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 LOWER ELWHA KLALLAM TRIBE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, WITH MOTIONS TO STRIKE NOTED ON MOTION CALENDAR: June 30, 2015 ORAL ARGUMENT REQUESTED

INTRODUCTION

This is a Paragraph 25(a)(1) case. Lummi's usual and accustomed fishing grounds ("U&A") have been specifically determined but the description is ambiguous in the disputed area. The Court must follow the *Muckleshoot* two-step process to resolve the ambiguity by reviewing the evidence that was before Judge Boldt to determine his intent. Lummi cannot use new evidence or a 25(a)(6) claim or argument to defeat Lower Elwha's claim under 25(a)(1). There is no jurisdiction over a 25(a)(6) claim in this subproceeding, and all evidence and

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argument related to 25(a)(6) in Lummi's response must be stricken. A review of the record here shows that there is no evidence on which Judge Boldt could have intended to include the waters west of Whidbey Island in Lummi's U&A as described in Finding of Fact ("FF") 46.

ARGUMENT

I. Lower Elwha's Paragraph 25(a)(1) Claim May Be Resolved on Summary Judgment.

Lummi agrees that the *Muckleshoot* two-step process controls as to the parties' respective burdens of proof, and that the Court is not to rewrite, revise, or supplement Judge Boldt's findings. Dkt. No. 179 at 10. Lummi concedes that the "central issue in a Paragraph 25(a)(1) proceeding is Judge Boldt's intent," which is found by interpreting his U&A finding "in light of the evidence in the record." Dkt. 179 at 3, 10. Lummi agrees that Lower Elwha must show that Judge Boldt did not intend to include the disputed waters in Lummi's U&A. *Id.*10, 11.[1]

Lower Elwha has met its burden of production. Its motion demonstrates that there is a complete absence of any evidence before Judge Boldt of treaty-time fishing by Lummi in the disputed waters. Dkt. No. 168 at 5-10 and 16-24. Lummi does not challenge Lower Elwha's statement of undisputed facts or argue that material issues of disputed fact prevent summary judgment. Under the two-step process, Lower Elwha is entitled to summary judgment that Judge Boldt could not have intended to include the disputed waters in Lummi's U&A.

A. Finding of Fact 46 Is Ambiguous as to the Disputed Waters.

Judge Boldt described Lummi's U&A as "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *U.S. v. Washington*, 384 F.Supp.

[1] Suquamish also agrees with the *Muckleshoot* two-step process, Dkt. No. 178 at 2, 5, but would have the Court commingle the Paragraph 25(a)(1) and (a)(6) evidence. *Id*. at 4. That approach is fundamentally flawed because the Court lacks jurisdiction over any 25(a)(6) claim and such evidence may not be used to rebut a showing under 25 (a)(1).

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312, 360 (W.D. Wash. 1974)(FF 46). It is well established that this phrase is ambiguous as to the waters west of Whidbey Island, which are in dispute here. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 449 (9th Cir. 2000). Yet, throughout its response, Lummi argues that its U&A unambiguously includes these disputed waters. *See e.g.*, Dkt. 179 at 2, 11. Lummi and Suquamish assert that this is so because it is impossible to travel from one end of the broadly described area to the other without passing through the disputed waters. Dkt. No. 179 at 3; Dkt. No. 178 at 3.[2] Even if the disputed waters lie within Judge Boldt's ambiguous description, the complete lack of evidence of fishing or travel cannot support including these waters in the U&A.

B. There Is No Presumption of Continuous and Contiguous U&A.

Lummi cites no authority for its assertion that no tribe has a "discontinuous or non-contiguous" U&A and that Ninth Circuit precedent disfavors such a result. Dkt. No. 179 at 4. The Ninth Circuit has held that Admiralty Inlet was included in Lummi's U&A because it lies between the San Juan Islands and the environs of Seattle, 235 F.3d at 452, but did not hold or even suggest that Lummi has a continuous and unbroken U&A or that any conclusion to the contrary is disfavored.[3]

Lummi argues that FF 11 and 12 in Decision No. 1 show that Judge Boldt described large bodies of water to encompass a Tribe's entire U&A and that he meant for U&A to be contiguous.

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[2] Lummi also argued that FF46 was unambiguous in subproceeding 89-2, but ended up conceding that "there may be some ambiguity about the westerly limit of Lummi's fishing rights." *Lummi Indian Tribe*, 235 F.3d 449 n.6 (internal quotation marks and citation omitted).

[3] The lone footnote in Lummi's response, Dkt. No. 179 at 5 n.*, declares that the waters *east* of Whidbey Island are not part of this subproceeding. But Lummi does not explain why the waters east of the island could not serve to create the continuity it seeks here, except to assert that it would involve a "substantial detour" to travel via those waters. *Id.* at 7.

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Dkt. No. 179 at 5. To the contrary, FF 11 states that the tribes "took whatever species were available at the *particular season and location*." 384 F.Supp. at 352-53 (emphasis added). And FF12 states that fishing was "largely unrestricted in geographic scope" and that there were home territories as well as spring and summer fishing areas that "were often more *distantly located*." *Id*. at 353 (emphasis added). Finally, FF 14 provides that marine waters were "used as thoroughfares for travel by Indians who trolled in route," but that such travel and incidental trolling did not make the marine waters traveled part of the U&A. *Id*. Together, these findings of fact establish that fishing generally occurred at particular locations, that home territories and seasonal fishing areas could be located some distance apart, and that travel between these locations did not necessarily create U&A.

Indeed, the Ninth Circuit has concluded that U&A described in broad geographic terms does not necessarily include all of the waters that appear to fit within the description; whether particular waters actually constitute U&A, where treaty fishing may occur, turns on the evidence underlying the finding of fact. *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433-34 (9th Cir. 2000)(*Muckleshoot III*)(holding that U&A described as "the salt water of Puget Sound" was limited to Elliott Bay because the evidence did not support anything further); *Upper Skagit v. Washington*, 590 F.3d 1020,1025 (9th Cir. 2010) (holding that Suquamish's U&A broadly described as "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits" does not include disputed waters on the east side of Whidbey Island because there was no evidence to support a finding of intent).

There simply is no presumption that a U&A must be "contiguous," and consequently Lower Elwha does not have to show that Judge Boldt intended to defeat it by creating two

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separate U&As, neither of which includes the waters west of Whidbey Island. Dkt. No. 179 at 8. Lower Elwha has to show only that there is no evidence to support a finding of Judge Boldt's intent to include the disputed waters in Lummi's U&A, and that burden has been met.

C. There Is No Evidence in the Record of Lummi Travel in the Disputed Waters.

Lummi argues without evidentiary support that it has a direct travel route along the "west coast of Whidbey Island" because U&A must be continuous. Dkt. No. 179 at 6. Lummi asserts that this case is similar to the Ninth Circuit's decision that confirmed the nearshore waters off the west coast of Whidbey Island to be within Tulalip's U&A. Dkt. No. 179 at 6. However, the Ninth Circuit did not confirm U&A in these waters in order to connect the dots between fishing north and south of Whidbey Island as argued by Lummi. *Id*. Instead, in that case Dr. Lane concluded that Tulalip fished on the west coast of Whidbey Island and Lummi conceded that Tulalip fished at least the "southerly portion" of the west coast. *U.S. v. Lummi Indian Tribe*, 841 F.2d 317, 319-20 (9th Cir. 1988). This evidence of fishing was bolstered by evidence of "regular and extensive" travel by Tulalip fishers along the west coast of Whidbey Island. *Id.* at 320. Here, on the other hand, there is no evidence in the record of Lummi fishing or travel on or near any part of Whidbey Island.

Similarly, in Subproceeding 14-01 this Court did not conclude, as Lummi contends, that if Suquamish traveled north to the Fraser River it means that Suquamish had to travel past the west coast of Whidbey Island. Dkt. 179 at 6. Rather, this Court noted that in Subproceeding 05-03 it reviewed ***record evidence*** that Suquamish fishers traveled through the Strait of Juan de Fuca, and Haro and Rosario Straits, which are on the west side of Whidbey Island, on their way to the Fraser River. *U.S. v. Washington*, 2015 WL 3504872, at *8 (W.D. Wash. 2015). It is also

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important to note that in Subproceeding 05-03 this Court held that the absence of evidence of Suquamish fishing or travel on the east side of Whidbey Island demonstrated that Judge Boldt did not intend to include the area in the U&A. *U.S. v. Washington*, 2007 WL 30869, at *9, 10 (W.D. Wash. 2007). No court has yet found that Lummi did not travel along the east coast of Whidbey Island. *See* fn. 3 above. But the evidence here does not support that Lummi traveled on the west side.

D. The Evidence Does Not Support an Intent to Include the Disputed Waters.

Lummi responds to Lower Elwha's having met its burden of production by asserting that four "fragments and snippets of evidence" support Judge Boldt's intent to include the disputed waters in its U&A, even though these snippets are "not as clear and conclusive as one would wish." Dkt. No. 179 at 8, 10. First, Lummi claims that a phrase from Dr. Lane's report—that Lummi was "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"—supports a finding of U&A in the disputed waters. USA-30 at 25. Dkt. No. 170 at 87. However, the language in that ambiguous phrase is nearly identical to the ambiguous phrase at issue in this subproceeding and it is not helpful in determining Judge Boldt's intent. *Muckleshoot III*, 235 F.3d at 434.

Lummi also claims that it visited halibut banks in the disputed area. Dkt. No. 179 at 8. The record does not support this. In wrapping up her discussion of Lummi's traditional fishing activities in its home territory, Dr. Lane stated that there were also halibut and other important fisheries. USA-30 at 24. Dkt. No. 170 at 86. Her next paragraph began with: "The traditional fishing areas discussed thus far extended from what is now the Canadian border south to

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Anacortes." *Id*. Clearly and unavoidably, the halibut banks she was referring to were north of the waters disputed here.

The claim based on USA-62 is also unconvincing. That map was not introduced as evidence of the boundaries of the Strait of Juan de Fuca. It was intended only to show the location of a Lummi fishery on San Juan Island. Tr. 1700: 23-25 to 1701: 1-11. Dkt. No. 170-1 at 78-79. Indeed, Judge Boldt did not refer to USA-62 in Decision No. 1 when he found that Makah had U&A in the Strait of Juan de Fuca. 384 F.Supp. at 364. Finally, B.N. McDonough's affidavit provided only that Lummi traveled and fished in "lower Puget Sound." Dkt. No. 168 at 23. Lummi does nothing to, and cannot, refute Lower Elwha's explanation that the lower Sound is limited to the area around the San Juan Islands. *Id.* at 23 n.3.

As Lummi points out, the Court previously considered these four "snippets of evidence" to be an insufficient basis for demonstrating Judge Boldt's intent to include the disputed waters in Lummi's U&A. Dkt. No. 179 at 9. But contrary to Lummi's argument, the Court was not reversed on appeal in 2014 as to this conclusion that the evidence was insufficient. Reversal was as to law of the case only. The Ninth Circuit did not find "two competing *definitions*" of Lummi's U&A, Dkt. No. 179 at 9 (emphasis added), but rather that there are ***two competing inferences*** that could be drawn from its previous geographic analysis of Admiralty Inlet, such that the 2000 opinion could not have resolved the issue "by necessary implication." *Lummi Nation*, 763 F.3d at 1187-88.

Lummi now urges the Court to adopt the inference that the disputed waters are included in Lummi's U&A. Dkt. No. 179 at 9. But the Ninth Circuit remanded the case. On remand this Court must follow the *Muckleshoot* two-step process and consider the evidence to determine

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Judge Boldt's intent. There is no reasonable inference to be drawn here because, even with a relaxed standard of proof, Lummi's "fragments and snippets" do not support such an inference. Dkt. No. 179 at 10. The evidence only places Lummi in the waters north of the disputed area.

Finally, Lummi would have the Court ignore the lack of evidence and decide the case on the geographic description and an inference of travel. Dkt. No. 179 at 10. But, Lummi acknowledges that a showing of travel requires evidence. Lummi quotes a passage from *Upper Skagit* that *twice* calls out the requirement for evidence: If the ***evidence*** shows that the ambiguous description includes the disputed waters, then the court considers whether there is any ***evidence*** that the tribe claiming U&A fished or traveled there. Dkt. No. 179 at 11 (quoting *Upper Skagit*, 590 F.3d 1023). Here the complete lack of evidence cannot support including the disputed waters in Lummi's U&A or an inference that Lummi traveled there.

E. Lower Elwha Does Not Have to Prove that the Strait of Juan de Fuca Ends on the Shores of Whidbey Island.

Neither Judge Boldt's description of Lummi's U&A in FF 46 nor any of the evidence in the record mentions Whidbey Island or the waters west of that island. It does not matter whether this area is the Strait of Juan de Fuca or the waters west of Whidbey Island, or even where the boundary between those waters may be. What matters is that there is no evidence in the record that was before Judge Boldt that would support an intent to find Lummi U&A in those waters.

Judge Boldt's descriptions of the Strait of Juan de Fuca and the waters west of Whidbey Island in later subproceedings was based on evidence that was not before him in 1974 and those descriptions do not shed any light on his intent in FF 46. Dkt. No. 179 at 12. Furthermore, if that evidence shows anything, it shows that when the Court intends to include the waters west of Whidbey Island in a tribe's U&A, it does so by expressly calling out the island or the waters by

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name. *See Upper Skagit*, 590 F.3d at 1026 ("If anything, the judge's inclusion of reference points in one U&A but not in another indicates a lack of intent to include them generically.").[4]

II. Motion to Strike Suquamish's Contemporary Understanding Evidence and Argument.

Lower Elwha moves the Court to strike Exhibit B (Map of Strait of Georgia and Strait of Juan de Fuca), Dkt. No. 178-2, Exhibit C (Puget Sound VTS Factsheet), Dkt. No. 178-3, and Suquamish's argument at Dkt. 178 at 9-10. No admissible evidence has been offered to explain why the map and the factsheet are probative of the contemporary understanding of the geographic extent of the Strait of Juan de Fuca in 1974. *Muckleshoot v. Lummi*, 141 F.3d 1355, 1360 (9th Cir. 1998) (*Muckleshoot I*); *See also, Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002)(holding only admissible evidence may be considered in ruling on a motion for summary judgment). Moreover, even assuming for the sake of argument that the evidence would show that the disputed waters were not commonly understood to be part of the Strait of Juan de Fuca, the Court would still need to look at the evidence to determine whether it would support an intent to include these disputed waters in Lummi's U&A and there is no such evidence. *U.S. v. Washington*, 2007 WL 30869, at *7.

III. The Court May Not Entertain Lummi's Paragraph 25(a)(6) Claim and Newly Submitted Evidence.

A. Motion to Strike Lummi's 25(a)(6) Evidence and Argument As Beyond the Court's Jurisdiction.

Lower Elwha hereby moves the Court to strike the Declaration of Philip Buri, Dkt. No. 180, and the Declaration of Sharon Kinley, Dkt. No. 181, including all attachments thereto (over

[4] In 1975 Judge Boldt described Lower Elwha's U&A in the Strait of Juan de Fuca as including "all of the streams draining into the Strait of Juan de Fuca from the Hoko River east ***to the mouth of the Hood Canal*** and the waters of the Strait of Juan de Fuca." *U.S. v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash. 1978).

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400 pages), as well as the argument based thereon in Section IV of Lummi's Response, Dkt. No. 179 at 19-23. Lummi acknowledges that this material is in furtherance of a Paragraph 25(a)(6) claim or argument. Dkt. No. 179 at 19:21 and at 23:16-17. None of Lummi's new material was part of the record before Judge Boldt when he issued Decision No. 1. Lummi's 25(a)(6) material is thus beyond the Court's jurisdiction and must be stricken. *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1172 (9th Cir. 2013) (where subject matter jurisdiction is lacking, a district court may not reach the merits of a summary judgment motion), *citing Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (rejecting the practice of exercising "hypothetical jurisdiction," because it "carries the courts beyond the bounds of authorized judicial action").

The new material in Lummi's Dkt. No. 180, as well as related argument, has already been stricken once, Dkt. No. 151, when Lummi proffered it, Dkt. No. 143, in response to the S'Klallam motion for preliminary injunction. Moreover, this Court's Order denying Lummi's motions for relief from deadline and to waive pre-filing procedures—which both Lummi and Suquamish ignore in their responses—emphasizes that the Court cannot "entertain" any argument or evidence premised on Lummi's 25(a)(6) claim:

> Paragraph 25(a)(6) jurisdiction is thus *contingent* on the Court's finding, or the parties agreeing, that the disputed waters in question were not specifically determined by Judge Boldt….*Only if* the issues cannot be resolved by looking at the record before Judge Boldt, *and* should the Court find that the Lummi's U&A in question was not specifically determined in Final Decision # 1, would it be appropriate to turn to Paragraph 25(a)(6) for further proceedings.

Dkt. No. 174 at 3:14, 3:21-23, and 4:3-6 (emphasis added).

Lummi nevertheless persists in arguing that the Court should exercise its 25(a)(6) jurisdiction while this subproceeding is in its current posture, incorrectly asserting that "to trigger

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Paragraph 25(a)(6)," Lummi "must show that Judge Boldt did not specifically determine the *western boundary* of its U&A." Dkt. N0. 179 at 17:2-3 (emphasis added). In fact, Paragraph 25(a)(6) jurisdiction is "triggered" *when a party files a Request For Determination*. It may well be *necessary* to demonstrate that the U&A has not been specifically determined in order to survive a motion to dismiss a properly filed Request, but merely asserting that this is so, during the adjudication of a 25(a)(1) proceeding, is not *sufficient* to establish jurisdiction under 25(a)(6).

Lummi's continued effort to present evidence and argument under 25(a)(6) is in effect an improper motion to reconsider the Court's prior Order declining to waive the pre-filing requirements of Paragraph 25(b). Lummi could have taken simple steps months ago to begin satisfying those requirements; instead Lummi has persisted in expecting the Court to relieve it of that responsibility.

B. Lummi's 25(a)(6) Evidence May Not Be Used to Rebut Lower Elwha's Showing Under the 25(a)(1) Two-Step Process.

Lummi is attempting to use its 25 (a)(6) evidence and argument to affect the Court's determination of Lower Elwha's 25(a)(1) case. That should not be permitted. The Court must decide the (a)(1) claim first, on the basis of the evidence that was before Judge Boldt in Decision No. 1; in doing so, it will necessarily conclude *either* that Lummi's fishing in the disputed waters is "in conformity with Decision No. 1," in which event Lummi may not need an (a)(6) case, *or* that it is not, in which event Lummi may attempt an (a)(6) case to enlarge its U&A.[5] At that

[5] Contrary to Lummi's assertion, Dkt. No. 179 at 14:6, Lower Elwha does not "want to end all Paragraph 25(a)(6) claims," but instead believes that the availability of a 25(a)(6) proceeding must be determined on a case-by-case basis. Interested party Suquamish wants to ensure not only that a 25(a)(6) proceeding is *always* available, but also that 25(a)(6) evidence and argument may be used to rebut a showing in a 25(a)(1) case. *See also* fn. 1 above.

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point, Lower Elwha would be entitled, among other things, to challenge the qualifications of Lummi's new witness Sharon Kinley and to assert any and all defenses, including those based on the outcome of the (a)(1) case or on principles of res judicata.

C. Lower Elwha's Right to Challenge Lummi's 25(a)(6) Claim Would Be Undercut If Lummi Is Allowed to Pursue the Claim Without Properly Invoking the Court's Continuing Jurisdiction.

Until Lummi properly invokes this Court's continuing jurisdiction under Paragraph 25(a)(6), it is impossible to be certain what the claim will consist of, what the defenses may be, the extent of necessary discovery, or whether Lower Elwha will need to retain an expert. The Court's disposition of the pending 25(a)(1) claim may well give rise to a defense that the 25(a)(6) claim is barred by principles of res judicata. In addition, Lummi's 25(a)(6) claim may also be precluded because of its prior litigation, over the course of eight years, of its 1990 Cross-Request in subproceeding 89-2. *See* Dkt. No. 168 at 13:13-22 and Dkt. No. 183 at 24:3-17. The evidence for such a claim—or at least the material attached to the Declaration of Philip Buri, Dkt. No. 180—has been known to Lummi from at least the time that it was adduced in post-Decision No. 1 proceedings in or around 1975. Lummi's assertion that it has not "waived" its right to file a cross-request, Dkt. No. 179 at 19:9-18, is untested and unsupported, and any such request will be subject to Lower Elwha's right to assert all defenses when and if Lummi files it.

Only after the 25(a)(1) case has been resolved, and only after Lummi has filed a 25(a)(6) case, can Lower Elwha fully and fairly evaluate whether such a claim may be barred. Accordingly, it is premature for the Court to consider any 25(a)(6) claim or evidence as a basis for avoiding a decision on the Klallams' 25(a)(1) claim, the only claim over which the Court has jurisdiction.

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CONCLUSION

Lower Elwha has met its burdens of production and persuasion: Judge Boldt's description of Lummi's U&A is ambiguous as to the waters west of Whidbey Island and because there is no evidence from the record of Decision No. 1of Lummi fishing or travel in these waters, Judge Boldt could not have intended to include them in Lummi's U&A. Nor may Lummi use a Paragraph 25(a)(6) claim or related evidence and argument to rebut Lower Elwha's showing under 25(a)(1). Indeed, the Court lacks jurisdiction over the 25(a)(6) claim and must strike such evidence and argument. Lower Elwha accordingly requests that the Court grant its motion for summary judgment.

DATED this 30th day of June, 2015,

s/ Samuel D. Hough
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Lower Elwha Klallam Tribe's Reply in Support of Motion for Summary Judgment, with Motions to Strike, was filed 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 30th day of June, 2015,

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