Nos. 15-35824 and 15-35827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, Defendant-Appellant,

MAKAH INDIAN TRIBE, Petitioner-Appellant

v.

UNITED STATES, Plaintiff,

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

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

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

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

BRIEF OF APPELLEES QUILEUTE INDIAN TRIBE AND QUINAULT INDIAN NATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Appellees Quinault Indian Nation and Quileute Indian Tribe certify that none of them has a parent corporation(s) and no publicly-held corporation owns stock in either of the Appellee Tribes.

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TABLE OF ABBREVIATIONS

Entities

Quileute:	Quileute Indian Tribe
Quinault:	Quinault Indian Nation
Makah:	Makah Indian Tribe
The State:	State of Washington
Hoh:	Hoh Indian Tribe
Four Tribes:	Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Swinomish Indian Tribal Community, Upper Skagit Indian Tribe
Six Tribes:	Squaxin Island Tribe, Muckleshoot Indian Tribe, Puyallup Tribe of Indians, Nisqually Indian Tribe, Suquamish Indian Tribe, Skokomish Indian Tribe

Briefs

Makah Br.:	Makah Brief, Dkt. 23 (7/6/2016)
State Br.:	State Brief, Dkt. 25 (7/6/2016)
Hoh Br.:	Hoh Brief, Dkt. 34 (8/5/2016)
Four Tribes Br.:	Four Tribes Brief, Dkt. 37 (8/5/2016)
Six Tribes Br.:	Six Tribes Brief, Dkt. 36 (8/5/2016)

Acronyms

RFD:	Request for Determination
U&A:	Usual and Accustomed

Excerpts of Record

MER:	Makah Excerpts of Record
QER:	Quileute and Quinault Excerpts of Record
HER:	Hoh Excerpts of Record

I. INTRODUCTION

This appeal concerns the geographic scope of the Quileute and Quinault tribes' Pacific Ocean treaty fishing areas.

Executed in 1855, the Treaty of Olympia reserves to Quileute, Quinault, and Hoh the "right of taking fish at all usual and accustomed grounds and stations . . . together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands." QER 4463 (emphasis added). The treaty is one of a number of similarly-worded treaties Governor Isaac Stevens negotiated with Washington tribes, known as the "Stevens Treaties." These treaties reserve the tribes' pre-existing rights to fish where they always had prior to execution of the treaties—their "usual and accustomed" areas ("U&As").

In 2009, Makah asked the District Court to adjudicate the western boundaries of Quileute's and Quinault's Pacific Ocean U&As, claiming that their U&As only extended five to ten miles offshore. Makah also asked the Court to adjudicate the northern boundary of Quileute's ocean U&A.

Trial on these three boundaries alone was the longest, most detailed and fact-specific U&A trial in the 46-year history of *United States v. Washington*, lasting longer than the original 1974 trial before Judge Boldt. After the exhaustive 23-day trial, the District Court made detailed and well-supported findings of fact and applied long-established law in an 83-page order, which concluded that Quileute's

customary Pacific Ocean treaty-time fisheries extended 40 miles offshore, and Quinault's extended 30 miles offshore. QER 1-83. The federal agency in charge of regulating ocean fisheries set essentially the same boundaries more than two decades before this subproceeding was filed after it considered a fraction of the evidence heard by the District Court.

On appeal, Makah and Washington State's arguments amount to two basic claims of error. They are fundamentally and emphatically wrong on both claims, and their contentions do not provide a basis for overturning the District Court's ruling.

1. U&As Are Not Determined On Species-Specific Bases. Makah and the State mistakenly contend that in U&A determinations, evidence of customary fishing for sea mammals should be treated differently than evidence of taking finfish. But the District Court did not err in treating evidence of sea mammal harvests as being equally important as evidence of taking finfish in deciding the extent of Quileute's and Quinault's respective U&As. Makah and the State attempt to resuscitate the arguments this Court rejected 20 years ago that a modern taxonomic definition of *fish* should dictate the meaning of a treaty executed in 1855, and that U&As must be adjudicated on a species-specific basis. But in 1998, this Court affirmed that (1) the Stevens Treaty term *fish* includes "every form of aquatic animal life" and (2) courts must not require species-specific proof of usual

and accustomed grounds. *U.S. v. Wash.*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd in part, rev'd in part on other grounds*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999) ("*Shellfish*"). This is absolutely consistent with the District Court's factual findings that all of the parties to the Treaty of Olympia—Quileute, Hoh, Quinault and the United States—intended that treaty to reserve to the tribes the right to harvest all aquatic species (which is how all of the parties to the treaty understood the meaning of *fish* as it was used in the treaty) throughout the entire expanse of their treaty-time aquatic animal harvest areas.

2. The District Court Did Not Abuse Its Discretion In Setting Boundary Lines. Makah and the State complain that the District Court used straight longitude and latitude lines to set the U&A boundaries. Ocean U&As have always been delineated in this fashion. Using straight-line boundaries is within the trial court's discretion and provides tribal fishermen and enforcement agencies with a straightforward, easily followed and enforced bright-line delineation of the areas in which Quileute and Quinault may exercise their treaty rights.

Contrary to Makah and the State's assertions, the District Court's rulings do not represent an "expansion" of Quileute's and Quinault's treaty fishing areas. Instead, the District Court's factual findings confirm where Quileute and Quinault have been fishing for millennia, and its ruling follows long-established principles of treaty interpretation. The District Court heard the evidence and judged the

credibility of nine expert witnesses. Its careful and detailed ruling is entitled to substantial deference and should be affirmed.

II. SUMMARY OF ARGUMENT

A. The District Court's Well-Supported Factual Findings and Proper Application of Long-Standing Law in This Circuit Defeat Makah and the State's Argument That Tribal U&As Must be Adjudicated on a Species-Specific Basis

The District Court found that all of the parties to the Treaty of Olympia understood it to reserve Quileute's and Quinault's pre-existing rights to seek food from all of their customary places and sources of subsistence, including areas where they took sea mammals. These findings are supported by a wealth of evidence. The treaty records show that the United States intended the Stevens Treaties to broadly preserve the tribes' usufructuary rights. Furthermore, in 1855, both the United States and the tribes would have understood the treaty right of taking "fish" in a broad and capacious way, consistent with the United States' intent to preserve the tribes' customary places and sources for obtaining food. Their actions in the years following the execution of the treaty evidence this understanding. QER 4-13, 71-82.[1] Makah and the State urge this Court to overturn the District Court's findings based on four fundamentally flawed contentions.

[1] An annotated version of the District Court's decision indicating where in the excerpts the evidentiary citations in the decision can be found is included at QER 1-83.

First, Makah and the State improperly seek to limit Quileute and Quinault's "usual and accustomed grounds and stations" to only those areas where they customarily harvested species that modern biology classifies as finfish. This claim is contrary to the law of the circuit and the substantial evidence supporting the District Court's findings.

In *Shellfish*, the State argued (as it does here) that the term *fish* should only include finfish, and that tribes should be required to adjudicate species-specific U&As. The District Court (Judge Rafeedie) held that *fish* "fairly encompasses **every form of aquatic animal life**," and that courts have "never focused on a particular species of fish in determining the Tribes' usual and accustomed grounds and stations." *Shellfish*, 873 F. Supp. at 1430-31 (emphasis added). This Court affirmed, holding that "[b]ecause the 'right of taking fish' must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation." *Shellfish*, 157 F.3d at 643-44 (internal quotation marks and citation omitted).

The State concedes that this Court's ruling in *Shellfish* means "a tribe's proven evidence of location-specific fishing for one species of *fish* is a sufficient basis for fishing for other species of *fish* by that tribe." State Br., p. 14 (emphasis added). Because *fish* is "every form of aquatic animal life," a tribe's evidence of

U&A for sea mammals (one type of aquatic life) is a sufficient basis for fishing for other types of aquatic life by that tribe. The District Court recognized and properly applied this fundamental principle to the extensive evidence in correctly establishing the western boundaries for Quileute's and Quinault's U&As.

Second, Makah and the State mischaracterize Makah's 1984 ocean U&A adjudication by mistakenly arguing that the law of the case and law of the circuit exclude sea mammals from consideration in U&A determinations. But Judge Craig's and this Court's rejection of Makah's claim for a U&A 100 miles offshore was not made on the basis of a distinction between sea mammals and finfish. Instead, that claim was denied because of the *insufficiency* of the evidence proffered by Makah. QER 80-81.

Third, Makah and the State erroneously contend that because Makah's treaty specifically refers to "whaling and sealing" and the Treaty of Olympia does not, Quileute and Quinault did not reserve their pre-existing rights of taking those aquatic animals. This is wrong for two reasons. First, a treaty must be interpreted as the signatory tribes would have understood it, not based on dealings with a different tribe and a different treaty. *U.S. v. Smiskin*, 487 F.3d 1260, 1267 (9th Cir. 2007). The canons of treaty construction dictate that the Treaty of Olympia be construed as *Quileute and Quinault* understood it, without regard to other tribes such as Makah who were not present at the negotiations. *See U.S. v. Confederated*

Tribes of Colville Indian Reservation, 606 F.3d 698, 709, 713 (9th Cir. 2010) ("*Colville*"). Second, the evidence overwhelmingly shows (and the District Court properly found) that *Quileute and Quinault* would have understood the term "fish" to include whales, seals, and other aquatic animals. QER 12-13, 76-77.

Fourth, Makah and the State incorrectly argue that certain types of aquatic animals must be excluded from the treaty fishing right based on a taxonomy "formalized in the Linnaean classification system . . . [and] familiar to educated Americans." Makah Br., p. 29. This argument inexplicably ignores the Supreme Court's admonition that a treaty not be construed "according to the technical meaning of its words." *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76, *modified sub nom. Wash. v. U.S.*, 444 U.S. 816 (1979) ("*Fishing Vessel*"). The District Court properly rejected each of these arguments, and this Court should too.

B. The District Court Did Not Err in its Findings Regarding The Distances at Which Quileute and Quinault Customarily Harvested Aquatic Animals at Treaty Time

The State claims the District Court committed clear error in finding that Quileute and Quinault customarily harvested marine mammals 40 and 30 miles offshore, respectively. Makah does not challenge these findings. Both Makah and the State challenge the District Court's finding that Quileute customarily fished for finfish 20 miles offshore.

These challenges rest on the untenable foundation that the District Court should have applied an evidentiary standard more stringent than has ever been applied by any court in adjudicating tribal U&As. The District Court properly used the same evidentiary standard that was applied in Makah's 1982 ocean U&A adjudication, and in every U&A adjudication before and after. QER 69-71.

The evidence unquestionably supports the District Court's findings on the location of the western boundaries of Quileute's and Quinault's U&As. QER 20-27, 35-57.

C. The District Court Did Not Abuse its Discretion in Delineating the Western Boundary of Quileute's and Quinault's U&As in the Same Way Ocean U&A Boundaries Have Always Been Delineated

Courts have uniformly found that it is impossible to delineate precisely the boundaries of ocean U&As. Both courts and federal government agencies have consistently used straight latitude and longitude lines to delineate the boundaries of tribes' ocean U&As. The District Court (Judge Craig) delineated Makah's own ocean U&A using straight lines in 1984.

Makah and the State wish to treat Quileute and Quinault differently than Makah by arguing that their western boundaries should precisely mimic and trace the coastline. The District Court did not abuse its discretion in delineating Quileute's and Quinault's western boundaries in the same way as Makah's western boundary was delineated.

The District Court's legal analysis and factual findings were correct and supported by the evidence adduced during 23 days of trial. This Court should affirm the District Court's orders.

III. STATEMENT OF JURISDICTION

For purposes of this appeal, Quileute and Quinault do not contest jurisdiction, but reserve the right to do so in all other proceedings.

IV. STATEMENT OF ISSUES PRESENTED

1) Under law of the case and law of the circuit, "the Court must read the 'right of taking fish' without any species limitation." *Shellfish,* 157 F.3d at 644. *Fish* includes all aquatic animals, and U&As include every area where tribes customarily harvested any type of aquatic animal. *Id.* U&A determinations do not require "species-specific findings of usual and accustomed fishing grounds." *Id.* It is immaterial that a tribe did not fish for a specific species in a particular area as long as the tribe fished for *any one* species in that area; the usual and accustomed grounds for one species is "co-extensive with the Tribes' usual and accustomed fishing grounds" for all other species. *Id*.

    a) Do Quileute's and Quinault's usual and accustomed grounds and stations encompass those grounds and stations where they customarily harvested any aquatic animal, including marine mammals?

    b) When Quileute and Quinault ceded their lands by treaty but reserved the

"right of taking fish at usual and accustomed places," did they understand that they were only retaining rights in those areas where they fished for species classified by zoologists as "oviparous, fin-swimming, gill-breathing" animals, or did they understand, as the District Court found, that they were retaining all of their pre-existing rights in all of their customary places?

2) Did the District Court commit clear error in finding that Quileute and Quinault customarily harvested marine mammals 40 and 30 miles offshore, respectively?

3) The law of the circuit establishes that U&A determinations are not done on a species-specific basis. If this Court nevertheless considers Makah and the State's challenges to findings particular to just finfish, have Makah and the State demonstrated that the District Court's finding that Quileute customarily fished for finfish up to 20 miles offshore is illogical, implausible, or without support in the record?

4) Ocean U&A boundaries have always been delineated using straight longitudinal lines. Did the District Court abuse its discretion by following law of the case in delineating Quileute's and Quinault's western ocean U&A boundaries using longitudinal lines?

V. STATEMENT OF THE CASE

A. Background of Treaties Made With the Tribes in Washington Territory

From 1854 to 1856, the United States entered into a series of treaties with tribes in what is now Washington State. While the United States' principal purpose for entering into the treaties was to open up Washington Territory for white settlement, the tribes' principal purpose "was to secure a means of supporting themselves once the Treaties took effect." *U.S. v. Wash.*, 827 F.3d 836, 849-51 (9th Cir. 2016) ("*Culverts*"). The United States provided for such means in part by reserving to the tribes in their treaties the "right of taking fish." *Id.*

Quileute, Hoh, and Quinault signed the Treaty of Olympia in 1855, ceding their vast homelands in the western half of the Olympic Peninsula in exchange for a set of promises from the United States. QER 4463-66, 3028-31. Among the most important promises was the treaty fishing right, which guaranteed that the tribes would retain the same rights of "tak[ing] *any* species, without limit," from their "usual and accustomed grounds and stations" that they enjoyed prior to execution of the Treaty. *Shellfish*, 157 F.3d at 644. "It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter 'should be excluded from their ancient fisheries.'" *Fishing Vessel*, 443 U.S. at 676; *Culverts*, 827 F.3d at 852 (quoting same).

B. Background of *United States v. Washington*

1. Decision I

In 1974, Judge Hugo Boldt adjudicated the boundaries of those U&As that were within Washington State's jurisdiction. *U.S. v. Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom. Fishing Vessel*, 443 U.S. 658 (1979) ("*Decision I*").

Areas are "usual and accustomed" if a tribe "customarily fished [there] from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Id.* at 332. Areas are not "usual and accustomed" if they are unfamiliar to the tribe or were used only "infrequently or at long intervals and extraordinary occasions." *Id.*

"Stations" are "fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area." *Id.* "Grounds" are "larger areas which may contain numerous stations and other unspecified locations which . . . could not [at treaty times] have been determined with specific precision and cannot now be so determined." *Id.*

Though the early focus of *United States v. Washington* was on salmon, U&A adjudications have *always* been based on all species, including non-finfish species such as crustaceans, mollusks, and marine mammals. *See, e.g.*, *id.* at 372

(adjudicating Quileute's in-state U&A based on where Quileute harvested salmon, "smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish [octopus], shark, herring, sardines, sturgeons, **seal, sea lion, porpoise and whale**.") (emphasis added).

This Court has acknowledged that a relaxed standard of proof is necessary in adjudicating where tribes fished in and before 1855. "Documentation of Indian fishing during treaty times is scarce," and what little documentation *does* exist is "extremely fragmentary and just happenstance." *U.S. v. Lummi*, 841 F.2d 317, 318 (9th Cir. 1988) ("*Lummi I*"). The "stringent standard of proof that operates in ordinary civil proceedings is relaxed" in U&A adjudications, because if courts *were* to follow the ordinary standard of proof, it "would likely preclude a finding of any such fishing areas." *Id.* at 318, 321 (citing *U.S. v. Wash.*, 730 F.2d 1314, 1317 (9th Cir. 1984) ("*Makah*"); *U.S. v. Wash.*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978)).

2. The *Shellfish* Subproceeding

In the *Shellfish* subproceeding, Washington State unsuccessfully argued that shellfish should be excluded from the treaty *fishing* right because *fish* should include only finfish. The State argued alternatively that tribes should be required to adjudicate separate species-specific U&As for shellfish. Judge Rafeedie rejected these arguments, holding that *fish* as used in the Stevens Treaties "fairly

encompasses every form of aquatic animal life," and that "the Court has never focused on a particular species of fish in determining The Tribes' usual and accustomed grounds and stations." *Shellfish*, 873 F. Supp. at 1430-31. This Court affirmed:

> [T]he Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights. The district court aptly noted that, had the Treaty parties intended to limit the harvestable species, the parties would not have chosen the word "fish." The word "fish" has "perhaps the widest sweep of any word the drafters could have chosen." Thus, the district court correctly chose not to "deviate from [the Treaties'] plain meaning."
>
> . . . .
>
> Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.
>
> A more restrictive reading of the Treaties would be contrary to the Supreme Court's definitive conclusion that the Treaties are a "grant of rights from" the Tribes. [*U.S. v.*] *Winans*, 198 U.S. [371] at 380 [(1905)]. . . .
>
> The "usual and accustomed grounds and stations" do not vary by species of fish. . . . [C]ourts considering fishing disputes under the Treaties have never required species-specific findings of usual and accustomed fishing grounds.

Shellfish, 157 F.3d at 643-44 (some internal citations omitted).[2] This is law of the

[2] Makah and the State's repeated characterization of the issue on appeal as "hunting whales and seals in areas where Quileute and Quinault were unaccustomed to fishing" assumes that "fishing" means only finfish. *E.g.*, Makah Br., p. 25. This flawed assumption was rejected by this Court in *Shellfish* and by the District Court in this Subproceeding.

case in *U.S. v. Washington* and is the law of this Circuit.

C. Prior Proceedings Addressing Pacific Ocean Usual and Accustomed Fishing Areas

1. *Moore v. United States*

The earliest case to mention the offshore extent of Quileute's customary fishing was *Moore v. United States*, where this Court found that Quileute "[o]bviously . . . had been an aboriginal sea-faring people of great daring and skill" in harvesting the resources abundant along the 100-fathom line by the continental shelf (roughly 40 miles offshore). 157 F.2d 760, 762-63 (9th Cir. 1946); QER 4825.

2. United States' Regulatory U&A Boundaries

Only those U&As within Washington State's jurisdiction—which extends three miles offshore in ocean waters—were adjudicated in *Decision I.* Ocean fisheries beyond state territorial waters were largely unregulated until 1976, when the Fishery Conservation and Management Act ("FCMA") gave the United States exclusive jurisdiction over fishing in ocean waters from three to 200 miles offshore. 16 U.S.C. § 1801 *et. seq.* Under the FCMA, the federal government is required to account for the "nature and extent" of any "Indian treaty fishing rights'" in those waters. 16 U.S.C. § 1853(a)(2).

Washington tribes with treaty fishing rights in ocean waters outside State jurisdiction (Makah, Quileute, Quinault, and Hoh) were not required to adjudicate

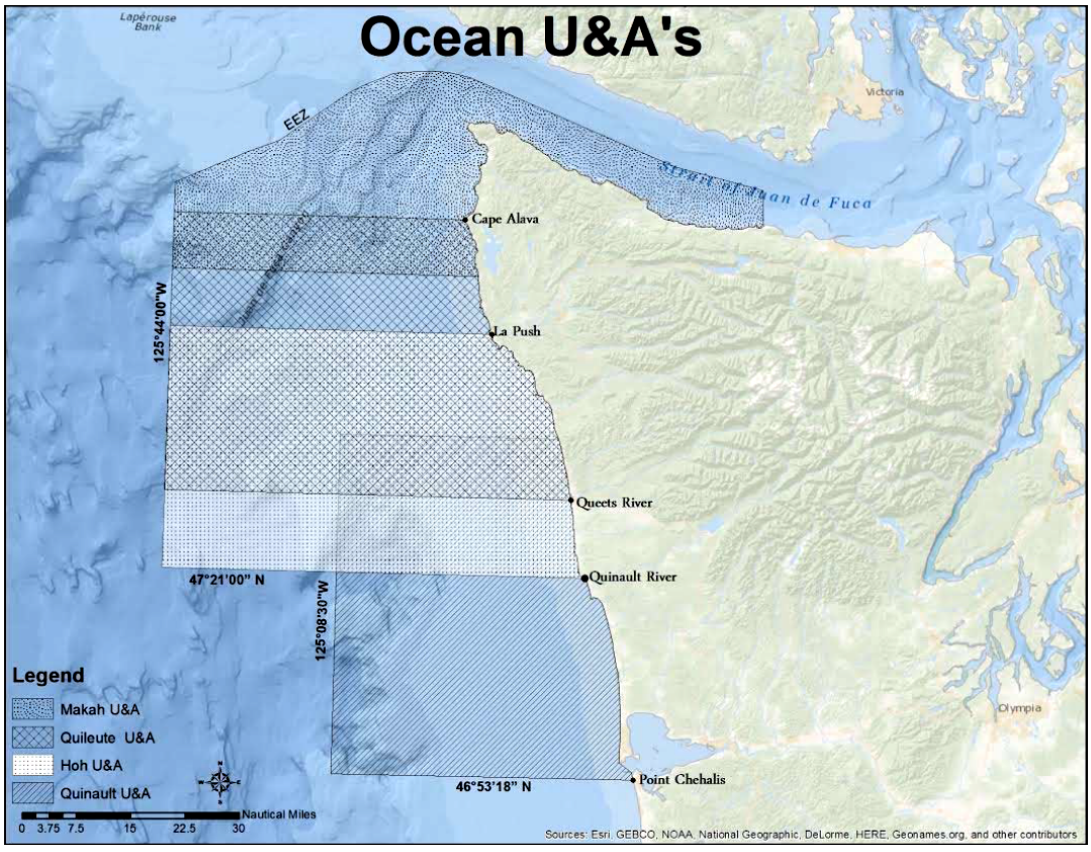
their federal-water U&As in order to exercise their treaty rights, so long as they and their treaty partner (the federal government) agreed on their U&A boundaries. *See Midwater Trawlers Co-op. v. U.S. Dep't of Commerce*, 139 F. Supp. 2d 1136, 1143-44 (W.D. Wash. 2000), *aff'd in part, rev'd in part on other grounds*, 282 F.3d 710 (9th Cir. 2002) (upholding the federal government's regulatory delineation of Quileute's and Quinault's boundaries at 40 miles offshore); 61 Fed. Reg. 28,786, 28,789 (June 6, 1996).

After enactment of the FCMA, the federal government reviewed three separate anthropological reports[3] authored by Dr. Barbara Lane in 1977 regarding the extent of the four coastal tribes' federal-water U&As. After considering Dr. Lane's reports, the government recommended that all four tribes' western boundaries be set at the same longitude 40 miles offshore. The government delineated the boundaries of the tribes' federal-water U&As using straight latitude and longitude lines. *See* 51 Fed. Reg. 16,471, 16,472 (May 2, 1986). In the three decades since 1986, the federal regulations have defined the western boundary of

[3] Because Hoh and Quileute were one tribe at treaty times, they submitted a joint report: *Traditional Marine Fisheries of the Quileute and Hoh Indians* (Aug. 4, 1977). QER 5193-216. Quinault submitted a report entitled *Traditional Ocean Fisheries of the Quinault Indians* (Sept. 25, 1977). QER 3132-46. After review of those reports, the Regional Solicitor for the Department of the Interior issued an opinion concluding that Hoh, Quileute, and Quinault customarily engaged in fishing activities 25 to 50 miles from shore at treaty times. *Midwater Trawlers*, 139 F. Supp. 2d at 1144; QER 5537 (Makah brief regarding regulatory boundaries); QER 5542-45 (Exhibit RRR to same).

Quileute's and Quinault's ocean U&As at 40 miles offshore. Quinault's boundary was adjusted in 2015 after the District Court issued its opinion below.

The evidence adduced and considered by the District Court demonstrated that the federal government's initial determination of Quileute's and Quinault's U&A boundaries was largely correct. Despite giving the federal regulatory boundaries no deference, the District Court determined that Quileute's western boundary is 40 miles offshore, and Quinault's is 30 miles offshore. The Court's determination of Quileute's northern boundary (which is not contested on appeal) is approximately three miles north of the boundary set by the federal government in 1986. These boundaries are depicted below:



National Marine Fisheries Service Public Notice, p. 3 (June 8, 2016), http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/groundfish/public_notices/public_notice_tribal_u_a.pdf (attached hereto as Appendix I) (hereinafter "Public Notice").

3. Makah's Ocean U&A Adjudication

Makah filed a Request for Determination ("RFD") of its ocean U&A in *U.S. v. Washington* in 1977. It claimed that its *capability* to travel 100 miles offshore in occasional post-treaty whaling and sealing forays supported an inference that it *customarily* fished 100 miles offshore at and before treaty times. Judge Craig disagreed, holding that Makah failed to show *customary* treaty-time fishing beyond 40 miles. *U.S. v. Wash.*, 626 F. Supp. 1405, 1467 (W.D. Wash. 1985).

On *de novo* review, this Court too determined that even though "[t]he Makahs probably were *capable* of traveling to 100 miles from shore in 1855" and "did go that distance at the turn of the century, . . . it is *not clear how frequently*." *Makah*, 730 F.2d at 1318 (emphasis added). None of Makah's evidence demonstrated that they *customarily* fished *for any species* beyond 40 miles. *Id.* Neither Judge Craig's nor this Court's rulings distinguished between finfish and other aquatic animals, including sea mammals. The rulings were based on *frequency*, not species.

D. Background of Subproceeding 09-1

In December 2009, nearly 25 years after the federal government first issued regulations defining Quileute's and Quinault's western U&A boundaries at 40 miles offshore, Makah filed a Request for Determination of the western boundaries of Quileute's and Quinault's federal-water U&As.

Washington State joined in Makah's RFD, submitting a Motion for Leave to File a Cross-RFD. QER 5514-18. The District Court denied the motion, reasoning that "the area put in dispute by the Makah lies outside the territorial waters of the State of Washington" in waters "subject to management and regulation" by the federal government. HER 35. Nevertheless, Washington State was permitted to fully participate in litigating Makah's RFD along with other Interested Parties.

Makah alleged that Quileute's and Quinault's U&As only extended five to ten miles offshore. HER 45. This significant and unprecedented reduction in Quileute's and Quinault's U&As would have removed them from fishing areas that the two tribes have depended upon since prehistoric times.

E. Final Decision in Subproceeding 09-1

Over the course of the 23-day trial, the District Court heard testimony from nine expert and two lay witnesses, admitted 472 exhibits comprised of thousands of pages, and heard argument and reviewed briefs by Makah, Quileute, Quinault, and a number of "Interested Parties," including 11 other tribes and the State of

Washington.[4] QER 3-4.

Based on the "extensive evidence presented at trial showing the furthest distances to which the tribes customarily traveled to harvest aquatic resources," the District Court found that Quileute's U&A extended 40 miles offshore, and Quinault's extended 30 miles offshore. QER 82.

Like prior U&A adjudications, the District Court adjudicated Quileute's and Quinault's U&As by reference to the vast array of aquatic resources customarily harvested by the tribes at treaty times. *See* QER 17-18, 33. The District Court delineated these boundaries in the same manner as Judge Craig delineated Makah's ocean U&A and in the same manner as the federal government in its decades-old regulations. MER 3-4.

Also like prior decisions in *United States v. Washington*, the District Court rejected Makah and the State's argument that tribal U&As must be established solely based on where the tribes customarily harvested finfish. QER 4-13, 71-82. The Court ruled that prior precedent defeated Makah and the State's arguments

[4] As an "Interested Party" whose motion to file a cross-RFD in this Subproceeding was denied in part because it lacks jurisdiction in waters beyond three miles from shore, the State has no basis to brand itself an Appellant or to attack the District Court's substantive findings regarding where Quileute and Quinault fished in federal waters. *See* Hoh Br., pp. 4-10. Notably, in Makah's ocean U&A adjudication, the State informed the court that "[w]e have a very limited interest in this matter since the area in question which the tribe seeks to extend its definition of usual and accustomed places is now under the jurisdiction of the United States government." MER 1260. No other Interested Party in this appeal has labeled itself an Appellant, even though they all participated at trial.

that U&A adjudications must be species-specific. QER 71-76; *see also* QER 81-82.

The District Court rejected Makah and the State's contention that Makah's ocean U&A adjudication "excluded evidence of sea mammal harvest," holding instead that Judge Craig and this Court had rejected Makah's claim to a 100-mile U&A based not on species but on Makah's failure to prove *customary* fishing beyond 40 miles. QER 80-81. The Court also found that Makah and other tribes' briefs in *Shellfish* made it clear "that they did not view [the Makah adjudication] as having excluded evidence of marine mammal harvest." QER 81. In the *Shellfish* subproceeding, the tribes argued that *fish* includes all aquatic animals, and that courts have *always* considered all species in adjudicating U&A, citing the example that "[t]he Makah usual and accustomed areas were originally determined with reference to salmon, halibut, whale, and seal. 384 F. Supp. at 363, FF 61." *Id.* (citing QER 5646, 5826-40 (Makah et al. briefs)).

The District Court found that all parties to the Treaty of Olympia intended and understood the treaty right of "taking fish" to secure to Quileute and Quinault the right to take all aquatic animals, including marine mammals, from the areas in which they customarily took any of them. QER 4-13, 71-82. The District Court also found that additional language in the separately-negotiated Makah treaty listing "whaling or sealing" did not show that the United States intended to

abrogate Quileute and Quinault's reserved rights in the Treaty of Olympia. QER 78-79. Instead, the evidence showed that the United States intended to broadly reserve those tribes' usufructuary rights. QER 9-13, 76-78. Makah and the State appeal these decisions.

VI. ARGUMENT

A. Standard of Review

1. Findings of Fact and Conclusions of Law

A district court's factual findings are reviewed under the "significantly deferential" clear error standard. *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004). If a district court's findings are "plausible in light of the record viewed in its entirety," this Court may not reverse them "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (internal quotation marks omitted).

Credibility of witnesses is a factual determination and will not be disturbed in the absence of clear error. *Lummi I*, 841 F.2d at 318-19. Here, where the bulk of the witnesses were expert witnesses who provided extensive testimony and were subject to lengthy cross-examination, the court's citations to the testimony of some over others reflects that the court found the cited experts' testimony more credible. *Simar Shipping Ltd. v. Global Fishing, Inc.*, 540 F. App'x 565, 567 (9th Cir. 2013) (unpublished).

A district court's findings on the parties' intent and understanding in entering into Indian treaties is also reviewed "[u]nder the highly deferential clear error standard." *Shellfish*, 157 F.3d at 642 (internal quotation marks omitted). This Court "therefore review[s] for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions." *Id.* at 642. It then reviews *de novo* "[w]hether the district court reached the proper conclusion as to the meaning of the [treaty] given those findings." *Id.*

2. Law of the Circuit

Law of the circuit applies to questions of law that have been raised, considered and discussed in a published Ninth Circuit opinion, and includes well-reasoned dicta on "issue[s] germane to the eventual resolution of the case." *U.S. v. Johnson*, 256 F.3d 895, 914-15 (9th Cir. 2001). Statements made in passing, without analysis, are not binding precedent. *Id.* at 915.

3. Law of the Case

Under the "law of the case doctrine," a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case. *U.S. v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014) ("*Lummi II*"). A court's application of the law of the case doctrine is reviewed for abuse of discretion. *Id.* Where the parties dispute whether the issue has already "been decided explicitly or by necessary implication," the applicability of the

doctrine is a question of law reviewed *de novo*. *Id.*

B. Supreme Court and Ninth Circuit Precedent and the Evidence Support the District Court's Finding That Quileute and Quinault's Treaty Reserved Their Pre-Existing Right to Take Any Aquatic Species—Including Marine Mammals—From Where They Customarily Harvested Aquatic Animals

The District Court entered detailed factual findings and legal conclusions, amply supported by the evidence, that the signatories to the Treaty of Olympia intended the fishing provision to reserve to Quileute and Quinault all areas where they customarily harvested aquatic animals, including sea mammals. The District Court's findings and conclusions follow established law, and three specific legal principles at play:

(1) The Stevens Treaties reserve pre-existing rights to the signatory tribes; any rights not specifically granted away to the U.S. government remain reserved by the tribes.[5]

(2) Treaties must be construed according to the signatory tribes' understanding, not according to technical distinctions or the U.S. government negotiators' understanding, and any ambiguities in treaty language must be resolved in favor of the signatory tribes.[6]

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[5] *Fishing Vessel*, 443 U.S. at 680; *Winans*, 198 U.S. at 381; *Shellfish*, 157 F.3d at 644; *Decision I*, 384 F. Supp. at 331.

[6] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Fishing Vessel*, 443 U.S. at 676-79; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630–31 (1970); *Tulee v. Wash.*, 315 U.S. 681, 684–85 (1942); *Seufert Bros. Co. v.*

(3) U&As do not vary by species; every place where a tribe customarily harvested *fish* (i.e., aquatic animals) at treaty times compose a tribe's U&A, and the treaty right entitles each tribe to harvest any species now available within its U&A, regardless of whether that species was harvested at treaty times. *Shellfish*, 157 F.3d at 644.

Overwhelming trial evidence supports the District Court's determination that the parties to the Treaty of Olympia understood it to reserve Quileute and Quinault's pre-existing rights to take all species, including sea mammals, from the areas where they customarily took them. QER 4-13, 71-82. The District Court did not err.

1. Under the Reservation of Rights Doctrine, the Stevens Treaties Reserve All Pre-Existing Rights Except Those Expressly Abrogated

Long-established Supreme Court precedent and law of the circuit mandate that the Treaty of Olympia be construed as reserving to Quileute and Quinault their customary sources and places for subsistence. In 1905, the earliest Supreme Court case interpreting the Stevens Treaties held:

> The right to resort to the [usual and accustomed] fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . **The treaty was not a grant of**

U.S., 249 U.S. 194, 198–99 (1919); *Winters v. U.S.*, 207 U.S. 564, 576-78 (1908); *Choctaw Nation v. U.S.*, 119 U.S. 1, 27-28 (1886); *Culverts*, 827 F.3d at 849-51.

> **rights to the Indians, but a grant of right from them,— a reservation of those not granted**.

Winans, 198 U.S. at 381 (emphasis added).

Makah mischaracterizes *Winans* as limiting the Indians' treaty right to only "the purpose mentioned" of *fishing*, which Makah narrowly construes as only finfishing. Makah Br., p. 25. But *Winans* explicitly found that the treaty language was "adapted to th[e] purpose" of reserving to the Indians *all* "those [rights] not granted" away in the treaties. 198 U.S. at 381. Similarly, in *Fishing Vessel*, the Supreme Court held that the treaty language "securing" fishing rights to the tribes is "synonymous with 'reserving' rights previously exercised" by the tribes to "meet their subsistence and commercial needs." 443 U.S. at 678-79. In *Shellfish*, this Court held that the contention that treaty rights are limited by species "is contrary to the recognized principle that the Treaties involved a grant of rights *from* the Indians *to* the United States." 157 F.3d at 643-44 (citing *Winans*, 198 U.S. at 380-81) (emphasis in original). Nothing in *Winans* or subsequent cases supports Makah's assumption that *fish* includes only what we modernly know as finfish; indeed, this argument must be rejected under the reservation of rights doctrine.

Reserved rights cannot be abrogated absent explicit language; such rights cannot be abrogated merely by implication. *Menominee Tribe v. U.S.*, 391 U.S. 404, 412-13 (1968); *Mille Lacs*, 526 U.S. at 195-96; *Fishing Vessel*, 443 U.S. at 690; *U.S. v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983). A reason for this rule is

that "the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights." *Mille Lacs*, 526 U.S. at 195.

Because the only exception to the tribes' otherwise broad usufructuary rights in the Treaty of Olympia[7] is a single express exception for shellfish beds staked or cultivated by citizens, *no other implied exceptions are permissible*. *Shellfish*, 157 F.3d at 643-44, 649. No provision in the Treaty of Olympia abrogates the tribes' pre-existing rights to take aquatic animals (including sea mammals) from where they customarily took them. As Judge Rafeedie ruled in *Shellfish*, an attempt "to impose a limit on the 'right of taking fish' without pointing to any treaty language in support of that interpretation. . . . is impermissible." *Shellfish*, 873 F. Supp. at 1430, *aff'd*, 157 F.3d at 643-44.

Here, it is undisputed that Quileute and Quinault's pre-existing rights included taking non-finfish species such as shellfish and sea mammals from their customary ocean harvesting areas. QER 20-23, 25-26, 40-43, 47-48, 52-53. Yet Makah and the State argue that the tribes reserve *none* of those rights unless they also happened to harvest finfish in those places. This argument fails under *Winans*, *Fishing Vessel*, *Mille Lacs*, and *Shellfish*.

[7] Broad hunting, fishing, and gathering provisions were common in the 40 treaties executed under Commissioner of Indian Affairs George Manypenny, including the Stevens Treaties, and only one of those treaties (the Treaty with the Sault Ste. Marie Chippewa) expressly revoked such rights. *Mille Lacs Band v. Minn.*, 861 F. Supp. 784, 817 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999).

2. Centuries-old Canons of Treaty Construction Mandate That the Treaty of Olympia be Construed as Quileute, Quinault, and Hoh Understood It

As early as 1832, the Supreme Court espoused the fundamental principle that "[t]he language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832). A treaty must be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). The "comprehensive language" of the treaty fishing right must not be restricted based on "the artificial meaning which might be given to it by the law and by lawyers." *Seufert Bros.*, 249 U.S. at 198-99.

Courts must also look "only to the substance of the right, without regard to technical rules." *Choctaw*, 119 U.S. at 28. Ambiguities must be resolved in favor of the tribal signatories because it cannot be supposed that they "were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them." *Winters*, 207 U.S. at 576-77.

> In determining the scope of the [Stevens Treaty] reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. . . . [W]e are impressed by the strong desire the Indians [at the treaty council] had to retain the right to hunt and

> fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee, 315 U.S. at 684–85 (citations omitted); *see also Fishing Vessel*, 443 U.S. at 675–76 (noting that the rule had "thrice been explicitly relied on by the Court in broadly interpreting the[] [Stevens] treaties in the Indians' favor.").

Makah and the State ask this Court to construe the Treaty of Olympia based on taxonomic distinctions "traced to Aristotle" and "formalized in the Linnaean classification system." Makah Br., p. 29. Such a technical, lawyer-driven construction is contrary to the law and would prejudice Quileute and Quinault, who in 1855 did not understand the language of the United States negotiators, much less the Linnaean classification of *fish* as "oviparous" and *cetacea* as "viviparous." *Id.* These distinctions were not even understood by the majority of non-Indians in the 1800s. Makah and the State's argument cannot be reconciled with 185 years of precedent prohibiting precisely the narrow, prejudicial interpretation they seek.

a) The Wording in the Makah Treaty Does Not Dictate the Meaning of the Treaty of Olympia

(1) Legal Framework

Makah argues that because its treaty has explicit language reassuring Makah of the right of "whaling or sealing," the Treaty of Olympia's (and all other Stevens Treaties') right of "taking fish" must necessarily exclude sea mammals. According

to Makah, the District Court's ruling "effectively rendered the whaling and sealing provision in the Makah treaty meaningless, contravening the principle that a treaty 'should be interpreted so as not to render one part inoperative.'" Makah Br., p. 24 (quoting *U.S. v. Wash.*, 873 F. Supp. at 1430). This argument is wrong for at least four reasons.

First, as Judge Boldt observed, the purpose of the language in Makah's treaty 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." *Decision I*, 384 F. Supp. at 363 (emphasis added); *see also* QER 4448 ("[w]hile [whaling and sealing] no doubt would have been considered as having been indicated by implication specific provision therefor was included to allay the fears of the Makah tribe"). The District Court's ruling leaves that reassurance fully "operative."

Second, even if the language were "surplusage" as Makah suggests, this Court has ruled that "surplus" language in one treaty cannot implicitly abrogate the rights in a different treaty. "[The] suggestion that we employ the rule of construction disfavoring surplusage depends on an implied cession of fishing rights . . . which contravenes our obligation to refrain from interpreting the agreement 'according to the technical meaning of its words to learned lawyers.'" *Colville*, 606 F.3d at 713 (quoting *Jones*, 175 U.S. at 11); *see also Lac Courte Oreilles Band*

of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 357 n.10 (7th Cir. 1983) ("[T]reaty-recognized usufructuary rights are not to be found abrogated by implication.").

Third, 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 *Decision I*, Judge Boldt ruled that although only Yakama's treaty expressly reserved exclusive on-reservation fishing rights, these rights were still reserved in the other Stevens Treaties.[8] 384 F. Supp. at 332, 332 n.12. Likewise, in *Fishing Vessel*, three justices observed that the language in Yakama's treaty "*explicitly includes what apparently is implicit in each of the [Stevens] treaties*: the Indians' right to take fish on their reservations is exclusive." 443 U.S. at 698–99 (Powell, Stewart, Rehnquist, JJ., dissenting) (emphasis added); *see also Mille Lacs*, 526 U.S. at 199; *Voigt*, 700 F.2d at 363.

Similarly, in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), this Court noted that the Treaty of Olympia likely reserves a right to marine mammals.

[8] The Yakama Treaty provides that "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places." 12 Stat. 951, 953 (June 9, 1855). Notably, the Senate ratified Yakama's treaty on the same day it ratified Makah's treaty and the Treaty of Olympia. 12 Stat. 939; 12 Stat. 971. There was no evidence that anyone in the United States government intended to confer different rights by virtue of using slightly different language in the Yakama and Makah treaties. Makah's suggestion that the Senate intended otherwise is wholly unsupported. Makah Br., pp. 32, 39.

Although Quileute and Quinault were not involved in the case, which only involved Makah's claim to resume whaling under its treaty, one of Makah's arguments was that allowing it to resume whaling would not cause conservation issues because it was the only tribe with a treaty that "expressly guaranteed" the right to whale. This Court rejected that argument, finding that "there is little doubt" that whales were included under the other coastal tribes' "less specific treaty language." 371 F.3d at 499. While the Court in *Evans* speculated that the right might be included in either the fishing or hunting clauses, specific interpretation of the Treaty of Olympia was not at issue in *Evans* and the Court therefore did not have the benefit of the voluminous legal precedent and evidence showing that sea mammal fisheries are included in the *fishing* clause.[9]

Fourth, "[t]he Supreme Court's jurisprudence makes clear . . . that we must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made, and [not based on dealings with] a different tribe, a different treaty, and a different right." *U.S. v. Smiskin*, 487 F.3d 1260, 1267 (9th

[9] Makah's argument that sea mammals may be reserved elsewhere than the treaty fishing clause has no merit. Makah Br., p. 44. Treaty *fishing* right U&A decisions have been made by reference to sea mammals such as porpoise, whale, seal, sea lion, and water fowl. *Decision I*, 384 F. Supp. at 372 (Quileute U&A); *id.* at 363 (Makah U&A); *U.S. v. Wash.*, 626 F. Supp. at 1467 (Makah ocean U&A); *id.* at 1489 (Skokomish primary fishing rights). Were sea mammals reserved elsewhere in the treaty, there would be no reason to consistently consider and include them in fishing rights determinations.

Cir. 2007) (citing *Mille Lacs*, 526 U.S. at 201–202). In *Mille Lacs*, Minnesota asserted that because another similarly-worded treaty was found not to reserve usufructuary rights, so too must Mille Lacs' treaty. The Supreme Court rejected this argument, noting that "the State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. The Court explained that construing treaty language requires examination of the historical record and context of negotiations *unique to that treaty*. *Id.*; *see also U.S. v. Webb*, 219 F.3d 1127, 1138 (9th Cir. 2000) (rejecting argument that Nez Perce agreement must be construed based on similar language in an agreement with the Yankton Sioux Tribe); *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 89 (8th Cir. 1975) ("Obviously, separate treaties and agreements with separate tribes must be separately construed.").

In sum, under established precedent, (1) express language in one Stevens Treaty does not mean that the right is abrogated by implication in other Stevens Treaties, and (2) the Treaty of Olympia must be construed as Quileute and Quinault understood it. Makah's treaty, negotiated by different government representatives and translated into a different tribal language, is irrelevant to Quileute and Quinault's understanding of the Treaty of Olympia.

(2) The Court's Findings

The evidence likewise supports the District Court's conclusion that Makah's treaty language is not germane to interpretation of Quileute and Quinault's treaty.

Most of the Stevens Treaties were negotiated by Governor Stevens. MER 465-507. Stevens was usually accompanied by George Gibbs, secretary and lawyer; Benjamin Shaw, interpreter; and Colonel M.T. Simmons. Gibbs drafted the template treaty language. *Decision I*, 384 F. Supp. at 354-56.

Stevens negotiated Makah's treaty, but both he and Gibbs were absent at the Treaty of Olympia negotiations. QER 4466; QER 298-99 (Hoard testimony); MER 482-86. Simmons negotiated the Treaty of Olympia in Stevens' absence. QER 8. The tribes at these two councils spoke drastically different languages. QER 659. As the District Court found, "these treaties were negotiated by different individuals and in different contexts." QER 78-79.

The District Court also found that Simmons "lacked the authority to tailor provisions in the way that Governor Stevens was able to do when negotiating the Treaty of Neah Bay." QER 79; *see also* QER 9. Makah nonetheless speculates that Simmons *did* have such authority because a provision was inserted into Article 2 stating that "a tract or tracts of land" would be set aside as a reservation. QER 4466. Although this provision did not actually guarantee a separate reservation, Makah asserts that it "addressed the Quileutes' demand that they be allowed to

remain on their traditional lands." Makah Br., p. 31.

Contrary to Makah's speculation, there is no evidence that the change was made by Simmons. Importantly, the Makah expert who opined that Simmons made the change was apparently unaware of evidence that Simmons was illiterate. QER 2430 (Renker testimony). In the treaty itself, Simmons is listed as a *witness* to the "tract or tracts" change and the final execution of the treaty in 1856 by Stevens. QER 4466. Moreover, Governor Stevens' letter transmitting the treaty to Commissioner Manypenny states: "The programme of the Treaty was prepared by me previously to my leaving for the Blackfeet Country, and the Treaty itself was signed by me after my return." QER 4839. The evidence indicates that Stevens inserted the language either before he left for Blackfeet Country or after he returned. QER 1795-1797 (Boxberger testimony).

Conjecturing that Simmons could have changed Article 2, Makah leaps to the conclusion that the lack of a "whaling or sealing" reassurance in the Treaty of Olympia means that Quileute and Quinault did not intend to preserve their customary sea mammal fisheries and fishing places. But the evidence demonstrates that Quileute and Quinault would have interpreted the treaties as reserving "food" (including sea mammals) and the places where they customarily obtained it. There was no need for them to press for reassurance because they already "understood the right to take [sea mammals] to be provided for in the

treaty." QER 10 (citing QER 354-55 (Professor Hoard's testimony that since Quileute and Quinault would have already understood that sea mammal fisheries were included, "[t]here is no reason to think they would have had concerns that would lead them to" ask for additional language)).[10]

That Makah wanted reassurance in its treaty that it could continue to take whales is immaterial to the interpretation of other Stevens Treaties.

b) The Treaty Canons Apply Regardless of Disagreement from Other Tribes who are Signatories to Different Treaties

Makah argues that the canons of treaty construction "do not apply when Indian interests are adverse." Makah Br., p. 22. Under this view, the Court should interpret language in favor of Quileute and Quinault if the State (or any other non-tribe) is the adverse party, but should not interpret such language in the tribes' favor if another tribe happens to be adverse. Applying a different canon of construction to the same language in the treaty, depending on whether a tribe or non-tribe initiated the RFD, makes no sense. The language in the Treaty of Olympia must be interpreted in the *signatory* tribes' favor, regardless of who initiated the RFD.

[10] *See also Shellfish*, 873 F. Supp. at 1435-36 (tribes' silence at treaty negotiations suggested that they did not understand the treaty to abrogate their pre-existing shellfishing rights); *Voigt*, 700 F.2d at 363–64 (silence indicated the tribes "believed their right to use ceded land for traditional pursuits to be secure and unaffected"); *Mille Lacs*, 861 F. Supp. at 831 (lack of discussion by the Chippewa about usufructuary rights during treaty negotiations shows they did not understand the treaty to abrogate them).

Makah cites *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) and *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996), but neither of those cases stands for the proposition that a tribe who is not signatory to a treaty can suspend the canons of construction simply by bringing an action in court. Instead, both cases involved disagreement among tribes *who claimed rights under the same treaty or statute*, and both cases held that the canons do not apply *in that circumstance*.

In *Chehalis*, the Chehalis and Shoalwater Tribes argued that they had the right to Quinault's treaty fishing rights via an "affiliation" with the Quinault Tribe. 96 F.3d at 339-40. This Court ruled that the canons did not apply because the tribes' interpretation was adverse to Quinault, who had rights under the *same treaty*. *Id*. at 340. Notably, the Court *did* apply the canons to the plaintiff tribes' interpretation of executive orders to which they were the *only* beneficiaries. *Id.* at 342-43.

In *Jewell*, the Rancheria Tribe sued the Secretary of the Interior over interpretation of a provision of the Indian Gaming Regulatory Act ("IGRA"). This Court found that the canons did not apply because the Rancheria Tribe's interpretation of IGRA could disadvantage other tribes who had rights under the *same statute*. 776 F.3d at 713; *see also* Six Tribes Br., pp. 20-25.[11]

[11] Docket entries cited in the Six Tribes brief are at QER 5855-65.

In treaty interpretation cases like this case involving disagreement among tribes *not* signatory to the same treaty, courts have held that the canons *must* apply. In *Seufert Brothers*, the Supreme Court applied the canons and found that Yakama understood its treaty to reserve fishing rights in an area where other tribes also had fishing rights and would have to share those rights with Yakama as a result of the ruling. 249 U.S. at 195–96, 198-99. The Court observed that Yakama's treaty "was with the government, not with [the other tribes]." *Id.* at 197.

This Court reached a similar result in *Colville*. There, Wenatchi claimed that an 1894 agreement between the United States and Yakama wherein Yakama "relinquish[ed] . . . all their right of fishery" at Wenatshapam (Wenatchi's preferred fishing site) extinguished *all* of Yakama's 1855 Stevens Treaty fishing rights there. 606 F.3d at 712-14. Despite this intertribal disagreement, the court applied the canons of construction, finding that Yakama understood that it retained fishing rights at Wenatshapam. *Id.* at 709-11.

On appeal, Wenatchi argued that the court's ruling rendered the language in the 1894 agreement mere "surplusage." This Court rejected Wenatchi's argument, holding that the "suggestion that we employ the rule of construction disfavoring surplusage depends on an implied cession of fishing rights," which "contravenes our obligation to refrain from interpreting the agreement according to the technical meaning of its words to learned lawyers." *Id.* at 713 ("We cannot conclude that the

Native Americans present throughout the negotiations would somehow discern an implied cession of . . . Article III fishing rights.") (internal citation omitted).

Canons of treaty construction *do* apply where tribes not party to the same treaty have adverse interests. *Colville* defeats Makah's argument that "surplusage" can implicitly abrogate fishing rights. There is no logical reason for interpreting the same language one way vis-à-vis non-tribal litigants like the State, and another way vis-à-vis tribal litigants like Makah. Instead, the treaty must be interpreted according to Quileute and Quinault's understanding.

3. In *Shellfish*, This Court Affirmed that the Right of "Taking Fish" Includes all Aquatic Animals and All Areas where Tribes Customarily Took Them

In *Shellfish*, Judge Rafeedie and this Court held that tribes reserved the right to take aquatic animals within all areas the tribes customarily took *any species of aquatic animal*. The decisions held that the treaty right did not limit the tribes' U&As to only those *specific* species that they harvested at treaty times in only those *particular* locations at which they caught those species. Instead, the tribes' U&As encompassed every area where they customarily harvested *any* one or more species.

In so holding, the *Shellfish* courts adopted the arguments of Makah and other tribes, including Swinomish, Upper Skagit, and the Port Gamble and Jamestown S'Klallams (the "Four Tribes"), that this was the appropriate interpretation of the

treaties. Those tribes, joined by the State, now take the inconsistent position that the rulings in that case did not address what species of *fish* could be considered to determine U&As or the treaty parties' understanding of *fish*. Makah and the State also argue that "all aquatic animal life" does not include sea mammals, and that past U&A adjudications were based only on finfish. *See* Makah Br., pp. 5, 8, 15-17, 20-21, 25-28; State Br., pp. 11-16. These arguments misconstrue the issues, evidence, and decisions in *Shellfish*.

a) Issues Raised in *Shellfish*

The District Court in the instant Subproceeding correctly found that Judge Rafeedie "directly addressed the breadth of the term 'fish' in the *Shellfish* proceeding." QER 76.

In *Shellfish*, the State's position was almost identical to its position in this case, which Makah opportunistically now joins: "'fish' meant finfish; salmon in particular." QER 5797; *see also* QER 5824. On that basis, the State claimed that the right of taking *fish* "does not include a right of taking shellfish." QER 5814; *see also* QER 5792.[12] The State pointed to the "whaling or sealing" language in the Makah treaty to support its argument that the parties to the Stevens Treaties "intended that right [of taking fish] to pertain only to finfish, in particular salmon." QER 5824, 5821 n.2. The State also argued (as it and Makah similarly argue now)

[12] The Four Tribes disingenuously assert that the State did not argue that shellfish were not "fish" in *Shellfish*. Four Tribes Br., p. 9.

that tribes should not be able to take shellfish in deep-water areas of their U&As where the State claimed they took only finfish at treaty times. QER 5804-06, 5810-12.

Makah and the other tribes responded in *Shellfish* that the plain language meaning of *fish* in 1855, as demonstrated by contemporaneous dictionary definitions, was "an animal that inhabits the water," and that the Indians understood the term *fish* to "refer to the products of the sea." QER 5746, 5757.[13] They also argued that the treaty partners intended all "traditional means of support and subsistence" to be reserved in the treaties. QER 5757-58. With respect to the State's argument that tribes must establish species-specific U&As, the tribes responded that "*[n]o* Court has ever required a tribe to show . . . treaty time *use* of a particular species in order to establish a treaty entitlement. . . . [T]here is no basis for excluding *any* type of fishing activity to establish [U&A]." QER 5775 n.8, 5777 (emphasis in original).

On summary judgment, Judge Rafeedie ruled that shellfish are *fish*. *U.S. v. Wash.*, 18 F. Supp. 3d 1172, 1218 (W.D. Wash. 1991); *see also U.S. v. Wash.*, 19 F. Supp. 3d 1126, 1128–30 (W.D. Wash. 1994). He based his ruling not only on the plain language of the treaties, but on the canons of treaty construction and

[13] Makah was mistakenly left off the signature block of the 5/14/1993 pleadings. QER 5663.

reservation of rights doctrine. 18 F. Supp. 3d at 1219.[14] Judge Rafeedie did not resolve the issue of whether tribes needed to prove shellfish-specific U&As until after trial.

At trial, Makah and the other tribes argued that they were not required to prove separate shellfish U&As because tribal U&As are composite areas made up of *all* the places tribes fished for various species. "Evidence of taking particular species has been used. . . . [a]s *cumulative proof of a broad geographical range*, not a means of parceling fishing areas by species." QER 5640, 5623 (emphasis added).

The tribes also argued that the language of the treaties, the canons of construction, and prior rulings dictated that tribes could take shellfish throughout their U&As, regardless of whether they caught shellfish throughout their U&As at treaty times. QER 5624-27, 5641-44. "[T]here has never been a determination of a tribe's [U&A] that imposed different geographic limits for different species of fish. This is true despite the fact that . . . some of the factual findings regarding locations of Indian fishing are specific to a single species or type of fish." QER

[14] These holdings controvert Makah's assertion that "the court resolved the threshold question whether shellfish were 'fish' on the basis of the treaties' plain language, not the reserved-rights doctrine." Makah Br., pp. 25-26. As Makah told this Court in its brief in *Shellfish*, "in holding that the treaty right applies to all species, the [District] Court looked to: (a) the plain language of the treaties; (b) the canons of construction of Indian treaties; (c) the reserved rights doctrine established under *Winans*; and (d) the law of this case." QER 5551.

5644, 5627. The tribes cited Quileute and Makah's U&A adjudications as examples showing that U&A adjudications consider "all fishing activities":

> The type of fishing activities this Court has considered in determining the boundaries of usual and accustomed grounds and stations also shows that all fishing activities should be taken into account. This Court has frequently considered more than just salmon fishing in establishing usual and accustomed areas. For example, in adjudicating the Quileute Tribe's usual and accustomed areas, the Court noted that in portions of its area the Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish, shark, herring, sardines, sturgeons, **seal, sea lion, porpoise and whale**. 384 F.Supp. at 372, FF 108. . . . **The Makah usual and accustomed areas were originally determined with reference to salmon, halibut, whale and seal**, 384 F.Supp. at 363 FF 61. . . . In an opinion regarding the Skokomish Tribe's primary right to fish within Hood Canal, a subject closely related to usual and accustomed grounds and stations, the Court found:
>
> > At and before treaty times, the Twana (Skokomish) engaged in a variety of fishing and hunting activities in and around Hood Canal and the streams flowing into it. These activities included . . . **water-fowl hunting and marine-mammal hunting** and trapping on the waters and tide flats of the canal.
>
> 626 F. Supp. at 1489, FF 352. . . . There would have been no reason for the Court to ever mention any species other than salmon if the usual and accustomed grounds and stations were being determined solely to apply to one or more species of salmon.

QER 5630-31, 5646-47 (emphasis added); *see also* QER 5594-97 (arguing that it was law of the case that tribal U&As are not species-specific and instead are composite areas of all the places where tribes took various aquatic species). Thus, contrary to the State's assertion that "[n]o tribe in the shellfish subproceeding asserted that marine mammal hunting activity could be used to" adjudicate U&A

(State Br., p. 14), the tribes asserted that *any customary aquatic animal harvesting* (including sea mammals) has *always* been considered in adjudicating U&As.

The tribes also relied on a number of experts who opined on the treaty parties' understanding of the right of taking *fish*. Dr. Ronald Butters explained that in the mid-1800s, dictionaries defined *fish* as "an animal that inhabits the water," and that "[i]t would be a serious error to project our twentieth-century linguistic intuitions back upon the nineteenth-century meaning." QER 4893-96.

Dr. Richard White similarly opined that the tribes understood *fish* to "refer to the products of the sea in the same way that Americans would, for example, use bread to refer to agricultural products. We would never interpret nineteenth century American statements about the necessity of earning their daily bread to mean that they wanted to eat only bread." QER 5735. "What Indians wanted was access to their customary food resources," and the U.S. negotiators explicitly promised that they would have continued "access to the usual places for procuring food." QER 5736.

Dr. Barbara Lane opined that "the Indians understood 'fish' to include **marine mammals such as whales, seals, and porpoise**, finfish such as salmon, halibut, and herring, and marine invertebrates such as octopus, crabs, and clams." QER 5709 (emphasis added).

Although much of the parties' evidence and arguments were understandably

focused on shellfish, both the State and the tribes asked the court to address the broader questions of the treaty parties' understanding of the term *fish* and whether U&As are coextensive as to species. The District Court and this Court agreed with the tribes.

b) Judge Rafeedie's Final Decision Regarding the Breadth of the Term *Fish* and the Coextensive Nature of U&As

Judge Rafeedie ruled that *fish* included all aquatic animals, and that the treaty fishing provision must be read without any species limitation:

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

Shellfish, 873 F. Supp. at 1429-30[15] (emphasis added). Judge Rafeedie further ruled that U&A determinations were *never* based on a particular species, and that the tribes' fishing right was not limited to species-specific areas:

> The Court finds that, as a matter of treaty interpretation, the Tribes' usual and accustomed grounds and stations cannot vary with the species of fish. . . . **Indeed, the Court has never focused on a particular species of fish in determining the Tribes' usual and accustomed grounds and stations.** *See e.g., Washington I,* 384 F.Supp. at 360, 364, 372; *Post–Trial Orders,* 626 F.Supp. 1405, 1467, 1528–29.

[15] Unlike its earlier summary judgment ruling on the tribes' motion that shellfish are fish, the Court did not limit its final decision to "the issue of whether shellfish can be regarded as 'fish' under the treaties at issue." 18 F. Supp. 3d at 1216 & n.1.

Id. at 1431 (emphasis added).[16] Judge Rafeedie specifically cited Quileute's U&A determination in *Decision I* (384 F. Supp. at 372), which referenced seal, sea lion, porpoise, and whale. Judge Rafeedie's citations also included Makah's U&A determinations. Though Makah now claims that those determinations "relied on fishing for multiple species of fish, but not whaling or sealing, to define Makah's U&A" (Makah Br., p. 8), *Makah told the District Court exactly the opposite* in its trial brief in *Shellfish*: "The Makah usual and accustomed areas were originally determined with reference to salmon, halibut, **whale and seal**, 384 F. Supp. at 363 FF 61." QER 5646 (Makah et al. Trial Brief regarding U&As); *see also U.S. v. Wash*, 626 F. Supp. at 1467 (finding that "[a]t treaty times, the Makah Indians engaged regularly and successfully in offshore fisheries . . . for whales and seals"; their "principal subsistence" was "the whale and the halibut").

Makah also argues that even though the Makah and Quileute adjudications reference whale and seal, they were not "based *solely* on evidence of whaling or sealing." Makah Br., p. 20 (emphasis in original). But Makah cannot prove this contention. As Judge Rafeedie's decision makes clear, courts have always

[16] After Judge Rafeedie rendered his decision in *Shellfish*, the State made similar arguments attempting to limit Makah's treaty rights to whiting in Subproceeding 96-2. Makah responded that "as Judge Rafeedie explained . . . [*fish*] 'fairly encompasses every form of aquatic animal life.' Judge Rafeedie correctly concluded that reading an implied species limitation into such broad language would violate all of the recognized canons of construction for interpreting Indian treaties." QER 5524.

adjudicated U&As as *composite areas* made up of areas where tribes took one or more species, including non-finfish species.

Makah also misconstrues Judge Rafeedie's holding that Yakama did not reserve shellfish, asserting that his holding was based solely on the lack of the shellfish proviso in their treaty. Makah Br., p. 27 n.7. But the holding also relied on the reservation of rights doctrine and canons of construction. Judge Rafeedie found that Yakama likely did *not understand* their treaty to include shellfish because at treaty times, they lived in an area where shellfish were unavailable. *Shellfish*, 873 F. Supp. at 1447-48. Yakama did not appeal this finding.

c) In *Shellfish*, the Ninth Circuit Affirmed the Breadth of the Term *Fish* and the Coextensive Nature of U&As

This Court affirmed Judge Rafeedie's decision in relevant part, holding that he correctly determined the breadth of the term *fish*:

> With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights. The district court aptly noted that, had the Treaty parties intended to limit the harvestable species, the parties would not have chosen the word "fish." The word "fish" has "perhaps the widest sweep of any word the drafters could have chosen." [*Shellfish*, 873 F. Supp. at 1430.] Thus, the district court correctly chose not to "deviate from [the Treaties'] plain meaning." *Id.*

Shellfish, 157 F.3d at 643.

This Court also agreed that even if a tribe did not take shellfish within the full extent of its U&A at treaty times, it did not limit the tribe's present right to

take shellfish from everywhere within its U&A. *Id.* at 643-44. It found that courts "have never required species-specific findings of usual and accustomed fishing grounds." *Id.* The State concedes that "[t]he point made was simply that a tribe's proven evidence of location-specific fishing for one species of fish is a sufficient basis for fishing for other species of fish by that tribe." State Br., p. 14. It is beyond disingenuous for the State to claim now that "no prior ruling in this case, including the shellfish ruling, supports the concept that usual and accustomed fishing grounds and stations encompass all species of marine organisms." State Br., p. 11.

Furthermore, the State's suggestion that Quileute and Quinault—unlike every other tribe—should have to prove their U&As on a species-by-species basis, simply because they had "no difficulty" providing sufficient evidence to do so, is inequitable and baseless. State Br., pp. 15-16.

Under this Court's rulings in *Shellfish*, *fish* means all aquatic animals, which includes sea mammals, and a tribe's U&A is a composite area made up of all areas where it customarily harvested *any* species of *fish*. That is the law of the circuit, and Makah and the State's argument that Quileute and Quinault did not harvest finfish in deep waters at treaty time is immaterial since their U&As for other

species of *fish* extend to 40 and 30 miles, respectively.[17]

4. Makah and the State's Proposed Definition of *Fish* Would Render the Treaty Language Inoperable

Makah and the State's proposed interpretation of *fish* would result in *fish* having two incompatible meanings: (1) only finfish are *fish* for purposes of *determining* a U&A, but (2) for purposes of "taking *fish*" once the U&A has been *adjudicated, fish* includes "every form of aquatic animal life." They fail to explain why the United States negotiators would intend the word *fish* to have two different meanings—a narrow and restrictive meaning when applied to determination of customary fishing places, but a broader meaning when applied to the reserved right of taking *fish*. Neither law nor logic supports the argument that *fish* means both "all aquatic animals" and "finfish only."

5. Affirming the District Court's Rulings in Subproceeding 09-1 Will Not Result in U&A Relitigation

The Four Tribes assert that the District Court's ruling will lead to tribes re-litigating prior U&A determinations. Four Tribes Br., pp. 10-14. The ruling does no such thing. As this Court found in *Shellfish*, and as the District Court found

[17] The State claims that "the 1974 proceedings in front of Judge Boldt produced evidence that every square mile of Puget Sound had been fished for salmon by one or more tribes." State Br., p. 15. This is untrue. *Decision I* contains no findings that suggest that the tribes proved salmon fishing in "every square mile of Puget Sound"; instead, Judge Boldt ruled that such a level of proof would be impossible given the limited evidence available, and referred to multiple species other than salmon (including sea mammals and shellfish) in his findings. *See supra* pp. 13-15, 46-47; *U.S. v. Wash.*, 459 F. Supp. at 1059.

here, past U&A determinations *already included* all species. QER 81-82; *see* 384 F. Supp. at 363 (Makah's 1974 U&A adjudication, referencing sea mammals); *id.* at 372 (Quileute's 1974 U&A adjudication, referencing sea mammals and shellfish); *id.* at 360 (Lummi's U&A determination, referencing shellfish); 626 F. Supp. at 1528-29 (Tulalip's U&A adjudication, referencing shellfishing areas); *id.* at 1489 (Skokomish's primary U&A rights determination, referencing clam digging, shellfish gathering, water fowl and marine mammal harvests). And, as the State concedes, in *Shellfish* the Upper Skagit Tribe adjudicated its marine U&A based on evidence of customary shellfishing activity. *Shellfish*, 873 F. Supp. at 1449-50; State Br., p. 14 n.2.

Tribes cannot now seek to "expand" their U&As by evidence of harvest of non-finfish species like whales, seals, octopus, clams, and water fowl. *They already submitted this evidence in their initial adjudications.* Continued consideration of all species in U&A determinations will not upset the *status quo*, it *is* the *status quo*.

6. The District Court Did Not Err in Finding that the Treaty of Olympia Reserved to Quileute and Quinault the Right to Take Aquatic Animals From the Places Where They Customarily Took Them

Makah and the State argue that the District Court committed "clear error" by finding as a factual matter that the parties to the Treaty of Olympia understood and used *fish* in a broad and capacious way. It is plain that substantial evidence

supports the District Court's findings regarding the parties' understanding of the Treaty of Olympia. QER 4-13, 76-78. The treaty negotiations, the broad 1855 meaning of *fish*, linguistic analysis of how the tribes would have understood the treaty, and the parties' actions after the treaty was signed all demonstrate that the parties understood *fish* to include marine mammals.

The State also improperly objects for the first time on appeal to the admissibility of Professor Hoard's linguistic testimony. State Br., pp. 17-20. The State waived its objection by failing to make it at trial.

a) Treaty Negotiations Demonstrate a Broad Meaning of *Fish*

In *Decision I*, Judge Boldt made key findings regarding the treaty negotiations. First, a primary concern of the Indians "was that they have freedom to move about to gather food at their usual and accustomed fishing places," and the treaty commission assured them that the treaty reserved this right. QER 5 (citing *Decision I*, 384 F. Supp. at 355). Second, there is nothing in the written records of the discussions with the Indians to indicate that they were told that their existing fishing activities would in any way be restricted or impaired by their treaty. QER 6. Third, Chinook Jargon, the trade language through which the treaties were negotiated, was capable of communicating *general* meanings of the treaty language, but incapable of expressing any technical legal meanings behind any of the treaty terms. QER 6.

(1) Failed Chehalis River Treaty

One month after reaching a treaty with Makah at Neah Bay, the full four-member treaty commission unsuccessfully attempted to negotiate a treaty with Quinault and other tribes in southwest Washington in February 1855 at the Chehalis River Council. Although not invited, Quileute heard of the council and sent two boys to observe.[18] QER 7. The Chehalis River negotiations failed when the tribes refused to agree to remove to a single reservation in Quinault territory; only Quinault, who was not required to move, was willing to sign the treaty. QER 7-8.

Like all tribes at their respective treaty councils, the tribes at Chehalis River were concerned with preserving their entire subsistence cycle. QER 9-11. The treaty commission generally responded to these concerns by assuring the tribes that they were "not called upon to give up their old modes of living and places of seeking food." QER 9 (citing Point-No-Point Treaty Council, MER 478); *see also U.S. v. Wash.*, 20 F. Supp. 3d 828, 897-98 (W.D. Wash. 2007) (quoting Stevens' statement at the Point Elliott council that "as for food, you yourselves now, as in time past, can take care of yourselves").

The District Court found that "[t]he minutes from the Chehalis River

[18] Quileute was initially invited to negotiate the Treaty of Neah Bay along with Makah, but Governor Stevens decided to proceed without them to avoid delaying the negotiations. QER 6-7.

negotiations indicate that the participating tribes were specifically concerned with reserving the right to take sea mammals." QER 10.[19] When Chah-lat demanded whales, asserting that "it was their food," Stevens assured him that the treaty "secured him the right to **fish**." MER 494 (emphasis added). Similarly, when Nah-kot-ti and Moosmoos requested "one half of all that came ashore on the weather beach, whales or anything," Stevens responded that "[t]hey of course were to **fish etc. as usual**. As to whales they were theirs, but wrecks belonged to the owners and if the Indians found them they were to tell the wreckmaster." MER 493 (emphasis added). Stevens did not distinguish between beached whales and swimming whales; he simply said, "as to whales they were theirs." QER 10 (citing QER 311-14 (Hoard testimony)).

Tuleh-uk also demanded whales: "I want to take and dry salmon and not be driven off… I want the beach. Everything that comes ashore is mine (Whales and wrecks.) I want the privilege of the berries (Cranberry Marsh)." QER 10. Governor Stevens assured Tuleh-uk that the treaty gave him "the right to **fish** in common with the whites, and get roots and berries." *Id.* (citing MER 491; emphasis added). The District Court found that "Stevens' response to Tuleh-uk suggests that the term 'fish' was used in a capacious sense, encompassing finfish as well as whales." *Id*.

[19] Contrary to Makah's representations, the minutes of the treaty councils do not reflect everything that was said at the councils. QER 353; QER 5757.

Makah makes the strained argument that the District Court's finding "is not a plausible reading of the cited passage" because *fish* does not "encompass the beach and shipwrecks." Makah Br., pp. 32-33. Because Stevens answered Tuleh-uk's demand for salmon, whales, and berries by responding that the treaty secured the right to *fish* and get roots and berries, the finding is sound and is not clear error.

This was not the only time Stevens referred to whales as *fish*. At the Neah Bay negotiations, Tse-heu-wrl stated, "if whales were killed and floated ashore, he wanted for his people the exclusive right of taking them," and Stevens responded 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 (emphasis added). Similarly, when Kal-chote stated that "[h]e thought he ought to have the right of fish and take whales and get food where he liked," Stevens responded that he did not wish "to stop their *fisheries*." MER 483-84 (emphasis added).

The District Court correctly found that Stevens' statements indicate that the government intended the treaties to reserve the tribes' pre-existing right to take every kind of fish, including sea mammals. QER 9-11, 77-78; QER 309-14 (Hoard testimony).[20]

[20] Makah misleadingly accuses the District Court of not "separately address[ing]" the federal government's intentions. Makah Br., p. 28. The District Court's ruling is replete with findings that the government intended that the tribes continue to take food, including sea mammals, from the places where they customarily obtained it. QER 4-13, 76-78.

The District Court found that the government's intent was corroborated by James Swan, a Chinook Jargon-speaking settler who attended the Chehalis River council. Swan wrote that the tribes at the council were told that the treaty allowed them "to procure their food as they had always done." QER 11; MER 833 (p. 344). Makah argues that this "does not mean Stevens intended the treaty to reserve to the Indians a right to fish in places they were unaccustomed to fishing." Makah Br., p. 34. This argument—repeated throughout Makah's brief—rests on the unsupported assumption that *fish* does not refer to all aquatic animals, and ignores the obvious breadth of the word "food."

As the District Court found, "[n]othing in the record of the negotiations of any of the treaties indicates that the U.S. treaty commission intended to exclude the harvest of sea mammals from the tribes' reserved fishing rights." QER 11.

(2) Treaty of Olympia

The draft Chehalis River Treaty was finalized with Quileute, Hoh, and Quinault as the Treaty of Olympia on July 1, 1855. QER 8. Negotiations took place at Taholah, a village at the mouth of the Quinault River. *Id.* Tribes who did not agree to sign the Chehalis treaty were not invited.

Members of the treaty commission were aware of the tribes' customary sea mammal harvesting activities. Writing in 1855, Gibbs observed that Quileute and Hoh "are good seamen and more nearly approach the Makah in daring than any of

the others," and that "[t]he Kwillehiut take [whales] by means of harpoons buoyed with sealskins." QER 2980, 2985.[21]

The subsistence provision in the draft Chehalis River Treaty was unchanged in the Treaty of Olympia. QER 8. There is no evidence that the tribes at Taholah were told anything different than the tribes at all other negotiations: the treaty reserved their pre-existing rights to obtain food (including sea mammal food) from the customary places. However, Makah misleadingly asserts:

> [i]n the **records** for the Treaty of Olympia there are repeated references to the importance of harvesting fish, but – **unlike the Makah Council** – there are *no* references to whaling or sealing. . . . The absence of any reference to whaling or sealing helps explain the absence of a whaling or sealing provision in the Treaty of Olympia.

Makah Br., pp. 34-35 (emphasis added). There *are no minutes* from the Treaty of Olympia Council. QER 8; HER 9; QER 297-98. Makah's argument comparing non-existent Treaty of Olympia minutes to minutes of its own treaty council is misleading at best. The District Court properly found that, in the absence of minutes, "the Court must look to other evidence of the meaning understood by the tribal parties and the rights they reserved, guided by the canons requiring liberal construction in favor of the tribes." QER 79.

b) English Language Meaning of *Fish*

Makah and the State contend that the meaning of *fish* in the treaties should

[21] Gibbs' piece was published posthumously in 1877. QER 3067, 5194.

be dictated by the Linnaean system, which classifies *fish* as aquatic animals that breathe through gills, swim by fins, and are oviparous. Makah Br., pp. 29, 35. Ironically, under this proposed definition, shellfish are not *fish*, because they do not swim by means of fins. *See* QER 2428-29.

The District Court, however, found that *fish* had a broad meaning in 1855. This finding is well-supported for three reasons. First, the treaty commission's use of *fish* to refer to whales indicated they intended a capacious meaning. QER 9-11. Second, dictionaries from around 1855 defined *fish* expansively as "[a]n animal that lives in the water." QER 11, 76. The dictionaries included the Linnaean classification of *fish*, but also described its broader popular meaning: "Cetaceous animals, as the whale and dolphin, are, in popular language, called fishes, and have been so classified by some naturalists. . . . The term *fish* has also been extended to other aquatic animals, such as shell-fish, lobsters, etc." QER 11; QER 327-28, 330-33, 482-83 (Hoard testimony).

Third, legal opinions from the 1800s referred to sea mammals as *fish* and *fisheries*. QER 11-12 (citing *In re Fossat*, 69 U.S. 649, 692 (1864) ("For all the purposes of common life, the whale is called a fish."); *Ex parte Cooper*, 143 U.S. 472, 499 (1892) (discussing "seal fisheries"); *The Coquitlam*, 77 F. 744, 747 (9th Cir. 1896) ("seal fishing")). Makah's assertion that some of these decisions also

referenced "seal hunters," and that the term "fisheries" is broader than *fish*[22] misses the point. Makah Br., p. 30. These cases demonstrate that even educated judges and lawyers in the 1800s referred to sea mammals as *fish* harvested in *fisheries*.

Given that the treaty commission knew that the Indians did not speak English,[23] let alone understand its nuanced taxonomic classifications, the District Court's finding that there is no indication that the commission intended to communicate *fish* in anything other than the broadest sense is sound. Just as Judge Rafeedie and this Court found in *Shellfish*, the District Court found that the parties' use of "the sweeping word 'fish' in lieu of more tailored language indicates an intended breadth of the subsistence provision that should not be circumscribed on the basis of post hoc understandings and linguistic drift." QER 77.

c) Translations of the Treaty Language Into Chinook Jargon

At each of the Stevens Treaty negotiations, Benjamin Shaw translated the English statements into Chinook Jargon, and Indian interpreters then translated Shaw's Chinook Jargon into their own languages. There is no record of the Jargon phrase that was actually used to communicate the "right of taking fish." QER 12.

Professor Hoard testified that many of the limited terms in Chinook Jargon

[22] *Cf. Fishing Vessel*, 443 U.S. at 676 (none of the treaty parties intended that the tribes "should be excluded from their ancient **fisheries**") (emphasis added).

[23] Astoundingly, despite acknowledging that the Indians *did not speak English*, Makah complains that "Judge Martinez identified *no* evidence" that Quileute and Quinault were familiar with "a more capacious English meaning of the word fish." Makah Br., p. 35.

are "highly ambiguous," resulting in a "translation bottleneck" that required the parties to negotiate the treaties using only general, high-level terms. QER 334-38; *see also* MER 831-32, 833. Furthermore, the tribal members who served as interpreters often had only limited ability in Chinook Jargon. *See* QER 339-41 (Hoard testimony); *Fishing Vessel*, 443 U.S. at 666-67 & n.10; QER 2509.

Professor Hoard testified, and the District Court found, that the commission most likely used the Chinook word "pish," translated by George Gibbs in his 1863 "Dictionary of the Chinook Jargon" as "English. Fish." QER 12. Makah claims that Gibbs "used Linnaean classifications." Makah Br., p. 29 n.8. Makah ignores that Gibbs too refers to whale as a "*fish*" in his description of Makah whaling. QER 2982 ("they were compelled to abandon the fish").

Makah also argues that "it was undisputed that the jargon could distinguish [fin]fish, whales and seals," Makah Br., p. 36 n.10, but simply having words for different species does not equate to differentiating *groupings* of species (e.g., finfish, sea mammals, shellfish) based on biological characteristics. As Makah admits (*id.*), and as the District Court found, "Chinook jargon did contain terms for some individual aquatic species, including whales, seals, and salmon, [but] lacked cover (i.e. high-level) terms that could differentiate between taxa or larger groupings of aquatic animals, such as finfish, shellfish, cetaceans, and sea mammals." QER 12. Gibbs' dictionary contains none of the latter terms. *See*

generally QER 2923-76; *see also Decision I*, 384 F. Supp. at 356 (Gibbs' Chinook Jargon dictionary "indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish").

Chinook Jargon lacks words to communicate that "finfish" were to be included in the treaty, "sea mammals" were to be excluded generally, and "shellfish" were to be included but only in areas where tribes customarily harvested "finfish." The 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. As irrational as this sounds, Makah and the State theorize that this is what must have occurred. Makah Br., pp. 36-39; State Br., p. 8.

Professor Hoard testified that it would have been impracticable and perhaps impossible to conduct the treaty negotiations in such a fashion. QER 344. No evidence indicates that the parties to the Treaty of Olympia undertook the creation of such a harvesting menu or that the tribes made selections from it. QER 344-45. Even if such a listing *were* attempted, tribal translators hearing a long list of species would still have logically translated the list as "food." QER 347.

The limitations of Chinook Jargon and translation difficulties rendered the Jargon useless to convey technical nuances such as Linnaean differentiation among

aquatic species. *See Decision I*, 384 F. Supp. at 330 ("Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ."). The evidence supports the District Court's finding that the treaty negotiators likely employed broad Chinook Jargon terms, and that these terms would not have been used in a restrictive sense. QER 12.

d) Translation of Chinook Jargon Into Quileute and Quinault

Just as there is no record of the Chinook Jargon terms used to interpret the treaty provisions, there is no record of the tribes' translation of those terms into their own languages. Neither Quileute's nor Quinault's language possessed terms that could differentiate between groupings of aquatic species, such as sea mammals, shellfish, and finfish. QER 12-13, 345-49, 520. The available evidence shows that Quileute and Quinault interpreters would have likely translated the Chinook Jargon terms as "Kémken" (Quinault) and "?aàlita?" (Quileute), meaning "food." *Id.*; QER 77, 300, 518, 638-39 (Hoard testimony). Those words are defined in the tribes' dictionaries to mean "fish, food, salmon." QER 12; QER 4120, 4199 (Quileute Dictionary); QER 3196, 3198 (Quinault Dictionary). The District Court found that Quileute and Quinault translators would have used the terms in their broadest sense, encompassing at least all aquatic animals on which they relied for subsistence purposes. QER 11-12, 77.

Makah attempts to convince this Court that Quileute and Quinault used "?aàlita?" and "Kémken" in their narrowest senses, citing excerpts from documents where these terms are used to mean "salmon." Makah Br., pp. 36-39. The excerpts list a few species of salmon individually by their species names and refer to them collectively as "?aàlita?." *See, e.g.*, QER 2494. The description is analogous to the statement, "I play golf and swim and I enjoy those **sports**." This does not *define* "sports" as only golf and swimming, just like the excerpts do not *define* "?aàlita?" as only those species of salmon, or as only finfish. QER 510-12 (Hoard testimony). Similarly, Makah's argument that the existence of separate Quileute and Quinault words for "whale," "whaling," "seal," and "sealing" meant those activities could not also be *fish* and *fishing* (Makah Br., p. 38) is just as wrong as the faulty conclusion that the existence of the words "swim," "swimming," "golf," or "golfing" means those specific activities are not "sports."

Professor Hoard discussed examples that make it clear "?aàlita?" was also used to mean "food generally":

> Q. Dr. Hoard, we saw in the Andrade text that Quileute had specific words for seal, steelhead salmon, chinook salmon. Is there a Quileute word for all of those species [grouped together]? . . .
>
> A. The only one available is alita. . . .[24]

[24] Makah's argument that "Professor Hoard testified that á·lita´ *did not mean* 'an animal that lives in or on the water,' and did not identify any Quileute word that did" (Makah Br., p. 37) implies that a tribe was required in 1855 to have terms in its own language that are precisely analogous to the meaning of English words

> Q. [Discussing QER 4052.] What word is used for food in Quileute? In that example, "Food is adequate for a family for a week."
>
> A. Pilil alita.
>
> Q. Do we know what kind of food this refers to?
>
> A. No, just food in general. Using the root -- the word alita for the choice of words.
>
> Q. Can we go to [QER 4111]? I would like to draw your attention to the definition for "eats," "he eats," alitaxashixes. Is there a base word for that?
>
> A. It is alita. It changes when you put the suffix on. "He is eating. He eats."
>
> Q. Do we know what kind of food this is referring to that he eats?
>
> A. Not at all. As I said, food is "alita." When it is extended that is exactly what you would expect. . . .
>
> Q. [Discussing QER 4175] If I had whale meat available, would I fairly say ["]I have no food,["] [iwalo] alita?
>
> A. No, [you] would definitely have food.

QER 638-39.

Makah and the State also speculate that because Quileute and Quinault had different gear and harvesting methods for different species, including sea mammals, they would have understood the treaty to exclude sea mammals. *See, e.g.*, Makah Br., pp. 39-43. If this were the case, shellfish would also be excluded from the treaties. *See* QER 5683-715 (describing different words, gear, and harvesting methods (e.g., prying, digging, spearing) for various species of

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such as "fish." Quileute and Quinault *did not have such terms* and would have translated the Jargon terms into the appropriate words in their own languages, ?aàlita? and Kémken.

shellfish). That tribes used different gear to catch different species does not mean they distinguished *biological groupings* of those species or understood them to be excluded from the treaties. *See Decision I*, 384 F. Supp. at 352 (fishing methods "included trapping, dip netting, gill netting, reef netting, trolling, long-lining, jigging, set-lining, impounding, gaffing, **spearing, harpooning** and raking.") (emphasis added). Courts have never permitted such strained distinctions to abrogate reserved rights.

Curiously, Makah posits that interpreting the treaty rights as encompassing "food" is "contrary to the treaties' plain language" and the parties' intentions. Makah Br., p. 39 n.11. There is no evidence that the commission intended to distinguish and separate subsistence activities. *See generally* minutes from treaty councils, MER 465-507. A treaty reserving fishing, hunting, and gathering is logically interpreted as reserving "food." Indeed, James Swan understood the treaty to allow the tribes "to procure their food as they had always done." MER 833.[25]

The District Court correctly found that Quileute and Quinault "would have

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[25] "The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that . . . they would have, in Stevens' words, 'food and drink ... forever.'" *Culverts*, 827 F.3d at 851. "Even if Governor Stevens had made no [such] explicit promise, we would infer . . . a promise to support the purpose of the Treaties." *Id.* at 852 (internal quotation marks omitted).

understood that the treaty reserved to them the right to take aquatic animals, including shellfish and sea mammals, as they had customarily done." QER 13.

e) The Parties' Actions After the Treaty of Olympia Was Signed Show They Understood It to Include Sea Mammals

The District Court found that the parties' actions after execution of the Treaty of Olympia indicated that they understood that sea mammals—and the areas where they were traditionally harvested—were included in the treaty. QER 13. The District Court properly relied on the parties' post-treaty course of conduct to guide its interpretation of their understanding of the treaty. *See Seufert Bros.*, 249 U.S. at 198–99; *Mille Lacs*, 861 F. Supp. at 831 (Chippewas' continued hunting, fishing, and gathering after an 1855 treaty indicates they did not understand that the treaty "extinguished their usufructuary privilege"); *Voigt*, 700 F.2d at 364 (similar finding). Substantial evidence supports the District Court's finding regarding the parties' post-treaty conduct.

In post-treaty years, Quileute and Quinault continued their traditional sea mammal harvesting activities with the encouragement of government agents. QER 13. For example, Quileute's Indian agent urged them to "continue your **fisheries** of salmon and seals and whales as usual," noting that the agency could help provide "spear heads for seals or harpoons for whales." *Id.* (emphasis added). Numerous government agents observed Quileute and Quinault's continued taking of sea mammals in post-treaty years, often emphasizing the importance of those

species to the tribes.[26]

When restrictions were placed on fur sealing under the 1893 Bering Sea Arbitration Award and 1894 Bering Sea Arbitration Act, Quileute, Quinault, Hoh and Makah were exempted from the restrictions. QER 13. Makah argues that this exemption was not based on treaty rights (Makah Br., pp. 44-45), but the exemption was only extended to those tribes who had *customarily* taken fur seals. QER 4805; MER 887; QER 380-85 (Hoard testimony). Because the treaties reserved the tribes' pre-existing rights, the exemption reflects the government's continued desire that they retain those pre-existing rights. QER 384-86 (Hoard testimony); QER 4795 ("exemption was made for certain Indians who had long

[26] *E.g.*, QER 373-387 (Hoard testimony discussing some accounts); *U.S. v. Pullen* Decision, QER 4939-40 (1893 Court opinion stating that "voluminous testimony" from individuals who had interacted with Quileute since 1854 indicated that Quileute went sealing in the spring and whaling in the summer); MER 627 (1893 affidavit from James Swan stating that an old Quileute chief told him they had always occupied La Push because it was good for sealing and whaling); QER 4731-32 (1874 report from superintendent for Washington Territory stating Quileute and Makah engage in whaling and sealing); QER 4743 (1880 Neah Bay Indian agent report that Quileute and Makah continue to subsist on sealing); QER 4746 (1881 Neah Bay and Quinault Indian agent reports stating that Makah and Quileute obtain their subsistence from fur seal and otter); QER 4751 (Quinault Indian agent 1882 report stating that Hoh and Queets Indians' main dependence is fur seal during spring and salmon during summer); QER 4758 (1887 Quinault Indian agent report that Quinault and Hoh continue to depend on otter and seal); QER 4472 (governmental "Report on the Fisheries of the Pacific Coast" noting that Quileute caught nine finback whales in 1888); QER 4771 (1889 accounting of Quileute whaling and sealing equipment by Indian agency schoolteacher at Quileute); QER 3243 (1894 Corps of Engineers observation that Quileute are whaling and sealing).

been dependent on the migrant seals for a livelihood").

In sum, substantial evidence supports the District Court's findings that all parties to the Treaty of Olympia understood that the fishing clause included sea mammals and the places where the tribes customarily took them. QER 9-13.

f) The State's Attack on Professor Hoard's Expertise and the Admissibility of His Testimony is Meritless

(1) The State Waived Any Objection to Professor Hoard's Testimony

The State challenges for the first time on appeal the admissibility of the testimony of expert linguist Professor Hoard. State Br., pp. 17-20. No other party joins the State's challenge. When Professor Hoard was formally proffered as an expert, no party objected. QER 290. Nor did any party below challenge the admissibility of his testimony. The State's only objection (which was not sustained) was its assertion that Professor Hoard's testimony specific to how post-treaty actions evidenced the parties' understanding of the treaty fell outside of the topic of linguistics. QER 368, 372-73.

The lack of a challenge to Professor Hoard's expertise and testimony was not surprising given his outstanding qualifications. Professor Hoard has studied multiple native languages, taught anthropological linguistics, worked with Quileute language speakers for four years, published an article on Quileute tongues and studied the publications available on the Quinault language. QER 279-86. His

contributions to analysis of the Quileute language are acknowledged in the 1976 and 2008 Quileute Dictionaries. QER 3490; QER 4042. In developing his opinions, Professor Hoard spent approximately 700 hours analyzing the linguistic evidence. QER 287. There is only one other living linguist who has done field work with both Chinook Jargon and Quileute speakers. QER 285-87, 1360.

Questions of admissibility and credibility are properly challenged either before or during trial, and failure to raise a challenge at trial "causes a party to waive the right to raise objections to the substance of expert testimony post-trial." *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012) (citing Fed. R. Civ. P. 16(c)(2)(D)); *accord Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996); *Price v. Kramer*, 200 F.3d 1237, 1252 (9th Cir. 2000). The requirement to object at trial is a well-established rule, and an attack on appeal that is re-phrased as a sufficiency of the evidence argument cannot avoid application of this rule. *Bartleson v. U.S.*, 96 F.3d 1270, 1277-78 (9th Cir. 1996).

The State attempts to excuse its failure to object by disingenuously suggesting that the District Court ruled that objections could be silently preserved. State Br., p. 18 n.4. That is not true. The Court made clear that all parties were required to object to testimony at trial, and that such objections would be heard as witnesses were testifying. Pre-Trial Conf., QER 5496, 5500-01, 5509-11. The State and others could and *did* object when they believed an objection was

warranted. *See, e.g.*, QER 368 (State objection), 369-71 (discussing Interested Parties' objections), 547, 600, 619, 634.

The State waived its newfound objections to Professor Hoard's testimony by failing to timely object at trial.

(2) Professor Hoard's Testimony Was Not Speculative

The State also argues that Professor Hoard's opinions were too equivocal to support the District Court's findings.[27] State Br., 16-20. This assertion is meritless. That the District Court's decision cites Professor Hoard's testimony numerous times shows that it was satisfied with Professor Hoard's expertise and credibility and gave due weight to his opinions. *See* QER 10-12, 53.

Professor Hoard's expert opinion that the parties to the treaty understood that the term *fish* included sea mammals was supported by his thorough analysis of the commonly understood meaning of the word *fish* in the 1800s, the limitations of Chinook Jargon, and the words in the Quileute and Quinault languages. QER 287-387. These opinions were expressed with certainty. *Id.* The State's cross-examination of Professor Hoard evidences its understanding that he had rendered his opinions on a "more likely than not" basis. QER 611, line 18.

[27] The State isolates a few instances when "may" and "might" were used in some questions and answers in Professor Hoard's direct and cross examination in an attempt to undermine his expert testimony. State Br., p. 19. If the State or any other party had an issue with the phrasing of a question or the quality of an answer, the time to raise it was at trial.

The Court's reliance on Professor Hoard's opinions was well within its discretion. *See Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010); *see also Mille Lacs*, 861 F. Supp. at 795 (admitting similar expert testimony); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1246-49 (E.D. Wash. 1997) (same), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 261–62 (E.D.N.Y. 2007), *as amended* (Feb. 7, 2008) (same; noting that disputes as to credentials or methodology go to weight, not admissibility), *vacated and remanded on other grounds*, 686 F.3d 133 (2d Cir. 2012).

7. The District Court Properly Applied the Law to the Facts

The District Court properly applied long-established precedent in holding that *fish* "as used in the Treaty of Olympia encompasses sea mammals," that "evidence of customary harvest of whales and seals at and before treaty time may be the basis for the determination of a tribe's U&A," and that "a tribe's U&A for the harvest of any one aquatic species is coextensive with its U&A for any other aquatic species." QER 78. Its decision that the "intended breadth of the subsistence provision [in the Treaty of Olympia] should not be circumscribed on the basis of post hoc understandings and linguistic drift," QER 77, is supported by exhaustive evidence, law of the circuit, and Supreme Court precedent.

Consistent with the canons of construction, the Court observed that its

"interpretation of the word 'fish' neither begins nor ends with today's commonly accepted biological definitions"; instead, the term must be construed as Quileute and Quinault would have understood it at the Treaty of Olympia negotiations, and any ambiguity must be resolved in their favor. QER 72-74.

Consistent with the reservation of rights doctrine, the Court found that the sea mammal harvesting rights that Quileute and Quinault possessed prior to the treaty were not specifically granted away to the United States and are reserved to them. QER 74-76, 78 (citing *Winans*, 198 U.S. at 381; *Adair*, 723 F.2d at 1413).

Consistent with the Supreme Court's holdings in *Mille Lacs* and *Seufert Brothers*, and with this Court's holding in *Colville*, the District Court correctly found that the intent of the parties to the Treaty of Olympia "is unaffected by the differences in language between the Treaty of Olympia and the Treaty of Neah Bay," as "these treaties were negotiated by different individuals and in different contexts." QER 78-79.

Finally, because courts have never required species-specific findings for usual and accustomed fishing grounds, and because "harvest of any one aquatic species is coextensive with its U&A for any other aquatic species," the District Court appropriately considered all species, including sea mammals, in determining Quileute's and Quinault's U&As. QER 75-78 (citing *Shellfish*, 873 F. Supp. at 1430 and 157 F.3d at 631-32; *U.S. v. Wash.*, 19 F. Supp. 3d at 1130).

Applying this established law to the evidence, the District Court found that the parties' statements and actions at and after the treaty negotiations, linguistic analysis of how Quileute and Quinault understood the treaty, and linguistic analysis of how the treaty commission likely used the term *fish* showed that all parties to the treaty understood it to include all aquatic species (including sea mammals) and the places where Quileute and Quinault customarily took them. QER 76-78. Because Quileute and Quinault "did not explicitly relinquish the right to continue this traditional practice, it follows that they reserved the right to continue to harvest marine mammals as they had long done." QER 78. "Just as Judge Boldt saw no reason in Final Decision # 1 to distinguish marine mammal from finfish harvest in setting forth tribal U&As, the Court sees no reason today to restrict the usufructuary rights reserved by the tribes based on a modern taxonomic distinction that they did not draw." QER 81-82.

8. The Makah Ocean U&A Determination Did Not Exclude Sea Mammals and Did Not Create Law of the Circuit Distinguishing Aquatic Species

Makah, joined by the State and the Four Tribes, claims that in its ocean U&A adjudication, this Court held that evidence of whaling and sealing was insufficient as a matter of law to establish U&A, and that this is the law of the

circuit. Makah Br., pp. 12-13; State Br., pp. 8-11; Four Tribes Br., pp. 5-9.[28] This argument primarily relies on the erroneous assertion that Makah presented proof sufficient to show customary treaty-time sea mammal fisheries beyond 40 miles offshore, and the Court rejected it based on species. That assertion is demonstrably wrong. Makah failed to present sufficient proof, and this lack of proof—not a species distinction—was the reason for the Court's ruling.

a) Evidence Presented to Prove Makah's Ocean U&A

The evidence submitted in Makah's ocean U&A proceeding consisted of a 22-page report on Makah's customary ocean fisheries by Dr. Lane (MER 566-590); a 31-page transcript of a 1977 hearing before a special master (MER 1255-86); and a three-page affidavit from Nora Barker, a Makah elder (MER 1287-89).

Makah presented its evidence in a 1977 hearing before a Special Master. MER 1255. The State was the only other party that participated in the hearing, but emphasized that it had "a very limited interest in this matter since the area in question which the tribe seeks to extend its definition of usual and accustomed

[28] It is apparent from the Four Tribes' briefing that they are concerned with several ongoing disputes among Puget Sound tribes regarding the so-called "travel rule," which holds that a court may not necessarily infer fishing from travel alone. *See, e.g.*, Four Tribes Br., pp. 2-5 (reciting numerous rulings on travel rule). The travel rule did not play a role in this Subproceeding. None of the District Court's findings relating to Quileute's and Quinault's U&As was predicated upon fishing incidental to travel. Nor did Quileute or Quinault ask the Court to make such a finding. Instead, all of the District Court's findings were based on evidence of the areas where Quileute and Quinault *customarily harvested* ocean species.

places is now under the jurisdiction of the United States government." MER 1260. Subsequently, the State "voluntarily waived any objections to [Makah's] request for determination that was the subject of this proceeding, and it did not resist the request." HER 48.[29]

Three witnesses testified at the hearing.

Dr. Lane testified that her oral opinion was contained in her written report. MER 1261-67. Her report was Makah's primary evidence of its ocean U&A.

Two sources wrote that Makah went out of sight of land for whales. MER 570, 572. Dr. Lane opined that "Makah would have been out of sight of land at about thirty or forty miles offshore from Cape Flattery." MER 576. James Swan, who lived among the Makah from 1862 to 1866 and from 1878 to 1881, wrote that the Makah preferred to fish at a bank 15-20 miles to the west. MER 568, 570-71. Swan reported that Makah's fishing lines extended 80-100 fathoms in length, "although it is seldom that fishing is attempted at that depth," except for black cod. MER 584. An explorer's logbook from 1791 stated that Makah fished 30-36 miles offshore. MER 575-76. Professor Waterman reported in 1920 that Makah used halibut banks from five to thirty miles offshore. MER 572. None of these sources placed Makah finfishing as far as 40 miles offshore; only the whaling evidence did.

[29] The State has no basis to now complain that Makah's ocean U&A was not adjudicated in accordance with applicable evidentiary standards. State Br., pp. 39-40.

Dr. Lane opined that the evidence supported "[t]hat the Makah regularly fished at known fishing banks some thirty or forty miles offshore," and that "there are frequent references to the Makah sailing out of sight of land," i.e., 30-40 miles offshore, for whales and other species. MER 576. Dr. Lane did not specify the location of the "known bank" 30-40 miles offshore, but a Makah elder identified it as a bank known as Forty Mile Bank. MER 1272.

Dr. Lane concluded that "[t]here does not appear to be any way to document whether the Makah travelled *farther* offshore [than 40 miles] to fish at treaty times," noting that the greater distances at which Makah fished in *post-treaty times* was due to "*altered circumstances [that] made it necessary to go further offshore*." MER 576, 588 (emphasis added). The altered circumstances included Makah's fisheries becoming overfished and Makah's purchase of five schooners, which they utilized to fish out to 100 miles offshore. MER 576, 588. Dr. Lane observed that "[i]f the Makah were pursuing offshore fisheries at those distances in 1897, there is no reason to suppose that they did not have the same *capability* in 1855." MER 580 (emphasis added). However, she opined that at treaty times, "when stocks were abundant within thirty or so miles of shore, there was little reason for the Makah to fish at greater distances." MER 587.

With respect to the delineation of Makah's customary harvest areas in the ocean, Dr. Lane stated that "[i]t does not seem feasible to describe Makah usual

and accustomed fishing grounds for offshore fisheries except in terms of distances offshore that the Makah reportedly navigated their canoes." MER 580; *see also* MER 577.

The testimony of Makah's other witnesses also did not support a reasonable inference that Makah harvested marine resources beyond 40 miles. Makah elder Harry McCarthy (born 1902), testified that he fished for halibut at "Forty Mile" and Swiftsure banks during *his lifetime*. MER 1275-77. His testimony was the only evidence that placed Makah 40 miles offshore for finfishing.

Another Makah elder, Oliver Ides, born 1907 testified that during his lifetime, the halibut and salmon "started disappearing." MER 1267, 1269. Ides also testified that during *his lifetime*, Makah harvested seal at "Blue Water," which he alternately located at 50-100 miles offshore, out of sight of land, and "about a hundred miles, I believe. It was quite a ways out." MER 1271-72.[30]

Makah also submitted an affidavit by Makah elder Nora Barker, born 1899. MER 1287. Barker stated that her husband fished at Forty Mile Bank, and that in 1920, the Makah had 35 trolling boats in which they fished "south of the Ozette area and out to at least 30 or 40 miles." MER 1288.

Makah and the Four Tribes improperly equate the evidence of Makah's post-

[30] Dr. Lane opined that the Makah reached the Blue Water "out of sight of land" area at 30-40 miles offshore, likely based on her 1977 interview with multiple elders. The transcript of the interview, in which the elders gave distances ranging from 40 to 60 miles offshore, was admitted in Subproceeding 09-1. QER 5185.

treaty forays for sea mammals beyond 40 miles offshore to evidence of *customary treaty-time harvest*. Makah Br., pp. 17-20; Four Tribes Br., pp. 2, 8. Makah also refers to evidence that it harvested sea mammals "out of sight of land" as if that were evidence of harvest *beyond* 40 miles (Makah Br., pp. 18-19), despite Dr. Lane's statement that such harvests occurred 30-40 miles offshore. Dr. Lane opined that Makah did not customarily go further than 30-40 miles offshore ***for any species*** until well *after* treaty times due to altered circumstances. MER 576, 588.

a) District Court's Ruling in Makah RFD

The Special Master issued a report and recommendation adopting Makah's proposed order, which included a finding that its U&A extended 100 miles offshore. QER 5853.

In urging Judge Craig to accept the Special Master's recommendation, Makah did not raise any treaty interpretation issues, and simply assumed that only salmon, and inferences about salmon fishing based on harvest of other species, mattered in determining its U&A. "[T]hough [Dr. Lane was] unable to point to documentation on Makah *salmon* fishing (as opposed to whaling and sealing) at distances beyond" 40 miles, "[w]e think it clear that the Makah would have undoubtedly regularly fished also on their regular whaling and sealing trips 100 miles to sea." MER 1239, 1241 (emphasis added).

The United States disputed that Makah's whaling and sealing trips were "regular," arguing that the evidence only demonstrated *regular* treaty-time harvests out to 40 miles offshore. Contrary to the State's assertion (State Br., pp. 9-10), the United States' argument about whaling was not a species distinction but instead simply followed Makah's framing of the issue as one of inferences drawn from salmon fishing. The United States argued that the court could not infer customary salmon fishing 100 miles offshore because there was no evidence that (1) Makah harvested whales *customarily* beyond 40 miles, or that (2) Makah caught salmon during their whaling trips. "It may well be that for whaling the Indians *occasionally* ventured as far as 90 or 100 miles. But salmon would have to be carried in the canoes all the way back to the villages, which would be much more difficult to do." MER 1252-53 (emphasis added). "This is not to say that [Makah] did *not* go these distances, but rather that there is no support for contending that these were *familiar* locations used frequently and *customarily*." MER 1253 (some emphasis added). The United States did not assert any treaty interpretation issue.

Judge Craig concluded that:

> 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.

U.S. v. Wash., 626 F. Supp. at 1467 (emphasis added).

At the hearing on Makah's motion for reconsideration, the United States again argued that Makah's "occasional" post-treaty whaling trips did not support an inference of "regular" treaty-time salmon fishing because the legal standard for proving U&A "distinguished between places they go usually and customarily and frequently, from those that they just occasionally went or in rare extreme instances." MER 1217-19.

Judge Craig acknowledged that the record reflected that Makah "tried to capture whales . . . out farther than the fishing banks," but stated that the record did not show *customary* harvest of *any species* beyond 40 miles offshore: "[the evidence] simply shows it was feasible to go 100 miles to fish for salmon, *for anything out there*, explore or whatever. That, to me, is not evidence of *usual and accustomed* fishing in a given area." MER 1221-22 (emphasis added).

Judge Craig then issued a memorandum opinion stating that:

> It was and remains the conclusion of the Court that there is no evidence in the record and no proper inference from the record that would support a finding that the area "where the members of [the Makah] Tribe *customarily* fished from time to time at and before treaty times" (384 F.Supp. 312 at 332) extended as far west as longitude 127° W. . . . There was no evidence that such *usual and accustomed* fishing at those times extended west of [40 miles offshore].

HER 46-47 (emphasis added).

To the extent Makah, the Four Tribes and the State contend that the Makah RFD somehow created "law of the case" or "law of the circuit" that sea mammals

are not *fish* within the meaning of the Treaty of Olympia, they are simply wrong. The law of the case doctrine only applies if the issue in question was "decided explicitly or by necessary implication in the previous disposition." *Lummi II*, 763 F.3d at 1187 (internal quotation marks omitted). Neither the U.S. nor Makah raised the issue of the meaning of *fish* in the Makah treaty, or put at issue the question of whether all aquatic animals should be considered in determining ocean U&A.[31] It was not necessary to raise the issue since Judge Craig considered all the evidence, including evidence of sea mammal harvest. His decision ultimately turned on the *sufficiency* of the evidence: Makah failed to show that it customarily harvested *any* species of aquatic animals beyond 40 miles.

b) Ninth Circuit's *De Novo* Review

After *de novo* review of the evidence, this Court also rejected Makah's claim to a 100-mile U&A based on frequency, not species. Like Judge Craig, this Court found that Makah had failed to show customary fishing for *any* species beyond 40 miles.

> The Makahs probably were *capable* of traveling to 100 miles from shore in 1855. They *may have* canoed that far for whale and seal or simply to explore. They did go that distance at the turn of the century, although it is *not clear how frequently*. About 1900, they fished *regularly* at areas about 40 miles out, and probably did so in the

[31] This Court confirmed in two subsequent cases that the Makah case "did not involve the interpretation of a treaty." *U.S. v. Wash.*, 969 F.2d 752, 754 n.2 (9th Cir. 1992) (panel included two judges from the *Makah* panel, Judges Wright and Hug); *see also Cree*, 157 F.3d at 773.

1850's.

Makah, 730 F.2d at 1318 (emphasis added). The Court emphasized Dr. Lane's opinion that Makah's post-treaty forays were not representative of treaty times. *Id.* at 1315-16 (quoting Dr. Lane's statement that there was little reason for Makah to fish at distances greater than 40 miles offshore until "altered circumstances" made it necessary in post-treaty years).

This Court concluded:

> [t]hese facts do not show that [the Makah's] usual and accustomed fishing areas went out 100 miles in 1855. There is no basis for an inference that they customarily fished as far as 100 miles from shore at treaty time.
>
> On the contrary, Dr. Lane suggested that the Makahs would travel that distance only when the catch was insufficient closer to shore. The earliest evidence of insufficient catch was Oliver Ides' statement about disappearing halibut when he was young, some 50 years after the treaty. Even under the less stringent standards of proof of this case, we cannot conclude that the Makahs usually and customarily fished 100 miles from shore in 1855.

Id. at 1318.

This Court's rejection of Makah's 100-mile U&A claim was based on Makah's failure to prove that it *regularly* fished for *any species* beyond 40 miles at or after treaty times. Had the basis for the rejection been a distinction between species, presumably this Court would have said so. Instead, it reviewed and evaluated the sea mammal evidence.

This Court's subsequent discussion of the Makah ocean U&A determination

confirms that the determination was based on frequency and not on species. In 1988, this Court compared Tulalip's evidence against that presented in *Makah* and noted that Makah's evidence that they "*traveled* as far as 100 miles offshore at treaty times," which "might have been" for whaling or exploration, did not provide a "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." *Lummi I*, 841 F.2d at 320 (emphasis added; internal citation and quotation omitted).

The meaning of *fish* was not raised, considered or discussed in *Makah*. *No court* has ruled that evidence of customary sealing and whaling at treaty times cannot determine a tribe's U&A. Quite the contrary, as discussed above, multiple U&A determinations, including both of Makah's adjudications, were made expressly by reference to sea mammal evidence. Moreover, the meaning of *fish was* squarely addressed by this Court in the intervening *Shellfish* decision, which rejected any species limitation. Law of the circuit is that *all species* must be considered in determining U&A. *Shellfish*, 157 F.3d at 643-44.

c) Makah and Other Tribes' Subsequent Representations Regarding *Makah* and the Law of the Case

As the District Court found in this Subproceeding, the positions Makah and other tribes advocated in *Shellfish* made clear that they "did not view [*Makah*] as having excluded evidence of marine mammal harvest from U&A determinations,"

and that they did not believe that U&A determinations had been, or should be, based on only finfish. QER 81 (citing QER 5646, 5826-40); *see also* QER 5570-75 (Makah et al. Ninth Circuit Brief in *Shellfish*) (noting that "[in *Decision I*] the court found that in portions of its area Quileute caught smelt, bass, puggy . . . **as well as sea mammals**" and arguing that Quileute's adjudication and other examples show that, "either explicitly or implicitly, every determination of [U&A] made by the district court during the course of this 26-year litigation has been based on evidence of the general areas where a tribe engaged in the activity of fishing, regardless of the species harvested") (emphasis added).

As Makah admits, the tribes addressed the *Makah* decision in their appellate brief in *Shellfish*. Makah Br., p. 21. Appellant-intervenor shellfish growers had argued that separate U&As must be adjudicated for different species, citing *Makah* as adjudicating a "whal[ing] and ocean fish[ing]" U&A separate from Makah's salmon U&A. QER 5578-79.

Makah and the other tribes responded:

> **In short, there have never been separate usual and accustomed grounds adjudicated for different species of fish. The Makah ocean fishing places case, cited by the growers, is not such a case.** There, the district court determined that Makah *customarily* fished at treaty times 40 miles from shore, but not 100 miles. 626 F. Supp. at 1466-68, *aff'd*, 730 F.2d 1314, 1318 (9th Cir. 1984). But Makah's adjudicated usual and accustomed fishing grounds were still determined with reference to multiple species of fish and cover one very broad general territory. The district court did not adjudicate separate fishing grounds for each species.[32]

MER 968 (bolded font omitted from Makah's brief in the instant appeal; other emphasis added). Makah also omits footnote 32, which states:

> The district court pointed out that "the principal subsistence of the Makah is drawn from the ocean and is formed of **nearly all of its products** . . ." The fish described among the Makah catch are halibut, salmon, cod, and "other kinds of fish," 626 F. Supp. at 1467; **see also** 384 F. Supp. at 364.

MER 968 (bold in original).

In sum, Makah and the other tribes' briefs show that they did not view *Makah* to stand for the proposition that U&A determinations exclude evidence of sea mammals, as they now claim. They and this Court have correctly described *Makah* as a decision based on frequency, not species. Because the treaty interpretation issue of the breadth of species that should be considered in U&A determinations was not raised or addressed by the Court, much less decided "by necessary implication," it is not law of the circuit. *Lummi II*, 763 F.3d at 1185.[32] Instead, as Makah argued in its *Shellfish* brief, it was law of the case (and is now law of the circuit) that evidence of all fishing activity, including sea mammal

[32] Even if this Court believes that *some* reasoning in *Makah* could suggest a species distinction, *other* reasoning in *Makah* (specifically, this Court's consideration and rejection of Makah's sea mammal evidence as failing to show *customary* or *treaty-time* harvest) shows that no species distinction was made. Where conflicting reasoning makes it ambiguous whether the Court decided a particular issue, that issue "has not yet been decided explicitly or by necessary implication." *Lummi II*, 763 F.3d at 1187 (holding that a prior Ninth Circuit decision containing some reasoning that could suggest alternately that a certain area was included in, or excluded from, Lummi's U&A could not constitute law of the case).

fisheries, are considered in determining U&A.

C. The District Court Did Not Err in Finding that Quileute and Quinault Customarily Harvested Sea Mammals 40 and 30 Miles Offshore, Respectively

The State alone argues that the District Court erred in finding that Quileute and Quinault customarily harvested sea mammals 40 and 30 miles offshore. The State contends that the finding was based "upon broad and nonspecific historic references to the ranges of distance" that Quileute and Quinault "general[ly] travel[ed] in relation to marine mammal hunting." State Br., pp. 23, 29-30. The State asserts that the District Court erred by not individually identifying all the "specific locations" where Quileute and Quinault harvested ocean species because tribal U&As must be delineated based on "named fishing places" and "specific fishing banks." State Br., pp. 23-29, 37, 41. Tellingly, Makah does not join the State's arguments on this point.

The State unsuccessfully made the same misguided argument in Subproceeding 92-1, where it asserted that tribes should be required to prove halibut bank-specific U&As. In response, Makah correctly referred to the "basic rule" established by Judge Boldt that "grounds" *are defined as* "larger areas which may contain numerous stations and other *unspecified locations*" that cannot be "determined with specific precision." *Decision I*, 384 F. Supp. at 332 (emphasis added); QER 4725. Makah also argued that limiting U&As to only specific banks

was "wholly inconsistent" with the treaty partners' understanding and "totally eviscerates the purpose of the treaty." QER 4725; *see Midwater Trawlers*, 139 F. Supp. 2d 1136 (mentioning halibut order and recognizing that "tribal rights are not limited by species of fish"). Makah emphasized that its ocean U&A was not defined by particular banks but instead extended to broader areas. QER 4725 ("That's how Makah U&A were defined in 1982 by the Court despite the possibility that particular areas might be identified, and that was affirmed by the Ninth Circuit."). The State's argument that the District Court should have applied an unprecedentedly stringent evidentiary standard to Quileute and Quinault is without merit.

The State also ignores the exhaustive evidence that the District Court analyzed in over 27 pages of its decision. QER 20-27, 39-57. Instead, the State mischaracterizes a few pieces of evidence and relies on scattered excerpts from the testimony of anthropologists retained by the State and Makah, whose theories the District Court did not find persuasive. State Br., pp. 29-30. Nowhere does the State mention marine mammal expert Professor Trites' testimony about the biological distribution of various marine mammals that Quileute and Quinault customarily harvested at treaty times. QER 710-53, 802-825. The District Court cited Professor Trites' testimony more than 23 times in its opinion, and its finding that his testimony was "credible and consistent with" the extensive historical

documentation of Quileute and Quinault's customary marine mammal harvests is entitled to substantial deference. QER 24-25.

The evidence shows that Quileute and Quinault regularly engaged in fur sealing and whaling at treaty times in areas of the ocean where they knew those species were abundant: the migratory paths these species have followed since prehistoric times.

1. Fur Sealing

Northern fur seals migrate each spring and summer 30-60 miles off the Washington coast on their way to breed on the remote Pribilof Islands, located in the Bering Sea. QER 49, 725, 746-48, 753-54. They are pelagic, traveling in deep waters over the continental shelf around the 100-fathom line. QER 712, 744-46, 751-52. They do not come ashore except to breed at the Pribilofs.[33] QER 49, 711-12. During their migratory journeys, fur seals depend on the upwelling of nutrients found around the continental shelf for their food. QER 49, 750, 759, 803. Professor Trites described the continental margin as "an ocean 'Serengeti,' through which large herds of marine animals, including whales and fur seals, would migrate on a seasonal basis." QER 24, 803.[34]

[33] Because the Indians never saw the breeding places of these species in aboriginal times, they considered them exclusively aquatic animals. *See, e.g.*, MER 789.

[34] Contrary to the State's assertions, the upwelling of nutrients at the continental margin is not a "theory" about where marine resources "may have" existed. State Br., p. 27. The concentration of nutrients at the margin is a long-recognized,

After feeding during the night, fur seals sleep on the surface of the open ocean to rest before resuming their migratory journey. QER 49, 732-33. Coastal tribes, who prized fur seal meat and pelts, developed a means to catch them while they slept. *See* QER 4799-800; QER 716 lines 7-8.

Coastal Indians began their fur sealing journeys at approximately 2:00 a.m. in order to reach the sealing grounds by 10:00 a.m.—when the seals were still asleep. QER 55-56. The Indians would silently approach a sleeping seal and harpoon it from their canoe. QER 3272-74. The commotion would scare away any nearby seals, so to obtain additional seals the Indians would have to look elsewhere along the seals' migratory route. QER 2772; QER 1504-05 (Boxberger testimony).

Excavation of Quileute middens revealed an astounding level of fur seal bones, which represented 70% to 91% of the mammal bones and confirmed "over 1,000 years of consistent and continuous fur sealing by the Quileute people." QER 47-48.

The similarities between the middens in aboriginal Quileute territory and

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biologically proven fact that was uncontested at trial. QER 750, 759, 803. Fur seals and various species of whales migrate along this nutrient-rich area. The biology and distribution of those species in the ocean, far from "ignor[ing] and essentially nullif[ying]" the requirement that tribes prove their customary fishing grounds (State Br., p. 27), *proves* where the tribes would have found and harvested those species. *See, e.g.*, QER 49, 803 (discussing the margin area as a Serengeti for fur seals and other marine species).

Makah territory "are indicative of the longstanding reliance on fur seal harvest by peoples spread across the Olympia Peninsula coast." QER 48. Though no middens have been excavated in Quinault territory, the evidence indicates that excavation of their middens "would more likely than not show a similar adaptation by the Quinault people to this feature of their coastal environment." *Id.*

Because fur seals adhere to their migratory route 30-60 miles offshore of the Washington coast, Quileute and Quinault had to travel out to the migratory route to obtain them. *See* QER 49, 754.

a) Quileute Fur Sealing

The District Court found that the evidence "profoundly demonstrates that since prehistoric times, the Quileute have been a fur sealing people, harvesting fur seals in great quantities from the Pacific Ocean for their subsistence uses"; evidence of the importance of fur sealing in Quileute economy and culture "is ubiquitous across the archaeological, historical, and ethnographic record in this case." QER 47. The District Court's findings on customary Quileute fur sealing are amply supported by the evidence. QER 46-57, 823-24.

"Numerous, remarkably similar reports of traditional Quileute sealing practices provide evidence that the Quileute were harvesting fur seals in substantial numbers each spring at the continental shelf break" out to 40 miles offshore. QER 55. Chris Morgenroth, an early settler in Quileute territory, accompanied Quileute

fur sealers on a sealing trip in 1893. He observed that the seals' migratory route was 30-50 miles offshore. QER 54-55, 3249. Morgenroth recalled that they left shore at 3:00 a.m. and reached the "outskirts of the sealing grounds, some thirty miles from shore" after "six hours of strong paddling." QER 55. Beatrice Black, a Quileute born in 1890,[35] recalled that each spring, her brother would "go out in the ocean, way out to get some seal . . . forty miles out in the ocean in an open canoe." QER 55. Professor Leo Frachtenberg, an ethnographer who lived among the Quileute from 1915 to 1916, reported that during sealing season, Quileute sealers "very often go 30 and 40 miles out into the sea." QER 4777. After reviewing testimony from numerous Quileute elders born in the 1800s, this Court in *United States v. Moore* concluded that the Quileute, "[w]hen first visited by white men," were regularly harvesting fur seals as they migrated along the 100-fathom line to the Pribolofs. QER 56.

Quileute's name for the fur sealing season was "yashabalktiyat." *See* QER 56-57. The name for the continental margin area in the Quileute language was "xopasida," which means "blue water." QER 56. To access the seals, "[t]hey wanted to get out to what was called xopasida (blue water) – the place where the ocean really gets deep." MER 657.

The District Court found that treaty-time Quileute fur seal harvests were

[35] Birth years for Quileutes represented in the evidence at trial are contained in QER 5252.

"concentrated at the continental shelf break adjacent to their territory, where the density of fur seals was greatest during the animals' annual migrations." QER 57. The District Court concluded that "[t]hese **geographic markers**, coupled with the ethnographic accounts, support a reasonable inference that the Quileute were fur sealing on a regular and customary basis up to 40 miles offshore at and before treaty time." QER 57 (emphasis added).

b) Quinault Fur Sealing

The District Court found that Quinault treaty-time fur sealing mirrored the fur sealing practice of both Quileute and Makah. QER 25. Dr. Lane, Professor Olson and Singh described fur sealing "as a seasonal Quinault activity, taking place regularly each year in the months of April and May when the animals could be encountered offshore on their annual migration to breeding grounds off the coast of Alaska."[36] *Id.*

Consistent with the biological evidence on the fur seal migratory route along the continental shelf offshore from Quinault territory, "Dr. Olson recorded that it was necessary for the Quinault to go ten to twenty-five miles offshore to hunt fur seals." QER 26. An 1895 article by Beriah Brown described pre-treaty Quinault

[36] Most of what is known about aboriginal Quinault culture and subsistence activities comes from Dr. Ronald Olson's 1936 ethnography on Quinault. Dr. Olson conducted field work at Quinault in the 1920s and his information about Quinault subsistence activities came from reliable informants who had memories reaching back to treaty times. QER 15.

fur sealing as occurring thirty miles offshore, "in the vicinity of the famous fishing bank off the coast from Shoalwater Bay." *Id.*

The District Court found the biological and historical evidence showed that Quinault were harvesting fur seals up to 30 miles off the coast of their territory at and before treaty times. QER 26-27. The evidence supports the District Court's conclusion that "[t]he Quinault more likely than not ventured up to thirty miles offshore in pursuit of fur seals on a regular, seasonal basis at and before treaty times." QER 26.

2. Whaling

The coastal tribes' aboriginal whaling practices were also remarkably similar. QER 42. Whalers were the social elites among the Makah, Quileute, and Quinault because they obtained enough food to feed an entire village for months. *See, e.g.*, QER 4821.

Whaling canoes were hewn from large cedar trees and measured roughly 34 feet long, typically carrying eight individuals: the harpooner, six paddlers, and a steersman. QER 1456-57, 2704, 2781-82. In a typical whaling journey, four or five canoes would work together to catch whales. QER 43, 2537.

The process of catching a whale was a sophisticated and lengthy endeavor. MER 745; QER 1468-71, 1475-76 (Boxberger testimony). Initially, the harpooner from the lead canoe would harpoon the whale, which would attempt to flee at

"racing speed" as the canoes followed, thrusting additional harpoons into the whale until it eventually died. QER 3173-75, 4319-22. Some species of whales were initially harpooned near shore, while other species were harpooned near the continental shelf where those species migrated. QER 46.

Once harpooned, whales would attempt to flee, leading the Indians in a miles-long chase. *Id.* ("[a whale] would regularly drag a canoe out of sight of land, for as long as two to three days at sea."); QER 24 ("after a whale was struck by a harpoon, the whale 'might run as much as ten to fifteen miles before being killed'") (quoting Olson); QER 4339-40 (account by Dr. Lane of Makah whale hunt). The typical struggle to kill a whale and bring it home lasted several days and involved a battle spanning many miles of the ocean. QER 3169-76 (detailed description of a whaling trip); QER 1468-71, 1475-76 (Boxberger testimony).

Substantial evidence supports the District Court's finding that both Quileute and Quinault customarily harvested whales up to 30 miles offshore at treaty times.

a) Quileute Whaling

The District Court found that Quileute have been a whaling culture since time immemorial. QER 41. The middens and ethnographic documents evidence that Quileute traditionally harvested various species of whale, including gray whale, humpback whale, killer whale, fin back whale, blue whale, and sperm whale. QER 33, 40-41.

Quileute pursued whale each spring and summer during the whales' migratory journeys. QER 44-45. There were six recorded treaty-time Quileute villages associated with whaling and numerous Quileute words related to whaling and to distances far offshore. QER 43-44.

The District Court found that, "[l]ike the Makah, the Quileute likely employed more than one whaling strategy, engaging on a regular basis in both nearshore and offshore hunts." QER 46; *see also* MER 572. Yahatub, a Quileute whaler born in 1835, recounted that the whales "were usually found out of sight of land,"[37] and that when more than one day was spent at sea searching for whales, "the leader watched at night while his men slept." QER 2537; QER 45 (quoting same). Anthropologist George Pettitt described aboriginal Quileute whaling as occurring "twenty-five to fifty miles out to sea." QER 45, 3343.[38] In her report on Quileute treaty-time ocean fisheries, Dr. Lane also opined that "whales were usually found out of sight of land, twenty-five to fifty miles offshore." QER 46 (quoting QER 5201-02).

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[37] Just as Dr. Lane concluded in her report on Makah's ocean U&A, the District Court found that "out of sight of land" is approximately 40 miles offshore. QER 45; *see also* QER 1447-48, 2086.

[38] The District Court correctly disregarded the State's argument that Pettitt's account "merely described" the capability of the canoe. State Br., p. 30. The State's bizarre interpretation is not a common sense reading of the passage; Dr. Pettitt would not give the mileage figure of 25-50 miles out to sea unless the Quileute were actually regularly going that far. QER 2372-73 (Boxberger testimony).

Dr. Frachtenberg described both nearshore and offshore harvests, which required whalers to go "20 to 30 miles into the ocean attacking whales with their primitive weapons." QER 46. The District Court found that:

> [o]ffshore hunts at these distances would allow Quileute whalers to access the most productive sites for whaling near the continental shelf break, which is generally located upward of 30 miles offshore adjacent to Quileute territory. [QER 804]. While the gray whale and humpback whale migrate fairly close to shore, other whales associated with Quileute harvest are typically encountered 20 to 50 miles offshore. *See* [QER 812-21].

QER 46.

The evidence demonstrates that Quileute whalers customarily harvested whales over vast expanses of the ocean, both nearshore and offshore. The evidence supports the District Court's conclusion that "Quileute whalers were more likely than not harvesting whales upwards of 30 miles offshore at treaty time on a customary basis." QER 46.

b) Quinault Whaling

At treaty times, Quinault customarily harvested whales each summer from May to August. QER 23. Quinault whalers spent much of that time on the open water, "cruising for the animals." *Id.* A "substantial proportion" of the Quinault population engaged in whaling at treaty times. QER 21, 2527-28.

Dr. Olson wrote that "[w]hales were most often encountered 12 to 30 miles off shore." QER 23. Dr. Olson also testified in 1956 that Quinault harvested

whale in the open ocean, "going as far out as 25 miles or even more to harpoon and capture whale." *Id.* Dr. Lane agreed the evidence showed that Quinault whaled 30 miles from shore. QER 23-24. Dr. Lane reported that, while "[i]t is not feasible to document the outer limits of Quinault fishing, [] it appears that Quinault fishermen were familiar with offshore resources for at least thirty miles west of the Olympic Peninsula." QER 19-20, 3133. This would place Quinault whalers at the continental shelf off Quinault territory where whales would have been abundant during the summer months. QER 24.

The District Court concluded that traditional Quinault whaling occurred at the distances from shore described by Dr. Olson (12 to 30 miles). QER 23-25. The evidence supports that conclusion and shows that at before and at treaty times, Quinault customarily harvested whales up to at least 30 miles offshore.

D. The District Court Did Not Err in Finding that Quileute Customarily Fished for Finfish 20 Miles Offshore

If this Court determines—as it should—that the District Court did not err in its factual and legal findings that U&A adjudications are not species-specific and that Quileute's U&A extended to 40 miles offshore, it need not address Makah and the State's other mistaken contention that the District Court committed clear error in finding that Quileute's customary species-specific finfishing area extended 20 miles offshore.

The findings regarding the western extent of Quileute's customary finfish

harvests are found at QER 35-39. Though Quileute presented evidence at trial of customary harvest of finfish up to 40 miles offshore, the District Court weighed the evidence and found that Quileute customarily fished for finfish 20 miles offshore.

The District Court found that archaeological and ethnohistoric evidence demonstrated that Quileute were continuously engaged in harvesting a wide variety of finfish from the Pacific Ocean at treaty times. QER 36. There are broad similarities in the finfish bone compositions in Quileute and Makah midden sites, indicating similar harvesting activity. *Id.*

Professor Donald Gunderson, a professor emeritus of fishery sciences, testified about the biological distribution and habits of various species found in Quileute middens. Professor Gunderson testified that while some fish of most any species could be found close in, fishermen in the 1850s (like fishermen today) would likely focus their efforts on areas where fish would be *abundant* to maximize the chance of a successful day of fishing. QER 1307. Three species found in Quileute midden sites—rockfish, halibut, and hake—are abundant in deeper waters. QER 36-37 (rockfish are abundant in habitats deeper than 50 fathoms, and hake "are strongly indicative of offshore harvest" because they congregate in deeper waters). Professor Gunderson testified that halibut would be abundant between 30 and 230 fathoms, with peak abundance at 70 fathoms. QER 1273-75; QER 37.

"Like all fishermen," the Northwest Indians shifted their effort "to those locales which seemed most productive at any given time." *Decision I*, 384 F. Supp. at 352. Makah argues that, unlike other fishermen, Quileute fishermen would *not* have targeted "areas of peak halibut abundance," and would have instead focused on areas closer to shore. Makah Br., p. 56. Makah's argument is inconsistent with Judge Boldt's finding above, its own fisheries biologist's testimony, and with general knowledge about fishing.

Mr. Stephen Joner, a fisheries biologist for the Makah Tribe, testified that fishermen go where they know they can reliably find fish:

> Most of [Makah's] fishing was done [at the bank approximately 15 miles from shore]. But as with any fish, halibut move around, so if they weren't in this spot, you go to the next spot. That's how I believe the Makahs made it out to [the bank 40 miles offshore]. . . . There is no reason to go 40 miles if you can get them within four miles. But if they are not available within four miles, you go 14; if not there, you go 40, I guess. But that - because the abundance availability is constantly shifting, they knew where to find them.

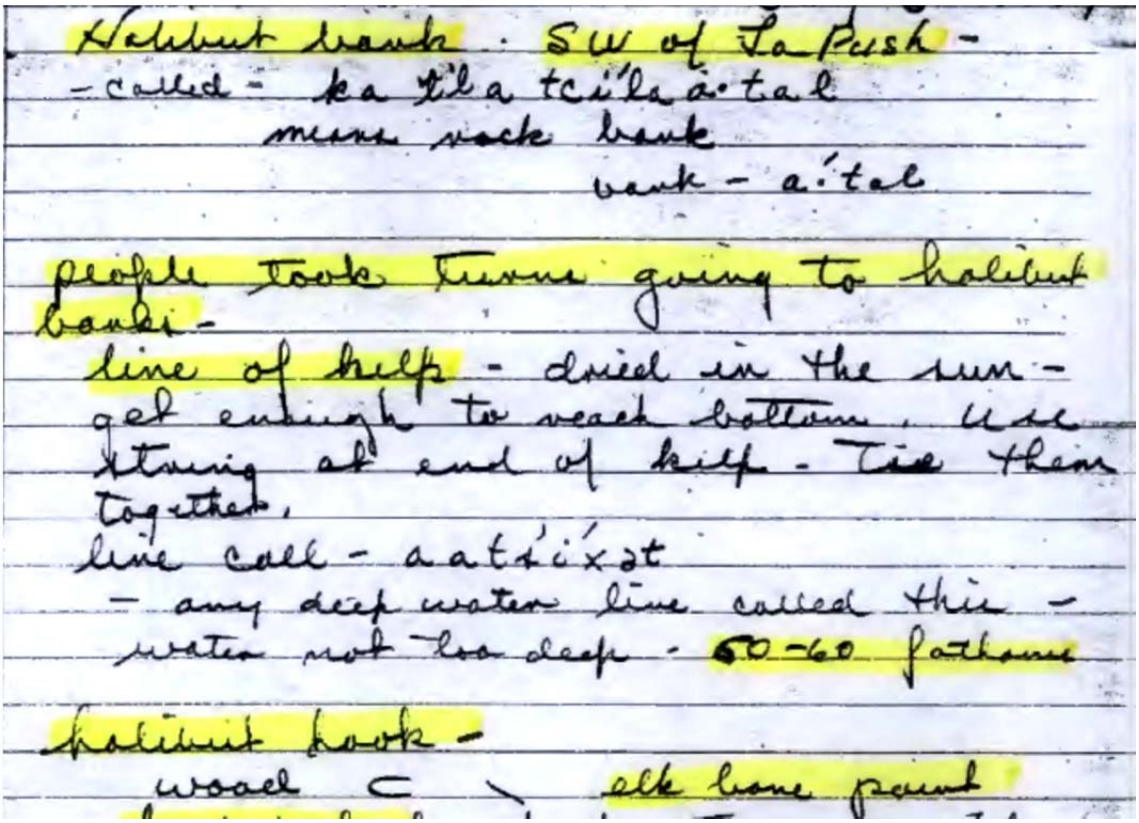
QER 2444, 2448. Similarly, Professors Boxberger and Gunderson testified that Quileute would concentrate their effort in areas of abundance in the ocean. "[I]t is a general rule of fishing cultures the world over that you go where the fish are. . . . [Y]ou tend to go where you have the greatest chance of success. And [that] in fact correspond[s] with what we have recorded ethnographically about those activities." QER 1390 (Boxberger); *see also* QER 1307 (Gunderson) ("If you wanted to catch large quantities, large fish, and you wanted to catch them [efficiently], and you

knew they were there, you would go out further."); QER 757 (Trites) (going to where aquatic animals are abundant "fits with the expectations of what people should have done.").

Makah seeks to put a misleading spin on Professor Gunderson's testimony, suggesting that he testified that halibut were *abundant* shoreward of the 30-fathom line at treaty times. Makah Br., p. 56. However, Professor Gunderson testified that the abundance distribution of halibut has likely always been the same; halibut generally prefer the same types of environments and congregate in those areas. Though halibut were more available *generally* at treaty times, that does not change the biological likelihood that they were *not abundant* shoreward of the 30-fathom line at treaty times. QER 1273-78. And, though Quileute (and Makah) *could have* caught halibut in these areas, it doesn't mean that they *would have*—as multiple witnesses testified, this would be an incredibly inefficient approach compared to simply targeting areas of known abundance.

The District Court found that that Quileute used multiple halibut banks in different locations. QER 38-39. Quileute tribal member Bill Hudson (born 1881) informed ethnographer Richard Daugherty that Quileute fished for halibut at depths of 50 to 60 fathoms. QER 39. Sixty fathoms equates to approximately 20 miles offshore of La Push, where Professor Gunderson opined that halibut would be abundant. *See id.*; QER 4947.

Hudson described the Quileute name "rock bank" for a *specific* bank southwest of La Push, but also stated that Quileute fished at multiple halibut banks that were 50-60 fathoms deep:


Halibut bank - SW of La Push -
- called - ka t'l a tc'i'la a·ta·l
means rock bank
bank - a·'tal

people took turns going to halibut banks -
line of kelp - dried in the sun -
get enough to reach bottom. Use
string at end of kelp - Tie them
together.
line call - a a t s'i'x ɔt
- any deep water line called this -
water not too deep - 50-60 fathoms

halibut hook -
wood C elk bone point

MER 902; *see also* QER 1433-34 (Boxberger testimony). Albert Reagan similarly reported that Quileute fished for halibut at multiple banks using "deep fishing" kelp lines. QER 4299; QER 1428 (Boxberger testimony).

Makah argues that 50-60 fathoms is "inconsistent with a rock bank" (Makah Br., p. 55), but, as the notes above show, the discussion about the Quileute name for the rock bank and the depths of the other banks are separate topics. Makah also attempts to discredit Hudson's statement because he describes the depth of 50-60

fathoms as "not too deep." Makah Br., p. 55. Makah quotes Professor Boxberger in support of its argument, but omits the following bolded portion of his testimony: "Three hundred to 360 feet sounds pretty deep to me. **And so this indicates that they didn't think it was that deep, and so obviously they had knowledge about deeper water**." *Id.*; *cf.* QER 1435. Indeed, Quileute were familiar with much deeper waters at the continental margin; their word for the waters by the continental margin was "xopasida (blue water)—the place where the ocean *really gets deep*." MER 657 (emphasis added). Relative to depths of over 100 fathoms at the continental margin, 50-60 fathoms is "not too deep." *See, e.g.*, QER 746-47 (Trites testimony).

The State argues that Hudson's statements are not relevant to treaty-time activity because Hudson was born in 1881[39] and was speaking with Daugherty in the 1940s. State Br., pp. 35-36. But the District Court observed that Hudson was describing Quileute halibut fishing "using kelp lines in the *traditional, pre-contact* style." QER 39 (emphasis added); *see also* QER 1965-66. The evidence supports this finding. Hudson's description of lines made of dried kelp and wood hooks with elk bone points, rather than modern hooks and lines introduced to the Quileute in the 1900s, indicate he is likely referring to times prior to non-Indian settlement in Quileute territory. QER 1433-36; QER 2760 ("The fish lines for sea

[39] Hudson's parents were born in 1836 and 1843. QER 5252.

fish were made of dried kelp"); QER 4422, MER 739 (describing kelp lines used by Quileute and Makah); QER 1428 (p. 447), 4299. The District Court further found that Quileute maintained their aboriginal fishing practices into the early 1900s, "[o]wing to their relative isolation and minimal contact with Indian agents and white settlers." *See* QER 27-30.[40]

Other evidence corroborates Hudson's statement that Quileute engaged in halibut fishing 50-60 fathoms deep, or 20 miles offshore. Dr. Leo Frachtenberg's field notes indicate that Quileute fished 20-30 miles west of their territory. QER 39. Frachtenberg wrote that Quileute's "[o]cean travel was confined to about 20-30 miles westward, to the south they usually went as far as Tahola (50 miles south of La Push) and to the north as far as Neah Bay (45 miles from La Push)." MER 439. Frachtenberg stated that Quileutes traveled away from their lands for four purposes: "fishing, trading, visiting and fighting." MER 440. Of the four purposes, ocean travel 20-30 miles westward from aboriginal Quileute territory could only have been for the purpose of fishing—not trading, visiting, or fighting—as Makah and the State's experts admitted at trial. QER 2421-22 (Thompson testimony); QER 2427 (Renker testimony). Makah suggests that

[40] Numerous sources referenced Quileute's isolation in post-treaty years. QER 1335-36, 1366-74 (Boxberger testimony); MER 616; QER 29, 4650, 4764, 4773, 4775, 3168, 3336, 3368, 3442, 3449. The State's characterization of a couple quotes from Indian Agent reports as "uncontroverted evidence that Quileute people were fully involved with the post-treaty world about them" (State Br., p. 32), is without merit.

Frachtenberg's 20-30 mile statement referred to sea mammals. Makah Br., p. 50. However, that could only be true if the word "fishing" includes sea mammals, which is something the State and Makah are unwilling to concede. *E.g.*, QER 2427.

The State complains that the Court did not explain why it rejected a statement elsewhere in Frachtenberg's field notes recording that Quileute fished for halibut out to two miles offshore. State Br., at 35. But the Court did explain this: "According to Frachtenberg, halibut was harvested within two miles of shore, cod taken along rock and reefs, and other fish caught under rocks in rough weather with a kelp line. [MER 406-410.] Other reliable accounts, however, place Quileute fishing further offshore." QER 39.

In addition to Hudson's and Frachtenberg's accounts of Quileute fishing 20 miles offshore, Professor Singh wrote that Quileute fished at a bank eight to 12 miles offshore. In his 1950 work on the "aboriginal economic system"[41] of the coastal tribes of the Olympia Peninsula, Singh reported that:

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

[41] Makah and the State suggest that the timing of this work is problematic. Makah Br., pp. 50-51; State Br., p. 33. Singh's field work with the tribes inquired about their *aboriginal* practices. MER 707. Singh interviewed only elders; the Quileute elders he interviewed were born between the 1850s and 1880s. MER 712.

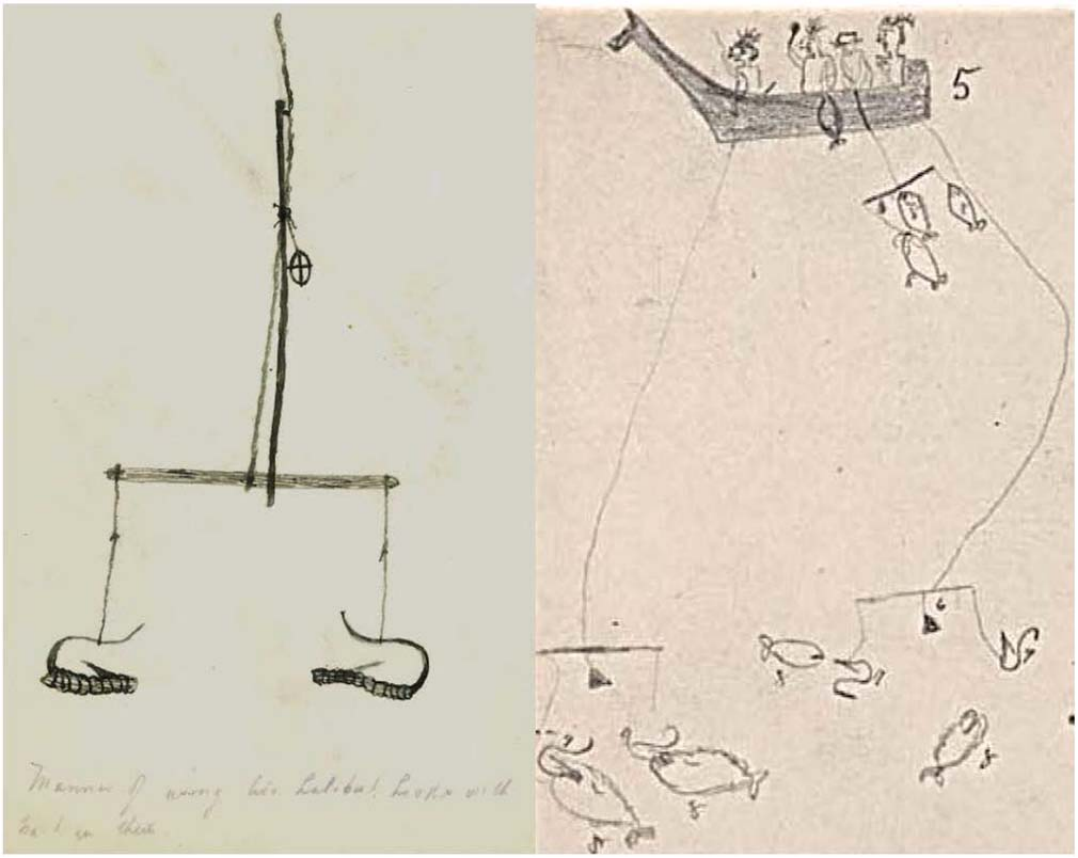
MER 736 (emphasis added); QER 1430-32 (Boxberger testimony).

Both Makah and the State complain that Singh's reference to "the Indians" did not refer to Quileute. State Br., 33-34; Makah Br., 52-53. But Singh specifically explained that when he used "Indians" (as opposed to identifying a specific tribe), he intended to refer to Quileute, Quinault, Makah, Hoh, Queets,[42] and Ozette.[43] MER 705. If Singh meant that only Makah used halibut beds eight to twelve miles offshore, as Makah argues, he would not have used his defined term "Indians."

Singh also specified that "deep sea fishing" was an annual subsistence activity for Quileute. MER 769 (chart of Quileute/Hoh annual subsistence activities). He explained that each summer, Quileute would harvest "halibut, rock cod, sea bass, and sea mammals." MER 775.[44]

In another historical account, Quileute member Luke Hobucket (born 1873) drew a picture of "implements used in fishing." QER 5003. His drawing of Quileute halibut fishing matched a drawing by Frachtenberg of pre-contact style Quileute halibut lines and hooks:

[42] Queets is a band of the Quinault.
[43] Ozette is a band of the Makah.
[44] Quileute harvested halibut in the summer; it is of no moment that James Swan stated that halibut "form no part of the *winter's* food" of Quileute, as Makah argues. Makah Br., p. 52 n.14 (emphasis added).



QER 5229 (Frachtenberg, drawing on left); QER 5000 (Hobucket, drawing on right). Hobucket noted in the key at the bottom of his drawing, "Halibut fishing No. 5, 700 feet deep under water." QER 5000. Halibut fishing at approximately 700 feet deep would place Quileute around the continental shelf margin, just over 100 fathoms deep or 40 miles offshore. QER 39. The District Court weighed this evidence and concluded that it was not "corroborated by other sources and was unlikely to have been a regular practice at and before treaty time." *Id.*[45]

[45] The State claims that "[t]he Quinault or Quileute never once asserted in this case that their treaty-time forefathers [fin]fished in the same far-offshore areas where they purportedly engaged in whale or seal hunting." State Br., pp. 21-22. This is untrue. *See* QER 5300, 5436-50 (Quileute and Quinault assertions that the evidence showed they finfished beyond the continental shelf).

Makah argues that a 1930 report stating that Indian halibut "[f]ishing was commonly done in 10 to 20 fathoms of water" but "the Neah Bay Indians most often [fished for halibut] 15 or 20 miles [offshore]" shows that Quileute fished in only 10 to 20 fathoms of water. Makah Br., p. 52; MER 849. This report is apparently inaccurate, as it suggests Makah's customary fishing was limited to 20 miles offshore. Moreover, the report focuses on the history of the *commercial* halibut fishery. MER 844. The relatively small banks within Quileute territory did not garner commercial attention, though Quileute relied upon them annually. The report makes no mention of Quileute or any other tribe south of Makah, and instead focuses on large commercial banks off of Alaska and British Columbia and the tribes who fished them. MER 846-850. The statement that fishing was commonly done in 10 to 20 fathoms of water likely refers to these areas.

Finally, Makah argues that Quileute only had a limited, unimportant halibut fishery. Tribes do not need to prove the grounds are "the primary or most productive one[s]," only "that the site is fished by members . . . on more than an extraordinary basis." *Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1521 (W.D. Wash. 1996). Here, the evidence showed that the halibut fishery *was* important to Quileute, and that they harvested halibut annually. *See* MER 902 (Quileute fished for halibut in the summer); QER 4313 (Quileute oral tradition about a witch who made bad weather "throughout the halibut season");

QER 3469-70 (subsistence chart for Quileute during the "Period of the Old Ways"), QER 3468 ("Period of the Old Ways" is the "centuries during which the Quileutes carried on traditional lifeways," extending to approximately 1900).

The evidence shows that, like Makah, Quileute would go to where the fish were abundant. They customarily finfished at various banks located up to 20 miles offshore. The record supports the District Court's finding that "Quileute were more likely than not harvesting finfish up to twenty miles offshore on a regular and customary basis." QER 38-39.

E. The District Court Did Not Abuse its Discretion in Delineating the Western Boundaries of Quileute's and Quinault's U&As in the Same Fashion That Ocean U&A Boundaries Have Always Been Delineated

Makah incorrectly argues that the District Court's delineation of Quileute's and Quinault's western U&A boundaries should be reviewed *de novo* because the Court's "rationale rested on a legal conclusion." Makah Br., p. 46. The District Court's order was based on law of the case, equity, and the evidence. The appropriate standards of review are abuse of discretion and clear error. *Lummi II*, 763 F.3d at 1185; *Lentini*, 370 F.3d at 843; *Shellfish*, 157 F.3d at 642 (equitable orders reviewed for clear error).[46]

[46] The State's arguments that Quileute and Quinault were required to prove that they fished in every square mile between their northern and southern boundaries are immaterial, because those boundaries (with the exception of Quileute's northern boundary) were not at issue in this case. *See* State Br., pp. 7-8, 28-29. Thus, Quileute did not present evidence of its southern boundary, and Quinault did

In its Order Regarding Boundaries of Quinault and Quileute U&As, the District Court adopted the western boundaries proposed by Quileute and Quinault "for the reasons set forth in their briefing," (MER 3) i.e., that delineation of U&A boundaries using longitudinal lines is consistent with law of the case, the evidence at trial, and equity. MER 107-112, 116, 135-140, 142-145.

1. Law of the Case

Ocean U&A boundaries have always been delineated using straight latitude and longitude lines. That is how the federal government regulations have delineated ocean U&As since 1986, and that is how Judge Craig delineated Makah's ocean U&A.

Makah's finfishing evidence was limited to three banks: Forty Mile Bank, Swiftsure Bank, and a bank in between Ozette Village and Cape Flattery that was located roughly three miles offshore. *See* Hoh Br., pp. 41-43; HER 1. Appellees have marked these banks with red circles below on the map Makah submitted in its ocean U&A case that depicts the proposed 40-mile western boundary:

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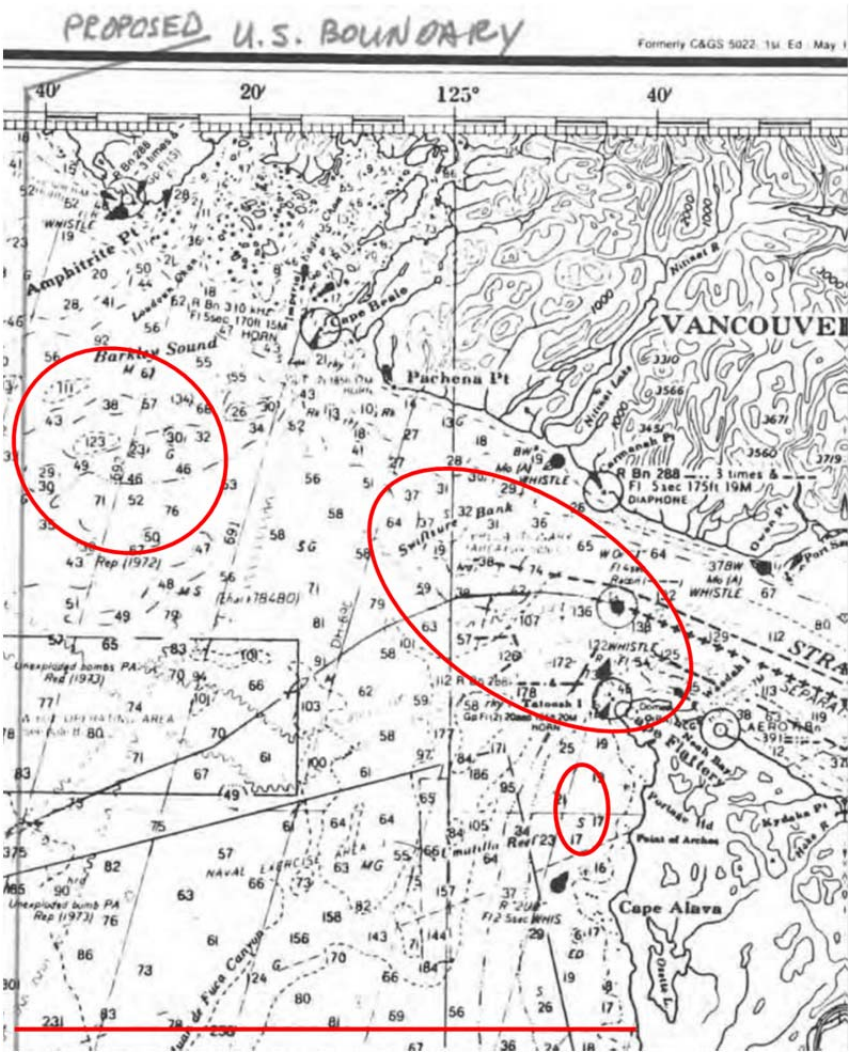
not present evidence of its northern or southern boundaries. They remain where they have always been defined in the federal regulations.



MER 1248. Appellees also show Makah's southern U&A boundary using a red line. No finfishing evidence was presented to the west or south of the banks circled in red, yet the court ruled that Makah's U&A extended as far west and north as its northwesternmost finfishing bank,[47] and over ten miles south of its southernmost finfishing bank.

[47] Forty Mile Bank and most of Swiftsure Bank are in Canadian waters. Though the District Court found that Makah customarily fished at those banks at treaty times, it limited Makah's modern-day right to waters within the United States' jurisdiction. *U.S. v. Wash.*, 626 F. Supp at 1468.

As the State admits, there was not "much, if any, evidence of actual [fin]fishing" south of Forty Mile Bank. State Br., pp. 39-40.[48] Makah glosses over the findings, arguing that its western boundary "tracked th[e] evidence" without pointing to any specific evidence showing Makah finfishing activity below Forty Mile Bank.[49] Makah Br., p. 46. The only possible evidence that "filled in" the vast area to the southwest of these banks was evidence that Makah customarily harvested sea mammals "out of sight of land," which Dr. Lane defined as 30 to 40 miles offshore.

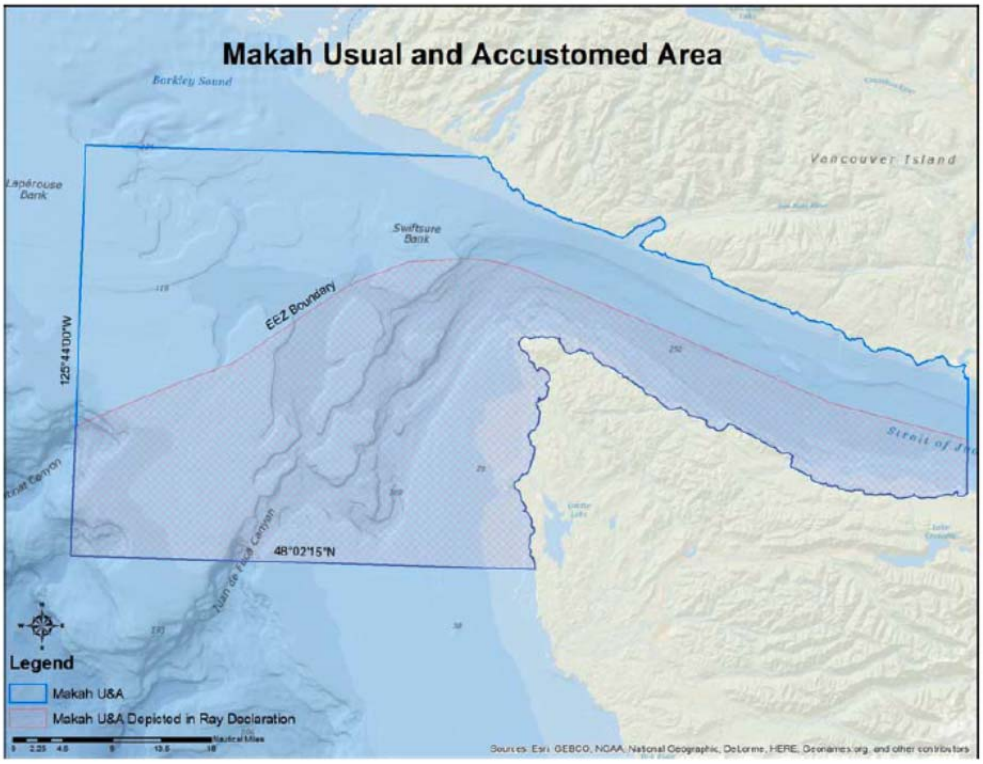
Judge Craig delineated Makah's 40-mile western boundary by using a longitude line at 125°44.00' W., located 40 nautical miles from the westernmost point of the coast adjacent to Makah's ocean U&A. *See U.S. v. Wash.*, 626 F. Supp. at 1467; QER 5258. Makah was not required to (and did not) show that in 1855, without the benefit of GPS, Makah fishermen traced the 125°44.00' west longitude line while fishing in the 40-mile stretch between its northern and southern boundaries. *See* 50 C.F.R. § 660.4. Judge Craig ruled that the boundary

[48] The State's argument that "the geographic scope" of the Makah's U&A was "specifically delineated" based on "known banks and specific locations" (State Br., p. 25) is demonstrably wrong, and contradicted by its own admission that there was no evidence of banks or specific locations for most of the area included within Makah's U&A. *Id.* pp. 39-40.

[49] Makah claims that Forty Mile Bank is La Perouse Bank, which extends to 126° W. (Makah Br., p. 46), but that is not what Judge Craig held. *Compare* QER 5853 (Special Master finding that Makah U&A included La Perouse) *with* 626 F. Supp. at 1467 (final order replacing "La Perouse" with "Forty Mile bank").

depicting the westernmost extent of Makah's customary ocean harvests satisfied the standard of proof by "specify[ing] with some certainty the extent of" Makah's U&A, and was "appropriate for present day administration of the treaty right." HER 47. This is law of the case.

Makah's U&A is depicted below:



MER 101. Contrary to Makah's assertions (Makah Br., pp. 46-47), its western boundary does not trace Makah's coastline. Indeed, there *is no* coastline to trace for a significant portion of Makah's western boundary, and where there *is* coastline, the western boundary is a straight line even though the coast is not straight. In fact, Makah's western boundary extends beyond 40 nautical miles at every point of land adjacent to its usual and accustomed fishing grounds other than

the westernmost point at Cape Alava. *See* QER 5258.

Both Quileute and Makah's ocean U&As extend 40 miles offshore, and the westernmost point of land adjacent to both U&As is Cape Alava. QER 5258-59. The District Court therefore delineated Quileute's 40-mile western fishing boundary using the same line as Makah's 40-mile western fishing boundary: 125°44.00' W. longitude. MER 3-4. The federal government has used the same line to define Quileute and Makah's western boundaries for three decades. *See* 51 Fed. Reg. 16,471, 16,472 (May 2, 1986).

The Court also adopted a longitudinal line to define Quinault's western boundary. In so doing, the District Court 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).

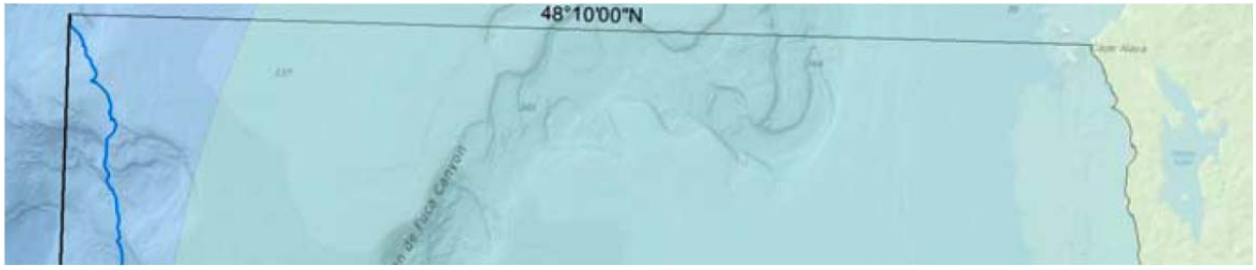
The District Court properly followed law of the case in delineating Quileute's and Quinault's western boundaries using longitude lines. "[T]he methodology applied by this Court in the Makah's prior ocean RFD is the appropriate method to use in the instant case." MER 3 (citation omitted).

2. Equity

The District Court further held that "equity and fairness demand" that the

Court use the same method of delineating ocean U&A boundaries for all tribes. MER 3. The most obvious example of how Makah and the State's proposal would apply a prejudicial and inequitable standard to Quileute and Quinault is the 10-mile area adjacent to Ozette Lake where Makah and Quileute's ocean U&As overlap. The overlap is shown below:

Public Notice, p. 3. Although Makah and Quileute *share this area*, Makah and the State seek to draw Quileute's boundary differently by tracing the coastline. In the below map created by Quileute's GIS expert, Makah's boundary is drawn in black and the boundary Makah and the State propose for Quileute is drawn in blue:

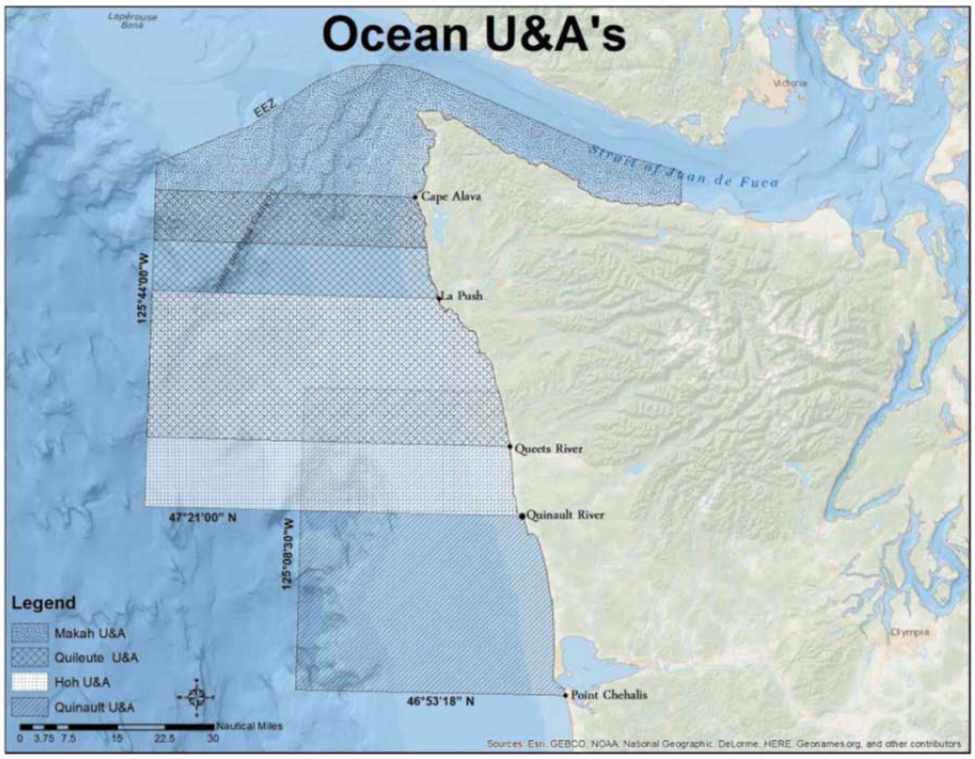


MER 102. There is no basis in law or logic to treat Quileute's boundaries differently than Makah's, and the District Court did not err in refusing to do so.

3. Evidence

The District Court also agreed with Quileute and Quinault that the evidence

supported the boundaries it adopted. MER 4, 116. The evidence showed that a typical whale harvest involved multiple canoes actively involved in killing the whale over a broad ocean area, and that whaling customarily took place everywhere from the nearshore to 30 miles offshore. Fur seal harvests occurred beyond the continental shelf in the seals' migratory route. MER 116, QER 754 ("the prime areas [for fur seals] are going to be the really deep areas or else the canyons."). NOAA's overlay of the tribes' U&As over a depth contour of the ocean shows that the western boundaries are located over the deep areas and canyons where the evidence showed these species were harvested:



Public Notice, p. 3. Thus, the District Court's decision comports with the evidence.

4. Radial Theory

Contrary to Makah's assertion, Quileute and Quinault did not present a so-called "radial theory" for the first time in their reply regarding their proposed boundaries. Makah Br., p. 48 n.13. It is not a theory, but instead a demonstration of the flaws in Makah and the State's counterproposals, shown in a series of maps. *See* MER 102-104, 112-116.

Neither Quileute nor Quinault advocated that the Court adopt boundaries patterned after the "radial" maps, explaining that "this methodology would be a departure from the *status quo* methodology and would violate the law of the case." MER 116. The Court did not err in rejecting Makah and the State's proposed boundaries and finding that "the geographical/evidentiary bases for the calculations and conclusions presented by the Quileute, Quinault, Hoh and their experts" were correct. MER 4. The Court did not abuse its discretion or commit clear error in its delineation of the tribes' western boundaries.

VII. CONCLUSION

For over a century, the Supreme Court has construed the Stevens Treaties as reserving the tribes' pre-existing rights to obtain food from where they customarily obtained it. Makah and the State's tortured reading of the fishing clause would require this Court to discriminatorily abrogate the reserved rights of Quileute and Quinault based on a modern taxonomic distinction that they did not draw or

understand at treaty times. As this Court recently observed, "Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise." *Culverts*, 827 F.3d at 851. Rather:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

Shellfish, 157 F.3d at 648-49 (quoting *Shellfish*, 873 F. Supp. at 1435); *see also Fishing Vessel*, 443 U.S. at 676; *Culverts*, 827 F.3d at 851-52.

The evidence shows that both the signatory tribes and the United States government understood and intended that the Treaty of Olympia reserved to Quileute and Quinault their existing rights to take *all* aquatic species within their customary ocean harvesting grounds. Neither Makah nor the State can point to any evidence that Quileute or Quinault relinquished their undisputed pre-existing rights to harvest sea mammals. The District Court correctly found that "extensive evidence" showed that Quileute and Quinault customarily harvested these species 40 and 30 miles offshore, respectively. The usual and accustomed grounds for one species is "co-extensive with the Tribes' usual and accustomed fishing grounds" for all other species. *Shellfish*, 157 F.3d at 644.

This Court should affirm the District Court's orders.

Dated: October 7, 2016

Respectfully submitted,

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APPENDIX I

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PUBLIC NOTICE

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FOR IMMEDIATE RELEASE
June 8, 2016

Court-Ordered Usual and Accustomed (U&A) Fishing Area Boundaries of the Quileute Indian Tribe and the Quinault Indian Nation

NMFS adopted U&A fishing area boundaries for several Pacific coast tribes in 1996 and published those boundaries in Federal fishing regulations for species managed under the Magnuson-Stevens Act (MSA). Since 1996, some tribal U&A fishing area boundaries have been amended, as ordered by the courts.

On September 3, 2015, the United States District Court set forth boundaries for the Quileute Indian Tribe (Quileute) and the Quinault Indian Nation (Quinault) U&A fishing areas off the Washington coast.[1] NMFS is announcing publication of a final rule on June 8, 2016 implementing the courts final judgement. Latitude and longitude coordinates of the tribal U&A fishing areas are shown below in Table 1. An illustration of the tribal U&A fishing areas are shown below in Figure 1.

The Pacific Coast treaty Indian tribal U&A fishing areas are referenced in several places within Title 50, Part 660. NMFS is consolidating and moving regulations describing the Pacific Coast treaty Indian tribes' U&A fishing areas to § 660.4, Subpart A, and updating cross-references to Pacific coast treaty tribes' U&A fishing areas throughout Title 50. Consolidated regulations at § 660.4, Subpart A provide consistency for U&A fishing area boundaries across groundfish, coastal pelagic species (CPS) and highly migratory species (HMS) regulations. Regulations governing Pacific salmon fisheries are not codified, but use the same boundaries when published annually[2].

West Coast federal fishing regulations describe U&A fishing areas for the Quileute Indian Tribe, Quinault Indian Nation, Hoh Indian Tribe, and Makah Indian Tribe.

Find these boundaries at § 660.4, Subpart A

These changes to U&A fishing area boundaries do not modify fishing regulations for tribal and non-tribal fishers that may apply within or outside of those areas.

[1] *United States v. Washington*, 2:09-sp-00001-RSM, (W.D. Wash. Sept. 3, 2015) (Amended Order Regarding Boundaries of Quinault & Quileute U&As)
[2] 81 FR 26157, May 2, 2016, Final rule; 81 FR 36184, June 6, 2016, Correction

National Marine Fisheries Service, West Coast Region

Table 1: Latitude and longitude coordinates describing the boundaries of the Quileute and Quinault tribal U&A fishing areas before and after the 2015 Court order. Changes to boundaries from the Court order are in bolded text.

Geographic Boundary	Quileute		Quinault	
	Old[3]	New[4]	Old[5]	New[6]
Northern	48°07.60′ N. lat. (Sand Point)	**48°10.00′ N. lat. (Cape Alava)**	47°40.10′ N. lat. (Destruction Island)	47°40.10′ N. lat. (Destruction Island)
Western	125°44.00′ W. long.	125°44.00′ W. long.	125°44.00′ W. long.	**125°08.50′ W. long.**
Southern	47°31.70′ N. lat. (Queets River)	47°31.70′ N. lat. (Queets River)	46°53.30′ N. lat. (Point Chehalis)	46°53.30′ N. lat. (Point Chehalis)

[3] Regulations at 50 CFR 660.50(c)(2) and (4)
[4] *United States v. Washington*, 2:09-sp-00001-RSM, (W.D. Wash. Aug. 27, 2015) (Order Regarding Boundaries of Quinault & Quileute U&As). These coordinates are converted from degrees, minutes, seconds to degrees, decimal minutes, which is the format the U.S. Coast Guard requests for the *Federal Register*.
[5] Regulations at 50 CFR 660.50(c)(2) and (4)
[6] *United States v. Washington*, 2:09-sp-00001-RSM, (W.D. Wash. Sept. 3, 2015) (Amended Order Regarding Boundaries of Quinault & Quileute U&As).

National Marine Fisheries Service, West Coast Region

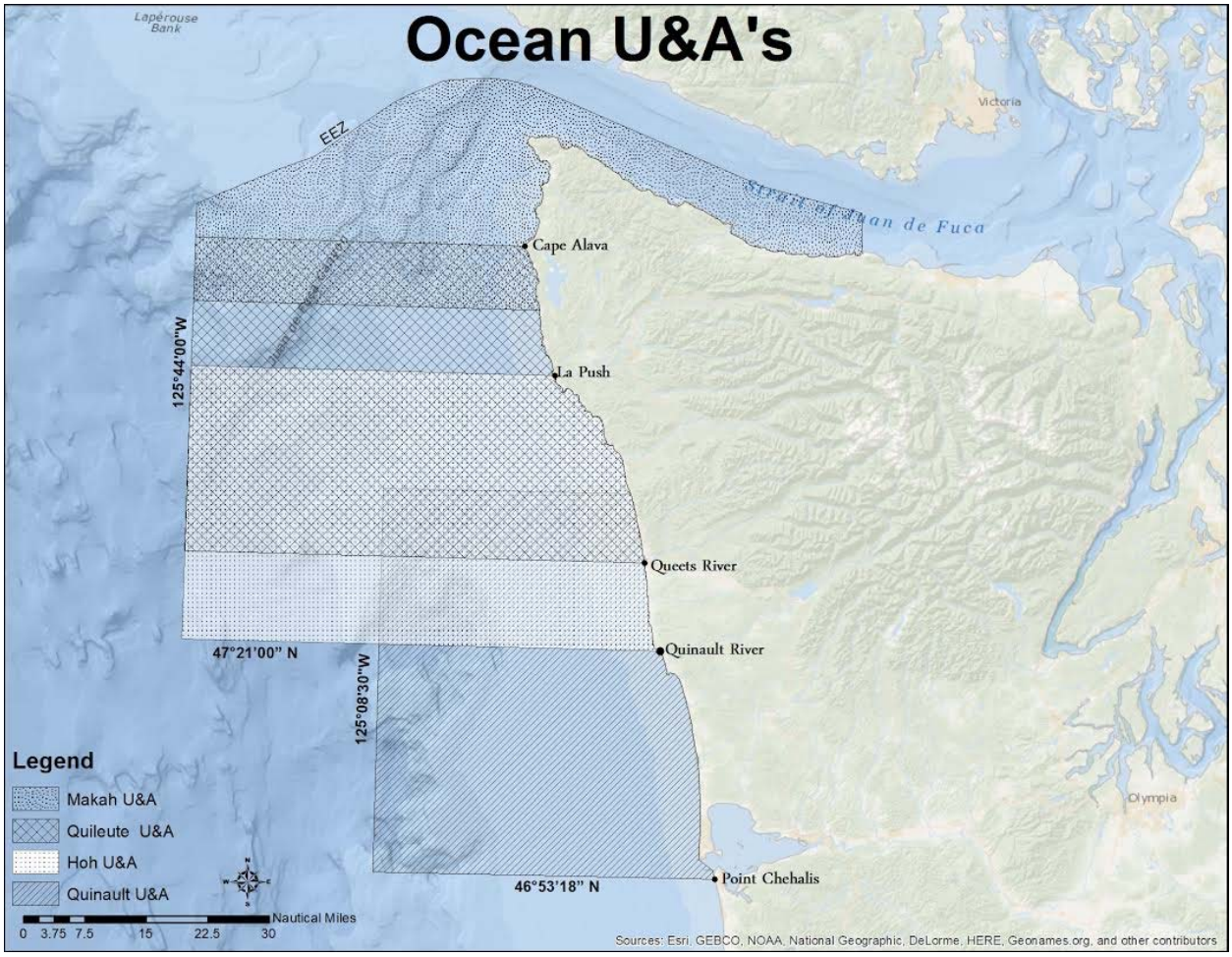

Figure 1: Depiction of Pacific coast treaty tribes' usual and accustomed (U&A) fishing areas off the Washington coast. Note: this map depicts U&A fishing areas that occur both inside and outside of the exclusive economic zone (EEZ). Note: NOT TO BE USED FOR NAVIGATIONAL PURPOSES.

STATEMENT OF RELATED CASES

The Quileute Indian Tribe and the Quinault Indian Nation are aware of the following related cases pending in the Court that would be deemed related to this case under Ninth Circuit Rule 28-2.6: (1) *U.S. v. Washington* (*In re Culverts*), No. 13-35474 (decided on June 27, 2016; petition for rehearing pending); (2) *U.S. v. Washington* (*Lummi U&A*), No. 15-35661; and (3) *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, No. 15-35540. These appeals arise out of separate district court subproceedings. *In re Culverts* is a dispute between the United States and the Tribes, on the one hand, and the State of Washington, on the other, regarding whether the Tribes' treaties require the State to refrain from building and maintaining culverts that block fish passage. Like the present appeal, *In re Culverts* involves interpretation of the Treaty of Olympia and other Stevens Treaties, including issues involving the canons of treaty construction and reservation of rights doctrine.

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CERTIFICATE OF COMPLIANCE

I certify that Appellees Quileute and Quinault have filed a brief of 27,995 words in accordance with this Court's October 3, 2016 Order that Appellees' Answering Brief contain no more than 28,000 words. Dkt. 54.

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 97-2003 Times New Roman 14 point font.

Dated: October 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I electronically filed the foregoing Brief of Appellees Quinault Indian Nation and Quileute 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: October 7, 2016.

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