The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. STATE OF WASHINGTON, *et al.*, Defendants.	Civ. No. C70-9213 Subproceeding No. 17-02 SUQUAMISH INDIAN TRIBE'S REPLY IN SUPPORT OF MOTION TO DISMISS ORAL ARGUMENT REQUESTED NOTE ON MOTION CALENDAR: January 12, 2018

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I. INTRODUCTION

The Muckleshoot Tribe's Opposition to Motions to Dismiss (November 27, 2017), SPDkt. # 31 ("Muckleshoot Response"),[1] asks the Court to ignore the rules. The Muckleshoot Indian Tribe ("Muckleshoot") argues that the Ninth Circuit's decision in *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*") did not establish or clarify the rules for when Paragraph 25(a)(6) jurisdiction is appropriate. Muckleshoot glibly declares that the Federal Rules of Civil Procedure do not apply insofar as it fails to substantively address the Suquamish invitation for it to explain away the hurdle of Rule 60(b).[2] Perhaps the most troubling element of Muckleshoot's disdain for the rules that apply to litigants in this forum is the assertion that, even though this Court specifically ruled in subproceeding 97-1 that Muckleshoot does not have usual and accustomed fishing grounds and stations ("U&A") in Puget Sound areas 9, 10, and 11, rules regarding finality, *res judicata*, issue preclusion, collateral estoppel, judicial estoppel and law of the case should not impair or impede Muckleshoot in its demand that we relitigate the issue of Muckleshoot's U&A in Puget Sound areas 9, 10, and 11 – nearly twenty years after this Court determined, and the Ninth Circuit affirmed, that Muckleshoot does not have treaty fishing rights there.

Muckleshoot eschews the rules in its Request for Determination and in its Response. Ironically, Muckleshoot's argument that it should be allowed to relitigate its U&A claims is that is what would be "fair." The incongruity is that *the rules* provide the framework and contours for determining what is "fair." It is *the rules* established for the *United States v. Washington* parties by the Ninth Circuit, that exist in the FRCP, and that have developed as law

[1] Muckleshoot's Response is Dkt. 21672 of *United States v. Washington,* 2:70-cv-09213-RSM. 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.").

[2] Muckleshoot dismisses any relevance of the Suquamish argument and Rule 60(b) in three short paragraphs by simply declaring it a "straw man," and without citation to *United States v. Washington* precedent or any case law whatsoever supporting its proposition that Rule 60(b) was rendered a nullity by Paragraph 25(a)(6) (*See infra* Section II.H and Muckleshoot Response, SPDkt. # 31 at Section F, pp. 33–34).

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of the case in its many subproceedings, including 97-1, that define what is "fair." One cannot ask for "fairness" on the one hand and ask to be excused from the rules that apply on the other.

Muckleshoot's attempt to relitigate its Puget Sound U&A has gone too far, and its aging, recycled evidence and argument goes beyond the "fault line" drawn by the rules that the Ninth Circuit, FRCP, and this Court require. Muckleshoot begins its Response with a quote from this case – a quote standing for the proposition that when this Court makes a decision, it shall stand the test of time. Its demand for a "fair opportunity" invoking the words or "rule" of this Court are in fact its own clear undoing:

> ***What the Court stated thirty years ago holds true today, so it cannot be said that there is substantial ground for a difference of opinion.***

Muckleshoot Response, SPDkt. # 31 at p. 1 (emphasis added).

And nearly 20 years ago this Court, through Judge Rothstein in subproceeding 97-1, declared:

> In light of the other U&As Judge Boldt delineated, it is ***inconceivable to the court that he would intend to give the Muckleshoot, an upriver people, a vast saltwater U&A stretching from the Tacoma Narrows to Admiralty Inlet and overlapping the U&A of tribes with documented history of open water fishing in the same areas . . . .The court finds that [Muckleshoot's] U&A is limited to Department of Fisheries Area 10A and hereby enjoins respondent from fishing in Department of Fisheries Area 9, 10, and 11.***

Order (August 5, 1998), Dkt. # 16540 at pp. 14-15, 18 (emphasis added).

Muckleshoot's U&A have twice been specifically determined by this Court. The notion that Muckleshoot has not had "its day in Court"[3] is belied by the extensive prior proceedings before this Court involving Muckleshoot's saltwater U&A in Puget Sound. The Motions to Dismiss Muckleshoot's Request for Determination should be granted.

II. ARGUMENT

Muckleshoot seeks to invoke jurisdiction under Paragraph 25(a)(6) of the Order

[3] *See* Muckleshoot Response, SPDkt. # 31 at p. 5.

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Modifying Paragraph 25 of the Permanent Injunction, entered in this action on August 24, 1993 ("Paragraph 25(a)(6)" or "25(a)(6)"), *United States v. Washington,* 18 F. Supp. 1172, 1213 (W.D. Wash. 1993).[4] Jurisdiction under 25(a)(6) is not appropriate here, however, because Muckleshoot's U&A in the saltwater of Puget Sound has already been "specifically determined." Under the law of this case, Muckleshoot must therefore proceed, at least initially, under 25(a)(1).

Further proceedings under 25(a)(6) would be available *only* if Muckleshoot's saltwater U&A had not been specifically determined by Judge Boldt. But this Court has already held, in subproceeding 97-1, that Muckleshoot's U&A in the saltwater of Puget Sound *were* specifically determined, albeit ambiguously. This Court further found that the only admissible evidence was that which would resolve the ambiguity; i.e., evidence that would help the Court determine Judge Boldt's intent when he found that Muckleshoot had U&A "secondarily in the saltwater of Puget Sound." Muckleshoot's RFD, which seeks to introduce "new" evidence – much, if not all, of which Muckleshoot has had in its possession since at least 1997 – should be dismissed.

A. Muckleshoot's Denial that the Ninth Circuit's 1998 Decision in *Muckleshoot I* Clarified the Process for Invoking Jurisdiction Under Paragraph 25 is not Well-Founded.

The Ninth Circuit's decision in *Muckleshoot I* brought clarity and order to the process for invoking the Court's continuing jurisdiction under Paragraph 25. *Muckleshoot I,* and the law of the case as it has evolved since that decision, also sheds light on the relationship between 25(a)(1) and 25(a)(6). Per *Muckleshoot I,* and the cases since, U&A must be evaluated *first* under 25(a)(1). It is only if the disputed waters have not been specifically determined that a Tribe may proceed to a 25(a)(6) procedure and present additional evidence that was not before Judge Boldt.

[4] *See* Muckleshoot Indian Tribe's Request for Determination of Additional Usual and Accustomed Fishing Places ("Muckleshoot RFD"), SPDkt. # 3 at p. 2, ¶ 2.

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1. Step One Under *Muckleshoot I* is to Determine Whether the U&A were "Specifically Determined" by Judge Boldt.

Following *Muckleshoot I,* this Court has made clear that there is a two-step process for invoking jurisdiction under Paragraph 25(a)(6). The first step is to proceed under Paragraph 25(a)(1) in order to determine whether the U&A at issue have already been "specifically determined" by Judge Boldt in his Findings of Fact ("FF") in *United States v. Washington,* 384 F.Supp. 312, 367 (W.D. Wash. 1974) ("*Final Decision I*"). If so, 25(a)(6) is not available.

This Court has articulated this two-step process at least four times since *Muckleshoot I,* and, indeed, the two-step process has affected the jurisdictional analysis in every *U.S. v. Washington* case since. First, in subproceeding 97-1, Judge Rothstein concluded, based on *Muckleshoot I,* that 25(a)(6) was not available to Muckleshoot because:

> ***Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U&A. Although his description may have turned out to be ambiguous, he did make a specific determination***. Subparagraph [25(a)(6)] 'does not authorize the court to clarify the meaning of terms used in the decree or resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree.' *Muckleshoot [I],* 141 F.3d at 1359. ***Issuing a supplemental finding under subparagraph [25(a)(6)] defining the scope of Muckleshoot's U&A in Puget Sound would 'alter, amend or enlarge upon' Judge Boldt's description, contrary to the Ninth Circuit's holding in Muckleshoot.***

Order (August 5, 1998), Dkt. # 16540 at p. 10 (emphasis added). Judge Rothstein found that Muckleshoot could not reach step two – a new determination of U&A under 25(a)(6) – because there was a specific determination of Muckleshoot's U&A in the saltwater of Puget Sound. Muckleshoot was therefore limited to evidence that resolved the ambiguity as to what Judge Boldt meant by that phrase.

Next, in subproceeding 09-1, this Court directed that:

> [The] subproceeding shall proceed initially under Paragraph 25(a)(1), …

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> [and] ***in the event that the issues cannot be resolved through a Paragraph 25(a)(1) proceeding***, the Court could find that the . . . U&A's were not specifically determined by Judge Boldt, and turn to Paragraph 25(a)(6) for further proceedings.
> . . .
> ***[O]nly [if the extent of a tribe's U&A's have not been specifically determined] would the Paragraph 25(a)(6) proceedings go forward.***

Order on Motion for Partial Summary Judgment (July 8, 2013), Dkt. # 20438 at pp. 6–7, (internal citations omitted) (underlined emphasis in original; other emphases added).[5]

Then, in subproceeding 11-2, this Court reiterated 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.***

Order on Motions for Summary Judgment (July 17, 2015), Dkt. # 21067 at p. 11 (emphasis added), quoting Order on Motions (May 28, 2015), Dkt. # 21015 at pp. 3–4.

Most recently, in subproceeding 17-01, this Court again stated that:

> ***Only if that question cannot be resolved by looking at the record before Judge Boldt, and should the Court find that [the Tribe's] U&A in question was not specifically determined in [Final Decision I], would it be appropriate to turn to Paragraph 25(a)(6) for further proceedings.***

Order Granting S'Klallam and Squaxin Island Tribes' Motions for Summary Judgment and Denying Skokomish Indian Tribe's Cross-Motion for Summary Judgment (August 30, 2017), Dkt. # 21555 at p. 12 (emphasis added).

2. Step Two – a Proceeding Under 25(a)(6) – is Contingent on a Finding that the U&A at Issue were not "Specifically Determined."

The post-*Muckleshoot I* cases make clear that a 25(a)(6) is contingent on a finding, or a stipulation by all the parties, that the U&A at issue were not "specifically determined." This is

[5] In 09-1, the parties eventually stipulated that the U&A at issue had not been "specifically determined" by Judge Boldt and therefore the matter proceeded to trial under 25(a)(6), with new evidence presented. *See* Order of Clarification and on Pending Motions (November 13, 2014), Dkt. # 20722 at p. 2 ("The parties have since stipulated that Judge Boldt did not specifically determine the western extent of the Quileute and Quinault's ocean U&A's or the northern extent of the Quileute's U&A, such that this subproceeding is moving toward trial under Paragraph 25(a)(6).")

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fatal to Muckleshoot's RFD because Judge Rothstein expressly found that "Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U&A. Although his description may have turned out to be ambiguous, ***he did make a specific determination***." Order (August 5, 1998), Dkt. # 16540 at p. 10 (emphasis added).

Muckleshoot argues that the Tribes have mischaracterized *Muckleshoot I,* and that the 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." SPDkt. # 31 at p. 21. Muckleshoot further claims that this Court's recent rulings in subproceedings 11-2 and 17-01 are "exceptional and distinguishable." *Id.* at p. 37. But this completely ignores the two-step process that this Court has so clearly articulated since *Muckleshoot I:* if there has been a specific determination of U&A, the rules for a 25(a)(1) proceeding apply, meaning that the focus must initially be on what Judge Boldt intended. It is only if there is *not* a specific determination – or if the ambiguity cannot be resolved – that a Tribe can proceed under 25(a)(6).

B. The Prior Proceedings not only Specifically Determined Where Muckleshoot Did Fish in Treaty Times; they also Specifically Determined some Areas Where Muckleshoot Did Not Fish.

Muckleshoot contends that "[t]he 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." Muckleshoot Response, SPDkt. # 31 at p. 29. To the contrary, however, that is *exactly* what subproceeding 97-1 was about – Judge Rothstein *specifically determined*, and the Ninth Circuit affirmed, that based on the record before Judge Boldt in *Final Decision I,* there was no evidence that Areas 9, 10, and 11 were treaty time fishing places of Muckleshoot's ancestors.

In 97-1, Puyallup, Suquamish and Swinomish sought "a declaratory judgment that the Muckleshoot's U&A ***does not include waters within Areas 10, 11 or waters west and north of***

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Area 10 and an injunction preventing the Muckleshoot from fishing those areas." Order (September 10, 1999), Dkt. # 16773 at pp. 3–4. Judge Rothstein found:

> In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would intend to give the Muckleshoot, an upriver people, a vast saltwater U&A stretching from the Tacoma Narrows to Admiralty Inlet and overlapping the U&As of tribes with a documented history of open water fishing in the same areas. The evidence in the record is that the Muckleshoot's predecessors were upriver Indians with fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay. There is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay. Furthermore, there is no evidence that the Muckleshoot possessed the technology to fish on the open waters of Puget Sound.

Id. at pp. 14–15. The Ninth Circuit affirmed the district court's finding that:

> [T]he Muckleshoot's ancestors were almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods. Insofar as they conducted saltwater fishing, the [documents before Judge Boldt] contain no evidence indicating that such fishing occurred with regularity anywhere beyond Elliott Bay.

Puyallup Indian Tribe, et al. v. Muckleshoot Indian Tribe, 235 F.3d 429, 434 (9th Cir. 2000) ("*Puyallup*"). The Ninth Circuit further found that none of the evidence presented by Muckleshoot in 97-1 established that Muckleshoot's ancestors had U&A beyond Elliott Bay. *Id.* at 435. Muckleshoot's statement at p. 29 is directly inconsistent with the Ninth Circuit's description of the "determination by Judge Boldt that the Muckleshoot's ancestors did not engage in U&A saltwater fishing beyond Elliott Bay." *Id.* at 438.

Without regard to the District Court's, and the Ninth Circuit's, findings that Judge Boldt considered significant evidence offered by Dr. Lane regarding treaty and pre-treaty time fishing, and that there was absolutely *no* evidence that the Muckleshoot's ancestors had U&A fishing grounds beyond Elliott Bay, Muckleshoot argues this does *not* mean that Muckleshoot has no U&A in those waters. Muckleshoot's theory, set forth in Section F of its Response, seems to be that there are *never* any exclusionary consequences when Judge Boldt makes a specific U&A determination. In other words, notwithstanding the trial and evidence presented to Judge Boldt to support his *Final Decision I,* if a subsequent 25(a)(1) proceeding reveals his intent was to

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include only a portion of a claim or a portion of Puget Sound, then he did not intend to exclude any portion of a claim, any portion of Puget Sound, or any of the overall case claim area. Consider the consequences of accepting Muckleshoot's proposition.

Muckleshoot's argument would empty 25(a)(6) jurisdiction of all meaning and application. Because 25(a)(6) applies only to expanded U&A outside the existing U&A determination, as Muckleshoot would have it, 25(a)(6) is *always* available to expand into the waters outside, and the limiting language "not specifically determined" would be no limitation at all upon the Court's jurisdiction. A case for such expansion would *always* be in order, because in Muckleshoot's view the new waters would *never* have been specifically determined.

U&A delineates a bounded area, defining what is within, but equally importantly, also what is outside. 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 circumstances that suggest otherwise.

This principle has often been applied 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 in subproceeding 11-2 to reject the very argument Muckleshoot advances here. *See* Order on Motions for Summary Judgment (July 17, 2015), Dkt. # 21067 at p. 15 ("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. The Court therefore dismissed the Tribe's 25(a)(6) claim.)

Accordingly, the specific determination of Muckleshoot U&A as clarified in subproceeding 97-1 applies to areas 9, 10 and 11 at issue in 97-1 as well as the other marine waters outside Elliott Bay. The Motions to Dismiss should be granted, and Muckleshoot's claim in this subproceeding should be dismissed.

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C. Muckleshoot's Marine U&A in Puget Sound have Twice Been "Specifically Determined."

Muckleshoot claims it just wants to have "its day in Court." *See* Response, SPDkt. # 31 at p. 5. But Muckleshoot has already had multiple opportunities to establish its U&A in the "saltwater of Puget Sound." It did so first in the original case before Judge Boldt, in which Judge Boldt made extensive findings as to the location of the U&A of several Indian Tribes in Washington, including Muckleshoot. Included in the record before Judge Boldt was evidence relating to Muckleshoot's treaty fishing in the saltwater of Puget Sound. *See e.g., Puyallup,* 235 F.3d at 434–38 (describing the evidence before Judge Boldt). The original case resulted in a "lengthy and detailed district court opinion published in 1974 after an extensive trial involving a voluminous record." *See id.* at 431.

1. Judge Boldt's FF 76 Specifically Determined That Muckleshoot Has U&A "Secondarily In The Saltwater of Puget Sound".

Judge Boldt's findings in *Final Decision I* were based primarily on testimony and reports provided by Dr. Barbara Lane, as well as other evidence. 384 F. Supp. at 350. As to Muckleshoot, Dr. Lane provided an *Anthropological Report on the Traditional Fisheries of the Muckleshoot* Indians, which was admitted as Ex. USA 27-b. FF 76, and the evidence cited by Judge Boldt in that finding, including the report of Dr. Lane, established that saltwater fisheries were of relatively minor importance to the predecessors of the Muckleshoot Tribe, whose primary fishing areas were in the fresh waters of the Duwamish River system. *Puyallup,* 235 F.3d at 434. Dr. Lane's report on Muckleshoot fishing places, Ex. USA 27-b, refers to saltwater fisheries only twice, and both places are limited to river-mouth fisheries. In particular, Dr. Lane said that "[t]he ancestors of the modern Muckleshoot lived in treaty times in about twenty villages on the Duwamish and upper Puyallup drainage systems" and were "'upriver' people in contrast to those people living directly on the bays and lower reaches of the

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rivers." Ex. USA 27-b at 6–7. None of the evidence cited by Judge Boldt in FF 76 mentions Muckleshoot fisheries in any open marine waters beyond Elliott Bay.

2. Subproceeding 97-1 Specifically Determined that Muckleshoot's U&A in Puget Sound is Limited to Inner Elliott Bay.

Beginning in around 1995, Muckleshoot asserted that its U&A included marine waters throughout Puget Sound and stated its intention to authorize fisheries in Area 11, including fisheries for geoduck clams in waters adjacent to Vashon Island. *See* Puyallup Request for Determination re: Usual and Accustomed Fishing Grounds of the Muckleshoot Indian Tribe (January 11, 1997), Dkt. # 16016 at p. 5, ¶ 12.[6] In 1997, Puyallup, later joined by the Suquamish and Swinomish Tribes, filed a Request for Determination seeking to enjoin Muckleshoot from authorizing fisheries in Area 11, and requesting a declaration that Muckleshoot's U&A does not include any marine areas outside Elliott Bay. *Id.* at 6. In subproceeding 97-1, this Court specifically determined that Muckleshoot's U&A "in the saltwater of Puget Sound" does not include Areas 9, 10, or 11. The Ninth Circuit affirmed. *Puyallup,* 235 F.3d at 438.

Muckleshoot argued in 97-1 that the term "Puget Sound" should not be interpreted to limit its fishing area to Elliott Bay and that Judge Boldt intended the phrase "Puget Sound" to include the inside marine waters from Admiralty Inlet to the Tacoma Narrows (Areas 9, 10, 10A, and 11). *See* Order Granting Petitioner's Motion for Summary Judgment, Denying Respondent's Motion for Summary Judgment and Dismissing Subproceeding (September 10, 1999), Dkt. # 16773 at p. 3. The parties agreed that Muckleshoot has fishing rights in Area 10A, which is Elliott Bay. But Puyallup, Suquamish and Swinomish sought a declaratory ruling that the Muckleshoot did not have fishing rights in Areas 9, 10, 11, and points beyond.

[6] According to Puyallup's Memorandum in Support of Motion for Preliminary Injunction in 97-1, Muckleshoot had not participated in any commercial fishery in Area 11 in the preceding 20 years, but that changed with the development of the "relatively new and lucrative geoduck fishery …". Dkt. # 16021 at p. 10.

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Critically, while 97-1 was pending, the Ninth Circuit issued its decision in *Muckleshoot I.* Judge Rothstein ordered supplemental briefing from the parties. *See* Minute Order (April 30, 1998), Dkt. # 16466. At the conclusion of that supplemental briefing, Judge Rothstein issued an Order. Dkt. # 16540. She began by bifurcating the contested waters at issue in subproceeding 97-1 into: 1) Areas 9, 10, and 11; and 2) the areas beyond Areas 9, 10, and 11. With respect to the latter, she found that Muckleshoot had no present intention of fishing in areas beyond Areas 9, 10, and 11, and therefore granted Muckleshoot's motion to dismiss with respect to those waters. *Id.* at p. 11.

Significantly, at the urging of Muckleshoot, Judge Rothstein found that the Ninth Circuit's decision in *Muckleshoot I* foreclosed the use of Paragraph 25(a)(6) to determine Muckleshoot's fishing rights in areas beyond Areas 9, 10, and 11:

> The Muckleshoot argue that the court cannot make a supplemental finding under [Paragraph 25(a)(6) under *Muckleshoot I*] to determine their fishing rights in areas beyond Areas 9, 10, and 11. The court agrees that *Muckleshoot [I]* forecloses this approach. ...
>
> Here, as in *Muckleshoot [I]*, Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U&A. Although his description may have turned out to be ambiguous, he did make a specific determination. … Issuing a supplemental finding under [Paragraph 25(a)(6)] would 'alter, amend or enlarge upon' Judge Boldt's description, contrary to the Ninth Circuit's holding in *Muckleshoot [I]*.

Id. at p. 10.

Muckleshoot had argued in 97-1 that "***the reservation of continuing jurisdiction in this case does not permit relitigation of Muckleshoot's fishing places in Puget Sound, because that matter was specifically decided in the first decision [Final Decision I]***." Memorandum in Support of Respondent Muckleshoot Indian Tribe's Motion to Dismiss (January 15, 1998), Dkt. # 16357 at p. 3, (emphasis added). *See also id.* at p. 4 (in *Final Decision I,* "Judge Boldt specifically found that Muckleshoot has treaty rights to fish in the 'saltwater of Puget Sound.' … [which] was part of a final decision that was affirmed by the Ninth Circuit.") More

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specifically, and as directly relevant to this RFD, Muckleshoot successfully argued that subproceeding 97-1 was "beyond the continuing jurisdiction reserved in paragraph 25 of the permanent injunction, as modified," and that "Subparagraph (6) … is inapplicable because Judge Boldt 'specifically determined' that Muckleshoot has usual and accustomed fishing places in 'Puget Sound.'" *Id.* at p. 17.

Judge Rothstein agreed, which is why she granted Muckleshoot's Motion to Dismiss the RFD as to the areas beyond Areas 9, 10, and 11. Order (August 5, 1998), Dkt. # 16540 at pp. 10–11. She reserved the question of whether the areas beyond Areas 9, 10, and 11 are part of Muckleshoot's U&A until such time as Muckleshoot stated an intention to fish there, at which point the Court could properly exercise its jurisdiction under 25(a)(1). *Id.* at 11. As to Areas 9, 10, and 11, she set a hearing date and discovery and disclosure schedule. *Id.* at 12.

Ironically, in 97-1, Muckleshoot argued persuasively to this Court that the petitioners should not be permitted "to reexamine the trial evidence Judge Boldt relied upon and revise his Finding No. 76 …" Dkt. # 16357 at p. 2. To do so, said Muckleshoot, would be "barred as an improper effort to relitigate a matter finally decided in the first decision in this case." *Id.* at p. 3. Yet, that is exactly what Muckleshoot seeks to do now; relitigate its claims to U&A "in the saltwater of Puget Sound;" which have already been decided by Judge Boldt, and as were further defined in subproceeding 97-1.

Judge Rothstein then went on to find that Muckleshoot does not have U&A in Areas 9, 10, and 11, which the Ninth Circuit affirmed in *Puyallup.*

D. Muckleshoot's Reliance on Arguments of Moving Tribes That Pre-Date the New Clarifications Provided in *Muckleshoot I* are Inapposite.

Muckleshoot makes much of the Reply Memorandum of Puyallup, Suquamish and Swinomish Tribes in Support of Motion to Strike in 97-1 (March 5, 1998), Dkt. # 16421 at pp. 2–3, to suggest that the three Tribes concurred that Muckleshoot could later file a Request for Determination, just as it has done now, in order to establish additional U&A. *See* Muckleshoot

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Response, SPDkt. # 31 at p. 27. But Muckleshoot ascribes undue weight to that pleading for at least two reasons.

First, that pleading was filed on March 5, 1998, *before* the Ninth's Circuit's decision in *Muckleshoot I* and the subsequent supplemental briefing with the Court in 97-1. As previously described, *Muckleshoot I* clarified the proper exercise of jurisdiction under 25(a)(6) and the types of evidence that would be admissible where U&A have been "specifically determined." *Muckleshoot I* established that "[a]lthough jurisdiction to enter supplemental findings exists under the decree," Paragraph 25(a)(6) is not available where the Tribe's usual and accustomed places were specifically determined by Judge Boldt, "albeit using a description that has turned out to be ambiguous." 141 F.3d at 1360.

Second, after that pleading was filed, Judge Rothstein specifically found that allowing Muckleshoot to present evidence of new U&A in the saltwater of Puget Sound would be contrary to Ninth Circuit's holding in *Muckleshoot I* because Judge Boldt had already made a finding of fact determining the location of Muckleshoot's U&A. *See* Order (August 5, 1998), Dkt. # 16540 at p. 10. While games of "gotcha" based on something a litigant argued in a different time, on different facts, and under different rules might be therapeutic or sport for some litigators, those old briefs and arguments must always give way to what the Court actually did with them. In 97-1, Judge Rothstein did not agree that Suquamish or any other Tribe could create Paragraph 25(a)(6) jurisdiction for Muckleshoot with a promise, rather, she applied the rule provided her by the *Muckleshoot I* decision.

E. Muckleshoot did not Appeal this Court's Ruling that Muckleshoot's U&A in the Saltwater of Puget Sound have been "Specifically Determined" or Her Decision to Exclude Extra-Record Evidence of Treaty-Time Fishing.

Muckleshoot appealed Judge Rothstein's September 10, 1999, Order holding that Muckleshoot's U&A under FF 76 was limited to Elliott Bay and enjoining the Muckleshoot from fishing in Areas 9, 10, and 11. Significantly, however, Muckleshoot did not appeal, or

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otherwise preserve or assign error to Judge Rothstein's decision to exclude extra-record evidence of Muckleshoot's treaty-time fishing *or* her finding that Muckleshoot's U&A had already been "specifically determined." To the contrary, Muckleshoot has waited twenty years to again try to present its "new" evidence.

Muckleshoot has simply put a new label on its request, claiming that this is different from the prior proceedings because it is brought under 25(a)(6), rather than 25(a)(1). In fact, Muckleshoot has been here before, with much of the same evidence in hand. Notwithstanding claims to the contrary, Muckleshoot had a "full and fair opportunity" to try to establish its U&A in the saltwater of Puget Sound, over the course of a three-year subproceeding in this case.

As the Ninth Circuit noted in *Puyallup:*

> [I]n referencing the documents cited in Finding 76, Judge Boldt said, 'The court finds that in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. ***They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties . . .'***

235 F.3d at 433, quoting *Final Decision I,* 384 F. Supp. at 350 (emphasis added). To now say that "[t]he 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" (Response, SPDkt. # 31 at p. 40) belies this finding by Judge Boldt, and the voluminous record upon which he relied in issuing FF 76. Moreover, both the district court and the Ninth Circuit in 97-1 carefully reviewed the record before Judge Boldt to find that "Muckleshoot's ancestors were almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods" who "did not engage in U&A saltwater fishing beyond Elliott Bay." *Puyallup,* 235 F.3d at 434, 438. There is simply no basis to reopen those two prior "specific determinations" of Muckleshoot's U&A.

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F. Jurisdiction Under Paragraph 25(a)(6) may be Available Under Certain Circumstances, Not Present Here.

Muckleshoot claims in its Response, SPDkt. # 31 at p. 38, that "The Moving Tribes assert 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." This mischaracterizes the Moving Tribes' position, and the meaning of 25(a)(6). The position of Suquamish – consistent with that of this Court in its previous rulings – is that 25(a)(6) is available only if: 1) the Tribe's U&As were not specifically determined in *Final Decision I;* 2) the parties stipulate to a 25(a)(6) proceeding, as they did in 09-1; or 3) the Court determines that the ambiguity as to what Judge Boldt intended cannot be resolved in a 25(a)(1) proceeding.

Here, however, Judge Boldt did specifically determine that Muckleshoot had U&A "secondarily in the saltwater of Puget Sound." *United States v. Washington,* 384 F. Supp. 312, 367 (W.D. Wash. 1974) (Finding of Fact 76). The "new" U&A Muckleshoot claims in its RFD are within this previously adjudicated area. This Court has also already determined that the phrase "secondarily in the saltwater of Puget Sound" is ambiguous. *See* Order Granting Petitioner's Motion for Summary Judgment, Denying Respondent's Motion for Summary Judgment and Dismissing Subproceeding (September 10, 1999), Dkt. # 16773 at pp. 4–5. Therefore, under *Muckleshoot I,* the proper analysis for this case is to determine what Judge Boldt intended by his use of that phrase. That question has already been fully answered with respect to Areas 9, 10, and 11. As to the areas beyond Areas 9, 10, and 11 in the saltwater of Puget Sound, Muckleshoot must proceed, at least initially, under 25(a)(1) because Judge Boldt made a specific determination in FF 76.

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G. The RFDs Brought by Other Tribes Prior to the Ninth Circuit's Decision in *Muckleshoot I* are Not Relevant here.

Muckleshoot contends that the proceedings brought by other Tribes to expand their initial U&A determinations "are no different than the relief Muckleshoot seeks[.]" SPDkt. # 31 at p. 16. However, all but one of the RFDs described in § III. C of the Muckleshoot Response were brought *prior to* the Ninth Circuit's decision in *Muckleshoot I.* As previously described, *Muckleshoot I* and subsequent cases have established a two-step process for determining whether jurisdiction under 25(a)(6) is proper (and therefore whether new evidence of treaty time fishing can be presented). The cases prior to *Muckleshoot I* simply are not relevant here.

The stark contrast between Muckleshoot's current RFD and subproceeding 09-1 – the only post-*Muckleshoot I* proceeding included in Muckleshoot's Response – is worth noting here. In that case, the parties stipulated that the U&A of Quinault and Quileute were *not* specifically determined by Judge Boldt, and therefore agreed that 25(a)(6) was the proper basis for jurisdiction to determine the western boundary of Quinault and Quileute's U&A in the Pacific Ocean. Accordingly, the court considered additional evidence of the Tribes' U&A, in a 23-day trial that exceeded the length of Judge Boldt's original trial in *Final Decision I.* Significantly, subproceeding 09-01 ***applied the two-step process from Muckleshoot I.*** As Muckleshoot acknowledges, the court directed that the case had to proceed initially under 25(a)(1). Muckleshoot Response, SPDkt. # 31 at p. 19. ***It was only after the parties stipulated that the U&A at issue had not been specifically determined that the Court allowed the case to proceed to trial under 25(a)(6).*** *Id.*

Even assuming the earlier, pre-*Muckleshoot I* cases are relevant, they are readily distinguishable from this RFD. For example, Muckleshoot refers to the request for determination brought by the Makah Tribe in 1977. That was an entirely different scenario. As described in Makah's Memorandum in Support of its RFD, included in Muckleshoot's exhibits to its Response, SPDkt. # 32-2 at p. 68:

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> [A]t the time of Final Decision I, little evidence concerning off-shore ocean places was presented. At the time, and at the present, the State of Washington, against whom the litigation was brought, did not have jurisdiction beyond three (3) miles from the Washington shore. However, subsequently, the United States Congress enacted the so-called '200-Mile Jurisdiction Act' (Public Law 94-265, The Fisheries Conservation and Management Act of 1976). This Act vests fishing regulation jurisdiction in the United States Government, Department of Commerce, up to 200 miles from the shores of the State of Washington. ***Thus, it has become important for the Makah Tribe to clearly establish its usual and accustomed places within that fishing zone.***

(emphasis added). Makah's U&A was "not specifically determined" by Judge Boldt in the waters outside of Washington's jurisdiction because there would have been no reason or ability to do so. A subsequent proceeding under 25(a)(6) was therefore appropriate.

Muckleshoot also points to the RFD filed by Upper Skagit in subproceeding 89-3. That case does not help Muckleshoot either. As briefed by the Upper Skagit Tribe in 89-3:

> As the Court is aware, the Upper Skagit Tribe previously sought and had adjudicated its riverine fishing rights. Now the Upper Skagit Tribe is moving for the first time in this subproceeding and in subproceeding 93-1 (anadromous fish) to establish its <u>marine</u> fishing and shellfishing rights.

See Exh. 16 to the Muckleshoot Response, SPDkt. # 32-2 at p. 169 (emphasis in original). Unlike the situation here, Upper Skagit Tribe's marine U&A was "not specifically determined" by Judge Boldt. Moreover, in subproceeding 89-3, the parties <u>*stipulated*</u> to Upper Skagit's introduction of evidence of its marine fishing:

> <u>Exception for Upper Skagit Indian Tribe</u>. All stipulating parties acknowledge and agree that in subproceeding 89-3 the Upper Skagit Indian Tribe shall be entitled to claim, and introduce evidence in support of its claims to shellfish usual and accustomed grounds and stations, outside of its currently adjudicated usual and accustomed grounds and stations, in the marine and fresh water areas, and the tidelands and bedlands adjoining and subjacent to those marine and fresh water areas, […][7]

[7] Exh. 17 to the Muckleshoot Response, SPDkt. # 32-3 at pp. 177–178.

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H. Muckleshoot Still has Failed to Show Why It Need Not Comply With FRCP 60.

Under amended ¶ 25(b)(5) of Judge Boldt's Injunction, motion practice in subproceedings initiated under ¶ 25 is conducted in accordance with the Federal Rules of Civil Procedure and the Court's general and civil rules. *United States v. Washington,* 18 F.Supp.3d 1172, 1214–1215 (W.D. Wash. 1993); *see also, Final Decision I,* 384 F.Supp. at 419 ("This injunction shall not alter or deprive the parties of any right to bring motions and other matters before this court as provided in the Federal Rules of Civil Procedure."). This Court further reiterated in subproceeding 97-1 that "[p]rocedures in this matter shall continue to be governed by the Federal Rules of Civil Procedure, the Local Rules of this Court, and prior orders in this case and sub-proceeding[.]" Order for Pre-Hearing Schedule (October 30, 1998), Dkt. # 16595 at p. 1.

Muckleshoot has yet to show why Rule 60 should not bar it from introducing evidence it has had for at least twenty years. Certainly as to Areas 9, 10, and 11, the time to bring a 25(a)(6) proceeding – if ever – was when Muckleshoot's U&A was at issue before this Court in 97-1.

III. CONCLUSION

Muckleshoot's RFD seeks a determination that its U&A under the Treaties of Point Elliott and Medicine Creek "include additional locations *in the saltwater of Puget Sound* not determined in earlier proceedings in this action." SPDkt. # 3 at p. 1 (emphasis added). But, as Muckleshoot successfully argued in subproceeding 97-1, its U&A in the saltwater of Puget Sound has already been specifically determined, so jurisdiction under 25(a)(6) is not proper. Indeed, there have been *two* specific determinations of Muckleshoot's U&A: one broad (the finding in FF 76 that Muckleshoot has U&A "secondarily in the saltwater of Puget Sound"), and one much more narrow (the finding in 97-1 limiting Muckleshoot's saltwater U&A to

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Elliott Bay, and determining that Muckleshoot does not have U&A in Areas 9, 10, or 11). Under the law of the case, as well as principles of finality and judicial efficiency, Muckleshoot should not be allowed to relitigate its claims with respect to Areas 9, 10 and 11, and the RFD should be dismissed to the extent it includes U&A claims in those Areas.

As to other U&A in the saltwater of Puget Sound, the law of case since *Muckleshoot I* requires Muckleshoot to proceed, at least initially, under 25(a)(1) (i.e., the record that was before Judge Boldt). Jurisdiction under 25(a)(6) is only appropriate if the Court finds – or all the parties stipulate – that the U&A have not been "specifically determined." Here, this Court found that Muckleshoot's U&A in "the saltwater of Puget Sound" *were* specifically determined. *See* Order (August 5, 1998), Dkt. # 16540 at p. 10. This Court also found that the phrase "secondarily in the saltwater of Puget Sound" is ambiguous. *Id.* Accordingly, the evidence admissible to resolve the ambiguity is that which shows "what Judge Boldt meant" by his use of that phrase. *Muckleshoot I,* 141 F.3d at 1358. The Motion to Dismiss Muckleshoot's RFD should be granted.

DATED this 12th day of January 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12th, 2018, 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 12th day of January, 2018.

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