10-13-1983

# Brief of Appellant Makah Indian Tribe

NO. 83-3802



IN THE
United States Court of Appeals
For the Ninth Circuit



UNITED STATES OF AMERICA,
Plaintiff/Appellee,

MAKAH INDIAN TRIBE
Plaintiff-Intervenor/Appellant

v.

STATE OF WASHINGTON, et al.,

Defendants.

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

HONORABLE WALTER E. CRAIG

# BRIEF OF APPELLANT MAKAH INDIAN TRIBE

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October 3, 1983

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>MAKAH INDIAN TRIBE,<br><br>Plaintiff-Intervenor/Appellant)<br><br>v.<br><br>STATE OF WASHINGTON, et al.,<br><br>Defendants. | CA NO. 83-3802<br><br>D.C. #C9213-WEC<br>Western Washington (Seattle)<br><br>CERTIFICATE OF SERVICE |

I hereby certify that on October 3, 1983, the Brief of Appellant Makah Indian Tribe and Appellant's Excerpt of Record were mailed to Phillip B. Winberry, Clerk of the U.S. Court of Appeals for the Ninth Circuit, and served on the attorneys of record, George Dysart, Thomas H. Pacheco and Anne S. Almy by mailing, postage prepaid, to their addresses listed on the attached mailing list of September 21, 1983. Parties in the district court in U.S. v. Washington - Phase I are notified of this filing and may request in writing a copy of the brief.

Dated this 3rd day of October, 1983.

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# BRIEF OF APPELLANT
# MAKAH INDIAN TRIBE

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October 3, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff/Appellee, | ) | NO. CA 83-3803 |
| | ) | |
| MAKAH INDIAN TRIBE, | ) | CERTIFICATION REQUIRED |
| | ) | BY NINTH CIRCUIT COURT |
| Plaintiff-Intervenor/Appellant, | ) | OF APPEALS |
| | ) | Rule 13(b)(3) |
| v. | ) | |
| | ) | |
| STATE OF WASHINGTON, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

The undersigned, counsel of record for the Appellant, certifies that the following listed parties may have an interest in the outcome of this case. These representations are made to enable the judges of the Court to evaluate possible disqualification or recusal. The parties are listed following the names and addresses of their respective counsel of record in the litigation in the District Court. Only the United States has appeared in this appeal.

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## STATEMENT OF ISSUES PRESENTED

The Makah Tribe signed a treaty with the United States in 1855, ceding vast areas of land to the government but reserving the right to fish at "usual and accustomed" fishing grounds. The Makahs were mariners who depended upon the sea for their livelihood and culture. This case will determine the western boundary of their historic ocean fisheries, and thus define the limits which will confine their fishing from this day forward.

The District Court committed to a Special Master the task of delineating the extent of the Makah Tribe's ocean fishing grounds. To that purpose, the Master heard oral testimony, examined documentary evidence, and made detailed findings.

The District Court later reversed the Master's essential findings.

This case presents the following issues:

A. Did the District Court change the standards used in previous cases for other tribes? If so, did this violate due process or deny the Makahs equal treatment under law?

B. Did the District Court improperly hold that the Special Master committed clear error, and thus substitute its order for the findings and conclusions made by the Special Master?

C. The District Court heard argument of both counsel but never heard evidence. Where nothing in the record contradicts the Master's findings, does Rule 53 leave the District Court free to reject them?

## STATEMENT OF THE CASE (L.R. 13(b)(1))

### 1. Nature of the Case.

#### A. Subject Matter Jurisdiction in the District Court.

This case is a sub-proceeding within the continuing jurisdiction of the District Court in the massive Northwest Indian fisheries litigation. The District Court rendered the underlying decision in the basic case in 1974. United States v.

Washington, 384 F. Supp. 312 (W.D. Wash. 1974)(referred to as "Final Decision No. 1"). That decision was affirmed by this Court, and certiorari denied. 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The Supreme Court heard appeals of later proceedings and, while effecting minor changes, basically affirmed the decisions made by this Court and the District Court. Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

The District Court's subject matter jurisdiction is based on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343(3) and (4) (civil rights), 28 U.S.C. § 1345 (action brought by the United States on behalf of Indian tribes), and 28 U.S.C. § 1362 (civil action brought by Indian tribes). The District Court retained continuing jurisdiction to ensure enforcement of its orders and to answer remaining questions in the case, creating a "Request For Determination" procedure for the parties to invoke its continuing jurisdiction. See 384 F. Supp. 312, 419 (1974).

The Makah Tribe filed its request for determination of ocean fishing areas on May 1, 1977, and renewed the request by further pleadings on October 8, 1981. This is one of a series of similar proceedings, stretching back to the beginning of the case, determining historic fishing areas. Without a determination that certain ocean areas are usual and accustomed fishing areas, the Makah Tribe is unable to exercise its treaty fishing right.

B. Jurisdiction In The Court Of Appeals; Appealability.

The Special Master recommended adoption of Supplemental Findings of Fact Nos. 343-347 and Supplemental Conclusions of Law Nos. 89-90. On December 13, 1982, the District Court adopted the views of the United States and substituted its own determinations in place of the Master's findings. The District Court denied the Tribe's post-decision motions on January 27, 1983. These orders were final and disposed of all claims before the District Court in this sub-proceeding with respect to all parties. The Court of Appeals has jurisdiction under 28 U.S.C. § 1291.

C. Timeliness of Appeal.

The appeal is timely. The orders appealed from were entered December 13, 1982 and January 27, 1983. The Tribe filed its notice of appeal on March 31, 1983, within the time limit as extended by order entered May 5, 1983 pursuant to Fed. R. App. P. 4(a)(5).

D. Statement of Relevant Facts.

United States v. Washington was brought by the United States and plaintiff Indian tribes to enforce treaty rights to fish in historic tribal fishing areas. The Appellant Makah Indian Tribe sought a determination of its ocean fishing areas, which the District Court referred to a Special Master for hearing and report. The Makahs are primarily an ocean fishing tribe. A finding that the ocean constitutes part of

the Makahs' usual and accustomed fishing places is essential to their exercise of the fishing right.

The Special Master held that the evidence established the Makahs' westward boundary to be longitude 127° west. The United States filed an objection to the report, arguing that the boundary should be further to the east at approximately 125° 44' west. The District Court adopted the views of the United States, reversing the Special Master's essential finding.

The relevant facts in the case include the following:

(1) Tse-Kaw-Wooth was the leading man of a Makah village and was chosen as head chief of the Makah at the time of the treaty. He stated that the ocean was central to the existence of the Makahs at treaty times.

> Tse-Kaw-Wooth - he wanted the sea - that was his country.

Official record of the treaty proceedings, Treaty with the Makah, quoted in report of Dr. Barbara Lane (Expert Witness for the United States), Exhibit USA-21.

(2) The Makahs were capable of navigating successfully out to at least 100 miles from shore and did so as a regular matter at treaty times. B. Lane, Makah Marine Navigation and Traditional Makah Offshore Fisheries. (Ex. MK-M-1, E.R. 16, 17, 25)

(3) The Makah traditionally depended upon the ocean for their food and for marine products to use in trade with other Indians. (Id., E.R. 4)

(4) In contrast to their neighbors, the Makahs often remained at sea overnight and for days at a time on fishing expeditions. (Id., E.R. 4) They were accustomed to fishing in open waters many miles offshore. (Id.)

(5) The Makahs regularly fished at known fishing banks some 30 or 40 miles offshore. (Id., E.R. 13) This is not contested by the government. (U.S. Supp. Brief, E.R. 109)

(6) The Makahs were expert seamen, (Id., E.R. 16), and their ability to navigate out to 100 miles at sea is established beyond argument. Dr. Lane noted their ability to navigate at night, in fog, or at distances beyond sight of land, by sighting stars, by observing the condition of wind and swells, and the like. (Id., E.R. 5, 12)

(7) The Makahs had the navigational skills, the canoes, and the gear to pursue fisheries out of sight of land and it is clear that they did so. (Id., at 19)

(8) The Makahs had the ability to predict weather conditions accurately. (Id., E.R. 5, 8) From childhood, they were taught by their elders to observe and predict the weather and to handle canoes. (Id., E.R. 8-9)

(9) The Makahs employed strong and efficient gear in pursuit of offshore fisheries, including spears, harpoons, a variety of fish hooks, and fishing lines. The fishing lines, made from giant kelp, were as much as 80 to 100 fathoms long. (Id., E.R. 20-24)

(10) Dr. Lane noted that the seaworthiness, design, and construction of Makah canoes impressed early observers. Makah canoes were "artistically beautiful," yet so designed that they "shipped no water except in the wildest weather." (Id., E.R. 10) Professor T.T. Waterman was quoted as observing that

> Better canoemen than the Makah have probably never existed. I learn also that their boats deserve the very highest place for staunch seaworthiness, coupled with great manageableness and speed. [Id., E.R. 9]... for buoyancy and easy riding of the waves in stormy weather, [the Makah canoe] compares favorably with any craft in the world. [Id., E.R. 11]

(11) Dr. Lane testified that it was not feasible to provide direct documentation of the outside limits to the Makah offshore fishery at treaty times. (Id., E.R. 24) She further testified that the exception to this would be the specific offshore banks which are noted by various sources (Id., E.R. 17).

(12) Mrs. Nora Barker, a Makah elder and teacher of Makah history, born in 1899, testified regarding the fishing grounds known as Skagway, located relatively close-in, in the area south of Flattery (Testimony of Nora Barker, E.R. 69).

(13) Mrs. Barker and Harry McCarthy, Sr. (a Makah elder born in 1902) both testified regarding the Dashodit or Skookum Bank, lying between Tatoosh Island and Ozette, approximately three miles off the Sooes River (Testimony of Harry McCarthy, E.R. 57-58; testimony of Mrs. Barker, E.R. 69).

(14) Mrs. Barker testified regarding the Klushooa Banks (meaning "shallow place"), known by the white men as the Swiftsure Banks (Testimony of Mrs. Barker, E.R. 69). Oliver Ward Ides (a Makah elder born in 1907) testified that these Swiftsure Banks are located by sighting two mountains in Canada, known together as Ksaquakobus (Testimony of Mr. Ides, E.R. 53-54).

(15) The Makah name for the Forty-Mile Banks is Slthu-slthu-both-lit (testimony of Mrs. Barker, E.R. 69), spelled by the court reporter "Susubusalit." (Testimony of Oliver Ward Ides, E.R. 53; testimony of Harry McCarthy, E.R. 58.)

(16) Blue Water is the area lying 50 to 100 miles seaward, known particularly as a seal hunting ground. (Testimony of Oliver Ward Ides, E.R. 52.) A fisherman traveling to Blue Water would lose sight of even Snow Mountain, known to the Makahs as Kweesus. (Testimony of Oliver Ward Ides, E.R. 52-53.)

(17) Except in terms of distances from shore that the Makah reportedly navigated in their canoes, it does not seem possible to define the outer boundaries of the Makah fishing areas. (Report of Dr. Lane, E.R. 17).

(18) The Makahs had limited river fisheries and depended more upon the marine fisheries than they did on the river fisheries. (Testimony of Dr. Lane, hearing transcript, Sept. 7, 1977 at E.R. 45.) The offshore fisheries were the mainstay of

Makah subsistence and provided the Makahs with surpluses for trade to other Indians and to non-Indians at treaty times. (Lane Report, E.R. 7-9.) Like all fishermen, the Makahs shifted their efforts to localities where fishing appeared to be productive. The localities varied over time and also varied seasonally and with respect to different species. (Lane Report, E.R. 14-15, 21.) These migratory offshore fisheries have remained important to the Makah economy from pre-treaty years to the present time. (Id., E.R. 13)

2. Course of Proceedings.

The matter was originally filed on May 1, 1977 (E.R. 1). The full hearing was held on September 7, 1977. The Honorable Robert E. Cooper, then acting as United States Magistrate, heard the testimony of several witnesses including the expert testimony of Dr. Barbara Lane, anthropologist and ethnohistorian (E.R. 30). Direct and cross-examination of witnesses was held and exhibits considered and admitted (E.R. 36).

After further procedural activities, the request was renewed on October 7, 1981, and re-referred to Robert Cooper as Special Master (E.R. 75, 78). Following further procedural hearings and the filing of memoranda, the Special Master issued a report on November 1, 1982. (E.R. 113.) That report found that, based on the evidence, Makah usual and accustomed fishing places extended into the ocean to a western boundary of longitude 127° west (E.R. 115).

Thereafter, the United States filed an objection to that report, opining that the true western boundary should be substantially further to the east (closer to the shore of Washington) or a distance of approximately 40 miles (E.R. 117).

3. Disposition in the District Court.

Without further proceedings, the District Court reversed the Special Master's essential finding as to the western boundary and adopted totally the views of the United States (E.R. 136).

Counsel for the Makah Tribe did not receive this Order. Upon learning about the order on December 23, 1982, counsel moved for specific and alternative relief seeking an order to alter or amend judgment, for a de novo hearing, for recommittal to receive further evidence, or for further relief (E.R. 140-146).

A telephone conference call on January 11, 1983 was held to consider the motions of the Makah Tribe. No other oral argument was heard by the District Court, and no additional testimony or exhibits were presented. During the course of the proceedings, no evidentiary hearings had ever been held by the District Court, and none were held on reconsideration. In its Memorandum Opinion, denying the Tribe's motions, the Court held that

> . . .There is no evidence in the record and no proper inference from the record that would support a finding that the area "where the

> members of [the Makah] Tribe customarily fished from time to time at or before treaty times" (384 F. Supp. 312 at 332) extended as far west as longitude 127° W.

(E.R. 162) [Emphasis supplied]. The Makah Tribe filed this appeal on March 31, 1983 (E.R. 166-168).

4. Standard of Review.

The standard of review is whether the Special Master's decision was supported by substantial evidence and was not clearly erroneous. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689 (1946). Morris Plan Industrial Bank v. Henderson, 131 F.2d 975, 976-77 (2d Cir. 1942) (L. Hand, Circuit Judge). Whether evidence is "substantial" depends on the standards originally set by the District Court in determinations regarding the fishing areas of other tribal plaintiffs in the case.

## ARGUMENT

### I. The District Court Applied Standards Different From Those Used in Previous Cases.

The Special Master properly applied the standards of proof applicable in this case. His findings are amply supported by the evidence and cannot be arbitrarily reversed by the District Court.

Although a party must, of course, present evidence of usual and accustomed fishing places, the standard of proof is not strict. There was substantial evidence, under the standards of the case, to support the Master's findings. In Final

Decision No. 1, District Court Judge George Boldt noted that in determining usual and accustomed fishing places

> . . .the Court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Little documentation of Indian fishing locations in and around 1855 exists today.

United States v. Washington, 459 F. Supp. 1020, 1059 (1978). Judge Boldt noted that fishing "grounds" could not be determined with particularity:

> "[G]rounds" 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.

United States v. Washington, 384 F. Supp. 312, 332 (1974). The court further held 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 areas, is a usual and accustomed ground or station at which the treaty tribe reserved and its members presently have, the right to take fish.

Id. Thus, while it is true that every place where a tribe might have occasionally taken fish is not a usual and accustomed fishing ground, it is clear that Makah trips far into the ocean were not an occasional matter but a regular and necessary part of their livelihood and lifestyle at treaty times.

In finding usual and accustomed fishing places, the Court has, of course, relied heavily on the anthropological reports of Dr. Barbara Lane but has also relied upon ". . .the credible testimony of tribal elders who speak from personal experience of data acquired from other sources." Id., at 459 F. Supp. 1020, 1059.

The United States has opined that "the record contained no evidence which would support a finding that the usual and accustomed salmon fishing places of the Makah Indians at treaty time extended beyond forty (40) miles offshore" (Objection of the United States, at 2-3). This statement is incorrect. Similarly, the District Court, in its Memorandum Opinion denying the Makah Tribe's post-decision motions, went even further in stating that "there is no evidence in the record and no proper inference from the record" that would support the Special Master's finding. [Emphasis supplied]. Again, this is simply incorrect. A brief review of the evidence will delineate why this is so.

A. Makah Presence in the Ocean 100 Miles from Shore.

The ocean was central to the existence of the Makahs at treaty times. In the official record of the treaty proceedings, it is recorded:

> Tse-Kaw-Wooth - he wanted the sea - that was his country.

Report of Dr. Lane, Exhibit USA-21. Tse-Kaw-Wooth was the

leading man of a Makah village and was chosen as head chief of the Makah at the time of the treaty.

It is beyond dispute that the Makahs were capable of navigating successfully out to at least 100 miles from shore and did so as a regular matter at treaty times.

In her expert report, "Makah Navigation and Traditional Makah Offshore Fisheries" (Exhibit MK-M-1, admitted Sept. 7, 1977), Dr. Barbara Lane noted that the Makah "traditionally depended upon the ocean for their food and for marine products to use in trade with other Indians." (Exhibit MK-M-1, E.R. 3) She noted that "in contrast to their neighbors in Washington, Makah often remained at sea overnight and for days at a time on fishing expeditions." (Id.)

Dr. Lane further found that the Makah regularly fished at known fishing banks some 30 or 40 miles offshore. (Id. E.R. 13) We would request that the Court take particular note of another statement of Dr. Lane. Although unable specifically to point to direct documentation on Makah salmon fishing (as opposed to whaling and sealing) at distances beyond this, Dr. Lane's testimony supports the concept that Makah usual and accustomed fishing grounds extended to the full range of their navigation:

> It does not seem feasible to describe Makah usual and accustomed fishing grounds for offshore fisheries except in terms of distances from shore that the Makah reportedly navigated in their canoes.

(Id., E.R. 17)

Dr. Lane was unable to find specific references to fishing within this entire range, but was clearly of the opinion that such grounds could be described "in terms of distances from the shore that the Makah reportedly navigated in their canoes." This statement alone is sufficient to support the Master's findings.

The evidence that the Makahs navigated 100 miles to sea is clear. Dr. Lane noted their ability to travel 50 to 100 miles at sea and evidence that they did so to whale and seal.

Thus, in 1897, the Indian agent at Neah Bay wrote that:

> These Indians are expert seamen and often sally forth in their canoes and capture whales, going out from 50 to 100 miles at sea.

(Id., E.R. 16) Although this account dealt with Makah activities in 1897, Dr. Lane was of the opinion that "... there is no reason to suppose that they did not have the same capability in 1855." (Id. E.R. 17)

She further noted that the evidence of specific fishing banks did not necessarily mark the outer limits of Makah travels and that "there is no evidence to suggest that this represented the outer limits of their offshore travels." (Id., E.R. 19). She noted:

> The record is clear that the Makah and their neighbors along the coast had the navigational skills, the canoes and gear to pursue fisheries out of sight of land and that they did so.

(Id., E.R. 19)

By 1887, Dr. Lane noted that "Makah sealing schooners fished from 20 to 100 miles from port and that their logs contained numerous references to canoes gone missing during the seal hunt, most of which returned safely on their own to Neah Bay." (Id., E.R. 25) She concludes:

> The men in the missing canoes, then, made their way back to Neah Bay from distances which may have been as far as 100 miles out. This evidence, although dating some 30 years after the treaty signing, provides further evidence of Makah capability to make their way home from offshore waters.

(Id., E.R. 25)

B. Makah Fishing at Sea.

Dr. Barbara Lane's expert testimony clearly supports Makah presence out to 100 miles at sea. Although not having direct documentary references to fishing places out that far, she noted that it was not feasible to describe those places, "... except in terms of distances from the shore that the Makahs reportedly navigated." (Id., E.R. 17). It is clear that they regularly navigated 100 miles to sea. It, therefore, is feasible to describe fishing places in terms of navigational distances.

Dr. Lane also noted that "The Makah were somewhat unique from the rest of the tribes in the case area in that they had very limited river fisheries and depended more upon the marine fisheries than they did on the river fisheries." (Transcript

of Sept. 7, 1977, hearing, E.R. 45).

It is also clear that any Makah journeying 100 miles to sea in a canoe in 1855 would regularly fish during such long journeys for their own subsistence and for fish to bring home. This conclusion was reached, for example, in the case of the Suquamish Tribe which was granted vast usual and accustomed fishing areas extending from their reservation west of Seattle to the Canadian border, a distance of approximately 92 miles. See United States v. Washington, 459 F. Supp. 1020 at 1049 (1978). Dr. Lane's testimony provided evidence of the travels of the Suquamish:

> The Fort Langley Journal documents that the Suquamish did travel to the Fraser River. It is my opinion that the Suquamish undoubtedly would have fished the marine waters along the way as they traveled. It is likely that one of the reasons for travel is to harvest fish. The Suquamish traveled to Whidbey Island to fish and undoubtedly used other marine areas as well.

Expert Report of Dr. Barbara Lane, Exhibit USA-73. Although there was documentary evidence that the Suquamish traveled in the marine waters between their home territory and the Fraser River in Canada, Dr. Lane testified in court in that proceeding that there was no specific documentation that the Suquamish fished there. (Dr. Lane Testimony, April 9, 1975, at 52) The Court's inclusion of this area within the Suquamish usual and accustomed fishing grounds illustrates the standards employed, of necessity, in adjudicating 19th Century Indian fishing grounds in marine waters.

We think it is clear that the Makah would have undoubtedly regularly fished also on their regular whaling and sealing trips 100 miles to sea.

Evidence of Makah presence from 90 to 100 miles at sea is also supplied by Makah tribal elders.

Oliver Ward Ides testified that the Makah used to hunt seals at Blue Water, an area about 100 miles offshore. (Transcript of Sept. 7, 1977, hearing, E.R. 52)

Mr. Ides was born in 1907 in Neah Bay, fished all his life and came from a family of fishermen. Id., E.R. 49)

Tribal elder Harry McCarthy, who was born in 1902 and began fishing when he was 10, stated that the Indians regularly fished in an area known to them as Slthu-Slthu-Both-Lit which is also known as 40 Mile. Id., E.R. 58)

Tribal elder Nora Barker, whose testimony was admitted as a written exhibit due to her age and physical condition, also testified that the Makahs regularly fished at Slthu-Slthu-Both-Lit, also known as 40 Mile Bank. Exhibit MK-M-2, E.R. 69)

The Court's reliance on the Objections of the United States is misplaced. The United States' contention that it is "pure speculation" to find that the Makahs fished at distances up to 100 miles at sea, (see United States Objections, E.R. 119) is grossly misleading. The Master was justified in drawing an inference from post-treaty evidence in support of a

finding regarding treaty time locations. Such an inference is supported by the expert testimony of Dr. Lane, to the effect that based on documentary evidence that Makahs traveled 50 to 100 miles at sea ". . .there is no reason to suppose that they did not have the same capability in 1855." (Exhibit MK-M-1, E.R. 16-17)

The United States seems to suggest that, in order to support a determination of historic fishing grounds, it must be shown that travel to an area was specifically for the purpose of fishing. The United States argues that Makahs would not have traveled 100 miles at sea in search of salmon when there was abundant salmon close to home. This argument misses the point and, if accepted by the Court, would impermissibly change the legal standard already applied by Judge Boldt in determining the fishing areas of other tribes. Those standards are the law of the case, and must be applied to all tribes consistent with due process and equal protection of law. It is not necessary to find that a tribe traveled to any area for the purpose of fishing, so long as the tribe customarily traveled there for some purpose (e.g., whaling, sealing, trading) and customarily fished while so traveling. In the example noted above, Judge Boldt determined that the Suquamish Tribe fished from its Reservation to the Canadian border, a distance of approximately 92 miles, without specific documentation that the Suquamish fished at that distance. United

States v. Washington, 459 F. Supp. 1020 at 1049 (1978). Rather, the Court accepted the inference that if the Suquamish traveled to trade at Fort Langley on the Fraser River in Canada, they would have fished along the way. Similarly, the Master's conclusion that the Makahs fished at distances from 40 to 100 miles offshore is supported by the inference that if they traveled such distances to take seal and whale, they certainly would have fished as well.

## II. A District Court May Not Refuse to Recognize A Special Master's Findings Merely Because of a Difference in Personal Persuasion, or a Dissatisfaction With the Result Reached.

Rule 53(e) provides clearly that:

> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.

Fed. R. Civ. P. 53(e)(2) [emphasis supplied]. This provision is a mandate to the district court in passing on a master's fndings of fact, and applies substantially the same test as that applied to district court findings on appeal. See Fed. R. Civ. P. 52(a). Failure to observe properly the "unless clearly erroneous" mandate will result in reversal of the district court on appeal. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689 (1946); N.L.R.B. v. Sequoia Dist. Council of Carpenters, 568 F.2d 628, 631 (9th Cir. 1977). It has been noted that:

> The mandate of Rule 53(e)(2), as applied in a typical case where the Master who makes the find-

> ings of fact is the one who heard the parties and the testimony, is based on hard common sense: the Master, as a judicial officer, must as a general proposition be trusted as to factual matters, particularly those involving oral and disputed testimony.

5A Moore's Federal Practice ¶ 53.12[4].

The District Court does not have the right to reconsider, weigh and evaluate evidence to arrive at its own independent conclusions, but must accept those of the Master unless clearly erroneous. Bynum v. Baggett Transportation Company, 228 F.2d 566, 569 n.3 (5th Cir. 1956). Where a master's finding is supported by substantial evidence, it is error for a district court to sustain an objection thereto and enter a contrary finding. Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912, 920 (7th Cir. 1953). Arrow Distilleries, Inc. v. Arrow Distilleries, Inc., 117 F.2d 636, 638-39 (7th Cir. 1941), subsequent appeal, 128 F.2d 841 (7th Cir. 1942).

The cases hold that, even where oral testimony is largely uncontradicted, the district court must respect the advantage the master enjoyed when he saw and heard the witnesses and was thus enabled to judge of their veracity and credibility. Ferroline Corp. v. General Aniline & Film Corp., supra at 920; Santa Cruz Oil Corporation v. Allbright-Nell Company, 115 F.2d 604, 607 (7th Cir. 1940). A district court may not refuse to recognize a special master's findings merely because of a difference in personal persuasion, or a dissatisfaction with the

result reached. Ferroline Corp. v. General Aniline & Film Corp., supra at 920; Sanitary Farm Dairies v. Gammel, 195 F.2d 106, 118 (8th Cir. 1952). The presence of substantial evidence to support a special master's finding precludes any different result in the district court. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689, 693, 694 (1946), reversing a district court which had replaced a master's findings with its own, which were based on a contrary view of the evidence.

In this case, the fact finding function and the determination of competing requests for findings had been committed by the District Court to the Special Master. The question of the western boundary of the historic Makah fishing grounds turned upon facts on which the Master made resolving findings from the testimony, documents and circumstances in evidence. Thus, under Rule 53(e) and the caselaw, the District Court was not at liberty to reject the findings lightly, and could do so only if the Master's findings were entitled legally to be declared clearly erroneous. Sanitary Farm Dairies v. Gemmel, 195 F.2d 106, 117-18 (8th Cir. 1952); Morris Plan Industrial Bank v. Henderson, 131 F.2d 975, 976-77 (2d Cir. 1942)(L. Hand, Circuit Judge); Dunsdon v. Federal Land Bank of St. Paul, 137 F.2d 84, 86-87 (8th Cir. 1943). The extent of Makah fishing grounds was not open to plenary redetermination by the District Court. Sanitary Farm Dairies, supra at 115. Where a

Special Master's findings are supported by substantial evidence, a district court is not entitled to reject them as clearly erroneous.

> Opposite factual views might perhaps with equal right have been capable of being reached on the evidence and might have been required to be sustained by us, had they constituted initial determination in judicial administration. But here it was the master and not the court which was the initial fact appraiser, and the court could not, under Rule 53(e)(2), Federal Rules of Civil Procedure, 28 U.S.C.A., refuse to recognize the master's findings or escape the conclusion to which they led, merely because of a difference in personal persuasion on the evidence or a dissatisfaction with the result reached.

Sanitary Farms Dairies, supra at 118 (reversing a district court which had modified special master findings). Thus, even though a district court may not agree with the master's reasoning process or with the inferences he drew, the court must adopt the master's findings "unless the findings are beyond the pale of sane judgment". Locklin v. Day-Glo Color Corporation, 429 F.2d 873, 880 (7th Cir. 1970), cert. denied 400 U.S. 1020 (1971). The Court is bound by the Master's findings even if the facts lend themselves to different interpretations.

The presumption of correctness which must be accorded to any master's findings is strongest where the master has heard testimony, and the courts will give due regard to the opportunity of the master to observe the credibility of witnesses. In Cunningham v. United States, 270 F.2d 545 (4th Cir. 1959),

cert. denied, 362 U.S. 989 (1960), a commission was appointed as master to determine the valuation of a land taking. The Court of Appeals for the Fourth Circuit reversed the district court which had rejected the master's report. The Court of Appeals noted that the commissioners "heard and saw the witnesses. What may be uncertain to us from a reading of the transcript was plain to them." Id. at 549. The Court of Appeals remanded with directions to accept and confirm the report.

III. The Master's Rulings Are Uncontradicted in the Record and Cannot be Labeled "Clearly Erroneous".

Modifications of special master findings have been upheld, but in the context that clear evidence to the contrary existed.

In United States v. Hilliard, 412 F.2d 174 (8th Cir. 1969) the Court of Appeals held that it was proper for the district court to modify a property value found in a condemnation case by a special master (in that case a three-person commission). The special master had found the lowest value to be $465,000 although no witness had placed the value any lower than $477,000. The district court therefore modified the special master finding and substituted $477,000 as the lowest value. Unlike the situation in Hilliard, here there is absolutely no specific evidence contradicting the Special Master's finding.

The District Court appears simply to have differed with the judgment of the Special Master on the evidence and, without receiving any further evidence or ever having heard any testimony, substituted his judgment on the original record for that of the Master. In doing so, the Court applied a stricter standard than had been applied to other tribes in the past. This was done without timely notice to the Makah Tribe, which prepared and presented its case assuming that the same standards would be encountered.

The record amply supports the Master's determination under the standards properly applicable to this case. The Master heard the evidence, the District Court did not -- rejection of the Master's findings in these circumstances violated Rule 53(e).

## IV. RELIEF REQUESTED

This case should be reversed and remanded with instructions to accept and confirm the Special Master's report, and enter an order consistent with the Master's recommended order, establishing the western boundary of the historic Makah fishing grounds as longitude 127° west. Without this relief, the Makah Tribe will be cut off from historical fishing grounds,

and its treaty fishing right will have been severely curtailed.

DATED this 3rd day of October, 1983.

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