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Ninth Circuit Determines That George Constanza Was Right!—In Limited Circumstances, Whales And Seals Are Fish (Not Mammals)

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[*Makah Indian Tribe, et al. v. Quileute Indian Tribe et al., 813 F.3d 1157 \(9th Cir. 2017\).*](#)

Defying the universal notion that whales and seals are, in fact, mammals, the Ninth Circuit recently affirmed in part, and reversed in part, the Western District Court of Washington's judgment determining that such species qualify as fish in limited circumstances relating to tribal fishing rights in western Washington. *Id.* at 1159. While the direct determination that the use of the word "fish" may occasionally include some marine mammals may not be universally enlightening, this case painstakingly details the rules to be utilized when interpreting sovereign treaties—a tool helpful to almost any jurisdiction. (The opinion also quotes from the television show "Seinfeld," validating George Costanza's proclamation that whales are fish.)

The origins of this specific matter date back to July 1855 when the Quileute Indian Tribe ("Quileute") and the Quinalt Indian Tribe ("Quinalt") (collectively, the "Tribes") signed the Treaty of Olympia ("Treaty") with the United States, thereby protecting the Tribes' "rights of taking fish at all usual and accustomed grounds and stations." *Id.* at 1159–60. More recently, in 2009, the Makah Indian Tribe ("Makah"), alleging the Quileute and Quinalt's hunting of whales and seal adversely impacted their ability to do the same, followed procedures to invoke the district court's continuing jurisdiction to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined" in prior case law. *Id.* at 1160. Specifically, the Makah asked the district court to adjudicate the western boundary of the Quileute's usual and accustomed grounds and stations and Quinalt's usual and accustomed grounds and stations in the Pacific Ocean and to determine whether the Treaty permits the Tribes' fishing of whales and seals. *Id.*

In response to these issues, the Ninth Circuit issued the following affirmative holdings: (1) the Treaty reserved the Tribes' right to take whales and seals; (2) evidence of whaling and sealing was appropriate to establish usual and accustomed grounds and stations under the Treaty; (3) the district court properly looked to the Tribes' evidence of taking whales and seals to establish the usual and accustomed grounds and stations for the Quileute and Quinalt, and did not err in its interpretation of the Treaty; and (4) the Tribes were not required to identify specific locations for "grounds and stations," and, as such, adequately identified the "grounds and stations" where they engaged in whaling and sealing. *Id.* at 1162–67. The court did not stop there, though, and reversed the district court's order imposing longitudinal boundaries on where the Tribes could fish because they did not match the district court's usual and accustomed grounds and stations determinations for the Tribes. *Id.* at 1168. Noting the law does not dictate any particular approach or remedy that the court should institute, the matter was remanded with direction to the district court to draw boundaries that are fair and consistent with the its prior findings. *Id.* at 1169–70.

In reaching its ultimate determinations, the Ninth Circuit employed the Indian Canons of Construction. *Id.* at 1163. Per these canons, which are rooted in the unique trust relationship between the United States and the sovereign tribes, treaties involving Indian tribes "are to be construed, so far as possible, in the sense in which the Indians understood them." *Id.* Ambiguous provisions are to be interpreted to a tribe's benefits. *Id.* The court found that these rules apply to treaty language reserving hunting, fishing, and gathering rights. *Id.* Relying on these

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principles, the Ninth Circuit determined that as a non-signatory party, the Makah cannot usurp application of the Indian canon with respect to the Treaty solely because an alternative interpretation of the word “fish” would adversely affect the Makah. *Id.* “Such an incursion would undermine tribal sovereignty and the signatory tribes’ government-to-government relations.” *Id.*

At the time of signing the Treaty, “fish” was ambiguous, having multiple meanings of varying breadth, some of which would include whales and seals, and some of which would exclude such mammals. *Id.* at 1162. Using the above-described canons to ascertain the Tribes’ understanding, the court looked beyond the written words to history of the Treaty, the negotiations, and the practical construction adopted by the parties. The Ninth Circuit highlighted the district court’s 23-day bench trial and 83 pages of findings of fact and conclusions of law as sufficient evidence to establish the Treaty intended “fish” to include whales and seals. *Id.* at 1164.

Last, the court also implemented the “reserved rights doctrine.” *Id.* at 1166. Pursuant to this doctrine, absent clear written indication, courts are reluctant to conclude a tribe has forfeited previously held rights “because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights.” *Id.* at 1166-67. The court determined this doctrine favors reading the “right of taking fish” to include the Tribes’ established historical whaling and sealing, particularly because there are independent indications that “fish” was understood that expansively. *Id.* at 1167.

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