No. 21-35985

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER SKAGIT INDIAN TRIBE,

Plaintiff-Appellee,

SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenor-Plaintiff – Appellee,

v.

SAUK-SUIATTLE INDIAN TRIBE,

Defendant – Appellant,

and

STATE OF WASHINGTON; TULALIP TRIBES; PORT GAMBLE S'KLALLAM TRIBE; JAMESTOWN S'KLALLAM TRIBE; PUYALLUP TRIBE OF INDIANS; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; HOH INDIAN TRIBE,

Real-parties-in-interest.

On Appeal from the United States District Court
for the Western District of Washington

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court properly invoked the continuing jurisdiction established by *U.S. v. Washington*, 384 F.Supp. 312, 419 (W.D. Wash. 1974), *as modified by U.S. v. Washington*, 18 F.Supp. 3d 1172, 1213 (W.D. Wash. 1993). The district court issued a final judgment in the matter, granting a dispositive motion for summary judgment. ER-4. Therefore, this Court has jurisdiction under 28 U.S.C. § 1291. The final judgment was entered on October 26, 2021 and notice of appeal was filed on November 23, 2021. ER-4; ER-151. Per Fed. R. App. P. 4(a)(1)(A), notice was timely filed.

II. STATEMENT OF THE ISSUES

The district court examined the findings of fact in *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) ("*Decision I*") to assess whether Appellant, Sauk-Suiattle, had exceeded the scope of its usual and accustomed ("U&A") fishing grounds by promulgating a regulation that authorized fishing in part of the Skagit River. ER-6-8. Finding that the Sauk-Suiattle U&A did not include the Skagit River, the district

court entered summary judgment in favor of Appellee, Upper Skagit. ER-11-17; ER-4. This appeal presents the following questions:

1. Whether the district court erred in finding Judge Boldt's description of the Sauk-Suiattle U&A unambiguous given this Court's instructions that *Decision I* is to be analyzed in its entirety and in light of the record before Judge Boldt which included evidence that: the Sauk-Suiattle had a village at the confluence of the Sauk and Skagit rivers, they fished where they lived, and the Skagit River is the natural connector between their established fishing grounds.
2. Whether the district court erroneously granted summary judgment by failing to consider the evidence before Judge Boldt that the Sauk-Suiattle lived, traveled on, and fished in the Skagit River.

III. STATEMENT OF THE CASE

The Skagit River begins its 150-mile long journey in British Columbia, winding through the Cascade mountain range before emptying into Skagit Bay on the western coast of Washington state.

Several other sizeable rivers in the region flow into the Skagit, including the Cascade, Sauk, and Baker rivers. The area where these tributaries join the Skagit River has been the traditional home and fishing grounds of the Sauk-Suiattle Indian Tribe ("Sauk-Suiattle"). *U.S. v. Washington*, 384 F.Supp. 312, 376 ¶131 (W.D. Wash. 1974) ("The usual and accustomed fishing places of the Sauk River Indians at the time of the treaty included [the] Sauk River, Cascade River [and] Suiattle River. . ."). *See also*, ER-145 ("The principal fisheries of the Sakhumehu were the headwaters of the Skagit River including the Baker River, Sauk River, and the smaller creeks which belonged to that water system.").

A. The Sauk-Suiattle traditionally lived, fished, and traveled along the Skagit River.

The Sauk-Suiattle are descendants of the Sakhumehu, who resided in the upper reaches of the Skagit river system and along its headwaters when the Treaty of Point Elliott was signed. *See generally*, *U.S. v. Washington*, 384 F.Supp. at 375-76. A Sakhumehu village was located at the confluence of the Sauk and Skagit rivers. *Id*. citing Ex. USA-58. The Sauk-Suiattle also lived "up and down" the Skagit River. ER-71. The Sauk-Suiattle covered a wide territory, travelling from

fishing sites along the Sauk and Suiattle rivers upriver to the Cascade River to fish. ER-96. From as far upriver as the Cascade, they would travel down to the coast to procure shellfish unavailable in the rivers. *Id*. There is evidence that during treaty times, the tribe traveled the waterways all the way to Skagit Bay, and that "the beaches around Tulalip were a favorite resort." *Id*.

Tribes native to western Washington typically lived near waterways which they used for travel and fishing. ER-111. This is, in part, due to the near impassibility of the dense forest and mountain ranges at the time. ER-110. By comparison, the "sea and waterways provided major advantages to Indian existence." ER-111. Travel was not unlimited, however: the Sauk-Suiattle were effectively "cut off from the coast during the winter season." ER-93. As an example of this, Sauk-Suiattle who wanted to travel to the reservations on the coast post-Treaty were stymied by the frozen rivers and had to wait for the thaw. ER-90.

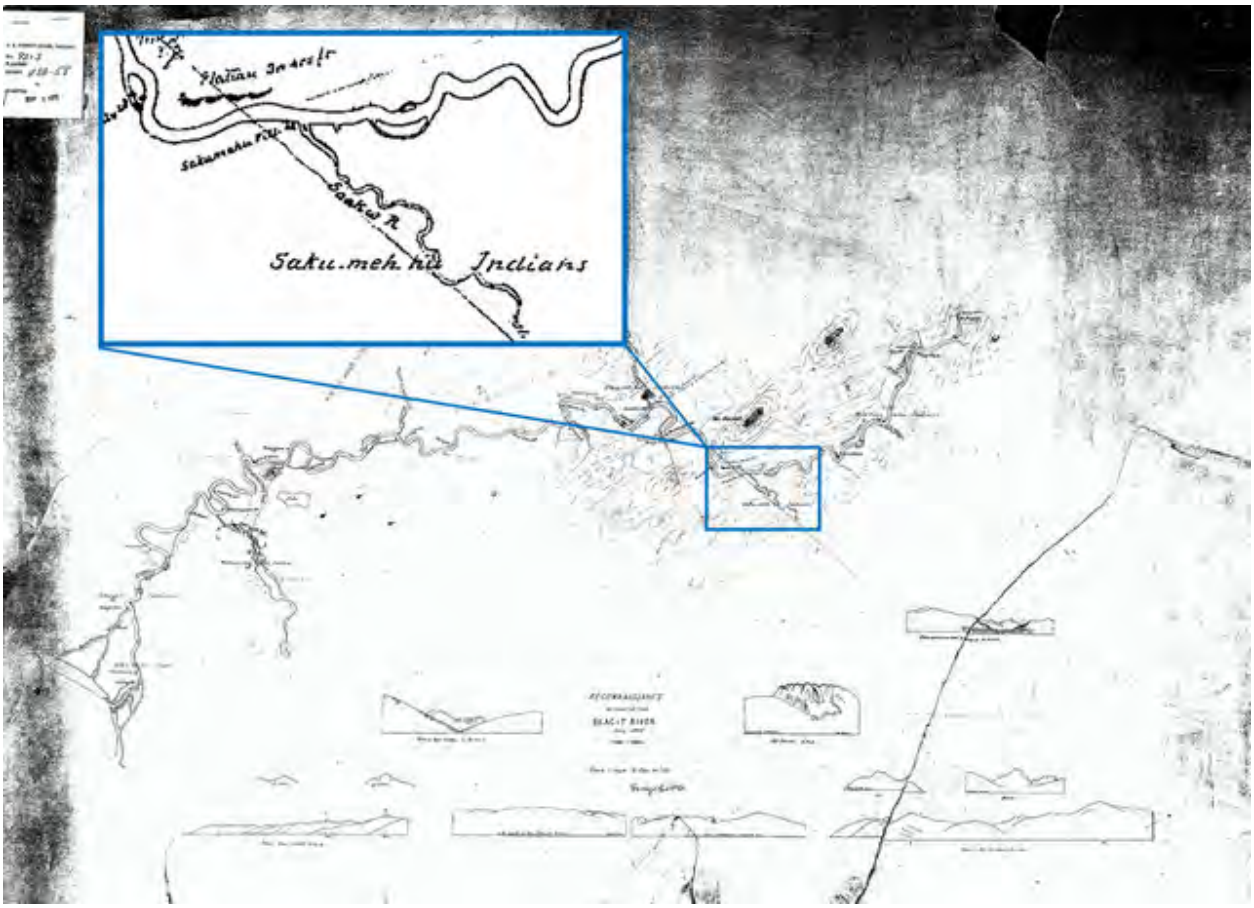
Although recognized as a separate and distinct entity from other tribes, members of the Sauk-Suiattle tribe inter-married and had extended familial relationships with the Upper Skagit and

Stillaguamish. *U.S. v. Washington*, 384 F.Supp. at 376, ¶129. ER-92. These relationships played a key part in fishing rights: "[p]eople moved about to resource areas where they had use rights based on kinship or marriage. Such rights were clear cut and important in native society. . . ." ER-115. Natives to the region would move with the salmon harvest, traveling to wherever the fish were. *See, U.S. v. Washington*, 384 F.Supp. at 352-3 ¶¶10, 13 ("Like all fishermen, they shifted to those locales which seemed most productive at any given time . . . Indian fishermen shifted to those locales which seemed most productive at any given time. . ."). Use of these productive fishing sites was based in part on familial relationships, such as the intermarriages between the tribes. *Id*. at 351 ¶4 ("People moved about to resource areas where they had use patterns based on kinship or marriage."). ER-115.

B. Judge Boldt determined the Sauk-Suiattle lived and traveled along the Skagit River when he described the tribe's U&A.

In *U.S. v. Washington,* Judge Boldt affirmed this history of the Sauk-Suiattle in the findings of fact and conclusions of law. *U.S. v. Washington*, 384 F.Supp. at 375-76. He concluded that there was a Sakhumehu village located at the confluence of the Sauk and Skagit

rivers. *Id.* ¶129. The map he cited to in support of this finding shows the village nestled between the west bank of the Sauk River and the southern bank of the Skagit River. *Id.* (citing USA-58).[1]



Judge Boldt also determined that the Sauk-Suiattle U&A contained two of the major tributaries to the Skagit River: the Sauk River and Cascade River. *Id.* ¶131. The Skagit connects these tributaries and borders the historic location of the Sakhumehu village.

[1] The image produced here is a version of USA-58 that has been enhanced for the Court's convenience to better show the area in question. The original image can be found at ER-77.

Additionally, Judge Boldt found that the Sauk-Suiattle "procured salmon and steelhead in their upriver region and also traveled to the saltwater to procure marine life unavailable in their own territory." *Id.* at 376 ¶132. Judge Boldt found that the tribe's U&A "included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River— Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground." *Id.* ¶131.

C. The Upper Skagit disputes Sauk-Suiattle's claim to fishing rights on the Skagit River.

Using its inherent authority to promulgate regulations within its territory, the Sauk-Suiattle issued fishing regulations on September 24, 2020 permitting the harvest of Coho in two areas where the Sauk-Suiattle had regularly fished prior to the Treaty:

1. Area 78P: Cascade River from confluence to just above bridge crossing Cascade River on Rockport-Cascade Road.
2. Area 78D: Skagit River from 100 yards upstream of the Cascade River Road Bridge downstream to Rocky Creek just above Illaboot Creek Complex.

ER-56. The only area contended in this proceeding is the area described in 78D. ER-26-27 ("Upper Skagit's RFD and motion for summary judgment do not concern the part of Sauk's regulation which authorized fishing in the 'Cascade River from confluence' and up the Cascade River. Rather, both address the second provision of Sauk's regulation, purporting to authorize treaty fishing 'in' the Skagit."). This area encompasses a portion of the Skagit River that runs downstream from the Cascade River, stopping well short of the Sauk River (the Illaboot Creek complex is roughly halfway between the Cascade and Sauk rivers).

On September 29, 2020 the three Skagit River tribes held a meet and confer, which was unsuccessful in reaching an agreement. ER-52. Immediately thereafter, Upper Skagit moved to open a new subproceeding under paragraph 25(b)(7) of the continuing injunction. *U.S. v. Washington*, 18 F.Supp. 3d 1172, 1215 (W.D. Wash. 1993). Upper Skagit requested a declaration that Sauk-Suiattle has no adjudicated U&A in the Skagit River and that therefore, the regulation violated Judge Boldt's decree. ER-42.

Upper Skagit filed a motion for temporary restraining order which was denied. ER-44. Upper Skagit moved for a summary judgment finding that the Sauk-Suiattle's U&A did not include any part of the Skagit River. ER-32. The district court granted Upper Skagit's motion, summarily concluding that the Sauk-Suiattle's U&A did not include the Skagit River. ER-13-17. The district court held: "the Court is left to conclude that there was no evidence of Sauk-Suiattle fishing on the Skagit River before Judge Boldt and that the only viable conclusion is that Judge Boldt intentionally omitted the Skagit River from the Sauk-Suiattle U&A." ER-17. Sauk-Suiattle now appeals.

IV. SUMMARY OF ARGUMENT

Ambiguity exists as to the scope of the Sauk-Suiattle U&A. Judge Boldt's omission of the Skagit River from a single finding of fact conflicts with several other findings made by Judge Boldt in the same section of *Decision I*, some of which include reference to the Skagit River. This contrast creates an ambiguity. While the district court did consider the record before Judge Boldt, it did so without consideration of the other relevant findings regarding the Sauk-Suiattle.

The intended scope of the Sauk-Suiattle Indian Tribe's adjudicated U&A may be confirmed and clarified by the expert reports, written testimony, and trial testimony that Judge Boldt cited with approval in his findings of fact. Examination of these materials provides evidence that the Sauk-Suiattle not only traveled on the Skagit River, but fished in the river as well. This surpasses the requirement for inclusion of the Skagit River in the Sauk-Suiattle U&A. *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133-35 (9th Cir. 2015) ("*Tulalip Tribes*").

V. STANDARD OF REVIEW

A grant or denial of summary judgment is reviewed de novo. *United States v. Washington*, 853 F.3d 946, 961–62 (9th Cir. 2017) (citation omitted). "This court must determine, viewing the evidence in the light most favorable to the appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432 (9th Cir. 2000) (citation omitted).

VI. ARGUMENT

In his landmark decision, Judge Boldt determined the rights of tribes that were parties to the Treaty of Point Elliott to take anadromous fish outside of their reservation boundaries. He found that these rights were geographically limited to a treaty tribe's "usual and accustomed places" ("U&A") where they had historically fished. *Tulalip Tribes*, 794 F.3d at 1131 (citing *U.S. v. State of Washington*, 384 F.Supp. 312, 407 (W.D. Wash. 1974)). The tribes' U&As were found to be "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. . . ." *U.S. v. Washington*, 384 F. Supp 312, 332 (W.D. Wash. 1974). Such locations were reserved to the treaty tribes and constituted areas where a given tribe had a present-day right to take fish. *Id*. *Decision I* also included a permanent injunction permitting the parties to invoke the continuing jurisdiction of the court to determine whether or not the "actions, intended or effected by any party" conformed to the decision and/or the injunction. *U.S. v. Washington*, 384 F.Supp. at 419. This process was later formalized and

clarified by the district court in a subsequent proceeding. *U.S. v. Washington*, 18 F.Supp. 3d 1172, 1213 (W.D. Wash. 1993).

A. The district court erred in its finding that Judge Boldt's determination of the Sauk-Suiattle U&A lacked ambiguity.

Upper Skagit invoked the process codified under the permanent injunction to request that the district court determine whether the Sauk-Suiattle fishing regulations were in conformance with *Decision I*. ER-63. The district court employed the two-step analysis required by the *Muckleshoot* trilogy of cases. ER-12. *See, e.g.*, *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844, 848-49 (9th Cir. 2017). This analysis begins with a determination of whether the description of the U&A in *Decision I* is ambiguous in any way. *Upper Skagit Indian Tribe*, 871 F.3d at 848-49. The second prong of the analysis requires a finding that there was *no evidence* before Judge Boldt indicating that disputed waters were included in the U&A. *Id*. at 848. The district court found the description of the U&A unambiguous. ER-17. The district court's consideration of ambiguity inexplicably overlooked some of the language in *Decision I* as well as key facts that were before Judge Boldt,

as discussed below. Therefore, the court erred in finding that the U&A was unambiguous.

1. The language used in *Decision I* gave rise to ambiguity in the description of the Sauk-Suiattle U&A.

The analysis required by the *Muckleshoot* trilogy asks a court to first examine whether "a [U&A] finding was ambiguous, or [whether] Judge Boldt intended something other than [the text's] apparent meaning." *Tulalip Tribes*, 794 F.3d at 1133 (internal quotation and citations omitted). Ascertaining ambiguity is not as simple as reviewing the language itself: courts may intend something other than the apparent meaning of the text. *U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) (citing *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998)). For this reason, facially unambiguous text is only a factor to be considered in analysis. *Id*. *See also*, *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1024 (9th Cir. 2010).

Instead, cases interpreting Judge Boldt's decision have found it imperative to consider *Decision I* as a whole when determining ambiguity. This Court has cautioned that debate over ambiguity in a

particular finding of fact is "largely misdirected" for the simple reason that analysis of the entire decision is necessary "whether the text is unambiguous or not. . . ." *Id*. The district court recognized that "a U&A may be ambiguous as to disputed waters even where the U&A's 'apparent meaning' appears determinative." ER-15 (citing *Tulalip Tribes*, 794 F.3d at 1133). However, even with this consideration in mind, the district court failed to adequately consider the language of *Decision I* in its entirety when analyzing the ambiguity of Sauk-Suiattle's U&A.

The district court focused on the description of the U&A provided by Plaintiffs, to wit: the three rivers and nine creeks listed in Finding of Fact 131 of *Decision I*. *U.S. v. Washington*, 384 F.Supp. at 376 ¶131; ER-13-14. Analyzing these four lines of text in a vacuum, the district court found that they lacked any "geographic anchors" in the Skagit River and appeared to unambiguously omit the Skagit River. ER-13-14. However, because this analysis focused on a single finding of fact alone, devoid of the context of the rest of *Decision I*, it necessarily failed to consider the references to the Skagit River that appear in the three other findings of fact concerning the Sauk-Suiattle.

Judge Boldt made a finding of fact that "a Sakhumehu village was located at the confluence of the Sauk and Skagit Rivers." *U.S. v. Washington*, 384 F.Supp. at 375-76. This finding was supported by a citation to exhibit USA-58: a map which shows a Sakhumehu village that is bordered to the north by the Skagit River and the east by the Sauk River. *Id*. ER-77. Beyond this specific finding, Judge Boldt described the historic residence of the Sauk-Suiattle as "the upper reaches of the Skagit River system." *U.S. v. Washington*, 384 F.Supp. at 375, ¶129.

The designation of the whole river "system" is pertinent in light of Dr. Lane's explanation in USA-20 that "Indian fisheries existed at all feasible places along a given drainage system from the upper reaches of the various tributary creeks and streams, down the main river system to the saltwater." ER-128-129. This analysis was incorporated into Judge Boldt's Finding of Fact 13. *U.S. v. Washington*, 384 F.Supp. at 353, ¶13. The designation of the Skagit River system is even more important given the language in Finding of Fact 132, that the Sauk-Suiattle "traveled to the saltwater to procure marine life unavailable in their own territory." *Id*. at 376, ¶132. Connecting Dr. Lane's historical

analysis with the acknowledgement by Judge Boldt of Sauk-Suiattle's travel to the saltwater, it stands to reason that the "Skagit River system" referenced in the very first line of Judge Boldt's findings on the Sauk-Suiattle includes the Skagit River itself.

Focused only on a single paragraph of *Decision I*, the district court found that the description of the Sauk-Suiattle's U&A "omits mention of the Skagit River." ER-13. Such focused analysis of a single finding of fact is "misdirected" as the entire decision must be considered. *Muckleshoot Indian Tribe*, 235 F.3d at 433 (9th Cir. 2000). Were it considered, the district court would have seen that the Skagit River is mentioned explicitly twice in the description of the Sauk-Suiattle's pre-treaty homeland. It is also implicated in the finding that Sauk-Suiattle "traveled to the saltwater" as it would have been the most natural route and means by which to travel to the coast. Failing to explicitly mention the Skagit River in Finding of Fact 131 while mentioning it elsewhere in the description of Sauk-Suiattle territory creates an ambiguity that the district court overlooked by confining its analysis to a single finding of fact.

2. The description of Sauk-Suiattle's U&A was ambiguous considering the facts before Judge Boldt.

This Court has long held that the "language of the court must be read in light of the facts before it." *Muckleshoot Indian Tribe*, 235 F.3d at 433 (citing *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927)). As has been reiterated throughout proceedings adjudicating the fishing rights delineated in *Decision I*, the evidence that was before Judge Boldt is highly relevant to determining the intent behind his language. *See, e.g.*, *Id.*; *United States v. Lummi Nation*, 876 F.3d 1004, 1009 (9th Cir. 2017) ("The better approach is to construe Judge Boldt's language in light of the available evidence."). This Court's previous examination of *Decision I* in *U.S. v. Muckleshoot Indian Tribe* is instructive. 235 F.3d at 433-34 (9th Cir. 2000). There, the Court examined whether the seemingly unambiguous descriptor "Puget Sound" was meant to encompass the whole Sound, or a more restrictive area. *Id.* at 432. The Court turned to the four documents referenced in the finding at issue. *Id.* at 434. Finding that those exhibits contained reference to Muckleshoot travel to Elliott Bay, but nowhere else in Puget Sound, the Court concluded that although Judge Boldt's

use of "Puget Sound" appeared unambiguous, in this context it was in fact restricted to "Elliott Bay." *Id*. As shown, an apparently unambiguous U&A may be found to mean something other than its plain language, and this meaning is ascertained by examining the evidence.

Judge Boldt relied heavily on the evidence produced by Dr. Barbara Lane, an anthropological consultant who studied native life in western Washington at and before the time of the Treaty of Point Elliott. Judge Boldt found that "in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence." *U.S. v. Washington*, 384 F.Supp. at 350 ¶2. These reports were accompanied by Dr. Lane's testimony, of which the court found: "nothing in Dr. Lane's report and testimony was controverted by any credible evidence. . . ." *Id*. Specifically, Judge Boldt found Dr. Lane's testimony more credible than that of Dr. Riley, another anthropologist who testified.

When asked to prepare further exhibits, Dr. Lane felt compelled to address the court and clarify the language used in her reports. She stated:

> . . .I think my words are the principal salmon fisheries include, these are not the -- the summary pages do not have a complete listing of principal fisheries. Therefore, there is perhaps a misunderstanding here, and the summaries cited only a few of the principal fisheries . . . But the principal fisheries include, in my understanding of the use – what I intended there was that these were simply a few of them, not necessarily a complete list of the principal fisheries.

ER-74. The summary paragraphs of Dr. Lane's various reports were never meant to provide exhaustive lists of tribal U&As, a fact that Judge Boldt was aware of through her testimony. The limit of this factual evidence was recognized by Judge Boldt, who found that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations." *U.S. v. Washington*, 384 F.Supp. at 353 ¶13. The findings of fact in *Decision I* must be read within the context of the limitations acknowledged by Judge Boldt.

a. Dr. Lane's Summary

The focus of the district court was on the verbatim adoption of Dr. Lane's summary of Sauk-Suiattle "principal fisheries." She opined that these "*included* Sauk River, Cascade River, Suiattle River and the

following creeks which are tributary to the Suiattle River – Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground." ER-98 (emphasis added). Judge Boldt adopted this list of principal fisheries in Finding of Fact 131 of *Decision I. U.S. v. Washington*, 384 F.Supp. at 376 ¶131. However, this adoption was made after Dr. Lane's testimony clarifying that these summaries were not exhaustive. ER-74. Further, she testified that "the reason that summary is in there is that counsel asked me when I finished each tribal report, would I please just highlight a few of the things at the end in case, considering the volume of the material, it would be convenient to refer to the summaries to recall what was in the report." Er-74. Judge Boldt was aware of these caveats when he adopted her summary.

Dr. Lane acknowledged a further issue with the Sauk-Suiattle summary: she lacked access to a critical piece of evidence when she developed it. ER-81. The map that Judge Boldt relied on to establish the location of a Sakhumehu village at the confluence of the Sauk and Skagit rivers was unavailable to Dr. Lane when she created her report

on the Sauk-Suiattle. ER-81. This map was introduced by Dr. Lane during her oral testimony. ER-80-81. When asked if the map was in any way inconsistent with her report on the Sauk-Suiattle, she responded "in no way." ER-81. She testified that it had the effect of corroborating her report, "[i]n that it precisely identifies and reports where these people were, and these people whom Gibbs called the 'Sakhumehu' lived at the confluence of the two rivers." ER-81. This precise identification was lacking from her summary report because she was unaware of it when she created the report.

b. Enick Testimony

It was with knowledge of the limits of Dr. Lane's reports and testimony that Judge Boldt included reference to the written testimony of Mr. James Enick in support of his findings in Finding of Fact 131. *U.S. v. Washington*, 384 F.Supp. at 376, ¶131. The district court rejected the possibility that this testimony was meant to expand "the scope of the fishing grounds described by Dr. Lane" and instead found that Mr. Enick's testimony merely provided "additional support for Dr. Lane's conclusions." ER-16. This reasoning overlooked the fact that

Judge Boldt specifically cited to lines of Mr. Enick's testimony that would have gone beyond the waters listed in Finding of Fact 131.

The lines of testimony cited by Judge Boldt read as follows:

> Q: What were the areas where your tribe traditionally fished?
> A: Wherever the people were, but mostly on the Sauk River, the whole river, and all the streams coming into the river, that's where the Indians fished.
> Q: Where has the Sauk-Suiattle Tribe lived?
> A: Up and down the Skagit River and the Sauk River mostly.

ER-71. Given Judge Boldt's understanding, from hearing her testify, that Dr. Lane's report summaries were limited in scope; it stands to reason that this portion of Mr. Enick's testimony was cited in acknowledgment that the Skagit River was included in Sauk-Suiattle's U&A. If it were merely meant to confirm Dr. Lane's testimony, then there would be no need to include the second question and answer, which deviate from the waters cited in Finding of Fact 131. At the very least, citation to these lines of Mr. Enick's testimony shows a possible intent to include the Skagit River in the Sauk-Suiattle U&A, and therefore creates an ambiguity in any description that does not include the Skagit River.

Taken together, this evidence paints a different picture than the one portrayed to the district court. Dr. Lane testified that her summaries were not complete or exhaustive and were prepared to aid counsel in the quick review of lengthy materials. ER-74. Further, her summary of Sauk-Suiattle fishing grounds could not have been exhaustive as she unearthed evidence after drafting it that there was a Sakhumehu village at the confluence of the Sauk and Skagit rivers. ER-80-81. This, in turn, supports Mr. Enick's testimony that the Sauk-Suiattle lived up and down the Skagit River and fished where they lived. ER-71. Dr. Lane's summary report and Mr. Enick's testimony were specifically cited as support for the U&A description in Finding of Fact 131 and the location of the Sakhumehu village was adopted two paragraphs earlier in Finding of Fact 129. *U.S. v. Washington*, 384 F.Supp. at 375-75 ¶¶129, 131. Thus, the omission of the Skagit River from Finding of Fact 131 creates an ambiguity.

3. The district court overlooked an inherent ambiguity that exists because of the implication that Sauk-Suiattle traveled on the Skagit River.

When dealing with a U&A that may appear ambiguous due to an omission of a certain waterway or marine area, this Court has looked to

other "geographic indicators" to determine the intent behind the language. *Lummi Nation*, 876 F.3d at 1009. In so doing, this Court has repeatedly found instances where the language of *Decision I* was ambiguous and marine areas omitted from various tribes' U&As were in fact intended to be included. For example, in *U.S. v. Lummi Indian Tribe*, this Court found that "geographically. . .Admiralty Inlet was intended to be included within the [U&A]" despite Admiralty Inlet not being mentioned anywhere in *Decision I*, much less in the description of the Lummi U&A. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). This reasoning was based largely on an assessment of the presumed travel routes of tribe members between other named locations within their U&A. *Id*.

Similarly, there were three geographic indicators in the description of the Sauk-Suiattle U&A that would have raised ambiguity in any version of the U&A that omitted the Skagit River. First, Finding of Fact 131 lists two major rivers that are both connected by the Skagit: the Sauk and the Cascade. *U.S. v. Washington*, 384 F.Supp at 376, ¶131. This is ambiguous in that it omits the most likely path of travel between the Cascade and Sauk rivers: the Skagit River. Second, as

Judge Boldt acknowledged, there was a Sauk-Suiattle village at the confluence of the Sauk and Skagit rivers. *Id*. at 375-76, ¶129. If the location of village at the confluence of the Sauk and Skagit rivers lends support for the use of the Sauk river, surely it lends equal support for use of the Skagit.

Lastly, the district court failed to consider Finding of Fact 132 that the tribe "traveled to the saltwater in order to procure marine life unavailable in their own territory." *Id*. at 376, ¶132. This was based on a nearly identical finding by Dr. Lane in USA-29 that ". . .the Sauk people travelled to the saltwater to procure marine life, particularly shellfish, unavailable in their own territory. At least in historic times, the beaches around Tulalip were a favorite resort." ER-96. The "beaches around Tulalip" lie on the west coast of Washington, south of where the southern fork of the Skagit River empties into Skagit Bay. At the very least this creates ambiguity by raising the question of how the Sauk-Suiattle would travel to this area, given that none of the rivers or creeks listed in Finding of Fact 131 connect to the saltwater. Any one of the three geographic indicators that indicated possible travel on the Skagit should have been enough render *Decision I* ambiguous as it relates to

the Sauk-Suiattle. Taken together, the three provide ample evidence of ambiguity in any description of the U&A that omits the Skagit River.

B. The evidence before Judge Boldt indicated that the Skagit River was part of the Sauk-Suiattle's U&A and therefore it was Judge Boldt's intent to include the Skagit River in the tribe's U&A.

Based on the *Muckleshoot* trilogy of cases, the district court first considers whether there is any ambiguity in the language of the decree; second, the court evaluates the evidence before Judge Boldt to determine what his intent was in wording his opinion. *Upper Skagit Indian Tribe*, 871 F.3d at 848-49. In order to exclude disputed waters from a tribe's U&A, the court must find that there was *no evidence* before Judge Boldt supporting inclusion. *Tulalip Tribes*, 794 F.3d at 1135. Therefore, the burden was on Upper Skagit to show that there was no evidence before Judge Boldt that Sauk-Suiattle fished in or traveled on the Skagit River in order for the district court to exclude it from the Sauk-Suiattle U&A. *Id*. at 1133 ("[T]he moving party bears the burden of showing that there was no evidence before Judge Boldt that would indicate that the contested area was included or excluded in the U&A of the nonmoving tribe.") (internal quotation omitted)). Upper

Skagit failed to meet this burden as there is evidence to show the Sauk-Suiattle both traveled on and fished in the Skagit River.

1. There was sufficient evidence before Judge Boldt that the Sauk-Suiattle traveled on the Skagit River.

The district court erred in finding that there was "no evidence of Sauk-Suiattle fishing on the Skagit River before Judge Boldt." ER-17. To avoid error, such a finding must be absolute: this Circuit has long held that even some evidence that a tribe fished or traveled on disputed waters could merit their inclusion in the tribe's U&A. *See, e.g.*, *Tulalip Tribes*, 794 F.3d at 1135 ("This general evidence, too, constitutes some evidence before Judge Boldt and supports the district court's determination that Judge Boldt did not intend to exclude these contested bay areas from Suquamish's U&A.")).

In *Tulalip Tribes*, the Court looked to evidence presented by Dr. Lane (both written and oral testimony) to determine whether there was anything to indicate that the Suquamish traveled to contested waters to fish. *Id.* Finding some evidence that the tribe fished in the contested waters, the Court buttressed this finding with evidence that the tribe also would have "passed through" the contested waters and "likely

would have fished there while traveling." *Id.* The Court noted that "this general evidence, too, constitutes *some evidence* before Judge Boldt. . . ." *Id.* (emphasis added). Thus, the Court seemed to be indicating that a minimal showing of evidence would satisfy the requirement for inclusion. A footnote in a subsequent decision, *Lummi Nation,* showed this was exactly what the Court meant. *Lummi Nation*, 876 F.3d at 1010, n.2. There, the Court wrote "*Tulalip Tribes* appears to indicate that the general evidence of travel was 'some evidence' that was sufficient to satisfy the necessary standard." *Id.*

In ascertaining whether some evidence of travel exists, the Court has often returned to the use of geographic indicators to endpoint likely routes of travel. This evidence can be persuasive even in the absence of other evidence entirely. For instance, the waters of Admiralty Inlet are not mentioned anywhere in Judge Boldt's decree. However, in 2000, the Court found he must have intended to include the inlet in the Lummi U&A since it "would likely be a passage through which the Lummi would have traveled. . . ." *Lummi Indian Tribe*, 235 F.3d at 452 ("*Lummi I*"). Tracing a route from "the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station) past the

Orcas and San Juan Islands (also Lummi usual and accustomed fishing grounds and stations)" the Court found that it would have been "natural to proceed through Admiralty Inlet." *Id.* (cleaned up). By tracing this likely route between two established areas of a U&A, the Court found sufficient grounds to include Admiralty Inlet in the U&A despite the absence of any other evidence.

The Court relied on identical reasoning to later include disputed waters in the Lummi U&A. Finding that the path the Court traced in *Lummi I* would also cut through the waters west of Whidbey Island, this Court determined that these were intended by Judge Boldt to be included in the Lummi's U&A. *Lummi Nation*, 876 F.3d at 1009-10. In so finding, the Court rejected the "most persuasive" argument against such reasoning: that "travel cannot by itself establish U&As." *Id.* at 1010. As Judge Boldt had recognized, "occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id.* (citing *U.S. v. Washington*, 384 F.Supp. at 353, ¶14). However, the Court clarified that "to proceed through" marine waters in travel between other established parts of a U&A constituted "more than mere

occasional and incidental trolling." *Id*. (citing *U.S. v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014) ("*Lummi II*")). Ergo, such travel supported inclusion of the waters in a tribe's U&A. This explanation fits within a "long-accepted framework" for evaluating U&As in the context of travel, consistent with *Tulalip Tribes*. *Id*. (citing *Tulalip Tribes*, 794 F.3d at 1135).

a. Travel Between Sauk and Cascade Rivers

It is uncontested that the Sauk-Suiattle U&A includes the Cascade and Sauk rivers. *U.S. v. Washington*, 384 F.Supp. at 376 ¶131. These rivers are tributaries that flow into the Skagit River and are therefore connected by the Skagit River. Not only does it stand to reason that a river-going people would use the natural connector to travel between these two areas, but there was explicit evidence before Judge Boldt that they did so. In USA-29, Dr. Lane states that ". . .the Sauk people went to the Cascades on the Skagit River to fish. . . ." ER-96. In the context of a tribe who lived at a village located at the confluence of the Sauk and Skagit rivers (downstream of the Cascade) and was known to travel to the Cascade River to fish, travel "on the Skagit River" can only mean what it sounds like: using the river to

travel from one part of the U&A to another. Importantly, it is this section of the Skagit River – the part that connects two undisputed areas of Sauk-Suiattle's U&A – that was included in the Sauk-Suiattle fishing regulations that are the subject of this proceeding. ER-56.

b. Further Travel on Skagit River

Dr. Lane further explained that "[i]n addition to procuring salmon (including steelhead) and other fish in the foothills region, the Sauk people traveled to the saltwater to procure marine life, particularly shellfish, unavailable in their own territory. At least in historic times, the beaches around Tulalip were a favorite resort." ER-96. This observation was adopted nearly verbatim at Finding of Fact 132. *U.S. v. Washington*, 384 F.Supp. at 376, ¶132. The reference to favored beaches near Tulalip, though not incorporated into *Decision I*, lends credence by use of the term "favorite" to the fact that travel to this area was more than "occasional and incidental."

That the Sauk-Suiattle would travel to these favored beaches via the Skagit, which empties into Skagit Bay just north of the area, is a natural assumption to make. However, the Court need not assume facts in this instance, nor did Judge Boldt need to. In her report on the Sauk-

Suiattle, Dr. Lane discussed the tribe's historical attempts to join reservations. ER-90-91. The upriver people, including the Sauk-Suiattle, "evidently came into the reservations later than the people living nearer to the saltwater" (where the reservations were located). ER-90. The report from Captain R.C. Fay, the officer responsible for the reservation at Penn Cove, explains the reason for this delay. ER-90. Dr. Lane quotes his report as stating that the "upriver Indians" claimed they had tried to access the reservation earlier, but "could not until the warm weather opened the river." ER-90. Penn Cove is formed by Whidbey Island, directly across Skagit Bay from where the southern fork of the Skagit River empties into the bay; therefore, it is obvious that "the river" that Captain Fay referred to was the Skagit. As Dr. Lane writes, "[t]hese records are instructive. . .[in that] it is evident that travel from the foothills country to the Sound was difficult, if not impossible, during the winter months." ER-91. While travel to the reservation would not have been sufficient to establish a U&A, it does provide evidence that the Skagit River was a travel route to Skagit Bay used by the Sauk-Suiattle.

Furthermore, as Dr. Lane observed in USA-20, her more general report on native life in the Pacific Northwest pre-1855:

> The rugged hills and mountains and dense forest cover made communication by land exceedingly difficult over much of the area . . . . Early travelers consistently reported the wooded areas in western Washington as silent, trackless, and little frequented by the Indians.

ER-110. Conversely, the ample rivers and creeks in this area were a boon:

> If the land environment posed difficulties, that of the sea and waterways provided major advantages to Indian existence. The Indians invariably lived next to waterways, traveled upon them, and depended on the resources of the water for their major livelihood.

ER-111. The Sauk-Suiattle lived at the confluence of two waterways: the Sauk and the Skagit. *U.S. v. Washington*, 384 F.Supp. at 375-76, ¶129. Based on Dr. Lane's description, they would have traveled upon and depended on both rivers.

c. Evidence of Travel Exceeds Similar Cases

The evidence of Sauk-Suiattle travel on the Skagit River exceeds that of similar cases where this Court has included waters in a U&A based on travel. In *Lummi I*, this Court found that Admiralty Inlet was "likely" to have been a "passage through which the Lummi would have

traveled" simply by tracing the most probable route from one area of the U&A to another. *Lummi Indian Tribe*, 235 F.3d at 452. In this case, there is a probability, supported by factual evidence, that the Sauk-Suiattle traveled on the Skagit River: both between the Sauk and Cascade rivers and down the Skagit to the beaches near Tulalip. In addition, as acknowledged by this Court, "*Decision I* is devoid of references to 'Admiralty Inlet.'" *Id*. Conversely, the Skagit River is mentioned twice in Finding of Fact 129 referencing the Sauk-Suiattle's pre-treaty homeland. *U.S. v. Washington*, 384 F.Supp. at 375-76, ¶129.

Furthermore, the acknowledgement of a Sauk-Suiattle village at the confluence of the Sauk and Skagit rivers provides evidence that surpasses that of similar cases. For example, in *Tulalip Tribes*, the Court found evidence of Suquamish travel to and fishing in the waters to the west of Whidbey Island despite Dr. Lane's observation that "there appears to be no clear evidence of Suquamish winter villages on the west side of Whidbey Island. . . ." *Tulalip Tribes*, 794 F.3d at 1135. Here, the Sauk-Suiattle had a village that was located at the confluence of the Sauk and Skagit rivers. *U.S. v. Washington*, 384 F.Supp. at 375-76, ¶129. The location of this village was acknowledged in a finding of

fact and supported by the historic evidence found in the map admitted as USA-58. *Id*. ER-77.

This Court has included disputed waterways in tribal U&As even when reference to those waterways was completely omitted from *Decision I*. *See*, *Lummi Nation*, 876 F.3d at 1009 ("As a linguistic matter, in *Decision I* Judge Boldt does not reference Whidbey Island with respect to the Lummi's or any other tribe's U&A."); *Lummi Indian Tribe*, 235 F.3d at 452 ("Determining Judge Boldt's intent with respect to 'Admiralty Inlet' is more difficult. *Decision I* is devoid of any references to 'Admiralty Inlet.'"). Unlike Admiralty Inlet or Whidbey Island, however, the Skagit River is referenced throughout *Decision I*, including in reference to the pre-treaty location of the Sauk-Suiattle. Their homeland is described as the "upper reaches of the Skagit River system" and their village was at the confluence of the Sauk and Skagit rivers. *U.S. v. Washington*, 384 F.Supp. at 375-76, ¶129. Further, the Skagit is referenced by implication, as it is the major river that joins the Sauk and Cascade rivers – the two primary fishing grounds of the Sauk-Suiattle. *Id*. at 376, ¶131. Taken together, this evidence surpasses

evidence used in other cases to establish the inclusion of disputed waters in a given tribe's U&A.

2. There was evidence before Judge Boldt that the Sauk-Suiattle fished in the Skagit River.

Upper Skagit, as the moving party, again bears the burden to show that there was *no evidence* before Judge Boldt that the Sauk-Suiattle fished in the Skagit River. *See*, *Tulalip Tribes*, 794 F.3d at 1133. Although this Court has previously cautioned that "it is the specific, rather than the general evidence presented by Dr. Lane that Judge Boldt cited as support for his findings," it has also seen fit to consider the general evidence before Judge Boldt when it was supported by specific evidence. *See, e.g.*, *Lummi Indian Tribe*, 235 F.3d at 451; *Tulalip Tribes*, 794 F.3d at 1135 ("This general evidence, too, constitutes some evidence before Judge Boldt. . ."). The district court has interpreted this to mean that although "Dr. Lane need not have mentioned specific marine waters by name, there must still be some evidence in the record before Judge Boldt indicating his intent to include them within a tribe's U&A." *U.S. v. Washington*, No. C70-9213, 2015 WL 3504872, at *9 (W.D. Wash. 2015).

a. Specific Evidence Before Judge Boldt

The specific evidence cited by Judge Boldt includes a section of MS-10, the written testimony of Mr. James Enick. In this specified section of his testimony, Mr. Enick stated that the Sauk-Suiattle fished "wherever the people were" and that the people lived "up and down the Skagit River and the Sauk River mostly." ER-71. This provides obvious support for the finding by Judge Boldt that the Sauk-Suiattle fished on the Sauk River. However, it provides equally compelling evidence that they fished the Skagit River, as stated by Mr. Enick.

b. General Evidence Before Judge Boldt

General evidence from Dr. Lane provides additional support for Sauk-Suiattle fishing in the Skagit River. In USA-29, she writes that the "Sauk. . .located their villages along rivers and streams where they had access to productive fisheries." ER-92. Judge Boldt made a finding of fact that a Sakhumehu village was located at the crux of two productive fisheries: the Sauk River and the Skagit River. *U.S. v. Washington*, 384 F.Supp. at 375-76 ¶129. Nothing in the record before Judge Boldt indicates that the Sauk-Suiattle avoided using the Skagit

River as a fishery – in fact, quite the opposite. Further evidence before Judge Boldt indicates fishing in the Skagit River by Sauk-Suaittle.

c. The Nature of Sauk-Suiattle Usage Rights

Judge Boldt's acknowledgment of the importance of familial and inter-tribal connections within the region offers additional evidence of the Sauk-Suiattle use of the Skagit River. The finding that "prior to and during treaty times, [the Sauk-Suiattle] intermarried to a considerable extent with the Upper Skagit and Stillaguamish Indians" is quite pertinent to the tribe's fishing rights. *Id.* As Judge Boldt noted, "[p]eople moved about to resource areas where they had use patterns based on kinship or marriage." *Id.* at 351, ¶4. The Sauk-Suiattle would fish in resource areas where they had usage rights based on marriage. ER-96. In this proceeding, the Upper Skagit have argued that this indicates the Sauk-Suiattle would only fish the Skagit and Baker rivers by invitation of Upper Skagit. ER-40. This interpretation of the evidence is an oversimplification of what Dr. Lane wrote and benefits from further scrutiny.

Dr. Lane wrote the following regarding inter-tribal use rights in relation to the Sauk-Suiattle and Upper Skagit:

> Apparently the sites along the Sauk and Suiattle rivers were considered to be the fishing grounds of the Sauk-Suiattle group, although others might sometimes join them in fishing there. In similar fashion some of the Sauk people went to the Cascade on the Skagit River to fish and to Baker River to fish with Upper Skagit friends and relatives there.

ER-96. Upper Skagit argues that this clarifies her more general statements in USA-20 and indicates that Sauk-Suiattle only fished the Skagit River by invitation of Upper Skagit. ER-40. This is not the case. Rather, the more general statements in USA-20 provide important context for the above description.

As she explained in her discussion of political and economic aspects of native culture pre-1855, "[p]eople moved about to resource areas where they had use rights based on kinship or marriage." ER-115. *See also*, *U.S. v. Washington*, 384 F.Supp. at 351 ¶4. Later, she expanded upon this idea:

> Visitors from beyond the immediate locality would arrive to take advantage of particular runs not available in their streams or not running at that particular time in their locality. Certain of those visitors would have use rights because they were related to local residents. *Others* might request permission to fish. . . .

ER-124 (emphasis added). Therefore, even if Upper Skagit's argument is to be taken at face value: that the Sauk-Suiattle only fished the

Skagit River by virtue of their relationships with the Upper Skagit; this relationship would have still entitled Sauk-Suiattle to use rights beyond those of *others* who did not have familial ties to the region. Such *others* would have had to request permission, whereas intermarried or interrelated members of Sauk-Suiattle would have had use rights. For this reason, Judge Boldt made a point to highlight in Finding of Fact 129 that Sauk-Suiattle "intermarried to a considerable extent" with the Upper Skagit. *U.S. v. Washington*, 384 F.Supp. at 376 ¶129. As he noted, "[p]eople moved about to resource areas where they had use patterns based on kinship *or marriage*." *Id.* at 351, ¶4 (emphasis added).

Therefore, both the specific and the general evidence before Judge Boldt point to Sauk-Suiattle use of the Skagit River as a productive fishery. The specific passage in Mr. Enick's testimony cited to by Judge Boldt indicates that the Sauk-Suiattle fished in the Skagit River as that was where they resided. ER-71. General evidence from Dr. Lane indicates both that tribes would use the productive fisheries co-located with their villages and that tribes would have certain usage rights to other fisheries based on inter-tribal marriage. ER-124. This constitutes,

at the very least, *some evidence* before Judge Boldt that the Sauk-Suiattle fished the Skagit River at and before treaty times and qualifies the Skagit River for inclusion in the Sauk-Suiattle U&A.

VII. CONCLUSION

The district court erred in finding that *Decision I* was unambiguous with respect to whether the Skagit River was included in the Sauk-Suiattle U&A. The language of the decision itself gives rise to ambiguity by referencing the Skagit River system as the Sauk-Suiattle's homeland and finding that a Sakhumehu village was located at the confluence of the Sauk and Skagit rivers. Further, the evidence before Judge Boldt created ambiguity by indicating that the Sauk-Suiattle fished and traveled on the Skagit River.

Finding the U&A unambiguous in spite of these facts, the district court further erred by finding that there was no evidence before Judge Boldt that the Sauk-Suiattle either traveled on or fished in the Skagit River. A review of the record before Judge Boldt shows there was evidence supporting, at the very least, travel on the Skagit where it connects the Sauk and Cascade tributaries (the area at issue in this

proceeding). Further evidence indicates that the Sauk-Suiattle traveled the Skagit River all the way down to the coast. This evidence of travel exceeds evidence presented in similar cases before this Court and supports inclusion of the Skagit River in the Sauk-Suiattle U&A. Lastly, there was evidence before Judge Boldt that the Sauk-Suaittle fished the Skagit River at and before treaty times.

As the evidence supports inclusion of the Skagit River in the Sauk-Suiattle U&A, summary judgment in favor of Upper Skagit was unwarranted and should have been denied in accordance with this Court's prior rulings in the *U.S. v. Washington* line of cases. For these reasons, the decision of the district court in granting summary judgment to Upper Skagit was in error. Appellant submits this Court should find *Decision I* is ambiguous as to the Sauk-Suiattle U&A and find that the record evidence before Judge Boldt supports inclusion of the Skagit River in Sauk-Suiattle's U&A. Further, this Court should reverse the district court's judgment and remand for further proceedings in accordance with these findings and entry of judgment in favor of the Sauk-Suiattle Indian Tribe.

Respectfully submitted,

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STATEMENT OF RELATED CASE

The undersigned attorney states:

I am aware of the following related case pending in this Court: *Swinomish Indian Tribal Community, Tulalip Tribes, Upper Skagit Indian Tribe v. Lummi Nation*, Case Nos. 21-35812, 21-35874. This appeal arises out of the same underlying district court case (C70-9213-RSM), but is a separate district court subproceeding, 2:19-sp-00001-RSM, with separate issues.

Dated: February 28, 2022

s/Jennifer Anne Gore Maglio
Jennifer Anne Gore Maglio

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