Nos. 19-35610, 19-35611, 19-35638

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Petitioners-Appellees-Cross-Appellants,

v.

LUMMI NATION,

Respondent-Appellant-Cross-Appellee,

SWINOMISH INDIAN TRIBAL COMMUNITY, ET AL.,

Real-Parties-in-Interest

Appeals from the United States District Court for Western Washington, Seattle,
Case No. 2:11-sp-00002, Hon. Ricardo S. Martinez

COMBINED OPENING AND RESPONSE BRIEF FOR PETITIONER-APPELLEE-CROSS-APPELLANT LOWER ELWHA KLALLAM TRIBE

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291. *Tulalip Tribes v. Suquamish Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015). The district court exercised its continuing jurisdiction over Subproceeding 11-2 of the main case, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), pursuant to 28 U.S.C. § 1331. The district court entered judgment on July 11, 2019, thereby terminating Subproceeding 11-2. ER1. Petitioner Lower Elwha Klallam Tribe timely filed its notice of cross-appeal on July 26, 2019. ER20. Respondent Lummi Nation filed its notice of appeal on July 19, 2019. ER26. Petitioners Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe filed their notice of cross-appeal on July 22, 2019. ER23.

STATEMENT OF THE ISSUES

Whether the district court erred in concluding that *Lummi III* held that only some unspecified portion of the waters disputed in this subproceeding—the waters west of Whidbey Island—are included in Lummi's usual and accustomed fishing grounds and stations ("U&A"), rather than that all of the disputed waters are included in Lummi's U&A.

Whether the district court erred in concluding that *Lummi III* did not establish that a line drawn from Trial Island (at the westernmost extent of the mouth of Haro Strait) to Point Wilson (at the westernmost extent of the mouth of Admiralty Inlet)

(the "Trial Island Line") is the western boundary of Lummi's U&A as specifically determined by Judge Boldt in *Decision I*, despite the fact that the Trial Island Line is the westernmost extent of what "lies between" Lummi's previously established U&A in the San Juan Islands to the north (*Decision I*) and Admiralty Inlet to the south (*Lummi I*).

INTRODUCTION

This is the third appeal to this Court in Subproceeding 11-2 of the main case, *United States v. Washington*, No. C70-9213 (W.D. Wash), interpreting Judge Boldt's original 1974 delineation of the Lummi Nation's usual and accustomed fishing ground and stations ("U&A") under the 1855 Treaty of Point Elliott. In this Subproceeding, the Lower Elwha Klallam Tribe ("Lower Elwha") along with the other two Requesting Tribes – the Jamestown S'Klallam Tribe and the Port Gamble S'Klallam Tribe (together "the S'Klallam") – sought to establish the extent of Lummi's U&A in inland marine waters of northwest Washington State and that it does not include the "waters west of Whidbey Island," bounded on the west by a line running from Trial Island near Victoria, British Columbia, and Point Wilson on the Olympic Peninsula. Prior to this Subproceeding, this Court also decided an appeal in Subproceeding 89-2, a related dispute among essentially the same tribal parties over these and other adjacent marine waters. *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) ("*Lummi I*") (affirming that the Strait of Juan de Fuca

and the mouth of Hood Canal lie outside the original delineation of Lummi's U&A, but that Admiralty Inlet is within the U&A).

As the three separate appeals in the instant proceedings demonstrate, final resolution of this long-running dispute has proved elusive with respect to the waters west of Whidbey Island and the western boundary of Lummi's U&A, due at least in part to the ambiguity and generality of Judge Boldt's original description, which the parties and this Court have long recognized. In the first appeal in Subproceeding 11-2, this Court reversed the district court and held that, even though the waters west of Whidbey Island were at issue in *Lummi I*, that opinion was ambiguous with respect to those disputed waters, such that it did not establish any law of the case. *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014) ("*Lummi II*"). But after remand to review Judge Boldt's original delineation in light of the evidence before him – the usual, two-step procedure for review of a prior U&A delineation – this Court's most recent opinion has provided the resolution. *United States v. Lummi Nation*, 876 F.3d 1004, 1011 (9th Cir. 2017) ("*Lummi III*") ("We conclude that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A.") Lower Elwha litigated vigorously and in good faith for a different outcome, but recognizes

that this Court clearly intended in *Lummi III* to resolve the Subproceeding by finding that Judge Boldt included the disputed waters in Lummi's U&A.[1]

The basis of *Lummi III* is the geographic fact that the disputed waters are located "directly between" the waters of the San Juan Islands (including Haro Strait in the west) and Admiralty Inlet. That is the exact rationale by which *Lummi I* included Admiralty Inlet in Lummi's U&A, and *Lummi III* is clear that this Court intended to apply it to the waters west of Whidbey Island as well: "The same result holds here because the waters at issue are situated directly between the San Juan Islands and Admiralty Inlet and also would have served as a passage to Seattle." *Lummi III*, 876 F.3d at 1007.

Lummi III then coupled the geographic rationale of *Lummi I* with "general evidence" before Judge Boldt of travel in these waters as a "marine thoroughfare." *Lummi III*, 876 F.3d at 1010 (*citing* expert Dr. Barbara Lane for the proposition that the disputed waters are a marine "corridor" or "public thoroughfare" "tied to fishing") and, at n.2., (*citing Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d

[1] It is important to point out, however, that this litigation has not been any kind of gratuitous attempt to "chip away at the Lummi's fishing grounds." Lummi Opening Br. at 2. There has been a legitimate dispute – hard-fought to be sure, because the Requesting Tribes hold adjudicated treaty rights in the same waters and treaty rights and fisheries are of supreme importance to all of these Tribes. Indeed, in *Lummi I*, the Requesting Tribes successfully demonstrated that large areas of marine water where Lummi had been fishing were in fact outside the U&A delineated by Judge Boldt. That did not involve any "chipping away," but rather was a justified effort to constrain Lummi from fishing where it had no treaty right in the first place.

1129, 1135 (9th Cir. 2015) ("*Tulalip Tribes*") for the sufficiency of "general evidence of travel" to overcome Lower Elwha's best argument to the contrary in the "specific context" of Lummi's U&A).

In general, Lower Elwha must agree with Lummi that *Lummi III* has determined that the entirety of the waters west of Whidbey Island, bounded by the Trial Island line, is included within Lummi's U&A and has resolved this Subproceeding. However, based on *Lummi III*'s treatment of geographical fact and general evidence related to travel, *Lummi III* has also established that the Trial Island line is the western boundary of Lummi's U&A. Lummi downplays the U&A boundary issue as a "subsidiary" matter. Opening Br. at 17. But it is not a subsidiary matter for Lower Elwha. As explained herein, the geography and general evidence necessarily entail a boundary. Lummi's Opening Brief barely acknowledges, let alone accords any significance to, the general evidence of travel as a basis for the Court's decision. There is no evidence in the record of any fisheries west of the Trial Island line to which Lummi traveled and thus no basis to extend the Court's evidentiary rationale past the Trial Island line. And, without reliance on that evidence, it is not possible to reconcile fully the rationale of *Lummi I* with the two-step procedure for interpreting an original U&A delineation.

Although the district court correctly pointed out the dearth of evidence, general or specific, regarding the western boundary of Lummi's U&A, it likewise

failed to acknowledge that *Lummi III* applied the prior holding of *Tulalip Tribes* regarding general evidence of travel, in order to ensure that its decision was grounded in evidence before Judge Boldt consisting of more than the geographical fact of the location of the disputed waters. *Lummi III*, 876 F.3d at 1010, n.2. Instead, the district court simply declared that because all that was needed for this Court to reverse was to conclude that Lummi must have fished somewhere within the disputed waters, that must be what this Court in fact did in *Lummi III*. ER17 ("The lone conclusion that *some* Lummi U&A lies within the disputed waters resolved the issue before the Ninth Circuit."). That in turn led the district court to dismiss Elwha's other arguments with the sweeping assertion that they entailed "that the Ninth Circuit opaquely equated the 'waters west of Whidbey Island' with the entirety of the disputed waters, did not clearly express its intent to define the Lummi U&A, and adopted the Trial Island Line as a boundary without ever referencing the Trial Island Line." ER16. As discussed herein, that assertion also failed to recognize the evidentiary basis of *Lummi III*.

The district court erred by not entering judgment that *Lummi III's* holding means that all of the waters west of Whidbey Island, as defined by the Trial Island line, are included in Lummi's U&A. The district court further erred by not entering judgment that, based on the rationale for *Lummi III*'s conclusions, the Trial Island to Point Wilson line is the westernmost extent or boundary of Lummi's U&A.

Lummi III reconciled the geographic and passageway rationales of *Lummi I* with the evidentiary requirements of the standard two-step procedure for review of an original U&A delineation by explaining that the disputed waters were a public thoroughfare lying directly between two undisputed areas of Lummi's U&A and that "general evidence" of Lummi travel and fishing in the disputed waters was sufficient to establish them as included within Lummi's U&A. The Trial Island line is thus the western boundary of Lummi's U&A, as specifically determined by Judge Boldt in *Decision I*, because there are no fisheries further west to which Lummi would have traveled. This Court should reverse the district court and clarify that *Lummi III* held that all of the waters west of Whidbey Island are included in Lummi's U&A and that the western boundary of that U&A is the Trial Island line.

STATEMENT OF THE CASE

This is the third appeal to this Court in Subproceeding 11-2 of *United States v. Washington*, No. C70-9213 (W.D. Wash) (the "main case"), regarding Judge Boldt's original 1974 delineation of the usual and accustomed fishing grounds and stations ("U&A") of the Lummi Nation ("Lummi"). In this Subproceeding, the Lower Elwha Klallam Tribe ("Elwha") along with the other two Requesting Tribes – the Jamestown S'Klallam Tribe ("Jamestown") and the Port Gamble S'Klallam Tribe ("Port Gamble") (together "the S'Klallam") – sought to establish the extent of Lummi's U&A in inland marine waters of northwest Washington State and that it

does not include the "waters west of Whidbey Island," bounded on the west by a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the Olympic Peninsula.

The previous two appeals, both by Lummi alone, resulted in the decisions in *Lummi II*, 763 F.3d 1180 (9th Cir. 2014) and *Lummi III*, 876 F.3d 1004 (9th Cir. 2017). The present (third) appeal is actually three appeals and essentially concerns the meaning of *Lummi III*, which the district court interpreted on remand in a July, 2019 Order dismissing the Subproceeding. ER1. When this Subproceeding began, the Requesting Tribes (Elwha and the S'Klallam) were aligned. Elwha now disagrees with the S'Klallam, as well as with Lummi and the district court, about the meaning of *Lummi III* – hence, the three appeals.

Prior to Subproceeding 11-2, Subproceeding 89-2 also involved a dispute about the extent of Lummi's U&A. That Subproceeding culminated in the decision in *Lummi I*, 235 F.3d 443 (9th Cir. 2000), which was further interpreted in the present Subproceeding. A proper statement of this case thus requires a summary reaching back to *Decision I* in the fifty-year-old main case, in which Judge Boldt delineated Lummi's U&A.

A. *Decision I*: Lummi's U&A and the District Court's Continuing Jurisdiction

The United States initiated *United States v. Washington* in 1970 to vindicate the treaty fishing rights of western Washington tribes from infringement and suppression by the State of Washington. The Tribes soon began intervening as plaintiffs, including Lummi. In 1974, after trial, Judge Boldt determined the continuing vitality of those treaty rights in a well-known decision, generally referred to as Final Decision No. 1, the Boldt Decision, or Decision I. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974)("*Decision I*"). *Decision I* also determined the U&As of some of the Tribes, including Lummi's, which Judge Boldt described in pertinent part as "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay." *Id.* at 360 (FF 46) (sometimes referred to herein as the "from/to description").

Decision I included a permanent injunction against the defendants (the State of Washington and certain of its officials) to protect the continued vitality of the exercise of the treaty fishing rights. Paragraph 25 of the permanent injunction also provided that a party may invoke the district court's continuing jurisdiction by filing a Request For Determination ("RFD") (analogous to a Complaint) in order to determine:

> a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I or this injunction….

> f. the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I….

Id. at 419.[2]

B. Subproceeding 89-2

In 1989, Elwha and the S'Klallam (along with the Skokomish Tribe) initiated Subproceeding 89-2 under Paragraph 25.a by filing an RFD asserting that Lummi's U&A did not include the Strait of Juan de Fuca, Admiralty Inlet, and the mouth of Hood Canal, on the ground that such fishing or intended fishing was "not in conformity" with Judge Boldt's determination of the extent of Lummi's U&A in *Decision I*. ER215; *Lummi I*, 235 F3d at 446. Lummi filed a cross-claim asserting that its U&A included those waters and also the waters west of Whidbey Island. *Lummi II*, 763 F.3d at 1183. In 1998, Judge Rothstein of the district court concluded that Lummi's U&A, as determined by Judge Boldt, did not include any of the waters identified in either the RFD or the Cross-RFD (which she concluded were the same waters but described with different language). *United States v. Washington*, 19 F.Supp.3d 1252, 1278 (W.D. Wash. 1997); ER173-ER180.

[2] The District Court revised Paragraph 25 in 1993, preserving the essence of subparagraphs a and f, albeit in slightly different language, as Paragraph 25(a)(1) and 25(a)(6), respectively. *United States v. Washington*, 18 F.Supp.3d 1172, 1213 (W.D. Wash. 1991). The 1993 revision also added jurisdictional prerequisites, in the form of a mandatory Meet and Confer process, prior to the filing of any RFD.

On appeal, in the opinion now referred to as *Lummi I*, this Court unanimously affirmed that Judge Boldt did not intend to include the Strait of Juan de Fuca and the mouth of Hood Canal in Lummi's U&A, but unanimously reversed as to Admiralty Inlet, reasoning that, geographically, it would have been a passageway at treaty time by which Lummi fishers would have traveled from Lummi's U&A in the San Juan Islands to Lummi's U&A in the vicinity of present-day Edmonds, and therefore Judge Boldt did intend to include it within Lummi's U&A. *Lummi I*, 235 F.3d at 452. *Lummi I* also held that Judge Boldt's "from/to" description of Lummi's U&A was "ambiguous because it does not delineate the western boundary of the Lummi's" U&A,[3] *id*. at 449, and that Judge Boldt viewed the Strait of Juan de Fuca as distinct from and "lying to the west" of Puget Sound, within which Lummi's U&A is located, *id*. at 451-52.

[3] Prior to *Lummi I*, this Court had also held that Judge Boldt's "from/to" description of Lummi's U&A was ambiguous because it did not precisely identify the location of the "present environs of Seattle." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998)("*Muckleshoot I*"). *Muckleshoot I* also noted that, although his description had "turned out to be ambiguous," Judge Boldt had "specifically determined" Lummi's U&A within the meaning of Paragraph 25.f (now Paragraph 25(a)(6)), such that the District Court could not use additional evidence to resolve any ambiguity in the original description. *Id*. at 1360.

C. Subproceeding 11-2

1. The Request For Determination

Within a few years, further disagreement arose, regarding the interpretation of *Lummi I*, and in 2011 Elwha and the S'Klallam Tribes (the "Requesting Tribes") initiated Subproceeding 11-2. Their jointly filed RFD asserted that Lummi's fishing in the waters west of Whidbey Island that lie outside of Admiralty Inlet, to its north and west, was "not in conformity" with Judge Boldt's original 1974 delineation of Lummi's U&A. Thus the district court's continuing jurisdiction over this Subproceeding 11-2 arose under Paragraph 25(a)(1) of the Permanent Injunction. ER215-ER228.[4] The RFD referred to the waters in dispute as "the waters west of Whidbey Island," ER216, ER219, ER224, ER226, and more particularly described these disputed waters as:

> …the marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait.

ER216 (RFD at ¶ 2). The RFD also noted that a "primary issue in this Request…is the extent of Lummi's U&A and the meaning of the marine area description in Finding of Fact 46." ER220 (RFD at ¶ 12).

[4] As noted in footnote 2, above, the district court revised paragraph 25 of the permanent injunction in 1993, preserving the essence of subparagraphs a and f, but renumbering them as Paragraph 25(a)(1) and 25(a)(6), respectively.

2. Lummi II

The Requesting Tribes initially sought summary judgment on the ground that the district court's 1998 decision in 89-2 had established law of the case that all marine waters disputed therein, including the waters west of Whidbey Island, were not part of Lummi's U&A as determined by Judge Boldt, and that *Lummi I* had reversed that law of the case only with respect to Admiralty Inlet. The district court agreed and granted summary judgment to the Requesting Tribes. *United States v. Washington*, 20 F.Supp.3d 899, 980 (W.D. Wash. 2008).

A divided panel of this Court reversed in *Lummi II*, holding that *Lummi I* was ambiguous as to whether Judge Boldt had included the disputed waters within Lummi's U&A, and therefore law of the case did not apply. *Lummi II*, 763 F.3d at 1187-88. *Lummi II* also expressly acknowledged that the "case area" (i.e., the waters in dispute) defined in the Requesting Tribes' RFD included the waters west of northern Whidbey Island as bounded by the Trial Island line. *Id*. at 1184.

3. Lummi III

On remand from *Lummi II* in 2015, Elwha and the S'Klallam began briefing separately but remained aligned as to their substantive positions. On cross-motions for summary judgment, Judge Martinez applied the two-step process, derived from the *Muckleshoot* trilogy of U&A cases and previously approved by this Court, for interpreting Judge Boldt's intent in delineating Lummi's U&A in *Decision I*. First

he determined that Judge Boldt's description was ambiguous, then he evaluated the evidence that was before Judge Boldt and concluded there was no evidence that Lummi fished at treaty time in the waters west of Whidbey Island. Accordingly, he granted summary judgment to Elwha and the S'Klallam, and in language tracking the RFD's description of the disputed waters, ruled as follows:

> The Lummi's U&A is specifically determined, and it does not contain the waters in dispute in this subproceeding. The Lummi's U&A does not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island, an area more specifically described as – the marine waters east of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait.

ER112 (Order On Motions For Summary Judgment) (July 17, 2015).

On appeal, this Court issued the *Lummi III* opinion, reversing Judge Martinez and concluding "that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011. *Lummi III* acknowledged that the purpose of the remand from *Lummi II* was for the district court to apply "the usual U&A procedures," also referred to as the "two-step procedure" involving review of the evidence before Judge Boldt. *Lummi III*, 876 F.3d at 1008. The basis for this Court's holding was that there was "general evidence" before Judge Boldt that the waters west of Whidbey Island were a "marine thoroughfare" through which Lummi

would have traveled at treaty time, *id*. at 1010-11, and thus the same "passageway" rationale that *Lummi I* applied to Admiralty Inlet also applies to the waters west of Whidbey Island. *Id.* at 1007. The final sentence of *Lummi III* stated that "…we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A." *Id*. at 1011.

Elwha and the S'Klallam filed separate petitions for rehearing of *Lummi III*, which were denied.

4. Remand After Lummi III

In 2019, the parties returned to the district court and litigated the meaning of *Lummi III*. Elwha, Lummi, and the S'Klallam now had three distinct, conflicting positions. Asserting that *Lummi III* had failed to determine Lummi's U&A in this area – and had created a "panel conflict" with *Lummi I* or *Lummi II*, ER79 – the S'Klallam filed a motion to amend the 2011 RFD, ER78, in order to determine a U&A boundary farther to the east of the Trial Island line. Elwha filed a motion for entry of judgment based on its understanding that *Lummi III* had fully determined this Subproceeding, including that the general evidence and geographical facts relied upon by *Lummi III* entailed a western boundary to Lummi's U&A at the Trial Island line. ER36. Lummi opposed both motions (but filed none of its own), asserting that *Lummi III* had fully determined the case initiated by the RFD, ER32, but also that "[t]he Ninth Circuit remanded solely for the determination of 'the outer reaches of

the Strait of Juan de Fuca,' 'further west of the contested waters…' [citation omitted]." ER35.

In its decisions on the Elwha and S'Klallam motions, the district court propounded a fourth interpretation of *Lummi III*. It denied the S'Klallam motion to amend for several reasons: Lummi's recent assertion of U&A on the east side of Whidbey Island, even if inconsistent with its position in the present Subproceeding, provided no basis for the district court to "revisit prior Ninth Circuit precedent," ER8-ER9; the proposed amended complaint would be based on evidence not in the record before Judge Boldt, which is not permitted in this Paragraph 25(a)(1) case limited to interpreting Judge Boldt's decision, ER10; continuing jurisdiction under Paragraph 25(a)(6) was not available because Judge Boldt has already "specifically determined" Lummi's U&A, ER10; the proposed amended RFD failed to state a claim for which relief could be granted, ER11; an amended RFD at this juncture would prejudice Lummi and Elwha, ER12-ER13.

The district court granted Elwha's motion for entry of judgment only in part. It noted that Elwha was entitled to an outcome in its case, ER13, but rejected the argument that *Lummi III* had determined that all of the waters west of Whidbey Island, extending to the Trial Island line, were included in Lummi's U&A (and hence also rejected that the Trial Island line is the western boundary of the U&A). Instead, the district court concluded that *Lummi III* had simply concluded that Lummi has

U&A in "some" unspecified portion of the disputed waters west of Whidbey Island. ER17. It noted, given the procedural posture of the case as it came up from the district court, that was really all that *Lummi III* needed to do in order to reverse the 2015 summary judgment decision in favor of the Requesting Tribes. ER17. While lamenting that *Lummi III* "has done little to resolve the underlying conflict," ER5, (even though acknowledging that *Lummi III* necessarily resolved this Subproceeding, ER17), the district court noted the probable futility of further proceedings due to lack of evidence before Judge Boldt that has not already been thoroughly reviewed. ER18. The District Court did not comment on the "general evidence" of Lummi travel through the disputed waters as a "marine thoroughfare" that this Court had noted in *Lummi III*.

Lummi, the S'Klallam, and Elwha each filed separate notices of appeal. ER20-ER27.

SUMMARY OF ARGUMENT

Contrary to the district court's interpretation, *Lummi III* fully resolved the issues in Subproceeding 11-2. *Lummi III* held that all of the waters in dispute – consistently referred to by all parties and this Court as the "waters west of Whidbey Island," bounded on the west by the Trial Island to Point Wilson line – are "encompassed in the Lummi's U&A," 876 F.3d at 1011. A major basis for this determination was the geographic fact that these waters "lie directly between"

previously adjudicated Lummi U&A in the San Juan Islands (including Haro Strait at the western extent of that island group) and previously adjudicated Lummi U&A in Admiralty Inlet – that is, between "the endpoints of the path we carved in *Lummi I*" – and for that matter, also essentially between the endpoints of Lummi's U&A as described by Judge Boldt in Finding of Fact 46 in *Decision I* (Fraser River to Seattle) – within which Lummi ''utilized'' various "fisheries." *Lummi III*, 876 F.3d at 1010 (quoting and citing the United States' expert anthropologist Dr. Barbara Lane, on whom Judge Boldt "relied heavily"). *Lummi III* also rebutted what it considered Elwha's best argument to the contrary (the so-called "Transit Rule") by further grounding its decision in "general evidence of travel" through these marine waters that functioned at treaty-time as a "thoroughfare" or "corridor." *Id*. at 1010-11, n.2 (further quoting and citing the expert Dr. Barbara Lane and also citing *Tulalip Tribes*, 794 F.3d at 1135, regarding the sufficiency of general evidence of travel as a basis for interpreting an initial U&A delineation under the standard two-step process).

Indeed, and also contrary to the district court's interpretation and Lummi's contentions in its Opening Brief, *Lummi III* concluded that the Trial Island to Point Wilson line is the western boundary not only of the waters in dispute but also of Lummi's U&A. For one thing, the "lies-between" basis for the decision to include the disputed waters in Lummi's U&A necessarily entails a limit or boundary. And

the Trial Island to Point Wilson is that limit, a limit that Lummi itself identified promptly in the wake of the decision in *Lummi I*. ER204 Moreover, there is no evidence of any "fisheries" west of the Trial Island line that Lummi "utilized" at treaty-time and to which it would have traveled, and thus no basis under *Lummi III*'s rationale for extending Lummi's U&A any farther. And, the final sentence of *Lummi III* states that any determination of a boundary for the Strait of Juan de Fuca (somewhere to the west of the waters in dispute) is essentially irrelevant to the determination of Lummi's U&A. 876 F.3d at 1011 ("In coming to this conclusion, we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A.") That is, it would become necessary to determine the outer reaches (boundaries) of the Strait of Juan de Fuca "for purposes of Lummi's U&A" only if Lummi's U&A extends to the west past the Trial Island line all the way to the eastern boundary of the Strait of Juan de Fuca as Judge Boldt would have defined it (assuming that is even possible); but *Lummi III* clearly states that is *not* necessary.

The district court's July 11, 2019 Order on remand from *Lummi III* correctly noted that Judge Boldt in *Decision I* "specifically determined" Lummi's U&A, such that (1) the only evidence that may be used to interpret Judge Boldt's intent is the evidence that was in the record before him, and (2) continuing jurisdiction under Paragraph 25(a)(6) of Judge Boldt's Permanent Injunction is not available for consideration of additional evidence to support a supplemental determination

regarding the western boundary of Lummi's U&A. ER10. The district court was also correct that there is no evidence in the record beyond what has already been analyzed in this case regarding the western boundary, but its pessimistic conclusion that it is thus unrealistic to expect a clear determination is flawed and incorrect. ER18. That is because, unfortunately, the district court engaged in, at best, minimal review and analysis of the language of or evidentiary basis for *Lummi III*. Instead, it substituted its own notion of how this Court *could have decided* the appeal, based on the procedural posture of the case – that is, because the district court believed that all this Court logically *needed to do* in order to reverse was to conclude that Lummi fished in *some* unspecified portion of the disputed waters, that is what the district court concluded this Court in fact *did* in *Lummi III*.

STANDARD OF REVIEW

The district court's compliance with the mandate of this Court is reviewed de novo. *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007); *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). This Court also reviews de novo whether the law of the case doctrine applies to an issue that was decided by prior disposition in the same case. *Lummi II*, 763 F.3d at 1185 ("whether the issue has already 'been decided explicitly or by necessary implication.'")(internal citation omitted).

ARGUMENT

A. The District Court Was Required To Follow This Court's Mandate And Enter Judgment That The Waters West Of Whidbey Island Are Included In Lummi's U&A.

The rule of mandate, and law of the case in *Lummi III*, controls the disposition of this subproceeding. *Thrasher*, 483 F.3d at 982; *In re Beverly Hills Bancorp.*, 752 F.2d 1334, 1337 (9th Cir. 1984); *Firth v. United States,* 554 F.2d 990, 993 (9th Cir.1977). Both the rule of mandate and law of the case require that the issue must have been resolved expressly or by necessary implication. *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). The doctrines are similar in that way but there is a key difference. The rule of mandate preserves the hierarchical structure of the judicial system and is jurisdictional in nature; the district court must follow the mandate of this Court. *Thrasher*, 483 F.3d at 982. The law of the case doctrine, on the other hand, is designed for judicial efficiency and requires the district court to follow the decision of this Court in subsequent proceedings in the same case unless certain enumerated exceptions apply. *Id*.; *Lummi I*, 235 F.3d at 452.

In *Lummi III* this Court held that "the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet are encompassed in the Lummi's U&A." 876 F.3d at 1101. That this language explicitly resolved this subproceeding was made even more apparent by the first paragraph of the opinion, in which this Court defined the issue on appeal as "whether the Treaty

of Point Elliot… reserves to the Lummi… the right to fish in the waters west of Whidbey Island, Washington." *Id.* at 1007. This Court then stated that the ***same result*** in *Lummi I*—that the treaty secured Lummi the right to fish in Admiralty Inlet—"***holds here*** because the waters at issue are situated directly between the San Juan Islands and Admiralty Inlet and also would have served as a passage to Seattle." *Id.* at 1007 (emphasis added). *Lummi III*'s determination that the Admiralty Inlet holding from *Lummi I* controls makes it abundantly clear that this Court intended to include all of the waters west of Whidbey Island in Lummi's U&A. *Lummi I*, 235 F.3d at 453.

Nonetheless, the district court concluded that the holding in *Lummi III* was limited to a determination that only "some" of the waters west of Whidbey Island were included in Lummi's U&A, which was enough to resolve the "sole" issue in the subproceeding. ER17. According to the district court, "Lower Elwha and S'Klallam sought to establish that *any* Lummi fishing in the disputed waters is "not in conformity" with *Final Decision I*," *id*., and therefore some Lummi fishing somewhere in those waters would be in accordance with *Decision I*. ER18. Essentially, the district court substituted its view of how this Court *could have decided* the case for any review or analysis of what this Court actually did. The district court erred in adopting this approach because *Lummi III* did not narrow the issue on appeal or its holding in this way.

In fact, this Court framed the issue on appeal as whether Lummi has U&A in the waters west of Whidbey Island, *Lummi III*, 876 F.3d at 1007, and described the applicable legal framework as whether the district court's interpretation of *Decision I* based on the two-step procedure for interpreting Judge Boldt's findings of a tribe's U&A was correct. *Id.*, at 1008. Thus, what was at issue on appeal in *Lummi III* was not whether there was an issue of fact that must proceed to trial; rather, it was whether the district court had properly applied the two-step procedure in the interpretation of *Decision I*. The only facts or evidence relevant to the interpretation were the facts and evidence that were before Judge Boldt when he made his findings. *Lummi I*, 235 F.3d at 450. Like the review of summary judgment on appeal, the district court's interpretation of a prior judicial decree is also reviewed de novo. *Muckleshoot v. Tulalip*, 944 F.3d 1179, 1183 (9th Cir. 2019); *United States v. Walker River Irrigation District*, 890 F.3d 1161, 1169 (9th Cir. 2018) ("However, deference to the district court is reduced where, as here, the district judge has not overseen the litigation from its inception.") Accordingly, contrary to the district court's assertion that *Lummi III* only dealt with whether the entry of summary judgment was proper, this Court reviewed de novo whether the district court's interpretation of *Decision I's* findings of Lummi's U&A was consistent with the evidence that was before Judge Boldt. *Lummi III*, 876 F.3d at 1008-09. On that question this Court concluded that the district court erred in excluding the waters west of Whidbey Island from

Lummi's U&A based on *Lummi I*, *Lummi II* and the Court's two-step procedure for interpreting *Decision I* based on the evidence before Judge Boldt. *Lummi III*, 876 F.3d at 1009.

B. *Lummi III* Has Determined That All of the Waters West of Whidbey Island, Bounded by the Trial Island-Point Wilson line, are Included Within Lummi's U&A

As a matter of plain language, *Lummi III* "…conclude[d] that the waters west of Whidbey Island, which *lie between* the southern portion of the San Juan Islands and Admiralty Inlet, are *encompassed* in the Lummi's U&A." 876 F.3d at 1011 (emphasis added). First, the phrase "encompassed in" indicates that all of the waters named are included within Lummi's U&A. The District Court concluded that it would "push *Lummi III* too far," ER16, to equate the description of the disputed waters in the *Lummi III* holding—"the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet"—with the description in the RFD—"the marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait."

Instead, the district court concluded that *Lummi III* held that only "some" of the waters, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, might be included in Lummi's U&A because this Court did not: (1)

equate the waters west of Whidbey Island with the entirety of the disputed waters; (2) clearly express an intent to define Lummi U&A; or (3) adopt the Trial Island line as a boundary. ER16-17.

The district court's conclusion was in error. As discussed in Section A. above, it mischaracterized the issue that was before this Court by misapprehending the unique procedural posture presented by the appeal of a district court's interpretation of a prior judicial decree on summary judgment.

The RFD in this Subproceeding framed the issues as "whether the actions intended or effected by the Lummi… conform with… Decision #1," ER215, and more specifically that Lummi was "impermissibly fishing" in the "waters west of Whidbey Island (excepting Admiralty Inlet)."[5] ER216. The RFD defined the disputed waters as those northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet (the Trial Island Line), the waters were bounded on the north by Haro Strait, the San Juan Islands and Rosario Strait, and on the east by Whidbey Island and Admiralty Inlet. ER216. The western boundary of the disputed waters is the Trial Island line. The requesting parties also put the western extent, or boundary, of Lummi's U&A at issue in the RFD, by clearly stating that a "primary issue in this

[5] The RFD definition included the "eastern Strait of Juan de Fuca" as an alternative name for the same waters. ER216 (RFD at ¶ 2).

Request … is the extent of Lummi's U&A and the meaning of the marine area description in Finding of Fact 46." ER220 (RFD at ¶ 12). Accordingly, the Tribes sought to demonstrate under Paragraph 25(a)(1) of the district court's permanent injunction that Lummi fishing in the disputed waters was an action not in conformity with *Decision I* and thereby establish the western extent of Lummi's U&A. ER217, ER220.

On remand from *Lummi II*, the district court applied the two-step procedure for interpreting *Decision I* and granted summary judgment in favor of the S'Klallam and Lower Elwha, ER90, but this Court reversed that determination in *Lummi III*. In so doing, this Court made it abundantly clear by the descriptions it used of the waters at issue that it was including all of the disputed waters—the waters west of Whidbey Island—in Lummi's U&A. Perhaps this Court's clearest description of the disputed waters was:

> [T]he waters west of Whidbey Island are situated just north of Admiralty Inlet, which is included in the Lummi's U&A, and just south of the water surrounding the San Juan Islands (such as Haro and Rosario Straits), which are also included in the Lummi's U&A.

Lummi III, 876 F.3d at 1010. Without a doubt, this description covers the same waters described in the RFD.

Beyond that, as to precisely which waters are so named, the opinion used the phrase "waters west of Whidbey Island" at least *twelve* times when referring to the waters in dispute. At seven other points, the opinion also referred to the "waters west

of Whidbey Island" as the "waters at issue," the "waters contested here," the "disputed waters," the "contested waters," and the "disputed area." *Id.* at 1007, 1008, 1009, and 1010.[6] Significantly, the opinion also noted that the waters of the San Juan Islands include Haro Strait, on the western side of that island group, *id.* at 1010, and that the waters at issue are "situated directly between" or "lie between" the waters of the San Juan Islands and Admiralty Inlet, *id.* at 1007 and 1011 (respectively), thereby extending to these disputed waters the "geographic" rationale by which it included Admiralty Inlet in Lummi's U&A in *Lummi I*. Thus, *Lummi III* concluded that the waters that "lie between" Haro Strait and Admiralty Inlet are within Lummi's U&A, which is essentially the position that Lummi adopted shortly after *Lummi I*, which incorporated the Trial Island line into its U&A.[7]

[6] In nearly every instance that this Court used terms such as "waters at issue," "contested waters," or "disputed waters" the Court also used the phrase "waters west of Whidbey Island" within the same paragraph thereby indicating that the terms are synonymously.

[7] *Lummi I* stated that, "If one starts at the mouth of the Fraser River… and travels past Orcas and San Juan Islands… it is natural to proceed through Admiralty Inlet." 235 F.3d at 452. Simple review of a map, such as ER44, ER46, or ER170, indicates that traveling past those two islands indeed puts the traveler into Haro Strait. Lummi relied on that to conclude, back when *Lummi I* was issued, "that the Opinion included *Haro Strait and Admiralty Inlet and the waters between the two*." ER204-ER205 (Declaration of Elden Hillaire at ¶ 3 and ¶ 4 (describing the Trial Island line) (emphasis added). The RFD for this Subproceeding defined the waters in dispute as it did at least in part to respond to Lummi's interpretation.

The "lies between" rationale clearly and necessarily entails a boundary or a limitation on its extent, as Lummi seemed to understand when it adopted it. Not all waters west of Whidbey Island lie between Haro Strait and Admiralty Inlet. Simple visual review of maps prepared or submitted by the Requesting Tribes, ER44 and ER46, corroborates that the line running from Trial Island (at the absolute western limit of Haro Strait) to Point Wilson (at the western opening of Admiralty Inlet) is the farthest geographic extent possible of the marine waters that "lie between" or are "situated directly between" those two points; the line cannot be extended any farther to the west or southwest. *See* also Lummi Opening Br. at 32, a reproduction of a portion of exhibit USA-62, which was part of the record before Judge Boldt, except for the red arrows added by Lummi for the Brief, to point out the locations of Haro Strait and Admiralty Inlet. (Other variations on USA-62 appear at ER170 and Lummi Opening Brief at 7.) The concept of these disputed waters as "lying between" also coincides with the RFD's use of the Trial Island line to identify their westernmost extent. ER216.

It is also instructive to refer to the language of the district court's Order that *Lummi III* reviewed and reversed:

> The Usual and Accustomed Fishing Area (U&A) of the Lummi Nation does not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island, an area more specifically described as the marine waters east of a line running from Trial Island near Victoria, British Columbia, to Point Wilson at the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and

> bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait…

ER165 (tracking the language of paragraph 2 of the RFD, ER216, and excluding the waters east of the Trial Island line from Lummi's U&A – i.e., the waters west of Whidbey Island). By reversing as to waters that "lie between" the waters surrounding the San Juan Islands (including Rosario and Haro Strait) and Admiralty Inlet, with its inherent boundary, *Lummi III* necessarily concluded that Lummi's U&A includes those same waters west of Whidbey Island, even though it does not expressly refer to the Trial Island line.

The terminology and representations of the parties throughout this Subproceeding, in both the district court and this Court, also clearly informed the opinion in *Lummi III*. The parties repeatedly used the term "waters west of Whidbey Island" to refer to the waters in dispute, as did this Court. In addition to the original RFD, other filings by all three of the Requesting Tribes consistently defined the "waters west of Whidbey Island" as being demarcated by the Trial Island line. *See, e.g.*, ER123-ER124 (Lower Elwha Motion for Summary Judgment (May 1, 2015)). The Requesting Tribes also filed numerous maps throughout the litigation of 11-2, all of which used the Trial Island line to illustrate the waters in dispute, which Lower Elwha and the S'Klallam reproduced in the *Lummi III* appeal as part of their Excerpts of Record or as inserts into their appellate briefs. *See e.g.*, ER44, ER46, and ER49.

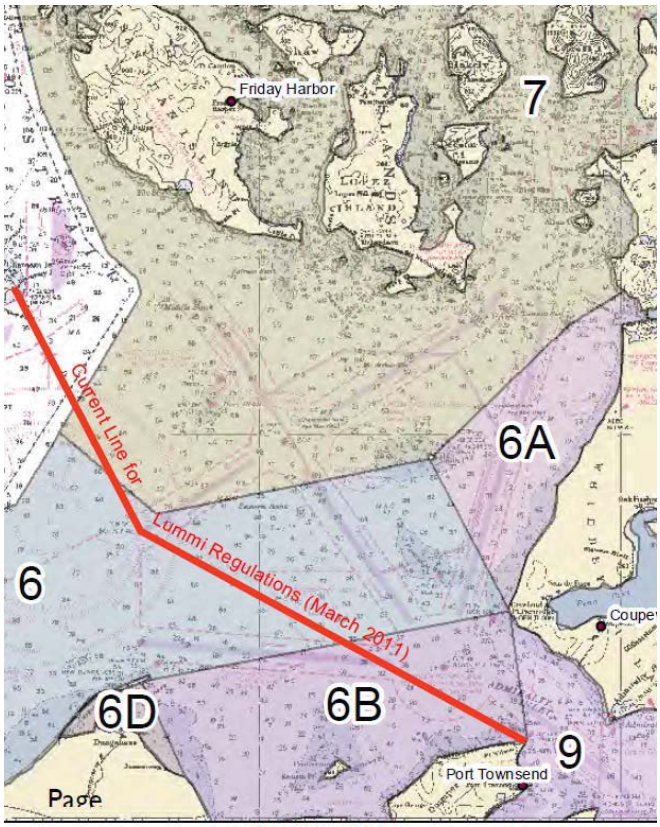
Lummi's Brief in the *Lummi III* appeal also defined the waters in dispute in terms of the Trial Island line, ER52-ER53, including a color map and a statement expressly acknowledging that "[t]he solid red line represents *the boundary* of the Lummi's claimed fishing grounds [emphasis added]." The solid red line is the Trial Island line.[8]

At oral argument in the Ninth Circuit in *Lummi III*, counsel for the S'Klallam handed each member of the panel a color copy of ER44, explaining that it shows the waters in dispute. *See* oral argument video at 14:45.[9] As noted above, ER44 shows the Trial Island line. And, the S'Klallam Petition For Rehearing in this Court inserted a map showing the Trial Island line, while stating:

> *This Court found* that because a nautical path from the southern San Juan Islands could geographically connect the Lummi to the waters of Admiralty Inlet, *that miles of waters in between the two points should be included in Lummi's U&A description* of "Northern Puget Sound." The disputed area is depicted below:

[8] Lummi has relied on the "lies between" rationale of *Lummi I* ever since it issued in 2000. See footnote 7 above and ER204-ER205.

[9] The video is available at: www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012091.



KSER158

ER49 (emphasis added). That was an express acknowledgement to this Court that *Lummi III* included within Lummi's U&A *all* of the waters bounded by the Trial Island line.[10]

In addition to the very strong indications from the plain language of *Lummi III* and the unavoidable implications of the geographic facts regarding the location of the disputed waters "between" Haro Strait and Admiralty Inlet, the conclusion in

[10] A year later, in a clear attempt to re-litigate *Lummi III* in the district court, S'Klallam took a very different position, without ever acknowledging the position it took in seeking rehearing in this Court. *See e.g.*, ER84. ("Now, however, the Ninth Circuit *has* ruled that some portion of the "waters west of Whidbey Island" *due north* of Admiralty Inlet is part of Northern Puget Sound.")

Lummi III was buttressed by "general evidence," for which the reasoning of *Lummi I* provided the first step. *Lummi III*, 876 F.3d at 1009-1010. *Lummi III* went on to explain that the waters in dispute constitute a "public thoroughfare" and that the United States' primary anthropological expert for *Decision I*, Dr. Barbara Lane, "tied travel in this corridor to fishing." *Lummi III*, 876 F.3d at 1010, *citing Tulalip Tribes*, 794 F.3d at 1135. "Dr. Lane also reported that 'Lummi fishermen were *accustomed* to visit fisheries as distant as' the endpoints of the path we carved in *Lummi I*, and 'utilized' other fisheries in between. (Emphasis added)." *Lummi III*, 876 F.3d at 1010. For the source of these statements by Dr. Lane, *see* ER120 and ER121, ¶ 4 (excerpts from Exhibit USA-30 in *Decision I*).

Ultimately, *Lummi III* concluded that the foregoing evidence of travel tied to fishing, coupled with the geographic fact that the disputed waters "lie between" other established Lummi U&A, was more than enough to overcome Lower Elwha's "most persuasive argument" against Lummi U&A in these waters, which was based on the so-called Transit Rule (that travel through a body of water is *insufficient*, without more, to establish U&A). Lastly, *Lummi III* invoked *Tulalip Tribes* one final time as authority that "general evidence of travel was…*sufficient* to satisfy the necessary standard." *Lummi III*, 876 F.3d at 1010-11, n.2 (emphasis added).

As discussed in the next section, *Lummi III*'s reliance on general evidence is significant because that is how this Court effectively reconciled *Lummi I* with the

Transit Rule in the context of the standard two-step procedure for interpretation of Judge Boldt's original delineation of a U&A.

C. *Lummi III* Reconciled *Lummi I's* Geography-Based Decision With The Two-Step Procedure Based On The Evidence Before Judge Boldt.

1. This Court reconciled Lummi I*'s geography-based approach with the evidence*

As this Court observed, "[t]his case is almost identical" to *Lummi I*. *Lummi III*, 876 F.3d at 1009.[11] *Lummi I* held that Judge Boldt intended to include Admiralty Inlet in Lummi's U&A based on the geography of the area in dispute. The dispositive geography was as simple as the fact that Admiralty Inlet lies between two established areas of Lummi's U&A, such that it was a corridor through which Lummi would have traveled from one usual and accustomed fishing ground to another. *Lummi I*, 235 F.3d at 452.[12] In concluding that Judge Boldt intended to include in Lummi's U&A the waters at issue in this Subproceeding, this Court stated "there is no doubt that the waters west of Whidbey Island 'would likely be a passage through which

[11] The analysis in *Lummi I* began with the language of *Decision I*. As this Court observed, language was not dispositive in *Lummi I* or in *Lummi III*. *Lummi III*, 876 F.3d at 1009 (Observing, on the basis of linguistics, that Admiralty Inlet was just as likely to be included in Lummi's U&A as it was to be excluded).

[12] As to evidence of fishing in the waters then at issue, *Lummi I* observed that "[n]one of Dr. Lane's testimony identified specific areas as far west and south as the Lummi now claim." 235 F.3d at 451. Nonetheless, *Lummi I* determined that geography was dispositive. *Id*. at 453.

the Lummi would have traveled from the San Juan Islands in the north to the present environs of Seattle.'" *Lummi III*, 876 F.3d at 1009 *quoting Lummi I*, 235 F.3d at 452 (some internal quotes omitted). This Court also indicated how the disputed waters here fit within the geographic scope of Lummi's U&A:

> [T]he waters west of Whidbey Island are situated north of Admiralty Inlet, which is included in the Lummi's U&A, and just south of the waters surrounding the San Juan Islands (such as Haro and Rosario Straits), which are also included in the Lummi's U&A.

Lummi III, 876 F.3d at 1010.

Although *Lummi I* was based only on the geography, in *Lummi III* this Court went further, by reviewing the evidence before Judge Boldt consistent with the long-accepted two-step procedure, before holding that "the waters west of Whidbey Island… are encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011. In this regard, this Court found that the expert report of Dr. Lane "tied travel" in the "corridor" at issue in this subproceeding—the waters west of Whidbey Island—"to fishing." *Id*. at 1010. Dr. Lane's report stated that the waters at issue were a "public thoroughfare" that would be used as a fishing area by any tribe traveling through the waters. *Id*. While this evidence of fishing is general in nature and applies to all tribes that would transit such a public thoroughfare, when that corridor lies between two-areas of a tribe's U&A, then the travel and fishing through the passageway is also U&A. *Id., citing Lummi II*, 763 F.3d at 1187. In this case, as this Court also noted, Dr. Lane's expert report on the Lummi stated "that 'Lummi fishermen were

accustomed to … visit fisheries as distant as' the endpoints of the path we carved in *Lummi I*, and 'utilized' other fisheries in between." *Lummi III*, 876 F.3d at 1010 (emphasis in original). This evidence is also general, in that it does not identify any specific fisheries; but, it does identify the "usual and accustomed" practice of Lummi fishermen to visit fisheries throughout the reach of Lummi's U&A from the Fraser River to modern day Edmonds such that the waters that lie between already confirmed areas of Lummi's U&A would also have that status. *Tulalip Tribes*, 794 F.3d at 1135 ("This general evidence, too, constitutes some evidence before Judge Boldt" that supports the intent to include the contested waters that geographically lie between the endpoints of Suquamish's U&A description).

2. *Lummi III*'s recognition that general evidence of travel between two areas of established U&A was sufficient to establish U&A served to reconcile *Lummi I* with the Transit Rule

The oft-quoted principle (known as the Transit Rule) that evidence of travel through thoroughfares by transiting Indians who trolled along the way ("occasional and incidental trolling") is not sufficient to establish U&A does not apply "in the specific context of the Lummi's U&A." *Lummi III*, 876 F.3d at 1010. As this Court explained, in *Lummi III* and in *Lummi II*, the evidence in the record before Judge Boldt shows that Lummi was "accustomed" to travel and fish throughout its U&A from the Fraser River to present day Edmonds, including in the waters west of Whidbey Island and Admiralty Inlet. *Lummi III*, 876 F.3d at 1010 *citing Lummi II*,

763 F.3d at 1187. When the disputed waters are a thoroughfare that lies between confirmed areas of U&A, then neither the travel nor the fishing in the thoroughfare could be considered "occasional or incidental." Rather, the travel and fishing could only be considered "usual or accustomed" as Judge Boldt explained in *Decision I*:

> 'Usual and accustomed,' being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions.

384 F.Supp.312 at 332. In other words, "usual and accustomed" is an antonym of "occasional and incidental." Accordingly, fishing while traveling through waters that lie between a tribe's (or at least between Lummi's specifically) usual and accustomed fishing grounds and stations cannot be only occasional or incidental because such fishing, even in a thoroughfare, is necessarily elevated to the same status as the endpoints of the travel. *Tulalip Tribes*, 794 F.3d 1135 ("As indicated by the plain text of the Suquamish's U&A, the Suquamish traveled … 'the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River'… and likely would have fished there while traveling.")(internal citations omitted); *compare*, *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010)(although the disputed waters were arguably included in the ambiguous description of the U&A, this Court held that Judge Boldt did not intend to include those waters because "there was no evidence from Lane or otherwise" that the area was "part of Suquamish's U&A.").

Indeed, as this Court explained, the results in *Lummi III* and *Lummi I* are readily reconciled with the transit rule. Quoting at length from *Lummi II*, this Court explained that *Lummi I*'s Admiralty Inlet rationale "covers the exact situation" in *Lummi III* and "fits within" the two-step procedure of reviewing the evidence before Judge Boldt:

> If to "proceed through Admiralty Inlet" rendered Admiralty Inlet a part of Lummi U&A, then to proceed from the southern portions of the San Juan Islands to Admiralty Inlet would have the same effect: to render the path a part of the Lummi U&A, just like Admiralty Inlet.

Lummi III, 876 F.3d at 1010, *citing and quoting Lummi II*, 763 F.3d at 1187.

D. *Lummi III* Necessarily Decided the Western Boundary of Lummi's U&A

1. The western boundary of Lummi's U&A is inherent in the geography and the evidence

The Requesting Parties put the western extent, or boundary, of Lummi's U&A at issue in the RFD. The RFD asserted that a "primary issue in this Request…is the extent of Lummi's U&A and the meaning of the marine area description in Finding of Fact 46." ER220 (RFD at ¶ 12). The evidence of record that *Lummi III* relied on for the finding of Lummi U&A in the waters west of Whidbey Island is necessarily limited to the waters that "lie between" Haro Strait and Admiralty Inlet.

The western boundary of Lummi's U&A is inherent in the geographic rationale and the evidence that supports *Lummi III's* holding that the waters west of

Whidbey Island are "encompassed in" that U&A. As noted in Section B, above, the simplest geographic illustration of this point is a visual review of the map, ER44, which corroborates that the line running from Trial Island (at the absolute western limit of the mouth of Haro Strait) to Point Wilson (at the westerly opening of Admiralty Inlet) is the farthest geographic extent possible of the marine waters that "lie between" those two points. Indeed, the "geographic" rationale cannot be extended any farther to the west or southwest of the Trial Island line. That line is the limit of waters that are "situated directly between" or that "lie between" the two areas of court-recognized Lummi U&A.

The boundary determination is also bolstered by the review of the evidence that was before Judge Boldt for *Decision I*. On remand from *Lummi II*, in the summary judgment proceedings before the district court, the Requesting Tribes presented every piece of evidence cited by Judge Boldt in findings of fact 45 and 46 of *Decision I*. *See e.g.*, ER124. When the district court again determined that such evidence did not support Lummi U&A in the disputed waters, ER103, *Lummi III* reversed based on: (1) the waters west of Whidbey Island being geographically located between two areas of Lummi's U&A; (2) the disputed waters being categorized as a public thoroughfare by Dr. Lane; (3) her expert opinion that such waters would be utilized for fishing by tribes traveling through; and (4) her opinion that Lummi fished at locations throughout its U&A from the Fraser River to the

environs of Seattle. *Lummi III*, 876 F.3d 1009-10. However, this Court's determination did not change the reality that neither the evidence of record nor Judge Boldt identified any specific areas of Lummi U&A (no specific geographic place names) that are west of northern Whidbey Island, much less west of the waters west of Whidbey Island. *See Decision I*, 384 F.Supp. at 360-61 (There are no specific fisheries identified in Findings of Fact 45 and 46 that are to the west of the Trial Island line). As this Court observed in *Lummi I*:

> None of Dr. Lane's testimony identified specific areas as far west and south as the Lummi now claim. Although Judge Boldt heard testimony from Lummi elders who stated that they had fished as far west as the Strait of Juan de Fuca, it is clear that he did not rely on this testimony in determining the location of the Lummi's usual and accustomed grounds and stations.

235 F.3d at 451. *Lummi I* then affirmed the district court's determination that the Hood Canal and the Strait of Juan de Fuca were excluded from Lummi's U&A. *Id*. at 452. The district court was reversed as to Admiralty Inlet but not on the basis of any specific evidence. *Id*. Thus, neither the geographic rationale nor the evidentiary rationale for this Court's holding that the waters west of Whidbey Island are included in Lummi U&A provides any basis upon which any waters further to the west of the Trial Island line could be included in Lummi's U&A because there are no Lummi fisheries identified to the west of that line.

2. Lummi III *concluded that Lummi's U&A does not have a boundary in common with the Strait of Juan de Fuca and that the boundary of Lummi's U&A is necessarily the Trial Island line*

Lummi III provides that the Strait of Juan de Fuca is somewhere "further west" of the waters west of Whidbey. 876 F.3d at 1008. And, immediately after holding that the waters west of Whidbey Island are included in Lummi's U&A, *Lummi III* clarified that the location of the Strait of Juan de Fuca, which is excluded from Lummi's U&A, was essentially irrelevant to that determination. This Court explained that: "In coming to this conclusion, we need not determine the outer reaches of the Strait of Juan de Fuca ***for purposes of the Lummi's U&A***." *Id.* at 1011 (emphasis added). That is, it would become necessary to determine the outer reaches (boundaries) of the Strait of Juan de Fuca "for purposes of Lummi's U&A" only if Lummi's U&A shares a boundary with the eastern boundary of the Strait of Juan de Fuca as Judge Boldt would have defined it; but *Lummi III* clearly states that it is *not* necessary to determine the boundary of the Strait. Indeed, although this Court has determined that Judge Boldt viewed the Strait of Juan de Fuca as a region distinct from and to the west of Puget Sound, *Lummi I*, 235 F.3d at 451-52, it is likely impossible to determine what he may have conceived the eastern boundary of the Strait of Juan de Fuca to be.

The substance of the disagreement between Lummi and Lower Elwha at this stage of this Subproceeding centers on the U&A boundary determination made by

this Court. This is not a mere subsidiary point as suggested by Lummi. Opening Br. at 17. Lower Elwha sought a boundary determination in the RFD and that "primary issue" has been resolved by the holding in *Lummi III*. To overcome the clear import of the Court's conclusion that the eastern boundary of the Strait of Juan de Fuca is not relevant to Lummi's U&A, Lummi twists the language employed in this Court's opinion.

After arguing for nearly thirty-two pages of its opening brief that the district court erred by failing to follow the very clear language in this Court's opinion, Lummi argues, Opening Br. at 33, that this Court did not use clear language or really mean what it said when it held, in the final sentence of *Lummi III*, "we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of Lummi's U&A." *Lummi III*, 876 F.3d at 1011. Lummi urges that what the Court meant to say was that "it did not need to define the 'outer reaches' of the Lummi's usual and accustomed ground to so hold." Opening Br. at 33. Lower Elwha believes that if that were what this Court meant, it would have used the language urged by Lummi. It is telling that Lummi bases its argument, not on text elsewhere in *Lummi III*, but on the audio recording from the oral argument. Lummi argues that the Court meant to adopt the reasoning provided at oral argument by counsel for Lummi, instead of what *Lummi III* actually held: "we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of Lummi's U&A." *Lummi III*, 876 F.3d at 1011. The

implications of each are profoundly different. On the one hand, the language this Court used necessarily means that the boundary of the Strait of Juan de Fuca is not relevant for purposes of Lummi's U&A because the two areas do not share a boundary. And on the other, the language urged by Lummi suggests that Lummi may continue to push for a boundary further to the west. As explained above, there is no evidentiary or geographic basis for extending Lummi's U&A to the west beyond the Trial Island line. *Lummi III* necessarily established the western boundary.

3. *Because the district court's continuing jurisdiction under Paragraph 25(a)(1) has high potential to lead to serial litigation seeking to refine an established U&A, this Court must carefully consider the extent to which the boundary of Lummi's U&A has necessarily been defined*

Lummi expresses concern that if the district court's approach to *Lummi III* – that it only determined that a Tribe has U&A" somewhere" within a disputed area – were applied to the numerous other Paragraph 25(a)(1) U&A cases decided by this Court, the result could be endless lawsuits seeking to narrow down the precise extent of a given U&A, but – like the classical Greek paradox of Achilles chasing the tortoise but never quite catching up to it – never achieving complete certainty or finality. Opening Brief at 36-38.

That is an understandable concern, but in the context of Paragraph 25(a)(1) continuing jurisdiction – which pertains to whether actions effected or intended by a party are in conformity with *Decision I* – it can also cut the other way. The district court, in the decision under appeal, also noted:

> This Court has previously noted the temptation to resolve "the contours of a tribe's U&A as determined by Judge Boldt at once, in order to facilitate finality and achieve repose." *United States v. Washington*, Case No. C70-9213RSM, 2015 WL 3504872 at *6 (June 3, 2015). But instead, "Paragraph 25(a)(1) jurisdiction contemplates successive lawsuits aimed at clarifying different portions of a tribe's U&A when a party's intended or effected actions raise the need for such clarification." *Id.* As such, "the Court's clarifications in any one subproceeding are necessarily limited to the issues raised in the request before it." *Id.*

ER10. Because of that, the district court expressed pessimism about the potential for eventual resolution of this particular dispute about the extent of Lummi's U&A in the waters west of Whidbey Island:

> The Court recognizes the practical impact of this ruling. Lummi will fish in areas that S'Klallam believes are not in conformity with *Final Decision I* and may possibly expand further into new areas that are objectionable to Lower Elwha as well. This dispute will continue, and the parties appear unlikely to resolve the issue without outside intervention. While further proceedings may occur, the Court notes the difficulty of identifying further evidence before Judge Boldt that will aid the Court in determining his intent.

ER18.

Leaving aside that Lower Elwha litigated for a different outcome in *Lummi III* than the one it now believes it is obliged to recognize, certainly any expansion of Lummi fishing activity west of the Trial Island would be objectionable. Under the district court's serial approach to inter-tribal U&A litigation under Paragraph 25(a)(1), a Tribe with a U&A defined by a broad "to/from" description has the incentive and the option to push the limits of its U&A and put the burden of

challenge and proof on an objecting Tribe, thereby gradually expanding its U&A in the same way that an opposing Tribe might seek gradually to restrict it. That may well be the way it is; certainly that is what the Requesting Tribes were facing when they initiated the prior Subproceeding 89-2, to constrain Lummi from fishing in areas where it had no right. But that is also a reason why this Court must carefully consider whether the boundary of Lummi's U&A, at the Trial Island line, has already been necessarily determined as an unavoidable result of the rationale – based on geographic fact and general evidence of travel – by which *Lummi III* determined that the waters west of Whidbey Island are within Lummi's U&A. If the Court cannot come to that conclusion, it should consider remanding for the purpose of reviewing, one more time, whether there is any evidence from the record before Judge Boldt of Lummi fishing or travel west of the Trial Island to Point Wilson line.

CONCLUSION

The judgment should be reversed and the case remanded with instructions for the district court to enter judgment in favor of Lower Elwha on the ground that the Lummi U&A has been specifically determined, the western boundary of the Lummi U&A is the Trial Island to Point Wilson Line, and that Lummi is foreclosed from fishing beyond that boundary.

DATED this 18th day of February, 2020.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Petitioner Cross Appellant Lower Elwha Klallam Tribe is aware of the following related cases pending in this Court within the meaning of Circuit Rule 28-2.6:

Muckleshoot Indian Tribe v. Tulalip Tribes, No. 18-35441. This appeal arises out of the same underlying district court proceeding, but involves an unrelated dispute and a separate district court subproceeding (No. 2:17-sp-00002 RSM).

Makah Indian Tribe v. Quileute Indian Tribe, No. 18-35369. This appeal arises out of the same underlying district court proceeding, but involves an unrelated dispute and a separate district court subproceeding (No. 2:09-sp-00001 RSM).

Dated: February 18, 2020

s/Stephen H. Suagee
Stephen H. Suagee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Combined Opening and Response Brief for Petitioner-Appellee-Cross-Appellant Lower Elwha Klallam Tribe with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 18, 2020.

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Dated: February 18, 2020

s/ Stephen H. Suagee
Stephen H. Suagee