NO. 17-35314

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nisqually Indian Tribe,
Plaintiff-Appellant,

v.

Squaxin Island Indian Tribe,
Defendant-Appellee.

Appeal from the United States District Court
for Western Washington, Seattle
Civil No. 70-9213-RSM, Subproceeding No. 14-02

Nisqually Indian Tribe's Opening Brief

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JURISDICTIONAL STATEMENT

The district court exercised its continuing jurisdiction, pursuant to 28 U.S.C. §1331, to implement the decree in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Final Decision I*"). The district court entered judgment for respondent-appellee, the Squaxin Island Indian Tribe ("Squaxin Island"), on March 10, 2017. ER 309. Petitioner-appellant the Nisqually Indian Tribe ("Nisqually") filed a timely notice of appeal on April 10, 2017. ER 310-311; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's order was final as to all disputed issues in this subproceeding. *United States v. Muckleshoot Indian Tribe*, 235 F. 3d 429, 432 n. 1 (9th Cir. 2000) ("*Muckleshoot III*").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, based upon the record and proceedings at the time of *Final Decision I*, Judge Boldt intended to include the Contested Area in Squaxin Island's usual and accustomed fishing area. The district court ruled that he did intend to include the Contested Area as part of Squaxin Island's usual and accustomed fishing area.

2. Whether, the district court erred when concluding that it would be illogical for a Tribe like Squaxin Island, composed of small autonomous bands, to have two separate usual and accustomed areas.

INTRODUCTION

The Nisqually have lived and fished since time immemorial on the waters of the Nisqually River and in Puget Sound. Their rights to fish at their usual and accustomed fishing grounds and stations ("U&A") was secured to them by the Treaty of Medicine Creek in 1854 and after decades of fighting and resisting state interference with their fishing rights, Judge Boldt recognized the Nisqually's fishing rights in 1974. Judge Boldt concluded that Nisqually's U&A included the Nisqually River, the bay of the Nisqually River, and the streams and creeks from McAllister Creek north and east to Chambers Creek and in the lakes in between and that Nisqually fished for chinook, coho, pink, chum, and steelhead salmon which are all species that return naturally to the Nisqually River. *Final Decision I*, 384 F. Supp. at 369.

The present day Squaxin Island Tribe is made up of the autonomous bands of Indians who resided on the western inlets of Puget Sound. *Id*. at 377-78. Judge Boldt also determined that "[d]uring treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye at their usual and accustomed places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets." *Id*. at 378.

Following *Final Decision I*, between 1980 and 1981, the Nisqually along with the Puyallup and Squaxin Island Tribes invoked the district

court's continuing jurisdiction to geographically expand their U&As under Paragraph 25(f) to include Carr Inlet and other marine waters south of The Narrows at Tacoma, Washington. *United States v. Washington*, 626 F. Supp. 1405, 1441-42 (W.D. Wash. 1985). Since the early 1980s the three Tribes have recognized and stayed out of each other's U&As while fishing together in their shared U&A in Carr Inlet. That was until September 7, 2011 when Squaxin Island opened a fishery at the mouth of the Nisqually River and as justification claimed that Judge Boldt had recognized Squaxin Island U&A in all marine waters south of The Narrows when he determined in 1974 that Squaxin Island's U&A included the "open Sound of Southern Puget Sound."

The area at dispute includes the waters in and around Anderson Island including the Nisqually Reach and the mouth of the Nisqually River. Specifically, the waters south and east of a line drawn from Mahnckes Point on the Kitsap Peninsula to the westernmost point of McNeil Island bordering on Pitt Passage, then extending from Hyde Point on McNeil Island to Gordon Point on the mainland, and east of a line drawn from Johnson Point to Devils Head. *United States v. Washington*, 626 F. Supp. at 1441 ("Contested Area"); ER 277. The Contested Area is entirely within the Nisqually's usual and accustomed area and are waters that Squaxin Island had not previously fished in until September 7, 2011. Squaxin Island's U&A

lies to the west of the Contested Area in the area characterized by the western inlets. ER 278.

The record before Judge Boldt contains no direct evidence of Squaxin Island regularly fishing the Contested Area, let alone all marine waters south of The Narrows. Instead the record contains one reference to Ezra Meeker's June 1853 journal entry about "several hundred [Indians] in aggregate of all ages and kind" fishing in front of the Nisqually River. Dr. Lane includes Meeker's observation in her report on the Nisqually and infers that these Indians may have included either Steilacoom, Puyallup, Duwamish, or inlet Indians because individuals from those groups could have been guests of the Nisqually based on kinship ties. The Steilacoom, Puyallup, and Duwamish Indians are from the areas north of the Nisqually River and are entirely distinct from Squaxin Island Indians.

This inference about the potential makeup of Indians fishing in front the Nisqually in June 1853, is the only evidence in the record potentially placing individual Squaxin Island Indians in the Contested Area. The actual observation does not specifically place Squaxin Island Indians in the Contested Area, instead its only Dr. Lane's subsequent inference that puts "inlet Indians" fishing in front of the Nisqually River. This inference without other evidence is not enough to show Squaxin Island's regular and customary use of the Contested Area to establish U&A. If it actually

amounted to evidence of Squaxin Island's practices it would have been included in Dr. Lane's specific report on Squaxin Island and most importantly, a fishing site at the mouth of the Nisqually River would have been included on the map of Squaxin Island fishing and village sites in her Squaxin Island report.

Critically, all evidence of Squaxin Island fishing sites are west of the Contested Area in the western inlets and open sound in close proximity to Squaxin Island village sites. Dr. Lane's description of the fish regularly caught by Squaxin Island does not include species unique to the Nisqually River that might suggest Squaxin Island fished the Contested Area and other marine waters south of The Narrows. Instead, all evidence presented in the reports place Squaxin Island fishing west of the Contested Area, in the area of the western inlets. The westerns inlets—Henderson, Budd, Eld, Totten, Hammersley, and Case—are the inlets that Judge Boldt recognized as being where the ancestors of the modern day Squaxin Island Tribe resided in Finding of Fact 140.

The evidence in the record of Squaxin Island's fishing practices and locations do not support the district court's conclusion that Judge Boldt intended to include the Contested Area in Squaxin Island's U&A. Even the most liberal interpretation of the evidence regarding Squaxin Island's U&A does not support U&A in the Contested Area but rather supports the

conclusion that Squaxin Island has two separate U&As, one west of the Contested Area and the other north and east of the Contested Area in Carr Inlet—areas where Dr. Lane actually identifies Squaxin Island fishing sites in her Squaxin Island report.

The district court impermissibly incorporated travel as a means to justify its conclusion that Judge Boldt intended to include the Contested Area as part of Squaxin Island's U&A even though there is no evidence in the record to support Squaxin Island regularly traveling through the Contested Area. There is no evidence in the record to support the district court's conclusion that the autonomous bands had any social or political connection that would necessitate travel through the Contested Area to reach one another.

A finding that Carr Inlet was included in Squaxin Island U&A by Judge Boldt does not require finding that the Contested Area is included in Squaxin Island's U&A. Instead the Court should find that Squaxin Island's U&A as determined by Judge Boldt in 1974 includes the area west of the Contested Area and the area north of the Contested Area, which encompasses the areas where the evidence places Squaxin Island village and fishing sites.

STATEMENT OF THE CASE

A. Procedural Background

On February 12, 1974, senior district court Judge George H. Boldt issued his opinion on Puget Sound treaty fishing rights. *Final Decision I*, 384 F. Supp. 312. This case concerns a continuation of one aspect of that case, the clarification of Judge Boldt's determination regarding the Squaxin Island Tribe's U&A. Judge Boldt determined each tribe's U&A by including a geographic description of the location of the fishery, the kinds of fish were caught, and the tribal practices used to catch those fish. *See generally Final Decision I*, 384 F. Supp. at 332.

Nearly forty years after Judge Boldt determined the fishing areas for Squaxin Island, Defendant-Appellee here, it sought to expand its fishing area by opening a fishery in the Contested Area. ER 284-285. The Contested Area includes waters at the mouth of the Nisqually River and the waters in and around Anderson Island including the Nisqually Reach which are within the Nisqually's homeland and also its U&A. *Final Decision I*, 384 F. Supp. at 369; *United States v. Washington*, 626 F. Supp. at 1441-42; ER 277. Nisqually objected to the Squaxin Island fishery and sought an emergency Temporary Restraining Order which it voluntarily withdrew when Squaxin Island closed the fishery in the Contested Area. ER 281-283; ER 288-290.

Nisqually then filed two separate subproceedings, 11-1 and 12-1, seeking clarification as to the geographic scope of Squaxin Island's U&A. Both subproceedings were dismissed without prejudice.

Once the procedural requirements of Paragraph 25 were satisfied Nisqually filed a Request for Determination in the district court on June 10, 2014—asking the Court to clarify that the Contested Area, was not within Squaxin Island's U&A.[1] ER 1-9. The district court denied Nisqually's Cross Motion for Summary Judgment and granted Squaxin Island's Cross Motion for Summary Judgment finding that Judge Boldt's description of Squaxin Island's U&A as "the open Sound of Southern Puget Sound" encompassed all marine waters south of The Narrows at Tacoma including the Contested Area. ER 294-308.

Nisqually filed a Notice of Appeal on April 10, 2017, as to the district court's denial of Nisqually's cross motion for summary judgment and grant of Squaxin Island's cross motion for summary judgment. ER 310-311. Nisqually requests that this Court reverse the district court's denial of the Tribe's cross motion for summary judgment and direct entry of summary judgment in favor of Nisqually.

[1] Nisqually also asserted judicial estopppel, collateral estoppel, and res judicata with respect to litigation involving Carr Inlet in 1980-1981 ("Claim II"). ER 1-9. Nisqually voluntarily dismissed Claim II with prejudice on March 9, 2017 and judgment was entered on March 10, 2017. ER 63.

In this appeal, Nisqually challenges the district court's finding that Judge Boldt intended to include all marine waters south of The Narrows, including the mouth of the Nisqually River, Nisqually Reach, the waters in and around Anderson Island, and Carr Inlet in Squaxin Island's U&A.

B. Factual Background

Relevant facts are drawn from the record of proceedings before Judge Boldt in 1974—mainly, the evidence considered by Judge Boldt and supplemental expert evidence, which sheds light on the meaning of geographic terms at the time of the decision. *Muckleshoot Indian Tribe, et al, v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*"); *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F. 3d 1099, 1100 (9th Cir. 2000) ("*Muckleshoot II*"); *Muckleshoot III,* 235 F.3d at 434.

Nisqually is political successor in interest and descendants of one or more of the treaty signatories who were parties to the Treaty of Medicine Creek. *Final Decision I*, 384 F. Supp. at 367-70. Nisqually's adjudicated U&A includes marine and freshwater areas south of The Narrows at Tacoma, including the Nisqually River and its surrounding bay, the Nisqually Reach, the waters in and around Anderson Island, and the waters of Carr Inlet. *Id.* at 367-70; *United States v. Washington*, 626 F. Supp. at 1441. Nisqually's U&A is not at issue in this case.

Squaxin Island is political successor in interest and descendants of one or more of the treaty signatories who were parties to the Treaty of Medicine Creek. *Final Decision I*, 384 F. Supp. at 377-78. The evidence before Judge Boldt regarding Squaxin Island's U&A consisted of Dr. Barbara Lane's reports *Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century,* ER 88-139, and her report on Squaxin Island, *Anthropological Report on the Identity, Treaty Status and Fisheries of the Squaxin Tribe of Indians,* ER 140-176. Dr. Lane described the ancestral makeup of the Squaxin Island as politically autonomous bands living west of the Contested Area on the southwestern inlets of Puget Sound. ER 159. The texts of the two reports do not contain any evidence of Squaxin Island fishing in the Contested Area. A map included in the Dr. Lane's Squaxin Island report on Squaxin Island shows Squaxin Island fishing sites in the southwestern inlets in close proximity to their village sites but not in the distant Contested Area. ER 174. Dr. Lane did include a village site in Carr Inlet on the map even though in the text of her report Dr. Lane could not determine with certainty where the Hotlemamish of Carr Inlet lived after the Treaty of Medicine Creek. ER 149, 174. Besides this one village site, all fishing and village sites are located west of the Contested Area. There are no fishing sites identified in the Contested Area. ER 174.

Dr. Lane concluded that Squaxin Island was composed of the descendants of the inlets from "South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley and Case Inlets." ER 159-160. Squaxin Island fishing sites included "(1) freshwaters streams and creeks draining into the various inlets; (2) shallow bays and estuaries; and (3) the inlets and the open sound," ER 157, and that its U&A included "the entire area of upper Puget Sound including all the creeks and streams draining into the head of the Sound as well as the estuaries and bays and open saltwater." ER 131.

Following *Final Decision I*, Squaxin Island defined its "exclusive management areas" as WDFW Catch Reporting Areas 13B-1 through 13B-10 which excluded the Contested Area but included Budd Inlet, Dana Passage, Henderson Inlet, Pickering Passage, Peale Passage, Hammersley Inlet, Totten Inlet, Skookum Inlet, Eld Inlet, and Upper Case Inlet. ER 252. In 1981 the Puyallup, Nisqually, and Squaxin Island Tribes all sought additional U&A in Carr Inlet invoking Paragraph 25(f) of the original injunction which allowed the parties to seek determination of "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I." *Final Decision I*, 384 F. Supp. at 429; *see also United States v. Washington*, 626 F. Supp. at 1441. The district court

recognized, based on additional evidence presented, the addition of Carr Inlet and other marine waters south of The Narrows but north of the Contested Area as part of each Tribe's U&A. *United States v. Washington*, 626 F. Supp. at 1441-1442. The area added for Squaxin Island did not include the Contested Area but did include other waters that it now claims Judge Boldt recognized as its U&A in 1974.

Since at least the 1981 decision, Squaxin Island did not fish the Contested Area until 2011 when it issued an emergency regulation opening a salmon fishery in the Nisqually Reach and at the mouth of the Nisqually River. ER 284-285. Despite Nisqually's objections, Squaxin Island opened its fishery on September 7, 2011. ER 286-287. During the fishery, Squaxin Island fishers caught 2,868 Endangered Species Act listed Nisqually River Fall Chinook salmon, 44 coho salmon, and 200 Nisqually River pink salmon from the Nisqually Reach and the mouth of the Nisqually River. ER 291-293. As justification for the fishery, Squaxin Island claimed that Judge Boldt recognized its U&A in all marine waters south of The Narrows. ER 13.

SUMMARY OF ARGUMENT

This Court has interpreted and clarified Judge Boldt's U&A findings on several occasions in the last two decades. *See Muckleshoot I*, 141 F.3d

1355; *Muckleshoot II*, 234 F.3d 1099; *Muckleshoot III,* 235 F.3d 429; *Lummi*, 235 F.3d 443; *Tulalip Tribes v. Suquamish*, 794 F.3d 1129 (9th Cir. 2015); *Upper Skagit Indian Tribe v. Suquamish Indian Tribe* 590 F.3d 1020 (9th Cir. 2010) ("*Upper Skagit I*"); *Upper Skagit v. Suquamish Indian Tribe*, No. 15-35540 (9th Cir. Sept. 22, 2017) ("*Upper Skagit II*"). The Court must interpret the U&A finding made by Judge Boldt and not modify or amend it. *Muckleshoot I*, 141 F. 3d at 1360. When tasked with interpreting a U&A description the Court must look to Judge Boldt's intent and in order to determine his intent must analyze the language of the finding and the record at the time the finding was made. *Id.* at 1359-60; *Muckleshoot II*, 234 F.3d at 1100-01; *Muckleshoot III*, 235 F.3d at 452. The Court may also consider other evidence if it sheds light on the meaning of the geographic terms at the time of the decision. *Muckleshoot I*, 141 F.3d at 1360; *Muckleshoot II*, 234 F.3d at 1100-01; *Muckleshoot III*, 235 F.3d at 452. The Court must determine "what Judge Boldt meant in precise geographic terms" by reviewing the record that was before Judge Boldt at the time of the U&A determination. *Muckleshoot I*, 141 F.3d 1359; *Muckleshoot III*, 235 F.3d at 432-33.

Here, Judge Boldt did not intend to include the Contested Area in Squaxin Island's U&A let alone all marine waters south of The Narrows. The record does not support the district court 's determination that Squaxin Island regularly fished the Contested Area, particularly at the mouth of the

Nisqually River, the Nisqually Reach, or around Anderson Island. In *Final Decision I*, Judge Boldt was precise 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." *Final Decision I*, 384 F. Supp. at 356. This Court recognized that Judge Boldt used specific geographic anchor points to describe a tribe's U&A and that "it is reasonable to infer that when [Judge Boldt] intended to include an area, it was specifically named in the U&A." *Upper Skagit I*, 590 F.3d at 1025.

In this case, there is no direct treaty time evidence of Squaxin Island fishing the Contested Area. The only link to Squaxin Island fishing the Contested Area is Dr. Lane's opinion that Squaxin Island Indians could have been among the Indians fishing in front of the Nisqually River on a day in June 1853 when Ezra Meeker reported seeing "several hundred [Indians] of all ages and kind" fishing. ER 57-59. This speculation was not included in her report on Squaxin Island but instead in her Nisqually Report, ER 36-69, and her guess was based entirely on her knowledge of who the Nisqually had kin relationships with and therefore who may have been fishing in front of the Nisqually River that day. ER 59. It is just as likely that these Indians that Meeker described were Steilacoom or upriver Nisqually, there is no definitive evidence that the Indians fishing in front of the Nisqually were Squaxin Island Indians. There is also no other evidence supporting this

inference. Dr. Lane's inference is not evidence that can support Squaxin Island's U&A in the Contested Area— it is not enough to show regular and customary fishing use of the Contested Area by Squaxin Island.

Judge Boldt's Squaxin Island U&A determination follows Dr. Lane's conclusions regarding the ancestral makeup of Squaxin Island, noting that Squaxin Island was composed primarily of the "inhabitants of all the inlets of upper Puget Sound from South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included in this area are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets." *Final Decision I*, 384 F. Supp. at 377-78. Judge Boldt then determined that the Squaxin Island fished "at their usual and accustomed fishing places in the shallow bays, estuaries and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets." *Id.* at 378. Although the phrase "open Sound of Puget Sound" can be interpreted as being quite expansive it is clear that the shallow bays, estuaries, and the open Sound of Southern Puget Sound are geographically anchored by the "freshwater streams and creeks draining into those inlets" which does not include the Contested Area—the Nisqually River or its vicinity— because the Nisqually River does not drain into an inlet, is neither a stream nor a creek, and is not specifically named or referenced anywhere by Dr. Lane or Judge Boldt with respect to Squaxin

Island. Squaxin Island's U&A description does not include any geographically specific location within the Contested Area.

STANDARD OF REVIEW

This Court reviews orders on summary judgment *de novo*. *Scheuring v. Taylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir. 2007); *Muckleshoot I*, 141 F.3d at 1357. Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court is to consider the pleadings, declarations, and exhibits to the motion. Fed. R. Civ. P. 56 (c). While facts are viewed in the light most favorable to the non-moving party, the "mere existence of a scintilla of evidence of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for. . ." that party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 255 (1986).

ARGUMENT

Judge Boldt in his original decision spent time determining the scope and meaning of "the right of taking fish, at all usual and accustomed grounds and stations" before determining the location of each tribe's U&A. *Final Decision I*, 384 F. Supp. at 331-32, 356-57. Judge Boldt concluded that the words "usual and accustomed" "were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Final Decision I*, 384 F. Supp. at 356. The words "indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id.* at 332. Judge Boldt then defined U&A as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Id.* This Court has recognized that "customarily" does not include "occasional and incidental fishing or trolling incidental to travel." *Upper Skagit I*, 590 F.3d at 1022 (quoting *Final Decision I*, 384 F. Supp. at 353) (internal quotations omitted).

In order to determine the extent of each of the tribes' U&A, Judge Boldt relied on the anthropological reports of Dr. Barbara Lane, finding them "very helpful in determining by direct evidence or reasonable inferences the probable location and extent of" U&As. *Tulalip Tribes*, 794

F.3d at 1132 (quoting *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978)); *see also Final Decision I*, 384 F. Supp. at 350. Judge Boldt used “specific geographic anchor points” when describing U&As and this Court has found that “it is reasonable to infer that when he intended to include an area, it was specifically named in the U&A.” *Upper Skagit I*, 590 F.3d at 1025.

In order to interpret Judge Boldt’s intent under Paragraph 25(a)(1) this Court has articulated a two-step analysis in the Muckleshoot line of cases. *Muckleshoot I*, 141 F.3d at 1359; *Muckleshoot II*, 234 F.3d at 1100; *Muckleshoot III*, 235 F.3d at 434.The first step requires the moving Tribe, here Nisqually, show that the U&A finding is “ambiguous, or that Judge Boldt intended something other than [the text’s] apparent meaning.” *Upper Skagit I*, 590 F.3d at 1023 (citing *Muckleshoot I*, *Muckleshoot II*, and *Muckleshoot III*). The second step, then requires the moving party show “that there was no evidence before Judge Boldt” that the Contested Area was intended to be included or excluded from the nonmoving Tribe’s U&A. *Id.*; *Tulalip Tribes*,794 F.3d at 1133. To determine Judge Boldt’s intent the Court must examine the record of the proceedings and evidence before the judge at the time of the decision. *Muckleshoot I*, 141 F.3d at 1359–60; *Muckleshoot III*, 235 F.3d at 433.

Judge Boldt determined that "[d]uring treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye at their usual and accustomed places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets." *Final Decision I,* 384 F. Supp. at 378. Squaxin Island's claim that Judge Boldt recognized its U&A in the Contested Area, as part of "open sound of Southern Puget Sound", fails for three reasons. First, the record before Judge Boldt contains no evidence that Squaxin Island regularly fished the Contested Area. Second, Judge Boldt did not use any geographic anchor points in the Contested Area to describe Squaxin Island's U&A. And finally, Squaxin Island's admissions and actions immediately following the 1974 decision show that its understanding of its U&A, as recognized by Judge Boldt, did not include the Contested Area. ER 215-269.

A. The evidence in the record before Judge Boldt does not support a finding that Squaxin Island's U&A includes the Contested Area.

Judge Boldt's intent in describing Squaxin Island's U&A as the "open Sound of Southern Puget Sound" was to limit Squaxin Island to the southern end of Puget Sound, in and around the western inlets, where the evidence places Squaxin Island's village and fishing locations. The evidence of Squaxin Island fishing sites and practices does not support the district

court's more expansive interpretation that "open Sound of Southern Puget Sound" includes all marine waters from The Narrows at Tacoma south to the western inlets, encompassing the Contested Area. The evidence of Squaxin Island's pre-treaty fishing practices supports the exclusion of the Contested Area from its U&A.

1. The phrase "open Sound of Southern Puget Sound" is ambiguous.

The district court correctly found that the phrase "open Sound of Southern Puget Sound" in Squaxin Island's U&A is ambiguous. ER 298-299. Judge Boldt described Squaxin Island's U&A as "the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets." *Final Decision I*, 384 F. Supp. at 378. This Court has found that the failure to delineate a boundary creates an ambiguity and here, Judge Boldt did not delineate the northern boundary of "Southern Puget Sound." *See Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 449 (9th Cir. 2000). The "open Sound of Southern Puget Sound" is ambiguous because it can reasonably be interpreted as all marine waters in the southern half of Puget Sound, so from Seattle south, or could mean a more discrete area at the south end of Puget Sound.

Even if this Court finds the phrase unambiguous, it is clear from the evidence before Judge Boldt that he did not intend to use the phrase to grant Squaxin Island U&A in all the marine waters south of The Narrows. The record lacks any evidence that would support Squaxin Island U&A in the Contested Area.

2. Dr. Lane's reports on the Squaxin Island Tribe do not contain evidence of Squaxin Island fishing the Contested Area and instead show that the Contested Area was excluded from Squaxin Island's U&A.

To determine each tribe's U&A Judge Boldt heavily relied on the reports of Dr. Barbara Lane. *United States v. Washington*, 2007 WL 30869 at *7 (W.D. Wash 2007). Two of Dr. Lane's reports examined Squaxin Island's pre-treaty fishing practices: *Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century,* ER 88-139, and the more specific *Anthropological Report on the Identity, Treaty Status and Fisheries of the Squaxin Island Tribe of Indians*, ER 140-176. Neither report contains any specific evidence of Squaxin Island regularly fishing the Contested Area, instead the evidence in these reports support the conclusion that the area is not included in Squaxin Island's U&A.

Dr. Lane described the treaty-time ancestors of Squaxin Island as "politically autonomous groups" living west of the Contested Area—the

Squawksin of Case Inlet, the Steh-chass of Budd Inlet, the T'Peeksin of Totten Inlet, the Squi-aitl of Eld Inlet, and the Se-heh-wamish of Hammersley Inlet. ER 160. The fishing areas of these groups included "the entire area of upper Puget Sound" and included "(1) freshwaters streams and creeks draining into the various inlets; (2) shallow bays and estuaries; and (3) the inlets and the open sound." ER 160, 157. The area of the western inlets, west of the Contested Area, encompasses all three of the geographic areas described in Squaxin Island's U&A. The streams and creeks flow into the shallow bays and estuaries at the heads of the named inlets from Henderson to Case and then flow into the open Sound which includes Dana Passage, Squaxin Passage, Pickering Passage, and Peale Passage. ER 278.

The geographic scope of Dr. Lane's "upper Puget Sound" can be gleaned from her own descriptions of the area in her reports. She notes in *Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century*, that Squaxin Island "is composed primarily of descendants of the original inhabitants of *all the inlets of upper Puget Sound* from South Bay on Henderson inlet (sic) around the head of the Sound to North Bay on Case Inlet. Included are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets." ER 129-130 (emphasis added). Dr. Lane's "upper Puget Sound" does not include the entire area south of The Narrows at Tacoma, for example,

because Carr Inlet is excluded from her description. If Dr. Lane used "upper Puget Sound" as synonymous with the entire area south of the The Narrows then Carr Inlet would have been included as one of the inlets of upper Puget Sound.

Dr. Lane places Squaxin Island fishing sites on the streams and creeks draining into the named western inlets which are connected to the open sound. Henderson, Budd, Eld, Totten, Hammersley, and Case Inlets flow into the open Sound of Dana, Pickering, Squaxin, and Peale passages and also the open waters below Case Inlet. There are no streams or creeks that flow into inlets in the Contested Area and therefore there is no open sound in the Contested Area. Dr. Lane anchors Squaxin Island U&A to the streams and creeks at the heads of the inlets where harvestable fish were returning and where Squaxin Island villages were located. ER 174.

The Nisqually River is also notably absent from Dr. Lane's Squaxin Island reports and does not fit into Squaxin Island's U&A description because it is neither a stream nor creek and does not flow into an inlet. ER 277. The Nisqually River is the main riverine feature in the area of Puget Sound south of The Narrows and would have been specifically included in either Dr. Lane's Squaxin reports or Judge Boldt's U&A description if there was evidence of Squaxin Island actually fishing it or out in front of it. In examining all Dr. Lane's reports and Judge Boldt's other U&A descriptions

it is clear that if a major river was the site of a fishing location it is either named in the U&A description or addressed in the report. Nowhere else in case area is a major river or its estuary not specifically included in either Dr. Lane's reports or Judge Boldt's U&A description and subsequently found by the district court to be included as U&A.

In *Tulalip Tribes*, this Court had to determine whether Judge Boldt intended to include the mouth of the Snohomish River, Possession Sound, Port Gardner Bay, and the bays on the west side of Whidbey Island (Admiralty Bay, Mutiny Bay, Useless Bay, and Cultus Bay) as part Suquamish's U&A which was described as " the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal." 794 F.3d 1129, 1132-33. While the mouth of the Snohomish River is not specifically mentioned in the U&A description it is discussed in Dr. Lane's Suquamish report. Unlike the Squaxin Island report, Dr. Lane specifically discusses the Suquamish traveling to larger rivers on the mainland to harvest salmon and that "[m]odern Suquamish, as well as neighboring Indians, have attested that the Suquamish traditionally fished at the mouths of the Duwamish and Snohomish Rivers as well as in the adjacent marine areas" in her Suquamish report. *Tulalip Tribes*, 794 F.3d at 1134 (quoting Dr. Lane's Suquamish

report). This Court found that the "evidence supports the district court's determination that Judge Boldt intended to include Possession Sound and Port Gardner Bay in Suquamish's U&A because salmon would swim through the marine waters before entering the Snohomish River" and that Dr. Lane's opinion regarding the Suquamish's harvest on the east side of the Sound "including at the mouths of the Duwamish and Snohomish rivers as well as adjacent marine waters" supported that conclusion. *Id.* at 1135.

Here, there is no evidence in Dr. Lane's Squaxin Island report that supports Squaxin Island fishing at the mouth of the Nisqually River. On the contrary the evidence of pre-treaty Squaxin Island fishing practices and the fish that it caught support the exclusion of the Contested Area from Squaxin Island's U&A. Dr. Lane's Squaxin Island report fails to mention Squaxin Island fishing at or near the Nisqually River and also fails to mention Squaxin Island catching fish that return exclusively to the Nisqually River in the area south of The Narrows. Dr. Lane's reports fails to mention Squaxin Island being a marine fishing tribe and instead places Squaxin Island's main fisheries in the inlets where the fish were returning in large numbers. ER 154.

With respect to Squaxin Island, Dr. Lane states that the "small creeks draining into the head of Puget Sound provided excellent spawning areas for Coho, Chinook, and Chum and the Indians were able to take prodigious

numbers when the salmon ascended the streams to spawn." ER 154. She also notes that "Coho and Chinook were available throughout the year in the Sound itself and the inlets, and the Indians took them by trolling in the saltwater." ER 154. Dr. Lane also discusses how Squaxin Island fisheries were affected very early by white settlers "in the upper Sound region" and that at the time her reports were written there were no sockeye streams in upper Puget Sound although historically there were and Squaxin Island fished for sockeye on Mason Lake and on Sherwood Creek in Case Inlet. ER 155.

Dr. Lane's reports do not to mention Squaxin Island fishing for pink salmon, steelhead, and late chum which are all species that return naturally to the Nisqually River and therefore are present in the marine waters between The Narrows and the Nisqually River. These species are discussed at length in Dr. Lane's Nisqually report. ER 53-57. The absence of the pink salmon harvest is especially noteworthy because pink salmon only return to the Nisqually River in the region south of The Narrows every two years and in large numbers. ER 56. They also return along with Coho and Summer/Fall Chinook, both species historically and currently present in the Nisqually River. More importantly, pink salmon would have been intercepted in large numbers as part of marine Chinook and Coho fisheries in the waters at the mouth of the Nisqually River and up through the marine

waters to The Narrows. This is evidenced by the Squaxin Island September 7, 2011 fishery in which Chinook, coho, and pink salmon were all caught by Squaxin Island fishers in front of the Nisqually River and in the Nisqually Reach. ER 291-293. The absence of pink salmon in Squaxin Island's report is also contrasted by Dr. Lane's Nisqually report in which she notes that the "Indians say this salmon is usually quite fat, and that as food they like it very much" and because of the high fat were not suitable for curing but were eaten fresh by the Nisqually. ER 56.

If Squaxin Island had been regularly trolling for Chinook or coho salmon during treaty times in the Contested Area, then they would have been harvesting pink salmon and it would have been an important part of their diet and a notable fishery, as it was for Nisqually. Instead, there is no mention or evidence of Squaxin Island catching pink salmon which means that Squaxin Island was not fishing in front of the Nisqually River nor in the marine waters north and east of the Nisqually River—where pink salmon would have been intercepted in large numbers on their return to the Nisqually River. The exclusion of pink salmon from Squaxin Island's fisheries supports a finding that Squaxin Island's U&A is west of the Contested Area, where pink salmon were not present.

Dr. Lane's reports also do not mention two other species of Nisqually River origin salmon which if Squaxin Island had been regularly and

customarily fishing in front of the Nisqually River they would have been catching, Nisqually River steelhead and late chum salmon. Nisqually River steelhead (known to the Nisqually as Skwowl) were eaten fresh and were also smoked by the Nisqually. ER 54. Although the steelhead populations were greatly diminished by the time Dr. Lane wrote her reports she does make the assumption "that in the 1850's when steelhead were more abundant, numbers of them were smoked in order to provide variety in the cured fish diet." ER 54. Again, notably there is no mention of steelhead in the Squaxin Island report which indicates that Squaxin Island was not regularly fishing in the marine waters where they would intercept returning Nisqually River steelhead. It is especially telling because Dr. Lane notes that steelhead can be taken by trolling in Sound or with nets on the rivers. ER 54.

Squaxin Island's fisheries also did not include Nisqually late chum which is a unique species of chum salmon that returns in December and January to the Nisqually River. The peak of the Nisqually late chum run is after December first and is the main run of salmon in the river during December, though steelhead are also present. *Final Decision I*, 384 F. Supp. at 369. If Squaxin Island had been fishing on Nisqually late chum it would have been such an anomaly among the Puget Sound Indians to be traveling to harvest salmon in winter that Dr. Lane would have surely noted it in her report. Dr. Lane does note in her report, *Political and Economic Aspects of*

Indian-White Culture Contact in Western Washington in the Mid-19th Century, that while Indians did move about based on harvest and movement patterns of returning resources, such movement did not occur during the winter season when "people remained in their permanent villages." ER 97. If people ran out of food during the winter "they used the fishing areas in closest proximity to their villages." ER 112. Squaxin Island winter villages were located at the "heads of the inlets near the mouths of salmon streams." ER 157. There is no evidence that Squaxin Island members left their villages to troll for late chum at the mouth of the Nisqually River in December and January and if there was it would have been noted by Dr. Lane.

The absence of pink salmon, steelhead, and late chum from the Squaxin Island supports the exclusion of the Contested Area from Squaxin Island's U&A. The absence of these species with respect to Squaxin Island is such a contrast to Dr. Lane and Judge Boldt's description of the salmon Nisqually regularly harvested during treaty times: "a) Tl'hwai (chum or dog salmon); b) Skowitz (coho salmon); c) Huddo (humpback salmon)[2]; d) Satsup (chinook salmon), To-walt (king or tyee salmon) were recognized as Satsup, the basis of distinction being size; e) Skwowl (steelhead)." *Final Decision I*, 384 F. Supp. at 368. If Squaxin had been regularly and

[2] *Oncorhynchus gorbuscha* commonly referred to as pink salmon. In the Nisqually language they are known as Huddo.

customarily fishing the Contested Area, these three species would have been caught and would have been a major part of Squaxin Island's diet. If Squaxin Island had been regularly harvesting by trolling in the marine waters south of The Narrows and in the Contested Area, they would have been harvesting the same exact species of salmon as the Nisqually and the evidence would reflect the harvest of pink salmon, steelhead, and late chum.

The absence of the Nisqually River and these species in Squaxin Island's reports supports the exclusion of the Contested Area from Squaxin Island's U&A. There is nothing in the record that shows or supports Squaxin Island fishing the Contested Area and therefore, the Contested Area should not be included in Squaxin Island's U&A.

3. At the time of Final Decision I, Dr. Lane did not have enough evidence to place the Hotlemamish of Carr Inlet with Squaxin Island.

Part of Squaxin Island's assertion that its U&A includes all marine waters south of The Narrows, including the Contested Area, is that the Hotlemamish of Carr Inlet moved to Squaxin Island after the Treaty of Medicine Creek. ER 33. Dr. Lane's reports do not support this conclusion. In fact, Dr. Lane was quite clear in her report on Squaxin Island that "[d]ocumentary evidence" as to whether the Hotlemamish consolidated to Squaxin Island "appears to be lacking." ER 149. Dr. Lane notes that George

Gibbs and T.T. Waterman classify them with people from the "head of the Sound" while W.W. Elmendorf "refers to them as a 'branch' of the Puyallup." ER 149. Dr. Lane goes on to the note that "[i]t is certain, however, that the peoples of Henderson, Budd, Eld, Totten, and Hammersley inlets, since 1855, have been referred to as 'Squaxin' along with the original inhabitants of North Bay on Case Inlet." ER 149.

There is no evidence that Judge Boldt ignored Dr. Lane's conclusion that the evidence at the time of *Final Decision I* was inadequate to determine where the Hotlemamish moved after the Treaty of Medicine Creek. Judge Boldt did not identify the Hotlemamish or Carr Inlet in his Squaxin Island findings, choosing instead to adopt Dr. Lane's conclusions that Squaxin Island is composed of the original inhabitants of the western inlets from Henderson to Case. *Final Decision I*, 384 F. Supp. at 377–78.

Dr. Lane did include a pinpoint on a map of Squaxin Island's U&A fishing sites at the head of Carr Inlet. ER 159. This pinpoint corresponds to T.T. Waterman's ethnographic fieldwork conducted from 1917-1920 in the region south of The Narrows. ER 159. The numbered sites located on the map in the Squaxin Island report were extracted from T.T. Waterman's report on living and fishing sites. ER 159. Dr. Lane used bold-faced circles to indicate living sites and lighter circles to indicate fishing locations. ER 159. The pinpoint on Carr Inlet is a bold-faced circle indicating a village site.

ER 174. Even if the Carr Inlet village is included among Squaxin Island villages the evidence does not show any fishing sites or locations in the Contested Area. All fishing locations are west of the Contested Area.

Dr. Lane described the pre-treaty bands as "autonomous" indicating that they had no political or social connection to one another. ER 142. Notwithstanding the lack of evidence in Dr. Lane's report as to travel between their villages or fishing sites, the district court erroneously found that "traveling to and from Carr Inlet to the southwestern inlets occupied by other Squaxin people necessitated travel through the contested waters." ER 304. There were no pre-treaty Squaxin people; the present day Squaxin Island Tribe is composed of small autonomous bands and one of those bands was the Squawksin of Case Inlet whose name was adopted for the consolidated tribe. ER 142. There is no evidence of any kind of political or cultural relationship amongst these bands that would indicate regular travel. These were simply small independent bands of people living on the southwestern inlets of Puget Sound and were not part of any larger social or political entity. There is simply no evidence in the record before Judge Boldt that supports the district court's conclusion that because of travel amongst the bands to see one another, Squaxin Island has U&A throughout the Contested Area.

Instead the district court cites to *Tulalip Tribes* as evidence of Squaxin Island travel even though in that case the issue was the Suquamish Tribe's travel in another region of Puget Sound and Dr. Lane's report specifically notes the Suquamish "traveling between Vashon and the Fraser River. . ." *Tulalip Tribes*, 794 F.3d at 1136. Unlike Suquamish, there is no evidence of Squaxin Island travel throughout all marine waters south of The Narrows, and more importantly no evidence that they fished the Contested Area. In fact, Dr. Lane notes that "deeper saltwater areas, the inlets and the open Sound, served as public thoroughfares, and as such, were utilized as fishing areas by anyone travelling through such waters." ER 158. And it has long been recognized by this Court that fishing incidental to travel does not constitute regular fishing for U&A purposes.

This Court more recently examined "general evidence" versus "specific evidence" when determining a Tribe's U&A. *Upper Skagit II*, No. 15-35540 at 11-12 (9th Cir. Sept. 22, 2017). While Dr. Lane's more general conclusion was that deeper saltwater was used for fishing by anyone traveling through there is no specific evidence that places Squaxin Island in the Contested Area. Unlike in *Tulalip Tribes*, which included specific evidence of Suquamish fishing near the mouth of the Snohomish River in Dr. Lane's Suquamish report, there is no specific evidence in the record placing Squaxin Island fishing in front of the Nisqually River.

Here, even if the Carr Inlet village did move to Squaxin Island, the record does not support the conclusion that during pre-treaty times these autonomous bands had any connection to one another or traveled between inlets. Furthermore, just because the Contested Area is adjacent to Squaxin Island's U&A does not mean Squaxin Island has U&A in the Contested Area based on general evidence of Squaxin's trolling deep saltwater areas. If the Hotlemamish are included as one of the Squaxin Island bands then it is logical for Squaxin Island to have U&A in Carr Inlet and the southwestern inlets but not in the Contested Area because there is no specific evidence of Squaxin Island fishing the Contested Area with regularity at treaty times.

Dr. Lane's map in her Squaxin Island does not show any fishing or village location within the Contested Area; all fishing locations are in the western inlets, west of the Contested Area and Dr. Lane's Squaxin Island reports do not contain any evidence of Squaxin Island fishing in the Contested Area. Even if this Court finds that the village pinpoint on Dr. Lane's map is enough to overcome the textual conclusion that Dr. Lane did not have enough evidence to decide whether or not the Hotlemamish of Carr Inlet consolidated to Squaxin Island, that village site would merely support Squaxin Island U&A in the western inlets and in Carr Inlet, not in the Contested Area.

4. Dr. Lane's inference in the Nisqually report about the possible make-up of the Indians fishing in front of the Nisqually River in 1853 is not evidence of Squaxin Island U&A in the Contested Area.

Judge Boldt was faced with the difficult task of trying to determine treaty time fishing locations for each tribe based on limited evidence of tribal fishing practices in the 1850s. Judge Boldt acknowledged that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations." *Final Decision I*, 384 F. Supp. at 354. However, the district court's reliance on Dr. Lane's inference in her Nisqually report cannot be considered evidence of Squaxin Island fishing the Contested Area at treaty times.

Dr. Lane's inference is based on a June 1853 journal entry by Ezra Meeker where he notes "several hundred [Indians] in the aggregate of all ages and kind" were fishing in front of the Nisqually River. ER 57. Ezra Meeker's description is not evidence of Squaxin Island fishing, it is his own personal observation which includes his conclusion that the Indians in front of the Nisqually River were different from one another. There is nothing in Ezra Meeker's description that would indicate that the different "kind[s]" of Indians were not upriver and downriver Nisqually, or even Nisqually and Steilacoom Indians. However, Dr. Lane, based on her knowledge of Puget Sound Indians, infers that the different "kind[s]" of Indians could have been Steilacoom, Puyallup, Duwamish, and the people from the western inlets

because of intermarriage and amicable relationships with the Nisqually. ER 59. Dr. Lane's inference is not based on actual evidence, it is based on Ezra Meeker's observation and his opinion that the Indians in front of the Nisqually were different from one another even though there is no evidence they were different Indians from the Nisqually. While the inference by Dr. Lane may be reasonable based on her knowledge of Puget Salish interrelationships, it is not specific evidence of Squaxin Island fishing the Contested Area and does not support Squaxin Island U&A in the Contested Area.

Dr. Lane notes in her Nisqually report that visitors only fished at the mouth of the Nisqually River with the permission of the Nisqually. ER 64. Even if some Squaxins were fishing in front of the Nisqually River that day in 1853, Dr. Lane concluded that such fishing occurred with the permission of the Nisqually. ER 64. The Nisqually people (the local residents and up-river Nisqually) used the fisheries on the lower reaches of the River and, occasionally, allowed visitors to fish the waters. ER 64.

Accordingly, the only non-Nisqually members that may have fished at the mouth of the Nisqually did so occasionally and with the permission of the Nisqually. And such occasional fishing, resulting from kinship ties and limited by the permission of the Nisqually, is insufficient to show the regular and customary fishing required to establish U&A. Also, the fact that some

Squaxin Island members may have fished with permission in front of the Nisqually River based on their personal relations with Nisqually does not equate to the entire Squaxin Island Tribe now having U&A rights in the Contested Area.

The fact that this evidence is not included in Squaxin Island's report clearly indicate that Dr. Lane and Judge Boldt did not include the Contested Waters in Squaxin Island's U&A. All evidence of Squaxin Island's fishing practices and locations included in Dr. Lane's Squaxin Island reports supports the exclusion of the Contested Area from its U&A and it cannot be overcome by Dr. Lane's inference that Squaxins may have been part of the larger group of Indians fishing in front of the Nisqually River based on a singular observation by Ezra Meeker in June 1853. The burden that Judge Boldt set in 1974 to establish U&A was much higher than this one inference in the Nisqually report and the district court erred by finding that it was enough to include the Contested Area within Squaxin Island's U&A. There is simply no actual evidence placing Squaxin Island in the Contested Area with enough regularity for U&A rights.

B. Judge Boldt's description of Squaxin Island U&A adopts Dr. Lane's conclusions as to Squaxin Island's U&A and did not expand her conclusions.

Judge Boldt used "Southern Puget Sound" as a way to clarify the difference between expert and lay witnesses' use of "upper Puget Sound" and "lower Puget Sound" when referring to the area of the southwestern inlets. The only difference between Dr. Lane and Judge Boldt's description of Squaxin Island's U&A is the use of the phrase "open Sound of Southern Puget Sound." Judge Boldt's description of Squaxin Island fishing the "open Sound of Southern Puget Sound" departs from Dr. Lane's description of Squaxin Island fishing in the "open Sound" of "upper Puget Sound." Since Dr. Lane identified Squaxin Island fishing the "entire area of upper Puget Sound"—an area identified by the western inlets—Judge Boldt's "Southern Puget Sound" should not be read as more expansive.

Judge Boldt's intent in using "Southern Puget Sound" may be gleaned from an exchange with one of Squaxin Island's witnesses, Calvin Peters, on September 10, 1973. In the exchange, Judge Boldt identifies a problem with the description of Squaxin Island's U&A, caused by the inconsistent use of terminology among the experts and witnesses, in a discussion about where Squaxin Island members lived.

> **The Court**: In that connection, Mr. Peters, you mention the lower Puget Sound area. Now, I always think of the area down in Olympia

> and Mud Bay and that area as being lower Puget Sound, but I notice that some cartographers and the like refer to that as the upper, rather than the lower.
>
> **The Witness**: I am like you.
>
> **The Court**: The common practice down among you people is the same. All right, we will have to be careful of that, because I notice some of the data from Dr. Riley, for example, in some of his material referred to the upper when he was referring to the area at the end of the Sound, as it were, the south end, so it may be that if that is important at any time, we bring it out.
>
> **Mr. McGimpsey**: Maybe we could refer to it as southern and northern.
>
> **The Court**: That would do it, because that hasn't changed.

ER 203.

The exchange shows that Judge Boldt's purpose in using the phrase "open Sound of Southern Puget Sound" was clarity, and it undermines the notion that he employed the language in order to grant Squaxin Island U&A in the southern half of Puget Sound where the evidence did not show Squaxin Island fishing. The departure from Dr. Lane's description was Judge Boldt's effort at demarcating the waters at the south end of Puget Sound, around Budd Inlet and Mud Bay in Eld Inlet. From this exchange it is reasonable to conclude that Judge Boldt chose "Southern Puget Sound" as a

way to resolve the linguistic differences among the experts and lay witnesses when referring to the area of the southwestern inlets.

The district court found that the exchange between Judge Boldt, Mr. McGimpsey and Squaxin Island witness Calvin Peters unpersuasive in establishing that Judge Boldt meant something other than the entire area below The Narrows when describing Squaxin Island fishing in "Southern Puget Sound." ER 304. The district court noted that the exchange was with respect to where Squaxin members lived and not to where they fished. However, the exchange does show that the Judge Boldt recognized that witnesses used "upper" and "lower" to describe the area at the south end of Puget Sound. The fact that the exchange deals with where Squaxins lived does not negate the reason that Judge Boldt decided to use "Southern Puget Sound" in Squaxin Island's U&A. It is clear that instead of using "upper" or "lower" Puget Sound, Judge Boldt decided to used "Southern Puget Sound" to describe the area of the western inlets at the south end of the Sound where Dr. Lane places Squaxin village and fishing sites. Judge Boldt did not use "Southern Puget Sound" to grant Squaxin Island U&A in all marine waters south of The Narrows, including the Contested Area, and where the evidence did not show them fishing.

Furthermore, Judge Boldt placed limitations on large marine areas with specific beginning and end points. *See e.g. Final Decision I*, 384 F.

Supp. at 360 (describing Lummi's U&A as "includ[ing] marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle); *United States v. Washington,* 459 F. Supp. 1020, 1048 (W.D. Wash. 1978) (identifying Suquamish's marine area "from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits."). Given Judge Boldt's use of geographic anchor points to delineate and limit marine U&A, it is unlikely without evidence of a vast marine fishery that Judge Boldt meant to recognize all the marine waters of Southern Puget Sound as Squaxin Island's U&A. If Judge Boldt had intended an expansive U&A for Squaxin Island, the phrase "Southern Puget Sound" would have been delineated with geographical markers so as to limit the U&A to the areas actually fished. Instead, he used "Southern Puget Sound" to recognize the limited area at the south or upper end of the Sound, west of the Contested Area, and not as a means to recognize Squaxin Island's fishing rights in an area unsupported by the evidence, that conceivably encompasses all marine waters south of Seattle.

Finally, it is unlikely that Judge Boldt, without any evidence of Squaxin Island fishing or traveling the Contested Area, intended for Squaxin Island's U&A to overlap with Nisqually's U&A, including an area where access was strictly controlled by Nisqually. *Final Decision I*, 384 F. Supp. at 368 ("Use of the lower Nisqually fisheries by non-Nisqually was with the

permission of the local people […]"). The evidence about Squaxin Island's fishing practices and the type of the fish caught clearly place its U&A west of the Contested Area. Judge Boldt's intent in describing Squaxin Island's U&A in the "open Sound of Southern Puget Sound" was to recognize the marine areas outside the named inlets at the south end of the Sound which includes Dana Passage, Peale Passage, Squaxin Passage, Pickering Passage, and the waters south of Case Inlet where Squaxin Island actually fished.

C. Even if the Carr Inlet village should be included as a Squaxin Island band, the district court's conclusion that it would be illogical for Squaxin Island to have two separate U&As is not supported by *United States v. Washington.*

The district court in its Order stated that "[s]ignificantly, traveling to and from Carr Inlet to the southwestern inlets occupied by other Squaxin people necessitated travel through the contested waters." ER 304. The district court without evidence implied travel as a way to grant Squaxin Island U&A in waters where the evidence does not establish it regularly fishing. Dr. Lane in her Squaxin Island report describes the pre-treaty Squaxin Island bands as "politically autonomous" groups living on the western inlets. ER 142. The Federal Government consolidated these groups after the Treaty of Medicine Creek. Dr. Lane's Squaxin Island report does not contain any evidence or discussion of the autonomous bands having had

any pre-treaty connection to one another. There is also no discussion of regular or even occasional travel among the Squaxin Island bands from any of the inlets to any of the other inlets.

U&A includes "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Final Decision I,* 384 F. Supp. at 332. Dr. Lane placed all of Squaxin Island's fishing and village sites west of the Contested Area with the exception of one village site in Carr Inlet. Without evidence of the people of Carr Inlet regularly fishing outside of Carr Inlet or in the Contested Area, or traveling to other villages and fishing while in transit, there is simply no evidence placing Squaxin Island in the Contested Area with enough regularity for U&A.

The district court's conclusion that it would be "illogical," ER 305, for Squaxin Island to have to separate U&As required it to imply travel, without evidence actual evidence of the pre-Treaty Squaxin Island bands traveling between Carr Inlet and the other western inlets. It also required the district court to imply that there were social or political connections among the pre-treaty Squaxin Island bands that would have necessitated travel even though the evidence does not support these conclusions. Given that the Squaxin Island bands were autonomous, having no political or social connection to

one another it is not illogical that that they would have two separate U&As. Squaxin Island's U&A should reflect the areas it actually fished and should not include the Contested Area because it lies between the western inlets and Carr Inlet. The district court's inclusion of travel between Carr Inlet and the western inlets is not supported in the evidence other than Dr. Lane's general conclusion that the Indians of Puget Sound traveled but travel alone is not sufficient to establish U&A as noted by Judge Boldt in *Final Decision I*. The Court erred when it implied travel and used it as a basis to grant Squaxin Island U&A in waters it never fished and ignored the evidence that shows that Squaxin Island did not fish the Contested Area.

D. Following the Boldt decision Squaxin Island did not fish the Contested Area.

Immediately following the issuance of the *Final Decision I* Squaxin Island declared its U&A to be the waters north and west of the Contested Area. In its 1974 Annual Treaty Regulation, it only opened Area 5 to its fishers which it defined as "all waters lying inside and northerly of a line projected from Johnson Point to Devil's Head" —the area west of the Contested Area. ER 222-223. In 1975, Squaxin Island identified the same waters west of the Contested Area as its U&A and also closed the "waters claimed as exclusive by the Nisqually Tribe. (Nisqually Reach)." ER 233.

Squaxin Island defined the Nisqually Reach as "[a]ll waters east of a line projected southwest from Treble Point (Anderson Island) through the navigation marker (southwest of Treble Point) to the mainland. And all waters south of a line running due east from Anderson across the north tip of Ketron to the mainland." ER 232, 243.

Then, in its 1976 Annual Regulation for Coho and Chum, Squaxin Island declared the Nisqually Reach (13-1) the "exclusive area of the Nisqually Tribe." ER 256. In that same regulation it recognized "13B-1 through 13B-10 [as the] exclusive management areas of the Squaxin Island Tribe […]" including Budd Inlet, Dana Passage, Henderson Inlet, Pickering Passage, Peale Passage, Hammersley Inlet, Totten Inlet, Skookum Inlet, Eld Inlet, and Upper Case Inlet.[3] ER 252. These actions show that Squaxin Island believed that Judge Boldt had limited its U&A to the waters west of the Contested Area and that its U&A did not include all marine waters south of The Narrows.

That Squaxin Island believed Judge Boldt had limited its U&A to the area west of the Contested Area is further borne out by its original 1980 request for determination, a request for additional U&A in the Contested Area

[3] A scrivener's error in the Squaxin Island 1976 Coho and Chum Regulations refers to both Budd Inlet and Nisqually Reach as Area 13B-1. However, Nisqually Reach was identified as Catch Reporting Area 13-1 not Area 13B-1. Catch Reporting Area 13-B1 was Budd Inlet.

and other marine waters south of The Narrows. ER 260-265. Squaxin Island subsequently modified its original request for determination, stating:

> The Squaxin Island Tribe hereby modifies its earlier designation to request a declaration that the usual and accustomed fishing areas for the Squaxin Island Tribe include, but are not limited to, the following:
>
> 1. Those salt waters north and west of a line drawn from Mahnckes Point on the Kitsap peninsula to the westernmost point of McNeil Island bordering on Pitt Passage, then extending from Hyde Point on McNeil Island to Gibson Point on Fox Island and then extending from Fox Point on Fox Island to Point Fosdick on the Kitsap Peninsula, generally known as the Carr Inlet/Henderson Bay/Hale Passage area, as well as the freshwater rivers and streams which drain into that area;
>
> 2. Those salt waters north and east of a line drawn from Hyde Point on McNeil Island to Gordon Point on the mainland and south of the Narrows Bridge.

ER 267.

Squaxin Island's modified request for determination reduced the area that it had originally sought and excluded Contested Area from its request. A map included in its modified request clearly shows that Squaxin Island only sought as additional U&A those waters northeast and east of the Contested Area. ER 269.

If Judge Boldt included the Contested Area within the definition of "open Sound of Southern Puget Sound" that definition would logically include all the marine waters south of The Narrows. If that were the case, then Squaxin Island would not have needed to file a request for new U&A in those waters because the area had already been adjudicated its U&A. The broad definition of "open Sound of Southern Puget Sound" cannot simultaneously include the Contested Area and exclude Hale Passage and other marine waters south of the Narrows. Squaxin Island's request for determination in 1980 was an admission that Judge Boldt had not recognized the areas east of Johnson Point as its U&A and by seeking an adjudication of its rights in those waters, Squaxin Island cannot now claim that Judge Boldt recognized its U&A in the Contested Area.

More importantly, when Squaxin Island modified its request for determination it excluded the Contested Area and, therefore, when Judge Craig finalized Squaxin Island's request the Contested Area was not included as part of its U&A. ER 271-273; *United States v. Washington*, 626 F. Supp. 1441-1442. The Contested Area has never been adjudicated the usual and accustomed area of Squaxin Island and the district court erred its inclusion.

The result of the 1980-1981 litigation was the creation of three exclusive U&As and one in-common U&A shared by Nisqually, Puyallup,

and Squaxin Island. ER 279. The Contested Area is clearly the U&A of Nisqually while the waters to the west are the U&A of Squaxin Island. The in-common area includes Carr Inlet and other marine waters south of The Narrows and the area north of The Narrows is Puyallup's U&A. For thirty years this model has proved to be a fair system, supported by the evidence of pre-treaty fishing practices, and has prevented continuous U&A battles among the three tribes over resources.

CONCLUSION

Review of the record before Judge Boldt demonstrates that he plainly did not intend to include the contested waters, particularly the mouth of the Nisqually River, the Nisqually Reach, and the waters in and around Anderson Island, in Squaxin Island's U&A. The evidence in the record of Squaxin Island's usual fishing practices at treaty time does place Squaxin Island in the Contested Area. The record demonstrates that Squaxin Island's U&A lies west of the Contested Area. Subsequent agreements and fishing practices by Nisqually, Puyallup, and Squaxin Island show that Squaxin Island understood that there were limitations placed on its U&A by Judge Boldt and that the Contested Area was not included as part of Squaxin Island's U&A.

For the foregoing reasons, the Nisqually Tribe requests that this Court reverse the district court's denial of Nisqually's cross motion for summary judgment and grant Nisqually's cross motion for summary judgment.

Respectfully Submitted this 18th day of October, 2017.

NISQUALLY INDIAN TRIBE

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CERTIFICATE OF SERVICE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 11, 277 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type of style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has prepared in a proportionally spaced typeface using Microsoft Word 2014 in 14-point Times New Roman.

Respectfully Submitted this 18th day of October, 2017.

NISQUALLY INDIAN TRIBE

____

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Nisqually Tribe states that the following cases are related to this case pending in this Court: None.

Dated this 18th day of October, 2017.

NISQUALLY INDIAN TRIBE

s/ MARYANNE E. MOHAN
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all the parties registered with the CM/ECF system for this matter.

Dated this 18th day of October, 2017.

NISQUALLY INDIAN TRIBE

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