

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

United States of America, et al.,

Plaintiffs,

vs.

State of Washington, et al.,

Defendants.

Civ. No. C70-9213

Subproceeding No. 14-02

**Nisqually Indian Tribe's Cross-Motion
for Summary Judgment**

Oral argument requested

Note on Motion Calendar: April 22, 2016

STATEMENT OF THE CASE

In ruling on Nisqually Indian Tribe's cross-motion for summary judgment, the Court is presented with one issue:

In 1974, Judge Boldt used the reports of Dr. Barbara Lane to precisely define the Squaxin Island Tribe's usual and accustomed fishing areas (U&A). Dr. Lane concluded that Squaxin Island regularly fished the area of upper Puget Sound, west of Johnson Point. Dr. Lane had no evidence that Squaxin Island regularly fished the waters of the Nisqually Reach and around Anderson Island. So, Judge Boldt defined Squaxin Island's U&A as the "shallow bays, estuaries and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets." In September 2011, Squaxin Island opened a fishery in the Nisqually Reach, claiming it to be "open Sound of Southern Puget Sound" and, therefore, part of its U&A. Did Judge Boldt intend to recognize the waters east of Johnson Point, including the Nisqually Reach and waters around Anderson Island, as Squaxin Island's U&A despite having no evidence that Squaxin Island actually fished these waters?

1 By opening a fishery in the Nisqually Reach and claiming that Judge Boldt recognized
 2 these waters as its U&A, Squaxin Island attempts to rewrite Judge Boldt's decision and
 3 disrupt a 30-year status quo for South Puget Sound fisheries. There is no factual support
 4 for Squaxin Island's claim that Judge Boldt intended to broadly define its U&A. Judge
 5 Boldt consistently used precise language to define each tribe's U&A and relied on the
 6 expert reports of Dr. Lane, reports that contain no support for Squaxin Island's claim of
 7 broad, nearly-unlimited U&A.

8 Nisqually seeks a determination that Squaxin Island has no adjudicated U&A east
 9 of a line running from Johnson Point to Devils Head, including the waters of the Nisqually
 10 Reach and around Anderson Island (Subproceeding Area).¹ (Cutler Decl., Exh. A, map of
 11 Subproceeding Area.) Relatedly, Nisqually asks the Court to clarify the previous language
 12 of the Court concerning Squaxin Island's U&A and enjoin Squaxin Island from future
 13 fishing or fisheries-management actions in the Subproceeding Area.

14 15 JURISDICTION

16 This Court has continuing jurisdiction over this case under Paragraph 25(a)(1) and
 17 (a)(7), *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), as modified by the
 18 Court on August 23, 1993. Nisqually does not seek to relitigate Squaxin Island's U&A, but
 19 requests clarification and identification of the geographic scope of Squaxin Island's U&A.

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24 ¹ Specifically, the waters south and east of a line drawn from Mahnckes Point on the Kitsap Peninsula to the
 25 westernmost point of McNeil Island bordering on Pitt Passage, then extending from Hyde Point on McNeil
 26 Island to Gordon Point on the mainland, and east of a line drawn from Johnson Point to Devils Head.
*Findings of Fact and Conclusions of Law Re: Determination of Additional Usual and Accustomed Fishing
 Places of Nisqually, Puyallup, and Squaxin Island Indian Tribe, U.S. v. Washington*, 626 F. Supp. 1405,
 1441 (W.D. Wash. 1985).

STANDARD FOR SUMMARY JUDGMENT

Summary Judgment is appropriate where the pleadings and other papers establish “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (a), (c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must set forth specific facts showing a genuine issue as to a material fact to avoid summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986).

FACTS

Nisqually and Squaxin Island are political successors in interest to certain bands and tribes who signed the Treaty of Medicine Creek. Treaty with Nisqualli, Puyallup, etc., 1854, 10 Stat. 1132 (Treaty of Medicine Creek); *U.S. v. Washington*, 384 F. Supp. at 367–70, 377–78.

Nisqually’s adjudicated U&A includes the Nisqually River and marine areas in Puget Sound. *U.S. v. Washington*, 384 F. Supp. at 367–70; *U.S. v. Washington*, 626 F. Supp. 1405, 1441 (W.D. Wash. 1985). The area involved in this dispute, including the Nisqually Reach, is entirely within Nisqually’s U&A. Prior to this dispute, Squaxin Island recognized the Nisqually Reach as the “exclusive area of the Nisqually Tribe.” (Dkt. No. 2407, Aug. 30, 1976; Mohan Decl., Exh. F, 9.) Nisqually’s U&A is not at issue in this Subproceeding.

1. Judge Boldt used the inlets of western Puget Sound to define Squaxin Island’s Usual and Accustomed fishing grounds.

In 1974, Judge Boldt recognized that Squaxin Island was composed primarily of the “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 in this area are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case

Inlets.” *U.S. v. Washington*, 384 F. Supp. at 377–78. Judge Boldt determined that Squaxin Island fished “at their usual and accustomed fishing places in the shallow bays, estuaries and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets.” *Id.* at 378.

Following Final Decision #I, Squaxin Island defined its “exclusive management areas” as WDFW Catch Reporting Areas 13B-1 through 13B-10 which included Budd Inlet, Dana Passage, Henderson Inlet, Pickering Passage, Peale Passage, Hammersley Inlet, Totten Inlet, Skookum Inlet, Eld Inlet, and Upper Case Inlet. (Dkt. 2407, Aug. 30, 1976; Mohan Decl., Exh. F, 5.) So, in the years following Final Decision #I, Squaxin Island defined its own U&A as the waters west of the Subproceeding Area.

2. On September 7, 2011, Squaxin Island opened an unprecedented fishery in the Nisqually Reach, nearly causing a breach of the peace.

On September 6, 2011, Squaxin Island issued an emergency regulation opening a salmon fishery in the Nisqually Reach. (Troutt Decl., Exh. A.) Despite Nisqually’s objections, Squaxin Island opened its fishery on the evening of September 7, 2011. (Troutt Decl., Exh. B.) Squaxin Island boats flooded into the Nisqually Reach and three boats began fishing within the mouth of the Nisqually River. (Slape, Jr. Decl.)

Having never seen Squaxin Island fishers in the Nisqually Reach, Nisqually fishers were justifiably outraged by the presence of Squaxin Island boats within the mouth of the Nisqually River. (Slape, Jr. Decl.) Nisqually fishers repeatedly demanded that the Squaxin Island fishers leave the area but their requests were ignored. (Slape, Jr. Decl.) So, Nisqually fishers began hauling in the nets of the Squaxin Island fishers. (Slape, Jr. Decl.) After a series of heated exchanges, Squaxin Island fishers finally pulled back from the mouth of the river but continued fishing near Anderson Island. (Blanksma Decl.) The next day, Nisqually filed a motion for a temporary restraining order and Squaxin Island withdrew its emergency regulation. (Troutt Decl., Exh. C.)

1 During the fishery, Squaxin Island fishers set 13,500 feet of gillnet and caught
 2 2,868 Endangered Species Act listed Fall Chinook salmon, 44 coho salmon, and 200 pink
 3 salmon from the Nisqually Reach and the mouth of the Nisqually River. (Troutt Decl.,
 4 Exh. D.)

6 ARGUMENT

7 This case turns on Judge Boldt's description of Squaxin Island's U&A and what
 8 Judge Boldt meant when using the phrase "open sound of Southern Puget Sound."
 9 Southern Puget Sound has no strict definition and Judge Boldt did not define the term in
 10 his description of Squaxin Island's U&A. The geographic description of Squaxin Island's
 11 fishing sites and presence on Puget Sound is inconsistently referred to as *upper Puget*
 12 *Sound*, *lower Puget Sound*, *the head of Puget Sound*, *southern Puget Sound*, *south end of*
 13 *Puget Sound*, and *southwestern Puget Sound* by Judge Boldt and Dr. Lane. Because
 14 Southern Puget Sound can mean Puget Sound south of Seattle, Puget Sound south of The
 15 Narrows at Tacoma, or Puget Sound west of a line running from Johnson Point to Devils
 16 Head encompassing the waters at the south end of the Sound, Judge Boldt's description of
 17 Squaxin Island's U&A is ambiguous.

18 When a description of a tribe's U&A is ambiguous, the Court must look to the
 19 intent of the judge at the time the decision was made to determine the scope and meaning
 20 of the U&A finding. *Muckleshoot Indian Tribe, et al, v. Lummi Indian Tribe*, 141 F.3d
 21 1355 (9th Cir. 1998) (Muckleshoot I); *Muckleshoot Indian Tribe v. Lummi Indian Nation*,
 22 234 F.3d 1099, 1000 (9th Cir. 2000) (Muckleshoot II); *United States v. Lummi Indian*
 23 *Nation* (Muckleshoot III) 235 F.3d 429, 434 (9th Cir. 2000). To determine the judge's
 24 intent the Court must examine the record of the proceedings and evidence before the judge
 25 at the time of the decision. *Muckleshoot I*, 141 F.3d at 1359–60; *Muckleshoot III*, 235 F.3d
 26 at 433.

Squaxin Island’s claim that Judge Boldt recognized its U&A in the Subproceeding Area, as part of the open sound of Southern Puget Sound, fails for three reasons. First, the record before Judge Boldt contains no evidence that Squaxin Island regularly fished in the Subproceeding Area. Second, Judge Boldt did not use any geographic anchor points in the Subproceeding Area to describe Squaxin Island’s U&A. And finally, Squaxin Island’s admissions and actions immediately following the 1974 decision show that its understanding of its U&A, as recognized by Judge Boldt, did not include the Subproceeding Area.

A. The record before Judge Boldt lacks any substantial evidence of Squaxin Island regularly fishing the waters of the Subproceeding Area.

The geographic extent of each tribe’s U&A is based on “every fishing location where members customarily fished from time to time at and before treaty times.” *U.S. v. Washington*, 384 F. Supp. at 332. To establish U&A, the use by a tribe must have occurred “with regularity rather than having been ‘isolated or infrequent.’” *Muckleshoot III*, 235 F.3d. at 436. Occasional trolling on marine waters during transit was insufficient to establish a tribe’s U&A on the waters traveled. *U.S. v. Washington*, 384 F. Supp. at 353.

To determine each tribe’s U&A Judge Boldt heavily relied on the reports of Dr. Barbara Lane. *U.S. v. Washington*, 2007 WL 30869 at *7 (W.D. Wash 2007). Two of Dr. Lane’s reports examined Squaxin Island’s pre-treaty fishing practices: *Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century*, (Exh. USA-20, Aug. 24, 1973; Mohan Decl., Exh. A), and the more in-depth *Anthropological Report on the Identity, Treaty Status and Fisheries of the Squaxin Island Tribe of Indian*. (Exh. USA-24, Aug. 24, 1973; Mohan Decl., Exh. B.) Neither report contains any evidence of Squaxin Island regularly fishing within the Subproceeding Area.

Dr. Lane described the treaty-time ancestors of Squaxin Island as “politically autonomous groups” living west of the Subproceeding Area—the Squawksin of Case Inlet,

1 the Steh-chass of Budd Inlet, the T'Peeksin of Totten Inlet, the Squi-aitl of Eld Inlet, and
 2 the Se-heh-wamish of Hammersley Inlet. (Exh. USA-20, Aug. 24, 1973; Mohan Decl.,
 3 Exh. A, 34; Exh. USA-24, Aug. 24, 1973; Mohan Decl., Exh. B, 1, 18.) The fishing sites of
 4 these groups included “(1) freshwaters streams and creeks draining into the various inlets;
 5 (2) shallow bays and estuaries; and (3) the inlets and the open sound.” (Exh. USA-24, Aug.
 6 24, 1973; Mohan Decl., Exh. B, 15.) According to Dr. Lane, Squaxin Island’s U&A
 7 included “the entire area of *upper Puget Sound* including all the creeks and streams
 8 draining into the head of the Sound as well as the estuaries and bays and open saltwater.”
 9 (Exh. USA-20, Aug. 24, 1973; Mohan Decl., Exh. A, 35 (emphasis added).) Dr. Lane
 10 described the inlets of upper Puget Sound as “South Bay on Henderson Inlet around the
 11 head of the Sound to North Bay on Case Inlet. Included are: Henderson, Budd, Eld, Totten
 12 (including Big and Little Skookum), Hammersley and Case Inlets. ” (Exh. USA-20, Aug.
 13 24, 1973; Mohan Decl., Exh. A, 34–35.)

14 Dr. Lane did not use the term “upper Puget Sound” to describe all waters south of
 15 The Narrows. This is clear because she did not include Carr Inlet which is south of The
 16 Narrows in her description of upper Puget Sound. Likewise, the Subproceeding Area is not
 17 within upper Puget Sound because the Nisqually River is omitted from both of Dr. Lane’s
 18 reports and is neither a “stream” nor a “creek.” Dr. Lane’s description of the bays and
 19 estuaries of upper Puget Sound includes no reference to any major river. Accordingly,
 20 there is no basis for the argument that Dr. Lane’s description of upper Puget Sound—
 21 which is the basis for Judge Boldt’s description of Squaxin Island’s U&A—included the
 22 Subproceeding Area. Instead, the more reasonable interpretation is that Dr. Lane concluded
 23 that Squaxin Island fished, and therefore had U&A, in the waters west of Johnson Point, in
 24 upper Puget Sound.

25 Although the text of Dr. Lane’s reports contains no evidence of Squaxin Island
 26 fishing the waters of the Subproceeding Area, a map in USA-24 did include a pinpoint of a

1 Squaxin Island fishing site on Carr Inlet. (Exh. USA-24, Aug. 24, 1973; Mohan Decl.,
 2 Exh. B, 32.) The pinpoint likely refers to the Hotlemamish of Carr Inlet. Dr. Lane could
 3 not determine with certainty where the Hotlemamish consolidated after the Treaty of
 4 Medicine Creek, noting that W.W. Elmendorf classified them as a “branch of the
 5 Puyallup.” (Exh. USA-24, Aug. 24, 1973; Mohan Decl., Exh. B, 7.) Because Dr. Lane
 6 included no textual findings linking the Hotlemamish of Carr Inlet to Squaxin Island the
 7 pinpoint is likely erroneous.

8 Further evidence that the pinpoint is inaccurate is found in Dr. Lane’s description
 9 of the ancestral Squaxin Island and its fishing sites. It is unlikely, without evidence to the
 10 contrary, that the small “autonomous” Squaxin Island bands traveled great distances for
 11 fishing given that “the many small creeks draining into the head of Puget Sound provided
 12 excellent spawning grounds” where its members “were able to take prodigious numbers
 13 when the salmon ascended the streams to spawn.” (Exh. USA-24, Aug. 24, 1973; Mohan
 14 Decl., Exh. B, 12.) Also “Coho and Chinook were available throughout the year in the
 15 Sound itself and the inlets,” reducing the need to travel away from village sites. (Exh.
 16 USA-24, Aug. 24, 1973; Mohan Decl., Exh. B, 12.) Aside from there being no evidence
 17 that Squaxin Island’s ancestors fished the marine waters of the Subproceeding Area with
 18 enough regularity to establish U&A, the evidence shows there was no need for Squaxin
 19 Island members to travel to reach fishing grounds because fish were abundant in close
 20 proximity to their village sites along the western inlets. (USA-24, 7. Cf. Exh. USA-30,
 21 Aug. 24, 1973; *Anthropological Report on the Identity, Treaty Status and Fisheries of the*
 22 *Lummi Tribe of Indians* (showing that when there was actual evidence that a tribe traveled
 23 long distances from its villages to reach fishing sites, such travel was noted in the text of
 24 Dr. Lane’s reports).)

25 The evidence in the record before Judge Boldt does not show Squaxin Island
 26 regularly fishing in the Subproceeding Area, let alone fishing it with enough frequency to

1 establish U&A. On the contrary, the evidence in Dr. Lane's reports is clear that Squaxin
 2 Island members regularly fished the waters of upper Puget Sound—west of the
 3 Subproceeding Area—including the inlets, Dana Passage, Squaxin Passage, Pickering
 4 Passage, Peale Passage, and the waters south of Case Inlet. (Cutler Decl., Exh. B, map of
 5 Squaxin Island's U&A.)

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 7 **B. If Judge Boldt had intended to include all marine waters south of The**
 8 **Narrows and, specifically, the Subproceeding Area, he would have done so by**
 9 **using geographic anchor points.**

10 Judge Boldt used specific geographic anchor points to define each tribe's U&A.
 11 The Ninth Circuit has recognized Judge Boldt's use of geographic anchor points, and
 12 found that when he intended to include an area in a tribe's U&A he specifically named the
 13 area within the tribe's U&A description. *Upper Skagit Indian Tribe v. Washington*, 590
 14 F.3d 1020, 1025 (9th Cir. 2010). Further, when Judge Boldt cited specific, rather than
 15 general, evidence from Dr. Lane's reports, that evidence determines the boundaries of the
 16 U&A. *U.S. v. Washington*, 2007 WL 30869 at *10 (citing *U.S. v. Lummi Indian Tribe*, 235
 17 F.3d 443, 451 (9th Cir. 2000)).

18 Judge Boldt adopted Dr. Lane's conclusions of the ancestral makeup of Squaxin
 19 Island and of its fishing sites, recognizing that the Squaxin Island Tribe was composed
 20 primarily of the "inhabitants of all the inlets of upper Puget Sound from South Bay on
 21 Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included in this
 22 area are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley,
 23 and Case Inlets." *U.S. v. Washington*, 384 F. Supp. at 377–78. Judge Boldt then
 24 determined that Squaxin Island fished "at [its] usual and accustomed fishing places in the
 25 shallow bays, estuaries and open Sound of Southern Puget Sound and in the freshwater
 26 streams and creeks draining into those inlets." *Id.* at 378.

1 The only difference between Dr. Lane and Judge Boldt’s description of Squaxin
 2 Island’s U&A is the use of the phrase “open Sound of Southern Puget Sound.” Judge
 3 Boldt’s description of Squaxin Island fishing the “open Sound of Southern Puget Sound”
 4 departs from Dr. Lane’s description of Squaxin Island fishing in the “open Sound” of
 5 “upper Puget Sound.” Since Dr. Lane identified Squaxin Island fishing the “entire area of
 6 upper Puget Sound”—an area identified by the western inlets—Judge Boldt’s “Southern
 7 Puget Sound” could be interpreted as much more expansive.

8 Judge Boldt’s intent, however, in using “Southern Puget Sound” may be gleaned
 9 from an exchange with one of Squaxin Island’s witnesses, Calvin Peters, on September 10,
 10 1973. In the exchange, Judge Boldt identifies a problem with the description of Squaxin
 11 Island’s U&A, caused by the inconsistent use of terminology among the experts and
 12 witnesses, in a discussion about where Squaxin Island members lived:

13 **The Court:** In that connection, Mr. Peters, you mention the lower Puget Sound
 14 area. Now, I always think of the area down in Olympia and Mud Bay
 15 and that area as being lower Puget Sound, but I notice that some
 16 cartographers and the like refer to that as the upper, rather than the
 lower.

17 **The Witness:** I am like you.

18 **The Court:** The common practice down among you people is the same. All right,
 19 we will have to be careful of that, because I notice some of the data
 20 from Dr. Riley, for example, in some of his material referred to the
 upper when he was referring to the area at the end of the Sound, as it
 were, the south end, so it may be that if that is important at any time,
 we bring it out.

21 **Mr. McGimpsey:** Maybe we could refer to it as southern and northern.

22 **The Court:** That would do it, because that hasn’t changed.

23 (Mohan Decl., Exh. C, 2506.)

24 The exchange shows that Judge Boldt’s purpose in using the phrase “open Sound of
 25 Southern Puget Sound” was clarity, and it undermines the notion that he employed the
 26 language in order to grant Squaxin Island U&A in half of Puget Sound. The departure from

1 Dr. Lane's description was Judge Boldt's effort at demarcating the waters at the south end
2 of Puget Sound, around Budd Inlet and Mud Bay in Eld Inlet. From this exchange it is
3 reasonable to infer that Judge Boldt chose "Southern Puget Sound" as a way to resolve the
4 linguistic differences among the experts and witnesses when referring to the area of the
5 western inlets.

6 Furthermore, this Court and the Ninth Circuit have recognized that Judge Boldt
7 placed limitations on large marine areas with specific beginning and end points. *See U.S. v.*
8 *Washington*, 384 F. Supp. at 360 (describing Lummi's U&A as "includ[ing] marine areas
9 of Northern Puget Sound from the Fraser River south to the present environs of Seattle);
10 *U.S. v. Washington*, 459 F. Supp. 1020, 1048 (W.D. Wash. 1978) (identifying Suquamish's
11 marine area "from the northern tip of Vashon Island to the Fraser River including Haro and
12 Rosario Straits.") Given Judge Boldt's use of geographic anchor points to delineate and
13 limit marine U&A, it is unlikely, without evidence of a vast marine fishery, that Judge
14 Boldt meant to recognize all the marine waters of Southern Puget Sound as Squaxin
15 Island's U&A. If Judge Boldt had intended an expansive U&A for Squaxin Island, the
16 phrase "Southern Puget Sound" would have been delineated with geographical markers so
17 as to limit the U&A to the areas actually fished. Instead, he used "Southern Puget Sound"
18 to recognize the limited area at the south end of the Sound and not as a means to recognize
19 Squaxin Island's fishing rights in an area that conceivably encompasses all marine waters
20 south of Seattle.

21 Finally, it is unlikely that Judge Boldt, without any evidence of Squaxin Island
22 fishing or traveling in the Subproceeding Area, intended for Squaxin Island's U&A to
23 overlap with Nisqually's U&A, including an area where access was strictly controlled by
24 Nisqually. *U.S. v. Washington*, 384 F. Supp. at 368 ("Use of the lower Nisqually fisheries
25 by non-Nisqually was with the permission of the local people [...]") Squaxin Island did not
26 fish the Subproceeding Area and Judge Boldt did not intend to include it in his

determination of Squaxin Island's U&A. On the contrary, Judge Boldt's intent in describing Squaxin Island's U&A in the "open Sound of Southern Puget Sound" was to recognize the marine areas outside the named inlets including Dana Passage, Peale Passage, Squaxin Passage, Pickering Passage, and the waters south of Case Inlet.

C. Following Final Decision #I, Squaxin Island recognized the geographical limits of its U&A as the waters west of the Subproceeding Area.

Immediately following the issuance of the Final Decision #I Squaxin Island declared its U&A to be the waters north and west of the Subproceeding Area. In its 1974 Annual Treaty Regulation, it only opened Area 5 to its fishers which it defined as "all waters lying inside and northerly of a line projected from Johnson Point to Devil's Head." (Dkt. 712, Aug. 20, 1974; Mohan Decl., Exh. D, 1–2.) In 1975, Squaxin Island identified the same waters west of the Subproceeding Area as its U&A and also closed the "waters claimed as exclusive by the Nisqually Tribe. (Nisqually Reach)." (Dkt. 1143, June 25, 1975; Mohan Decl., Exh. E, 3.) Squaxin Island defined the Nisqually Reach as "[a]ll waters east of a line projected southwest from Treble Point (Anderson Island) through the navigation marker (southwest of Treble Point) to the mainland. And all waters south of a line running due east from Anderson across the north tip of Ketron to the mainland." (Dkt. 1143, June 25, 1975; Mohan Decl., Exh. E., 5, 13 (map).)

Then, in its 1976 Annual Regulation for Coho and Chum, Squaxin Island declared the Nisqually Reach (13-1) the "exclusive area of the Nisqually Tribe." (Dkt. 2407, Aug. 30, 1976; Mohan Decl., Exh. F, 9.) In that same regulation it recognized "13B-1 through 13B-10 [as the] exclusive management areas of the Squaxin Island Tribe [...]" including Budd Inlet, Dana Passage, Henderson Inlet, Pickering Passage, Peale Passage, Hammersley Inlet, Totten Inlet, Skookum Inlet, Eld Inlet, and Upper Case Inlet.² (Dkt.

² A scrivener's error in the Squaxin Island 1976 Coho and Chum Regulations refers to both Budd Inlet and

1 2407, Aug. 30, 1976; Mohan Decl. Exh. F, 5.) These actions show that Squaxin Island
 2 believed that Judge Boldt had limited its U&A to the waters west of the Subproceeding
 3 Area.

4 That Squaxin Island believed Judge Boldt had limited its U&A is further borne out
 5 by its 1980 request for determination, a request for additional U&A in the Subproceeding
 6 Area and other marine waters south of The Narrows. (Dkt. 7094, Aug. 4, 1980; Mohan
 7 Decl., Exh. G.) Squaxin Island modified its original request for determination, stating:

8 The Squaxin Island Tribe hereby modifies its earlier designation to
 9 request a declaration that the usual and accustomed fishing areas for the
 10 Squaxin Island Tribe include, but are not limited to, the following:

- 11 1. Those salt waters north and west of a line drawn from Mahnckes
 12 Point on the Kitsap peninsula to the westernmost point of McNeil
 13 Island bordering on Pitt Passage, then extending from Hyde Point on
 14 McNeil Island to Gibson Point on Fox Island and then extending
 15 from Fox Point on Fox Island to Point Fosdick on the Kitsap
 16 Peninsula, generally known as the Carr Inlet/Henderson Bay/Hale
 17 Passage area, as well as the freshwater rivers and streams which
 drain into that area;
2. Those salt waters north and east of a line drawn from Hyde Point on
 McNeil Island to Gordon Point on the mainland and south of the
 Narrows Bridge.

18 (Dkt. 7662b, June 29, 1981; Mohan Decl., Exh. H, 1.)

19 Squaxin Island's modified request for determination reduced the area that it had
 20 originally sought as additional U&A by excluding the Subproceeding Area. A map
 21 included in its modified request clearly shows that Squaxin Island only sought as
 22 additional U&A those waters northeast and east of the Subproceeding Area. (Dkt. 7662b
 23 June 29, 1981; Mohan Decl., Exh. H, 3.)

24 Nisqually Reach as Area 13B-1. However, Nisqually Reach was identified as Catch Reporting Area 13-1
 25 not Area 13B-1. Catch Reporting Area 13-B1 was Budd Inlet.

1 If, as Squaxin Island claims, Judge Boldt included the Subproceeding Area within
2 the definition of “open Sound of Southern Puget Sound” that definition would logically
3 include at least the marine waters south of The Narrows. If that were the case, then
4 Squaxin Island would not have needed to file a request for new U&A in those waters
5 because the area had already been adjudicated its U&A. The broad definition of “open
6 Sound of Southern Puget Sound” cannot simultaneously include the Subproceeding Area
7 and exclude Hale Passage and other marine waters south of the Narrows. In effect, Squaxin
8 Island’s request for determination in 1980 was an admission that Judge Boldt had not
9 recognized the areas east of Johnson Point as its U&A. And by seeking an adjudication of
10 its rights in those waters, Squaxin Island cannot now claim that Judge Boldt recognized its
11 U&A in the Subproceeding Area.

12 More importantly, when Squaxin Island modified its request for determination it
13 excluded the Subproceeding Area—including an area it had previously acknowledged as
14 not within its U&A—and, therefore, when Judge Craig finalized Squaxin Island’s request,
15 the Subproceeding Area was not included as part of its U&A. (Dkt. 7686, July 20, 1981;
16 Mohan Decl., Exh. I.) The Subproceeding Area has never been adjudicated the U&A of
17 Squaxin Island. (Cutler Decl., Exh. D, map of Squaxin Island’s adjudicated U&A.)

18 The result of the 1981 litigation was the creation of three exclusive U&As and one
19 in-common U&A shared by Nisqually, Puyallup, and Squaxin Island. (Cutler Decl., Exh.
20 C, map of South Sound U&As after 1981.) The Subproceeding Area is the exclusive U&A
21 of Nisqually while the waters west of Johnson Point are the exclusive U&A of Squaxin
22 Island. The in-common area includes Carr Inlet and other marine waters south of The
23 Narrows and the area north of The Narrows is Puyallup’s exclusive U&A. For thirty years
24 this model has proved to be a fair system, one which has prevented continuous U&A
25 battles among the three tribes over resources.

CONCLUSION

The issue in the case might have been stated in various ways: Did Judge Boldt intend to recognize Squaxin Island’s U&A in the Subproceeding Area? Was his intent in using the phrase “open Sound of Southern Puget Sound” to recognize Squaxin Island’s U&A as all marine waters south of The Narrows? Or, did the Judge intend “Southern Puget Sound” to mean the waters west of Johnson Point—the area at the end of Puget Sound? But no matter how the question is framed there is only one answer: Judge Boldt did not recognize the Subproceeding Area as Squaxin Island’s U&A. Judge Boldt based his finding on the reports of Dr. Lane which contain no evidence of Squaxin Island fishing in the Subproceeding Area. Instead, Judge Boldt used the phrase “open Sound of Southern Puget Sound” to limit Squaxin Island’s U&A to the waters west of the Subproceeding Area, the area Squaxin Island actually fished.

For the Nisqually Indian Tribe, this case has the potential to seriously impact its treaty fishing rights and has the potential to disrupt treaty fishing management in south Puget Sound. Squaxin Island is attempting to rewrite and expand its U&A by exploiting an ambiguity in Judge Boldt’s description even though for years it recognized that it did not have U&A in the area. None of the evidence before Judge Boldt shows Squaxin Island regularly fishing the waters of the Subproceeding Area. The evidence clearly shows Squaxin Island fishing in the waters to the west.

Accordingly, Nisqually Indian Tribe asks this Court to grant this cross-motion for summary judgment and enjoin the Squaxin Island Tribe from any future fishing or fishery management actions in the Subproceeding Area.

Respectfully submit this 19th day of February, 2016.

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15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on February 19, 2016, I electronically filed the Nisqually
17 Indian Tribe's Cross-Motion for Summary Judgment with the Clerk of the Court using the
18 CM/ECF system which will send notice of the filing to all parties registered in the
19 CM/ECF system for this matter.
20

21 **s/ Maryanne E. Mohan**

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