No. _____

In the Supreme Court of the United States

MAKAH INDIAN TRIBE,

Petitioner,

v.

QUILEUTE INDIAN TRIBE AND QUINAULT INDIAN NATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
202 637-2207
gregory.garre@lw.com

MARC D. SLONIM
Counsel of Record
ZIONTZ CHESTNUT
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121
(206) 448-1230
mslonim@ziontzchestnut.com

Counsel for Petitioner

QUESTION PRESENTED

On the same day in 1859, the Senate ratified several treaties between the United States and Indian tribes in western Washington. The Treaty of Neah Bay secured to the Makah Indian Tribe the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations." The Treaty of Olympia secured to the Quileute Indian Tribe and Quinault Indian Nation, the southern neighbors of Makah along the Washington coast, the "right of taking fish at all usual and accustomed grounds and stations." Unlike the Treaty of Neah Bay, the Treaty of Olympia expressed only a "right of taking fish"; it did not reference "whaling or sealing."

In this case, the Ninth Circuit held the "right of taking fish" in the Treaty of Olympia includes a right of whaling and sealing. Then, the Ninth Circuit held Quileute and Quinault's "usual and accustomed" fishing grounds under the treaty extend beyond the areas in which the Tribes customarily *fished* to areas in which they hunted "'marine mammals—including whales and fur seals.'" App. 15a (quoting district court). In the process, the Ninth Circuit extended Quileute and Quinault's fishing right under the treaty to some 2,400 square miles of ocean—an area almost as large as the State of Delaware—in which the Tribes did not customarily fish at treaty time.

The question presented is whether the Ninth Circuit—in conflict with the decisions of this Court and other courts—properly held the Treaty of Olympia confers this expansive "fishing" right.

PARTIES TO PROCEEDINGS

Petitioner, the Makah Indian Tribe, initiated this proceeding seeking a determination pursuant to the injunction entered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974); it was the plaintiff in the district court and appellant in the Ninth Circuit. Respondents are (1) the Quileute Indian Tribe and Quinault Indian Nation, which were the defendants in the district court and appellees in the Ninth Circuit; (2) the State of Washington, which was an appellant at the Ninth Circuit; (3) the Hoh Indian Tribe, Squaxin Island Tribe, Muckleshoot Tribe, Puyallup Tribe, Nisqually Indian Tribe, Suquamish Indian Tribe, Skokomish Indian Tribe, Swinomish Indian Tribal Community, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, and Upper Skagit Indian Tribe, which participated as real parties in interest in the Ninth Circuit; (4) the United States of America, which was a plaintiff in the underlying proceeding but did not participate in the Ninth Circuit; and (5) the Lummi Indian Nation, Lower Elwha Klallam Tribe, and Stillaguamish Tribe, which were real parties in interest but did not participate in the Ninth Circuit.

RULE 29.6 STATEMENT

The Makah Indian Tribe is a federally recognized Indian tribe. It does not have a parent corporation, and no publicly held corporation owns stock in the Tribe.

TABLE OF CONTENTS

TABLE OF CONTENTS--Continued

Page

APPENDIX TABLE OF CONTENTS

Page

TABLE OF CONTENTS--Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES--Continued

Page(s)

TABLE OF AUTHORITIES--Continued

Page(s)

TABLE OF AUTHORITIES--Continued

Page(s)

TREATIES

NOTICES

The Makah Indian Tribe (Makah) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 873 F.3d 1157. The principal rulings of the district court (App. 27a-164a) are reported at 88 F. Supp. 3d 1203 and 129 F. Supp. 3d 1069. The order of the court of appeals denying rehearing (App. 165a-167a) is unreported.

JURISDICTION

The court of appeals entered its opinion on October 23, 2017. App 2a. On January 19, 2018, the court of appeals denied a timely petition for rehearing. *Id.* at 165a-167a. On April 4, 2018, Justice Thomas granted petitioner's request for an extension of time within which to file a petition for certiorari to May 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISIONS

Article 4 of the Treaty of Neah Bay, 12 Stat. 939 (1855), provides:

> The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall

> not take shell-fish from any beds staked or cultivated by citizens.

Article 3 of the Treaty of Olympia, 12 Stat. 971 (1856), provides:

> The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

INTRODUCTION

This case presents a fundamental question of treaty interpretation arising from a dispute among Indian tribes over the right to fish in an area of the Pacific ocean almost as large as the State of Delaware. The Ninth Circuit's decision deviates from settled principles of treaty interpretation established by this Court and others to reach a result at odds with the explicit terms of the treaty at issue, the express language of a contemporaneous treaty entered into with neighboring tribes, and the position of the United States and the State of Washington on the fishing rights reserved by these treaties.

In the mid-1800s, the United States entered into a group of treaties with Indian tribes in the Pacific Northwest known as the "Stevens Treaties," which reserved to the tribes fishing and other rights in exchange for release of land claims. The Treaty of Neah Bay secured to the Makah Indian Tribe the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations." The Treaty of Olympia secured to the Quileute Indian Tribe and Quinault Indian Nation the "right of taking fish at all usual and accustomed grounds and stations." It does not mention "whaling" or "sealing." The two treaties were contemporaneously negotiated with the Tribes by a small group of various federal officers and later ratified by the Senate on the same day.

This proceeding represents the second time the federal courts have been asked to identify "usual and accustomed grounds" for *ocean* fishing rights under the Stevens Treaties. App. 30a. In 1982, in what is known as the "*Makah* proceeding," the courts—in part at the urging of the United States—held that Makah's "usual and accustomed grounds" for fishing under the Treaty of Neah Bay extended as far offshore as Makah regularly fished for salmon, halibut, and other species of finfish at treaty time (40 miles), but did not extend as far offshore as Makah hunted whales or seals (roughly 50 to 100 miles). *United States v. Washington,* 626 F. Supp. 1405, 1466-68 (W.D. Wash. 1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984). That ruling has represented the settled interpretation of the Treaty for more than 30 years.

In this proceeding, Makah sought a determination of Quileute and Quinault's ocean fishing boundaries under the Treaty of Olympia, after a dispute arose among the Tribes over fisheries in the area. *See* App.

139a-140a. The district court found Quileute and Quinault customarily fished 20 and six miles offshore at treaty time, respectively. *Id.* at 49a-50a, 73a-74a. Yet, the court held the Tribes' "usual and accustomed grounds" for fishing under the Treaty of Olympia extended 40 and 30 miles offshore, respectively, because the Tribes had hunted *whales or seals* out that far. *Id.* at 129a; *see also id.* at 55a-56a, 58a, 97a. That decision represents the first time a court has held that a tribe's fishing rights under a Stevens Treaty extend to areas where the tribe hunted whales or seals but did not traditionally *fish* at treaty time.

The Ninth Circuit affirmed in relevant part. It held the Treaty of Olympia's "right of taking fish" extends to whales and seals. App. 20a-21a. The court flatly refused to construe the Treaty of Olympia in light of the Treaty of Neah Bay, even though the treaties were contemporaneously negotiated by neighboring tribes and ratified on the same day. *Id.* at 11a-12a. Instead, the court invoked the "Indian canon of construction" and then relied upon "ethnology studies and expert reconstructions" to determine what the Tribes purportedly would have understood "fish" to mean some 150 years ago. *Id.* at 12a-21a. Then the court went further. It concluded that Quileute and Quinault's "usual and accustomed grounds" for fishing under the Treaty of Olympia extend to areas in which the Tribes took "whales and seals," regardless of whether they actually *fished* in those areas at treaty time. *Id.* at 21a.

The Ninth Circuit's decision grants Quileute and Quinault a treaty-based right to take fish in some 2,400 square miles of ocean that were neither "usual" nor "accustomed" fishing grounds at treaty time. It sharply conflicts with the decisions of this Court and

other courts on treaty interpretation, as well as with the United States' longstanding position on how to determine an ocean boundary for Stevens Treaty fishing rights. It directly impacts Makah's own fisheries and creates a recipe for inter-tribal conflict over fisheries. And it conflicts with the State of Washington's own interpretation of the Treaty of Olympia and threatens to reduce substantially the fisheries available to non-Indian fishermen.

This Court's review is warranted.

STATEMENT

A. The Stevens Treaties

1. The "Right Of Taking Fish"

Between December 1854 and January 1856, Isaac Stevens, the Governor of the newly formed Territory of Washington, led a small group that negotiated several treaties with Indian tribes in the Territory on behalf of the United States. As one might expect from treaty negotiations led by members of the same small band in succession, the treaties—known collectively as the "Stevens Treaties"—share much in common. The treaties were negotiated using the same Chinook trading jargon, and while "[t]here is no record of English having been *spoken* at the treaty councils," "it is probable that there were Indians at each council who would have spoken or understood some English." *United States v. Washington*, 384 F. Supp. 312, 355-56 (W.D. Wash. 1974), *aff'd*, 730 F.2d 1314 (9th Cir. 1984) (emphasis added). Many of the same terms appear, without material modification, in all six documents. And five of the six treaties were ratified by the Senate on the same day, March 8, 1859.

This case, however, involves an important textual *difference* between two Stevens Treaties involving the Tribes here. Petitioner, the Makah Indian Tribe, entered into the Treaty of Neah Bay in January 1855. As part of its treaty, Makah—"primarily a seafaring people who spent their lives either on the water or close to the shore," *Washington*, 384 F. Supp. at 363—secured "[t]he right of taking *fish and of whaling or sealing* at usual and accustomed grounds and stations . . . in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands . . . ." *Supra* at 1 (emphasis added).

Respondents, the Quileute Indian Tribe and Quinault Indian Nation, who lived immediately south of the Makah, entered into the Treaty of Olympia six months later, in July 1855. That treaty was based on a draft that Stevens presented during negotiations at Chehalis River in February 1855, just a month after the Treaty of Neah Bay was signed. App. 35a-36a. In contrast to the Treaty of Neah Bay, the Treaty of Olympia (both in its draft and final form) secured "[t]he right of taking *fish* at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands . . . ." *Supra* at 2 (emphasis added).

Unlike the Treaty of Neah Bay, the Treaty of Olympia made no mention of whaling or sealing. That different treatment is consistent with the comparative priorities of these tribes: Whereas Makahs benefited from "the peculiarly rich resources

available to them in their ocean territories, primarily halibut and whale," and were "greatly concerned about their marine hunting and fishing rights," the Tribes to the south of them "relied primarily on salmon and steelhead taken in their long and extensive *river* systems." *Washington*, 384 F. Supp. at 363, 372 (emphasis added); *see also id.* at 375.

Nor is there any record that either Quileute or Quinault raised whaling or sealing during treaty negotiations. Indeed, the only recorded reference to whales or seals during negotiations at which Quileute and Quinault participated came at the instigation of *other* tribes, and only as part of a discussion of "[e]verything that comes *ashore*," including *beached* whales as well as shipwrecks. App. 38a (emphasis added).

2. Prior Stevens Treaties Litigation

The Stevens Treaties made the first of their many appearances before this Court in *United States v. Winans*, 198 U.S. 371 (1905). *Winans* involved a provision of the Stevens Treaty with the Yakama tribe that secured their "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Id.* at 378. This Court held that provision precluded the construction by non-Indians of "fishing wheels" that would capture all of the fish traveling along the river, effectively preventing the Yakama from taking fish in their usual and accustomed locations. *See id.* at 381-82.

The treaties have been a fertile source of litigation ever since—which is hardly surprising given the importance of the subjects they address. This Court itself has directly addressed the treaties on seven different occasions; an eighth case is currently

pending before the Court. *See Washington v. United States*, No. 17-269. And since 1970, the U.S. District Court for the Western District of Washington has retained continuing jurisdiction to resolve disputes over the scope of the fishing rights the treaties secured. *See United States v. Washington*, 384 F. Supp. at 419. That litigation commenced when the United States sued Washington to enforce the tribal fishing rights under the Stevens Treaties. *Id.* at 327-28. Twenty-one tribes, including Makah, Quileute, and Quinault, intervened. The district court (Boldt, J.) issued a decision in 1974, which it referred to as "Final Decision #I," that made findings regarding many of the tribes' "usual and accustomed fishing grounds" within the meaning of the treaties. *Id.* at 359-82. At the same time, it retained jurisdiction to resolve any further disputes over the boundaries for such grounds. *Id.* at 419.

From Judge Boldt's initial decision more than 40 years ago, the "usual and accustomed grounds" under the Stevens Treaties have been understood to encompass "every *fishing* location where members of a tribe customarily *fished* from time to time at and before treaty times." *Id.* at 332 (emphasis added). The use of marine waters for travel, even when accompanied by incidental trolling, did not "make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id.* at 353. According to the district court, "[t]he words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Id.* at 356.

This Court largely affirmed Final Decision #I in *Washington v. Washington State Commercial*

Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658 (1979). The Court adhered to its 1905 holding that, in "securing" the right of taking fish, the treaties "'reserv[ed]' rights previously exercised." *Id.* at 678 (quoting *Winans*, 198 U.S. at 381). The Court further held that the treaties "secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id.* at 679.

In the decades since Judge Boldt's initial decision, the district court has repeatedly applied the customary-fishing standard from Final Decision #I to resolve disputes over the "usual and accustomed grounds" of the 21 plaintiff-intervenor tribes. All told, the district court has made dozens of these so-called "U&A" determinations. Until this proceeding, however, neither the district court nor the court of appeals had ever held that a tribe's usual and accustomed grounds for *fishing* include waters where the tribe did not customarily *fish* for salmon or other species of finfish or shellfish at treaty times.[1]

3. The *Makah* Proceeding

Final Decision #I left unresolved the extent of the usual and accustomed *ocean* fishing grounds of Makah, Quileute, and Quinault. *See United States v. Washington*, 384 F. Supp. at 364, 372, 374. In 1982, Makah sought a determination of its usual and accustomed grounds for ocean fishing under the

---

[1] The district court has made occasional findings regarding marine mammal harvests (specifically, for Makah, Quileute, and Skokomish). However, the court has never made a "usual and-accustomed grounds" finding for an area in which the tribes did not customarily fish to begin with. *See Washington*, 384 F. Supp. at 364 (Makah), 372 (Quileute), 376-77 (Skokomish); 626 F. Supp. at 1467 (Makah).

Treaty of Neah Bay. Following a trial at which Makah presented evidence that Makah fishermen had regularly fished for salmon, halibut, and other finfish as much as 40 miles offshore at treaty time (a considerable distance, but less than the 50 to 100 miles offshore that Makah had customarily traveled to hunt whale and seal), the district court determined Makah's "usual and accustomed" ocean fishing grounds extended 40 miles offshore. *United States v. Washington*, 626 F. Supp. at 1467.

During the *Makah* proceeding, the United States argued—successfully—that evidence of whaling or sealing in a particular area at treaty time could not establish that that area was a "usual and accustomed grounds" for *fishing*. The United States explained that, because "there are essential differences between whaling and fishing," evidence that the Makah whaled as far out as "90 or 100 miles" offshore failed to support "the tribe's claim that their usual and accustomed *fishing* grounds extended 90 miles offshore." U.S. Suppl. Memo re Makah Renewed Request for Determination of Ocean Fishing Grounds, at 4-5 (Oct. 12, 1982) (emphasis in original). Ultimately, that position prevailed, as the courts drew Makah's ocean "usual and accustomed grounds" boundary at 40 miles. *See infra* at 27-29.

B. This Dispute

1. The Makah Whiting Fishery

Relying on the 1982 *Makah* decision, Makah developed a substantial treaty fishery for Pacific whiting within its "usual and accustomed" fishing grounds. Tribal members invested millions of dollars on specialized midwater trawl vessels and gear to participate in the fishery and on training to operate

this equipment. The Tribe sought and received whiting allocations from the National Marine Fisheries Service (NMFS), and partnered with a company to process whiting harvested by tribal members at sea. *See* App. 139a.

For more than a decade, as Makah defended the tribal treaty rights against various legal challenges and proved the economic viability of a tribal whiting fishery, the Tribe labored mostly alone. In 2007, however, Quileute and Quinault announced their intent to enter the fishery. In doing so, they refused to request a separate whiting allocation from NMFS. Instead, they insisted that there could only be a single, overall "treaty" allocation, and that the Tribes would compete with each other for shares of the catch. Because whiting migrate from south to north during the spring, Quileute and Quinault's locations south of Makah meant that, as a practical matter, they would be able to substantially preempt Makah's harvest—if they could fish for whiting as far out to sea, or nearly as far out to sea, as Makah. *See* App. 139a-142a (summarizing whiting dispute).[2]

---

[2] NMFS had previously established boundaries for Quileute and Quinault's fisheries by simply extending the adjudicated western boundary of Makah's usual and accustomed grounds due south. In doing so, however, NMFS explicitly recognized that those boundaries were not intended to have any presumptive or precedential effect in litigation over whether the usual and accustomed fishing grounds of Quileute and Quinault had actually extended that far out to sea, as the United States reiterated in two filings it made in the district court in this proceeding. *See* App. 133a-135a, 159a-161a.

2. District Court Proceedings

After unsuccessfully attempting to negotiate a mutually agreeable solution, Makah invoked the district court's continuing jurisdiction under Final Decision #I to determine the western boundaries of Quileute and Quinault's ocean fishing grounds. Makah argued that the Treaty of Olympia did not subsume a treaty right of whaling or sealing within the "right of taking fish," much less expand the right of taking fish at customary places to areas in which Quileute and Quinault hunted whales or seals but did not customarily fish at treaty time. The State of Washington likewise argued that, as a matter of law, the "usual and accustomed grounds" for fishing could not be expanded to include areas where the Tribes may have whaled or sealed but did not customarily fish. Washington Post-Trial Br. 3-15 (Apr. 17, 2015).

The case proceeded to trial, at which the parties disputed the legal relevance of whaling and sealing to establishing Quileute and Quinault's usual and accustomed grounds for fishing, and presented extensive evidence both of where the Tribes had fished and of where they had hunted whales and seals at treaty time. Based on that evidence, the court found Quileute and Quinault customarily *fished* up to 20 and 6 miles offshore, respectively, at treaty times—substantially closer to shore than Makah. App. 49a-50a (Quinault), 73a-74a (Quileute). Nevertheless, the court held the Tribes' "right of taking fish" extended 40 and 30 miles offshore, respectively, based on evidence that they had hunted *whales or seals* that far offshore. *Id.* at 129a.

In so holding, the district court framed the issue as whether "whaling and sealing practices can be the

basis for establishing the tribe's offshore U&A," which, the court explained, turned on "the scope of the 'right of taking fish,' as this term was used in the Treaty of Olympia." *Id.* at 115a. To answer that question, the court observed at the outset of its analysis that the "canons of construction for Indian treaties require that the Court give a 'broad gloss' on the Indians' reserved fishing rights." *Id.* at 116a.

"Applying these principles" to "linguistic evidence" about how the Indians might have understood the Treaty of Olympia in 1855, the district court concluded that the Treaty's reference to "fish" included "sea mammals." *Id.* at 121a-123a. From that premise, the court concluded that "Quinault and Quileute's usual and accustomed fishing locations encompass those grounds and stations where they customarily harvested marine mammals—including whales and fur seals—at and before treaty time," regardless of whether the Tribes customarily *fished* in those areas for salmon, halibut, or any other species of finfish or shellfish. *Id.* at 128a-129a. In so holding, the court refused to give any weight to the fact that the Treaty of Neah Bay had expressly distinguished between "taking fish" and "whaling or sealing," stating "these treaties were negotiated by different individuals and in different contexts." *Id.* at 124a.

3. The Ninth Circuit's Decision

Both Makah and the State of Washington appealed, and the Ninth Circuit affirmed in relevant part. The court concluded that the Treaty of Olympia's use of "fish" was ambiguous because, "[a]t the time of signing, 'fish' had multiple connotations of varying breadth." *Id.* at 10a. The court flatly refused to resolve that ambiguity by looking to the Treaty of

Neah Bay, holding that, "[r]ather than comparing and contrasting language and rights across treaties, courts '*must* interpret a treaty right in light of *the particular tribe's* understanding of that right at the time the treaty was made.'" *Id.* at 12a (quotation omitted; emphasis added).

Instead, the court invoked the "Indian canon of construction," under which "treaties 'are to be construed, so far as possible, in the sense in which the Indians understood them,' . . . and 'ambiguous provisions [should be] interpreted to their benefit[.]'" *Id.* at 12a-13a (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). It rejected Makah's argument that this canon is inapplicable in cases like this one that involve conflicting Indian interests, where expanding one tribe's treaty rights will adversely affect a competing tribe's treaty rights. *See id.* at 13a-14a.

Having concluded that the unambiguous contrast between the Treaty of Neah Bay and Treaty of Olympia on the precise question was irrelevant, the court turned to Quileute and Quinault's supposed understanding of the Treaty of Olympia. It concluded Quileute and Quinault would have understood "fish" to include whales based on evidence concerning "[t]he general context and tenor of the negotiations" carried out previously with *other* tribes, and "ethnology studies and expert reconstructions of what likely happened at the negotiations" of the Treaty of Olympia. *Id.* at 15a-20a. The Ninth Circuit acknowledged that the "Chinook, Quileute, and Quinault languages had separate words for 'fish,' 'whales,' and 'seals,' as well as for 'fishing,' 'whaling,' and 'sealing,'" and that there were "practical and

cultural differences in the real-world [Quileute and Quinault] occupations of fishing, whaling and sealing." *Id.* at 17a-18a. But the court concluded that none of that trumped its own reconstruction of what the Tribes would have understood. *Id.* at 18a.

The court added that "interpreting 'fish' to cover whales and seals also respects the reserved-rights doctrine, which recognizes that treaties reserving fishing rights on previously owned tribal lands do not constitute 'a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.'" *Id.* at 20a (quoting *Winans*, 198 U.S. at 381). The court pointed to no instance, however, in which the reserved-rights doctrine had been used to reserve a right to engage in a traditional activity (fishing, here) in areas in which the tribe did *not* traditionally engage in that activity.[3]

REASONS FOR GRANTING THE WRIT

From time immemorial, fisheries have been of "vital importance" to the Indian tribes who are parties to the Stevens Treaties. *Fishing Vessel,* 443 U.S. at 666. This Court thus has long taken an active role in superintending the "right of taking fish" at "usual and accustomed grounds" under the Stevens Treaties. On eight separate occasions, including this very term (*Washington v. United States*), the Court has

---

[3] The Ninth Circuit agreed with Makah that the district court had erred in "imposing *longitudinal* boundaries" to implement the 40- and 30-mile distances where it found Quileute and Quinault whaled or sealed. App. 26a (emphasis added). That ruling is not at issue here. On remand, the district court already has drawn new boundaries consistent with the Ninth Circuit's decision. Quileute and Quinault have appealed that decision, seeking more expansive boundaries.

addressed the scope and implications of this fishing right, recognizing it as a matter of unquestioned "public importance." *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 393 (1968) (*Puyallup I*). The reason is plain: As competition for fisheries has intensified, "the meaning of the Indians' treaty right to take fish has accordingly become critical" not only to the tribes but to non-treaty fishing interests and the public at large. *Fishing Vessel*, 443 U.S. at 669.

This Court's intervention is needed again. The decision below holds, for the first time, that tribes have a treaty-based right to harvest fish in expansive marine-mammal hunting areas where they did not customarily fish at treaty time. The Ninth Circuit arrived at that result by flouting this Court's precedents on treaty interpretation and ignoring key textual differences between contemporaneous treaties with neighboring Indian tribes. It conflicts with the longstanding position of the United States on how to determine ocean boundaries for "usual and accustomed" fishing grounds under a Stevens Treaty. And it will only increase inter-tribal strife and reallocate harvests among treaty and non-treaty fishermen worth millions of dollars annually.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Ninth Circuit's Striking Disregard For Treaty Language Sharply Conflicts With This Court's Decisions

In reaching its decision, the Ninth Circuit contravened perhaps the most important canon of treaty interpretation: while "treaties are construed more liberally than private agreements," "even Indian

treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 431-432). "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

In that respect, the interpretation of Indian treaties is like interpretation of *any* treaty: It "'begin[s] with the text of the treaty and the context in which the written words are used.'" *Water Splash, Inc. v. Menom*, 137 S. Ct. 1504, 1508-09 (2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)); *see also Air France v. Saks*, 470 U.S. 392, 396-97 (1988) (same). And one particularly useful way of analyzing that text and context, this Court's cases demonstrate, is by looking to the language of other contemporaneous treaties to see how the inclusion or omission of similar terms was understood when the treaty was adopted.

For example, in *Minnesota v. Mille Lacs Band*, this Court addressed whether an 1855 treaty with an Indian tribe had extinguished the hunting, fishing, and gathering rights (collectively "usufructuary rights") preserved in an earlier treaty. 526 U.S. 172, 195 (1999). Although the 1855 treaty contained a broadly worded release of rights, the Court emphasized that it was "devoid of any language expressly mentioning—much less abrogating—usufractuary rights." *Id.* "These omissions are telling," the Court emphasized, "because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months" after

completing the treaty in question, the same drafters "negotiated a Treaty with [a separate band of Indians] that expressly revoked fishing rights that had been reserved in an earlier Treaty." *Id.*

Similarly, in *Oregon Department of Fish and Wildlife*, this Court found that "the absence of any express reservation of [off-reservation hunting and fishing] rights, *as found in other 19th-century agreements*" with other tribes, indicated that "no special off-reservation rights were comprehended by the parties to the 1901 Agreement" with the Klamath Indian Tribe. 473 U.S. at 769 (emphasis added); *see also, e.g.*, *Johnson v. Geralds*, 234 U.S. 422, 436 (1914) (interpreting a provision in a treaty with the Chippewa in light of the meaning of a "contemporaneous treaty with the Winnebagoes [that] contained a similar" term); *cf. Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912) (pointing to provisions included in other contemporaneous treaties to discern meaning of treaty).

The courts of appeals likewise have long relied on the omission of a clause in one treaty that had been included in other contemporaneous treaties. In *United States ex rel. Neidecker v. Valentine*, for example, Judge Learned Hand addressed whether an extradition treaty between the United States and France gave the Secretary of State authority to surrender American citizens accused of committing offenses in France. 81 F.2d 32 (2d Cir. 1936). In doing so, he relied heavily on the fact that U.S. extradition treaties with six other countries contained language expressly granting such a right. *Id.* at 34. The inclusion of the express provision in those other treaties, he concluded, demonstrated that the

ambiguous language in the French treaty was *not* understood to convey such a right. *Id.*

The Ninth Circuit's decision flouts these bedrock principles of treaty interpretation. Even assuming the Ninth Circuit was right that "fish" had some meanings at treaty time that might encompass whales (though even then, not seals), it erred in categorically dismissing the contemporaneous usage in the Treaty of Neah Bay to resolve that ambiguity. The Treaty of Neah Bay clearly illustrates that "fishing" and "whaling or sealing" were understood to refer to separate things and separate pursuits in the context of the Stevens Treaties. Certainly that is the way the Senate would have understood it, when it ratified the Treaty of Olympia and Treaty of Neah Bay on the very same day in 1859. And there is no persuasive reason to think that these neighboring Indian tribes—for whom the evidence shows there were linguistic as well as "practical and cultural differences in the real-world occupations of fishing, whaling, and sealing," App. 18a—would have viewed the treaty language any differently.[4]

The Ninth Circuit's contrary analysis displaces the requisite inquiry into the meaning of the treaty's plain text with a one-sided, purposivist approach to interpretation that this Court and other circuit courts

---

[4] Indeed, the Treaty of Olympia and Treaty of Neah Bay were both negotiated using the same Chinook trading jargon. Like English, the Chinook language "had separate words for 'fish,' 'whales,' and 'seals,' as well as for 'fishing,' 'whaling,' and 'sealing.'" App. 17a-18a. And the Quileute and Quinault's own expert at trial testified that he was aware of no instance in which the Quileute and Quinault words for "fish" and "fishing" had ever been used to refer to sea mammals or sea mammal hunting. *See* Ninth Circuit Makah Excerpts of Record 325-30, 335-41.

have squarely rejected. Until now, it was well established that a court "cannot, under any acceptable rule of interpretation, hold that the Indians [had a certain right] merely because they thought so." *Confederated Band of Ute Indians v. United States*, 330 U.S. 169, 180 (1947); *see also DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) (Indian canon "is not a license to disregard clear expressions of tribal and congressional intent"); *Little Six, Inc. v. United States*, 280 F.3d 1371, 1376 (Fed. Cir. 2002); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998).

As the Federal Circuit held just last year, "the extent of our interpretive deference to the perspective of the Native leaders cannot extend past the meeting of the minds between the parties." *Jones v. United States*, 846 F.3d 1343, 1356 (2017). It is "the intention of the parties, and not solely that of the superior [or inferior] side, that must control any attempt to interpret [a treaty]." *Fishing Vessel*, 443 U.S. at 675; *see also Absentee Shawnee Tribe of Indians of Okla. v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988). The Ninth Circuit flouted this rule, putting all the weight on its supposed reconstruction of Indian understanding and simply disregarding the language of the treaties that the Senate ratified.

Indeed, the Ninth Circuit's refusal to consider the language of other contemporaneous treaties conflicts with this Court's decisions interpreting the Stevens Treaties themselves. In *Puyallup Tribe v. Department of Game*, this Court interpreted the fishing right in the Treaty of Medicine Creek, to which Puyallup was a party, based on its prior interpretation of fishing rights in the Treaty with the Yakama. 391 U.S. at 398-99 (discussing *Tulee v.*

Washington, 315 U.S. 681 (1942)). And in *Fishing Vessel*, the Court relied on prior interpretations of the Medicine Creek and Yakama treaties, as well interpretations of other similar treaties and agreements, to interpret the right of taking fish in all six Stevens Treaties. 443 U.S. at 679-85. The Court explained that "[a]ll of the treaties were negotiated by Isaac Stevens . . . and a small group of advisers," *id.* at 666, were authorized by a single act of Congress, and contained the same major provisions, including the right of taking fish, *id.* at 661-62 & n.1; *see id.* at 667-68 & n.11.

The Ninth Circuit's refusal to consider the language in the contemporaneous Treaty of Neah Bay is bad enough. But the Ninth Circuit exacerbated that error by replacing an analysis of the different language used in contemporaneous treaties among neighboring tribes on the precise issue with its own reconstruction of how Quileute and Quinault might have *wanted* the treaty to be written, disregarding concrete evidence of linguistic and real-world differences among fishing, whaling and sealing in Quileute and Quinault language and society. *See* App. 17a-18a. This approach led the court to effectively rewrite the Treaty of Olympia by adding a "whaling or sealing" clause that the parties did not include—in direct conflict with *Choctaw Nation*—and then to rely on that imaginary clause to greatly expand Quileute and Quinault's fishing right to waters in which they did not fish at treaty times despite the express restriction of the right of taking fish to "usual and accustomed grounds."[5]

---

[5] In seeking to defend the result here, Quileute and Quinault have pointed to the "*Shellfish* proceeding," under the

B. The Ninth Circuit's Invocation Of The Indian Canon Conflicts With The Decisions Of This Court And Other Courts

The Ninth Circuit's invocation of the Indian canon in this case conflicts with the decisions of this Court and other courts in another fundamental respect: the Ninth Circuit invoked the canon to favor the interests of one set of Indian tribes over another Indian tribe.

As this Court has held, the Indian canon "has no application [where] the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) (construing statute). Other courts have applied that principle as well. *See Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (Indian canon inapplicable "because the interests at stake both involve Native Americans"); *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014)

Stevens Treaties, in which the lower courts held "usual and accustomed grounds" for shellfishing include all areas in which the tribes customarily harvested finfish. *United States v. Washington*, 873 F. Supp. 1422, 1430-31 (W.D. Wash. 1994), *aff'd*, 157 F.3d 630 (9th Cir. 1998). But the Tribes miss the salient point: The holding in the *Shellfish* proceeding was "compelled by the plain language of the Treaties." *Id.* at 1430. The Stevens Treaties include a proviso to the "right of taking fish" that prohibits taking "shell-fish" from staked and cultivated beds. The explicit proviso for "shell-fish" establishes that the treaties included "shell-fish" within "fish"; otherwise, the proviso would serve no purpose. *Id.* In this case, however, the textual evidence points in the opposite direction—namely, that whales and seals are *not* covered by the bare "right of taking fish" because, otherwise, the "whaling or sealing" provision in the Treaty of Neah Bay, like the shell-fish proviso, would serve no purpose.

(Indian canon "does not apply for the benefit of one tribe if its application would adversely affect the interest of another tribe"), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016); *Cherokee Nation of Okla. v. Norton*, 241 F. Supp. 2d 1374, 1380 (N.D. Okla. 2002) ("Tenth Circuit and other courts have also held that this [Indian] canon is inapplicable when 'the competing interests at stake both involve Native Americans'" (internal brackets omitted)); *see also Baker v. John*, 982 P.2d 738, 791 (Alaska 1999) (Matthews, J., dissenting) (Indian canon is a "non-factor" because "Native Alaskans are on both sides of this case"). The Ninth Circuit's invocation of the Indian canon here directly conflicts with those decisions.

The Ninth Circuit believed it appropriate to apply the Indian canon even when the dispute is among Indian tribes unless the competing tribes assert "contradictory rights under the *same* statute or treaty." App. 14a (emphasis added). This analysis just doubles down on the Ninth Circuit's improper refusal to consider the language of other contemporaneous treaties. But more fundamentally, the rule established by this Court in *Hollowbreast* and followed in the Tenth Circuit and elsewhere turns on the *adversity* of Indian interests, not the *source* of those interests. That follows from the basis for the Indian canon itself, which is "the unique trust relationship between the United States and the Indians." *Oneida*, 470 U.S. at 247. Whatever benefit that trust relationship may confer when the United States is adverse to a tribe, it provides no basis for granting one tribe a preference over another in a dispute among the tribes themselves.

The Ninth Circuit's holding also flies in the face of this Court's long history, discussed above (at 20-21),

of interpreting the Stevens Treaties as a *group*. That practice reflects the fact all of the Stevens Treaties tribes share in a common treaty allocation for each species of fish, such that greater rights for one tribe will often mean lesser rights, as a practical matter, for others, even if they are not parties to the same treaty. *See Fishing Vessel*, 443 U.S. at 685-86; *United States v. Washington*, 143 F. Supp. 2d 1218, 1220-21 (W.D. Wash. 2001). Indeed, it was Quileute and Quinault's insistence that they fish on the same treaty whiting allocation as Makah that triggered this dispute. On the Ninth Circuit's logic, however, the Indian canon will apply if a given tribe's "usual and accustomed grounds" are challenged by a tribe that is a party to a different Stevens Treaty, but will not apply if the exact same challenge over the exact same issue is raised by a tribe that entered into the same Stevens Treaty. Especially given the ad hoc manner in which tribes were assembled for purposes of the Stevens Treaty negotiations, *see Fishing Vessel*, 443 U.S. at 664 n.5; App. 34a, this distinction makes no sense. Instead, it will simply introduce arbitrary differences in outcome among the tribes, and invite gamesmanship in the longstanding and inevitable disputes over "usual and accustomed grounds."

Despite having grounded its analysis on the Indian canon, the Ninth Circuit stated in cursory fashion that "we would reach the same conclusion without a beneficial preference" for one tribe over the other because "the evidence alone supports a broad interpretation of the Treaty language." App. 14a. But of course, the court refused to consider the most relevant evidence—the fact that the Treaty of Neah Bay, unlike the Treaty of Olympia, explicitly refers to "whaling or sealing." And even if the court *had*

considered all the evidence itself, the Ninth Circuit ignored the fact that the *district court's* decision was guided in large part by the Indian canon, which the district court identified as the "[f]irst . . . canon[] of construction for Indian treaties" upon which its decision depended. *Id.* at 116a. Without the overlay of that presumption, the district court's view of the evidence and resulting interpretation of the Treaty might well have been different. A determination that the Indian canon was inapplicable, therefore, would at a minimum require the district court to reconsider its decision in the first instance, which in turn could—and should—alter the result it initially reached.

Especially given the increasing frequency of disputes between and among Indian tribes (including in connection with gaming), the Court's guidance on the role of the Indian canon in this context is needed.

C. The Ninth Circuit's Decision Conflicts With This Court's Decisions On The "Reserved Rights" Principle

Importantly, the Ninth Circuit's decision also conflicts with this Court's decisions holding the "right of taking fish at all usual and accustomed places" under the Stevens Treaties was not a "grant of rights to the Indians," but instead a *reservation* of "rights previously exercised." *Fishing Vessel*, 443 U.S. at 678 (citing *Winans*, 198 U.S. at 381). This "reserved rights" principle is derived from the text of the treaties, which "secure" rather than *grant* the right of taking fish at "usual and accustomed" places, *id.*, and has been critical to this Court's decisions construing that right. And as the State of Washington explained below, the principle precludes the Ninth Circuit's

interpretation here regardless of whether "fish" is interpreted to encompass marine mammals.

The district court found Quileute and Quinault traditionally fished out to only 20 and six miles offshore, respectively, and the Tribes did not challenge those findings on appeal. App. 49a-50a, 73a-74a.[6] Thus, as the State of Washington explained, Quinault and Quileute did not prove "that their treaty-time forefathers fished in the same far-offshore areas where they purportedly engaged in whale or seal hunting." Washington CA9 Br. 21-22.

By nevertheless construing the Treaty of Olympia's "right of taking fish at all usual and accustomed grounds" to encompass huge ocean areas beyond where the Tribes traditionally fished, the Ninth Circuit effectively held the Treaty created *new*, expansive fishing rights that the Tribes did not exercise at treaty time. This holding directly contravenes not only the text of the Treaty, which "secure[s]" fishing rights at "usual and accustomed" places, but also the core, reserved rights principle this Court has derived from that text and repeatedly applied in construing the Stevens Treaties. That conflict underscores the need for this Court's review.[7]

---

[6] Makah argued that Quileute did not customarily fish out to 20 miles, but the Ninth Circuit did not address that argument because of its erroneous reliance on whaling and sealing.

[7] Quinault and Quileute argue that the reserved rights principle supports the conclusion that they retained the right to engage in whaling and sealing because they did not expressly forfeit such rights in the Treaty. But even assuming the Tribes retained a right to hunt whales and seals not expressed in the treaty, that does not mean that the treaty granted them a *new* right to take fish in areas in which the tribes hunted whales and seals but did not customarily fish at treaty times.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LONGSTANDING TREATY INTERPRETATION OF THE UNITED STATES

In holding Quileute and Quinault's "usual and accustomed" fishing grounds extend beyond the grounds in which they traditionally fished at treaty time to areas in which they hunted whales or seals, the Ninth Circuit also adopted a position directly at odds with the United States' interpretation of the fishing right in the only prior proceeding determining "usual and accustomed" ocean fishing boundaries.

In the *Makah* proceeding, the Special Master initially recommended a boundary for Makah's "usual and accustomed grounds" for fishing roughly 100 miles offshore, even though the evidence showed the Tribe "fished regularly at areas about 40 miles out" and the only hunting beyond 40 miles involved whales or seals. *United States v. Washington,* 730 F.2d at 1317-18. In response, the United States filed objections to the use of whaling or sealing to establish fishing grounds. The district court adopted the United States' position and held that Makah's "usual and accustomed grounds" for ocean fishing extended only to 40 miles (where Makah had customarily fished), not 100 miles (where Makah had hunted whales and seals), *Washington,* 626 F. Supp. at 1467, and the Ninth Circuit affirmed, 730 F.2d 1314.

In its brief objecting to the Special Master's report in that proceeding, the United States explained that the evidence showed that at treaty time "the Makah Indians fished for salmon, halibut and other species of fish at locations up to 40 miles offshore." *Makah* US Supp. Memo at 3. Although the United States

recognized that there was a report that "the Makahs traveled fifty to one hundred miles in their canoes to capture whales," the United States dismissed the legal relevance of the report on the ground that it "does not speak of *fishing*, and there are essential differences between whaling and fishing." *Id.* at 4 (emphasis added). The United States likewise stressed that "the usual and accustomed fishing areas must be defined now in terms of where tribal members customarily *fished*," and "there simply is no evidence supporting the tribe's claim that their usual and accustomed *fishing* grounds extended 90 miles offshore." *Id.* at 5 (emphasis in original); *see also* U.S. Objections to Special Master's Report at 2-4. The United States reiterated the same position in defending the district court's decision on appeal in the Ninth Circuit. Brief of Plaintiff-Appellee United States of America at 9-10, *United States v. Washington*, No. 93-3802 (9th Cir. Nov. 18, 1983).

It is "well settled that the United States' interpretation of a treaty is entitled to great weight." *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (internal quotations omitted). Here, the United States' interpretation of the Treaty of Neah Bay is highly relevant to the interpretation of the Treaty of Olympia. Even assuming the Ninth Circuit correctly held the Treaty of Olympia's "right of taking fish" extends to whales and seals, the Treaty could not possibly confer a broader fishing right than the Treaty of Neah Bay, which, unlike the Treaty of Olympia, explicitly refers to whaling and sealing. Moreover, as the only common party to the Treaty of Neah Bay and Treaty of Olympia, the United States has a substantial interest in ensuring that the courts' interpretations of the Treaties do not conflict.

Nevertheless, the Ninth Circuit afforded no weight to the United States' longstanding interpretation of the ocean fishing right in the Stevens Treaties.[8]

Instead, the Ninth Circuit focused on whether its *own* prior decision in the *Makah* proceeding decided "the question of what role whaling and sealing evidence plays in a U&A determination," and concluded it had not. App. 9a. In the court's view, its prior *Makah* decision "turn[ed] on the extent of the evidence presented" concerning whaling and sealing, not on that evidence's relevance. *Id.* We disagree with that reading of the *Makah* decision. But the salient point is that the Ninth Circuit's subsequent interpretation of its decision in the *Makah* proceeding in no way changes the *United States' position* in the proceeding. Nothing in the Ninth Circuit's decision in *Makah,* or its spin on *Makah* below, changes the United States' interpretation of the Treaty there. And the conflict between the decision below and the United States' longstanding treaty interpretation is an independent reason to grant certiorari.

---

[8] In doing so, the Ninth Circuit ignored the State of Washington's position on the views expressed by the United States in the *Makah* proceeding. *See* Washington CA9 Br. 9 ("[T]he United States argued that 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."); Washington CA9 Reply Br. 5-6 (discussing United States' "legal argument" that "whale hunting cannot establish usual and accustomed grounds or stations for fishing finfish as a matter of treaty interpretation").

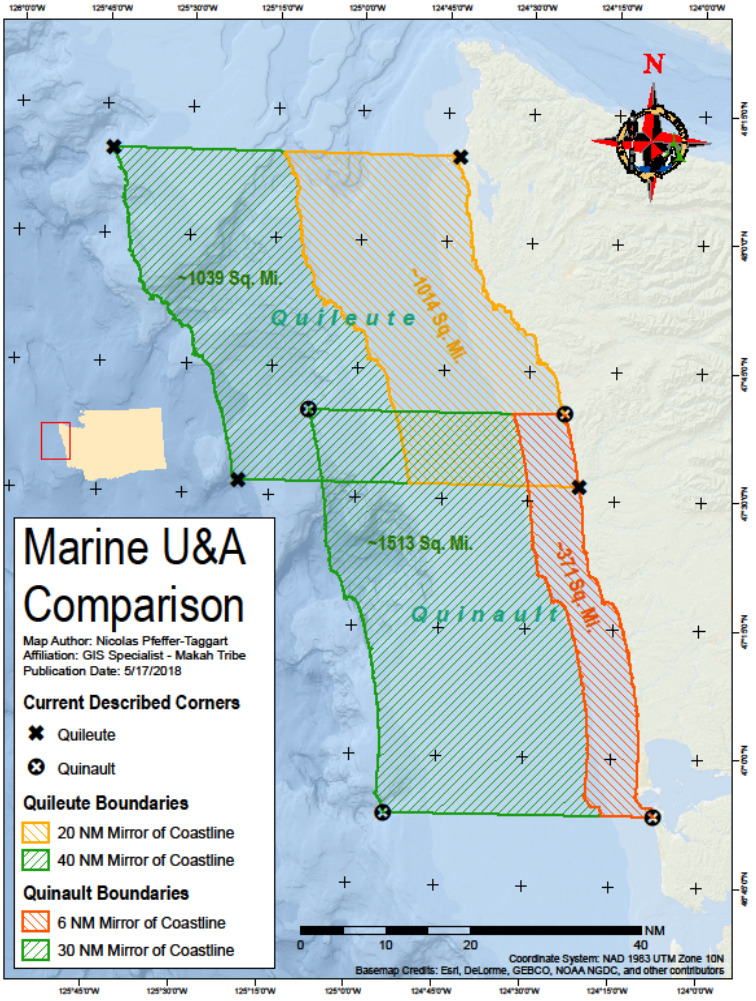
III. THE NINTH CIRCUIT'S DECISION WARRANTS THIS COURT'S REVIEW

The proper manner of interpreting Indian treaties, especially the weight to be given to the text and the context in which the words were used, is a recurring issue of unquestionable importance. But for several reasons, this case also has enormous practical significance to the Indian tribes that are parties to the Stevens Treaties, non-Indians who fish the waters at issue, and the State of Washington.

The first is the sheer magnitude of the area in question. As the following map shows, the Ninth Circuit's ruling extends Quileute and Quinault's treaty fishing rights over some 2,400 square miles of ocean where they did not customarily fish, with the green area reflecting the expanse at issue here[9]:

---

[9] *See* Makah Indian Tribe, *Map Depicting Disputed Area*, http://makah.com/2018/05/18/dispute-regarding-the-usual-and-accustomed-fishing-areas-of-the-quileute-tribe-and-quinault-nation/map-depicting-disputed-area-v2/ (last visited May 21, 2018).



Not surprisingly, given the vast area of ocean at issue, the Ninth Circuit's decision will also have a major impact on Pacific fisheries. As this case illustrates, at least some tribes went *much* farther out to sea to hunt whales and seals than they did to fish, so if evidence of whaling and sealing is relevant in establishing a usual and accustomed ground for

fishing, the areas over which the tribes have treaty-based rights to fish are many times larger.

Those rights, moreover, apply to *all* fish—not just Pacific whiting, the particular fish that gave rise to the dispute in this case—and so they would apply to salmon, halibut, and any other fish the Tribes may decide to harvest in the future. And while ocean fisheries may have seemed overabundant at treaty time, they are subject to much greater demands today, creating the potential for fights over limited resources and the need to apportion harvest opportunities for each different species of fish. For this reason, among others, the State of Washington is "directly impacted by the ruling below." State of Washington's Application for Extension of Time to File Petition for Certiorari 2, State of Washington v. Quileute Indian Tribe and Quinault Indian Nation, No. 17A1095. As the State explained, the expansion of a treaty right to fish over large swaths of ocean means that all "individuals who participate in [existing] fisheries will see their harvest opportunities substantially reduced." *Id.* at 3.

The magnitude of these impacts is illustrated by the Pacific whiting fishery, in which Makah invested millions of dollars based on its own established treaty rights to continue fishing in areas where it *fished* at treaty time. In announcing their intent to enter this fishery, Quileute and Quinault projected that they would harvest more than 70,000 metric tons of whiting annually. *See* App. 140a n.1; Dist. Ct. Dkt. No. 126-1 at 50-51. This translates into harvests worth more than $11.5 million per year. *See* 83 Fed. Reg. 3291, 3293 (Jan. 24, 2018) (noting 2016 average price of $165 per metric ton). Thus, the Ninth Circuit's decision may reduce annual harvests

currently available to Makah and non-treaty fishermen worth millions of dollars. *See* App. 139a (discussing potential impacts on "Makah's valuable Pacific whiting fishery"); Dist. Ct. Dkt. No. 76 at 2 (declaration of state fisheries official discussing impacts on "the non-treaty fishery based in Washington and State tax revenue that is collected").

But this represents only a fraction of the potential impact of the decision below on fisheries. As discussed, the boundaries set in this case for Quinault and Quileute's "usual and accustomed" fishing grounds are not limited to Pacific whiting; they apply to all fish. Thus, recognizing a treaty right for Quileute and Quinault to fish in thousands of square miles of ocean waters beyond those in which they customarily fished at treaty time has allocative effects in other valuable sport and commercial fisheries (including halibut, salmon, black cod, groundfish, and crab) as well—worth millions of dollars more. *See*, *e.g.*, Dist. Ct. Dkt. No. 278 at 38-39.

Apart from the substantial impact on other fisheries and fishing communities, the Ninth Circuit's decision will also profoundly disrupt previously settled understandings about the Stevens Treaties. As discussed, the Ninth Circuit's conception of how to draw the boundary for "usual and accustomed grounds" for fishing conflicts with the United States' own interpretation of the Stevens Treaties. The decision almost certainly will lead to an "arm's race" in which other tribes will seek to extend their fishing boundaries based on marine mammal harvests.

The decision below will destabilize settled understandings of other clauses that are used in multiple treaties, too, because the Ninth Circuit's methodology—under which a prior interpretation of a

given term in a treaty (here, "fish") sheds essentially no light on the meaning of that same term in other treaties ratified by the Senate around the same time—turns entirely on a tribe-by-tribe, treaty-by-treaty reconstruction of likely understandings, in which "expert reconstructions" (App. 16a) about what happened 150 plus years ago carry more weight than the text of the treaties themselves.

And because the Ninth Circuit also held that the application of the Indian canon depends on whether the competing parties in a given case are all subject to the same treaty or are instead parties to different treaties (*see* App. 13a-14a), those questions will potentially vary not just from one treaty to the next but from one *case* to the next, even where dealing with the same treaty, further multiplying litigation that has already burdened the federal courts and stoked tensions between the tribes. In *United States v. Washington* alone, the district court and Ninth Circuit have been called upon to adjudicate at least a dozen inter-tribal disputes in the last ten years in addition to this case. And the fallout from the Ninth Circuit's novel conception of the Indian canon in cases in which the dispute is among tribes themselves would extend to other types of inter-tribal disputes as well, including increasingly contentious (and litigious) conflicts over Indian gaming.

In short, denying review of the Ninth Circuit's seriously flawed decision in this case and allowing the conflicts discussed above to persist will only exacerbate the number of disputes that ultimately will require this Court's intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

GREGORY G. GARRE
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
202 637-2207
gregory.garre@lw.com

MARC D. SLONIM
Counsel of Record
ZIONTZ CHESTNUT
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121
(206) 448-1230
mslonim@ziontzchestnut.com

Counsel for Petitioner

May 21, 2018

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE,

Plaintiff-Appellant,

and

United States of America, Plaintiff

v.

QUILEUTE INDIAN TRIBE; Quinault Indian Nation, Respondents-Appellees,

Hoh Indian Tribe; Lummi Indian Nation; Port Gamble S'Klallam Tribe; Jamestown S'Klallam Tribe; Suquamish Indian Tribe; Tulalip Tribe; Swinomish Indian Tribal Community; Skokomish Indian Tribe; Squaxin Island Tribe; Nisqually Indian Tribe; Upper Skagit Indian Tribe; Puyallup Tribe; Muckleshoot Tribe; Lower Elwha Klallam Tribe; Stillaguamish Tribe, Real Parties in Interest,

and

State of Washington, Defendant.

Makah Indian Tribe, Plaintiff,

and

State of Washington, Appellant,

v.

Quileute Indian Tribe; Quinault Indian Nation, Respondents-Appellees,

Hoh Indian Tribe; Lummi Indian Nation; Port Gamble S'Klallam Tribe; Jamestown S'Klallam Tribe; Suquamish Indian Tribe; Tulalip Tribe;

Swinomish Indian Tribal Community; Skokomish Indian Tribe; Squaxin Island Tribe; Nisqually Indian Tribe; Upper Skagit Indian Tribe; Puyallup Tribe; Muckleshoot Tribe; Lower Elwha Klallam Tribe; Stillaguamish Tribe; United States of America, Real Parties in Interest.

No. 15-35824, No. 15-35827

Appeal from the United States District Court for the Western District of Washington, Ricardo S. Martinez, Chief District Judge, Presiding: D.C. Nos. 2:09-00001-RSM, 2:70-cv-09213-RSM

Filed October 23, 2017

---

873 F.3d 1157

Before: MICHAEL DALY HAWKINS and M. MARGARET McKEOWN, Circuit Judges, and ELIZABETH E. FOOTE,* District Judge

OPINION

McKEOWN, Circuit Judge:

Who would imagine that more than 150 years after the Treaty of Olympia (the "Treaty") was signed between the United States and the Quileute and Quinault tribes, we would be asked to determine whether the "right of taking fish" includes whales and seals? Although scientists tell us sea mammals

---

* The Honorable Elizabeth E. Foote, United States District Judge for the Western District of Louisiana, sitting by designation.

are not fish,[1] these appeals ask us to go back to the 1855 treaty negotiation and signing and place ourselves in the shoes of two signatory tribes—the Quileute Indian Tribe (the "Quileute") and the Quinault Indian Nation (the "Quinault")—to determine what they intended the Treaty to cover. In light of the evidence presented during the 23–day trial, the district court did not clearly err in its finding that the Quileute and Quinault understood that the Treaty's preservation of the "right of taking fish" includes whales and seals. The court's extensive factual findings supported its ultimate conclusion that "'fish' as used in the Treaty of Olympia encompasses sea mammals and that evidence of customary harvest of whales and seals at and before treaty time may be the basis for the determination of a tribe's [usual and accustomed fishing grounds]." We affirm the court's judgment on that score. However, we reverse the court's delineation of the fishing boundaries because the lines drawn far exceed the court's underlying factual findings.

---

[1] Modern popular culture recognizes that whales are mammals, not fish. An amusing exchange between two of the characters on *Seinfeld* provides one illustration:

> George: I'm such a huge whale fan. These marine biologists were showing how they communicate with each other with these squeaks and squeals, what a fish!
>
> Jerry: It's a mammal.
>
> George: Whatever.

Seinfeld: The Marine Biologist (NBC television broadcast Feb. 10, 1994).

Background

This appeal is one of many stemming from the long-running litigation over fishing rights in Western Washington. As we have noted, this litigation has a "lengthy background." *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1131 (9th Cir. 2015). The story began in the mid–1850s, when Governor Isaac Stevens approached the tribes of Western Washington with a proposal that the tribes cede most of their land to the United States but without giving up certain vital rights. His endeavor was successful: from December 1854 to January 1856, the United States entered into a series of similarly-worded treaties with the Washington tribes. Crucial to this appeal, the tribes preserved their right to "tak[e] fish" at all "usual and accustomed grounds and stations." That right has engendered a number of disputes between and among tribes about where each tribe can and cannot fish.

Here we address the Treaty of Olympia, which the Quileute and Quinault (as well as the Hoh Indian Tribe) signed in July 1855. As with the other Stevens Treaties,[2] the Treaty protects the tribes' "right of taking fish at all usual and accustomed grounds and stations" ("U & A"). Treaty of Olympia,

---

[2] We refer to the Treaty of Olympia as a "Stevens Treaty," as it was one of the similarly-worded treaties entered into by Governor Stevens between December 1854 and January 1856. In February 1855, Stevens negotiated with the Quinault a draft that formed the basis for the Treaty negotiations. On July 1, 1855, Stevens sent Colonel Michael Simmons in his stead to negotiate the Treaty, which Stevens signed on January 25, 1856.

art. III, July 1, 1855–Jan. 25, 1856, 12 Stat. 971, 972. In 1974, Judge Boldt of the Western District of Washington established standards and procedures for determining a tribe's U & A and made U & A determinations for several tribes. *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) (*Decision I*), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

This case is one in the ongoing saga arising from Judge Boldt's original decision but presents a slight twist on the usual facts. Rather than asking whether the Quileute and Quinault have presented enough evidence to establish U & A in a particular location, the central issue here is whether evidence of hunting whales and seals can establish where the Quileute and Quinault were "taking fish" at and before treaty time.

Litigation on this issue began in 2009, when the Makah Indian Tribe (the "Makah") followed procedures to invoke the district court's continuing jurisdiction to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined" in *Decision I*. The Makah asked the district court to adjudicate the western boundary of the Quileute's U & A and the Quinault's U & A in the Pacific Ocean. The court held a 23–day trial—exceeding the length of Judge Boldt's original trial leading to *Decision I*—and issued extensive findings.

Employing the Indian canon of construction, the court considered the Quileute and Quinault's understanding of the Treaty's ambiguous use of the word "fish" and found that, based on the historical and linguistic evidence, the tribes intended the term "fish" to encompass whales and seals. The court then looked at the evidence of pre-treaty Quileute

and Quinault whaling and sealing and set the Quileute's U & A boundary at 40 miles offshore and the Quinault's U & A boundary at 30 miles offshore. Both the Makah and the State of Washington appeal.

Analysis

I. Evidence of Whaling and Sealing Is Appropriate to Establish U & A Under the Treaty of Olympia

A. *Makah* Is Not Law of the Case

The crux of this appeal is whether the term "fish" in the Treaty includes whales and seals. The Makah seeks to short-circuit the inquiry by reference to *United States v. Washington* (*Makah*), 730 F.2d 1314 (9th Cir. 1984). In the Makah's view, we need not do much analytical heavy-lifting here because we already ruled in *Makah* that evidence of whaling and sealing cannot establish U & A. That reading of the case obscures what was actually decided and ignores a linchpin issue—in *Makah* we considered the Makah's Treaty of Neah Bay, not the Treaty of Olympia.

The two treaties have an important textual difference: unlike the Treaty of Olympia, the Treaty of Neah Bay secures "[t]he right of taking fish *and of whaling or sealing* at usual and accustomed grounds and stations." Treaty of Neah Bay, art. IV, Jan. 31, 1855, U.S.–Makah, 12 Stat. 939, 940 (emphasis added). In addressing the Treaty of Neah Bay, we concluded that the Makah did not establish that its U & A extends 100 miles from the shore out to sea. *Makah*, 730 F.2d at 1318. Given the express protection of the right to whale and seal, we had no

need in *Makah* to separate out fishing from whaling and sealing or to address the significance of different types of evidence. It should be obvious that *Makah* is neither controlling nor informative because the question whether the Treaty of Olympia's "right of taking fish" includes whales and seals was not "decided explicitly or by necessary implication." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Just as obviously, we cannot simply transport analysis of the Treaty of Neah Bay to the Treaty of Olympia because the member tribes' intent is important to, if not dispositive of, the meaning of particular provisions. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943) (holding that treaties involving Indian tribes "are to be construed, so far as possible, in the sense in which the Indians understood them . . . .").

In *Makah* we described the question presented as "what . . . we find to be the Makahs' usual and accustomed fishing areas." 730 F.2d at 1316. Consistent with that narrow framing of the issue on appeal, in discussing whether the Makah had presented sufficient evidence to establish its U & A out to 100 miles from shore, we explained:

> Ocean fishing was essential to the Makahs at treaty time. The Makahs probably were capable of traveling to 100 miles from shore in 1855. They may have canoed that far for whale and seal or simply to explore. They did go that distance at the turn of the century, although it is not clear how frequently. About 1900, they fished regularly at areas about 40 miles out, and probably did so in the 1850's.

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

Id. at 1318.

The first paragraph hones in on the absence in the Makah's evidence of *regular* fishing at 100 miles from shore. Although members of the Makah "*were capable* of traveling to 100 miles from shore" and "[t]hey *may have* canoed that far for whale and seal or simply to explore," at the turn of the century it was "*not clear how frequently*" they fished at that distance. In contrast, we noted that "[a]bout 1900, they fished *regularly* at areas about 40 miles out, and probably did so in the 1850's." Based on those facts and inferences, we held that the Makah's U & A did not extend 100 miles into the ocean.

The concluding paragraph builds on that analysis, citing to Dr. Lane's suggestion that "the Makahs would travel [100 miles from shore] only when the catch was insufficient closer to shore." Because "[t]he earliest evidence of insufficient catch"

came "some 50 years after the treaty," there was no basis to say that the Makah often traveled to the 100–mile mark at or before treaty time. The disparity between the Makah's evidence with respect to 40 miles versus 100 miles drove our conclusion that the Makah did not "*usually and customarily* fish[ ] 100 miles from shore in 1855."

This is not the first time that we have characterized *Makah* as turning on the extent of the evidence presented. In an appeal involving the Tulalip Tribes, we noted that the "[e]vidence of frequent fishing in the disputed areas is stronger . . . than in the *Makah* case." *United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988). While the Makah's evidence provided "no basis for an inference that [the Makah] customarily fished as far as 100 miles from shore at treaty time," the Tulalip Tribes' evidence "readily support[ed] an inference that the Tulalips frequently fished the disputed areas." *Id.* This later case reinforces that *Makah* did not explicitly or implicitly decide the question of what role whaling and sealing evidence plays in a U & A determination, let alone address the Treaty of Olympia.

B. The Treaty of Olympia Reserves the Quileute and Quinault's Right to Take Whales and Seals

Having put the *Makah* case in context, we turn to the interpretation of the Treaty of Olympia. The pertinent provision reads:

> The *right of taking fish at all usual and accustomed grounds and stations* is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses

> for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

Treaty of Olympia, *supra*, 12 Stat. at 972 (emphasis added). The parties dispute whether the term "fish"—and the corresponding right to "tak[e] fish"—embraces whales and seals.

1. Textual Ambiguity

The text of the Treaty of Olympia does not nail down whether the term "fish" was meant to include or exclude whales and seals. At the time of signing, "fish" had multiple connotations of varying breadth. For example, Webster's Dictionary simultaneously defined "fish" broadly as "[a]n animal that lives in water" (which would include whales and probably seals) and narrowly as a "name for a class of animals subsisting in water" that "breathe by means of gills, swim by the aid of fins, and are oviparous" (which would exclude whales and seals). *Webster's American Dictionary of the English Language* (1828). Other sources also acknowledged the popular understanding that the word "fish" could cover sea mammals; for example, the Supreme Court wrote that "For all the purposes of common life, the whale is called a fish, though natural history tells us that he belongs to another order of animals." *In re Fossat*, 69 U.S. 649, 2 Wall. 649, 17 L.Ed. 739 (1864).

The context in which the term "fish" is used does nothing to resolve the ambiguity. Although the Treaty preserves the "right of *taking* fish," the action of "taking" is far-reaching and offers no meaningful constraint. Tribes may "tak[e]" whales and seals just as they may "tak[e]" fish. The shellfish proviso—which prohibits the tribes from "tak[ing] shellfish from any beds staked or cultivated by citizens"—is similarly inconclusive, though it tends to point to a broader definition of fish. *See United States v. Washington* (*Shellfish*), 157 F.3d 630, 643 (9th Cir. 1998). We are left uncertain as to whether the Treaty employs the narrow or broad definition.

Nevertheless, the parties' decision to employ capacious language, and particularly the expansive word "fish," provides an indication of the provision's comprehended scope. As we have recognized, if "the Treaty parties intended to limit the harvestable species, the parties would not have chosen the word 'fish'" because that word has "perhaps the widest sweep of any word the drafters could have chosen." *Id.* (citation omitted). Notably, Judge Boldt's original determination of the Quileute's U & A relied on evidence of harvesting sea mammals. *See Decision I*, 384 F.Supp. at 372 (noting that "[a]long the adjacent Pacific Coast Quileutes caught . . . seal, sea lion, porpoise and whale").

The Makah does not advance a competing interpretation of the actual words of the Treaty of Olympia. Instead, it jumps to language in its own Treaty of Neah Bay, which explicitly references the right of "whaling [and] sealing" in addition to the right of "taking fish." The Makah contends that, to avoid the problem of surplusage, the right of "taking fish" must be construed so as to exclude "whaling

[and] sealing." That argument is hard to swallow because we are not even talking about the same treaty.

As the district court observed, the Treaty of Neah Bay is of limited import because it "w[as] negotiated by different individuals and in [a] different context[ ]."[3] Indeed, the "argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). Rather than comparing and contrasting language and rights across treaties, courts "must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made." *United States v. Smiskin*, 487 F.3d 1260, 1267 (9th Cir. 2007).

2. Indian Canon of Construction

Recognizing the ambiguity in the Treaty and underscoring that the Treaty of Neah Bay does not control interpretation of the Treaty of Olympia brings us to the Indian canon of construction. As a general rule, treaties "are to be construed, so far as possible, in the sense in which the Indians understood them," *Choctaw Nation*, 318 U.S. at 432, 63 S.Ct. 672, and "ambiguous provisions [should be] interpreted to their benefit," *Cty. of Oneida v.*

---

[3] One difference was that Colonel Simmons, sent by Governor Stevens to negotiate the Treaty of Olympia in Stevens's stead, "lacked the authority to tailor provisions in the way that [ ] Stevens was able to do when negotiating the Treaty of Neah Bay."

Oneida Indian Nation, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). That rule applies to "[t]reaty language reserving hunting, fishing, and gathering rights." Cohen's Handbook of Federal Indian Law § 18.02, at 1157 (Nell Jessup Newton ed., 2012). The Makah, however, seeks to cut off the Quileute and Quinault's argument from the get-go, asserting that the Indian canon does not apply here because "expand[ing] [the Quileute's and Quinault's] traditional fishing grounds adversely affects Makah." The Makah's contraction of the Indian canon is unwarranted.

Implicit in the Indian canon is the recognition that this principle inures to the benefit of the tribes that are parties to the treaty. As the Supreme Court has explained, the ultimate question is "how the [Indian] *signatories* to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196, 119 S.Ct. 1187 (emphasis added). The canon is "rooted in the unique trust relationship" between the United States and the sovereign tribes, who stood in an unequal bargaining position. *Cty. of Oneida*, 470 U.S. at 247, 105 S.Ct. 1245; *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899). As a non-signatory party, the Makah cannot usurp application of the Indian canon with respect to the Treaty of Olympia. Such an incursion would undermine tribal sovereignty and the signatory tribes' government-to-government relations. *See Tavares v. Whitehouse*, 851 F.3d 863, 877 (9th Cir. 2017); Cohen's, *supra*, § 2.02, at 117.

The Makah reads our precedent too broadly to advocate for its seemingly limitless rule that the

Indian canon is inapplicable whenever another tribe would be disadvantaged. Not surprisingly, the Makah cites authority involving tribes claiming contradictory rights under the same statute or treaty; in those circumstances, the Indian canon is indeterminate because the government owes the same legal obligations to all interested tribes and "cannot favor one tribe over another." *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996).

Here, by contrast, we are faced with an interpretive choice that would favor the signatory tribes on the one hand and the United States on the other. *See Rancheria*, 776 F.3d at 713. That conceptualization of the Indian canon also fits with Judge Boldt's recognition that a tribe may establish U & A in an area "whether or not other tribes then also fished in the same waters." *Decision I*, 384 F.Supp. at 332. To the extent the Indian canon plays a part in understanding the Treaty, it is appropriate to invoke it here. We also note that we would reach the same conclusion without a beneficial preference, as the evidence alone supports a broad interpretation of the Treaty language.

3. Intent of Quileute and Quinault

To ascertain the tribes' understanding, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Water Splash, Inc. v. Menon*, —— U.S. ——, 137 S.Ct. 1504, 1511, 197 L.Ed.2d 826 (2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988)). After a 23–day

bench trial, followed by 83 pages of Findings of Fact and Conclusions of Law, the district court undertook this task in a thoughtful and comprehensive manner.

Central to our review is the district court's ultimate determination "that the Quinault and Quileute's usual and accustomed fishing locations encompass those grounds and stations where they customarily harvested marine mammals—including whales and fur seals—at and before treaty time." This conclusion rested on the extensive factual findings of the treaty negotiators' intent—including the finding that the Quileute and Quinault understood the term "fish" covered whales and seals—and the underlying findings of historical fact, which were not clearly erroneous. *See Shellfish*, 157 F.3d at 642.

The general context and tenor of the negotiations is a helpful starting point. Governor Stevens was appointed to negotiate with the tribes to extinguish their claims to Washington land and allow for peaceful cohabitation of Indians and non-Indians. During negotiations, the Indians' main concern was reserving their "freedom to move about to gather food at their usual and accustomed fishing places" because harvesting fish was necessary for survival. Stevens and the other treaty commissioners made assurances throughout the process that the Indians would be able to continue their fishing activities and nowhere indicated that the Indians' existing activities would be restricted or impaired by the treaties.

Stevens's first attempt to reach an agreement with the Quinault in February 1855 at Chehalis River failed for reasons unrelated to this dispute.

But in July 1855, the Quileute and Quinault (as well as the Hoh Indian Tribe) entered into the Treaty of Olympia, which protects the tribes' "right of taking fish."

The minutes from the failed negotiations offer some insight into key negotiating points, as the draft treaty from Chehalis River formed the basis for the negotiations of the Treaty of Olympia.[4] Like Indians in other Stevens Treaty negotiations, the Indians at Chehalis River sought to preserve their entire subsistence cycle and worried that they would not be able to feed themselves if they ceded too much land. The commissioners explained that the treaty would confine where the tribes would live but would "not call[ ] upon [them] to give up their old modes of living and places of seeking food." Stevens informed the tribes that the treaty "secures [their] fish" and permits them to "take fish where [they] have always done so and in common with the whites."

Multiple aspects of the Treaty of Olympia negotiations shed light on the Quileute and Quinault's understanding of the scope of "fish." Although minutes from the negotiations do not exist today, the district court relied on ethnology studies and expert reconstructions of what likely happened at the negotiations. Because the commissioners and tribes did not speak the same languages, they used a limited trade medium of communication called Chinook jargon for translation. Colonel Shaw, the treaty commission's official interpreter, translated provisions and remarks from English to Chinook

---

[4] The value of the minutes is somewhat diminished because the Quileute was not officially represented at this council; the tribe did, however, send along members to watch.

jargon, then Indian interpreters translated the Chinook jargon into the tribes' native languages.

One linguistic clue provides powerful evidence that the Quileute and Quinault assigned a broad meaning to the use of "fish." The district court found, based on linguist Professor Hoard's testimony, that "[t]he negotiators most likely used the Chinook word 'pish,'" which translates into English as "fish." The court credited Professor Hoard's explanation that the negotiators would have opted for a broad cover term because Chinook language had general terms referring to large groups (like "fish") and specific terms referring to individual species (like "whales," "seals," and "salmon") but no intermediate terms referring to taxonomies (like "finfish" and "sea mammals").

The Quileute's and Quinault's corresponding words for "pish" have even wider sweep. Like Chinook jargon, the Quileute and Quinault languages have no intermediate terms for taxonomies. As Professor Hoard explained, the Quileute would likely have used "?aàlita?," which translates as "fish, food, salmon." Similarly, the Quinault's term "Kémken" is defined alternatively as "salmon," "fish," and "food." Because the Quileute and Quinault traditionally harvested whales and seals for food at and before treaty time, these pieces of linguistic evidence strongly support the district court's finding that the tribes "would have understood that the treaty reserved to them the right to take aquatic animals, including . . . sea mammals, as they had customarily done."

The Makah counters that the Chinook, Quileute, and Quinault languages had separate words for "fish," "whales," and "seals" as well as for "fishing,"

"whaling," and "sealing." But the mere existence of different words does not preclude some overlap in meaning. Such reasoning is as faulty as concluding that "tennis" and "volleyball" are not "sports" because "tennis," "volleyball," and "sports" are different words. Nor does the Makah's identification of practical and cultural differences in the real-world occupations of fishing, whaling, and sealing bridge that gap. Additionally, that the tribes had distinct terms available does not undermine what terms were actually utilized and how the Quileute and Quinault would have translated them. Because the Makah does not dispute that "pish" was used during negotiations and that "pish" can mean something as broad as "food" in the Quileute and Quinault languages, it has not shown that the district court's findings were erroneous, let alone clearly erroneous.

The district court made extensive findings regarding fishing and subsistence activities at the time of the treaty. For both the Quileute and the Quinault, "fishing constituted the principle economic and subsistence activity . . . at and before treaty time." As to the Quinault, "whale, seal, otter, deer, bear, elk, sea-gulls, ducks, geese," and "a variety of shellfish" were among the wide range of animals harvested. Among other witnesses, Dr. Ronald Olson, an ethnologist, described in detail offshore fishing, whaling, and fur sealing. As to the Quileute, Judge Boldt recognized the significant role of oceanic resources and found that before and at treaty time, the Quileute harvested diverse resources, specifically singling out seal, sea lion, porpoise, and whale, among others. Supporting the link between food and whales, the district court related testimony that "[t]he Indians did not want all fish or all whale but

liked to get something of everything which they wanted to eat." Multiple witnesses contributed to the detailed findings on Quileute offshore fishing, whaling, and fur sealing.

Evidence of post-treaty activities further supports the view that the Quileute and Quinault (and possibly even the commissioners) understood the Treaty to protect whaling and sealing. No party contests the district court's finding that "[d]uring the post-treaty period, the[ ] tribes continued to harvest whales and seals from the Pacific Ocean" with active encouragement from government agents. Although the government's acquiescence does not definitively show that the parties believed the right was preserved by the Treaty, the district court rightly noted that this important fact tends to suggest that "both sides believed the right to harvest sea mammals to have been reserved to the tribes."

During the Chehalis River negotiations, neither the tribes nor the commissioners used the term "fish" in a manner inconsistent with its inclusion of whales and seals. The district court identified only two times where the tribes mentioned sea mammals explicitly—in both instances, the Indians asked for beached whales. Stevens answered one request for beached whales by stating that the tribes "should have the right to fish in common with the whites, and get roots and berries." Stevens replied to the other request with: "[The tribes] of course were to fish etc. as usual. As to whales they were theirs, but wrecks belonged to the owners . . . ." Neither statement is clear as to whether Stevens understood fish and whales to be synonymous or overlapping, but we do not read his statements as drawing an incompatible distinction between the two. The

broader understanding finds further support in a book by James Swan, who attended the negotiations and later wrote that "[t]he Indians, however, were not to be restricted to the reservation, but were to be allowed to procure their food as they had always done."

As a practical matter, interpreting "fish" to cover whales and seals also respects the reserved-rights doctrine, which recognizes that treaties reserving fishing rights on previously owned tribal lands do not constitute "a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); Cohen's, *supra*, § 18.02, at 1156–57. In other words, absent a clear written indication, courts are reluctant to conclude that a tribe has forfeited previously held rights "because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights." *Mille Lacs*, 526 U.S. at 195, 119 S.Ct. 1187. That doctrine favors reading the "right of taking fish" to include the Quileute's and Quinault's established historical whaling and sealing, particularly because there are independent indications that "fish" was understood that expansively. *See Shellfish*, 157 F.3d at 644 (employing the reserved-rights doctrine to assist in understanding the scope of a treaty provision that could otherwise be read to encompass the right at issue). That practical point further solidifies that the Quileute and Quinault understood the "taking fish" provision to cover whales and seals.

Based on the considerable evidence submitted throughout the lengthy trial, the district court's finding that the Quileute and Quinault intended the

Treaty's "right of taking fish" to include whales and seals was neither illogical, implausible, nor contrary to the record. We conclude that the district court properly looked to the tribes' evidence of taking whales and seals to establish the U & A for the Quileute and the Quinault and did not err in its interpretation of the Treaty of Olympia. We do not address or offer commentary on whether the same result would obtain for the "right of taking fish" in other Stevens Treaties.

II. The Quileute and Quinault Have Identified the "Grounds and Stations" Where They Engaged in Whaling and Sealing

The State of Washington raises a separate argument, not joined by the Makah, namely whether the Treaty of Olympia's "grounds and stations" language mandates that the Quileute and Quinault provide evidence of "*specific location[s]* that the[y] regularly and customarily hunted whales or seals." (Emphasis added). This argument falls into the sea.

The State's suggestion that the tribes must identify specific named locations directly conflicts with Judge Boldt's description of "grounds and stations." Judge Boldt defined "stations" as "fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area" and "grounds" as "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." *Decision I*, 384 F.Supp. at 332.

While "stations" concerns particular locations and landmarks, "grounds" is not so limited. By definition, "grounds" includes "unspecified locations

which . . . could not then have been determined," vitiating the State's assertion that the tribes must come forward with specific named locations. The State's claim also runs headlong into the practical reality that documentation of Indian fishing in 1855 is scarce, and requiring extensive and precise proof would be "extremely burdensome and perhaps impossible," especially deep in the ocean. *Shellfish*, 157 F.3d at 644. The district court appropriately examined the substantial evidence of ocean whaling and sealing proffered by the Quileute and Quinault to determine that their usual and accustomed "grounds and stations" respectively extend 40 miles offshore and 30 miles offshore.[5]

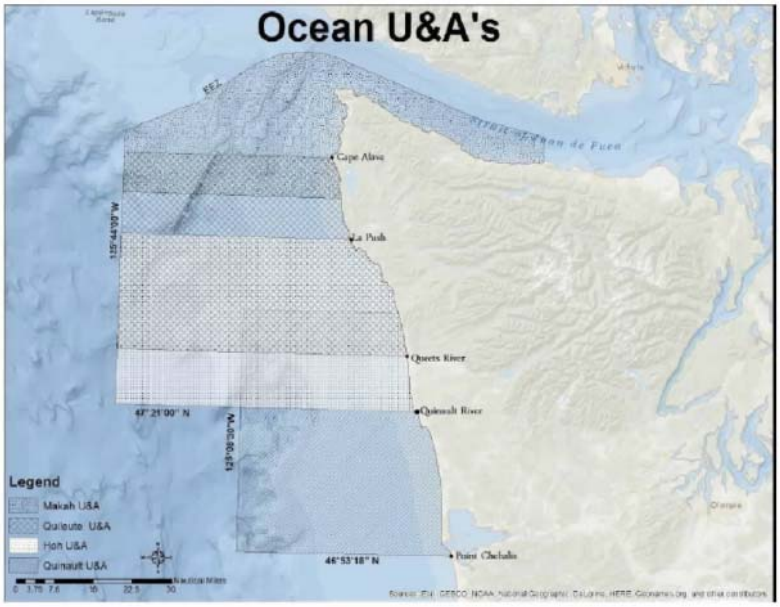
III. The Longitudinal Lines Do Not Match the District Court's Findings

Having made U & A determinations for the Quileute and Quinault, the district court endeavored to draw precise boundaries where the tribes could fish. The parties agreed as to the northern boundaries but "dispute how the parties believe the Western boundary for the Quileute and Quinault should be demarcated as the line proceeds south." The court decided to use longitudinal lines because it had done so in a prior proceeding with respect to the Makah's boundaries. The court started at the northernmost point of the Quileute's U & A, drew a line 40 miles west, and used that longitudinal

---

[5] Because no party challenges the adequacy of the submitted whaling and sealing evidence, there is no basis to overturn the district court's 40- and 30-mile findings. Nor do we need to reach the Makah's and the State's separate contention that the evidence was insufficient to establish that the Quileute's customary finfishing extended 20 miles offshore.

position as the western boundary for the entire area. The court did the same with 30 miles for the Quinault. The map below depicts the final result

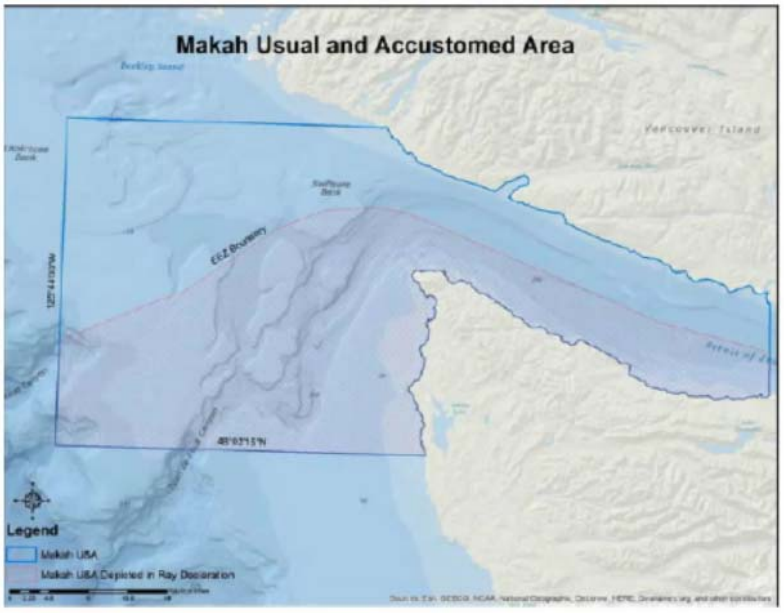


The Makah takes issue with the court's use of a straight vertical line because the coastline trends eastward as one moves south. The Makah calculates the coast-to-longitude distance at the southernmost point as 56 miles for the Quileute and 41 miles for the Quinault. In other words, the Quileute's and Quinault's southernmost boundaries respectively extend 16 miles and 11 miles beyond the court's finding of usual and accustomed fishing, and their total areas respectively sweep in an extra 413 square miles (16.9% of the total 2,450 square miles) and 387 square miles (17.4% of the total 2,228 miles). The result would be different, for example, had the boundary lines been drawn parallel to the coastline.

These significant disparities underscore the deficiencies in the court's longitudinal boundaries. The language of the Treaty of Olympia and countless judicial opinions spell out that the proceedings are designed to evaluate where the tribes were engaged in usual and accustomed fishing in 1855. After the court made that determination here, it effectively nullified parts of that same determination by creating a boundary containing large swaths of ocean where the Quileute and Quinault did not present sufficient evidence to establish U & A. Of course, practical difficulties mean that courts need not achieve mathematical exactitude in fashioning the boundaries. Nevertheless, the error rate here is too high and sweeps in areas that extend beyond the court's factual findings. In our view, there are other solutions that better approximate the court's findings.

The court's stated reason for invoking longitudinal lines was that the approach "is the status quo method of delineating U & A ocean boundaries by this Court" and "equity and fairness demand the same methodology for delineating the boundary at issue here." Although longitudinal lines were used to mark the Makah's western boundaries in a separate case, nothing in that case suggests that longitudinal lines are the required methodology. *See United States v. Washington*, 626 F.Supp. 1405, 1467 (W.D. Wash. 1985). Notably, the court drew longitudinal boundaries there "[o]n the basis of all evidence submitted and reasonable inferences drawn therefrom . . . ." *Id.* In denying a motion for reconsideration of the vertical boundaries, the court stated that the lines appropriately reflected "with some certainty the extent of the area which the

Court intends to encompass within its determination of a tribe's treaty-secured fishing area." *United States v. Washington*, No. 70–9213, Dkt. # 8763, Mem. Op. on Mot. for Recons., at 2 (W.D. Wash. Jan. 27, 1983). As shown in the map below, the lines tracked the coastline (and thus the court's findings) in a way that avoids the problem presented by this case.



A different approach is warranted here to account for the dissimilarities between the cases. Although the Quileute and Quinault assert that the longitudinal lines also are appropriate because they are supported by the evidence, the boundaries do not reflect the district court's findings. The Quileute and Quinault cannot vastly expand their U & A determinations without accompanying findings by

the district court. Nor is the evidentiary gap solved by the court's general statement that "tribal fishermen did not only fish due west of their villages, but moved in all directions from the coastline."

Accordingly, we reverse the district court's order imposing longitudinal boundaries. Because the law does not dictate any particular approach or remedy that the court should institute, we leave it to the court on remand to draw boundaries that are fair and consistent with the court's findings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Each party shall bear its own costs on appeal.

**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**

Signed July 9, 2015

---

129 F.Supp.3d 1069

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MEMORANDUM ORDER

RICARDO S. MARTINEZ, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This subproceeding is before the Court pursuant to the request of the Makah Indian Tribe (the "Makah") to determine the usual and accustomed fishing grounds ("U & A") of the Quileute Indian Tribe (the "Quileute") and the Quinault Indian Nation (the "Quinault"), to the extent not specifically determined by Judge Hugo Boldt in Final Decision # 1 of this case. The Court is specifically asked to determine the western boundaries of the U & As of the Quileute and Quinault in the Pacific Ocean, as well as the northern boundary of the Quileute's

U & A. A 23–day bench trial was held to adjudicate these boundaries, after which the Court received extensive supplemental briefing by the Makah, Quileute, Quinault, and numerous Interested Parties and took the matter under advisement. The Court has considered the vast evidence presented at trial, the exhibits admitted into evidence, trial, post-trial, and supplemental briefs, proposed Findings of Fact and Conclusions of Law, and the arguments of counsel at trial and attendant hearings. The Court, being fully advised, now makes the following Findings of Fact and Conclusions of Law. To the extent certain findings of fact may be deemed conclusions of law, or certain conclusions of law be deemed findings of fact, they shall each be considered conclusions or findings, respectively.

I. BACKGROUND

On February 12, 1974, Judge Hugo Boldt entered Final Decision # 1 in this case. The decision set forth usual and accustomed fishing grounds and stations ("U & As") for fourteen tribes of western Washington, wherein the tribes had a treaty-secured right to take up to 50% of the harvestable number of fish that could be taken by all fishermen. *See United States v. Washington,* 384 F.Supp. 312 (W.D.Wash.1974) ("*Final Decision 1* "). The Court enforced its ruling through entry of a Permanent Injunction, whereby it provided for any party to the case to invoke the continuing jurisdiction of the Court on seven different grounds, the sixth of which permits adjudication of "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I." *Id.* at 419 (Permanent Injunction, ¶ 25(a)(6)), as modified

by the Court's Order Modifying Paragraph 25, Dkt. # 13599.[1] After innumerable subproceedings and appeals and multiple decisions from this country's highest Court, this forty year-old injunction remains in place, safeguarding the rights reserved by these tribes in treating with the United States government to continue to fish as they had always done, beyond the boundaries of reservations to which they agreed to confine their homes.

It is under the jurisdiction set forth by the Permanent Injunction that the parties are again before this Court. The Makah Indian Tribe initiated this subproceeding on December 4, 2009 by filing a request for this Court to determine the usual and accustomed fishing grounds and stations of the Quileute Indian Tribe and the Quinault Indian Nation, to the extent not specifically determined by Judge Boldt in Final Decision # 1. In particular, the Makah ask the Court to define the western and northern boundaries of the Quileute U & A and the western boundary of the Quinault's U & A in the Pacific Ocean—waters beyond the original case area considered by Judge Boldt.[2] After a series of pre-trial rulings, this subproceeding proceeded to trial under Paragraph 25(a)(6) of the Permanent Injunction. *See* No. 09–01, Order on Motions, Dkt. # 304.

---

[1] Citations to docket entries herein are to those under *United States v. Washington,* Case No. 70–9213, unless stated otherwise.

[2] The Makah, Quileute, and Quinault stipulated that these boundaries were not specifically determined in Final Decision # 1. *See* No. 09–01, Joint Status Report, Stipulation and Proposed Discovery Plan, Dkt. # 181 at p. 2.

This is only the second subproceeding in the long history of this case in which this Court has been asked to rule on the boundaries of a tribe's usual and accustomed fishing grounds in the Pacific Ocean. In the first such subproceeding, this Court in 1982 adjudicated the boundaries of the Makah Tribe's Pacific Ocean U & A, determining its western boundary to be located forty miles offshore and its southern boundary to be located at a line drawn westerly from Norwegian Memorial. *United States v. Washington*, 626 F.Supp. 1405, 1467 (W.D.Wash.1985) ("*Makah*"), *aff'd* 730 F.2d 1314 (9th Cir.1984). Since that time, the Quileute and Quinault have been fishing at locations up to forty miles offshore under regulations adopted by the federal government pending formal adjudication by this Court. See No. 09–01, Dkt. # 304 at pp. 3–4.

The subproceeding was tried to the Court over the course of 23 days commencing March 2, 2015 and concluding April 22, 2015. The Court heard testimony from eleven witnesses and admitted 472 exhibits comprised of thousands of pages. The Court also heard argument and reviewed briefs by the Makah, Quileute, Quinault, and a number of Interested Parties, including the State of Washington and the Hoh, Port Gamble S'Klallam, Jamestown S'Klallam, Tulalip, Swinomish, Upper Skagit, Nisqually, Squaxin Island, Muckleshoot, Puyallup, and Suquamish Tribes. The Court commends counsel for each of these parties—and for the Makah, Quinault, and Quileute in particular—for their exhaustive, thorough, and diligent efforts throughout the course of trial and the proceedings leading up to it. Indeed, trial on these three boundaries exceeded the length of the original trial

before Judge Boldt leading to Final Decision # 1, a reflection of the great care and extensive research time and resources invested by all parties to this case. It is with the utmost respect for the impassioned efforts and the sincere professionalism demonstrated by all parties during this unusually extensive trial, as well as for the profound investment of diverse communities in the decision rendered herein, that the Court sets forth the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

The following findings of fact are based upon a preponderance of the evidence presented at trial. Where relevant, the Court also draws on findings of fact set forth by Judge Boldt in Final Decision # 1.

A. Treaty Background

As an initial matter, the Makah and Interested Party the State of Washington are at odds with the Quileute, Quinault, and a number of Interested Party tribes with respect to the scope of the treaty-secured "right of taking fish." Specifically, the parties dispute whether evidence of a tribe's harvest of marine mammals, including fur seals and whales, may be the basis for establishing a tribe's U & A. The Makah and the State, joined by three Interested Parties, take the position that a tribe's U & A must be established on the basis of locations where it went at treaty time for the purpose of taking finfish. By contrast, the Quileute and Quinault, with support from a number of Interested Parties, argue for a construction of their treaty that would allow for a U & A to be established based on a broader interpretation of "fish" inclusive of evidence of a

tribe's treaty-time marine mammal harvest activities. The following findings of fact concerning the background of tribal treaty rights are made in answer to the question of treaty interpretation raised by the parties.

1. General Context of Treaty Negotiations

1.1. On August 30, 1854, Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory, was notified of his appointment to negotiate treaties with tribes west of the Cascade Range (hereinafter, the "Stevens Treaties"). The principal purposes of the Stevens Treaties were to extinguish Indian claims to the land in Washington Territory and to provide for peaceful and compatible coexistence of Indians and non-Indians in the area. Governor Stevens and the treaty commissioners who worked with him were not authorized to grant to the Indians or treat away on behalf of the United States any governmental authority of the United States. *Final Decision 1,* Findings of Fact ("FF") 17, 19.

1.2. At the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting fish, was that they have freedom to move about to gather food at their usual and accustomed fishing places. In 1856, it was felt that the development of the non-Indian fisheries in the case area would not interfere with the subsistence of the Indians, and Governor Stevens and the treaty commissioners assured the Indians that they would be allowed to continue their fishing activities. FF 20.

1.3. It was the intention of the United States in negotiating the treaties to make at least non-coastal tribes agriculturists, to diversify Indian economy, and to otherwise facilitate the tribes' assimilation into non-Indian culture. There was no intent, however to prevent the Indians from using the fisheries for economic gain. FF 21.

1.4. There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by their treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians. FF 26.

1.5. Since the vast majority of the Indians at the treaty councils did not speak or understand English, the treaty provisions and the remarks of the treaty commissioners were interpreted by Colonel Benjamin F. Shaw, the treaty commission's official interpreter, to the Indians in Chinook jargon and then translated into native languages by Indian interpreters. Chinook jargon, a trade medium of limited grammar and a vocabulary of only 300 or so terms, was inadequate to express precisely the legal effects of the treaties, although the general meaning of treaty language could be explained. Even so, many of those present did not understand Chinook jargon. There is also no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision for the "right of taking fish." FF 22; *see also* Ex. 64.

2. Treaties with the Makah, Quileute, and Quinault

2.1. The Makah were a party to the Treaty of Neah Bay, signed on January 31, 1855. The Treaty of Neah Bay was negotiated with the Makah by Governor Stevens and members of his treaty commission, including George Gibbs (a lawyer and adviser to Stevens), Colonel Michael Simmons, and Colonel Shaw. Gibbs maintained a journal that includes a still extent record of the treaty negotiations with the Makah. It appears from Gibbs' journal that tribes to the south of the Makah, likely including the Quileute, were invited to attend the treaty council, but Governor Stevens decided to proceed without them to avoid delaying the negotiations. The Treaty of Neah Bay was ratified by the United States Senate on March 8, 1859, and proclaimed by the President on April 18, 1859. A reserved fishing rights provision is found in Article 4 of the Treaty of Neah Bay, which provides as follows:

> The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States and of erecting temporary houses for the purposes of curing, together with the privilege of housing and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

Ex. 29 at pp. 1, 4; Ex. 65 at p. 19 (journal of George Gibbs, recording decision to send for the "other tribes" to meet at Grays Harbor); Ex. 298.

2.2. Governor Stevens, along with Gibbs, Simmons, and Shaw, first attempted to negotiate a treaty with the Quinault and other tribes in southwest Washington in February 1855 at the Chehalis River Council. As with the Treaty of Neah Bay, Gibbs' journal provides a record, albeit a likely incomplete one, of the failed Chehalis River negotiations. The Quileute were not represented at the Council, although they sent two boys along with the Quinault to observe. The Chehalis River Council was intended to treat with the remaining tribes of Washington Territory west of the Cascade Range. However, it was accidentally discovered at the council, perhaps upon negotiators' overhearing the different language spoken by the two Quileute boys, that the Quinault did not occupy the entire area between the Chehalis River and Makah territory and that a distinct tribe—the Quileute—was situated between the two. Gibbs attributed the exclusion of the Quileute to their speaking a different language from the Quinault such that messengers sent up the coast to provide notice of the council had not communicated with the tribe. For these reasons, the Quileute were omitted from the negotiations. The Chehalis River negotiations ultimately broke down when participating tribes refused to agree to Governor Stevens' proposal that a single reservation be established for all of the tribes. *See* Ex. 65 at pdf pp. 23–24; Ex. 68 at pp. 172–73.

2.3. The Quileute and Quinault, together with the Hoh Tribe, were ultimately parties to the Treaty of Olympia, negotiated a few months later on July 1, 1855 at a village at the mouth of the Quinault River, now known as Taholah. Tr. 3/3 at 19:3–7 (Hoard). When the Treaty of Olympia was negotiated, only

half of the four-member U.S. treaty commission was present: both Governor Stevens and George Gibbs were absent, and Stevens sent Colonel Simmons to negotiate in his stead, with Shaw serving as interpreter. Simmons utilized the draft treaty developed at the Chehalis River negotiations. As a result, the only substantive difference between the two is that the Treaty of Olympia provides that more than one reservation might be established for the Quileute and Quinault. There is no surviving journal of the negotiations conducted by Simmons. The Treaty of Olympia was signed by Governor Stevens in Olympia on January 25, 1856, ratified by the United States Senate on March 8, 1859 and proclaimed by the President on April 11, 1859. Article 3 of the Treaty of Olympia contains the following reservation of rights provision:

> The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

Ex. 297.

2.4. Not all of the differences between treaties can be attributed to differing degrees of importance that

tribes attached to various resources. For instance, a provision for pasturing horses is absent from the Treaty of Neah Bay but present in both the Treaty of Olympia and the draft Chehalis River Treaty. It is probable that Governor Stevens included this provision deliberately in the draft Chehalis River Treaty in response to specific concerns of the Chehalis and Cowlitz tribes for maintaining their horse traditions. By contrast, the fact that the draft Chehalis River Treaty was used as a template for the Treaty of Olympia most likely explains the inclusion of this provision in the treaty with the Quinault and Quileute. In particular, the limited use of horses by the Quileute Tribe makes the inclusion of this provision in the Treaty of Olympia anomalous. Stevens, unlike Simmons, was invested with authority to tailor treaty provisions in response to needs and concerns expressed by the tribes. As Governor Stevens was absent from the Treaty of Olympia negotiations, the ability of the Quileute and the Quinault to negotiate tailored treaty provisions was most likely limited. *See* Tr. 3/16 at 182:13—184:18; 192:3–10 (Boxburger).[3]

3. Scope of the Right of Taking Fish

3.1. Although the treaty commission was primarily concerned with obtaining land, *see* Tr. 3/16 at p. 187:18–22 (Boxburger), the minutes that are available indicate a persistent concern among the Indians with preserving their entire subsistence cycle. For instance, when Che-lan-the-tat of the Skokomish Tribe expressed a concern at the

---

[3] Transcript citations herein are to the unofficial draft transcripts of trial proceedings produced by the Court Reporter.

negotiation of the Treaty of Point–No–Point with the ability of the tribes to feed themselves upon ceding so much land, Benjamin Shaw assured the tribes that they were "not called upon to give up their old modes of living and places of seeking food, but only to confine their houses to one spot." Ex. 65 at p. 11. Governor Stevens informed the tribes at that same council that the treaty "secures [their] fish." *Id.* at p. 14. Stevens similarly informed the tribes at the Chehalis River Council that the members of the treaty commission "want you to take fish where you have always done so and in common with the whites." *Id.* at p. 22.

3.2. The minutes from the Chehalis River negotiations indicate that the participating tribes were specifically concerned with reserving the right to take sea mammals. During the Chehalis River negotiations, the assembled Indians raised the issue of whales at least twice. Tuleh-uk, the head chief of the Lower Chehalis, stated, "I want to take and dry salmon and not be driven off . . . I want the beach. Everything that comes ashore is mine (Whales and wrecks.) I want the privilege of the berries (Cranberry Marsh)." Governor Stevens responded, "He (Tuleh-uk) sees that we write down all that he says . . . That paper (the Treaty) was the heart of the Great Father which he thought good. It said he should have the right to fish in common with the whites, and get roots and berries." Ex. 65 at p. 24. Stevens' response to Tuleh-uk suggests that the term "fish" was used in a capacious sense, encompassing finfish as well as whales. *See* Tr. 3/3 at pp. 34:1–35:21 (Hoard). While Stevens elsewhere distinguished between "fish" and "whales" in

responding to a demand from representatives of the Chinook Tribe for "one half of all that came ashore on the weather beach," he made no distinction between the tribes' right to take beached whales and to hunt for swimming whales. *See* Ex. 65 at p. 26 ("They of course were to fish etc. as usual. As to whales, they were theirs. . . ."); TR 3/3 at pp. 36:5–39:1 (Hoard).

3.3. Although the draft treaty was read to the assembled tribal representatives, no objection was made despite the lack of an express reference to the right to take sea mammals. *See* Ex. 65 at p. 32. It is reasonable to infer from the absence of any objection that the tribes understood the right to take whales to be provided for in the treaty. *See* 3/3 Tr. at pp. 45:13–25; 78:1–79:7 (Hoard).

3.4. Nothing in the record of the negotiations of any of the treaties indicates that the U.S. treaty commission intended to exclude the harvest of sea mammals from the tribes' reserved fishing rights. By contrast, the intent to include the harvest of sea mammals is corroborated by James Swan's record of the treaty negotiations. Swan recounts that "[t]he Indians, however, were not to be restricted to the reservation, but were to be allowed to procure their food as they had always done, and were at liberty at any time to leave the reservation to trade with or work for the whites." Ex. 291 at p. 344. It is reasonable to infer from Swan's statement that Governor Stevens intended the treaties to reserve to tribes that had customarily harvested sea mammals the right to continue to do so "as they had always done."

3.5. Dictionary definitions at the time also evidence a broad popular understanding of the word "fish." For instance, the 1828 Webster's American Dictionary of the English Language defined "fish" expansively as "[a]n animal that lives in the water." Ex. 334. While the dictionary recognized the Linnaean taxonomic classification of "fish," which limited the term to aquatic animals that "breathe by means of gills, swim by the aid of fins, and are oviparous," it nonetheless acknowledged its broader popular meaning: "Cetaceous animals, as the whale and dolphin, are, in popular language, called fishes, and have been so classified by some naturalists. . . . The term *fish* has also been extended to other aquatic animals, such as shell-fish, lobsters, etc." *Id.* (emphasis in original). Other dictionaries from the time corroborate the term's broad meaning in popular usage. *See, e.g.,* Ex. B222.6 (quoting Worcester's 1860 dictionary and Walker's 1831 dictionary, which both define fish as "an animal that inhabits the water"); 3/3 Tr. pp. 52:15, 56:4–57:25, 202:22–203:12 (Hoard). The common usage in legal opinions from the mid to late 1800s of the terms "fish" and "fisheries" in reference to both whales and seals suggests that the U.S. treaty negotiators may themselves have intended to use the term "fish" in its broadest sense. *See, e.g., In re Fossat,* 69 U.S. 2 Wall. 649, 696, 17 L.Ed. 739 (1864) ("For all the purposes of common life the whale is called a fish, though natural history tells us that he belongs to another order of animals."); *Ex parte Cooper,* 143 U.S. 472, 499, 12 S.Ct. 453, 36 L.Ed. 232 (1892) (discussing "seal fisheries"); *The Coquitlam,* 77 F. 744, 747 (9th Cir.1896) ("They all had the usual

ships' supplies and stores and outfit for seal fishing.").

3.6. There is no record of the Chinook phrase that was actually used to communicate the "right of taking fish." FF. 22. The severe limitations of Chinook jargon as a medium for communication, as well as the limited familiarity of negotiators on both sides with the language, inhibited the capacity to communicate treaty terms with precision. The negotiators most likely used the Chinook word "pish," translated by George Gibbs in his 1863 "Dictionary of the Chinook Jargon" as "English. Fish." Ex. 64 at p. 26. The negotiators may also have used the Chinook phrases "mamook pish" or "iskum pish," meaning "to take fish" or "to get fish." *See* Tr. 3/3 at pp. 66:6–67:24 (Hoard). While Chinook jargon did contain terms for some individual aquatic species, including whales, seals, and salmon, it lacked cover (i.e.high-level) terms that could differentiate between taxa or larger groupings of aquatic animals, such as finfish, shellfish, cetaceans, and sea mammals. *See* Ex. 64. It is reasonable to infer that the negotiators employed broad cover terms from Chinook jargon when negotiating the fishing rights provision and that these cover terms would not have been used in a restrictive sense. *See* Tr. 3/3 at p. 68:7 (Hoard).

3.7. The sweep of the words for "fish" in the Quileute and Quinault languages is even broader than in Chinook jargon. The Quinault cover term for "fish," "Kémken," is defined alternatively as "salmon," "fish," and "food." *See* Ex. 76. Similarly, the Quileute cover term, "?aàlita?" is translated by multiple lexicographers as "fish, food, salmon." Exs.

225, 233. As with the Chinook jargon, neither tribe's language possessed terms that could differentiate between groupings of aquatic species, such as sea mammals, shellfish, and finfish. It is reasonable to infer from the records of the Quileute and Quinault languages that members of these tribes would have understood that the treaty reserved to them the right to take aquatic animals, including shellfish and sea mammals, as they had customarily done.

3.8. Post-treaty activities also suggest that all parties to the Treaty of Olympia understood its subsistence provision to secure to the Quinault and Quileute the right to take whales and seals at their usual and accustomed harvest grounds. During the post-treaty period, these tribes continued to harvest whales and seals from the Pacific Ocean without any protest from government agents. To the contrary, Indian agents actively encouraged these tribes to continue their sea mammal harvest. For instance, Indian Agent Charles Willoughby urged the Quileute to "continue your fisheries of salmon and seals and whales as usual" and assured them that if they wanted any blacksmith work done, such as "spear heads for seals or harpoons for whales, the blacksmith at the agency at Neah Bay will do the work." Ex. 281 at pp. 165, 167. These two tribes were also among those along the coast of the United States and Canada that were exempted from restrictions on fur sealing imposed through the 1893 Bering Sea Arbitration Award and 1894 Bering Sea Arbitration Act. *See* Ex. B85 at p. 53. Post-treaty activities are thus consistent with the reservation of the right to harvest sea mammals in the Treaty of Olympia and inconsistent with a restrictive reading of the treaty's fishing rights provision.

A. Quinault Indian Nation's Western Boundary

1. Background on Traditional Quinault Economy

4.1. There is comparatively little documented information about aboriginal Quinault culture and subsistence fishing activity relative to information about other western Washington tribes. Evidence regarding treaty-time activities of the Quinault is limited even in comparison to the similarly isolated Quileute and substantially more limited than for the Makah, whose location amidst the deep harbors at Neah Bay made this latter tribe unusually accessible to non-Indian traders, settlers, and visitors. Tr. 3/16 at 4:22–25 (Boxburger).

4.2. Treaty-time governmental contacts with the Quinault were few. In 1854, just prior to the Treaty of Olympia negotiations, George Gibbs wrote, "Following up on the coast, there is another tribe upon the Kwinaitl [Quinault] River, which runs into the Pacific some twenty-five miles above the Chihalis, its headwaters interlocking with the streams running into Hood's canal and the inlets of Puget sound. Little is known of them except that they speak a different language from the last." Ex. B90 at p. 426. Federal Indian agent reports about the Quinault were all written post-treaty and focus on activities with the potential for commercial development to aid in the government's assimilation policy. These reports, narrow in their purview, are consequently of limited utility in discerning Quinault treaty-time practices. *See* Tr. 3/30 at p. 99 (Thompson); Tr. 4/2 at pp. 65–68 (Renker).

4.3. There have been no archaeological excavations that have generated data associated with aboriginal Quinault occupancy. *See* Tr. 4/7 at pp. 101–103 (Wessen). The only recorded pre-treaty historical accounts that mention the Quinault consist of records of a 1775 encounter with the Spanish vessel Sonora (an encounter that some scholars attribute to the Quileute rather than the Quinault, *see* Ex. 255 at p. 97 & n. 34), a 1788 encounter with English explorers on the Columbia expedition, and accounts by James Swan of his three-day trip to Quinault in 1854 as well as an encounter with several Quinault Indians while Swan was living 60 miles south of Quinault in Shoalwater Bay. One of nine accounts of the Wilkes Expedition also records an encounter with canoes carrying some men "from southward about Grays Harbor" at the western end of the Strait of Juan de Fuca on August 3, 1841. Ex. B200 at pdf p. 5. These men may have been Quinault. TR 3/18 at pp. 175–178 (Boxburger).

4.4. Most of what is known about Quinault culture and subsistence activities before and at treaty times comes from Dr. Ronald Olson's ethnology of the Quinault. Dr. Olson conducted anthropological fieldwork at Quinault for one month each in the spring of 1925 and the winters of 1925–26 and 1926–27 and published an ethnography on the Quinault in 1936. Ex. 213. Dr. Olson's ethnography intended to describe Quinault culture and society prior to contact with non-natives and drew from the memories and oral histories of informants, whom Dr. Olson described as "thoroughly reliable, reasonably intelligent" and "familiar with the old life." Ex. 213 at p. 3. Some of these informants, all of whom were over 60 years of age, had memories reaching back to

the 1850's. Ex. 212 at p. 696. Dr. Olson's field notes are available in addition to his 1936 ethnography, though it is uncertain whether the remaining field notes are complete. Ex. 211. Dr. Olson also testified before the Indian Court of Claims ("ICC") on behalf of the Quinault in 1956. Ex. 212.

4.5. The Quinault occupied the coast of Washington State for thousands of years. Tr. 3/16 at p. 2 (Boxburger). The current members of the Quinault Tribe are descendants of the treaty-time occupants of the villages situated in the territory extending roughly between the Queets River system to the north and the north shore of Gray's Harbor to the south. Ex. 141 at p. 1 (1973 Lane Report). Chief Tahola, Head Chief for the Quinault, expressed the important relationship of the tribe to these traditional lands in his remarks to Governor Stevens at the Chehalis River Council: "He wanted his country. His children live there and wanted food. He wanted them to get it there, did not want to leave it. The river he did not want to sell near the salt water, nor the sand beach mouth, but that part above the mountains and off the river he would sell." Ex. 65 at p. 23.

4.6. Fishing constituted the principal economic activity of the Quinault at treaty time. Salmon and steelhead served as the principal food and as an important item of trade for the tribe. FF 122. Gibbs remarked that the Quinault Tribe is "celebrated for its salmon, which are considered to excel in quality even those of the Columbia." Ex. 68 at p. 172. The large, glacier-fed rivers in the Quinault region provided a rich source of salmon for the tribe. Reflecting the Quinault's adaptation to extracting

resources from this environment, Judge Boldt included a number of rivers and streams in his determination of the Quinault U & A within the original case area: Clear water, Queets, Salmon, Quinault (including Lake Quinault and the Upper Quinault tributaries), Raft, Moclips, Copalis, and Joe Creek. FF 120.

4.7. At the same time, the position of the Quinault on the Olympic Peninsula coast played an undeniable role in shaping and orienting the tribe's culture, trade, and economic activities. *See* Ex. 213 at p. 12 ("The location of the Quinault on the open coast had its influence on their life."). Comparing their Quinault to their northern neighbors, the anthropologist Jay Powell explained that, despite many Quileute families maintain settlements along inland river courses, "the Quileute, like their neighbors (the Quinaults, Ozettes, and Makahs), were primarily seafarers, deriving most of their livelihood from the oceans." Ex. 224, p. 105. Intermarriages between the Quinault and members of tribes to the north and south were common in traditional Quinault society, as was inter-tribal trade along the coast. Ex. 213 at p. 13; Ex. 277 at p. 81–84. Before and at treaty time, the Quinault, whom Dr. Olson described as "expert canoemen," possessed large ocean going canoes that they manufactured themselves or obtained in trade from the Makah and the Quileute. *Id.* at pp. 68, 73. The Quinault also manufactured sails out of cedar mats and used bailers and inflated sealskins to aid them in traveling on ocean voyages. *Id.* at p. 72. Before and at treaty time, the Quinault regularly traveled the Washington coast between Cape Flattery and the Columbia River. *Id.* at p. 87; Ex. B200 at pdf p. 5

(1841 report documenting encounter with Indians from Grays Harbor near Cape Flattery). The important linkage between the Quinault's coastal location and the tribe's subsistence practices is reflected in Judge Boldt's determination that, in addition to inland fisheries, the Quinault utilized "[o]cean fisheries . . . in the waters adjacent to their territory." FF 120.

4.8. In addition to salmon, the Quinault made use of a wide variety of aquatic coastal and oceanic resources for food as well as for materials such as clothing, bedding, ropes, containers, and tools. For instance, Captain Willoughby, who served as Indian agent at Neah Bay prior to serving as Indian agent on the Quinault Reservation, recorded a wide range of plants and animals harvested by the tribe for food, including "[m]any varieties of salmon," "tender shoots of rushes, young salmon-berry sprouts and other succulent growth of the spring-time," bulbous roots, a wide range of berries, whale, seal, otter, deer, bear, elk, sea-gulls, ducks, geese, seaweed, and a variety of shellfish. Ex. 351 at pp. 269–70. In addition to many of these species, Dr. Olson noted Quinault harvest of halibut, cod, rock cod, sea bass, and sole. Ex. 213 at p. 36. The Quinault traditionally hunted for sea mammals, including whales, fur and hair (harbor) seals, sea otters, and sea lions. The Quinault both ate the flesh of seals and whales and used them to extract oil. They also traditionally made use of seal skins, as well as the skins of elk, bear, and rabbit, for clothing. Ex. 351 at p. 3. Skins of hair seals were used as buoys on whaling expeditions. Ex. 213 at p. 44. Sarah Willoughby, Captain Willoughby's wife, included many of these products in her 1887 description of the

possessions of a man named Riley, a Haida Indian and former slave who shared a lodge at Quinault with three other families. Among Riley's possessions, Sarah Willoughby noted: "[g]reat skins of seal and whale oil," "long festoons of whale blubber and dried clams," "baskets of dried halibut and salmon," "the skins of a beautiful sea otter," three large bear skins, and other products obtained either locally or by trade. Ex. 355 at pdf pp. 2–4. The anthropologist Ram Raj Prasad Singh listed a similarly broad range of food resources traditionally used by the Quinault on a regular, seasonal basis. Among marine resources, Singh included: sea trout, night smelt, sea lion, blueback, candlefish, fur seal, salmon, whale, sea otter, smelt, and silver and king salmon. He also noted "some deep sea fishing" occurring from April through June. Ex. 277 at p. 67. Much of the salmon, halibut, rock cod, and bass caught by the Quinault were preserved for later consumption. Ex. 142 at p. 11.

4.9. Traditional Quinault culture did not recognize the "idea of ownership of land beyond a 'use ownership' of the house site." Ex. 213 at p. 115. Individuals owned canoes and implements and could also own guardian spirits. *Id.* The concept of ownership did not extend to coastal and oceanic fishing grounds.

4.10. The Quinault possessed the navigational skills, knowledge, and technologies to travel extensively on the open ocean out of sight of land. Reflective of their oceanic navigational skills, the Quinault recognized six directions, one of which was expressed alternatively as "ocean side" and "far out to the ocean." Ex. 213 at p. 178. The Quinault navigated

chiefly by means of the sun but also watched the ocean swells when at sea, as they were said to always come from the west. *Id.* A few Quinault shamans were said to be able to control the weather. *Id.* at p. 150. The Quinault also had knowledge of the constellations, including of the Pole-star, which was known to be used by the Makah to navigate at night while whaling. *Id.* at pp. 177–78; Ex. 332 at p. 47. In consideration of this and other evidence, the noted anthropologist Dr. Barbara Lane wrote in a 1977 report on Quinault fisheries that "the record is clear that the Quinault possessed seaworthy canoes, navigational skills, and gear and techniques designed to harvest a variety of offshore fisheries and that they customarily did so." Ex. 142 at p. 12.

2. Quinault Offshore Fishing

5.1. At and before treaty time, the Quinault engaged in offshore fisheries on a regular, seasonal basis for salmon, halibut, cod, rock cod, sea bass, sole, smelt, candlefish, and herring. Ex. 213 at pp. 36–38. The Quinault harvested smelt and candlefish by means of a dip net, and caught halibut, cod, rock cod, and sea bass with hook and line. *Id.* Herring were harvested with a herring rake used from a canoe. *Id.* at p. 38. The Quinault also regularly harvested razor clams, mud clams, oysters, mussels, sea anemones, and crabs along the shore. *Id.* at pp. 38–39. During the summer months, some Quinault migrated from their upland villages to sites along the coast to engage in these ocean fisheries. *Id.* at p. 38; Ex. 277 at p. 71.

5.2. Dr. Olson recorded some of the usual locations and distances at which these offshore fish species were customarily harvested by the Quinault at and

before treaty time. Smelt and candlefish were taken by the people of the lower villages at the river mouth and at the surf of the beach, and herring was taken within a mile of the beach. Ex. 213 at pp. 36–38. Halibut, cod, rock cod, sea bass, and sole "could be taken anywhere along the coast within six miles of shore." *Id.* One of Dr. Olson's informants reported that halibut, rock cod, and bass were fished in an identical manner between July and August at locations five to six miles offshore, in waters close to rocks and approximately twenty-five feet deep. Ex. 211 at pdf p. 28.

5.3. Although the Quinault most likely harvested these fish within six miles, they may have fished at distances further offshore on at least an occasional basis. Dr. Lane, for instance, concluded in her 1977 report on Quinault ocean fisheries that, while "[i]t is not feasible to document the outer limits of Quinault fishing, [ ] it appears that Quinault fishermen were familiar with offshore resources for at least thirty miles west of the Olympic peninsula." Ex. 142 at p. 1. Evidencing this familiarity, unidentified Indians informed the United States Fish Commission of a fishing bank at the continental shelf, approximately 30 miles offshore from Shoalwater Bay. Ex. 318 at p. 65. In 1895, Beriah Brown wrote an article on Quinault marine mammal hunting, in which he noted that the fur seal stop at this bank on their migration northward, where many of them fall victim to the Quinault. Brown described this bank as a "famous [ ] fishing ground." Ex. 18 at pdf p. 2. More likely than not, the Quinault Indians were the ones who informed the U.S. Commission of the location of the bank, given that they frequented Shoalwater Bay at treaty-time and ranged 30 miles

offshore in their marine mammals hunts. The Quinault also manufactured fishing lines two to three hundred fathoms in length, which would be consistent with deep-sea fishing practices. Ex. 211 at pdf p. 675.

3. Quinault Whaling

6.1. Whaling has been consistently recognized as an important cultural and economical tradition is pre-treaty Quinault society. While Quinault, like other coastal tribes, made use of drift whales that beached on their territorial coast, the historical and ethnographic evidence demonstrates that the active pursuit of whales was a deeply engrained practice in Quinault society. Dr. Olson, for instance, described the Quinault as the "most southern people who engaged in the pursuit of whales." Ex. 213 at p. 12. While Dr. Olson was of the opinion that the abundance of salmon in Quinault Territory mitigated the tribe's need and desire to engage in whaling to the extent of the Makah and Quileute to the north, he nonetheless recognized the importance of the practice in Quinault society, as manifested by traditional Quinault secret societies dedicated to whaling and of rituals associated with the hunt. *Id.* *See id.* at p. 44 (describing whaling as a "dangerous and spectacular pursuits [ ] hedged about with ritual."). Dr. Olson recorded only two Quinault whalers—Nicagwa'ts and his brother—active around 1850, though he reported that there were as many as six Quinault whalers at any time in the pre-treaty era, when the population was larger. As each whaler would have needed to "call together seven other men to aid him," id. the number of individuals engaged in whaling in 1850 would have been a substantial

proportion of the population, which consisted of only 158 Quinault according to a treaty-time census. Tr. 3/16 at 60:2–18 (Boxburger). Edward Curtis, a Seattle photographer who visited Quinault in 1910, gave a similar account of the existence of two Quinault whalers at treaty-time, each captaining a canoe of eight men in total. Ex. 347 at pp. 9–10.

6.2. Quinault whalers traditionally made use of large ocean canoes, sufficient to fit six paddlers, the steersman, and the harpoon thrower, who also served as the head whaler. The Quinault whalers made use of a harpoon similar to that used by the Makah as well as buoys made of whole skins of hair seal.

6.3. A generations old myth describes how the Quinault learned to hunt whales. The "Story of the Dog Children," recorded by Livingston Farrand, tells of five children who could change from human to dog form. Cast away from society, the children learned to hunt whales from their mother using sealskin floats and harpoons. When their whaling prowess was discovered by the villagers, the children were welcomed back into society, becoming chiefs of the village and always keeping the people well supplied with whales. Ex. 52 at pp. 127–28. The myth expresses the substantial time depth of the Quinault whaling tradition as well as its important place in Quinault identity and culture.

6.4. Quinault whaling was a specialized occupation. A Quinault whaler spent much of the year making and repairing the necessary equipment, which included a large ocean canoe and considerable other valuable gear. The head whaler had to possess the requisite guardian spirit, called sláo'ltcu, which was

acquired shortly after puberty. In addition, a whaler went through a month of training previous to the season of whaling. During this period, the whaler bathed in a ritualized fashion each night in the ocean or river, went out alone in his canoe to practice throwing his harpoon and to converse with his spirit, and refrained from sexual intercourse for ten days prior to the hunt. *Id.* at pp. 44–46.

6.5. Whale products played an important role in the Quinault diet, economy, and ceremonial traditions. Whale meat was cured for later consumption and the blubber rendered into oil that was used as a condiment and in ceremonies and rituals. Dried foods were traditionally dipped into whale oil before they were eaten, and rendered whale fat was stored in the stomachs of seal or sea lion and in bags made from sections of whale intestines. Ex. 142 at p. 10.

6.6. Treaty-time historical accounts are consistent with customary Quinault whaling practices. During the first recorded contact with the Sonora in 1775, Indians (likely Quinault though possibly Quileute) offered whale meat to the Spanish sailors. The second recorded contact between Quinault and non-natives occurred in 1788, when the English ship Columbia encountered two whaling canoes with whaling implements from the village of Quinault. Around treaty-time, James Swan also came to know a famous Quinault whaler named Neshwarts, who was most likely the same whaler, Nicagwa'ts, reported by Dr. Olson. Ex. 283 at pp. 85–86; Tr. 3/16 at 104:5–105:18. Swan's descriptions of Neshwarts indicate that Swan was familiar with the Quinault whaling tradition.

6.7. The substantial number of words in the Quinault language associated with whaling practices is also indicative of the time depth of the Quinault whaling tradition. Quinault have separate words for whale, little whale, whale blubber, whale bone, whale oil, and whaling canoe. Ex 176 at p. 315. The Quinault language also contains words indicative of ocean-going practices, including words meaning to "navigate on the ocean" and ocean canoe. *Id.* at p. 281.

6.8. The historical and ethnographic evidence shows that before and at treaty time, whaling was a regular and customary subsistence practice exercised by the Quinault, taking place each year on a seasonal basis during the summer months when Quinault Indians would migrate from upland coastal villages to participate in the hunt. According to Dr. Olson, the Quinault whaled each year from May to August, when a Quinault whaler would spend much of his time on the open water, "cruising for the animals." Ex. 213 at p. 24. Singh too included whaling in his description of the Quinault's seasonal rounds, taking place during these summer months. Ex. 277 at p. 67. One of Dr. Olson's Quinault informants related that his grandfather, who would have lived before treaty time, harpooned 77 whales in his lifetime, a feat that would have required hunting whales regularly during the summer season. Ex. 213 at p. 155; Tr. 3/16 at pp. 53–54 (Boxburger). The summer season of active whale hunts stands in contrast to the winter season, when the waters were typically too turbulent for the tribe to venture far offshore but a drift whale or two would often make its way to the Quinault coast. *See* Ex. 211 at pdf p. 308.

6.9. The few ethnographic and historical accounts that exist of Quinault whaling show that the whaling voyages regularly required Quinault whalers to go up to 30 miles offshore on their hunts. Dr. Olson, for instance, records that "[w]hales were most often encountered 12 to 30 miles off shore." Ex. 213 at p. 44. Dr. Olson testified at the 1956 ICC hearing that Quinault hunted whale in the open ocean, "going as far out as 25 miles or even more to harpoon and capture whale." Ex. 212 at p. 514. When pressed about the western boundary of the Quinault territory, Dr. Olson testified that the Quinault "used to go out as much as 25 miles hunting whale." *Id.* at p. 503. Dr. Lane agreed with these distances. *See* Ex. 142 at p. 4 ("In contrast to the herring which could be taken quite close to shore, whales and seals were harvested as far as twenty-five and thirty miles offshore.").

6.10. Indian whaling canoes could also expect to be towed many miles out to sea as part of their hunt. *See* Ex. 260, pp. 18–19 (account by Dr. Lane of Makah whale hunt); Tr. 3/30 at p. 73:16–20 (Thompson). In his description of the traditional Quinault whale hunt, Dr. Olson noted that after a whale was struck by a harpoon, the whale "might run as much as ten to fifteen miles before being killed." *Id.* at p. 45. A whaler with particularly strong power, such as Nicagwa'ts, was able to spur the whale to run toward shore instead of out to sea. According to Dr. Olson, Nicagwa'ts was never forced to tow a whale more than five miles, which would be consistent with harpooning a whale up to twenty miles offshore. *Id.*

6.11. The length of time needed for a single whale hunt is consistent with whaling practices taking place far offshore. Singh, for instance, noted that hunting a whale could require two or three days. Ex. 277 at p. 41. Among the various rituals and cultural taboos associated with whaling, Dr. Olson recorded the belief that should a whaler's wife be unfaithful while her husband was away on a hunt, "the whale would be wary and 'wild,' and the men would be unable to kill any." Ex. 213 at p. 46.

6.12. Hunts taking place at distances 20 to 30 miles offshore would have placed Quinault whalers at the edge of the continental shelf, a location where whales would have been found in abundance during the summer months. *See* Tr. at 3/9, pp. 103:22–105:24 (Trites). The continental margin starts at 20 miles offshore at the Quinault canyon and runs, on average, 30 miles offshore adjacent to Quinault territory. *Id.* at 105:15–24. Biologist Dr. Andrew Trites described this margin as an ocean "Serengeti," through which large herds of marine animals, including whales and fur seals, would migrate on a seasonal basis. *Id.* at 104:8–23. The Court finds the testimony of Dr. Trites credible and consistent with traditional Quinault whaling voyages taking place at the distances described by Dr. Olson and other anthropologists.

4. Quinault Fur Sealing

7.1. The evidence also shows that fur sealing was traditionally practiced by the Quinault at and before treaty time. As with whaling, the Quinault language contains words specifically associated with fur sealing, including words for fur seal ("ma·a'i"), little seal, seal oil, and sealing canoe. Ex. 213 at p. 49, Ex.

176 at p. 295. Dr. Olson and Singh both described the hunting of fur seal as a seasonal Quinault activity, taking place regularly each year in the months of April and May when the animals could be encountered offshore on their annual migration to breeding grounds off the coast of Alaska. Ex. 213 at p. 49; Ex. 277 at p. 67. Dr. Lane was in accord. *See* Ex. 143.

7.2. Quinault traditionally fur sealed in an ocean canoe holding three men. According to Dr. Olson, the sealers cruised around the open ocean until a seal was sighted asleep in the sun. The sealers paddled quietly to move within harpoon range of the seal, whereupon the animal was struck with a harpoon, hauled toward the canoe, killed with a club, and hoisted aboard. Quinault preserved the meat and fat of the fur seal for consumption and used the skins for blankets and ropes. Ex. 213 at p. 49. These uses are consistent with treaty time subsistence purposes, taking place prior to trade with non-Indians. Tr. 3/16 at 122:16–123:5 (Boxburger). The Quinault sealing tradition mirrors that practiced by the Quileute and the Makah.

7.3. Beriah Brown's 1895 article on Quinault marine mammal hunts shows that Quinault fur sealing continued in its traditional form through the late 1800s. Brown described implements of fur sealing similar to those described by Dr. Olson, including the "bone harpoon" and a specialized ocean-going sealing canoe fifteen or sixteen feet in length, and noted that the Quinault hunt fur seals in the open ocean, along with finback whales. Ex. 18 at pdf pp. 1–2. According to Brown, the Quinault "alone among the coast tribes . . . still follow the customs of

their ancestors" in their pursuit of the seal, carrying out sealing voyages in canoes manned by three sealers and paddling as quietly as possible upon reaching the sealing grounds so as not to disturb the sleeping herds. *Id.* at p. 2. According to Brown, the sealers would regularly spend two days at sea during a hunt before returning to their village for several days' rest. *Id.* Though written post-treaty, Brown's account is indicative of both the important place of fur sealing in Quinault culture and the time depth of this customary practice.

7.4. The Quinault more likely than not ventured up to thirty miles offshore in pursuit of fur seals on a regular, seasonal basis at and before treaty times. Dr. Olson recorded that it was necessary for the Quinault to go ten to twenty-five miles offshore to hunt fur seals. Ex. 213 at p. 49; Ex. 211 at pdf p. 31. Dr. Olson contrasted fur seal hunting, which took place at distances far offshore, with the hunting of hair seals, which could be found on rocks close to shore. *Id.* While it is likely that the Quinault ventured even further post-treaty prompted by the demands of the commercial fur seal industry, the context of Dr. Olson's descriptions makes clear that he was describing the Quinault's pre-contact, traditional fur sealing activities. *See* Tr. 4/2 at pp. 80:1–81:12 (Renker). Beriah Brown's article also places fur sealing thirty miles offshore, in the vicinity of the famous fishing bank off the coast from Shoalwater Bay. Ex. 18. Although Brown's report was likely influenced by observations of post-treaty commercial fur sealing practices, he believed these practices to be consistent with pre-contact Quinault traditions.

7.5. These accounts of the distances at which the Quinault traditionally fur sealed place the sealers in the vicinity of optimal harvest. Fur seals are pelagic animals, spending their entire lives at sea other than their visit each year to their perennial breeding grounds. *See* Tr. 3/9 at 17:7–13. Current day tracking records and scientific studies demonstrate that, consistent with Dr. Olson's ethnography, fur seals can be found in great abundance in April and May at the continental margin off the coast of Washington as they carry out their annual migration to breeding grounds, such as the Pribolof Islands in Alaska. *See id.* at 17–13, 44:10–22 (Trites). Consistent with Dr. Olson's description of the Quinault fur sealing tradition, Dr. Trites explained that fur seal sleep during the day off the continental margin, making them vulnerable to hunters traveling quietly by canoe. *Id.* at p. 37:20–25; 60:1–61:13. Dr. Trites' descriptions of current day fur seal behaviors were unrebutted, and the Court finds credible Dr. Trites' testimony about the continuity of fur seal biology and behavior. As described in greater detail below, the behavior of fur seals at and before treaty-time is more likely than not consistent with their observed behavioral patterns today. These patterns support an inference that the Quinault were harvesting fur seals up to thirty miles off the coast of their territory at and before treaty-time.

B. Quileute Indian Tribe's Western Boundary

1. Background on Traditional Quileute Economy

8.1. As with the Quinault, the Quileute Tribe was

isolated before and in the decades immediately following the signing of the Treaty of Olympia. Prior to 1855, there were only four recorded interactions between the Quileute and non-Indians, or five if the 1775 Spanish encounter with either Quileute or Quinault whalers is included. The four encounters definitely attributed to the Quileute and their Hoh relatives include: (1) a report of a British expedition led by Charles Barkely, which visited the Washington coast in 1787 and was attacked by the Hoh at Hoh River, (2) an account of the 1782 Columbia expedition, which traded skins with the Quileute on its way north to Nootka Sound, (3) an account of the 1808 wreck of the Russian ship, the Sv. Nikolai, which wrecked off the coast of Quileute territory, and (4) the testimony of Mr. James, who was at La Push in 1854 for nine weeks assisting survivors of the wreck of the steamer Southerner and served as a witness in the Quileute's land dispute with the settler Dan Pullen. Little was written by any of these visitors about Quileute culture or economy.

8.2. The United States government was almost entirely unaware of the presence of a tribe located between the Makah and the Quinault prior to the negotiation of the Treaty of Olympia. In 1854, George Gibbs wrote that "[s]till further north, and between the Kwinaitl [Quinault] and the Makahs, or Cape Flattery Indians, are other tribes whose names are still unknown, but who, by the vague rumors of those on the Sound, are both numerous and warlike." Ex. B090.39. As set forth above, the Quileute were included in neither the Neah Bay nor Chehalis River negotiations. It was only in the course of these latter negotiations that the treaty commission became

aware of the presence of the Quileute, whose population they estimated to number around 300 people. Ex. 65 at pdf pp. 23–24.

8.3. The Quileute remained isolated in the decades following the execution of the Treaty of Olympia, continuing to live in their traditional manner. *See* Tr. 3/12 at 50:17–51:4 (Boxburger). Annual reports of Indian agents evidence the difficulty in traveling to Quileute territory and the lack of non-Indian presence in the area. Superintendent C.H. Hale, for instance, reported to Washington on August 8, 1864 that the Quileute "know but little of the whites . . . Their advantage consists in the fact of their village being surrounded for many miles with an almost impenetrable forest of gigantic growth. It is believed that no white man has ever been permitted to visit their village and its locality is only approximately known." Ex 218 at p. 23. In 1877, an Indian agent similarly reported that the "Queets, Hohs and Quillehutes live at such a distance from the agency as to be entirely out of reach." Ex. 218 at p. 33. In 1878, after oversight of the Quileute was transferred to the Neah Bay agency, Indian agent Charles Willoughby wrote that the "Quillehutes were unanimous in stating that they have only been once visited by an agent since the treaty was signed, and that visit they state was in the year 1862." Ex. 350 at pp. 2–3. By 1882, Willoughby too admitted to not being able to visit the Quileute: "The Quillehute Indians are 30 miles from the Agency by land and 40 miles by water and so difficult of access that I cannot make frequent visits to them." Ex. 218 at p. 33. The minimal familiarity of Indian agents with Quileute practices, coupled with the agency's economic development orientation, render Indian agent

reports of little utility in reconstructing customary Quileute fishing practices at treaty time.

8.4. During this post-treaty period, the U.S. government intended to move the Quileute together with the Quinault onto a new reservation established at the Quinault river. Several different Indian agents reported that the Quileute did not understand that by signing their treaty they would be forced to give up their homes. *See, e.g.,* Ex. 7 at p. 335, Ex. B049 at pp. 14–15; Ex. B226 at pp. 5–6. In an 1879 council with the Quileute, Chief Howeattle, Head Chief of the Quileute, recalled that Colonel Simmons "told us when he gave us our papers that we were always to live on our land, that we were not to be removed to another place." Ex. 281 at p. 161. The Quileute oral tradition likewise firmly roots the Quileute in their ancestral lands. Unlike neighboring tribes, the Quileute have no tradition of arriving on the Olympic Peninsula from other lands, instead asserting that they have always lived in this place. *See* Ex. 247 at p. 19. The Quileute remained on their land despite efforts to relocate them, and on February 19, 1889, the Quillayute Reservation was established by Executive Order at the Quileute coastal village, La Push. The first white settler to take up residency in Quileute territory was a schoolteacher, sent to oversee the Quileute when the first school was established at La Push in 1883 and who set about attempting to assimilate the Indians by assigning them colonial names. Ex. 218 at p. 25.

8.5. Into the 1890s, the Quileute nonetheless remained unfamiliar with white culture and notions of property. Evidencing the tribe's indigenous worldview, the settler Karl Olof Erickson remarked

on his meeting with the Quileute that "the leader of the group[ ] made an address and pointed to the woods, the ocean, and the sky." Ex. 145 at p. 85. Erickson presented the assembled Indians with his receipt for money paid at the U.S. Land Office in Seattle for his land claim, but this symbol of property ownership "did not mean anything" to the Quileute. *Id.* Tensions related to these differing notions of ownership arose when the settler Dan Pullen claimed land at La Push around 1883 and attempted to have the Quileute removed form the area. Several months after the Quillayute Reservation was established, Pullen burned the La Push village to the ground when its residents were away working in the Puget Sound hop fields. *See* Ex. B063.15. As a result, the Quileute suffered a devastating loss of most of their aboriginal artifacts, including their whaling and fur sealing implements and canoes. *See* Tr. 3/12 at pp. 26:15–28:8 (Boxburger); Ex. B63 at pdf. p. 15.

8.6. Owing to their relative isolation and minimal contact with Indian agents and white settlers, the Quileute maintained their traditional practices through the early 1900s. The noted anthropologist Dr. Leo Frachtenberg, who studied the Quileute from 1915–16, reported that his "investigation was facilitated by the fact that the Quileute Indians, numbering approximately 300 individuals, live together in a single village and still cling tenaciously to their native language, and to their former customs and traditions . . . . [Their] condition seems to be due to their complete isolation from the other tribes and from the white people, and to their persistence in adhering to the former customs and beliefs." Ex. B096 at pp. 111, 113.

8.7. Judge Boldt recognized that "[f]ishing is basic to the economic survival of the Quileute," FF 110, and it continues to be depended upon as a major source of income for the tribe. *See* Tr. 3/2 at 158:3–159:21. As it did for the Quinault, fishing constituted the principle economic and subsistence activity of the Quileute at and before treaty time. *See* FF 104, 105. Like the Quinault, the Quileute were favorably situated to harvest trout and steelhead, which were "taken in their long and extensive river systems." FF 104. The Quileute were also able to travel into the upland foothills to hunt by following their river system in canoes. *Id.* Individual Quileute families asserted ownership of river fishing grounds. FF 106; Ex. 58a at pdf p. 120. Pre-treaty Quileute villages were located where the conditions of the rivers were optimal for catching fish, with each village obtaining its principal supply of fish from a sophisticated fishtrap located nearby. FF at 109. Recognizing the tribe's customary use of rivers and lakes for their subsistence supply, Judge Boldt included a number of inland water bodies in his determination of the Quileute's case area U & A, including: "the Hoh River from the mouth to its uppermost reaches, its tributary creeks, the Quileute River and its tributary creeks, Dickey River, Soleduck River, Bogachiel River, Calawah River, Lake Dickey, Pleasant Lake, [and] Lake Ozette." FF 107.

8.8. At the same time, ocean fishing undoubtedly played a significant role in the traditional Quileute economy, culture, and identity. Judge Boldt recognized the importance of oceanic resources to the Quileute in including "adjacent tidewater and saltwater areas" in their U & A. FF 108. In furtherance of this determination, Judge Boldt found

that before and at treaty time, the Quileute harvested diverse resources in the Pacific Ocean, including "smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish, shark, herring, sardines, sturgeons, seal, sea lion, porpoise, and whale." *Id.* As they did with respect to their inland lakes, the Quileute viewed the waters of the ocean as common property. FF 106; Ex. 65(a) at pdf p. 120.

8.9. Early settlers and visitors to Quileute territory make mention of Quileute use of ocean resources, as does every ethnographer to have done work among the Quileute. The anthropologist Ram Raj Prasad Singh, who did field work with the Quileute in the 1950s, noted the unusual diversity of the tribe's economic resource base. Singh noted that, unique among the three Olympic coast tribes, the Quileute exploited all three of the economic resource areas available on the Peninsula: the deep sea economy, the river and coastal economy, and the inland economy. Ex. 277 at p. 4 (noting that "the Makah had primarily a deep sea economy; the Quinault, river, coastal, and inland; the Quileute, all three"). Singh explained that the Quileute were situated in a unique geographic zone where none of the economic resource areas was sufficient on its own to provide for adequate subsistence. *Id.* at p. 127.

8.10. The desire for dietary variety and the wide range of uses that the tribe found for the varied resources they exploited served as additional motivations for the Quileute to utilize a broad resource base. As one of Singh's Quileute informants related, "[t]he Indians did not want all fish or all whale but liked to get some of everything which they wanted to eat." Ex. 277 at p. 73.

According to Singh, "[c]hoice in production gave the Indians a freedom unknown to most hunting tribes the world over." *Id.* Specialization in occupations and in the tools and technologies for extracting resources in their different environmental zones abetted the Quileute's exploitation of a diverse range of resources. *See* Tr. 3/12 at pp. 76:26–77:11 (Boxburger); Ex. 277 at p. 81. The Quileute, for instance, had specialized technology for seafaring and harvesting different ocean resources, including four different canoes and four specialized hooks for ocean hook and line fisheries. *See* Ex. B350.13; Ex. B310; Tr. 3/30 at pp. 47:21–48:5 (Thompson). Intra-tribal trade networks further spurred economic specialization. Members of both the Quileute and the Quinault tribes who lived on coastal settlements harvested aquatic resources for intra-tribal trade with upriver tribal members in exchange for meats and furs. *See* Ex. 277 at p. 81.

8.11. Anthropologists who studied the traditional Quileute economy noted a startling variety of ocean resources harvested by the tribe. These resources included a wide range of finfish (flounder, sole, rock fish, bullheads, suckers, skate, surgeon, smelt, sardines, herring, dog fish, sea bass, cod, salmon, halibut, and others), sea mammals (hair seal, sea lion, sea otter, porpoise, dolphin, fur seal, gray whale, humpback whale, killer whale, fin back whale, blue whale, and sperm whale), and shellfish (crab, clams, octopus, mussels, barnacles, squid, rock oysters, chiton, sea urchin, sea anemone, and goose neck barnacle). *See, e.g.,* Ex. 58(c) at pdf pp. 40–48, 61; Ex. 247 at pp. 14–16. According to Singh, marine resources were customarily harvested by the tribe during the months of April through August, when

the tribe would harvest hair seal, fur seal, whale, sea lion, and smelt, and engage in "deep sea fishing." Ex. 277 at p. 65. Dr. Lane too reported that the Quileute "pursued whales, seals, sea-lion, porpoise and fished for halibut, cod, bass, salmon and other species in the marine waters off the west coast of the Olympic Peninsula." Ex. B349.2.

8.12. Quileute Indians who addressed government officials in the post-treaty era consistently attested to the tribe's customary subsistence harvest of ocean resources. Stanley Gray, a Quileute born in 1864, emphasized the importance of ocean resources in traditional Quileute culture and economy in his testimony in *United States v. Moore,* a case concerning the intended scope of the Quillayute Reservation. Gray testified that the Quileute hunted whale and seal in the Pacific Ocean "in the early days." He further testified that the Quileute "fished for halibut, ling cod, and whale" in the Pacific Ocean "continuously" during his lifetime. Ex. 178 at pp. 346–49. Similarly, when Edward Swindell, an attorney for the Department of the Interior, visited various tribes to identify their subsistence activities, several Quileute described the importance of ocean resources and intra-tribal trade between coastal and inland villages. Sextas Ward, a Quileute born in 1856, explained that "the Indians who lived in the villages along the various streams were able to catch much more salmon that those who lived along the ocean, whereas those along the ocean could obtain seal, whale and smelt; that as a result of this they were accustomed to trade amongst themselves so that they could have all kinds of fish and sea food for their daily subsistence." Ex. 293 at p. 221. Similarly, Benjamin Sailto, a Quileute born in 1853,

told Mr. Swindell that the Indians living at the ocean would "catch whales and seals in the ocean" and that the people who lived upriver "would visit the Indians at other places or else come down to the main village at La Push for festivities and to obtain a supply of the different kinds of fish food which they could not obtain at their own fishing places." *Id.* at p. 225.

8.13. Like the Quinault, the Quileute possessed navigational skills, knowledge, and technologies to travel extensively on the open ocean, reaching distances out of sight of land. Dr. Lane opined that the "Quileute and Hoh Indians at treaty times were known for their seamanship." Ex. B349.2. Like the Quinault, the Quileute propelled their ocean canoes by means of both paddles and sails. Ex. 58(a) at pdf p. 160. Frachtenberg specifically contrasted the traditional Quileute ocean-going equipment, including large paddles and a single sail set upon poles in the bow of the canoe, with the oars and canvass sails used in the early 1900s. *Id.* According to Frachtenberg, the Quileute traditionally used their canoes to travel 20–30 miles westward, as far south as Tahola (50 miles south of La Push), and as far north as Neah Bay (45 miles from La Push). *Id.*

8.14. Various historical and anthropological accounts relate Quileute knowledge of weather forecasting and the sophisticated navigational techniques the Quileute employed when voyaging offshore. Chris Morgenroth, who settled on the Bogachiel River in the 1880s, described in his autobiography his near deadly attempt to reach Neah Bay in a whaling canoe launched from La Push and crewed solely by him and other white settlers. Upon leaving La Push,

Morgenroth was warned by Chief Howeattle to "Look out for the East wind!," a warning that Morgenroth and his crew regretfully ignored. Ex. 180 at pp. 62–65. Both the anthropologist Professor Jay Powell, who lived with the Quileute for four decades, and the anthropologist Richard Daugherty commented on the traditional weather forecasting techniques used by the Quileute. *See* Ex. 220 at pp. 9, 111 (discussing the ability to tell which way the wind is coming from by the roar of the ocean and to predict weather by the appearance of fog and clouds); Ex. B345.14 (noting "weather forecasting" by Quileute sealers). Various oral traditions reflect Quileute knowledge of the stars used for navigation, as well as Quileute use of the sun's position as a navigational tool while at sea. *See, e.g,* Ex. B333 at pp. 51–56 (myths about the origin of the stars and constellations), 71–74 (oral tradition that whaling season begins when the sun goes straight across the ocean to the west).

8.15. The Quileute language reflects the tribe's oceanic orientation. Professor Powell's dictionary of the Quileute language records over ten distinct words for canoe, including separate words for "sealing canoe," "fur sealing canoe," "whaling canoe," and canoes of various sizes. Ex. 225 at pp. 44–45. Quileute words exist for a wide range of aquatic animals associated with the tribe's pre-treaty subsistence practices. The Quileute also possess distinct words associated with wide-ranging ocean traveling, including words meaning "to go out on the ocean," "at sea," "sea, blue water," and "sea, out in the ocean, west." *Id.* at p. 194; *see also* Ex. 233 at p. 159. Further words exist for a variety of sails used for traditional ocean travel and whaling purposes, as

well as for stars associated with navigation. *See* Ex. 233 at pp. 154, 177.

2. Quileute Offshore Fishing

9.1. The archaeological and ethnographic evidence show that the Quileute engaged in offshore fisheries on a regular, seasonal basis for a range of oceanic finfish at and before treaty time.

9.2. Fish bone data assemblages from middens associated with aboriginal Quileute occupancy evidence a community continuously engaged in harvesting finfish from the Pacific Ocean. Quantified faunal data is available for four sites associated with the Quileute: Cedar Creek (representing late prehistoric occupation), Cape Johnson (representing occupancy from 700 to 1100 years before present), La Push (dating 600 to roughly 900 years ago), and Strawberry Point (representing occupancy between 1650 and 1950). The species compositions of the bone assemblages at these sites are very similar to those found at the ten sites associated with Makah occupancy, for whom a forty mile offshore U & A has been determined by this Court. The three most prevalent fish at each of the Quileute sites are: (1) greenling, red Irish lord, and lingcod (Cedar Creek), (2) greenling, red Irish lord, and cabezon (Cape Johnson), (3) rockfish, salmon, and flatfish (La Push), and (4) perch, greenling, and lingcod (Strawberry Point). The top species compositions at Makah sites are analogous, with flatfish, rockfish, greenling, salmon, and lingcod typically found among the most prevalent three or four species. *See* Tr. 4/6, 163:11–165:11 (Wessen). Based on these comparisons, the archaeologist Dr. Wessen, whose testimony the

Court finds credible, testified that "there are broad similarities among all of these sites in fish bones." *Id.* at 164:8–9.

9.3. The types of species found at the Quileute sites suggest a strong oceanic orientation. Species like greenling, perch, lingcod, and sculpins (including red Irish lord and cabezon) would have been available to the tribe five to ten miles offshore, though they can also be found both nearer to shore and in deeper waters. *See* Tr. 3/11 at pp. 181–84 (Gunderson). Others, like rockfish, are most abundant in habitats deeper than 50 fathoms. *Id.* at 161:21–162:1. Hake, representing 1.4% of fish bone specimens at the Cape Johnson sites, and halibut, representing 2.5% of fish bone specimens at the La Push site, are strongly indicative of offshore harvest. Hake are a fish associated with deeper waters, *see* Tr. 3/11 at 15–16 (Schalk), though they too range from nearshore to distances beyond the 100–fathom line. *See* Tr. 4/3 at 109–109 (Joner). Dr. Gunderson, whose testimony the Court finds credible, testified that halibut are most common at depths from 30 to 230 fathoms, although they can be found in smaller quantities in nearshore waters as well. *See* Tr. 3/11 at 169:19–20 (Gunderson); *see also* Tr. 3/11 at 5:12–25 (Schalk).

9.4. The low percentage of halibut at Quileute sites may not accurately reflect its importance in the Quileute economy. In particular, evidence suggests that halibut may be underrepresented at archaeological sites because it was often filleted on the beach rather than at village sites. *See* Tr. 4/6 at 174:2–23 (Wessen). Limited archaeological excavations at three additional Quileute sites—the

Toleak Point site and two sites on Destruction Island (located 4 miles offshore)—provide further evidence of Quileute engagement in halibut fishing. Tentative identifications of fish bones at the Destruction Island sites indicate the probable presence of halibut, Ex. 267 at p. 3, and hooks and grooved stone sinkers associated with halibut fishing have been found at the Toleak Point site. *See* 3/10 at pp. 142:1–145:2 (Schalk). Halibut is also present at high frequencies (26% of fish bones) at an additional site at Sand Point located on the Washington Coast west of the northern portion of Lake Ozette and abandoned approximately 1,600 years ago. The Sand Point site may be reflective of either Makah, Ozette, or Quileute activity. *See* Tr 4/6 at pp. 42–43 (Wessen).

9.5. The presence of offshore birds in the middens, accounting for 31% of bird bones at La Push, provides additional circumstantial evidence of offshore fishing activities. *See* Tr. 3/10 at 162:4–163:5 (Schalk). These birds were likely taken incidental to offshore fishing and marine mammal hunting. Ex. 338 at pp. 32–34.

9.6. Ethnographic and historical evidence is broadly consistent with the archaeological evidence of regular and customary ocean finfish harvest by the Quileute at and before treaty time. James Swan, who traveled to La Push in 1861 on a trading vessel and remained for four days, later informed the U.S. Fish Commission that the Indians south of Cape Flattery subsisted principally on "rock cod, surf smelt, tomcod, salmon, etc." Ex. 318 at p. 66 (1888 U.S. Fish Commission Bulletin). The importance of salmon and smelt to the Quileute is corroborated by

Swan's descriptions of first salmon and first smelt ceremonies. *See* Ex. 287 at p. 45. While Swan did not believe that the Quileute were harvesting halibut, the archaeological and ethnographic record proves him mistaken on this point. For instance, multiple sources document traditional Quileute fishing for halibut at halibut banks, where specialized U-shaped hooks similar to those used by the Makah were employed to catch the fish. *See* Ex. 248 at p. 447, Ex. B346.40. Frachtenberg too discussed specialized gear and fishing techniques used by the tribe for offshore harvest of halibut, cod, bass, and other species. Ex. 56(c) at pdf pp. 68–76. According to Frachtenberg, the Quileute caught fish in the ocean using five different types of hooks as well as lines made of dried kelp. *See* Ex. 58(a) at pdf p. 128. Women and men would go out together on fishing trips in the ocean, during which specialized ocean canoes somewhat smaller than sealing canoes were used. Ex. 56(c) at pdf p. 69. The Quileute also took salmon by trolling in the open ocean and took herring from their canoes by means of a herring rake. *See* Ex. 293 at p. 184; Ex. 37a at p. 143; Ex. 58(a) at pdf p. 131.

9.7. While it is not possible to document the precise outer bounds of traditional Quileute finfish harvest in the Pacific Ocean, evidence suggests that the Quileute were more likely than not harvesting finfish up to twenty miles offshore on a regular and customary basis. According to Frachtenberg, halibut was harvested within two miles of shore, cod taken along rock and reefs, and other fish caught under rocks in rough weather with a kelp line. Ex. 56(a) at pdf at pp. 129–133. Other reliable accounts, however, place Quileute fishing further offshore.

Singh, for instance, reported that the coastal Indians, including the Quileute and Hoh, harvested bass six miles offshore and fished at halibut beds eight to twelve miles offshore. Ex. 277 at pp. 19, 32. Quileute tribal member Bill Hudson, born 1881, informed Richard Daugherty that the Quileute fished for halibut in depths of 50 to 60 fathoms using kelp lines in the traditional, pre-contact style. Ex. B346.40 at pdf p. 340; Tr. 3/2 at 116:18–119:9 (Boxburger). Fishing at a depth of 50–60 fathoms would place the Quileute approximately twenty miles offshore of La Push and at areas of peak abundance of halibut during the summer season. *Id.*; Tr. 3/11 at 171:5–9, 174:12–25 (Gunderson). This is a distance to which Frachtenberg reported that the Quileute were accustomed to travel westward in their ocean canoes. Ex. 56(a) at pdf pp. 162–63.

9.8. One post-treaty historic reference places traditional Quileute fishing at distances even greater than twenty miles offshore. Quileute member Luke Hobucket, born 1873, drew a picture of "implements used in fishing" by the Quileute, which depicts specialized halibut hooks and sinkers and notes that halibut fishing occurred "700 feet deep." Ex. B310A.1. Halibut fishing at 700 feet, or approximately 117 fathoms, would place the Quileute near the continental shelf break, about 40 miles offshore. Quileute finfish harvest 40 miles offshore at treaty time is not, however, corroborated by other sources and was unlikely to have been a regular practice at and before treaty time.

3. Quileute Whaling

10.1. Like the Quinault and the Makah, the Quileute

harvested whales on a regular and customary basis at and before treaty time. Judge Boldt recognized whaling as a customary Quileute practice in setting forth the Quileute's case area U & A. FF 108. Evidence of Quileute whaling is present in the archaeological assemblages from Quileute middens and pervasive in the historical and ethnographic record.

10.2. Whale bones have been recovered from three archaeological sites associated with prehistoric and historic Quileute occupancy: the La Push, Strawberry Point, and Toleak Point sites. *See, e.g.*, Ex. 338 at p. 28, Ex. 201 at p. 92. While it is possible that some of the whale bones present in the middens resulted from drift animals, Dr. Wessen concluded in a seminal report on the La Push excavation that the presence of marine mammal bones in the midden indicates that marine mammal hunting was a very important activity and that the archaeological data provide "clear evidence that Quileute People ventured into deeper offshore waters." Ex. 338 at p. 68. Dr. Schalk, whose testimony the Court also finds credible, was in accord. *See* Tr. 3/10 at 182:9–185:12 (Schalk). The proportions of mammal bones found at La Push closely resemble the makeup of the midden at the Ozette village at Cape Alava, another site believed by experts to represent continuous whaling activity for hundreds of years up to and including treaty time. *See* Ex. 338 at p. 29; Tr. 4/7 at pp. 2–7 (Wessen). Excavations at Toleak Point also suggest that whale bones are present in substantial amounts at the site, though not yet identified to species or quantified. *See* Tr. 4/7 at 16:4–15 (Wessen).

10.3. Albert Reagan also identified a diverse array of whale bones in the La Push middens, including "sperm whale, black fish, fin-back, sulphur bottom, California gray, and killer whale." Ex. 247 at p. 15. There are reasons to doubt the species identifications made by Reagan, who provided no indication of his methodology and attempted species identifications among salmonids thought impossible by Dr. Schalk and others. *See* Ex. B126 at p. 8. It is likely that Reagan's list reflected his observations of Quileute whaling in the early 1900s, as well as his knowledge of available whale species and historic Quileute whaling practices. *See, e.g.,* Tr. 4/6 at p. 61 (Wessen).

10.4. The significant presence of whale bones at Quileute sites is particularly telling because it is likely that whale bones would be underrepresented in the middens. Ethnographic information shows that whales were butchered on the beach, and it is likely that the only bones that ended up in the middens were those transported to the village for use in the manufacture of bone tools or in architectural elements. Tr. 4/6 at 107:9–108:3 (Wessen). The presence of whale bone artifacts in the middens both evidences this theory and demonstrates the important role that whales played in the traditional Quileute economy. Ex. 338 at p. 42.

10.5. The Quileute whaling tradition is deeply engrained in the tribe's identity, reaching as far back as the collective memory of the Quileute people. The Quileute Arthur Howeattle, for instance, informed Frachtenberg that "[w]haling was practiced since immemorial times and was an important industry, since the bone furnished them with material for

their tools, the oil and meat their food." Ex. 58(c) at pdf p. 84. Albert Reagan's article on whaling practices of the Olympic Peninsula Indians similarly begins, "In this village from time immemorial have lived the Quileute Indians, a coastal people that engage in whaling." Ex. 252 at p. 25. Another oral history recorded by Reagan, "Why the People of Quillayute are Few in Numbers," teaches the importance of praying to mother earth to ensure that the meat of hunted whales will be good and details aboriginal whaling practices, including the use of hair sealskin buoys used in towing the whale. Ex B333.28. These and other oral traditions illustrate the centuries-long time depth associated with Quileute whaling.

10.6. As with the Quinault, Quileute whaling is surrounded by rituals suggestive of its importance in the tribe's culture. The anthropologist George Pettit, stationed at La Push during World War II, observed that aboriginal Quileute culture possessed a number of occupations associated with a specific guardian spirit and practiced only by a defined group of people sponsored by the proper spirit power. One such occupation was whaling. Fur sealing was another. Ex. 218 at p. 10. Edward Curtis, who described the Quileute as second only in whaling to the Makah, recorded an account of some of the rituals associated with whaling given by Yahatub, a Quileute born around 1835 who learned the trade from his uncle. Ex. 37(a) at pp. 145–47. Yahatub learned from his uncle to begin in the winter taking daily ritualized baths in the sea in an isolated location. While bathing, Yahatub would pray to the Universe, asking for help in taking a whale. Whalers were to keep away from women during the season for bathing and

for whaling, which ended each year in October. Yahatub explained that "when summer approached, the Sun, some night as I slept, would show me that I would get whale the next day, and when the vision came I would start out." *Id.* at p. 146. Dr. Olson interviewed Quileute member Jerry Jones, born 1867, who informed him that his grandfather (born approximately 1815) was a whaler. Jones also described ceremonial whaling practices exercised by his relatives, which were wholly distinct from those practiced by the Makah, suggesting the substantial time depth of the Quileute whaling tradition. *See* Ex. 211 at pdf p. 286; Tr. 3/12 at 149:18–150:2 (Boxburger); Tr. 4/2 at 125:3–23 (noting differences between Quileute and Makah whaling rituals) (Renker).

10.7. While rituals may have differed between tribal groups, Quileute whaling practices mirrored those employed by both the Makah and the Quinault. Traditional whaling implements were similar to those used by the Makah, consisting of harpoons, sinew and cedar lines, and floats. Ex. 323 at p. 44; Tr 3/25 at 20:19–22:2 (Boxburger). Frachtenberg provided a lengthy description of aboriginal Quileute whaling practices. Like the Quinault, the Quileute practiced whaling in specialized ocean-going canoes in parties of eight, each with specified duties. The whalers brought their own lunch and used sails to voyage into the sea. Typically four of five canoes would go out together on a hunt, and after a whale was speared, the canoes would gather to assist in the fight. Frachtenberg characterized the Quileute as highly skilled whalers, better even than the celebrated Makah, and invested with "great skill,

courage, and quickness on the part of spearman and steerman." Ex. 58(c) at pp. 84–97.

10.8. Whale products played an important and diverse role in pre-treaty Quileute economy and culture. Dr. Frachtenberg reported on various uses of whales, among them: whale bones for tools and arrowheads; whale sinew for necklaces, threads, fish line and hooks; whale ribs to pry open mussels and barnacles; whale oil for dipping of food; and preserved whale meat serving as a valuable winter food supply. *See* Ex. 58(c); Tr. 3/12 at pp. 147:10–149:17 (Boxburger). The Quileute whaler Yahatub informed Edward Curtis that "[a]fter being rendered, the [whale] blubber was dried and smoked, and laid away for the winter. The flesh was cut into sheets like halibut steaks and dried in the sun or the smoke." Ex. 37(a) at p. 147. Harry Hobucket, born 1884, corroborated these uses of whale in his article, "Quillayute Indian Tradition," recounting aboriginal Quileute whaling practices. Ex. 94 at p. 41. The Quileute Robert Lee, in his testimony in *United States v. Moore,* likewise confirmed Quileute use of whale for subsistence purposes prior to the arrival of non-Indians. Ex. 178 at pp. 348–59.

10.9. The limited historical accounts of pre-treaty contact with the Quileute corroborate the traditional nature of Quileute whaling practices. There were six recorded treaty-time Quileute villages associated with whaling. Ex. 119 at pp. 6–10. Members of the Quileute/Hoh Tribes offered whale oil to the Russians stranded in their territory following the 1808 wreck of the Sv. Nikolai. Ex. 214 at p. 53. Ultimately, one of the Russian survivors was traded to a whaler who departed for Destruction Island in

Quileute/Hoh territory. *Id.* at p. 64. James Swan also recounted the Quileute offering him whale oil in trade when he visited La Push in 1861, several years after the signing of the Treaty of Olympia. Ex. 419 at pp. 5–6. Indians born around treaty-time recounted aboriginal whaling traditions to Edward Swindell, who visited the Quileute in 1942 to obtain information on their usual and accustomed activities. For instance, Benjamin Sailto, a Quileute born 1853, told Swindell that "in addition to smelt the Indians who lived at La Push would also catch whales and seals in the ocean." Ex. 293 at p. 225.

10.10. The many Quileute words associated with extraction of ocean resources and with whaling in particular are indicative of the importance of whaling in Quileute culture. Among others associated with whaling, Quileute possess different words for whale, killer whale, expert whaler, summer whale, whale society song, drift whale, whalers who inflate floats and assist with line, whalers who paddle and help to steer, steersman whaler, whale sinew, and different sorts of whaling equipment. Ex. 225. The Quileute words associated with offshore ocean travel, including words for "blue water" and "way out at sea," indicate Quileute familiarity with distances far offshore. *Id.*

10.11. The evidence shows that whaling was practiced by the Quileute at and before treaty time on a regular and customary basis, taking place habitually every summer. Singh noted that Quileute whaling traditionally took place each June and July, Ex. 277 at p. 65, while Powell recorded aboriginal Quileute whaling taking place each February, May, and June, Ex. 223 at pdf p. 14. According to Curtis,

the tribe pursued the "winter whale" each June and July and the "summer whale" in August. Ex. 37(a) at p. 145. According to Frachtenberg, the Quileute hunted whale each spring and summer. Ex. 58(c) at pdf p. 90.

10.12. Quileute whaling practices continued in the same manner after treaty-time. Upon hearing from a number of Quileute witnesses in the 1893 *United States v. Pullen* hearing, the court concluded that "the male portion of these Indians spent their time sealing during the months of March, April and May. They hunted up the river early in June and went whaling in the same month, and continued at that during July." Ex. B242.21. The 1888 U.S. Commission of Fish and Fisheries Report similarly observed that the Quileute "engage in whaling during the summer; nine finback whales were captured in 1888; these were cut up and smoked for food. The catch is wholly for home consumption and has no commercial importance." Ex. 299 at p. 243.

10.13. Accounts of the distances at which the Quileute customarily whaled at and before treaty time are contradictory. Dr. Frachtenberg reported that Quileute whalers "were not forced to go very far into the sea as some whales came as far to the beach as the edge of the breakers." Ex. 58(c) at pdf p. 90. Consistent with this observation, Albert Reagan recorded that the Quileute principally pursued the California gray whale, Ex. 252 at p. 25, a species that frequently traveled within six miles of shore on its northbound summer migration. Tr. 3/9 at 152 (Trites). The humpback whale too migrates in close proximity to the coastline and, like the gray whale, could often be spotted from shore. *See* Ex. 428 at

p. 37. Reagan and Frachtenberg both described Quileute villagers watching the hunt from shore.

10.14. Other ethnographic reports, however, describe customary whaling practices taking place at much greater offshore distances. Yahatub recounted that whalers "might spend several days in a fruitless search" and "usually found [their whale] out of sight of land." Ex. 37(a) at p. 146. Testimony and evidence submitted at trial show that the description "out of sight of land" is most likely associated with distances upward of 40 miles offshore. *See* Tr. 3/12 at pp. 132:10–133:24 (Boxburger); Ex. 348.2 (Quileute elder stating that land is no longer visible 50 to 60 miles offshore). Yahatub also detailed customs that the whalers would follow when forced to stay out over night in their search for whale. *Id.* ("When more than one day was spent at sea, the leader watched at night while his men slept."). Such customs are indicative of lengthy hunts. Dr. Pettit's description of aboriginal Quileute whaling practices placed them 25 to 50 miles offshore. Ex. 218 at pp. 8–9. Other reports suggest that whales could sometimes be seen spouting several miles offshore but that once harpooned would regularly drag a canoe out of sight of land, for as long as two to three days at sea. *See, e.g.,* Ex. 277 at p. 41 (Singh). Olof Erickson, for instance, recounted a whale pursuit with the Quileute tribe, where the whale was "discovered spouting five miles off shore" but once harpooned towed the canoe "[m]ile after mile . . . until not a sign of the Indian village could be seen." Ex. 145 at pp. 150–56.

10.15. Like the Makah, the Quileute likely employed more than one whaling strategy, engaging on a

regular basis in both nearshore and offshore hunts. *See* Ex. 260 at p. 18; Tr. 3/12 at 151:10–21, 163:2–7 (Boxburger). Dr. Frachtenberg described both strategies, reporting both nearshore hunts taking place to the edge of the breakers and offshore hunts which required whalers to go "20 to 30 miles into the ocean attacking whales with their primitive weapons." Ex. 56(a) at pdf p. 3. Offshore hunts at these distances would allow Quileute whalers to access the most productive sites for whaling near the continental shelf break, which is generally located upward of 30 miles offshore adjacent to Quileute territory. Tr. 3/9 at 105:12–24 (Trites). While the gray whale and humpback whale migrate fairly close to shore, other whales associated with Quileute harvest are typically encountered 20 to 50 miles offshore. *See* Tr. 3/9 at pp. 113–121 (Trites). Synthesizing the various accounts, Dr. Lane opined that "whales were usually found out of sight of land, twenty-five to fifty miles offshore, and that whaling crews sometimes had to be at sea overnight. These accounts attest to the ability of the Quileute to navigate the offshore waters and to return home safely." Ex. B349.9–10. While it is not possible to place a precise outer bound on Quileute whaling, the evidence together indicates the Quileute whalers were more likely than not harvesting whales upwards of 30 miles offshore at treaty time on a customary basis.

4. Quileute Fur Sealing

11.1. The evidence profoundly demonstrates that since prehistoric times, the Quileute have been a fur sealing people, harvesting fur seals in great quantities from the Pacific Ocean for their

subsistence uses. Evidence of the great time depth of the Quileute fur sealing tradition and of its substantial entanglement in Quileute economy and culture is ubiquitous across the archaeological, historical, and ethnographic record in this case.

11.2. First, archaeological data from middens associated with the Quileute people evidences over 1,000 years of consistent and continuous fur sealing by the Quileute people. Fur seal bones account for over 90% of the mammal bones recovered from the La Push midden, where mammal bones represent the most abundant class of recovered faunal remains. Ex. 338 at pp. 27–29 (accounting that the mammal bone assemblage represents 11% to 69% of the total specimens in the four strata represented in the La Push midden and concluding that the densities of mammal bones in the total archaeological assemblage are unusually high for regional standards); Tr. 4/6 at 111:22–23 (Wessen). Fur seal bones are dominant across the strata of the La Push midden, indicating a continuity in Quileute harvest of the animals stretching back 900 years before present. At the Cape Johnson site, whose archaeological remains reflect the time period from 1100 to 700 years before present, fur seals bones are similarly prevalent throughout the midden, accounting for roughly 70% of recovered mammal bone specimens. *Id.* at 111:23–24; Ex. 347, passim. The archaeological material recovered from the Strawberry Point site, located approximately 6 miles south of La Push and dating back 100 to 200 years, also shows the presence of fur seal bones in the midden, though in lower proportions than recovered at La Push and Cape Johnson. At the same time, there are reasons to believe that fur seal remains

may be more prevalent in the Strawberry Push midden than accounted for in the available data. In particular, the relatively small overall sample size of the Strawberry Point excavation (four square meters in area, representing only 10% of the remaining deposit) casts doubt as to whether the recovered samples are representative of the whole. *See id.* at pp. 49–50; Tr. 3/10 at 151:23–152:3, 3/11 at 72:9–73:11 (Schalk).

11.3. The presence of large proportions of fur seal bones throughout prehistoric to historic strata refutes the hypothesis that fur sealing is a post-contact phenomenon. *See* Ex. A16 at p. 6; Ex. 338 at p. 68. Dr. Schalk credibly concluded from the midden evidence that Quileute use of offshore marine resources—and of fur seals particular—was persistent, taking place unabated over a period of many centuries up through treaty times. Tr. 3/10 at 182:13–22 (Schalk). Dr. Wessen, in his book chapter on "Prehistory of the Ocean Coast of Washington," similarly concluded that fur seal hunting has been ongoing on the Olympic Peninsula coast for the last 2,000 years. Ex. 344 at p. 421. The similarities between the La Push site and Makah sites like that at Ozette are indicative of the longstanding reliance on fur seal harvest by peoples spread across the Olympic Peninsula coast. *See* Ex. 338 at p. 29. Were archaeological data to be generated for sites associated with aboriginal Quinault occupancy, the data would more likely than not show a similar adaptation by the Quinault people to this feature of their coastal environment. *See* Tr. 190:8–191:5 (Schalk).

11.4. While it is not possible to ascertain from the midden evidence alone the locations from which fur seal were obtained by the Quileute, it is reasonable to infer from the abundance of fur seal remains at La Push and Cape Johnson that the Quileute did not merely rely on the happenstance drift of a fur seal carcass onto their coast. Rather, the midden evidence demonstrates a sophisticated adaptation of the Quileute and other tribes of the Olympic Peninsula coast to harvesting available ocean resources through, among other offshore activities, the deliberate and customary hunt of fur seals. *See* Ex. 344 at p. 421. Moreover, current scientific knowledge of fur seal biology supports a strong inference that these hunts were regularly taking place at distances substantially offshore at and before treaty time.

11.5. Fur seal biology evidences a centuries-old migration path followed by the animals 30–60 miles offshore of the Washington coast. As Dr. Trites credibly testified, these pelagic animals are driven by their biology to follow the continental shelf in order to access their prey on their annual return migration to rookeries in northern Alaskan waters. Each year, adult female seals from the Pribolof Islands in Alaska migrate south to access the productive waters of the California current system, returning northward to their breeding grounds in the spring and coming onto land once a year to breed at their established offshore rookeries. Both while breeding and during their annual migration, the seals feed over the continental shelf break, where they spend their nights diving to meet their prey as it rises up from the deep. During the day, when their prey is too deep for the seals to access, the seals

spend their time sleeping and resting on the surface where they could easily be taken by furtive hunters.

11.6. Historical records and contemporary tracking data paint a robust picture of fur seal migratory behavior. Consistent with fur seal feeding patterns and expectations from the animals' physiology, these data document female fur seals following a settled migratory path along the continental shelf break roughly 30 to 60 miles off the coast of Washington as they return each spring to the Pribolof Islands to birth their young. Tr. 3/9 at 42–48 (Trites). In one recent study that tracked 81 migrating Alaskan seals, no fur seal came nearer than 15 or 20 miles from shore, and the majority of the seals remained 30 miles or more from the coast. *Id.* at 47:15–48:4. Historical data collected by sealing schooners between 1883 and 1897 corroborate these behaviors. *Id.* at 43:21–44:22. While errant fur seals occasionally wander closer to shore, it is highly unlikely that they leave the standard migratory path with sufficient frequency to account for the overwhelming abundance of fur seal remains in Olympic coast middens. *Id.* at 55:15–21.

11.7. While a hypothesis exists in the literature that a prehistoric nearshore rookery off the coast of Washington may have accounted for the prevalence of fur seals in the middens, this hypothesis is not supported by evidence of fur seal biology and behavioral patterns. First, all known fur seal rookeries are located on remote islands, over 25 miles offshore and characterized by cool and foggy weather. These inhospitable and inaccessible environmental conditions are necessary to protect the seals, particularly the vulnerable pups, from

predators during their annual mating cycle. *Id.* at 17–23. As of 1850, only four documented breeding sites for northern fur seals existed, with the Pribolof Islands off the coast of Alaska representing the sole North American site. *Id.* at 24. A breeding site has since been reestablished in the Farallon Islands off the coast of California, where historical records show that a productive rookery was extirpated by Russian sealers in 1841, and another rookery has been established on California's San Miguel Island at the likely location of a rookery extirpated by an indigenous population around 500 years ago. *Id.* at 25–29; Tr. 3/10 at 5:3–7 (Trites). Even with protective regulations enabling the return of fur seal populations to prehistoric rookeries, no rookery has been established off the Washington coast, and no known site in the region exists that would offer the protection necessary for fur seals during the breeding season. Tr. 3/9 at 73:17–94:19 (Trites). Dr. Trites' testimony that the hypothesized nearshore fur seal rookery would be a "biological impossibility" was not refuted by any qualified expert at trial. *Id.* at 91:21–23.

11.8. Second, the migratory behaviors of Pribolof Island, San Miguel Island, and Farallon Island fur seal populations fully account for the presence of bones of both male and female seals of varying ages in the middens. Variability in the size of fur seals of the same age accounts for some of the diversity in the size of bones present in the middens. *Id.* at 86:1–10. The adult female fur seals were most likely harvested during their return migration to Alaska or during their northward migrations from breeding grounds in California. Female fur seals returning to the breeding grounds carried fetuses in their last

month of gestation, whose harvest likely accounts for the presence of pre-weaned pups in the middens. Historical accounts of fetal pups being extracted from pregnant mothers bound for the Pribolofs by crews aboard schooners and brought back to shore accords with the biological evidence. *See* Tr. 3/9 at 84:10–85:7. Dr. Trites further credibly testified that, more likely than not, the migration of prehistoric adult male fur seals and young pups northward from Californian rookeries to feed off the coast of Washington explains the presence of bull and weaned pup remains in the middens. *Id.* at 86:15–87:6; 102:20–103:15. These California-based breeding populations migrate along the same continental shelf pathway off the coast of Washington that is followed by the Alaskan fur seals leaving the California current system for breeding grounds in the Pribolofs. It is reasonable to infer from tracking data for adult females and weaned pups from California populations that these seals would have been available for harvest off the coast of Washington prior to the extirpation of the California rookeries, consistent with expectations from fur seal biology and physiology. *Id.* at 87:10–88:16.

11.9. Third, genetic analyses of modern fur seals and fur seals remains from coastal middens indicate that modern fur seals are genetically identically to prehistoric ones. The continuity of fur seal DNA across the centuries undercuts the hypothesized existence of a now extinct non-migratory fur seal species capable of breeding in the nearshore environment. Tr. 3/9 at 82:24–83:17. As Dr. Trites explained, fur seals today are the same species as that taken by coastal Indians in prehistoric times. *Id.* at 90:10–11. Changes in ocean currents may

have exercised some influence on fur seal migratory patterns, but fur seals are "ultimately driven by their physiology and basic principles of oceanography, physics and biology." *Id.* at 90:12–15. The known offshore migratory patterns of fur seals have remained constant across time and regardless of fluctuations in the fur seal population.

11.10. In sum, the stable physiological and biological characteristics of fur seals strongly support an inference that coastal Indians were harvesting the species off the continental shelf adjacent to their territories at and before treaty times. By contrast, the alternative nearshore rookery theory is based on speculation rather than evidence and, in the opinion of Dr. Trites and this Court, lacks a sufficient scientific basis to reliably account for the abundance of fur seal remains in the Quileute middens.

11.11. Ethnographic evidence corroborates the biological and archaeological evidence of the Quileute fur sealing tradition. Quileute accounts of pre-treaty sealing practices indicate that fur seals were harvested for the tribe's own subsistence use as well as for trade with neighboring tribes prior to the arrival of non-Indians in the area. Robert Lee, a Quileute Indian born 1879, attested to the time depth of the tradition, stating that the Quileute traded fur seal skins "regularly with the west coast (British Columbia) Indians . . . up until the time that a white man's trading post was established at Neah Bay. They then traded at this trading post until a store was established at La Push." Ex. B100.4. Based on information obtained from Mr. Lee, the authors of the Bureau of Indian Affairs article titled "Indians at Work" reported that the Quileute

Indians had been engaged in pelagic sealing "[f]rom time immemorial. Before the advent of the white man these Indians used the skins so obtained for mats and bed coverings and for trading with the West coast and other Indians." Ex. 205, p. 12; Tr. 3/12 at pp. 181–83 (Boxburger). Lee likewise testified in *United States v. Moore* that the Quileute "used [fur seals] for themselves, before the white man come," "drying" the seal meat and "keeping it for winter use." Ex. 178 at p. 349. Recounting pre-contact Quileute history, Ruth Kirk wrote in a 1967 publication that the Quileute "lived by hunting whales and seals from dugout canoes when Great–Grandfather was a boy, and by gathering berries and digging roots in the forest. They knew nothing of white men's ways because white men had not yet settled along the west coast of Washington [ ]" Ex. 135 at pdf p. 5.

11.12. A Quileute oral history recounted by the anthropologist Manuel Andrade attests to the time depth of the Quileute fur sealing tradition, consistent with the midden data. The oral tradition tells that "long ago three men in a canoe drifted from the other side (from Vancouver Island) and landed at Ozette," where they taught the people to hunt fur seals in their canoes. "[N]ot long afterward people from the Quileute arrived at exactly the same time as those who had been hunting seals were returning home," where they too were taught the fur sealing practice. "Ever since that time the Quileute" continue to hunt fur seal. Ex. 4 at pp. 205–07. The framing of this story as having taken place "long ago" places the origin of Ozette and Quileute fur sealing traditions in aboriginal times, far before contact with non-Indians. *See* Tr. 3/3 155:12–19

(Hoard). This story is corroborated by the borrowing of the Quileute words for "fur seal" and "fur sealing" from the Makah language. The linguistic evidence, credibly attested to by Dr. Hoard, suggests that these words were adopted sufficiently long ago for any competing terms, or doublets, to fade out of collective memory. *See* 3/3 at pp. 142–43, 150–56 (Hoard).

11.13. By contrast, the evidence does not support an inference that the Quileute began fur sealing only when trade with non-Indians made the practice commercially viable. The hypothesized introduction of fur sealing to the Quileute economy in the mid–1800s is based principally on a single account by the Quileute Arthur Howeattle given to Dr. Frachtenberg. Howeattle's account, as recorded by Frachtenberg, placed the origin of the Quileute fur sealing tradition only a decade prior to the Treaty of Olympia: "According to Arthur, fur sealing was introduced by the Ozettes at the time when Arthur's uncle (his father's immediate predecessor) was chief. This was about 70 years ago . . . . Since then the Quileutes developed fur-sealing as their most profitable industry." Ex. 58a at pdf p. 137. Contrary to Howeattle's report, evidence of a Quileute sealing tradition stretching back hundreds of years is written across the archaeological and ethnographic record. Howeattle's report is also unreliable in other respects, including in his attestation that the Makah and the Ozette had given up fur sealing; these tribes in fact continued to practice sealing for years after 1916. *See* Tr. 3/13 at p. 22 (Boxburger).

11.14. Traditional Quileute use of fur seals continued after the arrival of non-Indians on the

Olympic Peninsula, resilient to the expansion of the commercial fur seal industry. A physician for the Neah Bay Agency, who visited La Push in the spring of 1891, observed that "It was [the Quileute's] sealing season, and seal flesh to them was a toothsome dish." Ex. 157 at p. 450. Albert Reagan similarly reported in 1922 that "fur seal is, of course, killed for its valuable fur, through the Indians are fond of its flesh and use its paunch to store whale oil and salmon-egg cheese." Ex. 248 at p. 447. Reagan's account mirrors Quileute practices recorded by survivors of the 1808 wreck of the Sv. Nikolai, who reported that the Quileute/Hoh offered "two sealskin bags of roe" and a "bladder full of whale oil" in up-river trade transactions. Ex. 214 at p. 53. In an 1887 publication, James Swan described Quileute sealing continuing in its traditional form despite the introduction of schooners to the area. He recorded that in 1880 the Quileute had caught 602 seals using 20 canoes crewed by 60 Indians. Ex. 288 at p. 399. The strength and resilience of the Quileute fur sealing tradition can reasonably be inferred from its continuity post-treaty, through the growth of the commercial fur seal industry.

11.15. Historical and ethnographic accounts of Quileute fur sealing are consistent with the biological evidence of regular Quileute fur seal harvest at distances upward of 30 miles offshore during the seals' annual spring migration off the Washington coast. During a sealing trip with Quileute sealers in 1893, Chris Morgenroth observed that the seals' migratory route was 30–50 miles: "Seal hunting by coastal Indians take place during these two months [April and May] in the 100 miles stretch of open sea between the mouth of the Queets

River and Cape Flattery. Here the seals approach nearest to land, their line of northerly migration being about thirty to fifty miles offshore." Morgenroth further recounted leaving La Push "about 3:00 a.m. with fresh 'mokah' (east wind)" and reaching the "outskirts of the sealing grounds, some thirty miles from shore" after "six hours of strong paddling." Ex. 180 at pp. 58–60. Morgenroth's description is entirely consistent with Dr. Trites' testimony about the spring migration of fur seals and their density off the continental shelf 30 or more miles from shore. *See* Tr. 3/9 at 59:5–61:13 (Trites). In 1895, Captain C.L. Hooper related that Quileute fur sealer canoes crewed by three men were forced to go greater distances offshore than the Makah and were "often kept out over night." Ex B097.14. Hooper's account is also consistent with Dr. Trites' testimony that the fur seals would be available closer to shore off Makah territory given the nearer shore continental shelf break at the site of the Juan de Fuca Canyon off of Neah Bay. *See* Tr. 3/9 at 54:6–55:21 (Trites). So too is Dr. Singh's account that, during their spring migration northward, "Quinault and Quileute had to ge [sic] from twelve to thirty miles into the open sea, whereas near Cape Flattery the fur seal came near shore and was hunted by the Makah within a range of ten to fifteen miles." Ex. 277 at p. 21.

11.16. Numerous, remarkably similar reports of traditional Quileute sealing practices provide evidence that the Quileute were harvesting fur seals in substantial numbers each spring at the continental shelf break, 30 to forty miles from shore. Beatrice Black, born 1890, recalled that her brother "used to go out early as, as March, go out in the

ocean, way out to get some seal . . . two or three months he'd go out . . . get as high as 100 seals each day hunting . . . They risk their lives going way out, forty miles out in the ocean in an open canoe. Three men in a canoe. Sometimes they'd be loaded with about five, six or ten seals." Ex. 017 at pdf p.1. Frachtenberg too reported that the "Quileute use special canoes for [sealing]; these canoes are dug-outs, made of cedar, and are manned by three people. The sealing season lasts from March until July, and the hunters very often go 30 and 40 miles out into the sea." Ex. B096.119. After reviewing testimony from numerous Quileute elders in 1945, the Ninth Circuit in *United States v. Moore* concluded the Quileute, "[w]hen first visited by white men," were regularly hunting pelagic fur seal herds as they migrated along the 100 fathom line to and from the Pribolofs. Ex. B118.4.

11.17. Robert Lee, who attested to having been out sealing to the "blue sea, reported to be forty miles," provided a description of traditional Quileute sealing practices that demonstrates a sophisticated adaptation to optimally exploiting fur seal physiology and behavior. According to Lee, Quileute sealers "leave the village before daylight, about 1:00 or 2:00 o'clock in the morning." The sealers take advantage of the prevailing "east wind . . . . through sails, made of cedar bark," arriving at "the sealing grounds about daylight, when they speared the seal as they were sleeping on the water. Seals normally sleep in the daytime and the Indians say they can distinctly hear the seal snoring as they sleep on the surface. As the seals are speared they are dragged into the boat where they are taken ashore, when the hides are taken off for use or trading purposes and

the meat used for food purposes." Ex. B100.5. Hal George, a Quileute born 1894, similarly recalled, "[Weather forecasters] would sit up after midnight to tell weather watching from up on the hill. Seal hunters sometimes took off at 2:00 AM. They wanted to get out to what was called xopasida (blue water)—the place where the ocean really gets deep." Ex. 220 at pdf p. 12. Jay Powell, in an article describing Quileute culture and "old ways," reported similar rituals and customs surrounding the Quileute whaling tradition. According to Powell,

> "Oldtime Quileutes used to go out in big sealing canoes called alotk [Ah-low-tk] and spear fur seals as they migrate north in great herds on their way to their 'pupping grounds' in the Pribolof Islands . . . . Fur seal hunting was considered to be real t'axilitowaskwa '*work that requires a strong spirit power*.' During the March moon, the old Weathermen would go up before dawn daily and sit on a bench located where the Senior Center is now. There, they would observe the dawn, clouds, wind, and waves . . . watching, listening, sniffing and chanting. It was their job to decide whether this would be a successful and safe day for the tribal sealers to go out. If so, several canoes would start out with four paddlers, one of whom was the harpooner. It took hours to go the 30–50 miles to the sealing grounds, pulling an empty canoe behind. If they were lucky, when they returned that two-canoe would be full, mounded up with fur seals. Fur seals are called kilados [KITH-ah-dos], but fur seal hunting is yashabal [yah-

SHAH-bah-th]. That's the reason March is called yashabalktiyat.

Ex. 221 at pdf p. 175.

11.18. It is not possible to document the precise outer bounds at which the Quileute regularly harvested fur seals before and at treaty time. At the same time, the evidence demonstrates that aboriginal Quileute sealers, like the Quinault, concentrated at the continental shelf break adjacent to their territory, where the density of fur seals was greatest during the animals' annual migrations. This shelf break occurs somewhat closer to shore in Quinault territory than in Quileute territory—as close as 20 miles to shore at the Quinault canyon and upwards of 30 miles offshore further north. Ex. 267, 277; Tr. 3/9 at 66:9–18; 105:15–24 (Trites). These geographic markers, coupled with the ethnographic accounts, support a reasonable inference that the Quileute were fur sealing on a regular and customary basis up to 40 miles offshore at and before treaty time.

C. Quileute Indian Tribe's Northern Boundary

1. Tatoosh Island and Cape Flattery

12.1. Although the Quileute do not claim to have occupied inland territory north of Cape Alava, they assert that the tribe was accustomed at treaty time to fish at the banks off of Tatoosh Island, offshore of Cape Flattery at the far northwest corner of the Olympic Peninsula. The evidence, and inferences drawn from it, do not support this claim.

12.2. First, the Quileute's claim is inconsistent with Makah assertion of ownership of the fishing banks off of Cape Flattery. The Makah were the southernmost representatives of the Nootkan culture, which "carried the concept of ownership to an incredible extreme." Tr 3/25 at 142:24–143:6 (Renker); Ex. 44 at p. 247. Unlike the Quileute, who differentiated between private hereditary ownership of inland fishing sites and common ownership of ocean and coastal sites, Nootkan notions of property swept broadly. Philip Drucker, an authority on Nootkan ethnography, explained that "[n]ot only rivers and fishing places close at hand, but the waters of the sea for miles offshore, the land, houses, carvings on house posts, the right to marry in a certain way or the right to omit part of an ordinary marriage ceremony, names, songs, dances, medicines, and rituals, all were privately owned property." *Id.*

12.3. Historical records confirm that the Makah asserted exclusive ownership of waters off of Cape Flattery. In 1841, the Makah Chief George informed Captain Wilkes of the Wilkes expedition that he owned the area around Cape Flattery and that Wilkes did not have the right to be there. Ex. 14 at p. 262. Dr. Renker's testimony that Chief George "was the chief who would have owned Tatoosh Island at that time" was unrebutted at trial. Tr. 3/25 at 144:3–5 (Renker). Other historical records in the immediate post-treaty era show continued Makah assertions of exclusive ownership of the Cape Flattery fishing banks. Colonel Simmons, who was then Puget Sound Indian Agent, wrote in an 1858 report that the Makah "obtain[ed] an abundant livelihood by catching cod and halibut on the banks

north and east of Cape Flattery." Ex. 275 at p. 231. According to Simmons, the Makah refused to allow four men who had established a nearby trading post to "fish on the banks," despite the men's congenial trading relationship with the tribe. *Id.* at p. 232. The Makah also objected to a new lighthouse on Tatoosh Island, asserting "that is on their land, and that [the Indian agents] have no right to put it there without their consent." *Id.*

12.4. The historical evidence further shows that the Makah and their Nootkan relatives asserted ownership of the halibut banks against Indian tribes as well as non-Indians. Gilbert Sproat, who was living among the Nootkan Indians of Vancouver Island, wrote in 1868 that "fishing tribes on both sides of the Straits of Fuca would drive away any other tribes which had not been accustomed to fish on the halibut banks." Ex. 143 at p. 20. Agent McGlinn, who had jurisdiction over the Makah and the Quileute, similarly reported on the Makah's longstanding claims of ownership over the halibut banks off of Cape Flattery. McGlinn attested in an 1891 report that the Makah "view[ed] with jealousy the encroachment if the white men on what they have always regarded as their exclusive possessions, and find for the first time in their history that white competition has overstocked, and will I am afraid eventually take from them a market of which heretofore they have had almost a monopoly." Ex. 157 at pp. 448–49.

12.5. Ethnographers of the Makah are in accord with the tribe's traditional assertion of exclusive ownership over these halibut banks. In the Makah Pacific Ocean U & A subproceeding, Dr. Lane

attested to the existence of "specific halibut banks lying northwest of Tatoosh . . . Island, which were known to be Makah banks and which other groups didn't fish at." Ex. 323 at pdf p. 11. Dr. Lane reiterated this view in a 1991 report on Makah halibut fishing traditions, commenting that "[t]he Makah, like other Nootkan people, regarded the fishing banks as private property. One aspect of this proprietorship was the right to control use of the fisheries." Ex. 140 at p. 9. Joshua Reid, in his Ph.D. dissertation on the Makah, likewise explained that "'[o]utside resources'—called such because they were in marine spaces outside bays, inlets, and rivers—were the most important property rights, and only the highest-ranking chiefs owned them." Ex. 255 at pp. 13–14. Judge Boldt too found that "[a] special feature of the Makah environment was a rich supply of halibut to which the Makah had access by virtue of ownership of lucrative fishing banks respected by competing tribes . . . ." FF 61.

12.6. Accounts of the history of conflict between the Makah and the Quileute are inconsistent with treaty-time use of the Cape Flattery halibut grounds by Quileute tribal members. Linguistic evidence, including mythic traditions, relates that the Quileute's ancestors once inhabited the entire northwest Olympic Peninsula before being displaced by the Makah, who moved south from what is now Vancouver Island around 1,000 years before present. *See* Ex. 134 at pp. 94–99; Ex. 259 at p. 422. An oral history recounted to Joshua Reid by a Makah elder places the exclusion of the Quileute from the waters around Cape Flattery and Tatoosh Island in the sixteenth century. The elder recounted that Quileute "warriors had once pushed Makahs north

across the strait, claiming Cape Flattery, Tatoosh Island, and the surrounding waters." However, during the early sixteenth century, "the exiled Makahs . . . began encroaching upon the halibut banks stolen by Quilleutes." Violent raids ensued, and the Makah ultimately drove the Quileute "south and thereafter excluded them from the waters and marine resources around Cape Flattery and Tatoosh Island." Ex. 255 at pp. 89–90. Albert Regan recorded a similar oral history. *See* Ex. 251 at pp. 7–11.

12.7. Later accounts show violent conflicts between the Makah and the Quileute extending closer to treaty time. Edward Curtis, for instance, recounted a Makah raid on Quileute fishermen near James Island around 1845 in the midst of a decade-long period of hostilities between the tribes. Ex. 37 at pp. 9, 11; Tr. 3/25 at 140–41, 152 (Renker); *see also* Ex. 58(a) at pdf p. 178 (account by Frachteberg of conflict around 1850). These hostilities appear to have continued for some years post-treaty. *See, e.g.* Ex. 284 at pdf pp. 28–29, 275–76 (account by Swan of killing of Makah whalers by Quileute when they drifted into Quileute territory); Ex. 65 at p. 16 (account by Gibbs that hostilities between the tribes "have occurred within the memory of men born as late as 1863").

12.8. Documented improvements in the relationship between the tribes in the late 1800s correspond with the first documentation of Quileute use of the fishing banks off of Tatoosh Island. According to Pettit and Swan, hostilities lessened with the arrival of non-Indian officials and the establishment of reservations. Ex. 218 at p. 15, Ex. 290 at p. 51. In

1879, Captain Willoughby attributed the improvement of the relationship between the tribes to various factors, including several intermarriages. Ex. 352 at pp. 144–45. Frachtenberg and Powell both recounted the exchange of "peace brides" in the post-treaty era, which brought hostilities to an end. *See* Ex. 58(a) at pdf p. 178; Ex. 220 at p. 27. Frachtenberg also recounted the first Quileute fishing trips to Neah Bay occurring in this period. For instance, Sally Black informed him that "Makah basketry was introduced amon[g] the Quileute's some 40 years ago [circa 1976], after the wars between the two tribes had stopped. Quilieute women used to accompany their husbands and fathers to Neah Bay on fishing trips and while there, they learned the Neah Bay basketry and introduced it among the Quilieute." Ex. 58(a) at pdf p. 21. Frachtenberg recounted Quileute fishing trips to Neah Bay continuing into the early 1900s, documenting that "[a]t the present time, the Quileutes leave for Neah Bay in the first part of July, fishing there with trolling hooks and purse-seins." *Id.* at pdf p. 126.

12.9. Additional historical accounts show Quileute use of the Cape Flattery fishing grounds occurring on a seasonal basis from the late 1800s. Makah elder Harry McCarthy, born 1902, recalled Quileutes fishing at a camp called Midway on Tatoosh Island. Ex. 323 at p. 25. The Quileute Hal George also recalled being at Tatoosh Island as a child, helping to dry the Quileute halibut catch, around 1899 to 1901. Ex. 220 at pdf p. 72. Lillian Pullen, a Quileute born 1912, relayed that her first husband's family would visit their annual halibut camp at Tatoosh Island during the period around WWI. Ex.

220 at pdf p. 125. By contrast, the comparatively voluminous historical record of Makah fishing off of Cape Flattery is absent any reference to Quileute use of the fishing banks prior to the late 1800s. Instead, the sole references to Quileute presence in the area are to occasional visits by tribal members to Neah Bay, not to fishing activities in surrounding waters. *See, e.g.,* Ex. 178 at p. 283 (1887 affidavit by Swan in the Pullen land dispute attesting that he "frequently saw these Indians at Neah Bay"). 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.

12.10. Indeed, the Quileute claim to treaty-time fishing at Tatoosh Island is based largely on an ambiguous 1879 statement by the Quileute Chief Tahahowtl. Chief Tahahowtl recounted that during the treaty negotiations in 1855, he informed Colonel Simmons that this land formerly extended "from the island of Upkowis opposite Kwedaitsatsit down the coast to the Hooh River." Ex. 281 at p. 162. The linguist Dr. Hoard opined at trial that the phrase translates to "island" or "promontory" across from "Makah place," which he located as Tatoosh Island. *See* Tr. 3/3 at 112–16, 119–20, 122–23 (Hoard); *see also* 3/25 at 176 (Renker) (explaining that "upkowis" is a Makah word meaning a promontory or piece of land projecting from a beach). For several reasons, Chief Tahahowtl's statement does not give rise to a reasonable inference that the Quileute were regularly fishing off of Cape Flattery at treaty times.

12.11. First, a claim by Chief Tahahowtl to Tatoosh Island would be entirely inconsistent with Makah

assertions of proprietary ownership of the island and surrounding waters, outlined above, as well as with exclusive habitation by the Makah people of the coast south of Tatoosh Island to Cape Alava in the centuries leading up to the treaties. It is not reasonable to infer that Chief Tahahowtl meant to claim the entirety of Makah territory for the Quileute, from Cape Flattery across from Tatoosh Island down the coast to the Hoh River. Indeed, Col. Simmons himself did not appear to understand Chief Tahahowtl to be claiming lands all the way to Tatoosh Island and Cape Flattery during the treaty negotiations, because he did not adjust the cession boundary in the treaty to encompass such lands. *See* Tr. 3/25 at 179–80 (Renker). Second, assuming that Dr. Hoard's translation is accurate, "upkowis" could have referred to any number of islands or promontories, such as Ozette Island across from Cape Alava, that would be more in keeping with a Quileute territorial claim than Tatoosh Island. *See* Tr. 3/25 at pp. 176:20–23 (Renker). While Hal George identified "upkowis" as Tatoosh Island, Ex. 220 at pdf p. 47, this identification is not exclusive. According to Dr. Renker, the Makah themselves associated the term with two different sites—one about a mile north of Cape Johnson and another east of Cape Flattery. *See* 3/25 at 176:10–15 (Renker). Third, the language and context of Chief Tahahowtl's statement indicate that he was concerned with claiming lands for the purpose of treaty negotiations, which concerned land sales. *See* Tr. 3/25 at pp. 172–74 (Renker). Even if Chief Tahahowtl was referring to Tatoosh Island, his statement asserted a claim to land, not to uses of

adjacent offshore waters for fishing purposes. *See* Tr. 3/4 at 40, 66 (Hoard).

2. Cape Alava

13.1. Like the Quileute's western boundary, the northernmost extent of Quileute fishing cannot be ascertained with either precision or certainty. Nonetheless, the treaty-time, ethnographic, and place name evidence together support a reasonable inference that the Quileute were fishing on a regular basis as far north as Cape Alava at and before treaty time.

13.2. First, it is reasonable to infer from the language of and statements attendant to the Treaties of Neah Bay and Olympia that the treaty negotiators on both sides understood aboriginal Quileute territory to extend as far north as Cape Alava. The treaties for the Makah and Quileute together denote a shared boundary between the aboriginal territories of the tribes, running eastward from the coast. The Treaty of Neah Bay identifies the Makah's southern territorial boundary as beginning on the coast at "Osett, or the Lower Cape Flattery, thence eastwardly along the line of lands occupied by the Kwe-deAh-tut or Kwill-eh-yute tribe of Indians." Ex. 298 at p. 1. The Treaty of Olympia likewise identifies the Quileute's northern boundary as "the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains." Ex. 297 at p. 1. Colonel Simmons, who negotiated the Treaty of Olympia, later clarified his understanding of aboriginal Quileute territory to correspond to the

boundaries identified in the treaties. In his 1960 Puget Sound Agency report, Simmons wrote, "The treaty of Olympia with the Qui-nai-elt and the Quillehute tribes remains only to be considered. These tribes occupy the sea-coast between Oxelt or old Cape Flattery, on the north, and the Qui-nai-elt river on the south." Ex. 276 at p. 195. Governor Stevens also affirmed this understanding of Quileute territory when he stated, in submitting the Treaty of Olympia to the Commission of Indian Affairs: "I herewith enclose the treaty made with the Qui-nai-elt and Quil-leh-ute Tribes of Indians on the Coast between Gray's Harbor and Cape Flattery," where "Cape Flattery" may refer to "Old" or "Lower Cape Flattery." Tr. 3/13 at 66:18–67:4 (Boxburger).

13.3. It is reasonable to infer that in placing this boundary at Ozette or old/lower Cape Flattery, the negotiators intended to locate the northernmost extent of aboriginal Quileute territory at or near Cape Alava. Tr. 3/13 at 66:12–14 (Boxburger). George Gibbs' 1855 map of the "Position of the Indian Tribes and the Lands Ceded by Treaty," illustrates the boundary between the Makah and the Quileute as beginning on the coast at "Osett," which it locates just north of Flattery Rocks in the vicinity of Cape Alava. Ex B243.1. Arthur Howeattle expressed a similar understanding held by the Quileute, informing Dr. Frachtenberg that the Quileute's northern boundary was located at Ozette River, which spills into the Pacific just north of Cape Alava. Ex. 58(a) at pdf p. 53.

13.4. Government officials continued to locate the Quileute/Makah boundary in the vicinity of Cape Alava in the decades following the signing of the

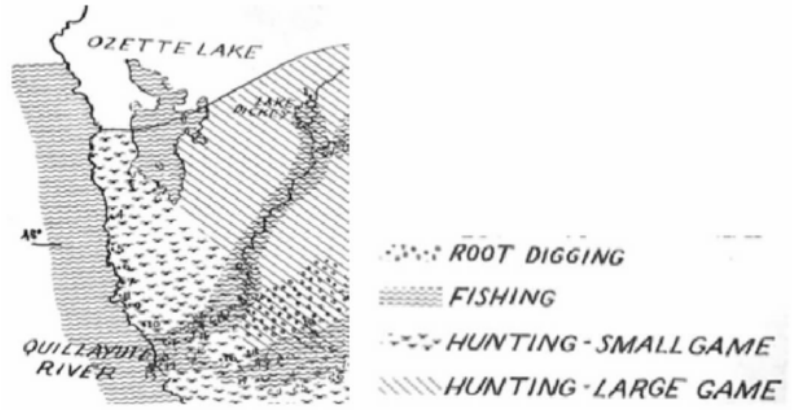
treaties. In 1872, R.H. Milroy, the Indian Agent for Quinault and Quileute, wrote that the lands ceded by the tribes extended "from a few miles south of Cape Flattery to a few miles north of Gray's Harbor." Ex. 168 at p. 339. A map published in 1876 at the direction of the U.S. Coast Survey and intended to "illustrate a paper by the late Geo. Gibbs" places Makah's southern boundary at the Ozette River, slightly north of Cape Alava. Ex. B088. James Swan, in his book "The Indians of Cape Flattery" gave a similar expression to Makah territory, informed by his experience living among the Makah between 1859 and 1866. Swan wrote,

> At the time of making the treaty between the United States and the Makah Indians in 1855 . . . the [Makah] tribe claimed as their land, all that portion of the extreme northwest part of Washington Territory lying between Cape Flattery Rocks on the Pacific coast, fifteen miles south from Cape Flattery, and the Hoko River, about the same distance eastward from the Cape on the Strait of Fuca.

Ex. 290 at p.1. Dr. Boxburger testified at trial that Swan's description accurately places Flattery Rocks fifteen miles south of Cape Flattery, indicative of Swan's keen understanding of the coastline. Tr. 3/13 at 69:23–70:22 (Boxburger).

13.5. Ethnographers of the Quileute and the Makah have since located the boundary between the tribes in the vicinity of Cape Alava, consistent with these treaty-time understandings. In the 1990 *Handbook of North American Indians,* Dr. Renker and Dr. Erna Gunther published a map of Makah Territory that places its southern extent just south of Cape Alava.

Ex. 249 at p. 423. Dr. Powell likewise reported that "aboriginal Quileute territory extended from south of Cape Alava to Destruction Island." Ex. 226 at p. 431. Dr. Verne Ray and Dr. Nancy Lurie prepared a map of aboriginal territory for the ICC proceedings, based on their review of ethnographic accounts of the Quileute and their own field studies with the tribe. The map depicts Quileute ocean fishing activity extending northward along the coast to a location just south of Cape Alava and adjacent to the northernmost extent of Lake Ozette:



Ex. 120. Dr. Ray explained in his ICC testimony that "the shading over here on the ocean [to the west of Lake Ozette] indicates fishing activities. This would include bottom fishing for the various rock cod and flounders and so on." Ex. 243 at p. 240. Another ethnographer involved in the ICC proceedings likewise reported in a 1968 article that "Quileute informants insist that in aboriginal days their people fished and sealed almost to the mouth of the Ozette river." Tr. 3/25 at 14:22–17:2 (Boxburger).

13.6. Second, aboriginal Quileute fishing in the vicinity of Cape Alava can be inferred from evidence that the Quileute were fishing at Lake Ozette at and before treaty time. Judge Boldt's inclusion of Lake Ozette in the Quileute case area U & A is consistent with evidence presented at trial. *See* FF 108. In contrast to the Makah's exclusion of other tribes from the Cape Flattery halibut banks, the evidence shows that the Quileute and the Makah engaged in an amicable, shared use of Lake Ozette. Sextas Ward, born 1853, recounted to Edward Swindell that:

> when he was a small boy and a young man that the Quileute Indians used to fish at the lower or southern end of Lake Ozette; that the other end of the lake was used by the Ozette Indians who were different people than the Quileute; . . . . that the Ozette Indians were friendly to the Quileutes and they did not have any trouble over both of them using the lake to obtain fish; . . . that he understands that when the treaty was made with Governor Stevens the Quileute Indians were supposed to be given the right to continue to use their old fishing place at Ozette Lake.

Ex. 293 at pp. 221–22. Ray and Lurie likewise concluded from their research that this shared use of the lake was a traditional practice, extending back before treaty time. Ray explained their decision to draw a boundary-line across the center of the lake in his ICC testimony:

> You will see that the fishing symbol covers all of Ozette Lake, and there was not in the minds of these people the feeling that there is

> somehow a dividing line across the middle of the lake, that they didn't dare follow the fish north or south. . . . I finally convinced myself this was the actual state of affairs, and I was much interested to see that later on, when I discovered the Frachtenberg manuscript, that he did precisely the same thing.

Ex. 243 at pp. 202–03. While Ray believed that each tribe should be able to fairly claim half of the lake for compensation purposes, the ICC ultimately denied compensation for the area to both tribes because of its joint use. Ex. 123 at p. 168; Tr. 3/13 at 72:20–73:11 (Boxburger). Arthur Howeattle likewise told Frachtenberg that he understood the Quileute to have "ceded to the Government the northern half of Lake Ozette" in signing the Treaty of Olympia. Ex. 58(a) at pdf p. 47. Because Arthur Howeattle was married to an Ozette woman, it is reasonable to infer that he was particularly knowledgeable about the history of shared use of the lake. *See* Tr. 4/1 at 100:12–101:6 (Renker).

13.7. The evidence shows that the Quileute did not constrain their fishing activities to Lake Ozette, but that they also fished along its adjacent coastline. Dr. Ray attested to this tradition before the ICC, explaining that the Quileute would fish up and down along the beach "covering a stretch of many miles" from their coastal village at Norwegian Memorial, located adjacent to the southern end of Lake Ozette. The Indians would travel back and forth along "the whole area in between Ozette Lake and the shores of the Pacific" for the purpose of hunting small game. "At other times, they would simply be hurrying down to the beach [from Lake Ozette] to get to their

whaling station or something of that sort." Ex. 243 at p. 239. Aboriginal Quileute fishing along the coastline west of Lake Ozette can also be inferred from Judge Boldt's inclusion in the Quileute case area U & A of the "tidewater and saltwater areas" "adjacent" to Lake Ozette and the other inland water bodies at which the Quileute traditionally fished. FF. 108.

13.8. Third, evidence of Quileute place names is consistent with regular Quileute fishing as far north as Cape Alava. Dr. Ray provided a compilation of Quileute village sites to the ICC along with his maps, locating the northernmost of the sixteen identified Quileute coastal villages at Norwegian Memorial. Ex. 119.1. It is reasonable to infer, as this Court did in locating the southern boundary of the Makah's ocean U & A at Norwegian Memorial ten miles south of the southernmost Makah village at Ozette, that the Quileute villagers living at Norwegian Memorial were fishing in the waters north as well as south and west of their home. *See U.S. v. Washington,* 626 F.Supp. at 1467; Tr. 4/1 at 172:17–19 (Renker). It is further apparent that Ray's compilation does not provide a full picture of Quileute use of the coastline. Ray himself testified that he is certain that his map does not include all of the "village or camp sites that were used in 1855." Ex. 243 at p. 130. While similarly acknowledging that "most of the Quileute names have been forgotten," Jay Powell and William Penn added several other Quileute place names to Ray's list. One such site, which translates as "hair seal-skin float," is located at White Rock between Cape Alava and Sand Point. Another Quileute site, translated as "Sea lion hunting place," is located north of

Norwegian Memorial. Ex. 224, pp. 104, 108. These use-oriented place names associate the area in between Cape Alava and Norwegian Memorial with traditional Quileute sea mammal harvest activities. According to Powell and Penn, it is appropriate to assume that many of these names "are of great age," reflecting a long history of Quileute seafaring traditions taking place along this coastline. *Id.* at p. 107.[4]

III. CONCLUSIONS OF LAW

A. Legal Standards

1.1. This case arises under the Court's continuing jurisdiction, retained under the Permanent Injunction set forth in Final Decision # 1, to consider "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # 1." *Final Decision 1,* 384 F.Supp. at 419. In making this determination, the Courts steps into the place occupied by Judge Boldt when he set forth U & As for fourteen tribes including the Quileute and Quinault within the original case area. The Court accordingly applies the same evidentiary standards applied by Judge Boldt in Final Decision # 1 and elaborated in the ensuing forty years of subproceedings.

1.2. In accordance with these standards, the Court has found that the Quinault Indian Nation and the

---

[4] Two archaeological sites located in this area, one at Sand Point and the other at White Rock, may reflect either Makah or Quileute occupancy. *See* 4/6 at 170:16–172:6 (Wessen); Tr. 4/7 at 8:4–11:6 (Wessen). As such, it is not possible to infer from the archaeological record alone which tribe occupied this coastal area prior to treaty time.

Quileute Indian Tribe bear the burden to establish the location of their usual and accustomed grounds and stations under the Treaty of Olympia. Order on Motions for Partial Summary Judgment, Dkt. # 304 at pp. 23–25. In determining whether these tribes have met their burden, the Court bases its findings "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom." *Id.* at 384 F.Supp. at 348.

1.3. Available evidence of treaty-time fishing activities is "sketchy and less satisfactory than evidence available in the typical civil proceeding." *U.S. v. Lummi Indian Tribe,* 841 F.2d 317, 321 (9th Cir.1988) ("*Lummi* "). What documentation does exist is "extremely fragmentary and just happenstance." *Id.* at 318. As Judge Boldt observed, "[i]n determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." *U.S. v. Wash.,* 459 F.Supp. 1020, 1059 (W.D.Wash.1975). "Accordingly, the stringent standard of proof that operates in ordinary civil proceedings in relaxed." *Lummi,* 841 F.2d at 318.

1.4. In sum, the Quileute and Quinault may rely on both direct evidence and reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show the probable location and extent of their U & As. *U.S. v. Wash.,* 626 F.Supp. 1405, 1431 (W.D.Wash.1985). In evaluating whether or not the tribes have met their burden, the Court gives due consideration to the fragmentary nature and inherent limitations of the

available evidence while making its findings on a more probable than not basis.

1.5. Under the Treaty of Olympia, the Quinault and Quileute reserved the "right of taking fish," at all of their "usual and accustomed grounds and stations." The term "usual and accustomed" grounds and stations encompasses "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same water." *Final Decision 1,* 384 F.Supp. at 332. Excluded from a tribe's U & A are "unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id.* In other words, the term "usual and accustomed" was "probably used in [its] restrictive sense, not intending to include areas where use was occasional or incidental." *Id.* at 356.

1.6. Evidence of the probable distances to which a tribe had the capability to travel at treaty-time is insufficient on its own to establish U & A. *Makah,* 730 F.2d at 1318 (affirming 40–mile offshore U & A despite recognizing that the "Makahs probably were capable of traveling to 100 miles from shore in 1855"). So too is evidence that a tribe occasionally trolled incidental to traveling through an area. *See Final Decision 1,* 384 F.Supp. at 353 ("Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians."); *Upper Skagit Indian Tribe v. Wash.,* 590 F.3d 1020, 1022 (9th Cir.2010) ("The term 'customarily' does not include 'occasional and

incidental' fishing or trolling incidental to travel.").

1.7. When it comes to determining a tribe's treaty-time offshore fishing grounds in the Pacific Ocean, this Court has recognized that it is not possible to document the precise outer limits of these areas with particularity. *Makah,* 626 F.Supp. at 1467. Rather than setting forth general "grounds" and specific "stations," the Court has found it appropriate to demarcate an offshore U & A based on the outermost distance to which the tribes customarily navigated their canoes for the purpose of "tak[ing] fish" at and before treaty time. *Id.* (delineating Makah offshore U & A as the entire area enclosed within the longitudinal line running forty miles offshore, from the State of Washington's boundary in the north to Norwegian Memorial in the south); *see also* Memorandum Opinion on Motion for Reconsideration, Dkt. # 8763, p. 2 (Jan. 27, 1983) (explaining that demarcating the extent of the Makah's U & A with certainty in this way is "appropriate for present day administration of the treaty right").

B. Treaty Interpretation

2.1. As set forth above, the parties to this subproceeding dispute the scope of evidence relevant to ascertain the Quileute and Quinault's Pacific Ocean U & As. At issue is whether evidence of a tribe's regular, treaty-time whaling and sealing practices can be the basis for establishing the tribe's offshore U & A. The nature of this dispute requires the Court to address the scope of the "right of taking fish," as this term was used in the Treaty of Olympia.

2.2. In interpreting the treaty fishing clause, the Court cannot simply look to the ordinary meaning of the words used in the Treaty of Olympia as they are understood today. That is, the Court's interpretation of the word "fish" neither begins nor ends with today's commonly accepted biological definitions. Rather, the Court's interpretation of this treaty fishing clause is constrained by a set of legal principles set forth in this and other cases involving adjudication of tribal treaty rights.

2.3. First, the canons of construction for Indian treaties require that the Court give a "broad gloss" on the Indians' reserved fishing rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n ("Fishing Vessel")*, 443 U.S. 658, 679, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). In *Worcester v. State of Georgia,* the United States Supreme Court first set forth the fundamental principle that "[t]he language used in treaties with the Indians should never be construed to their prejudice. . . . If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense . . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Worcester v. State of Ga.,* 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). The principle that treaty terms are to be construed in favor of the tribes stems from the indubitable recognition that the parties to these treaties were "not on an equal footing." *Choctaw Nation v. U.S.,* 119 U.S. 1, 28, 7 S.Ct. 75, 30 L.Ed. 306 (1886). As the Supreme Court later set forth, "superior justice" requires that the inequality in

bargaining power between the treaty parties "be made good by . . . look[ing] only to the substance of the right, without regard to technical rules[.]" *Id.*; *United States v. Winans,* 198 U.S. 371, 380–81, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

2.4. Where words used in a treaty may admit to more than one meaning, the canons of Indian treaty construction require that any such "ambiguities . . . be resolved from the standpoint of the Indians." *Winters v. U.S.,* 207 U.S. 564, 576–77, 28 S.Ct. 207, 52 L.Ed. 340 (1919); *see also Confederated Tribes of Chehalis Indian Reservation v. State of Wash.,* 96 F.3d 334, 340 (9th Cir.1996) ("Any ambiguities must be resolved in favor of the Indians."). The rule of liberal construction of treaties in favor of the tribes is "rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). In giving effect to the terms of the treaties, the Court must therefore endeavor to, as nearly as possible, construe the terms to have that meaning that would have been understood by the tribes represented at the treaty negotiations. *Tulee v. State of Wash.,* 315 U.S. 681, 684–85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.").

2.5. These canons have guided the construction of the fishing rights provision in the Stevens Treaties from the very first decision in this case. In Final

Decision # 1, Judge Boldt explained that "[e]ach of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed in the above quoted language of the United States Supreme Court." *Final Decision 1,* 384 F.Supp. at 331. These principles have continued to guide each of the many subsequent decisions in which this Court has been called upon to interpret specific terms within the fishing rights provision. *See, e.g., U.S. v. Wash.,* 774 F.2d 1470, 1481 (9th Cir.1985) (drawing on the canons of Indian treaty construction in giving a "properly liberal construction" to the term "citizens of the Territory"); *U.S. v. Wash.*, 20 F.Supp.3d 828, 896 (W.D.Wash.2007) ("*Culverts*") (emphasizing the importance of construing a Stevens Treaty "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians" (quoting *Fishing Vessel*, 443 U.S. at 675–77, 99 S.Ct. 3055)).

2.6. Second, the Court's interpretation is guided by the "reserved rights doctrine," which requires the Court to view those rights that were possessed by the tribes prior to the treaties and not specifically granted away as being reserved to the tribes. The Supreme Court set forth this doctrine in *United States v. Winans,* in language quoted by Judge Boldt in Final Decision # 1, 384 F.Supp. at 331. Reviewing the circumstances under which one of the Stevens Treaties was negotiated, the Supreme Court determined that the vital rights encapsulated in the fishing rights provision preexisted the treaty and

were reserved by the tribes in treating with the United States:

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

198 U.S. at 381, 25 S.Ct. 662. In accordance with this doctrine, 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. *See U.S. v. Adair,* 723 F.2d 1394, 1413 (9th Cir.1983) ("A corollary of these principles, also recognized by the Supreme Court, is that when a tribe and the government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status.").

2.7. This Court has since continued to recognize the "right of taking fish" as a reserved right and declined to read restrictions into it absent an explicit grant of subsistence rights away to the United States from the tribes during the treaty negotiations. *See, e.g., U.S. v. Wash.,* 18 F.Supp.3d 1172, 1218 (W.D.Wash.1991) ("[R]ights which were already possessed by the Indians and not granted to the United States were reserved by the Indians."); *Culverts,* 20 F.Supp.3d at 897–88 (recognizing that "Stevens specifically assured the Indians that they

would have access to their normal food supplies now and in the future").

2.8. Third, the reserved rights doctrine has produced the corollary principle that this Court is to interpret the "right of taking fish" without any limitation or differentiation as to species. Since Final Decision # 1, courts interpreting the Stevens Treaties have declined to require species-specific findings for usual and accustomed fishing grounds. *See U.S. v. Wash,* 157 F.3d 630, 631–32 (9th Cir.1998) (*Shellfish*). Judge Boldt in 1978, for instance, held that the usual and accustomed grounds and stations for herring were co-extensive with those previously adjudicated for salmon. *U.S. v. Wash.,* 459 F.Supp. 1020, 1049 (W.D.Wash.1978). In the *Shellfish* proceeding, this Court set forth the foundation for this principle: "Because the 'right of taking fish' must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, preexisted the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation." *U.S. v. Wash.,* 873 F.Supp. 1422, 1430 (W.D.Wash.1994) (*Shellfish*) (emphasis in original). The Ninth Circuit affirmed in relevant part, rejecting the State's argument that the right of taking fish is limited to those species actually harvested by the tribes at treaty-time: "With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any specifies-specific or technology-based restrictions on the Tribes' rights." *Shellfish,* 157 F.3d at 643. *See also U.S. v. Wash.,* 19 F.Supp.3d 1126, 1130 (W.D.Wash.1994) (concluding "as a matter of law that usual and accustomed grounds and stations do not vary with the species of

fish, and that usual and accustomed grounds and stations for non-anadromous fish are coextensive with those of anadromous fish"); *Midwater Trawlers Co–Op. v. U.S. Dep't of Commerce,* 282 F.3d 710, 716–17 (9th Cir.2002) (affirming that "[t]he term 'fish' as used in the Stevens Treaties encompassed all species of fish, without exclusion and without requiring specific proof").

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

2.10. Applying these principles to the case at hand, the Court looks first to indicia of the meaning that the Quileute and Quinault attached to the word "fish" when their representatives negotiated the Treaty of Olympia in 1855. As set forth above, a capacious understanding of this word was in broad, popular circulation at the time that the treaty was

negotiated, as evidenced by Webster's 1828 American Dictionary defining the word as "[a]n animal that lives in the water" and the numerous judicial decisions discussing "fish" and "fisheries" in ways that embraced sea mammals. *See, e.g., In re Fossat,* 69 U.S. 2 Wall. 649, 692, 17 L.Ed. 739 (1864) ("For all purposes of common life, the whale is called a fish, though natural history tells us that he belong to another order of animals."); *Ex parte Cooper,* 143 U.S. 472, 499, 12 S.Ct. 453, 36 L.Ed. 232 (1892) (discussing "seal fisheries"); *The Coquitlam,* 77 F. 744, 747 (9th Cir.1986) (discussing "seal fishing"); *Knight v. Parsons,* 14 F.Cas. 776, 777 (D.Mass.1855) (construing a contract to allow parties to "sell the fish" harvested in the "whale fisheries").

2.11. More to the point, it is clear from the linguistic evidence that the tribal signatories to the treaty drew no distinctions between groups of aquatic species and would have understood the term "fish" to encompass at least those aquatic animals on which they relied for their subsistence purposes. The Quileute word "?aàlita?" and the Quinault word "Kémken" express this breadth, encompassing a spectrum of meanings from all "food" to all "fish" to "salmon" in particular. The negotiators could have used species-specific words, such as salmon, that were available in the common Chinook jargon negotiating medium and in all the parties' native languages. As this Court has previously explained, that the parties to the treaties chose instead to use the sweeping word "fish" in lieu of more tailored language indicates an intended breadth of the subsistence provision that should not be

circumscribed on the basis of post hoc understandings and linguistic drift.

2.12. A construction of the term "fish" to include sea mammals likewise follows from the context in which the treaties were set forth. As expressed in the reserved rights doctrine, the Quinault and Quileute, in agreeing to cede large swaths of their land, reserved the right to continue to fish as they had always done, in the locations where they were accustomed to harvest aquatic resources at and before entering into their treaty. The various promises and assurances made to them by the U.S. treaty negotiators underscore the mutually agreed purpose to restrict the tribes only as to the location of their homes: in the words of Governor Stevens, the U.S. treaty commission intended the tribes to continue "to take fish where you have always done so and in common with the whites." Apart from a proviso restricting the tribes' right to "take shell-fish from any beds staked or cultivated by citizens," there is no indication anywhere in the language of the treaty or the evidence surrounding the negotiations of an intent to circumscribe this most important of usufructuary rights.

2.13. It is likewise clear that prior to the Treaty of Olympia, the Quinault and the Quileute were harvesting marine mammals on a usual and accustomed basis from the Pacific Ocean. The several assurances given to the tribes during the Chehalis River negotiations of their continued ability to harvest drift whales evidence the U.S. negotiators' intent to draft the treaties to encompass the taking of whales. As these tribes did not explicitly relinquish the right to continue this traditional

practice, it follows that they reserved the right to continue to harvest marine mammals as they had long done. That the tribes continued to harvest whales and seals in the decades following the Treaty of Olympia with active encouragement of federal officials and special dispensations on account of their tribal status shows that both sides believed the right to harvest sea mammals to have been reserved to the tribes.

2.14. Together these findings lead inexorably to the conclusion that "fish" as used in the Treaty of Olympia encompasses sea mammals and that evidence of customary harvest of whales and seals at and before treaty time may be the basis for the determination of a tribe's U & A. That the tribes are not now permitted by conservation restrictions to carry out this marine mammal harvest is of no moment with respect to adjudication of their U & As. As this Court has oft explained, a tribe's U & A for the harvest of any one aquatic species is coextensive with its U & A for any other aquatic species. *See U.S. v. Wash.,* 19 F.Supp.3d 1126, 1130 (W.D.Wash.1994). This principle holds as true for marine mammals as it does for non-anadromous fish, for anadromous fish, and for shellfish.

2.15. This Court's decision to so hold is unaffected by the differences in language between the Treaty of Olympia and the Treaty of Neah Bay. As set forth above, these treaties were negotiated by different individuals and in different contexts. Colonel Simmons, who negotiated the Treaty of Olympia, lacked the authority to tailor provisions in the way that Governor Stevens was able to do when negotiating the Treaty of Neah Bay. The loss of the

minutes for the Treaty of Olympia negotiations makes it impossible to discern what exactly was promised to the tribes and what specific assurances were requested or made. In the absence of such information, the Court must look to other evidence of the meaning understood by the tribal parties and the rights they reserved, guided by the canons requiring liberal construction in favor of the tribes.

2.16. Finally, this Court's decision is likewise unaffected by the Makah's 1982 ocean U & A determination. Having carefully reviewed the orders by Judge Craig, the findings of Magistrate Judge Cooper on which the determinations were based, and the briefing and official transcripts from the Makah's ocean U & A subproceeding, the Court is persuaded that neither questions of treaty interpretation generally nor the scope of the "right of taking fish" in particular were raised. Rather, prior to the Court's ruling that U & As for non-anadromous fish were coextensive with those for anadromous fish, the parties had no reason to seek a judicial interpretation of the scope of "fish" because they were focused on evidence of salmon fishing. The representations by the parties, and the reactions by the Court, show that the scope of "fish" was not at issue. After Judge Cooper's initial ruling that the Makah's western boundary extended 100 miles offshore, the U.S. filed an objection in which it disputed "how far west the Makah Tribe's usual and accustomed salmon fishing grounds in the Pacific Ocean extended at the time of the treaty." Dkt. # 8698 at p. 2. After the district court issued an order limiting the Makah's western boundary to 40 miles offshore, the Makah moved for reconsideration. At a telephonic hearing, the Makah argued that it

was sufficient for the Court to infer from the tribe's capability to travel 100 miles offshore that it actually did so to fish for salmon. Dkt. # 8984 at pp. 5–6. The Court disagreed, stating:

> As to my conclusion, the evidence I believe [Judge Cooper] heard in reaching his conclusion the Makahs fished for salmon 100 miles out at treaty times, simply shows it was feasible to go 100 miles to fish for salmon, for anything out there, explore or whatever. That, to me, is not evidence of usual and accustomed fishing in a given area.

Id. at p. 7. It was not until the shellfish proceeding over a decade later that this Court addressed the scope of the word "fish," giving it the broad construction affirmed by the Ninth Circuit and reaffirmed herein.

2.17. Moreover, Judge Craig's decision as to the Makah U & A ultimately turned on the sufficiency of the evidence proffered by the Makah to establish their U & A, not on a legal determination of what evidence would be deemed relevant. Judge Craig's Order cited solely to a 1977 report by Dr. Barbara Lane on "Makah Marine Navigation and Traditional Makah Offshore Fisheries." *Makah,* 626 F.Supp. at 1467; Ex. 143 (1977 Makah Report by Dr. Lane). While Dr. Lane's report contained evidence from which the Court could infer that the Makah fished 30 to 40 miles offshore at treaty time, *see id.* the only evidence showing that the Makah fished distances greater than 40 miles came from post-treaty sources. *See* Ex. 143 at p. 10 ("It is known that the Makah fished at greater distances than thirty or forty miles offshore in post-treaty times."). Among this post-

treaty evidence were reports that the Makah whaled and sealed at distances up to 100 miles in the late nineteenth century. *Id.* at p. 13 (citing reports from 1894 and 1897 of Makah offshore sealing); *Makah,* 626 F.Supp. at 1467 (citing same). This evidence, as Judge Craig determined, showed only that the Makah would have had the capability to travel distances up to 100 miles at treaty time—not that they customarily did so for their subsistence harvest. *Id.* (holding that "it is clearly erroneous to conclude that the Tribes customarily traveled such distances [up to 100 miles offshore] to fish" at treaty time). The Ninth Circuit agreed. Reviewing evidence that the Makah traveled up to 100 miles around 1900 and probably fished up to 40 miles offshore in the 1850s, it concluded that "[t]hese facts do not show that their usual and accustomed fishing areas went out 100 miles in 1855. There is no basis for an inference that they customarily fished as far as 100 miles from shore at treaty time." *Makah,* 730 F.2d at 1318. Neither of these opinions excluded evidence of sea mammal harvest. Rather, they restricted the Makah's U & A to the distance that the tribe had demonstrated it *customarily* traveled to harvest aquatic resources at and before the time it signed its treaty.

2.18. Indeed, it is clear from briefs later submitted by tribal parties to this case—including the Makah—that they did not view the Court's prior rulings as having excluded evidence of marine mammal harvest from U & A determinations. In a brief submitted in the *Shellfish* proceeding, the Makah and others argued:

> The type of fishing activities this Court has considered in determining the boundaries of usual and accustomed grounds and stations also shows that all fishing activities should be taken into account. This Court has frequently considered more than just salmon fishing in establishing usual and accustomed areas. For example, in adjudicating the Quileute Tribe's usual and accustomed areas, the Court noted that in portions of its area the Quileutes caught smelt, bass . . . seal, sea lion, porpoise, and whale. 384 F.Supp. at 372, FF 108. . . . The Makah usual and accustomed areas were originally determined with reference to salmon, halibut, whale, and seal. 384 F.Supp. at 363, FF 61.

Dkt. # 13696, Joint Tribal Trial Brief (March 21, 1994), at p. 8; *see also* Dkt. # 12958 (March 31, 1993) (memorandum by Makah and other tribes, arguing that the common understanding of "fish" as an animal that lives in the water should control). Just as Judge Boldt saw no reason in Final Decision # 1 to distinguish marine mammal from finfish harvest in setting forth tribal U & As, the Court sees no reason today to restrict the usufructuary rights reserved by the tribes based on a modern taxonomic distinction that they did not draw. The "superior justice" that guides the Court's enforcement of the treaties permits no such result. *Choctaw Nation,* 119 U.S. at 28, 7 S.Ct. 75.

2.19. The Court accordingly determines that the Quinault and Quileute's usual and accustomed fishing locations encompass those grounds and stations where they customarily harvested marine

mammals—including whales and fur seals—at and before treaty time.

C. Pacific Ocean U & A Boundaries at Issue

3.1. On the basis of these legal standards and foregoing findings of fact, the Court concludes that the western boundary of the Quinault Indian Nation's usual and accustomed fishing ground in the Pacific Ocean is 30 miles from shore.

3.2. The Court likewise concludes that the western boundary of the Quileute Tribe's usual and accustomed fishing ground in the Pacific Ocean is 40 miles offshore and the northern boundary of the Quileute Tribe's usual and accustomed fishing ground is a line drawn westerly from Cape Alava.

3.3. The Court makes these determinations on the basis of the extensive evidence presented at trial showing the furthest distances to which the tribes customarily traveled to harvest aquatic resources including finfish, fur seals, and whales, at treaty time. While the Quinault and Quileute may have occasionally harvested these resources at distances upward of the boundaries set forth herein, the evidence presented at trial does not support a reasonable inference that they customarily did so at treaty-time.

3.4. The Court did not receive evidence at trial specifying the longitudes associated with the U & A boundaries determined herein. Accordingly, and in order to delineate the boundaries with certainty, the Court directs counsel for the Quinault and the Quileute to file notice with the Court of the precise longitudinal coordinates associated with the boundaries set forth herein. Notice shall be filed

within ten (10) judicial days of the entry of this Order. The Makah and Interested Parties including the State of Washington may file a concise response within five (5) judicial days after the initial notices are filed if they so desire.

**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. C70-9213RSM

Signed Feb. 18, 2015

---

88 F.Supp.3d 1203

ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT, SUMMARY JUDGMENT AND MOTION TO DEFINE BURDEN OF PROOF

RICARDO S. MARTINEZ, District Judge:

This matter comes before the Court on Motion for Partial Summary Judgment by Petitioner Makah Indian Tribe (the "Makah") (Dkt. # 248), Motion for Summary Judgment by Respondents Quileute Indian Tribe (the "Quileute") and Quinault Indian Nation (the "Quinault") (Dkt. # 251), as well as Motion to Define the Burden of Proof by the Quileute and Quinault (Dkt. # 283). Both dispositive motions concern the application of equitable defenses in this subproceeding, specifically whether Makah's claims are barred by laches, judicial estoppel, and acquiescence. The Court deems oral argument unnecessary, having fully considered the extensive evidentiary record submitted by the parties,

including the parties' moving papers, attached declarations and exhibits, briefs filed by the numerous participating Interested parties, and the remainder of the record of this subproceeding. Being fully apprised the Court grants partial summary judgment on behalf of the Petitioner and denies Respondents' summary judgment motion. The Court further denies in part and defers in part Respondents' motion to define the burden of proof in this subproceeding.

BACKGROUND

The Makah initiated this subproceeding by filing a Request for Determination on December 4, 2009, seeking the Court's determination of the Quileute and Quinault's Pacific Ocean usual and accustomed fishing grounds ("U&A"). Dkt. # 1, ¶ 4. In particular, the Makah assert that the western boundary of the Quileute and Quinault U&A "appears to be approximately 5 to 10 miles offshore." *Id.* at ¶ 3(c)(ix). If the Makah are correct, the Quileute and Quinault have been conducting fisheries for salmon, halibut, and blackcod outside their U&A, as well as asserting intentions to enter the Pacific Whiting fishery beyond their U&A's western boundary. This subproceeding is brought under Paragraph 25(a)(6) of Final Decision #1, pursuant to which the Court exercises jurisdiction to determine the location of any of a tribe's U&A's not specifically determined by Judge Boldt in Final Decision # 1. *U.S. v. Washington*, 384 F.Supp. 312, 419 (W.D. Wash. 1974) ("*Final Decision # 1*"). Bench trial in this matter is scheduled to commence March 2, 2015.

While the procedural history of this subproceeding is well known to the parties and shall not be repeated here, a rough recitation of the underlying events and prior related subproceedings is necessary to set forth the factual predicate of the Court's rulings herein. When this case was initiated over 40 years ago, the case area was limited to waters within the jurisdiction of the State of Washington. *Final Decision # 1*, 384 F.Supp. at 400. The case area has since expanded as, among other developments, the Makah requested an adjudication of their own Pacific Ocean U&A, which the Court determined extends approximately 40 miles offshore. *See U.S. v. Washington*, 626 F.Supp. 1405, 1467 (W.D. Wash. 1985), aff'd 730 F.2d 1314. While the Quileute and Quinault have moved in the past to limit the Makah's ocean fisheries, they have not moved for a similar adjudication of their own asserted ocean U&A's. *See id.* at 1471.

(1) Federal Regulatory Boundaries

The Pacific Ocean customary fishing grounds of the Quileute and Quinault have, however, been implicated in prior federal regulation. The Magnuson Fishery Conservation Management Act, 16 U.S.C. § 1801 *et seq.*, vests authority in federal regulatory agencies to issue fishery management regulations consistent with the provisions of the Act and other applicable law. *See* 16 U.S.C. §§ 1853 – 1855. Pursuant to the Act, in 1986, the National Oceanic and Atmospheric Administration ("NOAA") adopted western boundaries for the Quinault and Quileute ocean fishing areas for the purpose of describing Subarea 2A-1, the tribal area for halibut fishing. 51 Fed. Reg. 16471 (May 2, 1986). The

regulations provide that Subarea 2A-1 "is not intended to describe precisely the historic off-reservation halibut fishing places of all tribes, as the location of those places has [not] been determined" and that the boundaries of a tribe's fishery within the Subarea "may be revised as ordered by a Federal court." *Id.*; *see* Dkt. # 58, Ex. J, pp. 2, 4.

The Quileute and Hoh Tribes, joined by the Quinault, shortly thereafter submitted a comment letter on the Halibut rule, in which they contested the legal basis for the western boundaries of their ocean fishing areas delineated by NOAA, asserting that "[n]o court, and no agreement, has ever established a western boundary for our treaty fishing areas." *See* Dkt. # 58, Ex. A, p. 2; *see also* Ex. B (letter from Quinault joining in the Quileute and Hoh Tribes' concerns). The Regional Director of the National Marine Fisheries Service ("NMFS") responded by inviting the Quileute, Quinault, and Hoh to submit information to justify a modification of the regulations. *Id.* at Ex. C.

The Quileute again contested the delineated western boundary for the tribes after the Halibut boundaries were incorporated into salmon fishing regulations in 1987. *See id.* at Ex. D (comment letter from Quileute to NMFS); 52 Fed. Reg. 17264 (May 6, 1987). The NMFS Assistant Administrator for Fisheries responded by noting that the Tribes had not answered NMFS's 1986 request for information concerning the tribes' historic boundaries and again solicited information. *Id.* at Ex. E.

NMFS included the same boundaries in its 1996 framework rule for the establishment of tribal groundwater fisheries. 61 Fed. Reg. 28786, 28789 (June 6, 1996); *see* Dkt. # 58, Ex. L. The rules'

preamble explains the rationale behind it, as well as its limitations:

> Under this rule, NMFS recognizes the same U&A areas that have been implemented in Federal salmon and halibut regulations for a number of years. The States and the Quileute point out that the western boundary has only been adjudicated for the Makah tribe. NMFS agrees. NMFS, however, in establishing ocean management areas, has taken the adjudicated western boundary for the Makah tribe, and extended it south as the western boundary for the other three ocean tribes. NMFS believes this is a reasonable accommodation of the tribal fishing rights, absent more specific guidance from a court. NMFS regulations, including this regulation, contain the notation that the boundaries of the U&A may be revised by order of the court.

Id. In the response to comments, the agency agreed with the Quinault that "this rule is without prejudice to proceedings in United States v. Washington. As stated above, NMFS will modify the boundaries in the regulation consistent with orders of the federal court." *Id.* at p. 9.

(2) The Halibut Litigation

Subarea 2A-1 became the subject of further dispute when the Makah filed suit in 1985 against the Secretary of Commerce under the Administrative Procedure Act (the "APA") seeking judicial review of the Secretary's regulations setting harvestable fishing quotas for halibut between treaty and non-treaty fishermen. *See Makah Indian Tribe v.*

Mosbacher, C85- 1606. In 1992, the *Mosbacher* court ruled on cross motions for partial summary judgment that the threshold issues in the case concerning the nature and extent of the Makah's treaty right to take halibut had to be resolved in the context of the continuing jurisdiction of the *U.S. v. Washington* court, and accordingly transferred the proceeding into the instant case. *See* Dkt. # 248-2 – 248-5 ("Joner Decl."), Exs. K & L. The Makah then initiated Subproceeding 92-1, seeking confirmation of their previously adjudicated U&A and their treaty right to take halibut. *See id.* at Ex. M, pp. 1-2.

Makah subsequently moved for preliminary injunction in *Moshbacher*, seeking to prevent the Secretary from allocating less than 35% of the total allowable catch of halibut in the larger Area 2A to the Subarea 2A-1 Indian treaty fishery. The Makah argued that the Secretary's halibut regulations set forth the fishing areas of each of eleven tribes in addition to the Makah within Subarea 2A-1, and that these regulations had never been challenged by the States of Washington or Oregon. *See Id.* at Ex. Q, pp. 14-15 (citing 50 CFR 301.5(c), 301.19 (1992). The Makah further argued on reply, responding to opposition from the State intervenors, that because *Mosbacher* was an APA case, Washington had the burden to prove that the regulations were arbitrary, capricious, or an abuse of discretion, which it had not done. The Makah also asserted that "substantial evidence" supported the Secretary's determination on tribal treaty rights in the Subarea. *Id.* at Ex. R, pp. 4-5.

Following consolidation of *Mosbacher* and Subproceeding 92-1, the Court entered an order on multiple pending motions, including the Makah's

request for preliminary injunctive relief. Noting that several tribes had joined in the Makah's request for determination, Magistrate Judge Weinberg recommended that the Court find that only "[t]he issue of the Makah's treaty rights is properly before the Court." *Id.* at Ex. U, pp. 9-10 (explaining that "no tribe other than the Makah has filed a request for determination, or has specifically moved for a ruling seeking such relief. Nor has any other tribe made a timely and complete evidentiary showing comparable to that made by the Makahs."). As to tribes other than the Makah, Judge Weinberg recommended that "the determinations of the responsible agency are binding upon the parties unless and until there has been a timely application for review to a court with jurisdiction to hear it." *Id.* at p. 10.

Judge Rothstein adopted Judge Weinberg's recommendation regarding judicial confirmation of the Makah's treaty right to fish for halibut and its U&A for halibut, and reached a similar confirmation for four of the eleven Subareas 2A-1 tribes' treaty rights for halibut fishing purposes. *Id.* at Ex. U, pp. 2-5. The Court made no such ruling for the Quileute, Quinault, or Hoh. The Court also confirmed that, in formulating its allocation decisions, the Secretary is obligated to accord treaty fisherman the opportunity to take 50% of the harvestable surplus of halibut in their U&A's. *Id.* at p. 56.

(3) Negotiated Management Plans

Although the Makah supported the Quileute and Quinault's asserted customary ocean fishing grounds in *Mosbacher, see, e.g.*, Dkt. # 252 (King Decl.), Ex.

G, the relations between the tribes regarding their respective ocean fisheries have not always been congenial. Previous to the instant dispute, however, the tribes were able to achieve negotiated ocean management plans with limited intervention by the Court. *See, e.g.*, Ocean Compact Subproceeding 81-2.

For instance, in 1996, the Quinault, Makah, and Hoh filed an RFD asserting that the Quileute's use of highly efficient pot gear threatened to preempt the Makah and Quinault's longline fisheries for blackcod. *See* Joiner Decl. at Ex. X. Previous to filing, the Makah had threatened the Quileute that failure to resolve the dispute would lead them to challenge Quileute's fishing beyond the western boundary of its previously adjudicated U&A. *Id.* at Ex. X, p. 3. The Quileute responded that a "Makah attack on the Quileute ocean U&A would result in irreparable damage to the relations between the costal tribes." *Id.* at Ex. Z, p. 1. The RFD ultimately filed asserted that the Quileute were fishing beyond their adjudicated north and south boundaries but did not specifically challenge Quileute's western boundary.

The parties entered into a 1997 settlement agreement, which memorialized the tribes' accord not to challenge any other tribe's right to fish in marine fishing areas during the term of the agreement. *Id.* at Ex. BB (Ex. A, p. 3). The agreement purported not to represent any parties' view with respect to usual and accustomed fishing areas and provided that it was "without prejudice to the parties' respective claims regarding usual and accustomed fishing places." *Id.* at pp. 3-4. The agreement terminated in 2001, upon which the tribes entered into a series of new agreements for

management of the treaty blackcod fishery. The 2001, 2003, 2005, and 2006 agreements provided a similar limitation that they do not "necessarily represent the view of any Party with respect to. . .the Parties' usual and accustomed fishing areas." *Id.* at Ex. DD – GG.

(4) Whiting Dispute

The instant dispute arose following the Quileute and Quinault's assertions of intent to enter the Makah's valuable Pacific whiting fishery. The Makah have been fishing Pacific whiting in their adjudicated U&A since 1995 under allocations determined by NMFS. *See Midwater Trawlers Cooperative v. Dept. of Commerce*, 393 F.3d 994 (9th Cir. 2004). The Quinault and Quileute notified NMFS of their intent to enter the whiting fishery on January 10 and April 4, 2008, respectively. Dkt. # 126, Exs. A & D. The Quileute stated that one or more of its members would enter the fishery commencing in 2009 and that it was "not presently requesting an increase in the whiting allocation to all coastal tribes." *Id.* at Ex. A. The Quinault stated that its entry into the fishery "may occur as early as 2009" but did not make any allocation request. *Id.* at Ex. D.

In response, Makah's Chairman McCarty proposed that the Quinault and Quileute seek allocations from NMFS on top of the 17.5% allocation being requested by the Makah, which McCarty stipulated did not represent the full treaty entitlement in the whiting fishery. *Id.* at Ex. F. McCarty expressed concern with the proposal that the Quinault and Quileute fish under the Makah allocation, as it would disrupt the Makah's

established treaty fishery and hinder its efforts to manage bycatch, in accordance with NMFS requirements. At the same time, McCarty informed the tribes that the Makah "will continue to support [ ] your requests for allocations to support your fisheries." *Id.*

Quileute Chairperson Hatch promptly rejected the proposal for separate allocations: "To be clear the Quileute Tribe rejects and will not accept any proposal which purports to limit its right to catch from the total 'tribal' whiting allocation announced annually by NMFS." *Id.* at Ex. G. Chairperson Hatch took the position that NMFS whiting allocations provided for harvest by all tribes collectively, and that NMFS lacked the authority to determine intertribal allocations. *Id.* Throughout meetings over the next several months with the Northwest Indian Fisheries Commission ("NWIFC"), the Makah continued to advocate for allocation of separate tribal shares, and the Quileute and Quinault continued to reject separate harvest guidelines.[1]

NMFS issued a proposed rule for 2009-1010 harvest specifications in the whiting fishery on December 31, 2008, in which it adopted the proposal of the Pacific Fisheries Management Council to create a total tribal allocation of 50,000mt, 42,000mt of which would be managed by the Makah and

---

[1] The Quinault ultimately decided not to participate in the 2009 fishery but informed the Quileute and the NWIFC that they intended to have five or six catcher boats in the 2010 fishery, with an anticipated harvest of around 7,000 mt per boat. Dkt. # 126, Ex. I, at pp. 50-51.

8,000mt of which would be managed by the Quileute. The proposed regulation provided:

> These interim individual Tribal set-asides for 2009 only are not in any manner to be considered a determination of treaty rights to the harvest of Pacific whiting for use in future fishing seasons, nor do they set precedent for individual Tribal allocations of the Pacific whiting resource: the amounts being set aside for each tribe for 2009 are based on the timely requests from the tribes at the June Council meeting.

50 CFR § 660; Dkt. # 126, Ex. S. In its final March 2009 rulemaking, NMFS explained that the set-asides were driven by concerns that the absence of individual tribal allocations could lead to a race for fish with deleterious impacts on bycatch management:

> Without clear management targets for each tribe, a race for fish may occur as whiting migrate from south to north, reaching the Quileute [U&A] before they reach the Makah U&A. A race for fish could result in excessive bycatch of overfished species, and the closure of other groundfish fisheries.

Id. at Ex. U, p. 25. In acknowledgment that fishing rights of the treaty tribes are determined under *U.S. v. Washington*, NMFS emphasized that its set-asides do not represent "formal allocations, nor do they create precedent for future years." *Id.* The rule also provided that NOAA "does not intend to allocate the total tribal whiting allocation to the individual tribes" in the future, and that it would consider initiating litigation should the tribes fail to reach

consensus amongst themselves as to intertribal allocation. *Id.* at p. 26. The Makah initiated the instant subproceeding following the tribes' failure to reach any such negotiated solution.

(5) Instant Motions

The Makah's motion for partial summary judgment, as well as the Quinault and Quileute's motion for summary judgment seek the Court's determination as to the availability of certain equitable defenses in this subproceeding. The Court previously rejected the Quinault and Quileute's laches argument as grounds for dismissal, noting that Respondents had at that stage failed to allege sufficient facts with respect to delay or injury for the Court to apply this equitable doctrine. Dkt. # 84, p. 4. The Court also noted that the tribes' laches defense is "incompatible" with their simultaneous defense that this dispute is not yet ripe for consideration. *Id.* In the parties' Joint Status Report filed October 1, 2013, the Quileute and Quinault reiterated their intention to pursue through discovery and dispositive motion "a defense that Makah's claims for relief are barred under the doctrines of laches and estoppel." Dkt. # 248, p. 3. The Quileute and Quinault clarify in their response to the Makah's motion and through their own dispositive motion that their asserted affirmative defenses include laches, judicial estoppel, and acquiescence. *See* Dkt. # 274, p. 2 n.1; Dkt. # 251. The Quinault and Quileute additionally invoke a sovereign immunity defense twice rejected by this Court and currently on appeal before the Ninth Circuit. *See, e.g.*, Dkt. ## 86, 171, 183, 185.

Also before the Court is the Quinault and Quileute's motion to define the burden of proof in this subproceeding. These tribes contend that the Makah must carry the burden of proof as the petitioning party. As to the standard of proof, the Quileute and Quinault contend that the APA arbitrary and capricious standard applies. If the Court finds that the Quileute and Quinault bear the burden of proof, Respondents assert that they should be held to a lower standard than the normal civil standard of preponderance of the evidence. The Makah and Interested Parties oppose the Quinault and Quileute's suggestions, arguing that the burden of proof rests with the tribes whose U&A is at issue and that these tribes should be held to the ordinary preponderance of the evidence standard. The instant Order addresses all pending motions.

ANALYSIS

I. Availability of Equitable Defenses

As an initial matter, the Makah, joined by the Interested Parties the Tulalip, Swinomish, and S'Klallam Tribes (*see* Dkt. # 275) contend that equitable defenses such as laches, acquiescence, and equitable estoppel are unavailable for U&A adjudications under *U.S. v. Washington.* These tribes draw this rule from then presiding Judge Coyle's February 15, 1990 decision on cross motions for summary judgment in Subproceeding 89-2, in which the court was asked by several requesting tribes to determine the extent of the Lummi Tribe's adjudicated U&A based on evidence before Judge Boldt. *See U.S. v. Washinton* 18 F.Supp.3d 1123, 1155 (W.D. Wash. 1990) (*"Coyle Order*") Asked to determine whether a tribe can be prevented from

challenging a U&A by laches, waiver, or equitable estoppel, Judge Coyle held that "[t]here is no question that these equitable defenses may not be invoked by non-Indians to defeat Indian treaty rights." *Id.* at 1163 (citing *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983)); *see also U.S. v.* Washington, 157 F.3d 630, 649 (9th Cir. 1998) (reiterating the principle that equitable defenses cannot be used to defeat Indian treaty rights). Judge Coyle adopted the requesting tribes' concerns that allowing for equitable defenses would promote circumvention of the procedures set forth in Paragraph 25 for adjudicating U&A's and encourage tribes to expand their established fishing areas through the exercise of prescriptive rights:

> If equitable defenses are available to a tribe that engages in treaty fishing outside its established area, there will be a great incentive for tribes to issue regulations for areas outside their established usual and accustomed fishing grounds and to allow or encourage tribal members to engage in treaty fishing outside those areas in anticipation of being able to enlarge the tribe's treaty rights by 'prescription.'. . .There is neither enough time nor resources to prevent a potential dilution of a tribe's treaty right by these 'equitable means' for it would mean constant court filings – most on an emergency basis.

Id. at 1164.

The Court agrees with the S'Klallam that the concerns recognized by this Court two and a half decades ago are no less present in this subproceeding. It remains the case that allowing for

equitable defenses could very well have the unfortunate consequence of compelling treaty tribes to flood the Court with requests for immediate adjudication of disputes for fear of losing fishing rights through prescription. At the same time, the efforts of tribes to informally resolve intertribal grievances without Court intervention would be sorely undermined.

The Quinault and Quileute nonetheless assert that Judge Coyle's holding is no longer the law of the case, having been unsettled by subsequent decisions within and without *U.S. v. Washington*. The Quinault and Quileute point out that the Ninth Circuit held that Judge Coyle's 1990 decision was not final because no separate judgment had been entered. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 447-48 (9th Cir. 2000). They also point to a vacated decision in Subproceeding 05-04, in which the Court ruled that all applicable legal and equitable doctrines apply to proceedings under its continuing jurisdiction, and held that laches barred the Tulalip Tribe's request for clarification of the Suquamish U&A. 20 F.Supp.3d 777, 805-06 (W.D. Wash. 2004). On remand from the Ninth Circuit, the Court determined that equitable defenses including laches and estoppel "require a factual analysis which is not appropriate on a motion to dismiss," 20 F.Supp.3d 899, 937, a conclusion similar to that reached by the Court in this subproceeding on the Quileute and Quinault's earlier motion to dismiss. *See* Dkt. # 86. Finally, the Quileute and Quinault argue that Judge Coyle's legal analysis has been eroded by the Supreme Court's decision in *City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197 (2005), and the Ninth Circuit's decision in *Apache Survival Coalition*

v. U.S., 21 F.3d 895 (9th Cir. 1994), both of which found tribal land claims to be barred by laches.

Needless to say, the status of equitable defenses in U&A adjudications is in a fairly uncertain state. While this Court has reached equitable defenses in suproceedings since Judge Coyle's decision, it has done so without fully resolving their availability. For instance, although the Court resolved the laches claim on its merits on summary judgment in Suproceeding 05-04, it cautioned that in doing so its order should not be read as reviving its earlier vacated determination as to the availability of equitable defenses. *U.S. v. Washington*, 20 F.Supp. 3d 986, 1044 n. 5 (W.D. Wash. 2013); *see also* Suproceeding 01-02, 20 F.Supp.3d 899 (W.D. Wash. 2008) (ruling on "unclean hands" equitable defense to Rule 60(b) motion and declining to reach the question of estoppel).

The Court also does not find *Sherrill* and *Apache* to be controlling on this issue, as the former involved an assertion of tribal authority over land some 200 years after the state began exercising sovereign control and the latter was brought under the National Historical Preservation Act and involved no claim of tribal treaty rights. By contrast, the laches defense in the instant case at most raises a delay of some three and one-half decades. During this period, the Quileute and Quinault were fully aware of the Makah's contestation of their western boundary, but the tribes were generally able to keep their disputes out of court through informal means of negotiation. Furthermore, the unique nature of the *U.S. v. Washington* case places the burden foremost on each tribe to fully and finally resolve its usual and accustomed fishing places through the

mechanism that Judge Boldt put in place. *See Coyle Order*, 18 F.Supp. 3d at 1165. As such, this matter raises neither the extraordinarily lengthy period of delay nor the disruption of settled, justifiable expectations at issue in *Sherrill*. *See Oneida Nation v. County of Oneida*, 617 F.3d 114, 127 (2d. Cir. 2010) (distinguishing *Sherrill* laches from traditional laches).

The Court notes that it has before it an unusual subproceeding, both in that it was initiated, like Subproceeding 89-2, by a tribe seeking adjudication of another tribe's U&A and in that it requires determination of a fishing grounds that was not finally adjudicated by Judge Boldt. Both of these features evoke concerns raised by Judge Coyle about the prospect that allowing for equitable defenses could lead to a system in which unadjudicated tribal U&A's are determined through prescription rather than through the orderly judicial management contemplated by Paragraph 25. While the Court declines to hold that equitable defenses are never available in a Paragraph 25(a)(6) subproceeding, it reiterates the long-held understanding that they do not apply in the typical fashion in this case. The Court further determines that the Respondents' equitable defenses are unavailing on their merits.

A. Judicial Estoppel

The doctrine of judicial estoppel codifies the rule that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by

him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation omitted). The *New Hampshire* Court identified three factors that typically inform the decision whether to apply judicial estoppel. First, "a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* at 750 (internal quotation omitted). Second, the party must have "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quotation omitted). Finally, the court considers whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair determinant on the opposing party if not estopped." *Id.* at 751.

The Court agrees with the Makah that none of these factors are present here. The Quileute and Quinault fail to point to any positions advanced by the Makah that are clearly inconsistent with those taken in this subproceeding. While Respondents point to the Makah's expressions of support for their customary ocean fishing grounds in *Mosbacher* and Subproceeding 92-1, the Court does not find any obvious inconsistency with the Makah's positions in this subproceeding. In the former, a challenge brought under the APA, the Makah had argued that federal regulations recognizing tribal rights to take halibut were controlling where supported by substantial evidence and not properly challenged by the State of Washington. The Makah's position that federal regulations are binding until appropriately challenged or revised in accordance with a decision

by this Court is not inconsistent with its request for adjudication of the Quileute and Quinault U&A's here based on a de novo determination on a full evidentiary record. Further, the Makah's statements that substantial evidence supported the Secretary's determination pertained to the rights of 12 tribes fishing in Subarea 2A-1, not the Quinault and Quileute specifically.

Even if there was an inconsistency in the Makah's assertion that "substantial evidence" supported the Secretary's determination, the Makah's position was never adopted by the Court. To the contrary, the Court only determined that federal regulatory boundaries governed the halibut fishery until properly challenged. The Court specifically declined to address the treaty rights of any tribe other than the Makah, the S'Klallam Tribes, and the Skokomish Tribe. *See* Joner Decl. Decl. at Exs. U & W. In declining to consider treaty fishing rights of tribes other than the Makah, Judge Weinberg explained:

> no tribe other than the Makahs has filed a request for determination, or has specifically moved for a ruling seeking such relief. Nor has any other tribe made a timely and complete evidentiary showing comparable that made that by the Makahs. In short, no other tribe has presented the issue to the court in a manner which might warrant the granting of relief on the pending motions.

The Court's decision implicitly contemplated that those other tribes, including the Quileute and Quinault, would initiate proceedings under this case to seek clarification of their treaty fishing rights as

had the Makah. *Id.* at Ex. U, pp. 9-10. The Quileute and Quinault accordingly fail to show that this or any other Court relied on any inconsistent statement by the Makah so as to pose a threat to judicial integrity. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("This Court has restricted the application of judicial estoppel to cases where the court relied on, or 'accepted,' the party's previous inconsistent position.").

Finally, the Quileute and Quinault fail to show that the Makah have received an unfair advantage as a result of any prior inconsistent position. As the Makah point out, any benefit they received from an increased total treaty allocation has always been offset by the need to share the increase with other tribes. This Court's determination as to Quileute and Quinault's western boundaries in this subproceeding does not dictate federal allocations of harvestable fish. Whichever side prevails before this Court, the total halibut allocations will be adjusted accordingly. The Court is not unsympathetic to the Quinault and Quileute's concerns as to the waste of resources that would attend a decision by this Court foreclosing their ocean fisheries. At the same time, it must be recognized that any prior support by the Makah of the Quileute and Quinault's customary ocean fishing grounds has primarily been to Respondents' benefit, allowing them to expand their fisheries in waters to which they may or may not have a right and to reap the resulting economic rewards. For all these reasons, the Court finds that judicial estoppel is not a defense available to the Quileute and Quinault in this subproceeding.

B. Laches

The Court finds Respondents' laches defense similarly unavailing. "Laches is an equitable defense that prevents a plaintiff, who, with full knowledge of the facts, acquiesces in a transaction and sleeps on his rights." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950-51 (9th Cir. 2001) (internal quotation omitted). A prima facie case for laches requires a two-fold showing of (1) unreasonable delay by the plaintiff in bringing suit and (2) prejudice to the defendant caused by the delay. *See Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 989 (9th Cir. 2010); *see also Kansas v. Colorado*, 514 U.S. 673, 687 (1995). The first prong of the test entails assessment of the length of the delay as well as the reasonableness of the delay. *Seller Agency Council*, 621 F.3d at 989.

The Court finds the Respondents' failure to make a showing under the first prong dispositive of their laches defense in this case. Far from sleeping on their rights, the Makah actively worked with the Quinault and Quileute since the 1980's to obtain amicably negotiated solutions to conflicts over their respective ocean fisheries, all the while preserving their right to seek adjudication in this Court should informal methods of dispute resolution reach an impasse. The express language in the blackcod agreements from 1997 onward supports the Makah's argument that the tribes preserved their right to asserts claims and defenses should formal adjudication become necessary. *See, e.g.*, Joner Decl. at Ex. BB (providing that the 1997 agreement was "without prejudice to the parties' respective claims

regarding usual and accustomed fishing areas"). There was nothing unreasonable in the Makah's decision to decline to investigate the western boundary of the Quileute and Quinault U&A and to wait to bring the issue to the Court for resolution until negotiated pathways broke down with the whiting dispute. The Court is unwilling to punish a tribe for attempting to solve intertribal issues intertribally and without judicial intervention, a pathway oft encouraged by the Court.

Indeed, as set forth above, Respondents' laches proposition would essentially turn the longstanding adjudication system established in this four-decade case on its head. As Judge Coyle explained, the onus is on each of the tribes to "finally resolve their usual and accustomed fishing places as soon as possible. This has nothing to do with equitable defenses. It has to do with the expeditious utilization of a mechanism that has been in place since the Boldt decision was issued." *Coyle Order*, 18 F.Supp.3d at 1165. Just as the Makah did decades ago, the Quileute and Quinault have had ample opportunity to submit evidence of their customary fishing grounds to the Court, seeking settlement of their ocean U&A's once and for all. The Court is unwilling to reinforce a tribe's decision to evade Paragraph 25 mechanisms, only to assert a U&A entitlement without the requirement imposed on every other tribe in this case to show that it is supported by the evidence.

C. Acquiescence

The Ninth Circuit's test for acquiescence is substantially similar to its test for laches, with the exception that it requires affirmative words or deeds

by a party conveying implied consent to another. *See Seller Agency Council*, 621 F.3d at 988. The elements of a prima facie case for acquiescence are: "(1) the senior user actively represented that it would not assert a right or a claim; (2) the delay between the active representation and assertion of the right or claim was not excusable; and (3) the delay caused the defendant undue prejudice." *Id.* at 989.

The Quileute and Quinault have identified no actionable representations by the Makah sufficient to meet the first element. The sole affirmative representation pointed to by Respondents is the Makah's assertion in *Mosbacher* that the federal regulations for Subarea 2A-1 were "not taken from whole cloth" but were instead supported by "substantial evidence." *See* Dkt. # 279, p. 14. These statements are insufficient to give rise to an acquiescence defense for several reasons. First, considered in their appropriate context, these statements were made as part of the Makah's argument that substantial evidence supported federal halibut regulations. The Makah did not thereby affirmatively represent that the Quileute and Quinault, or any other tribe fishing in the Subarea, had established their ocean U&A's, but only sought to counter the State of Washington's contention that the tribes bore the initial burden to prove that they had treaty rights and to prove that the federal regulations correctly depicted their U&A's.

These statements also do not imply that the Makah would not assert their right to seek adjudication of Quileute and Quinault U&A's through the proper channels in the future. To the

contrary, in response to R&R objections by the State of Washington, the Makah stated that they "agree[d] fully with Washington that, in a proper judicial proceeding to determine the. . .usual and accustomed fishing grounds of any tribe. . .the Court must apply the treaty-right principles articulated in United States v. Washington." Joner Decl., Ex. V at pp. 7-8. The Makah further emphasized that if federal regulations were inconsistent with tribal rights, as adjudicated previously or "in further proceedings" in *U.S. v. Washington*, the regulations would be invalid under the APA. Given these and other such counterbalancing statements, any inference that the Makah affirmatively represented that they would not seek adjudication of the western boundary of Respondents' U&A is far too attenuated to support a viable acquiesence defense. Any such inference is further undermined by the Makah's express retention of the right to seek formal adjudication if negotiated management solutions reached an impasse and by their threat to put the Quileute's western boundary before the Court during the blackcod dispute. *See* Joiner Decl. at Ex. X.

Even if these statements were actionable, the Court does not find that the Quileute and Quinault could reasonably have relied on them, knowing the purpose for which they were uttered during the halibut litigation and in light of the Makah's retention of their rights thereafter. *See Seller Agency Council*, 621 F.3d at 990 ("[P]rejudice in the context of acquiescence inherently must involve reliance on the senior user's affirmative act or deed, and such reliance must be reasonable."). Indeed, it appears that the tribes have not relied on them, as evidenced by the Quinault's letter to NMFS in

February 2014 acknowledging that the "[b]oundaries of a tribe's fishing area may be revised as ordered by a federal court." Joner Decl. at Ex. G. As set forth above, the Court also declines to find that the Makah unreasonably delayed in waiting to initiate this subproceeding until the tribes reached an actual impasse in their ability to achieve negotiated fishery management solutions.

The Quileute and Quinault ask the Court to allow them to explore their equitable defenses further at trial should the Court decline to bar the Makah's request on summary judgment. The Court finds no reason to do so.[2] The Quileute and Quinault are unable to carry their burden to make a sufficient showing of multiple elements on each of these affirmative equitable defenses. With all inferences from underlying facts viewed in their favor, Respondents fail to identify any genuine issue of material fact that prevents the Court's resolution of their equitable defenses as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Accordingly, partial summary judgment as to the Quileute and Quinault's equitable defenses shall be granted in the Makah's favor.

II. Burden and Standard of Proof

Also pending before the Court is the Quinault and Quileute's motion to define the burden of proof

---

[2] The Court declines to reach the Quinault and Quileute's arguments as to sovereign immunity, as the Court has previously denied this defense and the issue is currently on appeal before the Ninth Circuit.

in this subproceeding. Dkt. # 283. As an initial matter, the Court grants the Makah's request through its surreply to strike arguments and exhibits in support thereof raised for the first time by Respondents on reply. *See* Dkt. # 295. "As a general rule, a 'movant may not raise new facts or arguments in his reply brief'" as doing so "essentially prevents [the non- moving party] from providing any response." *Karpenski v. Am. Gen. Life Cos.*, 999 F.Supp.2d 1218, 1226-27 (W.D. Wash. 2014). In this instance, the Quinault and Quileute argue for the first time in their reply brief that it is the law of the case that "non-fish species such as shellfish and sea mammals are included in the Stevens Treaty fishing provision." Dkt. # 290 at p. 7. The Court declines to address this important issue through its one-sided presentation and accordingly strikes the following portions of the Quinault and Quileute's reply brief and supporting exhibits: (1) the portion of the Reply from page 6, line 18 through page 7, line 22, (2) Page 8 of Exhibit A of the third King Declaration (Dkt. # 291-1 at p. 9), and (3) Exhibits C through E to the Third King Declaration (Dkt. # 291-1 at pp. 58-77; Dkt # 291-2; Dkt. # 291-3).[3]

A. Burden of Proof

The Responding Tribes' first argument that the Makah bear the burden of proof in this subproceeding has no merit. The Quileute and Quinault fail to identify any U&A subproceeding in

[3] Should this issue remain in controversy between the parties and require resolution within this subproceeding, the parties may bring it to the Court's attention at their pre-trial status conference and an appropriate briefing schedule will be established.

the long history of this case where the Court has determined that any party but the tribe whose U&A was at issue carried the burden of proof. In the typical case, as the Quileute and Quinault point out, the burden is indeed "on the petitioning tribe to produce evidence that disputed waters were usual and accustomed fishing grounds." *U.S. v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988). This is so because in the typical subproceeding, the petitioning tribe brings its own U&A before the Court for adjudication. In the unusual case where a tribe's U&A is involuntarily brought forward for adjudication, that tribe bears the burden of proof just as it would as if it had been the petitioning party.

Indeed, it is the settled law of this case that each tribe bears the burden to produce evidence to support its U&A claims. *See, e.g.*, *U.S. v. Washington*, 459 F.Supp. at 1059 ("[T]he Tulalips have the burden of producing evidence to support their broad [U&A] claims."); 459 F.Supp. at 1037 ("In order to be entitled to exercise its off-reservation treaty fishing rights, any tribe allowed to intervene in this case to asserts its claim of treaty fishing rights shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim. . . ."). Any determination to the contrary would undermine the structure of this case, encouraging tribes to engage in gamesmanship with the mechanisms set up by Final Decision # 1 and wait for their U&A to be put at issue so as to shrug off the burden to prove their claimed territorial entitlements. As Judge Coyle wrote, it is incumbent on all "tribes which are parties to this action to finally resolve their usual and accustomed fishing

places as soon as possible." *Coyle Order*, 18 F.Supp.3d at 1165. When tribes fail to do so, they shoulder the burden to prove their customary fishing grounds all the same.

Lacking authority from within this case, the Quinault and Quileute contend that a request for determination is functionally equivalent to a complaint, and that the ordinary placement of the burden of proof in a civil proceeding should therefore apply. *See* Dkt. # 283, p. 4. While the party that seeks court action is ordinarily freighted with the initial burden of proving her claims, this "ordinary default rule" is not an inflexible one. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Indeed, the very case on which the Quileute and Quinault rely, *Schaffer ex. rel. Schaffer*, acknowledges that the general rule "admits of exceptions." *Id.* As the Supreme Court therein explained, "[u]nder some circumstances [the] Court has even placed the burden of persuasion over an entire claim on the defendant." *Id.* Among these exceptions are instances in which fairness counsel against placing "the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Id.* at 60 (citing *United States v. New York N.H. & H.R. Co.*, 355 U.S. 253, 256 n. 5 (1957)).

The Court recently illustrated the limits of *Schaffer*'s default rule in *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S.Ct. 843 (2014), in which a patent licensee sought a declaratory judgment of non-infringement. The Court rejected the defendant-patentee's argument that the licensee, as the party seeking relief, has the burden to prove the absence of infringement in a declaratory judgment action. *Id.* at 846. The Court explained

that the burden of proof is a "substantive aspect of a claim," *Id.* at 848, not to be confused with a "mere incident of a form of procedure." *Id.* (quoting *Garett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942)). Just as the operation of the Declaratory Judgment Act is procedural in nature, so are the Paragraph 25 avenues through which a tribe brings its U&A claim before the Court. As with the Declaratory Judgment Act, Paragraph 25(a)(6) does not alter substantive rights or shift the burden of proof away from the tribe asserting its usual and accustomed fishing grounds. Fairness also counsels in this case toward requiring the party with principal access to evidence about its own historic fishing practices to carry the burden to support its claim of entitlement. The burden of proof shall accordingly rest with the party asserting its U&A – here, the Quileute and the Quinault.

B. Standard of Proof

As to the appropriate standard of proof, the Court rejects the Quileute and Quinault's assertion that anything other than the usual standard for a Paragraph 25(a)(6) subproceeding applies in this case. Respondents first contend that the Makah must carry the burden to prove that the Secretary's determination of their federal-water fishing areas is arbitrary and capricious. Respondents' attempt to import an APA standard of review into this Paragraph 25 subproceeding is without merit. This dispute does not involve the sort of challenge to federal regulations that was at issue in *Mosbacher*. Rather, it arises under this Court's continuing jurisdiction to determine, in the first instance, the boundaries of a tribe's customary fishing grounds.

The fact that the federal government has crafted placeholder boundaries for the tribes' ocean fishing grounds does not alter the standard of proof. As provided above, each time NMFS and NOAA issued a proposed or final rule, they did so with the express qualification that their regulations were neither intended to describe the tribes' historic U&A's nor to supplant the jurisdiction of this Court to adjudicate them. *See, e.g.* 51 Fed. Reg. 16471 (providing that the boundaries of a tribe's fishery within Subarea 2A-1 "may be revised as ordered by a Federal court"). The 1996 framework rule for tribal groundwater fisheries illustrates the point. The NMFS therein explained that the rule represented merely a "reasonable accommodation of the tribal fishing rights, absent more specific guidance from a court" and that its interim boundaries may be revised at any time under this Court's jurisdiction. *See* Dkt. # 58, Ex. L.

The United States has again emphasized the minimal impact that its regulations should have on U&A adjudications in its responsive brief. *See* Dkt. # 285, p. 5 (explaining that "NOAA's regulations addressing the Quinault and Quileute U&A's were not intended nor should be interpreted to be a conclusive boundary determination. Instead, the regulations are necessary for the agency's management of the ocean fisheries in the absence of a judicial determination of the boundaries of the Tribe's U&As."); *see also* Dkt. # 58 (brief by the United States explaining that NMFS "has consistently assumed that this Court would be the forum to adjudicate the western boundaries of the Quileute, Quinault, and Hoh usual and accustomed fishing grounds as it has done throughout the

history of *United States v. Washington* in the context of other tribal U&A boundary disputes."). The Court is in accord. As it has stated before, it is this Court and not NMFS that determines tribal U&A's. As a consequence, federal regulations in this subproceeding have no bearing on the standard of proof that the Quileute and Quinault are required to carry.

Finally, in anticipation of the Court's decision to reject an APA standard and allocate the burden of proof to the Quileute and Quinault, Respondents move the Court to adopt a less stringent standard than the typical "preponderance of the evidence" standard employed in a civil case. The tribes point to previous recognitions by this Court and by the Ninth Circuit that evidence of treaty-time fishing practices is particularly hard to come by, and that evidentiary standards in U&A subproceedings should reflect this reality. *See U.S. v. Washington*, 459 F.Supp. at 1059 ("In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas."); *Lummi*, 841 F.2d at 317 (Because of the fragmentary nature of treaty-time documentation, "the stringent standard of proof that operates in ordinary civil proceedings is relaxed."). As a consequence, the Quinault and Quileute move the Court to determine that they are only required to show, by direct evidence or reasonable inferences, the "probable location and extent of usual and accustomed treaty fishing areas." Dkt. # 283, p. 11 (citing *U.S. v. Washington*, 626 F.Supp. 1405, 1531 (W.D. Wash. 1985)).

For several reasons, the Court shall defer its determination as to the precise standard of proof. First, the Court is not persuaded that a relaxing of evidentiary standards is necessarily inconsistent with a preponderance of the evidence standard. For instance, while Judge Boldt observed that "stringent" standards of proof were inapplicable in U&A adjudications, he nonetheless applied the preponderance of the evidence standard in Final Decision # 1. *See Final Decision # 1*, 384 F.Supp. at 348 (basing findings of fact and conclusions of law "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom"). It stands to reason that a standard of proof identical to that used by Judge Boldt in Final Decision # 1 would apply when the Court is asked to adjudicate a U&A not specifically determined by Judge Boldt. In such an instance, the Court is merely standing in for what Judge Boldt would himself have done had the evidence been before him.

In addition, it is unclear to the Court what exactly the proposed lesser standard of proof requires. Is the requirement to show "probable location" indeed less stringent than the requirement to show location on a "more likely than not" basis? If so, to what extent is the typical standard relaxed below a threshold 50% showing? The Court finds that these questions merit fuller discussion and hearing before a determination is reached on a matter that could carry a heavy precedential impact. Accordingly, the Court shall defer its decision on the precise standard of proof to be applied pending an

opportunity for oral argument on this question at the opening of the upcoming bench trial.[4]

CONCLUSION

For the reasons stated herein, the Court hereby ORDERS that:

(1) The Makah Motion for Partial Summary Judgment Rejecting Equitable Defenses (Dkt. # 248) is GRANTED. The equitable defenses of laches, judicial estoppel, and acquiescence do not preclude a determination of the usual and accustomed fishing grounds and stations of the Quileute Indian Tribe and Quinault Indian Nation in the Pacific Ocean.

(2) The Quinault and Quileute Motion for Summary Judgment that Judicial Estoppel, Laches, Acquiescence, and Sovereign Immunity Bar the Makah Tribe's Request for Determination (Dkt. # 251) is DENIED.

---

[4] The Court also acknowledges the expressed grievances of Interested Parties that the instant Motion was filed with what the S'Klallam and Tulalip Tribes term "minimal compliance" with the filing deadlines set out in the Local Rules. While the Motion was filed in technical compliance with LCR 7(d)(3), the Court agrees that it contravenes the spirit and structure of this case. The Quinault and Quileute's decision to file their Motion so as to provide for the shortest possible response time has limited the ability of Interested Parties to respond to issues with potential ramifications for the case as a whole. The Court frowns on any appearance of gamesmanship in this or any other proceeding. The Court's decision to defer this issue until trial provides an opportunity for Interested Parties to be heard on the matter. No further briefing shall be submitted until invited by the Court.

(3) The Quileute and Quinault Motion to Define the Burden of Proof (Dkt. # 283) is DENIED in part and DEFERRED in part. The Motion is denied to the extent that it moves the Court to place the burden of proof at trial on the Makah Tribe. The Motion is deferred pending hearing at bench trial to the extent that it seeks clarification of the precise standard of proof to be borne by the Quinault and Quileute Tribes at trial.

FILED

JAN 19 2018

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE, Plaintiff-Appellant, and UNITED STATES OF AMERICA, Plaintiff, v. QUILEUTE INDIAN TRIBE; QUINAULT INDIAN NATION, Respondents-Appellees, HOH INDIAN TRIBE; LUMMI INDIAN NATION; PORT GAMBLE S'KLALLAM TRIBE; JAMESTOWN S'KLALLAM TRIBE; SUQUAMISH INDIAN TRIBE; TULALIP TRIBE; SWINOMISH INDIAN TRIBAL	No. 15-35824 D.C. Nos. 2:09-sp-00001-RSM 2:70-cv-09213-RSM Western District of Washington, Seattle ORDER

COMMUNITY; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; NISQUALLY INDIAN TRIBE; UPPER SKAGIT INDIAN TRIBE; PUYALLUP TRIBE; MUCKLESHOOT TRIBE; LOWER ELWHA KLALLAM TRIBE; STILLAGUAMISH TRIBE, Real Parties in Interest, and STATE OF WASHINGTON, Defendant.	

MAKAH INDIAN TRIBE, Plaintiff, and STATE OF WASHINGTON, Appellant, v. QUILEUTE INDIAN TRIBE; QUINAULT INDIAN NATION, Respondents-Appellees, HOH INDIAN TRIBE; LUMMI INDIAN NATION; PORT GAMBLE	No. 15-35827 D.C. Nos. 2:09-sp-00001-RSM

S'KLALLAM TRIBE; JAMESTOWN S'KLALLAM TRIBE; SUQUAMISH INDIAN TRIBE; TULALIP TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; NISQUALLY INDIAN TRIBE; UPPER SKAGIT INDIAN TRIBE; PUYALLUP TRIBE; MUCKLESHOOT TRIBE; LOWER ELWHA KLALLAM TRIBE; STILLAGUAMISH TRIBE,

Real Parties in Interest.

BEFORE: HAWKINS and McKEOWN, Circuit Judges, and FOOTE,* District Judge.

The panel votes to deny the petition for rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

---

* The Honorable Elizabeth E. Foote, United States District Judge for the Western District of Louisiana, sitting by designation.