The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	No. 70-9213 Subproceeding No. 17-3 **SWINOMISH INDIAN TRIBAL COMMUNITY'S MOTION TO DISMISS** NOTE ON MOTION CALENDAR: November 30, 2018

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

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SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

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SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

I. INTRODUCTION

The Stillaguamish Tribe ("Stillaguamish") seeks to expand its usual and accustomed fishing places ("U&A") to include a broad marine area in Puget Sound. But Judge Boldt specifically determined Stillaguamish's U&A over forty years ago and concluded that the marine waters at issue are not within Stillaguamish's U&A. Litigation must come to an end, and Paragraph 25(a)(6) of the Permanent Injunction was not intended to allow tribes to perpetually relitigate U&A claims the Court has already disposed of in an attempt to expand their fisheries. Stillaguamish cannot establish subject matter jurisdiction to support the U&A determination it requests here, and the Swinomish Indian Tribal Community ("Swinomish") therefore requests that this Court dismiss this subproceeding with prejudice pursuant to Fed. R. Civ. P. 12(b)(1).

Final Decision #1 included a clear and unambiguous finding that Stillaguamish's U&A was located in the river system that bears the tribe's name. The Stillaguamish U&A finding was consistent with the report and testimony of Dr. Barbara Lane, as well as other evidence presented in the original trial in this case. The record in Final Decision #1 shows that each of the issues raised now by Stillaguamish was considered by Judge Boldt. There was substantial evidence in the record as to whether the Stillaguamish were a river people or a saltwater people; whether the Stillaguamish had villages fronting saltwater; whether the Stillaguamish tribe as a whole or Stillaguamish people individually traveled away from their river system villages for seasonal fishing or other purposes; about Stillaguamish movement and conduct during the Indian Wars; and the fact and import of treaty-times intermarriage among tribes, including the Stillaguamish. Evidence on all of these issues was before Judge Boldt when he determined that Stillaguamish U&A was limited to the Stillaguamish river system. Had he thought the evidence sufficient to establish Stillaguamish U&A in marine waters, he would have included such waters in his determination of Stillaguamish U&A. But he declined to do so. Put otherwise: Judge Boldt already specifically determined that Stillaguamish did *not* establish U&A in the marine waters that are the subject of this Request for Determination.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

Because Judge Boldt already considered and decided the issues raised by Stillaguamish, Stillaguamish therefore cannot establish subject matter jurisdiction for its renewed marine U&A claim. Swinomish respectfully submits that this subproceeding should be dismissed.

II. STATEMENT OF FACTS

A. Final Decision #1 and Its Stillaguamish U&A Finding.

Stillaguamish was one of the intervenor plaintiff tribes seeking enforcement of its treaty fishing rights in the original *United States v. Washington* trial. *See United States v. Washington*, 384 F. Supp. 312, 327 n.2 (W.D. Wash. 1974) ("Final Decision #1"). Pretrial preparations for the original trial lasted more than three years and included "exhaustive research" in anthropology and other fields of expertise and "extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case." *Id.* The Final Pretrial Order contained, among other things, "Admitted Facts" that were "admitted by all parties as true" and "admitted into evidence[.]" (Ex. 1 [Dkt. 353] at 12.)[1] Voluminous documentary and testimonial evidence was introduced at the original trial across several weeks. *See* 384 F. Supp. at 348. The Court made U&A findings for each of the plaintiff tribes. *Id.* at 359-82. The Court acknowledged that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations." *Id.* at 353 [FF 13]. Nevertheless, it made findings based on controlling law, briefs and oral argument of counsel, a preponderance of evidence found credible and inferences reasonably drawn. *Id.* at 348.

Regarding pretreaty and treaty-times fishing among Northwest Indians, the Court found, among other things, that individuals and families moved about in non-winter seasons:

> It was…necessary for the people to be on hand when [food resources, including wild fish] were ready for harvest. These seasonal movements were reflected in native social organization. In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter

[1] All citations in the form "Ex. __" refer to exhibits attached to the Declaration of Duffy Graham, submitted herewith. Citations in the form "Dkt. __" refer to the main docket for United States v. Washington, No. 70-9213; citations to "Subpr. 17-3 Dkt. __" refer to the docket for this subproceeding 17-3.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

> villages and lived more or less on stored food….Throughout the rest of the year individual families dispersed in various directions to join families from other villages in fishing, clam digging, hunting, gathering roots and berries, and agricultural pursuits. People moved about to resource areas where they had use patterns based on kinship or marriage. Families did not necessarily follow the same pattern of seasonal movements every year.

Id. at 350-51 [Finding of Fact ("FF") 4].

Regarding marine waters U&A, the Court found:

> Although not all tribes fished to a considerable extent in marine areas, the Lummi reef net sites in Northern Puget Sound, the Makah halibut banks, Hood Canal and Commencement Bay and other bays and estuaries are examples of some Indian usual and accustomed fishing grounds and stations in marine waters. Marine waters were also used as thoroughfares for travel by Indians who trolled en route. Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians.

*Id.*at 353 [FF 14]. For many Plaintiff tribes, the Court determined that their respective U&A was located both in freshwater locations and in saltwater locations. (*See* below at 8-9.)

The Court determined that the Stillaguamish U&A was located on the Stillaguamish River. It did not include marine waters in its Stillaguamish U&A finding:

> During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe.

Id. at 379 [FF 146].

B. Interim Events Relating to Stillaguamish U&A Claims.

1. Stillaguamish Fishing Regulations.

Following the issuance of Final Decision #1, the Court, Stillaguamish, and other parties to the case all understood that the Stillaguamish U&A finding was unambiguous and did not include marine waters. But Stillaguamish repeatedly issued fishing regulations authorizing it members to fish in marine waters without first establishing its right to do so, and this Court ordered Stillaguamish to use the Court's established jurisdictional rules and mechanisms.

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Seattle, Washington 98101-2272
(206) 749-0500

In June and in August 1974, Stillaguamish filed Fishing Regulations and Ordinances of the Stillaguamish Tribe that, among other things, "apply to the northern portion of Port Susan, north of a line which runs due west of Kayak Point to Camano Island" ("northern Port Susan"). (Exs. 2 [Dkt. 589]; 3 [Dkt. 716].) In December 1974 and July 1975, Stillaguamish filed amended annual fishing regulations for northern Port Susan. (Exs. 4 [Dkt. 923]; 5 [Dkt. 1178].)

Tulalip objected to Stillaguamish's 1974 and 1975 fishing regulations on several grounds, including that Final Decision #1 prohibited Stillaguamish from fishing in northern Port Susan. (Ex. 6 [Dkt. 1188].) *See also United States v. Washington*, 459 F. Supp. 1020, 1068 (W.D. Wash. 1978) (Order Re Tulalip Tribes' Objection to Stillaguamish Fishing Regulations [Dkt. 1927]).

In November 1975, Stillaguamish filed a Reply to Tulalip's objection in which Stillaguamish asserted the right to fish in marine waters near the mouth of the river and suggested that it might someday seek an expanded marine U&A. (Ex. 7 [Dkt. 1601] at 7.)

In March 1976, the Court issued its Order Re Tulalip Tribes' Objections to Stillaguamish Fishing Regulations. *See* 459 F. Supp. at 1068. The Court reiterated Finding of Fact 146 from Final Decision #1 regarding Stillaguamish's U&A and sustained Tulalip's objection to Stillaguamish fishing in Port Susan.

> Paragraph 25 of the Court's Injunction in Final Decision #1 establishes the mechanism whereby further usual and accustomed fishing grounds may be established and recognized by the Court. The Stillaguamish Tribe has not sought to expand its fishing places to include the northern portion of Port Susan by following the procedures set forth in paragraph 25 of the Injunction. It is only as a result of the Tulalip objections that the Court has been made fully aware that the Stillaguamish Tribe has, apparently unilaterally, expanded its fishing places beyond those areas recognized and determined in Final Decision #1. For all of the foregoing reasons the Court sustains the objections of the Tulalip Tribes of Washington to the Stillaguamish fishing regulations insofar as they authorize tribal fishing activities at grounds and stations beyond those determined and recognized in Final Decision #1.

Id. The Court struck Stillaguamish's 1975 and future regulations purporting to open tribal fisheries at places other than set forth in Final Decision #1 Finding of Fact 146. *Id.* at 1069.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

2. Subproceeding 79-1.

After the March 1976 Order, and over objection, Stillaguamish continued to issue fishing regulations that applied to not only the Stillaguamish River but also (1) northern Port Susan and (2) lower Skagit Bay, though Stillaguamish stated that it did not intend to fish in those areas until they were determined to be Stillaguamish U&A. (*See* Exs. 8 [Dkt. 2121]; 9 [Dkt. 2185]; 10 [Dkt. 2201]; 11 [Dkt. 2536]; 12 [Dkt. 3027]; 13 [Dkt. 3049]; 14 [Dkt. 6013]; 15 [Dkt. 6215]; 16 [Dkt. 6401].)

Meanwhile, in October 1976, Stillaguamish filed a Request for Determination seeking to expand its U&A beyond the Final Decision #1 determination into Port Susan and Skagit Bay. (Ex. 17 [Dkt. 2584].) In 1979 it filed a Supplemental Memorandum seeking a hearing (Subproceeding 79-1). (*See* Ex. 18 [Dkt. 5815].) Then, as now, Stillaguamish argued that Final Decision #1's acknowledgement that its U&A findings were necessarily imperfect, 384 F. Supp. at 353, 402, meant that Judge Boldt had deliberately tabled a determination of Stillaguamish marine U&A for a later day. (*See* Ex. 18 at 1.) And then, as now, Stillaguamish stated its intention to relitigate issues that Judge Boldt had already considered in making his Stillaguamish U&A determination, including the fact—not disputed in the original trial—that Stillaguamish had villages near Stanwood and at Hat Slough. (*See id.* at 2-3.) Evidence cited in support of the request for hearing included Dr. Lane's report on the Stillaguamish, which was admitted at the original trial (Ex. USA-028; *see* Graham Decl. Ex. 24) and relied on by Judge Boldt. (*See id.*; Ex. 19 [Dkt. 354].)

Stillaguamish elected not to prosecute its claim further, and the Court never determined that Stillaguamish had successfully established the continuing jurisdiction of the Court for its expanded U&A claim. Following a Stipulation and Agreement between Stillaguamish and Tulalip Tribes, dated May 1, 1984 ("Stipulation") and approved and entered by Order of this Court dated May 8, 1985 (Ex. 200 [Dkt. 10042]), this Court dismissed Subproceeding 79-1 without prejudice (Ex. 21 [Dkt. 10646]).

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

3. Subproceeding 89-3.

On May 3, 1993, in subproceeding 89-3, Stillaguamish filed a Statement of Usual and Accustomed Areas and Species Claimed. (Ex. 22 [Dkt. 13102].) It claimed that "any [Stillaguamish U&A in] marine areas established for purposes of this subproceeding will apply to all of the Tribe's adjudicated right of taking fish, for all species." (*Id.* at 2.) And Stillaguamish stated further that it claimed marine areas in Port Susan and lower Skagit Bay. (*Id.*)

Again, though, Stillaguamish elected to forego further pursuit of its marine U&A claim. On December 10, 1993, the Court granted Stillaguamish's motion for voluntary dismissal without prejudice of its claims in subproceeding 89-3 based on lack of funds to prosecute its claim. (Ex. 23 [Dkt. 13907].)

C. Stillaguamish's Current Request for Determination.

The Stillaguamish Request for Determination ("RFD") seeks to expand U&A for the tribe—beyond the Stillaguamish River system and into marine waters. It asks for broad expansion of its U&A into marine waters as follows: "on the eastern side of Whidbey Island and both shores of Camano Island, including Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and to Deception Pass[.]" (RFD [Subpr. 17-3 Dkt. 4] ¶ 1.)

III. ARGUMENT AND AUTHORITY

A. Stillaguamish Must Establish That Its U&A in the Contested Waters Was Not Specifically Determined in Final Decision #1.

Swinomish brings this motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. This motion is a "factual attack" that challenges the truth of the plaintiff's factual allegations. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014). In reviewing a factual attack, the Court may consider materials beyond the complaint. *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 732 n.4 (9th Cir. 2006).

To proceed with this case, Stillaguamish must first establish that its U&A was not specifically determined in Final Decision #1. It cannot do so.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

In this subproceeding, Stillaguamish pleads that the Court has subject matter jurisdiction under paragraph 25(a)(6) of the Permanent Injunction, as modified. (RFD ¶ 3.) Paragraph 25(a)(6) provides this Court with continuing jurisdiction to determine "[t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1." *See* 384 F. Supp. at 419, *modified by* Order Modifying Paragraph 25 of Permanent Injunction (Aug. 11, 1993 [Dkt. 13599]).

Jurisdiction under paragraph 25(a)(6) is contingent on a finding by this Court or an agreement of the parties that the waters in dispute were not specifically determined by Judge Boldt in his U&A findings for Stillaguamish. *United States v. Washington*, No. C70-9213RSM, 2015 WL 4405591, at *6 (W.D. Wash. July 17, 2015); *United States v. Washington*, No. C70-9213RSM, 2017 WL 3726774, at *5 (W.D. Wash. Aug. 30, 2017). The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction. *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1151 (9th Cir. 2017).

Paragraph 25(a)(6) does not confer subject matter jurisdiction here because Stillaguamish cannot make the necessary predicate showing. It must establish that its U&A was not specifically determined by Judge Boldt, including with respect to the marine waters at issue—but it cannot do so. First, FF 146 is unambiguous and restricts Stillaguamish U&A to the river system—a point that the Court, the parties to the case, and Stillaguamish itself have recognized for many decades. Contrary to Stillaguamish's assertions, Judge Boldt did not reserve a determination of Stillaguamish marine waters U&A for another day. Indeed, in Final Decision #1 and subsequent decisions, Judge Boldt found that most of the plaintiff tribes had both freshwater and saltwater U&A—but that Stillaguamish did not. Second, the record before Judge Boldt in determining Stillaguamish's U&A included evidence on each of the issues Stillaguamish seeks to re-argue now, 45 years later, in this subproceeding. That is, Stillaguamish marine U&A already has been adjudicated: having considered substantial evidence on that issue, Judge Boldt determined that marine waters are not within Stillaguamish's U&A.

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(206) 749-0500

B. The Stillaguamish U&A Was Specifically Determined in Final Decision #1.

1. The Final Decision #1 U&A finding for Stillaguamish is not ambiguous.

As noted above, Final Decision #1 set forth the Stillaguamish's U&A at Finding of Fact 146:

> During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe.

384 F. Supp. at 379. FF 146 is clear and unambiguous. It locates Stillaguamish's usual and accustomed fishing places on the Stillaguamish River and only on the Stillaguamish River. It contains no reference to marine waters.

The Stillaguamish U&A is at least as clear the Skokomish U&A, which this Court found to be not ambiguous. *See United States v. Washington*, 2017 WL 3726774, at *6. The Skokomish U&A, Finding of Fact 137, provides as follows: "The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself." 384 F. Supp. at 377 [FF 137].

Citing the acknowledgement in Final Decision #1 that "it would be impossible to compile a complete inventory of any tribe's" U&A, 384 F. Supp. at 353, Stillaguamish argues that Final Decision #1 identified the Stillaguamish River system "as only one of the areas in which the Tribe might be able to fish." (RFD ¶ 9.)

This is incorrect. Nothing in FF 146 or in other findings regarding the Stillaguamish suggests that the Court's U&A finding was incomplete or indeterminate. *See* 384 F. Supp. at 378-79 [FF 144-146]. Final Decision #1 does not provide that Judge Boldt was reserving a determination of any portion of Stillaguamish U&A—whether on marine waters or elsewhere—for a later time.

Further, where Judge Boldt intended to recognize both freshwater systems and marine waters within a tribe's U&A, he did so expressly. For example, the Court determined the Nisqually Tribe's U&A as follows: "The usual and accustomed fishing places of the Nisqually

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Indians included at least the saltwater areas at the mouth of the Nisqually River and the surrounding bay, and freshwater courses of the Nisqually River and its tributaries, McAllister (Medicine or Shenahnam) Creek, Sequalitcu Creek, Chambers Creek and the lakes between Steilacoom and McAllister Creeks." *Id*. at 369 [FF 86]. *See also id.* at 360 [FF 46] (Lummi Tribe U&A), 364 [FF 65] (Makah Tribe U&A), 366-67 [FF 75] (Muckleshoot Tribe U&A), 371 [FF 99] (Puyallup Tribe U&A), 372 [FF 108] (Quileute Tribe U&A), 374 [FF 120] (Quinault Tribe U&A), 377 [FF 137] (Skokomish U&A, quoted above at 8), 378 [FF 141] (Squaxin Island Tribe U&A). By contrast, where Judge Boldt intended to include only freshwater systems within a tribe's U&A, he did so. *See, e.g., id.* at 376 [FF 131] (Sauk-Suiattle Tribe U&A).

In short, a comparison of the Stillaguamish U&A determination by Judge Boldt with other U&A determinations in Final Decision #1 makes clear that, by locating Stillaguamish U&A only on the river, he did not intend to determine only one of Stillaguamish's usual and accustomed places. Rather, he intended to and did determine all of it and concluded that it did not include marine waters.

2. Dr. Lane's Report and Testimony on the Stillaguamish Supports Locating Stillaguamish U&A on the River System.

FF 146 is firmly supported by Dr. Barbara Lane's testimony and written report.[2] Dr. Lane's report on the Stillaguamish situates the tribe's fisheries on the Stillaguamish River and only on that river. (*See* Ex. 24 at 21-24.) She reviewed the historical information and describes the Stillaguamish's various gear and techniques for harvesting salmon from the Stillaguamish River. (*See id.*) She concluded:

> From the evidence available it is obvious that the Stillaguamish Indians were skilled fishermen and canoe handlers who relied on the resources of *their river and its tributary creeks* for their staple food. Salmon and Steelhead were taken with a variety of gear and techniques. As elsewhere throughout western

[2] The Court "thoroughly studied and considered" the anthropological reports and testimony of Dr. Barbara Lane and Dr. Carroll Riley. 384 F. Supp. at 350 [FF2]. It found Dr. Lane's reports "exceptionally well researched," "authoritative," and "reliable" and found her testimony highly credible. *Id.*

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Seattle, Washington 98101-2272
(206) 749-0500

> Washington *anadromous fish were taken in quantity as they ascended the river system* to spawn and were preserved for later use.

(*Id.* at 24 [emphasis added].) Dr. Lane did not include and indeed did not reference marine waters in her description of Stillaguamish fisheries.

As discussed further below, Dr. Lane (and other testimony and evidence admitted at trial) also addressed all the issues raised in the Stillaguamish RFD: the identity and territorial area of the pre-contact Stillaguamish tribe; Indian travel away from home villages and about the Puget Sound region, including on and adjacent to marine waters and especially during non-winter months, for seasonal food harvesting and other reasons; the fact that the Stillaguamish were forced to relocate—very briefly—to the temporary reservation at Holmes Harbor on southern Whidbey Island during the Indian Wars of 1855-56; and intermarriage among tribes around the Puget Sound.

3. The Final Decision #1 record demonstrates that Judge Boldt already considered the issues now raised by Stillaguamish.

The RFD purports to raise a number of new arguments and evidence to support Stillaguamish's claim for expansion of its U&A to include marine locations. (*See* RFD ¶¶ 14-23.) But the bases for marine U&A now raised by Stillaguamish are not new. Extensive evidence on all of these issues was introduced at the original trial and was considered by Judge Boldt before he determined the Stillaguamish U&A in Final Decision #1. After considering all of this evidence, Judge Boldt determined that Stillaguamish U&A is located not on marine waters but solely on the Stillaguamish River system. The fact that he made the clear and unambiguous U&A determination that he made, in the face of the evidence reviewed below, demonstrates that Stillaguamish's marine U&A was specifically determined in Final Decision #1 and cannot be relitigated now.

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Seattle, Washington 98101-2272
(206) 749-0500

a. Identity

Stillaguamish first alleges that the tribe has been "erroneously labeled as a 'river people'" and, according to recent evidence, is "very much a saltwater people." (RFD ¶14.) But the issue of the identity of the Stillaguamish was addressed at the original trial.

Evidence was introduced at the original trial that the Indian language word "Stillaguamish" (variously spelled) means "river people." (*See* Exs. 24 at 8; 25 at 3; 26 at 25; 27 at 3; 28.) Moreover, the issue of whether the Stillaguamish were river or marine-based people was the subject of considerable additional evidence at trial, including, most notably, Dr. Lane's report on the Stillaguamish. (*See generally* Ex. 24.) Dr. Lane stated, among other things, that "[t]he name Stillaguamish (under various spellings) has been used since about 1850 to refer to those Indians who lived along the Stillaguamish River and camped along its tributary creeks." (Ex. 24 at 3.) (*See also* Exs. 27 at 7; 29 at 46.)

Stillaguamish's claim to be a saltwater people is also contrary to facts admitted by Stillaguamish at the original trial. The Admitted Facts in the Final Pretrial Order included the following statement regarding the Stillaguamish Tribe:

> During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians *inhabiting the area embracing the Stillaguamish River and its south fork.* These Indians…took salmon and steelhead by spearing, harpooning, traps and weirs (with dipnets) at various places in those watercourses."

(Ex. 1 at 13 ¶ 3-100 [emphasis added].) Stillaguamish was also among the plaintiffs who submitted this same statement in the post-trial Plaintiffs' Proposed Findings of Fact and Conclusions of Law. (Ex. 30 [Dkt. 386] at 4.)

Dr. Lane placed the Stillaguamish fishery on the river that bore its name. (Ex. 24 at 3.) She stated that "Stillaguamish Indians were skilled fishermen and canoe handlers who relied on the resources of their river and its tributary creeks for their staple food." (*Id.* at 24.)

Esther Ross, the Stillaguamish tribal chairperson at the time of the original trial, who testified on behalf of the tribe, provided lay testimony that corroborated Dr. Lane's expert

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(206) 749-0500

Testimony as to the identity of the tribe and its orientation toward the river. Like Dr. Lane, Ms. Ross placed the tribe's fishery squarely on the river: "[Our fishing] is in our original land, in our *original place* and in our *accustomed places* of our folks. *We never sold that river*." (Ex. 31 at 6 [emphasis added].) In response to the question, "What is the area where Stillaguamish tribal members have in the past exercised their fishing rights?," she answered, "Mostly the north and south fork of the Stillaguamish River and its tributaries." (Ex. 32 at 3; *see also* Ex. 31 at 6; Ex. 33 at 19.) Tribal member Lena Smith provided testimony to the same effect. (*See* Exs. 34; 33 at 2-16.) Similarly, prior to trial, Ms. Ross and two other Stillaguamish tribe members—a tribal councilman and the tribal chairman—each provided sworn statements filed with the Court that referenced Stillaguamish fishing places and none mentioned marine locations. (Ex. 35 [Dkt. 129] at 4-6.)

In short, the identity of the Stillaguamish tribe was the subject of extensive evidence at the original trial, and the Court determined that Stillaguamish were a river people whose usual and accustomed fishing places existed in the river system, not in marine waters. *See* 384 F. Supp. at 378-79 [FF 144, 146].

b. Village locations and tribal territory

Stillaguamish further alleges that it primarily resided not along the river with which it shares a name but on marine waters. Specifically, it alleges that it "had multiple salt water village locations on Port Susan and Skagit Bay at or before treaty times, including: on Skagit Bay; at present day Warm Beach, near Stanwood on the waterway between Port Susan and Skagit Bay; and two at the main mouth of the Stillaguamish River." (RFD ¶ 15.) It alleges that its "most populous villages" were situated "on an extensive salt water marsh which extended from Warm Beach to Lower Skagit Bay." (*Id.*) It also claims "numerous" other seasonal camping sites at saltwater locations and habitual territorial use of Deception Pass, Whidbey Island, and Camano Island. (*Id.* ¶ 17.) It alleges that, based on such village locations and territorial use, it had access to and engaged in clamming and fishing in Saratoga Passage [between Whidbey and Camano Islands], Port Susan, and lower Skagit Bay." (*Id.*)

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But substantial evidence was introduced at the original trial that directly addressed Stillaguamish's primary residential locations and its seasonal territory, as well as its access to and use of marine waters.

Dr. Lane's report and testimony on the Stillaguamish placed the tribe at treaty times on the Stillaguamish River, relying, in part, on first-hand accounts of pioneer settlers Samuel Hancock and George O. Wilson.[3] Hancock traveled the Stillaguamish River twice in early 1850—he encountered a village of 300 people twenty miles upriver, likely near the place where the river split into its north and south forks. (Ex. 24 at 3-4.) He also observed a single Indian house five miles from the mouth of the river and a temporary camp of mat houses fifteen miles or so upriver, separate from the main village. (Ex. 24 at 4.) Hancock returned yet again in February 1851 and traveled the river with Wilson. Wilson's diary recorded an Indian house three miles from the mouth of the river, a village five miles from the mouth, a large village of 200 people (which Dr. Lane surmised was the same large village near where the river bifurcates), and an Indian house with one family near a falls and coal seam. (Ex. 24 at 5.)

Dr. Lane stated that the Stillaguamish remained on its ancestral territory along the river "relatively undisturbed in the occupancy and use of [its] traditional living sites and camps," even after white settlers began to settle near the mouth of the river in the 1870s. (Ex. 24 at 13.) As a result, she found the testimony of Stillaguamish tribal member James Dorsey from a 1926 United States Court of Claims proceeding highly relevant on the issue of Stillaguamish locations: "Mr. Dorsey was in a position to participate in and obtain first hand knowledge of Stillaguamish site use until about age 20." (Ex. 24 at 13-17.) Among other things, "Dorsey's affidavit provides information on Stillaguamish settlement on the north fork of the river not available in the earlier reports of Hancock and Wilson." (Ex. 24 at 14.)

[3] At the original trial, the Stillaguamish admitted that Wilson and Hancock's accounts regarding "the pretreaty Indians inhabiting the area embracing the Stillaguamish River and its south fork" were "reliable information." (Ex. 1 at 12, 13 ¶ 3-99.)

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Dorsey corroborated the upriver identity of the Stillaguamish. He also referenced one large house, one small house, and several cabins at Warm Beach (Ex. 24 at 27) and two potlach houses on Hat Slough four miles south of Stanwood (*see id.* at 28).

Dr. Lane concluded: "On the basis of available evidence it would appear that the Stillaguamish Indians in 1855 lived along both the north and south branches as well as the lower part of the Stillaguamish River." (Ex. 24 at 17/15.)

As the RFD notes, Esther Ross also testified that "[her] territory went over halfway to Camano Island, on down to [Utsaladdy]" and went clam digging in that area. (Ex. 33 at 22; *see* RFD ¶ 17.) And there was evidence at the original trial that Indians who left their tribe's permanent villages for seasonal food or travel typically moved about not as tribes but as individuals or in family units. (*See* discussion below at 17 & 18-19.)

Also in evidence at the original trial were the Findings of Fact from the 1965 Indian Claims Commission ("ICC") proceedings regarding the Stillaguamish. (Ex. 26.) The ICC Stillaguamish Findings reviewed in detail the extensive evidence introduced in that proceeding regarding the specific location of Stillaguamish villages and the larger territory exploited by the tribe. That evidence included treaty-times historical materials by Dr. George Gibbs, Governor Isaac Stevens, and others; testimony by Stillaguamish tribal members John Silva and Esther Allen; and testimony by two anthropology experts, Dr. Carroll Riley (who also testified in the original *United States v. Washington* trial) and Sally Snyder.

The ICC Findings again confirmed the primary residence of the Stillaguamish along the river system. It also acknowledged the Stillaguamish's non-exclusive presence—along with several other tribes—in the coastal area near Warm Beach and Hat Slough. Among other things, the 32-page ICC Stillaguamish Findings reviewed evidence addressing:

- specific locations of multiple aboriginal Stillaguamish villages, including in and around the Stillaguamish River watershed, along the river and its forks, at its headwaters, and at Warm Beach and Hat Slough;
- whether the Stillaguamish were "river" Indians and/or "headwater" Indians;

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- the identity and location of immediately neighboring tribes, and the distinction between the Stillaguamish, the Kikiallus tribe, and the Quadsak group;

- the joint use and "free use" among multiple tribes of the coast from Warm Beach up to the Skagit River, including the mouth of the Stillaguamish River, northern Camano Island, and the vicinity, which included clamming and other food gathering activities.

(*See id.* *See also* Exs. 25 at 4-6, 8, 10-14; 36 at 41; 37 at 3; 27 at 3; 29 at 25, 46; 24 at 3.)

Finally, there was substantial evidence at the original trial to support the premise of Stillaguamish's argument now that access or close proximity to food resources likely meant use of those resources. (*See, e.g.*, Exs. 38 at 7; 26 at 13; 29 at 9-10, 15-16, 24, 26; *see also* discussion re: travel and intermarriage, below at 16-19.) This evidence was relevant to the issues at the original trial.

In sum, evidence at trial made the Court aware that "[p]eople living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish" (Ex. 29 at 25), and there was evidence at the original trial regarding Stillaguamish village locations, territorial reach, and access to saltwater fisheries. Nevertheless, the Court restricted Stillaguamish U&A to the river system.

c. Temporary reservations

Stillaguamish alleges that its relocation with other tribes to internment camps during the Indian War of 1855-56 supports its claim to marine U&A. Specifically, it alleges that it was relocated to not one but two camps on Whidbey Island: one to the south at Holmes Harbor and one to the north at Penn Cove; that the government relocated Stillaguamish to those two camps because the tribe was "already familiar" with the territory; and that while there the tribe "maintained [its] subsistence fishing practices" in Port Susan, Skagit Bay, and Camano Island waters and also fished in Whidbey Island and Deception Pass waters. (RFD ¶ 18.)

Evidence relating to this grim episode and Stillaguamish's brief relocation was introduced at the original trial. Dr. Lane testified that Puget Sound area tribes were relocated to such "temporary reservations" under threat of violence. (Ex. 39 at 2-3.) She also explained,

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specifically and in detail, Stillaguamish's unique internment story. When the camps opened in 1855, Stillaguamish was overlooked by the Indian agents and so remained at home upriver. In May 1856, the tribe was finally called in to the southern Whidbey camp at Holmes Harbor. But within a few weeks of arriving at Holmes Harbor all the Stillaguamish families left—"bolted" in the words of the camp supervisor—and returned to their traditional upriver grounds. (Ex. 24 at 10-12; *see also* Ex. 40 at 3.)

In sum, the internment camps and the forced two-year relocation of Puget Sound tribes during the Indian War, as well as the facts of Stillaguamish families' extremely brief relocation to Holmes Harbor, was before the Court when it determined Stillaguamish's U&A.

d. Travel

Stillaguamish cites its travels about the Puget Sound at and before treaty times, facilitated by use of canoes and to such destinations as Whidbey Island, Fort Nisqually, Bellingham, Steilacoom, and Victoria, as support for its claim to marine U&A. (RFD at ¶¶ 19, 21.) The claim is that "Stillaguamish, like other tribes, would have fished along the way." (*Id.* ¶ 19.)

But this Court has repeatedly held that evidence of customary, regular, and frequent fishing activity in a particular location is required to establish U&A. *See, e.g.*, 384 F. Supp. at 332, 356; *United States v. Washington*, 2013 WL 3897783 (W.D. Wash. July 29, 2013), *aff'd*, *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015); *United States v. Washington*, 2007 WL 30869 (W.D. Wash. Jan. 4, 2007), *aff'd Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010).

More importantly for present purposes, this Court and the Ninth Circuit have repeatedly held that trolling incident to travel does not establish U&A along the travel route absent other evidence of fishing activity. Final Decision #1 stated that "occasional and incidental trolling was not considered to make the marine waters traveled thereon [U&A] of transiting Indians." 384 F. Supp. at 353; *see also*, *e.g.*, *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) ("[o]pen marine waters that were not transited or resorted to by a tribe on a

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regular and frequent basis in which fishing was one of the purposes of such use are not [U&A]"); *United States v. Lummi Nation*, 876 F.3d 1004, 1010 (9th Cir. 2017).

Further, the issue of Stillaguamish treaty-times travel was already considered at the original trial and did not result in marine water U&A for Stillaguamish, the "river people." Dr. Lane confirmed the point made by Stillaguamish in its RFD: "The deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling through such waters." (Ex. 29 at 26.) She likewise described the Straits and the Sound as "traditional highways used in common by all Indians of the region" and marine waters as "thoroughfares" on which Indians "traveled by canoe…and frequently fished along the way." (Exs. 42 at 9; 41 at 4.) Dr. Lane also stated that "in general there were not privately held fishing locations in marine areas[.]" (Ex. 42 at 10.) She noted exceptions, such as Makah halibut banks, but repeated that "the deeper waters were simply highways." (*Id.* at 11.) She elaborated: "For example, anybody coming from the Sound and going by canoe over to Neah Bay for [a] business visit or whatever would be free to troll anywhere on the way in the Straits, and get fresh salmon along the way, and this would not be considered an infringement of anybody else's, the Clallams['] or the Makahs['] traditional fishing ground." (*Id.*)

Dr. Lane testified that when Indians left their winter villages for seasonal fishing and other food gathering, they did so in family units (Ex. 43 at 46), not as tribes. Dr. Riley also testified that "[t]here was a great deal of travel" by Indian "bands" and families for fishing and other activities, using dugout canoes. (Ex. 38 at 4-5; *see also* Ex. 36 at 23.)

The RFD quotes Dr. Lane's statement that "Stillaguamish Indians were skilled fisherman and canoe handlers." (RFD ¶ 19.) The statement is from the original trial record before Judge Boldt, but the RFD omits the second half of it. Dr. Lane stated in full that "Stillaguamish Indians were skilled fisherman and canoe handlers *who relied on the resources of their river and its tributary creeks* for their staple food." (Ex. 24 at 24 [emphasis added].)

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In short, evidence establishing that all Puget Sound area Indians, including Stillaguamish families and individuals, traveled about for various reasons on marine waters using canoes and that they incidentally trolled in marine waters while on such travels was in the record considered by Judge Boldt when he determined that Stillaguamish U&A was limited to the river bearing its name.

e. Intermarriage

Stillaguamish also cites intermarriage with neighboring tribes as a basis for its claim to marine U&A. (RFD ¶¶ 17, 21.) Stillaguamish claims that intermarriage engendered travel about the Sound, with attendant fishing, and gave the tribe U&A locations outside the Stillaguamish River watershed. (*See id.*) But these issues were considered and addressed at trial. There was extensive testimony and documentary evidence at trial that intermarriage was commonly practiced among tribes of the Puget Sound region. Further, there was extensive testimony that intermarriage could result in permissive fishing rights for individuals or families, but no evidence that it resulted in new or additional U&A for an entire tribe.

Both Dr. Lane and Dr. Riley testified to the very point that Stillaguamish now makes: that marriage outside the tribe, seasonal food gathering, and general cultural ceremonial practices resulted in "a considerable amount of traveling around." (Exs. 38 at 7; 29 at 15-16.) Dr. Riley testified that kinship ties cut across political boundaries. (Exs. 39 at 6; 44 at 3-9.) He testified that "the ideal of marriage would be outside the village, and some marriages were up and down river systems and some were up and down the Sound, so that people did have contacts outside their village with other villages." (Ex. 44 at 7.) And Dr. Lane specifically noted "considerable" intermarriage among the Stillaguamish, the Upper Skagit, and the Sauk-Suiattle tribes, all upriver tribes living on the Skagit and Stillaguamish river systems. (Ex. 40 at 4.) In short, evidence of intermarriage and associated travel was extensive at the original trial.

Further, there was testimony that intermarriage resulted in permissive fishing rights for individuals and families, not expanded tribal U&A. Dr. Lane stated that after the winter season

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"individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, harvesting camas, berry picking, and other economic pursuits. People moved about to resource areas where they had use rights based on kinship or marriage." (Ex. 29 at 15-16; *see also* Ex. 1 at ¶ 3-32.) Likewise, Dr. Riley testified that movement to areas outside a tribe's territory usually occurred via family units: "The right to use fishing areas of other villages probably necessitated asking permission but, because families were linked by kinship and friendship ties, and because of the pattern of cultural generosity, this would seldom be refused." (Ex. 36 at 40-41.) A witness for the Yakima tribe, for example, testified that the result of an intertribal marriage was that the man who married into a tribe could fish in that tribe's traditional fisheries if he received permission or consent of that tribe. (Exs. 45 at 3-4; 46 at 4-5.) In other words, this was permission, not U&A, and it was on an individual or at most family level, not tribal.

In short, the issue of intermarriage, like the other issues now raised by Stillaguamish, is not new. Evidence addressing intermarriage and its implications for fishing places was before Judge Boldt when he determined Stillaguamish U&A.

f. Miscellaneous items

Stillaguamish also alleges that "[o]ther tribes have…acknowledged that Stillaguamish fished marine waters at and before treaty times." (RFD ¶ 22.) Stillaguamish cites only one such other tribe—Tulalip. And the quotation from an affidavit cited in the RFD—that upon a certain condition Tulalip would "share" with Stillaguamish anadromous fish resources at Tulalip's U&A places in Puget Sound—does not acknowledge or tend to establish that Stillaguamish fished marine waters at treaty times. (*See id.*)

Finally, Stillaguamish's reliance on "cultural affiliation" with artifacts located at various sites pursuant to the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. (the "Act"), is misplaced. (*See* RFD ¶ 23.) The Act established a regime to restore Native American ownership of human remains and objects possessed or controlled by

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federal agencies or museums. *See* 25 U.S.C. §§ 3002-09. The Act has nothing to do with western Washington tribal fishing rights under the Treaty of Point Elliott.

Further, under the Act, "cultural affiliation" refers to descendant networks, that is, "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C. § 3001(2). But descendant and familial networks are not tribal networks. As noted above, marriage outside the tribe was commonly practiced among western Washington native groups. Cultural affiliation with objects pursuant to the Act does not imply, and cannot establish, treaty-times U&A under Paragraph 25(a)(6).

C. In Post-Final Decision #1 Proceedings, Stillaguamish Has Not Satisfied Jurisdictional Requirements for an Expanded U&A Hearing.

Nothing that has occurred since Final Decision #1 has altered or limited the Stillaguamish U&A determination by Judge Boldt. FF 146 was and still is a complete and specific determination of Stillaguamish U&A, including with respect to marine waters. And in proceedings in the interim period between Final Decision #1 and the present RFD, Stillaguamish has never established subject matter jurisdiction for expansion of its U&A.

After Final Decision #1, Stillaguamish unilaterally began to issue regulations in an attempt to expand its fishing places into marine waters—particularly into northern Port Susan. *See United States v. Washington*, 459 F. Supp. at 1068. (*See also* above at 3-5 and exhibits cited therein.) In March 1976, upon objection by Tulalip, the Court struck Stillaguamish's regulations purporting to open Stillaguamish fisheries at places beyond those recognized in Final Decision #1. *See* 459 F. Supp. at 1068-69. The Court found that Stillaguamish "ha[d] not sought to expand its fishing places to include the northern portion of Port Susan by following the procedures set forth in paragraph 25 of the Injunction." *Id.* at 1068.

The March 1976 Order also provided that Stillaguamish "may at any future time apply to this Court for hearing, or reference to the Master, regarding expanded usual and accustomed fishing places *so long as such application is in accordance with paragraph 25 of the Court's*

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Injunction." *Id.* (emphasis added). This provision was not a determination that Stillaguamish had satisfied jurisdictional prerequisites for a hearing to seek expansion of its U&A or an open invitation for Stillaguamish to assert claims of expanded U&A at any time in the future it chose regardless of jurisdictional requirements under Paragraph 25. It was an admonition by the Court that Stillaguamish could not act unilaterally and was bound by and required to comply with Paragraph 25. Importantly, this provision does not excuse the requirement that Stillaguamish establish subject matter jurisdiction today.

Rather, this provision of the March 1976 Order means that Stillaguamish cannot obtain a hearing for expansion of its U&A unless it satisfies the requirements of Paragraph 25 of the Injunction, which identifies the bases of this Court's continuing jurisdiction in this case. As noted above, the burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Bishop Paiute Tribe*, 863 F.3d at 1151. Because Stillaguamish has invoked paragraph 25(a)(6), it must first establish that Judge Boldt did not specifically determine Stillaguamish U&A regarding the waters at issue in the RFD. *E.g., United States v. Washington*, 2017 WL 3726774, at *5. As explained above, Stillaguamish cannot do so.

Following the March 1976 Order, in 1976 and 1977, Stillaguamish resumed issuing fishing regulations applicable to marine waters, reaching not only northern Port Susan but also lower Skagit Bay. (*See* above at 5.) In response to Tulalip objections, Stillaguamish stated it did not intend to fish in such waters until it obtained U&A for those areas. (*See id.*) In 1979, Stillaguamish filed fishing regulations applicable to northern Port Susan and lower Skagit Bay "[s]ubject to court approval." (*See* Exs. 15 [Dkt. 6013]; 16 [Dkt. 6215]; 17 [Dkt. 6401].)

In neither subproceeding 79-1 nor subproceeding 89-3, both of which resulted in dismissal without prejudice of Stillaguamish's claims for expanded U&A in marine waters (*see* above at 5-6), nor at any other time, did Stillaguamish establish that Judge Boldt had not specifically determined the tribe's U&A. Neither subproceeding 79-1 or 89-3 eliminates the burden on Stillaguamish to satisfy the jurisdictional requirements to obtain a hearing to seek expanded U&A pursuant to paragraph 25(a)(6).

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(206) 749-0500

D. This Subproceeding Should Be Dismissed in the Interest of Finality.

The need for finality also compels dismissal of the RFD.

> [P]articipants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments. Similar considerations of finality loom especially large in this case, in which a detailed regime for regulating and dividing fishing rights has been created in reliance of the framework of [Final Decision #1]….[S]uch a complex regime…certainly cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based.

United States v. Washington, 593 F.3d 790, 800 (9th Cir. 2010) (citations and quotation marks omitted) (subproceeding 01-2; affirming denial of Fed. R. Civ. P. 60(b)(6) motion). Although not couched as such, in reality, what Stillaguamish seeks here is relief from the clear, unambiguous, and decades-old judgment of this Court. In substance, Stillaguamish either is asserting that it now should be allowed to come forward with newly-discovered evidence that could not previously have been discovered, or that some other reason justifies relief. *Cf.* Fed. R. Civ. P. 60(b)(2) & (6). Swinomish has demonstrated in detail that there is no new evidence. And, regardless, Stillaguamish has not sought this relief within a year after the entry of the judgment, or within a reasonable time. *See* Fed. R. Civ. P. 60(c)(1).

Finality considerations are especially relevant here, given Stillaguamish has known about its claim for expanded U&A into marine waters for forty-three years. Final Decision #1, including the Permanent Injunction, was entered in the spring of 1974. *See* 384 F. Supp. 312. Only a few months later, in the summer of 1974, Stillaguamish first filed fishing regulations attempting to expand its U&A into marine waters (specifically, northern Port Susan). (*See* Exs. 2 [Dkt. 589]; 3 [Dkt. 716].) In March 1976, this Court struck Stillaguamish fishing regulations applicable to waters beyond the U&A identified in FF 146 and ordered Stillaguamish to comply with Paragraph 25 in the event it wanted to apply for expanded U&A. 459 F. Supp. 1020, 1068. Stillaguamish first filed fishing regulations applicable to lower Skagit Bay in spring 1976. (Ex. 9 [Dkt. 2121].) And nearly 40 years ago Stillaguamish first raised the same arguments it now advances in the current RFD. (*See* Ex. 18 at 1-3; *see* above at 5.)

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

In short, Stillaguamish has sat on its claim for far too long to proceed with it now. Stillaguamish's voluntary dismissal from subproceeding 89-3 for lack of funds in 1993 does not create exceptional circumstance that would allow Stillaguamish to delay its prosecution of its expanded U&A claim for another 23 years.

IV. CONCLUSION

For all the reasons discussed above, the Court should dismiss this subproceeding 17-3 with prejudice.

DATED: October 5, 2018.

SAVITT BRUCE & WILLEY LLP

By /s/ David Bruce
David N. Bruce, WSBA #15237
Duffy Graham, WSBA #33103
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
Telephone: 206.749.0500
Email: dbruce@sbwLLP.com
Email: dgraham@sbwLLP.com

SWINOMISH INDIAN TRIBAL COMMUNITY

James M. Jannetta, WSBA #36525
Emily Haley, WSBA #38284
Office of Tribal Attorney
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, Washington 98257
Telephone: 360.466.1134
Facsimile: 360.466.5309
Email: jjannetta@swinomish.nsn.us
Email: ehaley@swinomish.nsn.us

Attorneys for the Swinomish Indian Tribal Community

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 5, 2018 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 5th day of October, 2018 at Seattle, Washington.

Rondi A. Greer

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500