No. 15-35661

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff, and

LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellees,

v.

LUMMI NATION,

Respondent-Appellant, and

STATE OF WASHINGTON,

Defendant,

SWINOMISH INDIAN TRIBAL COMMUNITY; SUQUAMISH TRIBE; MAKAH INDIAN TRIBE; STILLAGUAMISH TRIBE; UPPER SKAGIT INDIAN TRIBE; NISQUALLY INDIAN TRIBE; TULALIP TRIBES; SQUAXIN ISLAND TRIBE,

Real-parties-in-interest.

Appeal from the United States District Court for Western Washington, Seattle, case number 2:11-sp-00002-RSM, The Honorable Ricardo S. Martinez

REPLY BRIEF FOR RESPONDENT-APPELLANT LUMMI NATION

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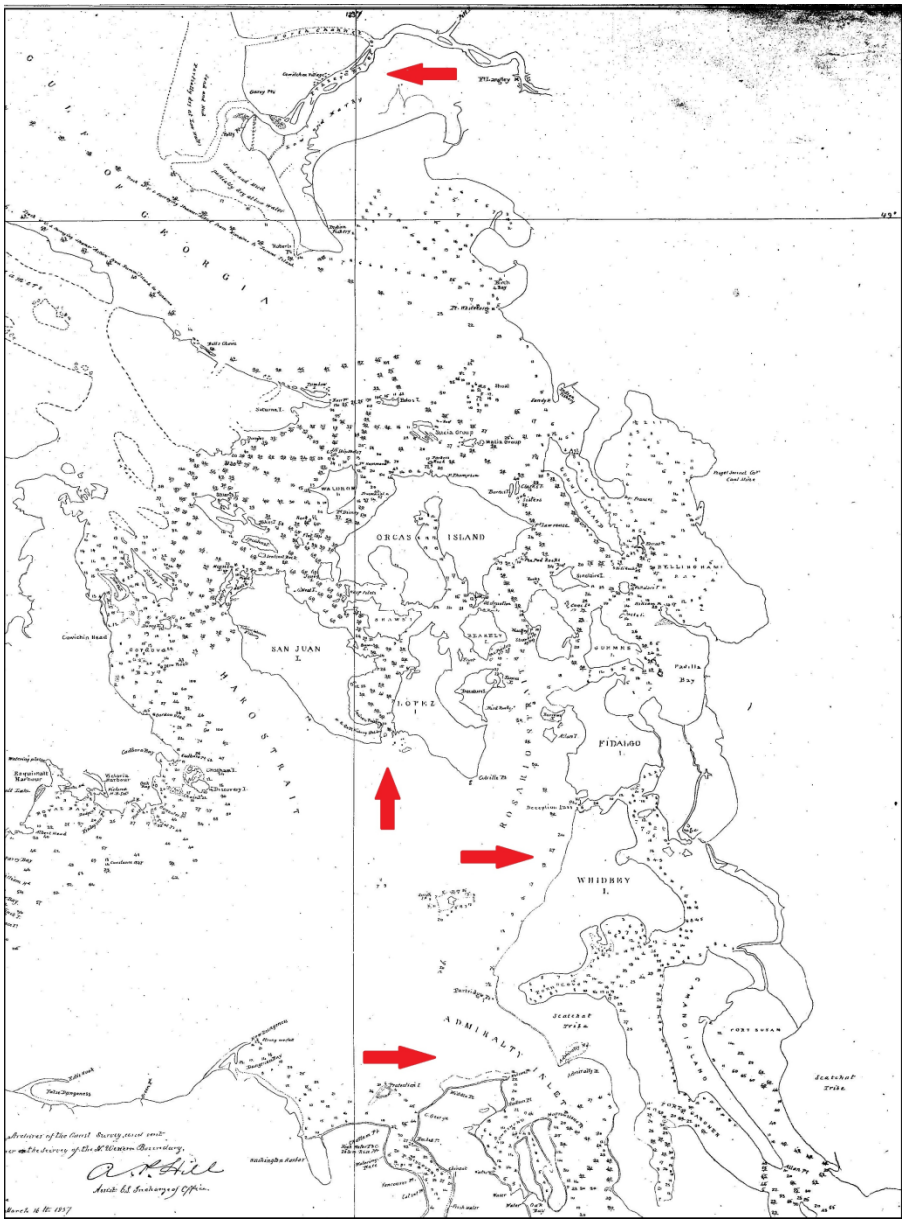
INTRODUCTION

The Requesting Parties did not meet their burden. They had to show "no evidence" from which Judge Boldt could have concluded that the Lummi Nation fished in the waters to the south of the San Juan Islands and west of Whidbey Island. *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015). But ample evidence before Judge Boldt demonstrated that the Lummi fished in the small body of water disputed here. This is not surprising: the Lummi are a "race of fishermen" with "intimate local knowledge of salmon migration routes and underwater topography of the region" (ER114, 182-83), and the disputed waters lie within miles of their historic villages and homeland—land the Lummi ceded in the Treaty of Point Elliot. There is thus every reason to believe that when Judge Boldt described their "usual and accustomed grounds" as encompassing "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle," he intended to include the waters disputed here. *United States v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974) ("*Decision I*"). After all, as the map excerpt below illustrates, these waters lie *directly in the middle* of the area described as well as *squarely in between* waters that this Court already has held are within the Lummi's usual and accustomed grounds:



ER260 (excerpt of Exhibit USA-62; red arrows added to indicate Fraser River, the San Juan Islands, Whidbey Island, and Admiralty Inlet).

Confronted with these facts, the Requesting Parties insist that this Court requires comprehensive documentation of a tribe's fishing in specific waters before recognizing its treaty rights. But this Court's precedent is directly to the contrary:

mere "fragmentary" evidence that would "support[] an *inference*" of fishing will suffice. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 320 (9th Cir. 1988) (emphasis added).

The inconsistency of the Requesting Parties' arguments with this Court's precedent is demonstrated most plainly by their efforts to reconcile their claims with *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) ("*Lummi I*"). There, this Court held that the Lummi's adjudicated usual and accustomed grounds include Admiralty Inlet, which is directly to the south of the waters disputed here. The Court so held despite the absence of any express reference to Admiralty Inlet in any of the evidence regarding Lummi fishing. Instead, it relied on the fact that Admiralty Inlet was a likely "passage through which the Lummi would have traveled" from their home territory in the San Juans to their fishing grounds near Seattle. *Id.* at 452.

For the very same reasons, the disputed waters are within Judge Boldt's description of the Lummi's usual and accustomed grounds. Indeed, to have concluded otherwise, Judge Boldt would have had to presume that, despite having acknowledged fishing grounds in the waters around the San Juan and Lopez Islands (the sites of Lummi villages), and despite having acknowledged fishing grounds in Admiralty Inlet and the waters beyond to the south, the Lummi for some unexplained reason did not fish in the small body of water lying in the 14 to

20 mile stretch directly in between those waters. And Judge Boldt would have had to reach this conclusion notwithstanding record evidence that the Lummi fished the marine waters throughout Northern Puget Sound, taking "long journeys to the various fishing grounds" to fish "wherever the run of fish was greatest." ER182. This Court should reject such an interpretation of his order, which is belied by the evidence and would mean that he intended unprecedented, non-continuous "usual and accustomed grounds."

At the least, even were this Court to conclude that Judge Boldt did not include these waters, it should clarify that the Lummi may still seek to prove their rights. The Requesting Parties have offered no reason to reject the Lummi's straightforward reading of Judge Boldt's retention of continuing jurisdiction over such claims. *Decision I*, 384 F. Supp. at 419.

ARGUMENT

I. THE REQUESTING PARTIES FAILED TO MEET THEIR BURDEN OF SHOWING THAT JUDGE BOLDT DID NOT INTEND TO INCLUDE THE DISPUTED WATERS

A. The Requesting Parties Must Show There Was No Evidence Suggesting Lummi Fishing

The Requesting Parties face a heavy burden. They must prove that Judge Boldt did not intend to include the waters at issue here when he described the Lummi's usual and accustomed grounds to "include[e] the marine areas of Northern Puget Sound from the Fraser River south to the present environs of

Seattle." *Id.* at 360. As the Requesting Parties concede, to make that showing, they must prove that there was "*no* evidence before Judge Boldt that the [Lummi] fished … or traveled through the contested areas." *Tulalip Tribes*, 794 F.3d at 1133 (internal quotation marks omitted, emphasis added); *see* S'Klallam Br. 23-24; Lower Elwha Br. 11. Thus, if there was *any* record evidence before Judge Boldt that the Lummi fished or traveled in the contested waters, the Requesting Parties cannot prevail.

Though the Requesting Parties recognize their burden, they dispute what qualifies as evidence before Judge Boldt. They insist they can satisfy the no-evidence standard so long as nothing in the record before Judge Boldt *expressly* named the waters west of Whidbey Island as a site of Lummi fishing. S'Klallam Br. 24-25; Lower Elwha Br. 13-14.

But this Court does not require such specific documentation. Instead, this Court has held that the "stringent standard of proof that operates in ordinary civil proceedings is relaxed" because "[d]ocumentation of Indian fishing during treaty times is scarce." *Lummi Indian Tribe*, 841 F.2d at 318. All that was required before Judge Boldt to establish a tribe's usual and accustomed grounds in a particular area was evidence that "support[ed] an inference" that the tribe fished in that area. *Id.* at 320; *see id.* at 321 ("Evidence concerning Indian fishing in treaty

times is sketchy and less satisfactory than the evidence available in typical civil proceeding."). Even "fragmentary" evidence sufficed. *Id.* at 318.

That precedent rightly recognizes the unusual posture of these proceedings. Judge Boldt was determining fishing rights guaranteed to tribes nearly 120 years earlier, and he was doing so through consideration of necessarily incomplete and fragmentary evidence concerning the historic fishing activities of multiple tribes in waters in and around what is now Washington State. In trying, years later, to divine Judge Boldt's intent, this Court appropriately holds that he intended to include waters within a tribe's usual and accustomed grounds unless there is "no evidence" supporting such inclusion. This makes sense, especially with waters (like those disputed here) in the Sound, straits, and ocean, not associated with weirs or permanent villages. As Dr. Lane cautioned, the latter were more likely to be evidenced by archaeological artifacts, historical records, and ethnographic studies. ER77.

The Lower Elwha try to brush aside this Court's precedent, arguing for a heightened evidentiary standard when a requesting party asserts that Judge Boldt did not include certain waters. Lower Elwha Br. 14-16. They contend that the Lummi are "effectively suggesting that the lenient standard count twice—once when the record before Judge Boldt was developed in 1973-74 and again in 2015 when the district court reviewed it." *Id.* at 15 n.1. The Lower Elwha cite nothing

to support this argument, and it is incorrect. A court reviewing the record before Judge Boldt must use the same standard he applied. After all, the purpose of this inquiry is to determine his intent in 1974. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998) ("*Muckleshoot I*"). If the record evidence could have led him to include certain waters under the standard he used, it would make no sense now, four decades later, to apply a heightened standard and hold that he did not intend to include them. *See id.* The Lower Elwha's novel standard would lead to anomalous results: evidence would be enough in 1974 to establish the Lummi's usual and accustomed grounds to the satisfaction of Judge Boldt, but that same record evidence would be "no evidence" to support inclusion years later when interpreting his decision.

Lummi I illustrates how far the Requesting Parties ask this Court to depart from its well-established precedent. Their basic argument is that "none of the evidence in the record before Judge Boldt, concerning Lummi treaty time fishing and travel, contained any references to Whidbey Island or the contested waters." Lower Elwha Br. 16. But the same could be said of Admiralty Inlet: the record before Judge Boldt regarding the Lummi contained no specific reference to Whidbey Island (which likewise borders Admiralty Inlet) or Admiralty Inlet itself. Indeed, the Requesting Parties made exactly that argument in *Lummi I*. Opening Brief of Plaintiff-Appellees Four Tribes at 30, *Lummi I*, 235 F.3d 443 (No. 98-

35964). Yet the Court held that Lummi fishing in Admiralty Inlet could be *inferred* from other evidence: because the Lummi's home fishing territory was in and around the San Juans, and because they fished in the waters of Puget Sound extending to the environs of Seattle, there was every reason to think they fished Admiralty Inlet. *Lummi I*, 235 F.3d at 452. That same logic applies with equal or greater force to the waters disputed here.

The Requesting Parties cannot reconcile their arguments with *Lummi I*'s Admiralty Inlet holding. Not until page 35 do the Lower Elwha even acknowledge it. Even then, they fail to explain how Admiralty Inlet could be within the Lummi's grounds, but the waters disputed here not be. *See* Lower Elwha Br. 35.

The S'Klallam, by contrast, try to cabin *Lummi I*'s focus on the Lummi's likely "passageway" through Admiralty Inlet as "dicta." They contend this Court actually relied on "linguistics." S'Klallam Br. 16, 35, 36 n.15. But the *Lummi I* Court specifically stated its holding was *not* based on "linguistics": "there are no linguistic clues to compare." *Lummi I*, 235 F.3d at 452. Instead, the Court's holding was "[b]ased on the geography of the area"—namely, that Admiralty Inlet represented the direct route between two areas undisputedly within the Lummi's fishing grounds. *Id.* at 453. Even if *Lummi I*'s holding were not already clear, this Court clarified any confusion in *Lummi II*: "[t]he reason the 2000 Ninth Circuit panel … f[ound] that the Admiralty Inlet *was* included in the Lummi's U & A was

that the Admiralty Inlet 'would likely be a passage through which the Lummi would have traveled' from the Fraser River, south through the San Juan Islands, to the present environs of Seattle." *United States v. Lummi Nation*, 763 F.3d 1180, 1186-87 (9th Cir. 2014) (quoting *Lummi I*, 235 F.3d at 452) ("*Lummi II*").[1]

Rather than confront *Lummi I*'s actual holding, the Requesting Parties rely on a snippet stating that the "specific, rather than the general, evidence … that Judge Boldt cited" governs the interpretation of his order. *Lummi I*, 235 F.3d at 451; *see* S'Klallam Br. 15; Lower Elwha Br. 32. But this Court was simply explaining that Judge Boldt had relied on evidence *specific to the Lummi* in setting out the Lummi's grounds, and had not cited Dr. Lane's "general" statements applicable to all tribes. *Lummi I*, 235 F.3d at 451 ("[I]t is the specific, rather than the general, evidence presented by Dr. Lane that Judge Boldt cited as support for his findings of fact regarding the Lummi's usual and accustomed grounds and stations."). This language provides no support for the Requesting Parties' suggestion that reference to Lummi fishing in *specific bodies of water* is required.

[1] In a similar misreading of precedent, the S'Klallam assert *Lummi II*'s remand somehow limited subsequent review to the waters "immediately" to the west of Whidbey Island, not the entire disputed area. S'Klallam Br. 1, 19, 37. But this Court reversed and remanded the district court's law-of-the-case ruling in favor of the Requesting Parties; it did not, as the S'Klallam apparently believe, affirm with respect to some waters but reverse with respect to others. *Lummi II*, 763 F.3d at 1188. This Court occasionally used the word "immediately" simply to describe the disputed waters, most likely to distinguish them from waters farther to the west of Whidbey Island in the Strait of Juan de Fuca. *See, e.g.*, *id.* at 1182.

Nor does *Tulalip Tribes* support imposing a heightened evidentiary standard. The Requesting Parties assert that, in holding that Judge Boldt's description of the Suquamish's usual and accustomed grounds includes certain bays to the west of Whidbey Island, this Court relied solely on "specific" evidence of fishing in those waters. Lower Elwha Br. 16; S'Klallam Br. 36-37. But the evidence they cite was not a "specific" description of Suquamish fishing in the relevant *waters*. The cited evidence was Dr. Lane's statements with respect to the nearby *land*: the Suquamish had "possibly" occupied the "west side of Whidbey Island" and had "travelled [sic] to Whidbey Island to fish." *Tulalip Tribes*, 794 F.3d at 1135 (internal quotation marks omitted). As the Lummi already explained (Opening Br. 45), the record before Judge Boldt contained the same kind of evidence regarding the Lummi. Although Dr. Lane did not refer to Whidbey Island, she did report that the Lummi had a presence on other islands bordering the disputed waters. What is more, the Lummi did not just "possibly" occupy those bordering islands, which would have been sufficient evidence under *Tulalip Tribes*; Dr. Lane showed they had villages "on Orcas, Lopez, Shaw and San Juan Islands." ER103. And as Dr. Lane established, the Lummi had numerous reefnetting stations off the San Juans—including off the southern shore of Lopez Island, immediately north of the disputed waters. ER128.

In any event, *Tulalip Tribes* demonstrates that even general evidence defeats an attempt to narrowly construe Judge Boldt's description of a tribe's grounds. This Court explained that "[w]hen traveling from Vashon Island to the Fraser River, the Suquamish would have passed through the waters west of Whidbey Island, and likely would have fished there while traveling." *Tulalip Tribes*, 794 F.3d at 1135. It then held that "[t]his general evidence, too, constitutes some evidence before Judge Boldt." *Id.* Recognizing this holding's inconsistency with their proffered standard, the S'Klallam again resort to the "dicta" label. S'Klallam Br. 36 n.15. But an independent ground for a holding is not dicta simply because it is an alternative; "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Try as they might, the Requesting Parties cannot wish away this Court's precedent.

B. The Requesting Parties Cannot Meet Their No-Evidence Burden

Nor can they satisfy this Court's precedent: the Requesting Parties cannot show there was *no* evidence from which Judge Boldt could infer the Lummi fished the disputed waters.

1. Dr. Lane's report provided evidence of Lummi fishing in these waters

Dr. Lane's report provided sufficient basis for Judge Boldt to conclude the Lummi fished these waters. Dr. Lane stated that "[i]n addition" to the Lummi's

"home territory"—which included the waters of the San Juans—the Lummi also customarily visited fisheries in "Puget Sound in the south." ER130. As the Lummi explained (Opening Br. 32-35), this description necessarily encompassed the waters directly to the south of the San Juans (and west of Whidbey Island). That conclusion is confirmed by Dr. Lane's further statement that the Lummi used "fisheries in the Straits and bays *from* the Fraser River south *to* the present environs of Seattle." ER131 (emphases added).

The Requesting Parties' only response to this evidence is to say that it is too broad, containing no specific reference to the disputed waters as they now describe them four decades after Judge Boldt ruled. S'Klallam Br. 28-29; Lower Elwha Br. 19-20. That is no answer. As explained above, specific references are not required. A broad, general description of Lummi fishing that would include these waters is "some" evidence of fishing in them. *See Tulalip Tribes*, 794 F.3d at 1135. There is no reason to believe that Dr. Lane, in describing a large area in which the Lummi fished, would have deemed it necessary to specify every body of water within that description.

Nor can this point be dismissed on the ground that Dr. Lane and Judge Boldt used similar terms when describing the Lummi's grounds as stretching "from the Fraser River south to the present environs of Seattle." *See* Lower Elwha Br. 20. The Lower Elwha point to the statement in *United States v. Muckleshoot Indian*

Tribe ("*Muckleshoot III*") that, because language in Judge Boldt's *pretrial order* was "nearly identical" to language he ultimately used in *Decision I*, it was "not very helpful" in discerning his intent. 235 F.3d 429, 434 (9th Cir. 2000). But here, Judge Boldt did not simply repeat similar language from a prior order.

Instead, he used similar language from *evidence* before him—Dr. Lane's report—and that report provides substantial grounds for inferring what was intended by those terms. Dr. Lane's report makes clear that her description of "Puget Sound" to the "south" of the Lummi's home territory in the San Juans included the disputed waters. ER130. Her report therefore precludes the Requesting Parties from demonstrating that Judge Boldt did not intend to include these waters when, using similar terms, he described the Lummi's usual and accustomed grounds as encompassing "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360; *see Muckleshoot III*, 235 F.3d at 433 ("[T]he language of the court must be read in the light of the facts before it.") (internal quotation marks omitted).

2. The 19th-century affidavit provided evidence that the Lummi fished in these waters

As the Lummi explained, the 19th-century affidavit cited by Judge Boldt likewise constitutes evidence of Lummi fishing in the disputed waters. Opening Br. 37. The affiant declared that the Lummi fished "at all points in the lower Sound and wherever the run of fish was greatest," taking "long journeys to the

various fishing grounds." ER182. The use of the phrase "at all points" demonstrates the Lummi fished in a *continuous* area in the Sound. The affidavit thus supports the inference that when Judge Boldt described the Lummi's usual and accustomed grounds as encompassing the waters of "Northern Puget Sound" extending "to the present environs of Seattle," he intended to include the waters "at all points" between the San Juans and the present environs of Seattle.

In response, the Requesting Parties first essentially repeat their objections to Dr. Lane's report, asserting the affiant's description is too broad and general to serve as evidence of fishing in the disputed waters. S'Klallam Br. 30; Lower Elwha Br. 23-24. But again, under the correct legal standard, a broad description that encompasses the disputed waters is some evidence of fishing in those waters. The affidavit is just that.

Nor does this evidence lack relevance simply because the statement concerns Lummi fishing in the latter half of the 19th century, after the signing of the 1855 treaty guaranteeing the Lummi's fishing rights. *See* Lower Elwha Br. 22 n.5. The question is whether the affidavit "supports an inference" of historic Lummi fishing in these waters. *Lummi Indian Tribe*, 841 F.2d at 320. Judge Boldt could have inferred from the fact that the Lummi fished these waters in the years following the treaty that they also fished them previously. Indeed, that is presumably why Judge Boldt cited this affidavit (along with other affidavits

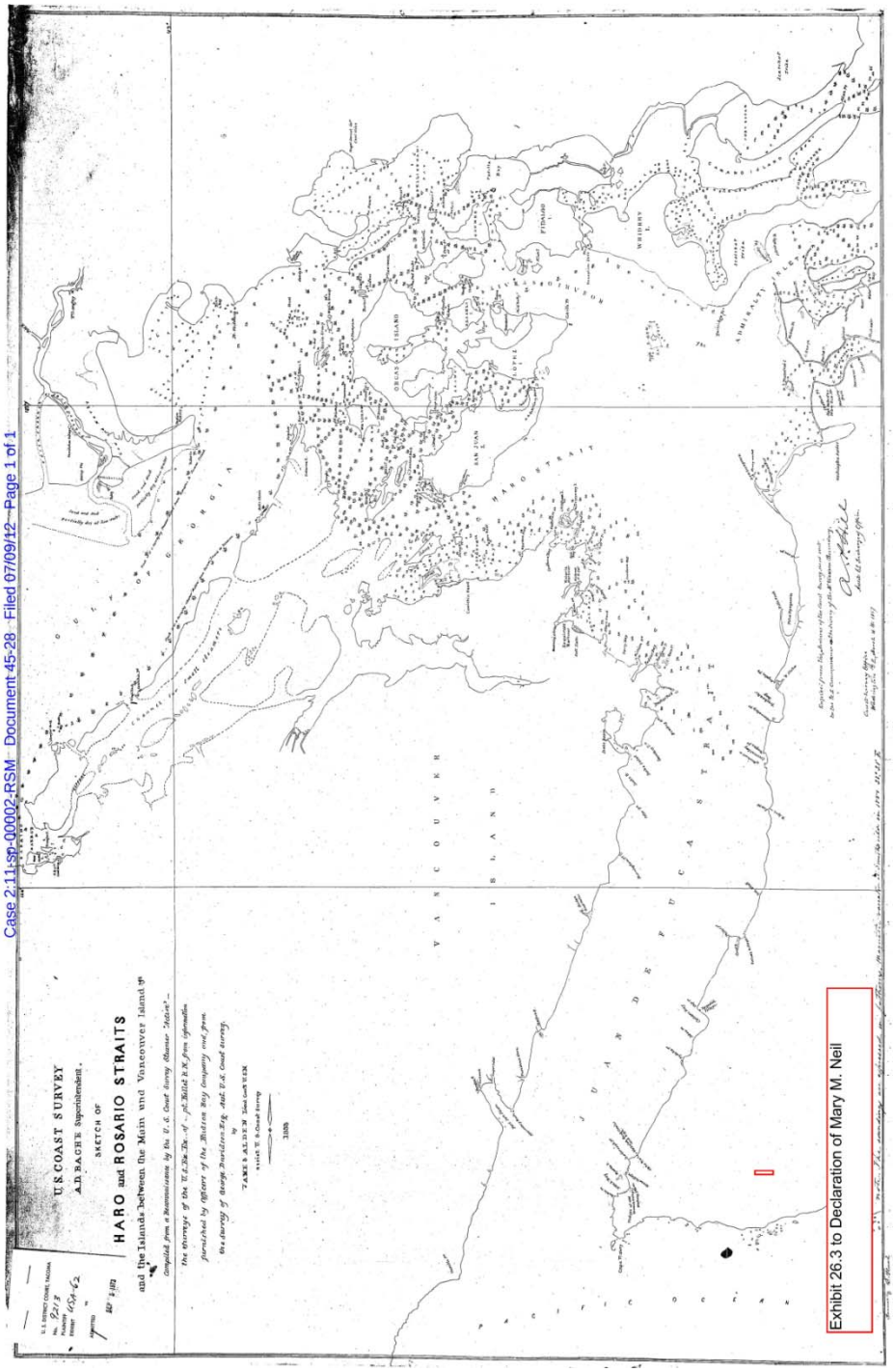
postdating the treaty) in describing the Lummi's grounds. *Decision I*, 384 F. Supp. at 360.

The Lower Elwha also contend that Judge Boldt would have understood the affidavit's reference to "lower Puget Sound" to mean Northern Puget Sound, not Southern Puget Sound. Lower Elwha Br. 22-23. Even if so, the important point here is that Judge Boldt would have considered the disputed waters to be in Northern Puget Sound. After all, as the Lummi explained (Opening Br. 36 n.2), Judge Boldt's description of the Lummi's usual and accustomed grounds demonstrates that he understood "Northern Puget Sound" to extend all the way south to the "environs of Seattle." *Decision I*, 384 F. Supp. at 360. And none of the areas the Lower Elwha identify as being within "upper Puget Sound"—such as Henderson and Case Inlets—disproves that point, as those areas are well to the south of Seattle. *See* Lower Elwha Br. 22-23.

3. Exhibit USA-62 further establishes that Judge Boldt would have understood the Lummi to have fished these waters

Exhibit USA-62 also provides evidence supporting inclusion of the disputed waters within the Lummi's usual and accustomed grounds. That map, which is reproduced again below, depicts the Strait of Juan de Fuca ending well to the west of the disputed waters, and shows Haro Strait, Rosario Strait, and Admiralty Inlet extending into those waters. It thus demonstrates that when Judge Boldt used the phrase "Northern Puget Sound" to include the latter three bodies of water (all of

which are unquestionably within the Lummi's grounds), but not the Strait of Juan de Fuca (which is not), he intended to include the waters to the south of the San Juans and west of Whidbey Island.



ER260 (Exhibit USA-62).

Advancing variations on the arguments accepted by the district court, the Requesting Parties counter that USA-62 served no purpose other than to demonstrate the location of specific Lummi reefnetting sites. S'Klallam Br. 30-31; Lower Elwha Br. 24. To be sure, USA-62 was initially introduced in support of testimony regarding Lummi reefnetting. ER210-11. But again, as the Lummi explained in their opening brief, Judge Boldt did not cite USA-62 only in Finding of Fact 45, where he laid out the Lummi's reefnetting sites. Opening Br. 40. He also cited it in Finding of Fact 46, in which he broadly described the Lummi's additional marine fishing grounds. *Decision I*, 384 F. Supp. at 360-61. Exhibit USA-62 therefore provides compelling evidence regarding what Judge Boldt intended this description to encompass.

In response, the Lower Elwha argue that only Finding of Fact 46, and not also Finding of Fact 45, describes the Lummi's usual and accustomed grounds. They thus contend that Judge Boldt simply repeated the citations set forth in Finding of Fact 45 so as to provide evidentiary support for *all* of the Lummi's grounds. Lower Elwha Br. 25-26. That novel argument (not pressed in the district court) is inconsistent with this Court's recognition that *both* Findings of Fact establish the Lummi's grounds. *See Lummi I*, 235 F.3d at 445-46. Contrary to the Lower Elwha's contentions, moreover, not all the evidence Judge Boldt cited in

Finding of Fact 45 regarding reefnetting locations was again cited in Finding of Fact 46; for example, he did not again cite "Tr. 1699, l. 2 to 1701, l. 21" or pages 6-22 of USA-30. *Decision I*, 384 F. Supp. at 360-61.

The Lower Elwha also try to explain away the placement of the name labels for the various bodies of water shown on USA-62 as being due to the need to provide information on sounding depths. Lower Elwha Br. 27. But the map itself refutes this suggestion. Even with the depth markings, USA-62 contains ample space to place the names on top of the bodies of water. Indeed, in particular, the words "Juan de Fuca Strait" are imposed directly on top of such markings. If the Strait did extend into the waters disputed here, USA-62's markings would not have precluded such labeling. And given where the name labels appear on this map cited by Judge Boldt, the map is evidence of where Judge Boldt would have understood the various bodies of water to be.

Separately, the S'Klallam invoke additional maps and evidence not in the record before Judge Boldt. S'Klallam Br. 32, 39-40. Evidence of contemporaneous geographical understanding may be relevant to discerning Judge Boldt's intent. *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100 (9th Cir. 2000) ("*Muckleshoot II*"). But as indicated by both sides' use of such extra-record evidence, it provides conflicting signals. *See, e.g.*, KSER151 (Lummi-introduced National Oceanic and Atmospheric Administration map

depicting the Strait of Juan de Fuca ending well to the west of the disputed waters); Suquamish Br. 10. The actual map in the record before Judge Boldt and cited by him—that is, USA-62—is the best indicator of his intent. *See Muckleshoot III*, 235 F.3d at 433 (when Judge Boldt has cited a supporting document, "[t]here is no question, then, that the court relied upon this information in reaching its decision"). And it shows that Judge Boldt would have understood the disputed waters to be within his description of the Lummi's grounds.

4. Evidence of Lummi travel through these waters is evidence they fished these waters

The record before Judge Boldt also contained evidence that the Lummi traveled through the disputed waters. Indeed, because these waters represent the sole direct route between the Lummi's established fishing grounds in the waters of the San Juans directly to the north and their established fishing grounds in Admiralty Inlet directly to the south, there can be no question that the Lummi must have traveled through them. And because evidence of a tribe's "fishing *or* travel" will defeat an attempt to show that there was no evidence before Judge Boldt to support a tribe's rights, the Requesting Parties cannot meet their burden here. *Tulalip Tribes*, 794 F.3d at 1136 (emphasis added).

The Requesting Parties assert that, in relying on this evidence, the Lummi are reading *Tulalip Tribes* to overrule prior decisions interpreting Judge Boldt's Finding of Fact 14, which determined that "occasional and incidental trolling"

through marine waters "was not considered to make" those waters part of a tribe's usual and accustomed grounds. *Decision I*, 384 F. Supp. at 353; *see, e.g.*, S'Klallam Br. 36-37. But *Tulalip Tribes*'s emphasis on evidence of travel is entirely consistent with this Court's prior precedent. Opening Br. 44-45. Indeed, this Court has long distinguished evidence suggesting more frequent travel through an area from the sort of evidence deemed insufficient by Finding of Fact 14. *See, e.g.*, *Lummi Indian Tribe*, 841 F.2d at 320 (while "incidental trolling" is insufficient to establish usual and accustomed grounds, "*frequent* travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters"); *Lummi I*, 235 F.3d at 452 (holding that Admiralty Inlet was within the Lummi's grounds because it was a "passage" through which the Lummi would have traveled); *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. 2010) (affirming judgment against Suquamish only upon finding that there was "no evidence in the record before Judge Boldt that the Suquamish fished *or traveled* in the waters on the eastern side of Whidbey Island") (emphasis added).

This long line of precedent also is consistent with Dr. Lane's testimony that, "[a]part from bays and estuaries of streams, no other specific locations within marine areas were so indicated in the report." S'Klallam Br. 33 (quoting KSER32). Contrary to the S'Klallam's suggestion, this testimony does not mean

that her report specifically mentioned all marine areas in which a tribe's travel was sufficient to render the waters part of its usual and accustomed grounds. In fact, her testimony reflects precisely the opposite: she named only a very few specific marine locations, but nonetheless asserted that *other* marine waters, including those used as "thoroughfares," were within tribes' fishing grounds. KSER34. As she explained, "all marine areas within the case area are indicated as usual and accustomed fishing sites" even though, aside from a few specific locations—namely, the Lummi reefnetting sites and certain Makah halibut banks—she had not identified "other specific locations." KSER31-32.

The testimony of Dr. Riley cited by the S'Klallam likewise fails to support their contentions. S'Klallam Br. 33. Dr. Riley confirmed what Judge Boldt himself stated in Finding of Fact 14: travel and fishing through an area would not make the area part of a tribe's grounds if done only at "rare intervals." KSER37. But again, the record demonstrates that the Lummi would have fished and traveled in the disputed waters at more than "rare intervals."

Indeed, a contrary conclusion would defy both the record evidence and common sense. As Dr. Lane described, the Lummi had villages on each of the San Juan Islands, including San Juan and Lopez Islands—directly to the north of the disputed waters. ER103. A mere 14 miles separate the south of Lopez Island from Admiralty Inlet, which this Court already has recognized as part of the Lummi's

usual and accustomed grounds. *Lummi I*, 235 F.3d at 452. The Lummi were, moreover, an avid and experienced fishing tribe, with "intimate local knowledge of salmon migration routes and underwater topography of the region," which they "coupled with close observance of salmon behavior." ER114. They were, in other words, a "race of fishermen," who fished "wherever the run of fish was greatest." ER182-83. There is every reason for Judge Boldt to have concluded that they fished the 14-mile swath of water directly in the middle of their undisputed fishing grounds.

Thus, just as this Court recognized that the evidence and inference of Lummi travel through Admiralty Inlet demonstrated that Judge Boldt included those waters in the Lummi's usual and accustomed grounds, the same conclusion follows here. *See Lummi I*, 235 F.3d at 452. As the *Lummi II* Court noted, *Lummi I*'s holding "suggests that the Ninth Circuit had concluded that the Lummi's use of 'the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle' was more than mere 'occasional and incidental trolling.'" *Lummi II*, 763 F.3d at 1187.

For their part, the Lower Elwha assert there is no record evidence that the Lummi even traveled in these waters. Lower Elwha Br. 28-30. It is true that Dr. Lane's specific statements regarding frequent travel in this area pertained to a group of tribes, not just the Lummi. But it is equally clear that she included the

Lummi in that group. ER130. In any event, Dr. Lane's description of travel was certainly not the only evidence from which Judge Boldt might have inferred Lummi travel through these waters. To repeat what should be now obvious (and was obvious in *Lummi I* with respect to Admiralty Inlet): to get from their home fishing territory in the San Juans to their fishing grounds in Admiralty Inlet, the Lummi *must* have traveled the waters between those two areas.

5. Evidence not cited by Judge Boldt cannot satisfy the Requesting Parties' no-evidence burden

Finally, the S'Klallam claim that Judge Boldt's failure to cite the testimony of certain Lummi elders is evidence that he did not intend to include the area disputed here. S'Klallam Br. 43. But even assuming this elder testimony covered the waters now in question, the S'Klallam are (again) misconstruing *Lummi I*. There, this Court stated that, because Judge Boldt had not cited this evidence, the testimony did not constitute evidence supporting the Lummi; this Court did not hold that such evidence somehow demonstrated Judge Boldt's intent *not* to include any waters in his description. *Lummi I*, 235 F.3d at 451. The S'Klallam thus cannot point to evidence on which Judge Boldt did not rely to meet their burden of establishing that there was *no* evidence before Judge Boldt that could have led him to include the disputed waters within the Lummi's usual and accustomed grounds.

C. The Text Of *Decision I* Confirms Judge Boldt's Intent To Include The Disputed Waters In The Lummi's Grounds

Judge Boldt's use of the term "Northern Puget Sound," together with his description of the Lummi's grounds as extending "from" the Fraser River "to" the present environs of Seattle, confirms what the evidence shows: Judge Boldt intended to include the waters south of the San Juans, west of Whidbey Island, and north of Admiralty Inlet. Opening Br. 47-54. This is true even though, as the Requesting Parties insist (S'Klallam Br. 24, Lower Elwha Br. 37), his description was ambiguous. That simply means his description was susceptible to more than one reading. But even an ambiguous description may have a best or most likely reading. For that reason, the terms that Judge Boldt used remain relevant to discerning his intent even if they do not clearly resolve the issue. *See Upper Skagit*, 590 F.3d at 1025; *Muckleshoot I*, 141 F.3d at 1359.

For the most part, the Requesting Parties do not engage with the Lummi's textual arguments. For example, rather than directly respond to the Lummi's observation that Judge Boldt's use of "from" and "to" demonstrates his intent to describe a continuous area (one that would necessarily cover the disputed waters), the Lower Elwha insist that the purported absence of evidence before Judge Boldt regarding Lummi fishing in these waters should trump this likely intent. Lower Elwha Br. 37-38. But as the Lummi have demonstrated, the record contained ample evidence. *See supra* pp. 11-23. That Judge Boldt's description of the

Lummi's grounds appears to cover the disputed waters simply confirms that any remaining uncertainty should be resolved in favor of inclusion.

The S'Klallam contend that, if that were Judge Boldt's intent, he would have specifically identified these waters, rather than using the broader term "Northern Puget Sound." S'Klallam Br. 25-27. But as the Lummi explained (Opening Br. 49), Judge Boldt never identified the disputed area in *Decision I* as a body of water separate and distinct from Puget Sound; indeed, he referred to Whidbey Island itself only once, and in a completely different context. 384 F. Supp. at 398 ("Saltwater steelhead fisheries are insignificant. Most are located on Whidbey Island at Bush Point and Lagoon Point."). The S'Klallam boldly contend that the "Lummi's argument that '[n]owhere in *Decision I* did Judge Boldt specifically single out the waters west of Whidbey Island as a distinct geographic area' is incorrect." S'Klallam Br. 27. But the S'Klallam do not actually cite *Decision I* for this contention. Instead, they cite a series of orders *after Decision I*. *Id.* at 26-27 (citing *United States v. Washington*, 459 F. Supp. 1020, 1048-49 (W.D. Wash. 1978) (Boldt, J.) & *United States v. Washington*, 626 F. Supp. 1405, 1434, 1442, 1486, 1531 (W.D. Wash. 1985) (Craig, J.)). The cited subsequent order by Judge Boldt merely confirms that it was not until *later* proceedings that he was called on to single out these waters. More importantly, the language Judge Boldt used in such subsequent orders demonstrates that he viewed the disputed waters to be

encompassed in the "Northern Puget Sound" he described in *Decision I*. Opening Br. 49-50.

The S'Klallam also appear to argue that the Lummi previously characterized the disputed waters as within the Strait of Juan de Fuca, citing the Lummi's statement of the issues in this Court in *Lummi I*. S'Klallam Br. 15, 38-39. But at that time, the Lummi had no need to distinguish between the Strait and the waters disputed here because they believed both to be within the "Northern Puget Sound" Judge Boldt described as the Lummi's grounds. In any event, the question is what Judge Boldt intended; the Lummi's one-time use of allegedly inconsistent language some 25 years later has no bearing on that issue.

II. IF JUDGE BOLDT DID NOT ALREADY INCLUDE THESE WATERS IN THE LUMMI'S USUAL AND ACCUSTOMED GROUNDS, THE LUMMI ARE ENTITLED TO PROVE THEIR RIGHTS

If this Court holds (as it should) that Judge Boldt already included the disputed waters in his description of the Lummi's grounds, it need not consider whether the Lummi should have been able to introduce new evidence regarding these waters. But if it does reach that issue, this Court should clarify that Paragraph 25(a)(6) permits a new hearing regarding any waters that Judge Boldt's description did not already encompass. The Requesting Parties have pointed to nothing that would support the district court's contrary conclusion.

A. The Lummi Are Not Appealing A Case Management Decision

The Requesting Parties insist that the Lummi are appealing a case management decision reviewed for abuse of discretion. S'Klallam Br. 44; Lower Elwha Br. 43. The Lummi are not, however, contesting the reasonableness of the decision to defer Paragraph 25(a)(6) proceedings until after resolution of the Paragraph 25(a)(1) request. ER43. Moreover, to the extent the district court dismissed the Lummi's Paragraph 25(a)(6) claim on the procedural or jurisdictional grounds cited by the Requesting Parties (Lower Elwha Br. 1, 41-47, 51-53; S'Klallam Br. 44-46), that would not foreclose the Lummi from seeking a determination of their rights in these waters in the future. *See, e.g.*, *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (res judicata applies, inter alia, when there is a "final judgment on the merits" of a claim); *Kelly v. Fleetwood Enters.*, 377 F.3d 1034, 1036 (9th Cir. 2004) (jurisdictional dismissals are without prejudice).

Instead, the Lummi appeal the district court's ruling to the extent it refused to hear their Paragraph 25(a)(6) claim because Judge Boldt purportedly had "specifically determined" that their usual and accustomed grounds do not include the disputed waters. ER24-25. That would be a legally erroneous reading of Judge Boldt's order that this Court reviews de novo. *Tulalip Tribes*, 794 F.3d at 1133.

B. If Judge Boldt Did Not Already Include The Disputed Waters, Those Waters Are Not Yet Determined

As the Lummi have demonstrated (Opening Br. 55-57), Judge Boldt made clear in *Decision I* that he was not determining the full expanse of each tribe's usual and accustomed grounds. Rather, he described "some, but by no means all" of them. *Decision I*, 384 F. Supp. at 333. In what is now called Paragraph 25(a)(6), he established "continuing jurisdiction" to adjudicate claims to those waters "not specifically determined." *Id.* at 419. If *Decision I* did not already hold that the Lummi's grounds include the disputed waters, the Lummi may invoke Paragraph 25(a)(6) to prove their entitlement to fish them.

In response to this straightforward reading of the order, the S'Klallam cite *Muckleshoot I*. They appear to contend that this Court held that Paragraph 25(a)(6) is categorically unavailable to the Lummi (and any other tribe as to which the district court has determined some of their usual and accustomed grounds). S'Kallam Br. 45. But as the Lummi already explained (Opening Br. 60-61), and as the S'Klallam fail to rebut, *Muckleshoot I* stands for no such thing. The decision simply clarifies that Paragraph 25(a)(6) does not permit the introduction of *new* evidence to resolve what Judge Boldt decided in *Decision I*. *Muckleshoot I*, 141 F.3d at 1360.[2]

[2] The S'Klallam also note that the Lummi at one point agreed the case should be decided on the record before Judge Boldt. S'Klallam Br. 45. At that

The Lower Elwha offer a somewhat more nuanced (but equally incorrect) interpretation of Paragraph 25(a)(6). They contend that "[t]he phrase 'not specifically determined' as used in Paragraph 25(a)(6), is for *new* areas located *outside* of an *existing* description." Lower Elwha Br. 48. They would have this Court hold that Paragraph 25(a)(6) proceedings are unavailable only for waters that one might have thought were included in Judge Boldt's description of a tribe's grounds, but are later held not to be. This interpretation has no basis in the text of *Decision I*. If Judge Boldt's description of a tribe's grounds does not include an area, that area does not become "specifically determined" just because one might have incorrectly *believed* Judge Boldt's order encompassed it. Indeed, this interpretation would lead to counterintuitive and absurd results. Under the Lower Elwha's proposed reading, the Lummi could secure a Paragraph 25(a)(6) hearing for waters well to the south of the environs of Seattle (which are clearly outside their adjudicated grounds), but not for the waters directly south of the San Juans (which would otherwise appear to be within their usual and accustomed grounds). There is no reason to think that, in establishing continuing jurisdiction, Judge Boldt intended to punish those tribes whose grounds he described in potentially

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time, however, it appeared the case would remain a Paragraph 25(a)(1) proceeding, and thus no new evidence would be admissible. These statements could not later preclude the Lummi from seeking to introduce new evidence in a Paragraph 25(a)(6) proceeding.

ambiguous terms and thereby prevent them from ever proving entitlement to fish in waters his descriptions initially appeared to include.

Finally, the Requesting Parties contend that the Lummi are foreclosed from invoking Paragraph 25(a)(6) because they have "attempted to present evidence of fishing in the Strait of Juan de Fuca and Whidbey Island twice already." S'Klallam Br. 23 n.9; *see* Lower Elwha Br. 53-54. They point to evidence submitted by Lummi elders before Judge Boldt and to a cross-claim the Lummi filed in the district court proceedings that eventually resulted in this Court's *Lummi I* decision.

But as this Court has made clear, *Decision I* and subsequent orders issued "in the context of this complex litigation of Indian treaty fishing rights" are final judgments only as to issues actually decided. *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 672 (9th Cir. 1985). In neither instance invoked by the Requesting Parties did the court reach a decision on the merits of the Lummi's claim to these waters (assuming arguendo that Judge Boldt did not already include them). Again, Judge Boldt deferred determination of all additional grounds to future proceedings. *Decision I*, 384 F. Supp. at 333, 419. Similarly, Judge Rothstein (who presided over the relevant *Lummi I* proceedings) resolved only what Judge Boldt had decided in *Decision I*; she did not address whether the Lummi proved their rights with additional evidence. *Lummi I*, 235 F.3d at 447.

The Lummi recognize the need for finality. But these decisions cannot preclude them from pressing their Paragraph 25(a)(6) claim given there was never a "final judgment on the merits" of that claim. *Stewart*, 297 F.3d at 956.

CONCLUSION

The judgment should be reversed and judgment entered for the Lummi. Alternatively, this Court should remand for the Lummi to present additional evidence supporting their treaty rights in the disputed waters or clarify that they may do so in a future proceeding.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 22, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 22, 2016 s/ Deanne E. Maynard

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 6,995 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2010 in 14-point Times New Roman font.

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