Appeal No. 23-35066

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Appellant

STATE OF WASHINGTON, *et al.*

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE
The Honorable Ricardo Martinez, United States District Court Judge
Case No. 2:17-sp-00003-RSM

APPELLEE HOH INDIAN TRIBE ANSWERING BRIEF

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Rule 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Appellee Hoh Indian Tribe, certifies that the Tribe does not have a parent corporation(s) and no publicly held corporation owns stock in the Appellee Tribe.

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I. INTRODUCTION

The Hoh Indian Tribe ("Hoh Tribe" or "Hoh") files this brief as an "Interested Party" in the proceeding below. The Hoh Tribe did not actively participate in the trial below and its treaty fishing area on the Olympic Peninsula and in the Pacific Ocean to the west of the Peninsula was not directly affected by the factual dispute in Subproceeding 17-03. Nevertheless, several of the legal issues and the application of legal standards to facts in the proceeding have the potential to adversely impact the Hoh Tribe's treaty rights, so the Hoh Tribe monitored the Subproceeding and participated by filing briefs in the case at specific points.

Two rulings in the district court's December 30, 2022, Order Granting Rule 52(c) Motion in Subproceeding 17-03, Dkt. # 312, ER 2-7, have the potential to adversely affect the Hoh Tribe's treaty interests, especially its unadjudicated ocean treaty fishing usual and accustomed grounds and stations western boundary, unless clarified by this Court on appeal.

The Hoh Tribe wants to be clear that it does not take a position on the factual findings of the district court in Subproceeding 17-03 and leaves any dispute on those findings to the parties who actively participated below. The Hoh Tribe's interest in Subproceeding 17-03 is limited to two questionable legal rulings made by the district court. The Hoh Tribe will also address the contention of certain

"Interested Tribes" in this Subproceeding that they should have different party status than other participating tribes ("Request to Modify the Caption, Dkt. # 11). The Court in its Scheduling Order dated May 5, 2023, directed that this issue be addressed by the parties in their merits briefs.

II. JURISDICTIONAL STATEMENT

The Hoh Tribe defers to the Jurisdictional Statement submitted by other appellate parties.

III. STATEMENT OF THE ISSUES

The Hoh Tribe defers to the Statement of the Issues submitted by other appellate parties.

IV. STATEMENT OF THE CASE

The Hoh Tribe defers to the Statement of the Case submitted by other appellate parties.

V. SUMMARY OF ARGUMENT

The district court's decision violates the law of the case on two specific issues. Petitioning tribes' motion to modify the case caption should be denied.

VI. ARGUMENT

1. The District Court improperly dispensed with the controlling standard to determine Tribal Usual and Accustomed Grounds and Stations of Treaty Tribes.

The standard of proof necessary for a treaty tribe with off-reservation fishing rights to establish its usual and accustomed fishing grounds and stations reserved by treaty is well established in *United States v. Washington*:

> In accordance with [the evidentiary] standards [applied by Judge Boldt in Decision I], the Court has found that the Quinault Indian Nation and the Quileute Indian Tribe bear the burden to establish the location of their usual and accustomed grounds and stations under the Treaty of Olympia. . . . In determining whether these tribes have met their burden, the Court bases its findings "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom." *United Sates v.* Washington, 384 F. Supp. 312, 348 (W.D. Wash. 1974) ("Decision I"). . . . In sum, the Quileute and Quinault may rely on both direct evidence and reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show the probable location and extent of their U & As. . . . In evaluating whether or not the tribes have met their burden, the Court gives due consideration to the fragmentary nature and inherent limitations of the available evidence while making its findings on a more probable than not basis.

United States v. Washington, 129 F. Supp. 2d 1069, 1110 (W.D. Wash. 2015), *aff'd*, *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017) ("*Makah v. Quileute*").

The district court altered this long-standing standard of proof to establish U&A by holding: "Furthermore, 'at and before treaty times' clearly requires evidence of fishing at treaty times. Evidence of fishing in the hundreds of years

prior to treaty times, alone, is insufficient." Order, p. 2, ER 3. This ruling dispenses with any requirement to prove historical fishing before a treaty was signed; if a tribe cannot show that it was fishing at a specific ground or station on the day it signed a treaty, any other historical evidence of fishing at that location or ground is irrelevant under the district court's ruling.

This is not the law established in *U.S. v. Washington*. The *Makah v. Quileute* decision is a recent example of the correct standard of proof. As found in that case, the United States government was not even aware of the existence of the Quileute and Hoh tribes located on the Olympic Peninsula between the Quinault Indian Nation and the Makah Tribe until most Indian treaties had been completed. *See Makah v. Quileute*, 129 F. Supp. 2d at 1075 (FOF 2.2: existence of Quileute Tribe between Makah and Chehalis tribes "accidentally discovered" by treaty negotiators to the unsuccessful Chehalis Council treaty negotiations when two young boys speaking a different language were overheard); p. 1079 (FOF 4.2: In 1854, little was known of the existence of the Quinault tribe); p. 1086 (FOF 8.1; 8.2: "The United States government was almost entirely unaware of the presence of a tribe located between the Makah and the Quinault prior to the negotiation of the Treaty of Olympia"; Quileute and Hoh remained isolated before and for decades following the treaty in 1855).

Consequently, there is little direct evidence of ocean fishing by the Olympic

Treaty tribes at the time the treaty was signed, except perhaps for the fact that the negotiated treaty did not expressly exclude such fishing. Instead, much or most of the evidence of ocean fishing was either pre-treaty or post-treaty. For pre-treaty evidence, for example, the district court found for Quinault:

> Evidence regarding treaty-time activities of the Quinault is limited even in comparison to the similarly isolated Quileute and substantially more limited than for the Makah, whose location amidst the deep harbors at Neah Bay made this latter tribe unusually accessible to non-Indian traders, settlers, and visitors.

129 F. Supp. 2d at 1079 (FOF 4.1);

> Most of what is known about Quinault culture and subsistence activities before and at treaty times comes from Dr. Ronald Olson's ethnology of the Quinault.. . . Dr. Olson's ethnography intended to describe Quinault culture and society prior to contact with non-natives and drew from the memories and oral histories of informants . . . .

Id., FOF 4.4.(emphasis added)[1]

The district court's decision requiring direct evidence of fishing at specific grounds or stations at the time the treaty was signed ignores the law of *U.S. v. Washington* and Judge Boldt's adoption of "reasonable inferences" under the case's relaxed standard of proof. Under this standard, it is a reasonable inference

[1] *See*, *e.g.*, *United States v. Lummi Indian Tribe*, 841 F. 2d 317, 318 (9th Cir. 1988) ("Documentation of Indian fishing during treaty times is scarce. Dr. Lane, an acknowledged authority in the field, has testified that what little documentation does exist is 'extremely fragmentary and just happenstance.' Accordingly, the stringent standard of proof that operates in ordinary civil proceedings is relaxed. *United States v. State of Washington* ("Makah"), 730 F.2d 1314, 1317 (9th Cir.1984).").

that a tribe which has fished for hundreds of years as documented in the historical, archeological, anthropological, linguistic, biological and/or other records continued to engage in the same fishing activity at treaty time in the absence of evidence to the contrary. This is the standard the district court should have applied in its ruling.

Two examples will illustrate why it would be inappropriate to apply the cramped evidentiary standard applied in the district court's decision. Northwest tribes were under an extraordinary amount of social and political stress around treaty time. The first and primary example is the introduction of European diseases to which Native Americans were highly susceptible. Tribal populations plummeted due to deaths from these diseases and took time to recover. *See*, *e.g.*, Decision I, 384 F.Supp. at 352 (FOF 9):

> "There was a sharp decline in Indian population in the case area in the period after extensive contact with Europeans and Americans which occurred around 1780. It has been estimated that Indian populations in the Puget Sound region declined by approximately 50% between 1780 and 1840, but pre-treaty censuses were often incomplete and inaccurate. . . . A decline in population continued during the decades following the signing of the treaties, due in large part to diseases introduced by non-Indians."

See, United States v. Lummi Tribe, *supra*, 841 F.2d at 319 ("disease and warfare depopulated the San Juan Islands").

While tribal populations were decimated by disease, the tribes were not able to fish at all the locations they traditionally used, and the tribes often consolidated in fewer locations for defense and other purposes. Once those tribes had recovered

from the various disease epidemics, they resumed fishing at all of their traditional locations. Tribes should not be penalized because outside influences like disease caused them to temporarily pause utilizing particular traditional locations at and around treaty time.

The second example is similar in degree but involves warfare and predation by Canadian coastal tribes, primarily against San Juan Island tribes and bands. The United States and Great Britain agreed to international boundaries in the San Juan Islands and the Strait of Juan de Fuca in the Oregon Treaty, ratified by the United States Senate on June 18, 1846. Problems persisted, however, with cross border raids by Indians from the Gulf Coastal Islands on the Indian tribes and bands within the new United States borders. The federal government struggled around treaty time to contain these incursions, and San Juan Island area Indian tribes retreated to defensive positions until the federal government was able to address the problem, temporarily altering traditional fishing practices.

Excerpts from annual Commissioner of Indian Affairs reports to the Secretary of Interior describe the problem:

> Settlements, as well as the friendly Indians along Puget's Sound and the waters of Admiralty inlet, suffer materially from the predatory incursions of Indians from Vancouver's Island, and the other adjacent British and Russian possessions. They are an enterprising, warlike race, and generally make their expeditions by water in large boats or canoes, some of them large enough to carry a hundred men, which they propel with much swiftness. To afford the necessary protection to our people from their frequent depredations, the employment of a

light draught armed steamer in those waters to intercept and chastise them is essential.[2]

The superintendent again represents the necessity for the employment of a small war steamer for the protection of our settlements and the friendly Indians along Puget's Sound and the waters of Admiralty Inlet, from the hostile and predatory visits of the warlike Indians from Vancouver's Island, and the neighboring British and Russian possessions, who move so swiftly in their large boats, that it is impossible to overtake or cut them off except by means of such a vessel.[3]

I desire to call your attention to the urgent necessity which exists for the constant presence of a small and swift war-steamer on the waters of Puget's Sound.

The presence of such a vessel would greatly tend to hold our own Indians in subjection, besides being indispensable for the protection of our settlers against the frequent incursions of the fierce and warlike tribes, who make descents in their large war canoes from the British and Russian territories of the north. The swiftness with which those savages propel their finely modelled canoes, capable of carrying one hundred warriors, renders anything but a steamer useless in pursuit, while their courage, numbers, and skill render them too formidable to be successfully contended with by an ordinary crew.[4]

This officer represents that the necessity is constantly becoming more urgent for a small and swift armed steamer in the waters of Puget's Sound, for the protection against the marauding expeditions of the piratical Coast Indians, north of our territory, who move so rapidly in

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[2] Letter dated November 30, 1857, from J.W. Denver, Commissioner of Indian Affairs to Hon. J. Thompson, Secretary of the Interior, pp. 11-12, available online at https://digital.library.wisc.edu/1711.dl/3YVW4ZRARQT7J8S.

[3] Letter dated November 6, 1858, from Charles E. Mix, Commissioner of Indian Affairs to Jacob Thompson, Secretary of the Interior, pp. 8-9, available at https://digital.library.wisc.edu/1711.dl/3YVW4ZRARQT7J8S.

[4] *Id.*, p. 219. Letter dated August 20, 1858, from J.W. Nesmith, Superintendent Indian Affairs, Oregon and Washington Territories, to Hon. Charles E. Mix, Commissioner of Indian Affairs.

> their large war canoes that then cannot be intercepted except by means of such a vessel.[5]

As these contemporaneous excerpts of Indian Affairs' correspondence show, the Indians in the northwest United States in and around the San Juan Islands and Puget Sound were subjected to serious attacks and depredation at and around treaty time and either withdrew to defensive areas to avoid such attacks or had to temporarily forego exercising the full extent of their fishing rights. Increased federal presence was required before the Indians of the area were able to return to all their traditional areas and fishing grounds. The fact that some of these tribes and bands were unable to exercise their fishing rights in all usual and accustomed areas at the exact time the relevant treaties were signed does not and should not mean that those tribes permanently abandoned their treaty rights.

The district court's decision that treaty U&A area is limited to a snapshot of where a tribe fished on the day the relevant treaty was signed alters the Court's previous comprehensive analysis of tribal fishing practices throughout history. The district court's decision is erroneous, will alter the law of this case, and must be reversed.

2. **The law of the case requires that for ocean treaty fishing tribes, the presence of villages includes a reasonable inference that the**

[5] Letter dated November 26, 1859. p. 25, from A.B. Greenwood, Commissioner of Indian Affairs, to Hon. J. Thompson, Secretary of the Interior, available at https://digital.library.wisc.edu/1711.dl/3YVW4ZRARQT7J8S.

coastal tribe in question fished in the ocean off the coastal areas where tribal villages were located.

The district court in its December 30, 2022, decision took an extreme isolationist approach in determining the Stillaguamish Tribe's potential ocean fishing U&A, meaning the district court looked at each treaty factor in isolation rather than looking at the evidence as a whole and reasonable inferences from the totality of that evidence. *See* Order, p. 4, ER 5, ¶ 6 (evidence of distinction between Stillaguamish tribe and another tribe not sufficient by itself to establish marine fishing by Stillaguamish); p. 4, ER 5, ¶ 7 (evidence of shell middens by itself not sufficient evidence to establish U&A); pp. 4-5, ER 5-6, ¶ 8 (evidence of intermarriage with neighboring tribes by itself not sufficient evidence to establish Stillaguamish ocean U&A); p.5, ER 6, ¶ 9 (evidence of ocean travel not sufficient by itself to establish marine fishing by Stillaguamish); pp. 5-6, ER 6-7 (law of the case requires that Stillaguamish do more than proffer evidence of village locations or possible presence to establish ocean fishing U&A). This approach by the district court is inconsistent with the law of the case.

The Hoh Tribe is particularly concerned with the district court's conclusion that: "The non-travel evidence presented by Stillaguamish, including the presence of villages, is ultimately insufficient to satisfy the above standards (direct evidence, indirect evidence or reasonable inferences therefrom)." While other tribes may argue this conclusion with regard to land- and river-based tribes, this conclusion

violates the law of the case with regard to coastal tribes that engage in ocean treaty fishing.

The district and appellate courts in *U.S. v. Washington* decades ago held that ocean treaty fishing U&As can only be determined by reference to how far out into the ocean a tribe likely traveled:

> 344. There does not appear to be any way to document the precise outer limits of the Makah offshore fishing grounds at treaty times. The only feasible way to describe Makah usual and accustomed fishing grounds for offshore fisheries is in terms of distance offshore that the Makah reportedly navigated their canoes.

United States v. Washington, 626 F. Supp. 1405, 1466-68 (W.D. Wash.1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984). This standard for ocean treaty fishing U&As was adopted by subsequent courts because there are no identifiable grounds and stations in the ocean other than a few specific fishing banks. Ocean treaty fishing U&As have been determined by looking at the evidence of where ocean-oriented tribes had their villages or coastal fishing sites, and then extending the tribe's ocean U&A from those points as far as the relevant tribe was found to have traveled out in the ocean.

This subject was most recently addressed in *Makah v. Quileute*, the ocean treaty fishing case that determined the western ocean treaty fishing U&A boundary of the Quileute and Quinault Tribes. In its opinion, the trial court "inferred"

Quileute and Quinault ocean fishing in the areas along the coastline near historical tribal villages:

> 13.7. The evidence shows that the Quileute did not constrain their fishing activities to Lake Ozette, but that they also fished along its adjacent coastline. Dr. Ray attested to this tradition before the ICC, explaining that the Quileute would fish up and down along the beach "covering a stretch of many miles" from their coastal village at Norwegian Memorial, located adjacent to the southern end of Lake Ozette. The Indians would travel back and forth along "the whole area in between Ozette Lake and the shores of the Pacific" for the purpose of hunting small game. "At other times, they would simply be hurrying down to the beach [from Lake Ozette] to get to their whaling station or something of that sort." Ex. 243 at p. 239. Aboriginal Quileute fishing along the coastline west of Lake Ozette can also be inferred from Judge Boldt's inclusion in the Quileute case area U & A of the "tidewater and saltwater areas" "adjacent" to Lake Ozette and the other inland water bodies at which the Quileute traditionally fished. FF. 108.
>
> 13.8. Third, evidence of Quileute place names is consistent with regular Quileute fishing as far north as Cape Alava. Dr. Ray provided a compilation of Quileute village sites to the ICC along with his maps, locating the northernmost of the sixteen identified Quileute coastal villages at Norwegian Memorial. Ex. 119.1. It is reasonable to infer, as this Court did in locating the southern boundary of the Makah's ocean U & A at Norwegian Memorial ten miles south of the southernmost Makah village at Ozette, that the Quileute villagers living at Norwegian Memorial were fishing in the waters north as well as south and west of their home. *See U.S. v. Washington,* 626 F.Supp. at 1467.

Makah v. Quileute, *supra*, 129 F. Supp. 2d at 1109, *aff'd*, 873 F.3d 1157 (9th Cir. 2017) (emphasis added). *See id.* at 1082, FOF 5.1 (Quinault: "During the summer months, some Quinault migrated from their upland villages to sites along the coast to engage in these ocean fisheries.").

As these *U.S. v. Washington* citations demonstrate, ocean U&As are established by the location of villages and fishing sites along the coast. The identification of village sites infers fishing off those village sites as well as adjacent areas along the coast – up to ten miles away in the situation of Makah, which presented no direct evidence of any kind of its ocean fishing in the southern reach of its adjudicated ocean treaty U&A. The district court's ruling that identification of villages by itself does not provide a reasonable inference of ocean fishing off those village cites is contrary to the law of the case and should be reversed.

3. Motion of Upper Skagit Indian Tribe, Tulalip Tribes, and Swinomish Indian Tribal Community to modify the caption in this appeal should be denied.

The Court in its Scheduling Order dated May 5, 2023, Dkt. #24, referred the Motion of the Upper Skagit Indian Tribe, the Tulalip Tribes, and the Swinomish Indian Tribal Community ("Petitioning Tribes") to Modify the Caption in this Appeal, Dkt. #11, March 14, 2023, to the merits panel for whatever consideration it warrants. Petitioning Tribes' motion must be denied because they are judicially estopped, and because their motion is inconsistent with the law of the case.

Petitioning Tribes have asked this Court to label them as "Appellees" and all other participating tribes as "Interested Parties/Real Parties in Interest" in this appeal. Petitioning Tribes base this request on the argument that only they among

the tribal parties allegedly were "Respondents" in the district court proceeding below. *See* Motion to Modify Caption, Dkt. #11, p. 2 ("the three Respondent tribes below . . . are the only parties that should be identified as appellees. . . . none of the tribes listed as 'Interested Party – Appellees' were respondents in the subproceeding . . ."; Dkt. # 2, Letter dated Feb. 1, 2023 (Caption should be changed to include the Swinomish Indian Tribal Community as a "Respondent-Appellee"); Dkt. #5, Letter dated Feb. 6, 2023 (Caption should be changed to include the Tulalip Tribes as a "Respondent-Appellee"); Dkt. #9, Letter dated Feb. 23, 2023, from Upper Skagit Indian Tribe ("Only Upper Skagit, Swinomish Indian Tribal Community, and Tulalip Tribes appeared as respondents on September 12, 2017, and September 14, 2017, respectively[6]. . . . The three respondent tribes are the only parties that should be identified as appellees.").

The three Petitioning Tribes are not Respondents and were never Respondents in the district court below. The Petitioning Tribes are judicially estopped from asserting that they are or were Respondents and argued the exact opposite position against the Hoh Tribe in Subproceeding 09-01 in the district

[6] In Subproceeding 17-03 in the district court, the Swinomish Indian Tribal Community filed its Notice of Appearance in the Subproceeding on September 12, 2017, Dkt. #8, Upper Skagit filed its Notice of Appearance on September 12, 2017, Dkt. # 11, and Tulalip Tribes filed its Notice of Appearance on September 14, 2017, Dkt. #14. None of these Notice of Appearances stated that the noting tribe was appearing as a Respondent. As will be discussed below, under the law of the case in *U.S. v. Washington* all parties filing notice of appearance in a Subproceeding are classified only as Interested Parties.

court. *See Makah Tribe v. Quileute Indian Tribe*, 129 F.Supp.2d 1069 (W.D. Wash. 2015), *aff'd*, 873 F.3d 1157 (9th Cir. 2017).

The district court has crafted an elaborate procedure over the years for the subproceeding process in *U.S. v. Washington*.[7] The primary rule is that whichever party initiates a new subproceeding by filing a formal "Request for Determination" completely controls who will be a respondent or responding party in that subproceeding.[8] Only parties named by the initiating party as respondents in the opening complaint are formal "respondents;" any other party can participate in the new subproceeding only by filing a notice of appearance as an "interested party." [9]

The Stillaguamish Tribe initiated Subproceeding 17-03 in the district court by filing a Request for Determination ("RFD") on September 11, 2011, Dkt. #4. Stillaguamish's RFD names one Respondent. RFD, p. 3, ¶7 ("Respondent is the State of Washington."). While Paragraph 8 of the RFD states that the Petitioning

[7] Paragraph 25 of the original continuing injunction in *U.S. v. Washington* provides the process for ongoing and future proceedings in the case. 384 F. Supp. 312, 419 (W.D. Wash. 1974). This process has subsenquently been modified by Orders of the District Court. Supplmental Order on Paragraph 25 Procedures, Aug. 11, 1993, Dkt. #13599 ("1993 ¶25 Procedures"); Supplemental Order on Paragraph 25 Procedures, Nov. 9, 2011, Dkt. # 19983 ("2011 ¶25 Order").

[8] Paragraph (1) in the November 2011 ¶25 Order states that when a party initiates a new subproceeding by filing a Request for Determination, "The motion shall clearly designate who shall be the requesting party and responding or affected parties . . . ."

[9] *Id.*, p. 2 Paragraph (6) ("Parties to *U.S. v Washington* who are not named as requesting or responding parties, but who wish to participate in the subproceeding may file a Notice of Appearance as an Interested Party, and will be entered as such on the docket by the Clerk.").

Tribes might want to appear as Respondents in the Subproceeding in whole or in part, the *U.S. v. Washington* Paragraph 25 Procedures do not provide for that option.

The Hoh Tribe struggled with this same situation in Subproceeding 09-01. *See United States v. Washington*, 129 F.Supp.3d 1069 (W. D. Wash. 2015) (Dkt. # 369), *aff'd sub nom., Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017) ("*Makah v. Quileute*"). That subproceeding was initiated by the Makah Tribe, challenging whether the signatory tribes to the 1855 Treaty of Olympia, 12 Stat. 971, reserved the right to fish out in the Pacific Ocean beyond the State's three-mile ocean jurisdiction boundary. *Makah v. Quileute*, 873 F.3d at 1159 ("Here we address the Treaty of Olympia, which the Quileute and Quinault (as well as the Hoh Indian Tribe) signed in July 1855."). There are three signatory tribes to the Treaty of Olympia: Hoh, Quileute and Quinault. In initiating Subproceeding 09-01, the requesting tribe, Makah, named only two of the three Treaty of Olympia tribes as respondents: Quileute and Quinault. Subproceeding 09-01, Makah Request for Determination, Dkt. # 1, ¶ 1. Makah did not list the Hoh Tribe as a Responding Party even though it was the only other signatory to the Treaty of Olympia on the ground that "Hoh is not exercising or threatening to exercise its fishing rights in a manner that injures Makah . . . ." Subproceeding 09-01, Makah RFD, Dkt. # 1, p. 2 n.1.

Makah's decision to only name two of the three signatories to the Treaty of Olympia deeply concerned the Hoh Tribe for at least two reasons; (1) as a fellow tribal party to the Treaty of Olympia, any federal court decision on what fishing rights were reserved under that Treaty would obviously affect and bind the Hoh Tribe; and (2) Judge Boldt in the original *U.S. v. Washington* decision found that at treaty time the Quileute and Hoh Indians were one people that had only separated into two tribes post-treaty, so any findings and conclusions involving the Quileute Tribe would almost certainly apply to the Hoh Tribe. *United States v. Washington*, 384 F.Supp. 312, 359 (Findings of Fact Nos. 38, 39), 371-72 Finding of Fact Nos. 103, 104 ("At the time of the treaty the Quileute (including the Hoh) relied primarily on salmon and steelhead . . . ."). Some of the district court's findings of facts for Quileute in Subproceeding 09-01 were based on the history of the Hoh Tribe at and before treaty time. *E.g., Makah v. Quileute*, 129 F.Supp.3d at 1086, 1090, 1092, 1095, 1101.

Hoh assumed it had a right to be joined as a Responding Party in 09-01 based on these common questions of law and fact and Hoh's obviously implicated rights. But because the November 9, 2011 Supplemental Paragraph 25 Order does not provide any process for a party not named as a Respondent by a Requesting Party to be joined as a Respondent, the Hoh Tribe filed a Fed. R. Civ. Proc. 24

motion to intervene in Subproceeding 09-01.[10] Subproceeding 09-01, June18, 2012, Dkt. # 115. Hoh argued that it was an "affected party" under Paragraph 25 procedure, *see* subparagraph 25(b)(1) at n.7, *supra*, and therefore was required to be added as a respondent or defendant.

The Makah Tribe and Tulalip Tribes opposed Hoh's motion to intervene on that ground that Hoh was already entitled to "participate fully" in Subproceeding 09-01 as an "interested party" even though it was not named as a Responding Party, and therefore no need to intervene existed. Subproceeding 09-01, Makah Response to Hoh Motion to Intervene, June 20, 2012, Dkt. # 116; Tulalip Response to Hoh Motion to Intervene, June 29, 2012, Dkt. # 117, p. 1 ("This Court has provided that, as a procedural matter, an existing party that is not named as a 'requesting' or 'responding' party in a new Request for Determination must file a Notice of Appearance in order to participate in the new Subproceeding as an 'interested' party."). Tulalip's position in Subproceeding 09-01 is ironical since Tulalip's Request for Correction of the Case Caption in the present appeal is based

[10] The district court's August 9, 1993 Order Modifying Paragraph 25, Dkt. #13599, p. 8, Subsecton (b)(9), states: "Except as specifically provided in this paragraph, this injunction shall not alter or deprive the parties of any right to bring motions or other matters before this Court as provided in the Federal Rules of Civil Procedure." Since the Paragraph 25 procedures do not provide any alternative for a tribe not named as a responding party to become a responding party or defendant, and the Federal Rules of Civil Procedure contains a specific rule allowing a directly affected party to intervene and become a party, Hoh invoked this subparagraph of Paragraph 25 in its motion to intervene.

on its argument that even though it was not named as a Responding Party by Stillaguamish in Subproceeding 17-03, it really was a Responding Party and therefore should have different appellate status than other Interested Parties in that subproceeding. Hoh fully participated in Subproceeding 09-01 at trial, but that participation never converted it into a Responding Party.

Hoh's Motion to Intervene in Subproceeding 09-01 was denied by the court:

> The Makah and Tulalip Tribes are correct that the Hoh are entitled to fully participate in this subproceeding without formally intervening as a responding party. Further, paragraph 25 of the Permanent Injunction, which governs jurisdiction and procedures in the subproceedings, does not contemplate intervention of the type requested here. To the extent that factual and legal determinations in this subproceeding have an implication for the scope of the usual and accustomed fishing grounds of the Hoh, that Tribe may argue their position in memoranda filed in their status as participant under Paragraph 25. On the other hand, should the Hoh wish to assert facts which would distinguish their position from that of the Quileute with respect to usual and accustomed fishing areas, they should file their own Request for Determination following the procedures set forth in Paragraph 25, including the requisite pre-filing meet and confer.

Subproceeding 09-01, Order Denying Hoh Motion for Leave to Intervene, August 9, 2012, Dkt. # 128.

This course of action continued in the Ninth Circuit appeal of Subproceeding 09-01. *Makah Indian Tribe v. Quileute Indian Tribe*, No. 15-35824. The Hoh Tribe moved to intervene in the appeal as an appellee along with formal Respondents Quileute and Quinault, Hoh Indian Tribe's Motion to Intervene, Dkt. # 11-1, January 19, 2016, based on the same arguments raised in the district court.

The S'Klallam Tribes opposed Hoh's motion, arguing that it was unnecessary because in prior appeals Interested Parties in the District Court were all treated equally as Appellees by the Ninth Circuit on appeal and not required to formally intervene, and that it would violate the law of the case to treat Interested Parties differently on appeal. Opposition to the Hoh Tribe's Motion to Intervene, Dkt. # 13, January 25, 2016. The Motions Attorney for the Ninth Circuit denied Hoh's motion to intervene "as unnecessary." Order, Dkt. # 17, March 30, 2016. The Court's briefing schedule in that appeal matches the briefing schedule adopted in the present appeal, with no distinction between classes of Interested Parties below.

As this precedential history reflects, there is no basis for the Petitioning Tribes in the present appeal to assert that they were really "Responding Parties" in the district court. They were not. There is no procedure for any party in any subproceeding in *U.S. v. Washington* that is not named as a responding party by the RFD requesting party to become a responding party; it is limited to participation as an "interested party" but is allegedly entitled to fully participate under that status. All Interested Parties in the district court share the same party status on appeal.

As this Court may be able to tell, the Hoh Tribe is frustrated by the artificial structures set up under the current *U.S. v. Washington* Paragraph 25 procedure. Hoh was not able to "fully" participate in Subproceeding 09-01, in violation of what Hoh believes is the intent of Rule 24 of the Federal Rules of Civil Procedure

– to resolve common questions of law and fact in one proceeding as a matter of judicial efficiency. Instead, if Hoh had wanted to adjudicate its rights under the Treaty of Olympia in the Pacific Ocean at the same time the other two signatories to that Treaty were litigating their rights, Hoh would have been required to initiate a separate, duplicative subproceeding. In Hoh's opinion, this rule makes no sense.

But it is the rule. Tulalip cannot argue for the rule in Subproceeding 09-01 and against it in the Subproceeding 17-03. Hoh recommends that the District and Circuit Courts review this procedure prospectively in an appropriate case, but it is not a "case caption correction" as asserted by the Petitioning Parties here. For example, appellate standing in the Circuit Court is supposed to be based on well-articulated Article III standing grounds; an "interested party" in *U.S v. Washington* should not be eligible to appeal or participate as an appellee in the absence of direct injury or impact. Yet at the moment, any "interested party" in any subproceeding has status as an appellant or appellee under custom of the case, no matter how attenuated its real interest in a particular subproceeding might be.[11]

[11] For example, in Subproceeding 09-01, the State of Washington's Request to file a Cross-Request for Determination, raising essentially the same claims against Quileute and Quinault as Makah's RFD, was denied by the district court on the ground that the State had no legal interest in an inter-tribal dispute because the State's share of the overal fishery would not be affected by any decision. Subproceeding 09-01, Order Denying State Motion for Leave to File a Cross-RFD, April 12, 2011, Dkt. # 74. Despite this ruling, the State fully participated in concert with Makah in the district court as an Interested Party and as an appellant in the appeal of the district court's decision.

Petitioning Tribes Request for a Case Caption Correction in this appeal should be denied.

VII. CONCLUSION

Based on the foregoing discussion, the district court's rulings that only direct evidence of tribal fishing at the moment a treaty was signed is determinative of tribal fishing U&A and that tribal village sites by themselves are not relevant in determining tribal fishing U&A are in error and must be reversed. In addition, the motion of petitioning tribes to modify the case caption in this appeal and change the status of certain Interested Parties in this appeal is contrary to the practice and custom in this long-running case and must rejected.

Dated: June 26, 2023

Respectfully submitted,
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STATEMENT OF RELATED CASES

NONE

Dated: June 26, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,820 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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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