No. 18-35369

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

v.

MAKAH INDIAN TRIBE, Plaintiff-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

BRIEF OF APPELLANTS QUILEUTE INDIAN TRIBE AND QUINAULT INDIAN NATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Appellants Quinault Indian Nation and Quileute Indian Tribe, certify that none of them has a parent corporation(s) and no publicly-held corporation owns stock in either of the Appellant Tribes.

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Acronyms

GIS:	Geographic Information Systems
FF:	Finding of Fact
CL:	Conclusion of Law
U&A:	Usual and Accustomed Grounds and Stations
WDFW:	Washington Department of Fish and Wildlife

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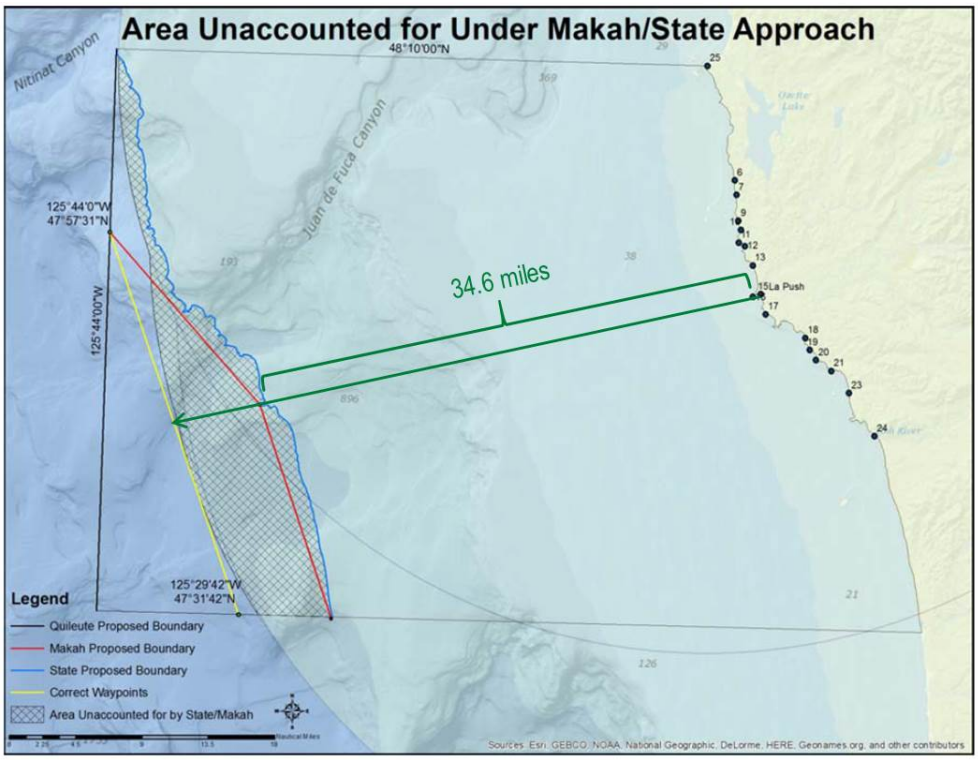
QER:	Quileute and Quinault Excerpts of Record

I. INTRODUCTION

The Quileute Tribe ("Quileute") and Quinault Nation ("Quinault") have a treaty right to "tak[e] fish" at "*all* usual and accustomed grounds and stations" ("U&A"). A tribe's U&A is the area where it customarily fished at treaty times. This appeal arises from the district court's factually flawed, legally erroneous and impracticable redrawing of these Tribes' U&A boundaries after remand.

After a trial in 2015, the district court found that Quileute and Quinault customarily fished 40 and 30 miles offshore, respectively, and that they fished in multiple directions from shore. The court found that these U&As should *not* be set using coastline-tracing boundaries (shown by a blue line below) because it would exclude large areas where the district court found the Tribes fished in directions *other than due west* from the coast at treaty times, QER 200, as shown below:



QER 206 (8/24/2015) (green arrow and label added). The area shaded in light blue above—depicting multidirectional 40-mile fishing[1] trips from certain Quileute coastal sites—shows that coastline-tracing boundaries exclude large areas where Quileute customarily fished at treaty times. For example, a 40-mile fishing trip slightly southwest of Quileute's main village (shown by a green arrow above) is cut short by these boundaries at about 34 miles. QER 204-205. The district court initially set longitudinal line western boundaries for these U&As (shown by a black line in the map above).

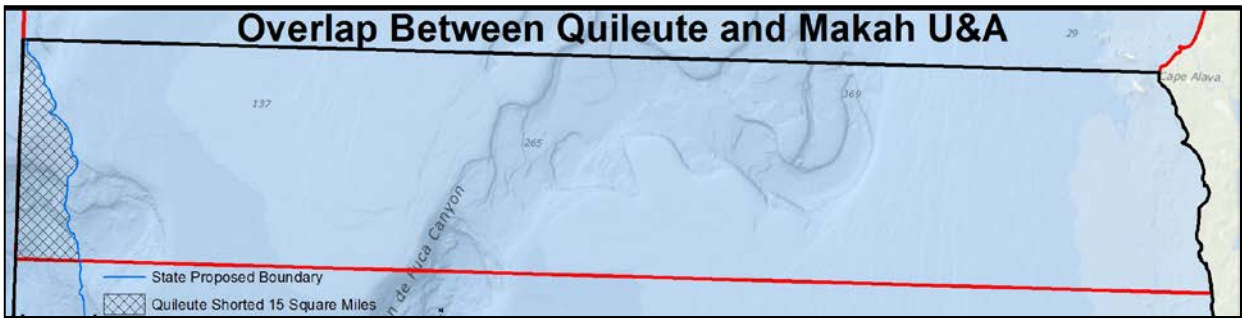
In 2017, this Court unanimously upheld the trial findings, but expressed concern about the "error rate" created by the longitudinal line boundaries. *Quileute II*, 873 F.3d at 1168-69. It remanded the case with instructions to set the boundaries in a manner "fair and consistent with" the trial findings. *Id.* at 1169-70.

Despite these instructions, the district court adopted the *same* coastline-tracing boundaries that it had *already held* were *inconsistent* with its trial findings. Altogether, the new boundaries exclude Quileute and Quinault from **270 square miles** of ocean waters where they customarily fished at treaty times.

The new boundaries also violate settled law requiring courts to apply a relaxed evidentiary burden to U&A determinations, in recognition of the fact that it

[1] In this brief, Appellants use "fish" and "fishing" to refer to the harvest of finfish, whales and seals. *See Makah v. Quileute*, 873 F.3d 1157, 1159 (9th Cir. 2017) ("*Quileute II*") ("fish" includes whales and seals).

is impossible to prove with precision where tribes fished in 1855. The district court's abandonment of these standards is starkly demonstrated by comparing Quileute's 40-mile U&A boundary with Makah's 40-mile U&A boundary. The two tribes' U&As partially overlap, but the new 40-mile boundary for Quileute (in blue) falls materially short of the 40-mile boundary for Makah (in black), cutting Quileute out of 15 square miles of prime fishing area over the continental shelf:



QER 178 (citing Third Rasmussen Decl., QER 140).

Worse, the new boundaries have the practical effect of reducing the U&As even further, because fishermen will steer clear of the unfollowable contours to avoid breaking the law. Further, because the new boundaries are tied to the modern, eroding coastline rather than to where the Tribes fished in 1855, treaty-secured areas *will be lost* over time as the coastline shifts eastward.

The new boundaries are neither fair nor consistent with the trial findings. They abrogate treaty rights that are central to Quileute's and Quinault's history, culture and modern economy. Appellants ask that this Court reverse and remand with instructions to adopt the boundaries they proposed below (shown at QER 183-184), which are fair, consistent with the trial findings, and minimize the error rate.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction over this subproceeding because it arose under a "treat[y] of the United States." 28 U.S.C. § 1331. Following Makah's appeal of the district court's 2015 trial decision and boundary order, the district court had jurisdiction over the remanded issue pursuant to this Court's mandate. That mandate issued on February 15, 2018, after this Court denied Makah's petition for rehearing and rehearing *en banc*. *Makah v. Quileute*, Nos. 15-35824, 15-35827, Dkts. 99 & 100.[2]

After remand, the district court issued its order and judgment setting the new boundaries on March 5, 2018. QER 32-37. It denied three tribes' request to vacate the order and hold a status conference on March 9, 2018 (QER 22), amended the judgment to correct a scrivener's error on March 21, 2018 (QER 16-21), and denied four tribes' motions for reconsideration on April 16, 2018 (QER 1-5). Quileute and Quinault timely filed a notice of appeal of these orders on May 1, 2018. QER 38-39; Fed. R. App. P. 4(a)(1)(B)(i).

This Court has jurisdiction because the district court's judgment disposed of all claims and defenses on the remanded issue, 28 U.S.C. § 1291, and because the district court failed to follow this Court's mandate on remand. 28 U.S.C. § 1651(a).

[2] Makah has appealed this Court's decision to the United States Supreme Court. *See Makah v. Quileute, et al.*, Supreme Court Case No. 17-1592.

III. STATEMENT OF ISSUES PRESENTED

1. This Court requires relaxed proof standards in U&A determinations, as it is "impossible" to define with precision where tribes fished in 1855. Was the district court's adoption of restrictive and precise boundaries legally permissible?

2. The Treaty of Olympia establishes U&As that are fixed in *treaty times*. Was it consistent with the facts and law for the district court to tether these U&As to the *modern coastline*, such that they will change with the changing coastline?

3. The district court found that Quileute and Quinault customarily fished 40 and 30 miles offshore at treaty times, and did not just fish due west from their lands. In adopting boundaries that extend 40 or 30 miles *only* due west, did the district court fail to follow this Court's mandate to adopt boundaries that are "fair and consistent with" the trial findings, especially when the district court previously found these uni-directional boundaries were *inconsistent* with its trial findings?

4. Was it fair or legally permissible for the district court to impose complex boundaries that cannot be followed without expensive GIS equipment, and that have the practical effect of reducing the U&As even further?

5. Did the district court abuse its discretion by denying four tribes' motions for reconsideration, where the motions demonstrated manifest legal error in the court's new boundary order and presented legal authority that could not have been brought to its attention earlier with reasonable diligence?

IV. STATEMENT OF THE CASE

A. Treaty "Usual And Accustomed Grounds And Stations."

From 1854 to 1856, the United States entered into eight treaties with tribes in Washington Territory, including the Treaty of Olympia with Quileute, Quinault, and the Hoh Tribe. QER 599-602. Responding to the tribes' desire to retain "a means of supporting themselves once the Treaties took effect," each of these treaties reserves to the tribes the right to continue taking fish from their "usual and accustomed grounds and stations." *United States v. Washington*, 853 F.3d 946, 964-65 (9th Cir. 2017), *aff'd by an equally divided court*, 584 U.S. __, 138 S. Ct. 1832 (2018) ("*Culverts*").

Since *United States v. Washington* was filed in 1970, all tribes' usual and accustomed areas have been adjudicated using the same standards. The seminal 1974 decision in the case defined "usual and accustomed" areas as "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 waters." *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) ("*Decision I*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ("*Fishing Vessel*"). "Stations" are "fixed locations such as the site of a fish weir or a fishing platform

or some other narrowly limited area." *Id.* "Grounds" are "larger areas which may contain numerous stations and other unspecified locations which . . . could not [at treaty times] have been determined with specific precision and cannot now be so determined." *Id.*

In recognition of the importance of treaty rights and the scarcity of evidence from 1855 regarding precisely where tribes were taking fish, U&A adjudications do not follow the same evidentiary standard as "ordinary civil proceedings"; instead, that "stringent" standard is "relaxed" in adjudicating U&As. *United States v. Lummi Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988). As the district court explained below:

> 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. [*United States v. Washington*,] 626 F. Supp. [1405,] 1467 [(W.D. Wash. 1985) ("*Makah I*")]. 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.*

United States v. Washington, 129 F. Supp. 3d 1069, 1111 (CL 1.7) (W.D. Wash. 2015) (additional citations omitted) (emphasis added) ("*Quileute I*").

The numerous marine U&A adjudications in the 48-year history of this case generally define such areas by reference to broad water bodies. For ocean U&As, courts and the federal government have used straight-line boundaries broadly

encompassing all customary fishing areas.[3] For instance, Makah's ocean U&A boundary is drawn in this manner, extending well beyond the areas for which it provided any specific proof of fishing activity. Other tribes' marine U&As are described in a similarly expansive manner, e.g., "the waters of the Strait of Juan de Fuca" and the "open Sound of Southern Puget Sound." *See infra* pp. 27 to 34.

B. After The 2015 Trial, The District Court Rejected Boundaries Tracing The Coastline Because They Contradicted The Trial Findings.

In December 2009, Makah filed this subproceeding in *United States v. Washington*, designated as Subproceeding 09-01. Makah asked the district court to adjudicate Quileute's and Quinault's boundaries at only five to ten miles offshore. Since Makah has a 40-mile boundary, its desired outcome would make it the *only* Washington tribe with commercially viable treaty ocean fisheries.

After a 23-day trial in 2015, the district court found that at treaty times Quileute and Quinault fishermen customarily fished 40 and 30 miles offshore, respectively. *Quileute I*, 129 F. Supp. 3d at 1117. The court found that these treaty-time efforts were made in multiple directions from shore, not just due west. Tribal fishermen "were fishing in the waters north as well as south and west of their

[3] Straight-line longitudinal boundary lines had been used by the federal government to delineate Quileute's and Quinault's U&As for nearly 30 years prior to the trial decision. *See Midwater Trawlers Co-op. v. U.S. Dep't of Commerce*, 139 F. Supp. 2d 1136, 1144 (W.D. Wash. 2000), *aff'd in part, rev'd in part on other grounds*, 282 F.3d 710 (9th Cir. 2002); 51 Fed. Reg. 16471, 16472 (May 2, 1986); *infra* p. 49 (depicting former boundaries).

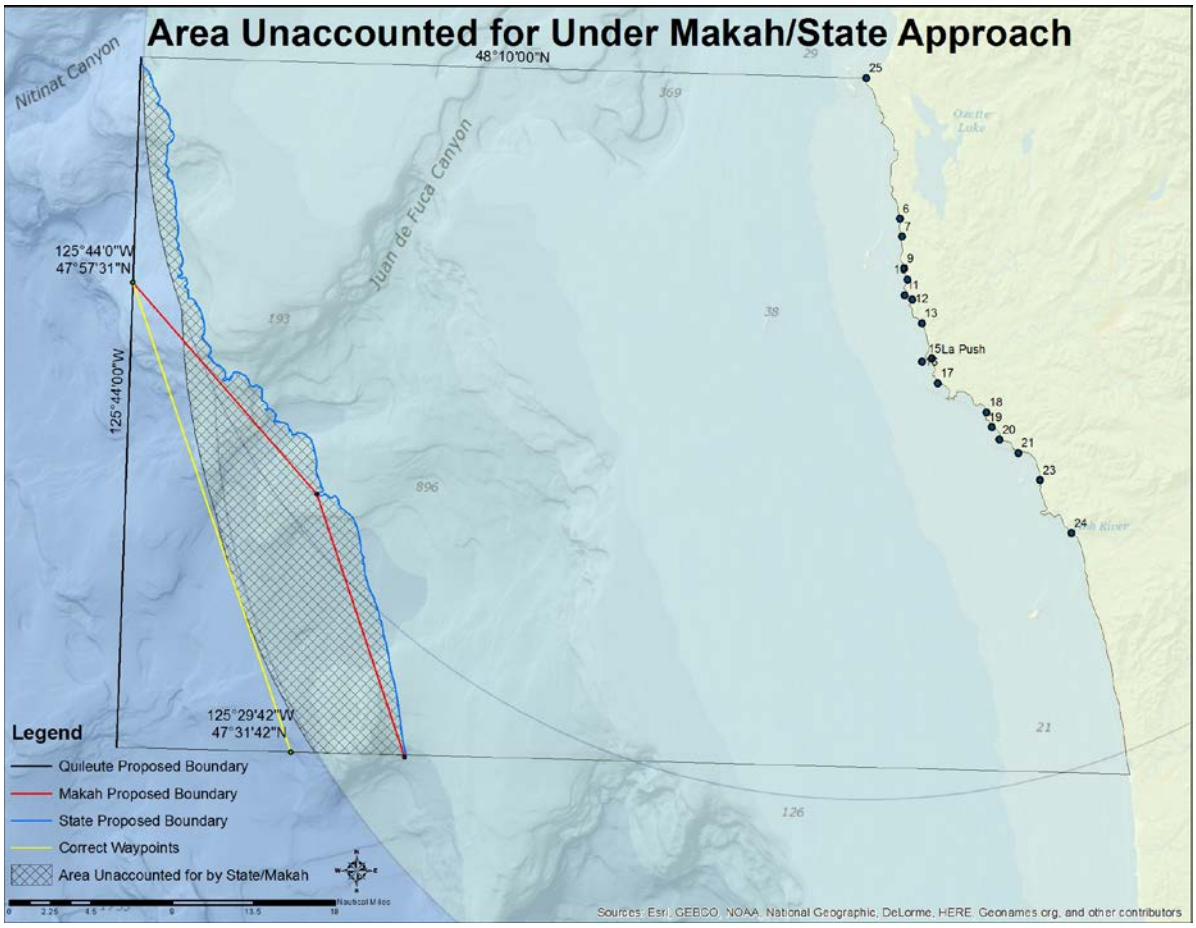
home." *Id.* at 1109 (citing *Makah I*, 626 F. Supp. at 1467; Trial Tr., QER 427).

Following its trial decision, the court ordered Quileute and Quinault to provide it with the "longitudinal coordinates" of "the longitudes associated with the U&A boundaries determined herein." *Id.* at 1117. Quileute and Quinault complied. QER 311-340 (7/23/2015). Washington State and Makah then submitted separate competing boundary proposals, totaling 63 pages of extensive additional briefing and declarations. QER 247-310.

The district court ordered Quileute, Quinault, and Hoh to submit a joint reply limited to 10 pages within 10 days. QER 246 (8/12/2015). In their reply, Quileute, Quinault, and Hoh argued that adopting either Makah's or the State's proposal would (1) conflict with the trial findings by excluding large areas where Quileute and Quinault had proved they customarily fished at treaty times; (2) violate law of the case and Circuit by imposing different evidentiary standards on Quileute and Quinault than were applied in other U&A determinations; and (3) with respect to the State's proposal, impose unprecedentedly complex boundaries that would be impracticable to follow and would require expensive GIS equipment to even try. QER 218-226.

Quileute, Quinault, and Hoh also included the below map (created by their GIS expert) demonstrating how Makah's and the State's proposals (shown by red and blue lines respectively) would *exclude* large swaths of ocean waters where

Quileute fishermen fished 40 miles to the southwest and northwest of Quileute's territory (shown in light blue shading) at treaty times:



QER 225 (citing Second Rasmussen Decl., QER 205-206). Quileute noted that if the court were to use waypoints rather than a longitudinal line to set its western boundary, the yellow line shown above would be the correct approach.[4] QER 226.

The district court rejected Makah's and the State's proposals, reiterating its trial findings "that tribal fishermen did not only fish due west of their villages, but

[4] Makah and Quileute proposed the same western boundary for the top third of Quileute's U&A.

moved in all directions from the coastline." QER 200 (citing *Quileute I*, 129 F. Supp. 3d at 1109, FF 13.8). "[T]he boundaries advocated by both Makah and State do not accurately reflect Quileute's or Quinault's U&A western boundaries" because "'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.'" *Id.* (quoting Quileute, Quinault, and Hoh Reply Br., QER 224).

The district court ultimately delineated Quileute's and Quinault's U&As using single longitudinal lines drawn at the outermost 40- and 30-mile points from Quileute's and Quinault's coastlines, in a manner it thought to be consistent with the approach it used in prior cases. QER 199-200 (noting that the court took the same approach in delineating a 40-mile offshore boundary for Makah in 1982).

C. This Court Upheld The Trial Findings, And Instructed The District Court To Redraw Boundaries That Were "Fair and Consistent With" The Trial Findings On Remand.

On appeal, Makah and the State argued that (1) in determining "all usual and accustomed grounds and stations," the district court should have excluded those grounds and stations where Quileute and Quinault customarily caught whales and seals; (2) even if the district court properly considered whaling and sealing grounds and stations, Quileute and Quinault failed to prove them with sufficient precision;

(3) the district court's findings regarding where Quileute customarily took finfish were incorrect; and (4) due to the southeasterly curvature of the coastline along Quileute's and Quinault's treaty-time territories, the longitudinal boundaries gave them too much area relative to the district court's factual findings.

This Court upheld the district court's rulings on all but the last issue. *Quileute II*, 873 F.3d at 1169. This Court found no fault with any of the district court's factual findings, and acknowledged the district court's finding that "tribal fishermen did not only fish due west of their villages, but moved in all directions from the coastline." *Id.* However, the Court held that the longitudinal boundaries still left an "evidentiary gap," even after accounting for those findings, due to the southeasterly curvature of Quileute's and Quinault's coastlines. *Id.* It agreed that ocean U&A determinations are necessarily imprecise, but held that the longitudinal boundaries still had "too high" of an "error rate" relative to the district court's ruling that Quileute's and Quinault's U&As extended 40 and 30 miles offshore. *Id.* at 1168. The Court remanded with instructions to set new boundaries that are "fair and consistent with the court's findings." *Id.* at 1169-70. These boundaries were to "better approximate" the evidence, but would still include the areas encompassed by the Court's factual findings. *Id.*[5]

[5] Makah's and the State's petitions for panel rehearing and rehearing *en banc* were denied. *Makah v. Quileute*, No. 15-35824, Dkt. 99 (9th Cir. Jan. 19, 2018). The mandate issued on February 15, 2018. *Id.*, Dkt. 100.

D. On Remand, The District Court Adopted Coastline-Tracing Boundaries That It Previously Held Contradicted The Trial Findings.

On remand, the district court acted without hearing from any party, shortly after the mandate issued. Without citing any trial evidence (despite this Court's instructions), it adopted the boundaries proposed by the State in 2015—boundaries that the court previously found *conflicted with* its trial finding that tribal fishermen fished in multiple directions from shore. QER 36. The only thing the district court cited in support of these boundaries was the uninformed and inadmissible 2015 statement of a Washington Department of Fish and Wildlife ("WDFW") Geographic Information Systems ("GIS") staff member that traveling precisely due west-east was consistent with "how ancient mariners would navigate in offshore waters without aid of modern navigation tools." QER 36 (citing QER 251 [¶ 16] (7/30/2015)).

Surprised by the *sua sponte* order made without notice or opportunity for the parties to be heard, Quileute and Quinault filed a request on March 8, 2018 asking the district court to "provide all parties in Subproceeding 09-1 the opportunity to propose appropriate boundaries in light of the Ninth Circuit's decision." QER 186. They also asked for a status conference and to "either brief the issue or attempt to resolve the issue through settlement," noting that, prior to appeal, Makah and Quileute had agreed on a boundary line describing the upper third of Quileute's western boundary. *Id.* n.1 (citing QER 216 (8/24/2015)).

The next morning, the district court denied the request, stating that "the Court requires no further briefing or discussion, and has already issued its final Order regarding boundaries in this matter." QER 22 (3/9/2018).

On March 19, 2018, Quileute, Quinault, Hoh, and the Suquamish Tribe filed separate motions for reconsideration, arguing that the impossibly precise boundaries adopted by the district court:

1. violated this Court's instructions on remand by adopting boundaries that conflict with the trial findings;
2. violated the evidentiary standards for adjudicating U&As and imposed significantly more stringent standards on Quileute and Quinault than were applied to other tribes;
3. violated the Treaty—which requires fixed U&As—by imposing variable boundaries tied to an ever-shifting coastline;
4. would be impracticable for fishermen and enforcement to follow, as (a) no other fisheries or U&As use sinuous lines precisely tracing the coastline, and (b) expensive GIS gear is required to follow the lines; and
5. would cause fishermen to steer far clear to avoid unintentionally crossing the lines, effectively reducing Quileute's and Quinault's U&As even further.

See QER 116-121 (Suquamish), 132-133 (Hoh), 123-129 (Quinault), 174-180

(Quileute). In response to the Ninth Circuit's concerns regarding the error rate associated with the prior boundaries, Quileute and Quinault proposed boundaries that closely hewed to the factual findings of multidirectional 40- and 30-mile fishing trips from their treaty-time territories. QER 129, 180, 183-184. Quileute's proposal used the same waypoints that it identified in its 2015 briefing on the boundaries issue. *See supra* p. 10.

The district court ordered the State to file a response to these motions, and granted Makah's motion for leave to file an additional response, but ordered that no replies be filed. QER 114, 111. Makah's response represented the evidence incorrectly, relied on mistaken mathematical calculations; and proffered legally inadmissible anthropological analysis from its GIS specialist. QER 99-110, 57-76 (4/11/2018). Both Makah and the State for the first time in their responses argued that the U&A boundaries should be delineated using a narrow and exacting species- and village-specific approach.

Quileute and Quinault moved for leave to file a reply to address these errors and respond to the new arguments advanced in the responses (QER 53-54 (4/13/2018)), but the court denied the motion less than 30 minutes after it was filed (QER 6).

The district court then denied the four motions for reconsideration, incorrectly finding that the four motions "fail[ed] to demonstrate manifest legal

error" and did not "present new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." QER 4 (4/16/2018). The court relied on Makah's legally and factually incorrect arguments in dismissing "the approach advocated by Quileute" as "not based on appropriate record evidence." *Id.* (citing Makah Response, QER 101-109 (4/11/2018)).

Quileute and Quinault then filed rebuttal testimony from Quileute's GIS specialist as an Offer of Proof. QER 41-52 (4/26/2018). This testimony demonstrated that the district court's order denying the four motions for reconsideration (1) relied on mistaken, misleading, and incorrect arguments submitted by Makah, and (2) upheld boundaries that violate Quileute and Quinault's treaty rights and are not fair or consistent with the district court's factual findings. *Id.*

V. SUMMARY OF ARGUMENT

Quileute's and Quinault's fishing right "arises from a treaty with the United States" and "is reserved and protected under the supreme law of the land." *United States v. Washington*, 157 F.3d 630, 647 (9th Cir. 1998) (quoting *Decision I*, 384 F. Supp. at 402). Courts cannot abrogate a treaty; absent abrogation by Congress, the Tribes' treaty rights "remain valid and enforceable." *Culverts*, 853 F.3d at 967.

Under the district court's new boundaries order, Quileute and Quinault, who fished "in the waters north as well as south and west of their home" 40 and 30 miles offshore at treaty times, *Quileute I*, 129 F. Supp. 3d at 1109, 1117, can no longer fish 40 or 30 miles offshore to the north or south of their treaty-time lands. The new boundaries ***understate*** Quileute's U&A ***by the same amount*** by which the prior straight-line longitudinal boundaries – the ones rejected by this Court – purportedly ***overstated*** them, a total of 205 square miles. The new boundaries understate Quinault's U&A by 65 square miles. In total, Quileute and Quinault are now excluded from **270 square miles** of ocean waters 40 and 30 miles offshore where they customarily fished at treaty times in directions *other than due west*.

In remanding this case for revision of the western boundaries, this Court acknowledged that Quileute and Quinault "fishermen did not only fish due west of their villages, but moved in all directions from the coastline." *Quileute II*, 873 F.3d at 1169. This Court agreed that U&A determinations are necessarily imprecise, but

held that the longitudinal boundaries initially set for Quileute and Quinault left an "evidentiary gap" containing too high of an "error rate" due to the southeasterly curvature of the coastlines along the Tribes' treaty-time territories. *Id.* at 1168-69. As shown in the area southwest of the yellow line on the map on page 10, *supra*, the longitudinal line boundaries included "large swaths of ocean where the Quileute and Quinault did not present sufficient evidence to establish U & A." *Quileute II*, 873 F.3d at 1168. Thus, this Court instructed the district court to set new boundaries that are "fair and consistent with the court's findings" on Quileute's and Quinault's U&As. *Id.* at 1169-70.

The district court's order following remand was neither fair nor consistent with the trial findings. The revised boundaries now **exclude** large swaths of ocean where Quileute and Quinault **did** present sufficient evidence to establish U&A, creating an equally large, erroneous and under-inclusive error rate. The court simply imposed the most restrictive boundaries possible—uni-directional, due-west coastline-tracing boundaries that it had already held *did not* encompass its factual findings. The district court did this despite having other alternatives before it that *did* comport with the mandate and findings, and that would have reduced the "error rate" to 2.2% or less. *See* QER 225-226 (citing QER 216); QER 183-184.

The new boundaries not only conflict with the trial findings, they also violate long-established legal standards for U&A determinations. Rather than

follow established law that fishing grounds "could not [at treaty times] have been determined with specific precision and cannot now be so determined,"[6] the district court on remand effectively imposed an unrebuttable and unmoored presumption that Quileute and Quinault only fished *due west* at treaty times. In other words, it was not enough that Quileute and Quinault proved they customarily fished 40 and 30 miles offshore in multiple directions from their aboriginal territories; they were effectively required to prove with stipple-dot precision the *specific locations* to which these multidirectional trips led, out in the open ocean, in 1855.

This Court has twice rejected such an unrealistic and burdensome approach: "requiring extensive and precise proof" of "*specific locations*" where tribes fished "would be 'extremely burdensome and perhaps impossible,' especially deep in the ocean." *Id.* (italics in original) (quoting *United States v. Washington*, 157 F.3d at 644). Courts must not apply "the stringent standard of proof that operates in ordinary civil proceedings" to U&A adjudications, and instead must apply an appropriately "relaxed" standard. *Lummi*, 841 F.2d at 318 (citing *United States v. Washington*, 730 F.2d 1314, 1317 (9th Cir. 1984) ("*Makah II*")).

This relaxed standard resulted in broadly drawn boundary lines in the only other *United States v. Washington* subproceeding involving adjudication of a tribe's ocean U&A. There, the district court found that the subject tribe (Makah)

[6] *Quileute II*, 873 F.3d at 1167 (quoting *Decision I*, 384 F. Supp. at 332).

customarily fished 40 miles offshore at treaty times, and delineated the tribe's western boundary using a longitudinal line that broadly encompassed every possible area in which the tribe could have made 40-mile fishing trips to the west, northwest, and southwest from its treaty-time territory. *See infra* pp. 30-31. This Court affirmed, emphasizing that U&A adjudications are necessarily imprecise due to the scarcity of evidence regarding where tribes were fishing at treaty times. *Makah II*, 730 F.2d at 1316-17, 1318.

The new boundaries order following remand also violates the Treaty by tethering U&A boundaries—which must be fixed *as of treaty time*—to an ever-shifting *modern* coastline.

Furthermore, the sinuous lines imposed by the district court are impossible to follow without expensive GIS equipment, and impracticable to follow even *with* such equipment. The boundaries thus have the practical (and unlawful) result of creating financial and physical barriers to the full exercise of treaty rights and reducing Quileute's and Quinault's U&As even further.

In sum, the district court's new boundary order results in the following factual and legal errors:

1. It violates this Court's instructions on remand by adopting boundaries that conflict with the trial findings, resulting in an "error rate" just as high as the previous error rate that caused this Court to reject the district court's

previous boundaries, and resulting in far worse harm, as Quileute and Quinault are now excluded from fishing in treaty-reserved areas;

2. It violates established law on U&A determination standards and imposes a much more stringent and prejudicial standard on Quileute and Quinault than has been applied to every other tribe in *United States v. Washington*;
3. It violates the Treaty by imposing boundaries that are not fixed as of treaty times, but instead constantly vary with an ever-shifting coastline;
4. It imposes boundaries requiring expensive GIS gear to follow, in violation of Supreme Court precedent holding that tribal fishermen must not be prohibited from exercising their treaty rights using traditional gear; and
5. It has the practical effect of reducing Quileute's and Quinault's U&As even further, as fishermen cannot follow the sinuous boundaries and will steer far clear to avoid unintentionally crossing them.

The district court's order should be reversed. Because the district court did not follow this Court's mandate, this Court should order it to adopt the boundaries proposed below by Quileute and Quinault, which fairly encompass the trial findings while minimizing the error rate. *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 720 (9th Cir. 1999) (where the district court disregards this Court's mandate, "mandamus is the appropriate remedy"). These proposed boundaries are shown at QER 183-184.

VI. ARGUMENT

A. Standard Of Review.

The Ninth Circuit reviews "de novo a district court's compliance with a mandate." *United States v. Paul*, 561 F.3d 970, 973 (9th Cir. 2009) (citing *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000)).

Questions of law are also reviewed de novo. *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018). "'An appellate cour[t has] power to correct errors of law,'" including those that "'infect . . . a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)). When a finding of fact is based on the application of an incorrect legal standard, including an incorrect burden of proof, the finding cannot stand. *Id.* (citing *Bose*, 466 U.S. at 501)).

The Ninth Circuit also reviews de novo mixed questions of law and fact, including whether, given "the district court's findings of historical fact concerning Indian fishing" (which are accorded clear error review), "disputed waters were usual and accustomed fishing grounds." *Lummi*, 841 F.2d at 319 (citing *Makah II*, 730 F.2d at 1317).[7]

[7] Though it is not necessary for this Court to reach the issue in order to reverse the decision below, a district court's refusal to grant a motion for reconsideration is reviewed for abuse of discretion. *Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d 1291, 1306 (9th Cir. 1994). "A district court by definition abuses its discretion when it makes an error of law." *A.D. v.*

B. The Boundaries Adopted By The District Court On Remand Impose A More Stringent And Prejudicial Standard On Quileute And Quinault Than Has Been Applied To All Other Tribes In *United States v. Washington.*

1. As A Matter Of Law, Tribes Must Not Be Subjected To Different Evidentiary And Legal Standards In Adjudicating U&As.

The district court was obligated to apply "the same evidentiary standards applied by Judge Boldt in Final Decision # 1 and elaborated in the ensuing forty years of subproceedings" to Quileute and Quinault as have been applied to other tribes. *Quileute I*, 129 F. Supp. 3d at 1110 (CL 1.1).

The legal standard for adjudicating ocean U&As accepts some degree of imprecision, with any error favoring the tribes. The "stringent standard of proof that operates in ordinary civil proceedings is relaxed" in U&A adjudications, because if courts *were* to follow the ordinary standard of proof, it "would likely preclude a finding of any such fishing areas." *Lummi*, 841 F.2d at 318, 321 (citing *Makah II*, 730 F.2d at 1317; *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978)). "Documentation of Indian fishing during treaty times is scarce," and what little documentation *does* exist is "extremely fragmentary and just happenstance." *Id.* at 318.

This is especially true in the ocean. Given the limited evidence regarding precise locations where Indians were fishing in the mid-1800s, "[t]here does not

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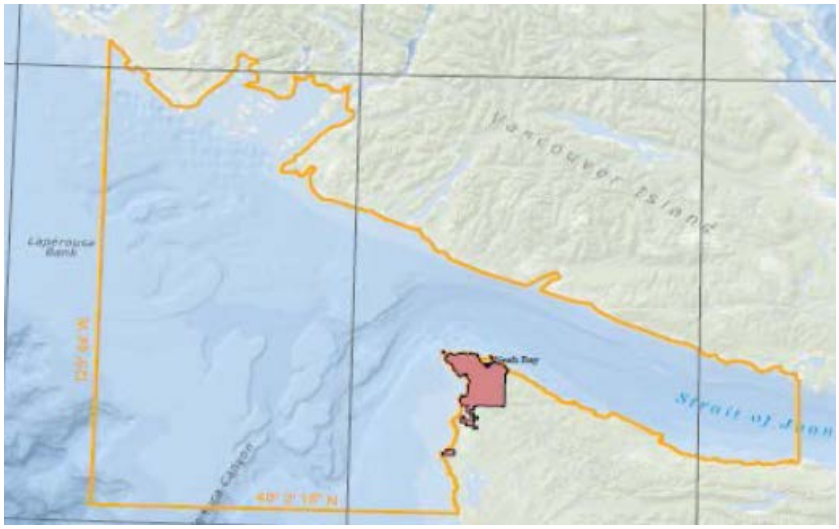
Cal. Highway Patrol, 712 F.3d 446, 460 (9th Cir. 2013) (quoting *Koon v. U.S.*, 518 U.S. 81, 100 (1996)).

appear to be any way to document the precise outer limits of [tribal] offshore fishing grounds at treaty times." *Makah I*, 626 F. Supp. at 1467. For instance, in Makah's 1982 ocean U&A adjudication, the inherent doubts about the precise outer limits of its treaty time fishing area were resolved in its favor by delineating its offshore U&As "in terms of distance offshore that the Makah reportedly navigated their canoes." *Id.* This was "the only feasible way" to draw such boundaries. *Id.* Makah's straight-line boundaries are depicted below:



QER 136, 162.

In its trial decision, the district court here reiterated that "it is not possible to document the precise outer limits of [ocean U&As] with particularity." *Quileute I*, 129 F. Supp. 3d at 1111 (CL 1.7; citing *Makah I*, 626 F. Supp. at 1467) *see also id.* at 1103 ("It is not possible to document the precise outer bounds at which the Quileute regularly harvested fur seals before and at treaty time."); *id.* at 1106 ("[l]ike the Quileute's western boundary, the northernmost extent of Quileute

fishing cannot be ascertained with either precision or certainty."). Consequently, "[r]ather 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.* at 1111. Citing a prior proceeding where Makah's ocean U&A was delineated "as the entire area enclosed within the longitudinal line running forty miles offshore," the district court confirmed that demarcating an ocean U&A in this fashion was "appropriate for present day administration of the treaty right." *Id.* (citing *Makah I*, 626 F. Supp. at 1467; Memo. Op. on Makah Mot. for Recons., QER 658 (1/27/1983)).

As this Court emphasized in its October 2017 opinion, the very definition of "grounds" includes areas which "'could not [at treaty times] have been determined with specific precision and cannot now be so determined.'" *Quileute II*, 873 F.3d at 1167 (quoting *Decision I*, 384 F. Supp. at 332). "[T]he practical reality [is] 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." *Id.* (quoting *United States v. Washington*, 157 F.3d at 644). "Of course, practical difficulties mean that courts need not achieve mathematical exactitude in fashioning the boundaries." *Id.* at 1168.

Adopting mathematically exact boundaries tracing only due west of the coastline is the narrowest and most prejudicial approach possible to delineate a U&A. The law prohibits this approach, absent concrete facts conclusively showing that the subject tribe fished in that impossibly bizarre pattern at treaty time. Such facts simply do not exist. Indeed, the facts and trial findings here were directly to the contrary. No facts have ever allowed—or could ever allow—a court to exactingly and precisely determine that tribal fishermen fished on the open ocean in an absurd, serpentine path such as this at treaty times:

QER 142 (excerpt of Quileute's new boundary).

Indians "went where the fish were to be found. Therefore, the right cannot be limited in any artificial manner to imaginary and unrealistic boundaries within the area of cession." *United States v. Michigan*, 471 F. Supp. 192, 259 (W.D. Mich. 1979) (citing *Choctaw Nation v. U.S.*, 318 U.S. 423, 431-32 (1943)).

Both law and equity require that the same relaxed standard that was applied to Makah and all other tribes in *United States v. Washington* also be applied to Quileute and Quinault. The district court clearly failed to do so here.

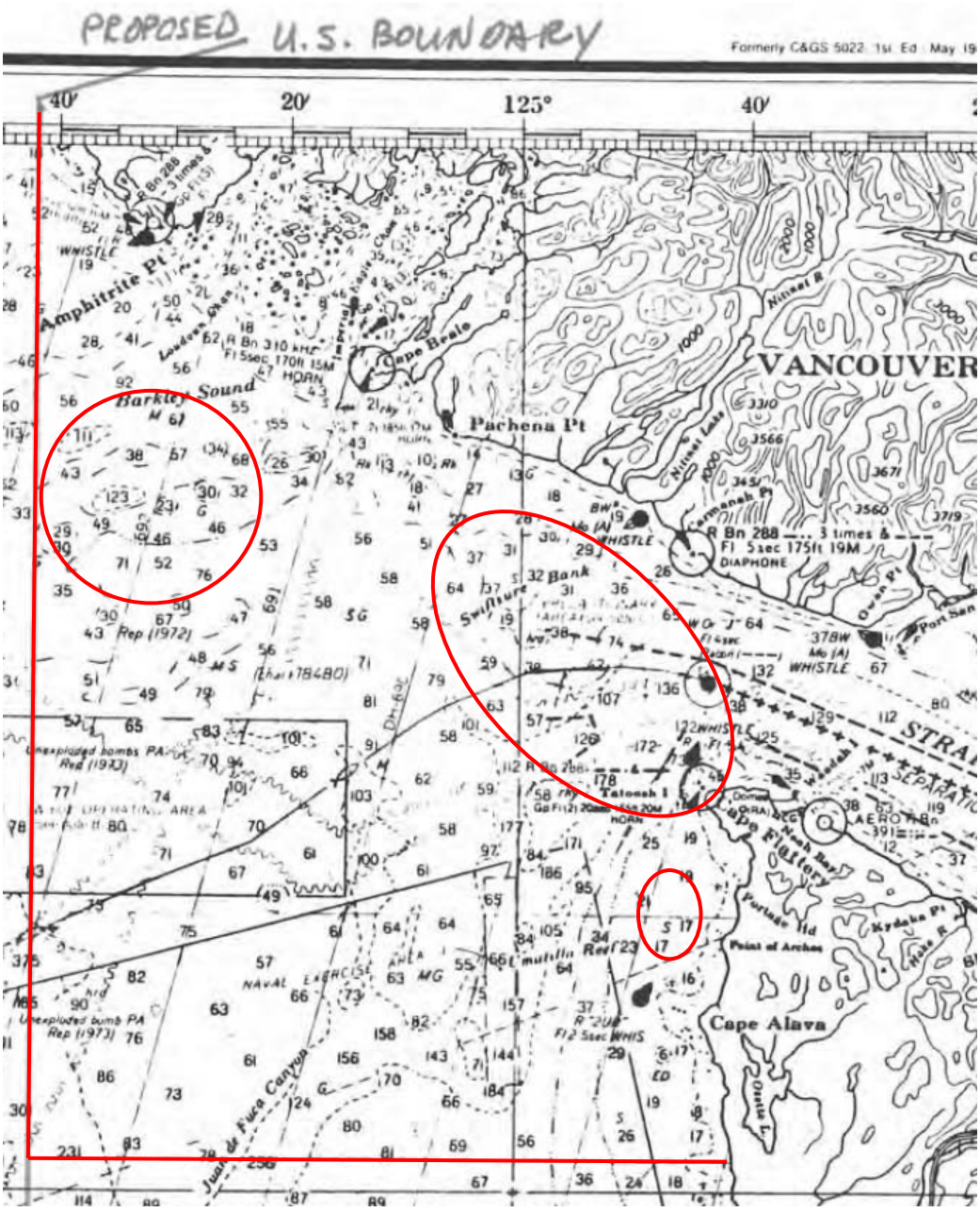
2. Marine U&A Boundaries Have Always Broadly Encompassed Actual Fishing Areas, And Have Never Traced Coastlines.

Quileute's and Quinault's new U&A boundaries are the only ones that track the coastline instead of actual fishing areas. All other tribes' U&As are described in terms of fishing areas—water bodies, inlets, and the like—and the only other adjudicated *ocean* U&A (Makah's) broadly encompasses described fishing banks and whaling areas within an easily-followed straight-line boundary.

a) Makah's U&A Boundary Encompasses Multidirectional 40-Mile Trips From Shore And Greatly Exceeds The Areas For Which It Submitted Evidence Of Specific Fishing Activity.

Correct application of the relaxed standard of proof in Makah's ocean U&A adjudication resulted in broadly-drawn U&A boundaries encompassing all potential multidirectional 40-mile fishing trips Makah could have made from its treaty-time territory, without requiring specific proof. In adjudicating its U&A, Makah presented extremely limited evidence, QER 660-740, proving that it fished

at three isolated fishing banks, shown by red circles below, and indicating generally that it went "out of sight of land" for whales:



Makah Memo. in Supp. of Request for Determination, Attach. 2, QER 672 (10/09/1982) (red circles and lines added by Appellants' counsel).

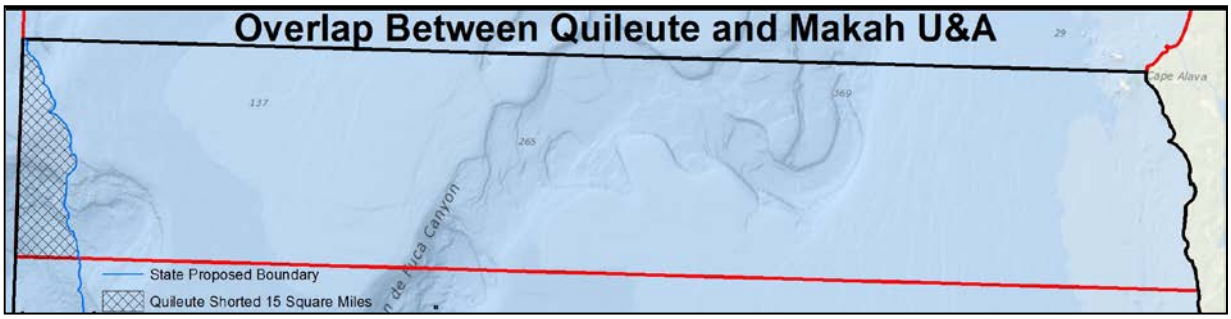
Makah did not submit *any* other evidence supporting its western or southern

boundaries. It identified only one village from which it made these trips—Cape Flattery. As Washington State conceded, there was not "much, if any, evidence of actual fishing" by Makah in the 45 miles south of the bank in the northwest corner of its U&A. State Br., *Makah v. Quileute*, Nos. 15-35824, 15-35827, Dkt. 25-1 at 39-40.[8] The district court in 1982 found that Makah customarily fished 40 miles offshore, but made no specific finding that Makah fished in all directions from shore. Nevertheless, it delineated Makah's western U&A boundary using a straight longitudinal line that more than encompassed 40-mile fishing trips from *all points* along Makah's treaty-time territory. *See infra* pp. 30-31.

For all intents and purposes, the outcomes of Quileute's and Makah's U&A adjudications were identical. These neighboring tribes caught the same migratory species (whales, seals, and halibut) 40 miles offshore at treaty times, using the same techniques. *See, e.g.*, *Quileute I*, 129 F. Supp. 3d at 1085, 1092, 1094 (FF 7.2, 9.6, 10.7). The courts found that neither tribe customarily fished *farther* than 40 miles offshore. *Id.* at 1117; *Makah II*, 730 F.2d at 1315-16, 1318. Both tribes' aboriginal territories share the same westernmost point of land, and their U&As *overlap* off of a nine-mile strip of land just south of that point. But the district court's application of a much more stringent and prejudicial standard to Quileute

[8] The district court here surmised that, in order to support Makah's southern U&A boundary, the court in 1982 must have simply assumed that Makah fished some degree to the **southwest** of its shores. *Quileute I*, 129 F. Supp. 3d at 1109, FF 13.8.

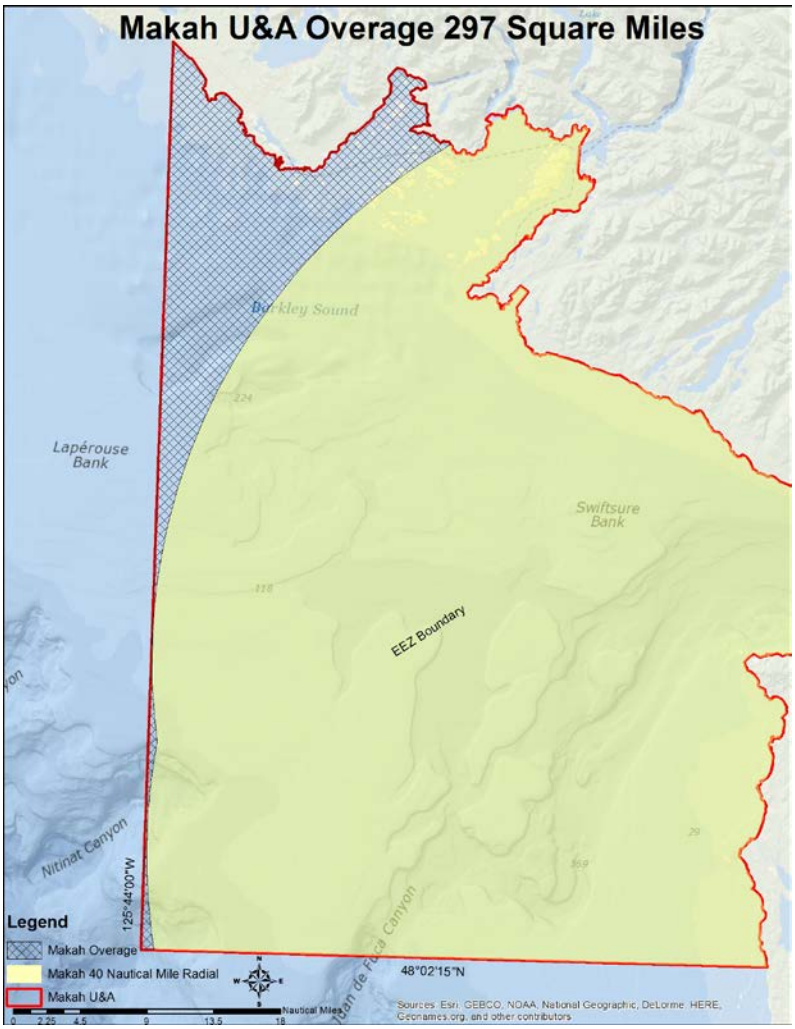
has resulted in drastically reduced fishing boundaries offshore of the *45 miles* of shoreline it occupied at treaty times. This incongruous reduction is highlighted in the northern area where Quileute's "40-mile" U&A overlaps with Makah's:

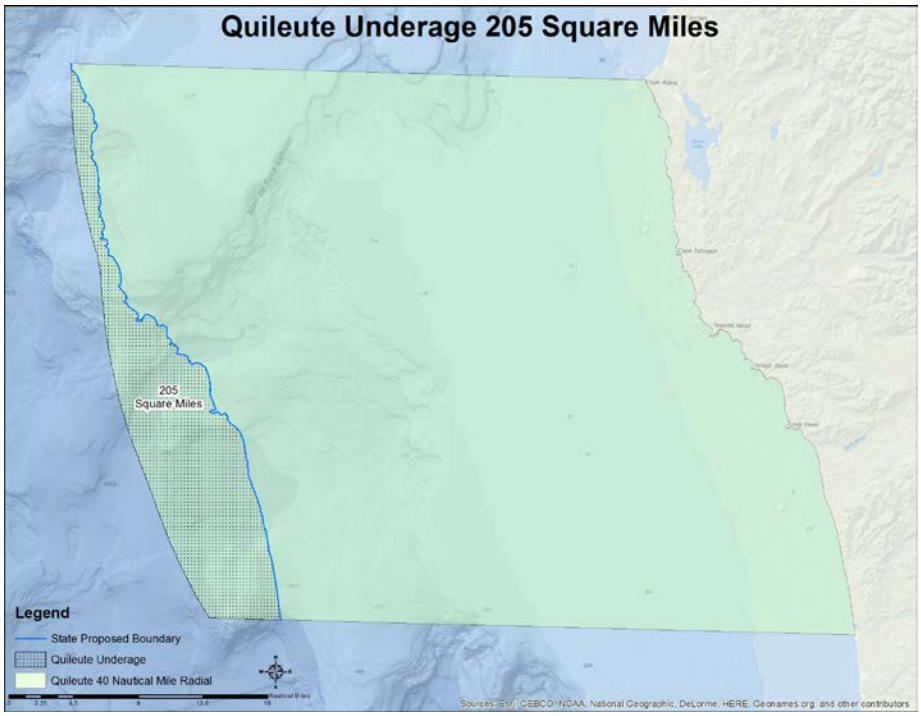


Quileute Mot. for Recons., QER 178 (citing Third Rasmussen Decl., QER 140). In this area alone, Makah's straight-line boundary (shown in black above) gives it 15 more square miles than Quileute in prime fishing area over the continental shelf.

In fact, Makah's longitudinal boundary gives it a U&A greater than 40 miles *due west* of its treaty-time territory at *every point of shoreline* other than the westernmost point. Third Rasmussen Decl., QER 137-138. And, as shown by the maps on the following page, Makah's western boundary allows it to make 40-mile *multidirectional* fishing trips from its aboriginal territory (shaded in yellow)[9]—despite the lack of any trial finding that it did this at treaty times—but Quileute's new western boundary does not—despite the trial finding that it *did* make such trips (shaded in green) at treaty times:

[9] Makah's treaty-time territory did not include Vancouver Island, the body of land at the top of the first map on the next page. *See* Ex. 143 at QER 504.


Makah U&A Overage 297 Square Miles
Barkley Sound
Lapérouse Bank
Swiftsure Bank
EEZ Boundary
Nitinat Canyon
125°44'00"W
48°02'15"N
Legend
Makah Overage
Makah 40 Nautical Mile Radial
Makah U&A
Nautical Miles
Sources: Esri, GEBCO, NOAA, National Geographic, DeLorme, HERE, Geonames.org, and other contributors


Quileute Underage 205 Square Miles
205
Square Miles
Legend
State Proposed Boundary
Quileute Underage
Quileute 40 Nautical Mile Radial
Sources: Esri, GEBCO, NOAA, National Geographic, DeLorme, HERE, Geonames.org, and other contributors

Third Rasmussen Decl., QER 138-139, 140-141. [10]

Under the "multidirectional" approach, Makah's overage amounts to 297 square miles out of its total ocean U&A of 2,676-square miles (a 12.5% error rate). The Ninth Circuit found that the longitudinal line setting Makah's western boundary appropriately tracked the factual finding that Makah customarily fished 40 miles offshore, even though the boundary contains surplus area beyond 40 miles and does not precisely trace the coastline. *Quileute II*, 873 F.3d at 1161, 1169.

Notably, even Makah did not propose a boundary that precisely traced the coastline for Quileute or Quinault in its 2015 proposal. It proposed that Quileute be given the *same* western boundary as Makah in, and extending some miles south of, the area where their U&As overlap, and that the rest of Quileute's U&A be delineated using two additional straight-line coordinates. Makah Proposed Boundaries, QER 301 (7/30/2015); *see also supra* p. 10 (map).

Significantly, Makah's proposed boundary for Quinault *did* encompass 30-mile multidirectional trips from shore, but its proposed boundary for *Quileute* did not encompass 40-mile multidirectional trips from shore. *See* Second Rasmussen Decl., QER 206; Third Rasmussen Decl., QER 145-146. After the district court

[10] In the prior appeal, Quileute and Quinault depicted Makah's U&A as a "box" in their answering brief. *Makah v. Quileute*, No. 15-35824, Dkt. 55 at 112 (10/7/2016). In its reply brief, Makah clarified that its U&A actually extends to the edge of Vancouver Island. *Id.* Dkt. 60, p. 60 n.28. The Ninth Circuit used the "box" depiction of Makah's U&A in its opinion. *Quileute II*, 873 F.3d at 1169.

issued its new boundaries order, Makah quickly abandoned its prior approach and supported the State-proposed boundaries, even arguing against its own proposed boundaries for Quinault from 2015. QER 103-105.

There is no legal or factual basis for Makah's and Quileute's boundaries to differ in the overlap, or for Makah's boundary to use straight lines and Quileute's and Quinault's to trace the coastline with exacting precision. This is especially true considering that Makah offered much less evidence than Quileute and Quinault in establishing its U&A.

b) Other Tribes' U&As Are Described In A Similarly Broad Manner.

Like with Makah's ocean U&A, the marine U&As of other tribes in *United States v. Washington* have also been adjudicated using broad descriptions, as demonstrated by the following examples:

- Suquamish: "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits." *United States v. Washington*, 459 F. Supp. at 1049.

- Lower Elwha: "the waters of the Strait of Juan de Fuca." *Id.*

- Swinomish: "the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island." *Id.*

- Squaxin Island: "the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound." *Decision I*, 384 F. Supp. at 378.

- Upper Skagit: "the following marine and tideland locations: Deception

> Pass, Similk Bay, and southward to and including Penn Cove and Utsaladdy." *United States v. Washington*, 873 F. Supp. 1422, 1450 (W.D. Wash. 1994).

All these marine U&A adjudications broadly encompass all the likely areas where the tribes customarily fished, without a high degree of geographic specificity. None are tied to movable coastlines or drawn with unfollowable, sinuous lines like the new boundaries the district court imposed on remand here.

3. As A Matter Of Law, U&A Boundaries Must Be Fixed *As Of Treaty Times* and Cannot Vary Along With the Modern Coastline.

Variable boundaries violate the Treaty of Olympia, the canons of treaty construction, and the reservation of rights doctrine, and will subject the United States to continuing claims for compensation for lost treaty fishing areas.

"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*." *Quileute II*, 873 F.3d at 1168 (emphasis added). The Treaty mandates that U&A boundaries be fixed *as of 1855*. By instead tying Quileute's and Quinault's boundaries to a moving, modern coastline, the district court's new boundary order violates the Treaty and ensures these Tribes' western boundaries will significantly change over time as the coastline changes. *See United States v. Alaska*, 503 U.S. 569, 584 (1992) (a boundary tied to a coastline is "a base line that is subject to change from natural and artificial alterations"). A treaty establishing boundaries meant to be fixed at the time of

execution is defeated where that boundary changes under a "regime of continually shifting jurisdiction." *Georgia v. South Carolina*, 497 U.S. 376, 396-97 (1990). As a matter of law, these boundaries cannot be variable. "The passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties. . . ." *Decision I*, 384 F. Supp. at 401; *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553, 555 (D. Or. 1977).

The Treaty of Olympia guarantees the right to fish at "*all* usual and accustomed grounds and stations." Substantial trial evidence, discussed on pages 51-52, *infra*, showed that the coastline has changed—and is changing—substantially over time. With sea level rise and erosion, Quileute's and Quinault's boundaries will eventually move eastward, just like the coastline. *See id.*[11] This will inevitably *exclude* westerly treaty areas that are currently *included* even in the

[11] Courts and government agencies have acknowledged the effects of sea level rise and erosion. *See Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007) ("rising seas have already begun to swallow Massachusetts' coastal land"; "[t]he severity of that injury will only increase over the course of the next century"); Wash. Dep't of Ecology, *Washington Greenhouse Gas Emission Reduction Limits*, Pub. No. 16-01-010, at 5 (Dec. 2016), *available at* https://fortress.wa.gov/ecy/publications/documents/1601010.pdf. ("Washington is experiencing long-term, sea level rise everywhere but Neah Bay."); *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, 2015 WL 13729180, at *2 (Wash. Super. June 24, 2015) (same); U.S. Geological Survey, *National Assessment of Shoreline Change: Historical Shoreline Change Along the Pacific Northwest Coast*, pp. 53-55 (2013), *available at* https://pubs.usgs.gov/of/2012/1007/pdf/ofr2012-1007.pdf (discussing significant past and future change in Washington's coastline).

new, flawed boundaries. In addition to violating the Treaty, this result violates the reservation of rights doctrine, which reserves the tribes' right to continue to fish in their customary areas *as of* treaty times. *Fishing Vessel*, 443 U.S. at 678-79 (the treaty language "securing" fishing rights to the tribes is "synonymous with 'reserving' rights previously exercised" by the tribes before the treaties). The most productive fishing is over the shelf break in the deep blue waters. *See infra* p. 49. As the coast moves eastward, that deep water area will be lost.

A constantly changing U&A is clearly not what the treaty parties intended or understood by reserving fishing rights in "usual and accustomed" fishing grounds in 1855. The Tribes "'were to be allowed to procure their food *as they had always done*.'" *Quileute II*, 873 F.3d at 1166 (emphasis added) (quoting *Quileute I*, 129 F. Supp. 3d at 1077). The new boundaries order thus violates the canons of treaty construction deferring to the tribes' understanding of their treaty, because as the coast moves eastward and away from the productive continental shelf break, the variable boundaries will increasingly exclude areas where the Tribes fished at treaty times. *See infra* p. 49; *Tulee v. Washington*, 315 U.S. 681, 684 (1942) ("It is our responsibility to see that the terms of the treaty are carried out . . . in accordance with the meaning they were understood to have by the tribal representatives" who reserved "the right to hunt and fish in accordance with the immemorial customs of their tribes."); *see also Georgia*, 497 U.S. at 396 ("We

doubt that the parties, in drafting the [fixed-boundary] Treaty, meant to create a boundary that shifted so radically each time a new island emerged. . . .").

Courts are not authorized to abrogate the treaty fishing right. Instead, the "taking of access or taking of [treaty] fishing grounds" cannot occur "without an act of Congress." *Muckleshoot Indian Tribe v. Hall,* 698 F. Supp. 1504, 1512 (W.D. Wash. 1988); *see also Confederated Tribes of Umatilla Indian Reservation*, 440 F. Supp. at 555 (citing *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968)) ("In order to nullify treaty rights in this way, Congress must act expressly and specifically."). Courts have consistently enjoined activities that obstruct the tribes' ability to fully exercise their treaty rights. *See, e.g., id.*; *United States v. Winans*, 198 U.S. 371 (1905). Additionally, because "[t]he Tribes' right to take fish is a property right, protected under the fifth amendment," *Muckleshoot,* 698 F. Supp. at 1510 (citing *Menominee,* 391 U.S. at 411 n.12, 412), "an abrogation of [that right] subjects the United States to a claim for compensation," *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 354 (7th Cir. 1983) (citing *Menominee*, 391 U.S. at 404). *See also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 (9th Cir. 2005) (same) (citing 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1505). As Quileute's and Quinault's treaty-secured areas are increasingly taken from them by means of eastward-shifting boundaries tied to an eastward-shifting coast, the loss will subject the United States to claims for

compensation for the taking of these areas. The district court was not authorized to impose boundaries that will abrogate Quileute's and Quinault's treaty areas as the shoreline changes and subject their treaty partner to takings claims.

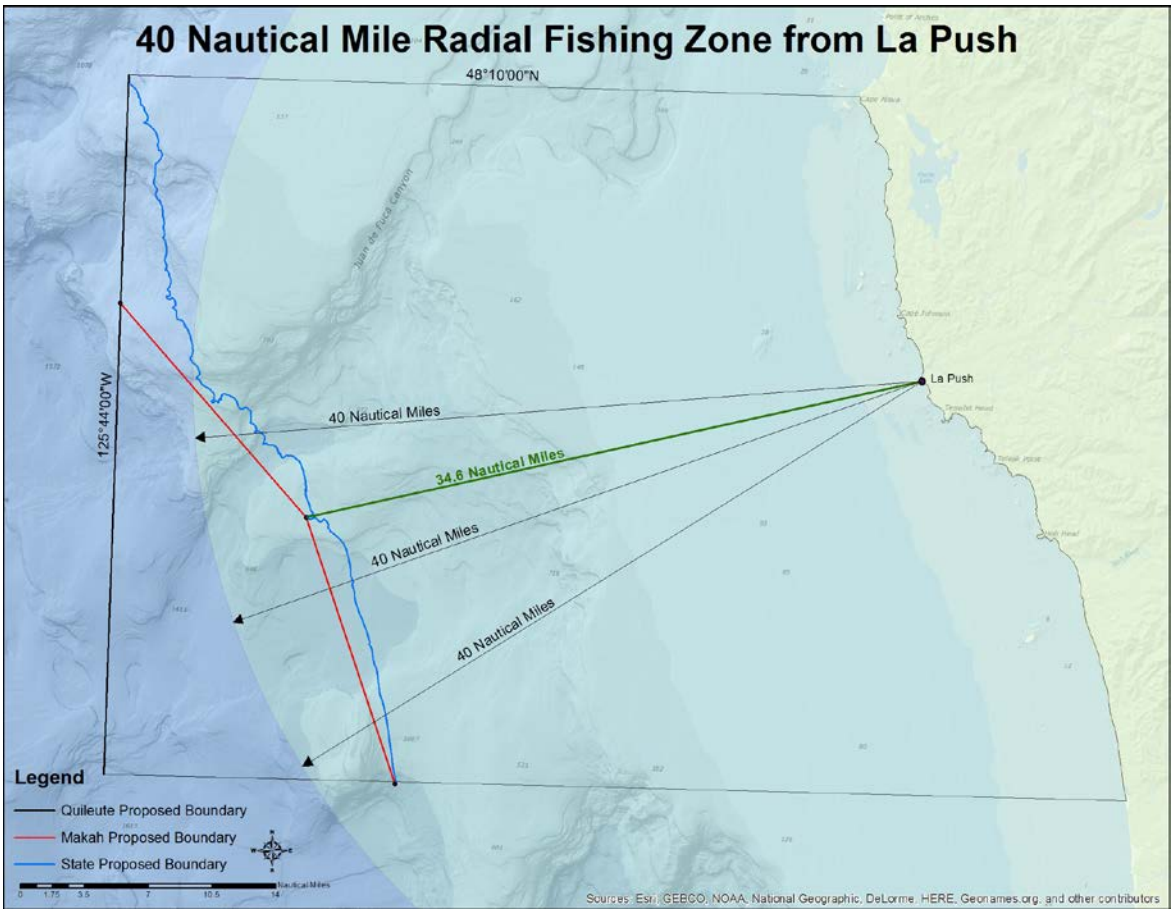
C. The District Court Violated The Ninth Circuit's Mandate By Adopting Boundaries That Are Not Consistent With Its Trial Findings, Preventing Quileute And Quinault From Fishing In 270 Square Miles Of Ocean Where They Customarily Fished At Treaty Times.

1. The District Court Previously Held That Coastline-Tracing Boundaries Are Not Consistent With Its Factual Finding That Quileute And Quinault Did Not Just Fish Due West From Shore.

After the 2015 trial, the district court found that Quileute and Quinault customarily took aquatic species 40 and 30 miles offshore, respectively. Tribal fishermen did not just fish due west, but "were fishing in the waters north as well as south and west of their home." *Quileute I*, 129 F. Supp. 3d at 1109, FF 13.8 (citing *Makah I*, 626 F. Supp. at 1467; Trial Tr., QER 427).

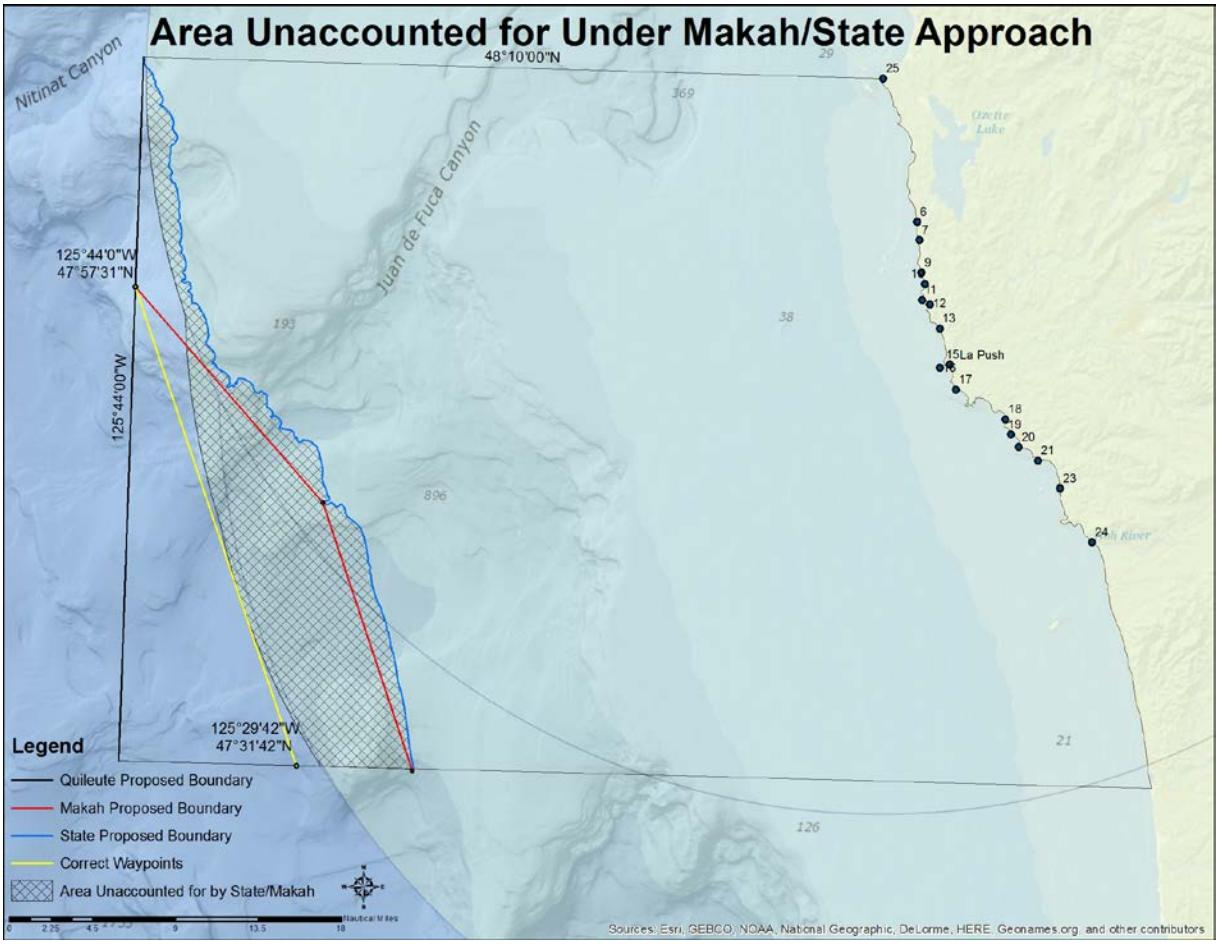
Based on this finding, the district court in 2015 rejected Washington State's proposed coastline-tracing boundaries. QER 200 ("tribal fishermen did not only fish due west of their villages, but moved in all directions from the coastline.") (citing *Quileute I*, 129 F. Supp. 3d at 1109, FF 13.8). It held that coastline-tracing boundaries failed to encompass the 40- and 30-mile trips Quileute and Quinault fishermen made in directions other than due west at treaty times. For example, a trip angled slightly southwest from Quileute's main village (one of many coastal villages) would be cut short at about 34 miles by coastline-tracing boundaries

(shown by a blue line):



Second Rasmussen Decl., QER 204 (8/24/2015).

As shown in the map on the next page depicting Quileute's U&A, Makah's and the State's proposals (shown in red and blue respectively) excluded large swaths of waters encompassed within multidirectional 40-mile trips (shown in light blue shading) from select treaty-time Quileute coastal sites:



QER 225 (citing Second Rasmussen Decl., QER 205-206).

The district court in 2015 found that these maps demonstrated that coastline-tracing boundaries (1) contravened the trial finding that tribal fishermen fished in multiple directions from shore, and (2) excluded large areas in which Quileute and Quinault proved they fished at treaty times. QER 200 ("the Court agrees with the geographical/evidentiary bases for the calculations and conclusions presented by [Quileute and Quinault]").

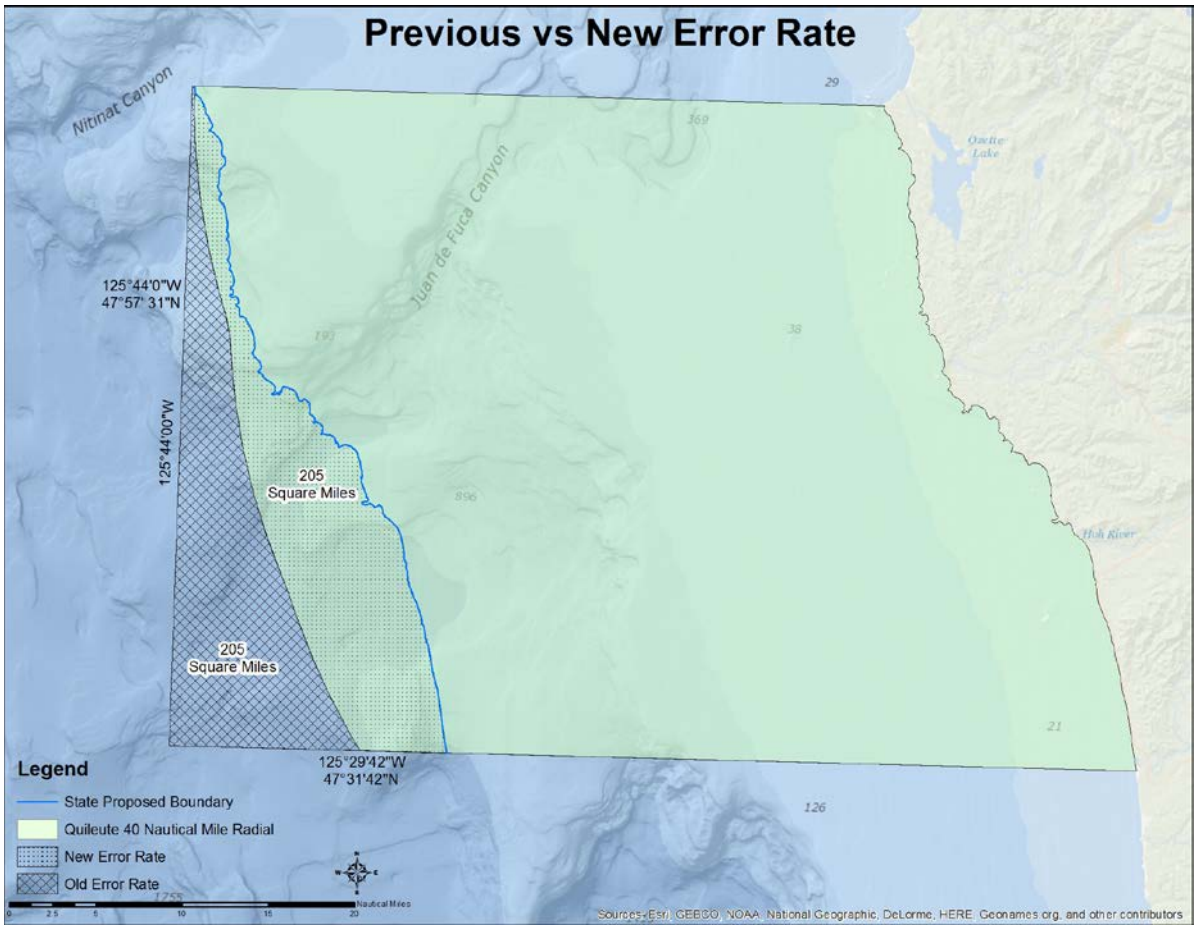
"[T]he boundaries advocated by both Makah and State do not accurately reflect Quileute's or Quinault's U&A western boundaries" because "'Quileute and

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.'" *Id.* (quoting Quileute and Quinault Reply, QER 224).

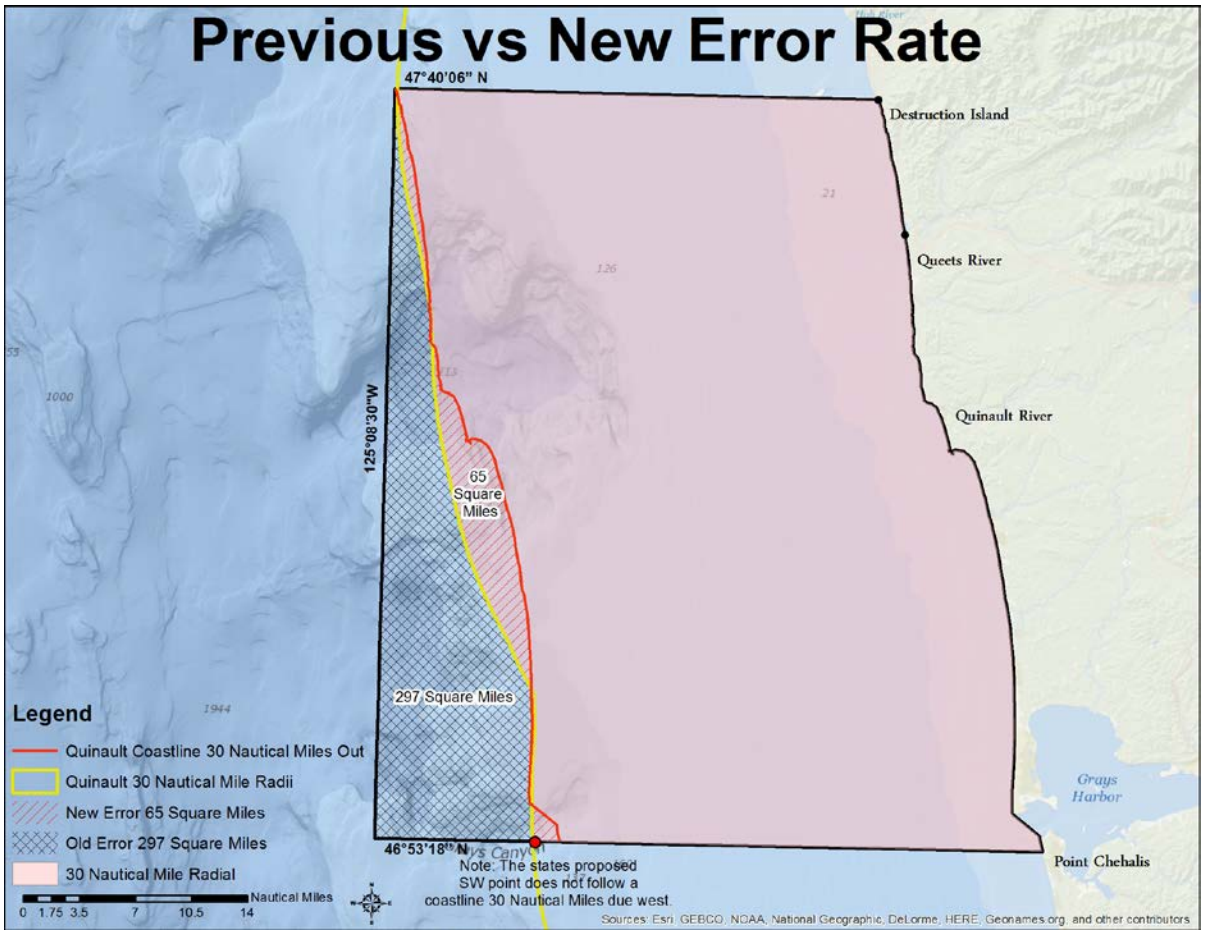
Nothing in this Court's opinion on appeal disturbed the trial findings or the factual bases for the district court's rejection of coastline-tracing boundaries in 2015. This Court acknowledged, and found no fault with, the finding that "tribal fishermen did not only fish due west of their villages, but moved in all directions from the coastline." *Quileute II*, 873 F.3d at 1169. Rather, the reasons for reversal were (1) that the use of longitudinal boundaries left an "evidentiary gap" even after taking the factual findings into account; and (2) that longitudinal boundaries were not the "status quo" method for delineating ocean U&As. *Id.* at 1168-69.

On remand, despite this Court's instruction to adopt boundaries that were "fair and consistent with" the trial findings, the district court adopted the very boundaries that it previously found *conflicted with* its trial findings. The district court did this even though it had an alternative before it that *was* consistent with the findings and the mandate: the yellow-line waypoints described by Quileute in its 2015 boundary briefing. *See supra* p. 10.

The new coastline-tracing boundaries now *exclude* "large swaths of ocean" where the district court previously found Quileute and Quinault *had* "present[ed] sufficient evidence to establish U & A"—the same problem (at the opposite extreme) that caused this Court to reverse the district court's previous boundary order. *Quileute II,* 873 F.3d at 1168-69. In fact, the district court's new error rate is the same as the reversed error rate with respect to Quileute's U&A:



Quileute Mot. for Recons., QER 177 (citing Third Rasmussen Decl., QER 141-142). Quinault's coastline is straighter than Quileute's, but the new order still excludes 65 square miles of its treaty fishing area:



Third Rasmussen Decl., QER 144-145.

As the district court previously held, coastline-tracing boundaries conflict with the trial findings because they only include areas 40 and 30 miles *precisely due west* of the Tribes' treaty-time territories, and fail to reflect the multidirectional 40- and 30-mile fishing trips that the district court found Quileute and Quinault made at treaty times. The new boundaries exclude **270 square miles of ocean** where Quileute and Quinault proved they customarily fished at treaty times.

2. The Trial Evidence And Findings Directly Contradict The New Boundaries.

The district court never found, and no evidence suggests, that Quileute or Quinault fished only precisely due west from their treaty-time territories. Indeed, such behavior would have been bizarre and technologically impossible. Even if they had wanted to confine their fishing trips to a due east-west latitude, ignoring any ocean species they saw to the north or south and fighting against winds and currents to stay on track, it would have been impossible to manage such precise trips in canoes without the aid of compasses or modern GIS equipment.

In their multidirectional journeys from shore, tribal fishermen could not have precisely followed the contours of the coastline once they were out 40 and 30 miles at sea searching for their prey. Land was not visible at those distances, *Quileute I*, 129 F. Supp. 3d at 1096, so it would be impossible for aboriginal fishermen to do this even if they tried.

Instead, as the trial findings state, Quileute and Quinault fishermen targeted migrating species at and over the continental shelf break 40 and 30 miles offshore, and fished in all directions, both from shore and once they were at sea.

a) The District Court Cited No Trial Evidence In Its New Boundaries Order, Instead Relying On Inadmissible Declaration Testimony From A Non-Trial Declarant.

The only thing cited by the district court in support of the new boundaries was the 2015 declaration of Andrew Weiss, GIS staff for the State, filed in support

of the State's coastline-tracing boundary proposal that the court previously rejected. QER 20 (citing Weiss Decl., QER 247-254). Without any qualifications, knowledge, or evidentiary support, Weiss declared that:

> Before the development of modern navigation gear, or even the discovery of how to locate lines of north/south lines of longitude with sextants and accurate timekeeping devices, ancient mariners traveled along lines of latitude using a compass or tracking the position of the sun and stars as the earth turned along an east to west plane of travel.

QER 251. In his declaration, Weiss stated he had "personal knowledge" of its contents (QER 247), but he indisputably did not know how ancient mariners traveled. Weiss is not an expert anthropologist or historian, nor did he participate in any capacity at trial. His claim that tribal fishermen in canoes would (or could) precisely trace the coastline by fishing only in "an east to west plane of travel" using the sun and stars (QER 251) is ludicrous. *Cf.* State closing argument, QER 459-460 (arguing that this was not possible). This is especially clear when one considers tribal whaling, where canoes would be towed by whales with no control over the direction the whales would go. *See infra* p. 48.

After rejecting the State's proposed boundaries in 2015 as *contrary* to how tribal fishermen fished at treaty times, the district court on remand ignored its prior affirmed findings and cited Weiss's uninformed 2015 declaration as support for the proposition that coastline-tracing boundaries are "consistent with how ancient mariners would navigate in offshore waters without aid of modern navigation

tools." QER 20. The court clearly erred in relying on this previously rejected, inadmissible statement on remand, rather than on the trial evidence painstakingly presented in a 23-day-long trial. *See Gray v. Shell Oil Co.*, 469 F.2d 742, 750 (9th Cir. 1972) (opinion testimony without a factual basis in the record is inadmissible).

The other 2015 declaration the district court relied upon on remand was wholly dedicated to explaining how it might be possible to follow "complex" coastline-tracing boundaries.[12] A WDFW enforcement officer opined that "commercial vessels" would be able to follow the complex lines using "advanced navigation tools" equipped with "e.g. electronic chart plotters." Chadwick Decl., QER 256. Canoes are not "commercial vessels." Aboriginal fishermen did not have "modern navigation gear using GPS locating devices." *See id.* They could not have—and would not have—followed these "complex" lines at treaty times.

b) Trial Findings Demonstrate That Quileute And Quinault Fished In Multiple Directions From Shore And Followed Their Prey Over The Continental Shelf Break.

The trial evidence showed that "tribal fishermen did not only fish due west of their villages, but moved in all directions from the coastline." *Quileute II*, 873

[12] The State violated the district court's instructions to submit "longitudinal coordinates" for "the longitudes associated with the U&A boundaries" *Quileute I*, 129 F. Supp. 3d at 1117; it provided no coordinates for the western boundaries it proposed. Given the State's disregard of these instructions and the facially obvious problems with its proposal, Quileute and Quinault did not (and could not) detail the litany of issues with the proposal in the 10 pages they were given to respond to 63 pages of briefs and declarations from Makah and the State. QER 246.

F.3d at 1169; *see also Quileute I*, 129 F. Supp. 3d at 1109, FF 13.8. Tribal fishermen would travel in different directions from shore on these fishing trips, "to the west, and the Northwest, and southwest" from any given point on the shore. Trial Tr., QER 397. There was *no evidence* that Quileute and Quinault only traveled due west, or that they traced the coastline 40 and 30 miles offshore once they were at sea.

Tribal fishermen traveled multiple directions offshore for many reasons. "Like all fishermen, they shifted to those locales which seemed most productive at any given time." *Decision I*, 384 F. Supp. at 352. Quileute and Quinault fishermen chose advantageous launching points from all along their aboriginal coastlines. *See, e.g., Quileute I*, 129 F. Supp. 3d at 1108-09. Because they propelled their canoes by means of cedar sails, winds too would play a factor in where and when they would take off and which direction their canoes would go. *Id.* at 1080, 1090, 1102 (FF 4.7, 8.13, 11.17). Tribal whalers imbued with the whaling spirit power may be told by their spirit power where to go to find whales. *Id.* at 1094, FF 10.6 (citing Ex. 37(a) at QER 474).

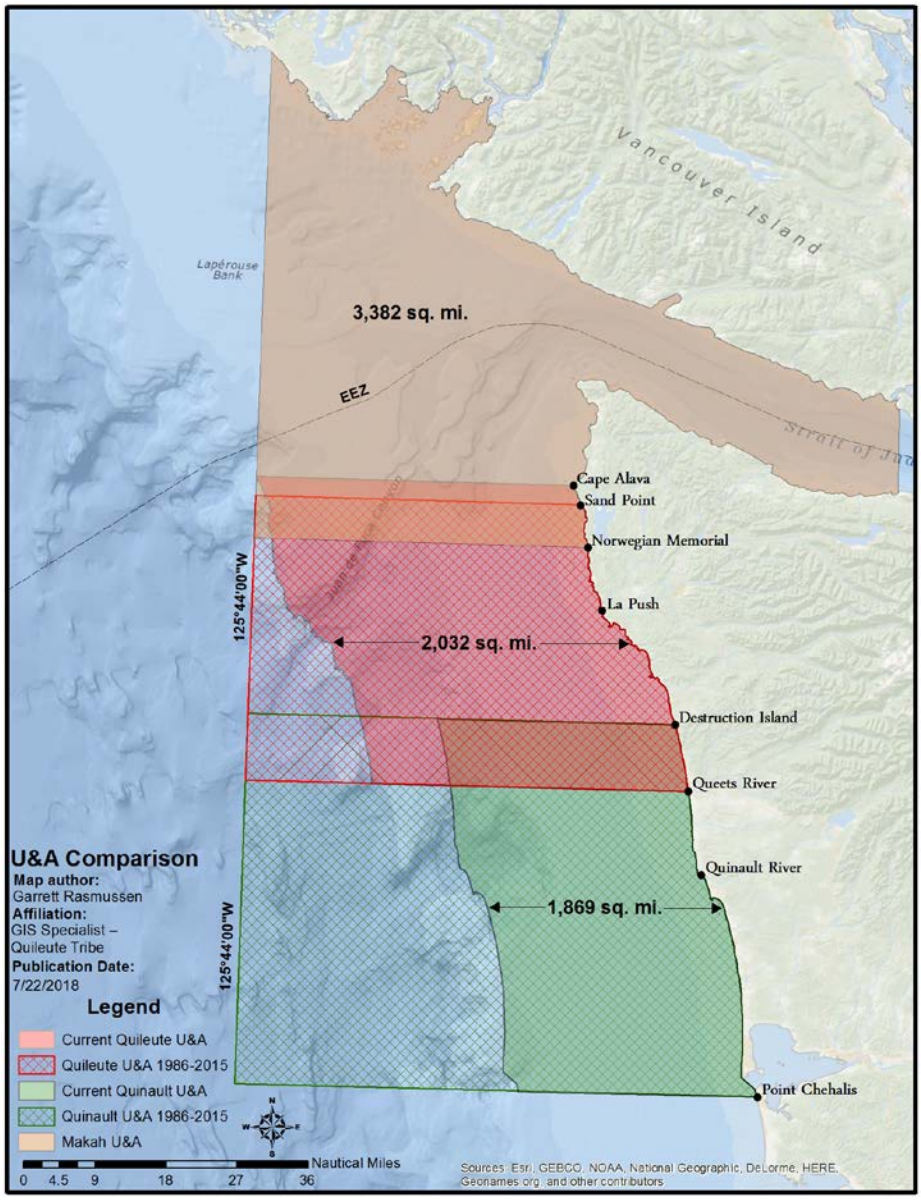
Once at sea, tribal fishermen would scour the ocean to find their prey, and if one spot was fruitless, they would search north, south, and other directions. For example, offshore whaling ventures upwards of 30 miles from shore involved considerable time spent on the water searching in all directions for whales. *Id.* at

1082-85. "A Quinault whaler would spend much of his time on the open water, 'cruising for the animals.'" *Id.* at 1084 (quoting Ex. 213 at QER 527). Whalers "'might spend several days in a fruitless search'" and "'usually found [the whale] out of sight of land.'" *Id.* at 1096 (quoting Ex. 37(a) at QER 474)). In a multi-day search, "'the leader [of the whaling crew] watched [for whales] at night while his men slept.'" *Id.* (quoting QER 474). "[H]unting a whale could require two or three days." *Id.* at 1084 (citing Ex. 277 at QER 593).

Tribal whaling also involved the whale towing the canoe in an attempt to escape after being harpooned. "[O]nce harpooned, [whales] would regularly drag a canoe out of sight of land, for as long as two or three days at sea." *Id.* at 1096; *see also id.* at 1084 (whaling canoes could "expect to be towed many miles out to sea as part of their hunt.") (citing Ex. 260 at QER 574-575; Trial Tr., QER 422). Of course, the direction in which the whale would tow the canoes was unpredictable. *See* Trial Tr., QER 397, 404.

Quileute and Quinault also targeted fur seals beyond the continental shelf—an area containing an upwelling of nutrients that attracted the migrating seals and is still a very productive fishing area today. *Quileute I*, 129 F. Supp. 3d at 1085, FF 6.12 (citing Trial Tr., QER 366); *see also* Trial Tr., QER 343-344. Sealers would search for fur seals along their "centuries-old migration path" located "30-60 miles offshore of the Washington coast." *Quileute I*, 129 F. Supp. 3d at 1098. The sealers

would canoe hours to "get out to what was called xopasida (blue water) – the place where the ocean really gets deep." *Id.* at 1102. These "really deep" waters, depicted in dark blue below, are largely to the west of the new boundaries imposed by the district court:

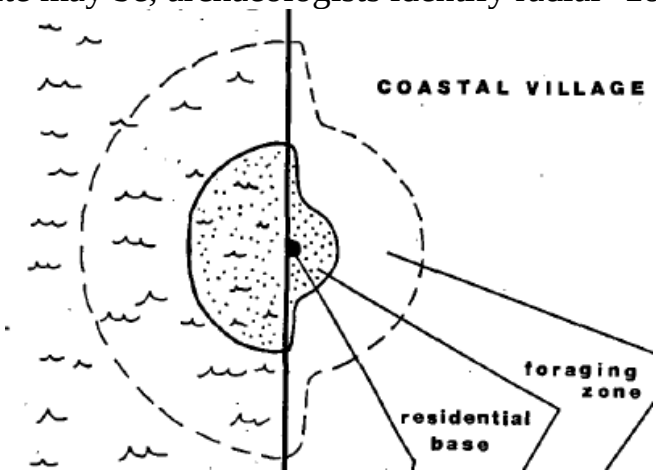


Quileute Tribe, Marine U&A Comparison, https://quileutenation.org/natural-resources/09-1/map/ (last visited Sept. 6, 2018); *see also* Trial Tr., QER 358-364.

Tribal sealers would harpoon fur seals while they slept on the surface of the water over the continental shelf break. *Quileute I*, 129 F. Supp. 3d at 1086, 1100 (FF 7.5, 11.10). As with whales, "the sealers cruised around the open ocean until a seal was sighted asleep in the sun." *Id.* at 1085. "[S]ealers would regularly spend two days at sea during a hunt. . . ." *Id.* (citing Ex. 18, QER 463). The commotion caused by harpooning one seal would scare away any nearby seals. It would take two hours, or about ten more miles' worth of paddling to other areas within the seals' migratory route, to find another sleeping seal. Frachtenberg, Ex. 58(c) at QER 483; Trial Tr., QER 383, 387-88.

Quileute and Quinault targeted their prey, not the coastline. As anthropologist Daniel Boxberger testified, "it is a general rule of fishing cultures the world over that you go where the fish are. . . . And [that] in fact correspond[s] with what we have recorded ethnographically about those activities." QER 380.[13]

[13] This is not a new concept. To identify where archaeological remnants of an aboriginal coastal site may be, archaeologists identify radial "zones" from the site:



The trial findings established that numerous factors drove Quileute and Quinault in multiple directions 40 and 30 miles offshore. There is no evidence that suggests they could (or would) fish only due west.

c) The New Boundaries, Which Will Vary With The *Future* Coastline, Contradict The Trial Findings Establishing Quileute's And Quinault's U&As Based On *Treaty Time* Activity.

The trial decision described the areas in which Quileute and Quinault usually and customarily fished "*at treaty time*" as 40 and 30 miles "offshore." *Quileute I*, 129 F. Supp. 3d at 1117. These Tribes made these 40- and 30-mile journeys from the *1855* coastline, not the 2018 coastline, and not any future coastline.

The trial evidence showed that the coastline has significantly changed since 1855, and will significantly change in the future, due to sea level rise, erosion, and other factors. Albert Reagan, an early schoolteacher for the Quileute, observed in 1917 that "the encroaching ocean has now removed practically the whole area on the Pacific front at [Quileute's main village of] La Push," as well as other Quileute areas. Ex. 247 at QER 557-558. In 1908 he wrote, "the sea has encroached upon the land 300 yards in four years; and the waves now rule supreme where the Indian

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Ex. 428 at QER 642-643. These radial zones can be quite large in the ocean due to "increased travel and transport efficiency," as for example in long-distance or overnight trips to sea. *Id.* at QER 644.

village stood only ten years ago."[14] Ex. 249 at QER 571.

Notably, the district court's new boundaries order tethers Quileute's and Quinault's western U&A boundaries to *whatever coastline exists at any given time*, meaning that these U&As will change in the future along with shoreline change. *See* QER 21 (ordering the boundaries to be measured by "mirroring the coastline at a distance no farther than" 40 and 30 "nautical miles from the mainland Pacific coast shoreline at any line of latitude"). Sea level rise will push the coast—and Quileute's and Quinault's U&As—eastward, **promising to eventually exclude areas that *no one* disputes are these tribes' treaty-reserved fishing areas**.

[14] *See also* Ex. 338 at QER 626 (same); Ex. 339 at QER 632 ("The western margin of the Olympic Peninsula is an uplifted coastal plain being eroded by the ocean"); Ex. 263 at QER 584-85 (the Olympic Peninsula coast "has undergone considerable topographic modification continuing into historic times"); Ex. B128 at QER 656 (charting the reduced length of seven coastal archaeological sites and noting that given the "significant reduction in the size of these sites during the [past] 35 to 40 years," it is likely that "most of these site[s] will be completely destroyed during the next 50 to 100 years" or sooner with rising sea levels); Trial Tr., QER 372 (noting that "a great part of [a Quileute site] was eroded off in the early 1900s. They described the loss of 200 feet."); Ex. 337 at QER 620 (noting that a Quileute site had eroded partially by 1956, and eroded further to "only a small remnant" by 1994); Trial Tr., QER 417; (stating that the Hoh/Quileute "coastline had changed significantly"); Ex. 227 at QER 536 ("The foreshore area around the river mouth seems to have raised in the last century, and the oldest Hoh remember that there was a much longer beach at the river mouth and low tide was much further out."); Ex. B126 at QER 650 ("it is readily apparent that this portion of [Quileute] coastline is being rapidly eroded by the sea"); Trial Tr., QER 447 ("erosion is a problem for every [coastal] archaeological site that is associated with the modern sea level. Only a few of them are not actively eroding."); Trial Tr., QER 453 ("all of the middens that are on active marine shorelines have eroded away.").

Even if it were in any respect appropriate to tie a U&A boundary to a coastline (it is not), the correct coastline would be the 1855 coastline. The new boundaries do not reflect the 1855 coastline because the shoreline has changed significantly over time.

D. As A Matter of Law, Tribal Members Must Not Be Forced To Purchase Modern Equipment In Order To Exercise Their Treaty Rights.

In imposing the coastline-tracing boundaries, the district court relied on the declaration of Dan Chadwick, a state enforcement officer, who opined that "commercial harvesters" could follow "complex regulatory lines" such as coastline-tracing boundaries by using "advanced navigation tools" such as electronic chart plotters. *See* QER 256.

As this Court recently observed, prior laws that required tribal fishermen to purchase modern gear prevented them from being able to fully exercise their treaty rights. "'[D]ue to their extremely limited financial means, [the Indians'] gear necessarily must be obtainable at a minimum of expense. Generally speaking, the Indians are unable to finance the purchase of other more expensive gear and operating equipment,'" which resulted in them being unable to exercise their treaty fishing rights in years when regulations required the purchase of expensive gear. *Culverts*, 853 F.3d at 956-57 (quoting Swindell, *Report on Source, Nature and Extent of Fishing, Hunting, and Miscellaneous Rights of Certain Indian Tribes in Washington and Oregon* 95 (1942)). Non-Indian commercial harvesters typically

have "far superior" capital resources and technology compared to tribal members. *Fishing Vessel*, 443 U.S. at 676 n.22.

Under established Supreme Court law, tribal fishermen must not be required to purchase modern gear just so they can fully exercise their treaty fishing rights—rights secured to them since before that gear was invented. Indians have the right under the treaties to continue to use their traditional methods for taking fish. *See Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (invalidating as discriminatory a regulation that barred fishing by means of nets, as it would prevent tribes from using traditional means to exercise their treaty rights). Likewise, this Court held that prohibiting tribal members who possessed certain kinds of boats from exercising their treaty rights in commercial fisheries "impermissibly hinder[ed] the exercise of Treaty rights guaranteed by the supremacy clause." *United States v. Washington*, 645 F.2d 749, 756 (9th Cir. 1981).

"The right secured by the treaties to the Plaintiff tribes is not limited as to . . . [the] manner of taking [fish]." *Decision I*, 384 F. Supp. at 401. "[T]he Indians preserved unabridged one hundred percent of their aboriginal right to take fish," and their treaty rights cannot be limited so as to "exclude those Indians from their livelihood or prevent them from taking available fish by their traditional fishing methods." *United States v. Michigan*, 505 F. Supp. 467, 495-96 (W.D. Mich.

1980), *modified*, 653 F.2d 277, 278 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981) (applying *Puyallup* in finding a regulation that prevented Indians from using their "traditional gear" "grossly discriminatory").

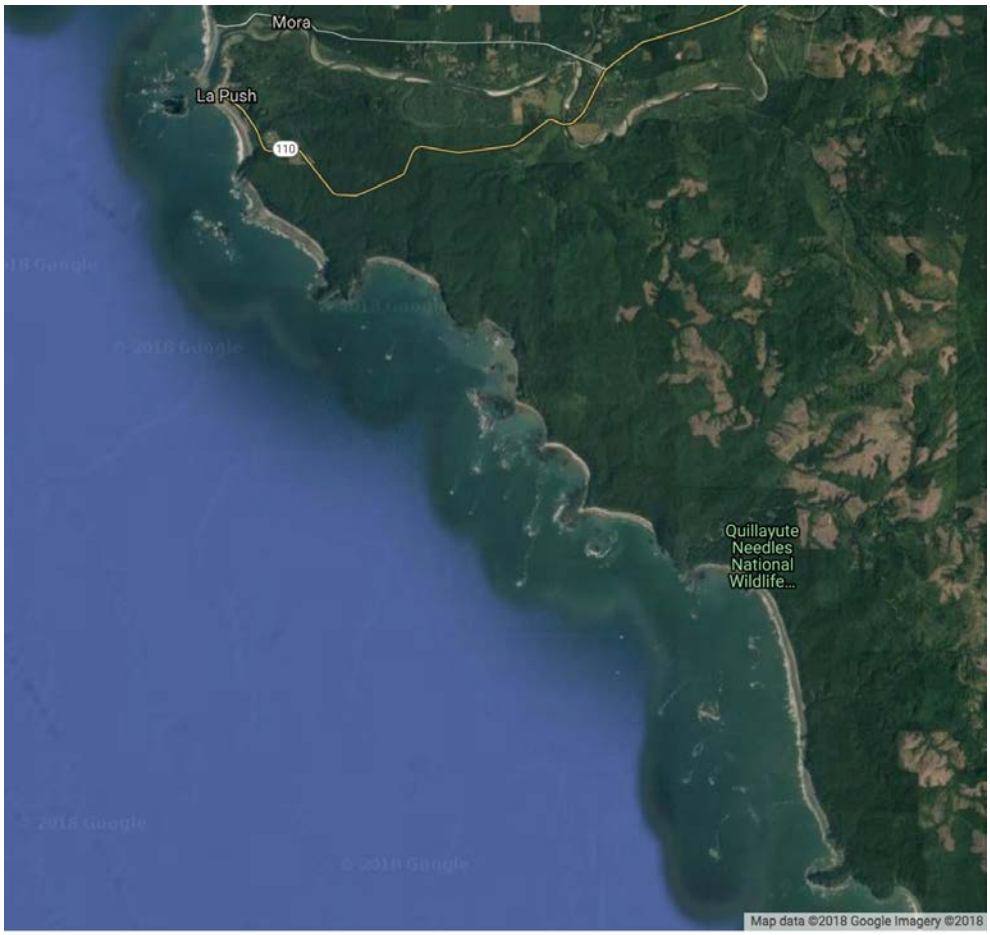
Furthermore, not all tribal fishermen are "commercial harvesters." Tribal members exercise their treaty rights for both subsistence and commercial purposes, and they are not subject to the same regulations as non-tribal harvesters. *See, e.g.*, 50 C.F.R. § 660.50(e) (tribal vessels not subject to other sections of regulations, including 50 C.F.R. § 660.14 (VMS requirements)). Quileute and Quinault fishermen typically have limited means, depending on fishing to make a basic living. *See Quileute I*, 129 F. Supp. 3d at 1088, FF 8.7 (citing Trial Tr., QER 346-348 (Quileute unemployment is at 50%)); *see also* Trial Tr., QER 350-351. Some tribal fishermen still use canoes to fish. *See, e.g.*, Trial Tr., QER 352-353 (describing the canoes the Quileute still carve today); *Woodyer v. U.S.*, 334 F. Supp. 2d 1263, 1265 (W.D. Wash. 2004) (describing a modern Makah whaling trip using a traditional canoe).

The "complex lines" the district court imposed prevent the full exercise of treaty fishing rights by tribal members who cannot afford the "advanced navigation tools" necessary to follow those lines. Such abrogation of treaty rights is not permitted under the Constitution or the Treaty of Olympia. Simple straight lines

from discrete and identifiable points (even with the limited technology available to most tribal fishermen) do not pose the same problem.

E. The Coastline-Tracing Boundaries Will Impermissibly Further Reduce Quileute's And Quinault's U&As As Tribal Fishermen Will Avoid The Risk Of Breaking The Law By Steering Far Clear Of The Boundaries.

Even if tribal fishermen were able to purchase the advanced technological gear described by the State declarants, the sinuous boundaries are not practicable to follow. The cost of erring is significant. For example, fishing outside the boundaries could result in imprisonment or a fine of up to six figures. 16 U.S.C. § 1859(b). It would be impractical and legally risky for any fisherman to attempt to fish along boundaries replicating this shoreline in open ocean sea swells:



Satellite Imagery of Partial Coastline in Quileute Ceded Territory, *available at* https://earthexplorer.usgs.gov/ (enter "Quileute" in Address/Place field and zoom in on result; last visited Sept. 2, 2018).

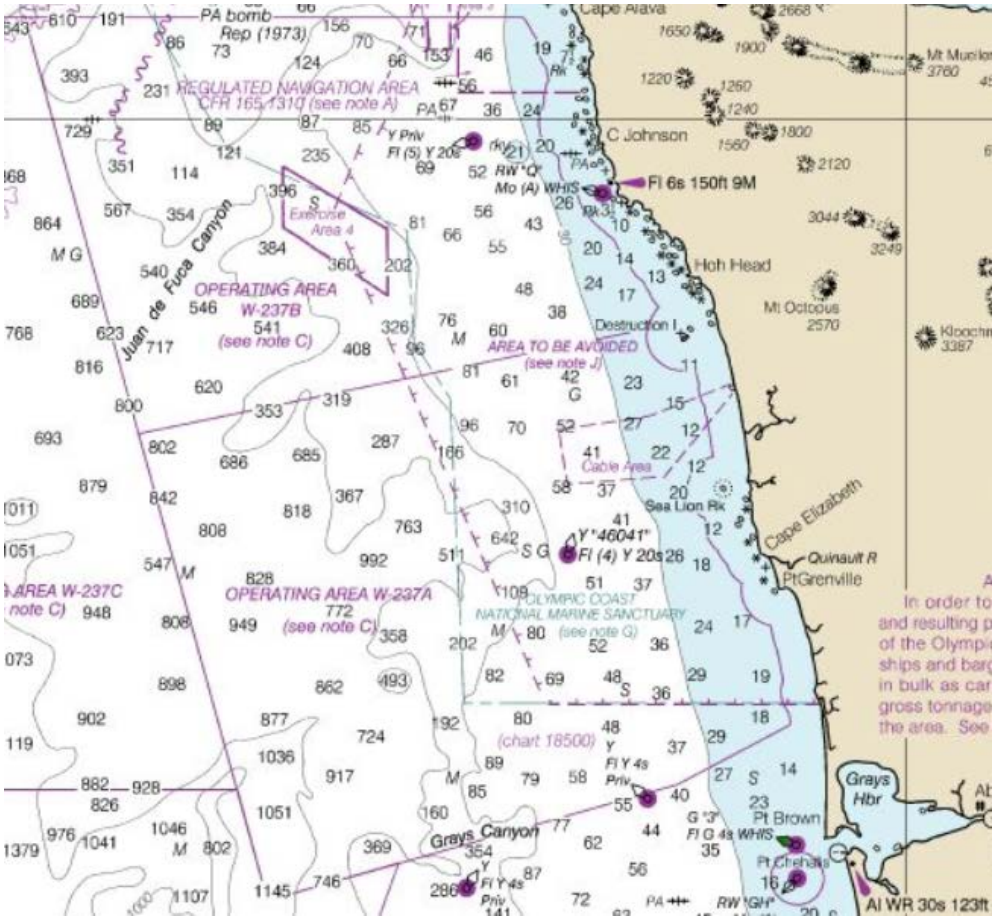
The new boundaries order requires Quileute and Quinault fishermen to ascertain fishing limits by measuring distance (40 or 30 miles) from "the mainland Pacific coast shoreline at any line of latitude" between their northern and southern boundaries. QER 21. The order provides no exact coordinates, does not indicate the tide level at which fishermen must measure the distance, and does not provide any source to rely on to ascertain "the shoreline."

The limits of lawful conduct must be defined so that ordinary people can comply with the law. As in the free speech context, such limits cannot "operate[] to inhibit the exercise" of important constitutionally-protected freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Here, those limits are built quite literally on shifting sands.

The boundaries' meandering and unfollowable contours have the practical result of diminishing Quileute's and Quinault's U&As even further, because rather than try to maneuver their canoes or boats around the outer edges of these boundaries, tribal fishermen will instead reasonably avoid potential error by "steer[ing] far wider of the unlawful zone." *Id*. Responsible fishermen can avoid the perils of crossing the sinuous boundaries "only by restricting their conduct to

that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

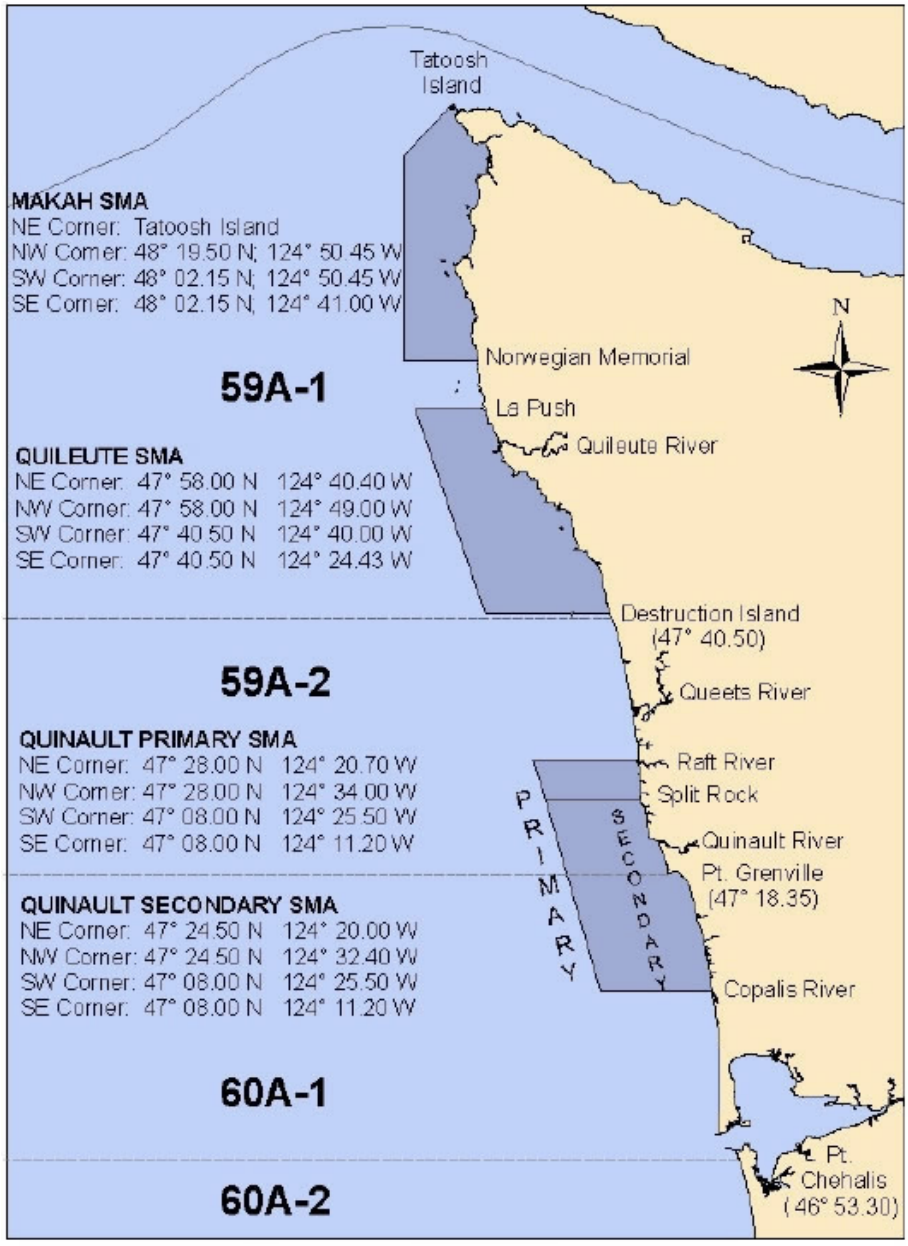
The impracticality of following such complex lines is demonstrated by the fact that no other U&As are described in such a precise manner, *see supra* pages 27-34, and that nearly all other fishing areas in Washington follow straight lines between set, discrete coordinates. For example, representative fishing areas under the Federal Pacific Coast Groundfish Regulations, 50 C.F.R. § 660, subparts C-G, are shown in purple below. They follow straightline coordinates, not sinuous lines tracing the coastline except where required to indicate the state jurisdiction area:[15]



[15] Submerged Lands Act, 43 U.S.C. § 1312 (a coastal state's boundary extends seaward "to a line three geographical miles distant from its coast line.").

Excerpt of NOAA Chart 18007, *available at* http://www.charts.noaa.gov/OnLineViewer/18007.shtml (last visited Sept. 9, 2018).

Tribal crab special management areas too are drawn with straight lines:



2014-2015 Coastal Dungeness Crab Season
Special Management Areas (SMA) Restrictions

Joner Decl., QER 269, 284.

Tellingly, the State proposed far more complex boundaries for Quileute and Quinault than it uses for all the ocean fisheries in which it regulates *non-tribal* State citizen fishing. All such areas follow straight-line boundaries:[16]

- Map of major fishing areas: https://wdfw.maps.arcgis.com/apps/webappviewer/index.html?id=2189646243d6401e85b1e9bb46de5858;

- Commercial crab reporting areas: https://wdfw.wa.gov/fishing/commercial/crab/coastal/graphics/crab_beaches.jpg; and

- Recreational shrimp fishing areas: https://wdfw.wa.gov/fishing/shellfish/shrimp/map.html.

Because Quileute and Quinault fishermen will avoid breaking the law by not attempting to fish in the unfollowable contours of the coastline-tracing boundaries, the new boundaries have the practical and legally impermissible effect of abrogating their treaty rights even further.

F. The District Court Abused Its Discretion In Denying Four Tribes' Motions For Reconsideration, And Should Have Adopted Quileute's And Quinault's Proposed Boundaries On Remand.

Though this Court need not reach this issue in order to reverse the new boundaries order, the district court should have granted the four tribes' motions for reconsideration. Reconsideration is appropriate if there was manifest error in the

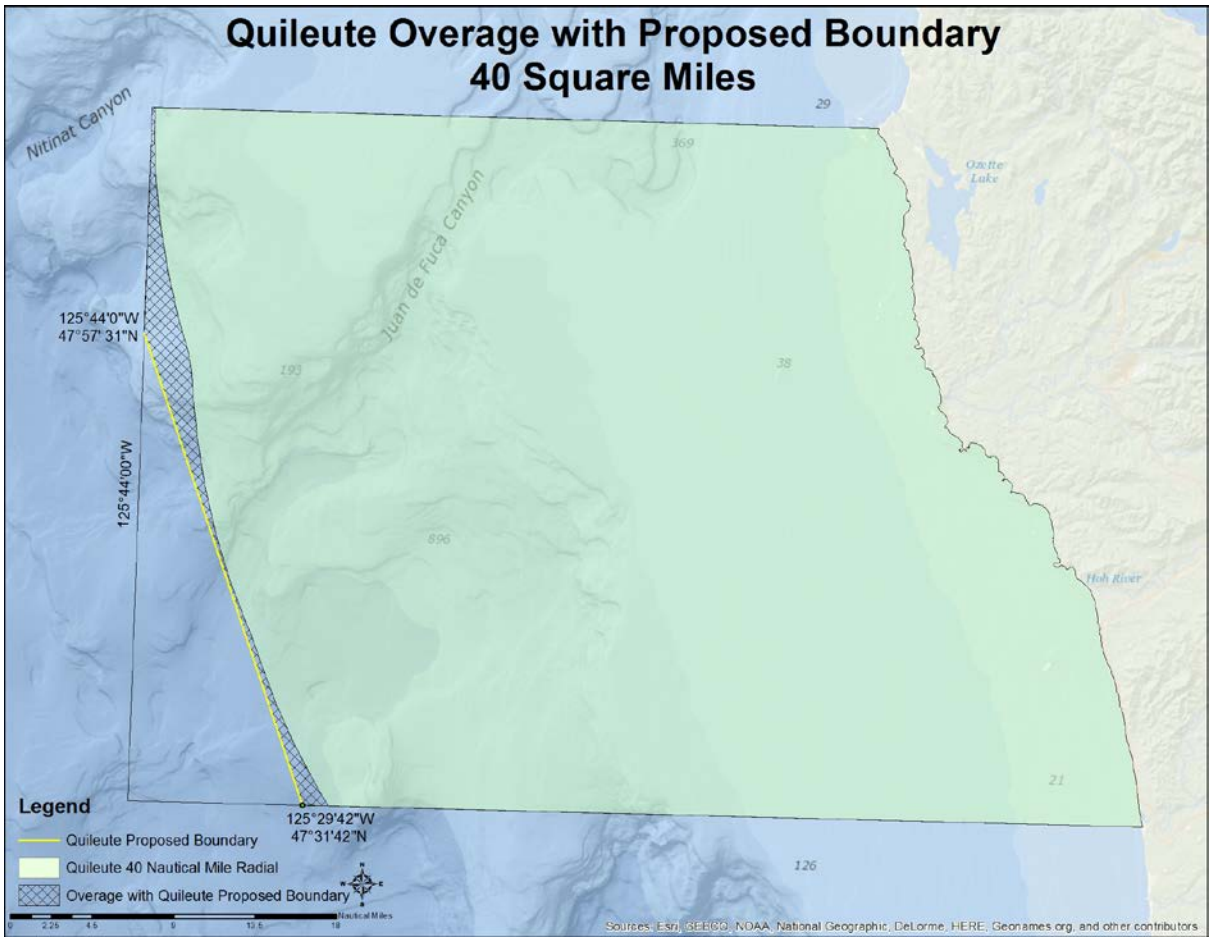
[16] All sites last visited September 9, 2018.

district court's ruling or a showing of new facts or legal authority. Local Rules W.D. Wash. LCR 7(h). "While the denial of a motion to reconsider is reviewed for abuse of discretion, a court abuses its discretion if the legal conclusions underlying the court's determination are clearly erroneous." *First Ave. W. Bldg., LLC v. James (In re Onecast Media)*, 439 F.3d 558, 564 (9th Cir. 2006).

After the district court issued its new boundaries order without hearing from the parties on remand, Quileute, Quinault, and Hoh asked the court to vacate the order to give the parties "the opportunity to propose appropriate boundaries in light of the Ninth Circuit's decision." QER 186 (3/8/2018). They asked for the court to hold a conference, just as it had done in a similar subproceeding remanded by the same panel. *Id.*; *United States v. Washington*, Subproceeding 11-2, QER 189 (2/9/2018) (ordering a conference after remand of *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017)).

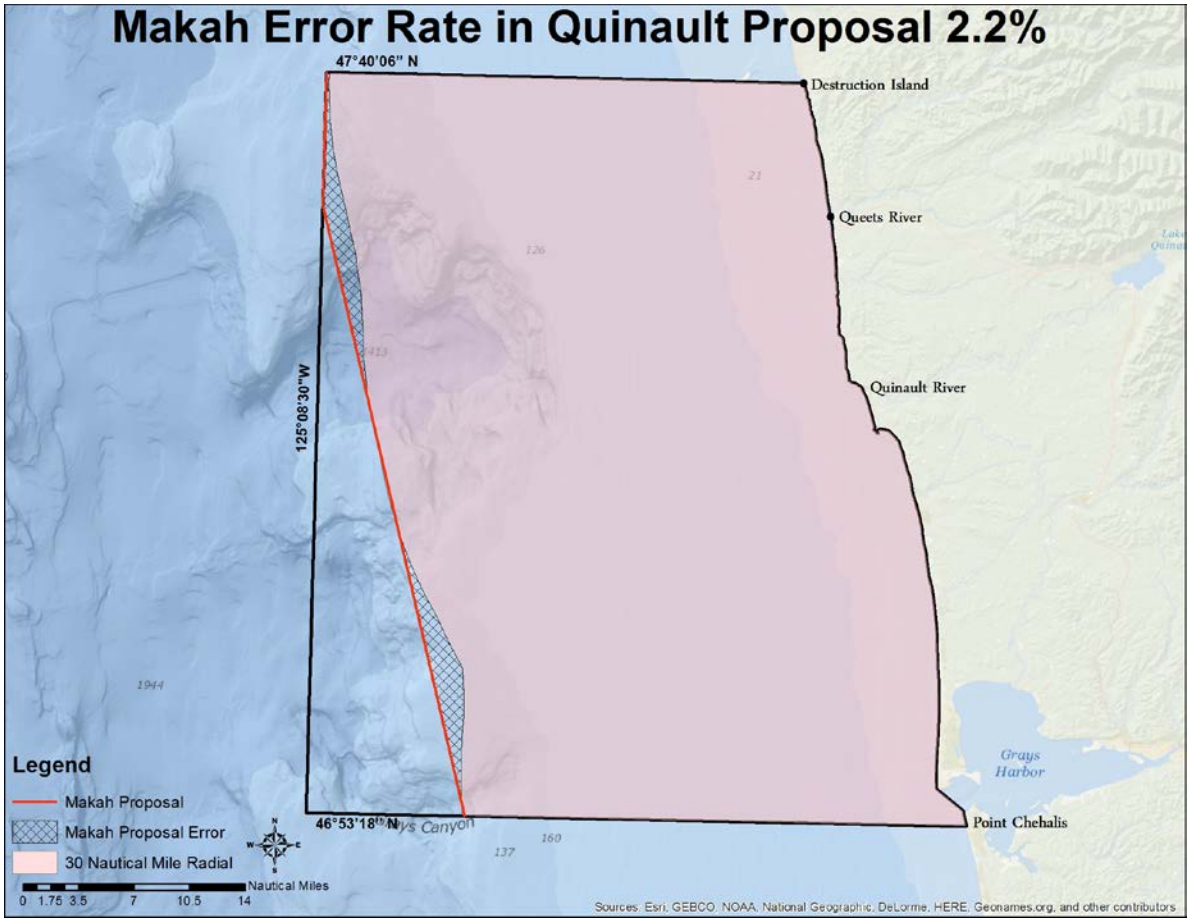
After the district court denied this request, Quileute, Quinault, Hoh, and Suquamish filed motions for reconsideration arguing that, for the same reasons described above in this Brief, the district court's order was manifestly erroneous and unjust. *See* QER 116-21 (Suquamish), 132-133 (Hoh), 123-129 (Quinault), 174-180 (Quileute). Quileute's and Quinault's motions also responded to new facts or law—the Ninth Circuit's decision—in proposing boundaries that "better approximated" the evidence and addressed the Ninth Circuit's concerns regarding

the "error rate." QER 183-184. Quileute proposed the following boundary, reducing the "error rate" to only 1.8%:



Third Rasmussen Decl., QER 143-144. These coordinates adopt the same western boundary line proposed by Makah in 2015 for the top third of Quileute's western boundary. QER 301.

Because Makah's 2015 proposal for Quinault *did* encompass 30-mile multidirectional trips from *its* treaty-time territory, Quinault proposed that the district court adopt Makah's 2015 proposed boundaries. These boundaries have an error rate of 43 square miles, or only 2.2%:



QER 129 (citing Third Rasmussen Decl., QER 145-146).

Quileute's and Quinault's proposed boundaries encompass the trial findings and use easily-followed and enforced straight lines similar to other regulatory areas in the ocean. The fixed latitude and longitude points will not change in the future. They are extremely narrowly tailored to the factual findings, reducing the error rate to just 1.8% and 2.2%, respectively. By way of comparison, Makah's U&A has an error rate of 297 square miles, or 12.5%. *See* map *supra* at p. 31; Third Rasmussen Decl., QER 138-139.

In response to the four motions for reconsideration, the State and Makah advanced a brand new theory that the coastline-tracing boundaries were justified under a precise and prejudicial village- and species-specific evidentiary standard that has been prohibited in *United States v. Washington*.

Specifically, they argued that, assuming the district court was correct that tribal fishermen did not just fish due west, the U&As must be narrowly and precisely drawn based on the specific distances the Tribes fished for *specific species* from *specific villages* in 1855. For example, since Quinault only identified one specific point from shore from which it conducted whaling voyages, that is the *only* point along its 45-mile-long coast from which the district court could assume it whaled. Makah Response, QER 104 (map). Under this theory, if a tribe could prove that it typically went 40 miles offshore for fur seals in 1855, but could not pinpoint a *specific* point from shore from which it did so, the court apparently could not presume *any* fishing area. Even using this approach, however, the coastline-tracing boundaries excluded treaty-secured areas.

The law prohibits imposing this kind of exacting burden on tribes. Ocean U&As must be delineated in a manner that encompasses "the furthest distances to which the tribes customarily traveled to harvest aquatic resources," *Quileute I*, 129 F. Supp. 3d at 1117; *see also id.* at 1111, CL 1.7 (same) (citing *Makah I*, 626 F. Supp. at 1467), not the *precise* distances traveled for *specific species* only from

specific stations along the shoreline.

As Judge Boldt explained, there are problems with requiring exact proof of the points along the shore from which tribal fisherman fished. "Indian fisheries existed at all feasible places," and although fishing stations located at "*permanent* villages are more easily documented," those located elsewhere were not. *Decision I*, 384 F. Supp. at 353 (emphasis added).

Settled authority also prohibits requiring *species*-specific proof:

> it would be extremely burdensome and perhaps impossible for the Tribes to prove their usual and accustomed grounds on a species-specific basis. "Little documentation of Indian fishing locations in and around 1855 exists today." [*United States v. Washington*,] 459 F. Supp. at 1059. If each Tribe were required to prove its usual and accustomed grounds for every species of fish and shellfish, the time and cost to the court and parties would be unreasonably burdensome.

United States v. Washington, 157 F.3d at 644. The Stevens Treaties' fishing right "encompasse[s] all species of fish," "without requiring specific proof." *Midwater Trawlers Co-op.*, 282 F.3d at 717.

Even using this incorrect village- and species-specific approach, Makah conceded that the coastline-tracing boundaries prevent Quileute from fishing in "135.75 square miles [of treaty-secured waters] in the southwest part" of its treaty area. QER 104. Makah miscalculated this number: even using its flawed approach, the correct number is **161 square miles.** Offer of Proof, QER 47, ¶ 8. Makah also conceded that the new boundaries would prevent Quinault from fishing in "24.27

square miles in the central part" of Quinault's treaty area, even under Makah's unduly restrictive approach. QER 104-05.

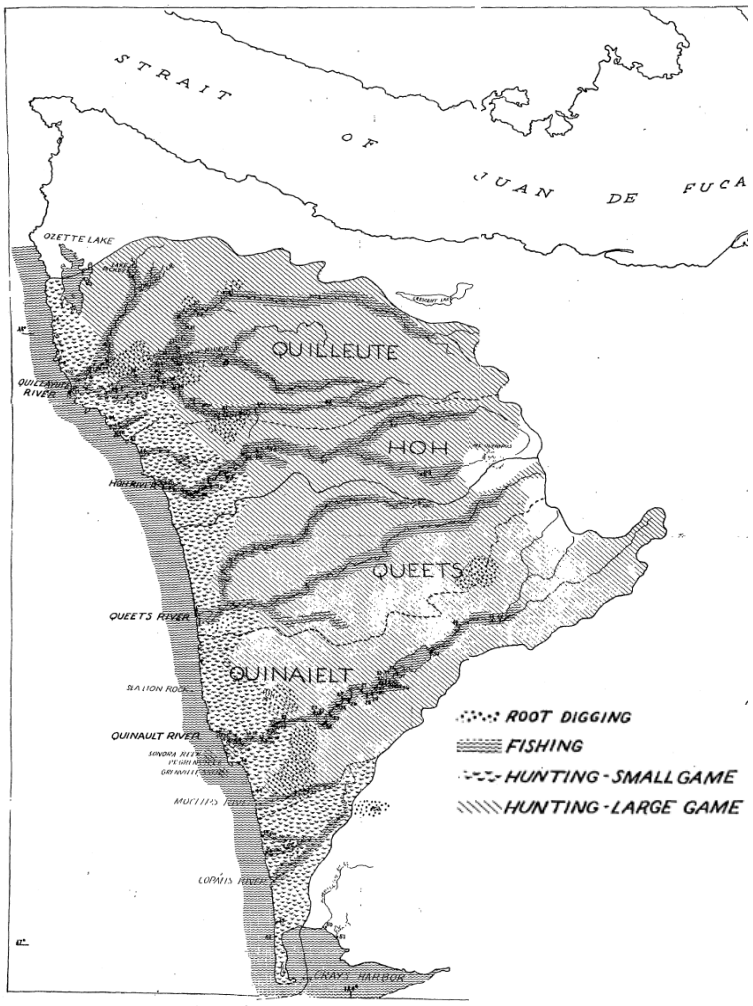
Makah compounded its error by incorrectly representing the evidence. First, it depicted fur-sealing trips from *only two* of Quileute's 16 proven coastal villages. QER 60, 68. The evidence, however, shows that at least *five* Quileute sites were used for fur sealing. *See* Ex. 119 at QER 493-494, 496 (sites 8 (whaling and "taking of other seafood"), 9 (same), 14 (seals), 46 (important village with a good harbor) and 47 ("sea hunting")). Accounting for 40-mile fur-sealing trips from those five villages, the new boundaries exclude Quileute from **180 square miles** of its treaty fishing area, even using Makah's legally impermissible approach. Offer of Proof, QER 47-49.[17]

Further exacerbating the flaws in Makah's village-specific approach were the district court's findings that (1) Quileute and Quinault did *not* confine their launching points to discrete villages, and (2) the village list that Makah relied upon (Exhibit 119) was incomplete.

The district court held that this list of Quileute and Quinault villages "does not provide a full picture of Quileute [or Quinault] use of the coastline. [The author of the list] himself testified that he is certain that his map does not include all of the

[17] This map uses the terms "underage" and "overage" counterintuitively to indicate "over-allocated" and "underallocated" mileage, respectively, in order to respond to Makah's flawed maps in which Makah used this confusing terminology. *See* QER 61-62, 46 ¶ 6.

'village or camp sites that were used in 1855.'" *Quileute I*, 129 F. Supp. 3d at 1109 (quoting Ex. 243 at QER 547). Instead, that author—an anthropologist who studied Quileute's and Quinault's treaty-time fishing—depicted fishing activity off of *every portion* of the tribes' respective coastlines:



Ex. 120 at QER 498-501; *see also Quileute I*, 129 F. Supp. 3d at 1109 (same; noting that "[a]boriginal Quileute fishing along the coastline . . . can also be inferred from Judge Boldt's inclusion" of ocean waters abutting the entirety of its inland U&A). Accordingly, the trial findings were that Quileute and Quinault customarily fished 40 and 30 miles "*offshore*" and "*from shore*," *Quileute I*, 129 F.

Supp. 3d at 1117 (emphasis added), not *only due west* from shore, and not *only from specific villages*.[18]

The district court denied Quileute and Quinault's motion for leave to file a reply to address the numerous legal, factual, and mathematical mistakes in Makah's and the State's new approach to adjudicating U&As. *See* QER 53-54 (Motion), QER 6 (Order). In denying the motions for reconsideration, the district court relied on Makah's legally and factually incorrect maps and arguments. QER 4 ("[f]or the reasons stated by Makah, the approach advocated by the Quileute is not based on appropriate record evidence.") (citing QER 101-109). It abused its discretion in doing so. *In re Onecast Media*, 439 F.3d at 564.

The district court should have adopted Quileute's and Quinault's proposed boundaries, because they followed precisely the Ninth Circuit's instructions on remand and minimized the error rate.

VII. CONCLUSION

Sinuous, coastline-tracing ocean boundaries tied to an ever-changing coast not only are completely unsupported by, and instead directly contradict, the trial

[18] *See also id.* at 1100 ("[C]oastal Indians were harvesting the species off the continental shelf adjacent to their *territories* at and before treaty times"); *id.* at 1082 (Quinault "ranged 30 miles *offshore* in their marine mammal hunts"); *id.* at 1084 ("whaling voyages regularly required Quinault whalers to go up to 30 miles *offshore* on their hunts"); *id.* at 1103 (Quileute regularly fur sealed "40 miles *offshore* at and before treaty time"); *id.* at 1108-09 (noting Quileute fishing activity along the full extent of its coastline); *id.* at 1116 (Makah U&A is 40 miles "*offshore*") (emphasis added in all quotes).

findings; they also are inequitable, manifestly unjust, and legally prohibited. The district court did not follow this Court's mandate. This Court should reverse and remand with instructions to adopt Quileute's and Quinault's proposed boundaries.

Dated: September 10, 2018

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STATEMENT OF RELATED CASES

Appellant Tribes 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:

- *Skokomish Tribe v. Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Squaxin Island Tribe, et al.*, No 17-35760.
- *Muckleshoot Tribe v. Tulalip Tribes, et al.*, No. 18-35441;

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).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 32-1(a) because this brief contains 13,949 words, excluding the parts of the brief exempted by Circuit Rule 32-1(c).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97-2003 Times New Roman 14 point font.

Dated: September 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, I electronically filed the foregoing Brief of Appellants Quileute Indian Tribe and Quinault Indian Nation with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

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