No. 20-195

In The Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,

Petitioner,

v.

TULALIP TRIBES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Respondents invite this Court to look past "the contemporaneous words of Judge Boldt" and to presume that the United States and Indian tribes (including Respondents themselves) "erroneous[ly] assum[ed]" for years that the New Determinations Paragraph could be used to secure additional U&A fishing grounds beyond those already memorialized in the Boldt Decree (and in fact was so used). BIO 22, 27. But rewriting the text and history of the Decree in that manner only repeats the Ninth Circuit's profound error. That error, facilitated by a deferential standard of review that the D.C. Circuit has explicitly rejected, has raised alarm bells among Pacific Northwest tribes that have relied on a shared understanding of the Decree for over four decades. This Court should grant review before permitting the Ninth Circuit to dismantle a longstanding pillar of the Decree.

I. RESPONDENTS' REVISIONIST ACCOUNT OF DECREE PROCEEDINGS CANNOT MASK THE NINTH CIRCUIT'S MODIFICATION.

1. Respondents do not dispute that modifying the Decree under the guise of interpretation contravenes this Court's precedent. Pet. 14-16; BIO 23-25. Respondents instead argue that tribes with decreed U&A grounds are barred from proceeding under the New Determinations Paragraph on the theory that the full scope of their fishing rights was already determined. That wholesale rewriting of the historical record, culminating in the Ninth Circuit's departure from the terms and intent of the Decree, impermissibly narrows the New Determinations Paragraph.

a. Far from "deal[ing] comprehensively with the nature and extent of treaty fishing rights in northwest Washington," BIO 1, Judge Boldt took pains to emphasize in 1974 that "no complete inventory of all the Plaintiff tribes' [U&A] fishing sites c[ould] be compiled," *United States v. Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974). That task was "impossible" because "[d]ocumentation as to which Indians used specific fishing sites [wa]s incomplete." *Id.* at 353. Thus, "[f]or each of the plaintiff tribes," Judge Boldt determined "some, *but by no means all*, of their principal [U&A] fishing places," *id.* at 333 (emphasis added), and adopted the New Determinations Paragraph to address new evidence of additional U&A grounds that came to light.

Those unambiguous statements disprove Respondents' assertion that the original Decree "proceedings were not limited or truncated in any way" and that "Judge Boldt ruled on the full scope of Muckleshoot U&A." BIO 30. Indeed, Judge Boldt's treatment of the New Determinations Paragraph soon after issuing the Decree flatly refutes that characterization. Under that provision, "further places that couldn't be identified as usual and accustomed places by any particular tribe or tribes should be included as and when evidence sufficient to sustain that showing was presented." CA9 ER377, ECF No. 11-3. Judge Boldt emphasized that it remained "open to any tribe to seek to have the areas identified previously in the main decision"—*i.e.*, the specific determinations referenced in the New Determinations Paragraph—"extended or further restricted, because there was not the time nor the

necessity during the trial to try to identify all of the hundreds of specific places in this area." *Id.*

Judge Boldt's contemporaneous explication of the New Determinations Paragraph's function and purpose cannot be casually disregarded as an "off the cuff" or "post-decision musing from the bench." BIO 28. In resolving a request by (Respondent) Puyallup Tribe for relief from "the harassment and *** unannounced arrests" of tribal members on disputed U&A grounds, Judge Boldt made clear—as part of his oral "ruling on th[e] subject"—that nothing "prevent[ed] the Puyallups or any other tribe" from initiating a proceeding under the New Determinations Paragraph to "claim some *additional*" U&A grounds. CA9 ER372-380, ECF No. 11-3 (emphasis added).

The United States has long shared that understanding. *See* CA9 ER367, ECF No. 11-3 (explaining that "it's the ruling of this Court that the treaty applies to all other [U&A] places" that "haven't been established yet," and that "[t]he Court certainly held it open *** that additional [U&A] places can be established"). Although Respondents surmise that "[i]t could be that the parties shared an erroneous assumption" about the availability of the New Determinations Paragraph, BIO 27, historical practice proves otherwise: for decades, tribes with specific determinations—including certain Respondent tribes (some of whom waived a response rather than join the BIO)—have used the New Determinations Paragraph to establish additional U&A grounds. Pet. 18. It is Respondents' account of Decree proceedings that is "at odds with" the "consistent reading given to the decree in binding judicial decisions." BIO 25 (internal quotation marks omitted).

b. Respondents urge this Court to ignore uncontrovertible evidence of the Decree's meaning "even if some of those words happen to be the contemporaneous words of Judge Boldt himself." BIO 22. But ignoring what the New Determinations Paragraph "was really designed to accomplish" defies this Court's precedent. *City of Vicksburg v. Henson*, 231 U.S. 259, 273 (1913). Courts have a "duty to construe [a] decree with reference to the issue it was meant to decide." *Minnesota Co. v. Chamberlain*, 70 U.S. 704, 710 (1865).

Respondents point to differences between consent decrees and judicial decrees. BIO 18-19, 24-25. Yet they fail to explain how those differences render inapplicable the prohibition against interpretations that "substantially change[] the terms of a decree." *United States v. Atlantic Refin. Co.*, 360 U.S. 19, 23 (1959). No surprise why: "Decrees entered after litigation and those entered by consent are treated in the same fashion on a motion to modify." 11A FEDERAL PRACTICE AND PROCEDURE § 2961 (3d ed. 2020).

Respondents also insist (BIO 3, 24) that the plain meaning of "specifically determined," as used in the New Determinations Paragraph, precludes tribes with *any* U&A findings from establishing additional fishing grounds under that provision—on the assumption that such findings implicitly exclude all other areas. Such a construction can only be described as "strained" in light of "the consistent reading given to the decree" since its inception. *Atlantic Refin.*, 360 U.S. at 22. Between Judge Boldt's own words and the Decree's implementation, there is every indication that the New Determinations Paragraph remains available to tribes (like Muckleshoot) with existing U&A findings,

and "no fair support for" the Ninth Circuit and Respondents' contrary view that the Decree would serve as the final word on a tribe's U&A grounds. *Hughes v. United* States, 342 U.S. 353, 357 (1952).

c. *Muckleshoot I* and Judge Rothstein's ruling in Subproceeding 97-1 do not dictate a different conclusion. Neither can modify the words of the Decree. And any tension between those decisions and Muckleshoot's position is illusory.

According to Respondents, *Muckleshoot I* holds that a tribe may *never* proceed under the New Determinations Paragraph if its U&A has been determined, and Subproceeding 97-1 declared that Muckleshoot's marine U&A had been conclusively demarcated in the Decree. Not so. Those decisions distinguished between Clarification Paragraph and New Determinations Paragraph proceedings. But they did so with an eye toward circumscribing the Clarification Paragraph issue before them: the scope of an *existing* U&A finding, based solely on limited evidence bearing on Judge Boldt's intent. *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) ("[T]he issues presented *** did not comprehend new determinations of locations of [U&A] fishing grounds. *** '[T]he only matter at issue is the meaning of Judge Boldt's Finding No. 46 and the only relevant evidence is that which was considered by Judge Boldt when he made his finding.'") (second alteration in original); *United States v. Washington*, 19 F. Supp. 3d 1252, 1272 (W.D. Wash. 1997) ("[The tribes] have asked the court to interpret Judge Boldt's Finding of Fact (FOF) 76.").

Neither decision had occasion to "address what happens after a Clarification Paragraph proceeding alters a Specific Determination" or to "preclude [Muckleshoot] from invoking the New Determinations Paragraph and offering evidence" of other U&A grounds. Pet. App. 22a-23a (Ikuta, J., dissenting). They simply refined the meaning of a U&A ground set forth in the Decree.

Tellingly, that is the position *Respondents* embraced in Subproceeding 97-1. Arguing that Judge Boldt intended his U&A finding of "Puget Sound" in the Decree to mean only "Elliott Bay," Respondents represented—consistent with the limited nature of that Clarification Paragraph proceeding—that if Muckleshoot "believes it has sufficient evidence to establish additional U&A [beyond Elliott Bay], it can file a Request for Determination and present the evidence" for an "expanded U&A." CA9 ER51, ER56, ECF No. 11-2. That is what Muckleshoot seeks to do here. Respondents offer nothing but deafening silence on their "manifestly unfair" turnabout. Pet. App. 21a (Ikuta, J., dissenting).

Respondents' law-of-the-case framing and finality concerns falter for the same reasons. Muckleshoot's ability to proceed under the plain terms of the New Determinations Paragraph exists *because of*—not in spite of—Subproceeding 97-1. As Judge Ikuta explained, "after Judge Rothstein's decision, *** there was no longer a Specific Determination addressing Puget Sound as a whole. Therefore, the Muckleshoot were entitled to request a new Specific Determination under the New Determinations Paragraph relating to areas in Puget Sound outside of Elliott Bay." Pet. App. 21a.

As no court has considered Muckleshoot's new evidence that it traditionally fished in those areas, this case poses no danger of "relitigation." BIO 34-36. Nor is the potential "expansion" of Muckleshoot's U&A grounds beyond the "Elliott Bay" specific determination reason to deny the tribe a "day in court" and a "full and fair opportunity *** to present [its] evidence." BIO 29-30. That is the entire purpose of the New Determinations Paragraph.

2. The Ninth Circuit's narrowing of the New Determinations Paragraph also runs counter to the Indian law canon of construction. Pet. 21-24. Respondents accept that treaty rights must be "given a sympathetic construction as the Indians understood them." BIO 26. But they wrongly suggest that the canon does not apply to decrees: a "[d]ecree is to be interpreted in a manner favorable to Indians." *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1438 (9th Cir. 1994).

Respondents cannot circumvent the canon by casting this case as "benefit[ting] one tribe over another." BIO 26. Beyond the fact that it "reads *** precedent too broadly to advocate *** that the Indian canon is inapplicable whenever another tribe would be disadvantaged," the Ninth Circuit has made clear *in a case concerning treaty fishing rights subject to the Boldt Decree* that use of the "Indian canon *** fits with Judge Boldt's recognition that a tribe may establish U & A in an area 'whether or not other tribes then also fished in the same waters.'" *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1163-1164 (9th Cir. 2017) (quoting 384 F. Supp. at 332); *see* 384 F. Supp. at 353 ("[Fisheries] are held in common, and no

tribe pretends to claim from another *** seignorage for the right of taking.").

The decision below diminishes Muckleshoot's treaty fishing rights by cutting off, not facilitating, litigation of additional U&A grounds under the New Determinations Paragraph. Respondents' answer (BIO 27) is to presume that Muckleshoot should lose on the merits, which of course is no answer at all.

II. RESPONDENTS CANNOT AVOID THE CIRCUIT CONFLICT.

Respondents do not (and cannot) dispute that the Ninth Circuit endorsed a deferential standard of review, and in this Court they continue to press their view that "deference to the district court" is "appropriate" in light of "extensive experience with overseeing and managing this litigation." BIO 13, 20, 22-23. Respondents' attempts to explain away a square conflict with *United States v. Western Electric Co.*, 900 F.2d 283 (D.C. Cir. 1990) (per curiam), do not withstand scrutiny.

1. Respondents assert (BIO 11-15) that Judge Martinez did not provide an interpretation of the New Determinations Paragraph to which the Ninth Circuit could defer. But that assertion cannot be reconciled with the Ninth Circuit's own words: "In the present case, the district court [*i.e.*, Judge Martinez] found lack of subject matter jurisdiction *based on its interpretation of a prior judicial decree*." Pet. App. 10a-11a (emphasis added).

It makes no difference that Judge Martinez relied on Judge Rothstein's reasoning in Subproceeding 97-1. An interpretation of the Decree couched in Judge

Rothstein's perceived view of the New Determinations Paragraph is still an interpretation of the Decree. That is especially true given that Judge Martinez was required to take the further step of resolving whether "Judge Rothstein somehow left a door open for the Muckleshoot to argue that they have fishing rights in Puget Sound beyond Elliott Bay." Pet. App. 13a.

That the Ninth Circuit also discussed Judge Rothstein's findings hardly means it "never explicitly adopted any of [Judge Martinez's] analysis." BIO 13. To the contrary, the Ninth Circuit immediately followed its discussion of those findings by stating: "This was, or should have been, the end of the matter, *as the district court here found*." Pet. App. 13a (emphasis added); *see id.* at 39a-41a. In short, as Respondents point out, the Ninth Circuit "agree[d] with the district court"—an agreement flowing from the "deference" the Ninth Circuit believed it owed "to the district court's interpretation." *Id.* at 11a.

2. In any event, the decision below is irreconcilable with the D.C. Circuit's directive in *Western Electric* to "take careful account of the explanatory opinion issued by the district judge *at the time the decree was entered*." 900 F.2d at 294 n.10 (emphasis added). Respondents do not point to any part of the Ninth Circuit's analysis that grapples with the contemporaneous evidence of Judge Boldt's intent in crafting the New Determinations Paragraph. That evidence demonstrates that Muckleshoot's invocation of the New Determinations Paragraph is anything but "an impermissible attempt to contradict Judge Boldt's [U&A] determination." Pet. App. 14a; *see* Pet. 16-21; pp. 2-7, *supra*.

Respondents would distinguish *Western Electric* on the ground that it concerned a consent decree negotiated by the parties, not a judicially imposed decree. But as with decree modification (p. 4, *supra*), whatever differences exist, they do not "ha[ve] consequences for the appropriate standard of review." BIO 19. The Decree is of a piece with those entered in water rights adjudications and institutional reform litigation, and this Court's clarification of the proper approach to appellate review will apply across such circumstances and regardless of whether the parties or the district court crafted the decree at issue.

Indeed, the line of authority the Ninth Circuit cites below for reviewing interpretations of judicial decrees originates with *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*—a case concerning a "consent judgment." 689 F.2d 885, 893 (9th Cir. 1982); *see* Pet. App. 11a (relying on *United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1169 (9th Cir. 2018), a "judicial decree" case citing two consent decree cases that directly or indirectly rely on *Vertex*). The Ninth Circuit's decision in *Keith v. Volpe*, which the D.C. Circuit expressly declined to follow, likewise cites *Vertex*. 784 F.2d 1457, 1461 (9th Cir. 1986). Accordingly, it takes no "misdirection" (BIO 15 n.1) to appreciate that the circuit conflict over deference does not turn on the type of decree, but rather "discomfort with the concept that" the standard of review changes with "the identity of a district judge." *Western Elec.*, 900 F.2d at 294.

Nor are Respondents correct (BIO 19-20) that *Western Electric* "primarily analyzed and answered legal questions," whereas Judge Martinez engaged in factfinding reviewed for clear error. Both rulings

involved "interpretation of a *** decree," Pet. App. 11a—"a pure question of law," *Western Elec.*, 900 F.2d at 293-294; *see Vertex*, 689 F.2d at 892 ("[T]he district court's interpretation of the consent judgment is a matter of law[.]"). Even the Ninth Circuit acknowledged that, but for the district court's extensive oversight of the decree, review would have been de novo. Pet. App. 11a.

Relatedly, Respondents' belief (BIO 20-23) that this Court resolved the conflict in "addressing standards of review more generally" is baseless. Neither *Salve Regina College v. Russell*, 499 U.S. 225 (1991), nor *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018), concerned a decree—much less the standard for reviewing interpretations by a district court that has extensively overseen a decree. That a district court may have such experience does not transform the purely legal exercise of construing a decree into a factual one better suited to deferential review.

III. RESPONDENTS DO NOT SERIOUSLY CONTEST THE EXCEPTIONAL IMPORTANCE OF THIS CASE.

Respondents barely engage on the exceptional importance of the question presented. In particular, Respondents do not dispute that this Court has granted review on several occasions—including at the Solicitor General's behest and as recently as a few years ago—to resolve disputes over treaty fishing rights subject to the Decree. If anything, Respondents confirm the vital nature of such rights by underscoring that tribes across the Pacific Northwest have vigorously litigated them across "92 subproceedings,

two volumes and more of reported district court decisions, 41 Ninth Circuit opinions, and two opinions of this Court" in *United States v. Washington* alone. BIO 36. Preserving tribes' ability to prove the full extent of their U&A grounds under the New Determinations Paragraph, as Judge Boldt envisioned, is no less compelling.

Respondents nevertheless claim that "[t]he case involves a single unique clause in a unique decree in a unique case," and that the Ninth Circuit's decision will "appl[y] in no other case and to no other tribe." BIO 36-37. But that sentiment is not shared by other tribes *in this case*—including even those that agree with Respondents on the merits of the underlying dispute—that fear the "devastating" consequences of being unable to invoke the New Determinations Paragraph. Pet. 31. That paradigm-shifting result should not go unreviewed by this Court. If any doubt remains, this Court should seek the United States' views as trustee.

* * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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