

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.

Case No. C70-9213
Subproceeding No. 17-3

UPPER SKAGIT INDIAN TRIBE’S MOTION
FOR SUMMARY JUDGMENT

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

I. RELIEF REQUESTED

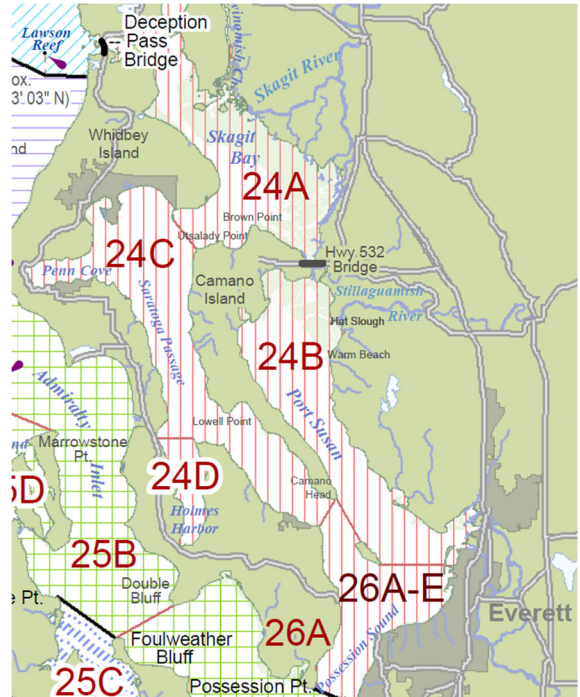
The Court should enter summary judgment against the Stillaguamish Tribe of Indians (Stillaguamish) because there is no genuine issue of material fact: there is no direct evidence or “inferences reasonably drawn therefrom” that Stillaguamish “customarily fished from time to time” (defined to exclude locations “used infrequently,” “at long intervals,” on “extraordinary occasions,” “occasional[ly],” or “incidental[ly]”) in the waters at issue “at and before treaty times.” *United States v. Washington*, 384 F. Supp. 312, 332, 348, 356 (W.D. Wash. 1974). In fact, there is no evidence of Stillaguamish treaty-time fishing in marine waters *at all*, let alone fishing there “customarily.” Without such evidence, Stillaguamish cannot show that these areas were its “usual and accustomed” fishing places, *id.* at 332, and summary judgment is appropriate, Fed. R. Civ. P. 56.

II. RELEVANT FACTS

A. Areas at Issue (map reprinted at Appendix 1)¹

Stillaguamish claims U&A in the marine waters on the eastern side of Whidbey Island and both shores of Camano Island, excluding waters directly adjacent to any Indian reservation. These waters include (counterclockwise around Camano Island from the north end of Whidbey Island):

- Deception Pass
- Skagit Bay
- Penn Cove
- Saratoga Passage
- Holmes Harbor
- Possession Sound
- Port Susan



B. Stillaguamish’s Expert Identifies No Evidence of Stillaguamish Marine Fishing in the Relevant Locations at and before Treaty Times.

Stillaguamish initially retained Dr. Jill Grady as an expert, who testified that providing an opinion in this matter required the “depth” of “stud[y]” she had done over sixteen years of research.² Stillaguamish went further, stating, “It is believed that *there is no other expert that is now or could be in the future* prepared to provide expert testimony on the subject of Stillaguamish’s marine fishing.”³

When the Court denied Stillaguamish’s motion to perpetuate Dr. Grady’s testimony,⁴

¹ See Dkt. 4 (Stillaguamish Request for Determination). The Court may take “[j]udicial notice” of the “map of the area.” *United States v. Trenary*, 473 F.2d 680, 682 (9th Cir. 1973).

² Dkt. 90 ¶ 8 (“I know of no other anthropologist who has studied Stillaguamish ethnohistory *to the depth required* to provide expert testimony” (emphasis added)).

³ Dkt. 88, p. 3 (emphasis added); see also Dkt. 106, p. 2 (same).

⁴ See Dkt. 120, pp. 11-12.

1 Stillaguamish retained historian Chris Friday to provide an opinion answering (in his words) five
 2 “very basic and straightforward guiding questions,” one of which was “did [Stillaguamish] from
 3 aboriginal times through the treaty era *utilize* marine (and estuarine) resources and if so which
 4 resources, how, and where?”⁵ Although Dr. Friday has stated that the answer as to all such areas is
 5 yes, he has presented no evidence of *fishing* by the Stillaguamish Tribe in those areas at and before
 6 treaty times. Indeed, he acknowledged that to determine whether Stillaguamish “were involved in
 7 marine fisheries of some kind” he looked not for first- or second-hand accounts of marine fishing
 8 by Stillaguamish at and before treaty times (implicitly acknowledging that there are none), but
 9 instead for evidence (a) “that they were in locations where marine fisheries were taking place, such
 10 as summer encampments along the west shore of Camano Island or in Holmes Harbor,” (b) that
 11 they were “traveling distances from their villages for purposes of summer encampments or the
 12 federal encampments,” and (c) that there were “shell middens” found at the seashore.⁶

13
 14 Within those “set[s] of data points,”⁷ Dr. Friday relied on the following, all of which are
 15 insufficient to prove Stillaguamish U&A:

- 16 (1) inferences that he claims establish Stillaguamish “territory”;
- 17 (2) an insupportable application of his novel theoretical model of “radiating tribal
 18 interests” which is contrary to the settled evidentiary standard required to prove
 19 U&A and, if accepted, could mean that every (or nearly every) treaty tribe had
 20 U&A in the entire case area;
- 21 (3) a single instance of travel for trade with no accompanying evidence that the travel
 22 was *in* the areas at issue, was for the *purpose* of fishing, or *involved fishing* while
 23

24 ⁵ Friday Report, p. 3 (emphasis added) (Ballinger Decl. Ex. 1).

25 ⁶ Friday Dep. 171:18-21, 172:6-17 (Ballinger Decl. Ex. 2). Dr. Friday acknowledges that “[s]hell middens,” which he
 26 describes as heaps of shells suggesting the location of “frequently re-used camps,” are “notoriously difficult to
 evaluate for content and dating based on selective sampling techniques.” Friday Report, pp. 110, 125 (Ballinger Decl.
 Ex. 1). Left unsaid by Dr. Friday is that shell middens provide no evidence of who left them.

⁷ Friday Dep. 172:6-17 (Ballinger Decl. Ex. 2).

1 underway;

2 (4) evidence that Stillaguamish were relocated to Whidbey Island *after* the treaty was
3 signed, and speculation that subsequent Stillaguamish travel from there to Utsalady
4 (on Camano Island) suggests that they had been to Utsalady *before* the treaty was
5 signed; and

6 (5) a single instance of a single Stillaguamish Indian who married into a tribe which
7 fished in marine waters.

8 Dr. Friday testified that his methodology would mean that every treaty tribe in the Whidbey
9 Basin (which he “defined as a geographic region including the freshwater drainages of the
10 Stillaguamish, Skagit, and Snohomish Rivers as well as the marine and estuarine shorelines (bays,
11 inlets, etc.) of Camano, Whidbey, and Fidalgo Islands and the open waters of Skagit Bay,
12 Deception Pass, Saratoga Passage, and Possession Sound”⁸), has U&A in the entire Whidbey
13 Basin:
14

15 A. All of the treaty tribes that were present in and around that Whidbey Basin
16 fished broadly in the marine waters. There were some specific locations
that seemed to be more precisely controlled.

17 Q. So . . . is it your view that all of the tribes had usual and accustomed
18 fisheries in all of the Whidbey Basin?

19 A. I would say --

[Objection to form and direction to answer]

20 A. Yeah. I would say that . . . all the tribes were active in traveling and
21 fishing in those waters in the notion that Boldt discussed about fishing
22 grounds as opposed to fishing stations.⁹

23 In his report, he goes even further than Stillaguamish’s request for determination,
24 concluding that in “the treaty era” the “Stillaguamish . . . utilized marine environments extensively
25 on par with Coast Salish tribes occupying freshwater drainages that emptied into the saltwaters of

26 _____
⁸ Friday Report, p. 3 (Ballinger Decl. Ex. 1).

⁹ Friday Dep. 67:7-68:2 (Ballinger Decl. Ex. 2).

1 the Whidbey Basin . . . *and the Puget Sound more generally.*”¹⁰

2 When addressing specific areas, Dr. Friday identified only the following as supporting a
3 finding of fishing at and before treaty times:

Location	Evidence	Citation ¹¹
Deception Pass:	Q. . . . Did Stillaguamish fish in Deception Pass at treaty time?	73:12-
Travel to Victoria for trade	A. The best evidence we have for that is a mention by Sally Oxstein of traveling to Victoria. In order to get -- to get to Victoria, families always waited for the right tides. And this involved sometimes camping on either sides, and while they were encamped there, the record indicates the families would fish and -- and harvest shellfish during that time period.	74:6
No evidence of route or of fishing en route	Q. What -- so do you have -- there’s a mention in one of the documents you cite in your report of Sally Oxstein traveling to a trading post, I think it was, in Victoria. Do you have any evidence other than that of Stillaguamish fishing Deception Pass?	
	A. No. Again, it’s about context and the way -- the nature of travel in that area. And so that is an example of a family traveling -- Stillaguamish family traveling to -- to that area. And it suggests a broader pattern.	
	. . .	
	A. . . . I think there’s evidence of travel through that area and being in that area of -- which would require waiting for tides to shift and change. And during that time, families fished and gathered shellfish while they camped.	173:9- 173:14
	. . .	
	A. There is . . . evidence of people trolling on the west side of Deception Pass in open waters. . . .	174:2- 175:12
	Q: . . . [W]hen you say “people,” who do you mean by “people”?	
	A. All the -- all the people within the -- the Whidbey Basin.	
	Q. Including Stillaguamish?	
	A. . . . [Y]eah.	
	Q. And how do you make that connection?	
	A. By the fact that they were in those waters traveling and part of the whole community of tribes in that -- in that area.	
	Q. . . . Do you have any specific evidence or data that shows Stillaguamish specifically in those areas -- not -- not that there were people there generally, but that people who were	

¹⁰ Friday Report, p. 3 (emphasis added) (Ballinger Decl. Ex. 1).

¹¹ Because Dr. Friday’s report (filed at Ballinger Decl. Ex. 1) did not clearly identify evidence specific to Stillaguamish as to each area (see Friday Report, pp. 102-139), all citations are to his deposition, excerpts of which are filed at Ballinger Decl. Ex. 2.

1	Location	Evidence	Citation¹¹
2		considered Stillaguamish were actually there?	
3		A. The -- the most direct evidence I have is by travel.	
4		Q. And you have that how? What is your documentation as it relates to them traveling through Deception Pass?	
5		A. One specific one would be Sally Oxstein's travel to Victoria.	
6		Q. And how do you know what her route was?	
7		A. By the fact that they would have taken the most direct, logical route, rather than sweeping down around Whidbey Island and coming up that interior area -- the -- the west side of that island; that the most logical movement through that area was to go through Deception Pass.	
8		...	
9		Q. So the only evidence that you're relying upon for them being in Deception Pass is the fact that they traveled to Victoria?	176:12-176:18
10		A. And that Deception Pass is on the west -- or, excuse me, the east side of Deception Pass was generally considered open territory for people traveling through that area.	
11		...	
12		A. ... If you look at pages 184 and 185 of the report, that's where I reference Sally Oxstein's visit -- her family visits to Victoria. ...	178:22-179:10
13		...	
14		Q. And there's where you're talking about they're -- they're traveling to Victoria, so hypothetically, they -- they traveled through Deception Pass and may have fished there. Is that correct?	
15		A. Yes.	
16		Q. Do you have any other information as it relates to Deception Pass?	
17		A. Not at this time.	
18			
19			
20	Skagit Bay:	Q. What evidence do you have that Stillaguamish fished Skagit Bay at all?	76:7-76:15
21	Access from location near sea	A. The best evidence of the use of marine resources would be the middens at the various sites that are within that Qwadsak region that we've -- that we've mentioned briefly before. And that -- the volume and size of those middens would suggest something much beyond a casual use or even a gifting use of shells to that area.	
22		...	
23		Q. ... [W]hat is your opinion as relates to Stillaguamish having U&A in the -- in what generally is referred to as Skagit Bay in your report?	181:10-182:10
24			
25			
26			

Location	Evidence	Citation ¹¹
	<p>A. I think it's the -- it's essentially focused around Qwadsak^[12] access -- and easy access to those waters on Qwadsak. And that would include some small portions of northern Camano Island. It puts them adjacent to the waters of Skagit Bay and which would have meant they would have been easily out in those waters on a potentially daily basis in some -- from some locations or easy access to camping locations, summers, resource camping locations in the area.</p> <p>Q. Let me understand that. So what are the facts that support their having access from Qwadsak to Skagit Bay?</p> <p>A. The fact that the Stillaguamish River's main channel ran over into that area, over the West Pass, and then split to West Pass and North Pass, which West Pass went up into Skagit Bay. There would have been no reason not to use that. And then down into South Pass through -- to Port Susan or Hat Slough to Port Susan. If they have landed territories and village sites right on the -- the brink of the bay there, that seems to be a -- position them for a usual and accustomed access to that -- to the waters of Skagit Bay.</p>	
Utsalady:	<p>Q. . . . What's your opinion as it relates to Stillaguamish having U&A at Utsalady?</p> <p>A. . . . We know that there were two kind of key Kikiallus sites at the north end there, one at -- one near Browns Point and one over -- I'm looking at the map here on page 70, is where I'm looking for that, which is the map that's open right now. But there -- there's -- at either end of Utsalady, they -- there appears to be settlements. There's water in -- freshwater in those locations, but there's extensive middens all along the whole bay which stretches about a mile and a half or two miles.</p> <p>Q. But you don't -- are those middens specifically associated -- can you tie those to Kikiallus? How do you distinguish whether they were used by Kikiallus or Stillaguamish?</p> <p>A. . . . There's evidence in 1857 from the agents, talking about people coming from Utsalady -- Stillaguamish people coming from Utsalady at least two different times, having been over there to gather berries. And we know that if they're gathering -- if the women are gathering berries, the men are doing something else -- whether that's hunting or fishing.</p> <p>. . .</p> <p>A. They came from Utsalady to -- . . . the camps on Whidbey Island. . . .</p>	<p>183:6- 184:11</p> <p>185:11- 185:18</p>
(1) Present after Federal relocation to Whidbey Island and		
(2) Presume fishing from that presence		

¹² See Appendix 3.

Location	Evidence	Citation ¹¹
	Q. So then you're making the assumption that they fished because they were in the area?	
	A. I'd have to look exactly at what I say in the report and exactly what the agent said. . . .	
	...	
	A. [Quoting from report] Through the winter of 1856-57 -- I'll read slower -- Fay continued to report interactions with Stillaguamish who came and went seeking rations or simply to visit others who remained at the agency at Penn Cove. In mid-March 1857, Fay reported that some Stillaguamish had come to Penn Cove from Utsalady on Camano Island -- or, excuse me, Camano Island and again later that month that two canoes of men from -- from the Stillaguamish Tribe now at Utsalady came here 15 in all. In May 1857, Fay reported some Stillaguamish from the island, Camano, here -- he's saying -- present here at Penn Cove.	186:9-186:24
	Q. So this would be your hypothesis that they were fishing there because you're saying that they were, according to these sites, in the area?	
	A. They came from those locations.	
	...	
	A. It shows that they're present. And if they're present for any length of time, all of the context and evidence for Coast Salish people suggests that they would have been fishing and clamming and harvesting what was available to them at that time at those locations.	187:11-187:16
	...	
	A. . . .[T]here is no evidence that they were fishing -- no direct evidence that they were fishing, other than the broader social context of being Coast Salish at this time.	189:20-189:23
Saratoga Passage:	Q. All right. How about Saratoga Passage? Did Stillaguamish fish Saratoga Passage at treaty time?	72:11-72:16
None (directs to Camano, Holmes Harbor, Penn's Cove)	A. The evidence that we have is they were present along the western side of Camano Island. And we know that while women were clamming, men tended to be fishing.	
	...	
	A. I believe they had U&A along that area, as we defined it today, about fishing grounds and -- and clamming grounds. There's evidence that they were in encampments along the west side of Camano Island. There's evidence that they were in Holmes Harbor, which is -- is a body of water that connects to Saratoga Passage. And there's evidence that they were at Penn's Cove.	192:3-192:10
	...	
	Q. . . . [D]o you have any other information as it relates to	195:4-

Location	Evidence	Citation ¹¹
Presence by marriage (Holmes Harbor)	had rights to fish there by virtue of his marriage. He had been married for about 48 years in 1902, which would have placed his marriage about 1854, which would have been at treaty times.	
Presence after Federal relocation (both)	<p>...</p> <p>Q. So your -- so do you have any evidence that Stillaguamish fished Holmes Harbor at treaty time other than Mowitch Sam had access to Holmes Harbor by marriage?</p> <p>A. Only -- that's the one specific example I can cite. I can also cite that Stillaguamish were at Holmes Harbor in the mid 1850s. They were also at Penn's Cove. They were also at Skagit head, which is around on the other side. And we see that from the correspondence of federal agents.</p> <p>Q. When they were interned there, correct?</p> <p>A. They -- they like all the other people who were ordered to go to those encampments went -- came and went, came and went -- virtually all of the tribes who were there came and went to their various locations.</p> <p>...</p> <p>Q. ... What -- what evidence do you have of Stillaguamish fishing Holmes Harbor at treaty time, other than the Mowitch Sam access by marriage and the Indian agent correspondence?</p> <p>A. The rest is all -- the rest is based on context.</p> <p>...</p> <p>Q. ... What is your information as it relates to encampments on Holmes Harbor?</p> <p>A. The -- the best evidence is the agents' reports from the 1850s of them being present and Mowitch Sam fishing there, as we discussed earlier this morning.</p>	<p>62:4-62:19</p> <p>64:18-64:23</p> <p>200:5-200:11</p>
Possession Sound:	<p>Q. ... Did Stillaguamish fish Possession Sound at treaty time?</p> <p>A. We have evidence that they were active in Port Susan that extends down. And to get around to the other side of the island -- of Camano Island, they would have gone up and around past Utsalady or come down and around through. And that would have put them around Camano head which abuts parts of Possession Sound.</p>	<p>71:7-71:15</p>
Supposition of travel		

III. ARGUMENT

A. Standard

Summary judgment is appropriate where “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.

1 Civ. P. 56(a).

2 A tribe's U&A includes "every fishing location where members of a tribe customarily
3 fished from time to time at and before treaty times, however distant from the then usual habitat of
4 the tribe, and whether or not other tribes then also fished in the same waters," but excludes
5 locations "used infrequently," "at long intervals," on "extraordinary occasions," "occasional[ly],"
6 or "incidental[ly]." 384 F. Supp. at 332, 356. "Evidence of the probable distances to which a tribe
7 had the capability to travel at treaty-time is insufficient on its own to establish U&A." *United*
8 *States v. Washington*, 129 F. Supp. 3d 1069, 1111 (W.D. Wash. 2015) (citing *United States v.*
9 *Washington*, 730 F.2d 1314, 1318 (9th Cir. 1984)), *aff'd sub nom. Makah Indian Tribe v. Quileute*
10 *Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017). "So too is evidence that a tribe occasionally trolled
11 incidental to traveling through an area." *Id.* (citing 384 F. Supp. at 353 and *Upper Skagit Indian*
12 *Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010)).

13 In Subproceeding No. 09-1, the Court outlined the standard which applies to a tribe's
14 request to expand its U&A, stating that the Court "steps into the place occupied by Judge Boldt
15 when he set forth U&As" and "applies the same evidentiary standards applied by Judge Boldt in
16 Final Decision #1 and elaborated in the ensuing forty years of subproceedings." 129 F. Supp. 3d at
17 1110. Because "evidence of treaty-time fishing activities is 'sketchy and less satisfactory than
18 evidence available in the typical civil proceeding,'" and the documentation is "extremely
19 fragmentary," "the stringent standard of proof that operates in ordinary civil proceedings in
20 relaxed." *Id.* (quoting *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir.
21 1988)). Nevertheless, Stillaguamish, as the tribe seeking to expand its U&A, "bear[s] the burden
22 to establish the location of" its U&A, which it must prove by "a preponderance of the evidence
23 found credible and inferences reasonably drawn therefrom." *Id.* (citing 384 F. Supp. at 348); *see*
24 *also United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975) ("In
25 determining usual and accustomed fishing places the court cannot follow stringent proof standards
26

1 because to do so would likely preclude a finding of any such fishing areas. . . . Notwithstanding the
 2 court’s prior acknowledgement of the difficulty of proof, the Tulalips have the burden of
 3 producing evidence to support their broad claims.”).

4 **B. Evidence of Presence at or Near Marine Waters Does Not Establish that Such an Area**
 5 **Was a U&A Fishing Location (waters around Camano Island, *i.e.*, Skagit Bay,**
 6 **Saratoga Passage, Possession Sound, Port Susan).**

7 Dr. Friday concluded that Stillaguamish customarily fished at and before treaty times
 8 around Camano Island (*i.e.*, in the waters of Skagit Bay, Saratoga Passage, Possession Sound, and
 9 Port Susan) using only evidence that he claims shows that Stillaguamish used two villages at
 10 Warm Beach (south of the mouth of the Stillaguamish River and on Port Susan),¹³ a village south
 11 of the present day Highway 532 bridge (north of the mouth of the Stillaguamish River and on Port
 12 Susan), and an encampment at the sound end of Camano Island. Even if proven, this evidence is
 13 insufficient to prove U&A in the adjacent waters. While the Court may find U&A based on
 14 “evidence found credible and inferences reasonably drawn therefrom,” 384 F. Supp. at 348, the
 15 *presence* of a tribe—even evidence of a tribe’s *village*—is not enough for the Court to infer fishing
 16 in the adjacent waters.

17 At the 1973 trial, a handful of the tribes proved marine U&A “adjacent” to their treaty-time
 18 villages on the sea. The evidence they adduced (and on which the Court explicitly relied) was not
 19 merely that their villages were at the sea. *Cf.* 384 F. Supp. at 353 (“*most* groups claimed autumn
 20 fishing use rights in the waters near to their winter villages” (emphasis added)). Had that been the
 21 rule, those tribes would have needed only to submit the Indian Claims Commission (ICC) findings
 22 about village locations, the mapped location of villages established at the ICC, or Dr. Lane’s
 23 conclusions about the location of those villages.

24 Instead, the Court turned to, and relied on, evidence of *fishing* to support findings of marine
 25 U&A adjacent to village locations. While the Court also cited the ICC maps and Dr. Lane’s
 26 conclusions, both contained crucial additional evidence: (1) the maps showed that the tribe at issue

¹³ Warm Beach is south of the mouth of the Stillaguamish River and adjacent to Port Susan. *See* Appendix 1.

1 named many of the villages based on the *fishing* activities that happened there and (2) Dr. Lane’s
 2 conclusions were supported by first- and second-hand accounts of *fishing*.¹⁴ That the Court
 3 concluded that a “complete inventory of any tribe’s usual and accustomed grounds and stations”
 4 would be “impossible to compile” does not mean that a tribe can prove U&A without proving
 5 *fishing* in the waters at issue: the rest of that sentence, the remainder of that paragraph, and a later
 6 conclusion make clear that what the Court was saying was that even though only “specific fishing
 7 locations can be pinpointed,” a tribe’s U&A was the waters identified, and not limited to the
 8 specific identified fishing locations. *See* 384 F. Supp. at 353 ¶ 13; *see also id.* at 402 ¶ 26 (“The
 9 only method providing a fair and comprehensive account of the usual and accustomed fishing
 10 places of the Plaintiff tribes is the designation of the freshwater systems and marine areas within
 11 which the treaty Indians fished . . .”).

12 The chart below shows some of the evidence of *fishing* on which the Court relied:

Tribe & Marine U&A	Example of First- and Second-Hand Accounts the Court Cited Supporting Marine U&A Finding
Quileute “and the adjacent tidewater and saltwater areas” 384 F. Supp. at 372 ¶ 108 (citing, <i>inter alia</i> , Exs. USA-22, pp. 11-21, 25-29; USA-31e, pp. 218-232, USA-53, App. 1)	“These tom cod which we caught are the first of that variety of fish I have yet seen on the Pacific.” (USA-22, p. 13 ¹⁵) “Quiliutes used to fish in rivers, lakes and ocean.” (USA-22, p. 14 ¹⁵) “The smelt were caught in the ocean along the beach in front of the village of La Push . . . and also south of the ocean down . . .” (USA-22, p. 18 ¹⁵) “The Indians would catch seals by spearing them from their canoes which was the same way they hunted whales in the ocean.” (USA-22, p. 19 ¹⁵) “They also caught seals out in the ocean, using the village of La Push as their headquarters.” (USA-22, p. 25 ¹⁵) “The Indians who lived along the ocean did not have as much fish as

14 This was consistent with the searching inquiry the Court made of Dr. Lane’s conclusions, “evaluat[ing]” the “substance of [her] testimony” and finding that the “extent and duration of [her] field work in the case area and academic research” meant that “in specific facts,” her reports “have been exceptionally well researched and reported and are established by a preponderance of the evidence.” 384 F. Supp. at 350. Notably, in listing her “summaries of relevant aspects of Indian life” that the Court found “authoritative and reliable,” the Court did not include her conclusions about the location of tribe’s U&As. *Id.*

15 USA-22 is filed at Ballinger Decl. Ex. 3.

Tribe & Marine U&A	Example of First- and Second-Hand Accounts the Court Cited Supporting Marine U&A Finding
	<p>those who lived in the villages upstream and, therefore, they would exchange dried whale, clam, and seal meat for dried fish.” (USA-22, p. 26¹⁵)</p> <p>“that in addition to information he gathered by actual observation of the way the Indians lived and fished at those places he always was told by his parents as well as the older members of the Quileute Tribe about the way the Indians lived and fished at the various villages prior to the coming of the white men and for as long as the Indians had been living in that country . . . [¶] those along the ocean could obtain seal, whale and smelt . . . that the Indians would go [Ozette Lake] in canoes which they paddled in the ocean . . . that they maintained canoes at the lake which were smaller than their ocean canoes . . .” (USA-31e, pp. 218, 221-22¹⁶)</p> <p>“4. . . . This was a small settlement used as a whaling station 5. . . . This was a site from which the residents fished along the shore during the summer season. . . . 6. . . . A whaling village 7. A sea fishing village 8. . . . A village used for whaling, bottom fishing, clam gathering and taking of other seafood. 9. . . . This site was noted for whaling. The residents also dug clams, did bottom fishing and obtained other kinds of sea food.” (USA-53, App. 1, Quileute Villages, p. 1¹⁷)</p>
<p>Quinault</p> <p>“Ocean fisheries were utilized in the waters adjacent to their territory.” 384 F. Supp. at 374 ¶ 120 (citing, <i>inter alia</i>, Exs. USA-31e, pp. 205-214; USA-53, App. 1)</p>	<p>“That the Queets Indians were accustomed to catching smolt in the Pacific Ocean at a place now called Brown’s Point” (USA-31e, p. 205¹⁶)</p> <p>“9. . . . ‘where the whale.’ . . . 43. A large and important settlement on the bay Razer clams were obtained from this point to Grays Harbor This was a preferred location for gathering mussels. This was the closest place . . . for the safe beaching of ocean-going canoes. . . . 46. . . . productive site[] for clamming and surf fishing” (USA-53, App. 1, Quinault Villages, pp. 1, 3¹⁷)</p>
<p>Nisqually</p> <p>“the saltwater areas at the mouth of the Nisqually River and the surrounding bay”</p>	<p>“from these camps they would go out into the bay when the tide was out to catch flounders and dig clams” (USA-31e, pp. 201-02¹⁶)</p> <p>“These villagers also fished the Sound, trolling for salmon and flounder.” (G-23, II-19¹⁸)</p>

¹⁶ The excerpts of USA-31e cited by the Court (pp. 200-02 re Nisqually; pp. 205-214 re Quinault; pp. 218-232 re Quileute) are filed at Ballinger Decl. Ex. 4.

¹⁷ USA-53, App. 1, is filed at Ballinger Decl. Ex. 5.

¹⁸ G-23 is filed at Ballinger Decl. Ex. 6.

Tribe & Marine U&A	Example of First- and Second-Hand Accounts the Court Cited Supporting Marine U&A Finding
384 F. Supp. at 369 ¶ 86 (citing, <i>inter alia</i> , Exs. USA-31e, pp. 200-02; G-23, II-19; G-25, II-4)	“The Steilacoom gathered clams near the mouth of Medicine Creek and also fished in this area.” (G-25, II-4 ¹⁹)

The same was true of the evidence underlying the Court’s findings concerning Stillaguamish: the evidence established that the Stillaguamish did not merely live along the Stillaguamish River but *fished* there. *See* Appendix 4.

While the Court was not explicit in Final Decision #1 that evidence of fishing was required to prove U&A in waters adjacent to villages, the Court was in a subsequent decision. In 1975, the Court explicitly held that evidence of village locations was not enough to prove fishing at those locations. *See* 459 F. Supp. at 1059. In that subproceeding, the Court considered three types of evidence in determining the Tulalip Tribes’ U&A: testimony by Dr. Lane, testimony from a tribal elder about post-treaty fishing locations (“tribal fishing locations subsequent to entering into treaties”), and ICC findings about the location of Tulalips’ “coastal and river villages.” *Id.* The Court held that the ICC findings “of the Indian coastal and river villages” although raising the “presum[ption]” of fishing activities, was not enough. *Id.* The Court held,

In the present case, the findings of the Claims Commission of the Indian coastal and river villages, from which fishing activities may be presumed, coincide with the findings of Dr. Lane and the testimony of Mrs. Dover. Future utilization of Indian Claims Commission decisions and findings for the purpose of establishing usual and accustomed fishing places *shall be given consideration consistent with the above stated limitations.*

Id. (emphasis added). Even though the Tulalip Tribes had proven “coastal and river villages, by which fishing activities may be presumed,” that presumption did not rise to the level of a “reasonable inference[.]” that fishing activities had occurred there. *Id.* Instead, to support a U&A finding, the Court required evidence of *fishing* to accompany evidence of coastal and river villages. *Id.*; *see also id.* (“Notwithstanding the court’s prior acknowledgement of the difficulty of proof, the

¹⁹ G-25 is filed at Ballinger Decl. Ex. 12.

1 Tulalips have the burden of producing evidence to support their broad claims.”).²⁰

2 Dr. Friday’s conclusions about Stillaguamish are supported by no such evidence. *At most*,
 3 Stillaguamish can prove that it used villages adjacent to Port Susan and encamped on the southern
 4 end of Camano Island. The Court’s caution about using territory established at the ICC to prove
 5 U&A applies here to an even greater degree because the ICC made no such determination as to
 6 Stillaguamish. If Stillaguamish can prove that those village sites were Stillaguamish at and before
 7 treaty times, the law of the case²¹ is that is not enough: evidence of tribal villages or presence must
 8 “coincide with” evidence of fishing, just as Tulalip’s U&A was established only because the ICC’s
 9 determination of Tulalip’s territory “coincide[d] with the findings of Dr. Lane and the testimony of
 10 Mrs. Dover” about where Tulalip fished. 459 F. Supp. at 1059.²²

11 Dr. Lane’s testimony in 1983 and 1975, on which Dr. Friday relies, is likewise insufficient.
 12 During her testimony about *Tulalip* fishing in the 1975 and 1983 proceedings described above, Dr.
 13 Lane was asked about Hat Slough and Warm Beach, both of which are adjacent to Port Susan. She
 14 testified that “there is documentation from the earlier part of this century that says that those were

15
 16 ²⁰ This evidentiary requirement—that fishing, not just presence on nearby or adjacent land—underlies the Ninth
 17 Circuit’s and this Court’s standard in determining Judge Boldt’s intent in a proceeding under Paragraph 26(a)(1) where
 18 the parties dispute the meaning of a U&A finding. An area is not within a tribe’s U&A, despite it being within the
 19 geographic area Judge Boldt identified, if there was no evidence before him of fishing there. Thus, in *United States v.*
 20 *Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000), Muckleshoot’s U&A included “the waters of Puget Sound,”
 21 but the Court held that Judge Boldt intended by that language only Elliott Bay because the evidence proved fishing
 22 only in Elliott Bay. *Id.* at 432, 434 (“These documents indicate that the Muckleshoot’s ancestors were almost entirely
 23 an upriver people who primarily relied on freshwater fishing for their livelihoods. Insofar as they conducted saltwater
 24 fishing, the referenced documents contain no evidence indicating that such fishing occurred with regularity anywhere
 25 beyond Elliott Bay.” (citing evidence that said that the tribe “occasionally made the trip down river to Elliott Bay on
 26 fishing and clamming expeditions” and “there was some trolling for salmon in salt waters when families descended the
 rivers to get shell fish supplies on the beaches of the Sound”)); *see also Upper Skagit Indian Tribe v. Suquamish
 Indian Tribe*, 871 F.3d 844, 850 (9th Cir. 2017) (“Absent any other indication in Dr. Lane’s report or testimony that
 the Suquamish might have traveled to the Contested Waters to fish, the ‘general evidence’ of northward travel through
 Hale Passage, which itself is merely adjacent to the Contested Waters, is insufficient to show the Suquamish traveled
 or fished through the Contested Waters. This case is distinguishable from *Tulalip*, which relied on both general and
 specific evidence that the Suquamish fished and traveled through waters west of Whidbey Island.”).

²¹ Although all parties are bound by the law of this case, Stillaguamish is especially bound by the 1975 decision given
 it opposed entry of that order. *See, e.g.*, No. 70-9213, Dkt. 1207 (Ballinger Decl. Ex. 7).

²² Notably, Mrs. Dover testified, “A. . . . We wouldn’t dream of going up like, you know, the Stillaguamish River.
 That belongs to those people. Q. And would they come down to your place? A. They come to visit. Q. But did they
 come to roam about and live and hunt and fish and gather berries in your areas? A. You mean which -- Q. Any of the
 tribes? A. No, they didn’t have to. They had riches galore.” No. 70-9213, Dkt. 1691, Tr. 114:8-17 (July 30, 1975)
 (Ballinger Decl. Ex. 8).

1 inhabited by Stillaguamish people and were called Stillaguamish villages” and that “areas like Port
 2 Susan and areas close to the mouth of the Stillaguamish River . . . were primarily fished by the
 3 Kikiallis and Stillaguamish.”²³ But, Kikiallus and Stillaguamish were different tribes (as Dr.
 4 Friday recognizes²⁴); unlike Stillaguamish, Kikiallus’s ICC-determined territory was on the sea;
 5 Dr. Lane was not asked to parse her testimony as to what areas were fished by Kikiallus versus
 6 Stillaguamish; and the only *evidence* Dr. Lane cited was that the tribes had villages adjacent to the
 7 sea, exactly the evidence the Court held to be insufficient in 1975.

8 Even though Dr. Friday *concluded* that Stillaguamish had marine U&A at Skagit Bay,
 9 Saratoga Passage, Possession Sound, and Port Susan, his only *evidence* is that Stillaguamish were
 10 documented to be present *on land* near those large bodies of water. And, in the case of Skagit Bay,
 11 in addition to speculating that they fished there, Dr. Friday must conjure two additional speculative
 12 facts for which he has no evidence: that Stillaguamish customarily crossed the area called
 13 Qwadsak and then entered Skagit Bay. *See supra* p. 6 (“Q. . . . [W]hat are the facts that support
 14 their *having access from Qwadsak to Skagit Bay*? A. The fact that the Stillaguamish River’s main
 15 channel ran over into that area, over the West Pass, and then split to West Pass and North Pass,
 16 which West Pass went up into Skagit Bay. *There would have been no reason not to use that.* And
 17 then down into South Pass through -- to Port Susan or Hat Slough to Port Susan. *If they have*
 18 *landed territories and village sites right on the -- the brink of the bay there, that seems to be a --*
 19 *position them for a usual and accustomed access to that -- to the waters of Skagit Bay.*” (emphasis
 20 added)). No witness, including experts, may speculate. Fed. R. Evid. 702 advisory committee’s
 21 notes to 2000 amendment (court must find that expert testimony is “properly grounded, well-
 22 reasoned, and not speculative before it can be admitted”); *see also* Upper Skagit’s Motion to
 23 Exclude (filed herewith).

24 _____
 25 ²³ No. 70-9213, Dkt. 9653E, Tr. 697:24-698:2, 704:24-705:2 (July 18, 1983) (Ballinger Decl. Ex. 9); *see also* No. 70-
 9213, Dkt. 1691, Tr. 80:3-10 (July 30, 1975) (Ballinger Decl. Ex. 8). Kikiallis is alternatively spelled Kikiallus.

26 ²⁴ *E.g.*, Friday Report, p. 25 (Ballinger Decl. Ex. 1). No Stillaguamish signed the Treaty of Point Elliott; instead,
 Stillaguamish “were designated as subordinate to Patkanam who signed the treaty as head chief for the Snoqualmoo
 and associated tribes.” 384 F. Supp. at 378 ¶ 144. Kikiallis signed the treaty. *See* Treaty with the Dwámish &c.
 Indians, Jan. 22, 1855, 12 Stat. 927, 931 (Treaty of Point Elliott) (Ballinger Decl. Ex. 10).

1 There is no genuine issue of material fact as to these locations: this evidence does not even
2 approximate the record the Court deemed necessary, and specifically cited, to support a U&A
3 finding.

4 **C. Evidence of Presence Caused by Federal Relocation Is Not Probative of U&A (Penn**
5 **Cove, Holmes Harbor, Saratoga Passage, waters adjacent to Utsalady).**

6 Stillaguamish presence on Whidbey Island in 1857 due to federal government relocation
7 there cannot be used to establish that Penn Cove, Holmes Harbor, Saratoga Passage, and the waters
8 adjacent to Utsalady and are Stillaguamish U&A, as Dr. Friday claims. Dr. Friday writes:

9 During the years between the negotiation of the Treaty of Point Elliott and its
10 ratification, . . . federal officials appointed to oversee Indian Affairs in
11 Washington Territory regularly and consistently noted their awareness of and
12 interaction with members of the Stillaguamish Indian tribe. That awareness
13 became even more acute during the conflicts between Indians and civilian militia
14 units and U.S. troops during the short-lived “Puget Sound War,” when Governor
15 Stevens issued an order on November 12, 1855, . . . that “All friendly Indians
16 within the limits of the Puget Sound District, have been directed by me, to
17 rendezvous at the following points to await further orders: Head of North Bay,
18 Nisqually, Steilacoom, Gig Harbor, Vashon’s Island, Seattle, Port Orchard,
19 Penn’s Cove and Oak Harbor.” [pp. 198-99 (footnotes omitted)]

20 . . . Stillaguamish were to report to Holmes Harbor and the records indicate that as
21 early as the end of December 1855, they were among the more than 900 who had
22 reported to Holmes Harbor. [p. 199]

23 . . . Stevens charged Agent R.C. Fay with making a census of Indians under his
24 charge at Penn Cove in April 1856 [I]t is possible to identify at potentially
25 six heads of households as Stillaguamish. . . . [pp. 200-01]

26 . . . In mid-March 1857, Fay reported that some Stillaguamish had come to Penn
Cove from Utsalady on Camano Island and again later that month that “two
canoes of men from the Stallaquames tribe now at Utsaladda [sic] came here
fifteen in all.” In May 1857, Fay reported that “some Stilequamus from the Island
[Camano] present here at Penn Cove.” [p. 202]

From this, Dr. Friday erroneously concludes that Stillaguamish had U&A at Penn Cove, Holmes
Harbor, Utsalady, and Saratoga Passage. That conclusion is wrong for two reasons.

First, as noted above, evidence limited to tribal presence at a location (even a permanent
village there) is insufficient to conclude that the tribe fished there.

Second, and even more obvious, where Stillaguamish went and what it did after the tribes

1 signed the treaty in January 1855²⁵ is not evidence of the rights they reserved in the treaty. That
 2 the treaty was not ratified by the United States government until some years later does not make
 3 the period between signing and ratification relevant to the determination. The treaty is a contract:
 4 the rights reserved to the tribes were fixed when they signed it. *See Washington v. Wash. St.*
 5 *Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979) (“A treaty, including one
 6 between the United States and an Indian tribe, is essentially a contract between two sovereign
 7 nations. . . . [I]t is the intention of the parties . . . that must control any attempt to interpret the
 8 treaties.”). That the treaty was not “obligatory on the contracting parties” until it was “ratified by
 9 the President and Senate of the United States,” *id.* at 693 n.33, does not change the fact that the
 10 obligations and rights were fixed at the time of signing, based on the intent of the parties at the
 11 time of signing, *id.* at 675.

12 The only evidence of Stillaguamish *presence* at Penn Cove, Holmes Harbor, Utsalady, and
 13 Saratoga Passage at and before treaty times (let alone *fishing*, of which there is none) is the agent’s
 14 reports of 1856 and 1857 placing Stillaguamish there. Dr. Friday merely speculates when he
 15 surmises that, because the agent documented Stillaguamish returning to Penn Cove from Utsalady
 16 after relocation to Penn Cove, Stillaguamish (1) must have been already familiar with Utsalady and
 17 (2) fished there. Such speculation does not create a genuine issue of material fact about whether
 18 Stillaguamish has U&A at Penn Cove, Holmes Harbor, Utsalady, and Saratoga Passage.

19 **D. Evidence of a Single Instance of Travel—Unrelated to Fishing and about Which No**
 20 **Route Is Known—Is Not Probative of U&A (Deception Pass).**

21 Dr. Friday cites a single instance of travel to Victoria by a Stillaguamish tribal member, the
 22 purpose of which was to trade. There is no evidence of fishing en route or even of the route taken.
 23 From this vacuous record, Dr. Friday concludes that the Stillaguamish had U&A at Deception
 24 Pass.

25 Dr. Friday’s conclusion that Stillaguamish even travelled through Deception Pass (let alone
 26

²⁵ See Treaty of Point Elliott, 12 Stat. 927, 927 (Ballinger Decl. Ex. 10).

1 fished there even once) is pure speculation and devoid of any factual support. It also is contrary to
2 findings made in prior subproceedings. *E.g., Upper Skagit Indian Tribe*, 590 F.3d at 1024 n.6
3 (“The northern exits through Deception Pass and Swinomish Slough are narrow and restricted;
4 both areas were controlled by the Swinomish at treaty times.”).

5 Even if Stillaguamish could prove that it travelled through Deception Pass, travel is not
6 probative of U&A, *even when the evidence establishes that fishing occurred*: “Marine waters were
7 also used as thoroughfares for travel by Indians who trolled en route. Such occasional and
8 incidental trolling was not considered to make the marine waters traveled thereon the usual and
9 accustomed fishing grounds of the transiting Indians.” 384 F. Supp. at 353 (citations omitted);
10 *Webster’s Third New International Dictionary* 2451 (2002) (trolling defined as “fishing with a
11 troll,” i.e., “the line with its lure and hook”).

12 There is no genuine issue of material fact about Deception Pass: Stillaguamish cannot
13 prove U&A there.

14 **E. Evidence of a Single Stillaguamish Fishing at the Sea Because He Married and Moved**
15 **to His Wife’s Tribe’s Location at the Sea, Is Not Probative of U&A (Holmes Harbor).**

16 Dr. Friday is wrong that the fact that “Mowitch Sam . . . was Stillaguamish and had rights
17 to fish [in Holmes Harbor] by virtue of his marriage” is evidence that Stillaguamish had U&A at
18 Holmes Harbor. *Supra* p. 8. In fact, he later agreed that rights established through marriage were
19 individual and did not establish a tribal right.²⁶

20 An individual Indian who fishes in another tribe’s U&A after marriage into that tribe does
21 not thereby expand the U&A of the individual Indian’s tribe. *See United States v. Washington*,
22 626 F. Supp. 1405, 1490 ¶ 356 (W.D. Wash. Mar. 22, 1984) (“Marriage relatives could also
23 acquire such secondary rights in the natal territories of their spouses. The secondary or permissive
24 fishing rights were ineffective, however, unless holders of the primary fishing right first invited or
25 otherwise permitted persons with secondary rights to fish in the territory. The holders of the
26 primary fishing right exercised the prerogative to exclude some or all secondary users from their

²⁶ Friday Dep. 252:10-17 (Ballinger Decl. Ex. 2).

1 territorial fishing grounds for any reason they deemed adequate.”).

2 Mowitch Sam’s marine fishing is not probative in determining Stillaguamish’s U&A.

3 **F. Evidence of “Radiating Interests” Is Not Probative of U&A.**

4 Dr. Friday’s final evidence, if accepted for the conclusion he draws, could establish that
5 Stillaguamish and every other treaty tribe has U&A throughout the case area. Dr. Friday has
6 constructed (or borrowed) a theoretical model of inter-tribal relationships, which he implies means
7 that Stillaguamish has U&A wherever its “radiating tribal interests” can be shown:

8 The movement of Stillaguamish People, and Coast Salish Peoples generally, out
9 of their own Tribal Core into areas of multi-tribal use and occupation or even into
10 the Tribal Core of another People, can effectively be characterized as a series of
11 ever-expanding areas of Radiating Tribal Interests, established and maintained by
12 specific Coast Salish familial and friendship social and cultural practices and
13 protocols. Within the Whidbey Basin, these ties were dense and well-known over
14 multiple generations. Outside the Whidbey Basin, they were less dense and
15 dependent upon transportation and communication routes, especially waterways.²⁷

16 While such a model may be of interest to historians and anthropologists researching the
17 interrelationship of tribes and tribal members, it is not the construct for this case, which requires
18 evidence of customary fishing at and before treaty times to establish U&A. That is, the model
19 might explain in part *why* a tribe had U&A outside where it lived, but it cannot be used as evidence
20 that a tribe *in fact had* U&A outside where it lived. Indeed, Dr. Friday concedes that a historian
21 such as himself does not “try to prove the model with our data” but instead “us[es] the model to
22 help us explain our data.”²⁸

23 If accepted, Dr. Friday’s theory of “radiating interests” as establishing U&A would render
24 irrelevant the Court’s painstaking insistence on evidence of actual fishing activity.

25 **IV. CONCLUSION**

26 The Court should enter judgment against the Stillaguamish Tribe of Indians.

27 Friday Report, p. 4 (Ballinger Decl. Ex. 1); *see also supra* note 8 & accompanying text re Dr. Friday’s definition of the Whidbey Basin.

28 Friday Dep. 148:23-149:3 (Ballinger Decl. Ex. 2).

1 DATED this 7th day of January, 2021.

2 UPPER SKAGIT INDIAN TRIBE

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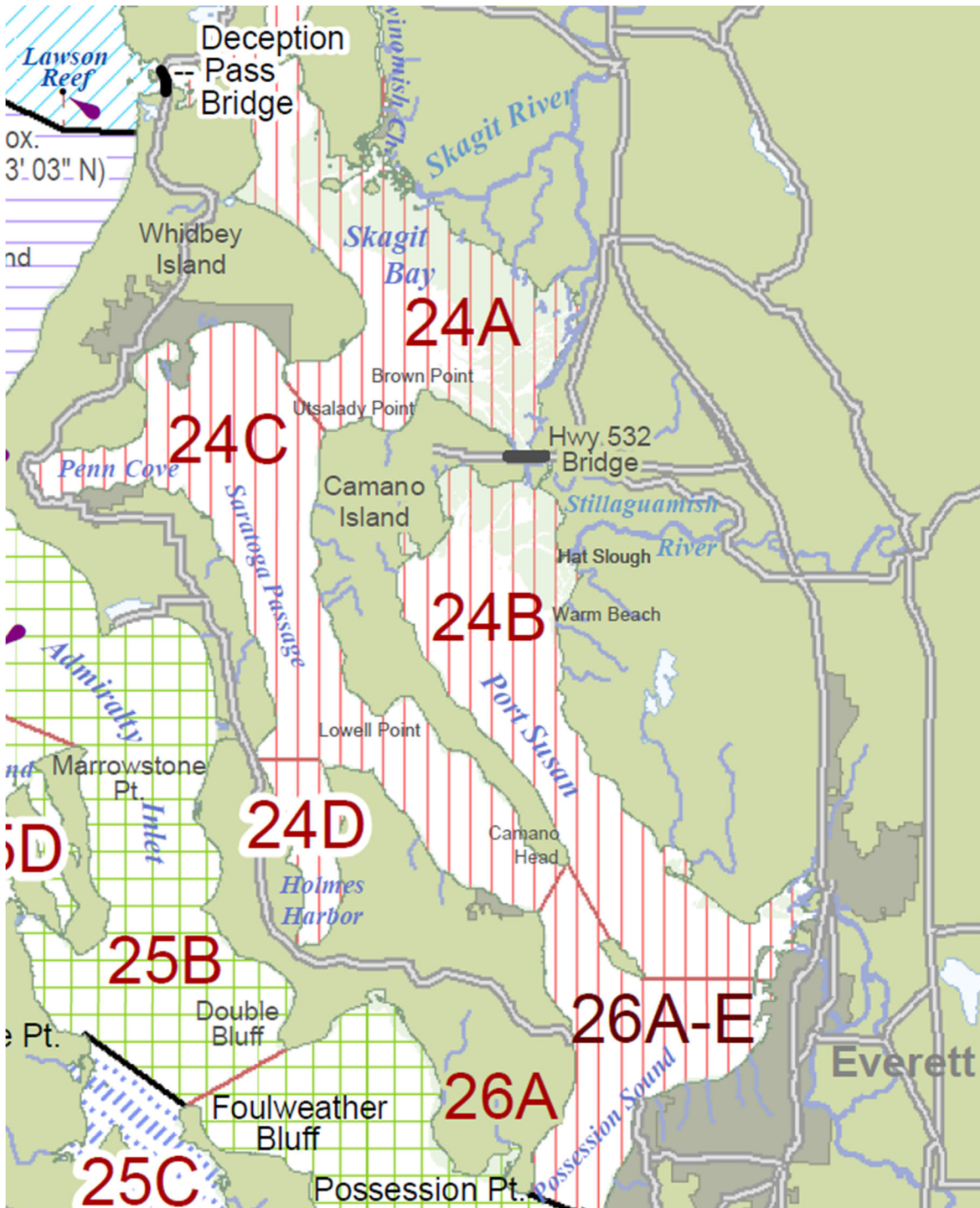
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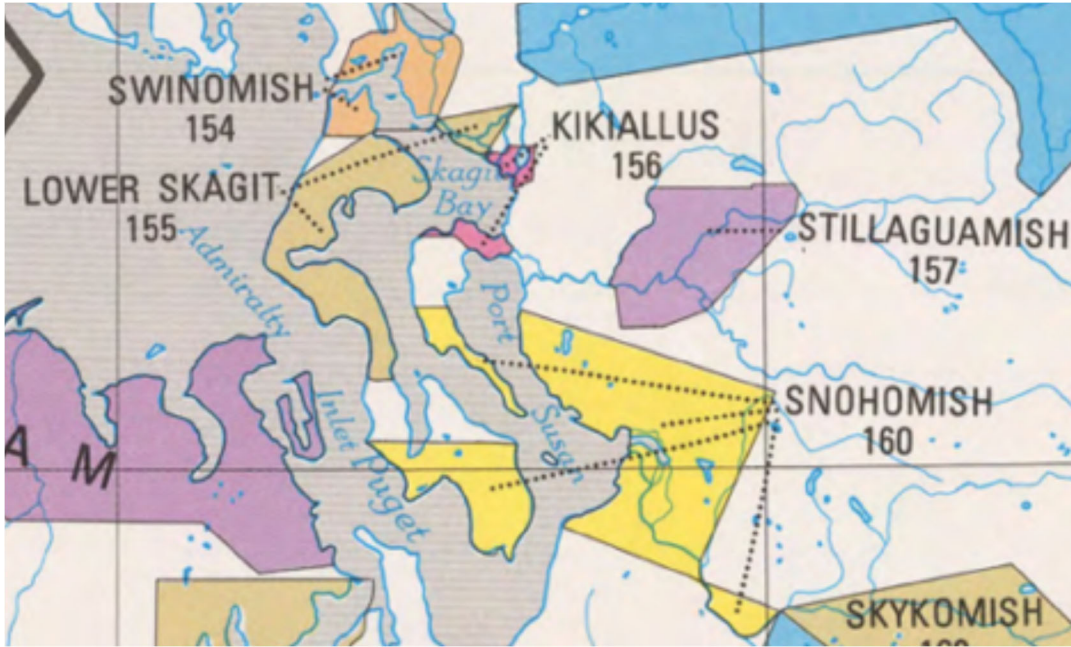
19 *Attorneys for Upper Skagit Indian Tribe*

APPENDIX 1



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APPENDIX 2



(Source: Indian Claims Commission and U.S. Geological Survey, Indian Land Areas Judicially Established, 1978, <https://pubs.usgs.gov/unnumbered/70114965/plate-1.pdf>.)

Reprinted from Friday Report, p. 90 (Ballinger Decl. Ex. 1).

APPENDIX 3

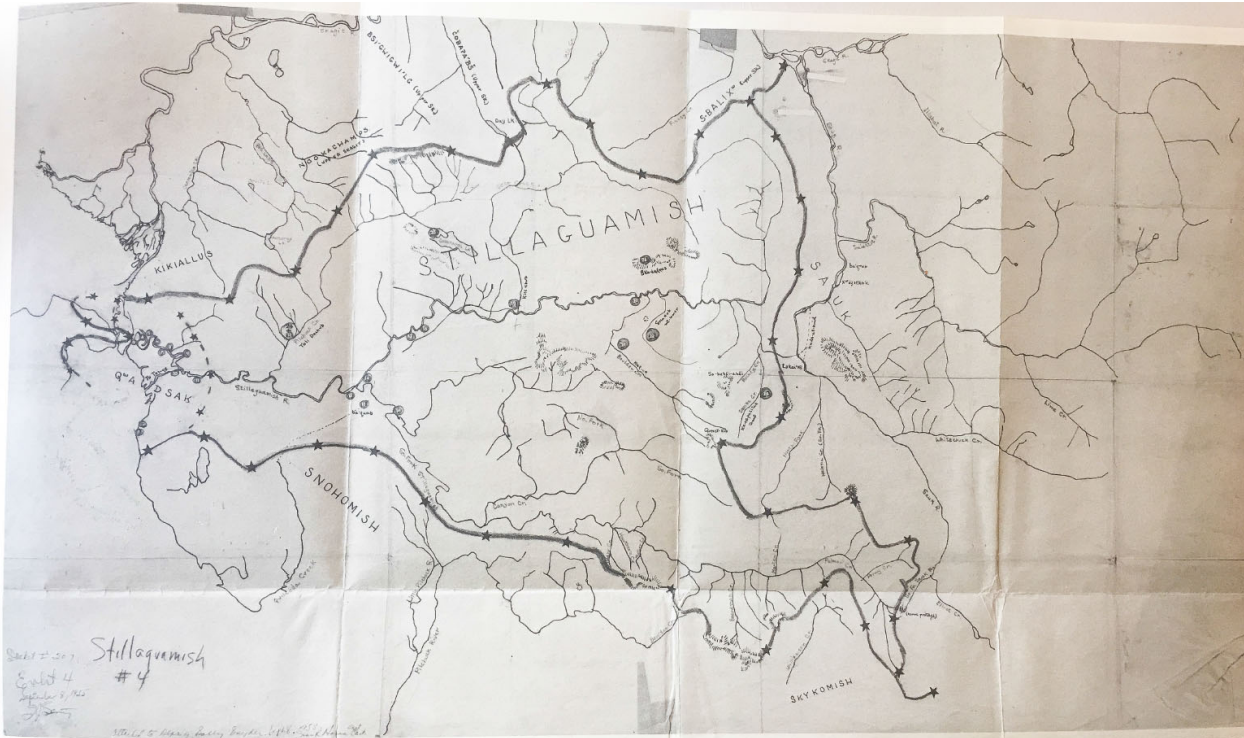


Figure 7 in Dr. Friday's Report is a portion of this map, which depicts the Qwadsak area adjacent to the sea. See Friday Report, p. 49 (Ballinger Decl. Ex. 1).

APPENDIX 4

Stillaguamish U&A	First- and Second-Hand Accounts of Fishing Supporting Finding
<p>“fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe” 384 F. Supp. at 379 ¶ 146 (citing, <i>inter alia</i>, Ex. USA-28)</p>	<p>“in Wilson’s 1851 diary of his trip up the [Stillaguamish] river in February of that year [he] mentions purchasing salmon from people at the village five miles from the mouth of the river . . . and he remarks on their ‘shrewdness in catching fish’” (USA-28, pp. 19-20²⁹)</p> <p>“In 1926 a deposition was taken from James Dorsey . . . , a Stillaguamish Indian who was born about 1850 and lived his entire life on the Stillaguamish River.” (USA-28, p. 11) “James Dorsey reported that there were fish traps at all or practically all of the villages mentioned in his affidavit. The fish taken in these traps were eaten fresh and they were also smoked and dried for winter use.” (USA-28, p. 20; <i>see also id.</i> App. 1, Dorsey Affidavit²⁴)</p> <p>“we . . . marveled at the skill of the Indians [at the Stillaguamish River] in catching fish with their two-pronged spears” (USA-28, p. 20²⁴)</p>

²⁹ USA-28 is filed at Ballinger Decl. Ex. 11.