Nos. 13-35925 and 13-35928

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs

v.

STATE OF WASHINGTON, Defendant

. . .

MAKAH INDIAN TRIBE, Petitioner-Appellee

v.

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION,
Respondents-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE 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

REPLY BRIEF OF APPELLANTS QUINAULT INDIAN NATION AND QUILEUTE INDIAN TRIBE

Eric J. Nielsen
NIELSEN, BROMAN & KOCH PLLC
1908 E. Madison Street
Seattle, WA 98102
(206) 623-2488
Attorneys for Appellant Quinault Indian Nation

Lauren J. King
FOSTER PEPPER PLLC
1111 Third Ave.
Suite 3400
Seattle, WA 98101
(206) 447-6286
Attorneys for Appellant Quileute Indian Tribe

John A. Tondini
BYRNES KELLER CROMWELL LLP
1000 Second Ave., 38th Floor
Seattle, WA 98104
(206) 622-2000
Attorneys for Appellant Quileute Indian Tribe

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Appellants Quinault Indian Nation ("Quinault") and Quileute Indian Tribe ("Quileute") (the "Appellant Tribes") appeal the District Court's denial of their sovereign immunity defense to a subproceeding filed against them by the Makah Indian Tribe ("Makah") in *U.S. v. Washington*. In this subproceeding, Makah seeks to determine the boundaries of Quinault and Quileute's treaty-time fishing places *in the Pacific Ocean*, beyond Washington State's jurisdiction (three miles offshore) in waters that are under the exclusive jurisdiction of the federal government. Quinault and Quileute have never waived their sovereign immunity to such a determination, nor is such a determination necessary given that federal regulations have defined their federal-water fishing places since 1986.

Quinault, Quileute, and the United States do not disagree on the meaning of their treaty or the federal regulations promulgated nearly 30 years ago.

For decades, Makah signed numerous ocean fisheries agreements with Quinault and Quileute without ever objecting to the established western boundaries. Makah now asks that *U.S. v. Washington*, a 44-year old institutional reform case against the state of Washington, be the forum for litigating the Appellant Tribes' century-old treaty rights in federal waters. However, "[t]he point of the lawsuit the United States filed was to protect Indian treaty rights from state infringement, not to sort out competing tribal claims. . . . [I]t is hard to see

why the court still displaces state and federal fish management agencies." *U.S. v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009) ("*Skokomish*").

Makah first claims that Appellant Tribes did not timely appeal. Makah also argues that Appellant Tribes have waived their sovereign immunity. This Court should reject both Makah's procedural and substantive arguments.

First, Appellant Tribes filed a timely appeal. Well-established Supreme Court and Ninth Circuit precedent entitles a party to appeal an order denying its sovereign immunity at *either* the dismissal stage *or* the summary judgment stage, *or both*. Under this authority, Appellant Tribes' appeal is timely.

Second, it is undisputed that Quinault and Quileute's sovereign immunity bars Makah's subproceeding unless that immunity has been waived. None of the circumstances identified by Makah effected a waiver. When Quinault and Quileute intervened in *U.S. v. Washington* in 1974, neither the Washington State nor the Court had any jurisdiction over the ocean waters at issue here. Because these areas were unquestionably outside the scope of *U.S. v. Washington*, the Appellant Tribes' intervention cannot constitute a waiver as to issues relating to those waters. Nor do the other actions identified by Makah – Quinault and Quileute's participation in certain subproceedings, a joint argument with 18 other tribes against the dismissal of *U.S. v. Washington*, and an *amicus* argument in a

completely different case – constitute consent by Appellant Tribes to the court's adjudication of their federal-water fishing grounds.

Quinault and Quileute request that this Court reverse the district court's erroneous ruling that they waived their sovereign immunity. Because it is barred by Appellant Tribes' immunity, Makah's subproceeding should be dismissed.[1]

II. ARGUMENT

A. This Court Has Jurisdiction Over Appellant Tribes' Appeal.

Makah concedes that an order denying a claim of sovereign immunity is a collateral order, and a party may appeal such denial at *either* the pleading motion stage *or* the summary judgment stage, or both. Dkt. 33-1 ("Response") at 36-37 (citing *Behrens v. Pelletier*, 516 U.S. 299 (1996)). Makah argues, however, that Quinault and Quileute's appeal from the district court's denial of their sovereign immunity defense at the summary judgment stage is untimely because their defense was not based on an "expanded record," and because it was raised in response to Makah's motion for summary judgment rather than in their own summary judgment motion. Response at 37-38.[2] Neither argument has merit.

[1] The Appellant Tribes also request that this Court not consider the improperly filed briefs of Washington State and the Port Gamble and Jamestown S'Klallam Tribes (the "S'Klallams"). Nor do these briefs establish a waiver of immunity. *See* Sections II.D below.

[2] Makah states that Quinault and Quileute have appealed the district court's ruling that federal regulations do not deprive it of jurisdiction to determine federal-water

Behrens and its progeny do not require an "expanded record" for an appeal at the summary judgment stage. Appellant Tribes were entitled to appeal an adverse ruling, regardless of who moved for summary judgment.

A party who raises an immunity defense is not required to present new arguments or facts at the summary judgment stage to be entitled to appeal from an order denying its defense. *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997) (there is no jurisdictional bar to appeal of the latter of two orders denying successive pretrial motions on immunity grounds); *see also Mueller v. Auker*, 576 F.3d 979, 988 (9th Cir. 2009) ("The interest protected by the qualified immunity doctrine is so singularly and sufficiently important that it justifies more than one pretrial appeal by a defendant asserting the same."). As the Third Circuit explained:

> *Behrens'* holding, that a defendant who raises the defense of qualified immunity at both the dismissal and summary judgment stage of the proceedings is entitled to appeal adverse rulings each time, indicates *a fortiori* that there is nothing to prevent a defendant from appealing an adverse ruling issued at one stage but not the other.

Grant v. City of Pittsburgh, 98 F.3d 116, 120 (3d Cir. 1996). Thus, a party may appeal from a summary judgment order denying immunity "whether or not the

---

fishing places. Response at 41. The issue on appeal is whether the district court erred in finding an implicit waiver of Quinault and Quileute's sovereign immunity. *See* Opening Br. at 9. Whether Makah's request to force a federal-water adjudication is not a cognizable claim within *U.S. v. Washington* is inextricably intertwined with the immunity issue.

[party] has appealed from an order denying a motion to dismiss the complaint, and whether or not the motion for summary judgment rests on new legal or factual, arguments." *Fairley v. Fermaint*, 482 F.3d 897, 901 (7th Cir. 2007).

Any contrary rule would compel litigants to appeal every denial of a Rule 12(b)(6) motion to preserve their immunity defense out of fear that discovery may not result in new facts relevant to the defense—"a rule that would dramatically increase the number of interlocutory appeals at the dismissal stage." *Grant*, 98 F.3d at 121. This elevates form over substance. Nothing would prevent Appellant Tribes from simply propounding discovery regarding their immunity claim, filing their own summary judgment motion, only to appeal after the district court denies (again) their immunity defense. Such a rule would accomplish nothing except requiring an exercise in futility that ultimately brings the parties and the court full circle. The Supreme Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation" precisely to avoid this result. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *Mueller*, 576 F.3d at 988 ("By reviewing it now, we efficiently eliminate the possible need to review it later.").

Appellant Tribes properly renewed their sovereign immunity defense after Makah's summary judgment motion asked the district court to dramatically expand the scope of the case in contravention of its prior orders. Before Makah's

summary judgment motion, the district court had explicitly held (twice) that the case would be limited to an *interpretation* of Judge Boldt's original rulings under Paragraph 25(a)(1); the court never indicated it would review new evidence under Paragraph 25(a)(6).[3] ER43, 35. The court's order denying the motion to dismiss explained: "The Court views this dispute as one regarding Judge Boldt's use of the term 'adjacent' in both the Quinault and Quileute U&A's [usual and accustomed fishing grounds]." ER43. "Therefore the Quinault [and Quileute] need look no further than the record for the evidence that will enable them to respond to the Request for Determination." ER43. In its order granting clarification of that ruling, the court reiterated:

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

ER35 (emphasis added; citation omitted).

Given these rulings, an appeal would have made little sense. By limiting the adjudication to only that evidence considered in *Decision I*, the court precluded a determination of Quinault and Quileute's fishing areas outside the case area. As

[3] There are two relevant subsections of the permanent injunction in *U.S. v. Washington*—Paragraph 25(a)(1), which provides only for interpretation of the 1974 Boldt Decision (*U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Decision I*")); and Paragraph 25(a)(6), which provides for adjudication of "[t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I." MSER272-73.

Makah has conceded, there was no jurisdiction over those ocean waters at the time of *Decision I*. ER734-35.

Despite those rulings, Makah asked the court in its summary judgment motion to "retain jurisdiction over this subproceeding to specifically determine the location of [Quinault and Quileute's ocean fishing] places pursuant to Paragraph 25(a)(6)." ER425. Because this dramatically changed the scope of the subproceeding, Quinault and Quileute again raised their sovereign immunity. In its July 2013 summary judgment order, the district court announced for the first time that it would go beyond a Paragraph 25(a)(1) interpretation and proceed with an adjudication under Paragraph 25(a)(6) of Quinault and Quileute's fishing boundaries outside Washington State by considering new evidence. The summary judgment order greatly expanded the scope of the litigation.

Makah also argues that "in directing the parties to proceed under Paragraph 25(a)(1), the court did not limit the subproceeding to the original case area." Response at 41. This assertion defies logic. Paragraph 25(a)(1) deals only with interpreting Judge Boldt's findings in *Decision I*, which was issued in 1974, a time when neither the state nor the federal government asserted jurisdiction over fishing in waters beyond three miles. ER330-31. At the time of the decision, therefore, the court did not have jurisdiction to determine treaty fishing grounds outside the

state. Makah admitted as much when it sought to adjudicate its federal-water fishing grounds in 1977:

> *Decision I* . . . 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**.

ER734-35. The district court did not—and *could not have*—adjudicated any federal-water fishing grounds in *Decision I*. By limiting the subproceeding to an interpretation of *Decision I*, the district court *necessarily* limited the subproceeding to the original case area.

Makah also argues that it is "nonsensical" to argue that the district court's sovereign immunity order was limited to a U&A determination within state waters. Response at 40. But the plain language of the order clearly limited the scope of the case. It is illogical to interpret that order *limiting* the scope of the subproceeding as a broad denial of sovereign immunity far exceeding those limits.

"The right inquiry under *Mitchell* and *Behrens* is what the court has done, not what arguments the litigant has made." *Fairley*, 482 F.3d at 901. It was not until July 2013 that the district court announced it would adjudicate Quinault and Quileute's federal-water fishing areas by considering new evidence outside the scope of *Decision I*. Quinault and Quileute timely appealed the trial court's

summary judgment order, which rejected their sovereign immunity defense to such an adjudication.

B. The Strong Presumption Against Waiver Of Sovereign Immunity Applies To *U.S. v. Washington*.

"Because they are sovereign entities, Indian tribes are immune from unconsented suit in state or federal court." *McClendon v. U.S.*, 885 F.2d 627, 629 (9th Cir. 1989). A waiver of tribal sovereign immunity generally "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Waivers of immunity may not "encompass related matters, even if those matters arise from the same set of underlying facts." *McClendon*, 885 F.2d at 630.

Makah suggests that its request to have the court determine the federal-water fishing areas of *other* tribes is merely business as usual in *U.S. v. Washington*. It goes so far as to accuse Quinault and Quileute of seeking a "unique exemption from the district court's continuing jurisdiction in which they alone of 21 plaintiff-intervenor tribes would be immune from the court's well established jurisdiction to adjudicate U&A."[4] Response at 60. Makah seeks to turn sovereign immunity law upside down.

[4] As examples of the district court's alleged "well established jurisdiction" to determine U&As, Makah cites *Upper Skagit Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010), *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000), *U.S. v. Muckleshoot Tribe*, 235 F.3d 429 (9th Cir. 2000), and *Muckleshoot Tribe v. Lummi*

Makah seeks to establish a broad waiver of sovereign immunity, unique only to *U.S. v. Washington*, that would disregard the mandate in *McClendon* to construe implicit waivers narrowly. There is no basis for finding a general, broad waiver in this case.

All 21 plaintiff-intervenor tribes, including Quinault and Quileute, have adjudicated their U&As within state jurisdiction. Only four of those 21 tribes have treaty fishing rights outside of Washington State: Makah, Quinault, Quileute, and Hoh (the "Coastal Tribes"). The court has adjudicated the federal-water fishing areas of only one tribe, Makah, which was done in 1977 at *Makah's* own request. Makah's request for adjudication was an affirmative waiver by Makah of its sovereign immunity.[5] No Coastal Tribe has been forced to adjudicate its federal-water fishing areas without its consent. Such adjudication is unnecessary for resolution of the dispute between the tribes and the state, making a finding of an implicit waiver of sovereign immunity inappropriate.

Indian Tribe, 141 F.3d 1355 (9th Cir. 1998). Response at 48. Appellant Tribes have already pointed out that those cases involved either primary rights to already-adjudicated overlapping U&As *within Washington State*, or interpretation of Judge Boldt's previous findings identifying the location of a tribe's U&A *within Washington State*. Opening Br. at 38, n.10 and 11. In *none* of these cases was an ajudication of fishing places outside state waters necessary.

[5] Notably, neither the parties nor the court in that subproceeding raised the propriety of adjudicating federal-water fishing areas in a case against Washington State.

Makah's attempt to compel another sovereign tribe to adjudicate well-established federal-water treaty fishing boundaries, which are *undisputed between the treaty partners* themselves, is unprecedented in *U.S. v. Washington*. The very concept of an "adjudicated U&A" was created only in relation to the tribes' claims against Washington State, and adjudication of treaty fishing areas outside state jurisdiction has **never** been required (or relevant) in this case. The federal government has recognized that an "adjudication" is not required in federal waters:

> NMFS believes that [the alleged requirement to prove treaty rights in *U.S. v. Washington* before exercising such rights] does not apply to the whiting fishery. . . . [T]he judicial procedure was set up in the early days of the treaty fishing rights litigation, in relation to fishing **within the jurisdiction of the State of Washington (which did not recognize the fishing rights** in question) in order to ensure an orderly implementation of new fisheries. **The whiting fishery is primarily under the jurisdiction of NMFS, which recognizes the treaty right** and which is working with the tribe to implement an orderly fishery. **Thus, the United States v. Washington procedure is not required for Federally regulated fisheries to the extent that there is no disagreement between the tribes and the Federal government**. The administrative procedures set up by this rule should ensure the orderly implementation of new treaty fisheries without the need to resort to the courts except in unusual circumstances.

61 Fed. Reg. 28786-01, 28788 (June 6, 1996) (emphasis added).

Quinault, Quileute, and the United States do not dispute the interpretation of their treaty; therefore, "the United States v. Washington procedure is not required." Makah is not a party to and not an intended third-party beneficiary of this treaty. If Makah had truly wanted to challenge the federal-water areas where Quinault and

Quileute should be allowed to fish, Makah could have brought an administrative challenge to the regulations defining those ocean fishing areas. Makah would have had the burden of proving that the Secretary's decision was arbitrary and capricious, an abuse of discretion, or illegal.[6]

But, by making its challenge in *U.S. v. Washington* instead, decades after the adoption and successful implementation of the federal regulations, Makah now hopes to circumvent administrative procedures, forcing Quinault and Quileute to litigate their ocean fishing activities, which at this late stage is an even more difficult task. *See Skokomish*, 573 F.3d at 710-711 (no evidence of "high reliability" and "little evidence of any kind" to prove what tribes did 150 years ago. This exercise is not law, and is not a reliable way to find facts.").

This Court should not allow a challenge to federal fishing regulations in *U.S. v. Washington*. *Makah v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990). As the Court has recognized, "it is hard to see why the court still displaces state and federal fish management agencies." *Skokomish*, 573 F.3d at 709-10.

[6] This Court already rejected that challenge in *Midwater Trawlers v. Department of Commerce*, 282 F.3d 710 (9th Cir. 2002). Makah states that the Ninth Circuit only affirmed the district court's ruling as to Makah's U&A. Response at 24 n.10. This is incorrect. *Midwater Trawlers*, 282 F.3d at 717–18 (holding that district court did not err in upholding regulations that defined the federal-water fishing areas of all ***four*** Coastal Tribes); *Midwater Trawlers v. Dep't of Commerce*, 393 F.3d 994, 1002 (9th Cir. 2004) (same).

C. Appellant Tribes Have Not Implicitly Or Explicitly Waived Their Sovereign Immunity To This Subproceeding.

Courts recognize one exception to the general rule that a waiver of sovereign immunity must be expressly made: a tribe implicitly waives its immunity if it participates in litigation that necessarily involves making a waiver, but this exception is strictly construed against a finding of a broad waiver. *See Lewis v. Norton*, 424 F.3d 959, 961-62 (9th Cir. 2005) ("the waiver must be a narrow one in order to be consistent with general principles of sovereign immunity."). For example, a tribe's sovereign immunity barred a claim for breach of a lease agreement that was executed as part of a settlement of a lawsuit brought by the same tribe. *McClendon*, 885 F.2d at 629-30; *see also U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (sovereign immunity barred compulsory counterclaims in excess of a tribe's original claim); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 509 (1991) (tribe's lawsuit challenging tax did not waive immunity as to counterclaim for back taxes). Mere participation in proceedings "is not the express and unequivocal waiver of sovereign immunity that we require in this circuit." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) (Indian tribe's voluntary participation in administrative proceedings did not waive its immunity to a later appeal of the administrative ruling); *see also Pit River Home & Agr. Co-op. Ass'n v. U.S.*, 30 F.3d 1088 (9th Cir. 1994) (tribe's trespass claim in underlying litigation did not

waive its immunity to a challenge of its ownership of the property that was the subject of its trespass claim).

In arguing that Quinault and Quileute waived their sovereign immunity either by intervening in *U.S. v. Washington* or by participating in certain subproceedings after *Decision I,* Makah presents a truly novel (and legally incorrect) "in for a penny, in for a pound" theory of waiver of sovereign immunity.[7] Makah cherry-picks out-of-context statements made by Quinault and Quileute over the 44-year history of the case, and argues that the statements are an invitation to sue them on any treaty claim imaginable. According to Makah, by asserting treaty fishing rights in various disputes over allocation of fish among tribes, Quinault and Quileute waived their sovereign immunity to adjudication of their federal-water fishing areas in perpetuity. This argument runs counter to this Court's rulings in *Lewis*, *McClendon* and *Pit River*.

Pit River illustrates the extremely limited scope of waiver by participation. In that case, a group of Indians referred to as the "Association" brought suit challenging the Pit River Tribal Council's (the "Council") ownership of a tribal property known as XL Ranch. However, the federal government had already determined that the Council had ownership rights to the XL Ranch. The Association claimed that the Council waived its immunity to the Association's

[7] Washington State and the S'Klallams echo these arguments. State Br. at 12-13, 16-19; S'Klallam Br. at 4-5, 8, 10.

lawsuit because the Council had asserted trespass claims against the Association for trespassing on the XL Ranch during underlying litigation. Similar to Makah's arguments against Appellant Tribes here, the Association argued that because the Council had sought to enforce its rights to the XL Ranch by asserting a trespass claim against the Association, the Council necessarily waived its immunity to a challenge to its ownership of the Ranch. *Pit River,* 30 F.3d at 1100.

This Court flatly and properly rejected the Association's argument that the Council's assertion of one set of rights effected a waiver of sovereign immunity as to all rights:

> Merely because it once had certain claims before the district court, the Council did not waive its sovereign immunity as to claims brought by the Association against the government [asserting rights to the same land that was the subject of the trespass claim in the district court], since those claims could not otherwise be brought against it. **The Council's bringing the trespass claim or seeking review of the district court's dismissal of the claim does not constitute a waiver of its immunity from claims brought by the Association regarding the beneficial ownership of the Ranch**.

Id. at 1100-01 (emphasis added and citations omitted).

Makah points to six matters that it argues result in a broad waiver of immunity. Makah does not and cannot show how Appellant Tribes' "mere participation" in those cases satisfies the narrow implicit waiver standard laid out in *Lewis, McClendon,* and *Pit River*. Quinault and Quileute's participation in

certain subproceedings unrelated to adjudication of their federal-water fishing areas does not establish a waiver of their immunity to such adjudication.

1. Intervention In *US v. Washington*.

Makah argues that Quinault and Quileute waived their sovereign immunity to adjudication of their federal-water fishing areas by intervening in *U.S. v. Washington* in 1970-71. According to Makah, Quinault and Quileute "expressly" consented to such adjudication by "asking the district court to adjudicate the existence of their treaty right to take fish at 'usual and accustomed places' without geographic limitation." Response at 43. Under Makah's theory, by intervening in a case against Washington State to establish fishing rights within the state's geographic jurisdiction, Quinault and Quileute somehow waived their immunity to lawsuits having nothing to do with their claims against the state, in areas that were not within the court's jurisdiction when they intervened. This contention is meritless.

The United States' original complaint expressly limited the jurisdiction invoked by the United States to "the western portion of the State of Washington" and "waters over which the State of Washington has jurisdiction." QSER3, 8. As intervenors, Quinault and Quileute were not permitted to enlarge the issues and jurisdiction already before the court. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 497 (1944). In their complaints, Quinault and Quileute requested

adjudication of only those fishing places within the state's jurisdiction.[8] MSER370, 381.

Moreover, the court limited the "case area" to certain watersheds in western Washington and offshore waters within Washington State's jurisdiction. *Decision I*, 384 F. Supp. at 328, 400.[9] ("This case is limited to . . . waters which are **within the jurisdiction of the State of Washington**.") (emphasis added).

Makah itself has conceded that no tribe requested a determination in *Decision I* of treaty fishing areas outside state waters and that *Decision I* did not deal with waters outside the state. ER372-373, ER352, ER692-761, ER734-735. Treaty fishing places outside state waters were simply beyond "the issues necessary to decide the action" brought against the state. *McClendon*, 885 F.2d at 630. Given the issues at stake at the time, it is plain that Quinault and Quileute did not waive their immunity by intervening in *Decision I*.

---

[8] A geographic limitation was not necessary because the United States did not assert jurisdiction over ocean waters beyond three miles from shore until two years after *Decision I*. ER330-31.

[9] Shortly after the entry of *Decision I*, the court recognized Grays Harbor as part of Quinault's U&A based *solely* on its initial Finding of Fact 121. *U.S. v. Washington*, 459 F. Supp. 1020, 1038, 1097 (W.D. Wash. 1978) (*Decision II*). Makah argues that this meant that "Pacific Ocean waters outside of the State's three-mile jurisdiction have been within the case area ever since." Response at 11. Not so. Grays Harbor is **within state waters**. Importantly, the court concluded that 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.

2. Treaty Troll Case.

Makah reasons that because Quinault and Quileute participated in a 1983 dispute over salmon allocation among the Coastal Tribes (the "treaty troll" subproceeding), they necessarily waived their immunity to Makah's current subproceeding.[10] Response at 44-48. Makah's argument has no logical, factual or legal support.

In the treaty troll subproceeding, Quinault, Quileute, and Hoh sought to enjoin Makah's ocean salmon fishery because Makah was intercepting the salmon before they returned to the other Coastal Tribes' in-river fisheries. ER682-691. The court denied Makah's motion to dismiss on sovereign immunity grounds, finding that Makah "waived its immunity and consented to a full adjudication of its treaty fishing rights when it intervened in this case seeking a determination of those rights, and asking that the Court exercise its equitable powers to protect those rights." *U.S. v. Washington*, 626 F. Supp. 1405, 1471 (W.D. Wash. 1985). Makah argues that this ruling has been "the law of the case ever since." Response at 45.

First, this Court's and the Supreme Court's decisions in *McClendon*, 885 F.2d at 630, *Babbitt*, 18 F.3d 1456, *Pit River*, 30 F.3d 1088, and *Citizen Band*

[10] Makah asserts that Quinault and Quileute believe that "their consent was limited to disputes with the State, and did not extend to disputes with other tribes." Response at 44. Makah incorrectly identifies the issue. The issue here is not whether Quinault and Quileute have waived their sovereign immunity to intertribal disputes, but whether they have requested relief that makes adjudication of their federal-water fishing areas necessary.

Potawatomi, 498 U.S. 509, all of which came *after* the district court issued the decision relied on by Makah, have clarified and heightened the showing required to establish a waiver of immunity by participating in litigation. Under those decisions, Makah would have to show that adjudication of Quinault and Quileute's ocean fishing places outside state waters was necessary to decide the issues in the treaty troll subproceeding. *See, e.g.*, *McClendon*, 885 F.2d at 630. Makah does not even attempt to make such a showing, nor could it.

Second, the treaty troll subproceeding was an allocation dispute to prevent preemption of Quinault and Quileute's *in-river* fisheries, and was entirely unrelated to any of Quinault and Quileute's ocean fishing places outside state waters. The relevant facts, relief sought, and the context in which the court found that Makah had waived its immunity, all of which Makah omits from its answering brief, undermines Makah's proposition that the treaty troll subproceeding somehow established a new, lowered standard for waivers of sovereign immunity unique to *U.S. v. Washington*.

3. Sunset Order.

Makah's reliance on a joint tribal memorandum opposing the district court's proposal to dismiss *U. S. v. Washington* (the "sunset order") to establish waiver is likewise misplaced. Response at 45-46, 49-51. No statement in the joint memorandum expresses an unequivocal waiver of Quinault and Quileute's

immunity to adjudication of their ocean fishing places outside state waters or otherwise requests relief making such adjudication necessary (the only relief requested was that the case not be dismissed).

Makah contends that by joining other tribes in opposition to the proposed sunset order, Quinault and Quileute implicitly agreed or acknowledged a willingness to submit to all manner of lawsuits brought against them by other tribes in the district court. Makah cites no authority for its sweeping proposition that all of the tribes waived their immunity to being sued on all future disputes by simply joining an opposition to dismissal of the case, because there is none. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (a tribe's implied willingness to submit to federal lawsuits does not waive tribal sovereign immunity). The scope of the case only encompassed matters relevant to the state's recognition of treaty rights within state waters. *Decision I*, 384 F. Supp. at 327-28, 400, 405. In joining the other 18 tribes that opposed the sunset order, Quinault and Quileute did not represent, either explicitly or implicitly, that they waived immunity to disputes *outside* those waters.

4. Invitational Fisheries.

Makah also argues that invitational agreements among Quinault, Quileute, and Hoh that allowed the three tribes to fish in each other's ocean fishing areas waived their immunity. Response at 12. As explained in Appellant Tribes'

Opening Brief, these agreements were only submitted to the *U.S. v. Washington* court pursuant to federal regulations that explicitly allowed invitational fisheries in federal waters and required court approval (ostensibly because the agreements would necessarily include waters within the case area) and did not constitute a request to adjudicate the tribes' already-established ocean fishing areas. Opening Br. at 45-46; ER640, 644.

5. Resource Allocation Subproceedings.

Makah also argues that Quinault and Quileute's participation in certain resource allocation cases (the halibut, black cod, and crab subproceedings) waived their immunity to a lawsuit seeking a determination of their federal-water fishing areas.[11] As Makah concedes, Quinault and Quileute *never requested* an adjudication of their federal-water fishing places in any of these subproceedings. Response at 51. Makah claims, however, that Quinault and Quileute's participation in those subproceedings is analogous to a tribe initiating a lawsuit to enforce a contract and then arguing its immunity deprives the court from determining the validity of that contract. *Id*. at 51-52. Makah's contract analogy is foreclosed by a long line of Supreme Court and Ninth Circuit precedent as discussed above at pages 13 to 15.

[11] Appellant Tribes addressed those proceedings in their Opening Brief at 39-51.

This Court rejected a nearly identical argument in *Pit River*, 30 F.3d at 1100-1101. Makah's challenge to Quinault and Quileute's ocean fishing boundaries is akin to the Association's challenge to the Council's ownership of the land, and its theory that Quinault and Quileute's participation in resource allocation disputes constitutes a waiver of immunity is akin to the argument the Council waived it immunity by bringing its trespass claim regarding the same land. Quinault and Quileute's participation in these resource allocation subproceedings does not constitute waiver of sovereign immunity any more than the Council's participation in the trespass action constituted a waiver of immunity based on a claim it did not own the property. *Id.* at 1100 ("the fact that the Council brought certain claims in the district court that are no longer at issue . . . does not amount to a waiver of sovereign immunity.").

Moreover, Makah's numerous management agreements with Quinault and Quileute regarding the halibut and blackcod fisheries constitute a tacit, if not explicit, concession that Quinault and Quileute's ocean fishing places were not at issue and that adjudication was not necessary to resolve those disputes. ER345-46, 386-87.

Washington State devotes the bulk of its "answering" brief to the crab subproceeding (to which Quinault was not a party). Both Makah and the state inaccurately describe the nature of the crab subproceeding. That subproceeding

arose out of a "Shellfish Implementation Plan" issued by the court containing procedures to protect the tribes' shellfishing rights and to resolve disputes regarding those rights. *U.S. v. Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995). In a dispute brought under the Implementation Plan, Quileute sought to delay the state crab fishery to prevent the state from overharvesting and preempting Quileute's crab fishery. In response, the state argued that Quileute did not have treaty fishing rights beyond three miles because its ocean fishing grounds had not been adjudicated in *U.S. v. Washington*.

The state now argues that Quileute waived its sovereign immunity to determination of its federal-water fishing areas by submitting a memorandum in the crab dispute where Quileute stated, "if the State wants to challenge the Tribe's federally-recognized fishing lines, it must file a Request for Determination." (State Br. at 18-19). According to the state, Quileute "expressly argued . . . that the proper means to resolve the western boundary issue was to initiate a new subproceeding." State Br. at 19. But the state overlooks Quileute's express statements to the contrary, making clear that Quileute was *immune* to a challenge to its western boundary and that any challenge to its northern and southern boundaries (as decided in *Decision I* and reflected in the federal lines) could not be handled by the Special Master:

> [referring to northern/southern boundaries] **both the Tribe and the State** must either abide by the federal lines or initiate an independent

> sub-proceeding to adjudicate the usual and accustomed fishing grounds and stations of the Tribe. **Neither party** may do so in a Special Master proceeding.[4]
>
> ---
>
> [4]. . . [T]he state has no standing to contest the Tribe's western boundary. . . . the federal government retains ultimate jurisdiction over these waters. Thus, **only the federal government or the Quileute Tribe can seek a judicial determination of the Tribe's western boundary**. Until then, the State is bound by the Tribe's federally-recognized western boundary.

QSER20 (emphasis added and citation omitted).

The state concedes that "the crab disputes never resolved the scope of Quileute's or Quinault's offshore U&As" (State Br. at 19). In fact, the court explicitly found that "resolution of the western boundary of the U&A is not an appropriate subject for the dispute resolution process as set forth in the Revised Shellfish Implementation Plan." ER53-54.

In sum, Quileute expressly asserted immunity to adjudication of its fishing boundaries in the crab subproceeding and nothing in that subproceeding constitutes a waiver under the standards established by *McClendon* and its progeny. *See McClendon*, 885 F.2d at 629-30; *Lewis*, 424 F.3d at 961-62; *Pit River*, 30 F.3d at 1100-01.

6. Appellant Tribes' *Amicus* Brief in Midwater Trawlers.

Makah relies on out-of-context citations to an *amicus* brief filed by Appellant Tribes in the *Midwater Trawlers* case as further purported evidence of a

waiver of sovereign immunity. Response at 52. Quinault and Quileute have already shown that the *amicus* brief arguments were made to demonstrate that Midwater could not improperly transform its administrative challenge to the federal regulations into the questions of whether the parties to the Stevens Treaties had "intended to extinguish tribal fishing rights more than three miles [offshore]" and "whether the term 'fish' in the Stevens Treaties included whiting." Opening Br. at 49. Makah concedes that Quinault and Quileute's statements were made in that context, but proceeds to ignore that context and cherry-pick statements from the amicus brief in a failed attempt to make it appear as if Quinault and Quileute were affirmatively waiving their immunity by inviting Midwater to sue them in *U.S. v. Washington*. Response at 52. Even taken out of context, the statements made in the *Midwater* amicus brief do not show that Quinault and Quileute implicitly waived their immunity to Makah's current suit to adjudicate their ocean fishing places outside state waters.

Midwater was a completely different case than *U.S. v. Washington*. Arguments made in one case do not establish waiver in separate cases. *See Tegic Commc'ns Corp. v. Bd. of Regents of Univ. of Tex. Sys.*, 458 F.3d 1335, 1342–43 (Fed. Cir. 2006) (university's participation in one patent lawsuit did not amount to a waiver of immunity in a second lawsuit, even one involving the same patent).

Even so, none of the statements cited by Makah express a waiver of immunity to adjudication of Quinault and Quileute's federal-water fishing places. In *Midwater*, non-tribal fishing organizations challenged the federal regulations recognizing the Coastal Tribes' right to harvest whiting on the theory that a specific adjudication of rights to that species was a prerequisite to their ability to participate in the fishery. *Midwater Trawlers v. Dept. of Commerce,* 139 F. Supp. 2d 1136, 1141 (W.D. Wash. 2000), *rev'd in part on other grounds*, 282 F.3d 710 (9th Cir. 2002). The plaintiffs also claimed that Quinault, Quileute, and Hoh did not have a treaty right to fish in federal waters because their federal-water fishing areas had not been judicially established.[12] *Id.*

In support of their argument that the plaintiffs' claims improperly transformed their administrative challenge into a non-administrative question of treaty interpretation (whether the treaty parties intended to extinguish treaty fishing more than three miles offshore and whether the term "fish" included whiting), Quinault and Quileute stated in a footnote in their joint brief: "Midwater may attempt intervention in the *U.S. v. Washington* proceedings, but, because of the sovereign immunity of the Coastal Tribes, it could not otherwise challenge tribal

[12] Ironically, Makah initiated this subproceeding because Quinault and Quileute expressed their interest in entering the whiting fishery and is now making the same claim made by the plaintiffs in *Midwater*; however, Makah did not join in the plaintiffs' challenge despite intervening in the suit. *Midwater Trawlers*, 139 F. Supp. 2d at 1139, n.1.

fishing rights." *Id.* Notably, the *amicus* brief cited to the federal rule wherein NMFS states that "the United States v. Washington procedure is not required for Federally regulated fisheries to the extent that there is no disagreement between the tribes and the Federal government." 61 Fed. Reg. 28786-01, 28788.

Makah argues, however, that this was an explicit statement by Quinault and Quileute that "their immunity would *not* prevent a challenge to their tribal fishing rights in *U.S. v. Washington*." Makah Br. at 54-55. Makah's interpretation is self-serving. The statement means no more than what it says: that Midwater could *attempt* to intervene to litigate the identified issues of treaty interpretation (which dealt with the meaning of "fish" and the treaty partners' intent, not with federal-water boundary adjudications). It is plainly not an express waiver by Quinault and Quileute of their sovereign immunity, much less an agreement that Makah may force them to adjudicate their ocean fishing places in this case.

In sum, Makah references out-of-context statements which on their face are not an unequivocal, express waiver of Quinault and Quileute's immunity. *See Santa Clara Pueblo*, 436 U.S. 49; *Pit River*, 30 F.3d 1088. Appellant Tribes' *amicus* brief in *Midwater Trawlers* did not effect an explicit or implicit waiver of their sovereign immunity to Makah's current case.

D. The S'Klallams And The State Fail To Show That Quinault And Quileute Waived Their Sovereign Immunity.

Washington State and the S'Klallams are not requesting or responding parties in this subproceeding. Nevertheless, Washington State appeared as an "appellee,"[13] and the S'Klallams appeared as "real parties in interest."[14] These designations are plainly incorrect. Both Washington State and the S'Klallams failed to follow the Appellate Rules and the Rules of Civil Procedure, which only permit appellants and appellees to file briefs and require all others to obtain leave to file briefs. But even if their "answering" and "real party in interest" briefs are procedurally proper, neither the Washington State nor the S'Klallams explains why this Court should depart from its holdings in *McClendon* and its progeny.

---

[13] The state spends pages of its "answering" brief claiming to have "inherent sovereign authority to regulate fishing by its citizens" in federal waters. State Br. at 15. In refusing to allow the state to intervene, the district court rejected those arguments (ER44-47) and denied the state's motion for reconsideration (ER36-38). The state voluntarily dismissed its appeal of those rulings. ER1596, dkt. 20276.

[14] The S'Klallams did not participate in the briefing on either order Appellant Tribes appealed from (ER799-803), did not establish their status as "real parties in interest," and never sought leave from this Court to file a brief. Quinault and Quileute do not share any fishing grounds with the S'Klallams. No outcome in this case will affect the S'Klallams' right to take 50% of the harvestable fish that pass through their U&A; the S'Klallams have never submitted any evidence in this case, and have never shown the "dilution" of rights they now claim they suffer. The only interest they *have* shown is a procedural interest in "parameters surrounding case management and jurisdiction," S'Klallam Br. at 2-3, which does not entitle them to participate as "real parties in interest." *See Safouane v. Fleck*, 226 F. App'x 753, 757 (9th Cir. 2007) (a real party in interest is one "to whom the relevant substantive law grants a cause of action."); *In re Opprecht*, 868 F.2d 1264 (Fed. Cir. 1989) (company was not entitled to intervene or file *amicus* brief in appeal from patent reexamination where it took no part in administrative proceedings and offered no reason for requested intervention other than its interest in outcome).

1. The State's Arguments Do Not Demonstrate Waiver.

The state asserts the same bases as Makah in arguing that Quinault and Quileute waived their sovereign immunity, which are addressed above at pages 13 to 27. The state also argues that the district court's jurisdiction "expressly encompasses" Makah's suit by pointing to the district court's 1975 ruling in a herring dispute and its adjudication of Makah's federal-water fishing grounds. State Br. at 9-10. Those rulings have nothing to do with the issues in this proceeding.

The issues in the herring proceeding were the tribes' treaty right to harvest herring and a determination of U&As *within state waters* that was *requested* by certain tribes. *Decision II*, 459 F. Supp. at 1048. In finding that Quinault's U&A included Grays Harbor, the court simply issued "a supplemental decree based on an *implied* modification of the pretrial order to conform it to the evidence actually presented" at the initial trial. *See supra* p. 17 n.9.

Makah's U&A proceeding was an aberration that took place at *Makah's* request. The court did not purport to expand the case area, and did not address the propriety of adjudicating the U&A in the first instance. As the district court properly recognized, ocean fishing areas outside three miles are under the exclusive authority of the federal government, and adjudication of treaty fishing

areas in such waters falls far afield of the claims against Washington State that form the basis of *U.S. v. Washington*:

> While Washington asserts that its citizens, as non-treaty fishermen, will be affected by the outcome of this dispute, it has not demonstrated how. . . . [F]ishing for Pacific whiting and other fish in offshore waters is subject to management and regulation by the National Marine Fisheries Service ("NMFS"), pursuant to the Magnuson-Stevens Act. NMFS has promulgated carefully crafted regulations which recognize the rights of treaty and non-treaty fishermen as they have been determined in this case. *See*, 50 C.F.R. §§ 660.320 - .324, .385. Such regulatory power properly lies with the agency and will not be disturbed by this Court's consideration of U&A boundaries as requested by the Makah.

ER47 (citations omitted).

The state has failed to show that Quinault and Quileute have taken any action making an adjudication of their federal-water fishing areas necessary.

2. The S'Klallams' Arguments Do Not Show Waiver.

None of the arguments raised by the S'Klallams justifies a finding of waiver. The S'Klallams assert that "[n]ow that the U&A has been challenged, the Quinault and Quileute should not be fishing." S'Klallam Br. at 10. This claim is meritless. A mere challenge to a tribe's U&A does not deprive the tribe of its treaty rights or prove that the U&A does not exist, much less establish jurisdiction over such challenge. Nor does a request to determine Quinault and Quileute's federal-water fishing areas nullify the federal regulations permitting their fishing activities. At any rate, that issue is not related to the waiver issue before this Court.

The S'Klallams' argument that the district court is the "ultimate authority" on U&As, S'Klallam Br. at 11-12, is also incorrect. For support, the S'Klallams rely on regulations that instead state: "[T]he United States v. Washington procedure is *not required* for Federally regulated fisheries to the extent that there is no disagreement between the tribes and the Federal government." 61 Fed. Reg. 28786-01, 28788 (emphasis added). Quinault, Quileute, and the federal government do not dispute the federal government's interpretation of their treaty.

The S'Klallams also argue that the Supreme Court in *Citizen Band Potawatomi Tribe*, 498 U.S. 505, 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 Br. at 6, n.3. The case, however, stands for the exact opposite proposition. There, 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 tax. 498 U.S. at 509.

The S'Klallams cite *U.S. v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), but this case is also not helpful to their position. S'Klallam Br. at 7-8. As Quinault and Quileute explained in their opening brief at pages 33 to 35, not only was the scope of the injunction in *Oregon* within the original case area, it was for conservation of the species, which the court deemed "a basic assumption" of the case, a foreseeable

issue, and the reason for the court's involvement in the first place. *Oregon*, 657 F.2d at 1014. Unlike in *Oregon*, the area in dispute here was not part of the initial complaint, nor was extension of jurisdiction over that area foreseeable given the subject matter of the case.

Furthermore, *Oregon* was decided before *McClendon* and its progeny. As this Court subsequently recognized, "*Oregon*'s finding of waiver probably tests the outer limits of *Santa Clara Pueblo*'s admonition against implied waivers. . . . [S]everal post-*Oregon* Ninth Circuit cases have reaffirmed the principle that tribal consent to suit must be unequivocally expressed." *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989); *Babbitt*, 18 F.3d at 1459 (same).

The S'Klallams also rely on this Court's decision in *U.S. v. Washington*, 157 F.3d 630 (9th Cir. 1998), a shellfish dispute. S'Klallam Br. at 8-9. But that case supports Quinault and Quileute, not the S'Klallams. In that case, this Court vacated a portion of the Shellfish Implementation Plan that allowed damage awards against the tribes, precisely because the tribes had not consented to damage awards. This was true even though "the damages arise out of the exercise of fishing rights based on the district court's interpretation of the Stevens Treaties." 157 F.3d at 656. The S'Klallams' contention that claims for damages are "much further afield of the original treaty issues than the questions raised here" is

wrong.[15] Rather, consistent with McClendon's mandate that waivers be construed narrowly, the tribes retained their immunity against damages claims, despite this Court's finding (contrary to the S'Klallams' contention) that the damages claims arose directly out of the exercise of fishing rights based on the district court's interpretation of the Stevens Treaties in *U.S. v. Washington*.

The S'Klallams' reliance on 28 U.S.C. §1367 is also misguided. Section 1367 governs supplemental jurisdiction. Sovereign immunity is a separate issue. Section 1367 "is a far cry from the 'unmistakably clear' language required for abrogation [of sovereign immunity]" and does not waive a tribe's immunity. *Stanley v. Trustees of California State University*, 433 F.3d 1129, 1133 (9th Cir. 2006); *see also Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 937 (7th Cir. 2008) (same with respect to tribal sovereign immunity).

Finally, the S'Klallams' argument that this Court "held that the *U.S. v. Washington* forum was the place for [treaty right] disputes" in *U.S. v. Washington*, 593 F.3d 790 (9th Cir. 2010) is incorrect. S'Klallam Br. at 11. Instead, this Court made the unremarkable statement, "Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* **or**

[15] The S'Klallams assert that this Court's allowance of damages against tribal *members* in the shellfish dispute somehow applies here. But tribal members generally do not possess sovereign immunity. *See Puyallup Indian Tribe v. Dept. of Game*, 433 U.S. 165, 171-72 (1977). The only issue with respect to members was whether claims against them were properly within the court's supplemental jurisdiction, not whether the members waived their [nonexistent] immunity.

other treaty rights litigation to present a claim of treaty rights not yet adjudicated." 593 F.3d at 800 (emphasis added). The decision does not stand for the legal proposition that the *U.S. v. Washington* case is the forum for determining treaty rights outside the state's jurisdiction.

In sum, the S'Klallams' answering brief fails to establish that Quinault and Quileute waived their immunity in this case. The S'Klallams do not show that the standards set out in *McClendon, Lewis* and *Pit River* are met. Quinault and Quileute have not expressly or implicitly waived their sovereign immunity against Makah's requested adjudication.

III. CONCLUSION

Quinault, Quileute, and the United States do not dispute the federal-water fishing areas defined in federal regulations that have been established for nearly 30 years. Makah's sudden challenge to these boundaries after decades of signing ocean fisheries agreements with Quinault and Quileute without one word regarding their western boundaries should be rejected.

"The original injunction, entered 35 years ago, was intended to resolve the treaty right fishing disputes once and for all. Yet this case has become a Jarndyce and Jarndyce, with judges dying out of it and whole Indian tribes being born into it." *Skokomish*, 573 F.3d at 709. Makah and the district court now propose yet another new chapter in this never-ending story.

Appellant Tribes have not waived their sovereign immunity to Makah's request to determine Quinault and Quileute's federal-water fishing locations and this subproceeding should be dismissed.

Dated: May 5, 2014

Respectfully submitted,

FOSTER PEPPER PLLC

By: s/ Lauren J. King
Lauren J. King, WSBA 40939
Attorneys for Appellant Quileute Indian Tribe

BYRNES KELLER CROMWELL LLP

By: s/ John A. Tondini
John A. Tondini, WSBA 19092
Attorneys for Appellant Quileute Indian Tribe

NIELSEN BROMAN & KOCH PLLC

By: s/ Eric J. Nielsen
Eric J. Nielsen, WSBA 12773
Attorneys for Appellant Quinault Indian Nation

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4 because this brief contains 8,398 words, excluding the parts of the brief exempted by Fed. R. App. P. 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 97-2003 Times New Roman 14 point font.

Dated: May 5, 2014

FOSTER PEPPER PLLC

By: s/ Lauren J. King
Lauren J. King, WSBA 40939
Attorneys for Appellant Quileute Indian Tribe

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, I electronically filed the foregoing Reply Brief of Appellants Quinault Indian Nation and Quileute Indian Tribe 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: May 5, 2014.

By: s/ Lauren J. King
Lauren J. King, WSBA 40939
Attorneys for Appellant Quileute Indian Tribe