No. 15-35540

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,
Plaintiff,

and
SUQUAMISH TRIBE,
Respondent-Appellant
v.

UPPER SKAGIT INDIAN TRIBE, et.al.,
Petitioner-Appellee,

v.
STATE OF WASHINGTON
Defendant.

On Appeal from the United States District Court
Western District of Washington at Seattle
The Honorable Ricardo S. Martinez
(District Court No. 70-9213, Phase I)
(D.C. No. 2:14-sp-00001-RSM)

INTERESTED PARTY PORT GAMBLE S'KLALLAM AND JAMESTOWN S'KLALLAM TRIBES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Interested Parties Port Gamble S'Klallam Tribe, and Jamestown S'Klallam Tribe are federally recognized Indian Tribes. They have issued no shares of stock to the public and have no parent company, subsidiary or affiliate that has done so.

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INTRODUCTION

The Port Gamble S'Klallam and Jamestown S'Klallam ("S'Klallam") are interested parties in this subproceeding. Interested parties in this case are parties that filed a "notice of appearance and participation" in the district court. The S'Klallam participated in the summary judgement briefing and oral argument and decision that was appealed and are directly impacted by any changes in the law of the case. Here, the S'Klallam are participating in this briefing (as they and other Tribes have done in several prior cases before this Court) because the Suquamish Tribe ("Suquamish") seeks to collaterally attack several decided cases and one pending case by requesting a modification of the standard applicable to previously decided fishing areas. The S'Klallam oppose the arguments made by the Suquamish also because adopting their arguments would potentially expand the Suquamish U & A far beyond the areas at issue in the subproceeding.

STATEMENT OF JURISDICTION

The S'Klallam concur with the Statement of Jurisdiction proposed by the Appellants.

RESTATEMENT OF ISSUE

The S'Klallam agree that the issue in this case is "[w]hether the District Court erred in applying the "*Muckleshoot* analysis" as set forth in this Court's

decisions in *Muckleshoot v. Lummi*, 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*"), *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) ("*Muckleshoot II*"), and *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("*Muckleshoot III*") and their progeny, in connection with denying the Suquamish's Cross Motion for Summary Judgement… ." Suquamish Opening Brief, p. 2. The S'Klallam position is that the district court did not err in its application of that standard.

SUMMARY OF ARGUMENT

The S'Klallam seek to preserve the rule of law set forth in prior decisions by this Court; in particular, the S'Klallam disagree with the Suquamish's arguments that their issuance of regulations or the court's general statements regarding Tribal travel amount to evidence of their U & A. The seventeen-year-old standard from *Muckleshoot I, II, and III*, applied to every U & A case for the last two decades, should be applied to the Suquamish here. A failure to do so could have consequences beyond the present case.

ARGUMENT

A. The Expansion of Suquamish U & A.

The Suquamish's U & A description uses very general boundaries with few geographic anchors:

> 5. The usual and accustomed fishing places of the Suquamish Tribe include the marine waters of Puget Sound from the northern Tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

U.S. v. Washington, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978). This is the third time the U.S. District Court for the Western District of Washington (Martinez, J.) has been asked to examine the area Judge Boldt intended to be covered.[1] All of those decisions have been upheld on appeal.[2]

B. The Legal Inquiry.

The Suquamish raise several arguments in this Appeal which seek to persuade this Court to reverse the latest district court decision. In doing so, the Suquamish ask this Court to ignore precedent and potentially use this case to further expand their U & A based on the mere issuance of their own regulations in various areas. Suquamish Opening Brief, p. 6, fn. 11 (listing out several decades of fishing regulations). The S'Klallam oppose the Suquamish claim to this broad

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[1] Subproceedings 05-4 and 05-3. Also, Suquamish's claims to additional freshwater bodies east of Puget Sound based on Duwamish successorship were rejected earlier in the case. *U.S. v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990).

[2] *U.S. v. Washington*, 20 F. Supp. 3d 828, 837 (W.D. Wash. 2007) (finding that nothing in the record showed the Suquamish fished on the east side of Whidbey Island), *aff'd, Upper Skagit Indian Tribe v. Suquamish*, 590 F.3d 1020 (9th Cir. 2010); *U.S. v. Washington*, 20 F. Supp. 3d 986, 1039 (W.D. Wash. 2013), *aff'd, Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1130 (9th Cir. 2015).

interpretation of their U & A, and more specifically, Suquamish's use of a narrow subproceeding as a way to obtain a broader court ruling without filing the requisite cross-request for expansion. ER 15 ("[t]he Court's clarifications in any one subproceeding are limited to the issues raised in the request before it and should not be read to sweep more broadly.").

The Suquamish ask this Court to reverse based on several factors, none of which amount actual grounds to reverse: (1) the impact of their regulations and testimony regarding fishing;[3] (2) the impact of agreements between Tribes such as the "Hale Passage Agreement"; (3) the lack of objection[4] to those regulations; (4)

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[3] Suquamish argue that there should be some weight given "to the uncontroverted evidence before the District Court established that Suquamish has regularly harvested fish and shellfish in the Contested Waters for the last forty years." Suquamish Opening Brief, p. 6. The only way for a Tribe to expand their U & A is by using Paragraph 25; therefore, the Suquamish's reliance on fishing regulations (*e.g.* Suquamish Opening Brief, p. 6, fn. 11, and ER 100-600) and other evidence of openly using the contested fishing areas is simply not relevant to these proceedings. The law of the case is that the court specifically admonished Tribes for merely opening up fishing areas as a way of expanding their U & A, and held that: "Those tribes or counsel expanding fishing places in a manner inconsistent with Final Decision # I are admonished to follow its provisions or risk the imposition of sanctions." *U.S. v. Washington,* 459 F. Supp. at 1069.

[4] The district court has already held that equitable defenses are not available to defeat a challenge to U & A. *U.S. v. Washington*, 18 F. Supp. 3d 1123, 1165 (W.D. Wash. 1987) ("[T]he court also thinks that the law requires it to conclude that equitable defenses are not available in the determination of usual and accustomed fishing places.")

the general evidence regarding treaty time fishing;[5] and (5) claim preclusion. Suquamish Opening Brief, pp. 2-3. It is well-established that no treaty right arises from prescriptive use;[6] therefore, any reliance on post-decision regulations as proof of the right to fish or approval of those locations is misplaced.[7] Here, the S'Klallam will focus on the required legal analysis for a U & A case and demonstrate that the Suquamish have not met their burden.

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[5] The Suquamish argue that because there are statements that they "traveled widely" and fished over "wider marine areas" this is enough evidence to satisfy this Court. Suquamish Opening Brief, p. 15. However, they neglect to remind this Court that they made this exact argument in subproceeding 05-3, and in that proceeding it was rejected. *U.S. v. Washington*, 20 F. Supp. 3d at 839 ("Thus such travel was not unique to the Suquamish, and no conclusion with respect to the subproceeding area can be drawn from the mere statement that they traveled widely.") This Court affirmed. *Upper Skagit Indian Tribe v. Suquamish*, 590 F.3d 1020. This appears to be a collateral attack on that case.

[6] The district court has also held that U & A cannot be created by prescription. *U.S. v. Washington*, 18 F. Supp. 3d at 1164 (stating that "[i]f equitable defenses are available to a tribe that engages in treaty fishing outside its established area, there will be a great incentive for tribes to issue regulations for areas outside their established usual and accustomed fishing grounds and to allow or encourage tribal members to engage in treaty fishing outside those areas in anticipation of being able to enlarge the tribe's treaty rights by 'prescription.'")

[7] Suquamish argues here that the Suquamish's fishing regulations are "probative of his [Judge Boldt's] intent" and implies they were approved. Suquamish Opening Brief, p. 7. This amounts to pure speculation. All Tribes were required to file their fishing regulations with the court, but the mere filing of voluminous regulations did not amount to approval by the court.

1. The *Muckleshoot* Inquiry.

The Suquamish agree that the *Muckleshoot* inquiry is required for an analysis of U & A, but argue here that the district court erred in its application. Suquamish Opening Brief, p. 9. More specifically, Suquamish assert that the Court ignored the "entire record" which included "general evidence" of Suquamish Treaty time fishing and travel and testimony about on-going fisheries. *Id*. at 10-12.

The problem with the Suquamish's argument, though, is that decisions of the district court and this Court, not only specify what type of inquiry a court should engage but also what type of evidence a court should consider. *Muckleshoot I*, 141 F.3d 1355. In *Muckleshoot I*, the court examined the meaning of two phrases in Judge Boldt's decision regarding two Tribes' U & A: Lummi and Swinomish. Specifically, the court examined whether the phrase describing Lummi's U & A "*from the Fraser River south to the present environs of Seattle*," included areas all the way to Seattle itself and whether the phrase "*up to and including Whidbey Island*" included an area seven miles south of Whidbey Island. *Muckleshoot I*, 141 F.3d 1355. There, the court found that the phrases were meant in a restrictive sense, and in its analysis the court made two important rulings that impact the inquiry here. One ruling is that it is improper to rely on latter day evidence to determine Judge Boldt's intent. *Id*. at 1359. The second ruling is that the court record must be examined for clarification when there is ambiguity and only under

very narrow circumstances will a reviewing court consider evidence not relied upon by Judge Boldt. *Id.*

More specifically, in that second ruling with respect to the Lummi, the court found that the phrase "*environs of Seattle*" was ambiguous because it was, "not precise as to the exact location of the environs of Seattle in 1972." *Id*. at 1359. Therefore, the court did remand the case for the narrow inclusion of "evidence indicative of the contemporary understanding" when it entered its decree to "enable the Court to interpret the decree in specific geographic terms." *Id*. at 1360. This Court affirmed that the evidence that was already "before Judge Boldt" when he entered his decree was "obviously relevant." *Id*. Thus, the Lummi's case was remanded but the Swinomish's case was affirmed because the court found the phrase in the Swinomish's case was not ambiguous. Swinomish was found to have had not met their burden to provide evidence in support of the inclusion of the area seven miles south of Whidbey Island as intended by Judge Boldt when he used the term "up to and including Whidbey Island." *Id*. at 1359 (finding that "Swinomish offered no evidence that suggests that FF 6 is ambiguous or that the court intended something other than its apparent meaning when it rendered *Decision I*.") Therefore, this case stands for a rule that latter day testimony (and presumably most latter day evidence) will be excluded from consideration by the court when it amounts to "pure speculation" as to Judge Boldt's intent. *Id*. at 1359-1360.

In the second *Muckleshoot* decision, the district court dealt with the narrow issue of what evidence is to be examined under the rule of *Muckleshoot I*, and held that the statement of a geography expert regarding where the "environs of Seattle" were was admissible. *Muckleshoot II*, 234 F.3d 1099. Dr. Morrill, the expert, concluded that the environs of Seattle extended approximately to Edmonds, and this Court agreed with the district court's approach to this narrow exception. *Muckleshoot II*, 234 F.3d at 1100 ("We find no fault with the district court's analysis because it looked at materials we said in our earlier opinion were appropriate for the district court to use.")

In the final piece of the trilogy, *Muckleshoot III*, Suquamish claimed that a phrase used in Muckleshoot's U & A could not have been intended to be as broad as it appeared because it was ambiguous in light of the context provided by the record. *Muckleshoot III*, 235 F.3d at 432. This Court agreed, and held in respect to Muckleshoot's U & A the phrase "*secondarily in the salt water of Puget Sound*" was ambiguous in the "context of the evidence before Judge Boldt." *Id*. at 432. Muckleshoot argued, exactly like Suquamish argue here, that Puget Sound had a common meaning and included the disputed waters (i.e. that it had a common geographical meaning). *Id*. The Court disagreed:

> Given the evidence that Judge Boldt relied upon and other Findings of Fact and Law in the opinion, the Tribes argue that Judge Boldt could not have intended to include the expansive area claimed by the Muckleshoot as part of their saltwater U&A. *Cf. Children's Hosp. &*

> *Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999) ("To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.")

Id. at 432. This Court then explained that it must narrow its focus to documents considered relevant and "specifically" cited in support of Finding of Fact 76:

> First, the documents and the evidence the court relied upon, which are the rough equivalent of legislative history, play a much larger and more definitive role in interpreting the judicial text than do the traditional components of legislative history in statutory interpretation. Finding 76 specifically cites the supporting documents used as the bases for its conclusions. There is no question, then, that the court relied upon this information in reaching its decision.

Id. at 432-433. The Court further explained that judicial opinions, unlike statutes, were never intended to be subjected to such searching analysis; rather, a court must look at the language of judicial opinions in the context of the facts presented:

> Opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis. Acknowledging this fact, this court held long ago that HN8 the "language of the court must be read in the light of the facts before it." *Julian Petroleum Co. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927); see also *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932) ("The language of all cases must be taken and understood in light of the facts of the case in which the language was employed.").

Muckleshoot III, 235 F.3d at 433. The importance of this language here is that it resulted in the rule of law applied in the present case: the reviewing court will focus primarily on evidence with which there is "no question" that Judge Boldt considered and relied upon it. In doing so, this Court fully agreed with the district

court's analysis which found there was no evidence in the record to support the broad interpretation of the term "Puget Sound" proposed by Muckleshoot:

> The court agrees with the Muckleshoot that Judge Boldt's use of a broad term like "Puget Sound" is perplexing in light of the geographic precision he generally used in describing U&As. And it agrees that, as a resident of the Puget Sound area, it is fair to assume that he would not have used the terms "Elliott Bay" and "Puget Sound" interchangeably. However, there is no evidence in the record before Judge Boldt that supports a [saltwater] U&A beyond Elliott Bay.

Id. at 433-434 (agreeing with the district court's conclusion). In examining the evidence presented, the Court was clear that it considered evidence not cited by Judge Boldt to have very little relevance. *Id.* at 436 (stating "First, the above statements contained in Exhibit USA-27b were not specifically referenced in Finding 76, so their relevance should not be overemphasized."). In that case, this Court also reaffirmed the rule that incidental travel cannot not create U & A. *Id.* ("evidence cited by the Muckleshoot does not establish that any seasonal saltwater fishing areas beyond Elliott Bay were used by their ancestors with enough regularity to establish them as U&A grounds.") Suquamish appears to be challenging this rule. Suquamish Opening Brief, p. 12, 14.

2. Post Muckleshoot: Subproceeding 05-3.

In suproceeding 05-3, a challenge to Suquamish's use of certain waters on the east side of Whidbey Island, the Court applied the above *Muckleshoot* inquiry to determine whether the term "Puget Sound" was ambiguous or meant something

other than its apparent meaning. *U.S. v. Washington*, 20 F. Supp. 3d 828.[8] The court placed the burden on Upper Skagit to demonstrate "there was no evidence before Judge Boldt that the Suquamish fished [in the Disputed Areas] or traveled there in route to the San Juans and the Fraser River area." *Upper Skagit*, 590 F.3d at 1023.[9] The district court found that Upper Skagit met their burden, because nothing in the record showed the Suquamish fished on the east side of Whidbey Island or traveled through that area on their way to the San Juan Islands and the Fraser River area. *U.S. v. Washington*, 20 F. Sup. 3d at 837. In making that determination, the court examined the record in front of Judge Boldt, and particularly the testimony of Dr. Lane:

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[8] The term "Puget Sound" as used by Judge Boldt has been held repeatedly to be ambiguous. *U.S. v. Washington*, 19 F. Supp. 3d 1252, 1274 (1997) ("Because the phrases ''Puget Sound'' and ''secondarily'' are ambiguous, the next issue is what evidence the court can consider to resolve the ambiguity.") The court clarified that although the determination was ambiguous, it did not mean the court had not made a "specific determination" such that new findings could be made. *Id.* at 1275.

[9] This decision has been upheld in other cases:

> We have determined previously that, for the finding describing the Suquamish's U&A, Judge Boldt intended something different than the language's apparent meaning, which neither the Suquamish nor the Tulalip contest. *Upper Skagit*, 590 F.3d at 1025 (affirming the district court's determination that the Upper Skagit Tribe met its burden on the first prong).

Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129, 1133 (9th Cir. 2015) (describing the ruling in subproc. 05-3).

> Nowhere in this discussion, or in Dr. Lane's entire testimony, was the area designated as Area 4 on the map mentioned. Nor were Skagit Bay and Saratoga Passage ever mentioned in Dr. Lane's testimony regarding the Suquamish travels and fishing, or in her Report.

Id. at 839. The Court then shifted the burden back to Suquamish:

> Her one statement in her report that the Suquamish traveled ''to'' Whidbey Island is insufficient to support a finding that they fished or traveled in the waters on the eastern side of Whidbey Island. This absence of evidence regarding Squamish [sic] fishing or travel through Saratoga Passage and Skagit Bay leads the Court to conclude that the Upper Skagit and Swinomish have met their burden of demonstrating that Judge Boldt did not intend to include these areas in the Suquamish U & A.

Id. Suquamish then focused on general statements from Dr. Lane regarding Tribal travels to support their assertion for U & A on the east side of Whidbey Island. *Id*. (citing Dr. Lane's statement regarding how it was "normal" for "all the Indians in Western Washington to travel extensively . . . ."). The district court disagreed that such a general statement could meet the required burden:

> Thus such travel was not unique to the Suquamish, and no conclusion with respect to the subproceeding area can be drawn from the mere statement that they traveled widely.

Id. This Court affirmed. *Upper Skagit*, 590 F.3d 1020.

As applied to this case, this affirmed decision directly refutes Suquamish's renewed argument that general statements about travel can support U & A in a particular area. The entire purpose of the analysis is to shed light on the vagueness of the underlying decree. Such vagueness cannot be clarified with more

vagueness. In their Opening Brief, Statement of Issue No. 1, Suquamish argue that the district court erred in part by failing "to evaluate general evidence of Suquamish treaty-time fishing and travel in the Contested Waters…." Suquamish Opening Brief, pp. 2-3, 12. Suquamish cannot arguably here rely on mere statements that Tribes "'traveled widely' and fished over 'wider marine areas'" to clarify the court's intent. Suquamish Opening Brief, p. 15. Instead, Suquamish needs to provide specific evidence that would shed light on the decree and help clarify it. No such evidence has been presented here.

3. Post-Muckleshoot: Subproceeding 05-4.

In subproceeding 05-4, Suquamish relied on the *Muckleshoot* two-step procedure to determine whether certain areas were included in their U & A. *U.S. v. Washington*, 20 F. Supp. 3d 986, 1048 ("The Court shall proceed with the two-step procedure set forth in *Muckleshoot I*, *II*, and *III*, as approved by the Ninth Circuit Court of Appeals in *U.S. v. Washington* (*Upper Skagit Indian Tribe v. Suquamish*), 590 F.3d at 1023."). The issue in that case was whether "certain inland marine waters on the east side of Admiralty Inlet but west of Whidbey Island (specifically including Admiralty Bay, Mutiny Bay, Useless Bay, and Cultus Bay), as well as Saratoga Passage, Penn Cove, Holmes Harbor, Possession Sound (south to Point Wells), Port Susan, Tulalip Bay, and Port Gardner" were intended to be included in the Suquamish U & A. *U.S. v. Washington*, 20 F. Supp. 3d at 1040. In that case,

the district court after proceeding to the second step of *Muckleshoot*, agreed that some of the areas were intended to be included in the U & A because specific evidence existed in the record before Judge Boldt. *Id*. at 1048-1053 (reviewing multiple evidentiary sources and finding "ample" evidence). The court relied on specific evidence of the use of the west side of Whidbey Island:

> Achilles de Harley, who collected information on the Indian tribes of Oregon Territory before the separate existence of Washington Territory, reported in 1849 [sic]
>
> *The Soquamish [sic] are a warlike tribe of Indians, whose relations with the whites and with the Hudson's Bay Company are friendly. They occupy the country about Port Orchard and neighbourhood, and the West side of Whidbey's Island. Males, 150; females, 95; children under 12 years, 210; slaves, 64; total 519. They live by labour.*

Id. at 1050.

The court concluded that based on these specific references, certain areas would have been included in their U & A:

> It is my opinion that the foregoing reports written by Paige in the fall and winter months of 1856 **document the fact that the Suquamish were accustomed to harvest their fall and winter salmon supplies at the rivers on the east side of Puget Sound**. Modern Suquamish, as well as neighboring Indians, have attested **that the Suquamish traditionally fished at the mouths of the Duwamish and Snohomish rivers as well as in the adjacent marine areas**.

Id. at 1051 (emphasis in original). The court also relied on Dr. Lane's determination regarding the western island shoreline bays of Whidbey Island that were challenged by Tulalip:

> **The Suquamish travelled to Whidbey Island to** fish and undoubtedly used other marine areas as well. Dr. Barbara Lane, "Identity, Treaty Status and fisheries of the Suquamish Tribe of the Port Madison Indian Reservation," Exhibit USA-73, pp. 1-2, 4-5, 11-16 (emphasis added).

Id. at 1052. The court thus concluded, "it is very likely that he intended to include waters west of Whidbey Island as far as the island shoreline, including the bays on the west side, in the Suquamish U&A." *Id*. at 1053.

Here, what is important to note is in the present case there are no such references to the disputed areas quoted in response by the Suquamish as was the case in the Tulalip challenge. In addition, in that case they did not rely merely on the issuance of regulations to fulfill their burden. It is inconsistent for them to claim a different approach is applicable here. This Court recently affirmed the decision of the lower court. *Tulalip Tribes*, 794 F.3d 1129.

C. The Court Did Nothing Unique in 14-1 to Require Reversal.

In the present appeal, Upper Skagit relied on the precedent of all the prior appeals of this matter, and sought a determination that the U & A of "the Suquamish Tribe do not include Samish Bay, Chuckanut Bay, and a portion of Padilla Bay (the "Disputed Areas"), where the Upper Skagit has its own Court-approved U&A." ER 6; SER 1-7. The court in its order did exactly what it did in all of the other cases listed above. The court proceeded to the second step in this

case because it found that the meaning of Puget Sound encompassed the waters at issue. ER 16.

It is interested to note that where the court has examined the term "Puget Sound" in the context of a Tribe's U & A, it has *never* held the court truly intended to grant the all-encompassing use of the term.[10] This case does not lend itself to a different result. In these past cases, as discussed above, the district court has found the court's use of the broad term "Puget Sound" perplexing[11] or ambiguous (as in *Muckleshoot III*), or much narrower meaning than the expansive one proposed. *See supra*, note 10; *see also U.S. v. Lummi Tribe*, 235 F.3d 443, 451-52 (holding that the Strait of Juan de Fuca and Puget Sound are two distinct regions).

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[10] *See, e.g. Muckleshoot III*, 235 F.3d 429 (holding that "secondarily in the waters of Puget Sound" is restrictive in the context of the decision and means the open waters and shores of Elliot Bay); *Upper Skagit*, 590 F.3d 1020 (holding that Puget Sound does not include certain waters east of Whidbey Island); *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) (holding that the Strait of Juan de Fuca is distinct from northern Puget Sound.)

[11] The court held in *Muckleshoot*:

> The court agrees with the Muckleshoot that Judge Boldt's use of a broad term like ''Puget Sound'' is perplexing in light of the geographic precision he generally used in describing U & As. And it agrees that, as a resident of the Puget Sound area, it is fair to assume that he would not have used the terms ''Elliott Bay'' and ''Puget Sound'' interchangeably. However, there is no evidence in the record before Judge Boldt that supports a U & A beyond Elliott Bay.

U.S. v. Washington, 19 F. Supp. 3d at 1311, *aff'd*, *Muckleshoot III*, 235 F.3d 429.

This case raises absolutely no unique issues in this sense; it is another U & A challenge where the result, as will be seen below, is essentially mandated by the evidence presented in the original case. At the very least, the claim for the broad U & A ("Claim Area 1") asserted now by the Suquamish needed to have been adopted by the court in the first challenge of their U & A, not the third.

D. The Evidence Did Not Support Suquamish's Claim to the Disputed Area.

As part of the *Muckleshoot* Inquiry, the court examined testimony from the hearing where their U & A was decided. This is exactly what the court did in suproceeding 05-3, a decision affirmed by this Court. The testimony from Dr. Lane recognized that the Suquamish generally travelled, but the court correctly held again that this was insufficient evidence. Identical to the argument in subproceeding 05-3, the Upper Skagit noted that based on the testimony presented, the disputed areas were outside of the listed areas discussed at the hearing. The court agreed with Upper Skagit:

> Specifically, the Upper Skagit point out that no testimony regarding Area 3 on the Suquamish claim map was elicited at the April 9, 1975 hearing, and Judge Boldt's findings the following day made no reference to Suquamish U&A outside Areas 1 and 2 in the northern Puget Sound.

ER 11-12 (*Order on Cross-Motions*). The court also noted that there was no evidence in the record to support the claims. ER 18 (Missing is any reference to

Area 3). Because the court did exactly what it did in subproceeding 05-3, with respect to both the analysis and the reliance on the testimony of Dr. Lane and the record, this Court should find for the Upper Skagit. The Suquamish's arguments have already been denied in prior cases: generalized travel, estoppel by failure to object to regulations, and a claim to a prescriptive right. If the mere issuance of regulations filed with the court is presumptive evidence of U & A, then Tribes could attempt to argue that all prior cases were incorrectly decided because all Tribes were required at the onset of the case to file their regulations with the court. *See, e.g. U.S. v. Washington*, 626 F. Supp. 1405, 1423 (W.D. Wash. 1985) (noting the parties regulations need no longer be filed with the Court pursuant to the *Order Re: Service of Documents* dated March 1, 1976). It is unknown whether the court ever reviewed the Tribes' regulations, but it is certainly speculative to presume Judge Boldt read and relied on any particular one prior to this or any decision. The regulation itself would have had no innate evidentiary value.

E. Suquamish's Claim Area Map is Not Equal to Their U & A.

Suquamish also argue that their entire "Claim Area," depicted in ER 1117, is all within their U & A. Suquamish Opening Brief, p. 17, fn. 30. Without merit, Suquamish boldly state that "[i]n fact, Judge Boldt's bench ruling on April 10, 1975, rejecting the State of Washington's limited challenge to Suquamish's U&A Claim Areas 1 & 2, expressly included all of Suquamish Claim Area 1 within their

U&A. See ER 891-892." Suquamish Opening Brief, p. 17, fn. 30, p. 19. This statement is directly inconsistent with Dr. Lane's testimony and is a collateral attempt to expand their U & A into the entire Strait of Juan de Fuca and beyond. Dr. Lane testified merely that the Suquamish *traveled* through "*[p]art* of Area 1." ER 55; ER 789 (testimony of Dr. Lane) (emphasis added). Which "part" is not clarified but it does not include everything depicted on the map as implied.

Suquamish also argue that the fact that they fished in the area is determinative of some sort of right or approval. Suquamish Opening Brief, p. 11 ("Suquamish has regularly harvested fish and shellfish in the Contested Waters for the last forty years"); Suquamish Opening Brief, p. 12 (fishing regulations required to be filed by the Court and approved by Judge Boldt). These arguments entirely ignore that Dr. Lane indicated that she had not even seen the regulation—the one that they now claim is determinative of their U & A. ER 788. The lawyer asked Dr. Lane specifically:

> Question: [A]re you familiar with the regulation filed by the Suquamish Tribe?
> Answer: No.

ER 788. In the context of this dispute, there appears to be no adoption by Dr. Lane regarding the accuracy of the entire regulation area in front of the court. The lawyer merely stated it is "on file" with the court or they "assume it is." ER 788 ("This is on file with the Court or I assume it is."). Suquamish argues that this map

is part of "all of the information presented to Judge Boldt" and therefore, because it was presented, he agreed and approved it. Suquamish Opening Brief, p. 23. On the contrary in the context of the decision, it is overreaching to speculate that the court or Dr. Lane somehow agreed that the Suquamish historically fished in the whole area found in their "Claim Area" map; instead, the record demonstrates the opposite conclusion. *Muckleshoot III*, cautions the reviewing court to look at the language in "light of the facts before" the trial court. *Muckleshoot III*, 235 F.3d at 443. Here, the "totality of the Order at issue" approach urged by Suquamish would have this Court speculate that each and every document that was "filed," was approved and relied upon. Suquamish Opening Brief at p. 23. Instead, the law requires a narrow consideration of appropriate evidence, and cautions the reviewing court not to enlarge upon the decree. *See Muckleshoot I*, *II*, and *III*, *supra*.

In addition there is no prescriptive right based on the self-issuance of 40 years of regulations; here, Suquamish must rely on the record not their regulations. *See U.S. v. Washington*, 459 F. Supp. at 1069 (cautioning Tribes that expansion of U & A is not done by including areas in a tribal fishing regulation); *See also U.S. v. Washington*, 18 F. Supp. 3d at 1164 (stating that "[i]f equitable defenses are available to a tribe that engages in treaty fishing outside its established area, there will be a great incentive for tribes to issue regulations for areas outside their

established usual and accustomed fishing grounds and to allow or encourage tribal members to engage in treaty fishing outside those areas in anticipation of being able to enlarge the tribe's treaty rights by 'prescription.'")

Further, "joint regulations" depict fishing areas of multiple Tribes (e.g. Nooksack, Lummi, Swinomish) with vastly different U & A's; so no conclusion about a single Tribe's U & A is possible to infer. ER 1258. Suquamish does not assert all of the Tribes in the regulation also share this vast U & A. Such a conclusion would contradict several decrees, including their own, which specifies that their fishing area includes the geographical anchors of the Rosario and Haro Straits. *U.S. v. Washington,* 459 F. Supp. 1020, 1049; *See Lummi Indian Tribe, supra*, note 10. Judge Boldt's use of the words "including" would be superfluous if all of the areas in the map were intended as their U & A. Words are important here. The record is limited to the documents cited as the "evidence" or "in support" of the actual claim made by the Suquamish in their Request for Determination and considered by the court, and not on some perceived acquiescence to regulations covering areas that happened to have been filed with the court. ER 1113-1114 (March 17, 1975, Request for Determination); ER 1117; ER 24-30.

CONCLUSION

The district court followed the required analysis, and therefore, none of the reasons or arguments set forth by the Suquamish warrant reversal. While this Court has critiqued this established inquiry,[12] the fact remains that the law of the case is firmly established and was developed over several decades. A contrary decision which creates an end run around that analysis could impact those cases or create new ways to challenge U & A decisions.

The history of this case illustrates that this is not the first time this district court has applied these standards to similar facts, and there is no error in the standard or manner of application by the court here. The S'Klallam therefore respectfully request this Court affirm the decision.

DATED this 8th Day of December, 2015.

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[12] *U.S. v. Washington*, 573 F.3d 701, 710-711 (9th Cir. 2009) ("And we pretend to determine what the Indian tribes did 150 years ago at a time for which there is no evidence of especially high reliability and little evidence of any kind.")

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered in the CM/ECF system for this matter.

DATED this 8th day of December, 2015.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Interested Party Appellees hereby identifies the following related cases:

United States v. Washington, Subproceeding 11-2 (C70-9213, Western District of Washington) (Ninth Circuit Cause No. 15-35661)

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Attorney for Port Gamble S'Klallam and Jamestown S'Klallam Tribes

Date December 8, 2015