No. 10-33

In The Supreme Court of the United States

SUQUAMISH INDIAN TRIBE,

Petitioner,

v.

UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, LOWER ELWHA KLALLAM TRIBE, LUMMI INDIAN NATION, NISQUALLY INDIAN TRIBE, PORT GAMBLE S'KLALLAM TRIBE, SKOKOMISH INDIAN TRIBE, AND TULALIP TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY RESPONDENT TRIBES UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, PORT GAMBLE S'KLALLAM TRIBE, AND TULALIP TRIBES

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QUESTION PRESENTED

In 1975 the district court in *United States v. Washington,* W.D. Wash. No. C70-9213, a case involving the treaty fishing rights of 21 Indian tribes in northwest Washington, made a factual determination of the Suquamish Tribe's usual and accustomed fishing places (U&As). A tribe's U&As comprise the area within which a tribe has a treaty right to fish and are based upon the tribe's historical fishing pattern at treaty time. Twenty-nine years after the finding was made, Suquamish changed its fishing pattern and for the first time in all the intervening years began fishing in Skagit Bay and Saratoga Passage. The tribes with established U&As in those waters challenged Suquamish's right to fish there and prevailed in the lower courts. The case presents one issue, which does not warrant this Court's review:

When confronted with interpreting the geographic extent of a prior U&A finding in *U.S. v. Washington,* may the court examine the evidence and record of proceedings before the judge who made the finding, including a bench ruling on the precise issue, to aid it in resolving whether a specific geographic area is within the tribe's U&As, where the language of the finding is unclear and ambiguous as to the specific area involved, and where the record before the court reveals a latent ambiguity in the language?

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STATEMENT OF THE CASE

This case involves a claim by Petitioner Suquamish Tribe to pursue treaty fishing in waters outside those originally described in the factual determination of its usual and accustomed fishing places (U&As), made in 1975 by District Court Judge George[1] Boldt in *United States v. Washington*. Such matters involve special consideration of anthropological and ethnohistorical evidence of the location and use of fishing areas in the mid-19th century by each of the 21 tribes involved in the case. For almost 30 years after its U&A finding, Suquamish fished on the western side of Puget Sound in accordance with that finding and never ventured into Skagit Bay or Saratoga Passage. Then suddenly, in 2004, Suquamish expanded its fishery into Saratoga Passage, precipitating this case. The issue presented is whether Skagit Bay and Saratoga Passage are included within Suquamish's previously determined U&As. Suquamish now contends that the term 'Puget Sound' invariably and unambiguously includes Skagit Bay and Saratoga Passage, and that this alone should have been determinative and ended the inquiry concerning its claim to expanded U&As. Pet. 1-2.

The Petition uses this case to attack a straw man, the prior Ninth Circuit decision in *United States v. Muckleshoot Indian Tribe,* 235 F.3d 429 (9th Cir. 2000) (*Muckleshoot III*). Pet. 5, 18, 20. That case

[1] Not Hugo, as the Petition has it. Pet. 1.

involved Muckleshoot marine U&As, which were broadly described as "the saltwater of Puget Sound," *Id.* at 431. In contrast, the U&A description at issue in this case is:

> 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.

United States v. Washington, 459 F. Supp. 1020, 1049, FF 5 (W.D. Wash. 1978) (*Decision II*). The two cases are quite different, so the attack on *Muckleshoot III* is misleading. This case does not turn on the meaning of 'Puget Sound.'

In this case the Ninth Circuit analyzed *all* of the language of the U&A finding, as well as its context. It determined that the language of the U&A finding did not clearly and unambiguously include Skagit Bay and Saratoga Passage, and proceeded to clarify the language and resolve the ambiguity by reviewing the proceedings and factual record before Judge Boldt at the time of his decision. The panel majority concluded that Judge Boldt did not intend to include the contested waters, because there was no evidence before him to support their inclusion and because the evidence affirmatively showed intent to exclude them.

That is exactly how a court should proceed in the presence of unclear or ambiguous language. There is nothing here that contravenes *Travelers Indemnity*

Co. v. Bailey, 129 S. Ct. 2195 (2009), the case upon which Petitioner relies. But even if the language of the Suquamish U&A finding unambiguously included the contested waters, the court below would nevertheless have been obliged to review the record before Judge Boldt to determine whether there is a latent ambiguity arising from a factual record that contravenes the allegedly unambiguous language. The end result in either case is thus the same.

The decision below is consistent with the law of this Court. It does not conflict with the law of other circuits or open a Pandora's box of problems for cases in other contexts. This case involves interpretation of a particular type of geographic finding and determination based upon anthropological and historical evidence of tribal fishing in 1855 that is uniquely tethered to and grounded upon that particular factual record. The decision below is limited to the special context of *United States v. Washington*, W.D. Wash. No. C70-9213, and has no reach beyond. It does not undermine the plain meaning rule in a broad spectrum of other legal contexts, either in the Ninth Circuit, or in other circuits.

Finally, Petitioner's basic premise is flawed. 'Puget Sound' does not have a fixed meaning that invariably includes Skagit Bay and Saratoga Passage. Both the common and the geographical meanings of the term exclude the waters in question. Judge Boldt did not use the term consistently in the very decision that Petitioner claims adopted a fixed

meaning of the term. Petitioner's argument thus fails on all levels.

A. Background on *United States v. Washington*.

The Respondent Tribes agree in the main with Petitioner's description of the tribes' treaty fishing rights and the general course of *United States v. Washington,* Pet. Statement Sections A and B, Pet. 3-7, with one notable exception. Judge Boldt did not detail "with great precision" the areal extent of the tribal U&As, as Petitioner asserts. Pet. 6. Many of these findings, including the one at issue in this case, are anything but precise. *See* Argument III.B. *infra.*

We add one point to Petitioner's discussion of U&As. Tribal travel through an area does not establish U&As in the area traversed. Travel must be accompanied by fishing that must be more than "occasional and incidental." *Decision I,* 384 F. Supp. at 353, 356. U&As include only those marine waters "transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use." *United States v. Washington,* 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) (*Decision III).* Suquamish had the burden to show this for each area in which it claimed U&As.

B. This Proceeding.

This case involves the specific waters known as Skagit Bay and Saratoga Passage. The location of

these waters is shown on the map appended to the Petition, Pet. 57a, as well as the map appended to this brief at 1a.[2] Geographically, "these waters are nearly enclosed or inland waters to the east of Whidbey Island." Pet. 7a, n. 6.

This case was precipitated in 2004 when the Suquamish Tribe, for the first time in the 29 years since its treaty fishing rights were recognized and the U&A finding was made, entered Saratoga Passage to fish. Pet. 18a. In response, the Upper Skagit Indian Tribe commenced, and the Swinomish Indian Tribal Community joined, a sub-proceeding in *United States v. Washington* challenging Suquamish's right to fish in Skagit Bay and Saratoga Passage by claiming that Suquamish had no U&As there. Pet. 3a. The Tulalip Tribes, who also have U&As in Saratoga Passage, joined in the proceedings as well, as did the Jamestown and Port Gamble S'Klallams.

The district court ruled that Suquamish U&As did not include the contested waters. Pet. 31a-54a. It found that the term 'Puget Sound', as used by Judge Boldt, included Skagit Bay and Saratoga Passage. *Id.* 44a. However, based upon an examination of the proceedings and factual record before Judge Boldt when he made the U&A finding, the district court concluded that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in

[2] This map is included in the Excerpts of Record filed in the Ninth Circuit, ER 0374.

Suquamish U&As. As a result the district court held that Suquamish had no right to fish in those waters. *Id.* 51a.

The Ninth Circuit panel originally reversed the district court. However, upon petition by the Respondent Tribes, the panel granted rehearing, withdrew its prior opinion, and substituted a new opinion in which a majority of the panel affirmed the district court. Pet. 3a.

The Ninth Circuit decision below did not follow the district court and adopt a meaning of 'Puget Sound,' as the Petition implies, Pet. 1-2. Rather, the Ninth Circuit rejected that definition in construing the U&A language as a whole. Pet. 11a. The panel majority began its analysis by focusing on whether the U&A finding "is ambiguous or that the court intended something other than its apparent meaning." *Id.* 8a-9a. The panel analyzed the language of the U&A finding as a whole (something the district court had failed to do) as well as the record before Judge Boldt upon which the U&A finding was based. *Id.* 9a-11a.

In addressing the language of the U&A finding, the panel did not fix its inquiry on 'Puget Sound,' but instead focused on the "specific geographic anchor points" in the Suquamish U&A language that described the limits of the U&A area. *Id.* 10a. The panel observed that Judge Boldt regularly used such descriptors in describing U&As, and that in this case the relevant "inclusive geographic anchor points,"

Haro and Rosario Straits, "do not include or delineate" Skagit Bay or Saratoga Passage. *Id.* 10a-11a. The panel also contrasted the Suquamish U&A finding with the Swinomish U&A finding made in the very next paragraph of the same order:

> The Swinomish U&A used the phrase 'marine waters of northern Puget Sound,' but it also used geographic anchors delineating an area that specifically included Saratoga Passage and Skagit Bay. As the district court (and the Suquamish) recognized, *the inquiry properly focuses on individual U&As,* and the fact that Judge Boldt defined 'Puget Sound' in one instance as including Skagit Bay and Saratoga Passage does not mean that the references to 'Puget Sound' in other U&As always include the same areas. *If anything, the judge's inclusion of reference points in one U&A but not in another indicates a lack of intent to include them generically.*

Pet. 11a (emphasis added).

The Ninth Circuit also examined the proceedings and factual record before Judge Boldt. *Id.* 9a-10a. The factual record for the Suquamish U&A finding consisted solely of the expert report and testimony of Suquamish's expert, anthropologist Dr. Barbara Lane. Pet. 45a-49a. That record is utterly devoid of evidence that Suquamish traveled through Skagit Bay and Saratoga Passage, let alone fished there. Pet. 10a n. 9, 49a. And importantly, the record indicates an affirmative intent to exclude those waters.

At the hearing on Suquamish U&As, the State challenged Dr. Lane's conclusions concerning U&As based upon the travel route from the Suquamish home territory to the Fraser River. That home territory is on the west side of Puget Sound[3] across the Sound west of Seattle, south and west of the contested waters. Pressed by the State to specify the waters traversed, Lane described the travel route northward through Haro and Rosario Straits and identified the route with the aid of a map provided by the state as part of area 1 and area 2 on the map. This map is appended at 2a, *infra*.[4] Because Skagit Bay and Saratoga Passage are in area 4 on the map, they were not included in this description. Pet. 48a-49a.

This testimony of Dr. Lane was incorporated in Judge Boldt's ruling from the bench on Suquamish travel U&As the next day, which also made reference to the map:

> The Court finds that a prima facie showing has been made that travel and fishing of the Suquamish Tribe through the north Sound areas, *that is areas one and two as designated by the state,* was frequent and also regular, not merely occasional, and the

[3] Used here without the single quote marks, because this area is within Puget Sound however broadly or narrowly defined.

[4] This map is included in the Excerpts of Record filed in the Ninth Circuit, ER 0453.

> application of the Suquamish for such a ruling is granted.

Pet. 9a (emphasis added by Ninth Circuit). Based on Dr. Lane's testimony and the court's ruling, the Ninth Circuit concluded that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in Suquamish U&A. Pet. 12a.

The Ninth Circuit panel majority affirmed the district court and voted to deny rehearing en banc. Judge Kleinfeld dissented from the decision and voted to grant the petition. The petition was circulated to the full Ninth Circuit and no judge requested an en banc vote. Pet. 56a.

ARGUMENT

I. The Language of the U&A Finding and Determination, Taken as a Whole, is Unclear and Ambiguous.

Petitioner's entire argument for granting certiorari is based upon two false premises: first, that this case can be decided on a fixed definition of 'Puget Sound' alone and second, that the broad definition of 'Puget Sound' is necessarily the one used in its U&A finding. But this case does not involve U&As described simply as 'Puget Sound,' in contrast to *Muckleshoot III*. 235 F.3d at 431. The U&A finding at issue states:

> The usual and accustomed fishing places of the Suquamish Tribe include 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.

Decision II, 459 F. Supp. at 1049, FF 5.

It is clear from this language that Suquamish U&As do not include all of 'Puget Sound,' however defined. It is the limiting, specific geographic anchors that are the key to determining the geographic extent of the U&A finding. The language must be examined as a whole, as well as in context. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000). *Accord, United States v. Santos,* 128 S. Ct. 2020, 2024 (2008) ("context gives meaning"). If, when taken as a whole and viewed in context, the language is unclear or ambiguous, then the court must look at the record to resolve the ambiguity and clarify the U&A finding, which is just what the Ninth Circuit did below.

We do not understand Petitioner to dispute this proposition. In fact, two of the cases that Petitioner cites, Pet. 20, 22, 27, expressly agree with or applied this approach: *United States v. Spallone,* 399 F.3d 415, 424 (2nd Cir. 2005) ("[W]here, as in this case, an ambiguity in terminology results in a lack of clarity as to the scope of the ruling, 'a reviewing court may

properly examine the entire record for purposes of determining what was decided.'");[5] *Security Mut. Cas. Co. v. Century Cas. Co.,* 621 F.2d 1062, 1066 (10th Cir. 1980) ("If there is any ambiguity or obscurity or if the judgment fails to express the rulings in the case with clarity or accuracy, reference may be had to the findings and the entire record for the purpose of determining what was decided.").

The specific geographic descriptors in the U&A finding at issue here confuse and confound Petitioner's view of the meaning of 'Puget Sound.' For if 'Puget Sound' truly includes "the Strait of Juan de Fuca and all saltwater areas inland therefrom," as Petitioner contends, Pet. 9, then the U&A finding would read in its entirety: "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River." It should not have included 'Hood Canal,' or 'Haro and Rosario Straits', because in Petitioner's view these waters are included in 'Puget Sound.' Petitioner's argument would render the inclusion of these waters superfluous and irrelevant. This violates "one of the most basic interpretive canons": the language "should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States,* 129 S. Ct. 1558, 1566

[5] *Spallone* was also cited and quoted with approval in the case upon which Petitioner's argument relies, *Travelers Indemnity Co. v. Bailey,* 129 S. Ct. at 2204.

(2009), *quoting Hibbs v. Winn,* 542 U.S. 88, 101 (2004).

If the specific descriptors are not simply ignored, they undermine Petitioner's argument. The phrase "including Haro and Rosario Straits" implies the exclusion of other, unnamed waters, such as Skagit Bay and Saratoga Passage, and appears to set an eastern boundary of the U&As that excludes Skagit Bay and Saratoga Passage. This comports with the interpretive canon that "expressing one item of an associated group excludes another left unmentioned." *Chevron U.S.A. Inc. v. Echazabad*, 536 U.S. 73, 80 (2002). Petitioner's argument is further undermined by the phrase "and also Hood Canal." The use of "and also" forcefully demonstrates that the expansive definition of 'Puget Sound' is *not* being employed. In addition, Petitioner's definition would render superfluous the reference to "Hood Canal."

The panel majority recognized and followed these principles of interpretation. It did *not* adopt the district court's approach to the meaning of 'Puget Sound' upon which Petitioner relies. Instead, it engaged in an analysis of *all* of the language of the U&A finding and determination, as well as its context. The panel addressed the "inclusive geographic anchor points" in the U&A language, and noted that the inclusion of "Haro and Rosario Straits" implied the exclusion of Skagit Bay and Saratoga Passage. Pet. 10a-11a. It contrasted the absence of any language that specifically includes or delineates Skagit Bay and Saratoga Passage in the Suquamish U&A

finding with the specific inclusion of those waters in the very next paragraph of the decree in the Swinomish U&A finding.[6] *Id.* 11a. The panel majority thus identified ambiguities and obscurities in the language and context of the U&A finding that cut against inclusion of the contested waters. That is more than sufficient to support proceeding to an examination of the factual record upon which the U&A finding was based.

The panel majority performed that examination. It concluded, as had the district court, that Judge Boldt intended to exclude Skagit Bay and Saratoga Passage from the Suquamish U&A finding. Pet. 12a. This approach is perfectly consistent with *Travelers Indemnity* and other applicable case law, as described below.

[6] The Swinomish marine U&As are described as "the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress, and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island." *Decision II*, 459 F. Supp. at 1049, FF 6. Saratoga Passage is between Whidbey and Camano Islands, and Skagit Bay is to the north, between Whidbey Island and the mainland. *See* 1a, *infra*.

II. The Decision Below Does Not Conflict with *Travelers Indemnity.*

A. This Case is Consistent with *Travelers Indemnity*.

Petitioner's argument is based upon a conflict between the decision below and this Court's decision in *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009). In pressing this argument, Petitioner seeks to transmogrify this case into *Muckleshoot III* and attacks that case instead of the decision below. But, as we have seen above, this case is not *Muckleshoot III*, because the geographic description of the U&As here contains additional geographic anchors that describe the areal extent of the U&As and is not limited to 'Puget Sound.'

In this case the Ninth Circuit did not follow a path at odds with *Travelers Indemnity.* Nothing in *Travelers* requires a case to be resolved based on the meaning of a key word or phrase in isolation, and without regard to other language or the context. In fact, this Court found that the key operative term in the prior bankruptcy court order being construed in *Travelers*, "based upon, arising out of or relating to," was ambiguous and could not be literally applied. *Id.* at 2203-2204. This Court repeated Justice Scalia's observation that literal application of a similar phrase "was a project doomed to failure." *Id.* at 2203, *quoting California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The Court not only examined the other language of the order at issue,

but also the "detailed findings of the Bankruptcy Court" on the nature of the claims at issue, and concluded that the claims were "within the terms of the [prior order] without pushing its limits." *Id.* at 2204.

This Court went on to reject an argument based on the parties' understanding of the prior order,[7] invoking the plain meaning rule. *Id.* But that was only after the Court had examined the language of the order as a whole as well as its context, a process similar to that followed by the court below. The only difference is this Court found no ambiguity in *Travelers,* whereas the Ninth Circuit found the U&A finding to be ambiguous in this case.

B. Even if the Language of the U&A Finding Were Found to be Unambiguous, the Decision Below Would Not Conflict with *Travelers Indemnity*.

Even if the ambiguity inquiry were confined to the term 'Puget Sound,' and even if the court found no patent ambiguity and gave the term the meaning Petitioner advances, the decision below would still not conflict with *Travelers Indemnity* or other plain meaning cases. This case involves a prior factual determination of a court, and an examination of the record before the court upon which the factual

[7] This is a quite different inquiry than the inquiry into a *judge's* intent that is involved in this case. *See* Sec. B, *infra*.

determination was based may – and in this case does – reveal a latent, or extrinsic, ambiguity which can be resolved only by an examination of the record.

Travelers Indemnity involved a bankruptcy court order adopting a settlement agreement and reorganization plan – a type of consent decree. The plain meaning rule with regard to consent decrees does not begin with *Travelers,* but has a long pedigree in this Court. The rationale for the 'four corners' or plain meaning rule as applied to consent decrees was laid out in detail in *United States v. Armour & Co.,* 402 U.S. 673, 681-682 (1971), which expressly distinguished consent decrees from orders resulting from litigation:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case . . . Naturally, the agreement embodies a compromise . . . [T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners. . . .

Accord, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

The rationale for this rule applies to *Travelers Indemnity*, but not to this case. Here, the decree being construed is a factual "finding[ ] and determination[ ]." *Decision II,* 459 F. Supp. at 1049, FF 8. The U&A finding is based upon, determined by and tethered to the factual record before the court that made the finding. The finding is not a linguistic artifact standing apart from, but instead a product and signifier of, the factual record. This is not true of consent decrees, legislation, contracts, or the performative or injunctive portions of decrees, which do not reflect an external record in the same way, if at all.

Further, in the specific context of U&A findings in *United States v. Washington,* it is appropriate to examine the proceedings and factual record before the court at the time the finding was made, even if the U&A language does not show a patent ambiguity, because the record below may reveal a latent, or extrinsic, ambiguity. A latent, or extrinsic, ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Black's Law Dictionary* (7th ed. 1999) at 80.

If the facts of record clearly do not support or are at odds with the language of the U&A finding, a latent ambiguity is revealed. The court cannot be thought to have intended a factual finding unsupported by or at odds with the record before it. The record before the court must then be examined to assist in resolving the latent ambiguity. "It is settled

doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." *Patch v. White,* 117 U.S. 210, 217 (1886). Here, the latent ambiguity emerges when the focus is on the question of whether a specific geographic area, Skagit Bay and Saratoga Passage, is within the areal extent of the U&A finding.

Long ago this Court applied the concept of latent ambiguity to descriptions of geographic area. *See, e.g., Reed v. Proprietors of Locks & Canals on Merrimac River,* 49 U.S. (8 How.) 274, 289 (1850). The doctrine has been invoked or applied more recently in other contexts as well. *See, e.g., Markham v. Westview Instruments, Inc.,* 517 U.S. 370, 385-386 (1996) (latent ambiguity in patent context); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (latent ambiguity in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters"); *United States v. Morton,* 467 U.S. 822, 836 n. 21 (1984) ("Litigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent"); *Chemeheuvi Tribe of Indians v. Federal Power Comm'n,* 420 U.S. 395, 404 (1975) (involving "ambiguity latent in the seemingly clear language chosen by Congress").

C. The Decision Below is Narrow and Case Specific.

Viewed in this light, the decision below and Petitioner's straw nemesis, *Muckleshoot III,* embody an approach specifically adapted and tailored to a particular type of sub-proceeding (interpretation of U&A findings) in the particular case in which it arose, *United States v. Washington.* In that specific context, and given the court's experience with imprecise U&A language, it is appropriate to review the record before the court upon which the U&A finding was based to resolve the meaning of unclear and ambiguous language and to see whether there is a latent ambiguity. That is all *Muckleshoot III* stands for.

Petitioner asserts that the U&A findings were "detailed with great precision," Pet. 6, but as the district court and the Ninth Circuit have discovered, the U&A findings often involve vague geographic descriptors, not metes and bounds descriptions.[8] The initial U&A findings in *United States v. Washington*, 384 F. Supp. 312, 359-382 (W.D. Wash. 1974) (*Decision I*), and *Decision II,* 459 F. Supp. at 1048-1050, 1058, were described "in general," not with precision. *Decision I,* 384 F. Supp. at 402. The Ninth Circuit agreed when it found itself faced with the task of

[8] Of the 21 initial U&A findings for tribes in *United States v. Washington,* only the last two of these findings, made years after the Suquamish U&A finding by a different district court judge, were shown with boundaries on a map incorporated in the finding. *Decision III,* 626 F. Supp. 1405, 1442-1443, 1486.

determining what Judge Boldt meant "in precise geographical terms" which were lacking in the findings themselves. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1359 (9th Cir. 1998) *(Muckleshoot I)*. *Muckleshoot III* also recognized this problem and responded to it with a guideline for approaching the issue of latent ambiguity in that particular context.

Thus even if the Ninth Circuit panel below had not found a patent ambiguity, it would nevertheless have been proper for the panel to examine the record before the court at the time the U&A finding was made to determine whether the judge intended something other than the language seemed to indicate.

There are undoubtedly many cases in which the record below would not be clear enough either to resolve a patent ambiguity or reveal a latent one. But this is not one of them. There is simply no evidence in the record that Suquamish even traveled through Skagit Bay and Saratoga Passage, let alone did so frequently and also fished there frequently. Pet. 10a n. 9, 49a. Without that evidence, there is no basis for a U&A finding including those waters.

Further, there is clear, uncontroverted evidence that these waters were specifically excluded. All of the evidence on Suquamish U&As came from a single expert anthropologist relied upon by Suquamish to establish its U&As. That witness described the relevant geographic extent of the U&As clearly with the aid of a map, 2a, *infra*, and that description excludes Skagit Bay and Saratoga Passage. Pet. 48a-49a.

The next day Judge Boldt ruled on Suquamish U&As from the bench with reference to the same map and again excluded the contested waters. Pet. 9a. That ruling, which described the travel as "frequent and regular," *id.*, delimited the U&A area arising from travel with specific reference to the standard applicable to travel U&As. *See* Statement, Sec. A, *supra*.

III. The Decision Below Does Not Create Conflicts with Other Circuits or Undermine the Plain Meaning Rule.

A. There is No Conflict Among the Circuits.

Petitioner cites cases from other circuits that it claims conflict with the decision below. But there is no conflict among the circuits here. The decision below is consistent with the general rule on plain meaning and involves a narrow, specific context of a particular type of fact-finding based upon tribal fishing over 150 years ago in a specific treaty rights case, with no implications for wider application.

First, Ninth Circuit law is in complete agreement with *Travelers Indemnity* and the general rule regarding unambiguous language. "A consent decree, like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree." *United States v. Asarco Inc.,* 430 F.3d 972, 980 (9th Cir. 2005). *Accord, United States v. FMC Corp.,* 531 F.3d 813, 819 (9th Cir. 2008); *Nehmer v. U.S. Dept. of Veterans Affairs*,

494 F.3d 846, 861 (9th Cir. 2007); *Gates v. Shinn,* 98 F.3d 463, 468 (9th Cir. 1996). Neither *Muckleshoot III* nor this case changed circuit law in that regard.

Second, the decision below does not conflict with *any* of the ten cases from other circuits cited in the Petition. Pet. 20-23. Not a single one of those cases involves interpretation of a court's prior factual determination. Seven of those cases found no ambiguity in the language of an order, but all seven involved contexts other than fact-finding.[9]

In the remaining three cases cited by Petitioner, the courts did just what the Ninth Circuit did in this case: found the language of the order ambiguous and resolved the ambiguity by examination of the record. *Ford Motor Co. v. Summit Motor Products, Inc.,* 930 F.2d 277, 286-288 (3rd Cir. 1991) (interprets ambiguous order in light of evidence of court's intent); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.,* 953 F.2d 1431, 1439 (3rd Cir. 1991) ("It is our responsibility to construe a judgment so as

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[9] These cases are *Negron-Almeda v. Santiago,* 528 F.3d 15 (1st Cir. 2008) (order dismissing claims); *Alstom Caribe, Inc. v. George P. Reintjes Co., Inc.,* 484 F.3d 106 (1st Cir. 2007) (order dismissing case); *In re Thinking Machines Corp.*, 67 F.3d 1021 (1st Cir. 1995) (statute); *Sec. & Exch. Comm'n v. Hermil, Inc.,* 838 F.2d 1151 (11th Cir. 1988) (order in securities case); *Dunlop v. Ledet's Foodliner of Larose, Inc.,* 509 F.2d 1387 (5th Cir. 1975) (contempt judgment); *In re National Gypsum Co.,* 219 F.3d 478 (5th Cir. 2000) (bankruptcy Ch. 11 agreed reorganization plan – a consent decree); *Spearman v. J & S Farms, Inc.,* 755 F. Supp. 137 (D. S.C. 1990) (declaratory judgment).

to give effect to the intention of the court."); *United States v. Spallone,* 399 F.3d at 424 (where language is ambiguous or unclear "the entire record must be examined for the purpose of determining what was decided.").

Petitioner also relies upon cases involving consent decrees. Pet. 24. These are irrelevant to this case because they do not involve factual determinations of a court. *See* Argument II.A., *supra.* In addition, one of the cases cited, *Ahern v. Bd. of Educ. of City of Chicago*, 133 F.3d 975, 981 (7th Cir. 1998), acknowledges that "even 'when the terms of the instrument are clear,' extrinsic evidence may be used in the rare situation where a latent ambiguity exists."

Third, Petitioner marshals eleven cases that illustrate types of cases the decision in this case purportedly might affect. Pet. 26-27. Again, not a single one of these cases involves the interpretation of a factual determination, so none is like the present case. In addition, *most* of the cases are consistent with the Ninth Circuit decision here because they involved an examination of the record beyond the language of the order to resolve an ambiguity: *Ford Motor Co.,* 930 F.2d at 286-288 (interprets ambiguous language in light of evidence of court's intent); *United States v. Georgia,* 171 F.3d 1344, 1348-1350 (11th Cir. 1999) (interprets school desegregation order in light of language of the entire order, its context and history); *Ahern,* 133 F.3d at 981 (acknowledges latent ambiguity rule); *Capacchione v. Charlotte-Mecklenburg Schools,* 57 F. Supp. 2d 228,

246 (W.D. N.C. 1999) (creates a single standard for racial balancing from a "mishmash of standards gleaned from several [prior] orders" in the case); *Security Mut. Cas. Co.,* 621 F.2d at 1066 (examines entire record to resolve ambiguity); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.,* 626 F.2d 95, 98 (9th Cir. 1980) (applies lower court's findings of "relevant surrounding circumstances" at the time of the decree to construe ambiguous language).

Thus of all the cases cited, not a single one involves interpretation of a finding of fact, and many of them involved resolution of the meaning of ambiguous language by examination of the record, just as the Ninth Circuit did below. The lack of citation to contrary cases in the Petition that involve interpretation of a finding of fact only serves to underscore the narrow context of this case.

The Westlaw citation history of *Muckleshoot III* also reflects the narrow context involved here and establishes that Petitioner's concerns are pure hyperbole. This Court denied review of that case. *Muckleshoot Indian Tribe v. Puyallup Indian Tribe,* 534 U.S. 950 (2001) (Mem.). In the decade since *Muckleshoot III* was decided it has been cited only eight times. Half of these occasions are within *United States v. Washington.* Of the other four, *none* cite *Muckleshoot III* for a rule of interpretation of judicial orders, factual or otherwise. If the floodgates are to open, they would likely have opened by now.

B. The Decision Below Protects Finality and Repose.

Petitioner also claims that the decision below undermines finality and repose. Pet. 28-31. But in the context of *United States v. Washington,* a wooden application of Petitioner's broad fixed meaning of 'Puget Sound' regardless of context would have the opposite effect. This case arose when the Suquamish Tribe suddenly, 29 years after its U&A finding was entered, decided to fish waters that had been closed for fishing for all those years. Suquamish had claimed broader U&As prior to the U&A finding, but shortly after the U&A finding was entered Suquamish changed its fishing regulations to exclude fishing in Skagit Bay and Saratoga Passage. Pet. 11a, 51a-52a. Suquamish thus well understood that its U&As did not include these waters. And this is not Suquamish's first attempt to expand beyond its U&As. Earlier, when Suquamish attempted to expand its fishery to the east side of central Puget Sound, the Ninth Circuit rejected this expansion, ruling that Suquamish U&As were limited to "the west side of Puget Sound." *United States v. Suquamish Indian Tribe,* 901 F.2d 772, 774 (9th Cir. 1990).

Substitution of a single, expansive, and fixed meaning of 'Puget Sound' for a nuanced examination of the U&A finding as a whole, its context and, where appropriate, the record before the court will encourage other tribes to seek a similar expansion of their fisheries. This can only threaten to undermine the complex web of dozens of agreements, decrees,

management plans and understandings of the parties that provides the framework for regulation of the northwest Washington marine fishery for Indians and non-Indians alike in *United States v. Washington*, that most "comprehensive and complex" case. Pet. 4a.

IV. The Term 'Puget Sound' is Ambiguous.

Petitioner's reliance on a purported meaning of 'Puget Sound' is misplaced for an additional reason: the term 'Puget Sound' is ambiguous. The Ninth Circuit decision below did not address the issue, but the district court ruled that 'Puget Sound,' was not ambiguous.[10] Pet. 44a. The Respondent Tribes disputed that ruling on appeal below and do so again briefly to preserve the issue here.

We begin where the plain meaning analysis usually begins, with the common meaning of the term. This Court has often resorted to dictionaries to identify the common meaning. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009); *Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010). Here Petitioner's argument runs aground, for the most common dictionary definition of 'Puget Sound' does *not* include the waters of Skagit Bay and Saratoga Passage. Some dictionaries define 'Puget Sound' as "a deep inlet of

[10] This ruling conflicts with *United States v. Lummi Indian Tribe,* 235 F.3d 443, 449 (9th Cir. 2000), a U&A case in which the Ninth Circuit rejected the same argument made by Petitioner in this case and held that the U&A finding was ambiguous.

the Pacific in W Wa extending S from the Strait of Juan de Fuca through Admiralty Inlet," *American Heritage College Dictionary* (4th ed. 2004) 1128, or some variant that describes the same waters. *See, e.g., Webster's New Collegiate Dictionary* (1976 ed.) 1478; *Merriam-Webster Online*, www.merriam-webster.com, search: "Puget Sound". A search on www.online.com, a website that retrieves a number of dictionary definitions of a term, reveals that of the six definitions describing the geographic extent of 'Puget Sound' more specifically than the generic 'northwest Washington,' five were variants of the definition cited above, and only one appears to include Skagit Bay and Saratoga Passage. *Id.,* search: 'Puget Sound.' The plain meaning of the term as reflected in dictionaries thus shows that, if anything, the term *excludes* the contested waters in this case.

'Puget Sound' may also be viewed as a geographic term that might vary from the ordinary meaning. But that is not the case. The record below contains the reports of three experts who addressed the meaning of the term 'Puget Sound,' and all three agreed, as stated by Petitioner's own expert, that Puget Sound is "commonly defined as including all marine waters southward from Admiralty Inlet *and the southern edge of Saratoga Passage.*"[11] (emphasis added).

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[11] This quotation can be found in the Excerpts of Record filed with the Ninth Circuit, ER 0384.

Finally, there is District Judge Boldt's use of the term in *Decision I,* the decision that Petitioner claims fixed an expansive meaning of 'Puget Sound'. That decision includes at least four examples where Judge Boldt used the term more narrowly than the expansive definition claimed by Petitioner (language showing variance is emphasized):

> [Makah] commercial boats go as far as fifty miles out to sea, *east to Puget Sound* and south To Westport and the Columbia River.
>
> *Decision I,* 384 F. Supp. at 364-365.[12]
>
> . . . sport and commercial fishing for salmon in the offshore areas within the three mile limit, *the Strait of Juan de Fuca* and Puget Sound . . .
>
> *Id.* at 390.
>
> . . . to provide an equal take to the Canadian and the American commercial fishermen in *the Strait of Juan de Fuca*, Northern Puget Sound, *and the Strait of Georgia* . . .
>
> *Id.* at 392-393.

[12] Makah is located on the ocean, at the western end of the Strait of Juan de Fuca. The quoted language thus describes travel east through the entire Strait of Juan de Fuca *to* 'Puget Sound'.

> . . . with jurisdiction to regulate the harvest of pink and sockeye salmon on the *Strait of Juan de Fuca and* northern Puget Sound . . .

Id. at 411.

This alone is sufficient to establish that 'Puget Sound' is ambiguous as to areal extent, because once it is established that a term has different meanings in the same document "the term standing alone is necessarily ambiguous." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 343 (1997).[13]

Petitioner's own analysis of 'Puget Sound' reaches outside the language of the U&A finding and the specific proceeding in which the finding was made and searches elsewhere in the record of *United States v. Washington* for clues to the meaning of the term. There are many problems with that effort, but a major stumbling block is this: If one must resort to a search outside the language itself and its immediate context to dredge through other proceedings in this complex case, one has stepped outside the 'four corners.' If one is to sift through the entire case record, why would one ignore the immediate, direct context and the best available source for meaning:

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[13] The Respondent Tribes also argued below that Petitioner is estopped to deny that 'Puget Sound' is ambiguous because it argued in a prior sub-proceeding of *United States v. Washington,* Subp. 97-1, that Judge Boldt used the term with "maddening inconsistency." ER 0322. Suquamish prevailed on that argument, giving rise to judicial estoppel here. *New Hampshire v. Maine,* 532 U.S. 742, 743 (2001).

the proceedings and factual record upon which the U&A finding was based? By what rule, by what logic, would a court prefer a definition of a term used in a different proceeding, for a different purpose, to a ruling by the judge from the bench directly on the question involved with reference to a map that unmistakably identifies that the U&A finding does *not* include the contested waters?

———♦———

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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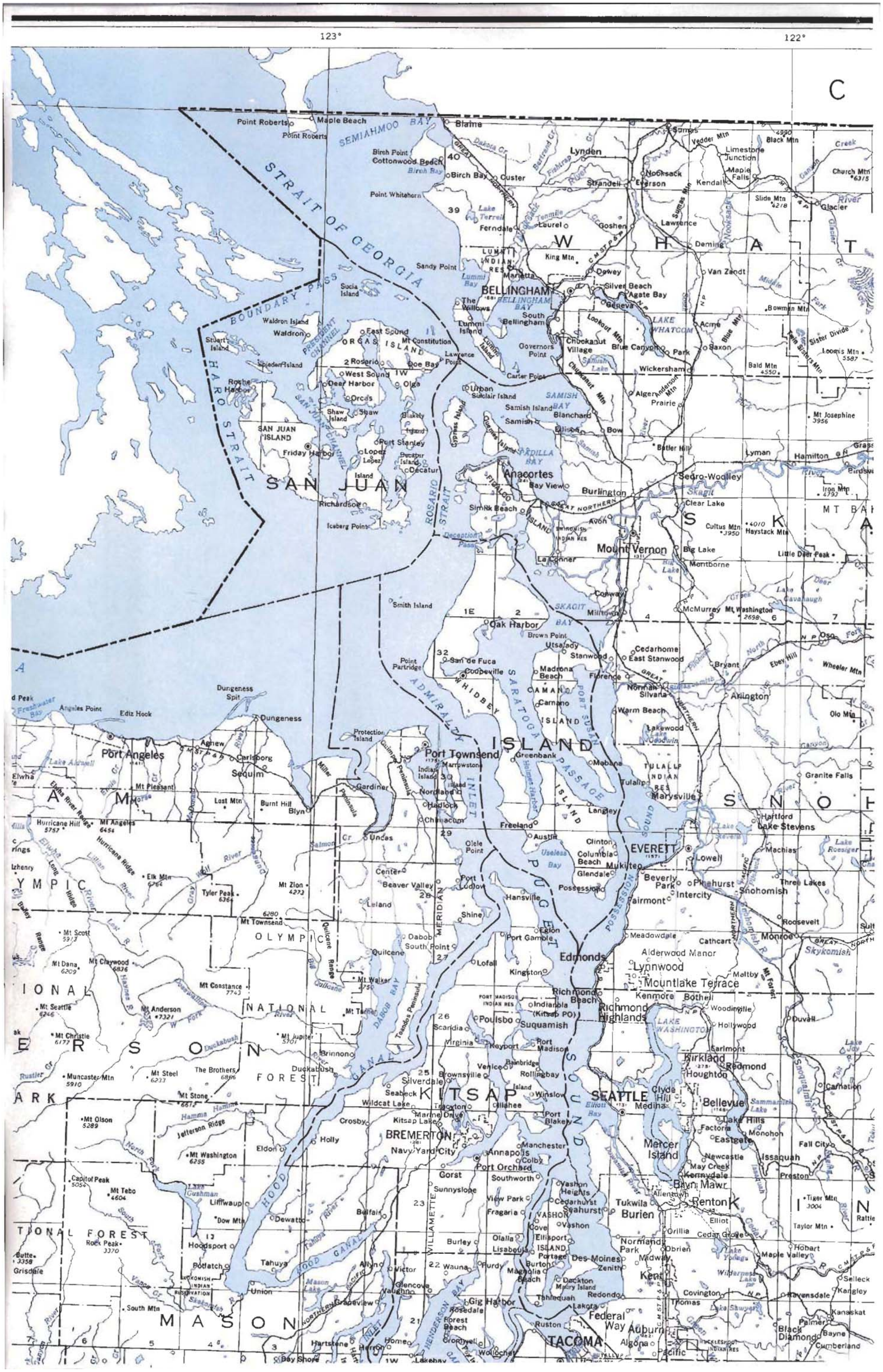
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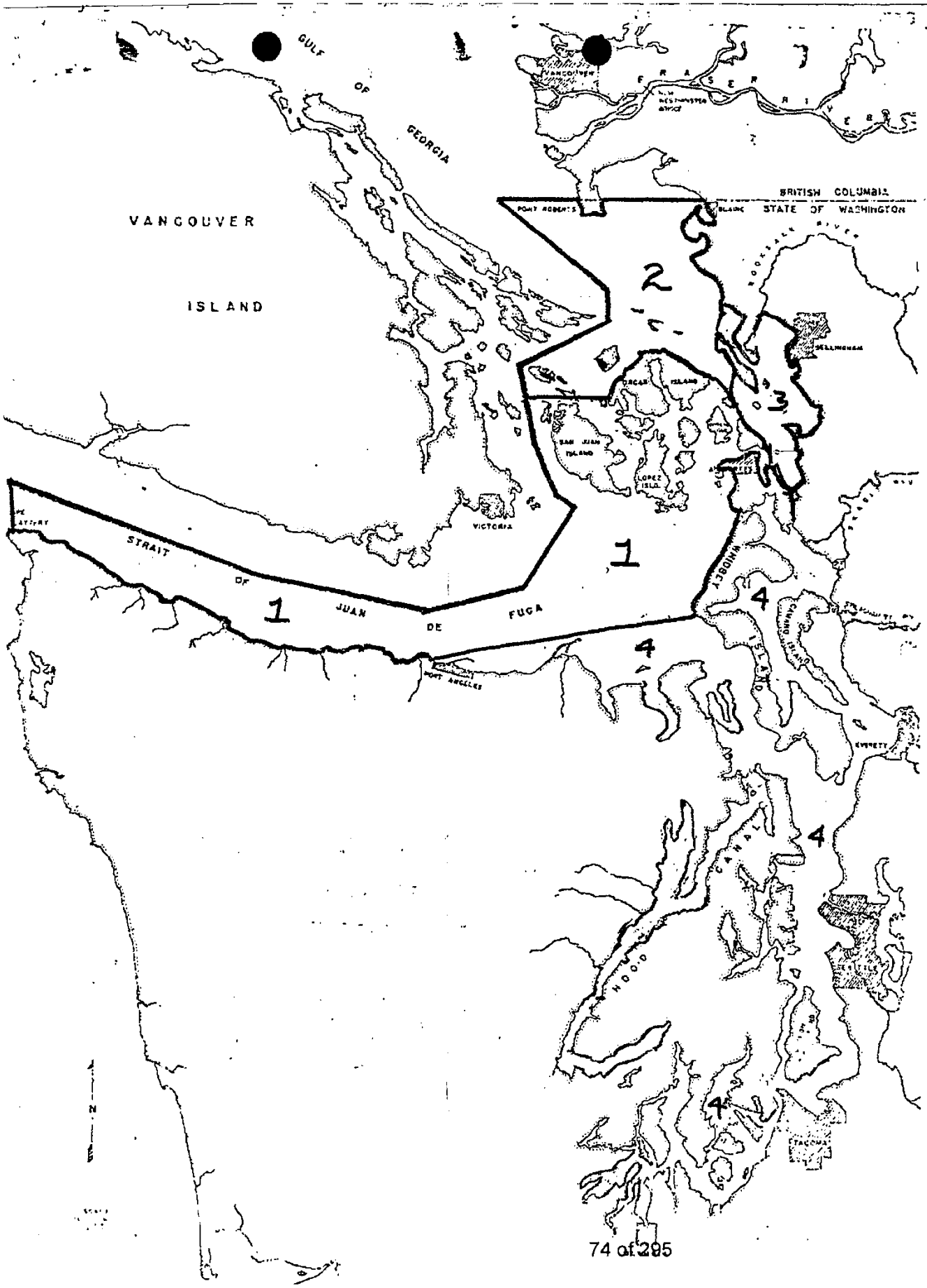
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