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'S OPPOSITION TO STILLAGUAMISH'S PORT SUSAN SUMMARY JUDGMENT MOTION NOTED ON MOTION CALENDAR: January 29, 2021

I. INTRODUCTION

The Court need read no further than Stillaguamish's introduction to see that there is no basis for summary judgment in its favor. Stillaguamish identifies as dispositive of whether "Stillaguamish regularly fished Port Susan" only the "undisputed evidence of village locations and encampments at Warm Beach and Hat Slough on the eastern shore of Port Susan" and the expert opinions relying on that evidence.[1] Setting aside the false claim that the village locations are "undisputed," and even if Upper Skagit were mistaken that evidence of fishing in an area is required to prove that a tribe "customarily fished" there,[2] the trier of fact still must determine if that circumstantial evidence (presence) means Stillaguamish "customarily fished" in Port Susan at and before treaty times. With no evidence of even a single Stillaguamish fishing in Port Susan at

[1] Motion at 1 (Dkt. 170, p. 2).

[2] *See* Upper Skagit's Motion for Summary Judgment (Dkt. 174).

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and before treaty times, the trier of fact could reject Stillaguamish's inference in favor of other, more probable inferences explaining Stillaguamish's presence there.

In addition, the dispute over the Court's jurisdiction precludes entry of summary judgment in Stillaguamish's favor. As Stillaguamish's motion and supporting declarations make clear, the Court in 1973 considered the foundational evidence Stillaguamish now relies on to claim U&A in Port Susan (*i.e.*, of villages at Warm Beach and Hat Slough). Having considered that evidence and nonetheless finding U&A only in the Stillaguamish River, the Court necessarily "specifically determined" that Stillaguamish did not have U&A in Port Susan.

The Court should deny Stillaguamish's motion seeking a summary judgment determination that it "customarily fished" in Port Susan at and before treaty times.

II. MOTIONS TO STRIKE

Pursuant to LCR 7(g), Upper Skagit hereby moves to strike the following evidence Stillaguamish filed in support of its motion for summary judgment. Stillaguamish must establish the admissibility of this evidence before the Court may consider it on summary judgment. Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

A. The Court Should Strike Hearsay Expert Opinions That Are Not "of Treaty-Time Fishing Activities"

Upper Skagit moves to strike the following evidence because they are expert opinions made in out-of-court statements for which the facts and data underlying the opinions are unknown (*see* Fed. R. Evid. 702, Fed. R. Civ. P. 26(a)(2)(B)(ii)) and the experts (who are dead or unknown to the parties) were not cross-examined by anyone with the same motivation as Upper Skagit has now (*see* Fed. R. Evid. 801, 804(b)(1)(B)):

(1) Dkt. 172-11, Dkt. 172-14, and Dkt. 172-15, which are out-of-court statements by Barbara Lane providing expert opinions.

(2) Dkt. 172-12 and Dkt. 172-13, which are out-of-court statements by Carroll Riley providing expert opinions.

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(3) Dkt. 172-4, 172-5, 172-6, which are hand-drawn maps purportedly showing Stillaguamish "territory."

In a series of decisions, this Court and the Ninth Circuit have held that, due to the nature of the "evidence of treaty-time fishing activities" (which is "sketchy," "less satisfactory than evidence available in the typical civil proceeding," and "extremely fragmentary"), the Court would "relax[]" the "stringent standard of proof that operates in ordinary civil proceedings." *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015) (quoting *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988)); *see also United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975).

Thus, the Court has routinely admitted hearsay of "treaty-time fishing activities," 129 F. Supp. 3d at 1110, that otherwise would have been inadmissible, including prior testimony and other out-of-court accounts of treaty-time fishing activities from long-dead witnesses, sources, and informants. But this motion concerns evidence of a different kind: hearsay that is not of "treaty-time fishing activities" but instead hearsay drawing conclusions. Stillaguamish did not present the evidence Upper Skagit seeks to strike as facts or data Stillaguamish's expert *relied on* in forming his opinions, though, even if it had, Stillaguamish could not present that evidence unless the "probative value . . . substantially outweighs the[] prejudicial effect." Fed. R. Evid. 703. Instead, Stillaguamish's motion presented this material as evidence *the Court* should consider.[3]

Barbara Lane died in 2013.[4] Carroll Riley died in 2017.[5] Stillaguamish could have presented their opinions at any time after the tribe became financially solvent (approximately 2002[6]) and before their deaths. Upper Skagit has withdrawn its laches defense,[7] but the facts

[3] *See* Motion at 3-4 (re maps), 6-7 (re Lane and Riley) (Dkt. 170, pp. 4-5, 7-8).

[4] Matthew L.M. Fletcher, *Barbara Lane Walks On*, Turtle Talk (Jan. 21, 2014), https://turtletalk.blog/2014/01/21/barbara-lane-walks-on/.

[5] *Carroll L. Riley*, The Southern Illinoisan (Apr. 11, 2017), https://thesouthern.com/news/local/obituaries/carroll-l-riley/article_1f48e889-dee3-50ab-aa63-3a1a959adee1.html.

[6] *See* Opp'n Motion Protective Order, p. 10 & nn. 17, 18 and evidence cited (Dkt. 160).

[7] Upper Skagit Indian Tribe's Withdrawal of Laches Defense (Jan. 19, 2021) (Dkt. 186).

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underlying it remain: one prejudice from Stillaguamish's delay in prosecuting its claim is that Upper Skagit cannot cross-examine the expert witnesses on which Stillaguamish now seeks to rely.

That result, if allowed, would be unfair. The evidentiary and civil rules, no matter how "relaxed," cannot countenance it. The evidence outlined above purports to be expert opinion (otherwise it would not be admissible, *see* Fed. R. Evid. 701, 702), *i.e.*, each of Lane, Riley, and the map illustrators presumably used specialized knowledge to evaluate and draw conclusions about facts and data. Upper Skagit has a right to know the facts and data on which the opinions are based and to cross-examine them about those facts and data and the conclusions they drew.

Qualifications. An expert must be qualified. Fed. R. Evid. 702 (a "witness who is qualified as an expert . . . may testify" thereto). Upper Skagit does not contest Riley or Lane's qualifications. Upper Skagit cannot contest the map-illustrators qualifications because the evidence advanced has no information about them.[8]

Facts and data. The Court must ensure the expert's opinion is "based on sufficient facts or data." Fed. R. Evid. 702. As the advisory committee to the 2000 amendments explained:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.* [(*Daubert II*)], 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.

Fed. R. Evid. 702 advisory committee's notes to the 2000 amendment.

None of the proffered experts identified the facts or data on which they based their opinion. In Drs. Lane and Riley's cases, it appears that their opinions that Stillaguamish fished in Port Susan are based on James Dorsey's 1926 affidavit. *See infra* page 13-14. Dorsey identified the locations of Stillaguamish villages, but Drs. Lane and Riley provided nothing to explain how they

[8] *See* Dkt. 172-4, -5, -6 (the latter identifies prior writings, but only of the authors, not the cartographers).

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concluded from that evidence that Stillaguamish fished in Port Susan. Accepting those conclusions without that explanation would be simply "taking the expert's word for it" (Fed. R. Evid. 702 advisory committee's notes to the 2000 amendment) based on "only the experts' qualifications, their conclusions and their assurances of reliability" (*Daubert II*, 43 F.3d at 1319).

In the case of the map illustrators, there is simply no way for the Court to assess the reliability of the maps. The maps themselves (all that Stillaguamish presented other than the cover, title, and/or publication pages of the books from which they are copied) provide no foundation for their accuracy; they say nothing about the information from which they were derived. Any use of the maps, including to prove Stillaguamish "territory," is inadmissible.

Cross-examination. An expert's opinion cannot be admitted if the opposing party has had no opportunity or similar motive to cross examine them. *See* Fed. R. Evid. 804(b)(1)(B). It is one thing to admit accounts of fishing activity that have not been subjected to cross-examination because excluding that evidence "would likely preclude a finding of any such fishing areas." 459 F. Supp. at 1059. It is quite another to admit experts' conclusions about evidence, even conclusions given under oath, when those conclusions have not been subjected to cross-examination by Upper Skagit and when Upper Skagit did not have "an opportunity *and similar motive* to develop it by direct, cross-, or redirect examination." Fed. R. Evid. 804(b)(1)(B) (emphasis added); *see also* Fed. R. Evid. 804 advisory committee's notes to 1974 enactment ("[I]t is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this . . . is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness.").

Even for those opinions of Drs. Lane and Riley that were under oath, none were offered when Upper Skagit had both an opportunity *and* a similar motive to cross-examine them. Upper Skagit was not a party to the 1955 proceeding titled *Stillaguamish Tribe of Indians v. United States*, before the Indian Claims Commission, in which Riley gave the testimony at Dkt. 172-12. And while Upper Skagit was a party to this case when Lane's testimony was admitted, that

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testimony was admitted in a subproceeding to determine *Tulalip's* U&A, not Stillaguamish's.[9] It would catastrophically complicate subproceedings in this matter if all parties had an obligation to cross-examine any witness whose testimony might later be used against them in a proceeding concerning a wholly different matter.

These out of court statements, and the arguments which rely on them, should be stricken.

B. The Court Should Strike Evidence the Court Already Considered in Determining Stillaguamish's U&A.

The evidence Stillaguamish relies on to prove U&A in Port Susan is James Dorsey's testimony (and derivatives of it) that Stillaguamish had villages at Hat Slough and Warm Beach. *See infra* pages 13-14. As Stillaguamish's expert explains in his declaration, this evidence was presented to the Court at the 1973 trial at which the Court determined that Stillaguamish's U&A was "the Stillaguamish River and its north and south forks":[10]

> Well-known and respected anthropologist Barbara Lane prepared a report on the Stillaguamish for the case in 1973 titled "Anthropological Report on the Identity, Treaty Status and Fisheries of the Stillaguamish Indians." Lane attached Dorsey's 1926 testimony as Appendix 1 to her report, in which she relied heavily on James Dorsey for village locations at the time of the treaty . . . .
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> . . .
>
> . . . Dorsey's listing, [Lane] wrote, "constitutes the most detailed list of Stillaguamish use sites and site use available." Furthermore, she noted that Dorsey was born in about 1850 and as Stillaguamish Indians were not displaced from their homes until sometime after about 1870, that "Mr. Dorsey was in a position to participate in and obtain first-hand knowledge of Stillaguamish site use until about age 20 . . . [and] lived his entire life on the Stillaguamish River."[11]

Likewise, the testimony of Esther Ross relied on by Stillaguamish was testimony at the 1973

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[9] Stillaguamish erroneously identifies Lane's testimony at Dkt. 172-14 as proffered ahead of Final Decision #1. *See* Motion at 8 (Dkt. 170, p. 7). It was not. Final Decision #1 issued in February 1974. *See United States v. Washington*, 384 F. Supp. 318, 348 (W.D. Wash. 1974). Lane's testimony at Dkt. 172-14 was admitted in July 1975 and was the basis of the Court's interim decision on Tulalip's U&A in September 1975. *See* 459 F. Supp. at 1058. Stillaguamish agrees that her 1983 testimony (Dkt. 172-15) was admitted in a subproceeding to determine (finally) Tulalip's U&A. *See* Motion at 7 (Dkt. 170, p. 8).

[10] "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." 384 F. Supp. at 379 ¶ 146.

[11] Friday Decl. ¶¶ 10, 17 (Dkt. 171) (citations omitted).

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trial.[12]

Not only was the Lane evidence and the Ross testimony presented to the Court in 1973, it was specifically cited in the Court's Stillaguamish U&A finding. *See* 384 F. Supp. at 379 ¶ 146 (citing, *inter alia*, Exhibit USA-28 and Transcript 2714). Exhibit USA-28 was Lane's report on Stillaguamish, including the Dorsey affidavit, relied on by Friday in the quotation above.[13] The Dorsey affidavit begins on the page after the page cited by the Court.[14] Transcript 2714 was a page of Ross's September 1973 testimony, and was just ten pages before her testimony quoted by Stillaguamish.[15] The intervening pages of the transcript (2714-2724) reveal a Court actively engaged with the witness and soliciting additional testimony from her.[16] It cannot seriously be disputed that the Court considered the Dorsey affidavit and the Ross testimony in making its Stillaguamish U&A finding.

The logical corollary to the bar on submitting new evidence in a Paragraph 25(a)(1) proceeding (*Muckleshoot*, 944 F.3d at 1182) must be that a tribe cannot submit old evidence in a Paragraph 25(a)(6) proceeding, even if repackaged in the guise of an expert report. This point is underscored by the fact that the preeminent expert in *United States v. Washington* (Lane) extensively described the very evidence at issue (the Dorsey affidavit) in her report; yet, in the next sentence, she identified only the river as where the Stillaguamish lived, and, elsewhere in her reports, identified only the river as where they fished and had U&A.[17] Just as Lane did, the Court specifically considered Stillaguamish's evidence about its village locations, and, despite evidence that one was on Hat Slough and one was at Warm Beach, determined that Stillaguamish's U&A was "the Stillaguamish River and its north and south forks," 384 F. Supp. at 379, *i.e.*, not Port Susan. Because the Court already considered this evidence and determined Stillaguamish's U&A

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[12] *See* Dkt. 172-16.

[13] Ex. USA-28 (Dkt. 175-11).

[14] *See* Dkt. 175-11, p. 27.

[15] *See* Motion at 8 (Dkt. 170, p. 9); Ross Testimony, pp. 2706-24 (Sept. 10, 1973) (Farmer Decl. Ex. 1).

[16] *E.g.*, Ross Testimony, pp. 2715, 2716, 2719, 2721, 2722, 2724 (Farmer Decl. Ex. 1).

[17] *See infra* notes 52-54 & accompanying text.

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from it, Stillaguamish should not be permitted to rely on it again to try to convince the Court to reach a different conclusion.

The Court should strike the evidence considered by the Court at the 1973 trial.

C. The Court Should Strike Expert Opinion Not Disclosed as Required by Rule 26(a)(2)(B).

The Court ordered disclosure of Stillaguamish's "expert testimony and reports," including a "complete statement of all opinions the witness will express and the basis and reasons for them" pursuant to Rule 26(a)(2)(B), by February 2020.[18] Stillaguamish timely produced the report of its expert, Chris Friday.[19] That report did not include an opinion as to the location, within the town of Warm Beach, of the Warm Beach "village" Stillaguamish tribal member James Dorsey identified in 1926;[20] Stillaguamish has now proffered such an opinion[21] based on documents its expert's declaration says were "accessed 3 January 2021" and were not earlier produced or identified by Stillaguamish or its expert as required by Rule 26(a)(2)(B)(ii),[22] and Stillaguamish relies on that opinion in its motion.[23] Nor did the report include an opinion based on a map submitted "the same day as Riley's testimony" in 1958;[24] Stillaguamish has now proffered such an opinion,[25] based on a document Friday did not identify as required by Rule 26(a)(2)(B)(ii).[26]

Rule 37(c)(1) provides that "[i]f a party fails to provide information . . . required by Rule 26(a) . . . , the party is not allowed to use that information . . . to supply evidence on a motion, at a

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[18] *See* Order, p. 2 (Dkt. 126) (citing Fed. R. Civ. P. 26(a)(2)).

[19] *See* Friday Report (Feb. 2020) (Dkt. 180-2).

[20] Friday Report (Feb. 2020) (Dkt. 180-2); Farmer Decl. Ex. 2 (Jan. 12 email request that Stillaguamish identify where Friday in his report discussed documents attached to his declaration purporting to show Warm Beach location; Jan. 14 email response does not address that request).

[21] Friday Decl. ¶¶ 14, 23-26 (Jan. 7, 2021) (Dkt. 171).

[22] *See supra* note 20; Friday Decl. ¶ 23-36 (Jan. 7, 2021) (Dkt. 171).

[23] Motion at 8 (Dkt. 170, p. 9) ("Dr. Friday's opinion is based upon the presence of Stillaguamish villages . . . on and near the east shore of Port Susan at Warm Beach . . . . ").

[24] Friday Report (Feb. 2020) (Dkt. 180-2); Farmer Decl. Ex. 2 (Jan. 12 email request that Stillaguamish identify where Friday in his report discussed maps; Jan. 14 email response does not address that request).

[25] Friday Decl. ¶¶ 19, 27 (Jan. 7, 2021) (Dkt. 171).

[26] *See supra* note 24.

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hearing, or at trial, unless the failure was substantially justified or harmless." The rule "gives teeth to [the requirement of Rule 26(a)] by forbidding the use at trial of the information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). The burden of proof is on the party seeking to avoid the Rule 37 sanction. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008) ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness." (citation omitted)). Under Rule 37, harm can result from "prejudice or surprise to the party against whom the" improperly disclosed "evidence is offered." *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010); Fed. R. Civ. P. 37(c)(1).

Upper Skagit has been unfairly surprised and would be prejudiced if the Court considers these new opinions now or at trial. Disclosure in a dispositive motion, months after the discovery deadline and nearly a year after the disclosure deadline, deprives Upper Skagit of the chance to investigate the facts underlying the opinions to determine if Friday utilized the correct records or interpreted them correctly in coming to his conclusions, deprives Upper Skagit of the chance to cross-examine Friday about his conclusions and to explore the facts and data on which he relied, and thus deprived Upper Skagit of the opportunity to timely develop contrary evidence or a rebuttal opinion. The Court should strike this evidence and the argument which relies on it.

D. The Court Should Strike Dr. Friday's Opinion That Stillaguamish Fished in Port Susan.

Upper Skagit's motion to exclude Dr. Friday's opinion that Stillaguamish fished in marine waters is pending.[27] The Court should not consider that opinion[28] in deciding this motion.

III. DISCUSSION

A. Summary Judgment Standard and Evidentiary Standard

Stillaguamish is not entitled to summary judgment in its favor because, even considering the evidence Upper Skagit seeks to strike, *see supra*, Stillaguamish cannot show "that there is no

[27] *See* Dkt. 173.

[28] (*e.g.*, Dkt. 171, p. 1, lines 23-24)

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genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the" case, and a dispute about a fact is "genuine" if "the evidence is such that a reasonable" fact finder "could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, "[s]ummary judgment is inappropriate if" a trier of fact, "drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008).

In a Paragraph 25(a)(6) proceeding to expand a tribe's U&A, 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 at 1110. Despite the "relax[ation]" of evidentiary standards applicable to the admissibility of "evidence of treaty-time fishing activities," Stillaguamish, as the tribe seeking to expand its U&A, "bear[s] the burden to establish the location of" its U&A, which it must prove by "a preponderance of the evidence found credible and inferences reasonably drawn therefrom." *Id.* at 1110 (quoting 384 F. Supp. at 348).

B. Stillaguamish's Reliance on the Same Evidence It Presented in 1973 Establishes That the Court Lacks Jurisdiction.

The Court's jurisdiction to hear this dispute is limited by Paragraph 25 of the Court's Permanent Injunction, entered in 1974 and amended in 1993. *See* 384 F. Supp. at 419 *as modified by United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. Aug. 24, 1993).

> As relevant here, Paragraph 25(a)(1) of the permanent injunction provides for jurisdiction over determinations of "whether or not the actions, intended or effected by any party . . . are in conformity with Final Decision #I or this injunction." By contrast, Paragraph 25(a)(6) of the permanent injunction provides the district court with jurisdiction over a tribe's request to decide "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I."

Muckleshoot Indian Tribe v. Tulalip Tribes, 944 F.3d 1179, 1182 (9th Cir. 2019) (quoting 384 F.

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Supp. at 419). Upper Skagit contests the Court's jurisdiction.[29] Thus, Stillaguamish, which brought this subproceeding under Paragraph 25(a)(6), "bears the burden of proving" the existence of the court's "jurisdiction," *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010), meaning Stillaguamish must prove at trial that "the U&A at issue [was not] 'specifically determined' by Final Decision # I," 944 F.3d at 1183. *See also Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) ("the court is under a continuing duty to dismiss" a claim "whenever it appears that the court lacks subject matter jurisdiction" and should determine its jurisdiction at trial if the jurisdictional facts overlap with the merits).

Stillaguamish argues that evidence showing its presence at villages and encampments at Hat Slough and Warm Beach means it fished in Port Susan.[30] But, as outlined above (*supra* pages 6-8), to prove that presence, Stillaguamish relies on evidence the Court considered in making its 1974 Stillaguamish U&A determination. And, as described below (*infra* pages 13-14), Dorsey appears to be the source of every person who claims that Stillaguamish were at Hat Slough and Warm Beach. It cannot be that an area is only "specifically determined" if it was identified in the U&A finding, as was the case in *Muckleshoot*. If that were the case, a tribe which presented evidence in 1973 to prove U&A in the entire case area but proved U&A only in an identified location could present the same evidence again in a subsequent proceeding despite the Court's implicit rejection of that evidence.[31] And that is exactly what happened here: just as Lane did,[32] the Court considered Stillaguamish's evidence about the location of its villages, and, despite evidence that one was on Hat Slough and one was at Warm Beach, determined that Stillaguamish's U&A was "the Stillaguamish River and its north and south forks,"[33] and not Port Susan.

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[29] Dkt. 95 ¶ 30 (affirmative defense that "[t]he Court lacks jurisdiction over this dispute").

[30] Motion at 1 (Dkt. 170, p. 2).

[31] Some of Stillaguamish's evidence, in fact, is implicitly an argument that the Court has already determined that the marine waters near Hat Slough and Warm Beach are within Stillaguamish's U&A. Quoting Lane, Friday characterizes those marine areas as the "lower part" of the river, claiming they are "part of the Stillaguamish River delta." Friday Decl. ¶ 10 (Dkt. 171).

[32] *See infra* notes 52-54 & accompanying text.

[33] 384 F. Supp. at 379 ¶ 146.

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Stillaguamish's summary judgment motion makes plain that Stillaguamish presented in 1973 the same evidence on which it now relies. Because the Court considered that evidence at the 1973 trial and nonetheless determined that Stillaguamish's U&A was only "the Stillaguamish River and its north and south forks,"[34] the Court "previously determined" that Stillaguamish did not have U&A in Port Susan. This dispute concerning the Court's jurisdiction means that Stillaguamish's motion must be denied.

C. A Reasonable Trier of Fact Could Conclude That Stillaguamish Has Not Proved It Customarily Fished in Port Susan at and before Treaty Times.

Because a tribe's U&A includes "every *fishing* location where members of a tribe customarily *fished* from time to time at and before treaty times," a tribe does not have U&A in fishing locations "*used infrequently*," "*at long intervals*," on "*extraordinary occasions*," "*occasional[ly]*," or "*incidental[ly]*." 384 F. Supp. at 332, 356 (emphasis added). Thus, Stillaguamish is entitled to summary judgment only if no reasonable trier of fact could conclude that Stillaguamish fished in Port Susan infrequently, at long intervals, on extraordinary occasions, occasionally, incidentally, or not at all. *See id.* Stillaguamish has not made this showing.

First, this Court has always required evidence of fishing in the waters in which a tribe seeks to establish U&A, no matter how "fragmentary," "sketchy," and "less satisfactory" that evidence may be.[35] For example, while Stillaguamish recently suggested that Upper Skagit's successful petition for U&A in Deception Pass was based only inferences from travel, Upper Skagit produced to Stillaguamish in this subproceeding its expert's direct testimony / report in that subproceeding (No. 89-3) which detailed evidence of Upper Skagit fishing in Deception Pass to support its U&A claim.[36] Without any evidence of Stillaguamish marine fishing in Port Susan, a reasonable trier of fact could conclude that Stillaguamish has not shown that it fished in Port Susan at all.

Even if the Court (whether as a matter of law or of fact) concludes that evidence of fishing

[34] 384 F. Supp. at 379 ¶ 146.

[35] *See* Dkt. 174, pp. 11-15 & evidence cited.

[36] *Compare* Opp'n at 7 (Dkt. 184, p. 8) *with* Ex. UPS-31, pp. 23-24 (admitted Apr. 22, 1994) (Farmer Decl. Ex. 8).

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is not necessary, it would be entirely reasonable for the Court to determine as a matter of fact that evidence that Stillaguamish "used" villages at Hat Slough and Warm Beach was insufficient to prove that Stillaguamish "customarily fished" in the nearby waters of Port Susan. There are many reasons the trier of fact could do so, including: (1) questions about whether Dorsey's affidavit should be relied on as to those villages; (2) the lack of evidence about how frequently, for what duration, and when Stillaguamish "used" those "villages" (including whether they even existed at and before treaty times); (3) the village at Hat Slough was on the river, at least one mile inland from the sea; and (4) the first- and second-hand informants identified what Warm Beach (which itself has freshwater) was "used" for, and it was not fishing.

Stillaguamish relies on the 1926 testimony of Stillaguamish tribal member James Dorsey to place Stillaguamish at Hat Slough and Warm Beach. Dorsey identified two Stillaguamish "villages" in those places, but for neither did he state that the village was on the sea or that Stillaguamish used the village to fish in the sea. He identified one as a "village on the banks of Hat Slough about four miles South of Stanwood."[37] He identified the second by stating, "the Town of Birmingham or Warm Beach is now the name of said village."[38] Dorsey appears to be the source of all later statements on which Stillaguamish relies in placing Stillaguamish at Warm Beach: Nels Bruseth, who Stillaguamish says was born in 1889, credits Dorsey as a source;[39] Sally Snyder, who testified in 1955, credits Dorsey and Bruseth;[40] Lane, who, in testimony about Tulalip in 1976 and 1985 was asked about Stillaguamish fishing in Port Susan, identified Dorsey as her source;[41] and Bruce Miller, an expert for Upper Skagit, relies only on Lane.[42] Three other people Stillaguamish cites—Riley and Ross (both of whom were born long after treaty time) and Tulalip expert Deward Walker—either provide no source for their claims about Stillaguamish being at the

[37] Dkt. 172-8, p. 8.

[38] Dkt. 172-8, p. 7.

[39] Dkt. 172-2, p. 5.

[40] Dkt. 172-3, p. 13; *see also infra* Figure 3.

[41] Dkt. 172-11, p. 3.

[42] Dkt. 172-19, pp. 3-4.

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sea (Riley[43] and Ross[44]) or rely on claims by members of the modern-day Tulalip tribe (Walker) who themselves provided no source for their claims,[45] making Riley, Ross, and Walker's testimony (even if admissible[46]) likely of little value to the trier of fact. *See* 459 F. Supp. at 1059 ("Where . . . the testimony of tribal elders is the sole evidence of usual and accustomed fishing grounds and stations, counsel should make extra efforts to assure the court that such testimony is of sufficient accuracy to support findings of usual and accustomed fishing places or areas.").

Snyder mapped the locations identified by Bruseth and Dorsey. That portion of her map showing the locations at issue in this motion is reproduced below as Figure 1, and that portion of her notes about those locations is reproduced below as Figure 3.[47] As detailed below, Warm Beach is at Map No. 1 and Map No. 2 on her map and notes and Hat Slough is at Map No. 10. Both her map and her notes were admitted by the court and described by her when she testified.[48] Figure 2 is a current map of the area showing roughly the same area as is depicted in Figure 1.[49]

[43] Riley did not identify a source in his testimony (*see* Dkt. 172-12, pp. 5, 7; Dkt. 172-13, p. 5), which was consistent with Judge Boldt's finding that Riley's testimony was less "credible and satisfactory than that of" of Lane (384 F. Supp. at 350).

[44] Ross provided no foundation (or source of information) for her 1973 testimony that Stillaguamish territory went to "Warren Beach" and "halfway to Camano." Dkt. 172-16, p. 4; *see also* Farmer Decl. Ex. 1 (entire testimony).

[45] *See* Walker Dep. 32:24-59:17 (Farmer Decl. Ex. 3).

[46] Tulalip did not disclose Walker as an expert who would provide an opinion as to where Stillaguamish fished at and before treaty times. Instead, his report disclosed that his expert opinion was limited to a critique of Stillaguamish's expert report. *See* Walker Report, p. 1 (Farmer Decl. Ex. 4). It was not until the filing of Stillaguamish's motion that Upper Skagit learned that Stillaguamish would be proffering Walker's opinion about where Stillaguamish fished at and before treaty times, which is based not on his critique but instead on his discussions with modern-day Tulalip tribal members. *See* Walker Dep. 32:24-59:17 (Farmer Decl. Ex. 3). If the matter is tried, Upper Skagit expects to bring a motion in limine to limit Walker's testimony to that which was disclosed and about which he has expertise.

[47] Figure 1 and Figure 3 are from documents Stillaguamish produced. *See* Farmer Decl. Ex. 5 & 6, p. 6 (STOI033218).

[48] Dkt. 172-3, pp. 7, 12-13.

[49] Figure 2 is from the U.S. Geologic Service, https://viewer.nationalmap.gov/advanced-viewer/.

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Figure 1

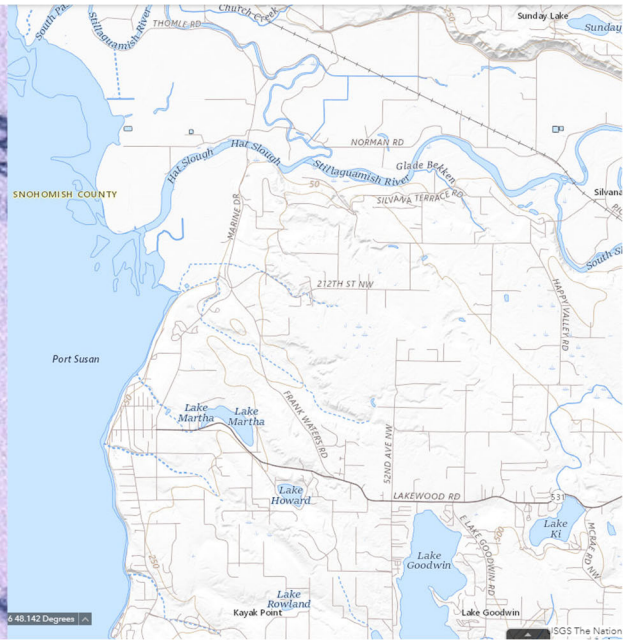

Figure 2

Map No.	Source	Name	Location, Date	Type	Occupants
2	B (6) 2	?	At a slough at the point of a hill near Splaidid (Warm Beach)	Permanent home built by Tsahbilt after he vacated B1 above.	Tsahlbilt
10	B (6) 3	?	One mile above Hat Slough (To Toluqe)	Permanent homes. 1 large house of Ku-Kwilkhaedib surrounded by houses of relatives. Place of councils.	Ku-Kwilkhaedib important leading man (perhaps Stillaguamish chief.) Perhaps K's nephew, Splitlip Jim, lived here too.
	JD 8	?	On banks of Hat Slough, 4 miles south of Stanwood.	2 large homes.	100 pop.
	W 4 (?)		(Head of Hat Slough, about 15 mi. from the Stillaguamish mouth)	1 large house with only 1 family in it.	?
	H 2		15 or 20 miles from the Stillaguamish mouth.	a number of mat-houses.	?
1	B (7) 4	Splaidid	At Port Susan, near Warm Beach	Place of potlatching (therefore with permanent housing)	?
	JD 6	Sp-la-tum	Sec. 13, Twp. 31 N. R 4 E. W. M. Gov. lots 3-4, at present site of Warm Beach (Birmingham).	Permanent village. One large house, another smaller one plus neighboring cabins. Visiting center for neighboring tribes. Cemetery. Occupied to recent times.	Chief: Zis-a-ba

Figure 3

The below discussion assumes that the Court as trier of fact accepts the Dorsey village locations as accurate and as existing at and before treaty times. But whether they are is itself an

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issue of fact: Stillaguamish's expert notes that the Indian Claims Commission "dismissed" Dorsey's testimony because it was obviously written by a lawyer.[50] Even within the evidentiary standards of this case, the Court must scrutinize it closely. *See* 459 F. Supp at 1059. Snyder testified that she "could not give the dating on" the Warm Beach village, and later explained that she had included "all villages, regardless of their dating" even those which may have been established long after treaty times: "Some of these villages may have been settlements after 1850 or so, and *probably well before 1900*, and others are known to have been inhabited prior to 1850 and in the 1850's."[51] Then, at the 1973 trial, Lane vouched generally for the Dorsey affidavit because "[n]othing in Mr. Dorsey's evidence appears to be inconsistent with known ethnographic facts" noting that "[i]n the absence of contradictory information or internal inconsistency, I see no warrant for discrediting his testimony."[52] But, tellingly, Lane immediately followed that statement with the conclusion that "it would appear that the Stillaguamish Indians in 1855 lived along the north and south branches as well as the lower part of the Stillaguamish River"[53] and elsewhere in her reports that Stillaguamish's fishing and U&A was in the river,[54] making no mention of villages on the sea or utilizing marine resources. In other words, Lane relied on Dorsey's affidavit in making her report to the Court about Stillaguamish's U&A and yet *said nothing* about Stillaguamish living at the sea or using marine resources.

Hat Slough. The Court can take judicial notice that Hat Slough is what the Stillaguamish River is called as it nears Port Susan. *See supra* Figure 2. Dorsey's testimony placed the Hat Slough village not on the sea at all; he placed it "on the banks" of the river.[55] And Snyder, on whom Stillaguamish relies, identified as Map No. 10 the village Dorsey identified and placed it at

[50] Friday Decl. ¶ 17 (Dkt. 171).

[51] Snyder Testimony 41, 69-70 (Sept. 8, 1955) (emphasis added) (Farmer Decl. Ex. 7).

[52] Ex. USA-28, p. 15 (Dkt. 175-11, p. 18).

[53] Ex. USA-28, p. 15 (Dkt. 175-11, p. 18).

[54] Ex. USA-28, p. 23 ¶ 7 (Dkt. 175-11, p. 26); Ex. USA-20, p. 38 ¶ 3 (Dkt. 67-1, p. 373).

[55] Dkt. 172-8, p. 8.

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least a mile (and maybe many miles) from the sea.[56] A reasonable trier of fact could reject the contention that a village on the banks of the river, and possibly miles from the sea, means Stillaguamish customarily fished at the sea, especially when there is no evidence of that use.

Warm Beach. Of the two places marked by Synder at Warm Beach in Figure 1, *supra*, only one (Map No. 1) was a village. It was the village Dorsey identified as "now . . . name[d]" the "Town of . . . Warm Beach."[57] The Court can take judicial notice that the town of Warm Beach has a number of streams and lakes (Lake Martha, Lake Howard) in and through it,[58] and Friday's testimony purporting to place the village at Map No. 1 at the sea is subject to the motion to strike at Section II(C), *supra*. As noted above (*supra* note 51 & accompanying text), Snyder could not date the Warm Beach village, which meant that (in her own words) the village was "*probably* well before 1900."[59] The second location on Snyder's map (*see* Figure 1, *supra*, Map No. 2) was not identified as a village by Dorsey, and Snyder testified it "was not a real village." She testified that it "was one home," that she did not know the dating of it, but said that it was "probably 1850 and after, but not before 1850."[60] Because Dorsey had not identified the home, Snyder relied on Bruseth, who said that an Indian named Tsahlbilt lived there in a "home near a slough at the point of the hill near [Warm Beach]" "[a]fter [he] retired from his job."[61]

If nothing else were known about the Stillaguamish, there would be no way to know why (or even when) the Stillaguamish located themselves in Warm Beach. But, knowing that all evidence of Stillaguamish fishing identifies them fishing only in freshwater (and even assuming

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[56] *Compare supra* Figure 3 (one informant placed Map No. 10 "about 15 mi. from the Stillaguamish mouth" and another "15 or 20 miles from the Stillaguamish mouth") *with* Snyder Testimony 45 ("There are four references to Village 10, which is located somewhere in the vicinity of Hat Slough. There is disagreement as to the exact location. It is probably a village one mile from the mouth of Hat Slough from the Stillaguamish River.") (Farmer Decl. Ex. 7).

[57] *See* Ex. USA-28, App. 1, p. 2 (Dkt. 175-11, p. 28); Dkt. 172-3, p. 14 ("the village indicated as 2 on the map was not a real village").

[58] *See* https://goo.gl/maps/SGomqDVJA25f7MWk9 (last visited Jan. 12, 2021; map created by searching maps.google.com for "Warm Beach, WA"); *see also* Figure 2, *supra*.

[59] Snyder Testimony 41, 69-70 (emphasis added) (Farmer Decl. Ex. 7).

[60] Dkt. 172-3, p. 14.

[61] Nels Bruseth, *Indian Stories and Legends of the Stillaguamish and Allied Tribes*, p. 6 (1926 ed.) (Dkt. 172-2, p. 6).

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they were there at and before treaty times), there are more plausible explanations as to why Stillaguamish were at Warm Beach than Stillaguamish's expert's supposition that they were there to fish in marine waters. Dorsey described the use Stillaguamish made of Warm Beach, and he did not say that it was used for marine fishing: instead, he said it "was a visiting center for other neighboring members of said tribe and other tribes."[62] This was consistent with Snyder's notation that Bruseth said that Warm Beach was a place of "potlatching,"[63] which Stillaguamish's expert says is a "reciprocal gift-giving and wealth/resource sharing 'circle,'" not fishing.[64] Stillaguamish had much to give to marine-based tribes: it was an upriver tribe with extensive hunting grounds and noted use of hunting resources,[65] and is documented to have traveled as far as Fort Victoria to trade its "hides for blankets and guns."[66]

Snyder, in addition to the testimony supplied by Stillaguamish for its motion,[67] after detailing the villages as described above (including the village at Warm Beach), testified:

> A. [The Stillaguamish] [e]conomy was of an up-river sort, based upon fresh water fishing, probably by trapping, and upon hunting. The economy differed from the Skagit, or the Skagit and Kikiallus, in that the Stillaguamish were not dependent on shell fish, nor upon fish caught in salt water.
>
> . . . [regarding] [s]ubsistence patterns -- I believe I have covered that under economy.
>
> . . .
>
> Q. Are the Stillaguamish partly headwater Indians?
>
> A. Well, they are located on the headwater and they have a village on the headwater and to that extent, yes, but at the river mouth there is a great deal of pollution of the water and shell fish ordinarily don't thrive there or

[62] Dkt. 172-8, p. 8.

[63] *See supra* Figure 3 (Map No. 1).

[64] Friday Report, p. 221 n.22 (Dkt. 180-2, p. 224 n.22).

[65] Dorsey testified, for instance, that Stillaguamish had "very large camping or hunting grounds" at Hazel which "people of the Tribe from all of the [Stillaguamish] villages" used; at it, "large numbers of both men and women would gather for hunting of bear, deer, elk, goat and other animals, the meat of which was stripped, smoked and dried on racks." Ex. USA-28, App. 1, p. 4 (Dkt. 175-11, p. 30).

[66] Friday Report, p. 184 (Dkt. 180-2, p. 187).

[67] *See* Dkt. 172-3; *see also* Motion at 5, 12 (Dkt. 6, 13) (identifying selected Snyder testimony and then using it to argue that Stillaguamish fished in Port Susan).

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> if they live, they are not used by the Indians since mussels, for example, cannot tolerate any pollution whatsoever or they are absolutely inedible. I would say that the Stillaguamish are essentially river people; that they live on freshwater beaches.[68]

Stillaguamish argues that Bruseth's book establishes that Stillaguamish fished in the sea, but it does no such thing. Bruseth merely identified an "enormous pile of old claim shells" near "Quadsak headquarters" which was "near Stanwood" and "kitchen middens in the Stanwood and Warm Beach area"[69] and said that "[w]ith an abundance of berries in the nearby hills, clams in the beach and some edible roots Tsahlbilt lived well" in his retirement home at Warm Beach.[70] A reasonable trier of fact could find Bruseth's writings not probative of Stillaguamish marine fishing at and before treaty time given that Bruseth (1) according to Stillaguamish, was born in the 1889,[71] (2) appears to have been writing from first-hand (*i.e.*, post-treaty) experience,[72] including in his descriptions of individual Indians,[73] (3) identified Quadsak and Stillaguamish as different tribes,[74] (4) did not provide any information about who left the shells or when, (5) said nothing about when Tsahlbilt lived and the account of his retirement reads as a first-hand account,[75] (6) described in some detail the food gathering of Tsahlbilt (*e.g.*, "For fish he set traps, generally a row of stakes across a slough or stream with pockets out of which the fish could not escape."[76]) and said nothing of him clamming or taking fish from the sea, suggesting he may have obtained clams from

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[68] Snyder Testimony 67, 89-90 (Farmer Decl. Ex. 7). "Headwater" means "the source and upper part of a stream." *Webster's Third New International Dictionary* 1043 (2002).

[69] Dkt. 172-1, p. 6.

[70] Dkt. 172-2, p. 6.

[71] Motion at 3 (Dkt. 170, p. 4).

[72] Nels Bruseth, *Indian Stories and Legends of the Stillaguamish, Sauks and Allied Tribes*, p. 5 (1950 ed.) ("Their comings and goings were interesting events for us children.") (Dkt. 172-1, p. 4).

[73] *E.g.*, Bruseth, p. 7 (1950 ed.) ("By far the most interesting Indian to us children was . . . .") (Dkt. 172-1, p. 5).

[74] Bruseth, p. 5 (1950 ed.) ("As a young boy I became well acquainted with our erstwhile neighbors the Stillaguamish and Quadsak Indians.") (Dkt. 172-1, p. 4).

[75] Bruseth, p. 6 (1926 ed.) (". . . where he lived to be a very old man. He always wore his hair long; for clothes he used the skins of ducks, sewed together with the down inside, sometimes as a long coat with short sleeves, sometimes as [s]hort-legged trousers, using a blanket as coat.") (Dkt. 172-2, p. 6).

[76] Bruseth, p. 6 (1926 ed.) (Dkt. 172-2, p. 6).

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others,[77] and (7) described in detail how the Stillaguamish and Quadsak Indians moved up and down the river for fish and yet said nothing about fishing in the sea: "Their comings and goings were interesting events for us children. It must be remembered that few Indians stayed in one place very long during spring, summer and fall. They moved up and down the rivers and creeks following good fishing, hunting and berry picking."[78]

Thus, while Stillaguamish's retained expert concludes that marine fishing occurred at Warm Beach, that is pure speculation. It is more plausible that the village at Warm Beach was not chosen for access to—or used for—marine fishing, and, instead, was used for exactly what Dorsey and Bruseth said it was used for—"visiting" and "potlatching." Because the trier of fact could credit these more plausible explanations for Stillaguamish presence at Warm Beach over the speculation that Stillaguamish were there to fish in marine waters, Stillaguamish is not entitled to summary judgment. *See Diaz*, 521 F.3d at 1207 ("Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor.").

IV. CONCLUSION

For the foregoing reasons, the Court should deny Stillaguamish's motion seeking a summary adjudication that Port Susan is within its U&A.

[77] A reasonable assumption: Tsahlbilt "was a respected man—big, strong and wise" who "[a]ll the Indians," including those on the Skagit delta, on Camano, and upriver knew, and who had been the "stronghouse keeper" (Bruseth, p. 6 (1926 ed.) (Dkt. 172-2, p. 6)), which Dorsey said was "probably 150 feet long, in which were stored blankets of fur and skins and other valuables" (Ex. USA-28, App. 1, p. 2 (Dkt. 175-11, p. 28)).

[78] Bruseth, p. 5 (1950 ed.) (Dkt. 172-1, p. 4).

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DATED this 25th day of January, 2021.

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