The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 RSM Subproceeding No. 09-01 QUILEUTE AND QUINAULT REPLY TO MAKAH, WASHINGTON STATE, AND UNITED STATES' RESPONSES RE MOTION TO DEFINE THE BURDEN OF PROOF NOTED ON MOTION CALENDAR: JANUARY 30, 2015 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Quinault and Quileute do not seek to change any burden or standard of proof in this case. They merely seek to *define* the burden of proof where one tribe seeks to force another to adjudicate its treaty fishing areas in federal waters, where adjudication is never required. As the United States acknowledges, "judicial adjudication of boundaries is not a prerequisite for the implementation of federal fishing regulations or for tribal fishing in federal waters pursuant to their self-executing treaties." Dkt. 285 (U.S. Resp.) at 2-3 (1/26/2014).

II. ARGUMENT

A. As the Requesting Party, Makah Bears the Burden of Proof.

Makah argues that the burden of proof in this subproceeding should be allocated to Quinault and Quileute because "[i]t is settled law that a tribe asserting U&A in an area has the burden to produce evidence supporting its assertions." Dkt. 287 (Makah Resp.) at 5 (1/26/2014). Quinault and Quileute are not "asserting U&A." It is instead *Makah's* "assertions" that define the issues in this case: (1) Is Quinault and Quileute's western boundary limited to 5-10 miles offshore? (2) Is Quileute's northern boundary located north of Norwegian Memorial? Dkt 1 (Makah RFD) (12/4/2009). Makah should therefore have the burden to prove its assertions.

It is not true, as Makah alleges, that this Court has "required every other tribe seeking to exercise treaty fishing rights in an area to prove it has U&A in that area." Dkt. 287 at 8. Tribes have never been required to adjudicate their fishing areas outside the case area. Quinault and Quileute address this issue in their Reply to the S'Klallams, Tulalip, and Upper Skagit (who also allege that Quinault and Quileute were required to adjudicate their federal-water areas).

B. Makah Has the Burden to Prove that Quinault and Quileute's Federal-Water Boundaries are Arbitrary and Capricious.

Quinault and Quileute agree with the United States that a judicial adjudication of the boundaries of treaty fishing areas by "a federal court with proper jurisdiction" will "supersede and be distinguishable from an agency determination of tribal fishing areas." Dkt. 285 (U.S. Resp.) at 2, 4. However, Quinault and Quileute maintain their position that this Court does not

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have jurisdiction to adjudicate their federal-water fishing areas based on a request from a stranger to the Treaty of Olympia. "[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 (1996). Makah is in the same position as any third party challenging Quinault and Quileute's federal-water fishing rights. It should be held to the same arbitrary and capricious standard.

C. In the Alternative, Makah should Bear the Burden of Proving its Allegations by Showing that no Inference Could Support Quinault and Quileute Treaty Fishing Areas Beyond Five to Ten Miles Offshore.

Makah relies primarily on *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014) to support its contention that a U&A adjudication is analogous to a declaratory action for patent non-infringement, such that an adjudication that there is no inference that could support Quinault and Quileute's beyond five to ten miles would leave "questions regarding the scope of Quileute and Quinault's ocean U&A . . . unresolved." Dkt. 287 at 8. *Medtronic* is factually and legally inapposite and does not lend Makah's argument any authority.

Medtronic reiterated the long-recognized rule in patent law that the burden is on the patentee in a declaratory action for noninfringement. The rationale is that if infringement is unclear, the potentially infringing party is faced with a Sophie's choice between abandoning his rights or risking prosecution—a quandry that the Declaratory Judgment Act was intended to ameliorate. *Medtronic*, 134 S. Ct. at 845. Unlike a declaratory action for patent noninfringement—where the challenger would potentially infringe if he didn't "know just what products and processes [he is] free to use" (*id.* at 849-50), here there is no uncertainty regarding where Quinault and Quileute are legally permitted to fish: the federal boundaries have been defined for nearly 30 years. These boundaries are no mystery to Makah. Instead, Makah advocated those boundaries and prior to this dispute Makah took and argued the legal position that U&As under federal jurisdiction did not require judicial determination. *See* Dkt. 251 (Quinault and Quileute Mot. for Summ. J.) at 5-14 (12/2/2014).

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Makah also argues that "there is nothing in Paragraph 25(a)(6) that suggests it was intended to change substantive rights or re-allocate the burden of proof in a U&A determination." Dkt, 287 at 7-8. The argument begs the question. There has never been a suit where one tribe has invoked this Court's jurisdiction under Paragraph 25(a)(6) requesting it determine the fishing location of another tribe *in waters outside the case area under the exclusive jurisdiction of the federal government, where the federal government and the tribe do not disagree with the location*. There is no established precedent—like with declaratory patent infringement actions—that holds where a party seeks Paragraph 25(a)(6) relief under these circumstances the general rule allocating the burden of proof to the plaintiff does not apply.

D. If this Court Allocates the Burden of Proof to Quinault and Quileute, the Standard is a Showing of Reasonable Inferences of their Probable Treaty Fishing Areas.

Quinault, Quileute, Makah, and the State agree that if this Court allocates the burden of proof to Quinault and Quileute, the standard of proof should be the *same* as that applied in prior U&A determinations. Quinault, Quileute, Makah, and the State agree that the standard is met by a showing of sufficient evidence to support inferences regarding where a tribe fished at treaty times. Dkt. 288 (State Resp.) at 8; Dkt. 287 (Makah Resp.) at 2. Quinault, Quileute, Makah, and the State also agree that mere speculation cannot prove (or disprove) a U&A.

However, the State and Makah now argue that a "preponderance" standard applies. This standard has been rejected by the Ninth Circuit:

> Documentation of Indian fishing during treaty times is scarce. Dr. Lane, an acknowledged authority in the field, has testified that what little documentation does exist is "extremely fragmentary and just happenstance." Accordingly, **the stringent standard of proof that operates in ordinary civil proceedings is relaxed**. *U.S. v. Washington* ("Makah"), 730 F.2d 1314, 1317 (9th Cir. 1984). . . .
>
> Evidence concerning Indian fishing in treaty times is sketchy and less satisfactory than evidence available in the typical civil proceeding. As Judge Boldt noted, "In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." 459 F.Supp. at 1059.

U.S. v. Lummi Indian Tribe, 841 F.2d 317, 318, 321 (9th Cir. 1988) (emphasis added). Thus, in U&A determinations, the standard of proof is *not* a "stringent" preponderance standard (the

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standard that operates in "ordinary" civil proceedings), but is instead a "relaxed" standard.

The State and Makah also contradict what has been argued and accepted in the past. A 1994 brief authored by Makah, Upper Skagit, Tulalip, and the S'Klallams, among others, reads:

> 4. LEGAL STANDARDS FOR DETERMINATION OF USUAL AND ACCUSTOMED GROUNDS. . . .
>
> 4.2 Stringent Proof Standards Cannot be Followed
>
> … [T]he Court cannot follow stringent proof standards because to do so would likely preclude a finding of any such areas. Little documentation of Indian fishing locations in and around 1855 exists today.
>
> *United States v. Washington*, 459 F. Supp. 1020, 1059 (1978).
>
> The Ninth Circuit has specifically approved the district court's ruling on this point. *United States v. Washington*, 730 F.2d 1314, 1316 (9th Cir. 1978). . . . This Court also reiterated these findings several times in a later proceeding involving a further determination of Tulalip usual and accustomed areas:
>
> > As a general matter, there is very little treaty-time documentation or direct evidence of [sic] fishing in open marine areas, and such occasional references as exist are extrememly fragmentary as just happenstance. [citation omitted.] It is only by chance that documents dating from treaty times note the presence of specific Indians at a given freshwater site.
>
> 626 F. Supp. at 1528, FF 368. . . .
>
> As a result of these and other findings, the Court concluded:
>
> > **Either direct evidence or reasonable inferences from documentary exhibits, expert witness reports and other testimony as to the probable location and extent of usual and accustomed treaty fishing areas may be sufficient to support a legal determination** of the areas involved. Stringent proof standards are not the applicable limiting basis for such determinations. [Citations omitted.]
>
> *Id.* at 1531, CL 95. . . .
>
> The Court of Appeals further expanded these rulings, holding that where the issue is the establishment of a tribe's usual and accustomed fishing places, ". . . the stringent standard of proof that operates in ordinary civil proceedings is relaxed, and that the loosening of proof requirements is necessary because documentation of treaty time fishing is "extremely fragmentary and just happenstance", *Id.*

Dkt. 14181 (Makah et al. Brief Re U&A Fishing Locations) at 10, 11-13, 15-16 (3/21/1994). We encourage the Court to read the entirety of Makah, the S'Klallams, Tulalip, and Upper Skagit's description of the legal standard for proving U&A areas, which spans pages 10-16 in their brief and is attached as Exhibit A to the Third King Declaration.

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In *Mosbacher*, Makah made similar arguments:

> the court has not imposed a strict standard of proof in designating "freshwater systems and marine areas" as usual and accustomed grounds. In a 1975 order regarding usual and accustomed areas of the Tulalip the court said:
>
> > In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Little documentation of Indian fishing locations in and around 1855 exists today.[1] The anthropological reports of Dr. Barbara Lane, which this court finds highly credible, have been very helpful in determining by direct evidence **or reasonable inferences the probable location and extent of usual and accustomed fishing areas**.
>
> 459 F. Supp. at 1059 (emphasis added).

Makah v. Mosbacher, Dkt. 244 at 66 (12/3/1991) (excerpt attached, Ex. B to Third King Decl.).

Eliminating the "preponderance" language, Quinault and Quileute agree with the following characterization by the State regarding the burden of proof:

> Ultimately, what Judge Boldt and subsequent judges in this case have said is that "[t]he court's concern and objective is to act upon the most accurate and authoritative data concerning usual and accustomed fishing places that can be developed by thorough investigation and research." *U.S. v. Washington*, 459 F. Supp. at 1059. Accordingly, to support a U&A claim, there must be credible evidence that a tribe "customarily fished from time to time at and before treaty times." Final Decision I at 332. Reasonable inferences may be drawn from such evidence. But "probable location" doesn't mean speculation, nor does it mean there is a burden of persuasion other than the traditional . . . standard used in prior U&A cases. *Seufert Bros. Co. v. U.S.*, 249 U.S. 194, 39 S. Ct. 203 (1919). Instead, it means that credible evidence must either directly demonstrate . . . that a tribe customarily fished at a claimed location at treaty times, or be the basis for a reasonable inference supporting a conclusion that . . . such fishing occurred.

Dkt. 288 at 8. Though Makah now claims that its 1984 U&A case established "that evidence of hunting marine mammals at treaty time did not establish U&A" (Dkt. 287 at 3-4), ten years *after* its U&A case Makah told this Court the opposite:

> The type of fishing activities this Court has considered in determining the boundaries of usual and accustomed grounds and stations also shows that all fishing activities should be taken into account. This Court has frequently considered more than just salmon fishing in establishing usual and accustomed

[1] Makah again mischaracterizes its own ocean U&A determination when it asserts that "the Court had held that evidence of post-treaty fishing practices is of limited value in determining U&A." Dkt. 287 at 4. In fact, evidence of post-treaty fishing practices is the vast majority of the evidence in this case since "little documentation of Indian fishing locations in and around 1855 exists today." Makah's U&A decision does not "reject" post-treaty evidence; instead, the Ninth Circuit found it quite credible: "About 1900, [Makah] fished regularly at areas about 40 miles out, and probably did so in the 1850's." *U.S. v. Wash.*, 730 F.2d 1314, 1318 (9th Cir. 1984). This is another example of a "reasonable inference" sufficient to show probable U&A locations.

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> areas. For example, in adjudicating the Quileute Tribe's usual and accustomed areas, the Court noted that in portions of its area the Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish, shark, herring, sardines, sturgeons, **seal, sea lion, porpoise and whale**. 384 F.Supp. at 372, FF 108. . . . **The Makah usual and accustomed areas were originally determined with reference to salmon, halibut, whale and seal**, 384 F.Supp. at 363 FF 61.

Dkt. 14181 (Makah et al. Re U&A Fishing Locations) at 8 (emphasis added) (Third King Decl Ex. A).[2] Makah argued that "fish" is "any animal living exclusively in the water" under the plain language of the treaty. Dkt. 12958, Subp. 89-3, (Makah et al. Mem. in Supp. of Mot. for Summ. J.) at 3 (3/31/1993) (Third King Decl. Ex. C). This Court accepted Makah's argument:

> The effort by the defendants to read a species limitation into the "right of taking fish" must fail in light of the canons of construction favoring Indians. . . . had the parties to the Stevens Treaties intended to so limit the right, they would not have chosen the word **"fish," a word which fairly encompasses every form of aquatic animal life**. "Fish" has perhaps the widest sweep of any word the drafters could have chosen, and the Court will not deviate from its plain meaning.

U.S. v. Wash., 873 F. Supp. 1422, 1430 (W.D. Wash. 1994) (emphasis added). If that weren't enough, Makah made the same argument on appeal:

> The district court typically considers a broad array of fishing activities in determining the boundaries of usual and accustomed grounds and stations. For example, the court noted that in portions of its area Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish, shark, herring, sardines, and sturgeons, **as well as sea mammals**. 384 F. Supp. at 372.

Makah et al. Brief, Appeal 96-35014, Dkt. 39, at 65, 82 (10/29/1996) (Third King Decl. Ex. D). The Ninth Circuit affirmed, ruling that a more restrictive reading of "fish" than "every form of aquatic animal life" would be contrary to the reservation by the tribes of their *pre-existing* right of taking subsistence of *all* forms from all areas where they traditionally obtained such subsistence. 157 F.3d at 643–44. Whether non-fish species such as shellfish and sea mammals are included in the Stevens Treaty fishing provision has been resolved and is law of the case.

III. CONCLUSION

For the above reasons, this court should rule that Makah has the burden to show that Quinault and Quileute's boundaries are arbitrary and capricious.

[2] Makah accuses Quinault and Quileute of "minimizing" the evidence used to support its ocean U&A. The evidence speaks for itself. Exhibit E to the Third King Declaration is the evidence provided in support of Makah's U&A.

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Respectfully submitted this 30th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2015, I electronically filed the foregoing document 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 30th day of January, 2015.

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