The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

| | |
|---|---|
| UNITED STATES OF AMERICA, et al.,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF WASHINGTON, et al.,<br><br>Defendant. | No. 70-9213<br>Subproceeding No. 17-3<br><br>**SWINOMISH INDIAN TRIBAL COMMUNITY'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR SUMMARY JUDGMENT**<br><br>NOTE ON MOTION CALENDAR:<br>Friday, January 29, 2021<br><br>**ORAL ARGUMENT REQUESTED** |



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

## TABLE OF CONTENTS





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

## I. INTRODUCTION

Stillaguamish seeks to expand its U&A from its river home into marine waters, based largely on an attempt to re-litigate its claim to certain land, rather than on any new or direct evidence of actual Stillaguamish marine fisheries. By this motion, Swinomish seeks, first, partial summary judgment dismissing Stillaguamish marine U&A claims to any waters beyond Port Susan at the mouth of the Stillaguamish River. Simply put: Stillaguamish does not provide evidence sufficient to support a reasonable inference of customary treaty-time fishing outside of Port Susan. Swinomish also disputes Stillaguamish's U&A claim to Port Susan, but in this motion does not request dismissal of that claim.

Swinomish also seeks partial summary judgment dismissal of any Stillaguamish marine U&A claim based on its claim to the Qwadsak territory at the mouth of the Stillaguamish River. That territorial claim lacks sufficient evidentiary support. Also, the Stillaguamish claim to the Qwadsak area was previously litigated and resolved against Stillaguamish.

Finally, Swinomish respectfully submits that the entire Stillaguamish request for marine U&A should be dismissed on summary judgment. Stillaguamish has had eighteen months of discovery to deliver on its promise of new evidence to support its marine U&A claim. But it provides no new evidence and relies on the core evidence considered by Judge Boldt in his Stillaguamish U&A determination. Thus Stillaguamish cannot establish jurisdiction for its U&A claim under paragraph 25(a)(6) of the Permanent Injunction.

## II. STATEMENT OF FACTS

In Final Decision #1, this Court determined the U&A of Stillaguamish, historically known as the "river people," as follows:

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



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

*United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974) ("Final Decision 1" or "FD #1") [FF 146]. Now, nearly fifty years later, Stillaguamish seeks U&A in a broad swath of marine waters far from its upriver home grounds and far from the mouth of the Stillaguamish River at Port Susan: it seeks U&A in "marine waters on the eastern side of Whidbey Island and both shores of Camano Island, including Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and to Deception Pass." (*See* Request for Determination (Dkt. 4; "RFD") ¶ 1.) Stillaguamish's Request for Determination promises evidence purportedly never previously available that would establish its U&A in marine waters. (*See, e.g.*, RFD ¶ 14 (claiming "[e]rroneously labeled as a 'river people,' recently obtained historical, cultural, and anthropological evidence makes clear that the Stillaguamish are very much a saltwater people"); Stillaguamish's Combined Response to Swinomish and Upper Skagit Motions to Dismiss [Dkt. 75] at 20-26.)

But Stillaguamish offers no direct evidence to establish that it had treaty-time usual and accustomed fishing locations anywhere beyond Port Susan: that is, it offers no direct evidence to support U&A in Skagit Bay, Deception Pass, Saratoga Passage, Penn Cove or Holmes Harbor. Moreover, there is nothing new here. Stillaguamish relies not on dramatic new evidence, but solely on evidence that was in the record at the original trial or available at the time, including especially the same core evidence that supported the Court's U&A determinations in Final Decision #1.

**A. There Is No Direct Evidence that Stillaguamish Fished in Skagit Bay or Beyond.**

***Skagit Bay.*** Stillaguamish offers no direct evidence that the tribe fished in Skagit Bay at treaty times. Stillaguamish's expert testified as follows, in relevant part, at his deposition:

> Q. What evidence do you have that Stillaguamish fished Skagit Bay at all?
>
> A. The best evidence of the use of marine resources would be the middens at the various sites that are within that Qwadsak region[1] that we've—that we've mentioned briefly before. And that – the volume and size of those

[1] The term Qwadsak is discussed below in Statement of Facts section B below.



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

> middens would suggest something much beyond a casual use or even a gifting use of shells in that area.
>
> Q. How do you know that any materials found in the middens came from Skagit Bay as opposed to Port Susan?
>
> A. There is some materials [sic] in the middens that – that appear to be … horse clam shells … and those are most common in deeper waters at the lowest tides. And those would have not come from that area.
>
> There are materials that would have come from both sides which would have been native oysters that would have grown in those – those muddier waters on either side of the delta lands as it went north and south.
>
> Q. Do you rely on any informant testimony about Stillaguamish treaty time fisheries in Skagit Bay?
>
> A. There are very few ethnographic informants that survive – whose – whose records – who were interviewed either in – especially in the 1950s. We have a gap in the elders available at that time. So the best evidence would have come from [James] Dorsey and Sally Oxstein.

(*See* Declaration of Nathan Garberich Ex. A at 76:7-77:11.)[2]

Neither Dorsey nor Oxstein left any testimonial or other record stating that Stillaguamish fished in Skagit Bay at treaty times. James Dorsey's affidavit and direct testimony in the early twentieth-century *Duwamish* Court of Claims proceedings makes no mention of fishing in Skagit Bay or indeed in any marine waters. As discussed below, Sally Oxstein recalled family travel to Victoria, but did not state that her family fished in Skagit Bay or any other marine waters.

Regarding the middens, Stillaguamish relies principally on the work of Harlan Smith, even as Stillaguamish denigrates the quality of his work. (*See* Garberich Ex. B [Friday Report] at 108-39.) In the late-nineteenth and early-twentieth century, Smith reported on certain middens and their locations, including at Stanwood and on Camano Island. (*See id.* at 109.) But Smith did not attribute the middens he discussed to the Stillaguamish tribe or any other group, nor did he state that the middens he studied evidenced fishing in Skagit Bay by Stillaguamish or any other group. (*See* Harlan Smith sources cited at Friday Report endnotes 165-168, attached to Garberich as Exs. C-G.) As for dating the middens observed by Smith, Stillaguamish's expert—an historian, not an archeologist—is unwilling to date the middens to

[2] After first citations, declarations are cited by the declarant's last name.



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

treaty time and only speculates that some of the information recorded by Smith "suggests that the items were from recent time to some antiquity [sic]." (Garberich. Ex. B at 125.) Stillaguamish also relies on the observations of Nels Bruseth, a local amateur folklorist of the early twentieth century. (*See id.* at 113.) Like Smith, Bruseth reported on middens and their locations, including in the Qwadsak area, but did not identify the middens as attributable to the Stillaguamish or any other group. (*See id.* and Exs. H-I.) Bruseth also did not state that the middens he observed demonstrated that Stillaguamish or any other group fished in Skagit Bay. (*See id.*)

Smith also described harpoon points and similar tools found in the middens he investigated. Stillaguamish's expert only notes that the type of tools located in the middens were in wide use throughout Puget Sound and are similar to tools identified as used by Stillaguamish. (*See* Garberich Ex. B at 134-36.)

The absence of any scientific or documentary basis for attributing marine-associated artifacts in the middens to the Stillaguamish tribe does not stop Stillaguamish's expert from making a baseless leap: he asserts with no evidence whatsoever that "[t]he evidence [Smith] pulled from Qwadsak is Stillaguamish." (*See id.* at 139.) Further, Stillaguamish's expert does not opine that these purportedly Stillaguamish artifacts specifically evidence fishing in Skagit Bay; rather, he states only the unremarkable generalization that such tools "overwhelmingly demonstrate[] a long association with marine environments and the use of marine resources." (*See id.*)

***Deception Pass.*** Stillaguamish's only evidence of its tribal U&A in Deception Pass is speculation that Stillaguamish fishing must have occurred there based on occasional travel by one family to Victoria. Stillaguamish's expert testified in deposition as follows:

> Q. How about Deception Pass? Did Stillaguamish fish in Deception Pass at treaty time?
>
> 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 side



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

> [of Deception Pass], and while they were encamped there, the record indicates the families would fish and – and harvest shellfish during that time period.
>
> 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 other evidence 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.
>
> Q. How frequently did the Oxstein family travel through Deception Pass?
>
> A. I'm not able to tell you exactly how – how many times they traveled or how frequently.

(Garberich Ex. A at 73:12-74:10.) And in his expert report, Stillaguamish's expert relies on two statements by Sally Oxstein from the 1920s about those family trips to Victoria, for his speculation that the Oxstein family—not the Stillaguamish tribe—"presumably" fished on those trips. (Ex. B at 184-85; J; K at 277-78.)

***Saratoga Passage.*** Stillaguamish's evidence of tribal U&A in Saratoga Passage is also speculation. Stillaguamish's expert testified:

> Q. How about Saratoga Passage? Did Stillaguamish fish Saratoga Passage at treaty time?
>
> 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.
>
> Q. And the evidence of presence on western Camano Island is what?
>
> A. It comes from ethnographic evidence collected by people in and around the … ICC cases.
>
> Q. Is this Sally Snyder's work?
>
> A. Sally Snyder and – and, to some degree, Twedell and even Riley.
>
> Q. But none of those people stated that Stillaguamish had any kind of a fishery in Saratoga Passage, did they?
>
> A. Well, if you'll recall, you and I were discussing what – were discussing previously what fishery meant, and we included clamming or shellfish in that. And so, if they're camped on the shoreline, the presumption is that they are gathering shellfish and fishing simultaneously in that area along the western shore of Camano Island. There is not much to distinguish that western shoreline from Saratoga Passage.

(Garberich Ex. A at 72:11-73:11.)



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

***Holmes Harbor & Penn Cove.*** Stillaguamish offers evidence that Stillaguamish tribal member Mowitch Sam had fishing rights in Holmes Harbor through marriage as of treaty time. (*See* Garberich Exs. A at 57:18-58:3, 59:14-20; B at 108; L-M [documents cited at Friday Report n.159].) Stillaguamish offers no evidence that the entire Stillaguamish tribe fished there, as a result of one member's marriage or anything else.

Also, Stillaguamish's expert avers that the temporary, forced internment of Stillaguamish tribal members at Holmes Harbor and Penn Cove during the Indian War of 1855-56 confirms that Stillaguamish regularly fished at Holmes Harbor, Penn Cove, and Skatchet Head before and at treaty times. For this, Dr. Friday relies on evidence that the Stillaguamish bolted from the government camp locations on Whidbey back to the tribe's home ground on the Stillaguamish River, where they gathered fish and other food. (Garberich Ex. A at 62:4-64:13; B at 199-200, 202.) He also speculates that any fishing and clamming done by Stillaguamish members at or near the government camps on Whidbey was performed in such locations because they were already known to the Stillaguamish as the tribe's regular fishing locations. (Garberich Ex. B at 203-04.) The evidence cited by Dr. Friday does not support the claim. (*See id.* at Exs. N-O [documents cited in Friday Report at n. 273.)

**B. The Record Does Not Support the Claim that the "Qwadsak" Was Stillaguamish Territory at Treaty Time.**

Lacking any direct evidence of treaty-time marine fisheries, Stillaguamish claims that the shared-use territorial area on the lower Stillaguamish River known as "Qwadsak" was actually Stillaguamish tribal territory and, further, that it should be assumed that Stillaguamish "would have" fished in nearby marine waters at treaty times. (*See* RFD ¶ 15; Garberich Ex. B at 65-95.) Qwadsak, also rendered Quadsak or some other like spelling, is described by Stillaguamish's expert as an area "in and around the Stillaguamish River Delta and extending onto Camano Island." (*Id.* at 65.) The Qwadsak area is depicted in various historical documents, including maps from the Stillaguamish ICC proceedings that are reproduced in the Friday Report. (*See id.* at 68 [Fig. 12], 82 [Fig. 16], 83 [Fig. 17].)



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

To support this construct, Stillaguamish asserts that there was an intertribal agreement that recognized the Qwadsak area as Stillaguamish territory. It also contends that the ICC final determination to the contrary should be disregarded. These assertions are not supported by competent evidence.

**1. There is no evidence of an intertribal agreement regarding tribal territorial boundaries.**

Stillaguamish alleges that in the 1920s several tribes, including Stillaguamish, reached agreement on the territorial boundaries for each of those tribes (the "agreement" or "intertribal agreement"). (Garberich Exs. B at 60; P at 73:14-18.) Stillaguamish alleges that its agreed-upon territory included the Qwadsak area. (*See id*. Ex Q.)

Stillaguamish has not produced the intertribal agreement. It cannot say whether the agreement was oral or written. (*Id*. Exs. P at 74:17-24, 75:11-20; A at 22:17-19.) It cannot identify the specific date of the agreement, but guesses it was entered in 1925 or 1926. (*Id.* Exs. P at 79:14-17; A at 44:18-20.) It also cannot identify the parties to the agreement (*id.* Exs. P at 79:22-25, 80:8-12, 80:18-23, 81:2-19; A at 43:18-24, 44:5-8), the terms of the agreement (*id.* Exs. P at 84:25-85:18; A at 44:21-45:20), the term (duration) of the agreement (*id.* Ex. P at 89:9-17), or whether it provided for dispute resolution (*id.* Ex. P at 87:24-88:2). Stillaguamish cannot identify the consideration for the agreement. (*Id.* Ex. P at 88:10-89:8.) It cannot identify who negotiated the agreement, or how or when or where the negotiations occurred. (*Id.* Ex. P at 82:9-83:9, 83:19-22.) It cannot state whether the agreement required ratification of each of the purportedly participating tribes. (*Id.* Ex. P at 87:20-23.)

Stillaguamish alleges that the agreement was reached in the context of the *Duwamish* case before the United States Court of Claims. (*Id.* Ex. B at 60.) It alleges that "by 1926, most of the tribes in the case had developed agreed upon tribal boundaries that allowed their attorneys to understand and present their case to the court." (*Id.*)

Stillaguamish primarily relies on a document from its archives, a copy of a letter from its then-lawyer dated June 17, 1926, which states:



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

> I was glad to note that the boundary lines of your tribe have been fixed. I believe practically all of the tribes whom I represent have agreed on their original boundaries, and in my judgement [sic] this is the proper thing to do at this time, as we do not wish to leave anything unsettled which might cause dispute between the different tribes in the future, although it will depend upon what view the court takes as to whether or not the amount of land and exact boundaries of tribes are material.

(*Id*. Exs. B at 61; R.) The letter does not clarify whether the phrase "practically all of the tribes whom I represent have agreed on their original boundaries" refers to intratribal agreements (internal agreements within each tribe) or an intertribal agreement (between tribes).

Stillaguamish also relies on a map that it alleges depicts Stillaguamish territory as agreed upon by the parties to the inter-tribal agreement. (*See* Garberich Ex. B at 62.) The map, entered as an exhibit in the *Duwamish* case, contains a dark, semi-elliptical line around the Stillaguamish River drainage system; the territory interior to the dark line is purportedly the agreed Stillaguamish territory and includes the Qwadsak area. (*See id*. Ex Q.) Stillaguamish believes the line was drawn by its then-secretary Esther Ross and James Dorsey. (*Id*. Ex. P at 105:6-8.) The map contains no reference to an inter-tribal agreement (nor to any marine fisheries), and Stillaguamish has produced no document that would establish that the map codifies an inter-tribal agreement. Stillaguamish has also produced no document from any other tribe that would substantiate its claim of an intertribal agreement.

**2. The Indian Claims Commission adjudicated Stillaguamish's Qwadsak territory claim.**

In the 1950s Stillaguamish commenced an action with the Indian Claims Commission in which it claimed that, at treaty time, it had exclusive occupation and use of certain territory within the area ceded to the United States in the January 22, 1855 Treaty of Point Elliott. (Garberich Ex. S at Finding 2.) Its petition described Stillaguamish territory as the "territory around and including the Stillaguamish River and the watershed thereof, from its headwaters to its mouth"—a description that included the Qwadsak area. (*See id.*) In 1958, during the



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

deposition of anthropologist Carroll Riley, counsel for Stillaguamish Frederick Post, who also represented the Kikiallus and other tribes before the ICC, stated:

> I would like the record to show at this time that as attorney for the Stillaguamish, that we abandon claim to that area which Dr. Riley has just referred to as "Quadsak"; and as attorney for the Kikiallus I moved that that area be included in the Kikiallus claim, so that an area south of the mouth of the Skagit River designated as "Kikiallus" and an area designated as "Quadsak" in the north portion of Camano Island all be included in the area belonging to the Kikiallus Tribe, and that the area to the east of the dotted line drawn by Miss Snyder on up to the North and South Forks of the Stillaguamish River on Pet. Ex. 4 and Deft. Ex. A be the area claimed by the Stillaguamish Tribe.

(*Id.*)

Stillaguamish subsequently submitted a revised territorial claim to the ICC. The revised claim included a portion of the Qwadsak area but excluded the westernmost portion of the Qwadsak area:

> Beginning at Warm Beach about 5 miles south of Stanwood; thence east to the City of Granite Falls; thence eastward on a line ten miles south of the South Fork of the Stillaguamish River to a point 10 miles south of Monte Cristo; thence north to Darrington; thence north to a point 10 miles north of Darrington; thence west to the northernmost point on Lake Cavanaugh; thence southwestward to Bryant; thence west to East Stanwood. (Pet. Req. Fdg. 13)

(*Id.*) Regarding this revised request, Stillaguamish's current expert, Dr. Friday, opines that "Post's out of hand cession of lands to Kikiallus seems to have had some resistance because subsequent to Post's requests in the hearing the Stillaguamish came back with an adjusted western boundary line, which started at Warm Beach and ran north to East Stanwood—thereby encompassing the shoreline from Warm Beach to the mouth of Hat Slough." (Garberich Ex. B at 87-88.) Dr. Friday has drawn the Stillaguamish revised request on a map, demonstrating that the revised claim excludes the substantial westernmost portions of the Qwadsak area, where the mouth of the Stillaguamish meets marine waters and out onto Camano Island. (*See id.* at 88 [Fig. 18].)

On February 26, 1965, the ICC issued its determination on the Stillaguamish territorial claim. (Garberich Ex. S.) The 32-page Findings of Fact reviewed the extensive evidence in the



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

case, including the expert testimony of anthropologists Sally Snyder and Carroll Riley (both of whom testified in multiple ICC actions at the time), "historical documents, Government records, writing of Indian agents and private individuals living in the area, anthropological reports and sundry maps," the Dorsey affidavit from the *Duwamish* case, and testimony of Stillaguamish members including Esther Ross. (*Id.* at Findings 8-17.) The Findings detailed the evidence addressed the occupation and use of the Qwadsak area. (*Id.* at Findings 10, 11 subpara. (14), 14 subparas. (8)-(11).)

The ICC determined that at treaty time Stillaguamish "was in possession of and had exclusively used and occupied…a somewhat rectangular tract of land near the center of said claimed tract," generally upriver along the Stillaguamish, described as follows:

> Beginning at the junction of the Stillaguamish River with Pilchuck Creek, thence northerly along said Pilchuck Creek to the line dividing Skagit and Snohomish Counties, thence easterly along said line to its intersection with Deer Creek, thence southerly along said creek to where it intersects with the North Fork of the Stillaguamish River, thence southwesterly on a diagonal line to a point where the South Fork of the Stillaguamish River intersects the 48° 10' line in Township 31 North between Ranges 5 and 6 East as shown on said map; thence southwesterly to the center of the town of Edgecomb; thence westerly to the Lakewood Station on the Seattle and Van Couver line of the Great Northern Railroad; thence northwesterly in a straight line to the point of beginning.

(*Id.* at Finding 18.) The Commission provided a map outlining the determined territory. (*See id*. Ex. U.) "[W]ith respect to the remaining tract of land claimed by [Stillaguamish]," the ICC determined that the tribe "did not actually occupy and exclusively possess and use the remainder or any part of thereof of the claimed territory as described in Finding No. 2." (*Id.* Ex. S at Finding 18.) In other words, the ICC determined that, at treaty time, Stillaguamish did not occupy and exclusively possess and use the claimed area that included Qwadsak.

Stillaguamish now alleges that it did not receive the ICC Findings and did not know its attorney had abandoned its claim to the Qwadsak area until February 5, 1967 (Garberich Ex. P at 138:19-24) and that upon receipt the tribe was "very, very upset at what had happened with their territory and what [their attorney] had done" (*See id.* at 134:18-135:3). Stillaguamish



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

alleges that its attorney Mr. Post abandoned its claim to the Qwadsak territory without the tribe's consent. (Garberich Exs. B at 7; P at 136:24-137:13.)

Stillaguamish has produced no contemporaneous evidence that its attorney lacked authority to speak for his client in surrendering the claim to the Qwadsak area. Stillaguamish relies on, and has produced, correspondence and other documents dated in the late 1960s and 1970s, after the ICC Findings, showing that Stillaguamish was unhappy with the testimony of anthropologists during Stillaguamish ICC proceedings, the ICC determination, its attorney's fee requests, and the award settlement—but none show that its attorney acted outside the scope of his authority in abandoning the tribe's claim regarding the Qwadsak area. (*See* Garberich Exs. V-LL.)

In any event, Stillaguamish hired the same attorney, Frederick Post, to represent the tribe on a motion for rehearing. (Garberich Exs. P at 137:25-138:7; Y; EE at 1.) Stillaguamish has produced the first page of its motion for rehearing, filed June 19, 1968; the United States' Response to the rehearing motion; Stillaguamish's Reply on its motion; and the ICC's order and opinion denying the rehearing motion (Garberich Exs. MM-PP; collectively, the "Rehearing Papers"). The Rehearing Papers make no reference at all to a lack of consent to the abandonment of the Qwadsak area claim, as a basis for the motion for rehearing or for any other reason. (*See id.*) On October 17, 1968, the ICC denied the motion. (*Id.* Ex. PP.)

Additional Findings of Fact, approving a stipulation to compromise and settle Stillaguamish's territorial claim, were entered January 8, 1970. (*Id.* Ex. T.) On that same date the ICC entered Final Judgment on Stillaguamish's claim. (*Id.* Ex. QQ.)

**C. Stillaguamish Has Produced No New Evidence.**

Swinomish filed a Motion to Dismiss in this subproceeding (Dkt. 66; "MTD"), which Swinomish incorporates herein. That Motion argued *inter alia* that the allegations Stillaguamish now makes to support its marine waters U&A claim and the evidence relied on by Stillaguamish to support those allegations were considered and rejected by Judge Boldt. (MTD at 10-20.) It detailed the record in the original trial to provide the context of Judge



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

Boldt's determination that placed Stillaguamish's U&A solely on the river. (*See id.* and Declaration of D. Graham filed herein Oct. 5, 2018 [Dkt. 67-1].)

The Court denied Swinomish's motion to dismiss. Discovery in this subproceeding then proceeded for eighteen months. In that time Stillaguamish has produced an expert report and voluminous documents and records on which its expert relies and has taken extensive discovery from the responding parties and other tribes. But Stillaguamish has produced nothing new.

Stillaguamish's expert report, by historian Chris Friday (*see* Garberich Ex. B) makes clear that Stillaguamish now relies heavily on the same records that were available and in the record for FD #1: records from and relating to Stillaguamish's claim in the Duwamish case (*Duwamish et al. Tribes of Indians v. United States of America*, Court of Claims of the United States, No. F-275), including especially the affidavit of tribal elder James Dorsey (*see* Garberich Ex. B at 60-64 and notes thereto); records from mid-twentieth-century litigation of the Stillaguamish and other tribes' territorial claims before the Indian Claims Commission (*e.g., Stillaguamish Tribe of Indians v. United States of America*, Indian Land Claims Commission, No. 207), including especially the testimony of anthropologist Sally Snyder (*see* Garberich Ex. B at 65-91 and notes thereto); several decades of Stillaguamish's own archival tribal records from the 1920s through the 1960s—information that Stillaguamish has had all along (*see, e.g., id*. notes 40, 43, 64-72, 76-77, 117, 166-167, 195-196, 198, 231, 283); and early-twentieth-century analyses of shell middens (*see id.* at 108-39 and notes thereto).

All of this evidence was available to Stillaguamish for the original trial. Esther Ross, a Stillaguamish tribal leader who was responsible for most of the tribal records on which Stillaguamish now relies and who had testified in the ICC proceedings, also both gave a deposition and testified at the original trial. (*See* Graham Exs. 31 [FD #1 Ex. F-43], 32 [FD #1 Ex. MS-7], 33 at pp. 16-22.) And anthropologist Barbara Lane, on whom the Court relied, in part, in making its U&A determinations, 384 F. Supp. at 350, considered and addressed the key evidence on which Stillaguamish now relies, including Dorsey, Wilson, Hancock, Bruseth, and



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

the ICC Stillaguamish decision, which in turn gave extensive consideration to the analysis of anthropologist Sally Snyder. (*Id.* Exs. 24 [FD #1 Ex. USA-28], 26 [FD #1 Ex. G-17k].)

In short: Stillaguamish offers no new evidence. Stillaguamish seeks only to re-argue, after the passage of nearly 50 years, the evidence that was before Judge Boldt.

## III. ARGUMENT AND AUTHORITY

### A. Stillaguamish Cannot Present Evidence Sufficient to Establish Marine U&A beyond Port Susan.

#### 1. Evidence to support a reasonable inference is minimally required.

Stillaguamish makes its claim to marine U&A under this Court's continuing jurisdiction to consider "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1." *See United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1991) (Order Modifying Paragraph 25 of Permanent Injunction, Aug. 24, 1993). "In making this determination, the Court steps into the place occupied by Judge Boldt when he set forth U&As" and "applies the same evidentiary standards applied by Judge Boldt in Final Decision # 1 and elaborated in the ensuing forty years of subproceedings." 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015). Stillaguamish bears the burden of establishing the location of its usual and accustomed grounds and stations under the Treaty of Point Elliott. *Id.* The Court will base its findings "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom." *Id.* Because available evidence of treaty-time fishing activities is "sketchy and less satisfactory than evidence available in the typical civil proceeding," the Court does not follow a stringent standard of proof. *Id.* "In evaluating whether or not the tribes have met their burden, the Court gives due consideration to the fragmentary nature and inherent limitations of the available evidence while making its findings on a more probable than not basis." *Id.*

A less-than-stringent standard does not mean no standard. On this summary judgment motion, as the nonmoving party, Stillaguamish still must make a sufficient showing of actual evidence, as opposed to speculation, from which a reasonable inference of customary fishing in



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

the waters at issue could be drawn. *United States v. Washington*, No. C70-9213, Subproceeding 17-01, 2017 U.S. Dist. LEXIS 140882, at *24, 2017 WL 3726774 (W.D. Wash. 2017). "The mere existence of a scintilla of evidence in support of [Stillaguamish's] position will be insufficient." *Id.* at *24-25.

Further, "[e]xcluded from a tribe's U&A are 'unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions.'" *United States v. Washington*, 129 F. Supp. 3d at 1110. "In other words, the term 'usual and accustomed' was 'probably used in [its] restrictive sense, not intending to include areas where use was occasional or incidental.'" *Id*. And so, for example, occasional and incidental trolling while traveling on marine waters does not establish U&A in such waters. Final Decision 1, 384 F. Supp. at 353.

**2. Stillaguamish's evidence cannot support a reasonable inference for U&A beyond Port Susan.**

Stillaguamish's purportedly new evidence for fishing in Skagit Bay and beyond is not sufficient to support a U&A finding in those waters. Stillaguamish offers evidence of the marriage of one tribal member (Mowitch Sam) to a wife in or from the Holmes Harbor area; the recollection of family travel to Victoria by Sallie Oxstein; the existence of shell middens in the Qwadsak area and Camano Island; speculation that Stillaguamish men would have fished in Saratoga Passage while women engaged in clamming activity on the western shore of Camano Island; and an argument that Stillaguamish's extremely limited presence at government camps at Holmes Harbor and Penn Cove on Whidbey Island during the Indian War of 1855-56 is evidence that Stillaguamish had already regularly fished in nearby locations. (*See* pp. 2-6 above.) Putting aside that the evidence is not new—it has been available to or in possession of Stillaguamish all along, and much of it (e.g., evidence of internment during the Indian War) was in the FD #1 record—it does not directly establish fishing by the Stillaguamish tribe in such locations and it cannot support even a reasonable inference to that effect.



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

- At most, Mowitch Sam's marriage establishes that he and his family may have had fishing rights in Holmes Harbor; it does not mean that the entire Stillaguamish tribe had fishing rights there.
- Likewise the travel of Sallie Oxstein's family: Preliminarily, Stillaguamish cannot establish the number of times her family made a trip to Victoria, including whether it was only once or twice. (Garberich Ex. A at 74:7-10.) It also does not clarify where the Oxstein family stayed en route, asserting only that travelers in general would have camped on either side of Deception Pass, an assertion at odds with what Dr. Lane concluded and the Ninth Circuit found. *Compare id.* at 73:12-21 *with Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1026 & n.6 (9th Cir. 2010); *see* Garberich Ex. UU at 29, 34. Incidental fishing while traveling cannot establish U&A. Final Decision 1, 384 F. Supp. at 353. But even if Stillaguamish could establish that the Oxstein family traveled to Victoria a significant number of times and fished in specified areas every time, it is not reasonable to infer that the entire Stillaguamish tribe has U&A in those areas.
- The brief presence of Stillaguamish, along with several other tribes, at government camps during the Indian War of 1855-56 cannot reasonably support an inference that Stillaguamish had usual and accustomed fishing grounds in waters near those camps.
- Undated shell middens possibly accumulated over centuries, even if located in Stillaguamish territory, cannot be attributed to Stillaguamish, or to specific marine waters. And the archeologist on whose work Stillaguamish relies made no such attribution, nor did a later folklorist familiar with the same artifacts. A reasonable inference cannot arise from the speculation of Stillaguamish's expert.

In the absence of meaningful new or direct evidence to support treaty-time usual and accustomed fishing locations in specific marine locations, Stillaguamish falls back on familiar generalizations about Coast Salish treaty-time culture from which it claims that it would have fished in Skagit Bay and beyond. For example, Stillaguamish argues that, like all Coast Salish tribes, it had extensive kinship and friendship ties throughout Puget Sound (*see, e.g.*, Garberich



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

Ex. B at 4 ¶¶ 8-9; 106), though Stillaguamish's expert acknowledges that kinship ties do not confer fishing rights on an entire tribe (Garberich Ex. A at 252:4-17). It also argues that members of Coast Salish tribes moved about seasonally, and Stillaguamish members would have done so too. (*See* Garberich Exs. B at 4-5 ¶¶ 10-11; A at 69:10-25.) But reasonable inferences of tribal U&A cannot be based on such generalizations.

Further, Stillaguamish's argument, based as it is on gross generalizations, is unlimited and, if accepted, would support region-wide U&A for all Coast Salish tribes. Stillaguamish does not shy from this. Asked whether all treaty tribes fished all of the waters in the Whidbey Basin at treaty time, Stillaguamish's expert testified:

> A. All of the treaty tribes that were present in and around that Whidbey Basin fished broadly in the marine waters. There were some specific locations that seemed to be more precisely controlled.
> Q. So … is it your view that all of the tribes had usual and accustomed fisheries in all of the Whidbey Basin?
> [Objection to form]
> A. Yeah. I would say that … all the tribes were active in traveling and fishing in those waters in the notion that Boldt discussed about fishing grounds as opposed to fishing stations.

(Garberich Ex. A at 67:7-68:2.) Recognition of U&A based on the broad generalizations and groundless inferential leaps advanced by Stillaguamish is contrary to the language of the Treaty, which limits treaty tribes' fishing rights to their usual and accustomed places, contrary to the jurisprudence of FD #1 and *United States v. Washington*, and might lead to virtually unlimited U&A for all Puget Sound area tribes, because the same non-specific arguments made by Stillaguamish would be available to all of the other tribes Such a result would inject chaos into the already-challenging process of regional fisheries management and upset long-held and reasonable economic expectations.



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

**B. Stillaguamish Cannot Establish Marine U&A Based on Occupation of the Qwadsak Area during Treaty Times.**

Stillaguamish claims that it occupied the Qwadsak area during treaty times and therefore likely would have fished in nearby marine waters. As a matter of law, Stillaguamish should be precluded from making this claim.

First, Stillaguamish alleges that an intertribal agreement in or about 1925 fixed Stillaguamish's territorial boundary, which included the Qwadsak area. (*See* Garberich Exs. B at 60; P at 73:14-18; Q.) But Stillaguamish cannot prove any of the essential elements of the purported contract. Second, Stillaguamish seeks to re-litigate the ICC determination of its claim to the Qwadsak area. (*Id.* Ex. B at 65-91.) But the doctrine of collateral estoppel precludes re-litigation of the issue.

**1. Stillaguamish cannot establish an intertribal agreement.**

Stillaguamish bears the burden of proving the existence of the alleged intertribal agreement and must prove each essential fact. *E.g., Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001) (affirming summary judgment dismissal of breach of contract claim for failure to establish essential elements of alleged contract). The essential elements of a contract are (1) the subject matter, (2) the parties, (3) the promise, (4) the terms and conditions, and (5) consideration. *Trotzer v. Vig*, 149 Wn. App. 594, 605, 203 P.3d 1056 (2009) (holding no contract formed for lack of consideration). Conclusory statements of fact are insufficient to defeat summary judgment. *Saluteen-Maschersky*, 105 Wn. App. at 852.

Stillaguamish cannot establish the essential elements of the purported intertribal agreement. Indeed, the intertribal agreement appears to be a fiction created for this subproceeding: Stillaguamish has not produced the agreement and cannot say whether it was written or oral. Stillaguamish cannot identify the date of the agreement, the parties, the scope of the agreement (i.e., its subject matter), any material terms or conditions, or the consideration. (*See* above at p. 7-8 above and citations therein.) Stillaguamish offers only speculation, or declines to speculate, as to any of these essential elements. (*See id.*)



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

Speculation and conclusory assertions are not sufficient to establish the existence of an intertribal agreement. *Saluteen-Maschersky*, 105 Wn. App. at 852. Regardless of whether Stillaguamish may proceed with its argument that it occupied the Qwadsak area at treaty time, partial summary judgment should be entered dismissing Stillaguamish's claim of an intertribal agreement.

**2. Collateral estoppel bars Stillaguamish's claim to treaty-time occupation of the Qwadsak area.**

In this subproceeding Stillaguamish alleges that it possessed and occupied the Qwadsak area at and adjacent to the mouth of the Stillaguamish River at treaty time. But that very issue of fact was litigated and expressly and finally adjudicated in the Stillaguamish ICC action. And the doctrine of collateral estoppel, or issue preclusion, forecloses re-litigation of an issue where "(1) the issue at stake [is] identical to the one alleged in the prior litigation; (2) the issue [is] actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action." *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

**a. Stillaguamish's occupation and use of the Qwadsak area was alleged in the ICC proceedings.**

The identical issue was alleged in the Stillaguamish ICC proceeding. The territorial claim in Stillaguamish's petition encompassed the Qwadsak area: the "territory around and including the Stillaguamish River and the watershed thereof, from its headwaters to its mouth." (Garberich Ex. S at Finding 2.) Stillaguamish abandoned its claim to the Qwadsak area during the proceedings, but then proposed revised findings that included a portion of the Qwadsak area. (*Id.* at Finding 2; Garberich Ex.B at 87, 88 [Fig. 18].)

**b. Stillaguamish's claim to the Qwadsak area was litigated in the ICC proceedings.**

The issue was actually litigated before the ICC. The occupation and use of the Qwadsak area was the subject of detailed analysis and testimony in the ICC proceedings, including that of Stillaguamish's expert, anthropologist Sally Snyder. (*See generally* Garberich



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

Ex. B at 67-91.) Ms. Snyder prepared a map that specifically outlined both (1) her identification of Stillaguamish territory and (2) the Qwadsak area. (*See* Garberich Ex. RR.) On that map, Snyder identified Stillaguamish villages and/or locations, some of which she located in the Qwadsak area. (*See id.*) She also prepared an annotations chart that more fully described those locations and provided the source material on which she based the identifications. (*See id.* Ex. SS.) The source material included the Dorsey affidavit, Bruseth, Wilson, and Hancock. (*See* Garberich Ex. TT at 40 [STOI 030381].) Ms. Snyder explained her map, its identification of Stillaguamish locations, and her source material in a deposition in the ICC action. (*See* Garberich Ex. TT.) Therein she testified:

> Q Insofar as the occupation of [the territory claimed by Stillaguamish], the ownership of it, it is you opinion that the Stillaguamish held it exclusively as far as the other tribes in the area were concerned?
> A Yes. Of course, this group I have indicated as Qwadsak, its affiliation has been debated. If they are not part of the Stillaguamish, although I think they are, then this entire lower river area was held in common by the Qwadsak and the Stillaguamish.
> Q But you place in your own mind the Qwadsak as a division of the Stillaguamish?
> A Yes, I believe the name refers to lowlands, or means like lowlands, and therefore it is a geographical name. It doesn't have a suffix which it should have if it were the name of a people. It would be Qwadsakabsh if it were the name of a people and a band.

(Garberich Ex. TT at 65:5-20 [STOI 030406].) The ICC carefully reviewed Snyder's testimony, and the Snyder Map and annotations, in reaching its determination. (*See* Garberich Ex. S at Findings 9, 10.) The Findings then summarized at great length "the testimony of petitioner's witness, Sally Snyder, as to specific use and occupancy or joint use with other Indian tribes of the claimed land and the lands adjacent thereto." (*Id.* at Finding 11.) The summary included this point: "(14) That the affiliation of the [group] she had indicated as Quadsak, had been debated. If they are not part of the Stillaguamish, although she thought they were, then the entire lower river area was held in common by the Quadsak and the Stillaguamish." (*Id.* at Finding 11 subpara. (14).)



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

Likewise the ICC considered the testimony of the United States' expert, Dr. Carroll Riley. (*See* Garberich Ex. S at Finding 14.) Dr. Riley testified that the Qwadsak people had a village on the very lower end of the Stillaguamish River "or right at the mouth of the river" and presumably used the area, and that the Kikiallus and Lower Skagits used the Qwadsak area as well. (*Id.* at Finding 14 subparas. 8-11.) He described the Qwadsak area as "one of those areas of rather free use." (*See id.* at Finding 14 subpara. 8.)

The ICC carefully considered the testimony of Stillaguamish leader Esther Ross. She testified *inter alia* that the Stillaguamish territory was bounded by "the Skagit … on the north, the Sauk on the east, the Snohomish on the east-west and the Kikiallus on the west." (*Id.* at Finding 13.) She also testified that her grandparents explained that "Stillaguamish in Indian language means river people." (*Id.*)

The ICC also carefully considered the Dorsey affidavit and Dorsey's deposition testimony from the *Duwamish* case, Bruseth, Hancock, and other evidence in making its decision. (*See id.* at Findings 10-14.)

**c. The determination that Stillaguamish did not occupy and use the Qwadsak area was essential to the ICC judgment.**

The ICC made a Finding of Fact as to Stillaguamish's treaty-time territory and therein affirmatively determined that Stillaguamish "did not actually occupy and exclusively possess" the Qwadsak area. (*Id.* at Finding 18.) The ICC's determination of the Qwadsak issue was a critical and necessary part of the ICC adjudication: Stillaguamish brought the action before the ICC to make its claim for territory ceded pursuant to the Treaty of Point Elliott, the determination of which would result in a compensatory award to the tribe for the ceded territory. Determining whether Stillaguamish occupied and used the Qwadsak area at treaty time was necessary and fundamental to the scope of the ICC's determination and the award based thereon. *See United States v. Washington*, 873 F. Supp. 1422, 1447 (W.D. Wash. 1994) (claims resolved by ICC were claims for compensation based on "unconscionable sum provided in the treaties in exchange for the Indians cession of their lands.")



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

With full knowledge of the ICC's Findings of Fact, which excluded the Qwadsak area from Stillaguamish territory, and of its claim that its attorney had ceded its Qwadsak claim without consent, Stillaguamish filed a motion for rehearing. (Garberich Exs. MM-OO.) The ICC denied that motion. (*See id.* Ex. PP.) Stillaguamish subsequently settled its award pursuant to the ICC Findings, and a Final Judgment was entered. (*Id.* Exs. T, QQ.)

Stillaguamish argues that the ICC determination should be disregarded because, allegedly, its attorney abandoned its claim to the Qwadsak area in proceedings in 1958 without the tribe's consent. (*Id.* Ex. B at 7.) The argument should be rejected. First, Stillaguamish cannot provide authority that its attorney's action lay outside the scope of representation. Second, Stillaguamish has not produced even one document that shows that it ever asserted the purported lack of consent prior to this subproceeding. Voluminous documents dated after the initial ICC Findings of Fact in 1965 clearly demonstrate that Stillaguamish was unhappy with the territorial determination by the ICC and with its attorney's fee request, but in further litigating and finally settling those issues Stillaguamish never asserted its attorney lacked consent to abandon the Qwadsak claim. (*See id.* Exs. V-LL, T.) Stillaguamish even re-hired the attorney it now claims to have acted against the will of the tribe. (*Id.* Ex. P at 137:25-138:7; Y; EE at 1.) And not least, after the abandonment of the Qwadsak territory claim in 1958, Stillaguamish submitted a revised territorial claim to the ICC that included some, though not all, of the Qwadsak area. (*Id.* Ex. S at Finding 2.) The ICC still rejected the claim based on all the evidence in the case. (*Id.* at Finding 18.)

In sum: In the ICC proceedings, Stillaguamish's claim to treaty-time occupation and use of the Qwadsak area was alleged, actually litigated, and fully considered, and the adjudication of that claim was essential to the ICC's determination of Stillaguamish treaty-time territory and the subsequent award based thereon. Stillaguamish now makes the same factual allegation as a basis to assert the inference that it would have fished in adjacent marine waters. Stillaguamish also now relies on the exact same evidence it relied on in the ICC proceedings – indeed it relies on the ICC proceedings and all evidence therein, especially the analysis and testimony of its



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

then-expert Sally Snyder, as well as the testimony of tribal leaders James Dorsey and Esther Ross, and other documentary evidence. (*See Id.* Exs. B at 65-91; A at 102:21-103:24.) The only difference now is that Stillaguamish has re-packaged the evidence in a new expert report. This is precisely the situation to which the doctrine of collateral estoppel applies: Collateral estoppel "exists to prevent a party from having a second chance to make their case after they have already received a full and fair opportunity to present their arguments in court" and "to mitigate the expenditure of scarce judicial resources on issues that have already been decided." *McCoy v. Foss Mar. Co.*, 442 F. Supp. 2d 1103, 1107 (W.D. Wash. 2006) (holding defendant estopped from relitigating specified findings of fact and conclusions of law from prior action). Collateral estoppel bars re-litigation of Stillaguamish's territorial claim to the Qwadsak area. *Id.* Partial summary judgment should be entered dismissing Stillaguamish's claim to U&A in any marine fishery based on a Stillaguamish claim that it occupied the Qwadsak area at treaty time.

**C. Stillaguamish Cannot Establish Jurisdiction.**

As this Court noted in its Order Denying Motions to Dismiss, two years after FD #1 Judge Boldt ruled that "Stillaguamish could not unilaterally expand its U&A into marine waters but could avail itself to paragraph 25 [of the permanent injunction], which is 'the mechanism whereby further usual and accustomed fishing grounds may be established and recognized by the court.'" (Order Denying Motions to Dismiss at 6 (citing *United States v. Washington*, 459 F. Supp. at 1068-69).) But that ruling does not give Stillaguamish a free pass: it must still satisfy the standards of paragraph 25 to establish U&A in the locations it seeks.

Swinomish of course acknowledges that the Court rejected Swinomish's jurisdictional argument as presented in its motion to dismiss, but notes that the standard for survival of a motion for summary judgment differs from that for survival of a motion to dismiss. *Malhotra v. Steinberg*, No. C09-1618JLR, 2012 U.S. Dist. Lexis 154922, at *11 (W.D. Wash. 2012). Swinomish also seeks to foreclose any later suggestion that Swinomish has failed to preserve this argument. Summary judgment is appropriate where "the pleadings, the discovery and



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

disclosure materials on file, and any affidavits, when viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* at *5 (internal quotations omitted). Stillaguamish cannot meet this standard for its jurisdiction claim under paragraph 25(a)(6).

The only aspect of Stillaguamish's evidence that is new is the packaging: a 220-page expert report. Through the Friday Report, Stillaguamish makes essentially five arguments, all of which were considered at the original trial, and relies on the same core evidence that was in the record for FD #1 and considered by Judge Boldt in making his U&A determinations, including Stillaguamish's:

1. Stillaguamish argues it had territory adjacent to marine water and therefore would have fished in those adjacent marine waters. (*See* Garberich Ex. B at 39-94.) Stillaguamish relies heavily on the records of the ICC proceedings; on tribal elder testimony; and on the treaty-time journals of Wilson and Hancock. (*See id.* and notes thereto.) All of that evidence was before Judge Boldt, including testimony by tribal leader Esther Ross, and was known to and specifically addressed by Barbara Lane in her Stillaguamish Report, which the Court relied on. (*See* Graham Exs. 24, 26, 31-35; *see also* MTD at 12-15.)

2. Stillaguamish argues that it gained marine water U&A through intermarriage of its people with other tribes. (*See* Garberich Ex. B at, e.g., 32-33, 38, 97-98, 107.) This claim was specifically acknowledged in the original trial: Barbara Lane noted "considerable" intermarriage among the Stillaguamish, the Upper Skagit, and the Sauk-Suiattle tribes. (*See* MTD at 18-19.). But Dr. Lane, anthropologist Carroll Riley, and another witness all testified intermarriage conferred fishing rights to a family, not to an entire tribe. (*See id.*)

3. Stillaguamish argues its people, like all Coast Salish people, traveled about the Sound and would have fished along the way. Stillaguamish relies on records of treaty time trading posts and on scant family ties to other tribes. (*See* Garberich Ex. B at, e.g., 113, 183-186.) This evidence is not new: At the original tribe, Drs. Lane and Riley acknowledged that deeper saltwater areas of the Sound served as highways, that marine travel was done for



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

business and kinship visits, and that travelers were free to fish along the way; they also testified that family units left their winter villages for food gathering. (*See* MTD at 16-18.)

4. Stillaguamish argues that the existence of shell middens on territory claimed by Stillaguamish proves that Stillaguamish fished in marine waters. (*See* Garberich Ex. B at 108-39.) Stillaguamish relies heavily on the work of Harlan Smith, which was published in 1899-1900. (*See id.* at 109-112.) Further, the middens now referenced by Stillaguamish were also described by Nels Bruseth, who published on the Stillaguamish in 1926; Lane discussed Bruseth's work in her report on the Stillaguamish. (*See* Graham Ex. 24.) Stillaguamish provides no evidence that specifically identifies any shell deposits on purported Stillaguamish territory as the product of the Stillaguamish tribe.

5. Finally, Stillaguamish argues that its forced internment on Whidbey Island in 1855-56 during the so-called Indian War evidences its fishing locations in Whidbey-adjacent waters. (*See* Garberich Ex. B at 198-204.) Stillaguamish offers no new evidence to support this claim. (*See id.*) It relies on government records prepared by agents in charge of the Whidbey internment camps, such as Nathan D. Hill and R.C. Fay, but Barbara Lane discussed those records in her Stillaguamish report. (*See* Graham Ex. 24.)

In short: Stillaguamish has produced nothing to show that the Stillaguamish (meaning "river people") were not really river people. Stillaguamish now has had an opportunity to develop the research and opinions of its expert, and discovery is closed. But the jurisdictional facts have not changed, and all available evidence demonstrates that Judge Boldt specifically determined Stillaguamish's U&A and concluded it did not have marine U&A.

## IV. CONCLUSION

For the reasons set forth above, Swinomish requests the entry of partial summary judgment dismissing (1) Stillaguamish's U&A claim to marine fisheries beyond Port Susan and (2) its claim to any marine fisheries based upon its previously resolved claim to the Qwadsak area. Alternatively, Swinomish requests summary judgment dismissal for failure to establish jurisdiction. A proposed order is submitted herewith.



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

DATED: January 7, 2021.

**SAVITT BRUCE & WILLEY LLP**

By *s/David N. Bruce*
David N. Bruce, WSBA #15237
Duffy Graham, WSBA #33103
James Herr, WSBA #49811
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
Telephone: 206.749.0500
Email: dbruce@sbwLLP.com
Email: dgraham@sbwLLP.com
Email: jherr@sbwLLP.com

**SWINOMISH INDIAN TRIBAL COMMUNITY**

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

Attorneys for the Swinomish Indian Tribal Community

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 7, 2021 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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

Dated this 7th day of January, 2021 at Seattle, Washington.

Nate Garberich



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