

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendant.

No. 70-9213

Subproceeding No. 17-3

**SWINOMISH INDIAN TRIBAL
COMMUNITY’S OPPOSITION TO
STILLAGUAMISH TRIBE OF
INDIANS’ MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
TREATY TIME USUAL AND
ACCUSTOMED FISHING IN PORT
SUSAN**

NOTE ON MOTION CALENDAR:

Friday, January 29, 2021

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I. INTRODUCTION

Stillaguamish asks this Court to resolve a set of competing inferences in its favor and, notwithstanding the absence of any historical evidence of actual marine fishing, to summarily award Stillaguamish usual and accustomed fishing rights in Port Susan.

First, Stillaguamish asks the Court to infer, based upon conflicting evidence, that there was a village at Warm Beach near Hat Slough, on the shores of Port Susan at treaty time. Next, Stillaguamish requests an inference from disputed evidence that, if there was such a village, it was a Stillaguamish village. Then, Stillaguamish argues for an inference that this claimed Stillaguamish village at Warm Beach proves that Stillaguamish fished marine waters at Warm Beach. Finally, Stillaguamish asks this court to infer that possible fishing at Warm Beach meant Stillaguamish fished the length and breadth of Port Susan, in every corner of it, giving Stillaguamish usual and accustomed fishing rights to the entire area.

All these inferences rely upon previously-reviewed historical and anthropological evidence, and Stillaguamish asks the Court to reach conclusions that differ from those of previous tribunals that reviewed essentially the same evidence. We respectfully submit that the Court should decline this invitation because on summary judgment competing inferences must be resolved in favor of the non-moving party.

II. 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.

United States v. Washington, 384 F. Supp. 312, 379 (W.D. Wash. 1974) (“Final Decision 1” or “FD #1”) [FF 146]. Stillaguamish now seeks to expand its U&A into Port Susan (among other

1 waters) but offers no new primary sources of evidence about treaty-time fishing to support its
2 argument that it should be awarded U&A in Port Susan as a matter of law.¹

3 **A. The Historical Record Does Not Support Stillaguamish’s Argument.**

4 There is no contemporaneous historical evidence that Stillaguamish fished in marine
5 waters. While the historical record of marine fishing by many tribes may be sparse, as to
6 Stillaguamish marine fisheries, it is non-existent. Stillaguamish and Dr. Friday therefore ask
7 the Court to accept inferences on summary judgment, claiming, first, that there were treaty-time
8 villages on the shores of Port Susan, and second, that at treaty time any such villages were
9 Stillaguamish tribal villages.² We treat the second inference in Section B, below.

10 As to the first inference: The historical record does not establish the foundation needed
11 to support Stillaguamish’s claim. It is not clear that there were any native sites on the shores of
12 Port Susan at treaty time. On this subject, there actually is contemporaneous historical
13 evidence. Two treaty-time witnesses visited the Stillaguamish and wrote down what they saw.
14 George Wilson visited the Stillaguamish in 1851. He kept a journal, which places the
15 Stillaguamish some distance upriver. (Siefert Ex. 3.) He entered the Stillaguamish River via
16 Hat Slough. (*See id.*) The critical site Stillaguamish now claims it occupied is at Warm Beach,
17 immediately south of the mouth of Hat Slough. However, Wilson’s detailed journal makes no
18 mention of people living on the shore of Port Susan, at Warm Beach or elsewhere. (*See id.*) As
19

20 ¹ Stillaguamish’s assertion that Swinomish “does not have adjudicated U&A in Port Susan”
21 (Stillaguamish Motion for Partial Summary Judgment Re: Treaty Time Usual and Accustomed Fishing
22 in Port Susan [“Mtn.”] at 16:11-12) is false. Swinomish has adjudicated U&A in Port Susan. In 1975,
23 Judge Boldt held that Swinomish had U&A not only in the Skagit and Samish rivers, but also in “the
24 marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano,
25 Fidalgo, Guemes, Samish, Cypress and the San Juan Islands . . .” *U.S. v. Washington*, 459 F. Supp.
1020, 1049 (W.D. Wash. 1978). Because Port Susan is bounded by Camano Island to the west,
Swinomish U&A includes Port Susan. Swinomish witness Lorraine Loomis testified that Swinomish
has U&A in all of the catch areas that make up Region 2E, which includes Port Susan. (Declaration of
A. Siefert, submitted herewith, Exs. 1, 2.)

26 ² Stillaguamish also asks the Court to infer that the inhabitants of any villages on the shores of Port
27 Susan must, as a matter of law, have had fisheries in Port Susan. This inference may be a reasonable
one: the inhabitants of shore sites may have entered adjacent waters and may have fished. But this
possibility alone is not enough to support the summary adjudication of Stillaguamish U&A in Port
Susan.

1 one of Swinomish’s expert has stated, “Given the nature of [Wilson’s] narrative, it is unlikely
2 that Wilson passed by communities without documenting them.” (Siefert Ex. 4 at 28.)
3 Wilson’s journal suggests there was no village on the shore of Port Susan – at least not at
4 Warm Beach.

5 Hancock’s narrative is to the same effect. Hancock likewise visited the Stillaguamish in
6 the early 1850s. He also produced a detailed narrative of his visit. (*See* Siefert Exs. 5, 6.) Like
7 Wilson, Hancock makes no mention of villages at the mouth of the river when he visited
8 shortly before the treaty time. Like Wilson, Hancock encountered the Stillaguamish well
9 upriver. (Siefert Ex. 5 at SWIN903732-33; Ex. 4 at 31.)

10 In summary: the most reasonable inference from the historical record is that there were
11 no villages at the mouth of the Stillaguamish at treaty-time. None were recorded by
12 contemporary observers.

13 **B. Stillaguamish’s Sources Are Contradictory and Support Competing Inferences.**

14 Stillaguamish argues that if there were native sites on the shores of Port Susan at treaty
15 time, those sites were Stillaguamish tribal sites. This argument is critical not just to
16 Stillaguamish’s Port Susan U&A claim, but also to its entire U&A claim in this subproceeding.
17 But the sources and evidence relied on by Stillaguamish support conflicting inferences.

18 As this Court previously noted, the tribes with whom Stevens purported to negotiate
19 were in some measure “created” by that process: “Stevens . . . deliberately created political
20 entities for purposes of delegating responsibilities and negotiating treaties.” *U.S. v.*
21 *Washington*, 384 F. Supp. 312, 355 (W.D. Wash. 1974). And the historical record suggests that
22 the Stillaguamish tribe was understood as the upriver group. George Gibbs was “a lawyer,
23 surveyor and ethnologist, who was one of the sources of information relative to the identity and
24 location of Western Washington tribes and who wrote an extensive ethnological report in 1854-
25 55.” *Id.* at 354 – 355. Gibbs also prepared maps of the tribes he encountered. An excerpt from
26 one Gibbs map is included as Figure 1 in the expert report of Astrida R. Blukis Onat, one of
27 Swinomish’s experts. (*See* Siefert Ex. 7 at 32 Figure 1.) The map shows that Gibbs located the

1 Stillaguamish Tribe upriver, not on the shores of Port Susan or any other marine waters; as Dr.
2 Blukis Onat observes, “[t]he home grounds of the Stillaguamish are shown some distance
3 upriver from the river mouth (Figure 1).” (*See id.* at 6.) The best inference from this map is
4 that Gibbs understood Stillaguamish to be an upriver tribe with no territory on marine
5 shorelines.

6 We turn first to the map evidence Stillaguamish cites in support of the inferences it asks
7 the Court to draw, and then to review of the competing inferences supported by Stillaguamish’s
8 other sources.

9 **1. Maps.**

10 Stillaguamish cites three maps that it claims “place Port Susan within known
11 Stillaguamish territory.” (Mtn. at 3:26-27.) Stillaguamish did not produce the entire source
12 material from which these maps were extracted, and an examination of those sources makes
13 clear why.

14 The first map appeared in an 1894 study of native American religious practices by
15 James Mooney entitled *The Ghost Dance and the Sioux Outbreak of 1890*. (*See* Siefert Ex. 8;
16 *see also* Declaration of R. Smith [Dkt 172; “Smith Decl.”] Ex. 4.) In the book’s Introduction,
17 Mooney details his extensive field research over several months: he traveled mostly in the
18 Oklahoma area and as far north as Wyoming, but did not travel to western Washington. (*See*
19 Siefert Ex. 8 at 653-55.³) Further, referring specifically to Stillaguamish’s Exhibit 4, which
20 depicts Stillaguamish territory extending into Port Susan, Mooney expressly stated that the map
21 is unreliable: “The general boundaries of the tribes west of the Cascade range, including the
22 adherents of the Shaker religion, are also indicated on the accompanying map (plate
23

24 _____
25 ³ The Mooney book is several hundred pages in length. In the interest of minimizing the submissions to
26 the Court, Swinomish has presented the Court with the book’s Introduction and selected pages sufficient
27 to demonstrate that Mooney never traveled to and had no personal knowledge of the Puget Sound, Coast
Salish tribes at treaty times, or the Stillaguamish. At the Court’s request, Swinomish can supply a copy
of the entire Mooney tome.

1 LXXXVIII), but our information in regard to this region is too meager to be definite.” (*Id.* at
2 731.)

3 The second map offered by Stillaguamish appeared in a 1936 book by Leslie Spier,
4 *Tribal Distribution in Washington*. (See Smith Ex. 5.) Stillaguamish fails to disclose that, like
5 Mooney, Spier expressly disclaimed the validity and reliability of his map: “The
6 accompanying map of tribal territories is merely tentative. Its sole purpose is to serve as a basis
7 for corrections in the light of future field work.” (Siefert Ex. 9 at 5.) He stated further that “it
8 is by no means easy to fix the precise boundaries of [a tribe’s] territory.... We have two
9 alternatives: to map only the permanent sites or to assign boundaries. I have preferred the
10 latter, though fully aware that the procedure is not wholly valid.” (*Id.* at 6.) He then stated that
11 “[t]he present map attempts to assign tribal location and boundaries as of the early nineteenth
12 century.” (*Id.*) In short, like Mooney, Spier was guessing. And his substantive discussion of
13 Stillaguamish territory is brief and makes no suggestion that it encompassed any portion of Port
14 Susan. To the contrary, he relied wholly on Gibbs, who placed Stillaguamish exclusively on
15 the river bearing its name. (See *id.* at 35 & n.38.)

16 The third map offered by Stillaguamish appeared in a 1968 *Historical Atlas of*
17 *Washington* by James Scott and Roland DeLorme. (See Smith at Ex. 6.) One of the sources of
18 the Scott map is Spier. (*Id.* at *xii.*) Stillaguamish provides no information to assess the validity
19 or reliability of the Scott map. There is no reason to believe that it, like the Mooney and Spier
20 maps, is based upon anything other than speculation.

21 In short, the maps offered by Stillaguamish cannot support Stillaguamish’s claim that
22 Port Susan was “within known Stillaguamish territory.”

23 2. Bruseth.

24 Amateur folklorist Nels Bruseth’s booklet of “Indian Stories and Legends,” first
25 published in 1926, presented information collected by the author over many years from
26 acquaintances with and experiences among local native groups, including the Stillaguamish, the
27 Qwadsak, and the Sauk. (Siefert Exs. 10, 11.) Critically, Bruseth distinguished between the

1 Stillaguamish and Qwadsak groups, refuting Stillaguamish’s claim that they were one and the
2 same. (Siefert Ex. 11 at 5 [“As a young boy I became well acquainted with our erstwhile
3 neighbors the Stillaguamish and Quadsak Indians.”], 35 [“The place names [provided in the
4 book] are old Stillaguamish and Sauk – Quadsak names for some of the places are quite
5 different.”])

6 Nowhere in his booklet does Bruseth report witnessing Stillaguamish fishing in marine
7 waters, whether in Port Susan or elsewhere. He also does not recount any information about
8 Stillaguamish actually fishing in marine waters. He does make limited, brief references to a
9 native individual or group eating clams at the beach, although he provides no details as to
10 where or by whom the clams were harvested or as to whether the clams were acquired through
11 trade. (Siefert Ex. 10 at 6, 7.)

12 Bruseth makes a brief reference to shell middens in the Stanwood and Warm Beach
13 areas. (Siefert Ex. 11 at 9.) But Bruseth does not attempt to date these middens, let alone
14 conduct a scientific investigation to that end, and indeed he was not qualified to do so. He also
15 does not attribute these middens to the Stillaguamish; to the contrary, he identifies the camp
16 site where one of these middens is located, “on the Leque place near Stanwood,” as “Quadsak
17 headquarters.” (*See id.*)

18 Stillaguamish asserts that Bruseth included “several descriptions of Stillaguamish
19 historical encampments on or near Port Susan,” but Stillaguamish does not identify those
20 villages or their distance from Port Susan and offers no citations. (Mtn. at 3:18-20.)
21 Stillaguamish also asserts that Bruseth described Stillaguamish “use of marine resources” at
22 those unidentified villages. (*Id.*) But Stillaguamish offers no evidence for this claim either,
23 and indeed Bruseth does *not* describe Stillaguamish use of marine resources.

24 Stillaguamish asserts that Bruseth reports that Tsalbilht, a long-time keeper of a
25 stronghouse at a location southeast of Stanwood, “retired ‘around treaty times’ to the Warm
26 Beach area and built a home there, subsisting in part on ‘clams on the beach.’” (Mtn. at 3:22-
27 25.) But Bruseth does not provide a date as to when Tsalbilht moved to near Warm Beach, and

1 given what appears to be Bruseth's personal knowledge it is unlikely that Tsahbilht moved
2 there until many decades after treaty times. (*See* Siefert 10 at 6.) Bruseth also does not identify
3 Tsahbilht's group affiliation, whether Stillaguamish, Qwadsak, or otherwise. (*See id.*)

4 Apparently based on personal observation, Bruseth provides a description of Tsahbilht's
5 fishing locations and techniques while at his retirement home near Warm Beach: Bruseth
6 reports that "[f]or fish he set traps, generally a row of stakes across a slough or stream with
7 pockets out of which the fish could not escape." (*See id.*) Notably absent here is any
8 description of fishing locations or techniques in Port Susan marine waters.

9 **3. Dorsey.**

10 On July 26, 1926, Stillaguamish tribal leader James Dorsey signed an affidavit in the
11 *Duwamish* case before the United States Court of Claims. (Siefert Ex. 12.) On March 4, 1927,
12 Dorsey testified in the same proceeding. (Siefert Ex. 13.)

13 In the affidavit Dorsey, born in 1850, identified a number of Stillaguamish village and
14 burial ground locations along the Stillaguamish River and its tributaries. (*See* Siefert Ex. 12.)
15 He stated that Stillaguamish territory was "confined for the most part to the aforesaid
16 Stillaguamish River, both branches and tributaries." (*Id.* at STOI 012249.) He identified only
17 one location on or near the shoreline of Port Susan: "one large house and another smaller one
18 and several smaller cabins" at Warm Beach. (*Id.* at STOI012247.) The other locations
19 identified by Dorsey were, at a minimum, three miles distant from the Port Susan shoreline.
20 (*See* Siefert Exs. 12; 14 at STOI 030376-382; 15; 16.) Mr. Dorsey did not attribute dates of
21 occupation to any of the sites he mentioned.

22 Nowhere in his affidavit or his direct testimony did Mr. Dorsey state that Stillaguamish
23 fished in marine waters. And nowhere in his affidavit or testimony did Mr. Dorsey claim
24 Stillaguamish territory anywhere other than on the Stillaguamish River and its tributaries.

25 **4. Riley.**

26 Stillaguamish cites Dr. Carroll Riley, expert for the United States in the ICC
27 proceedings, for opining that "Stillaguamish utilized Warm Beach and the marine

1 resources of Port Susan” and that Stillaguamish “came down to Port Susan and lower Skagit
2 Bay for clamming and fishing.” (Mtn. at 6:1-6.) But Dr. Riley also testified and opined in the
3 Stillaguamish ICC proceedings as follows:

- 4
- He never worked with a Stillaguamish informant. (Siefert Ex. 17 at 5:22-6:6.)
 - The Qwadsak were a separate group from the Stillaguamish. (*Id.* at 43:1-17; *see also* 79:8-21.) He also testified that several other anthropologists and experts, whom he identified, maintained this distinction as well. (*Id.* at 44:11-15, 45:3-12, 46:4-9, 46:14-18, 46:24-47:6, 47:25-48:4, 48:7-22.)⁴
 - At treaty time, the village at or near the mouth of the Stillaguamish River was a village of the Qwadsak group, not the Stillaguamish. (*Id.* at 14:24-15:3; 38:10-12.)
 - The Stillaguamish were “Riverine Indians,” while the Qwadsak group were more sea oriented. (*Id.* at 35:3-13.)
 - The area at the mouth of the Stillaguamish River where a Qwadsak village was operating at treaty time was an area of “free use” used by several groups. (*Id.* at 72:7-23; 77:21-24.)
 - Several groups, including the Qwadsak, Stillaguamish, and Snohomish used the Warm Beach area. (*Id.* at 38:7-15; 45:21-22; 72:24-73:5.)

16 **5. Snyder.**

17 Stillaguamish also relies on the testimony of its own expert witness before the ICC, Dr.
18 Sally Snyder. Stillaguamish cites Dr. Snyder’s identification of “two Stillaguamish village
19 sites on the shores of Port Susan near Warm Beach, which she entered on a map and detailed in
20 a chart.” (Mtn. at 5:19-20.)

21 Stillaguamish acknowledges that for the location of the first village, near Warm Beach,
22 Snyder relied on the Dorsey affidavit. (Mtn. at 5:21-24; *see* Siefert Exs. 14 at 1, 36-41; 15 at
23 STOI 033218; 16 at Location 1.) As noted above, Dorsey did not date this village, and Snyder

24

25 ⁴ The biography of Esther Ross, a Stillaguamish elder who testified before Judge Boldt and on whom
26 Stillaguamish now relies for its saltwater U&A claims, states that “[a]t the mouth of the Stillaguamish
27 was a permanent village of culturally unrelated Indians, the Quadsak (Kikialluses).” (Siefert Ex. 18 at SWIN903292. *See also* Siefert Ex. 4 at 50.) Although the sourcing of this statement is unclear, it is consistent with Dr. Riley’s testimony summarized in the text.

1 stated she “could not give the dating on this village,” calling into question whether it reflected
2 pre- as opposed to post-treaty occupation. (Siefert Ex. 14 at 41:23.)

3 The second “village” that Stillaguamish claims Snyder identified, which she located just
4 north of the first, was not a village at all. It was the place identified by Bruseth as the
5 retirement home for Tsalbilht, and Snyder identified Bruseth as the source for that second
6 location. (*Compare* Siefert Exs. 14 at 42:7-12; 15 at 6; 16 at Location 2, *with* Siefert Ex. 10 at
7 6.) Snyder stated that the second location “wasn’t truly a village, it was one home.” (Siefert
8 Ex. 14 at 42:12.) And as noted above, it appears that Tsalbilht retired to this location well after
9 treaty time.

10 Snyder also testified or opined in ICC proceedings as follows:

- 11 ➤ “[T]he Stillaguamish were not dependent upon shell fish, nor upon fish caught in salt
12 water.” (Siefert Ex. 14 at 67:13-14.)
- 13 ➤ “[T]he Stillaguamish are essentially river people; . . . they live on freshwater beaches.”
14 (*Id.* at STOI 030430-31.)
- 15 ➤ The Stillaguamish Village at Warm Beach “was occupied at least at times in common
16 with the Snohomish.” (*Id.* at 42:3-4.)

17 **6. Lane.**

18 Stillaguamish asserts that Dr. Barbara Lane “consistently testified that Stillaguamish
19 fished Port Susan at and before treaty times.” (Mtn. at 6:11-12.) This is patently false.

20 At the original trial in this case, Dr. Lane identified the Stillaguamish as “river people”
21 (Siefert Ex. 19 at 1, 6 [citing Gibbs]) and prepared an expert report on the Stillaguamish in
22 which she did *not* conclude or opine that Stillaguamish fished in Port Susan or any other marine
23 waters. (Siefert Ex. 19.) To the contrary, she described Stillaguamish customary fishing
24 locations on the river and noted Stillaguamish’s close relationship to and reliance on the river.
25 Dr. Lane’s report was based on careful consideration of the exact same treaty-time sources on
26 which Stillaguamish now relies for its U&A claim in Port Susan and other marine waters—the
27 Indian War government agent records, Dorsey, Bruseth, and the ICC proceedings—as well as
other treaty-time sources such as Gibbs, Hancock, and Wilson. (*See id.*; *see esp. id.* at 1-4,

1 8-15, 19-21, 30.) Dr. Lane attached the entire Dorsey affidavit to her Stillaguamish Report.
2 (*See* Siefert Ex. 19.) Judge Boldt expressly relied on Dr. Lane’s report in determining that
3 Stillaguamish’s U&A was limited to the Stillaguamish River. Final Decision 1 at 379 (FoF
4 146).

5 Moreover, Stillaguamish’s assertion is misleading and ignores the context of the cited
6 testimony. In 1975, after Final Decision 1, Dr. Lane testified in *United States v. Washington*
7 proceedings regarding her expert report on the Tulalip Tribes. She was asked her opinion as to
8 generally where the Tulalip Tribes fished, and she answered, “I would say, generally speaking,
9 the areas that you have mentioned except areas like Port Susan and areas close to the mouth of
10 the Stillaguamish River. I think they were primarily fished by Kikiellis and Stillaguamish.”
11 (*Siefert* Ex. 20.) This remark was made in passing, to delineate the fishing areas of the other
12 tribes under discussion – not Stillaguamish. Stillaguamish fishing locations were not at issue in
13 her testimony at that time. She did not explain, nor was she cross-examined as to, the basis for
14 the comment. She did not identify what type of fishing she thought Stillaguamish may have
15 done at Port Susan. Also, she did not clarify precisely which areas within Port Susan she
16 believed would have been fished by Stillaguamish and which by Kikiallus. In 1984, again in
17 proceedings concerning Tulalip Tribes, Dr. Lane briefly repeated essentially the same
18 testimony. (*See* Smith Decl. Ex. 15.)

19 In correspondence to attorney David Getches in December 1974, also after Final
20 Decision 1, Dr. Lane responded to an inquiry regarding where Stillaguamish may have fished
21 in marine waters. She referenced only the Dorsey affidavit in citing two Stillaguamish villages
22 at Warm Beach and Hat Slough, and opined that inhabitants of villages located on Port Susan
23 would likely have fished adjacent waters. (*See* Smith Decl. Ex. 11.) But of course Dr. Lane
24 discussed the Dorsey affidavit in, and appended it to, her Stillaguamish Report for the original
25 trial, but did not there determine or opine that Stillaguamish fished in Port Susan or other
26 marine waters. (*See* Siefert Ex. 19 at 11-15, 20.)

1 Nowhere in Dr. Lane’s testimony does she cite any direct evidence of actual
2 Stillaguamish fishing in Port Susan, from an informant or other some other source. She made
3 an inference of fishing based solely on the identification of two village locations, one from the
4 Dorsey affidavit and one from Bruseth. And nowhere does she assert that Stillaguamish
5 customarily fished or had U&A in Port Susan.

6 Finally, Stillaguamish suggests that all experts in this case agree that Stillaguamish
7 fished in Port Susan. (Mtn. at 12:6-11.) This too is incorrect. Stillaguamish itself
8 acknowledges the contrary opinion of Swinomish’s expert Dr. Anthony Gulig but argues that
9 Dr. Lane’s opinion is more credible. (See Mtn. at 16:22-17:12, 17:22-27.) Stillaguamish also
10 attacks Dr. Gulig’s credibility. (Mtn. at 17:27-18:11.) But the credibility of experts is to be
11 determined by the factfinder at trial. See *Braswell v. Shoreline Fire Dep’t*, No. C08-924-RSM,
12 2011 U.S. Dist. Lexis 115017, *8, 2011 WL 4712124 (W.D. Wash. Oct. 5 2011); see also
13 *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 871 (9th Cir. 2010) (credibility
14 determinations and drawing inferences from facts are functions for factfinder at trial, not for
15 judge ruling on summary judgment motion).

16 **7. Ross.**

17 Stillaguamish asserts that when tribal elder and then-chairperson Ester Ross testified in
18 proceedings for the original *United States v. Washington* trial, she identified Stillaguamish
19 territory as including “the east shore of Port Susan.” (See Mtn. at 8:1-9.) This is misleading
20 and not the whole story.

21 First, the description in Ms. Ross’s testimony quoted by Stillaguamish in the Motion
22 does not encompass the entire east shore of Port Susan. In the proceedings in the original trial,
23 in the testimony submitted by Stillaguamish, Ms. Ross stated that her description at that time of
24 Stillaguamish territory was the same as “what was claimed in years past.” (See Smith Decl. Ex.
25 17 at 4, lines 17-24.) As described more fully below, Ms. Ross was plainly referring to
26 Stillaguamish’s revised territorial claim to the ICC, described with particularity in the ICC
27 Stillaguamish Findings of Fact. (Compare *id.* with Declaration of N. Garberich [Dkt. 180] Ex.

1 S, ¶ 2 at p. 2.) And as Stillaguamish’s expert Dr. Chris Friday has acknowledged,
2 Stillaguamish’s ICC revised territorial claim did not encompass the entire eastern shoreline of
3 Port Susan. (*See* Garberich Ex. B at 87-88 & Figure 18.) Rather, it excludes a substantial
4 portion of the Port Susan shoreline north of Warm Beach.

5 Second, when Ms. Ross was asked directly in the proceedings for the original trial not
6 about Stillaguamish territory but about where Stillaguamish actually fished in the past, she
7 identified only the Stillaguamish River – not the saltwater shore of Warm Beach, not Port
8 Susan, and not any marine waters:

9 Q. What is the area where Stillaguamish tribal members have in the past
10 exercised their fishing rights?

11 A. Mostly the north and south fork of the Stillaguamish River and its
12 tributaries.

13 (Siefert Ex. 21 at 2, lines 7-10.)

14 Third, in proceedings for the original trial, when asked about Stillaguamish’s plans to
15 exercise the tribe’s fishing rights, Ms. Ross again referred only to the river. She stated: “It is in
16 our original land, in our original place and in our accustomed places of our folks. We never
17 sold that river.” (Siefert Ex. 22 at 7 lines 5-13.)

18 **C. On Substantially the Same Evidence Now Submitted by Stillaguamish, the ICC
Determined That Stillaguamish Was an Upriver Tribe.**

19 In the 1950s Stillaguamish commenced an action with the Indian Claims Commission in
20 which it claimed that, at treaty time, it had exclusive occupation and use of certain territory
21 within the area ceded to the United States in the January 22, 1855 Treaty of Point Elliott.
22 (Garberich Ex. S at Finding 2.) Its petition described Stillaguamish territory as the “territory
23 around and including the Stillaguamish River and the watershed thereof, from its headwaters to
24 its mouth.” (*See id.*) Stillaguamish subsequently submitted a revised territorial claim to the
25 ICC. The revised claim included Warm Beach and the mouth of Hat Slough, but otherwise did
26 not include any territory on the shores of Port Susan:
27

1 Beginning at Warm Beach about 5 miles south of Stanwood; thence east
2 to the City of Granite Falls; thence eastward on a line ten miles south of the
3 South Fork of the Stillaguamish River to a point 10 miles south of Monte Cristo;
4 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)

5 (*Id.*) Regarding this revised request, Stillaguamish’s current expert, Dr. Friday, opines that
6 “Post’s out of hand cession of lands to Kikiallus seems to have had some resistance because
7 subsequent to Post’s requests in the hearing the Stillaguamish came back with an adjusted
8 western boundary line, which started at Warm Beach and ran north to East Stanwood—thereby
9 encompassing the shoreline from Warm Beach to the mouth of Hat Slough.” (Garberich Ex. B
10 at 87-88.) Dr. Friday has drawn the Stillaguamish revised request on a map, demonstrating that
11 the revised claim included only a very limited claim to the shore of Port Susan. (*See id.* at 88
12 [Fig. 18].)

13 On February 26, 1965, the ICC issued its determination on the Stillaguamish territorial
14 claim. (Garberich Ex. S.) The 32-page Findings of Fact reviewed the extensive evidence in the
15 case, including the expert testimony of anthropologists Sally Snyder and Carroll Riley (both of
16 whom testified in multiple ICC actions at the time), “historical documents, Government
17 records, writing of Indian agents and private individuals living in the area, anthropological
18 reports and sundry maps,” the Dorsey affidavit from the *Duwamish* case, and testimony of
19 Stillaguamish members including Ester Ross. (*Id.* at Findings 8-17.) The Findings detailed the
20 evidence and addressed the occupation and use of the Qwadsak area. (*Id.* at Findings 10, 11
21 subpara. (14), 14 subparas. (8)-(11).)

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

25 Beginning at the junction of the Stillaguamish River with Pilchuck
26 Creek, thence northerly along said Pilchuck Creek to the line dividing Skagit
27 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

1 North Fork of the Stillaguamish River, thence southwesterly on a diagonal line
 2 to a point where the South Fork of the Stillaguamish River intersects the 48° 10'
 3 line in Township 31 North between Ranges 5 and 6 East as shown on said map;
 4 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.

5 (*Id.* at Finding 18.) The Commission provided a map outlining the determined territory. (*See*
 6 *id.* Ex. U.) “[W]ith respect to the remaining tract of land claimed by [Stillaguamish],” the ICC
 7 determined that the tribe “did not actually occupy and exclusively possess and use the
 8 remainder or any part of thereof of the claimed territory as described in Finding No. 2.” (*Id.*
 9 Ex. S at Finding 18.) In other words, the ICC determined that, despite Stillaguamish’s limited
 10 claim to the contrary, at treaty time Stillaguamish did not occupy and exclusively possess and
 11 use any territory on the shores of Port Susan, or for that matter, any territory on the Lower
 12 Stillaguamish.

13 III. ARGUMENT

14 A. Summary Judgment Is Not Appropriate for Resolution of Competing Inferences.

15 Stillaguamish and Dr. Friday claim the only possible inference to be drawn from the old
 16 evidence they reprise is that Stillaguamish fished Port Susan at treaty time. This is incorrect.
 17 In fact, as illustrated at pp. 3-12 above, the primary sources, the historical record, and the
 18 decades-old anthropological opinion support various possible inferences as to (1) whether there
 19 even were treaty-time villages on the shores of Port Susan, (2) whether at treaty time any such
 20 villages were Stillaguamish tribal villages, and (3) whether, if there were Stillaguamish tribal
 21 village on the shores of Port Susan, Stillaguamish might have fished in all or a portion of Port
 22 Susan. These inferences are the necessary support for Stillaguamish’s Port Susan U&A claim
 23 (and for all of its U&A claims), and unless the Court draws these inferences in favor of
 24 Stillaguamish, the moving party on summary judgment, summary judgment must be denied.

25 “When the evidence yields conflicting inferences, summary judgment is improper, and
 26 the action must proceed to trial.” *O’Connor v. Boeing N. Am.*, 311 F.3d 1139, 1150 (9th Cir.
 27 2002). *See also Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1087 (9th Cir. 2000);

1 *LaLonde v. C'nty of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). In fact, on summary
 2 judgment the Court must accept “the evidence of the non-movant,” and draw all reasonable
 3 inferences in the non-movant’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
 4 (1986). At summary judgment, “the court does not make credibility determinations or weigh
 5 conflicting evidence,” instead resolving those inferences “in the light most favorable to the
 6 nonmoving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

7 These guidelines ensure that the judge, in ruling on summary judgment, does not usurp
 8 the role of the fact-finder at trial in determining issues of fact. *See Anderson*, 477 U.S. at 255
 9 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate
 10 inferences from the facts are jury functions, not those of a judge, whether he is ruling on a
 11 motion for summary judgment or for a directed verdict”). This is especially so when the issue
 12 for summary judgment features contradictory expert testimony. *See, e.g., MacLean*
 13 *Townhomes, LLC v. Charter Oak Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 48429, at *5-6, 2008
 14 WL 2570667 (W.D. Wash. June 25, 2008) (on reconsideration, trial court vacated grant of
 15 summary judgment for plaintiff after defendant highlighted its expert’s opinions that
 16 contradicted plaintiff’s expert).

17 **B. There Are Disputed Material Facts Regarding Stillaguamish’s Claimed U&A in**
 18 **Port Susan.**

19 To be clear, none of the sources relied on by Stillaguamish to support its U&A claim in
 20 Port Susan provide any direct evidence of actual fishing by Stillaguamish in Port Susan.
 21 Moreover, Stillaguamish’s sources are inconsistent and contradictory and support conflicting
 22 inferences regarding Stillaguamish’s U&A claim in Port Susan.

23 Preliminarily, the support for Stillaguamish’s Port Susan U&A claim is actually quite
 24 limited: it all comes down to the Dorsey affidavit and, to an even lesser extent, to Bruseth.
 25 Between the two of them, Dorsey and Bruseth identified two Stillaguamish locations on or near
 26 the Port Susan shoreline, both at Warm Beach. (*See Siefert Exs. 12 at 2; 10 at 6-7; 15 at 6; 16*
 27 *at locations 1 & 2.*) No other source relied on by Stillaguamish identified any Port Susan-

1 adjacent location. Further, Stillaguamish heavily rely on Snyder and Lane—but Snyder and
2 Lane in turn relied on Dorsey and Bruseth. Snyder plotted Dorsey and Bruseth locations on a
3 map, but she never opined that Stillaguamish fished in Port Susan. Lane relied solely on
4 Dorsey and Bruseth for her post-FD #1 side comment in Tulalip U&A proceedings that
5 Stillaguamish might have fished in Port Susan.

6 First, Stillaguamish’s sources support an inference directly contrary to Stillaguamish’s
7 U&A claim in Port Susan. The premise of Stillaguamish’s RFD is that, contrary to all
8 historical accounts and the opinion of everyone who has looked at the issue other than
9 Stillaguamish’s current expert, at treaty time Stillaguamish was actually a saltwater people and
10 not a river people. (RFD at 4 ¶ 14.) If so, one would expect to see substantial evidence of
11 Stillaguamish people present on and using saltwater for fishing, travel, trade, or other reasons,
12 and, for purposes of the present motion, substantial evidence that Stillaguamish fished in the
13 marine waters at Port Susan. But not only is there no direct evidence of Stillaguamish fishing
14 in Port Susan, there is considerable evidence from the very sources it relies on that
15 Stillaguamish did not fish in Port Susan but instead limited its fishing to the Stillaguamish river
16 system: In the original trial, when asked not about territory but specifically about *where*
17 *Stillaguamish tribal members actually fished in the past*, then-chairperson Ester Ross identified
18 only the Stillaguamish River and its north and south forks and tributaries; she did not identify
19 Port Susan or any marine locations. (Siefert Ex. 21 at 3, lines 7-10.) She also testified that the
20 tribe intended to exercise its fishing rights in the *River*, not in marine locations. (Siefert Ex. 22
21 at 6 lines 5-13.) This is not the testimony of the leader of a “saltwater people,” as
22 Stillaguamish would now have it. (*See* RFD ¶ 14.) Dorsey makes no mention in his Duwamish
23 affidavit or direct testimony of fishing in marine waters or of using the locations he identified
24 to exploit marine resources. (*See* Siefert Exs. 12, 13.) Riley testified that in his view that the
25 Stillaguamish were “Riverine Indians.” (Siefert Ex. 17 at 35:3-13.) Snyder testified that “the
26 Stillaguamish were not dependent upon shell fish, nor upon fish caught in salt water.” (Siefert
27 Ex. 14 at 67:13-14.) She also testified that “the Stillaguamish are essentially river

1 people;...they live on freshwater beaches.” (*Id.* at STOI 030430-31.) Lane also identified the
2 Stillaguamish as “river people.” (Siefert Ex. 19 at 1, 6 [citing Gibbs].) At the original trial,
3 having considered the Indian War government agent records, Dorsey, Bruseth, and the ICC
4 proceedings—the sources on which Stillaguamish relies to claim U&A in marine waters and
5 Port Susan—as well as Gibbs, Wilson, and Hancock, Lane did not opine that Stillaguamish
6 fished in Port Susan. (*See* Siefert Ex. 19.)

7 Even with specific reference to Warm Beach, the only shoreline-adjacent location
8 claimed by Stillaguamish, Stillaguamish’s sources support an inference of only freshwater
9 fishing as much or more than an inference of fishing in Port Susan: In describing the fishing
10 practices of Tsalbilht at his retirement location at Warm Beach, Bruseth detailed only traps
11 used in the stream or slough, not techniques used in marine waters. (Siefert Ex. 10 at 6.) And
12 Ester Ross’s identification of Stillaguamish territory, when taken in the full context of her other
13 testimony in the original trial, reasonably supports an inference that even if the Stillaguamish
14 had a village at Warm Beach, it did not have customary fishing locations in marine waters at
15 Warm Beach or elsewhere in Port Susan. (*See* Smith Decl. Exs. 16, 17; Garberich Ex. S, ¶ 2 at
16 page 2; Garberich Ex. B at 87-88 & Figure 18; Siefert Exs. 21 at 3, lines 7-10; 22 at 6 lines 5-
17 13.) Ms. Ross’s testimony makes clear that at treaty time Stillaguamish’s customary locations
18 were in the Stillaguamish River and not in Port Susan or other marine waters.

19 Second, to the extent Stillaguamish relies on villages located in the Qwadsak area to
20 support its Port Susan U&A claim, the sources relied on by Stillaguamish support an inference
21 that those were villages of the Qwadsak people, not the Stillaguamish. Bruseth clearly
22 distinguished between the Qwadsak people and the Stillaguamish, and he was friends with
23 both. (Siefert Ex. 11 at 5 [“As a young boy I became well acquainted with our erstwhile
24 neighbors the Stillaguamish and Quadsak Indians.”], 35 [“The place names [provided in the
25 book] are old Stillaguamish and Sauk – Quadsak names for some of the places are quite
26 different.”].) Riley testified that the Qwadsak were a separate group from the Stillaguamish.
27 (Siefert Ex. 17 at 43:1-17; see also 79:8-21.) He also identified several other anthropologists

1 and experts who maintained this distinction as well. (*Id.* at 44:11-15, 45:3-12, 46:4-9, 46:14-
2 18, 46:24-47:6, 47:25-48:4, 48:7-22.) Riley also testified that at treaty time, the village located
3 near the mouth of the Stillaguamish River was a Qwadsak village, not Stillaguamish. (*Id.* at
4 14:24-15:3; 38:10-12.)

5 In other words, Stillaguamish wants an inference that it fished in Port Susan at treaty
6 times in part based on its claim that it occupied villages located in the Qwadsak area. But the
7 evidence is at least as strong if not stronger that the group living in the Qwadsak-area villages
8 at treaty times were not the Stillaguamish, but rather the separate Qwadsak group.

9 Accordingly, an inference of treaty-time fishing in Port Susan by Stillaguamish based on
10 Qwadsak locations is not supported, or at least a contrary reasonable inference is supported,
11 and thus summary judgment on Qwadsak area locations would not be proper.

12 Third, Stillaguamish seeks an inference that it fished in all of Port Susan at treaty times.
13 But Stillaguamish provides no evidence to justify an inference of such broad scope. If the
14 evidence supports any inference of fishing in Port Susan fishing, it supports an inference much
15 more limited in scope.

16 Stillaguamish has identified only two villages at or close to the Port Susan shoreline—
17 both of them at Warm Beach. One of them in the words of Snyder, “wasn’t truly a village, it
18 was one home.” (Siefert Ex. 14 at 42:12.) And as noted there is strong evidence and opinion
19 that Stillaguamish relied entirely, or very nearly entirely, on the resources of its river. (*See*
20 Siefert Exs. 12 at STOI 012249; 17 at 35:3-13; 14 at 67:13-14, STOI 030430-31; 19.) There is
21 no evidence to support Stillaguamish’s claim of U&A in all of Port Susan.

22 Stillaguamish cannot point to the shell middens as a basis for U&A in the entirety of
23 Port Susan. There is no scientific or other credible evidence attributing the middens to
24 Stillaguamish. The middens are not dated. Nor is there any evidence that the artifacts in the
25 middens in the Qwadsak or Stanwood area came from Port Susan. Stillaguamish’s expert, an
26 historian, is not qualified to make attribution of the middens, date the middens, or identify the
27 source of their artifacts. And Bruseth identified the camp site where one of these middens was

1 located, “on the Leque place near Stanwood,” as “Quadsak headquarters.” (Siefert Ex. 11 at 9.)
2 Resolving inferences in the light most favorable to the non-moving party, the Qwadsak
3 headquarters was not Stillaguamish.

4 **C. A Finder of Fact Received Essentially All of the Evidence on which Stillaguamish**
5 **Relied and Determined that Stillaguamish Was an Upriver Tribe.**

6 Another finder of fact previously considered the historical evidence, and much of the
7 expert opinion, submitted by Stillaguamish here, and determined that the Lower Stillaguamish
8 and the Qwadsak area were not Stillaguamish tribal territory. Swinomish has demonstrated
9 elsewhere that the Stillaguamish’s claim to Qwadsak and Lower Stillaguamish territory was
10 litigated and expressly and finally adjudicated in the Stillaguamish ICC action. (Swinomish
11 Motion for Partial Summary Judgment or Summary Judgment, [Dkt. 179] at 18-22.)

12 Swinomish seeks dismissal of any Stillaguamish U&A claim based upon its previously-
13 resolved claim to the Qwadsak area. *Id.* Grant of the Swinomish motion would require denial
14 of the instant Stillaguamish motion.

15 Further, because the ICC denied Stillaguamish the very territory that forms the basis for
16 Stillaguamish’s Port Susan claim, on substantially the same evidence, reasonable factfinders
17 can differ as to what inferences should be drawn from the limited historical evidence about
18 Stillaguamish’s treaty-time territory. Even if the ICC adjudication is not preclusive, it
19 demonstrates that reasonable minds can differ on the inferences here, and thus summary
20 judgment should be denied.

21 **IV. CONCLUSION**

22 For all of the reasons set forth above, Swinomish respectfully requests that this Court
23 deny Stillaguamish’s motion for summary judgment with respect to claimed Stillaguamish
24 U&A in Port Susan.

1 DATED: January 25, 2021.

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