The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiffs, v. STATE OF WASHINGTON, et al. Defendants.	NO. C70-9213 RSM Subproceeding No. 09-01 QUINAULT AND QUILEUTE OPPOSITION TO MAKAH MOTION FOR PARTIAL SUMMARY JUDGMENT REJECTING EQUITABLE DEFENSES NOTE ON MOTION CALENDAR: DECEMBER 12, 2014 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Makah's motion to reject all equitable defenses should be denied. The facts compel application of judicial estoppel, laches, and acquiescence.[1]

The undisputed facts are as follows. Makah *always believed* it had a claim against Quinault and Quileute to force them to adjudicate their ocean fishing grounds, but *chose* not to pursue that claim for decades. Makah has known since 1975 that Quinault and Quileute have been directly competing with Makah in various ocean fisheries that take place *the same distances offshore* as the whiting fishery. Makah has known since 1986 where the federal government believed that Quinault and Quileute's customary ocean fishing areas were located. Those boundaries are defined by unambiguous latitude and longitude lines that have remained unchanged since the federal government first established them in 1986. Makah never challenged those boundaries. Quite the opposite: in the early 1990s, Makah *supported and relied on* those boundaries to its benefit, claiming that they were based on "substantial" evidence and "careful historical and legal analysis." Makah admits that it "agreed that the federal regulations depicted the tribes' U&A." Makah PSJ Mot., Dkt. 20723 at 11 (11/20/2014). Makah also acknowledged that Quinault and Quileute are not required to adjudicate their federal-water fishing areas, and that any challenge to their federal-water boundaries must follow the APA process. Finally, Makah *actually raised claims* against Quileute's western and northern boundaries in 1996—based on the same fear of "preemption" that they now claim with respect to the whiting fishery. Makah then *chose* not to pursue those claims.

Having benefited from its prior positions, Makah now reverses course, claiming that (1) Quinault and Quileute's boundaries are *not* justified by the historical evidence; (2) Quinault and Quileute *were* required to adjudicate their customary ocean fishing areas; (3) a third party *can* challenge those areas in *U.S. v. Washington* and is not required to follow the APA process. If

[1] Makah does not identify that it is moving against application of judicial estoppel or acquiescence. Having not identified that it is moving on these issues, they should be reserved for consideration on Quileute and Quinault's own motion for summary judgment or for trial if material issues of fact are found to exist.

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Makah believed that Quinault and Quileute were required to adjudicate their federal-water fishing areas—and that third parties could assert a claim against them for not doing so—then Makah's "claim" ripened for such a challenge in 1986, when Quinault and Quileute's boundaries were established *without* an adjudication. But Makah waited 23 years to bring its "claim"—while knowing that Quinault and Quileute were investing in their ocean fisheries. Additionally, as a consequence of Makah's delay, elders with knowledge of Quinault and Quileute's traditional ocean fishing places are no longer available, nor is the highly esteemed expert who authored the anthropological report the federal government relied on in establishing their ocean fishing boundaries (Dr. Lane).

Makah's contention that all equitable defenses are somehow barred under law of the case is wrong. Neither this Court nor the Ninth Circuit has ever held that the law of the case in *U.S. v. Washington* precludes equitable defenses (including laches) in intertribal disputes. There is no legal basis to hold that a centuries-long equitable doctrine like laches would—by judicial fiat—not be allowed to a party, regardless of the facts in a particular equitable case. Moreover, the order Makah relies upon for this proposition was a non-final order issued 24 years ago that explicitly stated that tribes should resolve any disputes they had over other tribes' treaty fishing areas "as soon as possible" because "otherwise, it is possible for tribes to essentially mislead other tribes and then slam the door." Following that order, Makah *supported* Quinault and Quileute's treaty ocean fishing boundaries and failed to pursue any challenge it had against their boundaries for *decades*. Makah fails to show as a matter of law that equitable defenses are not applicable in this subproceeding. It fails to establish its burden to show the absence of material facts entitling it to summary judgment on the merits. Its motion should be denied.

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II. ARGUMENT

A. Undisputed Facts

1. Makah Has Always Believed that it had a Claim Against Quinault and Quileute's Federal-Water Fishing Grounds

Makah mischaracterizes and misstates the "undisputed" facts. Makah first asserts that it is undisputed that Makah did not delay in seeking adjudication after an alleged "threat" to its whiting fishery arose. Dkt. 248 at 3. It is irrelevant whether Makah delayed in seeking adjudication after a perceived threat to its whiting fishery; the relevant inquiry is whether Makah delayed in seeking adjudication in response to Quinault and Quileute fishing outside of their treaty fishing areas.

If there is such a thing as a claim against another tribe to force it to adjudicate its federal-water fishing grounds, then the claim ripens as soon as the plaintiff tribe is aware that the other tribe is fishing outside its adjudicated ocean fishing *area*—not when a dispute arises over a particular fishery.[2] It is the *area* that matters, not the particular fishery, as Makah pointed out in response to Quinault and Quileute's assertion that the case was really an allocation dispute about whiting (and was therefore not ripe):

> These arguments disregard entirely Quileute and Quinault's *existing* fisheries for salmon, halibut and blackcod, which compete directly with Makah fisheries for the same species. There is nothing speculative or abstract about Quileute and Quinault fishing for these species or the injuries to Makah from their doing so outside of their actual usual and accustomed fishing grounds. Because each fishery is subject to a single overall treaty quota, any harvest by Quileute and Quinault outside their usual and accustomed grounds unlawfully reduces the harvest available to Makah, and thus constitutes substantial injury.

Dkt. 19634 at 50.

Contrary to what Makah insinuates in its Motion, Makah was not somehow blind to where Quinault and Quinault fished at treaty times before the whiting dispute. Makah has known

[2] In evaluating a laches defense, the length of the plaintiff's delay is measured from "the time the plaintiff knew or should have known about his potential cause of action." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006).

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that Quinault and Quileute have been fishing in the ocean beyond what it now claims to be their "true" treaty fishing areas since 1975. (30(b)(6) Dep. 15:23-17:19 (Dkt. 20735-1, Ex. A).) Indeed, Makah believes that such fishing (beginning *33 years* before Makah brought this suit) caused Makah "substantial injury."[3] *Id*.; *see also* Dkt. 20735-1, Ex. A (30(b)(6) Dep.) at 15:23-22:24. Makah has been aware of Quinault and Quileute's federal boundaries since 1986. And, Makah argued extensively in Subproceeding 92-1 that those boundaries were based on *"substantial" evidence* and "careful historical and legal analysis." *See infra* pp. 11-15.

Nor did Makah lack reason to investigate the evidence of Quinault and Quileute's fishing activity at treaty times. As mentioned above, Makah asserted that it began suffering "substantial injury" when Quinault and Quileute began competing with Makah in the ocean fisheries in 1975. Furthermore, in the course of this subproceeding, Makah has argued that Quinault and Quileute put their federal-water treaty fishing boundaries at issue in 1971 when they intervened in this case; in the ocean compact subproceeding in 1981,[4] 1985, 1987, 1989, and 1990; in the ocean troll subproceeding starting in 1983; in the halibut subproceedings starting in 1991; in the sunset proceeding in 1993, in the blackcod subproceeding starting in 1996; in the crab subproceeding starting in 1996; and in the *Midwater Trawlers* case starting in 2000. Subproceeding 09-1, Dkt. 19634 at 16-36 (7/15/2010). In the 1996 blackcod dispute, Makah claimed the same injury that it now alleges it will suffer in the whiting fishery—"preemption." Dkt. 20723 at 15:7-8. Despite its contentions, Makah never pursued its challenge to Quinault and Quileute's ocean fishing

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[3] Makah commented on the regulations that established Quinault and Quileute's boundaries in 1986, but failed to raise a challenge to those boundaries. Makah Comment on 1986 Regulations (Second King Decl Ex. B).

[4] Makah objected to the QTA tribes' ocean compact in 1981 (Dkt. 20736 ¶ 6), prompting Quileute to write a letter to Makah's chairman asking Makah whether it intended to pursue its challenge and notifying Makah that due to its challenge, Quileute's fishermen "have become apprehensive":

> It has been about one year since the Makah's [sic] challenged the coastal tribes['] troll compact. So far we haven't heard from you regarding your intentions. Do you still intend to pursue the challenge? . . . To this point many of the Quileute tribal troll fishermen have become apprehensive about the Makahs continual protest regarding this tribes [sic] usual and accustomed fishing areas.

Letter from Quileute to Makah at 1 (5/18/1982), Dkt. 20736 ¶ 5, Dkt. 20736-1 Ex. A. Makah never challenged Quileute's western boundary in court until this subproceeding.

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boundaries in court until this subproceeding. (30(b)(6) Dep. 38:3-6 (Dkt. 20735-1, Ex. A).)

2. Quinault, Quileute, and the Federal Government have Always Believed that the Federal-Water Boundaries were Subject to Revision **Only** if the Treaty Partners Sought Such Revision Themselves. Makah Agreed that Quinault and Quileute were not Required to Adjudicate their Ocean Treaty Fishing Areas.

In its Motion, Makah claims that Quinault and Quileute have always known that their federal boundaries were "interim measures pending a judicial determination of their U&A" and that "Makah had no obligation to seek an adjudication of Quileute and Quinault's U&A prior to the dispute over the whiting fishery." Dkt. 20723 at 1, 4. Makah cannot have it both ways. If Quinault and Quileute *were* required to adjudicate their federal-water treaty areas, then it was incumbent upon any tribe who disputed their fishing activities outside their "adjudicated" areas to timely bring its challenge. If Quinault and Quileute *were not* required to do so, then a challenge to the federal boundary determination should be made administratively and not in this forum.

The argument that the federal boundaries were simply a "placeholder" contingent upon later mandatory adjudication is patently false. Neither Quinault nor Quileute (nor the federal government) has ever believed they were required to adjudicate their federal-water treaty fishing areas absent a dispute with the U.S. government.[5] Indeed, since 1985, the federal government has confirmed and reiterated at least four times that adjudication of federal-water fishing areas is not required. *See infra* pp. 8-10. In *Mosbacher*/92-1, Makah emphatically agreed (when it benefited Makah) that the tribes were not required to adjudicate federal-water treaty rights, including treaty fishing areas:

> MR. SLONIM: Now, in turning to the merits and initially the issues about which tribes have treaty rights and their usual and accustomed grounds and whether the

[5] Any doubt as to whether the United States would seek to revise the boundaries it established in its 1986 regulations was eliminated in 1991, when the federal government stated explicitly that it had "absolutely no intention of changing those descriptions of the treaty Indian usual and accustomed fishing areas in its regulations. In sum, there is no disagreement between the plaintiff [Makah] and the federal defendants over this issue." *Makah v. Mosbacher*, Case No. C85-1606M, Dkt. 216 (Federal Defs.' Resp. to Pl.'s Cross-Mot. for Partial Summ. J.) at 33 (8/12/1991) (Second King Decl. Ex. C).

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> equal-sharing rule should apply at all here. **You have to start with the understanding and the recognition that we're talking about a fishery in this case that is regulated by the United States. This is not a fishery regulated by the state of Washington** or the State of Oregon. It is a federally regulated fishery. . . .
>
> Judge Boldt's order which said that before a tribe can exercise rights to a non-anadromous fishery was issued in the context of a dispute and a case which involved a dispute between the tribes and the *State*. . . . **Judge Boldt did not say that before the *federal* government, the tribes' trustee, can recognize treaty rights in a different fishery, the federal government must insist on a prior judicial determination before it can implement the treaty rights in treaties between the tribes and federal government**.
>
> And that position has never been recognized in any situation that we're aware of. And it's particularly anomalous in the halibut fishery, because the government has done exactly that. Beginning in 1985, they have recognized treaty rights in the halibut fishery. And when this was called to Judge Coyle's attention in 1990, he didn't say, "Well, that's wrong. We need a court proceeding before you can do that." What he said is if someone wants to challenge that, if the states want to challenge that, they should initiate the proceeding to challenge that, and the burden, I submit, would be on the states as on anybody else who wants to challenge a federal regulation to make a showing that what the federal government has done is arbitrary, capricious or unlawful.

Mosbacher/92-1, Dkt. 321 at 19-22 (5/10/1993) (emphasis added) (Dkt. 20735-3, Ex. G).

When the State attempted to challenge Quileute's western boundary in 1996 (the first time any party challenged Quileute's boundary), Quileute stated that "only the federal government or the Quileute Tribe can seek a judicial determination of the Tribe's western boundary. Until then, the [party who wishes to challenge Quileute's western boundary] is bound by the Tribe's federally-recognized western boundary." *U.S. v. Washington*, Dkt. 15949 (Quileute Tribe's Mem. Re Crab Dispute) at 6 n.4 (11/13/1996) (Dkt. 20735-7, Ex. V).

The United States has also maintained an unwavering position that tribes are not required to adjudicate their federal-water treaty rights. In early 1985, the National Oceanic and Atmospheric Administration ("NOAA") informed the tribes that they "should seek confirmation of historic halibut fishing at and before treaty times through adjudication of the question **or by way of an opinion from the Secretary of the Interior, concurred in by the Departments of**

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Justice and Commerce." Dkt. 20736-1, Ex. C at 1 (emphasis added). Later that year, the Solicitor for the Department of the Interior evaluated Quinault and Quileute's treaty claims in a memorandum to the Portland Area Director for the Bureau of Indian Affairs. This evaluation indicated that the "available historic and anthropological record," including 1977 Barbara Lane reports on Quileute, Hoh, and Quinault's traditional marine fisheries, showed traditional fishing activities 25-50 miles offshore and established a treaty right to fish for halibut in federal waters. Dkt. 20736-1, Ex. E at 2-4.[6] Significantly, Makah admits that in 1993 it did not dispute this finding. (30(b)(6) Dep. at 50:9-54:13 (Dkt. 20735-1, Ex. A).)

In May 1986, the U.S. Attorney proposed to NOAA's Regional Counsel that Quileute and Quinault's western boundary be 125°44'00". Dkt. 20736-2, Ex. K. In its memorandum, the DOJ reiterated the position first described in NOAA's 1985 letter:

> **It has been the United States[']** position throughout the ***U.S. v. Washington*** **litigation that court determination of usual and accustomed fishing areas is not required in instances in which the affected parties** . . . **are able to agree**. . .
>
> In the Fisheries Conservation Zone fishing area [from 3-200 miles offshore] the regulatory entity is the Secretary of Commerce rather than the state agencies. Accordingly, the agreement of the affected parties that would be necessary as a substitute for a court order would have to include the agreement of the Secretary of Commerce. . . .

Id. at 1. Based on evidence of Quileute and Quinault's treaty fishing, the DOJ recommended:

> the limitation on the three other [coastal] tribes [should not] be any narrower than that prescribed for Makah, but neither should it be broader. I therefore strongly recommend that in future regulations . . . the Department of Commerce define the boundaries of the Quileute, Hoh, and Quinault Tribes as they are presently defined with the addition of the words "and east of 125°, 44', 00", West longitude" in each instance. **If any of those tribes contested that limitation, then they should be required to establish their rights to a greater fishery in court** just as the Makah were required to do so.

Id. at 1-2 (emphasis added). Four days later, NOAA's Regional Counsel responded, agreeing with the DOJ's boundary recommendation. Dkt. 20736-2, Ex. L. Thus, the choice to attempt to

[6] Makah attached this opinion to its briefing in *Mosbacher* as Exhibit RRR. Dkt. 20735-3, Ex. H.

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modify these boundaries in court was Quinault and Quileute's alone.[7]

Shortly after the coastal tribes first expressed interest in participating in the whiting fishery in the mid-1990s, the federal government issued proposed groundfish regulations. NOAA took the position that:

> the tribal usual and accustomed fishing areas for groundfish are the same as they are for salmon and halibut. The boundaries for the tribes' usual and accustomed fishing areas have not varied by species. In addition, the areas have already been recognized for a long period of time under federal management measures applicable to the salmon and halibut fisheries.

Dkt. 20736-2, Ex. P at 2 (citations omitted). The Solicitor concurred in NOAA's opinion: "I agree, consistent with settled principles of law in United States v. Washington, . . . that it is appropriate to recognize the same usual and accustomed ocean fishing areas that have been used for implementation of the tribes' rights for salmon and Pacific halibut." *Id.* at 20.

In response to a comment challenging Quinault and Quileute's boundaries on the basis that they had not been adjudicated, the federal government reiterated its long-held position:

> 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 FR 28786-01, 28788 (emphasis added) (Dkt. 20735-5, Ex. Q).

[7] Quileute and Quinault initially objected to the western boundary. Quileute objected because it believed that its evidence showed that its treaty fishing activity extended farther west than 125°44'00". *See* Dkt. 19633-2 (Ex. to Lockhart Decl.) (7/15/2010). However, Quileute and Quinault never exercised their option to seek to expand that boundary in court, and in 1991, the federal government stated that it had "absolutely no intention of changing those descriptions of the treaty Indian usual and accustomed fishing areas in its regulations." *Mosbacher*, Dkt. 216 (Federal Defs.' Resp. to Pl.'s Cross-Mot. for Partial Summ. J.) at 33 (8/12/1991) (Second King Decl. Ex. C).

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In sum, while Quinault, Quileute, and the federal government have always recognized that as treaty partners, they could *elect* to revise the federal regulations through court action, they never believed that court action was *necessary*. Nor did they believe that the boundaries were somehow invalid "placeholders" until an adjudication occurred. Once the federal government made it clear in 1991 that it had absolutely no intention of revising the boundaries, the option to attempt to expand the boundaries of their respective fishing areas was left to Quinault and Quileute (and *only* Quinault and Quileute). If Makah truly believed that a forced adjudication of another tribe's federal-water fishing areas was a cognizable claim (its statements in *Mosbacher* indicate otherwise), it was incumbent upon Makah to timely bring its challenge—not to wait until the most opportune moment to sue, after higher fishery allocations were established and Quinault and Quileute elders and experts had died or were otherwise unavailable.

3. Makah Never Represented to this Court that Quinault and Quileute's Boundaries were "Interim Measures Pending a Judicial Determination," and Instead Successfully Obtained a Halibut Allocation *Based on Those Boundaries*.

Makah claims that even as it defended and relied upon Quinault and Quileute's boundaries in *Mosbacher*, it "recognized that they were subject to revision . . . and made no promise not to seek an adjudication." Dkt. 20723 at 8. The record belies this misleading assertion. Makah unequivocally stated that the federal government's "determinations were not taken from whole cloth [but instead t]hey followed careful historical and legal analysis." *Mosbacher*/92-1, Dkt. 359 at 5-6 (11/8/1993) (Dkt. 20735-5 Ex. K). Makah also insisted that adjudication of federal-water areas is not required, and that any challenge to the boundaries must follow the APA process. *Mosbacher*/92-1, Dkt. 321 at 19-22 (5/10/1993) (Dkt. 20735-3 Ex. G).

Among the remedies Makah sought in *Mosbacher* was an allocation of 50% of the harvestable halibut in Subarea 2A-1, which encompasses all 12 halibut treaty tribes' usual and accustomed fishing grounds (including Quinault and Quileute's). *Mosbacher*, Dkt. 311 (Makah Mem. in Supp. of Mot. for Prelim. Injunction) at 22, 45 (12/16/1992) (Dkt. 20735-1, Ex. D) (citing Makah Ex. ZZZ); *see also* Makah Ex. ZZZ (testimony of coastal tribes) (Dkt. 20735-3,

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Ex. H); Dkt. 244 (Makah Reply in Supp. of Mot. for Summ. J.) at 21 (12/3/1991) (explaining that the halibut distribution north of Willapa Bay—the southern boundary of *Quinault's* U&A—to the Canadian border is 70% of the TAC, such that the treaty share would be 35%) (Dkt. 20735-2, Ex. E); Dkt. 352 (Objections to Report and Recommendation by intervenor-plaintiff Makah Indian Tribe) at 13 (10/22/1993) (same) (Dkt. 20735-4, Ex. I); Dkt. 342 (oral argument transcript) at 27-30 (6/23/1993) (same) (Dkt. 20735-4, Ex. J).

Makah specifically described Quinault and Quileute's customary ocean areas:

> [MR. SLONIM:] The Secretary also agrees that an area known as **Sub Area 2A1 . . . represent[s] the composite usual and accustomed grounds of all 12 tribes**. . . .
>
> THE COURT: When you say composite, **you mean all this area is usual ground of some tribe--**
>
> MR. SLONIM: Right.
>
> THE COURT: --but not every tribe can[] fish throughout the area--
>
> MR SLONIM: That's correct, your Honor. For example, the Makah Tribe's usual and accustomed grounds begin at a point in the Strait of Juan de Fuca known as Angela's Point and extends westward throughout the strait and then into the ocean, out to a distance of 40 miles from the Washington coast and then south down the coast for some distance.
>
> Below that, **the ocean fishing grounds of the Quileute, Hoh and Quinault Tribe encompass the remainder of 2A-1 in the ocean**. . . .

Dkt. 321 (Transcript of oral argument) at 5-6 (5/10/1993) (Dkt. 20735-3, Ex. G).

Makah unequivocally *supported* Quinault and Quileute's ocean fishing boundaries, pointing out that *substantial evidence* supported the Commerce Department's determination:

> [Washington State and Oregon State] have made no showing, and they point to nothing in the administrative record, to show that the [federal government's] determination of usual and accustomed grounds was wrong in any way. . . .
>
> In contrast, we have shown that **there's substantial support for each of these determinations in the record**. . . . **[T]he record contains opinions from the Solicitor's Office of the Department of the Interior which address in detail the three issues that Washington insists that must inform any determination of treaty rights: the species taken, in this case, halibut; by what tribes -- each of the 12 tribes [including Quinault and Quileute] is addressed; and where -- their usual and accustomed grounds are addressed.**

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> **And those opinions carefully assess the relevant findings in *United States v. Washington* regarding halibut, the reports of Dr. Lane that were admitted in evidence in *United States v. Washington* as well as additional anthropological reports**.[8] The states point to nothing in the record that's inconsistent with those opinions or which contradicts them. The states simply offer no basis on which to conclude the Commerce Department's reliance on those opinions which come from the Department of the Interior, the agency with special expertise regarding Indian treaty fishing rights, was arbitrary or capricious in any way.

Makah oral argument, *Mosbacher*/92-1, Dkt. 321 at 21-22 (5/10/1993) (Dkt. 20735-3, Ex. G). Makah made it clear that the boundaries were based on careful historical and legal analysis:

> [T]he regulations at issue here recognize 12 "treaty Indian tribes," make a separate allocation of halibut to those tribes, and define the "fishing areas" of each tribe, subject to revision "as ordered by a Federal court." 50 CFR § 30l.20(b), (c), (d) and (j) (l993). **These determinations were not taken from whole cloth. They followed careful historical and legal analysis by the Office of the Solicitor of the Department of the Interior, which prepared written opinions regarding each tribe's treaty halibut rights and usual and accustomed grounds**. Makah Exhs. G, RRR [1985 Solicitor Opinion on Quinault and Quileute], SSS and TTT. . . . [T]he Secretary has never stated that his determinations of the tribes entitled to participate in the treaty fishery or their usual and accustomed grounds were the product of negotiation or compromise.

Mosbacher/92-1, Dkt. 359 at 5-6 (11/8/1993) (emphasis added) (Dkt. 20735-5, Ex. K).[9]

For Makah to argue now that their unequivocal statements in *Mosbacher* somehow "expressly contemplated" that the boundaries were interim is disingenuous at best. Makah made no such express statement. Laches and estoppel prohibit this kind of opportunism.

In its Motion, Makah concedes that it "agreed that the federal regulations depicted the tribes' U&A" in *Mosbacher*, Dkt. 20723 at 11, but attempts to dismiss its support of the boundaries in *Mosbacher* by arguing that the court did not actually adjudicate that issue. Dkt. 20723 at 14. While adjudication may be relevant to *collateral* estoppel, it is not relevant to *judicial* estoppel. Unlike collateral estoppel, which requires an identical issue to have been

[8] Makah now impugns Dr. Lane's reports on the traditional marine fisheries of Quileute and Quinault.

[9] Makah also used Quinault and Quileute's boundaries in establishing a higher tribal blackcod allocation. Following Makah's success in Subproceeding 92-1, the coastal tribes successfully urged the federal government to apply the same allocation methodology as the halibut fishery to the blackcod fishery. As in the halibut fishery, the tribes were allocated half of the historical abundance and harvest in *all* the coastal tribes' customary ocean fishing areas. *See* Supplemental Tribal Comment (Oct. 1994) (Dkt. 20736 ¶ 19, Dkt. 20736-2 Ex. N); Cooney notes re Meeting with Coastal Tribes at 2 (10/21/1994) (Dkt. 20736 ¶ 19, Dkt. 20736-2 Ex. N); Dkt. 20737 (2nd Schumacker Decl.) ¶ 7.

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adjudicated in an earlier proceeding, *Hydra-Pro Dutch Harbor Inc. v. Scanmar AS*, 533 F. App'x 767, 768 (9th Cir. 2013), judicial estoppel simply requires that a party successfully assume a certain *position* in a legal proceeding and then later take a conflicting *position*. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Makah successfully obtained a higher halibut allocation by taking the position that the larger area it based its allocation proposal on (i.e., the treaty fishing areas of all 12 halibut tribes), was based on "substantial" evidence and "careful historical and legal analysis" of all tribes' customary fishing areas. If the court had based the allocation on Makah's area alone, the allocation would have been smaller:

> [W]e have referred to the total "treaty share," and not just a "Makah" share, because the federal regulations explicitly recognize that 12 tribes possess treaty halibut rights. If there were no ether tribes with treaty halibut rights, for the reasons discussed above, Makah alone would have an independent right to up to 50% of the halibut available for harvest in **its** usual and accustomed grounds under the Treaty of Neah Bay. However, it is well established that the Indian share reserved by the treaties is a collective share for all treaty tribes. Since 11 other tribes have recognized halibut treaty rights, **a 50% share for Makah alone would be a more expansive claim**. Washington cannot reasonably object to the fact that Makah acknowledges that the share is the total share for all tribes.

Mosbacher, Dkt. 244 (Makah Reply in Supp. of Mot. for Summ. J.) at 14 (12/3/1991) (emphasis added and citation omitted) (Dkt. 20735-2, Ex. E). As Makah's 30(b)(6) witness admitted:

> Q. [] Makah ultimately succeeded in getting what it asked for in that lawsuit in terms of getting an allocation of 35 percent for area 2A-1, correct?
> A. Yes.
> ***
> Q. Was area 2A-1 comprised of Quileute and Quinault's fishing areas?
> A. Yes.
> Q. So they were supporting those areas, weren't they?
> A. As I described as an interim boundary, they were, yes, Makah was.
> ***
> Q. Were they [Makah] seeking just an interim allocation for area 2A-1?
> A. No.

(30(b)(6) Dep. at 43:1-13, 72:15-19 (Dkt. 20735-1, Ex. A).) Not once in *Mosbacher* did Makah represent to the court that any tribe's boundaries were "interim" or contingent on adjudication.

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The court determined that Makah's requested allocation of 35% (based upon the abundance and historical harvest of halibut within *all* tribes' treaty fishing areas) was appropriate. *See* Dkt. 20723-5, Ex. V at 14-16 (report and recommendation that the appropriate basis for determining the allocation was that proposed by Makah); Dkt. 20723-5, Ex. W at 5-6 (adopting finding). The allocation has not changed since the Court's ruling in 1993. Makah cannot now undo its representations to the court.

4. Past Settlements of *Fishery Disputes* Did not Settle or Toll *U&A Disputes*.

Makah claims that prior to the whiting dispute, the coastal tribes had been able to resolve disputes "regarding ocean fisheries" through negotiation of management plans while "preserving" the ability to litigate U&A disputes. Settlement of disputes over *fishery management*, however, does not settle disputes over *U&A boundaries*, nor does it toll application of laches to disputes over U&A boundaries. As Makah acknowledged in its response to Quinault and Quileute's motions to dismiss in this subproceeding:

> It is one thing to direct tribes fishing *within* their respective usual and accustomed grounds on a common stock of fish to resolve allocation and management issues among themselves; it is quite another to permit a tribe to fish *outside* its usual and accustomed grounds on the hypothesis that any harm to other tribes might be resolved through negotiated management and allocation agreements.

Dkt. 19634 at 7 (7/15/2010).

Thus, it is incumbent upon a tribe who disputes another tribe's *treaty fishing area* (as opposed to its management of a particular fishery) to do so as soon as it knows or should know the other tribe is fishing beyond where the plaintiff tribe believes it is entitled to fish. It may not simply sit back and wait as the other tribe invests in its fisheries, "saving" its claim until the most opportune moment. *See infra* pp. 27-28. Makah's willingness to repeatedly enter into management plans that permitted Quinault and Quileute to continue investing in their fisheries and compete directly with Makah *for decades* only adds additional support to Quinault and Quileute's laches defense.

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Contrary to Makah's claim, no fishery management plan "preserved" a U&A claim or somehow excused Makah's unreasonable delay in bringing its challenge to Quinault and Quileute's treaty fishing areas (if such claim exists). In fact, the blackcod fishery management plan Makah relies upon to "preserve" its U&A claim was only in effect from 1997-2000 and states explicitly that it "shall not be used as a basis for . . . resolving disputes with respect to usual and accustomed fishing areas after the Agreement expires [in 2000]." Second King Decl. Ex A (1997 settlement agreement) at 4. The parties clearly intended that the agreement not be used in U&A disputes, and it is a breach of the agreement for Makah to reference it here. In any event, the agreement does not preserve Makah's "claim," nor does it defeat Quinault and Quileute's equitable defenses.

Makah hangs its hat on the provision stating that "[d]uring the term of this Agreement [1997-2000], each of the signatory tribes agrees not to challenge any other tribe's right to fish for any species in that tribe's marine ocean fishing areas as currently recognized by federal boundaries." Dkt. 20723 at 16. Makah carefully words its description of the agreement as "preserv[ing] their respective *positions*." *Id.* (emphasis added). The agreement does not preserve any party's *claims*, nor does it recognize the *legitimacy* of any such claims.[10] The intent of the provisions is to prevent the parties from using the agreement *for any purpose* in U&A disputes. The effect is to leave the relative positions of all the tribes *unchanged* upon expiration of the agreement. The agreement does not prejudice any defenses that any tribe may have:

> [t]his Agreement is without prejudice to the parties' respective claims regarding usual and accustomed fishing places and does not prevent a signatory tribe from raising any issues necessary to defend itself against a challenge to its fishing area . . . or from otherwise responding as it deems necessary to protect its interests.

Second King Decl. Ex A (1997 settlement agreement) at 4.

The provision in the blackcod agreement obligating the parties not to sue fell out of the

[10] Recognition of the basic fact that tribes had in the past *tried*, and could in the future *try* again to bring U&A challenges does not equate to recognition that such challenge has merit or would not be barred by equitable defenses.

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agreements as of spring 2000 when the 1997 agreement was terminated. The 2001 agreement (and all subsequent agreements) still provide that the agreements should not be used in U&A disputes. *See* Dkt. 20723-5 Exs. DD-GG. At most, the 1997 blackcod agreement simply prohibited Makah from suing over the other tribes's U&A boundaries for three years. It does not negate Makah's support of Quinault and Quileute's boundaries in *Mosbacher* (or Quinault and Quileute's resulting judicial estoppel claim). Nor does it excuse Makah's failure to pursue its claim (if forced adjudication is a cognizable claim) for decades *before and after* the agreement.

B. Equitable Defenses Are Available to Quinault and Quileute in This Subproceeding

Citing the Ninth Circuit's ruling in the shellfish case that laches cannot be applied to "defeat a tribe's treaty rights," Makah tries to argue that it is somehow *Makah's* treaty rights that are at issue here and that Makah's rights should not be "defeated" by equitable defenses. Dkt. 20734 at 19. But *Makah's* treaty rights are not at issue here. The only relief sought in Makah's RFD is a determination of *Quinault and Quileute's* U&A boundaries. Makah readily admitted that its RFD had nothing to do with Makah's rights (or injury thereto) in its response to Quinault and Quileute's motions to dismiss:

> Instead, it [Makah] simply asks the Court to interpret and apply the express language of the Stevens treaties in order to determine the location of Quileute's and Quinault's usual and accustomed fishing grounds, and to enforce the provision in the Court's original decree limiting each tribe's treaty fisheries to such grounds. Because this routine determination, which has been made for every tribe in this case, is not analogous to an equitable apportionment, it is not subject to the "substantial-injury" requirement.

See Dkt. 19634 at 49 (7/15/2010).[11] In sum, Makah has insisted, and this Court has held (Dkt. 19835 at 4), that this subproceeding is not about an equitable apportionment. Makah cannot now argue that its treaty rights are somehow relevant to the distance offshore Quinault and Quileute fished at treaty times. "The defense of laches pertains only to remedy sought, not the cause of

[11] If this suit is not truly a dispute about the distance offshore at which Quinault and Quileute are fishing, and instead is a dispute about how much whiting Makah should be permitted to harvest, it must be solved through equitable apportionment, where Makah's treaty rights *would* be relevant. In an equitable apportionment proceeding, Makah would be required to show substantial injury to its treaty rights. *U.S. v. Washington*, 573 F.3d 701 (9th Cir. 2009).

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action itself." *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 283 (2d Cir. 2005), *cert. denied*, (2006).

Established law, facts, and policy considerations compel application of equitable defenses in this case.

1. No Law of the Case Prohibits the Equitable Defenses of Laches and Estoppel.

Makah asserts that the equitable defenses of laches and estoppel are foreclosed to Quinault and Quileute in this subproceeding. Makah relies on an order entered in this case in 1990 in subproceeding 89-2, which it claims is the "law of the case." Dkt. 20723 at 13 (citing Dkt. 11596). The law of the case doctrine is a judicial invention that generally precludes a court from reconsidering an issue previously decided in the identical case. *U.S. v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014) (citation omitted). The 1990 order is not the law of the case.

In subproceeding 89-2, this Court clarified the Lummi Tribe's adjudicated U&A based on the evidence before Judge Boldt. Dkt. 11596 at 1-14. Lummi asserted a laches defense based upon the passing of tribal elders while the requesting tribes "sat on their rights." *Id*. at 19. Although Judge Coyle framed the question as whether a "tribe can be prevented by another tribe from litigating or challenging usual and accustomed fishing places by invocation of the equitable defenses of laches, waiver or equitable estoppel," *id.* at 17, the only issue before him was whether laches could apply to a claim for clarification of Judge Boldt's ruling. Judge Coyle went on to find that "[w]hile the court is not unsympathetic to the Lummis, the court also thinks the law requires it to conclude equitable defenses are not available in the determination of usual and accustomed fishing places." *Id* at 19. He continued:

> However, this development reinforces the court's determination that it must require the tribes which are parties to this action to finally resolve their usual and accustomed fishing places as soon as possible. This has nothing to do with equitable defenses. It has to do with the expeditious utilization of a mechanism that has been in place since the Boldt decision was issued. Otherwise, it is possible for tribes to essentially mislead other tribes and then slam the door.

Dkt. 11596 at 19-20 (2/15/1990).

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The dispute over Lummi's U&A has gone through several iterations since then. In 2000, the Ninth Circuit held that Judge Coyle's 1990 order was not final because no separate judgment was entered. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 447-48 (9th Cir. 2000). More importantly, Judge Coyle's order has been superseded by this Court's more recent rulings that equitable defenses are available, but cannot be resolved in the dismissal phase.

In its 2005 order in subproceeding 05-4, this Court ruled that all applicable legal and equitable doctrines apply to suits brought under its continuing jurisdiction, and held that laches barred Tulalip's request for clarification of the Suquamish U&A. Dkt. 20269 at 6. That order was vacated and remanded by the Ninth Circuit not based on its ruling on laches, but because the court did not state a basis for its continuing jurisdiction. Dkt. 19090 at 1 (11/13/2008). Following remand, Tulalip amended its request for clarification and Suquamish again moved to dismiss based on laches and judicial estoppel. This Court held that "all three—laches, estoppel, and res judicata—require a factual analysis which is not appropriate on a motion to dismiss." *Id.* at 4 (11/13/2008); *see also* Dkt. 19691 at 2 (12/10/2010) ("**bases for dismissal such as laches, estoppel, and res judicata were more appropriately resolved by a motion for summary judgment**.").[12] It is these orders that are the law of the case—not Judge Coyle's order.

Suquamish later moved for summary judgment on those issues. After fully analyzing Suquamish's judicial estoppel claim (indicating that the doctrine is indeed applicable in U&A proceedings) the Court found that the facts did not support application of the doctrine. Dkt. 20453 at 7. With respect to laches, this Court noted that the language from its vacated 2005 order "with respect to the viability of a laches defense in *this subproceeding* is no longer valid." *Id.* at 8 n.4 (emphasis added). However, the Court resolved the laches claim on the merits, noting that it was not to "be deemed a renewal of the court's prior determination that laches may be asserted in a subproceeding brought to *clarify* a Tribe's U&A, and may not be cited as such." *Id.*

[12] In this subproceeding (09-1), this Court also indicated that the laches claim could not be resolved at the dismissal stage but required further factual development. Dkt. 19835 at 4 (9/28/2011).

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(emphasis added). In resolving the claim, this Court found that Tulalip was not "raising issues they could have brought to the Court earlier" because Suquamish did not fish in the subject area until 2003. *Id.*; *see also* Dkt. 20266 (12/3/2012) (Tulalip opposition discussing Suquamish's expanded fishing).

Lastly, Judge Coyle's legal analysis has eroded in the tides of time. Both the Supreme Court and the Ninth Circuit have since recognized that certain claims by tribes are subject to equitable defenses. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (Laches barred Oneida Nation from asserting its sovereignty as a protection against taxation of land it repurchased within its historic reservation area); *Apache Survival Coalition v. U.S.*, 21 F.3d 895 (9th Cir. 1994) (tribe barred by laches from raising religious objection to construction on mountain site). Makah argues that *Sherrill* is limited to tribal land claims. Dkt. 20723 at 18 n.9. Not so. As the Second Circuit observed in *Cayuga Indian Nation*, "the import of *Sherrill* is that 'disruptive,' forward-looking claims, a category *exemplified* by possessory land claims, are subject to equitable defenses, including laches." 413 F.3d at 277, *cert. denied*, 547 U.S. 1128 (2006). Makah's claim to eject Quinault and Quileute from their offshore treaty fishing areas for the rest of time threatens to disrupt a culture these tribes have held dear since time immemorial, as well as numerous tribal members' livelihoods. *See* Dkt. 20746 (Johnstone Decl.) ¶ 11; Dkt. 20736 (Moon Decl.) ¶ 23; Dkt. 20742 (Boldt Decl.); Dkt. 20743 (Corwin Decl.); Dkt. 20744 (Goodell, Jr. Decl.); Dkt. 20745 (Goodell, Sr. Decl.); Dkt. 20747 (Rosander Decl.); Ratliff Decl.; Payne Decl.; Foster Decl.; Schumack Decl. (re-executed versions of the latter four declarations are attached hereto).

In sum, there is no inflexible "law of the case" that precludes equitable defenses in this case. This Court has instead held that equitable defenses *are* available, but are more appropriately evaluated at the summary judgment (or trial) stage. Equitable defenses are particularly merited here, where one tribe has invoked this Court's continuing jurisdiction to

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adjudicate (not clarify) the customary fishing area of another tribe outside state waters. Most particularly, the Ninth Circuit has never recognized that *U.S. v. Washington* is exempt from the well-established legal principles applicable to equitable actions. There is no legal justification for Makah's desire to have a special exemption from laches or other equitable doctrines.

2. Prohibiting Equitable Defenses Does Not Promote Fair Out-of-Court Resolution of Disputes

Makah asserts that wholesale rejection of equitable defenses is necessary to encourage out-of-court settlements; otherwise, "all tribes would be forced to advance outstanding U&A claims for immediate adjudication." In fact, that is exactly what Judge Coyle required that all tribes do (*24 years ago*) in the order Makah relies on.

> [T]he court's determination [is] that it must require the tribes which are parties to this action to finally resolve their usual and accustomed fishing places as soon as possible. This has nothing to do with equitable defenses. It has to do with the expeditious utilization of a mechanism that has been in place since the Boldt decision was issued. Otherwise, it is possible for tribes to essentially mislead other tribes and then slam the door.

Dkt. 11596 at 19-20 (2/15/1990). Makah is familiar with this part of Judge Coyle's order, because it reiterated the requirement to expeditiously bring challenges against other tribes' treaty rights at least *four separate times* in *Mosbacher* when it was criticizing Washington State for challenging the tribes' rights yet failing to follow Judge Coyle's mandate.

> Without objection from Washington, all 12 halibut tribes made factual representations to and obtained recognition of their treaty rights from the Federal regulators.[FN16]
>
> [FN16] Almost two years ago the United States v. Washington court invited any party—including Washington—who wished to challenge the treaty right of any halibut fishing tribe to commence a proceeding in that case "forthwith" if it believed that the tribe did not have such a right. [] (Docket No. 11, 596) (Feb. 15 1990) at 2~3 n. 1 ("if there is an issue that the Lummi (or any other tribe currently fishing for halibut) has no treaty right to do so, the court suggests that a sub-proceeding be commenced to get this issue resolved forthwith"). To date, no party—including Washington—has elected to do so.

Mosbacher/92-1, Dkt. 244 at 16 (12/3/1991) (Dkt. 20735-2, Ex. E); Dkt. 277 at 4-5 n.2 (7/9/1992) (Dkt. 20735-5, Ex. L) (same); Dkt. 306 at 4-5 n.3 (1/28/1993) (Dkt. 20735-3, Ex. F)

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(same); Dkt. 359 at 7-8 (11/8/1993) (Dkt. 20735-5, Ex. K) (same).

Moreover, although Judge Coyle stated his concerns "had nothing to do with equitable defenses," his mandate that tribes bring their U&A challenges "as soon as possible" in order to avoid misleading and then "slamming the door" on other tribes conforms precisely to the rationale for imposing laches:

> Laches is a clement doctrine. It assures that old grievances will some day be laid to rest, that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asserting them. Inevitably it means that some potentially meritorious demands will not be entertained. But there is justice too in an end to conflict and in the quiet of peace.

A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1029 (Fed. Cir. 1992) (quoting *Environmental Defense Fund v. Alexander,* 614 F.2d 474 (5th Cir. 1980), *cert. denied,* 449 U.S. 919). Finally, disputes and settlements are a fact of life in all contexts, not just in *U.S. v. Washington*, yet equitable defenses still apply in all contexts.

If the equitable defense of laches was unavailable as a defense to a tribe's long-delayed valid claim against another tribe's presumed right, the claimant tribe could delay in asserting its claim until the non-claimant tribe no longer had available evidence to defend against the claim and/or had made large investments from its presumed right. The claimant tribe could also dictate settlement terms because the non-claimant tribe will either no longer have the evidence to defend against the belated claim or it will risk the investments and transactions it has made in reliance on its presumed right, or both. Here, had Quinault and Quileute agreed to Makah's one-sided terms for the whiting fishery, Makah would have not filed its challenge to Quinault and Quileute's ocean fishing areas in federal waters. Under Makah's theory that no equitable defenses should be available, many more years (perhaps another quarter century) could pass and Makah could simply wait until Quinault and Quileute did not acquiesce to its terms to sue.

Makah cites *Petrella v. Metro-Goldwyn-Mayer, Inc.* 134 S.Ct. 1962 (2014) for the proposition that laches should not apply in this case because it would force tribes to sue over

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even "innocuous infringements" of U&A boundaries. *Petrella* lends no support to its argument. The issue in *Petrella* was limited to resolving a Circuit split over whether laches could be applied to copyright infringement claims brought *within* the three-year statute of limitations for copyright claims. *Id.* at 1972-73. The Supreme Court ruled that laches cannot be used to defeat a claim filed *within* the Copyright Act's three-year statute of limitations. *Id*. at 1973-74. Here, there is no applicable statute of limitations, and laches—rather than a statute—determines whether or not a party delayed unreasonably in bringing its claim.

Application of laches in this context will not force a tribe to sue over every "innocuous" instance of another tribe fishing outside of its U&A. Quinault and Quileute's fishing within their federally established boundaries has been neither innocuous nor difficult to detect. Makah has been aware since 1975 that Quinault and Quileute have been fishing in the ocean and directly competing with Makah in various ocean fisheries at *the same distances offshore as the whiting fishery*. The 1986 boundaries set forth the exact latitude and longitude boundaries within which Quinault and Quileute could legally fish. Makah viewed such competition as "substantial injury" to Makah. *See, e.g.*, Dkt. 19634 at 50. Given these facts, Makah's argument that it can sue to adjudicate Quinault and Quileute's federal-water boundaries but that it "had no obligation to seek an adjudication of [their] U&A prior to the dispute over the whiting fishery," Dkt. 20723 at 1, is preposterous.

The breakdown of whiting negotiations in 2008 was not the first time that Makah believed that Quinault or Quileute threatened to preempt its fishery.[13] In 1995, Makah claimed that Quileute would "preempt" its blackcod fishery, and affirmatively raised a legal claim against

[13] Nor was it the first time that Quinault or Quileute proposed to enter the whiting fishery. Although Makah now states that it chose not to join in the challenge to Quinault and Quileute's boundaries in *Midwater Trawlers* because "there was no dispute between Makah, Quileute and Quinault at the time of the Midwater Trawlers' litigation, since Quileute and Quinault were not then seeking to enter the whiting fishery," in 1998 Makah submitted a joint proposal *with Quileute* to NMFS proposing to share the whiting fishery between the two tribes. (30(b)(6) Dep. 119:17-125:12; Dep. Exs. 159 and 160; 64 Fed. Reg. 1341-01 (1999) (Dkt. 20735-1, -5, Exs. A, N, O, P).) When Makah submitted this proposal, it knew that Quileute would prosecute the whiting fishery 20 to 40 miles from shore. (30(b)(6) Dep. 15:4-9 (Dkt. 20735-1, Ex. A).)

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Quileute's western and northern boundaries by letter. Dkt. 20735-5, Ex. M. Makah then *chose not to pursue* its claim. (30(b)(6) Dep. 55:4-15, 72:21-76:1); Dkt. 20735-1, -5, Exs. A and M. Makah had abandoned the challenge to the western boundary by the time the subproceeding was filed, and failed to pursue its litigation against Quileute's northern boundary. (30(b)(6) Dep. 72:21-76:1 (Dkt. 20735-1, Ex. A)); *U.S. v. Washington*, Dkt. 16215 at 2 (6/12/1997). Courts apply equitable defenses in similar circumstances. *See Jensen v. Western Irr. and Mfg., Inc.*, 650 F.2d 165, 169 (9th Cir. 1980) ("Although Jensen charged various parties with infringement and threatened legal action on more than one occasion, he never took any action against appellees. If a patentee threatens an alleged infringer with prompt enforcement of the patent and then does nothing, that action may be sufficiently misleading to induce the alleged infringer to believe that the objection has been abandoned."); *Anderson v. Air W., Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) ("The law presumes injury from unreasonable delay" in prosecuting one's claim).

Makah admits that it *always believed* it could bring a suit in this case to challenge Quinault and Quileute's federally recognized ocean fishing boundaries, and that the evidence regarding Quinault and Quileute's treaty time fishing activity was as available to Makah in 1975 as it was in 2009. (30(b)(6) Dep. 134:13-136:3 (Dkt. 20735-1, Ex. A).) Rather than bring a timely challenge, Makah chose to try to "save" the challenge until such time as it could reap the greatest benefit for itself. (*Id*. at 127:11-15.)

Makah is not entitled to wait *decades* to sue despite perceived "substantial injury" to its fisheries. Similar arguments have been soundly rejected by the Ninth Circuit. In *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, the court applied laches where the plaintiff knew of the potential conflict several years before bringing suit. 391 F.3d 1088, 1103 (9th Cir. 2004) ("Grupo Gigante cannot logically argue that it had established a protectable interest in the Gigante mark in the Dallos' trading area in 1991, but was not obliged to protect that interest until 1999."). "The fact that [the plaintiff] chose to wait until the conflict was actual, versus potential, was not an

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excuse." *Internet Specialties West. v. Milon-DiGiorgio Enterprises*, 559 F.3d 985, 991 (9th Cir. 2009) (citing *Grupo Gigante*, 391 F.3d at 1103). In *Internet Specialties*, the court reached the same result on similar facts. Internet Specialties argued that it was not required to sue a competitor for trademark infringement until it discovered that the competitor added a new service of DSL access to its offerings. The Ninth Circuit disagreed, holding that because both companies were offering some of the same services under "remarkably similar names" in 1998, a "prudent businessperson should recognize the likelihood of confusion to consumers under such circumstances as existed in 1998." *Id.* at 990-91. The addition of a new service that posed greater competition to Internet Specialties was simply "a natural growth of [the defendant's] existing business" and did not create a new cause of action. *Id.* at 990. "Internet Specialties was not entitled to wait until MDE's business grew large enough to constitute a real threat, and then sue for trademark infringement." *Id.*

As in *Internet Specialties*, Quinault and Quileute's proposed entry into the whiting fishery was a foreseeable exercise of their existing fishing rights in the *same area* where they prosecute several other fisheries. Because the cause of action to force a U&A adjudication (if one indeed exists) is not *fisheries*-centric, but *place*-centric, Makah's claim was ripe as soon as it knew Quinault and Quileute were fishing beyond their adjudicated boundaries in 1975.

With respect to estoppel, the notion that prohibiting a tribe from asserting an estoppel defense promotes out of court settlements ignores the rationale that led courts to recognize it as a valid defense. The purpose of equitable defense of judicial estoppel is to protect the integrity of the judicial process itself by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001). That integrity will be lost if the defense is prohibited because there will be no incentive for a tribe to refrain from taking one position in a subproceeding and a different position in another proceeding depending on whether it believes it is to its advantage to do so. Furthermore, a rule

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that prohibits an estoppel defense would lead to more litigation, not less, because a tribe will not be bound by its previous positions.

Here, when it was to Makah's advantage to secure a larger tribal share of the halibut and blackcod fisheries, it asserted that Quinault and Quileute's federal boundaries were based on substantial evidence and that they had a treaty right to fish within those boundaries. Now, Makah takes the opposite position in an attempt to eliminate its competition from the ocean fisheries. *See* Dkt. 20734 at 5-14, 16-19 (Quinault and Quileute Mot. for Summary J.).

Thus, Makah's "policy concern" is unpersuasive and legally unsupported. Disputes and settlements are a fact of life in all contexts, not just in *U.S. v. Washington*. The equitable doctrines of laches, acquiescence, and estoppel have been around for centuries and the policy consideration that Makah feigns concern about is as applicable in all other contexts as it is in these tribes' disputes. The very rationale for the existence of equitable defenses of laches and estoppel support their validity in subproceedings involving certain intertribal disputes, and particularly in this subproceeding.

III. CONCLUSION

Makah advocates a rule that will force unjust settlements, increase litigation, and damage the integrity of the judicial process. Makah requests that this Court adopt a rule that is not based on the law or any sound policy considerations, in order to again gain an undeserved litigation advantage by taking from Quinault and Quileute viable long-standing defenses. Given the unique facts and issues in this subproceeding, equity demands that Quinault and Quileute be allowed to assert such defenses. This Court should deny Makah's request that this Court rule as a matter of law that equitable defenses are unavailable in this subproceeding. If the Court instead finds that the facts are not dispositive, the result is simply to reserve the issues for full development and presentation at trial.

DATED this 8th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will notify all parties in this matter who are registered with the Court's CM/ECF filing system of such filing.

DATED this 8th day of December, 2014.

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