No. 19-35610, 19-35611, 19-35638

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellees-Cross-Appellants,

v.

LUMMI NATION,

Respondent-Appellant-Cross-Appellee

SWINOMISH INDIAN TRIBAL COMMUNITY; SUQUAMISH TRIBE; STATE OF WASHINGTON; MAKAH INDIAN TRIBE; STILLAGUAMISH TRIBE; UPPER SKAGIT INDIAN TRIBE; NISQUALLY INDIAN TRIBE; TULALIP TRIBES; SQUAXIN ISLAND TRIBE.

On Appeal from the United States District Court for the Western District of Washington,
No. 2:11-sp-00002-RSM

BRIEF FOR REAL PARTY IN INTEREST THE TULALIP TRIBES

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CORPORATE DISCLOSURE STATEMENT

The Tulalip Tribes is a federally recognized Indian Tribe by the Secretary of the Interior. 83 Fed. Reg. 4235-02 (January 30, 2018). Accordingly, a corporate disclosure statement is not required by Rule 26.1 of the Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTRODUCTION 1
JURISDICTIONAL STATEMENT 2
STATEMENT OF THE ISSUES ON CROSS-APPEAL 2
TREATIES INVOLVED 2
RESTATEMENT OF THE CASE 2
A. Background and Introduction 2
B. Decision on Remand and This Appeal 2
SUMMARY OF ARGUMENT 3
A. Regardless of the Method of Proceeding, It Is Important to Determine the Western Boundary of the Lummi U&A. 3
ARGUMENT 5
A. This Court Has Established the Law Governing the Interpretation of U&A Findings. 5
B. The Boundary of the Lummi U&A Needs Precise Definition. 7
RESPONSE TO THE LUMMI POSITION 8
A. The Lummi's Position Should Be Rejected. 8
B. Standards Adopted in This Case Must be Applied When Determining Usual and Accustomed Fishing Places. 8
CONCLUSION 11
STATEMENT OF RELATED CASES 12
CERTIFICATE OF COMPLIANCE 13
CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

Makah Indian Tribe v. Quileute Indian Tribe,
873 F.3d 1157 (9th Cir. 2017), *aff'd after remand*, 778 Fed. App'x. 539 (9th Cir. 2019) 7
Muckleshoot Indian Tribe v. Lummi Indian Nation,
234 F.3d 1099 (9th Cir. 2000) 6
Muckleshoot Indian Tribe v. Lummi Indian Tribe,
141 F.3d 1355 (9th Cir. 2000) 6, 7
United States v. Washington,
384 F. Supp 312 (W.D. Wash. 1974) 4, 5, 8, 9
United States v. Lummi Indian Tribe,
235 F.3d 443 (9th Cir. 2000) 6
United States v. Muckleshoot Indian Tribe,
235 F.3d 429 (9th Cir. 2000) 6, 7
United States v. Washington,
459 F. Supp. 1020 (W.D. Wash. 1978) 5
United States v. Washington,
626 F. Supp 1405 (W.D. Wash 1985) 1, 3, 6

Treatises

Treaty of Point Elliott, 12 Stat. 927 (1855) 2, 5
Treaty of Point No Point, 12 Stat. 933 (1855) 2

INTRODUCTION

Real party in interest the Tulalip Tribes possess usual and accustomed fishing grounds and stations including the area covered by this subproceeding. *United States v. Washington,* 626 F. Supp 1405, 1530 (W.D. Wash 1985). ("The Tulalip Tribes customarily fished in the following marine areas and that such areas were therefore usual and accustomed fishing grounds … the portion of the Strait of Juan de Fuca northeasterly of a line drawn from Trial Island (in Canada) to Protection Island)."

The location and extent of fishing by other tribes and the boundaries for such fishing are therefore of serious interest and concern to Tulalip. If Lummi U&A extends into the eastern portion of the Strait of Juan de Fuca, then fishing by other tribes in the area will be affected. It is an unacceptable outcome for the western boundary of the Lummi U&A to remain vague and undetermined, subject to continued subtle shifting into the Strait by Lummi fishing practices, with no possibility of enforcement.

JURISDICTIONAL STATEMENT

The Tulalip Tribes concur with the Lummi's jurisdictional statement. *See* Lummi Opening Brief, Sept. 20, 2019, Dkt. No. 34, p. 1.

STATEMENT OF THE ISSUES ON CROSS-APPEAL

1. Whether the district court erred in denying the S'Klallam's motion for leave to amend their RFD and in striking the S'Klallam's additional evidence.

2. Whether the district court otherwise erred in dismissing this subproceeding on remand, leaving the parties with an undefined and unenforceable western boundary for the Lummi's U&A.

TREATIES INVOLVED

The 1855 Treaty of Point Elliott, 12 Stat. 927, and the 1855 Treaty of Point No Point, 12 Stat. 933, are reproduced in the addendum to the brief of Jamestown S'Kllalam filed February 18, 2020. Dkt. No. 34.

RESTATEMENT OF THE CASE

A. Background and introduction

The Tulalip Tribes adopt the background and introduction sections filed by the Jamestown and Port Gamble S'Klallam tribes on February 18, 2020. Dkt No. 34

B. Decision on Remand and This Appeal

Real party in interest the Tulalip Tribes concur in the section on "decision

on remand and this appeal" in the brief filed by the Jamestown and Port Gamble S'Klallam tribes on February 18, 2020. Dkt No. 34.

SUMMARY OF ARGUMENT

A. Regardless of the Method of Proceeding, It Is Important to Determine the Western Boundary of the Lummi U&A.

As noted above, Real Party in Interest the Tulalip Tribes possess usual and accustomed fishing grounds and stations in the area covered by this subproceeding (*United States v. Washington,* 626 F. Supp 1405, 1530. (W.D. Wash. 1985)). The extent of fishing by other tribes and the boundaries for such fishing are therefore of serious interest and concern to Tulalip. If Lummi U&A extends into the eastern portion of the Strait of Juan de Fuca, then fishing by other tribes in the area will be affected. It is an unacceptable outcome for the western boundary of the Lummi U&A to remain vague and undetermined, subject to continued subtle shifting into the Strait by Lummi fishing practices, with no possibility of enforcement.

It is also important that the standards as to what determines a U&A place remain firm as originally decided by the District Court in this case.

While the court found that every fishing location where the member of a tribe customarily fished was a U&A ground or station, it also held that: "usual and

accustomed, being closely synonymous words, indicate the exclusion of unfamiliar occasions and those used infrequently over long intervals and extraordinary occasions." *United States v. Washington,* 384 F. Supp 312, 332 (W.D. Wash. 1974).

"The words "usual and accustomed" were probably used in a restrictive sense, not intending to include areas where use was occasional or incidental" *United States v. Washington,* 384 F. Supp 312, 356 (W.D. Wash. 1974).

"Marine waters were also used as thoroughfares for travel by Indians who trolled in route . . . such occasional and incidental trolling was not considered to make the marine wasters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *United States v. Washington, supra*, at 353.

It is important to delineate U&A boundaries to achieve fairness in fishing areas. Here, although this court held that Lummi could fish west of Whidbey, "The Ninth Circuit did not define 'the waters west of Whidbey.'" District Court Order of July 11, 2019, Dkt No. 264, p. 4

This is a ripe controversy as "…Lummi further maintains that the west boundary of its U&A has not been determined and may lie further west than the Trial Island Line." District Court Order of July 11, 2019, Dkt No. 26, p. 6, citing Dkt 254, p. 2

ARGUMENT

A. This Court Has Established the Law Governing the Interpretation of U&A Findings.

Signatory tribes to the Stevens treaties reserved the "right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries[.]" *United States v. Washington*, 384 F. Supp. at 406. The Tulalip Tribes have secured fishing rights from the Treaty of Point Elliott, 12 Stat. 927 (1855). *United States v. Washington*, 459 F. Supp. 1020, at 1049, 1059 (W.D. Wash. 1978). Judge Boldt, who presided over *United States v. Washington* in its formative years, explained the method for finding U&A as the "designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs." *United States v. Washington*, 384 F. Supp. at 402. While Judge Boldt included "every fishing location where members of a tribe customarily fished from time to time at and before treaty times" in U&As, he specifically noted that U&As exclude "unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id*. at 332. Additionally, U&As do not include areas where fishing was "occasional or incidental." *Id.* at 356.

Fishing during "occasional or incidental" travel did not create U&As. *See id.* at 353. Fishing must have occurred "with regularity," and "[i]solated or infrequent

excursions" do not meet the U&A standard. *Muckleshoot III*, 235 F.3d 429, at 434 (9th Cir. 2000). The District Court found that "[o]pen marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not usual and accustomed fishing grounds of that tribe within the meaning of the Stevens treaties." *United States v. Washington*, 626 F. Supp. 1405, at 1531 (W.D. Wash. 1985) (Conclusion of Law 96).

This Court has established the legal parameters for interpreting U&A findings. Courts must look to the intent of the judge at the time the decision was made to determine the meaning of a U&A finding. *Muckleshoot I*, 141 F.3d 1355, at 1359 (9th Cir. 2000); *Muckleshoot II*, 234 F.3d 1099, at 1100 (9th Cir. 2000); *Lummi*, 235 F.3d 443, at 452 (9th Cir. 2000). In order to determine a judge's intent, courts must examine the record of the proceedings before the judge at the time of the decision and the evidence considered by the judge. *Muckleshoot I*, *supra* at 1360; *Muckleshoot II*, *supra* at 1100-01; *Lummi*, *supra* at 452. In addition, courts may consider "additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time." *Muckleshoot supra* at 1100 (citing *Muckleshoot I*, *supra* at 1360). That is, this Court "did not freeze the record." *Id.* Courts must examine the judge's intent regardless of whether the text at issue is ambiguous, because the U&A finding must be understood in the context of the facts of the case.

Muckleshoot III, *supra* at 433; *accord Muckleshoot I, supra* at 1359. Lastly, courts may not "alter, amend or "enlarge" the U&A finding. *Id.* at 1360.

These rules guide the determination of U&A places and do not support a vague and indeterminate western boundary ("wherever that may be," according to counsel for Lummi) for Lummi fishing in the Juan de Fuca Strait. *See,* Lummi Opening Brief, Sept. 20, 2019, Dkt. No. 23, p. 33. This court should not abandon the rigorous standards and limitations set for determining fishing areas.

B. The Boundary of the Lummi U&A Needs Precise Definition.

It is possible for a court to precisely determine the western boundary of the Lummi U&A, and there is precedent for such determinations in cases following from the Boldt decision. *See, e.g., Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1168 (9th Cir. 2017), *aff'd after remand*, 778 Fed. App'x. 539 (9th Cir. 2019) (remanding to the district court to set a more precise boundary consistent with the factual findings).

RESPONSE TO THE LUMMI POSITION

A. The Lummi's Position Should Be Rejected.

Focusing on limited phrases from *Lummi III*, the Lummi argue on appeal that this Court necessarily resolved the dispute over the western boundary of the Lummi U&A in the Lummi's favor. That position is plainly inconsistent with *Lummi III* and this Court's previous decisions and must be rejected.

B. Standards Adopted in This Case Must be Applied When Determining Usual and Accustomed Fishing Places.

The precise determination of usual and accustomed grounds and status is essential. A treaty tribe's right to fish is limited to the geographical extent of its U&A. *United States v. Washington,* 384 F. Supp. 312, 402 (W.D. Wash. 1974) ("*Boldt I*"). Judge Boldt explained the meaning of the term U&A as follows:

> "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.
>
> *Boldt I,* 384 F. Supp. 312, at 332.

The district court further refined the concept by specifically excluding waters occasionally fished during tribal travels:

> Marine waters were also used as thoroughfares for travel by Indians who trolled en route. . . . Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting tribes.
>
> *Boldt I,* 384 F. Supp. 312, at 353.

The district court considered the testimony and documentary evidence admitted into the record regarding where the various tribes "customarily fished from time to time." It was on the basis of that evidence that the district court defined U&As for each of the tribes that were parties to *Boldt I*. The U&As were described by "designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places, and seasons, on different runs." *id.* at 402.

The Court should resist attempts to "water down" the proof standards previously adopted in this case.

The Lummi position seems to boil down to the proposition that they do not need a western boundary for their usual and accustomed fishing grounds and stations. This does not comply with the district court's original rulings upheld by this court that usual and accustomed places must be determined with some specificity and with evidence to support them.

Indeed, Lummi contends that the disputed waters in the case are to the east of the western boundary of Lummi U&A. ("Wherever that boundary may be."). Lummi Opening Brief, Sept. 20, 2019, Dkt. No. 23, p. 33. In other words, there is no western

Boundary for Lummi fishing areas. But it is logical and consistent with the evidence that the Lummis would have traveled down the west coast of Whidbey Island en route to the environs of Seattle. It is not logical nor supported by the evidence that they would have wandered farther to the west into the open waters of the Strait and then executed a hard turn to approach Admiralty Inlet and eventually the environs of Seattle.

Determinations of usual and accustomed grounds and stations which are vague or ambiguous simply lead to ever expanding attempts to expand tribal fishing areas and continuing litigation and controversy concerning the extent and nature of travel and fishing in those areas.

The S'Klallam motion to amend is designed to determine where the outer limits of Lummi U&A are and on what evidence such limits are based. Such precision is required by the rulings in this case.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the district court and remand for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Tulalips are aware of the following related cases pending in this Court, within the meaning of Ninth Circuit Rule 28-2.6:

> *Muckleshoot Indian Tribe v. Tulalip Tribes*, No. 18-35441. This appeal is derived from the same underlying district court case (C70-9213-RSM), but it is a separate district court subproceeding (No. 2:17-sp-00002-RSM) with issues related to the availability of paragraph 25(a)(6) jurisdiction.
>
> *Makah Indian Tribe v. Quileute Indian Tribe*, No. 18-35369. This appeal is derived from the same underlying district court case (C70- 9213-RSM), but it is a separate district court subproceeding (No. 2:09- sp-00001-RSM) with distinct issues related to the proper method for determining the western boundary of Quileute and Quinault's U&A.

May 19, 2020

s/Mason D. Morisset
Mason D. Morisset

CERTIFICATE OF COMPLIANCE

A. This brief complies with the type-volume limitation of Circuit R. 28.1-1 because it is a principal and response brief by Real Parties in Interest containing 2,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

B. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

May 19, 2020

s/Mason D. Morisset
Mason D. Morisset

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Mason D. Morisset
Mason D. Morisset

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