**15-35540**

**United States Court of Appeals**
**for the Ninth Circuit**

UPPER SKAGIT INDIAN TRIBE
*Plaintiff-Appellee,*

v.

SUQUAMISH INDIAN TRIBE
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
CIVIL NO. 70-9213-RSM
Subproceeding No. 14-01

# INTERESTED PARTY TULALIP TRIBES' RESPONSE BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Interested Party Tulalip Tribes is a federally recognized Indian Tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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## I. ADDENDUM OF PERTINENT LAWS

This Response Brief does not contain any citations to pertinent statutes or regulations, so there is no addendum included pursuant to Circuit Rule 28-2.7.

## II. SUMMARY OF ARGUMENT

The Tulalip Tribes, as an Interested Party, submits this Response Brief to oppose the Suquamish Tribe's argument that it should be held to a different standard than has applied in other usual and accustomed fishing grounds and stations (U&A) subproceedings. The District Court properly rejected the Suquamish Tribe's invitation to apply a new standard, and this Court must affirm the District Court.

On February 12, 1974, senior District Court Judge George H. Boldt issued his seminal opinion, which determined the "usual and accustomed grounds and stations" of each tribal party. *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). This case is a continuation of the U&A determination aspect of Judge Boldt's seminal opinion.

This Court has previously interpreted U&A findings by Judge Boldt. *See Muckleshoot Indian Tribe v. Lummi Indian Tribe* (*Muckleshoot I*), 141 F.3d 1355 (9th Cir. 1998); *Muckleshoot Indian Tribe v. Lummi Indian Nation* (*Muckleshoot II*), 234 F.3d 1099 (9th Cir. 2000); *U.S. v. Muckleshoot Indian Tribe* (*Muckleshoot III*), 235 F.3d 429 (9th Cir. 2000); *U.S. v. Lummi Indian Tribe* (*Lummi*), 235 F.3d

443 (9th Cir. 2000); *Upper Skagit Indian Tribe v. Washington* (*Upper Skagit*), 590 F.3d 1020, 1025 (9th Cir. 2010); *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015).

The District Court must interpret the finding made by Judge Boldt and not modify or amend it. *Muckleshoot I*, 141 F.3d at 1360. The District Court must determine "what Judge Boldt meant in precise geographic terms" through review of the record that was before Judge Boldt at the time of the U&A determination. *Muckleshoot I*, 141 F.3d at 1359; *Muckleshoot III*, 235 F.3d at 432-33.

The Suquamish Tribe asserts that the District Court should have applied the *Muckleshoot* analysis differently because the Suquamish U&A was decided on an expedited basis. *See* Opening Br. at 10-12. This Court has already applied the *Muckleshoot* analysis to the Suquamish U&A in the same manner as the District Court below. *See Upper Skagit*, 590 F.3d at 1025. The District Court properly reviewed the record that was before Judge Boldt when he determined the Suquamish U&A. The law of the case requires the same analysis in any U&A subproceeding.

In the original *U.S. v. Washington* case, Judge Boldt explained that "[t]he words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Washington*, 384 F. Supp. at 356. This Court has found that to establish U&A, fishing must

have occurred "with regularity" as opposed to "isolated or infrequent" use. *Muckleshoot III*, 235 F.3d at 434.

The law of the case holds that U&A are determined based on factors stemming from treaty time evidence and post-treaty anthropological studies, including evidence of: (1) use of an area as a usual or regular fishing area; (2) any treaty-time exercise or recognition of a paramount or preemptive fisheries control (primary right control) by a particular tribe; and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty time use of an area for fishing purposes. *Washington*, 384 F. Supp. at 332; *U.S. v. Washington* , 626 F. Supp. 1405, 1531 (Conclusions of Law 96-97) (W.D. Wash. 1985), *aff'd*, 841 F.2d. 317 (9th Cir. 1988) ("Open marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not usual and accustomed fishing grounds of that tribe within the meaning of the Stevens treaties").

The Suquamish Tribe argues that the District Court erred by failing to place weight on the Suquamish U&A claim to fishing in the waters at issue (contested waters) and "general evidence" of Suquamish travel and fishing. *See* Opening Br. at 12. The Suquamish claim and "general evidence" do not suffice to establish

U&A.[1] *See Lummi*, 235 F.3d at 451-52 (finding that Judge Boldt relied on specific and not "general evidence" and would have used specific anchor points if he intended to include the contested waters); *Upper Skagit*, 590 F.3d at 1025 (explaining that Judge Boldt used specific geographic anchor points in Suquamish U&A, which did not include the contested waters).

The Suquamish claim to U&A, including later issued fishing regulations, is not evidence that was before Judge Boldt when he determined the Suquamish U&A, and it is not probative of Judge Boldt's intent.

Similarly, the Suquamish claim of fishing in waters adjacent to the contested waters in this case does not establish U&A in the contested waters. There is no doctrine of "adjacency" in this case. This Court must affirm the District Court's judgment in favor of the Upper Skagit Indian Tribe.

## III. ARGUMENT

### A. The District Court Properly Applied the U&A Analysis Below, and the Suquamish Argument for a Different Standard Must Fail.

Signatory tribes to the Stevens treaties reserved the "right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries[.]" *Washington*, 384 F. Supp. at 406. Judge Boldt, who presided over

[1] The Suquamish Tribe also states certain testimony and Judge Boldt's April 18, 1975 Order support their U&A claim. *See* Opening Br. at 12. The Suquamish Tribe misconstrues the testimony and Judge Boldt's Order, but these issues are beyond the scope of this Response Brief.

*U.S. v. Washington* in its formative years, explained the method for finding U&A as the "designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs." *Washington*, 384 F. Supp. at 402. While Judge Boldt included "every fishing location where members of a tribe customarily fished from time to time at and before treaty times" in U&As, he specifically noted that U&As exclude "unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id*. at 332. U&As do not include areas where fishing was "occasional or incidental." *Id.* at 356. Nor do U&As include areas where the tribe simply desires to fish. This Court affirmed Judge Boldt's U&A findings "in all respects." *U.S. v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975).

Fishing during "occasional or incidental" travel did not create U&As. *See Washington*, 384 F. Supp. at 353. Fishing must have occurred "with regularity," and "[i]solated or infrequent excursions" do not meet the U&A standard. *Muckleshoot III*, 235 F.3d at 434. District Court Judge Craig, who presided over *U.S. v. Washington* after Judge Boldt's retirement, found that "[o]pen marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not usual and accustomed fishing grounds of that tribe within the meaning of the Stevens treaties." *Washington*, 626 F. Supp. at 1531 (Conclusion of Law 96).

This Court has established the legal parameters for interpreting U&A findings. Courts must look to the intent of the judge at the time the decision was made to determine the meaning of a U&A finding. *Muckleshoot I*, 141 F.3d at 1359; *Muckleshoot II*, 234 F.3d at 1100; *Lummi*, 235 F.3d at 452. In order to determine a judge's intent, courts must examine the record of the proceedings before the judge at the time of the decision and the evidence considered by the judge. *Muckleshoot I*, 141 F.3d at 1360; *Muckleshoot II*, 234 F.3d at 1100-01; *Lummi*, 235 F.3d at 452. In addition, courts may consider "additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time." *Muckleshoot II*, 234 F.3d at 1100 (citing *Muckleshoot I*, 141 F.3d at 1360). Courts must examine the judge's intent regardless of whether the text at issue is ambiguous, because the U&A finding must be understood in the context of the facts of the case. *Muckleshoot III*, 235 F.3d at 433; *accord Muckleshoot I*, 141 F.3d at 1359. Lastly, courts may not "alter, amend or enlarge" the U&A finding. *Muckleshoot I*, 141 F.3d at 1360.

The Suquamish Tribe faults the District Court for applying the same *Muckleshoot* analysis it has applied in all U&A subproceedings in this case to the Suquamish U&A. *See* Opening Br. at 10-12. The Suquamish Tribe alleges that a different standard should apply because the Suquamish U&A was determined in an expedited manner. *Id.* On the contrary, the District Court properly analyzed the

Suquamish U&A under this Court's *Muckleshoot* framework. Just as in *Upper Skagit* and *Tulalip Tribes*, both of which this Court affirmed, the District Court reviewed the record that was before Judge Boldt and found that there was no evidence of Suquamish fishing in the contested waters. ER 15-23; *see also U.S. v. Washington*, 20 F. Supp. 3d 828, 832-841 (W.D. Wash. 2007), *aff'd*, 590 F.3d 1010 (9th Cir. 2010); *U.S. v. Washington*, 20 F. Supp. 3d 986, 1046-48, 1054 (W.D. Wash. 2013), *aff'd*, 794 F.3d 1129 (9th Cir. 2015) (finding Judge Boldt did not intend to include Saratoga passage, Penn Cove, Holmes Harbor, and Port Susan in Suquamish U&A). The analysis procedure and U&A standard cannot change in each U&A subproceeding or else Tribes whose U&A determinations were made by more stringent standards would see a dilution of their treaty rights. *See e.g.*, *U.S. v. Washington*, 18 F. Supp. 3d 1123, 1164 (W.D. Wash. 1990) (expressing concern about dilution of treaty rights).

The Upper Skagit Indian Tribe brought this subproceeding under Paragraph 25(a)(1) of the Court's injunction of March 22, 1974, *Washington*, 384 F. Supp. at 419 , as modified by the Court (*U.S. v. Washington*, 18 F.Supp.3d 1172, 1213 (W.D. Wash. Aug. 24, 1993)). Paragraph 25(a)(1) allows the Court to determine only whether the actions at issue conform with Judge Boldt's Decision #I or the injunction. The District Court assessed the record that was before Judge Boldt at the time he made the Suquamish U&A determination (Dr. Lane's report on the

Suquamish, testimony at the April 1975 hearings, and Judge Bold's plain language describing the Suquamish U&A), and the District Court adhered to this Court's *Muckleshoot* framework. ER 15-21. This Court must also comply with the U&A standards upheld in Judge Boldt's Decision #1 and the *Muckleshoot* framework, both of which have applied in every U&A subproceeding in this case.

### B. The Record Before Judge Boldt Did Not Include the Suquamish Claim or General Evidence of Suquamish Travel and Fishing.

The Suquamish tribe seeks to expand the evidence to be reviewed to include the Suquamish's claims—such as modern day fishing regulations—and "general evidence" of Suquamish travel and fishing. *See* Opening Br. at 10-12. Such an expansion is contrary to the law of the case. Modern day regulations and mere travel are not evidence of a tribe's U&A.

This Court has already ruled that Judge Boldt did not intend to include all waters shown on the Suquamish Claim Map (ER 102) in the Suquamish U&A. In the appeal of Subproceeding 05-3 this Court explained that:

> Judge Boldt used specific geographic anchor points in describing other tribes' U & As. From this it is reasonable to infer that when he intended to include an area, it was specifically named in the U & A. In Suquamish's case, the only inclusive geographic anchor points for the term "Puget Sound" are the "Haro and Rosario Straits," which do not include or delineate the Subproceeding Area.

*Upper Skagit*, 590 F.3d at 1025 (internal citations omitted). This Court affirmed the District Court's exclusion of waters within area four on the Suquamish Claim

Map in Subproceeding 05-3, which demonstrates that the Suquamish claim itself does not consist of evidence that the District Court must rely on. *Upper Skagit*, 590 F.3d 1020; *see Tulalip Tribes*, 794 F.3d 1129 (affirming District Court's decision, which excluded certain waters in area four from the Suquamish U&A). The *Muckleshoot* analysis consists of looking at Judge Boldt's intent and not the Suquamish Tribe's U&A aspirations. *See supra* Subsection A.

This Court has also ruled that "general evidence" does not establish U&A. When this Court considered the Lummi Indian Tribe's U&A, it found that Judge Boldt did not intend to include the Strait of Juan de Fuca or the mouth of Hood Canal in the Lummi Tribe's U&A. *Lummi*, 235 F.3d at 451-52. This Court reasoned that Judge Boldt would have used specific terms related to the waters at issue, as he did elsewhere in the decision, and he would not have limited the U&A "to '*Northern* Puget Sound'" if he intended to include the Strait of Juan de Fuca and the mouth of Hood Canal in the Lummi U&A. *Id.* Importantly, Judge Boldt relied on "the specific, rather than the general, evidence presented by Dr. Lane" in making U&A determinations. *Id.* at 451. The Suquamish reliance on "general evidence" is simply wishful thinking.

As explained above in Subsection A, travel alone does not establish U&A. *Washington*, 626 F. Supp. at 1531 (Conclusion of Law 96). Only regular, purposeful fishing can establish U&A while traveling, and there is no evidence of

such Suquamish fishing in the contested waters. *See id.* There is no specific evidence of Suquamish fishing at all in the contested waters, and the District Court rightfully ruled in favor of the Upper Skagit Indian Tribe.

The District Court properly reviewed the record before Judge Boldt for evidence showing Suquamish U&A in the contested waters, and the record was devoid of such evidence. This Court should not expand the evidentiary standard under the *Muckleshoot* analysis to include tribal claims of U&A and unspecified, general evidence of travel and fishing.[2]

### C. Evidence of Fishing in Waters Adjacent to the Contested Waters Does Not Establish U&A in the Contested Waters.

[2] Judge Boldt's own language demonstrates that he intended to exclude the contested waters from the Suquamish U&A. After hearing testimony from Dr. Lane regarding the Suquamish U&A, Judge Boldt ruled from the bench on April 10, 1975, finding:

> that a prima facie showing has been made that travel and fishing of the Suquamish Tribe *through the north Sound areas; that is, areas one and two* as designated by the state, was frequent and also regular, not merely occasional, and the application of the Suquamish for such a ruling is granted.

ER 891-92 (emphasis added). Judge Boldt was referring to areas one and two on the Suquamish Claim Map (ER 102). The contested waters are located in area 3 on the Suquamish Claim Map. Judge Boldt's written Order of April 18, 1975 further confirms Judge Boldt's intent to exclude the contested waters, because the only relevant geographic anchor points included are Haro and Rosario Straits, which are west of the contested waters. *See U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978).

Without citing any authority, the Suquamish Tribe alleges that evidence of Suquamish fishing in waters adjacent to the contested waters demonstrates Judge Boldt's intent to include the contested waters in the Suquamish U&A. *See* Opening Br. at 14-20. Reducing the U&A standard to fishing in adjacent waters would upend *U.S. v. Washington.*

There is no rule of "adjacency" in this case. As explained above in Subsection A, there must be evidence of regular fishing in specific waters to establish U&A. *Washington*, 384 F. Supp. at 332, 353, 356; *Washington*, 626 F. Supp. at 1531 (Conclusion of Law 96). If tribes can establish U&A by merely showing fishing in adjacent waters, the treaty language of "usual and accustomed" would be meaningless as would this Court's prior rulings in this case. It would turn this case on its head and allow the tribes to fish virtually everywhere rather than where the Treaties specified.

The District Court held the Suquamish Tribe to the same U&A standard that has been applied in all other U&A subproceedings—including previous cases determining the Suquamish U&A. This Court must affirm the District Court's ruling.

## IV. CONCLUSION

The law of the case required the District Court to apply the same U&A standard in this subproceeding as it has in previous U&A subproceedings.

Similarly, the District Court was required to apply the same *Muckleshoot* analysis. After properly reviewing the record that was before Judge Boldt at the time of the Suquamish U&A determination, the District Court found no evidence of Suquamish fishing in the contested waters. As such, the District Court rightfully ruled in favor of the Upper Skagit Indian Tribe. This Court has no legal grounds to change the U&A standard, alter the *Muckleshoot* analysis, or depart from its recent rulings on U&As. For the foregoing reasons, the Tulalip Tribes request that this Court affirm the District Court's grant of summary judgment in favor of the Upper Skagit Indian Tribe.

Respectfully submitted this 8th day of December, 2015.

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Tulalip Tribes states that the following cases related to this case are pending in this Court:

*U.S. v. Washington*, Ninth Circuit Appeal No. 15-35824 (consolidated with No. 15-35827). This consolidated case consists of appeals of the District Court decision in *U.S. v. Washington*, Subproceeding 09-1 – a subproceeding that involved interpretation of the Quinault and Quileute U&A determinations.

*U.S. v. Washington*, Ninth Circuit Appeal No. 15-35661. This case is an appeal of the District Court decision in *U.S. v. Washington*, Subproceeding 11-2 – a subproceeding that involved interpretation of the Lummi U&A determination.

While these cases are related in that they are part of the *U.S. v. Washington* main case, they do not directly involve the interpretation of the Suquamish U&A at issue here.

Respectfully submitted this 8th day of December, 2015.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

*/s/ Mason D. Morisset*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document – Interested Party Tulalip Tribes' Response Brief – with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 8, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on December 8, 2015.

Executed this 8th day of December, 2015, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ *Mason D. Morisset*

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