No. 15-35824 & 15-35827

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff

MAKAH INDIAN TRIBE, Plaintiff-Intervenor and **Appellant** in No. 15-35824,

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION, Plaintiff-Intervenors and **Appellees** in Nos. 15-35824 & 15-35827, and

HOH INDIAN TRIBE et al., Plaintiff-Intervenors and Real Parties in Interest in Nos. 15-35824 & 15-35827

v.

STATE OF WASHINGTON, Defendant and **Appellant** in No. 15-35827

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Nos. 2-09-sp-00001-RSM & 2-70-cv-09213-RSM
The Honorable Ricardo S. Martinez
United States District Court Judge

BRIEF OF APPELLANT MAKAH INDIAN TRIBE

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CORPORATE DISCLOSURE STATEMENT

The Makah Indian Tribe is a federally recognized Indian tribe. It does not have a parent corporation, and no publicly held corporation owns stock in the Tribe.

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INTRODUCTION

Between December 1854 and January 1856, Territorial Governor Isaac Stevens concluded five treaties with Indian tribes in Western Washington. The Makah Indian Tribe was a party to the Treaty of Neah Bay, while the Quileute Indian Tribe and Quinault Indian Nation were parties to the Treaty of Olympia.

The treaties secure to each tribe "the right of taking fish" at its "usual and accustomed grounds and stations" (U&A). The district court interpreted and enforced these rights in *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *substantially aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), retaining jurisdiction to determine, among other things, "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined." *Id.* at 419 (¶ 25.f).

In 2009, Makah commenced a subproceeding seeking a determination of the western boundaries of Quileute and Quinault's U&As in the Pacific Ocean. After a bench trial, the district court made findings regarding the distances offshore at which Quileutes and Quinaults customarily fished and hunted whales and seals. It based their U&A boundaries on the distances offshore at which they hunted whales or seals (up to 40 miles offshore for Quileute and 30 miles offshore for Quinault), even though those distances were much farther offshore than those at which they fished. It then drew their western boundaries along longitudinal lines located 40 and 30 nautical miles west of the westernmost point on the coast within their areas. Because

those lines do not follow the contour of the coast, they added large areas to Quileute and Quinault's treaty fishing grounds beyond the distances at which they hunted whales or seals (let alone fished) at treaty times.

Makah appeals.

JURISDICTION

The district court had jurisdiction because the subproceeding arose under a "treat[y] of the United States." 28 U.S.C. § 1331; *U.S. v. Washington*, 384 F.Supp. at 399. It entered judgment on August 27, 2015, and an amended judgment on September 3, 2015. Makah Excerpts of Record (MER) 1, 6. Makah filed a timely notice of appeal on October 21, 2015. MER 94-96; *see* Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction because the district court's judgment disposed of all claims and defenses in the subproceeding. 28 U.S.C. § 1291; *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432 n.1 (9th Cir. 2000).

ISSUES

1. Do Quileute and Quinault's treaty fishing rights extend to ocean waters in which they hunted whales or seals but were unaccustomed to fishing?

2. Should the western boundaries of Quileute and Quinault's treaty fishing rights be defined by longitudinal lines that include large areas in which they were unaccustomed to hunting whales or seals (let alone fishing)?

3. Did Quileute customarily fish up to 20 miles offshore?

ADDENDUM

The Treaties of Neah Bay and Olympia are set forth in the addendum.

STATEMENT OF THE CASE

A. Treaty Background.

In negotiating the treaties, Governor Stevens was assisted by George Gibbs, a lawyer, surveyor and ethnologist; Michael Simmons, the Puget Sound Indian Agent; and Benjamin Shaw, an interpreter. *U.S. v. Washington*, 384 F.Supp. at 354-55. The vast majority of the Indians at the treaty councils did not speak or understand English; consequently, Shaw interpreted the treaty provisions and remarks of the treaty commissioners into the Chinook jargon, a trade medium of limited vocabulary and simple grammar, which Indian interpreters then translated into native languages. *Id.* at 356.

The Treaty of Neah Bay is the only treaty that mentions whaling or sealing; it secures the "right of taking fish *and of whaling or sealing* at usual and accustomed grounds and stations." Addendum p. A1 (Art. 4) (emphasis added). During the treaty negotiations, "Governor Stevens found the Makah not much concerned about their land …, but greatly concerned about their marine hunting and fishing rights." *U.S. v. Washington*, 384 F.Supp. at 363. "Much of the official record of the treaty negotiations deal[s] with this. Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting and fishing but in

fact would help them to develop these pursuits." *Id*.

One month after concluding the Makah treaty Stevens attempted to negotiate a treaty with Quinault and other southwest Washington tribes at the Chehalis River Council. MER 487-507. The Quileutes were not represented. MER 487-488. Although Quinault signed the proposed treaty, other tribes rejected its provision for a single reservation and Stevens terminated the proceedings. MER 593-594, 603-605, 610-614. Simmons and Shaw met with Quileute, Quinault and related tribes (Hoh and Queets) on July 1, 1855, and concluded a treaty, which Stevens signed in Olympia on January 25, 1856. MER 254-255, 534, 898; Addendum pp. A5-8.

Article 3 of the treaty Quinault signed at the Chehalis River Council and Article 3 of the final treaty signed by Quileute and Quinault are identical; they each provide "[t]he right of taking fish at all usual and accustomed grounds and stations is secured to said Indians …." MER 611; Addendum p. A5.[1] Neither version includes the provision for "whaling or sealing" found in the Makah treaty. During the Chehalis River Council, some Indians claimed ownership of beached whales but, unlike the Makah Council, no one mentioned whaling or sealing. *See* MER 491, 493-494.

[1] Other provisions were modified. References to tribes who refused to sign the treaty were deleted; the cession area and amount of money to be paid were amended; and Article 2 was revised to provide that more than one reservation might be created. *Id.*; *see U.S. v. Washington*, 18 F.Supp.3d 1172, 1188 (W.D. Wash. 1991).

There is no surviving journal of Simmons' July 1855 council with Quileute and Quinault. MER 18. Later Quileute recollections of the council discuss Quileutes' desire to retain access to the river (where they obtained salmon), coast and prairies, and their refusal to leave their traditional lands, with no mention of whaling or sealing. *See* MER 39, 531, 616-617, 782-783.

The Senate ratified the Treaties of Neah Bay and Olympia on the same day in 1859. Addendum pp. A1, A5.

B. Prior Rulings Regarding "Fish."

The court initially limited the subject matter of this case to application of the treaty fishing right to anadromous fish, *U.S. v. Washington*, 384 F.Supp. at 400, but held the treaty right "is not limited as to species of fish," *id*. at 401; *see also id.* at 352 (Indian fishing not limited by species). After expanding the case to nonanadromous fish, *U.S. v. Washington*, 459 F.Supp. 1020, 1048-49 (W.D. Wash. 1975), it held the fishing right includes herring, *id.*, halibut, 18 F.Supp.3d at 1219-22 (W.D. Wash. 1993), shellfish, 873 F.Supp. 1422, 1430 (W.D. Wash. 1994), *aff'd in relevant part*, 157 F.3d 630 (9th Cir. 1998), whiting and rockfish, 19 F.Supp. 3d 1184, 1245-47 (W.D. Wash. 1996). In the shellfish subproceeding, the court reaffirmed its ruling that there is no "species limitation" on the right of taking fish, 873 F.Supp. at 1430, but held the Yakama treaty did not secure a right to shellfish, *id*. at 1447-48.

C. Prior Rulings Regarding U&A.

Each treaty expressly limits the right of taking fish to "usual and accustomed grounds and stations." The court found that "[a]lthough there is no evidence of the precise understanding the Indians had of the treaty language, the treaty commissioners probably used the terms 'usual and accustomed' … in their common parlance, and the meaning of them as found in a contemporaneous dictionary most likely would be what was intended by the government representatives." *U.S. v. Washington*, 384 F.Supp. at 356. 1828 and 1862 editions of Webster's American Dictionary of the English Language defined *accustomed* as "[b]eing familiar by use; habituated; inured … usual; often practiced" and *usual* as "[c]ustomary; common; frequent; such as occurs in ordinary practice or in the ordinary course of events." *Id*.

The court held 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.* (alteration by the court). However, "[t]he words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Id.* "The restrictive sense of the term 'usual and accustomed' could have been conveyed in Chinook jargon." *Id*.

Thus, while "[m]arine waters were … used as thoroughfares for travel by Indians who trolled en route[,] … [s]uch occasional and incidental trolling was not

considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id*. at 353; *see also id.* at 332 ("every fishing location where members of a tribe *customarily fished* from time to time at and before treaty times … is a usual and accustomed ground") (emphasis added); *see also U.S. v. Washington*, 626 F.Supp. 1405, 1531 (W.D. Wash. 1985) ("[o]pen marine waters that were not transited or resorted to by a tribe on a *regular and frequent basis* in which *fishing was one of the purposes of such use* are not usual and accustomed fishing grounds … within the meaning of the Stevens treaties") (emphasis added).

The court made initial U&A determinations for 14 tribes (including Makah, Quileute and Quinault) in 1974. *See* 384 F.Supp. at 359-82. It has since made additional U&A determinations for those tribes and seven others. *See* 459 F.Supp. at 1038, 1048-49, 1058-60; 626 F.Supp. at 1441-43, 1466-68, 1471-83, 1486, 1527-32; 873 F.Supp. at 1449-50.

In two cases, the court found a tribe hunted marine mammals and fished in the ocean. *See* 384 F.Supp. at 363-64 (Makah), 372 (Quileute). However, in no case (until this one) did it find a tribe's "right of taking fish" extended to waters in which it hunted marine mammals but did not fish. To the contrary, the court limited Makah's U&A in the Pacific Ocean to an area within 40 miles of shore, even though it found Makahs "traveled distances greater than forty miles from shore for purposes

of whaling and sealing." 626 F.Supp. at 1467. This court affirmed. It found "Makahs probably were capable of traveling to 100 miles from shore in 1855[, and] may have canoed that far for *whale and seal* or simply to explore," but these facts did not show "their usual and accustomed *fishing* areas went out 100 miles from shore in 1855." *U.S. v. Washington*, 730 F.2d 1314, 1318 (9th Cir. 1984) (emphasis added).

In the shellfish subproceeding, the court held tribal U&As "cannot vary with the species of fish." 873 F.Supp. at 1431. It based this conclusion on its prior ruling that U&As for herring were co-extensive with those for salmon and steelhead, *id*. (citing 459 F.Supp. at 1048-50), and the fact that it had "never focused on a particular species of fish" in determining U&As, *id*. (citing 384 F.Supp. at 360, 364, 372; 626 F.Supp. at 1467, 1528-29). These citations included the Makah decision, which relied on fishing for multiple species of fish, but not whaling or sealing, to define Makah's U&A.

D. Proceedings Below.

In pre-trial rulings, the district court denied Quileute and Quinault's motions to dismiss on subject-matter jurisdiction, sovereign immunity, standing, ripeness, laches and other grounds; held federal regulations defining their fishing areas did not affect the court's determination of their U&As; and denied motions for stay pending interlocutory appeals. MER 974-989, 990-996, 997-1006, 1007-1008,

1009-1013. It subsequently rejected laches, judicial estoppel and acquiescence defenses on summary judgment, and held Quileute and Quinault had the burden to establish the location of their U&As. MER 918-946. There is no appeal from these rulings.[2]

During a 23-day trial, the court admitted 472 exhibits and heard expert testimony in the fields of archaeology, anthropology, fisheries biology, linguistics and marine mammal biology. *See* MER 13. It found that at treaty times Quileute and Quinault were accustomed to harvesting fish up to 20 and 6 miles offshore, respectively (and Quinault "may have fished at distances [more than six miles offshore] on at least an occasional basis"). MER 29-30, 48-49. Given these findings, its conclusions that Quileute and Quinault's U&As extended 40 and 30 miles offshore, MER 92, necessarily rested on its findings regarding whaling and sealing – not fishing.[3] *See* MER 33, 36-37, 57, 67. Based on whaling and sealing, the court extended Quileute's U&A an additional 20 miles offshore (from 20 to 40 miles) and Quinault's U&A an additional 24 miles offshore (from 6 to 30 miles), expanding their U&As by hundreds of square miles.

[2] Quileute, Quinault and Hoh dismissed earlier interlocutory appeals after the district court entered its findings and conclusions. *See* MER 123.

[3] The court recognized that "'areas where use was occasional or incidental,'" such as possible Quinault fishing more than six miles offshore, were not U&A. *See* MER 80 (quoting *U.S. v. Washington*, 384 F.Supp. at 356).

The court placed Quileute and Quinault's western boundaries at 125°44'00" and 125°08'30" W. longitude, respectively. MER 4. These lines are 40 and 30 nautical miles offshore at the extreme northern ends of their U&As but, because of the orientation of the coast, are 56 and 41 nautical miles offshore at the southern ends of their U&As, adding yet additional areas to their U&As. MER 126-127.

SUMMARY OF ARGUMENT

Despite dozens of U&A determinations, this is the first time in *U.S. v. Washington's* 46-year history that the district court found a tribe's "right of taking fish" extends to waters in which it was *unaccustomed* to fishing at treaty times. In relying on whaling and sealing, the court departed from the Makah decision, where it refused to rely on whaling and sealing farther offshore than fishing. That decision, which was affirmed on appeal, should have been followed under the law-of-the-case and law-of-the-circuit doctrines. Moreover, fairness and equity demand application of the same standards to all U&A determinations.

Even if the district court were free to revisit the Makah ruling, the evidence demonstrated the parties to the Treaty of Olympia intended to secure a right of taking fish at those places at which the Indians were *accustomed to taking fish* – not at locations at which they hunted whales or seals or engaged in other activities (such as exploration or travel). For its part, the United States did not intend to subsume a treaty right of whaling and sealing within the right of taking fish (as is evident from

its inclusion of a *separate* whaling or sealing provision in the Makah treaty), let alone expand the right of taking fish at traditional places to areas in which the Indians were *unaccustomed* to fishing.

Nor did Quileutes or Quinaults understand that their "right of taking fish" extended to areas in which they were unaccustomed to fishing. Their native languages and the Chinook jargon had separate words for fish, whales and seals and for fishing, whaling and sealing. Fishing, whaling and sealing were distinct occupations pursued by different individuals who belonged to different ritual societies and observed different ceremonial practices specific to each activity. Given these and other differences, it cannot reasonably be inferred that Quileutes or Quinaults understood the treaty right of taking fish at traditional grounds extended to very large ocean areas in which they engaged in different activities but were *unaccustomed* to fishing.

The court also erred by drawing Quileute and Quinault's western boundaries along longitudinal meridians located 40 and 30 nautical miles from the westernmost point on the coast in their areas. Although the district court used a longitudinal meridian to define Makah's western boundary, the line bisected known Makah fishing grounds and followed the north-south contour of the coast in Makah territory. In contrast, the meridians used to define Quileute and Quinault's western boundaries intersect no known Quileute or Quinault fishing grounds, deviate from the contour

of the coast, and add hundreds of square miles to their treaty fishing grounds beyond those in which the court found they hunted whales or seals (let alone fished).

Finally, the court's finding that Quileutes customarily fished up to 20 miles offshore at treaty times was clearly erroneous. Substantial evidence – including detailed ethnographic accounts – established that Quileutes did not customarily fish more than five to ten miles offshore.

ARGUMENT

A. Quileute and Quinault's Fishing Rights Do Not Extend to Waters in which They Hunted Whales or Seals but Were Unaccustomed to Fishing.

1. The Makah Case Established that Neither Whaling Nor Sealing Can Be Used to Expand a Tribe's Fishing Right to Waters in which It Was Unaccustomed to Fishing.

a. Legal Standards.

Under the law-of-the-case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). "For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *Id.* (quoting *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982)); *see also Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1392 (9th Cir. 1995) ("'even summarily treated issues become the law of the case'"; "[t]his court has followed the law of the case even where the

first panel's holding was 'cryptic and somewhat ambiguous'") (quoting *Alliance for Cannabis Therapeutics v. DEA*, 15 F. 3d 1131, 1135 (D.C. Cir. 1994); *Hama Boys Ctr. v. Miller*, 853 F.2d 682, 687 (9th Cir. 1988)). Application of the doctrine is discretionary and reviewed for abuse of discretion. *Lummi*, 235 F.3d at 452.

Under the law-of-the-circuit doctrine, "a published decision of this court constitutes binding authority which '*must* be followed unless and until overruled by a body competent to do so.'" *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (*en banc*) (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)) (emphasis added), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013). Because this doctrine is mandatory, it presents a legal issue that should be reviewed *de novo*. *See*, *e.g.*, *U.S. v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (*en banc*).

Moreover, as Quileute and Quinault argued and the district court held, "equity and fairness demand the same methodology" used in the Makah case be used to delineate Quileute and Quinault's U&As. MER 3; *see* MER 109.

b. The Makah Holdings.

In the Makah case, Judge Craig found: "At treaty times, the Makah Indians engaged regularly and successfully in offshore fisheries for halibut, salmon, cod, and other kinds of fish as well as for whales and seals." 626 F.Supp. at 1467. "Makah regularly *fished* at known fishing banks some *30 to 40 miles offshore*." *Id.* (emphasis

added). Although "Makah traveled distances *greater than forty miles from shore for purposes of whaling and sealing*," it was "clearly erroneous to conclude that the Tribe customarily traveled such distances *to fish*." *Id.* (emphasis added). Based on these findings, Judge Craig limited Makah's U&A to an area within 40 miles of shore. *Id.*; *see* MER 89.

Judge Craig necessarily determined that whaling and sealing, by themselves, cannot be used to establish the area in which a tribe can exercise its treaty fishing right. He expressly found Makah traveled distances greater than 40 miles from shore for whaling and sealing. If whaling and sealing by themselves could establish a tribe's U&A, Makah's U&A would have extended more than 40 miles offshore.

This court affirmed:

> Ocean fishing was essential to the Makahs at treaty time. The Makahs probably were capable of traveling to 100 miles from shore in 1855. *They may have canoed that far for whale and seal or simply to explore*. They did go that distance at the turn of the century, although it is not clear how frequently. About 1900, they *fished regularly* at areas about 40 miles out, and probably did so in the 1850s.
>
> These facts do not show that their usual and accustomed *fishing* areas went out 100 miles from shore in 1855. There is no basis for an inference that they customarily *fished* as far as 100 miles from shore at treaty time.
>
> On the contrary, Dr. [Barbara] Lane suggested that the Makahs would travel that distance only when the catch was insufficient closer to shore. The earliest evidence of insufficient catch was Oliver Ides' statement about disappearing *halibut* when he was young, some 50 years after the treaty. Even under the less stringent standards of proof of this case, we cannot conclude that the Makahs usually and customarily *fished* 100 miles from shore in 1855.

730 F.2d at 1318 (emphasis added).

This court's decision (like Judge Craig's) distinguished whaling and sealing from fishing, and based its holding on the areas in which Makahs fished, not areas to which they may have gone "for whale and seal or simply to explore." *Id.* If whaling and sealing alone could be used to determine a tribe's U&A, the court would have needed to determine *whether* Makahs regularly engaged in whaling or sealing more than 40 miles offshore at treaty times. However, after noting that the Makahs may have gone up to *100 miles* offshore for whales or seals, the court made no attempt to determine how frequently they did so. Instead, it focused on distances Makahs traveled at treaty times for purposes of *fishing*. In so doing, it necessarily held whaling or sealing alone cannot establish a tribe's U&A.

c. The Decision Below.

Despite insisting that "equity and fairness demand" the same methodology used in the Makah case be used here, *see* MER 3, the district court (per Judge Martinez) declined to follow the Makah rulings. He proffered three reasons for this.

i. Scope of the Makah Decision.

Judge Martinez first asserted "that neither questions of treaty interpretation generally nor the scope of the 'right of taking fish' in particular were raised" in the Makah case. MER 89. According to Judge Martinez, "prior to the Court's ruling that U&As for non-anadromous fish were coextensive with those for anadromous

fish [in the shellfish subproceeding], the parties had no reason to seek a judicial interpretation of the scope of 'fish' because they were focused on evidence of salmon fishing"; "[i]t was not until the shellfish proceeding over a decade later that this Court addressed the scope of the word 'fish,' giving it the broad construction affirmed by the Ninth Circuit and reaffirmed herein." MER 89-90.

For several reasons, these observations do not change what was decided in the Makah case, *i.e.*, that whaling and sealing cannot be used to expand a tribe's U&A beyond its fishing grounds. First, the district court addressed the meaning of "fish" in its *1974* decision, holding that the fishing right is not limited by species of fish. 384 F.Supp. at 401. In 1975 it held U&As for herring, a nonanadromous species, were co-extensive with U&As for salmon. 459 F.Supp. at 1048-49. These rulings came before the 1982 Makah case, as did multiple U&A determinations, none of which "focused on a particular species of fish." 873 F.Supp. at 1431, *aff'd*, 157 F.3d at 644 (since the original decision, courts "have never required species-specific findings of [U&A]").

Second, while some pleadings and arguments in Makah's case focused on salmon, neither the evidence, Judge Craig's findings nor this court's decision was limited to salmon.[4] Judge Craig found Makahs engaged in fisheries "for halibut, salmon, cod, and other kinds of fish as well as for whales and seals," and held the

[4] As to the evidence, *see*, *e.g.*, MER 568, 570-571, 573, 576-577, 580-582, 586-588.

Tribe's "usual and accustomed offshore fishing grounds" – not its *salmon* fishing grounds – extended 40 miles offshore. 626 F.Supp. at 1467.

Third, in the shellfish case, the district court cited the Makah case as one in which a U&A determination *did not* vary by species of fish. 873 F.Supp. at 1431. This confirmed that the distinction Judge Craig drew was not between salmon and other species of fish, but between fish on one hand and whales and seals on the other. His findings squarely presented the question whether a tribe's U&A could be based on whaling or sealing in areas in which it was unaccustomed to fish, and his decision necessarily held it could not.

ii. Sufficiency of the Evidence.

Judge Martinez also asserted "Judge Craig's decision as to the Makah U&A ultimately turned on the sufficiency of the evidence proffered by the Makah to establish their U&A, not on a legal determination of what evidence would be deemed relevant." MER 90.[5] However, Judge Craig nowhere stated the evidence was insufficient to establish that Makahs traveled more than 40 miles offshore to whale and seal; to the contrary, he expressly found they "traveled distances *greater than forty miles* from shore for purposes of whaling and sealing." 626 F.Supp. at 1467

[5] The claim that the Makah courts considered whaling and sealing evidence but found it insufficient, MER 91, is inconsistent with the previous claim that they focused on salmon.

(emphasis added).[6] In denying reconsideration, he reiterated that whaling occurred farther offshore than fishing. MER 1221 ("As I recall the record, the Makahs also tried to capture whales. *Whales were out farther than the fishing banks*.") (emphasis added). On appeal, this court did not disturb Judge Craig's finding that Makahs traveled more than 40 miles offshore for whaling or sealing. Indeed, it found Makahs may have canoed *up to 100 miles* offshore to whale or seal. 730 F.2d at 1318. In focusing on evidence of *fishing*, the court did not suggest the evidence was insufficient to show Makahs went more than 40 miles offshore for whales or seals. *Id*.

Lacking support in the courts' decisions for the sufficiency-of-the-evidence theory, Judge Martinez re-examined the evidence in Makah's case. He noted that Judge Craig only cited a report by Dr. Barbara Lane and "the only evidence" Dr. Lane cited "showing that the Makah fished distances greater than 40 miles came from post-treaty sources." MER 90-91 (citing MER 577 ("It is known that the Makah fished at greater distances than thirty or forty miles offshore in post-treaty times.") and 579 (reports from 1894 and 1897 of Makah offshore sealing)).

However, Dr. Lane relied on "treaty-time documentation" in reporting that "[w]hale hunts often took the Makah out of sight of land and might keep them at sea for several days." MER 568; *see also* MER 569-570 (Gibbs' 1855 observation of

[6] Tellingly, Judge Martinez never mentions this finding.

Makahs pursuing whales out of sight of land), 572 (Waterman report that whale hunts often took Makahs entirely out of sight of land), 574 (Waterman report that Makah whalers used to put off from shore at sunset, to get to the whaling grounds at daybreak), 575 (Waterman quote stating whaling expeditions often go clear out to sea, out of sight of land), 576 (Lane's conclusion that while it was well documented that Makahs *fished* at known fishing banks some 30 to 40 miles offshore, it was less feasible to document the outer limits of Makah offshore journeys in pursuit of *whales* and other species), 578-579 (1894 Indian agent's report noting Makahs "*for years* past have been in the habit of going out 40 to 50 miles from the cape to kill seal") (emphasis added), 579 (1897 Indian agent's report that Makahs "often sally forth in their canoes and capture whales, going out from 50 to 100 miles at sea").

In addition, Oliver Ides, born in 1907, testified that "we used to hunt seals" in "Blue Waters," which he described as being located 50 to 100 or "about a hundred miles" offshore. MER 1271. They would "leave the shore about two in the morning and we don't get to what they call Blue Waters until about 10 o'clock in the morning. Yes, we hunted and there were three in a canoe." *Id.* Mr. Ides testified they did not use a motorized vessel to get to the sealing grounds, but instead used a "dugout" equipped with "paddles and sails." MER 1273-1274. Thus, while his hunts were post-treaty, he used traditional pre-treaty sealing methods.

Dr. Lane's report and Mr. Ides' testimony supported Judge Craig's finding that Makahs "traveled distances greater than forty miles from shore for purposes of whaling and sealing" and this court's observation that the Makahs may have traveled up to 100 miles offshore to whale or seal. That Judge Martinez viewed the evidence differently provides no basis for re-writing Judge Craig's findings or disregarding his and this court's determinations that whaling and sealing cannot be used to extend a tribe's U&A to waters in which it was unaccustomed to fishing. *See U.S. v. Jacobs*, 955 F.2d 7, 9 (2d Cir. 1992) (lower court must adhere to appellate decision at an earlier stage of the case "even where it disagrees or finds error in it").

iii. Shellfish Briefing.

Judge Martinez quoted a passage from a joint tribal brief in the shellfish subproceeding as evidence Makah "did not view the Court's prior rulings as having excluded evidence of marine mammal harvest from U&A determinations." MER 91-92 (quoting MER 1082). Although the brief discussed the district court's initial U&A determinations in 1974, which found that Quileute and Makah hunted marine mammals and fished in the ocean, it cited no U&A determination that was based *solely* on evidence of whaling or sealing. MER 1082. The brief did not discuss the treatment of whaling and sealing in the 1982 Makah case and made no argument that whaling or sealing alone could be used to establish U&A, an issue not presented in the shellfish case. *Id*.

The tribes did discuss the 1982 Makah case in their shellfish appeal brief, harmonizing its holding with a single U&A for all fish species:

> [T]he district court [in the Makah case] determined that Makah customarily fished at treaty times 40 miles from shore, but not 100 miles. ... But Makahs' adjudicated usual and accustomed fishing grounds were still determined with reference to multiple species of *fish* and cover one very broad general territory. The district court did not adjudicate separate *fishing* grounds for each species.[32]

MER 968 (internal citations omitted; emphasis added). Footnote 32 identified the fish species on which Makah's U&A was determined ("halibut, salmon, cod, and 'other kinds of fish'"), but did not mention whales or seals. *Id.*

Read together, the tribal shellfish briefs did not interpret the Makah (or any other) case to hold that whaling or sealing, by themselves, could establish U&A. The briefing is consistent with the district court and this court's rejection of distinctions among species of fish, while recognizing a clear distinction between fish and marine mammals.

For these reasons, Judge Martinez's failure to follow the Makah decision violated the law-of-the-case and law-of-the-circuit doctrines and his own holding that the methodology used in the Makah case must be used here.

2. The Treaty of Olympia Did Not Secure Fishing Rights in Waters in which Quileute and Quinault Were Unaccustomed to Fishing.

Even if the Makah case were not controlling, Judge Martinez erred in holding Quileute and Quinault's fishing rights extend to waters in which they hunted whales

or seals but were unaccustomed to fishing. This court "review[s] de novo the interpretation and application of treaty language." *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir. 1988). "Underlying factual findings, including findings of historical fact, are reviewed for clear error." *Id*.

a. Canons of Construction.

i. Indian Canons.

Judge Martinez cited canons of construction that require Indian treaties to be interpreted liberally in favor of and as they would have been understood by the Indians, with ambiguities resolved in their favor, noting they "have guided the construction of the fishing rights provision in the Stevens Treaties from the very first decision in this case." MER 82-84. However, the Indian canons do not apply when Indian interests are adverse:

> The [Indian law] canon has been applied only when there is a choice between interpretations that would favor Indians on the one hand and state or private actors on the other. … [It] does not apply when tribal interests are adverse because "[t]he government owes the same trust duty to all tribes." … It cannot favor one tribe over another.

Redding Rancheria v. Jewell, 776 F.3d 706, 713 (9th Cir. 2015) (quoting *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (refusing to apply Indian canons to benefit Chehalis and Shoalwater tribes' assertion of treaty fishing rights "if such application would adversely affect Quinault interests")).

Despite extensive use of the Indian canons in this case, Judge Martinez cited no example in which they were invoked to favor one tribe over another. Allowing Quileute and Quinault to use whaling and sealing to expand their traditional fishing grounds adversely affects Makah, enabling modern Quileute and Quinault fisheries in areas far outside their traditional grounds to take fish from and threaten established Makah fisheries. *See* MER 919, 925-927, 934-936 (describing fishing disputes that gave rise to this subproceeding). Judge Martinez's use of the Indian canons in this context was improper.

Moreover, even where the Indian canons apply, they cannot alter a treaty's plain meaning. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' … clearly runs counter to a tribe's later claims") (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675 (1979)); *Rice v. Rehner*, 463 U.S. 713, 732-33 (1983) (canon of construction is not a license to disregard clear expressions of tribal and congressional intent); *Choctaw Nation of Indians v. U.S.*, 318 U.S. 423, 432 (1943) (Indian treaties "cannot be rewritten or

expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties").

Furthermore, the Treaty of Olympia "cannot be construed in a vacuum; it must be analyzed in light of the other Stevens Treaties." *U.S. v. Washington*, 873 F.Supp. at 1447 (discussing Yakama Treaty). As discussed below, the inclusion of a whaling and sealing provision in the Makah treaty makes it clear the treaty drafters did not understand the right of taking fish to include whales and seals. In holding otherwise, Judge Martinez effectively rendered the whaling and sealing provision in the Makah treaty meaningless, contravening "the principle that a treaty 'should be interpreted so as not to render one part inoperative.'" *Id.* at 1430 (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

ii. Reserved Rights.

Judge Martinez also invoked the reserved-rights doctrine, "which requires the Court to view those rights that were possessed by the tribes prior to the treaties and not specifically granted away as being reserved to the tribes." MER 84-85. However, nothing in this doctrine requires a court to view such rights *as part of the right of taking fish*. For example, the tribes may have retained the right to travel on marine waters because they did not specifically grant that right away, but that does not mean the right to travel is part of the right of taking fish, or that a tribe's U&A extends to marine waters in which it was accustomed to traveling but not fishing.

See, *e.g.*, *U.S. v. Washington*, 384 F.Supp. at 353 (occasional trolling does not make marine waters "used as thoroughfares for travel" U&A); 626 F.Supp. at 1531 (unless "fishing was one of the purposes" for which marine waters were used, they are not U&A). Thus, even if Quileute and Quinault reserved whaling and sealing rights because they did not specifically grant those rights away, that does not mean such rights are part of the right of taking fish or that their U&As extend to marine waters in which they hunted whales or seals but were unaccustomed to fishing.

Judge Martinez added that a "corollary" to the reserved-rights doctrine required the court "to interpret the 'right of taking fish' without any limitation or differentiation as to species." MER 85. However, this corollary does not support expansion of the right of taking fish to a right of taking *other* resources, whether marine mammals, land mammals, plants or birds. In *U.S. v. Winans*, 198 U.S. 371, 381 (1905), where the doctrine originated, the Court held "'the right of taking fish at all usual and accustomed places'" gave the Indians "a right in the land,–the right of crossing it to the river,–the right to occupy it *to the extent and for the purpose mentioned*." *Id*. (emphasis added). It did not hold the fishing right gave the Indians a right in the land for *other* purposes.

In the shellfish case, the court resolved the threshold question whether shellfish were "fish" on the basis of the treaties' plain language, not the reserved-

rights doctrine. It relied on the proviso "that [the Indians] shall not take shellfish from any beds staked or cultivated by citizens" (*see*, *e.g.*, Addendum p. A2, Art. 4):

> This Proviso, plainly read, constitutes an exception to the right of taking shellfish at particular locations. *It inevitably follows* that shellfish were included in the "right of taking" fish referred to in the first sentence. This interpretation is consistent with the principle that a treaty "should be interpreted so as not to render one part inoperative." [*Colautti*, 439 U.S. at 392]. If the right of taking "fish" did not include shellfish, the entire shellfish proviso would serve no purpose.

873 F.Supp. at 1430 (emphasis added; footnote omitted). It was only *after* deciding that shellfish were "fish" that the court held the right of taking fish was not limited to those *species of shellfish* the tribes actually took before signing the treaties, a conclusion it based on the reserved-rights doctrine and the broad meaning of "fish." *Id.* In so holding, the court did not suggest the reserved-rights doctrine could be used to expand the right of taking fish to *other* resources. Any such suggestion would be inconsistent with the principle that Indian treaties "cannot be rewritten or *expanded* beyond their clear terms." *Choctaw Nation*, 318 U.S. at 432 (emphasis added).

iii. The Meaning of "Fish."

Judge Martinez noted the shellfish court also relied on the broad meaning of "fish" in holding the fishing right is not limited by species of fish:

> In declining to limit the "right of taking fish" to those species harvested by the tribes prior to signing the treaties, the Court explained that "had the parties to the Stevens Treaties intended to so limit the right, they would not have chosen the word 'fish,' a word which fairly encompasses every form of

> aquatic animal life. 'Fish' has perhaps the widest sweep of any words the drafters could have chosen, and the Court will not deviate from its plain meaning." *Shellfish*, 873 F. Supp. at 1430. The Ninth Circuit affirmed, agreeing with the district court's description of the broad sweep of the word "fish" as used in the treaties and noting that a more restrictive reading of the fishing rights provision would be contrary to the tribes' reservation of their pre-existing subsistence rights. *Shellfish*, 157 F.3d at 643-44.

MER 86.

The broad meaning assigned to the word fish in the shellfish case is of limited value here. First, like its use of the reserved-rights doctrine, the shellfish court relied on the broad meaning of fish to determine that the right of taking fish was not limited to certain species of fish (such as those harvested at treaty times), *not* to determine that shellfish were fish within the meaning of the treaties. As explained above, the latter determination was based on the plain language of the treaties as reflected in the shellfish proviso.[7] Here, the plain language of the treaties, as reflected in the Makah whaling and sealing provision, demonstrates that whales and seals are *not* fish.

Second, the issue whether the right of taking fish includes whales or seals was not present in the shellfish case, and there is no indication the courts intended to decide it. The shellfish courts did not consider either the language of the Makah

[7] This was confirmed by the holding that the Yakama Treaty – which secured a right of taking fish but did not include the shellfish proviso – did not secure a right to shellfish. 873 F.Supp. at 1447-48. If the broad meaning of "fish" was sufficient to establish the treaties secured the right to take shellfish, the Yakama treaty would have secured a right to shellfish.

treaty or other evidence relevant to whether the treaty parties intended to include whales or seals within the treaty fishing right.

b. United States' Intent.

Even where the Indian canons apply, a court must consider both the United States' and the Indians' intent in interpreting a treaty. *See*, *e.g.*, *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 206 (1999) (treaty "must be interpreted in light of *the parties*' intentions, with any ambiguities resolved in favor of the Indians") (emphasis added); *Passenger Fishing Vessel*, 443 U.S. at 675 ("it is the intention of *the parties*, and not *solely* that of the superior side, that must control any attempt to interpret the treaties") (emphasis added); *Absentee Shawnee Tribe of Indians of Oklahoma v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988) ("When interpreting a treaty, the intention of the Indians and the intention of the government are both considered.").

Judge Martinez did not separately address the intent of the Government's treaty negotiators or the Senate's understanding when it ratified the treaty. However, in discussing the Indians' understanding, he asserted "a capacious understanding of [the] word [fish] was in broad, popular circulation at the time that the treaty was negotiated, as evidenced by Webster's 1828 American Dictionary defining the word as '[a]n animal that lives in the water' and the numerous judicial decisions discussing 'fish' and 'fisheries' in ways that embraced sea mammals." MER 86.

These observations do not demonstrate the treaty drafters intended the word fish to include whales and seals. Webster's definition of fish did not include seals (animals that rest, mate and give birth on land), either in popular or any other usage. *See* MER 864. And, it stated that, notwithstanding popular usage, whales were not fish; according to Webster's, fish breathe by means of gills, swim by the aid of fins, and are oviparous, while whales and other cetaceous animals breathe by means of lungs and are viviparous. *Id*. The distinction between whales and fish can be traced to Aristotle, was formalized in the Linnaean classification system more than 100 years before the treaties, and was familiar to educated Americans (including Stevens and Gibbs) at treaty times. MER 190-195.[8] Thus, the fact that in popular usage "fish" might have included whales does not shed light on how the *treaty drafters* used the word in the treaty.

[8] Gibbs used Linnaean classifications in his Chinook jargon dictionary, *see, e.g.*, MER 461 (defining salmon), and distinguished between fish and whales in other writings, *see* MER 515 (describing Klallams as "almost exclusively maritime, depending mainly for support upon *fish* or the commodities which they get in exchange; but less venturous than the Makah, they do not pursue the *whale*") (emphasis added). Another contemporary who wrote about coastal tribes, James Swan, also distinguished fish, whales and seals in his writings. *See* MER 798 (Makahs "are more venturesome, hardy, and ardent in their pursuit of *whales* and in going long distances from the land for *fish*, than any of the neighboring tribes"), 801 ("*whaling* canoe carries eight men" while "very small [canoes are used] for *fishing*"), 807 (discussing "Otter, *Fish, Seals*, &c, taken by the Makahs"); MER 627 ("I was told by an old Chief that … [La Push] was occupied by the Quilleutes as it was good for *fishing, sealing, whaling* and for defense."); MER 792 (discussing "an old *sealer and fisherman*") (emphasis added throughout).

The four judicial decisions Judge Martinez cited also do not shed light on how the treaty drafters used the word fish. In *In re Fossat*, 69 U.S. 649, 692 (1864), counsel (not the Court) recognized both the popular and more precise meaning of fish recognized in Webster's dictionary ("For all the purposes of common life, the whale is called a fish, though natural history tells that he belongs to another order of animals."). In *In re Cooper*, 143 U.S. 472, 496-99 (1892), the Court referred to "seal fisheries," but also referred to "seal hunters" and quoted Rev. Stat. § 1956, which made it unlawful to "kill otter, mink, marten, sable or fur seal, or other *fur-bearing animal[s]*" (emphasis added). Because the word "fishery" can refer to "[t]he business, occupation, or industry of catching fish, or of taking *other products of the sea* or rivers from the water," MER 644 (emphasis added), the Court's reference to seal fisheries does not mean that seals were fish.

In *The Coquitlam*, 77 F. 744, 746-47 (9th Cir. 1896), the court referred to "seal fishing" but also referred to "fishing and sealing voyages," "seal hunting and fishing," and "regulation of seal hunting." These various references do not indicate the court – or the treaty drafters – thought seals were fish. Finally, Judge Martinez read *Knight v. Parsons*, 14 F. Cas. 776, 777 (D. Mass. 1855), to refer to the right "to 'sell the fish' harvested in the 'whale fisheries.'" MER 87. However, because the fish at issue were mackerel, not whales, the case provides no support for the

proposition that fish included whales or that it was used that way by the treaty drafters.

The most direct evidence of how the treaty drafters used the term fish is found in the Makah treaty, where they added a provision for whaling or sealing to the right of taking fish. If the drafters understood the right of taking fish to include whales and seals, they would have had no need for that provision.

In discussing the Indians' understanding, Judge Martinez discounted this evidence because:

> these treaties were negotiated by different individuals and in different contexts. Colonel Simmons, who negotiated the Treaty of Olympia, lacked the authority to tailor provisions in the way that Governor Stevens was able to do when negotiating the Treaty of Neah Bay.

MER 88-89. This reasoning disregards the shellfish decision, which held the provisions in the Stevens treaties "cannot be construed in a vacuum" but "must be analyzed in light of the other Stevens Treaties." 873 F.Supp. at 1447. It also overlooks the facts that: (1) Stevens was present at the Chehalis River Council where the Quinaults signed the proposed treaty without a provision for whaling or sealing; and (2) the drafters were able to make other changes in the treaty before Stevens signed it in Olympia – including adding a provision that addressed the Quileutes' demand that they be allowed to remain on their traditional lands. *See* note 1 and accompanying text above.

Moreover, the issue is not one of "tailoring" the treaties, but of the meaning intended by the drafters; if fish included whales and seals, there would have been no need to tailor the Makah treaty by adding a provision for whaling or sealing. And, when the Senate ratified the treaties on the same day in 1859, it had no reason to believe the "right of taking fish" in the Treaty of Olympia was co-extensive with the "right of taking fish *and of whaling or sealing*" in the Makah treaty (emphasis added). *See Mille Lacs*, 526 U.S. at 207 (inquiry focuses on Senate's intent in ratifying treaty).

The drafters' understanding of the word fish is confirmed by the records of the Chehalis River Council. As Judge Martinez acknowledged, in responding to a demand for beached whales, Stevens "distinguished between 'fish' and 'whales'" (as did the Indian speakers). MER 20 (citing MER 493 ("They of course were to *fish* etc. as usual. As to *whales* they were theirs, but wrecks belonged to the owners and if the Indians found them they were to tell the wreckmaster and they would be paid a share of what they saved.") (emphasis added).

Judge Martinez suggested Stevens used "fish" in a more capacious sense earlier in the Council, MER 20, but this is not a plausible reading of the cited passage. Stevens was responding to a speech by a Lower Chehalis chief, who stated repeatedly he wanted the right to fish in the Chehalis River and not be driven off by white settlers, wanted "the privilege of the berries," and: "I want the beach.

Everything that comes ashore is mine. (Whales and wrecks.)" MER 491. In response, Stevens began by stating the treaty provided "he should have the right to fish in common with the whites, and get roots and berries." *Id*.

This reference to "the right to fish" was a direct response to the demand for the right to fish in the river. It cannot reasonably be read as a response to the demand for the beach and "[e]verything that comes ashore," including "[w]hales and wrecks," since even the most capacious reading of the word fish does not encompass the beach and shipwrecks. And, as Judge Martinez acknowledged, later in the Council (in the passage quoted above) Stevens distinguished among fish, whales and wrecks. When these passages are read together, it is apparent Stevens was not lumping whales or wrecks into the right of taking fish, but addressing each independently.[9]

Other aspects of the Chehalis River Council reinforce the conclusion that both the treaty drafters and the Indians understood the treaty would secure fishing rights in traditional *fishing* grounds, not at whaling or sealing grounds. For example, as Judge Martinez found, Stevens informed the Indians that the treaty would secure their right "to take fish *where you have always done so*" and, as just noted, that they

[9] Judge Martinez also asserted Stevens "made no distinction between the tribes' right to take beached whales and to hunt for swimming whales." MER 20. However, Stevens had no occasion to discuss the tribes' right "to hunt for swimming whales" because the topic never came up.

"were to fish etc. *as usual*." MER 9-10 (citing MER 489, 493) (emphasis added). James Swan attended the Council and later wrote "that '[t]he Indians … were to be allowed to procure their food *as they had always done* ….'" MER 11 (citing MER 833) (emphasis added). Judge Martinez found it "reasonable to infer from Swan's statement that Governor Stevens intended the treaties to reserve to tribes that had customarily harvested sea mammals the right to continue to do so 'as they had always done.'" *Id*. However, even if that inference could overcome Stevens' failure to include a whaling or sealing provision in the treaty, it does not mean Stevens intended the treaty to reserve to the Indians a right to fish in places they were unaccustomed to fishing; rather, the statement that the Indians could "procure their food as they had always done" indicates exactly the opposite.

In *Passenger Fishing Vessel*, 443 U.S. at 676, the Court observed that, "[d]uring the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were critical in obtaining the Indians' assent." In the records for the Treaty of Olympia there are repeated references to the importance of harvesting fish, but – unlike the Makah Council – there are *no* references to whaling or sealing. *See*, *e.g.*, MER 487-507, 782-783. Even during the Chehalis River Council, where there were references to beached whales (by tribes other than Quinault), no one mentioned whaling. *See* MER 491,

493-494. The absence of any reference to whaling or sealing helps explain the absence of a whaling or sealing provision in the Treaty of Olympia, and makes it unlikely the United States negotiators intended to include such a right or to expand the right of taking fish to whaling or sealing grounds where the Indians were unaccustomed to fishing.

c. Indians' Intent.

Judge Martinez began his analysis of the Indians' intent with the observation, discussed above, that "a capacious understanding of [the word fish] was in broad, popular circulation at the time the treaty was negotiated." MER 86. However, as also discussed above: Webster's 1828 dictionary specifically defined "fish" in a manner that excluded whales and seals (animals that "breathe by means of gills, swim with the aid of fins, and are oviparous"); in adding a provision for whaling or sealing to the Makah treaty, the treaty drafters made it clear that they were not using the word fish to include whales and seals; both Stevens and Indians distinguished fish from whales during the Chehalis River Council; and Gibbs and Swan also distinguished fish from whales and seals. *See* p. 29 and n.8 above. Judge Martinez identified *no* evidence to indicate the Indians, most of whom did not speak English, were familiar with a more capacious English meaning of the word fish.

Judge Martinez also asserted, "[m]ore to the point, it is clear from the linguistic evidence that the tribal signatories to the treaty drew no distinctions

between groups of aquatic species and would have understood the term 'fish' to encompass at least those aquatic animals on which they relied for their subsistence purposes." MER 87. This finding was clearly erroneous; it contradicted undisputed linguistic and anthropological evidence that Quileutes and Quinaults clearly and consistently distinguished fish, whales and seals and fishing, whaling and sealing.

i. Linguistic Evidence.

Quileutes and Quinaults had different words for fish, whales and seals and, as coastal people, undoubtedly understood the differences among these animals. MER 199-202, 621, 623-624, 681, 683-684. The Chinook jargon used during the treaty negotiations also had different words for fish, whales and seals. MER 199-200, 462-464.[10]

The existence of different Quileute words for fish and seals (and for fishing and sealing) was illustrated by a Quileute text collected by anthropologist and linguist Manuel Andrade in 1928. Andrade's free translation provides:

> When autumn comes they begin *to fish* Chinook salmon and silver-side salmon, which lasts for two months. The season is over in such a short time because that is the law of the White people. They forbid *fishing*. They do so in order to make it possible for the *fish* to reach the spawning grounds. One makes much money (during this season), because the *fish* is usually sold at a high price.

[10] Judge Martinez cited Gibbs' dictionary of the Chinook jargon for the proposition that the jargon "lacked cover (i.e. high-level) terms that could differentiate between taxa or larger groupings of aquatic animals, such as finfish, shellfish, cetaceans, and sea mammals." MER 22. However, it was undisputed that the jargon could distinguish fish, whales and seals.

> Later, according to the law of the White people, the season *to fish* steel-head salmon begins. For two months steel-head salmon is *fished*. Then comes the *sealing* season, which lasts for three months.

MER 364 (emphasis added). Andrade's word-by-word translation has different Quileute words for fish (á·lita´), fishing (a.lé·tal), and sealing (yá.ča·bał). MER 363. Quileute and Quinault's linguist, Dr. Hoard, acknowledged the terms á·lita´ and a.lé·tal were used solely with reference to fish and fishing in these passages, and that, in his review of all Quileute texts collected by Andrade and Leo Frachtenberg (another anthropologist and linguist), he did not find any in which the word á·lita´ was used to refer to marine mammals generally or whales or seals in particular. *See* MER 325-330.

Dr. Hoard testified that á·lita´ *did not mean* "an animal that lives in or on the water," and did not identify any Quileute word that did. MER 335. It was not used to refer to whaling or sealing:

> Q. You don't find any references to the word whaling or sealing that used the word "alita," did you?
>
> A. I don't think it is necessary. I think it is like sealing, there are special words for it. *These are activities which are common enough, ordinary enough that they have words of their own*.

MER 330 (emphasis added); *see also* MER 336 (Quileute language had different words for whales, hair seals and fur seals, and for hunting these marine mammals).

Dr. Hoard also acknowledged the Quileute word á·lita´ is defined as "salmon, *fish (general)*" in a Quileute dictionary. MER 330 (discussing MER 687) (emphasis added). The illustrated guide to the Quileute alphabet, which appears at the beginning of the dictionary, translates the word á·lita´ simply as "fish" and includes a picture of a finfish to illustrate it. MER 333-334, 680. Published in 1976, when even popular usage of the English word fish excluded marine mammals (*see* MER 322), this definition confirms the Quileutes had a different word for fish (of all types) than for whales, seals or other marine mammals.

Dr. Hoard testified the Quinaults also had distinct words for fish, whales and seals, and for fishing, whaling and sealing. *See* MER 337-339. In the Quinault dictionary, the English word fish is translated using the Chinook jargon term písh and the Quinault word kəmkən. MER 336-337, 621; *see also* MER 631 (p. 26 n.11) (noting that kəmkən was "the general term for fish" as well as for food). The same entry provides Quinault words for "(fish) are running," "fish (by net)," "fish (by hook)," "fish (to lift net)," and "gather fish." These words were not limited to any particular species of fish, but none was associated with marine mammals. MER 337-338, 621. Dr. Hoard was unaware of any Quinault text that used the word kəmkən to refer to marine mammals. MER 340-341.

Thus, both Quileutes and Quinaults had words that referred to fish generally, but excluded marine mammals. Judge Martinez's finding that "neither tribe's

language possessed terms that could differentiate between groupings of aquatic species, such as sea mammal, shellfish, and finfish," MER 22-23, cannot be reconciled with this undisputed evidence.[11]

ii. Anthropological Evidence.

Fishing, whaling and sealing were different practically and culturally as well as linguistically. Here too the evidence was undisputed. Makah's expert, Dr. Renker, explained that Northwest Coast peoples generally had occupational specialties, and for tribes that engaged in whaling and sealing, those activities comprised distinct occupations from each other and from fishing. MER 203-204. There were different rituals, gear, oral traditions and art associated with each of these activities. *Id*. Quileute and Quinault's expert, Dr. Boxberger, agreed:

> Q. … In your opinion, did the Quileutes have different ritual societies for whaling, sealing and fishing?
>
> A. Yes.
>
> Q. Did they have different ceremonies relating to whaling, sealing and fishing?
>
> A. Yes, they did.
>
> Q. Did they have different gear for whaling, sealing and fishing?

[11] As Judge Martinez found, the Quileute and Quinault words for fish could also mean "food." MER 22. However, the right of taking fish cannot reasonably be interpreted to include all food resources. Any such interpretation would be contrary to the treaties' plain language (which contains separate provisions for taking fish, hunting, and gathering roots and berries) and the intention of the parties (who distinguished these activities during the negotiations).

A. Yes, they did.

Q. Did they use different canoes for whaling, sealing and fishing?

A. Yes, they did.

Q. They had different words to describe whaling, sealing and fishing; is that correct?

A. That's a linguistic question, but that is my understanding.

MER 217-218; *see also* MER 260-261 (discussing whaling as a unique occupation influenced by family history, identity, ceremonialism and spirituality), 264-265 (discussing occupational specialization in Northwest coast cultures and noting "an individual could specialize in … being a whaler"), 265-266 (discussing the role of guardian spirits in occupational specialization, including choice to pursue whaling, canoe making, hunting, fishing or other activities), 244-245 (noting whale hunting was "a very specialized occupation" among Quinaults), 249-250 (describing whaling as "a pretty dangerous occupation" for Quinaults, and noting that of many specialized occupations, "[w]haling was considered one of the most highly regarded of specializations"), 250-251 (describing other activities in which Quinaults specialized, including owning "particularly productive fishing sites" and hunting).

This testimony was supported by ethnographic literature. In the principal Quinault ethnography, Dr. Ronald Olson included separate descriptions of fishing and hunting sea animals. *See* MER 631-637, 640-642. Hunting was "not as

important in the Quinault economy as was fishing," but was "looked upon as a profitable way to spend the month or two following the salmon runs." MER 638 (p. 41). There was a clear distinction between hunting – including hunting sea mammals – and fishing:

> A somewhat romantic aura surrounded the pursuit of hunting, whether of the sea mammals or of elk and bear, and men were fond of relating their hunting experiences. For this reason they looked with a sort of disdain upon men who were not reckoned good hunters and who found it more profitable to spend most of their time fishing.

Id. Whale hunting, in particular, was a specialized pursuit:

> Whaling was a dangerous and spectacular pursuit and was hedged about with ritual. To be a whale hunter a man had to possess the right type of super-natural power; he must each season subject himself to a long period of "training" to insure success, and, not the least important, he must possess an ocean canoe and considerable other expensive gear. He must also be able to call together seven other men to aid him. Considering that it called for all these as well as a stout heart, it is no great wonder that only a few men followed whaling. Among the Quinault it is unlikely that more than a half dozen at any one time possessed the necessary qualifications and equipment.

MER 640 (p. 44); *see also* MER 641-642 (pp. 47-48). This description makes it clear that whaling was not simply another form of fishing (for which no similar rituals or training were mentioned), but an entirely separate pursuit.

Dr. Frachtenberg's Quileute ethnography indicates the same was true for Quileutes. Although he discussed fishing, sealing and whaling in a section called "fishing," and referred to sealing as a "style of fishing," he discussed each of these activities separately and provided different Quileute words for them. *See* MER 397-

436. In his discussion regarding fishing he wrote that "[f]ish were caught with dragnets, scoopnets and fish-trap, fishbaskets, dipnets, spears, hooks and lines," MER 397, and described each item of equipment and associated fishing activities in detail. MER 397-413. All of the equipment Frachtenberg described for catching "fish," including "ocean fish" (MER 405), was used to catch fish, not marine mammals. MER 397-413. Frachtenberg also reported that "[e]ach mode of catching fish had a separate term" and identified 20 such terms, none of which related to marine mammals. MER 410-411.

In his discussion regarding sealing, Frachtenberg identified separate Quileute words for fur sealing and hair sealing and provided a detailed description of the gear used in fur sealing and of the hunt itself, which had no association with fishing. MER 414-421. He identified the guardian spirit of the spearman and identified eight beliefs and inhibitions held by fur seal hunters – practices that also were not associated with fishing. MER 419-421.

Frachtenberg provided a Quileute word for whaling, and a detailed description of the equipment used for whaling as well as the manner in which the equipment was marked, decorated, used and stored and in which the hunt was conducted, which too had no association with fishing. MER 422-436. Like Olson, Frachtenberg observed that a whale "hunt was a dangerous undertaking, requiring great skill, courage and quickness on the part of spearman and steerman." MER 432. He

described rituals and training associated with whaling that had no association with fishing. MER 432-435.

In sum, substantial and undisputed evidence demonstrated that Quileutes and Quinaults distinguished fishing, sealing and whaling in every conceivable way. They were distinct occupations pursued by different individuals, required different preparation and training, involved the use of different gear and harvesting techniques, and were surrounded by different rituals, ceremonies and art. Given these differences, it cannot reasonably be inferred that Quileutes and Quinaults understood the right of taking fish "where [they had] always done so," MER 489, to secure a right of taking fish where they hunted whales or seals but were *unaccustomed* to fishing. Judge Martinez identified no evidence to support that inference, and his attempt to conflate fishing, whaling and sealing as a single activity cannot be reconciled with the evidence. *See Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015) ("finding is clearly erroneous if it is '(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record'") (quoting *U.S. v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (*en banc*)).

d. Post-Treaty Evidence.

Judge Martinez also found that "the tribes continued to harvest whales and seals in the decades following the Treaty of Olympia with active encouragement of federal officials and special dispensations on account of their tribal status" and that

this "shows that both sides believed the right to harvest sea mammals to have been reserved to the tribes." MER 88. However, this finding does not support the proposition that the right of taking fish, with its express limitation to usual and accustomed grounds, extends to waters in which the Indians were unaccustomed to fishing.

First, the post-treaty evidence does not support the existence of a *treaty* right to hunt sea mammals. No federal official referred to a treaty right in encouraging the Indians to continue whaling and sealing and the special dispensations (made in the Bering Sea Arbitration Award and Act) were based on *tribal status*, not treaty rights (notably, the same dispensations were extended to Alaskan and Canadian natives who had no treaty rights). *See* MER 23, 88, 784-785, 887. Second, even if the post-treaty evidence supported an inference that the treaty reserved a right to hunt sea mammals, it does not indicate whether that right was part of the right of taking fish, the privilege of hunting on open and unclaimed lands (which was separately reserved in the treaties) or an implied right under the reserved-rights doctrine.[12] Third, none of the post-treaty evidence involved an expansion of Quileute or Quinault fishing into waters in which they were unaccustomed to fish at

[12] *Cf. Anderson v. Evans*, 371 F.3d 475, 499 (9th Cir. 2004) ("less specific 'hunting and fishing' rights [in treaties other than Makah's] might be urged to cover a hunt for marine mammals[;] [a]lthough such mammals might not be the subject of 'fishing,' there is little doubt they are 'hunted'").

treaty times, and there is no evidence they or any federal official believed they had a treaty right to do so.

For these reasons, Judge Martinez erred in holding the Treaty of Olympia secured a right to fish in waters in which the Indians were unaccustomed to fishing.

B. The District Court Erred in Using Longitudinal Lines to Define Quileute and Quinault's Western Boundaries.

After concluding Quileute and Quinault's U&As extended 40 and 30 miles from shore, Judge Martinez defined Quileute's western boundary as 125°44'00" W. and Quinault's western boundary as 125°08'30" W. MER 2-4.

The Quileute boundary is 40 nautical miles from the coast at the extreme northern end of its ocean U&A. MER 126. However, because the coast trends from northwest to southeast in the Quileute area, the Quileute boundary is approximately 56 nautical miles from the coast at the southern end of its ocean U&A. *Id*. The boundary adds approximately 413 square statute miles to Quileute's U&A compared to a line that parallels the coast 40 nautical miles offshore. *Id*.; *see also* MER 132.

The Quinault boundary is 30 nautical miles from the coast at the extreme northern end of its ocean U&A. MER 126-127. Because the coast also trends from northwest to southeast in the Quinault area, the Quinault boundary is 41 nautical miles from the coast at the southern end of its U&A. MER 127. The boundary adds approximately 387 square statute miles to Quinault's U&A compared to a line that parallels the coast 30 nautical miles offshore. MER 126; *see also* MER 132.

1. The Makah Methodology.

Judge Martinez offered two justifications for these boundaries. First, he asserted the methodology applied in Makah's case was the appropriate methodology to use in this case. MER 3. Because this rationale rested on a legal conclusion, it should be reviewed de novo.

In the Makah case, the United States proposed a western boundary of 125°44' W. longitude, noting it was "40 miles west from the westernmost point of the North Washington coast – Cape Alava, Washington." MER 1250-1251. However, in adopting that boundary, the court stated it was based "on all evidence submitted and reasonable inferences drawn therefrom" and included waters "west of the coasts of Vancouver Island and what is now the State of Washington … including but not limited to the waters of 40 Mile Bank … to the extent that such waters are included in the area described." 626 F.Supp. at 1467.

As noted above, the court had found that "Makah regularly fished at known fishing banks some 30 to 40 miles offshore." *Id*. The evidence indicated those banks included 40 Mile (or La Perouse) Bank, which lies west of Vancouver Island and extends from longitude 125°33' W. to 126° W. MER 1234, 1248, 1272, 1277, 1288; *see also* MER 860 (depicting La Perouse Bank).

The western boundary adopted by the Makah court tracked this evidence. Beginning on the north where it intersects Vancouver Island, it proceeds south well

within 40 miles of the Vancouver Island coast, bisecting 40 Mile Bank. *See* MER 1248. As the boundary proceeds south off the Washington coast, it is 40 nautical miles west of Cape Flattery and, further south, 40 nautical miles west of Cape Alava. There is no pronounced southeasterly trend along this portion of the coast; consequently, at no point south of the U.S.-Canada line is the Makah boundary more than 42 nautical miles from the coast. MER 127, 132.

There is nothing in this record to support the proposition that, as a matter of law, a tribe's U&A boundary must follow a single longitudinal meridian regardless of the distance from the coast or the tribe's adjudicated fishing grounds. In Subproceeding 11-2, Judge Martinez excluded Lummi from marine waters comprising approximately 310 square miles because there was no evidence before Judge Boldt of Lummi fishing in that area. *See* MER 1027-1028, 1042 n.5, 1068. The addition of even larger areas to Quileute and Quinault's U&As based on the alleged "methodology" in the Makah case was erroneous.

2. The Radial Theory.

Judge Martinez also stated he agreed "with the geographical/evidentiary bases for the calculations and conclusions presented by Quileute, Quinault, Hoh and their experts" and, in particular, "that Quileute and Quinault fishermen did not robotically fish at locations directly west from their villages, but instead chose advantageous launching sites and traveled in multiple directions from those sites …." MER 4.

Because this rationale rested on a factual finding, it should be reviewed for clear error.

To represent fishing in "multiple directions" from coastal sites, Quileute and Quinault's expert prepared three maps depicting ocean areas within a 40-nautical-mile radius of Quileute sites on the coast and the relationship of those areas to its proposed western boundary. MER 102-104. No similar map was prepared for Quinault. Thus, for Quinault, there was *no evidence* that the radial approach supported the boundary adopted by the court. To the extent Judge Martinez found otherwise, that finding was clear error.

As to Quileute, the maps show that, even using the radial approach, the boundary adopted by the court encompasses large areas beyond the 40-mile limit of their U&A. Although the court denied Makah's request to respond to the radial theory,[13] the maps Quileute submitted indicate the additional area is about half the area initially calculated by Makah, or some 200 square miles. *See* MER 104. Given

[13] Judge Martinez's findings directed Quileute and Quinault "to file notice with the Court of the precise longitudinal coordinates associated with the boundaries set forth herein," and allowed Makah and other parties to file "a concise response." MER 92-93. In their notices, Quileute and Quinault did not mention the radial approach. *See* MER 135-141, 142-146. After Makah and the State responded, Judge Martinez directed Quileute and Quinault to file a response. MER 120-121. Although their response (MER 102-104, 112-115) presented the radial theory and supporting evidence for the first time, Judge Martinez denied Makah's request to reply. MER 8 n.1; *see* MER 97-99.

the large extent of this area, Judge Martinez's finding that Quileute's boundary was supported by the radial approach was clear error.

C. Quileute's Customary Fishing Grounds Did Not Extend 20 Miles Offshore.

Citing Frachtenberg, Singh and Daugherty, Judge Martinez found Quileutes "were more likely than not harvesting finfish up to twenty miles offshore on a regular and customary basis." MER 48-49. This finding was clearly erroneous.

1. Frachtenberg.

Frachtenberg was a "noted anthropologist" who studied the Quileutes in 1915 and 1916." MER 40; *see also* MER 173-174 (Frachtenberg's work has been highly regarded by anthropologists who have worked with the Quileutes); MER 693 (describing Frachtenberg as "one of the best ethnographers we have"); MER 697 (Frachtenberg's "researches with the Quileute were the most extended and intensive of any anthropologist and his unpublished manuscript is the primary source of information on this tribe"); MER 665 (Frachtenberg's work is "loaded with insights into old time Quileute lifeways"). Frachtenberg's studies were facilitated because Quileutes lived together in a single village (La Push) and held "'tenaciously to … their former customs and traditions….'" MER 40 (quoting MER 892); *see also* MER 892-894 (Frachtenberg obtained the "most voluminous data," including "exhaustive data on ... Hunting, Fishing, Sealing, and Whaling").

Frachtenberg provided a detailed description of Quileute fishing practices. MER 397-413; *see also* MER 391-395 (discussing fishing locations). As Judge Martinez acknowledged, Frachtenberg's description placed Quileute ocean fishing *within two miles of shore or along rocks and reefs, not 20 miles offshore*: "According to Frachtenberg, halibut was harvested within two miles of shore, cod taken along rock and reefs, and other fish caught under rocks in rough weather with a kelp line." MER 49 (citing MER 406-410).

Judge Martinez also cited Frachtenberg's statement that ocean travel "was confined to about 20-30 miles westward." MER 49 (citing MER 439-440). However, that statement was found in Frachtenberg's discussion of "Travel, Transportation, and Trade," and did not suggest Quileutes were traveling 20-30 miles westward to fish – a proposition that finds no support in and contradicts Frachtenberg's detailed description of Quileute ocean fishing. Frachtenberg himself tied the 20-30 mile range to whaling or sealing, stating Quileutes "go out sealing 20-30 miles into ocean attacking whales with their primitive weapons." MER 388.

2. Singh.

In rejecting Frachtenberg's description of Quileute fishing practices, Judge Martinez did not question Frachtenberg's reliability but asserted "[o]ther reliable accounts" placed "Quileute fishing further offshore." MER 49. He first cited Ram Singh, who worked with Makahs, Quileutes and Quinaults in 1954 and 1955 (40

years after Frachtenberg's Quileute work and 100 years after the treaty) as part of a comparative study of the tribes' aboriginal economic systems. MER 705-708. According to Judge Martinez, Singh "reported that the coastal Indians, including the Quileute and Hoh, harvested bass six miles offshore and fished at halibut beds eight to twelve miles offshore." MER 49 (citing MER 723, 736). However, this provides no support for a finding that Quileutes customarily fished *20 miles* offshore.

Moreover, with respect to halibut, Singh actually reported Quileute and Hoh had only limited fisheries, which took place near James Island and south of Destruction Island:

> The Strait of Juan de Fuca and the Swiftsure Bank provided *the Makah* with whale, seal, and porpoise, and there were *numerous halibut beds near Tatoosh Island near the coast*. South of Cape Flattery there are *only two small beds* so far as I could determine, *one near James Island and the other south of Destruction Island*. The *Hoh and Quileute generally did not attempt to obtain halibut* although the Hoh who lived on Destruction Island could get a few. …

MER 722 (emphasis added; footnote omitted); *see also* MER 743 (hooks used for ocean fish "played a small role in [Quileute] fishing"; Quileutes' "infrequently caught halibut and cod with hooks"), 752 (halibut not listed as an important food resource for Quileute or Hoh), 754 (Quileutes did not smoke halibut or other ocean fish "because of the small catch"). Since James Island lies a "few hundred meters" offshore of La Push and Destruction Island is "about four miles offshore," MER 277-278, 291-292, Singh's account is similar to and corroborates Frachtenberg's report that Quileutes fished for halibut within a few miles of shore.

Frachtenberg and Singh's descriptions were corroborated by other evidence Judge Martinez did not cite, including: (1) a report by the International Fisheries Commission (formed by the United States and Canada to manage the halibut fishery) that, except for Makah, traditional Indian halibut fishing took place close to shore in 10 to 20 fathoms of water, MER 849; and (2) Jay Powell's notes, which record a Quileute name for "shallow flats about 2 miles out" where Quileutes took halibut, MER 656.[14]

Judge Martinez did not mention Singh's description of Quileutes' limited, nearshore halibut fishery. Instead, he relied on a passage in Singh's discussion of "Material Means of Production":

> [The Indians] knew means by which they could locate halibut beds eight to twelve miles offshore. In the open sea, using the method we call triangulation, they found the exact location of a halibut bed which was a few acres in size. The Hoh exploited a small halibut bed by this method and fished there annually.

MER 736. However, Singh's reference to halibut beds eight-to-twelve miles offshore was almost certainly a reference to the "numerous halibut beds near Tatoosh

[14] Other evidence corroborated Singh's assessment that Quileutes had only a limited halibut fishery. *See, e.g.,* MER 863 (Swan: halibut "form no part of the winter's food" of Quileute, Hoh and more southerly tribes), MER 689 (Agent Powell: Quileutes "are too far from the halibut banks to obtain many"); MER 652 (anthropologist George Pettitt: "[t]rout, halibut, and other fish were sometimes caught with hook and line, but this was unimportant in the total [Quileute] economy"), MER 583 (Barbara Lane: halibut "did not figure prominently in … Quileute diet").

Island" that Singh said were utilized by Makah, not to the two small beds Singh associated with Quileute and Hoh. *See* MER 722, 731; *see also* MER 67-73 (Judge Martinez's finding that halibut beds off Tatoosh Island were used by Makah, not Quileute, at treaty times). Even Quileute's expert (Dr. Boxberger) acknowledged Singh could have been referring to "halibut beds off of Tatoosh Island." MER 213.

This reading is supported by the fact that "eight to twelve miles offshore" is within the range of the Makah halibut beds off Cape Flattery. In a report on Makah's ocean fisheries, Dr. Lane cited numerous sources discussing the location of those beds. *See* MER 572 (Waterman: halibut banks off Cape Flattery "lie from five to thirty miles off shore"), 580 (U.S. Fish Commission: "well-known halibut bank, resorted to by the Indians, begins close to shore in the vicinity of Cape Flattery, and extends thence northwestward some 15 miles"), 581 (U.S. Fish Commission: dredging stations made "on the halibut bank at the mouth of the Straits of Fuca, at distances of 10 to 12 miles northwesterly from Cape Flattery"), 582 (Swan: halibut "were taken on the well-known bank, from 9 to 12 miles west-northwest (magnetic) from Tatoosh Island"), 586 (Sproat: best halibut grounds off the Strait of Juan de Fuca "are about twelve miles off the land"). In contrast, no source identified a Quileute or Hoh halibut bed located eight-to-twelve miles offshore.

Read as a whole Singh's account supports Frachtenberg's earlier and more detailed account. It does not support the proposition that Quileutes regularly fished 12 miles offshore, let alone 20.

3. Daugherty.

Judge Martinez also discussed an entry in Richard Daugherty's notes of a 1949 interview with Bill Hudson. MER 39. According to Judge Martinez, Hudson, born in 1881, informed Daugherty that Quileutes fished for halibut in depths of 50 to 60 fathoms using kelp lines in the traditional pre-contact style. *Id.* (citing MER 902, 268-271). Judge Martinez reasoned that "[f]ishing at a depth of 50-60 fathoms would place the Quileute approximately twenty miles offshore of La Push and at areas of peak abundance of halibut during the summer season." *Id.* (citing MER 268-271, 297, 300-301).

There are several problems here. First, it was unclear whether Hudson, who was born 26 years after the treaty, was describing treaty-time fishing from La Push. Quileute's expert, Dr. Boxberger, testified that Hudson's 50-to-60 fathom reference could have been to fishing off of Cape Flattery as opposed to La Push (MER 221-222, 230-232), a practice Judge Martinez found did not begin until well after the treaty (MER 67-73). As Dr. Boxberger acknowledged, Daugherty recorded other activities that took place in the post-treaty period. MER 229-230.

Second, the fact that Hudson's 50-to-60 fathom reference appears only in Daugherty's field notes limits its usefulness. Dr. Boxberger testified that reliance on field notes is problematic for several reasons; among others, "we don't know the context in which [the information] was gathered" (MER 209); field notes "always leave out information" and often contain "conflicting statements" (MER 93, 216); and they are written for a researcher's own use, with no standardization (MER 224-225, 232-233, 242).

Daugherty's notes record the name of a halibut bank "SW of La Push" meaning "rock bank," describe a "line of kelp" and identify the name for it, and state "any deep water line called this – water not too deep – 50-60 fathoms." MER 902. The notes do not reconcile the observation that the water was not too deep with the 50-to-60 fathom range, *cf.* MER 270 (Boxberger's testimony that "300 to 360 feet [equivalent to 50-to-60 fathoms] sounds pretty deep to me"), and do not state Quileutes were fishing 20 miles offshore, a distance that appears inconsistent with a rock bank. *See* MER 180 (rocky areas lie within three to four miles of shore in Quileute territory).

Although Daugherty's notes do not resolve these questions, Hudson was also one of Singh's informants. MER 712. As discussed above, when Singh synthesized and analyzed information from his informants in a published monograph, he reported Quileutes and Hohs took halibut from "two small beds" (near James Island and south

of Destruction Island), MER 722, not 20 miles offshore in areas of peak halibut abundance. His conclusion was consistent with Frachtenberg's detailed description and was corroborated by other sources, including many noting the limited nature of Quileute halibut fishing. *See* note 14 above. Given the limitations of field notes, Judge Martinez's reliance on the 50-to-60 fathom reference in Daugherty's notes to extend Quileute's customary halibut fishery far beyond those areas was clearly erroneous.

Finally, there was no basis to infer Quileutes fished in areas of peak halibut abundance despite contrary evidence in Frachtenberg, Singh and other sources. Quileute's expert, Dr. Gunderson, testified halibut currently are available "shoreward of the 30-fathom line" and would have been more abundant in nearshore areas before commencement of the non-Indian halibut fishery in 1888. MER 311-314. Accordingly, he had "no reason to doubt" Quileutes could have caught halibut within five to ten miles of shore at treaty times. MER 314. That halibut may have been more abundant farther offshore – just as they were more abundant off Cape Flattery – does not mean Quileutes went there to catch them. The available evidence – including Frachtenberg and Singh's ethnographic accounts, the International Fisheries Commission's report and Jay Powell's field notes – showed Quileutes did not customarily fish more than five to ten miles offshore.

CONCLUSION

This court should reverse and remand for further proceedings consistent with the following holdings: (1) whaling and sealing cannot be used to determine Quileute and Quinault's U&As; (2) large areas cannot be added to their U&As by drawing their boundaries along longitudinal lines; and (3) Quileutes did not customarily fish more than five to ten miles offshore at treaty times.

Respectfully submitted,

ZIONTZ CHESTNUT

s/ Marc D. Slonim

Marc Slonim
Joshua Osborne-Klein

STATEMENT OF RELATED CASES

The Makah Indian Tribe is aware of the following related cases pending in this court that, under Ninth Circuit Rule 28-2.6, may be related to this case: (1) *U.S. v. Washington* (*In re Culverts*), No. 13-35474 (decided on June 27, 2016; mandate pending); (2) *U.S. v. Washington* (*Lummi U&A*), No. 15-35661; and (3) *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, No. 15-35540. Like this case, these three appeals arise from the district court's exercise of its continuing jurisdiction in *U.S. v. Washington*. Each appeal is from a separate district court subproceeding. The first case involves a dispute between the United States and the Tribes, on the one hand, and the State of Washington, on the other, regarding culverts that impair fish passage. The other two cases involve inter-tribal disputes over the location of usual and accustomed fishing places, but do not involve evidence of whaling or sealing.

Dated: July 6, 2016.

ZIONTZ CHESTNUT

/s Marc D. Slonim

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Attorney for Makah Indian Tribe

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 13,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: July 6, 2016.

ZIONTZ CHESTNUT

/s Marc D. Slonim

Marc D. Slonim, WSBA No. 11181
Attorney for Makah Indian Tribe

CERTIFICATE OF SERVICE

I certify that on July 6, 2016, I electronically filed the foregoing Brief of Appellant Makah Indian Tribe with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 6, 2016.

ZIONTZ CHESTNUT

/s Cara Hazzard

Legal Assistant

ADDENDUM

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TREATY WITH THE MAKAH, 1855.

Jan. 31, 1855. | 12 Stat., 939. | Ratified Mar. 8, 1859. | Proclaimed Apr. 18, 1859.

Articles of agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the several villages of the Makah tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

ARTICLE 1.

The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-déAh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately ceded to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

ARTICLE 2.

There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE 3.

The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In

the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 4.

The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 5.

In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 6.

To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefor accordingly.

ARTICLE 7.

The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the

same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

ARTICLE 8.

The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

ARTICLE 9.

The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

ARTICLE 10.

The above tribe is desirous to exclude from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11.

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of the other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter and farmer for the like term to instruct the Iindians in their respective occupations. Provided, however, That should it be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

ARTICLE 12.

The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

ARTICLE 13.

The said tribe finally agrees not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

ARTICLE 14.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned, chiefs, headmen and delegates of the tribe aforesaid have here unto set their hands and seals at the place and on the day and year herein before written.

TREATY WITH THE QUINAIELT, ETC., 1855.

July 1, 1855. Jan. 25, 1856. | 12 Stats., 971. | Ratified Mar. 8, 1859. | Proclaimed, Apr. 11, 1859.

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians,on the part of said tribes and bands, and duly authorized thereto by them.

ARTICLE 1.

The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is thesouthwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coas trange of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast;thence northerly along said coast to the place of beginning.

ARTICLE 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, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the samewithin one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied,if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation on compensation being made for any damage sustained thereby.

ARTICLE 3.

The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with allcitizens of the Territory, and of erecting temporary houses for thepurpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however*, That they shall not take

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shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

ARTICLE 4.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year: for the next three years, one thousand six hundred dollars each year: for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5.

To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6.

The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated: and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof,to be surveyed into lots, and assign the same to such individuals orfamilies as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

ARTICLE 7.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8.

The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this

pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in case of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

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ARTICLE 9.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE 10.

The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of saiddistrict, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter''s shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

ARTICLE 11.

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12.

The said tribes and bands finally agree not to trade at Vancouver''s Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE 13.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President andSenate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

Isaac I. Stevens, Governor and Sup''t of Indian Affairs.

Tah-ho-lah, Head Chief Qui-nite-''l tribe, his x mark. [L. S.]
How-yat''l, Head Chief Quil-ley-yute tribe, his x mark. [L. S.]
Kal-lape, Sub-chief Quil-ley-hutes, his x mark. [L. S.]
Tah-ah-ha-wht''l, Sub-chief Quil-ley-hutes, his x mark. [L. S.]
Lay-le-whash-er, his x mark. [L. S.]
E-mah-lah-cup, his x mark. [L. S.]
Ash-chak-a-wick, his x mark. [L. S.]
Ay-a-quan, his x mark. [L. S.]
Yats-see-o-kop, his x mark. [L. S.]
Karts-so-pe-ah, his x mark. [L. S.]
Quat-a-de-tot''l, his x mark. [L. S.]
Now-ah-ism, his x mark. [L. S.]
Cla-kish-ka, his x mark. [L. S.]
Kler-way-sr-hun, his x mark. [L. S.]
Quar-ter-heit''l, his x mark. [L. S.]
Hay-nee-si-oos, his x mark. [L. S.]
Hoo-e-yas''lsee, his x mark. [L. S.]
Quilt-le-se-mah, his x mark. [L. S.]
Qua-lats-kaim, his x mark. [L. S.]
Yah-le-hum, his x mark. [L. S.]
Je-tah-let-shin, his x mark. [L. S.]
Ma-ta-a-ha, his x mark. [L. S.]
Wah-kee-nah, Sub-chief Qui-nite''l tribe, his x mark. [L. S.]
Yer-ay-let''l, Sub-chief, his x mark. [L. S.]
Silley-mark''l, his x mark. [L. S.]
Cher-lark-tin, his x mark. [L. S.]
How-yat-''l, his x mark. [L. S.]
Kne-she-guartsh, Sub-chief, his x mark. [L. S.]
Klay-sumetz, his x mark. [L. S.]
Kape, his x mark. [L. S.]
Hay-et-lite-''l, or John, his x mark. [L. S.]

Executed in the presence of us; the words ""or tracts,"" in the II. article, and ""next,"" in the IV. article, being interlined prior to execution.

M. T. Simmons, special Indian agent.
H. A. Goldsborough, commissary, &c.
B. F. Shaw, interpreter.
James Tilton, surveyor-general Washington Territory.
F. Kennedy.
J. Y. Miller.
H. D. Cock.