The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 Subproceeding 11-2 REQUESTING TRIBES' MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: July 23, 2012 ORAL ARGUMENT REQUESTED

MOTION

The Jamestown S'Klallam, Lower Elwha Klallam, and Port Gamble S'Klallam Tribes (Requesting Tribes) respectfully ask this Court to find and enter summary judgment that:

A. The Lummi Nation's Usual and Accustomed treaty fishing area does not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island, an area more specifically described as – the marine waters east of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait[1]; and

[1] This area is depicted in the Declaration of Sarah Burlingame (hereinafter "Burlingame Decl." (May 30, 2012), Ex. A.

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B. Includes an order permanently prohibiting the Lummi Nation (Lummi) from issuing regulations or otherwise authorizing its fishers to exercise treaty fishing rights in the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island, as described above, and permanently prohibiting Lummi and its members from exercising treaty fishing rights in these waters; and

C. Includes a declaration that Lummi is barred by the doctrine of res judicata, collateral estoppel, or both, from any further attempt to relitigate its treaty right to fish in the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island, as described above.

MEMORANDUM IN SUPPORT

I. QUESTION PRESENTED

A. **Question:** Have the Ninth Circuit and the District Court already settled that the Lummi Nation's Usual and Accustomed treaty fishing area does not include the eastern portion of the Strait of Juan de Fuca, such that Lummi is now barred from fishing in these waters?

B. **Answer**: Yes. Lummi has had a full and fair opportunity to litigate the question of its treaty fishing rights in these waters and the question has been decided. Therefore res judicata bars further litigation of this question. In 1989, the Requesting Tribes filed a Request for Determination that Lummi's previously adjudicated treaty fishing area does not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. In 1990, Judge Coyle held that none of those waters are within Lummi's U&A as previously determined by Judge Boldt in Decision No. 1. Lummi then filed an Cross-Request in 1990, in which it sought to supplement Judge Boldt's decision by adding the Strait of Juan de Fuca, the waters west of Whidbey Island, and Admiralty Inlet to its U&A. In 1998, Judge Rothstein denied Lummi's claim in its entirety, while also granting the Requesting Tribes' RFD in its entirety, finding that the waters at issue in both requests were the same. On appeal, the Ninth Circuit reversed only as to Admiralty Inlet. Admiralty Inlet, as the Ninth Circuit clearly understood, is a defined body of water that does not overlap with any portion of the Strait of Juan de Fuca, including its eastern-most portion.[2]

[2] Declaration of Lauren Rasmussen (hereinafter "Rasmussen Decl.") (May 31, 2012), Exs. J, K, L, M and F.

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After the Ninth Circuit decision, Lummi seized upon a portion[3] of the reasoning the Court used in finding that Admiralty Inlet is included in Lummi's U&A and unilaterally applied it to the eastern portion of the Strait of Juan de Fuca, thereby effectively awarding itself an area of water that encompasses approximately 310 square miles, this despite the Court having plainly held that none of the Strait is within Lummi's U&A. The Ninth Circuit granted Lummi 111 square miles of water, and Lummi unilaterally interpreted that to mean they are entitled to an additional approximately 310 square miles—thus, all told, Lummi expanded the waters granted to it by nearly a factor of four. Decl. Randall McCoy (May 31, 2012), Ex. A. It was clear to the parties and the courts which waters were in dispute in Subproceeding 89-2, and they plainly included the large body of water Lummi granted to itself after the courts expressly found that Lummi had no right to it. This court has jurisdiction to decide this motion, as set out in the Request for Determination, ¶¶ 4–6. ECF No. 19886 (November 4, 2011).

II. UNDISPUTED FACTS

This section sets out undisputed facts in the form of prior rulings regarding Lummi's U&A and statements of the parties in Subproceeding 89-2, and descriptions of relevant bodies of water from official entities charged with their delineation.

A. The Original U&A Determinations: Lummi

In Decision No. 1, Judge Boldt described Lummi's U&A in pertinent part as follows: "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

[3] Rasmussen Decl. Ex. P.

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Fraser River south to the present environs of Seattle, and particularly Bellingham Bay." *U.S. v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974) (Finding of Fact No. 46).

B. The Original U & A Determinations: Klallam Rights in the Strait of Juan de Fuca

This Court has described the geographic area of Klallam U&A as follows:

> 341. The usual and accustomed fishing grounds of the Port Gamble Band of Klallam Indians include *the waters of the Strait of Juan de Fuca, and all the streams draining into the Strait from the Hoko River east to the mouth of Hood Canal*. In addition, the Port Gamble Klallam Band has usual and accustomed fishing rights on the Sekiu River, but the fishing on this river shall be subject to the control and regulation of the Makah Indian Tribe. Furthermore, the usual and accustomed fishing grounds of the Port Gamble Klallam Band include the waters of the San Juan Islands archipelago and the waters off the west coast of Whidbey Island. . . .

United States v. Washington, 626 F. Supp. 1405, 1442 (W.D. Wash. 1981) (emphasis added).

C. The Official, Federally-Recognized, Geographic Boundaries: Strait of Juan de Fuca

The U.S. Board on Geographic Names is a Federal body created in 1890 and was established by Congress in its present form in 1947 to maintain uniform geographic name usage throughout the Federal Government.[4] Decisions of the Board are binding for all departments and agencies of the Federal Government.[5] Congress has provided that the Board on Geographic names is to create uniformity in geographic nomenclature throughout the federal government and the name promulgated shall be standard for all material published by the Federal Government. Public Law 242-80. The Board "shall decide the standard names and their orthography for official use." *Id*. § 3. The Board has promulgated boundaries for the water bodies at issue in this

[4] http://geonames.usgs.gov/

[5] "An Introduction to the U.S. BGN," available at: http://geonames.usgs.gov/brochures_factsheets/docs/An%20Introduction%20to%20the%20US%20BGN%20%5Bfact%20sheet%20format%5D.pdf

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case. At all times during and after Subproceeding 89-2, the official definition of the Strait of Juan de Fuca has been:

> [A channel that] Extends east from the Pacific Ocean between Vancouver Island, Canada, and the Olympic Peninsula, Washington, to Haro Strait, San Juan Channel, Rosario Strait, and Puget Sound; its Pacific Ocean boundary is formed by a line between Cape Flattery - Tatoosh Island, Washington, and Carmanah Point (Vancouver Island), British Columbia; its north boundary follows the shoreline of Vancouver Island to Gonzales Point, then follows a continuous line east to Seabird Point (Discovery Island), British Columbia; Cattle Point (San Juan Island), Washington; Iceberg Point (Lopez Island); Point Colville (Lopez Island); and then to Rosario Head (Fidalgo Island); the eastern boundary is a continuous line extending south from Rosario Head along Whidbey Island to Point Partridge and south to Point Wilson (Quimper Peninsula); the Washington mainland forms the southern boundary of the strait.

U.S. Geological Survey, Geographic Names Phase I Data Compilation (1976–81), entered Sept. 10, 1979.[6] A geographic depiction of the definition is attached. Burlingame Decl. Ex. A, p. 6.

D. The Official, Federally-Recognized, Geographic Boundaries: Admiralty Inlet

At all times during and after Subproceeding 89-2, the official federal definition of Admiralty Inlet has been: "That part of Puget Sound from Strait of Juan de Fuca to the lines: (1) southernmost point of Double Bluff to the NE point of Foulweather Bluff (2) From NW pt. of Foulweather Bluff to Tala Point, the latter line forms also the northern boundary of Hood's Canal." Board on Geographic Names Decision Card, Admiralty Inlet, dated April 26, 1917.[7]

At all times during and after Subproceeding 89-2, the official federal definition of Puget Sound has been:

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[6] http://geonames.usgs.gov/pls/gnispublic/f?p=132:3:1175831874780941::NO::P3_FID,P3_TITLE:1526614%2CStrait%20of%20Juan%20de%20Fuca

[7] Linked to at: http://geonames.usgs.gov/pls/gnispublic/f?p=132:3:1175831874780941::NO::P3_FID,P3_TITLE:1515733%2CAdmiralty%20Inlet

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> Bay, with numerous channels and branches, extends 144 km (90 mi) S from the Strait of Juan de Fuca to Olympia; the N boundary is formed, at its main entrance, by a line between Point Wilson on the Olympic Peninsula and Partridge on Whidbey Island; at a second entrance, between West Point on Whidbey Island, Deception Island, and Rosario Head on Fidalgo Island; at a third entrance, the S end of Swinomish Channel between Fidalgo Island and McGlinn Island.

U.S. Geological Survey, Geographic Names Phase I Data Compilation (1976–81), entered Sept. 10, 1979.[8]

E. History of the Case: Subproceeding 89-2

1. The Request for Determination (1989)

On March 3, 1989, the Requesting Tribes, along with the Skokomish Tribe, started Subproceeding 89-2 by filing a Request for Determination (RFD) that Lummi's fishing was not in conformity with Findings of Fact 43 through 59 of *Decision I*. *See* Usual and Accustomed Fishing Grounds of the Lummi Tribe Req. for Determination at 1, *United States v. Washington*, Subproceeding 89-2 (W.D. Wash. Mar. 3, 1989) (89-2 RFD), Doc. No. 11209, Rasmussen Decl. Ex. K.[9]

The Four Tribes' RFD expressly requested the Court to preclude Lummi from issuing any regulations opening "the Strait of Juan de Fuca, Admiralty Inlet and Hood Canal to Lummi fishing." *See* 89-2 RFD at 13, Doc. No. 11209, Rasmussen Decl. at p. 282.

2. Judge Coyle's Decision (1990)

In their summary judgment briefing before Judge Coyle, the Requesting Tribes characterized the question before the Court as whether Lummi's U&A includes "areas within the

[8] http://geonames.usgs.gov/pls/gnispublic/f?p=132:3:1175831874780941::NO::P3_FID,P3_TITLE:1507653%2CPuget%20Sound

[9] Unless indicated otherwise, all citations to briefs and other pleadings are to those presented to this Court in 89-2—citations to those briefs are abbreviated from this point forward.

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Strait of Juan de Fuca, Discovery Bay and Admiralty Inlet currently designated . . . as Commercial Salmon Management and Catch Reporting Areas 6C, 6, 6D, 6B, and 9." *See* Mem. Supp. Skokomish and Klallam Tribes' Mot. Summ. J. at 2 (Aug. 18, 1989), Doc. No. 11348. In a March 13, 1989 motion the Requesting Tribes described the waters at issue as areas 23A, 23B, 23C, 23D, 25A, 25B, 25C, 25E, and 26A "known as the Strait of Juan de Fuca, Admiralty Inlet and the Mouth of Hood Canal." Mot. TRO, (March 13, 1989), Doc. 11226; *see also* Mot. for Prelim. Inj., Rasmussen Decl., pp. 247–48. The Requesting Tribes attached to their motion for summary judgment the relevant record that was in front of Judge Boldt in support of Finding of Fact 46, including USA 60, 61, 62, 63, 64 and the original trial testimony of Barbara Lane. Rasmussen Decl. pp. 227–31 (USA 61–64).

In his decision on the motions, Judge Coyle described the question before the Court as whether Lummi's U&A includes "the Strait of Juan de Fuca, Admiralty Inlet and/or the mouth of Hood Canal." *See United States v. Washington*, Subproceeding 89-2, Decision and Order Re Cross-Mots. Summ. J. (Feb. 15, 1990), Doc. No. 11596 (*Coyle Decision*), Rasmussen Decl. Ex. L.[10] Judge Coyle focused on the record in front of Judge Boldt and noted explicitly that Judge Boldt chose not to cite to the fishermen that Lummi was relying on in support of Finding of Fact 45 or 46. *Id*. at 13. He then quoted portions of a 1989 declaration of Dr. Barbara Lane, including one section that provides:

> At the time of my 1973 reports and testimony, I had not reached, expressed or intended any conclusion that the treaty-time U&A fishing grounds and stations of the predecessor Indians to the present Lummi Tribe included (1) the Strait of Juan de Fuca, (2) the open marine water beyond the immediate near shore area southwesterly of the San Juan Islands and westerly of

[10] The pagination to Court Documents in this Motion are to the originals rather than to the Declaration pagination due to the difficulty in viewing the pagination in Court documents that already contain a footer.

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> northern Whidbey Island, or the Admiralty Inlet passageway along the west side of Whidbey Island.

See id. at 7.

Judge Coyle then held that "[t]here is no question in the court's mind from the evidence presented to Judge Boldt that the Lummis' usual and accustomed fishing places were not intended to include the Strait of Juan de Fuca." *See id.* at 13. Judge Coyle also held that Hood Canal and Admiralty Inlet were not part of Lummi's U&A. *See id.* at 13–14. Judge Coyle ordered that the Requesting Tribes' motion for summary judgment be granted and that Lummi's motion for summary judgment be denied as set forth in the decision. *See id.* at 20.

3. Lummi's Cross-Request for Determination (1990)

On April 11, 1990, after Judge Coyle granted the Requesting Tribes' motion for summary judgment and denied Lummi's motion for summary judgment, Lummi filed an amended response to the 89-2 RFD and included a new Cross-Request for Determination (Cross-RFD). *See* Am. Resp. Lummi Indian Tribe to Requesting Tribes Req. for Determination and Cross Req. for Determination (April 11, 1990) (89-2 Cross-RFD), Doc. No. 11690, Rasmussen Decl. Ex. M.

Lummi's Cross-RFD sought "a declaration that the usual and accustomed fishing grounds and stations of the Lummi Indian Tribe include 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 waters south of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal south from Admiralty Inlet to a line drawn from Termination Point due East across Hood Canal." *See id.* at 1, 3.

a. Judge Rothstein's First Order (1994)

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On November 24, 1993, in its summary judgment briefing before Judge Rothstein, Lummi characterized its Cross-RFD as seeking a determination that Lummi's U&A includes "the waters of the eastern Strait of Juan de Fuca and the entrance to Puget Sound." *See* Lummi Nation's Mem. Supp. Cross-Mot. Summ. J. at 1 (Nov. 24, 1993), Doc. No. 13828.

Lummi further identified the issue in the subproceeding in its "Statement of the Case," which provides:

> This subproceeding was filed by the Skokomish and three S'Klallam Tribes in 1989 for the primary purpose of eliminating a Lummi halibut fishery in the waters bounded by the San Juan Islands, Vancouver Island, the Olympic Peninsula, and Whidbey Island, in spite of the fact that the Lummis have fished these waters since the Boldt decision in 1974. These open marine waters include Admiralty Inlet, which is the marine area between southern Whidbey Island and the Olympic Peninsula which leads to Puget Sound. Collectively, it is convenient to call these waters the "eastern Strait of Juan de Fuca."
>
> After cross motions for summary judgment, the Honorable Robert Coyle ruled that the Finding of Fact 46, 384 F. Supp. 312, 361, in which Judge Boldt initially adjudicated Lummi usual and accustomed fishing areas, did not include the Strait of Juan de Fuca, Discovery Bay or Admiralty Inlet. After receiving Judge Coyle's ruling, the Lummi Nation promptly filed a cross-request for determination seeking affirmative relief that it had fishing rights in these waters. By this motion, the Lummi Nation seeks a ruling that it is entitled to fish these waters as a matter of law.

Id. at 2.

In this brief, Lummi included a section of the affidavit of Dr. Wayne Suttles, which refers to "the body of water partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island" as "the eastern Strait of Juan de Fuca." *See id.* at 3. The entire affidavit states simply that it is his opinion that Lummi fished in the eastern Strait of Juan de Fuca. Aff. Wayne Suttles, (Nov. 24, 1993), Doc. No. 13810. Attached to their brief is a single map that identifies reef net sites on San Juan, Shaw, and Orcas

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Islands, and on Lummi Island and nothing in the Strait of Juan de Fuca, Whidbey Island or in Admiralty Inlet or Hood Canal. Lummi Cross Mot. (Nov. 27, 1993), Doc. No. 13828, Rasmussen Decl., p. 232.

In the Requesting Tribes' Response to the same briefing, they described what they refer to as the disputed areas:

> Thus for clarity these pleadings clarified the disputed areas by the appropriate State fishing area designation, that is for halibut, Washington Department 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 [noting that maps were attached to earlier briefing]. . . . The Court should note that WDF Salmon Catch Reporting Area 6A, which is the eastern portion of the Strait of Juan de Fuca just off the shores of Whidbey Island is not included in the disputed areas.

Skokomish and S'Klallam Tribes' Resp. Lummi Tribe's Mot. Summ. J. at 8 (Jan. 3, 1994), Doc. No. 13986, and also in their Reply to the State of Washington at 10–11 (Nov. 29, 1993), Doc. No. 13846.

The Requesting Tribes also filed a motion for summary judgment wherein they note that Lummi had completely failed to "produce evidence" and relied on post-treaty evidence or transitory use. Mot. Summ. J. (Oct. 28, 1993), Doc. No. 13730. Attached to the motion were several reports and transcripts that do not seem to support any fishing outside of Haro, Rosario, or the San Juan Islands. *Id*. at 14. In particular, a report of Wayne Suttles, who was Lummi's expert in this case, contains a map that clearly places Lummi above the San Juan Islands, and notes that the "the Lummi territory consisted of about half the San Juan Islands and a few miles of Mainland shore to the east." *Id.* The report further notes that the Lummi territory included

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Orcas and Shaw Islands, and the northwestern half of Lopez Island and the northeastern half of San Juan Island. *Id*.

In the Requesting Tribes' response to Lummi's Motion (Jan. 3, 1994), Doc. No. 13986, the Tribes relied on the December 20, 1993 Affidavit of their expert, Karen James, wherein she described for comparison the extensive evidence of the Klallam use of the Strait of Juan de Fuca and the San Juan Islands. She agreed that there was Samish presence on Smith Island (in region 6A which was stipulated out of the cross-request by Lummi and Swinomish).[11] She, however, stated "If the Lummi, Samish or Semiahmoo customarily fished in the waters of the Strait of Juan de Fuca beyond the San Juan Islands and Smith Island, in Admiralty Inlet or Hood Canal, I have not found evidence of such a fishery in Dr. Suttles's dissertation or in his published materials that I have reviewed." She noted that "none of the maps document use by the Lummi, Semiahmoo, or Samish beyond the San Juan Islands" and attached copies of the maps she reviewed. In particular, in the "Economic Life of the Coast Salish of Haro and Rosario Straits" by Wayne Suttles, Dr. Suttles states clearly that the "territory of the Lummi included a few miles of mainland shoreline and about half the area of the San Juan Islands." In Map #7, the Samish, which in portion became part of the Lummi, also did not have villages or fishing areas south of Rosario Strait. *Id*. Another map attached from Richard Stern, who wrote "the Lummi Indians of Northwest Washington" shows a very similar territory with the Lummi limited to the northeastern half of San Juan Island. *Id*.

Judge Rothstein denied both cross-motions for summary judgment. *See United States v. Washington*, Subproceeding 89-2, Order Den. Cross-Mots. for Summ. J. (Feb. 7, 1994), Doc. No. 14056 (*Rothstein Order I*) (noting "The Court will expect Dr. Suttles to clarify the boundaries of

[11] Stipulation Limiting Scope of Request for Determination (April 10, 1998), Doc. No.16448.

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the geographic areas to which he refers together with specific documentation pertinent to each area").[12] In her order, Judge Rothstein described the issue in the subproceeding as "whether the Lummi Tribe's usual and accustomed fishing grounds include the Strait of Juan de Fuca, Admiralty Inlet and the mouth of Hood Canal." *See id.* at 1. Judge Rothstein noted that Lummi "responded that it had been granted these areas in Final Decision No. 1. In the alternative, it filed a cross request for determination that these areas are included within its usual and accustomed fishing grounds." *See id.* at 2.

Judge Rothstein further described the issue as "whether the disputed areas should be *added* to the Lummi usual and accustomed fishing grounds." *See id.* at 3 (emphasis added). Judge Rothstein quoted the same section of Dr. Suttles's affidavit that Lummi included in its briefing, which states that "the body of water partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island" is within "the eastern Strait of Juan de Fuca." *See id.* at 5.

b. Judge Rothstein's Second Order" (1998)

Four years later, on May 18, 1998, the Requesting Tribes filed a Cross Motion to Dismiss Lummi's Cross-RFD, arguing that Lummi was precluded from relitigating the decision that Judge Coyle had made in 1990. Resp. Mot. Vacate Trial Date and Cross-Mot. Dismiss (May 18, 1998), Doc. No. 16492. In support of its Reply thereto, Lummi attached a map identifying "Admiralty Inlet," the "Fraser River," and "Haro Strait," and argued that its U&A includes the waters between Haro Strait and Admiralty Inlet. Lummi's Reply to Skokomish et. al. (May 21, 1998), Doc. No. 16457. Lummi also objected to the 1989 declaration of Barbara Lane as a basis

[12] Rasmussen Decl. Ex. I.

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on which to determine the extent of Lummi's U&A on the ground that the then-recent *Muckleshoot* decision barred the use of evidence not presented to Judge Boldt. *Id*. at 11–13. The Court did not appear to rule on this motion but instead ordered supplemental briefing of the "outstanding issues." Minute Order (June 8, 1998), Doc. No. 16525. Lummi then filed a Memorandum in Support of a Motion to Dismiss or for Summary Judgment (July 2, 1998), Doc. No 16534. Lummi argued that "[a] line drawn south from the mouth of Fraser passes directly through Haro Strait and enters the eastern end of the Strait of Juan de Fuca west of San Juan Island." *Id*. at 2. Lummi also identified the waters at issue in the subproceeding by referring to the Requesting Tribes' March 13, 1989 motion for the definition of those waters, which described them as those covered by catch areas for fin fish and shellfish 23A, 23B, 23C, 23D, 25A, 25B, 25C, 25E, and 26A "known as the Strait of Juan de Fuca, Admiralty Inlet and the Mouth of Hood Canal." Mot. TRO (Mar. 13, 1989), Doc. No. 11226. Lummi did not rely again on the Suttles affidavit that Judge Rothstein found to be deficient.

On September 1, 1998, Judge Rothstein denied Lummi's motion to dismiss or for summary judgment and granted the Requesting Tribes' motion to dismiss. *See United States v. Washington*, Subproceeding 89-2, Order Denying Lummi's Mot. Dismiss or Summ. J. and Granting the Four Tribes' Mot. Dismiss (Sept. 1, 1998), Doc. No. 16550 (*Rothstein Order II*).[13] In her order, Judge Rothstein described the issue in the subproceeding raised by the Requesting Tribes' RFD as whether Lummi's U&A includes "the Strait of Juan de Fuca, Admiralty Inlet or the mouth of Hood Canal." *See id.* at 2.

Judge Rothstein then described the issue in the subproceeding raised by Lummi's Cross-RFD as whether Lummi's U&A includes "the waters of the Strait of Juan de Fuca east from the

[13] Rasmussen Decl. Ex. J.

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Hoko River to the mouth of Puget Sound, the waters west of Whidbey Island, Admiralty Inlet, the waters south of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal . . . .” *See id.* at 3.

Judge Rothstein held that the waters at issue in Lummi’s Cross-RFD were indistinguishable from the waters at issue in the Requesting Tribes’ RFD: “The court can discern no difference between the two requests for determination, nor have the Lummi convincingly argued that there is a difference.” *See id.* at 3. Judge Rothstein further held that “Judge Boldt did not intend to include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of the Hood Canal in the Lummi U&A” and ordered judgment be entered in favor of the Requesting Tribes. *See id.* at 7. Lummi appealed.

F. The Appeal to the Ninth Circuit (1999–2000)

Lummi appealed Judge Rothstein’s judgment against it. Notice of Appeal (Sept. 23, 1998), Doc. No. 16568. In its opening brief to the Ninth Circuit Court of Appeals Lummi described the issue before the Court as whether “Judge Boldt intend[ed] to exclude from the broad language of his ruling the marine waters of Admiralty Inlet and the open marine waters in the Strait of Juan de Fuca between Admiralty Inlet and Haro Strait on the western edge of the San Juan Islands.” *See* Opening Br. Def. – Appellant Lummi Nation at 3, No. 98-35964 (9th Cir. Jan. 25, 1999).[14]

Lummi also stated that:

> [Finding of Fact 46] plainly includes all the marine areas between the Fraser River in the north and vicinity of Seattle in the south. The waters at issue—Admiralty Inlet and the eastern portion of the Strait of Juan de Fuca—are unquestionably located well between these endpoints.[FN5]

[14] Rasmussen Decl. Ex. A.

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> FN5: *There may be some ambiguity about the westerly limit of Lummi fishing rights in the eastern portion of the Strait of Juan de Fuca. However, the District Court did not rule on this because it held Lummi had no rights whatsoever in the Strait*. The best resolution of this issue is to follow the literal wording of Finding 46 and draw a line south from the mouth of the Fraser to the southern shore of the Strait on the Olympic Peninsula and then proceed to Seattle."

Id. at 12 (emphasis added).

Lummi also stated that:

> If one begins at the mouth of the Fraser and follows Dr. Lane's description through the "Straits and bays . . . south to the present environs of Seattle" one passes through Georgia Strait, Haro Strait, the eastern end of the Strait of Juan de Fuca, Admiralty Inlet and then arrives at the waters off Seattle.

Id. at 26–27 (footnote omitted).

Lummi also stated that:

> The crux of the Four Tribes' argument is that 'Puget Sound' ends at the southern tip of Whidbey Island about fifteen miles north of Seattle. The waters to the west of Whidbey Island comprise Admiralty Inlet; those to the east are Saratoga Passage and Possession Sound. Admiralty Inlet opens into the Strait of Juan de Fuca. North of this Strait lie the waters of the San Juan archipelago, including both Haro and Rosario Straits.

Id. at 30.

In their response brief, the Requesting Tribes noted that:

> The disputed portion of the Strait of Juan de Fuca, a vastly larger waterway, is located miles south of the exterior waters of the San Juan Islands. [FN 13]
>
> FN13: The initial pleadings specified that the Strait of Juan de Fuca was defined for purposes of the requested relief to include WDF Salmon Management and catch Reporting Areas 6C, 6, 6D, and 9. WDF Salmon Management and Catch Reporting Areas 6A and 7 which includes the northeastern most edge of the Strait of Juan de Fuca was not part of the relief requested.

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Opening Br. Pl. – Apellees [sic] Four Tribes at 29.[15] The Requesting Tribes concluded by asking the Court to affirm Judge Coyle's decision, and find that the "Lummi Tribe's treaty time U&A excludes the Strait of Juan de Fuca, Admiralty Inlet or the mouth of Hood Canal" *Id*. at 33.

In its reply brief, Lummi stated that:

> If one starts at the mouth of the Fraser and proceeds "south" one passes Point Roberts . . . bisects Haro Strait west of San Juan Island . . . and crosses the eastern portion of the Strait of Juan de Fuca. Following the marine waters from there to the environs of Seattle, one necessarily passes through Admiralty Inlet and across the mouth of Hood Canal.

Reply Br. Def. – Appellant Lummi Nation at 15, No. 98-35964 (9th Cir. Mar. 1, 1999).[16]

The Ninth Circuit Court of Appeals affirmed in part and reversed in part, holding that "Judge Boldt intended to: (1) exclude the Strait of Juan de Fuca and the mouth of the Hood Canal and (2) include Admiralty Inlet in the Lummi's usual and accustomed fishing grounds and stations." *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 445 (9th Cir. 2000).[17]

The Ninth Circuit noted that in its Cross-RFD filed after Judge Coyle's 1990 Decision Lummi sought that its U&A be *expanded* to add the disputed waters. *Id.* at 447.

The Ninth Circuit quoted and discussed sections of the 1989 Dr. Barbara Lane declaration, one of which (section 5) was referred to and quoted by both Judges Coyle and Rothstein:

> 4. The Straits referred to in my report—USA Exhibit 30, at p. 11—although not specifically denominated therein, were Haro, Rosario and Georgia Straits and I did not intend the reference to include the Strait of Juan de Fuca. * * *
>
> 5. At the time of my 1973 reports and testimony, I had not reached, expressed or intended any conclusion that the treaty-time [usual and accustomed] fishing grounds and stations of the predecessor Indians to the

[15] Rasmussen Decl. Ex. B.

[16] Rasmussen Decl. Ex. C.

[17] Rasmussen Decl. Ex. F.

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> present Lummi Tribe included (1) the Strait of Juan de Fuca, (2) the open marine water beyond the immediate near shore area southwesterly of the San Juan Islands and westerly of northern Whidbey Island, or the Admiralty Inlet passageway along the west side of Whidbey Island.

Id. at 449–50 (quoting the Declaration of Barbara Lane).

The Ninth Circuit further held that:

> It is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound. Had he intended to include the Strait of Juan de Fuca in the Lummi's usual and accustomed grounds and stations, he would have used that specific term, as he did elsewhere in *Decision I*.

Id. at 451–52.

In reversing the District Court as to Admiralty Inlet, the Ninth Circuit explained:

> Geographically, however, Admiralty Inlet was intended to be included within the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula. Admiralty Inlet would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the "present environs of Seattle." If one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station, see Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds and stations, see Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the "environs of Seattle." See Decision I, 384 F. Supp. at 360.

Id. at 452.

G. Lummi's Actions After 89-2

Sometime after the Ninth Circuit decision, Lummi interpreted the decision thusly:

> When Lummi received the 9th Circuit decision in Subproceeding 89-2 members of the LNRC conferred with Lummi staff and lawyers to determine what waters the Circuit had said were not part of Lummi Usual and Accustomed Stations ('U & A') and what waters were. The decision did not reference catch reporting areas, but only used the names of large bodies

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> of water without clear boundaries. We concluded the opinion included Haro Strait and Admiralty Inlet and the waters between the two. . . .
>
> . . . A reasonable point for the western end of Admiralty Inlet is Point Wilson, near Port Townsend.

Decl. Elden Hillaire (April 27, 2009), ECF No. 19242-2. Burlingame Decl. Ex. B is a depiction of the 2011 line Lummi used. Rasmussen Decl. Ex. N is an appendix of of the 2008 objections to other regulations. They are not the only objections issued.

III. ARGUMENT

The Requesting Tribes contend that based on the foregoing facts, which include statements and holdings from the prior litigation, there is no genuine issue of material fact with respect to whether Lummi's U&A includes the Strait of Juan de Fuca or the waters west of Whidbey Island.

A. Standard

Rule 56 of the Federal Rules of Civil Procedure provides that judgment should be rendered without delay if the pleadings and other papers, viewed in the light most favorable to the nonmoving party, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Prime Start Ltd. v. Maher Forest Prods. Ltd.*, 442 F. Supp. 2d 1113, 1117 (W.D. Wash. 2006) (citations omitted). Once the movant has met this burden, the nonmoving party then must show that there is in fact a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250.

The standards for res judicata and collateral estoppel also apply to this case. Res judicata, or claim preclusion, "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the

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prior proceeding." *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985) (quoting *Brown v. Felsen*, 442 U.S. 127 (1979)). Collateral estoppel, or issue preclusion, "bars relitigation, even in an action on a different claim, of all 'issues of fact or law that were actually litigated and necessarily decided' in the prior proceeding." *Id.* (quoting *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979)).

> When interpreting an ambiguous prior judgment, the reviewing court should "construe a judgment so as to give effect to the intention of the issuing court." *Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988). "[W]here the judgment is ambiguous or fails to express the rulings with clarity, the entire record before the issuing court and the findings of fact may be referenced in determining what was decided." *United States v. Angle*, 760 F. Supp. 1366, 1371–72 n.4 (E.D. Cal. 1991), *rev'd on other grounds*, 7 F.3d 891 (9th Cir. 1993).

Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1359 (9th Cir. 1998); *see also Gila Valley Irrigation Dist. v. United States*, 118 F.2d 507, 511 (9th Cir. 1941) ("[I]n case of an ambiguity, the pleadings should be first consulted to resolve the ambiguity."). If a Court does review an ambiguity, the Court cannot "alter, amend or enlarge upon the description in the decree." *Muckleshoot Tribe*, 141 F.3d at 1360.

B. Lummi's Claim to The Disputed Areas has Already Been Litigated

The Courts have already determined that neither the Strait of Juan de Fuca nor the Waters West of Whidbey Island is included within Lummi's U&A. The waters at issue in this subproceeding must necessarily be either the eastern portion of the Strait of Juan de Fuca, the "waters west of Whidbey Island," or both.

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There is no question that the Requesting Tribes asserted that Lummi's U&A did not include the Strait of Juan de Fuca. *See* 89-2 RFD at 7, Doc. No. 11209.[18] In February 1990, Judge Coyle agreed. *See Coyle Decision* at 13–14.[19] Two months after Judge Coyle so determined, in April 1990, Lummi filed a Cross-RFD seeking to expand its U&A as determined by Judge Boldt to add, among other areas, "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 . . . ." *See* 89-2 Cross-RFD at 1, 3, Doc. No. 11690. 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.

Eight years of litigation ensued after Lummi filed its Cross-RFD, as summarized in the Ninth Circuit's decision in *United States v. Lummi*, 235 F.3d at 447. During that continued litigation, there were numerous statements presented to the Court by the parties and their experts indicating that the phrase "waters west of Whidbey Island" was another way of referring to the eastern portion of the Strait of Juan de Fuca and making clear that those bodies of water are the same as the waters at issue in the present Subproceeding 11-2. *See supra* Undisputed Facts E(3); *see infra* Argument C.

In 1998, Judge Rothstein finally resolved the continuing litigation by denying Lummi's cross-claims in all respects and ruling in favor of the Requesting Tribes in all respects. *See Rothstein Order II* at 7.[20] Judge Rothstein explicitly noted that after Judge Coyle's initial decision in 1990, Lummi had filed its amended response and Cross-RFD, which claimed U&A

[18] Rasmussen Decl. Ex. K.

[19] Rasmussen Decl. Ex. L.

[20] Rasmussen Decl. Ex. J.

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rights in, among other waters, "the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound" and "the waters west of Whidbey Island." *See id.* at 3. Judge Rothstein noted that: Lummi's Cross-RFD was worded differently from the Requesting Tribes' RFD; the Requesting Tribes contended that Lummi's Cross-RFD covered essentially the same areas the RFD challenged; and that Lummi had not asserted that their Cross-RFD covered a different area from the area covered by the RFD and by Judge Coyle's decision. *See id.* at 3. Judge Rothstein then held that "[t]he 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." *See id.*

The District Court then ruled on both the Lummi Cross-RFD and the RFD, and rejected Lummi as to every element of its cross-claim. *See id.* at 7. Thus, there was an explicit and substantive ruling that Lummi's U&A does not include the Strait of Juan de Fuca *or* the waters west of Whidbey Island[21]—the very waters at issue in this Subproceeding. Judge Rothstein did not simply affirm Judge Coyle's 1990 decision that, based on the evidence that was before Judge Boldt, Lummi's U&A does not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal, she also denied the Lummi Cross-RFD, filed after Judge Coyle made his decision, that sought to add to Lummi's U&A as determined by Judge Boldt.

On appeal Lummi did not argue any claim of error specific to the denial of its cross-claim to the "waters west of Whidbey Island," or that Judge Rothstein erred in concluding that the areas covered by the RFD and Cross-RFD were identical. *See* Opening Br. Def. – Appellant

[21] The most reasonable interpretation being that the "waters west of Whidbey Island" are part of the eastern portion of the Strait of Juan de Fuca.

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Lummi Nation at 2, No. 98-35964 (9th Cir. Jan. 25, 1999).[22] Indeed, Lummi's appellate briefs repeatedly acknowledged that the waters adjacent to the western shore of Whidbey Island are in fact the eastern portion of the Strait of Juan de Fuca, *see infra* Argument C, something that seems logically inconsistent with a claim for the waters west of Whidbey Island as a discrete body of water. The only claim of error that actually focused on a decision by Judge Rothstein herself was her claimed failure to overturn Judge Coyle's 1990 decision on the ground that Judge Coyle had unduly relied on evidence not before Judge Boldt.

The Ninth Circuit 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. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 445 (9th Cir. 2000). The 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, the Ninth Circuit necessarily affirmed Judge Rothstein's conclusion that the entire Strait of Juan de Fuca *and* the "waters west of Whidbey Island" are outside Lummi's U&A.

The Ninth Circuit clearly understood that Admiralty Inlet is a distinct body of water from the Strait of Juan de Fuca, so there can be no basis for concluding that that Court may have impliedly granted Lummi the waters west of Whidbey Island when it reversed the district court as to Admiralty Inlet. The Court stated, "Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula." *Lummi Indian Tribe*, 235 F.3d at 452. There can be no dispute that Admiralty Inlet is demarcated from the Strait of Juan de Fuca by a north-south line between Point Partridge on Whidbey Island and Point Wilson on the Olympic Peninsula—the marine waters to the west of that line do not separate Whidbey Island

[22] Rasmussen Decl. Ex. A.

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from the Olympic Peninsula. *See supra* Undisputed Facts C, D; [23] *see also* map attached as Exhibit A to the Declaration of Sara Burlingame; Lummi Nation's Mem. Supp. Cross-Mot. Summ. J. at 2 (Nov. 24, 1993), Doc. No. 13828 (stating that Admiralty Inlet is "the marine area between southern Whidbey Island and the Olympic Peninsula"); Opening Br. Def. – Appellant Lummi Nation at 12, 26–27, 30 (9th Cir. Jan. 25, 1999) (stating that Admiralty Inlet opens into the Strait of Juan de Fuca, and that Haro and Rosario Straits are the waters north of the Strait of Juan de Fuca); Decl. Elden Hillaire (April 27, 2009), ECF No. 19242-2[24] (referring to "waters between" Haro Strait and Admiralty Inlet, and acknowledging that a "reasonable point for the western end of Admiralty Inlet is Point Wilson, near Port Townsend."). [25]

C. Lummi is Fishing in the Strait of Juan de Fuca as that Body of Water Was Understood by the Courts and the Parties

It is clear from the evidence before the Courts in Subproceeding 89-2 that the waters at issue in that subproceeding included the waters at issue in this subproceeding, and that the Courts and parties understood these waters to be part of the Strait of Juan de Fuca. *See* Lummi Nation's Mem. Supp. Cross-Mot. Summ. J. at 2 (Nov. 24, 1993), Doc. No. 13828 (stating that 89-2 "was filed by the Skokomish and three S'Klallam Tribes in 1989 for the primary purpose of

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[23] The official description of Admiralty Inlet adopted by the Board on Geographic Names also uses the same line of demarcation between Admiralty Inlet and the Strait of Juan de Fuca. *See supra* Undisputed Facts C, D. In addition, the Board on Geographic Names considers Admiralty Inlet to be a part of Puget Sound, *see id.*, which is consistent with the Ninth Circuit's conclusion that "there is no indication that Judge Boldt recognized Admiralty Inlet as a region separate from 'Northern Puget Sound.'" *See Lummi Indian Tribe*, 235 F.3d at 452. But the Board, no more than did Judge Boldt, Judges Coyle and Rothstein, and the Ninth Circuit, does not consider the Strait of Juan de Fuca to be part of Puget Sound. *See supra* Undisputed Facts C, D.

[24] Rasmussen Decl. Ex. P.

[25] It would seem to strain credibility to argue that the waters at issue in this Subproceeding are something other than the Strait of Juan de Fuca or the "waters west of Whidbey Island," given that they are those waters immediately west of Whidbey Island and are part of the Strait of Juan de Fuca as that body of water is officially defined, and also given that that area of water has no other recognized or regularly used name or descriptor.

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eliminating a Lummi Halibut fishery in the waters bounded by the San Juan Islands, Vancouver Island, the Olympic Peninsula, and Whidbey Island . . . ."); Opening Br. Def. – Appellant Lummi Nation at 3, 12, 26–27, 30 (9th Cir. Jan. 25, 1999)[26] (stating that: (1) the issue in the case was whether "Admiralty Inlet and the open marine waters in the Strait of Juan de Fuca between Admiralty Inlet and Haro Strait . . . ." are part of Lummi's U&A; (2) "The waters at issue [in 89-2]—Admiralty Inlet and the eastern portion of the Strait of Juan de Fuca—are unquestionably located well between" the mouth of the Fraser River in the north and Seattle in the south; and (3) Admiralty Inlet opens into the Strait of Juan de Fuca, and that Haro and Rosario Straits are the waters north of the Strait of Juan de Fuca); Lummi Mot. Summ. J. and Dismissal at 11, (August 21, 1989), Doc. No. 11352 (referring to catch areas 6 and 6B as part of the Strait of Juan de Fuca); Am. Resp. Lummi Indian Tribe to Requesting Tribes Req. for Determination and Cross Req. for Determination at 1 (April 11, 1990), Doc. No. 11690[27] (Lummi's Amended Cross-RFD sought "a declaration that the [U&A] of the Lummi Indian Tribe include[s] the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound"); Lummi Nation's Mem. Supp. Cross-Mot. Summ. J. at 1 (Nov. 24, 1993), Doc. No. 13828 (asserting rights in the "eastern Strait of Juan de Fuca.").

Lummi's own expert also concurred with this assertion. *See* Aff. Wayne Suttles (Nov. 24, 1993), Doc. No. 13810 (defining the area that Lummi was claiming as "the body of water partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island" and calling it "the eastern Strait of Juan de Fuca."); Reply Br. Def. – Appellant Lummi Nation at 15, No. 98-35964 (9th Cir. Mar. 1, 1999)

[26] Rasmussen Decl. Ex. A.

[27] Rasmussen Decl. Ex. M.

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(discussing a path that passes Haro and San Juan Island and then crosses the "eastern portion of the Strait of Juan de Fuca" and from there proceeding through Admiralty).

Both District Judges also used the geographic terms in the same manner as described by the parties, referring to the eastern Strait of Juan de Fuca as the area "partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island" or as a body of water that extends "east from the Hoko River to the mouth of Puget Sound":

- **Judge Rothstein Decision No. 1:** Judge Rothstein quoted the same section of Dr. Suttles's affidavit that Lummi included in its briefing, which states that "the body of water partially enclosed by the San Juan Islands, southeastern Vancouver Island, the northeastern Olympic Peninsula, and Whidbey Island" is within "the eastern Strait of Juan de Fuca." *See Rothstein Order I* at 5, Doc. No. 14056.[28]

- **Judge Rothstein Decision No. 2:** Judge Rothstein described the issue in the subproceeding raised by Lummi's Cross-RFD as whether Lummi's U&A includes "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 waters south of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal. *See Rothstein Order II* at 3, Doc. No. 16550 (emphasis added).[29]

- **Judge Coyle:** Judge Coyle issued an order denying Lummi rights in the Strait of Juan de Fuca, Admiralty Inlet and the Mouth of Hood Canal. *Coyle Decision* at 13–14, Doc. No. 11596.[30] This order was described in the Opening Br. Def. – Appellant Lummi Nation at 15, No. 98-35964 (9th Cir. Jan. 25, 1999): "Judge Coyle entered an order construing Judge Boldt's 1974 judgment as not including Admiralty Inlet or any portion of the Strait of Juan de Fuca."

Further, while the state of Washington's catch areas are not the best or preferred way to discuss tribal U&A, the Requesting Tribes indicated from very early on in the litigation of 89-2 that the waters at issue in the case included, among other waters, catch areas for fin fish and

[28] Rasmussen Decl. Ex. I.

[29] Rasmussen Decl. Ex. J.

[30] Rasmussen Decl. Ex. L.

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shellfish 23A, 23B, 23C, 23D, 25A, 25B, 25C, 25E, and 26A "known as the Strait of Juan de Fuca, Admiralty Inlet and the Mouth of Hood Canal." Mot. TRO (Mar. 13, 1989), Doc. No. 11226; Skokomish and S'Klallam Tribes' Resp. Lummi Tribe's Mot. Summ. J. at 8 (Jan. 3, 1994), Doc. No. 13986; Skokomish and S'Klallam Tribes' Reply to the State of Washington at 10–11 (Nov. 29, 1993), Doc. No. 13846; Mot. Prelim. Inj. (March 30, 1989), Rasmussen Decl. pp. 247–48. These areas, particularly 23A, 23B, and 25A, incorporate the eastern portion of the Strait of Juan de Fuca, the waters at issue in this subproceeding 11-2.

In the Ninth Circuit, Lummi continued to acknowledge that the waters in dispute were the eastern Strait of Juan de Fuca:

> [Finding of Fact 46] plainly includes all the marine areas between the Fraser River in the north and vicinity of Seattle in the south. The waters at issue—Admiralty Inlet and the eastern portion of the Strait of Juan de Fuca—are unquestionably located well between these endpoints.[FN5]
>
> FN5: *There may be some ambiguity about the westerly limit of Lummi fishing rights in the eastern portion of the Strait of Juan de Fuca. However, the District Court did not rule on this because it held Lummi had no rights whatsoever in the Strait*. The best resolution of this issue is to follow the literal wording of Finding 46 and draw a line south from the mouth of the Fraser to the southern shore of the Strait on the Olympic Peninsula and then proceed to Seattle."

Opening Br. Def. – Appellant Lummi Nation at 12, No. 98-35964 (9th Cir. Jan. 25, 1999) (emphasis added).

Lummi also acknowledged to the Ninth Circuit that "Admiralty Inlet opens into the Strait of Juan de Fuca": "*Admiralty Inlet opens into the Strait of Juan de Fuca. North of this Strait lie the waters of the San Juan archipelago, including both Haro and Rosario Straits*." *Id.* at 30 (emphasis added). In propounding its concept of a "passage" as a basis for its argument, Lummi

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again acknowledged to the Ninth Circuit that the disputed waters are part of the Strait of Juan de Fuca and separate from Admiralty Inlet:

> If one starts at the mouth of the Fraser and proceeds "south" one passes Point Roberts . . . bisects Haro Strait west of San Juan Island . . . and crosses the eastern portion of the Strait of Juan de Fuca. Following the marine waters from there to the environs of Seattle, one necessarily passes through Admiralty Inlet and across the mouth of Hood Canal.

Reply Br. Def. – Appellant Lummi Nation at 15, No. 98-35964 (9th Cir. Mar. 1, 1999).[31]

In addition to the acknowledgements of the courts and the parties, the USGIS definitions, which have remain unchanged since at least 1979, affirm that the official federal description of Admiralty Inlet and the Strait of Juan de Fuca are consistent with Lummi's delineation of Admiralty Inlet and the Strait.[32] *See supra* Undisputed Facts C, D.

Thus, when the Ninth Circuit ordered reversal only as to Admiralty Inlet, it understood full well that Lummi had asked explicitly in the request above for a path across "the eastern portion of the Strait of Juan de Fuca." When a request is specifically made and rejected, the only reasonable conclusion is that the Court meant what it said:

> It is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound. Had he intended to include the Strait of Juan de Fuca in the Lummi's usual and accustomed grounds and stations, he would have used that specific term, as he did elsewhere in *Decision I*.

Lummi Indian Tribe, 235 F.3d at 451–52.[33]

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[31] Rasmussen Decl. Ex. C.

[32] The definitions of the Board on Geographic Names are the official definitions of the federal government, and are standard and binding on all agencies of the United States. *See supra* Undisputed Facts C, D.

[33] The fact that the Ninth Circuit referred to the Strait as "lying west of the sound" does not weaken the Requesting Tribes argument. Admiralty Inlet is part of the Sound, and the Strait lies immediately to the north and west of the northern opening of Admiralty Inlet, which is a north-south line running from Point Wilson to Point Partridge. Furthermore, the waters to the east of Whidbey Island are also part of the Sound and the Strait is west of those too, a

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The Ninth Circuit defined Admiralty Inlet, the only area it granted to Lummi, in terms very similar to those employed by Lummi: "Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula." *Id*. at 452.

As this Court knows, the Requesting Tribes first attempted to resolve this issue by filing a show cause motion, seeking to demonstrate that Lummi continues to authorize treaty fishing in an area already determined to be outside its U&A. This Court dismissed that motion, concluding that a new subproceeding is the proper way to present that question to the Court. Order on Mot. Dismiss (June 16, 2009), ECF No. 235 (Sub. 89-2); Order on Mot. Recons. (July 14, 2009), ECF No. 239 (Sub. 89-2). The Court instructed the Requesting Tribes to present evidence supporting their assertion that the western boundary of Lummi's U&A has been decided by the exclusion of the Strait of Juan de Fuca from its U&A: "nowhere have they pointed to any language actually defining that western boundary or the boundaries of the Strait of Juan de Fuca, as that term was used by Judge Coyle, Judge Rothstein and the Ninth Circuit Court of Appeals in Prior Orders in this case." Order on Reconsideration, at 2:16–22. The Requesting Tribes have now provided extensive evidence that the parties and the courts all clearly understood the geographical terms used in Subproceeding 89-2 and the prior decisions of the Courts.

Based on the history of the adjudication of the original RFD in Subproceeding 89-2 and Lummi's Cross-RFD, it is clear that the question of Lummi rights in the waters at issue in this subproceeding 11-2 is one that was "actually litigated and necessarily decided" in the prior proceeding. *See Segal v. American Tel. & Tel. Co*., 606 F.2d 842, 845 (9th Cir. 1979); *Montana v. United States*, 440 U.S.at 153; *see* also *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir.

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fact supported by the official definition of the Sound as well as the ruling in Subproceeding 05-3 that Saratoga Passage and Skagit Bay are part of Puget Sound. *See Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010).

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2001) ("where . . . it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court.").

D. Lummi May Not Unilaterally "Interpret" the Ninth Circuit's Decision to Award Itself Waters That Court Clearly Denied It

Lummi has readily conceded that upon receiving the Ninth Circuit decision, it unilaterally "interpreted" it as including in Lummi's U&A a large expanse of the eastern portion of the Strait of Juan de Fuca:

> When Lummi received the 9th Circuit decision in Subproceeding 89-2 members of the LNRC conferred with Lummi staff and lawyers to determine what waters the Circuit had said were not part of Lummi Usual and Accustomed Stations ('U & A') and what waters were. The decision did not reference catch reporting areas, but only used the names of large bodies of water without clear boundaries. We concluded the opinion included Haro Strait and Admiralty Inlet and the waters between the two. . . .
>
> . . . A reasonable point for the western end of Admiralty Inlet is Point Wilson, near Port Townsend.

Decl. Elden Hillaire (April 27, 2009), ECF No. 19242-2[34] (also noting that Lummi at this time established its line across the Strait of Juan de Fuca, from Haro Strait to Point Wilson to encompass that portion of the eastern Strait of Juan de Fuca (or waters west of Whidbey Island), that are the subject of this Subproceeding 11-2.

The fatal flaw in Lummi's unilateral line-drawing is that the Court had just rejected its claim to the Strait of Juan de Fuca, which Lummi had consistently acknowledged includes the very waters between Haro Strait and Admiralty Inlet that Lummi purported to interpret as being part of its U&A. *See* Lummi Nation's Mem. Supp. Cross-Mot. Summ. J. at 2 (Nov. 24, 1993),

[34] Rasmussen Decl. Ex. P.

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Doc. No. 13828 (stating that 89-2 "was filed by the Skokomish and three S'Klallam Tribes in 1989 for the primary purpose of eliminating a Lummi Halibut fishery in the waters bounded by the San Juan Islands, Vancouver Island, the Olympic Peninsula, and Whidbey Island . . . ."); *see supra* Argument C. Lummi has attempted to justify this on the basis of the Court's explanation for why it decided to reverse Judge Rothstein and include Admiralty Inlet in Lummi's U&A, namely that it would be "natural" to pass through Admiralty Inlet when traveling from the San Juan Islands to the environs of Seattle. *See Lummi Indian Tribe*, 235 F.3d at 452. Lummi asserts that it could be just as natural to pass through the eastern portion of the Strait of Juan de Fuca. *See* Lummi Nation's Mem. Opp'n Klallams' Mot. Order Show Cause at 9 (April 27, 2009), ECF No. 223 (89-2). *See infra* further discussion of Lummi's passageway rationale in Argument E. But it could also be more, or at least equally, natural to take the coastal route along the shore of Whidbey Island when traveling south from the San Juan Islands to Admiralty Inlet. Any path, however, conflicts with the actual decision of the Ninth Circuit rejecting any Lummi U&A in the Strait of Juan de Fuca, and it was for the Court, not Lummi, to decide whether its Admiralty Inlet reasoning should be extended to the eastern Strait of Juan de Fuca. Lummi had an obvious remedy in the aftermath of the decision—it could have filed a motion for reconsideration or clarification in accordance with Ninth Circuit Rule 27-10 or its predecessor, or if it discovered the issue later it had up to one year to pursue a claim of mistake[35] under Fed. Rule 60 (b)(1). If they had done this, the Requesting Tribes would have had fair notice of Lummi's position and could have responded. Then the Ninth Circuit could have decided. Lummi's unilateral

[35] Assuming *arguendo* that the Ninth Circuit was grossly mistaken about the geography of the area and really believed that Admiralty Inlet extends all the way to the San Juans (even though the decision includes a clear definition that makes it clear they understood that it did not), Lummi's line—one that proceeds more than twenty miles off the coast of Whidbey Island to Haro Strait from Admiralty Inlet—is not based on the language they say they relied on for their decision. *See also* Burlingame Decl. p.8.

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interpretation intruded on the province of the Court and denied fair process to the Requesting Tribes, who were unaware of what Lummi had decided to do for several years.

E. Lummi's Passageway Rationale, Which It Failed to Timely Present to the Ninth Circuit, Is Suspect and Impermissibly Enlarges on the 2000 Decision

In reversing the District Court as to Admiralty Inlet, and Admiralty Inlet only, the Ninth Circuit began by noting that "Determining Judge Boldt's intent with respect to 'Admiralty Inlet' is more difficult. *Decision I* is devoid of references to 'Admiralty Inlet.' Thus there are no linguistic clues to compare, as there were for [the Strait of Juan de Fuca and the mouth of Hood Canal]." *Lummi Indian Tribe*, 235 F.3d at 452. Accordingly, the Court concluded that, as likely as not, Judge Boldt did not recognize Admiralty Inlet as separate from Northern Puget Sound. The Court went on to state:

> Admiralty Inlet would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the "present environs of Seattle." If one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station, see Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds and stations, see Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the "environs of Seattle." See Decision I, 384 F. Supp. at 360.

Id. at 452.

Lummi has asserted that the above passageway rationale justifies its unilateral interpretation of the Ninth Circuit decision. *See* Lummi Nation's Mem. Opp'n Klallams' Mot. Order Show Cause at 9 (April 27, 2009), ECF No. 223 (89-2). First, to state the obvious, anyone in the United States has the right to transit the Strait of Juan de Fuca. But the law of the case is that trolling incidental to transit was insufficient to establish U&A rights in the area of transit:

> While travel through an area and incidental trolling are not sufficient to establish an area as a usual and accustomed fishing ground, see The Boldt

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> Decision, 384 F. Supp. at 353, frequent travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters.

United States v. Lummi Indian Tribe, 841 F.2d 317, 320 (9th Cir. 1988).

Treaty fishers, therefore, must have usual and accustomed grounds to fish while transiting. The record before the District Court shows that Lummi failed to produce any persuasive evidence to the District Court showing that it had engaged in any "frequent travel and visits" to the eastern Strait of Juan de Fuca for fishing purposes. *See supra* Undisputed Facts E(3)(a); *see also Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. 2010) (noting the lack of any evidence of Suquamish fishing or travel in areas it claimed as part of its U&A, let alone any fishing that was more than incidental or occasional, did not support a conclusion that it was just as likely they fished here); *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) (requiring fishing or travel as regular and frequent basis in which fishing was one of the purposes of such use for U & A finding). Thus, without more, it simply is not reasonable to expand the Ninth Circuit's explanatory statement regarding transit from Admiralty Inlet into a holding that Lummi's U&A extends over more than twenty miles across the Strait of Juan de Fuca to Haro Strait. Neither a Court (nor a party[36] on its own) can "alter, amend or enlarge upon the description in the decree." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998).

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[36] A prior attempt to expand the Lummi U&A language based on an expansion of the terminology used was struck down in *Muckleshoot:*

> Also unavailing is the Lummi's effort to change the nature of the dispute over the location of the environs of Seattle in 1974 to a dispute over the semantic meaning of the word "to." The Lummi on remand contend that when Judge Boldt said the Lummi fishing waters extended south "to the present environs of Seattle," he really meant through the suburbs to the city center or even farther south.

Muckleshoot Indian Tribe v. Lummi Indian Nation, 234 F.3d at 1100.

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IV. CONCLUSION

The parties and the Courts of 89-2 understood that the waters at issue in that subproceeding included the Strait of Juan de Fuca and "the waters west of Whidbey Island," and that those waters included the area at issue in this subproceeding 11-2. There was no evidence cited or adopted by either the District Court or the Ninth Circuit that supported Lummi historical use of any area beyond the San Juan Islands and the reef net sites located there. *See* Undisputed Facts E(3)(a). Without those findings, Lummi's unilateral interpretation is based solely on an expansion of two lines in the Ninth Circuit's decision, despite the fact that the Ninth Circuit had clearly held in two ways (by denying waters west of Whidbey Island and the Strait of Juan de Fuca) that Lummi may not conduct treaty fishing in those waters. Historical treaty time use should not be diluted. Thus, in the context of the law of this case and the evidence which all the Courts reviewed, the Requesting Tribes assert that Lummi's actions impermissibly enlarge the decision that was issued by the Ninth Circuit that held that they could not fish in the waters where they are now fishing.

For the foregoing reasons, the Requesting Tribes respectfully request that this Court grant their motion for Summary Judgment.

DATED this 31st Day of May, 2012,

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2012, I electronically filed the foregoing Requesting Tribes' Motion for Summary Judgment using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 31st day of May, 2012.

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