IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-35772

U.S. District Court Cause No. 70-9213 – Phase I
(Subproceeding No. 89-2)

United States of America,

Plaintiff,

Port Gamble S'Klallam Tribe, Lower Elwha Klallam Tribe and Jamestown S'Klallam Tribe

Plaintiffs - Appellants,

v.

Lummi Indian Tribe

Defendant – Appellee,

And

Puyallup Indian Tribe et al.,
Interested parties.

On Appeal from the United States District Court
for the Western District of Washington

REPLY BRIEF OF PORT GAMBLE S'KLALLAM TRIBE, JAMESTOWN S'KLALLAM TRIBE, AND LOWER ELWHA KLALLAM TRIBE

Lauren Rasmussen
Law Offices of Lauren P. Rasmussen
1904 Third Avenue, Suite 1030
Seattle, WA 98107
(206) 623-0900

Stephen H. Suagee
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Road
Port Angeles, WA 98363
(360) 452-8471, Ext. 117

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Appellants Jamestown S'Klallam, Port Gamble S'Klallam, and Lower Elwha Klallam Tribes ("Klallams") submit this Reply Brief to the Appellee Lummi Nation's ("Lummi") Responsive Brief of January 19, 2010, ECF Docket No. 7199369, and to the Response Brief of Interested Party Tulalip Tribes of the same date, ECF Docket No. 7199534.

I. INTRODUCTION

Lummi's Responsive Brief utterly fails to acknowledge, let alone respond to, the primary argument in Klallams' Opening Brief at pages 16-25. ECF Docket No. 7170068. The Klallams' argument is simple and logical: Lummi filed a Cross-Claim in this case expressly claiming that the waters presently in dispute are part of the Lummi Usual and Accustomed fishing area ("U&A"). ER 252. The District Court denied that claim in 1998, ER 15, and on Lummi's appeal this Court's unanimous opinion, *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000), did not reverse the District Court as to the presently disputed waters. This Court reversed the District Court only as to its conclusion that Lummi's U&A does not include Admiralty Inlet, and as Lummi acknowledges in its Responsive Brief at 10 and 18, Admiralty Inlet is separate from the waters presently in dispute. Lummi's Brief does not attempt to explain why its failed Cross-Claim to the waters west of Whidbey Island is not fatal to its position in this appeal.

Instead, Lummi tries to show ambiguity as to the boundary between the Strait of Juan de Fuca and Northern Puget Sound. But no such boundary had to be determined in order for the prior decisions to conclude that Lummi's U&A does not include the presently disputed waters. Lummi has contrived this ambiguity to justify its "interpretation" of this Court's decision in 2000, an interpretation that entailed Lummi's drawing of an "imaginary line" on a map, Lummi Brief at 18, and continuation of fishing in the disputed waters that lie outside the only waters -- Admiralty Inlet – that this Court awarded to Lummi in 2000.

Tulalip's Brief purports not to address the merits of this appeal, but simply to concur in Lummi's procedural position that a new Subproceeding is required. Tulalip Brief at 3. But as stated in the Klallams' response to the motion to dismiss, this goes directly to the merits. The prior decisions have already denied Lummi's Cross-Claim and thereby determined that Lummi has no U&A rights in either the Strait of Juan de Fuca or the waters west of Whidbey Island (outside Admiralty Inlet); therefore there is no need for a boundary. A new subproceeding is neither necessary nor proper to establish that Lummi's U&A does not include the disputed waters. This appeal is the only possible proceeding for that determination.

II. DISCUSSION

A. Lummi Mischaracterizes the Issue on Appeal and Seeks to Avoid *De Novo* Review

The Klallams' appeal concerns a single, simple issue – whether the prior decisions in Subproceeding 89-2 of *U.S. v. Washington* have already determined that Lummi's U&A does not include the presently disputed waters, which the District Court, in the decisions appealed from, correctly identified as "the marine area immediately west of Whidbey Island and south of the San Juan Islands." ER 5 and 7. Lummi tries to distract attention from this simple issue by insisting that this appeal is about whether the District Court was correct in declining to find Lummi in contempt. Lummi Brief at 3. Lummi has four sub-issues but the gist is that the prior decisions are too ambiguous to warrant a contempt finding and that Lummi acted reasonably when it "interpreted" this Court's unanimous 2000 decision that preserved the determination that Lummi's U&A does not include the disputed waters. Lummi Brief at 3-4. On this basis, Lummi contends that the applicable standard of review is "abuse of discretion." Lummi Brief at 1-2.

But Lummi's proposed standard of review does not account for the reality that the District Court's decision was necessarily premised on interpretation of the prior decisions in this case. When a district court engages in interpretation of prior judicial decisions, its interpretation is reviewed *de novo* on appeal. *In re Glasply*

Marine Indus., Inc., 971 F.2d 391, 393 (9th Cir. 1992); *Schering Corp. v. Illinois Antibiotics Co*., 62 F.3d 903, 908 (7th Cir. 1995). In this case, the District Court decisions appealed from clearly involve analysis and discussion, and necessarily entail interpretations, of the prior decisions in this subproceeding regarding the extent of Lummi's U&A.

Moreover, one of the main cases Lummi (and Tulalip) relies on, *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885 (9th Cir. 1982) ("*Vertex Distributing*"), actually cuts against Lummi's preferred standard and in favor of *de novo* review. In *Vertex Distributing* there were four assignments of error on appeal. 689 F.2d at 888-89. Two involved claims that the district court had incorrectly concluded that specific conduct of an alleged contemnor did not violate a consent decree entered in that court. *Id.* This Court reviewed those claims of error under the abuse of discretion standard. *Id.* But the fourth claim of error was that the district court had misinterpreted the consent decree. This Court clearly acknowledged that that claim of error is subject to *de novo* review, *id*. at 892 ("district court's interpretation of the consent judgment is a matter of law … freely reviewable by this court on appeal") and 893 ("we are permitted de novo review"), but deferred to the district court and affirmed because of the special nature of consent decrees in general (they are negotiated compromises rather than litigated outcomes) and because of the district court judge's long-standing

involvement in the development of the particular decree at issue. *Id.* at 893. The Klallams' appeal is distinct from the situation in *Vertex Distributing*. The District Court judge who issued the orders under appeal in this case (Judge Martinez) did not preside over any of the prior litigation of Subproceeding 89-2, and the case was vigorously litigated to an outcome over the course of eleven years rather than compromised by consent decree. Accordingly, the District Court in this appeal is not entitled to deference under Lummi's own case.

B. Lummi's Claimed Need for a New Boundary Determination is Irrelevant Because Lummi Already Lost Its Cross-Claim To the Disputed Waters

Lummi asserts in its statement of issues that this Court in 2000 did not define the boundary between the Strait of Juan de Fuca (which is not part of Lummi's U&A) and Admiralty Inlet (which was held to be part of Lummi's U&A), and that the District Court was correct. Lummi Brief at 3-4. But the District Court clearly, and inconsistently, also understood that Admiralty Inlet lies "to the south" of the disputed waters, ER 5 and 7, and is therefore separate from them. The District Court also correctly identified the disputed waters as "the marine area immediately west of Whidbey Island and south of the San Juan Islands." ER 5 and 7.

The District Court stated in its initial order dismissing the Klallams' show cause motion that:

> Nowhere did either this Court or the Ninth Circuit Court of Appeals define the boundaries of the Strait of Juan de Fuca for the purpose of exclusion from the Lummi U&A….The Court cannot find the Lummi Nation in contempt without first defining the western boundary of the Lummi U&A in this area.

ER 7. Clearly the District Court was interpreting the prior decisions when it so stated. On reconsideration, the District Court changed some language in its initial statement but preserved the above language. It also stated, somewhat inconsistently, that its:

> ruling in the [Lummi] motion to dismiss is limited to a finding that it remains to be determined whether Judge Coyle and the Ninth Circuit intended to include the disputed area in 'the Strait of Juan de Fuca' when they excluded that body of water from the Lummi U&A.

ER 5. The prior decisions have either determined that the disputed area is outside Lummi's U&A or they have not. The District Court believes that the prior decisions possibly did not determine the issue or that a new subproceeding must re-interpret the decision made by this Court in 2000. Either perspective required the District Court to look at and interpret the prior decisions. The prior decisions in fact determined the issue as to the disputed waters, and that is a matter the Klallams are entitled to pursue in this appeal. Any question of a boundary is

ultimately a distraction from the reality that the prior decisions determined the issue by denying Lummi's own Cross-Claim in this subproceeding.

The Klallams' argument is simple and logical. It is set out at pages 16-25 of their Opening Brief and may be summarized as follows:

1. Lummi filed a Cross-Claim in this case in 1990, which expressly claimed treaty fishing rights in the waters presently in dispute, "the waters west of Whidbey Island," as well as in the Strait of Juan de Fuca and Admiralty Inlet. ER 252. Obviously Lummi had control over the choice of terminology in its Cross-Claim (referred to in this case as a Cross-Request For Determination or Cross-RFD).

2. The District Court in 1998 denied the Lummi Cross-Claim in all respects. ER 15.

3. This Court's unanimous decision in 2000 reversed only as to Admiralty Inlet, *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000), leaving intact the District Court's decision to deny Lummi U&A rights in the Strait of Juan de Fuca and the waters west of Whidbey Island. This Court's decision expressly stated an intent to resolve the issue of the western boundary of the Lummi U&A. *Id*. at 449 and n.6 (referring to need to resolve "western boundary" and "westerly limit" of the Lummi U&A), and as explained below, expressed a clear understanding of the boundary of Admiralty Inlet. *Id*. at 452.

4. Admiralty Inlet unquestionably does not include the waters currently in dispute. Lummi actually acknowledges this in its Responsive Brief at 10 and 18 (*see* discussion below) and as noted above the District Court understands this as well.

5. There is no further need for the courts to delineate any boundaries between the relevant marine areas.

Lummi's Brief does not acknowledge or directly respond to this argument at all, and does not even acknowledge it made a Cross-Claim to the waters presently

in dispute that the prior decisions denied. Instead, Lummi tries to create a new discussion about the absence of a boundary between Admiralty Inlet and the Strait of Juan de Fuca. But it does so very inconsistently.

In opposing the Klallams' show cause motion in the District Court, Lummi generally and repeatedly referred to the absence of a boundary between the Strait of Juan de Fuca and "Northern Puget Sound." ER 90, 91-92, 95, 96, 98, 99, 100. In this appeal, Lummi has shifted its focus to a contention that the boundary between the Strait of Juan de Fuca and Admiralty Inlet needs to be determined. Lummi Brief at 3-4, 4-5, 8-9, 10, 14, 15. Lummi is thus implying that Admiralty Inlet extends into the disputed waters, something it does not appear to have asserted previously. It does so even though the District Court has stated that Admiralty Inlet lies "to the south" of the disputed waters. ER 5 and 7. Lummi barely acknowledges the term "waters west of Whidbey Island" and does not acknowledge at all that its Cross-Claim to those waters was denied.

Despite Lummi's intimation in its Issue Statement at III.A, Lummi Brief at 3-4, that the boundary between the Strait of Juan de Fuca and Admiralty Inlet needs to be established, it is in fact well established that Admiralty Inlet is separated from the waters in dispute by a straight line running from Point Partridge on the western shore of Whidbey Island to Point Wilson on the Olympic Peninsula near the city of Port Townsend, Washington. *See* Klallams' Opening Brief at 25,

n.8. [1] Lummi itself refers to the "westerly opening of Admiralty Inlet" and the "mouth of Admiralty Inlet," Lummi Brief at 10 and 18, respectively, in a manner consistent with this widely accepted definition. Lummi made the same acknowledgment to the District Court at ER 92-93 and also submitted a map to the District Court, ER 112, referring to "Admiralty Head" as being at the mouth of the inlet. Moreover, this Court in 2000 expressly concluded Admiralty Inlet is separate and distinct:

> Admiralty Inlet consists of the waters to the west of Whidbey Island, *separating* that island from the Olympic Peninsula.

U.S. v. Lummi, 235 F.3d at 452 (emphasis added).[2] There is no absolutely no evidence in this case that Admiralty Inlet includes the disputed waters, because the disputed waters do not "separate" Whidbey Island from the Olympic Peninsula.

The "imaginary line" that Lummi has drawn from Haro Strait to Admiralty Inlet, Lummi Brief at 18, is simply an after-the-fact contrivance. The Chair of its Natural Resources Commission filed a declaration in the District Court in 2009, in which he explained how Lummi interpreted this Court's decision in 2000. ER 102-104. The declaration states that "[w]e concluded that the opinion included

---

[1] *See* also the map based on the U.S. Geologic Survey description at ER 81, and other maps at ER 131-139.

[2] *See* also the definition of the term "inlet." Klallams' Opening Brief at 25, fn.8.

Haro Strait and Admiralty Inlet and the waters *between* the two." ER 103 (emphasis added). Of course the prior decisions, especially the explicit denial of Lummi's Cross-RFD have already excluded the waters "between the two" from Lummi's U & A. Ultimately, the whole issue of whether a boundary needs to be determined is nothing but a distraction.

Lummi could have raised issues as to a boundary between the Strait of Juan de Fuca and the Admiralty Inlet when it appealed to this Court in 2000. Evidently it did not, because its focus was on arguing "strenuously that the term 'Puget Sound' encompasses the 'Strait of Juan de Fuca.'" *U.S. v. Lummi*, 235 F.3d at 451. Perhaps Lummi chose not to do so, because its own expert opinion identified the presently disputed waters as part of the "eastern Strait of Juan de Fuca." ER 237 at ¶ 4.[3] In fact, Lummi now argues, Lummi Brief at 20, that it should not be bound by its own definition of the *eastern Strait of Juan de Fuca*.

Lummi contends it is the Klallams who should have sought clarification when Lummi began to fish in the disputed waters. Lummi Brief at 21, §E. The Klallams have two responses to this argument. First, it was perfectly clear that the Court reversed only as to Admiralty Inlet, and based on the above discussion, it

[3] The District Court incorrectly (albeit irrelevantly) concluded that "there has been no evidence presented" regarding the location of the Eastern Strait of Juan de Fuca. ER 2.

also defined where that Inlet is located. Second, Lummi's claim of a nine-year delay by the Klallams is without any citation or support from the record and is incorrect. Lummi Brief at 21. Lummi's contention on this point is essentially a recycled update of the same argument it made in 1990, which was rejected, to the effect that *laches* should have barred the Klallams' claims in Subproceeding 89-2. ER 33-36. The appearance in Lummi's regulations of a series of differing and confusing lines of demarcation across the disputed waters is a recent event. See ER 71, 72, 73, and 74 (Appendix of 2008 regulations). Furthermore, a Tribe that authorizes treaty fishing by its members outside its adjudicated U&A is not entitled to claim that another tribe acted too slowly to restrain it. ER 33-35. Judge Coyle reminded Lummi 20 years ago that equitable defenses such as *laches* (based on claimed delay in prosecuting the violations) cannot be used against other tribes claiming infringements of their treaty rights. ER 36. ("Otherwise, it is possible for tribes to essentially mislead other tribes and then slam the door").[4]

[4] Moreover, each and every Lummi regulation purporting to authorize fishing in the disputed waters is a separate offense entitling the Klallams to seek post-judgment enforcement. Judge Boldt of the District Court long ago recognized that it is not good public policy to reward a party that violates the court's orders and admonished that tribes attempting to expand their U&A "by filing fishing regulations merely including . . . additional places" evidence "a disregard for the court's rulings and procedural guidelines" and "risk the imposition of sanctions." *United States v. Washington*, 459 F.Supp. 1020, 1068-69 (W.D. Wash. 1978).

In an effort to create a new question of boundaries, Lummi displays an improper and misleading map at page 7 of its Responsive Brief. This map is not part of the District Court record and differs from every map ever actually presented to the Court. ER 108-109; ER 112; 131-139, 81. The Klallams filed a Motion to Strike this improper map on January 25, 2010. ECF Docket No. 7206228.

The map displays several broken lines across both the marine waters and land forms shown on the map. The broken lines are not identified on the map, nor is there a legend to explain them. The Court should not be misled into thinking the map from "Wildflower Productions" with its dotted lines represents any geographic boundary between "Haro and Rosario Straits" and "Admiralty Inlet." None of these lines can possibly be a geographical boundary as to the disputed waters in this case. Nor is there any evidence to that effect anywhere in the record.

Clearly the map is improper, misleading, and prejudicial as to a key issue in this appeal.[5]

---

[5] There are a couple of other misleading aspects to Lummi's Responsive Brief: It has christened this Court's *unanimous* 2000 decision in *U.S. v. Lummi*, 235 F.3d 443, as the "Split Decision," as if to endow it with an ambiguity it does not possess, but without explaining why. Presumably it is because it reversed the District Court only in part, but certainly not because the decision was not unanimous. In addition, the Lummi Brief at 18 offers an odd use of the concept of paraphrasing. In attempting to justify its continued fishing in the disputed waters by means of its "imaginary line" from Haro Strait to the mouth of Admiralty Inlet, Lummi offers a sentence with a citation to this Court's 2000 decision, and a

C. The District Court's Decision Is At Odds With This Court's Recent Decision in *Upper Skagit Tribe et al. v. Jamestown S'Klallam Tribe et al.*

Lummi asserts that the District Court's decision comports with this Court's recent decision in *Upper Skagit Tribe et al. v. Jamestown S'Klallam Tribe et al.*, Ninth Circuit No. 07-35061, __F.3d__, 2010 WL 10971 (9th Cir. Jan. 5, 2010) ("*Upper Skagit*"), but it does so primarily in an attempt to bolster its argument that the boundary between Admiralty Inlet and the Strait of Juan de Fuca needs to be determined. That argument has been addressed in Section II.B above.

But the recent decision in *Upper Skagit* contains the following language, which bolsters the Klallams' position in their Opening Brief, at 29-30, n.11, that Lummi claims of transitory fishing across the disputed waters are insufficient to establish U&A rights:

> The term "customarily" [in reference to establishing a U&A] does not include "occasional and incidental" fishing or trolling incidental to travel. *Decision I*, 384 F.Supp. at 353.

---

statement *in quotes* that it says is a paraphrase of this Court's decision. But the quoted language was never uttered by anyone (most significantly not by this Court in the cited decision), and indeed, a paraphrase by its very nature is a statement that should not be placed in quotes. Not only is it misleading to put an imaginary statement in quotes, but the statement adds explanation regarding a "straight line," and "currents and weather" that does not appear in this Court's decision. Thus, the quoted language is a pure work of fiction and not even a true paraphrase.

Upper Skagit, Slip Op. at 213. What this means is that under the law of this case, a Tribe must show actual use of the area at Treaty times, more than use incidental to travel. Accordingly, Lummi's situation with respect to the disputed waters is analogous to the situation of the Suquamish Tribe in Saratoga Passage. Suquamish failed to provide any evidence in support of its claim of rights in the area in question. *Id.* at 217 (citing the lack of evidence).

Upper Skagit does not help and only hurts Lummi's position in this appeal.

D. A New Subproceeding Is Neither Necessary Nor Proper

As noted in Section II.B above, the prior decisions determined that the disputed waters are outside of Lummi's U&A. A new subproceeding would seem to be necessary only if this Court were to conclude that the issue has not been decided. It is certainly not in the interest of judicial efficiency to allow a new subproceeding if one is not needed. This would simply encourage Lummi and other tribes to continuously seek loopholes or new technicalities as a means of re-litigating or avoiding prior Court orders. *See* Klallams' Opening Brief, at 28, fn. 10, and 31, citing the prohibition on searching for actions "not specifically enjoined" to avoid the clear consequences of prior Court orders, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) , and noting the availability of a straightforward remedy in the form of a motion for "modification, clarification or construction of the order." *Id*. Disobedience cannot be justified by re-trying the

issues. *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948). But that is exactly what a new subproceeding would allow Lummi to do.

E. The District Court Decisions Appealed From Are Final, Appealable Orders

Lummi "renews" its previously filed motion to dismiss, Lummi Brief at 1, but does not provide any additional argument to show why, in light of the Klallams' arguments in their Opening Brief, the District Court's decisions appealed from are not final and appealable under 28 U.S.C. § 1291. As noted above, the prior decisions in this case have either determined that the disputed waters are outside of Lummi's U&A or they have not. The District Court has concluded that they have not and that a new subproceeding is needed. ER 5 and 7.

But as far as Subproceeding 89-2 is concerned, the District Court is finished with it. A new subproceeding is analogous to an entirely new action within the main case *United States v. Washington*. New subproceedings are initiated through the filing of "'requests for determination,' which are functionally the same as a complaint." *United States v. Washington*, 573 F.3d 701, 705 (9th Cir. 2009). Should a new subproceeding be required, it would be because the prior decisions have not determined whether the disputed waters are outside the Lummi U&A. Because there is nothing more for the District Court to do in Subproceeding 89-2, its dismissal of the Klallams' post-judgment show cause motion is final and

appealable and the Klallams may challenge the reason for that dismissal in this appeal. *See United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794, n. 1 (1949) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned.") and the cases and discussion in the Klallams' Opposition To Motion To Dismiss (which are incorporated herein by reference). ECF Docket No. 7074269.

III. CONCLUSION

Based on the foregoing and on the Klallams' Opening Brief, it is clear that Lummi lost its claim to the disputed waters when its Cross-Claim was denied. The question of a boundary is a false one. The boundary of Admiralty Inlet is well-established and does not include the disputed waters. It is ultimately unnecessary to decide whether the prior decisions have decided the boundary between the Strait of Juan de Fuca and the disputed "waters west of Whidbey Island," because the prior decisions have determined that Lummi's U&A includes neither.

RESPECTFULLY submitted this 2nd day of February, 2010.

/s/ Lauren P. Rasmussen
Lauren P. Rasmussen, WSBA No. 33256
Law Offices of Lauren P. Rasmussen
1904 Third Avenue, Suite 1030
Seattle, WA 98101

206-623-0900
lauren@rasmussen-law.com

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

/s/ Stephen H. Suagee
Stephen H. Suagee, WSBA No. 26776
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Road
Port Angeles, WA 98363-8409
360-452-8471, Ext. 117
steve.suagee@elwha.nsn.us

Attorney for Appellant Lower Elwha Klallam Tribe

IV. CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2010, I electronically filed the foregoing Reply Brief with the Clerk of the Ninth Circuit Court of Appeals using the CM/ECF system which will send notice of such filing to the persons required to be served and that any persons who are not registered with CM/ECF were served via first class mail.

s/Lauren Rasmussen

V. CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a) (7) (C) and 9th Cir. R. 32-1, the foregoing opening brief is monospaced, has 10.5 or fewer characters per inch, and contains 4007 words.

/s/ Lauren P. Rasmussen