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Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129 (9th Cir. 2015)

Kevin Rechkoff

In a longstanding battle between two entrenched Indian tribes, the Ninth Circuit reaffirmed fishing access doctrines established in the *Boldt Decisions*. Consequentially, the *Boldt Decisions* have been confirmed as the preeminent authority in determining tribal fishing rights in conjunction with treaties and inter-tribal conflicts. By applying the *Boldt* standards of “usual and accustomed,” the Ninth Circuit demonstrated its commitment to giving tribes a wide breadth in establishing claims to fishing grounds off reservation. In the future, fishing treaty litigation will continue with the *Boldt* standard’s low burden of proof for tribes asserting fishing access rights.

I. INTRODUCTION

In *Tulalip Tribes v. Suquamish Indian Tribe*, the United States Court of Appeals for the Ninth Circuit reviewed whether certain sections of the Puget Sound in Washington State constituted the Suquamish Indian Tribe’s traditional, or “usual and accustomed,” fishing grounds.¹ If the grounds were within the Suquamish’s customary range, the tribe would have access to routinely fish the area.² Recognizing the Treaty of Point Elliot as the governing document for tribal fishing rights, counsel and the Ninth Circuit embarked on a geographical and anthropological discussion as to where the ancestral members of the Suquamish likely went when fishing the waters of western Washington.³ Utilizing reports of the historical fishing patterns of tribes synthesized by Dr. Barbara Lane, and relying on seminal decisions regarding tribal fishing rights in the greater Puget Sound area by United States District Court Judge George H. Boldt, the Ninth Circuit determined that the Suquamish had presented “some evidence” that their elders had fished in all of areas contested on appeal.⁴ Following the burden of proof established by Judge Boldt, the Tulalip Tribes refuted the Suquamish’s fishing claims, arguing that the Suquamish had presented “no evidence” of regular visits to the contested areas.⁵ The Ninth Circuit rejected the Tulalip’s argument, deferring to Judge Boldt’s diligence and immense efforts to vet Lane’s report as a credible source for identifying tribal fishing patterns.⁶ Because Lane stated visitation to the contested areas by the Suquamish was plausible, the Ninth Circuit reasoned it could only affirm the district court, and held that the

¹ *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1130 (9th Cir. 2015).

² *Id.* at 1131.

³ *Id.*

⁴ *Id.* at 1135.

⁵ *Id.* at 1136.

⁶ *Id.* at 1132.

Suquamish had a right to fish in all of the areas the Tulalip sought to block them from on appeal.⁷

II. FACTUAL AND PROCEDURAL BACKGROUND

The Suquamish's cultural and economic hub is located on the Kitsap Peninsula, on the western shores of the Puget Sound.⁸ Today, the Tribe maintains the Port Madison Indian Reservation on the same tract of land their ancestors have called home for more than 10,000 years.⁹ The Tulalip Indian Reservation is located just west of Marysville, Washington, on the eastern shores of the Puget Sound.¹⁰ The Tulalip Tribes are an amalgamation of thirteen smaller Snohomish Indian tribes, who organized as one tribe under the Indian Reorganization Act.¹¹ These smaller tribes include the Snohomish, the Snoqualmie, the Skagit, and a host of others.¹² Under the Treaty of Point Elliot, the Tulalip Indian Reservation was created as a permanent home for these tribes.¹³

The Treaty of Point Elliot expressly granted the Tulalip and the Suquamish the right to continue fishing in waters traditionally used by their people.¹⁴ Following the language of the treaty, tribes retained the right to fish their "usual and accustomed" fishing grounds.¹⁵ In 1974, the first of the "*Boldt Decisions*" ("*Decision I*") defined "usual and accustomed" in greater detail.¹⁶ In *Decision I*, Judge Boldt defined usual and accustomed to exclude any areas that were "unfamiliar" or only visited on "extraordinary occasions" from tribes' access.¹⁷

Neither the Suquamish nor the Tulalip were parties in *Decision I*.¹⁸ Both intervened following the court's affirmation of tribal treaty rights based on the new parameters and thresholds for determinations of fishing access boundaries.¹⁹ In 1978, Judge Boldt held, in "*Decision II*," that the Suquamish's traditional fishing ground extended from the Fraser River, near contemporary Vancouver,

⁷ *Id.* at 1131.

⁸ *History & Culture*, SUQUAMISH TRIBE, <http://www.suquamish.nsn.us/HistoryCulture.aspx> (last visited October 22, 2015).

⁹ *Id.*

¹⁰ *About Us*, TULALIP TRIBES, <http://www.tulaliptribes-nsn.gov/Home/WhoWeAre.aspx> (last visited November 20, 2015).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Suquamish*, 794 F.3d at 1132.

¹⁵ *Id.* at 1131 (quoting *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974) [hereinafter *Decision I*]).

¹⁶ *Decision I*, 384 F. Supp. at 330.

¹⁷ *Id.*

¹⁸ *Suquamish*, 794 F.3d at 1132.

¹⁹ *United States v. Washington*, 459 F. Supp. 1020, 1028 (W.D. Wash. 1978) [hereinafter *Decision II*].

Canada, to the northern tip of Vashon Island, near Seattle.²⁰ In between this vast range sits the Tulalip Indian Reservation, along with hundreds of islands and thousands of inlets, bays, and river mouths.

Of principle concern in this litigation were a number of bays, inlets, and passages surrounding, and adjacent to, Whidbey Island.²¹ Whidbey Island sits in the middle of the Puget Sound, to the northeast of the Suquamish's reservation on the Kitsap Peninsula and southwest of the Tulalip Indian Reservation, making it a highly contested fishing ground.²² Also in contention were bays and inlets near the mouth of the Snohomish River, located near the Tulalip Indian Reservation.²³ Following *Decision I*, all of the waters and fishing grounds contested by the Tulalip sit squarely in the geographic range of the Suquamish's "usual and accustomed" fishing grounds.²⁴ However, due to the immense breadth of the Suquamish's traditional fishing range established in Lane's report, the Tulalip sought to clarify and exclude the Suquamish from using certain bays lacking evidence of regular use by the Suquamish.²⁵

Upon Suquamish encroachment of their traditional fishing waters, the Tulalip filed a motion for a declaratory judgment in the United States District Court for the Western District of Washington.²⁶ The district court treated the filing as a motion for summary judgment.²⁷ In the Ninth Circuit's view, the district court followed precedent from 2010 in which the Ninth Circuit held the Suquamish could not claim the northeastern waters of Puget Sound as their "usual and accustomed" fishing grounds.²⁸ However, the Ninth Circuit did not accept the Tulalip's contention that previous litigation prohibited the Suquamish from fishing along the southeastern shores of the Puget Sound.²⁹ Additionally, the court rejected the Tulalip's contention that the Suquamish had presented no evidence of fishing the western bays of Whidbey Island.³⁰ Thus, the court held those areas constituted traditional fishing grounds of the Suquamish.³¹ The Tulalip filed a timely appeal.³²

²⁰ *Id.* at 1041.

²¹ *Id.* at 1132.

²² *Id.* at 1133.

²³ *Id.* at 1134.

²⁴ *Decision I*, 384 F. Supp. at 330.

²⁵ Pet'r's Op. Br. at 1-2, *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1130 (9th Cir. 2015) (RSM No. 70-9213).

²⁶ *Suquamish*, 794 F.3d at 1132.

²⁷ *Id.*

²⁸ *See* *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010).

²⁹ *Suquamish*, 794 F.3d at 1134.

³⁰ *Id.* at 1132.

³¹ *Id.*

³² *Id.* at 1133.

III. ANALYSIS

In its pronouncement upholding the district court's application of the *Boldt Decisions* and the "some evidence" burden of proof, the Ninth Circuit reaffirmed the process for determining tribal treaty fishing access rights.³³ To determine if the Suquamish satisfied the *Boldt Decisions* standards, the Ninth Circuit utilized a two-step analysis established by previous tribal treaty fishing rights cases.³⁴ The first step determines if the waters in question were defined ambiguously.³⁵ Because the Tulalip specified the specific bodies of water from which it sought to exclude the Suquamish, this was not at issue in the instant case.³⁶ Step two requires the party challenging the "usual and accustomed" determination to demonstrate that there is "no evidence" of the opposing tribe's frequency of fishing in the questioned area.³⁷ In the instant case, the Ninth Circuit upheld the district court's decision to employ Lane's reports as the evidence in chief supporting the Suquamish's claim to fish in all of the contested waters.³⁸ Lane's reports, which were the crucial authorities in both *Decision I* and *II*, stated that while it was not clear the Suquamish fished in some of the contested waters, it was possible.³⁹

To support her conclusions in *Decision II*, Lane testified that she had conducted extensive research on the fishing habits of the Suquamish.⁴⁰ Lane's research determined the Suquamish were required to travel farther and more frequently for fish than neighboring tribes due to the lack of major waterways on the Kitsap Peninsula.⁴¹ Thus, because there was evidence of extensive travel for salmon fishing, as far north as modern day British Columbia, Judge Boldt held it was likely the Suquamish utilized the bays on the western side of Whidbey Island as they traveled to and from farther sources.⁴² Additionally, there was evidence that the Suquamish also fished periodically at the mouth of the Snohomish River.⁴³

To rebut Lane's analysis, counsel for the Tulalip contended that since the waters on the eastern shores of the Puget Sound were not used as a thoroughfare between fishing grounds, it was unlikely that the Suquamish used those bays,

³³ *Id.* at 1135.

³⁴ *Id.* at 1133.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (quoting *Upper Skagit Indian Tribe*, 590 F.3d at 1023).

³⁸ *Id.* at 1134.

³⁹ *Id.* at 1135.

⁴⁰ *Upper Skagit Indian Tribe* (quoting *Decision II*, 459 F. Supp. at 1048-50).

⁴¹ *United States v. Washington*, No. C70-9213 RMS, 2013 WL 3897783 (W.D. Wash. Jul. 29, 2013) (order granting in pt. pl.'s mot. for summ. j.).

⁴² *Decision II*, 459 F. Supp. at 1028.

⁴³ *Suquamish*, 794 F.3d at 1135.

river mouths, and inlets as regular fishing grounds.⁴⁴ Thus, the Tulalip asserted that there was no evidence that the Suquamish used those grounds.⁴⁵ The Ninth Circuit affirmed the district court's reliance on Lane's report, which described Suquamish use of the contested waters along the eastern shores of the Puget Sound.⁴⁶ The court determined that the Tulalip failed to show no evidence existed.⁴⁷

The findings of possibility and probability of regular fishing usage by the Suquamish on the western side of Whidbey Island and the eastern shores of the Puget Sound constituted "some evidence."⁴⁸ Thus, the Suquamish, armed with Judge Boldt's two-part test and Lane's report, presented evidence of "fishing at usual and accustomed" places, allowing them to prevail in the instant case.⁴⁹

IV. CONCLUSION

Facially, the Ninth Circuit's affirmation of the *Boldt Decisions* maintains the same legal principles that have guided tribal treaty fishing rights for years. As salmon runs have dwindled in the last century, some tribes have been forced to shift traditional practices. Here, the Suquamish ventured into areas used, at best, sparingly by their ancestors. The Ninth Circuit's application of Lane's report, and the strict application of the treaty language created a view of tribes in a 'snapshot' of fishing practices, limiting their fishing rights to areas used by ancestors. In essence, these principles dictate that tribes must adhere to the areas of traditional use, as prescribed by treaty. While practical and efficient, the continuing application of an old treaty, written and signed well before the proliferation of the western migration, poses a potential threat to tribes, and a likelihood of more frequent tribal suits against other tribes in order to protect tribal territory.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1134.

⁴⁶ *Suquamish*, 794 F.3d at 1135.

⁴⁷ *Id.* at 1136.

⁴⁸ *Id.* at 1135.

⁴⁹ *Id.*