Nos. 21-35812, 21-35874

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY, et al.,

Petitioners – Appellees,

v.

LUMMI NATION,

Respondent-Appellant,

JAMESTOWN S'KLALLAM AND PORT GAMBLE S'KLALLAM TRIBES,

Appellants.

Appeal from the United States District Court for Western Washington, Seattle, No. 19-1-sp-00001-RSM, Hon. Ricardo S. Martinez, C.J.

ANSWERING BRIEF OF PETITIONER-APPELLEE SWINOMISH INDIAN TRIBAL COMMUNITY

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CORPORATE DISCLOSURE STATEMENT

Petitioner-Appellee Swinomish Indian Tribal Community is a federally recognized Indian tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal involves another attempt by Appellant Lummi Nation (Lummi) to radically expand the marine areas within which it may treaty fish. The Treaty of Point Elliott guarantees Lummi "[t]he right of taking fish," but only at its "usual and accustomed grounds and stations," or U&A for short. 12 Stat. 927, Art. V.

A half-century ago, Dr. Barbara Lane carefully investigated and District Court Judge Boldt specifically determined the geographic scope of Lummi's U&A. In part, his findings describe Lummi's U&A as "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay." *U.S. v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974) (*Boldt Decree*) (Finding of Fact (FF) 46).

History has revealed this language to be ambiguous to an unfortunate degree. This Court repeatedly has had to determine whether Lummi's attempts to fish in areas not specifically named by Judge Boldt violated the *Boldt Decree*. With the exception of Admiralty Inlet and other waters west of Whidbey Island where evidence in the record established that Lummi traveled and customarily fished at treaty time, this Court has rejected Lummi's attempts to expand its treaty fisheries. *See, e.g., U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 450-52 (9th Cir. 2000) (*Lummi I*); *U.S. v. Lummi Nation*, 876 F.3d 1004, 1009-1010 (9th Cir. 2017) (*Lummi III*).

Apparently emboldened by its erroneous interpretation of this Court's holding in *Lummi III*, Lummi immediately tried to expand its fisheries into a broad swath of marine waters Judge Boldt did not include within its U&A. 6-ER-1010-1012. Thus, this appeal requires the Court to consider the geographic scope of Lummi's U&A once more, this time with respect to Lummi's claimed right to fish in the secluded waters to the *east* of Whidbey Island (Disputed Waters).[1] The question before the Court is whether District Court Judge Martinez reasonably interpreted Lummi's U&A finding to exclude the Disputed Waters under the familiar two-step test developed in the *Muckleshoot* line of cases. *See* Sec. III. The record in this case shows that he did.

While the language Judge Boldt used is ambiguous, he carefully reviewed the evidence presented at trial and determined that Lummi's homeland and customary fisheries were located in and around Bellingham Bay, the Nooksack River, the San Juan Islands, and other areas far to the north or west of the Disputed Waters. While there is evidence in the record that Lummi traveled to fisheries located both north and south of its homeland, this Court has ruled repeatedly – at Lummi's urging – that those fisheries and Lummi's travel path to and from them were north, west, or

[1] These waters are administratively defined as Washington State Shellfish Region 2 East and include five named bodies of water: Skagit Bay (including Deception Pass), Saratoga Passage, Port Susan, Holmes Harbor, and Possession Sound.

south of Whidbey, not in the secluded waters *east* of Whidbey. *See Lummi III*, 876 F.3d at 1009-1010.

Contrary to Lummi's arguments, there is no evidence in the record before Judge Boldt to support a finding that Lummi customarily fished the Disputed Waters at treaty time. In this, this case is virtually identical to those presented in *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010) (*Upper Skagit I*), and *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844 (9th Cir. 2017) (*Upper Skagit II*), where this Court found that Suquamish's U&A finding was ambiguous and did not include waters east of Whidbey because there was no evidence that Suquamish fished there at treaty time. The same conclusion is appropriate here. *See* Sec. IV.E.

Fundamentally, what Lummi seeks is a ruling from this Court that radically changes the longstanding law of the case regarding the standard of proof required to establish U&A. Rather than requiring a tribe to come forward with evidence of customary fishing, a tribe could establish U&A by identifying a hypothetical travel route between two points on a map, even if there is no evidence that the tribe traveled and customarily fished there.

This interpretation would contradict the plain language of the Treaty, which limits each tribe's fishing to its "usual and accustomed grounds and stations," not its hypothetical grounds or stations or hypothetical travel route. 10 Stat. 1132, Art. V.

It is also inconsistent with a half-century of court decisions interpreting the phrase. Importantly, changing the standard of proof now would open the door to a whole new round of U&A litigation over where each treaty tribe *might have* traveled or fished at treaty time.

Judge Martinez reasonably – and correctly – interpreted Lummi's U&A finding to exclude the Disputed Waters and his judgment should be affirmed.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and Paragraph 25(a)(1) of the Permanent Injunction, *U.S. v. Washington*, 18 F.Supp.3d 1172, 1213 (W.D. Wash. 1991). Lummi timely appealed on September 23, 2021, its appeal became effective on October 5, 2021 when Judge Martinez denied a motion for reconsideration filed by the Jamestown S'Klallam and Port Gamble S'Klallam (S'Klallam), and this Court has jurisdiction under 28 U.S.C. § 1291. The S'Klallam timely appealed on October 15, 2021, but this Court lacks jurisdiction over their appeal because the S'Klallam lack standing.

ISSUE PRESENTED

Did Judge Martinez reasonably interpret Findings of Fact 45 and 46 in the *Boldt Decree*, 384 F.Supp. at 360, to exclude the Disputed Waters from Lummi's U&A?

PERTINENT LAWS

Copies of Art. III of the United States Constitution and the Treaty with the Duwamish, Suquamish, Etc., 12 Stat. 927 (ratified 1859) (Treaty of Point Elliott) are included in the addendum.

STATEMENT OF THE CASE

I. Lummi's U&A Finding Does Not Include the Disputed Waters.

U.S. v. Washington was filed by the United States to interpret and protect Indian fishing rights. Judge Boldt presided over the case. After a lengthy trial, he issued a decree that he intended would "determine every issue of fact and law presented, and, at long last, thereby finally settle … as many as possible of the divisive problems of treaty right fishing…." *Boldt Decree*, 384 F. Supp. at 330.[2] This included determining each tribe's U&A. *See id*. at 359-382. He also entered a permanent injunction with continuing jurisdiction provisions. *Id*. at 419.

Following trial, Judge Boldt specifically determined Lummi's U&A:

> [FF 45] Prior to the Treaty of Point Elliott … [t]he Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point….

[2] Judge Boldt would surely shudder to know that a half-century later, this Court and various parties to the case lament the frequency of continued litigation and mourn the degree to which this case now resembles *Jarndyce v. Jarndyce*, the mythical estate case at the heart of Dickens' novel *Bleak House*, which languished for generations while the estate was slowly consumed by the parties' inability to stop fighting over it. *See U.S. v. Washington,* 573 F.3d 701, 709 n.50 (9th Cir. 2009).

> [FF 46] In addition to the reef net locations listed above, 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, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay.

Id. at 360. His finding does not include the Disputed Waters.

II. The Present Dispute.

Judge Martinez found that in the half-century since the *Boldt Decree*, Lummi never fished in the Disputed Waters and "has largely not pursued any such rights," confirming Lummi's long-term understanding that its U&A did not include the Disputed Waters. 6-ER-1013. However, following this Court's 2017 ruling in *Lummi III*, 876 F.3d 1004, Lummi made concrete threats and took overt action during the 2018 and 2019 fishing seasons to expand its fisheries into the Disputed Waters. 6-ER-1008-1012. Following two rounds of emergency motions practice, the Swinomish Indian Tribal Community (Swinomish), the Tulalip Tribes, and the Upper Skagit Indian Tribe (collectively, the Region 2E Tribes) were granted leave to file a new subproceeding to seek a declaration that Lummi's U&A does not include the Disputed Waters. 6-ER-1176.

On cross-motions for summary judgment, Judge Martinez ruled that "Judge Boldt intended to exclude the Disputed Waters from his determination of Lummi's [U&A]." 1-ER-8. He found that the reference to "the marine areas of Northern Puget

Sound" in FF 46 is ambiguous. 1-ER-12-17. Among other things, he noted that this Court has emphasized the importance of Judge Boldt's geographic anchors and that Lummi's U&A finding does not include any geographic anchors in the Disputed Waters. 1-ER-12-13. He noted that this Court has determined that the marine highway for tribes traveling between northern and southern fisheries was *west* of Whidbey, not *east*. 1-ER-13. And he noted that this Court has held repeatedly that Lummi's U&A finding is ambiguous. 1-ER-14.

He then interpreted FF 46 in light of the evidence and determined that "no evidence of Lummi travel or fishing within the Disputed Waters was before Judge Boldt." 1-ER-26. He rejected Lummi's argument that it might have traveled between the Fraser River and the environs of Seattle east of Whidbey because this Court has determined that Lummi's north-south travel route was west of Whidbey and he was not convinced that the *Lummi* cases "establish the 'straight-line test' that Lummi advocates." 1-ER-22-23. Moreover, the only evidence in the record that placed Lummi anywhere near the Disputed Waters was a single reef net site off Langley Point on Fidalgo Island, to the northwest of the Disputed Waters. *See* 1-ER-20. From there, the logical travel path to the "present environs of Seattle" would still be west of Whidbey. 1-ER-22-23. Because the evidence Lummi pointed to was speculative, the "record before Judge Boldt does not evidence Lummi travel within the Disputed Waters, let alone fishing." 1-ER-20.

This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW.

Lummi correctly notes that this Court typically reviews the entry of summary judgment *de novo.* Lummi Brief (Br.) at 21. However, this case involves the interpretation of a provision of a judicial decree. Accordingly, Judge Martinez's interpretation is due deference because of his extensive oversight of this case and the decree over almost two decades. *See Muckleshoot Indian Tribe v. Tulalip Tribes,* 944 F.3d 1179, 1183 (9th Cir. 2019) (*Muckleshoot IV*); *Nehmer v. U.S. Dept. of Veterans Affairs,* 494 F.3d 846, 855 (9th Cir. 2007) (this Court will uphold a district court judge's "reasonable interpretation" of a judicial decree they oversee). In addition, "the district judge, who is also the trier of fact, may resolve conflicting inferences and evaluate the evidence to determine Judge Boldt's intent." *Upper Skagit I*, 590 F.3d at 1025 n. 9.

II. STANDARD OF PROOF.

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…." *Boldt Decree*, 384 F. Supp. at 332. These are areas that a tribe fished on a "usual and accustomed" basis, not an "occasional or incidental" basis. *Id*. at 356 (FF 24). As a result,

"occasional and incidental trolling was not considered to make the marine waters traveled thereon the [U&As] of the transiting Indians." *Id*. at 353 (FF 14).[3]

This Court has affirmed these principles on a number of occasions. It has held that fishing must have occurred "with regularity" rather than on an "isolated or infrequent" basis to give rise to U&A. *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 434 (9th Cir. 2000) (*Muckleshoot III*). And it has held that even when travel was accompanied by incidental trolling, it did not establish U&A along the travel route absent other evidence of fishing activity. *See, e.g., U.S. v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988) ("[w]hile travel through an area and incidental

[3] FF 14 and FF 24 are critical, because they are two of the only instances in which Judge Boldt rejected Dr. Lane's opinions in favor of the opinions of the State's expert witness Dr. Carroll Riley. At trial, Dr. Lane expressed an expansive view of the term "usual and accustomed." She testified that a right in a fishery was "in no way dependent … upon the frequency with which" the right is exercised. 009STC-SER. In contrast, Dr. Riley testified that the phrase was "restrictive" and "meant what it said, which was usual and accustomed, not casual and incidental." 011STC-SER; 013STC-SER. Judge Boldt rejected Dr. Lane's view, holding instead that "[t]he words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Boldt Decree*, 384 F. Supp. at 356 (FF 24, citing Riley's testimony).

Similarly, when Dr. Lane was asked at trial whether incidental fishing while traveling to a distant location gave rise to U&A, she answered "yes, those would be usual, accustomed places." 008STC-SER; *see also* 007STC-SER. Dr. Riley did not agree, testifying that fishing along a travel route would "not mean usual and accustomed grounds." 013STC-SER. Again, Judge Boldt rejected Dr. Lane's testimony in favor of Dr. Riley's on this point. *Id*. at 353 (FF 14, citing Dr. Riley's testimony).

trolling are not sufficient to establish [U&A], *frequent* travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters") (emphasis in original; citation omitted).

III. THE COURT'S TASK IS TO DETERMINE JUDGE BOLDT'S INTENT.

One of the provisions of the Permanent Injunction retains jurisdiction to determine "[w]hether or not the actions of [a party] are in conformity with [the *Boldt Decree*]…." *U.S. v. Washington*, 18 F.Supp.3d at 1213 (Paragraph 25(a)(1)). In this Paragraph 25(a)(1) proceeding, the court's task is to interpret the *Boldt Decree* "so as to give effect to the intention of the issuing court." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998) (*Muckleshoot I*).

In the *Muckleshoot* trilogy of cases, this Court developed a two-step analytical framework for determining Judge Boldt's intent. First, the court must consider whether the language of the U&A finding is ambiguous or Judge Boldt intended something other than its apparent meaning. Second, if it is, the court must resolve the ambiguity by reviewing the record to determine Judge Boldt's intended meaning. *See, e.g., Upper Skagit I*, 590 F.3d at 1023; *Muckleshoot III,* 235 F.3d at 433. The most relevant evidence of Judge Boldt's intent is the evidence he cited. *Id*. at 434.

IV. LUMMI'S U&A FINDING IS AMBIGUOUS.

As to the first step of the *Muckleshoot* analysis, there is no question that Judge Boldt "'specifically determine[d]' the location of Lummi's [U&A], albeit using a

description that has turned out to be ambiguous." *Muckleshoot I*, 141 F.3d at 1360. However, contrary to this law of the case, Lummi's main argument to this Court is that its U&A finding is *not* ambiguous and the plain text "the marine areas of Northern Puget Sound" controls the result here. Br. at 22-39. Not so, for at least six reasons.

A. The Plain Language of Lummi's U&A Finding Does Not Support Lummi U&A in the Disputed Waters.

The plain language of Lummi's U&A determination raises "serious questions as to the geographic boundaries of the Lummi U&A, and whether the Lummi has U&A in [the Disputed Waters]." 6-ER-1014. Lummi's U&A finding lists 11 geographic features where Lummi customarily fished at treaty time.[4] Every one of them is to the north or west of the Disputed Waters (and many – Point Roberts, for example – are significantly to the north *and* west of the Disputed Waters). Conversely and perhaps more importantly, despite taking pains to carefully document the specific locations where Lummi fished at treaty time, *see Boldt Decree*, 384 F. Supp. at 348, Judge Boldt did not list a single geographic feature in the Disputed Waters. As this Court has noted, this alone strongly suggests that Judge

[4] These are: "the Straits," which read in context and in light of the underlying evidence refers to Haro and Rosario Straits, *see* 4-ER-552; reefnet sites on Orcas Island, San Juan Island, Lummi Island, Fidalgo Island, Point Roberts, and Sandy Point; the Nooksack River; Whatcom Creek; Bellingham Bay; and rivers draining to Puget Sound from Boundary Bay south to Fidalgo Bay.

Boldt did not intend to include the Disputed Waters in Lummi's U&A, because "it is the specific, rather than the general" that determines Judge Boldt's intent. *Lummi I*, 235 F.3d at 451. "Had he intended to include [the Disputed Waters] in the Lummi's [U&A] he would have used [those] specific term[s]." *Id*. at 452.

B. This Court Has Ruled Repeatedly that Lummi's U&A is Ambiguous.

While Lummi may be technically correct that this Court has never ruled that Lummi's U&A finding is ambiguous as to "any and all waters," Br. at 36, this Court has ruled that it is ambiguous every time it has considered the question. *Lummi III*, 876 F.3d at 1008-1009; *U.S. v. Lummi Nation*, 763 F.3d 1180, 1186-87 (9th Cir. 2014) (*Lummi II*); *Lummi I*, 235 F.3d at 449; *Muckleshoot I*, 141 F.3d at 1359. This is the law of the case, and Lummi offers no legitimate reason for deviating from it.

Lummi's suggestion that ambiguity needs to be determined on a water body by water body basis, Br. at 36-37, also contradicts the law of the case. *See Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015) ("It does not matter that the contested areas at issue here are slightly different; the finding that Judge Boldt intended something different than the plain text of the Suquamish U&A finding remains intact."). Moreover, there is nothing to suggest that the ambiguity which exists with respect to its western and southern boundaries is any different than that which exists as to its eastern boundary. If anything, the ambiguity is greater with respect to the eastern boundary given that there is no evidence in the record of

Lummi fishing or traveling in the secluded waters east of Whidbey. *See Upper Skagit*, 590 F.3d at 1025-26.

Lummi attempts to distinguish the prior cases by stating that they "called upon this Court to address Lummi's rights in waters not clearly covered by the language Judge Boldt used," which it argues is not the case here. Br. at 22-23. But this ignores the fact that Lummi made the exact same argument in those cases that it makes here, namely, that the contested waters were unambiguously included within its U&A finding. And it ignores the fact that, notwithstanding the apparent breadth of the phrase "the marine areas of Northern Puget Sound," this Court *rejected* Lummi's plain language arguments as to all waters other than Admiralty Inlet and other waters west of Whidbey where the evidence before Judge Boldt established that Lummi traveled and customarily fished at treaty time. *See, e.g., Lummi I*, 235 F.3d at 451-52 (holding that Admiralty Inlet is included within Lummi's U&A but the Strait of Juan de Fuca and Hood Canal are not, despite the fact that "Lummi argue[d] strenuously" that these waters were included within "Puget Sound").

C. Lummi's U&A Finding Must Be Interpreted as a Whole in Light of the Evidence Presented.

Despite the fact that this Court has ruled that Lummi's U&A finding is ambiguous on at least four occasions, Lummi argues that each of the key terms used in FF 46 unambiguously applies to the Disputed Waters and that the plain text cannot

be ignored. Br. at 23-24, 37-39. It also argues that the Region 2E Tribes concede that the Disputed Waters are encompassed within Judge Boldt's finding. Br. at 23, 36.[5]

However, Lummi's argument is "largely misdirected" because the question of Judge Boldt's intent cannot be answered simply by looking at the plain text of Lummi's U&A finding or any portion of it, as this Court has previously explained:

> [D]ebate over whether the language of [a U&A finding] is unambiguous is largely misdirected, inasmuch as an analysis of the decision is necessary, whether the text is unambiguous or not, in order to understand [the finding] "in light of the facts of the case." An unambiguous text is certainly a factor to be considered in this analysis, but it does not necessarily terminate the inquiry.

Muckleshoot III, 235 F.3d at 433; *see also Upper Skagit I*, 590 F.3d at 1024. Thus, even if the language of a U&A finding appears to be unambiguous and to include certain waters, as Lummi argues here, the court must still look to the evidence before Judge Boldt to determine if he "intended something other than its apparent meaning…." *Muckleshoot III*, 235 F.3d at 433.[6] While the meaning of the phrase

[5] To be clear, Swinomish did not stipulate but does not dispute that the Disputed Waters are marine waters in northern Puget Sound. It very much disputes that Judge Boldt "encompassed" them in Lummi's U&A.

[6] Lummi appears to believe that the inquiry whether a U&A finding is ambiguous and the inquiry whether Judge Boldt nevertheless meant something else are two separate inquiries. Because Lummi argues that there is no evidence in the record to indicate that Judge Boldt meant something else, it argues that the text is unambiguous and dictates the outcome in this case. Br. at 18, 24-29, 31-33, 35-38. However, whether a U&A finding is ambiguous on its face (patent ambiguity) and whether Judge Boldt nevertheless meant something else (latent ambiguity) are not two separate inquiries, but one inquiry into ambiguity under the first part of the

"the marine areas of Northern Puget Sound" is relevant to the analysis, it is not determinative of the outcome because this Court's task is to go beyond the plain language to interpret the finding as a whole in light of the underlying evidence.

Lummi encourages this Court to re-write its U&A finding to include "Puget Sound waters between Fidalgo Island and Edmonds." Br. at 31. But that is not what Judge Boldt found. *See Boldt Decree*, 384 F.Supp. at 360 (FF 45 and FF 46). It is apparent from the language he used and the evidence he relied upon that Judge Boldt did not intend to include within Lummi's U&A *all* of the marine areas in northern Puget Sound, but only *some* of them. *See, e.g., Lummi I*, 235 F.3d at 451 ("it is the specific, rather than the general" that determines Judge Boldt's intent). The question then becomes *which* areas, and the fact that this question cannot be answered simply by reading Lummi's U&A finding proves the point: the U&A finding is ambiguous and resort to the record is necessary to discern its meaning. *See Muckleshoot III*, 235 F.3d at 433; *Lummi III*, 876 F.3d at 1008-1009.

D. Lummi's Argument that the Absence of Geographic Anchors Proves Their Inclusion Violates Common Sense and the Law of the Case.

Perhaps in an effort to hedge its bet given the lack of evidence to support its claim, Lummi makes the truly novel argument that a lack of evidence is evidence

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Muckleshoot two-part test. If the Court determines that the finding is ambiguous (either patently or latently), the Court then turns to step two and analyzes the evidence to determine Judge Boldt's intent. *See, e.g., Muckleshoot III*, 235 F.3d at 433.

itself. According to Lummi, Judge Boldt's failure to specifically name a single geographic feature in the Disputed Waters "does not mean his description is ambiguous with respect to those waters" because "the greater (i.e., Northern Puget Sound) necessarily includes the lesser ([the Disputed Waters])." Br. at 31. Relatedly, Lummi argues that the fact that Judge Boldt did not reference Skagit Bay, Saratoga Passage, or any of the other Disputed Waters in Lummi's U&A finding while he did reference them in other U&A findings "does not indicate his intent to exclude" them. Br. at 33.

This is exactly the opposite of what this Court has said:

> Judge Boldt used specific geographic anchor points in describing other tribes' U & As. From this it is reasonable to infer that when he intended to include an area, it was specifically named in the U&A. In Suquamish's case, the only inclusive geographic anchor points for the term "Puget Sound" are the "Haro and Rosario Straits," which do not include or delineate the [waters at issue]. That 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.

Upper Skagit I, 590 F.3d at 1025; *see also Lummi I*, 235 F.3d at 452. To read these cases and conclude that the greater necessarily includes the lesser or that a lack of geographic anchors does not indicate an intent to exclude them requires the legal equivalent of a funhouse mirror.

That Dr. Lane did not identify and Judge Boldt did not include any geographic anchors within the Disputed Waters in Lummi's U&A finding strongly suggests that

Judge Boldt intended to exclude them. This conclusion is bolstered by the fact that the record before Judge Boldt does not contain *any* evidence of Lummi fishing or travel in the Disputed Waters. *See* Sec. V. The only geographic anchors for the phrase "the marine areas of Northern Puget Sound" are the Fraser River, the environs of Seattle, and Bellingham Bay. All three are to north, west, or south of the Disputed Waters or their entry points. *See Upper Skagit I*, 590 F.3d at 1025. That Judge Boldt neglected to name the Disputed Waters in Lummi's U&A finding does not support a conclusion that he intended to include them, as Lummi suggests, but instead a "conclusion that he did not intend for them to be included." *Id*.

Lummi argues that Fidalgo Island is a relevant geographic anchor immediately to the north of the Disputed Waters. Br. at 31. Setting aside the not-insignificant fact that Judge Boldt did not use Fidalgo Island as a geographic anchor for the "marine areas of Northern Puget Sound," Dr. Lane was only able to identify a single reefnet location offshore of Fidalgo Island at Langley Point, a promontory that faces northwest toward Lummi's homeland and away from the Disputed Waters. *See* Br. at 49. While she concluded that Lummi's fisheries extended south to Anacortes, it too is on the northwest coast of Fidalgo Island facing toward Lummi's homeland and away from the Disputed Waters. There is no evidence in the record before Judge Boldt that Lummi fished at or traveled to any other places on Fidalgo

Island or in the Disputed Waters south of Fidalgo Island. And we refute Lummi's suggestion that it *might have* in Section IV.D.1 below.

E. *Upper Skagit I* and *Upper Skagit II* Foreclose Lummi's Argument that FF 46 Unambiguously Includes the Disputed Waters.

The next problem with Lummi's argument that its U&A unambiguously includes the Disputed Waters is that this Court rejected a virtually identical argument in two virtually identical cases and there is no reason that this Court should reach a different result here.

In *Upper Skagit I*, 590 F.3d 1020, Suquamish argued that Skagit Bay and Saratoga Passage, two of the Disputed Waters, were unambiguously included within the plain text the "marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River…." *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975) (*Boldt II*) (FF 5). Contrary to Lummi's suggestion, Br. at 25, the panel did *not* hold that the "marine waters of Puget Sound" unambiguously include Skagit Bay and Saratoga Passage. Instead, this Court agreed with the district court that Upper Skagit met its burden to demonstrate ambiguity (*i.e.*, that Judge Boldt intended something other than its apparent meeting) because "[t]here is no evidence in the record before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of Whidbey Island, particularly in Saratoga Passage or Skagit Bay." *Upper Skagit I*, 590 F.3d at 1025. Additionally, this Court held that "it is reasonable to infer that when [Judge Boldt] intended to include an area, it was

specifically named in the U&A." *Id*. Because Judge Boldt did not specifically name Skagit Bay and Saratoga Passage in Suquamish's U&A finding, Judge Boldt did not intend to include them. *Id*.

This Court reached a similar result in *Upper Skagit II*, 871 F.3d 844, where Suquamish argued that certain waters to the northeast of Whidbey were included within its U&A. As in *Upper Skagit I*, this Court did not belabor whether Suquamish's U&A finding was facially ambiguous. Instead, it reviewed the record before Judge Boldt and concluded that nothing in Dr. Lane's reports or testimony suggested that Suquamish fished or traveled in the contested waters. *Id*. at 849. It again noted that Judge Boldt did not name the contested waters in Suquamish's U&A finding, "support[ing] the conclusion that he did not intend to include them." *Id*. at 850.

These cases foreclose Lummi's argument that the plain text "the marine areas of Northern Puget Sound" determines the outcome of this case. The Suquamish and Lummi U&A findings are remarkably similar: both appear on their face to include broad swaths of marine waters in Puget Sound between specifically identified northern and southern endpoints in the same general area. Despite this, both U&A findings are ambiguous. Suquamish sought and Lummi seeks U&A in the secluded waters east of Whidbey, but Judge Boldt did not include any of the waters east of Whidbey in their U&A findings. As will be demonstrated below, the evidence in the

record before Judge Boldt with respect to Suquamish and Lummi traveling and customarily fishing east of Whidbey is also remarkably stark and similar: there is none. *See* Sec. V. And critically important for present purposes, the general evidence regarding Suquamish and Lummi travel and fishing between their northern and southern fisheries is the very same evidence, establishes that the north-south marine highway was *west* of Whidbey, and is insufficient to show that Suquamish or Lummi traveled or fished in the secluded waters *east* of Whidbey. *See Lummi III*, 876 F.3d at 1009-1010; *Upper Skagit II*, 871 F.3d at 850. Like Suquamish, Lummi argues that the broad language of its U&A finding can overcome a complete lack of evidence in the record demonstrating Lummi traveled and customarily fished east of Whidbey at treaty time, but this Court rejected these arguments when Suquamish made them and should reject them here.

In Lummi's view, the significance of *Upper Skagit I* is that "this Court previously recognized that Judge Boldt's similar description of [Suquamish's U&A] unambiguously encompassed [the Disputed Waters]." Br. at 25. This is the same argument that prompted the district court to admonish that "[w]hile Lummi's argument may not misstate the prior decisions in this case, it certainly paints them in a misleading light." 1-ER-16. As explained above, *Upper Skagit I* did not hold that the Disputed Waters are unambiguously part of "the marine areas of Northern Puget Sound" as Lummi argues, but instead held that Skagit Bay and Saratoga

Passage are *not* unambiguously included in "Puget Sound" because U&A determinations must be interpreted "in light of the facts of the case." 590 F.3d at 1024. As the Court explained:

> [T]he fact that Judge Boldt defined "Puget Sound" in one instance as including Skagit Bay and Saratoga Passage does not mean that references to "Puget Sound" in other U&As always include those same areas. If anything, the judge's inclusion of reference points in one U&A but not in another indicates a lack of intent to include them generically.

Id. at 1026. Moreover, *Upper Skagit II* confirmed that *Upper Skagit I* did not hold what Lummi says it did. In analyzing the first part of the *Muckleshoot* two-part test (ambiguity), the Court stated that it had "previously determined [in *Upper Skagit I*] that Judge Boldt intended something different than the plain text of the Suquamish U&A finding." *Id*. at 848 (quotation omitted). In light of all this, Lummi's insistence that *Upper Skagit I* stands for the proposition that Judge Boldt unambiguously included the Disputed Waters within "the marine areas of Northern Puget Sound," and therefore resolves the dispute here, is astoundingly misleading.

Likely recognizing that *Upper Skagit I* poses a significant problem for it, Lummi makes several attempts to distinguish the case. It argues that Judge Boldt made a statement from the bench demonstrating that he only intended to include "certain portions of Puget Sound" within Suquamish's U&A. Br. at 27. Relatedly, it argues that *Upper Skagit I* found significant the fact that Suquamish's U&A does

not specifically include Skagit Bay or Saratoga Passage, while Swinomish's U&A finding does. Br. at 28.

There are several problems with these arguments. For one, Lummi's U&A finding is narrower than Suquamish's because it includes only the marine waters of "Northern" Puget Sound. *Compare Boldt Decree*, 384 F. Supp. at 360 (FF 46) *with Boldt II*, 459 F. Supp. at 1049 (FF 5). For another, Judge Boldt did not specifically name any of the Disputed Waters in Suquamish's U&A or Lummi's, despite doing so in Swinomish's. *See, e.g., Upper Skagit I*, 590 F.3d at 1026. For a third, Judge Boldt did not specifically name any geographic anchors in the Disputed Waters in either Suquamish's U&A or Lummi's. *Lummi I*, 235 F.3d at 451–52 (the specific, not the general, that controls). Far from demonstrating that Suquamish's U&A finding is somehow different than Lummi's, these facts bolster the argument that, at least for present purposes, they are virtually identical.

But the last and biggest problem is this: while both *Upper Skagit I* and *Upper Skagit II* considered Judge Boldt's statement from the bench regarding Suquamish's U&A and compared Suquamish's U&A to Swinomish's, neither case turned on these points and therefore neither provides any basis for distinguishing them. The critical finding by this Court in *Upper Skagit I* was that "[t]here is *no evidence* in the record before Judge Boldt that the Suquamish fished or traveled in the waters *on the eastern side of Whidbey Island*, particularly in Saratoga Passage or Skagit Bay." *Id*. at 1025

(emphasis added). The critical finding in *Upper Skagit II* was that "[n]either Dr. Lane's testimony nor her reports contain any indication that the Suquamish fished or traveled through the Contested Waters." 871 F.3d at 849.

Lummi claims that the same is not true here, arguing that "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]." Br. at 28. But Dr. Lane also detailed a number of specific Lummi fishing locations in Puget Sound and also made no mention of Lummi fishing or travel in the Disputed Waters. *See* Sec. V.A.1.

F. *Muckleshoot III* Undercuts, rather than Supports, Lummi's Position.

Lummi also tries to distinguish *Muckleshoot III*, 235 F.3d 429, where this Court rejected Muckleshoot's claim that the plain text "secondarily in the saltwater of Puget Sound" in its U&A finding meant it could fish throughout all of Puget Sound. *Boldt Decree*, 384 F. Supp. at 367 (FF 76). After explaining that "the parties' debate over whether the language of FF 76 is unambiguous is largely misdirected," *Muckleshoot III*, 235 F.3d at 433, this Court found that district court correctly interpreted Muckleshoot's U&A finding to exclude all marine waters beyond Elliott Bay adjacent to the City of Seattle. *Id*. at 434-35.

In Lummi's view, this Court rejected Muckleshoot's claim because there was "clear evidence of Judge Boldt's contrary intent" because the treaty-time

Muckleshoot were an upriver people and Judge Boldt listed a number of freshwater fishing locations in Muckleshoot's U&A finding. Br. at 26-27. Because "[u]nlike the Muckleshoot, the Lummi were not principally a freshwater fishing tribe. Far from it[,]" Lummi concludes that there are no "similar exceptional circumstances that would justify departing from Judge Boldt's plain language." Br. at 28.

This argument suffers from the same flaw that Lummi's arguments regarding *Upper Skagit I* and *Upper Skagit II* do. The critical finding by this Court was not that the Muckleshoot were an upriver people (although that was an important consideration), the critical finding was that "there is *no evidence* in the record before Judge Boldt that supports a [saltwater] U&A beyond Elliott Bay." *Id*. at 433-434 (adopting the language of the district court). The same is true here. *See* Sec. V.

Moreover, *Muckleshoot III* undercuts, rather than supports, Lummi's argument. Dr. Lane stated that Muckleshoot trolled for salmon in salt water when families descended the rivers to get shellfish on the beaches of Puget Sound. *Muckleshoot III*, 235 F.3d at 434. Dr. Riley stated that the Muckleshoot occasionally made the trip down river to Elliott Bay on fishing and clamming expeditions. *Id*. at 437. While this evidence did not support Muckleshoot's broad claims, it at least was evidence of *fishing*. Here, there is not a single statement in Dr. Lane's reports or testimony or any other evidence in the record before Judge Boldt which places

Lummi in the Disputed Waters for any purpose, let alone customarily fishing. *See* Sec. V.

Lummi's considerable focus on whether the language of its U&A finding is ambiguous is "largely misdirected." As demonstrated above, it is ambiguous, but even if it were not, resort to the record would still be required to determine Judge Boldt's intent. *See Muckleshoot III*, 235 F.3d at 433.

V. JUDGE BOLDT DID NOT INTEND TO INCLUDE THE DISPUTED WATERS IN LUMMI'S U&A.

Lummi unfairly criticizes Judge Martinez for what it calls a "text-free" approach. Br. at 38. But for the reasons explained below, Lummi's arguments are an "evidence-free" approach that, if accepted, would radically change the standard of proof in this exceptionally complex case almost a half-century after its inception. There is nothing the record before Judge Boldt that would support a conclusion that Lummi customarily fished the secluded waters east of Whidbey at treaty time. As a result, Judge Boldt could not have intended to include them in Lummi's U&A.

A. None of the Evidence Cited by Judge Boldt Supports Lummi U&A in the Disputed Waters.

The evidence cited by Judge Boldt to support Lummi's U&A finding is the most relevant evidence of his intent. *Muckleshoot III*, 235 F.3d at 434. None of it supports Lummi's claim to U&A in the Disputed Waters.

1. *Dr. Lane's Reports.*

The primary evidence Judge Boldt relied upon in determining Lummi's U&A were two reports prepared by Dr. Lane. The first, USA-20, was a general anthropological report. In it, Dr. Lane concluded that:

> 1. [The pre-treaty Lummi] lived in the area of Bellingham Bay and near the mouths of the [Nooksack] river emptying into it….
>
> 3. The principal fisheries of the Lummi included the reef-net locations for sockeye at Point Roberts, Village Point, off the east coast of San Juan Island as well as other locations in the San Juan Islands. Other fisheries included Bellingham Bay and the surrounding saltwater areas. The Lummi had important freshwater fisheries on the river system draining into Bellingham Bay.

4-ER-606 (cited by Judge Boldt in FF 46). Notably, USA-20 does not reference Lummi travel or customary fishing in the Disputed Waters.

The second and much more detailed report upon which Judge Boldt relied was USA-30, Dr. Lane's anthropological report on the Lummi. The report first describes Lummi's home territory as Bellingham Bay, Lummi Bay, Lummi Island, parts of the San Juan Islands, and portions of Samish, Padilla, and Fidalgo Bays. 4-ER-527-528. All of these areas are to the north or west of the Disputed Waters, indicating that Lummi people did not live near the Disputed Waters at treaty time and likely would not have fished there. *See* 4-ER-583-584; 4-ER-587.

Next, Dr. Lane emphasized the overarching importance of Lummi's reefnet fishery and the degree to which it was unique among the tribes of western

Washington. *See* 4-ER-534-551. This is the basis for Judge Boldt's findings that Lummi owned particularly lucrative reefnet fisheries, reefnetting was the single most important economic activity of the Lummi, and reefnetting was a highly specialized fishery that required, among other things, locational knowledge. *Boldt Decree*, 384 F. Supp. at 360-61 (FF 45; FF 52).

In general, Dr. Lane concluded that Lummi's "reefnetting technique was employed from the Straits of Juan de Fuca to Point Roberts apparently at all feasible locations." 4-ER-538. This area is northwest of the Disputed Waters. In addition, Dr. Lane identified at least 15 specific reefnetting sites and prepared a sketch depicting their location. 4-ER-553. The southernmost sites are south of Lopez Island and the easternmost site is Langley Point off the northwestern cost of Fidalgo Island. These locations are to the north or west of the Disputed Waters. Dr. Lane did not identify any reefnet location within the Disputed Waters, and the fact that Lummi did not engage in its most important and most lucrative fishing activity in the Disputed Waters suggests that Judge Boldt did not intend to include them in Lummi's U&A.

Next, Dr. Lane described Lummi's "Usual and Accustomed Fishing Areas." She explained that "[w]hile it is not possible to pinpoint every fishing site … it is feasible to indicate the general area of [Lummi's] traditional fishing operations and within the general area to designate certain sites as important or principal fishing locations." 4-ER-551. Dr. Lane concluded that Lummi's "traditional fishing areas

… extended from what is now the Canadian border south to Anacortes," which is northwest of the Disputed Waters. 4-ER-552.

Dr. Lane also described with particularity the locations of Lummi's fisheries. As noted above, the reefnet fishery was at fixed locations in open marine waters from the Strait of Juan de Fuca to Point Roberts. Lummi's troll fisheries were located in the San Juan Islands and Haro and Rosario Straits. 4-ER-550-552. Lummi also fished "river drainage systems emptying into bays from Boundary Bay south to Fidalgo Bay." 4-ER-555. All of these areas are to north or west of the Disputed Waters.

In her reports and testimony, Dr. Lane never indicates that the Disputed Waters were part of Lummi's homeland or part of Lummi's customary fisheries. She does not include the Disputed Waters in the section of her report addressing Lummi's "Usual and Accustomed Fishing Areas." She does not identify a single Lummi fishing location in the Disputed Waters. She does not document a single instance of Lummi presence in the Disputed Waters, let alone an instance of a Lummi person fishing there. In Dr. Lane's expert opinion, Lummi did not travel or customarily fish in the Disputed Waters at treaty time.

Judge Boldt specifically named many of Lummi's fishing places identified by Dr. Lane and clearly referred to others he did not specifically name (for example, the Lummi River and the Samish River are not specifically named but are "river

drainage systems" that empty to "bays from Boundary Bay south to Fidalgo Bay"). *Boldt Decree*, 384 F. Supp. at 360 (FF 46). In fact, Judge Boldt's findings mirror almost perfectly Dr. Lane's expert opinion regarding the locations of Lummi's customary fisheries. This reflects the degree to which he relied on Dr. Lane's opinion and suggests that he not only included the areas that she identified as Lummi's U&A within his findings, but also excluded the areas that she did not identify as Lummi's U&A, including the Disputed Waters. *See Upper Skagit I*, 590 F.3d at 1024.

Other parts of Dr. Lane's report are not specifically cited by Judge Boldt but are relevant to the current dispute. Dr. Lane noted several times that Lummi had "two basic characteristics which sharply differentiated them from their neighbors to the south and the east…." 4-ER-528. The first was linguistic; Lummi spoke a different language than the Region 2E Tribes, making conversations between them "mutually unintelligible." *Id*. The second related to fishing technologies; Lummi's reefnetting technique "contrasted sharply with their neighbors to the south and east who relied mainly on weirs and traps…." *Id*. The fact that Dr. Lane "sharply differentiated" Lummi from the Region 2E Tribes suggests that she saw them as linguistically, culturally, technologically and geographically distinct and did not view Lummi as one of the tribes customarily engaged in fishing in the Disputed Waters.

2. *None of the Other Evidence Cited by Judge Boldt Supports Lummi's Claim.*

In addition to Dr. Lane's reports, Judge Boldt cited other evidence in the record to support Lummi's U&A finding. He cited historic maps and sketches of Lummi's reefnet fishery in the San Juan Islands. 4-ER-746-755. He cited a portion of Dr. Lane's testimony regarding Lummi's fishery at the mouth of the Nooksack River in Bellingham Bay and Lummi's reefnet locations in the San Juan Islands. 4-ER-758; 002-004STC-SER. He cited portions of two reports prepared by Dr. Riley discussing Lummi's yearly economic cycle and a number of Lummi fishing sites, none of which are in the Disputed Waters. 014-034STC-SER; 035-042STC-SER. Judge Boldt also cited a number of affidavits, primarily made by Lummi members, in a separate case, *U.S. v. Alaska Packing Ass'n*, brought by the United States in the late 1800s to address non-Indian interference with Lummi's traditional fisheries. 4-ER-642-650; 4-ER-690-723; 5-ER-966-977.

None of this evidence supports a conclusion that Lummi customarily fished in the Disputed Waters at treaty time. Dr. Lane testified and Judge Boldt determined that Lummi's homeland was around Bellingham Bay and the mouth of the Nooksack River, not on lands adjacent to the Disputed Waters. *Boldt Decree*, 384 F. Supp. at 360 (FF 44). Dr. Lane testified about and Judge Boldt determined where Lummi's usual and accustomed fisheries were, and they are all to the north or west (and often both) of the Disputed Waters. *Id*. (FF 45 and FF46). And, as we discuss in greater

detail below, Dr. Lane testified about and Judge Boldt found where Lummi traveled between its northern and southern fisheries, and it was on the marine highway west of Whidbey, not through the secluded waters east of Whidbey. *Lummi III*, 876 F.3d at 1009-1010. It is this specific evidence that must control over general inferences Lummi asks this Court to make.

B. The Lack of Evidence in the Record Regarding the Disputed Waters Suggests that Judge Boldt Did Not Intend to Include Them.

Lummi tries to overcome the lack of evidence to support its claim to U&A in the Disputed Waters by arguing that "Judge Boldt applied a very low threshold of proof" to establish U&A because of "the scarcity of [d]ocumentation of Indian fishing during treaty times" and because "what little documentation does exist is extremely fragmentary and just happenstance." Br. at 39-40 (quotation omitted). Relatedly, Lummi argues that "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." Br. at 44. As theoretical points, perhaps so.

Within this case, however, the record belies these claims. There is not a scarcity of information about where Lummi fished at treaty time, but a *wealth* of information. *See* Sec. V.A. Contrary to Lummi's suggestion, the amount of evidence in the record to support Lummi U&A in areas to the north, west, and south of Whidbey does provide an important point of comparison. Judge Boldt determined

that Lummi's U&A extends throughout the San Juan Islands, and the record is replete with evidence that Lummi customarily fished there. *Boldt Decree*, 384 F.Supp. at 360 (FF 45, FF 46, and evidence cited therein). Similarly, Judge Boldt determined that Lummi has U&A in Admiralty Inlet and other waters west of Whidbey Island even though they were not specifically named in Lummi's U&A finding, and there is evidence to support this finding. *See, e.g.*, *Lummi III*, 876 F.3d. at 1009-1010 (holding that Lummi's treaty time travel path included the marine highway west of Whidbey because "[i]mportantly… [Dr. Lane] tied travel in this corridor to fishing.").

In contrast to the robust evidence in the record to support Lummi U&A elsewhere, Dr. Lane did not find a single piece of evidence documenting Lummi fishing in the Disputed Waters. *See* Sec. V.A. Lummi does not even try to explain its theory as to why there is voluminous evidence of it fishing north, west, and south of Whidbey but not a scrap of evidence of it fishing east of Whidbey, but the obvious conclusion to be drawn is not that the waters east of Whidbey are an evidentiary vacuum (they are not), but that Lummi did not customarily fish there. *See Boldt II*, 459 F. Supp. at 1049 (FF 6) (finding that Swinomish customarily fished these waters). Importantly, the fact that Judge Boldt did not cite *any* evidence to support a finding that Lummi customarily fished in the Disputed Waters also defeats Lummi's claim that it exists. Had he found that Lummi's U&A included the Disputed Waters,

he would have said so and cited to specific evidence in the record, just as he did with every other U&A finding, *including Lummi's*.

Because there is no direct evidence of Lummi fishing in the Disputed Waters at treaty time, it has scoured the record and found four pieces of evidence and two generalizations it argues should support an inference that Lummi customarily fished in the Disputed Waters. As we explain below, none of this evidence can bear the weight Lummi attempts to place upon it.

C. The Evidence Lummi Relies Upon Does Not Support an Inference that Lummi Customarily Fished the Disputed Waters.

1. *McDonough Affidavit*

The first piece of evidence Lummi relies upon is a single turn of phrase in an affidavit sworn by B.N. McDonough in the *Alaska Packers* case. Br. at 42-43 (discussing 4-ER-648-650). Mr. McDonough was a settler who moved near the Lummi Reservation and began trading in 1883. He testified that during the time he had known Lummi tribal members (*i.e.*, three decades or more after the Treaty) they "fished at all points in the lower Sound." 4-ER-649. Because Judge Boldt cited this affidavit in FF 46, Lummi argues "it constitutes compelling evidence that … he intended to include 'all points' within [Northern Puget Sound]" in Lummi's U&A. Br. at 43.

Importantly, none of the *Lummi* affiants made such a sweeping statement or described fishing in the Disputed Waters at treaty time, and Mr. McDonough does

not state that Lummi fished there either. He addresses non-Indian interference with Lummi's fisheries to the north and west. He names specific Lummi people he obtained information from and discusses fishing on the San Juan Island reefs, the sale or trade of Lummi salmon harvest from Point Roberts, camping places and shacks near Point Roberts, complaints he heard from Lummi people about non-Indians excluding them from the reefnet fishery at Point Roberts, and Lummi travel from its reservation to places "including Point Roberts and Village Point." *See* 4-ER-648-650. All of these areas are to the north or west of the Disputed Waters. Read as a whole, the content of the affidavit, as well as the fact that Judge Boldt cited it among the Lummi affidavits and not separately, demonstrates that Judge Boldt cited it to support his findings regarding Lummi's reefnet fishery, not to support an unwritten factual finding that Lummi fished in *all* northern Puget Sound waters.

If Judge Boldt intended the latter, as Lummi claims, his reliance on a general, ambiguous, and unsupported turn of phrase from a settler three decades or more after the treaty stands in sharp contrast to his other U&A findings, every one of which was supported by specific citations to specific evidence identifying specific fishing places or practices. *See Boldt Decree*, 384 F. Supp. at 348. Moreover, Mr. McDonough's general, ambiguous, and unsupported testimony that Lummi fished at "at all points in the lower Sound" cannot overcome the wealth of specific evidence in his own affidavit, Dr. Lane's reports, and elsewhere regarding Lummi's

customary fishing or Judge Boldt's specific, and limited, factual findings. *See, e.g., Lummi I*, 235 F.3d at 451 ("it is the specific, rather than the general" that determines Judge Boldt's intent).

2. *Kinley Testimony*

The next piece of evidence that Lummi relies upon is a single sentence from the testimony of Forrest "Dutch" Kinley. Mr. Kinley was a Lummi member who was born in 1914, six decades after the Treaty. He testified at length at trial. Among other things, he explained the various ways the State interfered with Lummi's traditional fisheries in the San Juan Islands, Bellingham Bay, and the Nooksack River. 3-ER-279-296. He never mentioned any of the Disputed Waters, let alone claimed that Lummi customarily fished them at treaty time. But in response to a question about Lummi's U&A, Mr. Kinley testified that "[*he* had] fished in the Straits [and *he* had] fished in *Whidby Island south* and into the Canadian border." 2-ER-83 (emphasis added). Lummi argues "[w]hile Judge Boldt did not give such statements the same weight he gave to Dr. Lane's report … he did consider credible testimony of tribal elders….'" Br. at 52 (quotation omitted). It also argues that this statement "demonstrate[es] that Lummi *would have* traveled to, and fished in, the waters *around* Whidbey Island, including the [Disputed Waters]." Br. at 56 (emphasis added).

This Court has held repeatedly that the best evidence of Judge Boldt's intent is the specific evidence cited. *See, e.g., Muckleshoot III,* 235 F.3d at 434. But Judge Boldt did not cite *any* of Mr. Kinley's testimony. *See Boldt Decree*, 384 F. Supp. at 360-363. Judge Boldt apparently did not give it any weight in determining Lummi's U&A in 1974, and this Court should not do so now, almost a half-century later.

This Court also has held repeatedly that Judge Boldt generally did not rely upon tribal testimony in making his U&A determinations. *See, e.g., Lummi I*, 235 F.3d at 451. While tribal testimony may be considered if it is corroborated by other evidence, it "is not the most accurate, documentary evidence" of where tribes fished at treaty time. *U.S. v. Lummi*, 841 F.2d at 319. As this Court explained in *Lummi I*:

> [I]t is the specific, rather than the general, evidence presented by Dr. Lane that Judge Boldt cited as support for his findings of fact regarding the Lummi's [U&A]. None of Dr. Lane's testimony identified specific areas as far west and south as the Lummi now claim. Although Judge Boldt heard testimony from Lummi elders [including Mr. Kinley] who stated that they had fished as far west as the Strait of Juan de Fuca, it is clear that he did not rely on this testimony in determining the location of the Lummi's [U&A]. It is entirely reasonable to conclude that Judge Boldt found this testimony to be self-serving, choosing instead to rely on Dr. Lane, whose testimony he found to be authoritative and reliable.

Lummi I, 235 F.3d at 451 (quotations and citations omitted).

This reasoning is equally applicable here. None of Dr. Lane's reports or testimony identified specific areas as far east as Lummi now claims. And although Mr. Kinley and other Lummi witnesses testified at trial about their historical fishing

locations, Judge Boldt did not rely on any of this testimony in determining Lummi's U&A.

This is especially true when the tribal lay witness testimony is ambiguous and significantly post-dates the Treaty. Contrary to Lummi's assertion, Mr. Kinley did not testify that Lummi customarily fished "around" Whidbey Island at treaty time, he testified that six or more decades after the Treaty *he* fished "in Whidby Island *south* and into the Canadian border." 2-ER-83 (emphasis added). At most, this testimony might support an inference that Lummi fished from the Canadian border to an unspecified point *south* of Whidbey; it does not support an inference that it customarily fished from Whidbey Island *east*.

3. *Trade*

The third piece of evidence Lummi relies upon are two statements by Dr. Lane discussing Lummi's trading activities. In the first, Dr. Lane wrote that Lummi "imported various fibers and grasses from upriver Skagit and flint from Puget Sound." 4-ER-569. In the second, Dr. Lane wrote that "[f]lint from Puget Sound and woven root hats from the West Coast were among [Lummi's] imports." 4-ER-537. Lummi interprets these statements to mean that Lummi traveled to "the mainland shore on the eastern side of [the Disputed Waters] to trade for these goods," and that, from there, Lummi fished the marine waters at the mouths of the Skagit, Stillaguamish, and Snohomish Rivers. Br. at 51-52.

This is pure speculation, as Judge Martinez found. 1-ER-24-25. There is no evidence of Lummi presence in any of the Disputed Waters at treaty time, for trade or any other purpose. *See* Sec. V.A. Prior to this appeal, Lummi has never claimed it fished in front of the Skagit, Stillaguamish, and Snohomish Rivers. There is absolutely no evidence to support these claims, and Dr. Lane's opinion and Judge Boldt's finding that Lummi's freshwater fisheries were limited to river drainage systems emptying into the bays from Boundary Bay south to Fidalgo Bay, well to the north of these rivers and the Disputed Waters, shows that Lummi's position is fantasy.

Even Lummi concedes that Dr. Lane's statements may not demonstrate that Lummi traded in the Disputed Waters. Br. at 55. However, it argues that "even an inference of Lummi fishing or travel in the disputed waters" is enough to establish U&A. Br. at 56. But an "inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on evidence but is pure conjecture and speculation." *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1982) (quotation omitted).

The evidence in the record demonstrates that Lummi traded in its homeland around Bellingham Bay, not in the Disputed Waters. In both of her statements, Dr. Lane said that Lummi "imported" goods from other areas, an oddly specific and inapt choice of word had Dr. Lane really meant "traveled to and collected." The

context of her statements also shows that Lummi traded in its homeland, not elsewhere. *See* 4-ER-536-37 (describing Lummi predecessors fishing in Boundary Bay, significantly to the north and west of the Disputed Waters, and possessing imported iron, copper, and blue beads). And despite Lummi's heroic attempt to recast Dr. Lane's reference to the "West Coast" to mean the "eastern side of the [Disputed Waters]," *see* Br. at 51-52, Dr. Lane's testimony confirms that she meant what she said: she was "[s]peaking about trade from the Olympic Peninsula over to the Lummi and Bellingham Bay area." 005STC-SER. This, along with Mr. McDonough's affidavit, 4-ER-648-650, confirms that Lummi engaged in extensive trade near its homeland, where a number of tribes, including the Skagit, traveled to fish. *See* 4-ER-554.

Even if Lummi had traveled to the Disputed Waters to trade, it would not prove that Lummi customarily fished there. This Court has never held that travel for trading purposes is sufficient to establish U&A, and it should not change the law of the case now. *See U.S. v. Lummi*, 841 F.2d at 320 ("[w]hile travel through an area and incidental trolling are not sufficient to establish [U&A], frequent travel and visits to trading posts may support other testimony that a tribe *regularly fished* certain waters.") (emphasis added; citation omitted).

1. *"Straits and bays"*

Next, Lummi argues that Dr. Lane's statement that "[o]ther fisheries in the Straits and bays from the Fraser River South to the present environs of Seattle were utilized" necessarily includes the Disputed Waters. Br. at 45-46 (discussing 4-ER-555).

However, Judge Boldt did not adopt Dr. Lane's "Straits and bays" language in Lummi's U&A finding, despite adopting another part of the very same statement verbatim. *See Boldt Decree*, 384 F. Supp. at 360 (FF 46). Moreover, Lummi's interpretation of this statement is inconsistent with Dr. Lane's own opinions. Her use of "the Straits" refers to Haro and Rosario Straits, both of which lie west of Whidbey. 4-ER-552. The only bays identified by Dr. Lane or Judge Boldt are Bellingham Bay, Boundary Bay, and Fidalgo Bay, all of which are to the northwest of the Disputed Waters. *Boldt Decree*, 384 F. Supp. at 360 (FF 46). Moreover, Dr. Lane's description of the general area of Lummi's fisheries from the Canadian border to Anacortes is inconsistent with a theory that Lummi fished generic Straits and bays south of there. 4-ER-552. And the notion that Dr. Lane impliedly included such a major geographic feature as Skagit Bay (including Deception Pass) through generic "Straits and bays" language, or that Judge Boldt determined that Lummi U&A's included those waters despite the fact that he rejected Dr. Lane's "Straits and bays" language, beggars belief.

D. The Generalities Lummi Relies Upon Do Not Support an Inference that Lummi Customarily Fished the Disputed Waters.

Because there is no evidence in the record demonstrating that Lummi customarily fished the Disputed Waters at treaty time, it relies on two generalities and asks this Court to make an inference that it did so. For the reasons explained below, neither holds up.

1. *Territory on Fidalgo Island*

The first generality Lummi relies upon is its alleged territory on Fidalgo Island. In its view, "Lummi fish[ed] in the Puget Sound waters to the south of their home territory in and around Fidalgo Island." Br. at 6. It also claims that "Dr. Lane described Lummi reefnetting sites and freshwater fisheries in and around Fidalgo Island." Br. at 11. This is misleading.

Lummi's home territory was not on Fidalgo Island. *Boldt Decree*, 384 F. Supp. at 360 (FF 44). The Samish, a predecessor tribe of both Lummi and Swinomish, occupied the northwest coast of Fidalgo Island at treaty time, but not areas adjacent to the Disputed Waters. *See* Br. at 42 (acknowledging that Lummi (*i.e.,* Samish) territory only went as far south as Anacortes, northwest of the Disputed Waters). Contrary to Lummi's assertion that it had reefnetting sites (plural) in and around Fidalgo Island, Dr. Lane identified a lone reefnet site offshore Fidalgo Island, which Lummi acknowledges was "off the western shore" at Langley Point, northwest of Deception Pass and the other Disputed Waters. *See* Br. 49. Contrary to

Lummi's assertion that it had freshwater fisheries in and around Fidalgo Island, Dr. Lane did not identify and Judge Boldt did not find *any* Lummi freshwater fisheries there. *Boldt Decree*, 384 F. Supp. at 360 (FF 46); 4-ER-555 (Lummi's freshwater fisheries drained to "bays from Boundary Bay south to Fidalgo Bay," northwest of the Disputed Waters). Dr. Lane did not opine that Lummi customarily fished waters south of Fidalgo Island, and her identification of a single open water reefnet site at Langley Point does not support an inference that Lummi customarily traveled through or fished in the Disputed Waters.

This is especially true because when faced with a similar argument from Suquamish about travel through the Disputed Waters, this Court found that:

> Geographically, [the Disputed Waters] are nearly enclosed or inland waters to the east of Whidbey Island. The southern entrance to these waters includes Possession Sound and the mouth of the Snohomish River, where the Suquamish were known to fish seasonally. The northern exits through Deception Pass and Swinomish Slough are narrow and restricted; both areas were controlled by the Swinomish at treaty times.

Upper Skagit I, 590 F.3d at 1024 n.6. In an attempt to avoid the only conclusion to be drawn from this, Lummi makes the truly befuddling and unsupported argument that Swinomish control "only confirm[s] the Lummi's passage." Br. at 20. It also suggests, without evidence, that Swinomish granted it permission to pass. *Id*. at 58. And it argues that Samish shared the area "around the Pass with Swinomish camas diggers." *Id*. But the fact that Swinomish and Samish might have shared an upland

resource near the Pass does not mean that Samish had the right to travel through the Pass, let alone control access; as this Court determined, Swinomish controlled access through the Pass.

Lummi also asserts, without evidence, that Deception Pass would have been its preferred travel route "given the shelter from the sea and weather provided by Whidbey Island." Br. at 55. Never mind the fact that this is completely inconsistent with its litigation position for the last several decades, *see* S'Klallam Brief (SK Br.) at 22-24, this argument only demonstrates the folly of making legal arguments or decisions based not on evidence, but theories about maps. It contradicts this Court's determinations that Lummi's north-south travel route was the marine highway west of Whidbey and that Swinomish controlled access through the Pass. *Lummi III*, 876 F.3d at 1009-1010; *Upper Skagit I*, 590 F.3d at 1024 n.6. And it betrays Lummi's lack of familiarity with these waters, since the Pass is one of the most dangerous waters in the State.

2. *Travel*

The second generality Lummi relies upon is the fact that it traveled widely and visited fisheries from the Fraser River south to the environs of Seattle. 4-ER-555. Lummi argues that this description "necessarily includes the [Disputed Waters]," Br. at 42, but this is nothing more than a restatement of its plain language argument.

This Court has already rejected the notion that traveling widely establishes U&A. In *Upper Skagit I*, Suquamish argued that Dr. Lane's statement that it traveled widely supported its U&A claim in two of the Disputed Waters. This Court disagreed, noting that Dr. Lane stated it was normal for Indians to travel and provided no evidence that Suquamish fished or traveled in the area claimed. *Upper Skagit I*, 590 F.3d at 1024. The same is true here.

With respect to Lummi's travel path south, Dr. Lane explained that the "Straits and Sound were traditional highways used in common by all Indians of the region…." 4-ER-554; *see also* 4-ER-585. As noted above, this refers to Haro and Rosario Straits and waters directly south, all of which are west of Whidbey. *See* 4-ER-552. This testimony was the basis for Judge Boldt's finding that Lummi utilized "the marine areas of Northern Puget Sound from the Fraser River south to the environs of Seattle." *See Boldt Decree*, 384 F.Supp. at 360 (FF 46) (citing 4-ER-551-555). It was also the basis for this Court's holdings that the marine highway was to the west of Whidbey and that Lummi has U&A there because it traveled there and "[i]mportantly, …. Dr. Lane tied travel in this corridor to fishing….." *Lummi III*, 876 F.3d. at 1010; *see also Lummi II*, 763 F.3d at 1187; *Tulalip Tribes*, 794 F.3d at 1135.[7]

[7] Lummi and the S'Klallam criticize Judge Martinez for concluding that this marine highway to the west of Whidbey was the "primary" thoroughfare. Br. at 17-19, 34; SK Br. at 15-18, 20, 30. This Court *has* determined that the primary route was west

In contrast, there is no evidence in the record that supports an inference that Lummi traveled and customarily fished east of Whidbey. "[G]eneral evidence of northward travel through Hale Passage [north of Whidbey] … is insufficient to show the Suquamish traveled or fished through [the contested waters to the northeast of Whidbey]." *Upper Skagit II*, 871 F.3d at 850 (quotation omitted). The same is true here; Lummi travel west of Whidbey is insufficient to show it traveled or customarily fished east of Whidbey. Moreover, the fact that Lummi customarily fished as far south as Edmonds is insufficient to show it customarily fished in the Disputed Waters, just as Suquamish fishing at the mouth of the Snohomish River was insufficient to show it fished in two of the Disputed Waters farther north. *See Upper Skagit I*, 590 F.3d at 1024.

Relying upon the *Lummi* trilogy of cases, Lummi suggests that U&A may be established by "geography showing [that the claimed] waters likely would have been 'a passage' through which [a tribe] would have traveled to fish…." Br. at 5. Because there is a hypothetical passage Lummi might have taken through the Disputed

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of Whidbey. *Compare Tulalip Tribes*, 794 F.3d at 1135 (Suquamish's travel path was west of Whidbey), and *Lummi III*, 876 F.3d at 1009-1010 (Lummi's travel path was west of Whidbey), *with Upper Skagit*, 590 F.3d at 1024, n.6 (east of Whidbey is nearly enclosed or inland and northern entrances were controlled by Swinomish). Regardless, even if Judge Martinez had not so concluded, it would not change the result because the critical determination was that there is no evidence of Lummi traveling, let alone customarily fishing, in the Disputed Waters. 1-ER-17-26.

Waters, Lummi urges this Court to infer Lummi customarily fished there. *See id.* at 47-56.

It should go without saying given that it has been the law of the case for a half-century, but neither geography nor a hypothetical "passage" can establish U&A in the absence of evidence of customary fishing. U&A is "every fishing location where members of a tribe *customarily fished* from time to time at and before treaty times." *Boldt Decree*, 384 F.Supp. at 332. Since even evidence of incidental trolling is insufficient to establish U&A, *id.* at 353, Lummi's argument about the Disputed Waters being a hypothetical "passage" is certainly insufficient to give rise to U&A.

This Court did not change the longstanding standard of proof requiring evidence of customary fishing to establish U&A in the *Lummi* cases. The cases did discuss geography and "likely" "passage" through various waters west of Whidbey between Lummi's northern and southern fisheries. *See, e.g., Lummi III*, 876 F.3d at 1009-1010. But they also reaffirmed the principle that "U&A cannot be established by occasional and incidental trolling in marine waters used as thoroughfares for travel," *id.* at 1007 (quotations omitted), and emphasized that Lummi had U&A along the marine highway west of Whidbey because there was *evidence* that it *customarily fished* there. *Id*. at 1010.

This Court should reject Lummi's invitation to radically change the standard of proof to require only a demonstration of hypothetical travel route, especially since

Judge Boldt considered and *rejected* Dr. Lane's expansive view that travel could establish U&As. *See supra* n. 3. There is a world of difference between this Court's determinations, based on specific evidence in the record, that Lummi traveled and fished along the entire length of the marine highway west of Whidbey between its northern and southern fisheries and the result that Lummi urges the Court to reach here. It is one thing to conclude that it is more likely than not that certain waters are U&A for a tribe when there is evidence in the record of their travel route and their fishing along the way. *See Lummi III*, 876 F.3d at 1009-1010. It is another thing entirely to conclude that it is more likely than not that certain waters are U&A for a tribe when the conclusion is not based upon evidence, but a hypothetical travel path it *might have* used. *See Daniels*, 692 F.2d at 1324.

There is *no* evidence in the record that Lummi was ever present, let alone traveling and customarily fishing, in the Disputed Waters. As explained above, every single geographic feature named by Dr. Lane or Judge Boldt, including the reefnet site on Fidalgo Island, is north or west of the Disputed Waters. Lummi argues that the relevant anchor point in its U&A finding is Seattle, Br. at 53, but Seattle also is not within the Disputed Waters. While Lummi suggests that the same evidence that supports its U&A west of Whidbey supports its claim to U&A east of Whidbey, Br. at 6, 20, this is untrue. It contradicts how this Court has interpreted the evidence, *see supra* n. 7, and ignores the fact that the evidence as to each side of Whidbey is *not*

the same. Dr. Lane described the western waters as open marine areas used as a marine highway by many tribes. 4-ER-554. In contrast, the eastern waters are nearly enclosed inland waters only accessible with permission from Swinomish or other resident groups. *See Upper Skagit I*, 590 F.3d at 1024, n.6.

The evidence or generalities offered by Lummi do not support an inference that it is more likely than not that Lummi customarily fished in the Disputed Waters at treaty time and this Court should deny its claim.

VI. LUMMI'S U&A HAS BEEN SPECIFICALLY DETERMINED.

In a fallback argument, Lummi suggests that its U&A is not "specifically determined" and it should retry its case. Br. at 59-61. Under Paragraph 25(a)(6) of the Permanent Injunction, the district court retains jurisdiction to determine "[t]he location of any of a tribe's [U&As] not specifically determined…." *U.S. v. Washington*, 18 F.Supp.3d at 1213.

There are at least three problems with Lummi's argument. First, it is not properly before the Court. Lummi did not follow required pre-filing procedures and has not properly pled the claim. *See id*. at 1213-14. As a result, it was not briefed, argued, or considered in the District Court and is raised improperly on appeal.

Second, and more importantly, the claim would fail. As this Court explained:

> Judge Boldt … "specifically determine[d]" the location of Lummi's [U&A], albeit using a description that has turned out to be ambiguous. [Paragraph 25(a)(6)] does not authorize the court to clarify the meaning of terms used in the decree or to resolve an ambiguity with

> supplemental findings which alter, amend, or enlarge upon the description in the decree.

Muckleshoot I, 141 F.3d at 1360.

Third, Lummi's claim relies on the mistaken notion that Judge Boldt limited his consideration to areas north, west, and south of Whidbey Island because his factual findings limited Lummi's U&A to those areas. But the issue before Judge Boldt, as framed and tried, was "what freshwater and saltwater areas are within each tribe's U&A?" Lummi provides no authority for the novel proposition that an issue tried should be retroactively recast based on the result, and the logical corollary of its argument is that a U&A is never specifically determined unless it is granted. This Court has already rejected that argument. *See Muckleshoot IV*, 944 F.3d at 1184-85, *cert den.*, 141 S. Ct. 663 (2020).

At trial, Lummi and the United States on its behalf presented claims and evidence as to the location of all of Lummi's freshwater and saltwater customary fisheries. Judge Boldt carefully considered those claims and entered judgment. For over four decades after trial, Lummi did not fish or attempt to fish in the Disputed Waters, demonstrating that it understood Judge Boldt did not include them within its U&A. The fact that Lummi now wants to fish the Disputed Waters does not change the fact that its U&A has been specifically determined and does not give Lummi the right to a new trial.

VII. THE S'KLALLAM LACK STANDING TO APPEAL.

The S'Klallam filed a separate appeal of Judge Martinez's order because they dislike some of his reasoning and verbiage. *See* SK Br. at 15-16, 26, 33.

This is not how appeals work. Even taking into account the many procedural quirks of this half-century old case, one would be hard pressed to tell from their notice of appeal or briefing whether the S'Klallam imagine the appellant, the appellees, or Judge Martinez himself to be the adverse party in their appeal, let alone deduce the remedy they seek. *See id*. at 26 (discussing either modifications to Judge Martinez's order or reversal).

In any event, the S'Klallam lack standing to appeal. Art. III, § 2 of the U.S. Constitution limits federal judicial power to "Cases" and "Controversies." Standing requires that a party: (1) suffer an injury in fact (2) traceable to the challenged action that (3) is likely redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact requires "an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (cleaned up). In *Spokeo, Inc. v. Robins*, the Supreme Court emphasized that concreteness is distinct from particularization and requires the injury to be "de facto; that is, it must actually exist." 578 U.S. 330, 340 (2016) (quotation omitted).

The S'Klallam appeal does not meet this standard. Contrary to its suggestions, SK Br. at 27, 29-30, the S'Klallam do not have a legally protected interest in any particular interpretation of the Stevens Treaties or the evidence before Judge Boldt. And the S'Klallam have not suffered an injury in fact that is concrete, particularized, or imminent. They claim that Judge Martinez's decision might cause them harm in the future because tribal travel might be pushed to the west of Whidbey and Lummi might be forced or compelled to concentrate its fleet there. *See id*. at 3, 18, 22, 29-30. But this is not actual or imminent concrete and particularized harm that exists and is justiciable; it is the status quo. A number of tribes, including Lummi, already exercise their rights to travel and fish on the west side of Whidbey pursuant to this Court's decisions, *see Lummi III*, 876 F.3d at 1009-1010, and this will not change even if Judge Martinez's decision were to be reversed.

Despite this, the S'Klallam offer a number of reasons they should be allowed to proceed with their appeal. They argue that they established standing when they intervened in the case, S'Klallam Br. at 26-27, but this ignores the requirement that a party demonstrate standing at each stage of litigation. *Arizona*, 520 U.S. at 64. They argue that it is customary practice for parties to this case to appeal, SK Br. at 27-29, and that they have complied with the Rules of Appellate Procedure, SK Br. at 26, but neither "customary practice" nor court rules are sufficient to meet "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560.

Our argument here does not mean that an Interested Party could never have standing to appeal (it might, if it were injured). Nor does it mean that the S'Klallam would be denied due process. *See* SK Br. at 8, 28-29. Like every other *U.S. v. Washington* party with no direct interest in the outcome of this dispute, they could have and should have filed a Real Party in Interest Brief in Lummi's appeal, rather than pursuing its own appeal. *See* Hoh Brief at 8-9.

The S'Klallam accuse others of playing fast and loose with the rules, SK Br. at 23, but that is the pot calling the kettle black. Over the last several decades, they tried valiantly to convince this Court that Lummi does not have U&A west of Whidbey. But this Court has ruled repeatedly that it does. *See, e.g., Lummi III*, 876 F.3d 1004. And no amount of S'Klallam intermeddling in this case will change that result.

CONCLUSION

Ever since the *Boldt Decree*, a tribe must present evidence of customary fishing in an area in order to establish U&A in that area. The law has *never* been that a tribe has a treaty right to fish along any hypothetical travel route it can sketch out on map, regardless whether there is evidence in the record of the tribe traveling and customarily fishing those waters at treaty time. That interpretation would contradict the plain language of the Treaty, which guarantees each tribe "[t]he right of taking

fish," but only at its respective "usual and accustomed grounds and stations." 12 Stat. 927, Art. V.

But that is exactly the interpretation of the Treaty Lummi is asking this Court to adopt. Its arguments to expand its fisheries into the Disputed Waters are not based on evidence of Lummi traveling or customarily fishing there, because there is no such evidence. Instead, its arguments are based on:

- Its desire to expand its fisheries at the expense of the Region 2E Tribes, their established fisheries, and their members' economic, cultural, and spiritual wellbeing;
- Its willingness to continue to attempt to relitigate Judge Boldt's findings of facts (and apparently again in the future if it does not win this appeal, Br. at 59-61);
- Its misreading of this Court's prior rulings, particularly *Lummi III*, 876 F.3d 1004;
- Its misleading arguments about evidence before Judge Boldt; and
- A hypothetical travel route it has traced on a route.

Radically changing the longstanding law of the case regarding the standard of proof a half-century into this litigation would not only be deeply unfair to tribes who came forward with actual evidence to support their claims, it would open the possibility to another round of U&A litigation, based not on where a tribe

customarily fished, but where it *might have* traveled or *might have* fished. This would wreak havoc not only on the dockets of this Court and the district court, but also on the parties' settled expectations, management regimes, and established treaty and non-treaty fisheries. Because this Court should not countenance a broad expansion of Lummi's treaty fishery based on its argument about what *might have happened* rather than evidence of *what was*, it should deny Lummi's claim and affirm Judge Martinez's reasonable interpretation of Judge Boldt's findings.

Date: July 15, 2022.

Swinomish Indian Tribal Community

By: s/ Emily Haley
Emily Haley, WSBA #38284
James M. Jannetta, WSBA #36525
Attorneys for the Swinomish Indian Tribal Community

STATEMENT OF RELATED CASES

The undersigned attorney states:

The following related case is pending in the Court: *Upper Skagit Indian Tribe et al. v. Sauk-Suiattle Indian Tribe*, No. 21-35985. That appeal arises out of the same underlying district court case (C70-9213-RSM), but is a separate subproceeding, 2:20-sp-0001-RSM, with distinct issues.

Date: July 15, 2022.

Swinomish Indian Tribal Community

By: s/ Emily Haley
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Attorneys for the Swinomish Indian Tribal Community

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-35812, 21-35874

I am the attorney or self-represented party.

This brief contains 13,439 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

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Signature s/Emily Haley **Date 7/15/2022**
*(use "*s/[typed name]*" to sign electronically-filed documents)*

Addendum

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In 2009, the House agreed to a resolution reported from the Committee on the Judiciary and called up as a question of the privileges of the House impeaching Federal district judge Samuel B. Kent for high crimes and misdemeanors specified in 4 articles of impeachment, some of them addressing allegations on which the judge had been convicted in a Federal criminal trial (June 19, 2009, p. __).

A resolution offered from the floor to permit the Delegate of the District of Columbia to vote on the articles of impeachment was held not to constitute a question of the privileges of the House under rule IX (Dec. 18, 1998, p. 27825). To a privileged resolution of impeachment, an amendment proposing instead censure, which is not privileged, was held not germane (Dec. 19, 1998, p. 28100).

For further discussion of impeachment proceedings, see §§ 601–620, *infra*; § 31, *supra*, and Deschler, ch. 14.

ARTICLE III.

§ 177. The judges, their terms, and compensation.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 178. Extent of the judicial power.

SECTION 2. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more

States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

§178a. Decisions of the Court on legislative standing.

Decisions of the Supreme Court involving legislative standing to bring cases in Federal court include Coleman *v.* Miller, 307 U.S. 433 (1939); Goldwater *v.* Carter, 444 U.S. 996 (1979); Allen *v.* Wright, 468 U.S. 737 (1984); Whitmore *v.* Arkansas, 495 U.S. 149 (1990); and, most recently, Raines *v.* Byrd, 521 U.S. 811 (1997), holding that Member plaintiffs must have alleged a "personal stake" in having an actual injury redressed, rather than an "institutional injury" that is "abstract and widely dispersed." See also the 11th amendment (§218, *infra*).

§179. Original and appellate jurisdiction of the Supreme Court.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

§180. Places of trial of crimes by jury.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

§181. Treason against the United States.

SECTION 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No

Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted.

§ 182. Punishment for treason.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§ 183. Each State to give credit to acts, records, etc., of other States.

SECTION 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

§ 184. Privileges and immunities of citizens.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

§ 185. Extradition for treason, felony, or other crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but

§ 186. Persons held to service or labor.

TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855 ("TREATY OF POINT ELLIOTT")

History

Enacting:

Treaty with the Dwamish, Suquamish, Etc., 1855 (1/22/1855), Ratified (3/8/1859), Proclaimed (4/11/1859).

[Ed. Note. The Treaty with the Dwamish, Suquamish, Etc., 1855 is published at 12 Stat. 927.]

TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855

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

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-she-da, the peninsula at the southeastern end of Perry's Island, called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, ad so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seb-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however,* That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner – that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

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

Isaac I. Stevens, Governor and Superintendent. [L. S.]

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

Pat-ka-nam, Chief of the Snoqualmoo, Snohomish and other tribes, his x mark. [L. S.]

Chow-its-boot, Chief of the Lummi and other tribes, his x mark. [L. S.]

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

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

S'hootst-hoot, Sub-chief of Snohomish, his x mark. [L. S.]

Snah-tale, or Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]

Squush-um, or The Smoke, Sub-chief of the Snoqualmoo, his x mark. [L. S.]

See-alla-pa-han, or The Priest,

Wats-ka-lah-tchie, or John Hobtst-hoot, Sub-chief of Snohomish, his x mark. [L. S.]

Smeh-mai-hu, Sub-chief of Skai-wha-mish, his x mark. [L. S.]

Slat-eah-ka-nam, Sub-chief of Snoqualmoo, his x mark. [L. S.]

St'hau-ai, Sub-chief of Snoqualmoo, his x mark. [L. S.]

Luge-ken, Sub-chief of Skai-wha-mish, his x mark. [L. S.]

S'heht-soolt, or Peter, Sub-chief of Snohomish, his x mark. [L. S.]

Do-queh-oo-satl, Snoqualmoo tribe, his x mark. [L. S.]

John Kanam, Snoqualmoo sub-chief, his x mark. [L. S.]

Klemsh-ka-nam, Snoqualmoo, his x mark. [L. S.]

Te'huahntl, Swa-mish sub-chief,

Sub-chief of Sk-tah-le-jum, his x mark. [L. S.]
He-uch-ka-nam, or George Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Tse-nah-talc, or Joseph Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Ns'ski-oos, or Jackson, Sub-chief of Snohomish, his x mark. [L. S.]
S'h'-chch-oos, or General Washington, Sub-chief of Lummi tribe, his x mark. [L. S.]
Whai-lan-hu, or Davy Crockett, Sub-chief of Lummi tribe, his x mark. [L. S.]
She-ah-delt-hu, Sub-chief of Lummi tribe, his x mark. [L. S.]
Kwult-sch, Sub-chief of Lummi tribe, his x mark. [L. S.]
Kleh-kent-soot, Skagit tribe, his x mark. [L. S.]
Sohn-beh-ovs, Skagit tribe, his x mark. [L. S.]
S'deb-ap-kan, or General Warren, Skagit tribe, his x mark. [L. S.]
Chul-whil-tan, Sub-chief of Suquamish tribe, his x mark. [L. S.]
Ske-ch-tum, Skagit tribe, his x mark. [L. S.]
Patchkanam, or Dome, Skagit tribe, his x mark. [L. S.]
Sate-Kanam, Squin-ah-nush tribe, his x mark. [L. S.]
Sd-zo-mahtl, Kik-ial-lus band, his x mark. [L. S.]
Dahtl-de-min, Sub-chief of Sah-ku-meh-hu, his x mark. [L. S.]
Sd'zek-du-num, Me-sek-wi-guilse Sub-chief, his x mark. [L. S.]
Now-a-chais, Sub-chief of Dwamish, his x mark. [L. S.]
Mis-lo-tohe, or Wah-hehl-tchoo, Sub-chief of Suquamish, his x mark. [L. S.]
Sloo-noksh-tan, or Jim, Suquamish tribe, his x mark. [L. S.]
Moo-whab-lad-hu, or Jack, Suquamish tribe, his x mark. [L. S.]
Too-leh-plan, Suquamish tribe, his x mark. [L. S.]
his x mark. [L. S.]
Kwuss-ka-nam, or George Snatelum, Sen., Skagit tribe, his x mark. [L. S.]
Hel-mits, or George Snatelum, Skagit sub-chief, his x mark. [L. S.]
S'kwai-kwi, Skagit tribe, sub-chief, his x mark. [L. S.]
She-lek-qu, Sub-chief Lummi Tribe, his x mark. [L. S.]
Tso-sum-ten, Lummi tribe, his x mark. [L. S.]
Klt-hahl-ten, Lummi tribe, his x mark. [L. S.]
Kut-ta-kanam, or John, Lummi tribe, his x mark. [L. S.]
Ch-lah-ben, Noo-qua-cha-mish band, his x mark. [L. S.]
Noo-heh-oos, Snoqualmoo tribe, his x mark. [L. S.]
Hweh-uk, Snoqualmoo tribe, his x mark. [L. S.]
Peh-nus, Skai-whamish tribe, his x mark. [L. S.]
Yim-ka-dam, Snoqualmoo tribe, his x mark. [L. S.]
Twooi-as-kut, Skaiwhamish tribe, his x mark. [L. S.]
Luch-al-kanam, Snoqualmoo tribe, his x mark. [L. S.]
S'hoot-kanam, Snoqualmoo tribe, his x mark. [L. S.]
Sme-a-kanam, Snoqualmoo tribe, his x mark. [L. S.]
Sad-zis-keh, Snoqualmoo, his x mark. [L. S.]
Heh-mahl, Skaiwhamish band, his x mark. [L. S.]
Charley, Skagit tribe, his x mark. [L. S.]
Sampson, Skagit tribe, his x mark. [L. S.]
John Taylor, Snohomish tribe, his x mark. [L. S.]
Hatch-kwentum, Skagit tribe, his x mark. [L. S.]
Yo-I-kum, Skagit tribe, his x mark. [L. S.]
T'kwa-ma-han, Swinamish band, his x mark [L. S.]
Sto-dum-kan, Swinamish band, his

Ha-she-doo-an, or Keo-kuck, Dwamish tribe, his x mark. [L. S.]
Hoovilt-meh-tum, Sub-chief of Suquamish, his x mark. [L. S.]
We-ai-pah, Skaiwhamish tribe, his x mark. [L. S.]
S'ah-an-hu, or Hallam, Snohomish tribe, his x mark. [L. S.]
She-hope, or General Pierce, Skagit tribe, his x mark. [L. S.]
Hwn-lab-lakq, or Thomas Jefferson, Lummi tribe, his x mark. [L. S.]
Cht-simpt, Lummi tribe, his x mark. [L. S.]
x mark. [L. S.]
Be-lole, Swinamish band, his x mark. [L. S.]
D'zo-lole-gwam-hu, Skagit tribe, his x mark. [L. S.]
Steh-shail, William, Skaiwhamish band, his x mark. [L. S.]
Kel-kahl-tsoot, Swinamish tribe, his x mark. [L. S.]
Patsen, Skagit tribe, his x mark. [L. S.]
Pat-the-us, Noo-wha-ah sub-chief, his x mark. [L. S.]
S'hoolk-ka-nam, Lummi sub-chief, his x mark. [L. S.]
Ch-lok-suts, Lummi sub-chief, his x mark. [L. S.]

Executed in the presence of us –

M.T. Simmons, Indian agent.
C. H. Mason, Secretary of Washington Territory.
Benj. F. Shaw, Interpreter.
Chas. M. Hitchcock.
H. A. Goldsborough.
George Gibbs.
John H. Scranton.
Henry D. Cock.
S. S. Ford, jr.
Orrington Cushman.
Ellis Barnes.
R. S. Bailey.
S. M. Collins.
Lafayetee Balch.
E. S. Fowler.
J. H. Hall.
Rob't Davis.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on July 15, 2022.

I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the CM/ECF system.

July 15, 2022 s/Emily Haley
Emily Haley