15-35661

United States Court of Appeals
for the Ninth Circuit

LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE
Petitioners-Appellees,
v.
LUMMI NATION
Respondent-Appellant, and

STATE OF WASHINGTON,
Defendant,

SWINOMISH INDIAN TRIBAL COMMUNITY; SUQUAMISH TRIBE; MAKAH INDIAN TRIBE; STILLAGUAMISH TRIBE; UPPER SKAGIT INDIAN TRIBE; NISQUALLY INDIAN TRIBE; TULALIP TRIBES; SQUAXIN ISLAND TRIBE,
Real-parties-in-interest

Appeal from the United States District Court for the Western District of Washington, CIVIL NO. 2:11-sp-00002-RSM, Subproceeding No. 11-02

REAL-PARTY-IN-INTEREST-APPELLEE TULALIP TRIBES' RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Real-party-in-interest Tulalip Tribes is a federally recognized Indian Tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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I. ADDENDUM OF PERTINENT LAWS

This Response Brief does not contain any citations to pertinent statutes or regulations, so there is no addendum included pursuant to Circuit Rule 28-2.7.

II. SUMMARY OF ARGUMENT

The Tulalip Tribes, as a real-party-in interest, submits this Response Brief to oppose Respondent-Appellant's argument that general evidence of travel and fishing suffices to establish usual and accustomed fishing grounds and stations (U&A). The District Court properly rejected Respondent-Appellant's invitation to apply a relaxed standard, and this Court must affirm the District Court.

On February 12, 1974, senior District Court Judge George H. Boldt issued his seminal opinion, which determined the "usual and accustomed grounds and stations" of each tribal party. *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). This case is a continuation of the U&A determination aspect of Judge Boldt's seminal opinion.

This Court has previously interpreted U&A findings by Judge Boldt. *See Muckleshoot Indian Tribe v. Lummi Indian Tribe* (*Muckleshoot I*), 141 F.3d 1355 (9th Cir. 1998); *Muckleshoot Indian Tribe v. Lummi Indian Nation* (*Muckleshoot II*), 234 F.3d 1099 (9th Cir. 2000); *U.S. v. Muckleshoot Indian Tribe* (*Muckleshoot III*), 235 F.3d 429 (9th Cir. 2000); *U.S. v. Lummi Indian Tribe* (*Lummi*), 235 F.3d 443 (9th Cir. 2000); *Upper Skagit Indian Tribe v. Washington* (*Upper Skagit*), 590

F.3d 1020, 1025 (9th Cir. 2010); *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015).

The District Court must interpret the finding made by Judge Boldt and not modify or amend it. *Muckleshoot I*, 141 F.3d at 1360. The District Court must determine "what Judge Boldt meant in precise geographic terms" through review of the record that was before Judge Boldt at the time of the U&A determination. *Muckleshoot I*, 141 F.3d at 1359; *Muckleshoot III*, 235 F.3d at 432-33.

In the original *U.S. v. Washington* case, Judge Boldt explained that "[t]he words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Washington*, 384 F. Supp. at 356. This Court has found that to establish U&A, fishing must have occurred "with regularity" as opposed to "isolated or infrequent" use. *Muckleshoot III*, 235 F.3d at 434.

The law of the case holds that U&A are determined based on factors stemming from treaty time evidence and post-treaty anthropological studies, including evidence of: (1) use of an area as a usual or regular fishing area; (2) any treaty-time exercise or recognition of a paramount or preemptive fisheries control (primary right control) by a particular tribe; and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty time use of an area for fishing purposes. *Washington*, 384 F. Supp. at 332; *U.S. v. Washington* , 626 F. Supp. 1405, 1531

(Conclusions of Law 96-97) (W.D. Wash. 1985), *aff'd*, 841 F.2d. 317 (9th Cir. 1988) ("Open marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not usual and accustomed fishing grounds of that tribe within the meaning of the Stevens treaties").

Respondent-Appellant argues that general evidence of Respondent-Appellant travel and fishing precludes Petitioners-Appellees from meeting their burden. *See* Opening Br. at 41-47. But general evidence does not suffice to establish U&A. *See Lummi*, 235 F.3d at 451-52 (finding that Judge Boldt relied on specific and not general evidence and would have used specific anchor points if he intended to include the contested waters); *Upper Skagit*, 590 F.3d at 1025 (explaining that Judge Boldt used specific geographic anchor points in U&A determinations).

Similarly, Respondent-Appellant's argument that fishing in waters adjacent to the contested waters in this case demonstrates Judge Boldt's intent to include those waters in Respondent-Appellant's U&A must fail. There is no doctrine of adjacency in this case. This Court must affirm the District Court's judgment in favor of Petitioners-Appellees.

III. ARGUMENT

A. General Evidence of Travel and Fishing Does Not Establish U&A.

Respondent-Appellant seeks to expand the evidence to be reviewed to include general evidence of Respondent-Appellant travel and fishing. *See* Opening Br. at 41-47. Respondent-Appellant fallaciously argues that even if there is no specific evidence of fishing in specific areas, adding up all the non-specific allusions to travel amounts to evidence supporting a U&A finding. Such an expansion is contrary to the law of the case.

Signatory tribes to the Stevens treaties reserved the "right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries[.]" *Washington*, 384 F. Supp. at 406. Judge Boldt, who presided over *U.S. v. Washington* in its formative years, explained the method for finding U&A as the "designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs." *Washington*, 384 F. Supp. at 402. While Judge Boldt included "every fishing location where members of a tribe customarily fished from time to time at and before treaty times" in U&As, he specifically noted that U&As exclude "unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id*. at 332. U&As do not include areas where fishing was "occasional or incidental." *Id.* at 356. Nor do U&As include areas where the

tribe simply desires to fish. This Court affirmed Judge Boldt's U&A findings "in all respects." *U.S. v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975).

Fishing during "occasional or incidental" travel did not create U&As. *See Washington*, 384 F. Supp. at 353. Fishing must have occurred "with regularity," and "[i]solated or infrequent excursions" do not meet the U&A standard. *Muckleshoot III*, 235 F.3d at 434. District Court Judge Craig, who presided over *U.S. v. Washington* after Judge Boldt's retirement, found that "[o]pen marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not usual and accustomed fishing grounds of that tribe within the meaning of the Stevens treaties." *Washington*, 626 F. Supp. at 1531 (Conclusion of Law 96). Thus, travel alone does not establish U&A.

This Court has explained that "Judge Boldt used specific geographic anchor points in describing other tribes' U & As. From this it is reasonable to infer that when he intended to include an area, it was specifically named in the U & A." *Upper Skagit*, 590 F.3d at 1025 (internal citations omitted). This Court has already considered Respondent-Appellant's U&A, and it found that Judge Boldt did not intend to include the Strait of Juan de Fuca or the mouth of Hood Canal in Respondent-Appellant's U&A. *Lummi*, 235 F.3d at 451-52. This Court reasoned that Judge Boldt would have used specific terms related to the waters at issue, as

he did elsewhere in the decision. *Id.* Importantly, Judge Boldt relied on "the specific, rather than the general, evidence presented by Dr. Lane" in making U&A determinations. *Id.* at 451. Respondent-Appellant's reliance on general evidence falls far short of establishing U&A.

There is no specific evidence of Respondent-Appellant fishing in the contested waters, and the District Court rightfully ruled in favor of Petitioners-Appellees. The District Court properly reviewed the record before Judge Boldt for evidence showing Respondent-Appellant U&A in the contested waters, and the record was devoid of such evidence. Respondent-Appellant repeatedly compares this case to *Tulalip Tribes*, but there this Court found Suquamish U&A in the mouth of the Snohomish River based on Dr. Lane's explicit reference to Suquamish fishing in the mouth of the Snohomish River. *Tulalip Tribes*, 794 F.3d at 1134-35. While the Tulalip Tribes disagrees with this Court's *Tulalip Tribes* decision, the Court at least relied on explicit and specific reference to Suquamish fishing in the mouth of the Snohomish River. There is no such explicit or specific evidence in the record before Judge Boldt of Respondent-Appellant fishing in the contested waters at issue here. This Court must not expand the evidentiary standard under the *Muckleshoot* analysis to include unspecified, general evidence of travel and fishing.

B. Evidence of Fishing in Waters Adjacent to the Contested Waters Does Not Establish U&A in the Contested Waters.

Respondent-Appellant alleges that evidence of Respondent-Appellant fishing in waters adjacent to the contested waters demonstrates Judge Boldt's intent to include the contested waters in their U&A. *See* Opening Br. at 42-44. Reducing the U&A standard to fishing in adjacent waters would upend *U.S. v. Washington.*

There is no rule of adjacency in this case.[1] As explained above in Subsection A, there must be evidence of regular fishing in specific waters to establish U&A. *Washington*, 384 F. Supp. at 332, 353, 356; *Washington*, 626 F. Supp. at 1531 (Conclusion of Law 96). If tribes can establish U&A by merely showing fishing in adjacent waters, the treaty language of "usual and accustomed" becomes meaningless along with this Court's prior rulings in this case. *See e.g.*, *U.S. v. Washington*, 20 F. Supp. 3d 986, 1054 n.8 (W.D. Wash. 2013), *aff'd*, 794 F.3d 1129 (9th Cir. 2015) (finding waters adjacent to Possession Sound outside the boundary of the Suquamish U&A). It would turn this case on its head and allow the tribes to fish virtually everywhere rather than where the Treaties specified.

[1] Nor is there such a concept as a tribe's "fishing territory." *See* Opening Br. at 5. That term does not appear in the Treaty or in prior rulings of this Court or the District Court. The inquiry here concerns U&A and not some vague "fishing territory."

The District Court held Respondent-Appellant to the same U&A standard applied in all other U&A subproceedings—including previous cases determining Respondent-Appellant's U&A. The District Court properly found that there was no evidence indicating Judge Boldt intended to include all marine waters between the Fraser River and Puget Sound. ER 022. U&A in waters north and south of the contested waters does not establish U&A for all waters in between. This Court must affirm the District Court's ruling.

IV. CONCLUSION

The law of the case required the District Court to apply the same U&A standard in this subproceeding as it has in previous U&A subproceedings. After properly reviewing the record that was before Judge Boldt at the time of Respondent-Appellant's U&A determination, the District Court found no evidence of Respondent-Appellant fishing in the contested waters. As such, the District Court rightfully ruled in favor of Petitioners-Appellees. This Court has no legal grounds to change the U&A standard or depart from its recent rulings on U&As. For the foregoing reasons, the Tulalip Tribes requests that this Court affirm the District Court's grant of summary judgment in favor of Petitioners-Appellees.

Respectfully submitted this 22nd day of January, 2016.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ *Mason D. Morisset*

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Tulalip Tribes states that the following cases related to this case are pending in this Court:

U.S. v. Washington, Ninth Circuit Appeal No. 15-35824 (consolidated with No. 15-35827). This consolidated case consists of appeals of the District Court decision in *U.S. v. Washington*, Subproceeding 09-1 – a subproceeding that involved interpretation of the Quinault and Quileute U&A determinations.

Upper Skagit Indian Tribe v. Suquamish Indian Tribe, Ninth Circuit Appeal No. 15-35540. This case is an appeal of the District Court decision in *U.S. v. Washington*, Subproceeding 14-01 – a subproceeding that involved interpretation of the Suquamish U&A determination.

While these cases are related in that they are part of the *U.S. v. Washington* main case, they do not directly involve the interpretation of Respondent-Appellant's U&A at issue here.

Respectfully submitted this 22nd day of January, 2016.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ Mason D. Morisset

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document – Real-Party-In-Interest-Appellee Tulalip Tribes' Response Brief – with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 22, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on January 22, 2016.

Executed this 22nd day of January, 2016, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ *Mason D. Morisset*

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