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	Case No.: C70-9213 Subp. 17-2 **RESPONDING TRIBES' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1)** **Oral Argument requested** **Noting Date: December 15, 2017**

MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1)

The Swinomish Indian Tribal Community, together with the Port Gamble and Jamestown S'Klallam Tribes, and the Tulalip Tribes (collectively "Responding Tribes"), move to dismiss this subproceeding with prejudice pursuant to Fed. R. Civ. P. 12(b)(1), because the Court lacks subject matter jurisdiction. Specifically, the Court lacks continuing jurisdiction under Paragraph 25(a)(6) because the Muckleshoot Tribe's ("Muckleshoot") marine usual and accustomed grounds and stations ("U&A") has been "specifically determined" within the meaning of that subparagraph. Further, Muckleshoot asserted a contrary position regarding its U&A in a prior subproceeding, 97-1, in which it prevailed. Therefore, it is estopped from taking a contrary position here.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

INTRODUCTION

Judge Boldt made Muckleshoot's U&A finding in his original decision in 1974. *U.S. v. Washington*, 384 F. Supp. 312, 367 (W.D. Wash. 1974) (Final Decision #1). The finding included U&A in fresh water areas and marine U&A described as "secondarily in the saltwater of Puget Sound." *Id.* Subsequently, in Supb. 97-1, acting under the Court's continuing jurisdiction under Par. 25(a)(1), the Court reviewed the record before Judge Boldt and concluded that Muckleshoot's marine U&A was limited to Elliott Bay (Area 10A). See map, p. 5. *U.S. v. Washington*, 19 F. Supp. 3d 1304, 1311 (W.D. Wash. 1999). The Ninth Circuit, independently reviewing the record before Judge Boldt, arrived at the same conclusion and affirmed. *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) *(Muckleshoot III*).

Now, 43 years after its U&A finding and 18 years after this Court and the Ninth Circuit clarified the geographic boundaries of its U&A, Muckleshoot lays claim to a greatly expanded marine area: all the way from part of Area 13 north to part of Area 8A. *Request for Determination* (RFD), ¶14, p. 6. Here, Muckleshoot claims that the Court has jurisdiction under Par. 25(a)(6). *Id.* at ¶2, p. 2. However, the Court lacks jurisdiction over this subproceeding under Par. 25(a)(6) because Judge Boldt specifically determined Muckleshoot's marine U&A in Final Decision #1, and this Court clarified the geographic scope of Muckleshoot's U&A in Subp. 97-1, affirmed on de novo review by the Ninth Circuit in *Muckleshoot III*.

More specifically, dismissal is warranted for the following reasons:

1) The law of the case under Subproceeding 97-1 is that Muckleshoot has a specifically determined U&A. (Section I.A.)

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

2) Muckleshoot is judicially estopped from arguing that its U&A is not specifically determined because it argued exactly the opposite in Subp. 97-1 and prevailed in that case based on that argument. (Section I.B.)

3) Even if the outcome was not determined by Subp. 97-1, the law of the case established in *Muckleshoot I*, and subsequently applied and elaborated on by this Court and the Ninth Circuit, compels the conclusion that Muckleshoot's U&A has been specifically determined. Judge Boldt's U&A finding, as subsequently clarified as to geographical scope, is specifically determined. (Section I.C.)

4) Per principles of finality underlying Fed. R. Civ. P. 60(b), as well as finality principles that apply to *U.S. v. Washington*, a contrary ruling would ignore finality and threaten the fabric of the case. (Section II.)

LEGAL STANDARD

The tribes bring this motion to dismiss under Fed. R. Civ. P. 12(b)(1), seeking dismissal for lack of subject matter jurisdiction. Motions to dismiss under 12(b)(1) may be facial – in this case, based on the RFD alone – or factual, based on materials beyond the RFD. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). This motion is factual, in that it relies on matters beyond the complaint, though all materials cited are either court decisions or pleadings filed in *U.S. v. Washington*. These materials may be considered without converting the motion to one for summary judgment. *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The burden is on Muckleshoot to establish that the Court has subject matter jurisdiction. *Id.*

In this case, the issue is subject matter jurisdiction under the Court's order of continuing jurisdiction. "[T]he Court retained jurisdiction … for limited and express purposes." *U.S. v. Washington*, 20 F. Supp. 3d 983, 986 (W.D. Wash. 2012). Those 'limited and express purposes'

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

are set forth in Par. 25(a) of the Permanent Injunction, as subsequently modified by order of the Court. *U.S. v. Washington,* 18 F. Supp. 3d 1213 (W.D. Wash. 1993). The Court must make a determination regarding "whether it has continuing jurisdiction and on what ground." *U.S. v. Washington,* 252 Fed. Appx. 183 (9th Cir. 2007). It is Muckleshoot's "burden, as the filing party, to identify the basis of jurisdiction." *U.S. v. Washington,* Subp. 17-1, *Order on Motions,* 8/30/17, Dkt. 43, p. 11 (JD 38).[1] Here, Muckleshoot asserts that the Court has jurisdiction under Par. 25(a)(6)[2]. RFD ¶ 2, p. 2. Under that provision, the Court has continuing jurisdiction to determine "[t]he location of any of a tribe's [U&As] not specifically determined by Final Decision #1." *U.S. v. Washington,* 18 F. Supp. 3d 1213 (W.D. Wash. 1993). However, since Muckleshoot's U&A was already specifically determined by Judge Boldt in Final Decision #1, Par. 25(a)(6) does not apply, and Muckleshoot has no basis for jurisdiction in this subproceeding.

ARGUMENT

I. Muckleshoot's Marine U&A Has Been Specifically Determined.

A. The Court Already Ruled That Muckleshoot's U&A Was "Specifically Determined," and That Determination is Law of the Case.

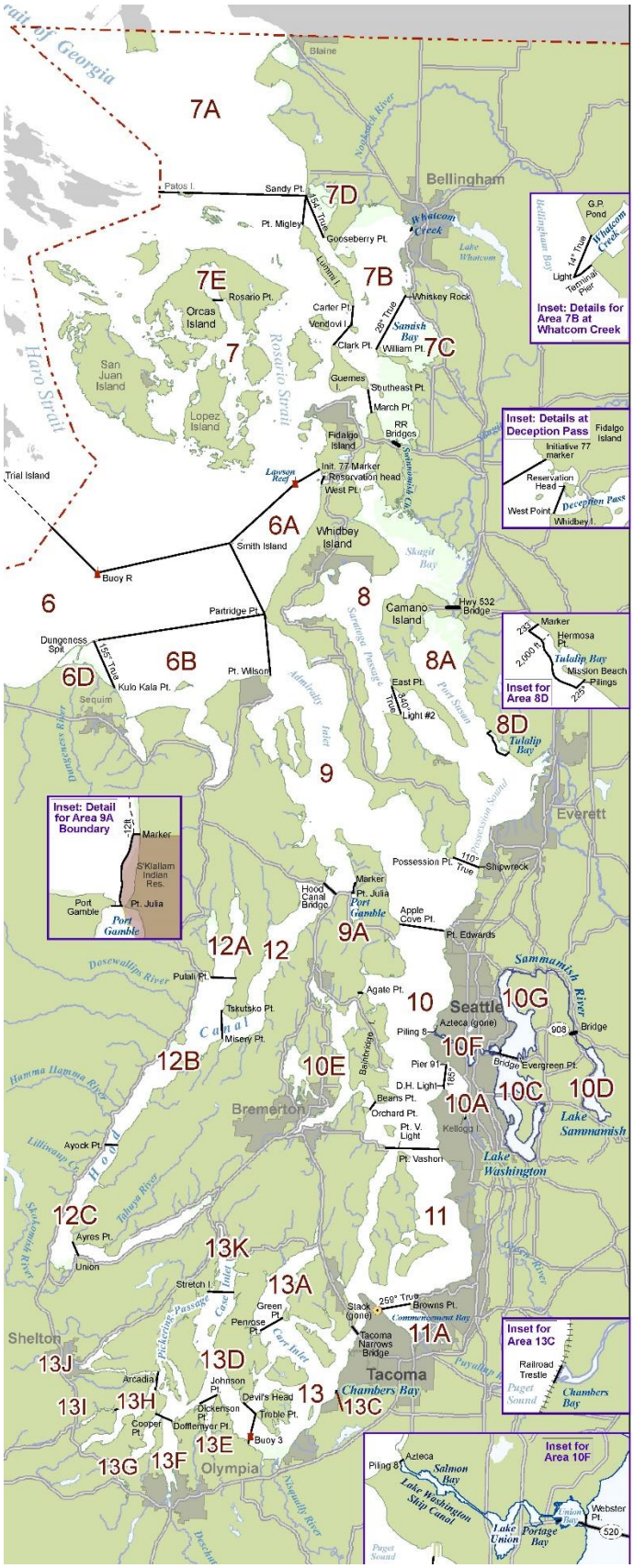
The insurmountable hurdle for Muckleshoot is that this Court decided in Subproceeding 97-1 that Judge Boldt *specifically determined* Muckleshoot's U&A in Final Decision #1, and therefore, continuing jurisdiction does not exist under subsection Par. 25(a)(6).

To aid the Court in visualizing the claims to the various fishing areas referred to in this motion, a map of these areas is included at p.5. The map depicts the Puget Sound Commercial

[1] This and other similar references in the motion are to the correlative Bates stamped page in the Declaration of James Jannetta filed to accompany this Motion.

[2] Prior to the Court's modification of Paragraph 25 in 1993, the identical jurisdictional provision in the Permanent Injunction was denoted as Par. 25(f). Final Decision #1, 384 F. Supp. at 419. To avoid confusion, we have converted the citation in cases prior to 1993 and used the term "25(a)(6)" throughout this motion.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134



Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

Salmon Management and Catch Report Areas covering the overall area relevant to this motion.[3] The areas referred to in this motion are the areas depicted on this map.

Subproceeding 86-5 was the seminal case construing the meaning of Par. 25(a)(6). It was the first occasion on which the Ninth Circuit addressed continuing jurisdiction in *U.S. v. Washington.* In Subp. 86-5, Muckleshoot contested the southern boundary of Lummi's U&A, described by Judge Boldt as "the present environs of Seattle." Final Decision #1, 384 F. Supp. at 360. Muckleshoot sought to use deposition testimony of Dr. Barbara Lane, the doyenne of U&A in *U.S. v. Washington,* to shed light on the meaning of the contested phrase. Dr. Lane's deposition was obviously not available to Judge Boldt at the time he made Lummi's U&A determination, and Lummi objected to the evidence on that basis. The Court ruled that the evidence could be employed under the continuing jurisdiction of Par. 25(a)(6), reasoning that Judge Boldt's U&A finding in Final Decision #1 was ambiguous as to geographical extent and thus not specifically determined. *U.S. v. Washington*, 19 F. Supp. 3d 119, 1195 (W.D. Wash. 1995).

The Ninth Circuit disagreed, rejecting that interpretation of Par. 25(a)(6) and disallowing the use of Dr. Lane's testimony. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355 (9th Cir. 1998) (*Muckleshoot I).* In *Muckleshoot I,* the Ninth Circuit determined that Lummi's U&A had been 'specifically determined' by Judge Boldt:

> Judge Boldt … **did 'specifically determine[ ]' the location of Lummi's [U&As]** albeit using a description that has turned out to be ambiguous. [Par. 25(a)(6)] 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.

Id. at 1360 (emphasis added). The Ninth Circuit held that Judge Boldt's U&A finding had specifically determined Lummi U&A. Moreover, prior to that decision the Court's method of

[3] This map was taken from the Washington Department of Fish and Wildlife website, wdfw.wa.gov/fishing/commercial/salmon/files/wac 220-022-030.pdf.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

adding to a tribe's U&A finding was by supplemental findings; that is, supplemental to the findings in Final Decision #1. *See, e.g., U.S. v. Washington,* 626 F. Supp. 1441, 1442 (W.D. Wash. 1981). Further, by disapproving this method for making additional U&A findings, the Ninth Circuit underscored that the Court's approach to Par. 25(a)(6) was no longer the law.

While Muckleshoot was on the losing side of the Par. 25(a)(6) issue in Subp. 86-5, it turned the decision to its advantage in a subsequent case, Subp. 97-1, which was a challenge to the extent of its own U&A. In that case, three tribes brought claims that ultimately resulted in Muckleshoot having marine U&A in Elliott Bay only (Area 10A). In relevant part, the three tribes' claims sought to exclude "fishing in the waters north and west of area 10." Subp. 97-1, *Cross-Request for Determination,* 4/3/97, Dkt. 36, p. 6 (JD 3). These waters specifically included Area 8A, an area Muckleshoot now includes in the expanded U&A sought in this subproceeding, RFD p. 3. *Id.* at 5 (JD 2). See also Subp. 97-1, *Motion for Summary Judgment,* 1/15/98, Dkt. 49, p. 1 (JD 14).

At the time, Muckleshoot fished in and claimed U&A only in Areas 9, 10 and 11. From the beginning, Muckleshoot argued that the tribes' claims concerning areas beyond 9, 10 and 11 were "not within the continuing jurisdiction of the court." Subp. 97-1, *Response to Cross-RFD,* 7/2/97, Dkt. 39, p. 2 (JD 5). Muckleshoot moved to dismiss the claims based, in part, on the lack of continuing jurisdiction. Subp. 97-1, *Motion to Dismiss,* 1/15/98, Dkt. 46 (JD 6). In its supporting brief, Muckleshoot argued for dismissal because "the reservation of continuing jurisdiction in this case does not permit relitigation of Muckleshoot's fishing places in Puget Sound, *because that matter was specifically decided.*" Subp. 97-1, *Memorandum in Support of Motion,* 1/15/98, Dkt. 47, p. 3 (JD 9) (emphasis added). Muckleshoot added that Judge Boldt's U&A finding "has now been final for over 23 years," *Id.* at 4 (JD 10), and repeated its argument that the Court lacked jurisdiction under 25(a)(6) "*because Judge Boldt 'specifically determined"* Muckleshoot U&A. *Id.* at 17 (JD 11) (emphasis added). Muckleshoot cautioned that "[t]he door

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

should not be opened to de novo debate about the merits of earlier aspects of Judge Boldt's decision." *Id.* at 19 (JD 13). After *Muckleshoot I*, Muckleshoot used *Muckleshoot I* in support of its Par. 25(a)(6) argument. *Supplemental Brief*, 5/14/98, Dkt. 78, pp. 1-2, 5-6 (JD 16-19); *Supplemental Reply Brief*, 5/28/98, Dkt. 79, p. 1 (JD 20).

Accordingly, as things stood when the Court made its decision on Muckleshoot's motion to dismiss in Subp. 97-1, Muckleshoot claimed that the Court had jurisdiction only over claims related to Areas 9, 10, and 11, and only under Par. 25(a)(1). As part of this claim, Muckleshoot sought the dismissal of claims regarding areas beyond Areas 9 through 11, including Area 8A, because Muckleshoot's U&A had been specifically determined, so the Court did not have continuing jurisdiction under Par. 25(a)(6).

The Court agreed with Muckleshoot's argument and adopted its position, *U.S. v. Washington*, 19 F. Supp. 3d 1272, 1275 (W.D. Wash. 1997). After framing the issue and reciting the holding on point in *Muckleshoot I*, the Court stated:

> Here, as in *Muckleshoot [I]*, Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U&A. Although his description may have turned out to be ambiguous, **he did make a specific determination**. [Par. 25(a)6)] 'does not authorize the court to clarify its meaning of terms used in the decree or resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree.' … **Issuing a supplemental finding under [Par. 25(a)(6)] defining the scope of Muckleshoot's U&A in Puget Sound would 'alter, amend or enlarge upon' Judge Boldt's description, contrary to the Ninth Circuit's holding in *Muckleshoot [I]*.**

19 F. Supp. 3d 1270, 1275-1276 (emphasis added; citation omitted). The Court granted Muckleshoot's motion to dismiss the claims relating to territory beyond Areas 9, 10 and 11, based in part on this determination.[4]

[4] This aspect of the Court's actions in the case was not appealed. *See U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) (*Muckleshoot III*).

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

To summarize, the Court in Subp. 97-1 has thus already decided that Muckleshoot's marine U&A was specifically determined by Judge Boldt. This decision is part of the law of the case, and it defeats Muckleshoot's invocation of continuing jurisdiction in this subproceeding under Par. 25(a)(6).

B. Muckleshoot is Estopped From Arguing That the Court Has Jurisdiction under Par. 25(a)(6).

Additionally, Muckleshoot is estopped from asserting continuing jurisdiction under Par. 25(a)(6) because in Subp. 97-1 it argued and prevailed on the claim that its marine U&A had been specifically determined. Judicial estoppel precludes a party from gaining advantage by taking one position that the court adopts, and then seeking a second advantage by later taking an incompatible position. *New Hampshire v. Maine,* 532 U.S. 742, 749-750 (2001). The doctrine applies "regardless of whether it is an expression of intention, a statement of fact, or a legal assertion." *Helfand v. Gerson,* 105 F.3d 530, 535 (9th Cir. 1997). In this instance, as shown in the previous section, Muckleshoot argued in Subp. 97-1, that its U&A had been 'specifically determined' by Judge Boldt, and that the Court therefore had no continuing jurisdiction under Par. 25(a)(6) over claims against it regarding U&A in the new waters beyond areas 9 through 11.

The Court agreed, ruling that Muckleshoot's U&A had been specifically determined, and dismissed the claim regarding the 'beyond' waters. In the instant subproceeding, Muckleshoot has reversed its position and now claims that the Court's continuing jurisdiction is grounded solely in Par. 25(a)(6) because its U&A is not specifically determined. Nothing could be more incompatible than these polar opposite positions, and the Court adopted the former position in Subp. 97-1.

Moreover, in Subp. 97-1, Muckleshoot laid claim only to Areas 9 through 11. In this subproceeding Muckleshoot makes claim to U&A in waters beyond Areas 9 through 11, which it

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

succeeded in excluding from Subp. 97-1 based on the very same argument that it now turns upside down. Its U&A claim in this subproceeding includes a part of Area 8A to the north (south "from the vicinity of Gedney (aka Hat) Island and the southern end of Whidbey Island)" and Area 13 to the south. *RFD,* ¶14, p. 6. The Court did not consider these areas in Subp. 97-1 because it determined, at Muckleshoot's urging, that its U&A had been specifically determined. The Court should not countenance the argument that it is now time to flip-flop and consider these areas Muckleshoot previously succeeded in excluding from consideration. The Court should apply its ruling in Subp. 97-1 to all areas now claimed by Muckleshoot, including the waters beyond Areas 9 through 11.

C. Even If Reviewed *De Novo* Today, the Court Must Conclude That Muckleshoot's U&A Was Specifically Determined.

1. An Overview of the Court's Evolving Approach to Par. 25(a)(6).

Even if the Court's decision in Subp. 97-1 were not dispositive of the issue here, Muckleshoot still fails to establish continuing jurisdiction. Continuing jurisdiction in this case is governed by *Muckleshoot I,* as this Court recognized in Subp. 97-1. *Muckleshoot I,* decided in 1998, was the first time that the Ninth Circuit addressed the meaning and application of Par. 25(a)(6) in an actual litigated contest over its application. Whatever the practice in this case concerning jurisdiction under Par. 25(a)(6) may have been prior to *Muckleshoot I,* that case authoritatively established the scope of application of the provision – a scope greatly restricted from the Court's prior practice. It was a game changer that altered this Court's approach to proceedings to expand U&A.

As shown below, the Court's approach to Par. 25(a)(6) abruptly changed after *Muckleshoot I,* and has since evolved to further narrow the opportunity for tribes to seek expansion of their

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

U&As under Par. 25(a)(6). Among other things, the Court now requires a tribe to establish in proceedings under Par. 25(a)(1) that its U&A has **not** been specifically determined before proceeding under Par. 25(a)(6). Here, that initial step has already been taken, in *Muckleshoot III*, and Muckleshoot U&A has been specifically determined. There is no opportunity for Muckleshoot to proceed under Par. 25(a)(6). As discussed below, the law of the case is that the Court will entertain a Par. 25(a)(6) proceeding only in the rare instance, as demonstrated by the only case in which the Court has done so since *Muckleshoot I.* Here, Muckleshoot has not demonstrated anything exceptional that would meet the criteria set by the Court.

For the first ten years after Final Decision #1, this Court entertained proceedings to expand tribal U&A beyond the original U&A finding, but only in the context where no party challenged jurisdiction, and where the expansion of its U&A itself was infrequently challenged. In this environment, expanded U&A was granted to some tribes. For a typical example among several, *see, e.g., U.S. v. Washington,* 626 F. Supp. 1441, 1442 (W.D. Wash. 1981). In addition, during this same period that initial or expanded U&A findings were decreed, the Court frequently included a provision that the "determination shall not preclude these or any other parties from seeking further determination under [Par. 25(a)(6)]." *U.S. v. Washington,* 626 F. Supp. 1443, 1444 (1983).

The Court's practice changed in 1984, when it excluded the provisional U&A finding from the Jamestown S'Klallam's U&A decision. *U.S. v. Washington,* 626 F. Supp. 1486 (1984). A year later the same occurred when Tulalip's U&A was established. *U.S. v. Washington,* 626 F. Supp. 1527, 1532 (1985). From then on, the Court has not made an expressly provisional U&A decision. Further, it has expanded previously decided tribal U&As **only twice** in the intervening

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

33 years, and **only one** of those occurred after *Muckleshoot I,* which established the law applicable to Par. 25(a)(6), was decided.[5]

2. Muckleshoot I Marked the Beginning of Par. 25(a)(6) as the Exception.

Muckleshoot I brought an end to unchallenged proceedings for expanded U&As and changed the apparent earlier operating assumption under which the Court routinely considered U&A expansions. By ruling that a U&A determination made by Judge Boldt in Final Decision #1 was "specifically determined" even though ambiguous in its geographic extent, the Ninth Circuit moved continuing jurisdiction under Par. 25(a)(6) from the norm routinely applied to the carefully examined exception by expanding what was specifically determined.

Another indicator of the Ninth Circuit's shifting, narrow approach to Par. 25(a)(6) in *Muckleshoot I* appears in its approach to supplemental findings. Until *Muckleshoot I* was decided, expansions of tribal U&A were made by means of supplemental findings; that is, the findings were supplemental to the original U&A finding for that tribe. *See, e.g., U.S. v. Washington,* 626 F. Supp. 1441, 1442 (W.D. Wash. 1981). *Muckleshoot I,* by holding that Par. 25(a)(6) does not authorize "supplemental findings which alter, amend or enlarge upon the description in the decree," was addressing – and disapproving – the prior common practice of the Court regarding Par. 25(a)(6). I*d.* at 1276.

While *Muckleshoot I* marked the end of U&A expansion, it also marked the reining in of tribes' expansive and incorrect view of their U&A. In addition to its ruling on Par. 25(a)(6), the Ninth Circuit for the first time allowed proceedings that examined the boundaries of previously determined U&A under Par. 25(b)(1). U&A proceedings shifted from *de novo* proceedings to

[5] The last expansion before *Muckleshoot I* dealt with Upper Skagit marine U&A as part of the shellfish subproceeding, Subp. 89-3. *U.S. v. Washngton,* 873 F. Supp. 1422, 1427-1428 (W,S, Wash. 1994).

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

expand U&A to proceedings to reduce fishing beyond U&A boundaries determining the geographic extent of those boundaries. This was done by closely examining of the intent of the judge making the initial determination (in every case so far, Judge Boldt) based not upon new evidence, but upon an examination of the record before the judge at the time the decision was made. The continuing jurisdiction basis shifted to Par. 25(a)(1), under which the inquiry involved whether a party was acting in conformity with the U&A finding by confining its fishing to the area of the previously determined U&A. *Muckleshoot I,* 141 F.3d at 1360.

3. Post-Muckleshoot I Cases Show Further Evolution of of Par. 25(a)(6).

Since *Muckleshoot I*, the Court has on numerous occasions rejected assertions of continuing jurisdiction under Par. 25(a)(6) and stated or ruled that a tribe's U&A had been specifically determined. For example:

- Subp. 97-1: discussed at length in Section I.A., above (no Par. 25(a)(6) jurisdiction; Muckleshoot U&A specifically determined).
- Subp. 05-3: *U.S. v. Washington*, 20 F. Supp. 3d 798, 799 (W.D. Wash. 2005) (no jurisdiction under Par. 25(a)(6)).
- Subp. 05-4: *U.S. v. Washington*, 20 F. Supp. 3d 815, 817 (W.D. Wash. 2006) (request under Par. 25(a)(6) barred by *res judicata* because U&A was specifically determined.) *Id.*
- Subp. 11-2 *Order*, 7/17/15, Dkt. 210 (JD 24-35): (Lummi U&A specifically determined; no jurisdiction under Par. 25(a)(6)).
- Subp. 17-1, *Order*, 8/30/17, Dkt. 43 (JD 36-43): (Skokomish U&As specifically determined; no jurisdiction under Par. 25(a)(6).

The last two merit further discussion because they are the most recent rulings of the Court that

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

show the Court's evolution in interpreting specifically determined under Par. 25(a)(6). In Subp. 11-2, the Court ruled against Lummi by holding that when there was no evidence relating to a particular area before Judge Boldt when the U&A finding was made, that fact supports the conclusion that the area was intentionally excluded, and so the U&A was specifically determined.

The Court proceeded under Par. 25(a)(1) to determine Judge Boldt's intent based on the record before the him at the time of the U&A finding. Lummi attempted to proceed instead under Par. 25(a)(6) and proffered evidence that was not before Judge Boldt. The Court struck all such documents from the record. Subp. 11-2, *Order on Motions*, 7/7/15, Dkt. 210 at 13 (JD 25). Lummi argued that the lack of evidence before Judge Boldt regarding specific areas meant these areas were not specifically determined, but the Court concluded the opposite:

> The absence of … specific evidence [of fishing in the disputed area] results in this Court's determination that Judge Boldt did not intend to include the disputed waters within Lummi U&A.

Id. at 15 (JD 27), *citing Upper Skagit Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. 2010).

The Court went on in Subp. 11-2 to rule that there was no need to make a Par. 25(a)(6) determination:

> Based upon [the record before Judge Boldt] the Court finds that neither logic nor linguistics would compel the conclusion that the [disputed waters] were intended by Judge Boldt to be included in the Lummi U&A. *Accordingly, the Court does not reach any determination under Paragraph 25(a)(6) in this matter.*

Id. at 23 (JD 35) (emphasis added). The Court did not reach Par. 25(a)(6) because Judge Boldt had specifically determined Lummi U&A. Likewise, in this case the lack of evidence of Muckleshoot fishing outside of Elliott Bay, as decided in *Muckleshoot III*, demonstrates that Judge Boldt intended to exclude marine waters outside Elliott Bay from Muckleshoot U&A. Accordingly, Muckleshoot marine U&A was specifically determined and consists solely of Elliott Bay.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

Further, in Subp. 17-1, the Court's most recent decision involving Par. 25(a)(6), it observed that Par. 25(a)(6) jurisdiction is "contingent on the Court's finding, or the parties agreeing, that the disputed waters in question were not specifically determined by Judge Boldt" and that in the case of Skokomish "the scope of that U&A has been determined in a manner contrary to the assertion now made by Skokomish." Subp. 17-1, *Order on Motions*, 8/30/17, Dkt. 43, p. 12 (JD 39).

Both cases are analogous to the Muckleshoot U&A claim at issue here because both involve a tribe whose U&A was decided by Judge Boldt that sought to return to the Court after a considerable and unexplained delay in an attempt to significantly enlarge its prior U&A by expanding into new areas. In both cases the Court found that omission of an area from the U&A finding was intended, and the U&A was specifically determined not to include the area. Omission of an area does not mean that the status of the area is undetermined, where the record contains no evidence to support inclusion of the area in question. Rather, omitting an area means that it was determined **not** to be part of the U&A.

4. Subp. 09-1 Shows that Exceptional Circumstances are Needed Under Par. 25(a)(6).

The narrow application of Par. 25(a)(6) is brought into focus by considering the Court's decision in Subp. 09-1, which is the proverbial exception that proves the rule: the only case since *Muckleshoot I* was decided that has allowed continuing jurisdiction under Par. 25(a)(6) to expand a tribe's U&A. Makah brought Subp. 09-1 to determine the Pacific Ocean boundary of the Quileute and Quinault U&A beyond the three-mile limit of state jurisdiction. The court proceeded under Par. 25(a)(6) and, after trial, established the ocean boundary for Quileute and Quinault.

Subp. 09-1 illustrates the exceptional circumstances necessary to support continuing jurisdiction under Par. 25(a)(6):

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

a) The case dealt with the U&A in the Pacific Ocean beyond the three-mile territorial limit of the state. When the Quinault and Quileute U&A findings were made by Judge Boldt in Final Decision #1, the case area did not include waters outside the state boundary. *U.S. v. Washington,* 20 F. Supp. 3d 946, 947 (W.D. Wash. 2011) (Final Decision #1 was "limited [to] treaty fishing rights in the waters within the jurisdiction of the State.). The Court's jurisdiction was not extended to such waters until later. *U.S. v. Washington,* 626 F.2d 1466 (W.D. Wash. 1982).

b) Before the Court would allow proceeding under Par. 25(a)(6), it required the parties to proceed under Par. 25(a)(1) to determine whether Judge Boldt had specifically determined the ocean boundary. *U.S. v. Washington,* 20 F. Supp. 3d 1033, 1037 (W.D. Wash. 2013).

c) The main parties stipulated[6] that the ocean boundary of the Quileute and Quinault U&A had not been specifically determined. Subp. 09-1, *Joint Status Report,* 10/1/13, Dkt. 181, p.2 (JD 22).

Subp. 09-1, then, is the extraordinary case in which Par. 25(a)(6) applies. The ocean boundary of the U&A in that case was simply never decided – in fact was outside the case area at the time - in the original U&A subproceeding. In contrast, Muckleshoot's marine U&A boundaries, as intended by Judge Boldt and clarified in *Muckleshoot III*, are crystal clear, and those boundaries exclude all marine waters outside of Elliott Bay.

The upshot is that even if the Court had not decided in Subp. 97-1 that Muckleshoot's marine U&A was specifically determined, and even if judicial estoppel does not prevent Muckleshoot from arguing that its U&A was not specifically determined, the law of the case requires ruling against Muckleshoot. The fact that Judge Boldt's original description of

[6] The S'Klallam did not stipulate to the Court's jurisdiction under Par. 25(a)(6) because they felt that the Quileute and Quinault U&As were specifically determined. However, they did not challenge the decision on these grounds on appeal. Issues concerning Par. 25(a)(6) are not involved in this appeal.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

Muckleshoot's marine U&A was "secondarily the salt water of Puget Sound," does not mean than the U&A was left undetermined. As the Ninth Circuit said of the Lummi U&A language regarding 'northern Puget Sound': "Judge Boldt did … specifically determine [Lummi U&As] albeit using a description that has turned out to be ambiguous." *Muckleshoot I,* 141 F.3d at 1360. Moreover, the Court, acting under Par. 25(a)(1), clarified the areal extent of Muckleshoot marine U&A in Subp. 97-1 by examining what Judge Boldt intended - and limited Muckleshoot U&A to Elliott Bay because there was no evidence in the record before Judge Boldt that Muckleshoot fished anywhere else. *U.S. v. Washington,* 19 F. Supp. 3d 1304, 1310-1311 (W.D. Wash. 1999). The Ninth Circuit, on *de novo* review, affirmed. *U.S. v. Muckleshoot Indian Tribe,* 235 F.3d 429, 431. 434 (9th Cir. 2000) (*Muckleshoot III).*

Here, Muckleshoot's U&A is expressly and completely described and contains limits that exclude the waters they seek, a clear case of being specifically determined under the principles discussed above. The Requesting Tribes are not asserting that a U&A finding must be complete and limited like this in all cases in order to be specifically determined. The law of the case reviewed above does not support that conclusion. The point made here regarding Muckleshoot U&A is that this case falls well within the expansive view of what is specifically determined adopted *Muckleshoot I* and further developed by the Court.

5. Muckleshoot's RFD Does Not Show Exceptional Circumstances.

Only under the most exceptional circumstances, such as those presented in Subp. 09-1, can a tribe return to this Court under Par. 25(a)(6). Muckleshoot has advanced only three points in support of its contention that its U&A was not specifically determined. None of these support Muckleshoot's claim or show exceptional circumstances.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

a) In support of Muckleshoot's claim U&A finding is somehow partial or incomplete and not specifically determined, its RFD offers the statement by Barbara Lane that "it would be impossible to compile a complete inventory" of a tribe's U&A Final Decision #1, 384 F. Supp. at 353, FF 13,[7] *cited in* RFD, , ¶ 5, p.3 But this Court has already rejected the use of this very statement as support for jurisdiction under Par. 25(a)(6) in this same context in Subp. 11-2. After reviewing at length what Dr. Lane said about U&As in FF 13 of Final Decision #1, which includes the quote above, the Court observed; "When FF 13 is read in its entirety, and together with the following FF 14, they lead to the opposite conclusion that Lummi argues." Subp. 11-2, *Order on Motions*, 7/17/15, Dkt. 210, p. 16 (JD 28). The Court went on to note that it is clear that FF 13 is addressing riverine U&A, while FF 14 addresses marine U&A. The 'complete inventory" statement thus applies only to river U&A, **not marine U&A**. *Id.*, at 17 (JD 29). The Court concluded: "It would be pure speculation to infer that the 'impossible to compile a complete inventory' statement applies … to marine areas when [no U&As] are mentioned; indeed logic and linguistics lead to the opposite inference." *Id.* at 17 (JD 29). Later the Court observes that Lummi "uses this language to invite consideration of unnamed locations well outside the designated area, but this section shows that was not Dr. Lane's intent." Subp. 11-2, Order on Motions, *Id.* at 20 (JD 32). Dr. Lane's statement relied upon in Muckleshoot's RFD does not support continuing jurisdiction under Par. 25(a)(6), as the Court ruled in Subp. 11-2.

b) Muckleshoot points to the shellfish Subp. 89-3, and two other cases as support for its claims. RFD ¶¶ 7, 8; pp. 3-4. But all occurred before *Muckleshoot III*, and thus reflect a mistaken assumption about the extent of Muckleshoot's U&A. That assumption was dispelled by

[7] The RFD incorrectly cites this as "FF 33." We do not separately discuss the RFD cite to 284 F. Supp. 353 because it is merely an echo of FF 13.

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

Muckleshoot III, controlling precedent on this issue, and any actions or decisions based on the discredited assumption can have no force and effect today. Activity that turns out to be violative of the Court's decree cannot trump *Muckleshoot III*. *Muckleshoot III* proved false the mistaken assumption and these earlier materials embracing that assumption are now irrelevant to Par. 25(a)(6).

c) Muckleshoot relies heavily on the evidence it now claims to possess that was not before Judge Boldt. RFD, ¶ 11, p. 5. This evidence is irrelevant to whether Muckleshoot's U&A has been specifically determined. The U&A must be found **not** to be specifically determined **before** these materials may be considered. Only if Par. 25(a)(6) applies can any evidence b considered.

To conclude, Muckleshoot's marine U&A, as decided by Judge Boldt and interpreted by the Court and the Ninth Circuit in *Muckleshoot III*, was specifically determined, and it does not include within its borders any of the waters now claimed. There are no exceptional circumstances that point to something incomplete or unresolved concerning Muckleshoot's U&A. There is no continuing jurisdiction in this Court under Par. 25(a)(6) to reconsider or expand upon the determination made by Judge Boldt 43 years ago and clarified 18 years ago. Muckleshoot's marine U&A is clearly confined to Elliott Bay and therefore this subproceeding should be dismissed.

II. Finality Considerations Strongly Support Dismissal.

The decisions of this Court and the Ninth Circuit concerning Par. 25(a)(6) discussed in Section I, above, are consistent with the important jurisprudential interest in finality and repose. Par. 25(a)(6) is a narrow exception to finality, and it should be viewed and applied in the light of finality, lest it lead to wholesale reopening of settled matters. Accordingly, finality considerations bear on this case, as implemented in the closely analogous procedure under Fed. R. Civ. P. 60(b)

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

and as applied to *U.S. v. Washington.* Both demonstrate that *Muckleshoot I* and the Court's approach to Par. 25(a)(6) are consistent with finality principles.

A. Rule 60(b) Provides Guidance for This Controversy.

At bottom, Muckleshoot seeks to mount a collateral attack on *Muckleshoot III* by employing Par. 25(a)(6). There is a procedural vehicle available to seek relief from judgment, but that vehicle is not Par. 25(a)(6). Fed. R. Civ. P. 60(b) provides the procedural vehicle for seeking relief from a judgment or order. It is useful, then to consider the finality concerns that underpin Rule 60(b) and which should be applied to this case.

Of the specific grounds for relief provided in the Rule 60(b), only two address situations that are remotely applicable here. Rule 60(b)(2) provides grounds based upon "newly discovered evidence which by due diligence could not have been discovered" in time to move for a new trial under Fed. R. Civ. P. 59. Given that this case involves evidence of tribal fishing practices over 150 years ago, however, it is highly unlikely that evidence that could not have been discovered in 1974 will be unearthed. More importantly, however, a motion on this grounds must be brought within a year of the challenged judgment, and so would be 16 years too late to be of use in this subproceeding.

This leaves only the residual provision of Rule 60(b)(6), which provides relief based on "any other reason justifying relief from operation of the judgment." Rule 60(b)(6) is to be used "sparingly as an equitable remedy to prevent manifest injustice" and only "where circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *U.S. v. Washington,* 98 F.3d 1159, 1163 (9th Cir. 1996). In addition, courts "have been diligent to consider the hardship that a reopening of the judgment might to cause to other persons and have denied relief when many actions have been taken on the strength of the judgment or when many person

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

had relied on the judgment." 11 Wright & Miller, *Federal Practice and Procedure* §2587 (3d. ed. 2008).

A Rule 60(b)(6) motion must be brought within "a reasonable time." *Id.* The caselaw demonstrates that the period is short and any delay must be justified. For example, the Court has observed in Subp. 01-2 that with regard to Rule 60(b)(6) motions "there is a common thread of finding delays of two years or more unreasonable." *U.S. v. Washington*, 20 F. Supp. 3d 912, 924 (W.D. Wash. 2008). In that subproceeding, the Court ruled that a delay of five years was too long, that no extraordinary circumstances excused the delay, and that the other parties were prejudiced by the delay. *Id.* Here, Muckleshoot waited 17 years from the decision in *Muckleshoot III* to file its RFD, and over a decade before it issued its "meet & confer," without excuse or justification for the delay.

B. Heightened Finality Concerns Favor Dismissal.

As the Court is well aware, this is no ordinary case. There are special reasons for finality at play here. Finality interests are highest in cases like this, involving natural resources issues and continuing jurisdiction that extends over decades. The parties and the public at large build up reliance interests based on decrees made in the course of such cases, and those reliance interests are served by scrupulous observance of finality and certainty of judgments in cases such as this one. The Ninth Circuit has recognized and relied upon the strong finality interests in this case to deny an attempt to revisit a settled matter concerning tribal treaty fishing rights. In upholding the Court's denial of a Rule 60(b)(6) motion in Subp. 01-2, the Ninth Circuit articulated and applied these special concerns:

> Participants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties in other types of civil judgments. Similar considerations of finality loom large in [*U.S. v. Washington*], in which a detailed regime for regulating

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

> and dividing fishing rights has been created in reliance upon the framework of [*Final Decision #1*]. [S]uch a complex regime … certainly cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based.

U.S. v. Washington, 593 F. 3d 790, 800 (9th Cir. 2010) (en banc). (citations omitted). *See Arizona v. California,* 460 U.S. 605, 620, 624 (1983) (need for finality in ongoing water rights adjudication); *U.S. v. Alpine Land and Reservoir Co.*, 984 F.2d 1047, 1050 (9th Cir. 1993) (same). In Subp. 01-2 the Court upheld the denial of reopening of a decision that a tribal entity was not a treaty tribe, and so had no treaty fishing rights. The entity asserted that its federal recognition, obtained after its treaty tribe status was denied, was an extraordinary circumstance justifying reopening the judgment. The Court and a unanimous en banc Ninth Circuit disagreed. Here, where Muckleshoot proffers nothing to justify overcoming finality considerations, the result is all the more clear.

Moreover, Muckleshoot well understands the applicability of the finality principle to this subproceeding. It employed finality concerns to support its argument in Subp. 97-1 that its U&A had been specifically determined, having argued "[i]n assessing whether it is appropriate to reopen a matter decided in [Final Decision #1] the Court should be guided by the socially beneficial policies favoring finality and repose." Subp. 97-1. *Motion to Dismiss,* 1/15/98, Dkt. 46, p. 1 (JD 6). We urge the Court to consider the same finality principles in this subproceeding.

CONCLUSION

The Court does not have continuing jurisdiction over this subproceeding under Par. 25(a)(6). It has already decided, in Subp. 97-1, that Muckleshoot U&A was specifically determined. In addition, Muckleshoot claimed in that subproceeding that its U&A had been specifically determined, prevailed upon that claim, and obtained dismissal of part of the claim

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

against it on that basis. Accordingly, Muckleshoot is estopped from now arguing that its U&A was *not* specifically determined.

Even without consideration of Subp. 97-1, the Court should conclude that Muckleshoot's U&A was specifically determined. This conclusion is compelled by *Muckleshoot I* and the Court's subsequent decisions on Par. 25(a)(6). Judge Boldt's marine U&A finding in Final Decision #1, as clarified in geographic terms by the Court and the Ninth Circuit in *Muckleshoot III*, was specifically determined to include only Elliott Bay, and to exclude all other waters. There are no exceptional circumstances pled or present in this subproceeding to suggest anything incomplete or unresolved about the finding. Nor are there and exceptional circumstances for Muckleshoot's delay in filing this subproceeding.

Par. 25(a)(6) remains available for the rare case. But the law of the case has expanded and defined more clearly what has been "specifically determined," and the Court's evolution in that direction aligns its decisions more closely with the finality principles. Muckleshoot is seeking to relitigate its U&A finding, not to resolve any claim that was left unsettled. In doing so, it seeks an expansive reading of Par. 25(a)(6) that threatens to lead to relitigation of U&As whenever a tribe unearths what is described as "new" evidence. The decisions on Par. 25(a)(6) have not countenanced such an interpretation, which flies in the face of finality considerations that are so important in this case.

An imposing tapestry has been woven in *U.S. v. Washington* over the four decades and more since Final Decision #1. Interwoven in that tapestry are the warp and weft of scores, if not hundreds, of decisions of this Court; dozens of Ninth Circuit decisions; numerous agreements and consent decrees between and among the parties; countless fisheries management plans for many areas, and many fisheries, during many years, between the tribes and the state or among the tribes;

Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360-466-1134

and less formal modes of understanding and cooperation. In addition, tribal fisheries, and investments and expectations of tribal fishers, have blossomed and matured under the cloak of this tapestry. The unraveling of a single thread can and will ramify throughout the fabric in unpredictable ways and threaten the integrity of the tapestry itself.

Muckleshoot I and this Court's decisions since have prevented Par. 25(a)(6) from becoming the snag that begins the unravelling. The Court should not accept Muckleshoot's invitation to pluck that thread. Accordingly, since Par. 25(a)(6) does not provide the Court with continuing jurisdiction in this subproceeding, the subproceeding should be dismissed with prejudice.

DATED: October 13, 2017.

SWINOMISH INDIAN TRIBAL COMMUNITY
s/ James M. Jannetta
James M. Jannetta, WSBA No. 36525
Counsel for Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
Tel: 360.466.3163
Fax: 360.466.5309
Email: jjannetta@swinomish.nsn.us

s/ Emily Haley
Emily Haley, WSBA No. 38284
Counsel for Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
Tel: 360.466.3163
Fax: 360.466.5309
Email: ehaley@swinomish.nsn.us

PORT GAMBLE AND JAMESTOWN
S'KLALLAM TRIBES
s/ Lauren P. Rasmussen
Lauren P. Rasmussen, WSBA No. 33256
Law Offices of Lauren P. Rasmussen
1904 Third Avenue, Suite 1030
Seattle, WA 98101
Telephone: (206) 623-0900
Fax: (206) 623-1432
Email: lauren@rasmussen-law.com

TULALIP TRIBES
s/ Mason D. Morisset
Mason D. Morisset, WSBA No. 00273
MORISSET SCHLOSSER JOZWIAK &
SOMERVILLE
1115 Norton Building, 801 Second Avenue
Seattle, Washington 98104-1509
Tel: 206-386-5200
Fax: 206-386-7388
Email: m.morisset@msaj.com

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed this MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

s/ James M. Jannetta
James M. Jannetta
Swinomish Indian Tribal Community
11404 Moorage Way
LaConner, WA 98257

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, vs. STATE OF WASHINGTON, et al., Defendant.	No. C70-9213 Subproceeding 17-2 [PROPOSED] ORDER GRANTING THE RESPONDING TRIBES' MOTION TO DISMISS MUCKLESHOOT INDIAN TRIBE'S REQUEST FOR DETERMINATION

THIS MATTER is before the Court on Responding Tribes' Motion to Dismiss Muckleshoot Indian Tribe's Request for Determination. The Court has reviewed the motion and the materials filed for and against the motion. The Court GRANTS the Responding Tribes' Motion to Dismiss with prejudice.

IT IS SO ORDERED.

DATED this ___ of _____, 2017.

_____
Ricardo S. Martinez
United States District Judge

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
LaConner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

Presented by: SWINOMISH INDIAN TRIBAL COMMUNITY

s/ James M. Jannetta
James M. Jannetta, WSBA No. 36525
Counsel for Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
Tel: 360.466.3163
Fax: 360.466.5309
Email: jjannetta@swinomish.nsn.us

s/ Emily Haley
Emily Haley, WSBA No. 38284
Counsel for Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
Tel: 360.466.3163
Fax: 360.466.5309
Email: ehaley@swinomish.nsn.us

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed this [PROPOSED] ORDER with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

s/ James M. Jannetta
James M. Jannetta
Swinomish Indian Tribal Community
11404 Moorage Way
LaConner, WA 98257