THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, vs. STATE OF WASHINGTON, et al., Defendant.	No. C70-9213 Subproceeding 19-1 SWINOMISH'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF Noted: July 31, 2020 Oral Argument Requested

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INTRODUCTION

Swinomish submits this Reply in support of its Motion for Summary Judgment and Permanent Injunctive Relief, Subp. 19-1 Dkt. No. 51 (Main Case Dkt. No. 22200) (Mot.). We addressed most of the arguments raised in Lummi's Omnibus Opposition to the Requesting Tribes' Motions for Summary Judgment, Subp. 19-1 Dkt. No. 67 (Main Case Dkt. No. 22231) (Opposition or Opp.), in our Motion and in our Response to Lummi's Motion for Summary Judgment, Subp. 19-1 Dkt. No. 69 (Main Case Dkt. No. 22233) (Resp.), and incorporate that argument here.

The Opposition demonstrates that Lummi either fundamentally misunderstands or intentionally obfuscates the ultimate issue in this case, which is Judge Boldt's intent. It attempts to hold the Region 2E Tribes to a higher burden of proof than what the law requires. It mischaracterizes the evidence, engages in wild speculation about the inferences to be drawn from it, or both. It insists that the phrase "the marine areas of Northern Puget Sound" determines the result in this case, when it does not. And it urges this Court to rule based solely on geography and "a natural travel path," despite the fact that neither can establish U&A in the absence of evidence of customary fishing. Because Lummi did not customarily fish in Region 2E, Judge Boldt could not have intended to include it in Lummi's U&A.

ARGUMENT

I. Lummi Misrepresents the Burden of Proof in this Case.

Lummi's first misdirection is its argument that the Region 2E Tribes "cannot show that Judge Boldt intended to exclude Region 2 East" from Lummi's U&A finding. Opp. at 7. The fact that Dr. Lane did not identify and Judge Boldt did not specifically name any reefnet site, geographic feature, or named body of water in Region 2E in describing Lummi's U&A strongly suggests that Judge Boldt intended to exclude Region 2E. *See* Mot. at 6-15; Resp. at 10. Lummi's argument that listing such

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features would have been redundant because its U&A unambiguously includes Region 2E, Opp. at 7-8, directly contradicts what the Ninth Circuit has said about the matter. *See, e.g., United States v. Lummi Indian Tribe*, 235 F.3d 443, 451-52 (9th Cir. 2000)(*Lummi I*)(holding that the specific rather than general controls and that Judge Boldt specifically named areas he intended to include). Lummi's argument that those features only form a boundary for other tribes, Opp. at 7-8, similarly contradicts what the Ninth Circuit has said and reflects Lummi's misunderstanding of the scope of Swinomish's and Tulalip's U&As and the proceedings in which they were determined. *See* Resp. at 10-11; Tulalip Opp. to Lummi Mot., Subp. 19-1 Dkt. No. 68 (Main Case Dkt. No. 22232) at 4 and n.1.

But the far bigger problem with Lummi's argument is that it misrepresents the burden of proof that applies in this subproceeding. The Region 2E Tribes are not required to prove that Judge Boldt intended to exclude Region 2E (although Swinomish believes it has done so). We are required to prove (1) *either* that the finding is ambiguous *or* that Judge Boldt intended something other than its apparent meaning *and* (2) that there was no evidence before Judge Boldt to support Lummi U&A in Region 2E. *See* Mot. at 4. For the reasons explained below and in our prior briefing, Swinomish has met its burden to prove that Judge Boldt "meant something other than [*all* of the marine areas of Northern Puget Sound] … given that nothing in the record show[s] [Lummi] fished on the east side of Whidbey Island, or traveled through there on their way [to or from] the San Juans and the Fraser River area." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023-24 (9th Cir. 2010)(*Upper Skagit*).

II. There is No Evidence in the Record of Lummi Fishing or Traveling in Region 2E.

Lummi's second misdirection is its continued insistence that there is "substantial evidence" to support its claim. Opp. at 2-3, 10-20. To the contrary, nothing in the record demonstrates that Lummi

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customarily fished or traveled in Region 2E at treaty time. Dr. Lane testified about and Judge Boldt found where Lummi's homeland was, and it was around Bellingham Bay and the mouth of the Nooksack River. *United States v. Washington*, 384 F.Supp. 312, 360 (W.D. Wash. 1974)(*Final Decision No. 1*)(FF 44); Mot. at 10-11. Dr. Lane testified about and Judge Boldt found where Lummi customarily fished, and it was to the north or west (and often both) of Region 2E. *Final Decision No. 1*, 384 F.Supp. at 360 (FF 45 and 46); Mot. at 9-18. And Dr. Lane testified about and Judge Boldt found where Lummi traveled between its northern and southern fisheries, and it was on the west side of Whidbey, not the east side. *See, e.g., United States v. Lummi Nation*, 876 F. 3d 1004, 1009-1010 (9th Cir. 2017)(*Lummi III*); Mot. at 21-23. It is this specific evidence that must control over the vague generalities upon which Lummi relies.

In addition to Dr. Lane's testimony, Swinomish relied upon certain other exhibits in the record, none of which evidences Lummi fishing in Region 2E at treaty time.[1] Lummi criticizes Swinomish for this, even going so far as to claim that they are "irrelevant." Opp. at 16-17. But Judge Boldt did not think they were irrelevant; he specifically cited them to support Lummi's U&A finding. *See Final Decision No. 1*, 384 F.Supp. at 360-61 (FF 45 and 46). And the Ninth Circuit is not likely to conclude they are irrelevant, for it has held that the evidence specifically cited by Judge Boldt is the "most relevant" evidence of his intent. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 434 (9th Cir. 2000)(*Muckleshoot III*). Lummi argues that just because these exhibits do not support its claim to U&A in Region 2E, "that does not mean that there was no *other* evidence" that supports its claim, Opp. at 17

1 These are the *Alaska Packers* affidavits sworn by Lummi members (Exhibits PL-94b, c, d, e, t, u, v, and x), a handful of historical maps or sketches of the San Juan Islands (Exhibits USA-60 through USA-64), and two reports prepared by the State's primary witness (Exhibits G-21 and G-26). *See* Mot. at 15-17.

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(emphasis in original), but the fact that Judge Boldt did not cite any other evidence belies Lummi's claim that it exists. Had Judge Boldt found that Lummi's U&A included Region 2E, he would have said so and cited to evidence in the record. *See Final Decision No. 1*, 384 F.Supp. at 348.[2]

Lummi also criticizes Swinomish for arguing that all of Lummi's fishing areas were to the north or west (and often both) of Region 2E. In its view, this ignores the language "to the present environs of Seattle" in Lummi's U&A finding. Opp. at 2, 8. Swinomish recognizes that this phrase has been interpreted to establish Lummi U&A as far south as Edmonds. *Muckleshoot Indian Tribe v. Lummi Indian Nation,* 234 F.3d 1099, 1100-1101 (9th Cir. 2000). But Lummi fishing in Edmonds does not prove that it fished in Region 2E, just as Suquamish fishing at the mouth of the Snohomish River did not prove that it fished in Skagit Bay and Saratoga Passage. *See Upper Skagit*, 590 F. 3d at 1024-25.

Moreover, the Ninth Circuit has noted that Region 2E is secluded because there are only three access points: Deception Pass, Swinomish Channel, and Possession Sound. *Id*. at 1024 n.6. Perhaps Swinomish should have been more explicit, but the fact remains that all of Lummi's customary fisheries were to the north or west (and often both) of Region 2E *or its access points*, even if Edmonds is nominally to the south and east of some of the waters of Region 2E. Contrary to Lummi's suggestion, Opp. at 3, 12, there is no evidence of Lummi presence in any of these access points, and the evidence

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2 In its Opposition at 17-18, Lummi also addresses several other pieces of evidence, including Mr. McDonough's affidavit in the *Alaska Packers* case (Exhibit PL-94w); Dr. Suttles' testimony in Subproceeding 89-3, Main Case Dkt. No. 13427 (Oct. 25, 1993); and Dr. Suttles' proffered testimony in Subproceeding 89-2, Main Case Dkt. No. 13810 (Nov. 23, 1993). Swinomish does not rely upon any of this evidence and will not respond to it in detail. But we note that Mr. McDonough's general and ambiguous testimony that Lummi fished and traveled at unidentified locations in Puget Sound cannot overcome the wealth of specific evidence in the record regarding Lummi's customary fishing locations or Judge Boldt's specific findings of fact. With respect to Dr. Suttles' testimony, we note that Lummi cannot have it both ways and simultaneously dismiss his testimony in 89-3 as outside the record while also relying upon his proffered testimony in 89-2, particularly since this Court found his affidavit in 89-2 to be "plagued by fundamental weaknesses," *United States v. Washington*, 19 F.Supp.3d 1126, 1134 (W.D. Wash. 1994), and the affidavit was never resubmitted or admitted, facts that Lummi fails to disclose to this Court.

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strongly suggests the opposite because they were controlled by Swinomish or other resident groups at treaty time. *Upper Skagit*, 590 F. 3d at 1024 n.6. Lummi attempts to dismiss this by mischaracterizing it as "a footnote … not[ing] the Suquamish's inability to travel though Deception Pass," Opp. at 12, but regardless of where it is located, it is a finding by the Ninth Circuit that is supported by Dr. Lane's testimony. *See* Resp. at 23 (citing USA-74 at 29 (SDEH081), 34 (SDEH087).[3] Moreover, as this Court is well aware, the case did not turn on Suquamish's ability to travel through Deception Pass, but on whether there was evidence to support Suquamish U&A in the disputed waters. The same is true here.

III. The Evidence Cited by Lummi Doesn't Support Lummi U&A in Region 2E.

Lummi's third misdirection is its argument that the Region 2E Tribes "ignore … substantial evidence … showing that the Lummi *did* fish in [Region 2E]" at treaty time. Opp. at 2 (emphasis in original). But the evidence does not demonstrate what Lummi claims it does.

For example, Dr. Lane testified that Samish occupied the northwest coast of Fidalgo Island and that there was a single Samish reefnet site off Langley Point that was used sporadically by a pair of brothers.[4] As noted above, she also testified that Swinomish controlled access through Deception Pass. It is a gross mischaracterization of this evidence to argue repeatedly to this Court that Fidalgo Island was a core part of Lummi territory, that Lummi occupied portions of Fidalgo Island adjacent to Region 2E, that Lummi had multiple reefnet sites off Fidalgo Island, or that Lummi lived on, had reefnet sites in, or frequently traveled through Deception Pass into the secluded waters of Region 2E, but Lummi

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3 In this Reply, "SDEH __" refers to Bates stamped pages in the Exhibits to the Second Declaration of Emily Haley, Subp. 19-1 Dkt. No. 70 (Main Case Dkt. No. 22234). "TDEH___" refers to Bates stamped pages in the Exhibits to the Third Declaration of Emily Haley filed with this Reply.

4 *See* Resp. at 13-15 (citing USA-30 at 1-2, 24, sketch inserted between pp. 24 and 25 (SDEH009-010, 014-015); USA-75 at 5-7, 16, 20, 27 (SDEH126-28, 138, 142, 149)).

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has done just that.[5] While Lummi is correct that Dr. Lane testified that Lummi fished beyond its home territory, she also testified that this fishing occurred along a marine highway to the west of Whidbey.[6] It is a gross mischaracterization of, and wild speculation from, this evidence to argue repeatedly to this Court that Dr. Lane meant that Lummi fished and traveled throughout the secluded waters of Region 2E, but again Lummi has done just that. *See* n.5.

For another, Lummi complains that the Region 2E Tribes do not acknowledge that "Lummi collected various materials from upriver Skagit" and therefore must have fished in Skagit Bay. Opp. at 3; *see also* Lummi Mot. at 2, 17-18. The reason we do not acknowledge this is because it never happened. Dr. Lane testified that Lummi acquired these materials through trade.[7] Lummi's argument is nothing more than wild speculation in the face of all available evidence to the contrary that at treaty time, Lummi was in the upper Skagit River watershed, Dr. Lane really meant collected when she said "imported" and described in detail how Lummi acquired the materials through trade, Lummi traveled down the Skagit River, and Lummi fished in Skagit Bay and other waters of Region 2E.

For a third example, Lummi mischaracterizes Mr. Kinley's testimony by claiming that when he testified he fished "in Whidbey Island south" he really meant that "the Lummi fished in the waters around Whidbey Island." Opp. at 20. The far likelier explanation is that Mr. Kinley meant what he said, and what Dr. Lane concluded and Judge Boldt found: that Lummi fished on the west side of Whidbey south to Edmonds. *See* Resp. at 19-21 (citing Tr. at 3075 (Sept. 12, 1973)(SDEH019)).

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5 *See, e.g.,* Opp. at 2-3, 10-12, 14, 20; Lummi Nation's Motion for Summary Judgment, Subp. 19-1 Dkt. No. 59 (Main Case Dkt. No. 22210)(Lummi Mot.) at 2, 12, 15-17.

6 Resp. at 14 (citing USA-30 at 25 (SDEH016); USA-20 at 18 (SDEH006)).

7 Resp. at 16-19 (citing USA-20 at 2-3 (SDEH003-004); USA-30 at 10-11 (SDEH011-012)).

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For a fourth, Lummi strongly implies that Judge Boldt found that Lummi had "key herring fishing sites at Greenbank on Whidbey Island and Camano Island." Opp. at 20; *see also* Lummi Mot. at 24. He did no such thing. While there is a brief reference to Lummi taking herring in *Final Decision No. 1*, Judge Boldt did not indicate where this activity occurred and did not include Greenbank or Camano Island in his extensive list of Lummi's customary fisheries. 384 F.Supp. at 360 (FF 45 and 46), 362 (FF 58). In the herring proceeding, Judge Boldt did not address Lummi's U&A at all, let alone add any additional locations to it. *United States v. Washington*, 459 F.Supp. 1020, 1048-49 (W.D. Wash. 1975)(*Orders re Herring Fisheries*). Dr. Lane testified that the Greenbank and Camano Island sites were Swinomish sites, that Lummi took herring elsewhere, and that tribes, including Lummi, would not encroach on each other's herring sites.[8] It is at best a self-serving fantasy and at worst a significant misrepresentation to this Court for Lummi to imply that Judge Boldt found that Lummi had herring sites at Greenbank and Camano Island.

As these examples demonstrate, Lummi mischaracterizes the evidence, engages in wild speculation about the inferences to be drawn from it, and attempts to exalt general observations by Dr. Lane about aboriginal fishing practices in order to fit its narrative. It then seeks to have these mischaracterizations, speculations, and general observations trump clear, specific, and more probative evidence regarding the location of Lummi's customary fisheries, including an explicit expression of Judge Boldt's intent when specifically identified the places that Lummi fished at treaty time. But argument is not evidence, and this Court should not countenance a bold expansion of Lummi's fishery

8 Resp. at 21-22 (citing USA-72E at 3-4 (SDEH046-47); USA-74 at 26-27 (SDEH078-79); Tr. at 63, 84 (Apr. 9, 1975)(SDEH049-50)).

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based on its argument about what must have been rather than the evidence in the record of what was.

IV. Lummi's Plain Language Argument Is "Largely Misdirected" Because It Ignores the Central Issue in this Case – Judge Boldt's Intent.

Lummi's fourth misdirection is its continued insistence that the phrase "the marine areas of Northern Puget Sound" resolves this case. Opp. at 1-2, 4-6. It does not. No one in this case disputes that Region 2E is a "marine area[] of Northern Puget Sound," yet Lummi continues to spill ink in an attempt to prove this rather obvious point rather than addressing the question actually presented – *whether Judge Boldt nevertheless meant something else*.

Lummi's plain language argument is "largely misdirected, inasmuch as an analysis of the decision is necessary, whether the text is unambiguous or not, in order to understand [the U&A finding] in light of the facts of the case." *Muckleshoot III*, 235 F.3d at 433. Contrary to Lummi's assertion, Opp. at 1, 5-6, Swinomish is not required to show that the language is ambiguous (although we believe we have done so, *see* Mot. at 5-6; Resp. at 3-11); it is sufficient for us to prove that Judge Boldt intended something other than its apparent meaning. *See supra* at 1-2.

Nevertheless, Lummi insists that its U&A finding is unambiguous. It argues that earlier cases holding that it is ambiguous "have no bearing on whether FF 46 is ambiguous" in this case. Opp. at 5. Lummi does not adequately explain why the ambiguity that exists as to its western and southern boundaries does not exist as to its eastern boundary. *See* Resp. at 6-7. Lummi concedes that its U&A finding is ambiguous because it does not "delineate the western boundary" or "clearly include or exclude [waters west of Whidbey]," Opp. at 6 (citations omitted), but apparently fails to see that the same is true here because it also does not delineate an eastern boundary or clearly include or exclude Region 2E. *See Final Decision No. 1*, 384 F. Supp. at 360 (FF 45 and 46). Lummi's argument that its

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U&A "end[s] naturally at the mainland, where 'marine waters' end," Opp. at 6, is nothing more than a restatement of its "largely misdirected" plain language argument.

Lummi's plain language argument is virtually identical to the one that Suquamish made and the courts rejected in Subproceeding 05-3. There, like here, Judge Boldt included broad general language in Suquamish's U&A finding. *Upper Skagit*, 590 F.3d at 1023. There, like here, Suquamish argued that the language was unambiguous and included the disputed waters. *Id*. at 1024. But this Court and the Ninth Circuit disagreed, finding that Judge Boldt nevertheless meant something else because the broad general language could not overcome the lack of specific evidence in the record to support Suquamish U&A in the disputed waters. *Id*. at 1023-25. The same is equally, if not more, true here, and should compel the same result. *See* Mot. at 19-22; Resp. at 7-8.

Lummi attempts to distinguish this case "based on [Judge Boldt's] statement during the 1973 trial that he did not consider [Suquamish U&A] to be as broad as his language suggested," and argues that "[h]ere, in sharp contrast, [there is] nothing in the record … to suggest that Judge Boldt did not mean precisely what he wrote." Opp. at 9. Of course, there is something in the record to suggest that Judge Boldt did not mean precisely what he wrote: a lack of evidence to support Lummi U&A in at least some of the "marine areas of Northern Puget Sound," including Region 2E. *See supra* at 2-8.

Lummi fundamentally misunderstands the extensive history of this litigation and the herring proceeding in particular. Suquamish and Swinomish were not parties in 1973, did not participate in the trial, and did not have their treaty tribe status or U&As determined in *Final Decision No. 1*. *See* Main Case Dkt. No. 655 (July 18, 1974)(granting intervention)(TDEH001-004). As a result, it is impossible for Judge Boldt to have made a statement during the 1973 trial regarding the relative scope of Lummi's

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U&A and Suquamish's U&A.

In the herring proceeding, Judge Boldt found that most of the tribes involved had made a prima facie showing of their right to take herring at their adjudicated U&As, or, in the case of Suquamish and Swinomish, at their claimed U&As. *See* Order, Main Case Dkt. No. 1062 (Mar. 28, 1975)(TDEH005-009). Suquamish filed a proposed regulation purporting to open State Herring Areas 1 through 4. *See* Notice, Main Case Dkt No. 1074 (April 3, 1975)(TDEH010-016). The State objected, Tr. at 40-41, 45-46 (Apr. 9, 1975)(TDEH017-021), and Dr. Lane was called and testified that Suquamish customarily fished and traveled in part of Area 1 and Area 2 (in addition to other areas closer to its homeland). *Id.* at 57-58 (TDEH022-023). Judge Boldt then ruled from the bench that Suquamish had made a prima facie showing that it fished and traveled in Areas 1 and 2. Tr. at 51-52 (Apr. 10, 1975)(TDEH024-026).

In light of this history, Judge Boldt's bench ruling is not a sufficient basis to distinguish Subproceeding 05-3 from this case. Contrary to Lummi's suggestion that Judge Boldt limited Suquamish's U&A but left Lummi's U&A intact in the herring proceeding, Opp. at 9; Lummi Mot. at 11 n.4, Judge Boldt determined Suquamish's U&A in the first instance and did not address Lummi's U&A, which had already been determined, at all. Judge Boldt's bench ruling was one reason that this Court and the Ninth Circuit concluded that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in Suquamish's U&A, but the primary reason for the decision was that there was no evidence to support Suquamish U&A in the disputed waters. The same is true here.

V. Geography and a "Natural Travel Path" Do Not Establish U&A.

Lummi's last misdirection is its argument that it should be "obvious from geography alone" that it has U&A in Region 2E because there is a "natural travel path" between its home territory in the

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north and the "present environs of Seattle." Opp. at 10-11. It should go without saying given that it has been the law of the case for nearly a half-century, but neither geography nor a "natural travel path" can establish U&A in the absence of evidence of customary fishing. In *Final Decision No. 1*, Judge Boldt defined U&A as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times." 384 F.Supp. at 332. Since even evidence of trolling incidental to travel is insufficient to give rise to U&A, *see, e.g., Upper Skagit*, 590 F.3d at 1022; *see also* Mot. at 5, Lummi's argument about where it might have traveled based on geography or its conception of what its "natural travel path" might have been is certainly insufficient to give rise to U&A.

The Ninth Circuit did not change these well-settled principles of law in *Lummi I*, 235 F.3d 443, *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014)(*Lummi II*), and *Lummi III*, 876 F.3d 1004. The cases did discuss geography and a travel path on the west side of Whidbey between Lummi's northern and southern customary fisheries. But the cases also reaffirmed the principle that "U&A cannot be established by occasional and incidental trolling in marine waters used as thoroughfares for travel," and emphasized that Lummi had U&A along its travel path because there was evidence that its travel was accompanied by customary fishing. *Id*. at 1007 (quotations omitted), 1010.

Lummi argues that the fact that it traveled on the west side of Whidbey does not foreclose the possibility that it also traveled on the east side. Opp. at 10-11. Of course it doesn't (although Lummi flip-flopping its position about its travel path in order to gain litigation advantage raises judicial estoppel and fairness concerns, *see* Mot. at 23). But the Ninth Circuit has found that Lummi traveled and customarily fished on the west side. In contrast, there is no evidence that Lummi traveled on the east side of Whidbey, let alone customarily fished while traveling. Accordingly, "[i]t would be pure

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speculation to conclude that [Lummi's] travels must also have included the east side of Whidbey Island…." *United States v. Washington*, 20 F.Supp.3d 828, 839 (W.D. Wash. 2007).

CONCLUSION

The simple fact of the matter is this: Lummi is trying to create U&A out of thin air. There is not a shred of evidence in the record to support Lummi U&A in the secluded waters of Region 2E. At treaty time, Lummi did not live on Region 2E, did not fish in Region 2E, and did not travel through Region 2E for fishing or any other purpose. Lummi and the United States on its behalf had the opportunity to make the case at trial for Lummi U&A in Region 2E and they chose not to take it. For over four decades after trial, Lummi did not fish or attempt to fish in Region 2E, demonstrating that it understood that its U&A as determined by Judge Boldt did not include Region 2E. In an attempt to avoid the only conclusion that can be drawn from all this, Lummi misstates the burden of proof in this case, presents mischaracterizations, wild speculations, and broad generalizations as if they were uncontroverted evidence, and urges this Court to ignore the record before Judge Boldt in favor of a plain language argument and a geographic argument, each of which runs afoul of the law of the case. This Court should grant Swinomish's Motion for Summary Judgment and Permanent Injunctive Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on JULY 31, 2020, I electronically filed this SWINOMISH'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

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