UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 18-35441

MUCKLESHOOT INDIAN TRIBE,

Plaintiff-Appellant,

v.

TULALIP TRIBES, et al.,

Respondents-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington,
Civil Action Nos. 2:17-sp-0002-RSM; 2-cv-09213-RSM
Honorable Ricardo S. Martinez

APPELLANT'S CORRECTED OPENING BRIEF

David R. West, WSBA #13680
Donald B. Scaramastra, WSBA #21416
Margaret A. Duncan, WSBA #47876
GARVEY SCHUBERT BARER, P.C.
1191 Second Avenue, 18th Floor
Seattle, Washington 98101-2939
(206) 464-3939

Richard Reich, WSBA #8178
Robert L. Otsea, Jr., WSBA #9367
Laura Weeks, WSBA #26992
Ann E. Tweedy, WSBA #32957
OFFICE OF THE TRIBAL ATTORNEY
Muckleshoot Indian Tribe
39015 172nd Avenue SE
Auburn, WA 98092-9763
(253) 939-3311

Attorneys for Appellant Muckleshoot Indian Tribe

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INTRODUCTION

In two treaties with the United States, ancestors of the Muckleshoot Indian Tribe reserved "[t]he right of taking fish, at all usual and accustomed grounds and stations." After the United States, the Muckleshoot Tribe, and other tribes sued the State of Washington to enforce these treaty rights, District Judge Boldt issued Final Decision # I in 1974.[1] In it, he determined that the Tribe's usual and accustomed grounds included "fishing places . . . in the saltwater of Puget Sound."

Holding that "no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today," Judge Boldt issued a Permanent Injunction including what is now Paragraph 25(a)(6). This authorizes any party to ask the court to determine "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I."

In 1997, after Muckleshoot had been fishing in the saltwater of Puget Sound for more than 20 years without controversy, the Puyallup Tribe,

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[1] The Tribe employs Judge Boldt's definition of "Final Decision # I": "the term 'Final Decision # I' means the Final Decision in this cause entered on February 12, 1974, as modified by the Orders entered March 22, 1974, including the Findings of Fact, Conclusions of Law and Decree entered February 12, 1974 which were made a part of said Final Decision # I." *United States v. Washington*, 384 F. Supp. 312, 414 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

later joined by other tribes, filed a subproceeding under what is now Paragraph 25(a)(1) of the Permanent Injunction, which reserves the district court's jurisdiction to determine "whether or not the actions, intended or effected by any party . . . are in conformity with Final Decision # I or this injunction." They asked District Judge Rothstein to decide what Judge Boldt meant when he determined that the Tribe's usual and accustomed fishing grounds included "the saltwater of Puget Sound."

Judge Rothstein ultimately construed that phrase to mean Elliott Bay. She enjoined fishing by the Tribe outside Washington Catch Area 10A, located inside Elliott Bay. Further, she refused to admit new evidence the Tribe offered to prove its usual and accustomed grounds beyond Elliott Bay, because a Paragraph 25(a)(1) proceeding is limited to interpreting or determining whether a party's actions conform with existing orders, and no party had invoked Paragraph 25(a)(6) to determine additional fishing grounds.

The Tribe now invokes Paragraph 25(a)(6) to offer evidence—never before considered by the district court—to prove the Tribe's additional fishing grounds. Chief Judge Martinez dismissed the Tribe's request under Rule 12(b)(1), citing issue preclusion and reasoning that Judge Boldt and

Judge Rothstein had already "specifically determined" that the Tribe's usual and accustomed saltwater fishing grounds did not include any areas outside Elliott Bay. But neither Judge Boldt nor Judge Rothstein actually considered evidence of the Tribe's treaty-time fishing outside Elliott Bay after a full and fair hearing, nor did either of them make a final, affirmative finding about that issue, as issue preclusion requires.

Therefore, the district court's dismissal was error. The Tribe appeals.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362, as the claims by the United States and the plaintiff tribes in the original complaint, and the claims by the Muckleshoot Indian Tribe in this subproceeding, all arise under and were based on rights reserved by the Tribe in the Treaty of Medicine Creek, 10 Stat. 1132, and the Treaty of Point Elliott, 12 Stat. 927. Specifically in this subproceeding, the Tribe sought a determination of the location of its usual and accustomed fishing grounds in the saltwater of Puget Sound beyond those "specifically determined" or actually litigated and resolved in Final Decision # I or any other subproceeding.

Before initiating this request, the Muckleshoot Indian Tribe complied

with the pre-filing requirements of Paragraph 25(b) of the Order Modifying Paragraph 25 of Permanent Injunction, ER 17, found at *United States v. Washington*, 18 F. Supp. 3d 1172, 1213-14 (W.D. Wash. 1991).

The district court entered judgment dismissing the Tribe's Request for Determination on April 24, 2018. ER15. The Tribe timely filed its Notice of Appeal of this final decision on May 22, 2018. ER1-2. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Issue preclusion prevents relitigation of issues "actually litigated and resolved" in an earlier proceeding that afforded a full and fair opportunity to litigate. Neither Judge Boldt nor Judge Rothstein held a factual hearing to hear evidence and to specifically determine whether the Tribe has usual and accustomed saltwater fishing grounds in Puget Sound outside Elliott Bay. Does issue preclusion bar the Tribe from presenting this evidence and seeking such a determination now?

2. Does *Muckleshoot Tribe v. Lummi Indian Tribe*[2]—which prohibits the use of "supplemental findings" to "alter, amend or enlarge upon" Judge Boldt's findings in a Paragraph 25(a)(1) proceeding to

[2] 141 F.3d 1355 (9th Cir. 1998).

interpret those findings—restrict the availability of relief or the admission of evidence in this Paragraph 25(a)(6) proceeding?

3. Judge Boldt explained that under Paragraph 25(a)(6), "there is nothing to prevent . . . any other tribe from applying for extension of the limits previously provided in *United States v. Washington*." The district court has never amended Paragraph 25(a)(6) or issued an order saying otherwise. Is relief under Paragraph 25(a)(6) now restricted to "exceptional circumstances"?

4. Judicial estoppel may prevent a party who prevails on an argument from relying on a contradictory argument later. In this subproceeding, the Tribe contends that it has usual and accustomed saltwater fishing grounds in Puget Sound beyond Elliott Bay, and the Tribe has never taken, or prevailed on, a contradictory assertion. Does judicial estoppel preclude the Tribe from proving its fishing grounds in Puget Sound outside Elliott Bay?

STATEMENT OF THE CASE

United States v. Washington has a unique history arising from the district court's exercise of continuing jurisdiction over the past 44 years to

enforce tribal treaty fishing rights. The unusually lengthy procedural history that follows is necessary to elucidate the issues in this appeal.

I. In Final Decision # I, District Judge Boldt Held that the Muckleshoot Tribe's Usual and Accustomed Fishing Grounds Included "Fishing Places . . . in the Saltwater of Puget Sound"

United States v. Washington was originally filed in 1970 to vindicate the treaty rights of the Muckleshoot Tribe and other tribes to take fish. 384 F. Supp. at 327-28. The initial trial in this matter, held over three weeks in 1973, focused on establishing the treaty rights of the plaintiff tribes, restraining the State of Washington from interference with those rights, and determining mechanisms to accommodate treaty fishing and non-tribal fishing. After trial, the court entered findings of fact, conclusions of law, and a decree, collectively embodied in Final Decision # I, as well as a Permanent Injunction.

In Final Decision # I, Judge Boldt determined some of the usual and accustomed fishing grounds of each of the plaintiff tribes. As to the Muckleshoot Tribe, he found:

> 76. Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed **fishing places** primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek,

> Burns Creek and Newaukum Creek) and Lake Washington, **and secondarily in the saltwater of Puget Sound.** Villages and weir sites were often located together.

384 F. Supp. at 367 (emphasis added) (citations omitted).

II. Judge Boldt Repeatedly Confirmed That Final Decision # I Did Not Determine All of the Plaintiff Tribes' Usual and Accustomed Fishing Grounds

In Final Decision # I, Judge Boldt clarified that he had determined only "some" of each tribe's fishing places: "For each of the plaintiff tribes, the findings set forth information regarding . . . some, **but by no means all,** of their principal usual and accustomed fishing places." 384 F. Supp. at 333 (emphasis added). He explained why this was so: it "would be impossible to compile" a "complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites . . . today." *Id.* at 353, 402.

Some 18 months after issuing Final Decision # I, Judge Boldt reminded the parties that his findings regarding usual and accustomed fishing places were not comprehensive, because it "would have been almost impossible under the trial conditions which involved so many more pressing and urgent issues" to comprehensively determine all of each tribe's fishing grounds. ER377. He raised this point in a hearing that involved State enforcement actions against Puyallup members for fishing

outside of the Puyallup Tribe's adjudicated fishing grounds. The State argued that the Puyallup Tribe should have appealed the initial determination of its usual and accustomed grounds and stations if it believed Final Decision # I incompletely described those locations, and that the Puyallup's failure to do so might bar it from proving additional fishing grounds. ER363.

Judge Boldt rejected this contention. ER378-79. At the time of the first trial, he observed, substantial anthropological research remained to be done, and "there was not the time nor the necessity . . . to try to identify all of the hundreds of specific places in this area." ER377. Judge Boldt confirmed that this was all "clearly understood" and that further places could be proven when evidence was available:

> First, all who participated in the trial of this case I am sure will recall that the anthropological experts for both plaintiffs and defendants agreed that the Indian tribes fished so fully over the Puget Sound area, that it would require special research by them to be able to identify more than a few of the principal places and areas that were usual and accustomed places. And that was what was done. A few of the specific places and areas were identified in the findings of fact and conclusions of law in the case. **But it was clearly understood that further places that couldn't be identified as usual and accustomed places by any particular tribe or tribes should be included as and when**

evidence sufficient to sustain that showing was presented.

ER 376-77 (emphasis added).

III. In Final Decision # I, Judge Boldt Retained Jurisdiction and Adopted Paragraph 25, Which Allows the Parties to Enforce His Rulings and Prove Additional Usual and Accustomed Fishing Grounds

Having acknowledged the need to identify additional usual and accustomed fishing grounds in the future, Judge Boldt expressly retained the court's jurisdiction to do so. First, in Paragraph 24 of the Declaratory Judgment and Decree, the court retained jurisdiction "for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and in implementation of this decree." 384 F. Supp. at 408.

Paragraph 25 of the Permanent Injunction then identified types of proceedings that could be initiated to seek further rulings in the case. 384 F. Supp. at 419, *amended by* 18 F. Supp. 3d at 1213, *amended by United States v. Washington*, 20 F. Supp. 3d 899, 959 (W.D. Wash. 2008). Two subsections of Paragraph 25 are pertinent here. Originally Paragraph 25(a)

and 25(f), they are now denominated Paragraph 25(a)(1) and 25(a)(6).[3]

These provisions serve different purposes.

A. Paragraph 25(a)(1) Permits Any Party to Request a Determination Whether a Party's Actions "Are In Conformity With Final Decision # I or This Injunction"

Paragraph 25(a)(1) creates a mechanism for determining a party's compliance with Final Decision # I. It allows any party to seek a determination "whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I or this injunction." 384 F. Supp. at 419.

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[3] The district court has twice amended Paragraph 25, in each instance without changing its substantive scope.

In 1993, the district court redesignated Paragraphs 25(a) through (g) as Paragraphs 25(a)(1) through (a)(7), with no change to the language or the court's continuing jurisdiction. *Compare* 18 F. Supp. 3d at 1213 *with* 384 F. Supp. at 419. This occurred after the district court proposed terminating the case and the court's continuing jurisdiction. After inviting and receiving briefing regarding the desirability of sunsetting the case, the court concluded that "if there ever was a case where there is a role of the Court for continuing jurisdiction . . . this is it." ER257.

In 2011, the court amended Paragraph 25 to facilitate the opening of new subproceedings, again without changes to the substantive scope of its continuing jurisdiction. *See* 20 F. Supp. 3d at 959.

For consistency, this brief uses the current nomenclature—original Paragraph 25(f) is referenced in this brief by its current designation Paragraph 25(a)(6), and original Paragraph 25(a) is referenced as Paragraph 25(a)(1), except where the reference is set forth in a quotation.

B. Paragraph 25(a)(6) Permits Any Party to Request a Determination regarding "the Location of Any of a Tribe's Usual and Accustomed Fishing Grounds Not Specifically Determined by Final Decision # I"

In contrast, Paragraph 25(a)(6) allows any party to request a determination of "the location of any of a tribe's usual and accustomed fishing grounds **not specifically determined by Final Decision # I.**" 384 F. Supp. at 419 (emphasis added). It is this paragraph – unchanged in any substantive respect to this day – that forms the basis of the Tribe's request here.

In the above-mentioned proceeding concerning Puyallup members' fishing activities, Judge Boldt explained why he included Paragraph 25(a)(6) as well as its intended effect:

> It is open to any tribe to seek to have the areas identified previously in the main decision extended . . . , because there was not the time nor the necessity during the trial to try to identify all of the hundreds of specific places in this area. It would have been almost impossible under the trial conditions which involved so many more pressing and urgent issues.
>
> . . .
>
> To my mind there is nothing to prevent the Puyallups or any other tribe from applying for extension of the limits previously provided in *United States v. Washington* . . ..

ER377-78.

In another proceeding under Paragraph 25(a)(1), when objections were raised to a tribe's fishing outside the area established in Final Decision # I, Judge Boldt reaffirmed that Paragraph 25(a)(6) "establishes the mechanism whereby further usual and accustomed fishing grounds may be established and recognized by the court." *United States v. Washington*, 459 F. Supp. 1020, 1068 (W.D. Wash. 1978). Judge Boldt also held that an individual tribal member could defend an unlawful fishing charge in state court by "prov[ing] he was fishing at a usual and accustomed ground or station of his tribe, **although not previously designated as such**." 384 F. Supp. at 408 (emphasis added).

IV. For 25 Years, All Parties and the Court Understood That Final Decision # I Allowed The Muckleshoot Tribe to Fish Throughout "the Saltwater of Puget Sound"

In accordance with Judge Boldt's determination in Final Decision # I, members of the Muckleshoot Tribe fished throughout central Puget Sound from 1974 to 1999. ER18.[4] During these 25 years, the Tribe entered into several agreements with the State and other tribes—all premised upon

[4] The allegations of Muckleshoot's Request for Determination and all reasonable inferences raised by the Request are deemed true for the purpose of a motion to dismiss under Rule 12(b)(6) or Rule 12(b)(1). *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

their mutual understanding that Final Decision # I had established the Tribe's right to fish in central Puget Sound—and the district court approved these agreements and embodied them in court orders. ER18.

This common understanding was also applied in subproceeding 89-3, initiated in 1989 by sixteen tribes and the United States to establish the treaty right of the tribes to take shellfish.[5] *United States v. Washington*, 873 F. Supp. 1422, 1427 (W.D. Wash. 1994), *aff'd in part and rev'd in part*, 157 F.3d 630 (9th Cir. 1998); ER270-81. Similarly, in an action brought jointly by the Muckleshoot and Suquamish Indian Tribes, the district court found that the two tribes' usual and accustomed fishing places included locations near Smith Cove, outside Catch Area 10A, the area later covered by Judge Rothstein's injunction against fishing by members of the Tribe. *Muckleshoot Indian Tribe v. Hall,* 698 F. Supp. 1504, 1509 (W.D. Wash. 1988).

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[5] During trial, a number of tribes stipulated that evidence regarding those tribes' historical shellfish harvesting would be limited to "areas, which are within the usual and accustomed grounds and stations previously determined for such Tribe in *United States v. Washington* or any of its subproceedings." ER241. At trial and without objection, the Tribe presented expert testimony and other evidence documenting historical shellfish harvesting activities of Muckleshoot ancestors in several locations in central Puget Sound. *See, e.g.*, ER159-234 (Direct Testimony of Lynn Larson, Ex. MU-002, admitted April 26, 1994); ER137-57 (Tr. of Proceedings, April 26, 1994, pp. 1376-96).

V. Since Final Decision # I, Tribes Have Successfully Invoked Paragraph 25(a)(6) To Request a Determination Regarding Additional Usual and Accustomed Fishing Grounds

Since 1974, tribes have initiated several proceedings under Paragraph 25(a)(6). As a result, ten tribes have presented claims regarding expansion of their usual and accustomed fishing places based on evidence not presented to Judge Boldt, claims the district court has decided on their merits.

A. Nisqually, Puyallup and Squaxin Island Tribes

In Final Decision # I, Judge Boldt determined specific usual and accustomed fishing places for the Nisqually, Puyallup, and Squaxin Island Tribes. 384 F. Supp. at 369, 371, 378. Six years later, these tribes requested determinations expanding their usual and accustomed fishing areas. *See* ER319-24 (Puyallup), ER315-18 (Squaxin Island), ER307-11 (Nisqually). They cited the incomplete nature of Judge Boldt's findings, as well as Paragraph 25(a)(6)'s breadth. *See* ER319-24 (Puyallup); ER315-18 (Squaxin Island); ER307-11 (Nisqually). For example, the Puyallup Tribe asserted:

> The original decision in this case included a partial list of the usual and accustomed fishing areas of each tribe . . .. The Court indicated, however, that a final determination of all usual and accustomed areas was

> not possible at that point. **The Court therefore left to the tribes the option of coming back to the Court for rulings on further usual and accustomed areas.** The Puyallup Tribe seeks the exercise of that continuing jurisdiction for this determination.

ER319-20 (emphasis added) (citations omitted). The Squaxin and Nisqually Tribe's requests for determination made the same point. ER307-08, 315-16.

The district court entered Supplemental Findings of Fact expanding the three tribes' usual and accustomed fishing places. *United States v. Washington*, 626 F. Supp. 1405, 1441-42 (W.D. Wash. 1985). The court stated that its ruling "shall in no way limit **these or any other parties** from seeking **further** determination of **other** usual and accustomed fishing grounds and stations." *Id.* at 1442 (emphasis added).

B. Makah Tribe

In Final Decision # I, Judge Boldt determined specific usual and accustomed fishing places for the Makah Tribe. 384 F. Supp. at 364. The Makah subsequently requested a determination under Paragraph 25(a)(6) enlarging its usual and accustomed fishing places. ER327-53.

In 1982, the district court found that the Makah had "usual and accustomed offshore fishing grounds . . . in addition to those areas previously determined by this Court." 626 F. Supp. at 1467. Again, the

court confirmed that these additional supplemental findings "in no way limit the Makah Indian Tribe or any other party from seeking further determination of other usual and accustomed grounds and stations." *Id.* at 1468.

C. Upper Skagit Tribe

In Final Decision # I, Judge Boldt determined the Upper Skagit Tribe's usual and accustomed fishing places included areas on the Skagit River upstream of Mt. Vernon. 384 F. Supp. at 379. Nineteen years later, the Upper Skagit requested a determination under Paragraph 25(a)(6) to enlarge its usual and accustomed fishing places to include the lower portions of the Skagit River, the Samish River and the marine waters of Skagit Bay and Samish Bay. ER265-69. After a trial, the district court enlarged the Upper Skagit Tribe's usual and accustomed fishing places to include the additional areas claimed. 873 F. Supp. at 1449-50, *aff'd in part and rev'd in part*, 157 F.3d 630 (9th Cir. 1998); *see also* ER241-42, 248 (regarding the introduction of evidence of usual and accustomed fishing grounds in subproceeding 89-3).

D. Lower Elwha Tribe

The Lower Elwha Tribe's usual and accustomed fishing places were

established in proceedings after the original trial, in 1975 and 1976. 459 F. Supp. at 1049, 1066. In 1978, the Lower Elwha invoked Paragraph 25(a)(6) "to request a broadening of their usual and accustomed fishing grounds and stations." ER 325. The district court granted the request, ruling that absent a binding agreement among the parties, no party was precluded from seeking additional usual and accustomed fishing grounds and stations. 626 F. Supp. at 1443.

E. Tulalip Tribes

The Tulalip Tribes intervened after Final Decision # I and obtained a provisional determination of their usual and accustomed fishing areas. 459 F. Supp. at 1059-60. Five years later, the Tulalip invoked Paragraph 25(a)(6) and were allowed to establish a substantially larger area than had been provisionally granted five years earlier. 626 F. Supp. at 1530; ER312-14.

F. Suquamish Tribe

The Suquamish Tribe's usual and accustomed fishing places were determined after the original trial. 459 F. Supp. at 1049. Ten years later, the Suquamish requested the determination of additional fishing places in Lake Washington, Lake Sammamish, the Duwamish River and the Lake

Washington Ship Canal. ER282. Though unsuccessful on the merits, the Suquamish were granted a full opportunity to present their claims and be heard on the merits. *United States v. Washington*, 18 F. Supp. 3d 1123, 1143 (W.D. Wash. 1987).

G. Quileute Tribe and Quinault Nation

In Final Decision # I, Judge Boldt determined specific freshwater fishing places for the Quileute Tribe, and also found that the Quileute's marine fishing places included "adjacent tidewater and saltwater areas." 384 F. Supp. at 372. Similarly, Judge Boldt identified the Quinault Nation's specific usual and accustomed freshwater fishing places and found that "[o]cean fisheries were utilized in the waters adjacent to their territory." *Id.* at 374.

Thirty-five years later, the Makah requested determination of the Quileute's and Quinault's usual and accustomed marine fishing grounds. *United States v. Washington*, 129 F. Supp. 3d 1069, 1072 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017), *cert. denied*, No. 17-1592, 2018 WL 2364652 (Oct. 1, 2018). The matter proceeded to a trial under Paragraph 25(a)(6) to determine the extent of the Quinault and Quileute ocean fishing places,

beyond those included in Judge Boldt's initial determinations. Based on evidence not before Judge Boldt, the district court ruled that both tribes' fishing areas extended miles into the Pacific Ocean. *Id*. at 1117.

VI. In a Paragraph 25(a)(1) Subproceeding, District Judge Rothstein Narrowly Interpreted Judge Boldt's Phrase "Fishing Places . . . in The Saltwater of Puget Sound" To Mean Elliott Bay

In 1997, the Puyallup, later joined by the Swinomish and Suquamish tribes, initiated subproceeding 97-1. ER100-13. These tribes did not seek to enlarge their own fishing grounds. Rather, they challenged the Tribe's right to fish throughout the Puget Sound, alleging that Judge Boldt's finding of the Tribe's saltwater usual and accustomed fishing areas was limited to Elliott Bay. ER100-13.

A. Subproceeding 97-1 Was Pleaded as a Paragraph 25(a)(1) Proceeding

The requesting tribes pleaded their case as a Paragraph 25(a)(1) proceeding. ER100-13. Specifically, the Puyallup sought "a determination that the Muckleshoot Tribe has no **adjudicated** usual and accustomed fishing grounds and stations in marine waters outside Elliott Bay." ER107 (emphasis added); *see also* ER112. The Suquamish and Swinomish similarly sought a "determination that the Muckleshoot Indian Tribe has no **adjudicated** usual and accustomed fishing places (U&A) in

Washington Marine Catch Reporting Areas 10 or waters west and north of Area 10." ER100 (emphasis added); *see also* ER105.[6] The three tribes asked the district court to "examin[e] the evidence before Judge Boldt to discover what he meant by 'secondarily in the saltwaters of Puget Sound' in the context of Muckleshoot U&A." ER99.

The thrust of these tribes' arguments was that during the initial trial, the Muckleshoot Tribe had presented no evidence of saltwater fishing beyond Elliott Bay, and that, therefore, Judge Boldt must have meant to refer to Elliott Bay (or some portion thereof) when he referred to "the saltwater of Puget Sound." In other words, their position was that the Tribe's right to fish outside Elliott Bay had not yet been "adjudicated." ER100, 105, 107 & 112. For its part, the Muckleshoot Tribe "asserted no claim for relief in [the] subproceeding; its position [was] wholly defensive in nature." ER59. Thus, neither the requesting tribes nor the Muckleshoot Tribe invoked Paragraph 25(a)(6) and its authorization to determine new fishing grounds.

[6] A map depicting Washington State's Catch Reporting Areas is found at ER388.

B. Judge Rothstein Refused To Permit the Muckleshoot Tribe to Introduce New Evidence Regarding the Scope of Its Usual and Accustomed Saltwater Fishing Grounds

Subproceeding 97-1 was filed before this Court issued its decision in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998). That decision precludes the use of supplemental findings supported by new evidence to clarify Judge Boldt's determinations in Paragraph 25(a)(1) proceedings. Before that decision was announced, the Muckleshoot Tribe sought to introduce new evidence to bolster its position that Judge Boldt's prior finding encompassed a substantially broader portion of Puget Sound than Elliott Bay. *United States v. Washington*, 19 F. Supp. 3d 1252, 1272-73 (W.D. Wash. 1997).

A number of tribes objected to the Tribe's new evidence, arguing that such evidence could only be admitted if the Tribe made an affirmative request for relief under Paragraph 25(a)(6). In support of their motions to strike, three tribes argued:

> If Muckleshoot believes it has sufficient evidence to establish additional U&A, it can file a Request for Determination and present the evidence—and all other parties can cross-examine the Muckleshoot witnesses and present their own evidence.
>
> Puyallup, Suquamish, and Swinomish do not seek any new finding regarding Muckleshoot U&A. What Movants have requested is only a narrow finding that Muckleshoot

> has not **yet** established U&A beyond Elliott Bay, and that Muckleshoot be enjoined from fishing in areas beyond Elliott Bay unless and until it does establish such additional U&A.

ER51. The tribes separately objected, noting that subproceeding 97-1 only presented claims under Paragraph 25(a)(1):

> to limit Muckleshoot to those areas for which evidence of regular and customary fishing was submitted to the court at the time Finding of Fact ("FF") 76 was entered. Any interpretation which cures the ambiguity in this finding will, of necessity, determine the scope of the phrase "secondarily in the saltwater of Puget Sound" and, a fortiori, the boundaries of Muckleshoot's previously adjudicated U&As.

ER62 (formatting omitted).

The three tribes further noted that the district court had previously made supplemental findings with respect to a number of tribes since 1974 under Paragraph 25(a)(6), and "if Muckleshoot wants a new finding and an expanded U&A, it must do as tribes did in those cases, and file an appropriate Request for Determination." ER55-56.

While these motions to strike were pending, this Court issued *Muckleshoot v. Lummi*. The Puyallup, Suquamish, and Swinomish described the limited impact of the decision:

> Much of the recent Court of Appeals decision is old wine i[n] a new bottle. The decision reiterated familiar rules: that judgments shou[l]d be

> interpreted as a whole, in light of the intention of the iss[u]ing judge; that *res judicata* does not bar efforts to clarify judgments which suffer from ambiguity, lack of clarity, or the possibility that the judgment does not mean what it appears to say; that in such cases the court may review the record as a whole to determine the judge's intent and to give the judgment the necessary clarity and certainty. The Court also clarified that, where U&A was previously but not clearly determined, it may be clarified under Paragraph [25(a)(1)] of the Injunction in this case, based on record evidence and, perhaps, other evidence of the judge's intent. Conversely, where U&A issues were not previously determined, they may be resolved through supplemental findings under Paragraph [25(a)(6)], but only after full development of evidence. The present sub-proceeding clearly falls within the former jurisdictional provision, and there is therefore no warrant to conduct an evidentiary hearing as suggested by Muckleshoot and by the Tulalip Tribes.

ER44.

Judge Rothstein largely granted the motions to exclude the Tribe's additional evidence, striking evidence the Tribe offered to show additional treaty-time usual and accustomed fishing areas beyond Elliott Bay. This included the Report and Direct Testimony of Lynn Larson and the Direct Testimony and Affidavit of Dr. Barbara Lane. 19 F. Supp. 3d at 1276; *see also* 19 F. Supp. 3d at 1305; ER67-86, 159-239. She did rule that "[t]he

court will consider extra record evidence as long as it is relevant to determining Judge Boldt's intention." 19 F. Supp. 3d at 1276.

C. Based on the Evidence Before Judge Boldt in 1973, Judge Rothstein Concluded in 1999 That Judge Boldt Designated Elliott Bay As the Tribe's Usual and Accustomed Saltwater Fishing Grounds

In 1999, Judge Rothstein issued her final ruling. After sifting through the evidence to determine what Judge Boldt meant, she construed Final Decision # I's reference to "the saltwater of Puget Sound" to mean Elliott Bay, and then enjoined the Tribe from fishing outside Catch Area 10A, which is located inside Elliott Bay. 19 F. Supp. 3d at 1304. She entered no new findings of fact, and confined her opinion to an analysis of how the facts presented to Judge Boldt bore on the meaning of the words he employed in Final Decision # I. This Court affirmed. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000).

VII. The Tribe Filed This Paragraph 25(a)(6) Proceeding to Determine Its Usual and Accustomed Saltwater Fishing Grounds In Puget Sound Beyond Elliott Bay

After assembling further evidence of its treaty-time fishing in Puget Sound beyond Elliott Bay, the Tribe commenced this subproceeding, designated 17-02. ER16-36. Relying on Paragraph 25(a)(6), the Tribe requested the opportunity to prove additional fishing grounds—beyond

those Judge Boldt previously determined—using the evidence it had unsuccessfully proffered to Judge Rothstein as well as substantial additional evidence.[7]

VIII. The District Court Dismissed This Proceeding, Reasoning That When Judge Boldt Found That the Tribe Had Usual and Accustomed Grounds "in the Saltwater of Puget Sound," He Also Specifically Determined That the Tribe Had No Such Grounds Outside Elliott Bay

Several tribes moved to dismiss subproceeding 17-02 under Rule 12(b)(1), arguing that the district court lacked subject matter jurisdiction because the scope of the Tribe's usual and accustomed fishing grounds in Puget Sound had been specifically determined within the meaning of Paragraph 25(a)(6). ER384 (Mot. to Dismiss). They also argued that this Court's ruling in *Muckleshoot v. Lummi*, prior district court practice, and judicial estoppel each required dismissal of the case. ER385-86. Along with the Muckleshoot Tribe, the Nisqually Indian Tribe opposed dismissal. ER382 (Opp. to Mot. to Dismiss).

The district court granted the motions to dismiss, holding that the district court lacked jurisdiction to entertain the subproceeding. ER3-14. Citing collateral estoppel, the court reasoned that Judge Boldt (as

[7] A portion of this evidence is summarized in Exhibit A to the Request for Determination, ER24-36.

interpreted by Judge Rothstein) had "specifically determined" that the Tribe had no usual and accustomed fishing grounds in Puget Sound beyond Elliott Bay, and that the issue had therefore been "actually litigated and resolved" adversely to the Tribe. ER12-13. The district court did so without considering the Tribe's additional evidence and without oral argument.

This appeal followed.

SUMMARY OF THE ARGUMENT

I. Issue preclusion does not bar this subproceeding because neither Judge Boldt nor Judge Rothstein considered or determined whether the Tribe has usual and accustomed saltwater fishing places beyond Elliott Bay.

Judge Boldt cautioned that he found "some, **but by no means all,** of [the tribes'] principal usual and accustomed fishing places," 384 F. Supp. at 333 (emphasis added), because determining them all "would have been almost impossible under the trial conditions." ER377. To ensure there was "nothing to prevent" a tribe "from applying for extension of the limits previously provided," Judge Boldt included Paragraph 25(a)(6), which broadly permits the district court to find fishing grounds beyond those "specifically determined" in Final Decision # I. ER378.

Among the Tribe's fishing grounds that Judge Boldt identified were "fishing places . . . in the saltwater of Puget Sound." 384 F. Supp. at 367. When other tribes later asked Judge Rothstein to interpret this phrase, she held that it referred to Elliott Bay. When the Tribe offered new evidence to prove its fishing grounds extended beyond this area, Judge Rothstein refused to consider it, because the limited nature of the proceeding required her only to interpret the existing decree. She also made no new findings regarding the location of the Tribe's fishing grounds.

Therefore, the location of the Tribe's usual and accustomed grounds outside Elliott Bay has never been actually litigated and resolved (or, to use Judge Boldt's words, "specifically determined"). The district court erred in ruling otherwise and dismissing the case.

II. *Muckleshoot v. Lummi* does not bar the Tribe from proving additional fishing grounds, as the moving parties contended below. Instead, it holds that in a Paragraph 25(a)(1) proceeding to interpret and apply Judge Boldt's rulings, it is improper for the district court to clarify those rulings with supplemental findings supported by new evidence. That decision did not consider the scope of a Paragraph 25(a)(6) proceeding or address the relief available in such a proceeding.

III. Since issuing the 1974 Permanent Injunction containing Paragraph 25(a)(6), the district court has never amended its substantive requirements. Nor has the district court ever held that relief under Paragraph 25(a)(6) is limited to "exceptional circumstances," as the moving parties contended below.

IV. In this subproceeding, the Tribe is not judicially estopped from presenting its Paragraph 25(a)(6) claim. Judicial estoppel may prevent a party from prevailing on an argument in one case and then relying on a contradictory argument later. Judicial estoppel does not bar the Tribe from arguing that its usual and accustomed fishing grounds extend beyond Elliott Bay because the Tribe has never taken, much less prevailed on, a contrary position.

ARGUMENT

I. ISSUE PRECLUSION DOES NOT BAR THE TRIBE FROM PROVING FISHING GROUNDS OUTSIDE ELLIOTT BAY BECAUSE THE TRIBE HAS NEVER BEFORE DONE SO, OR BEEN ALLOWED TO DO SO

A. Standard of Review

Applicability of the doctrine of issue preclusion is reviewed de novo.[8] *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016); *United States v. Smith-Baltiher*, 424 F.3d 913, 919 (9th Cir. 2005); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004); *see also Jacobs v. CBS Broad., Inc.*, 291 F.3d 1173, 1176 (9th Cir. 2002) (the preclusive effect of a prior judgment is a question of law reviewed de novo.).

B. For Issue Preclusion to Apply, the Tribe Must Have Previously Litigated, and Had a Full and Fair Opportunity to Litigate, the Same Issue Here

The doctrine of issue preclusion "bars successive litigation of an issue of fact or law **actually litigated and resolved** in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell,* 553 U.S. 880, 892 (2008) (emphasis added) (internal quotations omitted).

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[8] The district court dismissed for lack of subject matter jurisdiction, a ruling that is reviewed de novo. *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016), *cert. denied sub nom. Mera v. City of Glendale, Cal.*, 137 S. Ct. 1377 (2017).

Issue preclusion applies when: "(1) the issue necessarily decided at the previous proceeding is identical to the one" that the party currently seeks to litigate; "(2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom issue preclusion is asserted was a party or in privity with a party at the first proceeding." *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011) (internal quotations omitted). Issue preclusion bars relitigation only "where the legal and factual situations are identical." *Steel v. United States*, 813 F.2d 1545, 1550 (9th Cir. 1987). If "the factual issues litigated" previously are "different from those in the present case," there is no issue preclusion. *Blackfoot Livestock Comm'n Co. v. Dept. of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987).

In applying the doctrine of issue preclusion, two other limits come into play, both relevant here.

First, while "the reviewing court should construe a judgment so as to give effect to the intention of the issuing court," *Muckleshoot v. Lummi*, 141 F.3d at 1359 (internal quotations omitted), "reasonable doubts about what was decided in a prior judgment are resolved against applying issue preclusion." *In re Lopez*, 367 B.R. 99, 108 (9th Cir. B.A.P. 2007).

Second, issue preclusion "cannot apply when the party against whom

the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (internal quotations omitted). In determining whether a party received a full and fair opportunity to litigate, the court considers whether "'procedural opportunities unavailable in the first action . . . could readily cause a different result' in the second action." *Maciel v. C.I.R.*, 489 F.3d 1018, 1023 (9th Cir. 2007) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)). If such procedural opportunities could readily lead to a different result, "the first action generally should not be given preclusive effect." *Id.*

Bolstering these substantive limits on issue preclusion is a procedural one: issue preclusion is an affirmative defense that the defendant has the burden of pleading and proving.[9] *Taylor*, 553 U.S. at 907.

C. Whether Judge Boldt "Specifically Determined" the Issues in This Case Presents a Question of Issue Preclusion

Rather than evaluating the elements of issue preclusion, the district

[9] "[W]hen an affirmative defense is disclosed in the complaint, it provides a proper basis for a Rule 12(b)(6) motion." *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008)*; accord Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). But no case holds that issue preclusion may be treated as a jurisdictional matter under which the plaintiff has the burden of proof under Rule 12(b)(1). Nonetheless, that is precisely what the district court did. This was error.

court concluded that the Tribe's saltwater usual and accustomed fishing grounds had been "specifically determined" within the meaning of Paragraph 25(a)(6), precluding the court from considering additional grounds. ER12-13. Nothing in Final Decision # I or Judge Boldt's subsequent pronouncements suggests that he intended to endow the term "specifically determined" with any import beyond its plain and ordinary meaning. Judge Boldt could only have meant that he did not intend to revisit any of the findings he actually made after hearing evidence the parties actually presented to him on an issue actually before him.

So, whether the Court applies Judge Boldt's language ("specifically determined"),[10] its own language ("necessarily decided"),[11] or that of the Supreme Court ("actually . . . resolved"),[12] the dispositive question here is the same: Did the district court previously decide whether or not the Tribe's usual and accustomed fishing grounds included the locations in Puget Sound beyond Elliott Bay raised here—in a proceeding in which the Tribe had a full opportunity to present its case, using procedures similar to those applied under Paragraph 25(a)(6)? In answering this question,

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[10] 384 F. Supp. at 419.
[11] *Paulo,* 669 F.3d at 917.
[12] *Taylor,* 553 U.S. at 892.

reasonable doubts regarding the scope of the prior court's determination must be resolved in the Tribe's favor, and the moving parties bear the burden of proof. *In re Lopez*, 367 B.R. at 108. The moving parties failed to carry their burden of proving the first element of issue preclusion, i.e., that this subproceeding presents an issue identical to one necessarily determined by Judge Boldt.

D. Judge Boldt Never Considered or Concluded That the Tribe Had No Usual and Accustomed Saltwater Fishing Grounds Outside Elliott Bay

The moving parties below argued that, in 1974, Judge Boldt specifically considered and then affirmatively determined that at treaty-time the Tribe did not fish anywhere in Puget Sound (i.e., everywhere but Elliott Bay). This cannot be so.

First, the plain language of Judge Boldt's ruling regarding the Tribe's fishing grounds emphatically states the precise opposite, holding that the Tribe "had" usual and accustomed fishing grounds "in the saltwater of Puget Sound." 384 F. Supp. at 367. It is one thing to argue that Judge Boldt had in mind only the waters in Elliott Bay when he referred to the Tribe having "fishing places . . . in the saltwater of Puget Sound." *Id.* It is quite another to claim that when Judge Boldt ruled the Tribe had fishing

rights at "fishing places . . . in the saltwater of Puget Sound," he meant to affirmatively find that ancestors of the Tribe did not fish **anywhere** in Puget Sound except Elliott Bay, and further precluded the Tribe from ever proving otherwise. *Id.*

Such a transformation does not interpret Judge Boldt's ruling, but contradicts it. It cannot be squared with his repeated emphasis that the initial trial was not comprehensive, that his 1974 findings regarding the location of fishing grounds were incomplete, and that those findings were subject to future supplementation as further evidence was developed. Judge Boldt himself denied that the findings precluded claims such as those presented by the Tribe here: "To my mind there is nothing to prevent. . . any other tribe from applying for extension of the limits previously provided in *United States v. Washington*." ER378. Judge Boldt confirmed what everyone participating in the original trial understood: that the trial could and would address only limited issues. ER377. And Judge Boldt explained why: it was "clearly understood that further places **that couldn't be identified** as usual and accustomed places by any particular tribe or tribes should be included as and when evidence

sufficient to sustain that showing was presented." [13] ER377. To interpret the absence of evidence (or findings) as evidence (or findings) of an affirmative determination in Final Decision # I that the Tribe did not fish at a location at treaty-time disregards the reality of the trial, as encapsulated by Judge Boldt. The district court erred in treating a finding of usual and accustomed grounds in one location as a bar to the proof of such grounds elsewhere.

In sum, the first element of collateral estoppel is absent. Judge Boldt did not specifically determine that the Tribe had no usual and accustomed fishing grounds in Puget Sound.

Nonetheless, the district court dismissed the case because "Judge Boldt specifically determined Muckleshoot U&A in *Decision 1* [sic]." ER12.

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[13] Two matters involving the Tribe after the initial trial implemented the Tribe's right to additional fishing ground determinations. The first followed Judge Boldt's ruling that individual tribal members may prove previously undetermined usual and accustomed fishing grounds as a defense to a state-court unlawful fishing charge. 384 F. Supp. at 408; *State v. Courville*, 36 Wn. App. 615, 623, 676 P.2d 1011 (1983) (affirming a ruling that the Muckleshoot Tribe has usual and accustomed fishing grounds at Adelaide Beach on Puget Sound). The second involved a proceeding in which the Muckleshoot Tribe and the Suquamish established fishing rights just outside Catch Area 10A, but inside Elliott Bay, to substantiate their objection to a development project. *Muckleshoot Tribe v. Hall*, 698 F. Supp. 1504. Both of these comport with Judge Boldt's view that additional determinations remained available after Final Decision # I upon the submission of adequate proof.

This confuses two issues—whether the court determined **a** usual and accustomed fishing ground with whether the court comprehensively determined **all** such grounds—confusion fostered by the moving parties below. No one denies that Judge Boldt made **a** determination regarding **some** of each plaintiff tribe's usual and accustomed fishing grounds. But that is different from claiming that he comprehensively determined them all, or that he intended to affirmatively and specifically find that areas not identified as the Tribe's fishing grounds were not fished at treaty-time. In moving from the premise that Judge Boldt found **some** usual and accustomed grounds to the conclusion that he had conclusively and comprehensively identified them **all**, the district court erred.

E. Judge Rothstein Also Never Determined That the Tribe Had No Usual and Accustomed Fishing Grounds Outside Elliott Bay

Because Judge Boldt openly anticipated that additional fishing grounds could and would be proven later, the moving parties below focused much of their argument on Judge Rothstein's subsequent order in subproceeding 97-1, affirmed by this Court. They contended that her order transformed the Tribe's saltwater fishing area finding from one that affirmatively **included** Puget Sound to one that affirmatively **excluded** all but a small portion of Puget Sound, denying the Tribe a full and fair

opportunity to prove otherwise.

This argument has several flaws.

First, Judge Rothstein issued her order in a Paragraph 25(a)(1) proceeding, determining only that the Tribe had no adjudicated usual and accustomed grounds in Puget Sound beyond Elliott Bay and that fishing beyond this area did not conform with the existing decree. Having determined the phrase "the saltwater of Puget Sound" to be ambiguous, Judge Rothstein was charged with interpreting it and deciding whether Judge Boldt meant to refer to areas beyond Elliott Bay. She concluded that there is "no evidence in the record before Judge Boldt . . . that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay." 19 F. Supp. 3d at 1311. Judge Rothstein did not purport to modify or supplement Judge Boldt's ruling in any way.

Second, Judge Rothstein did not hold that Paragraph 25(a)(6) was unavailable to the Tribe to prove additional fishing grounds. Just as she had done in 1993,[14] she left the substantive language of Paragraph 25(a)(6) untouched. She said nothing that narrowed or restricted the parties' right to use Paragraph 25(a)(6) to supplement the areas determined in Final

[14] *See* note 3, *supra* at p.10.

Decision # I.

Indeed, in subproceeding 97-1, the requesting parties specifically promised the court and the Muckleshoot Tribe that Judge Rothstein's decision would not affect the Tribe's right to later proceed under Paragraph 25(a)(6) to prove, based on new evidence, where its ancestors actually fished at treaty time. They first confirmed the limited issue before the court in subproceeding 97-1:

> The only issue raised by the motion for Summary Judgment [in subproceeding 97-1] is: whether the **adjudicated** saltwater fishing areas of the Muckleshoot Tribe "include the waters within the Washington Department of Fisheries Commercial Salmon Management and Catch Reporting Areas 11, 10 or waters west and north of Area 10." Even more precisely, the issue is: Which marine areas are included in the phrase "secondarily in the saltwater of Puget Sound" in Finding of Fact 76?

ER50 (citations omitted). They then promised:

> If Muckleshoot believes it has sufficient evidence to establish additional U&A, it can file a Request for Determination and present the evidence—and all other parties can cross-examine the Muckleshoot witnesses and present their own evidence.

ER51. And later, "if Muckleshoot wants a new finding and an expanded U&A, it must do as tribes did in those cases, and file an appropriate Request for Determination." ER56.

Third, Judge Rothstein made no factual findings—pointedly denying requests to do so. Certainly she made no findings regarding the scope of the Tribe's usual and accustomed fishing grounds beyond Elliott Bay based on evidence not before Judge Boldt, after a full and fair opportunity to present such evidence. Instead, she relied solely on Judge Boldt's findings and she acknowledged this Court's caution in *Muckleshoot v. Lummi* that Paragraph 25(a)(6) does not authorize supplemental findings to clarify Judge Boldt's determinations in a Paragraph 25(a)(1) proceeding. 19 F. Supp. 3d at 1306.

It is true, as the district court noted, that Judge Rothstein closely evaluated evidence that might shed light on Judge Boldt's intent, and that she focused in particular on the absence of evidence presented in 1973 regarding historical activities outside Elliott Bay. But Judge Rothstein did so simply to determine what Judge Boldt's findings meant, not to make her own findings regarding the scope of the Tribe's usual and accustomed fishing grounds. It bears repeating: Judge Rothstein made no factual findings whatsoever, and she did not preclude the Tribe from returning to court under Paragraph 25(a)(6) to prove additional fishing grounds with new evidence.

Fourth, there is no identity of issues between those presented to Judges Boldt or Rothstein, and those presented here. This subproceeding presents the question whether the Tribe has usual and accustomed saltwater fishing areas beyond the areas Judge Boldt found. The issue before Judge Rothstein was what saltwater fishing area Judge Boldt intended to identify in Finding of Fact 76. That the question now raised has never been adjudicated (much less litigated) was the very point that appellees successfully made to Judge Rothstein. They prevailed, preventing the Tribe from introducing evidence of additional fishing areas in subproceeding 97-1.

Finally, Judge Rothstein refused to consider evidence that would clearly be admissible in this Paragraph 25(a)(6) proceeding, given the different nature of this proceeding from one under Paragraph 25(a)(1). Where "'procedural opportunities unavailable in the first action . . . could readily cause a different result' in the second action" then "the first action generally should not be given preclusive effect." *Maciel*, 489 F.3d at 1023 (quoting *Parklane Hosiery Co.*, 439 U.S. at 331). Unlike Paragraph 25(a)(1), Paragraph 25(a)(6) affords an opportunity to present new evidence. Issue preclusion applies only if "the legal and factual situations are identical."

Steel, 813 F.2d at 1550. The lack of procedural opportunities to introduce evidence of additional fishing grounds in subproceeding 97-1, a Paragraph 25(a)(1) proceeding, forecloses the application of issue preclusion here.

II. *MUCKLESHOOT v. LUMMI* DOES NOT RADICALLY LIMIT PARAGRAPH 25(a)(6)'S AVAILABILITY TO PROVE ADDITIONAL USUAL AND ACCUSTOMED FISHING GROUNDS

As discussed above, the central flaw in the district court's reasoning is its failure to account for Judge Boldt's broad reservation of jurisdiction to determine additional usual and accustomed fishing grounds based on the submission of new evidence. To patch this flaw, and to circumvent the limits of issue preclusion, the moving parties argued that this Court drastically curtailed the district court's continuing authority to hear Paragraph 25(a)(6) proceedings in *Muckleshoot Tribe v. Lummi Indian Tribe*. This sea change, they argued, reversed decades of practice, precluding (or at least substantially limiting) new proceedings under Paragraph 25(a)(6) to enlarge usual and accustomed fishing places beyond those determined in Final Decision # I. ER389-90 (Responding Tribes' Mot. to Dismiss 6-7); ER421-22 (Suquamish Mot. to Dismiss). This Court narrowed Paragraph 25(a)(6), they insisted, by "disapproving" the practice of "adding to a tribe's U&A finding . . . by supplemental findings," thereby

"underscore[ing] that the [district] Court's approach to Par. 25(a)(6) was no longer the law." ER390. Now, they contend, a tribe may not invoke Paragraph 25(a)(6) absent "exceptional circumstances." ER400 (Responding Tribes' Mot. to Dismiss).

A. Standard of Review

Interpreting and applying a prior decision by this Court presents a question of law reviewed de novo. *See generally Hart v. Massanari*, 266 F. 3d 1155, 1170-71 (9th Cir. 2001).

B. *Muckleshoot v. Lummi* Arose from a Paragraph 25(a)(1) Proceeding

Muckleshoot v. Lummi was an appeal from a proceeding to determine, among other things, whether the Lummi were fishing in conformity with Judge Boldt's findings regarding the Lummi's usual and accustomed fishing grounds. One issue in the case concerned the meaning of Judge Boldt's determination that the Lummi's usual and accustomed fishing grounds extended to the "present environs of Seattle." 141 F.3d at 1359.

The Muckleshoot Tribe contended that Swinomish and Lummi fishing grounds—as previously adjudicated in Finding of Fact 6, 459 F. Supp. 1048, 1049 (W.D. Wash. 1975), and Finding of Fact 46, 384 F. Supp. 312, 360 (W.D. Wash. 1974)—excluded Washington Catch Reporting Area

10. *Id.* at 1357. To prove Judge Boldt's intent, the Tribe offered testimony by an expert witness, Dr. Barbara Lane, who had also testified at the original trial.

The district court resolved the issue on summary judgment, "limit[ing] its review to clarifying the two prior rulings by Judge Boldt." *Id.* at 1358. This Court observed that the subproceeding "did not comprehend new determinations of locations of usual and accustomed fishing grounds." *Id.* at 1360.

C. On Appeal, This Court Restricted the Use of Supplemental Findings Based on New Evidence to Determine Judge Boldt's Intent

On appeal, this Court agreed that Judge Boldt's reference to the "present environs of Seattle" was ambiguous. *Id.* at 1359. In interpreting an ambiguous prior judgment, it held, the task is to "give effect to the intention of the issuing court," reviewing "the entire record before the issuing court and the findings of fact . . . in determining what was decided." *Id.* (internal quotations omitted). In other words, "the only matter at issue [was] the meaning of Judge Boldt's Finding of Fact No. 46 and the only relevant evidence [was] that which was considered by Judge Boldt when he made his finding." *Id.* at 1360 (internal quotations omitted).

The district court erred, this Court concluded, in admitting Dr. Lane's subsequent testimony and entering supplemental findings to explain Judge Boldt's ambiguous words, even though he appeared to derive those words from Dr. Lane's report in the original trial.[15] *Id.*

The Court did not generally restrict the use of Paragraph 25(a)(6). Instead, it recognized that Final Decision # I does not contain a complete inventory of tribal fishing grounds and acknowledged the availability of supplemental findings under Paragraph 25(a)(6). *Id.* The Court only ruled that Paragraph 25(a)(6) "does not authorize the court to clarify the meaning of terms used in the decree or to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree." *Id.*

D. In Prohibiting the Use of New Evidence to Modify a Decree in a Paragraph 25(a)(1) Proceeding, This Court Made No Radical Change to Paragraph 25(a)(6)

Muckleshoot v. Lummi does not announce radical restrictions on the parties' access to Paragraph 25(a)(6) to prove additional fishing grounds, nor does the opinion declare that parties could use Paragraph 25(a)(6)

[15] The admission was also error in part because the district court "failed to allow all parties to present evidence." 141 F.3d at 1360.

under only "exceptional circumstances." Any such ruling would have been improper, because an appellate court cannot revise a district court's ongoing injunction in the first instance, without such a revision being first considered by the district court after input from the parties. While a district court has wide discretion to modify its decrees under Rule 60(b)(5), *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 646 (1961), typically a strong showing of changed circumstances must be made before an injunction may be modified. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

The Permanent Injunction was more than 25 years old when the case was decided. It is inconceivable that this Court silently adopted a rule that substantially narrowed or eliminated provisions in Judge Boldt's injunction, without the district court first considering the issue after notice to the parties and an opportunity to brief that issue.

That *Muckleshoot v. Lummi* did not change Paragraph 25(a)(6) was understood by the moving tribes below, until they made a tactical change of course in this proceeding. In subproceeding 97-1, three of the moving tribes dismissed *Muckleshoot v. Lummi* as "old wine i[n] a new bottle," which merely

> clarified that, where U&A was previously not clearly determined, it may be clarified under Paragraph

> 25(a) [now 25(a)(1)] of the Injunction in this case based on record evidence and, perhaps, other evidence of the judge's intent. Conversely, where U&A issues were not previously determined, they may be resolved through supplemental findings under Paragraph 25(f) [now 25(a)(6)], but only after full development of evidence.

ER44.

Muckleshoot v. Lummi does not preclude adjudication of the Tribe's current Paragraph 25(a)(6) request for determination, nor does it change the rules for advancing such a claim. The Tribe does not seek to interpret or clarify Judge Boldt's findings; Judge Rothstein has done that. Rather, the Tribe seeks to present evidence to establish fishing grounds not previously determined, as Paragraph 25(a)(6) explicitly provides and as Judge Boldt expressly contemplated. The Tribe will do so by offering historical evidence not presented to Judge Boldt in 1973 to support proposed findings regarding additional fishing activities and locations of its ancestors at treaty-time. In offering such proof, the Muckleshoot Tribe does not seek to resolve ambiguities in the original decree, but to add new areas, just as so many other tribes have done.

III. THE DISTRICT COURT HAS NOT REVISED THE SCOPE OF PARAGRAPH 25(a)(6)

In addition to arguments based on *Muckleshoot v. Lummi,* the moving

parties below claimed that the district court itself has significantly restricted the availability of relief under Paragraph 25(a)(6), to the point where it no longer reflects or serves Judge Boldt's purpose.

A. Standard of Review

Interpretation of a judicial decree is reviewed de novo. *United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1169 (9th Cir. 2018).

B. The District Court Has Not Narrowed Paragraph 25(a)(6)

The movants cited two recent rulings concerning Lummi and Skokomish fishing grounds, which movants contended represent a change in the standards a party must meet to prove additional fishing areas. In these cases, Chief Judge Martinez concluded that Judge Boldt's determinations of usual and accustomed places in Final Decision # I precluded proceedings to seek additional fishing areas under Paragraph 25(a)(6). *United States v. Washington*, No. C70-9213RSM, 2015 WL 4405591, at *14 (W.D. Wash. July 17, 2015), *rev'd sub nom.*, *United States v. Lummi Nation*, 876 F.3d. 1004 (9th Cir. 2017); *United States v. Washington*, No. C70-9213, 2017 WL 3726774, at *9 (W.D. Wash. Aug. 30, 2017), *appeal docketed*, No. 17-35760 (9th Cir. 2017).

There are several problems with the moving parties' position that the district court has silently amended the requirements of Paragraph 25(a)(6)

to impose formidable barriers to the consideration of additional fishing areas.

First, the district court has never said it was considering or adopting any such new requirements, a fundamental requirement of due process when revising an injunction. All parties deserve an opportunity to be heard on such an important matter. In fact, when Judge Rothstein considered sun-setting the case and revising Paragraph 25 in 1994, she asked the parties to advise her of their positions on those issues before ruling. *See supra* note 3. After hearing from the parties, she declined to sunset the case or substantively amend Paragraph 25, concluding, "if there ever was a case where there is a role of the Court for continuing jurisdiction . . . this is it." ER257.

Second, neither the Lummi nor the Skokomish ruling binds this Court, nor should either control in ruling on the Tribe's request. In subproceeding 11-2, the district court refused to allow the Lummi Nation to prove fishing rights in the waters west of Whidbey Island or the Strait of Juan de Fuca, reasoning those rights had been determined in a prior subproceeding that had been affirmed on appeal, making it the law of the case. 20 F. Supp. 3d at 979-80. This Court reversed because the district

court had never determined whether the disputed waters were within the Lummi fishing area previously determined. *United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014). On remand, the district court again ruled against the Lummi, holding that "Lummi's U&A is specifically determined, and it does not contain the waters in dispute," precluding the Lummi from presenting evidence of treaty-time fishing in the area under Paragraph 25(a)(6). 2015 WL 4405591, at *14. This Court reversed a second time, holding that the disputed waters were indeed encompassed within the Lummi's fishing areas. 876 F.3d at 1011. The Court did not reach the Lummi's alternative argument that it should be permitted to present additional evidence of treaty-time fishing in the area under Paragraph 25(a)(6). Any reliance on the district court's twice-reversed series of orders is misplaced.

In a second subproceeding, now on appeal before this Court, the district court considered the Skokomish Tribe's request to expand its fishing grounds beyond the Hood Canal Drainage Basin. 2017 WL 3726774, at *9 (W.D. Wash. Aug. 30, 2017), *appeal docketed*, No. 17-35760 (9th Cir. 2017). The district court found multiple reasons to dismiss this request, including the Skokomish's failure to comply with Paragraph 25's pre-filing

requirements, as well as Skokomish's failure to delineate a specific basis for continuing jurisdiction. *Id.* at *4-5. The district court also evaluated the Skokomish's claims under Paragraph 25(a)(1), determining that Judge Boldt's original 1974 determination of the Tribe's fishing area was unambiguous (referencing only the Hood Canal drainage) and ruling that subsequent proceedings had not changed or expanded that finding. *Id.* at *8. The district court lastly declined to engage in a Paragraph 25(a)(6) analysis "because Judge Boldt's original determination is not ambiguous." *Id.*

The district court's dismissal of the Skokomish matter is substantially justified by one or more of the several alternate grounds articulated by the court, so the court's discussion of Paragraph 25(a)(6) is *dicta*. But the district court erred to the extent that it conditioned prosecution of a proceeding under Paragraph 25(a)(6) on the existence of a pre-existing ambiguity in a tribe's prior determinations, or on a lack of such an ambiguity. Neither is a requirement stated in Paragraph 25(a)(6), and neither comports with Judge Boldt's intent.

IV. JUDICIAL ESTOPPEL DOES NOT BAR THE TRIBE FROM PROVING FISHING GROUNDS OUTSIDE ELLIOTT BAY

A. Standard of Review

The district court's decision whether to invoke judicial estoppel is reviewed for an abuse of discretion. *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1044 (9th Cir. 2016); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016).

B. The Tribe Has Consistently Argued It Has Usual and Accustomed Saltwater Fishing Grounds Beyond Elliott Bay

The moving parties argued below that the Muckleshoot Tribe was judicially estopped from making arguments inconsistent with positions the Tribe took in subproceeding 97-1. They argued that the Tribe, having claimed that Judge Boldt specifically determined the Tribe's saltwater fishing grounds in that subproceeding, is estopped from now claiming that he did not. ER386 (Mot. to Dismiss).

The district court does not appear to have accepted this argument, for good reason. The Tribe has never denied, then or now, that Judge Boldt specifically determined several of the Tribe's usual and accustomed fishing grounds. The Tribe's position then was that Judge Boldt specifically determined, unambiguously, that the Tribe's fishing grounds extended well beyond Elliott Bay, and included all of the "saltwater of Puget Sound."

ER58-60. Having lost that argument, the Tribe's position now is that at the very least, Judge Boldt never considered and then rejected the Tribe's claim that its fishing grounds **extended beyond Elliott Bay**. These arguments are consistent.

Moreover, the Tribe lost before Judge Rothstein, and the doctrine of judicial estoppel "generally prevents a party from **prevailing** in one phase of a case on an argument and then relying on a contradictory argument . . . in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (emphasis added) (internal quotations omitted). The doctrine, equitable in nature, is intended to protect the integrity of the judicial process by preventing a party from gaining an advantage in litigation under one theory and then seeking an inconsistent advantage under another theory. *Id*.

To the extent judicial estoppel has any application here, it is to those moving tribes who successfully argued that the only issue in subproceeding 97-1 was the interpretation of the precise geographic scope of Finding of Fact 76, and who represented that the Muckleshoot Tribe would be later able to prove that its ancestors fished at treaty-time outside Elliott Bay in a proceeding under Paragraph 25(a)(6). Having prevailed based on that

position while preventing the Tribe's submission of new evidence in that proceeding, those tribes should not be allowed to assert the wholly inconsistent position that Muckleshoot Tribe is now barred from proving additional fishing grounds, using evidence the district court has never before considered.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing this subproceeding, and remand for a factual hearing on the merits of the Tribe's Request for Determination.

Date: October 12, 2018.

GARVEY SCHUBERT BARER, P.C.

By *s/ David R. West*
David R. West, WSBA #13680

By *s/ Donald B. Scaramastra*
Donald B. Scaramastra
WSBA # 21416

By *s/ Margaret A. Duncan*
Margaret A. Duncan, WSBA # 47876

Attorneys for Muckleshoot Indian Tribe

OFFICE OF THE TRIBAL ATTORNEY

By *s/ Richard Reich*
Richard Reich, WSBA #8178

By *s/ Robert L. Otsea, Jr.*
Robert L. Otsea, Jr., WSBA #9367

By *s/ Laura Weeks*
Laura Weeks, WSBA #26992

By *s/ Ann E. Tweedy*
Ann E. Tweedy, WSBA #32957

Attorneys for Muckleshoot Indian Tribe

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Muckleshoot Indian Tribe states that the applicability of Paragraph 25(a)(6) is at issue in *United States v. Washington*, No. C70-9213, 2017 WL 3726774 (W.D. Wash. Aug. 30, 2017), *appeal docketed*, No. 17-35760 (9th Cir. 2017), and that case might therefore be considered "related" under Circuit Rule 28-2.6.

Date: October 12, 2018.

GARVEY SCHUBERT BARER, P.C.

By *s/ David R. West*
David R. West, WSBA #13680

Attorneys for Muckleshoot Indian Tribe

OFFICE OF THE TRIBAL ATTORNEY

By *s/ Robert L. Otsea, Jr.*
Robert L. Otsea, Jr., WSBA #9367

Attorneys for Muckleshoot Indian Tribe

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,804 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook.

Date: October 12, 2018.

GARVEY SCHUBERT BARER, P.C.

By *s/ David R. West*
David R. West, WSBA #13680

Attorneys for Muckleshoot Indian Tribe

OFFICE OF THE TRIBAL ATTORNEY

By *s/ Robert L. Otsea, Jr.*
Robert L. Otsea, Jr., WSBA #9367

Attorneys for Muckleshoot Indian Tribe

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 12, 2018.

GARVEY SCHUBERT BARER, P.C.

By *s/ David R. West*
David R. West, WSBA #13680

Attorneys for Muckleshoot Indian Tribe

OFFICE OF THE TRIBAL ATTORNEY

By *s/ Robert L. Otsea, Jr.*
Robert L. Otsea, Jr., WSBA #9367

Attorneys for Muckleshoot Indian Tribe