No. 17-1592

In the Supreme Court of the United States

MAKAH INDIAN TRIBE,

Petitioner,

v.

QUILEUTE INDIAN TRIBE AND
QUINAULT INDIAN NATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITIONER

GREGORY G. GARRE
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
202 637-2207
gregory.garre@lw.com

MARC D. SLONIM
Counsel of Record
ZIONTZ CHESTNUT
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121
(206) 448-1230
mslonim@ziontzchestnut.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

ADDENDUM

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITY

ARGUMENT

As the State of Washington has explained, the Ninth Circuit's decision in this case resolves a "critically important" question of treaty interpretation in a way that "conflicts with this Court's approach to treaty interpretation at every step" and "inflicts substantial harm on the State, the public, and the Makah Indian Tribe," causing "permanent changes to existing commercial fisheries," "diminish[ing] tax revenues," and "exacerbat[ing] intertribal disputes." Br. of Resp. Washington Dep't of Fish & Wildlife (WDFW Br.) 1, 2, 3, 25, 26.

In response, the Quileute Indian Tribe and Quinault Indian Nation try to trivialize this as but "a narrow, fact-bound case," Opp. 1; double down on the Ninth Circuit's categorical refusal to give effect to explicit textual differences in contemporaneous treaties, *id.* at 13; and suggest that federal regulations that disclaim any intent to determine treaty boundaries somehow resolve this dispute, *id.* at 2, 5, 34. None of this holds up to scrutiny.

The same goes for Respondents' attempt to rewrite the longstanding treaty interpretation of the United States in the *Makah* proceeding that "usual and accustomed grounds" for *fishing* cannot be based on whaling or sealing. Pet. 27-29; Opp. 31. Respondents' misrepresentations about the federal government's position just beg the question of what that position really is. At the very least, the Court should call for the views of the Solicitor General.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS

A. The Ninth Circuit Erred in Categorically Refusing to Consider Critical Textual Differences in Contemporaneous Treaties

At its core, this case concerns whether treaties between the United States and Indian tribes should be interpreted based on the language the parties agreed to and the Senate ratified, or on an attempted reconstruction more than 150 years later of rights the tribes might have hoped to obtain in the treaty.

This Court's cases teach that treaties "cannot be rewritten or expanded beyond their clear terms," *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943), and that the use or omission of the same language in contemporaneous treaties is significant. Just as the "disparate inclusion or exclusion" of language in related sections of the U.S. Code evidences an intentional difference in meaning, *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted), so too the disparate inclusion or exclusion of language in otherwise similar treaties should lead to different results. Pet. 17-19 (collecting examples).

The Ninth Circuit's decision directly contravened these principles. Pet. 16-21. Yet Respondents double down on that approach, arguing that "construing one tribe's treaty based on another tribe's treaty [i]s improper" and that ultimately treaty language doesn't matter. Opp. 14, 16 (asserting "[n]o court has held that differences in the language of the usufructuary provision effect a difference in rights").

This disregard for treaty language is irreconcilable with *Choctaw* and this Court's other precedents. In *Minnesota v. Mille Lacs Band*, for example, this Court held that the absence of a clause "expressly mentioning" certain rights was a "telling" "omission[]" precisely because such a clause had been included in a treaty with a nearby tribe "just a few months" later. 526 U.S. 172, 195 (1999). The proximity in time and location, and overlap among treaty negotiators, demonstrated that the disparate inclusion and omission of treaty text were significant. *See id.*

So too here. The Treaty of Neah Bay and Treaty of Olympia were negotiated just months apart, by the same treaty commission, with neighboring tribes, for the same purpose, and ratified by the Senate on the same day. Pet. 5-6, 21. If this is not enough of a basis to ascribe meaning to their differences, no contemporaneous treaty could ever inform the meaning of another, upending this Court's precedents.

Respondents point (at 14) to the Court's reluctance in *Mille Lacs* to interpret the 1855 treaty at issue there to have the same meaning as a separate 1901 treaty with a different tribe. But the Court simply concluded that the language of a treaty negotiated with a tribe in *Oregon in 1901* shed far less light on a treaty negotiated with tribes in *Minnesota in 1855* than did the language of another treaty negotiated with a nearby tribe in 1855. *See* 526 U.S. at 195-96, 201-02. That analysis just underscores the importance of *contemporaneous* treaty usage. And here, there is no doubt the treaties were contemporaneous: they were negotiated just months apart with neighboring tribes.

As a fallback, Respondents suggest (at 16) that the Treaty of Neah Bay's distinction between "taking fish" and "whaling or sealing" was understood not as creating "a separate right but as *reassurance* of the right *already included* in 'taking fish.'" That argument necessarily acknowledges "taking fish" would not have been understood to clearly encompass those distinct activities. (Otherwise, no "reassurance" could have been needed.) More fundamentally, it renders the "whaling or sealing" provision superfluous, violating the principle that treaties should not be interpreted in a manner that makes clauses meaningless. *See, e.g.*, *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1509 (2017).

Nor does the Bureau of Indian Affairs report on which Respondents rely (at 16) lessen the significance of the Treaty of Neah Bay. The report was written in 1942, nearly a century after the treaties were signed, by a regional BIA attorney—facts Respondents omit. And its speculation about what rights Makah might have reserved "by implication" (Quileute ER 4448, CA9 Dkt. 48-19) was not based on the treaty's "taking fish" language, as Respondents alter the quotation to suggest (at 16). Instead, it was based on the reserved-rights principle, under which a tribe was presumed to reserve the right to "continue to engage in those pursuits in which, as distinguished from other tribes, they were particularly adept." Quileute ER 4448, CA9 Dkt. 48-19; *see id.* at ER 4447.

That reasoning cuts *against* the Ninth Circuit's decision here, which will allow Respondents to engage in "pursuits"—fishing in the contested waters—in which they did not engage at treaty time. That conclusion not only belies the treaty's text, but this Court's reserved-rights doctrine. Pet. 25-26.

B. The Ninth Circuit Erred in Focusing Exclusively on the Supposed Understanding of Quileute and Quinault

Remarkably, Respondents categorically reject (at 16) the possibility that "differences in the language of the usufructuary provision effect a difference in rights" and insist instead that a proper understanding of each treaty "depends on the signatory tribe's understanding." The only support they offer (at 16-18) for their anti-textual interpretation rule is Ninth Circuit precedent.

As the Petition explained, that view of treaty interpretation—which subjugates the text to a *post hoc* assessment of "Indian understanding"—is at odds with this Court's precedent (*e.g., Choctaw*) and conflicts squarely with the Federal Circuit's recent holding that "our interpretive deference to the perspective of the Native leaders cannot extend past the meeting of the minds between the parties." *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017); *see also Absentee Shawnee Tribe of Indians v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988) (similar).

Respondents insist (at 15) there is no conflict because the courts here "consider[ed] all treaty parties' intent." But the Ninth Circuit stated unequivocally that its interpretation of the Treaty had to rest on "the particular *tribe's* understanding," Pet. App. 12a (emphasis added), and it ultimately concluded only that *Quileute and Quinault* "understood the Treaty to protect whaling and sealing." *Id*. at 19a. As to the U.S. commissioners, the most the Ninth Circuit could muster was that they "possibly" had that understanding. *Id.* And the court completely disregarded the intent of the Senate

that ratified the two Treaties on the same day. *Cf. Mille Lacs*, 526 U.S. at 207 (treaty interpretation focuses on Senate's intent in ratification).

Respondents attempt (at 19-23) to paper over that error by pointing to evidence from which they claim the Ninth Circuit *could have* concluded that federal officials understood "taking fish" to include whaling and sealing. But that effort fails. Most importantly, there is no need to speculate about how the treaty drafters *might have* used the phrase "taking fish" because the treaties demonstrate how they *actually* used it. The "whaling and sealing" provision makes it clear that "taking fish" did *not* include whales or seals, while the shellfish proviso in the same article (reprinted at page 2 of the Petition but omitted by Respondents (at 4)) makes it clear that "fish" *did* include "shell-fish." There is nothing in contemporaneous dictionary definitions (or any other sources on which Respondents rely) that precludes this treaty usage. *See* Pet. App. 10a, 40a.

The dicta from a trial court decision in the *Shellfish* litigation that Respondents quote repeatedly (at i, 2, 7, 28, 33)—stating that "fish" "fairly encompasses every form of aquatic animal life"—does not change this. The only question presented in that proceeding was whether "fish" included "shellfish," and the treaty's adjacent reference to "shell-fish" confirmed that it did: As the district court stated, there was not "any treaty language in support of" a reading that excluded shellfish, and "[i]f the right of taking 'fish' did not include shellfish, the entire shellfish proviso would serve no purpose" because it presupposed a right to take shellfish that it then limited. *United States v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash.

1994), *aff'd in relevant part*, 157 F.3d 630 (9th Cir. 1998). The same logic points in the opposite direction here: If "the right of taking 'fish'" *includes* the right of whaling and sealing, then the "whaling and sealing" clause in the Treaty of Neah Bay "would serve no purpose." *Id.*

Respondents also claim that Governor Stevens "referred to whales as *fish*," Opp. 21 (emphasis in original), but here again, they are stretching things—going further than even the Ninth Circuit would. *See* Pet. App. 19a. In fact, the only time Stevens actually referred to "whales" during the Chehalis River Council was in response to a request about salvaging *beached* whales. Pet. App. 39a. Respondents say (at 21) that Stevens "made no distinction between the Tribes' right to take beached whales and to hunt for swimming whales," but there was no occasion to make that distinction because *the Tribes never said a word about hunting for swimming whales*. *See* Pet. App. 19a. And, in any event, there is no reason to think that preserving the right to take whales that landed on the beach granted the Tribes a right to *fish* in waters where they did not fish at treaty time.

Finally, when it comes to Quileute and Quinault's own understanding of the treaty terms, Respondents simply ignore that their own linguistics expert could not identify a single instance in which the Quileute and Quinault words for "fishing" had ever been used to refer to whaling or sealing (which all knew were separate vocations). Pet. 19 & n.4. Not one.

C. The Ninth Circuit's Misuse of The Indian Canons Warrants Review

Given the difficulty of their textual argument that "whales" and "seals" are "fish," it is unsurprising that

Respondents begin and end their "merits" argument with an appeal to the canon that "treaty language 'should never be construed to [the Indians'] prejudice.'" Opp. 19 (citation omitted); *see also id.* at 23. Their heavy reliance on the Indian canons belies their claim (at 23) that the canons were "[i]nconsequential" to the result here.

The district court's decision was based "[f]irst" on the Indian canons. *See*, *e.g.*, Pet. App. 116a, 121a. Respondents fail to argue otherwise. And their tepid statement (at 24) that "neither lower court found the canon[s] dispositive" ignores the weight the district court placed on the canons and the fact that the Ninth Circuit deferred extensively to the district court's interpretation. *See* Pet. 25.

Respondents try to patch over the split this creates by arguing that the inter-tribal cases in which other courts have declined to apply the Indian canons *against* Indian tribes all involved "tribes who claimed rights *under the same treaty or statute*." Opp. 24. (emphasis in original). But in each of those cases, the courts declined to apply the canons because of the adversity among the tribes, not because they were claiming rights under the same instrument. Pet. 22-23. Those decisions recognized that the canons are rooted in the federal trust responsibility and respect for Indian sovereignty—principles that apply equally to *all* tribes. *See* Cohen's Handbook of Federal Indian Law § 2.02[2], at 116-19 (Nell Jessup Newton ed., 2012). There is no basis to invoke the canons to give one tribe an advantage over another tribe.

II. THE EXCEPTIONAL IMPORTANCE OF THIS CASE UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

Respondents' efforts to trivialize the practical significance of this case also fail. As the State's brief explains, the notion that the decision below is merely "fact-specific" (Opp. 2) and results in "preservation of the *status quo*" (at 37) could hardly be farther from the truth. The Ninth Circuit's interpretation will inflict "substantial harm on the State" and "the public," including "permanent changes to existing commercial fisheries," and "disrupts the status quo achieved after 48 years." WDFW Br. 3, 25.

In particular, the United States itself has twice called out Respondents' improper reliance on federal regulations (*see* Dist. Ct. Dkt. 58 & 258; Addendum 9a-23a), explaining that the boundaries identified in those regulations were never "intended to represent a formal determination of the western boundary of [Respondents'] usual and accustomed fishing grounds[,]" and were always "subject to change as necessary to comport with future court orders." Addendum 11a. This case is the *first* and *only* determination of Respondents' western ocean boundaries under the Treaty of Olympia. *See* Pet. App. 151a-52a, 160a-61a.

Respondents likewise suggest (at 10 (heading)) that courts have long "relied on non-finfish species to determine usual and accustomed areas." But Respondents do not cite a single example in which a court has extended a tribe's traditional fishing grounds to marine mammal hunting grounds in which the court found that the tribe *did not fish*. *See* Pet. 9 n.1. This unprecedented expansion of

Respondents' fishing rights will only "exacerbate tribal disputes" and encourage Tribes to extend their "usual and accustomed" *fishing* grounds to far-flung areas where they purportedly hunted for marine mammals, or even seabirds—but never traditionally fished at treaty time. *See* WDFW Br. 3.

Respondents' claim (at 35-36) that the decision below will have no impact on existing fisheries ignores the federal fisheries managers' concerns about Respondents' entry into the whiting fishery, including the potential for a "race for fish," preemption of Makah's fishery, excessive bycatch, and closure of other fisheries—the very concerns echoed by United Catcher Boats (UCB). Pet. App. 139a-142a; UCB Amicus Br. 8-11. Respondents' entry into other fisheries, such as Pacific cod and rockfish, which are not currently allocated between treaty and non-treaty fishermen, will result in reductions in non-treaty harvests as well. UCB Amicus Br. 8. And the size of the treaty share in yet other fisheries will be directly affected by the size of Respondents' fishing grounds. *See* WDFW Br. 25-26.

The vast expanse of the disputed area (more than 2,400 square miles, Pet. 31) and the threat to Makah and "[n]on-tribal boats, crews, and businesses that currently harvest from the disputed area," WDFW Br. 25, alone warrant this Court's review.

III. AT A MINIMUM, THE COURT SHOULD CALL FOR THE VIEWS OF THE SOLICITOR GENERAL

On top of all this, Respondents repeatedly misrepresent the United States' position on key issues (like the import of the federal regulations,

supra at 9), in effect trying to leverage the United States' silence into a basis for denying certiorari.

First, Respondents suggest (at 33-34) that, because the United States has not filed a brief opposing their position, the government actually *agrees* with it. But as Respondents know, that suggestion is false. The United States made clear at the outset of this case that, given the government's "long-standing practice" of "stay[ing] neutral in inter-tribal disputes" where possible, it took "no position on the merits." U.S. Resp. to Mot. to Dismiss at 1-2, Dkt. 58, filed 07/15/10 (Addendum 9a-10a); *accord* U.S. Resp. to Mot. to Define Burden of Proof at 1-2, Dkt. 285, filed 01/26/15 (Addendum 18a-19a).

Second, Respondents suggest that, in the *Shellfish* proceeding, the United States embraced the notion that "fish . . . 'fairly encompasses *every* form of aquatic animal life'" for *all* purposes under the Stevens Treaties. Opp. 33 (citation omitted; emphasis added). But the Solicitor General's brief opposing certiorari stressed that "petitioners present no claim that the Tribes wish to exercise fishing rights in geographical areas where they had *historically engaged in no fishing at all*." *Washington v. United States*, Nos. 98-1026 *et al.*, Br. of the United States in Opposition 9 (Mar. 1999) (emphasis added). And that, of course, is the crux of the matter here: the Ninth Circuit's decision extends the Tribes' *fishing* rights to a geographical area the size of Delaware where they never customarily *fished* at all.[1]

---

[1] Notably, Respondents do not challenge the only findings really relevant here: that the Tribes never customarily fished beyond 20 and six miles offshore. Pet. App. 49a-50a, 73a-74a.

Finally, Respondents try to rewrite the United States' treaty interpretation in *Makah*—that Makah's fishing rights were limited to areas that "'tribal members customarily *fished*'" and therefore could not be based on whaling or sealing, Pet. 28 (quoting U.S. brief)—as merely an evidentiary argument that "did not raise treaty interpretation." Opp. 31. But as the State explained, the United States' position was based on a "legal argument" that "whale hunting cannot establish usual and accustomed grounds or stations for fishing finfish as a matter of treaty interpretation." Washington CA9 Reply Br. 5-6; *see* Pet. 27-29 & n.8. The United States' brief is reproduced in the attached Addendum (at 1a-8a) so that the Court can confirm this for itself.

At a minimum, the Court should call for the views of the Solicitor General before allowing the Ninth Circuit's misguided decision to stand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

GREGORY G. GARRE
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
202 637-2207
gregory.garre@lw.com

MARC D. SLONIM
Counsel of Record
ZIONTZ CHESTNUT
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121
(206) 448-1230
mslonim@ziontzchestnut.com

Counsel for Petitioner

August 8, 2018

ADDENDUM

TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON

UNITED STATES OF AMERICA, et al.,	)	Civil No. 9213 - Phase I
Plaintiffs,	)	UNITED STATES' SUPPLEMENTAL
v.	)	MEMORANDUM RE MAKAH RENEWED
STATE OF WASHINGTON, et al.,	)	REQUEST FOR DETERMINATION OF OCEAN FISHING
Defendants.	)	GROUNDS

On July 19, 1982, both the United States and the Makah Tribe submitted proposed orders on this matter. The only difference between the orders is the delineation of the Western boundary of the area which constituted the Makah Tribe's usual and accustomed offshore fishing grounds at treaty times. Counsel for the United States and the Makah Tribe have proposed, and the Special Master has agreed, that the record made in the Makah Tribe's 1977 Request for Determination on this same subject, including the transcript of the September 7, 1977 Hearing before your Honor as Magistrate, would be incorporated by reference as part of the record of this proceeding. This includes Dr. Barbara Lane's report of March 20, 1977 (Exhibit MK-M-1) as well as her oral testimony and the written and oral testimony of three tribal members. We also proposed and your Honor has agreed, that the remaining difference between the United States and the Makah Tribe on

the matter of the proper western boundary of the tribe's treaty-time usual and accustomed fishing grounds could be submitted by supplemental memoranda to be filed on or before October 8, 1982, and that no further oral hearing or argument would be necessary. These parties would submit the matter for your report and recommendation on the basis of the record made at the prior hearing, the memoranda filed to date on the present request and the aforementioned supplemental memoranda. The only other party which has appeared or indicated an interest in appearing in the present proceeding is the Quileute Tribe, although the State of Washington appeared at the 1977 proceeding. I have contacted Mr. Carl Ullman, counsel for the Quinault Indian Nation and he has authorized me to advise the court that the tribe does not desire to be heard on this matter. Ms. Susan Hvalsoe, counsel for both the Quileute and Hoh Tribes is out of the country until October 1st but we understand that the Quileute Tribe – the only party that has filed any objections in this matter – has reached an understanding with the Makah Tribe that satisfies the Quileutes' objections. Nevertheless we have proposed delaying the deadline for Supplemental Memoranda until October 8 so as to give Ms. Hvalsoe time to submit any comments she may have on behalf of either of her clients.

The purpose of this memorandum is to set forth the position of the United States on where the western boundary should be and our reasons for that position.

We have reviewed all of the evidence that was put before the Magistrate at the 1977 Hearing including the written report and oral testimony of

Dr. Barbara Lane, the written direct testimony of Mrs. Nora Barker and the oral testimony of Oliver Ward Ides and Harry McCarthy, Sr. given at the September 7, 1977 Hearing. On the basis of that review, we believe that the description which the court should adopt for the Makah Tribe's treaty-time usual and accustomed offshore fishing grounds should read as follows:

> "Waters of the Pacific Ocean west of the coasts of Vancouver Island and what is now the State of Washington bounded on the west by longitude 125° 441' W., and/on the south by latitude 48° N., including but not limited to the waters of 40 Mile Bank, Swiftsure Sound, and the waters above Juan De Fuca Canyon, to the extent that such waters are included in the area described."

This language differs somewhat from that recommended at page 2, lines 29-32 of our July 19 proposed order, and likewise differs from the language recommended at page 2, lines 29-32 of the tribe's proposed order. This proposed western boundary lies 40 miles west from the westernmost point of the North Washington coast – Cape Alava Washington, Longitude 127° W., recommended by the tribe, is approximately 93 nautical miles west of the Washington coast at latitude 48° N.

As is discussed more fully below, we believe that the evidence submitted by the Makah Tribe is sufficient to show that at the time of the treaty, i.e., 1855-1859, the Makah Indians fished for salmon, halibut and other species of fish at locations up to 40 miles offshore. We do not believe, however, that the evidence shows that they <u>usually</u> or <u>customarily</u>

went further than that for these species. There are statements contained in the materials comprising the record that indicate that the Makahs may have gone further than this distance in pursuit of whales and that they likewise went further than this distance in post-treaty times after motorized oceancraft became available.

As a starting point for determining the tribe's usual and accustomed fishing areas we refer to paragraph No. 8 in Judge Boldt's statement of the "Established Basic Facts and Law" in his Final Decision No. 1, 384 F. Supp. 312 at 332 (W.D. Wash. 1974). There Judge Boldt held as follows:

> "[5-8] 8. The tribes reserved the right to fish at "all usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indicates fixed locations such as the site of a fish wier or a fishing platform or some other narrowly limited area; "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe

> customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish." (emphasis added)

The documentation presented by Dr. Lane refers to fishing thirty or forty miles offshore during treaty times. Ex. MK-M-1 at 40. James Swan, an early resident at Neah Bay, observed that the Indians preferred to fish for halibut "on a bank or shoal some fifteen or twenty miles west from Tatooch light." Id. Swan also refers to "the fishing grounds" as being fifteen or twenty miles due westward from Cape Flattery. Id. at 5. Professor T.T. Waterman, a student of Makah canoes and whaling equipment, estimated the halibut banks to lie from five to thirty miles offshore of Cape Flattery. Id. at 6. Although the Makahs fished halibut banks located between Flattery Rocks (off Cape Alava where the Ozette village was located) and Cape Flattery, the most productive banks were northwest of Tatoosh Island. Id. at 20.

There are references in Dr. Lane's report to whaling expeditions out of sight of land, often putting off from shore at sunset so as to reach the whaling grounds at daybreak. An 1897 report suggests that the Makahs traveled fifty to one hundred miles in their canoes to capture whales. Id. at 13. But the report does not speak of fishing, and there are essential differences between whaling and fishing. In one of George Gibbs' accounts, he

describes the return of a whaling expedition. The Makahs towed the whale, buoyed up with floats, back to the village where it was cut up. Id. at 4. Because they could tow whales, it may well be that for whaling the Indians occasionally ventured as far as 90 or 100 miles. But salmon would have to be carried in the canoes all the way back to the villages, which would be much more difficult to do.

Further, with abundant fish closer to shore, it would not have been necessary to travel such great distances solely for fishing purposes. As Dr. Lane stated, "[W]hen stocks were abundant within thirty or so miles of shore, there was little reason for the Makah to fish at greater distances." Id. at 21. With increased competition and depleted stocks, post-treaty years created the necessity to fish at greater distances. Such travel was made easier with the advent of motorized ocean craft. However, the usual and accustomed fishing areas must be defined now in terms of where tribal members customarily fished at and before treaty times. 384 F. Supp. at 332.

We have omitted specific mention of La Perouse Bank because there is no mention in the record to that bank by name. There is reference to a 30-mile bank, which could be the southeasterly end of La Perouse. Ex. MK-M-1 at 15.

There is no argument concerning the Makah's extraordinary skill at ocean fishing and its importance to the tribe. However, there simply is no evidence supporting the tribe's claim that their usual and accustomed fishing grounds extended 90 miles offshore. This is not to say that they did not go these distances, but rather that there is no support for contending that these were familiar locations used frequently and customarily.

Finally, we refer to our memo of July 19, 1982 in which we stated that we have no objection to a Finding of Fact concerning Makah usual and accustomed fishing grounds in the 1850s, but that jurisdictional problems compel a limitation on present American Indian tribes' · fishing rights so as not to encompass waters now under the jurisdiction of other nations, such as Canada. It is for this reason, together with the fact that the record contains no evidence on the point, that we recommend against defining any northern boundary of the treaty-time Makah fishing area.

Since completing the above, we have been advised by Ms. Hvalsoe that the dispute between the Quileute and Makah Tribes is not yet fully resolved. She is still endeavoring to bring those parties together to try to resolve the matter and she will inform the court of the Quileutes' views with respect to the southern boundary of the Makah fishing area. She informs us that the 48° N latitude line reflected in the previously proposed Finding and retained in the language we propose above is not in accord with the Quileutes' understanding of their discussions with the Makahs.

The evidence of the area within which the Makah Indians of 1855 usually and customarily fished is understandably imprecise and the United States would not seek to represent otherwise. Our retention of the 48° line in our proposed language at p 3, lines 1-4 supra was because we thought that inter-tribal dispute had been resolved. It is not intended to indicate that we believe the evidence supports that line over any other in that general vicinity. We defer to those two tribes to make the arguments for or against that or any other precise

line in that area on the basis of all of the evidence contained in the record and reasonable inferences therefrom. See last paragraph of our Memorandum of July 19, 1982.

DATED this 8th day of October, 1982.

GENE S. ANDERSON
United States Attorney

/s/ George D. Dysart
GEORGE D. DYSART
Special Assistant U.S. Attorney

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	Civil No. C70-9213 Sub-Proceeding No. 09-1 (Quinault/Quileute U&A) **UNITED STATES' RESPONSE TO TRIBAL MOTIONS TO DISMISS** Note on Motion Calendar: August 6, 2010

INTRODUCTION

The United States infrequently participates in inter-tribal disputes in *United States v. Washington*, preferring instead to stay neutral. This long-standing practice has been followed both because the tribal parties have access to the best evidence of their historic and current fishing practices, and because of the United States' trust responsibility to all federally recognized tribes, it is prudent for it to stay neutral in inter-tribal disputes. Even in the

rare instance when it does participate in such disputes, it does so only for the limited purpose of commenting on procedural or jurisprudential questions or providing facts for the parties and the Court. Our submittal here is consistent with that approach. Therefore, in this sub-proceeding, the United States takes no position on the merits of the boundaries of the "usual and accustomed grounds and stations" of the Quileute, Quinault and Hoh tribes. Rather, we simply provide some additional factual background for the benefit of the Court and parties.

FACTUAL BACKGROUND

In their Motions to Dismiss the Makah Request for Determination re: Quinault and Quileute Usual and Accustomed Fishing Grounds in the Pacific Ocean, the Quinault[1] and Quileute[2] Tribes make reference to federal ocean fishing regulations for various species of fish, including groundfish.[3]

---

[1] Quinault Indian Nation's Motion to Dismiss and Memorandum in Support of Motion to Dismiss the Makah Tribe's Request for Determination Re: Quileute and Quinalt [Sic] Usual and Accustomed Fishing Grounds in the Pacific Ocean, Doc. No. 19615 ("Quinault Motion to Dismiss Makah RFD").

[2] Quileute Tribe's Motion to Dismiss Makah RFD Re: Quileute Usual and Accustomed Fishing Grounds in the Pacific Ocean, Doc. No. 19617 ("Quileute Motion to Dismiss Makah RFD").

[3] The Hoh Tribe joined in, and incorporates by reference, the motions of the Quinault and Quileute Tribes. Hoh Tribe's Response in Support of Quileute's and Quinault's Motion to Dismiss Makah RFD, and in Support of Quileute's and Quinault's Response in Opposition to State's Motion to File a Cross-request RFD, Doc. No. 19625, at 1-2.

Regulations including a western boundary for the Quileute and Quinault ocean fishing areas were promulgated by the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration ("NOAA") for tribal harvest of various species beginning in 1986 (halibut), 1987 (salmon), and 1996 (groundfish) pursuant to the Magnuson Fishery Conservation and Management Act (MFCMA), 16 U.S.C. sec. 1801 et seq. (2007) and applicable amendments.

The United States' purpose in submitting this brief and the accompanying Declaration of Frank Lockhart, is to provide the court with the pertinent history of, and basis for, the Department of Commerce's adoption of regulations relating to the western boundary of the Quinault and Quileute Tribes' ocean fishing areas. Since the initial adoption of the western boundary of the tribal fishing areas for halibut described in regulation in 1986, NOAA has consistently stated that this boundary is not intended to represent a formal determination of the western boundary of the Quinault and Quileute usual and accustomed fishing grounds, and that it is subject to change as necessary to comport with future court orders. Thus, NOAA has consistently viewed the court as the final arbiter of the location of the western boundary of the Quinault and Quileute U&As.

In contrast to this history, the Quinault Tribe describes this boundary in its brief as a "federally recognized ocean U&A boundary," and the "federal government's long-standing determination of the western boundary of Quinault's ocean U&A." Quinault Motion to Dismiss Makah RFD at 17-18. While the Quinault note that the federal regulation

at issue expressly states that it is subject to change pursuant to court order, their statements suggest that the regulations are intended to represent a formal determination of the western extent of their U&A. They further contend that the boundaries of their ocean U&A is a matter for the Tribe and the federal government to resolve. Their characterization of the regulation is contrary to the text of the regulations and their basis contained in the relevant federal register notices and responses to comments received from the Quinault, Quileute, and Hoh Tribes regarding the western boundary described in the regulations.

1986 Halibut Rule

NOAA first adopted western boundaries for the Quinault and Quileute ocean fishing areas for the purpose of describing Subarea 2A-1, the tribal area for halibut fishing, in 1986. 51 Fed. Reg. 16471 (May 2, 1986) (Lockhart Declaration, Exhibit J). The rule adopting the boundaries does not explain their basis, and states that "Subarea 2A-1 is not intended to describe precisely the historic off-reservation halibut fishing places of all tribes, as the location of those places has not been determined." Id., at 2. The rule language includes a statement that "boundaries of a tribe's fishery may be revised as ordered by a Federal court." Id., at 4.

The Quileute and Hoh Tribes submitted a joint comment letter on the halibut rule. They expressed their serious concern with the portion of the rule establishing the treaty halibut fishing area. May 16, 1986 letter from Walter Jackson and Yvonne Hudson to Rolland A. Schmitten (Lockhart Declaration, Exhibit A). They noted that "no court, and no

agreement, has ever established a western boundary for our treaty fishing areas." Id., at 2. They alleged that their fishermen went 100 to 200 miles out into the ocean before and during treaty times, and stated that "There is no legal basis to establish a western boundary . . . and there is no factual basis to support your regulatory provision." Id. The Quinault Tribe submitted a separate letter stating that they shared the concerns expressed by the Quileute and Hoh Tribes regarding the western boundary. May 27, 1986 letter from Joseph B. DeLaCruz to Rolland A. Schmitten (Lockhart Declaration, Exhibit B). In response to these letters, the Regional Director for the Northwest Region of the National Marine Fisheries Service ("NMFS") wrote that NMFS was not aware of any historical evidence indicating that the Hoh, Quinault, or Quileute tribes usually and customarily fished west of the boundary described in the regulations, but "would be pleased to consider any information you might wish to submit which would justify a modification of the regulations." June 20, 1986 letter from Rolland A. Schmitten to Yvonne Hudson, Walter Jackson, and Joseph B. DeLaCruz (Lockhart Declaration, Exhibit C).

1987 Salmon Rule

The same boundaries were subsequently adopted as part of the salmon fishing regulations in 1987, again with no discussion of the basis for the western boundaries. 52 Fed. Reg. 17264 (May 6, 1987)(Lockhart Declaration Exhibit K). The Quileute Tribe submitted a comment letter to NMFS protesting the application of the western boundary of the U&A from the halibut rule to the salmon fishery. This letter called the use of the Makah western

boundary as the Quileute western boundary "unlawful and unsupported by anything in the record," and requested

that NMFS "show, consistent with our adjudicated treaty rights, that our adjudicated treaty usual and accustomed fishing area have only tentative northern and southern boundaries at this point and time, with no western nor eastern boundaries." May 26, 1987 letter from Walter Jackson to Malcolm Baldridge (Lockhart Declaration, Exhibit D). The NMFS Assistant Administrator for Fisheries responded to this Letter by noting that the Tribes had not responded to NMFS' 1986 request for information regarding the historic range of the tribes' ocean fisheries and again inviting the submission of such information. June 19, 1987 letter from William E. Evans to Yvonne Hudson (Lockhart Declaration, Exhibit E).

1996 Framework Rule

In 1996, NMFS included the same boundaries in its rule describing the framework process for the establishment of tribal groundfish fisheries. In the preamble to the final rule, it described the delineation of the western boundary as follows:

> Under this rule, NMFS recognizes the same U&A areas that have been implemented in Federal salmon and halibut regulations for a number of years. The States and the Quileute tribe point out that the western boundary has only been adjudicated for the Makah tribe. NMFS agrees. NMFS, however, in establishing ocean management areas, has taken the adjudicated western boundary for the Makah tribe, and extended it south as the

> western boundary for the other three ocean tribes. NMFS believes this is a reasonable accommodation of the tribal fishing rights, absent more specific guidance from a court. NMFS regulations, including this regulation, contain the notation that the boundaries of the U&A may be revised by order of the court.

61 Fed. Reg. 28786, 28789 (June 6, 1996) (Lockhart Declaration, Exhibit L).

The Quileute and Quinault Tribes, as well as the states of Washington and Oregon[4], submitted comments on the proposed rule expressing concern with the use of the boundaries previously adopted (for the halibut and salmon fisheries) for the groundfish fisheries. The Quinault stated that they did not object to the description of the U&As in the regulation "if and only if, the description is without prejudice to proceedings properly brought under the continuing jurisdiction of the District Court in *United States v. Washington* to clarify or revise tribal usual and accustomed fishing areas . . . ." April 11, 1996 letter from Richard Reich to William Stelle (Lockhart Declaration, Exhibit G). The Quileute commented that they disagreed that the boundaries described in the regulation represented the extent of the usual and accustomed areas for the Quileute Tribe, but would agree that the boundaries, "represent federally established regulatory lines for the purposes of ocean fisheries management." April 12, 1996 fax from Leslie Barnhart to Bill Robinson

---

[4] *See* April 1, 1996 letter from Jay Geck and Fronda Woods to William Stelle and April 12, 1996 letter from Cheryl F. Coon to William Stelle (Lockhart Declaration, Exhibits F and I).

(Lockhart Declaration, Exhibit H). NMFS, in the preamble to the final rule, agreed with this characterization of its regulation, noting that the boundaries may be revised by order of the court. Specifically, NOAA noted that the rule is "without prejudice to proceedings in United States v. Washington [and stated that] NMFS will modify the boundaries in the regulation consistent with orders of the Federal Court. NMFS has not taken a position on the Quileute U&A boundaries in the pending sub-proceeding [No. 96-1]." 61 FR at 28789 (Lockhart Declaration, Exhibit L).

CONCLUSION

The foregoing background discussion demonstrates that NOAA's regulations addressing the Quinault and Quileute U&A's were not intended or interpreted to be a conclusive boundary determination, but instead were a "reasonable accommodation" necessary for the agency's management of the ocean fisheries in the absence of a judicial determination of the boundaries of the Tribes' U&A's. It is expected that the regulations could -- and would-- be changed to comport with a subsequent federal court order further defining the Tribes' U&A's. NOAA has consistently assumed that this Court would be the forum to adjudicate the western boundaries of the Quileute, Quinault, and Hoh usual and accustomed fishing grounds as it has done throughout the history of *United States v. Washington* in the context of other tribal U&A boundary disputes.

Respectfully submitted this 15th day of July, 2010.

/s/ Peter C. Monson

U.S. Department of Justice
Environment & Natural Resources Div.
Indian Resources Section
1961 Stout Street – 8th Floor
Denver, Colorado 80294
peter.c.monson@usdoj.gov

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al. Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	Civil No. C70-9213 RSM Sub-Proceeding No. 09-1 **UNITED STATES' RESPONSE TO QUILEUTE AND QUINAULT MOTION TO DEFINE THE BURDEN OF PROOF** Note on Motion Calendar: January 30, 2015

INTRODUCTION

As stated in the brief filed in this subproceeding on July 15, 2010, the United States prefers to stay neutral in inter-tribal disputes in this case, only participating to comment on procedural or jurisprudential questions or to provide facts for the parties and the Court. *See* United States' Response to Tribal Motions to Dismiss, Dkt. #58, filed 07/15/10 (U.S. 2010 Response). Our previous briefing outlined the history and nature of the National Marine Fisheries Services' (NMFS) regulations describing the ocean fishing areas of the Quileute

and Quinault Tribes. Given the significant amount of time that has passed since we last weighed in on this matter, and the fact that NMFS' regulations have continued to be a focus in this subproceeding, this submittal reminds the parties and Court of the factual background we previously described in light of the Quileute and Quinault Tribe's recent Motion to Define the Burden of Proof, Dkt. #283. As previously stated, the United States takes no position on any other issues in this subproceeding.

FACTUAL BACKGROUND

The Magnuson Act requires that any fishery management plan approved by the Secretary of Commerce and any implementing regulations be consistent with all provisions of the Act and "any other applicable law." 16 USC § 1854(b)(1). "Other applicable law" includes the Stevens Treaties. *Washington State Charterboat Association v. Baldrige*, 702 F.2d 820, 823 (9th Cir. 1983). NMFS recognizes that it must accommodate treaty fishing rights regardless of whether the details of those rights have been judicially determined. Pacific Coast Groundfish Fishery; Framework for Treaty Tribe Harvest of Pacific Groundfish and 1996 Makah Whiting Allocation, 61 Fed. Reg. 28786, 28788 (June 6, 1996). As described in the U.S. 2010 Response, the regulations describing the coastal tribes' fishing areas, currently at 50 C.F.R 660.50(c) (2014) and 50 C.F.R 300.64(i) (2011) were developed pursuant to NMFS' responsibilities under the Magnuson Act, but are subject to revision based on a federal court with proper jurisdiction ruling on any usual and accustomed fishing area boundary. Accordingly, while judicial adjudication of boundaries is not a

prerequisite for the implementation of federal fishing regulations or for tribal fishing in federal waters pursuant to their self-executing treaties, the regulations state consistently and explicitly that they do not supplant a judicial determination of boundaries and are not meant to prevent or override such a judicial adjudication occurring subsequent to the regulations.

The history and text of NMFS' regulations does not suggest that the regulations were intended to supplant a determination by the court of the boundaries of any usual and accustomed fishing area. Indeed, the text of the regulations themselves is inconsistent with this view because the regulations expressly state that the boundaries are subject to revision based on a federal court ruling. U.S. 2010 Response Dkt. #58 at p. 3; 50 C.F.R § 660.50(c) and 50 C.F.R § 300.64(i).

Federal Register notices proposing and adopting the initial versions of the fishing area boundaries likewise recognized that the regulations were not intended to supplant a court determination. For example, the 1986 rule initially adopting the western boundaries of the Quileute and Quinault fishing areas for the Pacific halibut fishery stated that "Subarea 2A-1 is not intended to describe precisely the historic off-reservation fishing places of all tribes, as the location of those places has not been determined." U.S. 2010 Response Dkt. #58 at p. 4, quoting 51 Fed. Reg. 16471 (May 2, 1986) (Exhibit J to Declaration of Frank Lockhart). In adopting the 1996 regulation incorporating the boundaries into the groundfish regulations, NMFS stated that it extended the Makah western boundary south for the other three ocean tribes as "a reasonable

accommodation of the tribal fishing rights, absent more specific guidance from a court." U.S. 2010 Response Dkt. #58 at pp. 5-6, quoting 61 Fed. Reg. 28786, 28789 (Lockhart Declaration, Exhibit L).

Finally, NMFS received comments on proposed rules regarding the fishing areas from the Quileute and Quinault expressing concern that the regulations might prejudice their ability to adjudicate their boundaries and should not be considered a determination of the extent of the usual and accustomed fishing areas. U.S. 2010 Response Dkt. #58 at pp. 4-6. In its preamble to its 1996 adoption of the fishing area boundaries, NMFS agreed with this characterization, stating that the rule was "without prejudice to proceedings in *United States v. Washington* [and] NMFS will modify the boundaries in the regulation consistent with orders of the Federal Court." U.S. 2010 Response Dkt. #58 at pp. 6-7, quoting 61 Fed. Reg. at 28789.

While the United States does not take a position on the appropriate burden of proof in this subproceeding, the regulations should not be improperly construed to stand for a final determination of boundaries not subject to judicial review. As described above, NMFS views a judicial adjudication of the boundaries of a usual and accustomed fishing area to supersede and be distinguishable from an agency determination of tribal fishing areas for fishery management purposes. Indeed, the regulations are only meant to provide a reasonable accommodation to tribal fishing rights in the absence of judicial determination and are subject to change to conform to a court adjudication of the boundaries. Quileute and Quinault assert that "[c]ourts have limited judicial

review of the Secretary's action" and then provide cites to the burden of proof standard found in the Administrative Procedures Act. Dkt. # 238 at 7, *citing* 5 U.S.C. § 706(2)(A). To the extent this assertion elevates the regulations as a definitive federal determination of boundaries, that position would be contrary to the plain language of the regulations themselves which repeatedly state that they are subject to change based on future court proceedings.

CONCLUSION

The foregoing discussion, together with the U.S. 2010 Response, demonstrates that NOAA's regulations addressing the Quinault and Quileute U&A's were not intended nor should be interpreted to be a conclusive boundary determination. Instead, the regulations are necessary for the agency's management of the ocean fisheries in the absence of a judicial determination of the boundaries of the Tribes' U&As. The United States expected that the regulations would change if a federal court with jurisdiction issued an order further defining the Tribes' U&A's.

Respectfully submitted this 26th day of January, 2015.

s/ Vanessa Willard

U.S. Department of Justice
Environment & Natural Resources Div.
Indian Resources Section
999 18th Street, South Terrace-Ste. 370
Denver, Colorado 80202
vanessa.willard@usdoj.gov