No. 15-35540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UPPER SKAGIT INDIAN TRIBE, Plaintiff - Appellee, v. SUQUAMISH INDIAN TRIBE, Defendant - Appellant.	D.C. No. 2:14-sp-00001-RSM Appeal from the U.S. District Court for Western Washington, Seattle

APPELLANT'S REPLY BRIEF

Howard G. Arnett
Oregon Bar #770998
KARNOPP PETERSEN
360 SW BOND STREET
SUITE 400
BEND, OR 97702
541-382-3011
FAX 1-541-388-5410
hga@karnopp.com

John W. Ogan
Oregon Bar # 065940
KARNOPP PETERSEN
360 SW BOND STREET
SUITE 400
BEND, OR 97702
541-382-3011
FAX 1-541-388-5410
jwo@karnopp.com

Nathan G. Orf
Oregon Bar #141093
KARNOPP PETERSEN
360 SW BOND STREET
SUITE 400
BEND, OR 97702
541-382-3011
FAX 1-541-388-5410
ngo@karnopp.com

James Rittenhouse Bellis
Washington Bar #29226
SUQUAMISH TRIBE
PO BOX 498
SUQUAMISH, WA 98392
360-394-8501
rbellis@suquamish.nsn.us

Attorneys for Defendant-Appellant Suquamish Indian Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. INTRODUCTION

The burden that the Upper Skagit Indian Tribe ("USIT"), the Port Gamble S'Klallam and Jamestown S'Klallam Tribes ("S'Klallam"), and the Tulalip Tribes ("Tulalip")[1] must carry in challenging Suquamish's U&A under the *Muckleshoot* Analysis[2] is a heavy one, as it ought to be when these Tribes are calling into question nearly 40 years of established practices and the understanding that Suquamish's U&A includes the Contested Waters.[3] As this Court held in its most recent application of the *Muckleshoot* Analysis, *Tulalip Tribes v. Suquamish Indian Tribe* (*Tulalip*), any evidence of fishing or travel in the Contested Waters before Judge Boldt, including "general evidence," precludes the Tribe challenging another Tribe's U&A from carrying its burden of proof.[4]

Rather than seeking to distinguish this Court's holding in *Tulalip*, USIT ignores *Tulalip* entirely in its response. Instead, USIT and the Interested Parties doggedly maintain their "partial record" theory; that is, no matter what is in the

---

[1] We refer to S'Klallam and Tulalip herein collectively as the "Interested Parties."
[2] As we use the term in this Reply and in our opening brief, the "*Muckleshoot* Analysis" generally refers to the analytical framework set forth in this Court's decisions in *Muckleshoot v. Lummi Indian Tribe*, 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*"), *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("*Muckleshoot III*"), and their progeny.
[3] "Contested Waters" refers to the waters listed in the Request for Determination filed by USIT with the District Court. ER 6 at n. 1 (listing waters subject to challenge).
[4] *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1135 (9th Cir. 2015).

record, only limited and specific types of evidence in the record may be considered in evaluating Judge Boldt's likely intent with respect to the April 18, 1975, Order ("Suquamish Order").[5] They do so despite the Court's recent holding in *Tulalip* that numerous bays, coves, and marine waters of Puget Sound are Suquamish U&A, although they were never the subject of specific Dr. Lane testimony and are not named in the Suquamish Order.[6]

USIT and the Interested Parties repeatedly direct the Court to Judge Boldt's Final Decision # 1 (*Boldt I*)[7] and subsequent interpretations of that decision as the context for applying the *Muckleshoot* Analysis. However *Boldt I* resulted from three years of trial and contains hundreds of findings and citations to evidence supporting each Tribe's fishing rights and their U&A,[8] whereas Suquamish's U&A was determined on the basis of a *prima facie* showing at an emergency hearing less than two months after the Suquamish's initial Request for Determination and has no citations to specific evidence. This distinction is important, and makes the justification for relying only on certain evidence in the record before Judge Boldt (e.g. his citation to specific exhibits) inapplicable, and in fact impossible here.

---

[5] ER 24-30.

[6] *See Tulalip*, 794 F.3d at 1135-1136 (waters need not be specifically named to be within a Tribes U&A, and that "general evidence" of fishing applicable to the use of open marine areas like the Contested Waters is probative and constitutes "some evidence" under the *Muckleshoot* Analysis).

[7] *See U.S. v Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

[8] *Id.*

Here, the absence of detailed *Boldt I*-type findings in the Suquamish Order requires that the entire record of the Suquamish proceeding be carefully examined in determining his likely intent. The record includes general testimony regarding Suquamish, testimony from tribal and federal witnesses that Suquamish would be participating in the upcoming herring fishery, Judge Boldt's statement that he gave great weight to the lack of a Tribal challenge to Suquamish's U&A claim (including the Contested Waters) in making his finding with respect to Suquamish's U&A,[9] and the 1975 Suquamish herring fishing regulations filed with Judge Boldt's Court prior to the date of the Suquamish Order. This Court should also take into account consistent Suquamish fishing regulations subsequently-filed with Judge Boldt, since his acceptance of the regulations is probative of his intent with respect to the geographic scope of Suquamish's U&A.[10]

The entirety of the Suquamish Order must be considered in construing Judge Boldt's likely intent, not just FF No. 5 describing Suquamish U&A.[11] In particular, FF No. 5 must be read in context with FF No. 7 regarding the three-Tribe Hale Passage Agreement,[12] and FF No. 9 wherein Judge Boldt approved the

[9] Transcript of Proceedings on April 9, 1975, ER 775-776 (noting same).
[10] *Muckleshoot I*, 141 F.3d 1355, 1359 (*citing United States v. Angle*, 760 F. Supp. 1366, 1371-72 n. 4 (E.D.Cal. 1991), rev'd on other grounds, 7 F.3d 891 (9th Cir. 1993) (noting the record is not frozen, and evidence bearing on Judge Boldt's intent and understanding may be considered under the analysis).
[11] *Id.*, ER 25 at ¶ 5.
[12] *Id.*, ER 26 at ¶ 7 (Judge Boldt's findings on the Hale Passage Agreement).

1975 Suquamish (and other Tribes') herring fishing regulations for areas that included the Contested Waters.[13] If one reads the findings in the Suquamish Order to be consistent and in harmony with each other, the only plausible reading is that Judge Boldt intended to include the Contested Waters in FF No. 5.

Lastly, neither USIT nor the Interested Parties have responded to Suquamish's arguments regarding claim preclusion. Nearly 40 years of Suquamish fishing regulations conclusively establish that it has consistently exercised treaty fishing rights in the Contested Waters since 1975.[14] Contrary to USIT and the Interested Parties' patently false and unsupported claims of "new activity" and "expansion," the same fishing activities were ongoing both before and at the time USIT and the Interested Parties brought prior challenges to Suquamish U&A. The current claims could have been brought in those earlier proceedings, but were not. As such the claims brought in this successive lawsuit should be barred by the doctrine of claim preclusion.

II. ARGUMENT

[13] Suquamish Order, ER 27 at ¶ 9.

[14] *See generally*, Fishing Regulations and Affidavits regarding fishing activity of Suquamish in the Contested Waters between 1975 and 2013, ER 100-725 (uncontroverted record evidence establishing Suquamish fishing in the Contested Waters during this period). Note also that USIT signed off on many of the Suquamish Regulations. *See*, *e.g.*, ER 124-131 (In-Common Point Elliot Treaty Fishery Regulations for 1976, authorizing Suquamish fishing in the Contested Waters, noting USIT approval at ER 131).

A. USIT and the Interested Parties cannot demonstrate that it is more likely than not that Judge Boldt intended to exclude the Contested Waters from Suquamish's U&A.

1. This Court may properly consider evidence and parts of the record other than Dr. Barbara Lane's testimony under the *Muckleshoot* Analysis

It is well-settled that the Court must consider the entire record when determining "the meaning Judge Boldt intended at the time he wrote his opinion."[15] As this Court has also held, the *Muckleshoot* Analysis does not require a court to "freeze the record," and additional evidence may be considered if it bears on Judge Boldt's understanding of the geographic scope of a Tribe's U&A.[16]

The nature of the proceedings in which Judge Boldt determined Suquamish's U&A is of critical importance in determining the probative value of the various parts of the record as to Judge Boldt's likely intent. USIT and the Interested Parties would have this Court apply the *Muckleshoot* Analysis as if Suquamish had its U&A determined in *Boldt I*, where the parties had an opportunity to fully develop the record following a lengthy and complex trial on the merits. However, Suquamish's U&A was determined over a period of fewer than two months on the basis of a *prima facie* evidentiary showing allowed and encouraged by Judge Boldt and ancillary to an emergency three-day hearing

[15] *Muckleshoot II*, 234 F.3d 1099, 1100.
[16] *Id.*; *see also Muckleshoot I*, 141 F.3d 1355, 1359 (*citing United States v. Angle*, 760 F. Supp. 1366, 1371-72 n. 4 (E.D.Cal. 1991), *rev'd on other grounds*, 7 F.3d 891 (9th Cir. 1993).

focused on various Tribes' rights to open a herring fishery in Northern Puget Sound for 1975.[17] The Order in *Boldt I* includes over 200 findings of fact, specific citations to particular record documents supporting each finding, and does not approve any fishing regulations.[18] By contrast, the Suquamish Order contains only twelve findings of fact, does not specifically identify the evidence Judge Boldt relied on in support of each finding, and specifically approves joint 1975 herring fishing regulations filed by Suquamish and other Tribes.[19]

Because there are no specific *Boldt I*- type citations to record evidence in the Suquamish Order, it is inappropriate to argue that Dr. Lane's reports and hearing transcript testimony are exclusively relevant in divining Judge Boldt's likely intent.[20] The absence of specific citations by Judge Boldt to evidence he relied upon in the Suquamish Order make other information in the record much more important in applying the *Muckleshoot* Analysis.

With respect to Suquamish, Judge Boldt declared in open court on April 9, 1975 that he relied on the lack of Tribal objection to the scope of Suquamish's

---

[17] *See, e.g.*, ER at 782 (Judge Boldt noting emergency nature of proceedings); *see also* ER 24-25 at ¶ 2 (noting prima facie showing and basis of order); *see also* ER 26-27 at ¶ 8 (noting same, and affording parties a right to request a full evidentiary hearing to challenge the U&A determinations, including Suquamish's).

[18] *See generally Boldt I*, 384 F. Supp. 312 (W.D. Wash. 1974).

[19] The Suquamish Order, ER 24-30.

[20] *See Muckleshoot III*, 235 F.3d at 434 (noting that the reason this Court treated certain record evidence as the "most relevant" evidence of Judge Boldt's intent was the fact that it was specifically and explicitly referenced in his Order).

U&A claim in finding that Suquamish had made its *prima facie* case for U&A based on its Claim Map.[21] This statement is highly relevant in determining Judge Boldt's likely intent, and strongly suggests he intended to include the Contested Waters within his broad description of the scope of Suquamish's U&A. In addition, Judge Boldt specifically approved the 1975 joint herring fishing regulations issued by Suquamish and other Tribes applicable to the Contested Waters in the Suquamish Order.[22] Judge Boldt's approval of these regulations strongly suggests that they were consistent with his intended description of the geographic scope of Suquamish's U&A established in the same Order.

Subsequent Orders issued by Judge Boldt required Suquamish and other Tribes to file their fishing regulations with the Court for review. A number of the fishing regulations included in the record for this Court's review and sought to be stricken by USIT[23] were filed with and accepted by Judge Boldt during his continuing jurisdiction in the months and years following his entry of the Suquamish Order.[24] The fact that these subsequent regulations covering the

---

[21] Transcript of Proceedings on April 9, 1975, ER 773-776. Boldt let the State raise its issues regarding Areas 1 and 2 on the Suquamish claim map, but the State had no other concerns except Suquamish's U&A claims in the "far north." *Id.* at ER 772-773.

[22] ER 27-28 at ¶¶ 9-10; *see also* Joint Regulations, ER 1255-1261 (in particular map at ER 1261).

[23] *See* USIT's Motion to Strike, Dkt. 28-1.

[24] *See, e.g.*, Regulations authorizing Suquamish fishing in the Contested Waters, ER121 (1975-1976 regulations, noting file stamp); ER 124 (In-Common Point

Contested Waters were: (a) consistent with the joint herring regulations explicitly approved by Judge Boldt in the Suquamish Order; and (b) continued to be filed with and reviewed by the Court without objection from the Court, the State of Washington, USIT, or any other Tribe, also shows that Judge Boldt understood his description of Suquamish U&A to include the Contested Waters. These post-Suquamish Order regulations are properly considered under the *Muckleshoot* Analysis because they are probative of Judge Boldt's intent and understanding with respect to the geographic scope of Suquamish's U&A.[25]

2. There was evidence of Suquamish travel or fishing in the Contested Waters before Judge Boldt that precludes USIT from meeting its burden under the *Muckleshoot* Analysis.

As this Court recently declared in *Tulalip*, Dr. Lane's general testimony that "[t]he deeper saltwater areas, the Sound, the straits, and the open sea served as public thoroughfares, and as such were used as fishing areas by anyone travelling (*sic*) through such waters,"[26] coupled with the plain text of the Suquamish Order

---

Elliot Treaty Fishery Regulations for 1976, noting file stamp); ER 135 (1976 Regulations, noting file stamp); ER 159 (1977 Regulations, noting file stamp); ER 161 (same); ER 163 (1978 Regulations, noting file stamp); etc.

[25] *Muckleshoot I*, 141 F.3d 1355, 1359 (*citing United States v. Angle*, 760 F. Supp. 1366, 1371-72 n. 4 (E.D.Cal. 1991), rev'd on other grounds, 7 F.3d 891 (9th Cir. 1993) (noting the record is not frozen, and evidence bearing on Judge Boldt's intent and understanding may be considered under the analysis).

[26] *See* Dr. Barbara Lane's report "*Political and Economic Aspects of Indian-White Culture in Western Washington in the Mid-19th Century,*" May 10, 1973, ER 1118-1147 (in particular at ER 1142); *see also* ER 781-782 (Dr. Lane's testimony regarding Suquamish's use of such areas throughout the Puget Sound).

describing the geographic scope of Suquamish's U&A from north to south, constitutes "some evidence" of Suquamish fishing in the waters through which they likely traveled. This alone should be sufficient to preclude a challenging Tribe from meeting its burden under the *Muckleshoot* Analysis.[27]

Dr. Lane provided written and hearing testimony that the Suquamish traveled widely over the marine waters of Puget Sound, including the "upper" Puget Sound specifically,[28] and that tribes traveling north toward the Fraser River (such as Suquamish) would use Hale Passage as a travel route.[29] Dr. Lane described bays and waters in the Contested Waters area as a commons, testifying that many Indians used Chuckanut Bay to gather marine foods.[30] At the 1975 hearing, counsel for the State of Washington understood that Dr. Lane had testified that Suquamish was historically in the region of the Contested Waters, and pressed

---

[27] *Tulalip*, 794 F.3d at 1135 (holding that Dr. Lane's testimony regarding fishing while traveling requires a challenging Tribe to show the lack of any evidence of fishing *or* travel in order to meet its burden).

[28] "*Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Port Madison Reservation"*, December 15, 1975, ER 1197-1123 (In particular at ER 1202: "the Suquamish often travelled to Hood Canal and *upper Puget Sound* as well as in *other directions* to harvest natural resources or to visit with relatives in other areas."); *id.* at ER 1214 ("the evidence that the Suquamish travelled to the Fraser River in pre-treaty times documents their capability to travel widely over the marine waters in what are now known as the Strait of Juan de Fuca and Haro and Rosario Straits.").

[29] ER at 803 (Dr. Lane's testimony regarding the use of Hale Passage as a travel route).

[30] ER 765-766 (Dr. Lane's testimony describing use of Chuckanut Bay); ER 816 (describing the in-common use of bays in and around Bellingham bay and Hale Passage).

her on that.[31] Dr. Lane's response was not that Suquamish did not fish in this general area; rather, she clarified that it would be uncommon for Suquamish to go "all the way into" Bellingham Bay "right in front" of the Lummi villages.[32] The emphasis placed on the selective and truncated reading of this testimony regarding Bellingham Bay by USIT and the District Court ignores its context and is directly contradicted by evidence of Suquamish fishing or travel in the same area in the form of Dr. Lane's testimony and reports concerning the use of the Contested Waters and Bellingham Bay by Suquamish and other Tribes for those purposes.[33]

a. Judge Boldt's finding acknowledging the Hale Passage Agreement demonstrates he intended to include the Contested Waters in Suquamish's U&A.

The District Court erred in concluding that Judge Boldt's finding regarding Hale Passage was of no consequence in understanding his intent in FF No.5, and that Suquamish's use of Hale Passage "was pursuant to (modern) agreement rather

[31] "Q [Solomon]: But if I understood your testimony, for example, *with respect to the Suquamish being in that area, you formed an opinion that that was in their usual and accustomed grounds by reason of their travelling to that territory*." ER 816-817 (emphasis added).

[32] ER at 816; *see also id*. at ER 812-813 (qualifying nature of exclusive use "right inside" or "right in front of where the houses were" of a Tribe's village, but noting generally that other Tribes, including Suquamish, were not excluded from the marine waters generally and "certainly came through those waters, maybe even fished there *with Lummi permission.*") (emphasis added); *accord*, *id.* at ER 802-804; *c.f.* District Court's Order, *at* ER 20.

[33] *See id.*; *see also supra* at nn. 28-30 (regarding Suquamish's use of "upper" Puget Sound, the use of Chuckanut Bay, and the use of Hale Passage as a route of travel for Tribes, like Suquamish, that traveled north to the Fraser River).

than historic right."[34] Because Judge Boldt had already decided in *Boldt I* that tribal fishing may not be permitted in the absence of treaty or "historic" rights, he could not have deferred fishery management of Hale Passage in FF No. 9 (the only "modern" use to which the agreement pertained) to the three Tribes unless each Tribe had a treaty right to fish there based on historic use of Hale Passage. The District Court's finding also ignores the evidence in front of Judge Boldt that Hale Passage was historically used at treaty time.[35] As relevant here, because the likely travel route to the southern mouth of Hale Passage runs directly through the Contested Waters, this constitutes "some evidence" before Judge Boldt of Suquamish fishing or travel that precludes USIT from meeting its burden under the *Muckleshoot* Analysis.[36]

b. The District Court analysis that Suquamish would not "detour" to the Contested Waters effectively creates a new island chain barrier and directly contravenes Judge Boldt's April 10, 1975 bench ruling.

It is undisputed that Judge Boldt's description of Suquamish's U&A, at the very least, includes all of those waters covered by Area 1 of Suquamish's Claim Map.[37] The District Court posits that travel to the east of an island chain

[34] District Court's Order, at ER 21.
[35] ER at 803 (Dr. Lane's testimony regarding the historic use of Hale Passage).
[36] *See Tulalip*, 794 F.3d at 1135-1136
[37] The District Court also acknowledged Judge Boldt's finding with respect to Suquamish Claim Area 1 (ER 9), but then went on to ignore this finding. ER 18-19.

comprised of Fidalgo, Cypress, Sinclair, and Lummi Islands would be an unlikely or uncommon "detour" for Suquamish. This is reversible error, as this new and porous island chain barrier fashioned by the District Court excludes a portion of Area 1 that Judge Boldt specifically declared as Suquamish U&A.[38]

Moreover, Dr. Lane specifically identified Chuckanut Bay and the bays and waters in the area of the Contested Waters as being used by many Tribes, akin to a commons.[39] There is no basis in the record for the District Court to uniquely exclude Suquamish from this commons with its new island chain barrier. Consider further that the most direct and likely travel route from Fidalgo Bay (which is within Suquamish's uncontested U&A in Claim Area 1) to Hale Passage runs through Padilla Bay and the rest of the Contested Waters. With no evidence or testimony about what a wide-ranging marine tribe would consider a "substantial detour,"[40] the District Court declared unlikely that Suquamish traveled and fished in waters that all parties concede Judge Boldt specifically declared as Suquamish U&A.

The purpose here is to divine the intent of Judge Boldt. The District Court's analysis strayed from a review of the record, manufactured "evidence" no party presented, and is directly at odds with Judge Boldt's explicit bench ruling.

---

[38] *See* Suquamish Claim Area Map, ER 1117 (noting Area 1 includes Fidalgo Bay and other waters to the east of the islands identified by the District Court).
[39] *See supra* at n. 30 (so noting).
[40] ER 19.

c. Judge Boldt heard testimony that Suquamish would be fishing in the Contested Waters on April 10 and 11, 1975.

This Court need not rely exclusively on general evidence before Judge Boldt. The record of the Suquamish proceeding includes explicit testimony that Suquamish would fish for herring in and around the Contested Waters during the upcoming 1975 season.[41] The District Court, USIT and the Interested Parties all flatly ignore this testimony, which is preserved in the April 1975 transcript and was heard by Judge Boldt before issuing the Suquamish Order. It is inarguably part of the Suquamish proceeding record.

In order to hold that USIT and the Interested Parties have carried their burden below, this Court must conclude that Judge Boldt heard extensive testimony from two separate witnesses regarding Suquamish's planned fishing activity in the Contested Waters, and that he went on to approve fishing regulations for the imminent herring fishery issued by Suquamish and other Tribes for the Contested Waters, all while intending to preclude Suquamish from participating in the upcoming herring fishery in those same waters. This is nonsensical. The full record reveals that it is, at the very least, just as likely as not that Judge Boldt

[41] *See* ER 920-921 (Testimony on April 10, 1975, noting Suquamish purse seiner would be fishing in State Area 3); *see also* ER 792 (On April 9th, Mr. Stay, Mr. Solomon, and the Court clarified that "state areas" and Suquamish sub-areas were the same); *see also* ER 1025-1027 (noting Suquamish would be fishing in the "Hale Passage area" within Area 3 that also includes the Contested Waters).

intended to include the Contested Waters within Suquamish U&A. [42]

B. Suquamish's arguments regarding claim preclusion are meritorious and uncontroverted.

USIT's arguments regarding the applicability of issue preclusion[43] and S'Klallam's arguments regarding claims to U&A based on prescriptive use[44] are non-sequiturs, and Tulalip simply does not attempt to address claim preclusion. The record establishes that Suquamish has been continuously fishing in the Contested Waters since the entry of the Suquamish Order on April 18, 1975,[45] including the time when USIT and the Interested Parties brought prior actions challenging the scope of Suquamish U&A.[46] This case and the prior challenges arise out of a common nucleus of operative fact, involve the alleged infringement of the same rights, depend on substantially the same evidence, and could have been

[42] *See U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (noting inquiry is focused on Judge Boldt's intent, and that a challenging tribe has failed to carry its burden if, on review, "it is just as likely that [the] area was intended to be included as that it was not.").

[43] USIT Reply Brief, Dkt. 26-1 at pp. 27-28; *see also Taylor v. Sturgell*, 553 U.S. 880, 892 n. 5, 128 S. Ct. 2161 (2008) (noting claim preclusion and issue preclusion are separate doctrines); *accord, Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 n. 2 (9th Cir. 1988) (same).

[44] S'Klallam Reply Brief, Dkt. 29 at p. 10 n. 6; *id.* at pp. 25-26.

[45] *See generally*, Fishing Regulations and Affidavits regarding fishing activity of Suquamish in the Contested Waters between 1975 and 2013, ER 100-725.

[46] *See U.S. v. Washington*, 20 F. Supp.3d 828, 831-841 (W.D. Wash. Jan. 3, 2007) (Order on USIT's prior 25(a)(1) subproceeding brought against Suquamish); 20 F. Supp.3d 986, 1040 (W.D. Wash. July 29, 2013) (noting Tulalip filed a previous Request for Determination regarding Suquamish's U&A on August 8, 2005).

brought concurrently with those prior actions.[47] As such, claim preclusion applies to bar USIT's claims.

Permitting USIT and the Interested Parties to continue filing successive limited challenges to various Tribes' U&A runs counter to principles of finality, wastes judicial resources, and increases uncertainty in a case that has been pending now for over 40 years.[48] This Court should refrain from subjecting Suquamish (and other Tribes) to a "death by a thousand cuts," hold that USIT's claims are barred by the doctrine of claim preclusion, and remand this case to the District Court with instructions to dismiss USIT's claims on this basis.

III. CONCLUSION

For the foregoing reasons and the reasons set forth above and in Suquamish's Opening Brief, Suquamish respectfully requests that this Court reverse the Judgment of the District Court granting USIT's motion for summary judgment, and remand with instructions to enter judgment in favor of Suquamish.

---

[47] *See* USIT's Motion for Summary Judgment, ER 1108-1109 (stipulating to elements); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority*, 322 F.3d 1064, 1077-1078 (9th Cir. 2003) (noting elements of claim preclusion); *accord*, *Elgin v. Department of Treasury*, 132 S. Ct. 2126, 2146-2147 (2012) (Alito, J., dissenting) (*citing Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236 (1976)) (additional citations omitted); *Haphey v. Linn County*, 924 F.2d 1512, 1517 (9th Cir. 1991).

[48] Avoiding these impacts of successive litigation is at the very heart of the doctrine of claim preclusion, and contrary to "the purpose for which civil courts have been established, the conclusive resolution of disputes." *Tahoe-Sierra Preservation Council*, supra, 322 F.3d at 1077 (internal quotation marks and citations omitted).

DATED this 21st day of January, 2016.

KARNOPP PETERSEN LLP

s/ John W. Ogan

John W. Ogan OSB# 065940
jwo@karnopp.com
TEL: (541) 382-3011
FAX: (541) 383-3073
Of Attorneys for Defendant-Appellant
Suquamish Indian Tribe

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 15-35540

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

☐ This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

☐ This brief complies with the enlargement of brief size granted by court order dated _____. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

☐ This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

☐ This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 29-2(c)(2) or (3) and is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

☒ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ John W. Ogan

("s/" plus typed name is acceptable for electronically-filed documents)

Date: January 21, 2016

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, 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 21st day of January, 2016.

KARNOPP PETERSEN LLP

s/ John W. Ogan

John W. Ogan OSB# 065940
jwo@karnopp.com
TEL: (541) 382-3011
FAX: (541) 383-3073
Of Attorneys for Defendant-Appellant
Suquamish Indian Tribe