**THE HONORABLE RICARDO S. MARTINEZ**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| UNITED STATES OF AMERICA, et al.,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF WASHINGTON, et al.,<br><br>Defendant | No. C70-9213<br>Subproceeding 17-2: Muckleshoot U&A<br><br>RESPONDING TRIBES' REPLY TO MUCKLESHOOT RESPONSE TO MOTION TO DISMISS<br><br>Oral Argument Requested |



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The Swinomish Indian Tribal Community, Port Gamble and Jamestown S'Klallam Tribes, and Tulalip Tribes (collectively "Responding Tribes"), reply to the Muckleshoot response to the pending motions to dismiss, Dkt. 31. The Responding Tribes join in the Reply filed by the Suquamish Tribe, except insofar as it limits the area 'specifically determined' to Areas 9, 10 and 11, and insofar as it differs from our position on when Par, 25(a)(6) applies. The Responding Tribes seek dismissal of the entire Muckleshoot claim, which includes as well portions of areas 8A and 13, located to north and south of Areas 9. 10 and 11.. *See* Responding Tribes Motion, Dkt, 25, 7-9 and map at 5. We file this separate Reply to address all areas claimed by Muckleshoot. It is clear that Muckleshoot U&A has been specifically determined as to all marine areas outside of Elliott Bay, and thus the Court has no jurisdiction over its claim to any new area under Par. 25(a)(6).

Muckleshoot has also misrepresented our position on when Par. 25(a)(6) is available. Response, Dkt. 31, 38. We restate that position in this Reply.

1. *Muckleshoot I*, as applied by this Court, governs proceedings to expand U&A.

Muckleshoot argues that the decision in *Muckleshoot I* did not change the Court's continuing jurisdiction under par. 25(a)(6). Dkt. 31, 21-25. Muckleshoot reads the decision too narrowly and completely ignores that fresh on the heels of *Muckleshoot I* this Court applied its holding broadly to encompass proceedings concerning new U&A. In fact, the Court first did so in Subp. 97-1, the Muckleshoot U&A case, where Muckleshoot itself urged the Court to foreclose proceedings concerning new U&A areas because its U&A had been specifically determined.

*Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (*Muckleshoot I)* arose in the specific context described in detail in the Muckleshoot Response, Dkt. 31. Briefly, the case involved a Muckleshoot challenge to Swinomish and Lummi U&A in Area



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10. As part of its decision, this Court determined that the phrase in the Lummi U&A finding "present environs of Seattle" was ambiguous and not 'specifically determined', and applied par. 25(a)(6) to consider a latter-day deposition of Dr. Barbara Lane to interpret the phrase. *Id.*

> The Ninth Circuit reversed the Court in this particular, stating:
>
> Judge Boldt, however, did 'specifically determine[ ]' the location of Lummi's [U&A], albeit using a description that has turned out to be ambiguous. [Par. 25(a)(6)] does not authorize the court to clarify the meaning of the terms used in the decree or to resolve an ambiguity with supplemental findings that alter, amend **or enlarge upon** the description in the decree.

*Id.* (emphasis added). Because the specific context was a case asserting 25(a)(6) jurisdiction to clarify a U&A finding, Muckleshoot seeks to limit its reach to that context, and not to proceedings that seek to establish additional U&A.

However, the decision clearly holds that Lummi U&A has been specifically determined, thus precluding further par. 25(a)(6) proceedings, and that 25(a)(6) cannot be used to "alter, amend **or enlarge upon"** a specifically determined U&A. If the Court's decision on the scope of 25(a)(6) were limited to interpretation of existing U&A findings, it would not have added the phrase "or enlarge upon," because the opportunity for enlargement is not available in a 25(a)(1) proceeding to interpret an established U&A (another key holding of *Muckleshoot I*). It is only under a 25(a)(6) proceeding that U&A may be enlarged. Moreover, by deciding that Lummi U&A was 'specifically determined', the Court foreclosed all 25(a)(6) jurisdiction.

Furthermore, immediately after the *Muckleshoot I* decision this Court applied it to claims concerning new, expanded U&A. *Muckleshoot I* was decided while dispositive motions were pending in the Muckleshoot U&A subproceeding, Subp. 97-1, and this Court first applied the case to those pending motions. This is addressed at some length in the Responding Tribes Motion, Dkt. 25, 7-9. Briefly, recall that the tribes disputing Muckleshoot U&A in Subp. 97-1 also brought a



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claim under 25(a)(6) to adjudicate Muckleshoot U&A in areas outside Areas 9, 10 and 11 to the north and south. These outside areas include the portions of Areas 8A and 13 – geographically remote from Elliott Bay - that Muckleshoot now claims in this proceeding. In Subp. 97-1 Muckleshoot moved to dismiss this claim for these outside areas, arguing that the Court did not have jurisdiction over them under par. 25(a)(6) because Muckleshoot U&A had been specifically determined. *Id.*

The Court agreed and dismissed the 25(a)(6) claim against Muckleshoot concerning the outside areas. The Court applied the *Muckleshoot I* language quoted above to a claim involving new U&A. It ruled that Judge Boldt "has already made a specific determination" of Muckleshoot U&A in Final Decision #1 and then applied the "alter, amend or enlarge upon" language from *Muckleshoot I* to preclude the tribes' claims concerning the new areas outside of Areas 9, 10 and 11. *U.S. v. Washington*, 19 F. Supp. 2d 1272, 1275-1276 (W.D. Wash. 1997).

Thus Muckleshoot itself argued that its U&A had been specifically determined in Subp. 97-1 as to these outside areas. The Court agreed and ruled in its favor by dismissing the claim regarding these areas. As a result Muckleshoot is now estopped from making the argument that its U&A was not specifically determined and that *Muckleshoot I* does not apply to proceeding for expansions of U&A. See Responding Tribes Motion, Dkt. 25, 9-10.

After *Muckleshoot* I and this Court's ruling in Subp. 97-1, the Court has acted consistently to apply *Muckleshoot I* to cases for expanded U&A under par. 25(a(6), and that approach is now engrained as law of the case. The Responding Tribes were thus entirely correct in marking *Muckleshoot I* as a pivotal event regarding Par. 25(a)(6) jurisdiction. See Dkt. 25, 12-13. The initial step for this Court was of Muckleshoot's own making and concerned its own U&A. Yet Muckleshoot's Response simply ignores this and the Court's subsequent cases as described by the



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Responding Tribes in Dkt. 25, 13-17.

2. Muckleshoot U&A Has Been Specifically Determined for All Marine Waters It Now Claims.

As the law of the case stands today, a U&A finding that has been reviewed in proceedings to determine its geographic extent under 25(a)(1) has been specifically determined, and only in extraordinary circumstances will the Court, in its discretion, allow a proceeding to expand that U&A under 25(a)(6). The only exception so far is Subp. 09-1, which presented such circumstances. See Motion, Dkt. 25, 15-17. Muckleshoot has presented no such circumstances, and its U&A has been specifically determined.

Muckleshoot argues that the only marine area that was specifically determined in Subp. 97-1 is Elliott Bay, and all other areas are amenable to proceedings to establish new U&A under par. 25(a)(6). Response, Dkt. 31, 28-30. The Court has rejected this attempt to stand 25(a)(6) on its head, as outlined in Section 1, above. Further, Muckleshoot seeks to erase the limiting phrase in 25(a)(6), "not specifically determined," by eliminating any cases to which it could be applied. If all areas outside the boundaries of a U&A finding are not 'specifically determined', and since 25(a)(6) applies only to claims for new U&A, Muckleshoot's approach reads the limiting phrase right out of 25(a)(6). Tribes could always bring claims for new U&A, *ad infinitum* and *ad nauseum.*

This Court has rejected Muckleshoot's approach and observed that "logic and linguistics lead to the opposite inference" concerning the meaning of 25(a)(6). Subp. 11-2, *Order on Motions,* 7/17/15, Dkt. 210, 17 (JD 28). A U&A finding sets boundaries, defining what is within the boundary but, equally importantly, also what is without. The *inclusio unius* maxim applies here: "the inclusion of the one is the exclusion of the other." *U.S. v. Terrence*, 132 F.3d 1291, 1294 (9th Cir. 1997). Both inside and outside areas are equally specifically determined, absent unusual



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circumstances – not shown here - that compel a different result.

This principle has been applied often in U&A cases. *See, e.g., Upper Skagit Tribe v. Washington,* 590 F.3d 1020, 1025 (9th Cir. 2010): "That Judge Boldt neglected to include [certain areas] in the … U&A supports our conclusion that he did not intend for them to be included." This Court recently applied the principle to reject Muckleshoot's very argument advanced here. A tribe sought to proceed under par. 25(a)(6) to add new areas not included in its U&A, arguing that because the new areas were not included in its U&A finding, they were not 'specifically determined'. The Court rejected with argument: "The absence of … specific evidence [of fishing in an area] results in this Court's determination that Judge Boldt did not intend to include the disputed waters" in the tribe's U&A. Subp. 11-2, Order on Motions, 7/7/15, Dkt. 210 at 15 (JD 27). The Court therefore dismissed the tribe's 25(a)(6) claim.

3. Conclusion.

Accordingly, the specific determination of Muckleshoot marine U&A, as determined by Judge Boldt and clarified in Subp. 97-1, applies to all marine waters outside Elliott Bay. The law of the case and the finality principles discussed in Responding Tribes Motion, Dkt. 25, compel this result. The Court has no continuing jurisdiction under 25(a)(6), and all of Muckleshoot's claim should be dismissed.

DATED: January 12, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2018, I electronically filed this RESPONDING TRIBES' REPLY TO MUCKLESHOOT RESPONSE TO MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

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