UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 18-35441

MUCKLESHOOT INDIAN TRIBE,

Plaintiff-Appellant,

v.

TULALIP TRIBES, et al.,

Respondents-Appellees.

Appeal from a Decision of the United States District
Court for the Western District of Washington,
Civil Action Nos. 2:17-sp-0002-RSM; 2-cv-09213-RSM
The Honorable Ricardo S. Martinez
United States District Court Judge

RESPONDING TRIBES' APPELLEE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Respondents-Appellees Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Swinomish Indian Tribal Community, and Tulalip Tribes are federally recognized Indian tribes. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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INTRODUCTION

The Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Swinomish Indian Tribal Community, and Tulalip Tribes (Responding Tribes) present this Responding Tribes' Appellee Brief, a consolidated response to Appellant's Corrected Opening Brief filed by the Muckleshoot Tribe and the briefs filed by Interested Parties Hoh Tribe and Stillaguamish Tribe.

This appeal involves an attempt by the Muckleshoot Tribe to radically expand its marine usual and accustomed fishing places (U&As). These U&As, which describe the area within which a tribe may exercise its treaty fishing rights, were decided 45 years ago as part of the first decision regarding tribal treaty fishing rights in *U.S. v. Washington*, 384 F. Supp. 312, 367 (W.D. Wash. 1974) (*Final Decision No. 1*). Muckleshoot seeks to disturb the repose of its U&A determination by invoking Paragraph 25(a)(6) of the permanent injunction entered in *Final Decision No. 1* (Par. 25(a)(6)),[1] in which the district court reserved continuing jurisdiction to determine "the location of any of a tribe's [U&As] not specifically determined" by *Final Decision No. 1*.

[1] The numbering of Par. 25 (a)(6) changed when that paragraph was amended in 1993. No substantive changes were made. To avoid confusion in this brief, we use the current numbering, as Muckleshoot did in its brief, p. 10, n. 3. The current provision is found in *U.S. v. Washington*, 18 F. Supp. 3d 1172, 1214 (W.D. Wash. 1991).

The district court below dismissed Muckleshoot's claim to expanded U&As, ruling that the court lacked subject matter jurisdiction over the claim and that the issue raised was precluded because Muckleshoot's U&As were "specifically determined" by *Final Decision No. 1*. ER 12. This appeal followed.

Muckleshoot's demurral notwithstanding, the district court's decision is correct and well-founded. This Court ruled in *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1360 (9th Cir. 1998) *(Muckleshoot I)* that Par. 25(a)(6) cannot be used to "alter, amend or enlarge upon" a previously determined U&A finding. The district court has consistently applied that decision ever since to bar relitigation of a tribe's U&As barring exceptional circumstances not present here. Moreover, Muckleshoot argued and the district court ruled 21 years ago, based on *Muckleshoot I*, that Muckleshoot's U&As had been specifically determined in *Final Decision No. 1*. RT-SER 65.[2]

Despite these rulings, Muckleshoot argues that Par. 25(a)(6) is always available to expand a previously determined U&A. This argument ignores finality considerations and will pave the way for any of the 21 tribes party to *U.S. v. Washington* to return to court at any time to seek expansion of its U&As in a case that stands on the verge of entering its sixth decade.

[2] RT-SER shall indicate the "Responding Tribes' Supplemental Excerpts of Record."

STATEMENT OF JURISDICTION

The district court does not have jurisdiction in this case for the reasons presented in this brief. The Responding Tribes moved to dismiss the case for lack of subject matter jurisdiction, and the district court granted the motion.

ISSUES PRESENTED

1. In order to invoke the continuing jurisdiction of the district court in this case, Muckleshoot must show that its U&As were "not specifically determined." Has Muckleshoot sustained its burden of establishing subject matter jurisdiction under Par. 25(a)(6) by showing that its U&As were "not specifically determined?"

This issue was raised by the Responding Tribes in their motion to dismiss, ER 384-408, and was decided by the district court in the Order on appeal to this Court. ER 394-395. The standard of review is deference to the district court decision: "this Court will uphold a district court's 'reasonable' interpretation of a decree." *Nehmer v. U.S. Dept. of Veterans Affairs,* 494 F.3d 846, 855 (9th Cir. 2007).

2. Does judicial estoppel, arising from an argument Muckleshoot made in Subproceeding 97-1 concerning its U&As that was adopted by the district court in an order dismissing a claim made by the opposing party, bar Muckleshoot from arguing in this case that its U&As are not specifically determined?

The Responding Tribes adopt and incorporate the statement of issues, standard of review and argument on this issue contained in the Appellee Brief filed by the Suquamish Tribe.

3. Does issue preclusion bar Muckleshoot from raising its claim to expanded U&As in this case? The Responding Tribes adopt and incorporate the statement of issues, standard of review and argument on this issue contained in the Appellee Brief filed by the Suquamish Tribe.

COUNTERSTATEMENT OF THE CASE

This appeal involves numerous actions and decisions of both the Western District of Washington and this Court during the entire 49-year span of *U.S. v. Washington,* W. D. Wash No. 70-9213, from its inception to this latest installment. Muckleshoot presents a lengthy Statement of the Case that weaves argument and interpretation that must be countered.

I. *FINAL DECISION NO. 1* DETERMINED MUCKLESHOOT U&As.

A. *Final Decision No. 1* Set the Parameters of the Treaty Fishing Right.

U.S. v. Washington was filed in 1970 by the United States, for itself and the Indian Tribes of western Washington, to define, implement and protect off-reservation Indian treaty fishing rights. These rights were reserved and secured to the tribes in five treaties negotiated with the tribes by Territorial Governor Isaac

Stevens in 1854 and 1855, known as the "Stevens Treaties." Taken together the treaties encompassed a case area in *Final Decision No. 1* within the State of Washington "west of the Cascade Mountains and north of the Columbia River drainage area." *Final Decision No. 1*, 384 F. Supp. at 328. The Stevens Treaties included a clause reserving each signatory tribe's right to fish at its "usual and accustomed grounds and stations … in common with all citizens of the territory." *Id.* at 350.

District Court Judge George Boldt rendered *Final Decision No. 1* in 1974. Prior to trial the parties conducted "exhaustive research in anthropology" and other subjects, and made "extreme efforts to find and present by witnesses and exhibits as much information as possible." *Id.* at 328. The goal was to "finally settle … as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do," *id.* at 330, and to address "every issue of substantial direct or indirect significance to the contentions of any party." *Id*. at 328.

The trial lasted three weeks and involved the testimony of nearly 50 witnesses, 4,600 pages of trial transcript, and more than 350 exhibits. After extensive post-trial briefing by all parties, Judge Boldt issued a decision that included 253 separate detailed Findings of Fact, each meticulously annotated with citations to the record, and 48 Conclusions of Law. *Id.* at 348-405. *Final Decision No. 1* comprehensively

addressed the nature and extent of treaty fishing rights; which tribes were entitled to those rights; the location of tribal fishing areas; the allocation of harvest between tribes and citizens of the state; the extent of state regulatory authority over treaty fishing; and the circumstances in which tribes could regulate their own fisheries. *Id.* at 332-33. Judge Boldt also issued a permanent injunction, *id.* at 413, which included a provision for continuing jurisdiction over the case. *Id.* at 419.

Final Decision No. 1 was affirmed by this Court in *U.S. v. Washington,* 520 F.2d 676 (9th Cir. 1975), and by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.,* 443 U.S. 668 (1979).

The present case involves two issues that have frequently been addressed in subproceedings of *U.S. v. Washington* in the decades since *Final Decision No. 1*: the geographic extent of a tribe's U&As, and the scope of district court continuing jurisdiction.

B. U&As Describe the Geographical Area within Which a Tribe May Exercise Treaty Fishing Rights.

In order for a modern tribal entity to exercise treaty fishing rights, it must first establish that it is a 'treaty tribe,' which requires establishing that the modern entity is a political successor in interest to one or more of the aboriginal tribes that were a party to one of the Stevens Treaties. *See Final Decision No. 1*, 384 F. Supp. at 349. In order to fish, that tribe must then establish its U&As, which constitute the

geographical area within which that tribe's fishing rights may be exercised. A tribe's treaty fishing is limited to the area of its U&As. *Id.* at 402. Judge Boldt made findings of fact concerning the geographical area of U&As for each of the 14 original plaintiff tribes, including Muckleshoot. *Id.* at 359-382.

Establishing U&As involves a historical inquiry. U&As include "every fishing location where members of a tribe customarily fished from time to time at and before treaty times," if the fishing was "usual and accustomed." *Id.* at 332. U&As do not include areas in which the tribal fishing was "occasional or incidental." *Id.* at 356. For example, occasional or incidental trolling during travel through an area did not give rise to the inclusion of that area in the U&As of the tribe travelling through. *Id.* at 353. A U&A finding is a "designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons." *Id.* at 402. Each tribe has one U&A area for all types of fishing; U&As do not vary by species. *U.S. v. Washington,* 873 F. Supp. 1422, 1431 (W.D. Wash. 1994).

C. Judge Boldt Addressed Muckleshoot's Freshwater and Saltwater U&As.

Judge Boldt established the areal extent of Muckleshoot freshwater and saltwater U&As in Finding of Fact 76:

> 76. Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing

> places primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound.

Final Decision No. 1, 384 F. Supp. at 367. The U&A finding thus established that Muckleshoot's primary fisheries were freshwater fisheries, with secondary fishing 'in the saltwater of Puget Sound." *Id.*

Judge Boldt meticulously appended at the end of each U&A finding an annotation of the citations to the record upon which the finding was based. *See, e.g., id.* The primary evidence for Muckleshoot U&As consisted of the expert reports from Dr. Barbara Lane admitted in evidence at the trial. Dr. Lane, the doyenne of *U.S. v. Washington* anthropologists, was the expert retained by the United States on tribal identity, treaty tribe status, and tribal fishing practices of the tribes at the time of the treaties. *Id.* at 350. Dr. Lane prepared an overview report relating to the tribes and the treaties in general, Ex. USA-20, and a separate report for each of 13 of the 14 plaintiff tribes that addressed its identity, treaty status, and fishing locations. Exs. USA-21-30 and USA-53. Judge Boldt found that the Lane reports "have been exceptionally well researched and reported and are established by a preponderance of the evidence" and that "[t]hey 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…." *Final Decision No. 1*, 384 F. Supp. at 350.

As the annotation to Finding of Fact 76 shows, two of Dr. Lane's reports were the primary sources for the Muckleshoot U&A finding. The first of these is the overview report, Ex. USA-20. RT-SER 152-202. At the page of this report cited as a source in the annotation Dr. Lane described Muckleshoot's principal fisheries. The description contained only freshwater fisheries. RT-SER 197.

The second Lane report noted in the finding, Ex. USA-27b, RT-SER 86-151, specifically addresses Muckleshoot. In this report Lane elaborates on Muckleshoot fisheries, both saltwater and freshwater. However, the report refers to saltwater fisheries only twice, and both references are limited to river-mouth fisheries. *See U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 434 (9th Cir. 2000) (*Muckleshoot III).* Lane reports that "the 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 rivers." RT-SER 93-94. Lane then describes the "traditional fisheries of the Muckleshoot" which include the freshwater areas listed in Finding of Fact 76, and adds: "In addition, there was some trolling for salmon in saltwater when families descended the rivers to get shellfish supplies on the beaches of the Sound." RT-SER 94. In fact, none of the evidence cited by Judge Boldt in Finding of Fact 76 mentions Muckleshoot saltwater fishing outside Elliott Bay. *Muckleshoot III* at 434.

Thus Dr. Lane and Judge Boldt both considered and addressed Muckleshoot saltwater U&As, and the evidence cited by Judge Boldt in Finding of Fact 76 established that saltwater fisheries were of relatively minor importance and considerably limited geographic extent.

D. *Final Decision No. 1* Provides for Continuing Jurisdiction of the District Court in *U.S. v. Washington.*

In addition to deciding Muckleshoot's U&As, *Final Decision No. 1* is crucial to this case because it established the continuing jurisdiction retained by the district court. What is now numbered Paragraph 25(b) of the permanent injunction provided a comprehensive procedure for invoking the continuing jurisdiction of the court. *See Final Decision No. 1*, 384 F. Supp. at 419. Each new claim is opened as a subproceeding that is pled and resolved as a case within a case. In the 45 years since *Final Decision No. 1*, the district court has been kept very busy exercising its continuing jurisdiction in the subproceedings of *U.S. v. Washington.* To date there have been 90 separately litigated subproceedings, which have spawned hundreds of district court decisions and 41 opinions of this Court, with two cases in addition to this one currently pending. *See Muckleshoot Statement of Related Cases,* 55. Many of those subproceedings have involved issues concerning tribal U&As. The subproceeding now before this Court, Subp. 17-2, is one such case.

Paragraph 25(a) specifies the grounds for invoking continuing jurisdiction. Two of its provisions are relevant to this case. The first relevant provision is Par. 25(a)(1), which provides for jurisdiction over determinations of "whether or not the actions intended or effected by any party … are in conformity with Final Decision #1 or this injunction." *Final Decision No. 1*, 384 F. Supp. at 419. Par. 25(a)(1) provides the jurisdictional basis for challenges to tribal fishing outside the tribe's established U&As. This jurisdictional basis was first articulated in this Court in *Muckleshoot I*, 141 F.3d at 1360. A U&A proceeding under Par. 25(a)(1) determines whether the court intended to include or exclude the contested area from the tribe's established U&As by examining the record upon which the decision was based. *Id.* Since *Muckleshoot I*, Par. 25(a)(1) has frequently been invoked in cases to limit the area of a tribe's fishing to its established U&As.

The second relevant paragraph, Par. 25(a)(6), is the provision at issue in this case. It provides for continuing jurisdiction over a tribe's request for the court to decide the "location of any of a tribe's [U&As] not specifically determined by Final Decision # I." *Final Decision No. 1*, 384 F. Supp. at 419. Tribes invoke this provision to attempt to expand their U&As, as Muckleshoot is attempting in this case. The crux of this case is the scope of Par. 25(a)(6): under what circumstances is a U&A finding "specifically determined"?

II. PRIOR TO *MUCKLESHOOT I,* THE DISTRICT COURT ENTERTAINED PROCEEDINGS TO EXPAND U&As WITHOUT CONTEST.

A. District Court Practice has Evolved Over Time.

In the first ten years after *Final Decision No. 1,* the district court entertained a few proceedings to expand a tribe's U&As. During that period no party challenged jurisdiction over such claims, and the merits of the claim were rarely challenged as well. In this acquiescent environment, some tribes were granted additional U&As. For example, in 1981 Judge Boldt's successor expanded the U&As of the Puyallup and Nisqually tribes, as Muckleshoot notes. Muckleshoot Brf. at 14-15 (citing *U.S. v. Washington,* 626 F. Supp. 1405 (W.D. Wash. 1981)). There seems to have been an assumption shared by the tribes and the district court concerning the scope of Par. 25(a)(6) at the time. No party ever challenged jurisdiction and the court never ruled in a contested setting on the issue.

In addition, during the first ten years of *U.S. v. Washington,* the district court sometimes included a provision in a U&A decree that the decree "would not preclude seeking further U&A determinations" under Par. 25(a)(6). For example, such a provision was included in the Lower Elwha Klallam U&A decree. *U.S. v. Washington,* 626 F. Supp. 1405, 1443 (W.D. Wash. 1985). However, the district court practice changed in 1984, when such a clause was not included in the Jamestown S'Klallam U&A decree. *U.S. v. Washington,* 626 F. Supp. 1405, 1486 (W.D. Wash. 1985). It was never again included in any U&A determination. Further,

in the last 35 years the district court has expanded U&As only twice, and only one such case occurred after the watershed decision in *Muckleshoot I.*

The unexamined practice of the district court prior to *Muckleshoot I* tells us nothing about the scope of Par. 25(a)(6) in light of *Muckleshoot I* and the consistent district court practice in the 21 years since. This practice, never elevated to law of the case and vitiated by *Muckleshoot I*, ended 34 years ago. Today it is of historical interest only and has no bearing on this appeal.

B. "Common Understanding" of Muckleshoot Marine U&As Before *Muckleshoot III.*

Muckleshoot also invokes a "common understanding" that Muckleshoot's U&As included areas outside Elliott Bay. Muckleshoot Brf. at 12-14. It appears, as Muckleshoot points out, that there was no challenge to Muckleshoot's expansive marine fishing in the years before *Muckleshoot III* was decided. But despite that acquiescence, the "common understanding" was wrong and Muckleshoot's expansive fishing was unlawful. As discussed in Section IV, below, Subp. 97-1 and *Muckleshoot III* established that Muckleshoot marine U&As, as decided by Judge Boldt in *Final Decision No. 1*, extended no further than Elliott Bay. Muckleshoot enjoyed the enormous benefit of fishing in marine waters in what turned out to be a violation of *Final Decision No. 1* for 25 years. No amount of "common

understanding" or court decisions based on this unexamined misunderstanding can arise to the level of a legal entitlement.

C. Puyallup's 1975 Injunction Proceeding.

Muckleshoot invokes 1975 proceedings regarding Puyallup fishing as some kind of ruling on Par. 25(a)(6). Muckleshoot Brf. at 7-9. Puyallup sought to enjoin state enforcement practices in a particular area. ER 356-357. In opposing the injunction, the State claimed that Puyallup was attempting to expand its U&As. ER 360-361. Puyallup responded that it was "not extending or attempting to extend" its U&As, ER 372, and that it was not "coming in and asking … to have our [U&As] extended." ER 373. Par. 25(a)(6) was thus not an issue in the case.

Judge Boldt denied Puyallup's motion for an injunction. ER 378. Thereafter, Judge Boldt engaged in musing about what Puyallup might be able to do under Par. 25(a)(6), but this was not part of a ruling on any issue before the court. Moreover, Judge Boldt spoke of "including a sharper delineation of the [U&A finding] as stated for the Puyallups in Decision #1." ER 379. This is an apparent reference to using Par. 25(a)(6) to clarify the existing U&A finding, and not to expand U&As. Whatever Judge Boldt's opinion on the matter at the time, this use of Par. 25(a)(6) was later specifically prohibited by *Muckleshoot I*. 141 F.3d at 1360.

D. Other Pre-*Muckleshoot I* Proceedings.

Other decisions relied upon by Muckleshoot are problematic for them.

1. Proceedings on Makah Ocean U&As in 1982.

The Makah Tribe is located on the Pacific Coast at the northwest tip of Washington. Makah U&As were determined in *Final Decision No. 1*. 384 F. Supp. at 364. At the time, the territorial limit of the United States and the State of Washington extended only 3 miles offshore, as perforce did Makah ocean U&As, because the court had no jurisdiction beyond that limit. Two years later federal jurisdiction was extended to 200 miles offshore, and Makah then sought and was granted ocean U&As beyond the former three-mile limit. *U.S. v. Washington,* 626 F. Supp. 1405, 1468 (W.D. Wash. 1984). This Court affirmed the expansion of U&As, noting the change to the new 200-mile limit. *U.S. v. Washington*, 730 F.2d 1314, 1316 (9th Cir. 1983). The issue of jurisdiction was not addressed in the case, but jurisdiction under Par. 25(a)(6) was appropriate because the area beyond the three-mile limit was beyond the jurisdiction of the court when the U&A determination was made, so the court could not have determined U&As beyond that limit at the time.

2. Upper Skagit Marine U&A Proceedings in Subp. 89-3.

Muckleshoot also invokes the proceeding that added marine U&As to the Upper Skagit Indian Tribe's U&A determination in *Final Decision No. 1*. Muckleshoot Brf. at 16 (discussing *U.S. v. Washington,* 873 F. Supp. 1422, 1449-50 (W.D. Wash. 1984), *aff'd in part and rev'd in part,* 157 F.3d 630 (9th Cir. 1998)).

This case was prior to *Muckleshoot I*, and the tribes involved in the case all stipulated that Upper Skagit could pursue marine U&As. RT-SER 83-86. Today the district court recognizes such a stipulation as a basis for proceeding under Par. 25(a)(6). *U.S. v. Washington*, 2015 WL 4405591 (W.D. Wash. July 17, 2015) *6 (Subp. 11-2).

3. Suquamish Claim to Duwamish Successorship inSubp. 85-1.

Muckleshoot also relies upon the Suquamish case concerning Duwamish successorship (Subp. 85-1), Muckleshoot Brf. at 17-18, but this reliance is misplaced. The Suquamish Tribe's U&As were determined by Judge Boldt in 1975. *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978). In Subp. 85-1, Suquamish sought to expand its fishing to freshwater U&As east of Puget Sound by asserting a claim to political successorship to another treaty signatory tribe, the Duwamish, and not by an expansion of its own previously determined U&As. *See U.S. v. Washington*, 18 F. Supp. 3d 1123, 1150 (W.D. Wash. 1987). Suquamish lost the case. *Id.* at 1152, *aff'd U.S. v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990). Neither the district court not this Court addressed continuing jurisdiction under Par. 25(a)(6).

III. IN SUBP. 97-1 MUCKLESHOOT'S SALTWATER U&As WERE LIMITED TO ELLIOTT BAY.

Subproceeding 97-1, which involved Muckleshoot's U&As, is crucial to this case because it dealt with issues of existing Muckleshoot U&As under Par. 25(a)(1)

and new U&As under Par. 25(a)(6). We take up the Par. 25(a)(1) ruling here and will return to the Par. 25(a)(6) ruling in Section V.A. below.

In Subp. 97-1 three tribes challenged Muckleshoot's fishing in Areas 9, 10 and 11[3] by claiming that Muckleshoot U&As did not include any marine waters outside of Elliott Bay (Area 10A). RT-SER 63-75. At the time Muckleshoot claimed the challenged waters as part of its U&As. The main issue in Subp. 97-1, as framed by the district court, was "whether Judge Boldt intended to designate a saltwater fishery for the Muckleshoot and, if so, what areas he intended 'secondarily in the saltwater of Puget Sound' to encompass." *U.S. v. Washington*, 19 F. Supp. 3d 1252, 1305 (W.D. Wash. 1999) (*Subproceeding 97-1*).

Following a careful review of the evidence presented to Judge Boldt, the district court ruled that Muckleshoot's saltwater U&As were limited to Elliott Bay (Area 10A). *Id.* at 1311. As described by the district court:

> It is clear from the documents Judge Boldt specifically cited to that the predecessors of the Muckleshoot were a primarily upriver people who may have, from time to time, descended to Elliott Bay to fish and collect shellfish there. … Based on this evidence, the court concludes that Judge Boldt intended to include [Elliott Bay] in the Muckleshoot U&A. … The court finds, however, that there is no evidence in the record before Judge Boldt, nor is it persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the

[3] These areas and all others referenced in this brief are shown on the map that can be found at ER 388, which is reproduced and embedded in this brief at p. 30. The areas referred to are Washington Department of Fisheries salmon management areas, a standard unit of state and tribal fisheries management.

> open waters and shores of Elliott Bay. … [T]here is no evidence in the record before Judge Boldt that supports a U&A beyond Elliott Bay.

Id. at 1310-1311. In addition, the district court stated:

> In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would have intended 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 area.

Id. at 1310. The district court enjoined Muckleshoot from fishing in Areas 9, 10 and 11, thus confining its saltwater U&As to Elliott Bay. *Id.* at 1311-1312.

This Court, conducting a de novo review, affirmed. *Muckleshoot III*, 325 F.3d 429. The Court noted that Dr. Lane's report on Muckleshoot, Ex. USA-27b, RT-SER 86-151, contains "an extensive discussion of the fishing practices of Muckleshoot's ancestors." *Id*. at 434. Like the district court, this Court concluded:

> The documents [before Judge Boldt] indicate that the 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 referenced documents contain no evidence indicating that the fishing occurred regularly anywhere beyond Elliott Bay.

Id. This Court also considered Dr. Lane's overall report on tribal fishing, Ex. USA-20, RT-SER 152-202:

> Dr. Lane's report lists the saltwater U&As for those tribes that she believed engaged in significant saltwater fishing. The only tribes for which there is no mention of specific saltwater fisheries are the three upriver tribes, including the Muckleshoot. This feature of the report suggests two conclusions. – (1) the phrase 'on the beaches of Puget Sound' was used because there were no established (i.e. U&A)

> saltwater locations anywhere and (2) the omission of 'Puget Sound' from Dr. Lane's findings in Exhibit USA-20, which listed the principal fisheries of Muckleshoot's ancestors, was not inadvertent or inconsequential.

Id. at 435.

Thus *Muckleshoot III* concludes that Muckleshoot saltwater U&As were considered by Judge Boldt when he made Finding of Fact 76, and that all the saltwater of Puget Sound except Elliott Bay was intentionally excluded from that finding.

IV. *MUCKLESHOOT I* LIMITED THE APPLICATION OF PAR. 25(a)(6).

While Subp. 97-1 was pending in the district court, this Court decided the seminal case on the scope of continuing jurisdiction in *U.S. v. Washington*: *Muckleshoot I,* 141 F.3d 1355. This case of first impression in this Court fundamentally altered prior district court practice under both Par. 25(a)(1) and Par. 25(a)(6) and has been followed ever since in *U.S. v. Washington,* including in Subp. 97-1.

In *Muckleshoot I* (Subp. 86-5 in the district court), the specific issue relevant here was the location of the southern boundary of Lummi's U&As, described by Judge Boldt in Lummi's U&A finding as "the present environs of Seattle." *Final Decision No. 1*, 384 F. Supp. at 360. This issue involved discerning Judge Boldt's intent concerning the boundary. Muckleshoot sought to go outside the record before

the court when the U&A finding was made by using new deposition testimony of Dr. Barbara Lane to shed light on this issue. Lummi objected to this new evidence outside the original record. However, the district court considered the deposition, invoking the continuing jurisdiction of Par. 26(a)(6) after concluding that Judge Boldt's U&A finding was ambiguous as to geographic extent and thus was not "specifically determined." *U.S. v. Washington,* 19 F. Supp. 3d 1184, 1195 (W D. Wash. 1995).

This Court rejected the use of Dr. Lane's deposition. In so doing, this Court held that Lummi's U&As had been "specifically determined" by Judge Boldt:

> Judge Boldt … did 'specifically determine' [the location of Lummi's U&As] 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 terms used in the decree to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree.

Muckleshoot I, 141 F.3d at 1360. Thus in the first case squarely addressing the issue of continuing jurisdiction in *U.S. v. Washington*, this Court held that Judge Boldt's Lummi U&A finding had been "specifically determined" in *Final Decision No.* 1 and that Par. 25(a)(6) could not be used to enlarge upon Lummi's U&As.

Having rejected the application of Par. 25(a)(6) to the case, this Court instructed the district court to proceed under Par. 25(a)(1) to resolve the boundary

dispute based on the record before Judge Boldt when the U&As were decided to determine his intent concerning that boundary. *Id.* at 1359-60.

Muckleshoot I clearly delineated and differentiated the roles of Par. 25(a)(1) and Par. 25(a)(6) with regard to U&A disputes. Par. 25(a)(1) is the basis for jurisdiction over disputes on the application of an existing U&A finding, which involved discerning the judge's intent as to the areal extent of the U&A finding based on the record before the judge at the time the finding was made. On the other hand, Par. 25(a)(6) provides continuing jurisdiction over proceedings to expand a tribe's U&As by presenting new evidence concerning the proffered area of expansion. However, the scope of that provision is far narrower than previously assumed.

V. THE DISTRICT COURT HAS APPLIED *MUCKLESHOOT I* TO LIMIT THE APPLICATION OF PAR. 25(a)(6) TO EXCEPTIONAL CIRCUMSTANCES.

The effect of *Muckleshoot I* upon district court continuing jurisdiction was immediate and dramatic. In the 21 years since the case was decided, the district court has entertained quite a few cases under Par. 25(a)(1) to decide whether a tribe's fishing in a particular area is within its previously determined U&As by examining the record before the judge at the time. At the same time, the district court has rejected jurisdiction over all but one of the tribal attempts to expand and add areas to a tribe's U&As under Par. 25(a)(6). We turn to an examination of those cases.

A. In Subp. 97-1 the District Court Ruled That Muckleshoot U&As Have Been Specifically Determined.

The district court wasted no time in applying the lesson of *Muckleshoot I*. The very first occasion occurred in Subp. 97-1, the proceeding involving Muckleshoot's U&As, previously discussed in Section III, above, in which the court held that Muckleshoot's saltwater U&As are limited to Elliott Bay. As explained above, that decision was reached under Par 25(a)(1). But continuing jurisdiction under Par. 25(a)(6) was also an issue in Subp. 97-1, and *Muckleshoot I* was decided while that issue was pending in the district court.

In addition to the claim that Muckleshoot had no marine U&As in Areas 9, 10 and 11 and were limited to Elliott Bay, the tribes opposing Muckleshoot in Subp. 97-1 also asserted a claim under Par. 25(a)(6) that Muckleshoot had no U&As in certain areas in which Muckleshoot was not fishing at the time; that is the areas beyond Areas 9, 10, and 11. RT-SER 76-78. The district court therefore had two issues before it in Subp. 97-1: the claim that Muckleshoot had no marine U&As under *Final Decision No. 1* in Areas 9, 10, and 11, grounded in Par. 25(a)(1), which was previously discussed; and the claim that Muckleshoot had no U&As in the marine areas beyond Areas 9, 10, and 11, grounded in Par. 25(a)(6). *U.S. v. Washington,*19 F. Supp. 3d 1252, 1273 W.D. Wash. 1997) (Subp. 97-1).

As discussed above, with respect to the first issue, concerning Areas 9, 10, and 11, the court followed *Muckleshoot I* and excluded Muckleshoot's proffered evidence that was not in the record before Judge Boldt at the time of decision. *Id.* at 1273-1275. The district court then proceeded to determine Judge Boldt's intent under the parameters applicable to Par. 25(a)(1) and held that Muckleshoot's U&As were limited to Elliott Bay. *Id.*at 1275.

With respect to the second issue, involving areas beyond Areas 9, 10 and 11, the district court granted Muckleshoot's motion to dismiss the claim regarding waters beyond, based in part[4] upon the court's holding that *Muckleshoot I* foreclosed the use of Par. 25(a)(6) to determine Muckleshoot's fishing rights in the areas beyond Areas 9, 10 and 11:

> The Muckleshoot argue that the court cannot make a supplemental finding under [Par. 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 [Par. 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 1275.

[4] This was one of the alternate grounds for dismissal of the motion. Despite Muckleshoot's argument to the contrary, neither of the alternative grounds is dicta. *Export Corp. v. Reef Industries*, 54 F.3d 1466, 1471 (9th Cir. 1995).

In this first ruling of the district court on the application of *Muckleshoot I*, then, the court ruled that Judge Boldt's Muckleshoot U&A finding made in *Final Decision No. 1* had been "specifically determined." Muckleshoot argued, and persuaded the court to agree, that the opposing tribes should not be permitted "to reexamine the trial evidence Judge Boldt relied upon and revise [Finding of Fact 76 determining the location of Muckleshoot's U&As]," RT-SER 77, and that the claim as to waters outside of Areas 9, 10, and 11 must be "barred as an improper effort to relitigate a matter finally decided" in *Final Decision No. 1*. RT-SER 78. Further, Muckleshoot argued that Par. 25(a)(6) "is inapplicable because Judge Boldt 'specifically determined'" Muckleshoot's U&As in Puget Sound. RT-SER 80.

Thus, Muckleshoot's U&As have been specifically determined, and at Muckleshoot's own insistence.

B. Since Subp. 97-1 the District Court Has Continued to Limit the Scope of Par. 25(a)(6) in Accordance with *Muckleshoot I*.

The law of the case in *U.S. v. Washington* concerning Par. 25(a)(6) has grown since Subp. 97-1, and the parameters of its application are now clear and consistent. With one lone exception, the district court has rejected Par. 25(a)(6) as a jurisdictional basis and has found that the U&As tribes have sought to expand have been "specifically determined."

Muckleshoot has ignored these cases in its Statement of the Case and deals with them only in its Argument. But in this case, of all cases, these district court decisions cannot be ignored in tracing the thread of *U.S. v. Washington* preceding the instant case. Since Subp. 97-1 was decided, the district court has ruled on at least four occasions that the court did not have continuing jurisdiction under Par. 25(a)(6) because the tribe's U&As had been specifically determined:

Subp. 05-3, *U.S. v. Washington,* 20 F. Supp. 3d 777, 799 (W.D. Wash. 2004) (no continuing jurisdiction under Par. 25(a)(6));

Subp. 05-4, *U.S. v. Washington,* 20 F. Supp. 3d 777, 817 (W.D. Wash. 2004) (claim brought under Par. 25(a)(6) barred by res judicata because U&A was specifically determined);

Subp. 11-2, *U.S. v. Washington,* 2015 WL 4405591 at *7 (W.D. Wash. July 17, 2015) (new evidence proffered on U&As rejected because Lummi U&As had been specifically determined), *rev'd on other grounds, U.S. v. Lummi Nation,* 876 F.3d 1004 (9th Cir. 2017);

Subp. 17-1, *U.S. v. Washington,* 2017 WL 3726774 at *5 (W.D. Wash. August 30, 2017) (no jurisdiction to seek new U&As because Skokomish U&As were specifically determined).[5]

As these cases show, Judge Martinez has developed a process for deciding whether a claim to expand U&As may move forward under the continuing jurisdiction in Par. 25(a)(6). The parties may stipulate that the area in question has not been specifically determined. Absent agreement, the court will first examine the judge's intent at the time of making the U&A decision and decide whether the U&As were specifically determined. If they were, there is no continuing jurisdiction and the case is dismissed. Only if the U&As were not specifically determined may the court proceed to the second step to consider new evidence under Par. 25(a)(6).

Judge Martinez has so articulated this process in three prior cases:

In Subp. 09-1, the court stated:

> [The] subproceeding shall proceed initially under Paragraph 25(a)(1) … However 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 at issue in Subp. 09-1] were not specifically determined by Judge Boldt, and turn to Paragraph 25(a)(6) for further proceedings.

U.S. v. Washington, 20 F. Supp. 3d 986, 1037 (W.D. Wash. 2013).

[5] This decision is on appeal to this Court and has been argued and is awaiting decision. It is listed as a related case in the Muckleshoot Brief following p. 54.

Then, in Subp. 11-2, the district court reiterated:

> 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.

U.S. v. Washington, 2015 WL 4405591 at *6.

Most recently prior to the present case, in Subp. 17-1, Judge Martinez again noted:

> 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 No. 1]*, would it be appropriate to turn to Paragraph 25(a)(6) for further proceedings.

U.S. v. Washington, 2017 WL 3726774 at *6.[6]

C. Subp. 09-1 Presented Exceptional Circumstances in Which the Use of Par. 25(a)(6) Was Appropriate.

Applying the process outlined above, the district court has proceeded only once in the 21 years since *Muckleshoot I* to decide a case for expanded U&As under Par. 25(a)(6). In Subp. 09-1, the issue was whether the Quinault and Quileute Tribes had U&As in the Pacific Ocean beyond the three-mile limit – the same type of issue that arose in the 1982 Makah ocean U&A case discussed in Section II.D above. As with Makah, the U&A decision for each of these tribes in *Final Decision No. 1* did not include waters over three miles offshore. *See U.S. v. Washington*, 20 F. Supp. 3d 899, 947 (W.D. Wash. 2008)). As noted above, the district court's jurisdiction was

[6] See n. 4, above.

not extended out to the 200-mile limit until the Makah case in 1982. In this circumstance, waters beyond the three-mile limit were outside the court's jurisdiction when Quinault's and Quileute's U&As were decided in *Final Decision No. 1* and so had not been specifically determined.

In addition, the three tribes involved in Subp. 09-1, Makah, Quileute and Quinault, stipulated that the ocean U&As beyond the three-mile limit had not been "specifically determined." RT-SER 60-61. Subp. 09-1 thus meets both of the circumstances in which the district court may proceed with a Par. 25(a)(6) proceeding: the presence of exceptional circumstances in which the U&As were not "specifically determined," and a stipulation that the U&As were not specifically determined.

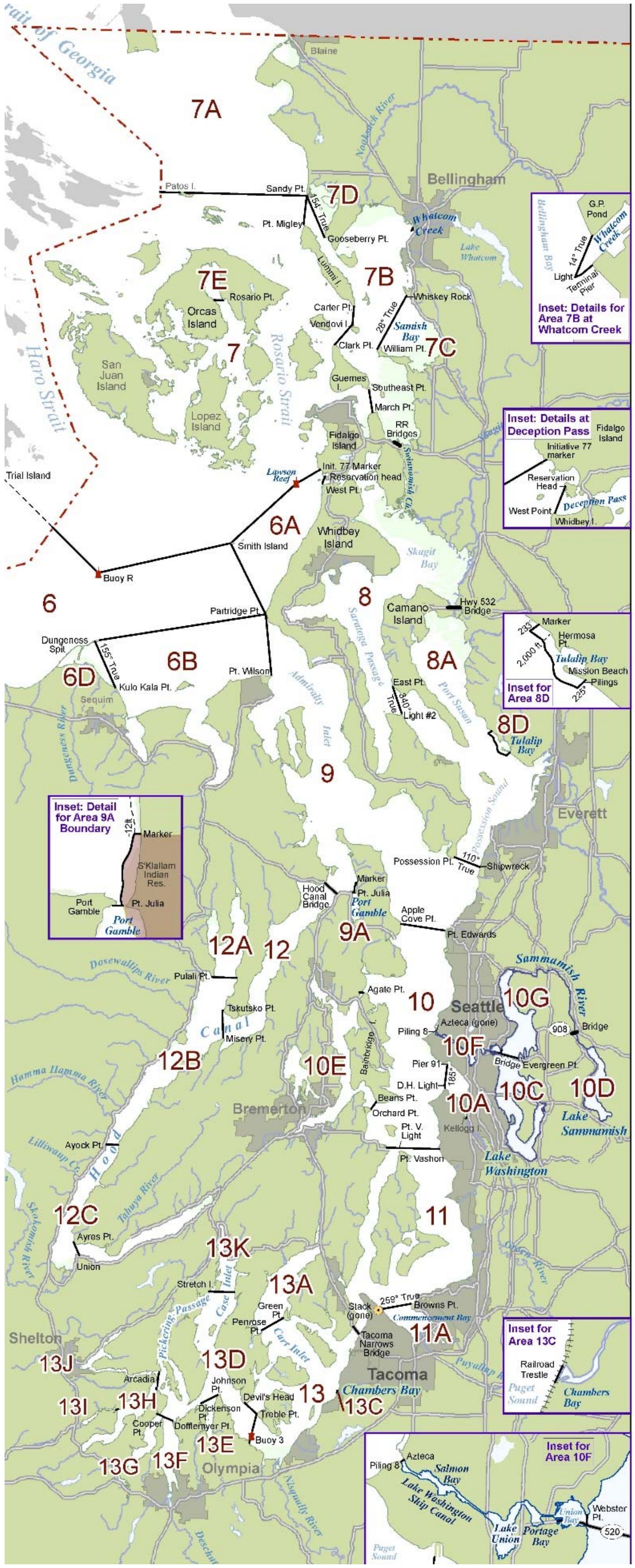
VI. THE DISTRICT COURT DISMISSED MUCKLESHOOT'S ATTEMPT TO REVISIT ITS U&As IN THIS CASE.

Having threaded through the complicated history of *U.S. v. Washington,* we at last arrive at the case before this Court on appeal. On July 13, 2017, Muckleshoot instituted Subp. 17-2 by filing its Request for Determination asking the district court to expand its marine U&As. ER 16. In doing so, Muckleshoot sought to invoke the continuing jurisdiction of the court under Par. 25(a)(6). ER 17. Muckleshoot laid claim to these new marine U&As:

> All of the marine waters of Puget Sound to and including the waters in the vicinity of Gedney (aka Hat) Island and the southern end of Whidbey Island in the north, to and including the marine waters around Anderson, Fox, and McNeil Islands in the south, and all of the marine areas of Puget Sound between those two areas, but excluding Colvos Passage and marine waters within the boundaries of any Indian reservation.

ER 21.

This encompasses a vast area, larger than the marine area it previously fished in and laid claim to in Subp. 97-1, and many times larger than its current marine U&As in Elliott Bay (Area 10A). The area Muckleshoot now claims extends from the southern portions of Areas 8A and 9 south through Areas 10, 11, and at least the eastern portion of Area 13. A glance at the map at ER 388 shows that the new claim is far larger than Elliott Bay (Area 10A):


Strait of Georgia
7A
Blaine
Patos I.
Sandy Pt.
7D
Bellingham
Pt. Migley
Gooseberry Pt.
Whatcom Creek
Lake Whatcom
Lummi I.
7E
Rosario Pt.
7B
Whiskey Rock
Orcas Island
Carter Pt.
Vendovi I.
28° True
Samish Bay
Clark Pt.
William Pt.
7C
7
Haro Strait
San Juan Island
Rosario Strait
Guemes I.
Southeast Pt.
March Pt.
Lopez Island
Fidalgo Island
RR Bridges
Lawson Reef
Init. 77 Marker
Reservation head
West Pt.
Trial Island
6A
Smith Island
Whidbey Island
Skagit Bay
Buoy R
6
8
Camano Island
Hwy 532 Bridge
Partridge Pt.
Dungeness Spit
155° True
6B
Pt. Wilson
8A
6D
Kulo Kala Pt.
Sequim
Admiralty Inlet
Saratoga Passage
East Pt.
340° True
Light #2
Port Susan
8D
Tulalip Bay
9
Everett
Possession Sound
Possession Pt.
110° True
Shipwreck
Marker
Hood Canal Bridge
Pt. Julia
Port Gamble
Apple Cove Pt.
9A
Pt. Edwards
12A
12
Dosewallips River
Pulali Pt.
Sammamish River
Agate Pt.
10
Seattle
10G
Tskutsko Pt.
Canal
Misery Pt.
Piling 8
Azteca (gone)
908
Bridge
10F
12B
10E
Bainbridge I.
Pier 91
Bridge
Evergreen Pt.
Hamma Hamma River
D.H. Light
185°
10C
10D
Beans Pt.
10A
Bremerton
Orchard Pt.
Lake Sammamish
Pt. V. Light
Kellogg I.
Ayock Pt.
Lilliwaup Cr.
Hood
Pt. Vashon
Lake Washington
Tahuya River
12C
11
Ayres Pt.
Union
13K
Green River
Stretch I.
Case Inlet
13A
Pickering Passage
Green Pt.
Stack (gone)
259° True
Browns Pt.
Penrose Pt.
Commencement Bay
Shelton
Carr Inlet
Tacoma Narrows Bridge
11A
13J
13D
Puyallup R.
Arcadia
Johnson Pt.
Tacoma
Devil's Head
13
Chambers Bay
13I
13H
Dickenson Pt.
Troble Pt.
13C
Cooper Pt.
Dofflemyer Pt.
13E
Buoy 3
13G
13F
Olympia
Nisqually River
Deschutes
Inset: Details for Area 7B at Whatcom Creek
Bellingham Bay
G.P. Pond
Whatcom Creek
14° True
Light
Terminal Pier
Inset: Details at Deception Pass
Fidalgo Island
Initiative 77 marker
Reservation Head
West Point
Deception Pass
Whidbey I.
Inset for Area 8D
Marker
Hermosa Pt.
2,000 ft.
Tulalip Bay
Mission Beach
Pilings
225°
Inset: Detail for Area 9A Boundary
12ft
Marker
S'Klallam Indian Res.
Port Gamble
Pt. Julia
Port Gamble
Inset for Area 13C
Railroad Trestle
Puget Sound
Chambers Bay
Inset for Area 10F
Azteca
Piling 8
Salmon Bay
Lake Washington Ship Canal
Lake Union
Portage Bay
Union Bay
Webster Pt.
520
Puget Sound

In response to this claim, the tribes opposing this expansion of Muckleshoot U&As filed motions to dismiss. The Responding Tribes filed their motion under Fed. R. Civ. P. 12(b)(1) based upon lack of subject matter jurisdiction. ER 384-408. Suquamish, joined separately by Squaxin Island and Puyallup, filed its motion under Fed. R. Civ. P. 12(b)(6) based on failure to state a claim. ER 409-429; RT-SER 7-8; RT-SER 5-6.

The district court issued its decision on the motions.ER 3-14. It relied upon and extensively quoted *Muckleshoot I,* ER 6-8, and the district court decision in Subp. 97-1, ER 9-10, including the ruling that Muckleshoot's U&As had been specifically determined. ER 12. Judge Martinez then ruled that "Judge Boldt specifically determined Muckleshoot U&A in [*Final Decision No. 1*] and therefore there is no continuing jurisdiction" under Par. 25(a)(6), ER 12, and that "Muckleshoot is collaterally estopped from relitigating its previously-adjudicated U&A in Areas 9, 10 and 11." ER 13. He then granted both motions and dismissed Muckleshoot's Request for Determination, ending Subp. 17-2. ER 14. This appeal followed.

SUMMARY OF ARGUMENT[7]

Muckleshoot's marine U&As have been finally determined in *Final Decision No. 1*, as clarified by *Muckleshoot III,* and as a result the district court does not have continuing jurisdiction under Par. 25(a)(6) over Muckleshoot's claim to expanded U&As.

A. The seminal case is *Muckleshoot I,* this Court's only word on Par. 25(a)(6) so far. This Court ruled that Par. 25(a)(6) cannot be employed to "alter, amend or enlarge upon" a U&A determination and that Lummi's U&As were specifically determined in *Final Decision No. 1*. *Muckleshoot I*, 141 F.3d at 1360.

B. On the heels of *Muckleshoot I* and based upon that decision, Muckleshoot argued and the district court agreed and ruled that Muckleshoot's U&As were specifically determined in *Final Decision No. 1*. *U.S. v. Washington*, 19 F. Supp. 3d 1252, 1275 (W.D. Wash. 1997). Ever since, the district court has applied *Muckleshoot I* to circumscribe a tribe's opportunity to employ Par. 25(a)(6) to expand its U&As, and only once has it been allowed.

C. Even if the district court and this Court in Subp. 97-1 had not so ruled, it is clear that Muckleshoot's U&As have been specifically determined.

[7] As previously noted, the Responding Tribes adopt by reference argument on Issue II (judicial estoppel) and Issue III (issue preclusion) contained in the Suquamish Tribe's Appellee Brief.

Muckleshoot's U&As, like those of Lummi, were decided in *Final Decision No. 1*. During the original trial, Judge Boldt tried and decided the issue of each tribe's freshwater and saltwater U&As and made a U&A finding for each tribe based on the evidence at trial. *See U.S. v. Washington*, 384 F. Supp. at 359-382. Muckleshoot has presented no exceptional circumstances that suggest otherwise.

D. Muckleshoot argues that the issue before Judge Boldt regarding marine waters was limited to Elliott Bay. But the issue before Judge Boldt as to all tribes, including Muckleshoot, was: What is the geographic extent of the tribe's U&As? Muckleshoot confuses the result of the litigation with the issue that was tried. Judge Boldt decided the geographic extent of each tribe's U&As —what was left out as well as what was included – as *Muckleshoot I* and *Muckleshoot III* indicate.

E. Under Muckleshoot's theory of the case, areas that lie outside the description of a tribe's U&As are never specifically determined, and Par. 25(a)(6) may always be used by a tribe to expand its U&As. This position ignores *Muckleshoot I* and *Muckleshoot III* and tramples upon jurisprudential considerations of finality and repose, which are of elevated importance in *U.S. v. Washington. U.S. v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc). If accepted, this argument would invite a new round of litigation among the tribes in *U.S. v. Washington* regarding U&As, 45 years after *Final Decision No. 1* and 35 years after the last

original U&A determination for a tribe was made, as evidenced by the Interested Party briefs filed in support of Muckleshoot's position.

ARGUMENT

The Requesting Tribes adopt by reference the argument in the Suquamish Tribe's Answering Brief on Issue II (judicial estoppel) and Issue III (issue preclusion).

I. MUCKLESHOOT HAS NOT SUSTAINED ITS BURDEN OF ESTABLISHNG SUBJECT MATTER JURISDICTION UNDER PAR. 25(a)(6) BECAUSE ITS U&As HAVE BEEN SPECIFICALLY DETERMINED.

A. Standard of Review and Burden of Proof.

In most cases this Court would review de novo the district court decision. But this case involves the district court's interpretation of Par. 25(a)(6), which is part of the decree entered in *Final Decision No. 1*. Judge Martinez has presided over *U.S. v. Washington* for over 14 years, RT-SER 62, far longer than Judge Boldt's tenure. Given his "extensive oversight" of the decree, this Court will uphold his "reasonable interpretation" of that decree. *Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 855 (9th Cir. 2007).

As to the underlying burden of proof, the Responding Tribes' motion was a factual challenge to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In this case, Muckleshoot asserted continuing jurisdiction under Par. 25(a)(6) of the

permanent injunction in *Final Decision No. 1*, as amended, which provides for continuing jurisdiction over claims to determine "[t]he location of any of a tribe's [U&As] not specifically determined by Final Decision No.1." *U.S. v. Washington*, 18 F. Supp. 3d 1213 (W.D. Wash. 1997) (emphasis added). Muckleshoot, then, has the burden of establishing that its marine U&As as decided in *Final Decision No. 1* and clarified in *Muckleshoot III* were "not specifically determined" under Par. 25(a)(6).

B. *Muckleshoot I* Limited the Scope of Par. 25(a)(6).

The legal analysis of the central issue in the case begins with *Muckleshoot I*, the only case of this Court to date that addresses the application of Par. 25(a)(6) and the first case at any level to do so. Decided in 1998, *Muckleshoot I* altered the prior practice of the district court and set the standard under Par. 25(a)(6) that the district court has followed ever since. It is one of the seminal cases in *U.S. v. Washington.*

Muckleshoot I involved, in relevant part, Muckleshoot's challenge to Lummi fishing in Area 10 by claiming that Lummi fishing in Area 10 was outside Lummi's U&As established in *Final Decision No. 1*. Lummi sought to introduce new evidence on the issue in the form of a latter-day declaration intended to clarify the boundary of the U&A area. This declaration was not in the record before Judge Boldt when he made the U&A finding, and Muckleshoot objected. The district court demurred, ruling that since the U&A language was ambiguous as to the boundary, Lummi's

U&As had not been "specifically determined" and the evidence could be considered under Par. 25(a)(6). *U.S. v. Washington*, 19 F. Supp. 3d 1184, 1196 (W.D. Wash. 1995).

On appeal, this Court disagreed with the district court and held that Par. 25(a)(6) did not apply to the case, stating:

> Judge Boldt … did 'specifically determine' the location of Lummi's [U&As], 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 terms used in the decree or to resolve the ambiguity with supplemental findings **that alter, amend or enlarge upon** the description in the decree.

Muckleshoot I, at 1360 (emphasis added). *Muckleshoot I* held that Lummi's U&As had been specifically determined, and that Par. 25(a)(6) cannot be invoked to "alter, amend, **or enlarge upon**" specifically determined U&As.

The Court went on to establish Par. 25(a)(1) as the proper jurisdictional basis for determining whether a particular area is within a tribe's established U&As. The process is limited to determining the judge's intent at the time of the finding by examining the record before him at the time. New evidence regarding the U&A finding was proscribed. *Id.* at 1359-1360. After *Muckleshoot I*, Par. 25(a)(6) could be used only for expansions of U&As, and only in limited circumstances.

Muckleshoot seeks to distinguish *Muckleshoot I* by limiting its application to clarification of prior U&A findings, and not to proceedings to expand them. For example, Muckleshoot states:

> The Court did not generally restrict the use of Paragraph 25(a)(6). Instead, it recognized that Final Decision # I does not contain a complete inventory of tribal fishing grounds and acknowledged the availability of supplemental findings under Paragraph 25(a)(6). *Id.* The Court only ruled that Paragraph 25(a)(6) "does not authorize the 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. *Id.*

Muckleshoot Brf. at 44. Muckleshoot's paraphrase of the Court's discussion omits two key sentences, thereby creating an erroneous impression of the Court's ruling. The complete passage in *Muckleshoot I* reads:

> [*Final] Decision No. 1* acknowledged that "it would be impossible to compile a complete inventory of any tribe's [U&As]." **At the same time, [Par. 25(a)(6)] reserved continuing jurisdiction to determine "the location of a tribe's [U&As] not specifically determined in [*Final Decision No. 1*]." Judge Boldt, however, did "specifically determine[ ]" the location of Lummi's [U&As], 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 terms used in the decree or to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree.

Muckleshoot I, 141 F.3d at 1360 (emphasis added; citations omitted).

The complete passage shows that the Court was stating that <u>although</u> *Final Decision No. 1* contained the language about an incomplete inventory of U&As that Muckleshoot cites, <u>nevertheless</u> Lummi's U&As had been specifically determined,

so Par. 25(a)(6) did not apply. In this passage, the Court dispels the argument, so heavily relied upon by Muckleshoot, that the "no complete inventory" language and other similar comments made by Judge Boldt demonstrate that tribal U&As are not specifically determined. This, coupled with the statement that Par. 25(a)(6) cannot be used to "enlarge upon" a specifically determined U&A finding, points to the opposite conclusion that Muckleshoot urges the Court to draw.

That the specific context of the case was the use of Par. 25(a)(6) to clarify established U&As rather than to establish new areas is a distinction without a difference. As discussed at greater length below, a U&A finding describes what is inside as well as what is outside, and the exclusion of areas is intentional. The area of specific determination is not limited to what is within the U&As. That is why it was perfectly appropriate for the Court to include "or enlarge upon" in its formulation of the limitations of Par. 25(a)(6).

C. The District Court Ruled in Subp. 97-1 that Muckleshoot's U&As Were Specifically Determined.

The district court wasted no time in absorbing and applying the lessons of *Muckleshoot I*. Subp. 97-1 was pending in the district court when *Muckleshoot I* was decided. As outlined below, the district court applied that decision and ruled that Muckleshoot's U&As had been specifically determined. That decision was not appealed and is now law of the case.

Subp. 97-1 involved a challenge to Muckleshoot's fishing in Areas 9, 10, and 11 based on the claim that these marine areas were not included in Muckleshoot's U&As as determined in *Final Decision No. 1*. As we have seen, Brief at 22, the district court ruled that Muckleshoot's marine U&As did not extend to Areas 9, 10 and 11, but was confined to Elliott Bay (Area 10A). *U.S. v. Washington,* 19 F. Supp. 3d 1304, 1252, 1311 (W.D. Wash. 1997). Upon de novo review this Court affirmed in *Muckleshoot III*.

Subp. 97-1 involved another claim, however. As noted above, the tribes challenging Muckleshoot also brought a claim for a determination that Muckleshoot did not have marine U&As beyond the area in which it was fishing, that is, beyond areas 9, 10 and 11. *U.S. v. Washington,* 19 F. Supp. 3d 1252, 1273 (W.D. Wash. 1997). Muckleshoot sought dismissal of this claim on the ground that the court lacked jurisdiction under Par. 25(a)(6) because Muckleshoot's U&As had been specifically determined. Muckleshoot argued, and persuaded the district court to agree, that Par. 25(a)(6) "is inapplicable because Judge Boldt 'specifically determined'" its U&As. RT-SER 80; *see also* RT-SER 77 (arguing that opposing tribes should not be permitted "to reexamine the trial evidence Judge Boldt relied upon and revise its [U&A finding]"); RT-SER 78 (complaining that opposing tribes were engaged in an "improper effort to relitigate a matter finally decided" in *Final Decision No. 1*).

The district court agreed and applied *Muckleshoot I*, which had just been decided by this Court:

> **The Muckleshoot argue that the court cannot make a supplemental finding [under Par. 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 description. … Issuing a supplemental finding under Par. 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 1275-1276 (emphasis added).

Three key points emerge from this decision. First, Muckleshoot itself understood that *Muckleshoot I* applied to attempts to extend U&As beyond their original boundaries. Second, it argued that its own U&As had been specifically determined in *Final Decision No. 1* as applied to areas outside the U&A boundary. Third, the district court agreed and applied *Muckleshoot I* to preclude a claim to adjudicate areas outside Muckleshoot's U&A because the area outside had been specifically determined. This decision was not appealed, and Par. 25 (a)(6) was not raised or addressed in *Muckleshoot III*.

D. Setting Aside Subp. 97-1, *Final Decision No. 1* Specifically Determined Muckleshoot's U&As.

That Muckleshoot's U&As have been specifically determined was decided in Subp. 97-1 and has been a settled matter in *U.S. v. Washington* for 21 years. Muckleshoot ignores this and expends considerable effort arguing that its marine U&As have not been specifically determined, or are specifically determined only as to Elliott Bay. But even without the district court's ruling in Subp. 97-1 and this Court's ruling in *Muckleshoot III*, it is abundantly clear that Muckleshoot's U&As were specifically determined in *Final Decision No. 1*, and that its saltwater U&As are limited to Elliott Bay as established in Subp. 97-1 and *Muckleshoot III.*

1. There is No Basis for Distinguishing the U&As at Issue in Muckleshoot I.

Like the Lummi U&A finding at issue in *Muckleshoot I*, Muckleshoot's U&A finding was made by Judge Boldt in *Final Decision No. 1*. 384 F. Supp. at 367. Muckleshoot has not presented anything to suggest that its opportunity to litigate its U&As was in any way different from Lummi's opportunity, nor has it suggested that there is anything unique about its U&A finding that renders it somehow tentative, provisional, or open-ended in a way that Lummi's was not. Since it hasn't raised an argument regarding its own U&As that would not apply to Lummi's U&As as well, there is no reason to withhold the application of *Muckleshoot I* to Muckleshoot U&As as well. Muckleshoot's claim that its saltwater U&As were not at issue in

Final Decision No. 1 lacks plausibility. Its U&A finding includes "the saltwater of Puget Sound." *Id.* It is true that Lummi's U&A determination is broader than Muckleshoot's U&A determination (Elliott Bay), but this difference was due to the evidence presented, not to any deprivation of the ability to present evidence.

2. The Issue Before Judge Boldt Was Not Limited to Elliott Bay.

To avoid this result, Muckleshoot takes a narrow view of the issue and the opportunity to litigate before the district court. Muckleshoot argues that the issue regarding marine U&As before Judge Boldt was confined to Elliott Bay because the evidence limited Muckleshoot's U&As to Elliott Bay. This *non sequitur* is repeated in various forms throughout Muckleshoot's brief. *See, e.g.,* Muckleshoot Brf. at 4, 21, 24, 26, 31, and 34.

Muckleshoot presents no legal support for the proposition that the issue before a court must be recast retrospectively in accordance with the outcome. Though the U&A finding comprehended "the saltwater of Puget Sound," Muckleshoot claims the issue was actually limited to Elliott Bay. In Muckleshoot's view, the issue concerning saltwater U&As was: Is Elliott Bay within Muckleshoot U&As? There is not a shred of support for the notion that the issue was limited in this unnatural way.

The issue before Judge Boldt, as framed and tried, was: What freshwater and saltwater areas are within Muckleshoot's U&As? This was the same issue involved

in all 14 U&A determinations in *Final Decision No. 1*. Muckleshoot was not limited in any way to the presentation of evidence on Elliott Bay only. The fact that the evidence provided by the United States and Muckleshoot supported marine U&As in Elliott Bay only does not change the issue tried. The evidence limits the result, not the claim.

Muckleshoot's strained attempt to recast the issue actually before Judge Boldt leads it to the untenable position that areas outside of a tribe's U&As are never specifically determined, and that Par. 25(a)(6) is always available to add new waters, even where, as here, those waters have been previously litigated and lost twice. The ostensibly limiting phrase "not specifically determined," in Muckleshoot's view, does not have any application to a claim for new U&A areas and is thus superfluous because Par. 25(a)(6) applies only to new areas.

This view is flatly contrary to *Muckleshoot I* and the district court decision in Subp. 97-1. It defies logic and the concept of boundary. A U&A finding sets a boundary, distinguishing the area in which a tribe may fish from the area in which it may not. The boundary function is fundamental to the *inclusio unius* principle: "[T]he inclusion of the one is the exclusion of the other." *U.S. v. Terrence*, 132 F.3d 1291, 1294 (9th Cir. 1997).

In accord with this principle, this Court has previously recognized that what is left out of a U&A finding is as important as what is included. In response to an

argument very similar to Muckleshoot's here, the Court observed: "That Judge Boldt neglected to include [certain areas] in the [tribe's] U&A supports our conclusion that he did not intend for them to be included." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1291, 1295 (9th Cir. 2010) (emphasis added). The district court has already rejected Muckleshoot's specific argument and its reading of Par. 25(a)(6): "[T]he 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, citing the *Upper Skagit* case. *U.S. v. Washington*, 2015 WL 4405591 *8 (W.D. Wash. July 17, 2017) (Subp. 11-2) (emphasis is the court's).

3. The Issue of Muckleshoot's Saltwater U&As Was Litigated and Decided in Final Decision No. 1.

In the ordinary case a U&A finding decides a boundary and establishes the area that is not U&A as well as the area that is. Nothing has been presented in this case to suggest that rule does not apply here. In fact, Judge Boldt considered the issue of Muckleshoot's saltwater U&As generally, and not just specifically Elliott Bay.

The Muckleshoot U&A finding was included among the findings concerning treaty tribe status and U&As of each of the 14 original plaintiff tribes. *Final Decision No. 1* at 359-382. This was part of the court's effort to try "every issue of substantial direct or indirect significance to the contentions of any party" in order to resolve "as

many as possible of the divisive problems of treaty fishing rights." *Id.* at 330. In preparation for trial, the parties conducted "exhaustive research in anthropology" and other topics "to find and present by witnesses and evidence as much information as possible." *Id.* at 328. A tribe's U&As were described by "the designation of … freshwater systems and marine areas" in which a tribe's ancestors frequently and habitually fished at treaty time. *Id.* at 402. Consideration of these freshwater and saltwater areas was thus baked into the litigation. Judge Boldt noted that "not all tribes fished to a considerable extent in marine areas." *Id.*at 353. Muckleshoot was one such tribe.

The primary evidence of Muckleshoot U&As, like all but one of the 14 original U&A findings, came from the expert reports prepared by Dr. Barbara Lane, the anthropological expert for the U.S in the case. Judge Boldt found that Lane's reports were "exceptionally well researched and reported" and were "authoritative and reliable" regarding tribes at treaty time, including their fishing areas. *Id.* at 350. Lane's report on Muckleshoot, Ex. USA-27b, RT-SER 86-151 considers both freshwater and saltwater fisheries. Lane notes that "the 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 rivers." RT-SER 93-94. In describing the traditional Muckleshoot fishing areas, Lane details the freshwater

areas in language included verbatim in Finding of Fact 76, and then states: "In addition, there was some trolling for salmon in saltwater when families descended the rivers to get shellfish supplies on the beaches of the Sound." RT-SER 94.

Judge Boldt also considered both freshwater and saltwater areas in determining Muckleshoot's U&As. Boldt addresses saltwater and describes Muckleshoot's saltwater U&As as secondary to freshwater fisheries: "secondarily the saltwater of Puget Sound." *Final Decision No. 1,* 384 F. Supp. at 367. The evidence before Judge Boldt establishes and Judge Boldt's U&A finding addresses both freshwater and saltwater fisheries for Muckleshoot, but also portrays an upriver people for whom the saltwater fishery was of minor importance and of considerably reduced area.

There is nothing in record before Judge Boldt to suggest that the issue concerning saltwater fisheries was limited to Elliott Bay. The issue was the same as it was for all of the other thirteen U&A findings in *Final Decision No. 1*: What was the areal extent of the tribe's U&As, freshwater and saltwater? It is the evidence presented on that issue that limited Muckleshoot's saltwater U&As to Elliott Bay. This evidence was consonant with the fact that Muckleshoot was an upriver people who rarely fished in salt water, and was consistent with the general situation for upriver tribes. The absence of areas from the saltwater U&As was intentional. *Upper Skagit Indian Tribe v. Washington,* 590 F.3d 1291, 1295 (9th Cir. 2010).

This conclusion was underscored in Subp. 97-1, the subproceeding that limited Muckleshoot's saltwater U&As to Elliott Bay. In support of that ruling, the district court noted that Muckleshoot's ancestors "were a primarily upriver people who may have, from time to time, descended to Elliott Bay to fish and collect shellfish there." *U.S. v. Washington*, 19 F. Supp. 3d 1252, 1310 (W.D. Wash. 1997). In addition, the court noted, *id.* :

> In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would have intended to give 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 area.

The "vast saltwater U&A" that Muckleshoot claims today is even more expansive.

This Court came to the same conclusion, affirming the district court's decision that Muckleshoot saltwater U&As were confined to Elliott Bay in *Muckleshoot III*. The court noted that Dr. Lane's Muckleshoot report contained "an extensive discussion" of Muckleshoot's fishing practices at treaty time. *Id*. at 434. It then found that Muckleshoot's ancestors were "almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods," and that there was no evidence that they regularly fished in saltwater outside of Elliott Bay. *Id.* The Court also understood that Judge Boldt was determining what waters were excluded from Muckleshoot's U&As as well as what was included. In its discussion Dr. Lane's

general discussion of all tribes' fishing, Ex. USA-20, RT-SER 86-151, the Court stated:

> Dr. Lane' report lists the saltwater U&As for those tribes that she believed engaged in significant saltwater fishing. The only tribes for which there is no mention of saltwater fisheries are the three upriver tribes, including the Muckleshoot. This feature of the report suggests two conclusions. – (1) the phrase 'on the beaches of Puget Sound' [in Lane's discussion of Muckleshoot] … was used **because there were no established (i.e. U&A) saltwater locations anywhere** and (2) **the omission** of 'Puget Sound' from Lane's findings in Exhibit USA-20, which listed the principal fisheries of Muckleshoot's ancestors, **was not inadvertent or inconsequential.**

Id. at 435 (emphasis added).

The omission of saltwater areas beyond Elliott Bay was thus intended and supported by a lack of evidence of usual and accustomed fishing in other areas.

Muckleshoot now seeks to reinvent itself from an upriver people to a seafaring tribe. But its U&As were specifically determined in *Final Decision No. 1*, and the district court lacked jurisdiction over its claim to new U&As.

E. The District Court Authorizes Jurisdiction Under Par. 25(a)(6) Only in Exceptional Circumstances.

Since Judge Martinez assumed responsibility for *U.S. v. Washington* in 2004, RT-SER 62, he has followed *Muckleshoot I*, and has applied the consistent process for addressing Par. 25(a)(6) claims employed in this case. The parties may stipulate that U&As in a particular area have not been specifically determined. If there is no agreement, the court first examines the circumstances surrounding the existing U&A

finding and decides whether that finding was specifically determined. If so, the case is dismissed. If not, the court proceeds to consider new evidence concerning the area in question under Par. 25(a)(6).

This process was followed in Subp. 09-1, *U.S. v. Washington*, 20 F. Supp. 3d 986, 1037 (W.D. Wash. 2013); Subp. 11-2, *U.S, v. Washington*, 2015 WL 4405591 *7 (W.D. Wash. July 17, 2015); and Subp. 17-1, *U.S. v. Washington*, 2017 WL 3726774 *5 (W.D. Wash. August 30, 2017).[8] The district court also applied this process in reaching the decision below. ER 11.

The application of this process has resulted in proceedings to expand U&As in only one case, Subp. 09-1. That subproceeding involved a claim by two tribes to U&As in the Pacific Ocean beyond the state's three-mile limit. Both tribes had U&As that were determined *Final Decision No. 1*. 384 F. Supp. at 372 (Quileute); 374 (Quinault). Subp. 09-1 met both of the alternative avenues for proceeding under Par. 25(a)(6). First, all tribes directly affected by the case stipulated that the U&As in the area at issue had not been specifically determined. RT-SER60-61. Second, the

[8] Muckleshoot's treatment of this case is illustrative of the way it wields the dicta argument throughout its brief. In the Muckleshoot Brief at p. 50, Muckleshoot dismisses the district court's ruling on Par. 25(a)(6) as dicta because the dismissal of the case was justified by alternative grounds. But the court was examining two possible grounds for a jurisdictional basis when ruling as to whether the case should be dismissed. Both grounds had to be negated for the court to lack jurisdiction, so the Par. 25(a)(6) ruling was not an alternative ruling, but necessary to the result.

case presented exceptional circumstances. When *Final Decision No. 1* was decided the district court lacked jurisdiction over ocean waters beyond the three-mile limit, so it did not consider U&As in those waters at the time. *U.S. v. Washington*, 20 F. Supp. 3d 899, 947 (W.D. Wash. 2008). Two years later the U.S. extended its territorial limit and jurisdiction over fisheries to 200 miles offshore, and the district court extended its jurisdiction over U&As accordingly. *U.S. v. Washington,* 730 F.2d 1314, 1316 (9th Cir. 1984).

Subp. 09-1 illustrates the type of exceptional circumstance in which Par. 25(a)(6) may apply because a U&A area has not been specifically determined. The ocean waters outside the case area and U.S. territory in 1974 had not been specifically determined because they were beyond the court's jurisdiction. Muckleshoot has pointed to no similarly exceptional circumstance in this case.

Muckleshoot claims that the district court improperly "silently amended" Par. 25(a)(6) in adopting the approach outlined above. Muckleshoot Brf. at 46. But the district court has done nothing but apply *Muckleshoot I* to interpret its holding and properly assess the application of Par. 25(a)(6) to this case.

F. Practices Prior to *Muckleshoot I* Do Not Affect This Case.

Muckleshoot rests much of its case on early actions in *U.S. v. Washington* and elsewhere. Muckleshoot Brf. at 7-17. These actions all occurred before *Muckleshoot I*. They have no bearing on the issue before this Court today because none of them

constituted a contested ruling on the application of Par. 25(a)(6) in a case in which it its application was actually an issue. It may well be that in the first decade or so of the case the parties shared an assumption about litigation of new U&As, but this was only an assumption that did not survive *Muckleshoot I*.

Muckleshoot in particular makes much of statements that relate to the continuing jurisdiction of the court in 1975 proceedings in which the Puyallup Tribe sought an injunction against the State over a fishery issue. Muckleshoot Brf. at 7-9. But that case did not involve a decision on Par. 25(a)(6). Puyallup specifically disavowed any reliance on Par. 25(a)(6) and stated that it "was not extending or attempting to extend" its U&As. ER 372-373. Accordingly, there was no issue concerning Par. 25(a)(6) before the court. Judge Boldt's statements concerning continuing jurisdiction were made after he had denied Puyallup's injunction request and were not part of that ruling or any other matter for decision. Moreover, Judge Boldt was musing about Puyallup's potential use of Par. 25(a)(6) to make a better showing of its established U&As by "including a sharper delineation" of the U&A finding in *Final Decision No. 1*. ER 379. Judge Boldt may have thought Par. 25(a)(6) could be used in that way, but he was wrong, because *Muckleshoot I* invalidated that very use of Par. 25(a)(6). *Muckleshoot I*, 141 F.3d at 1360.

Muckleshoot also argues that during the 25 years that it fished in expanded saltwater areas before *Muckleshoot III*, there was a "common understanding" these

waters were included in its U&As. Muckleshoot Brf. at 14-16. But whatever the amount of understanding of or acquiescence in Muckleshoot's extensive saltwater fishing, it has no legal significance in light of this Court's ruling in *Muckleshoot III*, which confined its U&As to Elliott Bay.

G. Finality Concerns Support Invocation of Par. 25(a)(6) Only in Exceptional Circumstances.

Paragraph 25(a)(6) will rarely provide a basis for continuing jurisdiction of the district court because ordinarily, U&A findings are "specifically determined." Par. 25(a)(6) will apply only in those rare cases like Subp. 09-1 where the parties stipulate that the U&A finding was not specifically determined or where for some reason a U&A finding does not address a particular area for particular reasons.

This approach assuages finality concerns that would otherwise arise concerning Par. 25(a)(6). Were it not for Par. 25(a)(6), the only avenue for Muckleshoot to press its claim would involve setting aside the judgment in *Final Decision No. 1* under Fed. R. Civ. P. 60(b), a procedure in which finality concerns severely circumscribe revisiting already decided matters.

Muckleshoot would have this Court read Par. 25(a)(6) to provide a sweeping exception to the finality of judgments by authorizing a tribe to seek to expand its U&As at any time, in any area. In its view, an area outside a tribe's U&As has never been specifically determined; any U&A finding may be expanded. This flies in the

face of finality concerns and leads to a never-final finding that can be added to 45 years or more after it was made. If adopted by this Court a new round of litigation of U&As is at hand. The tribes that support Muckleshoot's position in this Court, and the tribes the district court has already ruled against, are waiting in the wings.

The Court has already noted that within *U.S. v. Washington* finality concerns are particularly important. *U.S. v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc). In regard to another tribe's effort to revisit matters long decided in *U.S. v. Washington*, the Court stated:

> [C]onsiderations of finality loom especially large in [*U.S. v. Washington*], in which a detailed regime for regulating and dividing fishing rights has been created in reliance on the framework of [*Final Decision No. 1*]. … [S]uch a complex regime…certainly cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based.

Id. at 800.

Muckleshoot I and the district court's application of the decisions on Par. 25(a)(6) thereafter respect these heightened finality concerns identified by this Court and echo the "extraordinary circumstances" required by Fed. R. Civ. P. 60(b)(6). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 841, 864 (1988). This is an additional reason why the Court should affirm the district court and not accept an open-ended, broad application that will upset settled rulings "upon which many subsequent actions have been based."

II. THE BRIEFS OF THE INTERESTED PARTIES UNDERSCORE FINALITY CONCERNS.

A. Brief of Interested Party Stillaguamish Tribe.

1. Stillaguamish Has Filed a Subproceeding to Expand its Marine U&As that is Pending in the District Court.

Stillaguamish joins Muckleshoot's arguments and notes: "we write separately to emphasize that Stillaguamish has additional grounds to support its ability to bring its own claim for marine fishing areas." Stillaguamish Brf. (Dkt. 20) at 1, n.1. Stillaguamish then takes pains to distinguish its situation from Muckleshoot, *id.* at 6-8, and argues that a decision that its (Stillaguamish's) U&As were not specifically determined is "not even a close call." *Id.* p. 7.

Stillaguamish did not see fit to inform the Court that its claim for marine U&As is currently pending in the district court in Subp. 17-3. RT-SER 9-10. That case is awaiting decision on the very issue that it now argues in this Court – whether its saltwater U&As have been specifically determined. RT-SER 1-4. Stillaguamish apparently would like to steal a march on its pending case by having this Court rule in its favor in this case. The Responding Tribes have much to say about the Stillaguamish claim presented in Subp. 17-3. However, we are confident that the Court will recognize that any consideration of this issue is premature and improper until the district court has ruled on the issue and it has properly been brought before this Court.

2. The Responding Tribes Do Not Claim That Par. 25(a)(6) is Never Available to Expand a Tribe's U&As.

Stillaguamish joins Muckleshoot's argument for an absolute rule that Par. 25(a)(6) is always available to expand a U&A area. Stillaguamish goes so far as to assert that "[i]ssue preclusion only applies where the specific waters have been previously litigated using the same facts." Stillaguamish Brf. at 8, Heading II. This is an astounding assertion that would eviscerate issue preclusion.

The Responding Tribes do not argue the polar opposite position. We do not claim that adding a new area to U&As using Par. 25(a)(6) is never available. Given the long history of and many decisions in *U.S. v. Washington* and the varied circumstances among the tribes, situations have arisen, and may arise in the future, where the invocation of Par. 25(a)(6) is appropriate. In capsule, the Responding Tribes argue that the district court has correctly applied *Muckleshoot I* and allows proceedings under Par. 25(a)(6) only in the exceptional case, and that no such case is presented by Muckleshoot. We have no quarrel with the district court's application of Par. 25(a)(6) to Subp. 09-1, where 1) the ocean area beyond the three-mile limit at issue in the case was outside U.S. jurisdiction when *Final Decision No. 1* was decided, *U.S. v. Washington,* 20 F. Supp. 3d 899, 947 (W.D. Wash. 2008); and 2) the relevant parties stipulated that the U&As in that area had not been specifically determined. RT-SER 60-61.

If the district court is affirmed in this case, Stillaguamish and other tribes will continue to have their day in court to show that the status of the putative U&A area in question has not been specifically determined. No blanket rule will stand in their way. Stillaguamish is availing itself of the opportunity in the district court at this very moment in Subp. 17-3.

3. The Law of the Case Limits Expansion of U&As Under Par. 25(a)(6).

Stillaguamish argues that district court cases prior to *Muckleshoot I* constitute law of the case that support a sweeping scope of Par. 25(a)(6). Stillaguamish Brf. at 4-7. But as Stillaguamish itself recounts, law of the case requires that the issue in the prior case must be "actually considered and decided by the first court." *Id.* at 4 (*quoting United Steelworkers of America v. Retirement Income Plan for Hourly-Rated Employees of ASARCO,* 512 F.3d 555, 564 (9th Cir. 2008)). None of the cases cited by Stillaguamish involved actual consideration of the application of Par. 25(a)(6) as a contested issue, so the issue was not decided, either explicitly or by necessary implication.

Moreover, any law of the case emanating from these early district court decisions regarding Par. 25(a)(6) was vitiated and superseded by this Court in *Muckleshoot I*, *Muckleshoot III*, and *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 790 (9th Cir. 2010). Law of the case requires that the district court follow the

decisions of this Court in *U.S. v. Washington. In re Rainbow Magazine*, 77 F.3d 278, 281 (9th Cir. 1996). The district court's decisions since 1998 correctly apply these decisions and have added to the law of the case.

4. A U&A Determination Decides the Status of Areas Inside and Outside the U&A Area.

Stillaguamish adds some embellishments to the Muckleshoot argument that a U&A determination decides only the status of what is within the U&A area, and not the status of what lies beyond. Stillaguamish asserts that Judge Boldt did not fail to include waters "out of neglect," but because the record before him "did not include information to establish the areas in the first place." Stillaguamish Brf. at 10. We agree with this statement, but not the conclusion Stillaguamish draws. The proper conclusion, which this Court has drawn, is not that Judge Bold failed to consider these areas, but that he intentionally excluded them. The Court in *Upper Skagit* held: "that Judge Boldt neglected to include [certain areas] in the [tribe's] U&A supports our conclusion that he did not intend for them to be included." *Id.* at 1025. The Court also noted in *Muckleshoot III* that Judge Boldt's omission of saltwater areas in Muckleshoot U&A "was not inadvertent or inconsequential." *Id.* at 435. Where the issue of a tribe's U&As has been tried, and the resulting U&A finding has been made in accordance with the evidence, absent exceptional circumstances the areas outside the U&As have been intentionally excluded and specifically determined.

5. The Responding Tribes are Compelled to Respond.

Stillaguamish accuses those tribes who oppose claims for expanded U&As of "intertribal warfare." Stillaguamish Brf. at 11. The Responding Tribes regret Stillaguamish's use of this inflammatory term. Stillaguamish filed its case for expanded U&As in Subp. 17-3, claiming U&As in areas in which it is not currently fishing, and it now apparently expects the other tribes to simply concede, good cause to object notwithstanding.

The stakes are high for the tribes with fisheries in the targeted areas of expansion. This Court has recognized that the tribes opposing Stillaguamish and Muckleshoot claims have significant interests to protect: prevention of disruption to the existing fishing regime and the upsetting of settled matters in *U.S. v. Washington* concerning management and regulation of fisheries. These are legitimate interests that were central to this Court's discussion of finality considerations regarding such new claims. In rejecting the revisiting of a settled matter, the Court noted the "potential disruption and possible injury that might follow from reopening" settled matters in *U.S. v. Washington,* including increased competition with those treaty tribes who fish in the area involved in the U&A expansion area. *U.S. v. Washington,* 593 F.3d 790, 800 (9th Cir. 2010) (en banc).

B. Brief of Interest Party Hoh Tribe.

The issues the Hoh Tribe raises in its brief have been addressed in Section I and the discussion of the Stillaguamish brief above. It bears noting, however, that Hoh claims that its own U&As have not been specifically determined and seeks to distinguish its circumstances from those of Muckleshoot, attempting to leave the door open for its own expanded U&As case. Hoh Brf. (Dkt. 36) at 2.

C. Amicus Brief of Sauk-Suiattle Tribe.

The Sauk-Suiattle Tribe has filed a motion seeking amicus status in support of Muckleshoot. Dkt. 17. The Court has ordered that the motion be deferred for consideration by the panel assigned to this case. Dkt. 21. Sauk-Suiattle is a party to *U.S. v. Washington,* and its U&As were determined in *Final Decision No. 1*, 384 F. Supp. at 376. In this procedural posture, the amicus brief tendered along with the Sauk's motion is not before the Court, and we do not address the issues raised in that brief. We note here only that in the brief tendered by Sauk, it too states an intention to pursue its own case for marine U&As under Par. 25(a)(6). Sauk Brf. (Dkt. 17-2) at 2.

D. The Companion Briefs Underscore the Finality Concerns at Play in This Case.

As things stand now in *U.S. v. Washington,* five of the 21 tribes in the case are pursuing or have shown signs of intending to pursue a case under Par. 25(a)(6)

for expanded U&As. In addition to the Muckleshoot, Stillaguamish, Hoh and Sauk-Suiattle claims discussed in this brief, a Skokomish claim for expanded U&As is pending before the Court in appeal No. 17-35760 and is listed as a related case by Muckleshoot. Muckleshoot Brf. at 55. All of these tribes have U&As that were decided in *Final Decision No. 1* 45 years ago. *Final Decision No. 1*, 384 F. Supp. at 326-327.

These cases, along with the cases in which the district court has already ruled against U&A expansions, raise the specter of reopening so many long-decided matters and sound the alarm concerning finality, a heightened concern in *U.S. v. Washington.* 593 F.3d 790 (9th Cir. 2010) (en banc). There looms a new era of disruption to tribal fishing, but also to as state and tribal fisheries management and regulation, a consideration of importance not only to the tribes, but to the State of Washington and its citizens as well. As this Court stated, "such a complex regime … certainly cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based." *Id.* at 800.

This "complex regime" developed over the course of 45 years in *U.S. v. Washington* during which the courts and the parties wove a complex tapestry of treaty fishing rights and the management of fisheries between the state and tribes and among the tribes. The warp and weft of this tapestry is composed of 90 separate subproceedings; hundreds of district court decisions and 41 opinions from this

Court; hundreds of agreements, many entered as consent decrees, on all manner of fisheries related topics; annual state-tribal management agreements covering each of the types of fishing in each of the management areas; state and tribal regulations governing their respective fishers; unwritten practices and modes of interaction among the parties; and tribal fisher reliance on a livelihood derived from the fishery.

A tug on a single thread in that tapestry by reopening matters long settled threatens to unravel the entire fabric, as this Court recognized in the en banc opinion cited above. The Court can serve finality interests and preserve the tapestry by affirming the opinion of the district court in this case.

Date: February 1, 2019.

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STATEMENT OF RELATED CASES

Respondent Appellees, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Swinomish Indian Tribal Community, and Tulalip Tribes are aware of the following related cases pending in this court that, under Ninth Circuit Rules 28-2.6, may be related to this case: (1) *United States v. Washington (Skokomish Indian Tribe v. Jamestown S'Klallam, et al.*) No. 17-35760; and (2) *United States v. Washington* (*Quileute Indian Tribe and Quinault Indian Nation v. Makah Indian Nation*) No.18-35369. Like this case, these appeals arise from the district court's exercise of continuing jurisdiction in *United States v. Washington.*

Date: February 1, 2019.

Swinomish Indian Tribal Community

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-35441

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Date: February 1, 2019.

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