HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF WASHINGTON, Defendant.	CASE NO. C70-9213 Sub. No. 2:17-sp-00002-RSM MUCKLESHOOT TRIBE'S OPPOSITION TO MOTIONS TO DISMISS **ORAL ARGUMENT REQUESTED**

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"What the Court stated thirty years ago holds true today, so it cannot be said there is a substantial ground for a difference of opinion."[1]

I. INTRODUCTION

In its original 1974 decision, this Court found that the Muckleshoot Tribe had usual and accustomed fishing grounds in a number of specifically identified freshwater river and lake systems, and also at places located ". . . secondarily in the saltwater of Puget Sound." *United States v. Washington*, 384 F. Supp. 312, 367 (W.D. Wash. 1974) (Finding of Fact 76). For over twenty years thereafter, the Muckleshoot Tribe routinely fished throughout Puget Sound. The Tribe's right to do so was recognized in a number of fisheries management agreements between Muckleshoot and other tribes and with the State of Washington; several of these agreements were approved by the Court and even incorporated into Court orders. But after a set of fishing disputes arose in the late 1990's, three tribes (the Puyallup Tribe, the Suquamish Tribe and the Swinomish Indian Community) filed a request for determination under Paragraph 25(a)(1), asking the Court to decide if Judge Boldt intended that only inner Elliott Bay was determined to be part of the Muckleshoot Tribe's usual and accustomed saltwater fishing area. Dkt. 16016, 16129.[2] The three Tribes characterized the relief sought in that proceeding (Subproceeding 97-1) as follows:

> What Movants have requested is only a narrow finding that Muckleshoot has not yet established U&A beyond Elliott Bay, and that Muckleshoot be enjoined from fishing in areas beyond Elliott Bay unless and until it does establish additional U&A.

Reply Memorandum of Puyallup, Suquamish and Swinomish Tribes in Support of Motion to Strike, Dkt. 16421 at 3. The Court ultimately held that the Muckleshoot Tribe's saltwater area as determined in the original trial only included inner Elliott Bay. Thus, the Court ruled that

[1] *U.S. v. Washington*, 20 F. Supp. 3d 1054, 1058 (W.D. Wash. 2013).

[2] Citations to the record in this subproceeding are to the subproceeding docket numbers ("SPDkt."). Citations to the record in other subproceedings are to the main docket ("Dkt."). For the convenience of the Court and the parties, a declaration attaching working copies of the record outside of this subproceeding is being filed with this memorandum.

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when Judge Boldt used the term "the saltwater of Puget Sound" in his findings regarding the Muckleshoot Tribe, he actually meant "inner Elliott Bay."

The Muckleshoot Tribe has now filed this subproceeding to establish additional usual and accustomed saltwater fishing areas, beyond those previously determined by this Court. The Swinomish and Suquamish Tribes (tribes that brought Subproceeding 97-1), joined by the Puyallup Tribe (also a moving tribe in Subproceeding 97-1) and four other tribes, have filed two motions to dismiss this subproceeding. The first motion (SPDkt. 25) was filed by the Swinomish Indian Tribal Community, the Port Gamble and Jamestown S'Klallam Tribes and the Tulalip Tribes (hereinafter "Swinomish *et.al.*"), and seeks to dismiss Muckleshoot's Request for Determination of Additional Usual and Accustomed Fishing Areas (SPDkt. 3) pursuant to Fed.R.Civ.P. 12(b)(1), on the ground that the Court lacks subject matter jurisdiction under Paragraph 25(a)(6)[3] of the 1974 Permanent Injunction, as amended. The second motion (SPDkt. 27) was filed by the Suquamish Indian Tribe and seeks dismissal, claiming that the Court is without continuing jurisdiction under Paragraph 25(a)(6) and that Muckleshoot has failed to state a claim upon which relief can be granted.[4] While the two motions differ in their emphasis, both motions ultimately rest on the assertion that Muckleshoot has had two previous opportunities to establish the full extent of its marine usual and accustomed treaty time fishing grounds and stations, and that the Court "specifically determined" these areas.

[3] In 1974, what is now designated as Paragraph 25(a)(6) of the Permanent Injunction was designated as Paragraph 25(f). Similarly, Paragraph 25(a)(1) of the current Permanent Injunction was originally designated as Paragraph 25(a). The Court amended Paragraph 25 of the Permanent Injunction to add certain procedural requirements to the exercise of the Court's continuing jurisdiction, and also renumbered the provisions delineating the scope of the Court's continuing jurisdiction. These changes did not change the scope of continuing jurisdiction reserved by Judge Boldt under the provisions of Paragraph 25(a) or 25(f). *Compare* 18 F. Supp. 1213, 1213 (W.D. Wash. 1993) *with* 384 F. Supp. 312, 419 (W.D. Wash. 1974). For consistency, this response uses current nomenclature—Paragraph 25(f) is referenced in this response by its current designation Paragraph 25(a)(6), and Paragraph 25(a) is referenced as Paragraph 25(a)(1), except where the reference is set forth in a quotation.

[4] The Squaxin Island and Puyallup Tribes have each joined in the motions to dismiss. SPDkt. 28 & 29. The Swinomish, Port Gamble, Jamestown, Tulalip, and Suquamish Tribes, together with Puyallup and Squaxin Island, are collectively referred to herein as the Moving Tribes.

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In fact, Muckleshoot has never had a full and fair opportunity in any prior proceeding to prove that the saltwater areas at issue here are part of the Tribe's usual and accustomed fishing areas. In the first trial, Judge Boldt stated specifically that "some, but by no means all" of the fishing places for each tribe were determined. *United States v. Washington*, 384 F. Supp. 312, 333 (W.D. Wash. 1974). Judge Boldt subsequently explained that that "all who participated" in the original trial "clearly understood" that "further places that couldn't be identified" as U&A places in the original trial "should be included . . . when evidence sufficient to sustain that showing was presented":

> [A]ll who participated in the [original] trial…clearly understood that further places that couldn't be identified as usual and accustomed places by any particular tribe or tribe should be included as and when evidence sufficient to sustain that showing was presented.

Transcript of Proceedings Sept. 10, 1975, Dkt 1769 at 79-80. Judge Boldt further noted that, due to the short time available for the original trial and the number of issues presented, it was "impossible" for the parties and the Court to examine the entirety of the Tribes' U&A areas, and so "any tribe" could have those areas "identified previously extended or further restricted":

> **It is open to any tribe to seek to have the areas identified previously in the main decision extended or further restricted**, because there was not the time nor the necessity during the trial to try to identify all of the hundreds of specific places in this area. It would have been impossible under the trial conditions which involved so many pressing urgent issues. . . .
>
> To my mind **there is nothing to prevent the Puyallups or any other tribe from applying for extension of the limits previously provided** in United States v. Washington...

Id. at 80-81 (emphasis added). These statements by Judge Boldt are the best evidence of the meaning of the Injunction he had entered a year earlier, allowing "any" party to "invoke the continuing jurisdiction of this court" to determine "the location of any of a tribe's usual and

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accustomed fishing grounds not specifically determined by Final Decision #1."[5] Paragraph 25(a)(6).

Importantly, Muckleshoot was later precluded from proving the extent of its saltwater fishing locations in Subproceeding 97-1. In that matter, Muckleshoot sought to introduce evidence that would support additional U&A places in Puget Sound beyond those Judge Rothstein found to have been established in Finding of Fact 76. Three of the Moving Tribes objected, assuring the Court (and Muckleshoot) that Muckleshoot would have the chance to present that evidence in a future subproceeding:

> Muckleshoot seems determined to turn this subproceeding into a short-cut for establishing additional marine U&A. The materials which Muckleshoot seeks to introduce in support of its Opposition to Summary Judgment constitute new evidence, evidence which was not before Judge Boldt in 1974. **If Muckleshoot believes it has sufficient evidence to establish additional U&A, it can file a Request for Determination and present the evidence—and all other parties can cross-examine the Muckleshoot witnesses and present their own evidence . . . . What Movants have requested is only a narrow finding that Muckleshoot has not yet established U&A beyond Elliott Bay, and that Muckleshoot be enjoined from fishing in areas beyond Elliott Bay unless and until it does establish additional U&A.**

Reply Memorandum of Puyallup, Suquamish and Swinomish Tribes in Support of Motion to Strike, Dkt. 16421 at 3 (emphasis added). The Court agreed and excluded the evidence Muckleshoot offered.

Muckleshoot now seeks the relief that Judge Boldt promised in 1975 was available to "any tribe" and that the three tribes promised in 1998 was available to Muckleshoot – namely, a full and fair opportunity to present evidence of additional Muckleshoot fishing areas, giving the other parties the opportunity to cross-examine and present their own evidence. Muckleshoot has never been provided that opportunity – not in the original trial, not in Subproceeding 97-1, and not in any other subproceeding. In the meantime, no less than ten other tribes have been

[5] The Swinomish, Port Gamble, Jamestown, Tulalip, and Suquamish Tribes were granted intervention after the entry of Final Decision #I. *See* Dkt. 655 and 1539. Each of these Tribes is bound by Final Decision #I under the provisions of the orders granting their intervention, *id*., but none of these Moving Tribes participated in the 1973 trial. In contrast, Squaxin Island and Puyallup were participants in the original trial.

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given full opportunities to expand their U&A fishing areas beyond those specific areas initially determined by the Court. There is no basis on which to conclude that Muckleshoot alone is barred by principles of finality, where ten other tribes with similar claims were not so barred, and where Paragraph 25 of Judge Boldt's original injunction expressly contemplated the type of proceeding presented here. It would be fundamentally unfair for Muckleshoot to be barred from proceeding after it had been assured by the Court and by the opposing parties that it would be entitled to its day in Court.

II. FACTS

The Muckleshoot Tribe is one of the seven plaintiff tribes on whose behalf the United States filed this action in 1970. Seven other tribes intervened as additional plaintiffs prior to the original trial in this matter, held over three weeks in 1973. The original trial was focused on establishing the treaty rights of the plaintiff tribes, restraining the State of Washington from interference with those rights, and determining mechanisms to accommodate treaty fishing and non-tribal fishing.

In Final Decision #I, Judge Boldt determined the location of some of the Muckleshoot Tribe's treaty time usual and accustomed fishing places as follows:

> 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. Villages and weir sites were often located together. [FPTO § 3-53; Ex. USA-20, p. 38; Ex. USA 27b, pp. 7-16; Ex. PL-23, pp. 11-12.]

Finding of Fact No. 76, 384 F. Supp. 312, 367 (W.D. Wash. 1974).

After the trial court's ruling, the Muckleshoot Tribe began to fish throughout central and south Puget Sound. Request for Determination, ¶ 6 (SPDkt. 3).[6] The Muckleshoot Tribe

[6] The allegations of the Request for Determination and all reasonable inferences raised by the Request are deemed true for the purpose of a motion to dismiss under Rule 12(b)(6). *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).

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opened and conducted fisheries in central Puget Sound from 1974 to 1999, including fisheries in Washington Department of Fish and Wildlife Catch Reporting Areas 10 and 10A. *Id.* During that time, Muckleshoot entered into various court-approved agreements with the State and with other tribal parties to this action, all premised upon the parties' common understanding and belief that the Muckleshoot Tribe's right to fish in these marine areas had been established in Finding of Fact No. 76. *See, e.g.*, Approval of Settlement Agreement Among Muckleshoot, Suquamish, and Tulalip Tribe's Re Puget Sound Fishing Area Claims, 626 F. Supp. 1476 (W.D. Wash. 1983); Summary of Settlement Agreement Among Muckleshoot, Suquamish, and Tulalip Tribe's Re Tulalip Usual and Accustomed Fishing Places, 626 F. Supp. 1478 (W.D. Wash. 1983); Stipulation Between State of Washington and Area-10-And-South Tribes Re Withdrawal of States Objections to Area-10-And-South Intertribal Plan, 19 F. Supp. 3d 1228 (W.D. Wash. 1996); and Intertribal Salmon Allocation Plan for South Puget Sound (Area 10 and South), 19 F. Supp. 3d 1229 (W.D. Wash. 1996).

This understanding was also reflected in Subproceeding 89-3, which was initiated in 1989 by 16 tribes and the United States to establish that the treaty right of the tribes to take fish included the right to take shellfish. That matter proceeded to a trial in 1994. During the trial, a number of tribes presented evidence to the Court regarding their historical shellfishing activities throughout their usual and accustomed fishing areas, pursuant to a stipulation among the plaintiff tribes that limited such evidence to "areas, which are within the usual and accustomed grounds and stations previously determined for such Tribe, in *United States v. Washington* or any of its subproceedings." Stipulation Re: Presentation of Tribal Usual and Accustomed Claims and Evidence, Dkt. 14233 at 2. Based on the parties' common understanding, Muckleshoot presented expert testimony and other evidence at the trial in Subproceeding No. 89-3, documenting treaty time shellfish harvesting activities of Muckleshoot ancestors in WDFW Catch Reporting Area 10 and portions of Area 11, all

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without objection. *See, e.g.*, Direct Testimony of Lynn Larson, Ex. MU-002, admitted April 26, 1994; Transcript of Proceedings April 26, 1994, pages 1376 – 1396, Dkt. 14275.

The Washington state courts similarly acknowledged that Muckleshoot usual and accustomed fishing places included portions of Catch Reporting Area 11. *See State v. Courville*, 36 Wn. App. 615, 676 P.2d 1011 (1983). In addition, in an action brought jointly by the Muckleshoot and Suquamish Indian Tribes, this Court found that the two tribes' usual and accustomed fishing places include portions of Elliott Bay in the vicinity of Smith Cove (outside of the area later determined by Judge Rothstein to be encompassed by FF 76). *Muckleshoot Indian Tribe v. Hall,* 698 F. Supp. 1504 (W.D. Wash. 1988).

After more than 20 years of Muckleshoot fishing, the Puyallup, Swinomish, and Suquamish Tribes initiated Subproceeding 97-1 pursuant to Paragraph 25(a)(1) of the Permanent Injunction in 1997, alleging that Finding of Fact 76 was not intended by Judge Boldt to determine or establish Muckleshoot usual and accustomed saltwater fishing places beyond inner Elliott Bay. Dkt. 16016, 16129. The Court ultimately held in 1999 that Muckleshoot's adjudicated saltwater fishing area did not extend beyond inner Elliott Bay. 19 F. Supp. 3d 1304 (W.D. Wash. 1999). For the first time in twenty-five years, the Muckleshoot Tribe was no longer able to fish in areas it had frequented throughout Puget Sound. The Court's judgment was affirmed on appeal. *U.S. v. Muckleshoot*, 235 F.3d 429 (9th Cir. 2000).

The Muckleshoot Tribe now seeks a full and fair opportunity to present evidence to the Court not considered by Judge Boldt or by the Court in Subproceeding 97-1, establishing that Muckleshoot ancestors regularly fished in additional saltwater areas in Puget Sound beyond the area determined by Judge Boldt (i.e., Elliott Bay). Some of this evidence is summarized in Exhibit A to the Request for Determination, and that evidence is deemed true for purposes of these Motions. This claim has never been presented to this Court.

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III. ARGUMENT

A. The Key Issue Is Whether Muckleshoot Had a Full and Fair Opportunity to Litigate The Issues Presented in this Matter.

The Motions to Dismiss purport to be brought under Fed. R. Civ. P. 12(b)(1). The Swinomish *et.al.* Motion to Dismiss argues that the grounds for dismissal, largely claim preclusion and res judicata, fall within Rule 12(b)(1). SPDkt. 25 at 3-4. *See also* Suquamish Motion to Dismiss (SPDkt. 27) (citing Rules 12(b)(1) and 12(b)(6) as bases for motion). Motions under Fed. R. Civ. P. 12(b)(1) test whether the claims advanced in a lawsuit fall within the limited jurisdiction of the federal courts. Here, of course, Muckleshoot's claims clearly are "federal questions," 28 U.S.C. § 1331, as they "aris[e] under the Constitution, laws, or treaties of the United States," specifically the Treaty of Point Elliott, 12 Stat. 927, and the Treaty of Medicine Creek, 10 Stat. 1132. This Court has subject matter jurisdiction and Fed. R. Civ. P. 12(b)(1) is inapposite.

Fed. R. Civ. P. 8 and Fed. R. Civ. P. 12(b)(6) provide the proper procedural vehicles to seek dismissal based on finality considerations of the kind presented in the two motions.

> [R]es judicata is not one of the affirmative defenses that Rule 12(b) permits to be made by motion rather than in the answer to the complaint. But when an affirmative defense is disclosed in the complaint, it provides a proper basis for a Rule 12(b)(6) motion. (For the general principle see *Jones v. Bock,* 549 U.S. 199, 215, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007); *Walker v. Thompson,* 288 F.3d 1005, 1009–10 (7th Cir.2002), and *Jones v. Alcoa, Inc.,* 339 F.3d 359, 366 (5th Cir.2003), and for its application to the defense of res judicata see *In re Colonial Mortgage Bankers Corp.,* 324 F.3d 12, 20 (1st Cir.2003).)

Muhammad v. Oliver, 547 F.3d 874, 878 (7th Cir. 2008). *See also Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (res judicata can be raised in motion under Rule 12(b)(6)).

> As a preliminary matter, the court must address the plaintiffs' assertion that a motion to dismiss is not the proper vehicle for raising the defendants' res judicata argument. Res judicata is an affirmative defense that is generally pleaded in a defendant's answer, but courts have also allowed parties to assert it in a Rule 12(b)(6) motion to dismiss. *Stanton v. D.C. Ct. of Appeals,* 127 F.3d 72, 76-77 (D.C.Cir.1997). Res judicata may be asserted in a

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> motion to dismiss when "all relevant facts are shown by the court's own records, of which the court takes notice." *Hemphill v. Kimberly-Clark Corp.*, 530 F.Supp.2d 108, 111 (D.D.C.2008) (citing *Evans v. Chase Manhattan Mortgage Corp.*, 2007 WL 902306, at *1 (D.D.C. Mar. 23, 2007)).

Nader v. Democratic Nat. Comm., 590 F. Supp. 2d 164, 169–70 (D.D.C. 2008), *aff'd*, No. 09-7004, 2009 WL 4250599 (D.C. Cir. Oct. 30, 2009).

Under Fed.R.Civ.P. 8, the burden of establishing each element of a preclusion defense rests on the party asserting the defense. *Taylor v. Sturgell*, 553 U.S. 880, 907, 128 S. Ct. 2161, 2179–80, 171 L. Ed. 2d 155 (2008). The factual allegations of the Request for Determination are deemed true for the purposes of the motion to dismiss. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). This rule applies when considering dismissal based on an argument of claim preclusion. *Garity v. APWU National Labor Organization*, 828 F.3d 848, 854 (9th Cir. 2016). The Moving Parties do not identify or analyze the applicable elements of the defense of claim preclusion, and thus Muckleshoot has had no opportunity to respond to their arguments.

Garity illustrates the high bar that the Moving Parties face in establishing that this Court is precluded from hearing Muckleshoot's claims. In *Garity*, the plaintiff pursued two federal court actions arising out of the same facts, against the same defendant, but based on different legal theories. 828 F.3d at 852. Both cases were filed in the same District, one month apart, and were assigned to different District Judges. *Id.* Both judges ruled that the cases would proceed separately. *Id.*, at 852-53. The judge in the first case ultimately dismissed the first case for failure to state a claim, a decision that was affirmed on appeal. *Id.* at 853. The defendant then moved to have the second case dismissed, in part based on issue or claim preclusion or res judicata. The defendant's argument was that the plaintiff "should not have split [her claims] into two discrete complaints and should have brought them in one consolidated action." *Id.* at 855. The second judge agreed and dismissed the second action. *Id.* at 854.

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The Court of Appeals reversed, holding that the key determinant in deciding whether one matter resolves a second is whether the claimant actually had a "full and fair opportunity" to litigate the claims raised in the second matter in the first proceeding. *Id.* at 856. As the Court stated:

> The purpose of the claim preclusion doctrine is to avoid successive litigation when all of a plaintiff's claims derive from a common factual core and can be efficiently and effectively tried together. But implicit in the doctrine is the assumption that the plaintiff *actually had the chance to be heard* on all of her claims in the first proceeding. Indeed, as the Supreme Court has explained, "invocation of res judicata or claim preclusion" requires that "the first adjudication offer[ed] a full and fair opportunity to litigate." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 & n. 22, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).

Id. (emphasis in original). The Court also noted a "general exception" to the doctrine of claim preclusion where the first court "has expressly reserved the plaintiff's right to maintain the second action." *Id.* at 857, *citing* 7 Restatement (Second) Judgments § 26(1)(b). Both rules prevented claim preclusion from applying to the plaintiff's claims.

Here, the Muckleshoot Tribe has never had a full and fair opportunity to litigate the issues presented in this subproceeding, and the Court has "expressly reserved [Muckleshoot's] right to maintain [this] action." As explained below, the parties and the Court understood that all of Muckleshoot's fishing areas were not being litigated in either the original trial or in any other subproceeding. Judge Boldt quite clearly reserved Muckleshoot's right to bring this proceeding, and claim preclusion thus does not apply here. We turn first to Judge Boldt's reservation of Muckleshoot's rights, and then turn to the remaining issues raised by the Moving Parties.

B. Judge Boldt Assured the Parties That The Original Trial Did Not Act As A Comprehensive and Final Determination of the Extent of a Tribe's Usual and Accustomed Fishing Grounds and Stations.

The Motions to Dismiss first assert that Muckleshoot's usual and accustomed fishing areas were conclusively and completely determined by Judge Boldt in 1973, during the original

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trial in this matter. As a result, the Motions to Dismiss claim this Court lacks jurisdiction to consider whether Muckleshoot can prove additional areas beyond those established in the original trial. That assertion does not withstand even the slightest scrutiny.

The United States filed *United States v. Washington*, on its own behalf and as trustee for Muckleshoot and six other tribes, against the State of Washington in 1970.[7] The original trial held in 1973 accomplished a number of objectives, including the identification of some of the usual and accustomed fishing places of each of the plaintiff tribes. But the Court did not purport to determine all of the fishing places for each of those tribes; instead, the Court repeatedly and specifically stated it had not done so. For example, the preface to the original decision notes that "[f]or each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and some, but by no means all, of their principal usual and accustomed fishing places." 384 F. Supp. 312, 333 (W.D. Wash. 1974). Reinforcing this observation, the Court made legal and factual findings in Final Decision #I that "no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today" and such a complete inventory "would be impossible to compile." CL 26, 384 F. Supp. at 402; FF 13, 384 F. Supp. at 353. Judge Boldt later noted that undertaking the effort of proving all historical fishing places of the several plaintiff tribes "would have been almost impossible under the trial conditions which involved so many more pressing and urgent issues." Transcript of Proceedings, Sept. 10, 1975, Dkt. 1769 at 80.[8]

Knowing that the parties had not conclusively or completely determined each tribe's usual and accustomed places in Final Decision #I, Judge Boldt made a number of rulings designed to effectuate the rights of interested parties to present evidence regarding the right of a tribe in a particular area. Initially, the declaratory judgment and decree entered at the

[7] Seven other tribes joined the lawsuit before trial. 384 F. Supp. at 327.

[8] Given the length of the recent trial in Subproceeding No. 09-01, which involved the determination of the usual and accustomed fishing places of just two tribes, one can understand how the determination of fourteen tribes' fishing areas would have been impossible during a three week trial.

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conclusion of the first trial provided that the Court "retains jurisdiction of this case for the life of this decree" in order to "take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and implementation of this decree." Paragraph 24 of the Declaratory Judgment and Decree, 384 F. Supp. at 408; s*ee also* Conclusion of Law 48, 384 F. Supp. at 405 (Court retains "continuing jurisdiction of this case to grant such further relief as may be found by the court to be appropriate on motion of any party hereto and to assure compliance with the Judgment Decree entered herein"). More specific to the incomplete determinations of usual and accustomed places in Final Decision #I, the Court retained continuing jurisdiction and provided that the parties could invoke that jurisdiction to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I." 384 F. Supp. at 419, Paragraph 25 of the Permanent Injunction.

The Court also protected the rights of individual tribal members to prove additional fishing areas in light of ongoing enforcement disputes with the State of Washington. The Court was asked various questions by the Washington Department of Fisheries, and clarified that the State was entitled to arrest and criminally prosecute individual members of the plaintiff tribes found fishing in violation of state law outside of usual and accustomed fishing grounds and stations "enumerated" in Final Decision #I, "provided that, if the defendant proves he was fishing at a usual and accustomed ground or station of his tribe, although not previously designated as such, it shall be a defense to any such prosecution." Answer to Question No. 1, Rulings on Fisheries' Questions Per Reconsideration Motion, 384 F. Supp at 408. This proviso allowed individual tribal members to present evidence establishing that an area not previously adjudicated by the Court as a usual and accustomed area is in fact a usual and accustomed fishing place of the individual defendant's tribe, an opportunity that was used on several

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occasions.[9] This is another instance in which the Court evidenced its understanding that the determinations of fishing places in Final Decision #I were neither complete nor final.

Just a year after entering Final Decision #I, Judge Boldt again spoke to the completeness and finality of the findings establishing tribal fishing places, in a hearing involving a request by the Puyallup Tribe to enjoin State enforcement actions. In that proceeding, the State argued that Puyallup fishers were fishing outside of the Puyallup Tribe's adjudicated fishing area. The State described three alternatives regarding the dispute. First, individual Puyallup fishers could defend in state court by offering evidence that that the area was a usual and accustomed fishing area.[10] Second, the Puyallup Tribe had the option "of coming to this Court and proving their usual and accustomed grounds and stations are in fact more extensive than the Court originally found." Transcript of Proceedings Sept. 10, 1975, Dkt. 1769 at 65. Lastly, the State claimed the Puyallup Tribe should have appealed the initial determination of its usual and accustomed grounds and stations if it felt that area was incompletely described in Final Decision #I, suggesting that Puyallup might be barred from seeking additional fishery areas since it had failed to appeal those findings. *Id*. at 66. The United States responded that the Court's rulings clearly "held it open . . . that additional usual and accustomed places can be established," *id*. at 70,[11] while Puyallup argued that the area at issue north of Vashon Island was within the previously adjudicated fishing area. *Id*. at 76.

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[9] Tribal members subsequently invoked the proviso and state courts recognized the defense. *See, e.g. State v. Courville*, 36 Wn. App. 615, 676 P.2d 1011 (1983) (members of Muckleshoot Tribe established that Adelaide Beach is a usual and accustomed shellfish harvesting place of the Muckleshoot Tribe as an affirmative defense to state criminal charges of exceeding shellfish harvesting limits); *State v. Petit*, 88 Wn.2d 267, 558 P.2d 796 (1977) (recognizing affirmative defense). *Courville* was decided before this Court ruled on the scope of the right to harvest shellfish and that shellfish usual and accustomed fishing places are coextensive with those for salmon and other species. Adelaide Beach, the place at issue in *Courville,* is located along the shoreline of Puget Sound in Federal Way, Washington, an area outside of the Tribe's adjudicated usual and accustomed fishing places established in FF 76 of Final Decision #I, as construed by this Court in Subproceeding 97-1. *See* Order Granting Petitioner's Motion for Summary Judgment, 19 F. Supp. 3d 1304, 1304-05 (W.D. Wash. 1999), *affirmed*, 235 F.3d 429 (9th Cir. 2000), *cert. denied*, 534 U.S. 950 (2001).

[10] *See* 384 F. Supp. at 408 (Rulings on Fisheries' Questions Per Reconsideration Motion), discussed above.

[11] The omitted words in the quote are "in its original appeal." This appears to be a misstatement and the US Attorney likely intended to say "in its original decision."

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The Court declined to grant the injunction requested by Puyallup. *Id* at 82. In his ruling, Judge Boldt explained that the Court's Final Decision #I findings on usual and accustomed places were neither comprehensive nor final "because there was not the time nor the necessity during the trial to try to identify all of the hundreds of specific places in the area." The Court further explained it was "open to any tribe to seek to have the areas identified in the main decision extended or further restricted":

> THE COURT: First, all who participated in the trial of this case I am sure will recall that the anthropological experts for both plaintiffs and defendants agreed that the Indian tribes fished so fully over the Puget Sound area, that it would require special research by them to be able to identify more than a few of the principal places and areas that were usual and accustomed places. And that was what was done. A few of the specific places and areas were identified in the findings of fact and conclusions of law in the case. But **it was clearly understood that further places that couldn't be identified as usual and accustomed places by any particular tribe or tribes should be included as and when evidence sufficient to sustain that showing was presented. That is number one.**
>
> **It is open to any tribe to seek to have the areas identified previously in the main decision extended or further restricted, because there was not the time nor the necessity during the trial to try to identify all of the hundreds of specific places in this area. It would have been impossible under the trial conditions which involved so many pressing urgent issues.**
>
> . . .
>
> **To my mind there is nothing to prevent the Puyallups or any other tribe from applying for extension of the limits previously provided in United States v. Washington** and submitting a memorandum in support of the application sufficient to justify hearing thereon. We can't have hearings all the time just because somebody wants one. We are going to have a prima facie showing made at the time of such application showing that there is some merit to the application and that it ought to receive a full hearing.

Id. at 79-81 (Emphasis added). A few months later, Judge Boldt reiterated that Paragraph 25 "establishe[d] the mechanism whereby further usual and accustomed fishing grounds may be established and recognized by the court" when the Tulalip Tribes objected to Stillaguamish

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fishing outside of that tribe's adjudicated fishing places. Order Re Tulalip Tribes' Objection to Stillaguamish Fishing Regulations, 459 F. Supp. 1068, 1068 (W.D. Wash. 1978).[12] This again demonstrated that Final Decision #I determinations were neither complete nor final.

Judge Boldt was perfectly clear regarding the effect of his adjudication of areas as a tribal usual and accustomed fishing place in Final Decision #I. Such an adjudication in no way constituted a determination that places outside of the area established in the determination were not usual and accustomed fishing places. The exclusion of an area from a fishing place determination in Final Decision #I simply signified that the status of the excluded area as a usual and accustomed fishing place was yet to be determined, and awaited the presentation of evidence by the tribe claiming the area in conformance with the requirements of Paragraph 25(a)(6) of the Permanent Injunction. This was Judge Boldt's stated intention, and in Judge Boldt's words, the understanding of all of the parties. As we describe next, the parties and the Court effected that understanding over the following decades when considering additional fishing areas claimed by no less than ten other tribes.

C. Consistent with Judge Boldt's Promise, Many Other Tribal Parties Have Been Liberally Permitted to Seek Additional Usual and Accustomed Fishing Places Under Paragraph 25(a)(6).

Consistent with Judge Boldt's clarifications, seven of the fourteen tribes whose usual and accustomed fishing places were determined in Final Decision #I have already had their usual and accustomed fishing places enlarged in post-trial proceedings pursuant to Paragraph 25(a)(6). This includes the Puyallup and Squaxin Island Tribes, who oppose the Court granting relief to Muckleshoot here. Three other tribes (Lower Elwha, Suquamish and Tulalip) that intervened subsequent to the 1974 decision have also invoked paragraph 25(a)(6) in seeking to expand initial usual and accustomed fishing places determinations. We examine these

[12] In Final Decision #I, Judge Boldt determined that the "Stillaguamish River and its north and south forks . . . constituted the usual and accustomed fishing places of the [Stillaguamish] tribe." FF 146, 384 F. Supp. at 379. Had Judge Boldt intended FF 146 to be a "specific determination" of the full extent of Stillaguamish fishing places precluding any establishment of additional fishing areas, he would not have referred the Stillaguamish to Paragraph 25 as the means to establish additional fishing places.

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determinations below as they are no different than the relief Muckleshoot seeks, and they show the positions taken by those parties with regard to finality of the 1974 determinations when they sought to prove additional areas.

1. Nisqually, Puyallup and Squaxin Island Tribes

In Final Decision #1, the Nisqually, Puyallup, and Squaxin Island Tribes were each determined to have specific usual and accustomed fishing places by Judge Boldt. *See* FF 86, 384 F. Supp. at 369 (Nisqually); FF 99, 384 F. Supp. at 371 (Puyallup); FF 141, 384 F. Supp at 378 (Squaxin Island). In 1980, the three tribes each filed separate requests for determination seeking to expand their usual and accustomed fishing areas. *See* Dkt. 7031 (Puyallup), 7094 (Squaxin Island), and 7278 (Nisqually). In their requests for determination, the three tribes each explained their understanding of the completeness and finality of fishing place determinations in Final Decision #I, as well as the scope of paragraph 25(a)(6).

In its Request for Determination, the Puyallup Tribe invoked the Court's continuing jurisdiction under Paragraph 25(a)(6), conceded that the original decision contains only a partial list of each tribe's usual and accustomed fishing areas, and argued that tribes were free to seek rulings on additional usual and accustomed fishing places.

> The original decision in this case included a partial list of the usual and accustomed fishing areas of each tribe. (See for example, usual and accustomed areas of the Puyallup Tribe listed at finding of fact #99, 384 F.Supp. at 371.) The Court indicated, however, that a final determination of all usual and accustomed areas was not possible at that point. Finding of fact #13, 384 F.Supp. at 353; conclusion of law #26, 384 F.Supp. at 402. **The Court therefore left to the tribes the option of coming back to the Court for rulings on further usual and accustomed areas.** Injunction, paragraph 25(f), 384 F.Supp. at 419; transcript, remarks of Judge Boldt, September 10, 1975, at pages 79-80 (copy attached). The Puyallup Tribe seeks the exercise of that continuing jurisdiction for this determination.

Request for Determination Re: Puyallup Fishing Areas, Dkt. 7031 at 1-2. The Squaxin and Nisqually Tribes' requests for determination contain very similar jurisdictional statements. Dkt. 7094 at 1-2; Dkt. 7278 at 1-2.

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The three requests were referred to Special Master Cooper, who held a hearing on July 6, 1981 and approved proposed findings for entry by Judge Craig. Dkt. 7690, Transcript of Hearing of July 6, 1981, at 11.[13] On August 22, 1981, the Court entered Supplemental Findings of Fact which expanded and extended the usual and accustomed fishing places of the Nisqually, Puyallup, and Squaxin Island Tribes. 626 F. Supp. 1441, 1441-42 (W.D. Wash. 1981). Significantly, the Court ruled that its determination of additional usual and accustomed places for the three tribes "shall in no way limit these or any other parties from seeking further determinations of other usual and accustomed fishing grounds and stations . . . ." In other words, even these three tribes who had two opportunities to establish U&A areas were not precluded from attempting proof of additional usual and accustomed places. CL 88, 626 F. Supp. at 1442.

2. Makah Tribe

In Final Decision #I, the Court determined specific usual and accustomed fishing places for the Makah Tribe. FF 65, 384 F. Supp. at 364. The Makah Tribe subsequently filed a request for determination seeking to enlarge the usual and accustomed fishing places established in Final Decision #I. Dkt. 2892. In its Memorandum in Support of Request for Determination, Makah cited paragraph 25(a)(6) as the basis for the Court's jurisdiction, and then pointed out:

> In Final Decision I, it was noted in Finding of Fact No. 13 (384 F.Supp. at 353), that a "complete inventory" of any one tribe's usual and accustomed grounds and stations had not been done.

Dkt No. 2893 at 1.[14]

[13] The Tulalip Tribe had objected to the Nisqually and Puyallup Tribe's Requests for Determination, but later withdrew its objections. Dkt. 7690 at 9. The withdrawn objection appears to have related to the substantive merits of the requesting parties' claims. No party appears to have objected to the requests based on a claim that usual and accustomed place determinations made in Final Decision #I were intended to be comprehensive and final, which would of course been fruitless given Judge Boldt's statements on the issue. *See id.*

[14] Makah's motion was filed and signed by Mason Morisset, whose current client Tulalip is one of the Moving Parties.

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The matter was referred to Magistrate Cooper acting as a Special Master. Dkt. 2945. The Court ultimately made supplemental findings that the Makah had "usual and accustomed offshore fishing grounds…in addition to those areas previously determined by the Court." FF 346, 626 F. Supp. 1466, 1467 (W.D. Wash. 1982). And again, the Court clarified that these additional findings "in no way limit the Makah Indian Tribe or any other party from seeking further determination of other usual and accustomed grounds and stations." CL 90, 626 F. Supp. at 1468.

3. Upper Skagit Tribe

In Final Decision #I, the Court made a specific determination of Upper Skagit usual and accustomed fishing places, limited to an area on the Skagit River upstream of Mt. Vernon. FF 148, 384 F. Supp. at 379. Nineteen years later, the Upper Skagit Tribe filed a request for determination pursuant to paragraph 25(a)(6), seeking to enlarge its usual and accustomed fishing places to include the lower portions of the Skagit River, the Samish River and the marine waters of Skagit and Samish Bay. Dkt. 13269. That matter was designated as Subproceeding 93-1. Eventually, the Upper Skagit Tribe was permitted to present evidence establishing these usual and accustomed fishing places at the trial in Subproceeding 89-3, which resulted in enlargement of the Upper Skagit Tribe's usual and accustomed fishing places to include the areas claimed in Subproceeding 93-1. 873 F. Supp. 1422, 1449-50 (W.D. Wash 1994); *see also* Dkt. 14233 at 2-3; Dkt. 14146 at 2.[15]

4. Quileute Tribe and Quinault Nation

In Final Decision #I, the Court determined specific freshwater fishing places for the Quileute Tribe and also found that the Quileute's marine fishing places include "the adjacent tidewater and saltwater areas." FF 108, 384 F. Supp. at 372. Similarly, the Court identified specific freshwater rivers, streams, and lakes as usual and accustomed fishing places of the Quinault Nation, and also found that "[o]cean fisheries were utilized in the waters adjacent to

[15] Following the entry of these findings in SP 89-3, the remaining issues in SP 93-1 were settled. *See* 19 F. Supp. 3d 1252, 1280, 1297, 1300, 1303, 1304.

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their territory." FF 120, 384 F. Supp. at 374. In 2009, thirty-five years later, the Makah Tribe filed a request for determination invoking the Court's continuing jurisdiction under Paragraph 25(a)(1) and 25(a)(6) to clarify the extent of Quileute and Quinault marine usual and accustomed fishing places. 20 F. Supp. 3d 1033, 1037 (W.D. Wash. 2013). The Court ruled that the Makah's request should proceed initially under Paragraph 25(a)(1), and in the event that the issues could not be resolved, then proceed under Paragraph 25(a)(6), unless the matter was found to have been specifically determined by Judge Boldt. *Id*.; *see also* 20 F. Supp. 3d 1054, 1056 (W.D. Wash. 2013).[16] Ultimately, the matter proceeded to trial under Paragraph 25(a)(6), allowing the Quinault and Quileute to present evidence to establish the extent of their ocean fishing places based on the parties' stipulation that Judge Boldt had not specifically determined the full extent of Quinault and Quileute fishing places in 1974. *See* 20 F. Supp. 3d 1066, 1068 (W.D. Wash. 2013).

5. Lower Elwha Tribe

The Lower Elwha Tribe's usual and accustomed fishing places were initially established in post-trial proceedings in 1975 and 1976. *See* Orders of April 18, 1975, 459 F. Supp. 1048, 1049 (W.D. Wash. 1975) and Order of March 10, 1976, 459 F. Supp. 1066, 1066 (W.D. Wash. 1976). As originally established, the Lower Elwha fishing area included only the waters of the Strait of Juan de Fuca and certain streams flowing into the Strait. *Id*. In 1978, the Lower Elwha filed a request for determination invoking the Court's continuing jurisdiction under Paragraph 25(a)(6) "to request a broadening of their usual and accustomed fishing grounds and stations to include Hood Canal, all streams draining into Hood Canal, and the water of northern Puget Sound up to and around San Juan Island, Orcas Island, Whidbey Island, Haro and Rosario Straits." Dkt. 4820. The Court granted the request to enlarge the usual and accustomed fishing grounds of the Lower Elwha Tribe. Corrected Order Re:

[16] More recently the Court has stated that "Paragraph 25(a)(6) jurisdiction is thus contingent on the Court's finding, or the parties agreeing, that the disputed waters in question were not specifically determined by Judge Boldt." Dkt. 21555 at 12.

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Request for Determination of Port Gamble and Lower Elwha Usual and Accustomed Fishing Places, 626 F. Supp. 1442, 1442 (W.D. Wash. 1983). In its order, the Court once again reiterated that no party was precluded from seeking additional usual and accustomed fishing grounds and stations, except as limited by the Hood Canal Agreement. *Id.* at 1443.

6. Tulalip Tribes

Like the Lower Elwha Tribe, the Tulalip Tribes intervened after Final Decision #I and sought determination of their usual and accustomed fishing areas under Paragraph 25. The Court entered provisional findings in 1975. 459 F. Supp. 1068 (W.D. Wash. 1976). Some five years later, the Tulalip invoked the Court's continuing jurisdiction under Paragraph 25(a)(6) to finalize their usual and accustomed fishing areas, and in doing so, sought a substantially larger area than that which had been provisionally granted five years before. *See* Dkt. 7182 at 1-2 (invoking the Court's continuing jurisdiction under both Paragraph C of the Order of September 10, 1975 and Paragraph 25(a)(6)). Thus, like the other parties listed in this section, Tulalip have been before the Court twice – once to establish its fishing area, and a second time to expand that area.

7. Suquamish Tribe

Like the Lower Elwha and Tulalip Tribes, the Suquamish Tribe's usual and accustomed fishing places were initially determined by the Court following the original trial in 1975. FF5, 459 F. Supp. 1049 (W.D. Wash. 1975), Orders Re Herring Fisheries and Determination of Usual and Accustomed Fishing Places of Additional Tribes March 28 and April 18, 1975. As established in the 1975 Orders, the Suquamish Tribe's usual and accustomed fishing places did not include any freshwater areas on the east side of Puget Sound. In May 1985, pursuant to paragraph 25, the Suquamish Tribe filed a request for determination seeking additional fishing places in Lake Washington, Lake Sammamish, the Duwamish River and the Lake Washington Ship Canal. Dkt. 10054 at 1. Although this request was ultimately unsuccessful, the Suquamish were granted a full opportunity to present their claims to additional usual and

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accustomed fishing places and to be heard on the merits, an opportunity which the Suquamish now seek to deny the Muckleshoot Tribe. *See* 18 F. Supp. 3d 1143, 1143 (W.D. Wash. 1989) (Order Adopting the Special Master's Report and Recommendation in Subproceeding 85-1).

8. Summary

This Court and the parties have consistently followed Judge Boldt's initial instruction – determination of usual and accustomed fishing areas in one proceeding (whether the initial trial or a subsequent proceeding in this case) does not preclude a party from the opportunity to prove additional areas later. Ten parties have had multiple chances to prove the extent of their fishing areas. Indeed, several of the Moving Parties have been before the Court to expand their fishing areas already, and have obtained assurances they can come back again. Fundamental fairness requires that Muckleshoot be afforded the same opportunity, which is what Muckleshoot seeks here.

D. The Ninth Circuit's 1998 Decision in *Muckleshoot I* Did Not Change the Scope of this Court's Continuing Jurisdiction Under Paragraph 25(a)(6).

The Moving Tribes' second major argument is based on a mischaracterization of the Court of Appeals' decision in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (also referred to as *Muckleshoot I*). The Moving Tribes argue that *Muckleshoot I* effected a "sea change" in this Court's jurisprudence, and that it largely frowns upon any supplemental findings under Paragraph 25(a)(6) as a means to enlarge usual and accustomed fishing places beyond those determined in Final Decision #I. *See* Responding Tribes' Motion to Dismiss at 6-7; Suquamish Motion to Dismiss at 13-14. But *Muckleshoot I* did no such thing. Read properly, that case only disapproved supplemental findings based on subsequent evidence under Paragraph 25(a)(6) to clarify or resolve ambiguities in existing findings, where the only issue before the court was the proper interpretation of the existing findings. Here, the Muckleshoot Tribe does not seek to clarify prior findings; that was done in Subproceeding 97-1. The Muckleshoot Tribe intends to present evidence to establish new areas.

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Muckleshoot I was an appeal from orders in Subproceeding No. 86-5, in which Muckleshoot obtained rulings that Swinomish fishing places as previously adjudicated in Finding of Fact 6, 459 F. Supp. 1048, 1049 (W.D. Wash. 1975), and Lummi fishing places as previously adjudicated in Finding of Fact 46, 384 F. Supp. 312, 360 (W.D. Wash. 1974), did not include Washington Catch Reporting Area 10. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1357 (9th Cir. 1998). In resolving Muckleshoot's motion for summary judgment in the case, "the district court limited its review to clarifying the two prior rulings by Judge Boldt . . ." *Id*. at 1358. The Court of Appeals affirmed this Court's ruling that the Swinomish finding did not include Area 10 because the southernmost land point named in the finding was seven miles north of the northernmost part of Area 10. *Id.* at 1358-59. The Court of Appeals found an ambiguity in the Lummi finding's reference to the "present environs of Seattle," and held that the task of a subsequent court in interpreting an ambiguous prior judgment is to "give effect to the intention of the issuing court." *Id*. at 1359. In doing so, "the entire record before the issuing court and the findings of fact may be referenced in determining what was decided." *Id.* But the District Court could not consider the latter day meaning given to ambiguous terms by a trial witness to discern Judge Boldt's intention when the expert used those same terms, even if the words used by Judge Boldt were derived from the witness' expert report. *Id*. The Court of Appeals instructed this Court to "proceed pursuant to Paragraph 25, subparagraph a to resolve this dispute." *Id.* at 1360.

The critical portion of the *Muckleshoot I* decision here is the Court of Appeals' examination of the district court's alternative ground for its decision. In ruling on the issues pertaining to the Lummi, the district court had relied on Paragraph 25(a)(6) to admit and rely upon latter day witness testimony and to enter a supplemental finding clarifying the original ruling. The Court of Appeals found this to be error because the only evidence to be considered in evaluating the language used in the original decree was the evidence before Judge Boldt at the time he made his ruling:

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> subparagraph [25(a)(6)] does not authorize the court to clarify the meaning of terms used in the decree or to resolve ambiguities with supplemental findings which alter, amend or enlarge upon the description in the decree. Moreover, the issues presented in subproceeding 86-5 did not comprehend new determinations of locations of usual and accustomed fishing grounds and stations. A proceeding under subparagraph [25(a)(6)] raises issues beyond those defined in the pretrial order which rejected any submissions from Lummi involving additional research in this subproceeding: "[T]he only matter at issue is the meaning of Judge Boldt's Finding of Fact No. 46 and the only relevant evidence is that which was considered by Judge Boldt when he made his finding."

Id. at 1360. The Moving Parties claim this language reversed decades of practice and effected a change in the manner in which additional areas can be proven by tribes. But in fact, this language has no effect on the claims advanced by Muckleshoot in this matter. Read carefully, this passage in *Muckleshoot I* states the following propositions:

First, Paragraph 25(a)(6) can't be used to "clarify" terms "used in the decree." In this matter, Muckleshoot does not seek to clarify any terms in Final Decision #I or in any other finding of the Court.

Second, Paragraph 25(a)(6) can't be used to "resolve ambiguities with supplemental findings which alter, amend or enlarge upon the description used in the decree." Here, Muckleshoot does not seek to resolve any ambiguity with new findings for these purposes, either. Muckleshoot intends to provide proof leading to new findings of the fishing activities and fishing locations of its ancestors at treaty time, just as the ten tribes described in the prior section have done. In doing so, Muckleshoot will not be "resolving ambiguities" in the original decree, but adding new areas as others have done.

Third, the pretrial order in Subproceeding 86-5 was inconsistent with a proceeding initiated under Paragraph 25(a)(6), because the pretrial order had limited evidence to that considered by Judge Boldt when he made the Lummi finding. Here, Muckleshoot intends to introduce and rely on evidence not considered by the Court in the original trial to support new findings to be made by the Court after trial, all as contemplated by Paragraph 25(a)(6).

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Nothing in *Muckleshoot I* disapproves the use of Paragraph 25(a)(6) as a basis for establishing new determinations of additional usual and accustomed places beyond those identified and specifically determined in Final Decision #I. Indeed, the scope of Paragraph 25(a)(6) as a basis for supplemental findings of new, additional usual and accustomed places was not an issue before the district court or the court of appeals in Subproceeding 86-5, where the issue was whether the Lummi Tribe was taking fish in conformity with the existing decree.

The Moving Tribes' current claim that *Muckleshoot I* limited the parties' ability to utilize Paragraph 25(a)(6) to present evidence of new areas is also inconsistent with the positions Swinomish, Suquamish, and Puyallup took regarding that decision in Subproceeding 97-1. The three tribes who brought that Subproceeding against Muckleshoot explained the significance of *Muckleshoot I* as follows:

> Much of the recent Court of Appeals decision is old wine in a new bottle. The decision reiterated familiar rules: that judgments should be interpreted as a whole, in light of the intention of the issuing judge; that *res judicata* does not bar efforts to clarify judgments which suffer from ambiguity, lack of clarity, or the possibility that the judgment does not mean what it appears to say; that in such cases the court may review the record as a whole to determine the judge's intent and to give the judgment the necessary clarity and certainty. The Court also clarified that, where U&A was previously not clearly determined, it may be clarified under Paragraph 25(a) of the Injunction in this case, based on record evidence and, perhaps, other evidence of the judge's intent. Conversely, where U&A issues were not previously determined, they may be resolved through supplemental findings under Paragraph 25(f), but only after full development of evidence. The present sub-proceeding [97-1] clearly falls within the former jurisdictional provision, and there is therefore no warrant to conduct an evidentiary hearing as suggested by Muckleshoot and by the Tulalip Tribes.

Response of Puyallup, Suquamish, and Swinomish Tribes to Muckleshoot Tribe's Supplemental Brief, Dkt 16508 at 8. So the parties appear to agree: supplemental findings are not permissible in a Paragraph 25(a)(1) proceeding to clarify or resolve existing ambiguities in a prior ruling, but new findings <u>are</u> appropriate in Paragraph 25(a)(6) proceedings to establish

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additional usual and accustomed fishing places in areas not previously specifically determined. That is what Muckleshoot seeks to do here.

E. The Muckleshoot Tribe Was Not Afforded A Full and Fair Opportunity to Present Evidence Supporting Its Claim to Additional Marine Fishing Places in Subproceeding 97-1.

Like Subproceeding 86-5, Subproceeding 97-1 was limited to the issue of whether a tribe (Muckleshoot) was fishing in conformity with the provisions of the existing decree, and did not present the situation where a tribe was seeking new additional usual and accustomed grounds and stations beyond those identified in Final Decision #I. As described in Section II above, up to this point, the Muckleshoot Tribe had conducted fisheries in central Puget Sound and entered into various Court-approved agreements with other tribes and the State, all premised upon the parties' common understanding and belief that the Muckleshoot Tribe's right to fish in these marine areas had been established in Finding of Fact No. 76. After 23 years of Muckleshoot fishing in the waters of Central Puget Sound, the Puyallup, Swinomish, and Suquamish Tribes initiated Subproceeding 97-1 pursuant to Paragraph 25(a)(1) of the Permanent Injunction in 1997, alleging that Finding of Fact 76 was not intended by Judge Boldt to determine or establish Muckleshoot usual and accustomed saltwater fishing places in WDFW Catch Reporting Areas 9, 10, or 11, beyond Elliott Bay. *See* Dkt. 16016, 16129. On cross-motions for summary judgment, this Court interpreted the phrase "secondarily in the saltwater of Puget Sound," as it appears in the finding, to refer solely to inner Elliott Bay, Catch Reporting Area 10A. 19 F. Supp. 3d 1304, 1311 (W.D. Wash. 1999). The Court's judgment was affirmed on appeal. *United States v. Muckleshoot Indian Tribe,* 235 F.3d 429 (9th Cir. 2000). Therefore, for clarity's sake, "inner Elliot Bay" should be thought of as the intended meaning of "the saltwater of Puget Sound" as that term is used in Finding of Fact 76.

While the Moving Tribes now suggest that the issue before the Court in Subproceeding 97-1 was whether Muckleshoot ancestors fished in the waters of Catch Reporting Areas 9, 10, and 11 at treaty time, that is not what was at issue. The Puyallup Tribe described the relief it

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sought as "a determination that the Muckleshoot Indian Tribe has no **adjudicated** usual and accustomed fishing grounds and stations in marine waters outside Elliott Bay" and "a determination that the Muckleshoot Tribe's usual and accustomed fishing grounds, **as set forth in Finding of Fact 76**, do not include any marine areas outside Elliott Bay." Dkt. 16016 at 1, 6 (Puyallup Request for Determination in 97-1) (emphasis added). Similarly, the Suquamish and Swinomish Tribes sought a "determination that the Muckleshoot Indian Tribe has no **adjudicated** usual and accustomed fishing places (U&A) in Washington Marine Catch Reporting Areas 10 or waters west and north of Area 10." Dkt. 16129 at 1, 6 (emphasis added). In other words, those tribes sought only to have the Court rule on what Muckleshoot already had been awarded in Final Decision #I, not what Muckleshoot might prove if it were to proceed under Paragraph 25(a)(6).

If the Muckleshoot's historical fishing in Areas 9, 10 and 11 had been at issue in Subproceeding 97-1, then Muckleshoot would have been able to present evidence on that question, and the opposing parties would have been allowed to cross-examine and present their own evidence. But when Muckleshoot sought to introduce evidence of its ancestors' fishing practices in Subproceeding 97-1, Puyallup, Suquamish, and Swinomish Tribes successfully moved to strike that evidence, arguing that the only issue before the Court was "whether Judge Boldt intended to include any marine areas beyond Elliott Bay when he set forth Muckleshoot's U&A in Finding of Fact 76 and, if so, which areas were included." Dkt. 16410 at 2. The three tribes argued that the only evidence relevant to the inquiry was the evidence before Judge Boldt when he made his 1974 finding. *Id.*

In making this point, Swinomish, Suquamish, and Puyallup Tribes also made clear that Subproceeding 97-1 did not address and would not adversely affect Muckleshoot's right to later prove where its ancestors actually fished at treaty time. The Tribes told this Court:

> Muckleshoot attempts to defend the relevance of the materials submitted in support of its Opposition to Petitioner's Motion for Summary Judgment ("Muckleshoot Opposition to SJ") by

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> misstating the underlying issue in this case. Muckleshoot states: "The only issue presented by petitioners' motion for summary judgment is whether Muckleshoot's treaty-time saltwater fishing places are confined to Elliott Bay. The evidence petitioner seeks to strike is relevant to this issue." (emphasis added). Muckleshoot Opposition to Strike at 2. However that is not the issue here.
>
> The only issue raised by the motion for Summary Judgment [in Subproceeding 97-1] is: whether the adjudicated saltwater fishing areas of the Muckleshoot Tribe "include the waters within the Washington Department of Fisheries Commercial Salmon Management and Catch Reporting Areas 11, 10 or waters west and north of Area 10." . . . Even more precisely, the issue is: Which marine areas are included in the phrase "secondarily in the saltwater of Puget" in Finding of Fact 76? . . .
>
> Muckleshoot seems determined to turn this subproceeding into a short-cut for establishing additional marine U&A. The materials which Muckleshoot seeks to introduce in support of its Opposition to Summary Judgment constitute new evidence, evidence which was not before Judge Boldt in 1974. **If Muckleshoot believes it has sufficient evidence to establish additional U&A, it can file a Request for Determination and present the evidence—and all other parties can cross-examine the Muckleshoot witnesses and present their own evidence.**
>
> **Puyallup, Suquamish, and Swinomish do not seek any new findings regarding Muckleshoot U&A. What Movants have requested is only a narrow finding that Muckleshoot has not yet established U&A beyond Elliott Bay, and that Muckleshoot be enjoined from fishing in areas beyond Elliott Bay unless and until it does establish additional U&A.**

Reply Memorandum of Puyallup, Suquamish and Swinomish Tribes in Support of Motion to Strike, Dkt. 16421 at 2-3 (emphasis added). The three tribes further noted that the Court had previously made supplemental findings with respect to a number of tribes since 1974, under Paragraph 25(a)(6), and "if Muckleshoot wants a new finding and an expanded U&A, it must do as tribes did in those cases, and file an appropriate Request for Determination." *Id.* at 7-8.

This Court agreed and ruled that the relief requested was limited to an interpretation of Judge Boldt's FF 76. 19 F. Supp. 3d 1272, 1272 (W.D. Wash. 1998). It noted that under the Ninth Circuit's ruling, the key to resolving the controversy lay in determining what Judge Boldt meant in precise geographic terms. *Id*. at 1274. And the Court granted the three tribes' motion

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to strike the evidence Muckleshoot offered of its treaty time fishing by Muckleshoot ancestors in marine waters outside Elliott Bay that was not before Judge Boldt in 1974. *Id*. at 1276. In particular, this Court struck Exhibits MU-0002 (Direct Testimony of Lynn L. Larson); PL-590 (Direct Testimony of Dr. Barbara Lane); and Dkt. 16395 (Affidavit of Barbara Lane). All of this evidence documented Muckleshoot treaty time fishing activities in marine areas beyond Elliott Bay, but was not in the record before Judge Boldt in 1974. Because Subproceeding 97-1 was prosecuted under Paragraph 25(a)(1), rather than Paragraph 25(a)(6), the evidence was not considered by Judge Rothstein in ruling against Muckleshoot, and in ruling in favor of the parties who initiated Subproceeding 97-1. 19 F. Supp. 3d 1304, 1305 (W.D. Wash. 1999); 19 F. Supp. 3d 1272, 1273 (W.D. Wash. 1998). Muckleshoot now seeks to present this evidence as well as substantial additional evidence, a portion of which is summarized in Exhibit A to the Request for Determination, all of which has not been considered by the Court to establish the scope of its ancestors' saltwater treaty time fishing.

In the Suquamish Motion to Dismiss, the Suquamish reviews what it mischaracterizes as "extra-record" evidence presented by Muckleshoot and considered by the Court in Subproceeding 97-1, suggesting that Muckleshoot had the opportunity to present additional evidence of its marine usual and accustomed fishing grounds in that subproceeding. SPDkt. 27, at 9-11. In fact, the only piece of evidence considered by Judge Rothstein in Subproceeding 97-1 that was not before Judge Boldt was the declaration of Richard Morrill, discussing the meaning of the term "Puget Sound." 19 F. Supp. 3d 1304, 1308-09 and n.1 (W.D. Wash. 1999). The remaining evidence discussed by Suquamish (specifically, exhibits G-17(a), G17(e), G-27, and PL-73) were all before the Court in 1973.

F. The Fishing Grounds Specifically Determined for Muckleshoot are the Freshwater Areas Identified in FF 76 and Inner Elliott Bay.

Judge Boldt made clear that given the limited time and many other pressing issues addressed at trial in 1973, his intention in Final Decision #I was to identify only some of the

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usual and accustomed fishing places for each participating tribe. And, as Judge Boldt also made clear it was open to each of the tribes that participated in the 1973 trial to return to the Court and seek determinations of additional fishing places beyond those determined by the Court in Final Decision #I. In this context it is clear that when Judge Boldt used the phrase "specifically determined" in Paragraph 25(a)(6), he meant those areas established and identified in Final Decision #I. Areas not included within findings awaited the presentation of further evidence and were necessarily yet to be determined.

In Subproceeding 97-1, Judge Rothstein concluded that there is "no evidence in the record before Judge Boldt . . . that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay" for Muckleshoot in FF 76. 19 F. Supp. 3d 1304, 1311 (W.D. Wash. 1999). Judge Rothstein made no determination whether Muckleshoot ancestors possessed treaty time usual and accustomed fishing places beyond Elliott Bay; she only concluded that Muckleshoot had not presented evidence to Judge Boldt in 1973 that would warrant a conclusion that areas beyond Elliott Bay were included in his determination. *Id*. The suggestion that Judge Boldt or Judge Rothstein specifically determined that places beyond Elliott Bay were not treaty time fishing places of Muckleshoot ancestors is simply not supported by the record.

In Subproceeding 97-1, Judge Rothstein echoed the language of the Ninth Circuit that Paragraph 25(a)(6) does not authorize supplemental findings to clarify or resolve ambiguities with respect to the geographic scope of findings Judge Boldt actually made, citing *Muckleshoot I.* 19 F. Supp. 3d 1272, 1275-76 (W.D. Wash. 1998). But, like the Circuit's ruling, Judge Rothstein's statement regarding the availability of supplemental findings under Paragraph 25(a)(6) was made in the context of a proceeding under Paragraph 25(a)(1), which acts only to interpret existing findings and determine whether a party is acting in conformity with those findings. Both Subproceeding 86-5 and Subproceeding 97-1 were Paragraph 25(a)(1) proceedings, not Paragraph 25(a)(6) proceedings, and the rulings in both matters were that

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Paragraph 25(a)(6) cannot be used to introduce new evidence to collaterally clarify Judge Boldt's original rulings. Neither proceeding addressed the availability of relief under Paragraph 25(a)(6) in a proceeding actually initiated under that provision, as opposed to one seeking to clarify or resolve an ambiguity in an existing ruling under Paragraph 25(a)(1).

G. Muckleshoot Is Not Judicially Estopped from Presenting Its Paragraph 25(a)(6) Claim to Areas Beyond Elliott Bay.

The Moving Parties argue that Muckleshoot is judicially estopped from making arguments that are inconsistent with positions Muckleshoot took in Subproceeding 97-1. The doctrine of judicial estoppel has no application here because judicial estoppel only applies when a party prevails based on the argument at issue, and Muckleshoot was the losing party in Subproceeding 97-1.

The "rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001), *quoting Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000). The doctrine is equitable in nature and intended to protect the integrity of the judicial process by preventing a party from gaining advantage in litigation under one theory and then seeking an inconsistent advantage under another theory. *Id.*; *see also* 20 F. Supp. 3d 802, 805-806 (W.D. Wash. 2005).

Courts generally look to several factors to determine whether judicial estoppel is applicable in a particular case. These factors include whether the party's position is "clearly inconsistent" with its earlier position. A second factor is whether the party succeeded in convincing the court to accept its earlier position, because in the absence of success, there is no "risk of inconsistent court determinations." Third, the court should determine whether the party asserting an inconsistent position would derive an unfair advantage over an opposing party if not estopped. 532 U.S. at 750-51, 120 S. Ct. at 1815; *see also* 20 F. Supp. 3d 1039,

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1042-44 (W.D. Wash. 2013) (holding that more than threshold inconsistency is required for application of judicial estoppel and declining to apply the doctrine).

Muckleshoot did of course make a variety of arguments in Subproceeding 97-1, but the Court need not proceed further to evaluate these arguments because Muckleshoot did not prevail in its arguments or in the matter, which resulted in a decree against Muckleshoot that eliminated vast portions of fishing areas previously understood and accepted as having been adjudicated in Muckleshoot's favor. Whatever Muckleshoot may have argued in Subproceeding 97-1, the doctrine of judicial estoppel has no application to those arguments because Muckleshoot did not prevail. Certainly, Muckleshoot obtained no advantage in Subproceeding 97-1 as the result of the arguments it made.

To the extent judicial estoppel has any application here, it is to those Moving Tribes who successfully argued that the only issue in Subproceeding 97-1 was the interpretation of the precise geographic scope of FF 76, and who promised that Muckleshoot would be later able to prove where its ancestors fished at treaty time in a proceeding under Paragraph 25(a)(6). Having prevailed in large part based on that position, those Tribes should not be allowed to proffer the wholly inconsistent position that Muckleshoot is now barred from proceeding.

H. The Doctrines of Claim and Issue Preclusion, Res Judicata and Collateral Estoppel Are Not Applicable to Muckleshoot's Claims.

Claim preclusion or *res judicata* bars claims that were raised or should have been raised in a prior action. For claim preclusion to apply, the claims must be ones that were raised and or should have been raised in the prior action, and there must be a prior judgment on the merits. Issue preclusion or collateral estoppel applies to foreclose successive litigation of an issue of fact or law actually litigated in a prior action, and essential to the judgment. *New Hampshire v. Maine*, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001); *see also* 18 F. Supp. 3d 1182, 1200 (W.D. Wash. 1991); 20 F. Supp. 3d 802, 805 (W.D. Wash. 2004).

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Neither doctrine applies here. As discussed above, the parties and the Court all understood, and did not intend, for Final Decision #1 to determine the full scope of Muckleshoot's treaty time usual and accustomed fishing areas. Subproceeding 97-1 was clearly limited to the issue of the scope of the marine waters intended to be encompassed in Judge Boldt's use of the term "Puget Sound" in FF 76. Muckleshoot has never had the opportunity to litigate and this Court has never determined the complete extent of the Muckleshoot Tribe's usual and accustomed treaty time fishing areas. Because the record establishes that Muckleshoot has never had a full and fair opportunity to be heard on the complete extent of its marine usual and accustomed fishing areas, it would be a violation of due process to deny Muckleshoot's claims under the doctrines of claim or issue preclusion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552 (1979).

Along the same lines, Suquamish claims that Muckleshoot is trying to do nothing more than "recycle" evidence already considered by the Court. If that were the case, Suquamish would have nothing to fear. But in fact, Muckleshoot seeks to present substantial evidence not considered by Judge Boldt in 1974, or by Judge Rothstein in Subproceeding 97-1. Some of that evidence (but certainly not all of it) is summarized in Exhibit A to the Request for Determination, and supports Muckleshoot's claim that its ancestors fished in much of the Central and Southern Puget Sound at treaty time. Further evidence will be developed during discovery, of course. The Moving Tribes will have the chance to challenge this evidence if Muckleshoot is allowed to proceed to trial, but, for the purposes of the motions to dismiss, the evidence presented by Muckleshoot in its Request for Determination to support its claims must be deemed true.

Lastly, the Court should pay no heed to claims by the Swinomish *et. al.*, to the effect that allowing Muckleshoot to proceed poses a threat to "investments and expectations of tribal fishers, [that] have blossomed under the cloak of the tapestry" woven by the many orders and

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agreements that guide the management of Puget Sound fisheries. Responding Tribes' Motion to Dismiss (SPDkt. 25) at 22-23. Swinomish, Suquamish, and Puyallup themselves dashed the expectations and investments of Muckleshoot fishers in 1998, after having agreed to Muckleshoot fishing for decades. In fact, many of the agreements and orders that would guide future Muckleshoot fisheries in Central Puget Sound already exist, as they were established during the 24 years that Muckleshoot fished in Area 10, which it shared with Suquamish and Tulalip prior to 1999.

Here, the determinative considerations are whether Muckleshoot had a full and fair opportunity to litigate these issues, and whether Judge Boldt reserved Muckleshoot's right to proceed. *Garity, supra*. Muckleshoot has not had its day in court, and Judge Boldt reserved Muckleshoot's right to procced here.

I. Muckleshoot Does Not Seek Relief Under Rule 60, and Suquamish's Rule 60(b) Claim is a Straw Man.

Suquamish argues that Muckleshoot's claims are barred because Muckleshoot cannot meet the requirements of Fed. R. Civ. P. 60(b), and because Muckleshoot did not seek relief under that rule. This argument is off point. The Muckleshoot Tribe's Request for Determination does not seek to invoke the Court's jurisdiction under Rule 60(b) to reopen the Court's previous judgments in this case. Accordingly, the Muckleshoot Tribe did not address Rule 60(b) in its Request and need not do so here. Instead, the Muckleshoot Tribe's Request for Determination invokes this Court's continuing jurisdiction under Paragraph 25(a)(6) of the Permanent Injunction, which permits any party to seek a determination of usual and accustomed fishing grounds not previously specifically determined. The Suquamish Tribe's Rule 60(b) argument is a straw man.

Ironically, the Suquamish Tribe has repeatedly stated that the considerations of finality which underlie the requirements of Rule 60(b) do not preclude a tribe from seeking relief under Paragraph 25(a)(6) with respect to marine areas not included in an initial determination of usual

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and accustomed fishing grounds due to lack of evidence at the time of the original determination. For example, in 2012, Suquamish stated that a lack of evidence of a particular area in the original trial meant that Judge Boldt "could not have made a decision," and did not mean that he "intended to exclude the area":

> Judge Boldt understood the evidentiary difficulty tribes had in trying to document treaty time fishing areas, especially marine fishing areas. This is undoubtedly why he created Paragraph 25(a)(6) as a means for the court to take this evidentiary difficulty into account. The court should not permit Swinomish to use claim or issue preclusion to foreclose Suquamish's right to present evidence under the jurisdictional basis of Paragraph 25(a)(6). **When the court ruled that no evidence exists in the record by which Judge Boldt could have intended to include a marine area, it meant that Judge Boldt could not have made a decision, not that he positively intended to exclude the area. To rule otherwise defeats the very process Judge Boldt established to deal with the dearth of evidence of treaty time fishing.**

Suquamish Tribe's Response to Swinomish Motion for Partial Summary Judgment, Dkt. 20267 at 7-8 (SP 05-04) (emphasis added). Three years later, Suquamish reiterated the same position:

> In situations where the Court sustains a challenge to contested waters included in an unambiguous U&A under 25(a)(1) on the basis of an inference drawn from the lack of evidence in the record . . . both a plain reading of 25(a)(6) and equity demand that the affected tribe be permitted an opportunity to present evidence of treaty-time fishing and have the Court make a specific and explicit determination based on the best evidence available. Anything less risks an erroneous decision predicated on pure speculation as to what Judge Boldt was really thinking forty-plus years ago when he issued his original order describing U&A's in unambiguous, if broad, terms. While 25(a)(6) proceedings entail additional costs and time, the burden on the Court's and the parties' resources is justified where a tribe's culture, heritage, and economic future are at stake.
>
> . . .
>
> A finding by this Court that a tribe is fishing in an area where it does not presently have determined U&A under 25(a)(1) may, but does not necessarily, require a corollary determination that the Tribe does not have U&A in that area, but rather that it has not had its U&A previously determined with regard to that area in Final Decision # 1. Where this Court (or the Ninth Circuit) has held that a previous decision (including Final Decision #1) of the

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> Court did not determine U&A in a given area under 25(a)(1), a Tribe should not be prohibited from invoking the Court's jurisdiction under 25(a)(6) either in the same or a subsequent proceeding , and seeking an order from the Court to specifically determine whether that tribe has U&A in a given location in the first instance.

Suquamish Tribe's Response to Pending Motions for Summary Judgment, Dkt. 21024 at 4-5, 13 (SP 11-02) (footnotes omitted.). Even more recently, Suquamish argued in the Court of Appeals this past year as follows:

> Where a court has held that a previous decision (including *Boldt I*) did not determine U&A in a given area under 25(a)(1) based on the absence of evidence in the record, a Tribe should not be prohibited from invoking the Court's jurisdiction under 25(a)(6) either in the same or a subsequent proceeding, and seeking an order specifically determining whether that Tribe has U&A in a given location in the first instance.

Lower Elwha Klallam Tribe v. Lummi Nation, Interested Party Suquamish Indian Tribe's Answering Brief, No. 15-35661 at 13 (9th Cir. 2016) (footnotes omitted) (emphasis in original).

In its Motion, the Suquamish Tribe indignantly claims that Muckleshoot "owes this Court, Suquamish, and many other Tribes that have been forced to answer the bell for round three of this litigation regarding these precise saltwater areas (9, 10, 11) a convincing explanation why Fed. R. Civ. P. 60(b) does not provide respite." However, as explained above, this is not "round three" for Muckleshoot, nor has Suquamish ever had to "answer the bell" prior to this action.

First, Suquamish (as well as Swinomish, Tulalip, Port Gamble, and Jamestown) didn't "answer the bell" in the 1973 trial because they weren't parties to the case at the time. The thirteen other tribes that did participate in the trial, including Puyallup and Squaxin Island, did not contest the claims of any other plaintiff tribe with respect to usual and accustomed fishing places.

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Second, as discussed above, Judge Boldt explained there was neither the time nor the necessity for any tribe that participated in the 1973 trial to establish the full extent of its usual and accustomed fishing grounds at that time. Rule 60(b) has no application to a Request for Determination that falls within Paragraph 25(a)(6).

As for Subproceeding 97-1 and Suquamish's claimed "second bell," Muckleshoot did not initiate the proceeding or seek relief by filing a cross request. Puyallup, Suquamish, and Swinomish haled Muckleshoot into this Court, filed requests for determination, and sought relief under Paragraph 25(a)(1). Those same tribes successfully argued in that Subproceeding 97-1 that the only matter at issue was the geographic scope of the marine waters which Judge Boldt intended to include within FF 76, not whether Muckleshoot ancestors actually fished beyond Elliott Bay at treaty time, and promised that Muckleshoot could initiate a separate proceeding if it wanted to offer additional evidence of such fishing. It is beyond hypocritical to now blame Muckleshoot for seeking the relief that Suquamish promised, on the basis that Muckleshoot is somehow burdening the Suquamish.

> If Muckleshoot believes it has sufficient evidence to establish additional U&A, **it can file a Request for Determination and present the evidence**—and all other parties can cross-examine the Muckleshoot witnesses and present their own evidence.
>
> Puyallup, Suquamish, and Swinomish do not seek any new findings regarding Muckleshoot U&A. What Movants have requested is only a narrow finding that Muckleshoot has not yet established U&A beyond Elliott Bay, and that Muckleshoot be enjoined from fishing in areas beyond Elliott Bay unless and until it does establish additional U&A.

Reply Memorandum of Puyallup, Suquamish and Swinomish Tribes in Support of Motion to Strike, Dkt. 16421 at 3 (emphasis added). Suquamish should be held to the position it proffered to the Court in Subproceeding 97-1.

Having successfully prevailed in Subproceeding 97-1 in limiting the issues and preventing Muckleshoot from presenting evidence not before Judge Boldt in 1974 to demonstrate that Areas 9, 10, and 11 were fished by Muckleshoot ancestors at treaty time, the

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Suquamish and other Moving Tribes seek to deny Muckleshoot the opportunity to establish the full extent of its marine usual and accustomed fishing areas in the manner intended by Judge Boldt.

J. This Court's Rulings Regarding the Finality of the Skokomish and Lummi Tribes' Findings Are Exceptional and Distinguishable.

In two recent rulings, this Court concluded that determinations of usual and accustomed places by Judge Boldt for the Lummi Nation and Skokomish Tribe were final determinations precluding further proceedings under Paragraph 25(a)(6) to supplement and enlarge the determinations made in Final Decision #I. *See* 20 F. Supp. 3d 968, 979-80 (W.D. Wash. 2012); Dkt. 21555. Both rulings are distinguishable from the relief sought in this proceeding, and appear to represent an exception to the general rule that has permitted ten tribes to obtain supplemental findings under Paragraph 25(a)(6) enlarging initial usual and accustomed fishing place determinations.

In 2012, the Court ruled in Subproceeding 11-2 that the Lummi are precluded from re-litigating whether the Strait of Juan de Fuca is a Lummi usual and accustomed fishing area. Subproceeding 11-2 was brought under Paragraph 25(a)(1), seeking to enjoin Lummi from fishing in an area located in the eastern part of the Strait. The Lummi's rights in the Strait had previously been litigated in Subproceeding 89-2, and several rulings had been made by Judge Coyle and Judge Rothstein in that proceeding which were ultimately affirmed by the Court of Appeals.

In Subproceeding 11-2, the Court refused to relitigate the Lummi's rights in the Straits because those rights had been determined by Judge Rothstein in Subproceeding 89-2, and that ruling was affirmed on appeal and is now the law of the case. 20 F. Supp. 3d 968, 973-74 (W.D. Wash. 2012). The key fact underlying that ruling is that the Lummi Nation had filed a Cross-Request for Determination in Subproceeding 89-2 under Paragraph 25(a)(6), specifically seeking to expand the fishing area established by Judge Boldt to include the Strait of Juan de

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Fuca. *Id*; *see also* Dkt 11690, Amended Response of the Lummi Indian Tribe to Requesting Tribes Request for Determination and Cross Request for Determination. Following the Lummi cross request, the Court denied a Lummi motion for summary judgment and dismissed the subproceeding. 19 F. Supp. 3d 1277, 1279 (W.D. Wash. 1998). Thus, Lummi had an opportunity in Subproceeding 89-2 to prove its rights in the Straits; it failed in that effort on the merits; and that lack of proof was affirmed on appeal.

Unlike Lummi, Muckleshoot did not file a cross request for determination in Subproceeding 97-1 seeking to invoke the continuing jurisdiction of the Court under Paragraph 25(a)(6) to establish additional usual and accustomed places beyond those found by Judge Boldt in FF 76. Unlike Lummi, Muckleshoot has never had its day in court on its request under Paragraph 25(a)(6). Lummi's case is a straightforward application of the rule that one can pursue a specific claim to judgment only once.

In the recent Skokomish proceeding (Subproceeding 17-01), the Court considered a request of the Skokomish Tribe seeking rights to take fish outside of the Hood Canal Drainage Basin. The Court found there were multiple reasons to dismiss the Request for Determination, including Skokomish's failure to comply with the pre-filing requirements of Paragraph 25 of the Permanent Injunction, as well as the Skokomish Tribe's failure to delineate a specific basis for subject matter jurisdiction. The Court evaluated the Skokomish Tribe's claims under Paragraph 25(a)(1) and determined that Judge Boldt's original 1974 determination of the Tribe's fishing area was unambiguous, referencing only Hood Canal and the waterways draining into the Canal, and that subsequent proceedings had not changed or expanded that finding. The Court declined to engage in a Paragraph 25(a)(6) analysis "because Judge Boldt's original determination is not ambiguous." Dkt 21555 at 16.

The Moving Tribes assert that this language should be read to mean that a Paragraph 25(a)(6) proceeding is always unavailable – that is, a tribe is entirely foreclosed from proving further U&A areas – where that party's prior U&A determination was clear and unambiguous.

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At best, any statement to that effect in Subproceeding 17-01 appears to be dictum as there were several alternate grounds for dismissal, and Skokomish never specifically predicated a claim of jurisdiction on Paragraph 25(a)(6). Just as importantly, such a blanket assertion would be too broad and inconsistent with this Court's jurisprudence, which has consistently distinguished between instances in which a particular area was actually considered by the Court and the evidence found wanting, as compared to a situation where the Court never actually considered the evidence to support rights in a particular area. The former is an adjudication on the merits; the latter would not be in light of the Court's long-accepted practice of allowing tribes to prove new fishing areas in addition to those previously determined. It would be grossly inequitable to bar a party from pursuing an area the Court had never actually considered based on a claim that such an area had been "determined."

And, any such rule should have no effect on the claims Muckleshoot advances here. Muckleshoot's Finding of Fact 76 was found to be ambiguous on its face in its use of the terms "Puget Sound" and "secondarily." 19 F. Supp. 3d 1272, 1273-74 (W.D. Wash. 1998). Judge Rothstein found the lack of specificity in the description to be "perplexing in light of the geographic precision [Judge Boldt] generally used in describing U & As." 19 F. Supp. 3d 1304, 1311 (W.D. Wash. 1999). To the extent that a finding of "ambiguity" is required to proceed under Paragraph 25(a)(6), Muckleshoot has met that requirement.

Finally, as this Court indicated in its Order on Motion for Partial Summary Judgment in SP 09-01, whether a party is entitled to proceed under Paragraph 25(a)(6) depends on whether Judge Boldt intended to "specifically determine" the party's usual and accustomed places in Final Decision #I. *See* 20 F. Supp. 3d 1033, 1035 (W.D. Wash. 2013); *see also* 20 F. Supp. 3d 1054, 1056 (W.D. Wash. 2013); 20 F. Supp. 3d 1066, 1068 (W.D. Wash. 2013). That determination requires an individualized inquiry with respect to Judge Boldt's intentions with respect to Muckleshoot to determine whether FF 76 was intended to be a final and complete determination, or is incomplete and may be expanded pursuant to Paragraph 25(a)(6) like those

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for Nisqually, Puyallup, Squaxin, Makah, Upper Skagit, Lower Elwha, Quileute, and Quinault Tribes. In this regard it is important to note that neither Lummi, nor Skokomish fully developed the record with respect to Judge Boldt's intentions regarding the completeness of their usual and accustomed fishing area determinations. More particularly, neither party brought to the Court's attention Judge Boldt's 1975 statements in which he explained that none of the Final Decision #I fishing ground determinations were intended to be complete or preclude future proceedings to determine additional usual and accustomed fishing grounds under Paragraph 25(a)(6). *See* Transcript of Proceedings Sept. 10, 1975 (Dkt. 1769), at 79-80, discussed *supra* at pp. 3 and 11. And it is Judge's Boldt's intention that is dispositive in construing the 1974 judgment. *See Muckleshoot v. Lummi*, 141 F.3d at 1359.

IV. CONCLUSION

Judicial doctrines of finality are premised on the fundamental principle that a party is entitled to a full and fair opportunity to litigate an issue. The Muckleshoot Indian Tribe has never been afforded an opportunity to present evidence and be heard with respect to the complete extent of its marine usual and accustomed fishing places. As demonstrated above, the Tribe did not have that opportunity during the 1973 trial that resulted in Final Decision #I, and the Tribe had no such opportunity in Subproceeding 97-1. The only areas that have been specifically determined as Muckleshoot usual and accustomed fishing areas to date are the freshwater systems identified in FF 76 and inner Elliott Bay. The Muckleshoot Tribe seeks the same opportunity to present evidence and to be heard on the merits to expand its usual and accustomed fishing places that has been accorded to many of the other plaintiff tribes and which Judge Boldt clearly intended the Muckleshoot Tribe would have when he entered FF 76. Muckleshoot requests that the Court deny the motions to dismiss and that Muckleshoot be given its day in court.

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 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 27th day of November, 2017, at Seattle, Washington.

s/ Christy Reynolds

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