UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	CASE NO. C70-9213 RSM SUBPROCEEDING NO. 19-01 RSM ORDER ON PENDING MOTIONS

I. INTRODUCTION

This subproceeding is before the Court on cross-motions for summary judgment filed by each of the four tribes actively litigating this matter: the requesting parties the Swinomish Indian Tribal Community ("Swinomish"), the Tulalip Tribes ("Tulalip"), and the Upper Skagit Indian Tribe ("Upper Skagit") (collectively, the "Region 2 East Tribes") and responding party the Lummi Nation ("Lummi"). Dkt. #3.[1] The Region 2 East Tribes sought judgment determining that "[t]he adjudicated usual and accustomed fishing places of the Lummi Nation do not include"

[1] Dkt. #22,063 in Case No. C70-9213RSM. Throughout, the Court provides citations to the docket of the underlying case the first time a filing is cited. Thereafter, citations are only to the docket of Subproceeding No. 19-01RSM.

The Court's citations are to the docket and page numbers applied by the Court's CM/ECF system, unless otherwise indicated by paragraph number or page and line numbers.

the waters east of Whidbey Island (the "Disputed Waters").[2] *Id.* at ¶ 30. The Region 2 East Tribes now seek summary judgment and permanent injunctive relief. Dkt. #73-1[3] (Swinomish); Dkt. #55[4] (Upper Skagit); Dkt. #57[5] (Tulalip).

Lummi opposes the Region 2 East Tribes and seeks summary judgment and a ruling that its usual and accustomed fishing grounds and stations specifically include the Disputed Waters. Dkt. #67 (Lummi opposition);[6] Dkt. #59 (Lummi motion for summary judgment).[7] Having reviewed the matter, the Court finds for the Region 2 East Tribes and determines that Judge Boldt intended to exclude the Disputed Waters from his determination of Lummi's usual and accustomed fishing grounds and stations.

II. BACKGROUND

Almost one half-century ago, Judge Boldt determined Lummi's usual and accustomed fishing grounds and stations ("U&A"), as reserved under the Treaty of Point Elliott:[8]

> 45. . . . . The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point. . . . These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon.
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> 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of

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[2] Swinomish indicates that the five principal bodies of water within the Disputed Waters are Skagit Bay, Port Susan, Saratoga Passage, Holmes Harbor, and Possession Sound. Dkt. #73-1 at 2 (Dkt. #22,238 in Case No. C70-9213RSM).

[3] The Court cites to Swinomish's corrected motion for summary judgment, filed at Dkt. #73-1 (Dkt. #22,238 in Case No. C70-9213RSM). Swinomish's original motion for summary judgment is filed at Dkt. #51 (Dkt. #22,200 in Case No. C70-9213RSM).

[4] Dkt. #22,206 in Case No. C70-9213RSM.

[5] Dkt. #22,208 in Case No. C70-9213RSM.

[6] Dkt. #22,231 in Case No. C70-9213RSM.

[7] Dkt. #22,210 in Case No. C70-9213RSM.

[8] Treaty of Point Elliott, January 22, 1855, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 927.

> Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay.

United States v. Washington, 384 F. Supp. 312, 360 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (the "*Boldt Decree*") (citations omitted).

Through extensive prior litigation, this Court and the Ninth Circuit have determined that Judge Boldt intended for his expansive and general description of the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" to include Admiralty Inlet on the western side of Whidbey Island and "exclude[s] the Strait of Juan de Fuca and the mouth of the Hood Canal." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 445, 451–52 (9th Cir. 2000) ("*Lummi I*"). Noting that "Admiralty Inlet 'would likely be a passage through which the Lummi would have traveled' from the Fraser River, south through the San Juan Islands, to the present environs of Seattle," the Ninth Circuit has further concluded that Judge Boldt intended to include "the waters immediately to the west of northern Whidbey Island . . . within the Lummi's U&A." *United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014) (*Lummi II*). Subsequently, the Ninth Circuit expanded "the waters immediately to the west of northern Whidbey Island" to include, at least, "the waters 'northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait.'" *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) ("*Lummi III*"); *Lower Elwha Klallam Indian Tribe v. Lummi Nation*, 849 F. App'x 216, 218 (9th Cir. 2021).

The Court is now tasked with determining whether the expansive and general description of Lummi U&A includes the Disputed Waters. Lummi's general position is that the Disputed Waters are so obviously contained within Judge Boldt's description of "the marine areas of

Northern Puget Sound" that to otherwise mention geographic anchors within the Disputed Waters would be unnecessarily redundant. Conversely, the Region 2 East Tribes maintain that the omission of geographic anchors, combined with the lack of evidence of Lummi fishing or travel in the Disputed Waters, clearly convey Judge Boldt's intent to omit the Disputed Waters from Lummi's U&A.

III. DISCUSSION

A. Legal Standard

This subproceeding invokes the Court's continuing jurisdiction under Paragraph 25(a)(1) of Judge Boldt's injunction, as subsequently modified. Dkt. #3 at ¶ 2; *Boldt Decree*, 384 F. Supp. at 419, *as modified United States v. Washington*, 18 F. Supp. 3d 1172, 1213–1216 (W.D. Wash. 1993).[9] Accordingly, the Court considers whether Lummi fishing within the Disputed Waters would be "in conformity with [the *Boldt Decree* and] or this injunction." *Boldt Decree*, 384 F. Supp. at 419. In doing so, the Court interprets Judge Boldt's prior orders and construes the "judgment so as to give effect to the intention of the issuing court." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998) ("*Muckleshoot I*") (quoting *Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988)) (internal quotation marks omitted). The Court's consideration proceeds under the two-step process established by the *Muckleshoot* trilogy of cases.

First, the party asserting ambiguity must offer "evidence that suggests that [the U&A] is ambiguous or that the court intended something other than its apparent meaning." *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("*Muckleshoot III*") (quoting *Muckleshoot I*, 141 F.3d at 1358) (cleaned up). This is a more searching process than statutory

[9] Dkt. #13,599 in Case No. C70-9213RSM.

interpretation because "the 'language of the court must be read in the light of the facts before it.'" *Muckleshoot III*, 235 F.3d at 433 (quoting *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927)). Accordingly, the mere fact that a geographic term may include the waters at issue does not resolve the matter. *Id.* Rather, the Court may consider the record before Judge Boldt when he established the U&A and "may also include additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1024–25 (9th Cir. 2010) ("*Upper Skagit*") (quoting *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) ("*Muckleshoot II*")) (quotation marks omitted).

If Judge Boldt's U&A determinations are ambiguous or mean something other than their apparent meaning, the moving party must then "show that there was no evidence before Judge Boldt that [the responding party] fished [in the disputed waters] or traveled there in route to" other portions of the responding party's U&A. *Upper Skagit*, 590 F.3d at 1023; *see also Lummi III*, 876 F.3d at 1010. Conversely, summary judgment in favor of the responding party is appropriate if it can establish that it fished in or traveled through the disputed waters.

Here, the determinations are appropriately resolved on the parties' motions for summary judgment. Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.

Neither party offers additional evidence of Judge Boldt's contemporaneous understanding of geography and rely on the record before Judge Boldt, obviating factual disputes. *Muckleshoot I*, 141 F.3d at 1359 (noting pretrial order providing that "the only relevant evidence

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