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

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

REPLY BRIEF OF DEFENDANT-APPELLANT STATE OF WASHINGTON

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I. INTRODUCTION

Contrary to the Quileute's and Quinault's characterizations, the State makes no effort to restrict the Tribes from their traditional treaty-time fisheries. The right to continue those fisheries in off-reservation areas, fishing in common with other citizens of the territory, is protected by the Treaty of Olympia. But the Treaty imposes a geographic limit on the Tribes' reserved right to continue treaty-time fishing in off-reservation areas. That geographic limit is established by evidence of regular fishing at identifiable locations—or as referenced in the Treaty, at usual and accustomed fishing grounds and stations. That geographic limit inheres in all discussions of the desire and need to preserve tribal access to off-reservation, treaty-time fisheries.

The State, like the Makah, opposes the Quileute's and Quinault's claim to thousands of square miles of ocean fishing areas where there is no evidence that the fisheries associated with these geographic areas were being utilized by Quileute and Quinault at the time the Treaty of Olympia was negotiated. Where there is no evidence of regular treaty-time fishing in an off-reservation area, there are no treaty-time expectations to preserve. Judge Martinez erred as a matter of law by adjudicating usual and accustomed fishing grounds for Quileute and Quinault based upon roving whale and seal hunting expeditions,

conducted by just a few tribal members, in large ocean areas far offshore from where these Tribes regularly and customarily fished.

Even if occasional marine mammal hunting by a few tribal members could legally establish usual and accustomed fishing grounds and stations under the Treaty, the Quileute and Quinault never provided sufficient evidence of specific stations or grounds necessary to establish a treaty claim. The Tribes' own anthropological expert conceded that the Quileute did not regularly fish in all of the claimed 2,500 square miles of ocean in front of the Quileute's ceded upland areas. WER 33. The Quinault similarly proffered no treaty-time evidence of named or otherwise identifiable grounds or stations in the hundreds of square miles they claim based upon marine mammal hunting. Judge Martinez erred as a matter of law in allowing inferences surrounding roving marine mammal hunting across huge open swaths of ocean to satisfy the restrictive "grounds and stations" requirement in the Treaty.

Judge Martinez also erred in finding that the Quileute fished for finfish out to 20 miles from shore because the record contains no evidence of identifiable fishing grounds or stations to support such a finding. The response brief points to no compelling evidence sufficient to overcome these errors.

Finally, the Quileute and Quinault fail to provide any legal justification to support Judge Martinez's line drawing exercise that creates usual and accustomed fishing grounds and stations for miles *beyond* the distances the Judge ruled the Tribes hunted at treaty times. Creating usual and accustomed fishing grounds and stations in areas where the Tribes never hunted or fished at treaty times is also inconsistent with the limiting language of the Treaty and results in unfair control and allocation of fishing resources.

The State requests this Court to (1) hold that marine mammal hunting cannot be used to establish usual and accustomed fishing grounds and stations; (2) hold that insufficient evidence supports setting the Quileute's fishing boundary at 20 miles off the coast; and (3) hold that when a usual and accustomed fishing ground and station boundary is set by a distance from a point, then the entire boundary line must adhere to the determined distance. The district court's ruling should be reversed and remanded.

II. ARGUMENT

A. The District Court Erred as a Matter of Law by Allowing Random 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

1. This Court's 1984 Makah Boundary Ruling Establishes Marine Mammal Hunting Does Not Support Finding Usual and Accustomed Fishing Grounds or Stations

In its opening brief, the State supported the Makah's arguments regarding the legal effect of this Court's 1984 ruling on the Makah's ocean boundary, *United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984). The 1984 ruling establishes a legal conclusion that evidence of marine mammal hunting activity does not support the recognition of treaty-protected usual and accustomed fishing grounds and stations. The Quileute and Quinault, like the district court, mischaracterize the 1984 ruling as a determination there was a lack of evidence of usual and accustomed marine mammal hunting beyond 40 miles. Resp. Br. at 82.

The Makah's Reply Brief thoroughly explains how the district court's opinion, *United States v. Washington*, 626 F. Supp. 1405, 1466 (W.D. Wash. 1982), and this Court's 1984 opinion is properly characterized as a matter of treaty interpretation—that marine mammal hunting does not establish regular

treaty-time fishing activity—rather than a sufficiency of evidence analysis. The State offers one additional point in reply.

The United States was the only party that actively opposed the Makah's claim to fishing grounds 93 miles off the coast. The United States' pleadings did not attack the evidentiary sufficiency of the whaling evidence used to support that claim. Rather, the United States argued that the Makah's evidence of *fishing* for "salmon, halibut and other species of *fish*," is the correct basis for identifying usual and accustomed fishing grounds and stations, and then argued that the evidence of treaty-time *fishing* activity supported only a 40-mile line. MER 1251 (emphasis added). The United States specifically noted that Dr. Lane's report described Makah whaling expeditions further out than 40 miles, but argued that this did "not speak of fishing, and there are essential differences between whaling and fishing." MER 1252.

This overt effort to differentiate between Makah's fishing and whaling activity did not hinge on the sufficiency of the evidence needed to ascertain where the activity actually occurred. Rather, the United States' argument differentiated between uncontested evidence of fishing versus whaling for purposes of applying that evidence to determine the location of treaty-reserved, off-reservation fishing grounds. MER 1252. Accordingly, the position

advanced by the United States in relation to adjudication of the geographic scope of Makah's off-reservation fishing rights is properly understood as a legal argument about treaty interpretation: The United States argued that whale hunting cannot establish usual and accustomed grounds or stations for fishing for finfish as a matter of treaty interpretation. Given that no party contested the conclusion Makah engaged in whaling activity more than 40 miles offshore at treaty times, the United States' argument that "there are essential differences between whaling and fishing" would be nonsensical if the government's position was merely that the evidence of marine mammal hunting was factually insufficient to establish the Makah Tribe's off-reservation usual and accustomed fishing grounds and stations.

The United States' position prevailed with both the district court and this Court. 626 F. Supp. at 1467 (setting the boundary at 40 miles); *affirmed*, 730 F.2d 1314. Accordingly, the United States' legal theory that "there are essential differences between whaling and fishing" must be understood as the core principle of the opinions rendered by both the district court and this Court on

appeal.[1] The 1984 Makah decision thus establishes, as the law of the circuit, that whale hunting cannot be relied upon to establish usual and accustomed fishing grounds and stations.

2. The *Shellfish* Rulings Do Not Support Judge Martinez's Ruling

In its opening brief, the State argued that the *Shellfish* rulings never considered marine mammals and they fail to support the claim that treaty-time marine mammal hunting activity, in itself, can establish usual and accustomed grounds and stations. State Br. at 11-16. *See 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). In response, the Quileute and Quinault assert that because the language in the opinions referenced "any species," it creates a law of the case that hunting or fishing of any animal species can create usual and accustomed fishing grounds and

[1] If the Makah decision truly rested upon a sufficiency of the evidence claim and rejected post-treaty 1890s evidence of whaling for Makah, its holding creates an unfavorable precedent applicable to the Quileute and Quinault: Nearly all of the evidence of marine mammal hunting distances relied upon by Judge Martinez involved post-treaty sources, even sources from the 1950s and 1960s (MER 55, FOF 10.14 citing Ex. 218, a 1950 publication, for a range of 25-50 miles; MER 34, FOF 6.11 citing Ex. 277, a 1966 publication).

stations. Resp. Br. at 40. Their interpretation ventures far beyond the actual issue before the Court.

In the shellfish subproceeding, Judge Rafeedie held that tribes can take shellfish from those places *previously adjudicated as usual and accustomed fishing grounds and stations for anadromous fish*. 873 F. Supp. at 1431. It is one thing to hold that an adjudicated right to fish in usual and accustomed fishing grounds and stations includes shellfish species available within those grounds and stations. *Id.* But that holding does not support the Quileute and Quinault claim that a tribe's infrequent and random whale or seal hunting expeditions somewhere out in the ocean far from land demonstrate regular and frequent treaty-time use for fishing purposes, particularly when those hunting grounds were never used for any fishing activity whatsoever. The *Shellfish* rulings do not create a law of the circuit that controls the outcome of this present dispute, and those rulings do not overrule the legal holding of the Makah decision which rejected whale and seal hunting activity as establishing usual and accustomed fishing grounds and stations.

3. No Reliable Evidence Supports a Conclusion That the Quileute or Quinault Understood "Fish" to Mean "All Living Things"

In its opening brief, the State cited to multiple places in the record where Dr. Hoard—a linguist who had no professional experience serving as a spoken interpreter from Quileute or Quinault languages to English—testified that the Quileute and Quinault treaty negotiators *may* have understood the word "fish" to include all living things. State's Br. at 19. Dr. Hoard never testified that his opinions were based upon a more-likely-than-not degree of certainty—which is not surprising given that he was not fluent in either tribal language and had no prior experience translating them. Quileute and Quinault dispute the State's characterization of the evidence on this issue, yet they only point to a broad 100-page range of Dr. Hoard's testimony without identifying a single specific instance where they, as the parties carrying the burden of proof, elicited the required level of certainty from their expert. *See* Resp. Br. at 70 (citing QER 287-387). Because the court's factual findings and legal conclusions about the Quileute's and Quinault's understanding of the treaty language were based substantially on Dr. Hoard's speculation, Findings of Fact 3.3 and 3.6, and Conclusions of Law 2.11 and 2.12, should be reversed.

4. Quileute and Quinault Offer No Evidence of Grounds or Stations for Marine Mammal Hunting

In response to the State's argument that Judge Martinez's ruling ignores the "grounds and stations" portion of the "usual and accustomed grounds and stations" treaty language, the Quileute and Quinault spend multiple pages citing biological information and testimony of mostly post-treaty whale and seal harvest. Resp. Br. at 86-97. Yet they do not mention a single identifiable ground or station 30 or 40 miles out in the ocean where tribal whale and seal hunting actually occurred. This lack of evidence precludes a legal finding that Quileute and Quinault reserved treaty-protected fishing rights in thousands of square miles of ocean.

While Judge Boldt described fishing "grounds" as "larger areas which may contain numerous stations and other unspecified locations," 384 F. Supp. 312, 332 (W.D. Wash. 1974), the context for that explanation demonstrates that the concept of "unspecified locations" was anchored to the phrase "numerous stations," allowing the court to "connect the dots" between specific stations so as to include a broader area encompassing those stations. *See, e.g.*, *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025-26 (9th Cir. 2010) (describing several tribes' usual and accustomed grounds and stations as being broader geographical areas tied to specific, named geographic anchor points).

This is consistent with Judge Boldt's sense that *some* fluidity of description is needed in order to fairly identify treaty-time fishing areas. But that mild relaxation of the burden of proof when ascertaining and describing the geographic scope of off-reservation fishing areas did not dispense with the need to ultimately prove a claim based upon reliable evidence of regular treaty-time fishing activity at identifiable locations. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978) ("The court's concern and objective is to act upon the most accurate and authoritative data concerning usual and accustomed fishing *places* that can be developed . . . .") (emphasis added). The burden of proof still lies on the Quileute and Quinault Tribes. *See id.* ("Notwithstanding the court's prior acknowledgement of the difficultly of proof, the Tulalips have the burden of producing evidence to support their broad [U&A] claims.").

Quileute and Quinault here claim thousands of square miles of ocean areas without offering evidence of a single station that was regularly and customarily used by marine mammal hunters. They do not point to any evidence of named locations, navigational stories, or any other means by which marine mammal hunters would be able to locate and re-locate one or more

hunting areas out in the ocean 30 or 40 miles off the coast.[2] Rather, they weave together a loose tapestry of biologists' claims about huge swaths of ocean where marine mammal resources would have been most abundant, such as "migratory paths" and the edge of the "continental shelf." They couple those biological descriptions with post-treaty accounts of tribal hunters going somewhere nonspecific out into the ocean, such as the deep "blue water." Resp. Br. at 88, 90. The huge ranges claimed include 30-60 miles (Resp. Br. at 88), 10-25 miles (Resp. Br. at 92), and 25-50 miles (Resp. Br. at 95). None of this evidence rehabilitates their own anthropologist's admission with respect to the Quileute's regular and customary fishing areas:

> 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 (emphasis added).

In light of Dr. Boxberger's express disclaimer that the wide ocean area claimed by the Tribes did *not* constitute regular fishing grounds, Judge

[2] Judge Martinez cited evidence about the Tribes' knowledge of constellations, and then asserted that they used this knowledge to navigate while at sea, MER 28 at 4.10 (Quinault), MER 45 at 8.14 (Quileute), but none of the cited evidence connected the knowledge of constellations to maritime navigational skills. The mere knowledge of the stars has no inherent connection to the ability to navigate in the ocean—star gazing was not exclusive to tribes living near the ocean. There was no evidence introduced at trial that either Tribe relied upon constellations for maritime navigation.

Martinez erred as a matter of law by disregarding the lack of evidence of grounds and stations, and by relying upon an "inference" that the Quileute and Quinault regularly and customarily hunted marine mammals out to 40 and 30 miles, respectively. MERs 37, 67.

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

The Quileute justify Judge Martinez's opinion that the Quileute fished out 20 miles from the shore at treaty times by focusing primarily on testimony of a marine fisheries biologist who described likely locations of fish abundance. Resp. Br. at 98. The Quileute then pair this with an assumption that tribal fishers necessarily would have fished at places of higher abundance further offshore. But this assumption presumes that the also abundant fish available closer to shore would not have satisfied their needs. *See* Resp. Br. at 98 (citing testimony of Dr. Gunderson at QER 1307 who admitted some fish of most any species could be found close in to shore). Evidence of biological abundance, without any evidence that a claimant tribe actually fished regularly and customarily at grounds or stations in those places of highest abundance, cannot satisfy the Quileute's burden of proof to establish a 20-mile boundary for ocean fishing.

The Quileute also cite and rely upon reported statements of Bill Hudson, born in 1881, and reports of Albert Reagan from the early 1900s, to bolster their claimed 20-mile fishing boundary. *See* Resp. Br. at 100-01. But these descriptions necessarily involved post-treaty harvest practices because those informants were not alive at treaty times. The Quileute's response brief confronts that evidentiary deficiency by asserting that their 1890s fishing practices were identical to their treaty-time practices. Resp. Br. at 103. However, the claim that their 1890s fishing practices were identical to treaty time practices has no evidentiary support, and was previously rejected by Judge Martinez. MER 72 (FOF 12.9) ("It cannot, for all these reasons, be reasonably inferred from accounts of post-treaty Quileute use of Cape Flattery fishing banks that the same pattern existed at and before treaty time."). The Quileute argued that their usual and accustomed fishing grounds and stations also included known halibut banks in the Makah's area, because the Quileute fished jointly with Makah in areas west of Cape Flattery. They supported their claim with evidence they harvested there in the 1890s, and thereafter. Judge Martinez agreed with the evidence, but found that those fishing practices *did not extend back to treaty time*. MER 71-72 (FOF 12.8-12.9), 92 (COL 3.3). This adverse ruling precludes the Quileutes from claiming that the same post-1890s

evidence of deep fishing somehow supports *treaty-time* fishing activity out to 20 miles.

The Quileute also defend the post-1900 evidence of deep-ocean fishing activity as representative of treaty-time activity by citing evidence that tribal fishers continued to use the same aboriginal fishing gear into the 1890s. Resp. Br. at 102-03. But the continued use of traditional gear decades after treaty time provides no intrinsic correlation to *where* they may have fished 50 years earlier. Because the Quileute failed to provide any reliable treaty-time evidence supporting a claim of treaty-time fishing 20 miles off the coast, the district court's finding of a 20-mile fishing boundary should be reversed.

C. The District Court Committed Legal Error in Creating Usual and Accustomed Fishing Grounds and Stations 16 Miles Beyond the Purported Distances of Treaty-Time Hunting

After holding that the Quileute and Quinault Tribes have treaty-protected fishing rights 40 and 30 miles from shore, respectively, Judge Martinez drew the boundary lines in a fashion that extends for *miles* beyond those distances with no legal justification. Quileute and Quinault defend this error by claiming that "[o]cean U&A boundaries have always been delineated using straight latitude and longitude lines." Resp. Br. at 109. By "always," they really mean just one time—the 1984 Makah ruling. But the Makah ruling chose the

orientation of the boundary line in passing without analysis. The Makah decision likely reflects the generally north/south orientation of the coastline in this area, a condition that does not exist farther south in areas adjacent to the Quileute and Quinault nearshore fisheries.

Ultimately, no party participating in the 1984 Makah litigation challenged the orientation of the line so the opinion provides no analysis. The court was not asked to consider whether any other kind of line, curved or slanted, could also be appropriate. Therefore, the aspect of the Makah opinion drawing the line true north and south cannot constitute binding precedent or law of the circuit. *See* Resp. Br. at 24 (citing *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001), for the proposition that statements made in passing, without analysis, are not controlling). The Quileute and Quinault also fail to acknowledge that dozens of boundary lines for other Tribes' usual and accustomed grounds and stations across Puget Sound resulting from Judge Boldt's rulings do not track true ordinal directions.

In their Treaty, the Quileute and Quinault surrendered their ability to expand off-reservation activity free from state regulation.[3] Instead, they retained the right to continue their historic off-reservation fishing activities at

[3] *See* State's Opening Brief at pages 3 and 4 for a brief description of the State's regulatory interest in offshore fisheries.

identifiable and regularly used treaty-time locations. Treaty With the Qui-nai-elts, art. III, 12 Stat. 971, 972 (1859) (Makah Brief, Addendum at A5). After establishing the distances for their treaty-reserved usual and accustomed fishing grounds and stations, Judge Martinez departed from the treaty language and erred as a matter of law by drawing the boundary lines so as to extend beyond those distances by 16 miles for the Quileute and by 12 miles for the Quinault. *See* State's Br. at 38-39. Because that expansion is inconsistent with the language and purpose of the Treaty, this Court should reverse the district court's boundary lines and remand with an order that they be drawn parallel to the shoreline to abide by the district court's holding regarding distances off shore where the Tribes regularly and customarily fished.

III. CONCLUSION

None of the arguments raised in the Quileute's and Quinault's response brief overcome the errors in Judge Martinez's opinion.[4] Because the Makah ocean boundary ruling establishes that marine mammal hunting does not create usual and accustomed fishing grounds and stations for finfish, the district

[4] Quileute's and Quinault's response brief points out and offers corrections for 38 places where the district court's opinion contains errors in its citations to the record. *See* QER 1-83 (annotating the mistakes with alphabetically designated footnotes). These citation errors are representative of the broader legal and factual errors in the opinion as detailed in both the Makah Tribe's and State's pleadings.

court's opinion should be reversed and remanded. The finding that the Quileute regularly and customarily fished for finfish at grounds and stations 20 miles offshore should similarly be reversed because it has no factual support in the trial record. Finally, the ruling that the western boundary should be drawn along a north to south line of longitude should also be reversed because it has no grounding in any actual treaty-time hunting or fishing activity.

RESPECTFULLY SUBMITTED this 21st day of November, 2016.

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Western District of Washington, Seattle

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s/ Dominique Starnes
Dominique Starnes
Legal Assistant