

*The Honorable Ricardo S. Martinez*

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

**Case No. C70-9213**

**Subproceeding: 17-03**

**STILLAGUAMISH TRIBE OF  
INDIANS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT RE:  
TREATY TIME USUAL AND  
ACCUSTOMED FISHING IN PORT  
SUSAN**

**NOTE ON MOTION CALENDAR:  
JANUARY 29, 2021**

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,

Respondent(s).

1 **I. INTRODUCTION**

2 The Stillaguamish Tribe of Indians (“Stillaguamish”) seeks an order from this Court  
3 pursuant to Fed. R. Civ. P. 56 granting summary judgment on part of its request for a determination  
4 (“RFD”) that Stillaguamish’s usual and accustomed fishing grounds (“U&A”) include the marine  
5 waters of Port Susan.<sup>1</sup> Dkt. # 4.

6 Applying the same evidentiary standards as Judge Boldt in *Final Decision No. 1*,  
7 Stillaguamish’s undisputed evidence of village locations and encampments at Warm Beach and  
8 Hat Slough on the eastern shore of Port Susan, supported by the testimony of six experts, is  
9 sufficient to establish that, at and before treaty times, Stillaguamish regularly fished Port Susan.  
10 No genuine issues of material fact are in dispute regarding Stillaguamish’s treaty-time fishing in  
11 Port Susan, and Stillaguamish is entitled as a matter of law to a judgment that its U&A grounds  
12 include Port Susan. Partial summary judgment is therefore appropriate.

13 **II. MATERIAL FACTUAL BACKGROUND**

14 At and before treaty times, a “preponderance of the evidence found credible and reasonable  
15 inferences drawn therefrom” demonstrates that the Stillaguamish people regularly and customarily  
16 fished Port Susan. *United States v. Washington*, 384 F. Supp. 312, 348 (W.D. Wash. 1974) (“*Final*  
17 *Decision No. 1*”). This conclusion is reached by virtue of the expert evidence presented both  
18 within *United States v. Washington* and in other cases. The expert testimony of renowned  
19 anthropologist Dr. Barbara Lane establishes that Stillaguamish fished Port Susan at and before  
20 treaty times, and none of the experts in this case disagree with Dr. Lane’s assessment. Further,  
21 historical accounts as well as expert and tribal elder testimony presented to the Court of Claims,  
22 the Indian Claims Commission, and to this Court in *Final Decision No. 1* demonstrate that

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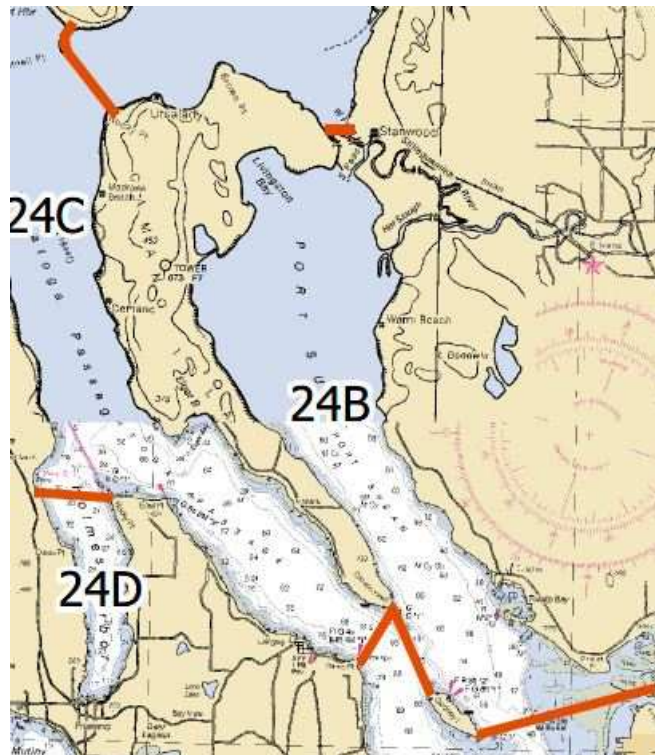
<sup>1</sup> The purpose of this Motion is to narrow the issues at trial. The RFD also requests that the Court  
25 determine and declare the non-exclusive treaty and equitable rights of Stillaguamish to harvest all  
26 species of fish and shellfish in the marine waters on the eastern side of Whidbey Island and both  
27 shores of Camano Island, including Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor,  
28 and to Deception Pass. Stillaguamish believes that genuine issues of material fact preclude  
summary judgment as to these other marine waters, and that trial will be necessary.

1 Stillaguamish maintained villages on or near the east shore of Port Susan at Warm Beach and Hat  
 2 Slough, and used the marine resources of Port Susan at and before treaty times.

3 The evidence as a whole, when applied consistently with the Court’s prior findings of fact  
 4 and legal conclusions, is sufficient to establish as a matter of law that, at and before treaty times,  
 5 the Stillaguamish regularly fished in the marine waters of Port Susan and that Port Susan is,  
 6 therefore, a usual and accustomed fishing ground of Stillaguamish in common with the Tulalip  
 7 Tribes (“Tulalip”).

8 **A. GEOGRAPHY AND MARINE RESOURCES OF PORT SUSAN**

9 Port Susan lies within the Whidbey Basin of Puget Sound, bounded on the west by Camano  
 10 Island and on the east by the mainland. The Stillaguamish River empties into Port Susan via Hat  
 11 Slough and South Pass, near Stanwood, Washington. To the south, Port Susan connects with Puget  
 12 Sound by way of Possession Sound and Saratoga Passage. To the north, a swampy isthmus running  
 13 between the mainland and Camano Island separates Port Susan from Skagit Bay. Warm Beach is  
 14 located on the east shore of Port Susan, approximately two miles south of Hat Slough and about  
 15 five miles south of Stanwood. The following illustrative map geographically depicts Port Susan:



1 Tribal U&A are defined by geographic terms, not by State shellfish area designations which did  
2 not exist at treaty times. Port Susan falls within modern day State Shellfish Catch Area 24B and  
3 Marine Area 8-2 (formerly 8A).

4 A diverse array of marine fish, shellfish, and mammals reside in Port Susan. Declaration  
5 of Dr. Chris Friday in Support of Stillaguamish Tribe of Indians' Motion for Partial Summary  
6 Judgment re: Port Susan ("Friday Decl."), ¶¶ 20-21. This diversity is a result of the combination  
7 of marine environments present in this largely shallow bay. *Id.* ¶ 22.

8 **B. EARLY ACCOUNTS OF STILLAGUAMISH VILLAGES ON THE EAST SHORE OF PORT SUSAN**

9 The firsthand accounts of Nels Bruseth describe historic Stillaguamish occupation of  
10 permanent dwelling sites on or near the shores of Port Susan. Mr. Bruseth, the son of a pioneer  
11 Scandinavian family and amateur historian, was born in 1889 in Stanwood, Washington. As a  
12 young boy, Mr. Bruseth became acquainted with his neighbors, the Stillaguamish, and learned  
13 their history. Declaration of Rob Roy Smith in Support of Stillaguamish Tribe of Indians' Motion  
14 for Partial Summary Judgment re: Port Susan ("Smith Decl."), Ex. 1 at p. 3-4. Mr. Bruseth first  
15 published "Indian Stories and Legends of the Stillaguamish and Allied Tribes" in 1926 and a  
16 second edition entitled "Indian Stories and Legends of the Stillaguamish, Sauk and Allied Tribes"  
17 beginning in 1950, which focused on the Stillaguamish people and their customs at and before  
18 treaty times. *See id.*, Exs. 1-2. Mr. Bruseth's book included several descriptions of historical  
19 Stillaguamish encampments on or near Port Susan, as well as Stillaguamish use of marine  
20 resources at those villages. For instance, Mr. Bruseth described visiting the remains of  
21 Stillaguamish camp sites and kitchen middens in the Warm Beach area. *Id.*, Ex. 1 at p. 6; *id.*, Ex.  
22 2 at p. 7. He also wrote about a Stillaguamish chief by the name of Tsalbilht who, after serving  
23 many years as keeper of the stronghouse near Stanwood, retired around treaty times to the Warm  
24 Beach area and built a home there, subsisting in part on "clams in the beach." *Id.*, Ex. 2 at p. 6;  
25 *see also* Ex. 3 at p. 14 ("The dating of this village is probably 1850 and after...").

26 Historical maps of western Washington tribal territories at and before treaty times likewise  
27 place Port Susan within known Stillaguamish territory. In 1894, James Mooney produced a map  
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1 for the Bureau of Ethnology showing the “Stilakwasmsh” tribe located south of the “Skadjit” and  
2 north of the “Skohomish” tribe and Tulalip Indian Reservation. *Id.*, Ex. 4 at p. 4-6. This map  
3 showed the historical homeland of the “Stilakwasmsh” as encompassing Port Susan. *Id.* In 1936,  
4 anthropologist Leslie Spier produced “Tribal Distributions in Washington,” in which he compiled  
5 information from previously published sources, including Mooney, about the various tribes within  
6 Washington. *Id.*, Ex. 5 at p. 3-4. Mr. Spier’s map also included Port Susan within “Stillaquamish”  
7 territory. *Id.* In their Historical Atlas of Washington, geographer James W. Scott and historian  
8 Roland L. DeLorme drafted a map of Washington tribal territories from 1790 to 1820 that included  
9 Port Susan within traditional Stillaguamish territory. *Id.*, Ex. 6 at p. 4.

10 **C. ELDER TESTIMONY IN *DUWAMISH ET AL.* RECOUNTS VILLAGES ON PORT SUSAN**

11 Stillaguamish tribal elder testimony presented to the Court of Claims in *Duwamish, et al.*  
12 *v. United States*, 79 C. Cl. 530 (1934) (“*Duwamish et al.*”), recounted Stillaguamish villages  
13 located on or near Port Susan at and before treaty times. Congress enacted legislation in 1925 that  
14 authorized treaty tribes in Washington to bring suit against the United States in the Court of Claims  
15 based on the federal government’s failure to honor the terms of the Stevens Treaties. 68 Cong.  
16 Ch. 214, Feb. 12, 1925, 43 Stat. 886. Stillaguamish was among the tribes that brought a claim in  
17 *Duwamish et al.* based on the unfulfilled promises the United States made in the Treaty of Point  
18 Elliott.

19 In preparation for litigation in *Duwamish et al.*, James Dorsey swore an affidavit in 1926  
20 (“Dorsey Affidavit”) on behalf of Stillaguamish regarding “the camping grounds of Indians at time  
21 Governor Stevens made the treaty and where Indians were living at time white man ordered them  
22 away.” Smith Decl., Ex. 7; *id.*, Ex. 8. James Dorsey (Quil-Que-Kadam) was a Stillaguamish elder  
23 and chief born in 1850 near Florence, Washington. *Id.*, Ex. 8 at p. 6. In his affidavit, Chief Dorsey  
24 identified a Stillaguamish village near Warm Beach on the east shore of Port Susan by the name  
25 of “Sp-la-tum.” *Id.* at p. 6. He explained that the Stillaguamish Warm Beach village had “one  
26 large house and another smaller one and several smaller cabins,” a “burial ground,” and that the  
27 “village was a visiting center for other neighboring members of said tribe and other tribes.” *Id.*

1 Chief Dorsey also identified the chief of this Warm Beach village by the name of “Zis-a-ba.” *Id.*  
2 Chief Dorsey further explained that another Stillaguamish “village on the banks of Hat Slough  
3 about four miles South of Stanwood” existed at treaty times. *Id.* at p. 7. He described two large  
4 homes or potlach houses at the Hat Slough village with about 100 people living there. *Id.*

5 Dr. Barbara Lane would later rely upon the Dorsey Affidavit when offering her opinion  
6 that Stillaguamish fished Port Susan at and before treaty times. *Id.*, Ex. 11 at p. 3; *see also* Ex. 24  
7 at p. 3-11. Dr. Sally Snyder likewise affirmatively cited to the Dorsey Affidavit when testifying  
8 that Stillaguamish maintained villages on or near the east shore of Port Susan at and before treaty  
9 times. Ex. 3 at p. 9-10, 13-14; *see also id.*, Ex. 9 at p. 3; *id.*, Ex. 10.

10 **D. EXPERTS BEFORE THE INDIAN CLAIMS COMMISSION CONFIRM VILLAGE LOCATIONS**

11 Expert testimony presented to the Indian Court of Claims (“ICC”) regarding Stillaguamish  
12 territory at and before treaty times similarly cataloged Stillaguamish villages and homes located  
13 on or near the east shore of Port Susan. Congress established the ICC in 1946 to provide a forum  
14 for Indian claims arising from the United States’ taking of Indian lands to be heard and decided.  
15 49 Cong. Ch. 959, Aug. 13, 1946, 60 Stat. 1049. Stillaguamish brought a claim against the United  
16 States before the ICC in *Stillaguamish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 1, Dkt.  
17 207 (“Stillaguamish ICC Case”). Dr. Sally Snyder testified as an expert on behalf of Stillaguamish,  
18 and Dr. Carrol Riley testified as an expert on behalf of the United States, among other witnesses.

19 In her testimony, Dr. Snyder identified at least two Stillaguamish village sites on the shores  
20 of Port Susan near Warm Beach, which she entered on a map and detailed in a chart. Smith Decl.,  
21 Ex. 3 at p. 13-14; *see also id.*, Ex. 9 at p. 3; *id.*, Ex. 10. Dr. Snyder testified that Stillaguamish  
22 village No. 1 was “located near Warm Beach or at Warm Beach” and was a “permanent” village.  
23 *Id.* Dr. Snyder also noted that James Dorsey identified this first village located at Warm Beach as  
24 “Sp-la-tum.” *Id.*, Ex. 9 at p. 3. Dr. Snyder identified another Stillaguamish home as village No.  
25 2 “[a]t a slough at the point of a hill near Splaidid (Warm Beach),” noting the location had a  
26 permanent Stillaguamish dwelling. *Id.*, Ex. 3 at p. 14; *see also id.*, Ex. 9 at p. 3.

1 In his testimony on behalf of the defendant United States during the Stillaguamish ICC  
2 Case, Dr. Carrol Riley similarly opined that Stillaguamish utilized Warm Beach and the marine  
3 resources of Port Susan. *Id.*, Ex. 12 at p. 5, 7. Dr. Riley also prepared a report in 1965 entitled  
4 “Early History of Western Washington Indians” for consideration by the ICC. *Id.*, Ex. 13. In this  
5 report, Dr. Riley opined that the Stillaguamish “came down to Port Susan and lower Skagit Bay  
6 for clamming and fishing.” *Id.* at p. 5.

7 **E. PRIOR TESTIMONY IN *U.S. v. WASHINGTON* EVINCES REGULAR USE OF PORT SUSAN**

8 Expert and tribal elder testimony offered to the Court in *Final Decision No. 1* provide  
9 further evidence that Stillaguamish regularly fished Port Susan at and before treaty times.

10 **1. Dr. Barbara Lane Repeatedly Offered Testimony That Stillaguamish Fished**  
11 **Port Susan At and Before Treaty Times**

12 Renowned anthropologist Dr. Barbara Lane has consistently testified that Stillaguamish  
13 fished Port Susan at and before treaty times. Beginning in *Final Decision No. 1*, Dr. Lane opined  
14 that Stillaguamish was one of the tribes that primarily fished Port Susan. *Id.*, Ex. 14 at p. 5 (“...  
15 areas like Port Susan and areas close to the mouth of the Stillaguamish River. I think they were  
16 primarily fished by Kikiellis [sic] and Stillaguamish.”); *see also id.* at p. 5-6 (“Q: Dr. Lane, counsel  
17 asked you about Port Susan specifically, and I believe your answer was that the Stillaguamish and  
18 Kikiellis [sic] may have fished there primarily? A: That is my recollection, yes.”).

19 After the Court issued *Final Decision No. 1*, Dr. Lane again expressed her opinion in 1974  
20 that Stillaguamish regularly fished Port Susan at and before treaty times. In response to an inquiry  
21 from Native American Rights Fund attorney David Getches “regarding usual and accustomed  
22 fishing places of the Stillaguamish in marine waters,” Dr. Lane directed Mr. Getches to the  
23 affidavit of James Dorsey, explaining:

24 In his affidavit Dorsey mentions a village at what is now the town of Warm Beach  
25 (p.2) and another at Hat Slough near the present town of Stanwood (p.3). Both of  
26 these villages are situated so as to enable easy access to marine fisheries. In my  
27 opinion it is inconceivable that villages would have been located on the waters of  
28 Port Susan and the inhabitants would not have fished those waters.

1 *Id.*, Ex. 11 at p. 3. As further evidence of Stillaguamish U&A in Port Susan, Dr. Lane referred  
2 Mr. Getches to Dr. Riley’s ICC testimony that Stillaguamish “came down to Port Susan and lower  
3 Skagit Bay for clamming and fishing.” *Id.*

4 Dr. Lane continued to reiterate her opinion that the Stillaguamish fished Port Susan at and  
5 before treaty times in 1983 during Tulalip’s U&A adjudication. In that sub-proceeding, Dr. Lane  
6 explained it was her opinion that Stillaguamish fished Port Susan at and before treaty times based  
7 on the presence of Stillaguamish villages on the east shore of Port Susan at Hat Slough and Warm  
8 Beach. In response to a question about whether she had an opinion as to who fished Port Susan in  
9 treaty times, Dr. Lane testified:

10 It is my opinion that the people who lived in the adjacent mainland area fished  
11 there, and that would be the people living on the shore itself of Port Susan. I believe  
12 there was at least one village there, and presumably fished there.

13 *Id.*, Ex. 15 at p. 4. Dr. Lane then further explained that the two primary groups that fished Port  
14 Susan at and before treaty times were the Stillaguamish and Snohomish, specifically noting “[t]he  
15 village at Hat Slough, which is described in the documentary records of this century as having  
16 been a Stillaguamish village.” *Id.* at p. 4; *see also id.* at 6 (“[T]he village at Hat Slough had people,  
17 so far as we know, people who were of mixed Stillaguamish, Snohomish, Skagit and other  
18 ancestry. This was true of every village everywhere in Puget Sound. People had relatives in other  
19 communities... And throughout the entire case area, there was a great deal of exogamy.”). Dr.  
20 Lane added “I think it is entirely likely that the people from the neighboring Snohomish area would  
21 have also joined [Stillaguamish] in using that area for shellfish and so on.” *Id.* Later in her  
22 testimony, Dr. Lane again opined:

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

26 *Id.* at p. 7-8. Dr. Lane’s opinion as to Stillaguamish fishing in Port Susan remains uncontroverted.



1           **2. Tribal Elder Testimony Indicates That Stillaguamish Treaty-Time Territory**  
2           **Included The East Shore of Port Susan**

3           Stillaguamish tribal elder and tribal secretary, Esther Ross, also offered testimony in *Final*  
4           *Decision No. 1* that Stillaguamish territory at and before treaty times included the east shore of  
5           Port Susan:

6           From Milltown up to McMurray on up to Little Creek, up to the northern part  
7           there of the Darrington on over to the Stillaguamish watershed, to Granite Falls on  
8           down to the northeast and northwest of the Tulalip Reservation on through to  
9           Warren Beach [Warm Beach] to Stanwood was our territory.

10           *Id.*, Ex. 16 at p. 4; *see also id.*, Ex. 17 at p. 4.

11           **F. SUBPROCEEDING 17-03 EXPERT EVIDENCE SUPPORTS STILLAGUAMISH IN PORT SUSAN**

12           The expert evidence—from both Stillaguamish and the Responding Tribes—in this case  
13           further establishes that Stillaguamish regularly fished Port Susan at and before treaty times. Three  
14           experts for Stillaguamish, Tulalip, and Upper Skagit place Stillaguamish on Port Susan and opine  
15           that Stillaguamish people fished Port Susan at and before treaty times.

16           Stillaguamish’s expert, Dr. Chris Friday, has offered expert testimony concluding that  
17           Stillaguamish regularly fished for all available species of finfish and shellfish in Port Susan at and  
18           before treaty times. Friday Decl., ¶¶ 2, 8, 20-22. Dr. Friday’s opinion is based upon the presence  
19           of Stillaguamish villages at and before treaty times on and near the east shore of Port Susan at  
20           Warm Beach and Hat Slough, as well as prior expert testimony from Dr. Lane and Dr. Riley that  
21           Stillaguamish utilized the marine resources of Port Susan. *Id.* ¶¶ 2, 8-19.

22           Dr. Deward Walker, expert witness for Tulalip, agrees and has unequivocally opined that  
23           Stillaguamish fished for all species of finfish and shellfish in Port Susan, and beyond, at and before  
24           treaty times. Smith Decl., Ex. 18 at p. 3-6. Dr. Bruce Miller, expert witness for Upper Skagit,  
25           likewise admits that “the evidence appears to show [Stillaguamish] may have” fished in Port Susan  
26           at and before treaty times. *Id.*, Ex. 19 at p. 3; *see also id.* at p. 5-7. Dr. Miller testified that the  
27           “evidence” he was relying on for this conclusion was the prior statements and opinions of Dr.  
28           Lane. *Id.* at p. 3-4. The other two experts in the case, both retained by Swinomish, offer no

1 relevant or material testimony as to Stillaguamish treaty-time fishing activities in Port Susan, as  
 2 explained in Part III.B.3 *infra*, and are insufficient to raise a genuine issue of fact to defeat partial  
 3 summary judgment regarding Port Susan in light of the totality of the evidence in this case.

### 4 III. AUTHORITY AND ARGUMENT

#### 5 A. APPLICABLE STANDARDS

##### 6 1. *Final Decision No. 1 Paragraph 25(a)(6) Requests For Determination*

7 This case arises under the Court’s continuing jurisdiction to consider the location of any  
 8 tribe’s U&A fishing grounds not specifically determined in *Final Decision No. 1*. Stillaguamish  
 9 reserved in the Treaty of Point Elliot the right of taking fish at all of its U&A fishing grounds and  
 10 stations.<sup>2</sup> 12 Stat. 927 (Apr. 11, 1859); *United States v. Washington*, 873 F. Supp. at 1431.  
 11 Stillaguamish possesses the burden to produce evidence that its U&A fishing grounds at and before  
 12 treaty times included Port Susan. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D.  
 13 Wash. 1978), *aff’d*, 645 F.2d 749 (9th Cir. 1981). U&A fishing grounds include “every fishing  
 14 location where members of a tribe customarily fished from time to time at and before treaty times,  
 15 however distant from the then usual habitat of the tribe, and whether or not other tribes then also  
 16 fished in the same waters.” *Final Decision No. 1*, 384 F. Supp. at 332; *see also United States v.*  
 17 *Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) (U&A determination requires evidence  
 18 of “regular and frequent treaty-time use of that area for fishing purposes.”).

19 Little documentation of Indian fishing locations in and around 1855 exists today. *United*  
 20 *States v. Washington*, 459 F. Supp. at 1059 (“In determining usual and accustomed fishing places

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21  
 22 <sup>2</sup> Tribes have the right to take all available fish, shellfish and marine mammals at adjudicated U&A  
 23 fishing locations. *United States v. Washington*, 873 F.Supp. 1422, 1431 (W.D. Wash. 1994);  
 24 *United States v. Washington*, 129 F.Supp.3d 1069, 1115 (W.D. Wash. 2015), *aff’d sub nom. Makah*  
 25 *Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017). U&A determinations do not  
 26 require “species-specific findings of usual and accustomed fishing grounds.” *United States v.*  
 27 *Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff’d in part, rev’d in part on other grounds*,  
 157 F.3d 630, 644 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999). It is immaterial that a tribe  
 28 did not fish for a specific species in a particular area as long as the tribe fished for any one species  
 in that area; the usual and accustomed grounds for one species is “co-extensive with the Tribes’  
 usual and accustomed fishing grounds” for all other species. *Id.*

1 the court cannot follow stringent proof standards because to do so would likely preclude a finding  
2 of any such fishing areas.”). This Court has repeatedly acknowledged that evidence of treaty-time  
3 fishing activities is “sketchy and less satisfactory than evidence available in the typical civil  
4 proceeding,” and the documentation that does exist is “extremely fragmentary and just  
5 happenstance.” *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988).  
6 Accordingly, the stringent standard of proof that ordinarily operates in civil proceedings does not  
7 apply here. *Id.* at 318. In determining whether Stillaguamish has met its burden, “the Court gives  
8 due consideration to the fragmentary nature and inherent limitations of the available evidence,”  
9 *United States v. Washington*, 129 F.Supp.3d at 1110, while making its findings “upon a  
10 preponderance of the evidence found credible and inferences reasonably drawn therefrom” that an  
11 area is U&A on a more probable than not basis. *Final Decision No. 1*, 384 F. Supp. at 322.

12 In demonstrating that its U&A includes Port Susan, Stillaguamish “may rely on both direct  
13 evidence and reasonable inferences drawn from documentary exhibits, expert testimony, and other  
14 relevant sources to show the probable location and extent of [its] U&As.” *United States v.*  
15 *Washington*, 129 F.Supp.3d at 1110. Under this relaxed standard, the Court has held that fishing  
16 activity may be presumed in a body of water that bordered a tribe’s village locations, including  
17 with some limitations, those villages identified in ICC proceedings. *United States v. Washington*,  
18 459 F. Supp. at 1059. The Court also has relied on the testimony of tribal elders and, in particular,  
19 expert testimony as evidence “to show the *probable location* and extent of [a tribe’s] U&As.”  
20 *United States v. Washington*, 129 F.Supp.3d at 1110 (emphasis added) (citing *United States v.*  
21 *Washington*, 626 F.Supp. at 1431); *see also United States v. Washington*, 730 F.2d 1314 (9th Cir.  
22 1984).

## 23 2. Summary Judgment

24 The Court must grant a motion for summary judgment when “the movant shows that there  
25 is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
26 law.” Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the suit under  
27 governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material  
28

1 fact is genuine “only if there is a sufficient evidentiary basis on which a reasonable fact finder  
 2 could find for the non[-]moving party.” *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008). Because  
 3 Stillaguamish bears the burden of proof regarding Port Susan at trial, it “must affirmatively  
 4 demonstrate that no reasonable trier of fact could find other than for [Stillaguamish].” *Soremekun*  
 5 *v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

6 If the Court finds that Stillaguamish meets this initial burden, the non-moving party must  
 7 set forth “specific facts showing that there is a genuine issue for trial,” *Anderson*, 477 U.S. at 250,  
 8 by “present[ing] significant and probative evidence tending to support its claim or defense.” *Intel*  
 9 *Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). “The mere  
 10 existence of a scintilla of evidence in support of the [non-moving party’s] position will be  
 11 insufficient; there must be evidence on which the jury could reasonably find for the [non-moving  
 12 party].” *Anderson*, 477 U.S. at 251. The non-moving party has failed to meet its burden if “the  
 13 record taken as a whole could not lead a rational trier of fact to find for the non-moving party.”  
 14 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

15 **B. STILLAGUAMISH’S U&A INCLUDES PORT SUSAN AS A MATTER OF LAW**

16 Stillaguamish has presented more than sufficient evidence—in the form of expert  
 17 testimony, as well as the testimony of tribal elders and treaty-time sources—to establish that  
 18 Stillaguamish customarily fished Port Susan at and before treaty times. Port Susan therefore falls  
 19 within Stillaguamish U&A grounds. *See Final Decision No. 1*, 384 F.Supp. at 332.

20 First, the expert testimony in this case overwhelmingly demonstrates that Stillaguamish  
 21 both had a village presence on Port Susan and fished Port Susan at and before treaty times. Dr.  
 22 Barbara Lane unequivocally opined multiple times that Stillaguamish fished Port Susan at and  
 23 before treaty times. Smith Decl., Ex. 14 at p. 5-7 *id.*, Ex. 15 at p. 4-8; *id.*, Ex. 11 at p. 3. It also  
 24 was Dr. Riley’s opinion that Stillaguamish historically went downriver to utilize Port Susan’s  
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1 marine resources.<sup>3</sup> *Id.*, Ex. 13 at p. 5. Dr. Friday, expert for Stillaguamish in this Subproceeding,  
 2 likewise has offered expert testimony concluding Stillaguamish regularly fished Port Susan at and  
 3 before treaty times. Friday Decl., ¶¶ 2, 8-19. And, importantly, the experts for two of the  
 4 Responding Tribes, Tulalip and Upper Skagit, also plainly testify that Stillaguamish actually fished  
 5 or, at least “may have” fished Port Susan at and before treaty times. Smith Decl., Ex. 18 at p. 3-  
 6 6; *id.*, Ex. 19 at p. 3. None of the four opposition experts in this case directly oppose Dr. Lane’s  
 7 opinion of Stillaguamish fishing in marine waters of Port Susan. *See id.*, Ex. 18 at p. 3-6; *id.*, Ex.  
 8 19 at p. 3-4; *id.*, Ex. 20 at p. 3-5; *id.*, Ex. 21 at p. 7-9.

9 The Court should conclude from this overwhelming expert testimony alone that Port Susan  
 10 falls within Stillaguamish’s U&A. *United States v. Washington*, 129 F.Supp.3d at 1110 (citing *United*  
 11 *States v. Washington*, 626 F.Supp. at 1431); *see also United States v. Washington*, 730 F.2d 1314.

12 Second, the Court also may conclude that Stillaguamish fished Port Susan at and before  
 13 treaty times based on the location of Stillaguamish villages on or near the shores of Port Susan at  
 14 Warm Beach and Hat Slough.<sup>4</sup> *United States v. Washington*, 459 F. Supp. at 1059. Stillaguamish  
 15 tribal elder and chief James Dorsey, who was born in 1850, described a Stillaguamish village at  
 16 Warm Beach on the east shore of Port Susan in his *Duwamish et al.* testimony in 1926. Smith  
 17 Decl., Ex. 8 at p. 7. Dr. Snyder identified that same Stillaguamish village at Warm beach on the  
 18 east shore of Port Susan during her testimony to the ICC. *Id.*, Ex. 3 at p. 9-10; *see also id.*, Ex. 9  
 19 at p. 3; *id.*, Ex. 10. Dr. Lane likewise noted the Stillaguamish village at Warm Beach in reaching  
 20 her conclusion that Stillaguamish fished Port Susan at and before treaty times. *Id.*, Ex. 11 at p. 3.  
 21 Further, historical maps depicting tribal territories at and before treaty times in Washington include

22 \_\_\_\_\_  
 23 <sup>3</sup> “People living upriver on a given drainage system would normally come to the saltwater areas at  
 24 the mouth of the river to obtain fish and shellfish.” *United States v. State of Washington*, 626 F.  
 25 Supp. at 1528.

26 <sup>4</sup> “Winter villages were located along the salmon streams, at the heads of inlets near the mouth of  
 27 such streams, and on protected coves and bays. During the winter season, if people went out for  
 28 fresh food stores, they used the fishing areas in closest proximity to their villages.” *United States*  
*v. Washington*, 626 F. Supp. at 1528; *see also United States v. Muckleshoot Indian Tribe*, 235 F.3d  
 429, 436 (9th Cir. 2000) (“most groups claimed autumn fishing use rights in the waters near to  
 their winter villages.”).

1 Port Susan within traditional Stillaguamish homelands. *Id.*, Exs. 4-6. Because the Court  
 2 reasonably infers and presumes from this evidence that Stillaguamish fished Port Susan at and  
 3 before treaty times, it can conclude that Port Susan is within Stillaguamish's U&A. *United States*  
 4 *v. Washington*, 459 F.Supp. at 1059.

5 There exists no genuine dispute of material fact regarding Stillaguamish's regular fishing  
 6 of Port Susan at and before treaty times. Stillaguamish has established that, based on the record  
 7 in this case and applicable case standards from *Final Decision No. 1* to today, no reasonable trier  
 8 of fact could find that Stillaguamish did not regularly fish Port Susan at and before treaty times.  
 9 *See Soremekun*, 509 F.3d at 984. Having met its initial burden on summary judgment, the burden  
 10 shifts to the Responding Tribes to show there is a genuine issue for trial regarding Stillaguamish  
 11 treaty-time fishing activity in Port Susan. *Anderson*, 477 U.S. at 250. The Responding Tribes can  
 12 only meet this burden by setting forth significant, probative facts upon which the trier of fact could  
 13 reasonably find that Stillaguamish did not fish Port Susan at and before treaty times. *Intel Corp.*,  
 14 952 F.2d at 1558. The Responding Tribes cannot meet this burden.

### 15 **1. Tulalip Cannot Create a Genuine Issue of Material Fact for Trial**

16 Tulalip is the only Responding Tribe with currently adjudicated U&A that includes, among  
 17 numerous other bodies of water, Port Susan.<sup>5</sup> *United States v. Washington*, 626 F.Supp. at 1530;  
 18 *United States v. Washington*, 459 F.Supp. at 1049; *see also* Smith Decl., Ex. 22 at p. 3-4. As such,  
 19 of the three Responding Tribes, Tulalip is the only party whose reserved treaty rights would be  
 20 affected if Stillaguamish obtained adjudicated U&A in Port Susan. It is therefore highly significant  
 21 that Tulalip cannot produce evidence upon which the trier of fact could reasonably find that  
 22 Stillaguamish did not regularly fish Port Susan at and before treaty times.

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23  
 24 <sup>5</sup> In 2015, the Ninth Circuit affirmed that the Suquamish Tribe has adjudicated U&A in certain  
 25 waters on the east side of Puget Sound, including Possession Sound and Port Gardner Bay, as well  
 26 as Admiralty Bay, Mutiny Bay, Useless Bay and Cultus Bay on the west side of Whidbey Island.  
 27 *United States v. Washington*, 20 F.Supp.3d 986, 1046-48, 1054 (W.D. Wash. 2013), *aff'd*, 794  
 28 F.3d 1129 (9th Cir. 2015) (finding Judge Boldt did not intend to include Saratoga Passage, Penn  
 Cove, Holmes Harbor, and Port Susan in Suquamish U&A). Stillaguamish's RFD claim to Port  
 Susan does not implicate these waters, which lie to the south of Port Susan.

1 Tulalip’s own expert, Dr. Walker, unambiguously concludes that Stillaguamish fished for  
2 finfish and shellfish in the entirety of Port Susan, and beyond, at and before treaty times, stating:

3 I think [Stillaguamish] have fished throughout the region. And you could say that  
4 about almost any region where they fish. And it would be beyond Port Susan.  
5 Not just Port Susan, which I would agree, but there are ways in which they have  
6 fished well beyond that.

7 Smith Decl., Ex. 18 at p. 3; *see also id.* at p. 4-6. This alone is dispositive, as this Court has been  
8 clear that expert testimony can be and often is decisive. *See United States v. Washington*, 19  
9 F.Supp.3d 1126, 1132 (W.D. Wash. 1994) (observing Judge Boldt “relied heavily” and  
10 “extensive[ly]” “on the expert testimony of Dr. Barbara Lane in reaching the conclusions stated in  
11 Final Decision No. 1.”); *see also United States v. Washington*, 626 F.Supp. at 1531 (either direct  
12 evidence or reasonable inferences from documentary exhibits, expert witness reports and other  
13 testimony as to the probable location and extent of [U&A] treaty fishing may be sufficient to  
14 support a legal determination of the areas involved.”). Unless Tulalip is prepared to disavow its  
15 sole expert’s sworn testimony, Tulalip is unable to offer any evidence to defeat this Motion as to  
16 the entirety of Port Susan.

17 Moreover, Tulalip has for over forty years acknowledged that Stillaguamish’s U&A  
18 includes at least northern Port Susan and has sworn to affirmatively support Stillaguamish’s U&A  
19 claim as to northern Port Susan (and lower Skagit Bay). In 1976, Tulalip sought to intervene as a  
20 defendant in *Stillaguamish v. Kleppe*, No. 75-1718 (D.D.C), in which Stillaguamish challenged  
21 the United States’ inaction on its federal recognition petition. The affidavit of the then-Chairman  
22 of the Tulalip Tribes stated in part that “recognition by the Federal Government of the  
23 Stillaguamish Tribe will result in the sharing by the Tulalip Tribes with it of the anadromous fish  
24 resources of Puget Sound... at the [U&A] grounds and stations of the Tulalip Tribes.” Smith  
25 Decl., Ex. 23 at p. 4.

26 Tulalip again acknowledged in 1984 that Stillaguamish’s U&A already includes at least  
27 northern Port Susan and has sworn to affirmatively support Stillaguamish’s RFD regarding  
28

1 northern Port Susan in the 1984 Settlement Agreement. Through the 1984 Settlement Agreement  
2 and 1985 Order, Tulalip made two key promises:

- 3 (1) “The Tulalip Tribes recognize that portion of Area 8A north of a line from  
4 Kayak Point due west to Camano Island (hereafter “Northern 8A”) as non-  
5 exclusive [U&A] of the Stillaguamish Tribe”; and,  
6 (2) “[Tulalip] will affirmatively support Stillaguamish Tribe’s [RFD] that the  
7 Stillaguamish Tribe’s U&A extend throughout Northern 8A and that portion of  
8 8A southerly of the line from Milltown to Polnell Point and northeasterly of the  
9 line from Polnell Point to Rocky Point.”

10 Dkt. # 65-1; *United States v. Washington*, 626 F.Supp. at 1480-83. Tulalip’s promises were  
11 unconditional as to time and not limited by species.<sup>6</sup> If, however, Stillaguamish agreed that the  
12 1984 Settlement Agreement applies only to salmon and not shellfish as Tulalip claims, *see* Dkt. #  
13 65, Tulalip still cannot raise a material fact issue in light of Dr. Walker’s testimony that  
14 Stillaguamish fished Port Susan for both finfish and shellfish at and before treaty times.  
15 Regardless, there can be no dispute that this is a valid and binding decree and that, to comply with  
16 the 1985 Order, Tulalip must do exactly these things as provided by the plain and unmistakable  
17 language of the 1984 Settlement Agreement and 1985 Order. Therefore, opposing Stillaguamish’s  
18 partial summary judgment motion at to at least northern Port Susan would clearly contradict and  
19 violate that court-approved settlement agreement. Dkt. # 48-2 at p. 5. Given Tulalip’s decades-  
20 long recognition of Stillaguamish U&A in northern Port Susan and Tulalip’s promise to  
21 “affirmatively support” Stillaguamish’s RFD regarding northern Port Susan, Tulalip cannot in  
22 good faith and without explicitly violating the settlement agreement now fully oppose this  
23 Motion.<sup>7</sup>

24 <sup>6</sup> Tulalip has correctly argued previously that “this court determined that ‘shellfish’ were ‘fish’”  
25 within the meaning of the treaty and, therefore, that “the [U&A] for salmon and steelhead were  
26 also the [U&A] for shellfishing.” *See United States v. Washington*, 873 F.Supp. 1422 (W.D. Wash.  
1994).

27 <sup>7</sup> Tulalip similarly cannot in good faith contend that the 1984 settlement agreement with  
28 Stillaguamish applies only to finfish, having itself recognized “that any adjudication of  
Stillaguamish marine U&A will apply to all species.” Dkt. # 91 at p. 7 (citing Dkt. # 87 at p. 5-



1           **2. Upper Skagit Cannot Create a Genuine Issue of Material Fact for Trial**

2           Upper Skagit’s adjudicated U&A does not include Port Susan. *See Final Decision No. 1,*  
3 384 F.Supp. at 379; *see also United States v. Washington*, 19 F.Supp.3d at 1268-70, 1280-90,  
4 1298-1304. Like Tulalip, however, Upper Skagit cannot produce evidence upon which the trier  
5 of fact could reasonably find that Stillaguamish did not fish Port Susan at and before treaty times.  
6 Upper Skagit’s sole expert, Dr. Miller, relying on the testimony of Dr. Lane before him, does not  
7 dispute the fact that Stillaguamish “may have” fished Port Susan at and before treaty times and  
8 “conclude[s] that at and before treaty times Stillaguamish appears to have little salt water presence  
9 in the subject areas other than at Port Susan.” Smith Decl., Ex. 19 at p. 3.

10           **3. Swinomish Cannot Create a Genuine Issue of Material Fact for Trial**

11           Swinomish has extensive adjudicated U&A and, like Upper Skagit, does not have  
12 adjudicated U&A in Port Susan. *See United States v. Washington*, 459 F.Supp. at 1049; *see also*  
13 *United States v. Washington*, 626 F.Supp. at 1476; Smith Decl., Ex. 22 at p. 4-5. Swinomish  
14 likewise cannot meet its evidentiary burden to oppose a determination that Stillaguamish has U&A  
15 in Port Susan as a matter of law.

16           Dr. Astrida Blukis-Onat, one of Swinomish’s experts, offers no opinion on Port Susan, and  
17 has not been asked to do so by Swinomish. Smith Decl., Ex. 20 at p. 3-5. Dr. Onat’s opinion  
18 addresses only the treaty time fishing activities in the marine waters of “greater Skagit Bay”—not  
19 Port Susan. *Id.*, Ex. 20 at p. 3-4. The opinions offered by Dr. Blukis-Onat “did not focus on the  
20 Stillaguamish fisheries,” and she has not otherwise specifically researched the extent of  
21 Stillaguamish fisheries at and before treaty times. *Id.* at p. 5.

22           The testimony of Swinomish’s other expert, Dr. Anthony Gulig, regarding Port Susan is  
23 insufficient to raise a genuine issue of fact to defeat summary judgment in light of the record in  
24 this case. Dr. Gulig is the only expert in this case that appears, at least at first blush, to offer the

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26 6); *see also United States v. Washington*, 873 F.Supp. 1422, 1431 (W.D. Wash. 1994) (holding  
27 that tribes have the right to take all available fish and shellfish at adjudicated U&A fishing  
28 locations).

1 opinion that Stillaguamish did not regularly fish Port Susan at and before treaty times. Dr. Gulig  
2 works as an associate professor at the University of Wisconsin—Whitewater whose academic  
3 “work and research has focused on the Upper Midwest and in [sic] the Subarctic regions of  
4 Canada.” *Id.*, Ex. 21 at p. 11-12. Dr. Guilg explained that it is not his opinion that the  
5 Stillaguamish never fished in any marine waters at or before treaty times; rather, Dr. Gulig opines  
6 that “Stillaguamish fisheries were primarily and substantially on the Stillaguamish River,” having  
7 himself found “little, if any, evidence that the Stillaguamish fished in marine waters.” *Id.* at p. 3-  
8 4. Of course, even if the Stillaguamish River represented the primary treaty-time fishery of  
9 Stillaguamish as Dr. Gulig states, *id.* at p. 4, it is the law of the case that “[p]eople living upriver  
10 on a given drainage system would normally come to the saltwater areas at the mouth of the river  
11 to obtain fish and shellfish,” which in this case would include Port Susan. *United States v.*  
12 *Washington*, 626 F. Supp. at 1528.

13 And, upon further questioning, Dr. Gulig concedes some of the evidence as to Port Susan.  
14 For example, at his deposition, Dr. Gulig: (1) admitted that Dr. Lane found that Stillaguamish  
15 “must have fished or inconceivable that they didn’t” fish in Port Susan, Smith Decl., Ex. 21 at p.  
16 10; (2) acknowledged that Stillaguamish “could have traveled between Port Susan and Skagit Bay”  
17 at treaty times, *id.*, at p. 6; and (3) agreed that Stillaguamish “generally” “would have at least  
18 entered the saltwater... from those villages on or adjacent to Port Susan.” *Id.* at p. 5. Importantly,  
19 Dr. Guilg also “neither agree[s] nor disagree[s] with” Dr. Lane’s assessment that Stillaguamish  
20 fished Port Susan at and before treaty times. *Id.* at p. 9. At bottom, Dr. Gulig thus appears neutral  
21 on Port Susan.

22 Dr. Gulig’s opinion as to Port Susan is an outlier. No other expert in this Subproceeding  
23 agrees with Dr. Gulig as to Port Susan. And Dr. Gulig’s opinion runs contrary to the prior opinion  
24 of Dr. Lane as to Stillaguamish utilization of Port Susan whose opinion, on numerous previous  
25 occasions in this case, the Court has found highly reliable. *United States v. Washington*, 626  
26 F.Supp. at 1487 (comparing and contrasting expert testimony of Dr. Lane, Dr. Elmendorf and Dr.  
27 Jay Miller). In contrast, other courts have questioned Dr. Gulig’s opinions and disregarded Dr.  
28

1 Gulig’s differing conclusions on summary judgment “when all other indications point to the  
2 opposite conclusion.” *Keweenaw Bay Indian Cmty. v. Naftaly*, 370 F.Supp.2d 620, 627 n. 5 (W.D.  
3 Mich. 2005), *aff’d*, 452 F.3d 514 (6th Cir. 2006).

4 In *Naftalky*, discussing the differences between competing experts’ opinions, the court  
5 noted that “[w]hile Dr. Gulig’s conclusions conflicts with the conclusions of Dr. Cleland in some  
6 respects, the Court notes that Dr. Gulig’s report focuses more on what was *not* in the 1854 Treaty  
7 than on the meaning of the ‘removal’ language.” 370 F.Supp.2d at 627, n.5 (emphasis in original).  
8 The Sixth Circuit, affirming the district court, was less kind to Dr. Gulig, noting that “Defendants’  
9 experts provide opinions that we do not find persuasive in the present context” and finding that  
10 “Dr. Gulig’s report says little as to” the primary issue in the case and that Dr. Gulig made  
11 “unsupported conclusory assertion[s].” 452 F.3d at 526. So too here. Dr. Gulig’s passing  
12 assertion as to Stillaguamish not fishing in Port Susan, which was walked back by his deposition  
13 testimony acknowledging certain evidence as to Port Susan, when compared to the extensive  
14 record detailing Stillaguamish villages at Warm beach and Hat Slough on the east shore of Port  
15 Susan and Stillaguamish treaty-time fishing in Port Susan, could lead no rational trier of fact to  
16 find that Stillaguamish did not regularly fish Port Susan at and before treaty times. *Matsushita*  
17 *Elec. Indus. Co.*, 475 U.S. at 587. All other indications point to the opposite conclusion—that  
18 Stillaguamish regularly fished Port Susan at and before treaty times.

19 In sum, Stillaguamish has shown that there is no genuine dispute of fact as to whether  
20 Stillaguamish fished Port Susan at and before treaty times. The documentary and expert evidence  
21 presented by Stillaguamish, as well as the expert evidence presented by Tulalip and Upper Skagit,  
22 when applied consistently with the Court’s prior findings of fact and legal conclusions, is sufficient  
23 to establish that Stillaguamish regularly fished in the marine waters of Port Susan at treaty times  
24 and that Port Susan is, therefore, a usual and accustomed fishing area of Stillaguamish. Swinomish  
25 cannot defeat summary judgment on this issue for two reasons: because Dr. Blukis-Onat offers no  
26 opinion on Port Susan; and because Dr. Gulig’s testimony alone could not lead a rational trier of  
27 fact to find that Stillaguamish did not regularly fish Port Susan at and before treaty times based on  
28

1 the record in this case. Stillaguamish is entitled to judgment as a matter of law that its U&A  
2 grounds include Port Susan.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Stillaguamish respectfully asks that this Court declare that  
5 Stillaguamish regularly fished the marine waters of Port Susan at and before treaty times and,  
6 therefore, that Stillaguamish's U&A grounds includes the non-exclusive treaty right to harvest all  
7 species of fish and shellfish in Port Susan.

8 DATED this 7th day of January, 2021.

9 By: /s/ Rob Roy Smith

10 Rob Roy Smith, WSBA #33798

Email: [rrsmith@kilpatricktownsend.com](mailto:rrsmith@kilpatricktownsend.com)

11 Claire Newman, WSBA #46200

Email: [cnewman@kilpatricktownsend.com](mailto:cnewman@kilpatricktownsend.com)

12 Bree R. Black Horse, WSBA #47803

Email: [brblackhorse@kilpatricktownsend.com](mailto:brblackhorse@kilpatricktownsend.com)

13 Kilpatrick Townsend & Stockton, LLP

14 1420 Fifth Avenue, Suite 3700

Seattle, Washington 98101

15 Tel: (206) 467-9600; Fax: (206) 623-6793

16 Scott Owen Mannakee, WSBA # 19454

Email: [smannakee@stillaguamish.com](mailto:smannakee@stillaguamish.com)

17 Stillaguamish Tribe of Indians

18 3322 236th Street NE

Arlington, WA 98223

19 Tel: (360) 572-3028

20 *Attorneys for the Stillaguamish Tribe of Indians*