No. 07-35061

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Upper Skagit Indian Tribe,
Plaintiff—Appellee

v.

Suquamish Indian Tribe,
Defendant—Appellant

v.

Swinomish Indian Tribal Community,
Cross-Claimant—Appellee

On Appeal from the United States District Court
Western District of Washington at Seattle
The Honorable Ricardo S. Martinez
(District Court No. 70-9213, Phase I)
(Subproceeding No. 05-3)

BRIEF OF APPELLEE SWINOMISH INDIAN TRIBAL COMMUNITY

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CORPORATE DISCLOSURE STATEMENT

(Fed. R. App. P. 26.1)

Appellee Swinomish Indian Tribal Community is a federally recognized Indian Tribe. It has issued no shares of stock and has no parent company, subsidiary or affiliate that has done so.

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STATEMENT ON ORAL ARGUMENT
Fed. R. App. P. 34(a)(1)

Appellee Swinomish Indian Tribal Community requests that oral argument be held in this appeal. This case involves the examination of a record compiled before the district court in *U.S. v. Washington*, W.D. Wash. No. C70-9213, the case which defined and implemented Indian treaty fishing rights in northwest Washington, from its initiation in 1970 into post-judgment proceedings in 1975. The question before the court is a matter of geography, a difficult matter to grasp from the written page. In addition, questioning by the Court may illuminate dark corners of this extensive record that is well past qualifying for ancient record status, as well as legal doctrines unique to this major case that has spawned so many decisions of this Court.

STATEMENT OF JURISDICTION

Appellee Swinomish Indian Tribal Community (Swinomish) agrees with the jurisdictional statement in Appellant's Brief. We note that appellant's statement does not contain the dates required by Ninth Cir. Rule 28-2.2(c), but we do not contest the timeliness of the appeal or that the appeal was made from a final order. Appellant has not included the Notice of Appeal or the Judgment in the Excerpts of Record, as required by Ninth Cir. Rule 30-1.4(i) and (ii). We have included these in the supplemental excerpts. ER 0351 (Judgment); ER 0352-0355 (Notice of Appeal).[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue in this case is whether the finding concerning appellant Suquamish Indian Tribe's (Suquamish) usual and accustomed fishing places (U&As) made by Judge Boldt in 1975 includes the waters of Skagit Bay and Saratoga Passage (contested waters). *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978) *(Washington II)*; ER 0114. This issue was raised in the request for determination filed by appellee Upper Skagit Indian Tribe (Upper Skagit), ER

[1] "ER" designates the Excerpts of Record filed by the parties in this appeal. The appellee tribes have supplemented the Excerpts of Record per Ninth Cir. Rule 30-1.7. That supplementation continues the consecutive pagination where Suquamish's ER left off. ER designations from 0207 to 0324 are found in Appellee Upper Skagit's Supplemental Excerpts of Record. Swinomish's Supplemental Excerpts of Record begins with ER 0325. We have also included the docket sheet, another mandatory inclusion in the ER omitted by Suquamish. ER 0325-0350.

0001-0007, and the cross-request for determination filed by the Swinomish Indian Tribal Community (Swinomish), ER 0008-0014. The district court ruled that the contested waters were not included in Suquamish U&As. ER 0015-0029. This Court reviews the decision de novo. The determination of this issue involves two sub-issues:

1) Whether the language of the Suquamish U&A finding is ambiguous. The district court ruled that the term 'Puget Sound' included the contested waters. ER 0023, 0028.

2) Whether, based upon a review of the record and proceedings before the court at the time the U&A finding was made, Judge Boldt intended to include the waters of Skagit Bay and Saratoga Passage in Suquamish U&As. The district court ruled that he did not. ER 0028-0029.

STATEMENT OF THE CASE

On April 18, 1975, District Judge George Boldt determined that the Suquamish Indian Tribe (Suquamish) U&As 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.

Washington II, 459 F. Supp. at 1049, ER 0114. This finding is now before the Court for interpretation. The issue is whether the finding includes the marine waters east of Whidbey Island, Shellfish Management Areas 24A and 24C,

commonly known as Skagit Bay and Saratoga Passage, respectively. A map of the marine waters of northwest Washington showing many of the places named in this brief is attached as Appendix 1. ER 0734. A map of the contested waters is attached as Appendix 2. ER 0007.

These proceedings were brought under the continuing jurisdiction of the district court in *U.S. v. Washington*, W.D. Wash. No. 70-9213, Sub-proceeding 05-3. Appellant Suquamish Indian Tribe (Suquamish) precipitated this case by inaugurating fishing in Saratoga Passage in 2004. Suquamish fishers then entered these new waters to fish. ER 0003-0005, 0012. In response the Upper Skagit Indian Tribe (Upper Skagit) filed a request for determination that Suquamish U&As do not include the waters of Skagit Bay and part of Saratoga Passage. ER 0001-0007. Swinomish then filed a cross-request for determination concerning all of Saratoga Passage. ER 0008-0014. Between them, the two requests encompass all of Skagit Bay and Saratoga Passage.

At the conclusion of discovery these three tribes filed cross-motions for summary judgment. ER 0045-0067 (Suquamish); ER 0068-0090 (Upper Skagit); ER 0091-0112 (Swinomish). The district court ruled that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage within Suquamish U&As and granted summary judgment in favor of Upper Skagit and Swinomish. ER 0015-0029, 0351. Suquamish appealed that decision. ER 0352.

STATEMENT OF FACTS

The facts of the case are drawn from the record of the proceedings before Judge Boldt at the time of the decision, and particularly the evidence considered by the judge, supplemented with expert evidence that sheds light on the ordinary meaning of geographic terms at the time the decision was made. See Argument, Section I.B., below.

The evidence before Judge Boldt concerning Suquamish U&As consisted of Dr. Barbara Lane's report on the Suquamish, Ex. USA-73, ER 0257-0311, and her testimony before Judge Boldt on April 9, 1975. ER 0454-0473. Dr. Lane was the expert for the United States on tribal identity, treaty status, and fisheries for all the tribes who intervened in the original proceedings in *U.S. v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975) (*Washington I),* or shortly after that decision. Judge Boldt found Dr. Lane's evidence to be authoritative and reliable. 384 F. Supp. at 350. Dr. Lane's report and testimony were the main evidence, and frequently the only evidence, concerning a tribe's U&As.

The Lane report contains a fairly detailed description of Suquamish fishing in its home territory along Bainbridge Island and the Kitsap Peninsula. ER 0269-0279. The report includes a map showing the location of these fisheries, which is attached as Appendix 3. ER 0280. As that map shows, all of the identified fisheries

are located on the west side of Puget Sound, well south and west of Skagit Bay and Saratoga Passage.

As to evidence of Suquamish's use of more northerly waters, the record contains not a single documented incident of fishing and only one documented incident of travel north. That incident is a trip to the mouth of the Fraser River, clearly made for trading, not fishing, purposes. ER 0273. During her testimony Dr. Lane admitted that she had no documentary evidence of northern travel by Suquamish beyond that single trip. ER 0472-0473. There is no evidence whatever in the Lane report or testimony, or any other evidence before Judge Boldt, that Suquamish ever entered the waters of Skagit Bay or Saratoga Passage, let alone fished there. In fact, there is no mention of these waters at all.

The Suquamish U&A finding was made during supplemental proceedings before Judge Boldt on April 9-11, 1975 concerning the herring fishery. *Washington II,* 459 F. Supp. at 1048, ER 0113. The first half of that hearing concerned the U&As of several tribes. *See* 459 F. Supp. at 1049, ER 0114-0115.

Prefatory to the herring hearing Suquamish filed its proposed herring regulations for the 1975 season. ER 0450-0453. A map attached to these regulations featured prominently in the Suquamish U&A finding and is appended to this brief as Appendix 4. ER 0453.

Dr. Lane, the only witness concerning Suquamish U&A, testified on April 9, 1975. Before she took the stand, however, the attorney for the State of Washington challenged the inclusion of waters north of the Kitsap Peninsula in Suquamish U&As. ER 0454-0455, 0459-0460. In light of these concerns, the attorney for Suquamish questioned Dr. Lane about Suquamish use of the northern waters.

Q Did they travel through the San Juan Islands area?
A Yes.
Q Did they travel to the Fraser River?
A Yes. They did.
Q Now, did they trade in the Fraser River area?
A Yes. They did.
* * *
Q Now, how long would it take to travel from, say, the Suquamish home territory to the islands or to, say, Birch Bay and that area?
A Well, if you are talking about Port Madison into the San Juans, we are talking about a day's trip.
Q So it was easily within the range of the Suquamish people to travel and use it as a resource allocation.
A Yes.
Q And we are talking about being able to travel by canoe.
A By canoe in 1855, yes.
Q Are you prepared to give an opinion on whether or not the Suquamish fished for herring in this part of Puget Sound?
A Which part?
Q Okay. San Juan Islands and off Birch Bay in that area, on their way to the Fraser River.
A I have no evidence of a documentary nature to say that they did so.
* * *
Q Are you prepared to give an opinion to the Court based either upon direct documentation or reasonable inferences based upon the life style of the people involved and other information you have been able to gather on whether or not it is likely that the Suquamish people engaged in non-anadromous fishing generally or herring fishing specifically in the areas which we have been concerned with this morning?

MR SOLOMON [attorney for state] I object to the form of the question.... 'The areas we have been talking about this morning' is not adequate. *The areas I think are critical, and it should be more sharply defined.*

Q *The San Juan Islands, Doctor Lane, and the area off Birch Bay on the way up to the Fraser River.*

A I have no specific documentation which I can cite which says the Suquamish were fishing for herring at any particular location or any other species of fish at any particular location *in those marine waters.* I can give it as my opinion, and I think it's entirely likely that they fished on whatever was available as they were traveling *through those waters* and that they visited *those waters* regularly as a usual and accustomed matter in order to fish and do other things.

ER 0463-0466 (emphasis added). This testimony provided the basis for Suquamish U&As outside the tribe's home territory derived from fishing during travel. The travel described is limited to waters west or north of Whidbey Island, the western boundary of the contested waters in this case. App. 1, ER 0374.

The point was driven home during the cross-examination of Dr. Lane by the State's attorney, who used the map attached to the Suquamish herring regulations to illustrate the geographic extent of the area of Suquamish travel. App. 4, ER 0453.

Q Is it your opinion that the Suquamish Tribe – are you familiar with the regulation that's been filed by the Suquamish Indian Tribe?

A No.

Q This is on file with the Court, or I assume it is. And looking at their map attached here, what has been described as Area Number 2, is this the area, roughly speaking, that Mr. Stay [Suquamish attorney] asked you about, the Strait of Juan de Fuca, Haro Strait, and whatnot?

A I think he has asked me about what is labeled 1 and 2 on that map.

Q Both areas 1 and 2. That's what your comments pertain to?

A Yes, that is correct.

Q Well, I am speaking about the San Juan Islands area, what is marked Number 1 there, and then 2.

* * *

Q Now, your report on the Suquamish notes that they traveled from their regular area up north as far as the Fraser River, which would cover areas 1 and 2 on this.

A Part of Area 1.

Q Part of Area 1, and 2.

ER 0470-0471. As is plain from a glance at this map, Skagit Bay and Saratoga Passage are not included in Area 1 or 2, but are in Area 4. App. 4, ER 0453.

The next day the parties argued their positions on the various U&A matters before the Court. Suquamish's attorney, in arguing for Suquamish U&As north of the Kitsap Peninsula, limited that argument to same areas 1 and 2 identified in Dr. Lane's testimony. The attorney did not mention, directly or indirectly, the contested waters. ER 0477-0480.

After argument Judge Boldt ruled from the bench on the various U&A issues before him. He used the Suquamish herring regulation map, App. 4, ER 0453, to describe the area of Suquamish U&As north of its home territory on the Kitsap Peninsula:

> The court finds that a prima facie showing has been made that travel and fishing of the Suquamish Tribe *through the north Sound areas; that is, areas one and two as designated by the state,* was frequent and also regular, not merely occasional, and the application of the Suquamish for such a ruling is granted.

ER 0188-0189 (emphasis added). The court then directed the attorney for the United States, George Dysart, to draft a proposed order reflecting the decisions

from the bench. Dysart asked a clarifying question concerning Swinomish U&As[2] that confirms Judge Boldt's intent:

> MR. DYSART. The Swinomish would have rights in one and two areas, just as you said for the Suquamish; is that a correct interpretation?
> THE COURT. That is correct.

ER 0191.

In addition to the record before Judge Boldt, each of the parties to this case submitted expert evidence on the common meaning of 'Puget Sound' at the time Judge Boldt made the U&A finding in 1975. Swinomish submitted an expert report by Theresa Trebon, a historian, who gathered representative samples of maps and printed sources relevant to the common meaning of 'Puget Sound' in 1975. ER 0370-0373. Based upon the results of her research Trebon concluded:

> By the spring of 1975, while the term was often loosely used to describe the region as a whole, it was specifically limited to a certain geographic area in the commonly used maps and reference works that were extant at the time and could be located for this report. ... *'Today all the water area from the southern end, north to Admiralty Inlet where the Sound enters the Strait of Juan de Fuca, is called Puget Sound.'*

ER 0371 (quoting ER 0376-0377) (emphasis added). The materials attached to her report bear this out. All but one map depicts 'Puget Sound' as described above,

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[2] Unlike Dr. Lane's Suquamish report, her Swinomish report specifically designates waters outside of areas 1 and 2 on the map as part of Swinomish U&As, including both Skagit Bay and Saratoga Passage. *See* Argument, Sec. II.B., below.

excluding the waters east of Whidbey Island. *See, e.g.*,ER 0374-0375.[3] As to the written materials attached to the report, one embraced the definition above, another defined Puget Sound broadly. ER 0376-0378.

Upper Skagit submitted a similar report from its expert, E. Richard Hart. ER 0379-0382. Hart reviewed a number of historical maps and texts, which showed that the term 'Puget Sound' was commonly used to describe the waters only in the southernmost regions of the inland marine waters of western Washington, far south of the contested waters. ER 0381-0382. Hart concluded that "the documentary record ... indicates that from 1855 to 1974 the typical definition of 'Puget Sound' did not include either Skagit Bay or Saratoga Passage." ER 0382.

In a rebuttal report Suquamish's expert, Dr. Jon Kimerling, a geographer, who reviewed the Trebon and Hart reports,[4] stated his complete agreement with their conclusions:

> I concur with E. Richard Hart[] ... and Teresa L. Trebon[] ... showing how the definition of Puget Sound as a geographic feature expanded over time ... to its modern wider expanse commonly defined as including all marine waters southward from Admiralty Inlet and the southern edge of Saratoga Passage. This was the definition of Puget Sound I learned as a schoolboy ...

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[3] Because of their size, we have not included all of these maps in the ER. We included only the relevant portion of two of these maps, photo-reduced to fit on one page. ER 0374-0375.

[4] Part of Kimerling's report also went beyond rebuttal, and the appellee tribes moved to strike that portion. The district court granted that motion. ER 0023. We discuss here and included in the ER only those portions of the report that were not stricken.

and later as an undergraduate at the University of Washington from 1969-72. I have used this areal extent of Puget Sound on several maps that I have produced showing geographic features in Washington and the Pacific Northwest.

Kimerling Report; ER 0384 (emphasis in original).

STANDARD OF REVIEW

Because the appeal is from a grant of summary judgment, this Court reviews the matter de novo. Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1357 (9th Cir. 1998) (*Muckleshoot I*).

SUMMARY OF ARGUMENT

The Court's approach to resolving the issue in this case has been well settled given its four previous decisions interpreting tribal U&A findings by Judge Boldt. *Muckleshoot I*; *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) (*Muckleshoot II*); *U.S. v Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) (*Muckleshoot III*); and *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000). These cases instruct that the district court must interpret the finding already made, and not alter, modify or amend it. The finding is to be interpreted according to Judge Boldt's intent at the time it was made. To determine intent the court must analyze the language of the U&A finding and examine the record and proceedings before Judge Boldt when the finding was made.

The language of the Suquamish U&A finding is ambiguous because it does not mention Skagit Bay or Saratoga Passage and because it does not establish an

eastern boundary of Suquamish U&A. *Lummi*, 235 F.3d at 449, 451-452. Moreover, the term 'Puget Sound,' even when viewed in isolation from the rest of the U&A language, is ambiguous. The common meaning of the term, then as now, excludes the contested waters, as the experts for all three tribes agreed. Further, Judge Boldt did not adopt or employ a fixed meaning of the term, but instead used it with 'maddening inconsistency,' as Suquamish argued to this Court in *Muckleshoot III*. 'Puget Sound' alone was not used to define the geographic extent of U&As. Judge Boldt employed more precise geographic descriptors for that purpose. The descriptors in the Suquamish U&A finding are at best ambiguous concerning the contested waters, if they do not outright exclude those waters. The ambiguity in the language must be resolved by determining Judge Boldt's intent.

Even if the language itself is not ambiguous, judicial intent must still be examined to determine whether there is a latent ambiguity; that is, whether the judge intended something other than the apparent meaning. *Muckleshoot III*, 235 F.3d at 433.

In this case, Judge Boldt's intent is clear. The contested waters are not in Suquamish's home territory, where specific Suquamish fishing sites are identified by Dr. Lane. There is nothing whatever in the record to indicate that Suquamish ever entered upon the waters of Skagit Bay or Saratoga Passage, let alone fished there, so Judge Boldt could not have intended to include those waters. The

evidence, consisting of Dr. Barbara Lane's report and testimony, does not mention either body of water. The only possible basis for including the contested waters in Suquamish U&As is fishing during Suquamish travel north from their home territory to the Fraser River. Dr. Lane described such a travel area, but that area was defined precisely with reference to areas 1 and 2 on the map attached to the Suquamish herring regulations. App. 4, ER 0453. These waters are west and north of Whidbey Island, the western boundary of the contested waters.

Judge Boldt, in ruling on Suquamish U&As from the bench, used the same designation, areas 1 and 2, to describe Suquamish U&As based on travel, and he ordered that findings be submitted reflecting his decision. Judge Boldt thus clearly intended to exclude Saratoga Passage and Skagit Bay from Suquamish U&As.

The importance of examining the record before Judge Boldt and the language of the U&A finding as a whole is underscored by a comparison between the Swinomish and Suquamish U&A findings, made in the same proceedings on the same day by Judge Boldt. The language of the Swinomish U&A finding includes the waters of Skagit Bay and Saratoga Passage; the language of the Suquamish U&A finding does not. The Lane report on Swinomish is richly detailed in its accounts of Swinomish fishing in the contested waters; Lane's Suquamish report and testimony lack a single instance of Suquamish presence on the contested waters. The only thing the two U&A findings have in common is the

inclusion of the term 'Puget Sound.' That term alone is insufficient to confer U&As in any particular area, as *Lummi* and *Muckleshoot III* demonstrate.

The district court was mistaken on the issue of patent ambiguity, but in the end that does not matter, since whether the task is to resolve a patent ambiguity or to search of a latent ambiguity, the ambiguity is to be resolved by determining judicial intent. The district court correctly analyzed the record and determined Judge Boldt's intent. Judge Boldt did not include the contested waters within Suauamish U&As.

ARGUMENT

I. THE NINTH CIRCUIT HAS ESTABLISHED THE LAW GOVERNING INTERPRETATION OF DISTRICT COURT U&A FINDINGS.

A. U&As Delimit the Geographical Areas in Which Each Treaty Tribe May Fish.

The five Stevens treaties involved in *U.S. v. Washington,* W.D. Wash. No. 70-9213, secured off-reservation fishing rights for the signatory tribes at "all usual and accustomed grounds and stations," *Washington I,* 384 F. Supp. at 406. A treaty tribe's right to fish is confined to the area of its U&As. *Id* at 402. Suquamish, Upper Skagit, and Swinomish all have treaty fishing rights secured by one of the Stevens treaties, the Treaty of Point Elliott, 12 Stat. 927. *Washington I,* 384 F. Supp. at 379 (Upper Skagit); *Washington II,* 459 F. Supp. at 1039-1041 (Swinomish and Suquamish).

District Judge George Boldt, who presided over *U.S. v. Washington* in its formative years, made U&A findings in 1974 and 1975 concerning all but two of the 21 tribes now party to *U.S. v. Washington*. *Washington I*, 384 F.2d at 359-382; *Washington II*, 459 F. Supp. at 1048-1049, 1058. He described the geographical extent of U&As by "designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs." *Id.* at 402. Tribal U&As "cannot vary with the species of fish" and so are the same for all tribal fishing activities. *U.S. v. Washington*, 873 F. Supp. 1422, 1431 (W.D. Wash. 1994), *aff'd* 157 F.3d 630, 644 (9th Cir. 1998).

While Judge Boldt described U&As as including "every fishing location where members of a tribe fished from time to time at and before treaty times," *id.* at 332, the treaties required that these locations be "usual and accustomed." U&As do not include areas where fishing was "occasional or incidental." *Id.* at 356. Thus trolling during travel that was occasional and incidental did not create U&As for the traveling tribe in the area traversed. *Id.* at 353. District Judge Craig later elaborated on this point:

> Open 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 usual and accustomed fishing grounds of that tribe within the meaning of the Stevens treaties.

U.S. v. Washington, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985). This Court likewise has observed that to give rise to U&As the fishing by the tribe must have

occurred "with regularity" rather than on an "isolated or infrequent" basis. *Muckleshoot III,* 235 F.3d at 434.

B. The Legal Parameters for Interpretation of U&A Findings are Well Established.

This Court addressed the interpretation of the geographic extent of U&A findings on four occasions: *Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (*Muckleshoot I)*; *Muckleshoot Indian Tribe v. Lummi Indian Nation,* 234 F.3d 1099 (9th Cir. 2000) (*Muckleshoot II*); *U.S. v Muckleshoot Indian Tribe,* 235 F.3d 429 (9th Cir. 2000) (*Muckleshoot III)*; and *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000). Together, these cases establish the following legal parameters that apply to this case:

1) The meaning of a U&A finding is determined by the intent of the judge at the time the decision was made. *Muckleshoot I,* 141 F.3d at 1359; *Muckleshoot II,* 234 F.3d at 1100; *Lummi,* 235 F.3d at 452.

2) The judge's intent is to be determined from examination of the record of the proceedings before the judge at the time of the decision, and particularly the evidence considered by the judge. The Court may also consider evidence that would help shed light on the meaning of geographic terms at the time the decision was made. *Muckleshoot I* at 1360; *Muckleshoot II* at 1100-01; *Lummi* at 452.

3) A textual, or patent, ambiguity is not a prerequisite for conducting an inquiry into the judge's intent. "[A]n analysis of the decision is necessary, whether

the text is unambiguous or not, in order to understand [the U&A finding] in light of the facts of the case." *Muckleshoot III* at 433. *Accord, Muckleshoot I* at 1359. (court is to consider whether the U&A finding "is ambiguous or that the court intended something other than its apparent meaning") (emphasis added).

4) The district court cannot modify, alter, or supplement the U&A finding, and is not to consider new evidence or additional research, except as identified in 2) above. *Muckleshoot I* at 1360.

II. JUDGE BOLDT DID NOT INTEND TO INCLUDE THE CONTESTED WATERS WITHIN SUQUAMISH U&A.

A. Judge Boldt's Intent is Clear from the Record in This Case.

Judge Boldt's intent as to the geographic extent of the Suquamish U&A finding is clear in this case: the waters of Skagit Bay or Saratoga Passage are not included. The district court correctly analyzed the issue based upon the record before Judge Boldt at the time the U&A finding was made. It correctly determined that that there was no evidence before Judge Boldt to support Suquamish U&As in the contested waters and that Judge Boldt did not intend to include them. ER 0023-0028. The decision closely tracks this Court's analysis in *Muckleshoot III*, where the Court held that a finding describing U&A "in the saltwater of Puget

Sound" was limited to Elliott Bay[5] because "there is no evidence in the record before Judge Boldt that supports a [saltwater] U&A beyond Elliott Bay." 235 F.3d at 433-434 (insertion is the Court's).

The issue of intent is the primary focus of the brief filed by Upper Skagit. Swinomish adopts by reference the Argument portion of Upper Skagit's brief. Fed. R. App. P. 28(i). We will not repeat that argument here, but write separately to emphasize that it is clear from the record that the Court intentionally excluded these waters. The contested waters are not included in the Suquamish fishing sites adjacent to its home territory on the Kitsap Peninsula. App. 3, ER 280. There is not even a mention of the contested waters in Dr. Lane's report or testimony. They are not included in U&As based on travel. Dr. Lane testified at the hearing on April 9, 1975:

> Q Now, your report on the Suquamish notes that they traveled from their regular area up north as far as the Fraser River, which would cover areas 1 and 2 on this.
> A Part of Area 1.
> Q Part of Area 1, and 2.

ER 0471. Judge Boldt's decision from the bench on Suquamish U&As on April 10, 1975, tracks Lane's testimony:

> The court finds that a prima facie showing has been made that travel and fishing of the Suquamish Tribe *through the north Sound areas; that is, areas*

[5] Elliott Bay is a small bay on the east side of Puget Sound that is right below the word "SEATTLE". As the map shows, it is a small portion of 'Puget Sound' as it is depicted on the map.

one and two as designated by the state, was frequent and also regular, not merely occasional, and the application of the Suquamish for such a ruling is granted.

ER 0188-0189 (emphasis added). Since Skagit Bay and Saratoga Passage are not in areas 1 and 2 on the map, App. 4, ER 0453, they were excluded from Suquamish U&As. *See* Statement of Facts, above.

B. A Comparison of Swinomish and Suquamish U&A Findings and Records Shows Why Examination of the Record is Crucial in Interpreting U&As.

Suquamish argues that the Court should "reconcile" Judge Boldt's U&A findings for Suquamish and Swinomish, which were made in the same proceedings, by holding that Suquamish U&As must include Skagit Bay and Saratoga Passage because Swinomish U&As include them. Suquamish Brief, p. 26.[6] But neither the language of the two U&A findings nor the records upon which these findings were based support this argument. In fact, a comparison of the two texts and records demonstrates the necessity of considering the record before the court in interpreting U&A findings.

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[6] As Suquamish notes, the district court discussed the Swinomish U&A finding. ER 0020-0021. However, this was in the context of the search for the meaning of 'Puget Sound' only. The district court did not discuss the record before Judge Boldt concerning the Swinomish U&A finding, nor did it question whether the waters contested here are within Swinomish U&A. The argument presented here illustrates the hazard of isolating and focusing on one term used in a U&A description to determine the scope of the U&As.

First, consider the U&A language itself. The Suquamish U&A language does not mention Saratoga Passage or Skagit Bay, or any other geographical feature east of Whidbey Island that could encompass these waters. The Swinomish U&A finding is markedly different:

> The usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island.

459 F. Supp. at 1049; ER 0114-0115.

Suquamish is correct to note that this language does not mention Saratoga Passage and Skagit Bay specifically. Suquamish Brief, p. 27. But that observation is somewhat disingenuous, because Judge Boldt described Swinomish U&As in part by reference to islands, and not by the names of those bodies of water surrounding them. Since Skagit Bay is bounded by named features -- Fidalgo Island, Whidbey Island, Camano Island, and the Skagit River (on the mainland) -- and since Saratoga Passage is between the named features Whidbey Island and Camano Island, it would be absurd to argue that these marine areas are not included in Swinomish U&As. It is like arguing that "the state bordered by British Columbia, Idaho, Oregon, and the Pacific Ocean" is not the State of Washington because it is not specifically named. In contrast, the Suquamish U&A finding does not contain a single geographic descriptor that touches on the contested waters.

Second, consider the home territories of the two tribes described in the evidence before Judge Boldt. The primary evidence with respect to each tribe is a report by Dr. Barbara Lane on the identity, treaty status and fisheries of the tribe. ER 0257-0311 (Suquamish); ER 0387-0449 (Swinomish).[7] Each report describes the territory in which the tribe lived. In the case of Suquamish, that home area is on the Kitsap Peninsula, on the west side of Puget Sound,[8] well south and west of the contested waters. ER 0259, 0278, 0280. *See* App. 3, ER 0280. By contrast, the Swinomish home area extended from Whidbey Island north through the San Juan Islands, and clearly included the contested waters. ER 0388, 0394-0398. And notably, the Swinomish report explained that "constricted waters like Deception Pass, Swinomish Slough, and Holmes Harbor were likely controlled by the resident groups [of Swinomish] in whose territories those waters were located." ER 0415. *See U.S. v. Washington,* 626 F. Supp. 1405, 1528 (W.D. Wash. 1985) (quoting this passage). The waters of Deception Pass and Swinomish Slough open directly into Skagit Bay, as to the waters of Holmes Harbor into Saratoga Passage.

Third, consider the evidence of tribal presence in the contested waters. Here, the situations of the tribes could not be more different. There is no evidence whatever in Lane's Suquamish report, in her testimony before Judge Boldt, or in

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[7] Consideration of the Swinomish report is appropriate because it was presented in the same proceedings in which Suquamish U&A finding was made and was thus part of the record upon which that finding was based.

[8] This area is 'Puget Sound' under any definition.

the proceedings before Judge Boldt, that Suquamish ever entered the waters of Skagit Bay or Saratoga Passage, let alone fished there. *See* Statement of Facts, above. In contrast, evidence of Swinomish presence and fishing grounds in those waters is abundant and detailed, and specifically mentions Skagit Bay and geographic features on or in Saratoga Passage. This is found in both Lane's Swinomish report, ER 0406-0415, and in her testimony before Judge Boldt. ER 0474-0476.

There is also a considerable difference between the ethnographic reports relied on by Dr. Lane and attached to the two reports. In the Suquamish report, the ethnographic materials do not deal with fishing specifically. ER 0284-0303. The only fishing sites mentioned in these materials are located well south and west of the contested waters. App. 3, ER 0280. In contrast, the Swinomish report incorporates two attached ethnographic reports, both of which specifically address Swinomish fishing activities throughout the area described in the Swinomish U&A finding, including Skagit Bay and Saratoga Passage. Snyder report, ER 0432-0439; Suttles report, ER 0444-0449.

This radical difference between the evidence regarding the two tribes clearly illustrates the necessity for a close review of the record upon which a U&A finding is based to interpret the U&A finding. The fact that 'Puget Sound' is used in both U&A findings tells us nothing particularly useful, let alone conclusive, about the

geographic extent of the two tribes' U&As, whereas the entirety of the U&A language and the record together reveal the judicial intent to include the contested waters in the case of Swinomish, and to exclude them in the case of Suquamish.

III. WHETHER VIEWED AS AN ISSUE OF PATENT OR LATENT AMBIGUITY, SUQUAMISH U&As DO NOT INCLUDE THE CONTESTED WATERS.

A. The Concept of Ambiguity Includes Both Patent and Latent Ambiguity.

The primary thrust of Suquamish's argument before this Court is that the district court should not have examined Judge Boldt's intent because the term 'Puget Sound' is unambiguous. Suquamish Brf., pp. 9-18. This is the same "largely misdirected" argument considered and rejected by the Court in *Muckleshoot III*, 235 F.3d at 433, and in *Lummi*, 235 F.3d at 449, 451-452.

Suquamish's argument on ambiguity is based upon the false premise that analysis of ambiguity is limited to the language of the U&A finding. This type of ambiguity is called patent ambiguity, which is "[a]n ambiguity that clearly appears on the face of a document, arising from the language itself." *Black's Law Dictionary* (7th ed. 1999) 80. But there is also latent ambiguity, which "does not readily appear in the language of a document but instead arises from a collateral matter when the document's terms are applied or executed." *Id.*

The district court recognized the two types of ambiguity. ER 0017-0018. It established a two-part analytical procedure for addressing this case. ER 0016-0017.

The court first considered patent ambiguity, and focused on the term 'Puget Sound.' It then addressed the issue of latent ambiguity: "whether Judge Boldt intended something other than the apparent meaning." ER 0017.

The district court correctly decided the case at the second step, applying *Muckleshoot III* and the other U&A cases of this Court to determine that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in Suquamish U&As. ER 0023-0028. This alone is a sufficient ground for affirmance. However, the language of the U&A finding is ambiguous, so there is a patent ambiguity in this case as well. This Court is not limited to the district court's rationale, *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006), and may affirm on any ground supported in the record. *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1180 (9th Cir. 2006). We therefore argue the issue of patent ambiguity as an alternative ground for affirmance.

B. The U&A Finding is Ambiguous on its Face (Patent Ambiguity).

The district court's analysis of patent ambiguity is faulty in two respects: 1) it confined the patent ambiguity analysis to the term 'Puget Sound;' and 2) it concluded that 'Puget Sound' unambiguously included the contested waters. ER 0023. Suquamish argues that the district court was correct on these two points, and that it should have ended its analysis there, without considering judicial intent.

Suquamish Brief, p. 6. However, both the Suquamish U&A finding as a whole and the term 'Puget Sound' are ambiguous, as Swinomish demonstrates below.

1. The Language of the U&A Finding is Ambiguous.

We begin the analysis of patent ambiguity with the language of the U&A finding itself. This is not a case like *Muckleshoot III*, where the only geographic descriptor in the U&A finding at issue is 'Puget Sound.' 235 F.3d at 432. The geographic scope of the Suquamish U&As is described as:

> 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.

Washington II, 459 F. Supp. at 1049, ER 0114. Regardless of what 'Puget Sound' means, it is immediately apparent that the U&A language, addressing only "this portion" of Puget Sound, does not purport to encompass the whole of Puget Sound. The geographic extent of the U&As will perforce be described in the other words of the finding. The U&A language, taken as a whole, is ambiguous for several reasons.

First, 'Saratoga Passage' and 'Skagit Bay' are not mentioned in the language. These are distinct, isolated bodies of water. *See* maps, Apps. 1and 2, ER 0374, 0007. The U&A language on its face therefore cannot be said to include these waters. The lack of inclusion in the U&A language of a specific body of water was sufficient to establish patent ambiguity in *Lummi*. The U&A language

at issue in that case did not specifically mention Admiralty Inlet, the Strait of Juan de Fuca, or Hood Canal, and this Court found the language ambiguous concerning those bodies of water on that basis. 235 F.3d at 451-452.

Second, the term 'Puget Sound' cannot include all inland marine waters north of the tip of Vashon Island, since Hood Canal is listed separately.

Third, all of the specific geographic descriptors mentioned – Vashon Island, [mouth of the] Fraser River, Haro and Rosario Straits, Hood Canal, streams on the west side – are west of the contested waters, and in fact west of Whidbey Island, which forms the western boundary of the contested waters. Given that the contested waters are isolated, distinct geographic features east of the areas specifically named in the U&A finding, and bounded by Whidbey Island, the language certainly cannot be said to unambiguously include those waters; if anything, it appears to exclude them. In fact, this lack of delineation of an eastern boundary of the U&A is reason enough to conclude that the language is ambiguous. In *Lummi,* 235 F.3d at 449, this Court held that the Lummi U&A finding "is ambiguous because it does not delineate the western boundary" of the U&A. The result should be no different here regarding the eastern boundary.

Fourth, the phrase "the streams draining into the western side of this portion of Puget Sound" raise additional questions about the geographic reach of the Suquamish U&A finding. If the phrase refers to the entire area from the tip of

Vashon Island to the Fraser River, as it appears to, then the phrase includes streams on Vancouver Island in Canada, beyond the treaty area and the jurisdiction of the court. For all these reasons, the U&A language is ambiguous on its face.

2. The Varying Ordinary Meanings of 'Puget Sound' Show Ambiguity as to Geographic Extent.

In determining whether a term is ambiguous on its face, this Court should look to the "ordinary, contemporary, common meaning" of the term. *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006). The Court often takes judicial notice of dictionary definitions the common meaning of the words it interprets. *See, e.g., Deegan v. Continental Cas. Co.*, 167 F.3d. 502, 507 (9th Cir. 1999) (interpreting ERISA plan); *Padilla*, 463 F.3d at 1057 (interpreting statute); *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (interpreting statute).

The writer applied this approach using the two reference sources perched on his desk:

> Puget Sound. A deep inlet of the Pacific in W WA extending S from the Strait of Juan de Fuca through Admiralty Inlet.
> *American Heritage College Dictionary* (4th ed. 2004) 1128.

> Puget Sound, an arm of the Pacific Ocean, western Washington State, extending 130 km (80 mi.) from Admiralty Inlet to Olympia, Washington.
> *Encarta Encyclopedia*, http://www.encarta.msn.com/encyclopedia_761563412/Puget_Sound.html

These two definitions clearly exclude the contested waters.[9]

Counterexamples are surely available, but they would only demonstrate that the term is ambiguous in common parlance; dueling definitions are a hallmark of ambiguity. Confusion over the geographic extent of the term led the eminent Washington geographer, Arthur R. Kruckeberg, to assemble three different descriptions of the geographic extent of 'Puget Sound,' throw up his hands, and conclude: "Take your pick. Each of the definitions of the Sound's perimeter has merit." ER 0481.

The ambiguity of the term 'Puget Sound' is confirmed by the opinions of the experts for both sides in this case on the contemporary understanding of 'Puget Sound' when Judge Boldt made his finding in 1975. All three experts in this case, including Suquamish's expert, are in complete agreement that in 1975 the term 'Puget Sound', as a commonly understood geographic feature, did not include Skagit Bay and Saratoga Passage. *See* Statement of Facts, above. This demonstrates that the term that 'Puget Sound' is, at the least, ambiguous, but that the most common usage of the term does not include the contested waters.

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[9]An internet search netted eleven definitions of the term from dictionaries. Five did not describe the geographic extent of 'Puget Sound,' merely defining it as an arm of the Pacific Ocean in northwest Washington. Five used variants of the two definitions above. Only one defined 'Puget Sound' in terms that appear to include Skagit Bay and Saratoga Passage. Website: www.onelook.com. Search: "Puget Sound."

The district court disregarded these experts, preferring other sources for the meaning of the term, such as a definition adopted by a naming board within the U.S. Geological Survey, a definition used in the Washington Administrative Code for fish management purposes, and JX-2a, described in Sec. 5, below. ER 0021-0023. But these are technical documents, not meant to describe the ordinary and common meaning of the term. The focus of the patent ambiguity analysis is on common, ordinary meaning of the term, and that is what the experts addressed. The sources above were not cited in U&A proceedings before Judge Boldt and neither negate the ambiguity created nor or supersede the common meaning of the term, which in its most common usage excludes the contested waters. At best, the documents favored by the district court, when stacked up against the other evidence, show that the term 'Puget Sound' is ambiguous. The task of the district court was to identify an ambiguity, not resolve it by selecting a preferred definition from among the competing choices.

3. Judge Boldt Used the Term 'Puget Sound' with "Maddening Inconsistency."

In determining whether the language of a U&A finding is ambiguous, the court is not confined to an examination of the words themselves or their common meaning. The words must also be read in context "with a view toward their place in the overall ... scheme" of the document. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). *See U.S. v. Oregon*, 470 F.3d 809, 817 (9th Cir.

2006). In the context of this case, Judge Boldt's practices concerning other U&A findings and his usage of the words in other contexts becomes relevant to determining whether there is a patent ambiguity.

As Suquamish has previously argued to this Court, Judge Boldt used the term 'Puget Sound' with "maddening imprecision and inconsistency." ER 0322. Swinomish prepared for the district court a compendium of all of the occasions on which Judge Boldt used the term 'Puget Sound' in reported decisions, in this case and other cases, and that compendium certainly bears out the Suquamish observation. ER 0356-0365.

These collected references show that Judge Boldt used 'Puget Sound' loosely, with varying geographic extent depending on the context. At its broadest, the term seems to extend to all inland marine waters east of the mouth of the Strait of Juan de Fuca. *See, e.g.* 384 F. Supp. at 328, ER 0356. On other occasions, the term was clearly more limited in geographic scope. *See, e.g., Washington I*, 384 F. Supp. at 364-65, 386, 390, 411, ER 0357-0359 (term apparently does not include the Strait of Juan de Fuca); *id.*, 384 F. Supp. at 392-93, ER 0358 (term apparently does not include Straits of Juan de Fuca and Georgia); *Washington II*, 459 F. Supp. at 1049, ER 0359 (term apparently does not include Hood Canal).

This Court has already rejected the expansive usage of 'Puget Sound' that embraces all marine waters of northwest Washington east of the Pacific Ocean. In

Lummi, the Court held that "Judge Boldt did not intend for either the Strait of Juan de Fuca or the mouth of Hood Canal" to be included in 'Northern Puget Sound.' 235 F.3d at 453. *Lummi* cited some of the provisions identified above as instances in which Judge Boldt used the term 'Puget Sound' more restrictively than Suquamish argues. *Id.* at 451-452.

4. Judge Boldt's Other U&A Findings Reveal Ambiguity in the Suquamish U&A Finding.

As a review of all of his U&A findings shows, Judge Boldt almost always used specific geographic descriptors to mark the extent of tribal U&As: straits, canals, islands, rivers, bays, points, harbors, inlets, sounds, ports, and the like. ER 0366 – 0369. The sole exception to that pattern, in which 'Puget Sound' was the only geographic term used to describe the extent of marine U&As, is the exception that proves the rule. The Muckleshoot Tribe's marine U&As are described as "the saltwater of Puget Sound," but this Court limited the U&As to Elliott Bay, a small portion of Puget Sound, because the record before Judge Boldt did not support any other saltwater areas. *Muckleshoot III*, 235 F.3d at 431, 438.

Judge Boldt made clear his intent to include the contested waters in other U&A findings through the use of specific descriptors. As we have seen in Sec. II.B., above, Judge Boldt made the Swinomish and Suquamish U&A findings at the same time. The Swinomish U&As are defined in terms of river, islands, bay and passage that identify waters both east and west of Whidbey Island:

> ...the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island.

Washington II, 459 F. Supp. at 1049; ER 0114-0115. For the reasons set forth in Sec. II.B., this language unambiguously includes the contested waters.

Just a few months later, on the next occasion when Judge Boldt made a U&A finding, he used a metes and bounds description to describe Tulalip U&As, some of which are in the contested waters.

> Beginning at Admiralty Head on Whidbey Island and proceeding south, those waters described as Admiralty Bay and Admiralty Inlet, then southeasterly to include the remainder of Admiralty Inlet including Mutiny and Useless Bay, then northeasterly to include Possession Sound and Port Gardner Bay, then northwesterly to include to include the waters of Port Susan up to a line drawn true west of Kyak Point and Holmes Harbor and Saratoga Passage up to a line drawn true west of Camano on Camano Island.

Washington II, 459 F. Supp. at 1159. Here, 'Saratoga Passage' is specifically mentioned, and a portion of it is included.[10] It is the specific descriptors, and not the term 'Puget Sound,' that are relevant to the issue before the Court here.

5. Judge Boldt Did Not Adopt a Global Meaning of 'Puget Sound.'

Suquamish relies heavily on a single document for its argument that Judge Boldt had adopted a broad definition of 'Puget Sound.' Suquamish Brief, pp. 10-12. This document is Ex. JX-2a, a report prepared by three state biologists

[10] The description does not include Skagit Bay.

commonly known as the "Joint Biological Statement." The district court also relied in part upon JX-2a to conclude that Judge Boldt incorporated its definition of Puget Sound in the findings of fact, and that as a result the contested waters are included in Judge Boldt's conception of 'Puget Sound.' ER 0018.

This conclusion is incorrect for several reasons. First, Judge Boldt incorporated only the "biological, fisheries management, and fisheries harvest facts" contained in JX-2a into the findings of fact. *Washington I*, 384 F. Supp. at 382-83 (FF 164). The definition of 'Puget Sound' was not one of the "biological, fisheries management, and fisheries harvest facts" set forth in JX-2a. The definition was contained in the preface, not the body of the report. ER 0127.

Second, the preface merely states a definitional convention for 'Puget Sound,' for the report and only to the report:

> *As used in this report (except when the context clearly indicates otherwise)* the term 'Puget Sound' *includes* the Strait of Juan de Fuca and all saltwater areas inland therefrom....

ER 0127 (emphasis added). This language unmistakably shows that the definition does not attempt to capture or fix an invariable definition, but only a convention of usage in the report. The parenthetical expression also negates any implication of a broader purpose for the definition. It makes clear that the meaning of the term depends on the context, and indicates that it may mean something different even within the report itself, depending on that context.

Third, the very next page of the report depicts Puget Sound as more narrow in geographic reach than the definition. That page contains a "Base Map of the Case Area." ER 0128. That map, also part of the preface, depicts 'Puget Sound' as a geographical feature on par with the Strait of Georgia and the Strait of Juan de Fuca, while the definition on the previous page purports to subsume them.

Fourth, JX-2a itself is not consistent in its use of the term 'Puget Sound,' as the parenthetical phrase in the definition itself suggests. For example:

> In the case of fall Chinook which enter *the Strait of Juan de Fuca and* Puget Sound net fisheries...
> ER 0385 (emphasis added).

> Seasonal closures have been imposes on the salmon sport fishery in Puget Sound *and the Strait of Juan de Fuca....*"
> ER 0386 (emphasis added).

The same considerations apply to another broad definition of 'Puget Sound' contained in Judge Boldt's Order of September 13, 1975, which begins: "*As used in this Order* the term 'Puget Sound' *when referring to the waters of origin or place of a salmon harvest*, includes ..." ER 0132 (emphasis added). This, too, is a special purpose definition, confined to the order and further limited to the specific context of salmon management. If the term 'Puget Sound' were unambiguous, and if the term encompassed all of the inland marine waters of Washington, this provision in the order would be unnecessary. In fact, such a definition is included precisely <u>because</u> the term is ambiguous or generally means something else.

We concede that, as in the above instance, Judge Boldt sometimes did use the term 'Puget Sound' in contexts where he appeared to have a similarly broad conception in mind, but he frequently employed the term more narrowly, as noted above. *See* Sec. 3. The only generalization that is accurate concerning Judge Boldt's use of the term is Suquamish's observation that he used the term with maddening inconsistency. In fact, even in *Washington I*, the very decision in which Judge Boldt is claimed to have adopted the definition the preface of in JX-2a, he used the term more narrowly and inconsistently so. For example:

> [Makah fishing boats used on the Strait of Juan de Fuca] go as far as fifty miles out to sea, *east to Puget Sound* and south ...
> ER 0357 (emphasis added).
>
> ...offshore areas within the three mile limit, *the Strait of Juan de Fuca and* Puget Sound...
> ER 0358 (emphasis added).
>
> ...to provide an equal take of the Canadian and American commercial fishermen in *the Strait of Juan de Fuca*, Northern Puget Sound *and the Strait of Georgia*...
> ER 0358 (emphasis added).
>
> ...the harvest of pink and sockeye salmon on the *Strait of Juan de Fuca and* northern Puget Sound...
> ER 0359 (emphasis added).

See Lummi, 245 F.3d at 451-452 (employing some of these examples to show ambiguity and negate broad interpretation of 'Puget Sound').

In addition, Judge Boldt also frequently used the phrase "Puget Sound and related waters" or the like to describe the marine waters of northwestern

Washington east of the Pacific Ocean, clearly indicating he understood 'Puget Sound' to mean something less than all those waters. ER 0359, 0363, 0364. The Suquamish U&A language itself shows a more narrow meaning than JX-2a and its ilk, since the U&A finding refers to "the marine waters of Puget Sound ... and also Hood Canal." Hood Canal is subsumed within the term 'Puget Sound' as defined in JX-2a, so Judge Boldt clearly was not employing that definition when he wrote the Suquamish U&A finding.

Finally, Suquamish's argument based on JX-2a and other similar documents proves too much, since these documents include both the Strait of Juan de Fuca and Hood Canal in their definitions of 'Puget Sound.' In *Lummi*, this Court rejected precisely that same argument and held that "Judge Boldt did not intend for either the Strait of Juan de Fuca or the mouth of Hood Canal" to be included in 'Northern Puget Sound.' 235 F.3d at 543. This holding is Circuit precedent and law of the case, and it precludes a finding that Judge Boldt employed the JX-2a definition of 'Puget Sound.'

At best, the documents relied upon by Suquamish and the district court are indications of usages of 'Puget Sound' which, when stacked up against the U&A language as a whole, the common meaning of the term, and Judge Boldt's other, inconsistent uses of the term, demonstrate that the language of the U&A finding is ambiguous. For all the reasons adduced above, the district court should have held

that the language of the Suquamish U&A finding was ambiguous as to whether the contested waters are included.

6. Suquamish is Estopped from Arguing that 'Puget Sound' is Not Ambiguous.

In prior proceedings, *U.S. v. Washington* Sub-proceeding 97-1, Suquamish joined Swinomish and another tribe in arguing that the term 'Puget Sound,' is ambiguous. Judicial estoppel now bars them from claiming otherwise, for the reasons set forth in the Upper Skagit Brief.

C. An Examination of the Record Before Judge Boldt Reveals a Latent Ambiguity Concerning the Suquamish U&A Finding.

As we have seen above, an ambiguity can arise outside the language under review. Even if the language itself is unambiguous, a latent ambiguity may exist, which "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Black's Law Dictionary* (7th ed. 1999) 80. In other contexts, such as the construction of statutes or contracts, it is well settled that courts must look beyond the language to extrinsic evidence in order to determine whether there is a latent ambiguity. "That is what it means to say that extrinsic evidence is admissible to *demonstrate* an ambiguity. There is no ambiguity on the surface of the document; the ambiguity appears only when extrinsic evidence is considered." *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 621 (7th Cir. 1989) (emphasis in original). "Even if

the [language] is clear and unambiguous on its face, the trial judge must receive relevant extrinsic evidence" to show whether the language means something other than it appears to mean. *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 871 (9th Cir. 1979). *See Bolton v. Construction Laborers' Pension Trust*, 56 F.3d 1055, 1059 n. 2 (9th Cir. 1995); *O'Neill v. U.S.*, 50 F.3d 677, 684 (9th Cir. 1995); *Chickaloon-Moose Creek Native Ass'n. v. Norton*, 360 F.3d 972, 983 (9th Cir. 2004). This familiar concept applies even more broadly to judicial decisions.

> Opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis. Acknowledging this fact, this court held long ago that the 'language of the court must be read in the light of the facts before it.'

Muckleshoot III, 325 F.3d at 433, *quoting Julian Petroleum Co. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927).

Applying these familiar principles, it is clear that the language of the U&A finding must be read in light of the record before the judge at the time the finding was made. *Muckleshoot I*, 141 F.3d at 1359; *Muckleshoot II*, 234 F.3d at 1100; *Lummi*, 235 F.3d at 452. If "the court intended something other than the apparent meaning" of the U&A language, a latent ambiguity is revealed that must be resolved by determining the judge's intent. *Muckleshoot I*, 141 F.3d at 1359. Although *Muckleshoot III* did not use the term latent ambiguity, it employed the same concept:

> [T]he parties' debate over whether the language of [the U&A finding] is unambiguous is largely misdirected, inasmuch as an analysis of the decision is necessary, whether the text is unambiguous or not, in order to understand [the U&A finding] 'in light of the facts of the case.'

Muckleshoot III, 235 F.3d at 433.

Even if there were no patent ambiguity, the analysis cannot end there, as Suquamish would have it, but must proceed to the question of whether there is a latent ambiguity that shows that the court intended something other than the language would suggest. The district court correctly conducted the requisite analysis of the record before Judge Boldt, ER 0023-0028, and concluded that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in Suquamish U&As because there was no evidence to support such a finding. ER 0028-0029. *See* Sec. II.A., above; Upper Skagit Brief. The district courts approach and conclusion accord with Circuit law and the general legal concept of latent ambiguity.

CONCLUSION

The language of the Suquamish U&A finding is ambiguous. It does not mention Skagit Bay or Saratoga Passage and does not describe an eastern boundary. The term 'Puget Sound,' in its ordinary, common meaning, does not include these waters. Judge Boldt did not adopt a definition of the term and used the term with maddening inconsistency. Suquamish is estopped to argue otherwise.

Even if the U&A language were not ambiguous, a review of the record before Judge Boldt reveals a latent ambiguity. There is no evidence in the record upon which to base the inclusion of the contested waters in Suquamish U&As. Moreover, because these waters are not in areas 1 and 2 of the map used by Barbara Lane – who was the sole source of evidence in the Suquamish U&A proceedings – in her testimony, and because Judge Boldt described Suquamish U&As based on travel by using the same map, the record indicates an affirmative intent to exclude these waters. Judge Boldt could not have intended to include Skagit Bay and Saratoga Passages based on the record, and the record shows he affirmatively intended to exclude them. The district court correctly analyzed this issue based on the record before Judge Boldt. It should be affirmed by this Court.

Respectfully submitted on June 18, 2007.

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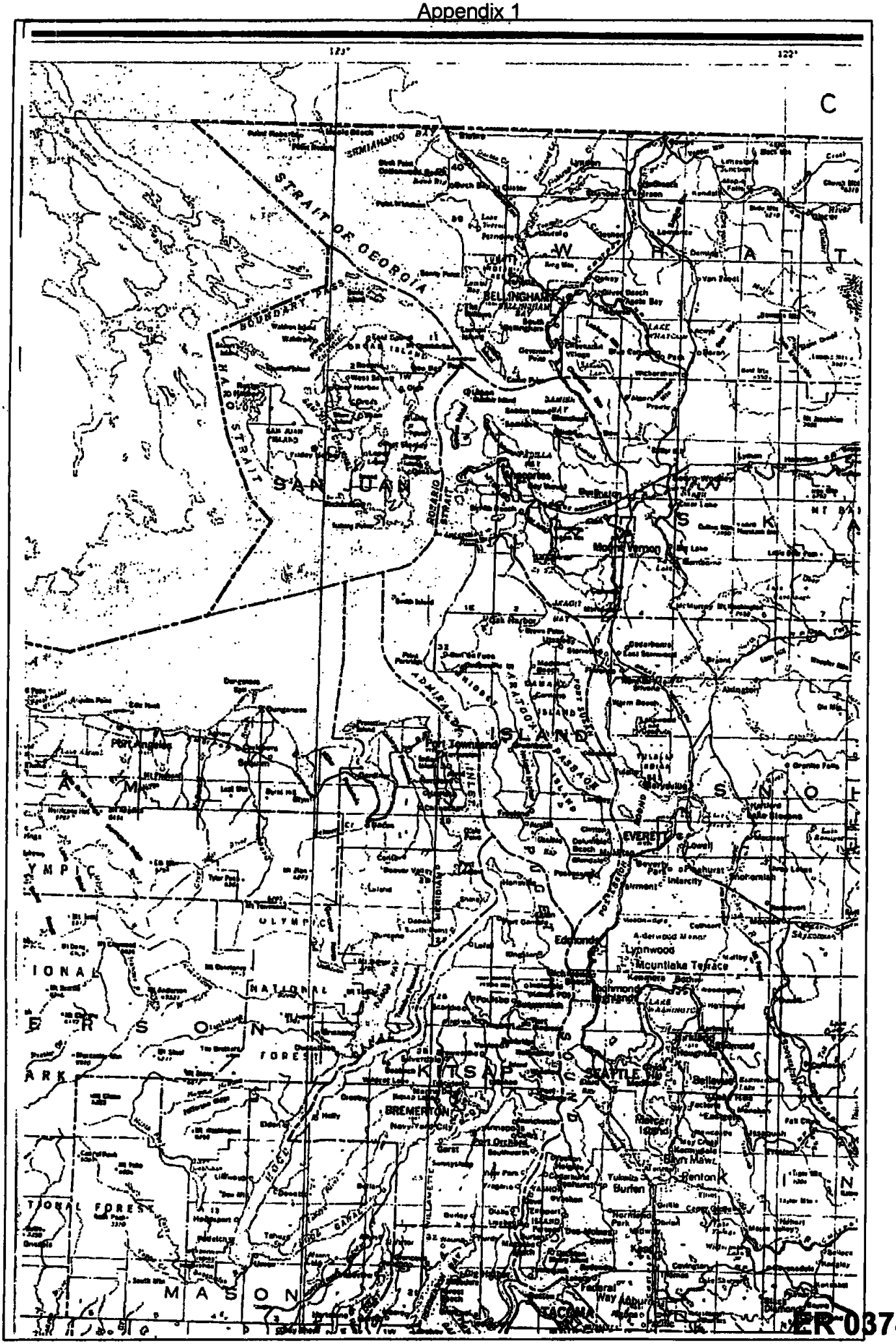
APPENDIX

Maps from Excerpts of Record

1. Map of Northwest Washington, ER 0374
2. Map of contested waters, ER 0007
3. Map of Suquamish fishing sites, ER 0280
4. Map of herring fishing areas, ER 0453

Appendix 1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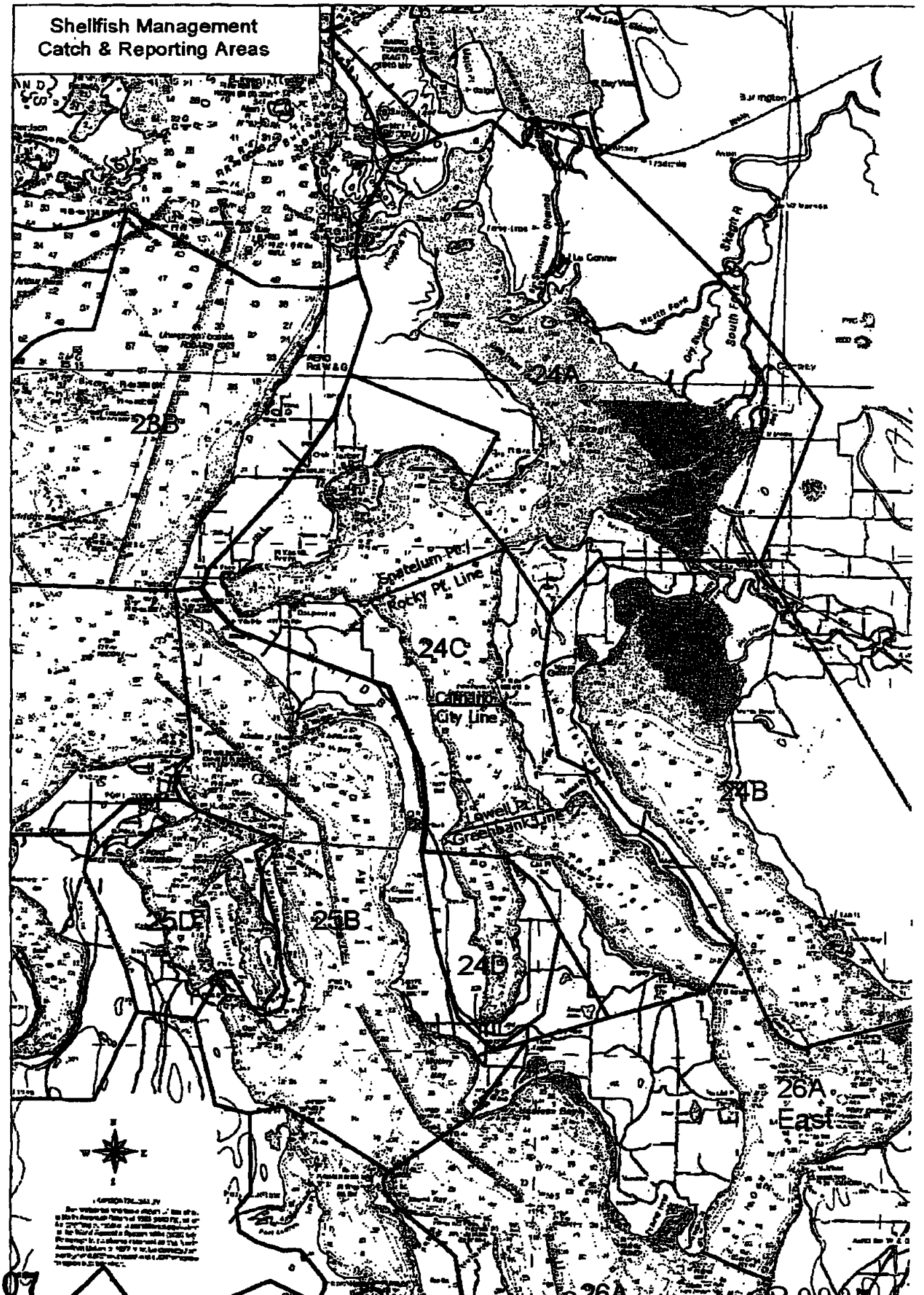
HARO STRAIT
BOUNDARY PASS
SAN JUAN
ISLAND
ADMIRALTY INLET
PUGET SOUND
Port Angeles
Port Townsend
BELLINGHAM
Mount Vernon
EVERETT
Edmonds
Lynnwood
Mountlake Terrace
SEATTLE
Bellevue
Renton
Burien
Federal Way
TACOMA
BREMERTON
KITSAP
MASON
OLYMPIC
NATIONAL
FOREST



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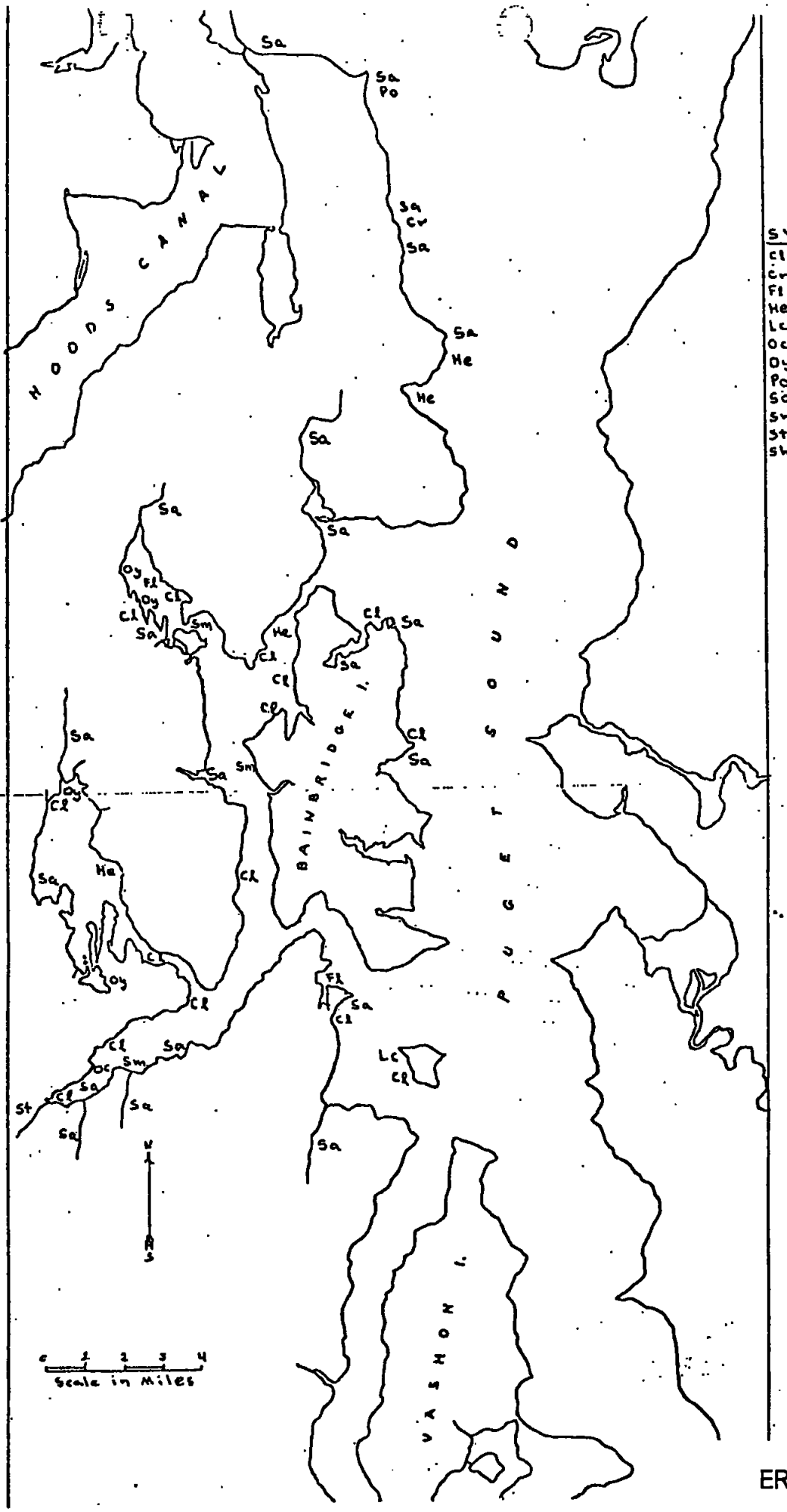
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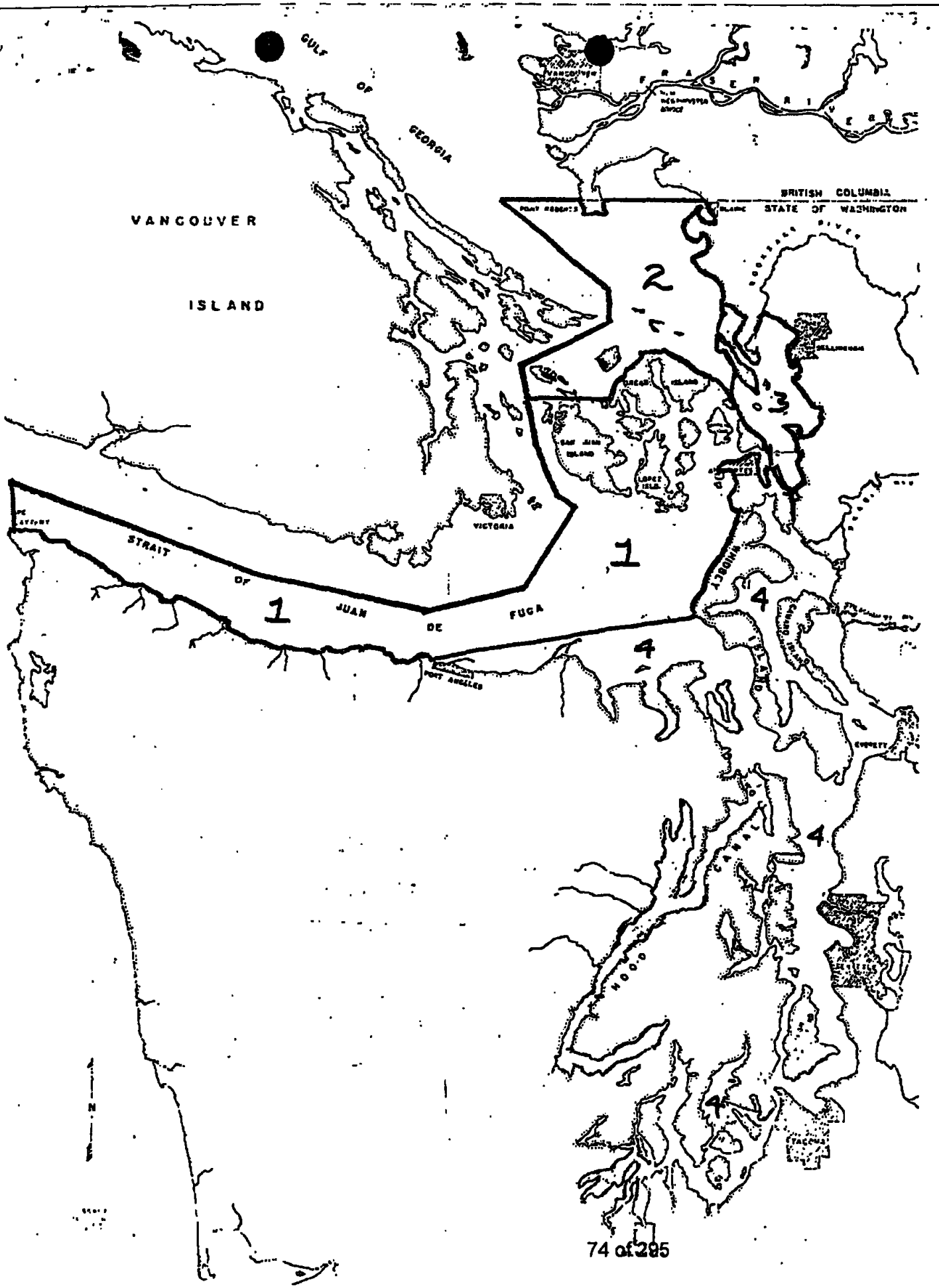
HOOD CANAL
BAINBRIDGE I.
PUGET SOUND
VASHON I.
SYMBOL KEY
Cl Clams
Cr Crabs
Fl Flounder
He Herring
Lc Ling Cod
Oc Octopus
Oy Oysters
Po Porpoise
Sa Salmon
Sm Smelt
St Steelhead
Sh Shrimp
Scale in Miles
0 1 2 3 4


GULF
OF
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee Swinomish Indian Tribal Community states that the following cases related to this case are pending in this Court:

United States of America, et al. and The Tulalip Tribes, Plaintiff-Appellant, v. State of Washington, et al., Defendants, and Suquamish Tribe, Defendant-Appellee, Ninth Circuit Appeal No. 06-35185, and *United States of America, et al., Plaintiffs v. State of Washington, et al., Defendants, and Suquamish Indian Tribe, Defendant-Appellee, Lummi Nation, Real-Party-in-Interest/Appellant*, Ninth Circuit Appeal No. 06-35241. Both cases are appeals of the district court decision in *U.S. v. Washington* Subp. 05-4, a sub-proceeding that involved interpretation of the Suquamish U&A finding. These appeals do not involve that issue directly, since the case was dismissed on procedural grounds.

CERTIFICATE OF COMPLIANCE

Fed. R. App. P. 32(a)(7)(C)

I hereby certify that:

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,624 words, (excluding the exempted parts of the brief) according to the word count of Microsoft Word, the word-processing system used to prepare the brief.

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32((a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word using Times New Roman font with a 14 point typeface.

Dated this 18th day of June, 2007.

James M. Jannetta
Attorney for Swinomish Indian Tribal Community

PROOF OF FILING AND SERVICE

Fed. R. App. P. 25(d)(1)(B) and (2)

I hereby certify that on June 18, 2007, I filed the original and fifteen (15) copies of **Brief of Appellee Swinomish Indian Tribal Community,** along with five (5) copies of **Appellee Swinomish Indian Tribal Community's Supplemental Excerpts of Record** with the Ninth Circuit Court of Appeals by mailing them by First-Class Mail, postage pre-paid, addressed to:

Clerk
United States Court of Appeals
Post Office Box 193939
San Francisco, CA 94119-3939

I further certify that on June 18, 2007, I served two copies of the **Brief** and one copy of the **Supplemental Excerpts of Record** by mailing them by First Class Mail, postage pre-paid, addressed to the following, who are counsel for all parties who filed a Notice of Appearance or a Notice of Participation in *U.S. v. Washington*, W.D. Wash. No. 70-9213, Subp. 05-3:

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I declare the above to be true and correct under penalty of perjury.

Executed this 18th day of June, 2007, at the Swinomish Indian Reservation, Skagit County, Washington.

James M. Jannetta
Attorney for Swinomish Indian Tribal Community