Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 Subproceeding 11-02 **LOWER ELWHA KLALLAM TRIBE'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO AMEND THE REQUEST FOR DETERMINATION** NOTED ON MOTION CALENDAR: March 8, 2019 ORAL ARGUMENT REQUESTED

The Lower Elwha Klallam Tribe ("Elwha"), an original Requesting Tribe in this Subproceeding 11-2, opposes the S'Klallam Tribes' Motion for Leave to Amend the Request for Determination ("RFD"), Dkt. 238. The Ninth Circuit opinion of December 1, 2017, *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) ("*Lummi III*"), has fully determined Subproceeding 11-2, including the western boundary of Lummi's U&A, and there is simply no case left to be "amended." The proposed amended RFD is in fact an attempt to re-litigate that case, coupled with a new case involving new claims and evidence about additional waters (Port

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Townsend Bay and Hood Canal) not previously at issue. Before the Court authorizes new claims, or "new" theories about old claims, Elwha is entitled to a final determination regarding the outcome of the case it filed in 2011. The proposed amended RFD seeks to avoid such a determination while also dismissing Elwha as a requesting party.

The rationale on which *Lummi III* is based – that the disputed waters "are situated directly between" Lummi U&A in Haro Strait and Lummi U&A in Admiralty Inlet – necessarily entails that there is indeed a western boundary to Lummi's U&A, consisting of the Trial Island-Point Wilson line by which all parties consistently defined the extent of the disputed waters. If the boundary has not been determined, the door may be open for Lummi to seek a boundary further to the west – potentially all the way to the Elwha River, where Elwha's Reservation is located. Allowing the amended RFD to go forward without first determining whether there is anything left of 11-2 would severely prejudice Elwha's interests. Accordingly, the appropriate course for this litigation would be for this Court to enter judgment based on *Lummi III*, including a specific determination of Lummi's U&A boundary at the Trial Island line.

A. Standard for Motions for Leave to Amend.

Under Fed. R. Civ. P. 15(a), leave to amend is to be freely granted when justice requires, a policy to be applied with "extreme liberality." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014). The Ninth Circuit considers five factors when assessing a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint. *Desertrain***,** 754 F.3d at 1154. Greatest weight is given to consideration of prejudice to the party opposing amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

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After remand of a case by the appellate court, the parties may present amendments to the pleadings not inconsistent with the appellate decision. *Vizcaino v. U.S. Dist. Court for W. Dist. of Washington*, 173 F.3d 713, 719 (9th Cir.), *opinion amended on denial of reh'g sub nom. In re Vizcaino*, 184 F.3d 1070 (9th Cir. 1999). However, the lower court may not deviate from the mandate of the court of appeal, *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948), including any "law of the case as was established by the appellate court," *Firth v. United States*, 554 F.2d 990, 993 (9th Cir.1977). A district court's decision to grant or deny a motion to amend is reviewed for abuse of discretion, *Desertrain*, 754 F.3d at 1154, but its compliance with the mandate of an appellate court is reviewed de novo. *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000).

In this case, Elwha relies primarily on two of the five factors in opposing the S'Klallams' motion: futility of amendment and prejudice. First, as explained in Section B, below, amendment would be futile because after seven years of litigation on the merits, including two appeals, this case has now been fully resolved by the Ninth Circuit. The underlying policy reason for the liberal standard on leave to amend – to promote resolution of cases on their merits, *U.S. v. Webb*, 655 F.2d 977, 979–80 (9th Cir. 1981) – is thus not present here. Second, prejudice to a party opposing amendment is a primary consideration, and as explained in Section C, below, Elwha would suffer extreme prejudice if the new claims and theories in the amended RFD were to go forward without first determining the outcome of 11-2.

B. *Lummi III* Has Fully Determined Subproceeding 11-2, Including the Western Boundary of Lummi's U&A, Such That Amendment Would Be Futile.

Lummi III "…conclude[d] that the waters west of Whidbey Island, which *lie between* the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's

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U&A." 876 F.3d at 1011 (emphasis added). The Court used the phrase "waters west of Whidbey Island" at least *twelve* times in the opinion when referring to the waters in dispute in this case. At seven other points, the Court also referred to the "waters west of Whidbey Island" as the "waters at issue," the "waters contested here," the "disputed waters," the "contested waters," and the "disputed area." 876 F.3d at 1007, 1008, 1009, and 1010. The Court also noted that the waters of the San Juan Islands include Haro Strait, on the western side of that island group, 876 F.3d at 1010, and noted that the waters at issue are "situated directly between" or "lie between" the waters of the San Juan Islands and Admiralty Inlet, 876 F.3d at 1007 and 1011(respectively), thereby extending to these disputed waters the geographic rationale by which it included Admiralty Inlet in Lummi's U&A in the 2000 *Lummi I* decision. Thus, the Ninth Circuit concluded that the waters that "lie between" Haro Strait and Admiralty Inlet are within Lummi's U&A. This "lies between" rationale is a primary reason that a U&A boundary is *inherent* in the Ninth Circuit's decision.

The Ninth Circuit clearly used the language employed by the parties to refer to the waters in dispute in this Subproceeding. Beginning with the original RFD, Dkt. 1-1 at 2:12-18, all three of the Requesting Tribes (Elwha and the S'Klallam Tribes) have consistently used the term "waters west of Whidbey Island" to refer to the waters in dispute and defined these as being encompassed by the Trial Island-Point Wilson line ("Trial Island line").[1] In addition, the Requesting Tribes filed numerous maps throughout the litigation of 11-2, all of which used the

[1] *See* also for example: Dkt. 40 at 1 (Requesting Tribes Motion for Summary Judgment) (May 31, 2012); Dkt. 168 at 1-2 (Lower Elwha Motion for Summary Judgment (May 1, 2015); Dkt. 164-2 at 2 (S'Klallam Proposed Order filed with Motion for Summary Judgment) (May 1, 2015).

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Trial Island line to graphically illustrate the waters in dispute.[2] In both of its dispositive orders in this Subproceeding, this Court used a verbal description of the Trial Island line to define the waters west of Whidbey Island as the waters in dispute, and twice excluded them from Lummi's U&A.[3] And on appeal, the Requesting Tribes reproduced several of their maps as part of the Excerpts of Record and as inserts into their appellate briefs. *See e.g.*, KSER048 and KSER158, Exhs. A and B to Declaration of Stephen H. Suagee ("Suagee Dec."). See also Suagee Dec. Exh. E. Lummi also defined the waters in dispute in terms of the Trial Island line, most significantly in its advocacy with the Ninth Circuit. S*ee* excerpt from Lummi's Ninth Circuit brief at 20-21, Exh. D to Suagee Dec., which reproduces a color map from Lummi's Excerpts of Record, ER236 (filed in this Court as Dkt. 131 at 18, Starkhouse Dec.), and expressly concedes that "[t]he solid red line represents *the boundary* of the Lummi's claimed fishing grounds [emphasis added]." The solid red line is the Trial Island line.[4]

At oral argument in the Ninth Circuit, counsel for the S'Klallam handed the panel a copy of KSER048, Suagee Dec. Exh. A, explaining that it shows the waters in dispute. *See* oral argument video at 14:45.[5] KSER048 shows the Trial Island line. And most tellingly of all, the

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[2] *See* for example Dkt. 169 at 4 (2d McCoy Dec.); Dkt. 41 and maps attached thereto (McCoy Dec.); Dkt. 38 at 8 (Burlingame Dec. defining disputed waters as of 2011).

[3] Dkt. 210 at 24 (Order On Motions For Summary Judgment) (July 17, 2015); Dkt. 59 at 16 (Order on Motion for Summary Judgment) (Oct. 11, 2012), *U.S. v. Washington*, 20 F.Supp. 3d 899, 980 (W.D. Wash. 2008).

[4] Lummi did not explicitly claim (by counter-claim or otherwise) any waters farther to the west of the Trial Island line and the record contains no evidence (not even "general evidence" of the kind endorsed by *Lummi III*) of any treaty-time presence by Lummi, for any purpose, in any marine waters west of the Trial Island line.

[5] The video is available at: www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012091.

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S'Klallam Petition For Rehearing to the Ninth Circuit inserts KSER158, which shows the Trial Island line, while stating:

> *This Court found* that because a nautical path from the southern San Juan Islands could geographically connect the Lummi to the waters of Admiralty Inlet, *that miles of waters in between the two points should be included in Lummi's U&A description* of "Northern Puget Sound." The disputed area is depicted below: [Color map KSER158 inserted here, showing Trial Island line.]

Pet. Reh. at 7, Exh. C to Suagee Dec. (emphasis added). That is an express acknowledgement to the Ninth Circuit that its opinion included within Lummi's U&A *all* of the waters bounded by the Trial Island line.[6]

Despite this clear acknowledgement, the S'Klallam now assert that Lummi has "misled" the Court in a way that casts doubt on the outcome in *Lummi III* (and on the 2000 decision in *Lummi I* as well). Dkt 238 at 3-6. The questionable premise of the argument based on these "new facts" – which the S'Klallam posit without providing any authority – is that Lummi can have only one treaty-time travel path, Dkt. 238 at 3. Lummi purportedly asserted to the Ninth Circuit on appeal in 11-2 "that the 'Waters West of Whidbey Island' was [*sic*] the *actual* and only possible travel route that it took from their U&A in the San Juan Islands to the 'present environs' of Seattle." Dkt. 238 at 3:6-7. But the statement actually quoted from Lummi's Ninth Circuit brief is that these waters "are the *sole* direct *connection* between, Admiralty Inlet and the waters of the San Juan Islands [second emphasis added]," Dkt. 238 at 3:8-10, which is a correct statement (particularly with respect to Haro Strait so far to the west of Admiralty Inlet). Lummi

[6] Visual review of maps KSER048 and KSER158, Exhs. A and B to Suagee Dec., readily shows that the geographic rationale of *Lummi III* cannot be extended any farther to the west or southwest of the Trial Island line. That line is the limit of waters that are "situated directly between" (or "lie between") Haro Strait and Admiralty Inlet.

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did not state that the waters are the sole transit path that Lummi is allowed to have. In the short-lived Subproceeding 18-1, Lummi stated in its response to a TRO motion that waters on the *east* side of Whidbey Island would likely be a passage between Lummi U&A at Fidalgo Island and Lummi U&A in the environs of Seattle. Dkt. 238 at 3; Rasmussen Dec., Exh. C, Dkt. 239 (ECF pages illegible). The S'Klallam view Lummi's 11-2 and 18-1 statements as contradictory and, thus, evidence of an attempt by Lummi to mislead the Court in 11-2. Unfortunately, there is no established principle that a Tribe with a broadly described "from/to" U&A is allowed only one transit path to get from one point to another, so the S'Klallams' premise is flawed. Moreover, the Lummi excerpt from 18-1 indicates its position is based in part on the reasoning in *Lummi III*. There is no basis for the sensational accusation that Lummi has "misled" the Court or "hidden its intentions."

The S'Klallam further assert (again, despite their clear concession in their Petition For Rehearing) that *Lummi III* is so ambiguous that it cannot be discerned "where … [it] intended to grant Lummi U&A," Dkt. 238 at 5:7-8, and that an amended RFD is necessary to determine just where. The motion contends that the boundary in need of determination is that between Lummi's U&A (which is in Northern Puget Sound) and the Strait of Juan de Fuca. The premise for this is that *all* the waters west of northern Whidbey Island are part of the Strait of Juan de Fuca, and that by recognizing Lummi U&A in these waters, *Lummi III* has necessarily come up with an idiosyncratic definition of the Strait of Juan de Fuca, which necessitates further clarification of the boundary between the Lummi U&A (or Northern Puget Sound) and the Strait. That misunderstands the very last sentence in *Lummi III*, which states that "we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A." 876 F.3d at 1011.

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The expression "outer reaches" is perhaps somewhat odd, but in context can only mean "exterior boundaries" rather than "outer" in a watershed sense (which is how the S'Klallam have understood it). The Court simply means that the precise location of an eastern boundary for the Strait of Juan de Fuca, as Judge Boldt would have understood that latter term, is irrelevant to determining this Subproceeding; all that need be known is that the Trial Island line is the western-most extent of Lummi's U&A in this area. Elsewhere in the opinion, the Court states that the Strait lies "to the west" of the waters west of Whidbey Island, which are within Lummi's U&A. *Id*. at 1008.

The motion for leave also suggests that ambiguity in *Lummi III* now requires determination of a historical "nautical path" that could locate the boundary somewhere to the east or north of the Trial Island line. Dkt. 238 at 5-6. That fails to recognize that *Lummi III* is based on a concept of "general evidence," for which the reasoning of *Lummi I* provided the first step. *Lummi III* does not require that there be a specific historical route that might otherwise reduce (or expand) the extent of the waters that it included within Lummi's U&A and there is no such evidence in the record. *Lummi III* is simply saying that indications of Lummi's treaty-time travel found in the 2000 *Lummi I* opinion constitute sufficient "general evidence" to support a conclusion that Judge Boldt intended to include within Lummi's U&A the waters west of Whidbey Island, which it characterizes (per Dr. Lane) as a "public thoroughfare." *Id*. at 1010. Under this rationale, as objectionable as it is to the S'Klallam and to Elwha, there is no room or need for a more specific travel path.[7] At the same time, this rationale *cannot* be extended past the

[7] The motion asserts that *Lummi III*'s reliance solely on general evidence of travel derogates the transit rule and conflicts with *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844 (9th Cir. 2017) ("*Upper Skagit*"), which requires more specific evidence. Dkt. 238 at 8. But

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Trial Island line because waters to the west of that line cannot be said to lie between the previously established U&A in the San Juan Islands and Admiralty Inlet. *See* footnotes 6, supra, and 9, infra.

The motion briefly asserts that this Court should apply the "shoreline mirroring approach" from Subproceeding 09-01, but fails to explain how this approach to U&A boundary in the open ocean would apply to interior marine waters commonly used as thoroughfares (per Dr. Lane). It also misleadingly states that this approach "was adopted, in part, because the court recognized that navigational routes at Treaty time would have mirrored the coast line; the Court understood that straight line navigational routes were simply not possible." Dkt. 238 at 9. This Court used the mirroring approach on remand in 09-01 to correct an error noted by the Ninth Circuit in the way this Court initially established the western boundaries of Quileute's and Quinault's U&As off the Pacific Coast. The initial longitudinal (north-south linear) boundaries were inconsistent with this Court's factual findings because they allowed the U&As to extend farther west into the ocean at some points than the mileage limits determined in the factual findings. On remand, this Court adopted non-linear boundaries that paralleled the coastline, which eliminated the conflict with the findings. The Court found that the boundaries established this way were defensible precisely because, contrary to the S'Klallams' premise, treaty-time mariners had the capability to navigate on a straight east-west line. Declaration of Lauren Rassmussen, Exh. D, Dkt. 239 at 47 (Order Regarding Western Boundaries, 09-01, Dkt. 439 at

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the same panel that issued *Lummi III* on December 1, 2017, also issued Upper Skagit just a few weeks earlier, and presumably saw no conflict. In addition, that panel in *Lummi III* specifically noted that "we already addressed and rejected this argument in the *specific* context of the Lummi's U&A." 876 F.3d at 1010 (citing *Lummi II*, 763 F.3d at 1187) (emphasis added).

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4:7-12, citing 09-01, Dkts. 382 and 383). *See* Exhs. F and G to Suagee Dec.. The shoreline mirroring approach to U&A boundaries makes sense for larger distances out in the ocean but the motion for leave fails to explain how it has any application here in inland marine waters, where the shore is likely always visible from a vessel. The Trial Island line is straight (albeit with a slight vertex) because of the evidentiary rationale used in *Lummi III*, which involves waters that "lie between" two points.

Ultimately, the motion for leave seriously downplays the intent to establish a boundary at the Trial Island line that can be readily discerned in the Ninth Circuit's express language and its overall context, as well as the repeated representations of the parties (something that the S'Klallam initially acknowledged in their Petition For Rehearing). In fact, both the motion, Dkt. 238 at 4, and the amended M&C notice, Dkt. 236 at 3 (suggesting this Court needs to recognize that *Lummi III* is "clearly erroneous"), assert that the main reason for an amended RFD is to call into question the validity of *Lummi III*. Ultimately, what the S'Klallam are seeking is an opportunity to re-litigate in this Court matters that the Ninth Circuit has already decided.[8] As noted in Section A, above, this Court is obliged to adhere to the mandate of the Court of Appeals, which issued in January, 2018, Dkt. 226. There is no basis for granting leave to amend where, as in this case, the appellate decision has disposed of the issues the movant desires to continue litigating.

[8] The motion for leave to amend, Dkt. 238 at 10, states that the S'Klallam will attempt to rely on the 1989 Declaration of Barbara Lane as evidence of Judge Boldt's intent, even though *Lummi I* disallowed it as latter-day evidence. In addition, the amended RFD states (but the motion does not mention) that it will seek to use the USGS definition of the Strait of Juan de Fuca as evidence that it includes the waters west of Whidbey Island, something that the Court rejected in 11-2, Dkt. 239 at 17.

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This Court should enter judgment that the Trial Island line is specifically determined as the boundary of Lummi's U&A. The S'Klallams' quarrel is with Ninth Circuit and the best way to address that is to enter judgment based on the Trial Island line and let the S'Klallam try again with the Ninth Circuit if they so choose.

C. Granting the Motion for Leave to Amend Would Prejudice Elwha's Interests, Especially Where the Amended RFD Would Involuntarily Dismiss Elwha As a Requesting Party.

The motion for leave to amend devotes but a single sentence to the relative prejudice as between the S'Klallam and Lummi, Dkt. No. 238 at 11:10-13, and fails to recognize any potential prejudice to Elwha, Dkt. 238 at 10:4-6. In fact, in a bit of classic bootstrapping, the motion brazenly presents the "need" to dismiss Elwha as a requesting party as one of the three reasons it should be granted, which would involuntarily relegate Elwha to the status of an interested party. Proposed Amended RFD at ¶¶ 1 and 3. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 925 (9th Cir. 2011) (upon filing an amended complaint, the original complaint is treated as nonexistent). Elwha opposes being involuntarily dismissed as a Requesting Party and its interests would be greatly prejudiced if the motion for leave were granted. First, as the basis for the motion for leave to amend the S'Klallam would have this court ignore *Lummi III*, as if the Ninth Circuit had only ordered dismissal of *a claim* as opposed to having decided *the one and only claim in the RFD*. As a simple matter of due process, Elwha is entitled to a clear determination that *Lummi III* has fully decided the case it has diligently litigated since 2011.

Second, Elwha believes that Lummi likely agrees with the S'Klallam that the boundary of its U&A has not yet been decided, at least to the extent that it necessarily opens the door to a claim by Lummi that the boundary is farther west than the Trial Island line, perhaps all the way

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to the Elwha River where the Lower Elwha Reservation is located.[9] The Declaration of Matthew M. Beirne, Elwha's Natural Resources Director, filed herewith, outlines the harm to Elwha's interests that could result from a Lummi U&A presence in marine waters nearer to, and more directly affecting, the Elwha River. Among other things, the presence of a large Lummi fishing fleet would likely displace Elwha fishers in their home waters, in much the same way as the S'Klallam assert harm to their fishers from the result in *Lummi III*. In addition, a Lummi presence near the Elwha River could greatly hamper efforts to restore Elwha River salmon and steelhead runs as part of the very recent, historic removal of the Elwha River dams. *See* Beirne Dec., particularly at ¶¶ 10-13.

The prejudice factor cuts strongly against granting the motion for leave to amend.

D. The "Amended" RFD Also Contains Elements of a New Complaint For a New Subproceeding, Which Should Not Be Permitted.

The amended RFD includes allegations and claims regarding marine waters – Port Townsend Bay and the mouth of Hood Canal – that have not been at issue in 11-2. Dkt. 239 at 6, 7, 11, 14, 15, 19 (¶¶ 2, 3, 13, 21, and 25). *See* also Amended M&C Notice, Dkt. 236 at 3. But the motion for leave makes absolutely no reference to these new waters, let alone explains how their inclusion in the amended RFD is justified on the basis of the various stated reasons in support of the motion, all of which pertain to the issue of Lummi's U&A boundary in the waters west of Whidbey Island. Because it fails to provide any support for these elements of the proposed RFD,

[9] Such a dispute would likely be cast in terms of where the eastern boundary of the Strait of Juan de Fuca is located, as understood by Judge Boldt. Certainly the S'Klallam motion and amended RFD would set that up. But *Lummi III* has concluded that question is irrelevant to determining the boundary of Lummi's U&A. 876 F.3d at 1011 ("…we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A.").

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the motion for leave to add these additional waters must be denied.

E. Conclusion.

Elwha strongly disagrees with the outcome of this Subproceeding in the Ninth Circuit and shares the S'Klallams' disappointment. But *Lummi III* has determined the U&A boundary and Elwha cannot accept the unrealistic arguments presented by the motion, which would dismiss Elwha as a Requesting Party while risking further litigation about a boundary farther west than the Trial Island line. The Court should deny the motion for leave to amend and enter judgment based on *Lummi III*.

DATED this 4th day of March, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Lower Elwha Klallam Tribe's Response in Opposition to Motion for Leave to Amend the Request for Determination was filed using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

Dated this 4th day of March, 2019,

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