

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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MAKAH INDIAN TRIBE,

Appellant,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ (in  
her official capacity), the WASHINGTON STATE  
DEPARTMENT OF NATURAL RESOURCES, and the  
WASHINGTON STATE BOARD OF NATURAL  
RESOURCES,

Respondents.

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**UNOPPOSED MOTION OF HOH TRIBE, QUILEUTE  
TRIBE, AND THE QUINULT INDIAN NATION FOR  
LEAVE TO PARTICIPATE AS *AMICI CURIAE***

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## I. INTRODUCTION

The Hoh Tribe, Quileute Tribe, and the Quinault Indian Nation (collectively the “Moving Tribes”) respectfully move for leave to appear as *amici curiae* and file a brief in the above-entitled matter for two purposes: (1) to seek dismissal of the appeal because the Moving Tribes are indispensable parties under CR 19 and the Declaratory Judgment Act who cannot be joined in the case because of their sovereign immunity; and (2) to provide information and perspective that will assist the Court under RAP 10.6.

Counsel for Appellant and Respondents have indicated that they will not oppose Moving Tribes’ participation as *amici* in this case. Affidavit of Lauren King ¶ 8. Counsel have also agreed on proposed dates for the filing of the Moving Tribes brief and for Appellant to file a response thereto that are consistent with the established briefing schedule. *Id.* ¶ 9.

## II. IDENTITY AND INTEREST OF MOVING TRIBES

The Moving Tribes are signatories to the Treaty of Olympia. Treaty with the Quinault, etc., July 1, 1855, 12 Stat. 971 (hereinafter “Treaty of Olympia”). Under that Treaty, the Moving Tribes reserved the right to hunt in the areas subject to the Peninsula Land Exchange that are at issue in this appeal. 12 Stat. 971, art. 3; *see also infra* p. 3 (maps showing that the land exchange areas are within the Moving Tribes’ treaty hunting area).

The Moving Tribes seek to serve as *amici* to protect their treaty rights. Specifically, Moving Tribes seek dismissal of this case because (1) it requires adjudication of Makah’s unsubstantiated claim to have treaty hunting rights in the Moving Tribes’ treaty hunting area, and (2) such adjudication cannot occur in the absence of the Moving Tribes, who cannot be joined to this case due to their sovereign immunity.

The Moving Tribes’ participation as *amici* is particularly appropriate here because the relief Makah seeks depends upon a predicate finding that it has treaty hunting rights in the Moving Tribes’ treaty hunting area—something Makah has never obtained. The Moving Tribes’ rights would be directly affected by such a finding, because Makah’s exercise of treaty hunting rights in the Moving Tribes’ treaty hunting area will violate the Moving Tribes’ treaty rights by

taking a treaty resource that belongs to the Moving Tribes. The Moving Tribes notified the existing parties of their intention to seek this relief before the Superior Court, but the case was dismissed before the Moving Tribes could file their motion. King Aff. ¶¶ 3-6.

In addition, the Moving Tribes' involvement in the land exchanges at issue in this case will provide a helpful additional perspective for the Court. Specifically, the Quileute Tribe was involved in consultations and communication with the Department of Natural Resources ("DNR") regarding the land exchanges at issue in this case before they took place. When DNR consulted with Quileute regarding the land exchange, Quileute expressed concerns regarding DNR meeting with Makah because the land exchange "involves land that is outside the Treaty Area of the Makah Tribe" and because Makah was attempting "to expand the reach of their domain" by asserting treaty rights where they had none. Declaration of Joenne McGerr, Ex. C. Such expansion "clearly ha[s] the potential to impact [Quileute's] Treaty rights in that area." *Id.*

In seeking to participate as *amici*, the Moving Tribes do not waive their immunity from suit or seek to become a party to this proceeding. The Moving Tribes take no position on, and reserve all objections to, the authority of state entities to determine federal treaty hunting rights, and the other positions contested by Appellant and Respondents.

### **III. MOVING TRIBE'S FAMILIARITY WITH THE ISSUES ON REVIEW**

From 1854 to 1856, Governor Isaac Stevens and his agents executed eight treaties with tribes in what would become Washington State.<sup>1</sup> See *United States v. Wash.*, 384 F. Supp. 312, 330 (W.D. Wash. 1974). These "Stevens Treaties" reserve to the tribes the "privilege of hunting . . . on open and unclaimed lands." *State v. Buchanan*, 138 Wn. 2d 186, 199-200 (1999). The hunting right language is "substantially the same" in each Stevens Treaty, *id.*, including Makah's treaty (Treaty with the Makah, art. 4, 12 Stat. 939, January 31, 1855) and the Treaty of Olympia, art. 3.

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<sup>1</sup> Treaty of Olympia, 12 Stat. 971; Treaty of Point No Point, 12 Stat. 933; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliot, 12 Stat. 927; Treaty of Neah Bay, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Walla Walla, Cayuse, Etc., 12 Stat. 945; Treaty with the Nez Percés, 12 Stat. 957.

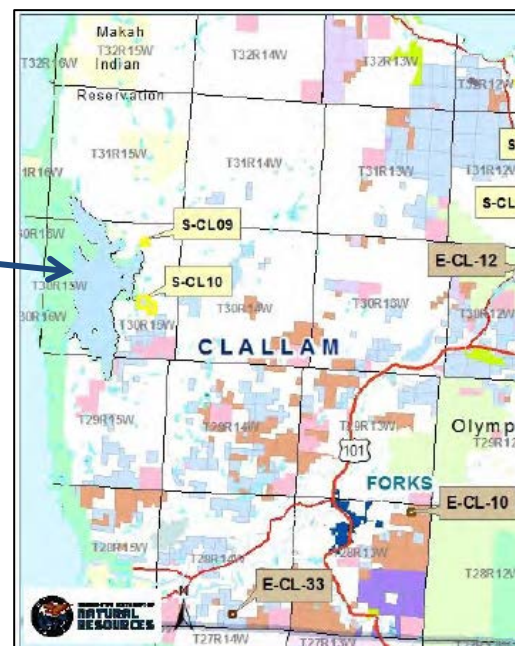
The Washington State Supreme Court held in *State v. Buchanan* that the treaty hunting right allows each tribe to hunt within (1) its ceded area; and (2) other lands if that tribe could prove the lands were “actually used for hunting and occupied by the [Tribe] over an extended period of time.” 138 Wn. 2d at 207. The latter category is known as “traditional use rights.”

Ceded area treaty hunting rights. The various tribal ceded areas are depicted in a map created by the Washington State Department of Fish and Wildlife (“WDFW”). *Tribal Ceded Areas in Washington State*, available at [https://wdfw.wa.gov/sites/default/files/2018-12/tribal\\_ceded\\_areas\\_in\\_washington\\_state.pdf](https://wdfw.wa.gov/sites/default/files/2018-12/tribal_ceded_areas_in_washington_state.pdf) (last visited on June 14, 2020); see also Declaration of Michelle Snyder and exhibits thereto. A comparison of Makah’s and the Moving Tribes’ respective ceded areas (outlined by the red and white line in the map on the left below) with the land exchange areas where Makah claims to have treaty hunting rights (SCL09 and S-CL10, on the map on the right below) shows that the exchange areas are well within the Moving Tribes’ ceded area (which encompasses Lake Ozette),<sup>2</sup> and outside Makah’s ceded area:



Excerpt of WDFW Tribal Ceded Area map

Lake Ozette



Excerpt of Washington State Dep’t of Natural Resources, *Peninsula Land Exchange Summary*, available at <https://tinyurl.com/yb6dhp2m> (last visited June 15, 2020).

<sup>2</sup> The following exchange areas are also within the Moving Tribes’ ceded area: E-JF-32, E-JF-27, E-CL-11, E-CL-12, and E-CL-13.

Traditional use rights. Under their treaty and under *Buchanan*, the Moving Tribes exercise treaty hunting rights in their ceded area, shown in the WDFW map on the left. Makah's ceded area does not contain any land exchange areas. Nor has any court held that Makah has traditional use rights in the area including S-CL09 and S-CL10.

#### **IV. SPECIFIC ISSUES TO BE ADDRESSED BY THE MOVING TRIBES**

##### **A. The Moving Tribes' Participation as *Amici* Is Proper To Address Dismissal Due To Their Sovereign Immunity.**

Both federal and state courts regularly grant Indian tribes leave to participate as *amici* in cases relating to tribal treaties and/or affecting governance of their territories, including where the tribes seek dismissal based on sovereign immunity. *See, e.g., N. Quinault Props., LLC v. State*, 197 Wn. App. 1056, No. 76017–3–I, 2017 WL 401397, at \*1 (2017) (unpublished)<sup>3</sup> (allowing the Quinault Nation to participate as *amicus* to seek dismissal of case where appellants argued that the State of Washington owned the bed of Lake Quinault such that there was a public right of access, and the Quinault Nation had an ownership interest in the lake under the Treaty of Olympia but could not be joined to the case due to sovereign immunity); *State v. Pink*, 144 Wn. App. 945, 949 (2008) (permitting Quinault Nation to participate as *amicus* to address whether state prosecution of an individual on tribal land “intruded on [the Nation’s] criminal jurisdiction and ignored its sovereignty and authority to govern its own people and property”); *Foxworthy v. Puyallup Tribe of Indians Ass’n*, 141 Wn. App. 221, 224 (2007), *as amended* (Oct. 30, 2007) (allowing Squaxin Island Tribe to submit an *amicus* brief in a case regarding the Puyallup Tribe’s sovereign immunity to a dram shop action); *Rodriguez v. Wong*, 119 Wn. App. 636, 639 (2004) (permitting the Muckleshoot Indian Tribe to participate as *amicus* to argue lack of jurisdiction and sovereign immunity in a lawsuit against tribal gaming employees alleging discrimination).

As with the tribes in the cases cited above, the Moving Tribes have a stronger interest in

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<sup>3</sup> Moving Tribes cite *North Quinault Properties* in this Motion as nonbinding authority with persuasive value because it involves similar facts to the instant case.

this case than a typical *amicus* because they have direct interest in the subject matter of the case. As in *North Quinault Properties*, the Appellant is asserting rights that, if recognized by this Court, would violate absent tribes' treaty rights; thus, the absent tribes are indispensable. This is ample reason for the Court to exercise its discretion, as it did in the above cases, to permit the Moving Tribes to participate as *amici*.

**B. The Moving Tribes Will Provide Information Useful To The Court About Treaty Hunting Rights In The Areas Affected By The Land Exchange Transaction.**

Makah's standing in this case depends on its unfounded assertion that it has treaty hunting and gathering rights on parcels of land that are within the Moving Tribes' ceded area. *See, e.g.*, Makah Emergency Mot. Seeking Stay Pending Review at 2-4, 7-9, 11 (June 24, 2020). Under *Buchanan* and the Treaty of Olympia, the Moving Tribes' treaty hunting and gathering area encompasses their ceded area. 138 Wn. 2d at 207. No tribes except the Moving Tribes have treaty hunting rights in that area. If Makah were allowed to hunt in the area, Makah would diminish the treaty resource of the Moving Tribes.

Recently, the Moving Tribes participated in two treaty hunting rights proceedings that have bearing on the issues in this case. First, in 2014 and 2015, the Moving Tribes' defended their treaty hunting areas against "traditional use" claims submitted to WDFW by three other tribes located on the Olympic Peninsula. The three other tribes claimed to have "traditional use" treaty hunting rights in the same Game Management Unit ("GMU") in which Makah now claims treaty rights—the Dickey GMU, pictured on the WDFW map above. This dispute involved five detailed expert reports discussing the application of the *Buchanan* standard to the Moving Tribes and to the three tribes claiming "traditional use" hunting rights within the Moving Tribes' ceded area. WDFW and its expert issued a detailed report discussing how the Moving Tribes fully used their territory and guarded it against incursions—including attempts to hunt—by other tribes. *See King Aff.* ¶¶ 10-11 & Ex. A at 19-27.

Second, Quileute and Hoh participated as *amici* in *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168 (W.D. Wash. 2014). There, Skokomish sought a declaratory judgment on

the scope of its Stevens treaty hunting rights, asserting as one of the alleged bases of harm that WDFW refused to allow it to hunt in the Moving Tribes' ceded area. Skokomish also asserted rights in the eastern Peninsula, where other tribes' ceded areas are located. In granting Quileute and Hoh's motion for leave to participate as *amici*, the court found that:

Moving Tribes have experience enforcing and administering treaty rights and working with federal, state, and local governments in that process. (See Mot. at 2-3.) They also have asserted treaty rights in the relevant geographic area (see Mot. at 2), and their proposed *amici curiae* brief provides a singular viewpoint from tribes that are signatories of the Treaty of Olympia (*see generally* Prop. *Amici* Brief). Thus, the court concludes that Moving Tribes may have "unique information or perspective that can help the court." *Cnty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)); *see also Warren v. United States*, No. 06-CV-0226S, 2009 WL 1663991, at \*1 (W.D.N.Y. June 15, 2009) ("The usual rationale for *amicus curiae* submissions is that they are of aid to the court and offer insights not available from the parties.").

*Skokomish Indian Tribe v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at \*2 (W.D. Wash. Oct. 21, 2013). The court ultimately held that granting relief to Skokomish would necessarily violate the rights of tribes who already had established treaty hunting rights in the areas in dispute because any share of the game that went to Skokomish would take game off the table for the other tribes who had treaty rights in the area. 994 F. Supp. 2d at 1187-88. Those tribes therefore had "a vital, legally-protected interest in how the [Skokomish] Treaty is interpreted and enforced." *Id.* at 1187. These same considerations support the Moving Tribes' request to participate as *amici* in this case.

Finally, the Moving Tribes have extensive experience litigating, enforcing, and administering their treaty rights. Since the time that their treaties were executed in the 1850s, the Moving Tribes have worked with federal, state, and local governments (including other tribal governments) to administer treaty hunting rights. The Moving Tribes have also been involved in protracted litigation involving treaty rights disputes generally, and of the Stevens treaty fishing



provision specifically.<sup>4</sup>

The Moving Tribes’ indispensability and their extensive experience with treaty rights—including in disputes with Makah—offer an important and helpful perspective with respect to the asserted treaty rights in this case. Moving Tribes should be permitted to protect their treaty rights by participating as *amici* in this case.

## **V. FURTHER ARGUMENT IS NEEDED BECAUSE NO PARTY REPRESENTS THE MOVING TRIBES’ SOVEREIGN INTERESTS OR FACTUAL PERSPECTIVE**

It is well-established that Indian tribes possess “the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Like all sovereigns, they are free to assert or to waive their immunity as they see fit. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). One aspect of this immunity is that a tribe “cannot be haled into court against its will.” *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 92 (2012). “[T]ribal immunity quickly surfaces as a crucial issue” in a suit implicating the interests of an absent tribe “since if the tribe is an indispensable party, and cannot be joined due to its immunity, the claim may not proceed.” *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 771 (D.C. Cir. 1986). “Failure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity.” *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995)).

Where a tribe seeks to protect both its interests and its sovereign immunity by participating as an amicus rather than intervening, it is appropriate to grant *amicus* status. In *North Quinault Properties*, the Quinault Nation’s participation as *amicus* proved dispositive.

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<sup>4</sup> See *United States v. Washington*, Case No. C70-9213 (W.D. Wash.) (interpreting the fishing provision of the Stevens treaties and involving more than 20 tribes over the course of its 44-year history); *Hoh Indian Tribe v. Baldrige*, 522 F. Supp. 683 (W. D. Wash. 1981) (evaluating propriety of Secretary of Commerce regulations governing salmon fishing vis-à-vis treaty fishing rights of Moving Tribes); *Midwater Trawlers Co-op. v. Dep’t of Commerce*, 282 F.3d 710 (9th Cir. 2002) (regarding treaty fish allocation; Quileute and Quinault participating as *amici*); *Moore v. United States*, 157 F.2d 760, 761 (9th Cir. 1946) (regarding Quileute treaty rights to fish in the Quillayute River and Pacific Ocean); *United States v. Washington*, 129 F. Supp. 3d 1069 (W.D. Wash. 2015), *aff’d sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017) (dispute over Quileute’s and Quinault’s ocean treaty fishing area boundaries).

There, Quinault sought dismissal as an *amicus* of a lawsuit by property owners around Lake Quinault that asked the Court to determine “the status of Lake Quinault and the property rights of non-tribal property owners abutting the Lake” and to determine “the public’s right [of] access [to] the Lake, its shore and lakebed.” 197 Wn. App. 1056, \*1. By treaty, Quinault Nation claimed an interest in Lake Quinault. *Id.* at \*2. The Court held that the owners’ request for declaratory judgment was improper in the absence of the Nation. “While [the appellant] clothes its request under the public trust doctrine” in arguing that the State had a duty to maintain public access to navigable waterways, “it does not satisfactorily explain why it should be allowed to seek adjudication of the above emphasized interests in the absence of the Nation and the United States,” the Nation’s trustee. *Id.* “Only if the Nation and the United States were parties could there be a proper resolution of ownership issues that are at the heart of this case. In the absence of both, there cannot be a proper resolution of these issues.” *Id.* The Court further observed that the absence of Quinault Nation and the United States “would prejudice their rights to claim ownership in Lake Quinault.” *Id.* at \*3.

Because absent tribes have sovereign immunity from suit, it is not necessary to require them to intervene (and thus waive immunity) to seek dismissal based on their immune status. In *Skokomish v. Goldmark*, the court held that absent tribes were not required to intervene to support dismissal of the case under Rule 19 because:

if the court were to require Moving Tribes to intervene as parties, it would be effectively requiring them to waive sovereign immunity, at least on a limited basis, for the purpose of arguing sovereign immunity. As a practical matter, and as previous courts have concluded, forcing Moving Tribes to jump through this hoop would elevate form over substance and would not change the overall posture of this proceeding.

No. C13-5071JLR, 2013 WL 5720053, at \*3 (W.D. Wash. Oct. 21, 2013) (citing *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 311–12 (W.D.N.Y. 2007) and *Warren v. United States*, No. 06–CV–0226S, 2009 WL 1663991, at \*3 (W.D.N.Y. June 15, 2009)).

In *Citizens Against Casino Gambling in Erie County*, the court allowed a tribe to seek dismissal under Rule 19 as an amicus rather than requiring it to intervene. The court noted that this was appropriate for two reasons:

First, the issue of indispensability is one that courts have an independent duty to consider *sua sponte*, if there is reason to believe dismissal on such grounds may be warranted. *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 892–3 (10th Cir. 1989); *see also, Havana Club Holding, S.A. v. Galleon S.A.*, 974 F.Supp. 302, 311 (S.D.N.Y. 1997) (“when a court believes that an absentee may be needed for a just adjudication, it may raise compulsory party joinder on its own motion”). In light of the Court’s independent duty, the [tribe]’s brief may be helpful in ascertaining whether the [tribe] is necessary and indispensable such that, in equity and good conscience, the case should be dismissed.

Second, . . . as a practical matter, requiring the [tribe] to resubmit its motion in a form Plaintiffs might consider procedurally correct [i.e., through intervention] would not alter the posture of this case. Were the [tribe] to move to intervene solely to seek Rule 19 dismissal, that issue still would be presented to this Court by an entity claiming sovereign immunity with respect to the underlying claims.

471 F. Supp. 2d at 312.

Similarly, in *Warren v. United States*, the court held that a tribe was not required to intervene and could instead participate as an *amicus* in briefing on whether claims against certain defendants were futile given their immunity. 2009 WL 1663991 at \*2. The court observed that requiring the tribe to re-file its motion as one to intervene “would not alter the posture of Plaintiff’s pending motion or this case as a whole, and would simply elevate form over substance. It would require the [tribe] to waive sovereign immunity, at least on a limited basis, to argue the protection of sovereign immunity.” *Id.* Finding that the tribe had “a special interest in and expertise with regard to the scope of its sovereign immunity,” the court permitted the tribe to participate as an *amicus*. *Id.* *See also Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 (2012) (noting that it is a sovereign’s prerogative as to whether to intervene).

Here, the issues of sovereign immunity and treaty hunting and gathering rights are crucial to the Moving Tribes. They can protect both interests by participating as *amici*.

## **VI. PROPOSED SCHEDULING FOR *AMICI* BRIEF SUBMISSION**

Rule 10.6 of the Washington State Rules of Appellate Procedure gives the appellate court discretion to “establish appropriate timelines for the filing of the amicus brief and answer thereto.” The Moving Tribes have conferred with counsel for Appellant and Respondents and have agreed that the Moving Tribes’ *Amicus* Brief will be filed not later than September 10, 2020. King Aff. ¶ 9. The parties have also agreed to a due date of September 30, 2020 for answering briefs to the Moving Tribes’ *Amicus* Brief under RAP 10.1(e). *Id.* These filing dates will allow the Moving Tribes to review Appellant’s opening brief and provide both Appellants and Respondents an opportunity to respond to the Moving Tribes’ brief consistent with the expedited briefing schedule already set in this case, as follows:

- August 28, 2020: Due date for Appellant’s Brief
- September 10, 2020: Due date for Moving Tribes’ *Amicus* Brief
- September 18, 2020: Due date for Respondents’ Brief
- September 25, 2020: Due date for Appellant’s Reply Brief
- September 30, 2020: Due date for Answering Briefs to *Amicus* Brief

## **VII. CONCLUSION**

The Moving Tribes seek to participate as *amici* to protect their treaty rights. Because Makah’s standing in this case relies on its assertion of possessing treaty hunting and gathering rights in the Moving Tribes’ treaty hunting and gathering area, a ruling in Makah’s favor will have a significant impact on the Moving Tribes’ treaty rights. The Moving Tribes thus have a vital interest in the outcome of this case and a perspective that will aid this Court’s analysis of the indispensability and treaty hunting rights issues in this case.

The Moving Tribes request that the Court grant them leave to participate as *amici curiae* on the terms outlined in this Motion.

Respectfully submitted this 17th day of August, 2020.

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## DECLARATION OF SERVICE

I, Sandra D. Lonon, declare under penalty of perjury under the laws of the State of Washington that I am now and at all times mentioned herein, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On August 17, 2020, I caused to be served in the manner noted copies of the foregoing through the Court's electronic court filing upon the designated parties below:

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August 17, 2020 - 5:17 PM

## Transmittal Information

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**Appellate Court Case Number:** 54945-0  
**Appellate Court Case Title:** Makah Indian Tribe, Appellant v. Commissioner of Public Lands Hilary Franz, et al., Respondents  
**Superior Court Case Number:** 20-2-01547-1

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