No. 20-195

In The Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,

Petitioner,

v.

TULALIP TRIBES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit violated the precedent of this Court and the D.C. Circuit in its application of the law of the case to the facts specific to Petitioner and affirming dismissal for lack of continuing jurisdiction under the Boldt Decree, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

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INTRODUCTION

This case involves an attempt by Petitioner Muckleshoot Indian Tribe (Muckleshoot) to radically expand the marine areas within Washington State in which it may exercise its treaty fishing rights secured under the Treaties of Medicine Creek and Point Elliott. 10 Stat. 1132 (1854); 12 Stat. 927 (1855). The treaties guarantee Muckleshoot and other signatory tribes "[t]he right of taking fish" in perpetuity, but only at their respective "usual and accustomed grounds and stations," or U&A for short. 10 Stat. 1132, Art. III; 12 Stat. 927, Art. V.

United States v. Washington, W.D. Wash. No. 70-cv-9213 (W.D. Wash.), was filed in 1970 by the United States, on its own behalf and on behalf of the treaty tribes, to secure, define, implement and protect these off-reservation Indian treaty fishing rights. District Court Judge George Boldt presided over the case. After a lengthy trial, he issued a judicial decree which dealt comprehensively with the nature and extent of treaty fishing rights in northwest Washington State, including the extent of each tribe's U&A. *See generally United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Boldt Decree). The Boldt Decree also included a permanent injunction, which contained continuing jurisdiction provisions. *Id*. at 419. The Boldt Decree was affirmed in nearly all respects by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 668 (1979).

At trial, Muckleshoot and the United States on its behalf presented Muckleshoot's claim to U&A in certain freshwater streams and in marine waters throughout Puget Sound. Judge Boldt considered the claim and determined the areal extent of Muckleshoot's freshwater and marine U&A:

> [Finding of Fact] 76. Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had [U&A] 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.

United States v. Washington, 384 F. Supp. at 367.

In a subsequent proceeding, denominated as Subproceeding 97-1 under one of the district court's standing case management orders, the district court and the Ninth Circuit interpreted this language in light of the underlying facts and concluded that Judge Boldt specifically determined Muckleshoot's U&A throughout Puget Sound – a ruling sought, argued for and won by Muckleshoot itself. They also determined that Judge Boldt had limited Muckleshoot's marine U&A to Elliott Bay, a body of water adjacent to the City of Seattle. *United States v. Washington*, 19 F. Supp. 3d 1252, 1275, 1310-11 (W.D. Wash. 1997), *aff'd*, 235 F.3d 429 (9th Cir. 2000) (*Muckleshoot III*). Muckleshoot asked this Court to review the case, but this Court declined to do so. 534 U.S. 950 (2001).

Apparently not deterred by two adverse judgments against it, Muckleshoot tried again. In the case currently on appeal, denominated as Subproceeding 17-2 under the district court's standing order, Muckleshoot asserted jurisdiction over its claim to expanded marine U&A under Paragraph 25(a)(6) of the Permanent Injunction in the Boldt Decree. Under this provision, the district court has continuing jurisdiction over a proceeding to determine "the location of any of a tribe's [U&A] not specifically determined [in the Boldt Decree]." *United States v. Washington*, 384 F. Supp. at 419, Paragraph 25(f) (renumbered as Paragraph 25(a)(6) without substantive change by *United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1991)) (emphasis added).

Thus, the crux of this case is whether Muckleshoot's marine U&A were specifically determined by Judge Boldt in 1974. Because the prior judgment in Subproceeding 97-1 ruled that they had been, District Court Judge Ricardo Martinez dismissed Muckleshoot's claim for expanded U&A under Paragraph 25(a)(6).

On appeal, the Ninth Circuit also applied the law of the case to the specific facts concerning Muckleshoot's prior U&A proceedings. The Circuit followed the path marked by *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (*Muckleshoot I*) and *Muckleshoot III*, 235 F.3d 429, and held – for a second time – that Judge Boldt specifically determined Muckleshoot's marine U&A in 1974 and limited them to Elliott Bay. Pet. App. 14a. The Ninth Circuit

carefully reviewed and reaffirmed its earlier ruling in Subproceeding 97-1 and found it was binding and determinative of the issue in this case. Pet. App. 11a-14a. Accordingly, the Circuit affirmed the district court's dismissal of Muckleshoot's claim in this case, holding that the district court lacked jurisdiction under Paragraph 25(a)(6) because Muckleshoot's marine U&A had been specifically determined. Pet. App. 14a.

Muckleshoot has again asked for this Court's review, but its reasons for granting review do not hold up. Muckleshoot avoids and ignores binding judgments against it and other law of the case. There is no circuit conflict to resolve. The district court did not issue a new interpretation of Paragraph 25(a)(6) in this case as Muckleshoot argues, but instead applied the law of the case to facts particular to Muckleshoot. The Ninth Circuit independently reviewed the case and reached the same conclusion without deference to the district court. The decision below does not conflict with the *Western Electric* case relied upon by Muckleshoot, and subsequent decisions of this Court, including a unanimous decision issued just two terms ago, *U.S. Bank Nat'l Ass'n v. Village at Lakeridge*, ___ U.S. ___, 138 S. Ct. 960 (2018), have resolved any conflict that may have existed regarding the proper standard of review.

In addition, the decision below is not manifestly unjust to Muckleshoot and this case is not worthy of a grant of a Writ of Certiorari for the reasons explained below. Muckleshoot attempts to cast this case as one in which its opportunity to litigate its treaty rights claim was unjustly denied in the first instance, but the actual

issue is whether Muckleshoot should get another bite at an apple twice denied by the lower courts charged with overseeing and managing this long-standing, complex, and highly fact-intensive case. Because allowing Muckleshoot a third chance to attempt to prove up a claim that Judge Boldt fully considered and rejected nearly half a century ago would wreak havoc on the Opposing Tribes' settled expectations and established treaty fisheries, this Court should deny the Petition.

STATEMENT OF THE CASE

We disagree with various aspects of Muckleshoot's statement of the case because it is overly argumentative. However, rather than preparing a separate statement of the case, we address facts relevant to the question presented in the Argument section below.

ARGUMENT

I. The Decision Below Did Not Create a Circuit Conflict Requiring This Court's Review.

Muckleshoot argues that this Court should accept review in order to resolve an alleged conflict between the decision below and a case decided by the D.C. Circuit thirty years ago, *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990). Pet. at 24-29. In its view, the Ninth Circuit made a "threshold misstep that infected its analysis from the outset: it deferred to Judge

Martinez's interpretation of the Decree decades after it was written by Judge Boldt" Pet. at 24, "thereby perpetuating a direct conflict with the D.C. Circuit over decree interpretation that bolsters the need for this Court's review." *Id*. at 13. In its view, "[h]ad the Ninth Circuit followed the D.C. Circuit's non-deferential approach to interpreting decrees [as set forth in *Western Electric*], there would have been little question that [jurisdiction under Paragraph 25(a)(6)] is available to Muckleshoot." *Id*. at 29.

The alleged conflict that Muckleshoot has identified between the case below and *Western Electric* is not a circuit conflict on the same important matter sufficient to justify this Court's review. Muckleshoot's argument regarding an alleged circuit conflict rests on at least five false premises:

First, that Judge Martinez engaged in an independent interpretation of the Boldt Decree's continuing jurisdiction provisions as applied to the facts underlying Muckleshoot's prior U&A decisions (he did not);

Second, that the Ninth Circuit deferred to Judge Martinez's independent interpretation, rather than engaging in its own independent interpretation of the Decree as applied to the facts underlying Muckleshoot's prior U&A decisions (it did not);

Third, that but for its deference to Judge Martinez, the Ninth Circuit would have reached the opposite conclusion in this case (a proposition for which Muckleshoot offers no support whatsoever);

Fourth, that the proper standard of review in this subproceeding, which involves the interpretation of a decades-old judicial decree and a number of subsequent judicial opinions interpreting it, should have been the *de novo* standard of review applied by the D.C. Circuit in *Western Electric* when interpreting an antitrust consent decree (a proposition unsupported by a well-developed body of Federal law distinguishing between judicial decrees and consent decrees); and

Fifth, that there is an unresolved conflict among the circuits on the same important question regarding the proper standard of review that requires this Court's review and decision (there is no conflict, and to the extent that one ever existed, it was resolved by this Court's later decisions).

Each of these five premises is incorrect. If any single foundational premise is false, Muckleshoot's ultimate conclusion that this Court should accept review to resolve a circuit conflict on the same important question is incorrect. As demonstrated below, Muckleshoot's primary argument fails five times over, and this Court should deny review.

A. Muckleshoot Misapprehends the Binding Law of the Case That Controls the Outcome Here.

The basic problem with Muckleshoot's circuit conflict argument is the same problem identified by the panel majority below in considering the dissent: "[it] misapprehends what occurred in the prior rulings" in

this lengthy, complex, and highly fact-intensive case and its many subproceedings and appeals over the course of its forty-six-year history. Op. at 13. The lengthy procedural history that led to the present dispute is discussed briefly in the Introduction above and at length in the decisions below, but these are the key points.

As noted above, in 1974, following lengthy pretrial and trial proceedings, Judge Boldt issued a finding of fact, supported by extensive citation to evidence in the record, determining that Muckleshoot had U&A in a long list of freshwater locations and also "secondarily in the saltwater of Puget Sound." *United States v. Washington*, 384 F. Supp. at 367 (FF 76).

In 1998, the Ninth Circuit issued its decision in *Muckleshoot I*, 141 F.3d 1355, a case brought by Muckleshoot to challenge the areal extent of other tribes' U&A. The district court had considered evidence that post-dated the Boldt Decree to determine the extent of the Lummi Tribe's U&A, and the Ninth Circuit reversed on this point. It held that in interpreting ambiguous prior judicial decrees, including the Boldt Decree, "the reviewing court should construe a judgment so as to give effect to the intention of the issuing court" by reviewing "the entire record before the court and the findings of fact . . . in order to determine what was decided." *Id*. at 1359 (quotations omitted). It held that under the plain language of the Boldt Decree, the district court lacks jurisdiction to entertain a new claim for U&A under Paragraph 25(a)(6) if the claimant's U&A had been specifically determined. *Id*. at

1360. And it held that, as a result, Paragraph 25(a)(6) does not authorize the introduction of new evidence or supplemental findings "which alter, amend or enlarge upon the description in the decree." *Id*.

In Subproceeding 97-1, District Court Judge Barbara Rothstein applied the law of the case established in *Muckleshoot I* to a challenge by three tribes to the extensive expanse of the marine U&A Muckleshoot then claimed and fished. Judge Rothstein analyzed the language of Muckleshoot's U&A finding as well as its context, determined that it was ambiguous, and proceeded to review the original proceedings in the case and the voluminous record in order to determine Judge Boldt's intent. *See United States v. Washington*, 19 F. Supp. 3d at 1273-75. She held that "[h]ere, as in *Muckleshoot [I]*, Judge Boldt *has already made a finding of fact determining the location of Muckleshoot's U & A*. Although his description may have turned out to be ambiguous, *he did make a specific determination*." *Id*. at 1275 (emphasis added). And she held that "there is no evidence in the record . . . that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay." *Id*. at 1311. Among other things, this was grounded in the district court's determination, based on the evidence presented to Judge Boldt, that the "Muckleshoot were a primarily upriver people" who "may have occasionally fished in the open waters of Elliott Bay. . . ." *Id*. at 1310.

Muckleshoot appealed and the Ninth Circuit affirmed. *Muckleshoot III*, 235 F.3d 429. Importantly for purposes of Muckleshoot's present-day argument, the

Ninth Circuit did not defer to Judge Rothstein's interpretation of the Boldt Decree as applied to the facts relevant to Muckleshoot's U&A, but instead independently examined the proceedings and the factual record.

As framed by the Ninth Circuit, the case "center[ed] on the interpretation of [the] lengthy and detailed [Boldt Decree] published in 1974 after an extensive trial involving a voluminous record," a point that Muckleshoot concedes. *Id*. at 431; *see* Pet. at 9. In the course of its decision, the Court issued two rulings relevant here. First, the Court examined principles of interpretation of judicial decrees and concluded that the "language of the [Boldt Decree] must be read in the light of the facts before it." *Id*. at 433 (quotation omitted).

Second, after applying this principle and carefully reviewing the record before it, the Court concluded that it agreed with Judge Rothstein's interpretation of the Decree as applied to Muckleshoot. Among other things, the Court emphasized that:

> [T]he Muckleshoot's ancestors were almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods. Insofar as they conducted saltwater fishing, the referenced documents contain no evidence indicating that such fishing occurred with regularity anywhere beyond Elliott Bay.
>
> This conclusion is buttressed by other evidence before Judge Boldt. The reports that Judge Boldt relied upon make a general

> distinction between downriver predecessor tribes, also referred to as saltwater tribes, and upriver tribes. The predecessor tribes to the Muckleshoot were considered to be upriver tribes.

Id. at 434.

Muckleshoot III was a final adjudication that in his 1974 Decree, Judge Boldt had specifically determined Muckleshoot's saltwater U&A as to all of Puget Sound, and that Judge Boldt, based on the evidence before him, had limited Muckleshoot's saltwater U&A to Elliott Bay. This is the law of the case that Judge Martinez and the Ninth Circuit were bound to apply, and properly applied, in the present subproceeding.

B. Judge Martinez Did Not Independently Interpret the Decree.

Muckleshoot proceeds as if Judge Martinez developed in this subproceeding a new, novel, and considerably narrower interpretation of Paragraph 25(a)(6) than what Judge Boldt intended in his original Decree. *See* Pet. at 29. But the plain language of Judge Martinez's order dismissing Muckleshoot's claim belies this assertion.

In his order, Judge Martinez did not analyze the plain language of Paragraph 25 separately or in conjunction with the remainder of the Boldt Decree. He did not engage in the same type of painstaking, fact-intensive inquiry that Judge Rothstein and the *Muckleshoot III* court undertook when they interpreted

Paragraph 25(a)(6) as applied to facts relevant to Muckleshoot in the first instance in Subproceeding 97-1. *See* Pet. App. 38a-42a.

Instead, he reviewed the procedural history and prior decisions in the case discussed above, paying particular attention to Judge Rothstein's decisions in Subproceeding 97-1. *Id*. at 28a-37a. He then faithfully applied the law of the case to the case at hand. Because prior judgments and rulings had *already* interpreted the Decree as applied to Muckleshoot and had *already* concluded that Muckleshoot's saltwater U&A were specifically determined by Judge Boldt in 1974 and was limited to Elliott Bay, Judge Martinez had no choice but to "find[ ] that Judge Boldt specifically determined Muckleshoot U&A in [the Boldt Decree], and therefore there is no continuing jurisdiction under paragraph 26(a)(6) [sic]." *Id*. at 39a. Notably, Muckleshoot recognizes that the basis for Judge Martinez's decision was Judge Rothstein's determination that Muckleshoot's U&A had been specifically determined. *See* Pet. at 9-10. It does not explain how this acknowledgment squares with its argument to this Court that Judge Martinez interpreted the Decree anew.

Judge Martinez's analysis is exactly how a court should proceed to evaluate a successive claim that the federal courts have already decided and reduced to final judgment, and is in fact what the judicial doctrines of the rule of the mandate, the law of the case, and others require in order to prevent endless litigation of the same claims and issues and to promote the interests of finality, repose, and judicial efficiency. *See*, *e.g.*, *Fed.*

Commc'ns Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 140 (1940).

C. The Ninth Circuit Did Not Defer to Judge Martinez's Independent Interpretation, But Applied the Law of the Case to the Relevant Facts.

In the decision below, the Ninth Circuit stated that "[t]he district court's interpretation of a judicial decree is also reviewed *de novo*, although this court typically gives deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." Pet. App. at 11a (quotation omitted). However, for the reasons explained above, there was no new interpretation of the Decree by Judge Martinez to which the Ninth Circuit could have deferred. And the Ninth Circuit devoted precious little, if any, attention to Judge Martinez's analysis and never explicitly adopted any of his analysis in its opinion.

Instead, it engaged in its own analysis of Judge Rothstein's decision and held that "Subproceeding 97-1, as affirmed by [the Ninth Circuit], definitively determined that the Muckleshoot's saltwater fisheries in Puget Sound had been limited by Judge Boldt to Elliott Bay. Therefore, the district court below did not err in holding that it lacked jurisdiction under Paragraph 25(a)(6) to entertain the present subproceeding, and properly dismissed it." *Id*. at 14a. The fact that the Ninth Circuit did not defer to Judge Martinez's

interpretation is confirmed in the language it used to explain why it did not review Judge Martinez's second ground for dismissal, collateral estoppel: "Because we *agree* with the district court that Judge Boldt had determined the entirety of the Muckleshoot's saltwater U&A, we do not reach other issues raised on appeal." *Id*. at 11a (emphasis added).

Nevertheless, Muckleshoot insists that such deference occurred, improperly modified the Boldt Decree *sub silentio*, and was a "but for" cause of the adverse decision it received. *See*, *e.g.*, Pet. at 2-3, 10, 12-16, 24-26. In support of this argument, Muckleshoot cherry-picks phrases from the Ninth Circuit's opinion and rearranges them in order to make it appear that the Ninth Circuit engaged in a course of analysis in which it did not in fact engage. *See* Pet. at 25-26. As just one example, Muckleshoot states that "the Ninth Circuit took Judge Martinez's 'most reasonable reading of Judge Rothstein's findings [in Subproceeding 97-1]' to be 'the end of the matter.'" Pet. at 26 (quoting App., *infra*, 13a). But what the Ninth Circuit actually said was this:

> These findings [by Judge Rothstein that Muckleshoot's U&A had been specifically determined and was limited to Elliott Bay] were affirmed by this Court. . . .
>
> *This was, or should have been, the end of the matter, as the district court here found.* But the dissent suggests [that it was not]. . . . *[T]he most reasonable reading of Judge Rothstein's findings, as quoted above, is that Judge*

> *Boldt, in referring to the Muckleshoot's fishing rights in Puget Sound, determined in effect that the only part of Puget Sound in which the Muckleshoot had any [U&A] was "the open waters and shores of Elliott Bay."* It was precisely for this reason that "[i]ssuing a supplemental finding under [Paragraph 25(a)(6)] defining the scope of Muckleshoot's U&A in *Puget Sound*" would be an impermissible attempt to contradict Judge Boldt's determination.

Pet. App. at 13a-14a (most emphasis added; citation omitted).

Nowhere in this passage does the Ninth Circuit analyze Judge Martinez's reasoning or state that it is deferring to it, and nowhere in Judge Martinez's order does Judge Martinez discuss "the most reasonable reading" of Judge Rothstein's orders. As the last portion of the language quoted above indicates, a key consideration for the Ninth Circuit was *Judge Rothstein's* conclusion that Paragraph 25(a)(6) could not be used to contradict a prior ruling by Judge Boldt, not Judge Martinez's subsequent ruling to the same effect. But with a linguistic bait and switch, Muckleshoot's Petition makes it appear that the Ninth Circuit deferred to Judge Martinez's interpretation of Judge Rothstein's orders rather than relying upon its own *de novo* interpretation of them.[1]

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[1] Muckleshoot engages in similar misdirection when it cites *Vertex* and *Keith v. Volpe* in its discussion of the standard of review that it says the Ninth Circuit applied. *See* Pet. at 25. While

D. The Decision Below Does Not Conflict with *Western Electric*.

Muckleshoot's primary argument for why this Court should grant review is to resolve an alleged conflict between the decision below and the decision of the D.C. Circuit in *Western Elec. Co.*, 900 F.2d 283. Pet. at 24-29. Muckleshoot does not attempt to explain why a thirty-year old decision from the D.C. Circuit regarding the interpretation of an antitrust consent decree should provide the rule of decision in this case regarding the interpretation of a judicial decree that has overseen tribal and non-tribal fisheries in Washington State for nearly fifty years. Nor does it explain why an alleged circuit conflict that has existed for thirty years is an important and compelling reason for this Court to grant review now, when Muckleshoot did not even raise the issue when it sought this Court's review of *Muckleshoot III* shortly after Judge Rothstein interpreted the Boldt Decree as applied to Muckleshoot in the first instance and the Ninth Circuit reviewed her decision. Nevertheless, we are compelled to address it.

Western Electric involved an appeal from a district court's decisions on motions to modify certain terms of an antitrust consent decree which provided for periodic review, substantive standards for modification, and

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those cases do stand for the proposition that the Ninth Circuit applies a deferential standard of review when reviewing a lower court's interpretation of consent decrees, they are irrelevant to this case because the Ninth Circuit did not cite them or purport to rely upon them and was not interpreting a consent decree, an issue we discuss below.

continuing jurisdiction. *See id.* at 289, 291. Before beginning its substantive analysis, the D.C. Circuit engaged in a fairly lengthy discussion about the standard of review it would apply. As relevant here, the court held that:

> [T]he construction of a consent decree . . . is subject to *de novo* appellate review. . . . Therefore, aside from fact-finding, we owe no deference to the district court's decisions. . . . Further, we reject the suggestion – apparently embraced by other circuits, *see*, *e.g.*, *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) – that this particular district judge's interpretations should be afforded some "special" deference because he drafted the pivotal provision of the decree [and] has had enormous experience overseeing the case and the decree since its inception.

Id. at 293–94 (quotations, citations, and footnotes omitted). It is this latter sentence that Muckleshoot seizes upon as evidence of a circuit conflict.

1. *Western Electric* is Distinguishable, and Cases Which Are Distinguishable Can Hardly Be Said to Conflict and Require This Court's Review.

Despite Muckleshoot's reliance upon it, *Western Electric* and the present case are legally and factually distinguishable. It is legally distinguishable because *Western Electric* involved the interpretation of a consent decree. The Ninth Circuit case that it declined to

follow, *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986), also involved the interpretation of a consent decree. And the vast majority of the cases that we have been able to identify that analyze the proper standard of review for interpreting any type of decree have involved consent decrees.

But this case does not involve a consent decree, it involves a long-standing judicial decree issued after lengthy trial proceedings. This matters, because contrary to Muckleshoot's suggestion, *see* Pet. at 14, there is a well-developed distinction in the law between consent decrees and judicial decrees. As this Court has previously explained:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); *accord, Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). For example, among other things, consent decrees are interpreted within their four

corners while judicial decrees are interpreted to give effect to the issuing judge's intent. *Compare Armour*, 402 U.S. at 682 *with Muckleshoot I*, 141 F.3d at 1359. This has consequences for the appropriate standard of review.

Western Electric is also factually distinguishable. There, the district judge primarily analyzed and answered legal questions. *Id.* at 293-94. Here, as we have seen, the district judge was asked to determine whether particular facts related to Muckleshoot's prior U&A proceedings before Judge Boldt and Judge Rothstein met the legal standard articulated in Paragraph 25(a)(6). This, too, has consequences for the appropriate standard of review, as a subsequent panel of the D.C. Circuit recognized when it called into question the wisdom and rationale of *Western Electric* in a subsequent case. *United States v. Microsoft*, 147 F.3d 935, 945 n.7 (D.C. Cir. 1998).

Given the legal and factual dissimilarities between the present case and *Western Electric*, it is difficult to see how they are in such conflict so as to justify this Court's review.

2. Even if *Western Electric* Applied, the Decision Below Would Not Conflict With It.

Even if the standard of review from *Western Electric* had been applied in this case, it would not have changed in the Ninth Circuit's analysis. As discussed

above, the Ninth Circuit engaged in its own independent analysis and did not defer to an independent interpretation of the Boldt Decree by Judge Martinez. As a result, it appears that the Ninth Circuit applied the standard of review that Muckleshoot says *Western Electric* requires. Moreover, nothing in *Western Electric* requires *de novo* review of factual findings or of the application of law to facts. *Id.* at 293. Since this case involves the question whether particular facts related to Muckleshoot's prior U&A proceedings before Judge Boldt and Judge Rothstein met the legal standard articulated in Paragraph 25(a)(6), some level of deference to the district court would have been appropriate under *Western Electric*'s "*de novo* with deference to fact-finding" standard. Because the Ninth Circuit's analysis would have satisfied the *Western Electric* standard, there is no important conflict between them.

3. If any Split Existed, It Turned on the Nature of the Question Presented and Was Resolved by This Court.

At its core, Muckleshoot's argument is that the decision below and *Western Electric* have applied irreconcilable standards of review regarding interpretation of decrees, creating an important and compelling question that the Court should answer. But even if the decision below and *Western Electric* actually conflicted, it appears that this Court has already resolved the conflict in two cases addressing standards of review more generally.

In *Salve Regina College v. Russell*, 499 U.S. 225 (1991), this Court held that appellate courts must review district court determinations of state law *de novo*. In its analysis, the Court emphasized the need to consider the "respective institutional advantages of trial and appellate courts" in addressing the particular question presented. *Id*. at 232. It held that appellate courts were better positioned to decide questions of law. *Id.* Trial courts were better positioned to find facts, decide issues involving supervision of litigation, and decide mixed questions of law and fact "when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of the legal doctrine." *Id*. at 234. Thus, the nature of the inquiry is much more important than the context of the case.

In 2018, this Court issued a unanimous opinion in *U.S. Bank Nat'l Ass'n v. Village at Lakeridge*, ___ U.S. ___, 138 S. Ct. 960 (2018), which analyzed the appropriate standard of review for a mixed question of law and fact and concluded that it depends on the question itself as well as which type of court is best suited to answer it:

> Mixed questions are not all alike. [S]ome require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so – when applying the law involves developing auxiliary legal principles of use in other cases – appellate courts should typically review a decision *de novo*. [Ot]her mixed questions immerse courts

> in case-specific factual issues – compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called "multifarious, fleeting, special, narrow facts that utterly resist generalization." And when that is so, appellate courts should usually review a decision with deference. In short, the standard of review for a mixed question all depends on whether answering it entails primarily legal or factual work.

Id. at 967 (citations omitted).

Viewed thus, there can be no question about which side of the line this case falls on under *Lakeridge*. Determining whether Muckleshoot's U&A have been specifically determined is not simply a matter of looking at words on a page and interpreting them, even if some of those words happen to be the contemporaneous words of Judge Boldt himself. Instead, it requires a deep understanding of the issues that were tried, the voluminous evidence that was proffered (much of it expert anthropological and ethnohistorical evidence of a particular tribe's territory, fishing locations, and customs in the mid-19th century), and the rulings that have been made over the five decades of this case. This involves a particular type of analysis within a particular type of case that is never likely to lead to "auxiliary legal principles of use in other cases." *Id*. In this specific context, and given the district court's and Ninth Circuit's extensive experience with overseeing and managing this litigation, the Ninth Circuit would have

been well within this Court's jurisprudence to defer to Judge Martinez's interpretation, even if that had been what happened in this case.

II. Muckleshoot Seeks to Modify Paragraph 25(a)(6) of the Boldt Decree.

A. Muckleshoot Seeks a Sweeping Change to Paragraph 25(a)(6).

In derogation of the law of the case concerning Paragraph 25(a)(6), Muckleshoot seeks to usurp and replace it with a sweeping blanket rule that continuing jurisdiction under Paragraph 25(a)(6) is always available for claims that expand a tribe's U&A.

Muckleshoot now attempts to brush aside the law of the case that Muckleshoot itself advocated for and secured to advance a new interpretation of Paragraph 25(a)(6). But this is a hollow and strained argument. It is Muckleshoot that is striving to modify the Boldt Decree in various ways, including by challenging Judge Boldt's finding of fact regarding the areal extent of its U&A and by advocating an interpretation of Paragraph 25(a)(6) that is contrary to Judge Boldt's intent to retain continuing jurisdiction to resolve U&A questions, but only if they had not been "specifically determined."

The modification that Muckleshoot seeks is not only a usurpation of the law of the case, but also a strained and illogical interpretation of the language of

Paragraph 25(a)(6). Muckleshoot's proposed modification erases the limiting phrase "not specifically determined" by eliminating any case in which the limitation could be applied. The ostensibly limiting phrase, in Muckleshoot's view, does not have any application to a claim for new U&A areas and is thus superfluous because Paragraph 25(a)(6) by its terms applies only to new U&A, which in Muckleshoot's view are always "not specifically determined." This position ignores that ordinarily an area description creates a boundary. Since *Muckleshoot III*, the courts in *United States v. Washington* have recognized that generally what is left out of a U&A finding is as significant as what is included. In response to an argument very similar to Muckleshoot's in this case, the Ninth Circuit observed: "That Judge Boldt neglected to include [certain areas] in the [tribe's U&A] supports our conclusion that he did not intend for them to be included." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. 2010) (emphasis added). This, too, is the law of the case.

B. *Atlantic Refining* Supports the Circuit Decision Below.

Muckleshoot claims that the Circuit decision below "flouts the language and history" of Paragraph 25(a)(6), citing *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959) and other cases. Pet. at 14-16. As argued above, it is Muckleshoot that ignores the law of the case and seeks to modify the Boldt Decree. Moreover, the cases cited by Muckleshoot involve consent

decrees, and not an interpretation of a judicial decree deciding a contested issue. In addition, most of the cases involve a party that is explicitly seeking a modification of the decree.

Atlantic Refining is instructive in this case, but not in the way Muckleshoot claims. The issue in *Atlantic Refining* concerned a consent decree entered among several oil companies and the United States. The specific decree provision at issue dealt with the calculation of dividends. *Id.* at 20-21. Twenty years after the decree had been entered, the United States sought to change the method of calculating dividends that had been applied through the intervening years. This Court rejected the proffered change, taking into consideration the "language and history of th[e] decree," and rejecting the "strained construction" of the decree provision that did not comport "with the consistent reading given the decree." *Id*. at 22.

This case involves more than the parties' consistent reading of the decree. Here, the reading is a Ninth Circuit decision, *Muckleshoot I*, the first case applying Paragraph 25(a)(6) in a contested proceeding, followed by twenty years of consistent application by the district court. Muckleshoot is the party offering the "strained interpretation" of Paragraph 25(a)(6) at odds with the language of the decree, and its requested modification is at odds with twenty years of "consistent reading given to the decree" in binding judicial decisions. To rule consistently with *Atlantic Refining*, the Court should reject Muckleshoot's strained interpretation.

C. Indian Treaty Canons of Construction Do Not Apply to Interpretations of Judicial Decrees.

Muckleshoot makes much of the canons of construction applicable to Indian treaties. Pet. at 21-24. Indian treaties are given a sympathetic construction as the Indians understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). This rule of construction has been extended to executive orders concerning tribes and to statutes benefitting Indians. However, this case deals with a clause in a continuing jurisdiction paragraph in the Boldt Decree, a case management provision. We know of no precedent that would apply the canons of construction to a judicial decree generally, or to the Boldt Decree in particular. Although the canons apply to interpreting treaty language in the first instance, "[t]here are no canons of construction of judicial opinions." *Muckleshoot III* at 433.

Even if the canons applied, it is unclear that Muckleshoot would benefit. This case involves a dispute among tribes concerning the application of Paragraph 25(a)(6). In a dispute among tribes, courts have held that the canons cannot be invoked to benefit one tribe over another. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). *Seufert Brothers v. United States*, 249 U.S. 194 (1919), cited by Muckleshoot, Pet. at 22-23, is not to the contrary because the case did not involve a dispute among tribes.

Muckleshoot seems to argue that the decision below diminishes its treaty rights. There is no basis, however, to suggest that an application of the Boldt decree that is faithful to the law of the case is a diminishment of those rights. No treaty provision grants Muckleshoot the privilege of seeking to expand its U&A despite the fact that it has already been specifically determined and despite a provision of the Boldt decree and long-standing law of the case that has interpreted it that precludes expansion under the facts of this case.

III. The Circuit Decision is Not Manifestly Unjust to Muckleshoot.

A. Muckleshoot Misses the Mark on Several Supporting Points.

1. Cases Prior to *Muckleshoot I.*

Muckleshoot makes much of early actions in *United States v. Washington* that resulted in expansion of certain U&A. Pet. at 7, 18, 20. These cases occurred before *Muckleshoot I*, and they did not involve a challenge to or ruling on continuing jurisdiction under Paragraph 25(a)(6). Muckleshoot has presented no authority for the proposition that these cases trump *Muckleshoot I*, the first decision to consider and rule on the issue of the application of Paragraph 25(a)(6). It could be that the parties shared an erroneous assumption about the issue prior to *Muckleshoot I*, but if so they were disabused of that assumption by that decision.

2. Judge Boldt's Comments in 1975.

Muckleshoot raises comments made by Judge Boldt in 1975 as if it is a ruling that supports its case. Pet. 2, 13, 17, 18, 20. These comments were not part of a ruling in any case, nor did the case involve Paragraph 25(a)(6). In fact, during the proceedings the plaintiff tribe disavowed the intent to expand its U&A. ER 372-373. Judge Boldt's comments came after the court had ruled in the case and played no part in his decision. Moreover, his post-decision musing from the bench concerned the use of Paragraph 25(a)(6) to clarify an existing U&A decision. ER 379. Judge Boldt may have thought that Paragraph 25(a)(6) could be used in this way, but *Muckleshoot I* subsequently invalidated that very use of Paragraph 25(a)(6). 141 F.3d at 1360. Muckleshoot rails against the phantom deference to the district court it believes occurred in this case, yet seeks to elevate an off the cuff and incorrect remark from a district court judge above a Ninth Circuit decision. A strange sort of deference, that.

3. Muckleshoot Marine Fishing before *Muckleshoot III.*

Muckleshoot invokes the loss of its marine fishery that it prosecuted between the Boldt Decree and *Muckleshoot III*, which limited the fishery to Elliott Bay. Pet. at 7. But whatever Muckleshoot's previous understanding of the extent of its marine U&A, or whatever the acquiescence of other tribes to the Muckleshoot's marine fishery, all of it but Elliott Bay proved

to be outside its U&A, as *Muckleshoot III* ruled. As a result, Muckleshoot did not lose a fishery to which it was entitled. To the contrary, it enjoyed 25 years of fishing at the expense of other tribes in a large area in which it had no treaty fishing rights. It is no injustice to halt Muckleshoot fishing where it never belonged.

4. The Boldt Decree "Complete Inventory" Finding.

Muckleshoot attempts to invoke the Boldt Decree's statement that "it would be impossible to compile a complete inventory" of a tribe's U&A in order to justify its claim. Pet. at 6, 16 (referencing *United States v. Washington*, 384 F. Supp. at 353 (FF 13)). But *Muckleshoot I* rejected this very argument. The Circuit acknowledged the existence of this and other similar language in the Boldt Decree and rejected it as affecting the scope of Paragraph 25(a)(6), stating that despite this language, "Judge Boldt, however, did 'specifically determine[]' the location of [the tribe's U&A]." *Id.* at 1360. This too is law of the case that is contrary to Muckleshoot's current interpretation of Paragraph 25(a)(6).

B. Muckleshoot Has had its Day in Court.

Muckleshoot claims the "manifest injustice" of being deprived of its day in court. But Muckleshoot had its day in court during the trial that resulted in the Boldt Decree. Judge Boldt considered and decided the issue of the areal extent of Muckleshoot's

U&A, including its marine U&A, upon facts adduced at trial, in the Boldt Decree.

The primary evidence submitted by Muckleshoot was contained in a report by an anthropological expert, Dr. Barbara Lane. Judge Boldt found that Dr. Lane's reports were "exceptionally well researched and reported" and were "authoritative and reliable" regarding treaty time tribes and their fishing areas. *Id.* at 350. The expert report on Muckleshoot, RT-SER 86-151, considers both freshwater and saltwater fisheries of the Muckleshoot people at treaty time. Dr. Lane found that the Muckleshoot "were 'upriver' people," as opposed to those living directly on saltwater shores. RT-SER 93-94. Lane describes the extensive riverine fisheries of the Muckleshoot, followed by a brief and limited mention of saltwater activity. RT-SER 94. Judge Boldt relied upon and annotated to Dr. Lane's report in determining Muckleshoot's U&A. He considered both freshwater and saltwater fisheries and included both in his U&A findings, but also portrayed Muckleshoot as an upriver people for whom the saltwater fishery was of secondary importance and of limited scope. *United States v. Washington*, 384 F. Supp. at 367.

The proceedings before Judge Boldt were a full and fair opportunity for Muckleshoot to present evidence regarding its U&A. The proceedings were not limited or truncated in any way. Judge Boldt ruled on the full scope of Muckleshoot U&A, both marine and riverine. Nor could Muckleshoot have understood otherwise. The Boldt Decree was rendered after the trial on U&A, and Muckleshoot could not possibly have

pulled its punches at trial (and there is no evidence it did).

The next occasion for addressing Muckleshoot U&A came in Subproceeding 97-1, which is addressed in detail above and dealt with the scope of Muckleshoot's marine U&A as determined in the Boldt Decree. Based on a careful review of the record, the district court ruled that Muckleshoot's marine U&A were limited to Elliott Bay. The district court noted that the Muckleshoot "were primarily an upriver people who may have, from time to time, descended to Elliott Bay" and that "it is inconceivable to the court that [Judge Boldt] would [have] intend[ed] to give Muckleshoot, an upriver people, a vast saltwater U&A." *United States v. Washington*, 19 F. Supp. 3d at 1310. On appeal, the Ninth Circuit reviewed the record before Boldt *de novo* and came to the same conclusion, affirming the district court's conclusion that Judge Boldt had limited Muckleshoot's saltwater U&A to Elliott Bay. *Muckleshoot III*, 235 F.3d at 438. The Circuit agreed that Judge Boldt considered all saltwater and intentionally excluded waters other than Elliott Bay. *Id.* at 435.

C. Muckleshoot Previously Prevailed on a Claim that its U&A Were Specifically Determined in the Boldt Decree.

As we have seen, twenty years ago Muckleshoot pioneered the application of *Muckleshoot I* to argue that its own U&A had been specifically determined in

the Boldt Decree. This occurred in Subproceeding 97-1, the subproceeding that limited Muckleshoot marine U&A to Elliott Bay and spawned *Muckleshoot III*. But Subproceeding 97-1 involved two issues: 1) the areal extent of Muckleshoot's marine U&A in the marine areas in which it was then fishing (areas 9, 10, and 11) which proceeded under Paragraph 25(a)(1); and 2) a claim that Muckleshoot did not have U&A in areas beyond areas 9, 10, and 11, with jurisdiction grounded in Paragraph 25(a)(6). *United States v. Washington*, 19 F. Supp. 3d at 1273.

With regard to the second issue, concerning the areas beyond those being fished by Muckleshoot at the time, Muckleshoot moved to dismiss the opposing tribes' claim on the ground that Paragraph 25(a)(6) jurisdiction was not available because Muckleshoot's own U&A had been specifically determined. Muckleshoot claimed that "Judge Boldt 'specifically determined' " Muckleshoot's U&A, RT-SER 80, and that the opposing tribes' claim must be "barred as an improper effort to relitigate a matter finally decided" in the Boldt Decree – its U&A finding. RT-SER 78. In 1998, the district court agreed and granted Muckleshoot's motion to dismiss:

> The Muckleshoot argue that the court cannot make a supplemental finding under [Paragraph 25(a)(6)] under [*Muckleshoot I*] to determine their fishing rights in the areas beyond Areas 9, 10 and 11. The court agrees that [*Muckleshoot I*] forecloses this approach. . . .

> Here, as in [*Muckleshoot I*], Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U&A. . . . [H]e did make a specific determination. . . . Issuing a supplemental finding under [Paragraph 25(a)(6)] would 'alter, amend or enlarge upon' Judge Boldt's description, contrary to the Ninth Circuit's holding in [*Muckleshoot I*].

19 F. Supp. 3d at 1275-76. It is this decision upon which the court below based its decision.

Thus, Muckleshoot fought for and won the first district court decision addressing continuing jurisdiction under Paragraph 25(a)(6) after *Muckleshoot I* regarding its own U&A, and today comes before this Court opposing the same result in this case.

Muckleshoot has also previously argued to this Court that its U&A had been specifically determined by the Boldt Decree. Petition for Writ of Certiorari, *Muckleshoot Indian Tribe v. Puyallup Indian Tribe*, S. Ct. No. 01-142001, 2001 WL 34115823 (July 3, 2001). Muckleshoot argued that its U&A finding "was an essential part of the [Boldt Decree] that was actually litigated and decided," *Id.* at *19, and that "the district court's intention that its decision [on Muckleshoot U&A] . . . be final, and not a tentative or interlocutory finding, subject to future revision, could not be clearer." *Id.* at *20.

Muckleshoot got it right in its approach to Paragraph 25(a)(6) twenty years ago. It pioneered in the district court and contributed to the law of the case an

approach that has been followed ever since, and obtained a victory over other tribes on that basis. Yet Muckleshoot now comes before this Court with new claims totally at odds with its previous victory, crying manifest injustice in what Muckleshoot itself wrought. Allowing Muckleshoot to succeed in its current effort would not correct a "manifest injustice," it would visit one upon the Opposing Tribes and their established treaty fisheries.

D. The Doctrines of Finality and Repose Require Denial of the Petition.

There is no manifest injustice in Muckleshoot being bound by the decision it sought and obtained in Subproceeding 97-1. Justice in this situation is in the interest in finality and repose that favor the Opposing Tribes. The Court should be aware of these countervailing interests that militate against Muckleshoot.

In the absence of Paragraph 25(a)(6), U&A findings determined by trial would be final and preclusive of further litigation, save only for the extraordinary and limited relief available under Fed. R. Civ. P. 60(b). Muckleshoot's proffered interpretation of Paragraph 25(a)(6) renders finality inapplicable to claims for expanded U&A in all circumstances, since jurisdiction would always be available to expand a U&A area. The phrase "not specifically determined" would be rendered meaningless and superfluous. The decision below and the law of the case that supports it better comport with principles of finality by requiring a particularized

showing that a specific U&A finding was "not specifically determined" before proceeding under Paragraph 25(a)(6), thus avoiding relitigation of a matter that has been tried, decided, and reduced to a final judgment, or inconsistent judgments if issues are relitigated. Narrowly interpreting this jurisdictional provision to allow for litigation *only* of matters that Judge Boldt did not already decide will help protect against this result.

The immense law of the case in *United States v. Washington* underscores the reliance interests of the parties that are protected under the rubric of finality. Muckleshoot's proffered reading of Paragraph 25(a)(6) raises the specter of inaugurating a new round of U&A cases and the reopening of issues long settled, resurrecting litigation as the case enters its fiftieth year. Finality interests are of heightened importance in this case because there are so many settled matters that the parties have relied upon in sharing and managing fisheries resources and harvests over that half-century.

This Court has recognized the importance of finality and certainty principles in long-standing decrees involving tribes and the sharing of natural resources. *See*, *e.g.*, *Arizona v. California*, 460 U.S. 605, 619-20 (1983) (water rights). This principle was applied to treaty fishing rights in *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) (en banc), which noted that *United States v. Washington* establishes a "complex regime" that "certainly cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based."

This "complex regime" developed over five decades, during which the courts and the parties to *United States v. Washington* wove a complex tapestry of treaty fishing rights and management of Washington's fisheries by the State and the Tribes. The warp and weft of this tapestry is composed of litigation involving 92 subproceedings, two volumes and more of reported district court decisions, 41 Ninth Circuit opinions, and two opinions of this Court. The weave also includes hundreds of agreements, many entered as consent decrees, on all manner of fisheries-related topics; annual state-tribal management agreements covering each of the types of fishing in each management area; state and tribal regulations governing their respective fishers; unwritten practices and modes of interaction among the parties; and enormous reliance of both tribal and state fishers on a livelihood and subsistence from the fishery. To begin unraveling this tapestry now by allowing parties to relitigate issues long ago decided would be inconsistent with the heightened concerns regarding finality and repose in a case as long-standing, complex, and fact-specific as this one.

V. This Case Does Not Include a Question of Exceptional Importance.

The Ninth Circuit decision below does not give rise to any issue of exceptional importance, nor has Muckleshoot provided "compelling reasons" that this Court should grant review. Supreme Court Rule 10. The case involves a single unique clause in a unique decree in a unique case. It is a decision that follows the law of the

case and applies that law to the particular circumstances and history regarding a single tribe's particular U&A. The rule of law that the courts below applied to the facts of this case – that Muckleshoot's U&A were specifically determined by Judge Boldt – was one that Muckleshoot itself obtained twenty years ago. The result reached in this case is correct, just, and applies in no other case and to no other tribe.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 18th day of September, 2020.

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