The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. STATE OF WASHINGTON, *et al.*, Defendants.	Civ. No. C70-9213 Subproceeding No. 17-02 SUQUAMISH INDIAN TRIBE'S MOTION AND SUPPORTING MEMORANDUM TO DISMISS THE MUCKLESHOOT INDIAN TRIBE'S REQUEST FOR DETERMINATION OF ADDITIONAL USUAL AND ACCUSTOMED FISHING AREAS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED NOTE ON MOTION CALENDAR: December 15, 2017

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 7, 12(b)(1), 12(b)(6) and Local Rule 7(b),[1] the Suquamish Indian Tribe ("Suquamish") respectfully moves for an order dismissing the Muckleshoot Indian Tribe's ("Muckleshoot") Request for Determination of Additional Usual and Accustomed Fishing Areas ("RFD"), Dkt. # 3 of this subproceeding 17-02.[2] Under Rule 12(b)(1), the Court lacks subject matter jurisdiction, and under Rule 12(b)(6), Muckleshoot has failed to state a claim upon which relief may be granted. While Muckleshoot has described an expansive claim to usual and accustomed fishing grounds and stations ("U&A") in the saltwater of Puget Sound, Suquamish intends to focus primarily on that portion of the claim to Washington Department of Fisheries catch reporting areas 9, 10, and 11 ("Areas 9, 10, and 11") – the exact waters that were the subject of a prior and specific determination by this Court in 1997.

Muckleshoot, in its third round of litigation regarding saltwater U&A, now seeks to again assert evidence under Paragraph 25(a)(6) of the Order Modifying Paragraph 25 of the Permanent Injunction, entered in this action on August 24, 1993, *United States v. Washington*, 18 F.Supp. 1172, 1213 (W.D. Wash. 1993), that its U&A in the saltwater of Puget Sound include Areas 9, 10, and 11. However, Judge Boldt specifically determined Muckleshoot's U&A in the first instance in 1974 as primarily freshwater and "secondarily in the saltwater of Puget Sound." *United States v. Washington*, 384 F.Supp. 312, 367 (W.D. Wash. 1974) ("*Decision I*"). Judge Boldt's intent was fully examined relative to Areas 9, 10, 10A, and 11 in subproceeding 97-1 conducted under Paragraph 25(a)(1). Muckleshoot's newest and current attempt to re-litigate its U&A in the saltwater of Puget Sound is barred by collateral

[1] Under amended ¶ 25(b)(5) of Judge Boldt's Injunction, motion practice in subproceedings initiated under ¶ 25 is conducted in accordance with the Federal Rules of Civil Procedure and the Court's general and civil rules. *United States v. Washington*, 18 F.Supp.3d 1172, 1214–1215 (W.D. Wash. 1993).

[2] Muckleshoot's RFD is Dkt. # 21521 of *United States v. Washington*, Case No. 2:70-cv-09213-RSM. This Motion to Dismiss contains the docket numbers of the subproceeding for ease of reference.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

estoppel and should be dismissed by this Court without further burden on the Court and other parties to this matter. Principles of finality and the law of the case further support dismissal of Muckleshoot's RFD. Dismissal is especially warranted here, given that Muckleshoot has made no factual or legal showing to demonstrate that Rule 60(b) standards can be met to justify setting aside the prior Judgments and proceeding to trial. Suquamish reserves all non-threshold questions regarding the merits for a separate stage of the proceedings if this Court does not dismiss the RFD.

II. SUMMARY OF ARGUMENT

Muckleshoot seeks to enlarge its U&A to "include additional locations in the saltwater of Puget Sound not determined in earlier proceedings in this action." Dkt. # 3 at p. 1, ¶ 1. Muckleshoot contends that this Court has continuing jurisdiction under Paragraph 25(a)(6) of the Order Modifying Paragraph 25 of the Permanent Injunction, entered in this action on August 24, 1993. *United States v. Washington*, 18 F.Supp. at 1213. That subparagraph provides that a party "may invoke the continuing jurisdiction of this court in order to determine: . . . (6) [t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I."[3] The jurisdictional pathway of that subparagraph is not open here. There are two reasons – the first is that this Court has already established that Muckleshoot's U&A in the saltwater of Puget Sound was "specifically determined" in 1974 in Finding of Fact ("FOF") No. 76 of *Decision I,* although there was some ambiguity as to what was intended by that phrase. *See Decision I,* 384 F.Supp. at 367; Order Granting Respondent's Motion to Dismiss in Part, Granting Petitioners' Motion to Strike in Part and Scheduling Pretrial Conference, Dkt. # 81 in subproceeding 97-1 at p. 10 (August 5, 1998) ("1998 Order"). Second, and with respect to Areas 9, 10, and 11, this Court made another specific determination in 1997 that those areas are not the U&A of the

[3] Prior to the Court's modification of Paragraph 25 in 1993, subparagraph 25(a)(6) was previously referred to as subparagraph f. To avoid confusion, this Motion to Dismiss refers to 25(a)(6) throughout.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Muckleshoot Tribe. *See* subproceeding 97-1, *Puyallup Indian Tribe v. Muckleshoot Indian Tribe*, 19 F.Supp.3d 1252, 1311–1312 (W.D. Wash. 1999) ("*Puyallup*"). That decision was affirmed by the Ninth Circuit. *See Puyallup Indian Tribe v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("*Puyallup*"). The saltwater U&A of the Muckleshoot has therefore been specifically determined in two prior proceedings and those proceedings confirmed that Areas 9, 10, and 11 are not part of Muckleshoot's U&A.

The Ninth Circuit, in another *United States v. Washington* subproceeding, subproceeding 86-5 involving the Lummi Indian Tribe's U&A, expressly rejected a similar effort to base jurisdiction on subparagraph 25(a)(6) where U&A had already been specifically determined by Judge Boldt, albeit with ambiguous language. *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) ("*Muckleshoot*"). Based on the law of the case, jurisdiction over Muckleshoot's RFD must be based on 25(a)(1) because Muckleshoot's claims involve U&A in the saltwater of Puget Sound, and that U&A was specifically determined by Judge Boldt in FOF No. 76.[4]

Apparently understanding the jurisdictional lane in which it must drive, the Court, Muckleshoot, and several Tribes including the Suquamish Tribe previously investigated the same issues that are now before the Court in Muckleshoot's RFD in a 25(a)(1) proceeding. In that previous proceeding, subproceeding 97-1, this Court found Muckleshoot's claims to Areas 9, 10, and 11 to be baseless. This Court has thus already determined that Muckleshoot does not have any U&A in Areas 9, 10, and 11, a decision which the Ninth Circuit affirmed. *See Puyallup*, 235 F.3d at 438. Muckleshoot is collaterally estopped from relitigating its U&A in Areas 9, 10, and 11, based on the judgment in subproceeding 97-1.

Given the prior specific determination of Judge Boldt and this Court in 1997, Muckleshoot cannot now steer the Court into 25(a)(6) and introduce alleged new evidence, not

[4] Prior to the Court's modification of Paragraph 25 in 1993, subparagraph 25(a)(1) was previously referred to as subparagraph a. To avoid confusion, this Motion to Dismiss refers to 25(a)(1) throughout.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

before the Court in *Decision I*, of its treaty fishing in Areas 9, 10, and 11 in Puget Sound. Furthermore, as Muckleshoot's RFD acknowledges, at least some of the evidence it seeks to introduce is not new, but was instead presented (and rejected) in prior proceedings. *See e.g.*, RFD, Dkt. # 3 at p. 1 ("This request is based, *in large part,* on evidence … that was not before the Court [in *Decision I*]") (emphasis added); at p. 5–6 ("Exhibit A to the Complaint … is a summary that includes some representative samples of evidence, *most of which was not presented to the Court* [in *Decision I*]"). But this promise of new evidence many years later presents more challenge than opportunity to Muckleshoot, as it has made no attempt to argue away the obstacle of Fed. R. Civ. P. 60(b), and further, an investigation of what evidence Muckleshoot has chosen to disclose at its Meet and Confer demonstrates that there is in fact nothing new about any of the sources it would rely upon.

Accordingly, and for the reasons more fully described below, this case should be dismissed because: (1) the Court lacks jurisdiction under 25(a)(6) to determine Muckleshoot's U&A in the saltwater of Puget Sound; (2) Muckleshoot has failed to state a claim upon which relief could be granted; and (3) Muckleshoot is collaterally estopped from relitigating its U&A in Areas 9, 10, and 11; and (4) Muckleshoot has not presented any legal theory for its implied claim that 25(a)(6) renders Fed. R. Civ. P. 60(b) inapplicable. Alternatively, Suquamish is entitled to summary judgment.[5]

III. RELIEF SOUGHT

Suquamish seeks dismissal of Muckleshoot's RFD, Dkt. # 3, with prejudice.

IV. STANDARD FOR MOTION TO DISMISS

Fed. R. Civ. P. 12(b)(1) provides for dismissal of an action for "lack of subject matter jurisdiction." Plaintiffs have the burden of establishing jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

[5] Under Fed. R. Civ. P. 12(b)(6), a motion to dismiss should be converted to one for summary judgment under Fed. R. Civ. P. 56 if extrinsic materials, outside those attached to the Complaint, are considered. Although the law of the case should not be considered "extrinsic" material, this motion pleads summary judgment in the alternative.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Fed. R. Civ. P. 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." For a 12(b)(6) motion, "all well-pleaded allegations of material fact [are accepted as true] and construe[d] in the light most favorable to the non-moving party." *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012). A complaint must state "evidentiary facts which, if true, will prove [the claim]," *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008), otherwise it will be dismissed. *See Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006). And, if there is no "cognizable legal theory" to a plaintiff's claim, then dismissal will be granted. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984) ("Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.")

Muckleshoot is unable to establish this Court's jurisdiction under subparagraph 25(a)(6), where its U&A has already been specifically determined in *Decision I*. Muckleshoot has also failed to advance a claim upon which relief may be granted. Therefore, Suquamish's Motion to Dismiss should be granted, and Muckleshoot's RFD should be dismissed with prejudice.

V. RELEVANT FACTS

A. Muckleshoot Has Adjudicated U&A in the Saltwater of Puget Sound.

As this Court is well aware, in September, 1970, the United States, on its own behalf and as trustee for several Western Washington Indian tribes, and later joined as intervenor plaintiffs by additional Indian tribes, filed a complaint against the State of Washington seeking a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 concerning off-reservation treaty right fishing within the case area by the plaintiff tribes, and for injunctive relief to provide enforcement of those treaty fishing rights. *Decision I*, 384 F.Supp. at 327. Muckleshoot was one of the original Tribes in that litigation. *Id.* at n. 1. The case area at issue in the litigation included "that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, and includes to the American

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas." *Id.* at 328. As a preliminary matter, at the court's suggestion, all the parties to the litigation agreed that "so far as possible . . . every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in [the] case." *Id.* The parties spent "more than three years" conducting "exhaustive research in anthropology, biology, fishery management and other fields of expertise" and "made extreme efforts to find and present by witnesses and evidence as much information as possible that pertains directly or indirectly to each issue in the case." *Id.* As described by Judge Boldt in 1974:

> The ultimate objective of [*Decision I*] is to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all the citizens of the area, and still do.

Id. at 330.

Following a three-week trial, testimony of nearly 50 witnesses, 4,600 pages of trial transcript, more than 350 exhibits, and extensive briefing by all the parties, Judge Boldt conducted "an exhaustive examination of the controlling law, the briefs and oral argument of counsel" and issued 253 separate detailed Findings of Fact and 48 Conclusions of Law. *Id.* at 332, 348.

Decision I, id. at 365–367, includes several findings with respect to Muckleshoot. As relevant here, in FOF 76, Judge Boldt found that Muckleshoot had the following U&A under the Treaties of Point Elliott and Medicine Creek:

> Prior to and during treaty times the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and ***secondarily in the saltwater of Puget Sound***.

Id. at 367 (emphasis added). Muckleshoot's current RFD seeks "additional locations in the

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

saltwater of Puget Sound not determined in earlier proceedings in this action." RFD, Dkt. # 3 at p. 1, ¶ 1.

B. This Court Has Already Determined That Muckleshoot Does Not Have U&A in Areas 9, 10, and 11.

In 1997, the Puyallup Tribe filed subproceeding 97-1 seeking a determination that Muckleshoot "has not adjudicated usual and accustomed fishing grounds and stations in marine waters outside Elliott Bay." Dkt. # 1 of subproceeding 97-1.[6] Two other tribes, Suquamish and Swinomish, joined Puyallup in asking this Court to determine Muckleshoot's saltwater U&A in Puget Sound under Judge Boldt's FOF No. 76. At issue in subproceeding 97-1 was "whether Judge Boldt intended to designate a saltwater fishery for the Muckleshoot and, if so, what areas he intended 'secondarily in the saltwater of Puget Sound' to encompass." *Puyallup,* 19 F.Supp.3d at 1305. Puyallup, Swinomish and Suquamish sought a declaratory judgment from this Court that Muckleshoot's U&A does not include waters within Areas 10, 11 or waters west and north of Area 10 and an injunction preventing Muckleshoot from fishing those areas, i.e., limiting Muckleshoot's saltwater fishery to Elliott Bay. *Id.* In response, Muckleshoot argued that Judge Boldt intended the term 'Puget Sound' to include the inside marine waters from Admiralty Inlet to the Tacoma Narrows (Areas 9, 10, 10A and 11). *Id.* As framed by this Court, subproceeding 97-1 addressed three key issues:

> The parties agree that the Muckleshoot have at least some fishing rights in Elliott Bay (Area 10A). What they do not agree on is what is the extent of those rights, more particularly: 1) whether the Muckleshoot have saltwater fishing rights that extend beyond Elliott Bay; 2) if their saltwater fishing rights are constrained by the phrase 'secondarily' and 3) if their saltwater fishing rights are limited to the shoreline, or whether they include fishing on the open water.

Id. at 1307.

Following an evidentiary hearing and careful review of the evidence presented to Judge

[6] Puyallup's RFD is Document No. 16016 of *United States v. Washington,* Case No. 2:70-cv-09213-RSM. This Motion to Dismiss contains the docket numbers of the subproceeding for ease of reference.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Boldt, this Court determined that Muckleshoot's saltwater U&A "is limited to Department of Fisheries Area 10A." *Id.* at 1311. As described by this Court:

> It is clear from the documents Judge Boldt specifically cited to that the predecessors of the Muckleshoot were a primarily upriver people who may have, from time to time, descended to Elliott Bay to fish and collect shellfish there. The court finds that the evidence before Judge Boldt establishes, at a minimum, that the Muckleshoot's predecessors may have occasionally fished in the open waters of Elliott Bay near the mouth of the Duwamish and gathered shellfish on the shores of Elliott Bay. Based on this evidence, the court concludes that Judge Boldt intended to include those areas (Department of Fisheries Area 10A) in the Muckleshoot U&A. … The court finds, however, that there is no evidence in the record before Judge Boldt, nor is it persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay. … [T]here is no evidence in the record before Judge Boldt that supports a U&A beyond Elliott Bay.

Id. Accordingly, this Court enjoined Muckleshoot from fishing in Department of Fisheries Areas 9, 10, and 11. *Id.* at 1311–1312.

C. This Court Has Already Rejected Several Pieces of Evidence Muckleshoot Now Relies Upon in Exhibit A of its RFD.

In reaching its conclusion that the Muckleshoot U&A does not include Areas 9, 10, and 11 in subproceeding 97-1, this Court relied on several documents that were before Judge Boldt, including the Summary Anthropological Report of Barbara Lane, the Anthropological Report on the Traditional Fisheries of the Muckleshoot Indians by Barbara Lane, and the Report from Carroll Riley, Anthropologist. *See id.* at 1308.

This Court also considered additional, "extra-record" evidence presented by Muckleshoot: 1) Exhibits G-17(a) and G-17(e) – Indian Claims Commission ("ICC") Findings of Fact for Duwamish Tribe and Puyallup Tribe, respectively; 2) Exhibit G-27 – "The Puyallup-Nisqually" by Marion [sic] Smith;[7] 3) Exhibit PL-73 – a map overlay that was used in Judge Boldt's courtroom in *United States v. Washington;* and 4) the declaration of Richard L.

[7] There appears to be a typo in Subproceeding 97-1 and in Exhibit A to Muckleshoot's RFD, both of which refer to a "Marion" Smith as the author of *The Puyallup-Nisqually*. "Marion" Smith appears to be a reference to anthropologist "Marian" Wesley Smith.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Morrill. *Id.* The Court found that none of these additional pieces of evidence presented by Muckleshoot was "helpful or persuasive" in establishing U&A in Areas 9, 10, or 11. *Id.* at 1309.

Muckleshoot acknowledges that some of the "representative samples of evidence" in Exhibit A to the RFD have already been presented to this Court. *See* RFD at p. 5 ("most of" the evidence in the Exhibit – but not all – has not previously been considered in this Court's consideration of Muckleshoot's U&A). Indeed, several pieces of evidence described in Exhibit A have already been expressly considered, and rejected, by this Court in subproceeding 97-1. *See e.g.* Exhibit A to Muckleshoot's RFD, Dkt. # 3 at pp. 3, 5 and 8 (citing Transcript of Proceedings before the ICC in Seattle in *The Duwamish Tribe of Indians v. U.S.*, Docket No. 109 August 12, & 13, 1953); at p. 4 (again citing the ICC proceedings); at p. 5 (citing ICC Docket Nos. 98 and 125); at pp. 6, 8 and 10 (citing "The Puyallup Nisqually" by Marion [sic] Smith).

More specifically, Muckleshoot again attempts to rely on the ICC proceedings as evidence of its purported U&A. But as this Court has already acknowledged, these "ICC documents are not helpful" because "Judge Boldt himself determined these documents should be given very little weight in determining U&As because the focus of ICC proceedings was entirely different." *Puyallup,* 19 F.Supp.3d at 1309. As stated by Boldt, and quoted by this Court in subproceeding 97-1:

> Proceedings before the . . . Indian Claims Commission . . . dealt with compensation claims for tribal lands taken by the United States, and in no way dealt with asserted Indian treaty fishing rights. Certain historical and anthropological evidence presented for consideration . . . in this case, which evidence was not rebutted by the defendant State of Washington, was not available to the Indian Claims Commission.

United States v. Washington, 459 F.Supp. 1020, 1042 (W.D. Wash. 1978), quoted at *Puyallup,* 19 F.Supp.3d at 1309. And, as this Court noted in subproceeding 97-1:

> Furthermore, the ICC document in the Duwamish proceeding does

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

> not make any reference to other tribes besides the Duwamish and the court finds that it does not support the Muckleshoot's arguments at all.

The Ninth Circuit affirmed that the evidence from the ICC proceedings "is insufficient" to establish that Muckleshoot had U&A in Areas 9, 10, and 11. *See Puyallup*, 235 F.3d at 437–438. Notwithstanding these previous rejections of the ICC proceedings as a basis for asserting U&A, Muckleshoot again relies upon them throughout Exhibit A to its RFD.

Similarly, this Court has already determined that Marian Smith's book, *The Puyallup-Nisqually*, does not help the Muckleshoot establish U&A in Areas 9, 10, or 11. *See Puyallup*, 19 F.Supp.3d at 1309. Again, as with the ICC evidence, the Ninth Circuit affirmed that the evidence from Marian Smith "is also insufficient to establish a saltwater U&A beyond Elliott Bay." *Puyallup*, 235 F.3d at 438.

D. Muckleshoot Has Previously Argued, and This Court Agreed, That 25(a)(6) Cannot Be the Basis to Determine Muckleshoot's U&A in the Areas Within the Saltwater of Puget Sound Beyond Areas 9, 10, and 11.

In subproceeding 97-1, Puyallup, Swinomish and Suquamish had also challenged Muckleshoot's U&A in the areas beyond Areas 9, 10, and 11. However, Muckleshoot successfully argued that they had no present intention of fishing in areas *beyond* Areas 9, 10, and 11, and that this Court therefore lacked jurisdiction with respect to those areas under either subparagraph 25(a)(1) or 25(a)(6). *See Puyallup*, 19 F.Supp.3d at 1307. Muckleshoot argued that this Court "could not make a decision under [25(a)(1)] about whether their actions in areas beyond Areas 9, 10, and 11, are 'in conformity with' the injunction because they are not currently fishing in those areas nor do they have a present stated intention to fish in those areas." *Id.* This court agreed that "since the Muckleshoot do not intend to fish in those areas, the petitioners' claim does not require a determination as to whether 'actions, intended or effected by any party' are in conformity with the permanent injunction with respect to those areas." *Id.*

Particularly significant for Muckleshoot's current RFD, Muckleshoot also successfully

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

argued in subproceeding 97-1 that this Court "cannot make a supplemental finding under [25(a)(**6**)] under *Muckleshoot* to determine their fishing rights in areas beyond Areas 9, 10, and 11." 1998 Order, Dkt. # 81 at p. 9. As stated in the Court's 1998 Order:

> The Muckleshoot argue that the court cannot make a supplemental finding under [subparagraph 25(a)(6)] under *Muckleshoot* to determine their fishing rights in areas beyond Areas 9, 10, and 11. The court agrees that *Muckleshoot* forecloses this approach. In *Muckleshoot,* as an alternative holding, this court made a supplemental finding of fact under [subparagraph 25(a)(6)], which reserved continuing jurisdiction to determine "the location of a tribe's usual and accustomed fishing grounds not specifically determined" by Judge Boldt. The Ninth Circuit ruled that this alternative holding could not be upheld. It held that this court did not have jurisdiction under [subparagraph 25(a)(6)] to make a supplemental finding to determine the location of Lummi's U&A because Judge Boldt had already made that determination, albeit using an ambiguous description. And it remanded with specific instructions to proceed under subparagraph [25(a)(1)], which reserves continuing jurisdiction to determine "whether or not the actions . . . by any party . . . are in conformity with" the injunction in *United States v. Washington.*
>
> Here, as in *Muckleshoot,* 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. Subparagraph [25(a)(6)] "does not authorize the court to clarify the 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." *Muckleshoot,* 141 F.3d at 1359. ***Issuing a supplemental finding under subparagraph f 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.***

Dkt. # 81 at pp. 9–10 (emphasis added).

This Court granted Muckleshoot's motion to dismiss with respect to areas beyond Areas 9, 10, and 11, and "reserve[d] the question of whether those areas are part of Muckleshoot's U&A" until such time as Muckleshoot "manifested an intent to fish in those areas." *Id.* at p. 11. The Court made clear, however, that it was reserving jurisdiction to consider Muckleshoot's U&A in those beyond waters under 25(a)(1), not 25(a)(6).

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

VI. ARGUMENT

A. This Court Lacks Jurisdiction Under Paragraph 25(a)(6) to Determine Additional U&A for Muckleshoot in the Saltwater of Puget Sound Because That U&A Was Already Specifically Determined in *Decision I.*

This Court has previously addressed the limits of its jurisdiction under Paragraph 25(a)(6). Under the law of the case, 25(a)(6) does not provide a basis for jurisdiction for Muckleshoot to assert claims for additional U&A in the saltwater of Puget Sound based on allegedly new evidence. Muckleshoot's U&A "in the saltwater of Puget Sound" have already been "specifically determined" in FOF No. 76 of *Decision I*, 384 F.Supp. at 367. They have been further defined and limited in subproceeding 97-1. Muckleshoot cannot now avoid the binding results of prior proceedings concerning Muckleshoot U&A "in the saltwater of Puget Sound" by simply asserting jurisdiction under a different subsection of paragraph 25.

While subproceeding 97-1 was pending, the Ninth Circuit issued its decision in *Muckleshoot*, 141 F.3d at 1360, which addressed the limitations of 25(a)(6) as a basis for jurisdiction where a Tribe's U&A was already specifically determined in *Boldt I*. The district court in *Muckleshoot* was faced with interpreting what Judge Boldt meant by his use of the phrase "present environs of Seattle" in describing Lummi's U&A in FOF 46. On appeal, the Ninth Circuit instructed that the case had to proceed under 25(a)(1), not 25(a)(6):

> Decision I acknowledged that 'it would be impossible to compile a complete inventory of any tribe's usual and accustomed fishing grounds and stations.' *Id.* at 353. At the same time, subparagraph f of Paragraph 25 [since renumbered to 25(a)(6)] reserved continuing jurisdiction to determine 'the location of a tribe's usual and accustomed fishing grounds not specifically determined in [Decision I].' *Id.* at 419. Judge Boldt, however, did 'specifically determine[ ]' the location of Lummi's usual and accustomed fishing grounds, albeit using a description that has turned out to be ambiguous. ***Subparagraph f [now 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.*** … We instruct the district court to proceed pursuant to Paragraph 25, subparagraph a [since renumbered to 25(a)(1)] to resolve this dispute.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Muckleshoot, 141 F.3d at 1359.

Applying the holding of *Muckleshoot* to the U&A at issue in subproceeding 97-1, this Court likewise determined that jurisdiction must be based in 25(a)(1), not 25(a)(6). The Court found that Boldt had already specifically determined Muckleshoot's U&A in FOF 76. 1998 Order, Dkt. # 81 at p. 2, and that the dispute was over "what areas Judge Boldt intended 'Puget Sound' to encompass." *Id.* The Court started by determining, as a threshold issue, that the phrase "secondarily in the saltwater of Puget Sound" in FOF 76 is ambiguous because it is "susceptible to more than one interpretation," both in terms of which waters are included in Puget Sound and in terms of what was meant by "secondarily." *Id.* at pp. 4–6.

The three Tribes in subproceeding 97-1 had contended that "Muckleshoot's predecessors were upriver Indians with fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott's Bay." *Id.* at pp. 5–6. The three Tribes further argued that the record "contains no evidence that [Muckleshoot] fished in the open marine waters beyond Elliott Bay." *Id.* at p. 6. In contrast, Muckleshoot argued that "'Puget Sound' encompasses the entire inside marine waters from the Canadian border to Olympia." *Id.* With respect to the term "secondarily," the three Tribes argued that "Judge Boldt may have used the term 'secondarily' to indicate that the Muckleshoot made more restricted use of saltwater fisheries than their river fisheries listed in FOF 76." *Id.* And, if so, the Court noted, "it is not clear if the restriction is one of frequency, species, amount or geography." *Id.*

After determining that FOF 76 is ambiguous, this Court then had to determine what evidence would be admissible in order to resolve the ambiguity and thereby determine Muckleshoot's U&A "secondarily in the saltwater of Puget Sound." Relying on *Muckleshoot*, this Court concluded that "[i]f a 'judgment is ambiguous or fails to express the rulings with clarity, the entire record before the issuing court and the findings of fact may be referenced in determining what was decided.'" *Id.* at p. 5, quoting *Muckleshoot*, 141 F.3d at 1359.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Significantly, however, the Court also found that it must construe the judgment, i.e., FOF 76, "'to give effect to the intention of the issuing court.'" *Id.*, quoting *Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988). This Court, again relying upon the Ninth Circuit's decision in *Muckleshoot*, determined that it could consider extra record evidence besides what was available to Judge Boldt when he made his finding, but only "as long as it is relevant to determining Judge Boldt's intention," i.e., what he meant when he found the Muckleshoot had U&A "secondarily in the saltwater of Puget Sound." *Id.* at pp. 7–8; *Puyallup*, 19 F.Supp.3d at 1307.

The Court then ordered that it would "hold an evidentiary hearing for the purpose of determining whether Judge Boldt intended to include Areas 9, 10, and 11, in his definition of Puget Sound." 1998 Order, Dkt. # 81, at p. 12. The Court made clear that it would "consider new evidence of [Boldt's] intent," and, more specifically, "whether Judge Boldt intended to restrict Muckleshoot's U&A in the Puget Sound by finding that they had usual and accustomed fishing areas primarily upriver and only 'secondarily in the saltwaters [sic] of Puget Sound.' And, if he did intend to so restrict their fishing rights, how (i.e. geographically, temporally or otherwise)." *Id.*

Following that evidentiary hearing, this Court issued another Order, ruling that Muckleshoot's U&A is limited to Area 10A, and does not include Areas 9, 10, and 11. *Puyallup*, 19 F.Supp.3d at 1311–1312. As described more fully above at Section V.C. of this Motion to Dismiss, the Court allowed Muckleshoot to present extra record evidence as to its U&A, much of which appears to overlap with what Muckleshoot is attempting to present to this Court yet again with its latest RFD.

This Court's Order in subproceeding 97-1 described several "undisputed facts," including that:

> At treaty time, the Muckleshoot's predecessors were upriver Indians with fisheries primarily in the Duwamish and upper Puyallup drainage systems. The Muckleshoot lived on the

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

> Duwamish and upper Puyallup drainage systems; they did not live directly on the bays and lower reaches of the rivers. There is evidence in the record before Judge Boldt that the Muckleshoot descended the rivers to fish in Elliott Bay and used the beaches of Puget Sound to gather shellfish supplies. At issue is what, if any, Muckleshoot saltwater U&A Judge Boldt intended to designate in FOF 76.

Puyallup, 19 F.Supp.3d at 1307. Based on the evidence presented by the parties, which was considerable, this Court concluded:

> It is clear from the documents Judge Boldt specifically cited to that the predecessors of the Muckleshoot were a primarily upriver people who may have, from time to time, descended to Elliott Bay to fish and collect shellfish there. The court finds that the evidence before Judge Boldt establishes, at a minimum, that the Muckleshoot's predecessors may have occasionally fished in the open waters of Elliott Bay near the mouth of the Duwamish and gathered shellfish on the shores of Elliott Bay. Based on this evidence, the court concludes that Judge Boldt intended to include those areas (Department of Fisheries Area 10A) in the Muckleshoot U&A. … The court finds, however, that there is no evidence in the record before Judge Boldt, nor is it persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay. … [T]here is no evidence in the record before Judge Boldt that supports a U&A beyond Elliott Bay.

Id. at 1311.

Muckleshoot appealed to the Ninth Circuit, which agreed "that the Muckleshoot's saltwater usual and accustomed fishing area, as found by Judge Boldt, was limited to Elliott Bay," and therefore affirmed the judgment of the district court. *Puyallup,* 235 F.3d at 431. As described more fully in Section V.C. of this Motion to Dismiss, above, the Ninth Circuit again carefully considered the evidence presented by Muckleshoot in support of its claimed U&A in Areas 9, 10, and 11, much of which overlaps with the evidence set forth in Exhibit A to Muckleshoot's current RFD. *See Puyallup,* 235 F.3d at 434–438 (describing the evidence presented by Muckleshoot and concluding that it was insufficient to establish a saltwater U&A beyond Elliott Bay).

Thus, under the law of the case, a proceeding to determine Muckleshoot's U&A in the

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

area described by Boldt as "the saltwater of Puget Sound" must be brought under paragraph 25(a)(1), not paragraph 25(a)(6). That is what exactly what was done in 1997 and what Muckleshoot wants to set aside and redo here. The evidence Muckleshoot now seeks to present is proffered to establish "additional locations in the saltwater of Puget Sound not determined in earlier proceedings in this action." RFD, Dkt. # 3, at p. 1, ¶ 1. That is inconsistent with the law of the case set forth *Muckleshoot* and subproceeding 97-1 that, although the court "can consider evidence besides evidence before Judge Boldt when he made his finding . . . [the court] is foreclosed from imputing someone else's understanding of a phrase to Judge Boldt." *Puyallup*, 19 F.Supp. at 1306. The evidence Muckleshoot describes in Exhibit A is not "relevant to determining Judge Boldt's intention" and therefore is inadmissible under *Muckleshoot* and *Puyallup*. As this Court already held in subproceeding 97-1:

> Issuing a supplemental finding under [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*.

1998 Order, Dkt. # 81 at p. 10.

In subproceeding 97-1, this Court reserved jurisdiction to consider areas beyond Areas 9, 10, and 11 (the "beyond waters") but made clear it was doing so under 25(a)(1), and not 25(a)(6). 1998 Order, Dkt. # 81 at pp. 8–9; *Puyallup*, 19 F.Supp.3d at 1307. As to any of those "beyond areas" in the saltwater of Puget Sound, this Court has already determined that it would make a determination as to Muckleshoot's U&A pursuant to its injunctive powers under 25(a)(1) if and when Muckleshoot indicated an intent to fish there. 1998 Order, Dkt. # 81 at pp. 9–11. Any such proceeding, however, would be limited to presenting evidence that is relevant to determining Judge Boldt's intention when he specifically determined that Muckleshoot has U&A "secondarily in the saltwater of Puget Sound" and cannot reach the additional evidence that Muckleshoot now seeks to introduce. *See Muckleshoot,* 141 F.3d at 1359–60; *Puyallup,* 19 F.Supp. 1306–07; 1998 Order, Dkt. # 81 at pp. 6–8.

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

B. Muckleshoot is Collaterally Estopped from Relitigating its Previously-Adjudicated U&A in Areas 9, 10, and 11.

Collateral estoppel, also known as issue preclusion, "bars 'successive litigation' of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell,* 553 U.S. 880, 892 (2008), quoting *New Hampshire v. Maine,* 532 U.S. 742, 748–49 (2001).

Muckleshoot's U&A in Areas 9, 10, and 11 has been "actually litigated and resolved" by this Court, and a prior judgment has been issued that establishes that Muckleshoot does not have U&A in Areas 9, 10, and 11. *Puyallup,* 19 F.Supp.3d at 1311–12. That prior judgment has been affirmed by the Ninth Circuit, which concluded that "Muckleshoot's ancestors did not engage in U&A saltwater fishing beyond Elliott Bay." *Puyallup,* 235 F.3d at 438.

Muckleshoot seeks now to relitigate its U&A in the saltwater of Puget Sound, including Areas 9, 10, and 11. Muckleshoot's effort is barred by collateral estoppel. Moreover, previous efforts by tribes to relitigate prior orders have been strongly disfavored in the *United States v. Washington* proceedings:

> Similar considerations of finality loom especially large in this case, in which a detailed regime for regulating and dividing fishing rights has been created in reliance on the framework of *Washington I.* The district court has twice made compilations of substantive orders entered in the wake of *Washington I. See United States v. Washington,* 459 F. Supp. 1020 (W.D. Wash. 1978); *United States v. Washington*, 626 F. Supp. 1405 (W.D. Wash. 1985). By 1985, seventy-two substantive orders had been entered. Although such a complex regime does not preclude a new entrant who presents a new case for recognition of treaty rights, ***it certainly cautions against relitigating rights that were established or denied in decision upon which many subsequent actions have been based.***

United States v. Washington, 593 F.3d 790, 799–800 (9th Cir. 2010) (emphasis added).

In Muckleshoot's own words from subproceeding 97-1:

> The demands of *United States v. Washington* place a considerable burden on judicial resources. While the burden is generally well justified, the parties have no license to add to it by treating final rulings as fair game for relitigation[.] . . .

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

Muckleshoot's Reply in Support of Motion to Dismiss, Dkt. # 69 at p. 3 (February 18, 1998).

C. Muckleshoot Fails to Address the Limits of Rule 60(b) in its Complaint.

In subproceeding 97-1 this Court did an exhaustive review of the record before Judge Boldt and determined that when he made FOF 76, there was nothing therein to support the proposition that he intended Muckleshoot U&A in Areas 9, 10, and 11 in his "secondarily in the saltwater of Puget Sound" description. *See Puyallup,* 19 F.Supp.3d at 1311–12, *aff'd,* 235 F.3d at 438. Prompted by Muckleshoot's appeal, the Ninth Circuit did its own comprehensive review of the Boldt record and affirmed the Judgment of the District Court, excluding Areas 9, 10, and 11. Seventeen years after the Ninth Circuit rejected the Muckleshoot claim of U&A in the open waters of Puget Sound that comprise Areas 9, 10, and 11, Muckleshoot seeks to reopen and set aside the District Court Judgement regarding the scope of its saltwater U&A (limited to catch reporting area 10A – inside Elliott Bay) in pursuit of a contrary determination by this court that Areas 9, 10, and 11 (and others) are in fact part of its U&A.

If permitted, Muckleshoot will recycle evidence previously before the courts regarding its claims to Areas 9, 10, and 11 already, and add what it asserts is new evidence not previously presented or considered. We respectfully submit that Muckleshoot owes this Court, Suquamish, and the many other Tribes that have been forced to answer the bell for round three of this litigation regarding these precise saltwater areas (9, 10, and 11) a convincing explanation as to why Fed. R. Civ. P. 60(b) does not provide respite. Fed. R. Civ. P. 60(b) provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding.
>
> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

To the extent that Muckleshoot's Request for Determination hints at a recognition of the limits of Rule 60(b), its promise of new evidence suggests an attempt to invoke 60(b)(2). However, Muckleshoot has provided nothing in its Exhibit A to the RFD that is newly discovered evidence that, *without reasonable diligence*, could not have been previously discovered. In fact, the proffer of evidence that is Muckleshoot Exhibit A is a list of documents and materials that have been publicly available in most cases for decades. The Declaration of Dr. Georgio Curti, submitted with this memorandum, includes a report that analyzed of each of the sources of "evidence" referenced in Exhibit A attached to the Muckleshoot Request for Determination. Dr. Curti explains all the sources referenced in the Muckleshoot Exhibit have been available in venues accessible to Muckleshoot for many years.

Suquamish understands that Muckleshoot has chosen not to provide a full list of what it characterizes as pieces of new evidence that it believes supports its renewed claim to U&A in Areas 9, 10, and 11 now (or during the Meet and Confer proceedings) as a matter of litigation strategy. That said, Suquamish cannot accept that Muckleshoot's tactic of metering out its alleged new or additional evidence to maintain the element of surprise at trial completely disables the application of Rule 60(b). While Muckleshoot argues that it is simply seeking to invoke the jurisdiction of this court under Paragraph 25(a)(6) of the Permanent Injunction, that fact is that it is seeking relief from the Judgement of the Court rendered in 1997 that it does not have U&A in Areas 9, 10, and 11. Part and parcel of its request to set-aside the specific determination of U&A and the Judgement previously rendered by this Court for Areas 9, 10,

OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
(360) 394-8501

and 11, is Muckleshoot's responsibility to convince this Court that Rule 60(b) is rendered a nullity when, given the case history, it simply pleads a right to its jurisdiction under Paragraph 25(a)(6). Muckleshoot has failed to grapple with Rule 60(b) directly in any way, and to the extent that it gives it a nod at all, it has failed to offer any evidence that could not have been obtained and presented in the preceding 17 years.

VII. CONCLUSION

Basic finality principles, preclusive doctrines, and the specific law of this case foreclose this effort by Muckleshoot to expand its previously-adjudicated U&A in the saltwater of Puget Sound by attempting to introduce additional evidence that was not before Judge Boldt in the original proceedings when he specifically determined Muckleshoot's U&A in the saltwater of Puget Sound and/or has already been expressly rejected by this Court. The RFD should be dismissed with prejudice.

DATED this 13th day of October, 2017.

Respectfully submitted,

Attorneys for the Suquamish Indian Tribe

/s/ *James Rittenhouse Bellis*
James Rittenhouse Bellis, WSBA #29226
OFFICE OF SUQUAMISH TRIBAL ATTORNEY
P.O. Box 498
Suquamish, Washington 98392-0498
Phone: (360) 394-8501
rbellis@suquamish.nsn.us

/s/ *John W. Ogan*
John W. Ogan, WSBA #24288
LAW OFFICE OF JOHN W. OGAN
P.O. Box 1192
Sisters, Oregon 97759
Phone: (541) 410-4766
Fax: (541) 383-3073
ogan@johnw@gmail.com
john.ogan@jwoganlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, 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 for electronic service with the CM/ECF system.

SIGNED this 13th day of October, 2017.

s/ John W. Ogan
John W. Ogan, WSBA #24288
LAW OFFICE OF JOHN W. OGAN
P.O. Box 1192
Sisters, Oregon 97759
Phone: (541) 410-4766
Fax: (541) 383-3073
ogan@johnw@gmail.com
john.ogan@jwoganlaw.com