

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

NO. C70-9213

Subproceeding No. 19-1

UPPER SKAGIT INDIAN TRIBE'S MOTION  
FOR SUMMARY JUDGMENT

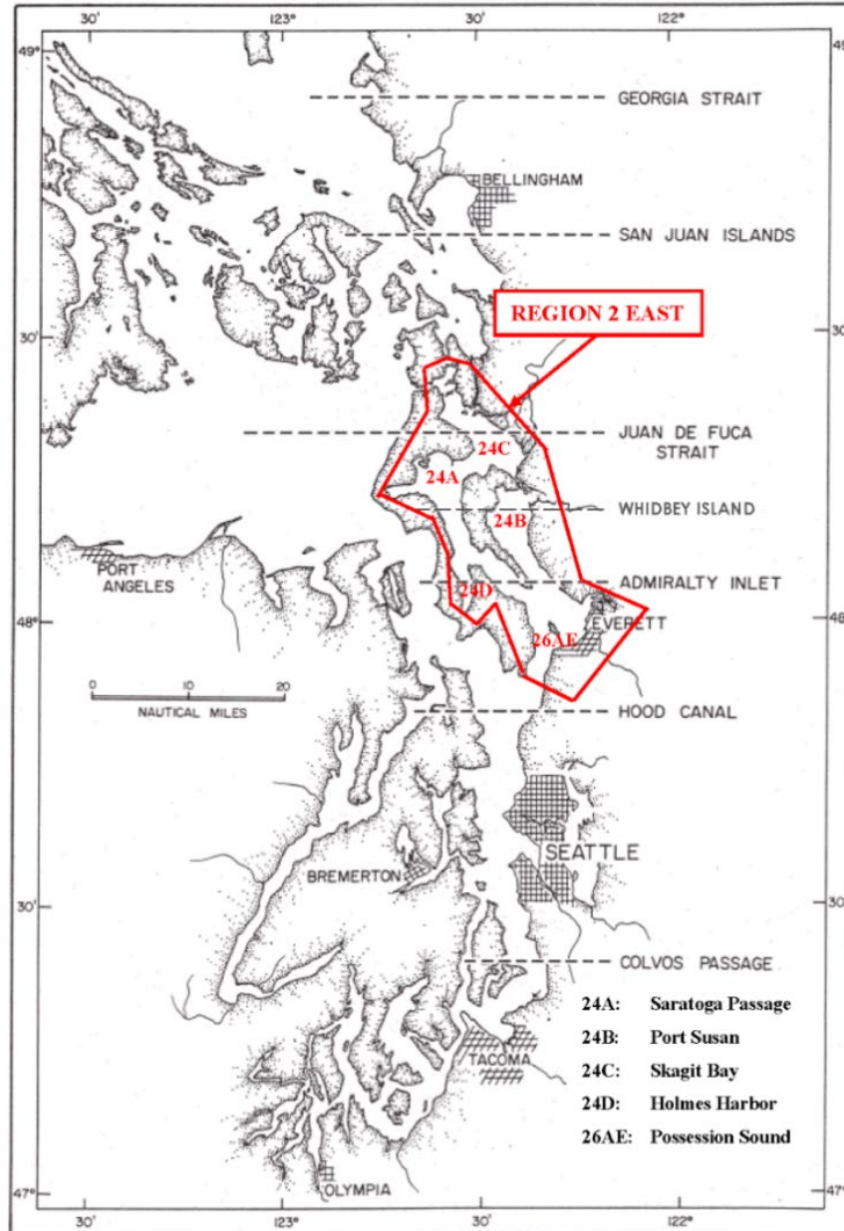
NOTE ON MOTION CALENDAR:  
July 31, 2020 (*see* Dkt. 50)

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## I. RELIEF REQUESTED

The Upper Skagit Indian Tribe (Upper Skagit) asks the Court to grant summary judgment in its favor by declaring that the area previously adjudicated to be the usual and accustomed grounds and stations (U&A) of the Lummi Nation (Lummi) does not include Region 2 East (the waters east of Whidbey Island as depicted in the map below<sup>1</sup>).



<sup>1</sup> Map is reprinted from Hawkins Decl. Ex 1 (May 29, 2020).

## II. BACKGROUND

### A. Judge Boldt Found That Lummi Had U&A in “the Marine Areas of Northern Puget Sound from the Fraser River South to the Present Environs of Seattle, and Particularly Bellingham Bay.”

Judge Boldt made the following findings about Lummi’s U&A:

¶ 45. . . . The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point. . . . These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon. [citations omitted]

¶ 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. (Exs. USA-20, p. 39; USA-30, pp. 23-26; Exs. PL-94a, b, c, d, e, t, u, v, w, x; Ex. G-26, pp. II-9 to II-13; Exs. USA-60, USA-61, USA-62, USA-63, USA-64; Tr. 1665, l. 4-11, l. 23-24<sup>[2]</sup>)

384 F. Supp. 313, 360 (W.D. Wash. 1974).

This controversy concerns whether Judge Boldt intended to include Region 2 East in “the marine areas of North Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay.”

### B. Judge Boldt Identified the Sources He Relied on in Determining Lummi’s U&A.

Judge Boldt relied on the 19 sources of evidence he listed in paragraph 46 (*see supra* & n.2) in limiting Lummi’s U&A to “the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay” and “the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay.” His list of evidence is finite and complete (*see* 384 F. Supp. at 347-48; C70-9213, Dkt. 11596, Order p. 13 (Feb. 15, 1990)), and is as follows:

<sup>2</sup> This evidence is filed at Hawkins Decl. Exs. 3-21 (May 29, 2020).

- 1           – USA-20 p. 39,<sup>3</sup> is Dr. Barbara Lane’s<sup>4</sup> report regarding many tribes. She stated,  
2                           [t]he principal fisheries of the Lummi included . . . Point Roberts, Village  
3                           Point, off the east coast of San Juan island as well as other locations in the  
4                           San Juan Island . . . Bellingham Bay and the surrounding saltwater areas . . .  
5                           on the river system draining into Bellingham Bay.

Bellingham Bay is the southern-most location identified by Dr. Lane in this report.

- 6           – USA-30 pp. 23-26,<sup>5</sup> is Dr. Lane’s report on the Lummis. She said it was  
7                           feasible to indicate the general area of their traditional fishing operations  
8                           and within the general area designate certain sites as important or principal.  
9                           (p. 23)

The traditional fishing areas discussed thus far extended from what is now  
the Canadian border south to Anacortes. (p. 24)

In addition to the home territory discussed to this point, Lummi fishermen  
were accustomed, at least in historic times, and probably earlier, to visit  
fisheries as distant as the Fraser River in the north and Puget Sound in the  
south. (p. 25)

Only once did Lane mention Seattle, and it concerned “post-treaty” fishing:

The traditional fisheries of the *post-treaty Lummi* included [listing sites] . . .  
[and] fisheries in the Straits and bays from the Fraser River south *to the*  
*present environs of Seattle* were utilized. (p. 26 ¶ 4).

Anacortes is the southern-most location identified for fishing at or before treaty time.

- 16           – PL-94a-x<sup>6</sup> are first-person accounts taken in 1895 in a lawsuit brought by tribal  
17                           members concerning fishing at Point Roberts. Point Roberts is at the U.S. / Canadian  
18                           border, and, although it can be reached by land only via Canada, it is in Whatcom  
19                           border, and, although it can be reached by land only via Canada, it is in Whatcom

21           <sup>3</sup> Hawkins Decl. Ex. 3 (May 29, 2020).

22           <sup>4</sup> “[T]he court finds that in specific facts, the reports of Dr. Barbara Lane have been exceptionally well researched and  
23           reported and are established by a preponderance of the evidence. They are found to be authoritative and reliable  
24           summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties.” 384 F. Supp. at  
25           350; *see also id.* (“Dr. Lane’s opinions, inferences and conclusions based upon the information stated in detail and  
well documented in her reports, appeared to the court to be well taken, sound and reasonable.”).

<sup>5</sup> Hawkins Decl. Ex. 4 (May 29, 2020).

<sup>6</sup> Hawkins Decl. Exs. 5-14 (May 29, 2020).

County.<sup>7</sup> Most of the testimony concerns Point Roberts, but one Lummi fisherman named Jack Sumptilin, who was born about 1810 and was present at the signing of the treaty, testified (PL-94d),

*the only places the sockeye salmon could be caught by the Lummis were Point Roberts and Village Point [on Lummi Island].*<sup>8</sup>

Lummi relied on affiant McDonough in Subp. No. 11-2. He testified (PL-94w) that

during all the time I have known these indians [the Lummi] they have fished at all points in the lower Sound and wherever the run of fish was greatest and salmon were most easily taken including Point Roberts.<sup>9</sup>

This latter testimony proves nothing about practices *at and before treaty time*:

McDonough was neither *Indian nor Lummi*, did not arrive in the Puget Sound area *until 1865* (10 years after the treaty signing), and appears to have first *made contact with Lummi in 1871*.<sup>10</sup> In addition, it is unclear what geographical area the declarant meant to encompass in the phrase “lower Sound.”

- G-26 pp. II-9 to II-13,<sup>11</sup> is barely legible but appears not to identify any locations south of the principal fisheries identified by Dr. Lane.
- USA-60 to USA-64<sup>12</sup> are maps, the focus of which are the areas of the main Lummi fisheries (*i.e.*, in the north). USA-62<sup>13</sup> is reprinted below and is discussed *infra* pp. 9-10. Notably, USA-62 does not include the entirety of Whidbey Island; it omits all points south of approximately Freeland:

<sup>7</sup> See [https://en.wikipedia.org/wiki/Point\\_Roberts,\\_Washington](https://en.wikipedia.org/wiki/Point_Roberts,_Washington).

<sup>8</sup> Hawkins Decl. Ex. 8, pp. 3-4 (May 29, 2020).

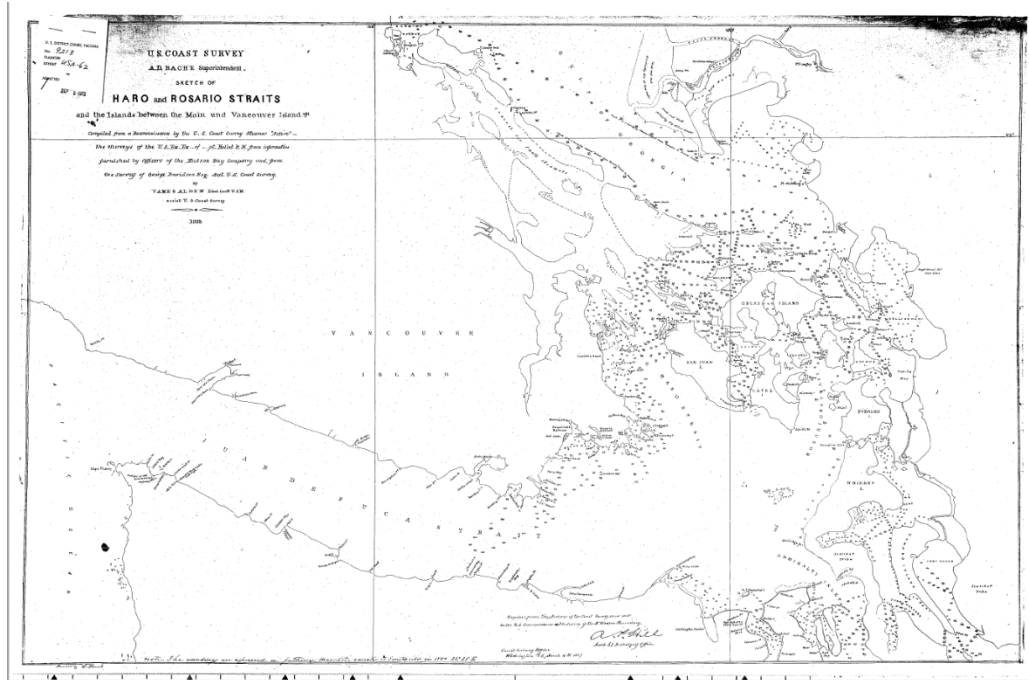
<sup>9</sup> Hawkins Decl. Ex. 13, p. 2 (May 29, 2020).

<sup>10</sup> Hawkins Decl. Ex. 13, p. 1 (May 29, 2020).

<sup>11</sup> Hawkins Decl. Ex. 15 (May 29, 2020).

<sup>12</sup> Hawkins Decl. Exs. 16-20 (May 29, 2020).

<sup>13</sup> Hawkins Decl. Ex. 18 (May 29, 2020).



– Tr. 1665 lines 4-11, 23-24,<sup>14</sup> concerns the Nooksack and Samish Rivers.

### III. ARGUMENT

#### A. The Court Employs a Two-Step Procedure to Determine if an Area Is within a Tribe's Adjudicated U&A.

When there is a dispute about whether an area is within a tribe's adjudicated U&A, the court must employ a "two-step procedure." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010). First, the Court must determine if the finding "was ambiguous, or that Judge Boldt intended something other than its apparent meaning (i.e., all salt waters of Puget Sound)." *Id.* In prior proceedings, this Court and the Ninth Circuit have held that Judge Boldt's finding that Lummi's U&A "included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay" is ambiguous as to precise locations other than Bellingham Bay. *See, e.g., United States v. Washington* (Subp. No. 89-2), 18 F. Supp. 3d 1123, 1157 (W.D. Wash. 1990), *aff'd United States v. Lummi Indian Tribe (Lummi I)*, 235 F.3d 443, 449 (9th Cir. 2000); *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d

<sup>14</sup> Hawkins Decl. Ex. 21 (May 29, 2020).



1355, 1359 (9th Cir. 1998); *United States v. Lummi Nation (Lummi II)*, 763 F.3d 1180, 1187 (9th Cir. 2014); *United States v. Lummi Nation (Lummi III)*, 876 F.3d 1004, 1008-09 (9th Cir. 2017).

Given the law of the case establishes that the language at issue is ambiguous, the inquiry moves to the second step of the analysis: the Court must determine if the evidence, including contemporaneous understanding of the extent of “the marine waters of Northern Puget Sound,” showed that “Northern Puget Sound” as used in the Lummi U&A included Region 2 East. Upper Skagit has the burden, just as it did in *Upper Skagit*, “to show that there was no evidence before Judge Boldt” that the Lummi “fished on the east side of Whidbey Island or traveled there in route” (language from *Upper Skagit* as to the Suquamish Tribe) “from the Fraser River south to the present environs of Seattle” (language from Lummi’s U&A finding). That is, this case presents a parallel set of factual evidence previously resolved in *Upper Skagit*. And the answer, as explained below, is the same as it was as to the Suquamish: there is no evidence that Judge Boldt’s intent was to include the east side of Whidbey Island as part of Lummi’s U&A. Lummi’s closed evidentiary record reflects that its U&A is confined to areas north and west of Region 2 East.

**B. No Evidence Relied on by Judge Boldt Placed Lummi in Region 2 East.**

To determine whether “from the Fraser River to the present environs of Seattle, and particularly Bellingham Bay” includes the waters of Region 2 East, the Court must “construe the provision so as to give effect to the intention” of Judge Boldt by examining “the entire record before” him and his “findings of fact.” *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998). The Court “may resolve conflicting inferences and evaluate the evidence to determine Judge Boldt’s intent.” *Upper Skagit*, 590 F.3d at 1025 n.9.

As outlined *supra* Section II(B), the only evidence before Judge Boldt placed Lummi fishing north and west of the waters in which Lummi now seeks to fish: Judge Boldt’s finding that Lummi had U&A “from the Fraser River south to the environs of Seattle” was supported by evidence that placed Lummi fishing no further south than Anacortes.



Conversely, there is no evidence of Lummi fishing at and before treaty time in Region 2 East or evidence tying Lummi to any Region 2 East geographic anchor or feature to support Lummi's current claim. In defining U&As (including Lummi's), Judge Boldt routinely identified bays, straits, and island areas that were to be included. For example:

- *Lummi*: Judge Boldt identified Orcas Island, San Juan Island, Lummi Island, Fidalgo Island, Point Roberts, Sandy Point, the mouth of the Nooksack River, Whatcom Creek, and Bellingham Bay. 384 F. Supp. at 360.
- *Puyallup Indians*: Judge Boldt identified Vashon Island, Commencement Bay, the Puyallup River, and its tributary rivers and creeks. *Id.* at 371.
- *Nooksack Tribe*: Judge Boldt identified the Nooksack River, its tributaries, Bellingham Bay, Chuckanut Bay, Birch Bay, Semiahmoo Bay, and Semiahmoo Spit. 459 F. Supp. at 1049.
- *Swinomish Tribal Community*: Judge Boldt identified the Skagit River, its tributaries, the Samish River, its tributaries, the Fraser River, Whidbey, Camano, Fidalgo, Guemes, Samish, Cyprus, the San Juan Islands, Bellingham Bay, and Hale Passage adjacent to Lummi Island. *Id.* at 1049.

Judge Boldt was sufficiently specific in his U&A delineations that when he intended to include straits, bays, and passages in a tribe's fishing areas, he specifically named them. As the Ninth Circuit found in *Upper Skagit*, "Saratoga Passage and Skagit Bay are nearly enclosed or inland waters to the east of Whidbey Island." 590 F.3d at 1024 n.6. Just as for Suquamish, because those waters were not identified by Judge Boldt and are not the obvious nautical path between the geographic anchors he did identify (in Suquamish's case, between the Fraser River and Vashon Island), the only logical "conclusion" is "that he did not intend for them to be included." *Id.* at 1025.

1 This evidence—fixing Anacortes as the southern-most geographic anchor of Lummi fishing  
 2 at and before treaty time—was consistent with Lummi’s interrogatory response that “The  
 3 traditional fishing areas extended from what is now the Canadian border south to Anacortes.”<sup>15</sup>  
 4 Likewise, that Judge Boldt did not intend to find that Lummi had U&A east of Whidbey is  
 5 consistent with Lummi’s decades-long fishing practices between his 1974 decision and 2008,<sup>16</sup>  
 6 during which time Lummi did not claim a right to fish in Region 2 East.<sup>17</sup>

7 **C. Geography, Not Fishing, Secured Lummi U&A West of Whidbey Based on Logic**  
 8 **That Precludes Finding Lummi U&A East of Whidbey.**

9 **1. Through a series of cases, Lummi built an argument and convinced the Ninth**  
 10 **Circuit that geography, as opposed to actual evidence of fishing, established**  
 11 **Judge Boldt’s intent to include the waters west of Whidbey within its U&A.**

12 Although Lummi has repeatedly returned to Court to argue the extent of its U&A, it has  
 13 never argued that the evidence before Judge Boldt established that Lummi customarily fished the  
 14 waters east of Whidbey (Region 2 East) at and before treaty times. Importantly, the arguments  
 15 Lummi advanced in order to convince the Ninth Circuit that its U&A included the waters *west of*  
 16 Whidbey foreclose their current position that they have U&A *east of* Whidbey.

17 In Subp. No. 89-3, the treaty tribes sought confirmation of their treaty right to take  
 18 shellfish. All tribes’ U&As were held to be co-extensive with their right to take finfish. The  
 19 Lummi relied on Dr. Wayne Suttles to establish where Lummi took shellfish. He testified orally:

20 The area that my report covers extends from the international boundary south to  
 21 the southern end of Padilla Bay, *the northern and western shores of Fidalgo*  
 22 *Island*, and includes all of the islands to the west. [¶] The northern part of that was  
 23 traditionally the territory of the Semiahmoo tribe who lived here in the Blaine  
 24 area from the – north of the boundary, in fact south to somewhere south of Birch  
 25 Bay, and then from there south to Samish Bay was the territory of the Lummi. [¶]  
 That territory extended from the mainland out through the San Juan Islands but  
 not including Stewart Island and the western shore of San Juan Island. *Samish*

<sup>15</sup> Hawkins Decl. Ex. 2, Answers p. 1, No. 1 (May 29, 2020).

<sup>16</sup> Lummi first issued a regulation purporting to open a fishery in Region 2 East in 2008. *See* Dkt. 3 ¶ 4; Dkt. 45 ¶ 4 (“Answer: Admit.”).

<sup>17</sup> *See* Dkt. 11 ¶¶ 14-16, Ex. 3; Dkt. 10 ¶ 30; Dkt. 14 ¶ 13; Dkt. 17 ¶ 7.

territory extended from the mainland shores, Fidalgo, out to the eastern and southern shores of Lopez Island.<sup>18</sup>

He testified by written testimony admitted by the court that those areas were:

West Sound, Orcas Island; East Sound, Orcas Island; Lopez Sound, Lopez Island; Boundary Bay side, Point Roberts Peninsula; Tongue Spit, Semiahmoo Bay; campsite north of Birch Point; Birch Bay; bay enclosed by Point Francis, Lummi Reservation; bay, east shore, Lummi Island; Chuckanut Bay; Samish Bay; Padilla Bay; *Fidalgo Bay*; *west shore Guemes Island*; *Shannon Point, Fidalgo Island*; *Flounder Bay, Fidalgo Island*.<sup>19</sup>

In other words, Dr. Suttles identified no areas as far south as the waters east of Whidbey.<sup>20</sup>

In Subp. Nos. 86-5 and 99-1 (in which the Ninth Circuit affirmed that “to the present environs of Seattle” did not include Area 10, the northmost edge of which is at Edmonds), Lummi appropriately relied only on USA-20, USA-30, and Final Decision #1.

In Subp. No. 89-2, Lummi argued from the presence or absence of specific locations in Final Decision #1 (and the evidence Judge Boldt identified) that he intended to include (inter alia) Admiralty Inlet.<sup>21</sup> The Ninth Circuit agreed that Admiralty Inlet, which is west of Whidbey, was within Lummi’s U&A because “[g]eographically . . . it is natural to proceed through Admiralty Inlet to reach ‘the environs of Seattle.’” *Lummi I*, 235 F.3d at 452 (emphasis added). *I.e.*, the decision was based on geographic inference, not evidence of treaty time fishing in the waters west of Whidbey (or even the environs of Seattle), and rested on the “natural” way to travel “from the Fraser River south to the environs of Seattle.” *Id.* This ruling supports the inference that waters east of Whidbey were not even part of Lummi’s route of travel much less their fishing activities.

In Subp. No. 11-2, the Court struck Lummi’s new evidence about whether ¶ 46 included

<sup>18</sup> Hawkins Decl. Ex. 22, pp. 743-45 (May 29, 2020) (emphasis added).

<sup>19</sup> Hawkins Decl. Ex. 23, pp. 5-8 (May 29, 2020) (written testimony admitted and referred to in oral testimony cited *supra* note 18) (emphasis added).

<sup>20</sup> Even if Dr. Suttles had produced new evidence, this evidence was not before Judge Boldt and therefore cannot be relied upon to interpret his intent. *See United States v. Washington* (Subp. 05-3), 20 F. Supp. 3d 777, 822 (Oct. 10, 2006) (striking present-day declaration of Dr. Lane as irrelevant in determining Judge Boldt’s intent).

<sup>21</sup> Hawkins Decl. Exs. 24, 25 (May 29, 2020).

1 the waters west of Whidbey Island.<sup>22</sup> Thus, as in 89-2, in 11-2 Lummi argued it had U&A west of  
 2 Whidbey based on the geographic connection between the Fraser River and Admiralty Inlet (which  
 3 the Ninth Circuit had found in *Lummi I* was part of Lummi’s U&A because it was necessarily  
 4 traversed in route to the present environs of Seattle). The maps Lummi used to prove their claim  
 5 accurately established that the most logical way to connect those waters was by traveling the  
 6 waters west of Whidbey. Lummi argued to the Ninth Circuit:

7 As the map excerpt [of Exhibit USA-62] below illustrates, those waters [to the  
 8 west of Whidbey Island] are directly surrounded by, and *are the sole direct*  
 9 *connection between*, Admiralty Inlet and the waters of the San Juan Islands  
 (including Haro Strait, far to the west of Whidbey Island).<sup>23</sup>

10 Lummi repeated this argument throughout its brief, that “the waters west of Whidbey Island . . .  
 11 *necessarily would have been traversed by the Lummi.*”<sup>24</sup> As Lummi explained, “excising the  
 12 waters west of Whidbey Island . . . *would leave a gaping hole* in the center of the Lummi’s fishing  
 13 territory.”<sup>25</sup> Later in its brief, Lummi made the point again:

14 Indeed, as Exhibit USA-62 below shows, the Lummi *undoubtedly would have*  
 15 *passed through these waters* when traversing their fishing grounds. The waters  
 16 west of Whidbey Island lie directly to the south of the waters of the San Juans . . .  
 17 , which are themselves to the south of the Fraser River . . . . The waters west of  
 Whidbey Island lie directly to the north of Admiralty Inlet . . . , which is on the  
 way to the “environs of Seattle” . . . . The waters west of Whidbey Island thus lie  
 directly in between waters that indisputably are within the Lummi’s usual and  
 accustomed fishing grounds.<sup>26</sup>

18 *Three times*, Lummi pasted Exhibit USA-62 into its brief, each time adding red arrows to show  
 19 how obvious it was that Lummi necessarily traversed the waters west of Whidbey:<sup>27</sup>

22 <sup>22</sup> Hawkins Decl. Ex. 26, pp. 12-13 (May 29, 2020).

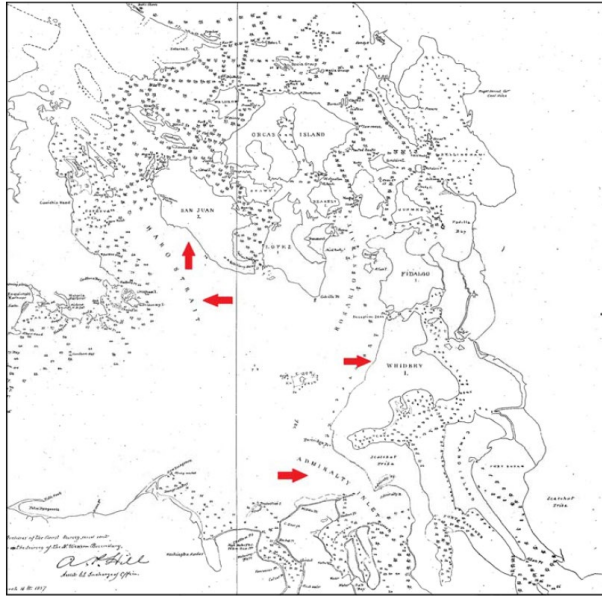
23 <sup>23</sup> Hawkins Decl. Ex. 27, p. 4 (as paginated by Lummi) (May 29, 2020) (emphasis added).

24 <sup>24</sup> Hawkins Decl. Ex. 27, p. 19 (as paginated by Lummi) (May 29, 2020) (emphasis added).

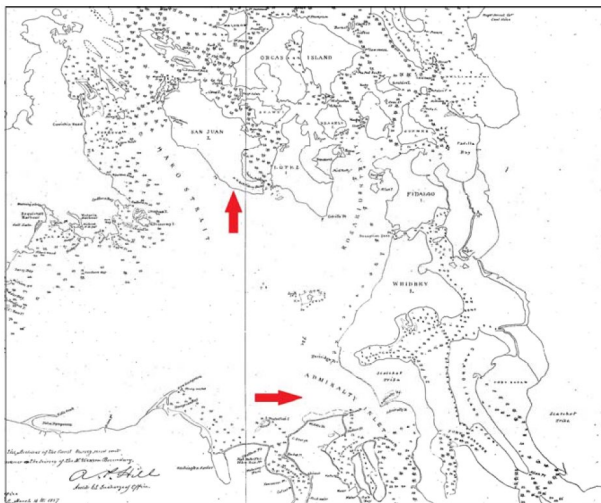
25 <sup>25</sup> Hawkins Decl. Ex. 27, p. 26 (as paginated by Lummi) (May 29, 2020) (emphasis added).

26 <sup>26</sup> Hawkins Decl. Ex. 27, p. 42 (as paginated by Lummi) (May 29, 2020) (emphasis added).

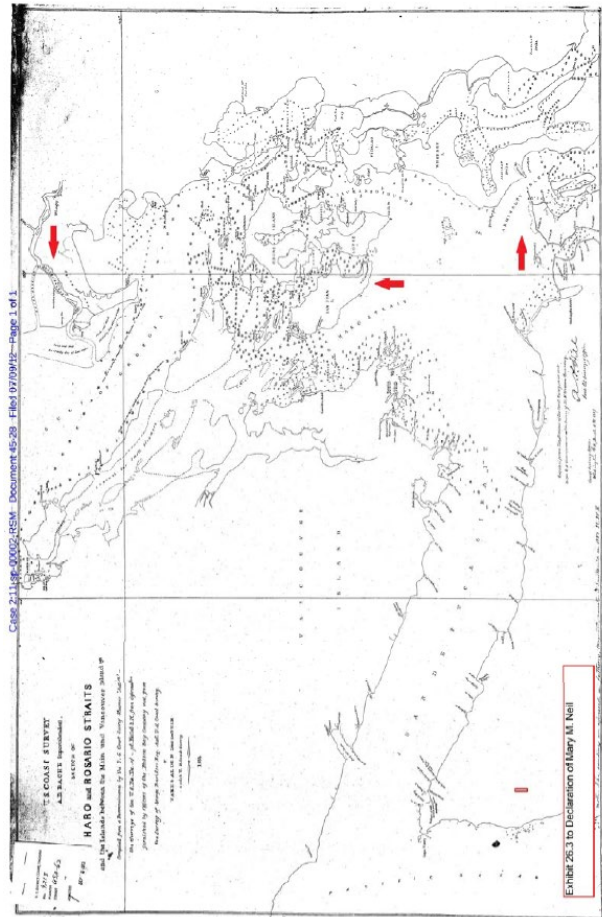
27 <sup>27</sup> Hawkins Decl. Ex. 27, pp. 4, 43, 52 (as paginated by Lummi) (May 29, 2020).



Page 4 ("red arrows" to identify "San Juan Island, Haro Strait, Whidbey Island, and Admiralty Inlet")



Page 52 ("red arrows" to identify "the Fraser River, San Juan Island, and Admiralty Inlet")



Page 43 ("red arrows" to identify "San Juan Island and Admiralty Inlet")

Lummi also relied on *Upper Skagit*, 590 F.3d 1020, and *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015), to argue that the north-south travel route necessarily was on the west side of Whidbey Island:

The [Ninth Circuit] cited the probable route of travel [from the Fraser River to Vashon Island] in holding that Suquamish's [U&As] include waters to the west of Whidbey Island. . . . A similar conclusion follows here.<sup>28</sup>

<sup>28</sup> Hawkins Decl. Ex. 27, p. 54 (as paginated by Lummi) (May 29, 2020) (citing 794 F.3d at 1135).



1 The Ninth Circuit again agreed with Lummi. The Court held that “[t]he nautical path that  
2 we traced in *Lummi I* from the San Juan Islands to Seattle cuts right through the waters” west of  
3 Whidbey Island. *Lummi III*, 876 F.3d at 1009-11.

4 **2. Lummi is judicially estopped from claiming that the nautical path also**  
5 **necessarily included the secluded waters east of Whidbey.**

6 The argument Lummi built, and that the Ninth Circuit adopted in *Lummi I* and *Lummi III*,  
7 was that the waters west of Whidbey *necessarily were traversed by Lummi* in travelling from the  
8 Fraser River south to the environs of Seattle. That argument cannot be squared with an argument  
9 that Lummi *also must necessarily have travelled east* of Whidbey to travel between those  
10 locations. Thus, Lummi is estopped from advancing its new argument.

11 “[J]udicial estoppel ‘is an equitable doctrine invoked by a court at its discretion.’” *New*  
12 *Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted). “[I]ts purpose is ‘to protect the  
13 integrity of the judicial process’ by ‘prohibiting parties from deliberately changing positions  
14 according to the exigencies of the moment.’” *Id.* at 749-50 (citations omitted). The doctrine is  
15 “not reducible to any general formulation of principle” but “several factors” may be considered in  
16 deciding whether to apply it. *Id.* at 750.

17 The first factor to be considered is whether the later position is “clearly inconsistent” with  
18 the earlier position. *Id.* (citation omitted). Second is “whether the party has succeeded in  
19 persuading a court to accept that party’s earlier position.” *Id.* A third is “whether the party  
20 seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair  
21 detriment on the opposing party if not estopped.” *Id.* at 751. The Court stressed that “[i]n  
22 enumerating these factors,” the Court was not “establish[ing] inflexible prerequisites or an  
23 exhaustive formula.” *Id.*

24 Here, the two positions are clearly inconsistent, and Lummi convinced the Ninth Circuit of  
25 its earlier position. According to the Ninth Circuit in *Lummi I*, waters that a tribe *necessarily*  
*traversed* from one geographic anchor identified by Judge Boldt to another he identified are within

the tribe's U&A even if (as here) Judge Boldt identified *no* geographic features or anchors in those in-between waters. Lummi cannot have it (literally) both ways. *E.g. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 996 (9th Cir. 2012) ("Monroe could not have been domiciled in both California and New York at the time of her death."). Lummi already convinced the Ninth Circuit that the nautical path between the Fraser River and the environs of Seattle *necessarily* included the waters west of Whidbey. That same nautical path cannot also have *necessarily* included the waters east of Whidbey. Likewise, Lummi convinced the Ninth Circuit that without the waters west of Whidbey there would be a "gaping hole" in its U&A.<sup>29</sup> But there would have been no "gaping hole" if Lummi had U&A east of Whidbey.

The third relevant factor is present, too. Lummi is attempting to derive an unfair advantage: having secured fishing rights based an inference about a *necessary* travel route, not evidence, Lummi cannot secure additional fishing rights which will come (literally) at the expense of the tribes with adjudicated U&A east of Whidbey.

Thus, although Upper Skagit would prevail even absent judicial estoppel because the nautical path obviously is *not* east of Whidbey (as the maps Lummi submitted to the Ninth Circuit illustrated, *see supra* pp. 5, 11), judicial estoppel prevents Lummi from arguing that travel between the Fraser River and the environs of Seattle requires travel east of Whidbey. *New Hampshire*, 532 U.S. at 749 ("judicial estoppel . . . prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase" (citation and quotation marks omitted)).

#### IV. CONCLUSION

Judge Boldt did not intend to include the waters east of Whidbey Island in Lummi's U&A. The Court should grant summary judgment to Upper Skagit affirming that fact.

<sup>29</sup> Hawkins Decl. Ex. 27, p. 26 (as paginated by Lummi) (May 29, 2020) (emphasis added).



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