The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 RSM Subproceeding No. 09-01 STATE OF WASHINGTON'S RESPONSE TO QUILEUTE AND QUINAULT MOTION TO DEFINE THE BURDEN OF PROOF Noted On Motion Calendar: January 30, 2015

I. INTRODUCTION

A tribe's assertion of a reserved treaty right to fish at usual and accustomed (U&A) fishing grounds and stations depends upon a showing that a specific geographic area was, at treaty times, customarily and regularly utilized by that tribe to harvest fish. Within this case, proceedings to establish the geographic scope of U&A fishing areas have always placed the burden of proof on the tribe asserting the right to fish in the area at issue. The burden has never been placed on any other party who may contest such an assertion.

Quileute and Quinault present no reasoned basis to depart from this long-standing approach. While Makah may have initiated this proceeding, the fact remains that the case will

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adjudicate Quileute's and Quinault's claims to offshore U&A areas. They are the claimants with regard to rights not previously determined and thus bear the burden of persuasion.

Furthermore, their premise – that the burden may be switched where parties disputing their right to fish in unadjudicated waters are compelled to raise the U&A question as a consequence of such fishing activity – invites an unruly approach to the adjudication of treaty fishing rights. A tribe with a weak U&A claim that desires to avoid the normal burden of proof in establishing its claim would simply fish in that area, wait for others to press the U&A issue in litigation, and then assert the advantage of a switched burden of proof. Gaming of the U&A adjudication process in this manner has no merit. For these reasons, Quileute's and Quinault's motion should be denied.

II. ARGUMENT IN RESPONSE TO THE MOTION

A. Adjudication of a Usual and Accustomed Fishing Area Establishes the Breadth of a Tribe's Off-Reservation Fishing Rights in Relation to the State, and in Relation to Other Tribes Who May Have Competing Rights to Fish in the Claimed Area.

Accordingly, the Tribe Asserting the Right to Fish Bears the Obligation to Obtain a Final Binding Determination of the Scope of its Rights Before Asserting Those Rights Against Other Parties.

Quileute and Quinault have stipulated that their claims to U&A fishing areas in ocean waters beyond three miles have never been adjudicated. Dkt. 181, pp. 2-3. Accordingly, the current subproceeding now undertakes the task of adjudicating these U&A claims for the first time. As described in this Court's order on continuing jurisdiction, this is a paragraph 25(a)(6) subproceeding that considers whether additional U&A fishing grounds should be added to those previously adjudicated for Quileute and Quinault by Judge Boldt in his 1974 Decision I.[1]

While a treaty that generally reserves fishing in U&A areas presupposes the existence of *some* U&A area, adjudications of the exact scope of these U&As are critical because they define rights and responsibilities under that treaty, including the right to harvest resources

[1] Judge Boldt observed that his 1974 adjudications may not be complete and left room for additional adjudications. Final Decision I at 353, 419.

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associated with those U&A areas. As this Court has previously stated, the exercise of a treaty tribe's right to take fish in off-reservation areas is limited by "the geographical extent of the usual and accustomed fishing places, the limits of the harvestable stock, the tribe's fair need for fish, and the opportunity for non-Indians to fish in common with Indians outside reservation boundaries." *United States v. Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974) (Final Decision I). Accordingly, U&A adjudications are a final determination of the geographic limit of a tribe's treaty reserved right to fish in off-reservation areas.

B. The Burden of Proof, and the Evidentiary Showing Necessary to Prove U&A Areas, Are Well Settled: The Burden Lies With the Tribe Seeking to Assert Its Right to Fish in a Geographic Area, and the Trier of Fact Must Be Persuaded of That Claim Based Upon a Preponderance of the Evidence.

For the entire history of this case, any tribe asserting a treaty-reserved right to fish outside of its established Indian reservation has carried the burden of establishing that the claimed fishing grounds are part of that tribe's off-reservation U&A. *See, e.g., United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978) (in a 1975 claim to fish certain U&A grounds, Tulalip "have the burden of producing evidence to support their broad claims" against the objecting parties Snohomish and Stillaguamish Tribes); *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988) (in supplemental U&A proceeding adjudicating additions to the Tulalip's 1975 U&A determination, Tulalip had the burden of establishing its claim as against the objecting party Lummi Tribe).

Where there is conflicting evidence, the burden is met based upon "a preponderance of the evidence found credible" and considering all inferences reasonably drawn from such evidence. Final Decision I at 348. This is the same burden of proof that Quileute and Quinault should carry in this subproceeding.

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C. There Is No Support for Quileute's and Quinault's Argument That the Burden of Persuasion Shifts When U&As Are Adjudicated Defensively as a Consequence of a Tribe's Unilateral Fishing Activity. It Is Still an Adjudication of a Tribe's U&A in the Normal Sense of What Is Ultimately Being Determined.

Quileute and Quinault assert that Makah bears the burden of persuasion because Makah initiated the subproceeding and is the "petitioning party" seeking relief. They also attempt to draw significance from the fact that some of the offshore fisheries that take place in the disputed offshore U&A areas are federally managed. Neither of these assertions provides a substantive basis for altering or applying this Court's prior framework for adjudicating U&A fishing areas.

With respect to their claim that adjudicating U&A areas in "federal waters" somehow makes a difference, Quileute and Quinault again assert that "the federal government has already established [their] ocean treaty fishing areas." Motion at 3. That assertion is false. Prior briefing by the federal government in this subproceeding (Dkt. 58) refutes this claim.[2] This Court has also rejected that argument in a prior Order. Order on Motion for Partial Summary Judgment at 8-9 - Dkt. 171.

While Makah initiated this subproceeding, the case will finally determine a previously unadjudicated U&A claim by the Responding Tribes – Quileute and Quinault – that they have extensive U&A fishing areas more than three miles offshore along the Pacific Coast. Indeed, they have fished those offshore areas without pursuing any prior U&A adjudication, including offshore fisheries that are not federally regulated (e.g., the coastal Dungeness crab fishery).[3] Their claimed right to engage in such fishing is contested by Makah and the State, just as other U&A claims have been contested by parties to this case.

[2] A full briefing of this aspect is contained in Makah's summary judgment filings (Dkt. 166, at 26-27). In addition, the State previously briefed this issue, Dkt. 60, and quoted from a stipulated order of dismissal executed by the federal court in another proceeding in which the federal government expressly disclaimed any notion that it has adjudicated or determined any offshore U&A for Quileute or Quinault. *Id*. at 8.

[3] The fact that the coastal Dungeness crab fishery is one of several offshore fisheries which are not federally regulated has previously been briefed. *See* Dkt. 60 at 6-7, 17-19, & 21-23; Dkt 76 at 6-7.

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Placed in proper perspective, the cases cited by Quileute and Quinault for the premise that the party seeking relief bears the burden of persuasion are inapposite to the position they take in their motion. What Makah seeks is a halt to fishing in areas where Quileute and Quinault have admittedly failed to prove their rights in any prior U&A adjudication. Because the Responding Tribes have not offered to desist, or taken the initiative to adjudicate their claimed rights, this case must first resolve the U&A claims that Quileute and Quinault assert for those areas. As the parties advancing that U&A claim, they bear the burden of proof in the same manner as any other civil case.

Quileute and Quinault also cite to language in prior case law dealing with U&A claims for the premise that the "petitioning party" bears the burden of proof. Motion at 4, citing to *Lummi Indian Tribe*, 841 F.2d at 318. However, that case involved a claim by Tulalip as a petitioning party seeking to vindicate its claim to a specific U&A area. The reference to Tulalip as the "petitioning" party and the statement that they bore the burden of proof is wholly unremarkable in that regard. Nothing in the cited case discusses, or stands for the proposition, that a tribe's burden in proving its U&A claim shifts to a different party if the tribe with an unadjudicated U&A claim acts in a way that compels another party to dispute that claim and bring the matter to this Court for resolution. The party asserting the existence of a U&A, and the right to fish there, is the party with the burden. It makes no difference if they are called a petitioner or a respondent because their right to claim that U&A area is being finally determined.

D. The Structure of this Case and Manner in Which Prior U&A Matters Have Been Resolved Support the Rule That the Tribe Asserting a Geographic U&A Area, Rather Than the Parties Who Contest That Claim, Has the Burden of Persuasion.

Judge Boldt set up an orderly structure for tribes to pursue treaty reserved fishing in areas not previously adjudicated. The tribe proposing to fish in some unadjudicated area is required to first come to the Court and make a prima facie showing of that U&A claim. *United*

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States v. Washington, 459 F. Supp. at 1037 (paragraphs F.2 and G.1). Upon making such a showing, this Court may make a "preliminary" determination of the right to fish in the asserted U&A area, but that preliminary determination is subject to a final U&A adjudication on the merits and following the manner in which such matters are determined. *Id.*[4] As discussed above, the normal procedure is for the party asserting a U&A claim to advance the claim, and to meet its burden of proof by a preponderance of the evidence, with the opportunity of contesting parties – whether state, tribal, or federal – to refute such claim.

Prior to this subproceeding, there may have been some question as to whether Quileute and Quinault were relying upon Judge Boldt's prior adjudications of their U&A fishing areas in marine waters "adjacent" to the coast as a basis for their fishing outside of three miles. However, with their stipulation that prior U&A adjudications did not determine any U&A for them in offshore waters, this is no longer in any doubt. Accordingly, paragraph (a)(6) of the order on continuing jurisdiction is the basis for determining Quileute's and Quinault's U&A claims. And Judge Boldt made it clear that the party asserting the right to fish a specific area, not the party contesting such right, must advance the claim. *See, e.g., United States v. Washington*, 459 F. Supp. at 1037. Indeed, he admonished tribes not to try to expand their U&A areas by simply fishing in unadjudicated U&A areas without first following the normal procedures for adjudicating that claim. *United States v. Washington*, 459 F. Supp. at 1068-69.[5]

Here, Quileute and Quinault assert that they have extensive offshore U&A fishing areas, and they fish in those areas. But they have never invoked the procedures used to

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[4] In some instances, Judge Boldt allowed a tribe to begin fishing in an asserted U&A based upon a *prima facie* showing, with the admonition that a fully contested adjudication would need to follow in order to conclusively determine the U&A, but also indicating that the presumed U&A would be adopted in the absence of any objection by a contesting party. *United States v. Washington*, 459 F. Supp. at 1049.

[5] "[T]he court has been made aware that other treaty tribes have sought to expand their usual and accustomed fishing places not in accordance with the procedures of paragraph 25 but by filing fishing regulations merely including such additional places. Such conduct evidences a disregard for the court's rulings and procedural guidelines meticulously set forth in Final Decision # I. Those tribes or counsel expanding fishing places in a manner inconsistent with Final Decision # I are admonished to follow its provisions or risk the imposition of sanctions."

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adjudicate those claims. If they are allowed to undertake such activity, and then assert that the burden of proof switches to any party who invokes paragraph 25 to halt such fishing, it provides an incentive for parties to ignore this Court's procedures. A tribe with a weak claim to an additional U&A area can simply fish that area, provoke contesting parties to invoke paragraph 25(a)(6), and then be rewarded with an adjudication of their U&A claim on a weaker burden of persuasion. Because this invites a violation of the normal procedures for adjudicating U&As set up by this Court, and because it inappropriately shifts the burden of persuasion from the real claimant to the party contesting an unproved claim, this approach should be rejected.

E. There Is No Need to Revise the Evidentiary Showing Necessary to Establish a Claimed U&A Area.

In the event they are assigned the normal *burden* of proof, Quileute and Quinault also seek a relaxed *standard* of proof – abandonment of the preponderance of evidence standard and application of some lesser "probable location" standard. Motion at 11. That request should also be denied because this Court has previously articulated the manner in which the preponderance standard is applied in U&A proceedings, and there is no basis for departing from that well-established approach.

Judge Boldt observed that "stringent" standards of proof were not going to be utilized in U&A adjudications. *United States v. Washington*, 459 F. Supp. at 1059.[6] Nonetheless, Judge Boldt did not shift the standard burden of persuasion; he applied the preponderance of the evidence standard. Final Decision I at 348.[7] *See also*, Dkt. 8764 (Order on Makah Tribe's Motion for Reconsideration – In adjudicating Makah's claim to offshore U&A, the

[6] "In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." *Id.*

[7] *See also, United States v. Washington*, 459 F. Supp. at 1059 ("The Tulalip Tribes claim extensive marine areas as usual and accustomed fishing places. Notwithstanding the court's prior acknowledgement of the difficulty of proof, the Tulalips have the burden of producing evidence to support their broad claims.").

Court utilized the "standards of proof for determining usual and accustomed fishing grounds previously applied by the Court in Final Decision No. 1.").

Ultimately, what Judge Boldt and subsequent judges in this case have said is that "[t]he court's concern and objective is to act upon the most accurate and authoritative data concerning usual and accustomed fishing places that can be developed by thorough investigation and research." *United States v. Washington*, 459 F. Supp. at 1059. Accordingly, to support a U&A claim, there must be credible evidence that a tribe "customarily fished from time to time at and before treaty times." Final Decision I at 332. Reasonable inferences may be drawn from such evidence. But "probable location" doesn't mean speculation, nor does it mean there is a burden of persuasion other than the traditional preponderance standard used in prior U&A cases. *Seufert Bros. Co. v. United States*, 249 U.S. 194, 39 S. Ct. 203 (1919).[8] Instead, it means that credible evidence must either directly demonstrate, more likely than not, that a tribe customarily fished at a claimed location at treaty times, or be the basis for a reasonable inference supporting a conclusion that, more likely than not, such fishing occurred.

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[8] In affirming a district court's determination of Yakama U&A, the Supreme Court stated: "The record also shows with sufficient certainty, having regard to the character of evidence which must necessarily be relied upon in such a case, that the members of the tribes designated in the treaty as Yakima Indians, and also Indians from the south side of the river, were accustomed to resort habitually to the locations described." *Id.* at 205. Cited in Final Decision I at 332.

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III. CONCLUSION

For these reasons the State respectfully asks this Court to deny Quileute's and Quinault's' motion seeking to alter the burden of proof and the burden of persuasion. This Court should retain the standards used in all U&A proceedings: The burden of proof lies with the party asserting the right to fish in an unadjudicated U&A area, and the burden of persuasion is by a preponderance of the evidence demonstrating customary fishing at the claimed location and allowing for reasonable inferences based upon credible evidence that supports such a claim.

DATED this 26th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015, I electronically filed the State of Washington's Response to Quinault and Quileute Motion to Define the Burden of Proof with the Clerk of the Court using the CM/ECF system which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

Dated this 26th day of January, 2015, at Olympia, Washington.

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