Nos. 15-35824 & 15-35827

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff*,

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

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

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

v.

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

On Consolidated Appeals from the United States District Court for the Western District of Washington at Seattle
No. 2:09-sp-00001-RSM & 2:70-cv-09213-RSM
The Honorable Ricardo S. Martinez
United States District Court Judge

SIX TRIBES' REAL PARTIES IN INTEREST PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Each of the six tribes is a federally recognized Indian tribe. None has a parent corporation. No publicly held corporation owns stock in any of the six tribes.

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STATEMENT OF JURISDICTION

The district court had jurisdiction because the subproceeding arose under a "treat[y] of the United States." 28 U.S.C. § 1331; *United States v. Washington* ("*Final Decision #1*), 384 F. Supp. 312, 399 (W.D. Wash. 1974) *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). It entered judgment on August 27, 2015, and an amended judgment on September 3, 2015. Makah filed a timely notice of appeal on October 21, 2015; the State of Washington filed a timely notice of appeal on the same day. Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction because the district court's judgment disposed of all claims and defenses in the subproceeding. 28 U.S.C. § 1291; *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432 n.1 (9th Cir. 2000).

STATEMENT OF THE ISSUES

1. Whether harvest of marine mammals is direct evidence of fishing within the meaning of the Stevens Treaties.

2. Whether the canons of construction that dictate that treaties should be construed liberally in the favor of the Indians and as the Indians would have understood them are applicable to the interpretation of the Treaty of Olympia presented here.

3. Whether the "grounds and stations" language in the Treaty of Olympia requires the signatory tribes to identify specific fishing locations in the

open ocean to establish usual and accustomed fishing grounds.

STATEMENT OF THE CASE

The Treaty of Olympia, executed in 1855, reserves 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." 12 Stat. 971. The six tribes are signatory to similarly stated treaties.

In 1855, "fish" had a broader meaning than it does today. "Fish" includes "every form of aquatic animal life," and has "perhaps the widest sweep of any word the drafters could have chosen" in terms of the species encompassed in the treaty right. *United States v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994), *aff'd in part, rev'd in part on other grounds*, 135 F.3d 618 (9th Cir. 1998), *opinion amended and superseded on other grounds*, ("*Shellfish*"), 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

1. Final Decision #1.

In *Final Decision #1*, the court adjudicated the "usual and accustomed grounds and stations" of the plaintiff tribes in waters under Washington State's jurisdiction. These usual and accustomed locations were adjudicated based on the following standards:

> 'Stations' indicates fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area; 'grounds'

> indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. 'Usual and accustomed,' being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.

Final Decision #1, 384 F. Supp. 312, 332 (W.D. Wash. 1974).

2. Prior Adjudication of Ocean U & A.

Makah filed a Request for Determination of the boundaries of its ocean usual and accustomed fishing locations in 1982, claiming that its capability to travel 100 miles offshore, as demonstrated by post-treaty whaling and sealing ventures ranging as far as 100 miles offshore, supported an inference of regular treaty time fishing 100 miles offshore.

On *de novo* review, of what was essentially a summary proceeding below, the Ninth Circuit held that capability alone does not support an inference of *customary* harvesting activity. *United States v. Washington,* 730 F.2d 1314, 1318 (9th Cir. 1984). Like the District Court, the Ninth Circuit held that Makah had failed to prove that it customarily fished beyond 40 miles offshore at treaty times. The Ninth Circuit determined that even though "[t]he Makahs probably were

capable of traveling to 100 miles from shore in 1855" and that "they did go that distance at the turn of the century, although it is *not clear how frequently*." *Id.* at 1318 (emphasis added). Thus, the Ninth Circuit held that the evidence was not sufficient to demonstrate that Makah *customarily* fished *for any species* beyond 40 miles. The Ninth Circuit concluded that:

> [t]hese facts do not show that their 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. The Ninth Circuit made no distinction between finfish and other aquatic animal life. Its ruling was based solely on the sufficiency of the evidence Makah presented to prove customary fishing activity, irrespective of species.

3. Prior Adjudication of *Shellfish*

The six tribes together with Makah and other tribes argued successfully in *Shellfish* that "fish" as used in the treaties includes all aquatic animal life, and that:

> 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…seal, sea lion, porpoise, and whale. . .The Makah usual and accustomed areas were originally determined with reference to salmon, halibut, whale, and seal.

MER 92 (quoting Dkts. 13696 and 12958) (internal citations omitted).

In *Shellfish*, Washington sought to either exclude shellfish from the treaty right to "fish" or else require tribes to adjudicate separate usual and accustomed fishing locations for separate species. The District Court rejected these arguments, holding that "fish" "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." *United States v. Washington*, 873 F. Supp. at 1430. On appeal, the Ninth Circuit upheld this part of the District Court's ruling in all respects:

> [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' preexisting 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.

> 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 630, 643-44 (9th Cir. 1998) (internal citations omitted).

4. District Court's Ruling Below

The District Court rejected any argument that tribal usual and accustomed fishing locations must be established solely based on where the tribes customarily went at treaty times for the purpose of taking finfish. MER 15-23, 82-93. The Court ruled that Supreme Court precedent and the law of the case and circuit defeated any arguments that adjudications of usual and accustomed fishing locations must be solely based on finfish:

> [T]his Court directly addressed the breadth of the term "fish" in the Shellfish proceeding. In declining to limit the "right of taking fish" to those species harvested by the tribes prior to signing the treaties, the Court explained that "had the parties to the Stevens Treaties intended to so limit the right, they would not have chosen the word 'fish,' a word which fairly encompasses every form of aquatic animal life. 'Fish' has perhaps the widest sweep of any words the drafters could have chosen, and the Court will not deviate from its plain meaning." *Shellfish*, 873 F. Supp. at 1430. The Ninth Circuit affirmed, agreeing with the district court's description of the broad sweep of the word "fish" as used in the treaties and noting that a more restrictive reading of the fishing rights provision would be contrary to the tribes' reservation of their pre-existing subsistence rights. *Shellfish*, 157 F.3d at 643-44.

MER 87 (citing *United States v. Winans*, 198 U.S. 371 (1905)). "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." MER 92-93.

SUMMARY OF THE ARGUMENT

The Muckleshoot Indian Tribe, the Nisqually Indian Tribe, the Puyallup Tribe of Indians, the Suquamish Indian Tribe, the Skokomish Indian Tribe, and the Squaxin Island Indian Tribe, Interested Parties, submit this Opposition to select arguments presented by the Makah Indian Tribe ("Makah") and the State of Washington ("the State.")[1] The six interested party tribes present the following arguments: First, that marine mammals are fish within the meaning of the Treaty of Olympia, and that therefore evidence of taking marine mammals is evidence to be considered in determining the usual and accustomed fishing places of a tribe, in the same manner as evidence of fishing for salmon or other species. Second, the "canons of construction" that apply to interpretation of Indian treaties are applicable to the Court's determination of this matter. And, third, that the State's position on the meaning of the "grounds and stations" clause of the Treaty of Olympia is overly restrictive and inconsistent with prior case law.

1. Marine Mammals Are Fish

Under the law of the case, marine mammals are fish within the meaning of

[1] The six tribes offer no position on any argument not addressed in this brief.

the Treaty of Olympia. In particular, the District Court and this Court held in *Shellfish* that "fish" was properly interpreted to include "every form of aquatic animal life." In addition, those holdings dictate that treaty time harvesting of any one species establishes usual and accustomed fishing locations for all species. These holdings do not conflict with these same Courts' holdings in the determination of the extent of Makah's marine fishery, which turned on the sufficiency of evidence of treaty time fishing beyond 40 miles from shore, and not any exclusion of whales and seals from the meaning of fish.

2. The Canons of Construction Apply

The well-established canons of construction that dictate the manner in which Indian treaties are to be interpreted apply to this Court's interpretation of the Treaty of Olympia in this matter. The cases relied upon by the Makah Tribe in asserting that the canons should be ignored do not apply here. The current dispute, which arises from a scarcity of resources unanticipated at treaty times, does not embody the direct conflict necessary to abandon the canons.

3. The "Grounds and Stations" Clause Does Not Require the Specificity of Evidence Called for by the State of Washington.

The State would interpret the "grounds and stations" clause of the Treaty of Olympia to require a specificity in naming and describing fishing locations that was never intended by the treaty negotiators. Judge Boldt plainly and properly

recognized that fishing "grounds" encompassed "larger areas which may contain numerous stations and other **unspecified locations** which…**could not have been determined with specific precision** and cannot now be so determined."

ARGUMENT

1. Marine Mammals Are Fish, and Evidence of Taking Marine Mammals is Evidence for the Purpose of Establishing Usual and Accustomed Fishing Locations.

The State and Makah argue that the right to take fish reserved in the Treaty of Olympia does not encompass the right to take marine mammals. In the alternative, they argue that even if the treaty reserved the right to take marine mammals, that evidence of taking marine mammals at treaty times is not evidence of fishing for purposes of establishing usual and accustomed fishing locations under the treaties. These arguments represent another attempt to introduce a species-specific limitation into the treaty rights reserved by the tribes, and must be rejected by this Court. The six tribes take no position on the sufficiency of the evidence in this subproceeding to establish Quinault and Quileute usual and accustomed fishing grounds. The six tribes, however, urge the Court to hold that evidence of the customary locations of treaty time harvest of whale, seal, porpoise or other marine mammals is probative of usual and accustomed fishing locations, in the same manner that evidence of salmon, herring or halibut harvest in an area supports establishment of a usual and accustomed fishing location in that area.

The six tribes note that members of Puget Sound Treaty tribes historically caught marine mammals like seal and porpoise, and they continue do so today although the current take of marine mammals is largely incidental to other fishing activities. The issue raised in this subproceeding therefore affects the treaty right of Puget Sound treaty tribes to continue taking marine mammals in their fisheries as well as bearing on the locations of usual and accustomed fishing places. The arguments put forth by Makah and the State would narrow the evidence available to prove a tribe's usual and accustomed fishing places, and thus diminish the treaty fishing rights of every other tribe party to this case.

A. Under the Law of the Case the "the Right of Taking Fish" Encompasses All Aquatic Animal Life.

Prior decisions of the District Court and this Court have directly addressed the breadth of the term fish and whether evidence of the customary treaty time harvest of one species establishes usual and accustomed fishing places for all species. In 1994 the District Court ruled that the word fish in the reservation of the "right of taking fish" should be interpreted broadly and is "a word that fairly encompasses every form of aquatic animal life." *United States v. Washington,* 873 F. Supp. at 1430. The District Court also ruled that "usual and accustomed grounds and stations cannot vary with the species of fish." *Id.* at 1431. This Court affirmed this broad construction of the word "fish" and the District Court's ruling that fishing places do not vary by species, as matters of treaty interpretation. *Shellfish,*

157 F.3d. at 643-644.

While the prior decisions focused on shellfish rather than marine mammals, these decisions necessarily and "directly addressed the breadth of the term 'fish,'" as the District Court noted. MER 86. The ruling that the right of taking fish encompasses all aquatic animal life was supported by evidence that the common mid-nineteenth century usage of the words "fish" and "fisheries" broadly included harvest of marine mammals like whale and seal. For example, in a January 8, 1854 letter from Governor Stevens to "Grinnell and Co." regarding "Whale Fisheries Pacific Coast," Stevens wrote of the opportunity for the establishment of "whale and other fisheries" and the beneficial location afforded "American whale fishermen" for a Pacific "rendezvous at some point within reasonable distance of the fishing grounds." Ex. USA-66.[2] Dr. Kent Richards, the State's expert in the shellfish proceeding, offered the opinion that Governor Stevens used the words "fish" and "fishing" to refer to whales and whaling during the Neah Bay Treaty Council. Docket 12977 ¶¶12-13, 20. Dr. Ronald Butters, expert witness for plaintiff tribes also provided support for the conclusion that whale and seal were commonly referred to as fish in the mid-nineteenth century. Docket 13173 ¶¶ 10-18.

[2] In an article published nearly two months before the Treaty of Medicine Creek a Washington Territorial newspaper described the fish of Puget Sound as including "cetaceous species", Pioneer and Democrat, 4 November 1854, vol 3 no. 8, p.2, attached to Declaration of Richard White, Docket 13172, ¶11, n.12, and page 306.

The conclusion of the District Court and this Court that the word "fish" in the Stevens Treaties must be broadly construed to include aquatic animals not taxonomically classified as fish is not unique. Judicial and legislative references to whale and seal as fish and to whale and seal fisheries as fisheries are common. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 111-12 (1949) (reservation included islands and surrounding water to preserve seal and other fisheries); *In re Fossat*, 69 U.S. 649, 692 (1864) (attorney for party notes that in common use a "whale is called a fish"); *Swan & Finch Co. v. United States*, 113 F. 243, 244 (2d Cir. 1902) ("Congress understood at least whale oil to be a fish oil" in Tariff Act of 1897); *United States v. Burdett*, 24 F. Cas. 1300, 1301 (C.C.D. Mass. 1836) (whale oil is product of domestic fishing, not foreign fishing when whales caught and processed by American vessel). Even as late as 1964, the United States Customs Court observed that "to say that a whale is a fish or to speak of 'whale fishing' and of 'whale fisheries,' may be scientifically and linguistically wrong, but the fact remains that such is the popular usage." *Dalquest v. United States*, 53 Cust. Ct. 99, 107 (1964). This was part of a broader discussion of whether sea lions, a member of the seal family, should be considered "fish" for tariff purposes. In holding that sea lions should be classified as "fish" for tariff purposes, the court noted that the Encyclopedia Britannica "has an article on 'Seal Fisheries,' with a subtitle 'Early

Seal Fishing,' which supports the views . . . that in common language the taking of seals is known as fishing." *Id.* at 109.

Summing up the common usage of the word fish as including marine mammals like whale, the Court of Customs Appeals concluded, "from earliest times down to this hour the whale, because of its habitat, its fishlike form, and its finlike fore limbs and tail has been called a fish by people in general. . . . We are regretfully forced to conclude that judges, legislators, and people in general have classified the whale as a fish. . . ." *Central Commercial Co. v. United States*, 11 U.S. Cust. App. 131, 132-33 (Ct. Cust. App. 1921).

B. The Decisions Regarding Makah Tribe's Ocean Fishing Grounds Do Not Foreclose Reliance Upon Evidence of Marine Mammal Harvest to Establish Fishing Locations.

The rulings by the District Court and this Court that the Makah Tribe's usual and accustomed fishing places extend 40 miles offshore, rather than 100 miles as the Makah claimed, rest on the Court's finding that "later 19th Century reports" of whaling and sealing trips 50 -100 miles offshore offered by Makah as support for their claim constituted insufficient evidence to establish that the Makah customarily traveled such distances offshore at treaty time. *See United States v. Washington*, 626 F. Supp. 1466, 1467 (W.D. Wash. 1982), *affirmed*, 730 F.2d 1314, 1318 (9th Cir. 1994). The rulings do not hold that marine mammals are not

fish for the purpose of the Stevens Treaties or that harvest of marine mammals is not evidence of fishing.

The Treaty of Neah Bay, 12 Stat. 939, to which Makah is a signatory, differed from the other Stevens treaties in its direct reference to whaling and sealing. The Treaty of Neah Bay states, in relevant part, "…the right of taking fish and of whaling and sealing at usual and accustomed grounds…." The remaining relevant Stevens treaties lack the reference to whales and seals, [and read "… The right of taking fish at all usual and accustomed grounds…"] As a result, neither the District Court nor this Court, in reviewing the Makah's treaty rights, had reason to address whether the parties to the treaty understood the word "fish" to include whales and seals. Therefore, neither decision includes any discussion of this issue. Rather, the ultimate holding simply turned on the finding that the evidence presented did not establish that the Makah took whale or seal at a distance of 100 miles offshore at treaty times with sufficient frequency to establish the area this far offshore was a customary treaty-time fishing location. From the Court of Appeals:

> 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 1850's.
>
> These facts do not show that their 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.

United States v. Washington, 730 F.2d at 1318.

From the District Court:

> There does not appear to be any way to document the precise outer limits of the Makah offshore fishing grounds at treaty times. The only feasible way to describe Makah usual and accustomed fishing grounds for offshore fisheries is in terms of distance offshore that the Makah reportedly navigated their canoes. Makah canoes were large, fast, and seaworthy, capable of traveling in the ocean conditions that obtained off of Cape Flattery and at least 30 to 40 miles offshore. The Makah were skilled in managing their canoes, were able to predict weather conditions, and were able to navigate at night and out of sight of land. It is reported by a number of observers that they were often away for days at a time. It is documented that the Makah regularly fished at known fishing banks some 30 to 40 miles offshore. Reports by mid-19th Century observers indicate that the Makah would start at midnight for the fishing grounds 15 or 20 miles due west of Cape Flattery where they would remain until the afternoon of the following day. Some later 19th Century reports tell of trips from 50 to 100 miles at sea…
>
> …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.

United States v. Washington, 626 F. Supp. at 1467 (emphasis added) (internal citations omitted).

Makah would stretch the District Court opinion on the extent of Makah fishing places to include an implication that whaling and sealing is not fishing, and therefore is not direct evidence of fishing locations. However, as the District Court in this matter concluded, its prior decision regarding evidence of Makah whaling contains no such implication and "ultimately turned on the sufficiency of the evidence proffered by Makah to establish its fishing places not on a legal determination of what evidence would be deemed relevant." Findings of Fact and Conclusions of Law 2.17 at 80 – 81. MER 90-91. The District Court's interpretation of its own prior decisions in this lengthy and complex case are entitled to deference. *See Labor/Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1119 (9th Cir. 2009) ("We review a district court's interpretation of a consent decree de novo, with 'deference . . . based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal.' ") (quoting *Nehmer v. Dep't of Veterans Affairs*, 494 F.3d 846, 855 (9th Cir. 2007)); *Zinchiak v. CIT Small Bus. Lending Corp. (In re Zinchiak)*, 406 F.3d 214, 224 (3d Cir. 2005) (noting that the bankruptcy court was "well suited to provide the best interpretation of its own order"); *In re USA Commercial Mortg. Co.*, 452 Fed. Appx. 715, 720 (9th Cir. 2011) ("[I]n light of its experience overseeing these proceedings, the district court is entitled to broad deference in interpreting whether the provisions of its own orders have been satisfied."

Moreover, this Court's opinion, based on its *de novo* review, contains no suggestion of a fish/marine mammal distinction. *United States v. Washington*, 730 F.2d at 1318. This Court's opinion therefore supports the District Court's interpretation of its prior decision which and, in contrast to the Makah and State's arguments, avoids any conflict with the prior clear rulings in this case on the broad meaning of the word "fish." The opinion also supports the District Court's rejection of the argument that usual and accustomed fishing places are species-specific.

This reading of the Makah decision is supported by the lack of a record regarding the treaty negotiators' intentions and understanding of the treaty terms in that proceeding, a necessary factual inquiry in interpreting the Treaties. *See United States v. Washington*, 873 F. Supp. at 1429, 1436; *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) (Factual inquiry into the intent and understanding of the treaty parties at the time a treaty was signed is required to determine meaning of treaty.). Unlike *Shellfish* or this subproceeding, the parties in the Makah subproceeding did not present evidence on the meaning of the word "fish" in the "right of taking fish," nor did the Court address the interpretation of the "right of taking fish," because the Treaty of Neah Bay expressly reserves the right of whaling and sealing as part of the treaty fishing right.

C. A Broad Reading of the Right to Take Fish Is Supported by the Reserved Rights Doctrine.

The Treaty of Olympia, as with all Stevens treaties, is a grant of rights from the tribes to the United States, and a reservation of that not granted. *Winans*, 198 U.S. at 381; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-680 (1979) (*Fishing Vessel)*. There is nothing in the Treaty to suggest tribes were abandoning any of their marine food gathering activities. If the United States intended to limit the scope of their fishing it could have done so as it did with the shellfish proviso.[3] It did not.

To now to infer that the fishing somehow is limited turns the reserved rights doctrine on its head. This Court has previously recognized that the fact that the treaties were reservations of rights directly precludes any species limitation of the fishing right:

> At [treaty] time . . . the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title…. The fact that some species were not taken before treaty time—either because they were inaccessible or the Indians chose not to take them—does not mean that their *right* to take such fish was limited. 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.

Shellfish, 157 F.3d at 644, *quoting with approval*, *United States v. Washington*, 873 F. Supp. at 1430. *See also Midwater Trawlers Co-operative v. Dep't of*

[3] Similarly, other treaty provisos delimit, for example, erecting temporary housing "for the purpose of curing", the right to pasture horses is limited to "open and unclaimed lands" and to alter all stallions "not intended for breeding-horses". Treaty with the Nisqualli, Puyallup, Etc., 10 Stat. 1132, Art. 3. (1854).

Commerce, 282 F.3d 710, 716-17 (9th Cir. 2002) ("Contrary to Midwater's contention, we need not determine tribal fishing rights under the Stevens Treaties on a case by case, 'fish by fish,' basis. . . . The term 'fish' as used in the Stevens Treaties encompassed all species of fish, without exclusion and without requiring specific proof.") (Citing *Shellfish*, 157 F.3d at 643-44.)

Although taxonomically viewed as distinct by zoologists, in the nineteenth century, marine mammals like whale, seal, and porpoise were commonly referred to as fish, and their harvest referred to as fisheries. Consistent with the District Court's and this Court's prior rulings that the right of taking fish extends to all "aquatic animal life" and the applicable canons of construction, this Court should affirm the District Court's conclusion that evidence of the harvest of marine mammals has the same value as evidence of the harvest of salmon in establishing usual and accustomed fishing places. As Herman Melville famously noted regarding the question whether whale are fish in his 1851 classic *Moby-Dick; or, The Whale:*

> Be it known that, waiving all argument, I take the good old fashioned ground that the whale is a fish and call upon holy Jonah to back me.

Herman Melville, *Moby-Dick; or, The Whale* 149 (Charles Child Walcutt ed., Bantam Books 1967) (1851).

D. The Act of Harvesting Marine Mammals is Fishing Under the Treaty of Olympia.

Throughout its brief, Makah seeks to distinguish hunting marine mammals from fishing, arguing that hunting marine mammals is a distinct activity and occupation different from fishing. *See* Makah Br. at 11, 21, 41-43. The Makah's effort to characterize the taking of marine mammals as hunting and the taking of fin fish as the different activity of fishing is unavailing. The "fishing" clause of the Stevens Treaties reserves the right of "taking fish." The *means* of taking fish is not limited in any way by the Treaties, and the record in this case makes clear that native people fished with spears and harpoons, as well as, hooks, nets, and traps. *Final Decision #1*, 384 F. Supp. at 352, 372, 402; *See also Shellfish*, 157 F.3d at 643 ("The Treaties do not prohibit or limit any specific manner, method, or purpose of taking fish.")

2. The Treaty of Olympia Must Be Liberally Construed in Favor of the Tribes that Signed that Treaty

The well-settled "canons of construction" dictate that Indian treaties are to be interpreted liberally in favor of, and as they would have been understood by, the Indians, with ambiguities resolved in their favor. *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Makah argues that these canons are inapplicable here, because "the Indian interests are adverse." *See* Makah Br. at 22. In support of this argument, 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). Neither of those cases is applicable

here.

This case does not embody the type of direct conflict involved in the cases relied upon by Makah where the canons were not employed. The dispute in this case arises as the result of the alleged reduction in harvest available to Makah fishers as the result of harvest or potential harvest by the Quinault and Quileute Tribes of Pacific Whiting and other migratory species of fish as they pass through Quinault and Quileute fisheries. *See* MER 12-13. The conflict is the result of a present-day scarcity of fisheries resources that stems from environmental degradation, climate change, and other factors not contemplated at treaty time, and it has no impact on the Makah right to harvest marine mammals. *See Fishing Vessel*, 443 U.S. at 669 (Acknowledging that the fisheries were thought to be "inexhaustible" at treaty time and that present-day scarcity and the need for allocation were not contemplated.). However, the canons of treaty construction are not obviated by such indirect second or third order divergence in interests of recent vintage—rather, the canons require courts to look back to how treaties "were understood by the tribal representatives who participated in their negotiation" and to "the larger context that frames the Treaty . . . ." William C. Canby, Jr., *American Indian Law in a Nutshell* 122 (5th ed. 2009) (citing *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)). It is only where tribal interests were directly

adverse at treaty time that the canons do not apply. The cases that Makah cites bear this out.

The first case, *Redding Rancheria*, is of little help to Makah. In *Redding Rancheria*, a tribe argued that the Indian canons of construction should be applied in the court's interpretation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq*., and the court addressed the canons in dicta, holding they were not applicable where tribes had competing interests under the IGRA. 776 F.3d at 713. The application of the canons to statutes is an extension of their original core application to treaties, and the scope and force of their application in the statutory context remain somewhat unclear. Canby, 127-29. More importantly, however, unlike the Treaty of Olympia, IGRA applies to tribes generally and competition among tribes for gaming revenues, particularly among those in the same general vicinity, was an inevitable and foreseeable—and immediate—consequence of the statute. Here, however, given the abundance of aquatic resources at treaty time, the scope of the term "fish" in the Treaty of Olympia was of no moment to the Makah, which signed a separate treaty, at the time at which the Treaty of Olympia was signed.

Other cases discussing this exception to the application to the canons in the statutory context also concern statutes that inevitably gave rise to immediate direct adversity among individual tribes. For example, in *Housing Authority of Te-Moak*

Tribe of Western Shoshone Indians v. Dep't of Housing & Urban Dev., 85 F. Supp. 3d 1213, 1221 (D. Nev. 2015), the district court noted that the Native American Housing Assistance and Self-Determination Act (NAHASDA) "allocates one total sum of annual appropriations amongst all eligible Indian tribes [so that] an interpretation of the statute that increases funding to some tribes necessarily decreases funding to other tribes under other formula factors." *See also Walker River Paiute Tribe v. Dep't of Housing & Urban Dev.*, 68 F. Supp. 3d 1202, 1209-1210 (D. Nev. 2014). Given the direct and immediate adversity of interests created by NAHASDA upon its passage, the court properly declined to apply the canons. By contrast, in interpreting the Gila Bend Act, a statute that was designed to benefit one particular tribe, the Ninth Circuit left open the application of the Indian canons of construction on remand, despite another tribe's insistence that the canons should not apply. *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1152-53 (9th Cir. 2013).

The second case that Makah cites to support the idea that the canons do not apply here, *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996), is similarly of little relevance to this matter. Although *Confederated Tribes of Chehalis Indian Reservation* concerns the treaty interpretation canons, the circumstances in that case were vastly different than those in this case. In *Confederated Tribes of Chehalis Indian Reservation*, the

Chehalis and Shoalwater Tribes, two non-parties to the Treaty of Olympia, argued that they had the right to share in Quinault's off-reservation fishing and governance rights under that treaty. 96 F.3d at 339. The Quinault tribal negotiators *at treaty time* would have understood the arguments of the Chehalis and Shoalwater Tribes to be directly and necessarily adverse because those two tribes argued for a direct share of the Quinault Tribe's property right in off-reservation fishing. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (treaty fishing rights constitute a federally protected property right).[4] By contrast, in this case, as a non-party that claims no rights under the Treaty of Olympia, Makah's assertion of adversity is not only indirect but a product of modern-day scarcity that no party could have envisioned at treaty-time.

The facts that an issue of treaty interpretation arises in the context of intertribal litigation and that tribes have taken adverse positions in that litigation by

[4] The unique posture of the *Confederated Tribes of Chehalis Indian Reservation* case renders it more similar in terms of the level and source of adversity to *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476 (1937), than to Makah's present-day attempt to limit the scope of language in the Treaty of Olympia, a treaty to which it was not only not a party but never even a prospective party as was the Chehalis Tribe during early negotiations. In *Shoshone Tribe of Indians*, the Shoshone successfully sued the United States for taking part of its reservation property and giving it to the Northern Arapahoe. While the canons were not addressed in that case, the position of the Northern Arapahoe occupied in that case (a beneficiary of federal takings) was similar to the position that the Chehalis and Shoalwater Tribes aspired to in *Chehalis*—to take part of another tribe's property right. Thus, *Chehalis* was clearly a case of direct adversity, whereas the case at bar at best involves present-day de facto adversity borne of factors that have nothing to do with the treaty negotiation.

themselves do not reduce the force of the canons as Makah suggests. Rather, the Court must look to the nature of the conflict and determine whether there is a direct intertribal conflict inherent in the treaty or statute. Here, where the intertribal conflict is not a direct conflict foreseeable at the time of the Stevens Treaties, the Makah argument that the canons have no force must be rejected.[5]

3. The State Misrepresents the "Grounds and Stations" Clause

In its brief, the State misstates the meaning of the "grounds and stations" language in the Treaty of Olympia in a manner that poses an unreasonable threat to tribes' ability to establish usual and accustomed fishing locations. The State argues that, in order to establish usual and accustomed fishing locations, tribes must "provide evidence of regular fishing activity at *identifiable locations*." *See* State Br. at 24. The state goes on to argue that tribes must identify an "*actual location* regularly frequented by the requesting tribe." *See* State Br. at 26 emphasis in original. The state then goes on to imply that a tribe must provide a specific place name to establish a usual and accustomed fishing location. *See* State Br. at 27.

With respect to this particular subproceeding, the State's position that tribes

[5] Another way of looking at whether the canons are applicable, is to ask whether the canons would apply in an action brought by the Quinault and Quileute Tribes asserting the right to take marine mammals against the United States under the fishing provision of the Treaty of Olympia. If the answer to that question is "yes" as it must be, the fact that the Makah now object for parochial reasons that are not inherent in the Treaty should make no difference.

would have to identify, by name, specific portions of the open ocean borders on the absurd. While some areas of the open ocean might be identifiable with respect to particular fishing banks, or the like, this is not necessarily true of the ocean in its entirety. To limit ocean fishing tribes only to areas that were identifiable by name or with specific reference to some particular location at treaty times is neither feasible, practical, nor required by the treaty language or the law of the case.

From a broader perspective, the six tribes are concerned that the State is improperly seeking to heighten the evidentiary burden a tribe must meet in establishing usual and accustomed fishing locations. There has never been a requirement that usual and accustomed fishing locations must consist only of specifically identified or named locations. As the state noted, but failed to incorporate in its argument, the term "grounds and stations" is comprised of both "grounds" and "stations." While "stations" is defined as indicating fixed locations, "grounds" refers to "larger areas which may contain numerous stations and other **unspecified locations** which…**could not have been determined with specific precision** and cannot now be so determined." *United States v. Washington*, 730 F.2d 1316 (citing and quoting *Final Decision #1*, 384 F. Supp. at 332) (emphasis added). In addition, the Court has always recognized the inability to catalog all of the tribes' usual and accustomed fishing places. "Although there are extensive records and oral history from which many specific fishing locations

can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations." *Final Decision #1*, 384 F. Supp. at 353. Taken together, these principles prohibit the heightened evidentiary requirement sought by the state.

CONCLUSION

For the reasons stated above, the six interested party tribes urge this Court to find:

1. That marine mammals are fish under the Treaty of Olympia, and that evidence of taking marine mammals is evidence of fishing in the same manner as other species for the purposes of establishing usual and accustomed fishing places.

2. That the "canons of construction" apply to this Court's interpretation of the Treaty of Olympia in this matter.

3. That the State's reading of the "grounds and stations" clause in the Treaty of Olympia is overly restrictive and inconsistent with previous rulings in *United States v. Washington*.

Respectfully submitted this 5th day of August, 2016

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STATEMENT OF RELATED CASES

The Six Tribes are aware of the following related cases pending in the Court that may be deemed related to this case under Ninth Circuit Rule 28-2.6: *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, No. 15-35540, and *United Sates v. Lummi Nation*, No. 15-35661. These appeals arise out of the same underlying district court proceeding, but involve unrelated disputes and are separate district court subproceedings (2:2014-sp-00001-RSM, and 2:2011-sp-00002-RSM).

Dated this 5th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

Counsel for the Squaxin Island Tribe certifies that this brief has been double-spaced, that the typeface used (Times New Rom 14) is proportionately spaced, and that the number of words is 8098.

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CERTIFICATE OF SERVICE

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

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

Dated: August 5, 2016.

s/ Kevin R. Lyon