Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et. al., Plaintiffs, v. STATE OF WASHINGTON, et. al., Defendants,	Case No. C70-9213 – Phase I (Sub-proceeding No. 14-01) **SUQUAMISH TRIBE'S RESPONSE IN OPPOSITION TO USIT'S MOTION FOR SUMMARY JUDGMENT** ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Upper Skagit Indian Tribe's ("USIT") attempt to frame this sub-proceeding as one in which the Suquamish Tribe ("Suquamish") is challenging the *status quo* cannot survive scrutiny. USIT, not Suquamish, initiated this proceeding, which is the most recent of successive proceedings brought by USIT to whittle away at what has for nearly forty years been understood by all involved to be Suquamish usual and accustomed fishing areas ("U&A"). Suquamish has not departed from customary practices in the contested marine waters at issue[1] that emerged following Judge Boldt's 1975 determination of their U&A. Instead it is USIT that is seeking in yet another sub-proceeding to expand its own U&A by subtraction and evict the Suquamish from

[1] USIT's RFD identifies those waters as "a portion of Padilla Bay and in Samish Bay and Chuckanut Bay." Dkt. # 4

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Suquamish's adjudicated U&A.

USIT's proffered "five reasons" supporting its attempt to further narrow the scope of Suquamish's U&A really boil down to three: (1) there was "no evidence" before Judge Boldt that could support a reasonable inference that he intended to include the Sub-proceeding Area as part of Suquamish's U&A; (2) Judge Boldt impliedly bifurcated the Puget Sound into an eastern and western zone, and intended "the marine waters of Puget Sound" to mean "the marine waters of the *western half* of Puget Sound"; and, (3) a bald assertion that this Court's order regarding certain waters on the eastern side of Whidbey Island in a prior sub-proceeding is entitled preclusive effect regarding Suquamish's defense of its U&A in the Sub-proceeding Area at issue here, despite the fact that the Sub-proceeding Area is not mentioned in the Court's prior order and has never before been challenged or litigated by USIT or any other Tribe.

USIT's first argument is premised on its contention that the case turns on whether or not Judge Boldt had received any evidence of Suquamish fishing in the Sub-proceeding Area prior to adjudicating Suquamish's U&A. USIT posits that the absence or presence of evidence of Suquamish fishing in the Sub-proceeding Area is "dispositive" here. Assuming, *arguendo*, that USIT's premise is legally sound, the evidence/testimony that was presented to Judge Boldt in 1975 *did* directly address Suquamish fishing in the Sub-proceeding Area. Moreover, Judge Boldt was specifically advised prior to issuing his April 18, 1975, written order that Suquamish fishing vessels would be participating in herring fisheries in and around the Sub-proceeding Area. As a result, the conclusion that he intended to *include* those areas in his "marine waters of Puget Sound" language of his U&A determination is inescapable and USIT's argument fails.

As to USIT's contention that Suquamish's U&A does not include any waters in "eastern Puget Sound," including the Sub-proceeding Area, the argument misconstrues and conflates prior decisions of this Court and the Ninth Circuit. Splitting the Puget Sound into a "Puget Sound east-half" and a "Puget Sound west-half" would require a radical departure from the plain

at p. 1. The contested marine waters at issue in this matter are hereinafter referred to as the "Sub-proceeding Area."

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language of Judge Boldt's Order and the law of the case, and lacks any basis in fact. This Court specifically rejected a nearly identical argument advanced by the Tulalip Tribe in sub-proceeding 05-04, and Suquamish respectfully requests that the Court reject USIT's renewed invitation to jettison forty-plus years of practice and understanding and adopt, from whole cloth, a scheme that bifurcates the marine waters of the Puget Sound.

USIT's third argument is best described as a hybrid of offensive claim preclusion and issue preclusion. USIT concedes that the prior sub-proceeding 05-03 between the parties arises out of common nucleus of operative fact. USIT could have (but failed to) challenge Suquamish's fishing activities in the Sub-proceeding Area at issue here in the earlier litigation. Therefore if claim preclusion applies, it operates to bar USIT's claims because USIT's renewed Request for Determination runs afoul of the prohibition against claim splitting. In the alternative, issue preclusion based on the Court's prior holding in sub-proceeding 05-03 is inappropriate because the scope of Suquamish's U&A in the Sub-proceeding Area was not litigated or decided in the prior proceeding, as would be necessary for issue preclusion to apply.

For those reasons, as more fully set forth herein, as well as the reasons set forth in Suquamish's own Motion for Summary Judgment (Dkt. # 37), USIT's motion should be denied.

II. ARGUMENT IN RESPONSE

A. USIT misrepresents the nature of the April 1975 proceeding, and asks the Court to ignore the evidence that was before Judge Boldt.

USIT's "no evidence" argument is predicated upon a substantial mischaracterization of the process that Judge Boldt used to establish the U&A of the Suquamish Tribe. USIT wants this Court to believe that the process used by Judge Boldt in rendering the Suquamish U&A determination was patterned after the extensive and methodical evidentiary process at play in the *Boldt I* decision. *U.S v Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974). It would have this Court believe that Suquamish planned to come before the Court in April 1975 with its "best evidence" just as "other tribes had done before it" in *Boldt I.* (USIT at p. 11, pp 11-16). In making the inapposite comparison with the extensive process employed in *Boldt I*, USIT ignores

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the procedural limitations applicable to the later (and controlling) expedited proceeding in which Suquamish's U&A was established.

The *Boldt I* U&A proceedings were initiated in September of 1970. The Court's U&A determinations were rendered four years later, on February 12, 1974. Judge Boldt himself commented on the amazingly complicated, extended, and deep factual inquiry that took place:

> For more than three years, at the expenditure by many people of great time, effort, and expense, plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery management, and other fields of expertise, and also have made extreme efforts to find and present witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in this case. As a consequence of this extensive pretrial preparation, all parties joined in stipulating to a great many agreed facts . . . . [A]ll procedures recommended in the Manual for Complex Litigation have been followed by counsel in the particulars and to the extent found applicable and practicable by the Court. . . . . All of the legal issues have been researched in depth and effectively presented and argued in pre-trial briefs, and in the final briefs submitted after the presentation of evidence was concluded and before final argument, which also was exceptional and in professional quality. (*Id* at 328-29).

Clearly, Judge Boldt believed that the three years of legal research, briefing, argument, presentation and examination of expert evidence prepared him well to make methodical and specific findings regarding usual and accustomed fishing areas of Tribes involved in *Boldt I*.

In contrast, the Suquamish Request for Determination was filed on March 17, 1975, and Judge Boldt issued his Order on April 18, 1975—lasting all of four weeks, as opposed to four years. The expedited Suquamish process included no briefing other than the initial Request for Determination filings, no pre-trial or pre-hearing conferences, no stipulated facts, and but three days' of evidence presentation and argument (April 9, 10, 11, 1975). *See, e.g.,* Dkt. # 37-1 at pp. 43-46 (noting basis and fact of expedited determination); *accord* Dkt. #37-2 at pp. 52 (noting that hearing related to Suquamish's U&A was "called as an urgent, indeed imperative, measure on an emergency basis . . ."). The fact that Judge Boldt used an expedited process for Suquamish does not make his U&A determinations less valid or any less the law of the case. However, it does partly explain why his U&A description for Suquamish was less detailed than

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those determinations for Tribes involved in *Boldt I* or in subsequent more deliberately paced proceedings in the case.[2]

An even more important distinction between *Boldt I* and the later proceedings leading to the Suquamish's (and eight other Tribes') U&A determination, however, is that Judge Boldt did *not* ask Suquamish to come forward with its "best evidence" to make its primary case affirmatively on April 9, 1975. Instead, as noted in his March 28th Order, Judge Boldt set up the April 9th hearing as an "exceptions process" wherein the State of Washington could "challenge" any of the U&A "claimed areas" that the Judge directed Suquamish to provide to the State by April 2nd:

> Based upon the evidence submitted, the Court **finds that prima facia showings of treaty entitlement have been made by the following tribes . . . Suquamish** [and listing eight other additional tribes] . . . and that therefore, such tribes shall be entitled to conduct off-reservation fisheries at each tribe's usual and accustomed fishing places as set forth in the Findings of Fact for each respective tribe; except that with respect to the Swinomish Indian Tribal Community and **the Suquamish Tribe**, for which no usual and accustomed places have been found by the Court, those tribes **shall be entitled to conduct herring fisheries at their claimed usual and accustomed fishing places**, **subject to the state's authority to contest any such location** consistent with the prior judgment and orders of this Court . . . .

Dkt. # 16-3 at p. 4 (emphasis added).

Judge Boldt directed Suquamish to provide the State and file with the Court by April 2nd its proposed herring fishing regulations, including the "locations at which said fishery will be conducted" which had yet to be described (in *Boldt I*). *Id.* The regulations and the claim area map[3] that the Suquamish provided to the State April 2nd showed the extent of Suquamish's U&A claim. The State and Tribes with presumptively established treaty fishing entitlement via Judge Boldt's March 28th Order met as directed *prior* to the April 9th hearing to attempt to resolve issues including "questions about usual and accustomed fishing locations." Dkt. # 16-3 at pp. 3-

[2] The other primary reason for the general description of Suquamish's U&A, discussed *infra*, is its sheer breadth—as it spans in excess of 100 nautical miles (and includes countless named bodies of water) measured from north to south.

[3] Dkt. #16-4 at p. 3 (the Suquamish U&A Claim Map).

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4. Per the expedited process used by Judge Boldt and set out in his March 28th order, the Suquamish U&A claim area described, mapped, and submitted on April 2nd constituted Suquamish's presumptive U&A, and it was then incumbent on the State *to challenge* some or all of it at the April 9th hearing. As is evidenced by the Court's orders and the hearing transcripts from April 9 through 11, 1975, contrary to deeply flawed historical narrative offered by USIT, Judge Boldt's 1975 Suquamish U&A determination process diverged significantly from the process in *Boldt I*.

A review of the April 9-11 hearing transcripts clearly demonstrates that Judge Boldt intended the April 9th hearing to be a venue for the State (and other Tribes) to present their *exceptions* to the U&A claim area described in the maps and regulations submitted by the Suquamish on April 2nd. Judge Boldt, having previously been provided with evidence and having preliminarily determined Suquamish's entitlement to its claimed U&A,[4] did *not* expect or anticipate that the Suquamish would necessarily provide additional support for their U&A claim at the April 9th hearing. A review of the hearing transcripts substantiates this:

- Attorney Alan Stay addressed the Court on behalf of "the Nooksack, the Nisqually, and for this hearing only the Suquamish Indian Tribes."Dkt. #37-1 at pp. 33-34.
- Mr. Stay, on behalf of the Nooksack Tribe, elicited testimony from Dr. Barbara Lane about Nooksack fishing in Bellingham Bay, Birch Bay, Chuckanut Bay; Attorney Paul Solomon, for the State, then cross-examined Dr. Lane about her testimony regarding fishing at Bellingham Bay, Chuckanut Bay and Birch Bay. *Id.* at pp. 34-37.
- As Mr. Stay was completing his examination of Dr. Lane regarding Nooksack fishing, Mr. Solomon surprised Mr. Stay and the Court with a request to challenge the "far north" U&A claimed by the Suquamish in the regulations filed on April 2nd. *Id.* pp. 41-42.[5]

[4] Evidence had previously been submitted to the Court for consideration. *See, e.g.,* Dkt. 16-3 at pp. 2-3 (noting evidence considered by Court that was submitted along with RFD).

[5] Notably, Mr. Solomon did not once refer to Bellingham Bay or Chuckanut Bay in his challenge to Suquamish's U&A though he had just addressed them minutes before as it pertained to his challenge of the Nooksack Tribe's U&A claim. *See, e.g., Id.* at pp. 38-39.

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- Mr. Stay objected to the State's inquiry regarding Suquamish, noting that there was no disagreement among the participating Tribes about the areas claimed by Suquamish in its regulations and U&A map, and advised the Judge that notwithstanding his direction to the parties to work between April 2nd and April 9th on disputes such as U&A areas claimed, the State failed to provide any notice that it intended to contest any of the claimed areas Suquamish had advised the State of on April 2nd. *Id.* at pp. 42-43.
- Mr. Solomon responded by reading from the March 28, 1975 order, and reiterated his understanding that this April 9th hearing would be the State's opportunity to object to the Suquamish U&A claim and not "down the line somewhere". *Id.* at pp. 43-44.
- Judge Boldt responded to Mr. Solomon that he sought to "expedite" this process telling him that "carrying the matter further at this point without an in-depth exploration and full hearing is inadvisable". Judge Boldt made clear that he did not intend for the April 9th hearing to be a "full and thorough" review of the U&A area claims because this would not be practical with the herring fishery "just days away." *Id.* at pp. 43-44.
- Judge Boldt invited Mr. Solomon to bring out objections regarding the northernmost areas identified by Suquamish in its U&A claim map filed with its regulations and to inquire of Dr. Lane regarding the same. *Id.* at pp. 46-47.
- Mr. Stay continued to object and advised the Court that he did not come prepared to put on any evidence regarding the Suquamish U&A claim areas and that the lack of notice that he would be expected to do so left him in a "quandary". *Id.* at pp. 48-49.
- Nonetheless, Mr. Stay briefly elicited testimony from Dr. Lane regarding Suquamish fishing in the San Juan Islands region, the Birch Bay area, and on the way to the Fraser River – the far north areas that the State was challenging. *Id.* at pp. 49-53.
- Mr. Solomon then cross examined Dr. Lane, and referenced the Suquamish April 2nd regulations, the claim area map filed with them, and contested sub-areas 1 and 2 (the "far north" zones) of the Suquamish's claimed U&A area, which was divided into four sub-

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areas referred to in the regulations and shown on the claim area map. *Id.* at pp. 53-61; *see generally* Dkt. #16-4 (Suquamish's proposed regulations and claim area map).

- Judge Boldt permitted the State's challenge to sub-areas 1 and 2 to go forward, but reserved judgment as to whether the challenge was appropriate. Dkt. #37-1 at p. 61.
- Mr. Solomon conceded the Suquamish U&A claims included sub-areas 3 and 4 of the Suquamish April 2nd U&A claim area map, and specifically limited his challenge to Suquamish U&A sub-areas 1 and 2. *Id.* at pp. 57-60. The Sub-proceeding Area here is located in the Suquamish claim sub-area 3, which was not an area challenged by the State (and therefore not an area on which testimony was sought to be elicited). *See* Dkt. 16-4 at p. 3 (Map showing claimed Suquamish U&A areas).
- Judge Boldt carried the evidentiary proceeding over to April 10th and invited argument on the issues that presented on the 9th. The morning of the 10th, the Court's law clerk summarized that one of the issues was "the question of the usual and accustomed fishing locations for the Suquamish Tribe as to the northern areas that were called one and two yesterday, and Mr. Stay's objection to that." Dkt. #37-2 at pp. 4-5. The clerk's report confirms that the State did not challenge Suquamish's U&A claims in the sub-areas noted as 3 and 4 in the claim area map, and the contest was only "as to" the claims to sub-areas 1 and 2. *Id.*
- On the morning of April 10th, Mr. Stay recounted the evidence in support of Suquamish fishing in the areas contested by the State – claim sub-areas 1 and 2. *Id.* at pp. 10-12. Mr. Solomon argued that Dr. Lane's testimony regarding U&A in Suquamish sub-areas 1 and 2 was inadequate, but again did *not* contest or mention any waters in sub-area 3 (the Sub-proceeding Area) or sub-area 4 (that included the Suquamish Reservation) claimed as U&A by Suquamish. *Id.* at pp. 41-45.
- That afternoon, Judge Boldt ruled on the State's challenge to Suquamish's U&A claim in sub-areas 1 and 2, finding that the documentary and live testimony supported a finding

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that sub-areas 1 and 2 are indeed a portion of the larger U&A claimed by Suquamish Dkt. *Id.* at pp. 52-53.

- On April 18, 1975, Judge Boldt rendered his memorandum "more fully explaining [his] views" on the full scope of the Suquamish U&A, and providing the State and participating Tribes an opportunity to request a full evidentiary hearing on any of the findings before they became final on May 19, 1975, *U.S. v. Washington*, 459 F.Supp. 1020, 1049 ¶ 8 (1975).

Reviewing Judge Boldt's March 28, 1975, Order and the April, 1975 hearing transcripts, it is clear why the April 9th hearing transcript contains limited references to Chuckanut Bay, Samish Bay or Padilla Bay as they pertain to the Suquamish U&A: these waters are all within the Suquamish U&A claim sub-areas that the State *conceded* when it failed to take exception to them, while the State *did challenge* other separate Suquamish sub-area claims. Mr. Stay may have been caught unaware and unprepared for the surprise State contest to the "northern" Suquamish U&A claims, but even though acting as Suquamish legal counsel only for this one day, he was certainly skilled and experienced enough to focus Dr. Lane in his brief direct examination on the sub-areas actually being challenged by the state, and not burden the Court with testimony about the sub-areas that were not being disputed.

The actual nature of the proceeding and official record destroys USIT's arguments that Suquamish had a full and thorough opportunity to present its "best evidence" about fishing in the Sub-proceeding Area on April 9th and that the lack of a specific reference by Dr. Lane to the Sub-proceeding Area on April 9th must be interpreted as a lack of evidentiary support for them being part of the "marine waters of Puget Sound" referenced by Judge Boldt. On the contrary, Judge Boldt established April 9th as a hearing for the State to dispute or take exception to some or all of the Suquamish U&A map. The State, in turn, aggressively challenged sub-areas 1 and 2. Neither the State nor any other Tribe challenged the U&A claim area shown in Suquamish's map (area 3) containing the Sub-proceeding Area or area 4. Understandably, Suquamish specifically

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responded to the State's limited challenge with testimony tailored to address the challenge that was actually made. It is therefore clear why the State never specifically asked about Suquamish's activities in Chuckanut Bay, Samish Bay, or Padilla Bay, and why the State did not make any attempt to argue that Suquamish were not active in those waters on April 9th or 10th—the State and other Tribes had already conceded these waters as Suquamish U&A.

B. On April 10th and 11th, 1975 Judge Boldt heard testimony from witnesses that Suquamish would be fishing in sub-area 3 of Suquamish's U&A claim, which includes the Sub-proceeding Area

After rejecting the State's challenge to a portion of the Suquamish U&A from the bench on April 10th, Judge Boldt turned his attention to matters involving the details of herring fishery management for the upcoming 1975 season. *See* Dkt. 32-2 at p. 54, *et seq.* The parties presented evidence on who would be participating in the upcoming fishery, and where the fishery locations would be. Mason Morriset, counsel for Suquamish, (Mr. Morriset filed the March 17, 1975 Request for Determination on behalf of Suquamish), addressed Judge Boldt as counsel for Lummi and Suquamish and other Tribes, and then called a fishery biologist in the employ of Lummi to the stand as a witness for Suquamish. The witness was asked to explain a document entitled "Joint Herring Roe Fishing Regulation for 1975." Dkt. # 16-14 (hereinafter "1975 Joint Regulations"); *see also* Dkt. #37-2 at pp. 67-71 (testimony on the 1975 Joint Regulations).

The 1975 Joint Regulations divided the collective tribal fishery into several sub-areas. After some initial confusion, the witness and Mr. Solomon agreed that the 1975 Joint Regulation sub-areas, as a whole, corresponded to the "state areas" 2 and 3. Dkt. # 37-2 at pp. 72-74. The "state area 3" is the same Suquamish U&A sub-area 3 identified in the regulations that the Suquamish provided on April 2nd.[6] Having established the fishing areas listed in the 1975 Joint Regulations corresponded to state areas 2 and 3, Mr. Morriset asked for testimony about details of the Indian purse seine fleet that was expected to participate in the herring fishery:

Q: And how many purse seiners are there in the Indian fleet"

[6] On April 9th Mr. Stay, Mr. Solomon and the Court clarified that "state areas" and Suquamish sub-areas were the same. Dkt. 37-1 at p. 60; see also Dkt. 16-4 (Suquamish Herring Fishery Regulations and Map).

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A: Two and possibly three. There's two in ours [Lummi], and I think there will be one more in Suquamish, so that will be three.

Dkt. # 37-2 at p. 81. While the question and exchange are brief, the import is *monumental* when trying to determine what Judge Boldt intended regarding the scope of the Suquamish U&A claim.

Contrary to USIT's claim that "no evidence" was presented regarding Suquamish's fishing in the Sub-proceeding Area, Judge Boldt (and counsel for the State and other Tribes) heard testimony from the Lummi biologist that the Suquamish Tribe "will be" fishing for herring in the coming weeks in locations that correspond to the disputed waters here. If the Court's decision on the hotly contested Suquamish U&A issue, which had been resolved just hours before, had left any question as to whether Suquamish U&A included sub-area 3, Judge Boldt or Mr. Solomon would have raised an objection or questioned the witness following his testimony that the Suquamish would have a purse seine boat fishing in that area. However, neither the Court nor the State reacted in any way whatsoever to this testimony. Therefore the only supportable inference is that everyone, including Judge Boldt, understood these areas to be within Suquamish's U&A.

The following day, April 11, 1975, Judge Boldt continued his inquiry into the details of the upcoming herring fishery. The United States put a federal biologist on the stand, and elicited facts and opinions about fishery management and biology matters involving the upcoming fishery. Mr. Solomon conducted cross examination for the State, and delved into details about the location of the upcoming Indian fishery, and what tribes would be involved:

Q: With respect to what is described as the Hale Passage area, the type of gear that is most effective there would be the gill net?

A: Yes, taking passage in total, yes.

Q: And the Indian fleet, at least last year, was somewhat in –at least 114, possibly up to 115 boats?

A: That's true.

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> Q: And there are now contemplated for 1975 additions by reason of others claiming a right to fish or being granted entitlement to fish so that there will be more gill net boats likely in the Indian fleet?
>
> A: That's true.
>
> Q: Do you have any estimate as the additional number of gill net boats at this time?
>
> A: I believe it's quite small. I think the Nooksacks are planning something around ten. That's just a feeling. I believe the Suquamish are planning as little as four I believe, something like that.

Dkt. # 37-4 at pp. 34-35

Like the prior day's testimony that the Suquamish would be fishing in the contested waters here, this testimony is critical to any understanding of Judge Boldt's intent with respect to the scope of the Suquamish U&A. The "Hale Passage area" is within what both the State and Suquamish designate as area 3. Sub-area 3 contains Chuckanut, Samish, and Padilla Bays, and this testimony is direct evidence of Suquamish fishing activity in the "Hale Passage area" on the "east side" of Puget Sound. Mr. Solomon had just spent a day and a half intensely challenging the scope of the Suquamish U&A. Had Mr. Solomon believed that Suquamish fishing in the Hale Passage area (sub-area 3) fell outside of the Suquamish's U&A, there is no doubt he would have objected. He did not. Mr. Solomon clearly understood that the Court had just expanded the fishery and that some tribes had a newly established "granted entitlement to fish" in this Hale Passage area. The witness acknowledges an expanded fishery in this area and *directly identifies Suquamish* as a participating Tribe in his response to Mr. Solomon. Dkt. # 37-4 at pp. 34-35.

Mr. Solomon continued to question the witness about participation in the planned 1975 Indian herring fishery in the Hale Passage area. He questioned the witness about an additional gear type in the fishery. The following single question and answer is yet more direct evidence presented to Judge Boldt, and proof that the Judge, the State, and all of the Tribal parties involved understood Suquamish had adjudicated rights to fish in the waters contested here:

> Q: Is it now contemplated this year by any of the other tribes, if you know, that have qualified for the herring roe fishery, to fish with a seine?

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A: Yes, one seine from Suquamish.

Q: One?

A: One seine.

Dkt. # 37-4 at p. 36.

As noted, there was testimony from two separate witnesses on two separate days that the Suquamish Tribe would be adding fishing vessels to the 1975 herring fishery in eastern Puget Sound and in the Hale Passage area, which includes the Sub-proceeding Area. Neither Judge Boldt nor the State (nor any of the other Tribes involved in the proceeding) made any objection or questioned this testimony. The State had demonstrated its strong interest and desire to limit the scope of the Suquamish U&A on April 9th when it contested some of the U&A claim area while accepting the remainder. The State would have reacted if it understood these areas to be outside of the Suquamish U&A. Judge Boldt would have reacted if he did not believe that Suquamish fishing in the area was consistent with his U&A determination. But, again, neither the Judge nor Mr. Solomon sought clarification, objected, or reacted in any way.

USIT claims that the "the absence of any factual evidence showing that Suquamish fished in the Disputed Areas on any usual and accustomed basis should be dispositive in this sub-proceeding". Dkt. 38 at p.11. However, the above testimony makes clear that USIT's claim that there was "no evidence" presented to Judge Boldt regarding Suquamish fishing activity in the Sub-proceeding Area is objectively false. The evidence considered by Judge Boldt includes documentary and live testimony of Dr. Lane that Suquamish travelled to "upper Puget Sound as well as in other directions to harvest natural resources"; that the Suquamish travelled "widely over the marine waters"; that they travelled to the Fraser River and "fished the marine waters along the way"; that Suquamish fished in the far north Birch Bay area and in the San Juan Islands region. Judge Boldt then heard testimony that the Suquamish Tribe would, by virtue of his new decision of treaty entitlement, be fishing in the eastern waters of northern Puget Sound and testimony of the Lummi biologist that Suquamish would be adding fleet in 1975 to

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Suquamish/state fishing areas 2 and 3. Judge Boldt also heard the next day that Suquamish would be adding both gill net boats and a seine boat to the herring fishing in the Hale Passage area (area 3) – the same area within which the contested waters are located.

The relevant inquiry is whether USIT can carry its burden of showing that no reasonable inference can be drawn, based on that evidence before him, that Judge Boldt intended to include the Sub-Proceeding Area in the Suquamish U&A. *U.S. v. Wash.*, 590 F.3d 1020, 1024 (9th Cir. 2010) (noting burden); *see also U.S. v. Wash.*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985). The evidence before Judge Boldt when he issued his April 18, 1975, order determining the Suquamish U&A supports an inference, and in fact compels a finding, that he intended to include the Sub-proceeding Area in his broad description of "marine waters of Puget Sound" for the Suquamish U&A. USIT has failed to carry its burden, USIT's motion must be denied, and Suquamish is entitled to judgment as a matter of law.

C. The text and context of Judge Boldt's order makes clear that the Sub-proceeding Area was clearly intended by Judge Boldt to fall within the scope of Suquamish's U&A.

The basis of USIT's assertion that the Sub-proceeding Area is excluded from the Suquamish U&A is that the particular geographic features are not specifically named in Judge Boldt's April 18, 1975, U&A determination. USIT's contention is contrary to the settled law of this case as contained in the Court's decision in sub-proceeding 05-04,[7] the Ninth Circuit's similar ruling in a related U&A proceeding,[8] and defies a common sense reading of Judge Boldt's Suquamish U&A determination in light of the evidence before him of the extraordinarily far-ranging Treaty-time marine travels and fishing of the Suquamish and the compelling geographic reasons for that marine travel.

1. Judge Boldt did not need to specifically name each body of water or geographic feature in order for it to be included in a Tribe's U&A

It is well settled that a Tribe's U&A is not limited exclusively to the referenced waters.

[7] C70-9213, Sub-proceeding 05-04, Dkt. # 242.
[8] *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000).

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Other waters are included if there is a "reasonable inference" that Judge Boldt intended such waters to be included based on the evidence before him when he made his U&A determination. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000); *accord U.S. v. Washington*, 626 F.Supp. 1405, 1531 (D.Wash. 1985). A good example is the Lummi Tribe's U&A, which the Ninth Circuit held includes Admiralty Inlet because "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'". 235 F.3d at 452. In other words, although Judge Boldt did not name Admiralty Inlet as part of the Lummi U&A, it is included because "it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle.'" *Id*. This Court's recent ruling of July 29, 2013, in sub-proceeding 05-04 again confirmed that specifically naming the Sub-proceeding Area is not required in order to conclude they are part of a Treaty Tribe's U&A.[9]

This Court's ruling in Sub-proceeding 05-04 illustrates how the second step of the *Muckleshoot* two part procedure works when applied to the evidence before Judge Boldt, and the error of USIT's assertion that Sub-proceeding Area must be expressly named to be part of the Suquamish U&A. This Court explained that Judge Boldt:

> "…would have fully credited Dr. Lane's statement that the Suquamish traveled "to Whidbey Island to fish." Thus it is very likely that he intended to include waters west of Whidbey Island as far as the island shoreline, including the bays on the west side, in the Suquamish U&A. It is also highly likely, indeed a near certainty in light of Dr. Lane's emphasis on the importance of the winter fishery, that he intended to include the area at the mouth of the Snohomish River, specifically including Port Gardner Bay where the river meets the saltwater. Further, he would have understood that the Suquamish could only have reached their fishing grounds at the mouth of the Snohomish River by traveling through Possession Sound, and they would have fished there as an "adjacent marine area" as reported by Dr. Lane. Thus, it is highly likely that Judge Boldt intended to include Possession Sound in the Suquamish U&A, along with the bays on the west side of Whidbey Island."

[9] This Court included Possession Sound, Port Gardner Bay, Useless Bay, Mutiny Bay, Cultus Bay and Admiralty Bay in the Suquamish U&A even though none of these waters are named in Judge Boldt's April 17, 1975, Suquamish U&A determination nor are they expressly mentioned in the evidentiary record before Judge Boldt. *United States v. Washington*, Cause No. 70-9213, Sub-proceeding 05-04, Dkt. # 242 at pp. 13-19 (July 29, 2013) (Martinez, J.) (*hereinafter*, the "05-04 Sub-proceeding").

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C70-9213, Sub-proceeding 05-04, Dkt. # 242 at p. 19.

In short, Tulalip failed the second step of the *Muckleshoot* two-part procedure in 05-04 by failing to show that there was "no evidence" before Judge Boldt from which an inference could be drawn that he intended to include Possession Sound, Port Gardner Bay, Admiralty Bay, Mutiny Bay, Useless Bay and Cultus Bay in the Suquamish U&A. Instead, this Court ruled that the evidence before Judge Boldt, *none of which expressly named the Sub-proceeding Area*, showed that it was "a near certainty" that he intended to include these marine waters in the Suquamish U&A. In this sub-proceeding, the fact that Judge Boldt did not specifically name the Sub-proceeding Area in his Suquamish U&A determination does not mean that USIT prevails. Rather, the law of the case requires this Court to consider the evidence before Judge Boldt at the time he made his Suquamish U&A determination, including reasonable inferences from such evidence that would illuminate Judge Boldt's intent. Here, that evidence includes, among other things, actual fishing by Suquamish in the contested waters fisheries management area.

2. Judge Bolt's failure to exclude the Sub-proceeding Area from Suquamish's U&A indicates he intended to include it.

The language used by Judge Boldt in the Suquamish's U&A determination was broad, but not unlimited. Judge Boldt specifically carved out "marine waters of Puget Sound" south of the "northern tip of Vashon Island" from its claimed U&A *despite the fact* that those waters are a portion of the Suquamish claim included in its April 2nd U&A claim map. 459 F.Supp. at 1049 ¶ 5; see also Dkt. # 16-4 at p. 3 (noting that claimed sub-area 4 extends south past Vashon Island). If Judge Boldt had intended to exclude the Sub-proceeding Area from the "marine waters of the Puget Sound," which falls exclusively within sub-area 3 claimed by Suquamish, he would have done so. He did exactly that for marine waters south of Vashon Island that were claimed U&A. USIT's contention, which is in essence that Suquamish's U&A extends no further east than the middle of Rosario Strait, would exclude the entire claimed sub-area 3. It is untenable to allege that Judge Boldt intended to exclude an entire sub-area falling within the "marine waters of Puget Sound" without saying so when he had evidence of both historic and

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planned Suquamish fishing in those waters before him at the time he made Suquamish's U&A determination.

3. The extraordinary range of Suquamish treaty time marine travels and fishing informs Judge Boldt's intent with regard to the Suquamish U&A determination.

What separates Suquamish from the other Puget Sound Treaty Tribes [10] is the remarkable geographic breadth of their "marine waters of Puget Sound" U&A determination. Judge Boldt described this range as follows: "…from the northern tip of Vashon Island to the Fraser River, including Haro and Rosario Straits…"[11] This Court may take judicial notice of the fact that Judge Boldt's defined Suquamish U&A, spans between approximately 100 and 140 nautical miles[12] from south to north through Rosario Strait and Haro Strait respectively when measured to the southern end of the Fraser River Delta (Westham Island/Canoe Passage). [13]

Dr. Lane's testimony at the April 9, 1975 hearing, as well as her expert witness reports, clearly provided the basis for Judge Boldt's broad ranging Suquamish U&A determination regarding the Tribe's treaty time use of the "marine waters of Puget Sound." At the April 9th hearing Dr. Lane explained the reasons for Suquamish's travels: "…the Suquamish had very

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[10] Perhaps the closest to Suquamish in size of its Puget Sound U&A is Lummi, which has a U&A stretching from the Fraser River in the north (the same northern terminus as Suquamish) through the marine areas of Northern Puget Sound south to the "present environs of Seattle", which was later determined to be Edmonds, Washington. *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100 (2000). The Suquamish U&A, on the other hand, stretches south to the northern tip of Vashon Island, which is approximately 17 nautical miles further south than the southern terminus of the Lummi U&A.

[11] His U&A determination also included "…the streams draining into the western side of this portion of Puget Sound and also Hood Canal."

[12] Approximate distances cited herein were calculated using web-based nautical charting software available at http://earthnc.com/online-nautical-charts (last visited February 25, 2015). The Court may also rely on the NOAA coastal charts of the Puget Sound (18440) and Strait of Georgia and Strait of Juan de Fuca (18400), copies of which are attached hereto as Exhibit X and Exhibit Y respectively. NOAA has made these .pdfs available to download at http://www.charts.noaa.gov/PDFs/PDFs.shtml (last visited 2/26/15). Full sized copies of these charts printed by an NOAA certified Print on Demand provider are being sent to chambers and counsel for USIT contemporaneously with the filing of this pleading. Both the attached .pdfs and the full size charts to be delivered to chambers are self-authenticating "official publications" under FRE 902(5). *See, e.g.*, *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389, 397 (D.Conn. 2008) (noting information retrieved from government websites constitutes a self-authenticating government publication under FRE 902(5)) (citations omitted).

[13] Notably, however, Dr. Lane's testimony and expert witness reports document that Suquamish's actual destination was historic Fort Langley. The Court may take judicial notice of the fact that Fort Langley (which is modernly a National Historic Site in Canada) is located approximately 30 nautical miles upriver the mouth of Fraser River. *See Parks Canada Website* http://www.pc.gc.ca/eng/lhn-nhs/bc/langley/natcul/natcul2/a.aspx (last visited 2/25/15).

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limited kinds of resources within their home territory because *almost uniquely* of all the people we are concerned with in this case, they had no large streams in their territory." Dkt. # 37-1 at p. 50 (emphasis added). In answer to counsel's questions whether Suquamish traveled through the San Juan Islands area, and traveled to the Fraser River and traded in the Fraser River area, Dr. Lane answered "yes", "yes, they did" and "yes, they did". *Id*. Dr, Lane went on to testify that these marine waters of Northern Puget Sound were well within the range of the treaty time Suquamish[14] and 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." *Id*. at 53.

The distance to the Sub-proceeding Area from Judge Boldt's expressly identified Rosario Strait and Hale Passage ranges from four (4) to eight (8) nautical miles, as compared to the hundred plus miles Suquamish regularly traveled from their homeland to the Fraser River.[15] By contrast, Haro Strait and Rosario Strait, both of which were specifically identified by Judge Boldt as included in the Suquamish U&A, are themselves separated in places by over 20 nautical miles. Accordingly, it is reasonable to infer that Suquamish Treaty-time marine travelers who fished and traveled both Haro Strait and Rosario Strait, and the waters nearby, would very likely have traveled the short distance from the Rosario Strait marine "highway" to nearby marine waters, such as those at issue in this sub-proceeding, especially when that is where marine food resources, such as herring and shellfish, were most abundant.[16]

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[14] *Id*. at p. 51 (describing the journey as "…about a day's trip.." by canoe from Port Madison to the San Juans).

[15] For example, from the Rosario Strait navigation channel across open water to the mid-point of Padilla Bay is just 4 nautical miles, to the mid-point of Samish Bay is 8 nautical miles and to the mid-point of Chuckanut Bay is also 8 nautical miles. Measured from the south end of Hale Passage, which Judge Boldt's April 18, 1975, Finding of Fact No. 7 specifically identified as part of Suquamish's U&A, the distance across Bellingham Bay to the mid-point of Chuckanut Bay is only 5 nautical miles, to Samish Bay is 7 nautical miles and to Padilla Bay is 11 nautical miles. See 459 F.Supp. at 1048-49 (Order). Moreover, Rosario Strait is a relative wide body of water that varies between one (1) to five (5) nautical miles across at points adjacent to Suquamish herring map Area 3 and the Sub-proceeding Area at issue. It is likely the Treaty-time Suquamish marine travelers navigated their canoes through the strait close to land, for reasons of safety, fishing and visitation opportunities, rather than stay in what is now the modern deep water shipping channel in the middle of the strait, meaning that the actual distances to the Sub-proceeding area would have been even shorter.

[16] *See, e.g.*, Dkt. 16-11 (map noting location of Herring fisheries in northern Puget Sound, including the Sub-proceeding Area).

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Along the length of Rosario and Haro Straits that Judge Boldt's order expressly identified as forming part of Suquamish U&A, any map will show literally dozens of bays, coves, inlets, passages, channels, islands, points and peninsulas, and other named marine features and landforms of widely varying sizes. Puget Sound is a geographically complex coastal water, made up of numerous islands and a rugged, undulating coastline along its eastern, western and southern shores (Canada and the Strait of Juan de Fuca form the northern and northwest boundaries of Puget Sound). Judge Boldt would have found it nigh impossible to name each and every marine feature and landform along the canoe routes from "the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits" and those within close proximity to the Haro and Rosario Straits marine "highways." *See, e.g.* Dkt. 16-5 at p. 25 (Dr. Lane report noting that those straits were "public thoroughfares"). Such a requirement would have made his written U&A determination extremely unwieldy. The size of the waters forming the Sub-proceeding Area is also a factor militating against their specific inclusion in the broad Suquamish U&A determination. For example, Chuckanut Bay is only 1.2 nautical miles across at its mouth, and .7 miles long at its deepest point, thus comprising only 1 square nautical mile of salt water out of the hundreds of square miles that are undisputedly included within Suquamish U&A.

Not only is the absence of a specific reference to the small geographical features within the Sub-Proceeding Area not dispositive,[17] given the scope of Suquamish's undisputed U&A, it is not even particularly probative here and should be given little weight in the analysis.

4. The adulterated "Nautical and Marine Map" offered by USIT for demonstrative/ illustrative purposes is not probative of whether Judge Boldt intended to exclude the sub-proceeding area from the Suquamish's U&A.

USIT argues that the "Nautical and Marine Maps" it has offered for "demonstrative/ illustrative" purposes "make clear" that the Sub-proceeding Area was not intended by Judge Boldt to be part of the Suquamish "marine waters of Puget Sound" U&A. However, as the

[17] *See, e.g., Lummi*, 235 F.3d at 453 (holding Admiralty Inlet was included notwithstanding the lack of a specific reference in Judge Boldt's U&A determination).

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Hawkins Declaration acknowledges, USIT has altered the maps by adding "dotted red lines" purporting to show the route traveled by Treaty time Suquamish when utilizing Rosario Strait. *See* Dkt. # 38-1 at p. 2 ¶ 4. The "dotted red lines" added by USIT to the maps are not based on any evidence, much less evidence that was before Judge Boldt at the time of the Suquamish U&A determination, and denote what Dr. Lane described as a "spurious kind of accuracy." *See* Dkt. 37-1 at p. 59. It is pure speculation to suggest, as USIT does, that the Treaty-time Suquamish canoes *only* traveled along the "dotted red lines", which conveniently correspond to the middle of modern shipping channels, when passing through Rosario and Haro straits. Indeed, as already discussed *supra*, there was ample evidence before Judge Boldt when he made his "marine waters of Puget Sound" U&A determination, that Suquamish in fact utilized marine waters east of Rosario Strait, such as Hale Passage, Birch Bay, Bellingham Bay and the Sub-proceeding Area.

Aside from their basis in rank speculation, USIT's alteration of the maps ignores the express language of the Suquamish U&A determination, which was "the marine waters of Puget Sound…*including* Haro and Rosario Straits." 459 F.Supp. at 1048 (emphasis added). "In both legal and common usage, the word 'including" is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle." *Arizona State Bd. For Charter Schools v. U.S. Dept. of Edu.*, 464 F.3d 1003, 1007-1008 (9th Cir. 2006) (citing *Fed. Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("The term 'including' is not one of all-embracing definition"). Again, naming all waters fished "along the way" would be impossible and unnecessary.

Because the depictions shown on USIT's adulterated maps are premised on a misreading the language of Jude Boldt's Suquamish U&A determination and ignore the evidence before him regarding Suquamish usual and accustomed fishing in marine waters throughout northern Puget Sound, they should be disregarded by the Court. To the extent regional maps will assist the Court in making its determination, unaltered officially published maps have been provided by the

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Suquamish as exhibits.[18]

D. USIT's "eastern Puget Sound" argument was rejected by this Court in sub-proceeding 05-04.

USIT's summary judgment motion claims, as set out in the heading to Section C of its brief, that "**This Court Previously Decided that Suquamish Has No U&A Rights on the East Side of Puget Sound**." Dkt. # 38 at p. 16 (Emphasis in original). In fact, just the opposite is true. This argument was previously heard and rejected by this Court when asserted by the Tulalip Tribe in Sub-proceeding 05-04:

> "As an initial matter, the Court notes that the Tulalip Request is based in part on the theory that the Suquamish U&A does not include marine waters on the east side of Puget Sound. This is apparent from the relief sought in the Request, namely that the Court declare that Suquamish "has impermissibly sought to expand its fishing areas by seeking to fish **on the east side of Puget Sound in the marine waters listed above**," citing to Possession Sound, Port Gardner, Port Susan, bays on the west side of Whidbey Island, and other areas at issue in this Request (emphasis added). The Tulalip "eastern Puget Sound" argument has appeared on various occasions in this sub proceeding, and formed the basis for the Suquamish laches argument: the Suquamish contended that the "eastern Puget Sound" theory was spawned in 1990 by the language used by the Ninth Circuit Court of Appeals in a previous proceeding regarding the Suquamish U&A. *United States v. Suquamish Indian Tribe*, 901 F.2d at 778. It appears that since that time the term has taken on a life of its own. However, as this Court noted above, that language was used to affirm a district court ruling, in Subproceeding 85-1, that the Suquamish U&A does not include Lake Washington, Lake Sammamish, the Duwamish River, or the Lake Washington Ship Canal. Those areas are indeed on the east side of Puget Sound, beyond the shoreline. The district court itself referred to these areas as "situated to the east of Puget Sound," not as "eastern Puget Sound" or "the east side of Puget Sound." *See*, Finding of Fact 384, *U.S. v. Washington (In re Suquamish Tribe's Request for Determination of Additional Usual and Accustomed Fishing Places)*, C70-9213, Dkt. # 1102 (February 25, 1989).
>
> The Ninth Circuit's "east side of Puget Sound" references in *U.S. v. Suquamish Indian Tribe* could only refer to what was actually at issue in the Request for Determination filed in the District Court in Subproceeding 85-1, specifically freshwater lakes and rivers situated to the east of Puget Sound. This language should not and cannot be read as referring to some undefined "eastern side" of the marine waters of Puget Sound, and it does not in any way limit the Suquamish U&A to the western side of some imaginary line drawn down the middle of Puget Sound. The Court accordingly rejects any and all Tulalip

[18] *See supra* at n. 11.

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> arguments based on the Ninth Circuit statement that the Suquamish "were not entitled to exercise fishing rights on the east side of Puget Sound." *U.S. v. Suquamish*, 901 F. 2d at 778. Instead, the Tulalip must demonstrate, area by area, that there was no evidence before Judge Boldt from which he could have found that the contested area was included within the Suquamish U&A."

C70-9213, Sub-proceeding 05-04, Dkt. # 242 at pp. 14-15. USIT's near verbatim regurgitation of the "eastern Puget Sound" argument Tulalip unsuccessfully asserted in Sub-proceeding 05-04 should be rejected for the same reasons previously and thoroughly articulated by this Court.

E. USIT's "claim and issue preclusion, res judicata and collateral estoppel" Arguments Must Fail.

As noted in the introduction, this sub-proceeding arises out of USIT's claim that Suquamish's longstanding fishing practices impermissibly infringe on USIT's U&A in the Sub-proceeding Area. The fishing activities to which USIT objects have been conducted routinely and Suquamish has been involved in regulating the fisheries in the Sub-proceeding Area since Judge Boldt's original determination regarding the scope of Suquamish's U&A.[19] In addition, the Sub-proceeding Area has never been the subject of U&A litigation involving Suquamish in any prior Sub-proceeding in *U.S. v. Washington* or other related matter.[20] As such, there is no prior ruling of a court that is binding on the issues raised in this sub-proceeding for the Suquamish that the Suquamish can be reasonably described as attempting to avoid.[21]

1. If any party is barred from challenging the scope of Suquamish's U&A by the doctrine of claim preclusion, it is USIT and not Suquamish.

This Court, in rejecting Suquamish's assertion of *res judicata* against Tulalip, explained

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[19] *See* Dkt. # 37-4 at pp. 34-36 (noting Suquamish fishing activity planned for 1975 in the Sub-proceeding Area).

[20] Res judicata/claim preclusion and collateral estoppel/issue preclusion are typically asserted as affirmative defenses by the responding party rather than asserted as elements of a Request for Determination, as USIT does here. Moreover, except for a short and ambiguous footnote that does not expressly name these preclusion doctrines, USIT's assertions of "claim and issue preclusion, res judicata and collateral estoppel" resulting from Sub-proceeding 05-03 do not appear in its Request for Determination in this Sub-proceeding. See, USIT RFD, Dkt. # 1 at p. 4.

[21] It is absurd and Orwellian that USIT would chastise Suquamish for failing to heed prior rulings of this Court while in the same breath gratuitously introducing quoted excerpts from a latter-day Barbara Lane declaration that this Court has previously ruled inadmissible in a thinly veiled attempt to get the substance of the declaration before the Court. *See* C70-9213, Sub-proceeding 05-03, Dkt. # 43 at pp. 3-4 (striking the declaration as inadmissible). Suquamish hereby moves to strike as inadmissible the quoted language from the Barbara Lane declaration set forth at Dkt. # 38 p. 17 n. 4, in accordance with Local Rules W.D. Wash. LCR 7(g), for those reasons adopted by the Court in its prior Order.

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that: "The Suquamish U&A was actually and finally determined by Judge Boldt, and the Court's role in this [05-04] subproceeding is not to alter or amend that determination but to clarify it. Under the procedures established for this case, that will require an examination of the evidence that was before Judge Boldt to determine his intent. Such examination is not barred by the doctrine of *res judicata*." C70-9213, Sub-proceeding 05-04, Dkt. # 242. As discussed in more detail, *infra*, the prior sub-proceeding involving USIT and Suquamish arose out of USIT's request for determination as it pertained to Suquamish's U&A in different waters and did not address or discuss evidence before Judge Boldt bearing on whether Suquamish's U&A extends to the Sub-proceeding Area.

Notwithstanding, USIT concedes that both this matter and Sub-proceeding 05-03 arise out of a common nucleus of operative fact, involve the alleged infringement of the same right,[22] and depend on substantially the same evidence. Plaintiffs, like USIT here, generally must bring all claims arising out of a common set of facts in a single lawsuit. *See Elgin v. Department of Treasury*, 132 S.Ct. 2126, 2146-2147 (2012) (Alito, J., dissenting) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (additional citations omitted). Because USIT could have, but elected not to, challenge Suquamish's U&A in the Sub-proceeding Area the first time around, the prohibition against claim splitting applies to bar USIT's successive separate challenges to the scope of Suquamish's U&A, not Suquamish's defense of USIT's repetitive actions. *See Id.* (noting that the prohibition on "claim splitting" falls under the same rule as claim preclusion); *accord Haphey v. Linn County*, 924 F.2d 1512, 1517 (9th Cir. 1991). This case and the prior sub-proceeding 05-03 factually overlap and could have conveniently been tried together. USIT's failure to bring all of its challenges in a single Request for Determination, whatever the reason, does not justify subjecting Suquamish to multiple lawsuits repeatedly challenging the scope of its U&A piecemeal. *See Western Systems, Inc. V. Ulloa*, 958 F.2d 864, 870-871 (9th Cir. 1992) (noting claim preclusion bars both those

[22] Suquamish fishing activity occurring outside of what USIT asserts is the scope of Suquamish's U&A.

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claims that were litigated, and those claims that could have been litigated in the prior proceeding); *accord Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983).

Allowing USIT to endlessly challenge the scope of Suquamish's U&A as to each possible island, beach, bay, inlet, passage, and cove located in the "marine waters of the Puget Sound" would waste the Court's resources and prevent this case, which has been ongoing now for over forty years, from ever coming to a conclusion. Based on USIT's concession that claim preclusion applies, USIT's motion for summary judgment should be denied, Suquamish's motion granted, and USIT's Request for Determination dismissed with prejudice.

2. Issue preclusion does not apply because the specific scope of the Suquamish U&A in the Sub-proceeding Area has not previously been determined by the Court.

The prior litigation that USIT asserts as the basis for its issue preclusion and collateral estoppel arguments is Sub-proceeding 05-03. See, Dkt. # 38 at p. 18-19. Like this Sub-proceeding, Sub-proceeding 05-03 started with a Request for Determination filed by USIT, not by Suquamish. In Sub-proceeding 05-03, USIT sought from this Court "an Order determining that the Sub-proceeding Area, including that portion of Saratoga Passage from the Snatelum Point Line to the Greenbank Line and Skagit Bay to the Deception Pass Bridge, is not a usual and accustomed grounds and stations for the Suquamish Indian Tribe for fishing and shellfishing." C70-9213, Sub-proceeding 05-03, Dkt. # 1 at p. 6. This Court's Order in Sub-proceeding 05-03 related exclusively to the challenged waters, specifically Saratoga Passage and Skagit Bay, and did not address the Sub-proceeding Area. C70-9213, Sub-proceeding 05-03, Dkt. # 198 at pp. 14-15.

In order to qualify for the application of issue preclusion or collateral estoppels (as opposed to claim preclusion or *res judicata*), the issue in question must have *actually* been litigated and decided on the merits in the prior action. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citing *New Hampshire v. Maine*, 532 U.S. 742, 748-749 (2001)). This is a different Sub-proceeding involving a new Request for Determination regarding different Sub-proceeding Area.

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USIT this time is seeking an "Order determining that the Subproceeding Area [Chuckanut Bay, Samish Bay and a portion of Padilla Bay] is not within the usual and accustomed grounds and stations of the Suquamish Indian Tribe for fishing and shellfishing." Dkt. # 4 at p. 4. These are wholly separate waters from those at issue in sub-proceeding 05-03. While the legal framework applicable to both sub-proceedings is, of course, the *Muckleshoot* two-part test, clearly the evidence before Judge Boldt in April 1975 and reasonable inferences that can be drawn from that record are different for the different contested waters at issue in the two sub-proceedings.

Because the issues in this proceeding and the prior proceeding are not identical and Suquamish's U&A in the marine waters at issue here was not essential to the determination of the Court in the prior action, the doctrine of issue preclusion / collateral estoppel cannot be properly applied to bar Suquamish's defense of USIT's RFD in this sub-proceeding.

Conclusion

For the reasons stated above, the USIT Motion for Summary Judgment in this Sub-proceeding should be denied, Suquamish's Cross Motion for Summary Judgment should be granted, and judgment entered in favor of the Suquamish Tribe.

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Respectfully submitted this 27th day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered in the CM/ECF system for this matter.

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