

HONORABLE RICARDO S. MARTINEZ

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

UNITED STATES OF AMERICA, et al.,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendant.

Case No.: C70-9213

Subproceeding No. 17-3

**UPPER SKAGIT INDIAN TRIBE'S  
MOTION TO DISMISS**

**NOTE ON MOTION CALENDAR:  
November 30, 2018**

**I. INTRODUCTION**

The Stillaguamish Tribe of Indian's (Stillaguamish) request for determination should be dismissed because the Court did not retain subject matter jurisdiction to revisit its prior specific determination of Stillaguamish's usual and accustomed fishing grounds (U&A).

**II. ARGUMENT**

Stillaguamish claims this Court has jurisdiction over this subproceeding under Paragraph 25(a)(6), which provides, "The parties or any of them may invoke the continuing jurisdiction of this court in order to determine . . . [t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I." 384 F. Supp. 312, 419 (Final Decision 1) (W.D. Wash. 1974), *as modified by* Order Modifying Paragraph 25 of Permanent Injunction, Dkt. 13599 at 1-2, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. Aug. 11, 1993).

1 Stillaguamish was fully heard in 1974 concerning its U&A. The Court specifically  
2 determined what those places were, and, in contrast to the Court’s rulings regarding nearly every  
3 other tribe, the Court’s language is definitive and expressly limits the geographical scope of the  
4 Stillaguamish U&A:

5 During treaty times and for many years following the Treaty of Point Elliott,  
6 fishing constituted a means of subsistence for the Indians inhabiting the area  
7 embracing the Stillaguamish River and its north and south forks, which river  
8 system *constituted* the usual and accustomed fishing places of the tribe.

9 Final Decision 1 at 379, ¶ 146 (emphasis added). For nearly every other tribe, the Court found that  
10 the tribe’s respective U&A “included” specified areas, leaving open the question whether other  
11 areas might also be “included.” See Appendix hereto. In careful language, in contrast, and in the  
12 same March 1974 order as the “included” finding made for ten other tribes, *id.*, the Court found  
13 that the Stillaguamish river system “*constituted*” the Stillaguamish U&A, clearly indicating that  
14 the Court was determining the *entire* scope of Stillaguamish U&A rather than determining that an  
15 area was *part of* Stillaguamish U&A. To “constitute” is to be *the* elements or parts of something,  
16 not *some of the* elements or parts of something. See *American Heritage Dictionary* (5th ed. 2015)  
17 (defining constitute as (“[t]o be the elements or parts of; compose”); *Webster’s Third New Int’l*  
18 *Dictionary* (2002) (defining constitute as “to make up (the element or elements of which a thing,  
19 person, or idea is made up)”). The Court’s express language, which sharply contrasts with that  
20 used for every other tribe, precisely defines and limits the Stillaguamish’s U&A. Therefore, the  
21 jurisdictional limitations contained in Final Decision 1 preclude the relief requested by  
22 Stillaguamish as this Court’s limited jurisdiction does not allow a tribe to expand its U&A when it  
23 has previously been conclusively adjudicated.

24 The law of the case confirms that. Since Final Decision 1, various parties have sought  
25 determinations of U&A. For some, Final Decision 1 made no U&A determination. Those tribes

1 sought and obtained determinations of U&A in the first instance. Lower Elwah, Nooksak,  
2 Suquamish, and Swinomish established U&A on this basis.<sup>1</sup> As did Tulalip.<sup>2</sup>

3 In only a handful of instances did tribes seek to expand the scope of the U&A initially  
4 determined by the Court. In none of those few instances is there any indication that any party  
5 challenged the jurisdiction of the Court. *See, e.g.*, 626 F. Supp. 1405, 1467 (W.D. Wash. Dec. 19,  
6 1982) (findings by Judge Craig re Makah). But in recent years, the Court has concluded that tribes  
7 whose U&A has been determined *may not* return to court to expand that U&A into new areas.  
8 That is, even for those tribes for which the determination was only that their usual and accustomed  
9 fishing places “included” identified areas, the Court’s recent rulings have rejected the effort to  
10 return to court to expand U&A holdings. The Court has considered only alleged ambiguities  
11 and/or Judge Boldt’s original intent in the rulings, not expansion of the areas covered by those  
12 rulings. This Court has so held in many instances:

- 13 • Muckleshoot: “the Court finds that Judge Boldt specifically determined  
14 Muckleshoot U&A in Decision 1, and therefore there is no continuing  
jurisdiction under paragraph 26(a)(6).”<sup>3</sup>
- 15 • Lummi: “The Lummi’s U&A is specifically determined, and it does not  
16 contain the waters in dispute in this subproceeding.”<sup>4</sup>
- 17 • Suquamish: “this Request for Determination does not, and cannot, involve  
18 a determination of the Suquamish U & A; that has already been  
determined. . . . A request under Paragraph 25(a)(6) is barred by res  
judicata because the Suquamish U & A has been specifically determined.”<sup>5</sup>

19 Citing and quoting *Muckleshoot I*, and regarding Suquamish, this Court elaborated:

21 <sup>1</sup> 459 F. Supp. 1020, 1049 (W.D. Wash. Mar. 28, 1975 & Apr. 18, 1975).

22 <sup>2</sup> 459 F. Supp. at 1059 (W.D. Wash. Sept. 10, 1975, as amended Oct. 15, & Dec. 29, 1975); *see also* 873 F. Supp. 1422,  
1449 (W.D. Wash. Dec. 20, 1994) (“Having concluded that the Upper Skagit has succeeded to the rights of the Nuwaha’ha  
23 and the Bsigwigwilt, the Court must determine the usual and accustomed areas of these predecessors from which the  
Upper Skagit may now take fish.”).

24 <sup>3</sup> Sub. 17-2, Dkt. 40 at 10, 2018 WL 1933718, at \*6 (Apr. 24, 2018).

25 <sup>4</sup> Sub. 11-2, Dkt. 210 at 24, 2015 WL 4405591, at \*14 (W.D. Wash. July 17, 2015), *rev’d sub nom. United States v.  
Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (holding that the U&A determination was ambiguous).

<sup>5</sup> Sub. 05-4, Dkt. 43 at 3-4, 20 F. Supp. 3d 777, 816-17 (W.D. Wash. Jan. 26, 2006).

1 Because the location of the U & A was “specifically determined” in Decision II, it  
 2 is subparagraph (a)(1), rather than (a)(6), which provides jurisdiction over this  
 Request. [Page 2, Note 1]

3 [U]nder subparagraph f of Paragraph 25 (now Paragraph 25(a)(6)) . . . the Court  
 4 retains jurisdiction “to determine the location of a tribe’s usual and accustomed  
 5 fishing grounds not specifically determined by [Decision I] . . . .” [*Muckleshoot*  
 6 *I*, 141 F.3d 1355,] 1360 (9th Cir. 1993). The appeals court noted that this  
 7 subsection “does not authorize the district court to clarify the meaning of terms  
 used in the decree or to resolve an ambiguity with supplemental findings which  
 alter, amend or *enlarge upon the description in the decree.*” [Page 3, Body].<sup>6</sup>

8 For these tribes, the operative term was not “constitute,” *see* Appendix hereto, arguably  
 9 leaving room to argue that the tribe’s U&A could include other areas. By contrast, the Court’s  
 10 Stillaguamish U&A decision uses the term “constitutes,” which defines the scope of U&A and  
 11 does not implicitly allow for other “inclusions.” The Court’s prior determination of  
 12 Stillaguamish’s U&A left no opening for follow-on litigation. The U&A has been conclusively  
 13 defined (and confined) to the Stillaguamish river system.

### 14 III. CONCLUSION

15 The Court specifically determined Stillaguamish U&A in 1974, limiting the tribe to taking  
 16 fish from the river. In contrast with nearly every other tribe, the Court did not find that the  
 17 Stillaguamish’s U&A merely “included” the river. This distinction must mean something. In  
 18 ordinary and accepted English parlance, “constitutes” defines the object, not part of it. Both the  
 19 term Judge Boldt used and the law of the case preclude the effort to return to court for an  
 20 expansion of an unambiguous U&A. The Court does not have jurisdiction to hear this request for  
 21 determination and it should be dismissed.

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<sup>6</sup> Sub. 05-3, Dkt. 71 at 2 n.1 & 3, 20 F. Supp. 3d 777, 806 n.1 & 807 (W.D. Wash. Dec. 19, 2005) (emphasis added).

1 DATED this 5th day of October, 2018.

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## APPENDIX

1  
2 Hoh: “In treaty times the usual and accustomed fishing places of the Quileute and Hoh Indians **included** the entire Hoh river system and the Quillayute, Dickey, Bogachiel, Calawah, Soleduck,  
3 Queets and Quinault river systems.” Final Decision 1 at 359, ¶ 39.

4 Lower Elwha: “The usual and accustomed fishing places of the Lower Elwha Tribe **include** all of  
5 the streams draining into the Strait of Juan de Fuca from the Hoko River east to the mouth of Hood  
6 Canal and the waters of the Strait of Juan de Fuca.” 459 F. Supp. at 1049, ¶ 3 (1975).

7 Lummi: “In addition to the reef net locations listed above, the usual and accustomed fishing places  
8 of the Lummi Indians at treaty times **included** the marine areas of Northern Puget Sound from the  
9 Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater  
10 fisheries **included** the river drainage systems, especially the Nooksack, emptying into the bays from  
11 Boundary Bay south to Fidalgo Bay.” Final Decision 1 at 360, ¶ 46.

12 Makah: “The Makah’s usual and accustomed fishing places prior to treaty time **included** the waters  
13 of the Strait of Juan de Fuca to Port Crescent (near Port Angeles) extending out into the ocean to an  
14 area known as Swiftsure and then south along the Pacific Coast . . . .” Final Decision 1 at 364, ¶ 65.

15 Muckleshoot: “Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot  
16 Indians **had** usual and accustomed fishing places **primarily** at locations on the upper Puyallup, the  
17 Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos  
18 Creek, Burns Creek and Newaukum Creek) and Lake Washington, and **secondarily** in the saltwater  
19 of Puget Sound.” Final Decision 1 at 367, ¶ 76.

20 Nisqually: “The usual and accustomed fishing places of the Nisqually Indians **included** at least the  
21 saltwater areas at the mouth of the Nisqually River and the surrounding bay, and the freshwater  
22 courses of the Nisqually River and its tributaries, McAllister (Medicine or Shenahnam) Creek,  
23 Sequahitcu Creek, Chambers Creek and the lakes between Steilacoom and McAllister Creeks. The  
24 saltwater fisheries were shared with other Indians.” Final Decision 1 at 369, ¶ 86.

25 Nooksack: “The usual and accustomed fishing places of the Nooksack Tribe **include** the Nooksack  
River and its tributaries, Bellingham Bay, Chuckanut Bay, Birch Bay, Semiahmoo Bay and  
Semiahmoo Spit and surrounding marine waters.” 459 F. Supp. at 1049, ¶ 4 (1975).

Puyallup: “The usual and accustomed fishing places of the Puyallup Indians **included** the marine  
areas around Vashon Island and adjacent portions of Puget Sound, Commencement Bay, the  
Puyallup River and the tributary rivers and creeks. In addition, smaller creeks adjacent cent to but  
not tributaries of the Puyallup River were used.” Final Decision 1 at 371, ¶ 99.

Quileute: “Before, during and after treaty times, the usual and accustomed fishing places of the  
Quileute and Hoh Indians **included** the Hoh River from the mouth to its uppermost reaches, its  
tributary creeks, the Quileute River and its tributary creeks, Dickey River, Soleduck River,  
Bogachiel River, Calawah River, Lake Dickey, Pleasant Lake, Lake Ozette, and the adjacent  
tidewater and saltwater areas. In aboriginal times the Quileute Indians utilized fishing weirs where  
salmon were caught along the Quillayute River.” Final Decision 1 at 372, ¶ 108.

1 Quinault: “The usual and accustomed fishing places of the Quinault people within the case area at  
2 treaty time **included** the following rivers and streams: . . .” Final Decision 1 at 374, ¶ 120.

3 Sauk-Suiattle: “The usual and accustomed fishing places of the Sauk River Indians at the time of  
4 the treaty **included** Sauk River, Cascade River, Suiattle River and the following creeks which are  
5 tributary to the Suiattle River— Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek,  
Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also  
a Sauk fishing ground.” Final Decision 1 at 376, ¶ 131.

6 Skokomish: “The usual and accustomed fishing places of the Skokomish Indians before, during and  
7 after treaty times **included** all the waterways draining into Hood Canal and the Canal itself.” Final  
Decision 1 at 377, ¶ 137.

8 Squaxin: “During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and  
9 sockeye salmon at **their** usual and accustomed fishing places in the shallow bays, estuaries, inlets  
and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into  
10 those inlets.” Final Decision 1 at 378, ¶ 141.

11 Stillaguamish: “During treaty times and for many years following the Treaty of Point Elliott, fishing  
12 constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish  
River and its north and south forks, which river system **constituted the** usual and accustomed fishing  
13 places of the tribe.” Final Decision 1 at 379, ¶ 146.

14 Suquamish: “The usual and accustomed fishing places of the Suquamish Tribe **include** the marine  
waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro  
15 and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and  
also Hood Canal.” 459 F. Supp. at 1049, ¶ 5 (1975).

16 Swinomish: “The usual and accustomed fishing places of the Swinomish Tribal Community **include**  
17 the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of  
northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo,  
18 Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage  
adjacent to Lummi Island.” 459 F. Supp. at 1049, ¶ 6 (1975).

19 Tulalip: “[T]he following described areas **are found to be** usual and accustomed marine fishing  
20 areas of the Tulalip Tribes of Washington: Beginning at Admiralty Head on Whidbey Island and  
proceeding south, those waters described as Admiralty Bay and Admiralty Inlet, then southeasterly  
21 to include the remainder of Admiralty Inlet including Mutiny and Useless Bay, then northeasterly to  
include Possession Sound and Port Gardner Bay, then northwesterly to include the waters of Port  
22 Susan up to a line drawn true west of Kyak Point and Holmes Harbor and Saratoga Passage up to a  
line drawn true west of Camano on Camano Island.” 459 F. Supp. at 1059 (1975).

24 Upper Skagit: “At treaty time, the usual and accustomed fishing places of the Upper Skagit Tribe  
25 **included** numerous areas along the Skagit River, extending from about Mt. Vernon upstream to  
Gorge Dam.” Final Decision 1 at 379, ¶ 148.

**CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties registered with the Court's ECF system for the above-captioned case.

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