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 REPLY IN SUPPORT OF MOTION TO DISMISS** NOTE ON MOTION CALENDAR: November 30, 2018

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A. Introduction.

Swinomish's Motion to Dismiss attacks the factual predicate for Stillaguamish's assertion of subject matter jurisdiction. The Motion disputes Stillaguamish's allegation that its claim to U&A in marine waters was not adjudicated in the original *United States v. Washington* trial. It does so by highlighting the clarity of Judge Boldt's determination of Stillaguamish U&A and, through meticulous review of the record before Judge Boldt in Final Decision #1, demonstrating that all of Stillaguamish's purported "new" bases for expanding its U&A into marine waters are, in fact, old. Comparison of the record before Judge Boldt with the issues raised by Stillaguamish in its Request for Determination makes clear that there is nothing new here: the tribe's identity and territorial range; Indian travel and seasonal food harvesting, including on marine waters; temporary relocation during the Indian Wars; intermarriage—on all these issues, extensive evidence was presented at the original trial. But Judge Boldt specifically determined that U&A for Stillaguamish is located on the river where this "river people" made its pre-contact home.

In opposing the Motion, Stillaguamish offers a hodgepodge of arguments that are incorrect and do not satisfy its burden of establishing jurisdiction. Contrary to Stillaguamish's arguments: Rule 12(b)(1) and paragraph 25(a)(6) standards apply on this motion to dismiss; this Court has never previously authorized Stillaguamish to proceed to an expanded U&A hearing without satisfying jurisdictional requirements; and Stillaguamish cannot avail itself of previous U&A expansion proceedings for other tribes.

Stillaguamish also opposes the Motion by presenting its merits case. The Court should disregard it. Such evidence and argument is improper on this Motion, which raises only the question whether Judge Boldt specifically determined Stillaguamish's U&A, and Swinomish would be severely prejudiced if required to respond to the merits case on this Reply.

There is an additional and separate ground for dismissal of this subproceeding. Stillaguamish knew about its marine U&A claim immediately following Final Decision #1 if

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not earlier. In the context of this complex case, Stillaguamish has waited too long to bring the claim. The Court should dismiss the subproceeding as untimely.

B. Motion to Dismiss Standards Apply.

Swinomish moves under Fed. R. Civ. P. 12(b)(1) for dismissal of this subproceeding for lack of subject matter jurisdiction. (See Mtn. at 6:20-27.) The Motion challenges the truth of Stillaguamish's factual allegations in support of jurisdiction. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014). Such a "factual attack" may be made, as Swinomish has done, by introducing evidence outside the pleadings. *Id.* at 1121. The Court may resolve the factual issues regarding jurisdiction, and consideration of the evidence on the jurisdictional issue does not convert the motion to dismiss into a motion for summary judgment. *Id.* at 1122; *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

When a factual attack is raised, (i) there is no presumption of the truthfulness of plaintiff's allegations, and (ii) the plaintiff must support its jurisdictional allegations with competent proof. *Leite*, 749 F.3d at 1121; *Safe Air*, 373 F.3d at 1039. The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met. *Leite*, 749 F.3d at 1121. Reliance on mere allegations and on arguments unsupported by evidence does not satisfy the burden of establishing jurisdiction. *See Bennett v. Kinney*, No. 15-cv-02200-JSW, 2015 WL 6847911, at *3 (N.D. Cal. Nov. 9, 2015). Where a plaintiff fails to meet its burden in opposing a factual challenge under Rule 12(b)(1), the Court should grant the motion to dismiss. *See White v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers*, No. 1:15-CV-01636-LJO-JLT, 2016 WL 54718, at *4 (E.D. Cal. Jan. 5, 2016) (granting motion to dismiss on factual attack under Rule 12(b)(1)); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Stillaguamish argues that "here, the factual jurisdictional issues go beyond jurisdiction to the merits" and that consequently this Court should apply standards applicable on a motion for summary judgment. (Opp. at 2.) Stillaguamish does not provide support for this

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conclusory assertion, and it is incorrect. Subject matter jurisdiction over Stillaguamish's claim, as explained in the Motion at 7 and in section C below, turns on whether Judge Boldt specifically determined Stillaguamish's marine waters U&A in 1974 in Final Decision #1. Resolution of that issue does not reach the merits—which concern whether, in the event Stillaguamish's marine U&A was not specifically determined in Final Decision #1 and this case proceeds, Stillaguamish in fact did have U&A in the contested waters during treaty times.

C. Paragraph 25(a)(6) Standards Apply.

Stillaguamish invokes paragraph 25(a)(6) of the Permanent Injunction as the jurisdictional basis for the Request for Determination. (See RFD ¶ 3.) Paragraph 25(a)(6) reserves to this Court continuing jurisdiction to determine the location of a tribe's usual and accustomed fishing grounds "not specifically determined by Final Decision #1." *See United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), *modified by* Order Modifying Paragraph 25 of Permanent Injunction (Aug. 11, 1993 [Dkt. 13599]). The jurisdictional standard under paragraph 25(a)(6) is clear and straightforward: To proceed to the merits of a claim under this paragraph, the Court must find or the parties must agree that the waters in dispute were not specifically determined in Final Decision #1. *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). (See Mtn. at 7.)

Swinomish supports its factual attack, in part, by pointing out that Judge Boldt's U&A determination for Stillaguamish is unambiguous. *See* 384 F. Supp. at 379 (FoF 146); see Mtn. at 8-9. Stillaguamish agrees that it is unambiguous. (Opp. at 12:12.)

But Stillaguamish argues that, by highlighting the clarity of Judge Boldt's Stillaguamish U&A determination, Swinomish conflates the standards of paragraph 25(a)(1) with those of 25(a)(6). (See Opp. at 11-12.) Indeed, Stillaguamish suggests that Swinomish "unabashed[ly] attempt[s]…to mislead the Court to incorrectly decide jurisdiction under Paragraph 25(a)(1), which is neither pleaded by Stillaguamish nor implicated by [sic] any way by this

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Subproceeding." Swinomish is certain that the Court could not be so misled and, in any event, Stillaguamish's argument has no merit.

Swinomish agrees that ambiguity in a U&A determination by Judge Boldt is relevant to the issue of jurisdiction under Paragraph 25(a)(1). *See Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010) (in paragraph 25(a)(1) jurisdictional analysis, first step is whether Final Decision #1 U&A finding is ambiguous). But Swinomish highlights the clarity of Judge Boldt's Stillaguamish U&A determination because it is plainly relevant to the paragraph 25(a)(6) issue presented by this Motion. The absence of ambiguity in the Court's original Stillaguamish U&A determination helps to rebut Stillaguamish's allegation in the RFD that Final Decision #1 identified the Stillaguamish River system "as only one of the areas in which the Tribe might be able to fish." (*See* RFD ¶ 9.) The clarity of Finding of Fact 146 supports the conclusion that Judge Boldt specifically determined all of Stillaguamish's U&A, not just a portion of it. *Cf. United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 435 (9th Cir. 2000) (omission of waters in Dr. Lane's report "not inadvertent or inconsequential" and suggests those omitted waters are not within principal fishing grounds of tribe). Nothing in the plain meaning of Finding of Fact 146 supports Stillaguamish's allegation that Judge Boldt made a partial U&A finding.

D. Stillaguamish Has Not Met Its Burden.

Swinomish also supports the Motion with a detailed factual analysis of the original trial record. Swinomish will not repeat those details in this Reply, but, in summary, the Motion demonstrates that none of the "new" grounds on which Stillaguamish bases its claim to marine water U&A is truly new: The Court had evidence that Stillaguamish had some village locations at or near marine waters; that all tribes traveled by canoe and moved about seasonally for food harvesting; that intermarriage was common among all tribes; and so on. (See Mtn. at 10-19 and evidentiary citations therein.) And yet Judge Boldt specifically determined that Stillaguamish's U&A was situated only on the Stillaguamish River. As Judge Boldt stated: "The words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas

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where use was occasional or incidental." 384 F. Supp. at 356. Judge Boldt found both freshwater and marine U&A for several tribes, but not for Stillaguamish. (See Mtn. at 8:25-9:15.) And although Judge Boldt cited only a few sources for his Stillaguamish U&A finding, that does not mean that he failed to consider and evaluate all of the evidence in the record before him in reaching his findings.

Stillaguamish has not met its burden in opposing the Motion. It does not produce facts to refute that substantial evidence was presented at the original trial on all the bases now offered for U&A expansion.

1. Judge Boldt did not exempt Stillaguamish from jurisdictional requirements.

Stillaguamish's primary argument in opposing the Motion is that it may skip over the Court's jurisdictional requirements. A 1976 Order stated that "the Stillaguamish Tribe may at any future time apply to this Court for a hearing…regarding expanded U&A[.]" *United States v. Washington*, 459 Fed. Supp. 1020, 1068 (W.D. Wash. 1978) ("Order Re Tulalip Tribes' Objection to Stillaguamish Fishing Regulations, March 10, 1976). Stillaguamish argues that this statement means that it does not have to satisfy jurisdictional requirements – in effect, Stillaguamish argues that this Court already has ruled on the subject matter jurisdiction issue raised by the Motion:

> This order preempts the procedural challenges now launched by Swinomish and Upper Skagit….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….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)….The Court need look no further than its express, unqualified invitation to deny the motions.

(Opp. at 4.) This argument is incorrect.

Federal courts "guard their limited jurisdiction zealously. They assume that cases are outside of their power to rule, and require parties to prove otherwise." *City of Stanton v. Green*

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Tree Remedy, No. SACV 15-1733 AG (JCGx), 2016 WL 316776, at *1 (C.D. Cal. 2016); *see* Fed. R. Civ. P. 12(h)(3). No party gets a free pass.

And in any event the Court did not exempt Stillaguamish from jurisdictional requirements for U&A expansion proceedings. To the contrary, it admonished Stillaguamish not to disregard the Court's procedures: As more fully recounted in the Motion (at 3:22-4:5), after Final Decision #1, Stillaguamish unilaterally began issuing fishing regulations for marine waters. When the Court found out by way of Tulalip's objection, it (i) reiterated its prior U&A determination for Stillaguamish and (ii) struck all past and future fishing regulations issued by Stillaguamish that purport to apply to waters outside of the Court's U&A determination. 459 F. Supp. at 1068-69. It also stated: "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 this Court." *Id.* at 1068.

Although Stillaguamish is correct that the 1976 Order states that it may in the future "apply to this Court for a hearing" regarding expanded U&A, Stillaguamish does not quote or discuss the Court's important qualifier: "…*so long as such application is in accordance with paragraph 25 of the court's injunction*." *See id.* (emphasis added). An application in accordance with paragraph 25 requires that Stillaguamish satisfy this Court's jurisdictional requirements. *See* 384 F. Supp. at 419, *modified by* Order Modifying Paragraph 25 of Permanent Injunction (Aug. 11, 1993 [Dkt. 13599]).

In sum, the 1976 Order means that if, as here, Stillaguamish has invoked the Court's continuing jurisdiction under paragraph 25(a)(6), and that assertion of subject matter jurisdiction has been factually attacked, then, like any other litigant, Stillaguamish must prove by a preponderance of the evidence that its U&A was not specifically determined by Judge Boldt. *Leite*, 749 F.3d at 1121; *United States v. Washington*, 2015 WL 4405591, at *6; *United States v. Washington*, 2017 WL 3726774, at *5. Stillaguamish does not satisfy the jurisdictional requirement simply by citing paragraph 25(a)(6).

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2. The "Law of the Case" does not support paragraph 25(a)(6) jurisdiction.

Stillaguamish correctly observes that Judge Boldt explained that, over a century later, a complete catalogue of a tribe's treaty time U&A could not be compiled. *See* 384 F. Supp. at 402. Even so, Judge Boldt could and did specifically locate Stillaguamish's U&A on the river and not in marine waters.

Stillaguamish relies on previous U&A expansion proceedings for ten tribes as a basis for opposing the Motion. It argues that because other tribes expanded their U&A, Stillaguamish should have the same opportunity, regardless of the requirements of paragraph 25. (Opp. at 5-6.) But those prior instances are distinguishable. Preliminarily—and critically—Stillaguamish does not demonstrate that any of those U&A expansion proceedings entailed a factual attack on the asserted basis for paragraph 25(a)(6) jurisdiction or, in the context of such dispute, a determination by this Court that it had jurisdiction under paragraph 25(a)(6). And even if one or more of those prior proceedings entailed a factual attack, Stillaguamish would still have the burden of overcoming Swinomish's specific factual attack in this subproceeding.

Further, *Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) ("*Muckleshoot I*"), clarified the scope of continuing jurisdiction under paragraph 25(a)(6) (formerly paragraph 25.f.): "Subparagraph f does not authorize the court to clarify the meaning of terms used in the decree or to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree." U&A expansions pursuant to paragraph 25(a)(6) prior to *Muckleshoot I* had not been so limited—thus the eight pre-*Muckleshoot I* expanded U&A decisions cited by Stillaguamish do not support its current, post-*Muckleshoot I* U&A expansion application under paragraph 25(a)(6). (*See* Opp. at 5:23-6:3 [citations re Nisqually, Puyallup, Squaxin Island, Makah, Upper Skagit, Lower Elwha, Tulalip, and Suquamish].) Likewise, the alleged "recognition" by the moving parties and other tribes that Final Decision #1 U&A findings were not in fact final (see Opp. at 6:19-7:9) occurred in the

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pre-*Muckleshoot I* era and so does not support Stillaguamish's opposition. *See* 141 F.3d at 1360 (holding that Judge Boldt specifically determined Lummi's U&A).

Following *Muckleshoot I*, this Court has authorized proceedings under paragraph 25(a)(6) only once. In that one instance, the disputed waters lay outside the original case area and thus could not have been specifically determined in Final Decision #1. *United States v. Washington*, 20 F. Supp. 3d 986, 1038 (W.D. Wash. 2013) (Order dated July 8, 2013; Subproceeding 09-1, initiated by Makah regarding Quileute and Quinault U&A in marine waters beyond 3 miles offshore); *cf. United States v. Washington*, 730 F.2d 1314, 1316 (9th Cir. 1984) (affirming Makah expansion of U&A under newly-expanded United States jurisdictional limits offshore). Moreover, the parties to that subproceeding stipulated that Quileute's and Quinault's U&As in the waters at issue had not been specifically determined. Here, by contrast, the area into which Stillaguamish seeks to expand is within the case area for Final Decision #1 and was considered and decided by Judge Boldt, and Swinomish disputes Stillaguamish's allegation that Judge Boldt did not specifically determine the contested waters. Thus the exercise of paragraph 25(a)(6) jurisdiction in subproceeding 09-1 does not support Stillaguamish's jurisdictional assertion here.

In subproceeding 09-1, the Court also found paragraph 25(a)(1) jurisdiction and conditioned any paragraph 25(a)(6) proceedings on a failure to resolve the dispute under paragraph 25(a)(1). *Id.* at 1037. Stillaguamish has not invoked paragraph (a)(1) and could not successfully do so here. Indeed, this Court already decided that Stillaguamish incursion into marine waters would not be in conformity with its U&A as determined by Judge Boldt. *See* 459 F. Supp. at 1068 ("Stillaguamish Tribe has, apparently unilaterally, expanded its fishing places beyond those areas recognized and determined in Final Decision #1.").

Finally, Stillaguamish is correct that in some determinations of U&A after Final Decision #1, the Court stated that the determination did not limit any party from seeking further U&A determinations. (See Opp. at 5:17-21.) But the Court made such provisions only in the first decade following Final Decision #1. *See, e.g., United States v. Washington*, 626 F. Supp.

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1405, 1443 (W.D. Wash. 1985) (Order dated Oct. 23, 1981 as amended; Lower Elwha). That no-preclusion provision was not included in Jamestown S'Klallam's U&A determination in 1985, *see id.* at 1486 (Order dated Mar. 14, 1985; Jamestown S'Klallam), and has not appeared in more than 30 years in a U&A determination by this Court. In short, the no-preclusion provisions from this Court in the first decade following Final Decision #1 do not support Stillaguamish's assertion of jurisdiction today.

3. Stillaguamish's "new" evidence must be disregarded.

Stillaguamish's final response to Swinomish's Motion to Dismiss is to present its case on the merits. (See Opp. at 18-26.) Stillaguamish has filed, among other things, what appears to be a substantial portion of the "new" evidence it argues would establish its claim to expanded U&A, including an expert declaration containing expert opinion and over 400 excerpted pages of exhibits. (See Grady Decl. [Subp. 17-3 Dkt. 78].) The Court should disregard all Stillaguamish's merits arguments and evidence.

Preliminarily, some of the "new" evidence is not new: For example, Stillaguamish relies on Wilson's 1851 diary of his joint visit to Stillaguamish with Hancock; the Dorsey affidavit; Indian Claims Commission testimony of Dr. Caroll Riley; and Nels Bruseth's account, including regarding shellheaps to support its expansion claim. (See Grady Decl. ¶¶ 17, 19, 26, 48; Boyer Decl. [Subp. 17-3 Dkt. 77] ¶ 5 pp. 3-33.) All of those sources and that information was in the record before Judge Boldt. (See Graham Decl. [Subp. 17-3 Dkt. 67] Ex. 24 [Ex. USA-028, Dr. Lane Report on Stillaguamish] at 251-254 [review of Hancock and Wilson accounts], 270-271 [review of Bruseth], 261-264, 270 [review of Dorsey affidavit], and 274-277 [Dorsey affidavit appended in full]; Ex. 26 [Ex. G-017k, Indian Claims Commission Findings of Fact re Stillaguamish] at 308 [review of Bruseth account of Stillaguamish locations and shellheaps], 318-323 [summary of testimony of Dr. Riley re Stillaguamish].) Stillaguamish's effort to make new arguments on these same old sources underscores that what Stillaguamish really seeks here is to reargue and relitigate what was already decided.

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Stillaguamish argues that "the evidence before the Court in 1973 bears little resemblance to the evidence Stillaguamish is prepared to offer at trial now" and that its expert's sources "far exceed what was available to Dr. Lane and that were [sic] presented to the Court during trial in 1973." (Opp. at 19:22-23; 20:6-8.) It argues that, if new evidence were heard on the already-litigated issues, the conclusion as to Stillaguamish U&A would be different. (See Opp. at 21-24.) But the Court should not hear such evidence. "A party is not entitled to relitigate an issue simply because it has found additional evidence that might lead a trier-of-fact to a different result." *Plancich v. County of Skagit*, 147 F. Supp. 3d 1158, 1163 (W.D. Wash. 2015) (citing *United States v. Weeks*, 49 F.3d 528, 533 (9th Cir. 1995) (holding district court erred in permitting government to introduce new evidence on previously adjudicated issue)).

Further, Stillaguamish's reliance on testimony by Dr. Lane after Final Decision #1 (Opp. at 17) is not relevant to the issue on this motion, whether Judge Boldt specifically determined Stillaguamish's U&A in Final Decision #1. *Cf. Muckleshoot I*, 141 F.3d at 1359 (holding district court erred in considering post-Final Decision #1 testimony by Dr. Lane as evidence of Judge Boldt's intended meaning).

Also, Swinomish disputes the entirety of Stillaguamish's merits case, including its many highly attenuated and extraordinary inferential leaps, but Swinomish would be severely prejudiced if it were required, in reply on its jurisdictional challenge, to respond substantively to the merits of Stillaguamish's claim. Swinomish should not be required to do so, and the Court should not consider such argument and evidence, given that the Motion poses the threshold issue of whether this Court has the power to decide the merits of Stillaguamish's claim. *United States v. $249,640.12 in United States Currency*, No. C15-5586 BHS, 2015 WL 8971433, at *2 (W.D. Wash. Dec. 16, 2015).

In the event the Court were to find that Stillaguamish has successfully invoked this Court's continuing jurisdiction, Swinomish should have the opportunity to pursue proper discovery, develop its own evidence on Stillaguamish's merits case, and prepare this matter for presentation in a just and efficient manner on summary judgment motions and/or at trial.

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E. Stillaguamish Has Waited Too Long.

Even if Stillaguamish had produced competent evidence to establish subject matter jurisdiction, the subproceeding should still be dismissed for a separate reason: Stillaguamish has waited too long to pursue it.

Stillaguamish has known about its claim for U&A expansion into marine waters for well over 40 years. Among other things: In 1974, immediately after Final Decision #1, Stillaguamish first began issuing fishing regulations applicable to marine waters—improperly. (See Mtn. at 3-5.) "As early as December 1974," according to Stillaguamish, Dr. Lane gave testimony that would support its marine U&A claim. (See Opp. at 17.) In 1976, a declaration was issued by the then-Chairman of Tulalip Tribes that Stillaguamish argues—incorrectly—is evidence of its marine waters U&A. (See Opp. at 24:24-25:7; Connolly Decl. [Subp. 17-3 Dkt. 79] Ex. F.) Also in 1976, this Court issued the "apply at any time" statement on which Stillaguamish now relies. *See* 459 F. Supp. at 1068.

Because Stillaguamish knew of its expanded U&A claim immediately following Final Decision #1, if not earlier, it should not be allowed to pursue an expanded U&A claim now. Stillaguamish argues that it previously lacked resources to pursue its expanded U&A claim. (RFP ¶ 12; Opp. at 9:26-10:1.) But it withdrew from pursuit of expanded U&A in subproceeding 89-3 on grounds of lack of funds 25 years ago (Graham Decl. Ex. 23) and acknowledges that it has pursued other priorities in recent years. (See Yanity Decl. [Subp. 17-3 Dkt. 76] ¶¶ 4-6.)

Principles of finality strongly favor denial of subject matter jurisdiction over Stillaguamish's claim for expanded U&A. The Ninth Circuit has stated that "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 on the framework of [Final Decision #1]." *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010). It further stated: "Although such a complex regime does not preclude a new entrant who presents a new case for treaty rights, it certainly cautions against relitigating rights that were established or denied in

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decisions upon which many subsequent actions have been based." *Id.* Stillaguamish is not a new entrant, and its RFP does not present a new case.

The "disruption and possible injury to existing treaty rights" that might follow from consideration of a U&A claim that Stillaguamish has known about for at least 40 years would not be confined to "mere across-the-board dilution of the shares of total harvest of all treaty tribes," *id.*, or disruptions to hard-fought intertribal and state-tribal management regimes for various fish species in various waters within the broad area encompassed in Stillaguamish's RFD. For example, if Stillaguamish is granted marine U&A on grounds it now asserts, such as intermarriage with Snohomish, Upper Skagit, Lower Skagit, Kikiallos, and Snoqualmie (see RFP ¶¶ 17, 21; Opp. at 24) or marine travel by canoe throughout Puget Sound (see RFP ¶¶ 19, 21; Opp. at 23-24), then fishing rights of all tribes would arguably have to be revisited. Stillaguamish should have raised these issues long ago.

Moreover, Stillaguamish advances a novel, if not radical, carve-out of continuing jurisdiction by this Court. Stillaguamish states that "[p]aragraph 25(a)(6) is not an endlessly open door" (Opp. at 10:4) but offers no limiting principle regarding its theory of continuing jurisdiction. Stillaguamish bases its jurisdictional claim under paragraph 25(a)(6) on purported "new" evidence purportedly not available at the time of Final Decision #1 and regarding grounds for U&A that were thoroughly addressed in the evidentiary record before Judge Boldt. Stillaguamish's theory would ensure that this Court's continuing jurisdiction over tribal claims for expanded U&A will never end: parties will always be able to come back with new evidence on adjudicated issues underlying past U&A determinations by the Court.

In short, finality principles require denial of subject-matter jurisdiction here. Allowing Stillaguamish's decades-old expanded U&A claim to proceed now would be "inconsistent with the considerations of finality" that are of heightened importance in this case.

F. Conclusion.

For all the reasons in the Motion and this Reply, the Court should grant the Swinomish Indian Tribal Community's Motion to Dismiss and dismiss this Subproceeding with prejudice.

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DATED: November 30, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 30, 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 30th day of November, 2018 at Seattle, Washington.

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