The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	No. C70-9213 Subproceeding 11-02 **INTERESTED PARTY SUQUAMISH TRIBE'S RESPONSE TO S'KLALLAM'S, LUMMI NATION'S, AND LOWER ELWHA'S MOTIONS FOR SUMMARY JUDGMENT** ORAL ARGUMENT REQUESTED

RESPONSE

Comes now, the Suquamish Tribe ("Suquamish"), through undersigned counsel, who, as an interested party, respectfully submits this response to the pending Motions for Summary Judgment filed on behalf of the Port Gamble S'Klallam and Jamestown S'Klallam Tribes (collectively S'Klallam") (Dkt. # 164), Lummi Nation ("Lummi") (Dkt. # 167), and Lower Elwha Klallam Tribe ("Lower Elwha") (Dkt. # 168).

I. INTRODUCTION

This matter arises out of yet another proceeding initiated by S'Klallam challenging another tribe's U&A—in this case that of Lummi. At issue is a swath of open marine waters located in northern Puget Sound, which constitute a part of the largest open water area (aside from the Pacific Ocean) subject to this Court's prior judgments in *United States v. Washington*,

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C70-9213, and related subproceedings. The Ninth Circuit's remand and the parties' various motions call for the Court to determine the geographic scope of the Strait of Juan de Fuca, in particular, whether the "Strait of Juan de Fuca" as understood by Judge Boldt encompasses the open marine waters that are contested in this subproceeding.

Suquamish therefore submits this response in order to challenge S'Klallam and Lower Elwha's misapplication of this Court's and the 9th Circuit's prior holdings as they apply to the standard in a proceeding brought pursuant to Paragraph 25(a)(1) of the Court's March 24, 1974 Order, as modified by its August 23, 1993, Order (Dkt. # 13599) ("25(a)(1)"); to correct the record with regard to the parties' descriptions of Suquamish's U&A; and in support of maintaining the availability of proceedings pursuant to Paragraph 25(a)(6) of the Court's March 24, 1974 Order, as modified by its August 23, 1993, Order (Dkt. # 13599) ("25(a)(6)"), to supplement a naked record and address a lack of specificity or ambiguity in Judge Boldt's prior orders determining the various Tribes' U&A.[1]

As the Ninth Circuit has made clear, in the context of proceedings brought under 25(a)(1), the goal of the Court's inquiry is to determine the intent of Judge Boldt. *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010). This inquiry is not, as S'Klallam and Lower Elwha contend, limited to parsing the record before Judge Boldt to determine whether there was a specific reference made by Dr. Barbara Lane in her record testimony or reports to a tribe's treaty-time fishing activity at every conceivable geographic location within a broadly described U&A.[2] It is also not the function of the Court in a 25(a)(1) proceeding to serve as a *de*

[1] The Order modifying Paragraph 25 is also reported at *U.S. v. Washington (Compilation of Major Post-Trial Substantive Orders, January 1, 1991 through December 31, 1993)*, 18 F.Supp.3d 1172, 1213 (W.D.Wash. 1991).

[2] Indeed, such a standard would require what Dr. Barbara Lane referred to as a "spurious kind of accuracy." *See, e.g.*, C70-9213, Sub-proceeding 14-01Dkt. 37-1 at p. 59. Furthermore, in this instance the contested waters are in a geographic location—certain waters to the west of Whidbey Island—that the parties and various cartographers cannot agree on a name for.

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facto appellate court and re-examine the record to determine whether there was sufficient evidence before Judge Boldt to support his unambiguous finding that a tribe had carried its then-burden to establish the existence of treaty-time U&A at any particular location, or to re-write Judge Boldt's U&A determinations by construing his Order in a manner that contravenes its text.

Suquamish, of course, does not dispute that evidence before Judge Boldt of treaty-time fishing at a particular geographic location is relevant in determining Judge Boldt's intent, but that is by no means the *only* evidence that can be considered. The Court may look at a variety of factors and evidence in determining whether S'Klallam (as the plaintiff in this case) has carried its burden to show that it is more likely than not that Judge Boldt *did not* intend to include the contested waters in Lummi's U&A. *U.S. v. Lummi*, 235 F.3d 443, 452 (9th Cir. 2000).

In evaluating Judge Boldt's likely intent, it is entirely permissible for the Court to draw inferences based on the entire record before Judge Boldt and the language of his original order.[3] To paraphrase, absence of specific evidence of treaty-time fishing in the record does not constitute conclusive evidence of absence of Judge Boldt's intent.[4] The adoption of S'Klallam's and Lower Elwha's position—that the Strait of Juan de Fuca as understood by Judge Boldt extends to the shores of Whidbey Island—would bifurcate Lummi's U&A. Such a construction contravenes Judge Boldt's express and unambiguous description of Lummi's U&A as an uninterrupted range from the Fraser River in the North to the present environs of Seattle in the south. Judge Boldt uses words of joinder (i.e. "from", "to") in the U&A description, not words of disjunction. The lack of any express mention or implicit description of a gap in Lummi's

[3] As well as certain types of contemporaneous evidence that sheds light on his understanding of the geography involved. *See Muckleshoot I,* 141 F.3d at 1360 (so noting).

[4] *See, e.g., Johnson v. PPI Technology Services, L.P.*, --- Fed.Appx. ----, 2015 WL 3452787 at *2 (5th Cir. 6/1/15) ("As the saying goes, the absence of evidence does not equal evidence of absence;" noting the effect of the lack of evidence is dependent upon the party bearing the burden of persuasion and proof) (citing *In re Rail Freight Fuel Surcharge Antitrust Litg.*, 725 F.3d 244, 254 (D.C.Cir. 2013) (internal quotation marks and additional citations omitted).

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U&A is strong evidence of Judge Boldt's intent to describe U&A by reference to regions that he considered to be contiguous with each other. As discussed in more detail below, viewing the record as a whole, S'Klallam cannot carry their burden to show that it is more likely than not that Judge Boldt intended to exclude the contested waters through which Lummi undoubtedly traveled (and fished).

Lastly, contrary to the position advanced by S'Klallam and Lower Elwha, proceedings under 25(a)(1) and 25(a)(6) should not be treated as mutually exclusive in all cases. S'Klallam devote a substantial portion of their brief to parsing the words "specific" and "explicit" as those terms are used in 25(a)(6) and the law of the case doctrine respectively, but their proffered distinction ignores the fact that the terms serve the same function related to finality and are synonymous. Moreover, law of the case addresses both prior "explicit" determinations, as well as those determinations that are necessarily implied. If the Court has previously specifically (or explicitly) determined the existence or lack of existence of a tribe's U&A in particular waters, the *Muckleshoot* analysis should be wholly unnecessary. The Court could merely point to the relevant Order and resolve the case on its face. However S'Klallam and Lower Elwha's shared position, that they are entitled to prevail under the *Muckleshoot* analysis based on their assertion of a lack of specific treaty-time evidence in the record (as opposed to affirmative evidence that Lummi did not actually fish in the contested waters at treaty-time), necessarily rests on an implicit assertion that no order of this Court has specifically determined Lummi's U&A in the contested waters or the eastern boundary of the Strait of Juan de Fuca.

In situations where the Court sustains a challenge to contested waters included in an unambiguous U&A under 25(a)(1) on the basis of an inference drawn from the lack of evidence in the record, which is the only ground advanced by S'Klallam and Lower Elwha here, both a plain reading of 25(a)(6) and equity demand that the affected tribe be permitted an opportunity to present evidence of treaty-time fishing and have the Court make a specific and explicit

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determination based on the best evidence available. Anything less risks an erroneous decision predicated on pure speculation as to what Judge Boldt was really thinking forty-plus years ago when he issued his original order describing U&A's in unambiguous, if broad, terms. While 25(a)(6) proceedings entail additional costs and time, the burden on the Court's and the parties' resources is justified where a tribe's culture, heritage, and economic future are at stake.

II. LEGAL STANDARD UNDER MUCKLESHOOT[5]

The *Muckleshoot* two-step procedure, which the parties agree applies here in the context of a 25(a)(1) proceeding is set out in *Muckleshoot* trilogy.[6] The first "step" in the procedure places the burden on the tribe bringing a challenge under 25(a)(1) that "…a term used by Judge Boldt is ambiguous or that he intended something other than its apparent meaning." C70-9213, Sub-proceeding 05-04, Dkt. # 242 at p. 7. The ambiguity (or lack thereof) of the language used by Judge Boldt is a factor to consider, but is not dispositive. *Muckleshoot III*, 235 F.3d at 433. Regardless of how the Court resolves the question of ambiguity at step one, at step two the challenging tribe bears the burden of proving that Judge Boldt did not intend to include the challenged areas in his original U&A determination, which requires an examination of the *entire* record that was before Judge Boldt at the time he made his determination. *Upper Skagit Indian Tribe v. Washington.*, 590 F.3d 1020, 1024 (9th Cir. 2010). Controlling here, the Upper Skagit case requires that S'Klallam bear the burden of proving that there was no evidence before

[5] There does not appear to be any substantive dispute between any of the parties regarding the proper standard to apply to the pending cross-motions for summary judgment under Fed. R. Civ. Pro. 56.

[6] *Muckleshoot Tribe v. Lummi Indian Nation*, 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*"), *Muckleshoot 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*").

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Judge Boldt from which he could have found that Lummi fished ***or*** traveled through the contested waters. *Id*. at 1023.[7]

Despite S'Klallam and Lower Elwha's best efforts to conflate them, the inquiry and legal standard under 25(a)(1) is fundamentally different from that applicable to the original inquiry made by Judge Boldt when he had to determine whether a tribe had adduced sufficient evidence to establish the existence of U&A. In this particular case, the distinction is key: while evidence of occasional fishing incidental to travel may not be sufficient evidence, standing alone, for a tribe to meet *its burden of proof* when first seeking to establish U&A in certain waters;[8] evidence of travel in contested waters, even standing alone, *is sufficient* to survive a 25(a)(1) challenge because the challenging party bears the burden of proof to show *no* such evidence exists. *Upper Skagit Indian Tribe*, 590 F.3d at 1023 (*noting burden*).

To be clear, S'Klallam's burden here goes well beyond showing that there was no *direct evidence* before Judge Boldt to support the proposition that his intent was to include the contested marine waters at issue here within Lummi's U&A in the "marine areas of northern Puget Sound *from* the Fraser River south *to* the present environs of Seattle." (*emphasis added*). The 9th Circuit has previously held that Lummi's U&A includes Admiralty Inlet because it is a "likely" travel route between named end-points in their U&A, even though Admiralty Inlet is not expressly named in Lummi's original U&A determination and is not specifically discussed (with respect to Lummi) in the evidentiary record before Judge Boldt. *U.S. v. Lummi*, 235 F.3d at 451-452; *accord* , *U.S. v. Washington*, Cause No. 70-9213, Sub-proceeding 05-04, Dkt. # 242

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[7] Contrary to the Upper Skagit Indian Tribe's unsupported mischaracterization of the Court's recently entered decision in subproceeding 14-01 (Dkt. # 175), nothing in the Court's holding altered the applicable standard or abrogated prior holdings of the Ninth Circuit standing for the proposition that likely travel through an area, standing alone, is sufficient to preclude the Tribe bearing the burden to demonstrate it was Judge Boltd's likely intent to exclude that area under 25(a)(1) from discharging it. *See e.g., U.S. v. Lummi*, 235 F.3d at 452.

[8] *See, e.g., U.S. v. Washington*, 384 F.Supp. 312, 353 (W.D.Wash. 1974) (FF # 14) (Boldt's order noting same).

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(finding waters on the west side of Whidbey Island were included in Suquamish's U&A notwithstanding the lack of an express reference). As a result, in order for S'Klallam to prevail, they must show that the contested waters would not "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." *U.S. v. Lummi*, 235 F.3d at 452 (*emphasis added, internal quotation marks omitted*).

III. ARGUMENT

a. The contested waters, which form part of the largest area of open salt water in the Puget Sound, were a commons traversed and fished by all tribes with saltwater U&A in the region, including but not limited to Lummi.

The contested waters at issue in this subproceeding are generally referred to in the alternative as "the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island" and 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, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the North by Rosario Strait, the San Juan Islands, and Haro Strait." S'Klallam Request for Determination, *Dkt.* # 1-1 at p. 2. These boundary lines of the contested waters are shown on the attached Exhibit A, which is submitted for demonstrative purposes only. A cursory review of the various maps submitted by the parties reveals that, geographically speaking, the contested waters are one of the largest if not the largest area of open salt-water in the Puget Sound.

As Dr. Barbra Lane noted in her report entitled *Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century*, the deeper salt-water areas, such as the contested waters here, "served as public thoroughfares, and as such, were used as fishing areas by anyone traveling through such waters." Exhibit A to Dkt. # 170 (pp. 4-56) at p. 30. There is no evidence in the record before Judge Boldt that any tribe controlled or exercised dominion over the contested waters, and in fact Dr. Lane described these as "free access areas" that were "used in common by *all Indians of the region.*" *Anthropological*

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Report on the Identity, Treaty Status and Fisheries of the Lummi Tribe of Indians, Exhibit B to Dkt. # 170 (pp. 57-89) at p. 87. As relevant here, S'Klallam and Lower Elwha do not dispute that Lummi has U&A on both the northern (San Juan Islands) and southern (Admiralty Inlet) boundaries of the contested waters. It is therefore reasonable to conclude that Judge Boldt would have considered Lummi, amongst others, as one of the Tribes constituting the "Indians of the region" that fished in the contested waters and therefore met the test for U&A in those waters.

b. The eastern boundary of the Strait of Juan de Fuca, as used and understood by Judge Boldt, lies to the west of the contested waters at issue here.

The determination of the Strait of Juan de Fuca's precise boundaries is an issue that this Court should address in connection with a determination whether Lummi has U&A in the contested waters.[9] This is because the 9th Circuit (and this Court) has previously determined that the Lummi do not have U&A in the Strait of Juan de Fuca. *See U.S. v. Lummi*, 763 F.3d 1180, 1187-1188 at n 1 (9th Cir. 2014) (so noting). Neither Court has determined explicitly or by necessary implication where, as those terms were used and understood by Judge Boldt, the Strait of Juan de Fuca ends and the Puget Sound begins. *Id*. at 1186 (noting that, while Judge Rothstein's prior order "suggests" the eastern boundary of the Strait of Juan de Fuca, it was not determined explicitly or by necessary implication). The critical question for this Court is: "When Judge Boldt decided Lummi's U&A, what did he understand the marine waters of northern Puget Sound to be?"

[9] It is also worth pointing out that S'Klallam's description of Admiralty Inlet and the other straits is also incorrect. In particular, S'Klallam cites to *U.S. v. Lummi*, 235 F.3d at 451-453, for the proposition that Admiralty Inlet ends at a line between Point Wilson and Partridge Point. *See* Dkt. # 1-1 at p. 5. Neither point, however, is mentioned anywhere in the 9th Circuit opinion, which describes Admiralty Inlet as "the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula," and are instead cut from whole cloth by S'Klallam (as are the other lines used to describe the contested waters). *See U.S. v. Lummi*, 235 F.3d at 452. Whatever the merits of S'Klallam claims that a contemporary understanding of geographic waterway boundaries is the logical way to demark U&As, S'Klallam is not permitted to unilaterally determine where such boundaries are located.

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As noted by the 9th Circuit, Judge Boldt, is understood as having used Strait of Juan de Fuca and the Puget Sound to describe two separate regions in terms of his original order in 1974, with the Strait located somewhere to the west of the Sound. *See U.S. v. Lummi*, 235 F.3d at 450-451 (citing *U.S. v. Washington*, 384 F.Supp. 312 (W.D.Wash. 1974); *but see Upper Skagit Indian Tribe v. Wash.*, 590 F.3d at 1023 n. 5 ("Puget Sound" as used by Judge Boldt included "the Strait of Juan de Fuca and all saltwater areas inland therefrom") (quoting *U.S. v. Washington*, 384 F.Supp. at 382-383).[10] The question is how far to the west is the Strait located? The most relevant and probative evidence of Judge Boldt's contemporaneous understanding, is evidence that was before him in 1974 when he made his decision. Evidence that he never had the opportunity to consider, or evidence not in the record, is simply not relevant. Of particular importance on this issue, is exhibit USA-62, a U.S. Coast Survey Map that was admitted by Judge Boldt on September 5, 1973, and depicts the entirety of the contested waters here, and identifies by name the locations of the various straits and Admiralty Inlet. *See* Dkt. # 45-28 (hereinafter "USA-62"). USA-62 labels the waters constituting the Strait of Juan de Fuca at a location far to the west of the contested waters at issue here. On this basis, it is likely that Judge Boldt, when referring to the "Strait of Juan de Fuca," was referring to waters located somewhere to the west of a line running northeasterly from New Dungeness to Trial Island (but no further east).

The Court need not solely rely on USA-62, and may consider additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time. *See,*

[10] In discussing this point, Lummi makes reference to the Suquamish U&A being located on the "west side of Puget Sound." Dkt. # 167 at .p 23. While Suquamish does not disagree with the thrust of Lummi's point—that the contested waters here are located within the Puget Sound—Suquamish does take issue with the mis-description of its U&A as limited to the "west side of Puget Sound." As this Court has previously held in Subproceeding 05-04, the East/West references used by the Ninth Circuit regarding Suquamish's U&A related only to their discussion of *freshwater* U&A, which was the question before them in *U.S. v. Suquamish Indian Tribe*. *See* C70-9213, Sub-proceeding 05-04, Dkt. # 242 at pp. 14-15, (Discussing Ninth Circuit's Holding in *U.S. v. Suquamish*, 901 F.2d 772 (9th Cir. 1990), and noting its limitations). Suquamish's U&A is not limited in its scope to the west side of Puget Sound.

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Muckleshoot I, 141 F.3d at 1360 (so noting). Notably, contemporary navigational charts from the time depicting a nearly identical geographic area as that included in USA-62 similarly locate the Strait of Juan de Fuca far to the west of the contested waters, and indeed even further to the west than the line described above.[11] In addition, beginning in 1974, the Puget Sound Vessel Traffic Service, operated by the United States Coast Guard, began requiring positional reporting by radio for vessel traffic *in the Puget Sound* underway at all points *eastward of the lights at New Dungeness.*[12] Both the evidence actually before Judge Boldt and other contemporary evidence of geographic markers indicate that it is likely Judge Boldt, a mariner, would likely have considered the contested waters part of the Puget Sound and not the Strait of Juan de Fuca.

c. Evidence of *either* travel *or* fishing, standing alone, is sufficient to demonstrate that Judge Boldt intended to include the contested waters in a tribe's U&A under *Muckleshoot* and its progeny.

Lower Elwha's and S'Klallam's position, that a plaintiff Tribe may prevail in a proceeding brought under 25(a)(1) notwithstanding a defendant Tribe's likely travel in the contested waters, is fundamentally flawed and invites the Court to commit error. As noted above, and even as quoted in both S'Klallam's and Lower Elwha's own briefs, the Ninth Circuit has stated that "[the plaintiff] has the burden to show that there was no evidence before Judge Boldt that [the defendant] fished [in the contested waters] *or traveled there.*" *Upper Skagit Indian Tribe v. Washington*, 590 F.3d at 1023 (9th Cir. 2010) (*emphasis added*). The use of the

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[11] *See* Map entitled Strait of Georgia and Strait of Juan de Fuca, 18400-006 (1974), published in NOAA's Historical Map and Chart Collection, available at: http://historicalcharts.noaa.gov/tiled/zoomifypreview.html?zoomifyImagePath=18400-6-1974 (last visited 6/9/15), a copy of which is attached hereto as "Exhibit B." The attached Exhibit B is a self-authenticating "official publication" under FRE 902(5). *See, e.g., Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389, 397 (D.Conn. 2008) (noting information retrieved from government websites constitutes a self-authenticating government publication under FRE 902(5)) (citations omitted).

[12] *See Puget Sound VTS Factsheet*, available at http://www.uscg.mil/d13/lib/doc/factsheet/vts_puget_sound.pdf (last visited 6/11/2015), and attached hereto as "Exhibit C."

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disjunctive "or" makes clear that the likelihood of travel alone—even without treaty-time evidence of fishing—can support the inclusion of waters in a previously determined U&A under 25(a)(1). *See e.g., U.S. v.* Lummi, 235 F.3d at 452 (*so holding*).

d. The fact that travel through the contested waters is necessary in order to move between undisputed U&A locations, which is conceded by S'Klallam, is fatal to S'Klallam's claims and requires a finding that Judge Boldt intended to include the contested waters as part of Lummi's U&A.

Unlike the areas at issue in *Upper Skagit*, the contested waters here are not "nearly enclosed" with "narrow and restricted" entrances or exits subject to the control of other Tribes. *See Upper Skagit Indian Tribe v. U.S.*, 590 F.3d at 1024 n.6.To the contrary, the contested waters include waters that Dr. Lane described as "free access areas" that were "used in common by *all Indians of the region*"[13] lying to the *east* of a straight line across open waters between Admiralty Inlet in the South (however geographically described) and Lummi reef net locations on San Juan Island in the North described in Dr. Lane's report.[14] It is a hard to claim that a straight line across open water between two undisputed U&A locations is an unlikely or unnatural route of travel. As S'Klallam apparently concede, it is reasonable to infer that Lummi traveled through the contested waters, given S'Klallam's description of Lummi as the "transiting tribe."[15] Moreover, even if the Court is to adopt S'Klallam's significantly narrower reading of *U.S. v. Lummi*, the fact that neither the parties (nor the Court in prior decisions)[16] can agree on what contested waters are appropriately labeled militates against requiring specific evidence of fishing

[13] Dkt. # 170 at p. 87.

[14] *Id.* at p. 86.

[15] Dkt. #164 at p. 22.

[16] *See, e.g. U.S. v. Lummi Nation*, 763 F.3d at 1186-1188 (describing the contested waters generically as the "waters west of Whidbey Island" and not necessarily the Strait of Juan de Fuca, noting the open question as to what to call them).

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in them, since they suffer from what S'Klallam has coined as a "lack of geographic uniqueness."[17]

Lastly, the Ninth Circuit has already held that Lummi had U&A in Admiralty Inlet because it "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.'" *U.S. v. Lummi*, 235 F.3d at 452. The most direct route for Lummi to take from the San Juan Islands in the north to the present environs of Seattle—indeed a straight line—runs directly through the contested waters. Because travel alone supports an inference that Judge Boldt intended to include waters within a Tribe's U&A in the context of a 25(a)(1) proceeding, and because the contested waters, like Admiralty Inlet, would be a natural and likely treaty-time passage for any tribe transiting between the Fraser River and the present environs of Seattle, S'Klallam has failed to carry their burden of showing that it is more likely than not that the contested waters were meant by Judge Boldt to be excluded from Lummi's U&A. *U.S. v. Lummi*, 235 F.3d at 452.

e. The Court May Properly Consider the questions raised in this Subproceeding under 25(a)(6)

The grounds for this Court's continuing jurisdiction set forth in 25(a)(1) and 25(a)(6) should not be construed as mutually exclusive. 25(a)(1) proceedings have almost uniformly functioned as a continuing mechanism for this Court (on motion of any party) to prohibit a Tribe from fishing in an area where the Court has not previously determined that Tribe to have U&A.[18] A distinct function is served by 25(a)(6), which is to enable a tribe to invoke the continuing jurisdiction of the Court in order to obtain a ruling regarding "the location of [its] usual and

[17] Dkt. 164 a p. 19 n. 22 (alleging this was the basis for the Ninth Circuit's holding finding Admiralty Inlet was included in Lummi U&A).

[18] A Tribe may also invoke the Court's jurisdiction under 25(a)(1) in order to confirm that actions it has taken or planned are "in conformity with Final Decision #1 or this injunction." *U.S. v. Wash.*, 18 F.Supp.3d at 1213.

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accustomed fishing grounds not specifically determined by Final Decision #1." *U.S. v. Wash.*, 18 F.Supp.3d at 1213. A finding by this Court that a tribe is fishing in an area where it does not presently have determined U&A under 25(a)(1) may, but does not necessarily, require a corollary determination that the Tribe does not have U&A in that area, but rather that it has not had its U&A previously determined with regard to that area in Final Decision # 1. Where this Court (or the Ninth Circuit) has held that a previous decision (including Final Decision #1) of the Court did not determine U&A in a given area under 25(a)(1), a Tribe should not be prohibited from invoking the Court's jurisdiction under 25(a)(6) either in the same or a subsequent proceeding , and seeking an order from the Court to specifically determine whether that tribe has U&A in a given location in the first instance.

The Ninth Circuit's determination that the eastern boundary of the Strait of Juan de Fuca and Lummi's U&A in the contested waters had not been determined explicitly or by necessary implication compels a conclusion that 25(a)(6) can and should apply. There is no meaningful distinction that can be drawn between "specifically" as used in 25(a)(6) and "explicitly" as used in the law of the case doctrine. *See e.g. Migard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990) (holding law of the case inapplicable because an issue had not been "specifically" addressed by a prior order). If the Court has already specifically (or explicitly) determined the existence or lack of a tribe's U&A in particular waters in a prior order, the *Muckleshoot* analysis should be wholly unnecessary. The Court could merely point to the relevant Order and resolve the case on its face (as law of the case). If, as here, law of the case does not apply and requires a finding from the Court that the Tribe, as a matter of law, did or did not fish in certain waters at treaty time, then a finding sustaining a 25(a)(1) challenge can only be based upon on a finding that no order of this Court has specifically determined that Tribe's U&A in the particular area at issue.

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As a result, in the event that the Court sustains a 25(a)(1) challenge under "step two" of the *Muckleshoot* test on the basis of the lack of evidence in the record before Judge Boldt from which to infer that he intended to include certain waters, the affected tribe should always be permitted to invoke 25(a)(6) because the 25(a)(1) holding in that situation necessarily implies that the affected tribe's U&A was never "specifically" determined as to those waters in the first instance and therefore the decision is properly within the Court's continuing jurisdiction.

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IV. CONCLUSION

For the forgoing reasons, the Court should deny S'Klallam's and Lower Elwha's motions for summary judgment, grant Lummi's motion for summary judgment, and dismiss this 25(a)(1) proceeding. In the alternative, Suquamish respectfully submits that, because the eastern border of the Strait of Juan de Fuca as Judge Boldt understood it on the date he determined Lummi's and other Tribes' U&A, has not been specifically determined by any other Court, Suquamish respectfully requests that the Court enter an order allowing for its determination in proceedings to be brought under the Court's continuing jurisdiction pursuant to Paragraph 25(a)(6).

Respectfully submitted this 12th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 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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