# APPENDIX

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI**

**TABLE OF CONTENTS**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| MUCKLESHOOT INDIAN TRIBE,<br>*Plaintiff-Appellant,*<br><br>v.<br><br>TULALIP TRIBES; SUQUAMISH TRIBE; PUYALLUP TRIBE; SQUAXIN ISLAND TRIBE, of the Squaxin Island Reservation; NISQUALLY TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; STATE OF WASHINGTON; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE; SKOKOMISH INDIAN TRIBE,<br>*Respondents-Appellees,*<br><br>and<br><br>HOH INDIAN TRIBE; LUMMI INDIAN NATION; QUILEUTE INDIAN TRIBE; QUINAULT INDIAN NATION; STILLAGUAMISH TRIBE OF INDIANS; SAUK-SUIATTLE INDIAN TRIBE,<br>*Real-Parties-in-Interest.* | No. 18-35441<br><br>D.C. No. 2:17-sp-00002-RSM<br><br>OPINION |

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted October 22, 2019
Seattle, Washington

Filed December 18, 2019

Before: Richard R. Clifton and Sandra S. Ikuta, Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Rakoff,
Dissent by Judge Ikuta

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## SUMMARY**

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### Tribal Matters / Fishing Rights

The panel affirmed the district court's dismissal due to lack of jurisdiction of a subproceeding brought by Muckleshoot Indian Tribe concerning usual and accustomed fishing grounds and stations ("U&As") in western Washington established under the "Stevens Treaties."

In *United States v. Washington (Final Decision #1)*, 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), Judge Boldt made detailed findings of facts and conclusions of law defining the U&As, and issued a permanent injunction that retained jurisdiction in implementing the decision's decree.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359–60 (9th Cir. 1998) ("*Muckleshoot 1*"), the Court held that where a tribe's U&As have been "specifically determined" in *Final Decision #1*, continuing jurisdiction under the permanent injunction resides only in Paragraph 25(a)(1). In Subproceeding 97-1, this Court affirmed District Judge Rothstein's holding that the Muckleshoot's saltwater U&As were limited to Elliot Bay. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 438 (9th Cir. 2000). In Subproceeding 17-2 at issue in this case, the Muckleshoot sought under Paragraph 25(a)(6) to expand their U&As to certain areas of Puget Sound beyond Elliot Bay.

The panel noted that in order for a tribe to bring an action under Paragraph 25(a)(6), the U&A at issue must have not been "specifically determined" by *Final Decision #1*. As a threshold issue, the panel held that the district court properly held that Muckleshoot's saltwater U&As in Puget Sound had already been "specifically determined" in their entirety by Judge Boldt, and accordingly, there was no continuing jurisdiction under Paragraph 25(a)(6) to entertain the present subproceeding. The panel did not reach the other issues raised on appeal.

Dissenting, Judge Ikuta stated that the majority's opinion frustrated Judge Boldt's rulings in *Final Decision #I* that his specific determinations were not comprehensive, and that tribes could invoke the court's continuing jurisdiction to determine additional U&A fishing locations.

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## OPINION

RAKOFF, District Judge:

In the 1850s, Isaac Stevens, then-Governor and Superintendent of Indian Affairs of the Washington Territory, executed eleven treaties with Indian tribes in an area that later became part of the State of Washington. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979); *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974) ("*Final Decision # I*"), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). Under these so-called "Stevens Treaties," each tribe ceded its lands in exchange for securing a small reservation and the right to take fish "in common with" others at its "usual and accustomed" fishing grounds and stations ("U&As").

In September 1970, the United States, on its own behalf and as trustee for several Western Washington Indian tribes (later joined by additional Indian tribes as intervenor plaintiffs), filed a complaint against the State of Washington to enforce these treaty fishing rights. *See Final Decision # I*, 384 F. Supp. at 327–28. In February 1974, after the parties had spent more than three years in exhaustive discovery in the fields of anthropology, history, biology, fishery management, and other areas of expertise, followed by a three-week trial before the Hon. George H. Boldt of the U.S. District Court for the Western District of Washington, Judge Boldt issued *Final Decision # I*, which encompassed 253 detailed findings of facts and 48 conclusions of law.

*Final Decision # I* defined U&As as "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[.]" *Id.* at 332. As to the Muckleshoot Indian Tribe, *Final Decision # I* stated as follows:

> 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.

*Id.* at 367 (citations omitted).

In rendering his historic decision, Judge Boldt clarified that, although *Final Decision # I* tried to resolve "as many as possible of the divisive problems of treaty right fishing," it "set forth information regarding . . . some, but by no means all, of [plaintiff tribes'] principal usual and accustomed fishing places." *Id.* at 330, 333. This was because it was "impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations" at that time. *Id.* at 353; *see also id.* at 402.

Anticipating that because of these gaps the decree might face future challenges, *Final Decision # I* included a permanent injunction that retained jurisdiction in implementing the decree. *See id.* at 408. Specifically, Paragraph 25 of the permanent injunction identifies various kinds of "subproceedings"

that a party may bring to seek further rulings within *United States v. Washington*. *See id.* at 419. The case now before the Court, Subproceeding 17-2, is one such subproceeding. Specifically, the Muckleshoot seek to expand their U&As to certain areas of Puget Sound beyond Elliott Bay.

As relevant here, Paragraph 25(a)(1) of the permanent injunction[1] provides for jurisdiction over determinations of "whether or not the actions, intended or effected by any party. . . are in conformity with Final Decision #I or this injunction." *Id.* By contrast, Paragraph 25(a)(6) of the permanent injunction provides the district court with jurisdiction over a tribe's request to decide "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I." *Id.*

In 1998, this Court issued an opinion in *Muckleshoot Tribe v. Lummi Indian Tribe*, holding that, where a tribe's U&As have been "specifically determined" in *Final Decision # I*, continuing jurisdiction under the permanent injunction resides only in Paragraph 25(a)(1), not Paragraph 25(a)(6). 141 F.3d 1355, 1359–60 (9th Cir. 1998) ("*Muckleshoot I*"). This Court further held that in such circumstances, the district court's task was to "give effect to the intention of the issuing court [(*i.e.*, Judge Boldt)]" by reviewing "the entire record before the issuing court and the findings of fact . . . in

[1] In 1993, without any changes to each provision's substantive content, original Paragraph 25(a) was redenominated as current Paragraph 25(a)(1), and original Paragraph 25(f) was redenominated as current Paragraph 25(a)(6).

determining what was decided." *Id.* at 1359 (citations omitted). By contrast, the district court was forbidden to consider new evidence in making supplemental findings that "alter, amend or enlarge upon the description in the decree." *Id.* at 1360.

In 1997, the Puyallup Tribe, the Suquamish Tribe, and the Swinomish Tribe brought Subproceeding 97-1, seeking a determination that the Muckleshoot had no saltwater U&As outside the Elliott Bay part of Puget Sound. *See United States v. Washington*, 19 F. Supp. 3d 1252, 1272 (W.D. Wash. 1999) ("Subproceeding 97-1"). The main issue in Subproceeding 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." *Id.* at 1305. After extensive proceedings, District Judge Barbara J. Rothstein held that the Muckleshoot's saltwater U&As were limited to Elliott Bay. *See id.* at 1311. This Court affirmed the district court's decision. *See United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 438 (9th Cir. 2000).

The Muckleshoot brought the instant subproceeding in the district court (Hon. Ricardo S. Martinez) on July 13, 2017. Relying on Paragraph 25(a)(6), the Muckleshoot seek to obtain additional U&As in the saltwater of Puget Sound beyond Elliott Bay.[2]

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[2] To be more precise, the Muckleshoot seek: "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

The Jamestown S'Klallam Tribe, the Port Gamble S'Klallam Tribe, the Swinomish Tribe, and the Tulalip Tribe jointly filed a motion to dismiss the instant subproceeding under Fed. R. Civ. P. 12(b)(1), arguing that the district court lacked subject matter jurisdiction because the scope of the Muckleshoot's U&As in the saltwater of Puget Sound had been specifically determined by Judge Boldt. The Suquamish Tribe, joined separately by the Squaxin Island Tribe and the Puyallup Tribe, filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[3]

The district court granted the motions to dismiss for two reasons. First, "Judge Boldt [had] specifically determined Muckleshoot U&A in [*Final Decision # I*], and therefore there [was] no continuing jurisdiction under [Paragraph 25(a)(6)]." Second, the Muckleshoot tribe was "collaterally estopped from relitigating its previously-adjudicated U&A in [Subproceeding 97-1]." This appeal followed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. Ordinarily, "[w]e review a dismissal for lack of subject matter jurisdiction *de novo*." *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1102 (9th Cir. 2017), *cert. denied*, 137 S. Ct. 2309 (2017). In the present case, the district court found lack of subject matter jurisdiction based

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around Anderson, Fox and McNeil Islands in the south, and all of the marine waters of Puget Sound between those areas, but excluding Colvos Passage and marine waters within the boundaries of any Indian Reservation."

[3] Relatedly, the Sauk-Suiattle Indian Tribe filed a motion for leave to file a brief as an interested party. That motion is **GRANTED**, and the Court has considered the accompanying brief.

on its interpretation of a prior judicial decree. In such case, "[t]he district court's interpretation of a judicial decree is also reviewed *de novo*, although this court typically gives deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1169 (9th Cir. 2018) (internal citation, quotations, and alterations omitted).

Discussion

In order for a tribe to bring an action under Paragraph 25(a)(6), the U&A at issue must not have been "specifically determined" by *Final Decision # I*. *See Final Decision # I*, 384 F. Supp. at 419; *Muckleshoot I*, 141 F.3d at 1359–60. Therefore, the threshold issue in this appeal is whether the district court erred in holding that the Muckleshoot's saltwater U&As in Puget Sound had already been "specifically determined" by Judge Boldt. Because we agree with the district court that Judge Boldt had determined the entirety of the Muckleshoot's saltwater U&As, we do not reach other issues raised on appeal.[4]

At the motion to dismiss stage of Subproceeding 97-1, Judge Rothstein held that there was no jurisdictional basis to entertain the three tribes'

[4] Other issues raised on appeal include whether the district court erred in holding that Subproceeding 97-1 collaterally estopped Muckleshoot from raising its claim to expand its U&As; and whether judicial estoppel prevents Muckleshoot from arguing here that its U&As were not specifically determined in that earlier subproceeding.

claims regarding Muckleshoot's U&As in Puget Sound under Paragraph 25(a)(6):

> Here, as in [*Muckleshoot I*], Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U & A. Although his determination may have turned out to be ambiguous, he did make a specific description. . . . Issuing a supplemental finding under [Paragraph 25(a)(6)] defining the scope of Muckleshoot's U & A in Puget Sound would "alter, amend or enlarge upon" Judge Boldt's description, contrary to the Ninth Circuit's holding in [*Muckleshoot I*].

*Subproceeding 97-1*, 19 F. Supp. 3d at 1275–76. Later, at the summary judgment stage of Subproceeding 97-1, Judge Rothstein, after her extensive review of the record in front of Judge Boldt, found as follows:

> 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 open waters and shores of Elliott Bay.

*Subproceeding 97-1*, 19 F. Supp. 3d at 1310–11. These findings were affirmed by this Court, which stated, *inter alia*, that 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 such fishing occurred with regularity anywhere beyond Elliott Bay." *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 434 (9th Cir. 2000).

This was, or should have been, the end of the matter, as the district court here found. But the dissent suggests that Judge Rothstein somehow left a door open for the Muckleshoot to argue that they have fishing rights in Puget Sound beyond Elliott Bay because the matter was not finally determined by Judge Boldt. This misapprehends what occurred in the prior rulings. When Judge Rothstein was called upon to determine what Judge Boldt meant when he ruled that the Muckleshoot had usual and accustomed fishing places "secondarily in the saltwater of Puget Sound," she determined, as quoted above, that he had necessarily considered whether the Muckleshoot had fishing places in various parts of Puget Sound but that he had in the end concluded that such places were limited to Elliott Bay. In other words, the most reasonable reading of Judge Rothstein's findings, as quoted above, is that Judge Boldt, in referring to the Muckleshoot's fishing rights in Puget Sound, determined in effect that the only part of Puget Sound in which the Muckleshoot had any usual and accustomed fishing was "the open waters and shores of Elliott Bay." It was precisely for this reason that

Judge Rothstein concluded that "[i]ssuing a supplemental finding under [Paragraph 25(a)(6)] defining the scope of Muckleshoot's U & A in *Puget Sound*" would be an impermissible attempt to contradict Judge Boldt's determination. *Subproceeding 97-1*, 19 F. Supp. 3d at 1275–76 (emphasis added).

In short, Subproceeding 97-I, as affirmed by this Court, definitively determined that the Muckleshoot's saltwater fisheries in Puget Sound had been limited by Judge Boldt to Elliott Bay. Therefore, the district court below did not err in holding that it lacked jurisdiction under Paragraph 25(a)(6) to entertain the present subproceeding, and properly dismissed it.

**AFFIRMED.**

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IKUTA, Circuit Judge, dissenting:

In *United States v. Washington* (*Final Decision #I*), Judge Boldt not only painstakingly identified some of the historical usual and accustomed (U&A) fishing locations for several Western Washington tribes, but also created a procedure through which the tribes could bring new evidence to support their claims to additional U&A fishing locations. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). Because the majority thwarts Judge Boldt's elegant solution to a complex problem, I dissent.

I

In his effort to resolve "as many as possible of the divisive problems of treaty right fishing" in Western

Washington, Judge Boldt had difficult decisions to make. *Id.* at 330. Because the tribes had treaty rights to fish at "all usual and accustomed grounds and stations," he had to figure out each tribe's historical U&A fishing areas. *Id.* at 332. But Judge Boldt knew that he could not define every U&A fishing location for every tribe. Compiling a "complete inventory" would be impossible. *Id.* at 353. So he made findings that defined, or "specifically determined," *id.* at 419, "some, but by no means all," of the tribes' U&A fishing locations, *id.* at 333. Given Judge Boldt's acknowledgment that it would be impossible to define each tribe's U&A fishing locations conclusively, it is not surprising that Judge Boldt made no findings that particular locations were *not* part of a tribe's U&A fishing locations.

After making his findings (his "Specific Determinations"), Judge Boldt issued an injunction to set forth "the basic obligations of the parties, together with means for resolving future matters" in order "to guide the conduct of all parties, plaintiff and defendant." *Id.* at 413–14. Judge Boldt contemplated two types of "future matters."

First, Paragraph 25(a)(1) of the Injunction (the "Clarification Paragraph") permits tribes to ask the court to resolve any ambiguity in Judge Boldt's Specific Determinations. *Id.* at 419. Under the Clarification Paragraph, tribes can invoke the district court's continuing jurisdiction to determine "whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction." *Id.* By invoking the Clarification Paragraph, tribes

can ask the district court to "clarify the meaning of terms used" in *Final Decision #I* so as to give effect to Judge Boldt's intent. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) (*Muckleshoot I*).

Second, Paragraph 25(a)(6) of the Injunction (the "New Determinations Paragraph") provides that the tribes can invoke the continuing jurisdiction of the court to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I." 384 F. Supp. at 419. Because Judge Boldt understood that he could not specifically determine all the U&A fishing locations for every tribe in *Final Decision #I* itself, he included this New Determinations Paragraph to allow a tribe to invoke the court's jurisdiction to consider further evidence showing the tribe historically fished at additional locations not included in the initial Specific Determinations. *Id.* at 353, 419. If a district court concludes, after a proceeding under the New Determinations Paragraph, that a specific location does not qualify as a U&A fishing location for a tribe, the tribe is barred by issue preclusion from bringing a second request for a determination as to the same location. *See Janjua v. Neufeld*, 933 F.3d 1061, 1065–66 (9th Cir. 2019).

We have previously explained the significant evidentiary difference between proceedings under the Clarification Paragraph and the New Determinations Paragraph. *See Muckleshoot I*, 141 F.3d at 1359. When a tribe claims that a Specific Determination is ambiguous under the Clarification Paragraph, a court's only job is to discern Judge Boldt's intent. This

is because "[w]hen interpreting an ambiguous prior judgment, the reviewing court should 'construe a judgment so as to give effect to the intention of the issuing court.'" *Id.* at 1359 (quoting *Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988)). Because Judge Boldt's intent is all that matters in a proceeding under the Clarification Paragraph, only evidence relevant to that intent can be considered in such a proceeding. *Id.* at 1360; *United States v. Washington*, 19 F. Supp. 3d 1252, 1272, 1310–11 (W.D. Wash. 1997) (*Subproceeding 97-1* or *Rothstein Decision*).

By contrast, when a tribe invokes the New Determinations Paragraph and argues that it is entitled to fishing locations that were not included in Judge Boldt's Specific Determinations, the tribe can offer any evidence—new or old—relevant to establishing that the tribe historically fished in those areas. *See Muckleshoot I*, 141 F.3d at 1360. Based on this evidence, the court may specifically determine additional U&A fishing locations.

II

In this case, the Muckleshoot tribe is bringing a claim under the New Determinations Paragraph. To understand the claim, it is necessary to provide some background.

In Paragraph 76 of *Final Decision #I*, Judge Boldt made a Specific Determination regarding the Muckleshoot's U&A fishing locations:

> 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*. Villages and weir sites were often located together.

*Final Decision #I*, 384 F. Supp. at 367 (emphasis added).

In a proceeding before Judge Rothstein, who had taken over hearing claims arising under *Final Decision #I* from Judge Boldt, the Muckleshoot pointed to the language in Paragraph 76 providing that the tribe had U&A fishing locations "secondarily in the saltwater of Puget Sound." *See Rothstein Decision*, 19 F. Supp. 3d at 1272. The Muckleshoot contended that this broad language constituted a Specific Determination that the Muckleshoot's U&A fishing locations encompassed all of Puget Sound, including locations designated as Areas 9, 10, and 11. *Id.* at 1274. Three other tribes argued that the phrase "secondarily in the saltwater of Puget Sound" was ambiguous, and the Muckleshoot did not "have fishing rights in Areas 10, 11 and points beyond" in Puget Sound. *Id.* at 1273–74.

Because *Final Decision #I*, on its face, set out a broad Specific Determination covering all of Puget Sound, the Muckleshoot tribe had to proceed under the Clarification Paragraph and could not invoke the New Determinations Paragraph. *See Muckleshoot I*, 141 F.3d at 1360. This is because the New Determinations

Paragraph "does not authorize the court to clarify the meaning of terms used in [*Final Decision #I*] or to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree." *Id.* As both Judge Rothstein and the Muckleshoot agreed, only the Clarification Paragraph permitted Judge Rothstein to construe the scope of the Specific Determination relating to Puget Sound. *Rothstein Decision*, 19 F. Supp. 3d at 1273–75.

Proceeding under the Clarification Paragraph, Judge Rothstein first determined that the terms "Puget Sound" and "secondarily" were ambiguous. *Id.* at 1274. To interpret Judge Boldt's intent in using these terms, Judge Rothstein held that she could consider "evidence before Judge Boldt when he made his finding," and evidence "indicative of the contemporary understanding" of the phrase "secondarily in the saltwater of Puget Sound." *Id.* at 1275. In other words, she could consider evidence relevant to what "Judge Boldt intended." *Id.* at 1311.

After an evidentiary hearing, considering only that evidence, Judge Rothstein determined that Judge Boldt intended the phrase "secondarily in the saltwater of Puget Sound" to mean "Elliott Bay." *Id.* at 1275. In other words, under Judge Rothstein's construction of *Final Decision #I*, Paragraph 76 can no longer be read as stating that "the Muckleshoot Indians had usual and accustomed fishing places . . . secondarily in the saltwater of Puget Sound." Instead, Paragraph 76 must be read as stating that "the Muckleshoot Indians had usual and accustomed fishing places" in Elliott Bay. In her opinion, Judge Rothstein did not make any finding that areas *outside*

of Elliott Bay were *not* part of the Muckleshoot's U&A fishing locations. This makes sense, given that Judge Rothstein was merely trying to discern Judge Boldt's intent, and Judge Boldt had not made findings that any locations were *not* part of a tribe's U&A fishing locations.

In 2018, after Judge Martinez had taken over for Judge Rothstein, the Muckleshoot asked the district court to consider its claims to U&A fishing locations outside Elliott Bay under the New Determinations Paragraph. *United States v. Washington*, 2018 WL 1933718, at *5 (W.D. Wash. April 24, 2018). The Muckleshoot offered new evidence, not relating to Judge Boldt's intent, which the Muckleshoot claimed showed that various areas within Puget Sound were historically Muckleshoot U&A fishing locations.

Judge Martinez rejected the Muckleshoot's request for a determination under the New Determinations Paragraph. He reasoned that because *Final Decision #I* stated that the Muckleshoot had U&A fishing locations "secondarily in the saltwater of Puget Sound," the court had no authority to "alter, amend or enlarge" that Specific Determination under the New Determinations Paragraph. *Id.* at *6–7. Judge Martinez therefore dismissed the case for lack of jurisdiction. *Id.* at 7.

III

In reaching this conclusion, Judge Martinez erred, and the majority errs in affirming it.

Judge Martinez was correct that the New Determinations Paragraph does not authorize a court to clarify or expand a Specific Determination, even if

that determination is broad and ambiguous. *Muckleshoot I*, 141 F.3d at 1360. But after Judge Rothstein's decision, *Final Decision #I* specifically determined only that Elliott Bay is a U&A fishing location for the Muckleshoot; there was no longer a Specific Determination addressing Puget Sound as a whole. Therefore, the Muckleshoot were entitled to request a new Specific Determination under the New Determinations Paragraph relating to areas in Puget Sound outside of Elliott Bay.

By rejecting the Muckleshoot's request to consider this issue under the New Determinations Paragraph, Judge Martinez's decision was both unfair to the Muckleshoot tribe and contrary to *Final Decision #I*. It is manifestly unfair for a court to rule that the Muckleshoot tribe has no U&A fishing locations outside Elliott Bay without considering all of the tribe's evidence. While Judge Rothstein considered only evidence of Judge Boldt's intent in her proceeding under the Clarification Paragraph, the Muckleshoot tribe claims it has additional historical evidence showing it had U&A fishing locations outside Elliott Bay in Puget Sound. Such evidence is admissible in a hearing under the New Determinations Paragraph. By denying the Muckleshoot's request for such a hearing, Judge Martinez effectively determined that the tribe did not have any additional U&A fishing locations in Puget Sound without reviewing all the admissible evidence. This is contrary to *Final Decision #I*, which expressly allows tribes to request additional determinations regarding their U&A fishing locations under the New Determinations Paragraph.

*Muckleshoot I* is not to the contrary, because it did not address what happens after a Clarification Paragraph proceeding alters a Specific Determination. *Muckleshoot I* involved a situation similar to the proceeding before Judge Rothstein. In *Muckleshoot I*, the district court considered a Specific Determination stating that a tribe had a U&A fishing location "from the Fraser River south to the present environs of Seattle." 141 F.3d at 1359. Various tribes disputed the meaning of "the present environs of Seattle." *Id.* We held that because Judge Boldt had made a broad Specific Determination, the district court had to proceed under the Clarification Paragraph and determine "what Judge Boldt meant in precise geographic terms by his use of the phrase 'the present environs of Seattle.'" *Id.* at 1360. We also held that the district court erred in finding (under the New Determinations Paragraph) that the phrase "the present environs of Seattle" described an area extending no farther south than Mukilteo, because a court cannot use that paragraph to clarify a Specific Determination. *Id.* Moreover, we held it would be improper for the district court to make any new determination, given that the court had "failed to allow all parties to present evidence" regarding that issue. *Id.* We remanded the case to allow the court to proceed under the Clarification Paragraph to determine what Judge Boldt meant when he used the phrase "the present environs of Seattle." *Id.*

We did not, however, address what would happen after the court interpreted "the present environs of Seattle." And based on the logic of *Muckleshoot I*, if the district court on remand interpreted Judge Boldt's phrase "the present environs of Seattle" narrowly (for

example, to mean "a location no farther south than present-day Mukilteo," *id.* at 1359), nothing in *Muckleshoot I* would preclude the tribe from invoking the New Determinations Paragraph and offering evidence that other areas in the broader "present environs of Seattle" were U&A fishing locations of that tribe.

The same logic applies here. Therefore, Judge Martinez erred in refusing to allow the Muckleshoot to invoke the New Determinations Paragraph and in refusing to consider the tribe's new evidence as to locations within Puget Sound that were not "specifically determined" in *Final Decision #I*. *See* 384 F. Supp. at 419.

In holding otherwise, the majority fails to grapple with the unprecedented procedural posture of this case, which arose after a proceeding under the Clarification Paragraph. Instead, its analysis of the Muckleshoot's argument rests on two errors.

First, the majority fails to recognize the limited scope of decisions made in a proceeding under the Clarification Paragraph. The majority mischaracterizes Judge Rothstein's decision as holding that Judge Boldt made a Specific Determination *excluding* all areas in Puget Sound except for Elliott Bay from the Muckleshoot's U&A fishing locations. Maj. at 13. But Judge Rothstein did not, and could not, make such a finding. Under the Clarification Paragraph, Judge Rothstein could consider only Judge Boldt's intent in making Specific Determinations. And Judge Rothstein's ruling, quoted by the majority, speaks only of Judge Boldt's intent to include, not exclude, particular locations. *See* Maj. at

12 ("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 open waters and shores of Elliott Bay.") (quoting *Rothstein Decision*, 19 F. Supp. 3d at 1310-11) (emphasis added). Judge Boldt's intent to include only Elliott Bay as a U&A location, based on the evidence then before him, does not raise the inference that Judge Boldt intended to exclude other areas of Puget Sound from consideration under the New Determinations Paragraph. Any such finding would have been directly contrary to *Final Decision #I*, given that Judge Boldt excluded no locations from any tribe's U&A and expressly laid out a procedure for tribes to return to court with additional evidence. For the same reason, the majority's statement that "Judge Boldt had determined the entirety of the Muckleshoot's saltwater U&As," Maj. at 11, is directly contrary to *Final Decision #I* and Judge Rothstein's decision.

Second, the majority confuses law that applies before a proceeding under the Clarification Paragraph with law that applies after. In particular, the majority errs in relying on Judge Rothstein's statement—made before she held an evidentiary hearing under the Clarification Paragraph—that "[i]ssuing a supplemental finding under [the New Determinations Paragraph] defining the scope of Muckleshoot's U&A in Puget Sound would 'alter, amend, or enlarge upon' Judge Boldt's description," contrary to *Muckleshoot I*. Maj. at 12; *see* 19 F. Supp. 3d at 1275–76. This

statement is merely a straightforward recitation of *Muckleshoot I*'s holding, made before Judge Rothstein heard evidence clarifying Judge Boldt's intent. As explained above, that holding does not speak to what happens after a proceeding under the Clarification Paragraph, and neither did Judge Rothstein.

***

In sum, the majority fails to recognize the Muckleshoot's plight. Because Judge Boldt made a Specific Determination using language that encompassed the entire Puget Sound, the tribe could not make arguments or present new evidence to Judge Rothstein about their historic entitlement to locations within Puget Sound; they were limited to evidence regarding Judge Boldt's intent. Now that Judge Rothstein has determined that Judge Boldt intended to make a Specific Determination that the tribe had a U&A fishing location in Elliott Bay, the majority unfairly holds that the Muckleshoot cannot present any new evidence regarding their historical use of other locations in Puget Sound. This frustrates Judge Boldt's rulings in *Final Decision #I* that his Specific Determinations were not comprehensive, and that tribes could invoke the court's continuing jurisdiction to determine additional U&A fishing locations. Because Judge Boldt could not have intended this result, I dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| UNITED STATES OF AMERICA, et al.,<br>Plaintiffs,<br>v.<br>STATE OF WASHINGTON, et al.,<br>Defendants. | Case No. C70-9213<br>Sub-proceeding No. 17-sp-02<br>ORDER GRANTING MOTIONS TO DISMISS |

## I. INTRODUCTION

This matter comes before the Court on the Swinomish Indian Tribal Community's, Port Gamble and Jamestown S'Klallam Tribes', and Tulalip Tribe's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) (Dkt. #25), and the Suquamish Indian Tribe's Motion to Dismiss (Dkt. #27), in which the Squaxin Island Tribe and the Puyallup Tribe of Indians have also joined (Dkts. #28 and #29) (hereinafter collectively the "Moving Tribes"). The Muckleshoot Tribe opposes the motion (Dkt. #31), and the Nisqually Indian Tribe has joined in that opposition (Dkt. #33). The Moving Tribes assert that this Court lacks jurisdiction to hear this matter under Paragraph 25(a)(6) of the Order Modifying Paragraph 25 of the Permanent Injunction, entered on August 24, 1993, because the Muckleshoot Tribe's marine usual and accustomed fishing grounds and stations ("U&A")

has already been specifically determined, and because the Muckleshoot asserted a contrary position to that advanced now in a prior subproceeding in which it succeeded. Dkts. #25, #27, #28 and #29. The Muckleshoot oppose the motion on the basis that the marine U&A asserted now has never been determined. Dkt. #31. The Nisqually, while not joining any substantive claims to the U&A, concurs with the procedural arguments made by the Muckleshoot with respect to its ability to invoke Paragraph 26(a)(6) jurisdiction. Dkt. #33. For the reasons discussed herein, the Court agrees with the Moving Tribes, and hereby DISMISSES this subproceeding.

## I. BACKGROUND

This case arises from a Request For Determination ("RFD") brought by the Muckleshoot Indian Tribe, in which it seeks a determination that the Tribe's U&A under the Treaties of Point Elliott and Medicine Creek includes additional locations in the saltwater of Puget Sound not determined in earlier proceedings in this action. Dkt. #3. The Muckleshoot invoke jurisdiction under Paragraph 25(a)(6) of the Order Modifying Paragraph 25 of Permanent Injunction, entered in this action on August 24, 1993, which provides in relevant part that a party "may invoke the continuing jurisdiction of this court in order to determine . . . [t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1. Dkt. #3 at 2.

In 1970 the United States, as trustee for all the treaty tribes, filed suit in the Western District of Washington to obtain an interpretation of the Treaty of Point Elliott and an injunction protecting treaty

fishing rights from interference by Washington State. In 1974, Judge Boldt issued extensive findings of fact, conclusions of law, and a permanent injunction. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("Boldt Decree"). The Boldt Decree defined the Treaty of Point Elliott's reference to "usual and accustomed grounds and stations" as meaning "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[.]" *Id.* at 332.

The U&A of the Muckleshoot was described by Judge Boldt in Findings of Fact ("FF") 76 his decision:

> 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. Villages and weir sites were often located together. [FPTO § 3-53; Ex. USA-20, p. 38; Ex. USA 27b, pp. 7-16; Ex. PL-23, pp. 11-12.]

384 F. Supp. at 312, 367 (W.D. Wash. 1974), FF 76 ("*Decision I*").

On January 11, 1997, the Puyallup Tribe sought a determination that the Muckleshoot had "no adjudicated usual and accustomed fishing grounds

and stations in marine waters outside Elliot Bay." Case No. 97-sp-00001RSM (originally brought before Judge Barbara Rothstein), Dkt. #1 at ¶ 1. The Puyallup sought to "bar any fisheries by the Muckleshoot Tribe in the waters surrounding Vashon Island, now known as WDFW Commercial Salmon Management and Catch Reporting Area 11." *Id.* The Puyallup then immediately moved for a preliminary injunction. *Id.*, Dkt. #4. In response to the motion, the Suquamish and the Swinomish Tribes agreed with the Puyallup that the Muckleshoot had no adjudicated U&A around the islands of Central and South Puget Sound, and argued that Judge Boldt's Finding of Fact 76 that Muckleshoot had U&A "secondarily in the saltwater of Puget Sound" was ambiguous and that Judge Boldt never intended to establish Muckleshoot U&A "in the saltwater, far from the upriver haunts of the Muckleshoot forbears." Case No. 97-sp-00001RSM, Dkt. #22 at 2-8. *See also id.*, Dkt. #24. The Puyallup then withdrew their motion.

The Swinomish and Suquamish next filed a cross-request for determination seeking, like the Puyallup, a finding that Muckleshoot marine U&A was "very limited." *Id.*, Dkt. #30. Specifically, the Tribes asserted that the Muckleshoot had no adjudicated U&A "in Washington Marine Catch Reporting Area 10 or waters west and north of Area 10." *Id.*, Dkt. #36 at ¶ 1.

On January 15, 1998, Muckleshoot filed a motion to dismiss the requests for determination, arguing that Judge Boldt had issued an unambiguous finding in his initial decision, and that the Requests for Determination ("RFD") were barred by the doctrine of

*res judicata*. *Id.*, Dkt. #47 at 1. Further, Muckleshoot argued that the RFDs did not fall within this Court's continuing jurisdiction. *Id.* Muckleshoot "took issue" with the petitioners' arguments that there was ambiguity with Judge Boldt's term "Puget Sound" as applied to areas 11, 10, 10E, 9, 8 and 8A of Puget Sound. *Id.* at 2. Muckleshoot argued that the Court was limited in its authority to clarify Judge Boldt's findings, and that petitioners were merely seeking a redetermination of the term "Puget Sound" which was unambiguous as to the waters at issue. *Id.* at 2-17. Finally, Muckleshoot argued that the Court did not have continuing jurisdiction under Paragraph 25(a)(6) because the U&A had been specifically determined by Judge Boldt. *Id.* at 17. The Swinomish, Suquamish and Puyallup Tribes responded with a Motion for Summary Judgment, asserting that finding of fact 76 was ambiguous and that the Court had jurisdiction to clarify that Muckleshoot had no U&A beyond Elliot Bay. Dkt. #50.

While those motions were pending, the Ninth Circuit Court of Appeals issued it decision in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (1998) (*Muckleshoot I*). In that case, relevant to the instant matter, the Ninth Circuit Court of Appeals held:

> As an alternative ground for its decision, the district court relied on the continuing jurisdiction reserved in the decree to "determine the location of a tribe's usual and accustomed fishing grounds not specifically determined by [*Decision I*]" and "such other matters as the Court may

deem appropriate." *Decision I*, 384 F. Supp. at 419. If FF 46 cannot be clarified by adopting Dr. Lane's definition of "present environs of Seattle," the court reasoned, the meaning of the phrase was not "specifically determined" by *Decision I*. The court then proceeded to determine the proper interpretation of the phrase. It concluded that the only authority capable of clarifying the meaning of that phrase is Dr. Lane and based on her testimony, the court made a supplemental finding that the phrase "to the present environs of Seattle" as used in FF 46 describes an area extending no farther south than Mukilteo.

Although jurisdiction to enter supplemental findings exists under the decree, we find the district court erred in entering a supplemental finding here because the court failed to allow all parties to present evidence. *Decision I* acknowledged that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed fishing grounds and stations." 384 F. Supp. at 353. At the same time, subparagraph f of Paragraph 25 reserved continuing jurisdiction to determine "the location of a tribe's usual and accustomed fishing grounds not specifically determined in [*Decision I*]." *Id.* at 419. **Judge Boldt, however, did "specifically determine[]" the location of Lummi's usual and accustomed fishing**

**grounds, albeit using a description that has turned out to be ambiguous. Subparagraph f 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.** Moreover, the issues presented in subproceeding 86-5 did not comprehend new determinations of locations of usual and accustomed fishing grounds. A proceeding under subparagraph f raises issues beyond those defined in the pretrial order which rejected any submissions from Lummi involving additional research in this subproceeding: "The only matter at issue is the meaning of Judge Boldt's Finding No. 46 and the only relevant evidence is that which was considered by Judge Boldt when he made his finding." Nor do we read subparagraph g – "such other matters as the court may deem appropriate" - to grant blanket authority to make such supplemental findings. Therefore we find that the district court's alternative ground cannot be upheld.

Nevertheless, we recognize that the district court has a genuine controversy before it that must be resolved. We instruct the district court to proceed pursuant to Paragraph 25, subparagraph a to resolve this dispute. Subparagraph a vests continuing jurisdiction to determine

> "whether or not the actions . . . by any party . . . are in conformity with [*Decision I*] of this injunction." 384 F. Supp. at 419. The RFD, and subsequent proceedings under it, present the court with a dispute over whether the southern portion of the areas in which the Lummi are currently taking fish is in conformity with the decree. It will be up to the parties to offer admissible evidence to enable the district court to interpret the decree in specific geographic terms. While evidence that was before Judge Boldt when he made his finding is obviously relevant, there may be other evidence indicative of the contemporary understanding of "the present environs of Seattle."

141 F.3d at 1359-60 (emphasis added).

After additional briefing on how that decision affected Subproceeding 97-1, this Court issued an Order granting Muckleshoot's motion to dismiss in part. Case No. 97-sp-00001RSM, Dkt. #164 at 4. In that Order, the Court found that Finding of Fact 76 was ambiguous in two respects – first, because it was susceptible to more than one interpretation, and second, because the term "secondarily" was ambiguous. *Id.* at 4-5. The Court, relying on *Muckleshoot I*, next ruled that it would consider extra-record evidence to resolve the ambiguity as long as such evidence was relevant to determining Judge Boldt's intention. *Id.* at 6. Finally, the Court determined that it did not have continuing jurisdiction under paragraph a to determine whether the

Muckleshoot's actions were in conformity with the injunction with respect to areas beyond Areas 9, 10 and 11, because the Muckleshoot had represented that they did not fish in those areas and did not intend to fish in those areas. Therefore, those areas were no longer at issue. *Id.* at 7.

This Court then addressed cross-motions for summary judgment to determine what Judge Boldt intended by "secondarily in the Puget Sound." *Id.*, Dkt. #164. The Court noted that all parties agreed that Muckleshoot's U&A included Elliot Bay (Area 10A). However, the parties disputed whether Muckleshoot had fishing rights that extended beyond Elliot Bay, if those rights are constrained by the term "secondarily," and whether those rights were limited to the shoreline or whether they included fishing on open water. *Id.*, Dkt. #164 at 9. The Court reviewed the evidence before Judge Boldt at the time of his decision, and rejected numerous other documents presented by Muckleshoot as unhelpful and unpersuasive. *Id.* at 9-14. The Court then determined:

> In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would intend to give the Muckleshoot, an upriver people, a vast saltwater U&A stretching from the Tacoma Narrows to Admiralty Inlet and overlapping the U&As of tribes with a documented history of open water fishing in the same areas. The evidence in the record is that the Muckleshoot's predecessors were upriver Indians with

fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay. There is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay. Furthermore, there is no evidence that the Muckleshoot possessed the technology to fish on the open waters of Puget Sound. There is, for example, no evidence that the Muckleshoot ever used anything other than the shovelnose river canoe which was unsuitable for extended open water fishing. According to Marion Smith, inland peoples "made and used only [the] shovel-nose type [canoe] [which] was used only on rivers above the tide flats." Ex. 33 at 289. Thus, the court is persuaded that Judge Boldt could not have intended the Muckleshoot's U&A to include the open waters of Puget Sound as Professor Morrill uses that term.

. . .

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. The court finds that the evidence before Judge Boldt establishes, at a minimum, that the Muckleshoot's predecessors may have occasionally fished in the open waters of Elliott Bay near the mouth of the Duwamish and gathered

shellfish on the shores of Elliott Bay. Based on this evidence, the court concludes that Judge Boldt intended to include those areas (Department of Fisheries Area 10A) in the Muckleshoot U&A. In light of the evidence before Judge Boldt that the Muckleshoot did fish in the open waters of Elliott Bay, the court rejects the Jamestown S'Klallam's argument that the Muckleshoot U&A should be limited to the shoreline.

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 open waters and shores of Elliott Bay. The court agrees with the Muckleshoot that Judge Boldt's use of a broad term like "Puget Sound" is perplexing in light of the geographic precision he generally used in describing U&As. And it agrees that, as a resident of the Puget Sound area, it is fair to assume that he would not have used the terms "Elliott Bay" and "Puget Sound" interchangeably. However, there is no evidence in the record before Judge Boldt that supports a U&A beyond Elliott Bay. In the court's view, Judge Boldt probably did not use a great deal of precision in describing the Muckleshoot's saltwater U&A since the saltwater U&A was clearly not the main focus of FOF 76 and was only of secondary importance in relation to the

> Muckleshoot's river U&As, which are described in great detail in FOF 76.

Case No. 97-sp-00001, Dkt. #164 at 14-17. The Court then concluded that Muckleshoot's "U&A is limited to Department of Fisheries Area 10A and hereby enjoins respondent from fishing in Department of Fisheries Area 9, 10, and 11." *Id.* at 18.

The Muckleshoot then appealed the matter to the Ninth Circuit Court of Appeals. *Id.*, Dkt. #166. On April 16, 2001, the Court of Appeals affirmed the District Court decision. *Id.*, Dkt. #181.

Muckleshoot have now filed a Request for Determination in which it seeks a determination that the Tribe's U&A under the Treaties of Point Elliott and Medicine Creek includes additional locations in the saltwater of Puget Sound not determined in earlier proceedings in this action.

## II. DISCUSSION

### A. Legal Standard Under Federal Rule of Civil Procedure 12(b)(1)

Under Federal Rule of Civil Procedure Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways: (1) a "facial" attack that accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction, or (2) a "factual" attack that contests the truth of the plaintiff's factual allegations. *Leite v. Crane Co.,* 749 F.3d 1117, 1121-22 (9th Cir. 2014). In this case, the Moving Tribes make a factual attack. In reviewing a factual attack, the Court may consider materials beyond the complaint. *McCarthy v. U.S.*, 850 F.2d

558, 560 (9th Cir. 1988); *see Americopters, LLC v. F.A.A.*, 441 F.3d 726, 732 n.4 (9th Cir. 2006) (When determining the existence of subject matter jurisdiction, "the district court is not confined by the facts contained in the four corners of the complaint-it may consider [other] facts and need not assume the truthfulness of the complaint.").

**B. Muckleshoot's Current RFD**

Muckleshoot initiated this subproceeding through an RFD that invoked Paragraph 25(a)(6) of Final Decision # 1, 384 F.Supp. at 419, as modified by this Court's August 23, 1993 Order Modifying Paragraph 25 of Permanent Injunction (Case No. 70-9213, Dkt. #13599). As this Court has previously explained, Paragraph 25(a)(1) provides the Court with jurisdiction to determine whether actions by a party are in conformity with Judge Boldt's findings in Final Decision # 1. While Paragraph 25(a)(1) jurisdiction comes into play where there is potential ambiguity in Judge Boldt's findings, Paragraph 25(a)(6) instead provides jurisdiction to resolve "the location of any of a tribe's usual and accustomed fishing grounds [("U&A")] not specifically determined by Final Decision # 1." 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. In the instant matter, the parties disagree on whether the disputed waters were specifically determined by Judge Boldt. For the reasons discussed by the moving party, the Court finds that they were.

The specific waters at issue in the current Muckleshoot RFD are: "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 waters of Puget Sound between those two areas, but excluding Colvos Passage and marine waters within the boundaries of any Indian Reservation." Dkt. #3 at 6. These waters encompass Salmon Management and Catch Reporting Areas 10 and 11, and portions of 8A and 13. *See Dkt.* #25 at 5.[1]

As an initial matter, the Court finds that Judge Boldt specifically determined Muckleshoot U&A in *Decision 1*, and therefore there is no continuing jurisdiction under paragraph 26(a)(6). Indeed, in 97-sp-00001, Muckleshoot argued that this Court "cannot make a supplemental finding under [25(a)(6)] under *Muckleshoot* to determine their fishing rights in areas beyond Areas 9, 10, and 11." Case No 97-sp-00001RSM, Dkt. #81 at 9. The Court then explained:

> The court agrees that *Muckleshoot* forecloses this approach. In *Muckleshoot*, as an alternative holding, this court made a supplemental finding of fact under [subparagraph 25(a)(6)], which reserved continuing jurisdiction to determine "the location of a tribe's usual and accustomed

[1] Because Muckleshoot's RFD vaguely references "to and including the waters in the vicinity of Gedney Island and the southern end of Whidbey Island," and the waters "around" Anderson, Fox and McNeil Islands, it is not entirely clear which portions of Catch Areas 8A and 13 are implicated, or if any portion of Areas 10A, 11A, 13A, or 13C are implicated.

fishing grounds not specifically determined" by Judge Boldt. The Ninth Circuit ruled that this alternative holding could not be upheld. It held that this court did not have jurisdiction under [subparagraph 25(a)(6)] to make a supplemental finding to determine the location of Lummi's U&A because Judge Boldt had already made that determination, albeit using an ambiguous description. And it remanded with specific instructions to proceed under subparagraph [25(a)(1)], which reserves continuing jurisdiction to determine "whether or not the actions . . . by any party . . . are in conformity with" the injunction in *United States v. Washington*.

Here, as in *Muckleshoot*, 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. Subparagraph [25(a)(6)] "does not authorize the court to clarify the meaning of terms used in the decree or resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree." *Muckleshoot*, 141 F.3d at 1359. Issuing a supplemental finding under subparagraph f defining the scope of Muckleshoot's U&A in Puget Sound would "alter, amend or enlarge upon" Judge Boldt's description,

> contrary to the Ninth Circuit's holding in Muckleshoot.

Case No 97-sp-00001RSM, Dkt. #81 at 9-10. This Court then granted Muckleshoot's motion to dismiss with respect to areas beyond Areas 9, 10, and 11, and "reserve[d] the question of whether those areas are part of Muckleshoot's U&A" until such time as Muckleshoot "manifested an intent to fish in those areas." *Id.* at p. 11. The Court agrees with the Moving Tribes that it is clear from the prior Order that it was reserving jurisdiction to consider Muckleshoot's U&A in those beyond waters under 25(a)(1), not 25(a)(6). *See id.* at 10-11. Because Muckleshoot invokes only 25(a)(6) jurisdiction, the Court may not proceed on any of its U&A claims.

Further, Muckleshoot is collaterally estopped from relitigating its previously-adjudicated U&A in Areas 9, 10 and 11. Collateral estoppel, also known as issue preclusion, "bars 'successive litigation' of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), quoting *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001). As noted above, Muckleshoot's U&A in Areas 9, 10, and 11 has been "actually litigated and resolved" by this Court, and a prior judgment has been issued that establishes that Muckleshoot does not have U&A in Areas 9, 10, and 11. Case No 97-sp-00001RSM. That prior judgment has been affirmed by the Ninth Circuit. Thus, Muckleshoot cannot relitigate those areas now.

For those reasons, the Court agrees that it lacks jurisdiction under paragraph 25(a)(6) to review Muckleshoot's current RFD and it must be dismissed.

## III. CONCLUSION

Having reviewed the Swinomish Indian Tribal Community's, Port Gamble and Jamestown S'Klallam Tribes', Tulalip Tribe's, and the Suquamish Indian Tribe's motions to dismiss (Dkts. #25 and #27), in which the Squaxin Island Tribe and the Puyallup Tribe of Indians have also joined (Dkts. #28 and #29), the oppositions thereto and replies in support thereof, along with all supporting declarations and exhibits and the remainder of the record, the Court hereby FINDS and ORDERS:

1. The Swinomish Indian Tribal Community's, Port Gamble and Jamestown S'Klallam Tribes', and Tulalip Tribe's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) (Dkt. #25) is GRANTED.

2. The Suquamish Indian Tribe's Motion to Dismiss (Dkt. #27) is GRANTED.

3. Muckleshoot's RFD is DISMISSED and this matter is now CLOSED.

DATED this 24 day of April, 2018.

/s/
RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| MUCKLESHOOT INDIAN TRIBE,<br>Plaintiff-Appellant,<br>v.<br>TULALIP TRIBES; et al.,<br>Respondents-Appellees,<br>HOH INDIAN TRIBE; et al.,<br>Real Parties in Interest. | No. 18-35441<br>D.C. No. 2:17-sp-00002-RSM<br>Western District of Washington, Seattle<br>ORDER |

Before: CLIFTON and IKUTA, Circuit Judges, and RAKOFF,* District Judge.

Judge Ikuta has voted to grant the petition for rehearing en banc. Judge Clifton and Judge Rakoff have recommended denial of the petition for rehearing en banc.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.