NOS. 15-35824, 15-35827

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE,

Plaintiff-Appellant, and

UNITED STATES OF AMERICA,

Plaintiff,

v.

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION,

Respondents-Appellees, and

STATE OF WASHINGTON,

Defendant-Appellant,

HOH INDIAN TRIBE, *et al.*,

Real Parties in Interest.

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

BRIEF OF DEFENDANT-APPELLANT STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100
(360) 753-6200

MICHAEL S. GROSSMANN
Senior Counsel
JOSEPH V. PANESKO
Senior Counsel

Attorneys for Defendant-Appellant State of Washington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

In order to extinguish conflicting land claims and clear the way for settlement, the United States entered into a series of treaties with the Pacific Northwest Indian Tribes in 1854 and 1855. In these treaties, the Tribes relinquished most of their land claims in exchange for monetary payments and small reservations on which they hold exclusive hunting and fishing rights. The treaties, however, reserved the Tribes' right to engage in their ancient fisheries off-reservation at all "usual and accustomed grounds and stations."

The Makah Indian Tribe initiated this case because the Quileute and Quinault Tribes proposed to start fishing in new offshore areas that would diminish the Makah's off-reservation fisheries. After a six week trial, Judge Martinez held that broad swaths of the ocean where the Quileute and Quinault *may* have hunted whales or seals may be considered a part of these Tribes' off-reservation "usual and accustomed fishing grounds and stations." Based upon that conclusion, the Quileute and Quinault Tribes will be able to assert treaty-reserved rights to harvest fish in these expansive marine mammal hunting areas even though they never harvested fish in those areas at or before treaty time.

The State participated in the case as an interested party because the State also conducts fisheries in offshore coastal waters along the entire Pacific coast.

The State fishes in areas co-extensive with Makah's usual and accustomed fishing grounds and stations, but also fishes in offshore areas south of Makah's fishing area where Quileute and Quinault claim the right to fish. The presence of new or additional treaty harvesters would require the State to regulate state harvesters to ensure a fair apportionment of harvest between treaty harvesters and state harvesters. Because the district court's ruling opens up hundreds of square miles of ocean to Quileute and Quinault fishing rights even though those areas were never part of those Tribes' ancient fisheries, the State has appealed.

II. STATEMENT OF JURISDICTION

The Makah Tribe initiated the case below as subproceeding 09-1 under the district court's continuing jurisdiction in *United States v. Washington*, C70-9213. The district court's jurisdiction arises under 28 U.S.C. §§ 1331, 1345, and 1362. The court's final judgment was entered on September 3, 2015. The State timely filed its notice of appeal October 23, 2015, pursuant to Fed. R. App. P. 4(a)(1)(B)(i). The Makah Tribe separately appealed the same day and both appeals have been consolidated. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES

1. Did the district court err as a matter of law in identifying usual and accustomed fishing grounds and stations for Quileute and Quinault based only upon marine mammal hunting activity, thereby confirming treaty-based claims to harvest fish in vast areas of the Pacific Ocean that were never part of the Tribes' ancient fisheries?

2. Did the district court err in finding that the Quileute Tribe customarily and regularly fished at identified grounds or stations 20 miles offshore at treaty times where the evidence fails to support that conclusion?

3. Where the western limits of the Quileute's and Quinault's usual and accustomed fishing grounds and stations are based on fixed distances of travel from shore, did the district court err as a matter of law by drawing a western boundary that far exceeds the identified distance from shore?

IV. STATEMENT OF THE CASE

The State adopts the statement of the case in the Makah's brief, but briefly addresses the State's specific interests in this matter. This adjudication of offshore Pacific Ocean fishing grounds for the Quileute and Quinault has real and significant impacts on state citizens. Although many fisheries occurring beyond three miles from shore are regulated by the federal

government, the State directly regulates several fisheries that are not regulated by the federal government. For example, the State opens and regulates Dungeness crab harvest both inside and outside the three-mile line. WER 70-74. The district court's adjudication of the western boundary of the Quileute's and Quinault's usual and accustomed fishing grounds and stations will require the State to restrain state crab harvesters from taking more than one-half of the resource in the adjudicated area.

Accordingly, Washington State actively participated in this case to ensure that the offshore breadth of Quileute's and Quinault's Pacific Ocean fishing grounds is consistent with the evidence of their pre-treaty ancient fisheries.

V. STANDARD OF REVIEW

This Court reviews the interpretation and application of a treaty de novo. *United States v. Washington*, 969 F.2d 752, 754 (9th Cir. 1992) (citing *Dillon v. United States*, 792 F.2d 849, 852 (9th Cir. 1986), *cert. denied*, 480 U.S. 930, 107 S. Ct. 1565 (1987)). Factual findings are reviewed under a clearly erroneous standard. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504 (1985).

VI. SUMMARY OF THE ARGUMENT

The district court erred as a matter of law in holding that marine mammal hunting alone, without any evidence of fishing activity, is sufficient to establish usual and accustomed fishing grounds and stations for a tribe. The district court's holding ignores the law of the case as established in the Makah's ocean boundary subproceeding, *United States v. Washington*, 626 F. Supp. 1405, 1466 (W.D. Wash. 1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984), where this Court concluded that the Makah's usual and accustomed fishing grounds could not be established based solely upon evidence of whale or seal hunting. Furthermore, the district court's holding that "fish" and "usual and accustomed grounds and stations" encompasses marine mammal hunting is not supported by the earlier rulings in the shellfish subproceeding. *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), 898 F. Supp. 1453 (W.D. Wash. 1995), 909 F. Supp. 787 (W.D. Wash. 1995), *aff'd in part, rev'd in part*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060, 119 S. Ct. 1376 (1999). The premise that previously proven usual and accustomed fishing grounds encompass all species of fish, including shellfish, does not support the adjudication of a brand new territorial claim where there is no evidence whatsoever of any fishing activity in the claimed area.

Even if marine mammal hunting activity were a basis for establishing treaty-reserved rights to harvest other living resources, such as fish, that exist in hunting areas, the treaty reserves a right to harvest only at identifiable locations frequented at or before treaty times—identifiable "grounds and stations." Accordingly, a tribe must establish its off-reservation claim based upon evidence of regular and customary harvest activity at identified *locations*. Neither Quileute nor Quinault provided evidence of identifiable locations for their whale or seal hunting other than generalities such as "deep blue water." Indeed, the Quileute's anthropologist disclaimed the proposition that the Tribe possessed usual and accustomed grounds and stations across every portion of the 2500 square mile area of the ocean encompassed simply by describing a distance travelled from shore. Because the Quileute and Quinault never associated their claimed marine mammal hunting activity with any particular locations in the ocean, the district court erred as a matter of law when it used a general description of travel activity associated with seal and whale hunting to establish locations for their usual and accustomed fishing grounds and stations.

Although the district court relied upon whale and seal hunting to establish the outer western boundaries of both Tribes' fishing rights, the court nonetheless entered separate findings of fact regarding the much nearer

distances each Tribe actually harvested fish at or before treaty times. The State agrees with the finding for the Quinault Tribe, but disputes the 20-mile distance for Quileute fishing as both factually and legally erroneous. Factually, the Quileute Tribe did not present any treaty-time evidence of fish harvest 20 miles out from the coast, and more reliable evidence and testimony shows much nearer fishing distances and locations. The 20-mile fishing determination is legally erroneous as well because the Quileute never offered evidence of any specific *locations* 20 miles from the coast where Quileute fishing allegedly occurred. The court's 20-mile fishing distance for the Quileute should thus be reversed.

Finally, the district court erred as a matter of law in drawing each Tribe's western boundary without regard to the curvature of the shoreline. Having decided to describe off-reservation fishing locations in reference to the farthest offshore distance Quileute and Quinault may have traveled to hunt seals and whales, the district court compounded its error by drawing a straight line due south from the northern limit of each Tribe's fishing grounds. This approach was used as a matter of convenience and simplicity, despite the fact that the line, thus established, is increasingly farther from shore as a person travels from north to south. Indeed, this approach produces a western

boundary up to 16 miles *beyond* the distance that the court found the Tribes may have travelled to hunt for marine mammals at treaty times. Because the district court's methodology in fixing a western boundary line adds hundreds of square miles of ocean to the conceptual area Quileute and Quinault may have traversed when hunting for marine mammals, the methodology must be rejected.

VII. ARGUMENT

A. The District Court Erred as a Matter of Law by Allowing Marine Mammal Hunting Activity to Establish Usual and Accustomed Fishing Grounds and Stations for Fish Even Though These Areas Were Never Part of the Tribes' Ancient Fisheries

The State adopts the Brief of Appellant Makah Indian Tribe and generally defers to the arguments in the Makah brief. The following sections supplement the Makah's arguments and raise several additional points of particular concern to the State's interests.

1. Marine Mammal Hunting Does Not Establish Usual and Accustomed *Fishing* Grounds and Stations

The State agrees with the Makah's characterization of this Court's 1984 ruling as establishing the binding legal principle that marine mammal hunting alone, absent any evidence of fishing activity, is insufficient to establish usual and accustomed fishing grounds and stations. *United States v. Washington*,

730 F.2d 1314 (9th Cir. 1984). The State addresses one additional reason in support of the Makah's interpretation of the 1984 decision.

The United States government actively participated in the Makah boundary proceedings at the trial and appellate levels. The filings by the federal government highlight the nature of the evidence and specific legal positions adjudicated in that case. The United States did not challenge the Makah's evidence, including evidence of marine mammal hunting. The United States nonetheless opposed the Makah's requested 93-mile boundary because the only evidence of activity beyond 40 miles involved whaling grounds. Specifically, the United States argued "*there are essential differences between whaling and fishing*." MER 1252 (emphasis added). The United States argued that the Makah had not usually or customarily travelled to locations more than 40 miles from shore to harvest salmon, halibut, and other species of *fish.* Accordingly, the United States argued that the Makah's treaty-reserved ocean fishing claim was limited to those locations no farther distant than 40 miles where they regularly fished at treaty times, notwithstanding undisputed evidence of whale hunting beyond 40 miles. MER 1251. After a special master recommended granting the Makah's 93-mile request, the United States objected to the district court.

The district court agreed with the United States and specifically adopted the United States' argument: "Although the Makah traveled distances greater than forty miles from shore for purposes of *whaling and sealing*, the Court finds that it is clearly erroneous to conclude that the Tribe customarily traveled such distances to *fish*." 626 F. Supp. at 1467 (emphasis added). The district court set the Makah's boundary at 40 miles—the outermost limit of Makah's regular treaty-time *fishing* activity. This Court affirmed using very similar language, which is quoted and discussed in the Makah's brief. 730 F.2d at 1318. Thus, it is clear Makah's proven marine mammal hunting activity was insufficient, as a matter of law, to establish a territorial claim broader than its proven fishing activity at treaty times for purposes of applying its reserved right to fish at usual accustomed fishing grounds and stations.

In this subproceeding, Judge Martinez incorrectly asserted that neither the district court nor the Ninth Circuit's rulings on the Makah boundary differentiated between fishing and whale hunting: "Neither of these opinions excluded evidence of sea mammal harvest." MER 91. This assertion is belied by the quotation and citations above which show that the district court and this Court accepted *uncontested* evidence regarding whale and seal hunting beyond 40 miles, but refused to allow that marine mammal hunting activity to

set the location of the Makah Tribe's usual and accustomed fishing grounds and stations. Judge Martinez ignored the unitary principle evident throughout the Makah boundary proceeding, as most clearly expressed by the United States' 1982 brief: "[T]here are essential differences between whaling and fishing." MER 1252. The 1984 Makah boundary ruling by this Court establishes the controlling legal principal that whale hunting alone does not establish usual and accustomed fishing grounds and stations for fishing activity.

2. The Shellfish Subproceeding Does Not Allow Marine Mammal Hunting to Establish Usual and Accustomed Fishing Grounds and Stations for Fish

Judge Martinez also erred as a matter of law in relying upon the shellfish subproceeding to support the premise that marine mammal hunting alone can support a tribe's claim to usual and accustomed fishing grounds and stations for fish. *See* MER 85-86; MER 88. 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.

Although the primary fish species that motivated the filing of this case in 1970 was salmon, numerous other species of fish were discussed in Judge Boldt's original decision:

> Aboriginal Indian fishing was not limited to any species. They took whatever species were available at the particular season and location. Many varieties, including salmon and steelhead, halibut, cod, flounder, ling cod, rockfish, herring, smelt, eulachon, dogfish and trout, were taken and were important to varying degrees as food and as items of trade.

United States v. Washington, 384 F. Supp. 312, 352-53 (W.D. Wash. 1974). Early in his original decision, Judge Boldt referenced "fishing" activity as he discussed the treaty phrase "usual and accustomed grounds and stations," thus writing "usual and accustomed *fishing* grounds and stations," which phrase, or minor variations thereof, was used multiple times throughout the original decision.[1] *See* 384 F. Supp. at 353, 356, 361, 408, 411, 417, 419. This approach has been accepted uniformly throughout the long history of the case, with the phrase "usual and accustomed fishing grounds and stations," or just "usual and accustomed fishing grounds," being approvingly used by the court dozens of times. *See, e.g.*, *United States v. Washington*, 626 F. Supp. 1405 (used 19 times); 520 F.2d 676 (9th Cir. 1975) (used one time, with multiple references to just "fishing grounds"); 459 F. Supp. 1020 (W.D. Wash. 1978)

[1] Judge Boldt did not originate the idea of adding "fishing" into the treaty phrase—he quotes the phrase and cites to the original trial transcript. *Id.* at 356 (citing "Tr. 2851, *l.* 5-19" which happens to involve trial testimony of the Tribes' anthropologist, Dr. Barbara Lane).

(used nine times); 143 F. Supp. 2d 1218 (2001) (used six times); 235 F.3d 443 (9th Cir. 2000) (used 12 times); 573 F.3d 701 (9th Cir. 2009) (used one time).

The shellfish subproceeding confirmed that shellfish are fish, and simply approved the use of previously adjudicated fishing grounds and stations when applying the reserved right to conduct fisheries in areas historically used to conduct ancient tribal fisheries. The shellfish subproceeding did not raise the question of whether marine mammal hunting, on its own, is a sufficient basis for a tribe to establish new claims to usual and accustomed fishing grounds and stations, including circumstances in which no ancient fishery had ever been pursued by a tribe in the claimed area. Accordingly, Judge Rafeedie's statement that usual and accustomed fishing grounds and stations do not vary across species, 873 F. Supp. at 1430-31, must be read within the context of the reserved right at issue—the right to continue undertaking pre-treaty fisheries at proven locations. The subproceeding involved only shellfish as a type of fish, not otters, turtles, whales, seals, marine birds, or any other kind of marine-based organism. Notably, all but one participating tribe in that subproceeding stipulated they sought to harvest shellfish only in those places already encompassed by their previously established usual and accustomed fishing

grounds and stations.[2] *Id.* at 1431. No tribe in the shellfish subproceeding asserted that marine mammal hunting activity could be used to expand usual and accustomed *fishing* grounds and stations to new geographic locations where fishing had never occurred at or before treaty times.

This Court's 1998 ruling—affirming Judge Rafeedie's holding that the shellfish proviso would be applied with regard to pre-existing usual and accustomed fishing grounds—was supported by two points, neither of which supports the district court's marine mammal approach to adjudicating the existence of treaty-reserved fishing grounds and stations. First, this Court observed that prior to the shellfish subproceeding, an earlier ruling in the case concluded that herring fishing was co-extensive with previously adjudicated usual and accustomed fishing grounds based primarily on evidence of salmon harvest. 157 F.3d at 644. The 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.

This Court's second basis for affirming Judge Rafeedie essentially relied on a matter of practicality:

[2] The Upper Skagit Tribe's previously adjudicated usual and accustomed fishing grounds and stations had included only freshwater river areas, *see* 384 F. Supp. at 379, so that one tribe did present new evidence of treaty time shellfishing activity in saltwater areas. 873 F. Supp. at 1449.

> Moreover, it would be extremely burdensome and perhaps impossible for the Tribes to prove their usual and accustomed grounds on a species-specific basis. "Little documentation of Indian fishing locations in and around 1855 exists today." 459 F. Supp. at 1059. If each Tribe were required to prove its usual and accustomed grounds for every species of fish and shellfish, the time and cost to the court and parties would be unreasonably burdensome.
>
> In light of the above, the district court was correct in concluding that the Tribes' usual and accustomed grounds for shellfish are co-extensive with the Tribes' usual and accustomed fishing grounds, which have been previously decided by the courts.

157 F.3d at 644.

In practical terms, 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. Accordingly, it was no great leap for previously identified salmon fishing locations to be identified as off-reservation fishing areas for tribes seeking to harvest herring, other finfish, or various species of shellfish. But establishing Pacific Ocean usual and accustomed fishing grounds and stations for the first time is another matter. While it may be impracticable to recognize separate usual and accustomed fishing grounds and stations on a species-by-species basis for fish and shellfish, Judge Martinez encountered no difficulty in this case separating evidence of marine mammal hunting from evidence of fishing. Indeed, he addressed each activity in separate sections of his order, listing different distances for each activity. MER 29-30 (Quinault fishing);

MER 30-37 (Quinault whaling and sealing), MER 46-49 (Quileute fishing), MER 49-67 (Quileute whaling and sealing). The practicality concerns relied upon by this Court in the shellfish decision do not exist here, and the shellfish rulings do not support the proposition that marine mammal hunting alone is a basis to establish new usual and accustomed fishing grounds and stations and a claimed right to fish in places where the Tribes never fished at or before treaty times.

3. The Treaty Signatories Would Not Have Understood the Treaty Fishing Clause as Reserving a Right to Harvest Fish at Locations They Had Never Before Fished

Unlike the Treaty of Neah Bay with the Makah, the Treaty of Olympia fishing clause reserves only the right of taking "fish at usual and accustomed grounds and stations." There is no mention of whaling or sealing.[3] Treaty With the Qui-nai-elts, art. III, 12 Stat. 971, 972 (1859). *See* Makah Brief, Addendum at A5. Judge Martinez utilized speculative evidence about treaty negotiations, and overly broad application of treaty language construction principles, to support his erroneous conclusion that the Quileute and Quinault's

[3] The State does *not* assert that the Quileute or Quinault lack the right to harvest marine mammals. The question of whether they have a right to harvest marine mammals under either the treaty fishing language, the treaty hunting language, or under a reserved rights doctrine, is not properly before the Court. The State's arguments are focused on the fact that marine mammal *hunting* practices cannot establish a Tribe's usual and accustomed *fishing* grounds and stations.

treaty fishing clause has a geographic scope co-extensive with generalized marine mammal hunting activity. First, Judge Martinez relied upon speculation about what Indian words may have been used to translate the treaty term "fish" from English to Chinook Jargon, and then from Chinook Jargon to the Quileute and Quinault languages. Second, the court coupled this definitional speculation with an overextension of the canons of treaty construction to create new tribal fishing rights in areas where the Tribes never fished at or before treaty times.

a. The District Court Relied Upon Speculation When Holding That the Quileute and Quinault Language Speakers Would Have Understood "Fish" to Mean All Aquatic Animals

In Section A.2.c.i. of their brief, the Makah Tribe thoroughly discusses the evidentiary record regarding Indian languages and the meanings of the words used in the fishing clause to support the argument that the Quileute and Quinault would not have understood the treaty fishing language as applying to marine mammals. The State offers one additional point in support of the Makah's arguments.

Judge Martinez ignored the evidence presented by the Makah Tribe with regard to the proper construction of the treaty at issue, and relied extensively on the testimony of a linguist, Dr. Hoard, to make findings about what Chinook

words were likely used, and which Quinault and Quileute words were likely used, in the oral translations. MER 22. The court was clearly erroneous in relying upon Dr. Hoard's translation testimony because it was speculative and beyond the area of his expertise.[4]

Dr. Hoard testified he studied and spoke Chinook Jargon for only a short time in 1967, and had not practiced speaking it since then. WER 56. He testified he had never previously worked with the Quinault language. WER 55. He spent four years interacting with a few Quileute speakers and published one article on Quileute tones, but he never testified that he was fluent in the Quileute language. WER 54. Prior to his testimony in this case, he had never served as a spoken interpreter from Quileute to English or English to Quileute, never served as a spoken interpreter between Chinook Jargon and English, and had never interpreted Quinault language in any fashion. WER 60-62. He

[4] The State did not object to Dr. Hoard's qualification as a linguist during his testimony, but that lack of objection does not preclude the State from arguing that his speculative translation testimony carries no weight. *See Coal Resources, Inc. v. Gulf & Western Industries, Inc.*, 865 F.2d 761, 772 n.4 (6th Cir. 1989) ("Although F.R.E. 703 has greatly liberalized the law regarding the type of information on which an expert may base his opinion, *compare Melton v. O.F. Shearer & Sons, Inc.*, 436 F.2d 22, 28 (6th Cir. 1970) *with Mannino v. Int'l Mfg. Corp.*, 650 F.2d 846, 851 (6th Cir. 1981), that liberalization has not eliminated the requirement than an expert ground his opinion on reliable data rather than pure speculation."). When discussing the propriety of objections, Judge Martinez informed the parties that his "intent here is to allow as much of the evidence to come in as possible . . . because it is a bench trial." WER 59.

admitted that both the Quileute and Quinault languages likely had thousands of words, and that the current dictionaries for those native tongues are incomplete. WER 49.

Dr. Hoard was asked to testify what Chinook Jargon terms "*may* have been used" to translate the treaty terms. WER 57 (emphasis added). Similarly, he opined about what words the Quinault and Quileute speakers *might* have used to translate from Chinook Jargon. WER 58 (emphasis added). On cross-examination, Dr. Hoard was asked how he tested his hypothesis about which native words the treaty language may have been translated into. He responded:

> Well, because it is a historical thing, and you can't do an experiment. The best you can do is look at the entire set of words that are available, and how those words normally are combined in Chinook jargon to produce a given meaning. And then you say, well, that is *probably* the way it was expressed.

WER 48 (emphasis added). Much of his testimony was couched in this same level of uncertainty, and he was never asked to offer an opinion about words used in translation on a more-probable-than-not basis.[5] Accordingly, because Dr. Hoard's conjecture about possible translations was not based on reliable

[5] In describing his background, Dr. Hoard described a prior experience serving as an expert witness in a trademark case in 1974. In contrast to the complete failure to connect his testimony with any scientific methodology in this case, in his 1974 testimony he relied upon "literature for experimental tests in psycholinguistics" to support his opinions about trademark confusion of the terms at issue. WER 52-53.

principles and methods, his claimed expert opinion does not satisfy Evidence Rule 702's minimal requirements. *See United States v. Vera*, 770 F.3d 1232, 1241-42 (9th Cir. 2014) (expert witness's opinions about the meaning of narcotics traffickers' coded language must be based on reliable and adequately explained methods).

In light of the contradictory evidence thoroughly discussed in the Makah's brief, the district court erred in making both factual findings and legal conclusions that the Quileute and Quinault would have understood the English word "fish" to include marine mammals, based entirely upon Dr. Hoard's speculation on which words may have been used in translation. *See* MER 22; MER 87-88. Judge Martinez erred in relying upon Dr. Hoard's speculative testimony, and Findings of Fact 3.3 and 3.6, and corresponding Conclusions of Law 2.11 and 2.12 should be reversed.

b. The Treaty Canons of Construction Do Not Support Granting Fishing Rights in Large Ocean Areas Where the Tribes Never Fished at or Before Treaty Times

Courts have articulated unique canons of construction in the construction of treaties. Generally, treaties with the federal government are construed liberally in favor of Indians. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672 (1943). When construing the Stevens Treaties

collectively, the United States Supreme Court applied the treaty canons of interpretation to achieve "'the sense in which [the treaty] would naturally be understood by the Indians.'" *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 S. Ct. 1 (1899)). The Supreme Court quoted Governor Stevens who had written near the time he was negotiating the treaties that his policy regarding treaty negotiations was to preserve Indian access to their "ancient fisheries." *Id*. at 666 n.9, & 676. This Court similarly acknowledged in the shellfishing subproceeding that the goal of the treaty fishing rights language is to maintain the Tribes' right of access to their ancient fisheries. 157 F.3d 630 (referencing "ancient fisheries" many times throughout the opinion). *See also Tulee v. Washington*, 315 U.S. 681, 684, 62 S. Ct. 862 (1942) ("From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes.").

Judge Martinez's holding departs from the principle of honoring the intentions of the treaty signors and preserving rights to ancient fisheries. The Quinault or Quileute never once asserted in this case that their treaty-time

forefathers fished in the same far-offshore areas where they purportedly engaged in whale or seal hunting.[6] As Judge Martinez recognized, treaty-time fishing occurred much closer to shore than the long distances alleged for marine mammal hunting.[7]

By holding that purported whale and seal hunting across hundreds of square miles of the ocean establishes usual and accustomed grounds and stations for *fish*, Judge Martinez's ruling affirms a claim to the exercise of treaty-reserved harvest rights for vast quantities of fish in huge ocean areas where the Tribes never traditionally fished. Judge Martinez's holding runs counter to his own conclusion of law that "any subsistence right *exercised by the tribes prior to the treaties* is to be viewed as a right reserved by the tribes unless explicitly relinquished." MER 84 (emphasis added). The rest of the fish and other marine resources in the vast offshore ocean areas, other than those marine mammals that a handful of tribal members may have hunted

[6] The Makah's brief details the extensive evidence demonstrating that whale and seal hunters were culturally and professionally distinct from tribal fishers, which helps explain why fishing did not occur in the claimed offshore marine mammal hunting areas. *See* Makah Brief at Argument section A.2.c.ii.

[7] Six miles for Quinault fishing, MER 29, but 30 miles for marine mammals, MER 33-37. Twenty miles for Quileute fishing, MER 48-49, but 40 miles for hunting fur seals, MER 67.

there, did *not* constitute part of the Tribes' "normal food supplies" that Governor Stevens sought to preserve for the Tribes. MER 84-85.

Because neither the Quileute nor Quinault Tribes traditionally fished in these vast ocean areas where a few of their members may have hunted for whales or seals, the Tribes would not have understood their treaty as reserving a right to pursue fish resources in ocean areas they never utilized for that purpose at treaty times. The district court erred as a matter of law in holding that marine mammal hunting practices establish usual and accustomed fishing grounds and stations entitling the Tribes to harvest fish in those marine mammal hunting areas.

4. Random Hunting Expeditions for Marine Mammals Do Not Establish Usual and Accustomed Fishing *Grounds and Stations*

Even if marine mammal hunting practices could serve as the sole basis for establishing the geographic scope of the reserved right to fish, Judge Martinez nonetheless erred as a matter of law by finding that roving marine mammal hunting expeditions, occurring somewhere out into the ocean without reference to any specific location, are sufficient to establish usual and accustomed fishing grounds and stations. Judge Martinez's holding essentially nullifies the treaty language, "grounds and stations," which courts have

recognized as placing a geographic limit on off-reservation treaty fishing claims. *See* 730 F.2d at 1316.

Judge Martinez accurately quoted Judge Boldt's explanation of the restrictive manner in which the court interpreted and applied the treaty phrase "usual and accustomed grounds and stations." *See* MER 80-81. Judge Martinez erred, however, in asserting that this Court abandoned the "grounds and stations" requirement in the 1984 Makah ocean boundary subproceeding. *See* MER 81. This Court's prior rulings did not excuse the need to provide evidence of regular fishing activity at identifiable locations, nor could such a holding be sustained in light of the express treaty language establishing a geographic limit to off-reservation fishing at "usual and accustomed grounds and stations." Fundamentally, courts cannot rewrite Indian treaties, or expand them "beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Indians*, 318 U.S. at 432. Here, the district court ignored evidence in the Makah subproceeding, and it completely reads the geographically restrictive phrase, "grounds and stations," out of the treaty.

In the Makah ocean boundary subproceeding, Judge Craig did consider a statement, attributed to Dr. Barbara Lane, to the effect that "[t]he 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." 626 F. Supp. at 1467 (citing Dr. Barbara Lane's Makah report). Judge Martinez referenced a portion of that quote in Conclusion of Law 1.7. MER 81. But Judge Craig's holding did not ultimately rely upon this statement; rather, he specifically delineated the geographic scope of the Makah Tribe's usual and accustomed fishing grounds and stations with reference to *known banks and specific locations*:

> Waters of the Pacific Ocean west of the coasts of Vancouver Island and what is now the State of Washington bounded on the west by longitude 125° 44'W. and on the south by a line drawn westerly from the Norwegian Memorial along latitude 48° 2' 15"" N., including but not limited to the waters of *40 Mile Bank*, *Swiftsure Sound*, and the waters above *Juan de Fuca Canyon*, to the extent that such waters are included in the area described.

626 F. Supp. at 1467 (emphasis added).

When this Court affirmed the Makah boundary in 1984, it reiterated and reaffirmed Judge Boldt's restrictive interpretation of "grounds and stations":

> "Stations" indicates fixed locations, while "grounds" refers to "larger areas which may contain numerous stations and other unspecified locations which . . . could not then have been determined with specific precision and cannot now be so determined." "Usual and accustomed" excludes locations used infrequently.

> Judge Boldt held that "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe . . . is a usual and accustomed ground or station . . . ."

730 F.2d at 1316 (citing and quoting 384 F. Supp. at 332). *See also Seufert Bros. Co. v. United States*, 249 U.S. 194, 199, 39 S. Ct. 203 (1919) (holding that the "servitude" on off-reservation property imposed by the reserved right to fish at usual and accustomed grounds and stations "is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or willfully blind to the conditions of the property he was purchasing, must have known of them").

This Court affirmed the Makah boundary in 1984 because evidence showed their known and established fishing *locations* extended out 40 miles, thus including the specific fishing spot named "Forty Mile Bank." The 1984 Makah decision does not support a proposition that a usual and accustomed fishing ground and station boundary can be established *without any showing of any actual location* regularly frequented by the requesting tribe.

In the present case, the Quileute and Quinault provided no evidence of any specific location that the Tribes regularly and customarily hunted whales or seals 40 and 30 miles out into the ocean, respectively. To the contrary,

Judge Martinez relied, in part, upon the haphazard flight of wounded whales randomly towing canoes many miles out in the ocean after being harpooned. *See* MER 34. Judge Martinez accepted the Tribes' characterization of the deep waters as a "Serengeti" where the richest collection of marine resources may have existed, and if those resources existed most densely out there, the Tribes must have gone 20-40 miles *somewhere* offshore to harvest them. *See* WER 12 (closing argument of Quileute counsel); s*ee also* MER 34-35. This Serengeti theory, disconnected as it is to any meaningful evidence regarding specific locations of treaty-time fishing activity, ignores and essentially nullifies the treaty language imposing a geographic limit on off-reservation fishing based upon identifiable grounds and stations.

None of the Quileute's or Quinault's witnesses could identify a single place name associated with any location out in the ocean, in stark contrast to the Makah Tribe's place names for the Makah Tribe's far-offshore fishing banks.[8] The Makah Tribe possessed cultural knowledge that was passed across generations about how to navigate to their specific offshore fishing locations using skills such as triangulation. In contrast, no evidence shows that either the

[8] There is one exception regarding place names: Dr. Boxberger asserted that the Quileute customarily fished at the Makah's named fishing banks, but the trial court correctly denied that claim as being contrary to the evidence. *See* MER 67.

Quileute or Quinault possessed or shared through oral tradition or stories pre-treaty time knowledge of triangulation or other means to locate specific places out in the ocean to hunt for whales or seals. *See* WER 15-16 (testimony of Dr. Ann Renker). Rather, Quileute and Quinault hunters would purportedly paddle westward 30 or 40 miles into the open ocean to search randomly for their prey. This characterization does not satisfy the grounds and stations requirement.[9]

The inability of the Quileute to identify any specific place in the ocean that served as a usual and customary fishing location was confirmed by their own expert. Dr. Boxberger expressly denied his client's own assertion that the Quileute Tribe had usual and accustomed fishing grounds and stations across the entire 2500 square miles of the ocean encompassed in their claim:[10]

> Question: We have hunting resources, we have in-river fisheries, we have coastal fisheries, and in your opinion we have some 2,500 square miles of ocean fisheries as well; is that correct?

[9] The Quileute and Quinault both employed a subtle shift in emphasis their questioning of witnesses, asking whether tribal members had engaged in usual and accustomed hunting and fishing *activity* instead of asking about usual and accustomed *grounds and stations*. *See*, *e.g.*, WER 45, 42, 36, 37. These questions fed into Judge Martinez's establishing boundaries *without* evidence regarding any specific grounds and stations within the claimed expansive ocean areas.

[10] The 2500 number was arrived at by multiplying 50 times 50, representing the 50 miles out from shore that the Quileute claimed, and presuming the Quileute Tribe's northern and southern boundaries are 50 miles apart from each other.

> Answer: No, that is not correct. I would not include the entire 2,500 square miles as an ocean fishery. There is a considerable amount of the ocean that wasn't used. Fisheries are in places where you go on a regular basis.

WER 33. Despite disclaiming the entire area, Dr. Boxberger was unable to provide any testimony about where within the disclaimed larger area the Tribe actually may have hunted marine mammals on a regular basis. Similarly, Dr. Thompson, an anthropologist who testified for the State, expressed misgivings over the concept that just two known Quinault whalers at treaty times could have regular and customary whale hunting grounds fully covering 900 square miles of the ocean.[11] WER 27.

Judge Martinez also relied upon broad and nonspecific historic references to the ranges of distance that the Quinault may have hunted whales and seals, which references fail to satisfy the standard for establishing usual and accustomed fishing grounds and stations. Dr. Olson's 1936 ethnography provided extremely broad ranges of where Quinault whale and seal hunting may have occurred, including 12-30 miles for whaling, and 10-25 miles for sealing. *See* WER 38-39. Judge Martinez relied on sources for whale hunting distances by the Quileute which used the phrase "out of sight of land," and he

[11] The 900 square mile area was calculated by 30 miles from shore, and northern and southern boundaries being 30 miles apart, thus 30 multiplied by 30.

relied on another report that merely described Quileute canoes as being of "sufficient draft and beam" to carry whaling crews 25 to 50 miles out into the ocean. *See* MER 55-56; MER 652. These extremely broad ranges of miles, and the vague reference to "out of sight of land," have no connection to specific grounds or stations, further illustrating the error of establishing boundaries based upon abstract distances without regard to locations.

In conclusion, even if marine mammal hunting alone was sufficient to establish usual and accustomed fishing grounds and stations for all marine resources, the Tribes must still provide evidence demonstrating locations where they customarily and regularly engaged in such activity. Here, the Quileute's and Quinault's generalized claims to hundreds of square miles of ocean based on roving marine mammal hunting expeditions does not conform to the geographically limiting language expressed in the treaty. The assertion of a treaty right to fish in distant Pacific Ocean waters must be grounded in relation to some meaningful sense of geographically identifiable grounds and stations. Judge Martinez's findings of usual and accustomed fishing grounds and stations based on generalized travel in relation to marine mammal hunting—a characterization denied by Quinault's own expert Dr. Boxberger—must be reversed as a matter of law.

B. No Reliable Treaty-Time Evidence Supports the Finding That the Quileute Regularly and Customarily Fished 20 Miles Offshore

Judge Martinez's conclusion that Quileute fished up to 20 miles from shore has no support in the trial record. He relied primarily upon a vague reference from 1949 about depth of fishing, coupled with a vague reference about travel distances, to support a finding that the Quileute fished up to 20 miles offshore before treaty times. Judge Martinez clearly erred in relying upon these vague post-treaty references to establish pre-treaty conduct, and erred as a matter of law by allowing vague distance references instead of specific locations to satisfy the treaty "grounds and stations" requirement.

The Quileute's witnesses attempted to portray the Quileute Tribe as extremely isolated from European influences for 40 or more years past the signing of the treaty. This was offered to support an argument that evidence of post-treaty activity from the 1890s and 1900s accurately reflected the Tribe's pre-treaty practices. Judge Martinez expressly relied upon these characterizations. *See, e.g.*, MER 40 ("Into the 1890s, the Quileute nonetheless remained unfamiliar with white culture and notions of property."—FOF 8.5; "Owing to their relative isolation and minimal contact with Indian agents and white settlers, the Quileute maintained their traditional practices through the early 1900s."—FOF 8.6).

But these characterizations ignore and fail to account for contrary uncontroverted evidence that Quileute people were fully involved with the post-treaty world about them. For example, an 1879 Indian Commissioner Report (authored ten years before the Quileute Reservation was established by Executive Order) describes settlers having already moved into the Quileute territory which would eventually require that the Quileute people be removed to the Makah reservation:

> And the day will come when this removal will be necessary, for the country they occupy is fast becoming settled; a long stretch of rich loamy prairie extends inland, and it is already dotted with the homes of several families of whites; and these people are sending forth through the press and otherwise, glowing accounts of this section, while they are already driving their fat stock into the distant markets, and have an established mail route.

WER 64. Additionally, in the 1880s, the residents of the main Quileute village had established what an Indian agent described as an "annual pilgrimage to the hop-fields of the Puyallup Valley" where they worked as field harvesters. WER 66. It was during this annual absence in 1889 that a settler wanting to steal their land burned down 26 of their houses. *Id*.

These descriptions belie the district court's characterization of the Quileute peoples as being isolated from settler influences and locked in their pre-treaty fishing practices into the 1900s. Accordingly, post-treaty evidence

of ocean fishing practices should not be given determinative weight with regard to treaty-time fishing activity, particularly where there is little or no direct evidence of such fishing activity in the first place.

Judge Martinez's erroneous reliance upon post-treaty sources to find that the Quileute fished for finfish 20 miles offshore is compounded by his failure to apply more specific information developed closer to treaty times that support a much narrower geographic breadth of treaty-time fishing practices. MER 48-49. First, Judge Martinez cited but dismissed the descriptions of Quileute fishing practices by Dr. Frachtenberg, an anthropologist who studied the Quileute in 1915 and 1916. MER 48-49.[12] Dr. Frachtenberg stated the Quileute never fished for halibut beyond two miles of shore, and they caught cod and other fish near rocks and reefs. MER 406-407. Judge Martinez discounted these references and instead relied on a paper written 100 years after treaty times by Dr. Singh, who studied aboriginal economics of the Olympic Peninsula Indians, including the Makah, Quileute, and Quinault. MER 49. A significant problem with Dr. Singh's paper—besides its temporal distance from 1855—is that he would often make generalized statements about "Indians" without specifying which coastal tribe he was discussing in any

[12] Judge Martinez cites "Ex. 56(a) at 129-133" but this appears to be a typographical error, because the information is in Exhibit 58(a) at those pages.

particular point, and one cannot reasonably assume that every general statement in his paper about "Indians" necessarily applied to all of the coastal tribes. This weakness of the paper was expressly called out in its preface which was written by anthropologist Dr. Robert Theodoratus. The preface admits the paper could be criticized because of "certain vague statements or generalities." MER 700.

Dr. Singh surmised that both the Makah and Hoh Indians would harvest sea bass up to six miles offshore. MER 723. Dr. Singh also made a generalized statement about "the Indians" locating halibut beds eight to twelve miles offshore using triangulation, but he did not specify as to which tribe that statement pertained. MER 736. No other ethnological or historic sources about the Quileute mentioned halibut beds eight to twelve miles offshore from the Quileute territory. Accordingly, Singh's unattributed statement about fishing eight to twelve miles from shore has no clear connection to the Quileute, and provides no evidentiary basis to find that the Quileute regularly and customarily fished eight miles, yet alone *20* miles from shore, at treaty times.

Judge Martinez also relied upon field notes by anthropologist Richard Daugherty, from 1949, in which Bill Hudson, a Quileute tribal member born in

1881, is reported to have said that the Quileute fished for halibut in depths of 50-60 fathoms of water using kelp fishing lines in traditional pre-contact style. MER 48-49. This reported depth would implicitly place fishing activity about 20 miles offshore. MER 48-49. However, the district court failed to acknowledge that this 1949 report, taken from a Quileute member born in 1881, fails to establish any degree of reliability about the depths being fished before 1855, 26 years before Mr. Hudson was born.

Judge Martinez connected Bill Hudson's testimony to a note from Dr. Frachtenberg's field notes that the Quileute could *travel* in their canoes in the ocean 20-30 miles westward. MER 48-49. Dr. Frachtenberg's statement was made in a section of his field notes regarding descriptions of travel, and the note was not included in the separate portion of his field notes regarding fishing where the furthest fishing distance he specified was the outer two-mile limit for halibut. *See* MER 406. Judge Martinez never articulates why he rejects Dr. Frachtenberg's fishing-specific observations while accepting and relying on Dr. Frachtenberg's generic travel references. Judge Martinez's reliance on a generic 20-mile reference in Dr. Frachtenberg's field notes about travel ignores the law of the case that evidence of travel, absent a meaningful evidentiary connection to actual fishing activity, is insufficient to establish

usual and accustomed fishing grounds. MER 80-81 (citing 384 F. Supp. at 353; *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010)). Dr. Frachtenberg's travel reference cannot be paired with Bill Hudson's 1949 statement about halibut fishing depths to show pre-treaty fishing practices. It was clearly erroneous for the court to find the Quileute's treaty-time fishing activity extended out 20 miles on a more probable than not basis.

The district court's finding of 20 miles for Quileute offshore fishing is also insufficient as a matter of law to establish usual and accustomed fishing grounds and stations because the finding lacks any reference to actual fishing locations. As discussed above in Section VII.A.4., a tribe must provide evidence of regular and customary fishing locations in order to reserve off-reservation fishing rights. Here, the Quileute provided no evidence of any fishing locations 20 miles off the coast. The Quileute offered no named places and no identified fishing banks extending 20 miles offshore with which to justify their claimed usual and accustomed fishing grounds and stations.[13] The court characterized the Quileute as "more likely than not harvesting finfish up

[13] The only exception is the Quileute's attempt to claim fishing rights at the Makah Tribe's named offshore halibut banks, which was correctly denied by Judge Martinez.

to twenty miles offshore on a *regular and customary basis*." MER 48-49 (emphasis added). But this characterization ignores the treaty language requiring that the fishing needs to occur both regularly and customarily, *and* at identified *grounds and stations*.

Dr. Thompson, the State's anthropologist, conducted an extensive review of historic and anthropological sources and concluded that the Quileute most likely fished up to four miles off the coast at treaty times. WER 23-26. Dr. Renker, the Makah's anthropologist, testified about references in primary sources to small Quileute halibut banks within two miles from the beach, as well as banks near James Island and Destruction Island. WER 30; WER 20. Dr. Renker also testified about Dr. Frachtenberg's notes from 1915-1916 as describing Quileute fishing practices, with the descriptions referencing rocks and reefs that placed the fishing activity out about three to four miles from the coast. WER 19.

Ultimately, Judge Martinez's holding that Quileute fishing activity occurred up to 20 miles offshore is unsupported by any evidence of known, specific fishing banks, or named fishing places, located that distance offshore. His conclusion that Quileute has treaty-reserved fishing rights at all Pacific Ocean locations 20 miles from shore thus fails as a matter of law because it

identifies broad swaths of ocean without any meaningful application of the specific treaty language imposing a geographic limit to off-reservation fishing. Off-reservation fishing claims must be based upon some meaningful evidence of identifiable fishing grounds and stations.

C. Where the Western Limit of the Quileute's and Quinault's Usual and Accustomed Fishing Grounds and Stations Is Based on a Fixed Distance of Travel From Shore, It Is Erroneous as a Matter of Law to Draw the Western Line So That It Extends Miles Beyond That Fixed Distance

After establishing set distances for the western limit of the Quileute's and Quinault's usual and accustomed fishing grounds and stations, Judge Martinez erred as a matter of law in drawing the western boundary in a fashion that extends many miles beyond those set distances from the shoreline. Instead, Judge Martinez set the western boundary lines along a true north-south axis, ignoring the fact that the Washington coastline trends eastward when moving from the north to south.

As a result, while Quileute's western boundary is 40 miles offshore at the northern edge of the usual and accustomed fishing grounds and stations described by the district court, the boundary line is 56 miles offshore at the southern edge of the court's description. WER 2. Similarly, the Quinault's western boundary is 30 miles off the coastline at the northern edge, and it

stretches to approximately 42 miles offshore at the southern edge. WER 3. This erroneous holding results in hundreds of square miles of Pacific Ocean that lie *beyond* the specified distance of the offshore boundary being included within the geographic scope of the Tribes' off-reservation treaty fishing rights.

Quileute and Quinault defend this approach by asserting a consistency argument—that the same methodology was purportedly used by the district court to establish the Makah's western boundary in 1982—and a convenience argument. Neither of the two arguments have any support in law or fact. The alleged consistency with the Makah's ocean boundary ruling is illusory, and convenience cannot be the basis for ignoring restrictive treaty language and allowing a treaty-reserved fishing claim to extend far beyond a distance evidenced by treaty-time fishing activity.

Other than the question of whether the Makah's whale and seal hunting influenced the establishment of their western boundary, the Makah's western boundary proceeding was largely uncontested. The adjudication of their fishing grounds and stations relied upon the location of halibut banks located at the 125° 44' line of west longitude. *See* 626 F. Supp. at 1467. Additional fishing grounds south of these specified banks were included within the court's ruling, without objection. Those southern claims do not appear to have been

supported by much, if any, evidence of actual fishing. We are incapable of knowing today why none of the parties raised an evidentiary challenge to this finding, and principles of *res judicata* bar any contemporary objection as to evidentiary sufficiency. But litigation choices made by parties in prior subproceedings do not alter the ultimate burden any tribe wishing to assert off-reservation fishing rights must bear—to provide reliable evidence of usual and accustomed treaty-time fishing at particular grounds and stations on a more probable than not basis. The Quileute and Quinault cannot avoid their evidentiary burden by pointing to litigation choices the parties made in the 34-year-old Makah decision.

The Quileute and Quinault's claim that the Makah ocean boundary ruling supports drawing their western boundary line due north and south also ignores the differences in the physical characteristics of the coastline. The coastline in the Makah's fishing area (Cape Flattery south to Norwegian Memorial) generally trends north to south, parallel to the line of longitude at which their halibut banks are located, with less than a two-mile deviation. MER 127, 132. Accordingly, to the extent that a straight north-south western boundary line may have been used to establish fishing grounds south of well-known halibut banks, the line generally mirrors the direction of the coast along

the Makah's territory. The same is not true for the coastline along the Quileute's and Quinault's territories as discussed above.

Furthermore, because no party in the Makah ocean boundary subproceeding disputed the manner in which the line was drawn, the Makah decision did not discuss the question of *how to orient* the western boundary with respect to the shape of the coastline, and it does not control the outcome here. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170, 125 S. Ct. 577 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (quoting *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148 (1925)).

If this Court upholds the district court's ruling that the boundary of usual and accustomed fishing grounds and stations can be set by generalized travel distances, without regard to evidence of particular places or locations where hunting regularly and customarily took place, then the boundary should be measured in a consistent manner across the entire length of the Pacific coastline—at the specified distance from shore—and no further.

The Quileute and Quinault may claim that setting a boundary parallel to the slanted shoreline presents an unworkable line that would be difficult for

present-day fishers to follow. That assertion is unsupported by the record. The Makah and the State both submitted declarations contesting that assertion. WER 5-6; WER 8-10. Modern electronics easily allow a vessel operator to follow a boundary set by a measurement to the shore, no differently than a vessel operator would need to rely on electronics to find a boundary line set by a measurement at its northern point and then tailing due south. More importantly, this convenience argument carries no legal weight. Convenience in line drawing might be appropriate where it approximates and conforms to the evidence of a tribe's usual and accustomed fishing grounds and stations. But convenience cannot be used to establish fishing grounds and stations covering hundreds of square miles of area that are unsupported by any evidence or indicia of regular treaty-time activity.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

VIII. CONCLUSION

The district court's order should be reversed, and this matter remanded for further proceedings consistent with this Court's guidance.

RESPECTFULLY SUBMITTED this 6th day of July, 2016.

ROBERT W. FERGUSON
Attorney General

s/ Michael S. Grossmann
MICHAEL S. GROSSMANN
Senior Counsel
WSBA 15293
1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100
(360) 586-3550
email: mikeg1@atg.wa.gov
Attorneys for State of Washington

ROBERT W. FERGUSON
Attorney General

s/ Joseph V. Panesko
JOSEPH V. PANESKO
Senior Counsel
WSBA 25289
1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100
(360) 586-0643
email: joep@atg.wa.gov
Attorneys for State of Washington

STATEMENT OF RELATED CASES

Defendant-Appellant State of Washington is 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 States 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 6th day of July, 2016.

ROBERT W. FERGUSON
Attorney General

/s/ Joseph V. Panesko
JOSEPH V. PANESKO
Senior Counsel
WSBA No. 25289

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 9,453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 *(state name and version of word processing program)* Microsoft Office Word 2010 *(state font size and name of type style)* Times New Roman 14 Point Font, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____

Signature s/Joseph V. Panesko

Attorney for Defendant-Appellant State of Washington

Date July 6, 2016

NO. 15-35824, 15-35827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE,

Plaintiff-Appellant,

and

UNITED STATES OF AMERICA,

Plaintiff,

v.

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION,

Respondents-Appellees,

HOH INDIAN TRIBE, et al.,

Real Parties in Interest,

and

STATE OF WASHINGTON,

Defendant-Appellant.

CERTIFICATE OF SERVICE

D.C. Nos. 2:09-sp-00001-RSM
2:70-cv-09213-RSM
Western District of Washington, Seattle

I hereby certify that I electronically filed the Brief of Defendant-Appellant State of Washington and this Certificate of Service in the above-captioned matter 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 July 6, 2016.

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 this 6th day of July, 2016, at Olympia, Washington.

s/ Dominique Starnes
Dominique Starnes
Legal Assistant

United States Court of Appeals Numbers 15-35824, 15-35827 (Consolidated)
Excerpts from *United States v. Washington*, Subproceeding 09-01
Index to State of Washington's Excerpts of Record (WER)

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213 Subproceeding No. 09-01 DECLARATION OF ANDREW WEISS

ANDREW WEISS declares as follows:

1. I am over the age of eighteen (18) and competent to testify to the matters contained herein. This declaration is based on my personal knowledge and is made in support of the State's Response to Quileute And Quinault's Notices Of Usual And Accustomed Fishing Grounds.

2. I am the WDFW Fish Program Geographic Information Systems (GIS) section lead since August 2008, responsible for developing data sets, analyses, and cartographic products to support fisheries ecology, research, management, and recreation for both freshwater and marine systems. I have been working with advanced GIS software since 1993, when I initiated the first GIS lab on Stanford University's campus at the Center for Conservation Biology. This was followed by staff positions at University of Montana; contractor to EPA R10. The Nature Conservancy NW

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON STREET SE
PO BOX 40100
OLYMPIA, WA 98504-0100
(360) 753-6200

Regional Office, and Oregon State University, doing a wide variety of research in Landscape Ecology and Conservation Biology.

3. I was asked to examine and map the proposed description of the usual and accustomed fishing areas for the Quileute and Quinault tribes as set forth in their court filings on July 23, 2015. I was also asked to examine and map a proposal for describing those U&A areas prepared by the Makah tribe. And I was asked to compare these proposals to the Washington State coastline shifted 30 and 40 nautical miles westward.

4. The exhibit map attached to this declaration was produced using ESRI ArcGIS 10.2.22 (www.esri.com).

5. All GIS processing was done using ArcGIS 10.2.2 (www.esri.com). We used the Washington State Plane South NAD 83 HARN map projection since it is the state of Washington standard, and minimizes East/West distance errors in the proposal area.

6. The exhibit map plots the U&A polygons described in the Quileute and Quinault proposals with crossed hatch areas as depicted in the legend – 45 degree cross hatching for Quileute and vertical cross hatching for Quinault.

7. The northern boundary for Quileute's U&A proposal is a line of latitude beginning at the Pacific coast at Cape Alava, located at 48°10′00″ north latitude, and then proceeding west approximately 40 nautical miles to 125°44′00″ west longitude.

8. The southern boundary for Quileute's U&A proposal is a line of latitude beginning at the Pacific coast 47°31′42″ north latitude near the Queets River; and extending offshore 56.15 nautical miles. The southwestern portion of this U&A description is 16.15 nautical miles wider than the northern portion because the Quileute proposal proceeds directly south, along a constant line of longitude (at 125°44′00″ west longitude), from the northwest corner of their proposed description. In contrast, the coastline itself trends south and east (going from north to south) in this area.

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON STREET SE
PO BOX 40100
OLYMPIA, WA 98504-0100
(360) 753-6200

9. The northern boundary for Quinault's U&A proposal is a line of latitude beginning at the Pacific coast near Destruction Island, located at 47°40′06″ north latitude, and then proceeding west approximately 30 nautical miles to 125°08′30″ west longitude.

10. The southern boundary for Quinault's U&A proposal is a line of latitude beginning at the Pacific coast near Point Chehalis at 46°53′18″ north latitude and extending offshore 41.76 nautical miles. Similar to the Quileute proposal, the seaward breadth of the southwestern portion of Quinault's proposed U&A description wider than the northern part of the described area (by 11.76 miles) because the Quinault proposal proceeds in a straight line directly south, along a constant line of longitude (at 125°08′30″ west longitude), from the northwest corner of their proposed description. In contrast, the coastline itself trends south and east (going from north to south) in this area.

11. The attached exhibit map also locates a proposed set of U&A descriptions prepared on behalf of the Makah Tribe and provided to the State for consideration. The lines of latitude that describe the northern and southern boundaries for both Quileute and Quinault's U&As are the same as those proposed by Quileute and Quinault - 48°10′00″ north latitude for the Quileute northern U&A boundary; 47°31′42″ north latitude for the Quileute southern U&A boundary; 47°40′06″ north latitude for the northern Quinault U&A boundary; and 46°53′18″ north latitude for the southern Quinault U&A boundary.

12. The Makah proposal uses a different technique to close the western edges of the Quileute and Quinault U&A descriptions. The closing line(s) at the western edge are established using several waypoints that coarsely mirror the general trend of the pacific coastline from north to south. I have depicted these with "+" designations labeled as "Proposed Points" in the legend for the exhibit. In the exhibit, these waypoints are connected with a bold line and labeled as Quileute Western Extent and Quinault Western Extent. Under the Makah proposal, the northern boundary lines for Quileute and Quinault are the same as those proposed by Quileute and Quinault. The southern boundary lines use the same lines of

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON STREET SE
PO BOX 40100
OLYMPIA, WA 98504-0100
(360) 753-6200

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213 Subproceeding No. 09-01 DECLARATION OF CAPTAIN DAN CHADWICK

CAPTAIN DAN CHADWICK declares as follows:

1. I am over the age of eighteen (18) and competent to testify to the matters contained herein. This declaration is based on my personal knowledge and made in support of the State's Response to Quileute and Quinault's Notices of Usual and Accustomed Fishing Grounds.

2. I am a Captain in the Enforcement Program of the Department of Fish and Wildlife. I have been employed in this Program since 2000. My area of responsibility is Region 6 and this includes patrolling the marine waters in the pacific coastal area adjacent to Washington State. In that capacity, I pilot and navigate vessels in the coastal waters to make contact with fishing vessels operating in Pacific Ocean waters. I have experience with the ability to define various marine maters as open and closed to fishing and with the ability of commercial and

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

recreational fishers to comply with time and place fishing restrictions using marine descriptions, and available tools for navigation and locating points in a marine environment.

3. In my experience, there are a variety of ways to describe marine water locations, and for vessel operators to locate themselves in relation to those descriptions. Marine fishing areas are not always described using straight lines. Often, fishing areas are described using multiple segmented lines or may be described in relation to a distance from shore or some other fixed point. An example of a complex line demarcating a distinct fishing area is the southern boundary for Puget Sound Marine Area 22A just south of Haro Strait, the San Juan Islands, and Rosario Strait, depicted in the attached exhibit. The description of these areas can be found at WAC 220-22-400 and also found at: http://apps.leg.wa.gov/wac/default.aspx?cite=220-22-400. Examining the regulatory descriptions, it is apparent that fish and shellfishing areas are described in relation to both fixed chart points, and points or lines which must be located in relation to a distance from shore or another described location. Commercial and recreational fishers are expected to comply with these marine area locations when incorporated into fishing regulations that open and close fisheries.

4. Another example of a complex regulatory line that commercial fishers must ascertain and comply with is the rockfish conservation area set forth in the Federal Pacific Coast Groundfish Regulations – 50 CFR part C-G. That line attempts to mimic the 100 fathom bottom contours of the Pacific Ocean in certain areas off the Washington coast.

5. With the advent of modern navigation gear using GPS locating devices, it is relatively easy for most fishers to locate boundaries described as above by plotting these descriptions into a paper chart that is then used to locate both the line and the position of the vessel on the chart as it travels through a marine area. In particular, most commercial vessels employ more advanced navigation tools (e.g. electronic chart plotters) that allow the vessel operator to plot locations and distances on an electronically displayed chart and then depict the

precise location of the vessel as it navigates through marine waters. Commercial vessels that navigate and operate in the distant marine waters in the Pacific Ocean almost universally have this technology available.

6. In light of both paper chart and electronic chart information and technology, there is no compliance basis for drawing straight lines along a constant line of longitude or latitude and that practice is not employed when defining fishery openings along the coast. Commercial harvesters are fully capable of locating more complex boundary lines using both paper charts and electronic navigation aides.

7. I have examined the proposed marine descriptions discussed in the Declaration of Andrew Weiss. In my experience, any of those descriptions, including the shoreline mirroring approach that limits offshore travel to a fixed distance along a line of latitude from a northern latitude boundary to a southern latitude boundary, are capable of being ascertained by typical commercial vessel operators I have encountered along the pacific coast.

I declare under penalty of perjury under the laws of the State of Washington that the above declaration is true and correct to the best of my knowledge.

DATED this 30th day of July, 2015, at Olympia, Washington.

Captain Dan Chadwick
WDFW Enforcement Program

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Honorable Ricardo S. Martinez

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 Subproceeding No. 09-01 FOURTH DECLARATION OF STEPHEN JONER

Stephen Joner declares under penalty of perjury:

1. I have personal knowledge of the facts contained in this declaration, I am of legal age, and I am competent to testify to the facts in this declaration.

2. I have worked as a fisheries biologist, manager and policy advisor for the Makah Indian Tribe (Makah) for over 38 years. In so doing, I have developed familiarity and personal knowledge of federal and state regulations and policies governing fishing activities in coastal marine waters off of Washington State.

3. Federal and state fishing regulations frequently define fishing areas in coastal waters off of Washington State that are subject to reporting requirements, catch limits, or

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

closures. The boundaries of these fishing areas frequently do not correspond to straight north-south longitude lines or east-west latitude lines.

4. The regulations at 50 C.F.R. § 660.70 define Groundfish Conservation Areas in marine waters. The boundaries of these Groundfish Conservation Areas often do not correspond to north-south longitude lines or east-west latitude lines, but rather are lines drawn between a series of coordinates. For example, the North Coast Commercial Yelloweye Rockfish Conservation Area (50 C.F.R. § 660.70(b)) is defined by straight lines drawn between eight points on the Pacific Ocean off of the Washington Coast, none of which follow straight north-south longitude or east-west latitude lines. Other examples include the Stonewall Bank Yelloweye Rockfish Conservation Area (50 C.F.R. § 660.70(f)), the Eastern Cowcod Conservation Area (50 C.F.R. § 660.70(m)), and the Cordell Banks closure (50 C.F.R. § 660.70(o)).

5. In addition, the general rockfish conservation areas are sometimes defined by hundreds of waypoints, many of which do not connect by straight north-south longitude lines or east-west latitude lines. For example, the federal regulations define the 20 fathom depth contour for the rockfish conservation area boundary in the area between the U.S.-Canada border and 42 degrees north latitude by a series of 112 waypoints which do not follow straight latitude or longitude lines. 50 C.F.R. § 660.71(b). Within these rockfish conservation areas, there are seasonal and year-round gear restrictions to protect overfished rockfish species. There are also restrictions on recreational fishing in these areas. 50 C.F.R. § 660.360(c)(1)(i)(D). Thus, both commercial vessels and recreational (sportfishing) vessels are expected to have the capability to identify their position relative to boundary lines that do not follow straight latitude or longitude lines.

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

6. There are also federal regulations establishing essential fish habitat ("EFH") conservation areas in the Pacific Ocean (50 C.F.R. §§ 660.75-660.79). The "Olympic 2" EFH conservation area off the Washington coast is defined by straight lines connecting nine waypoints, none of which follow straight east-west latitude or north-south longitude lines. 50 C.F.R. § 660.77(a). Similarly, the "Grays Canyon" EFH conservation area is defined by straight lines connecting 11 waypoints, most of which do not follow straight latitude or longitude lines. 50 C.F.R. § 660.77(d); *see also* 60 C.F.R. §§ 660.77(b) ("Biogenic 1" EFH conservation area), 660.77(c) ("Biogenic 2" EFH conservation area). Within these EFH conservation areas, there are year-round restrictions on specific gear types to protect bottom habitat for groundfish. *See, e.g.*, 50 C.F.R. §§ 660.11, 660.12(a)(12)-(13).

7. The Washington Department of Fish and Wildlife ("WDFW") has defined fishing management and catch reporting areas in the Pacific Ocean off of the Washington Coast. Some of these areas are defined by boundaries that do not follow straight latitude or longline lines. For example, Areas 58B, 59A-1, and 59A-2 use a 220 degree true line, as opposed to a longitude or latitude line, to define their shared boundary. WAC 220-22-410(10)-(12). A true and correct map depicting the WDFW management and catch reporting areas in the Pacific Ocean is attached to this declaration as Exhibit 1. Tribal and non-tribal fisherman use these catch reporting areas when reporting their groundfish harvests, and there are also gear restrictions within these areas. *See* WAC 220-44-040(2)(a).

8. A true and correct copy of excerpts of the WDFW Sportfishing Rules Pamphlet for 2015-2016 is attached to this declaration as Exhibit 2. As detailed in Exhibit 2, some of the WDFW recreational fishing areas also do not follow straight north-south longitude or east-west latitude lines. For example, there is a seasonal closure for bottom fish in an area defined by

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

straight lines connecting eight waypoints, most of which do not follow straight latitude or longitude lines. Exhibit 2 at 107. WDFW also defines the western boundary of a recreational northern nearshore halibut fishery using straight lines connecting four waypoints, none of which follow straight north-south longitude or east-west latitude lines. Exhibit 2 at 106.

9. Makah, Quileute, and Quinault have each negotiated crab management plans with WDFW. These plans establish special management areas ("SMAs") for each tribe, where non-tribal fishermen are not permitted to harvest crab for part of the crab season. The western boundary of the Makah crab SMA follows a straight north-south longitude line at 124°50.45, which approximates the north-south trajectory of the coast in the Makah area. The western boundary of the Quileute crab SMA, however, does not follow a north-south longitude line, but is instead a straight line connecting the waypoint at 47°28.00 N and 124°49.00 W with the waypoint at 47°40.50 N and 124°40.00 W, which roughly tracks the southeast direction of the coastline in Quileute territory. Likewise, the western boundary of the Quinault crab primary SMA is a straight line connecting the waypoint at 47°28.00 N and 124°34.00 W with the waypoint at 47°08.00 N and 124°25.50 W, also following the southeast direction of the coastline. A true and correct map depicting the crab SMAs for the coastal tribes is attached to this declaration as Exhibit 3.

10. I declare under penalty of perjury under the laws of the United States that this declaration is true and correct.

DATED this 29th day of July, 2015, at Seattle, Washington.

By: Stephen Joner
Stephen Joner

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

April 22, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

10:39:37AM When it comes to the Quileute, this case is about
10:39:40AM cultural identity. Since the time of the beginnings, they
10:39:44AM have been a people that have taken full advantage of their
10:39:47AM surroundings.
10:39:48AM The leaders of the tribe, the whalers, spent days at
10:39:53AM sea attacking the giant of the ocean. Fur sealers left in
10:39:57AM the middle of the night to provide warm blankets for their
10:40:00AM people. Their oral traditions reflect a rich culture with
10:40:05AM a deep connection to the ocean. What the Quileutes have
10:40:09AM always known about themselves has been borne out by the
10:40:11AM evidence in this case.
10:40:13AM Science alone, apart from any ethnographic evidence,
10:40:18AM tells you that the Quileutes were fur sealing, whaling,
10:40:21AM fishing in the Pacific ocean for hundreds of years in the
10:40:26AM rich depths of the ocean Serengeti up to 50 miles off
10:40:31AM their territory.
10:40:31AM One of the most significant chapters of the Quileute
10:40:35AM history is being written in this courtroom, one that there
10:40:38AM is no doubt in my mind will be talked about for seven
10:40:41AM generations to come.
10:40:43AM The Makah and the state wants this court to sign an
10:40:46AM order to the effect that everything the Quileutes have
10:40:49AM ever known about their ocean culture, everything they have
10:40:52AM ever been told by their parents, by their parents' parents
10:40:55AM is wrong. Makah and the state want this court to sign an

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. C70-9213RSM
Subproceeding 09-01

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

April 1, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

11:18:13AM 1 the mountain, some other obvious physical feature. But,
11:18:19AM 2 in general, most measurements of -- with the languages
11:18:26AM 3 that I am familiar with, tend not to be of extraordinarily
11:18:30AM 4 long distances that we measure in the English system.
11:18:34AM 5 Q. In pre-contact times, would a Quinault be able to
11:18:39AM 6 convey, through oral traditions or stories, the distance
11:18:43AM 7 of a far offshore location if they did not have a means of
11:18:46AM 8 measuring or the language to convey such distance?
11:18:49AM 9 A. Like I said, it would be some kind of a reference
11:18:52AM 10 that would have to do with the ability to triangulate from
11:18:55AM 11 a landmark. But, in general, it would tend to be conveyed
11:19:01AM 12 as a very long distance.
11:19:03AM 13 Q. For comparative purposes, with the Makah Tribe, how
11:19:07AM 14 does knowledge of the locations of their offshore fishing
11:19:10AM 15 banks be transmitted through the generations?
11:19:13AM 16 A. It was transmitted in a specific discussion about the
11:19:16AM 17 triangulation system that people would use when they were
11:19:20AM 18 on the water, and successive numbers of peaks, and the
11:19:25AM 19 distance at which one would be when one would be able to
11:19:29AM 20 be one peak out, two peak out, three peak out, four peak
11:19:31AM 21 out, that kind of thing.
11:19:33AM 22 Q. So there is documented history of those details about
11:19:37AM 23 how one could actually utilize the triangulation to arrive
11:19:41AM 24 at these places?
11:19:41AM 25 A. Yes, that's correct.

11:19:42AM Q. And did you ever see evidence of that type of
11:19:45AM knowledge or triangulation utilized in either the Quileute
11:19:50AM or Quinault oral tradition or stories by which their
11:19:53AM pre-contact generations could have conveyed locations out
11:19:57AM in the ocean?
11:19:58AM A. I did not.
11:20:02AM MR. PANESKO: Thank you. No further questions.
11:20:11AM THE COURT: Cross-examination.
11:20:15AM CROSS-EXAMINATION
11:20:17AM BY MR. TONDINI:
11:20:22AM Q. Good morning, Dr. Renker. How are you?
11:20:26AM A. Good morning.
11:20:27AM Q. Dr. Renker, do you agree that two different
11:20:44AM anthropologists could reach different conclusions, looking
11:20:50AM at the same source materials, based on their own unknown
11:20:53AM biases, and still be reasonable, correct?
11:21:00AM A. Could you repeat that question again, please?
11:21:02AM Q. Would you agree that two different anthropologists
11:21:06AM could reach different conclusions, looking at the same
11:21:09AM source materials, based on their own unknown biases?
11:21:15AM A. I do not necessarily believe that all anthropologists
11:21:21AM have unknown biases. But other than that statement, I
11:21:27AM would agree that two anthropologists can look at similar
11:21:31AM materials and come to different conclusions.
11:21:34AM Q. And that would not be uncommon in the field of

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 31, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

can have both those paragraphs.
A. That, "Herring was raked in from the canoe by means of rakes. These were flat fir wood sticks about ten feet long and two inches wide at upper, and three inches at lower end, and one inch thick throughout." So the opportunity was to be able to also harvest herring at the same time one was fishing for bass or salmon.
Q. And is that what Frachtenberg says at the end of that paragraph?
A. Yeah. "They were caught at the same time where bass and salmon was fished for."
Q. Did Frachtenberg give a specific offshore distance for salmon or bass trolling, or the herring harvest?
A. Basically these are nearshore activities. He says, "The bass are found close to shore near rocks and reef." And in this particular environment in Quileute territory we are talking about three to four miles from the coast.
Q. Did Frachtenberg provide a specific description, or is this your conclusion based on the description he provided?
A. That is my conclusion based on the description.
Q. Did any of the other sources you looked at discuss distances offshore at which bass were harvested?
A. Yes. Singh makes the comment that bass was caught anywhere within six miles, and he mentions very

halibut fishery?

A. He said that they didn't go out further than two miles. But we know that Jay Powell actually recorded the name of a halibut bank in his notebooks that was about two miles out. So that aligns with -- the Frachtenberg and Powell information align there.

Q. Can we scroll down to see the reference to the distance? Can you just identify where he discusses the distance? So right below where you placed the red dot?

A. Right here.

Q. Can we pull up the Jay Powell exhibit? It is Exhibit 220, please. Let's go to PDF Page 11. Scroll down. Is the reference -- is the material you were referring to in the lower left margin on this page?

A. Yes, it is. And there is the name of the Quileute halibut bank with the translation, "Long reach down, the shallow flats about two miles out to jig for halibut."

Q. Do you think there is any significance that there was a Quileute name that Professor Powell was able to record for this information?

A. Yes. Named fishing banks are a very important example of how native people, by giving a place-name, can put their stamp of importance on a particular space. In this case it is even more significant that it was an offshore space.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 30, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

11:08:22AM Q. And was there any information -- any facts in that
11:08:27AM information that provides a reasonable inference of
11:08:30AM regular and frequent fishing use by the Quinaults?
11:08:34AM A. No.
11:08:34AM Q. Could you walk us through the middle column with the
11:08:40AM Quileute Tribe's fishing distances?
11:08:43AM A. Yes. Again, there are more phrases here. Swan,
11:08:49AM 1861, talks about fishing at the mouth of the river. The
11:08:53AM Curtis one that says "well out from shore," has to do with
11:08:57AM that incident that has been discussed, where the Makahs
11:09:01AM were hiding in a cove. The Quileute salmon trollers went
11:09:07AM out well from shore on one morning, and then were attacked
11:09:10AM by the Makah.
11:09:12AM What I draw from that incident is that they probably
11:09:15AM were not out very far at all, because the people who were
11:09:20AM attacked broke in three directions. Some people went back
11:09:24AM to shore, some people went to James Island, and one guy
11:09:27AM went out farther into the water. But I think that they
11:09:32AM were actually -- when they were attacked they were not --
11:09:36AM that when Curtis talks about "well out from shore" he
11:09:39AM doesn't mean they were miles out.
11:09:44AM "Never went further than two miles into the sea."
11:09:49AM That is the Frachtenberg reference. "Along reefs and
11:09:52AM rocks," another from Frachtenberg.
11:09:54AM And then Singh talking about halibut near James

Island, south of Destruction Island; and saying that Hoh and Quileute generally did not attempt to obtain halibut, although the Hoh, who lived on Destruction Island, could get a few. And then he talks also about Hoh catching sea bass near Destruction Island.

The Dr. Powell interview with Hal George, it talks about the shallow flats about two miles out to jig for halibut. And that corresponds to the Frachtenberg two miles out into the sea.

And this last one is a little more problematic. It is in Daugherty's Hoh notes. "People took turns going out to halibut banks. Line of kelp dried in the sun. Get enough to reach bottom. Water not too deep, 50 to 60 fathoms." I checked with both Dr. Miller and Dr. Powell about that depth, just to make sure it was fathoms and not feet, and learned it was indeed fathoms. I would say here that the informant, Bill Hudson, was born sometime between 1880 and 1883. I have seen some different exact years for his birth date. But certainly his reference could be to fishing at halibut banks off of Cape Flattery, because of the -- you know, by the time that he was a young adult, he could have been fishing there. And that matches what we have heard about when Quileute people were fishing in that area.

Q. And did you find any other evidence about treaty time

11:11:45AM fishing that you found to be reliable that corroborated this reference to 50 to 60 fathoms?

A. I did not.

Q. And for the record, I will just briefly run through these exhibits. The Swan reference is Exhibit 283, at 35; Curtis is Exhibit 37, at 129; Frachtenberg is Exhibit 58a, at pages 129 and 130; Singh, Exhibit 277, at pages 24 to 25; Powell, Exhibit 220, at 11; and Daugherty, Exhibit 38, at 38.

None of these references in the middle column actually provide a distance, but you did state that your opinion was four miles at the beginning of your testimony this morning. Where did you get the four miles from?

A. The reason that I use the four miles figure is that it encompasses the actual mileages that are shown here, the two miles out. But it also -- if you take the four miles around Destruction Island, we don't know exactly where the bed is that Hoh talks about as being south of Destruction Island, but we've got a range to try to encompass that bed.

Q. So the four miles was based upon the distance of Destruction Island to the shore?

A. It was based on going along the shoreline four miles, and then going out around Destruction Island. Destruction Island is actually the eastern -- it runs kind of

11:13:28AM northeast/southwest. The eastern portion of it is
11:13:31AM actually about three miles off of the shore.
11:13:35AM Q. And what did you -- You included a column for Makah
11:13:38AM here. And what was your purpose for doing that, and what
11:13:40AM does it show?
11:13:41AM A. It was just to contrast the much larger distance --
11:13:45AM or longer distance that the Makah are fishing offshore.
11:13:51AM And there is that early explorer mention in 1791 of "as
11:13:58AM much as 10 or 12 leagues," which roughly translates into
11:14:05AM 30 to 36 statute miles, I think it is. It could be
11:14:10AM nautical miles. I'm not certain.
11:14:12AM And then there is a couple of references there to
11:14:14AM Swiftsure Bank from Swan and Singh -- well, Singh just
11:14:18AM says Swiftsure Bank, and Swan sets it at 15 to 20 miles
11:14:23AM west from the Tatoosh light.
11:14:25AM Q. And the first reference you mentioned for Makah, was
11:14:29AM that for someone that was on the ship Columbia, do you
11:14:34AM recall?
11:14:34AM A. I think so. I don't recall the exact --
11:14:36AM Q. And then the exhibit for that first one is
11:14:39AM Exhibit 105, at Page 238.
11:14:42AM Did you locate any other evidence regarding the
11:14:50AM Quileute suggesting that they regularly and frequently
11:14:55AM fished out more than four miles from shore for marine
11:15:00AM fish?

it. One of them is, if whales are most commonly encountered 30 miles offshore -- If you thought that the distance north to south of Quinault territory was maybe about 30 miles, then 30 miles north/south by 30 miles west is 900 square miles.

And there were very few whalers at treaty time, according to Olson. There were two men -- two brothers, and maybe their cousin. And the idea that they are going to be out covering 900 square miles, hoping to encounter a whale, just doesn't match, for me, with one of the things we know about their settlement subsistence system, which we looked at on that Singh chart that I modified, which is they had choices of things to do in the summertime. They could be ocean fishing instead of out patrolling this large area hoping to encounter a whale. There are other things that were more productive of resources with less effort, and with more certainty. And so it confuses me to see this. I don't understand why he says this.

Q. And how many of the villages would be involved in this whale hunt across 900 square miles of ocean territory?

A. Yes. Since each one of the whaling canoes had eight people in it, there would be 16 men involved in this search for whales, or 24, depending upon whether we are talking about two whaling captains or three. That's a

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 27, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

do you recall which ones right now?

A. Yes. Frachtenberg mentions that there was a halibut area that was within two miles from the beach, and Jay Powell actually found a name for that particular halibut bank, and he mentions that in his notebooks.

Q. And did Singh also mention a halibut bank?

A. Yes, Singh also mentions a halibut bank, one near James Island, and one the Hoh people accessed near Destruction Island.

Q. I would like to ask you a few questions about Agent McGlinn's reports. Where was he the agent?

A. He was the agent at Neah Bay.

Q. And do you know what years he was in office?

A. I believe it was 1890 to 1893.

Q. And did his report shed any light on Quileute treaty time subsistence activities?

A. No.

Q. Why not?

A. Because a snapshot at that time was not necessarily reflective of what was happening in 1855.

Q. His reports contain separate discussions of the Makahs and the Quileutes; is that correct?

A. That's correct.

Q. And for the Makahs, did he describe offshore fisheries?

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 17, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

09:11:20AM as from Barbara Lane, were in the river; is that correct?
09:11:24AM A. Barbara Lane, in one report, that is the report --
09:11:30AM the 1973 report, she stated that. In her 1977 report she
09:11:36AM stated that the marine fisheries was important as well.
09:11:40AM So those statements were specific to the task she was
09:11:43AM asked to undertake.
09:11:43AM Q. And we also have information that there were
09:11:51AM substantial fisheries along the coast for shellfish and
09:11:54AM for smelt; is that correct?
09:11:55AM A. Yes, that's correct.
09:11:56AM Q. Do you have any idea of how much land the Quileutes
09:12:01AM claimed they were using on a usual and accustomed basis
09:12:04AM for hunting?
09:12:05AM A. No, I didn't look into hunting for this.
09:12:09AM Q. We have hunting resources, we have in-river
09:12:15AM fisheries, we have coastal fisheries, and in your opinion
09:12:17AM we have some 2,500 square miles of ocean fisheries as
09:12:20AM well; is that correct?
09:12:21AM A. No, that is not correct. I would not include the
09:12:25AM entire 2,500 square miles as an ocean fishery. There is a
09:12:30AM considerable amount of the ocean that wasn't used.
09:12:34AM Fisheries are in places where you go on a regular basis.
09:12:42AM We would have to look at the total resource base. Because
09:12:46AM there are land resources, riverine resources, and ocean
09:12:50AM resources, we have to consider all of those together.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 16, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

02:05:19PM costly, if you were going to use beached whales
02:05:23PM exclusively. You wouldn't need the harpoons and all the
02:05:29PM other aspects of their culture that are so evident and so
02:05:32PM present.
02:05:35PM Q. Do you have an opinion on whether whales were
02:05:39PM important to Quinault at treaty time?
02:05:41PM A. Yes, I do.
02:05:43PM Q. And what is that?
02:05:44PM A. Whales were extremely important to the overall
02:05:47PM economy, to the society, to their religious life.
02:05:51PM Q. Do you have an opinion on whether whaling was a usual
02:05:55PM and accustomed activity at treaty time?
02:05:57PM A. I believe that whaling was a usual and accustomed
02:06:01PM activity at treaty time.
02:06:03PM Q. Now, Dr. Boxberger, I want to talk about some other
02:06:07PM marine mammals. In addition to whales, you listed a
02:06:09PM number of other marine mammals that Quinault harvested.
02:06:12PM One of those was sea lions. Do you recall that?
02:06:15PM A. Yes.
02:06:15PM Q. Where were the sea lions usually taken?
02:06:17PM A. Sea lions were usually taken, preferably, as they
02:06:23PM haul out of the water on rocks. They are very big. You
02:06:28PM don't want to get one in your canoe if it is still alive.
02:06:32PM They are very difficult to kill, because they are huge
02:06:35PM animals. While they could be hunted in the water,

continued through the period of the commercialization, and well into -- nearly to the middle of the 1900s. In other references to the fur seal industry, there are references made to all of the Indians between Grays Harbor and Cape Flattery participated in this. I think -- Well, I believe the evidence is clear that this was a traditional activity that carried over into the present until fur sealing began to dissipate.

Q. And is it your opinion that sealing was a usual and accustomed activity at treaty time?

A. Yes, it was a usual and accustomed activity at treaty time, that involved the same skill set that we see, the same regular expectation of the migratory paths, and the preparation to go out, the same tools were used that were used that we described and saw slides of with the Quileute. That leads me to the opinion that fur sealing was a usual and accustomed activity at treaty time.

Q. Is there any archeological evidence of Quinault's early ocean resource procurement?

A. No, there is not. There is very limited archeological evidence for the entire Quinault area. We saw how amongst the Quileute that the archeological data was extremely limited. That is even more true amongst the Quinault. There have never been any excavations done in Quinault territory, and there has been a few site reports,

02:31:39PM And as I described earlier, all of those villages tied
02:31:42PM together through the social system, the political system,
02:31:46PM through intermarriage, through interdependence. So those
02:31:51PM inland would focus more attention on things, as you see in
02:31:55PM the next part of the chart, like land mammal hunting.
02:32:01PM Those at the coastal village would focus on the resources
02:32:05PM of the sea and the lower stretches of the river at
02:32:10PM specific times of the year.
02:32:13PM So this is a nice overview that gives us an idea of
02:32:19PM the importance of the inland resources and the ocean
02:32:23PM resources in conjunction with one another. It is not
02:32:28PM exclusive of one or the other, it is part of a total
02:32:31PM picture of the economic system.
02:32:33PM Q. Now, Dr. Boxberger, you understand the issue in this
02:32:37PM case is the western boundary of the Quinault's usual and
02:32:41PM accustomed fishing activities, don't you?
02:32:42PM A. Yes, I do.
02:32:43PM Q. Can we see Exhibit 213, Page 44, PDF 24, please? Do
02:32:59PM you want to look where it says, "Whales" again? Can we
02:33:03PM have that highlighted a little bit? When Olson is talking
02:33:19PM about whaling, and he is talking about the different
02:33:22PM whalers that he describes here, does he at any point
02:33:27PM mention where the whales were hunted?
02:33:32PM A. Yes. Elsewhere he mentions 12 to 30 miles offshore.
02:33:38PM Q. Could we see -- Can we go down a little bit? Is

02:33:57PM that where he mentions it?
02:33:58PM A. Yes. "Whales were most often encountered 12 to
02:34:03PM 30 miles offshore."
02:34:05PM Q. Now, in his field notes does he ascribe this distance
02:34:08PM to a particular informant?
02:34:10PM A. No. I was unable to find any reference to this
02:34:16PM number, 12 to 30 miles offshore, in his field notes.
02:34:18PM Q. And do you believe that this came from someplace, or
02:34:24PM did he just make this up?
02:34:26PM A. No. Remember, Olson was a very careful field worker.
02:34:31PM He would not put information in his ethnography that he
02:34:35PM had not verified. So it is not at all unusual not to be
02:34:41PM able to find the reference in his field notes or the
02:34:44PM information in his publication, especially when it appears
02:34:48PM that parts of his field notes are missing. The fact that
02:34:53PM we cannot find it in his field notes does not indicate
02:34:57PM that it is something he made up, because he would not have
02:35:01PM done that. This is information he received from those
02:35:04PM people that he interviewed. We just don't know who he was
02:35:08PM talking to when he recorded these distances.
02:35:13PM Q. Can we go to Page 49, PDF 26, please? And can we go
02:35:22PM up to, "Seals." Can you call out that first sentence,
02:35:25PM please? Can you read that?
02:35:29PM A. "Usually it was necessary to go from 10 to 25 miles
02:35:32PM offshore in an ocean canoe to find fur seals."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

^ , 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

11:43:46AM A. I'm sorry. Could you state that again?
11:43:48AM Q. Looking at the descriptions of the Quileute diet in
11:43:51AM these observations on this slide, are you able to draw any
11:43:54AM findings or conclusions regarding their usual and
11:43:58AM accustomed fishing activities?
11:43:59AM A. Yes. It is oriented, as we see, towards maritime
11:44:05AM resources. Because these are the things that were
11:44:10AM emphasized, these are the resources that were important,
11:44:14AM it would follow that they were usual and accustomed
11:44:17AM activities.
11:44:18AM Q. Can we look at Exhibit B111, at PDF 6? Can we call
11:44:28AM out the two paragraphs starting, "The best accounts of
11:44:31AM whaling"? I notice in the second paragraph it states
11:44:38AM that, "The Makah and Quileute were familiar with about a
11:44:41AM dozen kinds of cetaceans." Is that consistent with the
11:44:46AM accounts you found regarding what species the Quileute
11:44:49AM traditionally harvested?
11:44:50AM A. Yes, it is.
11:44:51AM Q. Can we go to PDF Page 69? Can we call out the
11:44:59AM paragraph beginning, "In the ancient middens"? Professor
11:45:08AM Boxberger, did you review Reagan's work in this case?
11:45:11AM A. Yes, I did.
11:45:12AM Q. And what did Reagan observe regarding the species
11:45:17AM harvested at Quileute?
11:45:18AM A. Well, it points out here that he found porpoise,

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 10, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

04:17:08PM Q. And were you able to form an opinion as to whether
04:17:10PM the tribes, Quileute and Quinault, had usual and
04:17:16PM accustomed maritime offshore fisheries?
04:17:17PM A. Yes, I was.
04:17:18PM Q. And what was your opinion?
04:17:19PM A. That it was usual and accustomed activity.
04:17:24PM Q. And did that include prior to and up to treaty times?
04:17:27PM A. Yes.
04:17:28PM Q. And were these traits unique to Quileute and
04:17:33PM Quinault, or were they common among northwest outer coast
04:17:37PM cultures?
04:17:37PM A. They were common.
04:17:39PM Q. Now, you said that your opinions were on a more
04:17:44PM likely than not basis. Strictly from archeology from the
04:17:48PM middens, from the bones, are you able to say -- or would
04:17:52PM any archeologist be able to say with 100 percent certitude
04:17:57PM it has been concluded that these people fished out in the
04:18:00PM ocean?
04:18:00PM A. No, not with 100 percent certainty, because that kind
04:18:06PM of proof is very hard to attain in archeology.
04:18:11PM Q. But are you comfortable on a more-likely-than-not
04:18:15PM basis that they were fishing well out in the ocean?
04:18:17PM A. Yes, I am.
04:18:17PM Q. Did you review the archeological parts of
04:18:26PM Dr. Renker's litigation report in this case?

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 4, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

EXHIBIT INDEX

01:53:31PM Q. Thank you. When you first started introducing
01:53:41PM yourself you talked about linguistics and the field of
01:53:44PM linguistics. You described it as a scientific field, a
01:53:48PM scientific study.
01:53:49PM A. Yeah.
01:53:49PM Q. In the realm of science, my understanding is that you
01:53:52PM first come up with a hypothesis, and then you would come
01:53:54PM up with a means to test and validate that hypothesis to
01:54:00PM reach your conclusions --
01:54:01PM A. Yes.
01:54:01PM Q. -- is that accurate? So you have provided some
01:54:04PM opinions about which Quileute or Quinault words the
01:54:13PM translators would have chosen to translate from Chinook
01:54:18PM jargon into their native tongues. How did you test that
01:54:24PM hypothesis?
01:54:25PM A. Well, because it is a historical thing, and you can't
01:54:30PM do an experiment. The best you can do is look at the
01:54:33PM entire set of words that are available, and how those
01:54:38PM words normally are combined in Chinook jargon to produce a
01:54:44PM given meaning. And then you say, well, that is probably
01:54:47PM the way it was expressed. Because as Swan pointed out in
01:54:51PM his thing about -- his testimony about Chinook jargon, it
01:54:58PM is very far from a perfect tool to use. But it is the one
01:55:01PM they had. You use what you have. To get a flavor of the
01:55:08PM circumlocutions, the gymnastics you go through, if you

about.
Q. So the Quileute has thousands of words. And the Quinault, how many words --
A. About the same. Of course, the dictionaries we have are incomplete. A lot of things -- the lists are not known. But they are full, natural languages, and they have all the words you would want for everyday life. But they don't have like rennaisance words, legal-type words. They don't have words from the industrial revolution.
But, of course, at the time the treaties were negotiated you don't have words like telephone, or even spaghetti or pasta. Those come in in the 1870s. Even those kinds of words aren't available to Stevens.
Q. Thank you. It is one thing to look at a limited word set like the Chinook jargon and say, well, it is most likely that they used this word, because there are so few other alternatives, but how are you able to provide an opinion, saying more likely than not they would have used this particular Quileute word or Quinault word to translate from the Chinook jargon to those native tongues?
A. Because those are the words we have in, for example, the Quileute text, which are used in those kind of situations. We just had one this morning where you don't have a word that means chinook salmoning. You have the fish -- the ^ alcata word is right there, to fish for

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213RSM
	)	Subproceeding 09-01
v.	)	
	)	
STATE OF WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

TRIAL

BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

March 3, 2015

APPEARANCES:

MICHAEL GROSSMANN - STATE OF WASHINGTON
JOSEPH PANESKO - STATE OF WASHINGTON
JOHN TONDINI - QUILEUTE TRIBE
LAUREN KING - QUILEUTE TRIBE
JEREMY LARSON - QUILEUTE TRIBE
ERIC NIELSEN - QUINAULT TRIBE
RAY DODGE - QUINAULT TRIBE
CRAIG DORSAY - HOH TRIBE
LAUREN RASMUSSEN - PORT GAMBLE & JAMESTOWN S'KLALLAM TRIBE
MARC SLONIM - MAKAH TRIBE
BRIAN GRUBER - MAKAH TRIBE
BETH BALDWIN - MAKAH TRIBE
RICHARD BERLEY - MAKAH TRIBE
JOSHUA OSBORNE-KLEIN - MAKAH TRIBE
MASON MORISSET - TULALIP TRIBE
EARLE LEES - SKYKOMISH TRIBE
JAMES JANNETTA - SWINOMISH TRIBAL COMMUNITY
HAROLD CHESNIN - UPPER SKAGIT TRIBE
MARY NEIL - LUMMI TRIBE
KEVIN LYON - SQUAXIM ISLAND TRIBE

EXAMINATION INDEX

linguistics, computational linguistics, mathematical linguistics. And I studied Endoeuropean languages as part of European historical linguistics, and taking language courses in Sanskrit, Homeric Greek, Hittite. That's H-I-T-T-I-T-E. The language Hittite. Old Icelandic, among European languages. Also, comparison and structures, the Uralic languages, U-R-AL-I-C. Uralic languages. The best known are Finnish, Estonian, and Hungarian, and a large number of languages lesser known across Russia. The farthest to the east -- farthest is Samoyed. That is the historical comparison of languages. That's the breadth and depth of training in linguistics.

Q. How many years have you worked as a linguist?

A. Almost a half century. Probably 47 years.

Q. Dr. Hoard, have you previously testified as an expert witness where you were asked to opine as a linguistics expert?

A. Yes, once in 1974. It was a trademark case. The plaintiff -- I represented the plaintiff that was hired by them (sic), Dictaphone versus DictaMatic. Dictaphone sued DictaMatic for trademark infringement. And I realized that the possibility of confusion existed for two reasons, the words were similar, and they were in the same field, dictating equipment.

So I searched the literature for experimental tests in

09:29:48AM psycholinguistics. And indeed those experiments showed
09:29:52AM that people tend to confuse words if they begin the same
09:29:55AM but end in a different manner.
09:29:58AM Q. Do you have an area of concentration within the field
09:30:01AM of linguistics?
09:30:02AM A. I have several areas, especially phonetics and
09:30:07AM phonology, semantics and pragmatics, and mathematical and
09:30:10AM computational linguistics.
09:30:12AM Q. Do you currently hold an academic position?
09:30:14AM A. Yes. I am an affiliate professor of linguistics at
09:30:18AM the University of Washington. I have had that title since
09:30:21AM 1990.
09:30:23AM Q. What other professional positions have you held?
09:30:26AM A. My first teaching position when I was an academic
09:30:29AM linguist was at the University of Kansas. But then I
09:30:32AM moved to the University of Victoria. I have visiting at
09:30:37AM the University of British Columbia. And then I joined the
09:30:40AM University of Oregon. At the University of Oregon I was
09:30:43AM professor of linguistics and English. And so I taught a
09:30:47AM wide range of courses in linguistics over the years,
09:30:50AM including articulatory, acoustic phonetics, phonology,
09:30:54AM syntax, semantics, applied anthropological linguistics,
09:31:00AM the history of English, and advanced English grammar at
09:31:05AM 400 and graduate levels.
09:31:07AM Q. What is anthropological linguistics?

09:33:10AM 1 inland from Prince Rupert.

09:33:13AM 2 At the University of Oregon I had one student who was

09:33:16AM 3 a speaker of Nez Perce. That is a Sahaptin language,

09:33:20AM 4 spoken mostly in western Idaho. So I got a bunch -- some

09:33:27AM 5 things in Nez Perce. One of my students wrote a Ph.D.

09:33:33AM 6 in -- on Nez Perce. He completed that after I left the

09:33:37AM 7 University of Oregon.

09:33:39AM 8 I also worked a little bit with the last speaker of

09:33:43AM 9 Chetco. That is an Athabascan language spoken on the

09:33:48AM 10 Oregon coast -- southern Oregon coast.

09:33:52AM 11 Q. Just to make sure I understand, your work with the

09:33:55AM 12 Quileute language was over the course of four years?

09:33:58AM 13 A. Plus I visited, just on my own initiative, a time or

09:34:02AM 14 two to La Push. And then Mr. Woodruff, whom I worked

09:34:07AM 15 with, visited my family and I in Victoria on an occasion

09:34:12AM 16 or two when I taught at the University of Victoria.

09:34:15AM 17 Q. Have you published any articles or books in your work

09:34:18AM 18 on Indian languages?

09:34:20AM 19 A. Yes, articles on Indian languages, on syllabication,

09:34:28AM 20 syllables in Pacific Northwest languages, and an article

09:34:31AM 21 on Quileute tongues, and one on Gitxsan phonology.

09:34:37AM 22 Q. Now, you mentioned in your work with Quileute you

09:34:40AM 23 worked with an informant named Fred Woodruff?

09:34:42AM 24 A. Yes.

09:34:43AM 25 Q. Can you tell me a little bit more about what the work

visited the La Push in about 40 years.

Q. So you have consulted the materials of Andrade, who was there in 1928, and Frachtenberg, who was there in 1916?

A. Yes.

Q. Anything else?

A. Not at that time. There was nothing else published on Quileute.

Q. Can you estimate the number of linguists there have been throughout the United States' history who have focused their work on Native American languages?

A. Probably less than one per language overall. There has been some increase in number of linguists trained. So it has probably gone up in the last 25, 30 years. Often a given linguist, for example, the great anthropologist and linguist Franz Boaz worked on multiple languages. That was true for his student Edward Sapir, who worked on multiple languages. A lot of languages got some treatment, even if there was less than one linguist per language.

Q. Have you done work with the Quinault language?

A. No.

Q. What resources have you consulted in your work, if any, on the Quinault language?

A. A woman named Ruth Modrow in the '70s gathered and

09:37:53AM put together enough vocabulary for a dictionary of
09:37:58AM Quinault, and also a very brief grammatical sketch.
09:38:01AM Q. Is that the only published work on the Quinault
09:38:04AM language?
09:38:04AM A. So far as I know.
09:38:05AM Q. Let's turn to Chinook jargon. You mentioned you had
09:38:10AM some experience in Chinook jargon; is that right?
09:38:13AM A. I worked in the summer of 1967 with perhaps one of
09:38:18AM the very last fluent speakers of Chinook jargon, someone
09:38:21AM who knew it, a fellow named Charlie Scarborough. He was a
09:38:27AM descendent of Chief Comcomly, the well-known chief of the
09:38:32AM Chinooks when the Americans and British first arrived on
09:38:36AM the Columbia River. His daughter married Captain
09:38:38AM Scarborough of the British Navy. He was the second of
09:38:42AM Scarborough and Comcomly's daughter. While the Chinook
09:38:47AM language had died, he had learned, perhaps -- I think in
09:38:51AM 1890, he was old when I met him -- the Chinook jargon.
09:38:56AM That was the trade language used between the whites and
09:38:58AM the Indians in all of the early -- from about 1800 until
09:39:02AM about 1900, roughly.
09:39:04AM Q. And did you learn how to speak the Chinook jargon?
09:39:08AM A. I became fairly proficient at the time, but since I
09:39:11AM had no one to talk to but Charlie, and when I stopped, the
09:39:17AM fluency quickly dies down. I remember a lot of words and
09:39:19AM phrases in Chinook, but I haven't tried to practice

11:16:13AM beginning, "Only Hauwayal"?
11:16:22AM A. "Only Hauwayal treated very well by the white people
11:16:24AM when they grounded on the rock. Hauwayal took good care
11:16:28AM of the white people."
11:16:29AM Q. Who was Hauwayal?
11:16:30AM A. He was one of the subchiefs of the Quileute, and he
11:16:35AM participated in the negotiations at Taholah.
11:16:41AM Q. Did any of the minutes of any of the Stevens treaties
11:16:45AM record how Article III was communicated by Shaw into the
11:16:51AM Chinook jargon?
11:16:51AM A. No. None of the translations of the jargon are given
11:16:54AM at all.
11:16:54AM Q. Do we have any evidence of the extent of Hauwayal --
11:17:06AM THE COURT: Wait until she finishes her question,
11:17:12AM and then you can answer. Because otherwise --
11:17:14AM THE WITNESS: I'm sorry. I apologize.
11:17:17AM BY MS. KING:
11:17:18AM Q. Do we have any evidence of the extent of Hauwayal's
11:17:22AM vocabulary in Chinook jargon at treaty times?
11:17:26AM A. No.
11:17:27AM Q. Did anyone record what was said in the Indian
languages at the treaty councils?
A. No.
11:17:33AM Q. In your research on this case, did you look into the
11:17:34AM Chinook jargon terms that may have been used in the treaty

anything.
Q. You mentioned that is one actual mention of jargon in the minutes taken?
A. Yes. He says that Colonel Simmons addressed the jargon, and gives the jargon text.
Q. What about the text relating to Article III?
A. No.
Q. Were there any other jargon --
A. As far as I know you don't see jargon words, except maybe accidentally.
Q. Were there any other jargon translations provided in the treaty minutes taken by Gibbs?
A. Not generally, no.
Q. Did you look into how the Indian interpreters for Quinault and Quileute might have translated the jargon terms into their own languages?
A. Yes.
Q. How might the treaty have been communicated in Quileute?
A. In the term "taking fish" or "fish" generally?
Q. Yes.
A. On the next slide I have -- As I briefly mentioned before, the Quileute word "aalita" for fish or food, in the Powell dictionary. And the Quileute word "k'emken," for fish or food. Fish is basically the cover term on the

12:01:00PM THE COURT: You would not be the first juror I ever had to object. That would be a little out of the ordinary. Because I wanted everyone to have the ability to be engaged in this, if you do have -- Let me tell you what my philosophy is. My philosophy is going to surprise you a little bit, because it goes back to what Mr. Tondini said, I -- and Mr. Slonim said earlier, too. My intent here is to allow as much of the evidence to come in as possible, as makes sense, have the flexibility of doing that, because it is a bench trial. Whether or not I use something later on, or whether or not I give weight to something later on, obviously that is totally different.

If you intend to object to something that you think is important, obviously you would. That's why you would be objecting. And if you think it makes sense at that point in time to object at that point, then by all means, get my attention, stand up, and then we will put your objection on the record.

If you think that, no, it can wait -- Because I am going to give you an opportunity to do any follow-up questions, and then maybe do a follow-up question, or object at that point in time, to a line of questioning that took place earlier, as Mr. Panesko did, then we can always put that on the record subsequently.

MS. RASMUSSEN: Yes, your Honor. So the way we

03:44:24PM 1 **Q. But he had about six years of diaries. About how**
03:44:28PM 2 **much of that would you say that you reviewed?**
03:44:29PM 3 **A. At least half or more. I skimmed just about all of**
03:44:33PM 4 **it, just kind of skimming along. But, in particular, I**
03:44:37PM 5 **looked around 1861, was an interesting year, because**
03:44:42PM 6 **that's when he went down to La Push and so on. There are**
03:44:46PM 7 **various periods where he draws your attention to it, not**
03:44:50PM 8 **necessarily every year.**
03:44:51PM 9 **Q. You spent time -- you testified about spending time**
03:44:53PM 10 **at Quileute in the late '60s and early '70s; is that**
03:44:57PM 11 **right?**
03:44:57PM 12 **A. Yes.**
03:44:58PM 13 **Q. And you were gathering information about the Quileute**
03:45:00PM 14 **language?**
03:45:00PM 15 **A. Yes.**
03:45:00PM 16 **Q. And are you familiar with the 1976 or the 2008**
03:45:08PM 17 **Quileute dictionaries?**
03:45:09PM 18 **A. Yes.**
03:45:09PM 19 **Q. You didn't work on either of those works?**
03:45:12PM 20 **A. No.**
03:45:12PM 21 **Q. Have you ever served as an interpreter between**
03:45:17PM 22 **Quileute and English as it is spoken?**
03:45:19PM 23 **A. No.**
03:45:19PM 24 **Q. Before this case, did you ever translate English text**
03:45:25PM 25 **into Quileute?**

03:45:25PM A. No.

03:45:26PM Q. What was your familiarity with the Quinault language

03:45:31PM before working on this case?

03:45:32PM A. Just in the most general way. I knew it was a Salish

03:45:38PM language, related closely to Chehalis. But I have no

03:45:42PM special vocabulary in mind or anything else. I know what

03:45:49PM is said about the languages and their relations.

03:45:52PM Q. You have never interpreted between Quinault and

03:45:54PM English?

03:45:54PM A. No.

03:45:55PM Q. And you never translated text between English and

03:45:58PM Quinault?

03:45:59PM A. No.

03:45:59PM Q. Can you speak Chinook jargon?

03:46:03PM A. Not now. I could do fairly well in 1967, but not

03:46:07PM now. It is too many years passed.

03:46:11PM Q. Have you ever interpreted between Chinook jargon and

03:46:14PM English as it is spoken?

03:46:16PM A. No.

03:46:16PM Q. The most you have done in terms of translating

03:46:19PM written phrases between Chinook jargon and English are

03:46:24PM short sentences?

03:46:25PM A. Yes.

03:46:25PM Q. What is your familiarity -- what was your familiarity

03:46:28PM with the Makah language prior to this case?

03:46:31PM A. Again, I had heard -- seen papers by Bill Jacobsen, things presented at conferences that mentioned Makah. And I knew Bill Jacobsen for many years from the mid '60s until his death this past year. I knew Bill very well.

03:46:51PM Q. But you hadn't engaged in any systematic study of the Makah language?

03:46:55PM A. I'm sorry?

03:46:56PM Q. You hadn't engaged in any systematic study of the Makah language?

03:47:00PM A. No, not at all.

03:47:01PM Q. Back to your familiarity with the Chinook jargon, this was back in the 1960s when you were speaking it, correct?

03:47:13PM A. Yes. When I first worked with Charlie Scarborough. That was just for a period of a month or so, perhaps a little longer, in the summer of 1967.

03:47:24PM Q. Did you ever speak Chinook jargon with anyone else besides Charlie Scarborough?

03:47:29PM A. Not that I know, no. I don't remember that I did, no.

03:47:32PM Q. Would you consider yourself an expert in the history or culture of native peoples?

03:47:37PM A. Not an expert. There are people who devote their careers to it.

03:47:44PM Q. You are not a historian, are you?

INDIAN AGENCY, NEAH BAY, WASH.,
August 7, 1879.

SIR: In compliance with instructions received, I herewith transmit my second annual report of this agency.

The tribes under my supervision, *Makahs* and *Quillehutes* will, ere long, unless some powerful disturbing element interferes, become one people. The approach to this has been most rapid during the past year. Several cases of intermarriage have

Exhibit 09.01.352

occurred, while mutual good feeling and a strong desire for close unity is observable throughout. Both are an industrious people, with pursuits in common, interests more in common than ever before, and both are also extremely loyal to the United States Government, and obedient to its officers under whose immediate care they are placed. Add to this their friendly feeling toward the whites, whether strangers or whites of whom they have some knowledge, and the establishing of a mail route between the settlers in the Quillehute Valley and this agency; the close proximity of the tribes to each other (the nearest village of the Makahs, "Hoselt," being but 16 miles from the head village of the Quillehutes); the breaking down of the strong barrier of mistrust and jealousy which two years ago held them aloof from each other; all unite in bringing about the amalgamation with these two tribes, so assimilated and peaceably disposed; and if, at any future period, it should be the will of the government to move these Quillehutes on to the reservation, and into the midst of the Makahs, I am satisfied no force will be needed in their case; and although they are naturally endeared to the homes of their forefathers, and express constantly strong fears in this respect, yet I am certain, if the mandate went forth, they would be sadly obedient. And the day will come when this removal will be necessary, for the country they occupy is fast becoming settled; a long stretch of rich loamy prairie extends inland, and it is already dotted with the homes of several families of whites; and these people are sending forth, through the press and otherwise, glowing accounts of this section, while they are already driving their fat stock into the distant markets, and have an established mail route. There can be no doubt, then, that as settlers will surely come in, the necessity for moving these Quillehutes on to the agency will become obligatory.

I would state, however, that at present I think it would not be good policy to move the Quillehutes. There is, and will be for some time to come, sufficient room for both whites and Indians. The Quillehutes themselves give a passive assent to their country being settled, and were it not for the dread of removal, would be more than content, while the settlers need their services, and have no difficulty in obtaining them; in fact, it is to the settlers' interests that these people remain. Again, the Indians are exceedingly moderate, so far as land is concerned; they are not agriculturists, and the land needed by them is in the immediate vicinity of their homes. They are not a scattered people, but dwell principally in one large village, and close to the coast line, where they have on several occasions been instrumental in saving the life and property of sufferers by shipwreck, who invariably receive the greatest care and attention from them, even when expecting no remunerative return. I would therefore urge upon the government that the Quillehutes be permitted to remain in their present homes, and not to be removed on to the reservation until it becomes a necessity, as their homes are but a short distance beyond the limits of the reserve. An order for their removal was given some time ago, but was, happily for them, canceled.

AGRICULTURE AND PROGRESS.

Of the agency farm, situated at Hobuck, and distant from the agency four miles, it may be stated that the sandy nature of the soil, and the want of fertilizing material will compel me to discontinue it as a farm, and to let the whole area become a stock range. I purpose breaking new ground at a distance from the present farm site, and nearer the agency, for any additional produce that may be required beyond what can be grown at the agency or Neah Bay Village. My crops at the farm this season will be unsatisfactory, and it would be folly to waste seed and labor another year.

The land under crop at Neah Bay Village and the agency (distant two miles from each other) will bear a better yield; particularly that portion cultivated by the boys of the Industrial School, and if the weather and the worms permit, I shall have a moderately fair yield. The spring weather was extremely late this year, and the humidity of the climate at certain seasons is a great drawback to crops.

With reference to agriculture by the Indians, the accompanying statistics will show a marked improvement in this direction, at least for the people. It should be thoroughly understood that agriculture with these tribes is not an absolute necessity, and will never be in great favor with them. This is not from any distaste for these pursuits, nor from habits of indolence; far from it. I question if the United States Government has in its dominions Indians more industrious than these Makahs and Quillehutes; but their industry tends in another direction. The ocean and Straits of Fuca, upon whose shores they dwell, gives them all they need, and with no niggard hand. The supply never gives out; and, above all, it is an immediate return for their exertions. Little as they have tried agriculture, they are aware that this industry has many drawbacks; that to clear, plow, and plant, meets at times with an uncertain harvest. The army worm and rust made havoc with the crops last year, and the same drawbacks are experienced this year; though so far not to the same extent; whereas to fish is to give them certain returns, and is moreover exceedingly remunerative. Whale, fur, seal, salmon, and dogfish are the main features of their industries, and as they find a ready market, considerable sums are annually realized by them; and, being a race of fish-eaters, they take

FIFTY-NINTH ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR.

1890.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1890.

09--01-B063.1

age for the stock, but in winter and early spring the land is covered with water, and has many swamps and quagmires, where the weak and half-starved cattle seeking food perish. The land, if diked and ditched, could be made to produce oats, hay, potatoes, and roots of all kinds in abundance. I have cut about 25 tons of wild hay on these tide-lands this summer, but, owing to the humidity of the climate, found great difficulty in saving it. I think strongly of reclaiming about 50 acres in the Wa-atch Creek bottom, but would be obliged to have some assistance from the Indian Department to carry my plans out. With 50 acres of this rich bottom-land brought into cultivation I could insure abundance of hay for the cattle, and enough potatoes and roots to supply the boarding-school each year.

The produce raised for the support of the boarding-school, and cultivated by the school boys, under the supervision of Mr. Govan, our energetic industrial teacher, whilst it does not reach my expectations, yet, I think, is away beyond the average for many years. We will have fully 600 bushels of fine potatoes, 2,500 head of cabbage, and several tons of turnips, carrots, beets, etc. The 5 acres of oats I was obliged to cut for hay, as we had no means of thrashing it.

The Quillayute Indians are located about 35 miles south of Cape Flattery. I visited them last fall, and again in May. To go to Quillayute either by the trail over Pysht Mountain for 40 miles or by the Pacific Ocean in a canoe is not a pleasure trip by any means. I have tried both routes, and am undecided which is the roughest. When I was on the back of an Indian pony, climbing the mountains and holding on for dear life, I regretted I had not taken the route by the sea. On the ocean, in a frail canoe, every motion felt, sometimes on the crest of a mighty wave, and then diving down in the trough of the sea until the land was lost to our view, I was then quite positive that the mountain trail was the smoothest.

On February 19, 1889, President Cleveland, by an Executive order, set apart a little over 800 acres of land as a reservation for the Quillayute Indians, "Provided that this withdrawal shall not affect any existing valid rights of any party." The proviso leaves the Indians precisely as it found them, as most of the land withdrawn had been taken up previously by whites under the homestead and pre-emption laws. Not an acre that is worth anything to them is left. Their village, their homes, and what has been the homes of their fathers for generations, as the immense shell mounds prove, has been homesteaded by a white man, who has erected his dwelling-house in the center of this village.

Shortly after the Quillayute Indians left their village last September, on their annual pilgrimage to the hop-fields of the Puyallup Valley, twenty-six of their houses were destroyed by fire, with all they contained, consisting of whale and fur-sealing outfits, canoes, oil, etc. After the fire Mr. Pullen, the settler, sowed grass-seed on the site of the burned homes, inclosed it with a barbed-wire fence, and not satisfied with doing this, fenced them off from every other available location by five strands of barbed wire. With the $1,000 appropriated by the Indian Department to assist them in repairing their loss I purchased 55,100 feet of lumber, together with doors, windows, nails, etc. Being fenced off from the hill, they were compelled to erect their new houses on the beach, where they are very much exposed to the fury of the ocean and their houses in danger of being destroyed by the high winter tides. At the present writing they have fourteen houses completed and twelve nearly so. They are all very comfortable buildings.

I do not care to enter into the rights or wrongs in this case, but I do claim that it would be heartless and cruel to evict those inoffensive Indians from their homes, the resting place of their forefathers, and the dearest place on earth to them. If Mr. Pullen has legal rights, which I presume he has, in justice to these poor, defenseless Indians, this right should be condemned by the Government, and Mr. Pullen paid a fair valuation for it. It is to be hoped that some decision may be arrived at in the near future, and that this vexed question be settled for all time.

All these coast Indians are as superstitious as the natives of Central Africa. The influence that the native doctor has over them is astonishing; even the young men and women who have had several years' training in school are not free from it. Most of them firmly believe that the medicine men have power to blast their lives or kill them by the power of their magic. You may reason with them, laugh and scoff at their fears, but all is if no avail, their superstition still remains.

The adult Indian knows comparatively nothing regarding religion or morality. Marriage to them is not the sacred bond when two loving hearts are united "so long as both shall live," but a business transaction, to be dissolved at the pleasure of either party, without even the formality of a divorce court. I have married thirteen couples in the past year, but have declined to separate any. I have been very strict with them in this matter, and have punished several for infidelity towards each other.

The Episcopal Church I understand established a mission here some years ago, but for some cause abandoned the field. I think there has been a great mistake made. Civilization and Christianity should go hand in hand for either to be effective among a barbarous people. No doubt the children instructed in Christian doctrine and mor-

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213 RSM Subproceeding No. 09-01 NOTICE OF APPEAL

TO: THE CLERK OF THE ABOVE-ENTITLED COURT; and

TO: ALL PARTIES OF RECORD

Notice is given that the State of Washington hereby appeals to the United States Court of Appeals for the Ninth Circuit from the District Court's Finding of Facts and Conclusions of Law and Memorandum Order, Docket No. 369, entered July 9, 2015, the Amended Order Regarding Boundaries of Quinault and Quileute U&As, Docket No. 394, entered September 3, 2015, and from the Amended Judgment in a Civil Case, Docket No. 395, entered September 3, 2015. The State also assigns error to earlier non-final rulings and orders that merged into the final judgment.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

The State of Washington's Representation Statement is attached to this Notice, as required by Ninth Circuit Rule 3-2.[1]

DATED this 23rd day of October, 2015.

ROBERT W. FERGUSON
Attorney General

s/Michael S. Grossmann
MICHAEL S. GROSSMANN, WSBA 15293
Senior Counsel
1125 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0111
Attorneys for State of Washington
(360) 586-3550
E-mail: mikeg1@atg.wa.gov

s/Joseph V. Panesko
JOSEPH V. PANESKO, WSBA 25289
Senior Counsel
1125 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0111
Attorneys for State of Washington
(360) 586-0643
E-mail: joep@atg.wa.gov

[1] The State of Washington's Representation Statement includes only those parties who have filed a notice of appearance in Subproceeding 09-1. The actual List of Parties to Case No. C70-9213 is available on PACER, however, that list consists of more than 140 pages and the majority of the parties listed therein have not appeared in this subproceeding.

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213 Subproceeding No. 09-1 STATE'S REQUEST FOR DETERMINATION RE: QUILEUTE AND QUINAULT U&A FISHING GROUNDS IN THE PACIFIC OCEAN

I. REQUEST FOR DETERMINATION

Defendant State of Washington ("Washington") requests a determination of the breadth of the Pacific Ocean off reservation usual and accustomed grounds and stations (U&A) in which Plaintiff-Intervenor Quileute Indian Tribe ("Quileute") and Plaintiff-Intervenor Quinault Indian Nation ("Quinault") have reserved the right of taking fish in common with citizens of the State. Specifically, Washington seeks a determination of the western boundary of the Quileute and Quinault U&A fishing grounds previously adjudicated for the case area in Final Decision # I (*United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974)) because it is acknowledged that the prior U&A findings provide no precise definition of the western limit of these U&As within the case area. In addition, because Quileute and Quinault claim additional

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

and abundance of that species for offshore waters adjacent to Quinault U&A fishing grounds that that Washington alleges have not and could not be identified as Quinault U&A fishing grounds and stations considering anthropological evidence of pre-treaty fishing by Quinault.

Coastal Dungeness Crab Fisheries

13. In 1989, the *United States v. Washington* Tribes and the United States invoked the Court's continuing jurisdiction to adjudicate the extent to which the treaty right of taking fish applies to shellfish — *United States. v. Washington* subproceeding 89-3 (the "Shellfish Subproceeding"). After a trial, the Court concluded that all shellfish species are "fish" for purposes of the off-reservation right to take fish in common with Washington citizens reserved by the Stevens Treaties, and that "the Tribes have the right to take shellfish at those usual and accustomed grounds and stations adjudicated in" the Boldt Decision. *United States v. Washington*, 873 F. Supp. 1422, 1430-31 (W.D. Wash. 1994), *aff'd*, 157 F.3d 630 (9th Cir. 1998). Like Judge Boldt, Judge Rafeedie determined that equal sharing of "the harvestable fish passing through the usual and accustomed places" was equitable. 873 F. Supp. at 1445, *aff'd*, 157 F.3d at 651-52. Judge Rafeedie made it plain that he was relying upon the places adjudicated in prior proceedings, holding that "the Tribes have the right to take shellfish *at those usual and accustomed grounds and stations adjudicated in Washington I.*" 873 F. Supp. at 1431 (emphasis added).

14. To give effect to its judgment, the court entered a separate implementation order. *United States v. Washington*, 898 F. Supp. at 1453, *rev'd in part*, 157 F.3d at 656. An amended Shellfish Implementation Plan was entered in 2002 (Dkt. No. 17340/14331). The Implementation Plan applies to fisheries pursued by Quileute, including coastal Dungeness crab. The plan does not apply to fisheries pursued by Quinault, but Washington and Quinault have entered into a stipulation affirming that they are jointly bound by the Court's prior interpretation of the Stevens Treaties and also by the construction of those Treaties for purposes of shellfish harvesting.

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Washington and Quinault agreed to work cooperatively when planning for coastal fisheries within Quinault's U&A fishing areas. (Dkt. 14756) Good faith implementation of the plan, or related treaty sharing principles where the plan is not in effect, requires an accurate understanding of the breadth of tribal U&A fishing grounds.

15. Section 2.5 of the Implementation Plan outlines the sharing principles that apply to the harvest of shellfish. "Each Tribe may take . . . up to fifty percent of the sustainable harvest biomass of any shellfish species [including coastal Dungeness crab] within the usual and accustomed areas for that Tribe." If a sustainable harvest biomass cannot be calculated, the harvestable crab must be determined using the best fishery management information that ensures conservation and maintains continued productivity. Intertribal allocations for overlapping usual and accustomed grounds are to be determined between the affected tribes.

16. For over a decade, Quileute and Quinault have insisted that the amount of coastal Dungeness crab to be shared must be based on the portion of the crab associated with the geographic area described in the federal groundfish rule, 50 C.F.R. § 660.324(c)(2) rather than the portion of the crab associated with the much smaller U&A fishing grounds adjudicated in the Boldt decision, as Judge Rafeedie ordered. That area has a seaward boundary more than forty miles offshore, while the adjudicated Quileute and Quinault U&A fishing grounds cover only tide and saltwater areas adjacent to rivers along the coastline within the case area encompassed by Washington's three mile territorial sea.

17. Coastal Dungeness crab is not a highly migratory species and is widely distributed in coastal waters from nearshore areas to offshore areas as deep as 60 fathoms. The 60 fathom line varies in its distance from shore, but is roughly 18 to 20 miles from shore along the Washington coastline. Accordingly, substantial portions of coastal Dungeness crab are associated with offshore waters beyond three miles.

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

18. Following the conclusion of the Shellfish Subproceeding, Quileute and Quinault began to develop offshore crab fishing fleets. In the early years of the development of their crab fishing fleets, Quileute and Quinault were generally unable to take half of the available crab. As the capacity of their fleets developed, the State negotiated separate annual Dungeness crab management plans with Quileute and Quinault in an effort to meet the anticipated harvest objectives of each tribe. As a part of that process, the State began to employ management techniques to constrain its own larger crab fleet. Some of the constraints on the state fleet involved delayed openings of the state fishery to provide coastal tribes with early exclusive access to the crab resource, the creation of special management areas that would be available exclusively to tribal fishers for all or a portion of the annual crab season, and crab pot or other gear limits.

19. These limitations on the state crab fleet have an impact on state fishers that go beyond merely constraining the overall amount of crab taken by that fleet. Providing exclusive access geographically and temporally means that state fishers often experience a higher cost per unit of effort as they have to travel further distances to reach available fishing areas or fish on grounds that have already been fished over by tribal fleets. The State has been willing to proceed on this basis because it has been able to negotiate annual management plans that allow state fishers to harvest more than half the coastal Dungeness crab resource while tribes work to expand their harvest capacity.

20. The issue of whether Quileute and Quinault have offshore U&A fishing grounds that entitle them to share in Dungeness crab associated with these waters has been a continuing source of conflict and debate, together with the extent of any constraints that should be imposed on state fishers. On three occasions, the Quileute Tribe has invoked the continuing jurisdiction of this Court to weigh in on appropriate constraints to the State's crab fishing fleet, including offshore waters adjacent to the adjudicated Quileute U&A (*See* Dkt. No. 15444 — Request for special master relative to the 1995-96 crab fishery; Dkt. No. 15932 — Request for special master

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

relative to the 1996-97 crab fishery; and Dkt. No. 18247 — Request for dispute resolution proceeding relative to the 2005-06 crab fishery, denominated as Subproceeding 89-3-04). The issue of the western breadth of the Quileute coastal U&A and the extent of the Dungeness crab to be shared was a precipitating factor for the disputes between the State and Quileute in each of these proceedings, but Quileute's entitlement to claim treaty fishing rights in these offshore areas has never been fully resolved by this Court. While annual management agreements or working arrangements have been negotiated for the management and utilization of coastal Dungeness crab, the parties have continued to reserve their rights to assert their respective positions on the issue of the geographic scope of Quileute and Quinault U&A coastal fishing areas.

21. From time to time, Quileute has promulgated regulations or proposed coastal fisheries citing the Queets River as the southern limit for their coastal water U&A fishing grounds. *See, e.g.*, Ex. D to Washington's Pre-Hearing Brief in Subproceeding 89-3-04, Dkt. No. 18264, "Quileute Indian Tribe Dungeness Crab Regulations 2005/2006"). However, Judge Boldt's adjudication of Pacific Ocean U&A fishing grounds for Quileute refers to "adjacent tidewater and saltwater areas" for rivers no further south than the Hoh River — FF 108 in Final Decision # I. George Dysart, one of the original Department of Justice Attorneys who handled *Washington I*, prepared a map for the Bureau of Indian Affairs in 1977 depicting the "Usual and Accustomed Fishing Places of Certain Western Washington Treaty Tribes." This map identifies the area "adjacent" to the Hoh River based upon Abbey Island, a small island two nautical miles south of the Hoh River.

22. Quileute's adjudicated Pacific Ocean U&A fishing areas extend no further south than the Hoh River. Continued fishing by Quileute in Pacific Ocean waters south of the Hoh River, sometimes as far south as the Queets River, appreciably complicates catch accounting and annual management planning between Washington, Quileute and Quinault, including the extent to which constraints must be placed upon state fishers to meet the State's obligations

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

under the Shellfish Implementation Plan and the general sharing of fish that are subject to treaty harvest.

23. As the Quileute and Quinault crab fleets approach the ability, or claim to have the ability, to harvest up to half of coastal Dungeness crab in nearshore *and* offshore waters within, and adjacent to, their adjudicated U&A areas, management planning grows more complicated and difficult. Where half the crab is claimed from all nearshore and offshore waters, it is difficult to justify the continued use of management techniques that provide special timing and geographic advantages to the tribal fleets, but that disadvantage and increase the relative harvest costs to non-tribal harvesters, simply to avoid disputes over the geographic scope of the crab resource that is subject to treaty sharing with Quileute and Quinault.

24. Perhaps more significantly, because the State alleges that anthropological evidence of pre-treaty fishing by Quileute and Quinault does not support claims to offshore U&A fishing grounds as far offshore as Dungeness crab is located, the sharing of millions of dollars of harvestable coastal Dungeness crab is in dispute. Giving full and fair effect to the court's construction of the Treaties, and its equitable orders issued in the Shellfish Subproceeding, requires an adjudication of the western breadth of the Quileute and Quinault U&As now that these tribes are asserting the right to harvest up to fifty percent of all nearshore and offshore Dungeness crab in waters within or adjacent to their previously adjudicated coastal U&A fishing areas.

IV. REQUEST FOR RELIEF

Washington State requests that the Court determine the boundaries of Quileute and Quinault usual and accustomed fishing grounds in the Pacific Ocean. In particular, it requests that, on the basis of the evidence presented at trial and applicable law, the Court define:

ATTORNEY GENERAL OF WASHINGTON
1125 WASHINGTON Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

NO. 15-35824, 15-35827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE,

Plaintiff-Appellant,

and

UNITED STATES OF AMERICA,

Plaintiff,

v.

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION,

Respondents-Appellees,

HOH INDIAN TRIBE, et al.,

Real Parties in Interest,

and

STATE OF WASHINGTON,

Defendant-Appellant.

CERTIFICATE OF SERVICE

D.C. Nos. 2:09-sp-00001-RSM
2:70-cv-09213-RSM
Western District of Washington, Seattle

I certify that I electronically filed Defendant-Appellant State of Washington's Excerpts of Record and this Certificate of Service in the above-captioned matter 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 July 6, 2016.

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 this 6th day of July, 2016, at Olympia, Washington.

s/ Dominique Starnes
Dominique Starnes
Legal Assistant