No. 24-5511

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner - Appellant,

v.

UPPER SKAGIT INDIAN TRIBE, ET AL.,

Respondents - Appellees.

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

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

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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. 89 Fed. Reg. 944 (Jan. 8, 2024). Accordingly, Fed. R. of App. P. 26.1 does not require a corporate disclosure statement.

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INTRODUCTION

This Court is tasked with reviewing the scope of Stillaguamish's fishing territory and its claim to saltwater usual and accustomed fishing grounds and stations (U&A). On remand the district court determined, via amended order, that Stillaguamish did not meet its evidentiary burden, and therefore has no saltwater U&A. In doing so, however, the district court mistakenly ignored the conflict in the law of the case, as it relates to the role of travel in determining the scope of a tribe's U&A. This is perplexing, given that the district court specifically asked the parties to answer questions addressing the conflict within the law of the case.[1]

The S'Klallam take issue with the district court's application of the law of the case, as it lacks consistency, which spurs further litigation, and impacts all the tribal parties. Here, the district court applied one precedent but ignored another, the one more favorable to Stillaguamish. This case casts the dilemma: Stillaguamish presented circumstantial evidence of traveling to certain disputed waters, arguing that the evidence of their potential travel alone is *evidence* of their historical fishing. Acceptance of that theory, though, requires this Court to agree that a different, more recent, evidentiary standard is applicable to this long-running case. Overall, the existence of two different standards for evaluating evidence in this

[1] 8-ER-1497 (Dkt. # 278 at 2-6).

case 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

Whether there is an irreconcilable panel conflict regarding the standard for determining tribal usual and accustomed fishing grounds and stations (U&A), and how evidence of travel plays a role in U&A determinations.

RESTATEMENT OF THE CASE

The S'Klallam take issue with the district court's application of the law of the case. The *Lummi* subproceedings, no. 11-2, form the law of the case, *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. June 3, 2021) (*Lummi IV*) (Memorandum Opinion), and established a different standard for evidence of travel: for the first time it allowed a tribe's evidence of *potential* travel, that is, evidence of where a tribe might have traversed, without evidence of *actual* travel, to establish U&A in the traversed waterways. *Id.*

STANDARD OF REVIEW

When a district court enters judgment under Fed. R. Civ. P. 52(c), "we review its findings of fact for clear error and its conclusions of law *de novo*." *United Steel Workers Loc. 12-369 v. United Steel Workers Int'l*, 728 F.3d 1107, 1114 (9th Cir. 2013). "If the district court applied the correct legal rule, we may set aside its findings of fact as clearly erroneous only if they are illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.*

SUMMARY OF ARGUMENT

Over time, changes in the law of the case can disrupt expectations and, as with this case, create genuine confusion. A significant issue in this case is the role of travel in establishing a tribe's U&A. More specifically, there is confusion about (i) whether evidence of a tribe's potential travel is enough to presume a tribe historically fished in the disputed waters, thus awarding them U&A rights, or alternatively, (ii) whether the standard requires a tribe to present more specific evidence that demonstrates the tribe actually fished with regularity in the disputed area.

Stillaguamish advocates for application of the *Lummi* standard from subproceeding no. 11-2, when evaluating their travel evidence. This Court applied a different standard in that subproceeding, thereby making it applicable to all

subsequent subproceedings; this standard allows a tribe to establish U&A in the contested waters where they have only presented evidence of potential travel, without any additional evidence of fishing therein. The remaining tribes, however, argue in favor of the original travel standard set forth by Judge Boldt, which requires a tribe to provide more than just evidence of *potential* travel to establish fishing rights. This issue has been a source of contention in *U.S. v. Washington* in recent years, prompting several appeals and additional subproceedings.

ARGUMENT

The original travel standard from Judge Boldt's *Final Decision I* was called into question in several decisions regarding Lummi's U&A, where this Court set forth the *Lummi* standard, allowing U&A based on evidence of *potential* travel or a navigational-route theory. *See Lummi I*, 235 F. 3d 443; *Lummi II*, 763 F.3d 1180; *Lummi III*, 876 F.3d 1004, 1009; *Lummi IV*, 849 F. App'x 216. Both standards address whether a court should consider evidence of a tribe's *potential* but not *actual* travel when determining U&A and whether a court should allow an evidentiary inference that a tribe fished with regularity in waterways where they might have travelled.

A. Original Boldt Travel Standard

The first travel standard was set forth in *Final Decision I* of *United States v. Washington*. There, Judge Boldt defined "usual and accustomed" waterways as a

tribe's familiar and frequently used areas, excluding those a tribe 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 of waterways did not establish those 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 "use" 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, 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; *see, e.g., United States v. Muckleshoot Indian Tribe,* 235 F.3d 429, 434 (9th Cir. 2000) (*Muckleshoot III*) ("[i]solated or infrequent excursions" are 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 factual inference 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 it being a likely travel path. 235 F.3d at 451-53 (excluding the Strait of Juan de Fuca). This ruling referred to the disputed waters—those off the west coast of Whidbey Island—as an area of *potential* travel for the Lummi, but cited no actual documented travel or fishing by the Lummi, holding that they had U&A in Admiralty Inlet because it would "likely be a passage through" where "Lummi would have travelled" to reach Seattle. *Id.* at 451. This was unique at the time because the decision was a reversal of the district court's summary judgment ruling that would typically require the Ninth to remand the case to the factfinder; the Court, though, made an evidentiary inference, which opened the door to Lummi expanding its U&A based on the rationale that passage through an area, even without proof of fishing there, could establish a tribe's U&A.

Later, in *Lummi II*, the Court considered additional waters north of Admiralty Inlet as part of Lummi's U&A. In that 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 it remanded the case. 763 F.3d at 1187-88. In doing so, the Court 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 in *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 Judge Boldt's 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 was allowed to also fish in a pathway *through* the Strait of Juan de Fuca. *Id*. No evidence of Lummi's fishing in those waters was ever found or cited to, but instead the Court made *an inference* of fishing through the disputed waterway, which created a new evidentiary standard: evidence of potential travel was invoked as actual evidence of regular fishing.

This series of cases naturally affected all the tribal parties' understanding of how U&A is established. Formerly, "regular" and "frequent" use "for fishing purposes" was required but with the *Lummi* decisions, geographic indicators, coupled with general evidence of travel or a 'nautical path' was enough to create *an inference* that a tribe fished in a particular area, even in the absence of a single evidentiary reference of such. *Compare Lummi III*, 876 F.3d at 1009 and *Lummi IV*, 849 F. App'x at 218, *with United States v. Washington*, 384 F. Supp. at 353 (FF

14), and 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 this 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 tried to apply this new standard to a dispute with the Swinomish, Tulalip, and Upper Skagit regarding its claim of U&A on the eastern side of Whidbey Island. *Swinomish Indian Tribal Cmty. v. Lummi Nation*, 80 F.4th 1056 (9th Cir. 2022) (*Swinomish v. Lummi*). Recall, in *Lummi I*, Lummi was granted U&A in Admiralty Inlet largely based 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*. But in the *Swinomish v. Lummi* subproceeding, the Court ruled that Lummi did not have U&A in the eastern waters, reasserting Judge Boldt's U&A standard and travel rule—that when a tribe has a general U&A description (i.e., "to" and "from"), it does not include all the waters in between, particularly when a tribe cites only a "thin chain of inference," which the Court found amounts to "no evidence" of historical *fishing* in the disputed area. *Id.*

at 1072. While much of oral argument[2] in that proceeding was devoted to whether the travel standard and inferences from *Lummi I, II, III* should be applied, the Court ultimately did not apply it. *Id.*

D. New Case: Sauk-Suiattle

In another recent ruling, a Ninth Circuit panel again rejected the Sauk tribe's attempt to assert a travel route theory for establishing U&A based on the *Lummi I, II,* and *III* standard. *See Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766 (9th Cir. 2023) ("*Sauk*"). In *Sauk*, this Court 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 travel" as sufficient to establish U&A, explicitly 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 under Judge Boldt's standard and reject that an inference of fishing can be established from a likely path of travel, *see id*. at 773; however, in doing so, the Court did not explicitly reject the *Lummi* travel rule, but instead distinguished *Sauk* from *Lummi* on the grounds that the Sauk's original U&A ruling was unambiguous. *Id*.

[2] *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/.

E. This Case: Stillaguamish

The district court requested the parties provide supplemental briefing, including regarding the travel route issue, but then did not squarely address it in the current or prior ruling. *See* 8-ER-1497-1499 (Dkt. # 278 at 2-6; Dkts. # 288-293, Dkts. # 295, # 298); 1-ER-2-13 (Dkt. # 333). The resolution of Stillaguamish's U&A claim requires this Court to make an explicit determination about which evidentiary standard to apply because the difference impacts their evidentiary burden. Only an *en banc* Court can, and should, decide which standard applies, rather than ignore or attempt to distinguish the issues it presents. *See* Fed. R. App. P. 35(a)(1) and (b)(1)(A) (rehearing en banc appropriate to "maintain uniformity of the court's decisions" and when a panel decision conflicts with earlier panel decision). Recall, with the *Lummi* cases, this Court elected not to address the travel 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, by declining to even address whether the *Lummi* standard applies, the district court failed to reconcile the law of the case. This Court addressed the issue directly in *Sauk*, distinguishing that case from *Lummi* and reinforcing Judge Boldt's exclusion of "occasional and incidental [fishing]." 66 F.4th at 774.

However, that has not been done here, and the conflict remains. *See, e.g.*, Stillaguamish Br. 18-20 (explaining the travel rule in the *Lummi* case holds travel is alone sufficient evidence for a U&A determination and the district court erred when it ignored this standard).

A decision one way or the other must be made. Failure to decide the validity of the *Lummi* likely "nautical path" standard not only creates confusion and unsettles expectations, but it creates inconsistent results within a singular case, *U.S. v. Washington* and is simply unfair to the tribal parties. *See, e.g., Swinomish v. Lummi*, 80 F.4th 1056, 1077 (no U&A on the eastern side and did not apply the *Lummi* "nautical path" standard); *Sauk*, 66 F.4th at 773 (discussion of the *Lummi* standard); Stillaguamish Br. 18-20. While the district court correctly recognized this issue when declaring that "evidence of travel alone to prove U&A could readily unravel [the case]," it declined to actually address the issues presented in the supplemental briefing. 1-ER-12.

Again, whether Stillaguamish can apply the *Lummi* standard is a critical question here that requires *en banc* review because it directly impacts their case. Stillaguamish Br. 12, 18-19, 30 (noting the *Lummi* cases hold that travel alone is sufficient, and providing evidence of travel); *see Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc* appropriate mechanism for resolving conflict with standards applicable to discrimination cases). There is

clearly a conflict regarding the significance of evidence of tribal travel—actual, potential, frequency, timing, type, etc. *See* Stillaguamish Br. 18-20; *compare Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010) (finding that no travel *presumed no* fishing), *Tulalip*, 626 F. Supp. at 1531 (regular and frequent treaty time use *for* fishing), and *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 452 (finding that Admiralty Inlet would likely be a passage through which the Lummi would have traveled, and therefore, it was *just as likely* part of their U&A as it was not), and *Lummi III*, 876 F.3d at 1009 (stating the standard is whether the Lummi fished "or" travelled). Given this, the failure to address the conflict and consistently apply the law of the case, is simply unjust.

The S'Klallam agree with the Stillaguamish insofar as it appears the district court mischaracterized the importance of tribal villages and their relationship to evidence of fishing. *See* Stillaguamish Br. 26 citing *United States v. Muckleshoot Indian Tribe*, 235 F.3d at 436 ("most groups claimed autumn fishing use rights in the waters near to their winter villages."). It simply defies logic to determine that a tribe could inhabit the shores of water, but not fish or engage in resource procurement that tribal members would, at treaty times, have needed to survive. Judge Boldt, and subsequent courts, have repeatedly cited such circumstantial

evidence 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 indicators of use, as seen in the U&A rulings regarding the Muckleshoot Tribe,[3] where this Court considered whether the tribe was primarily an upriver people, when it determined 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 'upriver' people to those living "directly" on "the bays and lower reaches of the river." *Id.* at 434. Therefore, there is considerable precedent that village locations are critical to U&A inquiry, and the

[3] Several subproceedings have reviewed this issue. For example, with the *Muckleshoot* cases this Court reviewed it and ultimately affirmed that the Muckleshoot 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).

question of downriver versus upriver use is a necessary component of that analysis when addressing the meaning of a tribe's inhabitance of riverine areas.

CONCLUSION

For the reasons set forth above, this Court should refer this 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. Declining to recognize or address the panel conflict creates uncertainty and additional litigation in a case that is already over fifty years old.

Date: February 20, 2025.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2025, 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.

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Lauren Rasmussen