THE HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

UNTIED STATES OF AMERICA, et. al., Plaintiffs, v. STATE OF WASHINGTON, et. al., Defendants.	C70-9213 Sub-proceeding No. 14-01 UPPER SKAGIT INDIAN TRIBE'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST THE SUQUAMISH INDIAN TRIBE

I. Upper Skagit Has Established That There Is No Evidence in the Record Before Judge Boldt to Support the Claim that Suquamish Fished in the Disputed Areas At Treaty Times.

The combined submissions of the Suquamish Indian Tribe ("Suquamish") makes it clear that it misunderstands the relationship between evidence and inference in the line of cases which resulted in the law of the case established most recently in Subproceeding 05-3. Unlike a case in which a tribe is seeking to establish a new U&A, such as in Subproceeding 09-1, where the

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Court stands in the shoes of Judge Boldt and must utilize facts, but may include inferences[1], this case requires an examination and clarification of an existing U&A where the Court must review the record before Judge Boldt and where reliance upon inferences from inferences is not acceptable. In cases such as this one, as this Court determined in Subproceeding 05-3, the U&A and any clarification of that U&A must be based upon "actual evidence."[2]

When the Court reviews the record in 1975, upon which Judge Boldt's ruling on the Suquamish U&A was premised, it will be clear that this record contains no facts which place the Suquamish fishing in the Disputed Areas at and before Treaty times. That record consists of the Report of Dr. Barbara Lane entitled "Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Port Madison Reservation," USA 73 (the "Lane Report") and the testimony of Dr. Lane in open Court during the hearings held on April 9, 10, and 11, 1975. This is the "actual evidence" Judge Boldt had before him to describe the Suquamish U&A. Suquamish wants to ignore the 'actual evidence' standard and instead urges this Court to expand its U&A based upon "common sense" and hypothetical inferences that it seeks to discern from submitted documents that have no relationship to the actual evidence that existed in 1975 of the Suquamish fishing activities at and before Treaty times.[3]

What emerges from a review of the record before Judge Boldt in 1975 are the following dispositive facts about Suquamish fishing at and before Treaty Times:

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[1] The use of inferences in such cases is permissive and not mandatory and must be used in conjunction with actual evidence. Order on Motions for Partial Summary Judgment, Summary Judgment and Motion to Define Burden, February 18, 2015, Docket #20837, p. 27,

[2] The Court's colloquy in the recent Status Conference on the remand in Subproceeding 11-2 was an excellent exposition of the distinction between that Subproceeding and the attempt by Suquamish to improperly interject inferences into the evidentiary standard used by the Court in Subproceeding 05-3..

[3] What Suquamish complains is an adulterated map and what Upper Skagit has presented for illustrative purposes is the Exhibit 4 and 5 map to the Declaration of Hawkins and the full scale copy thereof delivered to Chambers, which merely highlights the routes ruled by Judge Boldt in 1975 to be the U&A routes for Suquamish (Haro and Rosario Straits). The addition of the marking is for purely demonstrative purposes and not some nefarious purpose as suggested by Suquamish.

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1. Dr. Lane's Report identifies no Suquamish fishing sites in the Disputed Areas.
2. Dr. Lane's testimony identifies no Suquamish fishing in the Disputed Areas.
3. Dr. Lane specifically opined that Suquamish never went to Bellingham Bay, which, as Suquamish has admitted in footnote 3 to its initial brief in support of its Motion for Summary Judgment, is the only water route to the Disputed Areas.
4. Judge Boldt specifically identified the Suquamish U&A to include Areas 1 and 2 on the map before him and not Areas 3 and 4.
5. The Disputed Areas are located in Area 3 on the very same map.
6. Hale Passage is also located in Area 3 and was never discussed by Judge Boldt as being within the Suquamish U&A.

In contrast to this actual evidence, Suquamish offers a set of faux facts[4] which fail the scrutiny necessary to constitute the required "actual evidence" standard:

1. *Non-specific discussions of fishing associated with the Treaty tribes but not identified to Suquamish.*

Suquamish urges this Court to make a gargantuan leap that Judge Boldt did not take and infer from a generalized discussion of the fishing practices of other tribes that Suquamish engaged in Treaty time fishing in the Disputed Areas.

2. *The Regulation submitted by Suquamish on April 3, 1975, showing a proposed fishery in Areas 3 and 4.*

First, and most obviously, this Regulation is a self-serving document about Suquamish's intended 1975 fishing activity and does not represent "actual evidence" supporting Treaty time fishing by the Suquamish. It is not supported by expert opinions that considered the evidence derived from anthropology and enthnohistory. In fact, this Court has already disposed of the

[4] USIT uses the term aptly coined by the Swinomish Tribe in Subproceeding 05-3 because such alleged facts are not facts at all relevant to this proceeding.

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Suquamish claimed inclusion of Area 4 by denying Suquamish the right to fish in Saratoga Passage and Skagit Bay. Thus, if the Regulation upon which Suquamish relies to establish an inference of its fishing in the Disputed Areas is of any significance, the significance is that the regulation has already been reviewed by the Court in Subproceeding 05-3 and found wanting as to Area 4. That being the case, what resurrects that Regulation as a basis for concluding that Suquamish fished at Treaty times in Area 3? Once again, Suquamish conflates a "claim" with "actual evidence". One does not constitute the other.

3. *The Testimony of Biologists that Suquamish intended to place fishing boats in portion of the Disputed Areas around 1975.*

The testimony before Judge Boldt in 1975 from fisheries biologists that Suquamish proffers at pages 10 to 13 of its Response Brief is not evidence of Suquamish fishing in the Disputed Areas at Treaty times. Once again, this testimony, at best, establishes only that Suquamish wished to claim rights in the areas where its fishing fleet presumed to trespass. Yet again, a claim does not constitute actual evidence. This is simply Suquamish's attempt to establish a novel standard of proof in this case that inferences alone and not actual evidence are sufficient to understand Judge Boldt's intent when he adjudicated a Tribe's U&A.

4. *A claim that Suquamish was 'surprised' at Judge Boldt's hearing on April 9, 10, and 11, 1975, and that this explains the absence of testimony on Areas 3 and 4*

In 1975, Suquamish was represented by an excellent trial counsel versed in both Indian law and in trial practice and procedure. The record contains no indication of surprise and no indication of a lack of preparedness. Judge Boldt was specific in his instructions that, after the initial prima facie showing and the State's objection, Suquamish was required to "bring out any evidence that you have to offer now on it (Suquamish's fishing areas)."*See* Transcript of proceedings of April 9, 1975 at p. 48. In order to do that, Suquamish's counsel questioned Dr. Lane on the stand about Suquamish's fishing areas as he had been directed to do by the Court.

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Counsel for Suquamish: a) never asked for more time or a continuance to present more testimony; b) never sought clarification or rehabilitation from Dr. Lane when she opined that Suquamish never went to Bellingham Bay to fish; c) never raised an objection when the Court stated unequivocally that Suquamish fishing was being identified as limited to Areas 1 and 2; and d) never sought reconsideration of that unambiguous determination of Suquamish's U&A.

5. *A contention that the State of Washington 'conceded' that Area 3 and Area 4 were part of the Suquamish U&A as a result of the lack of questioning of Dr. Lane at the Hearings in April, 1975.*

There is absolutely no evidence that the State of Washington ever conceded that Suquamish had a right to a U&A in the Disputed Areas. Suquamish cannot point to anything specific in the record before Judge Boldt that supports this assertion. From the record it is absolutely clear that all participants in April, 1975, the State, the Judge, the Suquamish, the Suquamish's attorney, Dr. Lane and even the staff for Judge Boldt, understood that all the testimony and evidence that had been offered by Dr. Lane on April 9, 1975, concerned only Areas 1 and 2 and there was no evidence presented to support a claim that Areas 3 and 4 were a part of the U&A of Suquamish.[5] Moreover, when the Court looked at this very type of claim in Subproceeding 05-3, it categorically rejected the claim.

In summary, nothing prevented Suquamish's counsel from offering any and all actual evidence Suquamish may have possessed in April 1975 to support its claim to treaty time fishing in areas of Puget Sound other than those designated Areas 1 and 2. Actual evidence is not derived from inferences alone, it is not established by the arguments advanced by counsel, and it cannot be based upon testimony from biologists or others that simply told the Court of Suquamish's expansionist plans and efforts in 1975. Rather, actual evidence must be based upon

[5] See the discussions both above and below, which discuss this point in greater detail.

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anthropological and ethnohistorical evidence or testimony. Suquamish offered all the actual evidence it had to support its as yet undefined U&A at the time of the April 1975 hearing and Judge Boldt's U&A determination for Suquamish relied upon and reflected the limits of that evidence. The April 1975 hearing was not an "exception process" as Suquamish now contends. U&A's had never been established in that fashion. A tribe's "claim" to U&A areas, whether based upon fishing regulations or its efforts to move its fishing fleet around the Sound, is not sufficient to establish a U&A. Actual evidence has always been required and must be required here. Suquamish has no actual evidence of fishing at treaty times in the Disputed Areas and that fact should be dispositive here.

II. The True Significance of the Suquamish Regulations in 1975

While the Suquamish proposed fishing Regulation of April 3, 1975[6] is not actual evidence of Suquamish fishing areas at Treaty times, it does have significance when: a) compared with Judge Boldt's ultimate determination of the Suquamish U&A; and b) when compared with the Suquamish's Revised Fishing Regulations of 1975 issued after the determination by Judge Boldt of the Suquamish U&A. *See* Supplemental Hawkins Dec. at Ex. 12. It is important to understand the procedural timeline for the filing of these regulations. First, Suquamish submitted the April 3 Regulation. Then Judge Boldt held the hearings which led to his specific designation of the Suquamish U&A. Next, Judge Boldt determined and fixed the Suquamish U&A. Finally, Suquamish filed Resolution 75-272, its Revised Fishing Regulations.

When Judge Boldt reviewed the evidence before him in 1975, he could have drawn an inference from the April 3 Regulation. What is clear is that he did not use that Regulation to either formulate his facts or to define the Suquamish U&A. Judge Boldt instead determined the

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[6] See the Second Supplemental Declaration of David Hawkins Exhibit 1.

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Suquamish fished within Areas 1 and 2 and the entire described U&A encompassed Areas 1 and 2 only. In addition, when comparing the April 3 Regulation to their Revised Fishing Regulation, it is clear that, after Judge Boldt's ruling, Suquamish understood that its U&A did not include Areas 3 and 4.[7] Indeed, this Court found this revised regulation very significant in its Order on Motions for Summary Judgment in Subproceeding 05-3; "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." 20 F.Supp. 3d.at 828 [8]

III. The Hale Passage Argument By Suquamish Does Not Establish a U&A in the Disputed Areas.

Hale Passage was the subject of discussion before Judge Boldt when he made his ruling, at least to the extent of commenting that several tribes had made an independent agreement concerning fishing in Hale Passage. However, even faced with the fact of a 1975 agreement and any inference that could be drawn from that[9], Judge Boldt ruled Hale Passage out of Suquamish's U&A. He called out other passage type waterways, Hood Canal, but not Hale Passage.

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[7] The discussion of the significance of Regulation __75-272_ is provided in detail in the Upper Skagit Response to the Suquamish Motion for Summary Judgment and will not be repeated here.

[8] The Suquamish have shown a propensity to mirror some of the arguments in Subproceeding 09-1. One of the arguments that might materialize in this Subproceeding relates to a Joint Tribal Brief submitted in Subproceeding 89-3 that Upper Skagit and 14 other tribes signed on to in 1994. That Joint Tribal Brief was not part of the record before Judge Boldt in 1975. Out of an abundance of caution and in order not to have to file a motion to strike if Suquamish raises this issue for the first time in the last brief in the schedule, thus preventing Upper Skagit from commenting, Upper Skagit briefly addresses the issue as follows:
Notwithstanding any Suquamish attempt to give the Joint Brief significance, the ruling of this Court and the Ninth Circuit in Subproceeding 05-3 trump and control the issues here. The ruling in Subproceeding 05-3 is the law of the case and settled any issue of reliance on any argument in prior subproceedings. Moreover, Dr. Lane foreclosed any Suquamish attempt to utilize the Joint Brief because, testifying in the context of the herring fishery and the U&A claim of the Suquamish, she ruled Suquamish out of Bellingham Bay and therefore, the Disputed Areas. (Upper Skagit still reserves the right to move to strike any Suquamish argument on this or a similar topic.)

[9] In 1975, inferences were a permissible part of the equation for initially defining and finding a U&A, but inferences are no longer part of a permissible equation for a Subproceeding 05-3 type of examination.

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Not only was Hale Passage not part of the Suquamish U&A, but Dr. Lane eliminated any significance it might have had here when she cut it off from the Disputed Areas. Dr. Lane categorically opined that Suquamish did not go to Bellingham Bay, which body of water intervenes between Hale Passage and the Disputed Areas. This provides additional support for a conclusion that the Suquamish U&A does not extend to the Disputed Areas.

IV. The Repeated Suquamish Attempts at Expansion and the Preclusion Argument[10]

Rather than repeating the substantial analysis and briefing that has occurred in support of the claim by Upper Skagit of issue preclusion in prior filings, Upper Skagit adopts the analysis provided by the Tulalip, Swinomish, Jamestown S'Klallam and Port Gamble S'Klallam as provided in their brief as a supplement to Upper Skagit's prior analysis submitted to this Court. Furthermore, Upper Skagit can think of no more persuasive analysis for issue preclusion and the reason it should be applied here to bar Suquamish's claims than the words of this Court in its Subproceeding 05-3 determination, which analysis applies exactly to the Disputed Areas. Analyzing the Suquamish claim in Area 4 on the map utilized by Judge Boldt, the Court said:

> 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:

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[10] Perhaps the most illogical argument that Suquamish has advanced in its Response is that the issue preclusion claim advanced by Upper Skagit and four other tribes should be used to deny Upper Skagit its relief here. While it is gratifying that Suquamish believes that issue preclusion is applicable in this case, it is difficult to fathom how Suquamish can assert that the total lack of evidence found by the Court in 05-3 should be used to overcome a total lack of evidence in 14-1. The issue is the record in 1975 not Suquamish illegal fishing attempts at any time thereafter. Furthermore, Suquamish fails to disclose what crystal ball would have forewarned Upper Skagit that Suquamish would blatantly ignore the ruling in 05-3 and the Ninth Circuit and create the same case in controversy in the Disputed Areas in 2014.

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> 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.
>
> ...
>
> 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. ...
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> 20 F.Supp. 3d at 838-839

The very same evidence, the very same facts and the very same lack of evidence that the Court identified in Subproceeding 05-3 exist here in Subproceeding 14-1. Dr. Lane did not write about or testify about Area 3, which encompasses the Disputed Areas. When the same evidence, the same lack of reference to a disputed area, and the same parties are before the Court, the result must be the same. The principal of issue preclusion is tailor made for these circumstances. Suquamish has had its day in Court and the same result should follow.

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Respectfully Submitted on this 1st day of April, 2015.

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