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

REPLY BRIEF OF APPELLANT MAKAH INDIAN TRIBE

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INTRODUCTION

Quileute and Quinault seek a treaty right to fish in vast areas of the Pacific Ocean in which they did not fish at treaty times. They claim this right on the basis of treaty-time whaling and sealing.

Whether whaling and sealing can define a tribe's usual and accustomed fishing grounds (U&A) was decided, by necessary implication, in *U.S. v. Washington*, 626 F.Supp. 1405, 1466-68 (W.D. Wash. 1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984) (*Makah*). The district court distinguished fishing, whaling, and sealing: it found Makah regularly hunted whales and seals more than 40 miles offshore but limited Makah's U&A to waters within 40 miles of shore where Makah customarily fished. In affirming, this court also distinguished fishing, whaling and sealing and acknowledged Makah may have pursued whales and seals up to 100 miles offshore. However, like the district court, it did not consider such evidence in determining Makah's U&A, but based its decision on where Makah fished. The necessary implication is that whaling and sealing cannot be used to determine U&A.

Even if the issue could be considered anew, the evidence established both sides to the Treaty of Olympia distinguished fishing, whaling and sealing. The treaty drafters made this plain in providing, in the Makah treaty, for "the right of taking fish and of whaling or sealing." Distinguishing fishing, whaling and sealing was common in the 19th century and reflected obvious differences among these

endeavors as well as an American usage of "fish" in Webster's 1828 Dictionary. Although fish also had a broad popular meaning, the best evidence of the drafters' intent is found in the commonplace distinction they utilized in Makah's treaty.

Quileute and Quinault also distinguished fishing, whaling and sealing. Their languages had different words for these activities and no word or cultural construct linked all three as a single pursuit. The differences among fishing, whaling and sealing – each comprising a *separate occupation* pursued by different individuals belonging to different ceremonial societies, surrounded by different rituals, music and art, and involving different canoes and gear at different seasons and locations – were pervasive.

This is not a matter of Linnaean classifications, linguistic drift or technical meaning of words to learned lawyers. Fishing, whaling, and sealing were not the same and there is no evidence anyone – least of all Quileute and Quinault – thought they were. Against this undisputed backdrop, it cannot reasonably be concluded that Quileute and Quinault understood the treaty "right to fish as they always had, in the places where they had always fished,"[1] provided for an enormous expansion of traditional fishing places to distant whaling and sealing grounds.

[1] Quileute and Quinault Brief (Q&Q Br.) at 117 (quoting *U.S. v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998)).

Quileute and Quinault's complaint (Br. at 20) that this would oust them from fisheries they have depended on since prehistoric times lacks merit; to the contrary, their traditional fishing grounds would be fully preserved, while their whaling and sealing grounds would remain should they seek to exercise whaling or sealing rights. Quileute and Quinault have described their "principal fisheries" as "place-oriented fisheries at the mouths of the rivers," and have described themselves as "river fishing peoples" who, at treaty times, "relied principally on salmon and steelhead taken in their long and extensive river systems." MSER 53; MSER 62, 64. Reversing the district court's reliance on whaling and sealing would not oust them from these or any other places where they customarily fished.

The district court erred in two other respects. First, in using longitudinal lines for western boundaries, it extended the southern end of Quileute's U&A 56 miles offshore (16 miles beyond its 40-mile Quileute U&A finding) and the southern end of Quinault's U&A 41 miles offshore (11 miles beyond its 30-mile Quinault U&A finding), adding hundreds of square miles to their U&As. While *Makah* supports straight-line boundaries with small deviations from the contours of the coast, it does not support these substantial deviations.

Second, the district court erred in finding Quileute customarily fished up to 20 miles offshore at treaty times. The district court's reliance on ambiguous field notes recorded almost 100 years after the treaty, which were contradicted by detailed

ethnographic accounts specifically addressing treaty-time fishing practices, was clearly erroneous.

ARGUMENT

A. *Makah* Established U&As Cannot Be Defined by Whaling or Sealing in the Absence of Fishing.

Makah's opening brief (at 12-21) demonstrated *Makah*: (1) rejected use of whaling or sealing to define U&As in the absence of fishing; and (2) should have been followed here under the law of the case and circuit doctrines and the principle that the same methodology must be used in all U&A determinations. Quileute and Quinault (Br. at 73-86) and the Six Tribes (Br. at 13-17) claim *Makah* did not distinguish whaling, sealing and fishing, but instead found Makah failed to present sufficient evidence of customary whaling or sealing more than 40 miles offshore. Because the dispute is over what was decided in *Makah*, it presents an issue of law reviewed *de novo*. *See U.S. v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014); Q&Q Br. at 24-25.[2]

1. The District Court Decision.

a. Areas More than 40 Miles Offshore.

[2] The Six Tribes (Br. at 16) argue for deference to the district court's interpretation of *Makah*. However, the cases cited are inapposite here, where the district court interpreted a 34-year-old opinion by a *different* district court judge and a 32-year-old opinion by this court. *See*, *e.g.*, *U.S. v. Spallone*, 399 F.3d 415, 423-24 (2d Cir. 2005) (deference is accorded to the "draftsman," not a different judge who did not draft the disputed order).

The district court found that "[a]t 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.[3] In this finding, the court distinguished fish of all kinds from whales and seals; although they could all be the subject of fisheries, whales and seals were not fish.[4]

The distinction between fishing, whaling and sealing is manifest in the following passage, in which the court explained the basis for limiting Makah's U&A to 40 miles offshore:

> The Special Master determined that the Makah customarily *fished* at distances of from forty to one hundred miles offshore. Although the Makah traveled distances *greater than forty miles from shore for purposes of whaling and sealing*, the Court finds that it is clearly erroneous to conclude that the Tribe customarily traveled such distances *to fish*.

626 F.Supp. at 1467 (emphasis added). This passage contrasts two different activities – travel for purposes of whaling and sealing on one hand, and travel for purposes of fishing on the other. It was clearly erroneous to conclude Makahs

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[3] In the shellfish appeal, the tribes quoted this passage in their discussion of *Makah*, but omitted the reference to whales and seals, pointing only to Makah fisheries for "halibut, salmon, cod 'and other kinds of fish.'" MER 968 n.32. Quileute and Quinault's suggestion (Br. at 84-85) that the tribes contended the Makah determination rested on whaling and sealing evidence – despite their telltale omission of whales and seals – lacks merit.

[4] This usage was consistent with the ordinary meaning of the word fishery. *See* MER 644 ("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") (emphasis added).

customarily traveled more than 40 miles offshore to fish – despite traveling more than 40 miles offshore for purposes of whaling and sealing – because whaling and sealing were not fishing.

Quileute and Quinault and the Six Tribes' reading of this passage assumes that "to fish" meant "to whale or seal," so that the court intended to say: "Although the Makah traveled distances greater than forty miles from shore for purposes of whaling and sealing, the Court finds that it is clearly erroneous to conclude that the Tribe customarily traveled such distances to ~~fish~~ whale or seal." Apart from its awkwardness, this revision is untenable for three reasons. First, it ignores the ordinary meaning of the word fish in 1982, which did not include whales or seals. *See* MER 322.

Second, it ignores the context of this passage, in which the court expressly distinguished whaling and sealing from fishing.

Third, it ignores the court's finding that, at treaty times, Makahs "engaged *regularly* and successfully in offshore fisheries for … whales and seals." *U.S. v. Washington*, 626 F.Supp. at 1467 (emphasis added). The court thus made two express findings regarding Makah whaling and sealing: (1) these were regular pursuits at treaty times; and (2) Makahs went more than 40 miles offshore for these purposes. It made no express finding that Makahs did not customarily go more than 40 miles offshore for these purposes. The attempt to imply such a finding, by

interpreting the word fish to mean something it did not mean in 1982 and in a manner inconsistent with the context, lacks merit.

The court again distinguished fishing and whaling on Makah's motion for reconsideration. It acknowledged Makahs "tried to capture *whales*," which "were out farther than *the fishing banks*," with no suggestion such efforts only occurred occasionally. MER 1221 (emphasis added). In stating subsequently there was "no evidence of usual and accustomed *fishing* at treaty times beyond 40 to 45 mile *fishing banks* off the coast," MER 1223 (emphasis added), the court distinguished whaling (which occurred "out farther than the fishing banks") from fishing (which did not occur "beyond [the] fishing banks"). Given the court's distinction between whaling, sealing and fishing, Quileute and Quinault's reliance on passages in which the court stated Makah did not present evidence of "usual and accustomed *fishing*" more than 40 miles offshore (*see* Q&Q Br. at 80) is unavailing.

Court orders must be construed "to give effect to the intention of the court." *See U.S. v. 60.22 Acres of Land*, 638 F.2d 1176, 1178 (9th Cir. 1980); *see also Negron-Almeda v. Santiago*, 528 F.3d 15, 22-23 (1st Cir. 2008) ("when a court's order is clear and unambiguous, neither a party nor a reviewing court can disregard its plain language …"). For the above reasons, Quileute and Quinault and the Six Tribes' attempt to revise or interject ambiguity into the district court's decision in *Makah* lacks merit. This case is therefore unlike *Lummi*, 763 F.3d at 1187, where

competing inferences from this court's earlier decision meant an issue had not been decided by necessary implication. Here, the only fair reading of *Makah* is that evidence of whaling and sealing cannot be used to expand U&A "beyond" waters in which a tribe customarily fished.

Quileute and Quinault (Br. at 83) and the Six Tribes (Br. at 17) challenge this reading on the additional ground that the court did not discuss the meaning of "fish" at treaty times or the intentions of the treaty parties. However, the distinction the court drew among fishing, whaling and sealing was apparent on the face of the Makah treaty, which secured "the right of taking fish and of whaling or sealing." Makah Br., Add. A-2 (Art. 4). Moreover, it was consistent with Judge Boldt's original decision, which defined "usual and accustomed [fishing] grounds," *U.S. v. Washington*, 384 F.Supp. 312, 356 (W.D. Wash. 1974) (brackets in original), and distinguished marine-mammal *hunting* from ocean *fishing*:

> Most of [Makahs'] subsistence came from the sea where they *fished* for salmon, halibut and other fish, and *hunted* for whale and seal.… The Makah imported their basic needs such as housing materials and ocean-going canoes used for sea mammal *hunting* and ocean *fishing* because of the peculiarly rich resources available to them in their ocean territories, primarily halibut and whale.… Governor Stevens found the Makah not much concerned about their land …, but greatly concerned about their marine *hunting and fishing* rights…. Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine *hunting and fishing* but in fact would help them to develop these pursuits.…

Id. at 363 (emphasis added). *Makah* was a straightforward application of the distinction between ocean fishing and marine-mammal hunting evident on the face of the treaty and in Judge Boldt's decision.

b. Areas Less than 40 Miles Offshore.

Quileute and Quinault (Br. at 111) and Hoh (Br. at 38-50) also argue the district court relied on evidence of whaling and sealing to extend Makah's U&A 40 miles offshore south of Cape Flattery. The court's decision does not support this argument; having distinguished fishing, whaling and sealing, the court defined Makah's U&A based on distances offshore where Makahs were known to fish, including "known fishing banks some 30 to 40 miles offshore." 626 F.Supp. at 1467.

"As a general matter, a court decree or judgment 'is to be construed with reference to the issues it was meant to decide.'" *Spallone*, 399 F.3d at 424 (quoting *Mayor & Aldermen of City of Vicksburg v. Henson*, 231 U.S. 259, 269 (1913)). In *Makah*, there was no dispute regarding Makah *fishing* 40 miles offshore. The only party to oppose Makah's request, the United States, conceded that:

> [T]he evidence submitted by the Makah Tribe is sufficient to show that at the time of the treaty, i.e., 1855-1859, the Makah Indians fished for salmon, halibut and other species of fish at locations up to 40 miles offshore. We do not believe, however, that the evidence shows that they usually or customarily went further than that for these species. There are statements contained in the materials comprising the record that indicate that the Makahs may have gone further than this distance in pursuit of whales and that they likewise went further than this distance in post-treaty times after motorized oceancraft became available.

MER 1251 (emphasis in original); *see also id.* at 1252 (distinguishing whaling from fishing). Since there was no dispute about Makah fishing – "for salmon, halibut and other species of fish" – up to 40 miles offshore, the assertion that the district court, without saying so, relied on evidence of whaling and sealing to draw Makah's western boundary 40 miles offshore lacks merit.

There was also no dispute regarding Makah's southern boundary. *See* MSER 229-230 (Quileute memorandum explaining that earlier dispute over southern boundary had been resolved and supporting Makah's western-boundary claim). In the absence of a dispute regarding the southern boundary, no party contended and the court did not hold that Makah had to prove it fished 40 miles offshore at every point along the north-south extent of its U&A.

Quileute and Quinault benefited from this approach here. As they acknowledge (Br. at 108-09 n.46), they were not "required to prove that they fished in every square mile between their northern and southern boundaries … because those boundaries (with the exception of Quileute's northern boundary) were not at issue in this case." If their argument regarding *Makah* were correct – that such proof was required (and was supplied with evidence of whaling and sealing) – it would be necessary to remand this case to determine whether Quileute and Quinault provided such evidence at all points along the north-south extent of their U&As. No such

remand is necessary, however, because such proof was not required (and, therefore, was not provided by evidence or whaling or sealing) in *Makah*.

2. The Ninth Circuit's Decision.

On appeal, this court also distinguished fishing, whaling and sealing. For example, it noted Makahs "had extraordinary ability to handle canoes … designed for ocean fishing, whaling, and seal hunting," referenced "an 1897 account of frequent Makah whaling expeditions out to 100 miles," and discussed Oliver Ides' testimony regarding "trolling for salmon" and "hunt[ing] seal in dugout canoes, beyond the sight of land." 730 F.2d at 1315.

The court began its legal analysis by discussing the meaning of "usual and accustomed grounds and stations." *Id*. at 1316. It cited Judge Boldt's holdings that "'[u]sual and accustomed' excludes locations used infrequently" but includes "'every *fishing* location where members of a tribe customarily *fished* from time to time at and before treaty times ….'" *Id*. (quoting *U.S. v. Washington*, 384 F.Supp. at 332) (emphasis added). Nothing in this discussion indicates the court understood "fishing location[s]" to include locations in which a tribe hunted whales or seals.

Applying the law to the facts, the court acknowledged "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." *Id*. at 1318. The court also acknowledged Makahs "did go that distance at the turn of the century, although it is

not clear how frequently." *Id*. If whaling or sealing could be used to determine U&A, it would have been necessary for the court to consider how far offshore the Makahs went to whale and seal on a customary basis at treaty times. However, its opinion does not address that question.

Instead, the court turned to evidence of fishing and found that, "[a]bout 1900, [Makahs] fished regularly at areas about 40 miles out, and probably did so in the 1850's." *Id*. In concluding the evidence did "not show that [Makah's] usual and accustomed *fishing* areas went out 100 miles in 1855," *id.* (emphasis added), the court explained:

> Dr. 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 [*i.e.*, around 1905].

Id.

This explanation confirmed the court was focused on evidence of fishing, not whaling or sealing. This is so because Dr. Lane's report contained evidence of whaling and sealing more than 40 miles offshore well before 1905. For example, she discussed evidence of sealing expeditions from 20 to 100 miles offshore in the mid-1880s, MER 588, an 1894 report that the Makahs "for years past [had] been in the habit of going out 40 to 50 miles from the cape to kill seal," MER 578-79, and the 1897 account (mentioned in the court's opinion at page 1315) of frequent Makah whaling "from 50 to 100 miles at sea." MER 579. Given this evidence, the court's

statement that the "earliest evidence" of Makahs going more than 40 miles offshore came around 1905 must have referenced fishing, not whaling or sealing.

The 1897 account of "frequent Makah whaling expeditions out to 100 miles," 730 F.2d at 1315, reinforces this conclusion. As quoted by Dr. Lane, the account states:

> [The Makahs] are expert seamen and *often* sally forth in their canoes and capture whales, going out from 50 to 100 miles at sea. So far this year to my certain knowledge, with their canoes and rude spears, they have brought to land no less than 10 whales.

MER 579 (emphasis added). Dr. Lane confirmed the distances in this account were not the product of new technologies: "[t]he record is clear that the [whaling] canoes and gear used even as late as 1920 were the same as those used at treaty times." MER 580. Moreover, while Dr. Lane discussed the effect of overfishing and changes in fur-seal distribution in the post-treaty period, she made no suggestion that changes in whale distribution or abundance had prompted Makahs to travel farther offshore for whales in 1897 than at treaty times.[5] Thus, there was no apparent reason (and the court did not suggest one) why the 1897 account did not support a finding

[5] *See* MER 576 ("[a]s close-in fishing grounds became overfished, it was necessary to go farther to harvest the various species"); 577-78 (use of guns by non-Indians made it necessary for Makahs "to purchase schooners and pursue the [fur-seal] herds at greater distances than had been necessary at treaty times"); 588 (Makah purchase of schooners for fur-seal hunts).

of frequent whaling from 50 to 100 miles offshore at treaty times.[6] The only fair reading of the opinion, consistent with the ordinary usage of "fishing" in 1984, is that the court rejected evidence of whaling, sealing and exploring more than 40 miles offshore at treaty times because it was not evidence of *fishing*, not because those activities were insufficiently customary.

Quileute and Quinault's discussion (Br. at 82-83) of *U.S. v. Lummi Indian Tribe* does not suggest otherwise. In *Lummi*, this court relied on evidence of Tulalip fishing on Whidbey Island, the communal nature of Indian marine fishing, and documentary evidence that Tulalips fished as far north as Point Roberts to conclude they also fished nearby waters off Whidbey Island. 841 F.2d 319-20. Nothing in

[6] As discussed in Makah's opening brief (at 18-19), Dr. Lane extensively documented treaty-time whaling voyages that took Makahs out of sight of land and might keep them at sea for several days. Quileute and Quinault's assertion (Br. at 78) that she found these voyages only went 30 to 40 miles offshore, the distance at which Makah whalers would *first* be out of sight of land, is mistaken. Dr. Lane stated that, while it was well documented that Makahs "regularly fished at known fishing banks some thirty or forty miles offshore," it was "less feasible to document the outer limits of Makah offshore journeys in pursuit of whales and other species." MER 576. Given the "frequent references to the Makah sailing out of sight of land," she mentioned Makah whalers would be out of sight of land when they were 30 to 40 miles off of Cape Flattery, but did not suggest this was the *maximum* distance they traveled. *Id*. As discussed in Makah's opening brief (at 18-20), on the basis of this and other evidence, including the 1897 account, the district court found Makahs went *more* than 40 miles offshore for whaling and sealing. *Cf. U.S. v. Lummi Indian Tribe*, 841 F.2d 317, 319-20 (9th Cir. 1988) (concluding Tulalips fished marine waters off of Whidbey Island notwithstanding Dr. Lane's inability to find specific documentation of such fishing). Quileute and Quinault's effort to re-evaluate the evidence and substitute their own findings for those of the district court lacks merit.

the court's opinion suggests it relied on whaling or sealing or (contrary to ordinary usage in 1988) used "fishing" to include whaling or sealing. Rather, the court's comparison of the Tulalip and Makah evidence reinforces the distinction between them:

> Evidence of *frequent fishing* in the disputed areas is stronger in this case than in the Makah case …. The Makah presented evidence that they *traveled as far as 100 miles off shore* at treaty times and that *whaling or exploration* might have been reasons for the journeys.… Reviewing the district court's decision *de novo*, we concluded that "there is no basis for an inference that [the Makah] *customarily fished* as far as 100 miles from shore at treaty time."… By contrast, evidence in this case readily supports an inference that the Tulalips *frequently fished* the disputed areas.

Id. at 320 (emphasis added). This passage focuses on the *purpose* of Makah travel – whaling or exploration – not its frequency. The necessary implication is that whaling, no matter how frequent, is not fishing.

3. Finality and Equity.

This court should adhere to *Makah* under the law of the case and circuit doctrines. As explained in the Jamestown S'Klallam *et al.* brief (at 10-14), those doctrines promote finality of judicial determinations, an especially important consideration in this 46-year-old case. Quileute and Quinault's assurance (Br. at 50-51) that no tribe will seek to re-open long-settled U&A determinations based on marine-mammal hunts does not bind other tribes.[7] Moreover, it does not address the

[7] Contrary to Quileute and Quinault's claim (Br. at 53-54), marine mammal hunts were not considered in any U&A determination except those for Makah, Quileute

fundamental concern that failure to adhere to a prior decision in this case threatens the entire fabric of the litigation, allowing not just U&A determinations but a multitude of other rulings to be re-opened.

Also, as a matter of equity, all U&A determinations should be based on the same rules. As the district court put it:

> The Court agrees with the Quileute, Quinault and Hoh [MER 109] that the methodology applied by this Court in [*Makah*] is the appropriate method to use in the instant case. The Court finds that *equity and fairness demand the same methodology for delineating the boundary at issue here*, and agrees that it is the *status quo* method of delineating U&A ocean boundaries by this Court.

MER 3 (emphasis added). For this reason alone, the rules in *Makah* should be applied here. Just as Makah whaling and sealing was not used to define its U&A, Quileute and Quinault whaling and sealing cannot be used to define their U&As.

B. No Other Ruling Establishes That U&As Can Be Defined by Whaling or Sealing in the Absence of Fishing.

1. Prior U&A Determinations.

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and Quinault. *See* Part B.1 below. Thus, every other tribe in this case, including 15 Puget Sound tribes, could attempt to expand its U&A based on such hunts. The Six Tribes (Br. at 10) suggest this is a real possibility, stating "members of Puget Sound Treaty tribes historically caught marine mammals like seal and porpoise" and expressing concern that inability to rely on those harvests "would narrow the evidence available to prove a tribe's [U&A]." That would not be a concern if such evidence had already been considered and no further U&A proceedings were contemplated.

Makah's opening brief notes (at 7) that, in its initial U&A determinations, the court found two tribes (Makah and Quileute) hunted marine mammals and fished in the ocean, but in no case (until this one) did it find a tribe's U&A included waters in which it hunted marine mammals but did not fish. Hoh (Br. at 38-50) disagrees, claiming *Makah* relied on whaling and sealing to define Makah's U&A south of Cape Flattery. However, as discussed in Part A.1.b above, this is not a fair reading of *Makah*.

Quileute and Quinault assert (Br. at 47) Judge Boldt's initial Makah and Quileute determinations may have been based solely on evidence of whaling and sealing. However, the paragraph describing Makah's U&A states that, "[i]n addition to their plentiful catches of halibut, at treaty times the Makah took chinook, sockeye, chum and coho salmon at their usual and accustomed fishing places using fishing techniques which included beach seining, spearing and trolling," and did not mention whaling or sealing. *U.S. v. Washington*, 384 F.Supp. at 364. Judge Boldt found Quileute's U&A included "adjacent tidewater and salt-water areas" and, in those areas, "Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish shark, herring, sardines, sturgeons, seal, sea lion, porpoise and whale." *Id*. at 372. Neither determination rested solely on whaling or sealing, and neither purported to extend U&A to areas in which the tribe did not customarily fish.

Quileute and Quinault also cite a 1984 Skokomish case for the proposition that "U&A decisions have been made by reference to sea mammals …." Q&Q Br. at 33 n.9; *see also id.* at 44. This argument is misleading: Skokomish's U&A was actually determined in 1974 with *no* reference to sea mammals. *See U.S. v. Washington*, 384 F.Supp. at 376-77. The 1984 case did not re-visit Skokomish's U&A, but considered whether Skokomish had primary rights within its previously adjudicated U&A. *See U.S. v. Washington*, 626 F.Supp. 1486, 1491 (W.D. Wash. 1984), *aff'd*, 764 F.2d 670 (9th Cir. 1985).

The test for primary rights – control of an area at treaty times – is not limited to consideration of fishing. *See U.S. v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698, 714 n.6 (9th Cir. 2010). Accordingly, the Skokomish court looked to "a variety of fishing *and hunting* activities" and other factors to determine whether Skokomish controlled the disputed area. 626 F.Supp. at 1489 (emphasis added). It did not suggest "hunting activities" (including "marine-mammal hunting") were fishing activities or that they could be used to determine U&A in the first instance; instead, it recognized the same distinction between fishing and marine-mammal hunting evident in the Makah treaty and recognized in Judge Boldt's decision and *Makah*.

2. The Shellfish Case.

Quileute and Quinault (Br. at 40-50) and the Six Tribes (Br. at 10-13) argue the shellfish case established the treaty fishing right extends to all aquatic animals, including whales and seals, and that each tribe's U&A extends to all areas where it customarily took any species of aquatic animal. This argument reads too much into the shellfish case and was not accepted by the district court. The court relied on the shellfish rulings, MER 85-86, but did not suggest they decided whaling and sealing could be used to define U&As. Had the shellfish case already decided that issue, there would have been no need for the district court's extended discussion of it. *See* MER 81-92.

Quileute and Quinault and the Six Tribes' argument conflates three distinct rulings. Read in context, those rulings do not establish that whales and seals are fish or that whaling and sealing can be used to define U&As, matters that were not presented, considered or decided in the shellfish case.

a. Shellfish Are Fish.

The court granted summary judgment that shellfish are fish under the plain language of the treaties. *U.S. v. Washington*, 18 F.Supp.3d 1216, 1217-18 (W.D. Wash. 1993) (*Shellfish I*). It reasoned that, because the shellfish proviso prohibited taking shellfish from certain locations (staked and cultivated beds), "it logically follows that shellfish were included in the 'right of taking fish' referred to in the first sentence." *Id*. at 1218. The court explained that, if the right of taking fish did not

include shellfish, the proviso would be meaningless, contravening the canon that no part of a treaty should be rendered inoperative. *Id.*

The court added that, even if the treaty language was ambiguous, it would conclude that shellfish are fish in light of the Indian canons, the reserved-rights doctrine, and evidence of Indian shellfish harvests at treaty times. *Id*. at 1218-19. However, in its post-trial decision, the court stated it concluded shellfish are fish "without reference to the canons of construction favoring Indians" and its conclusion was "compelled by plain language of the Treaties." *U.S. v. Washington*, 873 F.Supp. 1422, 1430 (W.D. Wash. 1994) (*Shellfish III*). It again pointed to the shellfish proviso and the principle that a treaty should not be interpreted to render one part inoperative. *Id.*

No party appealed the shellfish-are-fish ruling. *See* MSER 85. On appeal, the tribes stated that ruling was made "without reliance on the special canons for construction favoring Indian tribes because its 'interpretation [was] compelled by the plain language of the Treaties.'" *Id.* Summarizing the district court's reasoning, they explained that, "[i]f the right of taking 'fish' did not include shellfish, the entire shellfish proviso would serve no purpose" and "treaties should not be interpreted to render any section redundant …." *Id.*[8]

[8] Quileute and Quinault (Br. at 43 n.14) cite a different passage from the tribes' appeal brief to argue the shellfish-are-fish ruling was also based on the Indian canons, reserved rights doctrine and law of the case. However, the passage they cite

In its decision, this court noted "[t]he district court concluded in a thoughtful and well-reasoned opinion that the term 'fish,' as used in the Stevens Treaties, includes shellfish." *U.S. v. Washington*, 157 F.3d 630, 639 (9th Cir. 1998) (*Shellfish IV*). However, because no party appealed that determination, this court did not discuss the rationale for it.

Nothing in this portion of *Shellfish* suggests, let alone establishes law of the case or circuit, that whales and seals are fish within the right of taking fish. There was no claim in *Shellfish* that whales or seals are fish, and neither court purported to address that claim.[9] The district court's primary, if not exclusive, reliance on the shellfish proviso to conclude that shellfish are fish has no relevance to whales or seals because there is no whaling or sealing proviso. The factors on which the court relied (plain meaning and the rule against surplusage) suggest whales and seals are

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did not involve the threshold issue whether shellfish are fish but the subsidiary question whether, if they are fish, the right of taking shellfish extended to all species of shellfish. *See* Part B.2.b below.

[9] Quileute and Quinault suggest (Br. at 46 & n.15) the issues in the case expanded between summary judgment and trial. However, in a joint *post-trial* brief, the United States and the tribes "describe[ed] the specific relief that plaintiffs seek"; as relevant here, they sought a declaration that the tribes "have a treaty secured right to take all species of *shellfish*, at all locations, tidal elevations and water depths where *shellfish* are found within their usual and accustomed grounds and stations, as those grounds and stations have previously been adjudicated, to the same extent that they have the right to take other fish as previously adjudicated by this Court in Final Decision No. 1 …." MSER 99, 101 (emphasis added). The plaintiffs sought no relief – before, during or after trial – regarding marine mammals.

not fish because: (1) there would have been no need to add whaling or sealing to the Makah treaty if whales and seals are fish; and (2) interpreting fish to include whales and seals would render the whaling or sealing provision in the Makah treaty inoperative.

b. All Species of Shellfish.

After concluding the treaty fishing right included shellfish, the court considered whether it included all species of shellfish. This issue arose because the State asserted "the Tribes did not harvest certain *species of shellfish*, such as shrimp and scallops ('named species'), at or before treaty time." *U.S. v. Washington*, 19 F.Supp.3d 1126, 1129 (W.D. Wash. 1994) (*Shellfish II*) (emphasis added). The court's ruling on this issue did not determine whether whales or seals are fish within the meaning of the treaties. This is confirmed by reviewing the rationales for its ruling.

i. Plain Meaning. The court initially rejected the State's argument on summary judgment, based on the plain language of the treaties and its shellfish-are-fish ruling:

> The Court has already held that shellfish are fish. Since the named species are shellfish, they are fish as well, and are covered by the treaty. There is no language in the treaty that undermines these simple propositions.

19 F.Supp.3d at 1129. This rationale does not establish whales or seals are within the treaty fishing right; unlike the named species, whales and seals are not shellfish.

ii. Reserved Rights. The court also noted that any attempt to read a limitation on shellfish species into the treaties would contravene canons of treaty construction, focusing on the reserved-rights doctrine:

> Prior to the signing of the Stevens Treaty, the Indians had the absolute right to harvest any species they desired. They had the right to harvest shrimp and scallops; whether or not they exercised that right is irrelevant. The right to fish reserved in the treaty therefore encompasses a right to harvest the named species.

Id. at 1129-30. This rationale also does not establish that whales or seals are within the treaty fishing right. Just as Indians had "the absolute right" to harvest any species of shellfish they desired prior to the treaties, they had the absolute right to harvest any species of bird, land animal or plant. That fact does not make birds, land animals or plants fish; the Indians' absolute right to harvest any species of shellfish was important because the court had determined that shellfish are fish. It made no such determination with respect to whales or seals.

iii. Law of the Case. The court held the State's argument was foreclosed by the law of the case, citing Judge Boldt's finding that the right secured by the treaties "is not limited as to species of fish." *Id*. at 1130 (quoting *U.S. v. Washington*, 384 F.Supp. at 401). However, Judge Boldt's ruling did not establish that shellfish – let alone marine mammals – were fish. The shellfish court's reliance on his ruling was necessarily predicated on its determination that shellfish are fish, and does not establish that whales or seals are fish.

iv. Canons of Construction. In its post-trial decision, the court added that the State's effort "to read a species limitation into the 'right of taking fish' must fail in light of the canons of construction favoring Indians." *Shellfish III*, 873 F.Supp. at 1430. In particular, it noted the State asked the court "to impose a limit on the 'right of taking fish' without pointing to any treaty language in support of that interpretation." *Id.* Here, however, there is express language in the Makah treaty distinguishing fishing, whaling and sealing. The shellfish court had no occasion to consider that language because it was concerned with shellfish, not whales or seals.

v. Broad Meaning of Fish. The court's post-trial decision also said 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." *Id*. "Fish," the court said, "has perhaps the widest sweep of any word the drafters could have chosen, and the Court [would] not deviate from its plain meaning." *Id*. Quileute and Quinault and the Six Tribes emphasize these passages, but they do not hold the right of taking fish encompasses marine mammals.

First, such an interpretation removes the court's discussion of the word fish from its context. The purpose of that discussion was to demonstrate the treaties did not draw distinctions between *species of shellfish*, not to address the predicate question whether shellfish are fish within the meaning of the treaties, let alone to determine whether *other* species, such as marine mammals, are fish.

Context matters. As discussed above, when considered in light of the whaling and sealing provision in the Makah treaty, the factors on which the court relied to conclude shellfish are fish indicate the treaty drafters did not consider whales or seals to be fish. Also, the evidence in this case showed that, as early as 1828, Webster's Dictionary identified an American usage of "fish" that did not include whales or seals. MER 864. The evidence showed that definition was known to and used by the treaty drafters, who drew commonplace distinctions among fishing, whaling and sealing, and that those distinctions matched the fundamental and pervasive distinctions Quileutes and Quinaults recognized among these activities. *See* Makah Opening Br. at 28-29, 31-32, 35-43; Part C below. The parties had no occasion to present, and the shellfish courts had no occasion to consider the significance of, such evidence because they were concerned with shellfish not marine mammals.

As noted above, judicial opinions are generally construed with reference to the issues they were meant to decide. *Spallone*, 399 F.3d at 424. The shellfish decisions were meant to decide the tribes' rights to take shellfish, not marine mammals. Quileute and Quinault and the Six Tribes' attempt to extract a holding regarding species the court did not consider and which present materially different considerations from those it did lacks merit.

Second, the court made clear the broad meaning of fish does not trump other evidence of the parties' intent in holding the Yakama treaty, despite securing the

right of taking fish, did *not* secure a right to take shellfish. *Shellfish III*, 873 F.Supp. at 1447-48. The court explained the "timing of the [Yakama] treaty and the absence of the Shellfish Proviso [made it] clear that the United States did not intend that the Yakamas would reserve shellfishing rights," and it was "unlikely that the Yakamas … expected that they were reserving the right to harvest shellfish." *Id.* at 1447. If the broad meaning of fish were controlling, the court would not have considered these factors. Just as the absence of the shellfish proviso led the court to look beyond the broad meaning of fish in the Yakama case, the inclusion of a whaling or sealing provision in the Makah treaty, and its absence from the Treaty of Olympia, makes it necessary to consider whether Quileute and Quinault understood their treaty to provide for a vast expansion of traditional fishing grounds to whaling and sealing grounds where they did not customarily fish. *Shellfish* does not answer that question.

Third, Quileute and Quinault's assertion that *Shellfish* held "tribes reserved the right to take aquatic animals within all areas the tribes customarily took *any species of aquatic animal*," Q&Q Br. at 40 (emphasis in original), cannot be reconciled with the Yakama holding. Judge Boldt found Yakama "used fisheries located in the Puget Sound area for the purpose of obtaining salmon and steelhead …." *U.S. v. Washington*, 384 F.Supp. at 380. If Quileute and Quinault were correct, Yakama would have had a right to take shellfish in the areas where they fished for salmon and steelhead. That their reading of *Shellfish* is too broad *even with respect*

to shellfish counsels against extending it to entirely different species such as marine mammals.

vi. Decision on Appeal. This court affirmed "that the Treaties grant the Tribes a right to take *shellfish* of every species found anywhere within the Tribes' [U&As], except as expressly limited by the Shellfish Proviso." *Shellfish IV*, 157 F.3d at 643 (emphasis added). With respect to the all-species question, it adopted almost all of the district court's arguments and "therefore reject[ed] Washington's argument that the Tribes are limited in the *species of shellfish* they harvest." *Id.* at 643-44 (emphasis added). Like the district court's ruling, this holding was limited to shellfish, and did not address whales or seals.

Accordingly, the all-species-of-shellfish ruling did not decide whether whales and seals are fish within the meaning of the treaty fishing right, either "'explicitly or by necessary implication,'" as required to establish the law of the case. *U.S. v. Lummi Indian Tribe,* 235 F.3d 443, 452 (9th Cir. 2000) (quoting *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982). Even in dictum, this court did not "confront[the whaling and sealing] issue … and resolve[] it after reasoned consideration" so as to establish the law of the circuit under *U.S. v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (*en banc*) (Kozinski, J., joined in relevant part by Trott, T.G. Nelson, and Silverman, JJ.).

c. U&As.

Shellfish II also rejected the State's argument that the tribes' shellfish U&As could not include "deep-water areas … because none of the tribes engaged in deep-water harvest at or before treaty time." 19 F.Supp.3d at 1130. The court explained that, prior to the treaties, "the Tribes had the absolute right to fish for whatever species they desired within their usual and accustomed grounds." *Id*. Thus, "[j]ust as it [was] irrelevant that the Tribes chose not to harvest [shrimp and scallops], it [was] irrelevant that they could not, because of technological limitations, harvest shellfish in deep-water areas." *Id*. (emphasis in original).

"[T]he Court conclude[d] as a matter of law that usual and accustomed grounds and stations do not vary with the *species of fish*, and that the usual and accustomed grounds and stations for *non-anadromous fish* are coextensive with those of *anadromous fish*." *Id*. (emphasis added). In its post-trial decision, it stated this conclusion was consistent with a prior ruling that tribal U&As for herring were co-extensive with those for salmon and steelhead, and that the court had "never focused on a particular *species of fish* in determining" U&As. *Shellfish III*, 873 F.Supp. at 1431 (emphasis added).

This court agreed that the courts had "never required species-specific findings of usual and accustomed fishing grounds" and had found that herring U&A were co-extensive with salmon U&A, and stated "it would be extremely burdensome and perhaps impossible for the Tribes to prove their [U&A] on a species-specific basis."

Shellfish IV, 157 F.3d at 644. It therefore affirmed the district court's ruling that "the Tribes' [U&As] for *shellfish* are co-extensive with the Tribes' usual and accustomed *fishing* grounds, which have been previously decided by the courts." *Id*. (emphasis added).

Nothing in these rulings establishes that whales or seals are fish within the treaty fishing right, or that whaling and sealing can be used to define fishing U&As. Unlike *Makah*, no tribe presented whaling or sealing evidence and no tribe sought a U&A determination based on such evidence, making resolution of these questions unnecessary. The courts' observation that they had "never focused on a particular species of fish" in prior U&A determinations, 873 F.Supp. at 1431, does not mean that whales or seals are fish because, notwithstanding the few references to marine mammals in those determinations, they all involved multiple species of fish. *See* Part B.1 above.

Quileute and Quinault claim the tribes asserted "*any customary aquatic animal harvesting* (including sea mammals) has *always* been considered in adjudicating U&As." Q&Q Br. at 45 (emphasis in original). Disputing the State's argument that U&As must be determined on a species-by-species basis, the tribes argued the correct test was "'regular and frequent treaty-time use of [an] area for fishing purposes.'" MER 1078 (quoting *U.S. v. Washington*, 626 F.Supp. at 1531) (emphasis in tribes' brief); MSER 110 (same). However, they did not define

"fishing purposes" and made no argument that use of an area for marine-mammal hunting alone established its use for fishing purposes. *See* MER 1078-1083; MSER 110-116. There is no discussion in the courts' opinions of any such argument and no indication they intended to address it.

d. The Evidentiary Record.

Quileute and Quinault and the Six Tribes cite passing references to marine mammals in the *Shellfish* record as evidence *Shellfish* held whales and seals are fish. For example, the Six Tribes (Br. at 11 & n.2) cite two historical documents in arguing the district court's statement that fish encompassed all aquatic animals "was supported by evidence that the common mid-nineteenth century usage of the words 'fish' and 'fisheries' broadly included harvest of marine mammals like whale and seal." The district court, however, did not cite either document and did not address contrary evidence – such as the Makah whaling and sealing provision – because the question whether whales or seals were fish was not before it.

The Six Tribes (*id.*) also refer to passages in two expert declarations (Butters and Richards) filed in the shellfish case, while Quileute and Quinault assert (Br. at 45) the tribes' relied on experts (Butters, White and Lane) "who opined on the treaty parties' understanding of the right of taking fish." However, the experts stated focused on whether the tribes' right to take fish included shellfish, not marine mammals. *See*, *e.g.*, QER 4890 (Butters), 5671 (Lane); MSER 120 (White).

Moreover, the few references Quileute and Quinault and the Six Tribes cite do not demonstrate the courts, without ever saying so, determined whether the fishing right included whales or seals. Butters expressed the view that "fish" included shellfish on the basis of 19th and 20th Century dictionaries, many of which contain definitions that exclude whales and seals from "fish." QER 4891-96. Although he cited a 1774 quote from England, which stated whales (and tortoises) had been given the name fishes, QER 4893, he also quoted a mid-19th century dictionary indicating that, at least zoologically, whales were not fish. QER 4894-95.[10] Butters did not discuss the whaling or sealing provision in the Makah treaty and did not opine on whether the treaty drafters distinguished fishing, whaling and sealing, an issue not presented in the shellfish case.

Although White stated Indians "*may* have used fish or salmon to refer to the products of the sea in the same way that Americans would, for example, use bread to refer to agricultural products," MSER 133 (emphasis added), his affidavit never mentions whales, seals or other marine mammals and does not address the distinctions Indians (including Quileute and Quinault) recognized among fishing, whaling and sealing. Nor does it address whether the American promise of "access to the usual places for procuring food," MSER 134, could fairly be interpreted as a

[10] The experts in this case generally agreed that Webster's 1828 dictionary, as opposed to the dictionaries Butters cited, provided the most reliable guide to American usage at treaty times. MER 194-97, 344-45.

promise to expand a tribe's traditional fishing places to vast whaling and sealing grounds in which it was unaccustomed to fishing.

Lane's statement that the Indians understood "fish" to include marine mammals, QER 5709, is found in a single sentence in an 80-page declaration focused on shellfish, is unsupported by any linguistic, historical or ethnographic analysis, and was not cited by the tribes or the courts in *Shellfish*.

Richards, testifying for the State, asserted Stevens did *not* include shellfish within "fish" and that, during the treaty councils Stevens used "fish" to refer to fin fish, usually salmon. MSER 189-190, 195. Although Richards also inconsistently asserted Stevens' references to "fish" during *Makah's* council were primarily to whales and perhaps to halibut, MSER 197, he did not assert "fish" included whales in the Treaty of Olympia or in the negotiations for that treaty. There is no indication the courts relied on his affidavit for any purpose.

The suggestion that *Shellfish*, without saying so, relied on these passing references to decide marine-mammal issues that were not presented lacks merit.[11]

[11] To the extent Quileute and Quinault or the Six Tribes claim these passing references support their position on the merits, it is noteworthy that Judge Martinez did not rely on them. In this respect, Dr. Boxberger, who testified for Quileute and Quinault in this subproceeding, provides a cautionary tale. In *Shellfish*, he opined the Indians would have understood "fish" to refer *only* to salmon and, perhaps in the case of Makah, halibut, excluding other finfish species, shellfish and marine mammals. MSER 207, 208, 211 (¶¶ 2, 4, 11). However, in this case, Dr. Boxberger testified he no longer holds that opinion. QER 1791-1793. Given this disclaimer, Quileute and Quinault cannot fairly invoke passing references from other shellfish

Shellfish involved shellfish. It did not determine whether marine mammals were fish within the treaty right of taking fish or whether marine mammal harvests could be used to extend a tribe's U&A to waters in which it did not customarily fish.

C. The Treaty of Olympia Did Not Secure Fishing Rights Where Tribes Did Not Customarily Fish.

Makah's opening brief showed (at 21-45) that neither the United States nor Quileute and Quinault intended the right of taking fish at usual and accustomed grounds to extend to whaling and sealing grounds where the tribes did not customarily fish. In particular, Makah showed (at 28-35) U.S. treaty negotiators distinguished fishing, whaling and sealing in the Makah treaty and in the negotiations for the Treaty of Olympia. Makah also showed (at 35-43) Quileute and Quinault themselves distinguished fishing, whaling and sealing in every conceivable way. Makah acknowledged that, under the reserved-rights doctrine, Quileute and Quinault might impliedly have reserved whaling and sealing rights because they did not expressly relinquish those rights, but showed (at 24-26) that implied whaling or sealing rights cannot expand the right of taking fish, with its *express* U&A limitation, to waters in which they did not customarily fish.[12]

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affidavits, which did not directly confront the whaling and sealing issue and whose authors did not testify here regarding their current views, as evidence that whales and seals are fish.

[12] Quileute and Quinault wrongly assert (Br. at 57-58) that Makah contends Linnaean classifications dictate the meaning of "fish" in the treaties. Makah contends "fish" should be understood (as it was in *Shellfish*) by how the drafters actually used it in

Quileute and Quinault and the Six Tribes do not dispute that the Makah treaty distinguishes fishing, whaling and sealing, or that, at treaty times, Quileute and Quinault distinguished these activities. Instead, they assert a popular English meaning of the word fish trumps the distinctions among fishing, whaling and sealing evident in the Makah treaty and in Quileute and Quinault language and society. They also invoke the canons of construction and the reserved-rights doctrine, not to *preserve* access to traditional fishing grounds, but to *expand* those grounds to waters in which they were unaccustomed to fish. These arguments lack merit.

1. U.S. Treaty Drafters Distinguished Fishing, Whaling and Sealing.

a. Treaty of Neah Bay.

In providing for "the right of taking fish and of whaling or sealing" in the Makah treaty, U.S. treaty drafters unambiguously distinguished fishing, whaling and sealing. Judge Martinez dismissed this evidence because Governor Stevens was not present to tailor provisions in the Treaty of Olympia when Colonel Simmons negotiated it with Quileute and Quinault. Makah's opening brief showed (at 31-32) this reasoning was erroneous because: (1) Stevens was present when Quinault first

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the treaties, and by fundamental distinctions the drafters and Quileute and Quinault recognized among fishing, whaling and sealing. That the drafters' usage was consistent with an American usage recognized in Webster's 1828 dictionary, which was an outgrowth of the Linnaean system, provides support for Makah's position (*see*, *e.g.*, Makah Br. at 29), but does not mean Linnaean classifications dictate treaty interpretation.

signed the treaty without a provision for whaling or sealing; and (2) notwithstanding Stevens' absence when Simmons met with Quileute and Quinault, the drafters were able to modify the treaty to accommodate Quileute's concerns (in particular, by adding a provision for more than one reservation).[13] Moreover, the ultimate issue is the drafters' intent – if fishing included whaling and sealing, there would have been no need to "tailor" the Makah treaty by adding a whaling or sealing provision.

Quileute and Quinault (Br. at 35-36) further undermine Judge Martinez's argument, insisting that Stevens, not Simmons, changed the treaty to allow for more than one reservation. Stevens' ability to "tailor" the treaty to address Quileute's concern confirms his role in crafting the treaty and makes the language he employed in the Makah treaty even more important.

Quileute and Quinault offer four additional reasons for disregarding the language in the Makah treaty, none of which was adopted by Judge Martinez. First, they assert the purpose of the Makah language "was '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.'" Q&Q Br. at 31 (quoting *U.S. v. Washington*, 384 F.Supp. at 363) (emphasis added by Quileute and Quinault). There would have been no need, however, to add a reference to whaling or sealing if the right of taking fish already included those activities. That additional language was

[13] Dr. Boxberger acknowledged these points. *See* QER 1794-1797.

necessary to reassure Makah the treaty would not stop them from "marine hunting" confirms the treaty drafters did not understand the right of taking fish to include whaling or sealing.

Second, citing *Colville*, 606 F.3d at 713, Quileute and Quinault (Br. at 31) argue the rule disfavoring surplusage in one treaty cannot implicitly abrogate rights in another. In *Colville*, the Wenatchi argued an 1894 agreement ceded Yakama's non-exclusive fishing rights under Article 3 of their 1855 treaty. *Id.* at 711. The court held the 1894 agreement, which ceded "'their right of fishery, as set forth in *article 10* [of the 1855 treaty]' … [did] not implicate or extinguish the Yakama's non-exclusive *Article [3]* fishing rights …." *Id*. at 713 (emphasis added). The Wenatchi argued this reading rendered the reference to Article 10 in the 1894 agreement surplusage, because another provision in the agreement, which ceded *the lands* reserved in article 10, "impliedly ced[ed]" Article 10 fishing rights. *Id.* The court rejected this "strained interpretation" as contrary to a "plain reading" of the 1894 agreement, noting that the surplusage argument "depends on an implied cession of fishing rights supplementing the plainly worded express cession, which contravenes our obligation to refrain from interpreting the agreement 'according to the technical meaning of its words to learned lawyers.'" *Id*. (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

Here, however, Makah's position does not depend on a "strained interpretation" of the Makah treaty or an "implied cession of fishing rights." Rather, the conclusion that the drafters distinguished fishing, whaling and sealing is based on the plainly worded, express language of the treaty (securing "the right of taking fish and of whaling or sealing"). Nothing in *Colville* rejects use of the rule against inoperative provisions under these circumstances. That rule was critical to the shellfish-are-fish ruling in *Shellfish*, and is equally applicable here.

Third, Quileute and Quinault argue (Br. at 32) that "express language in one Stevens Treaty does not mean the subject right is excluded from the other Treaties; rather, the right is likely implied." In support, they note (*id.*) that all of the Stevens treaties reserved exclusive on-reservation fishing rights even though only the Yakama treaty said so expressly.[14] However, each treaty sets apart reservation lands for the Indians' "exclusive use," providing clear textual support for exclusive on-reservation fishing rights. *See*, *e.g.*, Makah Br. at A-1 (Art. 2) & A-5 (Art. 2). In the absence of such textual support, courts have not held rights reserved expressly

[14] Quileute and Quinault (Br. at 33) misquote *Anderson v. Evans*, 371 F.3d 475, 499 (9th Cir. 2002), for the proposition that "'there is little doubt' that whales were included under the other coastal tribes' 'less specific treaty language.'" The court stated only that "whale hunting *could* be protected under less specific treaty language" and that "less specific 'hunting and fishing' rights *might* be urged to cover a hunt for marine mammals." *Id*. (emphasis added). It only used the phrase "little doubt" in noting that, "[a]lthough such mammals might not be the subject of 'fishing,' there is little doubt they are 'hunted.'" *Id*.

in one Stevens' treaty are reserved implicitly in others. *See*, *e.g.*, *U.S. v. Smiskin,* 487 F.3d 1260, 1267 (9th Cir. 2007) (distinguishing an ambiguous trading provision in the Medicine Creek treaty from the express right to travel in the Yakama treaty).[15] Moreover, if the Makah treaty makes explicit what is implied in other treaties, it is that fishing, whaling and sealing are different activities and that, if whaling and sealing rights are reserved, they are reserved in addition to, not as part of, the right of taking fish.

Fourth, Quileute and Quinault (Br. at 33-34) invoke the rule that interpretation of one treaty does not control interpretation of similar language in another. However, Makah does not contend the language in its treaty controls interpretation of Quileute and Quinault's treaty, but only that, in this case, it is the best evidence of the drafters' intent. The courts have always interpreted the Stevens' treaties together, interpreting each one in light of the others. In *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 679-84 (1979), the Supreme Court relied on its prior interpretation of the fishing clause in the Yakama and Medicine Creek treaties to construe the fishing clause in all of the treaties; no

[15] The subsistence clauses in three western Washington treaties (Medicine Creek, Point Elliott and Olympia) secure the right to pasture horses on open and unclaimed lands, while those in two others (Point-No-Point and Neah Bay) do not. Under Quileute and Quinault's approach, all of the tribes would have that right, overriding clear differences in the treaty language and contravening settled principles of treaty interpretation. *See*, *e.g.*, *Choctaw Nation of Indians v. U.S.*, 318 U.S. 423, 432 (1943) (treaties "cannot be rewritten or expanded beyond their clear terms").

one suggested interpretation of the Yakama fishing clause was irrelevant to the interpretation of the Treaty-of-Olympia fishing clause. In *Shellfish III*, 873 F.Supp. at 1447, the court expressly held the Yakama Treaty "cannot be construed in a vacuum; it must be analyzed in light of the other Stevens Treaties." Here, Quileute and Quinault argue (Br. at 32, 53, 55, 57, 111-13) that rights reserved explicitly in one Stevens treaty can be implied in another; cite the Point Elliott, Point-No-Point and Neah Bay negotiations to interpret the Treaty of Olympia; and insist the methodology for drawing U&A boundaries under Makah's treaty must be applied to their treaty.

Under these circumstances, the assertion that language used in the Makah treaty is irrelevant to interpreting the Treaty of Olympia lacks merit. Given the overlap in personnel, nearly identical subject matter and proximity in time, the Makah language provides the best evidence of the drafters' intent and demonstrates they viewed fishing, whaling and sealing as distinct activities. Accordingly, it cannot be inferred they intended to expand Quileute and Quinault's right of taking fish to whaling and sealing grounds, not mentioned in the treaty, where they were unaccustomed to fish.

b. Treaty Negotiations.

Makah's opening brief showed (at 32-34) the Chehalis River Council minutes confirmed the drafters' intent to distinguish fish, whales and seals. Quileute and

Quinault (Br. at 53-56) disagree, asserting Stevens used "fish" to include whales in that council and the earlier Makah council.

Quileute and Quinault do not mention (or challenge) the district court's finding (MER 20) that Stevens distinguished fish from whales in an exchange with two Chinook negotiators, Nah-kot-ti and Moosmoos.[16] Instead, they rely (Br. at 54) on other exchanges in which Indian speakers made multiple demands – including the right to fish in particular rivers and bays, to gather berries, to pasture their horses, and to take objects they found on the beach, such as whales and wrecks. Although Stevens' responses assured the Indians they had the right to fish, it is not reasonable to read that assurance to include the right to take beached whales – which he separately addressed in response to Nah-kot-ti and Moosmoos – or to address other demands. *See* Makah Br. at 32-33.

For example, in exchange between Chah-lat and Stevens (cited in Q&Q Br. at 54), Chah-lat spoke separately of fishing and obtaining beached whales. MER 494. His fishing discussion focused on a small creek where his people wanted to fish; it

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[16] Nah-kot-ti and Moosmoos said:

> When anything came ashore on the weather beach, whales or anything they wanted one half. Wanted to fish in Shoalwater Bay as before. As also to take oysters.

MER 493. Thus, in seeking access to beached whales, they distinguished whales and fish and made no demand for whaling rights or the expansion of fishing grounds to whaling grounds.

was their "only" place for fishing and the creek was "where he always got his salmon." *Id.* In contrast, his people wanted whales when they came ashore; for that reason, he wanted "a scope on the beach where things floated up of which he got a good deal." *Id.* Like Nah-kot-ti and Moosmoos, Chah-lat did not seek a right to whaling or to expand his people's traditional fishing grounds to large ocean areas where they were unaccustomed to fishing.

Stevens' response likewise made no mention of whaling. He first mentioned three rights expressly reserved in the subsistence clause of the proposed treaty – the right to take fish, pasture horses and gather roots and berries. *Id.* He had just discussed beached whales in response to Nah-kot-ti and Moosmoos, and did not repeat that statement. Instead, he discussed the creation of a single reservation as opposed to a separate reservation requested by Chah-lat, and did not agree to reserve "a scope on the beach." *Id.* Nothing in this or any other exchange suggests the treaty drafters or the Indians equated whales with fish or whaling (which was never mentioned) with fishing.

In the passages from the Makah council on which Quileute and Quinault rely (Br. at 55), the Indian speakers did mention whaling, and distinguished it from fishing. *See* MER 483 (Kal-chote's statement that he "ought to have the right of fish and take whales and get food where he liked"); MER 484 (Tse-heu-wrl's statement that "if whales were killed and floated ashore, he wanted for his people the exclusive

right of taking them"). Stevens' response to the first statement – that he did not wish to stop their fisheries – uses the word fisheries to include catching fish and taking other products of the sea, *see* note 4 above, but does not equate fishing and whaling. His response to the second statement distinguished these activities; he replied "that he wanted them to fish but that the whites should fish also. Whoever killed the whale was to have them if they came ashore." MER 484. Stevens' addition of a whaling or sealing provision to the Makah treaty reflected these distinctions.

Makah's opening brief also observed (at 34-35) that the absence of any reference to whaling in the records for the Treaty of Olympia helps explain the absence of a whaling or sealing provision in the treaty, despite its inclusion in the Makah treaty only a few months earlier. Quileute and Quinault disagree, first asserting (Br. at 56) that "[m]embers of the treaty commission were aware of the tribes' customary sea mammal harvesting activities." The only support they offer for this claim (Br. at 56-57) is Gibbs' report that Quileutes were good seamen and took whales by means of harpoons buoyed by sealskins.[17] However, the report, published posthumously in 1877, included information Gibbs acquired *after* 1855.[18]

[17] Notably, the same report states the tribes south of Quileute, such as Quinault, did *not* hunt whales, but "content[ed] themselves with the animal when it drifts ashore dead." QER 2985; *see also* MER 207.

[18] Barbara Lane previously asserted the 1877 publication was written in 1855, but provided no support for that assertion. *See* QER 3067, 5194. The experts in this

Dr. Boxberger testified Gibbs "had very limited information on the Quinault" and "knew even less about the Quileute" at treaty times. QER 2196-2197. In 1854, Gibbs wrote that even the names of the tribes residing between Makah and Quinault (*i.e.* Quileute and Hoh) were unknown, and it was not until the 1855 Chehalis River council that Gibbs learned those tribes spoke a different language than Quinault. MER 255-258. Given his limited information, it cannot be inferred Gibbs was aware of Quileute sea mammal hunting in 1855, and the district court made no such finding.

Quileute and Quinault (Br. at 57) also complain it is misleading to compare records for their treaty to those for Makah's because no minutes survive from Simmons' July 1855 council with Quileute and Quinault. However, there are extensive minutes for the Chehalis River Council (more extensive than for Neah Bay), and those minutes contain no mention of whaling or sealing. *Cf.* MER 482-86 (Neah Bay) *with* MER 487-507 (Chehalis River). As to Simmons' council, Makah acknowledged (Br. at 5) the minutes had not survived, but noted the record includes Quileutes' *own recollections* of it, which discuss the Quileutes' desire to retain access to the river where they obtained salmon, the coast and prairies, and their refusal to leave their traditional lands, with no mention of whaling or sealing. *See* MER 39, 782-73.

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case agreed Gibbs included information he acquired while he remained in Washington Territory until 1859 or 1860. *See*, *e.g.*, QER 1378, 1820; MSER 39, 44.

It is possible that, despite recording Makah concerns about whaling during the Neah Bay Council, Gibbs neglected to record Quinault concerns about whaling at the Chehalis River Council. It is also possible that, in recalling their discussions with Simmons, Quileutes themselves overlooked concerns about whaling and sealing. However, these are the available records, and the absence of any reference to whaling or sealing is consistent with and helps explain the absence of a whaling or sealing provision in the Treaty of Olympia. The available records of the treaty negotiations thus support the proposition that the treaty drafters did not intend to secure a right of whaling or sealing or, more importantly, to expand the right of taking fish to distant, unmentioned whaling or sealing grounds where the tribes were unaccustomed to fishing.

c. Stevens' 1854 Letter.

In discussing the shellfish case, the Six Tribes (Br. at 11) cite an 1854 Stevens letter allegedly equating whaling with fishing. However, the letter distinguishes "whale fisheries" from other fisheries, and "whaling grounds" from "fishing grounds." QER 5863-5864. Stevens wrote: "The fisheries in [Washington's] rivers, in the Columbia which she divides with Oregon, & in other streams entering into the Sound and the Pacific are boundless, and without, the banks lying off the coast and the inlets stretching between Vancouver's Island and the main, swarm with cod, halibut & other valuable species." *Id.* Additionally, "to the North the Arctic Ocean,

to the West, the China Seas offer their field to the daring adventures of the New England whaler." *Id.* Stevens encouraged "eastern capitalists, interested in the whale fishing" to establish a "depot" for whalers in Puget Sound, which "would speedily become a rendezvous for seamen and a place at which provisions of all kinds would seek a market." QER 5865. In this context Stevens suggested the depot be located "within a reasonable distance of the fishing grounds …." QER 5864-5865. This was not, as the Six Tribes suppose, a reference to the "whaling grounds" located in the distant Arctic and China Seas. Rather, it was a reference to in-river and offshore fishing grounds (swarming with cod, halibut and other valuable species), which could provide additional business for the depot.

Throughout this letter Stevens consistently modified the terms fishing and fisheries when he had whaling in mind, and separately referred to whalers and whaling grounds. The letter strongly suggests Stevens, who came from New England, QER 5865, appreciated the differences between whaling and fishing and did not use those terms interchangeably. His addition of a whaling or sealing provision to the Makah treaty confirmed this.[19]

[19] The Six Tribes also cite (Br. at 11 n.2) an 1854 newspaper article attached to Professor White's shellfish declaration. The article describes the potential for mackerel, sardine, salmon, and shellfish fisheries on the Pacific Coast, asserts there is no "better fishing ground for salmon, cod, halibut, and numerous other fish" than Puget Sound and the Juan de Fuca Strait, and adds that "[t]he waters of the Sound and Straits are alive with almost every species of the *fish kind*, from the muscle throughout all the testacea, crustacea and cetaceous species." MSER 187 (emphasis

d. Judicial Decisions.

Quileute and Quinault (Br. at 58-59) and the Six Tribes (Br. at 12) also cite judicial decisions using the term fish to include whales or seals. However, none of the cases involved the Stevens treaties or Indian fishing rights. The distinction the treaty drafters themselves drew between the right of taking fish and of whaling or sealing is more probative of their intent than these unrelated decisions.

Quileute and Quinault cite three cases cited by the district court, which are discussed in Makah's opening brief (at 30-31). The Six Tribes cite additional cases, several of which recognized that, scientifically and technically, whales and seals were not fish. For example, in *Central Commercial Co. v. U.S.*, 11 Ct. Cust. 131, 132 (1921), the court explained that "[s]cientifically speaking, the whale is not a fish and is as far from being even a remote cousin to a fish as is a man or monkey." In *Swan & Finch Co. v. U.S.*, 113 F. 243, 244 (2d Cir. 1902), the court noted the 1897 Tariff Act did not use the terms "seal, herring, whale, and other fish oil" with "technical precision; for neither the seal nor the whale is a fish …." Just as *Swan* was guided by how the terms were used in the Act at issue there, this court should be guided by how the terms were used in the treaties at issue here.

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added). The author's use of Linnaean classifications, and his reference to species of the "fish kind" as opposed to "fish," suggests he was aware that these species were not actually "fish," and provides no support for the proposition that the *treaty drafters* equated fishing, whaling and sealing.

In other cases not cited by the Six Tribes, courts distinguished whaling from fishing. *See The Atlantic*, 2 F. Cas. 121, 129 (S.D.N.Y. 1849) (Congress has not regarded "the whaling business … as deserving regulation by law as much as fishing voyages"); *Crowell v. Knight*¸ 6 F. Cas. 910, 911 (D. Mas. 1874) (comparing contracts made "in a fishing voyage" with those made "in whaling voyages"); *Story v. Russell*, 157 Mass. 152, 154, 159 (1892) (declining to extend remedies available to crew on "whaling voyages" to crew on "fishing voyages"); *The Samuel Little*, 221 F. 308, 311 (2d Cir. 1915) (admiralty jurisdiction "includes whaling, sealing, and fishing voyages").

These cases confirm commonplace distinctions among fishing, whaling and sealing. The treaty drafters' intended meaning, as evidenced by the distinction they drew between the right of taking fish and of whaling or sealing in the Makah treaty, was consistent with them.[20]

2. Quileute and Quinault Distinguished Fishing, Whaling and Sealing.

It is undisputed that Quileute and Quinault distinguished fishing, whaling and sealing. Consistent testimony from Dr. Boxberger and Dr. Renker and extensive

[20] The Six Tribes also cite (Br. at 19) *Moby Dick*, but the cited passage acknowledges whales were not fish under the Linnaean system, discusses fundamental respects in which whales differ from fish, and asserts unequivocally that "the walrus [and by the same logic, the seal] is not a fish because he is amphibious." Herman Melville, Moby Dick 199 (Collector's Library 2004) (1851).

ethnographic literature demonstrated that fishing, whaling and sealing were *separate occupations*, with different ritual societies, different ceremonies, different gear, different canoes and different words. Makah Br. at 39-43.[21] For Quinault, whaling and sealing were hunting, not fishing, and hunters, "whether of sea mammals or of elk and bear … 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." MER 638. Given the fundamental and pervasive differences between fishing, whaling and sealing, it cannot reasonably be inferred that Quileute and Quinault understood the right of taking fish at usual and accustomed places to vastly expand their traditional fishing grounds to distant whaling and sealing grounds.

Quileute and Quinault (Br. at 64) attempt to reduce this argument to one over "different gear and harvesting methods," asserting such differences would have excluded shellfish from the right of taking fish. *See also* Six Tribes' Br. at 20. However, there is no evidence that differences between fishing and shellfishing were commensurate with the differences between fishing, whaling and sealing. For example, there is no evidence Quileute and Quinault considered fishing and shellfishing to be separate occupations or had different ritual societies for them. Nor

[21] Quileute and Quinault suggest (Br. at 65) that, despite Dr. Boxberger's testimony, they used some of the same gear – spears and harpoons – for fishing, whaling and sealing. However, different types of spears and harpoons were used for these activities. *See* MER 412-413, 414-416, 422-425, 634-635, 640.

is there evidence that shellfish harvesters were considered hunters or "looked with … disdain" on fishermen. Moreover, the pervasive distinctions among fishing, whaling and sealing in Quileute and Quinault languages, cultures and societies align with textual evidence that the drafters distinguished those activities – a critical factor not present regarding shellfish.

Quileute and Quinault also rely on technical linguistic arguments to avoid these fundamental distinctions. First, citing Professor Hoard's testimony, they claim (Br. at 61) limitations in Chinook jargon would have prevented the treaty negotiators from referring to fish without also including whales and seals; allegedly, "[t]he only way to attempt this would be to list all of the different individual creatures that were to be either included or excluded, and then attempt to explain to the tribes the inclusion or exclusion of each organism based upon biological characteristics." However, it is undisputed Chinook jargon had separate words for fish, whales and seals (*see* MER 199-200, 462-464; *see also* Q&Q Br. at 60); accordingly, the treaty negotiators could have employed the jargon's word for fish without including whales or seals. Because this would have corresponded precisely to distinctions Quileutes and Quinaults drew between fishing, whaling and sealing, there is nothing implausible about it. Moreover, at the Chehalis River Council, Indian speakers

repeatedly distinguished fish and whales. MER 491, 493, 494. To argue they could not have done so lacks merit.[22]

Quileute and Quinault also argue (Br. at 62-63) their own languages lacked words to distinguish fish, whales and seals. However, it is undisputed their languages had words that could refer to fish generally without including whales or seals. *See* Makah Br. at 36-39.[23] As Dr. Hoard testified (and Quileute and Quinault concede, Br. at 63 n.24), those words did not mean "an animal that lives in or on the water" and were not used to refer to whaling or sealing: those activities were "common enough, ordinary enough, that they have words of their own." MER 330, 335. Indeed, it is not plausible to suggest Quileute and Quinault lacked vocabulary to distinguish activities – fishing, whaling and sealing – that comprised *separate occupations and societies*. In 1861, a Quileute chief told James Swan their village "was good for fishing, sealing, whaling and for defense," MER 627, further confirming Quileutes could distinguish these activities.

[22] Under Quileute and Quinault's hypothesis, the treaty drafters could not have explained the shellfish proviso without listing every individual species of shellfish, but there is no evidence they did so.

[23] Quileute and Quinault wrongly assert (Br. at 63) that Makah contends these words were used in their narrowest sense to refer only to salmon. As discussed in Makah's opening brief (at 38), Makah contends they were used to refer to fish generally, but not whales or seals.

Notably, Quileute and Quinault identify no word or cultural concept that linked fishing, whaling and sealing as a single activity. Instead, they seize on a broader meaning of their words for fish as "food," arguing (Br. at 63-64) they would have understood the right of taking fish as a right of taking all food. However, they concede (Br. at 62) there is no evidence this is how the words were actually used in the treaty negotiations, and it highly implausible they were used in this manner. This is because the treaty drafters separately provided for "the privilege of hunting [and] gathering roots and berries … on all open and unclaimed lands." Makah Br. at A-5 (Art. 3). If the right of taking fish encompassed all food there would have been no need for a separate hunting and gathering provision, and no way to distinguish those provisions during the negotiations.

Interpreting the right of taking fish to encompass all food creates other problems. For example, a right of taking "food" would expand the treaty fishing right to watersheds where tribes hunted land animals or gathered plants but did not fish, contrary to settled law. *See*, *e.g.*, *U.S. v. Washington*, 626 F.Supp. 1405, 1531 (W.D. Wash. 1985). It would also expand the right of "erecting temporary houses for the purpose of curing [fish]," *see* Makah Br. at A-5 (Art. 3), to a right to erect temporary houses to cure elk and other land animals.

In sum, contrary to the district court's finding, there is nothing in "the records of the Quileute and Quinault languages," MER 23, that supports the inference that

Quileutes and Quinaults understood the right of taking fish to encompass whaling or sealing. The fundamental and pervasive distinctions in Quileute and Quinault languages, cultures and societies demonstrate that they distinguished these activities and would not have understood the right of taking fish to provide for an expansion of their traditional fishing grounds.

Nothing in the treaty negotiations suggests otherwise. As discussed above, the only discussion of whales at the council involved beached whales; there was no discussion of whaling. Moreover, even if it could be inferred that the tribes understood whaling rights to be preserved in the treaty, *see* MER 20, that does not mean such rights were part of the right of taking fish or that they could be used to expand the tribes' traditional fishing grounds to distant whaling grounds. No Indian speaker equated whaling and fishing, no Indian speaker sought an expansion of traditional fishing grounds to whaling or sealing grounds, and no American negotiator suggested the treaty would have that effect. *See* Makah Br. at 33-34; Part C.1.b above.[24]

3. Neither the Indian Canons Nor the Reserved-Rights Doctrine Support Expansion of Traditional Fishing Grounds.

[24] Like Judge Martinez, Quileute and Quinault (Br. at 66-68) seek support for their interpretation in post-treaty events. However, those events (none involving an expansion of Quileute or Quinault fishing grounds) do not indicate the treaty reserved fishing rights in waters in which they were unaccustomed to fishing. *See* Makah Br. at 43-45.

Makah's opening brief showed (at 22-26) the Indian canons are inapplicable where Indian interests are adverse; the canons cannot in any event alter a treaty's plain meaning (or the Indians' understanding of it); and the reserved-rights doctrine does not support expansion of Quileute and Quinault's treaty fishing right to waters in which they did not customarily fish.

a. Indian Canons.

Quileute and Quinault invoke the canons to defeat a strawman – a "technical, lawyer-driven construction" rooted in "the Linnaean classification of *fish* as 'oviparous' and *cetacean* as 'viviparous.'" Q&Q Br. at 29-30 (quoting Makah Br. at 29). As discussed above, Makah's position is based on plain language, including the commonplace distinction drawn by the drafters among fishing, whaling and sealing in the Makah treaty, and Indian understanding – rooted not in Linnaean classifications but in pervasive distinctions among fishing, whaling and sealing in Quileute and Quinault languages, cultures and societies. Thus, even if fully applicable, the canons would be unavailing.

However, the canons are inapplicable. In *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 337, 340 (9th Cir. 1996), Chehalis and Shoalwater argued they were entitled to share Quinault's fishing rights under the Treaty of Olympia. This court recognized "[c]ourts have uniformly held that

treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights." *Id.* at 340. However, it declined to apply this rule:

> The rules of construction ... are of no help to the Tribes in their claim to Quinault fishing rights because of the countervailing interests of the Quinaults. The government owes the same trust duty to all tribes, including the Quinault. We cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect Quinault interests.

Id.

Quileute and Quinault would distinguish *Chehalis* because it involved claims under the same treaty. However, the court declined to apply the Indian canons because "[t]he government owes the same trust duty to all tribes," a duty which is not limited to tribes claiming under the same treaty.[25]

Moreover, the tribes' rights under the Stevens treaties are inextricably linked because they are subject to a combined harvest ceiling. *See*, *e.g.*, *Passenger Fishing Vessel*, 443 U.S. at 685-86; *U.S. v. Washington*, 143 F.Supp.2d 1218, 1220-21 (W.D. Wash. 2001). The overall treaty share is analogous to a single fund available to all

[25] Quileute and Quinault argue (Br. at 38) *Chehalis* applied the canons to Chehalis and Shoalwater's claim to off-reservation fishing rights under executive orders. However, there is no indication Quinault asserted or the court understood those claims adversely affected Quinault. *See* 96 F.3d at 342-43; *see also U.S. v. Washington*, 19 F.Supp.3d 1294, 1296-97 (W.D. Wash. 1998) (Chehalis harvest of fish on executive order reservation does not reduce Quinault's treaty share under *U.S. v. Washington*). Similarly, nothing in *Seufert Bros. v. U.S.*, 249 U.S. 194 (1919), indicates the Court understood Yakama's claim to fishing rights south of the Columbia River would adversely affect other tribes; as the Court noted, "the tribes associated freely and intermarried, and … neither claimed exclusive control of the fishing places on either side of the river … but used both in common." *Id*. at 197.

eligible tribes: an interpretation that "increases [the harvest of] some tribes necessarily decreases [the harvest of] other tribes …." *Housing Auth. of Te-Moak Tribe of W. Shoshone Indians v. HUD*, 85 F.Supp.3d 1213, 1221 (D. Nev. 2015). Citing *Chehalis*, *Te-Moak* rejected application of the canon of liberal construction under such circumstances. *Id.*.

Further, the Stevens "treaties reserved to the signatory tribes their pre-treaty fishing rights *in relation to one another*." *U.S. v. Skokomish Indian Tribe*, 764 F.2d 670, 671 (9th Cir. 1985) (emphasis added); *see also U.S. v. Lower Elwha Tribe*, 642 F.2d 1141, 1144 (9th Cir. 1981) ("tribes reasonably understood themselves to be retaining no more and no less of a right vis-a-vis one another than they possessed prior to the treaty"). Given the inter-relatedness of the tribes' treaty rights, even under Quileute and Quinault's reading of *Chehalis* the canons cannot be invoked to expand the rights of one tribe if it would adversely affect the rights of another (or render a provision of its treaty inoperative).

The Six Tribes (Br. at 20-22) would distinguish *Chehalis* on a different ground; they contend "it is only where tribal interests were directly adverse at treaty time that the canons do not apply." In support, they assert "Quinault treaty negotiators *at treaty time* would have understood the arguments of the Chehalis and Shoalwater Tribes to be directly and necessarily adverse because those two tribes

argued for a direct share of the Quinault Tribe's property right in off-reservation fishing." *Id.* at 24 (emphasis in original).

This argument is not supported by *Chehalis*, which rested on the government's trust responsibility to adversely affected tribes, not on the degree of adversity or the date it accrued. The court made no finding of treaty-time adversity, and the record in this case shows just the opposite: the Quinault negotiators agreed to (and did) sign a treaty at the Chehalis River council that would have provided fishing rights to Chehalis and other southwest Washington tribes. *See* Makah Br. at 4. Moreover, under the Six Tribes' view (Br. at 24), the Chehalis and Shoalwater claims would not have been directly adverse to Quinault at treaty times because "adversity is … a product of modern-day scarcity that no party could have envisioned at treaty-time."

Quileute and Quinault are correct (Br. at 39-40) that this court applied the canons in resolving intertribal disputes in *Colville*. However, in applying the canons to benefit *both* tribes, the court never mentioned *Chehalis*, discussed its application to the case or purported to overrule it. *See* 606 F.3d at 708-09, 711, 713. Because this court and district courts within this circuit have continued to apply *Chehalis* since *Colville*,[26] it should be applied here.

[26] *See*, *e.g.*, *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); *Te-Moak*, 85 F.Supp.3d at 1221; *Walker River Paiute Tribe v. HUD*, 68 F.Supp.3d 1202, 1209-10 (D. Nev. 2014).

Quileute and Quinault (Br. at 37) and the Six Tribes (Br. at 25 n.5) argue it would not make sense for the canons to apply when the adverse party is the State or the United States but not when it is another tribe. However, under *Chehalis* the canons' applicability does not depend on the adverse party, but on whether they would adversely affect another tribe. A court might be less likely to find an adverse effect if the other tribe is not a party, but that does not change the *Chehalis* rule or provide a reasoned basis for not applying it where, as here, the adverse effect is clear. *See* MER 925-27.

b. Reserved Rights.

Quileute and Quinault (Br. at 26-28) and the Six Tribes (Br. at 17-19) invoke the reserved-rights doctrine to expand the right of taking fish to waters in which they did not fish at treaty times. The doctrine originated in *U.S. v. Winans*, 198 U.S. 371, 381 (1905), where the Court observed "the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." Makah's opening brief noted (at 25) that the doctrine provides support for the proposition that Quileute and Quinault reserved whaling and sealing rights because they did not specifically grant those rights away. However, the doctrine does not support the proposition that such rights are part of the right of taking fish, or that they can be used to expand the right of taking fish to waters where Quileute and Quinault were unaccustomed to fish. If anything "turns the reserved rights doctrine

on its head," Six Tribes Br. at 18, it is the claim that a reserved right to hunt marine mammals can be used to vastly expand Quileute and Quinault's fishing grounds.

To support this use of the doctrine, Quileute and Quinault and the Six Tribes cite *Shellfish*. However, as discussed above, *Shellfish* used the reserved-rights doctrine to hold the right of taking fish encompasses all species of shellfish *after* concluding, on independent textual grounds, that shellfish were within the right of taking fish. Because nothing in the reserved-rights doctrine demonstrates implied whaling and sealing rights, if any, are part of the express fishing right, it provides no support for use of whaling and sealing to expand the geographic scope of that right.

D. The District Court Erred in Delineating Quileute and Quinault's Western Boundaries.

Makah's opening brief (at 45-49) demonstrates the district court erred in using longitudinal lines to define Quileute and Quinault's western boundaries because those lines extend far beyond the areas in which the court found Quileute and Quinault hunted or fished. Quileute and Quinault defend (Br. at 108-116) the boundaries based on law of the case, equity, and the evidence.

1. Law of the Case.

This court reviews *de novo* a holding that an issue was decided explicitly or by necessary implication so as to establish law of the case. *Lummi*, 763 F.3d at 1185. Quileute and Quinault argue (Br. at 109) "[o]cean U&A boundaries have always

been delineated using straight latitude and longitude lines," but the only case they cite for this (*id.* at 109-113) is *Makah*.[27]

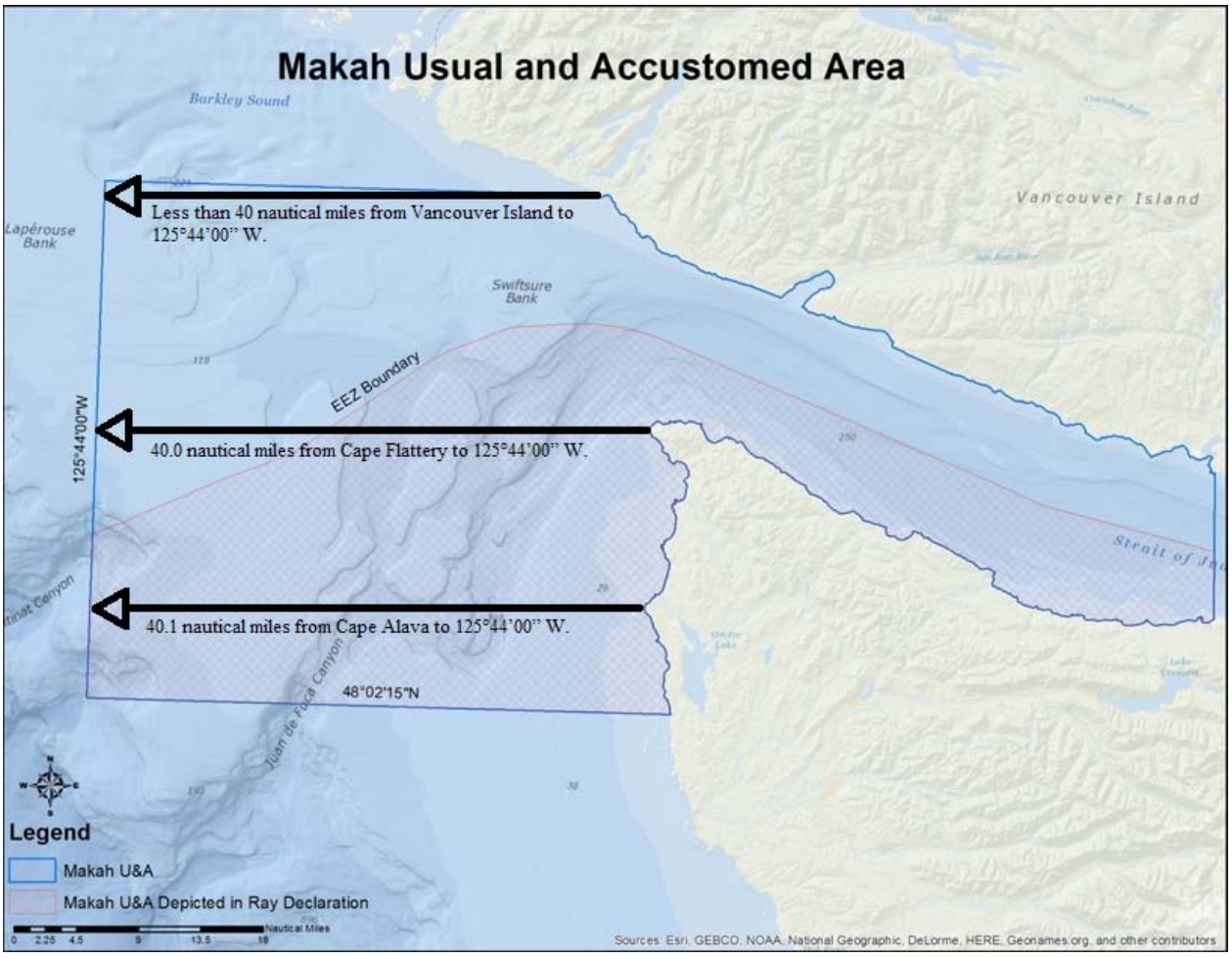
Makah does not hold explicitly or by necessary implication that ocean boundaries *must* follow straight longitude lines. Although it used a longitude line for Makah's western boundary, it stated it was based on "all evidence submitted and reasonable inferences drawn therefrom …." 626 F.Supp. at 1467. In denying reconsideration, the court explained that U&A boundaries need not be "determined with 'specific precision'" but should reflect "with some certainty the extent of the area which the Court intends to encompass within its determination of a tribe's treaty-secured fishing area." HER 47. This was consistent with other decisions holding U&A boundaries should reflect the "general area" of a tribe's fishing operations, *see* MER 1032, but also did not explicitly mandate use of straight longitude lines. And, because the Makah boundary reflected the "general area" of

[27] Quileute and Quinault also cite boundaries in federal regulations, Br. at 109, 113 (citing 51 Fed. Reg. 16471, 16472 (May 2, 1986)), but cite no authority holding federal regulations can establish law of the case. As the United States twice made clear in this proceeding, those regulations simply extended Makah's western boundary south as an interim measure necessary for management of ocean fisheries; they were never intended to adjudicate U&As or to set a precedent for court adjudication. *See* MSER 78-82; MSER 71-72. Quileute and Quinault themselves objected that there was *no legal or factual basis* for the regulations' western boundaries. MSER 79. And, the district court ruled repeatedly that the regulatory boundaries have no effect on its determination of U&As. *See* MER 943, 981, 1004. Quileute and Quinault have not challenged these rulings and are bound by them.

its fishing operations, *Makah* does not imply that straight longitude lines must be used where they do *not* reflect the general area of a tribe's fishing operations.

In *Makah*, the district court found "Makah regularly fished at known fishing banks some 30 to 40 miles offshore," including "40 Mile Bank," 626 F.Supp. at 1467, and this court found it probable Makahs "fished regularly at areas about 40 miles out …." 730 F.2d at 1318. The following map, prepared by Quileute and Quinault's GIS expert (MER 110),[28] with distances from Cape Flattery and Cape Alava provided by Makah's GIS expert (MER 127), shows the Makah boundary generally reflects these findings:

[28] The map errs in depicting Makah's northern boundary south of where longitude 125º44'00"W. intersects Vancouver Island. Makah's U&A includes all waters west of Vancouver Island bounded by longitude 125º44'00"W. *Makah*, 626 F.Supp. at 1467.



Quileute and Quinault argue (Br. at 112-13) Makah's boundary does not reflect the court's findings because it "extends beyond 40 nautical miles at every point of land … other than the westernmost point at Cape Alava." Their own map shows this is incorrect; the boundary is also 40 nautical miles west of land at Cape Flattery and, in Canadian waters, is even less than 40 miles west of land. Moreover, because of the orientation of the coast, the Makah boundary is never more than 42 miles west of land, *see* MER 127, and intersects La Perouse or 40 Mile Bank, where

Makahs were known to fish.[29] Thus – as the map illustrates – the boundary generally reflects the courts' findings.

Quileute and Quinault also argue (Br. at 111) the evidence did not support the courts' 40-mile findings, alleging Makah has not pointed "to any specific evidence showing Makah finfishing activity below Forty Mile Bank." However, as discussed in Part A.1.b above, Makah fishing out to 40 miles was undisputed. Moreover, because of the difficulties of proof in establishing ocean U&As, the court looked to the farthest distance offshore the tribe customarily fished to establish its western boundary along the full north-south extent of its U&A, *just as the district court did in this case*. As Quileute and Quinault explain (Br. at 113):

> [Judge Martinez] followed Judge Craig's reasoning: "the Court has found it appropriate to demarcate an offshore U&A based on the outermost distance to which the tribes customarily navigated their canoes for the purpose of 'tak[ing] fish' at and before treaty time." QER 71 (citing Makah ocean U&A rulings), *see also* MER 3-4 (Amended Order on Boundaries).

Thus, in this case, the district court found Quileute customarily hunted up to 40 miles offshore even though there was no "specific evidence" Quileute hunted (or fished)

[29] Quileute and Quinault claim (Br. at 111 n.49) La Perouse and 40 Mile Bank are different banks because Judge Craig substituted the latter name for the former in his finding. However, the *Makah* record indicated 40 Mile Bank was "somewhat co-extensive with the area shown on charts as 'La Perouse Bank,'" and had a western boundary of "approximately 126º longitude." MER 1234. Quileute and Quinault cite no evidence to the contrary. Their own depiction of 40 Mile Bank, for which they provide no source, extends to Makah's western boundary at longitude 125º44'00"W. *See* Q&Q Br. at 109-110.

40 miles west of Cape Alava at the northern end of its U&A. And the court found Quinault hunted 30 miles offshore even though there was no specific evidence Quinault hunted (or fished) 30 miles offshore at the northern end of its U&A.

The difference between this case and *Makah* lies not in the use of "outermost distances" to define U&As, but in the demarcation, in this case, of western boundaries that go far beyond those distances. The court found Quileute's U&A extends "40 miles offshore," MER 92, but delineated a western boundary approximately *56 miles* offshore at its southern end, adding more than *400 square miles* to Quileute's U&A, *see* MER 4, 126. Similarly, it found Quinault's U&A extends "30 miles from shore," MER 92, but delineated a western boundary *41 miles* offshore at its southern end, adding more than *380 square miles* to Quinault's U&A, *see* MER 4, 127.[30]

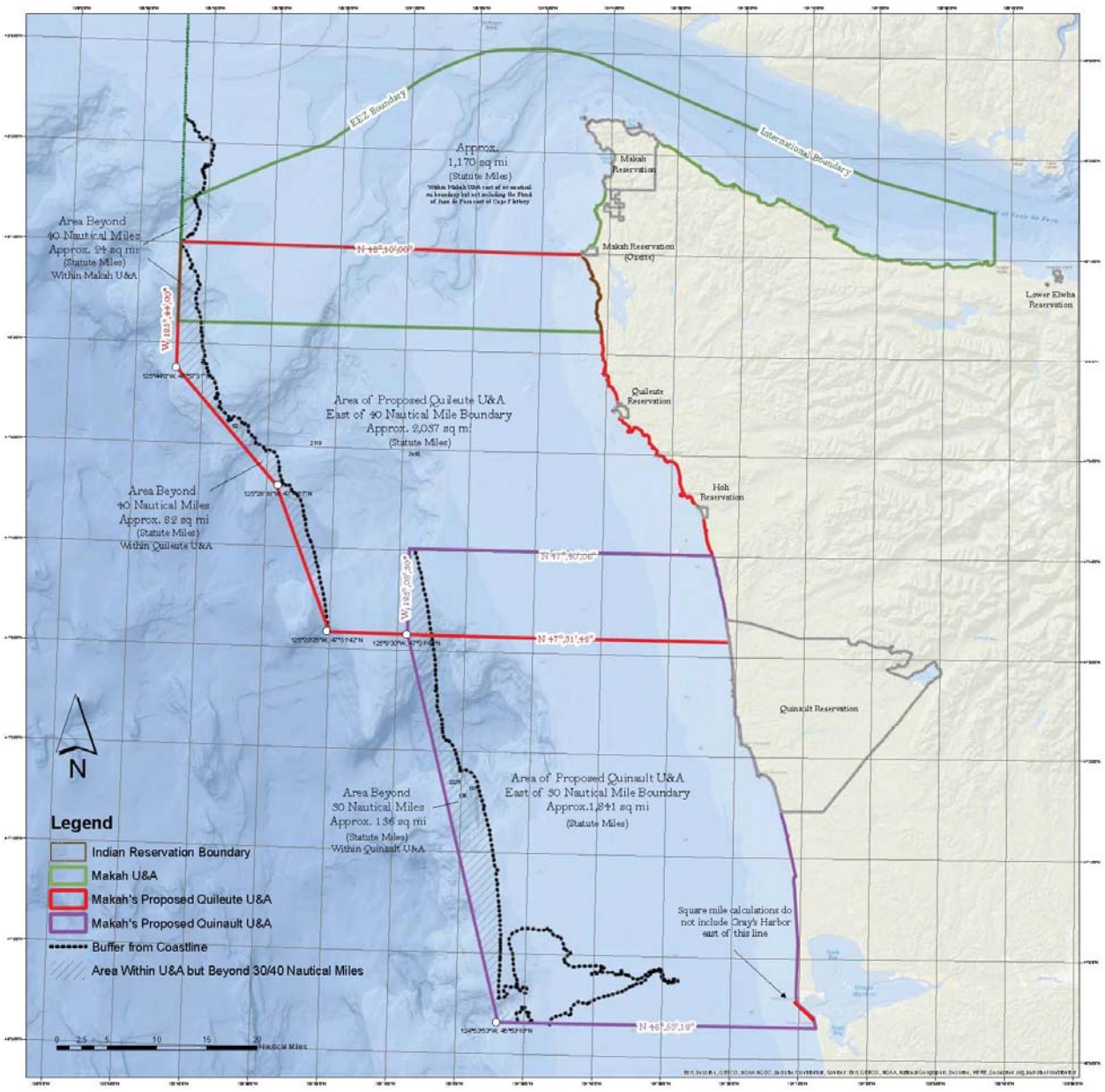
Makah neither expressly nor impliedly mandates use of straight longitude lines under these circumstances. Rather, in holding U&A boundaries must generally reflect the areas in which tribes customarily fished, *Makah* rejects this approach.

2. Equity.

Quileute and Quinault's "equity" argument (Br. at 113-114) also lacks merit. Pointing solely to the northern portion of Quileute's U&A, which overlaps with

[30] These discrepancies result from the fact that, unlike in Makah territory, the coastline trends eastward as one moves south through Quileute and Quinault territory. *See* MER 134.

southern portion of Makah's U&A, they argue: "[a]lthough Makah and Quileute *share this area*, Makah and the State seek to draw Quileute's boundary differently by tracing the coastline." *Id.* (emphasis in original). This seriously misrepresents Makah's position. Makah did not propose boundaries "tracing the coastline"; rather, it proposed *straight* lines that "approximate[] the trajectory of the coastline" and "fairly reflect[] the areas where the Court determined Quileute and Quinault customarily fished at treaty time." MSER 6-7. In the overlap area, Makah's proposed Quileute boundary was *identical* to Makah's existing boundary, as shown in the following map:

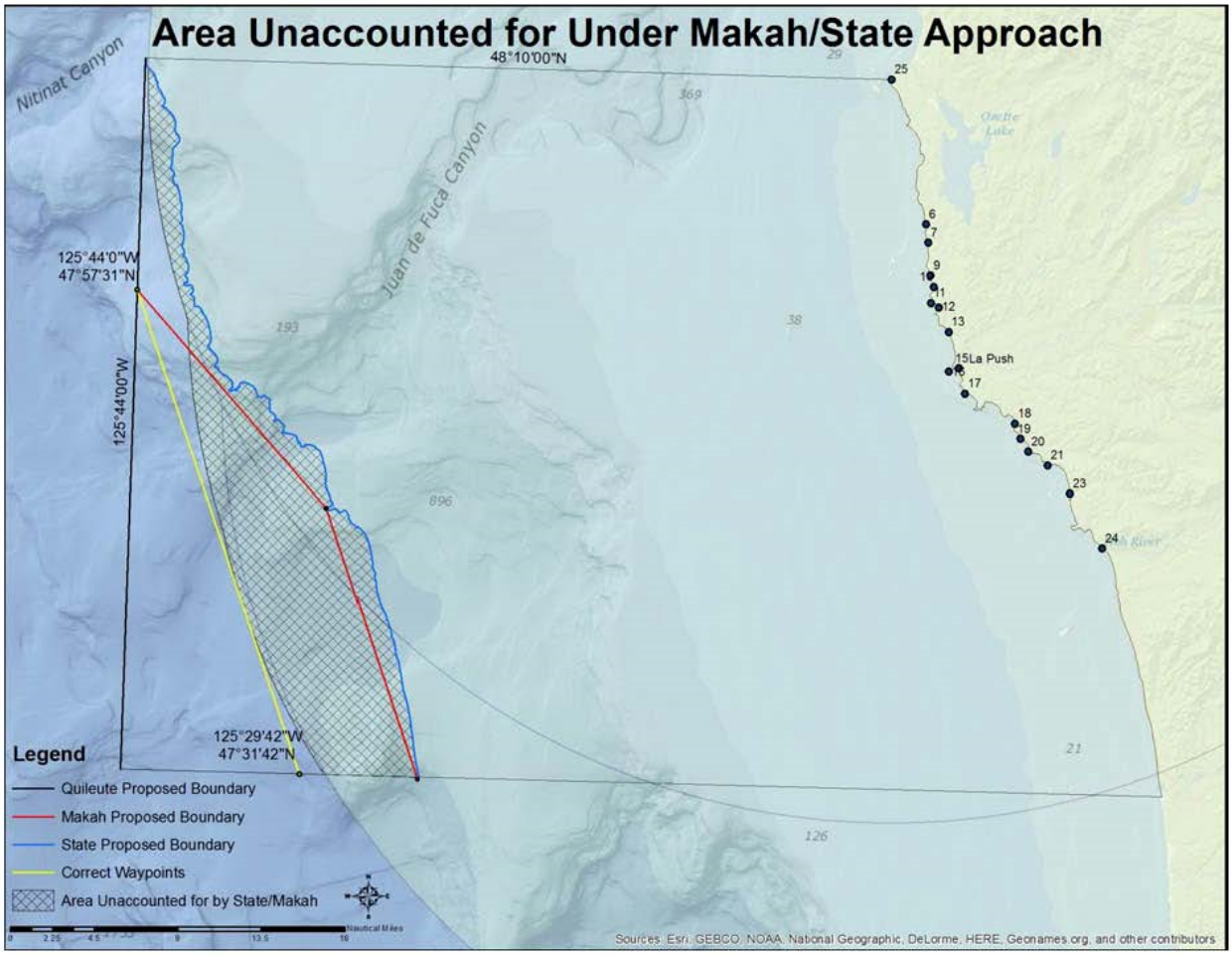


MER 134. Quileute and Quinault identify nothing inequitable about this.

3. Evidence.

Quileute and Quinault's claim (Br. at 114-15) that the evidence supports their boundaries fares no better. They argued below that "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 114. Even using this "radial" methodology (which was not used in *Makah*), the evidence did not support the district court's boundaries. The map Quileute produced illustrating the 40-mile radius from claimed villages shows the boundary delineations still far exceed the 40-mile finding:



MER 115.[31] Makah estimated (and Quileute does not dispute) that, even under this approach, the western boundary added some *200 square miles* to Quileute's U&A. *See* Makah Br. at 48.

E. The District Court Erred in Finding Quileute Customarily Fished 20 Miles Offshore.

The district court relied on three ethnographic sources (Frachtenberg, Singh and Daugherty) to find Quileute customarily fished 20 miles offshore. MER 48-49. Makah's opening brief (at 49-56) demonstrated this finding was clearly erroneous. Frachtenberg, whose work with Quileutes was the most intensive of any anthropologist and closest in time to the treaty, provided detailed descriptions placing their ocean fisheries within a few miles of shore and stated specifically that Quileutes "*never* went further than two miles into the sea" for halibut. MER 406 (emphasis added). Singh corroborated Frachtenberg's description; as far as he could determine, there were "only two small [halibut] beds" south of Cape Flattery, "one near James Island and the other south of Destruction Island," and Quileutes "generally did not attempt to obtain halibut." MER 722.[32] Another anthropologist, Jay Powell, also reported a Quileute halibut bank "about 2 miles out." MER 656.

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[31] Quinault made no attempt to delineate its western boundary based on the radial methodology.

[32] Quileute (Br. at 107-108) takes issue with Singh's observation regarding its limited halibut fishery, citing evidence Quileutes fished annually for halibut. However, that evidence does not alter the limited nature of the fishery, which was corroborated by multiple historical and anthropological sources. *See* Makah Br. at 52 n.14; *see also*

Quileute does not contest these specific descriptions of nearshore ocean fisheries. *See* Q&Q Br. at 97-108. Instead, it claims (*id.* at 98-100) Quileutes would have fished farther offshore because fish were more abundant there. However, while fishermen may seek areas of greater abundance, there is no reason to go farther than necessary (especially in a canoe) to meet their needs, *see* MSER 32-36, and Quileute cites *no* evidence that fish were insufficiently abundant in nearshore waters to meet their needs.[33] In the absence of such evidence, a higher abundance of fish elsewhere is not evidence Quileute went there to fish. The court has never used such evidence to determine U&As; to do so here would invite new and expansive U&A claims based solely on fish distribution, not evidence of fishing.

Quileute next asserts (Br. at 100) that Bill Hudson's reference to "50-60 fathoms" in Daugherty's notes is evidence Quileutes fished for halibut at depths of

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MER 538 (Barbara Lane, contrasting Makah's "extensive halibut grounds" with Quileute reliance on river-caught salmon and steelhead).

[33] Quileute cites evidence of rockfish, halibut and hake bones in archaeological sites as evidence of deep-water harvests. Q&Q Br. at 98. However, Frachtenberg, Singh and Powell reported that Quileutes successfully harvested rockfish and halibut in nearshore waters, *see* MER 410, 656, 722, and Dr. Gunderson testified these fish would have been available in significant quantities in such waters. *See* MER 300, 308-14, 318-19; QER 1267, 1270, 1298, 1301-1302; *see also* MER 160-162. As to hake, 12 bone fragments were found in a single 700-year-old site. MSER 22-25; QER 4626-4648. The small number of bones does not support an inference that hake was the target of a customary fishery, MSER 22-25, and there is no historical, ethnographic or other evidence of a Quileute hake fishery before, during or after treaty times. Also, Makah and Quileute experts agreed hake were available in nearshore waters. MSER 18-19, 28-31; QER 1170-72.

50 to 60 fathoms, which, allegedly, "equates to approximately 20 miles offshore of La Push." Q&Q Br. at 100.[34] This interpretation directly contradicts Frachtenberg's report that Quileutes "never went further than two miles into the sea" for halibut, MER 406, and Singh's report that there were only "two small [halibut] beds" south of Cape Flattery, "one near James Island and the other south of Destruction Island." MER 722. Singh's report is especially relevant because Hudson was one of Singh's informants.

Quileute makes no attempt to reconcile its interpretation with Frachtenberg or Singh. Makah's opening brief (at 54) notes that Quileute's expert, Dr. Boxberger, testified Hudson's 50-60 fathom reference was "in keeping with some halibut banks, in particular those off of Cape Flattery," MER 232, where the district court found Quileute began to fish in the late 1800s, well after treaty times. *See* MER 67-73. Dr. Boxberger also testified Daugherty recorded other activities that took place in the post-treaty period. MER 229-30. His testimony thus reconciles Hudson's 1949 comments with Frachtenberg and Singh's description of Quileute's treaty-time fisheries. Quileute never mentions this testimony and provides no reason to reject it. The observation that Hudson described fishing with traditional gear (Q&Q Br. at 102-03) is no answer because Quileutes still used traditional gear when fishing off

[34] The 20-mile claim is factually incorrect. A map produced by Quileute's expert (QER 4949) portrays the 60-fathom line approximately 16 nautical miles west of La Push. *See* Appendix A.

Cape Flattery in the late 1800s. *See* MER 40 (Quileute maintained traditional practices into the early 1900s).

Quileute also fails to address Dr. Boxberger's testimony regarding inherent limitations of field notes. *See* Makah Br. at 55. To sustain its interpretation, Quileute must dismiss Hudson's initial identification of a named halibut bank (meaning "rock bank"), posit that he was describing other unnamed halibut banks (but not those off of Cape Flattery), assume 50-60 fathoms was an accurate measurement of waters Hudson described as "not too deep," and rely on Hudson's description of fishing gear – which was used into the 1900s – to infer he was describing fishing in the 1850s. Q&Q Br. at 101-03. These are precisely the types of interpretative issues that, according to Dr. Boxberger, limit the usefulness of field notes. *See* MER 186-87, 209, 216, 224-25, 232-33, 241-42. Given these limitations, the district court's reliance on Daugherty's notes to reject detailed ethnographic accounts based on multiple informants (including Mr. Hudson) was clearly erroneous.

Quileute's attempt (Br. at 101, 103-07) to identify other evidence corroborating its interpretation of Daugherty's notes is unsuccessful. Although Reagan reported Quileutes harvested halibut "along the halibut banks," QER 4299, he did not identify the depths or offshore distances of such banks. As discussed in Makah's opening brief (at 50), Fractenberg's reference to travel 20-30 miles offshore was tied to whaling and sealing, not fishing. Quileute's response (Br. at 103-04),

that this means Frachtenberg used "fishing" to include whaling and sealing in this passage, does not demonstrate otherwise. *See* Makah Br. at 41 (Frachtenberg discussed fishing, whaling and sealing in a section called "fishing," but also discussed these activities separately and provided separate Quileute words for them).

Makah's opening brief (at 50-54) also showed that, read in context, Singh's statement that "[the Indians] knew means by which they could locate halibut beds eight to twelve miles offshore" likely referenced halibut beds off Cape Flattery, not the two small beds Singh found south of Cape Flattery, and in any event provides no support for the district court's *20-mile* finding. Quileute does not address the context Makah provided for this statement, but argues (Br. at 105) that, because Singh defined "Indians" to include all coastal tribes, the statement must include Quileute and Hoh. However, the following examples show Singh did not invariably use "Indians" to refer to all coastal tribes:

> In 1775 Bruno Heceta … landed to the south of the Quinault River, near Port Grenville. According to the account of Barrington … *the Indians* were hospitable and peaceful.
>
> The sailors rowed up the Hoh River, taking with them a sheet of copper for purpose of trade. They were never seen again and were thought to have been killed by *Indians.*
>
> Because of its glacial origin, the Hoh River was dirty and *the Indians* fished in it at any time.

MER 709, 710, 740 (emphasis added).

Quileute also cites (Br. at 105) Singh's statements that Quileute engaged in "deep sea fishing" and that, during the summer, "[s]ome Quileute … moved to the outer beaches for halibut, rock cod, sea bass, and sea mammals." MER 769, 775. Neither statement, however, provided an offshore distance for these activities. Elsewhere, Singh stated bass were harvested within six miles of shore and Pacific cod were caught on banks below fifteen fathoms. MER 723.

Finally, Quileute (Br. at 105-106) points to a 20th century drawing that purports to depict halibut fishing 700 feet deep. The district court found this would place the Quileutes "near the continental shelf break, about 40 miles offshore," but was "not … corroborated by other sources and was unlikely to have been a regular practice at and before treaty time." MER 49. Quileute does not challenge this finding and does not explain how a *post-treaty* drawing supports its claim to customary fishing 20 miles offshore at treaty time.

CONCLUSION

The court should reverse and remand, holding: (1) whaling and sealing cannot define U&As; (2) longitudinal lines cannot add hundreds of square miles to U&As; and (3) Quileutes did not customarily fish more than five to ten miles offshore.

Respectfully submitted,

ZIONTZ CHESTNUT

s/ Marc D. Slonim

Marc Slonim
Joshua Osborne-Klein

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 17,659 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Because this exceeds the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) and Circuit Rule 32-2(b), this brief is accompanied by a motion for leave to file an over-length brief pursuant to Circuit Rule 32-2(a).

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: November 21, 2016.

ZIONTZ CHESTNUT

/s Marc D. Slonim

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CERTIFICATE OF SERVICE

I certify that on November 21, 2016, I electronically filed the foregoing Reply 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: November 21, 2016.

ZIONTZ CHESTNUT

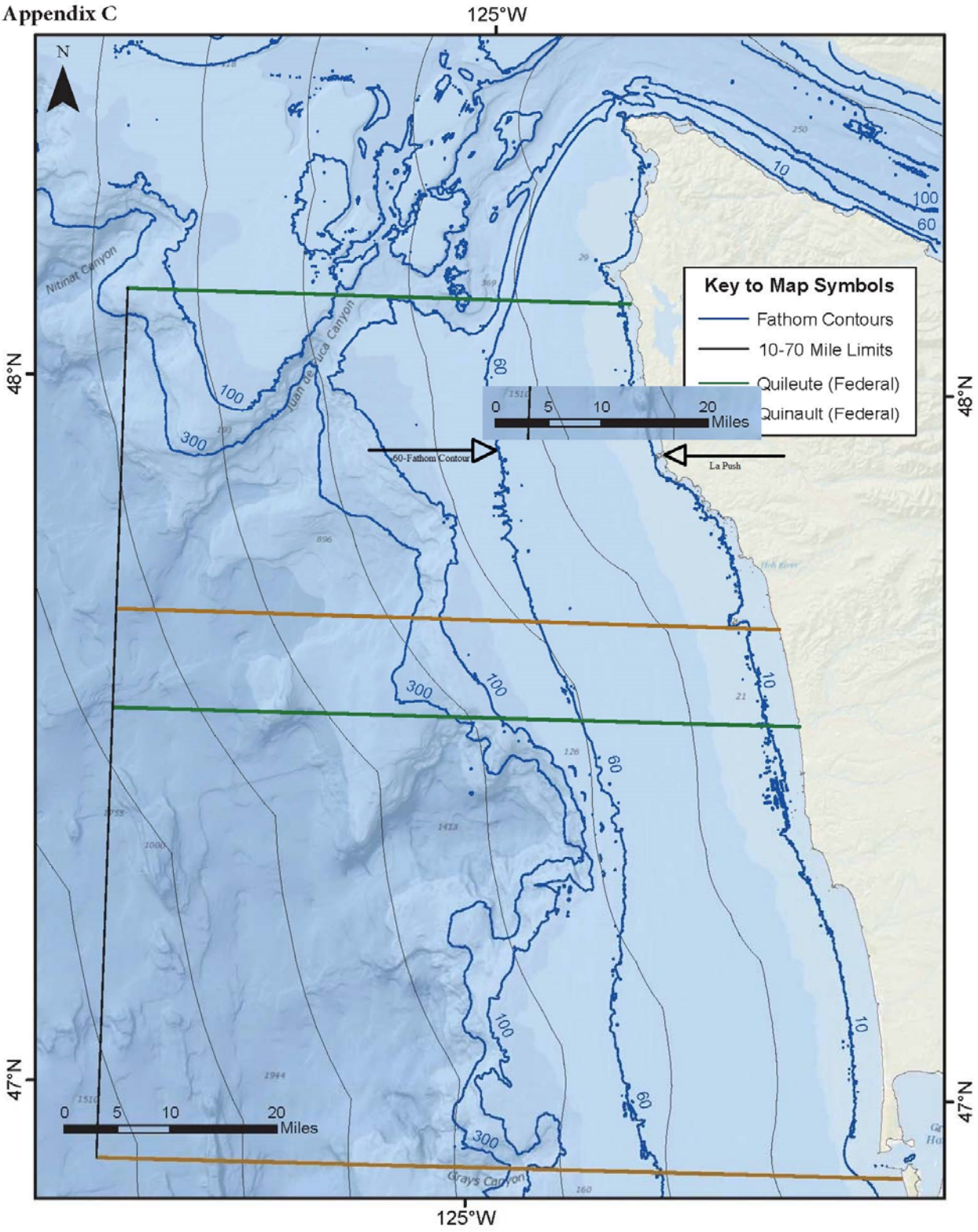
/s Cara Hazzard

Legal Assistant

Appendix A

Adapted from QER 4949

Appendix C


125°W
N
48°N
47°N
Nitinat Canyon
Juan de Fuca Canyon
Grays Canyon
Key to Map Symbols
Fathom Contours
10-70 Mile Limits
Quileute (Federal)
Quinault (Federal)
0 5 10 20 Miles
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La Push
10
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