

THE 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.

Civ. No. C70-9213

Subproceeding No. 14-02

**SQUAXIN ISLAND TRIBE'S MOTION FOR
SUMMARY JUDGMENT**

Oral argument requested

Note date: April 22, 2016

SQUAXIN ISLAND TRIBE'S MOTION FOR SUMMARY
JUDGMENT
(No.C70-9213, Subproc. 14-02)

SQUAXIN ISLAND LEGAL DEPARTMENT
3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF ARGUMENT	3
III. FACTUAL BACKGROUND.....	4
IV. LEGAL FRAMEWORK	6
A. Summary Judgment Standard	6
B. Two-Step <i>Muckleshoot</i> Analysis	7
VI. ARGUMENT	8
A. In FF 141, Judge Boldt Unambiguously Included the Contested Waters in Squaxin’s U&A, and Judge Boldt did not Intend Something Other than its Apparent Meaning.....	8
1. “Open Sound of Southern Puget Sound” Unambiguously Included the Contested Waters.....	8
a. “Puget Sound” as Used in this Case is Unambiguous.	8
b. “Southern Puget Sound”	9
(1) Evidence in the Boldt Record Shows a Lack of Ambiguity.....	9
(2) Extra-record Evidence Shows Judge Boldt’s Understanding.	11
c. “Open Sound of Southern Puget Sound”	12
(1) Evidence in the Boldt Record Shows a Lack of Ambiguity.....	12
(2) Extra-Record Evidence Shows Judge Boldt’s Understanding.....	15
B. Evidence in the Boldt Record Showed that Squaxin Fished and Traveled in the Contested Waters.....	16
1. Dr. Lane’s Report on Squaxin is Evidence that the Squaxin People Fished Throughout Southern Puget Sound.	16
2. Evidence in the Record Indicated that Squaxins Fished in Shared Saltwater Fisheries at the Nisqually River Mouth and Surrounding Bay.	18

1	3. Dr. Lane’s Squaxin Report Showed a Village and Many Squaxin-Named Places in Carr Inlet, Which Meant Fishing in and Travel Through the Contested Waters.....	21
2		
3	4. An Overlay Map Before Judge Boldt Showed that Squaxins Fished Throughout South Puget Sound, Including the Contested Waters.	22
4	5. An 1856 Map Designates Saltwaters in the Contested Waters as “Puget Sound.”	22
5	V. CONCLUSION.....	22
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

I. INTRODUCTION

Judge Boldt in 1974 decreed that the Squaxin Island Tribe's ("Squaxin") usual and accustomed fishing grounds and stations ("U&A") consisted of "the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound." *United States v. Washington*, 384 F.Supp. 312, 378 (W.D. Wash. 1974) ("Final Decision #1") (emphasis added). In this subproceeding, the Nisqually Indian Tribe ("Nisqually") asserts that Judge Boldt intended to exclude from Squaxin U&A all saltwaters that extend northward from Nisqually Reach, surrounding Anderson, McNeil and Fox islands, throughout Carr Inlet and Tacoma Narrows (also referred to as "The Narrows"), a subset of which are the contested waters. Squaxin Ex. 1: Map. The contested waters surround Anderson Island at the southernmost end of Puget Sound. *Id.* Nisqually's assertion is unsupported by both the facts and the law.

The Squaxins fished in the contested waters, which are undeniably "open Sound," at and before Treaty time. The present day Squaxin Island Tribe is primarily comprised of descendants of people who lived in bands in the inlets of Southern Puget Sound: i.e., Carr, Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets. *See* Squaxin Ex. 1: Map; Squaxin Ex. 13: USA-24¹ – *Anthropological Report on the Identity, Treaty Status and Fisheries of the Squaxin Tribe of Indians* at pp. 17-18, 31 (Oct. 6, 1972) ("Squaxin report"). The Squaxins were known as "saltwater oriented" people since their "main area of habitat and main region of economic operation [was] along the waters of the Puget Sound." Squaxin Ex. 3: D-1 – Direct Testimony of Carroll Laverne Riley at pp. 16-17 (June 29, 1973).

Accordingly, it came as no surprise that Judge Boldt recognized in Finding of Fact ("FF") 141 that the Squaxin people fished, without limitation, in marine waters throughout the "open Sound of Southern Puget Sound":

¹ The number of the exhibit in the Boldt record is included with each such exhibit cited herein.

During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places in the **shallow bays, estuaries, inlets and open Sound of Southern Puget Sound** and in the freshwater streams and creeks draining into those inlets. . . . (FPTO § 3-98) (384 F.Supp. at 378, emphasis added.)

Judge Boldt recognized no other tribe as having U&A in the marine waters of Southern Puget Sound, except for the Nisqually River “mouth” and “surrounding bay” where the Nisqually fished. 384 F.Supp. at 369 (FF 86). In contrast with the Squaxins, the Nisqually were known as “river” people who lived along and primarily fished in rivers, and were concerned at Treaty time with pasture for their horses. *Id.*, Squaxin Ex. 3 at pp. 16-17, 21; Squaxin Ex. 9: G-4 – G. Gibbs, *Part II: Tribes of Western Washington and Northwestern Oregon* at pp. 169, 178; Squaxin Ex. 24: Transcript of Proceedings,² *United States v. Washington*, CV-9213 at p. 2255 (“Boldt transcript”).

Nonetheless, Nisqually asserts that Judge Boldt intended to exclude the Nisqually Reach and other marine waters from U&A that he described as “open Sound of Southern Puget Sound.” Nisqually holds this position despite the fact that Judge Boldt included no such limitation in his findings. Nisqually’s position is apparently based upon Judge Boldt’s FF 140, which describes the southwestern Puget Sound inlets where the Squaxin people *lived*:

The Squaxin Island Tribe is composed primarily of descendants of the original inhabitants of all the inlets of upper Puget Sound from South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included within this area are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets. The Indian inhabitants of these inlets were listed separately by local group name in the preamble to the Treaty of Medicine Creek as follows and were included in that treaty: Squawk-sin, Steh-chass, T’Peeksin, Squi-aitl, and Sa-heh-wamish. . . . (FPTO § 3-95; Ex. USA-24, pp. 17-18)

384 F.Supp. at 377-378 (emphasis added); Dkt. No. 6 at p. 5, ¶ 6.3 (Nisqually RFD).

² For the Boldt transcripts, each day of the trial is a separate exhibit.

As described below, a central failure of Nisqually's argument is that Judge Boldt expressly did not limit tribes' U&As to the areas of their ancestral villages. Instead, he defined a U&A as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." 384 F.Supp. at 332 (emphasis added). Nisqually's attempt to limit Squaxin's U&A to only its dwelling places is unsupported by the facts and the law.

There is no genuine dispute as to any material fact required to resolve this matter. As described herein, the phrase "open Sound of Southern Puget Sound" in Judge Boldt's FF 141 is unambiguous as to the contested waters. He did not intend to exclude the contested waters any more than he intended to exclude Carr Inlet, the waters surrounding Anderson, McNeil and Fox islands, or The Narrows. Moreover, there was evidence in the record before Judge Boldt that Squaxins fished and traveled in these marine waters. Accordingly, Nisqually cannot meet its burden of proof.

II. SUMMARY OF ARGUMENT

Section III quotes from the relevant factual findings in Final Decision #1 and key documents in the record. Section IV describes the legal framework for determining this motion, which consists of the summary judgment standard and two-step *Muckleshoot* analysis. Section V.A addresses the first *Muckleshoot* step, i.e., demonstrating that Judge Boldt's FF 141 unambiguously included the contested waters in Squaxin's U&A, and that he did not intend something other than its apparent meaning. Section V.B addresses the second step of the *Muckleshoot* analysis. This section lays out the ample evidence in the record that Squaxins fished in the contested waters. The evidence is sufficient to defeat Nisqually's motion, regardless of the Court's determination of the first prong of the analysis. Accordingly, Nisqually's motion must fail.

III. FACTUAL BACKGROUND

In 1974, as part of Final Decision #1, Judge Boldt held that Squaxin's marine U&A consisted of the following:

141. During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places **in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound** and in the freshwater streams and creeks draining into those inlets. . . . (FPTO § 3-98)

United States v. Washington, 384 F. Supp. 312, 378 (W.D.Wash. 1974) (emphasis added).

The cited Final Pretrial Order ("FPTO") § 3-98 provides:

It is impossible to compile a complete inventory of the specific fishing places of those Indians who became known as the "Squaxin" following their relocation on the Squaxin Island Reservation. During treaty times they fished for coho, chum, chinook, and sockeye salmon in three water areas in southern Puget Sound: (1) freshwater streams and creeks draining into the various inlets, (2) shallow bays and estuaries, and (3) inlets and **the open Sound**. (Squaxin Ex. 2: FPTO § 3-98, emphasis added.)

The 1972 report on the Squaxin Island Tribe prepared by Barbara Lane, Ph.D, stated:

The "Squaxins" fished **all** the streams and creeks draining into the inlets at the head of Puget Sound as well as the bays, inlets, **and the Sound itself**. (p. 12)

The fishing areas used by the ancestors of the present day Squaxin Island Tribe were basically of three kinds: (1) freshwater streams and creeks draining into the various inlets; (2) shallow bays and estuaries; and (3) the inlets and **the open Sound**. (p. 15)

Deeper saltwater areas, the inlets **and the open Sound**, served as public thoroughfares that were utilized as fishing areas by anyone travelling through such waters. (p. 16)

The ancestors of the present "Squaxin" Indians fished **the entire area of upper Puget Sound** including all the creeks and streams draining into the head of the Sound as well as the saltwater estuaries and bays **and the open saltwater**." (p. 19)

Squaxin Ex. 13: Squaxin report (emphases added).

Attached to Dr. Lane's report is an appendix entitled, "Excerpts from Waterman Manuscript" and "Names of places in the so-called Nisqually and Squaxin areas on the 'upper' or southern portion of Puget Sound". *Id.* at p. 21. This report states:

Geographically, **the part of Puget Sound which we are here dealing with is the part lying above The Narrows**. This part of the sound is practically a large pond, the only outlet being the narrow passage between Point Defiance (near Tacoma) and Point Evans. **This "pond," however, is broken up into a number of areas or "inlets and its bosom**

1 **is dotted with a number of islands.** The inlets are extremely narrow and tortuous, so that
the geography becomes somewhat complicated. (*Id.*, emphasis added.)

2 Accordingly, Judge Boldt recognized Squaxin's marine U&A as encompassing all waters
3 of Southern Puget Sound – that part extending southward from the Narrows – without limitation.

4 Additionally, in establishing Nisqually U&A, Judge Boldt held:

5 85. At the time of the Medicine Creek Treaty upriver fisheries in the Nisqually area were
normally used by the locally resident group. **Saltwater fisheries and fisheries at the**
6 **mouth of the Nisqually River traditionally were used by visitors as well as the local**
7 **residents.** Visitors might use them because they held claims to them by virtue of kin ties
with the local people or they might be accorded guest privileges by virtue of friendship.
8 (FPTO § 3-60; Ex. USA-25, p. 26) Use of the lower Nisqually fisheries by non-Nisqually
was with the permission of the local people and would have been accorded automatically
9 to people claiming descent from someone who had come from the local village or who had
married into it. People with more distant kin ties to the local village or with none would
10 be accorded fishing privileges on request if amicable relations obtained. (Ex. USA-25, p.
26)

11 86. The usual and accustomed fishing places of the Nisqually Indians included at least the
saltwater areas at the mouth of the Nisqually River and the surrounding bay, and the
12 freshwater courses of the Nisqually River and its tributaries, McAllister (Medicine or
Shenahnam) Creek, Sequahitcu Creek, Chambers Creek and the lakes between Steilacoom
13 and McAllister Creeks. **The saltwater fisheries were shared with other Indians.**
(FPTO § 3-63; Exs. USA-25, p. 25; USA-31e, pp. 200-202; Exs. G-23, pp. II-18-19; G-25,
14 p. II-4)

15 384 F.Supp. at 368-369 (emphases added.)

16 Cited Exhibit USA-31e was a declaration of two elderly Nisqually members that states:

17 That they are Nisqually Indians . . . ; That . . . during the course of their respective lives
they have had occasion to visit the various places where the Nisqually Indians at one time
18 had permanent villages or temporary camps for the purpose of utilizing their usual and
accustomed fishing grounds; that they have fished at these places **and have seen other**
19 **Indians fishing there;**

20 Squaxin Ex. 15: USA-31e – U.S. Dept. of the Interior, *Report on Source, Nature, &*
21 *Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon Together With*
22 *Affidavits Showing the Location of a Number of Usual and Accustomed Fishing Grounds &*
23 *Stations* (July 1942) (emphasis added).

24 Finally, Dr. Lane's report on the Nisqually states:

25 SQUAXIN ISLAND TRIBE'S MOTION FOR SUMMARY
JUDGMENT - 5
(No.C70-9213, Subproc. 14-02)

SQUAXIN ISLAND LEGAL DEPARTMENT
3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

Upriver fisheries were normally used by the locally resident group. **Saltwater fisheries and fisheries at the mouth of the mouth [sic] of the Nisqually River traditionally were used by visitors as well as the local residents.** Visitors might use these fisheries because they held claims to them by virtue of kin ties with the local people or they might be accorded guest privileges by virtue of friendship. **The Nisqually intermarried with Steilacoom, Puyallup and Duwamish to the north and east and with people from the various inlets around the head of the Sound to the west. People from any of these groups were likely among the “several hundred” Meeker observed fishing at the mouth of the Nisqually in June 1853 [...].** (p. 21)

9. **The fisheries on the lower reaches of the Nisqually River were undoubtedly used** not only by the locally resident villagers, but by people from other Nisqually villages and by members of other groups, **such as the people of the upper sound inlets,** the Steilacoom, Puyallup, and some Duwamish.³

10. **Use of lower Nisqually fisheries by non-Nisqually was with the permission of the local people and would have been accorded automatically to people claiming descent from someone who had come from the local village or who had married into it.** People with more distant kin ties to the local village or with none would be accorded fishing privileges on request if amicable relations obtained. (p. 26)

Squaxin Ex. 14: US-25 – *Anthropological Report on the Identity, Treaty Status and Fisheries of the Nisqually Tribe of Indians* (“Nisqually report”) (emphases added).

IV. LEGAL FRAMEWORK

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party prevails if the non-moving party fails to show an element essential to its case and with respect to which it bears the burden of proof. *Cellotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In this kind of case, a trial on the merits would reveal no additional relevant facts because the decision is made on the record that was before Judge Boldt, augmented only by extra-record evidence that sheds light on Judge Boldt’s understanding of geography at that time or otherwise provides a contemporaneous understanding of ambiguous terms. *Upper Skagit Tribe v.*

³ See also Squaxin Ex. 2: FPTO § 3-59 – “Prior to and during treaty times the Nisqually Indians intermarried with the Steilacoom, Puyallup and Duwamish Indians **and with other Indians from various inlets of southwestern Puget Sound.**” (Emphasis added.)

1 *Washington*, 590 F.3d 1020, 1024-1025 and n. 9 (9th Cir. 2010), *cert. denied*, *Suquamish Indian*
 2 *Tribe v. Upper Skagit Indian Tribe*, 562 U.S. 981 (2010).

3 **B. Two-Step Muckleshoot Analysis**

4 This Court applies a two-step analysis to determine Judge Boldt's intent under Paragraph
 5 25(a)(1) of Judge Boldt's Final Decision #1.⁴ 384 F.Supp. at 419 (re ¶ 25(a)(1)). The first step
 6 places the burden on Nisqually, as the tribe challenging Judge Boldt's original U&A
 7 determination, to establish that a U&A finding was "ambiguous, or that Judge Boldt intended
 8 something other than [the text's] apparent meaning." *Tulalip Tribes v. Suquamish Indian Tribe*,
 794 F.3d 1129, 1133 (9th Cir. 2015).

9 If the challenging tribe fails to meet its burden in the first step of the analysis, the second
 10 step requires that it meet the burden of proving that Judge Boldt did not intend to include the
 11 challenged area in his original U&A determination, which in turn requires examining the
 12 evidence that was before him when he made his determination. *Upper Skagit*, 590 F.3d at 1024.
 13 Here, the challenging tribe bears the burden of proving that "there was *no evidence* before Judge
 14 Boldt" that the responding tribe fished or traveled through the contested waters. *Id.* at 1023
 15 (emphasis added).⁵ The challenging party does not meet its burden merely by asserting that the
 16 evidentiary record before Judge Boldt did not specifically name the contested waters. *See United*
 17 *States v. Lummi Indian Tribe*, 235 F.3d 443, 449 (9th Cir. 2000).

18 In fact, Nisqually's burden is greater than proving the absence of direct evidence before
 19 Judge Boldt to show that he intended to exclude the contested marine waters from "the open
 20 Sound of Southern Puget Sound." *United States v. State of Wash.*, 626 F.Supp. 1405, 1531 (W.D.

21 ⁴ Courts describe the framework as the "Muckleshoot two-part procedure," as set out in *Muckleshoot Tribe v. Lummi*
 22 *Indian Nation*, 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*"), *Muckleshoot Tribe v. Lummi Indian Nation*, 234
 F.3d 1099 (9th Cir. 2000) ("*Muckleshoot II*"), and *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir.
 2000) ("*Muckleshoot III*").

23 ⁵ As noted above, the evidence that Squaxin fished the contested waters is sufficient to deny Nisqually's motion,
 24 whether or not the Court finds ambiguity with respect to the first prong of the *Muckleshoot* test.

1 Wash. 1985). Rather, Nisqually must prove that there is *no reasonable inference that can be*
 2 *drawn from the evidence* before Judge Boldt that he intended to include the contested marine
 3 waters in the Squaxin U&A as “probable” U&A.⁶

4 Finally, if the Court finds ambiguity, it may look to extra-record evidence to help interpret
 5 Judge Boldt’s determination, if such evidence “sheds light on the understanding that Judge Boldt
 6 had of the geography at that time,” or otherwise provides a contemporaneous understanding of
 7 ambiguous terms. *Upper Skagit*, 590 F.3d at 1024-25 and n. 9.

8 V. ARGUMENT

9 A. In FF 141, Judge Boldt Unambiguously Included the Contested Waters in Squaxin’s U&A, and Judge Boldt did not Intend Something Other than its Apparent Meaning.

10 1. “Open Sound of Southern Puget Sound” Unambiguously Included the Contested Waters.

11 There are two kinds of ambiguities, neither of which exists as to the phrase “open Sound
 12 of Southern Puget Sound.” A latent ambiguity occurs when the language employed is clear and
 13 intelligible and suggests only a single meaning, but some extrinsic fact creates a necessity for
 14 interpretation or a choice among two or more possible meanings. *United States v. Washington*, 20
 15 F. Supp. 3d 828, 833 (W.D. Wash. 2007). A patent ambiguity is one that appears on the face of
 16 the instrument, and arises from the defective, obscure or insensible language used. *Id.* As
 17 described below, “open Sound of Southern Puget Sound” unambiguously includes the contested
 18 waters.

19 a. “Puget Sound” as Used in this Case is Unambiguous.

20 A parsing of the phrase “open Sound of Southern Puget Sound” demonstrates the lack of
 21 ambiguity, beginning with the term “Puget Sound.” Judge Boldt adopted the definition of Puget

22 ⁶ “Either direct evidence or reasonable inferences from documentary exhibits, expert witness reports and other
 23 testimony as to the probable location and extent of usual and accustomed treaty fishing areas may be sufficient to
 24 support a legal determination of the areas involved. Stringent proof standards are not the applicable limiting basis for
 25 such determinations.” *Id.*

1 Sound in an exhibit entitled, “*Joint Statement Regarding the Biology, Status, Management, and*
 2 *Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsula*
 3 *Drainage Area of Western Washington*” (“Joint Biological Statement”):

4 As used in this report (except where the context clearly indicates otherwise) the term
 5 ‘Puget Sound’ includes the Strait of Juan de Fuca and **all saltwater areas inland**
 6 **therefrom, . . .**

7 *Id.*, citing Ex. JX-2a at p. i (court added emphasis) (Squaxin Ex. 10: Joint Biological Statement).⁷

8 Additionally, “Puget Sound” was designated on a map before Judge Boldt as including a
 9 substantial portion of the contested waters, extending in a “U” shape starting from below Case
 10 Inlet through Nisqually Reach and north to Fox Island. Squaxin Ex. 11: PL-35 – Map signed by
 11 Isaac I. Stevens (January 1856).

12 **b. “Southern Puget Sound”**

13 **(1) Evidence in the Boldt Record Shows a Lack of Ambiguity.**

14 Nor is there ambiguity concerning the water body known as “Southern Puget Sound” (or
 15 “South Puget Sound”). When these phrases appear in the Boldt record without qualification, they
 16 mean saltwaters that at minimum include the contested waters.⁸

17 During the Boldt proceeding, the phrase “south Puget Sound or “southern Puget Sound”
 18 most frequently arose in the context of biologists describing Washington fisheries areas. In nearly

19 ⁷ The lack of ambiguity here differs from other cases in which courts found “Puget Sound” ambiguous because
 20 marine waters in the *northern* case area were being evaluated. *See, e.g., Tulalip Tribes*, 794 F.3d at 1133.

21 ⁸ The only ambiguous aspect of “Southern” or “South” Puget Sound” is the location of its northern boundary, which
 22 does not implicate the contested waters and thus is not at issue here. *See, e.g., Squaxin Ex. 16: Boldt transcript at p.*
 23 *199 (“South Puget Sound” described as Puget Sound waters south of Des Moines”); Squaxin Ex. 10: Joint Biological*
 24 *Statement at p. 00322 (“South Sound closure” defined as “waters south of a line from Alki Point to Restoration*
 25 *Point”); Squaxin Ex. 21 at pp. 1213-15 (referring to request “by a number of tribes in southern Puget Sound” – i.e.,*
Skokomish, Squaxin, Nisqually, Muckleshoots and Puyallups – to study several streams in “southern Puget Sound
beginning with the Skokomish on the Hood Canal side up to and including the Green River on the east side of Puget
Sound”); Squaxin Ex. 4: F-6 – Report of Dr. Stephen Mathews, commissioned by the Department of Fisheries
concerning Catches of Salmon from Indian Fishery Rivers of Puget Sound, Coastal Washington, and the Strait of
Juan de Fuca at p. 5 (Feb. 4, 1972) (“Mathews report”) (referring to “Southern Puget Sound, including Hood
Canal”).

every instance involving the phrase, the witnesses and documents appear to describe at least all marine waters extending south, west and southwest from the Tacoma Narrows.⁹ See, e.g., Squaxin Ex. 7: F-31 – Written direct testimony of Stephen B. Mathews at p. 23 (July 25, 1973)

⁹ On occasion, State biologists and exhibits described south/southern Puget Sound as something less than all saltwaters south of The Narrows, but these were limited to instances: (1) when the State's witness or exhibit attempted to characterize the geographic area of a tribe's fishery based not upon Dr. Lane's reports, but upon pre-Boldt state and tribal practices; or (2) when the state's witness or exhibit defined the phrase as something less because the state was excluding hatchery production from the tribes' Treaty share (later ruled impermissible, *United States v. Washington*, 459 F.Supp. 1020, 1085 (W.D. Wash. 1976). See, e.g., Squaxin Ex. 4: F-6 – Matthews Report at p. 7 (Table 21), Squaxin Ex. 5: F-18 – *Department of Fisheries Report on Salmon Escapement and Desired Escapement Levels to Certain Puget Sound Systems containing Indian Fisheries* at p. 11 (March 1972) ("Southern Puget Sound System" "[i]ncludes independent streams entering Puget Sound west of Dana Passage and south of Pickering Passage (excludes Budd Inlet streams)"); Squaxin Ex. 6: F-26 – *Analysis of Salmon Catches in Washington State Managed Waters Originating from Indian Fishery Rivers of Puget Sound and Coastal Waters* at p. 1 ("All five species were considered: . . . Puyallup (Puyallup and Muckleshoot Tribes), Nisqually (Nisqually Tribe), southern Puget Sound streams (Squaxin Tribe) . . ."); Squaxin Ex. 8: F-37 - Hypothetical question [for Heckman, prepared by Dept. of Fisheries] ("Hypothetical question: "ASSUME the following Indian tribal needs: PUYALLUP TRIBE . . . Areas to be fished: Puyallup River, Commencement Bay and Nisqually River. NISQUALLY TRIBE. . . Areas to be fished: Nisqually River . . . SQUAXIN TRIBE: . . . Areas to be fished: South Sound marine areas and creeks.""). See also Squaxin Ex. 18: Boldt transcript at p. 674 (State witness Thor Tollefson referring to special seasons for the Squaxins in the "south Sound"); Squaxin Ex. 22: Boldt transcript at p. 1448 ("you're dealing with Squaxin Tribe in the "south Sound, the Nisqually Tribe fishing on the Nisqually River, and the Puyallup Tribe fishing on the Puyallup River"); Squaxin Ex. 28: Boldt transcript at pp. 3634-3635 (State witness J.E. Lasater testifying, "F-60 shows the salmon on the south Sound origin meaning clear down to southern Puget Sound. . .") Do you know what tribes would be fishing on those runs? These would be the fishery by the Squaxin Indians. . . . We set a season in recognition of their treaty right in south Sound even though the area is a salmon preserve where other commercial fishing is not allowed. . . . Did the areas they fish include all the areas that were included in Dr. Matthews' south Sound study, do you know? . . . I believe so.); Squaxin Ex. 30: Boldt transcript at p. 4047 (State witness Dr. Matthews testifying, "Q: Now, in your reports, your first and your second, you indicate an area called "south Sound." As I understand it, that excludes the Deschutes River and production therefrom and Minter Creek and production therefrom, is that correct? A: That's correct. . . . Q: Would that definition of what is the south Sound be also included on that list of rivers that you were given? A: I really don't remember."); Squaxin Ex. 30: Boldt transcript at p. 4102 (State witness Dr. Matthews testifying, "Q: This is the South Sound excluding Minter Creek and the Deschutes River?" A: That's correct."); Squaxin Ex. 29: Boldt transcript at p. 3871 (State witness J.E. Lasater testifying, "Q: Dr. Matthews' study speaks of the south Sound area, do I understand correctly that that does not include Minter Creek? A: I believe when he is working with Squaxin, he is not including Minter Creek. Q: And that is also true of the Deschutes River? A: I would have to go back and check, I don't think he is including the Deschutes."); Federal biologist, in describing the status quo, also testified, "The Squaxin Indians fish in an off-reservation fishery. Their reservation is all on an island and their fisheries as regulated by the State are mostly located in the inlets to the west of their reservation." Squaxin Ex. 21: Boldt transcript at p. 1173.

Another reason that the phrase occasionally meant something besides all saltwaters below Tacoma Narrows was because the State had established the Southern Puget Sound Salmon Preserve, which prohibited commercial fisheries south of at least The Narrows. Accordingly, the commercial fishing that the State did allow began north of The Narrows. Squaxin Ex. 17: Boldt transcript at p. 00255 (Catch Area 10, labeled "South Sound" begins north of The Narrows).

(state's biologists describing "different fisheries in each of the major areas of the Sound: i.e., north Sound, south and central Sound and Hood Canal."); Boldt transcript at pp. 682 (Ex. 18), 863 (Ex. 19), 1133 & 1137 (Ex.20), 1400, 1401 & 1469 (Ex. 22), 3799-3801, 3813, 3821, 3834, 3892, 3968 (Ex. 29) (referring to "southern Puget Sound"), and at pp. 2178 (Ex. 24), 3561 & 3573 (Ex. 28) ("southern Sound area"). Additionally, Judge Boldt heard testimony about the "South Puget Sound Salmon Preserve" whose boundaries encompassed the entirety of south Sound saltwaters up to at least The Narrows.¹⁰ Squaxin Ex. 10: JX-2(a) – Joint Biological Statement at pp. 00254, 00320; Squaxin Ex. 2: FPTO at p. 83, ¶ 3-583.

(2) Extra-record Evidence Shows Judge Boldt's Understanding.

For the above reasons, the term "Southern Puget Sound" is unambiguous as to the contested waters; i.e., it encompasses all marine waters south of Tacoma Narrows. If the Court finds ambiguity, however, it may consider appropriate extra-record evidence to help resolve it. Because Judge Boldt's phrase "Southern Puget Sound" derives from Dr. Lane's Squaxin report, and Judge Boldt cited and heavily relied upon that report in his decision, Judge Boldt by adopting Dr. Lane's language also meant to adopt her intended meaning.¹¹ *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359-60 (9th Cir. 1998). He intended to conform Squaxin's U&A to Dr. Lane's report. *United States v. Washington*, 20 F. Supp. 3d 828, 840 (W.D. Wash. 2007) (so held for Suquamish U&A). The following contemporaneous extra-record evidence sheds light on key geographic terms that Dr. Lane used.

¹⁰ Commercial fishing was prohibited within state salmon preserves with a few exceptions, and only sport fishing was allowed. Squaxin Ex. 19: Boldt transcript at p. 838.

¹¹ Judge Boldt found "that in specific facts," Dr. Lane's reports were "exceptionally well researched and reported.... They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties". 384 F.Supp. at 350. He also found that her "opinions, inferences and conclusions based upon the information stated in detail and well documented in her reports, appeared . . . well taken, sound and reasonable." *Id.*

1 First, a 1976 letter to Dr. Lane from Chris Weller of Small Tribes Organization of Western
 2 Washington (“STOW”), which responded to Dr. Lane’s earlier letter and confirmed their phone
 3 conversation, shows Dr. Lane’s intent that “southern Puget Sound” meant the entirety of the
 4 saltwaters south of Tacoma Narrows Bridge:

5 Another point we talked about over the phone concerned a confusion over different
 6 interpretations of what was meant by upper Puget Sound. **Your upper Puget Sound is
 the same as my southern Puget Sound. My northern line of demarcation is the
 Tacoma Narrows Bridge.**

7 Squaxin Ex. 32: Ltr. from C. Weller to B. Lane, Ph.D (June 3, 1976) (stated that Squaxin
 8 biologist would be copied) (emphasis added); *see* Squaxin Ex. 23: Boldt transcript at p. 1732,
 9 3264 (Ex. 27) (referencing STOW), at p. 2502 (Ex. 25) (testifying that Squaxin was a member of
 10 STOW).

11 Second, Dr. Lane’s testimony in a 1975 proceeding on the tribes’ treaty right to take
 12 herring also confirms that she intended “Southern Puget Sound” as an unqualified area that
 13 encompassed and did not exclude the contested waters. Squaxin’s attorney asked Dr. Lane:

14 Q: Dr. Lane, I will begin with the Squaxin Island Tribe. Am I correct in assuming that
 15 the Squaxin Island Tribe was and is located in lower Puget Sound on an island in
 16 saltwaters, surrounded by saltwater?

17 A: In my terminology that is upper Puget Sound.

18 Q: Southern Puget Sound.

19 A: All right.

20 Q: Okay, is it correct that the Squaxin Island Tribe traditionally fished in saltwaters in
 21 southern Puget Sound?

22 A: Saltwater and fresh water, yes.

23 Tribe’s Ex. 31: *United States v. Washington*, No. 9213, Transcript of Proceedings at p. 29 (April
 24 9, 1975).

25 c. “Open Sound of Southern Puget Sound”

(1) Evidence in the Boldt Record Shows a Lack of Ambiguity.

The next question is whether the phrase “open Sound” introduces ambiguity as to the
 contested waters – i.e., the southern and eastern boundaries of “Southern Puget Sound.” It does

not. The dictionary defines “open” as “having no enclosing or confining barrier: accessible on all or nearly all sides.”¹² See *Muckleshoot II*, 234 at 1100-1011 (court looked to dictionary meaning of “environs”). Thus, “open Sound of Southern Puget Sound” in FF 141 means those portions of Southern Puget Sound that lack enclosing or confining barriers. In fact, Nisqually itself has recognized, “The term ‘open Sound of Southern Puget Sound’ does include the Subproceeding Area.” Nisqually Reply re Motion for Preliminary Injunction, Dkt. 19848, at p. 3 l. 1-2, *U.S. v. Washington*, C70-9213, Subproc. 11-1 (*Nisqually v. Squaxin Island*) (Oct. 7, 2011).

This lack of ambiguity is reinforced if one considers the entirety of Judge Boldt’s finding of Squaxin saltwater U&A: i.e., “the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound.” 384 F.Supp. at 378 (FF 141). He thus described all components of Southern Puget Sound: shallow bays + estuaries + inlets + open Sound. In other words, “open Sound” is the remaining saltwater of “Southern Puget Sound” after one subtracts its “shallow bays, estuaries [and] inlets.” *Id.* Therefore, Judge Boldt in FF 141 left no portion of the marine waters of Southern Puget Sound unstated. The plain language does not suggest that Judge Boldt was describing anything other than the entirety of the saltwaters of “Southern Puget Sound.” See *id.* In fact, if Nisqually were correct, and the contested waters were excluded from Squaxin’s U&A, then Squaxin would be limited to “shallow bays, estuaries, [and] inlets,” and the phrase “open Sound of” in FF 141 would be meaningless.

Moreover, if Judge Boldt had wanted to limit Squaxin’s U&A to exclude the contested waters, he would have used landmarks and similar limiting words in FF 141 – as he did for Nisqually’s U&A. Judge Boldt found that Nisqually’s saltwater U&A was in the “Nisqually River” and its “mouth” and “surrounding bay” 384 F.Supp. at 368-369. Nisqually asks the Court

¹² Available at <http://www.merriam-webster.com/dictionary/open?show=0&t=1317395110> (accessed February 11, 2016).

1 to read geographic markers into “open Sound of Southern Puget Sound” when that is not what
 2 Judge Boldt did or intended. *Id.* at 378.

3 That Judge Boldt intended “open” to mean unconfined and unenclosed saltwaters is
 4 consistent with other evidence in the record. For example, there was discussion of the “open sea”.
 5 Squaxin Ex. 12: USA-20(i) – Dr. Barbara Lane, Ph.D, *Political and Economic Aspects of Indian-*
 6 *White Culture Contact in Western Washington in the Mid-19th Century* at pp. 4, 18 (May 10,
 7 1973) (“The deeper saltwater areas, the Sound, the straits, and **the open sea**, served as public
 8 thoroughfares. . . .”); at p. 4 (“**open sea** and in the straits”), at p. 5 (“Types of marine life differed
 9 in the **open sea**, in bays, rivers and lakes.”), at p. 28 (“The deeper saltwater areas, the Sound, the
 straits, and **the open sea**, served as public thoroughfares. . . .”).¹³

10 Similarly, the Boldt record contains discussion about “open” Puget Sound waters where
 11 reefnetting occurred that is consistent with the concept of unconfined and unenclosed waters. A
 12 map in the Joint Biological Statement shows that reef nets were located on exposed points of land
 13 and in unconfined channels between islands. Squaxin Ex. 10: Joint Biological Statement at p.
 14 000289; *See also* Squaxin Ex. 16: Boldt transcript at p. 89 (Reefnetters attorney David Rhea
 15 referring to locations where reefnetting may be pursued in the “open waters of Puget Sound” and
 16 “. . . , there has to be different treatment for fishing that is done in the **relatively open waters of**
 17 **Puget Sound.**”) (emphasis added). *See also* Squaxin Ex. 28: Boldt transcript at p. 3674 (Dr.
 18 Lane describing a Lummi reefnet site, “It’s an **open channel** somewhere in the area between
 19 Lummi Island and Orcas Island. . . .”).

21 ¹³ It should be noted that in two instances, witnesses other than Dr. Lane referred to “open” when describing waters
 22 adjacent to Squaxin Island. Squaxin Ex. 25: Boldt transcript at p. 2489 (Squaxin member Cal Peters when answering
 23 a question about the “salt water area around the Island” responded “I’m talking about the salt water area, and this is
 open.”); Squaxin Ex. 29: Boldt transcript at p. 3919 (a state biologist in responding to question about where he had
 made provisions for an Indian fishery stated, “. . . on an area near the Tulalip [sic] reservation on the Puyallup River,
 the Nisqually River, and the area of Puget Sound that is open near Squaxin Island.”).

To conclude, both the plain language and Boldt record demonstrate that FF 141 has no patent or latent ambiguity. It cannot be interpreted to lead to the result that Nisqually seeks. The apparent meaning of FF 141 encompasses all of Southern Puget Sound, which includes all marine waters south of the Tacoma Narrows and thus includes the contested waters.

(2) Extra-Record Evidence Shows Judge Boldt's Understanding.

Dr. Lane's 1976 report on Carr Inlet sheds light on her and thus Judge Boldt's understanding of the term "open Sound." Squaxin Ex. 33: Dr. B. Lane, Ph.D, *Report on the Carr Inlet Area with Respect to Indian Occupancy at Treaty Times and Present Day Descendants of the Carr Inlet People* (July 1976). Dr. Lane's report on Squaxin had recognized Squaxin U&A in Carr Inlet, but acknowledged having insufficient evidence at that time to know whether it was also shared with the Nisqually and Puyallup tribes. Squaxin Ex. 13: Squaxin report at pp. 6-7, 31. Her 1976 report concluded that Carr Inlet U&A was shared. Squaxin Ex. 33 at p. 13.

Dr. Lane's Carr Inlet report is important because it is contemporaneous confirmation that Dr. Lane did not intend that "open Sound" meant only the southwestern inlets described in FF 140 where the Squaxins had primarily resided. It stated:

Carr Inlet differed from the other inlets around the head of Puget Sound in one important respect. **The rest of the inlets are relatively narrow with constricted water areas. In contrast, Carr Inlet is a wide waterway like the open part of the Sound.** (p. 10)

Three factors characterize the fishing situation at Carr Inlet at treaty times. First, the locally resident Indian population was reduced in numbers. Second, the fish and shellfish resources were plentiful. **Third, this was an area of open water unlike the constricted finger inlets branching around the head of the Sound.** These three factors, taken together, indicate that Carr Inlet was almost certainly used as an "in common" fishing area by all of the Indian groups in upper Puget Sound and including the Puyallup who lived below the Narrows. (p. 11)

Gibbs' description correctly characterized the situation in the **open salt water areas** such as Admiralty Inlet, **Puget Sound generally below the Narrows, and Carr Inlet.** (p. 12)

Carr Inlet contains the largest expanse of **open water in Puget Sound** above the Narrows. (p. 13)

(Emphases added.)

To conclude, before addressing the second step of the *Muckleshoot* test, the phrase “open Sound of Southern Puget Sound” is unambiguous and does not mean anything other than its apparent meaning as to the contested waters. It encompasses the contested waters because it covers the marine waters in Nisqually Reach, those surrounding Anderson, McNeil and Fox islands, and those extending northward in Carr Inlet and Tacoma Narrows.

B. Evidence in the Boldt Record Showed that Squaxin Fished and Traveled in the Contested Waters.

1. Dr. Lane’s Report on Squaxin is Evidence that the Squaxin People Fished Throughout Southern Puget Sound.

As described below, whenever Dr. Lane described the area *inhabited* by the Squaxin people, she used restrictive words that limited the geographic area within Southern Puget Sound. In stark contrast, these restrictive words do not appear whenever she described where the Squaxins *fished*. To illustrate, Dr. Lane in describing where Squaxins lived used the term “southwestern” to limit “Puget Sound.” *See, e.g.*, Squaxin Ex. 13: Squaxin report at p. 1 (“politically autonomous groups living along the various inlets and bays of **southwestern Puget Sound**”), at p. 2 (“records relating to the **southwestern Puget Sound** groups”), at p. 4 (“the names of the various **southwestern inlet groups**” and a list of “**southwestern inlets** and their populations”), at p. 5 (“**southwestern Sound** groups”), at p. 6 (“various **southwestern Sound** groups”. (Emphases added.) Similarly, she referred to the Squaxin people as inhabiting the “**inlets**”: i.e., “persons . . . drawn from **the inlets** at the extreme head of the Sound” and “**the inlet peoples**”. *Id.* at p. 6; *see also id.* at p. 11 (“living in Indian communities on the **various inlets** of the Sound”), at p. 18 (“The Indians residing on the **various inlets** of upper Puget Sound”). This geographically limiting language appears in Judge Boldt’s FF 140 and FPTO § 3-95, both of which described Squaxin’s aboriginal living places.

In contrast, these restrictive words are absent from Dr. Lane’s descriptions of Squaxin U&A. Instead, she used words with broad sweep. She found that the Squaxins “fished all the

streams and creeks draining into the inlets at the head of Puget Sound as well as the bays, inlets, **and the Sound itself.**” *Id.* at p. 12. Squaxin fishing areas were “of three kinds: (1) freshwater streams and creeks draining into the various inlets; (2) shallow bays and estuaries; and (3) the inlets and the **open Sound.**”¹⁴ *Id.* at p. 15. The “[d]eeper saltwater areas, the inlets and the **open Sound**” served as public thoroughfares that were used as fishing areas by anyone travelling through such waters. *Id.* at p. 16. She concluded that the Squaxin people fished “**the entire area of upper Puget Sound** including all the creeks and streams draining into the head of the Sound as well as the saltwater estuaries and bays **and the open saltwater.**” *Id.* at p. 19. (Emphases added.) Dr. Lane could have, but did not, describe Squaxins fishing in the “open Sound in southwestern Puget Sound,” or the “open Sound near the inlets in southwestern Puget Sound.”

Additional evidence that the Squaxins fished and traveled throughout saltwaters extending southward from The Narrows appears in the excerpted portion of Professor T.T. Waterman’s manuscript appended to Dr. Lane’s Squaxin report. Professor Waterman’s ethnographic fieldwork from 1917-1920 included collecting data on Puget Sound locations of social and economic importance to the Indians. *Id.* at p. 17. The excerpt is entitled, “Names of places in the so-called Nisqually¹⁵ and Squaxin areas on the “upper” or southern portion of Puget Sound.” *Id.* at p. 21. Professor Waterman, consistent with Dr. Lane’s broad reference to “open Sound of Southern Puget Sound,” described the covered geographic area as all saltwaters extending southward from The Narrows:

Geographically, the part of Puget Sound which we are here dealing with is the part lying above The Narrows. This part of the Sound is practically a large pond, the only

¹⁴ See also Squaxin Ex. 12: USA-20(i) at p. 16 (“The fishing areas used were basically of five kinds: (1) freshwater lakes; (2) freshwater streams and creeks draining into the various inlets; (3) shallow bays and estuaries; **(4) the inlets and the Sound**; and (5) the straits and ocean.”) (emphasis added).

¹⁵ While Professor Waterman’s introductory title referred to “so-called Nisqually and Squaxin areas”, Dr. Lane explained that the earlier ethnographers used the name “Nisqually” “to include all the natives of the inlets of upper Puget Sound” – i.e., the Squaxins. Squaxin Ex. 14: Nisqually report at p. 1. The only T.T. Waterman place name that Dr. Lane mentioned in her Nisqually report was a village site at the Nisqually River mouth. *Id.* at p. 4.

outlet being the narrow passage between Point Defiance (near Tacoma) and Point Evans. This “pond,” however, is broken up into a number of areas of “inlets” and its bosom is dotted with a number of islands. The inlets are extremely narrow and tortuous, so that the geography becomes somewhat complicated. At a change of tide, the water imprisoned in all these bays and inlets must escape through the narrows near Tacoma. . . . (*Id.* at p. 21, emphasis added.)

The evidence shows that Dr. Lane intended that the “large pond” lying south of The Narrows, as described by Professor Waterman, meant Squaxin U&A. *See id.* Her Squaxin report did not say that Squaxin fished in only a portion of these saltwaters, or that these saltwaters were Nisqually U&A to the exclusion of Squaxin. In fact, Dr. Lane did not append *any* part of the Waterman manuscript to her Nisqually report. That is because the only Nisqually saltwater U&A that Dr. Lane and Judge Boldt recognized was the Nisqually River mouth and surrounding bay (which was “shared with other Indians”). 384 F.Supp. at 368-369 (FF 86). Accordingly, the T.T. Waterman excerpt attached to Dr. Lane’s Squaxin report is evidence that Squaxins fished in the contested waters and beyond.

2. Evidence in the Record Indicated that Squaxins Fished in Shared Saltwater Fisheries at the Nisqually River Mouth and Surrounding Bay.

Judge Boldt established that Nisqually’s saltwater U&A was limited to the Nisqually River mouth and surrounding bay, and that these “saltwater fisheries were **shared with other Indians.**” *Id.* at 368-369 (FF 86, emphasis added). He then elaborated upon how non-Nisqually Indian “visitors” could fish these saltwaters – i.e., by having “kin ties” with the local people (i.e., the Nisquallys), or guest privileges through friendship. *Id.* at 368. In contrast with fishing in the saltwater, non-Nisqually Indians desiring to fish in the lower Nisqually River had to obtain the local people’s (i.e., the Nisquallys’) permission, or be descended from or married to Nisquallys.¹⁶ Accordingly, fishing saltwaters at the Nisqually River mouth and surrounding bay required

¹⁶ Moreover, those with more distant ties to the local village, or without any kin ties, would be granted lower Nisqually River fishing privileges on request if amicable relations obtained. *Id.* at p. 26.

1 neither permission nor the closer familial relationships (i.e., marriage, descent) needed to fish the
2 lower Nisqually River. *See id.* Kin ties or friendship was sufficient.

3 For the following reasons, Squaxins shared the fisheries in the Nisqually River mouth and
4 surrounding bay. First, Dr. Lane found Nisqually-Squaxin relationships that went beyond kin ties
5 and friendship. The Nisqually intermarried with, among others, “**people from the various inlets**
6 **all around the head of the Sound to the west.**” Squaxin Ex. 14: Nisqually report at p. 21a.
7 Those people were the Squaxins. She even recognized that the lower Nisqually River fisheries
8 were “undoubtedly” used by, besides the locally resident villagers, members of other groups
9 “such as **the people of the upper Sound inlets, . . .**” *Id.* at p. 26.

10 Second, Squaxins fishing in the Nisqually River mouth and bay and throughout the
11 Nisqually Reach area undoubtedly included the Nusehtsatl people who resided in Henderson Inlet
12 (also known as “South Bay”), the next waterway over. Squaxin Ex. 1: Map; Squaxin Ex. 13:
13 Squaxin report at p. 20. The Nusehtsatl were one of the groups that comprised the Squaxin
14 people.

15 Third, Squaxins would have fished in the Nisqually mouth, bay and environs for the
16 unique late run of winter chum that returned in December and January, after the runs destined for
17 the southwestern streams had ended. *See* Squaxin Ex. 13: Squaxin report at p. 4 (Dr. Lane noted
18 the “run of salmon” that was “later in the Nisqually than in any other stream.”); Boldt transcript at
19 pp. 227-228 (Ex. 17), 1203 (Ex. 21), 2686 (Ex. 25), 3633-34 (Ex. 28) (state biologists testifying
20 about the “unique” and “substantial” late Nisqually chum run that began in early December and
21 peaked towards the end of December and through January). Judge Boldt recognized the necessity
22 of the Indians “to be on hand when the resources were ready for harvest.” 384 F.Supp. at 350 (FF
23 4). He also found that the Indians “moved about to resource areas where they had use patterns
24 based on kinship or marriage. *Id.* at 351 (FF 4). “Like all fishermen, [the Indians] shifted to
25 those locales which seemed most productive at any given time.” *Id.* at 352 (FF 10). And, “They

1 took whatever species were available at the particular season and location.” *Id.* (FF 11).

2 Accordingly, Squaxins would have shared in fishing the unique run of Nisqually River late winter
3 chum, which did not appear until after the runs destined for creeks in Squaxin U&A had ended.

4 Fourth, the presence of shellfish beds in Nisqually bay and at Anderson Island were
5 evidence that Squaxins would have fished the contested waters. Dr. Lane found that shallow bays
6 “were often gathering places for people from a wider area” “especially . . . if shellfish beds were
7 present.” Squaxin Ex. 12: USA 20(i) at p. 17. Judge Boldt had evidence that shellfish were
8 present in the Nisqually bay and on Anderson Island. *See, e.g.*, Squaxin Ex. 14: Nisqually report
9 at p. 29, Squaxin Ex. 15: USA 31(e) at p. 201-202 (Nisqually member A. Yellout attesting to
10 Nisquallys digging clams in the bay and at Anderson Island). Accordingly, Squaxins from a
11 “wider area” would have gathered there.

12 Fifth, the evidence before Judge Boldt included documentation of “several hundred”
13 “Indians” of “all ages and kind” fishing off the Nisqually River mouth and in the bay, which
14 reasonably would have included Squaxins – particularly the nearby Nusehtsatl people from
15 adjacent Henderson Inlet. Squaxin Ex. 14: Nisqually report at p. 20 (emphasis added). Dr.
16 Lane’s Nisqually report quotes an observer who saw a “large flotilla of canoes” “off the mouth of
17 the Nisqually in June 1853” and in the “bay”:

18 . . . It was here, and during this visit, we began seeing Indians in considerable numbers.
19 Off the mouth of the Nisqually and several places along the beach and floating on the bay
20 we saw several hundred in the aggregate of all ages and kind. . . .¹⁷ (*Id.*)

21 Finally, Judge Boldt could have readily inferred that Squaxins fished in the Nisqually
22 River mouth and bay from the presence and size of the Nisqually River. The Ninth Circuit, in
23 holding that the Suquamish fished at the Snohomish River and in surrounding waters along with
24

25 ¹⁷ See also Squaxin Ex. 12: USA-20(i) at p. 17 (“Shallow bays where salmon, flounder, and other fish were speared
were often gathering places for people from a wider area. This was especially true if shellfish beds were present. In
the deeper waters of the bays, huge floatillas of canoes would gather to troll for the salmon as they gathered in the
bays just prior to their entry into the rivers. . . .At some of the major fishing locations, like Commencement Bay,
people from other drainage systems would also congregate to join in the fishing.”).

1 other tribes, recognized that Dr. Lane had contrasted marine waters that fronted “large”
 2 “mainland” rivers, with marine bays and passages that were “larger bodies of water separate from
 3 a river.” *Tulalip Tribes*, 794 F.3d at 1135. As to saltwaters that fronted large mainland rivers,
 4 “Dr. Lane explained that people ‘would gather to troll for the salmon as they gathered in the bays
 5 just prior to their entry into the rivers.’” *Id.* at 1135 (“Dr. Lane stated several times that the
 6 mouths of rivers and the surrounding areas were unique.”). Here, Squaxins undoubtedly fished in
 7 the marine waters that fronted the large, mainland Nisqually River.

8 **3. Dr. Lane’s Squaxin Report Showed a Village and Many Squaxin-Named
 9 Places in Carr Inlet, Which Meant Fishing in and Travel Through the
 10 Contested Waters.**

11 As described below, Judge Boldt had before him evidence that Squaxins occupied and
 12 fished in Carr Inlet. The Waterman excerpt attached to Dr. Lane’s report includes 13 place names
 13 on the east and west shores of “Carr’s Inlet”, including a Squaxin village. Squaxin Ex. 13:
 14 Squaxin report at pp. 31-32. This is important for several reasons. First, the fact that Carr Inlet
 15 was not one of the inlets listed in FF 140 undermines Nisqually’s effort to limit “open Sound of
 16 Southern Puget Sound” to the geographic area described in FF 140.

17 Second, getting to and from Carr Inlet to the southwestern inlets occupied by other
 18 Squaxin people necessitated regular travel through the contested waters. *See* Squaxin Ex. 1:
 19 Map; *see Tulalip Tribes*, 794 F.3d at 1136 (“When traveling from Vashon Island to the Fraser
 20 River, the Suquamish would have passed through the waters west of Whidbey Island, and likely
 21 would have fished there while traveling. This general evidence, too, constitutes some evidence
 22 before Judge Boldt and supports the district court’s determination that Judge Boldt did not intend
 23 to exclude these contested bay areas from Suquamish’s U&A.”).

24 Finally, Nisqually’s interpretation of Judge Boldt’s decision would illogically give
 25 Squaxin two geographically separated U&As and exclude the body of saltwater that connects

1 them, despite Dr. Lane's use of sweeping terms such as the "open Sound", the "entire area of
2 upper Puget Sound" and "the open saltwater". See Section II, *supra*.

3 **4. An Overlay Map Before Judge Boldt Showed that Squaxins Fished
Throughout South Puget Sound, Including the Contested Waters.**

4 At trial, the plaintiff tribes presented a red overlay exhibit that, when placed over the base
5 map of the entire case area from the Joint Biological Statement, showed all marine areas within
6 the entire case area as being the plaintiff tribes' U&A.¹⁸ Squaxin Ex. 26: Boldt transcript at p.
7 2847, 2852, citing to Ex. PL-73; Joint Biological Statement at p. ii (case area base map). This
8 overlay, which the federal government prepared using information in Dr. Lane's reports, thus
9 showed in red all marine waters of Southern Puget Sound. Boldt transcript at pp. 681-682 (Ex.
10 18), 1186-1187 (Ex. 21). Since no other Medicine Creek tribe besides Squaxin – or any other
11 plaintiff tribe for that matter – claimed marine waters in South Puget Sound as U&A (except for
12 the Nisqually River mouth and surrounding bay), this was evidence that Squaxin fished all of the
saltwaters of South Puget Sound – including the contested waters.

13 **5. An 1856 Map Designates Saltwaters in the Contested Waters as "Puget
14 Sound."**

15 An 1856 map signed by Isaac Stevens designates "Puget Sound" as including a substantial
16 portion of the contested waters, in a "U" shape that begins below Case Inlet and extends through
17 Nisqually Reach and north to Fox Island. Squaxin Ex. 11: PL-35. These waters are undeniably
"open", and thus evidence that Squaxins fished in the contested waters.

18 **VI. CONCLUSION**

19 The Squaxins have always been a people of the marine waters. For thousands of years the
20 Squaxins fished the fresh and saltwater throughout the Southern Puget Sound region. Judge Boldt
21 and Dr. Lane recognized the breadth of Squaxin's U&A in plain, unambiguous language.
22

23 ¹⁸ Squaxin has been unable to locate this exhibit at the district court or elsewhere. Declaration of Sharon Haensly in
24 Support of Squaxin Island Tribe's Motion for Summary Judgment at ¶ 3.

Nisqually cannot be permitted to misuse the locations of the Squaxins' ancestral homes to strip the Squaxins of the rights they reserved in the Treaty of Medicine Creek. For all of the reasons described above, Squaxin's motion should be granted and Nisqually's motion denied.

DATED this 19th day of February, 2016.

Respectfully submitted,

Attorneys for the Squaxin Island Tribe

/s/Sharon Haensly

Sharon Haensly, WSBA No. 18158

David Babcock, WSBA No. 31737

3711 SE Old Olympic Hwy

Shelton, WA 98584

Phone: 360.432.1771

Fax: 360.432.3699

E-Mail: shaensly@squaxin.us

dbabcock@squaxin.us

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2016, I electronically filed the foregoing **Squaxin Island Tribe's (1) Motion for Summary Judgment, (2) Declaration of Sharon Haensly in Support with exhibits attached thereto; and (3) Proposed Order** with the Clerk of the Court using the CM/ECF system that will send notification of such filing to the persons required to be served in this subproceeding whose names appear on the Master Service List.

s/Sharon Haensly

Squaxin Island Legal Department