

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

<p>UNITED STATES OF AMERICA et al., Petitioners,</p> <p>vs.</p> <p>STATE OF WASHINGTON et al., Respondent.</p>	<p>Case No. C70-9213</p> <p>Subproceeding No. (Pending)</p> <p>[Proposed] REGION 2 EAST TRIBES’ REQUEST FOR DETERMINATION RE: LUMMI NATION U&As</p>
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The Swinomish Indian Tribal Community, the Tulalip Tribes, and the Upper Skagit Indian Tribe (the “Region 2 East Tribes”) file this Request for Determination Re: Lummi Nation (“Lummi”) U&As as follows:

INTRODUCTION

1. Lummi states that it intends to open a crab fishery in Region 2 East, an area in which it has not fished for crab in the 45 years since its usual and accustomed fishing places (“U&As”) were determined by Judge Boldt in 1974. Because Lummi does not have U&As in Region 2 East, the Region 2 East Tribes seek a declaration to that effect and an injunction prohibiting Lummi from issuing regulations purporting to open any portion of Region 2 East to

1 Lummi fishing and prohibiting Lummi from fishing for any species in any portion of Region 2
2 East.

3 **JURISDICTION**

4 2. This Court has jurisdiction over the parties and the subject matter under the
5 Court's continuing jurisdiction in this case as set forth in Paragraph 25(a)(1) of the Court's
6 Permanent Injunction of March 22, 1974, *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D.
7 Wash. 1974), as modified by the Court on August 24, 1993, *U.S. v. Washington*, 18 F. Supp. 3d
8 1213 (W.D. Wash. 1993) (Paragraph 25). The Region 2 East Tribes seek a determination of
9 whether the actions of Lummi in authorizing fishing in Region 2 East are in conformity with the
10 Court's prior determination of its U&As. See *Muckleshoot Indian Tribe v. Lummi Indian Tribe*,
11 141 F.3d 1355, 1360 (9th Cir. 1998).

12 3. The Region 2 East Tribes have complied with the requirements of Paragraph 25
13 before filing this Request for Determination, as described below.

14 4. In 2008, Lummi issued a regulation purporting to open a shrimp fishery in Region
15 2 East. The Region 2 East Tribes convened a meet and confer to discuss Lummi fishing in
16 Region 2 East. That meet and confer was held on April 3, 2008.

17 5. The meet and confer resulted in a second meeting to continue discussion of
18 Region 2 East, as well as other areas involved in other meet and confers among the tribes. That
19 meeting was held on April 24, 2008. That meeting resulted in a formal agreement, Agreement to
20 Engage in Settlement Discussions ("Agreement"), to continue further discussions. The
21 Agreement was signed by Swinomish, Tulalip, Upper Skagit, and Lummi. The Agreement
22 provided that the tribes would not open any fisheries in which they were not already
23 participating, and that any party could terminate the Agreement by giving 25-day notice of
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1 termination. The meet and confer process initiated in April 2008 was left open. Thereafter,
2 discussions occurred informally and sporadically over the next ten years.

3 6. On April 23, 2018, the Lummi Tribal Chairman sent a letter to Swinomish giving
4 25-day notice of termination of the Agreement. The termination took effect on or about May 17,
5 2018. Several meetings and discussions among the Region 2 East Tribes and Lummi ensued, but
6 the tribes failed to resolve the dispute.

7 7. On May 30, 2018, Lummi issued a regulation opening a crab fishery in Area 24A
8 (Skagit Bay), a part of Region 2 East. The Region 2 East Tribes responded by initiating
9 Subproceeding 18-1 and seeking a Temporary Restraining Order (TRO) to enjoin Lummi's
10 fishing in Region 2 East. *Motion for TRO*, Subp. 18-1, 5/31/18, Dkt. Nos. 3, 7.

11 8. The Court denied the motions for TRO based upon the Lummi's representations
12 to the court that it would not fish in Region 2 East that season. *Order, U.S. v. Washington*, Subp.
13 18-1, 6/1/18, Dkt. No. 27, 6/1/18. The Region 2 East Tribes later voluntarily dismissed
14 Subproceeding 18-1 in order to comply with the pre-filing requirements contained in Paragraph
15 25(b). *Notice of Voluntary Dismissal*, Subp. 18-1, 6/27/18, Dkt. No. 38.

16 9. Parallel meet and confer requests on Lummi fishing in Region 2 East were issued
17 by Swinomish and Tulalip (July 23, 1018) and by Upper Skagit (July 27, 2018). The meet and
18 confers were convened and held jointly on August 2, 2018. Further discussions were held on
19 September 13, November 8, and December 6, 2018. These meetings failed to resolve the
20 dispute, and at the last of the meetings the Region 2 East Tribes terminated the meet and confer
21 and ended discussions. No party requested mandatory mediation within 12 days of the
22 termination of discussions.
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1 and exclusions contained in that decision. Tulalip U&As include substantially all of Region 2
2 East.

3 15. The Requesting Party Upper Skagit Indian Tribe is a political successor in interest
4 to certain tribes, bands and groups of Indians which were parties to the Treaty of Point Elliott, 12
5 Stat. 927, and holds fishing rights under that treaty. *U.S. v. Washington*, 384 F. Supp. 312, 379
6 (W.D. Wash. 1974).

7 16. The Upper Skagit marine U&As are set forth in *U.S. v. Washington*, 19 F. Supp.
8 3d 1252, 1280-1294, 1297-1304 (W.D. Wash. 1998, 1999), and *U.S. v. Washington*, 873 F.
9 Supp. 1422, 1449-1450 (1994). They include substantial fishing areas in Region 2 East.

10 17. The respondent Lummi Nation (“Lummi”) was a party to the Treaty of Point
11 Elliott, 12 Stat. 927, and holds fishing rights under that treaty. *U.S. v. Washington*, 384 F. Supp.
12 313, 360 (W.D. Wash. 1974) (FF 43).

13 18. The Lummi U&A findings pertinent to this subproceeding include:

14 The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi
15 Island and Fidalgo Island, and near Point Roberts and Sandy Point. . . . These
16 Indians also took spring, silver and humpback salmon and steelhead by gill nets
17 and harpoons near the mouth of the Nooksack River, and steelhead by harpoons
18 and basketry traps on Whatcom Creek. They trolled the waters of the San Juan
19 Islands for various species of salmon.
20 *Id.* (FF 45)

21 [T]he usual and accustomed fishing places of the Lummi Indians at treaty
22 times included the marine areas of Northern Puget Sound from the Fraser River
23 south to the present environs of Seattle, and particularly Bellingham Bay.
24 *Id.* (FF 46)

25 19. Other tribes who participate in the fishery in Region 2 East may have an interest
in this subproceeding, The State of Washington is also affected by this subproceeding.

ADDITIONAL FACTS REGARDING PRESENT CONTROVERSY

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2 20. Crab and shrimp harvests in Puget Sound waters are managed by Marine
3 Fish/Shellfish Management Catch Reporting Areas. The area relevant to this sub-proceeding,
4 Shellfish Region 2 East, is shown on the map attached as Attachment 1. Crab fishing in Region
5 2 East is governed by a Crab Harvest Management Plan (“Plan”) negotiated and agreed to
6 annually between the Washington Department of Fish and Wildlife and the tribes who have
7 U&As within the region. The Plan is developed in accordance with paragraphs 3.1 and 4.5 of
8 this Court’s order in the shellfish sub-proceeding, 89-3, filed August 28, 1995. The Plan sets a
9 quota for harvest of Dungeness crab in Region 2 East, and the quota is then divided equally
10 between treaty and non-treaty fisheries. Concomitant with the development of the Plan, the tribes
11 attempt to reach agreement among themselves on the timing, extent, and location of the harvests
12 of the various tribes.

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14 21. The tribes currently participating in the Region 2 East fishery have the capability
15 of reaching the tribal quota and have consistently done so in recent years. Because the tribal
16 harvests regularly reach the quota in Region 2 East, any increased harvest by one tribe anywhere
17 within Region 2 East necessarily results in a reduction of harvest by the others in Region 2 East.

18 22. With regard to Region 2 East, during the 45-year period beginning in 1974, when
19 Judge Boldt made the Lummi U&A finding, and continuing to the present, Lummi did not fish
20 and has not engaged in crab fishing in that region.

21 23. The events that precipitated the filing of this Request for Determination are set
22 forth in Paragraphs 4 through 10, above.

23 24. If Lummi proceeds with fishing in Region 2 East, it will greatly reduce the
24 harvest of the Region 2 East Tribes, require partial or total closure of their crab fishing, deprive
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1 the tribes of important fishing opportunity, upset a hard won management regime among the
2 tribes and between the tribes and the state in Region 2 East, deprive the tribes of subsistence and
3 ceremonial harvests, and impair cultural and spiritual practices that are the wellspring of the
4 Tribes' very identity. For these reasons, the Region 2 East Tribes will suffer severe and
5 irreparable harm if Lummi fishes in Region 2 East.

6 **FACTS REGARDING LUMMI U&As**

7 25. Judge Boldt's description of the Lummi's U&As set forth in ¶18, above, is
8 ambiguous and requires interpretation. *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d
9 1355, 1359 (9th Cir. 1998); *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 449 (9th Cir. 2000); *U.S. v.*
10 *Lummi Indian Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014); *U.S. v. Lummi Nation*, 876 F.3d
11 1004, 1008-09 (9th Cir. 2017). That interpretation took place in Subp. 11-2. The phrase
12 "Northern Puget Sound", as applied to areas outside the main Lummi fisheries near its homeland
13 north and west of Whidbey Island, describes a travel route from Lummi territory to Admiralty
14 Inlet and beyond, the marine highway west of Whidbey Island recently adjudicated in Subp. 11-
15 2. This route does not include the secluded Region 2 East waters east of Whidbey Island.

16 26. The Lummi U&A finding includes a number of geographic anchors in describing
17 the U&As. None of these descriptors is located in Region 2 East. All are north or west of that
18 Region.

19 27. None of the evidence before Judge Boldt, including the two reports by Dr.
20 Barbara Lane and the other materials cited by Judge Boldt as the source relied upon in
21 determining of Lummi U&As, mentions Lummi fishing or travel in Region 2 East, or names any
22 geographic feature of or within Region 2 East.
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1 opening any fishery in Region 2 East and enjoining Lummi fishers from entering and fishing in
2 Region 2 East.

3 32. In the event that Lummi does not heed the admonitions of the Court not to enter a
4 new fishery until it has established its right to fish there and proceeds with its threatened fishery,
5 to Region 2 East Tribes may seek a temporary restraining order prohibiting such contact.

6 RESPECTFULLY SUBMITTED this 8th day of October, 2019 at La Conner,
7 Washington.

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UPPER SKAGIT INDIAN TRIBE

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, 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 parties registered for electronic service with the CM/ECF system.

SIGNED this 8th day of October, 2019, at La Conner, Washington.

By: /s/ James M. Jannetta
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REGION 2 EAST
Catch areas 24A, 24B, 24C, 24D, and 26AE

