No. 12-35936

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

and

LOWER ELWHA KLALLAM INDIAN TRIBE, *et al*.,
Petitioners-Appellees,

v.

LUMMI NATION,
Respondent-Appellant,

and

STATE OF WASHINGTON,
Defendant.

On Appeal from the United States District Court
for the Western District of Washington
District Court Nos. 2:11-sp-2–RSM; 2:70-cv-9213-RSM

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INTRODUCTION

The Lower Elwha Klallam Tribe, the Jamestown S'Klallam Tribe, and the Port Gamble S'Klallam Tribe (the "Requesting Parties") place all their eggs in one legal basket: the contention that the status of the waters west of Whidbey Island has already been definitively resolved. The problem for the Requesting Parties is that the linchpin of their cross-cutting argument is missing: they simply do not and cannot point to any actual prior resolution of those particular waters' status.

The Requesting Parties first invoke the law of the case doctrine. But their argument omits the doctrinal cornerstone of law of the case: a prior decision in this case specifically adjudicating whether the waters west of Whidbey Island lie within the Strait of Juan de Fuca or Northern Puget Sound. That question, in fact, was left open by prior court decisions. And without a prior decision unambiguously addressing the fishing status of those specific waters—which this Court's precedent required the Requesting Parties to prove—there is no law of the case that governs this dispute.

The Requesting Parties' arguments are also geographically wrong. Applying the test prescribed by this Court's precedent, the waters west of Whidbey Island are "[g]eographically *** intended to be included within the 'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

Just like Admiralty Inlet, which this Court has already held falls within the Lummi fishing grounds, 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 Seattle,'" *id*., and thus are part of the Lummi Nation's usual and accustomed fishing areas.

Every defense of the decision below proffered by the Requesting Parties bypasses this Court's legal test, and instead hinges upon the erroneous premise that the waters' status has already been specifically resolved. Not so: the seven orders trumpeted by the Requesting Parties hold only that the Lummi usual and accustomed fishing grounds do not include the Strait of Juan de Fuca, which is not in dispute. The only orders to actually address the status of the waters west of Whidbey Island are the orders under review in this appeal.

ARGUMENT

I. THIS COURT'S REVIEW IS PLENARY

The Requesting Parties open by trying to stave off this Court's *de novo* review (Answering Br. 17-19), but Ninth Circuit precedent specifically commands plenary review of every issue presented in this appeal. Whether this Court necessarily decided an issue such that a prior decision constitutes law of the case is subject to *de novo* review. *See United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007) (reviewing *de novo* whether prior decision constituted law of the case

such that district court was barred by mandate rule from considering an argument); *see also Stewart v. Beach*, 701 F.3d 1322, 1329 (10th Cir. 2012) ("Whether a prior decision constitutes law of the case is a legal issue that we review de novo."); *Negron-Almeda v. Santiago*, 579 F.3d 45, 50 (1st Cir. 2009) ("We review *de novo* whether the law of the case doctrine applies."); *cf. Frank v. United Airlines, Inc.*, 216 F.3d 845, 849-850 (9th Cir. 2000) ("Questions of claim and issue preclusion are *** reviewed *de novo*.").

Only the question whether the district court properly exercised its discretion "to *reconsider* an issue previously decided" under the exceptions to the law of the case doctrine is subject to abuse of discretion review. *See Milgard Tempering, Inc. v. Seals Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990) (emphasis added). But that exception is not at stake in this case because these particular waters' status has never been decided at all, let alone reconsidered. This case instead presents the purely legal question of whether the district court erred in concluding that the issue before it had necessarily been resolved by this Court's prior opinion—which is subject to plenary review. *See Thrasher*, 483 F.3d at 982.

So too are the other questions of law raised by this appeal: whether the district court improperly placed the burden of proof on the Lummi Nation, *Molski v. Foley Estates Vineyard & Winery, LLC*, 531 F.3d 1043, 1046 (9th Cir. 2008) ("We *** review the district court's allocation of the burden of proof de novo."),

and whether the district court improperly granted summary judgment, *Walls v. Central Contra Costa Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011). The Requesting Parties' attempt to lower their bar for defending the judgment thus fails.

II. THE DISTRICT COURT IMPROPERLY RELIEVED THE REQUESTING PARTIES OF THEIR BURDEN OF PROOF CONCERNING THE GEOGRAPHICAL STATUS OF THE WHIDBEY ISLAND WATERS.

A. The Requesting Parties Bore The Burden Of Proving That This Court Necessarily And Specifically Decided That The Waters West Of Whidbey Island Were Within The Strait of Juan de Fuca

The party seeking to enforce a decree bears the burden of proving that it has been violated. *See Officers for Justice v. Civil Serv. Comm'n of the City and County of San Francisco*, 979 F.2d 721, 724 (9th Cir. 1992) ("The burden lies with the Union to show that the City's voluntary affirmative action plan [was] *** impermissible *** " under the parties' consent decree). By filing their request for determination, the Requesting Parties sought a ruling that Lummi fishing was not "in conformity with" the Boldt Decree and thus sought to enforce that decree. *United States v. Washington*, 384 F. Supp 312, 419 (W.D. Wash. 1974) (ER 167 ¶ 25); *see* ER 37 (requesting "a determination whether the actions *** by the Lummi Nation and its members *** conform with Findings of Fact numbers 43 through 59 of" the Boldt Decree).

The Requesting Parties admit (Answering Br. 31) that the district court instead placed the burden of proof on the Lummi Nation. In their view, the court properly required the Nation to "show that the waters at issue were not in fact adjudicated already," because the "district court[] clear[ly] demonstrat[ed] that the matter has already been decided in the prior subproceeding." *Id*. But that puts the decision cart before the burden-of-proof horse. The predicate question of which party bears the burden of proof cannot be answered by a determination that a party cannot carry a burden improperly imposed.

Plaintiffs are supposed to prove their own right to relief, not make defendants disprove the asserted basis for recovery. Accordingly, as the parties seeking affirmative legal relief to enforce a prior adjudication, the Requesting Parties are the ones that must show that the status of the waters west of Whidbey Island was actually and necessarily decided in the prior proceeding. *Cf. Pardo v. Olsen & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994) ("[T]he party asserting collateral estoppel[] has the burden of showing that the issue was actually adjudicated in a prior proceeding.").

But even if the burden of proof is properly reallocated onto the Requesting Parties, they still cannot prevail because, as explained in Section II.B, *infra*, there is (at the very least) "uncertainty" and "no assurance" that this Court itself has previously considered and decided that the waters west of Whidbey Island were

within the Strait of Juan de Fuca, and thereby excluded from the Lummi fishing grounds. *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995); *cf. Pardo*, 40 F.3d at 1067 ("'[I]f there is doubt as to the scope of the prior judgment, collateral estoppel will not be applied.'") (quoting *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994)) (alteration in original).

B. No Court Has Previously Decided The Status Of The Waters West Of Whidbey Island

To invoke law of the case, the Requesting Parties bear the burden of showing that the status of the waters west of Whidbey Island was necessarily and unambiguously decided by a prior decision. Law of the case cannot apply unless "the issue in question [was] decided explicitly or by necessary implication in [the] previous disposition." *Lummi Indian Tribe*, 235 F.3d at 452 (internal citation and quotation marks omitted) (second alteration in original). And in this dispute, that issue comes down to the question whether the waters west of Whidbey Island are part of the Strait of Juan de Fuca or part of Northern Puget Sound, as this Court interpreted Judge Boldt's terminology. *See id.* at 451-452. No prior decision in this case necessarily adjudicated that issue.

1. This Court's Prior Decision Left Unaddressed the Status of the Western Whidbey Island Waters

This Court's prior decision held only that the Lummi fishing grounds (i) included the waters within Northern Puget Sound, including Admiralty Inlet, and

(ii) did not include the Strait of Juan de Fuca. *See Lummi Indian Tribe*, 235 F.3d at 452. That ruling thus begs rather than answers the question whether the waters west of Whidbey Island fall within the Lummi fishing area or in the Strait outside of it. The Requesting Parties, who bore the burden of proof, cite no language—none—from this Court's decision that adjudicates the scope of the Strait. That is because there is none. Confronted only with an appeal challenging the district court's decision that the Strait itself was excluded from the Lummi fishing grounds, this Court had no occasion to issue any decision on the *scope* of the Strait, to demarcate where the Strait stops and other marine areas begin, or to otherwise comprehensively delineate boundary lines not specifically implicated in the first appeal. *See id.*, 235 F.3d at 451-452 (holding only that the Strait was a "distinct region[] *** lying to the west of the Sound").

What this Court *did* decide was the applicable legal analysis for determining whether a marine area falls within the Lummi fishing grounds or not. *Lummi Indian Tribe,* 235 F.3d at 452. A body of water is included if (i) it is not part of the Strait, (ii) it is not linguistically excluded from the term "Puget Sound," and (iii) it geographically falls within the "'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle'" in that it "would likely be a passage through which the Lummi would have traveled from the San Juan Islands in the north to" Seattle. *Id.* at 452.

Critically here, though, having prescribed the governing legal test, this Court did not evaluate the status of the waters west of Whidbey Island under that test, much less exclude them. For that reason, the status of the Whidbey Island waters was not "'actually considered and decided'" in the prior subproceeding, as required for application of the law of the case. *United Steelworkers of America v. Retirement Income Plan for Hourly-Rated Empls. of Asarco, Inc.*, 512 F.3d 555, 564 (9th Cir. 2008) (citation omitted).

All that the Requesting Parties can show is that this Court previously broached questions that are predicate to but legally distinct from the precise issue presented here. Rulings in the neighborhood of a legal question, however, do not constitute law of the case. *See Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 858 (7th Cir. 2002) (declining to find law of the case on "remarkably close" issue that was not itself decided). This Court must have resolved the specific issue now being litigated "with sufficient directness and clarity to establish the settled expectations of the parties necessary for the subsequent application of the law of the case doctrine." *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 621 (8th Cir. 2007).

Accordingly, because this Court's prior decision "grounded its conclusion on an analysis that neither acknowledged nor discussed" the status of the waters west of Whidbey Island, there is "no assurance the panel considered" that issue,

rendering law of the case inapplicable. *Hegler*, 50 F.3d at 1475; *see also Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766 (9th Cir. 2001) (where court of appeals "adopted the district court's assumption" in order to "develop its analysis" of a different issue, the decision was not law of the case on the assumed issue).

2. The District Court Did Not Previously Resolve the Waters' Status

The Requesting Parties try to hang their law-of-the-case hat on the district court's previous holding in Subproceeding 89-2, which underlay the prior appeal. Specifically, they contend that "the Lummi's cross-request cover[ed] essentially the same areas the [Requesting Parties] challenged in the initial request for determination." ER 69; *see* Answering Br. 22-23; *see also* ER 69 (noting that the Lummi Nation had not "asserted that [the] cross-request covers a different area" from the initial request).

That argument does not work. The district court's prior ruling established only that the two requests covered "essentially the same" *total* area. ER 69. It said nothing about the status of the area's sub-components. Indeed, the district court had no occasion to do so because it was not until this Court on appeal rejected the district court's total-area approach to the analysis of these waters that the status of such sub-components, and the legal test for determining their status, even arose. This case is the first one presenting the question opened by this Court's prior

ruling: whether the Whidbey Island waters are within or beyond the Strait of Juan de Fuca.

If anything, the district court's decision in Subproceeding 89-2 corroborates that no court previously resolved the proper division of the total body of water into constituent parts. The district court in the subproceeding specifically noted that "[t]he Lummis' request is worded differently from the [Requesting Parties'] original request." ER 69. Because the district court wrongly issued a categorical rule covering the total water area, that court ignored the parties' different formulations of the fishing area and made no effort to decide how constituent parts of the total area should be categorized.

3. A Statement in a Brief Does Not Give Rise to Law of the Case

The Requesting Parties' repeated citation (Answering Br. 8-9, 17, 23, 40) of an ambiguous statement from the Lummi Nation's brief in the Subproceeding 89-2 appeal does not help them either. Law of the case turns only on what a court decided, and statements or assumptions of the parties do not become law of the case unless actually considered and adopted by the court. *See Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 954 (9th Cir. 2006) (party's concession for purposes of summary judgment did not establish law of the case on that issue where trial court did not actually rule on the issue); *United States v. Bloate*, 655 F.3d 750, 755 (8th Cir. 2011) (where parties "assumed that no [pretrial] motion

was filed" in a prior appeal, and existence *vel non* of pretrial motion became legally relevant thereafter, prior statements by the court regarding lack of pretrial motion were not law of the case).

That rule applies with double force here because the district court, without any objection from the Requesting Parties, struck from the record the Lummi Nation's prior characterizations of the waters west of Whidbey Island, as it did other "discuss[ions of] what the parties to this subproceeding have said to other judges over the years." ER 16 n.2 (alteration in original). They therefore should not be considered on appeal. *See Associated Gen. Contractors of America, San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1195 (9th Cir. 2013) (court would not consider "many relevant portions of [a] declaration [that] were struck from the record by the district court in an evidentiary ruling that [plaintiff did not] challenge").

In any event, the argument misreads the Lummi Nation's brief. The Lummi did not "expressly accept[]" any holding that the waters west of Whidbey Island were included within the Strait of Juan de Fuca, Answering Br. 23, because there was no such holding to accept. The Lummi Nation was seeking reversal of the district court's holding that the Strait of Juan de Fuca—including waters less than twenty miles from Washington's western Pacific Coast and far beyond the much more narrow and localized dispute in this case—was not within the Lummi usual

and accustomed fishing grounds. *See Lummi Indian Tribe*, 235 F.3d at 451; ER 75 (Lummi cross-request describing waters at issue as including the "Strait of Juan de Fuca east from the Hoko River to the mouth of Puget Sound" along with "the waters west of Whidbey Island").

The precise question whether particular waters fell within the Strait or within a different marine area simply was not at issue in Subproceeding 89-2 and, for that reason, was not briefed by the Lummi Nation. The issue of the western Whidbey Island waters' distinct status arose only after this Court held that the previously ambiguous western boundary of the Lummi Nation's fishing grounds ended at the Strait's eastern boundary—without defining what that eastern boundary was. *See Lummi Indian Tribe*, 235 F.3d. at 451-452.

When the holding of a court of appeals shifts the legal landscape in that manner, law of the case does not freeze in place statements made before that shift. *Cf. EEOC v. Kronos Inc.*, 694 F.3d 351, 370 (3d Cir. 2012) (where a party's "position on remand was significantly altered by [the court's] opinion in [the prior appeal]," the party was entitled to make objection to a "new, higher cost" resulting from the court of appeals' decision); *Bloate*, 655 F.3d at 754 ("'Although parties should present alternative arguments,'" they are "'not required to anticipate every possible outcome on appeal and formulate a responsive argument for each alternative.'") (citation omitted). Accordingly, the casual and inconsistent

discussion about the location of the waters of Whidbey Island in various pleadings in Subproceeding 89-2 has no bearing on those waters' status under this Court's newly prescribed legal test. And that is a rule for which the Requesting Parties should be glad because their own briefing previously acknowledged the western Whidbey Island waters as distinct from the Strait of Juan de Fuca. *See* ER 113-114 (Requesting Parties' request for determination referring disjunctively to the Strait of Juan de Fuca and "any waters west of Whidbey Island").

4. A Fisheries Manager Statement Does Not Create Law of the Case

The Requesting Parties also highlight a fisheries manager's statement referring to "'Haro Strait and Admiralty Inlet and the waters *between* the two'" as evidence that the Lummi Nation "understood that Admiralty Inlet consists only of the waters west of the southern portion of Whidbey Island." Answering Br. 24 (quoting ER 54). But that is irrelevant for three reasons.

First, like the subjective understandings of the parties, the statements of fisheries managers do not establish law of the case. Only court rulings do.

Second, the fisheries manager defines Admiralty Inlet only by a *western* boundary, *see* ER 54, not the *northern* one that the Requesting Parties claim here (*see* Answering Br. 27).

Third, the fisheries manager's statement sheds no light on the dispositive issue here: whether the waters west of Whidbey Island are part of the *Strait of*

Juan de Fuca. *See* 235 F.3d at 451 (holding that the Strait is outside the Lummi usual and accustomed fishing grounds).

5. Additional Hurdles Bar Law of the Case

Two other aspects of the district court's decision foreclose application of the law of the case. To begin with, the district court's finding that that the area described under Washington fishing regulations as Salmon Management Area 6A—"which lies immediately west of the northern shores of Whidbey Island," ER 4-5; *see* Map, SER 51—was "not in dispute in the proceedings in 89-2," makes things worse, not better, for the Requesting Parties. *See* Answering Brief 26 n.7. The district court found not only that the Lummi Nation had stipulated that the area was not part of its cross-request, but also that the Requesting Parties had "not sue[d] [the Lummi] for 6A, because they were not opening 6A." ER 5 (quoting argument from counsel for the Requesting Parties).

That confesses that that portion of the western Whidbey Island waters area explicitly was "not in dispute" in Subproceeding 89-2 by *either party*, and thus its status was necessarily not decided under either the district court's erroneous total-area test or this Court's not-yet-announced geographic and linguistic test. The district court's holding that the law of the case precluded a decision on the status of those waters therefore was in error, as much as it was for the entirety of the waters west of Whidbey Island.

Finally and importantly, no decision in Subproceeding 89-2 or this subproceeding has resolved whether sufficient evidence existed to add the disputed areas to the Lummi Nation's usual and accustomed grounds. All prior decisions address only whether particular areas were part of the fishing grounds *as delineated in the Boldt Decree*. ER 73 (adopting prior decision—entered before the Lummi Nation's cross-request was even filed—and declining to "address the parties' other arguments," holding only "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" usual and accustomed grounds). Law of the case thus has no conceivable bearing on this distinct aspect of the Lummi Nation's cross-request.

The Requesting Parties' hints that the Lummi Nation is foreclosed from litigating whether these areas should be *added* to the Lummi Nation's usual and accustomed grounds, *see, e.g.*, Answering Br. 43 (stating "Judge Rothstein *** determined that there was no basis for granting Lummi's Cross-Request that [the areas] be added to Lummi's treaty area[]"), are thus simply wrong and without any considered legal basis. In addition, they are beyond the scope of this appeal because the Requesting Parties did not cross-appeal from the district court decision refusing to "permanently" bar the Lummi from exercising treaty fishing rights in the disputed waters or to declare that the Lummi Nation is "barred *** from any further attempt to relitigate its treaty right to fish in the eastern portion of the Strait

of Juan de Fuca or the waters west of Whidbey Island," *compare* ER 48 (Request for Determination), *with* ER 23 (district court order). *See Animal Prot. Inst. of America v. Hodel*, 860 F.2d 920, 928 (9th Cir. 1988) (A "cross-appeal *** is generally a prerequisite for an appellee who seeks alteration of a judgment to enlarge the relief granted by the trial court.").

* * * * *

In sum, the district court put the burden on the wrong party and applied the wrong standard, finding law of the case in a holding that does not even address, much less decide, whether the waters west of Whidbey Island are within the Strait of Juan de Fuca or Northern Puget Sound. The Requesting Parties did not carry their burden to show that this Court has already unambiguously and specifically resolved the question of the status of the western Whidbey Island waters.

C. Applying The Linguistic And Geographic Tests Required By This Court's Precedent, The Waters West Of Whidbey Island Fall Within Northern Puget Sound

When the analytical framework that this Court first prescribed in the prior appeal is applied to the issue in this case, the waters west of Whidbey Island fall both linguistically and geographically within "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Washington*, 384 F. Supp. at 360 (ER 153 ¶ 46).

First, linguistically the Boldt Decree does not refer to the waters west of Whidbey Island, and thus does not exclude them from the Puget Sound. In that respect, this case mirrors the Admiralty Inlet case, in which this Court ruled that the Inlet fell linguistically within the Puget Sound because it was not mentioned in the Boldt Decree, and as a result there was no evidence that Judge Boldt considered it to be distinct from Puget Sound. *See Lummi Indian Tribe*, 235 F.3d at 452.

The Requesting Parties point out (Answering Br. 36 n.11) that Judge Boldt's later decision separately and distinctly listed the "waters of Northern Puget Sound around *** Whidbey Island" when quoting one of the Requesting Parties' requests to expand its usual and accustomed fishing grounds *beyond* the Strait of Juan de Fuca, *United States v. Washington*, 459 F. Supp. 1020, 1067 & n.19 (W.D. Wash. 1978). True enough. And that simply corroborates the Lummi Nation's point because it demonstrates that Judge Boldt linguistically categorized waters around Whidbey Island as part of Northern Puget Sound and beyond the Strait of Juan de Fuca.

Second, the waters west of Whidbey Island also fall geographically within the marine areas of Northern Puget Sound that this Court ruled fall within the Lummi Nation's fishing grounds. In the earlier appeal, this Court concluded that Admiralty Inlet was "[g]eographically *** intended to be included within the

'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle'" 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." *Lummi Indian Tribe*, 235 F.3d at 452.

That same geographical reasoning applies equally to the waters west of Whidbey Island. It is not just "likely" (*Lummi Indian Tribe*, 235 F.3d at 452), but geographically certain that Lummi fishers traveled through these waters just as they did through Admiralty Inlet. Indeed, it is geographically impossible to travel from "the mouth of the Fraser River" to Haro Strait, and from there past "Orcas and San Juan Islands" through "Admiralty Inlet to reach the 'environs of Seattle,'" *Lummi Indian Tribe*, 235 F.3d at 452, without traversing the waters west of Whidbey Island, *see* Opening Br. 31.

The Requesting Parties' position, by contrast, would tie the area in geographic knots. This Court has recognized that "the Strait l[ies] to the west of the Sound." *Lummi Indian Tribe*, 235 F.3d at 451-452. The Requesting Parties, however, want to gerrymander the eastern edge of the Strait to fall at the shores of Whidbey Island—*east* of the Admiralty Inlet area that this Court has already held falls squarely within the Lummi's usual and accustomed fishing area. Logically and geographically, the waters cannot be both within and outside the fishing area at the same time.

Third, the linguistic and geographic status of the waters west of Whidbey Island as falling within the Lummi's Northern Puget Sound fishing area fits comfortably with the Boldt Decree's "transit rule": "'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.'" Answering Br. 35 (quoting ER 19). In the Boldt Decree, the district court both enunciated this transit rule *and* concluded that the Lummi usual and accustomed fishing grounds included the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Washington*, 384 F. Supp. at 353, 360 (ER 146 ¶ 14, 153 ¶ 45). The factual evaluation of whether the Lummi Nation engaged in sufficient fishing to include such marine areas, like the western Whidbey Islands here, within its usual and accustomed fishing grounds has thus already been resolved by the Boldt Decree itself.

That in fact is why this Court, in applying its geographic test to Admiralty Inlet, found no need to address evidence showing that the Lummi Nation fished in Admiralty Inlet *at all* before concluding that it fell within the Lummi usual and accustomed fishing grounds. *See Lummi Indian Tribe*, 235 F.3d at 452. And that is also why this Court has already ruled in an analogous case that evidence that a tribe "fished *** or traveled [around Whidbey Island] in route to *** the Fraser River area" was legally sufficient to support including the waters off the coast of

Whidbey Island in that tribe's similarly described fishing grounds. *See Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010). The Requesting Parties' arguments (Br. 37-38) that the transit rule requires the Lummi to provide still more evidence of fishing thus improperly seek to resuscitate an evidentiary addition to the geographic test that this Court has already rejected.

III. THE DISTRICT COURT FAILED TO HOLD THE REQUESTING PARTIES TO THEIR BURDEN OF PROVING THAT NO EVIDENCE SUPPORTS INCLUSION OF THE WATERS WEST OF WHIDBEY ISLAND WITHIN THE LUMMI NATION'S FISHING GROUNDS

The Requesting Parties' position not only runs afoul of this Court's linguistic and geographic tests and precedent, but also falls far short of their burden of showing that "no evidence" supports Lummi Nation treaty-time fishing in the waters west of Whidbey Island, *see Upper Skagit*, 590 F.3d at 1023. Yet that showing is specifically required under the "two-step procedure" mandated by this Court for resolving the meaning of ambiguous terms used by Judge Boldt. *See id*.

The Requesting Parties do not dispute that the district court failed to follow this Court's procedure. Instead, they argue that the two-step analysis was accomplished in Subproceeding 89-2, and need not be undertaken again now. Answering Br. 30. But, once again, that argument overlooks that no court has ever applied the two-step analysis specifically to the waters west of Whidbey Island.

The Requesting Parties cite the district court's decision in Subproceeding 89-2, ER 85-95. But that decision nowhere mentions the waters west of Whidbey Island, and the court concluded only that, "from the evidence presented to Judge Boldt *** the Lummis' usual and accustomed fishing places were not intended to include the Strait of Juan de Fuca," Hood Canal, and Admiralty Inlet. ER 94. That is a frail reed for the Requesting Parties to lean on given that this Court has ruled the opposite with respect to Admiralty Inlet. And it certainly provides no foundation for a law-of-the-case grounded refusal (ER 17; Answering Br. 30-32) to avoid the full and particularized analysis of the evidence supporting Lummi fishing in the waters west of Whidbey Island required by this Court's intervening and on-point precedent. *Cf. Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004) (intervening change in the law warrants departure from law of the case).

A proper application of the "no evidence" rule dictates that Judge Boldt never intended to foreclose the inclusion of the waters west of Whidbey Island within the "marine areas of Northern Puget Sound from the Fraser River south to" Seattle. *See Washington*, 384 F. Supp. at 360 (ER 153 ¶ 46). Record evidence documents, for example, that the Lummi's home fishing territory extended from "the Canadian border south to Anacortes" on Fidalgo Island, ER 253, and that they were also "accustomed *** to visit fisheries as distant as the *** Puget Sound in

the south," ER 255; *see also* ER 303 (the Lummi have "fished at all points in the lower Sound"). The Requesting Parties have no credible answer to how this fishing could occur without the waters west of Whidbey Island falling within that same usual and accustomed fishing area for the Lummi.

First, the Requesting Parties have no defense for the district court's improper discounting of the evidence of Lummi fishing in the area contained in Dr. Lane's report, or its disregard for her caveats with respect to other fishing areas, Opening Br. 37-38. They contend instead that the Boldt Decree requires that only specified marine area locations be included simply because it refers to particular locations as "examples" of marine fishing grounds—*i.e.*, "the Lummi reef net sites in Northern Puget Sound, the Makah halibut banks, Hood Canal and Commencement Bay and other bays and estuaries," *Washington*, 384 F. Supp. at 353 (ER 146 ¶ 14). *See* Answering Br. 36.

That argument, however, is at war with this Court's prior ruling in *Lummi Indian Tribe* that Admiralty Inlet—which is not specifically listed as a body of water—falls within the "'marine areas of Northern Puget Sound.'" *Lummi Indian Tribe*, 235 F.3d at 452.

Nor does anything in the Boldt Decree substantiate the district court's conclusion that Dr. Lane's report supported marine fishing only in "'Straits and bays.'" ER 19. That is because the report separately designated "Puget Sound"—

which of course is neither a strait nor a bay—as a fishery frequented by the Lummi. ER 255. The Requesting Parties thus simply misread the report in arguing that it does not support interpreting the Lummi's usual and accustomed fishing grounds as including areas south of Anacortes. Answering Br. 37. Indeed, the report expressly rejected that proposition, noting that "[i]n addition to the home territory" extending to Anacortes, "Lummi fishermen were accustomed *** to visit fisheries as distant as *** Puget Sound in the south," ER 255, and thus south of the Anacortes.

Similarly, the district court improperly read the report as presenting an exhaustive catalogue of marine fishing areas when, by its express terms, the report recognized the existence of "other important fisheries"—including specifically marine area fisheries, such as "halibut banks"—that were not separately listed in the report. ER 253.

Second, the Requesting Parties attempt to defend (Answering Br. 39) the district court's disregard for USA-62 (ER 171)—the map depicting the Strait of Juan de Fuca as ending west of the disputed waters—as irrelevant because "it was not cited by any judge" in Subproceeding 89-2. Answering Br. 39. That is a non sequitur. Whether the map was *cited in Subproceeding 89-2* or not is beside the point; the court's job is to evaluate the evidence that was before Judge Boldt.

The argument is also flatly wrong. Judge Boldt cited the USA-62 map in support of his Finding of Fact 46 that the Lummi usual and accustomed fishing grounds include the marine areas of Northern Puget Sound. *Washington*, 384 F. Supp. at 361 (ER 154 ¶ 46).

The Requesting Parties likewise voice no defense of the district court's flatly incorrect reasoning that USA-62 was important to the Boldt Decree only as documenting the location of the islands at issue in Finding of Fact 45, ER 16. If it were important only for Finding of Fact 45, then Judge Boldt would not have cited it to support his findings with respect to the marine areas identified in Finding of Fact 46 that comprise the Lummi's usual and accustomed fishing grounds. *Washington*, 384 F. Supp. at 361 (ER 154 ¶ 46)

The Requesting Parties next seize upon Dr. Lane's testimony that the map is a "'rough sketch'" showing "reef net sites. From that, they simply presume that the labels on the map are incorrect or otherwise inconclusive in depicting the locations of the relevant waterways. Answering Br. 39-40. But the one has nothing to do with the other. Situating the location of reef net sites employed by tribal fishermen is necessarily a different cartographical task than laying out the location of permanent waterways.

Third, nineteenth-century affidavits document that the Lummi have fished throughout the Northern Puget Sound, including "at all points in the lower Sound."

ER 303. The Requesting Parties do not dispute the evidentiary content of those affidavits. They simply object to their consideration. There is no basis for that objection. The affidavits are part of the record in this case. The Requesting Parties filed the index of the Excerpts of Record from Subproceeding 89-2 along with five pages of the Excerpts and a notation that "[a]ll of these documents can be *re-filed* *** at the Court's request." *See* Decl. of Lauren Rasmussen at 2 n.2, *United States v. Washington*, Civ. No. 2:70-cv-9213-RSM (W.D. Wash.) (May 31, 2012) (Dkt. 20030) (emphasis added). That notation acknowledged that all of the documents listed in the filed index were *already* filed with the district court and thus were already part of the record in this case because Subproceeding 89-2—like this one—is a constituent part of the larger case of *United States v. Washington*, Civ. No. 2:70-cv-9213-RSM (W.D. Wash.). *See United States v. Washington*, 573 F.3d 701, 705 (9th Cir. 2009) (noting that requests for determination "get two file numbers, the original 1970 number of the treaty case, and an 'SP' number to indicate a new subproceeding within that case.").

Although the Lummi did not quote the affidavits in their briefing, the district court was well aware of the full, closed universe of evidence considered by Judge Boldt in support of the findings of fact identifying marine areas. Plus, that record was further detailed through the Requesting Parties' filing of the index from the

Subproceeding 89-2 Excerpts of Record. *See* ER 9 (listing the exhibits considered by Judge Boldt in support of the marine areas finding for the Lummi Nation).

In the context of this closed, known list of relevant evidence, the *Alaska Packers* affidavit is simply additional authority to support the argument that the Lummi Nation has made throughout this case: the Lummi fishing grounds include the marine areas of Northern Puget Sound from the Fraser River south to Seattle, just as Judge Boldt decreed. *See Puerta v. United States*, 121 F.3d 1338, 1341-1342 (9th Cir. 1997) ("[T]here is nothing wrong" with introducing new authority in support of an argument on appeal because "[a]n argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court ***.").

In any event, the affidavit merely corroborates ample other evidence documenting that the Lummi fished throughout the Puget Sound south of the southern edge of their home territory at Anacortes. *See, e.g.*, ER 255. That is more than enough to foreclose the "no evidence" showing that the Requesting Parties had to make and, indeed, to support the inclusion of the waters west of Whidbey Island within the marine areas of Northern Puget Sound. *Upper Skagit*, 590 F.3d at 1023; *see United States v. Lummi Indian Tribe*, 841 F.2d 317, 319-320 (9th Cir. 1988) (finding sufficient evidence to support even the *expansion* of a tribe's usual and accustomed fishing grounds where the tribe presented evidence of

fishing to the south and north of the relevant marine area, of the communal nature of Indian marine fishing, and of frequent travel to nearby trading posts). Accordingly, on this record, the district court's complete failure to put the Requesting Parties to their proof, ER 17, requires reversal.

IV. MATERIAL DISPUTES OF FACT REGARDING THE BOUNDARIES OF AREAS UNDISPUTEDLY PART OF THE LUMMI NATION'S USUAL AND ACCUSTOMED FISHING GROUNDS PRECLUDED SUMMARY JUDGMENT

In relying on law of the case to exclude the disputed area wholesale from the Lummi Nations' usual and accustomed fishing grounds, the district court disregarded material disputes of fact concerning the proper boundaries of the long-established Lummi fishing areas in Admiralty Inlet and the waters of the San Juan Islands. Because of those factual disputes, at a minimum, summary judgment with respect to the entire disputed area was improper. *See, e.g., Porter v. California Dep't of Corrections*, 419 F.3d 885, 891 (9th Cir. 2005).

More specifically, the Lummi Nation put forth evidence that supports a northern boundary of Admiralty Inlet within the area the district court has now excluded from the Lummi Nation's usual and accustomed areas. *See* ER 171. Because that map is admissible evidence of the correct locations of the relevant waterways, including Admiralty Inlet, and viewing the record in the light most favorable to the Lummi Nation, *Porter*, 419 F.3d at 891, that evidence creates a disputed issue of fact regarding Admiralty Inlet's northern boundary.

The Requesting Parties argue (Br. 27) that the Lummi Nation's prior statements about Admiralty Inlet negate that factual dispute about the Inlet's northern boundary, *see* Answering Br. 27. But that argument cannot survive a straightforward reading of the relevant language. The Lummi Nation's fisheries manager stated only that, in determining Lummi fishing regulations following this Court's decision in Subproceeding 89-2, a "reasonable point for the *western end* of Admiralty Inlet is Point Wilson, near Port Townsend." ER 54 (emphasis added); *see* Map, SER 51. That statement says nothing about the Inlet's northern boundary, and the USA-62 map provides evidence that the boundary is within the area the district court decision excludes from the Lummi Nation's usual and accustomed grounds.

On top of that, it is undisputed that the Lummi's usual and accustomed fishing grounds include Haro and Rosario Straits and the "waters of the San Juan Islands." *Washington*, 384 F. Supp. at 360 (ER 153 ¶ 45). And the Responding Parties have not questioned that the Strait waters extend south of the San Juan Islands for some distance into Salmon Management Areas 7 and 6A. The district court's reconsideration decision adopting a boundary line one nautical mile south of the San Juan Islands, ER 6 & n.3, thus impermissibly constricts this fishing area on summary judgment notwithstanding a genuine dispute as to the southern boundary of the Lummi fishing grounds.

The Requesting Parties fault the Lummi Nation's reconsideration request for being too vague. Answering Br. 41-42. But they are the ones who obtained summary judgment, so the law saddles them with the burden of establishing that the boundaries are factually undisputed. And the Requesting Parties do not deny that there is evidence that the Lummi "trolled the waters of the San Juan Islands for various species of salmon." *Washington*, 384 F. Supp. at 360 (ER 153 ¶ 45). Nor do they dispute that the district court's rationale for the one-nautical-mile boundary—based on the location of the reef net sites, ER 6—disregarded that evidence. That evidence of Lummi "troll[ing]" around the San Juan Islands, *see Washington*, 384 F. Supp. at 360 (ER 153 ¶ 45), makes the extent of Lummi fishing in the waters south of the San Juan Islands a disputed issue of fact that should have precluded the grant of summary judgment in this case.

For that reason, at the very least, remand is required for further proceedings regarding the scope of the disputed area for which the district court granted summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in 14-point Times New Roman proportional font and contains 6,998 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

/s/James T. Meggesto
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September 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2013, I electronically filed the foregoing Brief with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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