THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

United States of America, et al.,

Plaintiffs,

v.

State of Washington, et al.,

Defendants.

Case No. C70-9213
Subproceeding No. 19-01

LUMMI NATION'S MOTION FOR SUMMARY JUDGMENT

Note on Motion Calendar: July 31, 2020

Oral Argument Requested

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Rules

Pursuant to Federal Rule of Civil Procedure 56 and the Court's Order Amending Case Schedule, dated March 23, 2020 (Dkt. #50), the Lummi Nation (the "Lummi") hereby moves for summary judgment dismissing the Request for Determination filed by the Swinomish Indian Tribal Community, the Tulalip Tribes, and the Upper Skagit Indian Tribe (the "Requesting Tribes"), and ruling that the Lummi's usual and accustomed fishing grounds and stations, as determined in *United States v. Washington*, 384 F. Supp. 312, 386 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), include marine areas known as "Region 2 East" to the east of Whidbey Island, including Skagit Bay, Port Susan, Saratoga Passage, Holmes Harbor, and Possession Sound.

INTRODUCTION

In their Request for Determination, the Requesting Tribes ask the Court to cut out and reserve exclusively for the Requesting Tribes a section of the Lummi's adjudicated fishing grounds within Puget Sound. In his 1974 decision in *United States v. Washington*, Judge Boldt found that the Lummi's usual and accustomed fishing grounds and stations "included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." In various cases since that decision, the Ninth Circuit has established that Judge Boldt intended to include Admiralty Inlet and the waters west of Whidbey Island within that description of the Lummi's usual and accustomed fishing grounds. The Requesting Tribes now argue that despite Judge Boldt's decision, and despite the Ninth Circuit's decisions, the Lummi's usual and accustomed fishing grounds do not include marine areas known as "Region 2 East" to the east of Whidbey Island, including Skagit Bay, Port Susan, Saratoga Passage, Holmes Harbor, and Possession Sound—waters that, as shown in the map below (*see infra* p. 14), are squarely included within the waters in which the Lummi unquestionably have treaty fishing rights.

To sever the disputed waters from the Lummi's adjudicated fishing grounds, the Requesting Tribes must show both that (a) Judge Boldt's decision defining the Lummi's usual and accustomed fishing grounds was ambiguous, and (b) there is no evidence in the record that might have led Judge Boldt to include the disputed waters in his description of the Lummi's fishing grounds—that is, no evidence that the Lummi fished in the disputed waters or traveled

there at or before treaty times. The Requesting Tribes cannot satisfy that burden.

First, nothing in the language of Judge Boldt's decision supports the Requesting Tribes' effort to shrink the Lummi's adjudicated fishing grounds. The disputed waters lie within "Northern Puget Sound," between all of the points Judge Boldt described as markers of the Lummi's usual and accustomed fishing grounds. In subsequent cases construing Judge Boldt's decision, the Ninth Circuit has sometimes agreed that a tribe's fishing grounds end at a certain border, or do not extend into different waters than those mentioned in Judge Boldt's decision. Never has the Ninth Circuit approved reading Judge Boldt's decision to create a discontinuity within a tribe's fishing grounds, as the Requesting Tribes' interpretation would require.

Nor can the Requesting Tribes show that there was no evidence in the record before Judge Boldt that would support the inclusion of the disputed waters within the Lummi's usual and accustomed fishing grounds. To the contrary, there was substantial evidence before Judge Boldt that the Lummi fished and traveled throughout the disputed waters at or before treaty times:

- Dr. Lane's reports indicate that the Lummi's "home territory" included waters off Fidalgo Island (just to the north of the disputed waters), and that they fished *beyond* that home territory all the way to the present environs of Seattle (to the south of the disputed waters). The report's description that the Lummi fished "from the Fraser River south to the present environs of Seattle" indicates that the Lummi fished throughout the area between these two endpoints, a continuous area including the disputed waters.
- Judge Boldt found that the Lummi include descendants of the Samish tribe, and he cited evidence of Samish reef-net fishing sites near Deception Pass, the entry point to the disputed waters.
- Dr. Barbara Lane's reports also indicate that the Lummi collected various materials from upriver Skagit, which empties into the disputed waters.
- Trial testimony from Dutch Kinley, a member of the Lummi Tribe, reveals that the Lummi fished in the waters around Whidbey Island.

This evidence necessarily precludes the Requesting Tribes from satisfying their burden of proving

that there is no evidence that would support the inclusion of the disputed waters within the Lummi's usual and accustomed grounds.

The Requesting Tribes' Request for Determination therefore fails as a matter of law. The Court should enter judgment dismissing the request and declaring that Region 2 East was included within the Lummi's usual and accustomed fishing grounds, as Judge Boldt's decision unambiguously says and as the record evidence supports.

BACKGROUND AND PROCEDURAL HISTORY

I. THE LUMMI'S AND THE REQUESTING TRIBES' USUAL AND ACCUSTOMED GROUNDS INCLUDE THE DISPUTED WATERS.

In February 1974, in a proceeding brought by the United States against the State of Washington, Judge Boldt determined the off-reservation fishing rights of tribes in western Washington with regard to anadromous fish resources. His findings were based upon the rights to fish "at all usual and accustomed grounds and stations" (sometimes referred to as "U&A"), which were reserved to the tribes in their treaties with Isaac I. Stevens on behalf of the United States in the 1850's. *United States v. Washington*, 384 F. Supp. 312, 386 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) ("*Decision I*"). The Lummi, which "includes descendants of the Semiahmoo and Samish Indians of 1855," is a "political successor in interest to some of the Indian tribes or bands [that] were parties to the Point Elliott Treaty." *Id.* at 360.

After more than three years of discovery, and a three-week bench trial at which the Court heard from 50 witnesses and examined over 350 exhibits, Judge Boldt's findings of fact ("FF") delineated the Lummi's usual and accustomed fishing grounds:

> 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. …
>
> 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.

Id.

In subsequent cases construing Judge Boldt's decision, the Ninth Circuit further refined the precise locations of the Lummi's fishing grounds. In *United States v. Lummi Indian Tribe* ("*Lummi I*"), the Ninth Circuit held that Admiralty Inlet was included within Judge Boldt's description of the Lummi's usual and accustomed fishing grounds because "[i]f one starts at the mouth of the Fraser River (a Lummi [U&A] …) and travels past Orcas and San Juan Islands (also Lummi [U&As] …), it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle.'" 235 F.3d 443, 452 (9th Cir. 2000) (citing *Decision I*, 384 F. Supp. at 360). The Strait of Juan de Fuca and the mouth of Hood Canal, however, were not included. *Id.* at 453. In *United States v. Lummi Nation* ("*Lummi III*"), the Ninth Circuit held that because "[t]he nautical path … traced in *Lummi I* from the San Juan Islands to Seattle cuts right through [the waters west of Whidbey Island]," those waters, too, were "encompassed in the Lummi's U&A." 876 F.3d 1004, 1009–11 (9th Cir. 2017). In *Muckleshoot Indian Tribe v. Lummi Indian Nation* ("*Muckleshoot II*"), the Ninth Circuit concluded that by "the present environs of Seattle," Judge Boldt meant the "northern outskirts, or suburbs, of Seattle as they existed in 1974," extending "approximately to Edmonds." 234 F.3d 1099, 1100 (9th Cir. 2000).

As Judge Boldt held with respect to all of the various tribes' fishing grounds (including the Requesting Tribes'), the Lummi's fishing grounds were not exclusive—that is, other tribes' fishing grounds could overlap with the Lummi's. *See United States v. Washington*, 573 F.3d 701, 704 (9th Cir. 2009) ("The adjudicated fishing areas of several tribes overlap."). For example, Judge Boldt held that the Swinomish Indian Tribal Community's ("Swinomish") fishing grounds, like the Lummi's, started at Fraser River, but did not extend as far south as Seattle:

> 6. The usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island.[1]

[1] The Snohomish and the Tulalip were not parties to *Decision I*, but were subsequently allowed to intervene in 1978. *United States v. Washington*, 459 F. Supp. 1020, 1028 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) ("*Decision II*").

Decision II, 459 F. Supp. at 1049. Judge Boldt also found that the Tulalip's fishing grounds started significantly further south, at Whidbey Island:

> [T]he following described areas are found to be usual and accustomed marine fishing areas of the [Tulalip]: Beginning at Admiralty Head on Whidbey Island and proceeding south, those waters described as Admiralty Bay and Admiralty Inlet, then southeasterly to include the remainder of Admiralty Inlet including Mutiny and Useless Bay, then northeasterly to include Possession Sound and Port Gardner Bay, then northwesterly to include the waters of Port Susan up to a line drawn true west of Kyak Point and Holmes Harbor and Saratoga Passage up to a line drawn true west of Camano on Camano Island.

Id. at 1059. And Judge Boldt found that the Upper Skagit Indian Tribe's ("Upper Skagit") fishing grounds "include[d] numerous areas along the Skagit River, extending from about Mt. Vernon upstream to Gorge Dam." *Decision I*, 384 F. Supp. at 379.

Strictly speaking, *Decision I* was limited to the tribes' fishing grounds with respect to anadromous fish. *Decision II*, 459 F. Supp. at 1048. Nevertheless, holding that the Court's jurisdiction extended to "matters related to, but not included within, [*Decision I*,] such as possible treaty-right nonanadromous fishing[,]" Judge Boldt ordered in a later decision that various tribes—including the Lummi and the Swinomish—had the right to "take herring at all of [their] [U&As] to the same extent and subject to the same terms and conditions as specified in [*Decision I*] with respect to the right of taking anadromous fish[.]" *Id.* at 1049.

II. THE PARTIES ATTEMPTED TO RESOLVE THE DISPUTED WATERS AMONG THEMSELVES—ALTHOUGH THE REQUESTING TRIBES DID NOT FULLY DISCLOSE THE BASIS FOR THEIR POSITION IN THE PARTIES' DISCUSSIONS.

In *Decision I*, the Court retained continuing jurisdiction to resolve various matters, as set out in Paragraph 25 of the Permanent Injunction, *see* 384 F. Supp. at 419. Judge Rothstein later modified the Injunction in 1994. *See United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1991) ("*Decision III*"). Paragraph 25(a) of the Permanent Injunction provides that the "parties or any of them may invoke the continuing jurisdiction of this court in order to determine … (1) [w]hether or not the actions intended or effected by any party (including the party seeking a determination) are in conformity with [*Decision I*] or [the] injunction." *Id*. It is pursuant to this provision that the Requesting Tribes filed their Request for Determination.

As a precondition to invoking the Court's continuing jurisdiction, the Injunction set out

detailed meet-and-confer requirements. *See id.* ¶ 25(b). As detailed below, the parties have engaged in some meet-and-confer discussions pursuant to the Injunction, although the Requesting Tribes were not completely transparent in setting out the basis for their position that Region 2 East was not included within the Lummi's fishing grounds.

A. The Parties Engaged in Settlement Discussions Concerning a Previous Subproceeding, 18-01.

Region 2 East—the waters in dispute here—comprises Marine Fish-Shellfish Management and Catch Reporting Areas 24A, 24B, 24C, 24D, and 26A-E. (May 29, 2020 Decl. of Gabriel Cantu ISO Lummi Motion for Summary Judgment ("Cantu Decl") ¶ 2, Ex. B at 1.) Consistent with the understanding that their usual and accustomed fishing grounds include the waters east of Whidbey Island—i.e., Region 2 East—the Lummi opened a crab fishery in Region 2 East in 2003 and a shrimping fishery in 2008. (*Id.* ¶ 4, Ex. C.) The Lummi then entered into an Agreement to Engage in Settlement Discussions with the Requesting Tribes. (*Id.* ¶ 5.) In the Agreement, the Swinomish agreed to respect the Lummi's management and regulatory preferences for Shellfish Areas 20A and 20B and Salmon Area 7A. (*Id.*) In exchange, the Lummi agreed not to fish in Region 2 East during settlement discussions. (*Id.*) The Lummi adhered to the terms of the Agreement. (*Id.* ¶ 6.)

No meaningful settlement discussions occurred thereafter. (*Id.*) Instead, the Lummi learned of certain violations by the Swinomish of the terms of the Agreement in Area 20B, and advised the Swinomish of these violations by a letter dated February 9, 2018. (*Id.* ¶ 7, Ex. D.) The Lummi also proposed dates for a meeting with the Swinomish. (*Id.*) No response was received. Following discussions with the Requesting Tribes between February and April 2018, the Lummi terminated the Agreement on April 23, 2018. (*Id.* ¶ 8, Ex. E.)

Finding themselves excluded from management discussions regarding Region 2 East, and with the intention of securing a seat at the table, the Lummi issued a regulation to open a crab fishery in Region 2 East on May 17, 2018. (*Id.* ¶ 9, Ex. F.) The Lummi regulation provided that the "expected effort" was "zero boats" and "zero fishers," because the Lummi did not intend to authorize any fishing. (*Id.*) In response, the Requesting Tribes opened Subproceeding 18-01 and

moved for a temporary restraining order ("18-01 TRO Motion"). (*Id.* ¶ 10, Ex. G.) The Court denied the request for a TRO, and the Lummi filed a motion to dismiss. (*Id.* ¶¶ 11–12, Ex. H.) While the motion to dismiss was pending, the Requesting Tribes voluntarily dismissed their Request for Determination. (*Id.* ¶ 12, Ex. I.)

B. While the Parties Engaged in Settlement Discussions Before this Subproceeding Was Filed, The Requesting Tribes Did Not Disclose the Basis for their Position in those Discussions.

On July 23, 2018 and July 27, 2018, the Lummi received Notices of Meet and Confer from the Swinomish and the Tulalip (collectively), and the Upper Skagit. (*Id.* ¶ 13, Exs. J–K.) Both Notices asserted that the Lummi's usual and accustomed fishing grounds do not include Region 2 East, and stated that the legal and factual basis for that assertion "[was] set forth in the" 18-01 TRO Motion; the Notices attached pages 11–16 of the Motion. (*Id.*) When the Requesting Tribes and the Lummi subsequently met on August 2, September 13, November 8, and December 6, 2018, the Requesting Tribes again referred only to pages 11–16 of the 18-01 TRO Motion and *Decision I* as the basis for their claim. (*Id.* ¶ 14.) The 18-01 TRO Motion did not rely upon or even mention the Lummi's Answers to Interrogatories submitted by the Washington Reef Net Owners Association (the "1973 Lummi Interrogatory Answers"), which were filed in Case No. 70-9213 on or about May 7, 1973. The 1973 Lummi Interrogatory Answers are the primary evidence the Requesting Tribes cite in their Request for Determination (Dkt. #3 ¶ 28), despite not having mentioned that evidence in discussions with the Lummi.

C. The Requesting Tribes Shut Out the Lummi From Subsequent Harvest Management Discussions.

Later, in 2019, the Lummi made multiple requests to participate in the management discussions regarding Region 2 East, as they had in the past. (Cantu Decl. ¶¶ 3, 15, 16, Exs. A, L.) The Lummi's efforts to participate included signing the 2019–2020 Region 2 East Dungeness Crab Harvest Management Plan for Fisheries Conducted by *U.S. v. Washington*, Subproceeding 89-3 Treaty Tribes and the State of Washington, dated May 20, 2019. No Requesting Tribe ever protested the Lummi's participation in that Management Plan. (*Id.* ¶ 3, Ex. B.) But the Lummi were excluded from discussions concerning Region 2 East; as a result, the Lummi were unable to

participate in the 36-hour crab fishery opening on May 31, 2019. (*Id.* ¶ 15.)

On September 24, 2019, the Lummi communicated their intent to have up to 10 fishers and fishing vessels participate in the next Region 2 East tribal crab opening. (*Id.* ¶ 17, Ex. M.) In response, the Lummi were informed of a Region 2 East crab meeting scheduled for September 27, 2019. (*Id.* ¶ 18.) After the Lummi confirmed their intent to participate in the next crab fishery at that meeting, however, they were asked to leave. (*Id.*)

D. The Requesting Tribes Filed This Subproceeding Seeking Preliminary and Permanent Injunctive Relief.

The Requesting Tribes then opened the present subproceeding on October 8, 2019, with a Request for Determination that the Lummi do not have usual and accustomed fishing grounds in Region 2 East. (Dkt. #3.)

On November 4, 2019, the Requesting Tribes and the Suquamish Indian Tribe ("Suquamish") issued regulations to send a total of 170 boats for the Region 2 East tribal crab opening. (*Id.* ¶ 19, Exs. N–Q.) On the same day, the Lummi filed Regulation 2019-65 to send a total of 10 boats to the opening, only to Area 24C; i.e., Saratoga Passage. (*Id.* ¶ 20, Ex. R.)

The Requesting Tribes moved for a temporary restraining order. (*See* Dkts. #8, #13, #16.) On November 13, 2019,[2] the Court entered an order enjoining the Lummi's participation in the crab fishery in Region 2 East. (Order dated November 13, 2019, Dkt. #37.) Without finding that "the likelihood of success on the merits tip[ped] sharply in favor of either side," the Court ruled that the Requesting Tribes had "adequately demonstrated that irreparable harm [was] likely in the absence of the relief they [sought]." (*Id.*)

ARGUMENT

The Ninth Circuit has established a two-step procedure to evaluate whether Judge Boldt intended to include a given area in a tribe's usual and accustomed grounds. "First, the moving party bears the burden of offering evidence that a U & A finding was ambiguous, or that Judge Boldt intended something other than [the text's] apparent meaning." *Tulalip Tribes v. Suquamish*

[2] By agreement of the Tribes, the Region 2 East crab fishery opening was postponed to accommodate the funeral services for a Tulalip tribal leader and elder. (*See* Dkt. #19.)

Indian Tribe, 794 F.3d 1129, 1133 (9th Cir. 2015) (alteration in original) (citation omitted). Second, even if the movant meets that initial burden, it still must demonstrate that there is "no evidence" in the record that might have led Judge Boldt to include the disputed waters in his description. *Id*. The relevant evidence "comprises the entire record before the issuing court and the findings of fact [which] may be referenced in determining what was decided." *United States v. Washington*, No. CV 9213, 2007 WL 30869, at *2 (W.D. Wash. Jan. 4, 2007) ("*Upper Skagit I*") (alteration in original) (citation omitted).

As detailed below, the Requesting Tribes can neither show that Judge Boldt's findings of the Lummi's fishing rights are ambiguous with respect to the waters at issue here, nor prove that there is no evidence in the record that might have led Judge Boldt to have included Region 2 East in the Lummi's fishing grounds.

I. THE REQUESTING TRIBES CANNOT SHOW THAT JUDGE BOLDT'S DESCRIPTION OF THE LUMMI'S FISHING GROUNDS IS AMBIGUOUS.

In Finding of Fact 46, Judge Boldt found that the Lummi's usual and accustomed fishing grounds "included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360. On its face, Judge Boldt's finding unambiguously included Region 2 East within the Lummi's fishing grounds: Region 2 East is a "marine area[] of Northern Puget Sound" that is between the Fraser River and Seattle. *Id.* Indeed, this Court has already explicitly held as much. *Upper Skagit I*, 2007 WL 30869, at *4–5. The parties are bound by this holding.[3] And that holding was correct: Judge Boldt's finding unambiguously included Region 2 East for the following reasons.

A. Region 2 East Is a "Marine Area."

While Judge Boldt did not define "marine area" in *Decision I*, his use of the term was meant to distinguish the "marine waters" within Puget Sound from freshwater inland. This is

[3] Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case. … For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition." *Lummi I*, 235 F.3d at 452 (alteration in original) (citation omitted).

obvious from Judge Boldt's various descriptions of the tribes' fishing in "marine waters," including his descriptions of the Swinomish and the Tulalip's usual and accustomed fishing grounds. *See Decision II*, 459 F. Supp. at 1049 (finding that the Swinomish's usual and accustomed fishing grounds included "the marine areas of northern Puget Sound"), 1059 ("the following described areas are found to be the usual and accustomed marine fishing areas of the Tulalip …"). The Requesting Tribes cannot dispute that the disputed waters are "marine waters."

B. "Puget Sound" Includes Region 2 East.

Region 2 East also is manifestly included in "Puget Sound," as Judge Boldt used that term. In FF 164, Judge Boldt adopted the contents of the "Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington dated May 14, 1973, prepared for [the] case by staff biologists of the Washington Department of Fisheries, the United States Fish and Wildlife Service, and the Washington Department of Game," *Decision I*, 384 F. Supp. at 382, and the Declaratory Judgment and Decree explicitly adopts all definitions in the Joint Statement, *id.* at 405. The Joint Statement defines "Puget Sound" as "(except where the context clearly indicates otherwise) … the Strait of Juan de Fuca ***and all saltwater areas inland therefrom*** …" *Upper Skagit I*, 2007 WL 30869, at *3.

In *Decision I*, therefore, Judge Boldt was referring to Puget Sound "as a broad area encompassing all the saltwater areas inward from the entrance to the Strait of Juan de Fuca." *Upper Skagit I*, 2007 WL 30869, at *3. While there was some ambiguity in Judge Boldt's description regarding how far *west* the Lummi's fishing rights in "Puget Sound" extended (an ambiguity that the Ninth Circuit largely resolved in a series of decisions, *see infra* pp. 16–17), the Requesting Parties cannot dispute that Region 2 East is unambiguously within "Puget Sound."

Indeed, this Court has already concluded as much. In *Decision II*, in addition to the Swinomish and Tulalip's usual and accustomed fishing grounds, Judge Boldt defined the Suquamish's fishing grounds to include "the marine waters of Puget Sound." *Decision II*, 459 F. Supp. at 1049. In a later decision regarding the Suquamish's fishing grounds, this Court found that the plain meaning of the phrase "the marine waters of Puget Sound" necessarily included

Skagit Bay and Saratoga Passage. *Upper Skagit I*, 2007 WL 30869, at *4–5.

C. "Northern Puget Sound" Includes Region 2 East.

Finally, Region 2 East is not only included within "Puget Sound"; it is also manifestly included within "Northern Puget Sound," as Judge Boldt used that term. Judge Boldt's description of the Lummi's usual and accustomed fishing grounds makes clear that he considered all marine waters south to the present environs of Seattle as included within the phrase "Northern Puget Sound": he defined the Lummi's grounds as "includ[ing] the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360. That description defines for its own purposes what Judge Boldt meant by "Northern Puget Sound."

Any lingering doubt was removed by Judge Boldt's subsequent uses of the term "Northern Puget Sound." For example, he defined the Swinomish's grounds to include "the marine areas of northern Puget Sound from the Fraser River ***south to and including Whidbey***, Camano, Fidalgo, Guemes, Samish, Cypress, and the San Juan Islands." *Decision II*, 459 F. Supp. at 1049. This Court held that this description confirms that waters to the east of Whidbey Island are included within the phrase "Northern Puget Sound." *See Upper Skagit I*, 2007 WL 30869, at *5 ("This description … necessarily includes Skagit Bay and Saratoga Passage as within the 'marine waters of northern Puget Sound.'"); *see Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023–24 (9th Cir. 2010) ("*Upper Skagit II*").[4]

[4] While *Upper Skagit I* held that the plain language of the Suquamish's usual and accustomed fishing grounds includes Skagit Bay and Saratoga Passage, on examining the evidence, the court also held that Judge Boldt could not have intended to include Saratoga Passage or Skagit Bay in the Suquamish's usual and accustomed fishing grounds. 2007 WL 30869, at *11. This was based on a specific statement from the bench in which Judge Boldt indicated that Suquamish's grounds were more limited than his otherwise unambiguous description would suggest, along with the finding that "[t]here [was] no evidence before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of Whidbey Island." *Upper Skagit II*, 590 F.3d at 1025. The same does not hold true for the Lummi. Judge Boldt never indicated that he "intended something other than [the] apparent meaning" of the phrase "marine waters of Northern Puget Sound" in describing the Lummi's grounds. *Id.* at 1024 (citation omitted). And regardless, as discussed in subsequent sections, Dr. Lane's testimony, as well as other evidence before Judge Boldt, shows that the Lummi fished and traveled in Region 2 East en route between other markers within their undisputed usual and accustomed fishing grounds.

D. The Requesting Tribes Cannot Create an Ambiguity in Judge Boldt's Decision Where there Is None.

The Requesting Tribes' argument that all of the "geographic anchors" used by Judge Boldt to describe the Lummi's usual and accustomed fishing grounds are "north or west" of Region 2 East (Dkt. #3 at ¶ 26 & Dkt. #8 at 10–12) does not create any ambiguity in Judge Boldt's description. For one thing, that characterization ignores "the present environs of Seattle," which Judge Boldt specifically included within the Lummi's fishing grounds. *Decision I*, 384 F. Supp. at 360. As the Ninth Circuit has confirmed, that term means what is now Edmonds, Washington, which lies southeast of Whidbey Island. *Muckleshoot II*, 234 F.3d at 1100. And Judge Boldt's description of the Lummi's fishing grounds included a number of eastern references, including Fidalgo Island (bordering the disputed waters to the north) and the present environs of Seattle (bordering the disputed waters to the south). *Decision I*, 384 F. Supp. at 360. Those markers place the Lummi throughout Region 2 East.

Nor does the Ninth Circuit's decision in *Lummi III* suggest that Judge Boldt's description of the Lummi's rights is ambiguous for present purposes. In that case, the Ninth Circuit held that the waters west of Whidbey Island were included in the Lummi's usual and accustomed fishing grounds. 876 F.3d at 1007. In so holding, the Ninth Circuit noted that "[a]ll parties agree that Finding of Fact 46 is ambiguous because it does not clearly include or exclude the disputed waters." *Id.* at 1008–09. Contrary to the Requesting Tribes' suggestion (*see* Request for Determination, Dkt. #3 ¶ 25), that FF 46 was ambiguous as to the waters ***west*** of Whidbey Island does not mean that FF 46 is ambiguous as to the waters ***east*** of Whidbey Island. FF 46 was ambiguous with respect to waters ***west*** of Whidbey Island because, without defining how far west Puget Sound extended, the finding did not clearly "delineate the western boundary of the Lummi's [U&A]." *Lummi I*, 235 F.3d at 449; *see also United States v. Washington*, 193 F. Supp. 3d 1190, 1194 (W.D. Wash. 2016). That has no bearing upon Region 2 East—an area that no party can dispute is within Puget Sound.

Finally, that Judge Boldt did not specifically mention "Whidbey Island," "Skagit Bay," or "Saratoga Passage" in *Decision I*'s description of the Lummi's fishing grounds only proves that

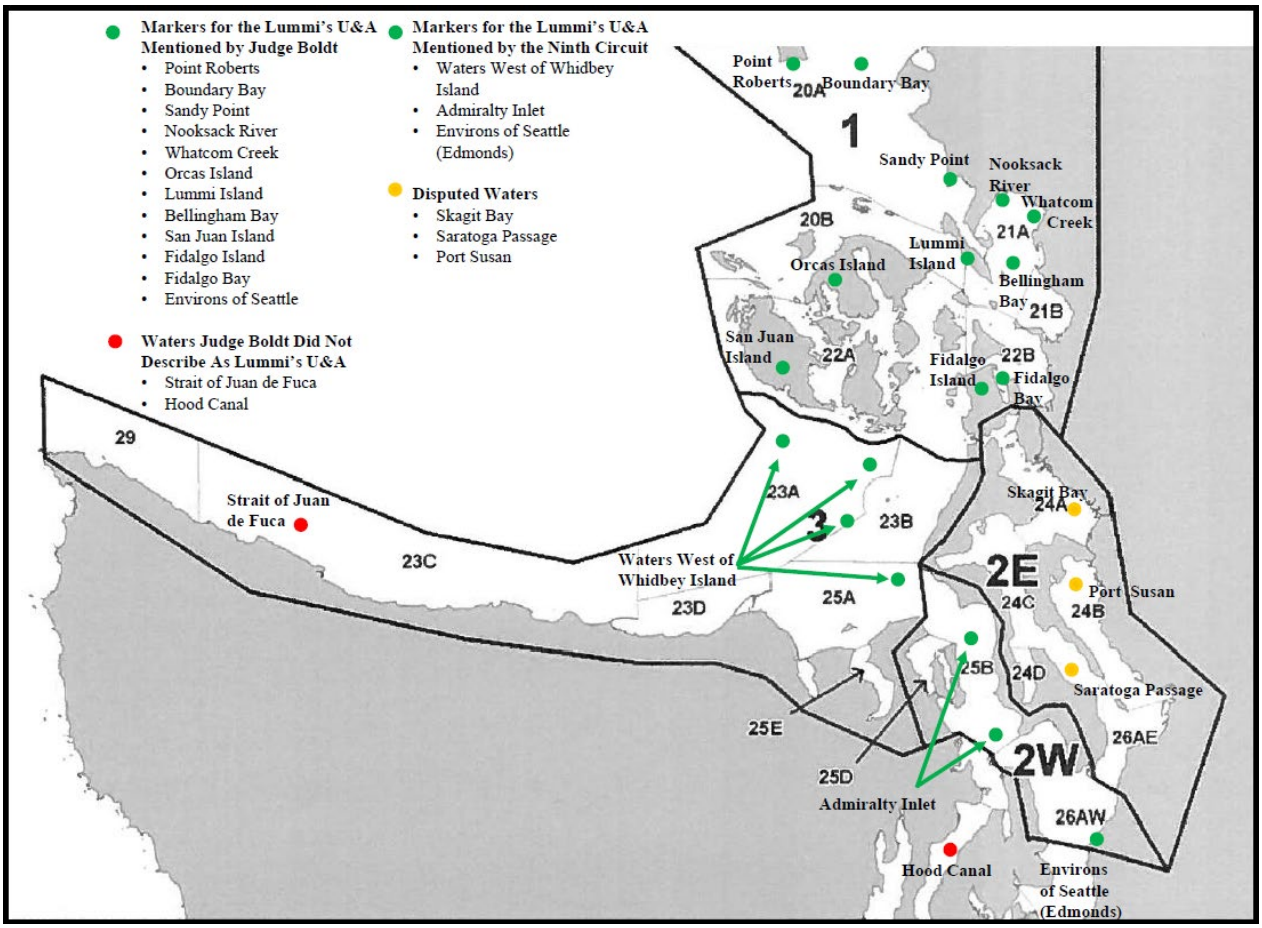
he intended the Lummi's usual and accustomed fishing grounds to include Region 2 East and extend further south, beyond it, to the environs of Seattle. Contrasting Judge Boldt's description of the Swinomish's and Tulalip's fishing grounds with that of the Lummi's proves the point. In *Decision II*, Judge Boldt used Whidbey Island as a southern "boundary" for the Swinomish's usual and accustomed fishing grounds: "The [U&A] of the [Swinomish] include … the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress, and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island." *Decision II*, 459 F. Supp. at 1049. Judge Boldt found that the Tulalip's U&A started even farther south than the Lummi's or the Swinomish's (both of which started at Fraser River), and he used Whidbey Island as a northern "boundary," holding that the Tulalip's U&A, "[b]egin[] at Admiralty Head on Whidbey Island and proceed[] south". *Id.* at 1059. As Whidbey Island marks a southern boundary for the Swinomish's fishing grounds and a northern boundary for the Tulalip's, it was necessary for Judge Boldt to explicitly mention Whidbey Island in his findings for those tribes' usual and accustomed fishing grounds.

In contrast, because Whidbey Island (or Skagit Bay, or Saratoga Passage) was not a relevant "geographic anchor point" in defining the Lummi's usual and accustomed fishing grounds, Judge Boldt's omission of it does not indicate that "he did not intend for [it] to be included." *Upper Skagit II*, 590 F.3d at 1025. Rather, Whidbey Island is obviously in ***the middle of*** Judge Boldt's description of the Lummi's usual and accustomed fishing grounds, which extend continuously "from" Fraser River in the north "to" the environs of Seattle in the south. *Decision I*, 384 F. Supp. at 360. It would, therefore, have served no purpose for Judge Boldt to explicitly mention Whidbey Island in describing the Lummi's fishing grounds.

The text of Judge Boldt's Order is thus susceptible to only one interpretation: the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" include Region 2 East. As the map below demonstrates,[5] to hold otherwise would create a

[5] The map below was originally prepared by the Washington Department of Fish and Wildlife depicting Regions 1 and 2E, attached as Exhibit 1 to the Declaration of Lorraine Loomis, which the Swinomish submitted in support of their motion for a TRO in this subproceeding (Dkt. # 22078-1). We have annotated the map with geographic markers mentioned by Judge Boldt or

discontinuity within the Lummi's fishing grounds, which cannot have been Judge Boldt's intent:



II. THE REQUESTING TRIBES CANNOT SHOW THAT THERE WAS NO EVIDENCE BEFORE JUDGE BOLDT SUPPORTING THE INCLUSION OF REGION 2 EAST WITHIN THE LUMMI'S USUAL AND ACCUSTOMED FISHING GROUNDS.

The inescapable conclusion is that the Requesting Tribes cannot show that FF 46 is ambiguous with respect to whether the waters east of Whidbey Island are included within the Lummi's adjudicated fishing grounds. Even if FF 46 were found to be ambiguous, however, the linguistic cues from *Decision I* support the conclusion that the disputed waters were included

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the Ninth Circuit, as well as markers showing the disputed waters. *See Decision I*, 384 F. Supp. at 360 (identifying Orcas Island, San Juan Island, Lummi Island, Fidalgo Island, Point Roberts, Sandy Point, Nooksack River, Whatcom Creek, Bellingham Bay, Boundary Bay and Fidalgo Bay); *Lummi I*, 235 F.3d at 451 (identifying Admiralty Inlet, the Strait of Juan de Fuca and the Hood Canal); *Lummi III*, 876 F.3d at 1009–11 (identifying the waters west of Whidbey Island); *Muckleshoot II*, 234 F.3d at 1100 (identifying Edmonds). (The original map as prepared by the Washington Department of Fish and Wildlife does not show the land masses or waters north and west of the US-Canadian border.)

within the Lummi's adjudicated fishing grounds, for the reasons detailed above. The Requesting Tribes cannot overcome those linguistic cues, nor can they satisfy their burden of showing that there was "no evidence" in the record that might have led Judge Boldt to include the disputed waters in his description of the Lummi's fishing grounds. *Upper Skagit II*, 590 F.3d at 1023.

A. Evidence Establishes that the Lummi Necessarily Would Have Traveled Through Region 2 East to Reach the Environs of Seattle.

While "occasional and incidental trolling was not considered to make the marine waters traveled thereon the [usual and accustomed grounds] of the transiting Indians," *Decision I*, 384 F. Supp. at 353, "*frequent* travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters." *United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988). Here, record evidence indicates that the Lummi fished as they traveled through the waters east of Whidbey Island, confirming that Judge Boldt meant to include those waters in his description of the Lummi's treaty fishing rights.

1. The Evidence Suggests that the Lummi Used a Route Along the Eastern Side of Whidbey Island.

Dr. Lane's *Anthropological Report on the Identity, Treaty Status and Fisheries of the Lummi Tribe of Indians* ("Lummi Report") indicates that the Lummi's "home territory" included waters off the San Juans and Fidalgo Island, and that the Lummi fished in waters *beyond* their "home territory": "Other fisheries in the Straits and bays from the Fraser River south to the present environs of Seattle were utilized." (Cantu Decl., Ex. S at 25–26.) Dr. Lane's report demonstrates that the Lummi fished both to the north (Fraser River) and to the south (present environs of Seattle) of their "home territory." The report's description of the Lummi having fished "from the Fraser River south to the present environs of Seattle" indicates that the Lummi fished throughout the area between these two endpoints. That continuous area would necessarily include the waters disputed here—which lie between the Lummi's home territory around Fidalgo Island and the present environs of Seattle.

Other evidence in the record also showed specifically that the Lummi conducted reef-net fishing near Deception Pass, which is at the entry point from open water into Skagit Bay, and therefore suggests that the Lummi traveled that route frequently. The Lummi include

"descendants of the . . . Samish Indians of 1855." *Decision I*, 384 F. Supp. at 360. Dr. Lane's Lummi Report stated that the Samish territory "included the eastern half of Lopez Island, Blakely, Guemes, Cypress and other islands between Lopez and the mainland and portions of Samish Bay, Padilla Bay and Fidalgo Island." (Cantu Decl., Ex. S at 1–2.) Dr. Lane also noted that the Samish "fished with reefnets off Langley Point on Fidalgo Island." (*Id.* at 24.) The map on p. 24 in the Lummi Report showed one mark for reef-net fishing in the southwest corner of Fidalgo Island, close to the entry point into Skagit Bay from Deception Pass. (*Id.*)[6]

This evidence puts an end to the Requesting Tribes' argument that the Lummi could not have traveled in the disputed waters at treaty times. As Judge Boldt found, reef-net fishing was extremely important to the Lummi. *Decision I*, 384 F. Supp. at 360; *see United States v. Washington*, 20 F. Supp. 3d 899, 977 (W.D. Wash. 2008) ("Judge Boldt cited extensively and repeatedly to Dr. Lane's discussion of reefnetting, its uniqueness and importance to the Lummi, their system of individual ownership of reefnetting sites, and the location of those sites."). The presence of a reef-net fishing site near Deception Pass, the entry point from the open water into Skagit Bay, is therefore powerful evidence that the area was heavily trafficked by the Lummi, and "places [the Lummi's] route" through Region 2 East. *Upper Skagit I*, 2007 WL 30869, at *9.

2. Ninth Circuit Decisions Confirm that the Lummi's Travels Through the Disputed Waters Establish their Treaty Fishing Rights Therein.

The Ninth Circuit's resolution of previous cases challenging the Lummi's treaty fishing rights confirms that the Lummi must have traveled regularly through the disputed waters.

In *Lummi I*, the Ninth Circuit held that Admiralty Inlet was included within the Lummi's

[6] Langley Point is also defined in Washington's Geological Survey in 1917 as: "A point on the west shore of Fidalgo Island, near the west end of Deception Pass, in southwestern Skagit County." https://www.dnr.wa.gov/Publications/ger_b17_geographic_dict_wa_2.pdf. Deception Pass is defined as "[a] narrow channel separating Whidbey and Fidalgo Islands, and connecting Skagit Bay with Rosario Strait." https://www.dnr.wa.gov/Publications/ger_b17_geographic_dict_wa_1.pdf. A Coast and Geodetic Survey conducted by the U.S. Department of Commerce in 1951 states, "Langley Point is about 2.1 miles northward of Deception Island." *See Upper Skagit I*, 2007 WL 30869, at *5 (referring to the official United States Geological Survey as "a highly reliable source to consult, and more precise than maps."); *see Muckleshoot II*, 234 F.3d at 1100 ("[T]he critical issue [is] the meaning Judge Boldt intended at the time he wrote his opinion… [T]he court … [can] consider additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time.").

usual and accustomed fishing grounds because "[i]f one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing grounds …) and travels past Orcas and San Juan Islands (also Lummi [usual and accustomed fishing grounds] …), it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle.'" 235 F.3d at 452 (citation omitted). In *Lummi III*, the Ninth Circuit held that "[t]he nautical path … traced in *Lummi I* from the San Juan Islands to Seattle cuts right through [the waters west of Whidbey Island]" and concluded that those waters, too, were "encompassed in the Lummi's usual and accustomed fishing grounds." 876 F.3d at 1010–11.

The same necessarily holds true for the waters ***east*** of Whidbey Island. That is because Region 2 East lies directly between Fidalgo Island and the present environs of Seattle, both of which are within the Lummi's adjudicated fishing grounds. *Decision I*, 384 F. Supp. at 360. Region 2 East is therefore "likely … a passage through which the Lummi would have traveled," because "it is natural to proceed" from Fidalgo Island through Region 2 East "to reach the 'environs of Seattle.'" *Lummi I*, 235 F.3d at 452 (citation omitted). And, as the Ninth Circuit has already recognized, the Lummi's fishing where they traveled "was more than mere 'occasional and incidental trolling.'" *United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014) ("*Lummi II*"). Thus, the Lummi's necessary passage through Region 2 East from Fidalgo Island to "the present environs of Seattle" establishes that the Lummi's fishing grounds include Region 2 East. *Id*.

B. Other Evidence Before Judge Boldt Shows that the Lummi Fished in Region 2 East.

Additional evidence before Judge Boldt in *Decision I*—in the form of Dr. Lane's reports, trial testimony, and other exhibits—shows that the Lummi fished in Region 2 East.

1. Dr. Lane's Report and Testimony Show that the Lummi Traveled to and Fished in Region 2 East.

In her *Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century* report, Dr. Lane specifically notes, in a discussion regarding the availability of animal, plant and mineral resources, that the Lummi "***apparently imported various fibers and grasses from upriver Skagit*** and flint from Puget Sound." (Cantu Decl., Ex. T

at 2.) She also explains that "[p]eople living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish." (*Id.* at 17.) As Skagit River empties into Skagit Bay, Dr. Lane's observation that the Lummi obtained "fibers and grasses" from "upriver Skagit" thus establishes their presence and fishing in Region 2 East.

This evidence—standing alone—is sufficient to preclude the Requesting Tribes from arguing that there was "no evidence" of the Lummi's fishing in Region 2 East before Judge Boldt in *Decision I*. *Upper Skagit II*, 590 F.3d at 1023; *see Tulalip Tribes*, 794 F.3d at 1135 (holding that the Suquamish's fishing grounds included the waters west of Whidbey Island based on statements in Dr. Lane's reports that the Suquamish's territory "possibly" included that area, and that tribes generally used such marine areas for fishing while traveling through them); *Lummi Indian Tribe*, 841 F.2d at 318 ("[d]ocumentation of Indian fishing during treaty times is scarce" and "[a]ccordingly, the stringent standard of proof that operates in ordinary civil proceedings is relaxed.").

2. Trial Testimony from Dutch Kinley Shows that the Lummi Fished in Region 2 East.

During the 1973 trial, Dutch Kinley, a member of the Lummi Tribe, testified as a witness. His testimony confirms that the Lummi's treaty rights extended into the disputed waters:

> Q. Now, as a Lummi Indian have you fished at places which you consider to be the usual and accustomed places of the Lummi Indians?
> A. Yes.
> Q. In addition to the Nooksack River and Bellingham Bay, what are those other places?
> A. I fished throughout Puget Sound purse seining, I did own a purse seine boat at one time.
> Q. And how far up the Straits [sic] have you gone in view of your concern of your usual and accustomed places?
> A. I have fished in the Straits, ***I have fished in Whidby [sic] Island*** south and into the Canadian border.

Decision III, 18 F. Supp. 3d at 1161. While the Ninth Circuit has noted that Judge Boldt was unlikely to have relied on testimony from tribal elders, it did so where there was evidence in the record contradicting such testimony. *See Lummi I*, 235 F.3d at 451. Here, in contrast, there is no contradictory evidence, from Dr. Lane or other sources, concerning the Lummi's presence in the

waters east of Whidbey Island. Kinley's testimony thus precludes the Requesting Tribes from satisfying their burden of showing that there is "no evidence" in the record that might have led Judge Boldt to include the disputed waters in his description of the Lummi's fishing grounds. *Upper Skagit II*, 590 F.3d at 1023.

This case is therefore in stark contrast with *Upper Skagit I*, where the Court found that "[Dr.] Lane provided ***no evidence*** that the [Suquamish] fished or traveled in Saratoga Passage or Skagit Bay" and accordingly excluded them from the Suquamish's usual and accustomed fishing grounds. 590 F.3d at 1023–24. Here, to the contrary, there is substantial evidence from Dr. Lane and others establishing the Lummi's fishing grounds in the disputed waters.

C. Judge Boldt's Subsequent Decision Concerning Herring Rights Confirms that He Meant to Include the Disputed Waters Within His Description of the Lummi's Usual and Accustomed Grounds.

While *Decision I* was limited to fishing rights to anadromous fish, Judge Boldt subsequently made findings regarding herring fishing rights. Those findings confirm that he understood the Lummi's usual and accustomed fishing grounds to include Region 2 East.

Following *Decision I*, certain tribes, including both the Swinomish and the Lummi, filed Requests for the "Right to Engage in Herring and/or Herring Roe Fisheries." *Decision II*, 459 F. Supp. at 1048. The Court ordered that each of the tribes that had "made a prima facie showing … of their treaty-secured right to take herring at their respective" fishing grounds also had the right to "take herring at all of its [fishing grounds] ***to the same extent and subject to the same terms and conditions as specified in Final Decision # 1*** with respect to the right of taking anadromous fish and subject further to the provisions of paragraph 7 below."[7] *Id.* at 1048–49 (emphasis added).

As in *Decision I*, Dr. Lane submitted reports in *Decision II* on which the Court relied, including *The Indian Herring Fishery from Earliest Times to the Mid-Nineteenth Century* and *Supplemental Report on Indian Herring and Herring Roe Fisheries*. (Cantu Decl., Exs. U–V.) In these reports, she noted that "[h]erring and herring roe were apparently taken by all Indian groups

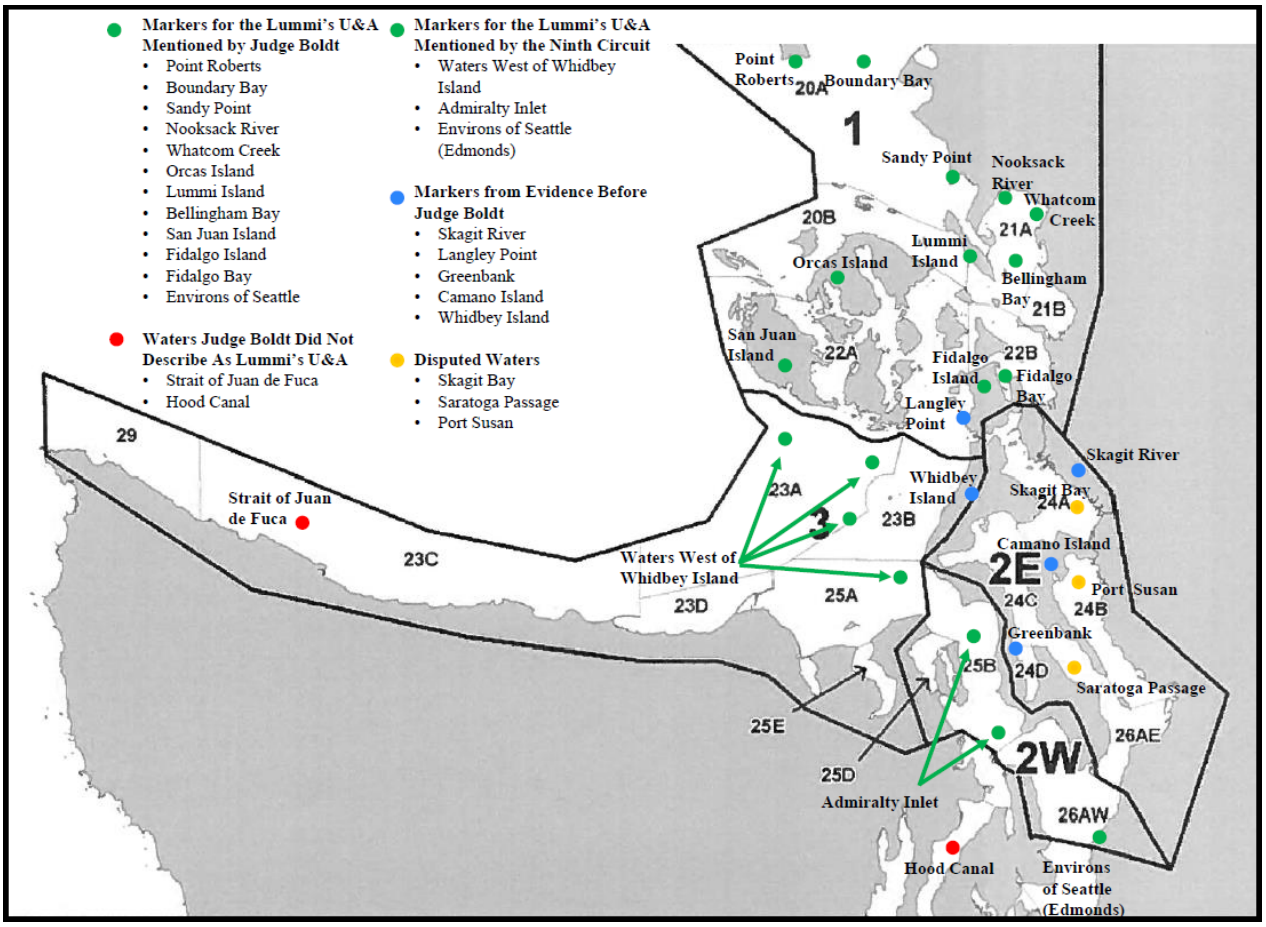
[7] Paragraph 7 laid out the primary control rights of the Lummi over Hale Passage. *Id.*

along the coast." (*Id.* Ex. U at 1.) The Lummi "used cedar branches to collect herring roe" and "ate herring in both fresh and dried state." (*Id.* at 11, 13.) They also "used herring spawn as an unharvested bait in order to take other species." (*Id.* Ex. V at 2.)

Although Dr. Lane pointed out that a "diligent search and review of available sources" for Indian herring usual and accustomed fishing grounds would give a "spurious accuracy[,] because some areas are better reported than others," she nevertheless mentioned some "usual and accustomed Indian herring fishing places" that were "culled from the unpublished field notes of anthropologists who have worked in the case area." (*Id.* Ex. U at 13, 14.) Specifically, she wrote, "Wayne Suttles has unpublished notes to the effect that the Samish took herring in Bellingham Channel, and that several groups of Indians took herring at Blowers Buff, at Greenbank, and at a beach near Camano City, and so on." (*Id.* at 13.) Greenbank is located on the ***eastern side of Whidbey Island***, along Saratoga Passage; i.e., in Region 2 East. Camano Island is in the middle of Region 2 East; i.e., to the south of Skagit Bay, to the north of Possession Sound, to the east of Saratoga Passage, and to the west of Port Susan. Dr. Lane further stated that, "[i]n view of the importance to the native economy and the value placed on the herring and herring spawn, it is safe to assume that herring fisheries were pursued wherever feasible." (*Id.* Ex. V at 3.)

It is only fair, then, to infer that the Lummi, for whom herring was an important resource, fished at all "feasible" herring fisheries, which included Greenbank and Camano Island. This places the Lummi squarely in Region 2 East. And Judge Boldt found in *Decision II* that the Lummi's herring usual and accustomed fishing grounds were equivalent to their anadromous fish usual and accustomed fishing grounds in *Decision I*. 459 F. Supp. at 1048–49. This, together with the other evidence before him, confirms that Judge Boldt understood the Lummi's usual and accustomed fishing grounds recognized in *Decision I* to include Region 2 East.

As the following map[8] demonstrates, therefore, the Requesting Tribes cannot satisfy their burden of showing that there was "no evidence" in the record that might have led Judge Boldt to include the disputed waters in his description of the Lummi's fishing grounds. To the contrary, the map demonstrates the Lummi's presence in the disputed waters at or before treaty times:



D. The "Evidence" the Requesting Tribes Cite Does Not Prove that Judge Boldt Did Not Intend to Include Region 2 East Within His Description of the Lummi's Fishing Grounds.

The Requesting Tribes cannot point to any evidence that shows that Judge Boldt did not intend to include Region 2 East within his description of the Lummi's usual and accustomed fishing grounds.

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[8] This map is similar to the map described *supra*, n.5, but adds markers in blue for the evidence summarized above (*see supra* pp. 17–20), showing the Lummi's presence in the disputed waters at or before treaty times. *See* Cantu Decl., Ex. T at 2 (identifying Skagit River); *id.* Ex. S at 24 (identifying Langley Point); *id.* Ex. U at 13 (identifying Greenbank and Camano Island); *see Decision III*, 18 F. Supp. 3d at 1161 (identifying Whidbey Island).

First, the Requesting Tribes' reliance on the 1973 Lummi Interrogatory Answers as the primary basis for their claim to relief (Dkt. #3 at ¶ 28) only divests this Court of jurisdiction. The Requesting Tribes did not disclose their reliance on these Answers during any of the parties' pre-filing discussions to resolve this dispute. (*See supra* p. 7.) By failing to do so, the Requesting Tribes failed to comply with the "mandatory" pre-filing requirements laid out in Paragraph 25(b). *United States v. Washington*, 20 F. Supp. 3d at 962. Their Request for Determination should therefore be dismissed to the extent it relies upon the Interrogatory Answers. *See United States v. Washington*, 928 F.3d 783, 790–91 (9th Cir. 2019) (affirming the dismissal of the Skokomish Indian Tribe's Request for Determination, regarding the primacy of their fishing rights in the Hood Canal, because they failed to disclose their reliance on the Court's holding in a prior subproceeding as the basis for their claim to relief during their meet-and-confer with other affected parties).

Second, the Interrogatory Answers, which the Requesting Tribes cite as evidence that the Lummi's fishing grounds did not extend south of Anacortes, are also irrelevant. That document was not before Judge Boldt as evidence during *Decision I* (Cantu Decl. ¶ 27). "The only matter at issue is the meaning of Judge Boldt's Finding … and ***the only relevant evidence is that which was considered by Judge Boldt*** when he made his finding." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) ("*Muckleshoot I*"). Nor, as a matter of pure logic, could Judge Boldt have possibly relied upon the Interrogatory Answers, as he explicitly found that the Lummi's fishing grounds extend to the "environs of Seattle," well south of Anacortes. *Decision I*, 384 F. Supp. at 360.

Third, the Requesting Tribes' argument that the Lummi conceded in previous proceedings that their travel route between their fishing grounds was on the west side—and not the east side—of Whidbey Island (Swinomish TRO Motion, Dkt. #8 at 12–13) inaccurately characterizes the Lummi's position. *Lummi III* concerned the Lummi's travel between the San Juan Islands and *Admiralty Inlet*, which is southwest of Whidbey Island. (Lummi Opening Brief, Case No. 15-661, Dkt. #21 at 53–54.) In that context, the Lummi argued that they naturally would have traveled through and fished in the waters west of Whidbey Island. (*Id.*) This dispute, by contrast, concerns

the Lummi's travel from their fishing grounds near Fidalgo Island in the north to the environs of Seattle in the south. Logically, the Lummi's travel between these points would have involved different routes. Regardless, the Lummi argued that the waters west of Whidbey Island were one "probable route of travel"; they did not claim that it was the *only* route, and did not deny their presence in the waters east of Whidbey Island at all. (*Id.*)

Fourth, the selective quotations from Dr. Lane's reports on which the Requesting Tribes rely are inapposite (Dkt. #3 ¶ 28); in fact, Dr. Lane's reports support the Lummi's claim that their fishing grounds include Region 2 East. As previously discussed, Dr. Lane's reports explicitly mention the Lummi's presence in upriver Skagit, and the materials on which she relied also mention the Lummi's presence on Whidbey Island. (*See supra* p. 17–18.)

Fifth, the Requesting Tribes' citation (Dkt. #3 ¶ 28) to the affidavit of Jack Sumptilino in *United States v. Alaska Packers Ass'n* (Ex. PL-94d in *Decision I*) for the proposition that the "only places the sockeye salmon could be caught by the Lummis were Point Roberts and Village Point" is misplaced. (Cantu Decl., Ex. W at 5–6.) This subproceeding involves a crab fishery, not a salmon fishery, and *Alaska Packers* was concerned with the Lummi's right to fish at Point Roberts, specifically, not their rights at all of their fishing grounds. *See United States v. Alaska Packers' Ass'n*, 79 F. 152, 153 (C.C.D. Wash. 1897) ("This is a suit by the United States and certain Indians of the Lummi tribe for an injunction … to protect the Lummi Indians in the right to take salmon … in the waters adjacent to Point Roberts"). Contrary to Sumptilino's affidavit, moreover, another affidavit by B. N. McDonough in the same case (Exhibit PL-94w) provided evidence of the Lummi's fishing "at all points in the lower Sound and wherever the run of fish was greatest." (Cantu Decl., Ex. X at 2.) And the fact that the Lummi's adjudicated fishing grounds extend well beyond just Point Roberts and Village Point underscores that Judge Boldt never relied on the Sumptilino affidavit to define the scope of the Lummi's rights.

Finally, the Lummi's choice not to fish within Region 2 East since *Decision I*—a fact cited by both the Requesting Tribes, in their TRO motion, and this Court, in its decision granting the TRO, Dkt. #37 at 3—does not preclude the conclusion that they have adjudicated fishing rights to do so. The question here is whether there was evidence before Judge Boldt that the

Lummi fished in the disputed waters ***at or before treaty times***. *See Decision I*, 384 F. Supp. at 332 (defining "usual and accustomed fishing grounds and stations" as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times"); *Muckleshoot I*, 141 F.3d at 1359 ("The only relevant evidence is that which was considered by Judge Boldt when he made his finding."). Whether the Lummi chose to exercise their treaty rights after *Decision I* was rendered in 1974 does not speak to that question.

And the fact that the Lummi did not exercise their right to fish in Region 2 East does not mean that they were not protecting their right to do so. To the contrary, the Court noted in its TRO order that the Lummi have "participated in some of the collaborative planning" for Region 2 East, showing that both the Lummi and the Requesting Tribes regard the Lummi as having fishing rights in Region 2 East. (Dkt. #37 at 3.) In fact, the Lummi made multiple requests in 2019 to participate in the management discussions regarding Region 2 East, as it had in the past, including as a signatory to the 2019–2020 Region 2 East Dungeness Crab Harvest Management Plan for Fisheries Conducted by *U.S. v. Washington*, Subproceeding 89-3 Treaty Tribes and the State of Washington, dated May 20, 2019, to which no Requesting Tribe ever protested. (Cantu Decl. ¶¶ 3, 15–16, Exs. A–B, L.) The Lummi simply chose not to exercise these rights until 2003, when they opened a crab fishery. (*Id.* ¶ 4, Ex. C.)

CONCLUSION

For all of these reasons, the Court should enter judgment dismissing the Requesting Tribes' Request for Determination and declaring that Region 2 East is included within the Lummi's usual and accustomed fishing grounds, as Judge Boldt's decision unambiguously says and as the record evidence proves as a matter of law.

Dated: May 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties which are registered with the CM/ECF system.

Dated: May 29, 2020 By: /s Mark David McPherson
Mark David McPherson