13-35773

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
CIVIL NO. 70-9213-RSM
Subproceeding No. 05-4

TULALIP TRIBES' OPENING BRIEF

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
Mason D. Morisset, WSBA #00273
Rebecca JCH Jackson, WSBA #44113
Email: m.morisset@msaj.com
Email: r.jackson@msaj.com
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
Tel: 206-386-5200
Fax: 206-386-7388
Attorneys for Tulalip Tribes

CORPORATE DISCLOSURE STATEMENT

Appellant 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. STATEMENT OF JURISDICTION

The District Court for the Western District of Washington has subject matter jurisdiction of the underlying proceedings pursuant to 28 U.S.C. §§ 1345, 1331, and 1362. The District Court retained continuing jurisdiction in this case pursuant to Paragraph 25(a)(1), 25(a)(4), (a)(6), and/or (a)(7) of the Court's injunction of March 22, 1974, *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), as modified by the Court (*U.S. v. Washington*, C70-9213, Dkt. #13599 (W.D. Wash. Aug. 23, 1993)). This case involves a dispute over usual and accustomed fishing grounds and stations between federally recognized Indian tribes. The District Court entered final judgment on Cross Motions for Summary Judgment on July 29, 2013. Dkt. #242, 243; ER 1, 2. The Tulalip Tribe filed its Notice of Appeal as to the Court's partial denial of Plaintiff-Appellant's Motion for Summary Judgment to this Court on August 22, 2013. ER 30. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

Whether the finding concerning the Suquamish Tribe's usual and accustomed fishing places (U&A) made by Judge Boldt in 1975 includes 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) (contested waters). *See U.S. v. Washington*, 459 F. Supp. 1020, 1049

(W.D. Wash. 1978); *see also* ER 45. The Tulalip Tribes raised this issue in their request for determination filed on August 8, 2005. Dkt. #1; *see also* ER 211. The determination of this issue involves the following sub-issue:

Whether, based upon the record and proceedings at the time of the U&A determination, Judge Boldt intended to include the contested waters in the Suquamish U&A. The District Court ruled that he did intend to include them. Dkt. #242, 243; ER 1, 2.[1]

III. ADDENDUM OF PERTINENT LAWS

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are included within the addendum to this brief.

IV. STATEMENT OF THE CASE

A. Procedural Background.

On February 12, 1974, senior District Court Judge George H. Boldt issued his seminal opinion on the northwest treaty fishing rights case, which came to be known as the "Boldt Decision." *Washington*, 384 F. Supp. 312. That decision has had far-reaching consequences, and this case concerns the continuation of one aspect of that case. Importantly, Judge Boldt determined fishing areas for the northwest treaty tribes that were parties to the case. In construing the treaties, it was necessary for Judge Boldt to determine the "usual and accustomed grounds

[1] The District Court's analysis and rulings regarding issues raised on appeal are found at ER 14-22.

and stations" of each tribe since the treaties referred to such areas as the geographic places where the tribes could exercise their treaty rights.[2]

Some thirty years after Judge Boldt determined the fishing areas for the Suquamish Tribe, Defendant-Appellee here, it sought to expand its fishing by claiming areas where it had not previously fished. *See* ER 53, 59. These areas included waters adjacent to the Tulalip Tribes,' Plaintiff-Appellant here, homeland on the east side of Whidbey Island near what is now the City of Everett.

Pursuant to the procedural rules adopted by Judge Boldt, the Tulalip Tribes filed a Request for Determination in the District Court on August 8, 2005—asking the Court to confirm that the newly claimed areas were not within the Suquamish U&A. Dkt. #1.[3] The District Court initially granted a Suquamish Rule 12(b)(6) Motion to Dismiss on jurisdictional grounds on October 27, 2005. Dkt. #17. On appeal, this Court found that a "12(b)(6) dismissal is not appropriate." *U.S. v. Washington*, 252 F. App'x 183, 184 (9th Cir. 2007). This Court remanded to the

[2] For the sake of clarity and brevity, it is customary to refer to such areas as "U&A," and this brief utilizes U&A in this manner.

[3] A Request for Determination is essentially a complaint under the unique procedural rules of this case. *See Washington*, 384 F. Supp at 419 (Paragraph 25), (modified by the Court on August 23, 1993). The Upper Skagit Indian Tribe, subsequently joined by the Swinomish Tribe, also filed a Request for Determination challenging Suquamish fishing expansion into waters east of Whidbey Island—specifically Saratoga Passage and Skagit Bay—in June of 2005 just prior to the Tulalip Request for Determination. *See* Subproceeding 05-3, Dkt. #1 (June 27, 2005); *see also* ER 225.

District Court on the grounds that "meaningful appellate review requires a more developed record." *Id.* The Tulalip Tribes amended their Request for Determination on November 30, 2007. ER 211. The Suquamish then renewed its Motion to Dismiss without any record being developed. Dkt. # 82. The District Court denied the second Suquamish Motion to Dismiss on November 13, 2008. Dkt. #105. Suquamish then filed a Petition for Interlocutory Appeal on January 15, 2009. Cause No. 07-35061 Dkt. #66; Cause No. 06-35185 Dkt. # 55. This Court denied the Suquamish Petition for Interlocutory Appeal on March 1, 2010. Cause No. 09-80008 Dkt. #24; ER 210.

After the second remand to the District Court, the Suquamish filed a Motion for Summary Judgment on October 25, 2012. Dkt. #195. The Suquamish Motion for Summary Judgment asserted affirmative defenses and a counterclaim against the Tulalip claim that Judge Boldt did not intend to include waters east of Whidbey Island in the Suquamish U&A. *Id.* The Tulalip Tribes filed a Motion for Summary Judgment on October 29, 2012. Dkt. #199. The District Court entered an Order on July 29, 2013 denying the Suquamish Motion for Summary Judgment and granting in part and denying in part the Tulalip Tribes' Motion for Summary Judgment. Dkt. #242, 243; ER 1, 2. The District Court granted the Tulalip Motion for Summary Judgment as to Skagit Bay, Saratoga Passage and its bays, Penn Cove and Holmes Harbor, and Port Susan. ER 21; *see also* ER 45. The District

Court denied the Motion as to Possession Sound, Port Gardner Bay, Admiralty Bay, Useless Bay, Mutiny Bay, and Cultus Bay. ER 21-22; *see also* ER 45.

The Tulalip Tribes filed a Notice of Appeal to this Court on August 22, 2013, as to the District Court's partial denial of the Tulalip Tribes' Motion for Summary Judgment. ER 30. The Tulalip Tribes request that this Court reverse the District Court's partial denial of the Tribe's Motion for Summary Judgment and direct entry of summary judgment in favor of the Tulalip Tribes.

In this appeal, the Tulalip Tribes challenge 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. *See* ER 20-22.

B. Factual Background.

The Tulalip Tribes are political successors in interest and descendants of one or more treaty signatories commonly referred to as the Snohomish, Snoqualmie, and Skykomish Tribes, which were parties to the Treaty of Point Elliott, 12 Stat. 927 (1855). *U.S. v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *aff'd*, 841 F.2d. 317 (9th Cir. 1988); *U.S. v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978). The Tulalip Tribes' adjudicated U&A include marine and freshwater areas east of Whidbey Island, including Possession Sound and the area

delineated as 8A on the fisheries map found at ER 45. *See Washington*, 626 F. Supp. at 1530-32 (Findings of Fact 380-82 and Conclusions of Law 94-101).

Relevant facts are drawn from the record of proceedings before Judge Boldt in 1975—particularly, the evidence considered by Judge Boldt and supplemental expert evidence, which sheds light on the meaning of geographic terms as of the time of the decision. *See Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) (*Muckleshoot I*); *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100-01 (9th Cir. 2000) (*Muckleshoot II*); *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

Following his seminal ruling on Treaty rights in 1974 (*Washington*, 384 F. Supp. 312), Judge Boldt made the Suquamish U&A finding during supplemental proceedings concerning the herring fishery on April 9-11, 1975. *Washington*, 459 F. Supp. at 1049. The evidence before Judge Boldt regarding the Suquamish U&A consisted of Dr. Barbara Lane's[4] report on the Suquamish, Ex USA-73, ER 70, and her testimony on April 9, 1975. *See* ER 271. The Lane report describes Suquamish fishing in its home territory of Bainbridge Island and the Kitsap Peninsula in detail. *See* ER 85-95. A map included in the report highlights the locations of Suquamish fishing places. *See* ER 96. The map does not show any

[4] Dr. Lane was the United States' expert on tribal identity, treaty status, and fisheries for tribes that were named in the original case of *U.S. v. Washington*, 384 F. Supp. 312, or intervened shortly thereafter.

Suquamish fishing places on Whidbey Island or in the constricted waters east of Whidbey Island. *See id.* The map only includes fishing places south and west of the contested waters. *See id.*

There is no documented evidence of Suquamish fishing in the contested waters, and there is only one documented incident of northerly travel, which consisted of a trip to the mouth of the Fraser River for the purpose of trading. ER 89. In her testimony, Dr. Lane confirmed that there is no documentary evidence of other trips to these more northerly waters. ER 328.

Dr. Lane's report and testimony are devoid of evidence sufficient to establish a Suquamish U&A in the constricted, contested waters. Although the report states that it is Dr. Lane's opinion that "the Suquamish were accustomed to harvest their fall and winter salmon supplies at the rivers on the east side of Puget Sound[,]" it also states that *modern-day informants* and not treaty time information "attested that the Suquamish traditionally fished at the mouths of the Duwamish and Snohomish rivers as well as in the adjacent marine areas." ER 89. The report states that the "Suquamish travelled to Whidbey Island to fish and undoubtedly used other marine areas as well." ER 90. These statements must be read in light of the entire context of the record before Judge Boldt. That context makes clear that Judge Boldt did not intend to include fishing while traveling as sufficient to constitute U&A waters. *See e.g.*, *Washington*, 384 F. Supp. at 353; *Washington*,

626 F. Supp. at 1531 (Conclusion of Law 96). Judge Boldt did not intend to include the contested waters in the Suquamish U&A. Additionally, modern-day attestations as to fishing places do not establish U&A, because treaty time fishing is necessary to establish U&A. *See Washington*, 384 F. Supp. at 332.

Prior to the supplemental proceedings regarding the herring fishery, the Suquamish submitted its proposed herring regulations for 1975. The corresponding map was used throughout the supplemental proceedings. *See* ER 65. This map shows herring fishing areas 1 and 2 in the Strait of Juan de Fuca and northern Puget Sound; it also shows herring fishing in area 4, which encompasses the constricted waters east of Whidbey Island at issue here. *See id.* In the April 1975 supplemental proceedings, Washington State's attorney, Mr. Solomon, challenged the inclusion of water north of Kitsap Peninsula in the Suquamish U&A. ER 310-11, 315-16. With these concerns in mind, the Suquamish attorney questioned Dr. Lane regarding more northerly waters.

Q Did they travel through the San Juan Islands area?
A Yes.
Q Did they travel to the Fraser River?
A Yes, they did.
Q Now, did they trade in the Fraser River area?
A Yes, they did.
* * *
Q Now, how long would it take to travel from, say, the Suquamish home territory to the islands or to, say, Birch Bay and that area?
A Well, if you are talking about Port Madison into the San Juans, we are talking about a day's trip.

Q So it was easily within the range of the Suquamish people to travel and to use it as a resource location.
A Yes.
Q And we are talking about being able to travel by canoe.
A By canoe in 1855, yes.
Q Are you prepared to give an opinion on whether or not the Suquamish fished for herring in this part of the Puget Sound?
A Which part?
Q Okay. San Juan Islands and off Birch Bay and that area, on their way to the Fraser River.
A I have no evidence of a documentary nature to say that they did so.
* * *
Q Are you prepared to give an opinion to the Court based either upon direct documentation or reasonable inferences based upon the life style of the people involved and other information you have been able to gather on whether or not it is likely that the Suquamish people engaged in non-anadromous fishing generally or herring fishing specifically in the areas which we have been concerned with this morning?
MR. SOLOMON I object to the form of the question, Your Honor. 'The areas we have been talking about this morning' is not adequate. The areas I think are critical, and it should be more sharply defined.
Q The San Juan Islands, Doctor Lane, and that area off of Birch Bay on the way up to the Fraser River.
A I have no specific documentation which I can cite which says the Suquamish were fishing for herring at any particular location or any other species of fish at any particular location on those marine waters. I can give it as my opinion, and I think it's entirely likely that they fished for whatever was available as they were traveling through those waters and that they visited those waters regularly as a usual and accustomed matter in order to fish and to do other things.

ER 319-22.

This testimony provided the basis for the inclusion of some northern waters in the Suquamish U&A, and the travel only took place in waters west or north of

Whidbey Island. Dr. Lane, on cross-examination by Mr. Solomon, clarified the extent of the Suquamish U&A by use of the map attached to the Suquamish 1975 herring regulations. *See* ER 65.

> Q Is it your opinion that the Suquamish Tribe—are you familiar with the regulation that's been filed by the Suquamish Indian Tribe?
> A No.
> Q This is on file with the Court, or I assume it is. And looking at their map attached here, what has been described as Area Number 2, is this the area, roughly speaking, that Mr. Stay has asked you about, the Strait of Juan de Fuca, Haro Strait and whatnot?
> A I think he has asked me about what is labeled 1 and 2 on that map.
> Q Both areas 1 and 2. That's what your comments pertain to?
> A Well, I am speaking about the San Juan Island area, what is marked Number 1 there, and then 2.
> * * *
> Q Now, your report on the Suquamish notes that they traveled from their regular area up north as far as the Fraser River, which would cover areas 1 and 2 on this.
> A Part of Area 1.
> Q Part of Area 1, and 2.

ER 326-27. The map plainly shows that the contested waters are not included in Areas 1 or 2 but rather Area 4. *See* ER 65. Dr. Lane also clarified the amount of evidence necessary to establish U&A.

> Q Is it your opinion, Doctor Lane, that tribal members visiting or traveling, the frequency of which cannot be pinpointed, can establish a usual and accustomed place for fishing?
> A If we have *abundant* ethnographic reporting that this was what has been reported by peoples from all over the area, vis-à-vis people from other groups, then I can rely on that as hard evidence.

ER 328-29. There is not *abundant* evidence but rather a dearth of such evidence here.

Immediately after argument in this matter, Judge Boldt ruled from the bench on certain U&A issues. Utilizing the Suquamish herring regulation map, Judge Boldt described the Suquamish U&A as follows:

> 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 269-70. Judge Boldt obviously did not intend to include the contested waters, which lie in Area 4, in his Order. *See* ER 65.

Judge Boldt's Order made a finding of fishing places in "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal." *Washington*, 459 F. Supp. at 1049.

The contested waters are not on the "western side" of Puget Sound. *See* ER 45. The mouth of the Snohomish River, Possession Sound, and Port Gardner Bay, are adjacent to the Tulalip Reservation, and they are of critical importance to the Tulalip Tribes and tribal fishers. ER 55-56. Entry of the Suquamish Tribe, which utilizes a large purse seiner to catch fish, into these waters would greatly

reduce the catch opportunities for Tulalip fishers—who use small gill net vessels.[5] *Id*. at 56.

Importantly, in "bays off the mouths of streams that were in the territory of particular people, the immediate estuary was considered to belong to the people in [the] river…." ER 267 (Dr. Lane distinguishing between marine areas held exclusively by one tribe and open marine waters where trolling was nonexclusive). Dr. Lane explained that there are "some qualifications on the absolutely shared access to marine areas…. [S]ome constricted channels, where there were perhaps rich resources that were heavily utilized by the local people, would not be open access areas or shared access areas to other people who might also be allowed to travel through." ER 342. On cross-examination, Mr. Solomon continued questioning Dr. Lane on the difference between open and constricted marine waters.

> Q Were there not parts where shared access in the Semiahmoo country was not permitted to tribes traveling by, through or near those waters, those marine waters?
>
> A No, I apparently am not making myself understood. I am trying to think of an analogy here. If you and I lived next-door to each other or at some distance, and we owned property or held title to property that goes to a certain distance and in front that is common thoroughfare, and there are flowers growing outside

[5] Purse seine vessels are larger, from 50 to 68 feet in length, and can make large harvests of fish in one "haul." A seine net is "pursed" or closed around a school of fish. Gill net vessels are much smaller, from 20 to 40 feet in length, and use gill nets strung out from floats to harvest fish.

> my property line, perhaps right outside my village, but right in front of my place, you don't come along and pick your flowers there. And in the same way with the fisheries. People didn't come and go and fish right in front of somebody else's place unless they were related or were on some kind of a visit or had been invited to come and do so, if you're speaking about the bay right in front of where the houses were.
>
> Q Yes, I was.
>
> * * *
>
> A In the normal way my understanding, my best understanding, is that at treaty times Lummi fishermen would not come and harvest herring from the spawning places in the inlets inside Suquamish territory …. They had herring places closer to their own place, where they lived. In the same way Suquamish would not go all the way over into Bellingham Bay in order to get the herring that were spawning right inside where the Lummi lived because they had their places.

Id. at 353-54. The mouth of the Snohomish River, Possession Sound, and Port Gardner Bay are constricted waters within the Tulalip Tribes' territory, and the evidence does not support Suquamish fisheries in these areas. *See* ER 45.

The Suquamish fishing regulations issued after Judge Boldt's April 1975 Order did not include any waters on the east side of Whidbey Island. *U.S. v. Washington*, CV 05-3, 2007 WL 30869, at *10 (W.D. Wash. Jan. 4, 2007); ER 240. Until approximately 2003, the Suquamish did not attempt to fish in the contested waters, which demonstrates, along with the post-Order 1975 fishing regulations, the Suquamish understanding that these waters were not included in their U&A. *See Washington*, 2007 WL 30869, at *10; ER 61; ER 55.

Beginning in 2003, however, the Suquamish aggressively sought to expand the scope of its fishing areas beyond its U&A in the contested area.[6] For example, on September 30, 2003, Suquamish issued Regulation 03-695, which purported to open crab harvesting for the first time in Washington Shellfish Management Areas 26A east, 24C, and 24D within Region 2 East. *See* ER 61-62; ER 96. Additionally, Suquamish attempted to exceed the scope of its U&A through issuance of Regulation 04-13S (March 29, 2004), Regulation 05-28S (April 5, 2005) (concerning shrimp in WDF Area 26A), and Regulation 05-57S (June 14, 2005) (concerning crab in Region 2 East). *See* ER 61-62; ER 96. Evidence filed by Suquamish in Subproceeding 14-1 demonstrates that it did not participate in shellfishing in these areas at treaty times.[7] *See* ER 96. The Tulalip Tribes have consistently objected to these expansive Regulations and other attempted openings by the Suquamish. ER 61.

V. SUMMARY OF ARGUMENT

This Court has interpreted U&A findings by Judge Boldt on four occasions. *See Muckleshoot I*, 141 F.3d 1355; *Muckleshoot II*, 234 F.3d 1099; *U.S. v.*

[6] Suquamish had already attempted to expand to waters on the east side of Puget Sound by claiming rights in Duwamish territory. *See infra* subsection C. This Court rejected those efforts. *U.S. v. Suquamish Indian Tribe*, 901 F.2d 772, 774 (9th Cir. 1990).

[7] These shellfish areas are shown on ER 47. Suquamish utilizes this map in its recent filing in Subproceeding 14-1. Dkt. #16-9 at 24 (Feb. 14, 2014).

Muckleshoot Indian Tribe (*Muckleshoot III*), 235 F.3d 429 (9th Cir. 2000); *Lummi Indian Tribe*, 235 F.3d 443. 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 also interpret the finding based on Judge Boldt's intent, and in order to determine that intent, the District Court must analyze the language of the finding and the record and proceedings before Judge Boldt at the time of the finding. *Id.* at 1359-60; *Muckleshoot II*, 234 F.3d at 1100-01; *Lummi*, 235 F.3d at 452. In addition, the Court may consider evidence that sheds light on the meaning of geographic terms at the time of the decision. *Muckleshoot I*, 141 F.3d at 1360; *Muckleshoot II*, 234 F.3d at 1100-01; *Lummi*, 235 F.3d at 452.

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.

Here, Judge Boldt did not intend to include the contested waters in the Suquamish U&A. The record does not support regular Suquamish fishing in the contested waters, particularly in the mouth of the Snohomish River, Possession Sound, or Port Gardner Bay. In the original *U.S. v. Washington* case, Judge Boldt made clear 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 explained 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; *Washington*, 626 F. Supp. at 1531 (Conclusions of Law 96-97). Here, there is no treaty time evidence of Suquamish fishing in the mouth of the Snohomish, Possession Sound, and Port Gardner Bay. One passing reference to occasional fishing in the mouth of the Snohomish by modern-day informants is insufficient to establish U&A.

Judge Boldt's ruling from the bench on the Suquamish U&A specifically designated herring areas 1 and 2 to describe Suquamish northern travel. ER 269-70. The contested waters do not lie in areas 1 or 2, which demonstrates that Judge Boldt did not intend to include the contested waters in the Suquamish U&A. *See* ER 65. Moreover, the Suquamish U&A does not include any geographic

descriptors indicating inclusion of the contested waters. *See* ER 269-70; *Washington*, 459 F. Supp. at 1049.

When this Court considered the Lummi Indian Tribe's U&A, it found that Judge Boldt relied on "the specific, rather than the general, evidence presented by Dr. Lane[.]" *Lummi Indian Tribe*, 235 F.3d at 451. Additionally, this Court held 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, because if he intended to include those waters, he would have used those specific terms as he did elsewhere in the decision, and he would not have limited the U&A "to '*Northern* Puget Sound.'" *Id.* at 451-52. Here, Judge Boldt did not include any reference to waters east of Whidbey Island in the Suquamish U&A, and he limited the U&A to waters within herring Areas 1 and 2[8] and waters "draining into the western side of this portion of Puget Sound and also Hood Canal." *Washington*, 459 F. Supp. at 1049.[9]

Just a few months after making the Suquamish U&A determination, Judge Boldt made the Tulalip Tribes' U&A finding, which specifically referenced the

[8] ER 269-70; *see also* ER 65.

[9] Judge Boldt made the Nooksack Indian Tribe's, the Lower Elwha Tribe's and the Swinomish Tribe's U&A determinations on the same day he made the Suquamish U&A finding. *Washington*, 459 F. Supp. at 1049. In contrast to the Suquamish finding, the Swinomish finding explicitly includes named, constricted waters—demonstrating that Judge Boldt knew how to designate specific and constricted waters and would have included the constricted waters east of Whidbey Island in the Suquamish U&A if that was his intent. *See id.*

contested waters. *Id.* at 1059. Thus, Judge Boldt plainly knew how to include the constricted, contested waters, and the absence of geographic descriptors indicating inclusion of waters east of Whidbey Island in the Suquamish U&A determination indicates an intent to exclude those waters.

In addition, Dr. Lane's report on the Tulalip Tribes details fishing in the contested waters and contains numerous places names in the area and a number of important village sites; the Suquamish report, however, merely mentions that modern-day informants believed the Tribe fished at the mouth of the Snohomish and that the Suquamish traveled to and fished at Whidbey Island. ER 127; ER 85-96.[10] There are no Suquamish place names near the contested waters. ER 70.

The mouth of the Snohomish River, Port Gardner Bay, and Possession Sound lie directly adjacent to the Tulalip Tribes' Reservation, and it would have been extremely uncharacteristic—even offensive—for other tribes to fish in these waters without an invitation. In 1977, Dr. Lane explained that "in the bays off the

[10] Dr. Lane has stated: "a. Any fishing in the mouths [sic] of the Snohomish River by Suquamish was likely the result of invitation from the Snohomish and/or intermarriage between Snohomish and Suquamish. b. If in fact the Suquamish harvested fall and winter salmon in the Snohomish River mouth, I am aware of no documentation that supports that they fished for other salmon nor for shellfish in the area. . . . d. The reference in my report (Exhibit USA 73) to fishing in the mouth of the Snohomish River was based on utterances of modern day informants and not treaty-time informants. None of the documentary records or treaty time statements supports [sic] the idea that the Suquamish fished in the Snohomish River area." ER 52.

mouths of streams that were in the territory of particular people, the immediate estuary was considered to belong to the people in [the] river…." ER 267. In 1983, Dr. Lane confirmed this concept by stating that "[c]onstricted marine waters like Deception Pass, Swinomish Slough, and Holmes Harbor, for example, were likely controlled by the resident groups in whose territories those waters were located." ER 260-61. The mouth of the Snohomish River, Possession Sound, and Port Gardner Bay are similarly constricted waters. *See* ER 45.

Furthermore, when another expert, Dr. Jay Miller, was questioned on Suquamish fishing in the Duwamish and Snohomish Rivers, he responded that only "[t]hose Suquamish who were married into Duwamish communities, especially the community at Herring House[,] went into the Duwamish River." ER 265. This type of invitation based on marriage was one of the purposes of exogamy (marriage out of the group), and it explains why certain Suquamish fishers would have been able to fish in the contested waters. *See* ER 263. In 1985, the Suquamish Tribe attempted to show they were a successor in interest of the Duwamish Tribe and therefore inherited Duwamish fishing sites, but this Court held that the Suquamish was not a successor in interest and did not fish in Duwamish U&A areas. *See Suquamish Indian Tribe*, 901 F.2d at 774, 777-78. The Suquamish now attempt to expand their U&A into the Tulalip Tribes' front

yard, and like the attempted expansions into Duwamish territory and other tribes' territories, the evidence does not support this Suquamish expansion attempt.[11]

VI. STANDARD OF REVIEW

This Court reviews orders on summary judgment *de novo*. *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir. 2007); *Muckleshoot I*, 141 F.3d at 1357. Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court is to consider the pleadings, declarations, and exhibits to the motion. Fed.R.Civ.P. 56(c). While facts are viewed in the light most favorable to the non-moving party, the "mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for…" that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986).

VII. ARGUMENT

A. This Court Has Established the Law Governing the Interpretation of U&A Findings.

Signatory tribes to the Stevens treaties reserved the "right to harvest anadromous fish at all usual and accustomed places outside reservation

[11] Analysis of the Suquamish fishing regulations issued in 1975 demonstrate the Suquamish understanding that its U&A did not include the contested waters. *See Washington*, 2007 WL 30869, at *10; ER 240.

boundaries[.]" *Washington*, 384 F. Supp. at 406. The Suquamish and the Tulalip Tribes have secured fishing rights from the Treaty of Point Elliott, 12 Stat. 927 (1855). *Washington*, 459 F. Supp. at 1049, 1059. Judge Boldt, who presided over *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. Additionally U&As do not include areas where fishing was "occasional or incidental." *Id.* at 356.

Fishing during "occasional or incidental" travel did not create U&As. *See id.* 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 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).[12]

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). That is, this Court "did not freeze the record." *Id.* 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.

[12] District Judge Walter E. Craig presided over *U.S. v. Washington* after Judge Boldt's retirement.

B. The Record Clarifies Judge Boldt's Intent.

Judge Boldt's intent related to the geographic scope of the Suquamish U&A is clear—the mouth of the Snohomish River, Port Gardner Bay and Possession Sound are not included in that U&A. The District Court wrongfully rejected the Tulalip Tribes' argument that the Suquamish U&A is limited to the western waters of Puget Sound. The District Court also erred by inferring inclusion of the contested waters in the Suquamish U&A when the evidence supports exclusion of those waters.

1. Judge Boldt's U&A Finding Specifically Related to Waters Described by Herring Areas 1 and 2 and Limited the Suquamish U&A to Western Waters.

Dr. Lane testified before Judge Boldt on April 9, 1975 regarding the Suquamish U&A. ER 271. Mr. Solomon, Washington State's attorney, cross-examined Dr. Lane during that proceeding, and Dr. Lane clarified the extent of the Suquamish U&A by utilizing the map attached to the Suquamish 1975 herring regulations:

> Q Is it your opinion that the Suquamish Tribe—are you familiar with the regulation that's been filed by the Suquamish Indian Tribe?
> A No.
> Q This is on file with the Court, or I assume it is. And looking at their map attached here, what has been described as Area Number 2, is this the area, roughly speaking, that Mr. Stay has asked you about, the Strait of Juan de Fuca, Haro Strait and whatnot?

> A I think he has asked me about what is labeled 1 and 2 on that map.
> Q Both areas 1 and 2. That's what your comments pertain to?
> A Well, I am speaking about the San Juan Island area, what is marked Number 1 there, and then 2.
> * * *
> Q Now, your report on the Suquamish notes that they traveled from their regular area up north as far as the Fraser River, which would cover areas 1 and 2 on this.
> A Part of Area 1.
> Q Part of Area 1, and 2.

ER 326-27. The map plainly shows that the contested waters are not included in Areas 1 or 2 but rather Area 4. *See* ER 65.

After hearing this testimony, Judge Boldt ruled from the bench on April 10, 1975 regarding certain U&A issues. Referring to the same Suquamish herring regulation map Dr. Lane used, Judge Boldt described the Suquamish U&A as follows:

> 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 269-70 (emphasis added). Judge Boldt did not intend to include the contested waters, which lie in Area 4, in the Suquamish U&A. *See* ER 65.

Judge Boldt's written Order made a showing of fishing places in "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the *western side of*

this portion of Puget Sound and also Hood Canal." *Washington*, 459 F. Supp. at 1049 (emphasis added). This Order is consistent with Judge Boldt's ruling from the bench; it includes only waters west of the contested waters by its plain language. It would be contrary to the evidence to infer an intent to find a broader U&A in the written Order than the oral ruling on which that Order is based.

In addition, Judge Boldt's written Order limits the Suquamish U&A to "the streams draining into the *western side of this portion of Puget Sound* and also Hood Canal." *Id.* Here, the District Court erred in assuming the Tulalip Tribes' request to halt the Suquamish from impermissibly expanding its fishing area to the east side of Puget Sound relied only on this Circuit's decision that the Suquamish U&A does not include fresh water lakes and rivers east of Puget Sound in Subproceeding 85-1. *See* ER 15-16. On the contrary, the Tulalip Tribes seek to halt the Suquamish from expanding into waters on the eastern side of Puget Sound, because, *inter alia*, Judge Boldt excluded those waters from the Suquamish U&A by limiting the U&A to western waters. *See Washington*, 459 F. Supp. at 1049.

2. The Suquamish U&A Lacks Geographic Descriptors Indicating Inclusion of the Contested Waters.

The descriptors included in Judge Boldt's Order on the Suquamish U&A are Vashon Island, the Fraser River, Haro and Rosario Straits, Hood Canal, and streams draining into the western side of Puget Sound. *Washington*, 459 F. Supp. at 1049. Noticeably absent from this list are any of the contested waters. The

contested waters are isolated, distinct geographic features east of the areas mentioned in the Suquamish U&A. *See* ER 45.

Judge Boldt knew how to use geographic descriptors to include particular waters when that was his intent. This Court considered the Lummi Indian Tribe's U&A, and 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 Indian Tribe*, 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.* Moreover, Judge Boldt relied on "the specific, rather than the general, evidence presented by Dr. Lane" in making U&A determinations. *Id.* at 451.

Here, Judge Boldt did not include any reference to waters east of Whidbey Island in the Suquamish U&A, and he limited the U&A to waters within herring Areas 1 and 2[13] and waters "draining into the western side of this portion of Puget Sound and also Hood Canal." *Washington*, 459 F. Supp. at 1049.[14] Only a few

[13] ER 269-70; *see also* ER 65.

[14] In contrast to the Suquamish finding, the Swinomish finding, made the same day as the Suquamish U&A determination, includes named, constricted waters—demonstrating that Judge Boldt knew how to designate specific and

months later, Judge Boldt explicitly included the contested waters in the Tulalip U&A. *Id.* at 1059. The marine waters of the Tulalip U&A include:

> Beginning at Admiralty Head on Whidbey Island and proceeding south, those waters described as Admiralty Bay and Admiralty Inlet, then southeasterly to include the remainder of Admiralty Inlet including Mutiny and Useless Bay, then northeasterly to include Possession Sound and Port Gardner Bay, then northwesterly to include the waters of Port Susan up to a line drawn true west of Kyak Point and Holmes Harbor and Saratoga Passage up to a line drawn true west of Camano on Camano Island.

Id. at 1059.

The absence of any similar geographic descriptors indicating the inclusion of waters east of Whidbey Island in the Suquamish U&A demonstrates Judge Boldt's intent to exclude those waters. The geographic descriptors that are included in the Suquamish U&A do not touch any of the contested waters. *See* ER 45. As this Court has previously found in the appeal of Subproceeding 05-3:

> Judge Boldt used specific geographic anchor points in describing other tribes' U & As. *See, e.g., Decision I,* 384 F.Supp. at 360, 371 (Lummi and Puyallup U & As); *Decision II,* 459 F.Supp. at 1049 (Nooksack, Swinomish and Tulalip 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.

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constricted waters; Judge Boldt would have named the constricted waters east of Whidbey Island in the Suquamish U&A if he intended to include them. *See Washington*, 459 F. Supp. at 1049.

Upper Skagit Indian Tribe v. Washington, 590 F.3d 1020, 1025 (2010).

3. Dr. Lane's Reports Support Exclusion of the Contested Waters from the Suquamish U&A.

In making the Suquamish U&A determination, District Judge Martinez found that Judge Boldt considered Dr. Lane's report on the identity, treaty status, and fisheries of the Suquamish. *Washington*, 2007 WL 30869, at *11. That report begins by explaining the extent of the Suquamish territory:

> In 1855 the Suquamish held the west side of Puget Sound from near the mouth of Hood Canal south to Vashon Island. Their territory included the land around Port Madison, Liberty Bay, Port Orchard, Dye's Inlet, Sinclair Inlet and south to Olalla. It also included Bainbridge Island, Blake Island, and possibly also the west side of Whidbey Island. It is difficult at this time to establish the precise nature of Suquamish use of the west coast of Whidbey Island.

Dkt. #200-9; ER 75.

Thus, none of the contested waters were included, and Dr. Lane noted that there was only a "possible" use of the west side of Whidbey Island. Dr. Lane went on to explain that "there appears to be no clear evidence of Suquamish winter villages on the west side of Whidbey Island." ER 76. No evidence of Suquamish villages on the west side of Whidbey Island certainly counsels against inferring a Suquamish presence on the east side of Whidbey Island.

The Suquamish had no place names for any sites on the east side of Whidbey Island. *Id.* 98-113. In a related proceeding, the District Court found that Judge Boldt heavily relied on Dr. Lane's report, including the use of terms and

place names. *Washington*, 2007 WL 30869, at *11. Place names indicate familiarity with particular locations and are a pivotal piece of evidence as to whether a tribe regularly visited those locations. *See id.*; *U. S. v. Washington*, CV70-9213RSM, 2012 WL 4846239, at *10 (W.D. Wash. Oct. 11, 2012). The complete lack of Suquamish place names anywhere on the east side of Whidbey Island or the adjacent mainland indicates that the Suquamish did not regularly visit or fish in those areas. *See* ER 96. By contrast, Tulalip predecessors had numerous place names throughout Whidbey Island and the area east of Whidbey Island. *See* ER 163-67, 177-87.

Dr. Lane's Tulalip Tribes report explains that the Snohomish, a Tulalip Tribes predecessor, "harvested a wide variety of sea-mammals, non-anadromous fish, shellfish, and other species in the marine waters of Possession Sound and Puget Sound. Certain nearby areas on Whidbey and Camano islands were favorite resorts for clamming and fishing, as for example at Holmes Harbor, Useless Bay, and Cultus Bay." *Id.* at 157. Dr. Lane explicitly included the contested waters in the fishing places of the Tulalip Tribes; no such evidence exists for Suquamish fishing in the contested waters, and Judge Boldt had no such evidence before him.

The District Court's erroneous inclusion of the contested waters in the Suquamish U&A relied upon descriptions of the Suquamish repairing "to the mouth of the Duwamish and other large rivers to share in the harvest of fall salmon

runs." *See* ER 18 (quoting ER 86) (emphasis removed). The District Court also relied on Dr. Lane's opinion that:

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

See id. at ER 19 (quoting ER 89) (emphasis removed).[15] Lastly, the District Court relied upon Dr. Lane's statement that "[t]he Suquamish travelled to Whidbey Island to fish and undoubtedly used other marine areas as well." *See id.* (quoting ER 90) (emphasis removed). Vague descriptions about fishing in rivers on the east side of Puget Sound—with no mention of the Snohomish River—and at Whidbey Island and only modern day views of fishing in the mouth of the Snohomish fail to rise anywhere near the level required to establish U&A places. *See Washington*, 384 F. Supp. at 332.

In Subproceeding 05-3, the District Court properly held that the Suquamish U&A did not include waters east of Whidbey Island. *Washington*, 2007 WL 30869, at *9. Possession Sound, Port Gardner Bay, and the mouth of the Snohomish River are all waters east of Whidbey Island. *See* ER 45. The District

[15] George A. Paige was the Indian Agent in charge of the Suquamish Reservation in 1856. ER 86.

Court found that the Suquamish U&A did not include waters east of Whidbey Island, concluding that Dr. Lane's "one statement in her report that the Suquamish traveled 'to' Whidbey Island is insufficient to support a finding that they fished or traveled on the waters on the eastern side of Whidbey Island." *Washington*, 2007 WL 30869, at *9. The District Court erred here by reversing course and finding Dr. Lane's statement sufficient to include the contested waters in the Suquamish U&A.

It is possible – though not certain – that the Suquamish fished on the west side of Whidbey Island as they traveled north to the Fraser River, but there is simply no treaty-time evidence of Suquamish fishing in the contested waters on the east side of Whidbey Island. This Court has held that there "is no evidence in the record before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of Whidbey Island[.]…" *Upper Skagit Indian Tribe*, 590 F.3d at 1025 (appeal of Subproceeding 05-3). Again, "[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). The District Court erroneously inferred Suquamish fishing where there is no treaty-time evidence of Suquamish fishing.

4. <u>The Contested Waters Are Adjacent to the Home of the Tulalip Tribes and Cannot Constitute Suquamish U&A</u>.

The constricted waters of the mouth of the Snohomish River, Possession Sound, and Port Gardner Bay lie directly adjacent to the Tulalip Tribes' Reservation. *See* ER 45 (Salmon Area 8D constitutes the mouth of Tulalip Bay entrance to the Reservation). Dr. Lane has explained that "in the bays off the mouths of streams that were in the territory of particular people, the immediate estuary was considered to belong to the people in [the] river…." ER 267. Moreover, there are "some qualifications on the absolutely shared access to marine areas…. [S]ome constricted channels, where there were perhaps rich resources that were heavily utilized by the local people, would not be open access areas or shared access areas to other people who might also be allowed to travel through." ER 342.

For example, the "Suquamish would not go all the way over into Bellingham Bay in order to get the herring that were spawning right inside where the Lummi lived because they had their own places." ER 354. Dr. Lane further confirmed this concept by stating that "[c]onstricted marine waters like Deception Pass, Swinomish Slough, and Holmes Harbor, for example, were likely controlled by the resident groups in whose territories those waters were located." ER 260-61. Judge Boldt utilized Dr. Lane's language when he found that constricted waters "were likely controlled by the resident groups in whose territories those waters were located." *Washington*, 626 F. Supp. at 1528 (Finding of Fact 364).

The contested waters, particularly the mouth of the Snohomish River, Possession Sound, and Port Gardner Bay, are of critical importance to the Tulalip Tribes and Tulalip fishers. ER 55-56. Suquamish entry into the front yard of the Tulalip Tribes not only offends history and tradition, it would "substantially reduce the salmon catch opportunities for Tulalip fishers" in their home territory, because the Suquamish Tribe uses a large purse seiner to catch fish, which means Tulalip gill net vessels could scarcely compete. *Id.* at 56. The mouth of the Snohomish River, Possession Sound, and Port Gardner Bay are constricted waters controlled by the Tulalip Tribes, and these waters could not be included in the Suquamish U&A. *See* ER 45.

C. The Suquamish Tribe Continues to Impermissibly Attempt to Expand Its Fishery.

Since the original Boldt decision, Suquamish attempted to expand its fishing areas on several occasions. For example, in 1985, the Suquamish filed a Request for Determination in Subproceeding 85-1 to expand their U&A into Lake Washington, Lake Union, Lake Sammamish, the Black and Cedar Rivers, and the lower White River. *See Suquamish Indian Tribe*, 901 F.2d at 774. The Suquamish claimed it was a successor in interest to the Duwamish Tribe, and was therefore entitled to exercise Duwamish fishing rights. *Id.* at 773. This Court held that the Suquamish was not a successor in interest to the Duwamish, and the Suquamish could not exercise Duwamish fishing rights. *Id.* at 778.

The record did not support a Suquamish U&A in the contested waters. When Dr. Jay Miller, an expert in these matters, was questioned on Suquamish fishing in the Duwamish and Snohomish Rivers, he explained that only "[t]hose Suquamish who were married into Duwamish communities, especially the community at Herring House[,] went into the Duwamish River." ER 265. Exogamy, or marriage out of the group, was a common practice amongst various tribes, and this type of invitation based on marriage was one of the purposes of exogamy. *See* ER 263. Exogamy explains why certain Suquamish fishers would have been able to fish in the contested waters, but there is no evidence of a Suquamish U&A in the contested waters.

After the Suquamish effort to fish in Duwamish waters failed, the Suquamish attempted to expand into waters east and north of its U&A. In 2005, the Upper Skagit Indian Tribe filed a Request for Determination in Subproceeding 05-3, and the Swinomish Tribe filed a cross-Request for Determination. *Washington*, 2007 WL 30869, at *1. The two Requests for Determination challenged Suquamish fishing expansion, which began in 2004, into waters east of Whidbey Island, particularly Saratoga Passage and Skagit Bay. *See id.*; *Upper Skagit Indian Tribe*, 590 F.3d at 1023.

This Court found that "[t]here is no evidence in the record before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of

Whidbey Island, particularly in Saratoga Passage or Skagit Bay." *Upper Skagit Indian Tribe*, 590 F.3d at 1025. As explained above, Judge Boldt delimited the Suquamish U&A by areas 1 and 2 as shown on the map at ER 65; this Court found that while "several areas on the west shores of Area Four comprised Suquamish's on-reservation territory and fishing locations, there was no evidence from [Dr.] Lane or otherwise that the east shores of Area Four, as well as Skagit Bay and Saratoga Passage, were part of Suquamish's U & A." *Id.* Again, this Court prevented the improper expansion of the Suquamish U&A by recognizing that the Suquamish U&A does not include waters east of Whidbey Island. *Id*.

Most recently, the Upper Skagit Indian Tribe filed a new Request for Determination in Subproceeding 14-1, because the Suquamish Tribe is attempting to expand their fishery into a portion of Padilla Bay, Samish Bay, and Chuckanut Bay. *See* ER 23. This new Subproceeding is yet another example of the Suquamish Tribe's many attempts to expand their U&A beyond the areas Judge Boldt intended to include.

D. Suquamish Historic Fishing Regulations Further Indicate That Its U&A Does Not Include the Contested Waters.

The Suquamish fishing regulations issued after Judge Boldt's April 1975 Order did not include any waters on the east side of Whidbey Island. *See Washington*, 2007 WL 30869, at *10; ER 240. For 32 years after the initial decision, the Suquamish did not attempt to fish for salmon in the contested waters

(*see* ER 55) – nor for shellfish until 2003 (*see* ER 61). Then suddenly in 2003, the Suquamish unilaterally began shell fishing attempts in the contested waters, despite the lack of any such treaty time fishing. *See* ER 55; ER 61; ER 96. The Suquamish post-Order 1975 fishing regulations and its lack of fishing in the contested waters until 2003 demonstrate that the Suquamish understood that its U&A does not include the contested waters. *See Washington*, 2007 WL 30869, at *10; ER 240; ER 55; ER 61.

VIII. CONCLUSION

Review of the record before Judge Boldt in April of 1975 demonstrates that he did not intend to include the contested waters, particularly the mouth of the Snohomish River, Possession Sound, and Port Gardner Bay, in the Suquamish U&A. The record and Judge Boldt's plain language indicate that waters east of Whidbey Island are not included in the Suquamish U&A, because there is insufficient evidence of Suquamish presence in the contested waters during treaty times, and Judge Boldt delimited the Suquamish U&A by areas 1 and 2 as shown on the map found at ER 65. The contested waters are in area 4 and not areas 1 or 2. *See* ER 65. The Suquamish must be prevented from expanding their fishery into the Tulalip Tribes' front yard. The Suquamish Tribe's fishing regulations issued after Judge Boldt's 1975 U&A determination and the Suquamish Tribe's lack of fishing in waters east of Whidbey Island until approximately 2003 - 2005

further indicate that it understood the contested waters to be beyond the reach of its U&A. For the foregoing reasons, the Tulalip Tribes request that this Court reverse the District Court's partial denial of the Tulalip Tribe's Motion for Summary Judgment and grant the Tulalip Tribe's Motion for Summary Judgment.

Respectfully submitted this 28th day of February, 2014.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ *Mason D. Morisset*

/s/ *Rebecca JCH Jackson*

Mason D. Morisset
Rebecca JCH Jackson
Attorneys for the Tulalip Tribes
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
Tel: 206-386-5200
m.morisset@msaj.com
r.jackson@msaj.com

IX. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 9,367 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Respectfully submitted this 28th day of February, 2014.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ *Mason D. Morisset*

STATEMENT OF RELATED CASES

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

U.S., et al., Plaintiffs, and Quileute Indian Tribe and Quinault Indian Nation, Respondents-Appellants, v. Washington, Defendant, and Makah Indian Tribe, Petitioner-Appellee, Ninth Circuit Appeal Nos. 13-35925 and 13-35928. These cases are 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. 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 28th day of February, 2014.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ Mason D. Morisset

ADDENDUM TO APPELLANT'S OPENING BRIEF

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28 U.S.C. § 1291

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
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§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; Pub. L. 85–508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 225(a), 933 (a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Jan. 28, 1915, ch. 22, § 2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, § 412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225 (a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225 (a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225 (a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371 (e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

Amendments

1982—Pub. L. 97–164, § 124, inserted "(other than the United States Court of Appeals for the Federal Circuit)" after "The court of appeals" and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

1958—Pub. L. 85–508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

Effective Date of 1982 Amendment

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

Effective Date of 1958 Amendment

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

28 U.S.C. § 1331

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 85 - DISTRICT COURTS; JURISDICTION

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, § 1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§ 30–43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in United States v. Sayward, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; Fishback v. Western Union Tel. Co., 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and Halt v. Indiana Manufacturing Co., 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41 (1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

Amendments

1980—Pub. L. 96–486 struck out "; amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of $10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations.

1976—Subsec. (a). Pub. L. 94–574 struck out $10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958—Pub. L. 85–554 included costs in section catchline, designated existing provisions as subsec. (a), substituted "$10,000" for "$3,000", and added subsec. (b).

Effective Date of 1980 Amendment; Applicability

Section 4 of Pub. L. 96–486 provided: "This Act [amending this section and section 2072 of Title 15, Commerce and Trade, and enacting provisions set out as a note under section 1 of this title] shall apply to any civil action pending on the date of enactment of this Act [Dec. 1, 1980]."

Effective Date of 1958 Amendment

Section 3 of Pub. L. 85–554 provided that: "This Act [amending this section and sections 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

28 U.S.C. § 1345

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 85 - DISTRICT COURTS; JURISDICTION

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41 (1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words "civil actions, suits or proceedings" were substituted for "suits of a civil nature, at common law or in equity" in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase "Except as otherwise provided by Act of Congress," at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

28 U.S.C. § 1362

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 85 - DISTRICT COURTS; JURISDICTION

§ 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

(Added Pub. L. 89–635, § 1, Oct. 10, 1966, 80 Stat. 880.)

Federal Rule of Civil Procedure 56(c)

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions I to VI are contained in this document. For Notes of Decisions for subdivisions VII through XXV, see the second document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions XXVI to end, see the third document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 28, 2010, effective December 1, 2010.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

1946 Amendment

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco,* N.D.Cal.1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents

unnecessary delay. See *United States v. Adler's Creamery, Inc.*, C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.*, 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 1945, 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.*, C.C.A.7, 1942, 130 F.2d 535; *Biggins v. Oltmer Iron Works*, C.C.A.7, 1946, 154 F.2d 214; 3 *Moore's Federal Practice*, 1938, 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.*, supra. See also *Audi Vision Inc. v. RCA Mfg. Co.*, C.C.A.2, 1943, 136 F.2d 621; *Toomey v. Toomey*, 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; *Biggins v. Oltmer Iron Works*, supra; *Catlin v. United States*, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 Amendment

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice & Procedure* 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.*, 191 F.Supp. 383 (D.Del.1961); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D.Pa.1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa.1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa.1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of

granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment--that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

2009 Amendments

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages--including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

2010 Amendments

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word--genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions--"must" or "should"--is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)"), with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record--including materials referred to in an affidavit or declaration--must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Notes of Decisions (1603)

Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., FRCP Rule 56
Amendments received to 12-1-13

End of Document

Federal Rule of Appellate Procedure 26.1

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 26.1, 28 U.S.C.A.

Rule 26.1. Corporate Disclosure Statement

Currentness

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

CREDIT(S)

(Added Apr. 25, 1989, eff. Dec. 1, 1989; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

ADVISORY COMMITTEE NOTES

1989 Addition

The purpose of this rule is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal. The committee believes that this rule represents minimum disclosure requirements. If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits.

1994 Amendment

The amendment requires a party to file three copies of the disclosure statement whenever the statement is filed before the party's principle brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a different number of copies by local rule or by order in a particular case.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to by stylistic only; a substantive change is made, however, in subdivision (a).

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement.

2002 Amendments

Subdivision (a). Rule 26.1(a) requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement--that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation--inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Changes Made After Publication and Comments The Committee is submitting two versions of proposed Rule 26.1 for the consideration of the Standing Committee.

The first version--"Alternative One"--is the same as the version that was published, except that the rule has been amended to refer to "any information that may be *publicly designated* by the Judicial Conference" instead of to "any information that may be *required* by the Judicial Conference." At its April meeting, the Committee gave unconditional approval to all of "Alternative One," except the Judicial Conference provisions. The Committee conditioned its approval of the Judicial Conference provisions on the Standing Committee's assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the Rules Enabling Act.

The second version--"Alternative Two"--is the same as the version that was published, except that the Judicial Conference provisions have been eliminated. The Civil Rules Committee met several days after the Appellate Rules Committee and joined the Bankruptcy Rules Committee in disapproving the Judicial Conference provisions. Given the decreasing likelihood that the Judicial Conference provisions will be approved by the Standing Committee, I asked Prof. Schiltz to draft, and the Appellate Rules Committee to approve, a version of Rule 26.1 that omitted those provisions. "Alternative Two" was circulated to and approved by the Committee in late April.

I should note that, at its April meeting, the Appellate Rules Committee discussed the financial disclosure provision that was approved by the Bankruptcy Rules Committee. That provision defines the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees, which are based on existing Rule 26.1. For example, the bankruptcy provision requires disclosure when a party "directly or indirectly" owns 10 percent or more of "any class" of a publicly *or* privately held corporation's "equity interests." Members of the Appellate Rules Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity.

F. R. A. P. Rule 26.1, 28 U.S.C.A., FRAP Rule 26.1
Amendments received to 12-1-13

End of Document

Federal Rule of Appellate Procedure 32(a)

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 32, 28 U.S.C.A.

Rule 32. Form of Briefs, Appendices, and Other Papers

Currentness

(a) Form of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10 ½ characters per inch.

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) Motion. The form of a motion is governed by Rule 27(d).

(2) Other Papers. Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

CREDIT(S)

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Only two methods of printing are now generally recognized by the circuits--standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

1998 Amendments

In addition to amending Rule 32 to conform to uniform drafting standards, several substantive amendments are made. The Advisory Committee had been working on substantive amendments to Rule 32 for some time prior to completion of this larger project.

Subdivision (a). Form of a Brief.

Paragraph (a)(1). Reproduction.

The rule permits the use of "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable. The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses head or dye to transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.

The rule requires that the number of the case be centered at the top of the front cover of a brief. This will aid in identification of the brief. The idea was drawn from a local rule. The rule also requires that the title of the brief identify the party or parties on whose behalf the brief is filed. When there are multiple appellants or appellees, the information is necessary to the court. If, however, the brief is filed on behalf of all appellants or appellees, it may so indicate. Further, it may be possible to identify

the class of parties on whose behalf the brief is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Paragraph (a)(3). Binding.

The rule requires a brief to be bound in any manner that is secure, does not obscure the text, and that permits the brief to lie reasonable flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. One circuit already has such a requirement and another states a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Stapling a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.

The provisions for pamphlet-size briefs are deleted because their use is so rare. If a circuit wishes to authorize their use, it has authority to do so under subdivision (d) of this rule.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are new. The existing rule simply states that a brief produced by the standard typographic process must be printed in at least 11 point type, or if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the briefs are easily legible.

With regard to typeface there are two options; proportionally-spaced typeface or monospaced typeface.

A proportionally-spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "M" is given more horizontal space than a lower case "i". The rule requires that a proportionally-spaced typeface have serifs. Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

Y Y *

[* For original representation of characters, see House Document 105-269 of the 105th Congress, 2d Session dated May 11, 1998 entitled "Amendments to the Federal Rules of Appellate Procedure .... (Executive Communication No. 9072)."]

So that the type is easily legible, the rule requires a minimum type size of 14 points for proportionally-spaced typeface.

A monospaced typeface is one in which all characters have the same advance width. That means that each character is given the same horizontal space on the line. A wide letter such as a capital "M" and a narrow letter such as a lower case "i" are given the same space. Most typewriters produce mono-spaced type, and most computers also can do so using fonts with names such as "Courier."

This sentence is in a proportionally spaced font; as you can see, the m and i have different widths. *

[* For original representation of characters, see House Document 105-269 of the 105th Congress, 2d Session dated May 11, 1998 entitled "Amendments to the Federal Rules of Appellate Procedure .... (Executive Communication No. 9072)."]

This sentence is in a monospaced font; as you can see, the m and i have the same width. *

[* For original representation of characters, see House Document 105-269 of the 105th Congress, 2d Session dated May 11, 1998 entitled "Amendments to the Federal Rules of Appellate Procedure .... (Executive Communication No. 9072)."]

The rule requires use of a monospaced typeface that produces no more than 10 ½ characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10 ½ cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

Paragraph (a)(6). Type Styles.

The rule requires use of plain roman, that is not italic or script, type. Italics and boldface may be used for emphasis. Italicizing case names is preferred but underlining may be used.

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50-page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words or lines. That is, the length of a brief is determined not by the number of pages but by the number or words or lines in the brief. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page.

The word counting method can be used with any typeface.

A monospaced brief can meet the volume limitation by using the word or a line count. If the line counting method is used, the number of lines may not exceed 1,300--26 lines per page in a 50-page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or line count of the word-processing system used to prepare the brief.

Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words "[e]xcept by permission of the court," signaling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.

Subdivision (b). Form of an Appendix.

The provisions governing the form of a brief generally apply to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subdivision (c). Form of Other Papers.

The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(7) do not apply to those documents and a cover is not required if all the formation needed by the court to properly identify the document and the parties is included in the caption or signature page.

Existing subdivision (b) states that other papers may be produced in like manner, or "they may be typewritten upon opaque, unglazed paper 8 ½ by 11 inches in size." The quoted language is deleted but that method of preparing documents is not eliminated because (a)(5)(b) permits use of standard pica type. The only change is that the new rule now specifies margins for typewritten documents.

Subdivision (d). Local Variation.

A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize noncompliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rules may not, however, impose requirements that are not in the national rule.

2002 Amendments

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed--or adequately addressed--in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.,* 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

2005 Amendments

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Notes of Decisions (6)

F. R. A. P. Rule 32, 28 U.S.C.A., FRAP Rule 32
Amendments received to 12-1-13

End of Document

Ninth Circuit Rule 28-2.7

28-2.6. Statement of Related Cases

Each party shall identify in a statement on the last page of its initial brief any known related case pending in this Court. As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. Cases are deemed related if they:

(a) arise out of the same or consolidated cases in the district court or agency;

(b) are cases previously heard in this Court which concern the case being briefed;

(c) raise the same or closely related issues; or

(d) involve the same transaction or event.

If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

28-2.7. Addendum to Briefs

Statutory. Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review or (2) in an addendum introduced by a table of contents and bound with the brief or separately; in the latter case, a statement must appear referencing the addendum after the statement of issues. If this material is included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: [e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____. *(Rev. 12/1/09)*

Orders Challenged in Immigration Cases. All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be bound with the brief but separated from the brief by a distinctively colored page. *(New 7/1/07; Rev. 12/1/09)*

28-2.8. Record References

Every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found. *(Rev. 7/1/98; 12/1/09)*

28-2.9. Bankruptcy Appeals *[Abrogated 12/1/09]*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-2

Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references. See Mitchel v. General Elec. Co., 689 F.2d 877 (9th Cir. 1982).

U.S. v. Washington, CV 05-3, 2007 WL 30869 (W.D. Wash. Jan. 4, 2007)

2007 WL 30869
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

UNITED STATES of America, et al., Plaintiffs,
v.
STATE OF WASHINGTON, et al., Defendants.

No. CV 9213. | Jan. 4, 2007.

Opinion

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

ARICARDO S. MARTINEZ, United States District Judge.

*1 This subproceeding was initiated as a Request for Determination ("Request") filed by the Upper Skagit Indian Tribe ("Upper Skagit"), asking the Court to determine that certain areas known as Saratoga Passage and Skagit Bay, on the eastern side of Whidbey Island, are not within the usual and accustomed fishing area ("U & A") of the Suquamish Indian Tribe ("Suquamish") as it was defined in *U.S. v. Washington,* 459 F.Supp. 1020 (1978). A Cross-Request for Determination was filed, with leave of Court, by the Swinomish Indian Tribal Community ("Swinomish"), essentially joining in the Request of the Upper Skagit. [1] The Suquamish filed an Answer opposing both Requests. The matter is now before the Court for consideration of summary judgment motions filed by the three parties. Oral argument was heard on December 12, 2006, and the arguments and memoranda of the parties, and other Tribes who appeared as interested parties, have been fully considered. As the three motions argue the same points and issues, they shall be discussed together.

BACKGROUND

In 1975, in the language that lies at the heart of this dispute, U.S. District Court Judge George Boldt described the U & A of the Suquamish as

> the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

Finding of Fact # 5 ("FF 5"), *U.S. v. Washington,* 459 F.Supp. 1020, 1049 (1978). The Upper Skagit and Swinomish assert in their separate Requests for Determination that this language is ambiguous as to certain waters lying on the eastern side of Whidbey Island, known as Saratoga Passage and Skagit Bay. They ask for a determination that the Suquamish U & A does not include these areas. The Suquamish, in answering the Request, contend that this language is not ambiguous, and that it unambiguously includes the contested areas.

The Court has ruled previously that there is sufficient ambiguity surrounding Judge Boldt's use of the term "Puget Sound" in describing the Suquamish U & A to require clarification, thus allowing this subproceeeding to go forward. Dkt. # 43, pp 2-3; Dkt. # 71, n. 2. In a later Order, the Court set out a two-step procedure for reaching an understanding of Judge Boldt's intent. Referring to prior decisions of the Ninth Circuit Court of Appeals known as *Muckleshoot I (Muckleshoot Indian Tribe, et al, v. Lummi Indian Tribe,* 141 F.3d 1355 (9th Cir.1998)), *Muckleshoot II (Muckleshoot Indian Tribe v. Lummi Indian Nation,* 234 F.3d 1099 (9th Cir.2000)), and *Muckleshoot III (Puyallup Indian Tribe, et al ., v. Muckleshoot Indian Tribe,* 235 F.3d 429 (9th Cir.2000)), the Court stated,

> These rulings inform this Court's decision on the motion to compel, as they define the scope of discovery in this matter. The burden in this subproceeding is on the requesting parties-the Upper Skagit and the Swinomish Tribal Community-to offer evidence that FF 5 is ambiguous, or that Judge Boldt "intended something other than its apparent meaning." *Id.* [citing to *Muckleshoot I,* 141 F.3d at 1359.] Since the apparent meaning of the phrase "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits ...." is in dispute here, it must be determined by the Court. **The relevant evidence on this issue is evidence which indicates the contemporary understanding of the extent of "the marine waters of Puget Sound ...", which will "shed light on the understanding that Judge Boldt had of the geography at the time."** *Muckleshoot I,* 141 F.3d at 1360; *Muckleshoot II,* 234 F.3d at 1100. This may be provided by supplementation of the record, at the appropriate time, with declarations of geography experts. *Id.* Such evidence may be offered by the parties to "enable the district

court to interpret the decree in specific geographic terms." *Muckleshoot I,* 141 F.3d at 1360.

***2** Should the evidence show that the common understanding of the term "Puget Sound" in 1974 included Saratoga Passage and Skagit Bay, the Upper Skagit or Swinomish Tribe must produce evidence that suggests that Judge Boldt intended something other than this apparent meaning when he wrote FF 5. *Muckleshoot I,* 141 F.3d at 1359. **The evidence that is relevant to Judge Boldt's intent comprises "the entire record before the issuing court and the findings of fact [which] may be referenced in determining what was decided."** *Muckleshoot I,* 141 F.3d at 1359.

Dkt. # 71 (emphasis added).

ANALYSIS

A. *Ambiguity and Apparent Meaning*

The first step, as set forth above, is to determine whether Judge Boldt's language is actually ambiguous. The Skagit and Swinomish assert that it is; the Suquamish contend that it is not. The Skagit and Swinomish counter that Suquamish should be estopped from asserting unambiguity, because they have in the past, in other subproceedings, argued that the term **is** ambiguous.

As the Court has stated previously, it is not the meaning of "Puget Sound" that is at issue here, but rather its use by Judge Boldt in describing that portion of Puget Sound that constitutes the Suquamish U & A. That is, the term must be viewed in context: "the marine waters of Puget Sound from the tip of Vashon Island to the mouth of the Fraser River."

Black's Dictionary defines "ambiguity" as:

> Doubtfulness; doubleness of meaning. Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument. Want of clearness or definiteness; difficult to comprehend or distinguish; of doubtful import.
>
> ....
>
> Ambiguity of language is to be distinguished from unintelligibility and inaccuracy, for words cannot be said to be ambiguous unless their signification seems doubtful and uncertain to persons of competent skill and knowledge to understand them
>
> It is *latent* where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings, as where a description apparently plain and unambiguous is shown to fit different pieces of property. A *patent* ambiguity is that which appears on the face of the instrument, and arises from the defective, obscure, or insensible language used.

Black's Law Dictionary, 5th ed., abridged, p. 41.

The Upper Skagit and Swinomish assert that the Court has already determined that Judge Boldt's language in describing the Suquamish U & A is ambiguous, and that such determination is the law of the case. However, the Court's previous ruling was not that the language was ambiguous, but rather that there was sufficient ambiguity "surrounding" Judge Boldt's language to justify clarification. While a latent ambiguity may have arisen later from various judges' and parties' imprecise use or differing understanding of the term "Puget Sound", it is the possible ambiguity in Judge Boldt's use of the term in 1975 that is at issue here.

***3** In support of their contention that the language is not ambiguous, the Suquamish point to various places in the record where "Puget Sound" was actually defined by the Court. Specifically, Judge Boldt expressly adopted the definition of Puget Sound set forth in the "Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsula Drainage Area of Western Washington", Exhibit JX-2a from the original *U.S. v. Washington* proceedings. That definition states: "As used in this report (except where the context clearly indicates otherwise) the term 'Puget Sound' includes the Strait of Juan de Fuca and **all saltwater areas inland therefrom,** ..." Ex. JX-2a, p. i. (emphasis added). Judge Boldt expressly adopted this definition in his Findings of Fact in *Washington I.* Referring to the facts set forth in the report, he stated, "The contents of said report are hereby incorporated by reference as Findings of Fact herein." *Washington I,* 384 F.Supp. 312, 338 (W.D.Wash.1974). This became Finding of Fact 164. *Id.* The contents of the report necessarily include the definitions.

The Skagit and Swinomish attempt to minimize the significance of this report by characterizing it as simply a fisheries management tool. However, this case arose out of fisheries management in Washington State, and tribal

participation therein. Judge Boldt's understanding and use of the term "Puget Sound" would necessarily have been shaped by the fisheries reports and regulations that were under discussion at that time. It was therefore reasonable for the Court to consider and adopt the terminology used in fisheries management in discussing the case area.

This was not Judge Boldt's only reference to Puget Sound as a broad area encompassing all the saltwater areas inward from the entrance to the Strait of Juan de Fuca. This same broad definition was used on defining the case area in Conclusion of Law # 7:

> This case is limited to the claimed treaty-secured off-reservation fishing rights of the Plaintiff tribes as they apply to areas of the Western District of Washington within the watershed of Puget Sound and the Olympic Peninsula north of Grays Harbor, and in the adjacent offshore waters which are within the jurisdiction of the State of Washington.

U.S. v. Washington, 384 F.Supp. at 400. This language is taken verbatim from ¶ 5 of the Final Pretrial Order ("PTO"), Dkt. # 353, p. 5. This PTO was signed by all the parties to the case at that time, including the Upper Skagit, and approved by Judge Boldt

The parties' and the Court's common understanding of the extent of Puget Sound is indicated once again later in the PTO:

> Each of the Plaintiff tribes has usual and accustomed fishing places within the area described in paragraph 5 *supra,* including, among others, the waters of Puget Sound, Strait of Juan de Fuca, off-shore marine waters, the Nisqually River, the Puyallup River and Commencement Bay, the White River, the Green-Duwamish River, Lake Washington, Cedar River, Stillaguamish River, Sauk River, Skagit River, the Nooksack River, the waters of Hood Canal and the rivers flowing into said Canal, the Hoko River, the Quilayute River and its tributaries, and the Hoh River.

*4 Final Pretrial Order ¶ 7-14, Dkt. # 353, p. 122. In designating only the Strait of Juan de Fuca and Hood Canal as separate areas, this language necessarily subsumes the other bays and inlets, including the areas at issue here, into Puget Sound, as the term was used in this case. [2]

The Court notes that the very maps used by the parties, admitted as exhibits by the Court on April 10, 1975 in the herring fisheries proceedings, also indicate a very broad region as Puget Sound. The maps themselves are National Oceanic and Atmospheric Administration ("NOAA") nautical maps with separate designations for each bay and inlet. Exhibit JX-3, JX-4. However, written by the parties in large letters on each map are the designations "Central and Southern Puget Sound" (Exhibit JX-3) and "Northern Puget Sound" (Exhibit JX-4). Thus, the map labeled by NOAA as "Strait of Georgia and Strait of Juan de Fuca" is designated by the parties as Northern Puget Sound. Exhibit JX-4. Similarly, the map labeled by NOAA as depicting "Admiralty Inlet and Puget Sound" is designated by the parties as Central and Southern Puget Sound. These handwritten designations on these maps are specific to this case, and indicate that the terms used and understood by the parties and the Court in the April, 1975 proceedings were Southern, Central, and Northern Puget Sound, rather than the NOAA designation of separate bays and inlets. The handwritten labels on these maps are thus highly significant to an understanding of Judge Bolt's use of the term "Puget Sound" during the 1975 proceedings.

These definitions, maps, and references support the conclusion that in 1975 the parties and the Court had a common understanding of Puget Sound as the case area, encompassing all the saltwater areas inward from the mouth of the Strait of Juan de Fuca. Indeed, Judge Boldt so stated in September 1975, five months after the ruling at issue here, in addressing the coho salmon fishery:

> As used in this Order the term "Puget Sound", when referring to the waters of origin or the place of salmon harvest, includes all the marine waters of Washington inland from the mouth of the Strait of Juan de Fuca (Tatoosh Island) together with the freshwater streams and lakes draining into such marine waters.

Order dated September 13, 1975, Dkt. # 1381. The Skagit and Swinomish assert that the language in this Order may not be considered, because the Court has limited the evidence under consideration in this subproceeding to that which was before the Court in April of 1975. However, this cited Order is not "evidence" within the meaning of that limiting rule, and it may therefore be considered as yet another indication of Judge Boldt's understanding, in 1975, of the extent of Puget Sound for the purposes of this case. As noted, in every instance in 1975 where Judge Boldt did state a definition for Puget Sound, it is a broad one which necessarily includes both Saratoga Passage and Skagit Bay.

***5** Indeed, that conclusion is the only logical one, in light of Judge Boldt's description, in the very paragraph following the Suquamish U & A description, of the U & A of the Swinomish:

> The usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress, and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island.

Finding of Fact # 6, *U.S. v. Washington,* 459 F.Supp. at 1049. This description, issued the same day and in the same Order as the Suquamish U & A, necessarily includes Skagit Bay and Saratoga Passage as within the "marine waters of northern Puget Sound", and within the U & A of the Swinomish.

Earlier, the Court invited the parties, pursuant to direction given in *Muckleshoot I,* to supplement the record, if appropriate, with declarations of geography experts in order to aid the Court in interpreting the language of the Suquamish U & A in specific geographic terms. Dkt. # 71, citing *Muckleshoot I,* 141 F.3d at 1360. In light of the definitions in the record itself, and the maps known to be used by the Court as cited above, the Court now deems it unnecessary and inappropriate to turn to extrinsic evidence in order to fathom Judge Boldt's meaning. This is particularly so in view of the lack of any evidence that Judge Boldt consulted a geography expert for definitions of the geographical terms he used; instead it appears that the terms were defined by the fisheries consultants.

Even if the Court were to consider the extrinsic evidence offered, and could find it relevant to Judge Boldt's understanding, it would find that the experts' opinions here are not based upon sufficient facts and data, and do not adequately reflect the application of scientific methods to the facts of this case. F.R.Evid. 702. The Upper Skagit and Swinomish experts Richard Hart and Theresa Trebon (both of whom are historians, not geography experts) examined historical maps, journals, dictionaries, atlases, and other sources. They both noted that the meaning of "Puget Sound" has changed over the years, from the original naming by Captain George Vancouver of the area at the southernmost end of the waterway. They both advanced the opinion that in 1975, as indicated on contemporary maps and charts, the term was generally used to describe the waters from the southern end up to (but not including) Admiralty Inlet. This opinion is clearly incompatible with Judge Boldt's own language in describing the Suquamish and Swinomish U & A's, which viewed Puget Sound as extending all the way north to the mouth of the Fraser River. The historians' opinions must therefore be disregarded as useless in shedding light on Judge Boldt's understanding of the extent of Puget Sound.

Moreover, it appears that neither historian consulted the official United States Geological Survey ("USGS") definition of Puget Sound, which would have been a highly reliable source to consult, and more precise than maps.[3] The Suquamish earlier asked the Court to take judicial notice of this official USGS definition of Puget Sound:

> ***6** Bay, with numerous channels and branches, [which] extends 144 km S from the Strait of Juan de Fuca to Olympia; the N boundary is formed, at its main entrance, by a line between Point Wilson on the Olympic Peninsula and Partridge on Whidbey Island; at a second entrance, by a line between West Point on Whidbey Island, Deception Island, and Rosario Head on Fidalgo Island; at a third entrance, the S end of Swinomish Channel between Fidalgo Island and McGlinn Island.
> U.S. Department of the Interior, *USGS Geographic Names Information System,* quoted at Dkt. # 6, p. 12. This "official" USGS definition of Puget Sound includes Saratoga Passage and Skagit Bay, which lie just south of the second-and third-named entrances. However, it appears that this definition was adopted in 1979, and no copy of

> the earlier version, adopted in 1961, has been presented to the Court. Therefore, the Court cites this definition here only as a basis for disregarding the experts' opinions as insufficiently grounded in facts and data.

Similarly, it appears that neither historian consulted the Washington Administrative Code, which in 1975 codified many of the tribal fishing regulations, area by area, and could have shed some meaningful light on the question. Washington Administrative Code ("WAC") 220-47-001 *et seq.* Indeed, the Exhibit JX-2a definition, adopted by Judge Boldt, mirrored the definition stated in these regulations:

> The term "Puget Sound" shall be construed to include all the waters of Puget Sound outside the mouth of any river or stream including the Strait of Juan de Fuca, Georgia Strait, and all bays and inlets thereof.

WAC 220-16-210 (adopted 1969). Copies of certain regulations, namely WAC 220-47-206 through 220-47-268, defining the boundaries of various Puget Sound fishing areas, were provided to the Court by the Upper Skagit, in support of their motion. Declaration of David Hawkins, Dkt. # 144 Exhibit C, pp. 14-19. The definition of Puget Sound applicable to these regulations, quoted above, was not provided. However, the parties agreed with the Court at oral argument that the Court may take judicial notice of the WACs. Here, the Court does so only for the purpose of pointing out deficiencies in the facts and resources researched by the two experts.

The Suquamish also presented the declaration of an expert, geographer Dr. Jon Kimerling. The Skagit in their reply asked the Court to strike Dr. Kimerling's opinion because he was identified only as a rebuttal witness, not in the original designation of experts. The Suquamish did not file a surreply to oppose the motion to strike. The Court therefore grants the motion to strike those portions of Dr. Kimerling's report which offer direct, as opposed to rebuttal, testimony.

Based on the discussion above, the Court finds that Judge Boldt demonstrated his understanding of the extent of Puget Sound by defining it in the record, and it is not appropriate to resort to extrinsic evidence to determine his meaning. As Judge Boldt defined Puget Sound as the case area, it includes the waters of of Saratoga Passage and Skagit Bay.

B. ***Judge Boldt's Intent***

***7** The determination that Judge Boldt in 1975 defined the term "Puget Sound" broadly, to include the disputed area here, does not end the inquiry. Under the rules developed by the Ninth Circuit, the Court must look to the actual evidence that was before Judge Boldt to determine if it "suggests that Judge Boldt intended something other than this apparent meaning when he wrote FF 5." *Muckleshoot I,* 141 F.3d at 1359. In this inquiry, the burden is on the Upper Skagit and the Swinomish to demonstrate that there was no evidence before Judge Boldt that the Suquamish fished on the east side of Whidbey Island, or traveled through there on their way up to the San Juans and the Fraser River area.

Both this Court and the Ninth Circuit Court of Appeals have noted on several occasions that Judge Boldt relied heavily on the reports and testimony of anthropologist Dr. Barbara Lane in determining the U & A's of various tribes. *Muckleshoot I,* 141 F.3d at 1359 (Dr. Lane's report was cited and heavily relied upon by Judge Boldt in his decision); *Muckleshoot III,* 235 F.3d at 437 (Judge Boldt specifically noted that Dr. Lane's testimony prevails over that of expert Dr. Riley in the event of a conflict).

Dr. Lane's report on the Suquamish is titled "Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Fort Madison Reservation" ("Report"). It was admitted as an exhibit on April 9, 1975. Dr. Lane testified in that day's proceedings, and the transcript of her testimony appears in the record at Docket # 7268 ("Transcript"). In both her report and her testimony, Dr. Lane characterized the Suquamish as a people who traveled widely by canoe, ranging as far north as the mouth of the Fraser River. She also stated that "[i]t was normal for all the Indians in western Washington to travel extensively either harvesting resources or visiting in-laws, ... visiting for social occasions such as potlatches, weddings, feasts ... or inter-community ceremonials or celebrations." Transcript, p. 48.

In the section of her report devoted to fisheries, Dr. Lane stated that the Suquamish fished for fall and winter salmon at the mouths of the Duwamish and Snohomish Rivers, and in the "adjacent marine areas." Report, p. 15. In the spring and summer, they traveled by canoe as far north as Fort Langley on the Fraser River. *Id.* Dr. Lane stated,

> In my opinion, the evidence that the Suquamish travelled [sic] to the Fraser river [sic] in pre-treaty times documents their capability to travel widely over the marine waters in what are now known as the Strait of Juan de Fuca and Haro and Rosario Straits. According to oral tradition, the

> Suquamish regularly travelled through the San Juan Islands and to the Fraser river.
>
> The Fort Langley journal documents that the Suquamish did travel to the Fraser river. It is my opinion that the Suquamish undoubtedly would have fished the marine waters along the way as they travelled. It is likely that one of the reasons for travel was to harvest fish. The Suquamish travelled to Whidbey Island to fish and undoubtedly used other marine areas as well.

***8** Report, p. 16. Dr. Lane also mentioned seasonal camps for smoke-curing fish on Bainbridge Island. *Id.*

The Report then listed the following places where the Suquamish traditionally took fish (salmon, herring, steelhead, halibut, and shellfish), by trolling. spearing, nets, or traps: Apple Cove Point, Hood Canal, Dye's Inlet, Liberty Bay, the head of Sinclair Inlet, Skunk Bay, Union River and Curley Creek, Blake Island, Jefferson Head, Point to Point, Rich's Passage, Orchard Point, Indianola, Ross Point, Miller's Bay, Agate Passage, and the area between Chico and Erland's Point. Report, p. 19-20. This list was accompanied in the Report by a map indicating the above-named fishing places, described as being within Suquamish territory. Report, p. 20. 22. In her testimony, Dr. Lane clarified that the places marked on this map, all on the western side of Puget Sound, were sites within Suquamish territory, and did not indicate other areas where they may have traveled to fish. Transcript, p. 57.

At the April 9, 1975 hearing, Dr. Lane was questioned at length about the travels of the Suquamish. She affirmatively stated that they did travel through the San Juan Islands to the Fraser River. Transcript, p. 49. When questioned specifically about fishing in the area of the San Juan Islands, Birch Bay, and up to the Fraser River, she stated that she could not specifically cite to any documentation regarding Suquamish fishing for herring there, but that

> it's entirely likely that they fished for whatever was available as they were traveling through those waters and that they visited those waters regularly as a usual and accustomed matter in order to fish and to do other things.

Transcript, p. 52.

Upon Dr. Lane's re-cross examination, the discussion turned to a map that accompanied the Suquamish April 3, 1975 proposed fishing regulations. A copy of this map appears as an attachment to the Declaration of James Janetta, Dkt. # 146, p. 74. The map divides greater Puget Sound into numbered areas, clearly separated by lines drawn on the map. Area 1 includes the San Juan Islands, south about halfway down Whidbey Island, and the Strait of Juan de Fuca. Area 2 lies entirely above the San Juan Islands, extending to the Canadian border. Area 3 encompasses Samish Bay and Bellingham Bay. Area 4 includes the very south-eastern end of the Strait of Juan de Fuca, plus Admiralty Inlet, lower Puget Sound, Saratoga Passage, and Skagit Bay. *Id.* Referring to this map, attorney Paul Solomon for the Department of Game questioned Dr. Lane. The following colloquy occurred:

> Q. And looking at their map attached, here, what has been described as Area Number 2, is this the area, roughly speaking, that Mr. Stay has asked you about, the Strait of Juan de Fuca, Haro Strait, and whatnot?
>
> A. I think he has asked me about what is labeled 1 and 2 on that map. Q. Both areas 1 and 2. That's what your comments pertain to?
>
> A. Well, I am speaking about the San Juan Island area, what is marked Number 1 there, and then 2.
>
> ***9** ....
>
> Q. Now, your report on the Suquamish notes that they traveled from their regular area up north as far as the Fraser River, which would cover areas 1 and 2 on this.
>
> A. Part of the Area 1
>
> Q. Part of Area 1, and 2.

Transcript, pp. 56-57.

Nowhere in this discussion, or in Dr. Lane's entire testimony, was the area designated as Area 4 on the map mentioned. Nor were Skagit Bay and Saratoga Passage ever mentioned in Dr. Lane's testimony regarding the Suquamish travels and fishing, or in her Report. While she did testify that the Suquamish traveled up to the Fraser River, her reference to the Strait of Juan de Fuca, Haro and Rosario Strait places their route on the west side of Whidbey Island, from the Port Madison area and up through the San Juan Islands. Her one statement in her report that the Suquamish traveled "to" Whidbey Island is insufficient to support a finding that they fished or traveled in the waters on the eastern side of Whidbey Island.

This absence of evidence regarding Squamish fishing or travel through Saratoga Passage and Skagit Bay leads the Court to conclude that the Upper Skagit and Swinomish have met their burden of demonstrating that Judge Boldt did not intend to include these areas in the Suquamish U & A. The Suquamish must now point to some evidence in the record that demonstrates that this conclusion is incorrect.

In support of their assertion that their U & A includes waters on the east side of Whidbey Island, the Suquamish point to Dr. Lane's finding that the treaty-time Suquamish were competent mariners who traveled widely. They assert that those travels would necessarily have included waters east of Whidbey Island. However, as noted above, Dr. Lane testified that it was "normal" for "all the Indians in Western Washington to travel extensively ..." Transcript, p. 48. Thus such travel was not unique to the Suquamish, and no conclusion with respect to the subproceeding area can be drawn from the mere statement that they traveled widely. Dr. Lane's actual testimony, as shown above, addressed only travel from the Suquamish territory up across the Strait of Juan de Fuca and through Haro and Rosario Straits, and the San Juan Islands. It would be pure speculation to conclude that those travels must also have included the east side of Whidbey Island, as there is absolutely no evidence in the record that they did so.

Next, the Suquamish point to the fact that they were found to fish at the mouth of the Snohomish River, which is on the eastern side of Whidbey Island, but well south of the area at issue. They assert that this fishing on the east side of Whidbey Island means that they could have well headed north into Saratoga Passage in their travels. However, Suquamish fishing in this area was described by Dr. Lane as fall and winter fishing at the mouth of a river, presumably to take the abundant migrating salmon. This fall and winter fishery was described by Dr. Lane as separate and distinct from the spring and summer travels up to the Fraser River. Thus, this reference to fishing at the mouth of the Snohomish River in the fall and winter cannot be deemed evidence that the Suquamish also traveled through that area on their way north to the Fraser River in the spring and summer. There was no mention in Dr. Lane's Report of Suquamish fishing anywhere north of the Snohomish River in their fall and winter fishery.

***10** Finally, the Suquamish point to the close relations between their people and the Skagit and Snohomish people, who had fishing camps on Whidbey and Camano Islands. They ask that the Court assume that the close relations between the tribes meant that the Suquamish must necessarily have camped and fished there as well. However, any connection between the Snohomish and Skagit camps on Whidbey and Camano Islands, and the Suquamish fishing in these areas, would again be purely speculative. There is nothing in Dr. Lane's report that places Suquamish camps in these areas, or documents Suquamish fishing there.

Judge Boldt found Dr. Lane's testimony to be authoritative and reliable in the original *U.S. v. Washington,* 384 F.Supp. at 350. His description of the Suquamish U & A tracks nearly verbatim the language in Dr. Lane's report, that the Suquamish had the "capability to travel widely over the marine waters in what are now known as the Strait of Juan de Fuca and Haro and Rosario Straits." Report, p. 16. Further, she reported, they "regularly travelled [sic] through the San Juan Islands and to the Fraser River." *Id.* In naming these specific areas in describing the Suquamish U & A, Judge Boldt demonstrated his intent to conform the Suquamish U & A to those areas documented by Dr. Lane. As noted by the Ninth Circuit Court of Appeals, where Judge Boldt has cited the specific, rather than the general, evidence presented by Dr. Lane, that evidence determines the boundaries of a tribe's U & A. *U.S. v. Lummi Indian Tribe,* 235 F.3d at 451.

For these reasons, the Court concludes that Judge Boldt did not intend to include Saratoga Passage or Skagit Bay within the U & A of the Suquamish. Indeed, it appears from the record that this is how the Suquamish themselves interpreted their U & A. The Suquamish understanding, in 1975, that their U & A excluded waters on the eastern side of Whidbey Island is indicated in the fishing regulations they issued following the Court's ruling on their U & A. These regulations appear in the record in the Declaration of David Hawkins, Dkt. # 144, Exhibit C. These regulations set guidelines for fishing in specified marine and freshwater fishing areas. No fishing was proposed in marine area 5, on the eastern side of Whidbey Island, which at that time included the areas at issue in this subproceeding. *Id.* While the Suquamish correctly argue that it would be improper to use these fishing regulations as evidence of Judge Boldt's intent, it is not improper to use them as evidence of the Suquamish Tribe's understanding of their own U & A at that time.

CONCLUSION

The Court has reviewed the evidence that was before Judge Boldt in the April 1975 proceeding that led to the

determination of the Suquamish U & A. That evidence, including maps, fisheries reports, anthropological reports, and testimony, demonstrates that the Court and the parties had a common understanding that the term "Puget Sound" generally described a continuous body of saltwater in western Washington, including all the bays and inlets, and specifically including Skagit Bay and Saratoga Passage. On some occasions, areas such as the Strait of Juan de Fuca and Hood Canal were described separately. On other occasions, Puget Sound was treated as divided into regions, namely Southern, Central, and Northern Puget Sound. Regardless of these differences, the term "Puget Sound" as used generally by Judge Boldt included Saratoga Passage and Skagit Bay.

***11** However, in describing the individual tribes' usual and accustomed fishing areas, Judge Boldt was necessarily indicating only a portion of that broader Puget Sound, even when, as here, he used the term "Puget Sound" without qualification. Thus, for example, in the description of the U & A of the Muckleshoot Tribe, the Court has found that the term "saltwater of Puget Sound" refers only to that portion of Puget Sound in Elliot Bay. *See, Muckleshoot III,* 235 F.3d at 438. Similarly, it has been judicially determined that the Lummi U & A, described in part as "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" does not include the Strait of Juan de Fuca or Hood Canal. *U.S. v. Lummi,* 235 F.3d at 451-52.

Here, the Court finds that in describing the Suquamish U & A as the marine waters of Puget Sound from Vashon Island up to the Fraser River, Judge Boldt could not have intended to include Saratoga Passage or Skagit Bay. Judge Boldt relied heavily on the report and testimony of Dr. Barbara Lane, and indeed in describing the Suquamish U & A he used terms and place names taken directly from her report on the Suquamish fishing and travels. Dr. Lane reported and testified that the Suquamish traveled by canoe from their territory (Port Madison) up through the San Juan Islands, and Haro and Rosario Straits, as far as the Fraser River. Nothing in her testimony or her report indicated a Suquamish presence in Saratoga Passage or Skagit Bay, neither as winter fishing grounds, nor as a route for travel up to the San Juan Islands.

The Court thus finds that there are no factual issues in dispute, and that the requesting parties are entitled to judgment as a matter of law on their claim that the Suquamish U & A does not include Saratoga Passage or Skagit Bay. Accordingly, the motions for summary judgment by the Upper Skagit and Swinomish are GRANTED, and the Suquamish motion for summary judgment is DENIED. As no issues remain to be determined, the trial date of February 26 is now STRICKEN.

The Clerk shall enter judgment in favor of the Upper Skagit and Swinomish, and close the file.

Footnotes

1 The Upper Skagit originally defined the case area as Saratoga Passage, from the Greenbank Line north to the Snatelum Point Line, and Skagit Bay. The Swinomish cross-request defines the case area for their purposes as Catch Reporting Area 24C. The case area, then, encompasses that portion of Saratoga Passage within Catch Reporting Area 24C, plus Skagit Bay (Catch Reporting Area 24A). For convenience, this case area will simply be referred to interchangeably as Saratoga Passage and Skagit Bay, or as the "subproceeding area."

2 The Court has ruled previously that this subproceeding will not address the western boundary of the Suquamish U & A, and therefore quotes these various definitions without making any finding as to whether the Strait of Juan de Fuca is included within "Puget Sound" as that term was used by Judge Boldt in the Suquamish U & A. However, the Ninth Circuit Court of Appeals has ruled previously, with respect to the Lummi U & A, that "[i]t is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound." *U.S. v. Lummi Indian Tribe,* 235 F.3d 443, 451-52 (9th Cir.2000).

3 In viewing maps and charts presented in this subproceeding, the Court finds maps to be an imprecise indicator of the boundaries of water areas. When bays and inlets are labeled on the map, it cannot be determined whether they are designated as parts of a greater whole (Puget Sound), or as separate areas which are not part of the whole. A written description with set boundaries is more informative on the question of the boundaries of a body of water.

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U.S. v. Washington, 252 F. App'x 183 (9th Cir. 2007)

252 Fed.Appx. 183
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff,
and
Tulalip Tribes, Plaintiff–Appellant,
v.
State of WASHINGTON, Defendant,
Swinomish Tribal Community;
et al., Real Parties in Interest,
and
Suquamish Indian Tribe, Defendant–Appellee.
United States of America, Plaintiff,
v.
State of Washington, Defendant,
and
Suquamish Indian Tribe, Defendant–Appellee,
Lummi Nation, Real–party–in–interest–Appellant.

Nos. 06–35185, 06–35241. | Argued and
Submitted Oct. 17, 2007. | Filed Oct. 26, 2007.

Attorneys and Law Firms

Christopher Lee Pickrell, Esq., Office of the U.S. Attorney, Seattle, WA, Peter C. Monson, Esq., U.S. Department of Justice Environment and Natural Resource Division, Denver, CO, for Plaintiff.

Mason D. Morisset, Esq., Rob Roy Smith, Esq., Morisset Schlosser Jozwiak & McGaw, Seattle, WA, for Plaintiff–Appellant.

Robert K. Costello, Esq., Fronda C. Woods, Esq., Michael S. Grossmann, Office of the Washington Attorney General, Olympia, WA, for Defendant.

Michelle Hansen, Esq., Office of Tribal Attorney, Suquamish, WA, for Defendant–Appellee.

Alix Foster, Esq., Office of the Tribal Attorney, La Conner, WA, Bill Tobin, Esq., Vashon, WA, Phillip Evan Katzen, Esq., Cory J. Albright, Esq., Kanji & Katzen, PLLC, Lauren P. Rasmussen, Esq., Law Offices of Lauren P. Rasmussen, PLLC, Marc D. Slonim, Esq., Richard M. Berley, Esq., John B. Arum, Esq., Ziontz Chestnut Varnell Berley & Slonim, Seattle, WA, Michele C. Coyle, Hogan and Hartson, Los Angeles, CA, Phillip Evan Katzen, Esq., Brian H. Collins, Esq., Lori Ellen Nies, Esq., Skokomish Indian Tribe, Skokomish Nation, WA, Daniel A. Raas, Esq., Office of the Reservation Attorney, Harry L. Johnsen, Esq., Raas Johnsen & Stuen, P.S., Mary M. Neil, Esq., Lummi Indian Nation Office of the Reservation Attorney, Bellingham, WA, for Real–party–in–interest–Appellant.

Appeal from the United States District Court for the Western District of *184 Washington, Ricardo S. Martinez, District Judge, Presiding. D.C. Nos. CV–70–09213–RSM, SP–05–00004–RSM.

Before: D.W. NELSON, BEAM [*], and RYMER, Circuit Judges.

Opinion

MEMORANDUM [**]

This case is remanded to the district court. A 12(b)(6) dismissal is not appropriate. The district court failed to make any determination on whether it has continuing jurisdiction and on what ground. The jurisdictional basis is not self-evident; it is necessarily linked to the nature of the claim being asserted. The issues and proceedings are complex and meaningful appellate review requires a more developed record.

REMANDED.

Parallel Citations

2007 WL 3129435 (C.A.9 (Wash.))

Footnotes

* The Honorable C. Arlen Beam, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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U. S. v. Washington, CV70-9213RSM, 2012 WL 4846239
(W.D. Wash. Oct. 11, 2012)

2012 WL 4846239
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

UNITED STATES of America, et al., Plaintiffs,
v.
State of WASHINGTON, et al., Defendants.

Nos. CV70–9213RSM, 11–SP–02. | Oct. 11, 2012.

Attorneys and Law Firms

Peter C. Monson, U.S. Department of Justice, Denver, CO, Colleen Kelley, United States Department of the Interior Office of the Regional Solicitor, Portland, OR, Philip H. Lynch, U.S. Attorney's Office, Cory J. Albright, Phillip Evan Katzen, Riyaz Amir Kanji, Kanji & Katzen, Eric J. Nielsen, Nielsen Broman & Koch, Seattle, WA, Michelle Hansen, Suquamish, WA, Fawn R. Sharp, Quinault Indian Nation, Taholah, WA, Katherine K. Krueger, Quileute Natural Resources, Lapush, WA, Alix Foster, James Miller Jannetta, Office of the Tribal Attorney, Swinomish Indian Tribal Community, La Conner, WA, Thomas A. Zeilman, Law Office of Thomas A. Zeilman, Yakima, WA, for Plaintiffs.

Rene David Tomisser, Douglas D. Shaftel, Michael S. Grossmann, Philip Michael Ferester, Terence A. Pruit, Joseph Earl Shorin, III, Joseph V. Panesko, Attorney General's Office, Olympia, WA, for Defendants.

Opinion

ORDER ON MOTION FOR SUMMARY JUDGMENT

RICARDO S. MARTINEZ, District Judge.

***1** This matter is before the Court for consideration of the motion for summary judgment filed by the Requesting Tribes, namely the Jamestown S'Klallam, Lower Elwha Klallam, and Port Gamble S'Klallam Tribes (together, "the S'Klallam"). Dkt. # 40. They request that the Court grant summary judgment on the issues presented in their Request for Determination filed November 8, 2011. Dkt. # 1. The Request for Determination asks the Court to find that the actions of the Lummi Nation in fishing in the "case area" [1] is not in conformity with Final Decision # I. The Lummi Nation ("Lummi") has opposed the motion. Oral argument was heard on September 27, 2012, and the matter has been fully considered. The Court has jurisdiction pursuant to Paragraph 25(a)(1) of the Permanent Injunction, as modified August 11, 1993. C70–9213, Dkt. # 13599. For the reasons set forth below, the motion shall be granted.

BACKGROUND AND CASE HISTORY

The usual and accustomed fishing area of the Lummi Tribe was described by Judge Boldt in Findings of Fact ("FF") 45 and 46 in the original *U.S. v. Washington* decision.

> 45. Prior to the Treaty of Point Elliott, the Lummi, Semiahmoo and Samish Indians had been engaged in trade in salmon, halibut and shellfish both with other Indians and with non-Indians. (FPTO § 3–42) This trade continued after the treaty. (Ex. USA–30, p. 6) At the time of the treaty they maintained prosperous communities by virtue of their ownership of lucrative saltwater fisheries. The single most valuable fish resource was undoubtedly the sockeye, which the Lummis were able to intercept in the Straits on the annual migration of the sockeye from the ocean to the Fraser River. (Ex. USA–30, p. 11) Lummi Indians developed a highly efficient technique, known as reef netting, for taking large quantities of salmon in salt water. (Ex. USA–30, p. 11) Aboriginal Indian 'reef netting' differs from present methods and techniques described by the same term. (FPTO § 3–40) The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point. (Ex. USA–30, p. 23; Exs. USA–62, USA–63; Tr. 1699, l. 2 to 1701, l. 21) When nature did not provide optimum reef conditions the Indians artificially created them. (Ex. USA–30, p. 17) Reef netting was one of the two most important economic activities engaged in by these Indians, the other being the sale of dog fish oil. These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon. (FPTO § 3–42; Ex. USA–30, pp. 6–25; Ex. G–21, pp. I–19–I–21)

> 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially

the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. (Exs. USA–20, p. 39; USA–30, pp. 23–26; Exs. PL–94a, b, c, d, e, t, u, v, w, x; Ex. G–26, pp. II–9 to II–13; Exs. USA–60, USA–61, USA–62, USA–63, USA–64; Tr. 1665, l. 4–11, l. 23–24).

***2** *U.S. v. Washington,* 384 F.Supp. 312, 360 (W.D.Wash.1974) ("Decision I").

I. *Judge Coyle's Decision*

In 1989, the S'Klallam, along with the Skokomish Tribe, filed a Request for Determination ("Request") regarding the Lummi U & A, which was opened as Subproceeding 89–2 and assigned to United States District Judge Robert Coyle. They asked for a ruling that Lummi fishing in the case area was "not in conformity with" the Findings of Fact in *Decision I,* which is one way by which a party may invoke the Court's jurisdiction under Paragraph 25 of the Permanent Injunction. The Request asserted that the Strait of Juan de Fuca, Admiralty Inlet, and the mouth of Hood Canal are all outside the Lummi U & A as it was described by Judge Boldt, and therefore, Lummi fishing in these areas is "not in conformity with" that decision.

The parties cross-moved for summary judgment. In a thorough and well-reasoned Order, dated February 13, 1990, Judge Coyle granted summary judgment to the S'Klallam, stating with respect to the case area, "There is no question in the court's mind from the evidence presented to Judge Boldt that the Lummis' usual and accustomed fishing places were not intended to include the Strait of Juan de Fuca." C70–9213, Dkt. # 11596, p. 13.

There are two concerns with this Order, which have led to the Lummi allegations of a lack of resolution in this matter. One is that Judge Coyle quoted extensively from a 1989 Declaration of Dr. Barbara Lane, the anthropologist upon whose reports Judge Boldt placed great reliance when he determined the U & A's of various tribes. Her post-*Decision I* testimony, offered in an attempt to clarify Judge Boldt's meaning, was subsequently found to be improper in a different subproceeding. ("The district court erred by considering Dr. Lane's latter-day testimony as evidence of Judge Boldt's intended meaning.") *Muckleshoot Indian Tribe v. Lummi Indian Nation,* 141 F.3d 1355, 1359–60 (9th Cir.1998) ("*Muckleshoot I*"). However, in considering this assertion by the Lummi in their appeal of Judge Coyle's Order, the Ninth Circuit found he did not improperly rely on the 1989 declaration, and upheld the decision as to the Strait of Juan de Fuca. This is now the law of the case, and the Lummi argument that Judge Coyle's decision is flawed is unavailing.

The other concern, as the Ninth Circuit later noted, was that judgment was never entered on Judge Coyle's decision, and the Lummi subsequently filed a Cross–Request for Determination in 89–2. The Lummi requested a determination that their U & A include:

> the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound, the waters west of Whidbey Island, Admiralty Inlet, the waters south of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal south from Admiralty Inlet to a line drawn from Termination Point due East across Hood Canal.

C70–9213, Dkt. # 11690. The Ninth Circuit later characterized this Cross–Request as an "expansion" of the Lummi U & A. *U.S. v. Washington (Lower Elwha Band of S'Klallams, et al. v. Lummi Indian Tribe,* 235 F.3d 443, 447 (9th Cir.2000) ("*Lummi*"). This "expansion" designation indicates that the Ninth Circuit did not, at that time, view any of these areas as included in the Lummi U & A as it was determined by Judge Boldt.

II. *Judge Rothstein's Decisions*

***3** In 1993, the case was assigned to United States District Judge Barbara Rothstein. The parties cross-moved for summary judgment on the Lummi Cross–Request for Determination, and Judge Rothstein denied both motions in an Order dated February 7, 1994. Judge Rothstein found that the affidavit of anthropologist Wayne Suttles, which the Lummi presented as evidence of their fishing in the eastern area of the Strait of Juan de Fuca, constituted sufficient evidence to allow the Lummi to survive summary judgment. She stated however, "The Court will expect Dr. Suttles to clarify the boundaries of the geographic areas to which he refers together with specific documentation pertinent to each area." Order, Dkt. # 14056, p. 8. This was four years before the Ninth Circuit pronounced such latter-day declarations improper in *Muckleshoot I.*

The Ninth Circuit released the *Muckleshoot I* decision on April 17, 1998. In May of 1998, the S'Klallam moved to dismiss the Lummi Cross–Request on the basis that the issues

had been decided by Judge Coyle, and that the Lummi were precluded from re-litigating them. In opposing the motion, the Lummi attached a map identifying Admiralty Inlet, the Fraser River, and Haro Strait, and argued that its U & A included the waters between Haro Strait and Admiralty Inlet. The Court ordered supplemental briefing on outstanding issues, and the Lummi then filed a cross-motion to dismiss the S'Klallam Request, or for summary judgment. The Lummi objected to consideration of Dr. Lane's 1989 Declaration, on the basis of the recent *Muckleshoot* decision. They did not re-submit the declaration of Wayne Suttles or rely on it.

On September 1, 1998, Judge Rothstein denied the Lummi motions, and granted the S'Klallam motion to dismiss. She described in her Order the issues raised in Subproceeding 89–2 as whether Lummi's U & A includes "the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal." Dkt. # 16550, p. 2. The conclusion states, "the Court determines that Judge Boldt did not intend to include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal in the Lummi U & A." *Id.*, p. 18. The Clerk was directed to enter judgment in favor of the S'Klallam and Skokomish tribes, and dismiss the subproceeding. *Id.*, p. 19. The Lummi appealed.

III. *The Ninth Circuit Court of Appeals Decision*

The Lummi "Statement of Issues Presented for Review" in the appeal listed three issues: (1) whether "Judge Boldt intend[ed] to include within Lummi fishing areas all of the marine waters from the San Juan Islands south to the vicinity of Seattle when he ... declared that Lummi fishing rights 'included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle"; (2) whether Judge Coyle erred when he considered matters outside the trial record (referring to the latter-day Declaration of Barbara Lane) in interpreting the final judgment entered by Judge Boldt; and (3) whether Judge Rothstein erred "when she declined to review and revise Judge Coyle's interpretation of the judgment" in light of *Muckleshoot I,* 141 F.3d 1355. Declaration of Lauren Rasmussen, Dkt. # 20030, Exhibit A, p. 1. In the Statement of the Case, the Lummi clarified that

> *4 [t]he issue presented by this case is whether ***all*** of the marine waters between the Fraser and Seattle were included in this judgment or only some of them. Specifically, based on the record before him, did Judge Boldt intend to exclude from the broad language of his ruling the marine waters of Admiralty Inlet and the open marine waters in the Strati of Juan de Fuca between Admiralty Inlet and Haro Strait on the western edge of the San Juan Islands?

Id., p. 3.

The Ninth Circuit ruled that Judge Coyle's decision merged into the final judgment which was entered on September 2, 1998, and then proceeded to address the Lummi arguments against both Judge Coyle's and Judge Rothstein's Orders. The court started by finding that Judge Boldt's language in describing the Lummi U & A is ambiguous, "because it does not delineate the western boundary of the Lummi's usual and accustomed fishing grounds and stations." *U.S. v. Washington (Lummi),* 235 F.3d at 449. Next, the appellate court found that in resolving the ambiguity, Judge Coyle did not improperly use the 1989 Declaration of Dr. Lane. Instead, he relied on the exhibits attached to it, notably, trial exhibits USA–20 and USA–30, which were before Judge Boldt and from which he quoted extensively in *Decision I.* The court rejected the Lummi argument that Judge Boldt's language should be interpreted broadly because of Dr. Lane's statement that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed fishing grounds. Such an inventory is possible only by designating entire water systems." *See* "Political and Economic Aspects of Indian–White Culture Contact in Western Washington in the Mid–19th Century (Summary Anthropological Report) Exhibit USA–20, filed in this case at Dkt. # 45, Declaration of Mary Neil, Exhibit 25. In rejecting this argument, the Ninth Circuit noted that Judge Boldt cited to specific locations listed by Dr. Lane (Point Roberts, Birch Point, Cherry Point, and others) rather than general areas, so there was no basis to find that he intended to include an "entire water system" such as all the waterways in Puget Sound. The court also rejected the Lummi argument that Judge Boldt intended to encompass the Strait of Juan de Fuca in the term Puget Sound, stating that "it is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound." *U.S. v. Washington (Lummi),* 235 F.3d at 451–52. Thus, "had he intended to include the Strait of Juan de Fuca in the Lummi's usual and accustomed fishing grounds and stations, he would have used that specific term, as he did elsewhere in *Decision I.*" *Id.* at 452. These findings by the Ninth Circuit, which exclude the Strait of Juan de Fuca from the Lummi U & A, are now the law of the case.

With respect to Admiralty Inlet, the Ninth Circuit could find no guidance as to Judge Boldt's intent, as he did not use that term in the Lummi U & A or anywhere else in *Decision I.* The S'Klallam argued that Judge Boldt could not have intended to include Admiralty Inlet in the Lummi U & A because he did not specifically name it, but this argument failed to persuade the Ninth Circuit. In the absence of linguistic clues, the court determined that "[g]eographically, however, Admiralty Inlet was intended to be included within the 'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle.' " *Id.* at 452. The court reasoned that the Lummi must pass through this area (Admiralty Inlet) to go from the Fraser River south to Seattle: "Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula. Admiralty Inlet would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle.' " *Id.* On the basis of this ruling, Admiralty Inlet became part of the Lummi U & A.

***5** With respect to Judge Rothstein's decision, the Ninth Circuit ruled that she did not abuse her discretion in applying the law of the case and ruling in favor of the S'Klallam in dismissing the subproceeding. The court concluded,

> We are persuaded that Judge Boldt did not intend for either the Strait of Juan de Fuca or the mouth of the Hood Canal to be included within the Lummi's usual and accustomed grounds and stations. Based on the geography of the area, however, we conclude that Judge Boldt did intend to include Admiralty Inlet. We affirm Judge Rothstein's order of dismissal in part, and reverse in part.

Lummi, 235 F.3d at 453.

In 2009, the S'Klallman filed a motion for an Order to Show Cause why the Lummi Nation should not be held in contempt for fishing in the eastern portion of the Strait of Juan de Fuca, in violation of this Court's Orders and the mandate of the Ninth Circuit Court of Appeals. The motion was filed in the closed 89–02 subproceeding. *U.S. v. Washington,* Subproceeding 89–2, Dkt. # 217. The Lummi moved to dismiss the motion for contempt and the Court granted that motion. Subproceeding 89–2, Dkt. # 235. The Court agreed with the Lummi that the motion, filed in a closed subproceeding, was improper but granted the S'Klallam leave to initiate a new subproceeding to bring the issue before the Court. *Id.* The S'Klallam appeal of the dismissal was dismissed by the Ninth Circuit Court of Appeals for lack of jurisdiction. On November 11, 2011, the S'Klallam then filed a Request for Determination, opened as this subproceeding, to again bring the issue of Lummi fishing in the case area before the Court. *U.S. v. Washington,* Subproceeding 11–02, Dkt. # 1. The S'Klallam motion for summary judgment is now ripe for consideration.

ANALYSIS AND DISCUSSION

I. Legal Standard

In moving for summary judgment, the S'Klallam assert that it is now the law of the case that the Strait of Juan de Fuca is not within the Lummi U & A, and that determination may not be altered or amended. The Ninth Circuit Court of Appeals clearly set forth the standards for application of the law of the case doctrine in the prior decision in this dispute:

> "The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case. For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition." Application of the doctrine is discretionary.

U.S. v. Washington (S'Klallam v. Lummi), 235 F.3d at 452 (citations omitted).

II. Analysis

The S'Klallam have moved for summary judgment on the basis that it is now the law of the case that the Lummi U & A does not include the Strait of Juan de Fuca. Therefore, Lummi fishing in the case area, described as the waters of the Strait west of Whidbey Island and east of a line drawn between Trial Island and Point Wilson, is "not in conformity with" *Decision I.* The Court agrees that the issue with respect to the Strait of Juan de Fuca has been explicitly decided by this Court and affirmed by the Ninth Circuit Court of Appeals, and is now the law of the case. Contrary to the Lummi assertion that the burden of proof lies with the S'Klallam, it is for the Lummi to demonstrate that the case area does not lie within the Strait of Juan de Fuca. That is a heavy burden in light of the fact that the Lummi specifically described

this area in their failed Cross–Request for Determination. Judge Rothstein determined that the area in the Lummi Cross–Request for Determination was the same as the case area as originally defined by the S'Klallam:

> ***6** This request [the Lummi Cross–Request for Determination] sought a declaration that the Lummi U & A included the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound, the waters west of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal.... The Lummi's request is worded differently from the Four Tribes' original request. The Four Tribes contend, however the Lummi's cross-request covers essentially the same areas the Four Tribes challenged in the initial request for determination. The Lummi have not asserted that their cross-request covers a different area from the area covered by the Four Tribes' initial request and by Judge Coyle's decision. Rather, they argue that Judge Coyle's decision is not final and is of no precedential value. The court can discern no difference between the two requests for determination, nor have the Lummi convincingly argued that there is a difference. Thus, this order is intended to resolve both requests for determination. C70–9213, Dkt. # 16550, p. 14. Therefore, the question with respect to waters "west of Whidbey Island" was resolved by Judge Rothstein and affirmed in that respect by the Ninth Circuit Court of Appeals. [2]

In opposing the motion for summary judgment, the Lummi advance several different arguments for their contention that the case area waters are not part of the Strait of Juan de Fuca. For one, they point to a map that was before Judge Boldt, namely Exhibit USA–62, which is a reproduction of a U.S. coastal survey map from 1853. They assert that the placement of the lettering for "Strait of Juan de Fuca" on this map would have led Judge Boldt to conclude that the eastern extent of the Strait was approximately Angeles Point. Lummi Nations's Memorandum in Opposition, Dkt. # 43, p. 18. This argument is unavailing for many reasons, not the least of which is that it is purely speculative with respect to Judge Boldt's meaning or intent. [3] While Judge Boldt did cite to USA–62 in FF 45, it was specifically in regard to the locations of Orcas Island, San Juan Island, Lummi Island, Fidalgo Island, Point Roberts, and Sandy Point. *U.S. v. Washington,* 384 F.Supp. at 360. Thus this map, while historically interesting, is of no import in the context of this subproceeding.

Second, the Lummi argue that their U & A includes the case area because:

> [t]he Ninth Circuit expressly held that Lummi's U & A includes Admiralty Inlet, which the Ninth Circuit defined as follows:
>
> > Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula. Lummi's Memorandum in Opposition, Dkt. # 43, p. 6, quoting *Lummi,* 235 F.3d at 452. This argument mis-reads the Ninth Circuit's definition of Admiralty Inlet and impermissibly expands its scope. The correct reading of the Ninth Circuit language describes Admiralty Inlet as "(those) waters to the west of Whidbey Island (which) separate that island from the Olympic Peninsula;" in other words, only the southern portion of the waters west of Whidbey Island. The fact that the Lummi understood the "waters west of Whidbey Island" to be distinct from Admiralty Inlet is evidenced from their own Cross–Request for Determination, filed in Subproceeding 89–2, set forth above at p. 3, which names them separately and disjunctively. *See* C70–9213, Dkt. # 11690.

***7** Next the Lummi assert that

> [t]he Ninth Circuit has developed a special two-step process for determining Judge Boldt's intent with regard to a Tribe's U & A. First, Klallam must prove that a term used by Judge Boldt to describe Lummi's U & A is ambiguous or that he intended something other than the apparent meaning of the terms he used to describe Lummi's U & A. If so, then Klallam must prove there was no evidence before Judge Boldt showing

> that Lummi fished the waters west of Whidbey island or traveled there en route from the Fraser River to the Seattle area.

Lummi Memorandum in Opposition, Dkt. # 43, p. 8. This line of argument misstates the burden of proof and the Court's task here. The two-step process has already been concluded by this Court in Subproceeding 89–02, and was affirmed (as to the Strait of Juan de Fuca and the mouth of Hood Canal) by the Ninth Circuit Court of Appeals. It is the law of the case that the Lummi U & A does not include the Strait of Juan de Fuca, and it now is for the Lummi to point to evidence that would create an issue of fact as to whether the case area lies outside that Strait. Specifically, they must point to evidence that would lead to the conclusion that the Ninth Circuit decision, excluding the Strait of Juan de Fuca but including Admiralty Inlet, somehow includes the case area as well.

To this end, the Lummi contend that "logic and linguistic clues from Judge Boldt and the Ninth Circuit lead inexorably to the conclusion that none of the waters between the San Juan Islands and the environs of Seattle were excluded from the Lummi's U & A." Lummi Memorandum in Opposition, Dkt. # 43, p. 22. Thus, they assert that by using a "broad, sweeping description" of the Lummi U & A, Judge Boldt "resolved the factual question of whether Lummi had fished sufficiently in the areas" to have them included in the U & A (referring to the waters west of Whidbey Island). *Id.,* p. 26. In support of this reasoning, the Lummi then point again to Dr. Lane's report:

> Dr. Lane testified that Lummi fishermen were "accustomed ... to **visit fisheries** as distant as Fraser River in the north and Puget Sound in the South," *USA–30 at 25,* and that "**other** fisheries in the Straits and bays from the Fraser River south to the present environs of Seattle were utilized" by the Lummi. *USA–30 at 26 (emphasis added*).

Id. (emphasis and italics in original). They conclude this "logic and linguistic clues" line of argument with the assertion that "[t]he Ninth Circuit was merely using the natural pathway from the San Juan islands south to Seattle as a means of understanding the area Judge Boldt was describing," thus including the case area in the Lummi U & A along with Admiralty Inlet. *Id.*

At the oral argument, the Lummi pointed to FF 13 in *Decision I* as support for their "broad sweeping description" argument, noting that Judge Boldt stated "it would be im possible to compile a complete inventory" of any tribe's usual and accustomed fishing areas. However, when FF 13 is read in its entirety, and together with the following FF 14, they lead to the opposite conclusion from what the Lummi argue. These Findings of Fact, stated in full, read as follows:

> ***8** 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) Among the reasons for this are the following: 1) Indian fisheries existed at all feasible places along a given drainage system. Fishing stations which were the site of weirs or permanent villages are more easily documented than riffles where fish were speared; 2) Indian fishermen shifted to those locales which seemed most productive at any given time depending upon such factors as changes in river flow, turbidity or water course; 3) some important recorded fishing sites are no longer extant because of subsequent man-made alterations in watersheds and water systems; and, 4) use of some sites has been discontinued because appropriate Indian gear for those sites has been outlawed or because competing uses and users have made utilization of the sites by Indian fishermen unfeasible. (Ex. USA–20, pp. 21–23; Ex. USA–27b, pp. 1–3) 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)
>
> 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 Indians who trolled en route. (Ex. PL–75; Tr. 2847, l. 13 to 2850, l. 23) Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians. (Tr. 2177, l. 24 to 2180, l. 4).

U.S. v. Washington, 384 F.Supp. at 353.

Thus, FF 13, with its references to drainage systems, riffles, weirs, river flow, turbidity, and so on in Reasons 1 through 3, appears to address only fishing sites along rivers. It would be pure speculation to infer that the "impossible to compile a complete inventory" statement applies as well to fishing in the marine areas where none are mentioned; indeed logic and linguistics lead to the opposite inference. Judge Boldt used terms specific to riverine areas in FF 13 when he listed reasons why it was "impossible to compile a complete inventory" of any tribe's usual fishing areas. On the other hand, marine areas, and specifically the Lummi reef net sites, are addressed in FF 14, which is also the basis for the oft-quoted principle that transit through an area does not, without more specific evidence of fishing, lead to inclusion of an area in a tribe's U & A. Thus, FF 13 fails to support the conclusion that Judge Boldt intended with his "broad sweeping description" to include the case area in the Lummi U & A, and FF 14 leads to the conclusion that the Lummi "natural pathway" argument must be rejected.

***9** Nor does reference to Dr. Lane's language regarding Lummi's "other fisheries in the Straits and bays from the Fraser River south" (quoted from Exhibit USA–30, p. 26) aid the Lummi position. First, the case area is not a bay, and according to the Lummi argument it is not part of the Strait of Juan de Fuca either. Therefore they have not shown how the case area could beincluded in the "other fisheries in the Straits and bays" referenced by Dr. Lane. Second, this statement in her report is a summary conclusion, and must be read in context with the entire report, particularly the sections that were cited or quoted by Judge Boldt in FF 45 and 46. Notably, Judge Boldt did not quote Dr. Lane's "Straits and bays" conclusion in either Finding of Fact. Instead, he c ited extensively and repeatedly to Dr. Lane's discussion of reefnetting, its uniqueness and importance to the Lummi, their system of individual ownership of reefnetting sites, and the location of those sites. *See* FF 45, set forth above, and citations therein to Exhibit USA–30 at pp. 11, 23.

Dr. Lane went into great detail on reefnetting by the Lummi in her report, describing the equipment and techniques, and the reasons for its success, which was attributed in part to specialized knowledge of topography and salmon behavior and migration patterns. Exhibit USA–30, p. 12. "Usually the reefnet was located in a kelp-covered reef a short distance offshore. Often it was opposite a headland that c aused a backward sweep of tidal current. The fish entered with the current." Exhibit USA–30, p. 17. "The more important reefnet locations of the Sem iahmoo-Lummi-Samish are noted i n the section on usual and accustomed fishing sites and are plotted on the accompanying map." Exhibit USA–30, p. 11. The m ap shows reefnet sites at various points from Point Roberts south to the southern shore of Lopez Island. All appear to be associated with prom ontories and headlands, and none are located south of Lopez Island, where the case area begins. The singular importance of reefnetting to the Lummi was acknowledged by Judge Boldt in FF 45, and the complete absence of any indicated sites from the case area is significant.

The section of Dr. Lane's report which was cited extensively, and sometimes quoted, by Judge Boldt states, in its entirety,

USUAL AND ACCUSTOMED FISHING AREAS

> While it is not possible to pinpoint every fishing site used by the ancestors of the present Lummi Tribe of Indians prior to the Treaty of Point Elliot, **it is feasible to indicate the general area of their fishing operations and within the general area to designate certain sites as important or principle fishing locations.**
>
> The pre-treaty Lummi, along with the Semiahmoo and Samish, both of whom were subsumed with the Lummi at the Treaty of Point Elliot, owned reefnet locations in the San Juan Islands, off Point Roberts, off Lummi Island, and Fidalgo Island.
>
> The reefnetting grounds off Point Roberts were the largest in the entire area and were situated within the aboriginal territory of the Semiahmoo. They were used not only by

the Semiahmoo but also by Saanich, Lummi, and other Indians.

*10 The grounds off Village Point, Lummi Island[,] were second in size to the point Roberts grounds. At least two of the Lummi signers of the Point Elliot Treaty owned reefnet locations off Village Point.

The main Samish location was off Iceberg Point, Lopez Island[,] in the San Juans. Other Samish and Lummi locations were located off the southern shores of Lopez. The Samish also fished with reefnets off Langley Point on Fidalgo Island.

Other Lummi reefnet grounds were located off Shaw Island, Orcas Island, Waldron Island, and off Cherry Point on the mainland.

The Birch Point grounds off Birch Bay lay within the aboriginal territory of the Semiahmoo people.

In addition to using the reefnetting grounds noted above, the ancestors of the present Lummi Tribe of Indians also trolled for salmon in the contiguous salt waters of Haro and Rosario Straits and in the islands, speared them in the bays and streams of the mainland, and took them by means of weirs and traps in the rivers. There were, in addition, other important fisheries, including halibut banks, but discussion here is limited to salmon (including steelhead) fisheries.

The **traditional fishing areas discussed thus far extended from what is now the Canadian border south to Anacortes.** This description included the traditional fishing areas of the Semiahmoo and the Samish. Some of the present Lummi Tribe are descendants of the pre-treaty Semiahmoo and Samish groups. Other descendants of these pre-treaty entities have not become members of the Lummi Tribe and those descendants would, of course, legitimately make claim to some of the same usual and accustomed fishing area included here.

In addition to the home territory discussed to this point, Lummi fishermen were accustomed, at least in historic times, and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south.

In the same manner, Saanich, Clallam, Skagit and other Indians fished in waters described above as within Semiahmoo, Lummi and Samish territory. The Straits and Sound were traditional highways used in common by all Indians of the region and most saltwater fisheries traditionally were free access areas. This point is discussed at some length in the Summary Anthropological Report, [4] pages 15–19. While it is useful for certain purposes to speak of Lummi waters, or Samish territory, it is important to note that this by no means implies exclusive rights by one group. That these Indians travelled [sic] widely and frequently throughout the waters of the Sound and Straits is commented on by numerous early observers.

Exhibit USA–30, pp. 23–24 (emphasis added).

The Court finds several aspects of this section have significant implications for the Lummi "logic and linguistics" argument. First, Dr. Lane stated that it was feasible to indicate a general area for the fishing operations of the Lummi, and within that general area to designate important sites, but not all of them. This is contrary to the sense in which the Lum mi would have the Court read the "im possible to compile a complete inventory" language in FF 13. They used this language to invite consideration of unnam ed locations well outside the designated area, but this section shows that was not Dr. Lane's intent. (And as shown above, Judge Boldt's "complete inventory" remark appears to be addressed to river fishing sites, not marine areas.) Second, the "traditional fishing areas" of the Lummi were designated as extending only as far south as Anacortes, well above the case area. Judge Boldt cited specifically to this section of the report and used the specific place names in FF 45, thus indicating his reliance upon this section. Third, Dr. Lane named only two places, Fraser River in the north a nd Puget Sound to the south, as fisherie s visited by Lummi fisherman; she did not report that they fished all the waters in between, or mention any intermediate fisheries. While Judge Boldt described the Lummi U & A in FF 46 as including marine areas from Fraser River south to the present environs of Seattle, "and particularly Bellingham Bay," the Lummi have pointed to no facts before Judge Boldt which would support the conclusion that he intended to include **all** the marine waters in between. Indeed, this Court has found in a previous subproceeding that Judge Boldt's "from" and "to" language in describing a U & A does notinclude all the waters in between. [5] Here, the pointed reference to Bellingham Bay, far to the north of the case area, is significant. Fourth, the description of the Straits and Sound as "highways" used by all tribes reinforces the rule set forth by Judge Boldt in FF 14 that incidental trolling during travel does not "make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *U.S. v. Washington,* 384 F.Supp. at 353.

CONCLUSION

*11 Based on this analysis of Dr. Lane's report and FF 45 and 46, the Court finds that neither logic nor linguistics would compel the conclusion that the waters to the west of Whidbey Island, designated as the case area, were intended by Judge Boldt to be included in the Lummi U & A. Nor were they awarded to the Lummi by the Ninth Circuit Court of Appeals as part of Admiralty Inlet, or a passage to it. The law of the case holds that the Lummi U & A does not include the Strait of Juan de Fuca or the waters west of Whidbey Island that were named in the Lummi Cross–Request for Determination. That issue has been finally determined and may not be re-litigated. Accordingly, the S'Klallam motion for summary judgment (Dkt.# 40) is GRANTED, and it is hereby ORDERED:

(1) The Usual and Accustomed Fishing Area (U & A) of the Lummi Nation does not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island, an area more specifically described as the marine waters east of a line running from Trial Island near Victoria, British Columbia, to Point Wilson at the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait;

(2) The Lummi Nation is prohibited from issuing regulations or otherwise authorizing its fishers to exercise treaty fishing rights in the waters described above; and

(3) The Clerk shall enter judgment in favor of the S'Klallam, as Requesting Tribes, and shall close this subproceeding.

Footnotes

1 The case area is defined in the Request for Determination as the eastern end of the Strait of Juan de Fuca, specifically "the marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait." Request for Determination, Dkt. # 1, ¶ 2.

2 The parties have argued at length in their briefs regarding whether the case area was actually included in the prior court rulings, pointing to statements made by one or the other in various briefs filed in the earlier proceedings. The Court notes that it is the language of the courts, not of the parties, that is determinative of the law of the case. The earlier briefs, while interesting, have not been considered and will not be addressed in this Order. It is only the court opinions, including Judge Boldt's, together with the evidence to which he pointed, that will be considered. To the extent that the Lummi have moved to strike "discuss [ions of] what the parties to this subproceeding have said to other judges over the years" that motion is granted. Memorandum in Opposition, Dkt. # 43, p. 19. The Lummi motion to strike the latter-day Declaration of Barbara Lane, together with evidence of the Board of Geographic names definition of "Strait of Juan de Fuca" was granted at the motion hearing.

3 By the same reasoning, Judge Boldt would have understood the western boundary of the Strait to be Klaholoh Rock, an inference which undoubtedly would be vigorously disputed by any tribe having a U & A in the Strait.

4 The Summary Anthropological Report, titled "Political and Economic Aspects of Indian–White Culture Contact in Western Washington in the Mid–19th Century," was before Judge Boldt as Exhibit USA–20.

5 In a recent subproceeding addressing similar language by Judge Boldt in describing the Suquamish U & A ("the marine waters of Puget Sound **from** the northern tip of Vashon Island **to** the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal"), this Court found that Judge Boldt did not intend to include all of Puget Sound, and excluded certain area to the east of Whidbey Island. Subproceeding 05–03, *affirmed, U.S. v. Washington (Upper Skagit v. Suquamish),* 590 F.3d 1020 (9th Cir.2010). This determination was made by examining the evidence that was before Judge Boldt, specifically Dr. Lane's report on Suquamish fishing areas.

End of Document

Treaty of Point Elliott, 12 Stat. 927 (1855)

Executed in the presence of us—

Cris. Taylor, assistant secretary.
Andrew Smith.
John Flett, interpreter.

We, the chiefs and headmen of the Clow-we-wal-la, or Willamette Tum-water band of Indians, being assembled in council, give our assent unto, and agree to the provisions of the foregoing treaty.

In testimony whereof we have hereunto set our hands and seals, at Linn city, Oregon Territory, this nineteenth day of January, eighteen hundred and fifty-five.

Lal-bick, or John, his x mark. [L. S.]
Cuck-a-man-na, or David, his x mark. [L. S.]

Executed in the presence of us—

Cris. Taylor, assistant secretary.
John Flett, interpreter.

We, the chiefs and headmen of the Santam bands of Calapooia Indians, being duly authorized by our respective bands, give our assent unto, and agree to the provisions of the foregoing treaty.

In testimony whereof we have hereunto set our hands and seals, at Dayton, Oregon Territory, this twenty-second day of January, eighteen hundred and fifty-five.

Tow-ye-colla, or Louis, first chief, his x mark. [L. S.]
La-ham, or Tom, third chief, his x mark. [L. S.]
Senegertta, his x mark. [L. S.]
Pul-i-can, his x mark. [L. S.]
Te-na, or Kiles, his x mark. [L. S.]
Pul-kup-ti-ma, or John, his x mark. [L. S.]
Sal-laf, or Silas, his x mark. [L. S.]
Hoip-ke-nek, or Jack, his x mark. [L. S.]
Yep-tah, his x mark. [L. S.]
Satinvose, or James, his x mark. [L. S.]

Executed in the presence of us—

Edward R. Geary, secretary.
Cris. Taylor.
Andrew Smith.
John Flett, interpreter.

TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855.

Jan. 22, 1855.

12 Stat. 927.
Ratified Mar. 8, 1859.
Proclaimed Apr. 11, 1859.

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-cháh-mish, Mee-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described

Cession of lands to the United States.

as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

Boundaries.

Reservation.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Shâis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

Whites not to reside thereon unless, etc.

Further reservation for schools.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however*, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Tribes to settle on reservation within one year.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Rights and privileges secured to Indians.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*,

That they shall not take shell-fish from any beds staked or cultivated by citizens.

Payment by the United States.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

How to be applied.

Indians may be removed to reservation, etc.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

Lots may be assigned to individuals.

Ante, p. 612.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Tribes to preserve friendly relations.

ARTICLE 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, of if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

To pay for depredations, not to make war, etc.

To surrender offenders.

Annuities to be withheld from those who drink, etc., ardent spirits.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Tribes to free all slaves and not to acquire others.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

Not to trade out of the United States.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

$15,000 appropriated for expenses of removal and settlement.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

United States to establish school and provide instructors, furnish mechanics, shops, physicians, etc.

ARTICLE 14. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Treaty, when to take effect.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens, Governor and Superintendent. [L. S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his x mark. [L. S.]
Pat-ka-nam, Chief of the Snoqualmoo, Snohomish and other tribes, his x mark. [L. S.]
Chow-its-hoot, Chief of the Lummi and other tribes, his x mark. [L. S.]
Goliah, Chief of the Skagits and other allied tribes, his x mark. [L. S.]
Kwallattum, or General Pierce, Sub-chief of the Skagit tribe, his x mark. [L. S.]
S'hootst-hoot, Sub-chief of Snohomish, his x mark. [L. S.]
Snah-talc, or Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Squush-um, or The Smoke, Sub-chief of the Snoqualmoo, his x mark. [L. S.]
See-alla-pa-han, or The Priest, Sub-chief of Sk-tah-le-jum, his x mark. [L. S.]
He-uch-ka-nam, or George Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Tse-nah-talc, or Joseph Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Ns'ski-oos, or Jackson, Sub-chief of Snohomish, his x mark. [L. S.]
Wats-ka-lah-tchie, or John Hobtst-hoot, Sub-chief of Snohomish, his x mark. [L. S.]
Smeh-mai-hu, Sub-chief of Skai-wha-mish, his x mark. [L. S.]
Slat-eah-ka-nam, Sub-chief of Snoqualmoo, his x mark. [L. S.]
St'hau-ai, Sub-chief of Snoqualmoo, his x mark. [L. S.]
Lugs-ken, Sub-chief of Skai-wha-mish, his x mark. [L. S.]
S'heht-soolt, or Peter, Sub-chief of Snohomish, his x mark. [L. S.]
Do-queh-oo-satl, Snoqualmoo tribe, his x mark. [L. S.]
John Kanam, Snoqualmoo sub-chief, his x mark. [L. S.]
Klemsh-ka-nam, Snoqualmoo, his x mark. [L. S.]
Ts'huahntl, Dwa-mish sub-chief, his x mark. [L. S.]
Kwuss-ka-nam, or George Snatelum, Sen., Skagit tribe, his x mark. [L. S.]
Hel-mits, or George Snatelum, Skagit sub-chief, his x mark. [L. S.]
S'kwai-kwi, Skagit tribe, sub-chief, his x mark. [L. S.]
Seh-lek-qu, Sub-chief Lummi tribe, his x mark. [L. S.]

S'h'-cheh-oos, or General Washington, Sub-chief of Lummi tribe, his x mark. [L. s.]
Whai-lan-hu, or Davy Crockett, Sub-chief of Lummi tribe, his x mark. [L. s.]
She-ah-delt-hu, Sub-chief of Lummi tribe, his x mark. [L. s.]
Kwult-seh, Sub-chief of Lummi tribe, his x mark. [L. s.]
Kwull-et-hu, Lummi tribe, his x mark. [L. s.]
Kleh-kent-soot, Skagit tribe, his x mark. [L. s.]
Sohn-heh-ovs, Skagit tribe, his x mark. [L. s.]
S'deh-ap-kan, or General Warren, Skagit tribe, his x mark. [L. s.]
Chul-whil-tan, Sub-chief of Suquamish tribe, his x mark. [L. s.]
Ske-eh-tum, Skagit tribe, his x mark. [L. s.]
Patchkanam, or Dome, Skagit tribe, his x mark. [L. s.]
Sats-Kanam, Squin-ah-nush tribe, his x mark. [L. s.]
Sd-zo-mahtl, Kik-ial-lus band, his x mark. [L. s.]
Dahtl-de-min, Sub-chief of Sah-ku-meh-hu, his x mark. [L. s.]
Sd'zek-du-num, Me-sek-wi-guilse sub-chief, his x mark. [L. s.]
Now-a-chais, Sub-chief of Dwamish, his x mark. [L. s.]
Mis-lo-tche, or Wah-hehl-tchoo, Sub-chief of Suquamish, his x mark. [L. s.]
Sloo-noksh-tan, or Jim, Suquamish tribe, his x mark. [L. s.]
Moo-whah-lad-hu, or Jack, Suquamish tribe, his x mark. [L. s.]
Too-leh-plan, Suquamish tribe, his x mark. [L. s.]
Ha-seh-doo-an, or Keo-kuck, Dwamish tribe, his x mark. [L. s.]
Hoovilt-meh-tum, Sub-chief of Suquamish, his x mark. [L. s.]
We-ai-pah, Skaiwhamish tribe, his x mark. [L. s.]
S'ah-an-hu, or Hallam, Snohomish tribe, his x mark. [L. s.]
She-hope, or General Pierce, Skagit tribe, his x mark. [L. s.]
Hwn-lah-lakq, or Thomas Jefferson, Lummi tribe, his x mark. [L. s.]
Cht-simpt, Lummi tribe, his x mark. [L. s.]
Tse-sum-ten, Lummi tribe, his x mark. [L. s.]
Klt-hahl-ten, Lummi tribe, his x mark. [L. s.]
Kut-ta-kanam, or John, Lummi tribe, his x mark. [L. s.]
Ch-lah-ben, Noo-qua-cha-mish band, his x mark. [L. s.]
Noo-heh-oos, Snoqualmoo tribe, his x mark. [L. s.]
Hweh-uk, Snoqualmoo tribe, his x mark. [L. s.]
Peh-nus, Skai-whamish tribe, his x mark. [L. s.]
Yim-ka-dam, Snoqualmoo tribe, his x mark. [L. s]
Twooi-as-kut, Skaiwhamish tribe, his x mark. [L. s.]
Luch-al-kanam, Snoqualmoo tribe, his x mark. [L. s.]
S'hoot-kanam, Snoqualmoo tribe, his x mark. [L. s.]
Sme-a-kanam, Snoqualmoo tribe, his x mark. [L. s.]
Sad-zis-keh, Snoqualmoo, his x mark. [L. s.]
Heh-mahl, Skaiwhamish band, his x mark. [L. s.]
Charley, Skagit tribe, his x mark. [L. s.]
Sampson, Skagit tribe, his x mark. [L. s.]
John Taylor, Snohomish tribe, his x mark. [L. s.]
Hatch-kwentum, Skagit tribe, his x mark. [L. s.]
Yo-i-kum, Skagit tribe, his x mark. [L. s.]
T'kwa-ma-han, Skagit tribe, his x mark. [L. s.]
Sto-dum-kan, Swinamish band, his x mark. [L. s.]
Be-lole, Swinamish band, his x mark. [L. s.]
D'zo-lole-gwam-hu, Skagit tribe, his x mark. [L. s.]
Steh-shail, William, Skaiwhamish band, his x mark. [L. s.]
Kel-kahl-tsoot, Swinamish tribe, his x mark. [L. s.]
Pat-sen, Skagit tribe, his x mark. [L. s.]
Pat-teh-us, Noo-wha-ah sub-chief, his x mark. [L. s.]
S'hoolk-ka-nam, Lummi sub-chief, his x mark. [L. s.]
Ch-lok-suts, Lummi sub-chief, his x mark. [L. s.]

Executed in the presence of us—

M. T. Simmons, Indian agent.
C. H. Mason, Secretary of Washington Territory.
Benj. F. Shaw, Interpreter.
Chas. M. Hitchcock.
H. A. Goldsborough.
George Gibbs.
John H. Scranton.
Henry D. Cock.
S. S. Ford, jr.
Orrington Cushman.
Ellis Barnes.
R. S. Bailey.
S. M. Collins.
Lafayetee Balch.
E. S. Fowler.
J. H. Hall.
Rob't Davis.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document – Appellant's Opening 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 February 28, 2014. 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 February 28, 2014.

Executed this 28th day of February, 2014, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ *Mason D. Morisset*

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