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

REPLY BRIEF OF APPELLANTS QUILEUTE INDIAN TRIBE AND QUINAULT INDIAN NATION

Eric J. Nielsen
NIELSEN, BROMAN & KOCH PLLC
1908 E. Madison Street
Seattle, WA 98102
(206) 623-2488
Attorneys for Appellant Quinault Indian Nation

Lauren J. King
FOSTER PEPPER PLLC
1111 Third Ave.
Suite 3000
Seattle, WA 98101
(206) 447-6286
Attorneys for Appellant Quileute Indian Tribe

John A. Tondini
BYRNES KELLER CROMWELL LLP
1000 Second Ave.
38th Floor
Seattle, WA 98104
(206) 622-2000
Attorneys for Appellant Quileute Indian Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

OTHER AUTHORITIES

TABLE OF ABBREVIATIONS

Acronyms

GIS:	Geographic Information Systems
FF:	Finding of Fact
NOAA:	National Oceanic and Atmospheric Administration
U&A:	Usual and Accustomed Grounds and Stations

Briefs

Opening Br.:	Quileute and Quinault Opening Brief, Dkt. 12
Makah Br.:	Makah Answering Brief, Dkt. 29
Opening Br.:	Interested Parties State of Washington, Port Gamble S'Kallam Tribe, and Jamestown S'Klallam Tribe Response Brief, Dkt. 18

Excerpts of Record

QER:	Quileute and Quinault Excerpts of Record

I. INTRODUCTION

The district court's post-remand order setting western boundaries for Quileute's and Quinault's treaty-time ocean fishing U&As should be reversed. Four undisputed points establish that the coastline-tracing boundaries imposed by the court after remand cannot survive even the most deferential standard of review:

First, the applicable legal standard requires that ocean U&A boundaries be demarcated "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." *United States v. Washington*, 129 F. Supp. 3d 1069, 1111 (W.D. Wash. 2015) ("*Quileute I*") (emphasis added) (citing *United States v. Washington*, 626 F. Supp. 1405, 1467 (W.D. Wash. 1982) ("*Makah I*")).

Second, the district court's trial findings established that (1) Quileute and Quinault customarily made 40- and 30-mile fishing trips, respectively, at treaty times and (2) they made these trips in multiple directions from shore, not only due west. *See* Opening Br. at 46-51.

Third, shortly after issuing its trial decision, the district court determined that coastline-tracing boundaries excluded Quileute and Quinault from large swaths of treaty-secured areas and were *inconsistent with its trial findings*. QER 200.

Fourth, this Court directed the district court to set boundaries on remand that are "fair and consistent with the court's findings" regarding where the Tribes

customarily fished at treaty times. *Makah Tribe v. Quileute Tribe*, 873 F.3d 1157, 1169-70 (9th Cir. 2017) ("*Quileute II*").

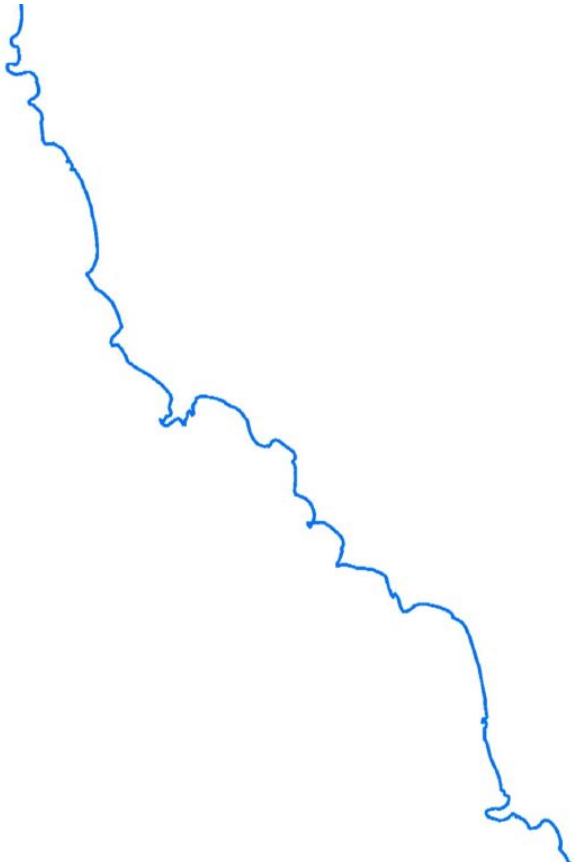
The district court's post-remand order adopting the very coastline-tracing boundaries it found *inconsistent* with the trial findings violates this Court's mandate and excludes Quileute and Quinault from at least **270 square miles** of ocean areas where they customarily fished at treaty times. The complexities of the new boundaries and the fact that they will vary with the eastward-moving shoreline have the practical—and legally prohibited—result of reducing Quileute's and Quinault's U&As even further.

On remand, the district court had one job: establish boundaries that were fair and consistent with the trial findings. *Every* prior boundary proposal presented by the parties had been rejected either by the district court or this Court for being *inconsistent* with the trial findings. The district court also had additional instructions from this Court to address a new factor – "error rate" – that had not been raised in prior U&A adjudications.

Rather than seeking input from the parties on how to address these issues, the district court erred by adopting boundaries it had previously rejected and that result in the *same error rate* as the prior boundaries, but with a much more harmful result: Quileute and Quinault now cannot exercise their fishing rights in hundreds of square miles of waters promised to them under their Treaty. *See* Opening Br. at

42-43. Nothing in this Court's mandate or the trial findings supports such a dramatic overreaction or depriving Quileute and Quinault of huge swaths of treaty-secured ocean areas.

The new boundaries rely entirely on an *impossible* premise: that when Quileute and Quinault made 40- and 30-mile fishing trips, they always happened to end up precisely due west from their coastlines, in this pattern:



See QER 142. In 1855, Quileute and Quinault could not and would not navigate their canoes against waves, winds, and fleeing whales in order to fish precisely due west from shorelines they could not see.

Instead, substantial trial evidence showed, and the district court found, that

tribal fishermen fished multiple directions from shore, not just due west. Makah's and the State's[1] attempts to argue otherwise defy reason. The Tribes pursued fish, not the coastline. Law, fact, equity, and basic logic require reversal and adoption of Appellants' proposed boundaries.

II. ARGUMENT

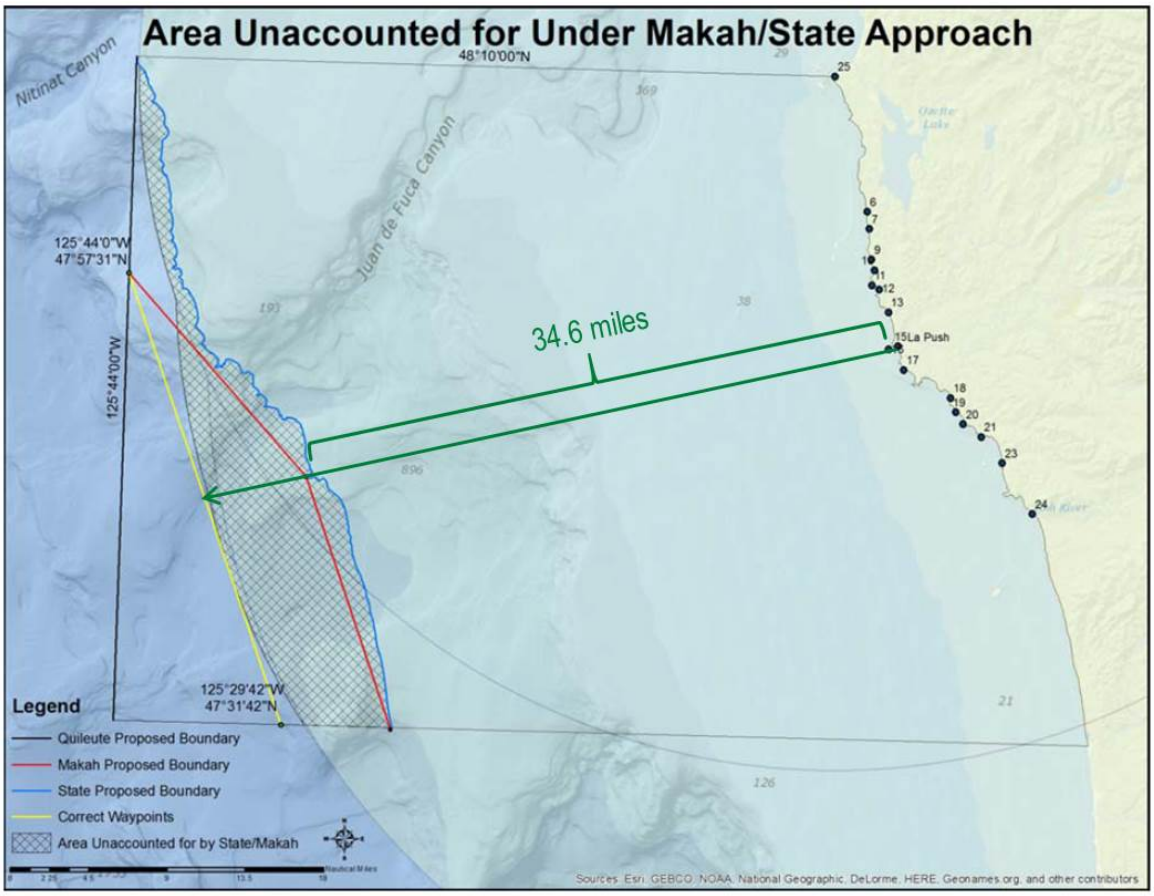
A. This Court Did Not Require Coastline-Tracing Boundaries On Remand.

On appeal, this Court left undisturbed all findings from the 23-day trial, including the finding that tribal fishermen "fish[ed] in the waters north as well as south and west of their home." *Quileute I*, 129 F. Supp. 3d at 1109, FF 13.8. The undisturbed trial findings must form the basis for the new boundaries.

The district court found that at treaty times, Quileute and Quinault customarily took fishing trips 40 and 30 miles offshore of their aboriginal territories. *Id.* at 1117. And, immediately after trial, the district court determined that, given its trial finding that "tribal fishermen did not only fish due west of their villages, but moved in all directions from the coastline," the coastline-tracing boundaries proposed by the State and Makah did not "accurately reflect Quileute's or Quinault's U&A western boundaries" because they would exclude large swaths of treaty-secured waters to the southwest and northwest. QER 200 (citing *Quileute*

[1] Appellants refer to the State and the Port Gamble S'Klallam and Jamestown S'Klallam Tribes collectively as "the State" in this brief. Neither S'Klallam Tribe has any treaty fishing rights in the Pacific Ocean, nor did they participate in any briefing regarding Appellants' U&A boundaries below.

I, 129 F. Supp. 3d at 1109, FF 13.8). In so holding, the district court "agree[d] with the geographical/evidentiary bases for the calculations and conclusions presented by [Quileute and Quinault]," *id.*, which illustrated how coastline-tracing boundaries would prevent the Tribes from continuing their treaty-time practice of making 40- and 30-mile fishing trips in directions other than due west, as shown for Quileute in the hatched area below:



QER 206 (green arrow and label added).

On appeal, this Court took no issue with the district court's repeated findings that Quileute and Quinault fished multi-directionally from shore. Rather, this Court found that the coastline's eastward curvature caused the longitudinal-line

boundaries that the district court initially adopted to have an excessive "error rate," *even when taking into account* 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 1168-69. This "error rate" was caused by the longitudinal boundaries extending beyond potential 40- and 30-mile multidirectional fishing trips, as illustrated for Quileute in the above map in the area to the left of the yellow line.

Contrary to Makah's and the State's assertions, Makah Br. at 2-3, 14-15, 26, 32 n.6; State Br. at 20-21, this Court did not adopt Makah's erroneous calculations regarding the error rate associated with the longitudinal boundaries, and did not prescribe coastline-tracing boundaries on remand. Makah and the State misconstrue this Court's *summarization* of Makah's estimates of the error rate associated with the longitudinal boundaries as an *adoption* of those estimates. However, the context and clear wording of this Court's opinion demonstrate that it neither adopted Makah's erroneous estimates nor prescribed coastline-tracing boundaries on remand. The paragraph at issue begins, "*The Makah* takes issue with the court's use of a straight vertical line because the coastline trends eastward as one moves south." *Quileute II*, 873 F.3d at 1168 (emphasis added). The Court then continues to summarize how "Makah calculate[d]" the error, without adopting Makah's argument. *Id.*

The Court begins its *analysis* of the argument in the *next* paragraph, taking

issue with the disparities caused by the longitudinal lines but recognizing that "practical difficulties mean that courts need not achieve mathematical exactitude in fashioning the boundaries." *Id.* This Court did not instruct the district court to set boundaries tracing the coastline or otherwise reduce Quileute's and Quinault's U&As by 413 and 387 square miles, as it might have done had it adopted Makah's erroneous calculations. Instead, the Court ruled that "the law does not dictate any particular approach or remedy that the court should institute." *Id.* at 1169. It instructed the district court to "better approximate" its findings by setting new boundaries that are "fair and consistent with the court's findings" regarding where the tribes were engaged in usual and accustomed fishing in 1855. *Id.* at 1169-70.

Nothing in this Court's opinion indicated that it disagreed with the findings that Quileute and Quinault fished 40 and 30 miles offshore in directions other than due west. Nor did this Court take issue with the district court's finding that coastline-tracing boundaries would *exclude* the Tribes from large portions of treaty-secured waters. Instead, it instructed the district court to set new boundaries *consistent with the trial findings* and that addressed this Court's concern about overinclusion in the southwest corner of the area encompassed by the previously-set longitudinal lines.

B. No Facts Support The District Court's Adoption Of The Coastline-Tracing Boundaries It Previously Rejected As Inconsistent With Its Trial Findings.

In violation of the mandate to set boundaries that are "fair and consistent with the court's findings," the district court adopted the *same* coastline-tracing boundaries that it had *already held were inconsistent* with its trial findings.

In its first boundaries order, the district court relied on its trial decision in unequivocally finding that coastline-tracing boundaries "*do not accurately reflect* Quileute's or Quinault's U&A western boundaries" given the reality that they "did not robotically fish at locations directly west from their villages." QER 200 (emphasis added; internal quotation and citation omitted). Its post-remand order paradoxically stated that coastline-tracing boundaries are "*consistent* with how ancient mariners would navigate in offshore waters without aid of modern navigation tools." QER 20 (citing the State's post-trial *briefing* but *no trial evidence or findings*). Nothing warranted or justified this evidentiary about-face.

The State disingenuously claims that "[i]t is unclear why the district court made this statement in the 2015 boundary order, because the statement was not used to justify the longitudinal boundaries that extended for miles beyond the 30 and 40 mile findings." State Br. at 19 n.3. But the district court's point was clear: boundaries that trace the coastline *contradicted* the trial findings. QER 200.

The State and Makah cannot explain the about-face in the district court's

orders, or reconcile its conflicting opinions. The district court's first boundaries order stated unequivocally that the coastline-tracing boundaries *did not* encompass the full extent of Quileute's and Quinault's U&As because the Tribes "did not only fish due west of their villages, but moved in all directions from the coastline." *Id.* No evidence supports that the Tribes could or would have fished only due west or that they inexplicably confined their ocean fishing to an invisible boundary that traced an invisible coastline. Simply put, there is no possible set of facts that would support the new boundaries.

For all the hypothetical arguments Makah and the State now throw behind the coastline-tracing boundaries, not one of their four expert witnesses, and not one of the 472 trial exhibits, even hinted that *any* tribe would fish by somehow tracing the shape of the invisible shoreline. The State did not cite *any* trial evidence or trial finding supporting these boundaries in 2015, and now seeks to downplay the only "evidence" it *did* rely on—the uninformed opinion of its GIS staff that "ancient mariners traveled along lines of latitude" using just a compass or the sun and stars. QER 251. The State now does not dispute that its declarant—who did not participate at trial—was unqualified to opine on ancient mariners, instead insisting that the inadmissible testimony "did not form the backbone" supporting the revised boundaries. State Br. at 16 n.2. But this testimony was the *only* supposed "evidence" of fishing activity relied on by the district court. QER 20 (citing Weiss

Decl., QER 247-254). The district court cited no trial evidence or trial finding, despite this Court's mandate to conform the boundaries to those findings.

Recognizing this serious flaw, the State now searches in vain for trial evidence that this bizarre manner of fishing was indeed possible, and in fact *probable*. But its citations to trial evidence that tribal fisherman knew and traveled in the deep ocean waters only serve to highlight the stark absence of *any* evidence suggesting that these Tribes fished due west at treaty times. State Br. at 12.

The State also asserts that the use of latitude lines for Appellants' northern and southern boundaries somehow supports an exclusively due east-west plane of travel. *Id.* at 13. At most, these boundaries support drawing *straight-line*, easily navigable boundaries that fully encompass the outermost extent of tribal fishing at treaty times.

Effectively conceding that the coastline-tracing boundaries do not reflect any possible form of actual fishing activity, Makah posits that actual fishing evidence is *immaterial*. First, it argues that the district court based its U&A determinations not on actual fishing activity, but instead "principally" on the location of the continental shelf, or on distances "associated with" whales and seals. Makah Br. at 33-36. Makah's selective citations misrepresent these features as being closer to shore than the district court found, omitting the express findings that they were located in sprawling mile ranges extending up to 60 miles offshore. *Compare id.*

with Opening Br. at 46-50 *and Quileute I*, 129 F. Supp. 3d at 1097, 1098, 1101 (whales associated with Quileute harvest are found "20 to 50 miles offshore," seals migrate "30-60 miles offshore" and sealing takes place "in the 100-mile stretch of open sea" between Queets River and Cape Flattery) (internal quotation and citation omitted). Moreover, the district court expressly based its trial determinations on "the extensive evidence presented at trial showing the furthest distances to which the tribes customarily traveled to harvest aquatic resources including finfish, fur seals, and whales, at treaty time." *Quileute I*, 129 F. Supp. 3d at 1117.

Second, Makah argues that *determining* usual and accustomed fishing areas and setting boundaries *describing* those areas are "distinct tasks" permitting the court to eschew evidentiary concerns in setting boundaries. Makah Br. at 27, 39-40. Makah does not contest that Quileute and Quinault did not fish precisely due west, or in a manner that would trace their respective coastlines, at treaty times, but argues it is irrelevant. Courts disagree: "[t]he 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 relaxed evidentiary standard for U&A determinations must apply *both* to determining how far the tribes customarily fished and to drawing the outer boundary of where they fished. Indeed, the district court originally rejected coastline-tracing boundaries precisely because

they conflicted with the evidence of how *actual* fishing took place. QER 200.

Third, Makah asserts that the route the Tribes took does not matter, and that the crux of the inquiry is where they ended up. Makah Br. at 5, 25. This does not solve Makah's problem. Even disregarding the *path* the Tribes took to arrive 40 and 30 miles from shore, there is no basis to conclude that once tribal fishermen *arrived* 40 or 30 miles offshore, they would coincidentally be located precisely due west from a particular point of shoreline, and would then fish by tracking a coastline that they could not see, resisting being pulled by a whale, or drifting, or pursuing fish in other directions. It is impossible that the 40- and 30-mile fishing trips that Quileute and Quinault made at treaty times always by pure chance or happenstance culminated 40 and 30 miles *due west* of coastline, and not to the *northwest*, or *southwest*, of the coastline.

C. As A Matter Of Law, The District Court's Order On Remand Must Be Reversed.

The district court's imposition of mathematically precise boundaries tied to a modern coastline reflects several errors of law. Makah and the State cite no legal support for these boundaries, instead resorting to arguments that this Court and others have previously rejected.

1. The District Court Imposed A Legally Prohibited Evidentiary Standard.

In its trial decision, the district court thoroughly described the Tribes'

fishing activities in the "open ocean" north, south and west of their homes, including being physically towed at "racing speeds" by whales, with no mention of following the coastline. *Quileute I*, 129 F. Supp. 3d at 1081-1103; Opening Br. at 46-51. Makah and the State now protest that this is not enough evidence to prove that Quileute's and Quinault's 40- and 30-mile fishing trips culminated anywhere but precisely due west of the coastline. What more would a tribe be required to prove, and—short of a precise map of the exact contours of the tribe's ocean-going travels drawn in 1855 by an omniscient settler—*how* could a tribe prove more?

It is well-established that the "stringent standard of proof that operates in ordinary civil proceedings is relaxed" in U&A adjudications because available evidence of treaty-time fishing activities is "extremely fragmentary" and "less satisfactory than evidence available in the typical civil proceeding." *United States v. Lummi Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988). Treaty fishing grounds thus include areas which "cannot now be [] determined" "with specific precision," *id.* (internal quotation and citation omitted), but rather are indicated by either "direct evidence" or "reasonable inferences," *Makah I*, 626 F. Supp. at 1531. "[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." *Quileute II*, 873 F.3d at 1167 (quoting *United States v. Wash.*, 157 F.3d 630, 644 (9th Cir. 1998) ("*Shellfish*")).

The relaxed evidentiary standard in U&A determinations aligns with the standard employed in treaty interpretation. To mitigate for tribes' disadvantages in negotiating their treaties, "treaties must be liberally construed in favor of establishing Indian rights," resolving any ambiguities in the tribes' favor, *Shellfish*, 157 F.3d at 643, and never construing them to the tribes' prejudice, *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902). So too in mitigating for tribes' disadvantages in proving where they fished in the vast ocean in 1855. Doubts must be resolved, and inferences made, in favor of the tribes, because if they are not, the likely outcome, as Judge Boldt observed, is that they will be excluded from areas where they fished for millennia. *Lummi*, 841 F.2d at 321 (citing *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978)).

Makah cites inapplicable authority in arguing that the location of a boundary is reviewed for clear error. Makah Br. at 30. This Court reviews de novo "[w]hether, given [the district court's findings of historical fact concerning Indian fishing], disputed waters were usual and accustomed fishing grounds." *Lummi*, 841 F.2d at 319. By adopting the State's coastline tracking boundaries on remand, the district court ignored the established evidentiary standard and the concerns that underlie it. This evidentiary standard requires courts to resolve the inherent uncertainty involved in U&A adjudications in a manner that avoids the risk of unnecessarily violating a tribe's treaty rights. The Treaty mandates that U&A

boundaries encompass "*all* usual and accustomed" areas. QER 599. Here, that means the boundaries must encompass 40- and 30-mile trips in multiple directions from the coast, acknowledging that it is no more likely that a tribal fisherman would end up 40 or 30 miles *due west* of its coastline than the same distance *northwest*, or *southwest*, of the coastline.

Makah and the State wrongly assert that uncertainty regarding the precise boundaries should be resolved to the Tribes' *prejudice*. They argue that the district court was correct to assume from "the inherent lack of specific precision" and any "gaps in historical evidence" regarding 40- or 30-mile multidirectional fishing that *no such fishing* took place. State Br. at 12; Makah Br. at 49-50. But under the established legal standard, a finding that tribes fished 40 or 30 miles offshore necessitates an inference that those trips did not take place solely due west from shore but instead extended to the west, northwest, and southwest. These are precisely the inferences that the court made in the *Makah* case, as the district court observed in its trial decision here. *See infra* at 22-25. Just as the district court refused to restrict Quileute's and Quinault's treaty rights "based on a modern taxonomic distinction that they did not draw" at treaty times, *Quileute I*, 129 F. Supp. 3d at 1117, it should not restrict those rights based on a modern shoreline they did not and could not see or follow.

2. Well-Established Law Prohibits The Stringent Species- And Village-Specific Evidentiary Standard Advanced By Makah And The State And Relied Upon By The District Court.

Makah and the State advance legally-foreclosed arguments about what proof was required in order for the district court to have found that Quileute's and Quinault's 40- and 30-mile fishing trips culminated in locations not precisely due west of the shoreline. These arguments highlight the legal error committed below. Makah and the State argue that Appellants were obligated to prove precise locations of departure, arrival, and fishing direction for each species they pursued at treaty times. State Br. at 8, 18, 22; Makah Br. at 56. The district court relied on this legally and factually flawed argument after remand in holding that Appellants' reconsideration arguments regarding multidirectional fishing did not demonstrate manifest legal error because they allegedly were "not based on appropriate record evidence." QER 4 (citing Makah Resp., QER 101-09).

This astoundingly specific, unprecedented evidentiary burden disregards the long-established legal standard and would require reversal of key Ninth Circuit rulings and numerous U&A adjudications. No tribe has ever been held to this burden. And, this Court has already *rejected* the argument that Quileute and Quinault were required to prove the precise locations where their 40- and 30-mile trips culminated in the ocean in 1855, finding that this argument "runs headlong into the practical reality" that "requiring extensive and precise proof would be

extremely burdensome and perhaps impossible, especially deep in the ocean." *Quileute II*, 873 F.3d at 1167 (internal quotation and citation omitted). For the same reasons, courts cannot require a tribe to produce "extensive and precise proof" of all the points on the shoreline from which it fished for specific species. Moreover, the district court found that Quileute and Quinault *did* fish from the entirety of their treaty-time coastlines. *See* Opening Br. at 66-68.

Furthermore, this Court has flatly rejected the argument that the Tribes must provide species-specific proof to establish their U&As, finding that this too would be "extremely burdensome and perhaps impossible" due to the acknowledged scarcity of evidence from 1855. *Shellfish*, 157 F.3d at 644.[2] "[C]ourts considering fishing disputes under the Treaties have never required species-specific findings of usual and accustomed fishing grounds." *Shellfish*, 157 F.3d at 644. "If each Tribe were required to prove its usual and accustomed grounds for every species . . . the time and cost to the court and parties would be unreasonably burdensome." *Id.*

Even Makah admits that if this flawed species-and village-specific burden *had* been applied to Quileute and Quinault, the coastline-tracing boundaries *still* exclude the Tribes from approximately **200 square miles** of treaty-secured areas.

[2] Though Makah "continues to object" to this Court's opinion on the meaning of Quileute's and Quinault's Treaty, Makah Br. at 2, the Supreme Court denied Makah's petition for certiorari. *Makah Tribe v. Quileute Tribe*, 139 S. Ct. 106 (2018).

See Opening Br. at 65-66.[3]

Makah now retreats from this analysis, calling it a "back-up" argument. Makah Br. at 56-57. But the district court *relied* on this "back-up" argument in finding that there was no manifest error in setting the coastline-tracing boundaries. *See infra* at 36. This argument (that Makah now abandons on appeal) defended the coastline-tracing boundaries by incorrectly asserting that the boundaries' *exclusion* of sizeable treaty-secured areas was justified by their *inclusion* of some *non*-treaty secured areas, resulting in a "net loss" for Quileute and a "net gain" for Quinault. QER 104-05. Treaty rights are not a horse trade, and there is no justification for the loss of *any* treaty rights. The treaty reserves the "right of access" to *all* customary areas, so "the existence of other areas . . . where the Tribes may fish . . . does not compensate for taking . . . [another] fishing area" in which the Tribes had right to fish under their treaty. *Muckleshoot Tribe v. Hall*, 698 F. Supp. 1504, 1514 (W.D. Wash. 1988).

The district court disregarded law and fact by relying on a prohibited legal standard in concluding that there was no manifest legal error even though the prohibitively stringent standard *still* showed that the new boundaries exclude Quileute and Quinault from hundreds of square miles of treaty-secured area.

[3] Makah does not dispute that (1) it miscalculated the square mileage of treaty-secured areas from which the coastline-tracing boundaries exclude Quileute, or that (2) Quileute provided an accurate correction in its offer of proof. *See id.*

3. *Makah* Demonstrates That The District Court Imposed An Impermissibly Stringent and Prejudicial Standard On Appellants.

Makah's ocean U&A adjudication reflects a correct application of the evidentiary standard because Makah's western boundary encompasses all of its treaty fishing areas. Very little evidence supported Makah's U&A boundaries,[4] so the court drew logical inferences in favor of Makah to resolve the evidentiary gaps. Makah now argues the *same* inferences should *not* be drawn for Appellants.

Contrary to Makah's and the State's assertions, Makah Br. at 45; State Br. at 9, this Court did not find *Makah* immaterial to this case for all purposes. Instead, this Court merely observed that a fair comparison could not be made between the longitudinal line drawn for Makah and the longitudinal lines drawn for Quileute and Quinault because there were "dissimilarities" in the tribes' respective coastlines. *Quileute II*, 873 F.3d at 1169. This Court did not suggest that Makah's U&A adjudication was irrelevant in its entirety.

Courts must apply "the same evidentiary standards applied by Judge Boldt in Final Decision # 1 and elaborated in the ensuing forty years of subproceedings" to all tribes. *Quileute I*, 129 F. Supp. 3d at 1110. Comparing the outcomes in prior

[4] Makah now attempts to embellish its evidence, Makah Br. at 42-45, but the sparse evidence in the record speaks for itself, QER 660-740. Contrary to Makah's insinuations, no federal-water fact-finding was done in *Decision I*. *Compare* Makah Br. at 42-43 *with* Makah argument at QER 713-14. Nor was Makah excused from its evidentiary burden by lack of objection from other parties, as it now claims.

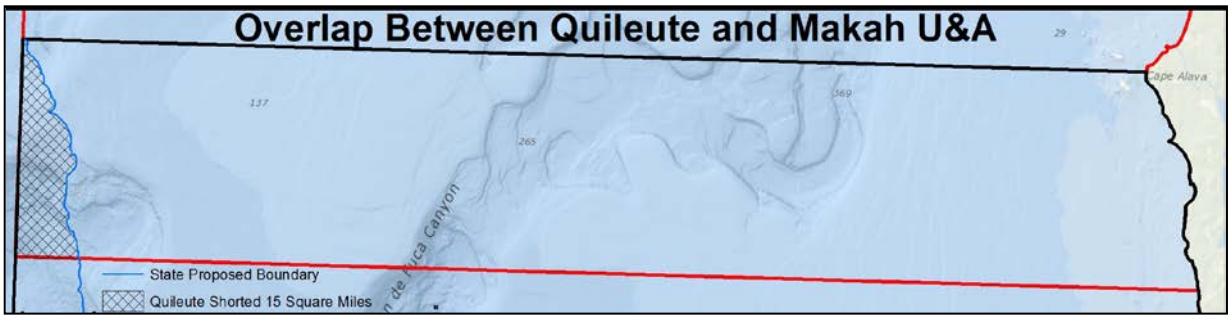
U&A cases is one tool for determining whether the district court consistently and equitably applied the correct standard of proof. Last year, this Court concluded that the evidence warranting an inference of U&A in a prior Lummi U&A adjudication compelled an "almost identical" inference in a subsequent proceeding involving a different part of Lummi's U&A. *United States v. Lummi Nation*, 876 F.3d 1004, 1009-10 (9th Cir. 2017). In 1988, this Court compared the evidence presented by Tulalip in support of its U&A claim with the insufficient evidence presented by Makah in its 1984 U&A claim, holding that "[b]y contrast, evidence [presented by Tulalip] readily supports an inference that the Tulalips frequently fished the disputed areas." *Lummi*, 841 F.2d at 320.

In *Makah*, the courts found that Makah did *not* customarily fish beyond 40 miles, but the U&A boundary established for Makah extends more than 40 miles due west at *every point of shore but the westernmost point*, and encompasses *all* potential 40-mile multidirectional fishing trips. Opening Br. at 27-32. In fact, it extends approximately *60 miles* offshore in the northwest corner.[5] *See id.* at 31, 32 n.10. This inclusivity achieves the legally-required goal of setting boundaries that encompass "the ***outermost distance*** to which the tribes customarily navigated their

[5] Makah's western U&A boundary intersects with Vancouver Island, *see* Opening Br. at 32 n.10; the intersection point is approximately 60 miles from Makah's aboriginal territory, which did not include Vancouver Island. *Compare* Makah Br. at 44 (citing QER 700) *with* QER 700 (the *Nootkan* tribe fished from Vancouver Island; Makah lived *opposite* them).

canoes for the purpose of 'tak[ing] fish' at and before treaty time." *Quileute I*, 129 F. Supp. 3d at 1111 (emphasis added). The district court's coastline-tracing boundaries for Appellants fail this test.

Makah emphasizes that its straight-line western boundary sufficiently matches the findings that it fished 40 miles offshore. Makah Br. at 43-44. If Makah's boundary accurately portrays a 40-mile U&A, as Makah contends it does, then the coastline-tracing boundary used for Quileute's 40-mile U&A is unquestionably inequitable. This inequity is starkly demonstrated in the northern portion of Quileute's U&A where the two U&As overlap, and where Makah's "40-mile" boundary gives it *15 square miles* more fishing area beyond Quileute's "40-mile" boundary:



QER 140.

Strangely, Makah's arguments justifying its *straight-line* boundary are the same arguments it insists justify *coastline-tracing* boundaries for Quileute and Quinault. According to Makah:

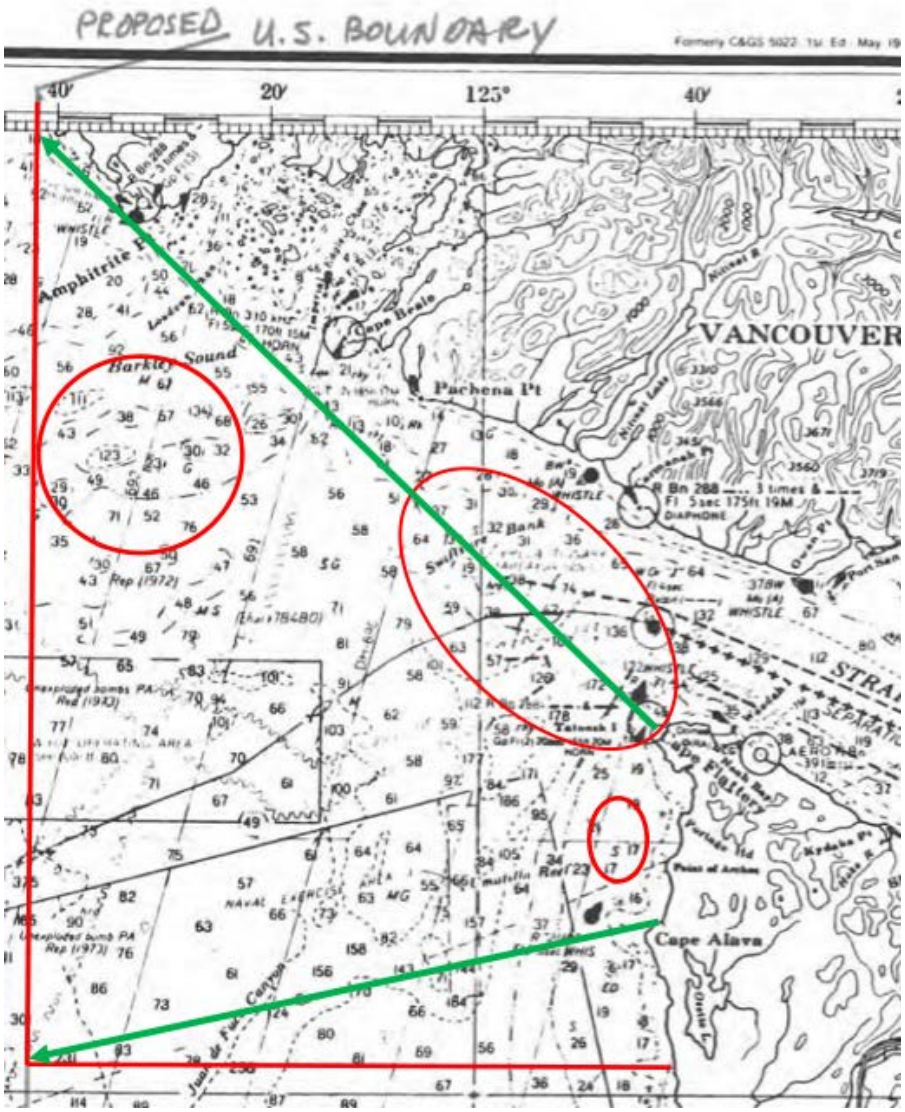
- evidence it fished 30-40 miles offshore *supports* its 40-mile straight-line boundary, Makah Br. at 43-44, but the same findings for Quileute and

Quinault justify restrictive coastline-tracing boundaries, *id.* at 34-36;

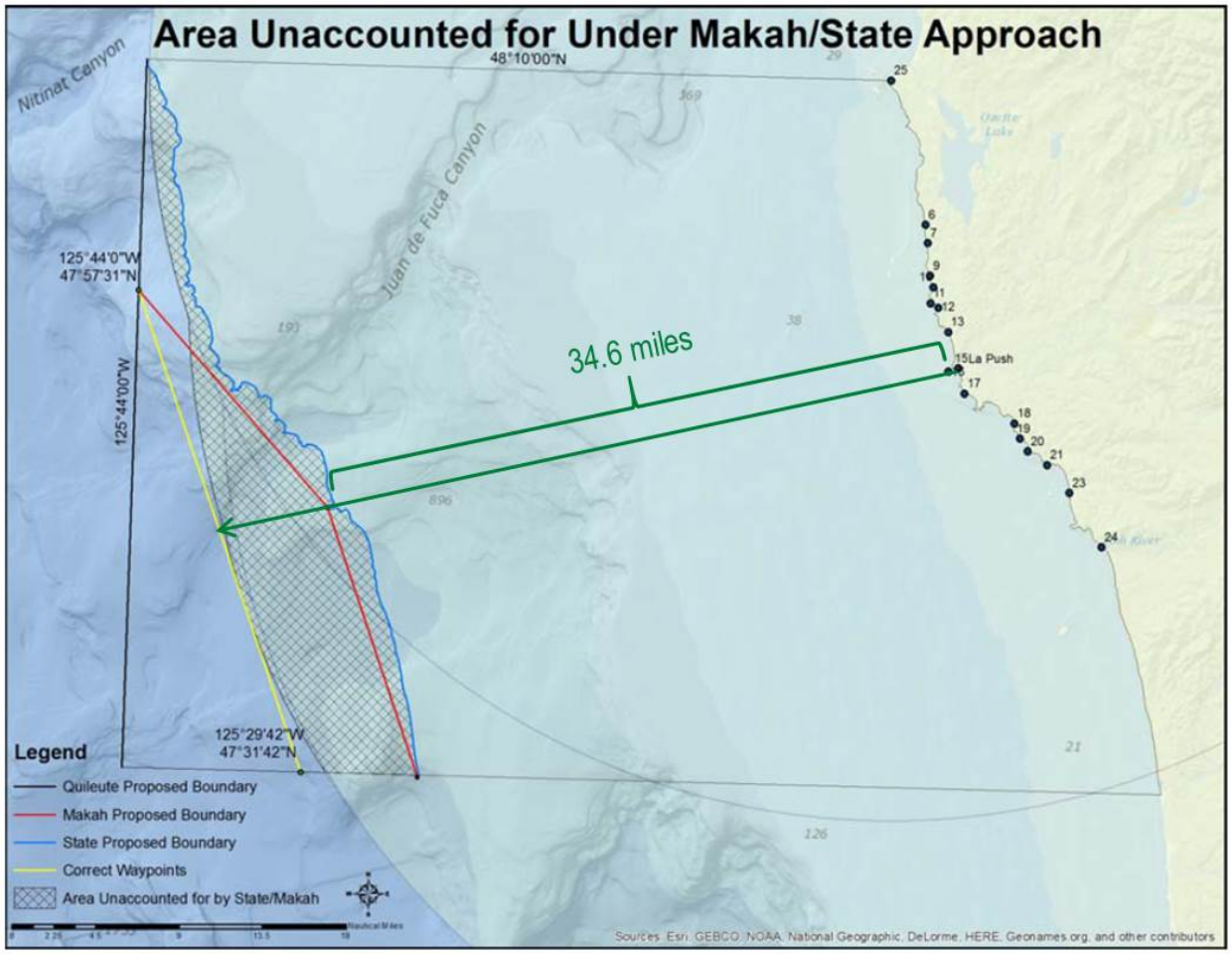
- evidence that Makah fished in waters 80 to 100 fathoms deep supports its straight-line boundary, *id.* at 44, but evidence that Quileute and Quinault fished beyond the 100-fathom line warrants coastline-tracing boundaries, *id.* at 21;
- evidence that Makah fished overnight supports its straight-line 40-mile boundary, *id.* at 44, but Makah omits mention of the same findings for Quileute and Quinault, *see Quileute I*, 129 F. Supp. 3d at 1081, 1084, 1096-97, 1102; and
- the term "offshore" should mean "due west" for Quileute and Quinault even though that is not how the term was used in Makah's own adjudication. *Compare* Makah Br. at 33 *with Makah I*, 626 F. Supp. at 1467 (setting a boundary encompassing multidirectional 40-mile offshore trips after determining that Makah did *not* customarily fish greater than 40 miles "from shore").

Finally, Makah's southwestern ocean U&A boundary depends on the same inference that Makah now seeks to deny Appellants. As the district court observed in its trial decision here, the *Makah* court *inferred* southwesterly fishing by Makah "in locating the southern boundary of the Makah's ocean U&A at Norwegian Memorial ten miles south of the southernmost Makah village at Ozette." *Quileute*

I, 129 F. Supp. 3d at 1109 (citing *Makah I*, 626 F. Supp. at 1467). In fact, neither Makah's northwest or southwest boundary is supported by *any* evidence, *see* Opening Br. at 27-29, nor did the court expressly find that Makah fished multiple directions. Thus, to support these boundaries, the court necessarily *inferred* that Makah fished approximately 40 miles *southwest* of its southernmost village, and 60 miles *northwest* of its northernmost village. These inferences are demonstrated by the green lines below, relative to the specific evidence of fishing, shown by the red circles below:



See Opening Br. at 28. These are the same inferences Makah and the State now insist *cannot be made* for Quileute and Quinault, as illustrated by the fact that the same southwesterly fishing path by Quileute is cut short at 34 miles by the coastline-tracing boundaries:



QER 204, 206.

Makah and the State argue that the district court's express finding that Quileute fishermen "were fishing in the waters north as well as south and west of their home," *Quileute I*, 129 F. Supp. 3d at 1109, can only mean that they fished 10 miles to the northwest of *one* village, but not 40 miles northwest or southwest, as

was inferred for Makah. *See* Makah Br. at 37; State Br. at 19-21.

"Forty miles offshore" cannot mean one thing for Makah and something significantly more restrictive for Quileute and Quinault. At treaty times, all three Tribes pursued the same species with the same equipment, using the same techniques. *See Quileute I*, 129 F. Supp. 3d at 1083, 1085, 1091-92, 1094, 1096 (FF 6.2, 7.2, 9.2, 9.6, 10.7, 10.15). As in *Lummi*, these "almost identical" facts warrant the same reasonable inferences. 876 F.3d at 1009.

4. U&A Boundaries Must Be Fixed As Of Treaty Times And Cannot Be Tethered To A Moving Coastline.

Appellants' Treaty and half a century of case law require that U&As be adjudicated as they existed at treaty times. Makah and the State assert that, because Quileute and Quinault did not remind the district court that U&A boundaries are delineated based on facts as they existed in 1855, not 2018, the district court was correct to hold that they waived the argument that their boundaries should not be tethered to the modern, ever-changing coastline. Makah Br. at 54; State Br. at 25; QER 4. However, in their 2015 briefing, Quileute and Quinault *did* object that the "continually variable" coastline-tracing boundaries bore no relation to the Tribes' treaty-time fishing, which "follow[ed] the[] prey, not the coastline." QER 222-24. The district court agreed. QER 200 (citing QER 224). It should not have needed a reminder that its task was to determine fishing areas as of treaty time. *Quileute I*, 129 F. Supp. 3d at 1117, FF 3.3.

Even if this Court were inclined to consider Makah's and the State's myopic argument, Appellants should not be prejudiced for failing to state the obvious.

> "[W]aiver is [a rule] of discretion rather than appellate jurisdiction," *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980), and we have reviewed issues for the first time on appeal where, as here, "the issue is a legal one, not necessitating additional development of the record," *Animal Prot. Inst. of Am. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988).

Ho v. Brennan, 721 F. App'x 678, 680 n.1 (9th Cir. 2018). This Court will also review issues for the first time on appeal "when review will prevent manifest injustice" or "when there is clear error." *Animal Prot. Inst.*, 860 F.2d at 927 (internal quotations and citations omitted).

The issue here is purely legal, turning solely on whether a U&A must be a fixed area determined on facts as of treaty times, or whether it can instead be ever-changing, tied to a moving, modern day coastline. Review of this issue now will prevent manifest injustice to Quileute and Quinault resulting from having constantly variable U&As that will inevitably exclude treaty-protected areas over time. *See* Opening Br. at 34-38, 51-53. It will protect these Tribes from continually having to return to the courts to litigate over lost treaty rights, as Makah suggests they should be required to do. Furthermore, to the extent it is debatable that the shoreline changes over time, the record developed at trial proved that it has. *See* Opening Br. at 51-52, 52 n.14 (citing nine exhibits and expert testimony, including Makah expert testimony that the Hoh/Quileute "coastline had changed

significantly" over time).[6]

Moreover, this Court could also take judicial notice of this well-known fact. *See* Opening Br. at 34-35; *see also Fuller v. State of Cal.*, 51 Cal. App. 3d 926, 938 (1975) ("This court may take judicial notice that . . . the combined acts of men and of nature have caused substantial change to the coastline's condition"). Shoreline change is not "speculative," as Makah and the State erroneously assert. *See* Makah Br. at 29, 54; State Br. at 26.

Makah and the State advance a second ludicrous argument: that even though Quileute and Quinault opposed a coastline-tracing line to delineate fishing areas, it was their burden to prove the shape of the 1855 coastline. Makah Br. at 53; State Br. at 26-27. Not only is there no support for imposing this impossible evidentiary standard, it is nonsensical to suggest that the shape of the coastline in 1855 was at all relevant to offshore fishing patterns. Furthermore, Appellants' use of modern maps as base maps for their demonstratives and proposed boundaries does not suggest that they support boundaries tracing the modern coastline. *See* Makah Br. at 53-54; State Br. at 26. Instead, it merely reflects the *impossibility* of proving the precise contours of the 1855 coastline, underscoring the absurdity of requiring coastline-tracing precision to define treaty-time fishing areas.

Makah maintains that Appellants should be required to continuously return

[6] Makah wrongly claims that Quileute and Quinault did not cite "evidence in the record" showing coastline change over time. Makah Br. at 53.

to court for lost treaty-secured areas whenever the coastline shifts eastward. Makah Br. at 29, 54. Beyond being a waste of judicial and party resources, there is no support for requiring Quileute and Quinault to monitor changes in the coastline and litigate over each change simply to obtain the full benefit of a Treaty that is by its own terms self-executing. QER 601, Art. 13; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.33 (1979) ("the treaties are self-enforcing") ("*Fishing Vessel*").

Makah's and the State's hypothetical examples involving river movement help prove Appellants' central point. They posit that a U&A including a river should not be defined such that the tribe would lose access to the river if it shifted course. Makah Br. at 54, State Br. at 27. Appellants' inland U&As were *not* defined in such a manner. Judge Boldt described these U&As by river names, not by features unconnected to fishing such as specific trees that were on the riverbeds in 1974 when he issued his decision. *United States v. Washington*, 384 F. Supp. 312, 372, 374 (W.D. Wash. 1974) ("*Decision I*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom. Fishing Vessel*, 443 U.S. 658 (1979). If these rivers moved, the U&A descriptions would encompass the changed route. In contrast, the coastline-tracing ocean boundaries *will* deprive Quileute and Quinault of access to the deep-water fishing grounds they used in 1855 as the shoreline moves eastward.

The crucial point is, as the State put it, that "treaty-protected fishing rights

. . . *necessarily* follow the water" where the tribes fished. State Br. at 8 (emphasis added). *Fixed* ocean U&A boundaries that will *not* eventually exclude tribes from their customary deep-water ocean fishing areas over time achieve this legally required objective. Boundaries tethered to an eastward-moving coastline do not.

Far from being "overly precise," as Makah terms them, the new boundaries erroneously exclude over 270 square miles of treaty-secured areas by hewing to a *modern, ever-changing* coastline that bore *no relation* to 1855 fishing. As the court explained in *United States v. Michigan*:

> The scope of the Indian right to fish at the present time is *defined by the character of Indian fishing at the time of the treaty*. Accordingly, the retained aboriginal right is not limited to any geographical area within the ceded area. Evidence has revealed that the Indians of 1836 fished extensively over the entire ceded area. They had the means to cover the entire ceded area and 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. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). . . .
>
> The reserved fishing right is *not affected by the passage of time or changing conditions*.

471 F. Supp. 192, 259-60 (W.D. Mich. 1979) (emphases added). Quileute and Quinault's treaty fishing right cannot be limited to unrealistic boundaries that exclude treaty-reserved areas.

5. As A Matter of Law, Tribal Members Must Not Be Prevented From Fully Exercising Their Treaty Rights By Means Of Impracticable Boundaries.

As Quileute and Quinault explained in their Opening Brief, practical difficulties with the new boundaries effectively reduce their U&As even further because (1) tribal members would impermissibly be required to purchase advanced navigation equipment to follow the serpentine lines, and (2) the impracticability of following the jagged lines will force fishermen to fish shoreward of the lines. Opening Br. at 53-60.

Quileute and Quinault timely objected to the impracticability of coastline-tracing boundaries in 2015, emphasizing that the "infinite points along the continuously variable line" would be unmanageable for fishermen and enforcement and "impracticable for even modern GPS equipment to follow," as indicated by the fact that nearly all fishing areas use straight lines. QER 222-23. Though Makah and the State attack Appellants for not producing declarations attesting to the impossibility of navigating the contours of the below coastline, Makah Br. at 52-53; State Br. at 17, the lines speak for themselves. Furthermore, none of the declarations submitted by Makah or the State establish that it would be possible to follow these boundaries using traditional equipment used by tribal fishermen.

Although Makah and the State insinuate that they both produced evidence supporting the practicability of coastline-tracing boundaries in 2015, Makah Br. at

52; State Br. at 15-16, Makah did *not* defend the State's proposed boundaries in 2015, and instead devoted its briefing to explaining how fishermen could follow straight-line boundaries. QER 266-84, 296-98, 306-08. The only boundary it could identify without straight lines was the international boundary line between the United States and Canada, QER 307-08—a political boundary not meant to define fishing areas that is nowhere near as complex as the coastline-tracing boundaries the district court adopted.

The State's own declaration attests to the fact that "advanced navigation tools" are required to follow "complex" coastline-tracing boundaries. QER 256-57. Captain Chadwick's declaration discusses how "most commercial vessels" have "advanced navigation tools" that allow the vessel operator to see where the vessel is in relation to an electronically displayed chart. *Id.* He does not explain how a tribal subsistence fisherman could be expected to plot thousands of coordinates on a paper chart and effectively navigate the labyrinthine boundaries using a compass or even a basic GPS device. While the State claims that "State, Federal, and Tribal fisheries managers [can] agree upon GPS coordinates for the shoreline and plot the corresponding boundary lines into a GIS data set," this process has never before been required for any other tribal U&A. And in asserting that "vessel operators can plot the boundary line and follow it no differently" than Appellants' proposed boundaries, State Br. at 17, the State fails to mention that charting the coastline-

tracing boundaries—even in a GPS device—requires hundreds, if not thousands, of coordinates. Indeed, the State did not produce these coordinates in 2015 in contravention of the district court's instructions; had it done so, the coordinates alone would have spanned innumerable pages, demonstrating their unmanageable complexity.

Finally, the fact that NOAA revised Appellants' boundaries merely reflects its obligation to implement court orders, just as it did with the longitudinal boundaries. Its guidelines for fishery boundaries, however, *discourage* coastline-tracing boundaries, noting that they are ambiguous and imprecise and that "natural processes such as tides, weather, and climate can significantly change the location of the shoreline over time." NOAA, *Marine Managed Areas: Best Practices For Boundary Making* 24-26 (2006), *available at* https://coast.noaa.gov/data/digitalcoast/pdf/marine-managed-areas.pdf (last visited Dec. 21, 2018).

Even if a fisherman could purchase the equipment required to input and follow these innumerable coordinates, no reasonable fisherman would then attempt to exercise the full extent of his treaty fishing rights for fear of inadvertently trespassing over the jagged lines. Furthermore, with each shoreline change, the coordinates would have to be redone. Established law prohibits these obstructions to Appellants' exercise of their treaty fishing rights. *See* Opening Br. at 53-60.

6. The District Court Did Not Follow This Court's Mandate To Set Boundaries That Are "Fair And Consistent With" The Trial Findings, Warranting Mandamus.

By implementing boundaries that are neither fair nor consistent with the trial findings, the district court violated this Court's clear mandate. "[W]hen a lower court obstructs the mandate of an appellate court, mandamus is the appropriate remedy." *Vizcaino v. U.S. Dist. Court*, 173 F.3d 713, 719 (9th Cir. 1999). District courts "must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* (internal quotations and citations omitted).

Makah contests jurisdiction under the All Writs Act, 28 U.S.C. § 1651, and the de novo standard of review of the district court's compliance with the mandate. Mandamus jurisdiction exists here because this appeal involves reviewing both the judgment below *and* the district court's compliance with this Court's remand instructions. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1078-79 (9th Cir. 2010) (holding this Court had jurisdiction under the All Writs Act to review whether the district court violated the Court's mandate after remand). Because review is for purposes of ensuring the district court followed the mandate, there is no need to show "extraordinary" circumstances before granting mandamus. *Id.* at 1079 (reliance on the *Bauman* factors is "misplaced" where "mandamus is sought on the ground that the district court failed to follow the appellate court's mandate")

(quoting *Vizcaino*, 173 F.3d at 719).

Likewise meritless is Makah's argument that this Court should afford *greater* deference to the district court's second boundaries order than it did the first boundaries order. Makah urges deference "amounting to an abuse of discretion standard," but *none* of the cases it cites involve review of compliance with a mandate. Makah Br. at 30-31. It is well-established that this Court reviews *de novo* "the district court's compliance with the mandate of our court." *See Pit River Tribe*, 615 F.3d at 1080.

Regardless, the new boundaries would not survive even the most lenient standard. The district court was required to hew to its trial findings. Instead, it adopted the very boundaries that it previously found *conflicted with* its trial findings and *excluded* Quileute and Quinault from large swaths of treaty-reserved areas. The new boundaries are *un*fair and *in*consistent with the findings, directly violating the mandate. This Court is free to remedy that error.

D. Quileute's and Quinault's Proposed Boundaries Are Enforceable, Consistent With The Evidence And Trial Findings, And Minimize The Error Rate.

Contrary to Makah's and the State's assertions, Appellants do not advocate for any extreme or dogmatic approach to drawing boundaries, and instead their demonstrative maps reflect application of reasonable inferences. The maps show potential 40- and 30-mile fishing trips angled only slightly northwest or southwest

and *within* the bounds of the Tribes' northern and southern boundaries. *See* Opening Br. at 61-63.

It is eminently reasonable to infer that Quileute and Quinault's 40- and 30-mile fishing trips did not occur only *due west* of shorelines that were invisible to fishermen and bore no relation to how fishing would occur. Not only does the law require this reasonable inference, *see supra* at 13-15, the district court *expressly found* that tribal fishermen fished "in the waters north as well as south and west of their home." *Quileute I*, 129 F. Supp. 3d at 1109.

Appellants' clear and enforceable latitudinal and longitudinal coordinates are the *only* legally and factually accurate boundaries that have been proposed in this case to date. In the interest of finally resolving this decade-old litigation, this Court should adopt Appellants' proposed boundaries, which encompass all treaty-protected areas, minimize the error rate, and provide easily-followed coordinates. While Makah and the State complain of the minimal 1.8% and 2.2% "error rates" (which pale in comparison to Makah's 12.5% error, Opening Br. at 32), some error is inevitable, and the standard of proof requires that any error favor the Tribes to avoid the risk of excluding treaty-secured areas.

E. The District Court Abused Its Discretion In Denying Four Tribes' Motions For Reconsideration.

At the time this Court issued its mandate, *all* the boundary proposals in the case (except Quileute's alternative waypoint proposal) had been rejected—either

by this Court or the district court—for being *inconsistent* with the trial findings. This Court mandated that the new boundaries be *consistent* with those findings. By acting without hearing from the parties and entertaining *only* Makah's and the State's prior rejected proposals, the district court prejudiced Appellants by making a disfavored motion for reconsideration their only opportunity to revise their proposed boundaries consistent with this Court's opinion. Opening Br. at 61-68.

Contrary to Makah's contentions, the district court unquestionably relied on Makah's legally foreclosed arguments advocating a species- and village-specific evidentiary standard in denying the motions for reconsideration. In finding that there was "no manifest legal error" in setting the coastline-tracing boundaries, the Court expressly cited "the reasons stated by Makah," *including* Makah's species- and village-specific arguments. QER 4 (citing QER 101-05).

Because Appellants never had a "first opportunity" to address Makah's newly invented evidentiary standard, presented for the first time in Makah's response, there is no merit to Makah's argument that Appellants were asking for a "second opportunity" to do so. *Compare* QER 53-54 *with* Makah Br. at 55-56. Quileute and Quinault were denied an opportunity to file a reply to assist the district court in understanding those flaws.

Makah likewise mischaracterizes the offer of proof Quileute and Quinault filed after the district court denied their motion for leave to file a reply. The offer

of proof was not a rehash of Appellants' arguments in their motion, but instead responded solely to the new arguments Makah raised for the first time in its response to the reconsideration motion. The offer of proof demonstrated that the court should not have relied on Makah's response, as it was mathematically and factually incorrect. QER 41-50. The offer of proof also showed that even if the court were to rely on this species- and village-specific approach, the coastline-tracing boundaries still excluded Quileute and Quinault from **over 200 square miles** of treaty-secured areas. *See* Opening Br. at 65-66.

Because the motions for reconsideration demonstrated that the district court's new boundaries were manifestly erroneous and contrary to law, the district court abused its discretion in denying the motion. Local Rules W.D. Wash. LCR 7(h) (reconsideration is appropriate if there was manifest error in the district court's ruling or a showing of new facts or legal authority); *In re Onecast Media, Inc.*, 439 F.3d 558, 564 (9th Cir. 2006) ("[A] court abuses its discretion if the legal conclusions underlying the court's determination are clearly erroneous.").

III. CONCLUSION

The coastline-tracing ocean boundaries the district court imposed on remand contradict law, fact, equity, common sense, and this Court's clear mandate. This Court should reverse and remand with instructions to adopt Appellants' proposed boundaries.

Dated: December 21, 2018

Respectfully submitted,
FOSTER PEPPER PLLC
By: s/ Lauren J. King
Lauren J. King, WSBA 40939
Attorneys for Appellant Quileute Indian Tribe
BYRNES KELLER CROMWELL LLP
By: s/ John A. Tondini
John A. Tondini, WSBA 19092
Attorneys for Appellant Quileute Indian Tribe
NIELSEN BROMAN & KOCH PLLC
By: s/ Eric J. Nielsen
Eric J. Nielsen, WSBA 12773
Attorneys for Appellant Quinault Indian Nation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I electronically filed the foregoing Reply 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.

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Dated: December 21, 2018.

By: s/ Lauren J. King
Lauren J. King, WSBA 40939
Attorneys for Appellant Quileute Indian Tribe