Nos. 21-35812; 21-35874

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY, TULALIP TRIBES, UPPER SKAGIT INDIAN TRIBE,

Petitioners – Appellees,

v.

LUMMI NATION,

Respondent-Appellant

JAMESTOWN S'KLALLAM TRIBE, PORT GAMBLE S'KLALLAM TRIBE,

Real parties in interest – Appellants, and

STILLAGUAMISH TRIBE OF INDIANS, ET AL.,

Real parties in interest

Appeal from the United States District Court for the Western District of Washington, Seattle, Nos. 2:70-cv-09213-RSM, 2:19-sp-00001-RSM, Hon. Ricardo S. Martinez, C.J.

ANSWERING BRIEF OF TULALIP TRIBES

MASON D. MORISSET, WA Bar # 00273
THANE D. SOMERVILLE, WA Bar # 31468
Morisset, Schlosser, Jozwiak & Somerville PC
811 First Avenue, Suite 218
Seattle, WA 98104
Tel: (206) 386-5200
m.morisset@msaj.com
t.somerville@msaj.com
Attorneys for Tulalip Tribes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

This sub-proceeding was triggered by the Lummi Nation's novel attempt to engage in crab fisheries in Region 2 East ("Region 2E"), which consists of secluded waters east of Whidbey Island in Washington State that are "home" waters near and adjacent to the Tulalip Tribes' reservation and of prime importance to Tulalip fishers. Tulalip, along with the Swinomish Indian Tribal Community and the Upper Skagit Indian Tribe (collectively herein, the "Region 2E Tribes"), has managed and participated in the crab fishery in Region 2E for many years. Lummi, whose usual and accustomed fishing areas (U&A) were first adjudicated in 1974, had never previously fished in the waters of Region 2E.[1]

The Region 2E Tribes issued regulations to open the winter crab fishery in Region 2E on November 4, 2019. Despite having never participated in a Region 2E crab fishery and having never pursued the right to fish in Region 2E, Lummi responded with its own regulation scheduled to open the same fishery for Lummi fishers on November 6, 2019, with an estimated effort of ten boats.

Because of the anticipated effect of Lummi's unprecedented attempt to take fish from Region 2E, Tulalip and the other Region 2E Tribes moved for and obtained a temporary restraining order and then a preliminary injunction against

[1] A map showing the location of Region 2E is at 2-ER-240 as well as Lummi's opening brief, p. 4.

Lummi. 6-ER-1005-1019. To finally resolve the issue of Lummi's incursion into Region 2E, the Region 2E Tribes initiated this sub-proceeding to determine whether Judge Boldt, in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), intended to include the waters of Region 2E within the Lummi Tribe's usual and accustomed fishing areas. 6-ER-1176-1185.

All parties cross-moved for summary judgment, with the Region 2E Tribes also moving for permanent injunctive relief against the Lummi. The District Court found for the Region 2E Tribes, determining that Judge Boldt intended to exclude the disputed waters of Region 2E from his determination of Lummi usual and accustomed fishing grounds and stations. 1-ER-6-27. The District Court denied the Region 2E Tribes' request for a permanent injunction, but only because the Court expressed its expectation that Lummi would comply with the Court's ruling that Lummi U&A does not include Region 2E and thus Lummi lacks any treaty right to take fish from that area. 1-ER-26. Tulalip asks this Court to affirm.

SUMMARY OF ARGUMENT

Nearly fifty years ago, Judge Boldt determined the Lummi's usual and accustomed fishing grounds and stations, as reserved under the Treaty of Point Elliott, as follows:

> [Finding of Fact] 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.
>
> [Finding of Fact] 46. In addition to the reef net locations listed above, the usual and accustomed places of the Lummi Indians at treaty time included the marine waters of 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).

For the past twenty-five years, the District Court and this Court have grappled with Judge Boldt's very general description of Lummi U&A contained in the phrase, the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Lower Elwha Klallam Indian Tribe v. Lummi Nation*, 849 F. App'x 216, 218 (9th Cir. 2021); *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) ("*Lummi III*"); *United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014) ("*Lummi II*"); *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) ("*Lummi I*"). Through this previous extensive litigation, this Court has confirmed that the general description of Lummi U&A in Finding of Fact 46 is ambiguous. And because the description of Lummi U&A in Finding of Fact 46 is ambiguous, the District Court must look to the evidence in the record before Judge Boldt, and especially that which was cited by Judge Boldt in his findings, to determine whether Judge Boldt intended to include the disputed waters within the determination of Lummi U&A.

In the current sub-proceeding, which arises under Paragraph 25(a)(1) of the Permanent Injunction entered by Judge Boldt, as modified, the District Court properly applied the law. The District Court, consistent with the law of this case, including the decisions cited above regarding Lummi U&A, found that Judge Boldt's description of Lummi U&A in Finding of Fact 46 is ambiguous or that Judge Boldt intended something other than the finding's apparent meaning. 1-ER-12–17. The District Court properly reviewed the evidence in the record before Judge Boldt, including the evidence specifically cited by Judge Boldt in his findings, and correctly found that there is no evidence whatsoever that supports Lummi's claim of usual and accustomed fishing areas in the secluded waters of Region 2E, located to the east of Whidbey Island and consisting of home waters of the Region 2E tribes. 1-ER-17-25.

Lummi, on appeal, principally argues that the District Court should have ignored the law of the case and the numerous prior rulings that Finding of Fact 46 is ambiguous. Lummi argues that the District Court should have strictly interpreted Finding of Fact 46, devoid of context or supporting evidence, to affirm Lummi U&A in waters to which there is no evidence of Lummi treaty-time fishing or Lummi treaty-time travel. Both in the context of Lummi U&A, as well as sub-proceedings involving U&A disputes of other tribes, this Court has repeatedly rejected the inflexible approach advocated by Lummi here. The District Court

properly found Finding of Fact 46 ambiguous and properly moved to the second step of the inquiry under Paragraph 25(a)(1) to determine whether there is any evidence in the record of Lummi treaty-time fishing in the disputed waters, which there is not.

Regarding the second step of the 25(a)(1) inquiry, Lummi argues that the report of the late expert Dr. Barbara Lane supports Lummi's claim to U&A in Region 2E. Lummi is wrong, as Dr. Lane did not report any treaty-time fishing or travel activity of the Lummi in the waters at issue here. Lummi also relies on a lone affidavit of a Lummi person that provides an extremely broad reference to Lummi fishing in Puget Sound – but that lacks any reference to the specific areas actually at issue here. 4-ER-648-649. With no evidence of actual treaty-time fishing, Lummi is left to argue that its people must have traveled in Region 2E at treaty-time. This speculative and self-serving argument is not only unsupported by evidence but is directly opposite to what Lummi has argued for the past 25 years – that is, that Lummi people at treaty-time traveled to and from the "environs of Seattle" on the west side of Whidbey Island, not the east side. 5-ER-892, 914. The District Court correctly found that there is no evidence to support Lummi's claims of U&A in Region 2E.

This Court should affirm the District Court's grant of summary judgment in favor of the Region 2E tribes and its denial of Lummi's motion for summary judgment.

ARGUMENT

A. The District Court Properly Applied the Governing Legal Standards.

In this proceeding arising under Paragraph 25(a)(1) of the Permanent Injunction entered by Judge Boldt in *Final Decision I*,[2] the District Court was tasked with determining whether Lummi's attempts to open treaty fisheries in Tulalip's home waters in Region 2E are in conformity with *Final Decision I* and the Permanent Injunction. Paragraph 25(a)(1) of the Permanent Injunction

> permits tribes to ask the court to resolve any ambiguity in Judge Boldt's Specific Determinations. [384 F. Supp. 312] at 419. Under [Paragraph 25(a)(1)], 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 #1 or this injunction.' *Id.* By invoking [Paragraph 25(a)(1)], tribes can ask the district court to 'clarify the meaning of terms used' in *Final Decision #1* so as to give effect to Judge Boldt's intent.

Muckleshoot Indian Tribe v. Tulalip Tribes, 944 F.3d 1179, 1185 (9th Cir. 2019) (Ikuta, J., dissenting). In a 25(a)(1) proceeding, the task of the District Court is to interpret Judge Boldt's prior orders and construe Judge Boldt's "judgment so as to

[2] *Final Decision I* and "Permanent Injunction" refer to the decision and injunction entered by Judge Boldt in *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974) and as subsequently modified in *United States v. Washington*, 18 F. Supp. 3d 1172, 1213-1216 (W.D. Wash. 1993).

give effect to the intention of the issuing court." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998).

This Court's opinions demand a two-step procedure in a Paragraph 25(a)(1) proceeding. *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015). First, the party asserting ambiguity in Judge Boldt's findings must offer evidence that suggests that [Judge Boldt's relevant U&A finding] is ambiguous or that Judge Boldt intended something other than the finding's apparent meaning. *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010); *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) (*Muckleshoot III*). When the District Court conducts this inquiry, it must construe the language of Final Decision #1 "in the light of the facts before [Judge Boldt]" at the time of Final Decision #1. *Id.* Because the text of the findings must be construed "in light of the facts of the case," an "unambiguous text is certainly a factor to be considered . . ., but it does not necessarily terminate the inquiry." *Id.*

Second, if Judge Boldt's U&A determinations are ambiguous or mean something other than their apparent meaning, the Court must resolve the ambiguity by determining Judge Boldt's intended meaning. *Muckleshoot III*, 235 F.3d at 433. The Court looks to the evidence before Judge Boldt, and the best evidence of Judge Boldt's intent is that specific evidence that he relied upon. *Id.* at 433-434. In a 25(a)(1) proceeding, the moving party has the burden to show that there is no

evidence before Judge Boldt to support a conclusion that he intended to include the disputed waters as usual and accustomed fishing areas of the responding tribes. *Upper Skagit*, 590 F.3d at 1023.

Determinations under Paragraph 25(a)(1) are appropriately resolved on summary judgment because the role of the Court is to determine Judge Boldt's intent based on the evidence before Judge Boldt at the time. *Muckleshoot*, 944 F.3d at 1186 ("Because Judge Boldt's intent is all that matters in a [25(a)(1) proceeding], only evidence relevant to that intent can be considered in such a proceeding"); *Muckleshoot* I, 141 F.3d at 1359 ("the only relevant evidence is that which was considered by Judge Boldt when he made his finding"). In such a case, "a trial on the merits would reveal no additional relevant facts." *Upper Skagit*, 590 F.3d at 1025, n. 9. "The district judge, who is also the trier of fact, may resolve conflicting inferences and evaluate the evidence to determine Judge Boldt's intent." *Id.*

In this proceeding, the issue is whether Judge Boldt intended to include the secluded waters of Region 2E as part of the Lummi's usual and accustomed fishing areas. In *Final Decision #1*, Judge Boldt defined U&A as "every fishing location where members of a tribe customarily fished from time to time at or before treaty times . . . ." 384 F. Supp. at 332. But these are areas that a tribe fished on a "usual and accustomed" basis, not an "occasional or incidental" basis. *Id.* at 356.

Trolling incident to travel does not establish U&A along the travel route absent evidence of other fishing activity. *Id.* at 353 ("Occasional and incidental trolling was not considered to make the marine waters traveled thereon [U&A] of transiting Indians."); *see also, e.g., United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) ("[o]pen marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not [U&A]"); *United States v. Lummi Nation*, 876 F.3d 1004, 1010 (9th Cir. 2017); *Upper Skagit*, 590 F.3d at 1022 (customary fishing activity "does not include 'occasional and incidental' fishing or trolling incidental to travel"); *Muckleshoot III*, 235 F.3d at 434 (fishing must occur "with regularity" and not just on an "isolated or infrequent" basis to establish U&As). Here, the District Court correctly applied these standards to find that Judge Boldt did not intend to include the waters of Region 2E within the Lummi's U&A.

B. Lummi's Strict Interpretation Argument Is Inconsistent With This Court's Prior Cases Interpreting Final Decision #1.

Lummi principally argues that Judge Boldt's broad reference to "the marine areas of Northern Puget Sound" in describing Lummi U&A unambiguously includes Region 2E, which are secluded waters to the east of Whidbey Island. This Court has previously rejected similar arguments that relied solely on a strict interpretation of certain broad geographic language used by Judge Boldt in his

findings while ignoring other surrounding language of Judge Boldt's U&A findings, such as geographic markers or anchors that provide more context and specific evidence of Judge Boldt's intent, and that also ignores specific evidence cited in Judge Boldt's findings.

In *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010) the Court evaluated whether the Suquamish Tribe's U&A included Saratoga Passage and Skagit Bay, which make up part of the same waters to the east of Whidbey Island that are at dispute in this proceeding. The Suquamish U&A, as determined by Judge Boldt, broadly included "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal." *Id.* at 1023. Like Lummi here, Suquamish argued that Judge Boldt's broad reference to "marine waters of Puget Sound" unambiguously included marine waters to the east of Whidbey Island, which are part of Puget Sound. *Id.* at 1024. The District Court disagreed and this Court affirmed. *Id.* at 1025.

In *Upper Skagit*, despite the broad reference to "the marine waters of Puget Sound" in the Suquamish U&A finding, this Court explained that there is "no evidence in the record before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of Whidbey Island, particularly in Saratoga Passage

or Skagit Bay." *Id.* at 1025. Given this lack of evidence, there was no basis to suppose "that 'it is just as likely' that Saratoga Passage and Skagit Bay were intended to be included as that they were not." *Id.* at 1025, fn. 9.

This Court also explained the importance of geographic anchor points in describing and interpreting U&A. Despite inclusion of broad references to waters of Puget Sound, Judge Boldt also included geographic anchor points in describing (and limiting) the scope of tribal U&A. "From this it is reasonable to infer that when [Judge Boldt] intended to include an area, it was specifically named in the U&A." *Id.* at 1025. In the case of Suquamish, its U&A description included the geographic anchor points of Haro and Rosario Straits, which were not within the disputed waters east of Whidbey Island. "That Judge Boldt neglected to include Skagit Bay and Saratoga Passage in the Suquamish's U&A supports our conclusion that he did not intend for them to be included." *Id*. *See also Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015) (again affirming that the description of Suquamish U&A as including "marine waters of Puget Sound" is ambiguous; "the finding that Judge Boldt intended something different than the plain text of the Suquamish U&A finding remains intact").

This Court also rejected a similar argument of the Muckleshoot Tribe. The Muckleshoot U&A is described as being primarily at locations along certain rivers and Lake Washington, "and secondarily in the saltwater of Puget Sound."

Muckleshoot III, 235 F.3d at 431, citing *Final Decision #1*, 384 F. Supp. at 367 (Finding of Fact 76). A dispute arose as to the extent of the Muckleshoot's rights in Puget Sound. The Muckleshoot's argument was "essentially one of plain meaning." *Id.* at 432. They argued that "Puget Sound" has a "well-understood, common geographical meaning" and thus their rights in Puget Sound extended well beyond Elliott Bay. *Id.* The District Court disagreed with Muckleshoot's interpretation and this Court affirmed.

The Court relied on the evidence presented to, and cited by, Judge Boldt in making his findings on Muckleshoot U&A. Despite the broad use of the term "Puget Sound" in the finding, "there is no evidence in the record before Judge Boldt that supports a [saltwater] U&A beyond Elliott Bay." *Id.* at 433-434. And although the Muckleshoot's ancestors "may have occasionally conducted saltwater fishing beyond Elliott Bay . . . [i]solated or infrequent excursions beyond Elliott Bay do not meet the 'usual and accustomed' standard." *Id.* at 434. Moreover, the documents and testimony relied on by Judge Boldt in support of Finding of Fact 76 did not support a conclusion that he intended to confirm saltwater U&A for the Muckleshoot beyond Elliott Bay. *Id.* at 434-35.

Here, Lummi asks this Court to ignore these previous cases and analysis in the *Upper Skagit* and *Muckleshoot*, in which this Court affirmed a more careful District Court inquiry into the intent of Judge Boldt's findings than Lummi's strict

interpretation argument would allow. As in *Upper Skagit* and *Muckleshoot*, this Court should reject Lummi's absolutist argument that Judge Boldt's use of the phrase "marine areas of Northern Puget Sound" as part of Lummi U&A must necessarily include the secluded waters of Region 2E to the east of Whidbey Island. Here, the District Court properly analyzed the evidence presented to and relied on by Judge Boldt in determining that Judge Boldt did not intend to include the waters of Region 2E in Lummi U&A.

C. This Court Has Repeatedly Found Judge Boldt's Description of Lummi U&A and Specifically the Reference to "Marine Areas of Northern Puget Sound" Ambiguous.

Lummi's argument ignores the numerous prior cases, including decisions of this Court, that find Judge Boldt's determination of Lummi's U&A ambiguous and that reject Lummi's strict interpretation of Finding of Fact 46. *See United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (noting "all parties agree that Finding of Fact 46 is ambiguous because it does not clearly include or exclude the disputed waters" to the west of Whidbey Island, despite the finding's broad reference to "marine areas of Northern Puget Sound"); *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014) (finding ambiguity as to whether waters immediately to the west of Whidbey Island are included within Lummi U&A); *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) (affirming that

the reference to "the marine areas of Northern Puget Sound" in Finding of Fact 46 (re Lummi U&A) was ambiguous and ultimately did not include certain disputed portions of Northern Puget Sound); *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (reference to "present environs of Seattle" in Lummi Finding of Fact 46 was ambiguous).

In *Lower Elwha v. Lummi,* 235 F.3d 443 (9th Cir. 2000) the District Court was asked to determine whether "the marine areas of Northern Puget Sound" (in Finding of Fact 46, describing Lummi U&A) included the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. *Id.* at 446. Lummi, as it does again here, focused on the "plain language" of Finding of Fact 46, arguing "strenuously that the term 'Puget Sound' encompasses 'the Strait of Juan de Fuca.'" *Id.* at 451. But the District Court, and this Court, found the reference to "Northern Puget Sound" ambiguous, "because it does not delineate the western boundary of the Lummi's usual and accustomed grounds and stations." *Id.* at 449. Instead of accepting Lummi's plain text argument, the District Court carefully reviewed the evidence presented to Judge Boldt, with careful attention to those exhibits actually referred to by Judge Boldt in Findings of Fact 45 and 46. *Id.* at 449. This evidence more specifically defined and limited Lummi's usual and accustomed fishing areas and "[n]one of Dr. Lane's testimony identified specific areas as far west and south as the Lummi [claimed]." *Id.* at 451.

Lummi argues that these prior cases focused on areas west of Whidbey Island, not to the east of Whidbey Island. But that makes no difference. In *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015, the Court was asked to revisit the Suquamish U&A, broadly described by Judge Boldt as "marine waters of Puget Sound." A prior case, *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010) had found ambiguity in that finding when assessing whether Suquamish U&A existed in waters to the east of Whidbey Island. The *Tulalip Tribes* case addressed the same U&A finding but involved disputed waters to the west of Whidbey Island instead of waters to the east. This Court determined that the finding of ambiguity in *Upper Skagit Indian Tribe* was the law of the case and continued to apply in the *Tulalip Tribes* proceeding. "It does not matter that the contested areas at issue here are slightly different [than in *Upper Skagit*]; the finding that Judge Boldt intended something different than the plain text of the Suquamish U&A finding remains intact. We adhere to that determination and do not analyze further prong one of the *Muckleshoot* analytical framework." 794 F.3d at 1133.

Here, it is the law of the case that the reference to "marine areas of Northern Puget Sound" as expressed in Finding of Fact 46 is ambiguous and means something other than the plain text's apparent meaning. Lummi's latest effort to broaden its U&A through its absolutist plain text argument must be rejected as

inconsistent with numerous precedents of this Court involving Lummi and other Coast Salish tribes.

D. There is No Evidence of Lummi Treaty-Time Fishing In the Region 2E Waters East of Whidbey Island.

Despite the voluminous body of evidence submitted to Judge Boldt, there is simply no evidence of any Lummi fishing in the waters of Region 2E at treaty time. In its brief, Lummi makes a feeble attempt to argue that "some evidence" exists of Lummi treaty-time fishing in the disputed waters, but upon closer examination, Lummi's argument is simply a speculative and self-serving interpretation of broad and extremely general descriptions of Lummi treaty-time activities in Puget Sound. None of the documents cited by Lummi in its appeal brief offer any evidence whatsoever of Lummi treaty-time fishing in the waters of Region 2E at issue in this case.

First, Lummi argues that Dr. Barbara Lane's report provides "some evidence" of Lummi fishing in Region 2E. It does not. Dr. Lane's report noted Lummi fishing from the Canadian border south to Anacortes, which is on the north side of Fidalgo Island and facing towards Lummi fishing areas in the waters to the north of Fidalgo Island. From the description of Lummi fishing on the north side of Fidalgo Island, Lummi wrongly extrapolates, without any supporting evidence, that Lummi was also fishing in the waters of Region 2E to the south of Fidalgo

Island. Access to the areas to the south of Fidalgo Island is limited and those access points and fishing areas were controlled by other Region 2E tribes at treaty time. *Upper Skagit Indian Tribe*, 590 F.3d 1020, 1024, n. 6 (explaining the "northern exits [from the waters east of Whidbey Island] through Deception Pass and Swinomish Slough are narrow and restricted; both areas were controlled by the Swinomish at treaty times."); *United States v. Washington*, 626 F. Supp. 1405, 1528 (W.D. Wash. 1985) (noting that "[c]onstricted waters like Deception Pass, Swinomish Slough, and Holmes Harbor were likely controlled by the resident groups in whose territories those waters were located"). Dr. Lane's report does not support Lummi here. Lummi's argument, to the extent it is based on Dr. Lane's report, is supported by nothing but speculation and self-serving interpretation and does not provide any evidence of Lummi treaty-time fishing in Region 2E.

Lummi also cites to Dr. Lane's statements regarding Lummi treaty-time travel in Puget Sound to the south. Dr. Lane's descriptions of Lummi travel has been repeatedly analyzed by the District Court and this Court, and has been determined to refer only to the waters west of Whidbey Island – as those waters (west of Whidbey) have been determined to be the pathway by which Lummi people traveled from north to south at treaty-time. *See, e.g., Lummi III*, 876 F.3d at 1010; *Tulalip Tribes*, 794 F.3d at 1135. The fact that Dr. Lane referred generally

to Lummi travel activity in Puget Sound waters provides no evidence that Lummi traveled or more importantly fished in the secluded waters east of Whidbey Island. In sum, Dr. Lane's report provides no evidence of Lummi treaty-time fishing in Region 2E waters east of Whidbey Island.

Other than Dr. Lane's report, which does not provide any evidence of Lummi treaty-time fishing in the waters of Region 2E, Lummi cites to an affidavit which provides a general and non-specific assertion that Lummi fished "at all points in the lower Sound." 4-ER-648-649. But this affidavit also provides no specificity that could serve as evidence of treaty-time Lummi fishing in Region 2E.

With no actual evidence of any treaty-time fishing in the record, Lummi then argues (again, with no supporting evidence) that Lummi people traveled along the east side of Whidbey Island at treaty time and thus must have fished in that area as well. But as discussed in more detail below, these speculative and self-serving assertions are in direct conflict with Lummi's arguments over the past twenty-five years – in which Lummi has consistently argued that the travel path of its people at treaty time was in the waters west of Whidbey Island – not east.

There is simply no evidence whatsoever to support a finding that Lummi U&A includes the waters of Region 2E.

E. Lummi's Argument Is Directly Inconsistent With Its Prior Arguments, and this Court's Prior Findings, That Lummi Traveled on the Western Side of Whidbey Island at Treaty Time.

Over the decades of prior litigation regarding the proper interpretation of the reference to "marine areas of Northern Puget Sound" in Finding of Fact 46, a principal argument of the Lummi is that they, at treaty time, would have frequently traveled on the west side of Whidbey Island when going from their home in the San Juan Islands to the environs of Seattle, and would have fished while doing so. But here, with no evidence of actual treaty-time fishing by Lummi on the eastern side of Whidbey Island, they try to support their U&A claim by arguing that they would have traveled in the secluded and restricted coves and bays east of Whidbey Island at treaty time. Lummi has no evidence to support their argument, which is directly inconsistent with its prior arguments and the prior determinations of this Court. Nor is occasional travel sufficient to support a finding of U&A.

In *Lummi I*, this Court addressed whether the ambiguous description of Lummi U&A in Finding of Fact 46 (i.e., the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle") included Admiralty Inlet, which consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula. *Lummi I*, 235 F.3d 443, 452 (9th Cir. 2000). The Court found that: "Admiralty Inlet would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the

north to the 'present environs of Seattle.'" *Id.* at 452. "If one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station, *see* Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds and stations), *see* Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle'". *Id.* at 452.

In *Lummi III*, 876 F.3d 1004, the Court likewise found, "as a matter of geography," that the waters just west of Whidbey Island and to the north of Admiralty Inlet also were within the scope of Finding of Fact 46. *Id.* at 1009-1010. "The nautical path that we traced in *Lummi I* from the San Juan Islands to Seattle cuts right through the waters at issue [in *Lummi III*]. . . . Indeed, the waters west of Whidbey Island are situated just north of Admiralty Inlet, which is included in the Lummi's U&A, and just south of the waters surrounding the San Juan Islands (such as Haro and Rosario Straits), which are also included in the Lummi's U&A. As we have already observed, '[*Lummi* I's] reasoning suggests that the waters immediately to the west of northern Whidbey Island would be included within the Lummi's U&A.'" *Id.* at 1010. And this Court further found that the use of this route in waters west of Whidbey Island between the San Juan Islands and the environs of Seattle was "more than mere 'occasional and incidental trolling'". *Id.* at 1010.

During multiple decades of litigation involving the scope of Lummi U&A, Lummi consistently argued that geography (that is, the natural route of travel between the northern and southern limits of its U&A) supported its claims to waters of Admiralty Inlet. Lummi had to rely on geography because it lacked evidence of treaty-time fishing in the disputed waters west of Whidbey Island. In its appeal briefing to this Court in *Lummi III*, Lummi repeatedly argued that its natural course of travel at treaty time was west of Whidbey Island. Lummi argued that the waters to the west of Whidbey Island "are directly surrounded by, and are the sole direct connection between, Admiralty Inlet and the waters of the San Juan Islands". 5-ER-892. Lummi stressed to this Court that "excising the waters west of Whidbey Island . . . would leave a gaping hole in the center of the Lummi's fishing territory." 5-ER-914. Lummi's brief included a map with arrows of their treaty-time route along the west side of Whidbey Island and Admiralty Inlet. 5-ER-892, 931, 940.

Here, Lummi again lacks any evidence of treaty-time fishing in the secluded bays, coves, and other marine waters east of Whidbey Island. And here, the geography provides no support to Lummi. As Lummi previously argued, the open waters to the west of Whidbey Island are the logical nautical path for the Lummi between the San Juan Islands and the environs of Seattle. Access to the waters east of Whidbey Island is limited to Deception Pass, Swinomish Channel, and

Possession Sound. As this Court previously noted, the "northern exits [from the waters east of Whidbey Island] through Deception Pass and Swinomish Slough are narrow and restricted; both areas were controlled by the Swinomish at treaty times." *Upper Skagit Indian Tribe*, 590 F.3d 1020, 1024, n. 6. And the waters to the south in Port Susan and Possession Sound, among others, were home waters of the Tulalip Tribes' ancestors. It defies common sense or logic that the Lummi would have regularly and consistently, if ever, traveled through Deception Pass or Swinomish Slough to reach their homeland as opposed to the open waters west of Whidbey Island.

For decades, the Lummi argued to the District Court and this Court that its treaty-time travel and fishing activities were to the west of Whidbey Island – and this Court found support for that claim, as a matter of geography. But now this Court should flatly reject the Lummi's brazen attempt to expand their territory to the east of Whidbey Island. In addition to there being no evidence of actual Lummi fishing or travel in waters east of Whidbey Island at treaty time, the geography and tribal affiliation and control of those waters east of Whidbey Island contradict the Lummi claim here.[3]

[3] Although Tulalip, as explained below, agrees that the S'Klallam have standing to appeal, Tulalip does not agree that the District Court unlawfully broadened the law of the case related to Lummi's likely path of treaty-time travel on the west side of Whidbey Island. This sub-proceeding related only to the interpretation of Lummi

F. All Interested Parties Have Standing to Appeal.

Tulalip agrees with the S'Klallam Tribes that all parties to *U.S. v. Washington* (whether labeled as "interested parties" or not) have standing to fully participate in District Court proceedings and to appeal to this Court when District Court orders impair or threaten to impair their interests. The procedural posture of this long-standing case is undeniably unique. It is also undeniable that the S'Klallam tribes are parties in the *United States v. Washington* litigation and may be directly affected by rulings that alter the law of the case or otherwise adversely affect their treaty rights and interests.

As parties to this case, the S'Klallam are bound by all judgments and decrees issued within it. As the District Court explained in 1993, notwithstanding the procedures for initiating and appearing in sub-proceedings as "interested parties" within this case, "all parties in this case will [nonetheless] be bound by all rulings in the subproceedings whether or not counsel have filed notices of appearance in particular subproceedings." SER-6. Accordingly, any party to *United States v. Washington* has standing to appeal when appealable orders entered in the case, which they will remain bound by, impair their interests.

U&A and the past cases interpreting Lummi U&A. The District Court's findings and conclusions, even if not parsed as carefully as the S'Klallams would like, plainly only relate to the Lummi's claims.

The fact that the District Court developed procedures to promote efficiency in the various sub-proceedings cannot be now used to lessen or restrict the rights that all parties have to fully participate and appeal decisions that adversely affect their interests. Despite the procedures for sub-proceedings and interested parties, this action remains one unitary case. As the District Court explained in 2014, the "interested party" label "was envisioned as and has remained a purely administrative construct, providing procedural regularity in an unusually complex case while in no way curtailing the participatory rights of the parties to it." SER-5. In fact, the "interested party" label was developed as part of the Court's efforts to adapt the *United States v. Washington* case into the new electronic case management system. SER-6. Nothing in the development of sub-proceedings or the interested party label alters the substantive rights of parties to this case, the effect of judgments upon them, or their normal rights to appeal in their role as parties.

The Supreme Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) does not undermine the S'Klallams' standing here. *Arizonans* involved a case where the original party Defendant, the Governor of Arizona, declined to pursue an appeal of a controversial constitutional challenge addressing an English language-only amendment to the Arizona state constitution. Other interest groups attempted to intervene for purposes of appealing the District

Court's order – effectively seeking to "step into the shoes" of the Governor as "concerned bystanders." The Supreme Court expressed "grave doubts" about the standing of these interest groups to pursue an appeal, but ultimately found the case moot because the original plaintiff had left state employment and thus was no longer directly affected by the relevant provision of the Arizona state constitution. The circumstances in *Arizonans* bear no resemblance to the facts here, where the S'Klallams were a party at all times to the proceedings, not simply a concerned bystander attempting to step into the shoes of another party.

Similarly, *Diamond v. Charles*, 476 U.S. 54 (1986) involved a case where the state defendant did not appeal and an interested citizen intervenor attempted to appeal in lieu of the State. Since the citizen intervenor lacked a direct interest, there was not the required case or controversy existing before the appellate court. Here, there is no question that a case or controversy exists on appeal – at minimum between the Lummi and the responding tribes. Thus, no further showing of standing is necessary to support the S'Klallams' appeal.

The Hoh Tribe, in its brief, argues that the S'Klallams lack standing to appeal, but it appears the Hoh's argument is actually an attack on the sub-proceeding system and "interested party" label. But, again, those administrative tools cannot alter or limit fundamental due process rights of parties to the case.

The Hoh complain that they were not granted "intervention" in sub-proceeding 09-01, but that is because the Hoh were already parties – thus a grant of intervention would be redundant and unnecessary. The Hoh further allege that, absent a formal grant of intervention, they were not permitted full participatory rights, but the Court's Order of Clarification (at SER-1) shows that is wrong. In response to the Hoh, the District Court clarified "that 'Interested Parties' to subproceedings under *U.S. v. Washington* may exercise the full scope of participatory rights available to all parties, including through filing motions and memoranda, taking discovery, presenting evidence, and participating in trial." SER-7. And regardless, the Hoh's complaints regarding its actual or perceived level of participation in 09-01 do not relate to the question of whether the S'Klallams have standing to appeal here. Whether adjustments need to be made to the sub-proceeding protocols to ensure full participation by all parties is a separate question – not at issue here. The fact remains that interested parties are parties with full participatory rights, including the right to pursue an appeal.

CONCLUSION

This Court should affirm the District Court in full.

Respectfully submitted this 15th day of July 2022,

MORISSET, SCHLOSSER, JOZWIAK
& SOMERVILLE PC
/s/ *Mason D. Morisset*
Mason D. Morisset
Thane D. Somerville
811 First Avenue, Suite 218
Seattle, WA 98104
Tel: (206) 386-5200
m.morisset@msaj.com
t.somerville@msaj.com
Attorneys for Tulalip Tribes

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-35812; 21-35874

I am the attorney or self-represented party.

This brief contains 6,368 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *s/Mason D. Morisset* **Date** July 15, 2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

On July 15, 2022 an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and service on all counsel of record occurred through the appellate CM/ECF system.

/s/ Mason D. Morisset
Mason D. Morisset