No. 19-35610, 19-35611, 19-35638

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOWER ELWHA KLALLAM INDIAN 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; SUQUAMISH TRIBE; STATE OF WASHINGTON; MAKAH INDIAN TRIBE; STILLAGUAMISH TRIBE; UPPER SKAGIT INDIAN TRIBE; NISQUALLY INDIAN TRIBE; TULALIP TRIBES; SQUAXIN ISLAND TRIBE; SKOKOMISH INDIAN TRIBE,

Real-parties-in-interest

On Appeal from the United States District Court for the
Western District of Washington,
No. 2:11-sp-00002-RSM

BRIEF FOR APPELLEES-CROSS-APPELLANTS JAMESTOWN AND PORT GAMBLE S'KLALLAM TRIBES

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CORPORATE DISCLOSURE STATEMENT

The Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe are federally recognized Indian Tribes by the Secretary of the Interior. 83 Fed. Reg. 4235-02 (January 30, 2018). Accordingly, a corporate disclosure statement is not required by Rule 26.1 of the Federal Rules of Appellate Procedure.

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INTRODUCTION

For generations, the Jamestown S'Klallam and Port Gamble S'Klallam Tribes have fished the waters of the Strait of Juan de Fuca, a strait off the Pacific Ocean bordered on the south by the Olympic Peninsula, site of the S'Klallam's ancestral homes. Fishing those waters is an historic way of life for S'Klallam tribe members, as well as a source of livelihood. The importance to the S'Klallam of their continued right to fish those waters accounts for their persistence in seeking a full and clear determination of the boundary of their usual and accustomed fishing grounds ("U&A"). Fishing in this "home" water is critical to the preservation of their treaty right for future generations.

Since 1989, a separate tribe, the Lummi Nation, has continually encroached upon the S'Klallam U&A, threatening to disrupt the S'Klallam way of life with their larger fleets and heavier fishing. Travelling southwest from their distant reservation in the Bellingham Bay area, the Lummi enter the historic S'Klallam fishing grounds and deplete the S'Klallam fisheries before returning to their own "home" waters.

As a result of the Lummi's continued encroachment, the S'Klallam have vigorously defended their U&A in litigation for the past three decades, including in the Lummi's three prior appeals to this Court. In the most recent appeal, this Court held that the Lummi U&A included some waters off the west coast of Whidbey Island, which lies to the east of the Strait of Juan de Fuca. The Court declined,

however, to define the outer boundary of the Strait of Juan de Fuca, leaving the details to be worked out by the district court on remand.

On remand, the parties offered three different interpretations of this Court's decision. The Lummi, not surprisingly, sought to interpret this Court's reference to the "waters west of Whidbey Island" as broadly as possible, to include the waters of the eastern part of the Strait of Juan de Fuca and perhaps beyond. In so doing, they ignored language from this Court's previous decisions confining the Lummi U&A to the waters "immediately" west of Whidbey Island—an area that remains to be defined but that cannot possibly extend into the eastern part of the Strait of Juan de Fuca under this Court's precedents.

The Lower Elwha tribe, meanwhile, whose historic fishing grounds are concentrated further west in the Strait of Juan de Fuca and are thus less affected by Lummi incursions, were willing to settle for an interpretation of the "waters west of Whidbey Island" that ceded to the Lummi all the waters east of an arbitrary line running from Trial Island, near Victoria, to Point Wilson, off Admiralty Inlet. That interpretation would likewise have allowed the Lummi to displace S'Klallam fishers in the eastern part of the Strait of Juan de Fuca.

The S'Klallam, finally, argued that this Court had remanded for the district court to determine the full extent of the Lummi U&A in the "waters west of Whidbey Island" as against the S'Klallam U&A in the Strait of Juan de Fuca. The S'Klallam

therefore moved for leave to amend their request for determination ("RFD") in order to properly present the request to the court.

In a perplexing decision, the district court rejected all three positions. The court agreed with the S'Klallam that this Court had not defined the "waters west of Whidbey Island" as broadly as the Lummi or the Lower Elwha claimed. But the court also denied the S'Klallam's motion for leave to amend, citing futility and prejudice to the other parties. The district court thus left undecided the critical issues that this Court had sent back to be determined on remand. It also left the S'Klallam with limited options: if the S'Klallam cannot amend, they must attempt to open a new subproceeding, which is inefficient and unnecessary—and, according to the district court, may be impossible. As a result, the S'Klallam will suffer continued Lummi encroachments on their U&A with no meaningful legal recourse.

The S'Klallam recognize that this case is long-running. But absent an opportunity to clarify the boundary of the Lummi U&A, and given that the Lummi continue to assert an expansive understanding of the "waters west of Whidbey Island," the S'Klallam have little choice but to appeal.

The S'Klallam's argument on appeal is simple: the district court erred in denying the S'Klallam's motion for leave to amend their RFD. Amendment would be neither futile nor prejudicial. The S'Klallam's proposed amendments clearly state a claim for relief, and there are several bases for the district court's exercise of

jurisdiction over the S'Klallam's amended RFD. Furthermore, there would be no prejudice to the Lower Elwha, which can be struck from the subproceeding and still retain full rights of participation, and no prejudice to the Lummi, which would otherwise face identical claims brought by the S'Klallam in a new subproceeding. This Court should therefore reverse the district court's denial of the S'Klallam's motion for leave to amend.

Even if this Court disagrees and sustains the district court's decision, the S'Klallam should at the very least be permitted to seek the same relief in a new subproceeding. Thus, in the alternative, the S'Klallam request that this Court make clear that there is no obstacle to the S'Klallam's filing a fresh RFD in a new subproceeding that requests resolution of the issues left open by the Court's most recent decision in this case.

In addition, and as a corollary, the S'Klallam oppose the positions of the Lummi and Lower Elwha below and before this Court. The district court correctly held that this Court's most recent decision determined only that *some* undefined waters off the west coast of Whidbey Island are included in the Lummi U&A. The view of the Lummi and Lower Elwha—that this Court intended to include all waters east of the Trial Island Line in the Lummi U&A—ignores the language and context of this Court's most recent decision and is plainly inconsistent with other previous decisions by this Court and the district court.

JURISDICTIONAL STATEMENT

The S'Klallam concur with the Lummi's jurisdictional statement. *See* Lummi Br. 1.

STATEMENT OF THE ISSUES ON CROSS-APPEAL

1. Whether the district court erred in denying the S'Klallam's motion for leave to amend their RFD and in striking the S'Klallam's additional evidence.

2. Whether the district court otherwise erred in dismissing this subproceeding on remand, leaving the parties after thirty years with an undefined and unenforceable western boundary for the Lummi's U&A.

TREATIES INVOLVED

The 1855 Treaty of Point Elliott, 12 Stat. 927, and the 1855 Treaty of Point No Point, 12 Stat. 933, are reproduced in the addendum to this brief.

RESTATEMENT OF THE CASE

A. Background

In the 1850s, the United States government entered into a series of treaties with the various Pacific Northwest Indian tribes living in what was then Washington Territory around Puget Sound, the Strait of Juan de Fuca, and the Pacific coast region. Among other things, those treaties typically reserved to the tribes the right to continue fishing in their "usual and accustomed" fishing grounds. The Lummi and S'Klallam both signed treaties reserving that right to their respective tribe

members. *See* 1855 Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927 (Lummi); 1855 Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933 (S'Klallam).

1. The Boldt Decision and the Lummi U&A

More than a century later, the United States and several tribes, including the Lummi, sought judicial determination of the boundaries of the tribes' fishing grounds. In 1974, Judge Boldt of the Western District of Washington issued a foundational decision that would serve as a roadmap for ongoing litigation over tribal fishing rights. *United States v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974) ("*Final Decision No. 1*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975). The Boldt decision first interpreted the treaty phrase "usual and accustomed fishing grounds and stations," or "U&A," holding that "usual" meant "customary," "common," or "frequent," and that "accustomed" meant "often practiced." *Id*. at 356. A tribe's U&A, then, included "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Id.* at 332. A tribe's U&A did not, however, include waters that the tribe only "occasional[ly]" or "incidental[ly]" fished as it traveled from one place to another in open marine waters. *See id.* at 353 (Finding of Fact ("FF") 14).

To determine the boundaries of each tribe's U&A, Judge Boldt turned to a set of reports describing the geographic areas that each tribe had historically fished.

With respect to the Lummi in particular, Judge Boldt relied on two reports to find that the Lummi U&A included "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay." *Id.* at 360. Although Lummi fishers had also testified that the tribe's U&A included waters in the Strait of Juan de Fuca and "in" Whidbey Island, *see United States v. Washington*, 18 F. Supp. 3d 1123, 1161 (W.D. Wash. 1987) (order issued Feb. 15, 1990) (quoting testimony), Judge Boldt did not identify or rely on that testimony in determining the bounds of the Lummi U&A, as evidenced by his annotated findings of fact regarding the Lummi U&A. *See Final Decision No. 1*, 384 F. Supp. at 360-61 (FF 45-46); *see also United States v. Washington*, 18 F. Supp. 3d at 1162 (noting that the Boldt decision did not cite that testimony).

In recognition that all potential issues were not foreseeable, Judge Boldt also specified the grounds on which a tribe could invoke the court's continuing jurisdiction and return to the court for a resolution. Those grounds are listed in paragraph 25 of the injunction portion of the Boldt decision, *see* 384 F. Supp. at 419, which was later modified in *United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1991) (order issued Aug. 24, 1993). As relevant here, under paragraph 25(a) of the modified Boldt injunction, a tribe may file a "Request for Determination" asking the district court to decide:

> [25(a)](1) Whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I [the Boldt decision] or this injunction;
> . . . .
> (4) Disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;
> . . . .
> (6) The location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I; and
> (7) Such other matters as the court may deem appropriate. *Id.*

2. The S'Klallam and Lower Elwha U&A

After the Boldt decision, follow-on district court decisions determined the U&A of the S'Klallam and Lower Elwha tribes, which share common ancestry. The S'Klallam and Lower Elwha U&A was held to include the Strait of Juan de Fuca, from the Hoko River east to the mouth of Hood Canal, as well as the waters of the San Juan archipelago and "the waters off the west coast of Whidbey Island." *United States v. Washington*, 626 F. Supp. 1405, 1442-43 (W.D. Wash. 1985); *see also United States v. Washington*, 459 F. Supp. 1020, 1048-49 (W.D. Wash. 1978) (orders issued March 28, 1975, April 18, 1975).

B. *Lummi I, Lummi II,* and *Lummi III*

The present dispute began in 1989, when the Lummi began to allow their tribe members to fish halibut in the Strait of Juan de Fuca, Hood Canal, and Admiralty Inlet. *See* JSER 321-323 (Lummi Halibut Regulations Opening areas 6, 7, and 7A); *United States v. Washington*, 18 F. Supp. 3d at 1155. Fearing the effect on those areas of the Lummi's larger fleets and more aggressive fishing, the S'Klallam,

Lower Elwha, and Skokomish Tribes filed a Request for Determination ("RFD") under paragraph 25(a)(1) of the modified Boldt injunction, asserting that the Lummi were not fishing "in conformity with the Boldt decision." *Id.*; ER 166-169. The RFD argued that the Boldt decision had not included "Admiralty Inlet, the mouth of Hood Canal, or any area west of Whidbey Island" in the Lummi U&A. JSER 304-319. The district court agreed that the entire disputed area was outside the Lummi U&A and granted summary judgment to the Requesting Parties. The Lummi appealed.

1. *Lummi I*

On appeal, this Court largely agreed with the district court, holding that the Lummi U&A, as described by Judge Boldt, did not include the Strait of Juan de Fuca or Hood Canal. *United States v. Lummi Indian Tribe* ("*Lummi I*"), 235 F.3d 443, 453 (9th Cir. 2000). With respect to the Strait of Juan de Fuca in particular, this Court observed that "[a]lthough 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 Lummi U&A. *Id.* at 451. The Court also rejected the Lummi's argument that the term "Puget Sound" included the "Strait of Juan de Fuca," explaining that Judge Boldt "viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound." *Id.* at 451-52.

With respect to Admiralty Inlet, however, this Court reversed the district court's decision, concluding that the inlet fell within the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle," which are part of the Lummi U&A. *Id*. at 452. The Court stated that "Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula," and reasoned that Admiralty Inlet "would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle.'" *Id*. (asserting that Lummi would likely "travel past Orcas and San Juan Islands" and "proceed through Admiralty" to reach the "environs of Seattle").

2. *Lummi II*

After *Lummi I*, the Lummi again began to fish in the Strait of Juan de Fuca, this time claiming that *Lummi I* remained ambiguous about the western boundary of the Lummi U&A. *See* ER 204. Specifically, to "make the boundaries of these waters clear" so fishers and enforcement officers could determine where it was "legal to fish," the Lummi fishing commissioner drew a management line from Trial Island, near Victoria, Canada, to Point Wilson, on Admiralty Inlet. *Id.* The effect of the "Trial Island Line," as it became known, was to open the entire eastern part of the Strait of Juan de Fuca to Lummi fishing. *See* ER 157.

The S'Klallam and Lower Elwha ("Requesting Parties") filed a new RFD challenging the Lummi's conformity with the Boldt decision. The district court ruled that, under *Lummi I*, the disputed waters were excluded from the Lummi U&A, which did "not include the eastern portion of the Strait of Juan de Fuca *or* the waters west of Whidbey Island." ER 165 (emphasis added); *United States v. Washington*, 20 F. Supp. 3d 899, 979-80 (W.D. Wash. 2008) (order issued Oct. 11, 2012).[1] The Lummi moved for reconsideration, and the district court clarified that although the Lummi were free to pass *through* the Strait of Juan de Fuca to reach Admiralty Inlet, they could not fish along the way. ER 148, n.2. After the Lummi moved for a stay, the court added that the Lummi could not extend their U&A into the Strait of Juan de Fuca by arguing that the Strait was part of their travel path: that would violate the principle articulated in the Boldt decision that occasional or incidental fishing while in transit does not qualify as U&A fishing. JSER 287-288. The Lummi again appealed.

On appeal, the Lummi argued that the Strait of Juan de Fuca was "somewhere to the west" of the western shores of Whidbey Island, while the S'Klallam and Lower

[1] In particular, the district court rejected the Lummi's attempt to define the Strait of Juan de Fuca as being further west based on the lettering of USA-62, a map the court found "historically interesting" but of "no import in the context of this subproceeding." ER 158; *see also, e.g.*, Lummi Br. 7-8. Placement of lettering on a map is at the discretion of the cartographer [JSER 292] and does not limit the extent of the waterbody. JSER 200; Lummi Br. 7-8.

Elwha contended that, under the Boldt decision and this Court's precedent, "the eastern boundary of the Strait of Juan de Fuca" was "the western shores of northern Whidbey Island." *United States v. Lummi Nation*, ("*Lummi II*"), 763 F.3d 1180, 1186 (9th Cir. 2014). This Court, however, concluded that no court had yet "*explicitly* determined the eastern boundary of the Strait of Juan de Fuca." *Id.* at 1186-87. Furthermore, the Court stated that *Lummi I* was "ambiguous" about whether "the waters *immediately* to the west of northern Whidbey Island" were within the Lummi U&A, and so "this issue" had also not yet been decided "by necessary implication." *Id.* at 1187 (emphasis added). The Court thus reversed and remanded to the district court.[2]

3. *Lummi III*

On remand, the parties cross-moved for summary judgment. The district court first considered the import of *Lummi II*'s conclusion that the boundary of the Lummi U&A had not yet been judicially determined. The Lummi argued that they should be allowed to invoke paragraph 25(a)(6) of the modified Boldt injunction, which governs disputes about the location of any tribe's U&A that was "not specifically determined" by the Boldt decision itself. *United States v. Washington*, 18 F. Supp. 3d at 1213 (order issued Aug. 24, 1993). Proceeding under 25(a)(6) would have

[2] Judge Rawlinson, dissenting, stated that "[i]t stands to reason that any other portion of the waters west of Whidbey Island that were not included in our description remain excluded from the Lummi U&A." *Lummi II*, 763 F.3d at 1189.

allowed the Lummi to introduce new evidence regarding their U&A. But the district court ruled that the case would proceed under 25(a)(6) only if it could not be resolved under 25(a)(1) by reference to the geographic record before Judge Boldt. *See* JSER 225.

The district court then granted summary judgment to the S'Klallam and Lower Elwha. The court reiterated the principle that mere historic travel through a fishing area does not create U&A and concluded that "an examination of the record before Judge Boldt in 1974 reveals that there is no factual evidence that the Lummi customarily fished at any time in the disputed waters at issue here"—that is, in the "eastern portion of the Strait of Juan de Fuca," the "waters west of Whidbey Island," or the "in between" waters. ER 103, 109, 112 (citing *Final Decision No. 1*, 384 F. Supp. at 353); *see also Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010) (recognizing the principle that mere travel cannot create U&A). The Lummi once again appealed. The sole question on appeal was whether the district court erred in holding that, under the Boldt decision and this Court's precedent, the Lummi had *no* U&A in the disputed waters. *See* ER 17.

In *Lummi III*, this Court reversed and remanded. *United States v. Lummi Nation* ("*Lummi III*"), 876 F.3d 1004 (9th Cir. 2017). As relevant here, *Lummi III* did three things. *First*, it disagreed with the district court's ruling that, under the Boldt decision and this Court's precedent, the Lummi had *no* U&A in the disputed

waters. Instead, the Court reasoned, *some* Lummi U&A must exist along the Lummi's travel path between the San Juan Islands and Admiralty Inlet. In reaching that conclusion, the Court explained:

> We previously concluded that the Treaty secures the Lummi's right to fish in Admiralty Inlet because the Lummi would have used the Inlet as a passage to travel from its home in the San Juan Islands to present-day Seattle. 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.

Id. at 1007. The Court also relied on its earlier statement in *Lummi II* that "[*Lummi I*'s] reasoning suggests that the waters *immediately* to the west of northern Whidbey Island would be included within the Lummi's U&A." *Id.* at 1010 (quoting *Lummi II*, 763 F.3d at 1187) (emphasis added). The Court thus held that at least some "waters west of Whidbey Island"—specifically, those that "lie between the southern portion of the San Juan Islands and Admiralty Inlet"—were "encompassed in" the Lummi U&A. *Id.* at 1011. But that was all it held: because *some* Lummi U&A must exist in the disputed area, the district court was incorrect to conclude that *none* existed. The Court did not purport to go further and define the full extent of the Lummi U&A within the disputed area.

Second, the Court did not mention Trial Island or the Lummi's "Trial Island Line" in concluding that *some* Lummi U&A existed in the disputed area. That should not be surprising, because adopting the Trial Island Line as the western boundary of the Lummi U&A would mean including an additional 300-plus square miles of water

simply for the Lummi to travel from the Fraser River on the mainland north of the Lummi reservation to their U&A in the environs of present-day Seattle. *See* JSER 301.

Third, the Court reiterated that the Strait of Juan de Fuca was "excluded" from the Lummi U&A. *Lummi III*, 876 F.3d at 1008. Yet the Court did not attempt to reconcile that exclusion with its ruling that some "waters west of Whidbey Island" were included in the Lummi U&A. The Court merely stated that the Strait of Juan de Fuca "lies further west" of the "waters west of Whidbey Island," *id.*, and added that it "need not determine the outer reaches of the Strait of Juan de Fuca" in order to resolve the appeal, *id.* at 1011. The Court also did not reconcile its holding in *Lummi III* with other decisions determining the bounds of the S'Klallam and Lower Elwha U&A and seeming to designate *all* waters west of Whidbey Island as part of the Strait of Juan de Fuca. *See United States v. Washington*, 459 F. Supp. at 1049 (describing the Strait of Juan de Fuca in the S'Klallam U&A as extending from the Hoko River to the mouth of Hood Canal); *United States v. Washington*, 626 F. Supp. at 1530 (describing the portion of Tulalip's U&A in the Strait of Juan de Fuca as "northeasterly of a line from Trial Island (in Canada) to Protection Island"). Instead, the Court remanded the case to the district court for further proceedings.

C. Decision on Remand and This Appeal

On remand, the parties disagreed about how to proceed. The S'Klallam asserted that *Lummi III* had decided only that there must be *some* Lummi U&A within the disputed waters, leaving it to the district court to determine the precise boundary of that U&A. Resolving that open question was critical because as long as the boundary remained ambiguous, the Lummi remained free to fish in the Strait of Juan de Fuca while claiming to stay within the "waters west of Whidbey Island." JSER 170:15-16 (Lummi claiming that they are "not fishing in the Strait of Juan de Fuca").

In light of *Lummi III*'s holding, the S'Klallam therefore sought to file an amended RFD requesting that the district court (1) determine the Lummi's transit path, (2) define the "waters west of Whidbey Island," and (3) define the eastern boundary of the Strait of Juan de Fuca. *See* ER 6, 80-81, 83-86; JSER 175-190. The S'Klallam also sought to introduce expert testimony analyzing record evidence to show that, historically and geographically, the eastern boundary of the Strait of Juan de Fuca is the western shore of Whidbey Island and that the Trial Island Line would be historically and geographically erroneous. JSER 9-21, 29-165. The S'Klallam proposed, however, to nonetheless define the Lummi U&A to include the immediate nearshore waters of Whidbey Island—but not beyond. ER 30, 86, 148; JSER 186-187. That definition would be consistent with both *Lummi III* and principles

articulated in other decisions by this Court and the district court, particularly the rationale that these waters served as a "nautical path" connecting the San Juan Islands to Admiralty Inlet, itself a narrow passageway. *Lummi III*, 876 F.3d at 1009-10; *see also* ER 81-82; *Lummi II*, 763 F.3d at 1185; ER 97, 148 (Lummi U&A might include nearshore waters immediately to the south of San Juan Island and Lopez Island); JSER 285.

The Lower Elwha, in contrast, took the position that *Lummi III* had fully resolved the parties' dispute by setting the Trial Island Line as the westernmost boundary of the Lummi U&A—thus opening the entire eastern portion of the Strait of Juan de Fuca to Lummi fishing. ER 36-37. The Lower Elwha requested that the district court enter judgment consistent with that interpretation based on what they asserted were "legal and factual" determinations in *Lummi III*. ER 36-37.[3] The tribe indicated its unwillingness to continue litigating the dispute and opposed the S'Klallam's motion for leave to amend. ER 63-74.

The Lummi, meanwhile, agreed with the Lower Elwha that *Lummi III* had resolved the parties' dispute. Puzzlingly, however, the Lummi did not agree with the Lower Elwha that the western boundary of the Lummi U&A had been fully

[3] It is unclear on what basis Lower Elwha concluded that this Court made "factual determinations" in *Lummi III*, as it is the district court's role to make factual findings. ER 37; *see Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531, 541 (9th Cir. 1982) (deferring to the "district court's fact-finding function").

determined. In the Lummi's view, *Lummi III* not only held that *all* the disputed waters were "waters west of Whidbey Island" included in the Lummi U&A, but also left open the possibility that the western boundary of the Lummi U&A might lie even further west than the Trial Island Line. ER 33-35. The Lummi thus opposed both the S'Klallam's motion for leave to amend and the Lower Elwha's motion for entry of judgment. *See* ER 7, 34.

The district court gave none of the parties the relief they requested. *See* ER 18-19. The court disagreed with the contention that *Lummi III* had adopted the Trial Island Line as the western boundary of the Lummi U&A, reasoning that such an interpretation would stretch *Lummi III* "past its limits" and was also "belied by the procedural posture of the case." ER 16. Instead, the court stated that the "lone conclusion" of *Lummi III* was that "*some* Lummi U&A lies within the disputed waters." ER 17. Thus, *Lummi III* had "done little to resolve the underlying conflict" between the tribes. ER 5.

Nevertheless, the district court also denied the S'Klallam's motion to amend and struck their proposed expert declaration. ER 14-15. The court concluded that the S'Klallam's proposed amendments would be futile (both by raising jurisdictional concerns and by failing to state a claim) and would prejudice the Lummi and the Lower Elwha. ER 12-13. The court then simply dismissed the case. ER 19. It did so despite acknowledging that *Lummi III* did "little" to resolve the core of the parties'

dispute and despite recognizing the "practical impact" of its ruling: the Lummi will proceed to fish in the S'Klallam's claimed U&A, the S'Klallam will be powerless to stop the Lummi, the "dispute will continue," and the parties "appear unlikely to resolve the issue without outside intervention." ER 18.

All parties appealed. ER 20-27.

SUMMARY OF ARGUMENT

The district court erred in denying the S'Klallam's motion for leave to file an amended RFD. Absent prejudice or a strong showing of futility, the S'Klallam were presumptively entitled to file an amended RFD under the generous standard for amended pleadings. And the S'Klallam's proposed amended RFD was neither futile nor prejudicial. Contrary to the district court's cursory analysis, there were at least four available bases for jurisdiction under paragraph 25(a) of the modified Boldt injunction. Furthermore, the proposed amended RFD stated a claim for relief with as much specificity as possible within the constraints imposed by the Boldt decision and this Court's precedents interpreting that decision. As for prejudice, there would be no prejudice to the Lower Elwha: if they do not wish to continue litigating, they may be struck from the amended RFD, and if they later do wish to be involved, they may file an answer or opposition and fully participate as interested parties. There would also be no prejudice to the Lummi: the dispute between the parties will continue regardless of whether the S'Klallam are permitted to proceed more

efficiently by filing an amended RFD or are forced instead to initiate a new subproceeding. This Court should therefore reverse the district court's denial of the S'Klallam's motion for leave to amend.

If the Court sustains the district court's denial of leave to amend, however, the Court should at the very least clarify that there would be no obstacle to the S'Klallam's filing a new RFD in a new subproceeding in order to request resolution of the issues left open by *Lummi III*. The district court suggested that the S'Klallam could initiate a new subproceeding, but also hinted (without elaborating) that it might be difficult or impossible to do so. If the S'Klallam cannot finally settle their rights in the present subproceeding, they should at least be permitted to settle them in a new subproceeding. The S'Klallam respectfully request that the Court at least make that much clear.

The S'Klallam also oppose the positions of the Lummi and Lower Elwha. Contrary to the Lummi's argument, this Court in *Lummi III* did not hold that the Lummi U&A extends at least to the Trial Island Line, and perhaps beyond. Rather, as the district court correctly concluded, *Lummi III* determined only that *some* undefined waters off the west coast of Whidbey Island must be included in the Lummi U&A. That much is clear from *Lummi I*'s exclusion of the Strait of Juan de Fuca from the Lummi U&A, *Lummi III*'s limited reversal of the district court's exclusion of *all* disputed waters from the Lummi U&A, a contextual understanding

of the language used in *Lummi III*, and a proper understanding of *Lummi III*'s reasoning in light of the relevant geography. The Lummi's contention that this Court extended the Lummi U&A at least to the Trial Island Line, and perhaps beyond, must therefore be rejected.

For essentially the same reasons, the Lower Elwha's position that this Court adopted the Trial Island Line in *Lummi III* must also be rejected. ER 36-37. The Lower Elwha's understandable desire to be done with this litigation cannot change what the Court decided, including the Court's remand for the district court to engage in its fact-finding function. ER 37. The Court should reverse the district court's denial of the S'Klallam's motion for leave to amend and remand for further proceedings.

S'KLALLAM ARGUMENT ON CROSS-APPEAL

I. The District Court Erroneously Denied Leave to Amend the RFD.

Under Federal Rule of Civil Procedure 15(a), courts must "freely" grant leave to amend a pleading "when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). A district court may deny a motion to amend due to (1) the movant's undue delay, bad faith, or dilatory motive; (2) repeated failure to cure deficiencies by previous amendments; (3) undue prejudice to the opposing party; or (4) futility of amendment. *Carvalho v. Equifax Info. Servs., LLC,*

629 F.3d 876, 892-93 (9th Cir. 2010). But "[n]ot all of the factors merit equal weight": prejudice to the opposing party is the "touchstone of the inquiry" and "carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052. Thus, "[a]bsent prejudice"—which the opposing party bears the burden of proving—or a "strong showing" of any of the other factors, "there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Id.*; *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

In denying the S'Klallam's motion for leave to amend the RFD, the district court did not suggest that the S'Klallam had engaged in undue delay or acted in bad faith. Rather, the court denied the motion on the grounds of futility (including "jurisdictional concerns" and failure to state a claim) and prejudice. ER 8-13. This Court reviews the former ruling *de novo* and the latter for abuse of discretion. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010); *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).

A. There is no jurisdictional barrier to amending the RFD.

In denying leave to amend, the district court cited "jurisdictional concerns." ER 8. That was legal error. Jurisdiction over the S'Klallam's proposed amended RFD would be proper under any of the following paragraphs of the modified Boldt injunction: 25(a)(1), which allows the district court to determine whether a party's actions are "in conformity with" the Boldt decision; 25(a)(4), which permits the

court to decide disputes that the parties cannot resolve among themselves; 25(a)(6), which empowers the court to determine a U&A not "specifically determined" by the Boldt decision; and 25(a)(7), which allows the court to decide "other matters" as it "deem[s] appropriate."

The S'Klallam's RFD originally invoked paragraphs 25(a)(1), 25(a)(4), and 25(a)(7). ER 217. After *Lummi II*, the court and parties discussed proceeding under those paragraphs, and agreed to switch to proceeding under paragraph 25(a)(6) if it became necessary to introduce new evidence to resolve the boundary dispute. JSER 224-225, 233-235, 260-261, 263-264. The court specifically stated that if the "boundaries of the U&A here have not, as the Ninth Circuit indicated, been previously determined," then the subproceeding "very likely, invokes not paragraph 25(a)(1), but 25(a)(6)." JSER 260:9-13.

The S'Klallam's proposed amended RFD would proceed under those same four paragraphs, which provide the district court with more than adequate basis to exercise jurisdiction. JSER 177-179. First, jurisdiction is proper under 25(a)(1): the amended RFD would argue that the Lummi U&A, as defined in the Boldt decision, does not extend to the Trial Island Line, and that by fishing all the way out to the Trial Island Line, the Lummi are not acting "in conformity with" the Boldt decision. Second, jurisdiction is proper under 25(a)(4): there is a live dispute over the western boundary of the Lummi U&A that the parties have not been able to resolve among

themselves. Indeed, the very fact that the Lummi, S'Klallam, and Lower Elwha have offered *three* different and inconsistent interpretations of this Court's decision in *Lummi III* speaks for itself in satisfying 25(a)(4). Third, jurisdiction is proper under 25(a)(7) because it would be "appropriate" for the district court to adjudicate what remains of the parties' dispute—a dispute that has been ongoing for more than three decades and that vitally affects S'Klallam tribe members' ability to make a living. Finally, jurisdiction is proper under 25(a)(6) because the Boldt decision did not "specifically determine" the western boundary of the Lummi U&A. *See Lummi II*, 763 F.3d at 1187-88 (describing *Lummi I*'s interpretation of the Boldt decision as "ambiguous" about "whether the waters immediately to the west of northern Whidbey Island are included within the Lummi U&A," and concluding that "this issue has not yet been decided explicitly or by necessary implication"); ER 129 (Lummi arguing that "[b]ecause Judge Boldt did not specifically determine the western boundary of the Lummi's U&A, a genuine question of material fact exists on the boundary's location").

In denying leave to amend based on "jurisdictional concerns," the district court primarily addressed paragraph 25(a)(6). ER 8-11. The court seemed to reason as follows: (i) this Court in *Lummi III* held that the Boldt decision had "specifically determined" that the Lummi U&A included "at least some" of the disputed waters; (ii) the evidence that formed the basis of that part of the Boldt decision must have

been somewhere in the record before Judge Boldt; therefore, (iii) the Boldt decision must have "specifically determined" the Lummi U&A, which would preclude a 25(a)(6) proceeding. ER 10-11.

But step (iii) of that chain of reasoning does not at all follow, as even the district court seemed to recognize in the same breath: *Lummi III* "did *not* identify the extent or location" of the Lummi U&A that lies within the disputed waters. ER 10 (emphasis added); *see also* ER 5 ("The Ninth Circuit's latest ruling has done little to resolve the underlying conflict."); *id.* ("The Ninth Circuit did not define 'the waters west of Whidbey.'"). Rather, *Lummi III* held only that *some* "waters west of Whidbey Island" must be included in the Lummi U&A, and remanded to the district court to resolve what remained of the parties' dispute. Rather than undertake that task—by further interpreting the Boldt decision in light of *Lummi III* or admitting new evidence to determine the precise western boundary of the Lummi U&A—the district court seemed to abdicate its responsibility, stating that the "S'Klallam's argument appears better suited for the Ninth Circuit." ER 9.

In any event, whatever this Court makes of the district court's reasoning, it cannot be that there is *no* jurisdictional basis for the district court to consider the S'Klallam's proposed amended RFD. There is a live dispute among the parties over the western boundary of the Lummi U&A, an issue left open by *Lummi III*. Whether the amended RFD proceeds under 25(a)(1), 25(a)(4), 25(a)(6), or 25(a)(7), this is

precisely the kind of dispute that the Boldt injunction grants the district court continuing jurisdiction to decide. It was thus legal error for the court to refuse to exercise any jurisdiction over the amended RFD.

B. The proposed amended RFD states a claim under 25(a)(1).

Jurisdiction aside, the district court also held that amendment would be futile because the S'Klallam's proposed amended RFD failed to adequately state a claim under paragraph 25(a)(1)—which, again, empowers the court to determine whether a party's actions are "in conformity with" the Boldt decision. In particular, the court faulted the S'Klallam for failing to indicate with "adequate specificity" the boundary line beyond which it claimed the Lummi were forbidden to fish. ER 11.

But the S'Klallam's proposed amended RFD stated its claim for relief with as much specificity as the various decisions in this case allowed it to. Again, the dispute here boils down to a disagreement about where the Strait of Juan de Fuca ends and the Lummi U&A begins. The original Boldt decision did not define the Strait of Juan de Fuca, except to indicate that it was separate from "Northern Puget Sound." *Final Decision No. 1*, 384 F. Supp. at 411. With respect to the Lummi U&A, the decree did not mention or refer to the Strait of Juan de Fuca or Whidbey Island, instead using general and rather vague geographic language, such as "Northern Puget Sound," to describe an area where the Lummi fished. *See, e.g.*, *id.* at 360. Then, in *Lummi II*, this Court indicated that the waters "immediately west of

northern Whidbey Island" were not "decided explicitly or by necessary implication." *Lummi II*, 763 F.3d at 1187-88. Later, the original RFD in this matter identified a large area that the Requesting Parties argued was not Lummi U&A under the Boldt decision. *Lummi III* concluded that *some* portion of that area was Lummi U&A, but still did not define where that U&A ends and the Strait of Juan de Fuca begins. The S'Klallam's consistent position, as confirmed in *Lummi I* and reiterated in the proposed amended RFD, is that the Lummi U&A does not extend *into* the Strait of Juan de Fuca.

The S'Klallam should not be penalized for their inability to state their claim with greater specificity than that, given that no decision in this case has yet adopted a more precise definition of the boundary between the Lummi U&A and the Strait of Juan de Fuca. Indeed, the S'Klallam would prefer, and have proposed, a very precise definition of the Strait of Juan de Fuca: the definition of the U.S. Geological Survey. *See* JSER 186-187 (requesting judicial notice and a boundary using the USGS definition of the Strait of Juan de Fuca). In the meantime, however, for references to the Lummi U&A, the S'Klallam were stuck with the more general geographic terminology used in the prior decisions in this case.

In light of that reality, the district court should not have faulted the S'Klallam for stating their claim using "broad geographical assertions," as though greater specificity were required as a matter of law. ER 12. In the context of this case, the

S'Klallam's claim was stated with as much specificity as the various relevant decisions allowed, and, in any event, it was certainly stated specifically enough to show the S'Klallam were entitled to relief. *See* Fed. R. Civ. P. 8. In concluding otherwise, the district court committed legal error.

C. Amendment would not prejudice the Lower Elwha or the Lummi.

Contrary to the district court's decision, allowing the S'Klallam to amend their RFD would prejudice neither the Lower Elwha nor the Lummi.

The Lower Elwha indicated to the district court that they were unwilling to continue litigating this dispute via an amended RFD and stated that they were entitled to a resolution of their RFD. ER 37; ER 63-64. Although the district court denied the Lower Elwha's motion for entry of judgment, the court agreed that the Lower Elwha "should generally be entitled to some resolution" of their RFD. ER 13. The court nevertheless seemed to think that the Lower Elwha would be prejudiced by the S'Klallam's proposed amended RFD, and it gave them a decision. ER 13. Yet there would be no prejudice to the Lower Elwha's interests from the S'Klallam's proposed amended RFD, which merely asks for a more clearly defined boundary than "some" waters west of Whidbey Island. Furthermore, if the Lower Elwha prefer final resolution to continued litigation, the tribe can be struck as a Requesting Party, allowing the S'Klallam to proceed on the amended RFD alone. If the Lower Elwha later decide they want some further say in the matter, the tribe can,

if it wishes, file an answer or opposition to the S'Klallam's amended RFD, just as the Lummi did in response to the original RFD in this matter. *See, e.g.*, ER 13, 206-213; *see also United States v. Washington*, 20 F. Supp. 3d at 983 (supplemental order issued Nov. 20, 2012) (¶ 6 describing how non-requesting/responding party may still participate as an interested party). Such an arrangement would allow "resolution" of both the Lower Elwha's and the S'Klallam's boundary claims. It would also preserve the Lower Elwha's ability to continue to assert their position. It is difficult to see, and the district court did not explain, how the Lower Elwha would be prejudiced by that arrangement.

There would also be no prejudice to the Lummi from an amended RFD. In a somewhat thin analysis of prejudice to the Lummi, the district court cited "timing and finality" issues, referring to the Lummi's contention that the S'Klallam could have asserted the arguments made in the proposed amended RFD earlier in this litigation. ER 13. But that is simply wrong: *Lummi III* was the first decision to hold that some undefined portion of the disputed waters *is* included in the Lummi U&A, so it was not until after *Lummi III* that the S'Klallam had reason to request a precise determination of the western boundary of the "waters west of Whidbey Island." The district court itself seemed to recognize that point in acknowledging that prejudice to the Lummi from an amended RFD would be "mitigated" by the fact that the S'Klallam could always simply bring a fresh challenge to the Lummi U&A in a new

proceeding. *See* ER 13. But the court failed to follow the logic of that point to the conclusion that an amended RFD would not unduly prejudice the Lummi.

The district court also cited the specter of "duplicative discovery" from an amended RFD. *Id.* As the S'Klallam argued, however, and the court again seemed to acknowledge, barely any discovery has yet taken place in this matter (mere laydowns), so the Lummi cannot possibly be prejudiced by duplicative discovery. *See* ER 13. In short, there is no good argument that the Lummi would suffer prejudice from an amended RFD that simply seeks to decide what *Lummi III* left open for the district court to resolve on remand.

Despite considering those arguments and stating that they "weigh[ed] against" the Lummi's and Lower Elwha's arguments for prejudice, the district court nonetheless denied leave to amend because it concluded that "initiating a new subproceeding" would not "substantially burden[]" the S'Klallam. ER 13. As an initial matter, that conclusion is perplexing because the court then stated, without further explanation, that opening a new subproceeding might be "especially difficult or impossible here." ER 14. But even setting that oddity aside, the district court's prejudice analysis cannot be sustained because the court improperly shifted the burden of proving prejudice: rather than require the Lummi and Lower Elwha to prove that they *would* be prejudiced by an amended RFD, the court required the S'Klallam to show that they would *not* be prejudiced by initiating a new

subproceeding. That was legal error. Because the Lummi and Lower Elwha failed to prove that they would be prejudiced by the filing of the S'Klallam's proposed amended RFD, the district court's denial of leave to amend must be reversed.[4]

II. The S'Klallam Should At Least Be Permitted to File a New RFD.

Even if this Court were to sustain the district court's denial of leave to amend, the S'Klallam should at the very least be permitted to initiate a new subproceeding to request determination of the western boundary of the Lummi U&A. As discussed, and as the district court recognized, *Lummi III* did not resolve where the Strait of Juan de Fuca ends and the Lummi U&A in the "waters west of Whidbey Island" begins. Nor would there be any jurisdictional barrier to a new RFD requesting resolution of the parties' ongoing dispute over the western boundary of the Lummi U&A. Such an RFD could proceed under any of the heads of jurisdiction discussed above. Indeed, the district court itself did not express any concern about a jurisdictional basis for a *new* RFD; it merely believed (incorrectly, as the S'Klallam have argued) that there might be jurisdictional issues associated with an *amended* RFD in the *present* subproceeding.

[4] Given that earlier in the case, both the Lummi and the Lower Elwha discussed how it would make sense to proceed under paragraph 25(a)(6) if the 25(a)(1) proceeding ended without a boundary, it was especially disingenuous of either tribe to claim prejudice when the S'Klallam proposed to do just that. *See* JSER 224-226, 264:8-25, 266-267.

There would also be no prejudice to the Lummi or Lower Elwha from a new RFD in a new subproceeding. The present subproceeding would be over, and the Lower Elwha would be free to refrain from involvement in the new proceeding. The Lummi, meanwhile, could not oppose a new RFD on the basis of "timing" or "finality" issues. The Boldt decision expressly contemplated the likelihood of ongoing tribal disputes over fishing rights and provided for continuing jurisdiction over certain specifically enumerated kinds of disputes. *See United States v. Washington*, 18 F. Supp. 3d at 1213 (order issued Aug. 24, 1993). The dispute here is ongoing because the Lummi continue to encroach on the S'Klallam U&A in the Strait of Juan de Fuca. Given that the S'Klallam have no other available means to challenge ongoing Lummi incursions into S'Klallam fishing grounds, the district court cannot just leave the matter as is. *See* ER 12:13-15 ("Without some alleged boundary, S'Klallam will be unable to show—based on the evidence before Judge Boldt—that Lummi fishing is out of compliance with *Final Decision I*.").

To be clear, the S'Klallam continue to maintain that it would be far more efficient to file an amended RFD than to file a new subproceeding to ask the same question: what is the western boundary of the Lummi U&A? *See* ER 236; JSER 316. But the S'Klallam also wish to ensure that, should this Court sustain the district court's denial of leave to amend, there would be no barrier to the S'Klallam's filing a new RFD in another subproceeding. In its analysis of prejudice, the district court

seemed to acknowledge that the S'Klallam could open a new subproceeding, but, curiously, it also vaguely implied that there might be some obstacle. *See* ER 14 ("it may be especially difficult or impossible" to bring a new subproceeding); ER 13 (initiating a new subproceeding, "if the S'Klallam may," would not be substantially burdensome). Yet the court identified no actual obstacle, and the S'Klallam are aware of none. For the avoidance of any doubt, if this Court sustains the district court's denial of leave to amend, the S'Klallam respectfully request that the Court also make clear that the S'Klallam are still free to initiate a new subproceeding.

III. Regardless of the Method of Proceeding, It Is Important to Determine the Western Boundary of the Lummi U&A.

Taking a step back, it is important to emphasize that this is not just an abstract dispute among lawyers over lines on a map. Lummi incursions on S'Klallam fishing grounds result in irreparable cultural damage and displacement of S'Klallam fishers. *See, e.g.*, JSER 7, ¶¶4-7 (describing harm to S'Klallam way of life); JSER 167-168, ¶¶12-13 (describing impact of Lummi's large fleet in the Strait of Juan de Fuca); JSER 270 (granting a preliminary injunction because Lummi fishing in S'Klallam fishing grounds displaced S'Klallam fishers and reduced their catch, creating a "harm that is cultural as well as economic and therefore not readily compensable"); JSER 278 ("The Lummi harvest the bulk of the crab, shrimp, sea urchin and sea cucumber resources in the San Juan Region, typically amounting to more than a million pounds of combined resource, and then move south to the Strait and

significantly impact S'Klallam harvest opportunity in a Region that is critical to the economic survival of S'Klallam fishers."). The S'Klallam have been vigorously litigating this issue for over three decades because it concerns the survival of the S'Klallam's treaty rights, customs, and "way of life" that must be practiced to be taught to the next generation. JSER 7.

At its core, this case concerns the fishing grounds of sovereign tribes, which agreed to give up the right to defend those grounds by force, in exchange for having them defined and adjudicated peacefully by treaty. *See* 1855 Treaty of Point No Point, 12 Stat. 933. The boundaries of tribal fishing grounds are comparable to the borders between states: it is essential that they be defined precisely so that all parties can plan and arrange their affairs in a predictable and orderly fashion. Uncertainty about the western boundary of the Lummi U&A leaves the S'Klallam in the kind of untenable position the State of Washington would find itself in if Oregon authorities steadily encroached upon southern Washington territory but equally resisted all efforts to define the border between the two states.

In more concrete terms, if the Lummi U&A extends into the eastern portion of the Strait of Juan de Fuca, then the S'Klallam must fish fewer hours in that area, S'Klallam fishers must plan around fewer fishing hours and smaller catches, and the S'Klallam bands must manage the area to ensure that those limits on fishing are observed. If the Lummi U&A is instead confined to the waters immediately off the

coast of Whidbey Island, then the S'Klallam will have meaningful access to historical fisheries and predictability for their fishers in the Strait of Juan de Fuca. Regardless, the parties need certainty. The one unacceptable outcome would be for the western boundary of the Lummi U&A to remain vague and undetermined, subject to continued subtle shifting into the Strait by aggressive Lummi fishing practices—with no possibility of enforcement, a problem the Lummi themselves recognize. *See* ER 204. Yet that is precisely the outcome that will result unless this Court either reverses the district court's denial of the S'Klallam's motion to amend or at least remands with instructions to allow the S'Klallam to file a new RFD in another subproceeding.

A. The western boundary of the Lummi U&A remains undefined.

At the risk of repetition, it bears reviewing exactly what the various decisions in this case have and have not determined. The Boldt decision defined the Lummi U&A as including "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Final Decision No. 1*, 384 F. Supp. at 360-61. Separate follow-on decisions defined the S'Klallam U&A as including the Strait of Juan de Fuca, from the Hoko River east to the mouth of Hood Canal, as well as the waters of the San Juan archipelago and "the waters off the west coast of Whidbey Island." *United States v. Washington*, 626 F. Supp. at 1442-43 (order issued Oct. 23, 1981 and amended Mar. 8, 1983 and May 24, 1983); *United States v. Washington*,

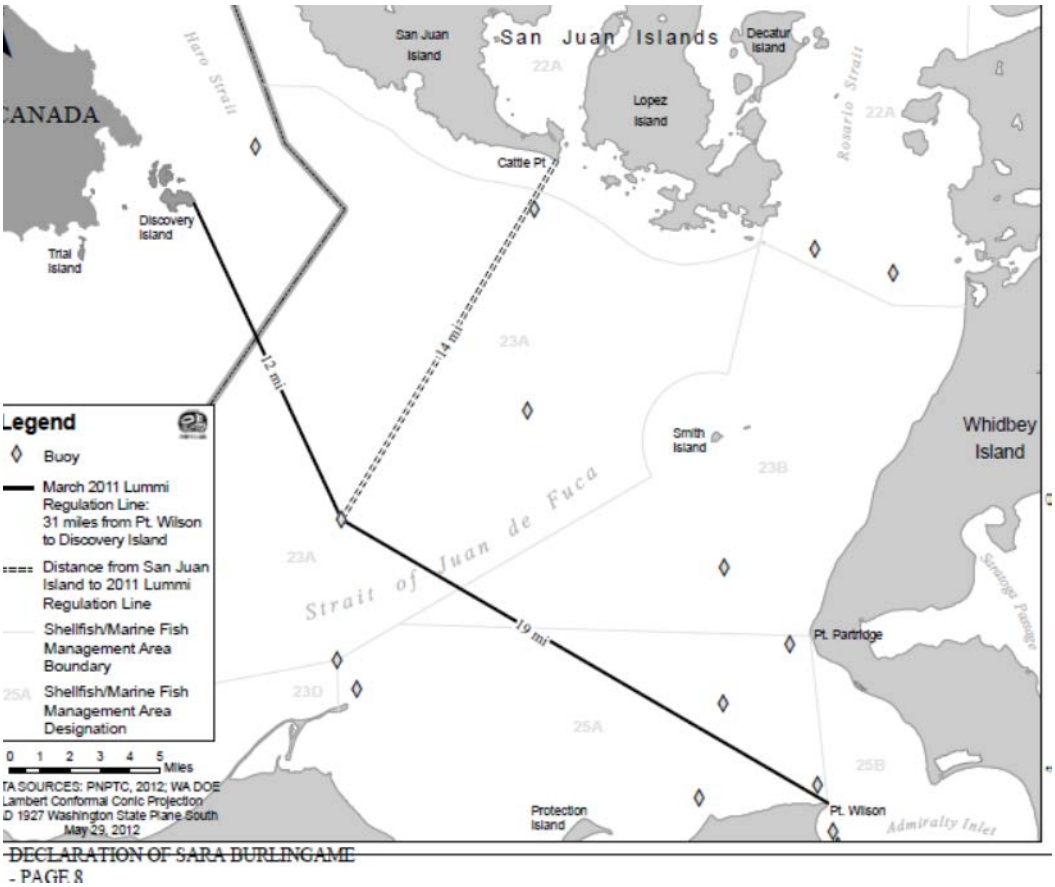
459 F. Supp. at 1048-49 (order issued Mar. 28, 1975). Later, *Lummi I* held that the Lummi U&A included Admiralty Inlet but did *not* include the Strait of Juan de Fuca or Hood Canal. *Lummi I*, 235 F.3d at 451-53. It also described a route that the Lummi used to "travel[] past" "Orcas" and "San Juan Islands" "through" "Admiralty Inlet." *Id*. at 452. That travel-route description did not include fishing the open waters of the Strait of Juan de Fuca, nor did the relevant expert reports indicate that the Lummi fished alongside the S'Klallam in that area at treaty times. *Lummi II* then held that *Lummi I* had not decided whether the waters "immediately" to the west of Whidbey Island were included in the Lummi U&A. *Lummi II*, 763 F. 3d at 1187. And *Lummi III* then held that *some* waters west of Whidbey Island were included in the Lummi U&A, but it declined to specify how far west those waters extended or to set the boundary of the "outer reaches" of the Strait of Juan de Fuca. *Lummi III*, 876 F.3d at 1008, 1011. Instead, *Lummi III* merely referred to unspecified waters along the Lummi's travel route between "the southern portion of the San Juan Islands" and "Admiralty Inlet." *Id*. at 1011. The result, as the district court recognized on remand, was to leave the core of the parties' dispute over the western boundary of the Lummi U&A still unresolved. *See* ER 5.

In practical terms, it is difficult for the parties to discern exactly how to comply with the various decisions ostensibly determining their rights. The decisions exclude the Strait of Juan de Fuca from the Lummi U&A, but also include at least

some "waters west of Whidbey Island" in the Lummi U&A, a seeming contradiction. *See Lummi III*, 876 F.3d at 1008, 1011; JSER 186-187, 329; ER 224 (U.S. Geological Survey, Geographic Names Phase I Data Compilation, defining eastern edge of Strait of Juan de Fuca as "a continuous line extending south from Rosario Head *along Whidbey Island* to Point Partridge and south to Point Wilson") (emphasis added).[5] Those waters are, in turn, described in vague and general terms both as lying between the "southern portion of the San Juan Islands" and Admiralty Inlet—a potentially large area—and as being confined to the smaller area "immediately" west of Whidbey Island. *Lummi III*, 876 F.3d at 1008, 1010; *see also* JSER 331. That imprecise description of the western boundary of the Lummi U&A is impossible for fishers, fishery managers, and enforcement officers to follow, as the Lummi themselves admit. *See* ER 204. It also allows Lummi fishers to capitalize on the ambiguity by encroaching on the Strait of Juan de Fuca while claiming they are simply fishing the waters "west of Whidbey Island." *See* JSER 170 (Lummi referring to the S'Klallam's concern as hypothetical). The ambiguous western boundary of the Lummi U&A is, in effect, no boundary at all.

[5] The district court has previously stated in another subproceeding that the USGS is a "highly reliable source to consult, and more precise than maps." *United States v. Washington*, 20 F. Supp. 3d 828, 836 (W.D. Wash. 2007).

The map below helps illustrate the S'Klallam's predicament. The solid dark line marks the southwest boundary of the waters that the Lummi claim they historically used as a travel route between Haro Strait and Admiralty Inlet.[6] *See* ER 204; JSER 331.



The line is drawn in such a way as to include not simply a "path," but also a dramatic widening after leaving Admiralty Inlet, veering left to encompass the open marine

[6] The line is approximate because over time the Lummi have switched the terminus between Trial and Discovery Islands—a fact that demonstrates how the management line they drew was truly haphazard. *See, e.g.*, JSER 238 (map of Lummi's 2015 regulations with terminus at Trial Island); JSER 331 (map of Lummi's 2011 regulations with terminus at Discovery Island).

waters of the eastern portion of the Strait of Juan de Fuca, which the Lummi have no treaty right to fish. The line thus marks a most unlikely "path" that would have sent the Lummi 14 miles west of this Court's description of the Lummi's travel route "from the southern portions of the San Juan Islands" to Admiralty Inlet, *see Lummi III*, 876 F.3d at 1009 (citing *Lummi I*), and *24 miles* west of Whidbey Island. JSER 238, 274-275 (describing that "path" as the "longest and least direct" travel route).

B. The boundary of the Lummi U&A is capable of precise definition.

Despite the ambiguity created by prior decisions, it is possible for a court to precisely determine the western boundary of the Lummi U&A, and there is precedent for doing so in cases following from the Boldt decision. *See, e.g., Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1168 (9th Cir. 2017), *aff'd after remand*, 778 Fed. App'x. 539 (9th Cir. 2019) (remanding to the district court to set a more precise boundary consistent with the factual findings).

The court could, first of all, piece together the boundary of the Strait of Juan de Fuca based on evidence in this case and descriptions in this and related cases. *See* JSER 199-221 (series of NOAA maps depicting the location of the Strait of Juan de Fuca); JSER 186-187, 230, 297-298, 301 (Lower Elwha's declaration that the entire disputed area is the Strait of Juan de Fuca); ER 154 (Lummi referring to the waters as the Open Marine Waters of the Strait of Juan de Fuca); ER 144 n.1 ("Area 7 encompasses the marine waters surrounding and flowing between the San Juan

Islands and extends south beyond Lopez Island into the Strait of Juan de Fuca."); *Lummi I*, 235 F. 3d at 445, 451-52 (ruling that Lummi should not fish in the Strait of Juan de Fuca); JSER 287 (stating that the "waters above and to the west of the entrance to Admiralty Inlet do not separate the two land masses (Whidbey Island and the Olympic Peninsula); instead they constitute the open water of the Strait of Juan de Fuca."); *id.* (finding it "geographically unsupportable" to allege that Areas 6A and 7 were not in the Strait of Juan de Fuca); JSER 285 ("There was no evidence before Judge Boldt to demonstrate Lummi fishing in the open area of the Strait of Juan de Fuca lying south and offshore of the San Juan Islands and west of Whidbey Island." (citation omitted)); *United States v. Washington*, 626 F. Supp. at 1530 (Tulalip customarily fished in "the portion of the Strait of Juan de Fuca northeasterly of a line drawn from Trial Island (in Canada) to Protection Island"); *United States v. Washington*, 459 F. Supp. at 1049 (defining the Strait of Juan de Fuca as running at least from the Hoko River to the mouth of Hood Canal); ER 112, 144, 150 n.1. These descriptions and rulings form the law of the case.[7]

[7] All of *United States v. Washington* is one case for the purpose of the "law of the case," as all matters are filed in both the main case as well as the corresponding subproceeding, with all parties bound by orders in each subproceeding. *United States v. Washington*, 20 F. Supp. 3d at 959-60 (order issued Nov. 9, 2011); *see, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(n)(1).

Second, the court could consider additional evidence of the scope of the Lummi U&A, such as the declaration of anthropologist Dr. Josh Wisniewski, which the S'Klallam attempted to introduce below.[8] *See* JSER 9-20, 28-165. The district court refused to admit that additional evidence, *see* ER 15, but it erred in so refusing: under the *Muckleshoot* line of precedent, courts are permitted to consider external evidence for the limited purpose of interpreting and illuminating the geographic terms used in the Boldt decision. *See Muckleshoot Indian Tribe v. Lummi Indian Nation*, 141 F.3d 1355, 1359-60 (9th Cir. 1998) ("*Muckleshoot I*"); *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100 (9th Cir. 2000) ("*Muckleshoot II*") (holding it proper to consider the opinion of a geography expert to shed light on where the "present environs of Seattle" were located at the time of the Boldt decision). The declaration of Dr. Wisniewski, as well as earlier reports, would have shed light on the Boldt decision's understanding of the relevant geography and other expert reports, showing that the area claimed by the Lummi

[8] The Lower Elwha objected to the introduction of that evidence. Yet by moving to strike their own, already admitted, expert report by Dr. Lane, the Lower Elwha essentially acknowledged that the Trial Island Line must be at odds with the historical geographic definition of the Strait of Juan de Fuca and the S'Klallam's use of those waters. *See* JSER 28-79 (Lower Elwha Report); JSER 3-4.

was not supported by the evidence already admitted in the case.[9] *See* ER 39; JSER 9-20, 28-165.

Finally, as already discussed, the court could always directly consider further evidence of the proper boundary of the Lummi U&A under paragraph 25(a)(6). In short, whether considering an amended RFD in the present subproceeding or a new RFD in a new subproceeding, and whether relying only on the existing record or considering new evidence, it is possible for a court to determine the western boundary of the Lummi U&A. And for the reasons already stated, it is critical for a court to do so.

RESPONSE TO THE LUMMI AND LOWER ELWHA POSITIONS

I. The Lummi's Position Should Be Rejected.

Cherry picking certain phrases from *Lummi III*, the Lummi argue on appeal that this Court necessarily resolved the dispute over the western boundary of the Lummi U&A in the Lummi's favor. That position is plainly inconsistent with *Lummi III* and this Court's previous decisions and must be rejected.

[9] Dr. Wisniewski's report reviewed the *United States v. Washington* record and included several exhibits by Dr. Lane, already admitted in the main case, including historic place names that provide historical definitions for relevant locations, such as Point Wilson. *See* JSER 1-12, 68. Given the Lower Elwha's proposal to establish the Trial Island Line (ending at Point Wilson) as the historic treaty boundary, the court's refusal to consider historical definitions of places, like Point Wilson, was error. *See* JSER 68.

At its core, the Lummi's argument is an attempted short cut: (i) *Lummi III* held that the "waters west of Whidbey Island" that "lie between the southern portion of the San Juan Islands and Admiralty Inlet" are "encompassed in" the Lummi U&A, 876 F.3d at 1011; (ii) the Court described the "waters west of Whidbey Island" as the "waters contested here," *id.* at 1008; (iii) the "waters contested here" *must mean* the waters put at issue by the Requesting Parties' RFD—that is, the waters east of the Trial Island Line defined as the eastern Strait of Juan de Fuca, ER 216, 226; therefore, (iv) *Lummi III* must have meant to include all the waters east of the Trial Island Line in the Lummi U&A. *See* Lummi Br. 24-26. According to the Lummi, it further follows that the district court "contradict[ed] the mandate" in concluding that *Lummi III* necessarily determined that only *some* Lummi U&A was included in the disputed waters. *Id.* at 25.

The Lummi's argument breaks down at several points. First and most fundamentally, it puts *Lummi III* in seeming conflict with *Lummi I*. *Lummi I* unequivocally held that the Strait of Juan de Fuca is entirely excluded from the Lummi U&A. *Lummi I*, 235 F.3d at 451-53. There can be no real dispute that the Lummi's proposed Trial Island Line is in the eastern portion of the Strait of Juan de Fuca. *Compare Lummi I*, 235 F.3d at 451, 453, *with* JSER 329, 331, and *Lummi III*, 876 F.3d at 1011. Thus, if *Lummi III* had decided that the Lummi U&A included all the waters east of the Trial Island Line, it would have overruled *sub silentio* the part

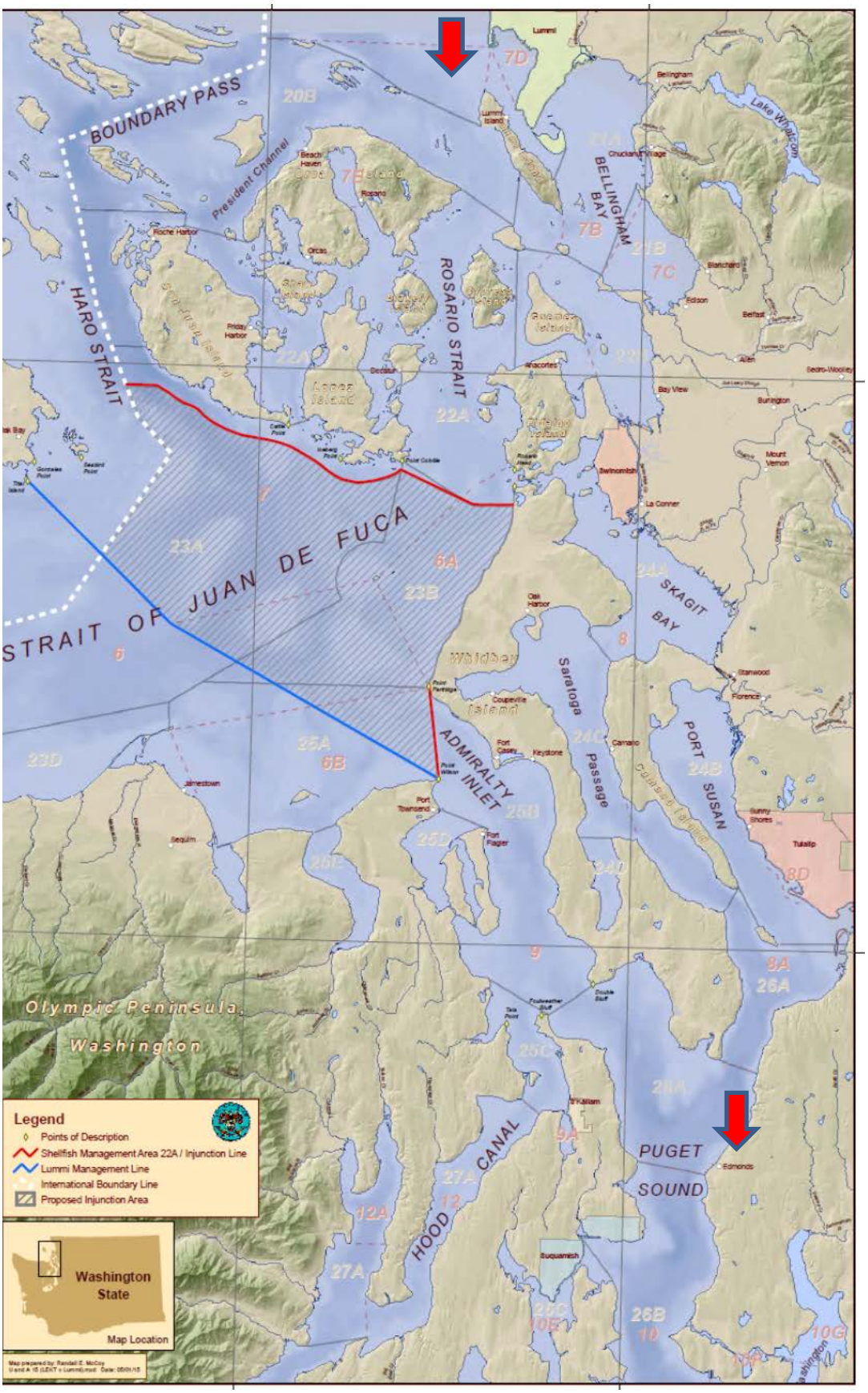
of *Lummi I* excluding the Strait from the Lummi U&A—an absurd conclusion, particularly given that *Lummi III* in fact reaffirmed the exclusion of the Strait from the Lummi U&A. *See Lummi III*, 876 F.3d at 1008.

Second, the Lummi's position ignores the procedural posture of *Lummi III* and the precise question this Court answered. As the district court explained, the Requesting Parties in the lead-up to *Lummi III* originally sought to demonstrate that this Court had previously determined that the disputed waters were entirely outside the Lummi U&A. The district court initially agreed, holding that the Lummi had *no* U&A in the disputed waters and granting summary judgment to the Requesting Parties on that basis. When the Lummi appealed, the "sole question" before the *Lummi III* Court was whether that grant of summary judgment was erroneous. ER 17. This Court concluded that it was erroneous because, the Court reasoned, *some* Lummi U&A must necessarily exist along the Lummi's transit path between the San Juan Islands and Admiralty Inlet. But that was all this Court decided: because *some* Lummi U&A must exist in the disputed area, the district court was incorrect to conclude that *none* existed. The Court certainly did not purport to go further and definitively decide the western boundary of the Lummi U&A. Instead, it remanded to the district court—the finder of fact—to work out the details. *See Lummi III*, 876 F.3d at 1011.

Third, in arguing otherwise, the Lummi latch onto loose language in *Lummi III* taken out of context. *See* Lummi Br. 26, 27, 30-31. In the Lummi's view, *Lummi III*'s reference to the "waters contested here" and the "waters west of Whidbey Island" *must* mean all waters up to at least the Trial Island Line. *Id.* at 24-25. Yet as the district court pointed out, this Court's passing use of those general phrases would be a surprisingly obscure way of adopting the Trial Island Line as the Lummi U&A boundary, particularly given that the Court *never once mentioned* the "Trial Island Line." ER 16. Indeed, the Court expressly declined to define the eastern boundary of the Strait of Juan de Fuca. It is inconceivable that this Court, simply by referring to the "waters contested here," casually adopted the very boundary line that the parties have hotly disputed for years. Certainly nothing in the Court's opinion suggests an intention to adopt, as the western boundary of a treaty-defined area, the arbitrary and self-serving line that the Lummi's own fishing commissioner drew. That conclusion would also eviscerate references in *Lummi II* and *Lummi III* to the waters "*immediately*" off the western coast of Whidbey Island. *Lummi III*, 876 F.3d at 1010 (emphasis added); *Lummi II*, 763 F.3d at 1187 (emphasis added).

In short, the Court's reference to the "waters contested here" could not have been intended to casually include, as a travel path, more than 300 square miles of water that the parties have hotly disputed for years, all while the Court expressly stated that it was not defining the Strait. *See Lummi III*, 876 F.3d at 1011.

Fourth, the Lummi's argument ignores this Court's reasoning in *Lummi III*, as well as the basic geography of the disputed area. As just discussed, *Lummi III* reasoned that *some* Lummi U&A must exist along the Lummi's transit path between the San Juan Islands and Admiralty Inlet—a path that would take the Lummi past the shores of Whidbey Island. In explaining why that was so, the *Lummi III* Court referred back to the passage in *Lummi I* holding that Admiralty Inlet must be included in the Lummi U&A because Lummi fishers would have used the inlet to travel from Lummi U&A in the San Juan Islands to U&A further south near present-day Seattle. *Lummi III*, 876 F.3d at 1007, 1009-10 (citing *Lummi I*, 235 F.3d at 452). Although the S'Klallam continue to believe that passage from *Lummi I* is in some tension with the principle articulated in the Boldt decision that occasional and incidental fishing during transit does not constitute U&A fishing, the important point for present purposes is that *Lummi III* relied on a transit rationale to hold that *some* Lummi U&A must exist in the waters between the "southern portion of the San Juan Islands" and Admiralty Inlet. *See Final Decision No. 1*, 384 F. Supp. at 353 (FF 14); *Lummi III*, 876 F.3d at 1011. Once again, as the map below illustrates, there is a large difference between the nautical path described by the Court and the path the Lummi now claim in the open marine waters of the Strait of Juan de Fuca:


BOUNDARY PASS
President Channel
HARO STRAIT
ROSARIO STRAIT
BELLINGHAM BAY
STRAIT OF JUAN DE FUCA
SKAGIT BAY
ADMIRALTY INLET
Saratoga Passage
PORT SUSAN
Olympic Peninsula
Washington
HOOD CANAL
PUGET SOUND
Legend
Points of Description
Shellfish Management Area 22A / Injunction Line
Lummi Management Line
International Boundary Line
Proposed Injunction Area
Washington State
Map Location

ER 44 (arrows added to indicate path direction from "Fraser River" north of the Lummi reservation to the "environs of Seattle" [Edmonds]). *See Final Decision No. 1*, 384 F.2d at 360-61.

With that transit rationale as the backdrop, it would have made little sense for the *Lummi III* Court to adopt the Trial Island Line as the treaty-based boundary of the Lummi U&A. The Lummi U&A, as described in the Boldt decision, includes fishing grounds in "Northern Puget Sound" from the Fraser River, near present-day Vancouver, through Bellingham Bay, down to the "present environs of Seattle." *Id*. A straightforward water route between those points using the USGS definition of Puget Sound would largely hug the eastern coast of the region, along the mainland shore of the United States. *See* JSER 293 (noting the USGS definition describes three entrances to Puget Sound as Point Wilson, Deception Island to Fidalgo Island, and at Swinomish Channel, and that Puget Sound "extends…south from the Strait of Juan de Fuca").[10] Indeed, the Lummi's own original filings claim U&A "eastward" through "bays, passages, and inlets" along the "mainland shore." JSER 247 (filed January 14, 1971).[11]

[10] This definition of Puget Sound was submitted by Lummi's expert GIS Manager. JSER 293.

[11] Furthermore, the Lummi recently argued in a different subproceeding that a transit path along the *east* side of Whidbey Island was the "Northern Puget Sound" path that the Lummi historically used to reach the "environs of Seattle"—undermining their argument in this subproceeding that they were "just as likely" to

The Trial Island Line, by contrast, lies out in open marine waters, some 20-plus miles west of the shores of Whidbey Island. JSER 238. This line, a creation of the Lummi fishing commissioner, has no apparent connection to the Lummi's transit path as described in the Boldt decision or any later decision. *See* ER 204. True, Trial Island is west of Lummi U&A in Haro Strait, but mere adjacency to U&A does not itself constitute U&A. *See Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844, 850 (9th Cir. 2017) (adjacency to an area and general evidence of travel insufficient to support U&A). And the Lummi make no effort to otherwise connect the Trial Island Line to the transit rationale articulated in *Lummi I* and *Lummi III*, except to argue that the line marks an area that was "just as likely" to have been used as any other route—announcing the new and somewhat incredible position that all possible routes from any point in their U&A to the present environs of Seattle (even expanding to points outside their U&A such as Trial Island), regardless of evidence of historical use, should be included in the Lummi U&A.[12]

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have used the expansive and indirect path *west* of Whidbey Island depicted in the map above. Lummi Br. 29-30; *see e.g.*, *United States v. Washington*, No. C70-9213RSM, 2019 WL 5963052, at *3 (W.D. Wash. Nov. 13, 2019); JSER 194-196 (arguing that the Lummi's path in Northern Puget Sound from "Fidalgo" to the "environs of Seattle" passes on the *east* side of Whidbey Island).

[12] Given this history, it would be inconsistent with the law of the case to haphazardly connect all U&A areas for the Lummi, especially when other tribes have been held to much higher standards. For instance, in *Upper Skagit*, 871 F.3d at 850, this Court found that "[a]bsent any other indication in Dr. Lane's report or testimony that the Suquamish might have traveled to the Contested Waters to fish, the 'general

Lummi Br. 29; JSER 194-197 (Lummi arguing they are not limited to one single highway). At the same time, the Lummi point to no evidence in *any* decision establishing that Lummi fishers historically traveled and fished as far west as Trial Island, opposite the eastern mainland shore claimed in the Lummi's original filings.

A closer look at the Lummi's proposed line also underscores the unlikelihood that this Court meant to adopt it in *Lummi III*. As mentioned earlier, adopting the Trial Island Line as the western boundary of the Lummi U&A would mean designating 300-plus square miles of water as the Lummi's transit path from the San

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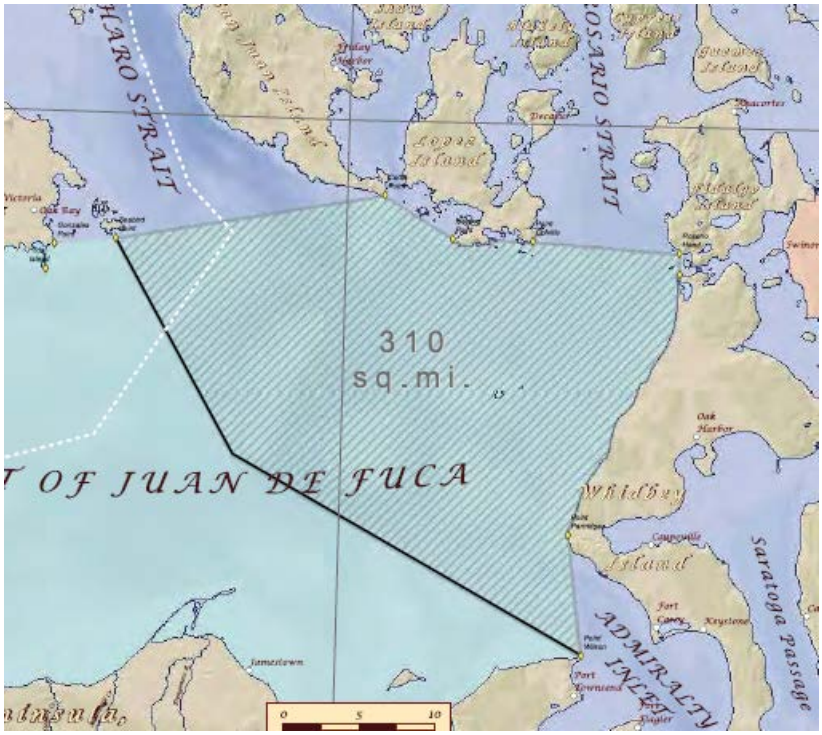
evidence' of northward travel through Hale Passage, which itself is merely adjacent to the Contested Waters, is insufficient to show the Suquamish traveled or fished through the Contested Waters." This is similar to how this Court concluded that the Suquamish Tribe fished inside the bays of Admiralty Inlet on the west side of Whidbey Island. The Court recognized that there was *general evidence* that all tribes traveled, but the Suquamish were able to show via Dr. Lane's reports that Suquamish fishers "travelled to Whidbey Island *to fish*." *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1135 (9th Cir. 2015) (emphasis added). Further, when the Suquamish claimed the *east* side of Whidbey Island, their assertion was ultimately denied because the opposing tribes were able to prove that the Suquamish did not even travel, *let alone* fish, in the disputed waters. *See Upper Skagit*, 590 F.3d at 1025. That case was a *denial* of U&A for the Suquamish, because there was testimony that the Suquamish did not travel in the disputed area, and if there was no evidence of travel, then the Suquamish were not fishing there. *Id*. But the reverse is not necessarily true, as we see in FF 14 of the Boldt decision and Dr. Lane's reports: if the Lummi's travel for was visitation, the decision was describing waters within other tribes' territories. *See* ER 163. Nevertheless, the Lummi now claim that any area they "would have" (and now *could have*) travelled they also "would have fished." Lummi Br. 15, 37. The Lummi's position that any travel, from any point and in any direction, necessarily means they were fishing, is incorrect because *incidental* fishing is not *U&A* fishing. *Final Decision No. 1*, 384 F. Supp. at 353.

Juan Islands to Admiralty Inlet—based on nothing more than a rather vague reference to the Lummi's historic practice of traveling from their home territory near the Fraser River to visit fisheries further south in the "environs of Seattle." *Lummi III*, 876 F.3d at 1009-10; *see also* JSER 301; *Final Decision No. 1*, 384 F. Supp. at 360 (citing USA-30 pp. 23-26); ER 108 (citing USA-30, pp. 23-24), 117-118. The following map illustrates the point:



JSER 301 (excerpt).

Furthermore, *Lummi III* clarified that the Lummi's "nautical path" from "the San Juan Islands"—which are actually separated from Trial Island by Haro Strait—"cuts right through" the waters "at issue here." *Lummi III*, 876 F.3d at 1009-10. If the Lummi's transit route, which defines the Lummi U&A in the disputed area, *cuts*

through the waters at issue, it is hard to see how the Lummi's U&A could nevertheless include *all* the waters at issue.

Altogether, if there were any doubt that this Court did not intend to adopt the Trial Island Line as the boundary of the Lummi U&A in *Lummi III*, it should have been put to rest by the Court's reasoning understood in light of the law of the case, as well as the relevant history and geography. This Court recently reversed and remanded to better determine the Quinault and Quileute tribes' U&A boundary because the "lines drawn" by the district court "far exceed[ed] the court's underlying factual findings." *Makah*, 873 F.3d at 1159. In that case, this Court declined to "sweep in" an extra "413 square miles." *Id*. at 1168. Given that there is a similar concern here, and given the kind of specific evidentiary showing this Court has required in other cases, there is no reason why the Lummi's U&A boundary should be entitled to a different, lower standard—thereby diluting the treaty rights of tribes in their home waters. The Lummi have no sound basis to argue that this Court in *Lummi III* decided anything more than that *some* undefined waters off the western coast of Whidbey Island are included in their U&A. The extent of those waters, and the point at which they end, remains for the district court to determine on remand. *See Lummi III*, 876 F.3d at 1011. The Lummi's position on appeal is unsustainable and should be rejected.

II. The Lower Elwha's Position Should Be Rejected.

In a sudden change of course after years of litigation, the Lower Elwha are now willing to cede the waters east of the arbitrary Trial Island Line to the Lummi in exchange for finality, even though that new position runs counter to the Lower Elwha's own expert and other evidence presented to the court. *See* ER 36-37; JSER 297-298, 301 (asserting that the Strait of Juan de Fuca begins at Point Wilson); *see also* JSER 2, 17, 34 (stating that Clallam inhabited most of the north shore of the Olympic Peninsula), 37 (stating that the "country occupied by them extends from Port Townsend along the Straits of Fuca"), 43 (describing Clallam country as the "straits between the Okeho river and Point Wilson"), 48, 68, 106, 122.[13] The Lower Elwha now argue that this Court's decision in *Lummi III* made a "factual determination" and adopted the Trial Island Line as the western boundary of the Lummi U&A—and, therefore, also implicitly adopted the Trial Island Line as the "new" boundary of the Strait of Juan de Fuca. ER 37. The only meaningful difference between the positions of the Lummi and the Lower Elwha is that the Lower Elwha seek a definite pronouncement that the Lummi U&A includes the waters up to, but no further west than, the Trial Island Line, while the Lummi prefer to leave the latter question open. *See* ER 7, 32, 36-37; JSER 5.

[13] As these materials explain, the term "Clallam" described a number of Native American groups, the descendants of which include the Lower Elwha. *See* JSER 34.

For essentially the same reasons that this Court should reject the Lummi's position, it should also reject the Lower Elwha's. As already discussed, *Lummi III* did not adopt the Trial Island Line as the western boundary of the Lummi U&A, and litigation weariness cannot change that. It is moreover disingenuous of the Lower Elwha—whose home waters are located further west than the S'Klallam's, and who therefore suffer less from the Lummi's incursions into the eastern part of the Strait of Juan de Fuca—to reverse course at this late stage. For the last thirty years, the Lower Elwha have joined the S'Klallam in arguing that the Trial Island Line impermissibly intrudes on the S'Klallam and Lower Elwha U&A in the Strait of Juan de Fuca. *See* JSER 304-319, JSER 297-298, 301; ER 36-39, ER 215-17, ER 224, ER 226. Indeed, the Lower Elwha have already successfully argued in the district court that this part of the Strait of Juan de Fuca is part of their historical fishing territory. *United States v. Washington*, 459 F. Supp. at 1048-49 (orders issued Mar. 28, 1975, Apr. 18, 1975); JSER 28-79. Until now, the Lower Elwha also agreed that determining the western boundary of the Lummi U&A must respect the actual boundary of the Strait of Juan de Fuca, and not be the result of plucking imprecise language from an appellate decision to settle what is essentially a factual dispute. *See* ER 224, 226. This Court has held similarly in related cases. *See, e.g.*, *Makah*, 873 F.3d at 1169 (tribe "cannot vastly expand their U&A findings without accompanying findings by the district court"). The Lower Elwha's original position

was correct, and this Court should place no weight on the tribe's eleventh-hour change of heart.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the district court and remand for further proceedings.

Respectfully submitted,

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February 18, 2020

STATEMENT OF RELATED CASES

The S'Klallam are aware of the following related cases pending in this Court, within the meaning of Ninth Circuit Rule 28-2.6:

> *Muckleshoot Indian Tribe v. Tulalip Tribes*, No. 18-35441. This appeal is derived from the same underlying district court case (C70-9213-RSM), but it is a separate district court subproceeding (No. 2:17-sp-00002-RSM) with issues related to the availability of paragraph 25(a)(6) jurisdiction.
>
> *Makah Indian Tribe v. Quileute Indian Tribe*, No. 18-35369. This appeal is derived from the same underlying district court case (C70-9213-RSM), but it is a separate district court subproceeding (No. 2:09-sp-00001-RSM) with distinct issues related to the proper method for determining the western boundary of Quileute and Quinault's U&A.

February 18, 2020

s/Lauren Rasmussen
Lauren Rasmussen

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit R. 28.1-1 because it is a principal and response brief by Appellees-Cross-Appellants containing 13,635 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

February 18, 2020

s/Lauren Rasmussen
Lauren Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Lauren Rasmussen
Lauren Rasmussen

Addendum

TABLE OF CONTENTS

TREATIES.

Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: Jan. 22, 1855.

Preamble. WHEREAS a treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kahmish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mish, Mee-see-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Contracting parties. Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-cháh-mish, Me-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States. ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the

Boundaries.

Vol. x. p. 1132.

same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

Reservation.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

Whites not to reside thereon unless, &c.

Further reservation for school.

ARTICLE III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Tribes to settle on reservation within one year.

ARTICLE IV. The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Rights and privileges secured to Indians.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Payment by the United States.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner — that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time

How to be applied.

determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Indians may be removed to reservation, etc.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

Lots may be assigned to individuals.

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ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Tribes to preserve friendly relations.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

to pay for depredations.

not to make war except, &c.

to surrender offenders.

Annuities to be withheld from those who drink etc., ardent spirits.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Tribes to free all slaves and not to acquire others.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

not to trade out of the United States.

ARTICLE XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

$15,000 appropriated for expenses of removal and settlement.

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

United States to establish school and provide instructors,

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an

furnish mechanics, shops, physicians, &c

agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Treaty when to take effect.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Signatures, Jan. 22, 1855.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent,* [L. S.]

SEATTLE, *Chief of the Dwamish and Suquamish tribes.* his x mark. [L. S.]

PAT-KA-NAM, *Chief of the Snoqualmoo, Snohomish and other tribes.* his x mark. [L. S.]

CHOW-ITS-HOOT, *Chief of the Lummi and other tribes.* his x mark. [L. S.]

GOLIAH, *Chief of the Skagits and other allied tribes.* his x mark. [L. S.]

KWALLATTUM, or General Pierce, *Sub-chief of the Skagit tribe.* his x mark. [L. S.]

S'HOOTST-HOOT, *Sub-chief of Snohomish.* his x mark. [L. S.]

SNAH-TALC, or Bonaparte, *Sub-chief of Snohomish.* his x mark. [L. S.]

SQUUSH-UM, or The Smoke, *Sub-chief of the Snoqualmoo.* his x mark. [L. S.]

SEE-ALLA-PA-HAN, or The Priest, *Sub-chief of Sk-tah-le-jum.* his x mark. [L. S.]

HE-UCH-KA-NAM, or George Bonaparte, *Sub-chief of Snohomish.* his x mark. [L. S.]

TSE-NAH-TALC, or Joseph Bonaparte, *Sub-chief of Snohomish.* his x mark. [L. S.]

NS'SKI-OOS, or Jackson, *Sub-chief of Snohomish.* his x mark. [L. S.]

WATS-KA-LAH-TCHIE, or John Hobtst-hoot, *Sub-chief of Snohomish.* his x mark. [L. S.]

SMEH-MAI-HU, *Sub-chief of Skai-wha-mish.* his x mark. [L. S.]

SLAT-EAH-KA-NAM, *Sub-chief of Snoqualmoo.* his x mark. [L. S.]

ST'HAU-AI, *Sub-chief of Snoqualmoo.* his x mark. [L. S.]

LUGS-KEN, *Sub-chief of Skai-wha-mish.* his x mark. [L. S.]

S'HEHT-SOOLT, or Peter, *Sub-chief of Snohomish.* his x mark. [L. S.]

DO-QUEH-OO-SATL, *Snoqualmoo tribe.* his x mark. [L. S.]

JOHN KANAM, *Snoqualmoo sub-chief.* his x mark. [L. S.]

KLEMSH-KA-NAM, *Snoqualmoo.* his x mark. [L. S.]

TS'HUAHNTL, *Dwa-mish sub-chief.* his x mark. [L. S.]

KWUSS-KA-NAM, or George Snatelum, Sen., *Skagit tribe.* his x mark. [L. S.]

HEL-MITS, or George Snatelum, *Skagit sub-chief.* his x mark. [L. S.]

S'KWAI-KWI, *Skagit tribe, sub-chief.* his x mark. [L. S.]
SEH-LEK-QU, *Sub-chief Lummi tribe.* his x mark. [L. S.]
S'H'-CHEH-OOS, or General Washington, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
WHAI-LAN-HU, or Davy Crockett, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
SHE-AH-DELT-HU, *Sub-chief of Lummi tribe,* his x mark. [L. S.]
KWULT-SEH, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
KWULL-ET-HU, *Lummi tribe.* his x mark. [L. S.]
KLEH-KENT-SOOT, *Skagit tribe.* his x mark. [L. S.]
SOHN-HEH-OVS, *Skagit tribe.* his x mark. [L. S.]
S'DEH-AP-KAN, or General Warren, *Skagit tribe.* his x mark. [L. S.]
CHUL-WHIL-TAN, *Sub-chief of Suquamish tribe.* his x mark. [L. S.]
SKE-EH-TUM, *Skagit tribe.* his x mark. [L. S.]
PATCHKANAM, or Dome, *Skagit tribe.* his x mark. [L. S.]
SATS-KANAM, *Squin-ah-mush tribe.* his x mark. [L. S.]
SD-ZO-MAHTL, *Kik-ial-lus band.* his x mark. [L. S.]
DAHTL-DE-MIN, *Sub-chief of Sah-ku-meh-hu.* his x mark. [L. S.]
SD'ZEK-DU-NUM, *Me-sek-wi-guilse sub-chief.* his x mark. [L. S.]
NOW-A-CHAIS, *Sub-chief of Dwamish.* his x mark. [L. S.]
MIS-LO-TCHE, or Wah-hehl-tchoo, *Sub-chief of Suquamish.* his x mark. [L. S.]
SLOO-NOKSH-TAN, or Jim, *Suquamish tribe.* his x mark. [L. S.]
MOO-WHAH-LAD-HU, or Jack, *Suquamish tribe.* his x mark. [L. S.]
TOO-LEH-PLAN, *Suquamish tribe.* his x mark. [L. S.]
HA-SEH-DOO-AN, or Keo-kuck, *Dwamish tribe.* his x mark. [L. S.]
HOOVILT-MEH-TUM, *Sub-chief of Suquamish.* his x mark. [L. S.]
WE-AI-PAH, *Skaiwhamish tribe.* his x mark. [L. S.]
S'AH-AN-HU, or Hallam, *Snohomish tribe.* his x mark. [L. S.]
SHE-HOPE, or General Pierce, *Skagit tribe.* his x mark. [L. S.]
HWN-LAH-LAKQ, or Thomas Jefferson, *Lummi tribe.* his x mark. [L. S.]
CHT-SIMPT, *Lummi tribe.* his x mark. [L. S.]
TSE-SUM-TEN, *Lummi tribe.* his x mark. [L. S.]
KLT-HAHL-TEN, *Lummi tribe.* his x mark. [L. S.]
KUT-TA-KANAM, or John, *Lummi tribe.* his x mark. [L. S.]
CH-LAH-BEN, *Noo-qua-cha-mish band.* his x mark. [L. S.]
NOO-HEH-OOS, *Snoqualmoo tribe.* his x mark. [L. S.]
HWEH-UK, *Snoqualmoo tribe.* his x mark. [L. S.]
PEH-NUS, *Skai-whamish tribe.* his x mark. [L. S.]
YIM-KA-NAM, *Snoqualmoo tribe.* his x mark. [L. S.]
TWOOI-AS-KUT, *Skaiwhamish tribe.* his x mark. [L. S.]
LUCH-AL-KANAM, *Snoqualmoo tribe.* his x mark. [L. S.]
S'HOOT-KANAM, *Snoqualmoo tribe.* his x mark. [L. S.]
SME-A-KANAM, *Snoqualmoo tribe.* his x mark. [L. S.]
SAD-ZIS-KEH, *Snoqualmoo.* his x mark. [L. S.]
HEH-MAHL, *Skaiwhamish band.* his x mark. [L. S.]
CHARLEY, *Skagit tribe.* his x mark. [L. S.]
SAMPSON, *Skagit tribe.* his x mark. [L. S.]
JOHN TAYLOR, *Snohomish tribe.* his x mark. [L. S.]
HATCH-KWENTUM, *Skagit tribe.* his x mark. [L. S.]
YO-I-KUM, *Skagit tribe.* his x mark. [L. S.]
T'KWA-MA-HAN, *Skagit tribe.* his x mark. [L. S.]
STO-DUM-KAN, *Swinamish band.* his x mark. [L. S.]

BE-LOLE, *Swinamish band.*	his x mark.	L. S.
D'ZO-LOLE-GWAM-HU, *Skagit tribe.*	his x mark.	L. S.
STEH-SHAIL, William, *Skaiwhamish band.*	his x mark.	L. S.
KEL-KAHL-TSOOT, *Swinamish tribe.*	his x mark.	L. S.
PAT-SEN, *Skagit tribe.*	his x mark.	L. S.
PAT-TEH-US, *Noo-wha-ah sub-chief.*	his x mark.	L. S.
S'HOOLK-KA-NAM, *Lummi sub-chief.*	his x mark.	L. S.
CH-LOK-SUTS, *Lummi sub-chief.*	his x mark.	L. S.

Executed in the presence of us—

M. T. SIMMONS, *Indian Agent.*
C. H. MASON, *Secretary of Washington Territory.*
BENJ. F. SHAW, *Interpreter.*
CHAS. M. HITCHCOCK.
H. A. GOLDSBOROUGH.
GEORGE GIBBS.
JOHN H. SCRANTON.
HENRY D. COCK.
S. S. FORD, Jr.
ORRINGTON CUSHMAN.
ELLIS BARNES.
R. S. BAILEY.
S. M. COLLINS.
LAFAYETEE BALCH.
E. S. FOWLER.
J. H. HALL.
ROB'T DAVIS.

Consent of Senate, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Proclamation, April 11, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in [SEAL.] the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: January 26, 1855.

Preamble. WHEREAS a Treaty was made and concluded at Hahd Skus, or Point no Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates of the different villages of the S'Klallams Indians, viz.. the Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit:

Contracting parties. Articles of agreement and convention, made and concluded at Hahd-skus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hun-nint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch and Chem-a-kum tribes, occupying certain lands on the straits of Fuca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States. ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of Territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the *the* United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

Boundaries.

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Reservation. ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: January 26, 1855.

Preamble. WHEREAS a Treaty was made and concluded at Hahd Skus, or Point no Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates of the different villages of the S'Klallams Indians, viz.. the Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit:

Contracting parties. Articles of agreement and convention, made and concluded at Hahd-skus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hun-nint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch and Chem-a-kum tribes, occupying certain lands on the straits of Fuca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States. ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of Territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the *the* United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

Boundaries.

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ante Treaties, p. 1.

Reservation. ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the

amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Whites not to reside thereon.

Tribes to settle on reservation.

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Privileges to the Indians.

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

Payments by the United States.

ARTICLE V. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year.

How to be applied.

All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Appropriation for removal, &c.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Indians may be removed to other reservation.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

Lands may be surveyed and assigned, &c.

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Annuities not to be taken for debts of individuals.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

Tribes to preserve friendly relations,

to pay for depredations.

not to make war but in self defence.

To surrender offenders.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Annuities may be withheld from those drinking ardent spirits.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

United States to establish school.

Mechanics' shop.

To employ a physician.

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Tribes to free slaves and not to acquire others.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Not to trade out of the United States.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

When treaty to take effect.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

Signatures, January 26, 1855.

ISAAC I. STEVENS, *Governor and Superintendent.* [L. S.]

CHITS-A-MAH-HAN, the Duke of York, his x mark. [L. S.]
Chief of the S'klallams.

DAH-WHIL-LUK, *Chief of the Sko-ko-mush.* his x mark. [L. S.]

KUL-KAH-HAN, or General Pierce, his x mark. [L. S.]
Chief of the Chem-a-kum.

HOOL-HOLE-TAN, or Jim, *Sko-ko-mish sub-chief.* his x mark. [L. S.]

SAI-A-KADE, or Frank, *Sko-ko-mish sub-chief.* his x mark. [L. S.]

LOO-GWEH-OOS, or George, his x mark. [L. S.]
Sko-ko-mish sub-chief.

E-DAGH-TAN, or Tom, *Sko-ko-mish sub-chief.*	his x mark.	[L. S.]
KAI-A-HAN, or Daniel Webster, *Chem-a-kum sub-chief.*	his x mark.	[L. S.]
ETS-SAH-QUAT, *Chem-a-kum sub-chief.*	his x mark.	[L. S.]
KLEH-A-KUNST, *Chem-a-kum sub-chief.*	his x mark.	[L. S.]
HE-ATL, Duke of Clarence, *S'klallam sub-chief.*	his x mark.	[L. S.]
LACH-KA-NAM, or Lord Nelson, *S'klallam sub-chief.*	his x mark.	[L. S.]
TCHOTEST, *S'klallam sub-chief.*	his x mark.	[L. S.]
HOOT-OTE ST, or General Lane, *S'klallam sub-chief.*	his x mark.	[L. S.]
TO-TOTESH, *S'klallam sub-chief.*	his x mark.	L. S.
HAH-KWIA-MIHL, *S'klallam sub-chief.*	his x mark.	L. S.
SKAI-SE-EE, or Mr. Newman, *S'klallam sub-chief.*	his x mark.	L. S.
KAHS-SAHS-A-MATL, *S'klallam sub-chief.*	his x mark.	L. S.
S'HOTE-CH-STAN, *S'klallam sub-chief.*	his x mark.	L. S.
LAH-ST, or Tom, *S'klallam sub-chief.*	his x mark.	L. S.
TULS-MET-TUM, Lord Jim, *S'klallam sub-chief.*	his x mark.	L. S.
YAHT-LE-MIN, or General Taylor, *S'klallam sub-chief.*	his x mark.	L. S.
KLA-KOISHT, or Captain, *S'klallam sub-chief.*	his x mark.	[L. S.]
SNA-TALC, or General Scott, *S'klallam sub-chief.*	his x mark.	[L. S.]
TSEH-A-TAKE, or Tom Benton, *S'klallam sub-chief.*	his x mark.	[L. S.]
YAH-KWI-E-NOOK, or General Gaines, *S'klallam sub-chief.*	his x mark.	[L. S.]
KAI-AT-LAH, or General Lane, Jr., *S'klallam sub-chief.*	his x mark.	[L. S.]
CAPTAIN JACK, *S'klallam sub-chief.*	his x mark.	[L. S.]
HE-ACH-KATE, *S'klallam sub-chief.*	his x mark.	[L. S.]
T'SOH-AS-HAU, or General Harrison, *S'klallam sub-chief.*	his x mark.	[L. S.]
KWAH-NALT-SOTE, *S'klallam sub-chief.*	his x mark.	L. S.
S'HOKE-TAN, *S'klallam sub-chief.*	his x mark.	L. S.
PAITL, *S'klallam sub-chief.*	his x mark.	L. S.
WEN-A-HAP, *S'klallam sub-chief.*	his x mark.	L. S.
KLEW-SUM-AH, *S'klallam sub-chief.*	his x mark.	L. S.
SE-ATT-HOME-TAU, *S'klallam sub-chief.*	his x mark.	L. S.
TSAT-SAT-HOOT, *S'klallam tribe.*	his x mark.	L. S.
PE-AN-HO, *S'klallam tribe.*	his x mark.	L. S.
YI-AH-HUM, or John Adams, *S'klallam tribe.*	his x mark.	L. S.
TI-ITCH-STAN, *S'klallam tribe.*	his x mark.	L. S.
SOO-YAHNTCH, *S'klallam tribe.*	his x mark.	L. S.
TT'SEH-A-TAKE, *S'klallam tribe.*	his x mark.	L. S.
HE-ATS-AT-SOOT, *S'klallam tribe.*	his x mark.	L. S.
TOW-OOTS-HOOT, *S'klallam tribe.*	his x mark.	L. S.
TSHEH-HAM, or General Pierce, *S'klallam tribe.*	his x mark.	L. S.
KWIN-NAS-SUM, or George, *S'klallam tribe.*	his x mark.	L. S.
HAI-AHTS, John, *S'klallam tribe.*	his x mark.	L. S.
HAI-OTEST, John, *S'klallam tribe.*	his x mark.	L. S.
SEH-WIN-NUM, *S'klallam tribe.*	his x mark.	L. S.
YAI-TST, or George, *S'klallam tribe.*	his x mark.	L. S.
HE-PAIT, or John, *S'klallam tribe.*	his x mark.	L. S.
SLIMM, or John, *S'klallam tribe.*	his x mark.	L. S.
T'KLALT-SOOT, or Jack, *S'klallam tribe.*	his x mark.	L. S.
S'TAI-TAN, or Sam, *S'klallam tribe.*	his x mark.	L. S.
HUT-TETS-OOT, *S'klallam tribe.*	his x mark.	L. S.
HOW-A-OWL, *S'klallam tribe.*	his x mark.	L. S.

Executed in the presence of us—
M. T. SIMMONS,
C. H. MASON, *Secretary Washington Territory,*
BENJ. F. SHAW, *Interpreter,*
JOHN H. SCRANTON,
JOSIAH P. KELLER,
C. M. HITCHCOCK, M. D.,
A. B. GOVE,
H. A. GOLDSBOROUGH,
B. J. MADISON,
F. A. ROWE,
JAS. M. HUNT,
GEORGE GIBBS, *Secretary,*
JOHN J. REILLY,
ROBT. DAVIS,
S. S. FORD, Jr.,
H. D. COCK,
ORRINGTON CUSHMAN,
J. CONKLIN.

Ratification, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,): That the Senate advise and consent to the ratification of treaty between the United States and the S'Klallams Indians occupying lands in the Straits of Fuca and Hood's Island, in Washington Territory, signed 26th January, 1855.
"Attest: "ASBURY DICKINS, *Secretary.*"

Proclamation April 29, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL]

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

Treaty between the United States of America and the Makah Tribe of Indians. Concluded at Neah Bay, Washington Territory, January 31, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: January 31, 1855

WHEREAS a treaty was made and concluded at Neah Bay, in the Territory of Washington, on the thirty-first day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the several villages of the Makah tribe of Indians, viz.: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same; which treaty is in the words and figures following, to wit:

Articles of agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the several villages of the Makah tribe of Indians, viz.: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same. Contracting Parties.

ARTICLE I. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-déh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast range of mountains, and thence northwardly along the line of lands lately ceded to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast. Surrender of lands to the United States. Boundaries. Treaties, *ante*, p. 7.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz.: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States here- Reservation. Boundaries. Whites not to reside thereon, unless, &c. Roads may be made.