IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-35772

U.S. District Court Cause No. 70-9213 – Phase I
(Subproceeding No. 89-2)

United States of America,

Plaintiff,

Port Gamble S'Klallam Tribe, Lower Elwha Klallam Tribe and Jamestown S'Klallam Tribe

Plaintiffs - Appellants,

v.

Lummi Indian Tribe

Defendants – Appellees,

And

Puyallup Indian Tribe et al.,
Interested parties.

On Appeal from the United States District Court
for the Western District of Washington

OPENING BRIEF OF PORT GAMBLE S'KLALLAM TRIBE, JAMESTOWN S'KLALLAM TRIBE, AND LOWER ELWHA KLALLAM TRIBE

Lauren Rasmussen
Law Offices of Lauren P. Rasmussen
1904 Third Avenue, Suite 1030
Seattle, WA 98107
(206) 623-0900

Stephen H. Suagee
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Road
Port Angeles, WA 98363
(360) 452-8471, Ext. 117

CORPORATE DISCLOSURE STATEMENT

Appellants Port Gamble S'Klallam, Lower Elwha Klallam, and Jamestown S'Klallam Tribes are federally recognized Indian Tribes. They have issued no shares of stock to the public and have no parent company, subsidiary or affiliate that has done so.

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INTRODUCTION

Appellants Port Gamble S'Klallam Tribe, Jamestown S'Klallam Tribe and the Lower Elwha Klallam Tribe (hereinafter "Klallam Tribes" or "Klallams") submit this opening brief. Appellee is the Lummi Indian Nation ("Lummi").

The Klallams appeal the District Court's 2009 Orders dismissing and denying the Klallams' show cause motion seeking enforcement of this Court's order of 2000, which affirmed that Lummi's Usual and Accustomed fishing areas ("U&A") under its 1855 Treaty with the United States does not include the marine waters west of Whidbey Island or the eastern portion of the Strait of Juan de Fuca. *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) ("*U.S. v. Lummi*"). The Klallams' show cause motion asserted that Lummi was authorizing its fishers to fish in those same waters. The District Court (Martinez, J.) dismissed and denied the Klallams' show cause motion on the ground that the boundary of the Lummi U&A in this area has not yet been determined.

This case involving the extent of the Lummi U&A is an old case -- Subproceeding 89-2 of the Indian treaty fishing rights case *United States v. Washington*. The Klallams initiated Subproceeding 89-2 in 1989 by filing a Request for Determination ("RFD") that the Lummi U&A does not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. ER 160-175. In 1990 Lummi filed a Cross-RFD (equivalent to a Cross-Claim) in this same

subproceeding, claiming in pertinent part that its U&A includes the Strait of Juan de Fuca, the waters west of Whidbey Island, Admiralty Inlet, and the mouth of Hood Canal. ER 250-253. In 1998 the District Court (Rothstein, J.) denied Lummi's Cross-RFD in all respects and granted the Klallams' original RFD in all respects. ER 8-16. This Court in 2000 reversed *only* as to Admiralty Inlet, *U.S. v. Lummi*, 235 F.3d at 451-52, thereby necessarily affirming that the waters in dispute in the present appeal (the waters west of Whidbey Island, which constitute the eastern portion of the Strait of Juan de Fuca) have already been determined to be outside the Lummi U&A. In 2009, the District Court erroneously concluded that it must first determine the western boundary of the Lummi U&A in this area and instructed the Klallam to file a new subproceeding. ER 1-5.

STATEMENT OF JURISDICTION

A. Basis For District Court's Jurisdiction

The District Court originally had jurisdiction over the main Treaty fishing rights case, *United States v. Washington*, pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1345, and 1362. Its jurisdiction over Subproceeding 89-2 was pursuant to its continuing jurisdiction in *U.S. v. Washington*, as stated in its order of March 22, 1974, 384 F. Supp. 312, 419 ¶ 25 (W.D. Wash. 1974) (subsequently modified by the District Court on August 23, 1993). In addition, the District Court had jurisdiction over the Klallams' show cause motion under 18 U.S.C. § 401 and

under its retained jurisdiction to enforce its judgments. *Federal Sav. and Loan Ins. Corp. v. Fletcher*, 364 F.3d 1037, 1040 (9th Cir. 2004).

B. Basis For Court of Appeals' Jurisdiction

The Klallams' show cause motion was filed to enforce a final judgment of this Court in Subproceeding 89-2 reported at *U. S. v. Lummi*, 235 F.3d 443 (9th Cir. 2000). No other matters have been pending in this Subproceeding since this Court issued its mandate in 2000, and the District Court's dismissal of the Klallams' show cause motion left that court with no further matters to be determined in this Subproceeding. This case is therefore appealable under 28 U.S.C. § 1291:

> where the contempt proceeding is the sole proceeding before the district court, an order of civil contempt finding a party in contempt of a prior final judgment and imposing sanctions is a final decision under section 1291. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983).

In re Crystal Palace Gambling Hall, Inc. v. Mark Twain Indus., Inc., 817 F.2d 1361, 1363 (9th Cir. 1987).

C. Filing Dates Establish Timeliness of This Appeal

This appeal is timely. The District Court's order dismissing the show cause motion was filed on June 16, 2009 (ER 6-7); motions for reconsideration were timely filed on June 29 and 30, 2009 (ER 50 and 42); and the District Court's Order on Reconsideration was filed on July 14, 2009 (ER 1). The Port Gamble

S'Klallam, Jamestown S'Klallam, and Lower Elwha Klallam Tribes filed their notice of joint appeal on August 12, 2009, ER 37, and therefore appeal is timely under Fed. R. App. Proc. 4(a)(1).

STATEMENT OF THE ISSUE

The essential issue in this appeal is whether the District Court erred when it dismissed the Klallams' show cause motion, filed on April 16, 2009, on the basis of its conclusion that the western boundary of Lummi's usual and accustomed fishing area had not yet been determined by the Ninth Circuit in *U.S. v. Lummi Tribe*.

STATEMENT OF THE CASE

Twenty years ago, the Klallams filed a Request for Determination seeking to enjoin the Lummi from fishing in the Strait of Juan de Fuca, Hood Canal, and Admiralty Inlet. ER 166-175. In 1990 Lummi filed a Cross-RFD in this same subproceeding, claiming in pertinent part that its U&A includes the Strait of Juan de Fuca, the waters west of Whidbey Island, Admiralty Inlet, and the mouth of Hood Canal. ER 250-252. In 1998 the District Court (Rothstein, J.) denied Lummi's Cross-RFD in all respects and granted the Klallams' original RFD in all respects. ER 9-15. On appeal, this Court in 2000 reversed *only* as to Admiralty Inlet, 235 F.3d 443, thereby necessarily affirming the District Court's 1998

determination in all other respects – including the denial of Lummi's Cross-RFD that claimed the waters west of Whidbey Island as part of its U&A.

In the Request for Determination, the Klallams identified two regulations to illustrate the actions by Lummi to which the Klallams objected -- Regulation 89-2 authorizing fishing in the Strait of Juan de Fuca (catch areas listed 6, 7, and 7A), ER 78 and 166-67 and Regulation 89-08, authorizing fisheries in the Strait of Juan de Fuca, Admiralty Inlet and Hood Canal. ER 76 and 167. Recent actions by Lummi authorize fishing in most of the same waters.

On April 16, 2009, the Klallams sought to enforce this Court's determination that Lummi may not fish in these waters by filing a show cause motion in the District Court. ER 254-267. The motion asserted that under the orders issued in Subproceeding 89-2, the Lummi U&A does not include the waters west of Whidbey Island (also frequently referred to, including by Lummi, as the eastern portion of the Strait of Juan de Fuca).

The District Court (Martinez, J.) dismissed and denied the Klallams' show cause motion on the ground that the western boundary of the Lummi U&A had not been specifically determined in Subproceeding 89-2:

> The Court cannot find the Lummi Nation in contempt without first defining the western boundary of the Lummi U&A in this area.

ER 7.

The Klallams have filed this appeal asserting that the District Court erred in concluding that the western boundary of the Lummi U&A has not already been determined by this Court in *United States v. Lummi*, 235 F.3d 443 (2000).

STATEMENT OF FACTS

A. Original Determination of Lummi's Usual and Accustomed Fishing Area

In the original injunction issued in *United States v. Washington* (often referred to as Decision No. 1 or the Boldt Decision), the District Court (Boldt, J.) determined that the Lummi U&A includes the following waters described in Finding of Fact No. 46:

> 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. [Exs. USA-20, p. 39; USA-30, pp. 23-26; Exs. PL-94a, b, c, d, e, t, u, v, w, x; Ex. G-26, pp. II-9 to II-13; Exs. USA-60, USA-61, USA-62, USA-63, USA-64; Tr. 1665, *l.* 4-11, *l.* 23-24]

United States v. Washington, 384 F. Supp. 312, 360-61 (W.D. Wash. 1974).

B. Subproceeding 89-2

Over twenty years ago, the Klallams[1] initiated Subproceeding 89-2 by filing a Request For Determination ("RFD") in accordance with Paragraph 25 of the original Boldt Decision. ER 160-175. An RFD is the form of pleading by which a party invokes the continuing jurisdiction of the District Court in *U.S. v. Washington* and is analogous to a complaint. Under Paragraph 25, a requesting party seeking to enforce or clarify a prior U&A determination must allege that the actions of another party are not "in conformity" with the prior determination. *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974). Accordingly the Requesting Tribes in Subproceeding 89-2 alleged in their RFD that Lummi was not fishing "in conformity with" the Lummi U&A as described in Findings of Fact 43-59 of the Boldt Decision, No. 46, *supra*. Specifically, the RFD asserted that the District Court's 1974 description of Lummi's U&A in Finding of Fact 46 does not include "the Strait of Juan de Fuca, Admiralty Inlet or the mouth of Hood Canal," ER 166, ¶ 11, and alleged that Lummi had issued two fishing regulations purporting to open those waters to treaty fishing by its members:

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[1] The Skokomish Indian Tribe also participated in the original Request For Determination, and hence the parties' filings and the decisions through 2000 often refer to the "Requesting Tribes" or "Four Requesting Tribes." The Skokomish Tribe has not participated in the Klallams' efforts in 2009 to enforce the prior orders of the District Court and the Court.

- Regulation 89-2, which opened a commercial salmon fishery in Washington State Department of Fish and Wildlife ("WDFW") Salmon Catch Areas 6, 7, and 7A.
- Regulation 89-8, which opened a commercial halibut fishery in WDFW Marine Fish and Shellfish Management and Catch Reporting Areas 20A, 20B, 21A, 22A, 22B, 23A and 23B (east of a line from Angeles Point to Race Rocks), 23D, 25A, 25C, 25D, 25E, 26A, and 26B.

ER 75-78; ER 166-67, ER 166-167. *See also* Map depicting challenged Catch Areas and corresponding geographical nomenclature, ER 138; Map of Regulation No. 89-8, ER 139.

C. The First Decision on Summary Judgment (1990)

On August 18, 1989 the Four Requesting Tribes moved for summary judgment, ER 204-222, noting among other things that Lummi was incorrect in arguing that the Strait of Juan de Fuca should be included within the broad definition of its U&A in "Northern Puget Sound." Lummi responded with its own claims and cross motions, claiming a right to fish, in among other areas, WDFW Salmon Catch Area 6, which Lummi referred to as located in the "eastern portion of the Strait of Juan de Fuca." ER 234. Lummi expressly asserted it had the right to fish in the Strait of Juan de Fuca:

> The Lummi Tribe should be awarded summary judgment denying the request for determination as to the Strait of Juan de

> Fuca. The *areas of that strait claimed by the Lummis' [sic], WDF Areas 6 and 6B,* are within the area awarded by Finding of Fact 46 and are not subject to challenge.

ER 230 (emphasis added to note Lummi's concession that the Strait of Juan de Fuca extends at least as far east as WDFW Salmon Catch Areas 6 and 6B); *See also* ER 138.

In February, 1990, the District Court (Coyle, J.) issued its first summary judgment in Subproceeding 89-2, granting summary judgment in favor of the Four Requesting Tribes and rejecting Lummi claims to the Strait of Juan de Fuca:

> The Lummis contend that…[their] usual and accustomed fishing places include… WDF Areas 6, 6B and 6D.

ER 27.

> There is no question in the court's mind from the evidence presented to Judge Boldt that Lummi's usual and accustomed fishing places were not intended to include the Strait of Juan de Fuca.

ER 29.

D. The Lummi Cross-Request for Determination in 1990 and the District Court's Second Decision on Summary Judgment in 1998

Two months after Judge Coyle's decision on summary judgment, on April 11, 1990, Lummi filed a Cross-Request For Determination ("Cross-RFD") as part of the continuing litigation of Subproceeding 89-2, seeking a declaration:

> that the waters of *the Strait of Juan de Fuca* east from the Hoko River to the mouth of Puget Sound, *the waters west*

> *of Whidbey Island, Admiralty Inlet*…are usual and accustomed fishing grounds and stations of the Lummi Indian Tribe.

ER 250 and 252 (emphasis added to show that Lummi initiated a separate claim for the Strait of Juan de Fuca, Admiralty Inlet and the waters west of Whidbey Island).[2]

In 1993, Lummi filed the affidavit of its expert Wayne Suttles in support of its claim that its U&A includes the *eastern portion of the Strait of Juan de Fuca* (that is, the waters west of Whidbey Island):

> It is my opinion that during the mid-19th century the Lummi and Samish people, whose territory included most of the San Juan Islands, customarily and routinely fished in the *eastern Strait of Juan de Fuca, that is, the body of water partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island.*

ER 237.[3]

In 1998, the District Court (Rothstein, J.) issued a second decision on summary judgment, which was expressly intended to determine both the original

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[2] The Klallams would assert that the waters west of Whidbey Island are really part of the Strait of Juan de Fuca geographically. However, for the purposes of this appeal, it does not matter whether they are part of the same waters or separate waters, because Lummi claimed the Strait of Juan de Fuca, Admiralty and the waters west of Whidbey Island and this Court reversed *only* as to Admiralty.

[3] The Requesting Tribes challenged the assertions regarding Lummi fishing areas in Mr. Suttles' affidavit as being conclusory and for failure to contain any supporting facts, but did not challenge his description of the extent of the Strait of Juan de Fuca. ER 248.

RFD of the Four Requesting Tribes and Lummi's 1990 Cross-RFD.[4] ER 11, ll. 23-25. The 1998 decision expressly noted that the Lummi Cross-RFD claimed both the Strait of Juan de Fuca and the waters west of Whidbey Island as part of the Lummi U&A and then denied the Cross-RFD as to every element of the claim. ER 11 and 15. The 1998 decision also determined the original RFD favorably to the Requesting Tribes in all respects, concluding that the Lummi U&A does not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. ER 15.

E. Ninth Circuit Reviews the District Court Orders in 2000 and Affirms Except As to Admiralty Inlet

In 2000, this Court affirmed the District Court's conclusion as to the Strait of Juan de Fuca and the mouth of Hood Canal, *U. S. v. Lummi*, 235 F.3d 443, 451-52, 453 (9th Cir. 2000), and reversed only as to Admiralty Inlet. 235 F.3d at 452-453. This Court specifically indicated that it intended to resolve any ambiguity

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[4] In 1993 briefing, the disputed areas had also been identified as follows:

> Thus for clarity these pleadings classified the disputed areas by the appropriate State fishing area designation, that is for halibut, Washington Department of Fisheries (WDF) Marine Fish-Shellfish Management and Catch Reporting Areas 23A, 23B, 23C, 23D, 25A, 25B, 25C, 25D, 25E, and 26A, also designated in the case of salmon as WDF Commercial Salmon Management and Catch Reporting Areas 6C, 6, 6D, 6B and 9.

ER 249.

regarding the location of the "western boundary" or "westerly limit" of the Lummi U&A:

> The question before Judge Coyle was whether the Lummi's usual and accustomed grounds and stations, as expressed in Finding of Fact 46 of *Decision I*--"the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle"--included the disputed areas. The phrase used by Judge Boldt is ambiguous because it does not delineate the *western boundary* of the Lummi's usual and accustomed grounds and stations. FN6. ...
>
> FN6. Although the Lummi attempt to characterize Findings 45 and 46 as unambiguous, they concede that "[t]here may be some ambiguity about the *westerly limit* of Lummi fishing rights[.]" *See* Lummi Br. at 12 n. 5.

U. S. v. Lummi, 235 F.3d at 449 (2000) (emphasis added). The mandate of the Court of Appeals affirming in part, and reversing in part, was entered on May 30, 2000 (Dkt. No. 11378/144).

F. Lummi Post-2000 Fishing Regulations Once Again Open the Waters West of Whidbey Island (Eastern Strait of Juan de Fuca) to Lummi Treaty Fishing

This Court's decision of 2000 clearly indicated that Lummi has no U&A in the waters west of Whidbey Island. Those waters west of Whidbey Island are outside of Lummi U&A both because Lummi specifically claimed them in its unsuccessful Cross-RFD and because they form part of the eastern Strait of Juan de Fuca. Nevertheless, Lummi in its current fishing regulations has contrived a line running from the westerly opening of Admiralty Inlet (at Point Wilson on the

Olympic Peninsula in the State of Washington) to Trial Island offshore near Victoria, British Columbia, and now asserts it may exercise treaty fishing rights to the north and east of that line all the way to the San Juan Islands on the north and to Whidbey Island on the east. ER 93, 131, and 135.

A selection of these Lummi regulations that the Klallam find objectionable can be found at ER 70-74 (Appendix 1 to Klallams' April, 2009, Show Cause Motion). On April 16, 2009, after various attempts through meetings and correspondence to resolve the issue, the Klallams filed a motion with the District Court seeking an order that Lummi show cause why it should not be held in contempt for authorizing its fishers to engage in treaty fishing in the waters west of Whidbey Island (eastern portion of the Strait of Juan de Fuca). ER 254-267.

G. District Court's Dismissal of the Klallams' 2009 Show Cause Motion Based On Its Belief That Western Boundary of Lummi U&A Was Not Determined in Subproceeding 89-2

The District Court dismissed and denied the Klallams' show cause motion on the ground that the western boundary of the Lummi U&A had not been specifically determined in Subproceeding 89-2:

> The Court cannot find the Lummi Nation in contempt without first defining the western boundary of the Lummi U&A in this area.

ER 7. The District Court directed the Klallams to file a new, *second* subproceeding against Lummi if they desired to determine that boundary. *Id*.

The Klallams disagree with the District Court's conclusion that Subproceeding 89-2 has not decided the issue of Lummi U&A rights in the waters west of Whidbey Island (which is the eastern Strait of Juan de Fuca), and also disagree that the Lummi had any authority to draw its own line across the Strait of Juan de Fuca as a means of relitigating its claim to these waters.

STANDARD OF REVIEW

Although a district court's decision granting or denying a motion for an order holding a party in contempt is reviewed for abuse of discretion, in this case the District Court dismissed the Klallams' show cause motion based on its interpretation of prior court orders in Subproceeding 89-2 (including a decision of this Court). Accordingly, the District Court's 2009 Orders are to be reviewed *de novo*. *See In re Glasply Marine Indus., Inc.*, 971 F.2d 391, 393 (9th Cir. Wash. 1992) ("We review judicial interpretation of orders *de novo*."); *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 908 (7th Cir. 1995) ("The construal of judicial opinions is a form of legal rather than factual determination") (citations omitted).

Here, the District Court's order granting Lummi's motion to dismiss and denying the Klallams' show cause motion and the District Court's order denying the Klallams' motions for reconsideration are both predicated on the District Court's interpretation of this Court's decision in *U. S. v. Lummi*, 235 F.3d 443 (9th

Cir. 2000), and the prior orders of Judge Coyle and Judge Rothstein. That interpretation -- which lies at the core of this appeal -- is subject to *de novo* review.

SUMMARY OF ARGUMENT

The Klallams filed Subproceeding 89-2 to establish that the Lummi U&A as described in the original Boldt Decision of 1974 does not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. ER 166-67. To specify the actions which they found improper, the Klallams identified the fishing regulations which they objected to as overbroad. *Id.* The District Court (Coyle, J.) agreed with the Klallams objections in all respects in a 1990 decision on summary judgment. ER 29-30. But the parties kept litigating and later in 1990, Lummi filed a Cross-RFD expressly claiming that the Strait of Juan de Fuca and the "waters west of Whidbey Island" are part of its U&A. ER 250.

In 1998, the District Court (Rothstein, J.) affirmed the first summary judgment determination that the Lummi U&A does not include the Strait of Juan de Fuca, Admiralty Inlet, or the Strait of Juan de Fuca. ER 15. The 1998 District Court decision also expressly noted that Lummi's Cross-RFD claimed "waters west of Whidbey Island," and that Lummi used different terminology to describe the same area described in the Klallams' original RFD. ER 11. The District Court rejected the Lummi Cross-RFD in all respects. ER 15.

Lummi appealed the 1998 District Court decision to this Court. On appeal Lummi did not argue that the District Court erred in rejecting its Cross-RFD as to the waters west of Whidbey Island and did not argue that there may be a line of demarcation between the Strait of Juan de Fuca and the waters west of Whidbey Island. Instead Lummi argued that the District Court erred by not finding that the entire Strait of Juan de Fuca is part of the Lummi U&A. *U.S. v. Lummi*, 235 F.3d at 451. Lummi also argued that the District Court erred in not finding that Admiralty Inlet and the mouth of Hood Canal are part of the Lummi U&A. *Id.* This Court reversed only as to Admiralty Inlet, and thereby necessarily affirmed the District Court in all other respects, including the determination that the waters west of Whidbey Island are not part of the Lummi U&A. *Id.*

In its 2009 Orders dismissing and denying the Klallams' motion for a show cause order seeking to enforce this Court's decision of 2000, ER 1-7, the District Court (Martinez, J.) misunderstood the effect and meaning of this Court's decision of 2000, and erroneously concluded that the western boundary of the Lummi U&A in the disputed area has not yet been determined.

ARGUMENT:
In 1998, the District Court Determined That the Disputed Waters Are Outside the Lummi U&A, and This Court Affirmed in 2000.

A. The Waters in Dispute Are the Marine Waters West of Whidbey Island

In its Orders dismissing the Klallams' show cause motion, the District Court described the waters presently in dispute as "the marine area immediately west of Whidbey Island and south of the San Juan Islands." ER 7; ER 5. The Klallams essentially agree with that description. Lummi asserts that its U&A includes the disputed waters to the north and east of a line running across the disputed waters from Trial Island, near Victoria, British Columbia, to Point Wilson. ER at 93. The disputed areas are depicted in a map at ER 137.

B. The District Court's 1998 Decision Expressly Rejected Lummi's Cross-Claim That the Waters Presently in Dispute Are Part of Lummi's U&A, and This Court's Decision in 2000 Necessarily Preserved That Determination

The Klallams initiated this subproceeding in March, 1989, with a Request for Determination asserting that:

> The Lummi Tribes [sic] usual and accustomed fishing grounds…set forth in Findings of Fact 45 and 46, 384 F.Supp. 312, 360 (1974)…does not include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of Hood Canal.

ER 166.

In February, 1990, Judge Coyle determined that, according to the evidence presented to Judge Boldt, the Strait of Juan de Fuca, Admiralty Inlet, and the mouth of Hood Canal are outside the Lummi U&A. ER 29-30.

Two months after Judge Coyle's Decision and Order, in April, 1990, Lummi filed a Cross-RFD seeking to expand its U&A into, among other areas, the "waters west of Whidbey Island" and the "waters of the Strait of Juan de Fuca." Overall, Lummi sought a declaration:

> that the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound, *the waters west of Whidbey Island*, Admiralty Inlet…are usual and accustomed fishing grounds and stations of the Lummi Indian Tribe.

ER 252 (emphasis added).

Lummi thus framed its Cross-RFD as though the waters immediately west of Whidbey Island are distinct from the waters of the Strait of Juan de Fuca. But the Cross-RFD did not attempt to identify any line of demarcation between the Strait of Juan de Fuca and the waters west of Whidbey Island. Wherever Lummi may have thought that line is located, it necessarily sought in its Cross-RFD to claim the presently disputed waters as lying within its U&A, either as part of its claim to the Strait of Juan de Fuca or as part of its claim to the waters west of Whidbey Island.

Substantial litigation ensued after the Cross-RFD was filed, subject to repeated delays resulting from the parties' involvement in other subproceedings, as summarized in this Court's decision in *U.S. v. Lummi*, 235 F.3d at 447. During the continued litigation of this Subproceeding, Lummi filed an affidavit of its expert

Wayne Suttles that included the following acknowledgment regarding extent of the Strait of Juan de Fuca and the waters at issue in the present appeal:

> It is my opinion that during the mid-19th century the Lummi and Samish people, whose territory included most of the San Juan Islands, customarily and routinely fished in the *eastern Strait of Juan de Fuca, that is, the body of water partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island.*

ER 237, ¶ 4 (emphasis added). This statement makes no distinction between the eastern portion of the Strait of Juan de Fuca and the "waters west of Whidbey Island" and admits freely that the Strait of Juan de Fuca also includes the waters all the way to Whidbey Island. Moreover, the above-quoted passage is the only opinion offered in the 2-page affidavit; its reference to the "eastern Strait of Juan de Fuca" (expressly repeated in paragraphs 5 and 6 thereof) indicates it was offered specifically in support of Lummi's claim to the waters adjacent or closer to Whidbey Island (essentially the same waters to which Lummi continues to claim rights in 2009). Mr. Suttles' description of the extent of the Strait of Juan de Fuca also essentially coincides with the official description of the U.S. Geological Survey ("USGS"). A map effectively illustrating the USGS description of these waters can be found at ER 81.[5]

[5] Although Lummi asserts that there is "no generally accepted location of a boundary between the Strait of Juan de Fuca and Puget Sound," ER 92, it is nevertheless interesting to note that *both* Lummi and Klallam expert GIS analysts

The District Court (Rothstein, J.) finally resolved the continuing litigation with its 1998 Order denying Lummi's cross-claims in all respects and ruling in favor of the moving Tribes in all respects. ER 15. In the Order the District Court recognized that the original requesting Tribes "…initiated this sub-proceeding seeking a determination that the Lummi's U&A does not include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of Hood Canal." ER 10. The District Court further noted that Lummi filed an amended response and Cross-RFD after Judge Coyle's initial decision in this case, which claimed U&A rights in the Strait of Juan de Fuca and in the "waters west of Whidbey Island:"

> This [Lummi] request sought a declaration that the Lummi U&A included the waters of the *Strait of Juan de Fuca* east from the Hoko River to the mouth of Puget Sound, the *waters west of Whidbey Island*, Admiralty Inlet…. The Lummi's request is worded differently from the Four Tribes' original request. The Four Tribes contend, however, the Lummi's cross-request covers essentially the same areas the Four Tribes challenged in the initial request for determination. The Lummi have not asserted that their cross-request covers a different area from the area covered by the Four Tribes' initial request and by Judge Coyle's decision….The court can discern no difference between the two requests for determination, nor have the Lummi convincingly argued that there is a difference. *Thus this order is intended to resolve both requests for determination.*

ER 11 (footnote omitted, emphasis added).

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have relied on USGS maps for their work in opposing and supporting, respectively, the Klallam show cause motion. *Compare* ER 106 (Dec. of Lummi expert Gabrisch, ¶ 4,) *with* ER 79-80 (Second Dec. of Klallams' expert Burlingame).

The District Court then ruled on *both* the Lummi and the Four Tribes' requests, and *rejected* Lummi as to *every* element of its Cross-claim. ER 15. This means that there was an explicit and substantive ruling not only with respect to all of the Strait of Juan de Fuca but also up to and including the waters west of Whidbey Island – the very waters in dispute in the present appeal. Judge Rothstein did not simply affirm Judge Coyle's 1990 decision that the Lummi U&A does not include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of Hood Canal.[6] She also denied the Lummi Cross-RFD that was filed shortly *after* Judge Coyle made his decision. In crafting its Cross-RFD, Lummi of course had the benefit of knowing what Judge Coyle had just decided and his reasons therefor, and also had control over the choice of geographic terminology to describe the areas it was claiming. And Lummi chose to make a claim for the "waters west of Whidbey Island" as well as the Strait of Juan de Fuca. There was no need in 1998 for the District Court to resolve any question about some supposed line of demarcation between the Strait of Juan de Fuca and the waters west of Whidbey Island in order to determine the western boundary of the Lummi U&A because that court clearly

[6] Lummi's only argument for modifying Judge Coyle's 1990 decision was that an intervening decision of this Court, *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359-60 (9th Cir. 1998), held that it is improper to rely on latter-day testimony to clarify Judge Boldt's intent as to the boundaries of a U&A and that Judge Coyle had in fact relied on such impermissible latter-day testimony. Judge Rothstein carefully reviewed Judge Coyle's decision and concluded he had not relied on latter-day testimony. ER 14.

determined that the Lummi U&A does not include *any* of the marine areas in question.

It was Judge Rothstein's decision that was on appeal to this Court in 2000, 235 F.3d at 447, and this Court affirmed that the Lummi U&A does not include the Strait of Juan de Fuca or the mouth of Hood Canal, and reversed only as to Admiralty Inlet. *Id*. at 452. This Court did not reverse as to any part of the Strait of Juan de Fuca or as to any waters *outside* of Admiralty Inlet that could be described as "waters west of Whidbey Island." Accordingly, this Court in 2000 necessarily affirmed Judge Rothstein's conclusion that the waters west of Whidbey Island – the very waters in dispute in the present appeal – are outside Lummi's U&A as determined by Judge Boldt in Findings of Fact 45 and 46.

Moreover, this Court expressly indicated its understanding that the question to be determined by this Subproceeding involved resolution of the ambiguity as to the western boundary of the Lummi U&A:

> The question before Judge Coyle was whether the Lummi's usual and accustomed grounds and stations, as expressed in Finding of Fact 46 of *Decision I*--"the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle"--included the disputed areas. The phrase used by Judge Boldt is ambiguous because it does not delineate the *western boundary* of the Lummi's usual and accustomed grounds and stations.

Id. at 449 (emphasis added).

Lummi made essentially the same arguments to this Court in 2000 that it made to Judge Rothstein in the District Court – that Judge Boldt intended to include all of the then-disputed areas (the Strait of Juan de Fuca, any waters west of Whidbey Island that may not be part of that Strait, Admiralty Inlet, and the mouth of Hood Canal) in the Lummi U&A and that Judge Coyle had improperly relied on latter-day testimony to determine otherwise. *Id*. But Lummi failed to argue any claim of error specific to the denial of its Cross-RFD claim to the "waters west of Whidbey Island." Nor did Lummi argue that the District Court erred by failing to consider the location of a line of demarcation between the Strait of Juan de Fuca and the waters west of Whidbey Island. Instead, Lummi took what this Court referred to as an "inclusive" approach to the interpretation of the relevant geographical terms by arguing "strenuously that the term 'Puget Sound' encompasses the 'Strait of Juan de Fuca.'" *Id*. at 451. This Court rejected that approach, and in 2009 it is much too late in the game for Lummi to argue that the "waters west of Whidbey Island" are a separate body of water distinct from the Strait of Juan de Fuca that may be included in the Lummi U&A. Such an argument is tantamount to a belated appeal of Judge Rothstein's denial of Lummi's Cross-RFD claim to those waters. Because this Court reversed Judge Rothstein *only* as to Admiralty Inlet, Lummi's U&A does not include any of the *other* disputed waters.

Despite the foregoing determination by Judge Rothstein and this Court, Lummi has recently been issuing regulations authorizing its fishers to fish in the waters west of Whidbey Island. *See* Lummi Regulations 2009-07, 2009-08, 2009-10, 2009-14, and 2009-16, with Klallam objections thereto, at ER 143-159. In defending this practice, Lummi has purported to infer that this Court's 2000 decision to reverse *only* as to Admiralty Inlet somehow justifies fishing in areas *outside* of Admiralty Inlet – *i.e.*, the waters north and east of a line drawn by Lummi that runs from Point Wilson at the mouth of Admiralty Inlet to Trial Island off the coast of Victoria, B.C. ER 92-93. This Court reversed as to Admiralty Inlet (and *only* as to Admiralty Inlet) because it reasoned that Lummi would have "naturally" passed through Admiralty Inlet en route from "Orcas and San Juan Islands" (part of the Lummi U&A) to reach the "environs of Seattle" (also within the Lummi U&A), and that therefore Admiralty Inlet should be considered part of the "marine areas of Northern Puget Sound" (which describes the Lummi U&A in part). 235 F.3d at 452. But Lummi has extended this Court's reasoning to the open marine waters *between* Admiralty Inlet and the San Juan Islands – the very waters in dispute in this case – and has argued that Lummi would have to cross some part of these waters in order to travel from the San Juans to Admiralty Inlet. ER 92-93. *See* also ER 103 (April 27, 2009, Dec. of Lummi Natural Resources Director Elden Hillaire, ¶ 3, stating that in 2000 Lummi "concluded that the [Ninth

Circuit] opinion included Haro Strait and Admiralty Inlet and the waters between the two" as part of the Lummi U&A).[7] But it is too late now for Lummi to act upon this reasoning because it ignores the fact that this Court did not reverse as to any waters other than Admiralty Inlet.[8]

C. Because Lummi Has Repeatedly Admitted That the Disputed Waters Are Part of the Strait of Juan de Fuca, Lummi May Not Now Assert That They Are Part of Its U&A

The Klallams initiated this Subproceeding by identifying specific behavior of Lummi that was not in conformance with the prior decision describing Lummi's

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[7] Assuming *arguendo* that this Court believed Lummi's U&A should include some sort of path from Admiralty Inlet to the San Juan Islands, Lummi has at no time demonstrated why such path should not simply be limited to the waters immediately adjacent to the west coast of Whidbey Island and the south coast of the San Juans. However, Lummi should not be entitled to any pathway because any transitory use of the disputed area is not sufficient to establish a U&A. *See infra* n. 11.

[8] The line of demarcation between Admiralty Inlet and the waters presently in dispute is well-established, and there is no basis for claiming that the waters presently in dispute are somehow part of Admiralty Inlet. Admiralty Inlet is separated from the disputed waters by a straight line running from Point Partridge on the west shore of Whidbey Island to Point Wilson on the Olympic Peninsula near the city of Port Townsend, Washington. In the briefing in the District Court on the Klallams' show cause motion, Lummi has agreed with this method of demarcating Admiralty Inlet from the "waters west of Whidbey Island." ER 92-93 (referring to "Point Wilson on the westerly opening of Admiralty Inlet"). *See* also http://www.merriam-webster.com/dictionary/inlet (defining "inlet" as "a narrow water passage between peninsulas or through a barrier island leading to a bay or lagoon") or the similar definition in *Webster's Third New Int'l Dictionary* 1165 (1966) *and Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100-01 (9th Cir. 2000) (relying in part on dictionary definition of geographic term "environs").

U&A, (ER 166-67), and objecting to Lummi's issuance of regulations 89-2 (salmon) and 89-8 (halibut),[9] which opened the Strait of Juan de Fuca, Admiralty Inlet, and the mouth of Hood Canal to treaty fishing by Lummi tribal members. The regulations expressed the opened areas in terms of WDFW Catch Areas 6, 7 and 23A, 23B, 23D and 25D, which coincides with many of the same waters that Lummi contends are again at issue today. *See* ER 143-159 (2009 Lummi Regulations and Klallam objections thereto).

In its summary judgment brief to Judge Coyle, Lummi readily acknowledged that WDFW Salmon Catch Areas 6 and 6B, which were in dispute at that time, are part of the Strait of Juan de Fuca:

> The Lummi Tribe should be awarded summary judgment denying the request for determination as to the Strait of Juan de Fuca. The areas of that strait claimed by the Lummis' [sic], WDF Areas 6 and 6B, are within the area awarded by Finding of Fact 46 and are not subject to challenge.

[9] These regulations, filed with the RFD, frame the "actions" objected to by the Requesting Tribes that were not "in conformity with" the prior determination of the Lummi U&A by Judge Boldt. It should be noted, however, that at times the parties' use of both Salmon and Shellfish catch area designations, as well as the names of the bodies of water at issue, may have created some misunderstanding regarding the areas in dispute. In addition, the salmon and shellfish catch areas are not co-extensive. The Catch Area map filed in support of the Klallams' 2009 show cause motion, ER 138, should assist in illustrating the disputed areas with more exactness because the map displays the numbering system for both finfish and shellfish catch areas and also contains the names of the bodies of water.

ER 230. In his decision on summary judgment, Judge Coyle in 1990 noted that "[t]he Lummis contend… [their] usual and accustomed fishing places include… WDF Areas 6, 6B and 6D," ER 27, and proceeded to determine that Lummi's U&A does not include the Strait of Juan de Fuca. ER 29. Since Lummi had just conceded in its brief to Judge Coyle that Catch Areas 6 and 6B are part of the Strait of Juan de Fuca, it necessarily follows from Judge Coyle's determination, which was affirmed by Judge Rothstein and this Court, that the Lummi U&A *cannot* now still include Catch Areas 6 and 6B. As can be seen on the map located at ER 137, the northeastern portions of Areas 6 and 6B, which are substantial, are within the area now being opened by Lummi in its current regulations.

In the litigation that continued after Judge Coyle's decision, Lummi filed its Cross-RFD in April, 1990, and then in 1993, the affidavit of its expert Wayne Suttles, quoted at pages 10 and 19 *supra*, which stated that the Strait of Juan de Fuca is bounded "by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island." ER 237. In addition, this area corresponds to the USGS delineation of the Strait of Juan de Fuca. ER 81.

Despite the foregoing admissions, Lummi in 2009 has engaged in self-help and drawn its own line on the map that cuts across the disputed waters from Admiralty Inlet to Trial Island. This new line unilaterally restores to Lummi substantial portions of waters that, as noted above, Lummi has already conceded

are part of the Strait of Juan de Fuca. It is also without basis in the language of the court orders, geography, or Lummi's own admissions, expert testimony and claims.[10]

Lummi may now claim that the line between the Strait of Juan de Fuca and its U&A in Northern Puget Sound is located where it has drawn it, but this would effectively allow Lummi to retract its prior admissions and assertions about the geography of the Strait of Juan de Fuca. By analogy to the concept of judicial estoppel, the Court should not permit Lummi to fish in these areas. Allowing Lummi to switch its position as to what constitutes the Strait of Juan de Fuca, so that it can keep on fishing in areas already determined to be outside of its U&A, would "impose an unfair detriment on the opposing party [the Klallams]." *See Randle v. Crawford*, 578 F.3d 1177, 1183 (9th Cir. 2009) (noting that the factors relevant to judicial estoppel are whether a party's changed position is inconsistent

[10] Lummi cannot now argue that its newly drawn line is set out in a prior court order or that it is a reasonable interpretation of any prior order because it admitted that it drew the line itself, ER 103, and did it without the agreement of the Klallams. Moreover, Lummi had, but chose not to use, a *straightforward* and logical remedy, which would have been to seek clarification of this Court's decision issued in 2000. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (citing *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948) and condemning the practice of devising a scheme "not specifically enjoined" as a means of avoiding the consequences of a court order). Having chosen not to ask this Court to determine whether some sort of line was intended, Lummi cannot now create its own boundary line in order to claim that it has not been "specifically enjoined" from fishing in areas denied to it by Judge Rothstein in 1998 and not restored to it by this Court in 2000.

with an earlier position, whether the first court accepted the earlier position, and whether the party changing position would gain an unfair advantage if change in position is accepted). *See also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001), *citing New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

D. The District Court in 2009 Failed to Recognize That the Disputed Waters Have Already Been Determined to Be Outside Lummi's U&A

In its 2009 Order on Motion to Dismiss, the District Court concluded that Subproceeding 89-2 had never "defined the boundaries of the Strait of Juan de Fuca for the purpose of exclusion from the Lummi U&A," ER 7, and in fact went so far as to state:

> While the marine area immediately west of Whidbey Island and south of the San Juan Islands may be considered part of the Strait of Juan de Fuca, some portion of this area is *necessarily* also within the Lummi U&A, because otherwise there would be no connection between Haro, Rosario, and Georgia Straits to the north and Admiralty Inlet to the south – all areas that are indisputably within the Lummi U&A.

Id. (emphasis added). The Klallams sought reconsideration because, among other reasons, the above quoted statement asserts that some portion of the presently disputed waters is "necessarily" within the Lummi U&A.[11]

[11] Just because certain waters could be used as a route to connect one portion of a U&A with another does not mean that the connecting waters must also be part

On reconsideration, the District Court modified the above quoted passage and set forth the following limitation on its ruling:

> This Court's discussion in the dismissal Order of the disputed area south of the San Juan Islands, and its position relative to the Strait of Juan de Fuca, was intended simply to frame the issues to be decided in the event this dispute is re-filed as a Request for Determination. The Court's statements do not represent findings or conclusions, and the parties are cautioned not to cite them as such. This Court's ruling in the motion to dismiss is limited to a finding that it remains to be determined whether Judge Coyle and the Ninth Circuit Court of Appeals intended to include the disputed area in "the Strait of Juan de Fuca" when they excluded that body of water from the Lummi U&A.

ER 5. It is clear the District Court currently believes that the issue as to the disputed waters has not been decided, and that its resolution depends on determining the boundary between the Strait of Juan de Fuca and the Lummi U&A. For Judge Martinez, the purpose of any new subproceeding would be to decide that question.

But the District Court in 2009 has misapprehended the effect of Judge Rothstein's decision to dismiss the Lummi Cross-RFD and thereby risks replacing

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of the U&A; transit alone does not establish a U&A. *See United States v. Washington*, 384 F. Supp. 312, 353 (Finding 14) ("Marine waters were also used as thoroughfares for travel by Indians who trolled en route. Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians.") (internal exhibit references omitted), *quoted and cited with approval in United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 436 (9th Cir. 2000).

its judgment for that of the this Court and adding terms and reasoning which were not contained in the original mandate.[12] As explained above, Judge Rothstein denied the Cross-RFD with full awareness that it sought a determination that the "waters west of Whidbey Island" and the Strait of Juan de Fuca are part of Lummi's U&A. Judge Martinez erred by focusing only on what Judge Coyle had explicitly decided in 1990 – that Judge Boldt had not intended for the three disputed areas to be included in the Lummi U&A – and by failing to acknowledge what Judge Rothstein had subsequently and explicitly determined by denying Lummi's Cross-RFD that was filed after Judge Coyle's decision.

If Lummi believed this Court's order was ambiguous, the correct approach would have been to move to clarify at the time it was entered rather than simply go fishing in waters denied be the plain language of the prior orders. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (condemning the practice of devising a scheme "not specifically enjoined" as a means of avoiding the consequences of a court order) (citing *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948)).

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[12] It is well established in the overall case *U.S. v. Washington* that the District Court, in reviewing a prior district court decision (often that of Judge Boldt), must give effect to the prior Judge's intent. *U.S. v. Lummi*, 235 F.3d at 339; *Muckleshoot v. Lummi*, 141 F.3d at 1359, *citing*, *U.S. v. Narramore*, 852 F.2d 485, 490 (9th Cir. 1988). But it is far from clear that the District Court may also infer an intent in the decision of this Court of Appeals that is at odds with the plain language of its holding and then deny enforcement of that holding based on the inferred intent.

CONCLUSION

The District Court in 1998 determined that the Lummi U&A does not include the "waters west of Whidbey Island," which are the only waters that are in dispute in the present appeal. This Court's decision of 2000 necessarily affirmed that decision. The District Court's 2009 Orders are incorrect in failing to recognize this. Accordingly, the Klallams respectfully request that this Court vacate the District Court's 2009 Orders and remand for contempt proceedings in Subproceeding 89-2.

RESPECTFULLY submitted this 18th day of December, 2009.

/s/ Lauren P. Rasmussen
Lauren P. Rasmussen, WSBA No. 33256
Law Offices of Lauren P. Rasmussen
1904 Third Avenue, Suite 1030
Seattle, WA 98101
206-623-0900
lauren@rasmussen-law.com

Attorney for Appellants Port Gamble S'Klallam
and Jamestown S'Klallam Tribes

/s/ Stephen H. Suagee
Stephen H. Suagee, WSBA No. 26776
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Road
Port Angeles, WA 98363-8409
360-452-8471, Ext. 117
steve.suagee@elwha.nsn.us

Attorney for Appellant Lower Elwha Klallam Tribe

STATEMENT REGARDING ORAL ARGUMENT

The Klallams request that the Court hold oral argument in this appeal, as the Court would benefit from a discussion of the history of the Subproceeding from which this appeal arises and an explanation of the points raised in this brief, including discussion of the relevant geography. In addition, the District Court has indicated that a new Subproceeding in *U.S. v. Washington* is needed to resolve the issue raised in this appeal, and the Klallams believe this Court should have every opportunity to determine whether such a significant new round of proceedings is truly necessary or whether the issue raised in this appeal has in fact already been decided.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a) (7) (C) and 9th Cir. R. 32-1, the foregoing opening brief is monospaced, has 10.5 or fewer characters per inch, and contains 8,273 words.

/s/ Stephen H. Suagee

STATEMENT OF RELATED CASES

Counsel is aware of the following related cases pending or previously heard in this Court within the meaning of Ninth Circuit Rule 28-2.6.

1. No. 98-35964, *United States v. Lummi*, 235 F.3d 443 (9th Cir. 2000), which is an appeal in Subproceeding 89-2, the same subproceeding as the current contempt motion and order on appeal.

2. No. 07-35061, *Upper Skagit Tribe et. al. v. United States*, 576 F.3d 920 (9th Cir. 2008) which is an appeal from Subproceeding 05-3 of the same treaty fishing rights case as the present appeal, *United States v. Washington*, No. C70-9213, 384 F.Supp. 312 (W.D. Wash. 1974). A petition for rehearing en banc and a motion for reconsideration are pending and the case raises the question of whether transit alone is a proper basis to assert treaty rights in specific areas.

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, I electronically filed the foregoing Opening Brief of Port Gamble S'Klallam Tribe, Jamestown S'Klallam Tribe, and Lower Elwha Klallam Tribe, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons required to be served in this Subproceeding whose names appear on the Master Service List.

In addition, I caused the following persons to be served on December 18, 2009, by placing a true and correct copy of the foregoing Opening Brief in the United States Mail, postage prepaid, at the addresses listed:

John H. Bell
Samuel J. Stiltner
Puyallup Indian Tribe
3009 E. Portland Ave.
Tacoma, WA 98404-4926

Bill Tobin
Bill Tobin, Attorney at Law
P.O. Box 1425
Vashon, WA 98070

Fawn R. Sharp
Quinault Indian Nation
P.O Box 189
Taholah, WA 98587

Seth J. Bersten
Garvey, Schubert & Barer
The Second and Seneca Building
1191 Second Ave.
Seattle, WA 98101

/s/ Stephen H. Suagee