No. 18-35369

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAKAH INDIAN TRIBE, Plaintiff-Appellee,

v.

QUILEUTE INDIAN TRIBE and QUINAULT INDIAN NATION,
Defendants-Appellants,

HOH INDIAN TRIBE; et al.,
Real Parties in Interest,

On Appeal from U.S. District Court for Western District of Washington, Seattle
No. 2:09-sp-00001-RSM; 2:70-cv-09213-RSM
The Honorable Ricardo S. Martinez

BRIEF OF REAL PARTY IN INTEREST HOH INDIAN TRIBE

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I. INTRODUCTION.

A. The Interest of the Hoh Tribe in This Proceeding.

There are three signatory tribes to the Treaty of Olympia, negotiated on July 1, 1855, signed by Governor Isaac Stevens on January 25, 1856, and ratified by the U.S. Senate on March 8, 1859. 12 Stat. 971. Those tribes are the Quileute Nation, *U.S. v. Washington*, 384 F. Supp. 312, 372 (W.D.Wash. 1974) (FF# 103) (hereinafter "Decision I"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), the Quinault Tribe, *id.*, 384 F. Supp. at 374, FF# 119, and the Hoh Tribe, *id.*, 384 F. Supp. at 359, FF# 35. Order, p.8, MER 18, FF# 2.3; *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1164 (9th Cir. 2017) (hereinafter "*Makah v. Quileute*"). [1] In Subproceeding 09-01, the Makah Tribe filed a Request for Determination pursuant to Paragraph 25 of the Injunction granted in Decision I, 384 F. Supp. at 419, as amended, against the Quileute and Quinault Tribes. Makah Indian Tribe's Request for Determination Re Quileute and Quinault Usual and Accustomed Fishing

[1] The original decision of the District Court in 2015 was the subject of a previous Ninth Circuit Appeal. No. 15-35824. The present appeal is much narrower than the original appeal, involving only the one issue reversed and remanded by the Ninth Circuit in its October 23, 2017 Opinion. The excerpts of record involved in the current appeal are likewise much narrower than those included in the previous appeal. Rather than unnecessarily expand the excerpts of record the Court must consider in this appeal, the Hoh Tribe in this brief introductory section setting forth its unique interest will refer to the Excerpt of Record from the previous appeal. The term "U&A" is used as a shorthand reference to the treaty term "the right of taking fish at usual and accustomed grounds and stations."

Grounds in the Pacific Ocean, Dkt. # 1, Hoh Excerpt of Record (HER) HER 36-45. The Hoh Tribe was not named as a Responding Party in Makah's RFD because Makah stated that the Hoh Tribe was not currently exercising or threatening to exercise its ocean treaty fishing rights in a manner that injured Makah. *Id.*, p. 2 n. 1, HER 37. Like Quileute and Quinault, Hoh had the right to exercise its ocean treaty fishing rights in the Pacific Ocean long before this RFD was initiated by Makah, pursuant to its treaty and federal regulations adopted by NOAA. *See* Order, MER 13, lines 16-18.

Under the law of the case and Circuit, the Hoh Tribe is bound by all the rulings in this Subproceeding even though it is not named as responding party. As the District Court in this Subproceeding noted:

> As Judge Rothstein also made explicit two decades ago, 'all parties in this case will [nonetheless] be bound by all rulings in the subproceedings whether or not counsel have filed notices of appearance in particular subproceedings.' C70-9213, Dkt. # 13292, ¶ 4. While the scope of a party's U&A may be in no way at issue in a single subproceeding, that party is still entitled to fully participate given that they will be bound by any determination made under it.

Order of Clarification and On Pending Motions, Dkt. # 247, Nov. 13, 2014, p. 6, HER 21. *See id.* at pp. 4-5, HER 19-20 ("*U.S. v. Washington* is a single case . . . it remains a fundamental principle that all parties to a lawsuit are bound by a judgment or decree within it.") (citations omitted). In addition, since Judge Boldt found in Decision I that the Quileute and Hoh Indians were "linguistically,

culturally and historically . . . one people" at treaty time living along two river systems, and had only relatively recently been identified by the federal government as two separate tribes, 384 F. Supp. at 359, FF# 38, any rulings regarding Quileute treaty rights and U&A area will also necessarily affect Hoh treaty rights. The Hoh Tribe has a direct legal interest in this proceeding, different than the other Interested Parties in this proceeding.

II. JURISDICTION.

The Hoh Tribe agrees with Quileute and Quinault's statement of jurisdiction in their Opening Brief, Dkt. #12.

III. STATEMENT OF THE ISSUES.

The Hoh Tribe defers to the Statement of Issues as expressed in the Opening Brief filed by the Quileute Indian Tribe and Quinault Indian Nation, whose treaty rights were specifically determined in the proceeding below and with whom the Hoh Indian Tribe is aligned.

IV. STATEMENT OF THE CASE.

The Hoh Tribe defers to the Statement of the Case as expressed in the Opening Brief filed by the Quileute Indian Tribe and Quinault Indian Nation, whose treaty rights were specifically determined in the proceeding below and with whom the Hoh Indian Tribe is aligned.

V. STANDARD OF REVIEW.

The following is the standard of review for treaty interpretation as set out in *U.S. v. Conf. Tribes of the Colville Indian Reservation*, 606 F.3d 698, 708 (9th Cir. 2010):

> We review the district court's interpretation of treaties, statutes, and executive orders *de novo. United States v. Idaho,* 210 F.3d 1067, 1072 (9th Cir.2000). "Findings of historical fact, including the district court's findings regarding treaty negotiators' intentions, are reviewed for clear error." *Id.* at 1072–73. "We therefore review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions. We then review *de novo* whether the district court reached the proper conclusion as to the meaning of the [Treaty proviso] given those findings." *United States v. Washington,* 157 F.3d 630, 642 (9th Cir.1998).

VI. SUMMARY OF ARGUMENT

The Hoh Tribe agrees with and adopts the arguments submitted by the Quileute Indian Tribe and the Quinault Indian Nation regarding how the western ocean treaty fishing boundary should be drawn consistent with the decision of the District Court as clarified by this Court in No. 15-35824. The District Court found that the Quileute and Quinault tribal members at and before treaty time embarked from the shoreline along each tribe's traditional area to head out to sea and fish and headed to sea in many different directions. The boundary line adopted by the District Court on remand, exactly following the coastline out in a straight westerly direction 40 miles out in the ocean for Quileute and 30 miles out for Quinault,

does not match the fishing area within which Quileute and Quinault tribal members fished at and before treaty time, thus violating applicable treaty law standards.

VII. ARGUMENT.

The standards to be applied to determination of signatory tribes to the Treaty of Olympia's western Pacific Ocean treaty fishing boundaries are simple and straightforward. As this Court has noted, the practical reality is that documentation of Indian fishing in 1855 was scarce, and that requiring extensive and precise proof of actual fishing locations and grounds, especially in the ocean where no record is left, is extremely burdensome and perhaps impossible. *Makah v, Quileute*, 873 F.3d at 1167. The role of the federal courts in interpreting ratified treaties like the 1855 Treaty of Olympia at issue in this appeal is to figure out the signatory tribes' intent and understanding of the various treaty provisions. *Id.* at 1163. This Court held that the District Court did so "in a thoughtful and comprehensive manner" in finding that the Treaty of Olympia Tribes' intent in entering into that treaty was to reserve their previous ocean fishing practices, including fishing for whales and seals. *Id.* at 1163-64.

After the District Court issued its comprehensive opinion in this case with extensive Findings of Fact and Conclusions of Law, *U.S. v. Washington*, 129 F.Supp.3d 1069 (W.D. Wash. 2015) (hereinafter "Decision"), including findings

that the Quileute Tribe fished 40 miles out into the ocean and the Quinault Indian Nation fished 30 miles out into the ocean, the court requested input from all of the participants in the case on how this western ocean treaty fishing boundary should be drawn. Decision, 129 F.Supp.3d at 1117 (CL 3.1, 3.2. 3.4). After briefing, the District Court determined that straight longitudinal boundaries were most appropriate. Order dated Sept. 3, 2015, Dkt #394, QER 198-203.

This Court disagreed. It concluded that the western ocean treaty fishing boundary of Quileute and Quinault determined by the District Court was too large:

> it effectively nullified parts of that same determination ("where the tribes were engaged in usual and accustomed fishing in 1855") 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.

873 F.3d at 1168. The Court then expressed its opinion that "there are other solutions that better approximate the court's findings." *Id.* at 1169.

The Hoh Tribe agrees with the brief of the Quileute and Quinault Tribes that the western ocean treaty boundary adopted by the District Court on remand, Orders dated April 16, 2018, Dkt. #459, QER 1-5; March 21, 2018, Dkt. #449, QER 16-21; Order dated March 5, 2018, Dkt. #439, QER 32-37, is not consistent with either the mandate of this Court as quoted above or with the findings of the District Court in its main decision. The Hoh Tribe agrees that the western boundary proposed by

Quileute and Quinault is consistent with the both the findings of the District Court and the counsel of this Court.

Without repeating the well stated and comprehensive arguments of Quileute and Quinault, the Hoh Tribe here presents the basic principles that it believes should be the focus this Court's review of the District Court's Order.

The first principle is that in determining the western ocean treaty boundary, both the District Court and this Court rejected any linkage in determination of ocean treaty fishing U&A to precise identification and location of fishing areas:

> 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 wier 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.

873 F.3d at 1167.

While the courts were discussing this subject in the context of determining where the evidence or reasonable inferences from the evidence showed the Quileute and Quinault Tribes fished out in the ocean, the same principles should be applied in determining where those two tribes left the land to go fishing in the ocean, and which directions they may have traveled in the ocean to conduct such fishing. For example, the precise locations from where the Indians embarked on fishing journeys before and in 1855 cannot be determined with certainty. While known villages are obvious locations, there are other villages which have not been documented, as well as non-village embarkation points. There is no way to concretely state that the few village sites that have been documented were the only places where Quileute and Quinault left from to fish in the ocean, and the available evidence infers a broader practice. Weather and ocean conditions, time of year, likely location of animals out in the ocean and other factors would have led Quileute and Quinault Indians to head to sea from wherever would have been the most advantageous location. There are no records of where those locations might or could have been; the only reasonable solution is to conclude that the Indians had the ability and potential to leave the land to sail or row into the ocean from anywhere along their traditional ocean boundary as determined by the District Court.

The Makah Tribe's and State's argument, that a boundary that exactly follows the western land boundary 40 or 30 miles out into the ocean is the only reasonable

solution because the Quileute and Quinault Tribes failed to precisely identify the locations from which those two tribes left the land aside from one or two locations, and failed to identify the precise direction they traveled in the ocean, must fail for the same reason that precise locations could not determine where those tribes fished out in the ocean. There is no written record of these Tribes' history and if precise proof is required before any such determination can be made, Quinault and Quileute would end up with no right – which is Makah's objective.

This standard was expressly rejected by Judge Boldt in the earliest stages of *U.S. v. Washington*. *See* Decision, 129 F.Supp.3d at 1110-11:

> 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. Washington*, 459 F.Supp. 1020, 1059 (W.D. Wash. 1975). "Accordingly, the stringent standard of proof that operates in ordinary civil proceedings is relaxed." *Lummi*, 841 F.2d at 318. . . . [T]his 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.*

This discussion leads to the Hoh Tribe's second principle. As quoted above, this Court directed the District Court on remand "to draw boundaries that are fair

and consistent with the court's findings." *Makah v. Quileute*, 873 F.3d at 1170. The District Court made a number of findings relative to this western boundary. The main decision only included a brief discussion of this subject. For example, in finding that the Quileute fished in the ocean as far north as Cape Alava, the District Court stated:

> 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.

Decision, 129 F.Supp.3d at 1109 (FOF 13.8) (emphasis added). The District Court's only discussion in the main decision of how to calculate the western ocean treaty

boundary was to use the entire stretch of coastline within the Tribe's traditional territory:

> 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) (Makah traditional territory).

The District Court elaborated on what findings and standards it deemed relevant to calculate the western ocean treaty boundary of Quileute and Quinault fishing when it issued its post-trial order establishing a specific western boundary:

> Moreover, the Court agrees with the geographical/evidentiary bases for the calculations and conclusions presented by the Quileute, Quinault, Hoh and their experts. This Court has previously acknowledged that tribal fisherman [sic] did not only fish due west of their villages, but moved in all directions from the Coastline. *See* Case No. 70-9213RSM, Dkt. #21063 at 68, Findings of Fact 13.8.[2] Thus, the Court agrees with the Quileute, Quinault and Hoh, that:
>
> > Given the reality that Quileute and Quinault fishermen did not robotically fish at locations directly west from their villages, but instead chose advantageous launching sites and traveled in multiple directions from those sites depending on the tides and on where a particular species might be found at a particular time, the boundaries

[2] This is the finding of fact regarding Cape Alava that is quoted at p. 10 above.

> advocated by both Makah and State do not accurately reflect Quileute's and Quinault's U&A western boundaries.

Subproceeding 09-01, Dkt. #394, Order, QER 298, 300 (Sept. 3, 2015) (citing Dkt. #388 at 8) (emphasis added).

This finding of fact by the District Court was not overturned by the Ninth Circuit in *Makah v. Quileute*. Instead it directed that the District Court draw a western ocean treaty fishing boundary that comported more closely with the evidence:

> 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, 1982 U.S. Dist. LEXIS 18245 (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.
>
> (map omitted).
>
> 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.

Makah v. Quileute, 873 F.3d at 1168-70.

Based on the findings of fact entered by the District Court, Quileute's and Quinault's western ocean treaty fishing boundary should be based on distances 40 miles (for Quileute) and 30 miles (for Quinault) from any coastal point within the traditional coastline of either tribe, and should extend in any direction from any of those coastal points. This conclusion is consistent and fair with the factual findings of the District Court. Such a conclusion is also consistent with the treaty time ocean fishing practices of both tribes.

The Hoh Tribe believes that the western ocean treaty boundaries proposed by the Quileute and Quinault Tribes, *see* Quileute and Quinault Opening Brief, Dkt. #12, pp. 61- 63, are consistent with the evidence found by the District Court in this case. They for the most part follow the 40 mile and 30 mile distance line from various points within the traditional territory of each tribe, with minor "straight-line" adjustments (proposed originally by Makah) to make their administration and compliance easier. They result in an extremely small error rate from the actual distance as shown in the maps in Quileute and Quinault's brief.

The Hoh Tribe believes the western boundary lines proposed by the State and adopted by the District Court on remand – precisely following the western Washington coastline directly west 40 miles or 30 miles – are inconsistent with the mandate of this Court and with the findings of fact made by the District Court. The District Court originally rejected the western boundary proposed by the State as inconsistent with the factual findings made in the main decision, QER 198-201, but then adopted that same boundary on remand as consistent without making any new findings or explaining how that boundary was consistent with the evidence in the case. The District Court has therefore contradicted itself in different Orders, requiring appellate review to clarify the District Court's confusion. The Hoh Tribe urges the Court to adopt the Quileute and Quinault western ocean fishing U&A areas set out in that brief.

Long-established rules of treaty construction require treaty fishing rights to be construed in favor of the signatory tribes. Treaties "should never be construed to [the Indians'] prejudice." *U.S. v. Washington*, 853 F.3d 945, 963 (9th Cir. 2017) (culverts decision) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832)). "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear." *Tulee v. Wash.*, 315 U.S. 681, 684 (1942). Any doubts regarding the treaty meaning must be construed in favor of the signatory tribes. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 676 (1979). This rule has on four occasions "been explicitly relied on by the [Supreme] Court in broadly interpreting these very treaties in the Indians' favor." *Id.* at 676 (citing *Tulee*, 315 U.S. 681; *Seufert Bros. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905)). In all seven cases in which the Supreme Court has construed the Stevens Treaty fishing rights, it has placed a "broad gloss" on the right. *Id.* at 679.

So too with ocean U&A boundaries. The evidence found persuasive by the District Court and confirmed by the Ninth Circuit proved that the Quileute fished 40 miles out into the ocean, the Quinault fished 30 miles out into the ocean, and the fishermen of both tribes left from multiple locations and traveled in multiple directions to harvest sea animals. These U&A areas are entitled to protection under the treaty. Arguments by Makah and the State that there is a "net" gain or loss of

Quileute and Quinault ocean treaty U&A in the lines drawn by the State are unavailing; under the treaties and undisputed case law the two tribes are entitled to fish where they fished at treaty time; a "trade" in area is an inadequate substitute: As the District Court for the Western District of Washington ruled in *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504 (W.D.Wash. 1988), a case involving proposed displacement of Muckleshoot treaty fishing area by proposed construction of a marina:

> Relying on *Fishing Vessel*, the Marina Group and federal defendants contend that construction of the Marina will not impair the Indians' treaty rights because they can still attain a "moderate living" by collecting their share of fish elsewhere. *Fishing Vessel* holds that the treaty right to take fish secures no more than is necessary to provide the Indians with a moderate living. *Fishing Vessel*, 443 U.S. at 686. However, as the federal defendants recognize, the Supreme Court, in making this statement, clearly was addressing the "fair share" aspect of the treaty fishing right. The Tribes' fishing grounds in Elliott Bay are protected under the treaty right of access to those grounds (the "geographical aspect"), which is not displaced by the right to some share of fish and is not met by supplying the Tribes with a proper portion of fish. *U.S. v. Oregon*, 718 F.2d 299, 304 n.6 (9th Cir. 1983). The District Engineer's determination that construction of the Marina will not impair the Tribes' ability to meet their moderate living needs, AROD, at 50-51, even if accurate, does not circumvent the requirement of congressional authorization for such a taking, nor does it compensate for the conceded loss of the Tribes' usual and accustomed fishing grounds. Similarly, the existence of other areas in Elliott Bay where the Tribes may fish, the productive value of which is disputed, does not compensate for taking or permitting the taking of the fishing area within the Marina site.
>
> The Marina Group further argues that the Tribes have "meaningful use" of their usual and accustomed fishing areas when they still have the ability to harvest fish from other parts of their usual and accustomed fishing

> places, to the extent necessary to attain a moderate living. *See Fishing Vessel*, 443 U.S. at 676. The Marina Group's reliance on the phrase "meaningful use" to support the actual loss of part of a usual and accustomed fishing ground collapses the right of access into the right to a fair share of fish, which this Court may not do. *See Oregon*, 718 F.2d at 304; *Fishing Vessel*, 443 U.S. at 667, 675.

Based on the principle stated in this decision, which itself is based on Ninth Circuit and United States Supreme Court precedent, this Court must draw western ocean treaty fishing boundaries that most accurately reflect the actual fishing practices of these two tribes as demonstrated by the evidence and reasonable inferences therefrom, with minimal error to accommodate administration of the boundary set.

VIII. CONCLUSION.

The Hoh Tribe is aligned with the Quileute and Quinault Tribes in this appeal and therefore defers to the arguments and discussion in their Opening Brief. Based on the discussion above, the Hoh Tribe asks that the Order of the District Court be reversed, and the Court order ocean treaty fishing boundaries for the Quileute and Quinault Tribes that match the evidence in this case and consistent with the standards of treaty interpretation. While this Court could order the District Court to draw new boundaries consistent with the reasoning set forth in this brief, the Hoh Tribe also believes, given the time that has passed and the significant

delays in this proceeding which has taken nine years, that this Court could directly impose reasonable western ocean treaty boundaries as requested in Quileute's and Quinault's brief.

Dated: October 9, 2018.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Real Parties in Interest Hoh Indian Tribe are aware of the following related cases pending in the Court that would be deemed related to this case under Ninth Circuit Rule 28-2.6:

Muckleshoot Tribe v. Tulalip Tribes, et al, No. 18-35441

Skokomish Tribe v. Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Squaxin Island Tribe, et al, No. 17-35760

These appeals arise out of the same underlying district court "main case," but involve unrelated disputes and are separate district court subproceedings (Nos. 17-1 and 17-2, respectively).

Dated this 9th day of October 2018.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay, WSBA 9245
Attorneys for Hoh Indian Tribe, Real Party in Interest

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure, the undersigned counsel for Real Parties in Interest Hoh Indian Tribe certifies that none of them have a parent corporation(s) and no publicly held corporation(s) own stock.

Dated this 9th day October 2018.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 4,916 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

I certify that his brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14 Point Font.

DORSAY & EASTON LLP

By: s/ Craig J. Dorsay Date: October 9, 2018
Craig J. Dorsay, WSBA 9245
Attorneys for Hoh Indian Tribe, Real Party in Interest

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 9, 2018.

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

Dated: October 9, 2018.

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