The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 Subproceeding 11-2 MOTION FOR SUMMARY JUDGMENT Note on Motion Calendar: June 30, 2015 Oral argument Requested

I. MOTION FOR SUMMARY JUDGMENT

The Port Gamble S'Klallam, and Jamestown S'Klallam Tribes ("S'Klallam") move this Court for Summary Judgment pursuant to Fed. R. Civ. P. 56 (a) because there is no genuine dispute as to any material fact required to resolve this matter.

II. INTRODUCTION

Subproceeding 11-2 was brought for the purpose of establishing once and for all that Lummi's issuance of fishing regulations in S'Klallam waters have been in violation of the rule of law set forth in the *Boldt* decision. Declaration of Lauren Rasmussen, (Exs. N,O) (Dkt. 39 (5/31/12)

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(regulations issued and objections thereto). The *Boldt* decision found Tribes retained a treaty right to fish in their Usual and Accustomed fishing grounds and stations, but not elsewhere. The issuance of the fishing regulations in waters known to be the Strait of Juan de Fuca are not "in conformity" with the original decree and are therefore prohibited. Request for Determination ("RFD"), Dkt. 1, pp. 1,12. This Court originally agreed with that exact conclusion, but was reversed on narrow grounds. The Ninth Circuit decided the matter had not yet been "explicitly decided" or decided "by necessary implication" by the prior subproceeding such that it could not have been already decided under the law of the case doctrine. *Lower Elwha et. al. v. Lummi Natio*n, 763 F.3d 1180, 1185 (9th Cir. 2014) (*Lummi V*). This remand ensued.

III. PROCEDURAL HISTORY

In 1974, as part of Final Decision No. 1, the Court in what became known as the *Boldt* decision held that Lummi's U & A included certain named waters and excluded others:

> 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. [Exs. USA-20, p. 39; USA-30, pp. 23-26; Exs. PL-94 a, b, c, d, e, t, u, v, w, x; Ex. G-26, pp. II-9 to II-13; Exs. USA-60, USA-61, USA-62, USA-63, USA-64; Tr. 1665, l. 4-11, l. 23-24]

United States v. Washington, 384. F. Supp. 312, 360 (1974).[1]

A. Subproceeding 89-2 and *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 447 (*Lummi III*)

In 1989, the S'Klallam initiated their first subproceeding against Lummi and argued that the above description in FF 46 did not include the Strait of Juan de Fuca, Hood Canal, or Admiralty

[1] This Order is attached in the Appendix along with the major substantive orders in this case.

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Inlet. This was Subproceeding 89-2. Two district Court decisions, known in this case as the *Coyle* and *Rothstein* Decisions, issued in 1990 and 1998 respectively agreed and ruled that those waters were excluded. The Coyle decision (1990) was brought under the prior paragraph 25(a).[2] After the Coyle decision ruled in favor of the S'Klallam, Lummi amended their Answer and asserted a cross-request to expand into the disputed waters and lost that claim too.[3] *U.S. v. Washington*, 19 F. Supp. 3d 1252 at 1278; Rasmussen Decl., Dkt. 39-1, p. 308 (5/31/2012). These decisions will be described for convenience's sake as *Lummi I*, 18 F. Supp. 3d 1123, 1155 (1990) and *Lummi II*, 19 Supp.3d 1252, 1277 (1998). Lummi appealed those decisions to the Ninth Circuit and the Court affirmed the prior two decisions with respect to the Strait of Juan de Fuca and Hood Canal and reversed the prior decisions with respect to Admiralty Inlet. *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 447 (*Lummi III*). This case centers essentially around one phrase in that decision.

In *Lummi III*, the Ninth Circuit held that Admiralty Inlet was not geographically distinct from Northern Puget Sound which was a part of Lummi U & A: "This argument fails because there is no indication that Judge Boldt recognized Admiralty Inlet as a region separate from 'Northern Puget Sound'; it is just as likely that this area was intended to be included as that it was not." *Lummi III*, 235 F.3d at 452. The Court then defined Admiralty Inlet: "Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula." *Id*.

The Court then used one perplexing phrase to describe a potential transit path through Admiralty Inlet:

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[2] Paragraph 25 is this Court's Order on Continuing Jurisdiction. *U.S. v. Washington*, 18 F. Supp. 3d 1172, 1213 (1993).

[3] The cross-request for determination was purportedly filed pursuant to the authority of a minute order entered by Magistrate Judge Weinberg on June 28, 1989. *Lummi III,* 235 F.3d 443, 447.

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> 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." If one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station, see Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds and stations, see Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the "environs of Seattle." See Decision I, 384 F. Supp. at 360.

Id. The Lummi felt that because of the one phrase above it had the right to connect the two areas even if it meant fishing in the Strait of Juan de Fuca which was prohibited. Declaration of Lauren Rasmussen, Dkt. 39, pp. 325-326 (5/31/2012) (*Declaration of Elden Hillaire*) ("We concluded that the opinion included Haro Strait and Admiralty Inlet[4] and the waters between the two"). The S'Klallams objected because the waters "between the two" included a large expanse[5] of the Strait of Juan de Fuca.[6] *Id*., p. 317. The RFD filed by the S'Klallam[7] and Lower Elwha Klallam in this case, requested a ruling that Lummi had no treaty right to fish in the areas described as the "marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia to Point Wilson on the westerly opening of Admiralty Inlet." RFD, Dkt. 1 ¶ 2. For a map of the area, *See* Declaration of Sarah Smith, Ex. A (April 28, 2015). The S'Klallam asserted this area is commonly known as the Strait of Juan de Fuca, and necessarily contains all water west of Whidbey Island and that all fishing there by the Lummi is contrary to the law. RFD, ¶ 1. [8]

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[4] Later, in its Answer to this case, it claimed the definition of Admiralty Inlet was unclear. Answer to RFD, p. 308.

[5] Approximately 310 square miles of the Strait of Juan de Fuca were reopened by the regulation. Declaration of Randall McCoy, Ex. A (Dkt. 20033/41, 5/31/2012).

[6] Initially the S'Klallam filed a show cause motion in Subproceeding 89-2 attempting to enforce the prior decision but this Court decided that a new subproceeding had to be filed.

[7] The 26 year history of Subproceeding 89-2 which culminated in the first decision in *U.S. v. Lummi*, 235 F.3d 443 (2000) is not described here but can be found in the first Motion for Summary Judgment, Dkt. 40, pp. 6-18 and the history is incorporated herein as necessary.

[8] The RFD was brought under Paragraph 25(a)(1), (a)(4) and (a)(7). RFD, ¶ 4, 5. The Lummi's Answer to the RFD asserted that the boundaries of Admiralty Inlet were unclear. Answer to RFD, ¶ 19, Dkt. 15.

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B. District Court Proceeding (Subp. 11-2): *U.S. v. Washington*, 20 F.Supp. 3d 899 (2012) (*Lummi IV*)

In Suproceeding 11-2, this Court entered summary judgment in favor of the S'Klallams and in doing so independently agreed that the Strait of Juan de Fuca included all waters west of Whidbey Island. The Court held that decision prohibiting Lummi fishing in the disputed area was law of the case. *Id*. at 980 (*Lummi IV*).

The Court examined all evidence cited by Judge Boldt and held that it did not support the Lummi's assertions that Final Decision No. 1,[9] FF 46, specifically included the disputed areas:

> Third, Dr. Lane named only two places, Fraser River in the north and Puget Sound to the south, as fisheries visited by Lummi fisherman; she did not report that they fished all the waters in between, or mention any intermediate fisheries.

Order on Summary Judgment, Dkt. 59.[10] The Court also found no historic evidence of Lummi fishing in the disputed areas at treaty times.[11] *Order on Reconsideration*, Dkt. 72, p. 4. In denying Lummi's Motion for Stay, the Court found that the Lummi's assertions regarding the geography of the Strait of Juan de Fuca were "geographically unsupportable." *Order on Motion for Stay of Enforcement*, Dkt. 104, p. 4:

> Lummi may not gain access to fishing in Areas 6A and 7 by claiming they lie in the "waters west of Whidbey Island," because these areas indisputably are within the Strait of Juan de Fuca, not Admiralty Inlet.

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[9] *U.S. v. Washington*, 384 F. Supp. 312 (1974).
[10] This Order is reproduced in the Appendix.
[11] The Court defined the numbered areas (6A and 7) as follows in Fn 1 of the Order on Reconsideration:

> According to the map included with the Lummi motion, Area 6A encompasses a small triangle of marine waters immediately to the west of the northern part of Whidbey Island and the southernmost reach of Fidalgo Island. Area 7 encompasses the marine waters surrounding and flowing between the San Juan Islands and extends south beyond Lopez Island into the Strait of Juan de Fuca. Motion for Reconsideration, p. 3.

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The Lummi Nation appealed. Dkt. 73.

C. 9th Circuit Decision: *Lower Elwha Klallam Tribe v. Lummi*, 763 F.3d 1180 (2014) (*Lummi V*)

The Court of Appeals examined "whether the issue is controlled by law of the case at all." *Lummi V*, 763 F.3d at 1185. The law of the case, the Court reasoned, was for matters regarding the "efficient" operation of Court affairs which precluded a Court from reconsidering an issue previously decided by the same court or a higher court in the identical case. *Id*. "For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition." *Id*. citing *Lummi III* at 452. The Court found that the prior Ninth Circuit Decision in *Lummi III*, 235 F.3d 443, was "ambiguous" such that the issue "had not yet been decided explicitly or by necessary implication." The reason for this, according to the Court, was that the decision itself was ambiguous as to the status of the waters "immediately west of the northern Whidbey Island" because of the fact that there were two possible conclusions that could be drawn because of the one additional phrase in the *Lummi III* ruling regarding Admiralty Inlet:

> Thus, each of *Lummi Indian Tribe's* two holdings implies a different result. Therefore, we conclude that *Lummi Indian Tribe* is ambiguous regarding whether the waters immediately to the west of northern Whidbey Island are included within the Lummi U&A, and accordingly that this issue has not yet been decided explicitly or by necessary implication.

Id. at 1187. The Court then held that the law of the case holding was reversed:

> We hold that no prior decision in this case has yet explicitly or by necessary implication determined whether the waters immediately west of northern Whidbey Island are a part of the Lummi's U&A. Therefore, the district court erred in concluding that the issue was controlled by law of the case.

Id. at 1188. The Court also examined the two perspectives and compared them:

> This reasoning suggests that it has already been determined by necessary implication that the waters immediately west of northern Whidbey Island are part of the Strait of Juan de Fuca and hence not a part of Lummi's U & A.

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Id. at 1186. The Lummi perspective was that it was already decided:

> Applying that reasoning here, the 'passage through which the Lummi would have traveled' from the San Juan Islands to the Admiralty Inlet would have been the waters directly to the west of Whidbey Island. Thus, this reasoning suggests that the waters to the west of northern Whidbey Island would be included within the Lummi's U & A.

Id. at 1187.

The Court[12] found it could not definitively decide and therefore remanded to the District Court to determine if "any" waters west of northern Whidbey Island were included in Lummi's U & A. *Id*. at 1188, fn. 1.

D. Actions After Remand: Temporary Restraining Order and Preliminary Injunction

After the 9th Circuit ruled in August 2014, the Lummi issued regulation 2015-09 to again fish in the disputed waters. Declaration of Ben Starkhouse, ¶ 4, Dkt. 131; *Id.* p. 13; Ex. C (map illustrating the disputed area in the regulation). The S'Klallam objected then filed a Motion for Temporary Restraining Order. Dkt. 20880; Dkt. 125. The Court entered a TRO on March 13, 2015. Dkt. 132. The S'Klallam then filed a Motion for Preliminary Injunction. Dkt. 134. Lummi defended the motion arguing that "[n]either [the District Court or the 9th Circuit] has specifically determined the western edge of the Lummi Nation's U&A." Dkt. 142, 2:8-9.[13] The Court granted

[12] The decision was divided. Two Judges (Judges Bea and Hawkins) joined the decision. Judge Rawlinson, agreed with the S'Klallam theory of the case that the waters west of Whidbey Island were already determined to be subset of the Strait of Juan de Fuca.

[13] Lummi also attempted to use three reports never considered by Judge Boldt in its original determination to support their claim. The S'Klallam moved to strike the three reports because they were not cited by Judge Boldt in support of FF 46, which was the only issue in the proceeding. Dkt. 146, p. 2 ("The only relevant evidence is that which was considered by Judge Boldt when he made his finding.")

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both motions and agreed Lummi had no evidence of fishing in the disputed waters. Dkt. 150; Dkt. 151.

IV. JURISDICTIONAL ARGUMENT ON PARAGRAPH 25

The remand decision in *Lummi V* was not crystal clear as to what it expected the parties to analyze on remand, and the Court asked the Parties whether the case was no longer a Paragraph 25(a)(1) violation case but had instead morphed into a Paragraph 25(a)(6) expansion case. Based on the agreement of the parties, the court ordered that this issue be discussed along with the dispositive motions under Paragraph 25(a)(1). Rasmussen Decl., Dkt. 156; pp. 6-14; pp. 14:16-19 (Indicating no opposition to the S'Klallam proposal). Lummi later reversed its position and filed a motion for relief from the briefing schedule and indicated a desire to insert a new Paragraph 25(a)(6) claim. Dkt. 153. The S'Klallam opposed the motion and a companion motion to be relieved of all Paragraph 25(a) pre-filing requirements because, as discussed below, it was an inappropriate request in this case. Dkt. 153; 154; 155; 160; Tr. 12;14-15 attached to Dkt. 156. To date, the Court has not ruled on the Lummi request.

A. The 9th Circuit Remand Does Not Change the Jurisdictional Framework

The S'Klallam find that although the remand order is not perfect, that it clearly sets forth the next steps the parties and the Court need to follow. This is because the 9th Circuit can't tinker with the jurisdiction alleged by the parties. S'Klallam filed this case under the jurisdictional ambit of Paragraph 25(a)(1), (a)(4) and (a)(7) as provided in the Order Modifying Paragraph 25. RFD, Dkt. 1. This Order provides for further review i.e. continuing jurisdiction of a Tribe's U & A determinations if a Tribe is violating their original U & A decree or if a Tribe is seeking to expand into new waters:

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- (a)(1). Whether or not the actions intended or effected by any party (including the party seeking the determination) are in conformity with Final Decision # 1 or this injunction; or

- (a)(6). The location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # 1.[14]

U.S. v. Washington, 18 F.Supp. 3d 1172, 1213 (1993). A case cannot be considered under both provisions at the same time. Lummi may not seek to both argue their U&A includes the disputed waters, then ask for time to amend their pleading prior to the first issue being resolved, and simultaneously seek to expand into the disputed waters. *See Motion for Relief from Deadline,* Dkt. 153. The S'Klallam contend that the Ninth Circuit remand requires only an analysis under Paragraph 25(a)(1) because it found the prior ruling ambiguous. The case law in *Lummi III*, 235 F. 3d. 443 and *U.S. v. Muckleshoot*, 141 F.3d 1355 (1998), is that ambiguity in a prior determination is a consideration under (a)(1), and not (a)(6).

B. The S'Klallam Position is that the Case Should be Litigated Under Paragraph 25(a)(1)

The S'Klallam position is therefore straightforward and consistent with how this Court has handled prior cases. In Subproceeding 09-1, as a recent example, this Court held that the parties should first proceed under Paragraph 25(a)(1) to determine if the Boldt decision had resolved the issue in the case regarding the western boundary of Quileute and Quinault's U & A. *Order on Reconsideration*, Dkt. 179 ("While the Court's Order anticipated a two-step proceeding, first under Paragraph 25(a)(1), then under Paragraph 25(a)(6)…"). The main parties then stipulated[15] that the matter was never decided by Judge Boldt. Dkt. 181 (09-1). Had the parties not so stipulated, the Subproceeding would have proceeded under Paragraph 25(a)(1).

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[14] At some point this provision should be put to rest altogether.

[15] The S'Klallam did not stipulate that the matter was not specifically determined because they believe the U & A was in fact determined by the *Boldt* Court.

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The remand order does nothing to alter the jurisdictional framework of the case. RFD, Dkt. 1.[16] This Court must decide the issue without relying on the premise that it was already decided by *Lummi I*, and *Lummi II*, and *Lummi III*. The S'Klallam assert that because Lummi's U & A is specifically determined[17] and does not include the disputed waters, the required inquiry is completed with a review of the evidence that supported the decision. As the Court held in *Muckleshoot I*:

> At the same time, subparagraph f of Paragraph 25 reserved continuing jurisdiction to determine "the location of a tribe's usual and accustomed fishing grounds not specifically determined in [Decision I]." *Id*. at 419. Judge Boldt, however, did "specifically determine[]" the location of Lummi's usual and accustomed fishing grounds, albeit using a description that has turned out to be ambiguous. Subparagraph f does not authorize the court to clarify the meaning of terms used in the decree or to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree.

Lummi v. Muckleshoot, 141 F.3d 1355, 1360 (1998). Thus, as a matter of law, Lummi's U & A is specifically determined—just ambiguous. It is important to restrict the analysis because a Court cannot "alter, amend, or enlarge" on the description in the decree. *Id*. *Lummi V* held that the Decision in *Lummi III* was "ambiguous regarding whether the waters immediately to the west of the northern Whidbey Island are included in the Lummi U & A…" such that it was not law of the case that the waters were included or excluded. *Lummi V*, 763 F.3d at 1187. "For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition." *Id*.

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[16] If a case is remanded for further proceedings, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal. *Stephens v. F/V Bonnie Doon, 731 F.2d 1433, 1435* (9th Cir. 1984).

[17] Note the use of "specifically determined" is in Paragraph 25(a)(6) does not have the same use or meaning as "explicitly determined" as used in a law of the case analysis.

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Lummi V notes that that "[n]o court has ever *explicitly determined* the eastern boundary of the Strait of Juan de Fuca." *Lummi V*, 763 F.3d at 1186. The Ninth Circuit thus implies the boundary of the Eastern Strait of Juan de Fuca somehow needs to be decided still. The boundary question is a diversion of sorts. The only legitimate issue here is that regardless of the obvious geography, the real issue is where Lummi fished, and that area where the proof ends becomes the boundary line of their U & A. The same is true in any new U & A case.

Nor is it really a question, as Lummi posits, about a matter never decided by any Court such that it is a completely open issue. The terms "specifically" and "explicitly" determined would have to have the exact same meaning and underlying analysis for that to be true. But, Paragraph 25(a)(6) refers to the future determination of locations of U & A not *specifically determined* whereas law of the case considered whether an issue was *explicitly determined*. The analysis is also different. The law of the case inquired examines whether the determination regarding Lummi fishing in the marine waters immediately west of Whidbey Island were explicitly determined by *Lummi III*, to be outside of Lummi's U & A. Conversely, Paragraph 25(a)(6) can only be used to expand into an area *not already sought* in Final Decision No. 1 (*Boldt* Decision) and denied. Where the question was answered but is ambiguous, as here, it is a Paragraph 25(a)(1) issue.[18]

The proper examination is therefore to do the two-step analysis used to construe the original decision for its meaning and intent. *Lummi v. Muckleshoot, supra.* This is exactly what Lummi argued should have been done in the first place when this Court decided the two-step had already been completed. 20. F. Supp. 3d 899, 975. The underlying philosophy is presumably that

[18] *Lummi V* held that the issue is one of ambiguity. 763 F.3d at 1187.

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if the Court is going to imply a right to fish in an area when the area is not specifically described it can only do so if there is actual evidence-not mere speculation.

V. EVIDENCE RELIED UPON

The S'Klallam rely on the Declaration of Lauren Rasmussen in Support of Summary Judgment, the Declaration of Lauren Rasmussen dated May 31, 2012, (Dkt. 39), Second Declaration of Lauren Rasmussen dated July 23, 2012 (Dkt. 50) the Declaration of Sarah Smith dated April 28, 2015, and the Declarations submitted in this Subproceeding as relied upon herein.

VI. ARGUMENT ON THE MERITS

A. Introduction

The S'Klallam will prevail on summary judgment because: (1) the *Boldt* Decision considered but did not grant Lummi U & A in the disputed waters such that any claimed transit path is for transit alone (2) once a Tribe has a specifically determined U & A, it cannot both claim the disputed waters are both part of its U & A and that it can also expand into those waters because they are not part of its U & A and never were (3) the record cited in FF 46 shows Lummi had no proof it fished in the disputed waters at Treaty times and (4) the S'Klallam had that proof such that allowing Lummi to connect the dots in their claimed transit route dilutes the treaty rights of Tribes who historically fished in the areas Lummi seeks.

B. Standards for Relief

1. Summary Judgment Standard

One purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which

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are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)(citations and quotations omitted). The standard under Fed. R. Civ. P. 56(a) is that the moving party must show that there is "no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law." The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The nonmoving party must show more than metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

2. Standard in US v. Washington: *Upper Skagit* Analysis

The basic analysis is referred to as the two-step inquiry as described in the case of *Upper Skagit v. Suquamish* which requires the original finding be ambiguous and, if it is ambiguous, the Court will look at the record in front of Judge Boldt to clarify the meaning:

> The district court adhered to a two-step procedure in keeping with our decisions in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) ("Muckleshoot I"), *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) ("Muckleshoot II"), and *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("Muckleshoot III"). First, it determined that Upper Skagit had the burden to offer evidence that FF 5 was ambiguous, or that Judge Boldt intended something other than its apparent meaning (i.e., all salt waters of Puget Sound). Second, if the evidence, including contemporaneous understanding of the extent of "the marine waters of Puget Sound," showed that "Puget Sound" as used in the Suquamish U&A included the Subproceeding Area, Upper Skagit had the burden to show that there was no evidence before Judge Boldt that the Suquamish fished on the east side of Whidbey Island or traveled there in route to the San Juans and the Fraser River area.
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> *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. Wash. 2010).

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3. Finding of Fact 46 Is Ambiguous

This test is called the two-step. Applying the two-step standard to the present case requires the S'Klallams to show that the Finding of Fact 46 is ambiguous. It has already been determined that Finding of Fact 46 is ambiguous about the western boundary in both *Lummi III* and *Lummi V*. *U.S. v. Lummi (Lummi III)*, 235 F.3d. 443, at 449[19]. *Lummi V* narrows the issue to whether the area "immediately to the west of northern Whidbey Island" are included:

> Thus, each of *Lummi Indian Tribe's* two holdings implies a different result. Therefore, we conclude that *Lummi Indian Tribe* is ambiguous regarding whether the waters immediately to the west of northern Whidbey Island are included within the Lummi U&A…

Lummi V, 763 F.3d at 1187. In a claimed of a transit route such as the present case, the analysis is not one where the two endpoints are merely connected any manner the Tribe claims but what proof there was of fishing in the disputed area:

> In this inquiry, the burden is on the Upper Skagit and the Swinomish to demonstrate that there was no evidence before Judge Boldt that the Suquamish fished on the east side of Whidbey Island, or traveled through there on their way up to the San Juans and the Fraser River area.
>
> *U.S. v. Washington*, 20 F. Supp. 3d 828, 837 (2000) (Sub. 05-3).

In Subproceeding 05-3, also a case like this involving two endpoints which are very far away from one another (Vashon Island and Fraser River), the Court engaged in an inquiry whether the route that Suquamish traveled from Vashon Island to the Fraser River area was on the west side of Whidbey Island. *Id*. The Court considered the explicit testimony of Dr. Lane referring to Whidbey Island. *Id.* at 839 ("It would be pure speculation to conclude that those travels must also

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[19] *Citing,* FN6. Although the Lummi attempt to characterize Findings 45 and 46 as unambiguous, they concede that "[t]here may be some ambiguity about the westerly limit of Lummi fishing rights[.]" See Lummi Br. at 12 n. 5.

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have included the east side of Whidbey Island, as there is absolutely no evidence in the record that they did so.").

> … Upper Skagit had the burden to show that there was no evidence before Judge Boldt that the Suquamish fished on the east side of Whidbey Island or traveled there in route to the San Juans and the Fraser River area.

Upper Skagit Indian Tribe v. Washington, 590 F.3d 1020, 1023.

Here, applying that analysis to this case, means that the Lummi simply cannot, as a matter of law, simply connect its two endpoints (environs of Seattle and Fraser River) to be allowed all fishing areas every which way in between. The evidence creates the parameters of their U & A. This is logical because Tribes at treaty times probably did not fish using geographic waterway boundaries. In modern times, however, that is the way we define areas.

4. The Evidence Points to a Different Geographic Area of Lummi Fishing

In looking at the evidence, what will be shown is that there is both no specific reference to any of the disputed area and no evidence supporting any additional U & A than the areas described in FF 46. When Judge Boldt has cited the specific, rather than the general evidence presented by Dr. Lane, that evidence determines the boundaries of a tribe's U & A. *Lummi III*, 235 F. 3d at 451. In FF 46 there are several specific geographic references, all which show that Lummi was fishing north of the disputed waters at treaty times, and it is those references that determine the boundary of their U & A. Declaration of Sarah Smith, Exs. A-C.

a. The Record Shows the Court and Dr. Lane Specifically Described the Disputed Waters When Describing the S'Klallam U & A

Comparing Judge Boldt's use of specific references has been used in the past to shed light on terminology. A comparison of the Dr. Lane findings for the Lummi to the S'Klallam finding highlight that the Court (and Dr. Lane) used different language when it intended to include these

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areas within a Tribes' U & A. *U.S. v. Washington*, 626 F. Supp. 1405, 1442, FF 341. ("Furthermore the usual and accustomed fishing grounds of the Port Gamble Klallam Band include the waters of the San Juan Islands archipelago and the waters off the west coast of Whidbey Island."). The determination of the location of the Strait of Juan de Fuca was specific and clear:

> The usual and accustomed grounds of the Port Gamble Band of Klallam Indians include the waters of the Strait of Juan de Fuca, and all the streams draining into the Strait from the Hoko river east to the mouth of Hood Canal.

The Finding of Fact in the original decree, specifically FF 46, found at 384 F. Supp. 312, 360-363 (W.D. Wash. 1975), describes the Finding of Fact that is at issue in this case contains no similar references to the disputed waters as noted above:

> 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. (Exs. USA-20, p. 39; USA-30, pp.23-26; Exs. PL-94a, b, c, d, e, t, u, v, w, x; Ex. G-26, pp. II-9 to II-13; Exs. USA-60, USA-61, USA-62, USA-63, USA-64; Tr. 1665, l. 4-11, l. 23-24).[20]

This is a singificant omission. The reason it is a significant omission is that, in addition to not including the specific terms, Judge Boldt actually considered whether Lummi fished "up the Strait of Juan de Fuca to the Makah Reservation." The Court also heard Lummi's claim they fished at Whidbey Island. *Id.* The fact that this testimony was heard and not cited by Judge Boldt was determined by Judge Coyle to be a significant factor in concluding the issue had been considered and denied. *Lummi I*, 18 F. Supp. 3d 1123, 1162 ("These statements are very telling because it must be noted that neither the testimony of J.B. Finkbonner, or Dutch Kinley quoted above was cited by Judge Boldt in support of either Findings 45 or 46."). What this means is that the issue of

[20] *See* Rasmussen SJ Decl., and attached Exhibits.

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whether Lummi fished "up the Strait of Juan de Fuca" from the San Juan Islands to the Makah, and waters near “Whidbey Island” were considered and rejected by Judge Boldt.

b. There is No Evidence Lummi Fished in the Disputed Waters at Treaty Times

The Court also did not cite any supporting documents that would lead to a conclusion that it actually intended to include any of the disputed areas without naming them. As will be shown below, there is "no evidence before Judge Boldt showing that Lummi fished the waters west of Whidbey Island or traveled there en route from the Fraser River to the Seattle area." *U.S. v. Washington*, 20 F. Supp. 899, 975.

1. USA-30: Dr. Lane’s Report on Lummi’s U & A

The main language adopted by the Court in the dispute in FF 46 above, draws its source from similar language in Exhibit USA-30, which is Dr. Lane’s “Anthropological Report on the Identity, Treaty Status, and Fisheries of the Lummi Tribe of Indians.” The reef net locations described in this finding of fact can be found on the map in the Dr. Lane report. Rasmussen SJ Decl., p. 36; Declaration of Sarah Smith, Ex. A. Throughout the course of USA-30, Dr. Lane uses nineteen references and makes twenty-one parenthetical citations. Fifteen of these citations are in relation to reef netting. Because reef netting is a fishery that is designed to intercept Sockeye salmon returning to the Fraser River it can only be carried out in specific locations that meet specific ecological conditions. Therefore the identification of reef net sites is a critical dimension of identifying Lummi usual and accustomed fishing grounds and stations. Dr. Lane identifies the following Lummi, Semiahmoo, and Samish reef netting locations, listed below:

- Village Point (Lummi Island)
- Iceberg Point (Lopez Island)
- Langley Point (Fidalgo Island)
- Birch Point (Birch Bay)
- Point Roberts

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- Cherry Point
- Shaw Island
- Orcas Island
- Waldron Island

Rasmussen SJ Decl., p. 35; Declaration of Sarah Smith, Exhibit A (map of fishery locations). USA-30 does not provide any additional geographic description of Lummi fisheries or documentation supporting any examples of Lummi seasonal adjustment to participate in fisheries outside of the geographic area, from Fidalgo Island, north to the Canadian border. Rasmussen SJ. Decl., p. 35, 38.

In USA-30 Dr. Lane also writes "Lummi fishermen were accustomed, at least in historic times and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south." Rasmussen SJ Decl., p. 37. It is important to analyze this passage in relation to the parenthetical citations within Lane's text and her work cited. Visitation to Fraser to sell fish to canneries, does not entail fishing. Appendix, FF 48. Dr. Lane describes these trips in her conclusion as post-treaty Lummi activities. Rasmussen SJ Decl., p. 38. [21] Because transit alone does not establish U & A, the statement regarding the transit route does not equate with traditional fishing rights. *U.S. v. Washington*, 384 F. Supp. 312, 353 (1974), FF. 14. The one phrase used in *Lummi III* regarding Admiralty Inlet does not change this fact. Thus, in following *Upper Skagit*, it would be pure speculation alone to conclude Lummi fished all of the intervening locations without

[21] 4. The traditional fisheries of the **post-treaty** Lummi included reefnet sites in the San Juan Islands, off Point Roberts, Birch Point, Cherry Point, and off Lummi Island and Fidalgo Island. Other fisheries in the Straits and bays from the Fraser River to the present environs of Seattle were utilized. Freshwater fisheries included the river drainage systems emptying into the bays from Boundary Bay south to Fidalgo Bay.

Rasmussen SJ Decl., p. 38; See Declaration of Sarah Smith, Exhibit A for a geographic depiction of these areas.

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any evidence that they did so. *U.S. v. Washington*, 20 F. Supp. 3d 828, 839 ("It would be pure speculation to conclude that those travels must also have included the east side of Whidbey Island, as there is absolutely no evidence in the record that they did so.").

There are also no references at all to the disputed areas in Lummi's U & A description, and indeed the Lummi's expert only references the Strait of Juan de Fuca once and makes no mention of Whidbey Island, which based on her other reports were inhabited by other Tribes. Rasmussen SJ. Decl., p. 20. The reference to the Strait of Juan de Fuca in USA-30 is in relation to a cultural group (Songish) located west of the Lummi, intercepting sockeye salmon prior to salmon reaching the Lummi fishing grounds and stations Dr. Lane identifies. Rasmussen SJ. Decl., p. 20. Rasmussen SJ Decl., p. 20. She states specifically with respect to the Lummi that "these groups" took "sockeye" at "reefnet locations in the San Juan Islands and on the mainland coast." *Id*. The reef net locations are all north of the disputed area; and reef net sites are fixed, not transient locations like a trolling area; and the only two trolling areas referenced are Haro and Rosario Straits. Rasmussen SJ Decl., p. 36.

There is absolutely no basis to presume that the Lummi went through the Strait of Juan de Fuca or any waters west of Whidbey Island along the shoreline (if for some reason they are not part and parcel of the Strait of Juan de Fuca) en route to the environs of Seattle or it would have been mentioned when Dr. Lane discussed the Songish above.

The bottom line, as noted above, is that the only "evidence" Lummi ever has to rely on is not evidence as all, but a naked ruling granting them Admiralty Inlet[22] which was notably granted because the lack of geographic uniqueness. The ruling granting Lummi Admiralty Inlet in *Lummi*

[22] The ruling on Admiralty was based primarily on the fact that the Court found Admiralty Inlet was not called out separately by Judge Boldt as a unique geographic term.

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III, but denying Lummi the Strait of Juan de Fuca, would not, in any event, allow Lummi to bootstrap to their U & A every potential transit route from the Admiralty Inlet. As seen in the *Upper Skagit* subproceeding, the boostrapping approach does not replace real evidence.[23]

2. USA 20: Dr. Lane Report on Various Tribes

A second more general report by Dr. Lane, USA-20 is also relied on in the citation for FF. 46, but does not help create a material fact either. Rasmussen SJ. Decl., p. 7-15. FF 46 refers to only one page of the report. This Report is entitled "Political and Economic Aspects of Indian-White Culture Contact in Western-Washington In the Mid-19th Century." *Id*. p. 7. This Report does not mention any Lummi activities in the disputed area. In fact, the references refer to Lummi sites on the eastern side of San Juan Island. Rasmussen SJ Decl., p. 14.

3. Testimony of Dr. Lane

The testimony of Dr. Lane was not cited by Judge Boldt in support of any of the disputed areas.[24] At no time in the testimony of Dr. Lane at the hearing on the matter, did Dr. Lane testify that the Lummi had fishing rights in the Strait of Juan de Fuca or make any reference to Whidbey Island. Instead, she focuses solely on fixed reef net sites. Rasmussen SJ Decl., pp. 114-124. Dr. Lane does not reference any fishing en route to the "environs" of Seattle in regards to any of the map exhibits. The map exhibits themselves do not raise any material fact regarding the disputed issues because they were submitted for the purpose of showing reef net sites. Rasmussen SJ Decl., pp. 107-112, 118-124. The conclusion to be drawn thus far, is that Dr. Lane specifically did not

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[23] Point Elliot, the southern terminus of their route lies on the other side of Whidbey Island. Declaration of Sarah Smith, p. 7.

[24] FF 46 cited only to the Tr. p. 1665 attached to Rasmussen SJ Decl. and references the Samish and Nooksack Rivers.

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include all the points in between Fraser River and the environs of Seattle within Lummi's U & A.[25]

4. Alaska Packers Affidavits

The Court in FF 46 cites to several "Alaska Packers" affidavits which were done by Lummi informants and other individuals as part of a Court case seeking compensation for reef net sites. Only one of the affidavits refers to a statement which Lummi has claimed in the past supports their contentions in this case (Lummi Response, Dkt. 142). The statement is from a former Indian Trader who wrote that the Lummi "during all the time I have known these Indians they fished at all points in the lower Sound, and wherever the run of fish was greatest and the salmon were most easily taken including Point Roberts." PL-94(w) (June 1895). This same declarant concludes the Lummi's "fished at all usual fishing places within many miles of their reservation including Point Roberts and Village Point." Rasmussen SJ. Decl., p. 89. This affidavit does not create any material fact.

In conclusion, the entire cited anthropological record supporting FF. 46 (as attached to the Rasmussen Declaration in Support of Summary Judgment) provides no evidence that Lummi ever engaged in regular fishing south of Anacortes through the disputed area. There also is not merely an absence of evidence. The maps provided and used by Dr. Lane, and Dr. Suttles, show that Lummi fished for all species north of the disputed area. Rasmussen SJ Decl., pp. 36 (reef net map); pp. 107-112, Ex. E (USA 60-64); pp. 137-139 (Suttles Maps). Lummi had robust evidence of northern fisheries. What is absent in the record is any reference of fishing locations at or along

[25] In *Upper Skagit*, the court found that because Judge Boldt's description of the Suquamish U&A tracked nearly verbatim the language in Dr. Lane's report it demonstrated the Judge's intent to conform the Suquamish U&A only to those areas documented by Lane. *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1024

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Whidbey Island and in Strait of Juan de Fuca. The Lummi regulation itself is suspect because it relies on a highly unlikely circuitous transit route that is the longest possible route from Point Elliot to Lummi. Moreover, it opens an area twenty miles from the shores of the Whidbey Island. This proffered "route" defies logic as to how it relates to either the evidence, or the remand order describing the open issue as the waters "immediately" west of the northern shores of Whidbey Island. Decl. Sarah Smith, Ex. C (regulation line is 18-24 miles from Whidbey Island and extends 31 miles away from Admiralty Inlet.). *Lummi IV*, 763 F.3d 1180. The S'Klallam, in short, have met their burden. Lummi's fishing regulations indisputably opened waters in violation of Final Decision No. 1.

C. Transit is Not U & A

The bottom line is that this is a classic transit case where, without evidence, the vast expanse of waters at issue are not included within the U & A of the transiting Tribe:

> Marine waters were also used as thoroughfares for travel by Indians who trolled en route. (Ex. PL-75;Tr. 2847, 1,13 to 2850, l. 23) Such occasional and incidential trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians. (Tr. 2177, l. 24 to 2180, l. 4.)

United States v. Washington, 384 F. Supp. At 353. This case presents an example of a situation where Dr. Lane's Report (USA-30) and the subsequent holding described a very general area, and transiting activities which just did not rise to the standard needed for Dr. Lane to list any particular intervening areas (on the east or west side of Whidbey Island) as part of Lummi's marine U & A. Summary Judgment is therefore appropriate. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471. Dr. Lane herself frequently acknowledges that there may or may not be more evidence for some Tribes, but at the time, she did the best she could. Now that decision is as final as it would be for any litigant.

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VI. CONCLUSION

The S'Klallam have been through twenty-six years of litigation to answer the one question that seems to elude every Court that seeks to answer it—that is where Lummi fished at treaty times. The Lummi have sought every opportunity to avoid that determination, or delay it, in the hopes of fishing one more season in S'Klallam waters. Lummi's U & A has been specifically determined and determined to not include the disputed waters. *Lummi v. Muckleshoot,* 141 F.3d 1355, 1360. Applying the two-step as is required, clarifies that the western boundary of Lummi's U & A is Whidbey Island. The Court should grant summary judgment.

Dated this 1st Day of May, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Summary Judgment and the Declaration of Sarah Smith, and the attached Appendix using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

Dated this 1st day of May, 2015,

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