No. 23-35066

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner - Appellant,

v.

STATE OF WASHINGTON, ET AL.,

Respondents - Appellees.

On Appeal from the United States District Court for the
Western District of Washington at Seattle
No. 2:17-sp-00003-RSM

APPELLEES JAMESTOWN AND PORT GAMBLE S'KLALLAM TRIBES' ANSWERING BRIEF

LAUREN RASMUSSEN
LAW OFFICES OF
LAUREN P. RASMUSSEN PLLC
1215 Fourth Avenue, Ste. 1350
Seattle, WA 98161
(206) 623-0900
lauren@rasmussen-law.com

Counsel for Jamestown S'Klallam and Port Gamble S'Klallam Tribes

June 26, 2023

DISCLOSURE STATEMENT

The Secretary of the Interior recognizes the Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe (S'Klallam) as federal Indian Tribes. 88 Fed. Reg. 2112 (Jan. 12, 2023). Accordingly, Fed. R. of App. P. 26.1 does not require a corporate disclosure statement.

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INTRODUCTION

After a trial on the merits, the district court issued a decision concluding that Stillaguamish did not meet its burden of establishing U&A in the "[c]laimed Waters (including the waters of Deception Pass, Skagit Bay, Penn Cove, Saratoga Passage, Holmes Harbor, Possession Sound, and Port Susan) at and before treaty times." 1-ER 1. Typically, deference is accorded to the factfinder unless Stillaguamish can carry the burden of establishing that the findings are clearly erroneous. The S'Klallam take no position on the outcome for this part of the appeal.

The S'Klallam do take issue with the district court's application of the law of the case as it impacts all tribal parties because they are bound by every *United States v. Washington* subproceeding. Here, the district court applied one precedent but ignored another, the one more favorable to Stillaguamish. This case casts the dilemma: Stillaguamish presented evidence of traveling to certain disputed waters, arguing that potential travel alone can serve as *evidence* of historical fishing, but that case theory requires this Court to agree that the second, more recent, standard is applicable. The existence of two different standards, though, presents a panel conflict, which can only be resolved by an *en banc* Court, not by a subsequent panel or the district court.

JURISDICTIONAL STATEMENT

Federal court jurisdiction exists pursuant to 28 U.S.C. § 1331, as this case is derived from *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) *aff'd*, 520 F.2d 676 (9th Cir. 1975) (*Final Decision I*).

RESTATEMENT OF THE ISSUES

1. Whether the district court erred in its application of the law of the case, or if alternatively, there is an irreconcilable panel conflict regarding the standard for determining tribal usual and accustomed grounds and stations (U&A).

2. Whether the district court declined to consider all relevant evidence regarding tribal villages and pre- and post-treaty evidence in adjudicating Stillaguamish's U&A.

STATEMENT OF THE CASE

The S'Klallam concur with Stillaguamish's Statement of the Case.

STANDARD OF REVIEW

Under Fed. R. Civ. P. 52(a) the appellate court applies the "clearly erroneous" standard to challenges to a district court's findings of fact. As this Court has stated, "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." *See also*

Maxwell v. Sumner, 673 F.2d 1031, 1036 n.5 (9th Cir. 1982). This Court reviews the district court's application of the law of the case for abuse of discretion. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (*Lummi I*); *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991). Decisions regarding evidentiary rulings are reviewed for an abuse of discretion. *See Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016).

SUMMARY OF ARGUMENT

Over time, changes in the law of the case can disrupt expectations and, as in this case, create genuine confusion. One issue in this case is the role of travel in establishing U&A. Specifically, whether evidence of a tribe's potential for travel alone is sufficient to presume a tribe historically fished in the disputed waters, thus awarding them U&A rights. Alternatively, whether additional evidence is required to demonstrate the tribe actually fished with regularity in the claimed area.

Stillaguamish advocates for application of the *Lummi* standard when evaluating their evidence of travel, a standard that this Court has applied, which allows evidence of potential travel, without any additional evidence of fishing, to help them establish U&A in the contested waters. The remaining tribes, however, argue in favor of the original travel standard set forth by Judge Boldt, which requires a tribe to provide evidence of far more than just potential travel to

establish fishing rights. This issue has been a source of contention in *United States v. Washington* in recent years, prompting several appeals and additional subproceedings.

ARGUMENT

I. The Law of the Case on Travel

The original travel standard from Judge Boldt's *Final Decision I* has been called into question due to several decisions regarding Lummi's U&A, where this Court created what is referred to here as the *Lummi* standard. *See Lummi I*, 235 F. 3d 443; *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014) (*Lummi II*); *United States v. Lummi Nation*, 876 F.3d 1004, 1009 (9th Cir. 2017) (*Lummi III*); *Lower Elwha Klallam Indian Tribe v. Lummi Nation*, 849 F. App'x 216 (9th Cir. 2021) (*Lummi IV*); *Lower Elwha Klallam Indian Tribe, et al. v. Lummi Nation*, No. 19-35610, D.C. No. 2:11-sp-00002- RSM, at 4 (9th Cir. June 3, 2021) (Memorandum Opinion). Both travel standards address how a court should consider evidence of *potential* travel, and whether there is an evidentiary inference that a travelling tribe should be allowed U&A in the waterways they travelled.

A. Original Boldt Travel Standard

This first travel standard was set forth in *Final Decision I* of *United States v. Washington*. Judge Boldt defined "usual and accustomed" waterways as familiar and frequently used areas, excluding those used infrequently or only for extraordinary occasions. *Final Decision I*, 384 F. Supp. 312, 332, 353. In *Final*

Decision I, Judge Boldt emphasized that occasional and incidental use did not establish those marine waters as part of the transiting tribe's U&A. 384 F. Supp at 356 (Finding of Fact 14 – travel alone exclusion). Later, the test for this standard was set out in three-parts:

> (1) use of that area as a usual or regular fishing area, (2) any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe, and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty-time use of that area for fishing purposes.

United States v. Washington, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) *citing, Final Decision I*, 384 F. Supp. at 332, *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978) (*Tulalip*), *aff'd*, *United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988). For an extended period, this standard was consistently accepted and applied. *See, e.g.,* 841 F.2d at 320; *United States v. Muckleshoot Indian Tribe,* 235 F.3d 429, 434 (9th Cir. 2000) (*Muckleshoot III*) ("[i]solated or infrequent excursions" not U&A).

B. *Lummi I, II, III*, and *IV*: New Standard

In 2000, though, this Court examined the extent of Lummi's U&A, and for the first time, on appeal, created a new factual inference of U&A based on geography and potential travel. In *Lummi I*, the Court clarified the confines of Lummi's U&A, indicating that Judge Boldt's phrase, "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and

particularly Bellingham Bay," *must have meant* to include Admiralty Inlet based on a travel path. 235 F.3d at 451-53 (excluding the Strait of Juan de Fuca). This ruling referred to the disputed western waters as an area of *potential* travel but cited no actual documented travel, holding that Lummi had U&A in Admiralty Inlet because it would "likely be a passage through" that "Lummi would have travelled." *Id.* at 451. This was unique at the time because the decision was a reversal of a summary judgment motion that would typically require a remand to the factfinder; this Court, though, made an evidentiary conclusion, which opened the door to further expansions based on the rationale that passage through an area, even without proof of fishing, could be U&A. Later, in *Lummi II*, the Court considered additional waters north of Admiralty Inlet. In the decision, it indicated that "no prior decision" had yet determined whether the waters "immediately west" of northern Whidbey Island were part of the Lummi's U&A and remanded the case. 763 F.3d at 1187-88. In doing so, it noted the key issue as one of travel and reasoned that:

> [i]f to "proceed through Admiralty Inlet" rendered Admiralty Inlet a part of the Lummi U&A, then to proceed from the southern portions of the San Juan Islands to Admiralty Inlet would have the same effect: to render the path a part of the Lummi U&A, just like Admiralty Inlet.

Lummi II, 763 F.3d at 1187. Then, this Court in *Lummi III*, with a clarification by *Lummi IV*, concluded that the "path" the Lummi used to travel from "the southern portion of the San Juan Islands" to "Admiralty Inlet" should also be added as part of Lummi's U&A given the description and a concept of "general evidence," which

the Court reasoned allowed for an *inference* that Lummi fished in the disputed waters. *Lummi III*, 876 F.3d at 1009-11; *Lummi IV*, 849 F. App'x 216, 218, *cert. denied* 142 S. Ct. 1123 (2022). In the end, *Lummi I* was eroded to the extent that Lummi could now fish in a pathway *through* the Strait of Juan de Fuca. No evidence of fishing was ever found, but instead the Court made *an inference* that created a new standard, whereby potential travel was invoked as actual evidence of fishing.

This series of cases naturally affected the tribes' understanding of U&A. Formerly, "regular" and "frequent" use "for fishing purposes" was required but with the *Lummi* decisions, geographic indicators coupled with general evidence of travel was enough to create an inference that a tribe fished even in the absence of a single reference. *Compare Lummi III*, 876 F.3d at 1009 and *Lummi IV*, 849 F. App'x at 218, *with* 384 F. Supp. at 353 (FF 14), *and United States v. Washington*, 626 F. Supp. at 1531 (*frequent* travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters). Consequently, this created a conflict with the *Final Decision I* standards. This Court has thus far declined to resolve the issue *en banc*. *See, e.g.,* Order, *Lummi II*, No. 12-35936, ECF no. 69 (declining but J. Rawlinson voting for rehearing *en banc*).

C. Lummi Again: Eastside Case

As a result, Lummi began to apply this new standard in a recent dispute with the Swinomish, Tulalip, and Upper Skagit for U&A on the east side of Whidbey. *Swinomish Indian Tribal Community, et al. v. Lummi Nation*, *et al*., Nos. 21-35812, 21-35874, D.C. No. 19-1-sp-00001-RSM (9th Cir. 2022) (*Swinomish v. Lummi*) (awaiting decision). Recall, in *Lummi I*, Lummi was granted U&A in Admiralty based largely on a travel route *theory*, and after succeeding in *Lummi II* and *III*, they again used this theory to claim U&A on the *eastern side* of Whidbey Island. *See id*. The Court has yet to issue a ruling in that proceeding; however, much of oral argument was devoted to whether the standard from *Lummi I, II, III* applies or Judge Boldt's original travel exclusion.[1]

D. New Case: Sauk-Suiattle

In a recent ruling, a Ninth Circuit panel rejected another tribe's attempt to assert a travel route theory based on the *Lummi I, II,* and *III* standard. *See Upper Skagit Indian Tribe et al. v. Sauk-Suiattle Indian Tribe* et al., 66 F.4th 766 (9th Cir. 2023) ("*Sauk*"). In *Sauk*, this Court's opinion rejected the tribe's attempt to create an inference of travel and fishing based on geographic descriptors and a travel route theory. *Id*. at 773-774. There, this Court unambiguously rejected the "path of

[1] *See* Oral Argument at 5:05 et seq., *Swinomish Indian Tribal Cmty. v. Lummi Nation,* Cause No. 21-35812, (9th Cir. argued November 9, 2023), available at https://www.ca9.uscourts.gov/media/video/?20221109/21-35812/.

travel" as sufficient to establish U&A, distinguishing that case from the *Lummi* cases, and its travel standard. *Id*. In *Sauk*, the Court appears to acknowledge the significance of upholding the law of the case and the necessity of rejecting the inference of fishing from a likely path of travel. *See id*. at 773. The Court, however, did not reject the argument outright. Instead, it sought to distinguish *Sauk* from *Lummi* on the grounds that the original ruling was not ambiguous or unclear. *Id*.

E. This Case: Stillaguamish

In the present case, however, Stillaguamish presented some evidence that they travelled to certain locations, such as the mouth of the river, Fort Victoria, and were present at Penn Cove (3-ER 370-371) where Indian agent Fay was located (1-ER 7, 2-ER 47-48, 2-ER 69, 2-ER 81), arguing, in-part, that presence or visitation of an area should be sufficient to establish that they fished *en route* per *Lummi I*, *II*, and *III*. 2-ER 27-30; 3-ER-372; *see Lummi III*, 876 F.3d at 1009 (indicating that language "[i]f to "proceed through Admiralty Inlet" rendered Admiralty Inlet part of the Lummi U&A). After supplemental briefing on the issue, the district court did not even address the application of the *Lummi* standard to this evidence. 1-ER-7.

The resolution of the Stillaguamish's U&A claim does hinge on the sufficiency of evidence regarding the specific path they historically traveled. In the *Lummi* cases there was no specific evidence of travel or fishing on either side of Whidbey. If the *Lummi* standard applies here, it would follow that Stillaguamish

should not be required to present more evidence than what Lummi was required to present regarding travel, or alternatively, the *en banc* Court must decide that the *Lummi* standard is overruled. *See* Fed. R. App. P. 35(b)(1)(A) (rehearing en banc appropriate when panel decision conflicts with earlier panel decision). Recall, with the later *Lummi* cases, this Court elected not to address this issue *en banc*, which leaves the panel conflict unresolved. *See* Order, *Lummi II*, 9th Cir. No. 12-35936, ECF no. 69 (denying *en banc* with J. Rawlinson dissent); *see* Order, *Lummi III*, 9th Cir. No. 15-35661, ECF no. 67, 2018 U.S. App. LEXIS 722 (Jan. 10, 2018) (denying *en banc*).

Here, the district court's declination to address the *Lummi* standard presents difficulties in reconciling the law of the case. This Court addressed the issue directly in *Sauk*, distinguishing it from *Lummi* and reinforcing Judge Boldt's exclusion of "occasional and incidental [fishing]." 66 F.4th at 774. However, the issue remains unresolved. *See e.g.*, Stillaguamish Br. 25-26 (discussion of *Lummi* cases and the court's blind eye in regard to the precedent). Failure to make sense of the *Lummi* standard with respect to this case not only creates confusion and unsettles expectations, but it creates inconsistent results. *See, e.g., Swinomish v. Lummi*, Nos. 21-35812, 21-35874 (where the lower court found no U&A and did not apply the *Lummi* standard to a similar travel path); *Sauk*, 66 F.4th at 773 (discussion of the *Lummi* standard); Stillaguamish Br. 13-17. While the district

court here correctly indicated that "evidence of travel alone to prove U&A could readily unravel [the case]," it declined to rule on the supplemental briefing about the *Lummi* standard as well as other evidentiary questions. 1-ER 7.

Whether Stillaguamish is able to apply the *Lummi* standard is a critical question that requires *en banc* review. Stillaguamish Br. 19, 25 (noting the *Lummi* cases hold that travel alone is sufficient); *see* three-part test, *supra*, pp. 4-5 from 626 F. Supp. at 1531; *see Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987). There is clearly a conflict regarding tribal travel—actual, potential, the amount, timing, type, etc.—and the inferences drawn therefrom. Stillaguamish Br. 25; *compare, Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010) (finding that no travel *presumed no* fishing) and *Tulalip*, 626 F. Supp. at 1531 (regular and frequent treaty time use for fishing); *Muckleshoot III,* 235 F.3d 429, 434 ("the referenced documents contain no evidence indicating that such fishing occurred with regularity anywhere beyond Elliott Bay.") *with Lummi I* at 451 (Admiralty Inlet was an area that Lummi would have travelled, and therefore fished); *Lummi III*, 876 F.3d at 1009 (stating the standard is whether the Lummi fished "or" travelled). Only when tribes know which standard to apply can this Court or the district court properly evaluate the facts.

II. The District Court Incorrectly Articulated the Law of the Case Regarding the Time Period for Evaluating U&A Evidence and the Evidentiary Significance of Historical Villages

To the extent the Court declines to refer the conflict regarding the *Lummi* standard *en banc*, there are still two additional issues to resolve.[2] These changes, if made, would better articulate the law of the case concerning the time period with which a district court evaluates any U&A evidence and the evidentiary significance of historical villages. *See* 1-ER-3, 7.

First, this Court should clarify that pursuant to *Final Decision I*, Judge Boldt articulated the relevant time period for submission of U&A evidence as both "at and before" treaty times. The S'Klallam largely agree with Stillaguamish's assessment of the district court's error in this instance. Stillaguamish Br. at 19. The district court's statement in this regard implies evidence *at* treaty times is the more essential time period (1-ER-3), giving it weight, which was not what Judge Boldt said. 384 F. Supp. at 332 (articulating merely "at and before" without describing one as more significant). Making this correction is an opportunity for this Court to explicitly acknowledge that U&A evidence encompasses both pre- and post-treaty activities, where Judge Boldt's intent has always been for the factfinder to obtain a comprehensive understanding of tribal historical fishing rights.

[2] Obviously, this Court can affirm on any basis supported by the record. *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992).

Next, it appears the district court mischaracterized the importance of tribal villages, 1-ER-4-6, which Judge Boldt, and subsequent courts, have repeatedly cited as indicators of historical use and occupancy. *See, e.g., Final Decision I*, 384 F. Supp. at 353 ("fishing use rights . . . near to their winter villages."); *United States v. Washington*, 129 F. Supp. 3d 1069, 1082, 1084 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017) (relying on Quinault migrating upland from coastal villages to hunt and fish); 129 F. Supp. 3d at 1088 (Quileute village locations were located where the rivers were optimal for catching fish); *Muckleshoot III,* 235 F.3d 429, 434 (relying, in-part, on village sites upriver).

Village locations are significant, as seen in the U&A rulings regarding the Muckleshoot Tribe[3], where this Court considered whether the Tribe was primarily an upriver people, such that they had no U&A in a larger marine area. The evidence of upriver village sites was critical to this analysis—and this Court previously contrasted the 'upriver' people to those living "directly" on "the bays and lower reaches of the river." *Id.* at 434. Therefore, there is considerable

[3] Several subproceedings reviewed this issue. For example, with the Muckleshoot this Court ultimately affirmed that they were primarily an upriver people. *See, e.g.*, 19 F. Supp. 3d 1252, 1310-11 (W.D. Wash. 1997) (order issued Sept. 10, 1999, subproceeding no. 97-1), *aff'd*, *Muckleshoot III*, 235 F.3d 429 (isolated and infrequent excursions downriver do not expand U&A to that area); *Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1184 (9th Cir. 2019) (finding it lacked jurisdiction to review the issue again).

precedent that village locations are critical to U&A inquiry, and the question of downriver versus upriver use is a necessary component of that analysis when addressing a tribe that inhabited riverine areas.

III. District Court Findings Are Given Deference

Findings made by the district court should generally be accorded deference unless clearly erroneous. *See Church by Mail, Inc. v. Commissioner*, 765 F.2d 1387, 1390 (9th Cir. 1985) (factual findings binding unless clearly erroneous). If there are errors that undermine the accuracy or fairness of the decision and appropriate measures should be taken to rectify those errors. The subproceeding below, however, included a bench trial with expert testimony, presided over by Judge Martinez who has been the sole judge assigned to *U.S. v. Washington* for almost 20 years. Even with the district court's mischaracterization of the evidentiary standards (1-ER-7), the Court must carefully consider whether the factual findings were clearly erroneous.

CONCLUSION

For the reasons set forth above, this Court should refer the case *en banc* to decide which rule of law is applicable—the original Boldt standard or the *Lummi* standard regarding travel use and fishing rights. This is the Court's duty in the event of a conflict. If it chooses not to do so, the Court must still clarify the evidentiary value of village sites on fishing practices, and the importance of before and after treaty time evidence as well as apply the corrected standards to the evidence presented.

Date: June 26, 2023.

Respectfully submitted,

s/Lauren Rasmussen
LAUREN RASMUSSEN
LAW OFFICES OF
LAUREN P. RASMUSSEN PLLC
1215 Fourth Avenue, Suite 1350
Seattle, WA 98161
(206) 623-0900
lauren@rasmussen-law.com

Counsel for Jamestown S'Klallam and Port Gamble S'Klallam Tribes

STATEMENT OF RELATED CASES

Pursuant to Cir. R. 28-2.6(a) and (b) the following case arises out of the same case in the district court, *United States v. Washington*, C70-9213, and it also raises a similar issue regarding the standard to be used in U&A cases:

> *Swinomish Indian Tribal Community, et al. v. Lummi Nation*, *et al*., Nos. 21-35812, 21-35874, D.C. No. 19-1-sp-00001-RSM (9th Cir. 2022).

[FORM 8 – INSERTED HERE]

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

s/Lauren Rasmussen
Lauren Rasmussen