The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,

Respondent(s).

Case No. C70-9213
Subproceeding: 17-03

STILLAGUAMISH TRIBE OF INDIANS' COMBINED RESPONSE TO SWINOMISH INDIAN TRIBAL COMMUNITY'S AND UPPER SKAGIT INDIAN TRIBE'S MOTIONS TO DISMISS

NOTE ON MOTION CALENDAR: NOVEMBER 30, 2018

ORAL ARGUMENT REQUESTED

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

TABLE OF CONTENTS

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

TABLE OF AUTHORITIES

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Statutes

Other Authorities

Rules

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

INTRODUCTION

The Stillaguamish Tribe of Indians ("Stillaguamish") provides this combined response in opposition to Swinomish Indian Tribal Community's Motion to Dismiss (Dkt. # 66, filed Oct. 5, 2018) and Upper Skagit Indian Tribe's Motion to Dismiss (Dkt. # 64, filed Oct. 5, 2018). Stillaguamish responds in opposition to the Tulalip Tribes separately.

Upper Skagit and Swinomish dispute the Court's jurisdiction over Stillaguamish's Request for Determination ("RFD"), arguing that Stillaguamish cannot use Paragraph 25(a)(6) to adjudicate new marine water usual and accustomed fishing areas ("U&A") because Stillaguamish's U&A was allegedly "specifically determined" in Finding of Fact ("FF") #146 of Final Decision #I. In Final Decision #I, the Court determined only some of the Stillaguamish U&A as "the area embracing the Stillaguamish River and its north and south forks, which river system constituted the U&A of the tribe." *United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974). This Court has jurisdiction and should deny the Motions for four reasons. First, in 1978 and again in 1987 and 1993, this Court expressly, and in unqualified terms, promised and ordered that Stillaguamish may "at any future time apply to this Court for a hearing . . . regarding expanded [U&A]". No other tribe has this express permission, and the existence of this Court's ruling by itself provides ample grounds to deny the Motions. Second, Swinomish and Upper Skagit's effort to construe FF #146 as forever adjudicating all of Stillaguamish's U&A ignores the law of the case, which permits tribes to expand their U&A pursuant to the Court's continuing jurisdiction under Paragraph 25(a)(6) which jurisdiction the Court has exercised in over ten cases, including for Upper Skagit and Tulalip. Third, despite Swinomish's effort to mislead the Court, this is not a Paragraph 25(a)(1) proceeding. And, fourth, the evidence before Judge Boldt in 1974 was extremely limited and Stillaguamish should be able to present its substantial new evidence now.

Paragraph 25(a)(6) exists to hear cases like Stillaguamish's RFD. In FF #146, the Court made no reference to or suggestion of its consideration of a marine U&A, nor did the Court rely on evidence tending to show marine fishing. Stillaguamish, like many other tribes that have

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

benefitted from the Court's continuing jurisdiction before it, is entitled to have its claim decided on the merits.

STANDARD OF REVIEW

A. Swinomish's Motion Should Be Construed Under Rule 56

Though Swinomish styles its motion as a "factual" attack on jurisdiction brought under Federal Rule of Civil Procedure 12(b)(1), it is a thinly-veiled effort to secure summary judgment against Stillaguamish.[1] Dkt. #66 at 4. Following its challenge to the RFD on jurisdictional grounds, Swinomish provides a ten-page attack on the factual bases of the merits of Stillaguamish's marine U&A claim under the RFD. *Id.* at 9-19. Swinomish wants to have their cake and eat it too.

Where, as here, the factual jurisdictional issues go beyond jurisdiction to the merits, "the trial court should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional facts is akin to a decision on the merits." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). Fairness and reason therefore demand application of Rule 56, under which the facts are viewed and factual inferences are drawn in favor of the non-moving party, Stillaguamish. *Stanislaus Food Prod. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1088 (9th Cir. 2015). Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If this burden is met, Stillaguamish must then establish a "genuine" factual dispute, which involves "more than ... some metaphysical doubt as to the material facts." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

[1] "In deciding a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003)). The court need not presume the truthfulness of plaintiff's allegations. *Id.*

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

B. Upper Skagit's Motion is a Facial Challenge Under Rule 12(b)(1)

Upper Skagit does not cite to Rule 12 in their motion. Dkt. #64. Given the arguments, the motion should be construed as a facial attack on jurisdiction. With a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inferences in favor of the party opposing dismissal (Stillaguamish). *Id.*

ARGUMENT

Swinomish argues that the Stillaguamish's U&A was specifically determined in 1974 because "[n]othing in FF #146 or in other findings regarding Stillaguamish suggests that the Court's U&A finding was incomplete or indeterminate" and that "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." Dkt. #66 at 8-9. Upper Skagit provides a hyper-technical analysis of a single word to argue that Judge Boldt's use of the term "constituted" to describe Stillaguamish's U&A "clearly indicat[es] that the Court was determining the entire scope of Stillaguamish U&A rather than determining that an area was part of Stillaguamish U&A." Dkt. #64 at 2. According to both tribes, the Court intended for FF #146 to be a final, comprehensive and complete adjudication of Stillaguamish's U&A. As explained below, these arguments simply do not square with the law of the case, which permits later expansion of U&A, nor do they square with the Court's 1978 unequivocal permission for Stillaguamish to file "at any future time" to expand its U&A.

A. The Court Expressly Permitted Stillaguamish to Return to the Court Regarding Expanded U&A "At Any Future Time" Pursuant to Paragraph 25

In 1974 and again in 1976, Stillaguamish filed fishing regulations applying to the northern portion of Port Susan, to which Tulalip objected on the basis that Stillaguamish marine fishing should be limited to subsistence purposes, ***not*** that the Tribe's U&A did not extend to

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

marine waters. Smith Decl., Ex. A. In deciding Tulalip's 1976 challenge, the Court disagreed with Tulalip's assertion that Final Decision #I "prohibit[s] Stillaguamish tribal fishing in the marine waters of the northern portion of Port Susan", finding its argument "without merit", and instead sustained Tulalip's objection on a procedural deficiency—Stillaguamish's failure to follow the Court's order under Paragraph 25. *United States v. Washington*, 459 F. Supp. 1020, 1068 (W.D. Wash. 1978). This Court held that ***"the Stillaguamish Tribe may at any future time apply to this Court for a hearing . . . regarding expanded U&A"*** if it complied with Paragraph 25. *Id.* (emphasis added).

This order preempts the procedural challenges now launched by Swinomish and Upper Skagit. The order is unique among tribes in *United States v. Washington*. The order has never been amended, overruled or vacated. This order, by itself, requires this Court to deny the motions to dismiss and proceed to the promised "hearing" on the merits as the Court has previously held. *Id.* It is a specific promise by the Court to Stillaguamish that it could have its day in court. All Stillaguamish had to do was comply with Paragraph 25, which it did in its RFD by invoking Paragraph 25(a)(6) of the Court's Permanent Injunction to determine "[t]he location of any tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1". *See United States v. Washington*, Subproceeding No. 17-01, 2017 WL 3726774 at *5 (Aug. 30, 2017); *United States v. Washington*, 20 F. Supp. 3d 899, 950 (W.D. Wash. 2008) (noting that Paragraph (a)(6) "sets a fairly low bar"). This Court need look no further than its express, unqualified invitation to deny the motions.

B. The Law of the Case Supports the Court's Exercise of Jurisdiction

1. The Court Has Permitted Later U&A Expansion

"The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Id.* In 1974, Judge Boldt

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

established the law of the case regarding future additional designation of U&A by retaining jurisdiction under Paragraph 25(f) (now Paragraph 26(a)(6)) to enable the Court "to determine . . . the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I". Judge Boldt did so because he knew his U&A determinations were incomplete. As the Court explained:

> Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled ***today***, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes ***in general*** describe ***some*** of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights ***today***.

United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974) (Conclusion of Law #26) (emphasis added), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). In addition to the express language of Paragraph 25(a)(6), the use of the terms "in general", "some" and "today" in Conclusion of Law #26 expressly recognizes both the preliminary nature and limited scope of the Court's designation of U&A in 1974, and the prospect of additional designations at some point in the future. The preliminary nature of the Court's 1974 designation of U&A is bolstered by the Court's finding that "[f]or ***each*** of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and ***some, but by no means all, of their principal U&A***." *Id.* at 333 (emphasis added). In the compilation of many of the major post-trial orders in these decisions, the Court further noted that the additional fishing areas "***in no way limits***" that tribe "or any other party from seeking further determination of other usual and accustomed grounds and stations." *United States v. Washington*, 626 F. Supp. 1405, 1442, 1468 (W.D. Wash. 1985) (emphasis added).

The law of the case was cemented when the Court exercised its continuing jurisdiction over no less than ten tribes' proceedings to expand their U&A set forth in Final Decision #I. *See United States v. Washington*, 626 F. Supp. 1405, 1441-42 (W.D. Wash. 1985) (expanding Nisqually, Puyallup, and Squaxin Island fishing areas); *Id.* at 1467 (Makah); *United States v. Washington*, 873 F. Supp. 1422, 1449-50 (W.D. Wash. 1994), *aff'd in part and rev'd in part*, 157

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

F.3d 630 (9th Cir. 1998) (Upper Skagit); *United States v. Washington*, 626 F. Supp. at 1443 (Lower Elwha); *Id*. at 1530 (Tulalip); *United States v. Washington*, 18 F. Supp. 3d at 1123, 1143 (W.D. Wash. 1987) (Suquamish, although denied on the merits); *United States v. Washington*, 129 F. Supp. 3d 1069, 1072 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017), *aff'd Washington v. United States*, 138 S. Ct. 1832 (2018) (*per curiam*) (affirming decision below by equally divided court) (invoked by Makah as to Quileute and Quinault). These ten prior proceedings belie Upper Skagit's argument that only a "handful" of tribes have sought to expand the scope of the U&A. Dkt. 64 at 3. Upper Skagit's argument is particularly hypocritical considering that Upper Skagit's original U&A was—like Stillaguamish—limited to freshwater under FF #148[2] before it availed itself of the Court's continuing jurisdiction to expand its U&A. Smith Decl., Ex. B at 1 (claiming U&A in catch reporting areas 6A, 7B, 7C, a portion of 8A, 7A and 9). Upper Skagit's opposition to Stillaguamish's RFD highlights the nonsensical positions that tribes now take in order to protect their treaty fishery from competition, but it is neither equitable or legally tenable.

These prior rulings of the Court and tribes' repeated invocation of Paragraph 25(a)(6) following Final Decision #I constitute the law of the case, which enables Stillaguamish to adjudicate its RFD to expand into marine waters in the same manner as many tribes before it.

2. Swinomish, Upper Skagit and Tulalip Previously Argued that the 1974 U&A Determinations Were Not Final and Conclusive

All three of the tribes now opposing Stillaguamish previously recognized that the 1974 findings were not, and could not be, final and determinative of U&A. In the 1994 Joint Tribal Trial Brief Re Usual and Accustomed Fishing Locations signed by Swinomish, Upper Skagit, and Tulalip (among others) the three tribes argued that "[t]his Court has recognized that it would be impossible to list all areas customarily used by tribes for fishing purposes" and that the courts

[2] The Court originally designated Upper Skagit's U&A as river-specific too: "numerous areas along the Skagit River, extending from about Mt. Vernon upstream to Gorge Dam." 384 F. Supp. at 379.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

have "refused to let the lack of historical record limit the scope of tribal fishing." Smith Decl., Ex. C at 9-10.

Three years later, in 1997, Tulalip again correctly characterized the process of determining U&A as "an Ongoing Task". Smith Decl., Ex. D at 2. Tulalip argued that Judge Boldt's U&A determinations in Final Decision #I were not final: "Although it was important to establish geographical locations for the exercise of treaty rights, the history of this case makes it clear that such rights were, by and large, not established with any particular precision at the initial stages"—hence the need for subsequent orders determining "places in addition to the original findings" *Id.*

What the three tribes said about the U&A determinations in Final Decision # I twenty or more years ago remains true today. And, at no time before now did any tribe argue that Stillaguamish would somehow be an exception to this rule.

3. The Court's Express Permission for Stillaguamish to Return "At Any Future Time" and the Dismissals "Without Prejudice" Reject the Movant's "Specifically Determined" Notion

Swinomish and Upper Skagit's argument that Judge Boldt "specifically determined" Stillaguamish's U&A to forever foreclose only Stillaguamish from seeking to later expand its U&A was expressly rejected by this Court in 1978 and again in 1993.

In 1978, the Court would not have expressly permitted Stillaguamish "**at *any* future time [to] apply to this court for hearing or reference to the Master regarding expanded U&A**" had the Court thought that the determination it made four years earlier was final and conclusive of all U&A for Stillaguamish. *United States v. Washington*, 459 F.Supp. at 1068 (emphasis added). Quite the opposite, the Court's subsequent express, unqualified invitation for Stillaguamish to file this case acts as a clear rejection of Swinomish's and Upper Skagit's argument that the 1974 determination was complete and final. The 1978 order is an unmistakable pronouncement that the 1974 U&A was incomplete (*i.e.* not "specifically determined") and could be expanded.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

The same holds true for the 1987 and 1993 dismissals without prejudice of Stillaguamish's efforts to establish shellfishing rights. See Dkt. #67-1 at 216 (dismissal "without prejudice" of Subproceeding 79-1) Based on Stillaguamish's challenging economic circumstances at the time, on December 8, 1993, the Court granted Stillaguamish's motion to voluntarily dismiss its separate effort to establish marine U&A as part of the shellfish case, dismissing its case "***without prejudice***" because the Court specifically found that the Tribe "lack[s] the financial resources to adequately prosecute [its] claims regarding usual and accustomed areas" and rejecting the idea that future re-litigation constituted prejudice. Dkt. #67-1 at 217-223. (emphasis added). Under Rule 41, the dismissals without prejudice enables Stillaguamish to "commence another action for the same cause of action against the same defendants." *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995) (noting that "[s]uch a dismissal leaves the parties as though no action had been brought") (citing *McKenzie v. Davenport–Harris Funeral Home*, 834 F.2d 930, 934–35 (9th Cir.1987); 5 MOORE'S FEDERAL PRACTICE ¶ 41.02[2]).[3] Once again, the Court could have taken the opportunity to construe FF #146 narrowly and forever foreclose Stillaguamish from coming back to the Court. Tellingly, this Court did not do so and, instead, acted in 1987 and 1993 to dismiss Stillaguamish's claim in a way that left the door open for this expansion.

The only reasonable reading of the Court's three later-in-time actions allowing Stillaguamish to file its expansion RFD at any future date is that the Court knew of FF #146 and had determined that FF #146 did "not specifically determine" or "constitute" with finality Stillaguamish's U&A for all time. If Judge Boldt had already specifically, comprehensively, and finally determined the full extent of Stillaguamish fishing rights, it would have been meaningless (and mean-spirited) for the Court to explicitly leave the door open for the Tribe to come back to

[3] Swinomish's argument that Stillaguamish did not establish subject matter jurisdiction in Subproceedings 79-1 or 89-3 and therefore, Stillaguamish must do so now, is a strawman. Dkt. #66 at 2-6 The issue was never adjudicated previously. And, even if it was, the Court's jurisdiction over prior Subproceedings is irrelevant as to whether it has jurisdiction over this Subproceeding now.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

court at any future time. *See, e.g., United States v. LeCoe,* 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts."). The Court has already rebuked Swinomish's and Upper Skagit's cramped arguments.

4. Swinomish's Finality Concerns Are Not Well-Taken

The Court placed no deadline on the 1978 invitation for Stillaguamish to file its RFD. Nevertheless, Swinomish asks this Court to read such a limitation into that order and the 1993 dismissal without prejudice, arguing that "Stillaguamish seeks … relief from the . . . decades-old judgment of this Court" and that "Stillaguamish has sat on its claim for far too long to proceed with it now." Dkt. #66 at 22-23. Not only does Stillaguamish have a good explanation for why it is only able to come to the Court now (*see* Yanity Decl., ¶¶ 4-10 (filed herewith)), Swinomish's Rule 60(b) arguments are inapposite to the law of case.

The Court imposed no deadline in 1978, 1987 or 1993; nor does Paragraph 25 impose such a deadline. This Court need look no further than Judge Boldt's tentativeness in Conclusion of Law #26, the Court's retention of continuing jurisdiction under Paragraph 25(a)(6), its willingness to exercise that jurisdiction in the decades that followed for ten other tribes to expand their U&A determinations, and the Court's express and unqualified invitation to Stillaguamish to return to Court to expand its U&A in 1978 to see that FF # 146 does not constitute the type of "final judgment, order or proceeding" to which Rule 60(b) is intended to apply. The passage of time between Final Decision #I and now is of no matter; after all, Upper Skagit only availed itself of the Court's jurisdiction to expand its U&A ***nineteen years*** after Final Decision #I, and the Makah challenge to Quinault and Quileute's U&A under Paragraph 25(a)(6) was filed ***35 years*** after Final Decision #I. *United States v. Washington*, 129 F. Supp. 3d at 1072. In addition, numerous other subproceedings within *United States v. Washington* were initiated decades after the 1974 order, such as the shellfish proceeding in 1989 (14 years after Final Decision #I) and culverts in 2001 (27 years after Final Decision #I). There has never been a rush to judgment and there should not be one now. Penalizing Stillaguamish for lacking the resources necessary to

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

adjudicate its U&A previously, should not be condoned by the Court. Finality concerns pose no bar to jurisdiction in this case and, despite Swinomish's hopes to the contrary, there is not now, nor has there ever been, an "exceptional circumstance" requirement under Paragraph 25(a)(6).[4]

Paragraph 25(a)(6) is not an endlessly open door; but it is also not a trap door. Swinomish and Upper Skagit's arguments cannot be squared with Judge Boldt's clear and repeated disclaimers that his U&A findings were not comprehensive in 1974, and his creation of what is now Paragraph 25(a)(6) to allow tribes to come back to court with new evidence. It also cannot be squared with the subsequent practice and rulings of the court expressly inviting tribes to make proper application for new fishing areas. As a matter of law, this Court should exercise subject matter jurisdiction and allow Stillaguamish's RFD to move forward to the hearing on the merits that this Court promised to Stillaguamish in 1978.

C. Swinomish Cannot Rewrite Paragraph 25(a)(6) to Bar Tribes from Expanding U&A Designated in Final Decision #1

Swinomish offers the Court two other deeply flawed ways to deny jurisdiction to Stillaguamish: (1) to determining that FF #146 is unambiguous[5] or (2) determining that Judge Boldt intended, through his silence in FF #146, to exclude marine waters from Stillaguamish's U&A because the evidence before him did not support such a fishery. Dkt. # 66 at 7-10. The first basis fails because it conflates the legally distinct requirements for jurisdiction under Paragraph 25(a)(1) and Paragraph 25(a)(6). The second basis fails because the record before

---

[4] Swinomish and Upper Skagit do not invoke laches, at least not by name. The Court has denounced application of laches and certain other equitable defenses in *U.S. v. Washington* proceedings. *See United States v. Washington*, No. 09-01, 2015 WL 12670516, at *6–7 (W.D. Wash. Feb. 18, 2015). Moreover, Swinomish has also failed to show that it has suffered prejudice as a result of the delay as required by laches doctrine. *Jarrow Formulas, Inc., v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002); *see also* Yanity Decl., ¶¶ 4-10 (explaining why there is no prejudice).

[5] Swinomish and Upper Skagit do not claim that Stillaguamish's RFD is barred by the doctrine of issue preclusion. That doctrine cannot apply here because Stillaguamish never fully litigated or obtained judgment on the issue of marine U&A. *See Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), *opinion amended on reh'g sub nom. Kamilche v. United States*, 75 F.3d 1391 (9th Cir. 1996).

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Judge Boldt demonstrates the Court did not have an opportunity to consider, much less decide, whether marine waters were included within its U&A.

1. Swinomish Misleads the Court by Conflating Jurisdiction Under Paragraph 25(a)(1) and (a)(6) to Require Ambiguity

Paragraph 25(a)(1) provides continuing jurisdiction to decide "whether or not the actions . . . [of] any party . . . are in conformity with Final Decision #1 or this injunction." *United States v. Washington*, 384 F. Supp. at 419. This subparagraph, by focusing on "actions" as a trigger, is backward-looking and exists to provide recourse to prevent unlawful State enforcement or to, *e.g.* challenge a tribe's right to issue fishing regulations for certain waters. In contrast, Paragraph 25(a)(6) provides jurisdiction over "the location of any tribe's [U&A] not specifically determined by Final Decision #1". *Id.* This subparagraph is forward-looking, enabling tribes to expand existing U&A determinations with new evidence. Although the distinction between these two subparagraphs should be beyond dispute, Swinomish attempts to conflate them by arguing, no less than eight times in its brief, that FF #146 is "clear and unambiguous" and, on that basis, jurisdiction cannot lie. *E.g.,* Dkt. #66 at 7-9. Framing Stillaguamish's RFD to impose an ambiguity requirement is an unabashed attempt by Swinomish to mislead the Court to incorrectly decide jurisdiction under Paragraph 25(a)(1), which is neither pleaded by Stillaguamish nor implicated by any way by this Subproceeding.

The Ninth Circuit, while never clearly deciding what "specifically determined" means,[6] has set forth rules to analyze Paragraph 25(a) proceedings. First, after some action that may not be in conformity with prior orders takes place, Paragraph 25(a)(1) requires the requesting tribe to show that a specific word or phrase within a U&A designation is ambiguous. *See, e.g.*, *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) (instructing

[6] The Ninth Circuit's in *Muckleshoot I* that "Judge Boldt, however, did 'specifically determine[ ]' the location of Lummi's usual and accustomed fishing grounds, albeit using a description that has turned out to be ambiguous", was dicta, made without any analysis as to what renders a usual and accustomed finding "specifically determined." *Muckleshoot,* 141 F.3d at 1359-60 (dealing with analysis under Paragraph 25(a)(1) of the district court's Permanent Injunction).

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

parties litigating under Paragraph 25(a)(1) to "offer admissible evidence to enable the district court to interpret the decree in specific geographic terms"); *United States v. Washington,* 20 F.Supp. 3d 986, 1037 (W.D. Wash. 2013) (analyzing the meaning of the phrase "adjacent" within Quileute and Quinault U&A in Final Decision #1); *United States v. Washington*, 2018 WL 1933718, at *4 (W.D. Wash. Apr. 24, 2018) (analyzing the meaning of the term "secondarily" within Muckleshoot's U&A). That jurisdiction under Paragraph 25(a)(1) depends on both a hostile act and clarifying an ambiguity regarding specific words or phrases, is further supported by the Ninth Circuit's conclusion that, in contrast, "Subparagraph [25(a)(6)] '***does not*** authorize the court to clarify the meaning of terms used in the decree or resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree." *Muckleshoot*, 141 F.3d at 1359 (emphasis added).

Stillaguamish agrees with Swinomish that the words of FF #146 are unambiguous. However, the ambiguity of FF #146 is of no moment. Paragraph 25(a)(6) neither requires a finding of ambiguity nor the interpretation of any specific words or phrases within a particular finding of fact in Final Decision #I. In fact, it is precisely the absence of words describing a marine fishery from FF #146 that allows this case to proceed. *United States v. Washington*, 459 F. Supp. at 1068 (Judge Boldt reaffirmed that Paragraph 25(a)(6) "establishes the mechanism whereby ***further*** usual and accustomed fishing grounds may be established and recognized by the court.") (emphasis added).

Swinomish's interpretation would unilaterally re-write Paragraph 25(a)(6) of the Permanent Injunction (something that could only be done with all parties to the case participating) so as to foreclose any tribe's ability to expand their U&A beyond that declared in Final Decision #I, contrary to the law of the case. Paragraph 25(a)(6) applies to Stillaguamish's RFD because it never presented evidence of, the Court never considered, and Stillaguamish never litigated to a final decision on the merits, its U&A in marine waters.

2. The Stillaguamish Evidence Relied Upon By Judge Boldt Was Extremely Limited

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Logically, the Court could find that a particular U&A was not "specifically determined" for the purpose of jurisdiction under Paragraph 25(a)(6) in two scenarios: (1) the Court was presented with evidence of and considered a particular fishing area in 1974, but nonetheless refrained from "specifically determin[ing]" whether that area was contained within the tribe's U&A due to lack of sufficient evidence; or (2) the Court was not presented with evidence of a particular fishing area or offered to prove such area and, therefore, could not "specifically determine" that U&A. This case falls squarely under the second scenario. After all, a determination of one fishing area does not exclude the determination of others unless the Court (and the evidence before it) expressly says so. *See, e.g., U.S. v. Washington*, 626 F. Supp at 1486 (expressly excluding river system from usual and accustomed fishing area determination).

Undeterred, Swinomish argues that because the Court considered and determined marine U&A for many other tribes (notably, not Upper Skagit who now has marine fishing rights), the fact that the Court did not designate marine waters for Stillaguamish means that those waters are not encompassed within Stillaguamish U&A. Dkt. 66 at 1 ("There was substantial evidence in the record as to whether the Stillaguamish were a river people or a saltwater people"); Dkt. 64 at 2 ("Stillaguamish was fully heard in 1974 concerning U&A"). But this assumption only holds if considerable evidence of Stillaguamish fishing in marine waters was before the Court in Final Decision #I and if the Court considered and based its decision on that evidence. In fact, the evidence before Judge Boldt in 1974 regarding Stillaguamish was scant and belies Swinomish's post hoc depiction of Judge Boldt's careful consideration of a river versus marine U&A for Stillaguamish.

a. Final Decision #I Centered on Political Identity, Not U&A; Thus, Evidence Relating to U&A Was Severely Limited

In 1970, when the United States, on its own behalf and as trustee for certain Western Washington Tribes, filed this case, it was a civil rights lawsuit against the State of Washington requesting a declaration of the tribes' off-reservation treaty fishing rights and for injunctive relief. *United States v. Washington,* 384 F.Supp. at 328 (alleging civil rights violations under 28

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

U.S.C. 1343(3) and (4)). The threshold question before the Court in Final Decision #I was whether "Stillaguamish" and other tribes "hold a special treaty status to harvest anadromous fish". *Id.* at 328. In other words, the primary question before Judge Boldt was ***whether*** tribes could exercise off-reservation fishing rights free from State harassment, not ***where*** those rights could be exercised. This required the Court to confirm political history and treaty status, as without this threshold determination, designating of individual tribes' U&A would be useless.

The import of the Court's declaration of off-reservation fishing rights explains why 85 pages of Final Decision #I were dedicated to the pre-treaty role of fishing among Northwest Indians, the history of the treaties, the treaty status of each plaintiff tribe, the scope of off-reservation fishing rights, conservation and management authority, and the injunction. By comparison, only 23 pages are dedicated to findings regarding individual tribes' treaty status, and then only a few paragraphs of which are dedicated to U&A for each tribe. *Id*. at 359-82. It is particularly telling that, in the August 1973 pretrial brief filed by Stillaguamish (and Muckleshoot, Squaxin Island, Skokomish, Sauk-Suiattle) there is not a single reference to each of those tribes' sought usual and accustomed fishing places. Smith Decl., Ex. E. The tribes' focus was stopping the State from harassing Indians exercising a treaty right to fish, not carving up waters for specific U&A. *Id.*

It is for this reason that Judge Boldt noted, because of the focus of Final Decision #I on political and treaty status, "[f]or each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and ***some, but by no means all***, of their U&A." *United States v. Washington,* 384 F. Supp. at 333 (emphasis added). That the Court did not even establish U&A for five tribes, as Upper Skagit points out, further supports the secondary role that U&A determinations played in Final Decision #I. Dkt. 64 at 2-3.

In fact, when Tulalip sought to expand its U&A five years after Final Decision # I, it found itself in the same position as Stillaguamish—it had not secured a complete adjudication of its U&A through Final Decision #I, and thus invoked the Court's continuing jurisdiction under what is now Paragraph 25(a)(6). *See United States v. Washington*, 459 F.Supp. at 1058. Tulalip

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

urged then, as Stillaguamish does now, that "[t]he 1975 proceedings did not constitute a complete adjudication of Tulalip Fishing Areas. Indeed, the Tulalip Tribes offered only a relatively small amount of evidence concerning fishing during the 1975 proceedings." Smith Decl., Ex. F at 2. Because "the evidence primarily concerned the identity and political status of the Tulalip Tribes", and "the focus of the proceedings [in Final Decision #1] was not on fishing areas, but on political history", there was a need to return to the Court for further determination of marine U&A. *Id*.

b. Judge Boldt Cited to Only Three Pages of Fishing Evidence for Stillaguamish

Stillaguamish is no different from Tulalip or any of the other original intervenor tribes. The evidence before Judge Boldt regarding the history of Stillaguamish fishing and its U&A was extremely limited.

Contrary to Swinomish's assertion that there was vast evidence before Judge Boldt from which he could "specifically determine" Stillaguamish's U&A, in Final Decision #I – and its submission of entire exhibits with its motion – Judge Boldt cited only ***26 pages of documents*** for all of his findings of fact related to Stillaguamish. *See United States v. Washington*, 384 F.Supp. 378-79 (FF #144-46); Smith Decl., ¶ 3. Reflecting the Court's focus, the evidence to which the Court cited related primarily to Stillaguamish's treaty status (*see* 384 F.Supp. at 378; *see also* Smith Decl., Ex. G; Dkt. # 67-1 at p. 258); its population (Dkt. #67-1 at p. 395); Stillaguamish's Constitution (Smith Decl., Ex. H); and the United States Department of Interior's lists of federally recognized tribes (*see id.,* Exs. I, J). Only three of the 26 pages of documents relate to Stillaguamish fishing. In relevant part, those documents state the following:

- "The principal fisheries of the Stoluckwasmish were located on the Stillaguamish River system from its upper reaches to its mouth." *See* Dkt. # 67-1 at p. 373.
- "Salmon were taken by harpooning, both from canoes and from log jams. Weirs with associated dipnets were used to take salmon and steel had as they ascended the rivers and fish returning downstream were caught in traps." *See* Dkt. # 67-1 at p. 266.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

- "We do not want to fish commercially in that kind of river, but it is still our river." *See* Smith Decl., Ex. K at 3.

Notably, these three pages are silent as to marine waters. Because "none" of these few pages "mentioned marine locations", Swinomish argues, the Court "specifically determined" that the Stillaguamish were exclusively a river people. Dkt. # 66 at 11-14; *see also* Dkt. #64 at 4. However, it would be reversible error to read this scant documentation as foreclosing the possibility of marine water U&A.

To the contrary, the record before Judge Boldt demonstrates that Stillaguamish's U&A was never "specifically determined". As USA-20 (Dr. Lane's Summary Report), cited by the Court, acknowledged, the river was the "principal" (*i.e.*, primary) fishery, not the exclusive fishery of the Stillaguamish at treaty times. *See* Dkt. # 67-1 at p. 373. Dr. Barbara Lane provided poignant testimony in July 1983 explaining why marine water fishing was absent or limited in her reports: "the documentation was better for fishing locations that were located on fresh water . . . than it was for marine-area fisheries, ***and the record, of course, is incomplete of any area***…." Smith Decl., Ex. L at 5 (emphasis added). Tulalip also argued this point to the Court when it sought to expand its fishing areas despite the lack of prior marine area evidence: "[Dr. Lane] noted that the lack of documentation for open marine areas was true for other tribes and that she would not rule out treaty-time fisheries in such areas." *Id.*, Ex. F at 8. Exclusion of marine U&A by implication is thus unsupported by the law and the extensive factual record in this case. *See, e.g., U.S. v. Washington*, 626 F. Supp at 1486 (expressly excluding river system from usual and accustomed fishing area determination).

c. Dr. Lane Later Explained The Limits of Her Report and Expanded Stillaguamish U&A to Marine Waters

Swinomish places heavy reliance on Dr. Lane's discussion of Stillaguamish river fisheries and silence as to marine fisheries in her report. Dkt. #66 at 12-13. However, Dr. Lane later acknowledged both the lack of documentation in her earlier report and Stillaguamish fishing in saltwater on numerous occasions after Final Decision #I.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

As early as December 1974, nine months after Final Decision #I, Dr. Lane told Stillaguamish's lawyer that Stillaguamish fished in the saltwater at treaty times. Connolly Decl., Ex. A (filed herewith). That same month, Dr. Lane wrote to David Getches at NARF, who was also representing Stillaguamish (among others) and stated that "***In my opinion, it would be inconceivable that [Stillaguamish] villages would have been located on the waters of Port Susan and the inhabitants would not have fished those waters."*** Connolly Decl., Ex. B at 1 (emphasis added). Dr. Lane also indicated that, as of December 1974, she was still researching Stillaguamish, noting "I have not yet had time to thoroughly review all of the Stillaguamish files which I acquired on my last trip to Washington, D.C." *Id.* Dr. Lane's acknowledgment of the on-going nature of her work as to Stillaguamish – likely because she authored no less than 11 reports for the United States that were admitted in 1973 – further belies Swinomish's claim that all of Stillaguamish's fisheries were conclusively decided in March 1974.

In testimony before the Court in July 1975 relating to Tulalip, Dr. Lane testified that "areas like Port Susan and areas close to the mouth of the Stillaguamish River. I think they were primarily fished by Kikiellis and Stillaguamish." Smith Decl., Ex. M at 5. Again, in July 1983, Dr. Lane testified before this Court concerning the scope of Tulalip's U&A. Under questing from Tulalip's lawyer, Mr. Morisset, Dr. Lane confirmed the opinions in her December 1974 letters and 1975 testimony, and explained that:

> . . . the Port Susan area was a salt water area used by the people who lived in the village at Hat Slough and the village at Warm Beach, and there is documentation from the earlier part of the this century that says that those were inhabited by Stillaguamish people and were called Stillaguamish villages.

Smith Decl., Ex. L at 8-9. Although not expressed in her 1973 report, the subsequent work by and opinions of Dr. Lane make clear that her opinion as to Stillaguamish fishing evolved over time, and that Judge Boldt did not have before him all of the evidence of Stillaguamish fishing, including the pertinent evidence of marine fishing. None of this evidence was presented to the Court on a motion by Stillaguamish to obtain marine fishing treaty rights. The Court must not turn a blind eye to this evidence now.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

The Court's preliminary determination of U&A for Stillaguamish is a direct reflection of the limited scope of evidence before it; serves as a poignant example of why Judge Boldt acknowledged the limited nature of his U&A determinations; and, explains why he put what became Paragraph 25(a)(6) in place. Judge Boldt did not fail to include waters within a tribe's adjudicated fishing areas out of neglect; rather, it was because Judge Boldt knew the record before him was insufficient to comprehensively determine the areas in the first place. Given that the Court had before it extremely limited evidence of Stillaguamish U&A to begin with, the absence of reference to marine waters is unremarkable. Judge Boldt's preliminary findings as to Stillaguamish are consistent with the evidence before him, but those findings do not support a conclusion that marine fishing did not occur at all. The record shows that Judge Boldt did not have the opportunity to even consider, much less "specifically determine" such areas. The mere fact that a tribe has had some areas determined before has never meant that Paragraph 25(a)(6) is *per se* unavailable to pursue new areas with new evidence.

As a matter of law, Stillaguamish is entitled to its day in Court on the merits of its claim. The movants' effort to short-circuit this Subproceeding should be denied.

D. New Admissible Evidence Supports Stillaguamish's U&A in Marine Waters

Going beyond the jurisdictional question under Paragraph 25, in its quest for summary judgment on the merits of Stillaguamish's claim, Swinomish spends more than 10 pages attacking the facts as pled in the RFD. Dkt #66 at 13-23. In so doing, Swinomish pulls various exhibits that were before the Court submitted by different parties for purposes other than proving Stillaguamish marine fishing to once again argue that there is no evidence that Stillaguamish can present now that was not before Judge Boldt. *See generally*, Dkt. #67-1. This is not true.

1. The Evidence Before the Trial Court Record Was Limited and Not Offer to Show Stillaguamish Marine Fishing; Not so Now

Swinomish's entire presentation ignores a basic principal of trial practice: the purpose for which admissible evidence is being offered matters. At no time does Swinomish ever discuss the party that entered the exhibit or the purpose for which that party offered the exhibit. This

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

omission is intentional, as the evidence they point to was mostly neither offered by Stillaguamish nor admitted for the purpose of proving the extent of Stillaguamish marine fishing. Stillaguamish should be entitled to offer this and/or other evidence for the purpose of proving its fishing now.

During trial, Stillaguamish submitted a mere ten combined exhibits with Muckleshoot, Squaxin Island, Skokomish, Sauk-Suiattle under the reference "MS" of which only two (MS-5 and MS-7) related to Stillaguamish fishing at all. *See* Dkt. # 67-1 at pp. 391-396; 419-424; *see also* Dkt. #67. Other testimony was adduced during trial concerning Stillaguamish, and other parties submitted evidence that referenced Stillaguamish fishing, including the United States in Exhibits USA-20 and USA 28, and the State Department of Game in Exhibits G-17m (Kikiallus ICC decision), and G-17k (Stillaguamish ICC decision). *See generally* Dkt. # 67 (describing trial testimony and attaching documents). Despite Swinomish argument to the contrary, this evidence is far from vast and the fact that it was admitted in the record does not mean is was introduced for the purpose of proving Stillaguamish marine fishing. There was little, if any, evidence offered by Stillaguamish as to the scope of its treaty right. This is clear from Stillaguamish's 1973 response to an interrogatory from the State Department of Fisheries asking "Please identify, giving geographical descriptions, all off reservation usual and accustomed fishing stations guaranteed your tribe by treaty with the United States government", as follows: "***It is impossible to identify specifically all 'stations' at this time***. Indians of our tribe fished at various places throughout the Puget Sound drainage and thus we claim treaty rights to fish at such places today." Smith Decl., Ex. N at 11 (emphasis added).

Importantly, the evidence before the Court in 1973 bears little resemblance to the evidence Stillaguamish is prepared to offer at trial now. As explained by Stillaguamish's cultural anthropologist, Dr. Jill Grady, "[t]here was no 'exhaustive research' in 1974. During the past 40 years, access to Puget Sound historical records has greatly increased. Newly available access to the previously unacknowledged history of Stillaguamish fishing has thus been broadened accordingly." Grady Decl., ¶ 6. Dr. Grady also explains how she "was able to access materials

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

from the National Archives in Washington, D.C., the Smithsonian in Washington, D.C., the Port Townsend Historical Society, the MAC in Spokane, Fort Nisqually, Bancroft Library at the University of California, Berkeley, the University of Washington Archives, and field notes from researchers that were either not considered, were overlooked, or were simply unavailable to Dr. Lane." *Id*., ¶ 8. The research bibliography provided by Dr. Grady says it all – citing 94 different sources for her research concerning Stillaguamish marine fishing. Grady Decl., Ex. C. These sources far exceed what was available to Dr. Lane and that were presented to the Court during trial in 1973.

2. The New Evidence Supports Stillaguamish Marine U&A

The very essence of a proceeding under Paragraph 25(a)(6) is that it is not limited to the evidence that was before Judge Boldt. Stillaguamish can and should be able to present both new evidence not previously available, as well as new analysis of existing documentation to prove the geographic extent its U&A.[7] All of the following evidentiary sources, with which Swinomish attempts to take issue as a matter of fact, support Stillaguamish U&A in the waters claimed in the RFD and, at the very least, present a genuine issue of material fact precluding summary judgment for Swinomish.

a. Identity[8]

[7] To establish U&A, the use by a tribe must have occurred "with regularity rather than having been 'isolated or infrequent.'" *United States v. Muckleshoot Indian Tribe,* 235 F.3d 429, 436 (9th Cir. 2000). However, "[i]n determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." *United States v. Washington*, 459 F. Supp. at 1059; *United States v. Washington*, 730 F.2d 1314, 1317 (9th Cir. 1984) (noting it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations). Therefore, direct evidence or reasonable inferences that may be used to support the claim that a tribe regularly fished certain waters include: frequent travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters (*United States v. Washington*, 841 F.2d 317 (9th Cir. 1988)); village locations on the water body from which fishing activities may be presumed (*United States v. Washington*, 384 F. Supp. at 351, 353); testimony of tribal elders (*United States v. Washington*, 459 F. Supp. at 1058-60); and expert anthropological testimony (*United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984)).

[8] For the Court's convenience, Stillaguamish uses Swinomish's headers.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Swinomish argues the identity of the Stillaguamish as "river people" "was addressed at the original trial." Dkt. #66 at 14-15. However, while the principal fisheries may have been on the River, as evidenced by USA-20, the historical record shows Stillaguamish camping with priests on Whidbey and trading at Nisqually, demonstrating a much broader reach and access to other fisheries. Grady Decl. ¶ 16. Among other things, the record shows that Stillaguamish spoke Chinook Jargon, the trade jargon learned from the Hudson Bay Company in order to communicate with white traders. *Id.* ¶ 18. Stillaguamish had no need to learn Chinook Jargon if they were isolated on their River. *Id*

b. Village Locations and Tribal Territory

Swinomish seeks to discount "alleged" evidence of Stillaguamish saltwater villages, arguing that the Stillaguamish – apparently unique among the tribes in Western Washington – simply stayed on its river. Dkt. #66 at 15-17. But, the facts are to a contrary. As discussed above, Dr. Lane – upon whom Swinomish seeks to rely – admitted in 1974, 1975 and 1983 that Stillaguamish lived on and fished on the saltwater.[9] *See supra*. This evidence was never presented to the Court in connection with a Stillaguamish fishing claim. The Stillaguamish had villages and camps on the salt water: Stillaguamish people were discretely documented in the neighborhood of Holmes Harbor drying clams; Stillaguamish people camped and were observed fishing in the immediate vicinity of Penn Cove; Stillaguamish camped and hunted duck and deer at Greenbank, then canoed to Penn Cove, and Steilacoom; Stillaguamish were the only northeastern river group that resided and accessed resources on both ends of Whidbey and Camano Islands; and Stillaguamish camped on the Tulalip coast and were acknowledged by the Snohomish to be welcome there according to Snyder's Dissertation (1964). Grady Decl., ¶¶ 20-25; *see also* Connolly Decl., Ex. F (Tulalip argued to the Court that recognition of Stillaguamish as a tribe would mean it could fish anywhere Tulalip fished). Stillaguamish village locations,

[9] Swinomish is correct that Dr. Lane's testimony only referenced Stillaguamish's "skilled fishermen and canoe handlers" with regard to the Stillaguamish River system. Dkt. # 66 at 17. But later, in 1983, Dr. Lane expanded her opinion to include salt water fishing in Port Susan.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

camps, cemeteries and shell middens show clear Stillaguamish presence on the salt water on Port Susan, Skagit Bay, and Saratoga Passage from which marine fishing is inferred. *See* Boyer Decl. and Exhibits (filed herewith).

Swinomish also urges that "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 and use of marine waters." Dkt. 66 at 13. Yet Swinomish's two pages of references relate to Stillaguamish's villages on the River, with only a single reference to expert testimony regarding the proximity to food resources and use of those resources by Puget Sound tribes in general. *See* Dkt. # 66 at 14-15. Again, although saltwater facing village sites at the mouth of the Stillaguamish River were briefly mentioned in Indian Claims Commission ("ICC") Findings that became an exhibit of the State at trial, they were not referenced by the Court in FF #146; thus it is impossible to know whether the Court considered the implication of village sites to marine fishing and then decided to exclude marine waters from Stillaguamish's U&A. Proving Stillaguamish marine fishing was certainly not the purpose for which the ICC findings were offered by the State in 1973. In addition, it was not until ***after*** Final Decision #I that the Court recognized the value of evidence from the Indian Claims Commission insofar as it can presume fishing activity took place from coastal areas used by a tribe. *United States v. Washington*, 459 F. Supp. at 1059.

Dr. Grady's evidence also fleshes out the seasonal nature of fishing on the River, suggesting that, like all other Indian people in Washington, Stillaguamish would have taken advantage of marine water resources. Grady Decl., ¶¶ 60, 62-63. This is particularly true given the historic marsh conditions at both mouths of the Stillaguamish River, which would have created superior sites for constructing villages with indigenous fish weirs and traps that were more efficient and manageable in slow moving water. *Id.*, ¶ 33. Marine resources were necessary for year round survival because food supplies in the form of fish and game were only available seasonally. *Id.*, ¶ 13.

c. Temporary Reservations

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Swinomish urges the Court to use evidence and findings applicable to Puget Sound tribes in general against Stillaguamish. For example, Swinomish argues that "Dr. Lane testified that Puget Sound area tribes were relocated to 'temporary reservations' under threat of violence". Dkt. #66 at 15-16. But, the portion of Dr. Lane's testimony regarding internment on Whidbey Island was not presented in the context of U&A and made no connection between Stillaguamish peoples' residence there with the extensive marine fishing that occurred. *See* Dkt #67-1 at 10-12. The way these exhibits were used at the 1973 trial – which was not to prove Stillaguamish marine fishing – matters.

In contrast, Dr. Grady details the marine fishing that took place during internment as a result of the federal government's intentional withholding of food provisions. Grady Decl., ¶¶ 35-46. Using 1850s Whidbey Indian Agents' records which augment those records previously discussed in Dr. Lane's 1973 Report, Dr. Grady notes that numerous federal government officials observed Stillaguamish fishing in the vicinity of the temporary reservations and "traveling back and forth from the River to access resources at Penn Cove, Holmes Harbor, Camano and to visit Bellingham." *Id.,* ¶ 44. Indeed, no treaty time evidentiary record exists to show that the Stillaguamish were excluded, acquiesced, or excepted from traveling around and camping in Whidbey's saltwater vicinities for subsistence while under government oversight. The journals, logs, and correspondence maintained by Indian agents on Whidbey during this period have provided the clearest available evidence of treaty time indigenous social and subsistence practices within which, the Stillaguamish were well included, further debunked the outdated concept that Stillaguamish were only a river people. *Id.,* ¶ 45. There is no indication that these journals and notes were fully considered by Dr. Lane or fully available to her at the time of her report. *Id.,* ¶ 46.

d. Travel

Swinomish repeats the law of the case that occasional trolling on marine waters during transit is insufficient to establish a tribe's U&A on the waters traveled. Dkt. #66 at 19; *U.S. v.*

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Washington, 384 F. Supp. at 353. With this principle, Stillaguamish does not disagree. The reason the travel is meaningful is that it rejects the false narrative that Stillaguamish was isolated on the River. Grady Decl., ¶¶ 46, 49, 53. Among other things, contemporary Stillaguamish people recall that while growing up they went with their grandparents and parents to Whidbey and Camano Islands to dig clams, Port Susan and Deception Pass to fish, and Swinomish for smelt. *Id.*, ¶ 51. "it is clear that in common with the other coastal people, [Stillaguamish] were accustomed to travel widely in their canoes and to harvest such fish as were accessible to them." *United States v. Lummi Tribe,* 841 F.2d 317, 320 (9th Cir. 1988). This is because "Indian fishing practices at treaty times were largely unrestricted in geographic scope." *United States v. Washington,* 384 F. Supp at 353.

e. Intermarriage

As with travel, Swinomish misunderstands the importance of intermarriage. Because of the misunderstandings about Stillaguamish travel and "isolation" on the River, the impact of Stillaguamish intermarriage was not well understood during Final Decision # I. Dkt. #66 at 21. People from the Stillaguamish eight villages on the salt water were heavily intermarried with all their closest neighbors: the Kikiallos, Snohomish, Lower Skagit, Upper Skagit, and Snoqualmie. Grady Decl., ¶ 55. In addition, they married with others around the Sound at a distance and they fished wherever they had relatives. *Id.* Any exceptions to the practice of exogamy at treaty times would have been historically noted. *Id.* No records exist to substantiate that the Stillaguamish were such an exception, further demonstrating their presence on the marine water. *Id.*

f. Miscellaneous Items

Finally, Swinomish argues that Tulalip's post Final Decision # I admission that Stillaguamish fished in marine waters is of no relevance to proving marine fishing. Dkt. #66 at 22. Again, Swinomish misses the mark. The 1976 filing when Tulalip sought to intervene as a defendant in *Stillaguamish Tribe v. Kleppe*, No. 75-1718 (D. D.C.), in which Stillaguamish challenged the United States inaction on its federal recognition petition, is important for two

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

reasons. First, this is yet another example of post-1974 evidence that was not considered by Judge Boldt when he made FF #146. Second, the affidavit of George Williams, then Chairman of the Tulalip Tribes, stating that "recognition by the Federal Government of the Stillaguamish Tribe will result in the sharing by the Tulalip Tribes with it of the anadromous fish resources of Puget Sound . . . . at the usual and accustomed grounds and stations of the Tulalip Tribes" is undeniably admissible as a statement against interest tending to show where Stillaguamish fished in the marine waters. Connolly Decl., Ex. F at p. 4; Fed. R. Evid. 804(b)(3).

The same holds true with respect to evidence of "cultural affiliation" determinations under the Native American Graves Protection and Repatriation Act ("NAGPRA), 25 U.S.C. § 3001 *et seq*. While Swinomish seeks to discount such evidence out of hand (Dkt. #66 at 22-23), the relevance of a NAGPRA determination to proving treaty time fishing has never been presented to this Court and would be matter of first impression at trial (NAGPRA was only enacted in 1990). That NAGPRA has nothing to do with Western Washington fishing is not the point. *Id*. at 23. Under NAGPRA, a cultural affiliation determination between a present day tribe and found human remains or artifacts is based on evidence that includes geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. 43 C.F.R. § 10.14(e). In this regard, where a cultural affiliation determination is made placing Stillaguamish on or near the saltwater, it serves as additional evidence from which reasonable inferences may be made to support the claim Stillaguamish regularly fished in those adjacent marine waters. In this manner, NAGPRA determinations should be treated in a manner similar to ICC findings. *United States v. Washington*, 459 F. Supp. at 1059 (noting the value of evidence from the ICC insofar as it can presume fishing activity took place from coastal areas used by a tribe).

Here, numerous NAGPRA cultural affiliation determinations place Stillaguamish people at various saltwater locations on Camano Island, Whidbey Island, Warm Beach, Cama Beach Holmes Harbor, Useless Bay, and Bowman Bay on Deception Pass. *See, e.g.,* Notice of Intent To Repatriate Cultural Items, 81 Fed. Reg. 63795-76 (Sept. 16, 2016); Notice of Inventory

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Completion, 78 Fed. Reg. 13887-88 (Mar. 1, 2013); Notice of Intent To Repatriate Cultural Item, 78 Fed. Reg. 50109-10 (Aug. 16, 2013). Not only should reasonable inferences be drawn about fishing adjacent to affiliation areas, these determinations confirm the extent of Stillaguamish travel off the river and its intermarriage with neighboring tribes throughout these waters, as the cultural affiliations were often jointly made with Swinomish, Tulalip and Upper Skagit. *Id.*

This Court has never let the lack of historical record limit the scope of tribal fishing. The evidence at trial will show that, from Stillaguamish villages, adjacent salt waters were used by Stillaguamish people for trolling and gill netting from the contiguous coastlines of their River, extending to the full lengths of Camano and Whidbey Islands, including Skagit Bay, Port Susan Bay, Port Gardner Bay, Saratoga Passage, and Deception Pass. Grady Decl. ¶ 60. Not only is much of this evidence new, Stillaguamish would be able to present all the evidence for the first time for the express purpose of establishing Stillaguamish marine fishing. At the very least, the documentation presents a genuine issue of material fact for trial precluding summary judgment for Swinomish on the question of whether Judge Boldt already considered the evidence and rejected Stillaguamish marine fishing.

CONCLUSION

Allowing a tribe to put on new evidence in support of a marine U&A claim, that had not been previously litigated to a final decision on the merits, has always been squarely within the purpose of Paragraph 25(a)(6) of *U.S. v. Washington*. For the foregoing reasons, Stillaguamish respectfully requests that the Court deny Swinomish's and Upper Skagit's motions to dismiss, and proceed to the hearing this Court promised to Stillaguamish in 1978 on the merits of Stillaguamish's treaty-time marine fishing.

DATED this 14th day of November, 2018.

By: */s/ Rob Roy Smith*

Rob Roy Smith, WSBA #33798
Email: rrsmith@kilpatricktownsend.com
Claire Newman, WSBA #46200
Email: cnewman@kilpatricktownsend.com

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Kilpatrick Townsend & Stockton, LLP
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101
Tel: (206) 467-9600; Fax: (206) 623-6793

Scott Mannakee, WSBA # 19454
Email: smannakee@stillaguamish.com
Tribal Attorney
Stillaguamish Tribe of Indians
3322 236th Street NE
Arlington, WA 98223
Tel: (360) 572-3028

Attorneys for the Stillaguamish Tribe of Indians

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I electronically filed the foregoing **STILLAGUAMISH TRIBE OF INDIANS' COMBINED RESPONSE IN OPPOSITION TO SWINOMISH INDIAN TRIBAL COMMUNITY'S AND UPPER SKAGIT INDIAN TRIBE'S MOTIONS TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties registered in the Court's ECF system for the above-captioned case.

DATED this 14th day of November, 2018.

Kilpatrick Townsend & Stockton LLP

By: */s/ Rob Roy Smith*
Rob Roy Smith, WSBA # 33798
rrsmith@kilpatricktownsend.com
Attorneys for the Stillaguamish Tribe of Indians

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600