-held corporation owns stock in either Tribe.

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I. INTRODUCTION

The Quileute, Quinault, and Hoh Tribes ("Appellants") assert sovereign immunity as a defense to the Makah's request for determination of extent of their ocean fishing areas, and they seek interlocutory review of Judge Martinez's denial of their defenses. The Port Gamble S'Klallam and Jamestown S'Klallam ("S'Klallam") oppose this interlocutory appeal. If this Court reaches the merits of the consolidated appeals, the Court should affirm the district court and hold that Appellants waived their sovereign immunity and are subject to the district court's jurisdiction in Subproceeding 09-01.

II. STATEMENT OF JURISDICTION

The Port Gamble S'Klallam and Jamestown S'Klallam Tribes join the jurisdictional statements of the Makah Tribe and the State of Washington. ECF No. 33-1; ECF No. 47-1.

III. STATEMENT OF THE ISSUE

The question that concerns the S'Klallam in this case is whether there exists a procedural loophole such that the Quileute, Quinault and Hoh can expand their fishing places in a manner not in "conformity with Final Decision

No. 1[1]" and leave the remaining Tribes who are subject to this Court's jurisdiction on the sidelines with no say in the matter.

IV. STATEMENT OF THE CASE AND RELATED FACTS

Makah and the State of Washington have described the various issues in this case regarding timeliness of the appeal thoroughly and the S'Klallam join those arguments and do not seek to repeat them here. ECF No. 33-1 (Makah Response Brief, hereinafter "Makah Br."); ECF No. 47-1 (State of Washington Response Brief). The S'Klallams concerns have to do with important parameters surrounding case management and jurisdiction (when a Tribe or

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[1] 25. The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:

> a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction;
> ...
> c. whether a tribe is entitled to exercise powers of self-regulation;
> d. disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;
> …
> f. the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I; and
> g. such other matters as the court may deem appropriate.

United States v. Washington, 384 F. Supp. 312, 419 (1974). This order has been amended by the *Order Modifying Paragraph 25 of this Court's Permanent Injunction* of August 23, 1993. MSER 272.

Tribes can seek to adjudicate another Tribes' U & A) and whether or not all Tribes in *U.S. v. Washington* have a say in the establishment of a usual and accustomed fishing ground under the various Stevens' Treaties.

V. SUMMARY OF THE ARGUMENT

The Appellants raise several arguments as to why they should be free from any challenges to their U & A. This would make the federal regulations the only consideration of the extent of their U & A. Quileute and Quinault Brief (hereinafter "QQ Br.") at pp. 17-20. They assert they did not waive immunity for the district court to consider that issue and that the court cannot act beyond the three mile line. QQ Br. at p.1-2; Brief of Appellant Hoh Indian Tribe (hereinafter "Hoh Br.") at p. 33. But the district court has a well developed law of the case that holds the opposite, and no exceptions to the law of the case exist here.[2] Hoh claims that they have been improperly limited (because they were denied intervention) and they should have "full party status" (Hoh Br. 49-52). They also simultaneously argue that other Tribes (namely the S'Klallam) should be denied the right to participate both in the

[2] A district court abuses its discretion in applying the law-of-the-case doctrine only if: "(1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452-53 (9th Cir. 2000) (internal quotation marks omitted).

district court and in this Appeal. Hoh Br. p. 49 (questioning status of other parties); ECF No. 40 (letter claiming no right to participate). These arguments are plainly inconsistent.

VI. ARGUMENT

A. The Court's Jurisdiction and the Tribes' Corresponding Waiver of Immunity Extends to the Issue in Subproceeding 09-01

The issue of whether Quileute, and Quinault waived immunity for a Paragraph 25(a)(6) claim is raised in this subproceeding. Quileute and Quinault admit, however, on p. 7 of their Brief, that the "sole exception to this general rule that waiver must be unequivocally expressed applies where a tribe implicitly waives its immunity by directly participating in litigation." They fail to convincingly argue that this is not one of those cases. Makah clearly demonstrates that not only have Quinault and Quileute "directly" participated in intertribal litigation but they have done so multiple times. Makah Br. §2 (a) (Argument). Furthermore, the district court has in fact adjudicated Makah's U & A in the ocean. MSER 363; Makah Br. at p. 11.

As long Quileute and Quinault assert the fish they catch in the ocean are treaty fish, and seek the district courts' approval on aspects related to their ocean fisheries, (MSER 351), the district court has been invited by them into this arena. There are good reasons they have needed the court. Every landing

these Tribes make of the treaty share for halibut (for example) must be transported into and sold within the three mile line (they claim is the jurisdictional limit) and properly counted within the overall halibut management plan. As such, the time and place for the determination about whether the catch counts as part of the treaty share at all is done within the three mile line and the management of the fishery is done as a collective (ocean tribes and inside Tribes). To claim that one part of this fishery operates outside of the case would be disruptive to the entire management plan in place. In fact, management would become impossible. Intuitively they understand in their past pleadings that all Tribes must coordinate catches to avoid overharvest due to the collective allocation. MSER 329 (Quinault asking the district court to require coordination to prevent overharvest.)

Quinault and Quileute argue that Makah's claim is barred by sovereign immunity because the request goes beyond the issues originally before the court and extends to an area outside the original case area. The argument is simply wrong. The issue of U&As has been a core issue in the case from its inception, and this subproceeding lands well within the scope of the waiver of tribal sovereign immunity as delineated in *U.S. v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) and by this court in *United States v. Washington*, 626 F. Supp 1405,

1470 (1985) ("Makah Indian Tribe is a party and has used the equitable powers of this Court to protect its treaty rights").

It is well established that, as a general rule, Indian tribes are immune from unconsented suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998). It is equally well established that tribal sovereign immunity may be waived, and that a tribe's immunity is waived when it files (or intervenes in) a suit. "Initiation of a lawsuit is an action that 'necessarily establishes consent to the court's adjudication of the merits of the particular controversy,' … including the risk of being bound by an adverse determination." *In re White,* 139 F.3d 1268, 1271 (9th Cir. 1998), *quoting McClendon v. U.S.,* 885 F.2d 627, 630 (9th Cir. 1989).[3] The question presented here is whether there was a waiver of Quinault's and Quileute's sovereign immunity arising from their intervention as plaintiffs in the case and invocation of the court's jurisdiction in intertribal matters. MSER 369-377 and 378-328 (Quinault and Quileute's Complaints in Intervention).

[3] The general rule is that when a tribe brings or intervenes as a plaintiff in an equitable action, it submits to the broad equitable power of the court to shape relief among the parties. *Oklahoma Tax. Comm. v. Citizen Band Potawatomi Tribe,* 498 U.S. 505, 509 (1981).

The guiding case here is *U.S. v. Oregon*, 657 F.2d 1009, which dealt with the scope of waiver of tribal immunity by intervention in the other major Pacific Northwest treaty case. In that case an intervenor tribe asserted sovereign immunity to block a post-decree order virtually barring tribal fishing on a particular run. The Ninth Circuit rejected this argument, noting that by intervening the tribe rendered itself "vulnerable to complete adjudication by the federal court of the issues in litigation." *Id.* at 1014. The court went on to state, *id.* at 1015:

> [T]he court retained post-judgment jurisdiction to modify its decree. … To hold at this stage that tribal immunity blocks modification of an equitable decree would impermissibly violate a central tenet of equity jurisprudence, that of flexible decrees. By seeking equity, the Tribe assumed the risk that nay equitable judgment secured could be modified if warranted by changed circumstances. By intervening the Tribe assumed the risk that its position would not be accepted and that the Tribe itself would be bound by an order it deemed adverse.

This Court followed *U.S. v. Oregon* in a similar context. Makah asserted sovereign immunity against a claim by Quinault, Quileute and Hoh that Makah's ocean fishery posed a threat to their fisheries. This court rejected the argument, holding that when it intervened in the case, Makah waived its immunity as to an adjudication of "whether they threaten to infringe the

adjudicated treaty rights of the other tribes as alleged," and the granting of appropriate equitable relief from such infringement. *United States v. Washington*, 626 F. Supp. 1405, 1471 (1985).

This Court need not address the outer limits of the tribal waiver of sovereign immunity in this case. This subproceeding does not present a close case. As demonstrated above, the issue of U&As is a core treaty issue that was framed at the inception of the case and adjudicated in the Final Decision # 1, and it has since been held that U&A rights are treaty rights that can be enforced in this Case in actions among the tribes. Because Quinault and Quileute have previously invoked this Court's power to exercise its jurisdiction beyond the three-mile line to control the actions of other Tribes, and most certainly count all fish caught as treaty fish, it would not be equitable to accept the sovereign immunity argument.

The discussion by this Court on the extent of tribal waiver in the *Shellfish Decisions* is a useful comparison. This Court indicated that as long as the damages claims arose out of the exercise of fishing rights, the district court had the authority to hear the dispute with respect to claims against Tribal members *but not* against the Tribes themselves because of sovereign immunity. In explaining its rationale, this Court then found that as long as a dispute arose

from the same "nuclear of operative facts" the court would have supplemental jurisdiction under 28 U.S.C.§ 1367. *United States v. Washington*, 157 F.3d 630, 656-57 (9th Cir. 1998) (vacating the provision allowing damages against the Tribes themselves but allowing claims against Tribal members). This appears to be a rather broad ruling.

The argument here would be that as long as it would be so closely related to the original dispute, under 28 U.S.C. § 1367, "district courts shall have supplemental jurisdiction[4] 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." This also example highlights the type of claim that shouldn't be included. A damages claim is much more far afield of the Tribes claim of treaty rights, whereas here, with U &A, the type of claim is exactly the same as *specifically allowed* under Paragraph 25. In fact, the claims against Tribal members that this Court appears to have authorized is *much further* afield of the original treaty issues than the questions raised here.

[4] This rational in 28 U.S.C. § 1367 seems to underlie the Paragraph 25 jurisdictional breadth in this case, especially when considering the provisions of Paragraph 25(a)(4) "disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves." The key is the question of whether this type of claim here is of the same *subject matter* - the answer here has already been given on countless occasions.

The fact that Makah is the party requesting the action, is only due to the fact that Quileute, and Quinault (and perhaps Hoh) believe that they may fish *everywhere* pending or until the district court determination. The S'Klallam assert this is untrue[5] because the Boldt Court admonished Tribes for opening areas without first adjudicating their rights. *United States v. Washington,* 459 F. Supp. 1020, 1068-1069 (1978).

Now that the U & A has been challenged, the Quinault and Quileute should not be fishing. Clarification on this is important. The past authorization were a "reasonable accommodation" and not an adjudication and the authorizations are no longer valid because there is a dispute and objection. MSER 121. The Appellant Tribes have argued too many times in multiple forums that *U.S. v. Washington* was the place to hear this dispute. MSER 106, MSER 119-122. They should be estopped to deny it now.

Treaty rights is not a shell game where a Tribe has the right to make promises in other forums with their fingers crossed. This type of issue arose in

[5] The only reason it appears the request for an adjudication didn't come from them and came from Makah is that Quileute and Quinault never did seek the adjudication because they were enjoying fishing without the adjudication. *See Fn 16,* Makah Br. at p. 56.

a different context in the conflict between the *Greene*[6] decisions and *U.S. v. Washington.* This Court resolved the tension by holding that Tribes are not required to intervene and police other administrative proceedings (in that case recognition proceedings) to "protect against future assertion of treaty rights." The Court held that the *U.S. v. Washington* forum was the place for those disputes:

> It interjects unnecessary and distracting considerations into recognition proceedings if treaty tribes find it necessary or are permitted to intervene to protect against future assertion of treaty rights by the tribe seeking recognition. Such intervention has the potential to interfere unnecessarily with a tribe's establishing its entitlement to recognition because of the speculative possibility that some administrative finding might have an impact on future treaty litigation. The best way of avoiding such difficulties, we conclude, is to deny intervention by tribes seeking to protect their treaty rights, and to deny any effect of recognition in any subsequent treaty litigation. That is the course we adopt.

United States v. Washington, 593 F.3d 790, 801 (9th Cir. 2010).

Thus, any argument that Tribes seeking to challenge the Federal Regulations regarding the U & A's at issue here, ought to have done that just doesn't seem accurate or fair given that the Appellants repeatedly admitted that

[6] *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996). The Tulalip Tribes challenged the fear of that their treaty rights would be diluted but were denied intervention in the Samish recognition proceedings on the ground that recognition could not affect treaty rights. *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993).

they recognized the district court as the ultimate authority on the matter and the Federal Regulations themselves contained this explicit limitation. 61 Fed. Reg. 28786, 28789 (June 6, 1996); Makah Br. at pp. 18-19.

B. Due Process Requires Participation

Hoh argues they should have been granted intervention and were not. Hoh Br., pp. 11-12,46-49,52. The district court did not grant intervention because Hoh were already parties. HER 17-18. The limitations Hoh claims were placed on its participation are fictional. If a party follows the procedure set forth in the Court's Order modifying Paragraph 25, there has never been any limitation placed on their participation. HER 91 (requiring parties to file a notice of their intent). Hoh was also not limited in any way. Hoh filed responses, motions, and even an Appeal in this matter. HER 85 (Motion for Stay Pending Appeal); HER 61 (noting that Hoh opposed Makah's Motion). This has been true in other subproceedings as well. Quileute and Quinault, for example, made repeated motions and objected to the Magistrate's Reports and Recommendations in the 91-1 Halibut Subproceeding arguably also as mere "interested parties." MSER 80; 90, 145, 325. 330. Subproceeding 91-1 was initiated by the S'Klallam against the Makah for preemption in the Halibut fishery due to their fishing for halibut in the ocean impacting Tribes in the

inside. Yet, Appellants here took full advantage of their right to participate ask for affirmative relief in a multitude of hearings, even claiming at times to be "irreparably harmed" (MSER 94) in a case they did not file. In addition, interested parties have "in fact" appealed. The latest example was in Subproceeding 05-2, where several interested parties, including the Makah Tribe, appealed the decision to the 9th Circuit. *United States v. Washington*, 573 F.3d 701 (9th Cir. 2009). This Court allowed the appeal.

In addition to claiming the Hoh Tribe shouldn't be limited in their ability to participate (to which we believe they are not), they argue that other Tribes (especially the S'Klallam) *should be* prohibited from participating. Hoh Br, at p. 50 (claiming that their status is in question). This isn't logical. The Hoh and the Quileute and Quinault, also opposed the S'Klallam participation in the motion for stay in this matter on the grounds that they believe the S'Klallam have no right to participate on Appeal as they did in the district court. Quileute and Quinault Reply (ECF No. 35) at p. 2("This Court should not consider the opposition filed by S'Klallams because they do not have a legitimate interest in opposing the stay pending appeal."); Hoh's Letter February 25, 2014 Letter to the Court, ECF No. 40 (Challenging any right of the S'Klallam to participate on Appeal). The district court agreed that the S'Klallam, however, were part of

the public interest considerations in denying the stay in the first instance. ER 15. This is a legitimate interest.

The S'Klallam's interest in this proceeding is cited directly by Judge Martinez in his order. ER 15. The S'Klallam are impacted by any procedural decision regarding the extent of the waiver of sovereign immunity, and when other Tribes fish outside their established U & A and intercept fish that truly belong to other Tribes' nets. They are also impacted by the dilution of their treaty rights which is a known irreparable harm. They are also directly impacted if ocean fisheries were to end up jurisdictional no man's land.

It is hard to imagine a harm more direct and consequential than the creation of a loophole, outside of *U.S. v. Washington*, where Coastal Tribes can preempt the entire fishery in areas that they have never proven treaty status and Quileute, Quinault, and Hoh can argue they have no say. This is particularly egregious after they have sought to control the "inside tribes" fishing for halibut via court orders in a case they did not file. The S'Klallam should have the same right to participate fully and defend their interests.

VII. CONCLUSION

This proceeding challenges the very basis for the courts' authority over Tribes in *U.S. v. Washington* by blasting away at the very premise recognized

by decades. If this approach is adopted there could officially be a procedural no man's land where ocean Tribes can act as they wish, but no one can stop them, even if their actions serve to completely preempt another Tribes' rights down the line. This would be wrong. These Tribes have invited the district court to control others, and they themselves must also likewise be controlled.

RESPECTFULLY SUBMITTED this 26th day of March, 2014.

By: s/Lauren Rasmussen
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STATEMENT OF RELATED CASES

The Port Gamble S'Klallam and Jamestown S'Klallam join the list of related cases in *US. v. Washington*.

Dated this 26th day of March, 2014.

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CERTIFICATE OF COMPLIANCE

I certify this brief compliance with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3, 345 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 Times new Roman 14 Pt. Font.

Dated: March 26, 2014

By: s/Lauren Rasmussen

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Attorney for the Jamestown S'Klallam and
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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2014, I electronically filed the foregoing Brief of the Port Gamble S'Klallam Tribe and the Jamestown S'Klallam Tribe with the Clerk 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: March 26, 2014.

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