Nos. 19-35610, 19-35611, 19-35638

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Petitioners-Appellees-Cross-Appellants,

v.

LUMMI NATION,

Respondent-Appellant-Cross-Appellee,

SWINOMISH INDIAN TRIBAL COMMUNITY, ET AL.,

Real-parties-in-interest

Appeals from the United States District Court for Western Washington, Seattle, Case No. 2:11-sp-00002, Hon. Ricardo S. Martinez

OPENING BRIEF FOR RESPONDENT-APPELLANT-CROSS-APPELLEE LUMMI NATION

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JURISDICTIONAL STATEMENT

The district court exercised its continuing jurisdiction, pursuant to 28 U.S.C. § 1331, to implement the decree in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Decision I*"). The district court entered judgment on July 11, 2019. ER1. Respondent the Lummi Nation ("Lummi") filed a timely notice of appeal on July 19, 2019. ER26-27. Petitioners the Jamestown S'Klallam Tribe and the Port Gamble S'Klallam Tribe (together, the "S'Klallam") filed a notice of cross-appeal on July 22, 2019. ER23-25. The Lower Elwha Klallam Indian Tribe (the "Lower Elwha," and, collectively with the S'Klallam, the "Requesting Parties") filed a notice of cross-appeal on July 26, 2019. ER20-22. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's order terminated this subproceeding. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432 n.1 (9th Cir. 2000).

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that this Court's holding that the Lummi have the right to fish in the *entirety* of the waters disputed in this subproceeding meant only that the Lummi have the right to fish in some unidentified *portion* of those waters.

INTRODUCTION

It should go without saying that district courts must follow this Court's holdings. The district court here violated this essential principle. This Court has

twice reversed the district court in this subproceeding, with the second reversal definitively determining all of the issues at stake. But on remand, the district court entered a judgment that directly conflicts with this Court's mandate. The Lummi Nation thus now appeals a third time, seeking reinstatement of the result it secured in its last appeal.

This litigation concerns the Lummi's treaty rights in the waters off the coast of the State of Washington. The Lummi's rights to fish in the tribe's usual and accustomed grounds (sometimes abbreviated "U & A") were recognized in an order issued more than 45 years ago. That order determined that the Lummi's usual and accustomed grounds encompass a broad expanse of waters including "the marine areas of Northern Puget Sound." *Decision I*, 384 F. Supp. at 360. Since this 1974 decree, the Requesting Parties—certain other tribes whose fishing rights were later determined by the district court—have brought a succession of suits to try to chip away at the Lummi's fishing grounds. Here, the Requesting Parties challenged the Lummi's right to fish in the disputed waters, which the litigants described as the "waters west of Whidbey Island."

In the most recent appeal, this Court definitely rejected that challenge. It held: "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." *United States v. Lummi Nation,* 876 F.3d 1004, 1011 (9th Cir.

2017) (hereinafter *Lummi III*). Thus, this Court determined the Lummi have the right to fish *throughout* "the waters at issue." *Id.* at 1007.

On remand, the district court found ambiguity where there was none. Declaring that the "Ninth Circuit's latest ruling has done little to resolve the underlying conflict," the district court read this Court's opinion to support only the "lone conclusion that *some* Lummi U&A lies within the disputed waters." ER5, ER17. Thus, rather than recognize that the Lummi's usual and accustomed grounds include *all* of the waters at issue in this subproceeding—as this Court had expressly held—the district court concluded that the Lummi have treaty rights to some unidentified area *within* those waters. ER17-18. In the district court's view, the location of any Lummi U&A within these disputed waters must be left for still further litigation in the future. ER18. The district court thus revoked what this Court had granted, undoing what had been determined over the last ten years of litigation.

The plain terms of this Court's mandate cannot be so easily disregarded. Because the district court's judgment contravened this Court's decision, it should be reversed. This Court should make clear (again) that the Lummi have the right to fish in all the waters put at issue by this subproceeding's Request for Determination.

STATEMENT OF THE CASE

A. Factual Background

1. The Treaty of Point Elliot

In 1854 and 1855, Washington Territorial Governor Isaac Stevens, acting on behalf of the United States, negotiated a series of treaties with the Indian tribes of western Washington to "extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661 (1979). In the Treaty of Point Elliot, Act of Jan. 22, 1855, 12 Stat. 927, the Lummi relinquished most of their land rights, save for a few small parcels. *Id.* at 927-28.

But the Lummi retained their rights to fish. The Treaty guaranteed the Lummi the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." *Id.* at 928. This clause mirrored the language in the treaties signed by other tribes in this era, and reflected the "vital importance of the fisheries to the Indians" in the region. *Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. at 662, 666.

2. The Boldt Decree

The underlying district court proceedings commenced in 1970 when the United States, acting on its own behalf and as trustee for several tribes, filed suit against the State of Washington seeking clarification and enforcement of tribal treaty

fishing rights. *Decision I*, 384 F. Supp. at 327. Various tribes, state agencies, and a commercial fishing group intervened. *Id.* The Lummi were one of these original intervenors. *Id.* at 325.

In 1974, Judge Boldt issued a wide-ranging order clarifying the nature and extent of the tribes' treaty rights with respect to anadromous fish—that is, fish that migrate from the ocean and spawn in fresh-water rivers. *Id.* at 400, 405. Outside of reservation boundaries, tribes retained rights to fish in their "usual and accustomed grounds and stations," or U&A. *Id.* at 332, 406-07. 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.

Judge Boldt made a series of factual findings with respect to the "usual and accustomed" fishing grounds of a number of treaty tribes. For "each of the plaintiff tribes," Judge Boldt set forth "some, but by no means all, of their principal usual and accustomed fishing places." *Id.* at 333.

Judge Boldt described the usual and accustomed grounds of the Lummi in two separate findings of fact. In Finding of Fact #45, he determined that the Lummi had reef-netting sites at Orcas and San Juan Islands, among other locations, and had "trolled the waters of the San Juan Islands for various species of salmon." *Id.* at 360.

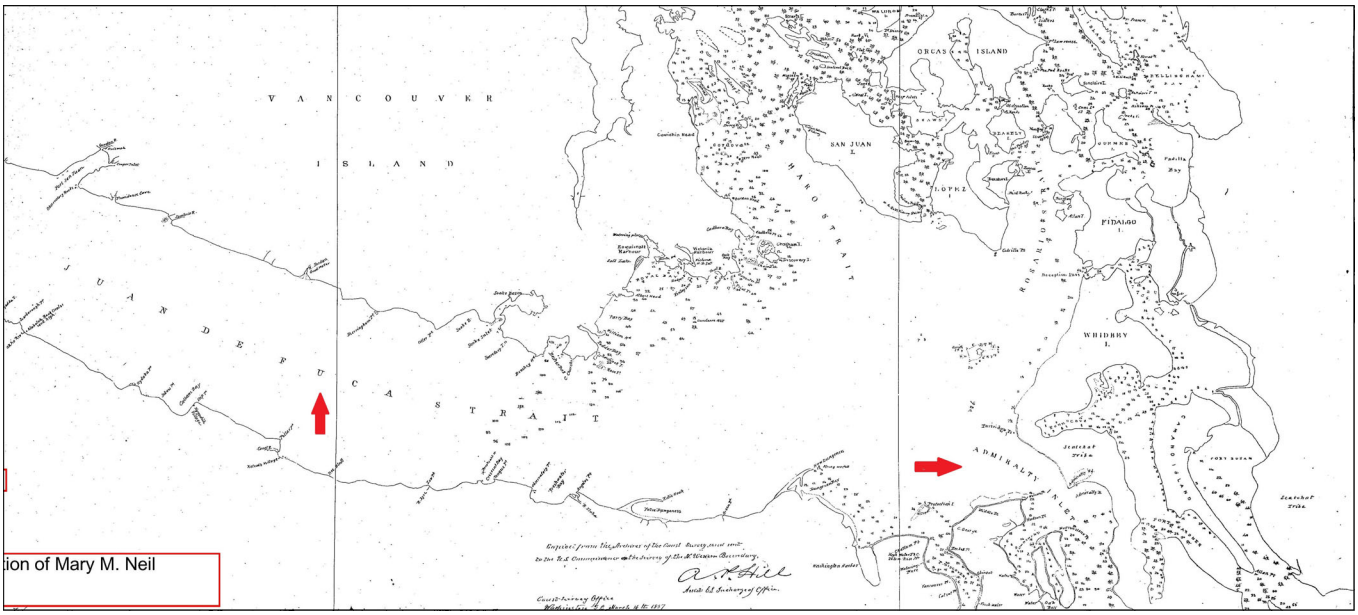
In Finding of Fact #46, Judge Boldt found the Lummi had marine fishing grounds "[i]n addition to the reef net locations" listed in the prior finding of fact. *Id.* Specifically, Judge Boldt determined that "the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." *Id.*

Judge Boldt recognized that he could not resolve all future controversies regarding tribal fishing rights. Thus, *Decision I* provided that the district court would retain continuing jurisdiction over the case. *See id.* at 419. The parties could invoke this jurisdiction to, among other things, clarify "whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #1." *Id.* This basis for seeking a judicial determination is now referred to as Paragraph 25(a)(1). *See United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1993).

3. The prior Lummi I *subproceeding*

In 1989, the Requesting Parties, together with the Skokomish Indian Tribe, invoked the district court's continuing jurisdiction under now-Paragraph 25(a)(1) by filing a "Request for Determination" (the equivalent of a complaint). These tribes sought a ruling that the Lummi's usual and accustomed fishing grounds do not include "the Strait of Juan de Fuca, Admiralty Inlet, which is the body of water west of Whidbey Island, and the mouth of Hood Canal." ER168. The map below, which

Judge Boldt cited in his findings of fact describing the Lummi's usual and accustomed grounds, shows some of the areas disputed in that earlier subproceeding. The red arrows have been added to indicate the map's text identifying the Strait of Juan de Fuca and Admiralty Inlet. Hood Canal is not shown on this map; it is located south and to the west of Admiralty Inlet.



ER170 (excerpt, red arrows added). The district court ruled in favor of the requesters as to all three bodies of water. ER179; ER194-195.

This Court affirmed in part and reversed in part. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 453 (9th Cir. 2000) (hereinafter *Lummi I*). It held that Admiralty Inlet was included within Judge Boldt's description of the Lummi's usual and accustomed fishing grounds. *Id.* at 451-52. First looking to the language Judge Boldt used, this Court concluded there was "no indication that Judge Boldt recognized Admiralty Inlet as a region separate from 'Northern Puget Sound.'" *Id.*

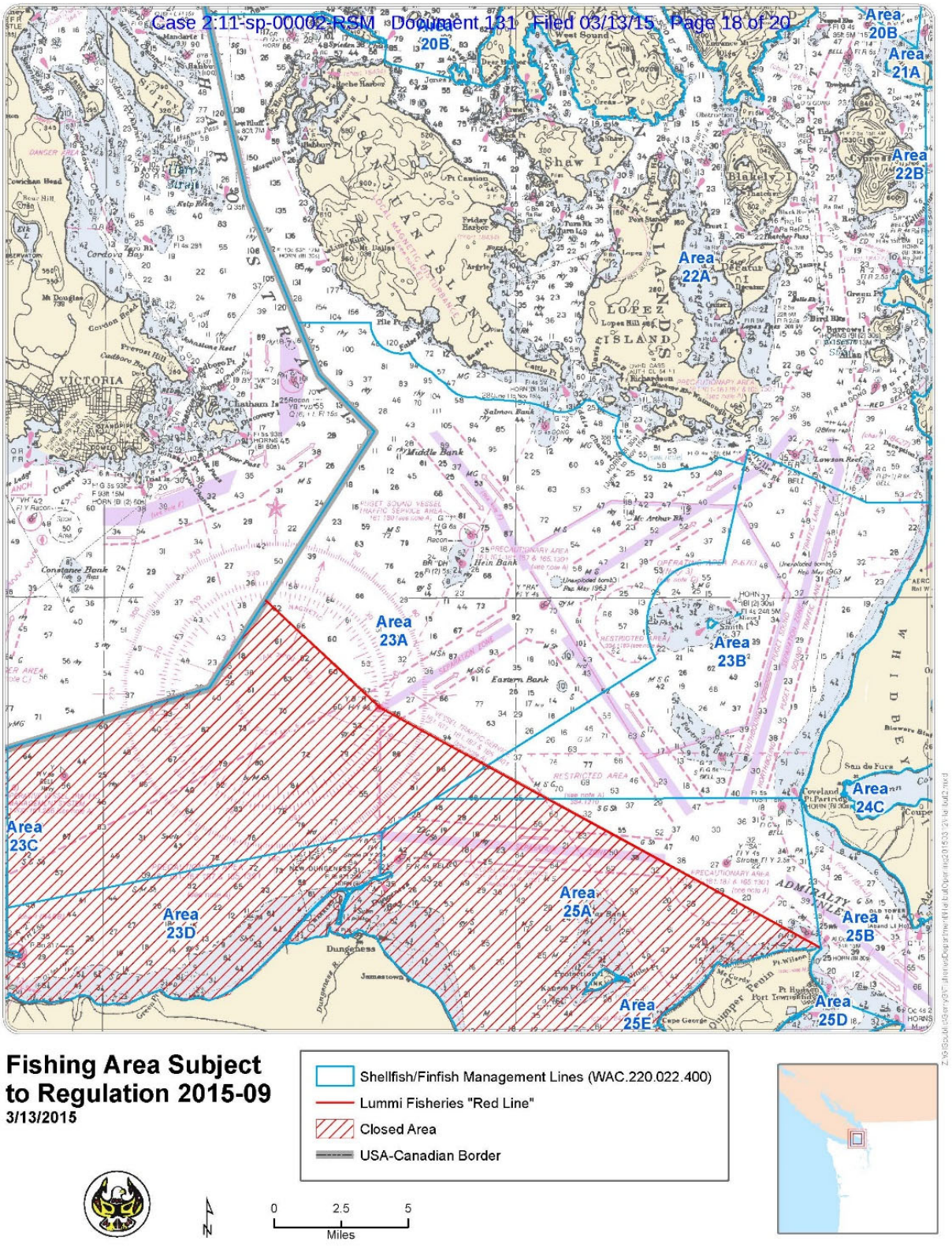
at 452. And geography was dispositive. Because Admiralty Inlet "would likely be a passage through which the Lummi would have traveled" in traversing the fishing grounds Judge Boldt identified, this Court concluded that it was "intended to be included within the 'marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle.'" *Id.* As this Court explained: "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.'" *Id.* By contrast, this Court held that given the language Judge Boldt used, he had not intended to include the Strait of Juan de Fuca or Hood Canal in his description of the Lummi's usual and accustomed grounds as "the marine areas of Northern Puget Sound." *Id.* at 451-52 (citing *Decision I*, 384 F. Supp. at 364-65, 385, 390).

4. The challenged fishing regulations

After this Court's decision in *Lummi I*, members of the Lummi Nation Natural Resources Commission concluded that, although they could no longer consider the Strait of Juan de Fuca and Hood Canal as within the Lummi's adjudicated fishing grounds, the Lummi retained fishing grounds in the waters to the west of Whidbey Island and south of the San Juan Islands. ER204. After all, those waters are directly between Admiralty Inlet and the waters of the San Juan Islands, and the Lummi

necessarily would have traversed them in the manner this Court described in *Lummi I*.

The Lummi therefore issued regulations authorizing Lummi fisherman to fish in the waters to the east of a line running from Trial Island in British Columbia to the northeastern tip of the Olympic Peninsula (a line sometimes referred to in this litigation as the "Trial Island Line"). ER205. The Lummi believed that this area was well within this Court's ruling and that the boundary line would be manageable. ER205. The map below (which was before both the district court and this Court in this subproceeding) demonstrates the Lummi's fisheries jurisdiction, with the solid red line representing the western boundary. The waters disputed in this case are to the east of this line, in the areas labeled 23A, 23B, and in the northeast corner of 25A.


Area 20B
Area 21A
Area 22B
Area 22A
Area 23A
Area 23B
Area 23C
Area 23D
Area 24C
Area 25A
Area 25B
Area 25D
Area 25E
Fishing Area Subject to Regulation 2015-09
3/13/2015
Shellfish/Finfish Management Lines (WAC.220.022.400)
Lummi Fisheries "Red Line"
Closed Area
USA-Canadian Border
0 2.5 5
Miles

ER142.

B. This Subproceeding's Procedural Background

1. The Request for Determination

A decade after *Lummi I*, the Requesting Parties initiated this subproceeding by filing another Request for Determination. ER215-228. Once again, they invoked Paragraph 25(a)(1), seeking a determination as to whether "the actions intended or effected by the Lummi Nation and its members (Lummi) conform with" Judge Boldt's findings of fact. ER215.

Specifically, the Requesting Parties contended the Lummi were:

> 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 Rosario Strait, the San Juan Islands, and Haro Strait.

ER216. The described "marine waters" corresponded to the fisheries boundary the Lummi Nation Natural Resources Commission drew following the *Lummi I* decision. *Supra* pp. 8-10. The Request for Determination defined these waters as "the waters west of Whidbey Island" (ER216, ER219, ER226), and the parties and this Court have referred to the disputed waters using this shorthand. *E.g.*, Opening Br. 2, *Lummi III,* 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661); ER65. The Requesting Parties sought a declaration that Judge Boldt's description of the Lummi's usual and accustomed fishing grounds does not encompass these waters and an injunction prohibiting the Lummi from fishing there. ER226.

2. This Court's decision in Lummi II

The district court granted summary judgment to the Requesting Parties. ER165. Applying the law-of-the-case doctrine, it concluded that *Lummi I* had held that the disputed waters are outside the Lummi's usual and accustomed grounds. ER165. It enjoined the Lummi from continuing to exercise their "treaty fishing rights" there. ER165. Following a reconsideration motion, the district court clarified that the "Lummi U&A should include nearshore waters immediately to the south of San Juan Island and Lopez Island," thus carving out this subset of waters from the scope of its summary-judgment order. ER148.

The Lummi appealed, and this Court reversed. *United States v. Lummi Nation*, 763 F.3d 1180, 1188 (2014) (hereinafter *Lummi II*). This Court concluded that, contrary to the district court's decision, language in *Lummi I* actually suggested "that the waters immediately to the west of Whidbey Island *are* included in the Lummi's U & A." *Id.* at 1186. This Court explained: "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." *Id*. at 1187. But because *Lummi I* had not conclusively resolved the status of these waters, this Court remanded for further proceedings. *Id.* at 1188.

3. Summary judgment proceedings

On remand, the parties cross-moved for summary judgment. Under this Court's precedent, the Requesting Parties bore the burden of demonstrating that there was "no evidence" before Judge Boldt that might have led him to include the disputed waters in his description of the Lummi's fishing grounds. *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015). After reiterating the definition of the disputed waters, the Lower Elwha tried to meet this heavy burden by insisting that the record demonstrated Judge Boldt "could not have intended" to include these waters, and that "[a]ny Lummi fishing in those waters is accordingly not in conformity" with Judge Boldt's decision. ER123-125. Similarly, the S'Klallam contended that "Lummi's fishing regulations indisputably opened waters in violation of" Judge Boldt's decision. ER133. By contrast, in its cross-motion for summary judgment, the Lummi asserted the Requesting Parties could not demonstrate "that Judge Boldt excluded the marine areas south of the San Juan Islands and west of Whidbey Island from the Lummi Nation's U&A." ER130.

The district court again granted judgment to the Requesting Parties, denying the Lummi's cross-motion. The court held the Requesting Parties had met their burden, declaring that "an examination of the record before Judge Boldt in 1974 reveals that there is no factual evidence to establish that the Lummi customarily fished at any time in the disputed waters at issue here." ER103. Thus, the court

again determined that the Lummi's adjudicated fishing grounds do not include "the marine waters east 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." ER112. The court again "permanently enjoined" the Lummi from "exercising or purporting to authorize treaty fishing in these waters." ER112.

4. This Court's decision in Lummi III

The Lummi again appealed, and this Court again reversed. *Lummi III*, 876 F.3d 1004. The Court first observed that *Lummi I* had previously held that the Lummi's usual and accustomed grounds encompass 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." *Id.* at 1007. This Court then stated: "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." *Id.*

This Court's analysis confirmed that all of the waters at issue in this subproceeding are within the Lummi's usual and accustomed grounds. In outlining the relevant geography, this Court explained: "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." *Id.* at 1008. This Court then reasoned that, like Admiralty Inlet, the disputed area was one through which the Lummi would have fished and traveled: "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." *Id.* at 1010.

This Court then again summarized its holding in no uncertain terms: "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." *Id.* at 1011. The Court further observed that it "need not determine the outer reaches of the Strait of Juan de Fuca"—which the opinion had previously stated was to the west of the disputed waters (*id.* at 1008)—"for purposes of the Lummi's U&A." *Id.* at 1011. Having thus clarified its decision, this Court reversed and remanded. *Id.*

Both the S'Klallam and the Lower Elwha petitioned for rehearing. The S'Klallam complained that this Court had "found that because a nautical path from the southern San Juan Islands could geographically connect the Lummi to the waters of Admiralty Inlet, that miles of waters in between the two points should be included in Lummi's U&A description of 'Northern Puget Sound.'" S'Klallam Rehearing Pet. 7, *Lummi III,* 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661) (emphasis omitted).

The S'Klallam illustrated this "disputed area" with a map depicting the boundary set by the Lummi's fishing regulations. *Id.* Likewise, the Lower Elwha, after describing the disputed waters as the "marine waters west of Whidbey Island," contended this Court had erred in holding that "Judge Boldt did in fact intend to include those waters within Lummi's U&A." Lower Elwha Rehearing Pet. 1, *Lummi III,* 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661).

This Court denied the rehearing petitions. *United States v. Lummi Nation*, No. 15-35661, 2018 U.S. App. LEXIS 722, at *3 (9th Cir. 2018).

5. Further proceedings in the district court

One might have thought that would end this litigation. It did not.

Following issuance of this Court's mandate, the S'Klallam moved to amend the initial Request for Determination. ER78. Their arguments were somewhat unclear—involving, among other contentions, a claim that the Lummi had committed some sort of spoliation by also asserting treaty rights in the waters to the east of Whidbey Island, and the argument that *Lummi III* created a "panel conflict" with Ninth Circuit precedent that "must be resolved." ER79-86. The thrust of the S'Klallam's motion was that the precise western boundary of the Lummi's usual and accustomed grounds was uncertain, and that the district court should hold proceedings to definitively determine that line. ER88.

The Lummi opposed this motion to amend. As the Lummi explained, to the extent the S'Klallam suggested the outer boundary of the Lummi's usual and accustomed grounds should be drawn *within* the area disputed in this subproceeding, *Lummi III* precluded any such contention: the Lummi contended this Court had held that "the Lummi U&A encompasses the entire area at issue in this Subproceeding." ER77. To the extent that the S'Klallam sought a determination regarding waters *outside* the waters disputed in this subproceeding (*e.g.*, to the west of the disputed waters, toward the Strait of Juan De Fuca), any amendment was unnecessary because the Lummi were not fishing in those areas. ER77. Thus, the Lummi asserted, there was "nothing left in this Subproceeding for the Court to decide." ER32.

The Lower Elwha agreed with the Lummi in almost every respect. The Lower Elwha "strongly disagree[d] with the outcome of this Subproceeding in the Ninth Circuit and share[d] the S'Kallams' disappointment." ER74. But the Lower Elwha acknowledged that *Lummi III* had plainly held that the Lummi's waters include the entire area disputed in this subproceeding, which was demarcated by the "Trial Island line." ER65. As the Lower Elwha observed, "Ultimately, what the S'Klallam are seeking is an opportunity to re-litigate in this Court matters that the Ninth Circuit has already decided." ER71.

The Lower Elwha did, however, diverge from the Lummi on a subsidiary point: they contended *Lummi III* held not only that the Lummi's usual and

accustomed grounds encompass the waters disputed here, but also that the Lummi have *no* usual and accustomed grounds to the west of those disputed waters. ER39. Thus, the Lower Elwha sought entry of a judgment declaring that the Lummi "may not engage in treaty fishing west of the Trial Island line on the basis that such fishing is in conformity with Final Decision No. 1." ER37.

The Lummi opposed this effort, explaining that *Lummi III* could not have determined the status of the waters to the west of "Trial Island line" because the question was not before the Ninth Circuit: those waters were not at issue in this subproceeding. ER35. In fact, this Court had expressly disclaimed any such determination, observing that it "'need not determine the outer reaches of the Strait of Juan de Fuca for purposes of the Lummi's U&A.'" ER34 (quoting *Lummi III*, 876 F.3d at 1011). The S'Klallam also opposed the Lower Elwha's motion, reiterating many of the arguments they made in their attempt to amend the pleadings. ER28-29.

6. The district court's order

In resolving these competing motions, the district court adopted a view of the proceedings, and this Court's mandate, advocated by none of the parties—one that effectively swept aside everything this Court had decided after a decade of litigation. In the district court's view, "[t]he Ninth Circuit's latest ruling has done little to resolve the underlying conflict." ER5.

The district court first denied the S'Klallam's motion to amend the original Request for Determination. ER8-14. It explained that the S'Klallam had identified no basis for the court to "resolve" any supposed "conflicts resulting from the Ninth Circuit's prior decisions." ER9. It also observed that the S'Klallam's proposed amendment did not adequately specify any particular waters where "Lummi fishing is out of compliance with *Final Decision I*." ER11. And it concluded that if the S'Klallam wished to litigate these issues, they should satisfy the procedural requirements for invoking the district court's continuing jurisdiction and initiate a new subproceeding. ER13-14.

But the district court also rejected the proposition that this Court's decision in *Lummi III* had determined the Lummi's usual and accustomed grounds in the waters disputed in this subproceeding. ER15-18. Instead, the district court declared that "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 the Lummi U&A, and adopted the Trial Island Line as a boundary without ever referencing the Trial Island Line." ER16. The district court further asserted the "sole question before the Ninth Circuit was whether the [district court]'s grant of summary judgment" holding the Lummi had *no* rights in the disputed waters "was in error," and that this Court's reversal meant only that "*some* Lummi U&A lies within the disputed waters." ER17. That purported holding, the district court

continued, had "necessarily resolved this proceeding." ER17. It reasoned that the "Lower Elwha and S'Klallam sought to establish that *any* Lummi fishing in the disputed waters is 'not in conformity' with *Final Decision I*," and that all this Court's decision in *Lummi III* did was reject that narrow proposition. ER17-18. For that reason, the district court declared that it need not address whether the mandate rule or the law-of-the-case doctrine precluded it from reaching this result on remand. ER17 n.22.

The district court did not explain how it reconciled its interpretation with this Court's express holding 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." *Lummi III*, 876 F.3d at 1011. The district court did recognize, however, that the "practical impact" of its ruling was that the "dispute" over the status of these waters "will continue." ER18. The district court deemed itself unable to resolve that dispute, declaring: "Ultimately, there may not be a legal solution and if there is it will likely have to come from the Ninth Circuit." ER18.

The Lummi, S'Klallam, and Lower Elwha all appealed. ER20-27.

SUMMARY OF ARGUMENT

In *Lummi III*, this Court 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." *Lummi III*, 876 F.3d at 1011. Nevertheless,

on remand, the district court entered a judgment that deprived the Lummi of this Court's holding. The district court concluded that the Lummi have rights only to some undetermined area *within* the disputed waters. But the district court was bound by this Court's contrary determination in *Lummi III*. Because the district court deviated from the strict terms of this Court's mandate, the judgment should be reversed.

The district court gave no sound justification for disregarding *Lummi III*'s holding. The district court stated that this Court's opinion was ambiguous. But the scope of *Lummi III* was plain. This Court made clear that it understood exactly which waters were disputed, and it repeatedly stated that the Lummi have treaty rights to fish throughout the disputed waters.

The district court also erred in asserting that the only question presented on appeal was whether the Lummi have treaty rights *somewhere* within the disputed waters. The underlying Request for Determination sought a determination whether the Lummi would exceed their adjudicated treaty rights by fishing in the waters put at issue by the Request—as have many similar Requests for Determination in the ongoing *United States v. Washington* proceedings. And the parties had cross-moved for summary judgment with respect to the Lummi's rights throughout the disputed waters. If left to stand, the district court's decision would call into question much of

what has already been decided in the *United States v. Washington* subproceedings, giving rise to endless lawsuits in what is already a much-litigated case.

STANDARD OF REVIEW

This Court reviews de novo whether a district court has complied with this Court's mandate. *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007). It also reviews de novo whether an issue has "been decided explicitly or by necessary implication" so as to constitute law of the case. *Lummi II*, 763 F.3d at 1185.

ARGUMENT

THE DISTRICT COURT'S JUDGMENT CONTRAVENES THIS COURT'S MANDATE IN *LUMMI III* AND SHOULD BE REVERSED

A. The Mandate Rule And The Law Of The Case Bind District Courts

Few rules are better established than those requiring the district court to follow the commands of the appellate court. "[W]hen a cause has been decided by an appellate court and remanded, the court to which it is remanded *must* proceed in accordance with the mandate and such law of the case as was established by the appellate court." *In re Beverly Hills Bancorp.*, 752 F.2d 1334, 1337 (9th Cir. 1984) (emphasis added, internal quotation marks omitted). Both the mandate rule and the law-of-the-case doctrine enforce a principle that has been integral to our judicial system for more than two centuries: "[m]atters that were adjudicated on the first appeal are no longer open to re-examination." *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 966 (9th

Cir. 2005) (internal quotation marks omitted); *see, e.g.*, *Himely v. Rose*, 9 U.S. 313, 314 (1809).

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Thrasher*, 483 F.3d at 981. Thus, any issue an appellate court has "decided explicitly or by necessary implication" cannot be revisited by a lower court. *Herrington v. County of Sonoma,* 12 F.3d 901, 904 (9th Cir. 1993).

"The rule of mandate is similar to, but broader than, the law of the case doctrine." *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). Under this rule, "whatever was before this court, and disposed of by its decree is considered as finally settled." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). When this Court issues its mandate, the district court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *Id.* "Thus, a district court could not refuse to dismiss a case when the mandate required it, and a district court could not revisit its already final determinations unless the mandate allowed it." *Thrasher*, 483 U.S. at 981-82 (internal quotation marks omitted).

Applying these rules, this Court reverses when a district court takes action on remand that contravenes this Court's decision. *See, e.g.*, *United States v. Carpenter*,

526 F.3d 1237, 1240 (9th Cir. 2008) (reversing denial of intervention where "prior opinion foreclosed any argument that appellants were not entitled to intervene"); *United States v. Lewis*, 862 F.2d 748, 750-51 (9th Cir. 1988) (reversing where district court disregarded mandate to resentence on a single, specified count); *Beverly Hills Bancorp.*, 752 F.2d at 1337-38 (reversing where district court tried theory beyond the scope of remand).

B. This Court Held In *Lummi III* That The Lummi Have Fishing Rights In All The Waters Disputed In This Subproceeding

The district court's judgment here cannot be reconciled with this Court's decision. The terms of this Court's mandate were plain: this Court 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." *Lummi III*, 876 F.3d at 1011.

In so holding, *Lummi III* unambiguously determined that the Lummi have treaty rights to fish throughout the waters disputed in this subproceeding. As this Court's opinion specified, the "waters west of Whidbey Island" are the "waters contested here." *Id.* at 1008; *see United States v. Cote*, 51 F.3d 178, 182 (9th Cir. 1995) ("the opinion delivered by [the] court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate") (quoting *Sanford Fork & Tool Co.*, 160 U.S. at 256). And the "waters contested here" were the waters put at issue by the Requesting Parties' Request for Determination and contested in the

parties' cross-motions for summary judgment—namely, all of 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 Rosario Strait, the San Juan Islands, and Haro Strait." ER216. Thus, by equating the "waters contested here" with the "waters west of Whidbey Island" (as both the Request for Determination and the parties had done, ER216; ER65), and then holding that "the waters west of Whidbey Island" are included "in the Lummi's U&A," this Court necessarily held that the Lummi's usual and accustomed grounds include *all* of the waters disputed in this subproceeding. *Lummi III*, 876 F.3d at 1011; *see also*, *e.g.*, *id.* at 1007 ("the Treaty secures the Lummi's right to fish" in "the waters at issue").

The district court's judgment directly contradicts that mandate. Rather than recognize that the Lummi have treaty rights to *all* of the disputed waters, the district court entered a judgment stating the Lummi have rights to only *some* of the disputed waters. ER17. The district court thus effectively revoked what this Court had granted: while this Court's opinion expressly confirmed that the Lummi's usual and accustomed grounds include these waters, the district court instead provided only that the Lummi have rights to fish in some unspecified *portion* of these waters. ER17-18. A district court cannot revise this Court's mandate in that fashion. *See*

Beverly Hills Bancorp, 752 F.2d at 1337 ("a trial court cannot consider issues decided explicitly or by necessary implication").

C. The District Court Contravened This Court's Decision

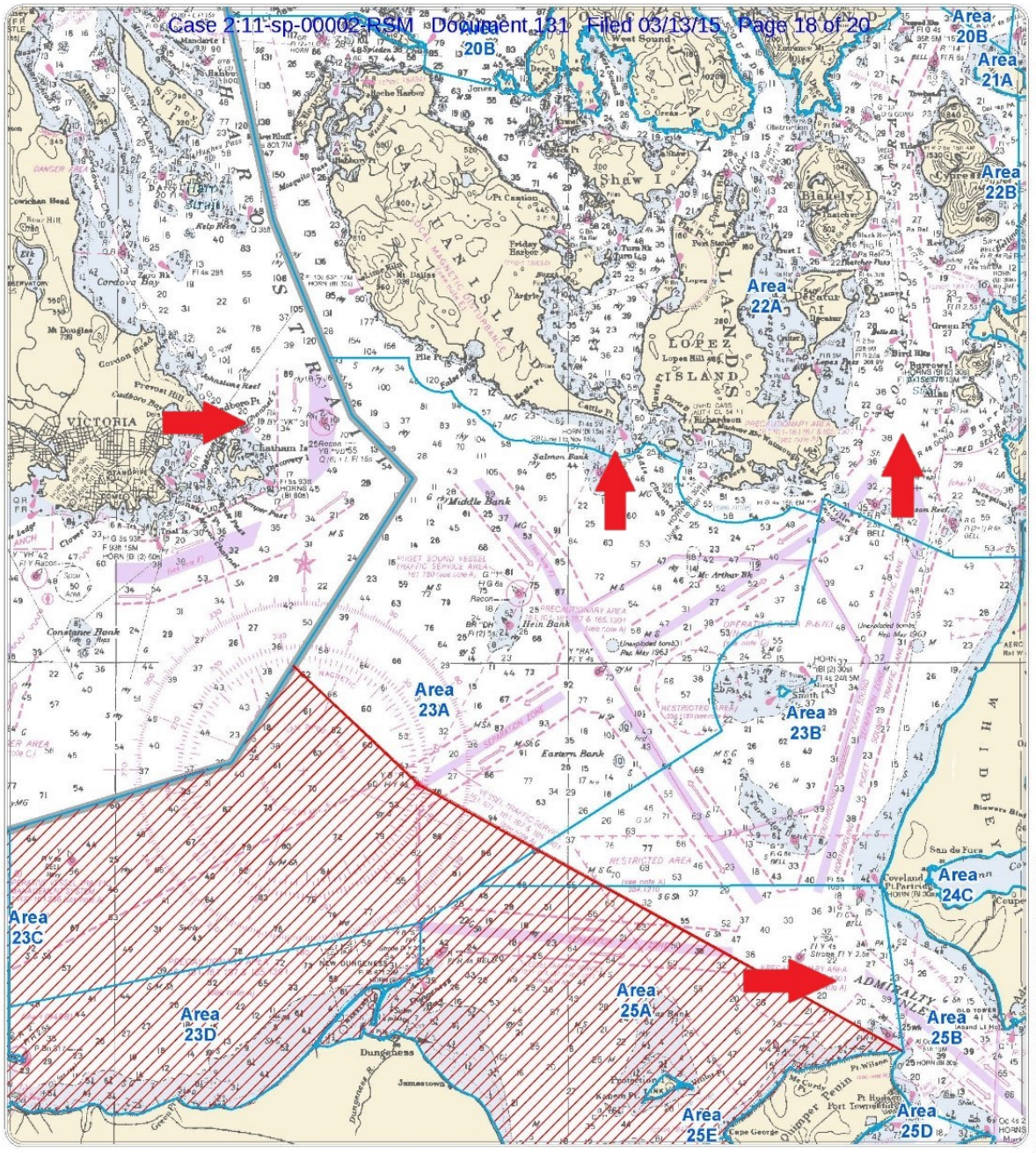
The district court advanced two primary rationales for its holding: first, it believed this Court's holding was ambiguous; and second, it thought the subproceeding's procedural posture precluded this Court from determining the Lummi's rights to the entirety of the contested waters. ER16-18. Neither rationale withstands scrutiny.

1. This Court's holding was clear

The district court believed it would "stretch[] *Lummi III* past its limits" to conclude that this Court's decision determined the status of all of the waters put at issue by the Request for Determination. ER16. The district court reasoned that "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 the Lummi U&A, and adopted the Trial Island Line as a boundary without ever referencing the Trial Island Line." ER16. But this Court's holding was clear: the Lummi's usual and accustomed grounds include all of the contested waters. *Lummi III*, 876 F.3d at 1011.

First, there was nothing "opaque[]" (ER16) about this Court's reference to the "waters west of Whidbey Island." Again, this Court had expressly defined the

"waters contested here" as the "the waters west of Whidbey Island." *Lummi III*, 876 F.3d at 1008. It then repeated the phrase more than a dozen times throughout the course of its opinion. *Id.* at 1008-13. In doing so, this Court adopted the practice of the parties before it, which had themselves described the disputed area as "the waters west of Whidbey Island." *E.g.*, Opening Br. 2, *Lummi III,* 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661); ER64-65; ER216 (Request for Determination so defining the contested waters). And rather than leave any doubt, this Court also specifically defined its geographic terms, explaining that "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." *Lummi III*, 876 F.3d at 1010. Thus, the "waters west of Whidbey Island" are located between Admiralty Inlet, the San Juan Islands, and Haro and Rosario Straits. *Id.* As the map below indicates, that precisely describes the disputed waters (which are to the north and east of the solid red line, between Admiralty Inlet, the San Juan Islands, and Haro and Rosario Straits):


Area 20B
Area 21A
Area 22B
Area 22A
Area 23A
Area 23B
Area 23C
Area 23D
Area 24C
Area 25A
Area 25B
Area 25D
Area 25E
VICTORIA
Middle Bank
Hein Bank
Eastern Bank
Salmon Bank
Constance Bank
Dungeness
Jamestown
Port Townsend
Fiery Organ
Fishing Area Subject to Regulation 2015-09
3/13/2015
Shellfish/Finfish Management Lines (WAC.220.022.400)
Lummi Fisheries "Red Line"
Closed Area
USA-Canadian Border
0 2.5 5
Miles

ER142 (red arrows added to indicate Haro Strait, the San Juan Islands, Rosario Strait, and Admiralty Inlet).[1]

Second, and again contrary to the district court's conclusion, this Court "clearly express[ed] its intent to define Lummi U&A." ER16. That much was apparent from this Court's express holding: the disputed waters "are encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011. If that holding were insufficiently clear, the rest of this Court's opinion spoke directly to the issue. In particular, this Court repeatedly equated the Lummi's rights in the disputed waters with their rights in Admiralty Inlet—waters unequivocally "included" in the Lummi's usual and accustomed grounds. *Id.* at 1008. For example, this Court noted that it had "previously concluded that the Treaty secures the Lummi's right to fish in Admiralty Inlet," then stated that "the same result holds here" for "the waters at issue." *Lummi III*, 876 F.3d at 1007. This Court explained that this case was "almost identical" to *Lummi I*, in which Admiralty Inlet "was deemed part of the Lummi's U&A." *Id.* at 1009. And it reasoned that the "disputed area here" was both just as likely as Admiralty Inlet to be included in Judge Boldt's delineation of the Lummi's U&A in "'Northern Puget Sound'" and just as "likely to be a passage through which

[1] Even if this Court's holding were somehow ambiguous (and it was not), the district court would have been required to follow it. *E.g., Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988) ("[T]he law of the case turns on whether a court previously 'decided upon a rule of law' . . . not on whether, or how well, it explained the decision.").

the Lummi would have traveled from the San Juan Islands in the north to the 'present environs of Seattle.'" *Id.* (quoting *Lummi I*, 235 F.3d at 452). Thus, just as *Lummi I* held that all of the waters in Admiralty Inlet are included in the Lummi's usual and accustomed grounds, *Lummi III* held that the waters disputed here are "'included within the Lummi's U & A.'" *Id.* at 1010.

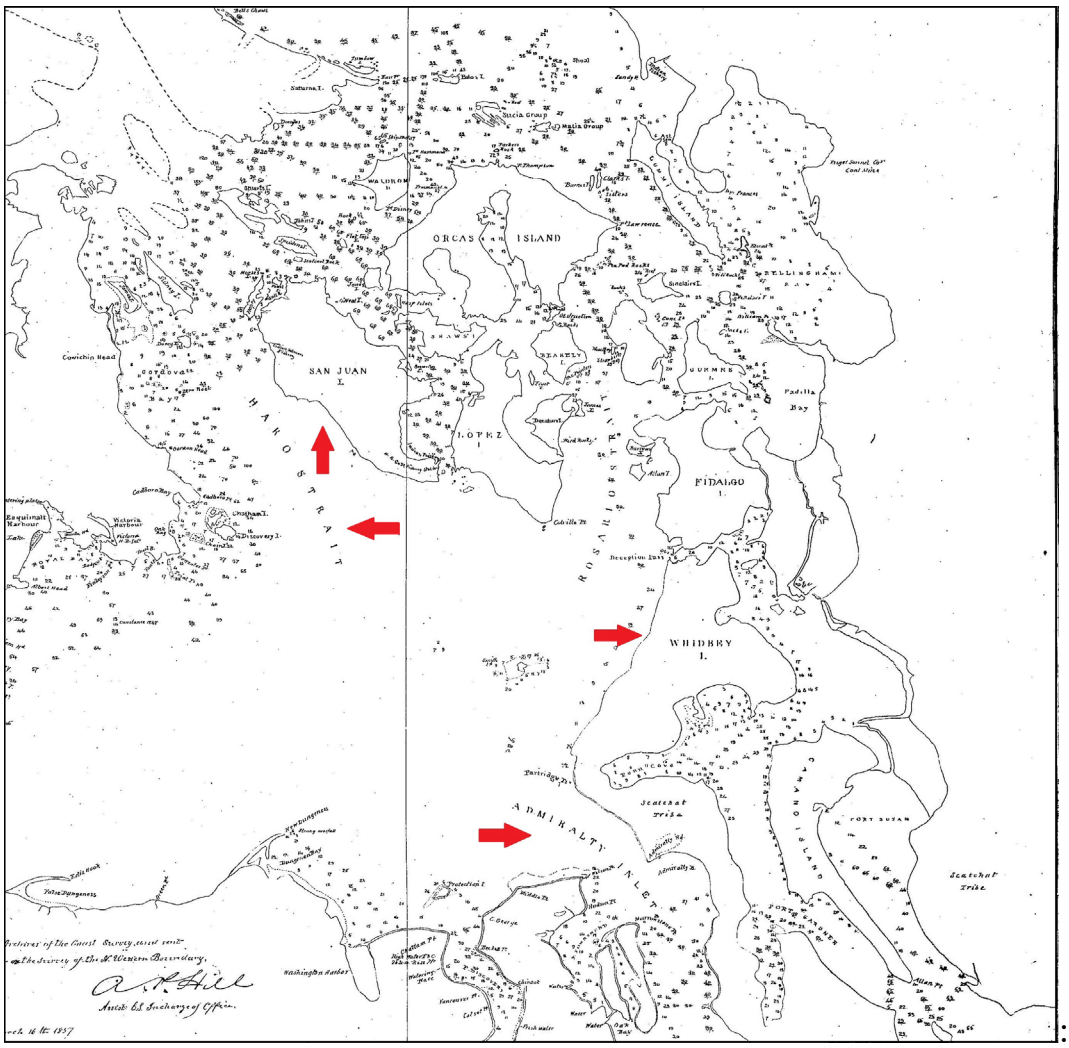
Third, there is no question this Court "adopted the Trial Island Line." *Contra* ER15. This Court repeatedly referenced the "waters contested here," the "disputed" waters, and "the waters at issue here," and it phrased its holding as applying to that area. *See Lummi III*, 876 F.3d at 1007, 1008, 1011. Although this Court did not expressly mention the "Trial Island Line," it was well aware which waters were "contested," "disputed," and "at issue" in this case. This Court was reviewing a judgment governing the Lummi's rights in an area "east of a line running from Trial Island near Victoria, British Columbia, to Point Wilson." ER112. The Lummi specifically quoted this definition of the case area in their briefing to this Court and provided an illustrative map (the same map reproduced *supra* pp. 10, 28). Opening Br. 20-21, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661). And during oral argument before this Court, counsel for the S'Klallam provided the panel with a similar map demonstrating the scope of the disputed waters and illustrating the Trial Island line. ER44; *see* Oral Arg. Audio Recording at 14:45, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661). Thus, when this Court held the Lummi

have the "right to fish" in the "waters at issue," it knew the location of those waters. *Lummi III*, 876 F.3d at 1007. That, of course, was why the Requesting Parties conceded in their rehearing petitions that this Court had recognized the Lummi's usual and accustomed grounds throughout the disputed waters. *Supra* pp. 15-16.

Finally, although the district court was required to follow this Court's decision whether it was "correct or in error," *Firth v. United States*, 554 F.2d 990, 994 (9th Cir. 1977), this Court was correct in holding that these waters are "encompassed in the Lummi's U&A." *Lummi III*, 876 F.3d at 1011. The Requesting Parties bore the burden of demonstrating that there was "no evidence" before Judge Boldt that could have led him to include these waters in the Lummi's usual and accustomed grounds; even "fragmentary," "happenstance" evidence would defeat an attempt to meet that burden. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988); *see Tulalip Tribes*, 794 F.3d at 1133. And here, the record contained evidence of Lummi fishing throughout these waters.

In particular, the expert anthropologist report on which Judge Boldt relied described the Lummi's "home territory" as encompassing the waters of the San Juan Islands and Haro Strait—directly to the north of the disputed waters. ER118-120. The expert report further noted that the Lummi had traveled throughout the waters of the Sound to the south and had fished while doing so. ER121. To get from their home territory in Haro Strait and the San Juan Islands in the north to Admiralty Inlet

in the south (and from there to their usual and accustomed grounds in the environs of Seattle), the Lummi would have traveled and therefore fished throughout the waters disputed here. *Lummi II*, 763 F.3d at 1187. The map below (which was cited by Judge Boldt in his findings regarding the Lummi usual and accustomed grounds) illustrates these straightforward geographic facts:



ER170 (excerpt, red arrows added).

Thus, as counsel for the Lummi explained at oral argument when asked by this Court about the western boundary of the Lummi's usual and accustomed grounds, the disputed waters here are necessarily to the east of that boundary (wherever that boundary might be). *See* Oral Arg. Audio Recording at 10:40, *Lummi III*, 876 F.3d 1004 (9th Cir. 2017) (No. 15-35661). This Court correctly adopted that reasoning, concluding the Lummi have treaty rights to fish in the waters disputed here and that it did not need to define the "outer reaches" of the Lummi's usual and accustomed grounds to so hold. *Lummi III*, 876 F.3d at 1011. The district court erred in disregarding that holding.

2. The procedural posture did not preclude this Court's holding

The district court was equally mistaken in believing that the subproceeding's "procedural posture" demonstrated that this Court decided only that the Lummi have rights to some unspecified portion of the disputed waters. ER16. Although the district court asserted that the "sole question before the Ninth Circuit was whether the [district court's] *grant* of summary judgment was in error" (ER17 (emphasis added)), the order under review in *Lummi III* had also rejected the Lummi's cross-motion for summary judgment. ER112. Perhaps more important, all of the competing motions pertained to the entire area in dispute, seeking complete judgment in this subproceeding. ER132-134; ER130; ER123-125. In such a posture, there can be no question of this Court's authority to resolve the controversy

and determine the Lummi's treaty rights in the entirety of the waters at issue in this subproceeding. *E.g.*, *Lummi I*, 235 F.3d at 452 (holding Lummi have U&A throughout Admiralty Inlet); *see Scribner v. Worldcom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001) ("[W]e have jurisdiction to review the district court's denial of Scribner's summary judgment motion as well as its grant of summary judgment of WorldCom."). This Court exercised that authority, holding "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." *Lummi III*, 876 F.3d at 1011.

To be sure, as the district court emphasized, the order this Court was reviewing had held that the Lummi had no rights whatsoever "within the disputed waters." ER17; *see* ER112. Theoretically, this Court might have reversed without holding the Lummi have rights throughout these waters, leaving it to the district court on remand to determine the full extent of the Lummi's rights within this area. *Cf. Lummi II*, 763 F.3d at 1187-88 (remanding for such a determination). But nothing *required* this Court to take that course, and it plainly did not do so. *Lummi III*, 876 F.3d at 1011. The district court cannot disregard the mandate this Court actually issued just because the mandate conceivably could have been narrower. *Firth*, 554 F.2d at 994.

Nor can the district court's judgment be sustained by reconceiving what this litigation concerned at its outset. The district court stated that the "Lower Elwha and S'Klallam sought to establish that *any* Lummi fishing in the disputed waters is 'not in conformity' with *Final Decision I*," and the determination that "Lummi fishing in some portion of the disputed waters conforms with *Final Decision I*" had "resolved" that issue. ER17-18. Tellingly, neither the Lower Elwha nor the S'Klallam advanced this interpretation of their own Request for Determination.

For good reason: the Requesting Parties asked for a determination of the scope of the Lummi's right to fish in the disputed waters, not an answer to the abstract question of whether the Lummi have some treaty rights in some unspecified subarea. The pleadings could not have been plainer. The Requesting Parties asserted that the Lummi were "impermissibly fishing" in the disputed waters northeast of the Trial Island line. ER215. These disputed waters corresponded to the Lummi's fishing regulations, which had opened the waters northeast of the Trial Island line to Lummi fishing. ER205. The Requesting Parties sought a determination under Paragraph 25(a)(1) as to whether the Lummi's "actions" were in "conform[ity]" with *Decision I*. ER215-216. Only if the Lummi have rights *throughout* these waters (as *Lummi III* held they do) would the Lummi's fishing in those waters in fact be consistent with *Decision I*. If the Lummi had rights to some but not all of these

waters, their fishing in waters in which they lacked treaty rights would not "conform with" *Decision I*.

In other words, the Requesting Parties asked for a judicial determination as to whether the Lummi were violating *Decision I* by fishing in the contested waters. This Court answered that question "no." *Lummi III*, 876 F.3d at 1011. The district court replaced that "no" with a "maybe," then declared it had answered the Requesting Parties' question—effectively rendering the last ten years of litigation pointless. ER18.

Indeed, given its reasoning, the district court's decision would have unsettling effects well beyond this particular subproceeding. Parties to the *United States v. Washington* case often invoke Paragraph 25(a)(1) to determine the scope of a given tribe's usual and accustomed grounds, and this Court regularly entertains appeals from such subproceedings. *See, e.g.*, *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844 (9th Cir. 2017); *Tulalip Tribes*, 794 F.3d 1129; *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010); *United States v. Mucklelshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000). The district court's decision here threatens to undermine any decision in which this Court has held that a tribe has rights to specified waters.

In *Tulalip Tribes*, for example, the Tulalip filed a Request for Determination that the Suquamish lacked rights to fish in certain waters around Whidbey Island.

794 F.3d at 1132. This Court affirmed that the Suquamish's usual and accustomed grounds in fact encompassed specified portions of the disputed waters. *Id.* at 1134-36. But under the district court's view of Paragraph 25(a)(1) Requests for Determination, this Court's decision would not have resolved the Suquamish's rights to fish in those designated waters. Rather, this Court would have held only that Suquamish have rights to fish somewhere in those waters, as that supposedly would be all that was necessary to answer the question posed by the Tulalip's Request for Determination. ER17-18. Under the district court's rationale, it would be left to subsequent litigation, over an even narrower subarea, to further determine whether some of *those* waters were within the Suquamish's usual and accustomed grounds. Like Achilles and the tortoise, each successive iteration of litigation might bring the parties ever closer to securing—but never quite attaining—a determination of where the tribe actually has fishing rights.

The *United States v. Washington* case is not lacking for lawsuits. To the contrary, "[l]itigation over the various tribes' U&As has been ongoing ever since" Judge Boldt issued his order over 45 years ago. *Lummi III,* 876 F.3d at 1007; *see Upper Skagit*, 590 F.3d at 1026 (Kleinfeld, J., dissenting) (recognizing that "[c]ontinually revisiting Judge Boldt's decades-old opinions" is "extremely burdensome and expensive"). The district court's erroneous approach would leave

tribes frustrated in their attempts to discern where their treaty rights extend, spawning further, unnecessary litigation.

What this Court has decided must remain decided. Here, this Court held that the Lummi's usual and accustomed grounds include the waters between Whidbey Island, the San Juan Islands, and the Trial Island line. *Lummi III,* 876 F.3d at 1011. That clear and unambiguous holding should be the end of the matter.

CONCLUSION

The judgment should be reversed and the case remanded with instructions for the district court to enter judgment in favor of the Lummi on the ground that the Lummi have treaty rights to fish throughout the disputed waters described in the Request for Determination.

Dated: December 20, 2019

Respectfully submitted,

s/ Deanne E. Maynard

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STATEMENT OF RELATED CASES

Appellant Lummi Nation is aware of the following related cases pending in this Court within the meaning of Circuit Rule 28-2.6:

Muckleshoot Indian Tribe v. Tulalip Tribes, No. 18-35441. This appeal arises out of the same underlying district court proceeding, but involves an unrelated dispute and a separate district court subproceeding (No. 2:17-sp-00002-RSM).

Makah Indian Tribe v. Quileute Indian Tribe, No. 18-35369. This appeal arises out of the same underlying district court proceeding, but involves an unrelated dispute and a separate district court subproceeding (No. 2:09-sp-00001-RSM).

Dated: December 20, 2019

s/ Deanne E. Maynard
Deanne E. Maynard

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FOR THE NINTH CIRCUIT

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