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 LOWER ELWHA KLALLAM, JAMESTOWN S'KLALLAM, AND PORT GAMBLE S'KLALLAM TRIBES' REPLY TO LUMMI NATION'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The Lower Elwha Klallam, Jamestown S'Klallam, and Port Gamble S'Klallam Tribes (Requesting Tribes) respectfully asked this Court for summary judgment. Doc. 40. The Lummi Nation (Lummi) opposes the motion. Doc. 43. The Requesting Tribes reply below to Lummi's opposition.

SUMMARY OF ARGUMENT

The Ninth Circuit did not grant Lummi the eastern Strait of Juan de Fuca.[1] In fact that Court expressly excluded it, as it was defined by the Courts and the Parties, from Lummi's

[1] Defined at Doc. 40 at 1:17–21.

Lower Elwha Klallam Tribe
Office of General Counsel
2851 Lower Elwha Rd
Port Angeles, WA 98363

Law Offc. Lauren P. Rasmussen, PLLC
1904 Third Avenue, Suite 1030, Seattle, WA 98101

U&A. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 445 (9th Cir. 2000); Rothstein Order, Rasmussen Decl. 39-9, 255 (J. Rothstein) (citing to the Wayne Suttles description of the Eastern Strait of Juan de Fuca); Order Mot. Dismiss, (J. Coyle), Rasmussen Decl. Doc. 39-10 at 302-303 (reciting testimony describing Lummi's claim to fish in 1973 as going "up the Strait of Juan de Fuca to the Makah Reservation."); Doc. 40 at 25:3–10. Lummi responds that not only did the Ninth Circuit Court rule in its favor, but the ruling "concluded" that its specific line of demarcation was appropriate: "[T]he Ninth Circuit has concluded that Judge Boldt intended to include" the "waters located west of Whidbey Island and east of a line between Trial Island and Point Wilson . . . ." Doc. 43 at 1:19–21.

Lummi's argument makes sense only if the Ninth Circuit grossly misunderstood both where Admiralty Inlet is located and what an "inlet" is, Doc. 43, 23:11–20, and further misunderstood that the path Lummi was claiming went through the Strait of Juan de Fuca. But the Ninth Circuit's opinion, in light of the record in front of it, plainly shows that it understood all of these things. 235 F.3d 443 at 451.[2] As is required under Federal Rule of Civil Procedure 56 (a), the Requesting Tribes have cited with specificity to relevant portions of this record, the evidence, the pleadings, and orders from Judges Rothstein and Coyle and the Ninth Circuit. Doc. 40, § III, C.

Lummi lists four reasons why it believes the Requesting Tribes' motion should nevertheless be denied. Doc. 43 at 2:2–10. All four of those reasons fail because all are based on

[2] Lummi attempts to make much of the Ninth Circuit's description of the Strait of Juan de Fuca as lying to the "west of the Sound." 235 F.3d 443 at 451. But the Requesting Tribes have already explained this is not persuasive or helpful to Lummi's case. Doc. 40 at fn. 33 (Admiralty is south and east of the Strait); *See also*, McCoy Decl., Doc. 41 at 6 (map showing the location of Saratoga Passage and Skagit Bay, two additional areas in Puget Sound located east of the Strait). Lummi also says the Strait is on the *western* edge of the San Juan Islands in their 9th Circuit Brief. Doc. 39-1 at 15. In any event, the time for Lummi to have made that argument was a decade ago.

a fundamental misunderstanding of what is at issue in this subproceeding. What is at issue here is what the District Court and the Ninth Circuit Court of Appeals intended when they issued their rulings in Subproceeding 89-2, not what evidence was in front of Judge Boldt or what the definition of the Strait of Juan de Fuca was at the time of *Final Decision # 1*.[3] The parties spent more than a decade litigating 89-2, where they examined Judge Boldt's intent; that phase of the case has passed. The "special two-step process for determining Judge Boldt's intent with regard to a Tribe's U&A" has already been performed. Doc. 43 at 8:1–2.

In addition to its four arguments on the merits, Lummi asks this Court to strike the Requesting Tribes' evidence, including the statements from the very briefs that gave rise to the Ninth Circuit decision as well as the other decisions in 89-2. Doc. 43 at 19–21. Given that the issue is what the courts of 89-2 intended, the pleadings and papers before those courts are absolutely relevant. *Infra*, Argument § D (Response to Motions to Strike).

The essence of this case is whether Lummi had appropriate and timely justification for unilaterally "interpreting" the Ninth Circuit decision as including in its U&A waters that it admits lie *outside of* Admiralty Inlet (the only waters awarded by that Court): "We concluded that the waters included Haro Strait and Admiralty Inlet and the Waters between the two." Decl. Hillaire, Doc. 39-13 at 326, (purporting to explain Lummi's interpretation of the Ninth Circuit decision after it was issued in 2000).

The Requesting Tribes assert that Lummi has no right to create a new "western boundary" granting itself waters that were denied in the ruling, expanding its U & A 310 square miles.

[3] The term "the Strait of Juan de Fuca" did not occur in any of Lummi's U&A findings, so Judge Boldt's understanding of the term does not come into play in this case. The first use of the term with respect to Lummi's U&A in a Court order was by Judge Coyle.

PROCEDURAL BACKGROUND

Lummi stated that "[t]his Court refused to hold Lummi in contempt, because the Ninth Circuit decision in 89-2 was ambiguous and appeared to include at least some portion of the waters at issue." Doc. 43 at 4:9–11. This Court's order did not include any such ruling that the Ninth Circuit's decision "appeared to include at least some portion of the waters at issue." Order Mot. Recons. 5, Doc. 19310.[4] The order said "it remains to be determined" and cautioned the Parties to not cite this as a ruling. *Id.* at 5 ("The Court's statements do not represent findings or conclusions, and the parties are cautioned not to cite them as such.")

UNDISPUTED FACTS

Lummi claims to dispute the Requesting Tribes' Undisputed Fact A, but it disputes issues not in the Requesting Tribes' Undisputed Fact A. Doc. 43 5:5–11. Undisputed Fact A very clearly notes that it is not a comprehensive listing of Judge Boldt's findings as to Lummi's U&A, but is rather an excerpt of the pertinent part. Lummi has offered no explanation of how the quoted language in Undisputed Fact A is insufficient as an excerpt or what other findings are relevant to the question.

Lummi claims to dispute the Requesting Tribes' Undisputed Facts C and D, but it disputes issues not in the Requesting Tribes' Undisputed Facts C and D. Doc. 43 5:11–18. Undisputed Facts C and D very clearly note that the official definitions provided were the official definitions "at all times during and after Subproceeding 89-2." Lummi may (and does) dispute the relevance of those definitions, but it cannot reasonably challenge the truth of those statements.

[4] The Court also did not "hold" that the prior decisions did not provide any guidance as Lummi argues. Doc. 43 at 28:20–22. The Court instructed the parties to find the evidence.

Lummi claims to dispute the Requesting Tribes' Undisputed Facts E, but it actually does not. Instead it claims that the facts listed therein are "incomplete and largely irrelevant." Doc. 43 5:18 to 6:10. Again, Lummi may and does dispute the relevance of those facts, but it cannot reasonably challenge the truth of the statements.[5]

ARGUMENT

A. Lummi Fails to Raise Any Genuine Issue of Material Fact

When the moving party has carried its burden under Rule 56(a) and (c), the following events must occur for the nonmoving party to prevail: First, the opposing party must do more than simply assert some "metaphysical doubt as to the material facts." Second, the opposing party must come forward with specific facts showing a genuine issue for trial, thereby "piercing the pleadings." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (U.S. 1986) (citations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* The Court will examine whether "a trial on the merits would reveal no additional relevant facts. In these circumstances, the district judge, who is also the trier of fact, may resolve conflicting inferences and evaluate the evidence to determine Judge Boldt's intent." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. Wash. 2010) (citing *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123–24 (5th Cir. 1978); *In re First Capital Holdings Corp.*, 179 B.R. 902, 904–05 (Bankr. C.D. Cal. 1995) (Tashima, J.).

[5] The one explicit challenge to the truth of a statement is directed at a statement made in the argument section of the motion that is not offered as an undisputed fact. Doc. 43 at 6:2–10.

Lower Elwha Klallam Tribe
Office of General Counsel
2851 Lower Elwha Rd
Port Angeles, WA 98363

Law Offc. Lauren P. Rasmussen, PLLC
1904 Third Avenue, Suite 1030, Seattle, WA 98101

If a party fails to "properly" address the fact, the Court can consider the fact undisputed and grant summary judgment. The Court is required to consider "only the cited materials" and has the option of considering other materials in the record. Fed. R. Civ. P. 56(c)(3).

In response to the Requesting Tribes motion, Lummi contends[6] that the Requesting Tribes "redefine" the Strait of Juan de Fuca and that the Strait must end along the line that Lummi unilaterally created when it purported to "interpret" the holding of the Ninth Circuit in 89-2. Doc. 43 at p. 4: Rasmussen Decl., Doc. 39-13 at 326.[7] Lummi has not created a "reasonable dispute." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1103 (9th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Lummi's argument rests essentially on the concept that this Court must go back yet again and examine Judge Boldt's intent, or find that there is some sliver of water that was undecided in the previous cases. Doc. 43, 2:2–10, 29:8–21. But this Request and this motion are not brought to reargue whether "Northern Puget Sound" included the waters at issue here. Doc. 43, §A; *see* Doc. 45-19, (Ex. 18, 1989) at 7 ("The Strait of Juan de Fuca is within the Marine Waters of Northern Puget Sound"),[8] 12 (extensive travel occurred across the Strait of Juan de Fuca). Nor is Lummi correct that the Requesting Tribes have the "burden of proving that Judge Boldt intended to exclude Lummi from the disputed area." Doc. 43, 16:19–21. The Requesting Tribes successfully responded to

[6] It is telling that Lummi has a history of making overly semantic arguments in an attempt to expand its U&A. Doc. 40 at 32, fn. 36.

[7] The Declaration of Mary Neil, filed with Lummi's response brief, includes many documents not referred to in the response. The Court is not required to dig through pages and pages of documents submitted and attached to a declaration to determine what facts if any might be responsive to the Requesting Tribes' motion. Fed. R. Civ. P. 56(c)(3).

[8] Lummi's argument that the Tulalip decision from 1988 also supports the inference that Lummi also must have fished off the west coast of Whidbey Island is also an argument that also relevant only the first time around. Doc. 43 at 12–13. In addition, the effort backfires on them because in that case the Court found that "Tulalip elders testified that their ancestors circumnavigated Whidbey Island for the purposes of fishing." The Lummi determination contains no such language.

these arguments years ago and should not be required to do so again. Rasmussen Decl. Doc. 39-10 at 280–81 (1989 Request for Determination) (The "Straits" in Lummi's U&A description refer to Haro and Rosario Straits, not the Strait of Juan de Fuca.") Both Judges Coyle and Rothstein agreed that Dr. Lane's use of the term "the Straits," Doc. 43 at 10:1–5, as to Lummi's U&A did not include the Strait of Juan de Fuca. Rasmussen Decl., Doc. 39-10 at 297 (referring to the Dr. Lane exhibit discussing the "Straits"); 299 (ruling that after considering the Dr. Lane exhibit that there was "no question" that the Strait of Juan de Fuca was not included in Lummi's U&A); 297(reaffirming Judge Coyle's decision as to the Strait of Juan de Fuca). In deciding that fact, Judge Coyle already looked at the record of the original U&A determination and the specific claim of Lummi witness John Finkbonner, September 11, 1973, that Lummi fished in the Strait of Juan de Fuca, when asked what areas "beyond the reef net" areas it claimed in its U&A (reef net map, Decl. Mary Neil, Doc. 45-24; Ex. 24 at 29.)

> Q: How far west in the Straits do you claim?
> A: Around the San Juan Islands and part of the Strait of Juan de Fuca?
> Q: How far up into the Straits do you claim?
> A: Clear up to the Makah's.
> ...
> Q: If I understand you correctly you claim salt water fishing areas encompassing the entire San Juan Island group, and up the Strait of Juan de Fuca to the Makah reservation?
> A: Yes.

Order Mot. Dismiss, (J. Coyle), Rasmussen Decl. Doc. 39-10 at 302; Decl. Mary Neil, Doc. 45-19 (Ex. 18) at 22 (Finkbonner transcript excerpt). In denying Lummi's motion, Judge Coyle specifically found meaning in the fact that Judge Boldt did not cite Mr. Finkbonner in support of Lummi's U&A determination. Rasmussen Decl. at 303. Judge Coyle then rejected Lummi's claim to the "Strait of Juan de Fuca," an area clearly understood in this order (and by Judge

Boldt) as being beyond the San Juan Islands, and leading you from there to "the Makah reservation."

Lummi relies entirely on a "natural pathway" argument for the proposition that its unilateral line should be located where it says it is. Doc. 43 at 26:10–18. But, setting aside Lummi's overly generous transit route for a moment, the argument is untimely and not justified. *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). The fact that the Requesting Tribes moved for rehearing with respect to the Admiralty Inlet holding, Doc. 43 at 26:1–4, does not allow Lummi or this Court to expand the "Admiralty Inlet" ruling and now apply it to the Strait of Juan de Fuca. This is because the Ninth Circuit's rationale for including Admiralty Inlet within Lummi's U&A was that it is not geographically distinct from "Northern Puget Sound"; the Strait of Juan de Fuca is clearly distinct from Northern Puget Sound.

B. Lummi Claimed These Waters and Lost

Because Judge Coyle's 1990 Order ruled that Lummi's U&A does not include the Strait of Juan de Fuca as it was defined by the Parties and the Courts, "[f]ollowing Judge Coyle's Order, Lummi did not seek to *interpret* FF 46 through the introduction of new evidence and the making of a supplemental finding—which is what the Circuit held was impermissible—Lummi sought to *establish* U&A in waters it previously thought it had established U&A." Decl. of Mary Neil, Doc. 45-37 (Ex. 27.7) at 14. Lummi also filed a map claiming the exact same waters it now asserts were granted by the Ninth Circuit, with a sticker placing Admiralty Inlet south of the Point Wilson line. Second Rasmussen Decl., at 7; Dec. Neil, at 45-37 at 17, 34. The Cross-

Request for Determination of the Lummi Nation, Doc. 45-42 (Ex. 29) at 1, requests rights to fish in 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 . . . ." Then Lummi presented evidence from its expert Dr. Wayne Suttles regarding their use of the "eastern Strait of Juan de Fuca" and defined that area as including the same waters it claims are now not the Strait of Juan de Fuca.[9] Second Rasmussen Dec. at 24, Ex. G; Requesting Tribes' Motion, Doc. 40, § III (C) at 23–24 (repeated admissions regarding the location of the waters at issue here).

In 1993, the Requesting Tribes again made it clear which WDFW Catch areas it objected to:

> 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.[10]

Skokomish and S'Klallam Tribes' Reply to the State of Washington (November 29, 1993) at 11 (Doc. 13846).

As described above, the waters that were without question litigated included 23A and 23B, which overlap in part with Area 7 but do not include all of it. Decl. Mary Neil, Doc. 45-34, at 37–38 (shellfish catch and finfish area maps attached to Lummi's Reply Brief in 1998).

---

[9] At the same time, Lummi asks this Court to strike the multitude of statements where Lummi defines Admiralty Inlet and the Strait of Juan de Fuca, claiming one should not be bound by what said it says. Doc. 43 at 2:7–8, 19-20.

[10] The Requesting Tribes made it clear from the very beginning of Subproceeding 89-2 that the case was about Lummi fishing in "[the] Strait of Juan de Fuca (including Discovery Bay), the waters off the west coast of Whidbey Island (including Admiralty Inlet) [and] the mouth of Hood Canal," Decl. of Mary Neil, Doc. 45-7 (Ex. 6) at 4–5, and that the catch areas at issue included 23A, 23B, 23C, 25A, 25B, 25C, 25E, and 26A. Decl. of Mary Neil, Doc. 45-7 (Ex. 6) at 11; *see also* Decl. of Mary Neil, Docs. 45-8 and 45-9 (Exs. 7 and 8) at 1–2 (the waters at issue in 89-2 were "Catch Reporting Areas 23A, 23B, 23C, 23D, 25A, 25B, 25C, 25D, 25E, 26A known as the Strait of Juan de Fuca, Admiralty Inlet and the mouth of Hood Canal and also designated by WDF Commercial Salmon Management and Catch Reporting Areas- 6C, 6, 6D, 6B and 9 ("Klallam waters")"; Decl. of Mary Neil, Doc. 45-10 (Ex. 9) at 7, 9, 13, 18, 19 (maps referred to as depicting the areas at issue); Decl. of Mary Neil, Doc. 45-11 (Ex. 9.1).

Lummi in fact acknowledged early on that Subproceeding 89-2 had a "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," Doc. 40, at 9:7–9 (citing Lummi's Ninth Circuit Opening Brief). The area of dispute corresponds with the above description of the catch areas. This area is depicted geographically by Sarah Burlingame, in Doc. 38 at 10 (map of 1989 regulations that were cited to in the original Request for Determination). Ultimately, it does not matter what these waters are called, just that Lummi litigated and lost them due to lack of treaty-time evidence of fishing there. *See Upper Skagit Indian Tribe v. Washington*, 590 F.3d at 1025.

Nevertheless, Lummi now asserts there is some area of water at issue in 11-2 that was not decided in 89-2. Doc. 43 at 28.[11] It is not clear where this gets them. Everything cited above refutes this argument. In support of this argument, Lummi's witness, Mr. Gabrisch, has created a map highlighting this portion of purportedly undecided waters. Doc. 44-6 (Ex. 6). But the map, created seemingly in a vacuum, ignores the multitude of references in this case *supra* and *infra* to the disputed area in 89-2 as including 23A and 23B. *Supra*, fn. 10; *see* Doc. 45-34 at 37 (map of shellfish areas) Doc. 45-30 (Ex. 27) (Lummi's excerpts of 89-2, showing repeated references to 23A and 23B as being at issue in the case on p. 2, 4, 8, 10), or the Requesting Tribes' Motion, Doc. 40 at 7, 10, 13, 26 (repeated references in the record to shellfish areas 23A and 23B as being in dispute).[12] The fact is these areas were claimed by Lummi, and were specifically the

[11] All Lummi relies on for this sweeping assertion is one statement in the Requesting Tribes' Ninth Circuit brief that says that area 7 was not part of the case, and which neglects to also include the shellfish designations 23A and 23B, which do cover this disputed area entirely.

[12] Further, the statement that area 7 was not an area at issue in 89-2, which the Requesting Tribes maintain was nothing more than a scrivener's error, has no effect regardless, because a portion of area 7 (i.e., that southern portion that overlaps with areas 23A and 23B) was without question at issue before the District Court and the District Court's decisions necessarily covered those waters. The Parties cannot unilaterally undo a ruling by the District Court.

subject of a motion for preliminary injunction, and thus were most certainly litigated. *E.g.* Decl. Mary Neil, (Ex. 20), Doc. 45-21. Moreover, this area of supposedly undecided waters does not relate at all to Lummi's line of demarcation.

Under these circumstances, there is no material challenge to the assertion that Lummi claimed these waters and lost them, or that areas 23A and 23B were at issue in the case.[13] Lummi also cannot refute that it in fact attempted, via Dr. Suttles (Ex. G, Second Rasmussen Decl. at 17), to put on evidence about this very area—which would have been extremely peculiar if the waters were not at issue then as Lummi claims now. As such, the case involves the same "claim" to the same waters despite Lummi's assertion to the contrary. Doc. 43 at 27:18–22. Accordingly, the prior decisions are res judicata with respect to the issues in this case, and Lummi's contention that there is no "identity of causes of action," Doc. 43 at 27:l8–19, is without merit. There is no portion of water for Lummi to litigate that has not already been disputed and adjudicated already. Doc. 43 at 29, 20–22 (Lummi incorrectly asserting that there are new claims it may assert in the future as to waters not previously determined).

C. Lummi Incorrectly Proposes to Go Back to "Interpret" Judge Boldt's Intent

Lummi requests that this court examine Judge Boldt's intent, again proposing that, exactly like Subproceeding 89-2, the Requesting Tribes must show the "term"[14] used by Judge

[13] As to Area 6A, the Requesting Tribes, at least at some point in the 89-2 litigation, did not intend to include that water in their Request for Determination, likely because Lummi's regulations did not open 6A. Lummi later entered into a stipulation with the Swinomish Tribe stating that 6A was not part of the waters it was seeking to have added to its U&A. Ex. F, Rasmussen Second Decl. at 16.

[14] Here, the "term" that the Requesting Tribes are apparently required to show is ambiguous to satisfy Lummi's proposed path to relief, "the Strait of Juan de Fuca," wasn't used at all in the Lummi U&A determination in 1974 but was first used by the Court with respect to Lummi U&A in Subproceeding 89-2. Thus, under Lummi's view the Requesting Tribes, not surprisingly, have no way to succeed because they would have to show Judge Boldt's intent when he didn't use a geographical term. Proving the meaning behind the absence of a word is a high standard indeed, but one that the Requesting Tribes already met in Subproceeding 89-2.

Boldt is ambiguous, or that he intended to use something other than the apparent meaning. Doc. 43, 8:1–6.

This historical case has been litigated two ways (both as an affirmative claim and as a claim that it was part of the original decision), and this case should be treated differently by this Court for that reason. This Court's sole role is to look at the decisions of Judges Rothstein and Coyle and the Ninth Circuit. The Court has instructed the Parties to produce evidence to shed light on the understanding of the Courts when the rulings were issued. Order Mots. Recons., Sub. 89-2, Doc. 19310 (July 14, 2009) (instructing the parties to return to the decisions of the District Court and the Ninth Circuit to determine the boundaries of the Strait of Juan de Fuca). In reviewing the evidence presented to the Ninth Circuit, the Court should give greater emphasis on materials that were in the Ninth Circuit briefing, as well as the language of the rulings, because those materials in the brief, including the two directly attached maps, were undoubtedly reviewed by the Court and the two lower Court decisions show which geographic area the Ninth Circuit "affirmed." One historical map (of several in a series USA 60–64),[15] taken out of the context of the text of the Dr. Lane Report, buried in the Appendix of Record, should be considered less relevant and likely was not the basis for the ruling. Other material, of which judicial notice could be taken, may be considered, such as the contemporaneous US Board definition, because not only is it official but it also has a second layer of reliability in that it fits exactly with Lummi's own statements regarding the geography of the area. The 1954 definition, which does not fit with what Lummi said to the Courts of 89-2, is irrelevant to the question of what the "issuing court" thought or the waters that Lummi claimed in 1990. It is also not what

[15] Decl. Mary Neil (Ex. 26) (Maps cited by the District Court in FF 46).

Lummi said at the time was their justification for the line they drew across the Strait. Decl. Hillaire, Doc. 39-13 at 326. As such, it has absolutely no bearing on the current case.

The Requesting Tribes have met their burden of showing there is no dispute as to the material facts in this case. Doc. 40 at 23 (Argument § III). Lummi and the District Court Judges, understood exactly where both Admiralty Inlet and the Strait of Juan de Fuca were located. Requesting Tribes Brief, §III (C). There is nothing that comes out of reviewing the record that establishes anything more than "metaphysical doubt" on these issues.[16] There is also nothing at all that supports the Lummi "line" drawn after the decision. Lummi argued to the Ninth Circuit: "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." Opening Br. Def. – Appellant Lummi Nation at 30, No. 98-35964 (9th Cir. Jan. 25, 1999); Ex. A, Rasmussen Decl., Doc. 39-1, 39-2, at 6–80. Lummi attached two maps, which label Admiralty Inlet, Haro, and Rosario Strait so the Court can see that Haro and Rosario Strait are "North of this Strait." Rasmussen Decl., Doc. 39-2 at 60–61. There is also no evidence that reefnet sites go 14 miles beyond the shore of San Juan Island on the reefnet site map. Doc. 39-2 at 63 (reefnet site map); Doc. 43 at 25:1–3 (suggesting now that reef nets go beyond the immediate nearshore); Doc. 38 at 8 (map of distances the Lummi line is from the shoreline). Lummi also admitted that after the 2000 decision it drew a line from Admiralty Inlet across the Strait in a unilateral interpretation of

[16]Lummi's citation to one map of a series of maps (USA 60–64), USA 62 which is a "sketch" of Haro and Rosario Straits and purports to locate the key for the Strait of Juan de Fuca to the west is not persuasive. Not one of the multitude of maps in this case puts the key on the same spot, nor does the location of the name without more prove any intent whatsoever. More instructive is the complete lack of text describing Lummi frequenting the Strait of Juan de Fuca or the Waters West of Whidbey Island in the Dr. Lane report on its Treaty Time Identity (Exs. 45-25 at 47, 45-24 at 27–31). As a direct comparison, the Klallam findings on their U&A have specific references to fishing rights in the Strait of Juan de Fuca as extending from the Hoko River to the mouth of Hood Canal and explicit references to Whidbey Island. *United States v. Washington*, 626 F. Supp. 1405, 1442 (1985). In any event, this entire argument is irrelevant because Judge Boldt's intent has already been decided.

the Decision, noting "a reasonable point for the Westerly end of Admiralty Inlet is Point Wilson." Rasmussen Decl., Doc. 39-13 at 236 (paragraph 4 of the Declaration of Elden Hillaire). The evidence against Lummi's argument is overwhelming.

This Court should recognize that neither the Court nor a party may "alter, amend or enlarge upon the description in the decree." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998). Certainly if the Court may not do it, it must be impermissible for a party to do so unilaterally. Lummi could readily have moved for reconsideration of the Ninth Circuit Order if it believed that Court had erred in not using "clear boundaries" or for any other reason. Rasmussen Decl., Doc. 39-13 at 326; Doc. 39 at 30:15–20. Instead, it did not disclose its interpretation[17] to the Requesting Tribes for several years, eventually issuing different lines for every fishery and engaging in self-help in a way that precluded the Requesting Tribes from going back to the panel immediately to resolve Lummi's claim.

The Court should also decline Lummi's suggestion to ignore Lummi's statements to the Court regarding the geography of the area. The case law simply does not support their request under *Muckleshoot*. In addition, Federal Rule of Civil Procedure 11(b)(3) requires all "factual contentions" to have evidentiary support if included in a brief. This should preclude Lummi from claiming specifically and repeatedly that the Strait of Juan de Fuca is north of Admiralty Inlet and then later claiming that it is not, or that the boundaries are suddenly "unclear."

[17] See Second Rasmussen Declaration at 12, 14, which is the 2004 Correspondence between Dan Raas and Michelle Coyle, where Mr. Raas makes no mention whatsoever of having adopted any specific line or that he disagrees that Area 7 and 6 are within the Strait of Juan de Fuca.

One mistaken statement or a reference that uses a term in a different context is one thing, but Lummi's consistent use of the geographic terms here is meaningful.[18] The Ninth Circuit decision contains the language that is being interpreted.[19] When the Ninth Circuit reversed only as to one area (Admiralty Inlet) this necessarily means that the Judge Coyle and Judge Rothstein decisions stand as to the Strait of Juan de Fuca. Judge Boldt did not use the term "Strait of Juan de Fuca" in the Lummi U&A description in 1974 even though Lummi clearly asked in 1973 for the area all the way up to the Makah Reservation. *Supra*, at 8. It was not until 1990 that Lummi sought this area again via a cross-request to expand into the area (after fishing in it without making a request). Doc. 45, Ex. 29. The request for relief posed by Lummi in front of the Ninth Circuit was whether the "Strait of Juan de Fuca," which was located on "the western edge of the San Juan Islands" was part of their U&A; Rasmussen Decl., Doc. 39-1 at 15 (Opening Br. Def. – Appellant Lummi Nation at 3, No. 98-35964 (9th Cir. Jan. 25, 1999).

When the Ninth Circuit ruled on Lummi's request, by granting Lummi Admiralty Inlet and denying it the Strait of Juan de Fuca, this ruling must be viewed "in light of what was before the Court when it issued the Judgment." Rasmussen Decl., Doc. 39-9 at 266 (Judge Rothstein's Order citing the standard of review). As such, the boundary of the Strait of Juan de Fuca should be found to be the boundary asserted by Lummi in its own brief to the Court.

In the event the Court is not persuaded that there is ambiguity in the Ninth Circuit decision regarding the boundary of the Strait of Juan de Fuca sufficient to justify Lummi's unilateral interpretation of that decision, Lummi also asks the Court to find that perhaps the term

[18] An example of this would be the Requesting Tribes' Statement in their Ninth Circuit Brief that neglects to also include the shellfish areas.

[19] Though the decisions of the District Court on which the appeal was based are also of course relevant to understanding the dispute and the Ninth Circuit's ruling.

"Admiralty Inlet" is not all that clear either. Lummi therefore claims that Admiralty Inlet might extend past the Point Wilson line to encompass the waters of the eastern Strait of Juan de Fuca, Doc. 43 at 23. The Ninth Circuit's definition makes the Lummi assertion impossible. 235 F.3d 443 at 451. Further, the dictionary definition of the term "inlet" also corresponds with the Ninth Circuit's definition as it is most plainly read (as opposed to Lummi's semantic analysis): ". . . 1b**:** a narrow water passage between peninsulas or through a barrier island leading to a bay or lagoon."[20]

In light of these facts, there is only one reasonable conclusion, which is that as with the term "Strait of Juan de Fuca," there was a common definition of "Admiralty Inlet" throughout the litigation of 89-2 and continuing until now, 235 F.3d 443 at 452 ("separating [Whidbey] island from the Olympic Peninsula"); Doc. 40 at 28:1–3, Doc. 43 at 12:11–20. According to the Ninth Circuit, the "separation" ended at Point Wilson. This is a fact that Lummi should be estopped to deny. Doc. 39-2, pp. 60–61 (map of disputed area Lummi offered to the Ninth Circuit); Declaration of Elden Hillaire, Rasmussen Decl., Doc. 39-13 at 326 ("We concluded that the waters included Haro Strait and Admiralty Inlet and the Waters between the two" and "A reasonable point for the western end of Admiralty Inlet is Point Wilson near Port Townsend"); Rasmussen Decl., Doc. 39-1 at 42 (citing Lummi's Opening Brief: "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."); Rasmussen Decl. Doc. 39-1 at 15 (". . . did Judge Boldt intend to exclude from the broad language of his ruling the marine waters of Admiralty

[20] http://www.merriam-webster.com/dictionary/inlet

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?")

Based on the above, there is no genuine issue that the Ninth Circuit also understood that Admiralty Inlet ended at the Point Wilson line. Lummi agrees that "extrinsic evidence is not necessary if there are definitions in the record itself and the maps known to be used by the Court." Doc. 43 at8:15-17. Based on those definitions and maps, all Lummi has done here, again, is raise mere "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 586–87.

Accordingly, the Ninth Circuit ruling is clear that Lummi's U&A does not include the area that it named as the Strait of Juan de Fuca in its pleadings. Now, twelve years after the fact, one can only speculate as to how the Ninth Circuit may have responded to further argument from Lummi as to whether the "passageway" rationale should have been applied beyond the boundary of Admiralty Inlet to the eastern portion of the Strait of Juan de Fuca. Perhaps the Court would have considered approaches to this rationale significantly different than the one unilaterally developed by Lummi. For example, Lummi's passageway could have consisted of a route through Catch Area 6A.[21] Or perhaps, Lummi may have also used the "inland" route on the east side of Whidbey Island, through Saratoga Passage, which has been held to be part of "Puget Sound" and is a much closer transit route from Edmonds (the location of the "environs of Seattle") to the Lummi reservation. In any event, Lummi's unilateral action deprived the

[21] This would be similar to the finding that the Tulalips traveled "up the west coast of Whidbey Island," Doc. 43 at 12, that Lummi claims supports the finding that they also fished there. But Lummi neglects to add that this is relevant only to the initial review of their U&A claim, and that it never got a similar ruling. They cannot now re-make these arguments to get a different result. This is exactly why the "Klallam go to great lengths to avoid discussing Judge Boldt's intent," Doc. 43 at 13, fn. 2. It is not out of fear, but rather because redoing the analysis of Judge Boldt's intent is no longer the necessary analysis. This is also why the 1953 Board definition is not relevant—it is not the operative time period. Doc. 43 at 14.

Requesting Tribes, as well as the Court, of any opportunity, until now, to present their arguments. If Lummi desired to be awarded additional waters that are outside of Admiralty Inlet, it should have approached the Ninth Circuit with its proposed rationale and sought that Court's approval. But Lummi chose instead to act unilaterally, and should not be permitted now to find a new way to create and capitalize on purported ambiguity in the very Ninth Circuit decision that was intended to resolve the ambiguity as to the western boundary of Lummi's U&A. 235 F.3d 443 at 449 ("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.")

D. Motions to Strike

Lummi moves to strike several portions of the Requesting Tribes' motion; there is no basis for such request and it should be denied. First, Lummi states that all of the maps should be stricken as "self-serving," Doc. 43, § C, but then Lummi attaches several of its own maps made by its staff. The Requesting Tribes' maps were produced using an accepted methodology and are relevant to the actions that Lummi took in this case. Map # A is a geographical depiction of the 1979 BGN definition of the Strait. It has the identical purpose to that of Lummi's map at Gabrisch Ex. 8. Map # B maps the Lummi regulation line that it is claiming in this subproceeding is the extent of its U&A. It contains distances to illustrate for the Court just how wide a "passage" Lummi gave itself. There is no other way to provide this information effectively. Map # C is identical in purpose to Gabrisch Ex. 12. Map # D is the area the

Requesting Tribes objected to in 2008. All of the maps are relevant. All of the above maps are attached to the Declaration of Sarah Burlingame, Doc. 38.[22]

Lummi also moves to strike all Lummi's "statements in other subproceedings," Lummi Resp. Doc. 43 at 19, and provides a summary of many such statements from Subproceeding 89-2 as an attachment to the Declaration of Mary Neil, Doc. 45, Ex. 27. This request fails for several reasons. First, Lummi asserts the statements cannot be judicial admissions because they were not made in the same proceeding. Doc. 43 at 20:1–9. This ignores that the purpose of this Subproceeding 11-2 is to ascertain the outcome of Subproceeding 89-2, and ultimately suggests that each subproceeding in *U.S. v. Washington* should be seen in a vacuum. The entire basis of this subproceeding is to understand the decision of the "issuing Court." Requesting Tribes' Brief, Doc. 40 at 19 citing *Muckleshoot* (the review is of the entire record before the "issuing Court"). In addition, pleadings from subproceeding 89-2 are absolutely relevant to and certainly are the very "documents and evidence the Court relied upon," which Lummi has argued "play a much larger and definitive role in interpreting the judicial text." Doc. 43 at 8:7–14). The Court here has specifically instructed the parties to specify the evidence that supports their position. Order Mot. Recons., Doc. 19310 (July 14, 2009). There is no basis for striking the materials.

In addition, all the statements have been asserted under Rule 11 to have an evidentiary basis. Fed. R. Civ. P. 11(b)(3). Thus, if Lummi is claiming the ambiguity, it should be held to its own definition of the Strait of Juan de Fuca and Admiralty Inlet. The idea that the statements were never "adopted," Doc. 43 at 20:6–7, is misplaced. Rothstein Order, Rasmussen Decl. at 255 (citing to the Dr. Suttles Report describing the geography of the area); 235 F.3d 443 at 451

[22] It is unclear whether there is also an objection to the maps attached by Mr. McCoy because the critique appears to be directed at Ms. Burlingame. Doc. 43 at 17; Doc. 41. If there is, the same arguments in favor of the maps applies.

(defining Admiralty Inlet as "separating" Whidbey Island from the Olympic Peninsula); 235 F.3d 443 at 451 (defining Admiralty Inlet). Lummi also moves to strike the Requesting Tribes inclusion of the official Federal definitions of the Strait and Admiralty Inlet that were in place during the entirety of Subproceeding 89-2. It first argues that those definitions are irrelevant because they were issued in 1979, but Lummi is mistaken as to the operative period here. Because Judge Boldt never referenced the Strait in his decisions on Lummi's U&A, what the definitions were before 1979 are not relevant.[23] What is relevant are the definitions during 89-2, because the question is what the Courts of 89-2 intended and because they are the same as those asserted by the Court and the Parties.[24]

Finally, Lummi moves to strike the portion of Barbara Lane's 1989 declaration found in Judge Coyle's 1990 Order, and which was cited by the Ninth Circuit and this Court. But citing to a Court Order or a published Ninth Circuit Case is not improper. The Requesting Tribes have not offered that declaration for the truth of the matter it asserts, and in doing so acknowledged that Lummi had challenged the 1989 Declaration as improper. Doc. 40 at 12–13 (noting Lummi's objection). Contrary to the suggestion by Lummi, the Ninth Circuit found that Judge Coyle did not impermissibly rely on the declaration. 235 F.3d 443 at 450. The Motions should be denied.[25]

---

[23] This argument is also something they could have raised in the first case but did not. But here now, it is too late to argue that Judge Boldt understood the Strait of Juan de Fuca to end earlier when he denied them rights in those waters. Either way, it is not instructive as to what waters they claimed and lost.

[24] Lummi mistakenly argues that the Board on Geographic Names' definitions are not relevant for the Federal courts. Lummi states incorrectly that "Definitions promulgated by the Board are binding only on 'departments, bureaus and agencies of the Federal Government". 43 USC § 364e.'" Doc. 43 at 15:16–18. What the law actually says is that the Board's decisions "shall be standard for all material published by the Federal Government." 43 U.S.C. § 364e; see also 43 U.S.C. §§ 364b and 364d . The language Lummi misquotes is that "all departments, bureaus, and agencies of the Federal Government shall refer all geographic names problems to the said Board for the purpose of eliminating duplication of work, personnel, and authority." *Id*.

[25] In any event, the Court could rule without the use of any of the challenged maps, or even the Lane Declaration, based on the overwhelming evidence from the record.

CONCLUSION

The Requesting Tribes respectfully request that this Court find that: (a) there is no genuine issue of material fact about the location of Admiralty Inlet; (b) Lummi may open Admiralty Inlet for fishing but may not fish in the disputed area as it was defined, adjudicated, and decided in subproceeding 89-2;[26] and (c) there remains no issue left for trial and judgment should be entered in favor of the Plaintiffs.[27]

DATED this 23rd day of July, 2012.

Respectfully submitted,

s/ Lauren P. Rasmussen
Lauren P. Rasmussen, WSBA # 33256
Law Offices of Lauren P. Rasmussen, PLLC
1904 Third Avenue, Suite 1030
Seattle, WA 98101
(206) 623-0900
lauren@rasmussen-law.com

Attorney for the Jamestown S'Klallam Tribe and the Port Gamble S'Klallam Tribe

s/ Stephen H. Suagee
s/ Trent S.W. Crable
Stephen H. Suagee, WSBA # 26776
Trent S.W. Crable, WSBA # 38227
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Rd.
Port Angeles, WA 98363
(360) 452-8471
steve.suagee@elwha.nsn.us
trent.crable@elwha.nsn.us

[26] Described with particularity at Doc. 40 at 1:17–21.

[27] To the extent it may be necessary, the Requesting Tribes also renew the request that this Motion be referred to Judge Rothstein in the event the Court concurs that in considering the question of what was adjudicated in Subproceeding 89-2 it would be appropriate inquire of the Judge who entered the order that was appealed to the Ninth Circuit in the first place.

Attorneys for the Lower Elwha Klallam Tribe

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to Lummi Nation's Memorandum in Opposition to Motion for Summary Judgment was filed with the Clerk of the Court on July 23, 2012, 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.

s/ Lauren P. Rasmussen
Lauren P. Rasmussen, WSBA # 33256
Law Offices of Lauren P. Rasmussen, PLLC
1904 Third Avenue, Suite 1030
Seattle, WA 98101
(206) 623-0900
lauren@rasmussen-law.com

Attorney for the Jamestown S'Klallam Tribe and the Port Gamble S'Klallam Tribe