The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213 RSM Subproceeding No. 09-1 STATE OF WASHINGTON'S RESPONSE TO QUILEUTE, QUINAULT, HOH, AND SUQUAMISH TRIBES' MOTIONS FOR RECONSIDERATION

I. INTRODUCTION

Motions for reconsideration seek an extraordinary remedy and are disfavored absent a compelling showing that meets the reconsideration standards. The motions of Quileute, Quinault, Hoh, and Suquamish fail to meet the required criteria. They have not presented newly discovered evidence, have not demonstrated clear error, and there has not been an intervening change in controlling law. Most of the arguments now presented by the Quileute and Quinault are nearly identical re-arguments of the boundary line question when it was before the Court in July and August of 2015. Accordingly, the motions for reconsideration should be denied.

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II. ARGUMENT

A. Standard of Review

Local Civil Rule 7(h)(1) provides the standard for reviewing motions for reconsideration:

> Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Local Rules W.D. Wash. LCR 7(h)(1). Such motions are an "extraordinary remedy" and "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal citation omitted).

Quinault's memorandum in support of reconsideration is the only one that acknowledges and attempts to address these standards, but ultimately fails to meet the standard.

B. Continued Comparisons to the Prior Makah U&A Adjudication Have No Bearing

The Quinault and Quileute portray the Court's March 5 Order as "manifestly unfair" claiming that the Court has applied a different standard than what informed adjudication of the Makah's U&A boundary in 1983. Both the Quileute and Quinault devote substantial portions of their memoranda to a comparison of their proposed boundary lines with the Makah's previously adjudicated boundary line. This unfairness argument does not satisfy any of the strict standards for reconsideration, and ignores explicit holdings from the Ninth Circuit's ruling.

The Ninth Circuit held that the determinations underlying the Makah boundaries resulted from interpretation of the *separate* and *distinct* Treaty of Neah Bay. *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1160-61 (9th Cir. 2017). Furthermore, the Ninth Circuit

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noted that the Makah's boundary was determined by the evidence before the court in *that* subproceeding, and held that "[a] different approach is warranted here to account for the dissimilarities between the cases." *Id.* at 1169. The Quileute and Quinault therefore have no legal ground to claim that the Makah boundary line has any relevance to their western boundaries. The focus must be on the evidence presented in this separate case.

C. The Boundary Established by the Court Is Not Manifestly Erroneous

In July 2015, Quileute and Quinault advocated for western U&A boundaries drawn as straight lines, from north to south, regardless of the distance from shore as these lines diverged from the actual coastline. Dkts. # 372–375. In response to those proposed lines, Makah proposed slanting lines approximating the shoreline at the travel distances adjudicated by this Court. Dkt. # 377. The State proposed a boundary that tracks the shoreline more closely than Makah's proposal. Dkt. # 381. Quileute's and Quinault's joint reply brief, filed in August 2015, defended their initial lines but advocated, in the alternative, for a western boundary charted as "waypoints" based upon a "radius" approach. U&As would be determined as a swath of ocean described by the maximum sealing or hunting travel distance, radiating outwards across an arc of all possible straight-line compass courses departing from the shoreline. Dkt. # 388 at 8-10.

This Court originally adopted Quileute's and Quinault's straight-line north-south boundary lines and the Ninth Circuit reversed on the basis that this approach is not grounded in evidence before the Court and does not comport with marine mammal hunting travel that formed the Court's conclusions about seaward breadth of hunting activity.

On remand, this Court relied upon prior pleadings and evidence to select the State's shoreline mirroring approach as the best means to describe the scope of Quileute's and Quinault's U&A when engaged in its furthest distance hunting activity. In doing so, this Court

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fulfilled the Ninth Circuit's instruction to adopt a boundary reflecting determinations made by this Court and the evidence presented by the parties at trial – a general travel distance from shore.

Quileute's and Quinault's motions for reconsideration essentially reargue the same three-year-old "radius" theory. Because such re-argument fails to provide a basis for reconsideration, the reconsideration motions should be denied on that basis alone.

To the extent this Court considers Quileute's fundamental premise – that travel from shore for purposes of describing possible whaling and sealing grounds should be gauged more precisely across all possible straight-line compass bearings from shore – the State agrees with, and adopts the response of the Makah Tribe. That brief fully analyzes why Quileute's approach is not based upon appropriate record evidence and does not demonstrate manifest error with regard to the Court's March 5 Order sufficient to warrant reconsideration.

However, if this Court finds merit in applying a sweep of possible travel courses radiating from shore to identify the scope of Quileute's and Quinault's regular whaling and sealing activity, it should be applied in a manner consistent with the evidence of where along the shoreline such travel likely occurred at or before treaty times.

As Makah's brief and associated mapping demonstrates, a radial approach applied using actual evidence of shoreline departure points for whaling and sealing expeditions produces U&A descriptions much different and smaller than what either Quileute or Quinault ask this Court to define as their U&As. Their proposed U&As on reconsideration are thus over-inclusive because they have applied the radial approach to many departure points where there is no evidentiary basis for a starting voyage location.

Compared to the general western travel approach in the State's proposal which this Court adopted in its March 5 Order, the corrected radial approach as mapped in Makah's brief produces

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variances that are theoretically both under-inclusive and over-inclusive. But as Makah's brief points out, there is no basis for concluding the Court's use of a general western travel approach is manifestly erroneous on reconsideration.

In contrast, adopting Quileute's and Quinault's uncorrected radial approach *would* produce manifest error. Application of the allegedly more precise radial travel theory is only sensible if attached to actual whaling and sealing departure points along the shore. But Quileute's proposed application applies to many more points along the shoreline than were connected to marine mammal hunting activities. Why? For no apparent reason other than to produce the largest possible U&A.

Paradoxically, while Quinault appears to support Quileute's radius theory, it then expressly advocates for the western boundary suggested by the Makah Tribe at trial below. Dkt. # 445 at 7. Why? Apparently because the Makah's proposed line provides a larger U&A than either a strictly applied radius theory or the Court's application of a general western travel limit. But this too cannot be the basis for a U&A adjudication. U&As must be based upon sound evidence set out in the Court's findings, rather than geometric theories applied simply to maximize a Tribe's fishing territory.

D. Arguments About a Moving Shoreline and Inconvenience Are Stale

The Quinault argue for the first time on reconsideration that the boundary should not be tied to the geographic shoreline because the shoreline is constantly shifting. They separately claim that the boundary line following the shoreline is inconvenient and impracticable.

The first argument should have been raised in 2015 when the Quinault responded to the State's proposed boundary, and the second argument *was* raised in 2015. *See* Dkt. # 388 at 6 ("The State's proposal creates a continually variable line that would be impracticable for even

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modern GPS equipment to follow."). Neither argument satisfies any basis for reconsideration – they do not identify a clear error, manifest injustice, or a change in law.

III. CONCLUSION

None of the Quileute's and Quinault's arguments overcome the strict standards for granting reconsideration. Accordingly, the motions for reconsideration should be denied.

If the Court is inclined to grant reconsideration and make further adjustments to the boundary based upon Quileute's approach utilizing radii of straight-line travel courses from shoreline locations, it should apply that approach based upon evidence in the record of actual departure points for hunting parties. Furthermore, if the boundary is adjusted in that manner, the same standard should be applied to both the Quileute and Quinault boundaries.

Respectfully submitted this 11th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2018, I electronically filed the State of Washington's Response to Quileute, Quinault, Hoh, and Suquamish Tribes' Motions for Reconsideration with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

Dated this 11th day of April 2018, at Olympia, Washington.

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