Nos. 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, ET AL.,

Real-parties-in-interest

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

RESPONSE AND REPLY BRIEF FOR RESPONDENT-APPELLANT-CROSS-APPELLEE LUMMI NATION

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INTRODUCTION

This Court, in *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) ("*Lummi III*"), vindicated the Lummi's right to fish in the waters directly south of their ancestral homeland in and around the San Juan Islands. The Lummi have fished in these waters for hundreds of years. The Lummi secured the right to do so in a treaty their ancestors signed more than 165 years ago and a district-court judgment rendered more than 45 years ago. This Court finally, and definitely, resolved any remaining questions regarding the Lummi's right to fish in these waters in its decision issued three years ago—which should have ended what had been more than a decade of litigation.

Yet like the district court, the S'Klallam and the Lower Elwha fail to accept the plain terms of this Court's mandate. The S'Klallam continue fighting a battle they already lost, arguing this Court should not have rejected their arguments. The Lower Elwha attempt to declare victory in a battle that was never fought, arguing this Court would have agreed with arguments about additional waters never raised.

But this Court's decision speaks for itself. As this Court explained, it held "that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *Lummi III,* 876 F.3d at 1011. Thus, this Court determined that the waters disputed in this subproceeding (that is, the waters to the east of what has been called the Trial

Island line) are included in the Lummi's usual and accustomed grounds. It decided no more, and it decided no less.

The Lower Elwha at least recognize that this Court decided what it purported to decide: the Lummi's usual and accustomed grounds include all the disputed waters. But the Lower Elwha attempt to take this Court's decision an additional step. They claim that this Court *also* decided that the Lummi have no rights to fish west of the disputed waters. But nowhere did this Court purport to reach any such holding. Nor could it have done so: that issue was not part of this subproceeding.

The S'Klallam, by contrast, refuse to accept that *Lummi III* decided much of anything. The S'Klallam seize on the district court's (erroneous) interpretation, insisting this Court held only that the Lummi have rights to some unspecified area somewhere within the disputed waters. Because the plain language of this Court's opinion contradicts that reading, the S'Klallam disregard what this Court said. Instead, they press the same arguments they advanced in the last appeal, contending this Court *should* have agreed with them. Yet this Court already expressly (and correctly) rejected those arguments. The S'Klallam cannot resurrect them now.

Nor, for many of the same reasons, can the S'Klallam identify any reason the district court should have granted them leave to amend their Request for Determination (sometimes abbreviated "RFD") to continue litigating these or any other issues. The S'Klallam cannot challenge the Lummi's right to fish in the waters

originally disputed in this subproceeding because *Lummi III* resolved that question. And the S'Klallam cannot expand this subproceeding by contesting the Lummi's abstract right to fish in *additional* waters to the west of these disputed waters because the Lummi are not fishing there. The Lummi should not be forced to bear the costs of litigating issues that were either already decided or need not be decided at all.

REPLY IN NO. 19-35610

The arguments raised in the two cross-appeals turn, in large part, on the meaning of this Court's decision in *Lummi III*. The Lummi therefore begin by addressing the straightforward contention advanced in their appeal: *Lummi III* held the Lummi have treaty rights throughout the waters named and disputed in this subproceeding. Because the district court's decision contravened this mandate, it must be reversed. *In re Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984).

ARGUMENT

I. *LUMMI III* DETERMINED THE LUMMI'S RIGHT TO FISH IN THE DISPUTED WATERS

One can see why the S'Klallam fought to prevent this appeal from returning to the *Lummi III* panel. *See* Dkt. Nos. 31, 33 (No. 19-35610). The terms of this Court's holding were plain. This Court expressly concluded that "the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011.

As the Lummi have explained (Lummi Br. 24-33), this Court meant exactly what it said. It specifically defined the "waters contested here" as "the waters west of Whidbey Island," thus using the same terms that the litigants had used to describe the disputed waters. *Lummi III*, 876 F.3d at 1108; *see*, *e.g.*, ER216 (Request for Determination defining the disputed area as "the waters west of Whidbey Island").

This Court accurately stated that these disputed waters are located between Admiralty Inlet, the San Juan Islands, and Haro and Rosario Straits. *Lummi III*, 876 F.3d at 1010. And this Court determined that, just as it had previously concluded that the Treaty of Point Elliot "secures the Lummi's right to fish in Admiralty Inlet," the "same result holds" for "the waters at issue" in this subproceeding. *Id.* at 1007; *see id.* at 1009-10 (explaining how, for the same reasons Admiralty Inlet is "'included within the Lummi's U & A,'" the "disputed area here" is as well). Thus, this Court held in no uncertain terms that all the "waters contested here"—that is, the "waters west of Whidbey Island"—are within the Lummi's usual and accustomed grounds. *Id.* at 1008, 1011.

In light of this unambiguous holding, the Lower Elwha acknowledge that "this Court clearly intended in *Lummi III* to resolve the Subproceeding by finding that Judge Boldt included the disputed waters in Lummi's U&A." Lower Elwha Br. 4. The S'Klallam also once admitted as much. In their petition for rehearing of *Lummi III*, they challenged the decision's holding that the "miles of waters in between" the southern San Juan Islands and Admiralty Inlet are "included in Lummi's U&A." S'Klallam Rehearing Pet. 7, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661). This characterization of the Court's holding was entirely correct.

II. THE S'KLALLAM'S ARGUMENTS ARE MERITLESS

The S'Klallam now attempt to defend the district court's conclusion that *Lummi III* "determined only that *some* undefined waters off the west coast of Whidbey Island are included in the Lummi U&A." S'Klallam Br. 4. The S'Klallam make no effort to reconcile their current position with their prior contentions to this Court. Nor can they offer any viable argument for their newfound interpretation of this Court's opinion. Instead, aside from briefly parroting the district court's reasoning, the S'Klallam primarily attack the rationale of *Lummi III* itself, repeating the very contentions this Court previously considered and rejected. All of these arguments fail.

A. *Lummi III* Does Not Conflict With *Lummi I*

The S'Klallam's principal argument is that *Lummi III* could not have meant what it said, as that would create a conflict with the Court's prior decision in *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) ("*Lummi I*"). There, this Court held that Judge Boldt did not include the Strait of Juan de Fuca in his description of the Lummi's usual and accustomed grounds. *Id.* at 451-52. The S'Klallam insist that because "[t]here can be no real dispute" that the disputed waters here are "in the eastern portion of the Strait of Juan de Fuca," it would have been "absurd" for *Lummi III* to hold that "the Lummi U&A included all the waters east of the Trial Island Line." S'Klallam Br. 43-44.

This Court has already rejected these contentions. There was, in fact, a "real dispute" about whether these waters are within the Strait of Juan de Fuca, and *Lummi III* resolved that dispute *against* the S'Klallam. *Contra* S'Klallam Br. 43. In defining the relevant geographic terms, *Lummi III* explained that "Admiralty Inlet is due south of the waters contested here" and that "[t]he Strait of Juan de Fuca lies further west of both of those waters." 876 F.3d at 1008. Thus, this Court expressly concluded that the "waters contested here" are *not* within the Strait of Juan de Fuca; rather, the Strait is "further west" of these waters. *Id.*

The S'Klallam simply ignore this critical passage of the *Lummi III* decision, never even attempting to reconcile it with their arguments. *Cf.* S'Klallam Br. 15 (suggesting, in their statement of the case, that this Court's geographic description was inconsistent with certain district court decisions). The S'Klallam did address this passage in the prior appeal; there, they were far more forthright. In their rehearing petition, the S'Klallam repeatedly quoted this language, insisting that *Lummi III* had "overrul[ed] a commonly understood geographic fact" and created a "conflict" with *Lummi I* in concluding "the disputed waters within the Strait of Juan de Fuca are now part of Northern Puget Sound." S'Klallam Rehearing Pet., *supra*, at 4-5. This Court rejected those arguments. *United States v. Lummi Nation*, No. 15-35661, 2018 U.S. App. LEXIS 722, at *3 (9th Cir. Jan. 1, 2018). The S'Klallam cannot relitigate the issue now. *In re Beverly Hills Bancorp*, 752 F.2d at 1337.

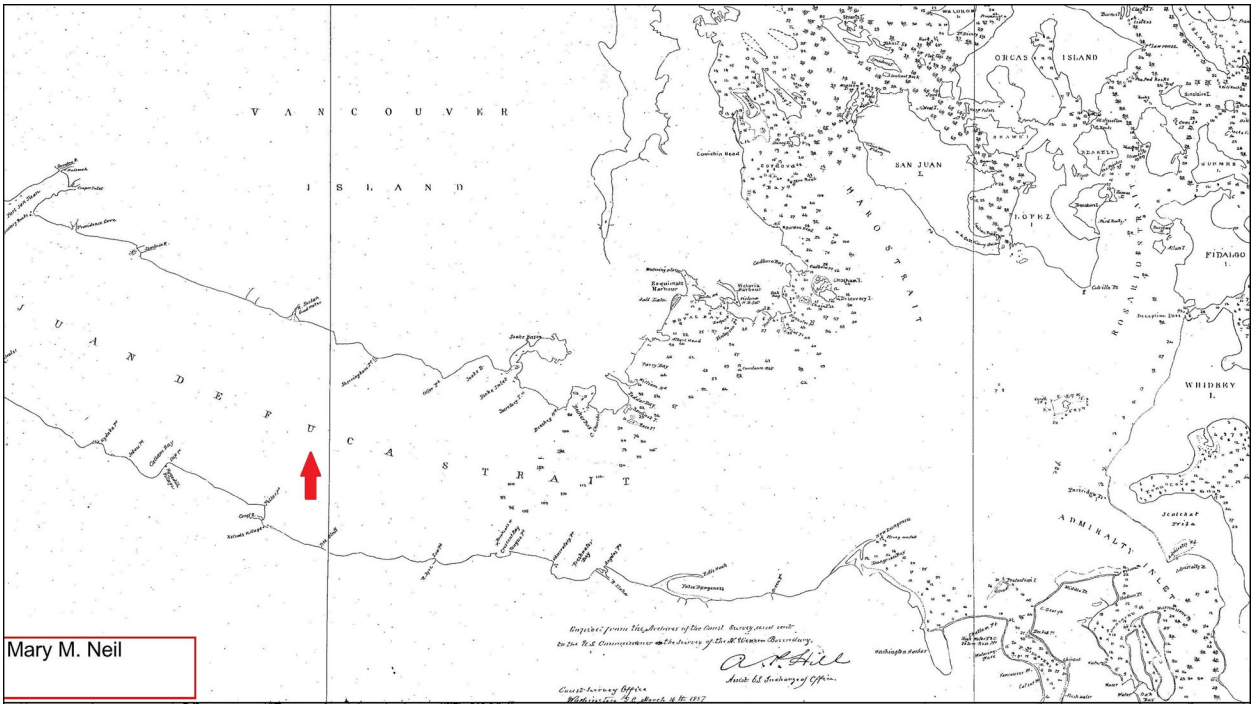
And this Court was right in rejecting those arguments. *Lummi III*'s holding that the waters contested here are within the Lummi's usual and accustomed grounds is entirely consistent with *Lummi I*. *Lummi I* held that, given the language Judge Boldt used in his order, he must have "viewed Puget Sound" (which is included in his description of the Lummi's usual and accustomed grounds) and "the Strait of Juan de Fuca" (which is not) "as two distinct regions, with the Strait lying to the west of the Sound." 235 F.3d at 451-52. But *Lummi I* did not purport to define where, exactly, Judge Boldt would have drawn the line between these two bodies of water. *Id.*; *see United States v. Lummi Nation*, 763 F.3d 1180, 1186 (9th Cir. 2014) ("*Lummi II*") (holding that no court had "determined the eastern boundary of the Strait of Juan de Fuca"). Thus, nothing in *Lummi I* precluded this Court in *Lummi III* from holding—as it expressly did—that, in describing the Lummi's usual and accustomed grounds, Judge Boldt would have understood "Puget Sound" to encompass the waters disputed here. *Lummi III*, 876 F.3d at 1008.

Much as they did in the prior appeal (*e.g.*, S'Klallam Rehearing Pet., *supra,* at 5-6), the S'Klallam invoke a map that depicts the Strait of Juan de Fuca extending to the shores of Whidbey Island. S'Klallam Br. 43 (citing JSER329). But as the Lummi explained in the last appeal (*see* Lummi Reply 18-19, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661)), such geographic evidence provides conflicting signals, as other maps depict the Strait of Juan De Fuca ending well to

the west of the Trial Island line. *E.g.*, FER10. *Lummi III* clearly refused to credit the S'Klallam's particular definition of the Strait, which would have led the Court to hold the Lummi have *no* treaty rights in the waters west of Whidbey Island. *Contra* S'Klallam Br. 4 (claiming *Lummi III* recognizing the Lummi's right in "*some* undefined waters"); *cf. also* S'Klallam Br. 48 (citing JSER293) (invoking a definition of "Puget Sound" that would eliminate *all* Lummi usual and accustomed grounds north of Admiralty Inlet).

If any particular map is relevant, it is the one that Judge Boldt cited in his findings of fact regarding the Lummi's usual and accustomed grounds. *See United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) (when Judge Boldt cited a supporting document, "[t]here is no question, then, that the court relied upon this information in reaching its decision"). That map depicted the Strait of

Juan De Fuca lying to the west of the waters disputed in this subproceeding:



ER170 (excerpt of map; red arrow added to indicate labeling of Juan de Fuca Strait). Thus, not only is *Lummi III*'s interpretation of Judge Boldt's order controlling, it is also correct: Judge Boldt would have understood the "Strait of Juan de Fuca" to "lie[] further west" of "the waters contested here." *Lummi III*, 876 F.3d at 1008.

B. The Procedural Posture Did Not Preclude *Lummi III*'s Holding

Next, the S'Klallam embrace the district court's conclusion that the "sole question" before the *Lummi III* Court was whether the district court erred in concluding the Lummi have *no* rights in the waters west of Whidbey Island, and thus this Court's reversal determined only that "*some* Lummi U&A must necessarily exist" in those waters. S'Klallam Br. 44 (quoting ER17). The Lummi have already addressed this contention. Lummi Br. 33-34; *accord, e.g.*, Lower Elwha Br. 20.

This Court conceivably *could* have reversed on that narrow ground. But it also unquestionably had the authority to resolve the entire controversy before it and determine the extent of the Lummi's rights in the disputed waters. *See*, *e.g.*, *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001). That is exactly what it did. *Lummi III*, 876 F.3d at 1011.

The S'Klallam do not dispute the existence of this Court's authority. Instead, they appear to argue that this Court chose not to exercise it. S'Klallam Br. 44. This argument is notable for its lack of quotations or citations to this Court's actual opinion—the S'Klallam merely assert "that was all this Court decided." S'Klallam Br. 44.

The closest the S'Klallam come to attempting to link their "interpretation" of this Court's opinion to the actual content of that opinion is later in their brief, when they briefly quote the following statement: "The nautical path that we traced in *Lummi I* from the San Juan Islands to Seattle cuts right through the waters at issue here." *Lummi III*, 876 F.3d at 1009-10; *see* S'Klallam Br. 51. According to the S'Klallam, "[i]f the Lummi's transit route . . . *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." S'Klallam Br. 51-52. But the very next sentence of this Court's opinion removes any possible confusion: "Indeed, the waters west of Whidbey Island are situated just north of Admiralty Inlet, which is included in the Lummi's U&A, and

just south of the waters surrounding the San Juan Islands (such as Haro and Rosario Straits), which are also included in the Lummi's U&A." *Lummi III*, 876 F.3d at 1010. Thus, the "nautical path" *Lummi III* described extended from the waters stretching between Haro and Rosario Straits south to Admiralty Inlet—an area encompassing the entirety of the disputed waters. *Id.* at 1009-10; *see* Lower Elwha Br. 26 ("Without a doubt, this description covers the same waters described in the RFD.").

The S'Klallam cannot simply brush aside the many statements in this Court's opinion that contradict their cramped reading. *See supra* pp. 4-5. This Court did not hold that the Lummi have rights to some unspecified portion of the disputed waters; it held that "the waters west of Whidbey Island"—which it had defined as the disputed waters—"are encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011.

Equally notable is the S'Klallam's refusal to defend the district court's further conclusion that the original Request for Determination put at issue only whether "Lummi fishing in some portion of the disputed waters" is consistent with Judge Boldt's order. *See* ER17-18. As the S'Klallam implicitly recognize, that rationale is indefensible: just as in all similar cases in the long-running *United States v. Washington* litigation, the Requesting Parties clearly sought a determination of whether the Lummi have treaty rights *throughout* the disputed waters. ER215-16;

see Lummi Br. 35-38. This Court answered that question in the affirmative. *Lummi III*, 876 F.3d at 1011. The S'Klallam's invocation of "procedural posture" provides no basis for upending that determination.

C. This Court Resolved The Case Before It

Again echoing (at least in part) the district court's reasoning, the S'Klallam also contend this Court could not have recognized the Lummi's right to fish east of the Trial Island line because the Court never expressly mentioned the Trial Island line. S'Klallam Br. 45 (citing ER16). According to the S'Klallam, "[i]t 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." S'Klallam Br. 45.

Along with being inconsistent with the plain language of this Court's opinion, the S'Klallam's argument misapprehends this Court's role. This Court was not, as the S'Klallam seem to believe, charged with definitively drawing the "Lummi U&A boundary," wherever it might lie. S'Klallam Br. 45. Rather, this Court was asked to resolve the specific issue presented to it: whether the Lummi's usual and accustomed grounds include the waters disputed in this case. *Lummi III*, 876 F.3d at 1007. Those waters were defined by the Requesting Parties in their Request for Determination as the "marine waters northeasterly of a line running from Trial Island

near Victoria, British Columbia, to Point Wilson"—that is, the Trial Island line. ER216.

The "hot[] disput[e]" (S'Klallam Br. 45) before the Court was thus whether the Lummi have treaty rights in the waters *defined by the parties* at the outset of this litigation. The Court resolved that dispute in the Lummi's favor. *Lummi III*, 876 F.3d at 1011. While this Court did not specifically quote the Requesting Parties' definition of these waters, it was not unaware of those boundaries—which the litigants had made abundantly clear in briefing and argument. Lummi Br. 30-31. Thus, this Court straightforwardly defined the "waters contested here" as the "waters west of Whidbey Island," *Lummi III*, 876 F.3d at 1008, correctly explained that these waters are situated between "Haro and Rosario Straits" and "Admiralty Inlet," *id.* at 1010, then that held these disputed waters are within "the Lummi's U&A," *id.* at 1011. The S'Klallam identify no ambiguity in this holding, which plainly applies to all the waters the parties contested—that is, those east of the Trial Island line.

For the same reasons, this Court's statement that it "need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A" undermines rather than supports the S'Klallam's arguments. *Id.*; *contra* S'Klallam Br. 45. Again, this Court had made clear that the "Strait of Juan de Fuca lies further west" of the waters disputed here. *Lummi III*, 876 F.3d at 1008. Thus, in stating that it need not define the Strait of Juan de Fuca, this Court clarified that it resolved

only the status of the waters the Requesting Parties had specifically put at issue. *Id.* at 1011. Those waters were bounded by the Trial Island line. ER216.[1]

D. *Lummi III* Was Correctly Decided

Finally, the S'Klallam devote the bulk of their argument to the merits of the last appeal. S'Klallam Br. 46-52. They insist, in effect, that *Lummi III* was wrongly decided. But as the Lummi have explained (Lummi Br. 36), even if *Lummi III* were "in error," it would still be binding. *Firth v. United States*, 554 F.2d 990, 994 (9th Cir. 1977). This Court's holding cannot now be relitigated. *Id.*

Even if considered, the S'Klallam's arguments fail (as this Court already determined in rejecting them). Tellingly, the S'Klallam never address the legal standard that governed in *Lummi III*. When parties seek to establish that Judge Boldt did not include a given area within his description of a tribe's usual and accustomed

[1] The S'Klallam also briefly assert that this straightforward reading would somehow "eviscerate" *Lummi III*'s reference "to the waters '*immediately*' off the western coast of Whidbey Island." S'Klallam Br. 45; *see Lummi III*, 876 F.3d at 1010 (quoting *Lummi II*, 763 F.3d at 1187). The S'Klallam made the same argument in the last appeal. *See* S'Klallam Answering Br. 37, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661). As the Lummi explained then, *Lummi II* occasionally used the word "immediately" when describing the disputed waters in order to distinguish them from waters farther to the west of Whidbey Island (*i.e.*, the Strait of Juan de Fuca). *See* Lummi Reply, *supra*, at 9 n.1 (citing *Lummi II*, 763 F.3d at 1182). *Lummi III* simply quoted this characterization in the course of explaining that *Lummi I*'s reasoning regarding Admiralty Inlet applies equally to the waters linking the San Juan Islands and Haro Strait to Admiralty Inlet, holding that all of these waters (unlike the waters of the Strait further to the west) are within Judge Boldt's description of the Lummi's adjudicated usual and accustomed grounds. *Lummi III*, 876 F.3d at 1010.

grounds, they must first show that Judge Boldt's order is ambiguous on this point. *Tulalip Tribe v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015). That requirement was largely undisputed here. *Lummi III*, 876 F.3d at 1008-09. But requesting parties like the S'Klallam then bear the onerous burden of demonstrating there was "no evidence" in the record before Judge Boldt that the tribe "fished . . . or traveled through the contested areas." *Tulalip Tribes*, 794 F.3d at 1133 (quotation marks omitted, alteration in original); *see Lummi III*, 876 F.3d at 1009. As the Lummi have already noted (Lummi Br. 36), what constitutes "evidence" in this context is extremely modest: even "fragmentary" and "happenstance" evidence will suffice. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988).

To prevail, the Requesting Parties thus had to prove that *no* evidence could have led Judge Boldt to include these waters in his description of the Lummi's usual and accustomed grounds. They could not make that showing. *Lummi III*, 876 F.3d at 1010-11. None of the S'Klallam's arguments in this appeal changes that fact.

Indeed, rather than address the evidence before Judge Boldt (as this Court's precedent requires), the S'Klallam focus on cherry-picked terms contained in Judge Boldt's order. The S'Klallam emphasize that Judge Boldt described the Lummi's usual and accustomed grounds as including, among other things, the Puget Sound waters "from the Fraser River south to the present environs of Seattle." *United States v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974) ("*Decision I*"); *see*

S'Klallam Br. 48. They contend the most direct route from the Lummi's "home territory" near the Fraser River to the environs of Seattle would hug the coast of Whidbey Island. S'Klallam Br. 14-15, 51.

The actual *evidence* before Judge Boldt provides no support for this argument. Critically, the Lummi's "home territory" was not the Fraser River. To the contrary, the expert anthropologist report on which Judge Boldt relied expressly described the Lummi's "home territory" as encompassing, among other things, the waters surrounding the San Juan Islands, including Haro Strait. ER118-120; *see Lummi III*, 876 F.3d at 1008 (recognizing the Lummi's "home in the San Juan Islands"); *Decision I*, 384 F. Supp. at 360 (describing the Lummi's reefnetting and trolling in this home territory). From their "home territory" in and around the San Juan Islands, the Lummi were "accustomed . . . to visit fisheries as distant as the Fraser River in the north" as well as "the present environs of Seattle" in the south. ER120-121.

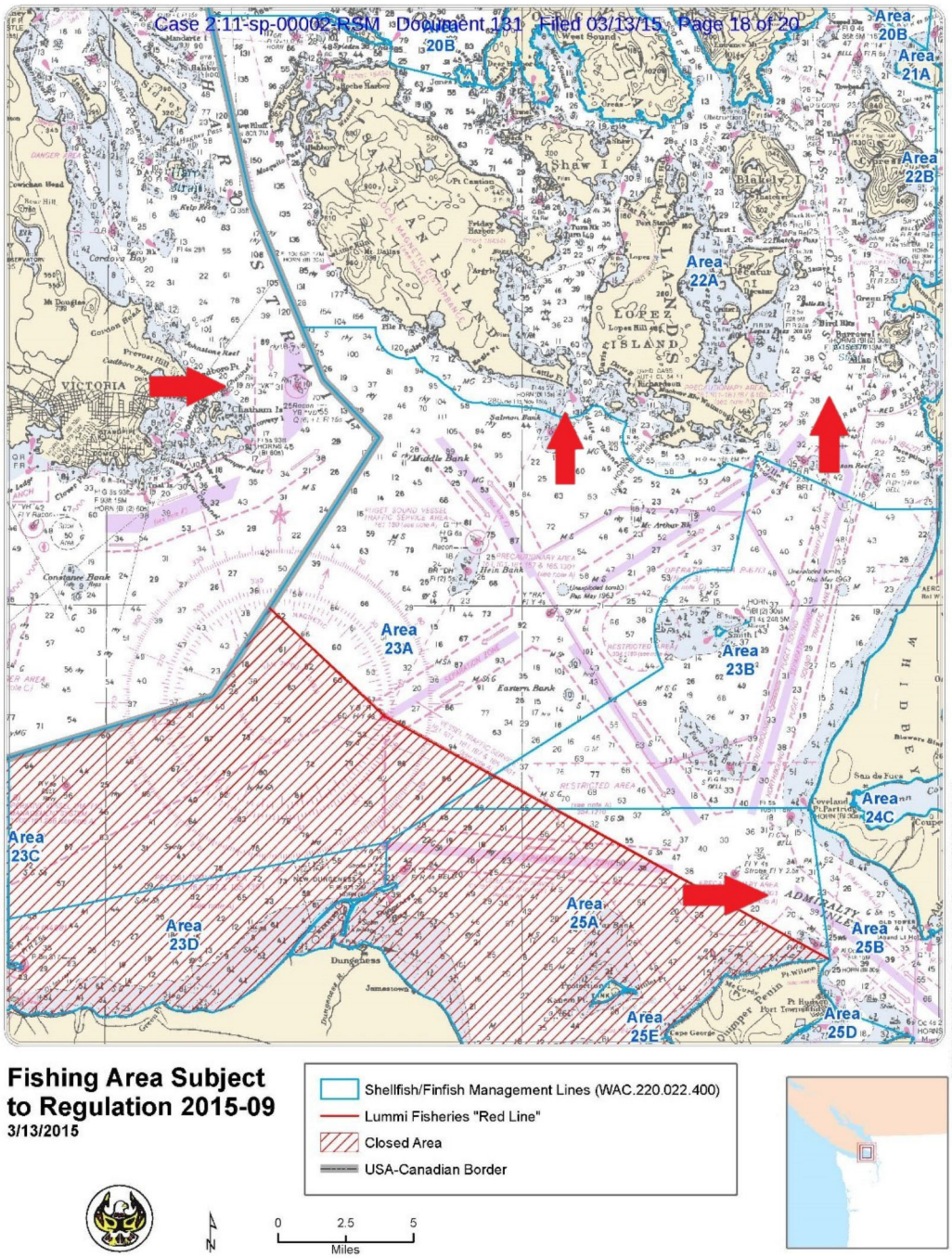
Thus, the question before the *Lummi III* Court was not, as the S'Klallam contend (*e.g.*, S'Klallam Br. 48), what path would most directly link the Fraser River to the present environs of Seattle. Judge Boldt referenced these points because they were among the more distant fisheries the Lummi frequented. ER120-121. Rather, the question before the *Lummi III* Court was whether Judge Boldt might have inferred from the evidence before him that the Lummi would have traveled, and therefore fished, in the waters disputed here. *See Lummi III*, 876 F.3d at 1009-10.

Because the evidence demonstrated these waters directly linked the Lummi's home territory in the San Juan Islands, Haro Strait, and Rosario Strait to Admiralty Inlet—through which this Court had already held the Lummi would have fished and traveled to reach the environs of Seattle—this Court correctly determined Judge Boldt could have. *Id.* at 1010; *accord, e.g.*, Lower Elwha Br. 32-37.[2]

To the extent the S'Klallam attempt to address this evidence, their arguments fall well short. The S'Klallam insist the fact that the disputed waters are south of the Lummi's usual and accustomed grounds in Haro Strait means nothing because "mere adjacency to U&A does not itself constitute U&A." S'Klallam Br. 49-50. Yet these waters are not just "adjacen[t]" to the Lummi's usual and accustomed grounds; they are directly between the Lummi's home territory and Admiralty Inlet, through which this Court had already recognized the Lummi must have traveled frequently. *See Lummi III*, 876 F.3d at 1010. Similarly, the S'Klallam contend there was no evidence Lummi "fished as far west as Trial Island." S'Klallam Br. 50. To

[2] For the same reasons, the Lummi are not being inconsistent in also maintaining they have rights to waters east of Whidbey Island. *Contra* S'Klallam Br. 48-49 n.11; *see also* Oral Arg. Recording at 17:29, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661) (counsel for the S'Klallam making this same argument to *Lummi III* panel). The disputed waters west of Whidbey Island are directly between the Lummi's home territory in and around the San Juan Islands and Admiralty Inlet, and thus the Lummi would have traveled and fished throughout these waters. While the evidence before Judge Boldt similarly demonstrates the Lummi also would have traveled and fished in the waters east of Whidbey Island, that is a separate issue.

be clear, the waters immediately surrounding Trial Island cannot have been addressed by Judge Boldt for a simple reason: they are in Canada. ER142. Trial Island is merely used as an endpoint in describing the waters disputed in this case. ER216. That aside, while the record before Judge Boldt may have contained no reference to Trial Island itself, the evidence did demonstrate that the Lummi routinely fished in Haro Strait, which borders Trial Island. ER118; *see Lummi III*, 876 F.3d at 1010. As the below map makes clear, this Court thus had good reason to conclude "there is no doubt" the waters disputed here "would likely be a passage through which the Lummi would have traveled." *Lummi III*, 876 F.3d at1009.



ER142 (red arrows added to indicate Haro Strait, the San Juan Islands, Rosario Strait, and Admiralty Inlet).

Unable to dispute this straightforward reasoning, the S'Klallam fall back on the argument that evidence of the Lummi's travel through these waters could not

establish their rights to fish in them. S'Klallam Br. 49 n.12. This Court may recall that the S'Klallam made the same argument before. *E.g.*, S'Klallam Answering Br., *supra*, at 36-37. This Court expressly rejected it. *Lummi III*, 876 F.3d at 1010. As *Lummi III* acknowledged, a tribe's "occasional and incidental trolling" through marine waters would not render those waters usual and accustomed grounds. *Id.* But this Court had already held that "the Lummi's use of 'the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle' was more than mere 'occasional and incidental trolling.'" *Id.* (quoting *Lummi II*, 763 F.3d at 1187). And as this Court noted, treating evidence of more frequent travel as sufficient to establish a tribe's treaty rights is consistent with this Court's "long-accepted framework, which requires looking at the evidence 'before Judge Boldt that the [tribe] fished *or traveled* in the . . . contested waters.'" *Id.* (quoting *Tulalip Tribes*, 794 F.3d at 1135) (emphasis and alteration in original). Once again, this Court was correct. *See, e.g.*, *Lummi Indian Tribe*, 841 F.2d at 320 (distinguishing evidence of "*frequent* travel and visits" from "incidental trolling") (emphasis in original).

In a variation on these misguided contentions, the S'Klallam invoke *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017). S'Klallam Br. 52. They also did so in their *Lummi III* rehearing petition. *See* S'Klallam Rehearing Pet., *supra*, at 9. As this Court presumably recognized in rejecting that

petition, the *Makah* decision has little to do with this case. In *Makah*, this Court held that the district court erred in drawing vertical (*i.e.*, North-South) lines as boundaries for two tribes' usual and accustomed grounds because the district court had found these tribes fished at specified distances from the coastline (either 30 or 40 miles, depending on the tribe), and the coastline is not vertical. 873 F.3d at 1168. Here, by contrast, there is no evidence or finding that the Lummi fished only a certain distance from Whidbey Island, the San Juan Islands, or anywhere else. Rather, the record before Judge Boldt demonstrated that tribes like the Lummi "travelled widely and frequently throughout the waters of the Sound." ER120. Both the record and basic geography confirmed these journeys would have taken the Lummi directly through the waters at issue in this subproceeding. *Lummi III*, 876 F.3d at 1010.

Finally, the S'Klallam suggest the Lummi cannot have rights throughout these waters given the language used in 1971 Lummi filings. S'Klallam Br. 48. Unlike the bulk of the S'Klallam's arguments, this one was not advanced in the prior appeal. While this Court has not yet rejected this contention, it also could not have been the basis for the holding the S'Klallam assert this Court reached. Regardless, this argument would have had no effect on *Lummi III*'s outcome. The 1971 filing was not evidence on which Judge Boldt relied in making his determination, but merely the Lummi's initial complaint. JSER246. And nowhere in that filing did the Lummi disclaim any right to the waters disputed in this subproceeding. Instead, the pleading

stated the Lummi have rights to waters "*including but not limited to*," among others, those "surrounding the San Juan Island group, and eastward to the mainland shore." JSER247 (emphasis added). Nothing in this description was inconsistent with this Court's holding that "the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011.

RESPONSE TO LOWER ELWHA KLALLAM TRIBE'S CROSS-APPEAL IN NO. 19-35638

For the most part, the Lummi have no quarrel with the Lower Elwha's reading of *Lummi III*. The Lower Elwha recognize that this Court "determined that the entirety of the waters west of Whidbey Island, bounded by the Trial Island line, is included within Lummi's U&A." Lower Elwha Br. 5. Exactly right.

But seeking to turn these lemons into lemonade, the Lower Elwha contend *Lummi III* "*also* established that the Trial Island line is the western boundary of Lummi's U&A." Lower Elwha Br. 5 (emphasis added). Here, the Lower Elwha go too far. Consistent with the constitutional principles of restraint that bind the federal judiciary, this Court did not decide (and could not have decided) that issue because it was not before the Court.

COUNTERSTATEMENT OF THE ISSUE

Whether *Lummi III* determined the Lummi's rights to fish in waters not contested in that appeal.

STATEMENT OF THE CASE

The Lummi rely on their previous statement. Lummi Br. 4-20.

SUMMARY OF ARGUMENT

Federal courts decide only the disputes before them. In *Lummi III*, that dispute concerned the waters defined in the Requesting Parties' initial Request for Determination—namely, the waters between Whidbey Island and the Trial Island

line. The Request for Determination challenged the Lummi's right to fish in these waters, and these waters alone, because the Lummi were not fishing west of the Trial Island line. The federal courts thus lacked jurisdiction to decide whether the Lummi could fish in the waters west of that line.

The Lower Elwha can provide no basis for concluding this Court ignored these jurisdictional and jurisprudential limitations by reaching out to resolve whether the Lummi's treaty rights extend beyond the disputed waters. Rather, the Lower Elwha rely almost entirely on arguments regarding what this Court purportedly *would* have decided had the issue been raised. The Lower Elwha could press these contentions in the future if and when a justiciable case or controversy requires their resolution. The Lower Elwha cannot, however, prevail here by insisting that this Court already decided a question never presented for its review.

ARGUMENT

I. THIS COURT DID NOT AND COULD NOT DETERMINE THE LUMMI'S RIGHTS WEST OF THE TRIAL ISLAND LINE

It is axiomatic that federal courts may "decide only the case at hand." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007). This requirement reflects Article III's fundamental limitation of the judicial power to actual "[c]ases and [c]ontroversies." *Id.* (quotation marks omitted). Federal courts do not "sit to decide hypothetical issues or to give advisory opinions." *Akina v. Hawaii*, 835 F.3d 1003, 1011 (9th Cir. 2016).

Here, the only issue before the *Lummi III* Court was whether the Lummi's usual and accustomed grounds include the specific waters disputed in this case. 876 F.3d at 1008, 1011. That was accordingly the only issue this Court decided. *Id.*

The Requesting Parties' initial Request for Determination established the scope of the relevant case or controversy. There, the Requesting Parties challenged the Lummi's alleged "impermissibl[e] fishing" in the "marine waters northeasterly of a line running from Trial Island . . . to Point Wilson on the westerly opening of Admiralty Inlet." ER216. That is, the Requesting Parties challenged Lummi fishing east of the Trial Island line. They did not challenge Lummi fishing *west* of the Trial Island line.

The Requesting Parties did not challenge Lummi fishing west of that line for a simple reason: the Lummi were not fishing there. Rather, the Lummi Nation Natural Resources Commission had issued regulations authorizing Lummi fisherman to fish only in the waters east of the Trial Island line (regulations that, in this respect, have not since been altered). ER205; *see* FER5; FER8 (2019 declarations confirming this boundary). And to invoke Paragraph 25(a)(1) of the district court's continuing jurisdiction order, as the Requesting Parties did, they were required to identify specific "actions intended or effected" by the Lummi that were allegedly not "in conformity" with Judge Boldt's order. *United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1993); *see* Lower Elwha Br. 12

(litigation proceeded under Paragraph 25(a)(1)); JSER223-224. Because the Lummi had not (and have not) manifested any intention to fish in the waters west of the Trial Island line, the district court did not have jurisdiction under Paragraph 25(a)(1) to address the Lummi's rights in those waters. *United States v. Washington*, 928 F.3d 783, 791 (9th Cir. 2019) (when parties do not satisfy the requirements of Paragraph 25 of the continuing jurisdiction order, the court "lack[s] the ability to proceed to the merits").

Paragraph 25(a)(1)'s requirement of an actual, live controversy is consistent with Article III's more general mandate restricting the federal judiciary to the "traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009). Had the Requesting Parties sought to litigate the Lummi's abstract legal right to fish in waters in which the Lummi had indicated no intent to fish, they would have raised the sort of "wholly speculative concerns that call for a type of purely advisory opinion that federal courts are prohibited by the Constitution from giving to putative litigants." *Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767, 773 (9th Cir. 2008) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 106-07, 110-11 (1982)).

Thus, the case or controversy before the *Lummi III* Court concerned the Lummi's right to fish in the waters east of the Trial Island line. This Court described

these "waters at issue" as the "waters west of Whidbey Island" (*Lummi III*, 876 F.3d at 1007), and it sought to determine whether these waters "are included in the Lummi's U&A" (*id.* at 1008). This Court resolved that issue by holding that "the waters west of Whidbey Island, which lie between the southern portions of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *Id.* at 1011. This Court did not decide the separate issue of whether the Lummi's usual and accustomed grounds *also* encompass additional waters to the west. *Id.* That question was not before it.

In fact, this Court affirmatively disclaimed making any such determination. Immediately after setting forth its holding, it clarified: "In coming to this conclusion, we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A." *Id.* In other words, the Court did not decide where the Strait of Juan de Fuca—which is not included within Judge Boldt's description of the Lummi's usual and accustomed grounds, *Lummi I*, 235 F.3d at 451-52—ends and the Lummi's adjudicated usual and accustomed grounds begin. This Court did not decide that issue because it had no call to do so: as it had already explained, wherever the Strait of Juan de Fuca ends, it is "further west" of the "waters contested here." *Lummi III*, 876 F.3d at 1008.

II. THE LOWER ELWHA CANNOT EXPAND THIS COURT'S MANDATE TO ENCOMPASS NEW ISSUES

According to the Lower Elwha, the *Lummi III* Court ventured far beyond the case before it. The Lower Elwha insist this Court determined not only that the Lummi's usual and accustomed grounds *include* the waters at issue in this subproceeding, but also that they *exclude* waters to the west. Thus, the Lower Elwha argue, the district court violated this Court's mandate in refusing to enter judgment that "the Trial Island to Point Wilson line is the westernmost extent or boundary of Lummi's U&A." Lower Elwha Br. 6. The Lower Elwha cannot, however, retroactively change what was before this Court.

A. What This Court Might Have Decided Cannot Change What It Did Decide

The Lower Elwha's central contentions are premised not on what *Lummi III* actually decided, but rather what they believe this Court *would* have decided had the issue been presented. The Lower Elwha insist "[t]here is no evidence in the record of any fisheries west of the Trial Island line to which Lummi traveled and thus no basis to extend the Court's evidentiary rationale past the Trial Island line." Lower Elwha Br. 5. They contend that any waters to the west of this line therefore can and should be distinguished from those to the east of the line. Lower Elwha Br. 37-39.

Even if these merits argument were correct (and the Lummi by no means concede the issue), they are beside the point. Whatever the *Lummi III* Court

hypothetically would have decided had the issue been raised, it *did* "decide only the case at hand." *Hein*, 551 U.S. at 615. *Lummi III* never had any cause to examine the evidence of Lummi fishing to the west of the Trial Island line, or to evaluate whether Judge Boldt might have believed this evidence sufficed to establish Lummi usual and accustomed grounds. *Lummi III*, 876 F.3d at 1007-11. Although the Lower Elwha passingly suggest that they sought a definitive "boundary determination" in the initial Request for Determination (Lower Elwha Br. 37-38, 41), what they in fact sought was a determination of the Lummi's rights *within the disputed waters*. *E.g.*, ER226 (requesting "[a] determination that [the] Lummi's Usual and Accustomed fishing treaty area does not include" the waters "described in paragraph 2"). That was therefore the only issue presented for this Court's resolution. *Lummi III*, 876 F.3d at 1007. The Requesting Parties did not—and, given the requirements of Paragraph 25(a)(1) and Article III, could not—raise the separate issue whether the Lummi have rights to the west of those disputed waters. ER216; *supra* pp. 26-27.

The Lower Elwha could press these contentions if and when it ever becomes necessary to litigate the issue. But the question was not presented here.[3]

B. *Lummi III* Did Not Go Beyond The Case Before It

The Lower Elwha make only a brief attempt to argue that this Court actually *did* decide that question. Oddly, the Lower Elwha seize on the final sentence of this Court's opinion—which, as explained above (*supra* p. 28), expressly disclaims precisely the holding the Lower Elwha seek to attribute to this Court. *See* Lower Elwha Br. 40-42. Again, this Court stated: "In coming to this conclusion" (*i.e.*, that the disputed waters are "in the Lummi's U&A"), "we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A." *Lummi III*, 876 F.3d at 1011.

The Lower Elwha's argument is somewhat difficult to parse, but it appears to have two steps. *First*, because "it would become necessary to determine the outer reaches (boundaries) of the Strait of Juan de Fuca 'for purposes of Lummi's U&A'

[3] In a similar vein, the Lower Elwha suggest the Lummi understood the Trial Island line to be the limit of the Lummi's usual and accustomed grounds when the tribe's Natural Resources Commission adopted that boundary in its regulations. Lower Elwha Br. 27-28. For the reasons explained above, that would be beside the point: the Lummi's own view of their rights would not change what this Court actually decided. But regardless, the Commission did not, in fact, view this line as delineating the western limits of the Lummi's adjudicated treaty rights. The line reflects a number of factors, including the Commission's view of which waters are well within the Lummi's jurisdiction and practical concerns regarding manageability. ER205.

only if Lummi's U&A shares a boundary with the eastern boundary of the Strait of Juan de Fuca," this Court must have held that the Strait of Juan de Fuca and the Lummi's U&A "do not share a boundary." Lower Elwha Br. 40-42. *Second*, this Court accordingly held that the boundary of the Lummi's usual and accustomed grounds is the Trial Island line. Lower Elwha Br. 42.

This contention fails at each step. To start, the second proposition does not follow from the first. Even assuming that the Lummi's adjudicated usual and accustomed grounds are not bounded by the Strait of Juan de Fuca, that would not necessarily mean that they are bounded by the Trial Island line (let alone that this Court held as much). The boundary could instead be located somewhere between the Trial Island line and the Strait of Juan de Fuca, which is even "further west." *Lummi III*, 876 F.3d at 1008.

In any event, the first proposition—that this Court held that the Strait of Juan de Fuca does not border the Lummi's usual and accustomed grounds set forth in Judge Boldt's order—misreads this Court's decision. This Court did not say that it "need not determine the outer reaches of the Strait of Juan de Fuca *in order to definitively determine the boundary* of the Lummi's U&A." It said that it "need not determine the outer reaches of the Strait of Juan de Fuca *for purposes* of the Lummi's U&A." *Lummi III*, 876 F.3d at 1011 (emphasis added). As the S'Klallam's brief in this appeal once again demonstrates, there are many possible definitions of the

"Strait of Juan de Fuca." *Supra* pp. 7-10; *e.g.*, S'Klallam Br. 39-40. The particular definition relevant here is the one that Judge Boldt had in mind when he omitted the Strait from his description of the Lummi's usual and accustomed grounds. *Lummi I*, 235 F.3d at 451-52. Thus, the *Lummi III* Court explained that it need not determine the reaches of the "Strait of Juan de Fuca *for purposes* of the Lummi's U&A"—that is, in resolving the Lummi's rights to the disputed waters, this Court need not definitively decide how to define the understanding of the "Strait" relevant to Judge Boldt's description of the Lummi's usual and accustomed grounds. *Lummi III*, 876 F.3d at 1011 (emphasis added). It did not thereby hold, as the Lower Elwha assert, that some third body of water lies between the Strait and the Lummi's usual and accustomed grounds.

C. The Lower Elwha's "Efficiency" Arguments Are Misplaced

Finally, the Lower Elwha invoke judicial economy concerns and ask this Court to now hold that the Lummi have no rights west of the Trial Island line, or to remand for the district court to do so. Lower Elwha Br. 42-44. The Lower Elwha identify no legal authority for this request. Nor could they. While "[j]udicial efficiency is an admirable goal," it cannot justify ignoring fundamental jurisdictional limits on how federal courts decide cases. *United States v. Washington*, 928 F.3d at 791 n.6. The Lower Elwha "cannot demand a ruling on an action [they] chose not to file"—namely, a ruling on waters *other* than those disputed in this case. *United*

States v. 300 Units of Rentable Hous., 668 F.3d 1119, 1125 (9th Cir. 2012). Nor can the Lower Elwha explain how they could pursue such an action given the limits of Paragraph 25 and Article III: to repeat, the Lummi are not fishing in the waters west of the Trial Island line. *Supra* pp. 26-27; *see infra* pp. 45-50. What the Lower Elwha seeks "would amount to nothing more than an advisory opinion." *300 Units of Rentable Hous.*, 668 F.3d at 1125. The federal courts lack authority to answer such hypothetical questions. *Id.*

RESPONSE TO JAMESTOWN AND PORT GAMBLE S'KLALLAM TRIBES' CROSS-APPEAL IN NO. 19-35611

While the Lower Elwha overread this Court's decision in *Lummi III*, the S'Klallam prefer to read it as deciding nothing at all. On remand, the S'Klallam sought to amend the initial Request for Determination to challenge Lummi fishing "in the Strait of Juan de Fuca"—by which the S'Klallam apparently meant both the waters originally at issue in this subproceeding and additional waters to the west. Now on appeal once again, the S'Klallam contend the district court abused its discretion in denying this request. But the proposed amended Request for Determination was plainly futile: to the extent the S'Klallam sought to challenge Lummi fishing within the originally disputed waters, *Lummi III* definitively foreclosed that claim; to the extent S'Klallam sought to challenge Lummi fishing to the west of those waters, the court lacked jurisdiction because the Lummi were not (and are not) fishing there. Moreover, as the district court recognized, continued litigation—and especially the S'Klallam's raising *new* issues seven years into this litigation—would necessarily cause the Lummi undue prejudice. In these respects, the district court was correct and should be affirmed.

COUNTERSTATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying the S'Klallam leave to amend the original Request for Determination.

STATEMENT OF THE CASE

Understanding the S'Klallam's arguments in their cross-appeal—and where those arguments go wrong—requires a slightly more detailed description of this case's recent procedural history than the Lummi provided previously. *See* Lummi Br. 16-19.

A. The S'Klallam's Amended Request For Determination

After this Court issued its mandate in *Lummi III*, the S'Klallam moved to amend the initial Request for Determination, dropping the Lower Elwha from the pleadings entirely. JSER175. In the proposed amended Request for Determination, the S'Klallam struck the original Request's detailed description of the disputed waters, which had referenced the Trial Island line. JSER176. In its place, the S'Klallam inserted: "The area where Lummi is impermissibly fishing or threatening to fish is in the Strait of Juan de Fuca, Port Townsend Bay, and Hood Canal." JSER176.[4]

[4] Hood Canal is to the south of Admiralty Inlet, far from the waters originally disputed here. This Court has previously held that Judge Boldt did not intend to include Hood Canal in his description of the Lummi's usual and accustomed grounds. *Lummi I*, 235 F.3d at 452. Port Townsend Bay is within Admiralty Inlet, on the coast of the Olympic Peninsula. This Court has previously held that the Lummi's usual and accustomed grounds include Admiralty Inlet. *See id.* at 451. The S'Klallam advance no arguments on appeal respecting either of these two bodies of water, and they have therefore abandoned any such claims. *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988).

As the authority for the district court to address these contentions, the S'Klallam invoked four separate provisions of Judge Boldt's continuing jurisdiction order: Paragraphs 25(a)(1), 25(a)(4), 25(a)(6), and 25(a)(7). JSER177-178. Paragraph 25(a)(1), as described above (*supra* pp. 26-27), provides for jurisdiction to consider: "Whether or not the actions intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I." *United States v. Washington*, 18 F. Supp. 3d at 1213. The other cited subsections provide for jurisdiction over:

> [25(a)(4)] Disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves; . . .
>
> [25(a)(6)] The location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I; and
>
> [25(a)(7)] Such other matters as the court may deem appropriate.

Id.

Before filing a Request for Determination, complaining parties must also satisfy certain procedural requirements. *See id.* Most relevant here, Paragraph 25(b) requires that they "meet and confer with all parties that may be directly affected by the request," and that the parties discuss "the basis for the relief sought by the requesting party" and "the possibility of settlement." *Id.* In the proposed Request

for Determination, the S'Klallam asserted that they had "held an amended meet and confer." JSER178; *see* JSER171 (declaration from S'Klallam counsel stating same).

B. The Parties' Briefing

In seeking leave to file this amended Request for Determination, the S'Klallam made a variety of arguments. Among other things, the S'Klallam contended the district court needed to resolve a "panel conflict" in the Ninth Circuit's jurisprudence, and that the Lummi had engaged in spoliation. ER79-86; *see* Lummi Br. 16.

In their cross-appeal, the S'Klallam have abandoned these arguments. The S'Klallam now focus on the contention that *Lummi III* did not establish "a clear boundary line" between the Lummi's usual and accustomed grounds and the Strait of Juan de Fuca, and that further proceedings were needed to draw one. ER79; *see* S'Klallam Br. 16. Below, the S'Klallam appeared to propose that this line be drawn somewhere *within* the waters originally disputed in this case. ER30; ER86; *see* S'Klallam Br. 16 (explaining S'Klallam sought to "define the Lummi U&A to include the immediate nearshore waters of Whidbey Island").

In their opposition, the Lummi explained that no such proceedings were necessary or warranted. The Lummi did not dispute that *Lummi III* left undefined the far western boundary of the Lummi's usual and accustomed grounds set forth in Judge Boldt's order. ER35. But as the Lummi detailed, any Request for

Determination regarding the waters originally disputed in this case would be futile, as *Lummi III* had held these waters are in the Lummi's usual and accustomed grounds. ER77. And any purported amendment challenging Lummi fishing *west* of these originally disputed waters would be futile because the Lummi were not fishing there. ER77. Moreover, the Lummi continued, because the S'Klallam had failed to specify the basis on which they might seek relief with respect to any such waters, they also could not satisfy Paragraph 25(b)'s prefiling requirements. ER77; *see* FER3 (declaration of Lummi counsel explaining that S'Klallam had refused to clarify on what basis they sought relief regarding these waters).

Subsequently, in opposing the Lower Elwha's motion for judgment, the S'Klallam sought to introduce a purported "expert" declaration from an anthropologist who reviewed the record before Judge Boldt. JSER9-10. In this declaration, the anthropologist stated his view that "[i]f a boundary line from Trial Island to Point Wilson were established, this would include areas for the Lummi that are inconsistent with the historical record that the Boldt court considered and would not be supported by any factual evidence in the decree." JSER10 (emphasis omitted). The Lower Elwha moved to strike the declaration as irrelevant because it was not evidence before Judge Boldt that could be considered in discerning his views. JSER4.

C. The District Court's Decision

The district court denied the S'Klallam's motion for leave to amend, offering two primary reasons for doing so. First, the court concluded that any such amendment would be futile. The court explained that the S'Klallam had identified no proper jurisdictional basis to press its claims. ER9-11. The court further concluded the S'Klallam had failed to state a claim on the merits because the proposed amendment did not "define[] a specific area of dispute." ER12. Without a specific definition of the waters at issue, "'intended and effectuated' activities cannot be identified and compliance with *Final Decision I* cannot be determined." ER12.

Second, the district court concluded any proposed amendment would also prejudice both the Lower Elwha and the Lummi. ER12-13. It highlighted the additional, unnecessary costs to which this litigation would subject the Lummi. ER13. Although the court acknowledged that the S'Klallam might seek to initiate a new subproceeding raising these claims, the court emphasized that such a filing would trigger Paragraph 25(b)'s "important pre-filing procedures." ER14.

The district court also granted the Lower Elwha's request to strike the S'Klallam's purported expert declaration. ER15. As the court explained, this sort of evidence is "not properly considered," and in any event was "irrelevant to the Court's resolution of the underlying [m]otions." ER15.

SUMMARY OF ARGUMENT

The S'Klallam's cross-appeal is premised almost entirely on their erroneous belief that *Lummi III* failed to determine the Lummi's rights in the waters originally disputed in this case. Under a correct understanding of this Court's decision, the district court's refusal to grant the S'Klallam leave to amend was justified on two separate grounds, each of which independently supports its decision.

First, the S'Klallam's proposed amendment was futile. The S'Klallam could not challenge Lummi fishing *east* of the Trial Island line because *Lummi III* definitively resolved that issue in the Lummi's favor. The S'Klallam could not challenge Lummi fishing *west* of the Trial Island line because the Lummi were not fishing there—thus depriving the court of jurisdiction. And even setting aside these fatal defects, the S'Klallam also did not adequately define *which* waters were at issue, thereby failing to state a claim.

Second, the S'Klallam's proposed amendment would cause the Lummi undue prejudice. The Lummi could not be forced to again defend their rights to fish east of the Trial Island line, as *Lummi III* had already answered that question. And the Lummi could not be required, seven years into this litigation, to incur the costs of defending their right to fish in wholly different waters. The district court properly exercised its discretion in determining that, to the extent the S'Klallam could

possibly mount such a challenge, they should do so by initiating a new subproceeding.

STANDARD OF REVIEW

This Court reviews a district court's denial of leave to amend for abuse of discretion. *In re Western States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 736 (9th Cir. 2013). In the *United States v. Washington* litigation specifically, this Court reviews the district court's case-management decisions regarding whether to "requir[e] initiation of a new, separate subproceeding" for abuse of discretion. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1358 (9th Cir. 1998) ("*Muckleshoot I*"). This Court also reviews the district court's evidentiary rulings for abuse of discretion. *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012).

ARGUMENT

A motion for leave to amend is properly denied where amendment would be futile or would cause the opposing party prejudice. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Both of these criteria are readily satisfied here. Either independently supports the district court's denial of the S'Klallam's motion.

The S'Klallam's contrary contentions are premised on their assumption that *Lummi III* failed to resolve the Lummi's rights in the waters east of the Trial Island line. The S'Klallam insist, for example, that the district court would have

jurisdiction over their claims because "by fishing all the way out to the Trial Island Line, the Lummi are not acting 'in conformity with' the Boldt decision." S'Klallam Br. 23. Were the S'Klallam's underlying premise correct—that is, if *Lummi III* had held only that the Lummi have *some* usual and accustomed grounds somewhere within the disputed waters—further proceedings might have been warranted. *Cf.* S'Klallam Br. 25.[5] But as the Lummi have already explained at length (*e.g.*, *supra* pp. 4-23), *Lummi III* did not leave the Lummi's rights to these originally disputed waters an open question. *See Lummi III*, 876 F.3d at 1011. Given this Court's holding that *all* of these waters are within the Lummi's usual and accustomed grounds, the S'Klallam's arguments that they should have been allowed to continue litigating this case fall apart.

To be sure, the district court did not follow this straightforward path in rejecting the S'Klallam's arguments. It shared the S'Klallam's erroneous understanding of *Lummi III*. ER17. But much of the district court's reasoning—including, in particular, its determinations that the S'Klallam's proposed amendment failed to state a claim and would cause the Lummi undue prejudice (ER12-14)—did not turn on its mistaken reading of *Lummi III*. And regardless, this Court "can affirm the district court on any basis supported by the record." *Wood v. City of San Diego*,

[5] As explained *infra* pp. 52-53, even in that counterfactual world, no *amendment* to the original Request for Determination would be necessary.

678 F.3d 1075, 1086 (9th Cir. 2012). Here, adherence to *Lummi III*'s actual holding confirms that the district court was ultimately correct in concluding that the S'Klallam's proposed amendment was both futile and unduly prejudicial. Indeed, allowing such an amendment would have been an abuse of discretion.

I. THE S'KLALLAM'S PROPOSED AMENDMENTS WOULD BE FUTILE

"Futility alone can justify the denial of a motion to amend." *Johnson*, 356 F.3d at 1077. That is the case here: any S'Klallam attempt to challenge Lummi fishing on either side of the Trial Island line would be futile.

A. The S'Klallam Cannot Challenge The Lummi's Rights In The Waters East Of The Trial Island Line

Because *Lummi III* already held that the Lummi's usual and accustomed grounds include *all* of the waters originally disputed in this subproceeding (*see supra* pp. 4-23), any further challenge to the Lummi's rights in those waters would plainly be futile. "Although amendment of pleadings following remand may be permitted, such amendment cannot be inconsistent with the appellate court's mandate." *In re Beverly Hills Bancorp*, 752 F.2d at 1337. To the extent the S'Klallam sought to amend their complaint to relitigate the Lummi's rights east of the Trial Island line, they contravened this Court's mandate. *Id.*

B. The S'Klallam Cannot Challenge The Lummi's Rights In The Waters West Of The Trial Island Line

Any attempt by the S'Klallam to challenge the Lummi's rights in *additional* waters not previously at issue would be equally futile. Whether or not the Lummi's usual and accustomed grounds extend to the west of the Trial Island line, the Lummi are not exercising (or threatening to imminently exercise) any rights to those waters. It is undisputed that the Lummi are fishing *only* to the east of the Trial Island line, in the waters originally contested in this subproceeding. *See* FER5; FER8. The S'Klallam thus can neither establish jurisdiction nor state a claim with respect to any waters to the west of that line.

1. Any claim would fail for lack of jurisdiction

a. The S'Klallam cannot satisfy Article III

The S'Klallam cite four separate provisions of the district court's continuing jurisdiction order that, they assert, would permit the district court to address their claims. S'Klallam Br. 22-26. They ignore Article III's more fundamental limitations. As explained above (*supra* p. 27), Article III allows federal courts to adjudicate only those cases and controversies that involve "actual or imminently threatened injury." *Summers*, 555 U.S. at 492. Any S'Klallam challenge to Lummi fishing in waters in which the Lummi are not actually or imminently intending to fish would not meet that standard.

To invoke the jurisdiction of the federal courts, a litigant must establish an "injury in fact," that injury must be "fairly traceable to the challenged action of the defendant," and it must be "likely" that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and alterations omitted). Where, as here (JSER189), litigants seeks prospective relief, they must show there is a "real and immediate threat" the challenged conduct will occur and that federal-court intervention will thus redress a threatened injury. *Lyons*, 461 U.S. at 105.

The S'Klallam cannot satisfy these basic requirements. Their injury, if any, would be caused by Lummi fishing in the waters west of the Trial Island line. Given that the Lummi have not threatened to fish in those waters, that is a "wholly speculative concern." *Guidiville Band of Pomo Indians*, 531 F.3d at 773. The S'Klallam would ask the court to resolve the hypothetical question whether the Lummi could take actions they have yet to manifest any intention of taking. Federal courts have no power to resolve such disputes. *Id.*

b. The S'Klallam cannot satisfy the continuing jurisdiction order

Regardless, none of the four provisions on which the S'Klallam rely would authorize litigation over any of the additional waters the S'Klallam apparently seek to challenge.

Paragraph 25(a)(1). As explained above (*supra* pp. 26-27), parties may invoke Paragraph 25(a)(1) only to determine "[w]hether or not *the actions intended or effected* by any party . . . are in conformity" with Judge Boldt's decision. *United States v. Washington*, 18 F. Supp. 3d at 1213 (emphasis added). Because the Lummi have not "intended or effected" any actions in the waters west of the Trial Island line, Paragraph 25(a)(1) cannot supply jurisdiction.

Paragraph 25(a)(4). Paragraph 25(a)(4) likewise would not provide jurisdiction over the S'Klallam's claims. It covers "[d]isputes concerning the subject matter of this case which the parties have been unable to resolve." *Id.* While it is phrased broadly, the provision has been applied in relatively narrow circumstances. *E.g.*, *United States v. Washington*, 20 F. Supp. 3d 777, 824 (W.D. Wash. 2006) (Paragraph 25(a)(4) applicable to dispute over tribe's primary right to fish in waters in which multiple tribes' usual and accustomed grounds overlap). It should not be understood to swallow Paragraph 25(a)(1)'s more specific limitations on when and how parties may litigate the extent of the usual and accustomed grounds Judge Boldt recognized in his order. *See Muckleshoot I*, 141 F.3d at 1360 (recognizing Paragraph 25(a)(1) as the principal vehicle for determining a tribe's adjudicated usual and accustomed grounds). Nor, for that matter, should it be interpreted to violate Article III's requirement that federal courts adjudicate only cases and controversies. *See Gollust v. Mendell*, 501 U.S. 115, 125 (1991) (construing

statutory provision authorizing suit to avoid Article III concerns). As the S'Klallam acknowledge, Paragraph 25(a)(4) can be invoked only where there is a "*live* dispute." S'Klallam Br. 23 (emphasis added). Because the Lummi are not fishing in these waters, there is no such live dispute.

Paragraph 25(a)(6). Paragraph 25(a)(6) is the jurisdictional basis for determining whether a tribe has usual and accustomed grounds in *additional* waters not already recognized in Judge Boldt's order. *See Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1183 (9th Cir. 2019). Thus, it provides jurisdiction to determine "[t]he location of any of a tribe's usual and accustomed fishing grounds *not specifically determined* by Final Decision # I." *United States v. Washington*, 18 F .Supp. 3d at 1213 (emphasis added). This Court's decision in *Lummi III*, however, leaves open the question whether Judge Boldt recognized the Lummi's rights in the waters west of the Trial Island line. 876 F.3d at 1011; *see supra* pp. 24-34. Where, as here, Judge Boldt may have in fact "specifically determined" that the waters in question are included in a tribe's usual and accustomed grounds—an inquiry that would proceed under Paragraph 25(a)(1)—this Court has held it premature to invoke Paragraph 25(a)(6). *Muckleshoot I*, 141 F.3d at 1360. Regardless, like Paragraph 25(a)(4), Paragraph 25(a)(6) should not be interpreted to authorize litigation over a tribe's right to fish in waters in which that tribe has no demonstrated

intention of fishing—a reading that would raise serious constitutional concerns. *Gollust*, 501 U.S. at 125.[6]

Paragraph 25(a)(7). Finally, Paragraph 25(a)(7) provides for jurisdiction to consider "[s]uch other matters as the court may deem appropriate." *United States v. Washington*, 18 F. Supp. 3d at 1213. But as with Paragraph 25(a)(6), this Court has made clear that where, as here, the waters in question may be encompassed in Judge Boldt's description of a tribe's usual and accustomed grounds, parties cannot evade Paragraph 25(a)(1)'s restrictions by invoking Paragraph 25(a)(7). *Muckleshoot I*, 141 F.3d at 1360 (refusing to read Paragraph 25(a)(7) "to grant blanket authority to

[6] The Lower Elwha's brief could be read to suggest that the Lummi could *never* invoke Paragraph 25(a)(6) to establish their rights to fish in the waters west of the Trial Island line because Judge Boldt already "specifically determined" all of the Lummi's usual and accustomed grounds. *See* Lower Elwha Br. 19-20. To the extent the Lower Elwha press this argument (which would parallel the argument the Requesting Parties advanced in the last appeal), it is wrong: if Judge Boldt did not already determine these waters are included in the Lummi's usual and accustomed grounds, then these waters are "not specifically determined" within the meaning of Paragraph 25(a)(6). *See Decision I,* 384 F. Supp. at 333 (emphasizing that *Decision I* set forth "some, but by no means all, of the [tribe's] principal usual and accustomed fishing places"). Thus, if the waters west of the Trial Island line were, in some theoretical future Paragraph 25(a)(1) proceeding, held to be outside the waters Judge Boldt described as within the Lummi's usual and accustomed grounds, Paragraph 25(a)(6) could then be an appropriate vehicle for determining whether the Lummi nevertheless have treaty rights to fish in those waters. *E.g., United States v. Washington*, 626 F. Supp. 1405, 1443 (W.D. Wash. 1985) (finding, under Paragraph 25(a)(6), that the Lower Elwha have usual and accustomed grounds in waters additional to those the court had previously recognized). Regardless, there is no need for this Court to address that hypothetical question to resolve any of the issues presented here.

make such supplemental findings"). In any event, while Paragraph 25(a)(7) is a discretionary provision, the district court would abuse that discretion were it to "deem" judicial consideration of a purely hypothetical dispute "appropriate." *United States v. Washington*, 20 F. Supp. 3d at 825; *see Gollust*, 501 U.S. at 125. Once again, the undisputed fact that the Lummi have demonstrated no intention of fishing in these waters defeats jurisdiction.

2. The S'Klallam did not state a claim

Setting aside these numerous jurisdictional defects, the S'Klallam also failed to adequately plead a claim. Like other complaints in federal court, a Request for Determination "must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *United States v. Washington*, No. C70-9213, 2017 WL 3726774, at *2 (W.D. Wash., Aug. 30, 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A Request for Determination that provides only "labels and conclusions," "naked assertions devoid of further factual enhancement," or "a formulaic recitation of the elements of a cause of action" does not suffice. *Iqbal*, 556 U.S. at 678 (quotation marks and alterations omitted).

The S'Klallam's amended Request for Determination offered nothing more. As outlined above, because *Lummi III* left unresolved whether Judge Boldt recognized the Lummi's rights to fish in waters west of the Trial Island line, Paragraph 25(a)(1) would provide the initial basis for resolving any (justiciable)

dispute over those waters. *Supra* pp. 47-50; *Muckleshoot I*, 141 F.3d at 1360. To state a claim under that provision, the S'Klallam would have to identify where, exactly, the Lummi were improperly fishing. Otherwise the S'Klallam would not have pleaded any facts showing the Lummi's "actions" were not "in conformity" with Judge Boldt's order. *United States v. Washington*, 18 F. Supp. 3d at 1213.

But the S'Klallam's proposed amended Request for Determination eschewed any such precision. It asserted that "[t]he area where Lummi is impermissibly fishing or threatening to fish is in the Strait of Juan de Fuca." JSER176. As the many years of litigation in this case confirm, there is no single accepted definition of the "Strait of Juan de Fuca." *See supra* pp. 7-10; *compare*, *e.g.*, S'Klallam Br. 43 (pressing a definition that would extend to the shores of Whidbey Island); *with Lummi III*, 876 F.3d at 1008 (describing the Strait as "further west" of the waters originally disputed here). The S'Klallam apparently did not intend to use the definition from the *Lummi III* decision, as their proposed Request for Determination attacked Lummi fishing near the shores of Whidbey Island. *See* JSER186-187. But the S'Klallam provided no clear definition of their own. Thus, as the district court concluded, by "[r]elying only on broad geographical assertions, S'Klallam cannot demonstrate that Lummi is pursuing fishing in the Strait of Juan de Fuca," and therefore they cannot plead that the Lummi's actions are not "in conformity" with Judge Boldt's order. ER12.

On appeal, the S'Klallam attempt to deflect blame to the courts, complaining that they "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." S'Klallam Br. 27. But even if certain geographic terms are unclear, litigants may still define precisely the waters in which a tribe is alleged to be improperly fishing, as Paragraph 25(a)(1) requires. The Requesting Parties did just that in their initial Request for Determination, carefully describing the challenged area of Lummi fishing as bordered by, among other things, "a line running from Trial Island near Victoria, British Columbia, to Point Wilson." ER216.

The S'Klallam's motive for striking this clear, detailed definition from the original Request for Determination and replacing it with the amorphous term "Strait of Juan de Fuca" is unclear. JSER176. If, as appears possible, the S'Klallam hoped only to relitigate the extent of the Lummi's rights within the waters originally disputed in this subproceeding, they could have retained the original definition of the disputed waters. That is, if (counterfactually) the S'Klallam were right that *Lummi III* had not already resolved the status of those waters, the parties could have continued litigating the issue under the original Request for Determination, just as they did following this Court's remand in *Lummi II*. *See* ER246-254. And if the S'Klallam instead sought to challenge (non-existent) Lummi fishing in different waters, they could have specified *which* waters using additional geographic markers.

By instead purporting to challenge Lummi fishing in the undefined "Strait of Juan de Fuca," the S'Klallam only confused matters—and in the process failed to state a claim.

3. The S'Klallam's "expert report" is irrelevant

The purported "expert report" the S'Klallam submitted in conjunction with their proposed amended Request for Determination did not render that pleading any less futile. *Contra* S'Klallam Br. 41-42.

First, the district court acted well within its discretion in striking this report. ER15. It was submitted as purported "evidence" of the meaning of Judge Boldt's order, and it evaluated the record before him. *See* JSER10-11. This Court has expressly held that such "latter-day interpretation of the evidence that was before Judge Boldt" is inadmissible. *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100 (9th Cir. 2000) ("*Muckleshoot II*"). The S'Klallam invoke the narrow exception for evidence regarding the contemporaneous meaning of the geographic terms Judge Boldt used in his order. S'Klallam Br. 41; *see Muckleshoot II*, 234 F.3d at 1100 (permitting evidence "by a geography expert . . . as to where the northern environs of Seattle were located at the time of Judge Boldt's decision"). But the excluded report was nothing of the sort. The S'Klallam conspicuously do not quote anything from the report itself—which nowhere purported to opine on what terms like the "Strait of Juan de Fuca" or "Northern Puget

Sound" might have meant in the early 1970s. *See* JSER9-20. Rather, to even attempt to make this argument, the S'Klallam must cite an *exhibit* appended to the report. S'Klallam Br. 42 n.9. Even that exhibit: (1) was not before Judge Boldt when he described the Lummi's usual and accustomed grounds, (2) did not purport to define geographic terms used in the 1970s, and (3) simply mentioned "Point Wilson," which is neither (a) a term used in Judge Boldt's order nor (b) a disputed geographic location. JSER68. Merely to describe this argument is to refute it.

Second, the district court likewise acted well within its discretion in concluding this report was irrelevant in any event. ER15. Nothing in the report had any bearing on whether the S'Klallam's proposed Request for Determination satisfied any of the relevant jurisdictional prerequisites (*supra* pp. 45-50) or adequately identified the relevant waters (*supra* pp. 50-53). Rather, the report was, in effect, a legal brief addressing the question this Court answered in *Lummi III*: whether waters east of "a boundary line from Trial Island to Point Wilson . . . include areas for the Lummi that are inconsistent with the historical record that the Boldt court considered." JSER10; *see Lummi III*, 876 F.3d at 1010. Such expert "opinion" evidence is generally irrelevant even in the ordinary case. *E.g.*, *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (an expert witness "cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law") (emphasis in original). It is even more clearly irrelevant when it

contradicts a binding legal conclusion this Court has already reached. That the S'Klallam were able to procure an expert who purported to disagree with *Lummi III* provided no basis for them to amend their Request for Determination and continue litigating that or any other issue.

Third, and for all the same reasons, the district court's order striking this evidence was harmless. An appellant "must demonstrate that the allegedly erroneous evidentiary ruling more probably than not was the cause of the result reached." *Jauregui v. City of Glendale*, 852 F.2d 1128, 1133 (9th Cir. 1995). The S'Klallam make no attempt to satisfy that standard here, and they could not possibly do so.

4. Lummi III *satisfied any need for certainty*

The S'Klallam cannot evade the fundamental defects in their proposed Request for Determination by making broad policy arguments about the need for certainty. *See, e.g.*, S'Klallam Br. 33-40. For the most part, these arguments appear to be based (yet again) on the S'Klallam's refusal to accept the result in *Lummi III*. The S'Klallam (joined by interested party the Tulalip Tribes) complain, for example, that the parties cannot "discern exactly how to comply with the various decisions ostensibly determining their rights," as there is "a seeming contradiction" between *Lummi I*'s holding that the Lummi's adjudicated usual and accustomed grounds do not include the Strait of Juan de Fuca and *Lummi III*'s holding that they include the

"waters west of Whidbey Island." S'Klallam Br. 36-37. To the extent the S'Klallam seek certainty regarding the Lummi's rights in the waters originally disputed in this subproceeding, *Lummi III* provided it: these waters are within the Lummi's usual and accustomed grounds. *Lummi III*, 876 F.3d at 1011.

To the extent the S'Klallam challenge the Lummi's rights in additional waters, they identify no pressing need for certainty. To be sure (and contrary to the Lower Elwha's contentions here), this Court's decision in *Lummi III* did not definitively determine the ultimate western boundary of Judge Boldt's description of the Lummi's usual and accustomed grounds. *See id.*; *supra* pp. 24-34. But that does not mean "fishers, fishery managers, and enforcement officers" are left in chaos. *Contra* S'Klallam Br. 37. Regardless of where the boundary of the Lummi's usual and accustomed grounds may lie, the Lummi Nation Natural Resources Commission has imposed a boundary on where the Lummi may actually fish: the Trial Island line. ER204-205. After this Court's decision in *Lummi III*, there can be no meaningful dispute that the waters east of this boundary, at least, are within the Lummi's usual and accustomed grounds. *Lummi III*, 876 F.3d at 1011. The Commission adopted this line in large part because it was "workable." ER205. It has been established (with some minor alterations) for nearly two decades. ER205. Nothing in the record suggests the Lummi have violated this boundary. *See* FER5; FER8.

If the Lummi ever attempt to assert their rights to fish in additional waters further west, there may be reason to resolve the questions left open by *Lummi III*. Until that happens, any dispute over the Lummi's abstract right to fish west of the Trial Island line is just that—wholly abstract. There is no need, let alone legal basis, to resolve it now.[7]

II. THE S'KLALLAM'S REQUESTED AMENDMENT WOULD PREJUDICE THE LUMMI

Leave to amend is also properly denied where it would cause the opposing party undue prejudice. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388-89 (9th Cir. 1990). Such prejudice is particularly unwarranted where the party requesting amendment has delayed in raising the issue it hopes to inject into the litigation. *Id.* at 1389. Here, the prejudice to the Lummi from continuing this litigation was alone reason for the district court to deny the S'Klallam's motion.

There can be little question the Lummi would suffer undue prejudice were the S'Klallam allowed to continue litigating the issue in the original Request for Determination: whether the Lummi's usual and accustomed grounds include the

[7] At times, the S'Klallam seem to suggest the boundary of the Lummi's usual and accustomed grounds is also necessarily the boundary of the S'Klallam's own usual and accustomed grounds. *E.g.*, S'Klallam Br. 1 (S'Klallam are seeking "a full and clear determination of the boundary of *their* usual and accustomed fishing grounds") (emphasis added); S'Klallam Br. 34 (equating the issue to the border between Washington and Oregon). In fact, as the S'Klallam elsewhere acknowledge, tribes' usual and accustomed grounds can be (and generally are) overlapping. *See, e.g.*, *Decision I*, 384 F. Supp. at 332.

waters east of the Trial Island line. This Court definitively resolved that question in the Lummi's favor. *Lummi III*, 876 F.3d at 1011. The S'Klallam's proposed amendments to that Request for Determination reflect, in large part, a (futile) attempt to pursue an end-run around this Court's decision. *E.g.*, ER30 (challenging Lummi fishing east of the Trial Island line); ER79-86 (claiming *Lummi III* conflicted with other Ninth Circuit decisions); S'Klallam Br. 30 (claiming the "amended RFD . . . simply seeks to decide what *Lummi III* left open"). The Lummi should not have to incur additional litigation expenses just because the S'Klallam refuse to accept this Court's binding mandate. *In re Beverly Hills Bancorp*, 752 F.2d at 1337.[8]

There should be equally little question that the Lummi would be unduly prejudiced if the S'Klallam expanded the waters at issue in this subproceeding. Only after seven *years* of litigation did the S'Klallam seek to amend their Request for Determination to challenge the Lummi's right to fish west of the Trial Island line.

[8] The S'Klallam accuse the Lummi of being "disingenuous" because the Lummi had previously acknowledged "how it would make sense to proceed under paragraph 25(a)(6) if the 25(a)(1) proceeding ended without a boundary." S'Klallam Br. 31 n.4. The Lummi had previously argued that if Judge Boldt's order had not already determined the Lummi have rights to the waters originally disputed in this subproceeding, the Lummi should be permitted to invoke Paragraph 25(a)(6) to prove their rights in those waters. Opening Br. 54-62, *Lummi III,* 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661); JSER266-267. This Court has now held that Judge Boldt *did* determine that these waters are within the Lummi's usual and accustomed grounds. *Lummi III*, 876 F.3d at 1011. There is thus nothing "disingenuous" in the Lummi's insistence that additional proceedings under Paragraph 25(a)(6) or any other provision are now unnecessary and would cause the Lummi prejudice.

JSER172, 176. Although the S'Klallam claim they had no "reason" to seek such a determination "until after *Lummi III*" (S'Klallam Br. 29), nothing in *Lummi III* created any need for the S'Klallam to litigate the Lummi's treaty rights in waters not even at issue in that decision. To repeat, even if the S'Klallam actually believed *Lummi III* held only that "some undefined portion of the disputed waters is included in the Lummi U&A" (S'Klallam Br 29, emphasis omitted), no amendment to the original Request for Determination was needed for the S'Klallam to litigate the Lummi's rights in those "disputed waters." *Supra* pp. 52-53. The S'Klallam can offer no justification for forcing the Lummi to litigate their rights to new and different waters. Putting the Lummi "through the time and expense of continued litigation on a new theory, with the possibility of additional discovery," would cause the Lummi "undue prejudice." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (quotation marks omitted).

That is all the more true given the S'Klallam's failure to satisfy the prefiling obligations Paragraph 25(b) imposes. As the Lummi attested—and the S'Klallam failed to refute—the S'Klallam never explained before requesting leave to amend how they might seek to challenge the Lummi's rights to any additional waters. FER3. The S'Klallam thus contravened Paragraph 25(b)'s requirement that they "meet and confer with all parties" and discuss "the basis for the relief sought." *United States v. Washington*, 18 F. Supp. 3d at 1213. This Court has recently

emphasized the importance of these pre-filing requirements, which are intended to enable the parties to "resolve their disputes . . . *before* initiating an RFD." *United States v. Washington*, 928 F.3d at 790 (emphasis added). Had the S'Klallam complied with Paragraph 25(b), the parties might well have managed to avoid costly litigation over the Lummi's theoretical right to fish in waters in which the Lummi are not, in fact, fishing.

Thus, as the district court correctly found, while the S'Klallam could perhaps subject the Lummi to many of the same costs by filing a Request for Determination in a new subproceeding, doing so would "trigger *Final Decision I*'s important pre-filing procedures," which may enable the Lummi to avoid the burden of needless litigation. ER14. In so concluding, the district court did not, as the S'Klallam now claim, "improperly shift[] the burden of proving prejudice" onto the S'Klallam. S'Klallam Br. 30. Rather, the district court had already found that the Lummi (and the Lower Elwha) would suffer prejudice if the court allowed the S'Klallam to amend the original Request for Determination. ER13. The court further explained that this prejudice was "mitigated," but not "fully offset," by the possibility the S'Klallam might simply initiate a new subproceeding. ER13. Yet the court determined the S'Klallam should be required to satisfy the requirements for commencing new litigation, including, most importantly, Paragraph 25(b)'s meet-and-confer requirements. ER13-14. The court did not abuse its discretion in

reaching that conclusion. *See Muckleshoot I*, 141 F.3d at 1358 (whether to "requir[e] initiation of a new, separate subproceeding" is a matter within the district court's discretion).

CONCLUSION

The judgment should be reversed and the case remanded for the sole purpose of entering judgment in favor of the Lummi on the ground that the Lummi have treaty rights to fish throughout the disputed waters described in the original Request for Determination.

Dated: June 18, 2020

Respectfully submitted,

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