No. 21-35812

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY, ET AL.,

Petitioners-Appellees,

v.

LUMMI NATION,

Respondent-Appellant,

STILLAGUAMISH TRIBE OF INDIANS, ET AL.,

Real Parties in Interest.

Appeal from the United States District Court for Western Washington, Seattle, Case No. 2:19-sp-00001, Hon. Ricardo S. Martinez, C.J.

OPENING BRIEF FOR RESPONDENT-APPELLANT LUMMI NATION

JAMES R. SIGEL
JAMES M. SCHURZ
MARK DAVID MCPHERSON
CAMILLE FRAMROZE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

DEANNE E. MAYNARD
MORRISON & FOERSTER LLP
2100 L Street, NW
Suite 900
Washington, D.C. 20037
Telephone: (202) 887-8740
Facsimile: (202) 887-0763
DMaynard@mofo.com

Counsel for Respondent-Appellant Lummi Nation

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JURISDICTIONAL STATEMENT

The district court exercised its continuing jurisdiction, pursuant to 28 U.S.C. § 1331, to implement the decree in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Decision I*"). The district court entered judgment for petitioners-appellees Swinomish Indian Tribal Community, Tulalip Tribes, and Upper Skagit Indian Tribe (collectively, the "Requesting Parties") on September 20, 2021. 1-ER-6. Respondent-appellant Lummi Nation ("Lummi") filed a timely notice of appeal on September 23, 2021. 6-ER-1189–1190. The district court denied a subsequently filed reconsideration motion on October 5, 2021, at which point Lummi's notice of appeal became effective. 1-ER-2–5; *see* Fed. R. App. P. 4(a)(4)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's order was final as to all disputed issues in this subproceeding. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432 n.1 (9th Cir. 2000) ("*Muckleshoot III*").

STATEMENT OF THE ISSUES

1. Whether the Requesting Parties failed to establish that Judge Boldt's 1974 decision describing Lummi's usual and accustomed fishing grounds as including "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" (*Decision I*, 384 F. Supp. at 360) did not encompass the Northern Puget Sound waters between Fidalgo Island and the present environs of Seattle.

2. If the 1974 decision is deemed not to include these waters within Lummi's usual and accustomed fishing grounds, whether Lummi's rights in these waters have yet to be determined.

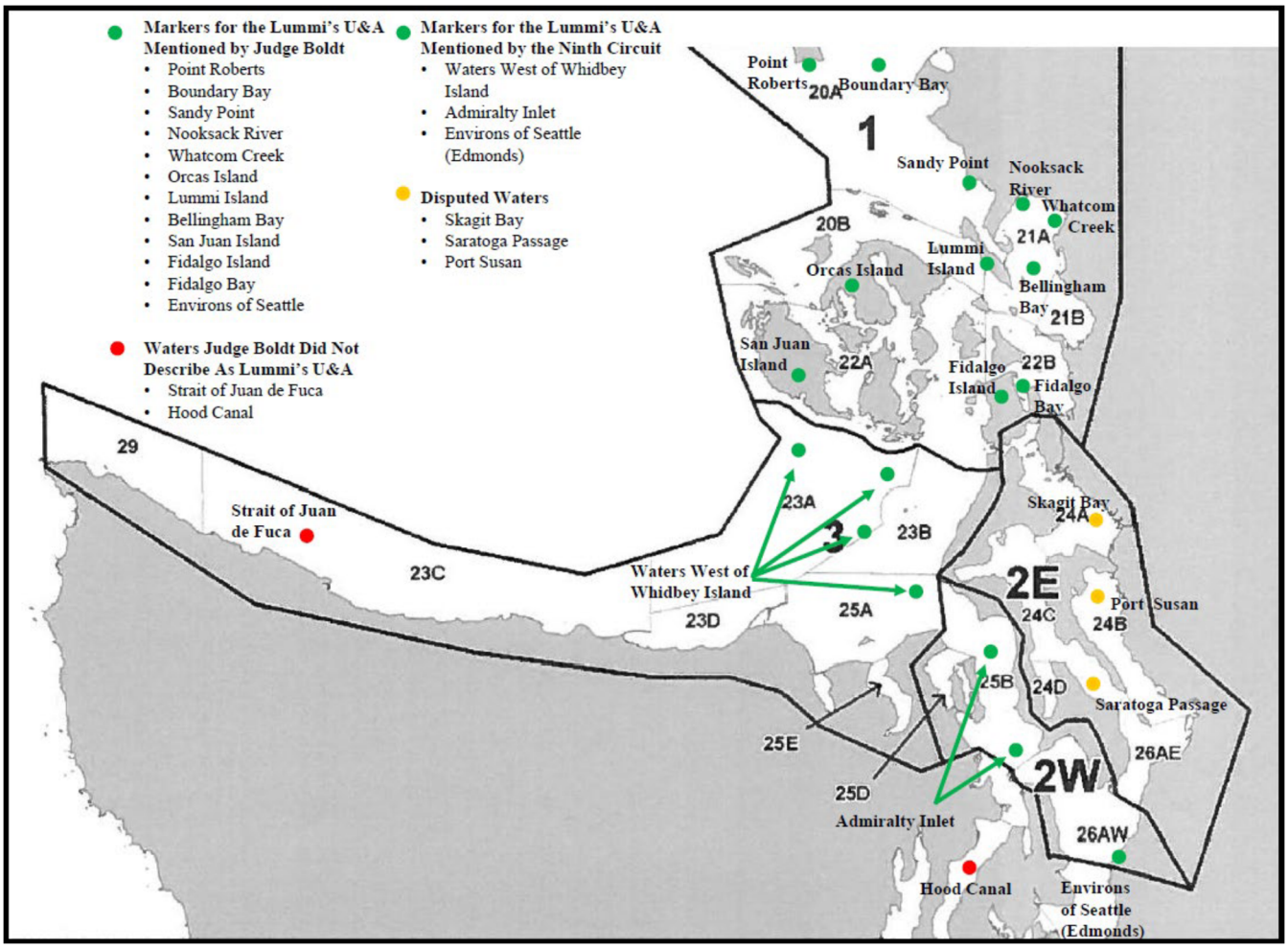
INTRODUCTION

For hundreds of years, members of Lummi have fished in the Puget Sound waters off the coast of what is now the State of Washington. Lummi secured their rights in these waters more than 165 years ago, signing a treaty that guarantees they may fish in all their usual and accustomed grounds. Nearly 50 years ago, Judge Boldt found that this treaty preserved Lummi's rights to "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp at 360.

A number of tribes have since sought to unwind this judicial order, repeatedly asking courts to adopt narrow interpretations of Judge Boldt's broad description. In this particular iteration of that ongoing effort, the Requesting Parties attempt to contradict Judge Boldt's plain language. They seek to establish that the Puget Sound waters south of Fidalgo Island and east of Whidbey Island—waters that all agree are "marine areas of Northern Puget Sound" between the "Fraser River" and "the present environs of Seattle," just as Judge Boldt described (*Decision I*, 384 F. Supp. at 360)—are somehow *outside* Lummi's adjudicated usual and accustomed grounds. Disregarding both the text of Judge Boldt's description and the evidence that was before him, the district court agreed.

That conclusion cannot be reconciled with either the terms of Judge Boldt's order or with this Court's decisions interpreting that order. This Court has held that

Judge Boldt intended his description of Lummi's usual and accustomed grounds to include both the waters west of Whidbey Island and Admiralty Inlet. *See United States v. Lummi Nation*, 876 F.3d 1004, 1009 (9th Cir. 2017) ("*Lummi III*"); *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) ("*Lummi I*"). The map below illustrates these waters and other key points:



4-ER-656.[1]

In both cases, this Court held the text of Judge Boldt's description was not controlling because it was unclear whether the disputed waters were in "Northern Puget Sound." *Lummi III*, 876 F.3d at 1009; *Lummi I*, 235 F.3d at 452. Nevertheless, in both cases, this Court ruled for Lummi based on evidence and geography showing these waters likely would have been "a passage" through which Lummi would have traveled to fish between their home territory in the north and the environs of Seattle in the south. *Lummi III*, 876 F.3d at 1009-10; *Lummi I*, 235 F.3d at 452.

Here, the case for holding the disputed waters to be within Lummi's adjudicated usual and accustomed fishing grounds is even stronger because Judge Boldt's language clearly encompasses them. The waters contested here are designated "2E" in the map above. Unlike with Admiralty Inlet or the waters west of Whidbey Island, no one disputes that these waters are within "Northern Puget Sound." *See* 2-ER-72. Judge Boldt's description thus unambiguously includes them. And neither the district court nor the Requesting Parties could identify any

[1]This map, which was included in Lummi's motion for summary judgment, was originally prepared by the Washington Department of Fish and Wildlife. *See* Loomis Declaration Ex. 1, *United States v. Washington*, No. 2:70-cv-09213-RSM (W.D. Wash. Nov. 4, 2019), Dkt. No. 22078-1. Lummi annotated the map by adding markers showing locations specified by Judge Boldt or this Court, along with the waters disputed here. The map does not show the Fraser River, which is north of Point Roberts past the U.S.-Canada border.

basis for concluding that Judge Boldt did not mean what he said. That by itself is sufficient to resolve this appeal.

But even if the text of Judge Boldt's order were not dispositive, the evidence before him would confirm this plain-meaning interpretation. The Requesting Parties can prevail here only by demonstrating that *no* record evidence could have led Judge Boldt to include these waters in his description—and the standard for what constitutes any evidence in this context is relaxed, given the scarcity of documentation of historical tribal fishing. The Requesting Parties could not possibly meet their burden. The very same evidence supporting Lummi fishing in Admiralty Inlet and the waters west of Whidbey Island also supports Lummi fishing in the waters disputed here, which were equally likely to serve as "a passage" through which members of Lummi would have traveled and fished between their home territory in the north and the environs of Seattle in the south. *Lummi III*, 876 F.3d at 1009-10; *Lummi I*, 235 F.3d at 452.

If that were not enough, Judge Boldt also relied on direct evidence of Lummi fishing in these waters. In particular, he cited a report from an anthropologist describing Lummi fishing in the Puget Sound waters to the south of their home territory in and around Fidalgo Island—a description that necessarily encompasses the disputed waters. This evidence independently forecloses the Requesting Parties'

effort to prove that Judge Boldt could not have intended to include the "Northern Puget Sound" waters he in fact expressly included. *Decision I*, 384 F. Supp. at 360.

The district court's judgment should be reversed with a direction to enter judgment for Lummi.

STATEMENT OF THE CASE

A. Factual Background

1. The Treaty of Point Elliot

In 1854 and 1855, Washington Territorial Governor Isaac Stevens, acting on behalf of the United States, negotiated a series of treaties with the Indian tribes of western Washington to "extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661 (1979). Among these tribes were three linguistically and culturally related groups known as the Lummi, the Semiahamoo, and the Samish, which were "subsumed under the Lummi designation" for purposes of signing the Treaty of Point Elliot. *Decision I*, 384 F. Supp. at 360; *see* Treaty of Point Elliot, Act of Jan. 22, 1855, 12 Stat. 927. The modern Lummi Nation is composed of descendants of these tribes, which are here referred to collectively as "Lummi" except where distinctions among them are relevant. *See* 4-ER-528.

In the Treaty of Point Elliot, Lummi relinquished most of their land rights, save for a few small parcels. 12 Stat. at 927-28. But Lummi retained their rights to fish. The Treaty guaranteed Lummi the "right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory." *Id.* at 928. This clause mirrored the language in the treaties signed by other tribes in this era, and reflected the "vital importance of the fisheries to the Indians" in the region. *Wash. State Commercial Fishing Vessel Ass'n*, 443 U.S. at 661-62, 666.

Lummi were particularly dependent on fishing: it was the core foundation of their culture and economy. 4-ER-536. Unlike many other tribes, Lummi used an "ingenious and unique" technique known as "reefnetting," which enabled them to trap large quantities of migrating salmon. 4-ER-534. They established reefnet sites in the marine waters off Point Roberts and Lummi Island, throughout the waters of the San Juan Islands, and off the western shore of Fidalgo Island. 4-ER-551–553. In addition to reefnetting, Lummi also used many other methods of harvesting fish. 4-ER-552. And Lummi utilized fisheries far from their home territory, traveling in their canoes to fish throughout the waters of Puget Sound. 4-ER-546, 4-ER-554 As explained by Dr. Barbara Lane, an anthropologist credited by Judge Boldt (*Decision I*, 384 F. Supp. at 350), Lummi thus signed the Treaty of Point Elliot only after they "received assurances that they would continue to hold the rights to their fishing grounds and stations." 4-ER-532.

2. Decision I

The underlying district court proceedings commenced in 1970 when the United States, acting on its own behalf and as trustee for several tribes, filed suit against the State of Washington seeking clarification and enforcement of tribal treaty fishing rights. *Decision I*, 384 F. Supp. at 327-28. Various tribes, state agencies, and a commercial fishing group intervened. *Id.* Lummi was one of these original intervenors. *Id.* at 327 n.2.

In 1974, Judge Boldt issued a wide-ranging order clarifying the nature and extent of the tribes' treaty rights with respect to anadromous fish—that is, fish that migrate from the ocean to spawn in their natal fresh-water rivers. *Id.* at 400, 405. As relevant here, Judge Boldt concluded that outside of reservation boundaries, tribes retained rights to fish in their "usual and accustomed grounds and stations" (sometimes abbreviated "U&A"), which might overlap with the grounds of other tribes. *Id.* at 332, 406-07. Judge Boldt defined "usual and accustomed grounds and stations" as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Id.* at 332.

For "each of the plaintiff tribes," Judge Boldt also set forth "some, but by no means all, of their principal usual and accustomed fishing places." *Id.* at 333. While

some tribes' grounds were primarily limited to rivers, streams, and freshwater fisheries (*e.g.*, *id.* at 367 (Muckleshoot), *id.* at 376 (Sauk-Suiattle)), tribes such as Lummi "fished to a considerable extent in marine areas." *Id.* at 353.

3. The Lummi's U&A

Indeed, Lummi were foremost among the *Decision I* tribes with considerable marine fisheries in Puget Sound. *See id.* at 359-82. While Judge Boldt found that Lummi had rights to certain "[f]reshwater fisheries"—including in "the river drainage systems . . . emptying into the bays from Boundary Bay south to Fidalgo Bay"—he focused the bulk of his findings on Lummi's fishing grounds in marine waters. *Id.* at 360.

Judge Boldt described these usual and accustomed grounds in two separate Findings of Fact. In Finding of Fact #45, Judge Boldt determining Lummi had reefnetting sites on "Lummi Island and Fidalgo Island," among other locations, and that they had "trolled the waters of the San Juan Islands for various species of salmon." *Id.* In Finding of Fact #46, Judge Boldt then found Lummi had marine fishing grounds "[i]n addition to the reef net locations" listed previously. *Id.* Specifically, Judge Boldt determined that "the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Id.*

In support of these findings, Judge Boldt relied on several exhibits providing evidence of Lummi fishing in the waters disputed here—that is, the marine waters on the eastern side of Northern Puget Sound, south of Fidalgo Island and east of Whidbey Island (referred to here interchangeably as the "waters south of Fidalgo Island" and "the waters east of Whidbey Island"). In particular, Judge Boldt cited two submissions from Dr. Lane, whose reports Judge Boldt found "exceptionally well researched and reported." *Id.* at 350; *see id.* at 360. Among other things, Dr. Lane described Lummi reefnetting sites and freshwater fisheries in and around Fidalgo Island. 4-ER-552, 4-ER-555. She explained that Lummi had traded fish and clams for "[f]lint from Puget Sound and woven root hats from the West Coast," the latter of which she separately specified as being from "upriver Skagit," a river emptying into the waters south of Fidalgo Island. 4-ER-537; 4-ER-569. She observed that "Lummi fishermen were accustomed, at least in historic times, and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south." 4-ER-554. And she noted that Lummi and similar tribes "travelled widely and frequently throughout the waters of the Sound and Straits," and that Lummi specifically utilized "fisheries in the Straits and bays from the Fraser River south to the present environs of Seattle." 4-ER-554–555.

Judge Boldt also relied on a 19th-century affidavit from someone who had lived near the Lummi reservation for decades, and who echoed Dr. Lane's

assessment of the breadth of Lummi's fishing grounds. *See Decision I*, 384 F. Supp. at 360-61. The affiant declared that Lummi "fished at all points in the lower Sound and wherever the run of fish was greatest and the salmon were most easily taken," and that they had "been accustomed to take long journeys to the various fishing grounds." 4-ER-649.

4. The district court's continuing jurisdiction and Decision II

Judge Boldt recognized that he could not resolve all controversies regarding tribal usual and accustomed grounds. Thus, *Decision I* provided that the district court would retain continuing jurisdiction over the case. 384 F. Supp. at 419. The parties could invoke this jurisdiction to, among other things, clarify "whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #1," or to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1." *Id.* These two grounds for invoking the court's jurisdiction are now referred to as Paragraph 25(a)(1) and Paragraph 25(a)(6), respectively. *See United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1991).

In the years following *Decision I*, Judge Boldt exercised this continuing jurisdiction to resolve a series of issues. Many of those orders were compiled and published in *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1978)

("*Decision II*"). In particular, Judge Boldt delineated the usual and accustomed grounds of a number of tribes that intervened in the proceedings following *Decision I*, including the Swinomish and the Suquamish. *Id.* at 1049.

5. Challenges to Lummi's U&A

Over the ensuing years, various tribes have brought challenges concerning the scope of the Lummi's adjudicated usual and accustomed fishing grounds. In a series of decisions, this Court has addressed the western management line and southern boundary of the waters to which Judge Boldt referred in declaring Lummi's right to fish in "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360.

This Court first addressed what Judge Boldt meant by "the present environs of Seattle." *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359-60 (9th Cir. 1998) ("*Muckleshoot I*"); *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099, 1100 (9th Cir. 2000) ("*Muckleshoot II*"). As this Court explained, that "phrase" is "ambiguous in the sense that it is not precise as to the exact location of the environs of Seattle in 1972." *Muckleshoot I*, 141 F.3d at 1359. Relying largely on the testimony of a geography expert, this Court concluded that the Lummi grounds described in *Decision I* extend south to Edmonds, Washington. *Muckleshoot II*, 234 F.3d at 1100-01.

Next, this Court addressed whether Judge Boldt's description of Lummi's usual and accustomed grounds includes the Strait of Juan de Fuca, the mouth of the Hood Canal, or Admiralty Inlet—waters to the west of those at issue here. *Lummi I*, 235 F.3d at 445. As this Court explained, Judge Boldt's phrasing was "ambiguous because it does not delineate the western boundary of the Lummi's usual and accustomed grounds and stations." *Id.* at 449. Emphasizing the language used elsewhere in *Decision I*, this Court concluded that Judge Boldt would not have intended "Northern Puget Sound" to encompass either the Strait of Juan de Fuca or the mouth of Hood Canal. *Id.* at 451-52. But this Court held that Admiralty Inlet—which lies between Whidbey Island and the Olympic Peninsula—was included within Judge Boldt's description. *Id* at 452. Because *Decision I* contained no references whatsoever to Admiralty Inlet, the Court rejected the requesting tribes' argument that Judge Boldt's failure to expressly list it in his description of Lummi's usual and accustomed grounds was dispositive. *Id.* And because Admiralty Inlet "would likely be a passage" through which Lummi would have traveled in traversing the fishing grounds Judge Boldt identified, this Court concluded that it was "intended to be included within the 'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle.'" *Id.*

Subsequently, this Court recognized Lummi's right to fish in the waters west of Whidbey Island—waters the tribes challenging Lummi fishing contended were

within the Strait of Juan de Fuca and thus outside "Northern Puget Sound." *See Lower Elwha Klallam Indian Tribe v. Lummi Nation*, 849 F. App'x 216, 218 (9th Cir. 2021); *Lummi III*, 876 F.3d at 1009-10; *United States v. Lummi Nation*, 763 F.3d 1180, 1186-87 (9th Cir. 2014) ("*Lummi II*"). This Court explained that, as had been true of Admiralty Inlet, *Decision I* contained no specific reference to the waters west of Whidbey Island, and thus this area was "'just as likely' to be included in 'Northern Puget Sound' as it is to be excluded." *Lummi III*, 876 F.3d at 1009 (quoting *Lummi I*, 235 F.3d at 452). And, this Court continued, just as with Admiralty Inlet, these waters "'would likely be a passage through which the Lummi would have traveled,'" as they "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." *Id.* at 1009-10 (quoting *Lummi I*, 235 F.3d at 452). To further support that conclusion, the Court pointed to Dr. Lane's statements that marine tribes would use "'[t]he deeper saltwater areas, the Sound, the straits, and the open sea'" as "'public thoroughfares,'" and that Lummi were "'accustomed to visit fisheries as distant as'" the Fraser River and the environs of Seattle and "utilized other fisheries in between." *Id.* at 1010 (quotation marks, alteration, and emphasis omitted); *see* 4-ER-554–555.

B. Procedural History

1. The Request for Determination

The current subproceeding began when the Requesting Parties filed a "Request for Determination" challenging Lummi's right to fish in "Region 2 East"—a reference to the regional shellfish management area that covers the waters south of Fidalgo Island, between the mainland and Whidbey Island. 6-ER-1176. Invoking Paragraph 25(a)(1) of the district court's continuing jurisdiction order, the Requesting Parties contended that Lummi fishing in these waters was inconsistent with Judge Boldt's recognition of their treaty rights in "Northern Puget Sound." 6-ER-1177, 6-ER-1182.

Unlike the tribes in prior challenges to Lummi's fishing rights, the Requesting Parties did not deny that the plain terms of Judge Boldt's description of Lummi's usual and accustomed grounds includes these disputed waters. As the Swinomish stipulated, "[n]o one in this case disputes that Region 2E is a 'marine area[] of Northern Puget Sound.'" 2-ER-72 (second alteration in original). Rather, the Requesting Tribes' central contention was that Judge Boldt "intended something other than" the "apparent meaning" of the language he used. 2-ER-72. The Requesting Tribes attempted to support that contention primarily by pointing to the purported absence of any evidence before Judge Boldt demonstrating Lummi fishing in these waters. 2-ER-72. The parties cross-moved for summary judgment, with the

Requesting Parties contending that Judge Boldt's description of Lummi's usual and accustomed grounds did not include the waters disputed here, and Lummi seeking a determination that Judge Boldt had already declared their right to fish throughout these waters.

2. The district court's order

The district court granted the Requesting Parties' motions for summary judgment and denied Lummi's cross-motion. The court began by declaring that it had "little trouble concluding that Judge Boldt's broad use of 'the marine areas of Northern Puget Sound' is ambiguous." 1-ER-12. While the district court did not deny that the waters at issue here are unequivocally " marine areas of Northern Puget Sound," it dismissed that plain meaning. *See* 1-ER-15. To the extent it addressed the text itself, the court considered it significant that Judge Boldt's description did not single out particular subareas of the disputed waters within "Northern Puget Sound"—even though those subsidiary waters are necessarily included in Judge Boldt's broader description. 1-ER-12–13. Otherwise, in declaring Judge Boldt's Finding of Fact somehow "ambiguous," the district court relied on what it believed was a holding from this Court that tribes' "primary" travel route was through the waters west of Whidbey Island, this Court's conclusion that Judge Boldt's description of Lummi's usual and accustomed grounds was ambiguous with respect to *other* waters, and this Court's decisions holding that Judge Boldt meant something

other than what he actually said in describing other tribes' fishing grounds. *See* 1-ER-13–14.

Having deemed the text of *Decision I* largely irrelevant, the district court turned to the evidence before Judge Boldt. While acknowledging that Dr. Lane had described Lummi fishing "'in the Straits and bays from the Fraser River south to the present environs of Seattle,'" the court read this statement to refer to certain "bays" to the north of Anacortes on Fidalgo Island—well to the north of the "'present environs of Seattle.'" 1-ER-20–21 (citation omitted). The district court also rejected the argument that the waters east of Whidbey Island would have been Lummi's likely route of passage between Fidalgo Island and the environs of Seattle, again asserting that this Court had held "that the waters west of Whidbey Island provided the preeminent travel route." 1-ER-23. Dismissing the remaining evidence Lummi cited as "speculative," the district court declared that "no evidence of Lummi travel or fishing within the Disputed Waters was before Judge Boldt." 1-ER-24–26.

SUMMARY OF ARGUMENT

I. The Requesting Parties showed neither (1) that Judge Boldt did not mean what he said in defining Lummi's usual and accustomed grounds nor (2) that there was no evidence before him of Lummi fishing or travel in these waters. For each of these independent reasons, their challenge fails.

A. Judge Bolt's Finding of Fact #46 unambiguously grants Lummi the right to fish in the waters contested here. Indeed, the Requesting Parties do not dispute that these waters are "marine areas of Northern Puget Sound" between the "Fraser River" and the "environs of Seattle." *Decision I*, 384 F. Supp. at 360. Instead, they attempted to show that Judge Boldt did not mean what he said in describing Lummi's usual and accustomed grounds. But they cannot meet that heavy burden: they point to nothing demonstrating Judge Boldt's intent not to include these waters in his description.

Nor do the district court's rationales for declaring Judge Boldt's description "ambiguous" withstand scrutiny. Contrary to the district court's assertion, Judge Boldt's failure to specify subareas within the contested waters creates no uncertainty as to whether these waters are within "Northern Puget Sound." Also contrary to the district court's reasoning, this Court has never held that the waters to the west of Whidbey Island were the "predominate" travel route for Lummi or any other tribe; in any event, such a holding would not render Judge Boldt's description ambiguous. This Court has likewise never concluded that Judge Boldt's description of Lummi's usual and accustomed grounds is "ambiguous" with respect to all possible waters. The district court erred in ignoring the plain language of Judge Boldt's Finding of Fact.

B. Regardless, the Requesting Parties also failed to meet their burden of demonstrating that "no evidence" before Judge Boldt could have led him to include the contested waters in his description. In fact, the record contained ample evidence of Lummi fishing in these waters, including Dr. Lane's description of Lummi fishing in the "Puget Sound" waters south of Anacortes and the 19th century affidavit recounting Lummi fishing at "all points" in Northern Puget Sound. The district court reached a contrary conclusion only by misreading this evidence or disregarding it entirely.

Separately, the record before Judge Boldt also contained evidence of Lummi travel in these waters. This Court deemed that same evidence sufficient to confirm Lummi's right to fish in Admiralty Inlet and the waters west of Whidbey Island. It applies with equal force to the sheltered waters east of Whidbey Island—presumably the preferred route of travel in dangerous weather. The district court offered no reason to assume these waters would not likewise have served as a passage from Lummi's home territory in the north to the environs of Seattle in the south. Nor did the Requesting Parties. While they pointed to evidence that allegedly demonstrated the Swinomish would have controlled access to these waters, that evidence was not before Judge Boldt, and it would only confirm the Lummi's passage through these waters in any event.

II. Even if this Court concludes that Judge Boldt did not include these waters in his description of Lummi's usual and accustomed grounds, that would not mean that Judge Boldt found Lummi had no treaty rights to these waters. Judge Boldt recognized that he was listing only a subset of tribes' usual and accustomed grounds. His continuing jurisdiction order expressly recognized the need to provide tribes the opportunity to establish their rights to fish in waters not already "specifically determined." To the extent the district court concluded that Judge Boldt determined Lummi have no right to fish in these waters, it erred.

STANDARD OF REVIEW

This Court reviews the district court's entry of summary judgment and its interpretation of Judge Boldt's order de novo. *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015).

ARGUMENT

I. THE REQUESTING PARTIES FAILED TO ESTABLISH THAT JUDGE BOLDT DID NOT INTEND TO INCLUDE THE DISPUTED WATERS IN LUMMI'S USUAL AND ACCUSTOMED GROUNDS

This Court has established a two-step procedure (sometimes called the "*Muckleshoot* framework") to determine whether Judge Boldt intended to include a given area in his description of a tribe's usual and accustomed grounds. "At step one, the moving party bears the burden of offering evidence that a U & A finding was ambiguous, or that Judge Boldt intended something other than the text's

apparent meaning." *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844, 848 (9th Cir. 2017) ("*Upper Skagit II*") (quotation marks, citation, and alteration omitted). If it meets that burden, then "[a]t step two, the moving party bears the burden to show that there was no evidence before Judge Boldt that the [tribe] fished or traveled through the contested areas." *Id.* (quotation marks, citation, and alteration omitted).

Here, the Requesting Parties made neither showing. They provided no reason to conclude Judge Boldt did not mean what he said in recognizing Lummi's right to fish in the waters of "Northern Puget Sound." And even if they had met that first-step burden, they failed to demonstrate there was "no evidence" before Judge Boldt that could have led him to include these waters in his description of Lummi's usual and accustomed grounds.

A. The Plain Text Of Judge Boldt's Description Controls

1. The disputed waters are unambiguously in "Northern Puget Sound"

This case is more straightforward than the prior appeals requiring this Court to interpret Judge Boldt's description of Lummi's rights. In Finding of Fact #46, Judge Boldt recognized that Lummi's usual and accustomed grounds include "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360. Previous cases called upon this Court to address Lummi's rights in waters not clearly covered by the language

Judge Boldt used—it was unclear whether the Strait of Juan de Fuca, Hood Canal, Admiralty Inlet, and the waters west of Whidbey Island were part of "Northern Puget Sound," or where, exactly, the "present environs of Seattle" lie. *See Lummi II*, 763 F.3d at 1186-87; *Lummi I*, 235 F.3d at 449; *Muckleshoot I*, 141 F.3d at 1359. Here, by contrast, there is no dispute that the disputed waters are encompassed by the plain terms of Judge Boldt's description. *See* 2-ER-72 (Swinomish acknowledgment in summary judgment reply that "No one in this case disputes that Region 2E is a 'marine area[] of Northern Puget Sound'") (alteration in original); 3-ER-374 & n.13 (similar acknowledgement by Upper Skagit); 2-ER-253–254 (Tulalip offering no response to Lummi's plain-text argument).

That is because each of the key terms Judge Boldt used in Finding of Fact #46 unambiguously applies here. The disputed waters are "marine" areas—a term Judge Boldt used to distinguish saltwater fisheries from "[f]reshwater" fisheries located in rivers, streams, and lakes. *Decision I*, 384 F. Supp. at 360; *see also*, *e.g.*, *id.* at 385 (distinguishing "marine fisheries" from "river fisheries"). The disputed waters are in "Puget Sound"—as confirmed both by Judge Boldt's adoption in *Decision I* of a report defining "Puget Sound" to include all saltwaters inland of the Strait of Juan de Fuca (*see United States v. Washington*, No. CV 9213, 2007 WL 30869, at *3 (W.D. Wash. Jan. 4, 2007)), and by his express designation of the waters east of Whidbey Island as being within "Puget Sound" when he later defined the

Swinomish's usual and accustomed grounds (*see Decision II*, 459 F. Supp. at 1049 (referring to "marine areas of Northern Puget Sound from the Fraser River south to and including Whidbey, Camano, [and] Fidalgo" Islands)). The disputed waters are also in "Northern" Puget Sound, rather than the "Southern" portion of the Sound that extends south of Seattle past Tacoma. *E.g.*, *Decision I*, 384 F. Supp. at 378. And the disputed waters are located between "the Fraser River" (in Canada, to the north) and the "present environs of Seattle" (in Edmonds, to the south and east). *Decision I*, 384 F. Supp. at 360; *see Muckleshoot II*, 234 F.3d at 1100-01.

The waters south of Fidalgo Island between Whidbey Island and the mainland are thus unquestionably "marine areas of Northern Puget Sound" located between the "Fraser River" and the "present environs of Seattle." *Decision I*, 384 F. Supp. at 360; *see*, *e.g.*, 2-ER-247 n.3 ("Swinomish does not dispute" that "the waters of Region 2E are 'marine waters' in 'northern' 'Puget Sound' between 'the Fraser River' and 'the present environs of Seattle"). Holding that Lummi have no rights in the disputed waters would defy the plain language Judge Boldt used: Lummi's usual and accustomed grounds would not include "the marine areas of Northern Puget Sound *from* the Fraser River south *to* the present environs of Seattle" if the Puget Sound waters directly between Judge Boldt's geographic anchors were excluded. *Decision I*, 384 F. Supp. at 360 (emphases added).

Indeed, this Court previously recognized that Judge Boldt's similar description of the Suquamish's usual and accustomed grounds unambiguously encompassed the waters at issue here. In *Decision II*, Judge Boldt declared that the Suquamish have rights in "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal." 459 F. Supp. at 1049. The Upper Skagit subsequently requested a determination that this description did not encompass "Saratoga Passage" or "Skagit Bay," both of which are located between Whidbey Island and the mainland. *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010) ("*Upper Skagit I*"). While a divided panel of tshis Court ultimately ruled for the Upper Skagit for reasons inapplicable here (*see infra* pp. 27-29), all members of the panel agreed that the waters south of Fidalgo Island and east of Whidbey Island are "marine waters of Puget Sound" between the "Fraser River" and "Vashon Island" (which is to the south of Seattle). *Id.* at 1023-24 (quotation marks omitted); *see id.* at 1026 (Kleinfeld, J., dissenting) ("In my view, the better reading of 'Puget Sound' is that it means 'Puget Sound."); *Tulalip Tribes*, 794 F.3d at 1133 (explaining that *Upper Skagit I* "affirmed" that "the apparent meaning of the term 'Puget Sound' from the Suquamish's U & A included the waters at issue in that case"). Judge Boldt's

description of Lummi's usual and accustomed grounds likewise unambiguously includes the waters contested here.

2. The Requesting Parties cannot show Judge Boldt did not mean what he said

To be sure, an "unambiguous text" does "not necessarily terminate the inquiry." *Muckleshoot III*, 235 F.3d at 433. After all, a moving party can meet its burden at the first step of the two-step inquiry by demonstrating either that Judge Boldt's finding was "'ambiguous'" *or* that he "'intended something other than the text's apparent meaning.'" *Upper Skagit II*, 871 F.3d at 848 (alteration and citation omitted). But the two decisions in which this Court has cast aside such a plain-text reading—*Muckleshoot III* and *Upper Skagit I*—demonstrate how difficult it is for a moving party to overcome the presumption that Judge Boldt meant what he said. These decisions illustrate how far short the Requesting Parties' showing here falls.

In *Muckleshoot III*, this Court relied on clear evidence of Judge Boldt's contrary intent in holding that he did not mean to recognize the Muckleshoot's rights to all of the waters his description might seem to cover. 235 F.3d at 432-38. Judge Boldt described the Muckleshoot's usual and accustomed grounds as "'primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar, and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound.'" *Id.* at 431 (emphasis omitted) (quoting *Decision I*, 384 F. Supp. at 367).

As reflected in this description, the Muckleshoot had been "almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods." *Id.* at 434. For that reason, this Court rejected the Muckleshoot's bold proposition that Judge Boldt had, almost as an afterthought, granted them the right to fish throughout "Puget Sound"—i.e., the marine waters stretching from the Canadian border in the north to Olympia in the south. *Id.* at 434-35. Rather, the evidence before Judge Boldt demonstrated that the Muckleshoot "occasionally made the trip down river to Elliott Bay on fishing and clamming expeditions," and that even there they fished primarily on the "beaches" of the Sound. *Id.* (quotation marks omitted). Thus, this Court concluded, Judge Boldt's phrase "secondarily in the saltwater of Puget Sound" had been intended to grant the Muckleshoot rights only to "saltwater fishing [in] Elliott Bay." *Id.* at 438

Similarly, in *Upper Skagit I*, this Court relied on three factors in finding that the Upper Skagit met their burden of showing that Judge Boldt "intended something other than [the text's] apparent meaning" in describing the Suquamish's usual and accustomed grounds. 590 F.3d at 1024 (quotation marks and citation omitted). First—and perhaps most important—Judge Boldt made a statement from the bench demonstrating that he viewed the Suquamish to have established their right to fish only in certain *portions* of Northern Puget Sound, and not in the broader area his otherwise unambiguous description in *Decision II* would suggest. *Id.* at 1025.

Second, the record before Judge Boldt did not contain "*any* evidence of Suquamish fishing or travel in these areas"; while Dr. Lane had detailed a number of specific Suquamish fishing locations in Puget Sound, she made no mention of Suquamish fishing or travel in the disputed waters. *Id.* at 1025 & n.9; *see id.* at 1024 & n.7. Third, this Court contrasted Judge Boldt's description of the Suquamish's usual and accustomed grounds with his descriptions of other tribes' usual and accustomed grounds—most notably those of the Swinomish, determined contemporaneously in *Decision II*'s subsequent paragraph. This Court concluded that had Judge Boldt intended to include the disputed waters, he would have used "geographic anchors delineating an area that specifically included Saratoga Passage and Skagit Bay," as he had for the Swinomish. *Id.* at 1026.

The Requesting Parties can point to no similar exceptional circumstances that would justify departing from Judge Boldt's plain language. Unlike the Muckleshoot, Lummi were not principally a freshwater fishing tribe. Far from it. As both *Decision I* itself and this Court's decisions interpreting it have recognized, Lummi fished extensively throughout marine waters; Lummi was perhaps the foremost fishing tribe in Northern Puget Sound. *Compare Muckleshoot III*, 235 F.3d at 434 (citing the Muckleshoot's reliance on freshwater fishing); *with, e.g.*, *Decision I*, 384 F. Supp. at 360 (emphasizing Lummi's many marine fishing grounds); *Lummi I*, 235 F.3d at 452 (recognizing Lummi's usual and accustomed grounds in Admiralty

Inlet), *Lummi III*, 876 F.3d at 1011 (recognizing Lummi's usual accustomed grounds in the waters west of Whidbey Island). There would thus be no incongruity in concluding that Lummi established usual and accustomed grounds in the "marine areas of Northern Puget Sound" between Fidalgo Island and the "present environs of Seattle." *Id.* at 1010.

Likewise, unlike with the Suquamish, Judge Boldt said nothing about Lummi that would contradict a straightforward understanding of his description of Lummi's usual and accustomed grounds. *See Upper Skagit II*, 871 F.3d at 848. Nor did the evidence before Judge Boldt belie the conclusion that Lummi fished in the disputed waters. *Compare id.* at 1024 & n.7 (Dr. Lane's description of Suquamish grounds omitting disputed waters), *with, e.g.*, 4-ER-555 (Dr. Lane describing Lummi fishing in Puget Sound "south to the present environs of Seattle"); *see infra* pp. 40-55 (discussing evidence of Lummi fishing and travel). And, unlike the order at issue in *Upper Skagit I*, Judge Boldt had not contemporaneously described another tribe's usual and accustomed grounds using terms suggesting he intended to omit the disputed waters from his description of Lummi's usual and accustomed grounds. *Compare Upper Skagit I*, 590 F.3d at 1026 (relying on *Decision II*'s description of the Swinomish usual and accustomed grounds), *with Decision I*, 384 F. Supp. at 359-83 (making no specific reference to any of the disputed waters in setting forth tribes'

usual and accustomed grounds). In these circumstances, Judge Boldt's plain language must govern.

3. The district court identified no ambiguity

The district court set forth a variety of reasons for nevertheless declaring the relevant language of Judge Boldt's Finding of Fact "ambiguous." 1-ER-12–17. Of course, this Court owes no deference to the district court's conclusion or rationale. *See Tulalip Tribes*, 794 F.3d at 1133. But the errors in the district court's reasoning confirm that the Requesting Parties' claim fails at the first step of the *Muckleshoot* inquiry, as they can provide no basis for disregarding Judge Boldt's plain language.

a. The absence of "geographic anchors" creates no ambiguity

First, the district court stated that Judge Boldt's determination was "ambiguous" because it did not list any "geographic anchors" "within the Disputed Waters." 1-ER-12–13. Invoking the passage in *Upper Skagit I* in which this Court compared *Decision II*'s description of the usual and accustomed grounds of the Suquamish to that of other tribes, the district court declared that it "struggle[d] to see" how Lummi's usual and accustomed grounds could unambiguously include the disputed waters if "Suquamish's U&A was determined to be ambiguous as to whether it included Skagit Bay and Saratoga Passage." 1-ER-16–17; *see also* 1-ER-14 (same).

But just because Judge Boldt did not specifically name subareas of a particular body of water in describing a tribe's usual and accustomed grounds does not mean his description is ambiguous with respect to those waters. Here, Judge Boldt described the relevant "geographic anchors" (1-ER-12) as "the Fraser River" and the "environs of Seattle," and he declared that Lummi's treaty rights extend throughout the "Puget Sound" waters in between. *Decision I*, 384 F. Supp. at 360. To the extent any additional "anchor" is needed, Judge Boldt also referenced Fidalgo Island—directly to the north of the waters at issue here. *Id.* The disputed waters could perhaps most succinctly be described as the "Puget Sound waters between Fidalgo Island and Edmonds." Judge Boldt's description plainly includes those waters. *See id.* This clear description is not rendered ambiguous simply because Judge Boldt—in a decision covering the rights of more than a dozen tribes and already exceeding 100 pages—did not also delineate every conceivable bay and inlet within Puget Sound (e.g., "Holmes Harbor," "Penn Cove," "Saratoga Passage," or any number of other subareas). The greater (i.e., Northern Puget Sound) necessarily includes the lesser (i.e., the portion of Northern Puget Sound east of Whidbey Island).

Upper Skagit I is not to the contrary. This Court did not, as the district court presumed, declare that the description of Suquamish's usual and accustomed grounds was "ambiguous" (1-ER-14, 1-ER-17)—let alone that any Judge Boldt description not specifying subareas of Puget Sound is ambiguous with respect to

those subareas. Rather, as explained above (*supra* pp. 25, 27-28), this Court determined that Judge Boldt's description unambiguously encompassed the disputed waters. *Upper Skagit I*, 590 F.3d at 1023-24; *see Tulalip Tribes*, 794 F.3d at 1133. Only because other evidence—including his statement from the bench apparently excluding the waters from the Suquamish's usual and accustomed grounds—demonstrated that Judge Boldt meant something *different* from what he said did this Court depart from that unambiguous meaning. *Upper Skagit I*, 590 F.3d at 1024-26.[2]

Even the particular passage from *Upper Skagit I* on which the district court relied is inapplicable here. *See* 1-ER-16–17. As noted (*supra* p. 29), in contrasting Judge Boldt's descriptions of the Suquamish and Swinomish usual and accustomed grounds, this Court compared two findings Judge Boldt made in adjacent paragraphs of *Decision II*. *Upper Skagit I*, 590 F.3d at 1025-26; *see Decision II*, 459 F. Supp. at 1049. Thus, this Court had good reason for declaring that the fact "[t]hat Judge Boldt neglected to include Skagit Bay and Saratoga Passage in the Suquamish's U & A supports our conclusion that he did not intend for them to be included":

[2] In a similar vein, the district court here failed to appreciate the distinction between an ambiguous description and evidence showing that Judge Boldt did not intend the meaning of an unambiguous description. Although the district court called Lummi's arguments about *Upper Skagit I* "misleading" (1-ER-15–16), Lummi simply invoked *Upper Skagit I*'s conclusion that the waters at issue are unambiguously located within "Puget Sound," while explaining that the specific justifications this Court gave for departing from that plain meaning for the Suquamish are inapplicable to Lummi. *E.g.*, 4-ER-653 & n.4; 2-ER-258–259, 2-ER-260.

Judge Boldt had made express his intent to include those very waters for the Swinomish in the next paragraph. *Upper Skagit I*, 590 F.3d at 1025.

By contrast, Judge Boldt described Lummi's usual and accustomed grounds in *Decision I*. That order includes no reference to Skagit Bay, Saratoga Passage, or any other subarea in the Puget Sound waters south of Fidalgo Island. And as this Court has held, Judge Boldt's specific mention of waters in *Decision II* does not indicate his intent to exclude those waters from *Decision I*'s description of Lummi's usual and accustomed grounds. *See Lummi III*, 876 F.3d at 1009 n.1 ("Just as we did not infer that Judge Boldt intended to exclude Admiralty Inlet from the Lummi's U&A simply because U&A decisions after *Decision I* explicitly reference Admiralty Inlet, we decline to make such an inference here concerning the waters west of Whidbey Island.").

b. Decisions about other waters create no ambiguity

Next, the district court reasoned that this Court had "previously determined that the waters west of Whidbey Island served as the primary thoroughfare for tribes traveling between the Fraser River and the environs of Seattle." 1-ER-13. "Considered in this light," the district court declared, "Lummi's U&A is ambiguous." 1-ER-14. In reaching that conclusion, the district court erred in at least two respects.

First, while this Court has held that Lummi and the Suquamish likely traveled through the waters west of Whidbey Island, it has never held or suggested that these waters were the "primary" or "preeminen[t]" (1-ER-13) route of travel in Puget Sound (or that Judge Boldt believed them to be). In *Lummi I*, this Court held that, given the geography, "Admiralty Inlet would likely be *a* passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle.'" 235 F.3d at 452 (emphasis added). It did not hold that Admiralty Inlet was *the* passage, or that Lummi could not have also traveled and fished in the waters between Fidalgo Island and the environs of Seattle. *See id.*[3] Likewise, in *Lummi III*, this Court held that the "waters west of Whidbey Island would likely be *a* passage through which the Lummi would have traveled" between the San Juan Islands and Admiralty Inlet; it said nothing about this "nautical path" being the primary or exclusive passage through which Lummi traversed their fishing grounds. 876 F.3d at 1009-10 (quotation marks omitted, emphasis added). Similarly, in *Tulalip Tribes*, this Court merely held that evidence of Suquamish fishing and travel supported the Suquamish's claimed usual and accustomed grounds in the waters west of Whidbey Island. 794 F.3d at 1135. While this Court had, in *Upper Skagit I*, previously concluded that the Suquamish do not have usual and

[3] In fact, the evidence that Lummi traveled in these waters is perhaps even stronger than that supporting their travel through Admiralty Inlet. *Infra* pp. 46-55.

accustomed grounds in certain waters east of Whidbey Island, it did not do so because of a more general travel route to the west. 590 F.3d at 1023-26, *supra* pp. 27-28.

Second, even if the district court's premise were correct, its conclusion would not follow. This Court's purported holding that tribes principally traveled to the west of Whidbey Island would not render "ambiguous" Judge Boldt's description of Lummi's usual and accustomed grounds. The disputed waters to the east of Whidbey Island would remain "marine areas of Northern Puget Sound." *Decision I*, 384 F. Supp. at 360; *see supra* pp. 22-25. Nor would such a holding demonstrate that Judge Boldt "intended something other than the text's apparent meaning." *Upper Skagit II*, 871 F.3d at 848 (quotation marks and citation omitted). Nothing Judge Boldt said, or that was in the record before him, indicates any intent to *limit* Lummi's usual and accustomed fishing grounds to the purported "primary thoroughfare" (1-ER-13) through which tribes generally traveled. *Cf., e.g.*, *Upper Skagit I*, 590 F.3d at 1025 (relying on Judge Boldt's statement from the bench). That tribes might travel to the west of Whidbey Island provides no justification for disregarding Judge Boldt's determination that Lummi have usual and accustomed grounds in the "marine areas of Northern Puget Sound," a description encompassing the waters east of Whidbey Island.

c. This Court has not declared Judge Boldt's description categorically ambiguous

The district court also believed that finding ambiguity here "comport[ed]" with this Court's prior decisions holding that "Lummi's generalized U&A determination is ambiguous." 1-ER-14. Yet this Court has never held that Judge Boldt's description of Lummi's usual and accustomed grounds is ambiguous for any and all waters. Instead, in *Muckleshoot I*, this Court deemed ambiguous the phrase "the present environs of Seattle"—language not directly at issue here. 141 F.3d at 1359. And in *Lummi I* and *Lummi III*, this Court declared "'Northern Puget Sound'" ambiguous with respect to Admiralty Inlet and the waters west of Whidbey Island because the term "does not clearly include or exclude th[ose] disputed waters." *Lummi III*, 876 F.3d at 1008-09; *see Lummi I*, 235 F.3d at 449 (description "ambiguous because it does not delineate the western boundary").

The district court concluded that "the ambiguities regarding Lummi's western and southern boundaries, due to a lack of geographic anchors, similarly exist[] with regard to the Disputed Waters." 1-ER-17. But no one disputes (or could dispute) that the waters contested here are within "Northern Puget Sound." *Supra* pp. 22-25; *e.g.*, 2-ER-72. Thus, unlike in the prior decisions finding ambiguity, Judge Boldt's description *does* "clearly include" these disputed waters. *Lummi III*, 876 F.3d at 1008-09.

Nor did this Court's *Tulalip Tribes* decision adopt a once-ambiguous-always-ambiguous rule for interpreting Judge Boldt's findings, as the district court suggested. *See* 1-ER-14, 1-ER-17. In *Tulalip Tribes*, this Court adhered to its prior determination that in defining the Suquamish's usual and accustomed grounds, Judge Boldt "intended something different than the plain text"—a conclusion that would apply whenever that same "text" was at issue, regardless of the waters involved. 794 F.3d at 1133. By contrast, with Lummi's usual and accustomed grounds, this Court has never held that Judge Boldt meant something other than what he said; it has merely concluded that the application of his description to particular waters was uncertain. *Lummi III*, 876 F.3d at 1008-09; *Lummi I*, 235 F.3d at 449; *Muckleshoot I*, 141 F.3d at 1359. Because no uncertainty exists as to whether the waters at issue here are "marine areas of Northern Puget Sound," *Decision I*, 384 F. Supp. at 360, there is no ambiguity.

d. The text of Judge Boldt's Findings of Fact cannot be ignored

Finally, again citing *Tulalip Tribes*, the district court declared that "the Ninth Circuit has approved of collapsing consideration of ambiguity and consideration of the evidence before Judge Boldt where the existence of fishing or travel within the contested waters appears to be the more significant inquiry." 1-ER-14. Once again, that is not what *Tulalip Tribes* held. Rather, this Court concluded that because it had already determined that Judge Boldt did not mean what he said in defining the

Suquamish's usual and accustomed grounds (which, to repeat, is not true of Lummi's usual and accustomed grounds), it would examine the evidence before him to determine his intent. *Tulalip Tribes*, 794 F.3d at 1133; *supra* pp. 36-37.

To the extent the district court meant that even Judge Boldt's unambiguous language may not control if the moving party points to evidence showing Judge Boldt intended something other than what he said, then the moving party must actually make that showing. *See Upper Skagit I*, 590 F.3d at 1023-26; *Muckleshoot III*, 235 F.3d at 432-38. And the district court pointed to nothing here indicating that Judge Boldt did not mean for Lummi's usual and accustomed grounds to include the "Northern Puget Sound" waters he said they included.

The dangers of the district court's text-free approach are evident. This Court has characterized the *United States v. Washington* proceeding as an "ongoing saga" comparable to "Jarndyce and Jarndyce." *United States v. Washington*, 928 F.3d 783, 784 (9th Cir. 2019) (citation omitted). The continuous litigation over the meaning of Judge Boldt's decades-old orders would only increase were the parties free to relitigate the conclusions Judge Boldt purportedly should have drawn from the evidence before him, no matter how clearly he expressed the actual conclusions he drew from that evidence. Here, Judge Boldt expressly found that Lummi have rights in "Northern Puget Sound." *Decision I*, 384 F. Supp. at 360. The application of his description to the disputed waters is clear, and the Requesting Parties identified

nothing affirmatively demonstrating that Judge Boldt nevertheless intended to exclude them. *Supra* pp. 28-29. The inquiry need go—and should go—no further.

B. The Requesting Parties Cannot Show There Was "No Evidence" Of Lummi Fishing In The Disputed Waters

Regardless, the Requesting Parties also cannot satisfy the second step of the *Muckleshoot* inquiry. Their burden is a heavy one: to prevail, they must demonstrate that there was "*no* evidence before Judge Boldt that [Lummi] fished . . . or traveled through the contested waters." *Tulalip Tribes*, 794 F.3d at 1133 (quotation marks omitted, emphasis added, second alteration in original). Thus, so long as there is "some evidence" of Lummi fishing or travel in the contested waters, the Requesting Parties' challenge fails. *Id.* at 1135.

What constitutes "some evidence" is especially modest because Judge Boldt applied a very low threshold of proof for a tribe to establish its rights to fish in a particular area. As Judge Boldt explained, "[i]n determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." *Decision II*, 459 F. Supp. at 1059. This Court has agreed, explaining that "the stringent standard of proof that operates in ordinary civil proceedings is relaxed" when a tribe seeks to establish its usual and accustomed fishing grounds. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988). This lower standard reflects the scarcity of "[d]ocumentation of Indian fishing during treaty times," as well as the fact that "what

little documentation does exist is extremely fragmentary and just happenstance." *Id.* (quotation marks omitted). That is especially true of fishing grounds in marine waters. *See Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1167 (9th Cir. 2017); *Decision I*, 384 F. Supp. at 332; 4-ER-589. Accordingly, where (as here) requesting parties seek to establish there was "no evidence" before Judge Boldt, they bear the burden of demonstrating that the record lacks even "fragmentary" evidence from which tribal fishing in the area might be inferred.

The Requesting Parties cannot meet that onerous burden. As at the first step, their showing at the second step of the *Muckleshoot* inquiry is even more clearly deficient than in the prior appeals concerning Lummi's usual and accustomed grounds. All the evidence supporting Lummi fishing in Admiralty Inlet (*see Lummi I*, 235 F.3d at 452) and the waters west of Whidbey Island (*see Lummi III*, 876 F.3d at 1009-10) equally supports Lummi fishing in the waters contested here, and additional evidence confirms it. That is not to mention that the language Judge Boldt used to describe Lummi's usual and accustomed grounds more clearly applies to these disputed waters than to those at issue in prior appeals. *Supra* pp. 22-25. The plain text of Judge Boldt's Findings of Fact remains relevant even where it is not dispositive. *E.g.*, *Upper Skagit II*, 871 F.3d at 848-49. And here, Judge Boldt's language renders even more apparent the Requesting Parties' failure to demonstrate that no evidence could have led him to include these waters.

1. Judge Boldt cited evidence of Lummi fishing in these Puget Sound waters

a. Dr. Lane's report and the 19th century affidavit each constitute "some evidence"

Two key documents Judge Boldt cited in describing Lummi's usual and accustomed grounds provide evidence of Lummi fishing throughout the waters of Northern Puget Sound. Either one of these documents alone represents "some" evidence of Lummi fishing in the disputed waters.

First, and most important, is Dr. Lane's report on Lummi. Judge Boldt relied heavily on Dr. Lane's reports, declaring them "exceptionally well researched" and "established by a preponderance of the evidence." *Decision I*, 384 F. Supp. at 350. Dr. Lane's report on Lummi began by describing their "traditional fishing areas" as extending "from what is now the Canadian border south to Anacortes" (which is on Fidalgo Island, directly to the north of the disputed waters). 4-ER-552. But this "home territory" did not represent the limit of Lummi's fishing grounds. Rather, as Dr. Lane's report continued: "In addition, . . . Lummi fishermen were accustomed, at least in historic times, and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south." 4-ER-554. As the report's summary of Dr. Lane's conclusion then clarified, "fisheries in the Straits and bays from the Fraser River south to the present environs of Seattle were utilized." 4-ER-555.

Dr. Lane's description necessarily includes the waters disputed in this case. Because the "home territory" of Lummi reached as far south as Anacortes, the "addition[al]" Lummi fishing in "Puget Sound in the south" must have been in waters to the south of Anacortes. 4-ER-554. Dr. Lane's summary of her conclusions confirmed as much: Lummi "utilized" fisheries extending as far south as "the present environs of Seattle." 4-ER-555. And again, as no one disputes, the waters at issue here are in "Puget Sound." *See supra* pp. 22-25. They also lie south of Anacortes and north of the present environs of Seattle. It follows that when Dr. Lane said Lummi fished in "Puget Sound in the south" (4-ER-554), she described an area that includes the disputed waters. That evidence forecloses the Requesting Parties' claim.

Second, also in the record before Judge Boldt was an affidavit executed in the late 19th century confirming that Lummi fished throughout the waters of Northern Puget Sound. *See* 4-ER-648–649. The affiant had lived on or near Lummi Reservation for decades, and he traded with the tribe daily. 4-ER-648. He attested that Lummi "fished *at all points* in the lower Sound and wherever the run of fish was greatest and the salmon were most easily taken including Point Roberts." 4-ER-649

(emphasis added).[4] He also stated that Lummi had been "accustomed to take long journeys to the various fishing grounds." 4-ER-649.

This evidence establishes that Lummi fished in a continuous area ("at all points") through Puget Sound. Because Judge Boldt specifically cited this affidavit in support of Finding of Fact #46 (*Decision I*, 384 F. Supp. at 360-61), it constitutes compelling evidence that when he described Lummi's usual and accustomed grounds to include "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" (*id.*), he intended to include "all points" within the area described. 4-ER-649. The waters disputed here are unquestionably within the "Sound," and, as the affiant recounted, Lummi fished in all such waters. 4-ER-649. This affidavit thus also provides "some" evidence that independently defeats the Requesting Parties' challenge. *Tulalip Tribes*, 794 F.3d at 1135.

b. The district court erroneously disregarded this evidence

The district court offered no viable reason for disregarding this evidence. Indeed, the court simply overlooked the 19th-century affidavit describing the breadth of Lummi fishing. It did so even though Lummi specifically highlighted that affidavit in summary judgment briefing (*e.g.*, 6-ER-660; 2-ER-263), and even

[4] Given the reference to Point Roberts—which is on the Canadian border—the affiant apparently used "lower" in the watershed (rather than directional) sense to refer to Northern Puget Sound. *Cf. Decision I*, 384 F. Supp. at 377-78 (referring to southern areas of Puget Sound as "upper" Puget Sound).

though Judge Boldt himself cited the affidavit in Finding of Fact #46. *Decision I*, 384 F. Supp. at 360-61; *see Muckleshoot III*, 235 F.3d at 433 (when Judge Boldt has cited a document, "[t]here is no question, then, that the court relied upon this information in reaching its decision").

While the district court did address Dr. Lane's report, the court could not explain why the report provided "no evidence" of Lummi fishing in these waters. Instead, the court appeared to conclude that Dr. Lane's descriptions of specific Lummi reefnetting sites and home territory somehow undermined the evidence of Lummi fishing elsewhere. *See* 1-ER-18-21. The court declared that the fact that none of the reefnetting sites Dr. Lane identified were in the disputed waters was "significant," and it emphasized that Dr. Lane "did not identify any portion of the Disputed Waters as traditional fishing grounds." 1-ER-20.

But merely because Dr. Lane's report may have provided more and clearer evidence of Lummi fishing in a particular area does not mean there was no evidence of Lummi fishing in other areas. As Judge Boldt determined, a tribe's "usual and accustomed grounds" include "*every* fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe." *Decision I*, 384 F. Supp. at 332 (emphasis added). While the reefnetting technique that Dr. Lane described in depth was a particularly innovative means by which Lummi harvested fish, it was far from the only means.

4-ER-552. And whatever Dr. Lane said about Lummi's "traditional fishing areas," she also said Lummi had extensive fishing grounds "[i]n addition" to those "traditional fishing areas." 4-ER-552–554.

Judge Boldt described the traditional fishing areas as Lummi home territory in Finding of Fact #45. *See Decision I*, 384 F. Supp. at 360. But it was in part Dr. Lane's evidence of *additional* territory that led Judge Boldt, in Finding of Fact #46, to describe Lummi's usual and accustomed grounds as also extending well to the south of this home territory. *See id.* at 360-61. For that reason, this Court has repeatedly recognized that Lummi's usual and accustomed grounds extend beyond the "traditional fishing areas" Dr. Lane described. *See Lummi III*, 876 F.3d at 1011 (waters west of Whidbey Island); *Lummi I*, 235 F.3d at 452 (Admiralty Inlet); *Muckleshoot II*, 234 F.3d at 1100-01 (south to Edmonds).

The district court's error is perhaps most apparent in its attempt to reconcile its ruling with Dr. Lane's conclusion that Lummi fished "in the Straits and bays from the Fraser River south to the present environs of Seattle." 4-ER-555; *see* 1-ER-21. The district court concluded that, given Dr. Lane's description of Lummi's "'traditional fishing areas,'" her "references to 'bays' were primarily to Bellingham Bay, Samish Bay, and Padilla Bay"—all of which are to the north of Anacortes and Fidalgo Island. 1-ER-21. Yet that is not what Dr. Lane said. Had Dr. Lane intended to limit her description of Lummi's fishing in this manner, she would have described

Lummi as having fished "in the Straits and bays from the Fraser River south to *Anacortes*," much like she had in describing Lummi's "traditional fishing areas." *See* 4-ER-552. Instead, Dr. Lane described Lummi fishing extending south of Anacortes to the "present environs of Seattle," further clarifying her own prior statement that Lummi also fished in the "Puget Sound" waters to the "*south*" of their "home territory." 4-ER-554–555 (emphasis added).

That was how Judge Boldt understood her report. Judge Boldt determined Lummi fished in the waters of "Puget Sound" (a term taken from the first part of Dr. Lane's report) "south to the present environs of Seattle" (a phrase taken from the report's conclusion). *Decision I*, 384 F. Supp. at 360-61; *see also Lummi III*, 876 F.3d at 1010 (reading Dr. Lane's report in same manner). The district court could not undo Judge Boldt's determination with its own reinterpretation of Dr. Lane's report.

2. Judge Boldt considered evidence of travel in these Puget Sound waters

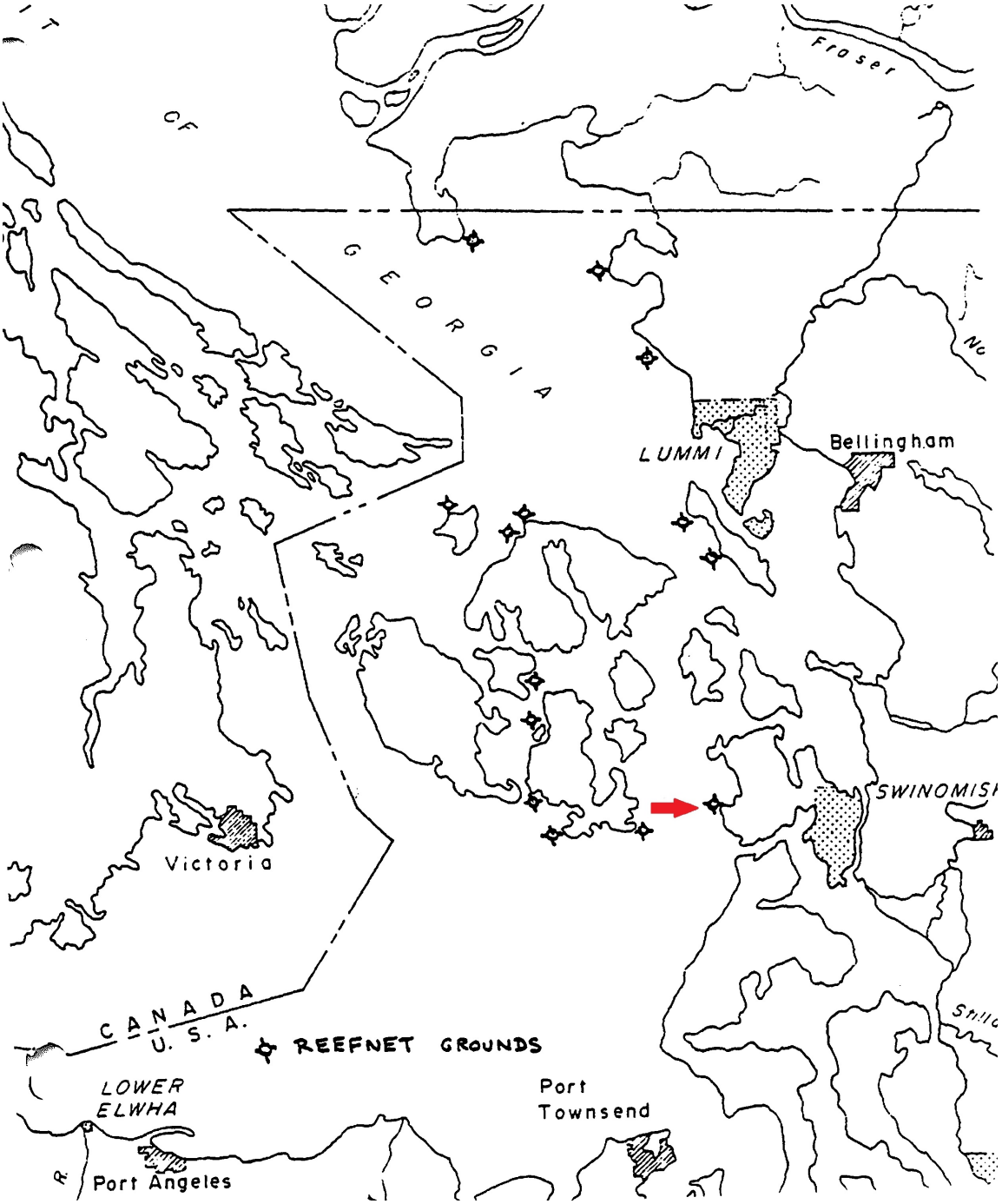
Even if this evidence of Lummi fishing were not already sufficient—and it is—evidence of Lummi travel in the disputed waters would independently defeat the Requesting Parties' challenge. *See Lummi III*, 876 F.3d at 1010 & n.2 ("general evidence of travel" may constitute "some evidence" that precludes a moving party's challenge). While "occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the

transiting Indians" (*Decision I*, 384 F. Supp. at 353), "*frequent* travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters." *Lummi Indian Tribe*, 841 F.2d at 320. Here, evidence of frequent Lummi travel confirms Judge Boldt's intent to include the disputed waters in his description of Lummi's usual and accustomed grounds.

a. The disputed waters would be "a passage" utilized by Lummi

The relevant circumstances here are almost identical to those in *Lummi I* and *Lummi III*. As described above (*supra* pp. 14-15), *Lummi I* held that Admiralty Inlet is within Lummi's usual and accustomed grounds because "[i]f one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground . . .) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds . . .), it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle.'" 235 F.3d at 452 (citation omitted). *Lummi III* reached the same conclusion for the waters west of Whidbey Island, explaining that these waters would likewise be "a passage" for Lummi because they "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." 876 F.3d at 1009-10 (quotation marks and citation omitted).

The same reasoning applies here. The disputed waters lie directly between Fidalgo Island and the present environs of Seattle, both of which Judge Boldt described as within Lummi's usual and accustomed fishing grounds. *Decision I*, 384 F. Supp. at 360. And Dr. Lane's report confirms Lummi's historic presence in the Fidalgo Island waters adjacent to Deception Pass, which separates Fidalgo and Whidbey Islands and serves as a principal entry point to the disputed waters. *See* 4-ER-552, 4-ER-555. Indeed, illustrating the extent to which Lummi's "home territory" bordered the disputed waters, Dr. Lane included a map demonstrating that Lummi had an established reefnetting site just off the west coast of Fidalgo Island:



4-ER-553 (red arrow added to indicate Langley Point site off Fidalgo Island). Dr. Lane also described portions of Padilla Bay as Samish "territory" and recounted Lummi fishing in the freshwaters emptying into that bay—thus placing Lummi in the waters adjacent to Swinomish Slough, which separates Fidalgo Island from the

mainland and provides another entry to the waters at issue here. 4-ER-527–528, 4-ER-554–555.

Accordingly, to paraphrase this Court's decision in *Lummi III*, the disputed waters "are situated just north of" the present environs of Seattle, "which is included in the Lummi's U&A, and just south of the waters surrounding" Fidalgo Island, "which are also included in the Lummi's U&A." *See* 876 F.3d at 1010. They therefore "would likely be a passage through which the Lummi would have traveled from" Fidalgo Island "in the north to the present environs of Seattle." *Id.* at 1009 (quotation marks omitted) (using the same logic with different anchors to conclude the waters west of Whidbey Island are within Lummi's U&A).

The additional evidence cited in *Lummi III* also applies with full force to the waters disputed here. *See id.* at 1010. That evidence confirms that Lummi travel in these waters was "frequent," not just occasional "incidental trolling." *Lummi Indian Tribe*, 841 F.2d at 320 (emphasis omitted); *see Lummi III*, 876 F.3d at 1010. As this Court emphasized, Dr. Lane explained that "[t]he deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling [sic] through such waters." *Id.* at 1010 (quotation marks and citation omitted, second alteration in original); *see also* 4-ER-554 ("The Straits and Sound were traditional highways used in common by all Indians of the region and most saltwater fisheries traditionally were free access

areas."). The disputed waters here are "saltwater areas" in "the Sound," and thus would have also "served as public thoroughfares." *Lummi III*, 876 F.3d at 1010 (quotation marks omitted); *see supra* pp. 22-25. Similarly, this Court cited Dr. Lane's statement that "Lummi fishermen were *accustomed* . . . to visit fisheries as distant as" the Fraser River and the environs of Seattle, and that they "utilized" fisheries in between. *Lummi III*, 876 F.3d at 1010; *see* 4-ER-554–555. The waters disputed here are likewise between the Fraser River and the environs of Seattle, and Dr. Lane's statement that Lummi were "accustomed" to "visit" and "utilize[]" such fisheries is equally applicable. The same conclusion follows: the disputed waters are within Lummi's usual and accustomed grounds. *See Lummi III*, 876 F.3d at 1011.

Other evidence specific to these disputed waters confirms Lummi's travel (and fishing) throughout them. As Dr. Lane noted, the mouths of rivers were significant fishing locations both for tribes living upriver and for those that fished in marine waters (4-ER-574–575), and numerous rivers empty into the Puget Sound waters at issue here. Dr. Lane also described Lummi as having traded fish and clams to obtain "woven root hats from the West Coast." 4-ER-537. She similarly recounted that Lummi had "imported various fibers and grasses from upriver Skagit." 4-ER-569. Because the Skagit River empties into waters disputed here, this evidence indicates that Lummi's members journeyed to "West Coast"—that is,

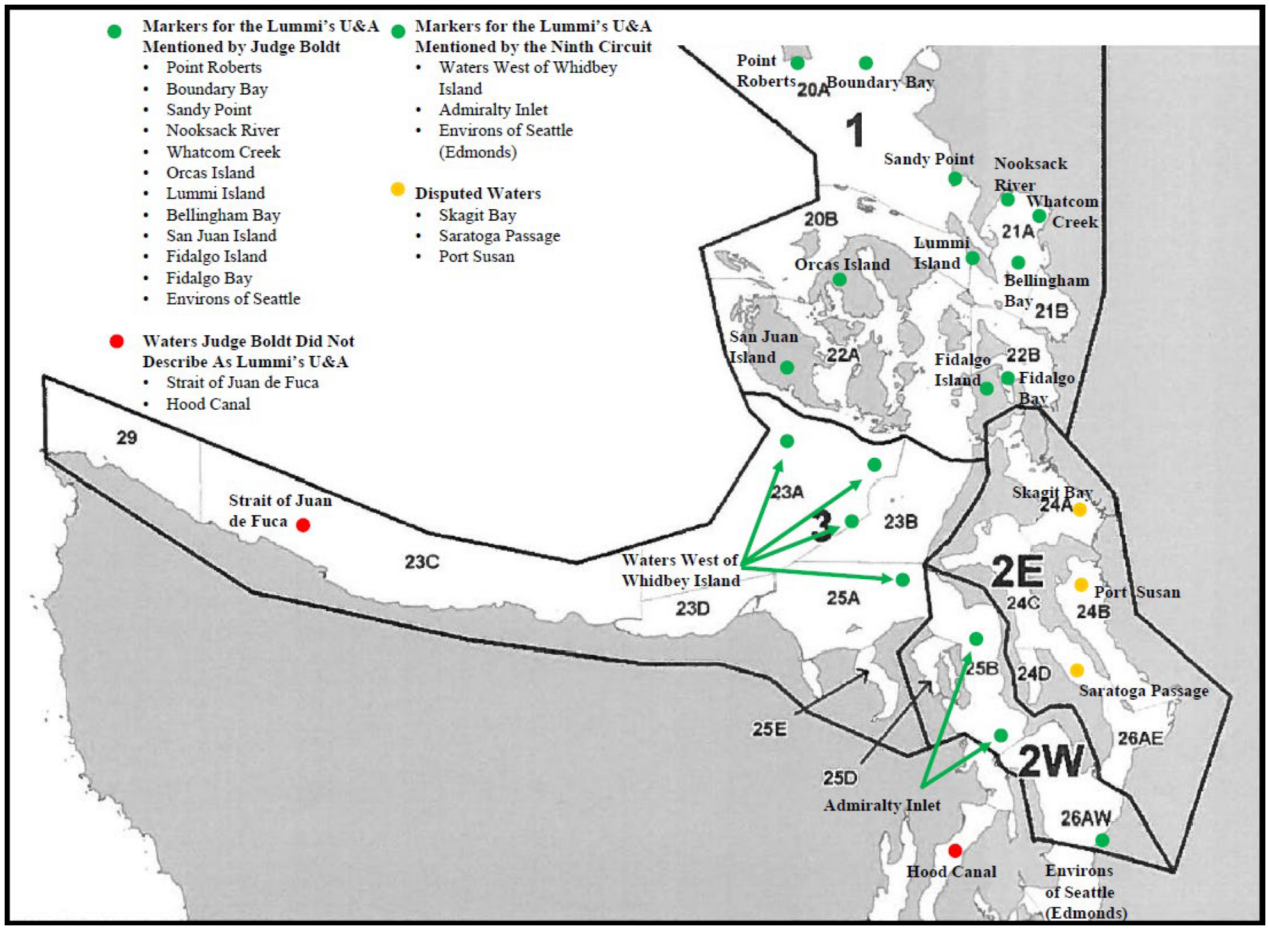
the mainland shore on the eastern side of the disputed waters—to trade for these goods.

In addition, although he did not cite it in Finding of Fact #46, Judge Boldt heard the testimony of Forrest ("Dutch") Kinley, a Lummi tribal elder. Kinley testified that in fishing what Lummi considered their "usual and accustomed grounds," he had "fished in Whidby [sic] Island." 2-ER-83. While Judge Boldt did not give such statements the same weight he gave to Dr. Lane's report (*see Lummi I*, 235 F.3d at 451), he did "consider[] the credible testimony of tribal elders who speak from personal experience or data acquired from other sources, bearing in mind the limitations of such testimony regarding 1855 fishing practices." *United States v. Washington*, 730 F.2d 1314, 1317 (9th Cir. 1984) (quotation marks omitted).

b. The district court erroneously disregarded this evidence

Once again, the district court's rationales for disregarding this evidence do not withstand scrutiny. The district court concluded that whereas "the waters west of Whidbey Island were the most direct route" between "two geographic anchors" in Lummi's usual and accustomed grounds, the waters disputed here are not. 1-ER-22. It reasoned that because "Lummi fishing off of Point Langley, not Fidalgo Island, provides the appropriate geographic anchor," the "logical path of travel *to Admiralty Inlet* and the present environs of Seattle" is again "through the waters west of Whidbey Island." 1-ER-22–23 (emphasis added).

The district court misunderstood the relevant inquiry. The district court may have been correct that one "geographic anchor" of Lummi's travel path is off Langley Point—which, again, is on the west coast of Fidalgo Island, immediately to the north of one entrance to these disputed waters. 1-ER-22. The court may also have been correct that the direct "path" from those Fidalgo Island waters to Admiralty Inlet would lie west of Whidbey Island. 1-ER-22–23 But Admiralty Inlet is not a relevant anchor; the environs of Seattle are. This Court has held that Admiralty Inlet is within Lummi's usual and accustomed grounds because it is "a passage" through which it would have been "natural" for Lummi "to proceed" when traveling from their home territory in the north to the "'environs of Seattle.'" *Lummi I*, 235 F.3d at 452. The question here is not, as the district court apparently believed, whether Lummi would have for some reason circumnavigated the eastern shores of Whidbey Island to reach Admiralty Inlet. Rather, the question is whether the disputed waters would, like Admiralty Inlet, be "a passage" through which members of Lummi likely would have traveled between their home territory in the north (including the waters around Fidalgo Island) and the "environs of Seattle" in the south. As basic geography illustrates, the disputed waters are equally likely to have served as a "passage" to the environs of Seattle:



4-ER-656. For that reason, they are included within Judge Boldt's description of Lummi's usual and accustomed grounds. *See Lummi III*, 876 F.3d at 1009-10; *Lummi I*, 235 F.3d at 452.

To the extent the district court offered any further reasoning, its conclusion was premised on this Court's purported holdings "that Judge Boldt regarded the waters west of Whidbey Island as the main north-south thoroughfare between the environs of Seattle and the Fraser River." 1-ER-23. To repeat, this Court has never so held. *Supra* pp. 33-34. The district court cited no other basis for presuming that Judge Boldt believed Lummi traveled to the west of Whidbey Island but not to the

east. Indeed, if anything, the waters to the east would appear to be a particularly favorable travel route given the shelter from sea and weather provided by Whidbey Island, along with the opportunity to fish near the mouths of the rivers emptying into Puget Sound along the west coast of the mainland.[5]

The district court also erred in dismissing as unduly "speculative" the evidence provided by Dr. Lane's account of Lummi trade and the Lummi elder's testimony. 1-ER-24–25. Perhaps, as the district court noted, the fact that Lummi acquired goods "from the West Coast" (4-ER-537) and "upriver Skagit" (4-ER-569) does not mean these exchanges "necessarily occurred" on the west coast of the mainland. 1-ER-24. But given the low standard of proof applicable in these cases—in which "'extremely fragmentary'" and "'happenstance'" evidence suffices (*Lummi*

[5] The district court's suggestion that Lummi's arguments in the *Lummi III* appeal were somehow inconsistent with Lummi's arguments here betrays a similar confusion. *See* 1-ER-23–24 n.12. As the district court noted, Lummi argued in *Lummi III* that if their usual and accustomed grounds did not include the waters west of Whidbey Island, they would not have "continuous" fishing grounds from their home territory around the San Juan Islands, through Admiralty Inlet, and to the environs of Seattle, as there would be a "gaping hole in the middle of the Lummi territory." 5-ER-894; *see also, e.g.*, 5-ER-940 (same). But nothing about that argument is inconsistent with the contention that the evidence also demonstrates Lummi travel to the east of Whidbey Island. Lummi have never asserted, as the district court suggested (1-ER-23–24 n.12), that they would have no other path to the "environs of Seattle." To the contrary, as the *Lummi III* Court was aware, Lummi have also asserted their rights to fish in the waters east of Whidbey Island. *See* Oral Arg. Recording at 17:15-32, *Lummi III*, 876 F.3d 1004 (9th Cir. Aug. 30, 2017) (No. 15-35661) (opposing counsel noting that Lummi claim the waters east of Whidbey Island as their U&A).

Indian Tribe, 841 F.2d at 318)—evidence supporting even an inference of Lummi fishing or travel in the disputed waters is "some evidence" defeating the Requesting Parties' challenge. *See*, *e.g.*, *Tulalip Tribes*, 794 F.3d at 1135 (relying on Dr. Lane's statement that Squamish territory included "'possibly . . . the west side of Whidbey Island'"). And perhaps, as the district court concluded (1-ER-25), Kinley's testimony that he "fished in Whidby [sic] Island" (2-ER-83) would not by itself establish Lummi fishing in these waters. But at the very least, Kinley's testimony buttresses the other evidence demonstrating that Lummi would have traveled to, and fished in, the waters around Whidbey Island, including the disputed waters to the east.

c. The Requesting Parties' evidence does not trump evidence of Lummi travel

Although the district court did not address the issue, the Requesting Parties contended that evidence demonstrated Lummi would not have traveled through the disputed waters. *E.g.*, 2-ER-250. They pointed to a passage in Dr. Lane's report on the Swinomish, which recounted that "[c]onstricted marine waters like Deception Pass[and] Swinomish Slough" were "likely controlled by the resident groups in whose territory those waters were located." 2-ER-149. This evidence was presumably the basis for *Upper Skagit I*'s observation that "Deception Pass and Swinomish Slough are narrow and restricted; both areas were controlled by the Swinomish at treaty times." 590 F.3d at 1024 n.6. The Requesting Parties argued

that because the Swinomish had controlled the northern entry points to the disputed waters, Lummi would not have traveled through them to reach the environs of Seattle. *E.g.*, 2-ER-250. But for at least three reasons, this report cannot help the Requesting Parties meet their "no evidence" burden.

First, and most important, this evidence was not before Judge Boldt at the time he defined Lummi's usual and accustomed grounds to include "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360. Rather, the cited report was admitted only in the subsequent *Decision II* proceedings in which the Swinomish and the Suquamish (among other tribes) established their usual and accustomed grounds. 2-ER-119; *see Decision II*, 459 F. Supp. at 1049. As this Court has made clear, such later-filed evidence is irrelevant to determining Judge Boldt's intent at the time he issued *Decision I*. *Muckleshoot I*, 141 F.3d at 1359-60; *see* 1-ER-18, n.11 (refusing to consider such *Decision II* evidence). Simply put, Judge Boldt could not have concluded that Lummi would not have traveled through these waters based on evidence that was not before him.

Second, the evidence that *was* before Judge Boldt in *Decision I* indicated that Lummi would have had little trouble reaching the Puget Sound waters disputed here. In one of her reports admitted as part of the *Decision I* proceedings, Dr. Lane observed that even when a particular tribe controlled a fishing area—which was

generally true only of freshwater, not saltwater, fisheries—members of other tribes "might request permission to fish and such permission was normally extended provided that amicable relations existed between the local people and the visitors." 4-ER-584. Dr. Lane's report on Lummi demonstrated that the Samish (one of Lummi's predecessor tribes) had such "amicable relations" with the Swinomish: as she noted, some members of the tribe moved to the Swinomish reservation after the 1855 treaty was signed. 4-ER-527–528. Dr. Lane also described Lummi's freshwater fisheries as including "the river drainage systems emptying into the bays" along the mainland coast all the way to "Fidalgo Bay"—freshwater fisheries in the heart of Swinomish territory. 4-ER-553, 4-ER-555. At the time he issued *Decision I*, Judge Boldt thus would have had no reason to doubt that members of Lummi could pass through the disputed waters given these amicable relations.

Third, even if the evidence presented in *Decision II* were relevant to interpreting *Decision I*, it would support that same conclusion. Indeed, the same exhibit in which Dr. Lane indicated that the Swinomish controlled Deception Pass expressly stated that the Samish "shared the area around Deception Pass . . . with Swinomish camas diggers." 2-ER-181. The report also noted that in 1857, Lummi, the Nooksack, and the Samish had a temporary encampment at Penn Cove, which is to the east of Whidbey Island along the waters disputed here. 2-ER-139. Thus, far

from creating any uncertainty as to whether Lummi would have traveled through these disputed waters, the Requesting Parties' evidence confirms they did.

II. JUDGE BOLDT DID NOT FIND LUMMI HAVE NO RIGHTS TO THESE WATERS

For the reasons discussed above, Judge Boldt's description of Lummi's usual and accustomed fishing grounds includes the waters disputed here. Were this Court to hold otherwise, however, that would not mean that Judge Boldt decided these waters were definitely *outside* Lummi's usual and accustomed grounds. Instead, it would simply mean that these disputed waters were not "specifically determined by Final Decision #1," and Lummi could seek to establish their treaty rights to fish there. *Decision I*, 384 F. Supp. at 419.

Judge Boldt expressly recognized that he was not deciding the outer bounds of any tribe's fishing territory. Rather, "[f]or each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and *some, but by no means all*, of their principal usual and accustomed fishing places." *Id.* at 333 (emphasis added). With respect to Lummi in particular, Judge Boldt found that their usual and accustomed grounds "included" the described areas—not that they were the only Lummi fishing grounds. *Id.* at 360. Because it would "be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations" (*id.* at 353), Judge Boldt left for future proceedings the task of identifying additional waters in tribes' usual and accustomed grounds. *See id.*

at 419. Thus, if Judge Boldt's description of Lummi's usual and accustomed grounds in *Decision I* did not include the waters disputed here, Lummi may invoke the district court's "continuing jurisdiction" to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1." *Id.*

In its order, the district court appeared to recognize that its decision was limited to determining whether Judge Boldt's description "include[s]" these disputed waters. *E.g.*, 1-ER-23 ("Judge Boldt's intentional inclusion of the waters west of Whidbey Island in Lummi's U&A, the primary north-south public thoroughfare and Lummi's accustomed route of travel, makes it less likely that he also intended to include the Disputed Waters as an alternative, albeit unlikely, route."). But at times, the district court used phrasing that might be read to suggest its determination that not only did Judge Boldt fail to "include" these waters in his description of Lummi's usual and accustomed grounds, but also that Judge Boldt found Lummi have *no* rights to these waters. *E.g.*, 1-ER-8 ("Judge Boldt intended to exclude the Disputed Waters from his determination of Lummi's usual and accustomed fishing grounds and stations."); 1-ER-26 ("Judge Boldt intentionally included the waters west of Whidbey Island in Lummi U&A as the usual and accustomed thoroughfare utilized by Lummi and intentionally omitted the Disputed Waters."). This Court has held that a somewhat similar district court statement, if not challenged on appeal, may

subsequently prevent a tribe from contending it has rights in waters not described in *Decision I*. *See Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1184 (9th Cir. 2019).

Thus, out of an abundance of caution, Lummi ask this Court to make clear that to the extent the district court concluded that Judge Boldt found Lummi have no treaty rights in these disputed waters, that conclusion was erroneous. As Judge Boldt stated, he merely set forth "some, but by no means all, of their principal usual and accustomed fishing places." *Decision I*, 384 F. Supp. at 333. Any failure to mention a particular area in his description of Lummi's usual and accustomed grounds simply reflects Judge Boldt's lack of a determination regarding that area—not a specific, negative determination. To hold otherwise would wrongly deprive Lummi of their ability to protect the treaty rights essential to their heritage, culture, and economic vitality.

CONCLUSION

The judgment should be reversed with a direction to enter judgment that the disputed waters are within Lummi's usual and accustomed fishing grounds and stations already adjudicated by Judge Boldt. In the alternative, and at the very least, the judgment should be reversed to the extent it holds that Judge Boldt affirmatively determined that Lummi have no treaty rights to fish in these disputed waters.

Respectfully submitted,

s/ Deanne E. Maynard

JAMES R. SIGEL
JAMES M. SCHURZ
MARK DAVID MCPHERSON
CAMILLE FRAMROZE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

DEANNE E. MAYNARD
MORRISON & FOERSTER LLP
2100 L Street, NW
Suite 900
Washington, D.C. 20037
Telephone: (202) 887-8740
Facsimile: (202) 887-0763
DMaynard@mofo.com

December 22, 2021

Counsel for Respondent-Appellant Lummi Nation

STATEMENT OF RELATED CASES

Appellant Lummi Nation is aware of the following related cases pending in this Court within the meaning of Circuit Rule 28-2.6:

*Swinomish Indian Tribal Community v. Lummi Natio*n, No. 21-35874. The No. 21-35874 appeal arises out of the same underlying district court subproceeding (No. 2:19-sp-01-RSM) as this appeal, No. 21-35812. A motion to consolidate the two appeals is currently pending.

Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe, No. 21-35985. This appeal arises out of the same underlying district court proceeding, but involves an unrelated dispute and a separate district court subproceeding (No. 2:20-sp-01-RSM).

December 22, 2021

s/ Deanne E. Maynard
Deanne E. Maynard

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FOR THE NINTH CIRCUIT

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