APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35610

LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellees,

v.

LUMMI NATION,

Respondent-Appellant,

TULALIP TRIBES; MAKAH INDIAN TRIBE; NISQUALLY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; STATE OF WASHINGTON; STILLAGUAMISH TRIBE; SUQUAMISH TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; UPPER SKAGIT INDIAN TRIBE,

Real Parties in Interest.

No. 19-35611

LOWER ELWHA KLALLAM INDIAN TRIBE,

Petitioner,

and

JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellants,

v.

LUMMI NATION,

Respondent-Appellee,

TULALIP TRIBES; MAKAH INDIAN TRIBE;
NISQUALLY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE;
SQUAXIN ISLAND TRIBE; STATE OF WASHINGTON;
STILLAGUAMISH TRIBE; SUQUAMISH TRIBE;
SWINOMISH INDIAN TRIBAL COMMUNITY;
UPPER SKAGIT INDIAN TRIBE,

Real Parties in Interest.

No. 19-35638

LOWER ELWHA KLALLAM INDIAN TRIBE,

Petitioner-Appellant,

and

JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE
S'KLALLAM TRIBE,

Petitioners,

v.

LUMMI NATION,

Respondent-Appellee,

TULALIP TRIBES; MAKAH INDIAN TRIBE;
NISQUALLY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE;
SQUAXIN ISLAND TRIBE; STATE OF WASHINGTON;
STILLAGUAMISH TRIBE; SUQUAMISH TRIBE;
SWINOMISH INDIAN TRIBAL COMMUNITY;
UPPER SKAGIT INDIAN TRIBE,

Real Parties in Interest.

Submitted: June 2, 2021*

Before: HAWKINS and McKEOWN, Circuit Judges, and FOOTE,† District Judge.

MEMORANDUM

The parties appeal the district court's application of our opinion and remand in *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (*"Lummi III"*).

We held in *Lummi III* that the "waters west of Whidbey Island" are encompassed in the Lummi Nation's "usual and accustomed" fishing grounds ("U&A"). For purposes of that opinion, we equated the phrase "waters west of Whidbey Island" with the phrase "the waters contested here." *See id.* at 1008 (describing "the waters contested here" as "the waters west of Whidbey Island"). Therefore, in stating that the "waters west of Whidbey Island" are part of the Lummi Nation's U&A, we held that the "waters contested here" are part of the Lummi Nation's U&A. The "waters contested here," in turn, are the waters "northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

† The Honorable Elizabeth E. Foote, United States District Judge for the Western District of Louisiana, sitting by designation.

bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait." *Lummi III* held that these waters are part of the Lummi Nation's U&A.

Lummi III did not address, nor did we have occasion to address, the waters west of the line running from Trial Island to Point Wilson ("the Trial Island line"). However, in holding that the waters east of the Trial Island line are included in the Lummi Nation's U&A, we relied on the geographic fact that those waters lie between "the waters surrounding the San Juan islands" and "Admiralty Inlet" and the general evidence of travel between those two areas. *Lummi III*, 876 F.3d at 1009. Under the logic of *Lummi III*, the waters to the west of the Trial Island line are not part of the Lummi Nation's U&A, because those waters do not similarly lie between "the waters surrounding the San Juan islands" and "Admiralty Inlet." *Id.* Finally, by declining to determine the outer bounds of the Strait of Juan de Fuca, which is excluded from the Lummi Nation U&A, we held that the Lummi Nation U&A and the Strait of Juan de Fuca do not necessarily share a boundary. *Id.* at 1011.

Because the district court interpreted *Lummi III* to hold only that the Lummi Nation has the right to fish in some portion of the contested waters, we reverse and remand for the purpose of entering judgment in favor of the Lummi Nation on the ground that the Lummi Nation U&A includes the entirety of the area contested in this subproceeding, e.g. the waters "northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey

Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait."

The district court did not abuse its discretion in denying the S'Klallam's motion for leave to amend the Request for Determination ("RFD") and in striking S'Klallam's expert report. *See In re Western States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 736 (9th Cir. 2013) (reviewing denial of motion for leave to amend for abuse of discretion). The Lummi Nation's fishing rights in the waters east of the Trial Island line were resolved by *Lummi III*, and the rights in the waters west of the Trial Island line are not presently contested. The amended RFD would therefore be futile—rendering harmless any error in denying leave to amend and in striking the expert report. *See Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).[1]

REVERSED with respect to the district court's interpretation of *Lummi III*, AFFIRMED with respect to the district court's denial of leave to amend and striking of the expert report, and REMANDED for entry of judgment in favor of the Lummi Nation. Each party shall pay its costs on appeal.

[1] The Motion to Take Judicial Notice [Docket Entry No. 71] is denied as moot.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35610

LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellees,

v.

LUMMI NATION,

Respondent-Appellant,

TULALIP TRIBES; MAKAH INDIAN TRIBE; NISQUALLY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; STATE OF WASHINGTON; STILLAGUAMISH TRIBE; SUQUAMISH TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; UPPER SKAGIT INDIAN TRIBE,

Real Parties in Interest.

No. 19-35611

LOWER ELWHA KLALLAM INDIAN TRIBE,

Petitioner,

and

JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellants,

v.

LUMMI NATION,

Respondent-Appellee,

TULALIP TRIBES; MAKAH INDIAN TRIBE;
NISQUALLY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE;
SQUAXIN ISLAND TRIBE; STATE OF WASHINGTON;
STILLAGUAMISH TRIBE; SUQUAMISH TRIBE;
SWINOMISH INDIAN TRIBAL COMMUNITY;
UPPER SKAGIT INDIAN TRIBE,

Real Parties in Interest.

No. 19-35638

LOWER ELWHA KLALLAM INDIAN TRIBE,

Petitioner-Appellant,

and

JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE
S'KLALLAM TRIBE,

Petitioners,

v.

LUMMI NATION,

Respondent-Appellee,

TULALIP TRIBES; MAKAH INDIAN TRIBE;
NISQUALLY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE;
SQUAXIN ISLAND TRIBE; STATE OF WASHINGTON;
STILLAGUAMISH TRIBE; SUQUAMISH TRIBE;
SWINOMISH INDIAN TRIBAL COMMUNITY;
UPPER SKAGIT INDIAN TRIBE,

Real Parties in Interest.

Submitted: July 20, 2021

Before: HAWKINS and McKEOWN, Circuit Judges, and FOOTE,* District Judge.

ORDER

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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* The Honorable Elizabeth E. Foote, United States District Judge for the Western District of Louisiana, sitting by designation.

Appendix C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. C70-9213RSM

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

ORDER

I. INTRODUCTION

This matter is before the Court on a Motion for Leave to Amend the Request for Determination and Memorandum of Support (Dkt. #238[1]) filed by the Jamestown S'Klallam Tribe and the Port Gamble S'Klallam Tribe (collectively, "S'Klallam") and a Motion for Entry of Judgment (Dkt. #252[2]) filed by the Lower Elwha Klallam Indian Tribe ("Lower Elwha").[3]

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[1] Dkt. #21,868 in Case No. C70-9213RSM.

[2] Dkt. #21,897 in Case No. C70-9213RSM.

[3] Also before the Court are Lower Elwha's request that certain material be struck from the record (Dkt. #260 at 3-4) and Objection to Surreply, With Alternative Request to Respond (Dkt. #263). Both are addressed below.

This subproceeding was initiated on November 4, 2011, as a joint Request for Determination ("RFD") by S'Klallam and Lower Elwha. Dkt. #1-1.[4] The tribes sought confirmation that Lummi Nation's ("Lummi") usual and accustomed fishing places ("U&A") did "not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island (excepting Admiralty Inlet)." *Id.* at ¶ 2. On this subproceeding's second trip to the Ninth Circuit, the Ninth Circuit concluded "that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *United States v. Lummi Nation*, 876 F.3d 1004, 1011 (9th Cir. 2017) ("*Lummi III*") (Dkt. #224[5]). The Ninth Circuit remanded the matter to this Court and the parties pursued settlement.

The parties were unable to agree on an appropriate path forward or on a satisfactory resolution and now present the three different interpretations of *Lummi III* and three different views for the future of this dispute. Believing that litigation should continue, S'Klallam seeks leave to amend the RFD. Lower Elwha believes that the Ninth Circuit's decision resolved this case and seeks for the Court to enter judgment. Lummi, also believing that the dispute has been resolved, does not support amendment of the RFD but does not agree with the judgment that Lower Elwha seeks. Finding that this subproceeding has run its course, the Court resolves

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[4] Dkt. #19,886 in Case No. C70-9213RSM.

[5] Dkt. #21,676 in Case No. C70-9213RSM.

the pending motions as follows and dismisses the action.[6]

II. BACKGROUND

At issue in this subproceeding is the scope of the Lummi U&A, an issue that has been before this Court several times. Judge Boldt provided the first determination:

> [T]he usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay.

United States v. Washington, 384 F. Supp. 312, 360 (W.D. Wash. 1974) ("*Final Decision I*"). In Subproceeding 89-2, this Court determined that the Lummi U&A did not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. The Ninth Circuit reversed as to Admiralty Inlet because it "would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) ("*Lummi I*").

Years later, Lower Elwha and S'Klallam initiated this subproceeding, asserting "that Lummi's U&A does not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island (excepting Admiralty Inlet)." Dkt. #1-1 at ¶ 2 (citing

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[6] The parties requested oral argument, but the Court does not find oral argument necessary to its resolution of these matters.

Lummi I). The waters at issue in the dispute (the "disputed waters") were further defined:

> [T]he marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet [(the "Trial Island Line")], bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait.

Id.

Lower Elwha and S'Klallam sought summary judgment on the basis that prior decisions had already determined that no Lummi U&A was within the disputed waters. Dkt. #40.[7] This Court agreed, finding that the issue had already been resolved by a prior judicial decision in Subproceeding 89-2. Dkt. #59.[8] Lummi appealed to the Ninth Circuit. On review, the Ninth Circuit reversed, finding that its reasoning in *Lummi I* applied equally in this case and that "no prior decision in this case has yet explicitly or by necessary implication determined whether the waters immediately west of northern Whidbey Island are a part of the Lummi's U&A." *United States v. Lummi Nation*, 763 F.3d 1180, 1187-88 (9th Cir. 2014)[9] ("*Lummi II*"). The matter was remanded to this Court for further proceedings.

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[7] Dkt. #20,032 in Case No. C70-9213RSM.

[8] Dkt. #20,112 in Case No. C70-9213RSM.

[9] Dkt. #109 (Dkt. #20,680 in Case No. C70-9213RSM).

On a second motion for summary judgment, this Court found that the evidence before Judge Boldt did not support the conclusion that he intended to include any of the disputed waters in Lummi's U&A and the Court resolved the matter in favor of Lower Elwha and S'Klallam. Dkt. #210.[10] Lummi again appealed, and the Ninth Circuit again reversed.

The Ninth Circuit concluded "that the district court erred in excluding the waters west of Whidbey Island from the Lummi's U&A." *Lummi III*, 876 F.3d at 1009. In doing so, the Ninth Circuit relied on its prior reasoning that "[i]f to 'proceed through Admiralty Inlet' rendered Admiralty Inlet a part of the Lummi U&A, then to proceed from the southern portions of the San Juan Islands to Admiralty Inlet would have the same effect: to render the path a part of the Lummi U&A, just like Admiralty Inlet." *Id.* at 1010 (quoting *Lummi II*, 763 F.3d at 1187) (quotation marks omitted). On this basis, the Ninth Circuit held "that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." *Id.* at 1011. The Ninth Circuit did not define "the waters west of Whidbey."

III. DISCUSSION

A. Differing Interpretations of *Lummi III*

The Ninth Circuit's latest ruling has done little to resolve the underlying conflict and the tribes have adopted three differing interpretations of *Lummi III* and how to proceed.

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[10] Dkt. #21,067 in Case No. C70-9213RSM.

S'Klallam takes the position that the Ninth Circuit determined only that there must be *some* Lummi U&A within the disputed waters, but that the Ninth Circuit left it for this Court to determine where that U&A lies. As such, S'Klallam believes that an amended RFD is necessary, removing assertions that Lummi is prevented from fishing in "waters west of Whidbey Island" and instead requesting that the Court determine Lummi's "transit path," define the "waters west of Whidbey Island," and define the eastern boundary of the Strait of Juan de Fuca.[11] Dkt. #238 at 6-9. S'Klallam believes that these amendments will allow the Court to make factual determinations to fully resolve the dispute. Because S'Klallam believes that further proceedings are necessary and Lower Elwha believes that judgment

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[11] The Court notes that S'Klallam differs in its formal request for relief and its characterization of the relief it seeks. *Compare* Dkt. #239 at 19 (proposed amended complaint asking the Court to determine that the Lummi U&A "does not include the eastern portion of the Strait of Juan de Fuca," to prevent Lummi fishing "in the eastern portion of the Strait of Juan de Fuca, Hood Canal, Port Townsend Bay, and any other bay outside Admiralty Inlet but adjacent to Admiralty Inlet," and to define "'Northern Puget Sound' as it relates to Lummi's U&A.") *with* Dkt. #239 at 5-6 (characterizing its request as seeking determination of "(A) western boundary of Lummi's usual and accustomed fishing grounds and stations ("U&A"); (B) the definition of "Northern Puget Sound" as it is used in Finding of Fact 46; and (C) the definition of the Strait of Juan de Fuca as used by the Ninth Circuit in" *Lummi I*) *and* Dkt. #238 at 6-8 (arguing that S'Klallam must amend the RFD to eliminate its request that Lummi be prevented from fishing in "waters west of Whidbey Island" and must ask the Court to determine Lummi's "transit path," define the "waters west of Whidbey Island," and define the eastern boundary of the Strait of Juan de Fuca).

should be entered, S'Klallam believes that Lower Elwha should be stricken as a co-requestor and also opposes Lower Elwha's Motion for Entry of Judgment.

Lower Elwha maintains that the Ninth Circuit has resolved the matter, such that judgment should be entered. Dkt. #252. Specifically, Lower Elwha argues that the Ninth Circuit (1) determined that the disputed waters are Lummi U&A, (2) thereby determined the full extent of Lummi U&A, and (3) determined that Lummi U&A cannot include any waters further west of the disputed waters—west of the Trial Island Line. *Id.* at 1-2. Lower Elwha therefore opposes S'Klallam's Motion and requests, in its own Motion, that the Court enter judgment consistent with its interpretation.

Lummi agrees with Lower Elwha that the Ninth Circuit resolved this matter but disagrees as to whether the western boundary of its U&A was fully determined. Dkts. #240[12] and #254.[13] Lummi maintains that the Ninth Circuit determined that all of the disputed waters are "waters west of Whidbey Island" and constitute Lummi U&A. Dkt. #240 at 2. But Lummi further maintains that the western boundary of its U&A has not been determined and may lie further west than the Trial Island Line. Dkt. #254 at 2. Lummi accordingly opposes both motions and believes that no further proceedings should occur in this matter.

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[12] Dkt. #21,877 in Case No. C70-9213RSM.

[13] Dkt. #21,908 in Case No. C70-9213RSM.

B. S'Klallam's Motion for Leave to Amend

1. Legal Standard

Federal Rule of Civil Procedure 15 mandates that leave to amend "be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). The party opposing amendment has the burden of showing that amendment is not warranted. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); *see also Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988). Amendment may be unwarranted "due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . ., [and] futility of amendment.'" *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)). "Not all of the factors merit equal weight. . . . [I]t is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052 (citation omitted). "Absent prejudice, or a strong showing of any of the remaining [] factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Id.* (emphasis in original).

2. S'Klallam's Arguments for Amendment Are Not Persuasive

S'Klallam raises two primary arguments in favor of amendment: that new facts call into question the Ninth Circuit's conclusions in *Lummi I* and *Lummi III* and that the Ninth Circuit remanded this case for the

Court to make factual findings. But these arguments are not persuasive as they appear futile and raise jurisdictional concerns. Not only that, the amended RFD does not appear to appropriately state a claim. For these reasons, leave to amend is not proper.

a. S'Klallam's "New Facts" Argument Raises Futility Concerns

S'Klallam first argues that in this and other subproceedings Lummi has inconsistently and deceptively asserted that its U&A includes waters both to the west and to the east of Whidbey Island. Dkt. #238 at 3-4. Specifically, S'Klallam argues that it has recently learned of a 2008 Lummi agreement with the Swinomish Indian Tribal Community to "stand-down" in asserting U&A on the east side of Whidbey Island and that thereafter Lummi represented to this Court and the Ninth Circuit that the waters west of Whidbey Island "are the sole direct connection" between the San Juan Islands and Admiralty Inlet. *Id.* at 3. This undisclosed agreement is important information, S'Klallam argues, as it "would have refuted the argument that [] 'it was just as likely' that the Lummi travelled west of Whidbey," thereby undermining the Ninth Circuit's reasoning in both *Lummi I* and *Lummi III*. *Id.* at 4.

But there are several problems with S'Klallam's argument. Even if Lummi has taken inconsistent positions, S'Klallam provides no basis for this Court to revisit prior Ninth Circuit precedent. S'Klallam does not adequately demonstrate that the Ninth Circuit's decisions in *Lummi I* and *Lummi III* would have been different with knowledge of this "stand-down" agreement. And, as discussed below, this Court is

unable to consider new evidence in this Paragraph 25(a)(1) proceeding. *Lummi I*, 235 F.3 at 450 ("the only matter at issue is the meaning of Judge Boldt's Finding [of Fact] 46 and the only relevant evidence is that which was considered by Judge Boldt when he made his finding") (quoting *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1360 (9th Cir. 1998) ("*Muckleshoot I*")). S'Klallam's argument appears better suited for the Ninth Circuit and does not justify amendment.

b. S'Klallam's "Clarification" Argument Raises Jurisdictional Concerns

S'Klallam also argues that the Ninth Circuit remanded this matter for the Court to resolve various ambiguities and conflicts resulting from the Ninth Circuit's prior decisions. S'Klallam recognizes that the Lummi U&A includes some waters west of Whidbey Island but maintains that the RFD must be amended to ask the Court to "determine *where* the eastern Strait of Juan de Fuca begins . . ., and *where* the waters west of Whidbey Island end." Dkt. #238 at 5-7. Otherwise, S'Klallam argues, "the Lummi's U&A boundary is still ambiguous and subjects the S'Klallam and other tribes to further conflict regarding fishing rights." *Id.* at 7. Resolving these conflicts, S'Klallam believes, necessitates further development of the factual record and application of new and different legal principles. *Id.* at 6-9; Dkt. #247[14] at 3 (Ninth "Circuit intended to remand the case because, not only did the Lummi specifically request it, the district court can take evidence—where

[14] Dkt. #21,888 in Case No. C70-9213RSM.

the appellate court is limited in its review") (citing *Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982)).

But S'Klallam's argument raises significant jurisdictional concerns and S'Klallam does not demonstrate an adequate basis for this Court to exercise its continuing jurisdiction under Final Decision I. S'Klallam appears to assume, without directly addressing, that its amended RFD can proceed under Paragraph 25(a)(6). That provision allows the Court to determine: "The location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I." Final Decision I, 384 F. Supp. at 419. But the Ninth Circuit has ruled that Lummi U&A was specifically determined, precluding Paragraph 25(a)(6) jurisdiction.

The history and procedural posture of this subproceeding supports the Court's decision. This subproceeding has been entertained under Paragraph 25(a)(1), which allows the Court to determine: "Whether or not the actions intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction." *Final Decision I*, 384 F. Supp. at 419. As such, the dispute was considered under *Muckleshoot I*'s twostep analysis. *Muckleshoot I*, 141 F.3d 1355. The Court first looks to *Final Decision I*'s U&A determinations. *Id.* at 1359. If the prior determinations are ambiguous, the Court next looks to the entire record before Judge Boldt, which is the only relevant evidence. *Id.*

This is the process utilized here. The Court has already found that Finding of Fact 46 is ambiguous. Dkt. #210 at 14. On Lower Elwha and S'Klallam's motion for summary judgment, this Court found, from the record before Judge Boldt, that Judge Boldt had specifically determined that Lummi U&A did not lie within the disputed waters. *Id.* at 23. But in *Lummi III*, the Ninth Circuit—also considering the record before Judge Boldt—held that Judge Boldt had specifically determined that at least some Lummi U&A passed through the disputed waters. While the Ninth Circuit did not identify the extent or location of that U&A, reason dictates that the evidence that formed the basis for Judge Boldt's intent lies within the record before him.[15] This leads to the inescapable conclusion that Judge Boldt specifically determined this portion of the Lummi U&A, precluding proceedings under Paragraph 25(a)(6) for presentation of new evidence.

This Court has previously noted the temptation to resolve "the contours of a tribe's U&A as determined by Judge Boldt at once, in order to facilitate finality and achieve repose." *United States v. Washington*, Case No. C70-9213RSM, 2015 WL 3504872 at *6 (June 3, 2015). But instead, "Paragraph 25(a)(1) jurisdiction contemplates successive lawsuits aimed at clarifying different portions of a tribe's U&A when a party's intended or effected actions raise the need for such clarification." *Id.* As such, "the Court's

[15] The Court does not presume that Judge Boldt determined that Lummi U&A was included somewhere in the disputed waters but did not come to a reasoned basis for his decision or simply intended to leave the issue ambiguous.

clarifications in any one subproceeding are necessarily limited to the issues raised in the request before it." *Id.* Paragraph 25(a)(6) is not available and Paragraph 25(a)(1) does not allow the Court to resolve general ambiguities and potential contradictions as requested by S'Klallam. Dkt. #248[16] at 2 (Ninth Circuit "created a new body of water . . . leaving it ambiguous and potentially in contradiction with prior rulings").

c. S'Klallam's Amended Request for Determination Fails to State a Claim

The Court is also persuaded by Lummi's argument that S'Klallam's proposed amended RFD fails to adequately state a claim or properly invoke the Court's Paragraph 25(a)(1) jurisdiction. Lummi complains that S'Klallam does not specify the relief it seeks with adequate specificity, relying instead on general terms to define geographic areas where it alleges Lummi fishing is out of compliance with *Final Decision I*. Dkt. #240 at 11 (Lummi arguing that S'Klallam does not provide any basis or proposal for the determinations they seek). Without defining a specific area of dispute, "intended and effectuated" activities cannot be identified and compliance with *Final Decision I* cannot be determined.

For instance, S'Klallam does "not discuss any specific location of the boundary between the Strait of Juan de Fuca and the waters west of Whidbey Island." *Id.* Relying only on broad geographical assertions, S'Klallam cannot demonstrate that Lummi is pursuing fishing within the Strait of Juan de Fuca. Indeed, Lummi maintains that it does not fish within

[16] Dkt. #21,889 in Case No. C70-9213RSM.

the Strait of Juan de Fuca and does not intend to. *Id.* at 7-8. S'Klallam may be correct that this particular example is unavailing because it is premised on Lummi's position that the eastern end of the Strait of Juan de Fuca is at least as far west as the Trial Island Line. Dkt. #247 at 5 (noting impossibility of determining whether Lummi is fishing in the Strait of Juan de Fuca because no court has defined the boundaries of the Strait). But the Court agrees with Lummi's underlying reasoning. Without some alleged boundary, S'Klallam will be unable to show—based on the evidence before Judge Boldt—that Lummi fishing is out of compliance with *Final Decision I*.

3. S'Klallam's Proposed Amendments Prejudice Lower Elwha and Lummi

Even if the jurisdictional and futility concerns did not convincingly weigh against granting leave to amend, Lower Elwha and Lummi raise valid concerns about prejudice, a primary consideration for the Court. Specifically, Lower Elwha notes its status in this matter as a co-requestor and argues that it is entitled to a resolution of its RFD and should not be involuntarily removed, as S'Klallam seeks to do. Dkt. #244[17] at 11-12. Conversely, S'Klallam argues that it will be prejudiced if Lower Elwha is not struck as a requestor because the subproceeding will not proceed and S'Klallam will face harm in the absence of relief while Lower Elwha will not. Dkt. #238 at 9-10. While the Court discusses Lower Elwha's request for a judgment in more detail below, the Court does agree that Lower Elwha should generally be entitled to some

[17] Dkt. #21,881 in Case No. C70-9213RSM.

resolution of its RFD. *See Askins v. U.S. Dep't. of Homeland Security*, 899 F.3d 1035 (2018) (plaintiff entitled "to judgment on the complaint's own merits").

Lower Elwha and Lummi also assert that they will be prejudiced by any expansion of this subproceeding. Specifically, Lower Elwha points to S'Klallam's addition of new disputes related to Port Townsend Bay and the mouth of Hood Canal and notes that S'Klallam mentions no basis for the additions. Dkt. #244 at 12-13. Lummi focuses, instead, on timing and finality issues, maintaining that the Court should not allow yet another S'Klallam challenge to Lummi's U&A as S'Klallam has known, for almost ten years, that it could assert that Lummi U&A was only a portion of the disputed waters. Dkt. #240 at 7, 9-10. At a minimum, Lummi maintains that the Court should not allow amendment at this stage in the subproceeding, forcing Lummi to begin litigation anew, formulate a new defense, and engage in duplicative discovery. *Id.* at 12-13.

This prejudice is mitigated somewhat by the fact that S'Klallam may seek multiple challenges to Lummi U&A. *See United States v. Washington*, 2015 WL 3504872 at *6 (noting intent of multiple actions under Paragraph 25(a)(1)). As such, Lower Elwha and Lummi face the same perceived harms if the Court allows amendment or if S'Klallam initiates a new subproceeding. S'Klallam also notes that the prejudice related to discovery is limited because very little discovery has occurred thus far. Dkt. #247 at 4-5. These counter-arguments certainly weigh against the arguments for prejudice, but they do not fully offset them.

More importantly, the Court does not find that initiating a new subproceeding—if S'Klallam may—substantially burdens S'Klallam. S'Klallam recognizes that it "could potentially file the new claims as a separate RFD," but argues that such an approach "would be inefficient." Dkt. #248 at 6. The Court recognizes that there are expenses and difficulties inherent in opening a new subproceeding and that it may be especially difficult or impossible here. But a new subproceeding would clearly mark a new chapter in this ongoing saga and would trigger *Final Decision I*'s important pre-filing procedures. *See United States v. Washington*, No. 17-35760 (9th Cir. June 26, 2019) (emphasizing the importance of pre-filing procedures).

For these reasons, the Court concludes S'Klallam should not be granted leave to file its proposed amended RFD.

C. Motion for Entry of Judgment

1. Lower Elwha's Requests to Strike

Before considering Lower Elwha's Motion, the Court addresses requests, made in Lower Elwha's reply, to strike material included in support of, and referenced in, S'Klallam's response. Specifically, Lower Elwha argues:

> The Declaration of Josh Wisniewski and Exhibits A, C, D, and E thereto, Dkt. No 256 (filed with the S'Klallam Response), must be struck: the declaration is new anthropological opinion; Exhibit A is Dr. Wisniewski's Vita; and Exhibits C, D, and E are Barbara Lane's reports on treaty-time fishing of Elwha, Port Gamble, and Jamestown, respectively. None of this material was before Judge Boldt in

> Decision No. I and all of it is prohibited latter-day evidence. *Lummi I,* 235 F.3d at 450. In addition, the statements in the S'Klallam Response that expressly cite to Dr. Wisniewski's Declaration, other than to Exhibit F, must also be struck.
>
> Elwha also requests that the 1989 Declaration of Barbara Lane be struck, Dkt. No. 249 at 39-44 (Exh. F to 2d Rasmussen Dec.), as well as the arguments in the S'Klallam Response that rely on it. Dkt. No. 255 at 10:21-22 and 11:1-4. *Lummi I* held, and the S'Klallam concede, that this declaration is latter-day evidence that may not be relied on to determine Judge Boldt's intent. *See* Dkt. No. 255 at 11, *citing Lummi I*, 235 F.3d 443, 449-50.

Dkt. # 260[18] at 3-4 (footnotes omitted).

S'Klallam argue, in a "Surreply," that the Court can properly rely on the Declaration of Josh Wisniewski because the attached materials have previously been submitted to the Court in the underlying case and because the declaration does not interpret Judge Boldt's intent but "'sheds light' on terminology used." Dkt. #262[19] at 2-3. Further S'Klallam maintains that the Wisniewski Declaration challenges the Trial Island Line as a route of travel and merely assists the Court in parsing the record with the benefit of his professional knowledge. *Id.* Regarding Dr. Lane's declaration, S'Klallam argues

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[18] Dkt. #21,910 in Case No. C70-9213RSM.

[19] Dkt. #21,915 in Case No. C70-9213RSM.

that it was not submitted in response to Lower Elwha's Motion—though it was relied on for support—and is relied on to "rebut the assertion that a specific travel route was already adjudicated by this court, *not* to determine Judge Boldt's intent." *Id.* at 4 (emphasis in original).

Lower Elwha further responded to S'Klallam's surreply, filing Lower Elwha Klallam Tribe's Objection to Surreply with Alternative Request to Respond ("Objection"). Dkt. #263.[20] Lower Elwha argues that S'Klallam's surreply was procedurally improper and requests the opportunity to respond should the Court consider S'Klallam's arguments.

The Court agrees with Lower Elwha that the evidence identified and the arguments relying on that evidence are not properly considered in this instance and accordingly grants Lower Elwha's requests to strike. This result is further buttressed by the evidence being irrelevant to the Court's resolution of the underlying Motions. Because the Court otherwise grants Lower Elwha's requests to strike, the Court denies its Objection as moot.

2. Judgment Should Not Be Entered as Requested by Lower Elwha

As noted above, Lower Elwha takes the position that the Ninth Circuit has finally decided everything there is to decide in this case and that the Court must enter judgement. As noted previously, this subproceeding was initiated regarding "the marine waters northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point

[20] Dkt. #21,919 in Case No. C70-9213RSM.

Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait." Dkt. #1-1 at ¶ 2. And again, the Ninth Circuit determined "that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A." Dkt. #252 at 4 (quoting *Lummi III*, 876 F.3d at 1011). Believing that the Ninth Circuit inherently intended for these areas to be coincident, Lower Elwha brings its Motion[21] and requests that the Court enter judgment consistent with its interpretation.

Lower Elwha's argument for its interpretation pushes *Lummi III* too far. Lower Elwha contends that the Ninth Circuit and the parties inherently used "waters west of Whidbey Island" and the disputed waters synonymously, that these waters fully "lie between" other portions of Lummi U&A, and that the Trial Island Line must necessarily serve as the western boundary of the "waters west of Whidbey Island." Dkt. #252 at 5-10. But such a reading requires that the Ninth Circuit opaquely equated the "waters west of Whidbey Island" with the entirety of the disputed waters, did not clearly express its intent to define Lummi U&A, and adopted the Trial Island Line as a boundary without ever referencing the Trial Island Line. The argument stretches *Lummi III* past

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[21] S'Klallam objects to Lower Elwha's Motion as "an improper sur-reply" to S'Klallam's own Motion. Dkt. #255 at 1. The Court does not agree as Lower Elwha may seek relief it believes is necessary and S'Klallam points to nothing procedurally improper about the Motion.

its limits and is also belied by the procedural posture of the case.

Lower Elwha and S'Klallam initiated this action alleging that Lummi fishing in the disputed waters did not conform with *Final Decision I*. Dkt. #1-1 at ¶ 3. This was the sole issue:

> The Requesting Tribes do not seek to relitigate Lummi's adjudicated [U&A] but, rather, seek to demonstrate that the [disputed waters] have already been found by this Court and the Ninth Circuit Court of Appeals to be outside of Lummi's U&A.

Id. at ¶ 5. As previously noted, this Court agreed that Lummi did not have U&A within the disputed waters and granted summary judgment. Dkt. #210. Thus, the sole question before the Ninth Circuit was whether the Court's grant of summary judgment was in error. Concluding that some Lummi U&A necessarily existed between the San Juan Islands and Admiralty Inlet, the Ninth Circuit held that it was error for this Court to conclude otherwise. But the Ninth Circuit did not define the extent or location of the Lummi U&A because it did not need to. The lone conclusion that *some* Lummi U&A lies within the disputed waters resolved the issue before the Ninth Circuit.[22]

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[22] Because of the Court's interpretation of *Lummi III*, there is no need to address Lower Elwha's and Lummi's law of the case and rule of mandate arguments because both of those doctrines require that the issue was previously decided. *United States v. Miller*, 890 F.3d 317, 325 (D.C. Cir. 2018) ("[T]he law of the case doctrine does not apply where an issue was not raised before the prior panel and thus was not decided by it.") (quoting *Yesudian ex rel. U.S. v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001)) (quotation marks omitted); *United States v. Almazan- Becerra*,

Judgement should not be entered in the form requested by Lower Elwha.

3. Judgment Dismissing This Subproceeding Should Be Entered

The Court does find, however, that the Ninth Circuit's decision necessarily resolved this subproceeding. Lower Elwha and S'Klallam sought to establish that *any* Lummi fishing in the disputed waters is "not in conformity" with *Final Decision I*. The Ninth Circuit determined that this is not the case. The Court did not otherwise make any affirmative finding on which the Court should enter judgment. Other questions were left for other days. But, the Ninth Circuit's determination nevertheless mooted this subproceeding and divested this Court of jurisdiction. *Becerra v. United States Dep't of Interior*, 276 F. Supp. 3d 953, 959 (N.D. Cal. 2017) ("An action is moot when the issues presented are no longer live, and the mootness inquiry asks whether there is anything left for the court to do.") (citing *Western Oil & Gas Ass'n v. Sonoma Cnty.*, 905 F.2d 1287, 1290 (9th Cir. 1990)). Lummi fishing in some portion of the disputed waters conforms with *Final Decision I* and the sole issue before the Court is resolved.

The Court recognizes the practical impact of this ruling. Lummi will fish in areas that S'Klallam believes are not in conformity with *Final Decision I* and may possibly expand further into new areas that

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537 F.3d 1094, 1097 (9th Cir. 2008) (law of the case doctrine did not preclude deciding something that was not previously decided); *Integrated Computer Sys. Pub. Co. v. Learning Tree Open Univ.*, 61 F.3d 911 (9th Cir. 1995) (on remand, district court may address issues not decided by court of appeals).

are objectionable to Lower Elwha as well. This dispute will continue, and the parties appear unlikely to resolve the issue without outside intervention. While further proceedings may occur, the Court notes the difficulty of identifying further evidence before Judge Boldt that will aid the Court in determining his intent. Because of the lack of a clear path forward, dismissal at this point is warranted to allow the parties to consider and revise their approaches.

Knowing that the dispute will likely continue makes dismissal an unsatisfactory resolution. But the Court sees no other possible result at this time. Judge Boldt could not be expected to anticipate or resolve all possible conflicts arising in this case and likely relied on the tribes to act amongst themselves in good faith to resolve disputes fairly and evenly. The Court likewise strongly urges the parties to work together as they are best positioned to understand and resolve the dispute in a fair and equitable manner. Ultimately, there may not be a legal solution and if there is it will likely have to come from the Ninth Circuit.

IV. CONCLUSION

Having considered the Motions, the briefing of the parties and the attached declarations and exhibits, and the remainder of the record, the Court finds and ORDERS:

1. The Jamestown S'Klallam Tribe's and the Port Gamble S'Klallam Tribe's (collectively, "S'Klallam") Motion for Leave to Amend the Request for Determination and Memorandum of Support (Dkt. #238) is DENIED.
2. Petitioner Lower Elwha's requests to strike certain material submitted by S'Klallam (Dkt.

#260 at 3-4) is GRANTED. The Court strikes and does not consider: (1) the Declaration of Josh Wisniewski and Exhibits A, C, D, and E thereto (Dkt. #256); (2) the Declaration of Barbara Lane (Dkt. #249 at 39-44) as it relates to Lower Elwha's Motion for Entry of Judgment; and (3) those portions of S'Klallam's Response to Lower Elwha's Motion for Entry of Judgment that rely on the material struck (Dkt. #255 at 2:5-8; 3:19-21; 9:3-7; 9:12-15; 10:1-2; 10:15-16; 10:18-22; 11:1-4; 11:13-17; 12:7-11; and 13:10-12).

3. Petitioner Lower Elwha Klallam Tribe's Motion for Entry of Judgment (Dkt. #252) is GRANTED IN PART.

4. Lower Elwha Klallam Tribe's Objection to Surreply with Alternative Request to Respond (Dkt. #263) is DENIED as moot.

5. Lower Elwha Klallam, Jamestown S'Klallam, and Port Gamble S'Klallam Tribes' Request for Determination Regarding the Usual and Accustomed Fishing Grounds of the Lummi Nation (Dkt. #1-1) is DISMISSED in its entirety.

6. The Clerk of Court shall enter judgment in conformance with this Order.

7. This subproceeding is now CLOSED.

Dated this 11th day of July 2019.

[handwritten: signature]

RICARDO S. MARTINEZ

CHIEF UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35964

UNITED STATES OF AMERICA,
Plaintiff,
and
LOWER ELWHA BANK OF S'KLALLAMS; JAMESTOWN BAND OF S'KLALLAMS; PORT GAMBLE BAND OF S'KLALLAMS; AND THE SKOKOMISH INDIAN TRIBE,
Plaintiffs-Appellees,
v.
LUMMI INDIAN TRIBE,
Defendant-Appellant.

Argued and Submitted: Sept. 12, 2000
Filed: Dec. 13, 2000

Before: SCHROEDER, BEEZER and HAWKINS, Circuit Judges.

OPINION

BEEZER, Circuit Judge:

The Lummi Indian Tribe appeals from the final judgment entered in favor of the Lower Elwha Band of S'Klallams, the Jamestown Band of S'Klallams, the

Port Gamble Band of S'Klallams and the Skokomish Indian Tribe (collectively "the Four Tribes"). The district court concluded that Judge Boldt, in *United States v. Washington,* 384 F.Supp. 312, 332 (W.D.Wash.1974) (Boldt, J.) (hereinafter "*Decision I*"), *aff'd,* 520 F.2d 676 (9th Cir. 1975), did not intend for the Lummi's usual and accustomed fishing grounds and stations to include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of the Hood Canal. We have jurisdiction pursuant to 28 U.S.C. § 1291. We conclude that Judge Boldt intended to: (1) exclude the Strait of Juan de Fuca and the mouth of the Hood Canal and (2) include Admiralty Inlet in the Lummi's usual and accustomed fishing grounds and stations. We affirm in part and reverse in part.

I

This appeal involves the scope of fishing rights secured by the Lummi Indian Tribe in the 1855 Treaty of Point Elliott. Tribes who were party to the Treaty, including the Lummi, reserved the right to fish at all "usual and accustomed grounds and stations." Act of Jan. 22, 1855, Art. V, 12 Stat. 927, 928. The term "usual and accustomed grounds and stations" includes "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Decision I*, 384 F.Supp. at 332.

The United States filed the underlying action in *Decision I*, on its own behalf and as trustee for several Western Washington Indian tribes, to enforce compliance by the State of Washington with treaty

fishing rights. *See Decision I*, 384 F.Supp. at 327-28. As part of *Decision I*, Judge Boldt determined the various tribes' usual and accustomed fishing grounds and stations. With respect to the Lummi, Judge Boldt described their usual and accustomed grounds and stations as follows:

> 45. Prior to the Treaty of Point Elliott, the Lummi, Semiahmoo and Samish Indians had been engaged in trade in salmon, halibut and shellfish with other Indians and with non-Indians. This trade continued after the treaty. At the time of the treaty they maintained prosperous communities by virtue of their ownership of lucrative saltwater fisheries. The single most valuable fish resource was undoubtedly the sockeye, which the Lummis were able to intercept in the Straits on the annual migration of the sockeye from the ocean to the Fraser River. Lummi Indians developed a highly efficient technique, known as reef netting, for taking large quantities of salmon in salt water. Aboriginal Indian "reef netting" differs from present methods and techniques described by the same term. The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point. When nature did not provide optimum reef conditions the Indians artificially created them. Reef netting was one of the two most important economic activities engaged in by these Indians, the other being the sale of dog fish oil. These Indians also took spring, silver and

> humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon.
>
> 46. *In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay.* Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay.

Id. at 360 (citations to the record omitted) (emphasis added).

Almost fifteen years after *Decision I,* the Four Tribes initiated Subproceeding 89-2 by filing a request for determination, pursuant to the continuing jurisdiction of the court.[1] The Four Tribes sought a

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[1] Paragraph 25 of the injunction entered by Judge Boldt in *Decision I* provides in pertinent part:

> The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:
>
> a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I or this injunction;
>
> b. whether a proposed state regulation is reasonable and necessary for conservation;

determination that the Lummi were violating *Decision I* by fishing in areas outside of their adjudicated usual and accustomed grounds and stations, specifically in the Strait of Juan de Fuca, Admiralty Inlet and the mouth of the Hood Canal. The Four Tribes claim these same fishing areas as part of their usual and accustomed grounds and stations.

The Four Tribes and the Lummi both moved for summary judgment as to whether the disputed areas were contained within the Lummi's usual and accustomed grounds and stations. Judge Coyle, a visiting judge assigned to preside at many of the *Decision I* subproceedings, determined that Judge Boldt had not intended the disputed areas to be

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c. whether a tribe is entitled to exercise powers of self-regulation;

d. disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;

e. claims to returns of seized or damaged fishing gear or its value, as provided for in this injunction;

f. the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I; and

g. such other matters as the court may deem appropriate.

In order to invoke such jurisdiction, the party shall file with the clerk of this court and serve upon all other parties (through their counsel of record, if any) a "Request for Determination" setting forth the factual nature of the request and any legal authorities and argument which may assist the court, along with a statement that unsuccessful efforts have been made by the parties to resolve the matter, whether a hearing is required, and any factors which bear on the urgency of the request.

Decision I, 384 F.Supp. at 419.

included within the Lummi's usual and accustomed grounds and stations. On February 15, 1990, Judge Coyle granted the Four Tribes' motion for summary judgment and denied the Lummi's motion. Although no apparent issues remained pending, a final judgment was not entered.

Instead, the Lummi filed an amended response to the Four Tribes' request for determination and a cross-request for determination on April 12, 1990.[2] The cross-request sought a determination that the Lummi's usual and accustomed grounds and stations should be expanded to include the three disputed areas.[3]

Based on the Lummi's "expansion" theory, several years of discovery ensued, after which the parties again filed cross-motions for summary judgment. By this point, Subproceeding 89-2 had been transferred to Judge Rothstein. On February 7, 1994, Judge

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[2] The Lummi's "amended" response contained no actual amendments; rather, it stated that "[t]he Answer and Affirmative Defenses previously pled … are not changed, and will not, in the interest of the conservation of trees and filing cabinets, be repeated here."

[3] The cross-request for determination was purportedly filed pursuant to the authority of a minute order entered by Magistrate Judge Weinberg on June 28, 1989. The text of that order: (1) directed the parties to file cross-motions for summary judgment as to the Lummi's usual and accustomed grounds and stations and the availability of equitable defenses; (2) stated that further discovery would wait until after the decision on the summary judgment motions; and (3) recognized that the Lummi intended to file amended pleadings, but that responses to those pleadings would not be due until after a decision on the summary judgment motions.

Rothstein denied both summary judgment motions. Judge Rothstein concluded that, despite the weakness of the Lummi's evidence, genuine issues of material fact remained as to whether the disputed areas should be added to the Lummi's usual and accustomed grounds and stations.

During the next few years, the parties were heavily involved in the litigation of other subproceedings. Consequently, the trial in Subproceeding 89-2 was repeatedly delayed. In the meantime, an opinion was filed in *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355 (9th Cir.1998).

One month prior to the now seemingly-firm trial date of June 15, 1998, the Lummi moved to vacate that date and to reopen discovery, arguing essentially that *Muckleshoot* required reframing of the issues. According to the Lummi, the correct focus was no longer whether the disputed areas should be added to the usual and accustomed grounds and stations, but rather whether Judge Coyle correctly determined in 1990 that the areas were not intended by Judge Boldt to be included in the findings of *Decision I.* The Lummi argued that Judge Coyle impermissibly relied on latter-day evidence that was not presented to Judge Boldt in order to determine Judge Boldt's intent.

The Four Tribes opposed the Lummi's motion, and moved to dismiss the Lummi's cross-request for determination. Judge Rothstein denied the Lummi's motion to vacate the trial date and later entered an order setting a briefing schedule to resolve the outstanding issues. The Lummi then moved to dismiss or, in the alternative, for summary judgment.

On September 1, 1998, Judge Rothstein denied the Lummi's alternative motions and granted the Four Tribes' motion to dismiss. Judge Rothstein applied the law of the case doctrine and accepted Judge Coyle's 1990 decision that Judge Boldt did not intend to include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of the Hood Canal in the Lummi's usual and accustomed grounds and stations. Final judgment was entered on September 2, 1998, dismissing Subproceeding 89-2. The Lummi timely appeal.

II

At the outset, the Four Tribes raise two arguments as to why we should not review Judge Coyle's 1990 summary judgment order, which established that Judge Boldt did not intend to include the disputed areas within the Lummi's usual and accustomed grounds and stations. First, the Four Tribes argue that the order was final in 1990, thus any attempt by the Lummi to appeal now is untimely. Second, the Four Tribes argue that Judge Rothstein's application of the law of the case doctrine insulates Judge Coyle's order from review. We address each argument in turn.

A.

According to the Four Tribes, Judge Coyle's 1990 decision was a final one, from which the Lummi may no longer appeal. Thus, the Four Tribes argue that we are limited to reviewing only Judge Rothstein's application of the law of the case doctrine and not the merits of the usual and accustomed grounds and stations dispute.

Section 1291 confers jurisdiction on us to hear "appeals from all final decisions of the district courts." 28 U.S.C. § 1291. "A final decision is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Does v. Advanced Textile Corp.,* 214 F.3d 1058, 1065-66 (9th Cir.2000) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)). We observe that "[a] ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." *National Distribution Agency v. Nationwide Mut. Ins. Co.,* 117 F.3d 432, 433 (9th Cir.1997) (citation and internal quotation marks omitted).

The Lummi contend that Magistrate Judge Weinberg's minute order is evidence that Judge Coyle's subsequent order was not intended to be final. According to the Lummi, the minute order contemplated the filing of amended pleadings after the summary judgment motions were resolved. This contention is unavailing. The order states that "*[r]esponses* [to the Lummi's amended pleadings] are not due until after a decision on the motions." The order does not state that the amended pleadings themselves may be filed after disposition of the summary judgment motions. Moreover, when read in context, it is clear that Magistrate Judge Weinberg's minute order was intended to save the parties the effort and expense of preparing additional discovery and responses, if such were not necessary. Once Judge Coyle granted the Four Tribes summary judgment, further litigation was no longer necessary.

Even though Judge Coyle's disposition of the summary judgment motions left no issues to be resolved, the Lummi amended their pleadings to assert a cross-request for determination.[4] Both parties then continued to actively litigate, with no opposition from the district court.[5] Most importantly, no final judgment was entered. *See* Fed.R.Civ.P. 58 ("Every judgment shall be set forth on a separate document.").

Although Rule 58 requires the entry of a separate document, the existence of such a document is not a prerequisite to appellate jurisdiction under § 1291. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 385, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam). Nevertheless, Rule 58 serves to protect parties from uncertainty. *See, e.g., Ingram v. ACandS, Inc.,* 977 F.2d 1332, 1339 (9th Cir.1992) ("[A] party should not have to run the risk that the order he may choose to appeal from may not be the same order a court of appeals decides he should have chosen.").

B.

The Four Tribes next argue that Judge Rothstein's application of the law of the case doctrine

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[4] Judge Rothstein's "Order Denying Lummi's Motion to Dismiss and for Summary Judgment and Granting the Four Tribes' Motion to Dismiss" erroneously asserted that the Lummi filed their cross-request for determination *before* Judge Coyle issued his decision. The Lummi, however, did not file their amended pleading until approximately two months *after* Judge Coyle granted summary judgment to the Four Tribes.

[5] If the Four Tribes believed Judge Coyle's ruling constituted a final judgment, they could have moved to dismiss the Lummi's amended response and cross-request for determination at the time it was filed.

insulates Judge Coyle's summary judgment order from review. This argument also lacks merit. Judge Coyle's decision, which was not final, merged into the final judgment entered on September 2, 1998, and may be challenged in this appeal. *See Hook v. Ariz. Dep't of Corrections,* 107 F.3d 1397, 1401 (9th Cir. 1997) ("A party does not lose the right to appeal an interlocutory order by not immediately appealing and waiting for the final judgment. The interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment.") (citation and internal quotation marks omitted).

III

We address the merits of this appeal. The Lummi challenge both Judge Coyle's summary judgment order and Judge Rothstein's refusal to revise that order. We address each argument in turn.

A.

The Lummi argue that Judge Coyle erred in granting summary judgment to the Four Tribes because Judge Boldt intended to include the Strait of Juan de Fuca, Admiralty Inlet and the mouth of the Hood Canal within the Lummi's usual and accustomed fishing grounds and stations. This court reviews a grant of summary judgment de novo. *See Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc).

The question before Judge Coyle was whether the Lummi's usual and accustomed grounds and stations, as expressed in Finding of Fact 46 of *Decision I*—"the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle"—included the disputed areas. The phrase

used by Judge Boldt is ambiguous because it does not delineate the western boundary of the Lummi's usual and accustomed grounds and stations.[6] "When interpreting an ambiguous prior judgment, the reviewing court should 'construe a judgment so as to give effect to the intention of the issuing court.'" *Muckleshoot,* 141 F.3d at 1359 (quoting *Narramore v. United States,* 852 F.2d 485, 490 (9th Cir.1988)).

To determine whether Judge Boldt intended to include the disputed areas within the Lummi's usual and accustomed grounds and stations, Judge Coyle looked at the evidence presented to Judge Boldt, specifically those exhibits which Judge Boldt referred to in Findings of Fact 45 and 46. These exhibits consisted of summaries and reports prepared by Dr. Barbara Lane, a noted anthropologist who testified as an expert witness in *Decision I,* as well as maps that she relied on in her testimony. These exhibits were submitted for Judge Coyle's review via a declaration prepared by Dr. Lane. In that declaration, Dr. Lane identified and authenticated the exhibits. Dr. Lane also made the following statements with respect to what she intended at the time of *Decision I*:

> 4. The Straits referred to in my report—USA Exhibit 30, at p. 11Ð although not specifically denominated therein, were Haro, Rosario and Georgia Straits and I did not intend the

[6] Although the Lummi attempt to characterize Findings 45 and 46 as unambiguous, they concede that "[t]here may be some ambiguity about the westerly limit of Lummi fishing rights[.]" *See* Lummi Br. at 12 n. 5.

reference to include the Strait of Juan de Fuca. * * *

5. At the time of my 1973 reports and testimony, I had not reached, ex- pressed or intended any conclusion that the treaty-time [usual and accustomed] fishing grounds and stations of the predecessor Indians to the present Lummi Tribe included (1) the Strait of Juan de Fuca, (2) the open marine water beyond the immediate near shore area southwesterly of the San Juan Islands and westerly of northern Whidbey Island, or the Admiralty Inlet passageway along the west side of Whidbey Island.

* * *

In the time available before the presently scheduled court hearing on this subproceeding, I am unable to formulate a conclusion on treaty-time existence or extent of fishing activity by those Lummi predecessors in those waters.

6. I do not consider the term "Northern Puget Sound" as used in the Court's Finding No. 46 or any other language in the Court's Findings to include the Strait of Juan de Fuca, or the Hood Canal area waters southerly of a line from Olele Point to the tip of Foulweather Bluff.

The Lummi argue that Judge Coyle improperly considered Dr. Lane's declaration because it constituted latter-day testimony which, after *Muckleshoot,* is not proper evidence of Judge Boldt's intent. *Muckleshoot* held—in a different

subproceeding, but one which also involved the Lummi and Dr. Lane—that "to treat the definition of the phrase ['present environs of Seattle'] first articulated by Dr. Lane in her August 1995 deposition as having been adopted by Judge Boldt in 1972 is pure speculation. Accordingly, the district court erred by considering Dr. Lane's latter-day testimony as evidence of Judge Boldt's intended meaning." 141 F.3d at 1359-60. Elsewhere in *Muckleshoot,* the court approved of the statement that "the 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." *Id.* at 1360. In the final sentence of the opinion, however, the court left open the possibility that extrinsic evidence might be appropriately considered in determining Judge Boldt's intent: "While evidence that was before Judge Boldt when he made his finding is obviously relevant, there may be other evidence indicative of the contemporary understanding of 'the present environs of Seattle.'" *Id.* at 1360.

The facts of *Muckleshoot* are distinguishable. There, Dr. Lane's latter-day testimony was "the only authority capable of clarifying the meaning of that phrase ['present environs of Seattle']." *Muckleshoot,* 141 F.3d at 1360. Here, although Judge Coyle considered Dr. Lane's declaration, it is clear that he did not rely on it. Instead, he focused directly on the exhibits attached to Dr. Lane's declaration, USA-20 and USA-30, which were presented to Judge Boldt in *Decision I.*

Judge Coyle's order makes it clear that he properly relied on evidence that was put before Judge

Boldt, and not upon latter- day testimony. For instance, Judge Coyle stated that "the court examines *the evidence presented to Judge Boldt* in connection with the underlying proceeding." (Emphasis added.) Judge Coyle also concluded that "[t]here is no question in the court's mind *from the evidence presented to Judge Boldt* that the Lummis' usual and accustomed fishing places were not intended to include the Strait of Juan de Fuca." (Emphasis added.) We hold that Judge Coyle's opinion does not run afoul of *Muckleshoot* because there is no indication that Judge Coyle imputed Dr. Lane's later- announced intentions to Judge Boldt.

The Lummi also argue that Judge Coyle erred by not considering all of the evidence submitted to Judge Boldt in *Decision I* in context. The Lummi contend that Judge Boldt intended to define fishing areas in a broad and general way. They rely on a section of Dr. Lane's 1972 summary, in which she wrote:

> Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations. Such an inventory is possible only by designating entire water systems.

Dr. Lane also indicated that "[t]here are a variety of reasons why any listing of usual and accustomed fishing sites must be incomplete and thus give a spurious kind of accuracy."

Although this argument is somewhat compelling, it ignores the fact that evidence was also presented by Dr. Lane as to the specific locations of the Lummi's

usual and accustomed grounds and stations. For instance, Dr. Lane described the principal fisheries of the Lummi as including several named areas, ``Point Roberts, Village Point, off the east coast of San Juan Island TTT Bellingham Bay." She also concluded that:

> The traditional fisheries of the post-treaty Lummi included reef net sites in the San Juan Islands, off Point Roberts, Birch Point, Cherry Point, and off Lummi Island and Fidalgo Island. Other fisheries in the Straits and bays from the Fraser River south to the present environs of Seattle were utilized. Freshwater fisheries included the river drainage systems emptying into the bays from Boundary Bay south to Fidalgo Bay.

As noted above, it is the specific, rather than the general, evidence presented by Dr. Lane that Judge Boldt cited as support for his findings of fact regarding the Lummi's usual and accustomed grounds and stations. *See Decision I,* 384 F.Supp. at 360-61. None of Dr. Lane's testimony identified specific areas as far west and south as the Lummi now claim. Although Judge Boldt heard testimony from Lummi elders who stated that they had fished as far west as the Strait of Juan de Fuca, it is clear that he did not rely on this testimony in determining the location of the Lummi's usual and accustomed grounds and stations. It is entirely reasonable to conclude that Judge Boldt found this testimony to be self-serving, *see United States v. Lummi Indian Tribe,* 841 F.2d 317, 319 (9th Cir.1988) (noting that "elder testimony is not the most accurate, documentary evidence"), choosing instead to rely on Dr. Lane, whose testimony he found to be

"authoritative" and "reliable." *Decision I,* 384 F.Supp. at 350.

The Lummi argue strenuously that the term "Puget Sound" encompasses "the Strait of Juan de Fuca." Evidence in the record, however, demonstrates that Judge Boldt did not intend the term "Puget Sound" to be so inclusive. When comparing those Indian tribes that were active in marine fisheries, Judge Boldt found that "[t]he Makahs and Quileute have troll fisheries off the coast. The Makahs also pursue both troll and gill net fishing in the Strait of Juan de Fuca. The Lummi Indians use gill nets in Puget Sound." *Decision I*, 384 F.Supp. at 385. Other examples from *Decision I* include:

> … There are presently eight [Makah] boats of commercial size fishing on the high seas. Three of these boats are gill netting in the *Strait of Juan de Fuca,* four are trolling, and one is tuna fishing…. These commercial boats go as far as fifty miles out to sea, *east to Puget Sound* and south to Westport and the Columbia River.

Id. at 364-65 (emphasis added).

> The Department of Fisheries has authority to impose limitations on the time, place and manner of sport and commercial fishing for salmon in the off-shore areas within the three-mile limit, in the Strait of Juan de Fuca *and* Puget Sound….

Id. at 390 (emphasis added). It is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound. Had he intended to include the

Strait of Juan de Fuca in the Lummi's usual and accustomed grounds and stations, he would have used that specific term, as he did elsewhere in *Decision I*.

Similarly, if Judge Boldt had intended to include the mouth of the Hood Canal, which lies south of Whidbey Island, in the Lummi's usual and accustomed grounds and stations, he would not have limited the Lummi's usual and accustomed grounds and stations to "*Northern* Puget Sound." *See Decision I,* 384 F.Supp. at 360 (emphasis added). That Judge Boldt viewed "Northern Puget Sound" as a different area than "Hood Canal" is also evident from the following language in *Decision I*:

> Although not all tribes fished to a considerable extent in marine areas, the Lummi reef net sites in *Northern Puget Sound,* the Makah halibut banks, *Hood Canal* and Commencement Bay and other bays and estuaries are examples of some Indian usual and accustomed fishing grounds and stations in marine waters.

Id. at 353 (emphasis added).

Determining Judge Boldt's intent with respect to "Admiralty Inlet" is more difficult. *Decision I* is devoid of references to "Admiralty Inlet." Thus, there are no linguistic clues to compare, as there were for both of the other disputed areas. Nevertheless, the Four Tribes argue that because this area was not specifically named as part of the Lummi's usual and accustomed grounds and stations, it was not intended to be included. This argument fails because there is no indication that Judge Boldt recognized Admiralty Inlet as a region separate from "Northern Puget

Sound"; it is just as likely that this area was intended to be included as that it was not.

Geographically, however, Admiralty Inlet was intended to be included within the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." Admiralty Inlet consists of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula. Admiralty Inlet would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the "present environs of Seattle." If one starts at the mouth of the Fraser River (a Lummi usual and accustomed fishing ground and station, *see* Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi usual and accustomed grounds and stations, *see* Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the "environs of Seattle." *See Decision I,* 384 F.Supp. at 360.

B.

The Lummi also challenge Judge Rothstein's refusal to disturb Judge Coyle's decision. We conclude that Judge Rothstein properly applied the law of the case doctrine.

"The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Milgard Tempering, Inc. v. Selas Corp. of Am.,* 902 F.2d 703, 715 (9th Cir.1990). Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case. *See id.* For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary

implication in [the] previous disposition." *Liberty Mutual Ins. Co. v. EEOC,* 691 F.2d 438, 441 (9th Cir. 1982). Application of the doctrine is discretionary. *See United States v. Mills,* 810 F.2d 907, 909 (9th Cir.1987). A trial judge's decision to apply the doctrine is thus reviewed for an abuse of discretion. *See Milgard Tempering,* 902 F.2d at 715.

In this case, the issue in question—whether Judge Boldt intended for the three disputed areas to be included in the Lummi's usual and accustomed grounds and stations—was explicitly decided by Judge Coyle. Therefore, Judge Rothstein abused her discretion in applying the law of the case doctrine only if: (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. *See United States v. Cuddy,* 147 F.3d 1111, 1114 (9th Cir.1998). The Lummi contest only the second factor, arguing that *Muckleshoot* constituted an intervening change in the law.

As discussed in Section III-A, Judge Coyle's summary judgment order did not violate *Muckleshoot*; Judge Coyle looked to the record before Judge Boldt. Thus, Judge Rothstein did not abuse her discretion in applying the law of the case.

IV

We are persuaded that Judge Boldt did not intend for either the Strait of Juan de Fuca or the mouth of the Hood Canal to be included within the Lummi's usual and accustomed grounds and stations. Based on the geography of the area, however, we conclude that

Judge Boldt did intend to include Admiralty Inlet. We affirm Judge Rothstein's order of dismissal in part, and reverse it in part.

AFFIRMED IN PART AND REVERSED IN PART.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-35936

UNITED STATES OF AMERICA,
Plaintiff,
and
LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBE S'KLALLAM TRIBE,
Petitioners-Appellees,
v.
LUMMI NATION,
Respondent-Appellant,
and
STATE OF WASHINGTON,
Defendant.

Argued and Submitted: Apr. 11, 2014
Filed: Aug. 19, 2014

Before: HAWKINS, RAWLINSON, and BEA, Circuit Judges.

OPINION

BEA, Circuit Judge:

This appeal involves a fishing territory dispute between two sets of Indian tribes: the Lower Elwha S'Klallam Tribe, the Jamestown S'Klallam Tribe, and the Port Gamble S'Klallam Tribe ("the Klallam") on the one hand, and the Lummi Nation Tribe ("the Lummi") on the other. The appeal arises from a proceeding brought by the Klallam pursuant to the continuing jurisdiction of a 1974 decree issued by the U.S. District Court for the Western District of Washington ("Boldt Decree"), and it involves a dispute over the geographic scope of the Lummi's "usual and accustomed fishing grounds" ("U&A"). We must decide if a prior Ninth Circuit opinion has already decided whether the waters immediately to the west of northern Whidbey Island are a part of the Lummi's U&A such that the question is controlled by law of the case. We conclude that the question has not yet been determined and therefore reverse and remand.

Factual and Procedural Summary

This case arises from a request for determination brought by the Klallam in 2011 to determine the fishing rights of the Lummi under the 1855 Treaty of Point Elliott. The Klallam initiated this subproceeding for a determination of rights, declaratory relief, and to prohibit the Lummi from fishing in certain waters.

On January 22, 1855, the Lummi entered into the Treaty of Point Elliott with the United States. 12 Stat. 927 (1855). This treaty "secured" to the Lummi "[t]he right of taking fish at usual and accustomed grounds and stations." *Id.* at 928. The "usual and accustomed grounds and stations" is abbreviated throughout this opinion as "U&A."

In 1970 the United States, as trustee for all the treaty tribes including the Klallam and the Lummi, filed suit in the Western District of Washington to obtain an interpretation of the Treaty of Point Elliott and an injunction protecting treaty fishing rights from interference by Washington State. Both the Klallam and the Lummi intervened as plaintiffs. In 1974, Judge Boldt issued extensive findings of fact, conclusions of law, and a permanent injunction. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("Boldt Decree").

The Boldt Decree defined the Treaty of Point Elliott's reference to "usual and accustomed grounds and stations" as meaning "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters[.]" *Id.* at 332.

The Boldt Decree discussed the Lummi in particular. *Id.* at 360-62. Judge Boldt found that the Lummi fished using reef nets "on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point." *Id.* at 360. In addition, Judge Boldt found that the Lummi "trolled the waters of the San Juan Islands for various species of salmon." *Id.* Moreover, "[i]n addition to the reef net locations listed above, the [U&A] of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle[.]" *Id.* at 360.

Judge Boldt also reserved the "continuing jurisdiction" to hear future subproceedings regarding

"the location of any of a tribe's [U&A] not specifically determined by" the Boldt Decree. *Id.* at 419.

1. Subproceeding 89-2

On March 3, 1989, in response to the Lummi's continued fishing of certain disputed waters, the Klallam invoked this continuing jurisdiction of the Western District of Washington to initiate Subproceeding 89-2. In this Subproceeding, the Klallam filed a request for determination that "the [U&A] of the Lummi Tribe does not include the Strait of Juan de Fuca, Admiralty Inlet and/or the mouth of Hood Canal."

On February 15, 1990, Judge Coyle of the Western District of Washington granted summary judgment to the Klallam. ("Coyle Decision"). Judge Coyle, after examining the Boldt Decree and the evidence on which it was based, found that "the Lummis' [U&A] were not intended to include the Strait of Juan de Fuca. The court is further persuaded that the mouth of the Hood Canal would not be an area which Judge Boldt would have intended to include in the Lummis' [U&A]." Further, Judge Coyle concluded that "Judge Boldt did not intend Admiralty Inlet to be part of the Lummis' [U&A]."

Judge Coyle, however, did not enter final judgment. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 447-48 (9th Cir. 2000). The Lummi filed a cross-request for determination, and both parties continued to litigate. *Id.* The Lummi's cross-request sought determination that:

> the [U&A] of the Lummi Indian tribe include the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of the

> Puget Sound, *the waters west of Whidbey Island*, Admiralty Inlet, the waters south of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal south from Admiralty Inlet to a line drawn from Termination Point due East across Hood Canal.

(emphasis added). The Lummi filed a motion to dismiss and a motion for summary judgment; the Klallam filed a cross-motion to dismiss.

On September 4, 1998, Judge Rothstein, to whom the subproceeding had been reassigned, denied the Lummi's motions and granted the Klallam's cross-motion to dismiss. ("Rothstein Decision"). She held that "the court can discern no difference between" the area covered by the Klallam's request for determination before Judge Coyle (*i.e.* the Strait of Juan de Fuca, Hood Canal, and the Admiralty Inlet) and the Lummi's cross-request for determination before her (which included "the waters west of Whidbey Island)." Although "[t]he Lummi's request is worded differently from the [Klallam's] original request[,] . . . [it] covers essentially the same areas." Judge Rothstein also held that, even though Judge Coyle did not enter final judgment, the Coyle Decision was law of the case. Therefore, she adopted the Coyle Decision's finding that "Judge Boldt did not intend to include the Strait of Juan de Fuca, Admiralty Inlet or the mouth of the Hood Canal in the Lummi" U&A. Judge Rothstein accordingly denied the Lummi's cross-request for determination and granted the Klallam's cross-motion to dismiss.

The Lummi appealed Judge Rothstein's order to the Ninth Circuit. *Lummi Indian Tribe*, 235 F.3d at 445. The panel held, first, that the Coyle Decision was not final because Judge Coyle never entered final judgment. *Id.* at 448-49. Because it was not final, the panel continued, the Coyle Decision merged into the Rothstein Decision. *Id.* at 449. Therefore, the panel concluded, both the Coyle Decision and the Rothstein Decision were before the panel in the appeal. *Id.*

As the panel framed the issue:

> The question before Judge Coyle was whether the Lummi's [U&A], as expressed in Finding of Fact 46 of *Decision I* [*i.e.* of the Boldt Decree]—"the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle"—included the disputed areas [*i.e.* the Strait of Juan de Fuca, Hood Canal, and the Admiralty Inlet]. The phrase used by Judge Boldt is ambiguous because it does not delineate the western boundary of the Lummi's [U&A].

Id. The panel analyzed the evidence that was before Judge Boldt and concluded that Judge Boldt had not intended to include either the Strait of Juan de Fuca or the Hood Canal in the Lummi's U&A, because Judge Boldt commonly distinguished between the Puget Sound, where the Lummi fished, and the Strait of Juan de Fuca and Hood Canal, where other tribes fished. *Id.* at 450-52. The panel held that "It is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound." *Id.* at 451-52. The panel also concluded that Judge Boldt did intend for

the Admiralty Inlet, *i.e.* "[t]he waters to the west of Whidbey Island, separating that island from the Olympic Peninsula[,]" to be included in the Lummi's U&A, because, "[g]eographically," the Admiralty Inlet

> would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the "present environs of Seattle." If one starts at the mouth of the Fraser River (a Lummi [U&A], see Findings of Fact 45 & 46) and travels past Orcas and San Juan Islands (also Lummi [U&A], see Finding of Fact 45), it is natural to proceed through Admiralty Inlet to reach the "environs of Seattle."

Id. at 452 (*quoting* the Boldt Decree, 384 F. Supp. at 360). The panel thus affirmed in part and reversed in part. *Id.* at 453.

After *Lummi Indian Tribe* was decided, the Lummi Natural Resources Commission, a tribal body, interpreted the decision as including in the Lummi U&A "Haro Strait and Admiralty Inlet and the waters between the two." In April, 2009, the Klallam moved for the district court in Subproceeding 89-2 to hold the Lummi in contempt for violating the court orders regarding the extent of the Lummi's U&A. The Lummi moved to dismiss, arguing that Subproceeding 89-2 was closed, and the issue should be addressed in a new subproceeding. The district court, Judge Martinez, granted the Lummi's motion to dismiss and denied the Klallam's motion without prejudice so it could be renewed as a new subproceeding.

2. Subproceeding 11-02

On November 4, 2011, the Klallam initiated Subproceeding 11-02 by filing a request for determination that the Lummi's U&A do not include "the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island (excepting Admiralty Inlet)." In particular, the Klallam defined the "case area" at dispute as follows:

> Lummi is impermissibly fishing i[n] the marine waters northeasterly of a line running from Trial island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosaria Strait, the San Juan Islands, and Haro Strait.

The Klallam then moved for summary judgment.

On October 11, 2012, Judge Martinez granted summary judgment to the Klallam. He concluded that "[t]he law of the case holds that the Lummi U&A does not include the Strait of Juan de Fuca or the waters west of Whidbey Island that were named in the Lummi Cross-request for determination. That issue has been finally determined and may not be relitigated." The district court came to this conclusion because the Rothstein decision determined that there was no difference between "the Strait of Juan de Fuca, Hood Canal, and the Admiralty Inlet" and a list of locations that included "the waters west of Whidbey Island." The district court also quoted extensively from a report on traditional U&A of Indian tribes, including the Lummi, by Dr. Lane, on which Judge Boldt had relied in making his findings of facts. This

report stated that "Lummi fishermen were accustomed, at least in historic times, and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south." The district court found that this statement would not compel the conclusion that the waters west of northern Whidbey Island should be included in the Lummi U&A because "the Lummi have pointed to no facts before Judge Boldt which would support the conclusion that he intended to include all the marine waters in between."

The Lummi moved for reconsideration on the ground that the district court's decision was overbroad because it interpreted the Lummi's U&A as not including waters off the southern coast of the San Juan Islands. The district court denied the motion, but did clarify that "the Lummi U&A should include nearshore waters immediately to the south of San Juan Island and Lopez Island." The Lummi appealed both the district court's original decision and its denial of their motion for reconsideration.

Standard of Review

The parties disagree over what standard of review we should apply in analyzing the district court's conclusion that the law of the case holds that the Lummi U&A does not include the waters west of northern Whidbey Island. The Klallam argue that the correct standard of review is abuse of discretion, and that there are only five circumstances under which a district court abuses its discretion in applying the law of the case, none of which applies here. *See Lummi Indian Tribe*, 235 F.3d at 452-53 (holding that application of the doctrine of law of the case is

"discretionary" and that a district court abuses its discretion "in applying the law of the case doctrine only if: (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result").

Abuse of discretion, however, is the standard when it is clear that the law of the case doctrine applies. Here, on the other hand, the parties dispute whether the doctrine applies at all, *i.e.* whether the issue has already "been decided explicitly or by necessary implication." *Id.* at 452. This is a question of law and therefore we review *de novo* this threshold question of whether the issue is controlled by law of the case at all.

Analysis

"The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Lummi Indian Tribe*, 235 F.3d at 452. "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Id.* "For the doctrine to apply, the issue in question must have been decided explicitly or by *necessary implication* in the previous disposition." *Id.* (internal quotation marks and brackets omitted) (emphasis added).

In their request for determination here, the Klallam assert that "Subproceeding 89-2 [has] determined that the Lummi's U&A does not include the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island (excepting Admiralty

Inlet)." The Klallam state that they "do not seek to relitigate Lummi's [U&A] but, rather, seek to demonstrate that [these] waters . . . have already been found by th[e district c]ourt and the Ninth Circuit Court of Appeals to be outside of Lummi's U&A." The Lummi acknowledge that it is clear law of the case that Judge Boldt did not intend to include the Strait of Juan de Fuca in the Lummi's U&A. The Lummi argue, however, that no prior proceeding has established precisely the eastern boundary of the Strait of Juan de Fuca, and that this eastern boundary is somewhere to the west of the western shores of northern Whidbey Island. The Klallam, on the other hand, argue that the eastern boundary of the Strait of Juan de Fuca is the western shores of northern Whidbey Island.

No court has yet *explicitly* determined the eastern boundary of the Strait of Juan de Fuca. Thus, the question before the panel is, has a prior judicial decision in Subproceeding 89-2 already established, by *necessary implication*, the eastern boundary of the Strait of Juan de Fuca such that future litigation of the question in this case is controlled by law of the case.

The district court found that earlier decisions in Subproceeding 89-2 had already established that the Strait of Juan de Fuca's eastern boundary was the western shores of northern Whidbey Island. In reaching this conclusion, the district court relied on Judge Rothstein's statement in Subproceeding 89-2 that she could "discern no difference" between the geographical area comprising "the Strait of Juan de Fuca, Admiralty Inlet, and the Hood Canal," as the

Klallam defined the case area in their request for determination in Subproceeding 89-2, and "the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound, the waters west of Whidbey Island, Admiralty Inlet, the waters south of Whidbey Island to the present environs of Seattle, and the waters of Hood Canal, south of Admiralty Inlet to a line drawn from termination Point due east across Hood Canal," as the Lummi defined the case area in their cross-request for determination in the same Subproceeding. To the district court, this statement demonstrated that the Rothstein Decision held that "the Strait of Juan de Fuca" and "the waters west of Whidbey Island" were not different regions, but rather the "waters" were included in the "Strait." Moreover, the district court determined that, while it is true that the Ninth Circuit reversed the Rothstein Decision with regard to the Admiralty Inlet, finding that the Inlet was a part of the Lummi's U&A, it affirmed the rest of the Rothstein Decision. Therefore, the district court held, it is law of the case that the eastern boundary of the Strait of Juan de Fuca is the western shores of northern Whidbey Island.

This reasoning suggests it has already been determined by necessary implication that the waters immediately west of northern Whidbey Island are part of the Strait of Juan de Fuca and hence not a part of the Lummi's U&A. The Rothstein Decision determined that "the Strait of Juan de Fuca, Admiralty Inlet, [and] the mouth of the Hood Canal" and the "waters west of Whidbey Island" were not different regions, but rather the latter was a subset of the former. The Rothstein Decision also determined that the Strait of Juan de Fuca was not included in the

Lummi's U&A. *Lummi Indian Tribe* affirmed the second of these findings, namely that the Strait of Juan de Fuca was not included in the Lummi's U&A. 235 F.3d at 450-52. This finding at least suggests that it also affirmed the first finding that the "waters west of Whidbey Island" are a subset of the Strait of Juan de Fuca, and therefore are not included in the Lummi's U&A.

Other language in *Lummi Indian Tribe*, however, contains reasoning that would suggest just the opposite, namely that the waters immediately to the west of Whidbey Island *are* included in the Lummi's U&A. The reason the 2000 Ninth Circuit panel reversed the Rothstein Decision to find that the Admiralty Inlet *was* included in the Lummi's U&A was that the Admiralty Inlet "would likely be a passage through which the Lummi would have traveled" from the Fraser River, south through the San Juan Islands, to the present environs of Seattle. *Id.* at 452. Applying that reasoning here, the "passage through which the Lummi would have traveled" from the San Juan Islands to the Admiralty Inlet would have been the waters directly to the west of Whidbey Island. Thus, this reasoning suggests that the waters immediately to the west of northern Whidbey Island would be included within the Lummi's U&A.

Both the district court and the Klallam on appeal argue that applying this reasoning here would violate "the oft-quoted principle that transit through an area does not, without more specific evidence of fishing, lead to inclusion of an area in a tribe's U&A." This principle comes from the Boldt Decree, which stated

> Marine waters were also used as thoroughfares for travel by Indians who trolled en route. Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians.

384 F. Supp. at 353 (internal citations omitted). The Ninth Circuit, however, in interpreting the Boldt Decree's language ("the [U&A] of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle," *id.* at 360), concluded that this language meant the Admiralty Inlet was included in the Lummi's U&A, because "it is natural to proceed through Admiralty Inlet to reach the 'environs of Seattle.'" *Lummi Indian Tribe*, 235 F.3d at 452. This suggests that the Ninth Circuit had concluded that the Lummi's use of "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" was more than mere "occasional and incidental trolling." If to "proceed through Admiralty Inlet" rendered Admiralty Inlet a part of the Lummi U&A, then to proceed from the southern portions of the San Juan Islands to Admiralty Inlet would have the same effect: to render the path a part of the Lummi U&A, just like Admiralty Inlet. This implicit conclusion would suggest that the *Lummi Indian Tribe* panel interpreted the Boldt Decree's language to mean that the Lummi had a continuous and unbroken U&A connecting Fraser River to Seattle. This would further suggest that it has already been determined by necessary implication that the waters immediately

west of northern Whidbey Island *are* a part of the Lummi's U&A.

Thus, each of *Lummi Indian Tribe*'s two holdings implies a different result. Therefore, we conclude that *Lummi Indian Tribe* is ambiguous regarding whether the waters immediately to the west of northern Whidbey Island are included within the Lummi U&A, and accordingly that this issue has not yet been decided explicitly or by necessary implication.

The law of the case doctrine applies only when the issue was "decided explicitly or by necessary implication in the previous disposition." *Id.* (internal quotation marks and brackets omitted); *see United Steelworkers of Am. v. Ret. Income Plan For Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555, 564 (9th Cir. 2008) (holding that "law of the case acts as a bar only when the issue in question was actually considered and decided by the first court"). We hold that no prior decision in this case has yet explicitly or by necessary implication determined whether the waters immediately west of northern Whidbey Island are a part of the Lummi's U&A. Therefore, the district court erred in concluding that the issue was controlled by law of the case.[1]

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[1] We agree with Judge Rawlinson that *Lummi Indian Tribe*, 235 F.3d 443, by affirming Judge Rothstein's decision that the Strait of Juan de Fuca is not within the Lummi U&A, implied that it was also affirming Judge Rothstein's conclusion that the waters west of northern Whidbey Island were not a part of the Lummi U&A. The dissent, however, does not address the reasoning implicit in the panel's reversal of Judge Rothstein's conclusion regarding the Admiralty Inlet. That reasoning implied that the Lummi U&A contains an unbroken swath from Fraser River south to the present environs of Seattle, thereby including at

Conclusion

Therefore, we REVERSE the district court's grant of the Klallam's motion for summary judgment and REMAND to the district court for further proceedings consistent with this opinion.

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least the waters immediately west of Whidbey Island. Because these two implications point in opposite directions, the Ninth Circuit opinion cannot have "necessar[il]y impli[ed]" one way or the other whether the Lummi U&A contain any waters west of northern Whidbey Island.

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that no court has determined whether the "usual and accustomed [fishing] grounds and stations" (U&A) for the Lummi Nation Tribe (Lummi) included the waters west of northern Whidbey Island.

In my view, the answer to this question is contained in our prior opinion, *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000). That case also addressed a challenge to Judge Rothstein's adherence to Judge Coyle's previous determination that neither the Strait of Juan de Fuca, Admiralty Inlet nor the mouth of the Hood Canal were within the Lummi's usual and accustomed fishing areas. *See id.* at 447. Judge Rothstein's adherence to Judge Coyle's decision followed her application of the law of the case doctrine. *See id.*

As the district court noted, Judge Rothstein was quite detailed in her description of the areas sought to be included by the Lummi in its U&A:

> This request [the Lummi Cross-Request for Determination][1] sought a declaration that the Lummi U&A included the waters of the Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound, *the waters west of Whidbey Island* to the present environs of Seattle and the waters of Hood Canal. . . . *The Lummi have not asserted that*

[1] The Lummi's Cross-Request for Determination sought to include the same areas that competing tribes described as the Four Tribes sought to have excluded in the initial petition before Judge Coyle. *See Lummi*, 235 F.3d at 446-47.

> *their cross-request covers a different area covered by the Four Tribes' initial request and by Judge Coyle's decision*. Rather, they argue that Judge Coyle's decision is not final and is of no precedential value. The court can discern no difference between the two requests for determination, nor have the Lummi convincingly argued that there is a difference. Thus, this order is intended to resolve both requests for determination.

United States v. Washington, Nos. CV 70-9213 RSM, 11-SP-02, 2012 WL 4846239 at *6 (W.D. Wash., Oct. 11, 2012) (emphases added).

Judge Rothstein's ruling encompassed the following facts:

1. The Four Tribes filed an initial proceeding seeking to exclude the waters west of Whidbey Island from the Lummi U&A. *See id*. at 2.
2. Judge Coyle granted summary judgment in favor of the Four Tribes, but never reduced his order to judgment. *See id.*
3. The Lummi subsequently filed a "Cross-Request For Determination" seeking to include within its U&A the waters west of Whidbey Island. *See id.*
4. Judge Rothstein viewed the initial proceeding filed by the Four Tribes seeking to exclude the waters west of Whidbey Island and the cross-request for determination filed by the Lummi seeking to include the waters west of Whidbey Island as the one and the same

request—to determine if the waters west of Whidbey Island were included in the Lummi U&A. *See id.* at 6.

5. Judge Rothstein interpreted Judge Coyle's decision as law of the case that the disputed areas, including the waters west of Whidbey Island, were not within the Lummi U&A. *See Lummi*, 235 F.3d at 447.

On appeal of Judge Rothstein's ruling, we reversed only to the extent that her ruling excluded Admiralty Inlet from the Lummi U&A. In doing so, we described Admiralty Inlet as "consist[ing] of the waters to the west of Whidbey Island, separating that island from the Olympic Peninsula. . . ." *Id.* at 452. It stands to reason that any other portion of the waters west of Whidbey Island that were not included in our description remain excluded from the Lummi U&A. In *Lummi*, we had no difficulty "concluding that Judge Rothstein properly applied the law of the case doctrine."

I continue in the belief that our prior conclusion is correct, and that the law of the case doctrine precludes further expansion of the Lummi U&A. I would affirm the district court.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35661

UNITED STATES OF AMERICA,

Plaintiff,

and

LOWER ELWHA KLALLAM INDIAN TRIBE; JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE,

Petitioners-Appellees,

v.

LUMMI NATION,

Respondent-Appellant,

and

STATE OF WASHINGTON,

Defendant,

SWINOMISH INDIAN TRIBAL COMMUNITY; SUQUAMISH TRIBE; MAKAH INDIAN TRIBE; STILLAGUAMISH TRIBE; UPPER SKAGIT INDIAN TRIBE; NISQUALLY INDIAN TRIBE; TULALIP TRIBES; SQUAXIN ISLAND TRIBE,

Real-Parties-in-Interest.

Argued and Submitted: Aug. 30, 2017
Filed: Dec. 1, 2017

Before: Michael Daly Hawkins, and M. Margaret McKeown, Circuit Judges, and ELIZABETH E. FOOTE,* District Judge.

OPINION

McKEOWN, Circuit Judge:

This appeal asks whether the Treaty of Point Elliott (the "Treaty") reserves to the Lummi Nation (the "Lummi") the right to fish in the waters west of Whidbey Island, Washington. We previously concluded that the Treaty secures the Lummi's right to fish in Admiralty Inlet because the Lummi would have used the Inlet as a passage to travel from its home in the San Juan Islands to present-day Seattle. The same result holds here because the waters at issue are situated directly between the San Juan Islands and Admiralty Inlet and also would have served as a passage to Seattle. We reverse the district court's judgment to the contrary.

Background

The 1855 Treaty of Point Elliott secures the Lummi's "right of taking fish at usual and accustomed grounds and stations" ("U&A"). Treaty of Point Elliott, art. V, Jan. 22, 1855, 12 Stat. 927, 928. Over 100 years later, Judge Boldt of the Western District of Washington developed a framework for determining U&As for Indian signatories to the Treaty and other

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* The Honorable Elizabeth E. Foote, United States District Judge for the Western District of Louisiana, sitting by designation.

similarly worded treaties. *See generally United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (*Decision I*), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Litigation over the various tribes' U&As has been ongoing ever since.

Judge Boldt defined a U&A as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Decision I*, 384 F. Supp. at 332. Importantly, a U&A cannot be established by "occasional and incidental trolling" in marine waters "used as thoroughfares for travel." *Id.* at 353. As to the Lummi, Judge Boldt provided some general background on the tribe's fishing and techniques in Finding of Fact 45, and then made a U&A finding in Finding of Fact 46:

> 45. Prior to the Treaty of Point Elliott, the Lummi, Semiahmoo and Samish Indians had been engaged in trade in salmon, halibut and shellfish both with other Indians and with non-Indians. This trade continued after the treaty. At the time of the treaty they maintained prosperous communities by virtue of their ownership of lucrative saltwater fisheries. The single most valuable fish resource was undoubtedly the sockeye, which the Lummis were able to intercept in the Straits on the annual migration of the sockeye from the ocean to the Fraser River. *Lummi Indians developed a highly efficient technique, known as reef netting, for taking*

> *large quantities of salmon in salt water*. Aboriginal Indian 'reef netting' differs from present methods and techniques described by the same term. *The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point*. When nature did not provide optimum reef conditions the Indians artificially created them. Reef netting was one of the two most important economic activities engaged in by these Indians, the other being the sale of dog fish oil. These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon.
>
> 46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay.

Id. at 360-61 (emphases added) (citations omitted).

These findings formed the foundation of our earlier adjudication of parts of the Lummi's U&A.

Notably, we held that Admiralty Inlet was included in the Lummi's U&A but the Strait of Juan de Fuca was excluded. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 445, 451-52 (9th Cir. 2000) (*Lummi I*). Admiralty Inlet is due south of the waters contested here—the waters west of Whidbey Island. The Strait of Juan de Fuca lies further west of both of those waters.

This dispute began in 2011. The Lower Elwha Klallam Tribe, the Jamestown S'Klallam Tribe, and the Port Gamble S'Klallam Tribe (collectively, the "Lower Elwha") invoked the district court's continuing jurisdiction under *Decision I* to determine whether the Lummi has the right to fish in the waters west of Whidbey Island. The district court granted summary judgment to the Lower Elwha, reasoning that *Lummi I* had determined that the waters west of Whidbey Island are excluded from the Lummi's U&A.

On appeal, we disagreed with the district court's conclusion that the law of the case doctrine applied. *United States v. Lummi Nation*, 763 F.3d 1180, 1185-88 (9th Cir. 2014) (*Lummi II*). Examining the decision in *Lummi I*, we noted that while there were some indications that the contested waters were excluded from the Lummi's U&A, there were strong indications pointing the other way too. *Id.* at 1186-87. In particular, *Lummi I*'s geography-based reasoning suggested that "the waters immediately west of northern Whidbey Island *are* a part of the Lummi's U & A." *Id.* at 1187 (emphasis in original). Thus, we concluded that *Lummi I* had not yet decided the issue explicitly or by "necessary implication." *Id.* at 1187-88. In other words, the law of the case was not the

operative standard. Instead, we remanded for the district court to apply the usual U&A procedures. *Id.*

On remand, the district court reached the same conclusion as it did before—that the disputed waters are not included in the Lummi's U&A—and again granted summary judgment to the Lower Elwha. The court explained that "neither logic nor linguistics would compel the conclusion that the waters to the west of northern Whidbey Island were intended by Judge Boldt to be included in the Lummi U&A."

The Lummi appealed. Reviewing de novo, we reverse. *See Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015).

Analysis

This is another chapter in the "ongoing saga" arising from Judge Boldt's original decision. *See Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1160 (9th Cir. 2017). In Finding of Fact 46, Judge Boldt stated that "the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Decision I*, 384 F. Supp. at 360. To determine whether the waters west of Whidbey Island are included in the Lummi's U&A, we follow a two-step procedure. At step one, we decide whether a particular finding of fact is ambiguous. *See Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010). All parties agree that Finding of Fact 46 is ambiguous because it does not clearly include or exclude the disputed waters. At step two, we examine the record before Judge Boldt to clarify his intent. *Id.* Given this standard and our prior case law concerning

the Lummi, we conclude that the district court erred in excluding the waters west of Whidbey Island from the Lummi's U&A.

We also highlight that the district court improperly imposed a heightened standard in holding that logic or linguistics need to "*compel the conclusion*" that contested waters be included in a U&A. (Emphasis added). We do not countenance such a standard because it imposes a nearly insurmountable burden on tribes in view of *Decision I*'s decades-long lookback approach. The better approach is to construe Judge Boldt's language in light of the available evidence.

Our analysis harkens back to *Lummi I*, where we examined whether Admiralty Inlet is part of the Lummi's U&A. We began by noting that Judge Boldt's *Decision I* does not mention Admiralty Inlet at all, so "there [we]re no linguistic clues to compare." 235 F.3d at 452. But we reasoned that, as a matter of geography, Admiralty Inlet fell within the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Id.* Because "Admiralty Inlet would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle,'" the disputed area was deemed part of the Lummi's U&A. *Id.*

This case is almost identical. 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. 384 F. Supp. at 348-82.[1] The only mention of "Whidbey Island" in *Decision I* comes in a section labeled "DEPARTMENT OF GAME POLICIES AND PRACTICES" and says that "The Game Department permits fishing for steelhead in all marine areas within its regulatory jurisdiction. Saltwater steelhead fisheries are insignificant. Most are located on *Whidbey Island* at Bush Point and Lagoon Point." *Id.* at 393, 398 (emphasis added). That reference does not indicate whether the waters west of Whidbey Island are included in "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Id.* at 360. Like Admiralty Inlet in *Lummi I*, the disputed area here is "just as likely" to be included in "Northern Puget Sound" as it is to be excluded. 235 F.3d at 452.

Turning to the geographic indicators, as we did in *Lummi I*, there is no doubt that the waters west of Whidbey Island "would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of

[1] The fact that later U&A decisions for other tribes make explicit reference to "the waters off the west coast of Whidbey Island" does not change our view. *See United States v. Washington*, 626 F. Supp. 1405, 1442-43 (W.D. Wash. 1985); *United States v. Washington*, 459 F. Supp. 1020, 1056-57 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) (describing fishing grounds "off of Whidbey Island's West Beach"). Just as we did not infer that Judge Boldt intended to exclude Admiralty Inlet from the Lummi's U&A simply because U&A decisions after *Decision I* explicitly reference Admiralty Inlet, we decline to make such an inference here concerning the waters west of Whidbey Island. *See Lummi I*, 235 F.3d at 452; *Washington*, 459 F. Supp. at 1059 (stating that the U&A of the Tulalip Tribes includes Admiralty Inlet).

Seattle.'" *Id.* (quoting *Decision I*, 384 F. Supp. at 360). The nautical path that we traced in *Lummi I* from the San Juan Islands to Seattle cuts right through the waters at issue here. *See Lummi I*, 235 F.3d at 452. Indeed, the waters west of Whidbey Island are situated just north of Admiralty Inlet, which is included in the Lummi's U&A, and just south of the waters surrounding the San Juan Islands (such as Haro and Rosario Straits), which are also included in the Lummi's U&A. As we have already observed, "[*Lummi I*'s] reasoning suggests that the waters immediately to the west of northern Whidbey Island would be included within the Lummi's U & A." *Lummi II*, 763 F.3d at 1187.

Importantly, expert anthropologist Dr. Barbara Lane tied travel in this corridor to fishing: "The deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling [sic] through such waters." *Tulalip Tribes*, 794 F.3d at 1135. Dr. Lane also reported that "Lummi fishermen were *accustomed* . . . to visit fisheries as distant as" the endpoints of the path we carved in *Lummi I*, and "utilized" other fisheries in between. (Emphasis added). Judge Boldt lauded Dr. Lane's work as "exceptionally well researched and reported"; Dr. Lane testified extensively at trial and Judge Boldt relied heavily on her report in Finding of Fact 46 and throughout *Decision I*. 384 F. Supp. at 350.

The Lower Elwha's most persuasive argument is that general evidence of travel cannot by itself establish U&As. Judge Boldt defined "usual and accustomed grounds and stations" as "every fishing

location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Id.* at 332. He also specified what was not included: "Marine waters were also used as thoroughfares for travel by Indians who trolled en route. Such 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.* at 353 (citations omitted). In the Lower Elwha's view, Judge Boldt's statements stand for the principle that transit through an area is insufficient for a U&A finding.

Although the Lower Elwha's general statement is accurate as far as it goes, in *Lummi II*, we already addressed and rejected this argument in the specific context of the Lummi's U&A. We held that "the Lummi's use of 'the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle' was more than mere 'occasional and incidental trolling.'" *Lummi II*, 763 F.3d at 1187. We explained further: "If to 'proceed through Admiralty Inlet' rendered Admiralty Inlet a part of the Lummi U & A, then to proceed from the southern portions of the San Juan Islands to Admiralty Inlet would have the same effect: to render the path a part of the Lummi U & A, just like Admiralty Inlet." *Id.* That explanation covers our exact situation and fits within our long-accepted framework, which requires looking at the evidence "before Judge Boldt that the [tribe] fished *or traveled* in the . . . contested waters."

Tulalip Tribes, 794 F.3d at 1135 (emphasis added) (citing *Upper Skagit*, 590 F.3d at 1023).[2]

We conclude that the waters west of Whidbey Island, which lie between the southern portion of the San Juan Islands and Admiralty Inlet, are encompassed in the Lummi's U&A. In coming to this conclusion, we need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A.

REVERSED AND REMANDED.

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[2] It is true, as the Lower Elwha points out, that the evidence in *Tulalip Tribes* was more than general evidence of travel. For example, in addition to evidence that the Suquamish "would have passed through the waters west of Whidbey Island, and likely would have fished there while traveling," there was evidence from an expert report that the "Suquamish travelled [sic] to Whidbey Island to fish." 794 F.3d at 1135. Nevertheless, *Tulalip Tribes* appears to indicate that the general evidence of travel was "some evidence" that was sufficient to satisfy the necessary standard. *See id.* ("This general evidence, too, constitutes some evidence before Judge Boldt . . . ."). And, in any event, the Lower Elwha cannot overcome the court's strong statements in *Lummi I* and *Lummi II* that counter its position.

Appendix G

EXCERPTS FROM RELEVANT TREATIES

Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES

To all and singular to whom these presents shall come, greeting:

* * *

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on

the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, tide, and interest of the said tribes and bands to any lands within the territory of the United States.

* * *

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however that they shall not take shell-fish from any beds staked or cultivated by citizens.

* * *

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said

Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities from trial.

* * *

Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA:

To all the singular to whom these presents shall come, greeting:

* * *

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described at follows, viz: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of Territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence

northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

* * *

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

* * *

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the government of

the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

* * *