HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213 Subproceeding No. 19-1 UPPER SKAGIT INDIAN TRIBE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT NOTED ON MOTION CALENDAR: July 31, 2020

I. REPLY

Lummi's opposition to Upper Skagit's motion for summary judgment largely repeats arguments it made in its own summary judgment motion. Where possible, to avoid repetition, Upper Skagit will reference arguments made in its opposition brief (Dkt. 63) rather than repeat them wholesale here.

A. Judge Boldt's Finding Is Ambiguous and Means Something Other Than Its Apparent Meaning.

Lummi claims that "the requesting tribes have not shown that Judge Boldt's description of the Lummi's fishing grounds is ambiguous, or that Judge Boldt intended something other than the description's apparent meaning." Dkt. 67, pp. 4-10.[1] Upper Skagit demonstrated both (ambiguity

[1] All pagination is as paginated by the electronic filing system (rather than the numbering in the brief), as provided in LCR 10(e)(6).

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and intent otherwise) in its moving papers and in opposition to Lummi's motion:

– *Ambiguity.* The law of the case establishes that "Puget Sound" and "south to the present environs of Seattle" is ambiguous, including as to the southern boundary. Dkt. 55, pp. 7-8; Dkt. 63, p. 5.

– *Other than apparent meaning.* The evidence before Judge Boldt about Lummi fishing establishes that Judge Boldt meant something other than those terms' apparent meaning because, while the waters east of Whidbey Island are in the "Puget Sound" and could be considered to be north of the "present environs of Seattle," no evidence before Judge Boldt placed Lummi fishing in those waters. Dkt. 55, pp. 4-7, 8-9; Dkt. 63, pp. 6-7.

B. The Evidence Relied on by Judge Boldt Did Not Place Lummi Fishing in the Protected Waters East of Whidbey at and before Treaty Times.

Lummi claims that "the requesting tribes cannot show that there was no evidence before Judge Boldt supporting the inclusion of Region 2 East within the Lummi's usual and accustomed fishing grounds." Dkt. 67, p. 14. Upper Skagit did just that, showing that the evidence relied on by Judge Boldt did not place Lummi in the protected waters east of Whidbey at and before treaty times (Dkt. 55, pp. 4-7, 8-9), and that Lummi's arguments otherwise are not about *that evidence*:

– *Travel.* The burden is not to prove that Lummi "*would not have* traveled through" those waters (*cf.* Dkt. 67, p. 14), the burden is to prove that "is *no evidence* in the record before Judge Boldt that" Lummi *in fact* "fished or traveled" in those waters (Dkt. 63, p. 9 (quoting *Upper Skagit*, 590 F.3d at 1025)), let alone engaged in more than "occasional and incidental trolling" as was required "to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians," 384 F. Supp. at 353. Upper Skagit met its burden.

– *"Present environs of Seattle."* To understand what Judge Boldt *meant* by "south to the present environs of Seattle," this Court must look to the *evidence*, and *no evidence* places Lummi fishing south of the reefnet sites to the west of Anacortes. Dr. Lane never used that phrase

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in describing "pre-treaty Lummi" (Dkt. 60-19, pp. 23-25) and instead used that term only in describing "post-treaty Lummi" (Dkt. 60-19, p. 32 ¶ 4). Thus, even assuming Judge Boldt intended for Lummi to fish between identified anchors, the most southerly anchor is to the north and west of Whidbey Island, and there is no evidence in the closed record that Judge Boldt intended Lummi to fish east of Whidbey.

– *Edmonds.* There is no evidence that Lummi has U&A at Edmonds and U&A there has never been established (Dkt. 63, pp. 6-7). But, even if it did, Lummi is not entitled to the inference that it traveled in the protected waters east of Whidbey to get there, just as Suquamish was not entitled an inference that it traveled those waters to get to the mouth of the Snohomish River (Dkt. 63, p. 14). The fact that Lummi had reefnet sites west of Deception Pass does not distinguish Lummi from Suquamish (*cf.* Dkt. 67, p. 16). That Lummi fished the open waters west of Deception Pass (the location of the reefnet sites Dr. Lane identified "off . . . Fidalgo Island," Dkt. 60-19, pp. 28, 30), means the crucial factor identified by the Ninth Circuit in *Upper Skagit* is equally applicable here.[2]

– *"Other evidence."* The "other evidence" Lummi cites

(1) does not evidence Lummi fishing east of Whidbey (the Samish reefnet sites are west of Deception Pass, *see* Dkt. 63, p. 8; that Lummi "imported" upriver Skagit materials proves nothing about where Lummi fished, *see* Dkt. 63, pp. 9-10 & Dkt. 66, pp. 4-5; no evidence —before or after Final Decision 1—placed Lummi fishing for herring east of Whidbey, *see infra*);

(2) is not at and before treaty time (Mr. Kinley's testimony of fishing during his 20th century lifetime, *see* Dkt. 63, pp. 11-12); and/or

(3) was not relied on by Judge Boldt (evidence adduced at subsequent hearings

[2] "Geographically, Saratoga Passage and Skagit Bay are nearly enclosed or inland waters to the east of Whidbey Island. The southern entrance to these waters includes Possession Sound and the mouth of the Snohomish River, where the Suquamish were known to fish seasonally. The northern exits through Deception Pass and Swinomish Slough are narrow and restricted; both areas were controlled by the Swinomish at treaty times." 590 F.3d at 1024 n.6.

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concerning herring fisheries, *see* Dkt. 67, p. 24).

Further as to the herring fishery: Lummi misrepresents the evidence it cites and ignores other evidence in claiming Judge Boldt's "subsequent findings" about "herring fishery rights show that he intended to include Region 2 East . . . within the Lummi's fishing grounds" (Dkt. 67, p. 24). Neither source Lummi cites (Judge Boldt's finding and Dr. Lane's report) supports that claim. To the contrary, Judge Boldt found only that "Lummi Tribe" had "made a prima facie showing . . . of [its] treaty-secured right to take herring at [its previously determined] usual and accustomed fishing place" (459 F. Supp. at 1048-49) and Dr. Lane stated that Suttles noted "that the Samish took herring in Bellingham Channel, and that several groups of Indians took herring . . . at Greenbank" and "near Camano City" (Dkt. 60-21, p. 15 (page 13 of the report as internally paginated)). The latter is particularly jarring as supposedly evidencing that it was *Lummi* who took herring at Greenbank and Camano given that, just seven lines earlier and on the same page of its brief, Lummi claims that its fishery rights in the area derive from *Samish* (Dkt. 67, p. 24). In addition to this deficiency in the evidence Lummi chose to cite, Lummi ignored other evidence, specifically that Dr. Lane testified in the herring proceeding that

> at treaty times Lummi fishermen would not come and harvest herring from the spawning places in the inlets inside Suquamish territory . . . . *They had herring places closer to their own place, where they lived.* In the same way Suquamish would not go all the way over into Bellingham Bay in order to get the herring that were spawning right inside where Lummi lived because they had their places (Dkt. 70, p. 59 (emphasis added)).

The Court's task is to determine Judge Boldt's intent and the inferences Judge Boldt made, 384 F. Supp. at 348, wherein "the most relevant evidence in determining what Judge Boldt intended . . . consists of the . . . documents referenced in" the finding at issue, 235 F.3d 429, 434 (9th Cir. 2000); *see also* Subp. No. 14-1, 2015 WL 3504872, at *10 (W.D. Wash. June 3, 2015) ("in discerning Judge Boldt's intent, this Court looks to the evidence underlying his decision, not the capacious U&A claims made by the tribe"), aff'd 871 F.3d 844. Lummi's "other evidence" is

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irrelevant to this task.

C. At Lummi's Invitation, the Ninth Circuit Filled a "Gaping Hole" Which Cannot Have Existed with U&A East of Whidbey.

Lummi fails to explain in its opposition how its argument to the Ninth Circuit that without U&A west of Whidbey there would be a "gaping hole" in its U&A (Dkt. 56-1, p. 362) is consistent with its new argument that it has U&A east of Whidbey. In its "Summary of Argument," Lummi argued to the Ninth Circuit that

> Judge Boldt intended to include the waters west of Whidbey Island within the "Northern Puget Sound" he identified as the Lummi's usual and accustomed grounds. Any contrary interpretation . . . would disregard his intent to ensure that the Lummi's usual and accustomed grounds extended "from the Fraser River south to the present environs of Seattle": *excising the waters west of Whidbey Island*, as the Requesting Parties seek to do, *would leave a gaping hole in the center of the Lummi's fishing territory*.

Dkt. 56-1, p. 362 (emphasis added). If, as Lummi now says, it has always had U&A east of Whidbey, there would not have been a "gaping hole": it could have traveled east of Whidbey as it went north to south. Lummi convinced the Ninth Circuit to patch the "hole" with the waters west of Whidbey; Lummi should be estopped from making its new argument, which is inconsistent with the possibility of a "gaping hole."

D. Citation to Lummi's Interrogatory Responses Does Not Divest the Court of Jurisdiction.

As Upper Skagit already addressed (Dkt. 63, pp. 14-16), Lummi's interrogatories are not the "primary basis" of the requesting tribes' relief. If it were, the requesting tribes would be arguing that Lummi was bound by its discovery responses no matter the evidence before Judge Boldt. The requesting tribes do not make that argument, instead arguing that the interrogatory responses, just like Lummi's post-decision actions, evidence Lummi's "understanding of its own U&A." Dkt. 63, p. 16 (quoting 590 F.3d at 1026). Citation to those responses does not divest the Court of jurisdiction.

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II. CONCLUSION

For the reasons outlined in Upper Skagit's motion (Dkt. 55), opposition to Lummi's motion (Dkt. 63), and here, the Court should grant summary judgment in favor of Upper Skagit.

DATED this 31st day of July, 2020.

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