No. 15-35824
15-35827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE,
Plaintiff-Appellant,
and

STATE OF WASHINGTON,
Defendant,

v.

UNITED STATES OF AMERICA,
Plaintiff

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION,
Respondents - Appellees,

HOH INDIAN TRIBE; et al.,
Real Parties in Interest,

Appeal from U.S. District Court for Western Washington, Seattle
D.C. No. 2:09-sp-00001-RSM; The Honorable Ricardo S. Martinez

BRIEF OF REAL PARTY IN INTEREST HOH INDIAN TRIBE

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I. INTRODUCTION

A. The Interest of the Hoh Tribe in This Proceeding.

There are three signatory tribes to the Treaty of Olympia, negotiated on July 1, 1855, signed by Governor Isaac Stevens on January 25, 1856, and ratified by the U.S. Senate on March 8, 1859. 12 Stat. 971. Those tribes are the Quileute Tribe, *U.S. v. Washington*, 384 F. Supp. 312, 372 (W.D.Wash. 1974) (FF# 103) (hereinafter "Decision I"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), the Quinault Tribe, *id.*, 384 F. Supp. at 374, FF# 119, and the Hoh Tribe, *id.*, 384 F. Supp. at 359, FF# 35. Order,[1] p.8, MER 18, FF# 2.3. In Subproceeding 09-01, the Makah Tribe filed a Request for Determination pursuant to Paragraph 25 of the Injunction granted in Decision I, 384 F. Supp. at 419, as amended, against the Quileute and Quinault Tribes. Makah Indian Tribe's Request for Determination Re Quileute and Quinault Usual and Accustomed Fishing Grounds in the Pacific Ocean, Dkt. # 1, Hoh Excerpt of Record (HER) HER 36-45. The Hoh Tribe was not named as a

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[1] The term "Order" is used in this brief to refer to the decision of the District Court, "Findings of Fact and Conclusions of Law and Memorandum Order," dated July 7, 2015, that is the subject of the present appeal. This decision is included in Makah's Excerpt of Record at MER 11-93. The Makah Tribe's opening brief is referred to as "Makah Brief;" the State of Washington's Brief is referred to as "State Brief." The term "u&a" is used as a shorthand reference to the treaty term "the right of taking fish at usual and accustomed grounds and stations." The term "RFD" is a shorthand reference to the phrase "Request for Determination," the term used to initiate a new subproceeding in *U.S. v. Washington* under Paragraph 25, as amended, of the District Court's continuing jurisdiction.

Responding Party in Makah's RFD because Makah stated that the Hoh Tribe was not currently exercising or threatening to exercise its ocean treaty fishing rights in a manner that injured Makah. *Id.*, p. 2 n. 1, HER 37. Like Quileute and Quinault, Hoh had the right to exercise its ocean treaty fishing rights in the Pacific Ocean long before this RFD was initiated by Makah, pursuant to its treaty and federal regulations adopted by NOAA. *See* Order, MER 13, lines 16-18.

The Hoh Tribe was concerned that it was not named as a Responding Party in Subproceeding 09-01, given that Makah's RFD asked the District Court to determine the scope of ocean treaty fishing rights under the Treaty of Olympia and the Hoh Tribe is a signatory to that Treaty; any decision on the scope of rights reserved by the signatory tribes under that treaty in the Pacific Ocean would necessarily directly affect the legal rights of the Hoh Tribe. As the District Court noted:

> As Judge Rothstein also made explicit two decades ago, 'all parties in this case will [nonetheless] be bound by all rulings in the subproceedings whether or not counsel have filed notices of appearance in particular subproceedings.' C70-9213, Dkt. # 13292, ¶ 4. While the scope of a party's U&A may be in no way at issue in a single subproceeding, that party is still entitled to fully participate given that they will be bound by any determination made under it.

Order of Clarification and On Pending Motions, Dkt. # 247, Nov. 13, 2014, p. 6, HER 21. *See id.* at pp. 4-5, HER 19-20 ("*U.S. v. Washington* is a single case . . . it remains a fundamental principle that all parties to a lawsuit are bound by a

judgment or decree within it.") (citations omitted). In addition, since Judge Boldt found in Decision I that the Quileute and Hoh Indians were "linguistically, culturally and historically . . . one people" at treaty time living along two river systems, and had only relatively recently been identified by the federal government as two separate tribes, 384 F. Supp. at 359, FF# 38, any findings regarding Quileute pre-treaty treaty rights would also necessarily affect Hoh treaty rights. The Hoh Tribe has a direct legal interest in this proceeding.

The District Court ruled that Hoh treaty u&a area was not at issue in Subproceeding 09-01, in a series of rulings:

> To the extent that factual and legal determinations in this subproceeding have implication for the scope of the usual and accustomed fishing grounds of the Hoh, that Tribe may argue their position in memoranda filed in their status as participant under Paragraph 25. On the other hand, should the Hoh wish to assert facts which would distinguish their position from that of the Quileute with respect to usual and accustomed fishing areas, they should file their own Request for Determination following the procedures set forth in Paragraph 25 . . . .

Order on Motion for Leave to Intervene, Dkt. # 128, Aug. 8, 1992. HER 27-28. *See* HER 22 ("The only limitation that Interested Parties face is that they may not broaden the scope of the adjudication taking place under the subproceeding, including by seeking the determination of their own U&A within it."). But, as the paragraph immediately above states expressly, any factual or legal determinations made in Subproceeding 09-01 that implicate the scope of Hoh's treaty fishing rights will be binding on the Hoh Tribe. Dkt. #128, HER 28.

The Hoh Tribe is therefore in a unique and anomalous status in this proceeding. Despite being another signatory to the Treaty of Olympia along with the Quileute and Quinault Tribes, and despite the fact that the District Court ruled in Decision I that the Hoh and Quileute Tribes were culturally, linguistically and historically one tribe at treaty time – thus necessitating review of both tribes' history and culture in determining either tribes' rights – the Hoh Tribe's usual and accustomed treaty ocean fishing grounds are not legally at issue in Subproceeding 09-01. Quileute and Quinault's ocean treaty fishing u&a areas are at issue in this subproceeding. The Hoh Tribe will therefore not address the specific factual findings made by the District Court regarding those two tribes. Instead, Hoh will limit its brief to a discussion of general treaty legal principles relied upon by the District Court and general historical factual findings reached by the District Court that have some implication for scope of Hoh treaty ocean fishing rights and have been challenged by the Makah Tribe and the State in this appeal. The Hoh Tribe asks the Ninth Circuit to keep in mind as it reviews the District Court's decision that the decision it reaches will impact the Hoh Tribe's treaty rights even though the Hoh Tribe's u&a area was not adjudicated in this subproceeding.

B. The State of Washington Has No Article III Standing In This Subproceeding And Does Not Have Standing to Appeal.

U.S. v. Washington was a suit initiated by the United States on behalf of treaty Indian tribes to enjoin the State of Washington from interfering with tribal

treaty rights. The action was necessarily limited to the geographic area where the State exercises legal and jurisdictional authority, within three miles of the Washington coastline. *See* State's Brief at 3; Decision I, 384 F. Supp. at 400 (Conclusion of Law #7: "This case is limited to . . . . the offshore waters which are within the jurisdiction of the State of Washington."); Order on [State of Washington] Motion for Leave to file a Cross-Request for Determination, Dkt. # 74, April 12, 2011, HER 35 ("This ruling (that the question of inter-tribal allocation of the treaty share of fish is a matter for the tribes, not the State) is particularly applicable here, where the area put in dispute by the Makah lies outside the territorial waters of the State of Washington."), Order, MER 3 ("the Makah ask the Court to define the western and northern boundaries of the Quileute U&A and the western boundary of the Quinault's U&A in the Pacific Ocean – waters beyond the original case area considered by Judge Boldt.").

While the present subproceeding is beyond the territorial jurisdiction of the State of Washington as a matter of law, the State still claims that it has an interest in the subproceeding because the adjudication of offshore treaty fishing grounds for the Quileute and Quinault "has real and significant impacts on state citizens," and "would require the State to regulate non-Indian harvesters to ensure a fair apportionment of harvest between treaty harvesters and state harvesters." State

Brief at 2, 3-4. The State particularly relies upon its regulation of crab harvest inside and outside the three mile territorial line. *Id.*, p. 4.

The State made these same claims in the proceeding below, where they were rejected by the District Court. The State filed a motion for leave to file a cross-request for determination to Makah's RFD. Proposed RFD submitted as WER 69-74. The District Court denied this request, concluding that the State had failed to demonstrate any legal impact on its citizens that would confer standing on the State:

> While Washington asserts that its citizens, as non-treaty fishermen, will be affected by the outcome of this dispute, it has not demonstrated how. The allocation of fishing rights between treaty and non-treaty fishermen was determined long ago in this case, and will be unaffected by a ruling pursuant to Paragraph 25(a)(1) or (a)(6) in a dispute between tribes. Moreover, fishing for Pacific whiting and other fish in offshore waters is subjection to management and regulation by the National Marine Fisheries Service ("NMFS"), pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1801 *et seq. See*, *Midwater Trawlers Co-operative v. Dep't of Commerce*, 393 F.3d 994 (9th Cir. 2004). NMFS has promulgated carefully crafted regulations which recognized 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.

Order on Motion for Leave to File a Cross-Request for Determination, HER 35. The District Court rejected the State's claimed interest again on reconsideration. Order on Motions for Reconsideration, Dkt. # 98, Feb. 13, 2012, HER 29-31. The State did not appeal these adverse rulings.

The District Court ruled that the Makah Tribe had "alleged injury sufficient to meet the standing requirements" under law in bringing Subproceeding 09-01, because "fishing by other tribes has an impact on the Makah share of the treaty allocation." Order on Motion for Summary Judgment, MER 1005.

The State was permitted to "fully participate" in the proceeding below because all parties in *U.S. v. Washington* who are not "Requesters" or "Responders" in any subproceeding are permitted to fully participate as "Interested Parties" to address issues raised in the Subproceeding that may affect them. HER 22-23. The District Court stated, however, that should any Interested Party seek to "broaden the scope of the adjudication taking place under the subproceeding," they could only do so by filing and being granted permission by the court to proceed with their own RFD, or to file a counter-request for determination only if such request relates directly to the subject matter of the request for determination. *Id.* As discussed above, the State of Washington's Motion for Leave to File a Cross-RFD was denied on the ground that the State had failed to identify a concrete injury it would suffer in the subproceeding.

The State spends pages of its brief asserting the same interests in this case that the District Court rejected. It argues it has regulatory authority over "several fisheries" in federal waters and that "[t]he State fishes" in federal waters. State Brief at 2, 4. This is false. The *State* does not fish; its citizens do, and when

citizens fish in federal waters, they are fishing subject to federal - not state - authority. Moreover, the State has only temporary, limited authority over *non-treaty* fishing by Washington State citizens in *only* the Dungeness crab fishery, and is specifically prohibited from regulating *any* treaty fishing. Pub. L. 109-479, Title III, § 302(e), Jan. 12, 2007, 120 Stat. 3624 (describing the restrictions on the state's limited and temporary regulatory authority to regulate its citizens' Dungeness crab fishing and stating that "[a]ny law or regulation adopted by a State under this section for a Dungeness crab fishery. . . . shall not apply to any fishing by a vessel in exercise of tribal treaty rights.").[2] Contrary to the State's assertions, it has no permanent regulatory authority in the ocean waters at issue here, does not fish in such waters, and does not have standing to deem itself an "Appellant" in this case.

In addition, a state may not assert the interests of private parties such as fishers from Washington State because the State is "no more than a nominal party" in relation to such parties. *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 601-02 (1982); *Nevada v. Burford*, 918 F.2d 854, 857 (9th Cir. 1990); *see also Oregon v. Legal Services Corp.*, 552 F.3d 965, 972-73 (9th Cir. 2009). The Supreme Court

[2] *See* 16 U.S.C. § 1856(a)(3) (vesting *no* regulatory authority in the State over treaty fishing, which is subject to *federal* regulations; provision only applies to vessels registered under state law; tribal vessels are not required to register under WAC 308-93-720).

has been careful to note that a state's interest must be in some way distinguishable from that of its citizens: "In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties." *Snapp,* 458 U.S. at 607. "Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party." *Id.* at 602.

Allowing a party like the State to participate in the District Court in a subproceeding as an Interested Party does not confer Article III standing on that party; the standing requirements for a party to appeal to the federal appellate court are more restrictive. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) ("As the parties invoking federal jurisdiction, plaintiffs bear the burden of establishing their standing to sue. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). To do so, they must demonstrate three elements which constitute the 'irreducible constitutional minimum' of Article III standing. *Id.* at 560. First, plaintiffs must have suffered an 'injury-in-fact' to a legally protected interest that is both 'concrete and particularized' and 'actual or imminent,' as opposed to ''conjectural' or 'hypothetical''").[3]

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[3] This standard must be met at every stage of a federal judicial proceeding, trial and appellate. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *Int'l Ass'n of Machinists and Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace*

The State of Washington cannot meet the Ninth Circuit's requirement of standing to bring its present appeal. In contrast to the Hoh Tribe, which has a direct legal interest in the outcome of the present proceeding, the State of Washington has been repeatedly adjudicated to have no personal or legal stake in the outcome of this proceeding.

II. JURISDICTION

Because the Hoh Tribe's ocean treaty usual and accustomed area was not determined in Subproceeding 09-01 below, and because the Hoh Tribe's interests in this subproceeding are aligned with the interests of the Quileute Indian Tribe and Quinault Indian Nation, fellow signatories to the Treaty of Olympia, whose ocean treaty rights were specifically adjudicated in the proceeding below, the Hoh Tribe defers to those Tribes' Statement of Jurisdiction which will be included in their Answering Brief(s).

III. STATEMENT OF THE ISSUES.

The Hoh Tribe defers to the Statement of Issues as expressed in the Answering Brief(s) to be filed by the Quileute Indian Tribe and Quinault Indian Nation, whose treaty rights were specifically determined in the proceeding below and with whom the Hoh Indian Tribe is aligned.

Aerostructures Group, 387 F.3d 1046, 1049 (9th Cir. 2004) (parties must continue to have a personal stake in the outcome of the lawsuit at every stage of the proceedings).

IV. STATEMENT OF THE CASE.

The Hoh Tribe defers to the Statement of the Case as expressed in the Answering Brief(s) to be filed by the Quileute Indian Tribe and Quinault Indian Nation, whose treaty rights were specifically determined in the proceeding below and with whom the Hoh Indian Tribe is aligned. The Hoh Tribe does not agree with the Statement of the Case as set out in the briefs of the Makah Indian Tribe and the State of Washington.

V. STANDARD OF REVIEW.

The following is the standard of review for treaty interpretation as set out in *U.S. v. Conf. Tribes of the Colville Indian Reservation*, 606 F.3d 698, 708 (9th Cir. 2010):

> We review the district court's interpretation of treaties, statutes, and executive orders *de novo. United States v. Idaho,* 210 F.3d 1067, 1072 (9th Cir.2000). "Findings of historical fact, including the district court's findings regarding treaty negotiators' intentions, are reviewed for clear error." *Id.* at 1072–73. "We therefore review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions. We then review *de novo* whether the district court reached the proper conclusion as to the meaning of the [Treaty proviso] given those findings." *United States v. Washington,* 157 F.3d 630, 642 (9th Cir.1998).

The Hoh Tribe does not agree with the standard of Review stated by the State of Washington because it is not complete; the Makah Tribe's Brief does not include a section on the standard for review in this case, but does state on page 22 that "[t]his court 'review[s] de novo the interpretation and application of treaty language.'

Cree v. Flores, 157 F.3d 762, 768 (9th Cir. 1998). 'Underlying factual findings, including findings of historical fact, are reviewed for clear error.' *Id.*"

VI. SUMMARY OF ARGUMENT.

The Hoh Tribe was not a "Responding Party" in the proceeding below; instead it was classified as an "Interested Party," pursuant to Paragraph 25, as amended, of the District Court's continuing jurisdiction in *U.S. v. Washington*. Since the Hoh Tribe is the third tribal signatory to the Treaty of Olympia, which the District Court interpreted and applied below, the Hoh Tribe will be directly affected by the decision in this appeal.

The Makah Tribe and the State of Washington seek to overturn the law of the case in *U.S. v. Washington* with regard to treaty interpretation and the canons of treaty construction, long-standing guiding principles in Indian law. The reservation of rights doctrine states that Indian treaties are a grant of rights from the tribes to the United States and a reservation of all rights exercised at treaty time that were not expressly granted away in the treaty. The Makah Tribe argues in this appeal, however, that the Quileute and Quinault Tribes did not reserve any treaty right that was not specifically preserved in treaty language. This argument contravenes the long-standing law of the case in *U.S. v. Washington*.

The District and Circuit Courts have repeatedly held in *U.S. v. Washington* that Indian treaties must be interpreted as the Indians understood them, that the

tribes and Indians were an unlettered people who lacked a knowledge of English or sophisticated legal or scientific terms, and therefore treaty language cannot be interpreted in a way terms might be understood by learned. sophisticated non-Indians. The Makah Tribe and the State seek to overturn this long-standing law of the case by asserting that the Quileute and Quinault Indians had a full understanding of sophisticated European biological terminology that distinguishes between biological classifications, with no direct evidence that such distinctions were understood or even communicated by federal treaty negotiators.

The Makah ocean treaty fishing u&a proceeding between 1977 and 1982 used evidence of Makah pre-treaty whaling out as far as 40 miles into the ocean to support most of its adjudicated ocean u&a area in that proceeding. Makah presented direct evidence of pre-treaty fin-fishing at only a few specific fishing banks; no other pre-treaty fin-fishing areas or locations were identified in most of the ocean u&a area determined for Makah.

The State of Washington lacks Article III standing to assert that only specific locations, rather than grounds or areas, can qualify as "usual and accustomed grounds and stations" under the Stevens Treaties. In addition, the State did not raise this issue at trial or preserve it for appeal, and did not file an independent RFD to raise it in a separate subproceeding.

VII. ARGUMENT.

A. Treaty Principles: Application of The Law of *U.S. v. Washington* and the Canons of Construction to Interpretation of the Treaty of Olympia.

Several treaty principles are the law of the case in *U.S. v. Washington* and apply to the present decision and appeal. The Makah Tribe seeks to revisit and revise many of these core principles, and presented evidence and argument seeking to apply a different standard of treaty interpretation to Quileute and Quinault's exercise of ocean treaty fishing rights. To do so would be inconsistent with law-of-the case doctrine as cited by this Court. Makah seeks to invoke that doctrine for its own purposes – incorrectly as discussed below – but the doctrine does apply where Makah seeks to have the Court use completely different standards of treaty interpretation than have been applied in the last 42 years of this case. Makah Brief at 12-13 (citing cases such as *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000); *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (*en banc*). Some examples of how these treaty principles are being incorrectly asserted by Makah are discussed below.

1. Under The Reserved Rights Doctrine, the Signatory Tribes to the Treaty of Olympia Reserved all Rights not Expressly Granted Away in Express Treaty Language.

A fundamental principle of Indian treaty law is that when Indian tribes negotiated treaties with the United States, the resulting document was a grant of rights from the Indian tribe to the United States and a reservation of all rights not

expressly granted away. This principle was first stated in *United States v. Winans*, 198 U.S. 371, 381 (1905), where "the Court construed the fishing rights in the Stevens Treaty as 'not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted.'" *U.S. v. Washington*, 157 F.3d 630, 643-44 (9th Cir. 1998) ("Shellfish case"); *Midwater Trawlers Co-op v. U.S. Dep't of Commerce*, 282 F.3d 710, 717 (9th Cir. 2002); Decision I, 384 F. Supp. at 331 (same quote). In the Shellfish case, this Court construed the reserved rights doctrine to mean the Indians reserved the right to take any species not expressly foreclosed. 157 F.3d at 643-44. The District Court specifically relied upon the reserved rights doctrine in the present subproceeding. Order, MER 84, COL 2.6.

Makah's argument that the Treaty of Olympia does not include the right to take whales, seals and other sea mammals because Makah's treaty specifically reserved such right while Quileute and Quinault's treaty did not, runs afoul of the reserved rights doctrine. It is undisputed that the Indians in treaty negotiations intended to continue all fishing, harvesting, hunting and food gathering activities as they had always done. *See* Order, MER 15-16, FF # 1.2 – 1.5. It is also undisputed that the federal Treaty Commission made repeated reassurances to all the Stevens' treaty tribes that they would be able to continue their traditional food gathering activities unaffected by any restrictions. *E.g.*, Order, MER 19-20, FF# 3.1; *U.S. v. Washington*¸ 20 F.Supp.3d 828, 896 (W.D.Wash. 2007) ("It is absolutely clear, as

Governor Stevens himself said, that neither he nor the Indians intended that the latter 'should be excluded from their ancient fisheries . . . .'", quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979). There was no intent expressed anywhere by the federal treaty negotiators to take any food gathering activities away from the Stevens tribes except for the proviso on taking shellfish from staked and cultivated beds, *U.S. v. Washington*, *supra*, 157 F.3d 630, 643, 648 ("The Shellfish Proviso is an exception to the Tribes' broad fishing rights. 'A proviso is strictly construed . . . .'"), and no expressed intent by tribes to give up any such activities. Order, MER 20, FF# 3.3.[4] *See Mille Lacs Band of Indians v. Minnesota*, 861 F. Supp. 784, 796, 798 (D. Minn. 1994) ("If removal had been intended, it would have been a topic of discussion during the treaty council, and the treaty would have included provisions . . . ."), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd,* 526 U.S. 172 (1999).

This was the result in the Midwest Indian treaty dispute that ultimately ended up in the Supreme Court's decision in *Mille Lacs*, *supra*. The District Court, in deciding whether the Mille Lacs Band had ceded their treaty hunting, fishing

[4] For example, there is no mention of continued construction and use of cedar canoes in the treaty negotiations, even though such vessels were critical to the ocean harvesting of all the ocean tribes – Makah, Quileute, Quinault, and Hoh. Such canoes were described by non-Indian observers as amazing vessels admirably suited for their specialized tasks. Different size canoes crews from two to eight used whaling canoes, sealing canoes, and fishing canoes. Yet the cedar trees and these canoes were critical to the Indians' food gathering.

and gathering rights in one of a series of treaties, found that when the United States intended to exclude rights from the Indians' reserved rights, the exclusion was explicitly stated in the treaty, and had the United States intended to exclude Mille Lacs' rights, it would have used similar exclusionary language in Mille Lacs' treaty. The fact that such revocation was not included or even discussed was controlling evidence, under the reserved rights doctrine and canons of treaty construction, that such rights were not lost through silence in the treaty, but were rather reserved. *Id.*, 861 F. Supp. at 817.

The reserved rights doctrine applies with full force in the present case. Since it is undisputed that the Quileute and Quinault engaged in whaling and sealing before the Treaty of Olympia, and such rights were not expressly excluded in the Treaty, those rights continued to exist after the Treaty. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195–96 (1999) ("[T]he Treaty contains no language [regarding] abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights.").

2. The Treaty of Olympia must be interpreted as the signatory tribes would have understood the Treaty's terms.

One of the three canons of construction[5] that applies to the interpretation of Indian treaties, and that has been applied repeatedly in *U.S. v. Washington* and is the law of the case, is the principle that treaties must be construed as the Indians would have understood them. *E.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). This principle was applied by Judge Boldt in Decision I, 384 F. Supp. at 401 (COL 18), and by the District Court in the present case. Order, MER 83-84, COL 2.4, 2.5. As Judge Boldt found in Decision I:

> The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.

384 F. Supp. at 330. *See id.* at 356, FF# 22 (same); *U.S. v. Washington*, 20 F. Supp. 3d 828, 896 (W.D.Wash. 2007) ("'[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense

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[5] The three canons, which apply to treaties and statutes affecting Indians, are: (1) treaties and statutes are be liberally construed to favor Indians; (2) ambiguous expressions must be resolved in favor of the Indians; and (3) treaties should be construed as the Indians would have understood them. F. Cohen, Handbook of Federal Indian Law 222 (1982 ed.).

in which they would naturally be understood by the Indians.' This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor." (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, *supra*, 443 U.S. at 675-77; *U.S. v. Conf. Tribes of the Colville Reservation*, *supra*, 606 F.3d at 708-09.[6]

This canon of construction was applied in interpreting the Treaty of Olympia in Decision I. Now, however, the Makah Tribe seeks to impose on the Quileute and Quinault Indians of 1855 the same "sophisticated" understanding of the Linnaean classification system differentiating between fin-fish, crustaceans, mollusks, and sea mammals that the courts in *U.S. v. Washington* have rejected for the last 42 years. Makah's argument is foreclosed by this canon of construction and by previous decisions in *U.S. v. Washington*, which can only read as including sea mammals within the definition of "fish" as used in the Stevens Treaties. In the Shellfish case, for example, the District Court held that the term "fish" in the Stevens' Treaties "has perhaps the widest sweep of any word the drafters could

[6] "A finding as to what a negotiator understood involves the same kind of factual analysis as a finding of intent – including for example the consideration of the events leading up to a negotiation, statements made during a negotiation, and the overall context of the negotiation – which is entitled to deferential clear error review. *See Idaho* 210 F.3d at 1072-73. We accordingly review for clear error the district court's findings as to the understanding of the Native Americans present at the negotiations."

have chosen, and the Court will not deviate from its plain meaning." 873 F. Supp. 1422, 1430 (W.D.Wash. 1994). The District Court in that proceeding found:

> At [the time of the Stevens Treaties], however, the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. . . . Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.
> 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. Defendant and the intervenors ask the Court to impose a limit on the "right of taking fish" without pointing to any treaty language in support of that interpretation. This is impermissible under *Winters* and *Choctaw Nation*. Moreover, had the parties to the Stevens Treaties intended to so limit the right, they would not have chosen the word "fish," a word that fairly encompasses every form of aquatic animal life.

Id. This holding was expressly affirmed on appeal, *U.S. v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998), with the Court confirming that any contrary position is prohibited by the law of the case. *Id.*

The law of the case doctrine also applies because in Decision I, Judge Boldt determined both Makah and Quileute treaty fishing u&a area by including whaling and sealing. 384 F. Supp. at 363 (Makah: "Most of their subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal."); 372 (Quileute: "Along the adjacent Pacific Coast Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish shark, herring, sardines, sturgeons, seal, sea lion, porpoise and whale."). *See* Shellfish case, *supra*, 873 F. Supp. at 1431 ("Indeed, the Court has never focused on a particular species of fish

in determining The Tribes' usual and accustomed grounds and stations. *See e.g.*, *Washington I*, 384 F. Supp. at 360, 364, 372 . . . ."); Barbara Lane Report, SP 89-3, Dkt. # 13174, p. 69, May 14, 1993 (Indians understood fish to include marine mammals).

Makah seeks either to ignore or overturn this precedent in the current appeal. First, it tries to argue that the Quileute would not have understood the "right of taking fish" to extend to other species of animals. Makah Brief, pp. 24-27, 35-42. This argument is contradicted by the authority cited above that the right to take fish exists without species limitation, and has already been held to include marine mammals, and that fact that the tribes reserved all food gathering activity not expressly granted away.[7] The fact that Quileute or Quinault historical language may have included some different words for different species of finfish and sea mammals (but no word for groupings of aquatic animals such as "finfish," "shellfish," or "sea mammals") does not mean that this distinction was communicated to the Indians or that the word "fish" was understood differently than the District Court in *U.S. v. Washington* has repeatedly held it was understood. Such argument is defeated by the law of the case and is not supported

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[7] *See*, *e.g.*, *U.S. v. Washington*, *supra*, 157 F.3d at 643 ("Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights.").

by any documentation.[8] *See Menominee Indian Tribe v. United States*, 391 U.S. 404 (1968) (treaty granting reservation "to be held as Indian lands are held" includes hunting and fishing rights even though not specified in the treaty); *U.S. v. Conf. Tribes of the Colville Reservation*, *supra*, 606 F.3d at 709 (1894 Agreement grants non-exclusive fishing rights to Wenatchi Indians even though Agreement is silent as to fishing).[9]

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[8] Makah repeatedly asserts that the "records of the Treaty of Olympia" do not contain any references to whaling and sealing. Makah Brief at 33-34. As discussed below, *see* p. 25-26, *infra*, there are no official records of the Treaty of Olympia. They were lost. *See* Trial Exhibits 09-01-B192 (Simmons letter to Gov. Stevens reporting on treaty negotiation – proceedings of negotiation attached); 09-01-B191 (letter dated May 25, 1856, from Stevens to Commissioner of Indian Affairs Manypenny, transmitting treaty); 09-01-B193 (letter dated Feb. 13, 1945, from BIA Archives: unable to find Treaty of Olympia proceedings), HER 3-10. The Treaty of Olympia is the only Stevens Treaty where no minutes of the treaty negotiations still exist.

The records we do have, however, strongly support the District Court's finding that both the United States and the signatory tribes of the Treaty of Olympia understood their treaty to reserve the right to all species – including sea mammals. *See* discussion at p. 25-26, *infra*.

[9] Makah also raises the "travel" argument – that travel by a tribe does not by itself confer fishing rights during the course of travel. Makah Brief at 24. *See also* State Brief at 6, 35. Decision I, 384 F. Supp. at 353; *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010). The implication is that Quileute and Quinault travel out into the ocean to harvest sea mammals and fish should not confer a fishing right during this travel. The two situations are not comparable, however. Previous case law addressed travel between locations that was not primarily for the purpose of fishing. In contrast, travel by Quileute, Hoh or Quinault out into the ocean would only have been for the purpose of fishing or hunting; there is no other reason to head directly out into the ocean. Travel between villages would have been along the coast and in sight of land where possible, for safety reasons. There was no area within Quileute or Quinault's U&As where the District Court found that they were *not* "fishing," i.e., harvesting

Second, Makah argues that the federal treaty negotiators must have understood the technical "Linnaean" system of biological classification at the time the Treaty of Olympia was negotiated, and therefore could have intended only to convey that interpretation of the term "fish" to the Indians. Makah Brief at pp. 28-35. This argument is total speculation on Makah's part, and contradicts the law of the case that the language of the treaty <u>cannot</u> be interpreted as sophisticated and "learned" European-Americans would have understood those terms. The only documentation that exists on the meaning of these treaty terms are the discussions cited earlier in this brief – that Governor Stevens and the treaty negotiators assured the Indians that they would be allowed to continue all food gathering and harvesting activities <u>as they always had</u>, without limitation. *See* p. 15-16, *supra*. In addition, as discussed below, the primary intent of the federal treaty negotiators was to obtain Indian land title and to avoid future conflicts with non-Indian settlers, and since the fish and sea mammal resource was considered inexhaustible at the time, no one considered that in the future the resource might become limited.

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aquatic animals. *See* Order, MER 29-30, 33-34, 36, 67 (customary Quinault finfishing "up to" six miles offshore; customary Quinault whaling ranged from nearshore to 12-30 miles offshore, and after harpooning a whale it might "run as much as ten to fifteen miles before being killed"; customary Quinault fur sealing occurred 20 to 30 miles offshore); *see also id.* MER 49, 55-56, 65 (Quileute finfishing occurred at banks located from two miles offshore to 20 miles offshore; customary Quileute whaling ranged from nearshore to "upwards of 30 miles offshore"; customary Quileute fur sealing occurred 30 to 40 miles offshore).

See Decision I, 384 F. Supp. at 355, FF# 20. Reserved off-reservation fishing and hunting rights were of little importance to the federal treaty negotiators; they were only important to the Indians. *Id.*, FF# 19, 20. Since it was an area of discretion for the federal treaty negotiators, they were glad to reserve unlimited rights for the tribes except in the one area where settlers were already staking and cultivating shellfish beds. There is no documentation indicating that distinguishing between sea fin-fish, mammals, and shellfish was ever brought up or discussed.

Makah's only argument to support its claim that the federal treaty negotiators must have intended a distinction between fish and sea mammals is that the negotiators added whales and seals to the Makah Treaty but not to the Treaty of Olympia, Makah Brief at 31. As discussed at greater length below, however, the whaling and sealing language was only added to the Makah Treaty to "reassure" the Makah because they were "greatly concerned about their marine hunting and fishing rights," Decision I, 384 F. Supp. at 363, FF# 62, but this extra wording was not necessary to reserve the right. *See* p. 32, *infra*; Order, MER 17-20, FF# 2.2 – 3.3. Additional language on other topics of interest was added to other Stevens Treaties to address other tribes' specific concerns, *id.* at MER 18-19, FF# 2.4; so long as the tribes ceded land title, federal negotiators did not oppose adding other language that did not alter the substantive primary intent of the treaties.

In arguing that the Treaty of Olympia must be construed by speculating both that federal treaty negotiators imparted their alleged sophisticated understanding of the Linnaean system of biological classification's distinction between "fin-fish" and other forms of aquatic life to the Indians they were negotiating with, and that the signatory tribes to the Treaty of Olympia understood and acknowledged this distinction between fin-fish and other aquatic life in the terms communicated to them in translated English to Chinook jargon to local language, Makah seeks to overturn and rewrite the fundamental principles and assumptions of Judge Boldt's original Decision I, which are the law of this case. Makah also seeks to discriminate against the signatory tribes to the Treaty of Olympia by applying treaty interpretation standards that were not applied in Decision No. I and that have not been applied to any of the other Northwest treaties negotiated by Governor Isaac Stevens in 1854-55.

There are no records of the negotiations that took place for the Treaty of Olympia, as there are for all the other Stevens Treaties. *See* n. 8, *supra*. The records we do have, however, strongly support the District Court's finding that both the United States and the signatory tribes of the Treaty of Olympia understood their treaty to reserve their right to all species – including sea mammals. A failed negotiation with Quinault and other tribes earlier in 1855 at Chehalis explicitly indicates that the United States intended – and the tribes understood – sea

mammals to be included in the treaty fishing right. *See* Order, MER 20 (in response to demand for whales, Governor Stevens responds: "As to whales, they were theirs.") (citing Ex 09-01-065 at p. 26, Tr. 3/3 at pp. 36:5 – 39:1 (Hoard)). James Swan, a later observer and writer on Indians along the Olympic Peninsula, MER 24, FF# 4.3, understood the intent of those failed negotiations to be to reserve to the tribes the ability "to procure their food as they had always done." Order, MER 21. There is no reason that Quinault or the other tribes at treaty negotiations for the Treaty of Olympia would have understood the treaty any differently when the draft version of the Chehalis Treaty was finally executed as the Treaty of Olympia, with minor changes, later that year. *See* Ex. 09-01-144, Lane & Lane (1999), p. 6, (Stevens conceded the points at issue during negotiation of the Chehalis Treaty in the Quinault Treaty), HER 12.

Makah's attorneys' present day argument for what they wish had been said during the 1855 negotiations for the Treaty of Olympia cannot overcome basic factual findings concerning Stevens Treaty negotiations made by Judge Boldt in Decision No. I. "The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area." Decision No. I, 384 F. Supp. at 355 (FF# 19). This intent is expressed in the Letter from Commission of Indian Affairs Charles E. Mix to Isaac I. Stevens, August 30, 1854,

instructing Governor Stevens on the conduct of treaty negotiations with Washington Territory tribes. Ex. 09-01-144, pp. 6-9, HER 12-15. *See* Decision I, 384 F. Supp. at 354 (quotations from Letter). The two primary purposes expressed in that letter are to combine as many tribes and bands as possible onto as few reservations as possible and to avoid committing the United States to extended monetary annuity obligations. *Id.* Any other issue was negotiable and left to the discretion of Governor Stevens:

> It is not deemed necessary to give you specific instructions as to the details of the treaties. . . . With these general views (as to specific subjects to be included in the treaties), you will nevertheless exercise a sound discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise,[10] or by means of which the Treasury of the United States may be approached.

Id., HER 15. What this language meant is that Stevens was given mandatory instructions only as to a few specific treaty subjects, primarily to acquire Indian land title and free the Territory up for non-Indian settlement, and had discretion to address other subjects of interest or importance to each group of tribes, while avoiding potential federal financial liability from arising in the future.

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[10] Fishing was one of the issues that the treaty commissioners were fearful could cause such problems in the future: "In an extensive report on the Indian Tribes of the Territory of Washington, dated March 4, 1854, George Gibbs had noted that the right of fishery was a subject 'concerning which difficulties may arise' and that the Indians would require liberty of motion for the purpose of seeking fish in their proper season." Decision No. I, 384 F. Supp. at 356-57, FF# 25.

The treaty commission was aware from pre-negotiation meetings with Indian villages by B.F. Shaw, who was the official interpreter at the treaty councils, "of the importance the Indians attached to fishing," making it "probable that the continuance of the right to take fish was one that Shaw had in mind or discussed" when he told the villages that the treaty councils were where the Indians could bring up subjects ("privileges") of importance to them. 384 F. Supp. at 357, FF# 27; Order, MER 16, FF# 1.5 (role of Shaw). All of the tribes raised this issue at their treaty councils: "At the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food . . . at their usual and accustomed fishing places. . . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish . . . ." 384 F. Supp. at 355, FF# 20.

The Makah Tribe argues in its brief that this continued right to fish included in all of the Stevens Treaties – this historical fact of treaty intent - did not include the right to fish or hunt whales, seals or other sea mammals because Makah stressed the importance of this harvest in its treaty negotiations[11] and specifically requested

[11] This argument – that whaling and sealing were added to their treaty because the minutes of the Treaty of Neah Bay council contain statements made by Makahs stressing the importance of those activities - is contradicted on its face by the fact that the minutes do not contain one mention – by either Makah or the federal negotiators – of sealing, yet sealing was added to the Neah Bay Treaty. If sealing

and had added to their treaty "the right of whaling and sealing," art. 4, and no other tribe did. Makah Brief at 34-35. This argument is wrong as a matter of law under the reservation of rights doctrine, as well as being wrong as a matter of historical fact.[12] Silence in treaty language and in treaty negotiations is not construed as abrogation of an important harvesting right the Indians had continuously exercised for centuries. *Cf. Mille Lacs Band of Chippewa Indians v. State of Minn.*, 861 F. Supp. 784, 831 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997) *aff'd*, 526 U.S. 172, 199 (1999). ("The lack of discussion by the Chippewa about a privilege that was so important to them shows that they did not understand the treaty to" eliminate their usufructuary rights); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 363-64 (7th Cir. 1983) (silence in the 1854 treaty about usufructuary rights guaranteed by the 1837 and 1842 treaties means that the Indians "believed their right to use ceded land for traditional purposes to be secure and unaffected").

As discussed above, under the reservation of rights doctrine, treaties were a grant of rights from the Indians to the federal government and a reservation of rights not expressly granted away. To succeed in its argument that the Treaty of

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was never mentioned, why was sealing added? Expert reports infer that Makah did not request it because sealing was not an important harvest activity for Makah at treaty time. MER 578 (Lane), yet sealing is still reserved.

[12] *See U.S. v. Washington*, 873 F. Supp. 1422, 1429 (W.D.Wash. 1994) ("[T]reaties may, when necessary, be interpreted in light of the surrounding historical circumstances. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Thus, the Court looks to the historical context surrounding the negotiations of the Stevens Treaties.").

Olympia does not include sea mammals, Makah must be able to demonstrate that this right was affirmatively given up by the signatory tribes. There is no intent expressed anywhere in any of the Stevens Treaties to give up or grant away their pre-existing practice of taking sea mammals. Stevens' treaty instructions from the Commissioner of Indian Affairs do not mention the subject. The subject was never discussed in the U.S. Senate. Makah argues that Quinault, Quileute and Hoh did not reserve the right to fish or hunt mammals in the ocean because they did not specifically include such a right in their treaty, but the correct inquiry is whether there is any indication in the treaty or treaty negotiations to exclude the continued practice of such right. There is none.

The district court has previously ruled that the term "fish" in the Stevens Treaties is to be interpreted without any species limitation and has the widest meaning of any term that could have been used in the treaties. See p. 20, *supra*, 873 F. Supp. at 1430 (quotation from decision).

Judge Boldt addressed what the Indians intended in reserving the right to fish off-reservation in Decision No. I:

> There is no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." [Ex. USA-20, p. 26; Tr. 2372, *l.* 15 to 2374, *l.* 7] A dictionary of the Chinook jargon, prepared by George Gibbs, indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish.

384 F. Supp. at 356, FF# 22.

> The clause "usual and accustomed [fishing] grounds and stations" was all-inclusive and intended by all parties to the treaty to include reservation and off-reservation areas.

Id. at 356, FF# 24.

> There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty.

Id. at 357, FF# 26. Under the reservation of rights doctrine and under the law of the case, it is clear that in the absence of a specific intent to give up their pre-existing fishing practices, the treaties intended to continue such practices uninterrupted. Since Judge Martinez found as a historical fact that fishing in the Stevens Treaties includes harvesting of sea mammals, the undisputed factual finding that the signatory tribes to the Treaty of Olympia harvested whales and seals large distances out into the Pacific Ocean means that tribal fishing in those areas, without regard to species, continued after the treaty, protected permanently as a treaty right.

Makah's argument that addition of the term "whaling and sealing" to their treaty means that the term fish did not include whales or seals in any other Stevens Treaty is wrong as a matter of historical fact and of law. There is no indication anywhere in the historical record that Makah's alleged distinction between its treaty with whaling or sealing added was raised or understood in any other treaty negotiation by any other Indian tribe or band. Makah's allegation that it must have been is

unsupported by the evidence. What the historical record does reflect is that Stevens agreed to add such language to the Treaty of Neah Bay to "reassure" the Makah and to obtain their signatures to cession of their lands, no more, Decision I, 384 F. Supp. at 363, FF# 62:

> Governor Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. . . . . Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting or fishing but in fact would help them develop these pursuits.[13]

Stevens had discretion to add any treaty language that did not affect the mandatory treaty negotiation instructions he had been given. *Id.* at 355, FF# 19. The following additions to other treaties illustrates that this authority was routinely exercised by Stevens:

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[13] Reassurance means that the guarantee was already present; it just needed to be restated or repeated to allay Makah's concerns. It is critical in this quote to note that Stevens had to reassure the Makah about both marine hunting and marine fishing even though by Makah's own reasoning fish were already in treaty. Stevens added language about whaling and sealing, but did not need to add the term "fish" again because it was already in the draft. The language used in the Makah Treaty and the record of Makah's treaty negotiations confirm, rather than negate, the historical conclusion that the term "fish" includes all aquatic life including sea mammals. This history also highlights an additional faulty argument by Makah. If Stevens and the other treaty negotiators knew and intended to convey the Linnaean system of biological classification to the Indians during their treaty negotiations, *see* p. 23 *supra*, they would have inserted the term "fin" before the word "fish" in the Makah and other treaties to be more scientifically precise, and to distinguish other aquatic animals. The absence of such detail illustrates the fallacy of Makah's argument about the intended meaning of the term "fish."

1. The treaty negotiations with the Chehalis, Cowlitz and other tribes were unsuccessful because those tribes refused to all relocate on the Quinault reservation and instead wanted to remain on separate reservations within their traditional lands. Ex. 144, MER 594-95, 610. Stevens refused this demand because his negotiation mandate was to relocate the Indians on as few reservations as possible, and he eventually walked away from the treaty negotiations because Cowlitz, Chehalis, and Chinook refused to budge on the subject. Stevens even threatened the tribes, stating the United States would take their lands anyway and they would get nothing. *Id*. Only Quinault, which would remain on its own aboriginal territory where the reservation selected by Stevens to house all the proposed signatory tribes was located, signed this treaty, but it was not ratified.
2. The Cowlitz, Chinook and Chehalis tribal leaders were also extremely concerned during the unsuccessful negotiations for the Chehalis Treaty that they be able to continue to pasture their horses on open and unclaimed land. *E.g.,* MER 601, 603, 606; Order, MER 19, FF# 2.4 ("Stevens, unlike Simmons, was invested with authority to tailor treaty provisions in response to needs and concerns expressed by the tribes."). This issue was not a concern for the Quinaults, or for the Hoh and Quileutes who were not present at the Chehalis Treaty negotiation, who had limited use of horses

and whose lands were located in dense coastal areas without adequate pasture land. Stevens included a provision to protect horse pasturing in the draft Chehalis Treaty to address these concerns by the inland tribes. MER 611, Art. III. Later, when Stevens' representatives began treaty negotiations with the Quinault and included Quileute and Hoh (who they had "discovered" in the interim) instead of Chehalis, Chinook and Cowlitz, they retained the horse pasturing language in Article 3 of the Chehalis draft treaty even though Quinault, Quileute and Hoh expressed no interest in that issue. Treaty of Olympia, 12 Stat. 971, art. 3. Order, MER 19, FF# 2.4 (inclusion of horse pasturing language in Treaty of Olympia is "anomalous").

3. The Treaty of Olympia was the last Puget Sound area treaty negotiated by the federal negotiating team and Governor Stevens needed to finalize it to wrap up his treaty negotiation mandate. Stevens was not present at negotiations for the Treaty of Olympia with the Quileute, Quinault and Hoh because he was in Montana dealing with Indian uprisings. *See* HER 8 (Ex. B-191). Only Colonel Simmons and Colonel Shaw, Order, MER 16-17, FF# 2.1 (make-up of federal negotiating team) were present at the Treaty of Olympia, and likely had more limited authority to negotiate changed terms than if Governor Stevens had been present. Order, MER 19,

> FF# 2.4. In the negotiations, the new Indian tribes present – Quileute and Hoh – demanded separate reservations for themselves. This had been the sticking point in the Chehalis Treaty negotiations, but to finalize the treaty the federal negotiators were willing to be more flexible. *See* Treaty of Olympia, art. 2 ("There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington . . . ."). The contemplation of more than one reservation was likely draft language added by Stevens and/or Gibbs resulting from the Chehalis treaty negotiations, which had foundered on the same issue. The negotiators still hoped that the three tribes would settle on one reservation, but sent Simmons with draft language that allowed for the possibility of multiple reservations. Quileute and Hoh were eventually granted their own reservations on lands where they had remained, by Executive Orders in 1889 and 1893. 1 Kappler Indian Affairs: Laws and Treaties 923 (Quileute), 916-17 (Hoh) (U.S. GPO 1904).

Makah also argues that since the Yakama Treaty of 1855 included language reserving off-reservation fishing at all usual and accustomed grounds and stations but did not include the Shellfish Proviso, and the district court in *U.S. v. Washington*, subproceeding 89-3 concluded that Yakama did not reserve shellfish

rights, this ruling stands for the principle that the absence of specific language in a treaty means that subject was not reserved by the signatory tribes. Makah Brief at 27 n.7; *U.S. v. Washington*, *supra*, 873 F. Supp. at 1447. *See* Treaty with the Yakama Nation, 12 Stat. 951, art. 3.

In actuality, the Shellfish decision found that the Yakama Treaty did not include shellfishing rights only in part because it did not expressly include the shellfish language contained in the other Stevens' treaties, but also because the factual evidence indicated that it was unlikely that Yakama intended to reserve shellfishing rights under the general fish language of the treaty since Yakama Indians did not conduct any shellfish harvest prior to the Treaty except through marriage into Puget Sound Tribes, and could not identify any usual and accustomed grounds and stations where the Tribe had ever conducted shellfish harvests. *Id.*, 873 F. Supp. at 1447. Because there was no customary shellfishing to reserve in the first place, there was no need for the proviso. *Id.* Makah omits this critical part of the District Court's ruling. In the present case, in contrast, Quinault and Quileute proved that they conducted whale and seal and other marine mammal harvests in the Pacific Ocean for hundreds of years before the Treaty of Olympia. The Yakama shellfish ruling would have been different if Yakama had been able to show pre-treaty tribal shellfish harvesting in Puget Sound.

Finally, to illustrate the fallacy of Makah's position in this case, if Makah's argument about express language being required is accepted, it means that Makah has no reserved on-reservation exclusive fishing rights under its treaty. The Treaty with the Yakama Nation contains express language reserving the exclusive right of fishing on-reservation: "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians . . . ." Treaty with the Yakama, art. 3. *See* Decision I, 384 F. Supp. at 332 n.12. Under Makah's argument, since this exclusive right was reserved specifically in one Stevens Treaty, it would mean that same right was not reserved by any other Stevens Treaty signatory which did not also specifically reserve that right. In actuality, the Yakama Treaty just makes explicit what is already an implicit reserved right in every treaty.[14]

It is not the law of the case, and Hoh is not urging such a result here. Judge Boldt found that exclusive on-reservation fishing was reserved under all the Stevens Treaties because the "Supreme Court has assumed that on reservation fishing is exclusive and has interpreted and applied similar fishing clauses as though the word 'exclusive' was expressly stated therein as in the Yakima treaty."

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[14] This is the result that the Supreme Court believes is correct. *Wash. Passenger Fishing Vessel Ass'n, supra,* 443 U.S. at 698 ("This conclusion is confirmed by the language used in the treaty negotiated with the Yakima Tribe, which explicitly includes what apparently is implicit in each of the treaties: the Indians' right to take fish on their reservations is exclusive.") (dissenting opinion).

Id. Yakama's language was therefore superfluous, but was included anyway because the Yakama Nation wanted reassurance on this issue. *Cf. U.S. v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 713 (9th Cir. 2010) ("The Wenatchi's suggestion that we employ the rule of construction disfavoring surplus [language] depends on an implied cession of fishing rights supplementing the plainly worded express cession, which contravenes our obligation to refrain from interpreting the agreement 'according to the technical meaning of its words to learned lawyers.'") (emphasis added). Likewise, the right to take fish off-reservation includes sea mammal fishing or hunting without the need to expressly reserve such a right because the treaty term "fish" includes by common usage all animals that live in the sea, and Quileute and Quinault never gave up their pre-existing right to take all such animals, including sea mammals.

B. Response to Makah's Claim that Pre-Treaty Whaling and Sea Mammal Harvest Cannot Be Used to Support Treaty U&A Area: The Sub-proceeding in Which Makah's Ocean Treaty Fishing Rights were Adjudicated Relied on Evidence of Pre-Treaty Whaling and Sealing, Rather than on Evidence of Fin-Fishing, to Support the Great Majority of Makah's Adjudicated Ocean Treaty Fishing Usual and Accustomed Grounds and Stations.

Makah's primary argument in this appeal is that since the decision adjudicating its own ocean treaty fishing usual and accustomed grounds and stations allegedly prohibited use of whaling and sealing to document ocean fishing usual and accustomed grounds and stations in areas where no pre-treaty fin-fishing

was documented, the law of the case prohibits Quileute and Quinault from using pre-treaty ocean whaling and sealing to document its ocean treaty fishing usual and accustomed fishing area western boundary. *E.g.*, Makah Brief at 3,10. Makah repeatedly argues that the decision in Subproceeding 09-01 is the first time the court in *U.S. v. Washington* has ever determined u&a grounds where there is no evidence of actual fishing (meaning, for Makah's argument, fin-fishing only). *E.g.*, Makah Brief at 10. These claims are not accurate.

Makah's arguments are incorrect on a number of different grounds. First, Makah's argument completely misstates the district court and Ninth Circuit's ruling in the Makah case. Second, Makah's claim is factually incorrect; approximately 75% of Makah's adjudicated ocean treaty usual and accustomed fishing area was determined by the district court with no direct evidence of pre-treaty fin-fishing within its boundaries.[15] It was instead established only because of evidence of pre-treaty whaling and sealing activity by Makah members.

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[15] The southern border of Makah's ocean treaty fishing usual and accustomed area is a line drawn due west from a point 10 miles south of the southern land boundary of documented Makah pre-treaty residence and occupation on the Olympic Peninsula. See Decision No. I, 384 F. Supp. at 364, FF# 65 ("Makah's usual and accustomed fishing places prior to treaty time . . . extend[ed] out into the ocean to an area known as Swiftsure and then south along the Pacific Coast to an area intermediate to Ozette Village and the Quileute Reservation"). *See* Order. MER 13 (Makah's southern ocean treaty fishing line drawn westerly from Norwegian Memorial). The District Court determined that the northern boundary of Quileute's ocean treaty fishing u&a area is a line drawn due west from the northern land boundary of documented Quileute pre-treaty residence and occupation.

The Makah ocean treaty u&a proceeding, filed in May1977, heard in September 1977, dismissed for lack of prosecution in October 1978, revived in August 1981, and decided without new evidence in 1982, *see* Makah Memorandum in Support of Request for Determination Re: Makah Usual and Accustomed Ocean Fishing Grounds, Oct. 9, 1982, p. 1, MER 1236, in contrast to the present proceeding included minimal evidence. All of the evidence submitted in that proceeding (it took place in the main *U.S. v. Washington* case, before the district court authorized separate subproceedings in the case) is included in Makah's excerpt of record. It consists of the following:

1. Lane, Barbara S. – Makah Marine Navigation and Traditional Makah Offshore Fisheries (1977), MER 591-614.
2. Transcript of Trial Hearing on Makah Ocean Treaty Fishing U&A Area, Sept. 7, 1977, U.S. v. Washington, Civil Case No, 9213, MER 1255-1286, 31 pages.
3. Written Testimony of Nora Barker, Makah Elder and Teacher of Makah History, 3 pages, MER 1287-89.

MER 92,COL3.2. There are no documented Makah fishing banks or specific locations in the southern two-thirds of Makah's ocean u&a area; Makah ocean harvest fin-fish was concentrated in the San Juan Canyon leading to the Strait of Juan de Fuca, the two halibut banks northwest 12-40 miles from the tip of the Olympic Peninsula and adjacent to Vancouver Island, and close-in along the shoreline of the Olympic Peninsula.

The evidence was undisputed that the Makah primarily fished at two specific "banks" located Northwest of Cape Flattery - at Swiftsure Bank located between 12 and 20 miles Northwest of Tatoosh Island, and at La Perouse Bank, also known as 40 Mile Bank, located approximately 40 miles Northwest of Cape Flattery off Vancouver Island. *E.g.*, Lane, *supra*, MER 569-575, 576 ("That the Makah regularly fished at known fishing banks, some thirty or forty miles offshore, appears to be well documented."); 577 ("With the exception of specific fishing banks that can be mapped it is not feasible to specify the locations of offshore fisheries except in a general way."); Transcript, Sept. 7, 1977, MER 1265-66, 1272, 1276-77 (Makah witnesses Lane, Ides, McCarthy). The numbers of fish caught by the Makah at these banks, primarily halibut, were "incredible." Lane, 1977, MER 575-76. Dr. Lane testified that the Makah also caught salmon at one of these banks at treaty time. Transcript, Sept. 7, 1977, MER1280.

In addition, the Makah caught fish at a bank just off-shore of their "most southerly [] village (Ozette Village) along the coast at treaty times," known as Flattery Rocks. Lane, 1977, MER 580-81; Ides, MER 1276, but this bank was not as productive as the banks lying northwest of Tatoosh Island. Lane, 1977, MER 581; *U.S. v. Washington*, 626 F. Supp. at 1467. The adjudicated Makah ocean treaty fishing u&a grounds' southern boundary was drawn due west from a point ten miles south of Flattery Rocks, using the Norwegian Memorial on the south

edge of Lake Ozette as the reference point. However, Makah produced no evidence that Makah fin-fished south of Flattery Rocks or due west of the bank there.

This is the entire specific documentation of ocean fin-fishing submitted as evidence in the Makah ocean treaty fishing u&a proceeding, between 1977 and 1982. Makah produced no evidence of other "banks" or documented fishing locations in Makah's ocean u&a area. Makah's own expert reported that there was no need at treaty time for Makah to look outside these identified banks for fin-fish. *See* Lane, 1977, MER 587 ("When stocks were abundant within thirty of so miles of shore, there was little reason for the Makah to fish at greater distances."). Additional fishing opportunities existed just offshore at the entrance to the Strait of Juan de Fuca. Dr. Lane reported that the Makah only switched to other fishing grounds as post-treaty non-Indian fishing forced a change in fishing patterns. Lane, 1977, MER 578-79.

The Hoh Tribe submitted two maps in post-trial briefing in the District Court in the present case mapping Makah's documented fin-fishing locations as proven in Makah's adjudicated ocean treaty fishing u&a grounds proceeding, attached as HER 1-2. *See* Trial Court Dkt. No. 355, Hoh Supplemental Brief, April 29, 2015, pp. 27-28. One of these maps is the same NOAA map submitted by the Makah Tribe in its supplemental briefing in the 1982 Makah ocean treaty fishing u&a proceeding. MER 1248. As these maps show, most of the Makah ocean treaty

fishing u&a area determined by the District Court is not linked to any specific evidence of fishing locations or grounds. *See* Lane, 1977, MER 577 ("With the exception of specific fishing banks that can be mapped, it is not feasible to specify the locations of offshore fisheries except in a general way."); Transcript, Sept. 7, 1977, MER 1265 (Lane: "I can't find any documentation to support boundaries for offshore fishing areas, except where there are specifically known grounds . . . .").

How was this large area – close to 75% of Makah's adjudicated ocean u&a area – adjudicated in favor of Makah?[16] The only answer is - pre-treaty whaling and sealing by Makah members. It is undisputed that the Makah engaged in substantial ocean whaling and sealing pre-treaty. The only documentation of where such whaling took place is that such whaling "frequently" took place out of sight of land, which Dr. Lane reported occurred at 30 to 40 miles offshore. Lane, 1977, MER 576. She concluded that: "It is less feasible (than documented fishing grounds) to document the outer limits of Makah offshore journeys in pursuit of

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[16] The State agrees with the Hoh Tribe on this point: "Those southern claims (Makah's claim to ocean fishing areas 'south of these specified banks') do not appear to have been supported by much, if any, evidence of actual fishing." State Brief at 39-40. The State opines that this deficiency can no longer be challenged because of principles of *res judicata*. *Id.* at 40. But the State waived any objection to depiction of ocean u&a in this fashion: "The State of Washington voluntarily waived any objections to the Tribe's [Makah's] request for determination that was the subject of this proceeding, and it did not resist the request." Order Denying Makah Request for Reconsideration, Dkt. # 8763, p. 3, Jan. 27, 1983, HER 46 – HER 48.

whales and other species. . . . There does not appear to be any way to document whether the Makah travelled farther offshore to fish at treaty times." *Id.* This reference only includes whales and other sea mammals; there would have been no need to travel to places other than the identified banks to catch fin-fish.

The District Court in Makah's ocean treaty fishing u&a proceeding used the documented evidence of fin-fishing up to 30 or 40 miles offshore in a northwesterly direction from the tip of the Olympic Peninsula and extended that line due south to the southern limit of Makah's onshore pre-treaty village habitation. No fin-fishing south of the two documented halibut banks justified this extension. The extension can only be based on evidence of sea mammal harvesting at treaty time as documented by Dr. Lane, since whales, seals and other sea mammals are highly migratory and found all along the Coast out from Makah occupied territory. The District Court's inclusion of most of Makah's ocean u&a area therefore was not based on evidence of fin-fishing, but only of undisputed treaty-time whaling and sealing that occurred off the Coast. The District Court placed a reasonable limit on this undefined geographic area by extending the area due west from Makah occupation areas.

Makah's argument that the present case is the first decision in *U.S. v. Washington* that found that a tribe's right of taking fish "extends to waters in which it was *unaccustomed* to fishing (meaning fin-fishing) at treaty times."

Makah Brief at 10 (emphasis in original), is therefore wrong. *See also* State Brief at 8. As the foregoing discussion shows, no evidence of fin-fishing supports the great majority of Makah's adjudicated ocean u&a area. The only evidence for this large area was whaling and other sea mammal harvest. Contrary to Makah's arguments, therefore, whaling and other sea mammal harvest has been relied upon by the District Court in determining another tribe – Makah's - ocean treaty fishing u&a area. The decision Subproceeding 09-01 follows the law of the case.

How does one reconcile this irrefutable conclusion with the District Court's and Ninth Circuit's holding in Makah's ocean u&a proceeding that evidence of Makah whaling and sealing 50 to 100 miles offshore, 626 F. Supp. at 1467; 730 F.2d at 1318, was not sufficient to support a finding that the Makah Tribe customarily traveled such distances at treaty times? The answer is clear and easy. The evidence of Makah whaling and sealing 50-100 miles offshore was from 1897, 42 years after the Makah Treaty. *See* Lane, 1977, MER 579. There was no documentation introduced in that proceeding that the Makah had traveled that far offshore to catch whales in pre-treaty times; rather, the evidence was undisputed that the greater distances traveled by Makah fishers had only occurred post-treaty, as a result of changed circumstances and declining near-shore fish populations. *See* Lane, 1977, MER 576 ("It is known that the Makah fished at greater distances than thirty or forty miles in post-treaty times. . . . As close in fishing grounds became overfished, it was

necessary to go further to harvest the various species."); 577 ("The locations at which Makah fished . . . had to be adjusted in post-treaty years in response to the fishing efforts of others."); 588 ("In post-treaty times, when altered circumstances made it necessary to go further offshore, as for example in the seal fishery, the Makah demonstrated that they had the capability to do so."); *U.S. v. Washington*, *supra*, 730 F.2d 1314, 1318 (9th Cir. 1984) (Makah only went further out to fish post-treaty, "when the catch was insufficient closer to shore").

The District Court and Ninth Circuit in the Makah proceeding ruled that such post-treaty evidence of whaling and sealing 50-100 miles off-shore, by itself, was not sufficient evidence that the Makah harvested ocean resources that far off-shore at treaty time or before. *U.S. v. Washington*, *supra*¸ 626 F. Supp. at 1467, *aff'd*, 730 F.2d at 1318. *See* Order, MER 80, Conclusion of Law 1.6. Importantly, on *de novo* review, the Ninth Circuit determined that even though "[t]he Makahs probably were *capable* of traveling to 100 miles from shore in 1855" and that "they did go that distance at the turn of the century," it was "*not clear how frequently*." *U.S. v. Wash.*, *supra*, 730 F.2d at 1318 (emphasis added). In other words, none of Makah's evidence—either from treaty- or post-treaty times—demonstrated that they *customarily* fished *for any species* beyond 40 miles. The Ninth Circuit concluded that Makah's journeys out to 100 miles resulted from "altered circumstances" in

post-treaty years, and therefore did "not show that their usual and accustomed fishing areas went out 100 miles *in 1855*." *Id.* at 1316, 1318 (emphasis added).[17]

This ruling does not mean that post-treaty documentation is prohibited in all circumstances. Many tribes retained their pre-treaty subsistence practices long after treaty time, such that post-treaty evidence of those practices is probative as to what the tribe was doing at or before treaty time. *E.g.*, *id.* at 1318 ("About 1900, Makah fished regularly at areas about 40 miles out, and probably did so in the 1850s."); Decision I, 384 F. Supp. at 357 ("Post-Treaty Indian Fishing"); *Mille Lacs Band of Indians*, *supra*, 861 F. Supp. at 818 ("After the 1855 treaty was signed, the Mille Lacs Band continued to follow its traditional pattern of hunting, fishing and gathering throughout the 1837 ceded territory.").

This is exactly what the District Court found in the present case with regard to Quileute (and Hoh) pre-treaty Indian fishing. The Court found that the United States was "almost entirely unaware" of the existence of the Quileute and Hoh Tribes before negotiating the Treaty of Olympia on July 1, 1855. Order, MER 38, FF 8.2. There were "only four (brief) recorded interactions" between Quileutes and non-

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[17] It is notable that neither the District Court nor the Ninth Circuit reduced Makah's requested u&a ocean treaty fishing area even further – under 40 miles - south of the Swiftsure and 40 Mile halibut banks because that area was included based only on documentation of pre-treaty whaling and sea mammal harvest. If those courts had applied the legal principle from its decisions that Makah argues, they would have diminished Makah's ocean treaty fishing u&a by another two-thirds or three-quarters in the southern part of Makah's grounds.

Indians pre-treaty in all of the available documentation between 1775 and the treaty in 1855. Order, MER 37, FF 8.1.[18] Quileute and Hoh continued to be isolated from non-Indian and federal contact after the Treaty of Olympia, up until at least 1879, Order, MER 38-39, FF 8.3, and "maintained their traditional practices through the early 1900s." *Id.*, MER 40, FF 8.6 (citing "noted anthropologist" Leo Frachtenberg, Ex. B096, pp. 111-13).[19] The District Court specifically found that Quileute and Quinault's post-treaty activities supported the contention that they and the United States understood that the treaty reserved their right to take whales and seals. Order,

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[18] Contrast this sparse documentation with Makah, "whose location amidst the deep harbors at Neah Bay made this latter tribe unusually accessible to non-Indian traders, settlers, and visitors." Order, MER 24 (citing Tr. 3/16 at 4:22-25); Ex. 255, p. 23 (recounting Makah contact with explorers and traders since 1788).

[19] The State disputes the District Court's Findings of Fact on this subject and argues that Quileute (and Hoh) were not isolated post-treaty because a few settlers had moved into Quileute territory starting in the late 1870s, and that Quileutes began migrating into the Puyallup Valley to pick hops seasonally in the 1880s. State Brief, pp. 31-33. The State argues that these facts mean that post-treaty evidence of Quileute and Quinault fishing practices cannot be used as documentation of pre-treaty practices by those tribes. *Id.*

This argument is ridiculous. The District Court's findings are supported by substantial evidence. Testimony was uncontroverted that the first non-Indian to live among the Quileute, a school teacher assigned by the Indian agency, did not arrive until 1883. Transcript, 3/12/16, pp. 29:11 to 31:4 (Boxberger), at which time he assigned the Indians English names. *Id.*, p. 35:14-21. The fact that the Quileutes had some contact with a few settlers or picked hops on non-Indian farms is completely irrelevant to the question of whether they continued their traditional fishing practices and customs post-treaty. The documentation is undisputed that they did. Order, MER 40, FF # 8.6. The fact that the first non-Indian settler near the Quileute village burned that village to the ground in an attempt to remove the Indians from the area substantiates that the Quileute had not "civilized" by 1883. Order, MER 40, FF# 8.5. The State's argument on this issue has no merit.

MER 23, FF# 3.8. The District Court's reliance on post-treaty Quileute fishing (including whaling and sealing) activity – the most reliable documentation of that activity that exists that is directly related to pre-treaty practices – was reasonable and factually supports the District Court's findings regarding Quileute pre-treaty practices. *See* Order, MER 40-67.

At trial in this case, Makah took the position that the evidence it had submitted in 1977 in support of its ocean treaty fishing u&a area was of a superior quality than the evidence that Quileute and Quinault submitted in Subproceeding 09-01 in favor of their asserted ocean treaty fishing u&a areas. However, there was no detailed evidence in Lane's 1977 Makah Ocean Fisheries Report which documented any treaty time Makah fishing in most of Makah's claimed ocean treaty fishing u&a area. Hoh sought to question Makah's anthropologist/linguist Dr. Renker about the basis for her statements about the asserted superior quality of Makah's evidence, but she refused to answer questions regarding Makah ocean fishing at treaty time or details of the Lane Report she relied upon in her professional opinion about Quileute and Quinault pre-treaty ocean fishing:

> This is a hot zone right now. I am very concerned about being put in a position where something I might say might be deleterious to the Makah Tribe or another tribe. . . . I don't feel I am prepared to do that at all.

Transcript, April 2, 2015, pp. 3466, 3476. Makah's argument – that whaling and sealing cannot ever be used to establish ocean treaty fishing u&a area because of

the precedential effect of its own ocean treaty fishing decision, *U.S. v. Washington*, 626 F. Supp. 1405, 1466 (W.D.Wash. 1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984), is wrong as a matter of fact and law, and Makah could not defend its position on cross-examination. Makah should be prohibited from even arguing this position because of its conduct at trial. [20]

The Makah ocean treaty fishing u&a decision establishes as binding precedent that marine mammal fishing or hunting that took place at or before treaty time can be used to establish a tribe's ocean treaty fishing u&a area. *See U.S. v. Washington*, *supra*, 626 F. Supp. at 1467 (mentioning whales and seals numerous times in findings of fact regarding Makah's ocean u&a). The District Court decision followed this precedent in determining the ocean treaty fishing u&a areas of the Quileute and Quinault Tribes, and its reliance on such historical evidence should be affirmed.

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[20] Dr. Renker is a long-term employee of the Makah Tribe and is married to a Makah Tribal Council member. 3/25 Tr. Pp. 104-05. Her testimony was not cited by the District Court in support of any of its findings of fact except for its finding rejecting Quileute's claim to pre-treaty use and occupation of one of Makah's halibut fishing banks. Opinion at 57, 61. The District Court did not find Dr. Renker's testimony credible on any other issue.

C. Quileute and Quinault Ocean Treaty Fishing Areas are "Grounds", Not "Stations" or "Locations", and the State of Washington Lacks Standing to Raise This Issue on Appeal.

The State of Washington makes the novel argument, not raised at trial, that the Quinault and Quileute ocean fishing u&a grounds determined by the District Court cannot be sustained because the evidence did not show and the District Court did not name "specific locations," "proven locations," or "places" where Quileute and Quinault ocean fishing took place. State Brief at 7, 9, 13, 14, 16, 22-28, 30, 36-37, 39-40. The State's argument has no merit for several reasons.

First, this issue was not raised at trial. The State points to no reference where it made or preserved such argument at trial. It is axiomatic that an issue not raised at trial cannot be raised for the first time on appeal.

Second, the State's argument exceeds the scope of the proceeding below. The issue of whether the term "usual and accustomed grounds and stations" only includes specific places and locations was not raised by the Makah Tribe in its RFD. *See* Makah Request for Determination, *supra*, HER 36-45.[21] The District Court has been extremely clear in its rulings that additional claims or issues cannot be interjected into an existing subproceeding in *U.S. v. Washington*: "The only limitation that Interested Parties face is that they may not broaden the scope of the

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[21] It would have been anomalous for Makah to have done so in any event since the title of Makah's own ocean treaty fishing u&a determination is entitled "Order Re" Makah Tribe's Ocean Fishing Grounds." (emphasis added).

adjudication taking place under the subproceeding . . . . Should a party wish to present separate claims, it must file and be granted permission to proceed with either a separate request for determination . . . or a cross-request 'if such counter-request relates directly to the subject matter of the request of determination."
Order, Nov. 13, 2014, Dkt. # 247, HER 22 (citations omitted).

It is beyond dispute that the State has filed no RFD or cross-RFD to litigate this additional issue. The State is therefore foreclosed for raising it in the absence of initiating its own subproceeding.

Third, the Hoh Tribe believes the State of Washington lacks standing to raise this issue about the interpretation of the Treaty of Olympia and the location of Quileute and Quinault's usual and accustomed grounds and stations in the ocean beyond the demarcation line of State authority and jurisdiction. As discussed above, the State's legal authority and interest in the Pacific Ocean extends no further than three miles out into the Pacific Ocean. *See* p. 5, *supra*. Even if the State has some limited statutory interest in crab harvest beyond that line, that interest does not confer standing on the State as to other species of aquatic animals. The State has not identified - and the District Court specifically rejected – any State legal interest out in the Pacific Ocean. The State should not be permitted to raise this issue in the present subproceeding beyond its territorial boundaries.

Finally, the State's argument on this issue is wrong as a matter of law. The issue of the specificity necessary to identify what constitutes grounds and stations under the Stevens Treaties was addressed by Judge Boldt at the beginning of Decision I:

> The tribes reserved the right to fish at "*all* usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indications fixed locations such as the site of a fish wier or a fishing platform or some other narrowly limited area, "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. . . . [T]he court finds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe . . . is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.

384 F. Supp. at 332, FF# 8. The State would emasculate this holding and limit the term "grounds and stations" to specific, documented locations. The Pacific Ocean, however, is uniquely unsuited, with extremely limited exceptions such as Makah's halibut banks, to such a limitation. No identifiable locations exist in the ocean except for landmarks such as the edge of the Continental Shelf, called the "Blue Water," *see* 3/13 Tr., p. 36, where marine life concentrates and food is plentiful, and in underwater canyons. The District Court accepted expert opinion calling this area a "Serengeti" through which large herds of sea mammals migrate on a seasonal basis. Order, MER 34-35, FF# 6.12. The term grounds surely - and

reasonably - includes the entire offshore ocean area where fin-fish, sea mammals, and their food supplies can be found.[22] The State's argument on this issue has no merit.

[22] The State also contends that the District Court's ruling did not adequately identify the locations where Quileute and Quinault fished because it was based "upon broad and nonspecific historic references to the ranges of distance" that "a few" Quileute and Quinault "general[ly] travel[ed] in relation to marine mammal hunting." State Brief pp. 23, 29-30. The State "misrepresents the evidence and mischaracterizes the district court's order." *U.S. v. Washington*, 2016 WL 3517884, at *16 (9th Cir. June 27, 2016). In its brief, the State completely ignores the exhaustive evidence on Quileute and Quinault sea mammal harvests analyzed by the District Court over 27 pages of its decision. MER30-37, 49-67. Rather than addressing that evidence, the State mischaracterizes a few pieces of evidence and relies solely on a few excerpts from the testimony of State and Makah anthropologists, whom the Court did not find to be credible on these issues. Nowhere in the State's argument is mention of Quileute and Quinault's marine mammal expert, Dr. Trites, who was mentioned 23 times over the course of 16 pages in the District Court's decision and whose testimony on the likely locations of sea mammal abundance the court found to be "credible and consistent with" historical documentation of Quileute and Quinault's customary marine mammal harvests. MER34-37, 55-67. The District Court's ruling contains numerous references to specific harvests and the distances where such harvests customarily took place. *See supra* pp. 22-23, n.9.

VIII. CONCLUSION.

The Hoh Tribe is aligned with the Quileute and Quinault Tribes in this appeal and therefore defers to the positions in their Answering Brief(s) to be filed soon. Based on the discussion above, the Hoh Tribe asks that the Order of the District Court be affirmed.

Dated: August 5, 2016.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure, the undersigned counsel for Real Parties in Interest Hoh Indian Tribe certifies that none of them have a parent corporation(s) and no publicly held corporation(s) own stock.

Dated this 5th day August, 2016.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

STATEMENT OF RELATED CASES

Real Parties in Interest Hoh Indian Tribe is not aware of any related cases involving interpretation of the Treaty of Olympia or the determination of treaty usual and accustomed fishing grounds and stations in the Pacific Ocean.

Dated this 5th day of August, 2016.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

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Attorney for Hoh Indian Tribe, Real Party in Interest

Date August 5, 2016

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 5, 2016.

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Dated: August 5, 2016.

s/ Craig J. Dorsay