THE HON. RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

Case No. C70-9213

Subproceeding No. 18-sp-01

LUMMI NATION'S OMNIBUS OPPOSITION TO SWINOMISH, TULALIP, AND UPPER SKAGIT'S MOTIONS FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

In their motions for temporary restraining order, the Swinomish Indian Tribal Community, the Tulalip Tribes, and the Upper Skagit Indian Tribe (the "Requesting Tribes") attempt to create an emergency that does not exist. Although the Lummi's adjudicated usual and accustomed fishing grounds encompass the waters at issue here, the Lummi have no present plans to fish in those waters—a fact the Lummi have made abundantly clear to the Requesting Tribes. Rather, the regulation the Lummi have issued serves only as a declaration of their rights to fish in these waters. As the regulation itself states, the Lummi have no intention of exercising that right, but will send "zero boats and zero fishers." Zero boats and zero fishers means no Lummi fishing in the disputed waters. And without any

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threat of Lummi fishing, the Requesting Tribes cannot show any immediate threat of irreparable harm. Their request for a temporary restraining order should be denied.

II. BACKGROUND

Judge Boldt declared that the Lummi's U&A "include[s] the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *United States v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974) ("*Final Decision I*"). As the Ninth Circuit recently confirmed, that description encompasses the marine passageways through which the Lummi would have likely traveled (and fished) in traversing from the waters of Puget Sound in the north to their territory in the present environs of Seattle to the south. *United States v. Lummi Nation*, 876 F.3d 1004, 1009-11 (9th Cir. 2017) (*Lummi II*).

Consistent with this straightforward understanding of their adjudicated treaty rights, in 2008 the Lummi opened a shrimping fishery in 2 East and 6A. (Decl. of Jeremiah Julius ISO Omnibus Opp. ("Julius Decl.") ¶ 3.) These waters lie in Puget Sound to the east of Whidbey Island, en route from the Lummi U&A in and around Fidalgo Island to the Lummi U&A in the environs of Seattle. *Final Decision I*, 384 F. Supp. at 360.

Lummi then entered into an Agreement to Engage in Settlement Discussion with the Swinomish, Tulalip and Upper Skagit Tribes. (Julius Decl. ¶ 4.) In the Agreement, the Swinomish agreed to respect Lummi's management and regulatory preferences for Shellfish Area 20A and 20B and Salmon Area 7A. (*Id.*) In exchange, Lummi agreed not to authorize its fishers in Area 2E during settlement discussion. (*Id.*)

No such settlement discussions were had for a decade. (*Id.* ¶ 5.) Instead, Lummi learned of various violations of the Agreement by the Swinomish. (*Id.*) In February 2018, Lummi advised the Swinomish of these violations by letter and requested their adherence to the terms of the Agreement. (*Id.* Ex. A.) Lummi also proposed dates for a meeting to discuss these violations. (*Id.*) Lummi received no response from the Swinomish. (*Id.* ¶ 8.)

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In April 2018, Lummi sent a letter notifying the Tribes that the Agreement was terminated. (*Id.* ¶ 10.) Subsequent efforts by Lummi to meet with the Swinomish about a potential new agreement were to no avail, and the Lummi found themselves excluded from management discussions regarding this important fishery. (Decl. of Benjamin Starkhous ISO Omnibus Opp. ("Starkhouse Decl.") ¶ 5.).

To declare their rights to fish in these waters, and to secure their place at the bargaining table, Lummi issued a regulation to open the fishery. (Julius Decl. ¶ 13; May 31, 2018 Decl. of James Gibson ("Gibson Decl."), ECF No. 21749-6, Ex. 5.) That regulation did not, however, actually have the effect of authorizing Lummi fishermen to fish in this area. (*Id.*) To the contrary, it expressly stated that the "expected effort" was "zero boats and zero fishers"—in other words, no fishing at all. (*Id.*) That is because Lummi fisherman will respond to this regulation only if it is transmitted to them through the Lummi Fishing Regulation Hotline. (Starkhouse Decl. ¶ 7.) The fishermen are then required to obtain the necessary tags from the Lummi before being authorized to fish. (*Id.* ¶ 9.)

Although the Lummi maintain that they have established treaty rights to do so, they do not intend to actually commence fishing in these waters. (Julius Decl. ¶ 14.) The Lummi have not, and will not, announce this fishery on the Fishing Regulation Hotline. (Starkhouse Decl. ¶ 7.) And the Lummi have not, and will not, order the tags that would be provided to its fisherman in order to authorize them to fish. (*Id.* ¶ 9.) As the Lummi repeatedly made clear to the Requesting Tribes, they will adhere to the "zero boats and zero fishers" provision. (Julius Decl. ¶ 19.; Gibson Decl. Ex. 5.) "No Lummi fishers will be authorized to fish in the opening in Area 2E." (Starkhouse Decl. ¶ 9.)

At a meeting on May 30, the Requesting Tribes demanded that the Lummi withdraw their regulation. (Julius Decl. ¶ 14.) The Lummi declined to do so, but again confirmed that they have no intention of fishing in these waters this season. (*Id.* ¶¶ 14-15; Starkhouse Decl. ¶ 13.)

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III. LEGAL STANDARD

In order to succeed on a motion for temporary restraining order, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that a balance of equities tips in the favor of the moving party; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). The Ninth Circuit employs a "sliding scale" approach, according to which these elements are balanced. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

IV. ARGUMENT

A. The Requesting Tribes Do Not Clearly Show Immediate and Irreparable Injury Because The Lummi Regulation Will Not Lead To Any Fishing In The Disputed Waters.

The Requesting Tribes' motions for a temporary restraining order fail for a simple reason: they cannot show any threat of harm. That is because—as the Lummi regulation that precipitated these supposedly emergency motions expressly confirms—the Lummi have no immediate intention of fishing in the disputed waters.

A plaintiff must demonstrate a significant threat of irreparable injury—not just a possibility—in order to obtain preliminary relief. *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989); *Winter*, 555 U.S. at 20. The speculative risk of a possible injury is not enough; the threatened harm must be imminent. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); Fed. R. Civ. Proc. 65(b)(1)(A). And a plaintiff seeking injunctive relief "must proffer evidence" sufficient to establish that significant threat of harm. *Herb Reed Enterprs., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013).

Here, the Requesting Tribes have pointed to no such imminent risk of irreparable harm. All of the supposed "irreparable harm" that the Requesting Tribes cite would result

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from the Lummi actually *fishing* in the contested waters. (*See* Swinomish and Tulalip Tribes Mot. at 6-11; Upper Skagit Mot. 10-11.) Yet the language of the regulation is plain: there will be "zero boats and zero fishers." (Gibson Decl. Ex. 5.) And if there are "zero boats and zero fishers," there is zero harm. The Requesting Tribes can suffer no irreparable injury from the mere existence of a regulation that reflects the Lummi's professed rights to fish in these waters—rights the Requesting Tribes have long known the Lummi maintain.

In attempting to convert the Lummi's declaration of rights into an imminent threat, the Requesting Tribes rely on speculation that the Lummi could nevertheless "cho[o]se" to fish in these waters. (Swinomish and Tulalip Tribes Mot. at 8-9 (quoting Gibson Decl. ¶28).) But the relevant question here is not what the Lummi *might* do in some hypothetical situation; it is whether there is actually an imminent risk that the Lummi will take the actions that the Requesting Tribes claim would cause them irreparable harm. *Caribbean Marine Servs.*, 844 F.2d at 674. And the Lummi have made very clear that they have chosen *not* to send their fleet to these waters. (Julius Decl. ¶ 14.) As the Fisheries Harvest Manager of the Lummi Nation expressly represents in his declaration to this Court: "No Lummi fishers will be authorized to fish in the opening in Area 2E." (Starkhouse Decl. ¶ 9.) Indeed, even while claiming that they were motivated by the threat of Lummi fishing to change their regulations to prevent the harvest quota from being exceeded (Tulalip and Swinomish Mot. at 3), the Requesting Tribes actually *increased* the total number of hours that this fishery would be open. (*Id.* ¶ 10.)

The only evidence that the Requesting Tribes have proffered to counter the Lummi's clear statements of intent is their description of the May 30 meeting between the Lummi and the Requesting Tribes. (Swinomish and Tulalip Tribes Motion at 3-4.) But the Requesting Tribes conflate the Lummi's refusal to withdraw their regulation with a refusal to state their intentions with respect to fishing. (*Id.*; *see* Cladoosby Decl. ¶¶ 4, 7.) The Lummi did indeed refuse to withdraw the regulation, as they see it as an important statement of their rights

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necessary to secure their place at the bargaining table. (Julius Decl. ¶ 13.) But the Lummi also expressly stated that "it is not our intention" to fish these waters. (Julius Decl. ¶ 14). And if that statement of intent was not plain enough, the Lummi's declarations submitted in conjunction with this opposition make it abundantly clear: the Lummi will not fish these waters next week. (Starkhouse Decl. ¶ 9; Julius Decl. ¶ 14.) There is thus no need for a temporary restraining order.

B. The Requesting Tribes Will Not Succeed on the Merits.

The Requesting Tribes have also failed to demonstrate any likelihood of success on the merits. To prove that Judge Boldt's order did not recognize Lummi U&A in the waters east of Whidbey Island, the Requesting Tribes must satisfy the Ninth Circuit's two-part test. "First, the moving party bears the burden of offering evidence that a U&A finding was ambiguous, or that Judge Boldt intended something other than [the text's] apparent meaning." *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015) (alteration in original). Second, if the movant meets that initial burden, it must also demonstrate that there is "no evidence" in the record that might have led Judge Boldt to include the disputed waters in his description. *Id.* Thus, even if Judge Boldt's description of the Lummi U&A is ambiguous, the Requesting Tribes must demonstrate that there was "*no* evidence before Judge Boldt that the [Lummi] fished . . . or traveled through the contested areas." *Id.* (emphasis added).

The Requesting Tribes have not demonstrated any likelihood that they will be able to meet this heavy burden. As noted, Judge Boldt determined that the "usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Final Decision I*, 384 F. Supp. at 360. The waters at issue here—which are within Northern Puget Sound between Fraser River and Seattle—fall comfortably within this description.

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Indeed, the Ninth Circuit has confirmed the breadth of the waters encompassed by Judge Boldt's description. In *United States v. Lummi Indian Tribe*, 235 F.3d 443, 453 (9th Cir. 2000) (*Lummi I*), the Ninth Circuit held that the Lummi's U&A includes Admiralty Inlet, which is to the east of Whidbey Island. The Court reasoned that Admiralty Inlet "would likely be a passage through which the Lummi would have traveled" in traversing the fishing grounds Judge Boldt identified, this Court concluded that it was "intended to be included within the 'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle.'" *Id.* It explained: "If one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station, *see* Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds and stations, *see* Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle.'" *Id.*

The Ninth Circuit applied the same reasoning in a recent decision holding that the Lummi U&A also includes the waters west of Whidbey Island to the north of Admiralty Inlet. *Lummi II*, 876 F.3d at 1009-11. Echoing its *Lummi I* decision, the court declared that "there is no doubt that the waters west of Whidbey Island would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle.'" *Id.* at 1009. The court rejected the argument that such evidence of travel alone was insufficient to support a Tribe's U&A, emphasizing that the Court's framework "requires looking at the evidence before Judge Both that the tribe fished *or traveled* in the contested waters." *Id.* at 1010 (alteration omitted).

The same logic applies here. The waters at issue lie between Fidalgo Island—expressly named in Judge Boldt's order as the site of Lummi U&A (*Final Decision I*, 384 F. Supp. at 360)—and the "presented environs of Seattle"—also expressly named in Judge Boldt's order (*id.*). These waters thus also "would likely be a passage through which the

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Lummi would have traveled," as "it is natural to proceed" through this passage from Fidalgo Island "to reach 'the environs of Seattle.'" *Lummi I*, 235 F.3d at 452.

Additional evidence before Judge Boldt supports the conclusion that the Lummi would have fished in these waters—further precluding the Requesting Tribes from satisfying their "no evidence" burden. In particular, Dr. Barbara Lane noted that the Lummi "imported various fibers and grasses from upriver Skagit," demonstrating the Lummi's likely presence in Skagit Bay. (Decl. of Mary Neil ISO Omnibus Opp., Ex. 1 [USA-20 at 2] at 2.) She also described the Lummi as having fished off "Fidalgo Island," then asserted that "[o]ther fisheries in the Straits and bays from the Fraser River south to the present environs of Seattle were utilized." (May 31, 2018 Decl. of James Jannetta ("Jannetta Decl."), ECF No. 21749-3, Ex. 3 at 26.) The waters disputed here are "Straits and bays" satisfying this description.

In their motions for a temporary restraining order, the Requesting Tribes do not address this evidence. Instead, they largely focus their efforts on insisting that because Lummi have U&A in Admiralty Inlet and to the west of Whidbey Island, they cannot have U&A in the waters at issue here. But nothing in the Ninth Circuit decisions described above held or even suggested that the passage from the Lummi's undisputed U&A in the north to their undisputed U&A in the south addressed in those decisions was the *only* route through which the Lummi would have traveled and fished. To the contrary, *Lummi I* described Admiralty Inlet as "*a* passage" through which the Lummi likely traveled, not *the* passage. 235 F.3d at 452 (emphasis added). As the evidence before Judge Boldt established, it was also just as likely that the Lummi traveled to the east of Whidbey Island in traversing their U&A—thereby also rendering those waters part of their U&A.

Contrary to the Requesting Tribes' assertions, the Lummi have never contended that the waters west of Whidbey Island must be within their U&A because the Lummi did not travel "*on the east side*" of the Island. (Upper Skagit Mot. at 9; Swinomish and Tulalip Tribes Mot. at 14.) Instead (as the quotations they excerpt from the Lummi's Ninth Circuit

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brief in fact demonstrate), the Lummi argued only that they "undoubtedly would have passed through" the waters west of Whidbey Island in traveling from their U&A in the San Juans to their U&A in Admiralty Inlet. (Upper Skagit Mot. at 8 (emphasis omitted).) The Lummi have never asserted that they utilized only one route in traversing their U&A. Rather, the Lummi have maintained that they traveled "*throughout* the waters of Puget Sound." *See, e.g.*, *Opening Brief of Respondent-Appellant Lummi Nation*, No. 15-35661, Dkt. No. 21 at 7 (9th Cir.) (emphasis added, citing USA-30 at 25).

Likewise, nothing in the record before Judge Boldt would suggest that the Lummi could have traveled only to the west of Whidbey Island. The Requesting Parties repeatedly refer to Dr. Lane describing a single "marine highway" through which the Lummi traveled. (Swinomish and Tulalip Tribes Mot. at 13; Upper Skagit Mot. at 8.) In fact, however, Dr. Lane said that the "Straits and Sounds were traditional *highways* used in common by all Indians of the region." (Jannetta Decl., Ex. 3 at 25 (emphasis added).) Nowhere did she limit the Lummi to a single highway.

Finally, the Swinomish and TulalipTribes assert that the Swinomish's purported control over Swinomish Slough and Deception Pass would have precluded the Lummi from fishing and traveling in these waters. (Swinomish and Tulalip Tribes Mot. at 16-17.) But of course, "[t]he only relevant evidence is that which was considered by Judge Boldt when he made his finding." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (1998). Because the Requesting Tribes cite no evidence from the record before Judge Boldt that the Swinomish would have refused to allow the Lummi to travel through these passes, they provide no basis to conclude that the Judge Boldt himself would have presumed the Lummi did not do so. *See id.* (explaining court must "construe a judgment so as to give effect to the intention of the issuing court"). Moreover, if the Swinomish hope to establish primary rights in these waters (*see* Swinomish and Tulalip Tribes Mot. at 17), they must comply with the procedural requirements of Paragraph 25 in doing so—something that if the Tribe has done,

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it did over ten years ago. (*See* Swinomish and Tulalip Tribes Request For Determination at 2-3.) And even if the Swinomish are now able to establish that they have primary rights to fish in these particular passageways, that does not mean that they can preclude the Lummi from exercising their treaty-protected right to fish in the waters to the south that are at issue in this proceeding.

C. The Balance of Equities Favors The Lummi Nation, Not The Requesting Tribes.

Before issuing a preliminary injunction, courts must weigh the claims of injury and "consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987). Here, because the Requesting Tribes can establish no immediate harm from the Lummi's mere issuance of a regulation that articulates their *right* to fish, but does not provide for any actual fishing, and because their underlying claims lack merit in any event, that balance tips decidedly in favor of the Lummi.

D. A Temporary Restraining Order Is Not in the Public Interest.

The public interest analysis for the issuance of a preliminary injunction requires courts to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief. *Alliance For The Wild Rockies*, 632 F.3d at 1131. For the same reasons that the Requesting Tribes cannot establish that they will be harmed absent this Court's issuance of a temporary restraining order, they likewise cannot establish that the public interest requires the issuance of such an order. There is no need for this Court to exercise its power to prevent actions that the Lummi have expressly disclaimed any intention of taking.

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IV. CONCLUSION

The Requesting Tribes' motions for a temporary restraining order should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on 1st day of June, 2017 I electronically filed the forgoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties which are registered with the CM/ECF system.

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