No. 13-35773

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Tulalip Tribes,
Plaintiff – Appellant

v.

Suquamish Indian Tribe,
Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

District Court No. 70-9213 – RSM
Subproceeding No. 05-04

APPELLEE SUQUAMISH TRIBE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

(FRAP 26.1)

Appellant Suquamish Tribe is a federally recognized Indian Tribe. It has issued no shares of stock to the public and has no parent company, subsidiary or affiliate that has done so.

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I. APPELLEE'S STATEMENT OF JURISDICTION

Appellant Tulalip Tribes ("Tulalip") erred in stating that the district court exercised continuing jurisdiction pursuant to Paragraphs 25(a)(1), (a)(3), (a)(4) and (a)(7) of the Permanent Injunction dated March 22, 1974, as amended August 23, 1993. C70-9213, Dkt. # 13599. The district court exercised continuing jurisdiction only pursuant to Paragraph 25(a)(1).[1] ER 5.

II. APPELLEE'S STATEMENT OF ISSUE PRESENTED

Under Paragraph 25(a)(1) continuing jurisdiction the only question before the court is "whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #1 or this injunction". To make this determination, the district court is required by circuit precedent to adhere to the "*Muckleshoot* construct" whereby "the tribe asserting ambiguity in a U&A determination must offer "evidence that suggests that [the U&A] is ambiguous or that the court intended something other than its apparent meaning." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010).

[1] The district court wrote "Paragraph 24(a)(1)" in its order, however, there is no such paragraph in the Injunction. This was likely a typographical error referring to Paragraph 25(a)(1).

The *Muckleshoot* construct involves a two-step procedure. *Id*. Tulalip first has to offer evidence that Judge Boldt's determination of Appellee Suquamish Tribe ("Suquamish") was ambiguous or that Judge Boldt intended something other than its apparent meaning. *Id.* Second, if the evidence, including the contemporaneous understanding of Judge Boldt's determination, includes the area at issue in the subproceeding, Tulalip has the burden to show there was no evidence before Judge Boldt that Suquamish fished in the case area at or before treaty times. *Id*.

In *Upper Skagit*, this court acknowledged that Judge Boldt defined "Puget Sound" as "the Strait of Juan de Fuca and all saltwater areas inland therefrom" and that such definition included the waters of Saratoga Passage and Skagit Bay. *Id*. at 1024, fn.5. The district court similarly found in this subproceeding that "Puget Sound" as defined by Judge Boldt "would also encompass all the waters at issue here." ER 14. Tulalip has not appealed this finding, and this court should consider it a verity in this appeal.

Thus, the only issue for review is step two of the *Muckleshoot* construct. To this end, the district court reviewed the records and proceedings before Judge Boldt and found there was reliable evidence from which Judge Boldt could find, and most likely did find, that Suquamish fished in treaty times in the mouth of the

Snohomish River, Possession Sound, Port Gardner Bay, and the bays in Admiralty Inlet on the west side of Whidbey Island (Admiralty Bay, Mutiny Bay, Useless Bay and Cultus Bay)("Case Area").[2] Based on those findings, the district court found Judge Boldt intended to include these areas in Suquamish's U&A. ER 21.

As Suquamish will show below, upon review of the district court's work, this court will agree and affirm its findings that Judge Boldt intended to include these areas in Suquamish's U&A.

III. APPELLEE'S STATEMENT OF THE CASE AND FACTS

In this appeal, this court must review the district court's contemporary review of actions taken almost 40 years ago by a different district court judge, George Boldt. The district court's task was to determine Judge Boldt's intent in using the phrase "marine waters of Puget Sound" to describe Suquamish's treaty

[2]Tulalip also included Saratoga Passage, Skagit Bay, Penn Cove and Holmes Harbor in its case area. The district court held below that this court ruled in *Upper Skagit* that because there was no evidence before Judge Boldt of Suquamish fishing in Saratoga Passage and Skagit Bay at treaty times, he could not have intended to include them when he determined Suquamish's U&A. Noting that access to Penn Cove and Holmes Harbor is through Saratoga Passage and that there was no evidence before Judge Boldt of Suquamish fishing in these areas at treaty times, the district court found Judge Boldt also could not have intended to include these waters in Suquamish's U&A. As an affirmative defense and at oral argument, Suquamish offered to present evidence of its treaty times presence in these areas, however, the district court ruled such evidence could not be presented in a Paragraph 25(a)(1) proceeding.

reserved fishing grounds. Because the review focuses on the court record and the proceedings before Judge Boldt, the "facts" and "case history" are inextricably inter-twined.

A. Case and Factual History Before Suquamish Intervened in Case

This case started on September 18, 1970, when the United States filed suit on behalf of 14 Puget Sound tribes to enforce the tribes' treaty reserved fishing rights.[3] After extensive discovery and a long trial, Judge Boldt issued his "Decision I" on February 12, 1974. *United States v. Washington*, 384 F.Supp. 312 (W.D.Wash. 1974). Certain findings of fact and conclusions of law in Decision I evidence Judge Boldt's understanding and factual decisions about the Indian way of life at treaty times and are fundamental to this appeal.

In Decision I, Judge Boldt found Dr. Lane's May 10, 1973 "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century", Exhibit USA 20 (ER 415-465) to be well researched and reported and established by a preponderance of the evidence. *Id.* at 350 (For the court's convenience, relevant portions of Judge Boldt's Decision I are attached as ER 466-474). He found all her reports to be authoritative and reliable summaries

[3] Neither Tulalip nor Suquamish were parties to the initial suit. Suquamish moved to intervene on June 10, 1974. C70-9213, Dkt. # 585. Tulalip moved to intervene on August 20, 1974. C70-9213, Dkt. # 710.

of relevant aspects of Indian life in the case area at and prior to treaty times. *Id*. Judge Boldt held that nothing in Dr. Lane's reports and testimony was controverted by any credible evidence in the case and that her opinions, inferences and conclusions appeared to be well taken, sound and reasonable. *Id.*

In this May 1973 report Dr. Lane said the following (bolding added):

1. Aboriginally and during the time when the treaties were negotiated, Indian settlements were widely dispersed throughout western Washington. ER 423.

2. Winter villages were situated on protected bays and inlets and along the rivers and streams. **During the winter season, when people remained in their permanent villages**, those living near the foothills contended with snow conditions unknown to the saltwater dwellers. These **differing conditions materially affected the types of fresh foods accessible to the coastal and inland people during the cold weather.** ER 423.

3. In other seasons, when people ranged over a wider area and set up temporary camps at fishing locations, shell-fish collecting grounds, and the like, they were able to share access to resources not available in the immediate vicinity of their winter villages. ER 424.

4. Throughout most of the area salmon (including steelhead where available) was the staple food and the most important single food resource available to the native population. ER 428.

5. A great challenge was posed by the fact that this species could be taken in vast quantities, but only at particular periods of limited duration. ER 429.

6. **In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived more or less on stored foods - - dried meat and berries and dried and smoked fish. Fresh fish and other foods were harvested during the winter. That season, however, was devoted primarily to intra- and intervillage ceremonies and manufacturing tasks.** ER 429-430.

7. **Dried or smoked salmon was easily stored and transported. At the same time, keeping quantities were of limited duration. Surplus preserved salmon was usually consumed or distributed within the year.** ER 431-432.

8. **As a staple food, salmon was eaten either in fresh or cured form throughout the year.** ER 432.

9. **During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages.** ER 438.

10. In general, I think it is correct to say that **the freshwater fisheries were controlled by the locally resident population**. During the winter season, the local residents were the exclusive users. At other seasons use rights at these locations and others within the territory of a particular group would be extended to visitors from other localities. ER 438.

11. **The situation with regard to saltwater fisheries appears to have been slightly more complicated. Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This is especially true if shellfish beds were present. In the deeper waters of the bays, huge flotillas of canoes would gather to troll for the salmon as they gathered in the bays just prior to their entry into the rivers.** ER 439.

12. **The 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 through such waters.** ER 440.

13. **However, both within the straits and off the west coast in the open sea there were halibut banks known to the Indians, used by them and claimed as private property. Other private property rights to saltwater fisheries were recognized reefnet locations in the straits. Among the Makah, ownership of halibut banks were held in the name of the chief as steward for his local kin group and retainers. With the Lummi reefnet locations, the situation was different. Individuals owned specific locations on the reef which they received by heirship.** ER 440.

14. Based on his observation made in the mid-1850's and apparently without knowledge of either Makah or Lummi fisheries, **Gibbs (1877:186) stated, "As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season."** As intimated by the foregoing discussion, Gibb's generalization requires modification to cover adequately a range of local situations. **His characterization is acceptable if it is understood to refer to saltwater fisheries and if it is understood that certain exceptions existed, notably in the halibut, cod, and sockeye fisheries.** ER 440.

15. **As regards freshwater fisheries**, all subsequent information about fishing and everything else known about **western Washington Indian cultures clearly defined property concepts.** Ownership rights to specific fishing areas were well developed; at the same time, use rights were freely given. Gibbs' statement appears to be concerned with use rights. If so, his characterization is useful, provided that the contexts and limitations noted above are understood. ER 441.

16. **Techniques such as spearing and trolling in saltwater which involved individual effort were not regulated or controlled by anyone else.** ER 442.

17. Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, **it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations. Such an inventory is possible only by designating entire water systems.** ER 443.

18. Fishing stations which were also the site of weirs and permanent villages are more easily documented through archeological evidence, historical records, and ethnographies studies than are riffles where fish were speared. **The nature of the gear used has tended to influence the recording of sites.** ER 444.

Judge Boldt adopted Dr. Lane's statements and opinions in his findings of fact ("FF") regarding treaty times Indian life, sometimes quoting her statements

almost verbatim. Crucial to understanding Judge Boldt's intent for the purposes of this appeal are the following adjudicated findings of fact found at *United States v. Washington,* 384 F.Supp. at 350, ER 468-470, (bolding added):

FF 3 : . . . one common cultural characteristic among all of the Puget Sound Indians was the almost universal and generally paramount dependence upon products of an aquatic economy, especially anadromous fish, particularly salmon and steelhead, to sustain the Indian way of life. (G-17o, pp. 286-287; Exs. USA-20 to 30 and 53; Exs G-21 to 26; FPTO §§ 3-32, 3-33; Ex. USA-20; Ex. PL-40, p. 577; Ex. G-4, pp. 193-197). ER 468.

FF 4: The major food sources of the Northwest Indians were the wild fish, animal and vegetative resources of the area. It was, therefore, necessary for the people to be on hand when the resources were ready for harvest. These seasonal movements were reflected in native social organizations. **In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and live more or less on stored food. Fresh fish and other foods were harvested during the winter but that season was devoted primarily to ceremonies and manufacturing tasks.** (FPTO §3-32; Ex. USA-20; Ex. JX-2a, §3.1 pp. 108-114, Fig. 44-47, 280-283; Ex. USA 31, pp.17-26; Ex. PL-88a-d; Ex. L-7). ER 468.

FF 5: The Indians' harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. (Tr. 2006, l.17 to 2012, l. 24; Ex. PL-40, p. 577; Ex. F-39; FPTO § 3-32; Ex. USA-20, p. 5). ER 468.

FF 12: Indian fishing practices at treaty times were largely unrestricted in geographic scope. Generally, individual Indians had primary use rights in the territory where they resided and permissive use rights in territories where they had consanguineal kin. Subject to such individual claims, most groups claimed autumn fishing use rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups from other villages (FPTO §3-34). ER 469.

FF 13: Each of the Plaintiff tribes had usual and accustomed fishing places within the case area. **Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations.** (FPTO §3-34; Ex. USA-20, p. 21; EX USA-52, p. 4, l. 7 to p.5, l. 29) . . . . Documentation as to which Indians used specific fishing sites is incomplete. **George Gibbs noted that**

> **"As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season."** (Ex. USA-20, p. 18; Ex. USA 27b, p. 3; Ex. G-4, p. 186). ER 469.

FF 14: **Although not all tribes fished to a considerable extent in marine areas, the Lummi reef net sites in Northern Puget Sound, the Makah halibut banks, Hood Canal and Commencement Bay and other bays and estuaries are examples of some Indian usual and accustomed fishing grounds and stations in marine waters.** Marine waters were also used as thoroughfares for travel by Indian who trolled en route. (Ex. PL-75; Tr. 2847, l. 13 to 2850, l. 23). ER 469.

FF 28: At the time of the treaties Indian control over fishing practices was by customary modes of conduct rather than by formal regulations. Controls were necessary in cooperative fishing efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the times at which the weir was opened to allow upstream escapement for spawning and/or supply for upriver fishermen. **Techniques such as spearing and trolling in salt water which involved individual effort were not regulated or controlled by anyone else.** (Ex. USA-20, pp.19, 20). ER 470.

The following of Judge Boldt's conclusions of law ("CL") in Decision I

(ER 471-473 are also informative as to his understanding of treaty reserved

fishing rights and his intent in using the phrase "marine waters of Puget Sound" to describe Suquamish's U&A (bolding added):

CL 22: **The passage of time and the changed conditions affecting the water courses and the fisheries resources in the case area have not eroded and cannot erode the right secured by the treaties** but have merely affected the limits which may be placed upon its exercise in order to preserve the fish resources which are necessary to the continued and future enjoyment of the right. (*U.S. v. WA,* 384 F.Supp. at 401). ER 473.

CL 26: **The only method providing a fair and comprehensive account of the usual and accustomed fishing places of the Plaintiff tribes is the designation of the freshwater systems and marine areas within which the treaty Indians fished at various times, places and season, on different runs.** Changes in water course do no impair the geographical scope of the usual and accustomed fishing places. **Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be complied today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.** *U.S. v. WA*, 384 F.Supp. at 402). ER 473.

Further, the following from Judge Boldt's Judgment, Decree and Permanent Injunction in Decision I and his answer to question 12 posed by the State in its Motion for Reconsideration emphasize his opinion that treaty fishing rights did not erode over time because they are reserved rights and also his intent regarding the inter-tribal division of off-reservation harvests, ER 475-478 (bolding added):

Declaratory Judgment and Decree ¶14: The taking of anadromous fish from usual and accustomed places, the right to which was secured to the Treaty Tribes in the Stevens' treaties, constituted both the means of economic livelihood and the foundation of native culture. . . . But **the mere passage of time has not eroded,**

and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. (*U.S. v. WA*, 384 F.Supp. at 406-407). ER 475.

Declaratory Judgment and Decree – Answer ¶12.A. to States Question 12 on Motion for Reconsideration and Injunction ¶15: **The division among tribes of the Indian off-reservation share of the harvest shall be determined by the tribes fishing in the same usual and accustomed places. The only concern of the state would be to determine (a) whether the total harvest by all tribes exceeds 50%, and (b) whether any tribe or group of tribes will cut into escapement when fishing as the tribes had planned**. (*U.S. v. WA*, 384 F.Supp. at 410. ER 478.

To summarize, Judge Boldt adopted many passages from Dr. Lane's 1973 Report and her trial testimony virtually verbatim in his Decision I findings of facts. Of importance to this appeal, Judge Boldt found that at treaty times: 1) winter weather made travel and fishing difficult, so Indian people remained in their winter villages and lived more or less on their stored food and by harvesting fresh fish and other food within close proximity; 2) only fresh water stations, evidenced by physical weirs and permanent villages on the rivers, were the subject of control by nearby tribes; 3) not all tribes fished to a great extent in marine areas; Makah halibut banks, Lummi reef net sites, Hood Canal and bays and estuaries were singled out as exceptions where saltwater fisheries occurred at treaty times; and 4) saltwater fisheries were individual endeavors and not regulated or controlled by anyone else.

These findings and opinions show Judge Boldt came into the April 1975 hearing with a solid understanding of the pre-treaty Indian way of life and with adjudicated opinions based on his understanding. Judge Boldt would have referred to and relied upon his 1974 findings and adjudications when analyzing the evidence and opinions Dr. Lane presented in her December 1974 Report entitled "Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Port Madison Indian Reservation", admitted in April 1975 as USA Exhibit 73 ("Suquamish Report"). ER 71-126. Judge Boldt's adjudicated findings and opinions in Decision I are instructive in showing that Judge Boldt fully understood the nuances of Dr. Lane's opinion when she said the Suquamish had fall and winter fisheries at the mouth of the Snohomish River as well as in adjacent marine areas. ER 89. Judge Boldt's Decision I findings and opinions fully underscore and give credence to the district court's finding that Dr. Lane's Suquamish Report and her April 9, 1975 testimony constituted reliable evidence before Judge Boldt of Suquamish fishing in the Case Area at treaty times.

B. Case and Factual History After Suquamish Intervened in Case

Suquamish successfully intervened in *United States v. Washington* in July 1974. Order dated July 17, 1974, C70-9213, no docket number assigned. While the litigation was ongoing, on March 17, 1975 Suquamish sought to participate in

the 1975 Puget Sound spring herring fishery. ER 479-508 (C70-9213, Dkt. # 1036). On April 4, 1975, Suquamish submitted its proposed fishing regulation, attaching a map of its claimed fishing areas. ER 509-515 (C70-9213, Dkt. # 1074). This map identified Areas 1, 2, 3 and 4 which covered marine territory from Cape Flattery (Tatoosh Island) at the west end of the Strait of Juan de Fuca as its western boundary, the Washington State border as its northern boundary, the continental mainland abutting Puget Sound as its eastern boundary and Tacoma as its southern boundary. Contrary to Tulalip's assertion in its Opening Brief ("OB"), Suquamish submitted definitive boundaries of its proposed U&A to Judge Boldt, all of which are geographically located with Judge Boldt's definition of "Puget Sound". OB 27; *Upper Skagit*, 590 F.3d at 1023; 1024, fn.5.

At the April 9, 1975 hearing, the State orally objected to Suquamish claiming an entitlement to fish for herring in a portion of Area 1 and in Area 2 as shown on the map attached to the regulation, but not to Suquamish fishing in Areas 3 and 4. ER 310-311. Judge Boldt responded to this objection by stating:

> "In as much as no other tribe who will share this same fishery at these places and who have a direct interest in excluding any who might not be qualified to have a direct interest in whatever their take is will be added to the total that the tribes may take, since no tribe has objected, it seems to me that that is at least sufficient prima facie showing, and carrying the matter further at this point without further and in-depth exploration and full hearing is inadvisable. ER 313 - 314.

Despite this admonition the State continued its objection, so Judge Boldt heard live testimony from Dr. Lane on the matter that day.

At the beginning of the hearing on the next day, April 10, 1975, Judge Boldt advised the parties that,

> "The purpose of these hearings was quite narrowly defined as pertaining to the taking of herring, and it was expedited for speedy hearing at the instance of [State] Fisheries largely because of the urgent need that there be a determination as to who might fish and where, with the run of herring coming on very shortly. Now, the only determinations we will make in this respect are whether or not a tribe seeking treaty status is entitled thereto; if so, whether the tribe may fish for herring and in what waters. The questions presented could conceivably involve a much broader question than that simple determination. I do not intend at this time to go beyond the narrow issues because, first, I can't do justice to those broader issues without being fully briefed with counsel having a full and fair opportunity to present oral argument on them." ER 518-519.

After hearing oral argument, Judge Boldt ruled from the bench that,

> "First of all, all of these rulings are based on whether or not a prima facie showing has been made. A prima facie showing, of course, means that it is rebuttable and may be modified, if, and when, a full scale hearing with presentation of additional evidence and argument thereon has been made. I am satisfied that upon the evidence all four of the tribes seeking treaty entitlement to fish for herring have made a prima facie showing of their entitlement, and it is so ordered upon the showing made. The Court finds 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 523-524.

Eight days later, on April 18, 1975, Judge Boldt issued a written order memorializing his bench rulings regarding the herring fishery and, additionally, determining Suquamish and three other tribes' broader U&As. *U.S. v. Washington*, 459 F.Supp.1020, 1049 (W.D.Wash. 1975). ER 526-527. In paragraph 8 of this order Judge Boldt ruled,

> "The findings and determinations made in paragraph 2 through 7 above are made on the basis of a prima facie showing as heretofore provided and each is subject to reconsideration on the basis of a full evidentiary hearing if requested by any party by written request filed on or before May 19, 1975. If no such reconsideration is requested within said time as to any such finding or determination, the latter shall become final and reviewable as provided by 28 U.S.C. §§ 1291 and 2201 without further order of this court." ER 527.

No party contested Suquamish's U&A determination and the determination became final.

Suquamish issued regulations and actively fished throughout its U&A, including in the Case Area, after April 18, 1975. ER 528-534. In 2003, nearly 28 years later, Upper Skagit, Swinomish Indian Tribal Community and Tulalip started filing court cases questioning the geographic scope of Suquamish's U&A determination. This suit is the second of three such suits filed to date.[4]

[4] The first was *Upper Skagit, supra*. Upper Skagit filed a second suit, subproceeding 14-01, in October 2013 asserting Judge Boldt did not intend to include Padilla Bay, Samish Bay and Chuckanut Bay in Suquamish's U&A. The only actions in that suit to date have been the filing of pleadings. In its Opening

C. Case and Factual History of Tulalip's Participation in Case

Tulalip intervened in the case several months after Suquamish intervened. Tulalip's first significant filing occurred on July 11, 1975, when it sought a very broad U&A determination claiming it had marine U&A in all marine waters within the lands and waters ceded to the United States in its treaty, all marine waters of Puget Sound and the Strait of Juan de Fuca lying within Washington State, all marine waters outside those waters ceded in its treaty and exclusive fishing rights in Port Susan, Port Gardner Bay, Possession Sound, Saratoga Passage, and the easterly and northerly portions of Admiralty Inlet from the town of Edmonds to approximately Bush Point on Whidbey Island. *U.S. v. Washington*, 459 F.Supp. at 1058. ER 535. Judge Boldt's subsequently granted Tulalip provisional marine U&A in Admiralty Inlet from Admiralty Head south, including Mutiny and Useless Bays, Possession Sound, Port Gardner Bay, Holmes Harbor, a limited portion of Port Susan, and that portion of Saratoga Passage lying south of Camano. ER 538-539. He reserved ruling on Tulalip's claims of exclusive fishing areas pending further evidentiary proceedings. ER 539.

Brief, Tulalip refers to papers Suquamish filed there. Given the very early status of that suit, Suquamish asserts that subproceeding is irrelevant to this appeal and the court should so hold. Additionally, Port Gamble and Jamestown S'Klallam tribes have threatened to file suit if Suquamish renews fishing activities in the Strait of Juan de Fuca.

Fifteen years later, in 1980, Tulalip sought to make its provisional U&A permanent and renewed its request for U&A beyond its provisional U&A. Tulalip Amended Request for Determination re U&A, C70-9213, Dkt. # 8485. ER 540-541. Prior to trial, Tulalip settled with Suquamish and every other tribal party except Lummi, with whom it went to trial. Tulalip resolved its exclusivity claim in court approved settlements with individual tribes with adjudicated U&As by delineating the relations between them in any waters that overlapped. *U.S. v. Washington,* 626 F.Supp. 1405, 1527-1532 (W.D.Wash. 1985). ER 542-545.

These court approved settlements are not adjudicated U&A as Tulalip contends. In his post-trial order, Judge Craig made explicit in Finding of Fact #383 and Conclusion of Law #102 that "None of the Findings of Fact or Conclusions of Law contained herein shall be binding on the stipulating tribes named in Finding of Fact No. 383, *supra,* or have any presumptive, persuasive, prima facie or other force or effect against any such stipulating tribes in this or any other judicial or other proceeding." *Id*. at 1530-1532. ER 545. Thus, Tulalip cannot use Judge Craig's findings against Suquamish in this or any other proceeding and this court should affirm Judge Craig's ruling on this point.

Although it was a party to the case at the time, Tulalip did not participate in the April 1975 herring hearings. Suquamish will discuss the significance of this

fact more fully in Section VI below. Suffice it to say, arguments based on testimony never seen, heard or considered by Judge Boldt in 1975 are inadmissible for the purposes of this Paragraph 25(a)(1) proceeding and this court should hold that they are, therefore, irrelevant and immaterial to this appeal.

IV. STANDARD OF REVIEW

Tulalip identifies its appeal as a "challenge to the District Court's finding that Judge Boldt intended to include the mouth of the Snohomish River, Possession Sound, Port Gardner Bay, and the bays on the west side of Whidbey Island (Admiralty Bay, Mutiny Bay, Useless Bay, and Cultus Bay) in the Suquamish U&A. OB 5.

In all cases tried without a jury, the Federal Rules of Civil Procedure require that the district court make findings of fact and conclusions of law. *Huff v. City of Burbank*, 632 F.3d 539, 543 (9th Cir. 2011); Fed.R.Civ.P. 52(a). The factual findings must be sufficient to indicate the factual basis of the district court's ultimate conclusions. *Id.* The district court's findings should be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *Id.*

The district court's findings of fact are reviewed under the clearly erroneous standard. Fed.R.Civ.P. 52(a)(6); *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Mondaca-Vega v. Holder*, 718 F.3d 1075, 1080-1081 (9th Cir. 2013). The clear error standard is significantly deferential. *Fisher v. Tucson Unified School District*, 652 F.3d 1131, 1136 (9th Cir. 2011); *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009)(en banc). The reviewing court "must accept the district court's factual findings absent a "definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S. at 574; *Fisher,* 652 F.3d at 1136. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Rodriguez v. Holder*, 683 F.3d 1164, 1171 (9th Cir. 2012), quoting *Anderson,* 470 U.S. at 573-574.

The appellate court reviews a district court's decision to grant or deny summary judgment *de novo*. *Crowe v. County of San Diego*, 593 F.3d 841, 862 (9th Cir. 2010). When reviewing summary judgments, this court must view the evidence in the light most favorable to the non-moving party and, in doing so, must

draw all justifiable inferences in favor of the non-moving party, here the Suquamish. *Id.*

It is well established in this Circuit that the clearly erroneous standard of review applies to findings of fact even when the district court relies solely on physical or documentary evidence, a written record, or inferences from other facts. *K.D. v. Department of Education*, 665 F.3d 1110, 1117 (9th Cir. 2011)(findings based on administrative record); *Burlington Northern, Inc. v. Weyerhaeuser Company*, 719 F.2d 304, 307 (9th Cir. 1983) (findings based solely on written record).

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that *their function is not to decide factual issues de novo*. *Anderson*, 470 U.S. at 573-574, citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (italics added). *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.* *Rodriguez*, 683 F.3d at 1171, quoting *Anderson*, 470 U.S. at 573-74 (emphasis added by 9th Circuit court); *Inwood Labs., Inc. v. Ives Labs., Inc.,* 456 U.S. 844, 857-58, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982)("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply

because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'" quoting *United States v. Real Estate Boards,* 339 U.S. 485, 495, 70 S.Ct. 711, 94 L.Ed. 1007 (1950)).

Issues of intent are factual matters subject to the clearly erroneous rule. *Pullman-Standard v. Swint*, 456 U.S. 273, 288-289, 102 S.Ct. 1781, 72 L.Ed.2d. 66 (1982)(intent to discriminate is a factual question); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979)(intent to maintain a racially segregated school system is a factual question); *Commissioner v. Duberstein*, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960)(donor's intent in Internal Revenue Code gift tax case is a factual question).

In summary, the standard of review applicable to the district court's findings of fact as to Judge Boldt's intent in describing Suquamish's U&A is a factual determination reviewed under the "clearly erroneous" standard. This standard applies even though the district court reviewed court records.

Finally, as a practice, this court gives great deference to a district court's factual findings when that court has supervised a case for many years. *Fisher,* 652 F.3d at 1136, fn.5. As this court knows, this difficult litigation is in its 44th active year. District Court Judge Ricardo Martinez's findings of fact deserve this court's

deference as he has personally supervised this case for the past 11 years, starting from when he was a magistrate judge.

V. SUMMARY OF APPELLEE'S ARGUMENT

Tulalip presents numerous arguments in its Opening Brief as to why the district court erred in finding it "highly likely" and "nearly certain" based on the evidence before Judge Boldt in 1975 that Judge Boldt intended to include the Case Area in Suquamish's U&A. The arguments Tulalip present fail to meet the burden of demonstrating "there was no evidence before Judge Boldt that the Suquamish fished [in the disputed area] or traveled there in route to the San Juans or the Fraser River area" at treaty times. ER 14. As Suquamish will show below, the district court found ample evidence in the record before Judge Boldt to find that he included the Case Area in Suquamish's U&A, a determination this court should affirm.

VI. APPELLEE'S ARGUMENT

A. This Court Should Affirm Finding of Near Certainty That Judge Boldt Included Case Area in Suquamish's U&A

The district court found that Judge Boldt would have fully credited Dr. Lane's statement that the Suquamish traveled "to Whidbey Island to fish." ER 20. On this ground, the district court made a finding of fact that "Thus 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*.

As to Possession Sound and the marine waters at and near the mouth of the Snohomish River, the district court found it is nearly certain from the information in Dr. Lane's 1974 Suquamish Report that Judge Boldt intended to include these marine waters in the Suquamish U&A. *Id*. In addition to re-affirming Dr. Lane's description of Suquamish's on-reservation territory, ER 16-17, the district court quoted the following paragraphs of Dr. Lane's Report to support his finding that Judge Boldt intended to include the Case Area in Suquamish's U&A:

1. Suquamish relied primarily on salmon for their food staple. ER 17.

2. There are no large rivers in Suquamish territory. ER 17.

3. For their store of smoke-dried salmon to serve as winter provision, the Suquamish resorted to fisheries more distant from their own shores. They repaired to the mouth of the Duwamish and other large rivers to share in the harvest of fall salmon runs. ER 17.

4. Correspondence from Fort Kitsap Reservation Indian agent George Paige to Governor Isaac Stevens in October, November and December 1856, clearly indicated that when confined to fishing on the west side of Puget Sound, the Suquamish were unable to secure sufficient supplies of salmon and the whole of the tribe except those who lived in Port Orchard, came into the Fort Kitsap Reservation to keep from starving. ER 18-19.

5. It was Dr. Lane's opinion based on Agent Paige's 1856 reports that the Suquamish were accustomed to harvesting their fall and winter salmon supplies at the rivers on the east side of Puget Sound and that modern Suquamish as well as neighboring Indians attested that the Suquamish traditionally fished at the mouths of the Duwamish and Snohomish rivers as well as in the adjacent marine areas. ER 19.

6. It was Dr. Lane's opinion that in the spring and summer of pre-treaty times, the Suquamish made use of wider marine areas, citing to an 1827 report that mentioned the presence of Suquamish visitors at Fort Langley on the Fraser River in Canada and it was also her opinion that the Suquamish traveling to the Fraser River documented their capability to move widely over the marine waters in what is now known as the Strait of Juan de Fuca, and Haro and Rosario Straits and to the Fraser river, that the Suquamish undoubtedly fished the marine waters along the way and that one of the reasons for the travel was to harvest fish. ER 19.

7. It was Dr. Lane's express opinion that "the Suquamish travelled to Whidbey Island to fish and undoubtedly used other marine areas as well." ER 19.

The district court found these passages "demonstrate that there was competent and reliable evidence before Judge Boldt in 1975 that (1) the Suquamish fished in Admiralty Inlet and traveled as far as the western shores of Whidbey Island to do so (referencing the de Harley 1849 report); and (2) the mouth of the Snohomish River was an important fall and winter fishery for them." ER 19.

The district court further found that, "Dr. Lane emphasized the importance of this fall/winter fishery with quotes from Agent George Paige's letters to Governor Stevens, and the poignant reference to possible starvation resulting from their exclusion from this traditional fishery in 1856 by hostilities." ER 19-20.

The court found that "[Dr. Lane] also testified at the trial before Judge Boldt, on April 9, 1975, confirming that the Suquamish "'did in fact go to the

larger rivers on the mainland in order to harvest salmon because they had no rivers in their own country.' Transcript of Proceedings, April 9, 1975, p. 49; found at C70-9213, Dkt #7268." ER 20.

From all of this evidence in the court record, the district court found that "It is also highly likely, indeed a near certainty in light of Dr. Lane's emphasis on the importance of the winter fishery, that [Judge Boldt] intended to include the area at the mouth of the Snohomish River, specifically including Port Gardner Bay where the river meets the saltwater." *Id.* The district court continued, "Further, [Judge Boldt] would have understood that the Suquamish could only have reached their fishing grounds at the mouth of the Snohomish River by traveling through Possession Sound, and they would have fished there as an "adjacent marine area" as reported by Dr. Lane." *Id.* On these factual grounds the district court found, "Thus, it is highly likely that Judge Boldt intended to include Possession Sound in the Suquamish U&A, along with the bays on the west side of Whidbey island." *Id.*

The district court quoted specific evidence before Judge Boldt that supported its finding that Judge Boldt intended to include the Case Area in Suquamish's U&A. The district court rejected Tulalip's contrary interpretation of the same evidence and so should this court. Under the clearly erroneous standard which applies here, this court should affirm these findings of fact because they are

not only plausible but fully supportive of the district court's determination that Judge Boldt included the Case Area in Suquamish's U&A.

B. District Court Properly Rejected Tulalip's "Home Territory" Claim

When Judge Boldt addressed several tribes' request to participate in the spring herring fishery in April 1975, he had yet to receive Tulalip's U&A request. Thus, none of the claims Tulalip asserts in its Opening Brief about the Case Area being its "homeland", "home territory", "tribal territory", "front yard", or constricted area under its "control" (OB 3, 5, 11, 13, 32, 33) were presented to, briefed or adjudicated by Judge Boldt before April 18, 1975. Because these claims were not before Judge Boldt, they are inadmissible in this Paragraph 25(a)(1) proceeding and should be rejected and ignored by this court. ER 12. Furthermore, the district court addressed these "home territory" issues in 1983 by approving individualized settlements between Tulalip and other tribes with adjudicated U&A in the Case Area that included negotiated solutions to inter-tribal fishing disputes in the Case Area. ER 545-552.

C. This Court Has No Jurisdiction to Hear Tulalip's Argument Based on Its Interpretation of Another Phrase in Suquamish's U&A

Tulalip claims the phrase "the streams draining into the western side of this portion of Puget Sound" limits Suquamish to the west side of Puget Sound. OB 24-25. This claim is procedurally deficient because Tulalip has not complied with

the Paragraph 25(b) pre-requisites to bringing the claim. ER 5. Moreover, this issue was not before or ruled upon by Judge Boldt in April 1975 and so is irrelevant to this appeal. ER 12. For these reasons, this court does not have jurisdiction to hear this claim and should so hold.

D. This Court Should Rule Tulalip's Post April 18, 1975 Submissions Inadmissible in this Paragraph 25(a)(1) Proceeding

All post-April 18, 1975 hearing testimony, declarations, reports or other documents and materials which Tulalip inserted into its Excerpt of Record and any argument Tulalip made in its Opening Brief based on such excerpts were not and could not have been before Judge Boldt when he determined Suquamish's U&A. Thus, they are inadmissible, irrelevant and immaterial to this appeal. On this basis, this court should reject and refuse to consider these submissions.

E. This Court Should Affirm District Court's Rejection of Tulalip's Argument Based on Improper Reading of *United States v.Suquamish*

The district court held Tulalip improperly read this court's 1990 opinion in *United States v. Suquamish Indian Tribe,* 901 F.2d 772 (9th Cir. 1990) in claiming that the opinion states Suquamish's U&A did not include marine waters on the east side of Puget Sound. ER 15. The district court further held the 1990 opinion addressed treaty fishing in the freshwaters of Lake Washington, Lake Sammamish, the Duwamish River and Lake Washington Ship Canal and not any

saltwater areas identified in this subproceeding. ER 15-16. This court should affirm the district court's ruling on the same basis.

F. Judge Boldt Would Not Have Heard Inter-tribal Fishery Management Issues and Neither Should This Court

In Decision I, Judge Boldt specifically ruled that if there were overlapping U&As, the tribes were responsible to determine among themselves how to manage the fisheries there. *U.S. v. Washington*, 384 F.Supp. at 406-407. ER 478. Thus, Judge Boldt would not have considered inter-tribal fisheries management when determining Suquamish's U&A even if they have been presented to him in 1975. Tulalip's claims and arguments on these grounds are therefore irrelevant and immaterial to this appeal and this court should so hold.

G. Reserved Rights Cannot Erode So Court Must Not Attach Significance to Suquamish Fishing or Not Fishing in Case Area

As a reserved treaty right, Suquamish's U&A cannot erode regardless of whether its members engaging in fishing in the Case Area or in any other portion of its U&A. *U.S. v. Washington*, 384 F.Supp. at 406-407. ER 473, 475. Therefore, Tulalip's argument attaching significance to Suquamish decisions to fish or not fish in the Case Area has no bearing on the issues on appeal and this Court should so hold.

H. This Court Should Hold That Tulalip Failed to Meet Step Two of the *Muckleshoot* Construct

Tulalip has not and cannot refute the district court's findings of ample evidence in the court record supporting its determination that Judge Boldt intended to include the Case Area in Suquamish's U&A. On this basis, this court should rule that Tulalip failed to meet its burden to prove step two of the *Muckleshoot* construct and affirm the District Court's factual determinations.

I. This Court Must Reject Dr. Lane's Inadmissible Latter Day Declaration Because It Was Not Part of the 1975 Record

It is the law of this case that latter-day documents and testimony by Dr. Lane or any other expert or lay witness are inadmissible in a Paragraph 25(a)(1) proceeding because such information was not before Judge Boldt and it would be speculative to say Judge Boldt would have adopted such documents or testimony had he seen or heard them. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1259 (9th Cir. 1998). An example of inadmissible evidence in this appeal is a copy of Dr. Lane's August 4, 2011 Declaration which Tulalip attached to its Opening Brief as ER 48-52. The district court reiterated in his Order on Motion to Quash dated November 20, 2012, (C70-9213, Dkt. # 20255), below,

> "this Court has already ruled, in accordance with *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F. Ed [sic] 1355 (9th Cir.1998)("*Muckleshoot I*"), that Dr. Lane may not offer latter-day testimony regarding the evidence that was before Judge Boldt when he rendered his decision in 1974. Dkt. #43. Although Dr. Lane's assistance was of enormous value to the Court, the record now speaks for itself, and Dr. Lane may

not offer her opinion as to what she believes Judge Boldt intended. *U.S. v. Washington*, 2006WL 2882968 at *1 (W.D.Wash.)

Especially here, when Judge Boldt adopted much of Dr. Lane's 1973 statements and opinions in his own findings of fact in Decision I, there should be no speculation as to whether Judge Boldt would have entertained, let alone adopted, latter-day testimony by Dr. Lane re-interpreting her original trial reports and testimony, a full 40 years after her original work.

VII. CONCLUSION

This court stated in its opinion dated January 5, 2010 in *Upper Skagit, supra,* that Judge Boldt defined "usual and accustomed grounds and stations" as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters. *Upper Skagit*, 590 F.3d at 1022. Thus, regardless of other possible interests in the subproceeding case area, the question of Judge Boldt's intent in describing Suquamish's U&A is not subject to or limited by such interests.

The answer to the question posed by Paragraph 25(a)(1), i.e. whether Suquamish is fishing in conformance to its court adjudicated U&A determination in the bays of Admiralty Inlet, Possession Sound and the marine waters at and adjacent to the mouth of the Snohomish River, the answer is "yes". For all of the reasons stated

above in Appellee Suquamish Tribe's Answering Brief, Suquamish requests that this court uphold the district court findings of fact definitively affirming that Judge Boldt intended these marine areas to be in Suquamish's U&A.

Respectfully submitted on March 31, 2014.

Attorney for Appellee Suquamish Tribe

s/ Michelle Hansen

VII. CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements
and Type Style Requirements – Ninth Circuit Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,082 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman with a 14 point typeface.

Dated this 31st day of March, 2014.

Attorney for the Suquamish Tribe

s/ Michelle Hansen

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee Suquamish Tribe additionally identifies *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*, Ninth Circuit Appeal No. 09-35772 as a related case under FRAP 28-2.6(a), (c) as this appeal also arises the main *United States v. Washington* litigation and addresses alleged ambiguities in Judge Boldt's determination of the Lummi Nation's usual and accustomed fishing grounds in Northern Puget Sound. Although this appeal is not directly related, some of the legal arguments briefed may be similar.

Appellee Suquamish also identifies *Upper Skagit Tribe, Plaintiff-Appellee v. Suquamish Indian Tribe, Defendant-Appellant v. Swinomish Indian Tribal Community*, *Cross-Claimant-Appellee,* Ninth Circuit Appeal No. 07-35061, as a related case under FRAP 28-2.6(a),(b), (c) and (d) which, though now closed, involved the same parties, addressed the same case area and was decided using the same legal precedents.

Respectfully submitted on March 31, 2014.

Attorney for Appellee Suquamish Tribe

s/ Michelle Hansen