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 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Upper Skagit Indian Tribe ("USIT") and the Interested Parties filing in opposition[1] to Suquamish Indian Tribe's ("Suquamish") Motion for Summary Judgment base their claims on their factual assertion that "Suquamish moved into [the contested] waters that it had not fished previously."[2] This claim is objectively false. As is discussed in greater detail below, Suquamish's regulations and catch reports from 1975 through present conclusively show that Suquamish has regularly fished and harvested in the contested waters at issue as part of their

[1] These include the Port Gamble S'Klallam Tribe, Jamestown S'Klallam Tribe, Swinomish Tribe and Tulalip Tribe (collectively the "Interested Parties").

[2] Dkt. # 44 at p.4 (Interested Parties' brief in opposition); *see also, e.g.*, Dkt. # 45 at p. 2 (USIT's opposition).

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U&A.[3] While USIT and the Interested Parties mischaracterize this proceeding as one arising out of "new" activity by Suquamish, their bare assertions are wholly unsupported by any evidence in the record, much less by evidence sufficient to create a genuine issue of material fact. USIT and the Interested Parties' argument collapse under their own weight when stripped of the inaccurate premise that Suquamish has not been fishing and actively engaged in the regulation of the fisheries in the contested waters in this sub-proceeding (which they most certainly have). Suquamish has not "moved again to new waters,"[4] but USIT and the Interested Parties certainly have as part of a deliberate litigation strategy of filing successive Requests for Determination designed to upset the *status quo* and expand their own respective U&A's by subtraction.[5]

The question before the Court in applying the *Muckleshoot* analysis is not whether the evidence before Judge Boldt was sufficient to support a finding of Suquamish U&A, but whether USIT can carry its burden of showing that Judge Boldt intended to carve out the contested marine waters from Suquamish's U&A in ". . . the marine waters of the Puget Sound" without actually saying so. USIT (and the Interested Parties) cannot carry this burden. As noted herein, and as further set forth in Suquamish's prior pleadings in this matter, not only was there sufficient evidence before Judge Boldt on which to base a reasonable inference that he intended to include the contested waters as part of Suquamish's U&A, there was also direct evidence of Suquamish fishing activities in the contested waters at the time Judge Boldt made his U&A finding.

There is no genuine dispute as to any material fact, and it is incontrovertible that Suquamish has been regularly fishing in the contested waters for the last thirty-nine plus years. USIT (and the Interested Parties) have failed to discharge their burden to show it was more likely

[3] *See* Declarations of Ray Forsman, Tony Forsman and Rob Purser in Support of Suquamish Tribe's Reply In Support of Motion for Summary Judgement, filed herewith.
[4] Dkt. # 44 at p. 4.
[5] In light of USIT's own prior efforts at broadening the scope of their U&A, the Court should view the claims of expansion lodged against Suquamish by USIT and the Tulalip Tribe with a healthy degree of skepticism. *See, e.g.*, June 24, 1976, Letter from Dept. of Fisheries to NW Indian Fish Commission, attached hereto as part of "Exhibit 2" (notably omitting Suquamish from list of tribes attempting to expand their U&A).

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than not that Judge Boldt intended to excise the contested waters from "the marine waters of Puget Sound." Therefore USIT's claims fail as a matter of law. For those reasons set forth in Suquamish's prior pleadings in this matter, and as more fully set forth herein, Suquamish's motion for summary judgment should be granted, USIT's motion be denied, and judgment entered in Suquamish's favor.

II. APPLYING THE MUCKLESHOOT TWO-STEP PROCDURE

The *Muckleshoot* two-step procedure provides the current 9th Circuit approved framework for resolution of USIT's claim that Judge Boldt did not intend his April 18, 1975, Suquamish U&A determination of "…the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River" to include the three open, saltwater bays of northern Puget Sound at issue here.[6]

As this Court and the Ninth Circuit made clear in sub-proceeding 05-03, the *Muckleshoot* two-step procedure begins with the recognition that Judge Boldt's order defining the Suquamish U&A to include "the marine waters of Puget Sound" is not ambiguous. C70-9213, Sub-proceeding 05-03 (hereinafter "Sub-proceeding 05-03), Dkt. # 198 at p. 9; *accord* 590 F.3d. 1020, 1023-1025 (9th Cir. 2010). Judge Boldt's use of "Puget Sound" includes the three open saltwater bays of northern Puget Sound at issue in this case. *Id*. As is relevant here, Judge Boldt's U&A determination also specifically names Rosario Strait as part of Suquamish U&A, and as the Port Gamble and Jamestown S'Klallam Tribes have admitted in other proceedings, the contested waters here are part of the "contiguous salt waters of [] Rosario Strait."[7] As such, the contested waters are unambiguously included in Suquamish's U&A and the Court need not proceed further.

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[6] *See Muckleshoot I (Muckleshoot Indian Tribe, et al. v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998)), *Muckleshoot II (Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000)), and *Muckleshoot III (Puyallup Indian Tribe, et al., v. Muckleshoot Indian Tribe*, 235 F. 3d 429 ((9th Cir. 2000)). As has been noted throughout Suquamish's pleadings in this matter, however, the analysis must be applied in a manner reflecting the actual nature of the proceedings before Judge Boldt with respect to his determination of Suquamish's U&A.

[7] *See* Declaration of Sarah Smith, filed on behalf of Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe, C70-9213, Sub-proceeding 11-02, Dkt. # 136, at p. 5 (Map prepared by Sarah Smith, labeling and describing the contested waters as "Area 15").

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Assuming, *arguendo*, that the Court finds it necessary to proceed to the second step of the analysis, USIT nevertheless bears the burden of demonstrating that Judge Boldt "intended something other than its apparent meaning (i.e., all salt waters of Puget Sound)." *Id*. Put another way, USIT must show at step 2, based on the entire record before Judge Boldt when he issued his April 18, 1975, Order, that he could not have intended to include the disputed marine waters, which are otherwise clearly part of northern Puget Sound and within the meaning of his phrase "marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River". *Id.*

Certainly, express language of *exclusion* in Judge Boldt's April 18, 1975 Order, such as his exclusion of the marine waters of Puget Sound *south* of the northern tip of Vashon Island[8], would resolve this dispute in USIT's favor. However, no such exclusionary language is contained in Judge Boldt's order. Express language of *inclusion*, on the other hand, is *not* required in order to resolve the issue in favor of Suquamish.[9] This court, in Sub-proceeding 05-04, and the Ninth Circuit in *U.S. v. Lummi Tribe*, determined that Judge Boldt intended to include certain contested Puget Sound marine waters (Possession Sound, Port Gardner Bay, Cultus Bay, Mutiny Bay, Useless Bay, and Admiralty Bay for Suquamish in 05-04 and Admiralty Inlet for Lummi in *U.S. v. Lummi Tribe*) that were not expressly included in Judge Boldt's original description of the U&A for these Tribes. *See* C70-9213, Sub-proceeding 05-04 (hereinafter "Sub-proceeding 05-04), Dkt. # 242 at pp. 19-22; *see also, U.S. v. Lummi Tribe*, 235 F.3d 443, 452 (2000) (holding Admiralty Inlet was included in Northern Puget Sound despite lack of specific reference).

[8] Recall that when Suquamish presented its U&A claim area map to the Court on April 2, 1975, it included claimed U&A south of Vashon Island. Judge Boldt expressly declined to include those waters in his April 18, 1975 Suquamish U&A determination. That Judge Boldt excluded those waters, but did not exclude those in issue here shows considered intent that the contested waters be part of the U&A.

[9] Although, as noted above, Judge Boldt's express inclusion of Rosario Strait should be interpreted as unambiguously including continuous salt waters, and thus the contested waters. In addition and as previously addressed in Suquamish's Response in Opposition to USIT's Motion for Summary Judgment, it is not only legally unnecessary but impractical and unreasonable to require Judge Boldt's Suquamish U&A determination to expressly name each of the hundreds of marine features and landforms, large and small, contained within the over 100 nautical mile stretch of saltwater that constitutes the "marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River." *See* Dkt. # 47 at p. 19-20.

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At the second step of the *Muckleshoot* procedure, USIT must prove a negative -- that there was "no evidence" in the record before Judge Boldt when he made his April 18, 1975, Suquamish U&A determination that "the marine waters of Puget Sound" language included the northern Puget Sound marine waters of Chuckanut, Samish, and Padilla Bays. This USIT cannot do. Judge Boldt had before him the Suquamish U&A claim area map that includes the contested waters; he had written reports of, and heard testimony from, Dr. Lane regarding the extensive range of Suquamish and specifically fishing activity in "upper" or "northern" Puget Sound and the Bellingham Bay area; and he heard extensive testimony on April 10th and 11th, 1975 regarding the imminent treaty Indian herring fishery that was the impetus for his April 18th Suquamish U&A determination.[10] In evidence regarding the imminent fishery, which featured a Lummi tribal biologist, he heard testimony that a Suquamish purse seiner would join those of Lummi as the Indian purse seine fleet in the herring fishery. Where were the Suquamish and Lummi boats going to fish? One of the areas was Area 3 on Suquamish's herring fishery regulations/U&A claim map, which Judge Boldt declared on April 9th and ruled on April 10th, were Suquamish U&A. Area 3 basically constitutes all of Bellingham Bay, Hale Passage, Chuckanut Bay, Samish Bay and Padilla Bay. There can be no doubt that Judge Boldt understood prior to issuing his written Suquamish U&A determination of April 18, 1975, that Suquamish would shortly be fishing in the Bellingham Bay\contested waters area (Area 3) pursuant to his April 10th bench ruling of prima facie "treaty entitlement" to the Suquamish claimed U&A areas.[11]

On April 11th a federal biologist witness was even more specific about Suquamish participation in the 1975 Indian herring fishery. He testified that four Suquamish gillnet boats would fish the Hale Passage area. Like the contested waters here, this is in the Suquamish claim map noted as Area 3. Judge Boldt heard this additional testimony regarding Suquamish fishing in Area 3, and neither he, nor the State, nor any other Tribe objected. There was no objection

[10] *See generally*, Dkt. # 47 at pp. 12-15 (noting evidence).
[11] *See* Dkt. 37-2 at pp. 52-54 (Boldt's bench ruling regarding Suquamish's successful prima facie showing).

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because all understood that Judge Boldt had ruled that Area 3 was Suquamish U&A. USIT cannot, as required by step 2 of the *Muckleshoot* procedure, prove that Judge Boldt did *not* have this evidence in mind a week later as he issued his April 18th "marine waters of Puget Sound" Suquamish U&A determination.

Just a few short days after hearing multiple witnesses testify about immediate Suquamish plans to implement the court's April 10th prima facie "treaty entitlement" ruling and fish for herring in Suquamish claim map Area 3, Judge Boldt certainly could have, but did *not*, exclude Suquamish claim map Area 3 from his "marine waters of Puget Sound" U&A determination. Nor did he object to the proposed Suquamish fishing in any manner whatsoever. Accordingly, based on the record before him, step 2 of the *Muckleshoot* procedure compels the conclusion that Judge Boldt understood that the contested waters in this sub-proceeding are part of northern Puget Sound and Suquamish claim Area 3 and are therefore encompassed within his term "marine waters of Puget Sound.[12]" USIT cannot prove the negative. USIT cannot prove that there was "no evidence" before Judge Boldt that would support a finding that his intent was to include the contested waters. Judge Boldt knew on April 10th and 11th, that Suquamish *would* be fishing this area, and for years after, he received Suquamish fishing regulations regarding its fishing in the contested waters.[13]

III. NEITHER ISSUE PRECLUSION NOR RES JUDICATA ARE APPLICABLE TO SUQUAMISH'S DEFENSE OF ITS U&A IN DIFFERENT WATERS

In order to qualify for the application of issue preclusion, it is hornbook law that 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)). There has been no prior sub-proceeding that resolved or otherwise included a finding of fact or ruling of law regarding Suquamish's U&A in the disputed waters here.

[12] Judge Boldt would have also surely have recalled the colloquy between Dr. Lane and George Solomon of April 9th, during which Mr. Solomon asks Dr. Lane to elaborate on her prior opinion that Suquamish U&A included the Bellingham Bay area, and she proceeds to testify that Suquamish would adhere to custom and not likely fish in that region right inside of Lummi homeland or village areas. *See* discussion and citations *infra* at Section IV C.

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Like USIT in its motion, the Interested Parties base their misguided issue preclusion argument, in part, on the Court's order in Sub-proceeding 05-03. *See*, Dkt. # 38 at p. 18-19 (USIT's Motion); *see also* Dkt. # 44 at p. 2 (Interested Parties' brief). As Suquamish has already pointed out in opposition to USIT's motion, Sub-proceeding 05-03 resolved a challenge by USIT to Suquamish's U&A in wholly separate and distinct waters from those at issue here.[14] The Interested Parties also rely on the Court's determination in sub-proceeding 05-04, in which the Tulalip Tribe ("Tulalip") sought a determination that the Suquamish had no U&A in "the following sheltered or discernable marine areas: East side of Admiralty Inlet, (including Admiralty Bay, Mutiny Bay, Useless Bay, and Cultus Bay), Saratoga Passage, Penn Cove, Holmes Harbor, Possession Sound (south to Point Wells), Port Susan, Tulalip Bay, and Port Gardner." Sub-proceeding 05-04, Dkt. # 1 at p. 1. The Court's resolution of Sub-proceeding 05-04, which notably rejected a number of Tulalip's claims, was similarly limited to those waters wherein Suquamish's U&A was challenged by Tulalip as set out in the RFD. *See generally*, Sub-proceeding 05-04, Dkt. # 244.

The proceeding at hand involves different contested marine waters, with USIT this time seeking an "Order determining that the Sub-proceeding Area [Chuckanut Bay, Samish Bay and a portion of Padilla Bay] is not within the usual and accustomed grounds and stations of the Suquamish Tribe for fishing and shellfishing." These are distinct waters from those at issue in Sub-proceedings 05-03 and 05-04. Moreover, unlike the "nearly enclosed or inland waters" or "sheltered marine areas" at issue in the prior sub-proceedings, the contested waters here are saltwater bays facing the open waters of Upper or Northern Puget Sound. Again, while the *Muckleshoot* two-part procedure applies, the evidence before Judge Boldt in April 1975 and reasonable inferences that can be drawn from that record and from the text of Judge Boldt's April 18, 1975, Order itself are clearly different for the different contested waters at issue.

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[13] *See infra* at Section V.

[14] *See* Sub-proceeding 05-03, Dkt. # 1 at p. 6 (note scope of RFD was limited to "that portion of Saratoga Passage from the Snatelum Point Line to the Greenbank Line and Skagit Bay to the Deception Pass bridge"); *accord* Sub-proceeding 05-03, Dkt. # 198 at pp. 14-15 (Order, limiting ruling to Saratoga Passage or Skagit Bay).

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Because the issues in this proceeding and the prior proceedings are not identical and Suquamish's U&A in the marine waters at issue here was not essential to, much less a part of, the determination of the Court in the prior action, the doctrine of issue preclusion, or more general principals of *res judicata*, cannot be applied to bar Suquamish's defense of USIT's RFD in this sub-proceeding.

IV. EVIDENCE BEFORE JUDGE BOLDT COMPELS A CONCLUSION THAT SUQUAMISH HAS U&A IN THE CONTESTED WATERS

A. This Court Has Already Determined that Suquamish has U&A Beyond and Outside of its Claim Areas 1 and 2, and Judge Boldt Would Not Have Intended to Exclude Waters Adjacent to the Suquamish Homeland.

The Court's task is to determine what Judge Boldt intended in his April 18, 1975 description of the Suquamish U&A. USIT and the Interested Parties repeatedly assert that Judge Boldt intended to limit the Suquamish U&A to Areas 1 and 2 of its claim map, and to exclude all else. To adopt this line of argument is to buy the idea that Judge Boldt intended, without saying so explicitly, to exclude the entirety of what Barbara Lane described as Suquamish's "homeland" (located in Area 4) from Suquamish's U&A.[15] In addition to leading to an absurd result, this line of argument has been implicitly rejected by this Court in Sub-proceeding 05-04 wherein this Court ruled that Suquamish's U&A includes Possession Sound, Port Gardner Bay, Cultus Bay, Mutiny Bay, Useless Bay, and Admiralty Bay—none of which are located within Area's 1 or 2 of the claim map. *See* Sub-proceeding 05-04, Dkt. # 244. For those reasons, and as it has done prior, the Court should reject the unsupportable contention that Suquamish only has U&A in claim Area's 1 and 2.

B. Dr. Lane's Testimony Establishes Suquamish U&A in Bellingham Bay.

On April 9, 1975 George Solomon examined Dr. Lane, and she tried to help him comprehend that culture and custom among Puget Sound Tribes was that they would not,

[15] As noted earlier, Judge Boldt did exclude that portion of Suquamish claim Area 4 south of the northern tip of Vashon Island. Again, Judge Boldt knew how to, and did, exclude portions of the claim area presented by Suquamish when that was his intent.

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without welcome, harvest fish resources at the door-step of another Tribe's homes and villages. Contrary to the spin applied by USIT through a careful editing of the Lane/Solomon colloquy, Dr. Lane's actual testimony directly *places* Suquamish in Bellingham Bay. The full exchange between Mr. Solomon and Dr. Lane makes this abundantly clear. The exchange starts with Mr. Solomon *placing Suquamish in the Bellingham Bay area*:

> Q: But if I understood your testimony, for example, **with respect to the Suquamish being in that area**, you formed an opinion that **that was in their usual and accustomed grounds** by reason of their travelling to that territory.

Dkt. # 37-1 at pp. 84-85.

Dr. Lane's response to Mr. Solomon's question about her earlier testimony of Suquamish being in the Bellingham Bay area was that they would not fish "*all the way over into* Bellingham Bay to get the herring that were spawning *right inside* where the Lummi lived." Dkt. 37-1 at p. 85 (emphasis added).[16] While Lummi may certainly have and use U&A fishing rights in Chuckanut, Samish, and Padilla Bays, none has contended that those are on the doorstep of treaty time Lummi habitations or villages. In fact, if Chuckanut, Samish and Padilla Bays were "*right inside* where the Lummi lived," Dr. Lane's testimony would serve to exclude USIT or other tribes' U&A in those bays as well. The adoption of USIT's position would require ignoring Dr. Lane's testimony specifically speaking to the area as being something of a great commons:

> Where there were rich harvests of resources, more than required by local populations, frequently those places – **and some of these bays were that sort of situation – where large numbers of people came to harvest,** and local people had no objection.

Dkt. # 37-1 at pp. 84-85.

[16] Dr. Lane's testimony that Suquamish didn't go "all the way over into Bellingham Bay" should not be interpreted to mean that they did not go into Bellingham Bay *at all* because such an interpretation does not match the interested Tribes' actual practices or their contemporary understanding of Dr. Lane's testimony. For example, the contemporary understanding was reflected in the 1976 Suquamish Fishing Regulations, which were developed in consultation agreement with the Lummi Tribe, whereby Suquamish agreed to abide custom and not fish "all the way over into Bellingham bay"—meaning north of a line between Point Francis to Post Point across Bellingham Bay. *See* Declaration of Raymond Forsman, attached hereto as an Exhibit (discussing line and its origins in negotiations with the Lummi Tribe).

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The full reading of her testimony reveals that Dr. Lane's testimony does just the opposite of what USIT claims. George Solomon starts the exchange by referring Dr. Lane to prior testimony and her opinion of Suquamish U&A in the area. Dr. Lane testifies that according to custom, Suquamish would not fish "right inside" near Lummi villages. Dr. Lane goes on to testify that the bays in the Bellingham Bay area were rich in resources and utilized on an amicable basis by both local and non-local tribes.[17] If Judge Boldt had understood Dr. Lane's comments to fully exclude Suquamish from Bellingham Bay and the contested waters as suggested by USIT, he could have easily done so (as he excluded south of Vashon Island). He did not. He did not because the full exchange he heard placed Suquamish in Bellingham Bay. Recall that he had *already* declared earlier that day that Suquamish had made a *prima facie* showing of U&A in that area. The correct understanding of this testimony also is reflected in the April 18, 1975, Order explicitly acknowledging a Suquamish claim of right and presence in Hale Passage in Finding of Fact Number 7, and, as explained in Section V. below, by the fact that the Suquamish co-managed and fished in the management zones that include the contested waters without any objection from the State or any other Tribes from 1975 until this case was filed.[18]

C. Interested Parties' Expert Witness Testimony In Sub-Proceeding 11-02 Anchors the Contested Waters to the Rosario Strait as "Contiguous" Waters.

The Interested Parties offer this Court contradictory characterizations of the spatial relations of the contested waters and Rosario Strait in different sub-proceedings. Contrary to their attempts to characterize the contested waters in Sub-proceeding 14-01 as *disassociated* from Rosario Strait, the Interested Parties' proffered geography expert testified in sub-proceeding 11-02 that the contested waters here are part of the "contiguous salt waters of []

[17] Earlier in the day, Dr. Lane testified that Nooksack and "lots of other people" went to Chuckanut Bay". Dkt. # 37-1 at p. 35. This is consistent with her description of the bays in the Bellingham Bay area being rich in resources and used by many tribes.

[18] These regulations also show what the tribes understood about Dr. Lane's testimony that Suquamish would abide custom and not fish "right inside where the Lummi lived." In 1976 the Suquamish regulations included a "no fishing zone" north of a line between Point Francis to Post Point across Bellingham Bay. *See* Declaration of Raymond Forsman, attached hereto as an Exhibit (discussing line and its origins in negotiations with the Lummi Tribe).

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Rosario Strait."[19] In 11-02, they use Rosario Strait as a "geographic anchor" to the full Bellingham Bay fishing area (15A), which includes the contested waters. When it suits the purposes of the Interested Parties in 11-02 to link and "anchor" the contested waters to Rosario Strait -- to actually connect them in its *title of the fishing area* as "Area 15 (Rosario)" -- they do so. But because a consistent representation would be fatal in 14-01, they do an about face, and argue that Rosario Strait is not a "geographic anchor" for the contested waters, but instead a wedge.[20] USIT on the other hand glibly claims that a "cursory review of nautical and marine maps"[21] shows a gulf of separation between Rosario and the contested waters supported only by lines USIT's attorneys have placed on a map. The testimony of the Interested Parties' proffered expert -- that Rosario and the contested waters are contiguous and associated—is simply more compelling than the contradictory and unsupported argument of their legal counsel on this point. Judge Boldt's specific inclusion of Rosario Strait in his April 18, 1975, Order determining Suquamish U&A geographically anchors Suquamish's U&A in the contested waters and is a sufficient basis on its own for this Court to find that USIT cannot meet its burden under *Muckleshoot*.

D. USIT and Interested Parties Continue to Misrepresent the Nature of the Judge Boldt's Suquamish U&A Determination Process.

USIT devotes all of Section III of its Response Brief to a claim that Suquamish has mischaracterized the "procedural posture" of Judge Boldt's April, 1975 proceedings. USIT and Interested Parties are desperate for this Court to believe Judge Boldt presided over a full-fledged evidentiary hearing where Suquamish was asked to present all of its evidence regarding its U&A areas for a final determination and ruling. This is simply not true, and not the case. As noted in detail below, the opposition's attempts to characterize the relevant hearing before Judge Boldt as

[19] *See* Declaration of Sarah Smith, filed on behalf of Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe, C70-9213, Sub-proceeding 11-02, Dkt. # 136, at p. 5 (Map prepared by Sarah Smith, labeling and describing the contested waters as "Area 15").

[20] Dkt. # 44 at, p.9, lines 3-8.

[21] Dkt. # 38 at p.7, lines 19-23.

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anything other than expedited and "emergency" in nature is predicated on a spurious and highly selective reading of the record of the proceedings.

1. The USIT assertion that Judge Boldt intended the April 9-11, 1975 hearings to be the full evidentiary hearing for Suquamish to offer evidence and prove its U&A as a final matter is untrue.

USIT takes the rather remarkable positon that "the April, 1975 hearing was the Suquamish's opportunity to present whatever evidence they wished to support the entirety of their claimed U&A.]" Dkt. # 45 at p.7, lines 7-9. Such a claim, however, requires one to either ignore or refuse to acknowledge Judge Boldt's Finding of Fact 8 in the text of the April 18, 1975, Order itself, which specifically and directly controverts USIT's rendition of the "procedural posture" of the April 1975 proceedings:

> 8. The findings and determinations made in paragraphs 2 through 7 above are made on the basis of **a prima facie showing as heretofore provided and each is subject to reconsideration on the basis of a full evidentiary hearing if requested by any party by written request on or before May 19, 1975.** If no such reconsideration is requested within said time as to any such finding or determination, the latter shall become final and reviewable as provided by 28 U.S.C. §§ 1291 and 2201 without further order of this court.[22]

Judge Boldt could not have been clearer – the April, 1975 proceedings and findings were preliminary and not the "full evidentiary hearing" that USIT claims it was.

USIT characterization of the 1975 proceedings as a full evidentiary hearing is also directly contradicted by the transcript of the proceedings. In a response to State's counsel George Solomon's challenge to Areas 1 and 2 (but not Areas 3 or 4) of the Suquamish U&A claim map Judge Boldt said:

> THE COURT: The problems relating to the herring fishery were brought to the Court's attention very late in the game, as it were. I am not being critical about that in any manner, shape, or form. The press of innumerable other matters in this litigation has kept everyone working overtime constantly; but we had all hoped that the herring fishery matter could be brought on with ample time to develop everything about it and get it settled once and for all in final form subject, of course, to appeal. That was not possible, as a result of which I have gone to

[22] *U.S. v. Washington*, 459 F.Supp. 1020, 1049 (1975) (April 18 Order) (emphasis added).

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> great pains to expedite a prima facie determination for the benefit of the Fisheries Department even above the tribal questions. And it seems to me that all we need to concern ourselves with at this time is the matter of a prima facie showing with respect to the matter. **Inasmuch as no other tribe that will share this same fishery at these places and who have a direct interest in excluding any who might not be qualified to have a direct interest in whatever their take is will be added to the total that the tribes may take, since no tribe has objected, it seems to me that that is at least sufficient prima facie showing; and carrying the matter further at this point without further and in-depth exploration and full hearing is inadvisable.** If we do this with each of the matters, we will never get these matters resolved before the herring have arrived. I regret this very much. I would much prefer to have had the matter brought up in time so that we could have given full and thorough attention to it. But if we are going to get this resolved in time for the arrival of the herring, which is just days away now, that is all we can do as a practical matter[23].

Dkt. 37-1 at pp. 44-45 (emphasis added).

Judge Boldt's transcribed comments made two things absolutely clear: 1) the lack of any Tribe's objection to any of the Suquamish sub-areas 1, 2, 3 or 4 constituted a "sufficient prima facie showing" of its U&A entire claim; and, 2) that he *did not* consider or even want the April 9th hearing to be an "in depth exploration and full hearing." USIT's claim that the April 9th hearing was intended to be the full evidentiary hearing for Suquamish to "prove" its U&A is simply unsupportable given the plain language of the Order and the clear and stern declaration from Judge Boldt on April 9, 1975.

Suquamish, in contrast, has accurately described the procedural posture. Judge Boldt organized an expedited process on an emergency basis, quite unlike anything seen or done in making U&A determinations in Boldt I. On March 28th, the Judge ruled that Suquamish had made a prima facie showing of treaty entitlement, and declared that Suquamish could fish in its claimed U&A areas. He set the hearing on April 9th to, in part, give the State the opportunity to contest any of the U&A claimed by Suquamish. Between filing its U&A claim area map (four distinct areas) on April 2nd and the April 9 hearing, the parties met with the Court Technical

[23] In response, Mr. Solomon states that "Your Honor, and knowing that the Court is only interested in prima facie, I think that it is important to note that it may be said or argued by the state that what has been submitted with respect to the Suquamish Tribe does not constitute a prima facie showing." (cite page 45 lines 3-9).

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Advisor and were to address any questions about U&A areas. No State or Tribe objection was raised prior to April 9th.

On April 9th, in response to a determined effort by the State to delve deeply into an evidentiary proceeding, Judge Boldt pushed back and stated: "since no Tribe has objected, it seems to me that that is at least sufficient prima facie showing." The State then pointed to the March 28th Order, and argued with Judge Boldt that this hearing was the opportunity to contest the prima facie showing of U&A. The Judge permitted the State to attempt to rebut the prima facie showing for the Suquamish U&A, and the State limited its attempted rebuttal to only the Suquamish claim Areas 1 and 2. The State did not attempt to rebut the prima facie showing Judge Boldt had already declared for Suquamish U&A claim Area 3 (or 4), which includes the contested waters in this sub-proceeding. Judge Boldt rejected the State's attempted rebuttal on April 9th, and ruled that Suquamish had successfully established (prima facie) that it has U&A in claim Areas 1 and 2. Thus, the Suquamish U&A claim for all four of the sub-areas—the entirety of the U&A claim—remained presumptive U&A. No Party requested the full hearing offered to contest the Suquamish U&A by the Court's May 19, 1975, deadline and therefore no further argument was had.

2. USIT's assertion that when Suquamish made its prima facie case with "adequate facts" that it must next add evidence to "prove" the claim is nonsensical and contrary to Judge Boldt's call for rebuttal for the prima facie case.

USIT concedes that Suquamish made a prima facie showing for its U&A claim,[24] but disagrees with Judge Boldt about what was supposed to happen next. USIT contends that the party for which the Court has ruled in favor based on "adequate facts"[25] still has the ball in its court, and that Suquamish was obligated to press forward on April 9th with additional or different

[24] Dkt. # 45 at p. 7, lines 3-7.

[25] USIT's concession that Suquamish had alleged adequate facts for its full U&A claim as of April 9th, is an admission against interest and absolutely contrary to its position that Judge Boldt had "no evidence" of fact related to Suquamish fishing in the contested waters. USIT has conceded "evidence" was before the Court in support of the entirety of the U&A claim, and in doing so, fails step 2 of the *Muckleshoot* test.

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evidence to satisfy an unspecified standard of proof. *See* Dkt. # 45 at p.7 lines 3-6.[26] USIT's interpretation ignores and is contravened by Judge Boldt's clear explanation of the process:

> First of all, all of these rulings are based on whether or not a prima facie showing has been made. **A prima facie showing, of course, means that it is rebuttable** and may be modified if and when, a full scale hearing with presentation of additional evidence and argument thereon has been held.

Dkt. # 37-2 at p. 51. In other words, once a prima facie showing has been made, it might be *rebutted*. It flies in the face of common sense to claim that Suquamish was under an obligation to rebut its own showing of "adequate facts" and its winning of a prima facie ruling. In Finding of Fact Number 8, Judge Boldt explained clearly how, where and when a party could seek to rebut (as opposed to bolster) the prima facie showing of "adequate facts" in his April 18th Order and request a full evidentiary hearing. *See U.S. v. Washington*, 459 F. Supp. at 1049 *et seq.* (the Order).

> 3. <u>The April hearings were to establish the Suquamish U&A at a prima facie level, with parties having an opportunity to rebut a prima facie ruling if requested in writing by May 19, 1975.</u>

Early during the hearing on April 9th, Judge Boldt informed the State and other parties that he had come to a conclusion that all of the Suquamish U&A claim had met a prima facie standard:

> I have gone to great pains to expedite a prima facie determination for the benefit of the (State) Fisheries Department even above the tribal questions. And it seems to me that all we need to concern ourselves with at this time is the matter of a prima facie showing with respect to the matter. Inasmuch as no other Tribe that will share this same fishery at these places and who have a direct interest in excluding any who might not be qualified to have a direct interest in whatever their take is will be added to the total that the tribes may take**, since no Tribe has objected, it seems to me that that is at least sufficient prima facie showing.**

Dkt. # 37-1 at pp. 44-45.

[26]USIT said, "Thus, as of the April 9, 1975 hearing date, Suquamish had made only a 'prima facie' showing of entitlement to unspecified U&A locations, that is, the Court found only that Suquamish had alleged adequate facts and their allegation was accepted as true only until proven. . . . .the April 1975 hearing was the Suquamish opportunity to present whatever evidence they wished to present to support the entirety of its claimed U&A." Dkt. # 45 at p. 7, lines 8.

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After hearing the Judge's announcement that applied to *the totality* of the Suquamish U&A claim, the State, by its actions, conceded claim Areas 3 and 4, and tried to change Judge Boldt's mind with rebuttal for Suquamish claim Areas 1 and 2. The State was unsuccessful, and on April 10th, Judge Boldt made a bench ruling on the State's rebuttal regarding Suquamish U&A Areas 1 and 2:

> The Court finds that a prima facie showing has been made that the travel and fishing of the Suquamish Tribe through the north sound areas; that is, areas one and two as designated by the State, was frequent and also regular, not merely occasional, and the application of the Suquamish for such a ruling is granted.

Dkt. # 37-2 at pp. 52-53.

Although it had no notice of the State's intention to do so, Suquamish was able to defeat the State's rebuttal aimed at a limited portion of the Suquamish U&A claim area, and kept its expansive U&A claim to Areas 1, 2, 3, and 4 fully intact. As set forth consistently by Suquamish, the reason that there is not extensive testimony from Dr. Lane on April 9th about Suquamish claim areas 3 and 4 (or the specific contested waters) is because the State did not attempt to rebut the prima facie showing in Areas 3 and 4 declared by Judge Boldt just prior to this examination.[27] Rather, the State limited its challenge to the prima facie showing announced by the Judge for Areas 1 and 2. Mr. Stay focused his examination of Dr. Lane on eliciting testimony on Areas 1 and 2 that the State was explicitly and actually trying to challenge in its attempt to rebut the prima facie showing. Especially when one considers Judge Boldt's repeated admonitions regarding time sensitivity, it would be nonsensical for Mr. Stay to elicit testimony for U&A claim areas and waters for which he had already secured a prima facie declaration from the Judge, and that the State was not trying to rebut. Mr. Stay and Suquamish had already won the prima facie battle for Areas 3 and 4.

4. <u>The Court should reject USIT's attempt to manipulate the record in an effort to concoct a narrative that Suquamish knew and planned for a full evidentiary hearing on its U&A claim on April 9th.</u>

[27] There was Dr. Lane testimony applying to upper Puget Sound and northern areas and Bellingham Bay.

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In his own words, the April 9th hearing was established by Judge Boldt "on an emergency basis" to make a prima facie ruling on the Suquamish U&A claim. Dkt. #37-2 at pp. 52. Suquamish's U&A claim was provided to all parties on April 2nd. The record reveals that because no party had provided notice of any objection to the Suquamish U&A claim area, its legal counsel was surprised when the State sought to object to a portion of that claim. Undaunted, USIT scoffs at this as a Suquamish "surprise theory" in its Response brief,[28] and supports its claim that Suquamish's attorney for the day, Mr. Alan Stay, [29] was prepared, ready, and expecting to put on extensive evidence regarding the U&A claim with the following quotation:

> "Counsel for Suquamish, Alan Stay, then asked if the Court 'wants him to go into a 45-minute discussion of the Suquamish fishing areas'"

Dkt. # 45 at p. 7 line 25, through p.8, line 2. As is obvious from a review of the context in which the statement was made, USIT's selective quotation of the record fundamentally alters the meaning of what Mr. Stay actually said:

> "I don't know whether or not the Court wants me to go into a 45-minute discussion of the Suquamish fishing areas**. I am not really prepared to do that, but it appears to me Mr. Solomon is going to contest that**."

Dkt. # 37-1 at pp. 48-49 (emphasis added).

It also ignores what transpired earlier in the proceeding of April 9th, where, in responding to Mr. Solomon's surprise challenge to a portion of the Suquamish U&A claim, Mr. Stay said:

> "Mr. Solomon has not noted an objection in any filing to the Suquamish . . . we of course are not prepared with tribal witnesses et cetera to be involved in this. And therefore, because it is a prima facie matter and because it's already been determined that this is not to be delved into until the full hearing, which I assume will be scheduled with some dispatch."

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[28] Dkt. # 45 at p.8, lines 19-21.

[29] Recall that Mr. Stay advised the Court on April 9th that he was serving as counsel for Suquamish on this one day. Regular counsel for Suquamish was Mr. Mason Morisset, who actually filed the Suquamish RFD on March 17, 1975. It seems very likely that if Suquamish was expected to put on a full evidentiary proof of its U&A claim on April 9th, Mr. Morisset would have understood that to be the case and would have been in Court with his witness that day. Putting on a full evidentiary showing to "prove" a U&A claim does not seem to be the sort of task primary counsel would hand off to a young stand-in for the day.

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Dkt. # 37-1 at pp. 42-43.

The Court should reject USIT's attempt to re-write the transcript of the proceedings by using cherry-picked quotations in order to challenge the fact that Mr. Stay was caught unaware by the State challenge to the Suquamish U&A claim.

V. SUQUAMISH'S USE OF ITS U&A IN THE CONTESTED WATERS IS NOTHING NEW

The Suquamish have consistently fished, harvested, and participated in the regulation of the contested waters at issue. Citing a single early regulation, USIT makes much of the fact that Suquamish did not immediately begin fishing in the contested waters following Judge Boldt's order on April 18, 1975. The explanation for this, which was conveniently omitted by USIT in their argument, was the closure of certain fisheries (including the contested waters) for conservation purposes.[30] The contested waters at issue fall entirely within what are described after 1975 as WDFW Salmon areas "7B" and "7C" and WDFW Marine Fish/Shellfish Areas 21A, 21B and 22B.[31] The Suquamish have regularly fished, harvested, and regulated their fishing in the contested waters since that time.[32]

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[30] *See* Declaration of Raymond Forsman at ¶ 5, attached hereto as an exhibit; *see also*1975 Suquamish Fishing Regulations, attached hereto as "Exhibit 1" at p. 21 (noting closure of fishery); *id*. at pp 12-13 (noting closure).

[31] In 1975, a portion of Bellingham Bay and the contested waters were described as "Area 3" in the regulations, which corresponds to the label for the area in the proposed regulations filed by Suquamish and before Judge Boldt. *See* Exhibit 1 at p. 18 (showing "Area 3"); *see also* Dkt. # 16-4 at p. 3 (U&A claim map); *but see* 1976 Suquamish Fishing Regulations, attached hereto as "Exhibit 2" at p. 18 (1976 NW Indian Fisheries Commission map showing location of areas 7B and 7C); *see also* Declaration of Rob Purser (noting same); *see* Declaration of Viviane Berry (noting location of shellfish catch areas 21A, 21B, and 22B); *accord* Exhibit 40.

[32] *See generally* Declaration of Rob Purser (noting same); *accord* Declaration of Raymond Forsman; Declaration of Tony Forsman; Exhibit 1 at pp. 1-3, 15-16, 18-19, 21-22 (1975 Fishing Regulations related to contested waters); Exhibit 2 at pp. 6, 8, 12-13, 15, 20-21, 29, 31-33 (1976 Suquamish Fishing Regulations); 1977 Fishing Regulations attached hereto as "Exhibit 3" at pp. 1-3; 1978 Fishing Regulations attached hereto as "Exhibit 4" at pp. 2, 4-5, 8-13, 15-16, 19, 22, 25, 29, 32-33, 35-36, 38, 41, 44; 1979 Fishing Regulations attached hereto as "Exhibit 5" at pp. 1-16, 18, 23; 1980 Fishing Regulations attached hereto as "Exhibit 6" at pp. 1-2, 4-13, 15-24, 26-28; 1981 Fishing Regulations attached hereto as "Exhibit 7"; 1982 Fishing Regulations attached hereto as "Exhibit 8" at pp. 1-2, 4-19; 1983 Fishing Regulations attached hereto as "Exhibit 9" at pp. 1-4, 6-9; 1984 Fishing Regulations attached hereto as "Exhibit 10" at pp. 2-4; 1985 Fishing Regulations attached hereto as "Exhibit 11" at pp. 3-13; 1986 Fishing Regulations attached hereto as "Exhibit 12" pp. 2-6; 1987 Fishing Regulations attached hereto as "Exhibit 13" at pp. 3-7, 9-14; 1988 Fishing Regulations attached hereto as "Exhibit 14" at pp. 2, 5-8; 1989 Fishing Regulations attached hereto as "Exhibit 15" pp. 3-14; 1990 Fishing Regulations attached hereto as "Exhibit 16" at pp.1-2, 4-5; 1992 Fishing Regulations attached hereto as "Exhibit 17" at pp. 1-2; 1995 Fishing Regulations attached hereto as "Exhibit 18" at pp. 1-2, 4, 6-9; 1996 Fishing Regulations attached hereto as "Exhibit 19" at pp. 1-4; 1997 Fishing Regulations attached hereto as "Exhibit 20" at pp. 1, 3-6, 8, 11-12; 1998 Fishing Regulations attached hereto as "Exhibit 21" at

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The regulations and catch reports for the contested waters make clear that Suquamish has been regularly and actively fishing and harvesting in these waters since its U&A was originally determined. Between 1975 and 2014, USIT and the Interested Parties made no objection to Suquamish's activities in these waters, but cannot truthfully claim ignorance of them. As such, their claimed right to relief in this sub-proceeding is not only inequitable, but their legal arguments regarding Judge Boldt's and the parties' understanding of the scope of Suquamish's U&A determination flies in the face of the facts and the practices established by this Court (including Judge Boldt himself) and the parties over last thirty-nine plus years.

VI. CONCLUSION

For the foregoing reasons, there is no genuine dispute as to any material fact, and Suquamish is entitled to prevail as a matter of law. Suquamish therefore respectfully requests that its Motion for Summary Judgment be granted and that judgment dismissing USIT's and the Interested Parties' RFD *with prejudice*, be entered in Suquamish's favor.

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pp. 1, 4-6; *see* 1999 Fishing Regulations attached hereto as "Exhibit 22" at pp. 1, 4-6, 8; 2000 Fishing Regulations attached hereto as "Exhibit 23" at pp. 1, 4-5, 7, 9-12; 2001 Fishing Regulations attached hereto as "Exhibit 24" at pp. 1-3, 5-6; 2002 Fishing Regulations "Exhibit 25" at pp. 1, 3-4; 2003 Fishing Regulations attached hereto as "Exhibit 26" at p. 1, 4-5; 2004 Fishing Regulations attached hereto as "Exhibit 27" at pp. 1-4, 6-7, 9, 11-13; 2005 Fishing Regulations attached hereto as "Exhibit 28" at pp. 1-3, 5, 7, 9, 11-13; 2006 Fishing Regulations attached hereto as "Exhibit 29" at pp. 1-3, 5-6, 10-12; 2007 Fishing Regulations attached hereto as "Exhibit 30" at pp. 1, 3-4, 6-9, 11-13, 15-18; 2008 Fishing Regulations attached hereto as "Exhibit 31" at pp. 1, 3-7, 9, 11, 13, 15, 17-22, 24, 26; 2009 Fishing Regulations attached hereto as "Exhibit 32" at pp. 1, 4-7, 9, 11, 13, 23-30, 33-36; 2010 Fishing Regulations attached hereto as "Exhibit 33" at pp. 1-2, 5-7, 10-12, 14, 16, 18, 21-26; 2011 Fishing Regulations attached hereto as "Exhibit 34" at pp. 1, 3, 5, 7-8, 11-13, 15-19, 21-22; 2012 Fishing Regulations attached hereto as "Exhibit 35" at pp. 1, 3, 5, 7, 9, 11, 13-16; 2013 Fishing Regulations attached hereto as "Exhibit 36" at pp. 1, 4-6, 8, 10, 12, 14, 16, 18, 20-21; 2014 Fishing Regulations attached hereto as "Exhibit 37" at pp. 1-2, 4, 7, 9, 11, 14-16, 18-21, 23-25; *see also* 1975-2014 catch report totals from the NW Indian Fish Commission database identifying that portion of the Suquamish fleet's salmon catch in the contested waters, attached hereto as "Exhibit 38"; Declaration of Viviane Barry, attached hereto as an exhibit (noting shellfish harvest); *see* catch report totals identifying Suquamish's year-over-year shellfish harvest in the contested waters, attached hereto as "Exhibit 39."

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Respectfully submitted this 1st day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 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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