The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	Case No. C70-9213 RSM Subproceeding No. 17-03 MUCKLESHOOT INDIAN TRIBE AND HOH INDIAN TRIBE'S MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS

The Muckleshoot Indian Tribe and the Hoh Indian Tribe ("Tribes"), as intervenor-plaintiffs in this case and as interested parties in this subproceeding, oppose the Upper Skagit (Dkt. 64) and Swinomish (Dkt. 66) Motions to Dismiss the Stillaguamish Tribe's Request for Determination. While the Muckleshoot Tribe and the Hoh Tribe take no position at this time on the merits of the Stillaguamish Tribe's claim to additional usual and accustomed fishing places, the Tribes support the right of the Stillaguamish Tribe to have its request heard on the merits under Paragraph 25(a)(6) of the Permanent Injunction.

As the Stillaguamish point out in their memorandum in opposition, Judge Boldt made clear that Final Decision No. I determined some, but not all, of each participating tribe's usual and accustomed fishing places, and Judge Boldt expressly retained continuing jurisdiction to determine additional places when he entered Paragraph 25(a)(6) of the Permanent Injunction.

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A year after Final Decision No. I and the entry of the Permanent Injunction, Judge Boldt unambiguously confirmed his intention with respect to the retention of continuing jurisdiction under Paragraph 25(a)(6). In a 1975 hearing related to claims that the Puyallup Tribe was fishing beyond its adjudicated fishing places, Judge Boldt explained that the Court's findings on usual and accustomed places in Final Decision No. I 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.**
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> **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.**
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> . . .
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> **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.

Transcript of Proceedings Sept. 10, 1975, Dkt. 1769 at 80-81 (Emphasis added).

Paragraph 25(a)(6) should be implemented in accord with Judge Boldt's intentions until and unless the Court amends Paragraph 25 to revise the scope of the continuing jurisdiction it

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retains. *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998) (judgments should be construed "so as to give effect to the intention of the issuing court."). Although the Court has twice revised Paragraph 25(a)(6) to add procedural requirements, the Court has never amended the scope of the Court's continuing jurisdiction retained in Paragraph 25.

In 1993, Judge Rothstein proposed sun-setting the case and terminating continuing jurisdiction. After seeking input from the parties, she concluded that the case needed to continue, ruling that "if there ever was a case where there is a role of the Court for continuing jurisdiction . . . this is it." Dkt. 13,440 at 6. She subsequently revised Paragraph 25 by adding pre-filing procedural requirements for invoking the Court's continuing jurisdiction, while leaving the substantive scope of continuing jurisdiction wholly unchanged. *See* Order Modifying Paragraph 25 of Permanent Injunction, 18 F.Supp. 3d 1172, 1213 (Aug. 24, 1993). Similarly, in 2011, this Court revised Paragraph 25 to add additional procedural requirements but noted that the new procedures were not intended to change the substance of the Court's continuing jurisdiction. *See* Supplemental Order on Paragraph 25 Procedures at ¶ 9, 20 F. Supp. 899, 960 (Nov. 9, 2011).

In *Muckleshoot v. Lummi*, *supra*, the Court of Appeals disapproved the use of supplemental findings in connection with the interpretation and application of existing orders in a Paragraph 25(a)(1) proceeding where the parties' ability to present evidence was limited, but specifically noted the availability of supplemental findings under the decree in other circumstances. *Id*. at 1360. Nothing in *Muckleshoot v. Lummi* amends Paragraph 25(a)(6) to limit the continuing jurisdiction of the court to hear claims to usual and accustomed places beyond those determined in Final Decision No. I.

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Moreover, any modification of the scope of the district court's continuing jurisdiction under Paragraph 25(a)(6) by the Court of Appeals in *Muckleshoot v. Lummi* would have been improper, because an appellate court cannot revise a district court's ongoing injunction in the first instance, without such a revision being first considered by the district court after input from the parties. While a district court has wide discretion to modify its decrees under Rule 60(b)(5), *System Fed'n No. 91 v. Wright,* 364 U.S. 642, 646 (1961), typically a strong showing of changed circumstances must be made before an injunction may be modified. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

Accordingly, the Motions to Dismiss should be denied.

Respectfully submitted this 14th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I electronically filed the foregoing MUCKLESHOOT TRIBE'S MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

DATED this 14th day of November, 2018.

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