

Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

UNITED STATES OF AMERICA et al.,

Plaintiffs,

v.

STATE OF WASHINGTON et al.,

Defendants.

)  
) NO. C70-9213  
)  
) Subproceeding 11-2  
)  
) LUMMI NATION'S  
) CONSOLIDATED REPLY IN  
) SUPPORT OF MOTION FOR  
) SUMMARY JUDGMENT  
)  
) Note for Motion Calendar: June  
) 30, 2015  
)  
) Oral Argument Requested  
)

**INTRODUCTION**

The point of the lawsuit the United States filed was to protect Indian treaty rights from state infringement, not to sort out competing tribal claims. That goal was achieved, and has nothing to do with the continuing exercise of jurisdiction as far as we can tell from the record.

*United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009). In Final Decision I, Judge Boldt intentionally defined usual and accustomed fishing grounds broadly. *United States v. Washington*, 384 F. Supp. 312, 332 (W.D.Wa. 1974) *aff'd and remanded*, 520

1 F.2d 676 (9th Cir. 1975) (“however distant from the then usual habitat of the tribe, and  
2 whether or not other tribes then also fished in the same waters”). These large,  
3 continuous U&A boundaries protected the treaty rights of the Tribes in Final Decision I –  
4 including those of the Lummi Nation – from State encroachment. They also covered all  
5 of Puget Sound.

6  
7 For 26 years, however, the Port Gamble and Jamestown S’Klallam and Lower  
8 Elwha Klallam Tribes (the S’Klallam) have used this Court’s continuing jurisdiction for a  
9 different purpose -- to whittle away at Lummi U&A. The S’Klallam approach  
10 subproceedings under revised Paragraph 25(a)(1) as a continuing test for the  
11 sufficiency of evidence underlying Judge Boldt’s findings. Here, they even return to the  
12 Lummi’s 44-year old complaint to limit the Court’s original ruling. (Port Gamble  
13 Response at 3; Dkt. #176).

14  
15 The flaw in the S’Klallam argument is that it substitutes de novo review for a  
16 much narrower inquiry: did Judge Boldt intend to include the marine areas west of  
17 Whidbey Island within the phrase “Northern Puget Sound from the Fraser River south to  
18 the present environs of Seattle?” *Washington*, 384 F. Supp. at 360-61. He did, to grant  
19 the Lummis continuous U&A throughout the described area.

20  
21 Judge Boldt did not intend, as the S’Klallam allege, to divide Lummi U&A into two  
22 discrete areas – one north of Deception Pass and one south of Point Wilson in  
23 Admiralty Inlet. The Lummi Nation therefore requests the Court to grant its motion for

summary judgment under revised Paragraph 25(a)(1) that Judge Boldt recognized U&A in the disputed area. The western boundary of the U&A, however, remains a disputed question of fact requiring supplemental findings under revised Paragraph 26(a)(6)

**I. Judge Boldt's Intent Is The Sole Issue Under Paragraph 25(a)(1).**

The parties agree that the *Muckleshoot* two-step procedure provides the relevant test, but they disagree on two questions: (1) must the Lummis prove anew treaty-time fishing in the disputed area to preserve their U&A; and (2) is traveling in the disputed area in route to Admiralty Inlet sufficient to confirm Judge Boldt's findings? The answer to both questions comes from his decisions and the purpose underlying them. Because Judge Boldt granted a continuous stretch of U&A from the San Juan Islands south to Admiralty Inlet, the Lummis need not prove anew their fishing rights in the disputed area. And at minimum, evidence of travel through the area confirms Judge Boldt's intent.

**A. Only The Western Boundary Is Ambiguous**

To eliminate all U&A west of Whidbey Island, the S'Klallam contend alternatively that the disputed area is the Strait of Juan de Fuca, or that the entire Lummi U&A in the disputed area is ambiguous. Neither is correct. As the Ninth Circuit held in *United States v. Lummi*, "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. *United States v. Lummi*, 235 F.3d 443, 449 (9th Cir. 2000) (emphasis added).

1 The eastern boundary of disputed area – the west coast of Whidbey Island – is clear.  
2 Judge Boldt intended the western boundary to be in the marine area south of the San  
3 Juan Islands and west of Whidbey Island. But Final Decision I did not specifically  
4 determine where.

5 The S'Klallam's first argument is that the Court already decided the Strait  
6 includes the disputed area. (Port Gamble Response at 12). Yet the Ninth Circuit  
7 reversed the District Court on this point – no court has decided whether the marine area  
8 west of Whidbey Island is part of the Strait. *United States v. Lummi Nation*, 763 F.3d  
9 1180, 1187-88 (9<sup>th</sup> Cir. 2014). If Judge Boldt believed the disputed area was the Strait  
10 of Juan de Fuca, the Ninth Circuit would have affirmed, not reversed.  
11

12 Under revised Paragraph 25(a)(1), the S'Klallam have the burden of proving that  
13 Judge Boldt considered the entire disputed area to be the Strait of Juan de Fuca. They  
14 provide no evidence that he believed the Strait ended on the shores of Whidbey Island.  
15 Instead, they allege that “other sources, including this Court, Judge Craig, the S'Klallam  
16 fisheries manager, and Lummi's own fishermen, have all identified the Strait of Juan de  
17 Fuca in a manner that includes the disputed waters.” (Port Gamble Response at 14).  
18 Even if this were true, which it is not, these other sources do not prove what Judge  
19 Boldt intended. The best evidence comes from his rulings and geographic descriptions.  
20 Never did Judge Boldt find or imply that the eastern boundary of the Strait of Juan de  
21 Fuca was Whidbey Island. Despite having many opportunities to rule as the S'Klallam  
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1 allege, Judge Boldt consistently treated the Strait as a body of water bordering another  
2 body of water, Puget Sound, which in turn surrounded Whidbey Island. (Lummi  
3 Summary Judgment Motion at 8-10; Dkt. #167)

4       Next, the S'Klallam contend that the Lummi cannot claim the waters west of  
5 Whidbey Island because Judge Boldt did not specifically identify them in his findings, as  
6 he did for the Tulalip and Swinomish. (Port Gamble Response at 15) This mixes two  
7 arguments – one geographic and one legal. First, Judge Boldt's geographic  
8 descriptions for other tribes show that he did not divide Puget Sound in two, with the  
9 Strait in the middle. As the S'Klallam finally admit, their geographic argument is a  
10 "diversion". (Port Gamble Summary Judgment Motion at 11; Dkt #176). Judge Boldt's  
11 understanding was that the Strait of Juan de Fuca bordered Puget Sound, not Whidbey  
12 Island.  
13

14       Second, Judge Boldt's later U&A descriptions for the Swinomish, Tulalip and  
15 Lower Elwha do not imply that he meant to exclude the waters west of Whidbey Island  
16 for the Lummi. Arguing *expressio unius est exclusio alterius*, the S'Klallam claim that if  
17 Judge Boldt intended to include the west coast of Whidbey in Lummi U&A, he would  
18 have said so. Yet he did. "Northern Puget Sound from the Fraser River south to the  
19 present environs of Seattle" necessarily includes the waters surrounding Whidbey  
20 Island. When Judge Boldt entered findings in Final Decision 1 he protected Lummi  
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1 treaty fishing throughout the described area. Had he wanted to exclude the marine  
2 waters around Whidbey, he would have said so.

3 Finally, the S’Klallam suggest without proof that Lummi ancestors traveled  
4 exclusively through Deception Pass and down the east side of Whidbey Island to reach  
5 the environs of Seattle. (Port Gamble Response at 19). The waters east of Whidbey  
6 Island are not at issue in this subproceeding, and the Court should disregard the  
7 S’Klallam’s arguments. Furthermore, the Ninth Circuit has already held that Lummi  
8 fisherman traveled through Admiralty Inlet – on the west side of Whidbey Island.  
9 Finally, the most thorough anthropological and ethnohistorical evidence shows that  
10 Lummi predecessors fished and traveled on both sides of Whidbey. (See Deur Report;  
11 Exhibit A to Kinley Dec.; Dkt. #181).  
12

13 B. Ambiguity Does Not Justify Reconsideration  
14

15 The S’Klallam’s second argument is that because the western boundary is  
16 ambiguous, the entire disputed area is at issue. In other words, the S’Klallam presume  
17 that Judge Boldt never considered whether the Lummi had U&A in the disputed area.  
18 (Lower Elwha Response at 5; Dkt. #183). This is equivalent to reconsideration.  
19 Regardless of what Judge Boldt may have intended, if there is “no evidence in the  
20 record that could support a finding of U&A in the disputed waters”, a reviewing court  
21 may restrict U&A beyond what was originally found.  
22  
23

Here, Judge Boldt meant to include the area. First, there is no evidence that Judge Boldt wanted to exclude the disputed area from Lummi U&A. This would be the most compelling evidence in the S'Klallam's favor and it is completely lacking. Second, as set out in the Lummi's response to summary judgment, Judge Boldt always described contiguous U&A in marine areas. (Lummi Response at 4-7; Dkt. #179) If the Court bifurcates Lummi U&A, it would be the first time a treaty tribe has discontinuous U&A in separate areas of Puget Sound. Third, Judge Boldt never called the marine waters in the disputed area "the Strait of Juan de Fuca". Instead, when he did not identify it separately, he called the area "Puget Sound" or "Northern Puget Sound".

## **II. The Record Supports Judge Boldt's Intent**

The S'Klallam contend that "Judge Boldt could not have intended to include the waters west of northern Whidbey Island in Lummi's U&A *because there is no evidence to support such a finding.*" (Lower Elwha Response at 14) (emphasis added). After making this claim, the S'Klallam spend a combined nine pages distinguishing the evidence in the record that suggests Lummi fishing and transit through the disputed area. The fact there is relevant evidence in the record is sufficient to confirm his intent. Judge Boldt had ample reason to find continuous U&A from the Fraser River to the environs of Seattle.

### **A. USA-30: "Fisheries as Distant as the Fraser River in the North and Puget Sound in the South"**

1 The S'Klallam argue that Dr. Barbara Lane's statement on Lummi fishing "refers  
2 to transitory use." (Port Gamble Response at 20). They cite Dr. Carroll Riley, whom  
3 Judge Boldt concluded was less credible than Dr. Lane. *Washington*, 384 F. Supp. at  
4 350 ("testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley").  
5 There are a number of flaws with this argument.

6  
7 First, under Paragraph 25(a)(1) and *Muckleshoot*, evidence of travel in route to  
8 Admiralty Inlet is sufficient proof of Judge Boldt's intent. *Upper Skagit v. Washington*,  
9 590 F.3d 1020, 1023 (9<sup>th</sup> Cir. 2010). Second, Dr. Lane never agreed that Lummi  
10 presence in marine "thoroughfares" was unrelated to fishing or excluded from U&A.  
11 (Lane Testimony at 2850; Exhibit A to Rasmussen Dec.; Dkt. #177) ("these waters were  
12 used for various kinds of fisheries, but we were mainly concerned with anadromous  
13 fish"). Third, the S'Klallam misquote the original Lummi complaint to assert that Lummis  
14 fished only on the east side of Whidbey Island in the bays, passages and inlets along  
15 the shore. (Port Gamble Response at 21). The Complaint describes U&A "including  
16 but not limited to the waters of the Straits of Georgia...southward..." (1971 Lummi  
17 Complaint; Exhibit G to Rasmussen Dec.; Dkt. #165) (emphasis added).

18  
19 B. USA-30 The Lummi Visited "Other Important Fisheries, Including Halibut  
20 Banks"

21 The S'Klallam concede that Lummis fished for halibut, but argue that they did not  
22 fish for them in the disputed area. "Dr. Suttles work (cited by Dr. Lane) shows that  
23 Lummi had their own halibut banks off of Orcas and Waldron islands in their territory."



1 (Port Gamble Response at 21). The S'Klallam do not provide the full story regarding  
2 Dr. Suttles' work.

3 First, in his 1954 article "Post-Contact Culture Change among the Lummi  
4 Indians", also cited by Dr. Lane in USA-30, Dr. Suttles identified Samish territory  
5 extending throughout the disputed area and along the west coast of Northern Whidbey  
6 Island. (Dr. Suttles Map; Exhibit A to Buri Dec.) (attached as Appendix A). As Judge  
7 Boldt found, the Lummis are the direct treaty successors to the Samish. *Washington*,  
8 384 F. Supp. at 360.

10 Second, Dr. Suttles' 1963 article "The Persistence of Intervillage Ties among the  
11 Coast Salish", submitted to Judge Boldt as USA-49, explains that kinship ties rather  
12 than geographic territory determined where Coast Salish people fished. "Members of  
13 different villages who were united by ties of marriage and kinship also co-operated in  
14 the food quest or shared access to each other's resources." (1963 Suttles at 514; USA-  
15 49; Exhibit B to Buri Dec.). As Sharon Kinley stated, many Lummis were direct  
16 descendants of Skagit people from Whidbey Island. (Kinley Dec. ¶ 7) (Dkt. # 181).

18 Third, in Subproceeding 89-2, Dr. Suttles provided a declaration for the Lummis  
19 concluding that Lummi and Samish forbearers fished in the disputed area at treaty time.  
20 (Dr. Suttles Declaration; Subproceeding 89-2; Dkt. #13810). The foremost expert on  
21 Coast Salish culture – and a primary source for Dr. Lane – documented the broad  
22 geographic reach of Lummi and Samish fishing. The forbearers of the Lummi and  
23

Samish tribes fished where they had kinship ties, including throughout the marine areas south of the San Juan Islands and west of Whidbey Island.

C. USA-62 The 1853 U.S. Coast Survey Map

In Finding of Fact 46, Judge Boldt relied on five maps – USA 60-64 – to describe the geographic extent of Lummi U&A separate from reef netting sites. *Washington*, 384 F. Supp. at 360 (“in addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle”). Only one of these maps, USA-62, depicts the southern portion of Lummi U&A to Admiralty Inlet. And it labels Rosario and Haro Straits and Admiralty Inlet extending far into the disputed area. Even though this may not be accurate by current map-making standards, it documents what Judge Boldt found relevant in describing Lummi U&A. He identified USA-62 twice for a reason. In Finding of Fact 45, he used it for reef-netting locations; in Finding of Fact 46 he used it for Lummi U&A *beyond* reef-netting locations.

The S’Klallam rebut this with what Dr. Lane believed the maps showed. (Port Gamble Response at 21-22) (Lower Elwha Response at 13) (USA-62 “was introduced for the sole purpose of locating a Lummi reef net site on San Juan Island”). But the relevant issue is Judge Boldt’s intent, and his reference to USA-62 separate from reef-netting sites documents his belief that Lummi U&A stretched from the San Juan Islands

1 south to Admiralty Inlet. The only map before Judge Boldt that contains the entire  
 2 disputed area, USA-62, is relevant evidence of what he meant when he described an  
 3 unbroken continuous area from the Fraser River south to the environs of Seattle.

4 D. PL-94w B.N. McDonough's Description Of Lummi Fishing Sites

5 In his 1895 affidavit for the Alaska Packers Association case, B.N. McDonough  
 6 described his first-hand experience with Lummi fishing. (McDonough Affidavit, PL-94w;  
 7 5-1-15 Rasmussen Dec. at 90; Dkt. #165). McDonough had lived on the newly-formed  
 8 Reservation since 1883 "and since that time I have been engaged in the general  
 9 merchandising business and have traded with the Lummi Indians daily". (McDonough  
 10 Aff; Rasmussen Dec. at 88). He stated that Lummis "have fished at all points in the  
 11 lower Sound..." (McDonough Aff.; Rasmussen Dec. at 89).

12 The S'Klallam argue that McDonough's reference to Lower Sound actually meant  
 13 the area around Point Roberts. (Lower Elwha Response at 13-14). But McDonough  
 14 referenced Point Roberts because the litigation was over non-tribal fishermen blocking  
 15 Lummi reef net sites around Point Roberts. His statement in context refers to lower  
 16 Puget Sound – south of the Reservation, not north.

17 The S'Klallam next claim that the 1895 affidavit of Jack Sumptilino, PL-94d, also  
 18 refers to Northern Puget Sound as "Lower Sound". (Lower Elwha Response at 14). But  
 19 the statement proves just the opposite: tribes from Lower Puget Sound traveled north  
 20 to Point Roberts to fish. (Sumptilino Aff; 5-1-15 Rasmussen Dec. at 65; Dkt. #165)

1 (“Point Roberts was a common fishing point for the Indians of the Lower Sound and  
 2 Southern British Columbia”). Numerous southern Puget Sound tribes, including the  
 3 Suquamish, Swinomish and Tulalip and have adjudicated U&A at Point Roberts. The  
 4 Lower Sound means what the affiants said – the southern portion of Puget Sound, not  
 5 the Lummi home territory.  
 6

7 //

8 **III. To Rule On The 25(a)(6) Jurisdictional Issue, The Court Appropriately**  
 9 **Reviews Evidence Of Treaty Time Fishing**

10 The Lower Elwha move to strike the Lummi’s discussion of Paragraph 25(a)(6)  
 11 except “the discussion in Section V of Lummi’s motion may stand to the extent it simply  
 12 expresses Lummi’s *views* on jurisdictional issues.” (Lower Elwha Response at 16-17).  
 13 It is unclear what the Lower Elwha would strike and what they would accept, but the  
 14 Court should deny the motion for two reasons. First, the Lummi have an initial burden of  
 15 coming forward with relevant evidence. Had the Lummis argued without evidence, the  
 16 S’Klallam would have moved to dismiss any discussion of Paragraph 25(a)(6) for lack of  
 17 proof. Because asserting 25(a)(6) jurisdiction requires some proof of the claim, the  
 18 Lummis have presented sufficient prima facie evidence.  
 19

20 Second, there is no contradiction between finding the existence of U&A under  
 21 Paragraph 25(a)(1) and the extent of U&A under 25(a)(6). As noted above, the Ninth  
 22 Circuit concluded that the western boundary is ambiguous – and not specifically  
 23 determined. Under Paragraph 25(a)(1), the court decides whether Judge Boldt

1 intended to find Lummi U&A in the disputed area. Because only intent is at issue, the  
2 Court appropriately limits consideration to what Judge Boldt wrote and the evidence he  
3 reviewed. But Judge Boldt recognized that Final Decision 1 laid the groundwork for  
4 enforcing treaty rights and did not resolve every issue. Under revised Paragraph  
5 25(a)(6), this Court decides an issue Judge Boldt never specifically determined – where  
6 does Lummi U&A end.  
7

### 8 **CONCLUSION**

9 The Lummi Nation respectfully requests this Court to grant summary judgment  
10 on the existence of Lummi U&A in the disputed area and set this matter for  
11 supplemental proceedings under revised Paragraph 25(a)(6).  
12

13 DATED this 30th day of June, 2015.

14 BURI FUNSTON MUMFORD, PLLC

15 By /s/ Philip Buri  
16 Philip Buri, WSBA #17637  
17 Of Attorneys for Lummi Nation  
18

### 19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on the 30th day of June, 2015 I electronically filed the  
21 foregoing Reply in Support of Motion for Summary Judgment and Declaration of Philip  
22 Buri in Support of Consolidated Reply with the Clerk of the Court using the CM/ECF  
23

24 Page 13 – LUMMI NATION'S REPLY IN SUPPORT OF  
25 MOTION FOR SUMMARY JUDGMENT  
26

**BURIFUNSTON**  
**MUMFORD**  
attorneys at law  
BuriFunstonMumford, PLLC  
1601 F Street  
Bellingham, Washington 98225  
P 360.752.1500 | F 360.752.1502

1 system which will send notification of such filing to all parties registered in the CM/ECF  
2 system for this matter.

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4 /s/ Heidi Main  
Heidi Main, Legal Assistant  
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# APPENDIX A

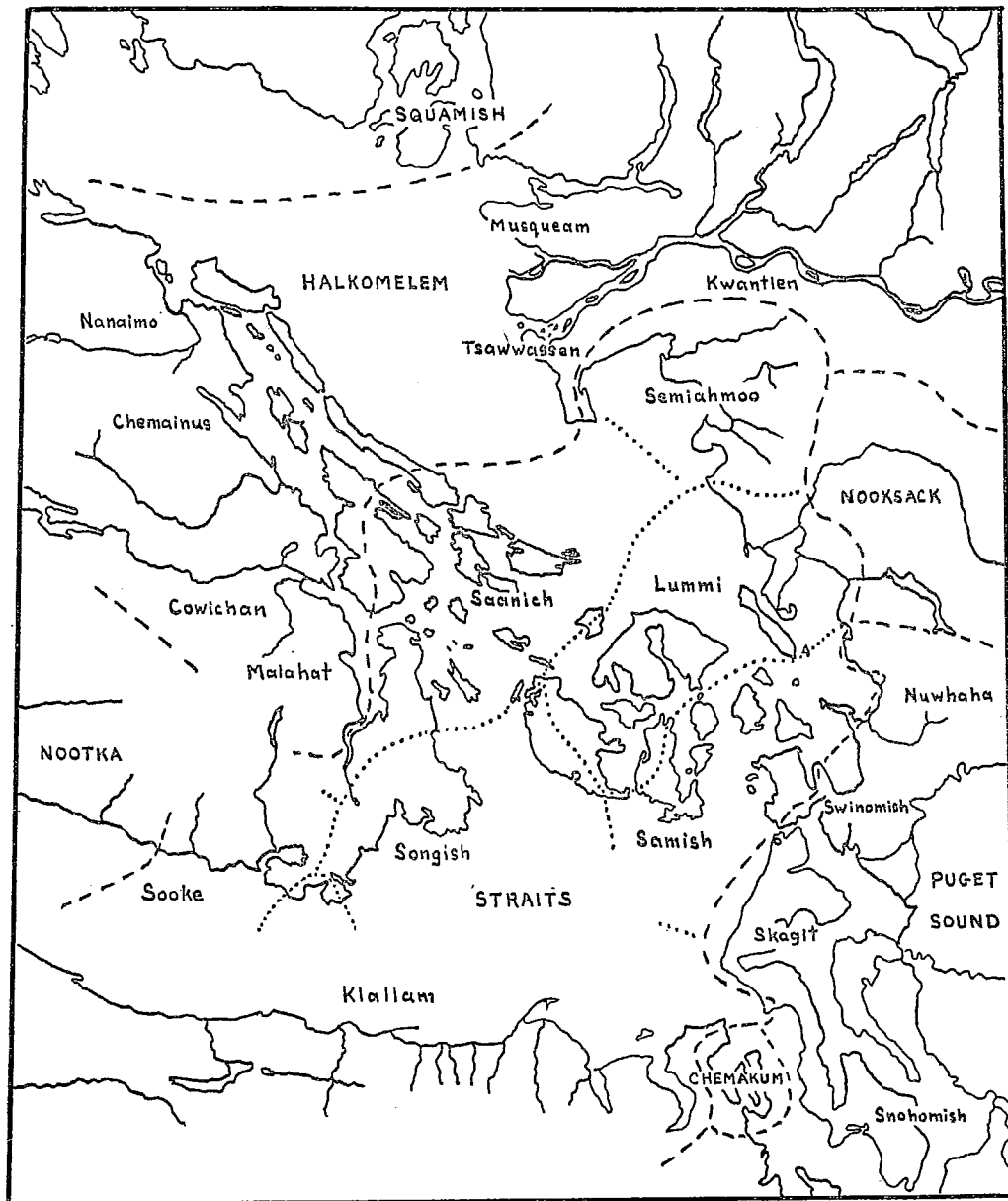
*Post-Contact Culture  
Change among the  
Lummi Indians*

by  
WAYNE SUTTLES

from the  
British Columbia Historical Quarterly, Vol. XVIII, Nos. 1 and 2, Jan.-Apr. 1954

CITATION INFORMATION: Container/Image# \_\_\_\_\_  
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Territory of the Straits tribes. (Heavy broken lines indicate language boundaries; dotted lines indicate tribal boundaries.)

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