*The Honorable Ricardo S. Martinez*

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

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,

Respondent(s).

**Case No. C70-9213**
**Subproceeding: 17-03**

**STILLAGUAMISH TRIBE OF INDIANS' POST-TRIAL BRIEF RESPONDING TO COURT'S QUESTIONS**

**JUNE 3, 2022**



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27

Petitioner Stillaguamish Tribe of Indians ("Stillaguamish") respectfully submits this post-trial brief to answer the questions posed by the Court. Dkt. ##278, 285.

**1. How, if at all, should the Court consider evidence of practices that were characteristic of all Coast Salish tribes in considering a specific tribe's U&A?**

Characteristics shared in common by all Coast Salish people of Puget Sound both inform the Court's understanding of the evidence relating to a specific tribe's usual and accustomed ("U&A") fishing areas, and contextualize the evidence presented. The Court has long recognized the importance of such practices: "Historical evidence of tribal customs is a proper basis for judicial conclusions about the present effect of Indian treaty provisions." *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1143 (9th Cir. 1981), *cert. denied*, 454 U.S. 862 (1981).

For example, as Dr. Lane informed the Court: "Shellfish were important to all of the Indian people of western Washington, including those people not ordinarily resident near the coast." Ex. PL-590 at 8. She continued: "Throughout much of the Puget Sound region, access to beaches and tidelands having shellfish or other resources was fairly open. People living in a territory had the right to use the resources and locations within in." *Id.* at 16; *see also United States v. Washington*, 626 F. Supp. 1405, 1528 (W.D. Wash. 1985) ("[s]hallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This was especially true if shellfish beds were present"). These common characteristics and patterns of treaty-time Coast Salish life eliminated the question of *whether* tribes took shellfish and assist the Court in determining *where* such shellfishing occurred, particularly given the "extremely fragmentary," "happenstance," and "sketchy" nature of the specific evidence available for marine fishing by each tribe at treaty times. *Lummi v. Tulalip*, 841 F.2d 317, 318, 321 (9th Cir. 1988).[1] As a result, tribes have consistently used evidence of common cultural characteristics to support usual and accustomed fishing area determinations. *See, e.g.,* Joint Tribal Trial Br. re Usual and Accustomed

[1] For example, as Tulalip successfully argued in *Subproceeding 80-1* that "it is not possible nor required that specific evidence concerning precise locations be given to establish a general marine area as U&A." Ex. SG-160 at 65.



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Fishing Locations, Civil No. 9213-Phase I, No. 2:89-sp-00003-RSM, Dkt. #13696 at 26 (W.D. Wash. Mar. 21, 1994) ("Subp. 89-3 Joint Tribal Trial Brief").

Applying evidence regarding the common treaty-time practices of Coast Salish people contextualizes and supports the historic, anthropologic, ethnographic, and expert record evidence demonstrating that Stillaguamish people regularly fished the interconnected marine waters and used the marine resources of the claimed waters in this Subproceeding.

**2. Does any tribe claim to be a successor tribe to the Quadsak people? Does it matter whether Quadsak was a treaty tribe?**

As expressed through the testimony of expert ethnohistorian Dr. Christopher Friday, it is Stillaguamish's position that Qwadsak refers to a place and not a people. Friday Testimony, 3/21 Tr. p. 166:15-18 ("Qwadsak is a region, an area, a geographical place on the … lower Stillaguamish River."). Dr. Sally Snyder likewise believed Qwadsak refers to a region not a people. Ex. SG-094 at 36 ("I believe the name refers to lowlands, or means like lowlands, and therefore is a geographical name."). Every tribal informant from the Qwadsak region (people born at villages in the region at and before treaty times such as Bob Harvey, Sally Oxstein, and James Dorsey) all identified themselves as Stillaguamish. Ex. SG-072; Ex. SW-014 at 108-125; Ex. SW-169 at 218. The Responding Tribes failed to produce any historical or ethnographic accounts at trial of a Tribal person born in the Qwadsak region identifying themselves with a tribe other than Stillaguamish.

Stillaguamish expressly rejects the idea that there was a separate and distinct Qwadsak people at treaty times. At best, a reference to Qwadsak would refer to the people living at the place with that name (like saying a person who lives in Seattle is a Seattleite). A reference to Qwadsak with the suffix "–bix$^{w}$" attached does not convert a region to a people. "–bix$^{w}$" is a commonly used Lushootseed suffix to indicate a group or cluster in a very broad sense, and only occasionally a tribe. *See, e.g.,* Ex. SW-136. "Quadsak-bix$^{w}$" does not create a tribe, or even a band, and there is nothing in the evidentiary record to suggest it is anything more than the people at a place.



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

No tribe has claimed to be a successor-in-interest to a Qwadsak people, and there exists no evidence that Qwadsak possess "treaty status," or that they reserved treaty fishing rights. Successorship, with respect to tribes, occurs where a once distinct tribe with distinct rights is subsumed or merged into another. *United States v. Washington,* 641 F.2d 1368, 1371-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *see also United States v. Washington,* 520 F.2d at 693. Unsurprisingly, no tribe has claimed to be a successor to the Qwadsak people, as they did not exist as a distinct tribe at treaty times. *See* Stillaguamish Proposed Finding of Fact ¶¶ 123-129; *see also* Treaty of Point Elliott, 12 Stat. 927 (1855); 25 U.S.C. § 5130(2). As no tribe called Qwadsak signed a treaty, no distinct rights have been reserved from which another group could claim successorship. *See United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) ("*Final Decision #1*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). To be clear, if there were a separate Qwadsak people, Stillaguamish would claim to be a successor in interest to this group, as nearly all modern-day Stillaguamish Tribal members trace their ancestry to people who lived in villages in the Qwadsak region of the lower Stillaguamish River delta.

**3. Does any party contest that Quadsak, to the extent it was ever a separate tribe, ceased to be an organized tribe at some time?**

Stillaguamish does not contest that Qwadsak, to the extent that it was ever a separate tribe, ceased to be an organized tribe prior to treaty times. Again, Stillaguamish's position is that Qwadsak refers to a place and not a distinct people, let alone a "tribe."

**4. What effect, if any, should the Court give the continual distinction drawn by various experts as to primary and secondary rights? Should any such distinction apply in the context of the underlying case? To the extent the distinction should and does apply, has the Court addressed the distinction consistently in the past?**

Stillaguamish does not agree that there was a "continual distinction" drawn as to primary and secondary rights. Regardless, the Court should give the distinction no effect. No tribe has adjudicated primary rights in any of the claimed interconnected waters.



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 First, the question of primary rights is not properly before the Court for adjudication in
2 this Subproceeding. No party has filed a request or counter-request for determination for such a
3 declaration consistent with Paragraph 25, and no meet and confer on the issue has occurred. *See*
4 *United States v. Washington*, 928 F.3d 783, 790-91 (9th Cir. 2019) (affirming dismissal of
5 Skokomish RFD regarding the primacy of their fishing rights in Hood Canal because of meet and
6 confer failure); *see also United States v. Washington*, 626 F.Supp. at 1486. Significant due
7 process issues would be raised if the Court proceeded with such a determination at this stage given
8 the absence of a clear request for a primary rights adjudication at the beginning of this
9 Subproceeding.

10 Second, the open marine waters claimed in this Subproceeding are not amenable to a
11 primary rights determination. Generally, "[a]s distinguished from waters lying within a single
12 drainage basin, the open waters of Puget Sound usually were not subject to territorial claims,"
13 and primary control rights. *United States v. Washington*, 626 F.Supp. at 1490. That is because
14 the open marine waters of Puget Sound were fished by all tribes at treaty times. The claimed
15 interconnected marine waters in this case were defined by Judge Boldt as "Northern Puget
16 Sound." *Final Decision #1*, 384 F.Supp. at 360. That such open marine waters are not subject to
17 a primary right adjudication is made clear by the few instances where the Court has clearly
18 adjudicated the question of primary and secondary rights. Such adjudications have only happened
19 with the benefit of a full record and only in certain narrow, constricted waters with an absence of
20 through travel. As this Court noted, "[Hood Canal] is generally distinguishable from the open
21 waters of Puget Sound in that it terminates in a cul-de-sac within a single drainage, while Puget
22 Sound links a number of otherwise separate drainages and provides an avenue of transportation
23 between them." *Id.* at 1487 (also noting Twana had nine villages in area and "[n]o other aboriginal
24 Indian group occupied a village" in the area); *see also United States v. Washington*, 459 F.Supp.
25 1020, 1049 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) (noting that, as to Hale
26 Passage, Swinomish fishing subject to Lummi grant of permission); *United States v. Washington*,
27



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

626 F.Supp. at 1442 (awarding Port Gamble U&A but noting that its U&A fishing on Sekiu river "subject to control and regulation of the Makah").

Third, in the rare instances the Court has adjudicated primary rights, the following elements must be shown by a preponderance of the evidence: resident control (as well as recognition of that control by the other tribes(s)) and unique geography. *See United States v. Washington*, 626 F.Supp. at 1530 (noting "in some cases a particular tribe or tribe exercises preemptive territorial fishing control at the mouths of river near the locations of its villages as well as over certain nearby narrow or constricted waterways, base or channels or at specific reefnet or beach seine sites and halibut banks."). "A primary right is the power to regulate or prohibit fishing by members of other tribes." *United States v. Washington*, 393 F.Supp.2d 1089, 1093 (W.D. Wash. 2005) (internal quotation and citation omitted). It is a right of exclusion. In addition to the critical due process issues noted *supra,* the record developed at trial is an insufficient basis upon which the Court may determine a primary and secondary rights system in the marine waters at issue in this Subproceeding.

**5. Is there evidence in the record indicating that a primary-/secondary-right scheme was always operative (i.e., secondary user must obtain permission before use) or was such a scheme only relevant if two groups happened upon the same location at the same time (i.e., secondary user must yield to the primary user's superior right)?**

The interconnected open marine waters in this Subproceeding do not lend themselves to a primary rights determination. There is neither evidence in the record "indicating that a primary/secondary right scheme was always operative" nor has this ever been the default in the case. It is only in the limited factual circumstances discussed at *supra* Question 4 that a primary rights adjudication arises, none of which are present here. As this Court noted in adjudicating Tulalip's marine fisheries: "The straits and sound were traditional highways used ***in common*** by all Indians of the region and most saltwater fisheries traditionally were ***free access areas***. While it is useful for certain purposes to speak of waters or territory in terms of a particular adjacent tribe, this by no means imposes exclusive rights by that group." *United States v. Washington,*



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

626 F.Supp. at 1528 (emphasis added). This latter admonition by the Court is particularly important here. The evidence at trial demonstrates that Stillaguamish, as well as Upper Skagit, Swinomish, and Snohomish had treaty-time territory adjacent to certain portions of the claimed interconnected marine waters, but not that such groups had exclusive use of those waters. The evidence offered at trial fails to establish on a more probable than not basis that any of the claimed interconnected marine waters were anything other than open shared use areas at treaty times.

**6. Could a tribe ever have usual and accustomed fishing grounds or stations at locations it was permitted to use by another tribe?**

It is the law of the case that irrespective of whether a fishing right is primary or secondary, permissive or shared, it remains a reserved treaty right that results in a usual and accustomed fishing determination.[2] In shared open marine waters such as these, multiple tribes may be awarded U&A in the same waters. *See, e.g., Final Decision #1*, 384 F.Supp. at 332 ("The tribes reserved the right to fish at '*all* usual and accustomed grounds and stations... Therefore the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and ***whether or not other tribes then also fished in the same waters***, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish'") (first emphasis in original, second emphasis added); *id.* at 369 ("The saltwater fisheries were shared with other Indians"); *United States v. Washington*, 459 F.Supp. at 1067 ("There is no dispute as to Makah and Lower Elwha fishing in common marine areas"). The Court has long recognized joint and overlapping U&A for multiple tribes based on evidence of shared use. *See, e.g. United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988) ("Except for specific fishing stations, such as reef net sites and halibut banks, a tribe's right to fish usual and

[2] Once, the Court briefly drew a distinction between a jointly shared usual and accustomed fishing area and a "permissive" use area. In the Subproceeding 97-1 ambiguity clarification, the S'Klallam argued that Judge Boldt used the term "secondarily" in Muckleshoot's fishing area determination to indicate that those rights "were permissive fishing rights in relation to resident tribes." *United States v. Washington*, 19 F.Supp.3d 1252, 1305 (W.D. Wash. 1999). Rejecting that interpretation of the word "secondarily," the Court noted that "if a fishing ground was really only permissive, by definition it would not be a usual and accustomed fishing ground." *Id.* at 1311. However, the Court amended the order a month later to delete the text making the distinction from the order. *Id.* at 1312.



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 accustomed grounds is held in common with other tribes whose usual and accustomed fishing
2 grounds include the same water"); *United States v. Washington*, 573 F.3d 701, 704 (9th Cir. 2009)
3 ("The adjudicated fishing areas of several tribes overlap.").

4 **7. Assuming that Quadsak peoples were not members of the Stillaguamish tribe and**
5 **that they had primary use rights in Port Susan:**

**a. How does Quadsak's presumably extinct primary right impact**
6 **Stillaguamish's claims to U&A in Port Susan?**

7 There was neither a justiciable primary right for a Qwadsak group nor was there a separate
8 Qwadsak people. *See* Answers to Question Nos. 2, 3 & 4, *supra*. As Dr. Snyder testified: "Of
9 course, this group I have indicated as Qwadsak, its affiliation has been debated. If they are not
10 part of the Stillaguamish, although I think they are, then this entire lower river area was held ***in***
11 ***common*** by the Qwadsak and Stillaguamish." Ex. SG-094 at 36 (emphasis added). To find
12 otherwise would elevate the hypothetical treaty rights of a theoretical tribal group, which the
13 preponderance of evidence shows very likely did not exist as a separate people at treaty times,
14 over the rights of an adjudicated Treaty Tribe whose own members are documented to have winter
15 villages in the Qwadsak area from which they accessed the marine waters to fish.

16 An "extinct" primary right, assuming it existed, is no right at all and is irrelevant to
17 Stillaguamish's U&A claim for Port Susan.

18 **b. Does the answer change if Stillaguamish had secondary rights to fish in Port**
19 **Susan or permissive rights?**

20 No. *See* Answer to Question No. 7(a), *supra*.

21 **8. Should the Court draw any distinction between situations where:**

22 **a. A tribe cannot present direct historical evidence of <u>fishing</u> in a marine water**
23 **body but establishes its member's regular presence on the shores of the**
**marine water body and its use of marine resources; and**

24 **b. A tribe cannot present direct historical evidence of <u>fishing</u> in a marine water**
25 **body and is only able to establish its members' temporary or infrequent**
26 **presence on the shores of a marine water body.**

27



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 The reasonable inference of fishing is certainly strongest when presence on the shores is
2 "regular" based on a village or encampment—as is the case for Stillaguamish in Port Susan,
3 Skagit Bay and Saratoga Passage. *See United States v. Washington*, 459 F.Supp. at 1059; *United*
4 *States v. Washington*, 873 F.Supp. 1422, 1448 (W.D. Wash. 1994), *aff'd in part, rev'd in part sub*
5 *nom*, 157 F.3d 630 (9th Cir. 1998). Such villages and encampments suggest regular and frequent
6 use, from which the Court has correctly found fishing in adjacent waters. The trial testimony
7 from Dr. Friday concerning substantial shell middens in Stillaguamish treaty time territory
8 likewise demonstrates "aboriginal… occupancy evidenc[ing] a community continuously engaged
9 in harvesting" particular species. *United States v. Washington*, 129 F.Supp.3d at 1091; *see also*
10 Stillaguamish Proposed Findings of Fact and Conclusions of Law ¶¶ 151-157 (discussing shell
11 midden evidence).

12 To the best of Stillaguamish's knowledge, the Court has not previously drawn a distinction
13 between "regular" presence and "temporary" presence on the shores of a marine body, likely
14 because the law of the case supports a "from time to time" treaty fishing right. *Final Decision*
15 *#1*, 384 F.Supp. at 332 (FF#8). In the case of "temporary" presence, the Court would need to
16 evaluate the evidence to determine if the presence is in an area that is unfamiliar, used
17 infrequently or at long intervals, or only in extraordinary occasions. There is no evidence in this
18 Subproceeding to suggest that the claimed interconnected marine waters were unfamiliar to
19 Stillaguamish or only used at long intervals.

20 **9. How should the Court treat situations where a tribe takes differing positions based**
21 **on its particular interest in the subproceeding before the Court. Compare, e.g., Dkt.**
**#14181 at (Swinomish, Tulalip, and Upper Skagit emphasizing relaxed standard of**
22 **proof as to U&A claims and the generality of U&A in open marine areas and arguing**
**that evidence of "regular visitation or travel to open marine areas is sufficiency to**
23 **establish U&A, that absence of "hard" documentary data does not preclude U&A**
24 **finding, and that "annual usage" is not required) with, e.g., Dkts. ##22494–96**
**(Swinomish, Upper Skagit, and Tulalip now arguing that Stillaguamish lacks direct**
25 **evidence of fishing in contested waters).**

26 The Court has two options when parties take inconsistent positions, as Tulalip, Swinomish
27 and Upper Skagit have done here. First, the Court may rely on the law of the case doctrine to



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

simply apply prior findings and conclusions in this case consistently, rejecting any efforts to argue to the contrary for present litigation purposes. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (discussing doctrine). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Id.* In fact, Tulalip, Swinomish and Upper Skagit have argued to the Court before that "[t]he standards for determining usual and accustomed fishing places for the tribes should be consistent" and that "documentation of Indian fishing during treaty times is scarce." Subp. 89-3 Joint Tribal Trial Brief at 12; *see also* Ex. SG-160 at 65 (Tulalip arguing "it is not possible nor required that specific evidence concerning precise locations be given to establish a general marine area as U&A."). The due process and equal protection guarantees of the Fourteenth Amendment require the Court to apply these same standards to Stillaguamish.

Second, the Court may judicially estop such behavior. Judicial estoppel is an equitable doctrine invoked at the discretion of the Court. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996). The doctrine of judicial estoppel codifies the rule that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation omitted). The U.S. Supreme Court has identified three factors that inform the Court's decision as to the application of judicial estoppel. First, "a party's later position must be clearly inconsistent with its earlier position." *Id.* at 750 (internal quotation omitted). Second, the party must have "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quotation omitted). Finally, the Court considers whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair determinant on the opposing party if not estopped." *Id.* at 751.



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

All three of the *New Hampshire* factors are clearly met here: Tulalip, Swinomish, and Upper Skagit seek to argue a point of law they argued could never apply previously; the Court ultimately agreed with the arguments previously advanced by those tribes; and, the tribes would certainly derive an unfair advantage from their shifting legal positions, now that arguing the contrary to limit Stillaguamish treaty rights is to their benefit. The inconsistent positions advanced here as to fundamental principles in the case, unlike those of Tulalip in *Subproceeding 05-4* concerning ambiguity in terms, warrants application of the doctrine. *See United States v. Washington*, 20 F.Supp.3d 986, 1044 (W.D. Wash. 2013). The egregious inconsistencies that the Court has itself highlighted create a basis for the application of the doctrine of judicial estoppel in this case.

**10. Why was Stillaguamish included as a bound party in the Shellfish Implementation Plan if Stillaguamish did not have any interest in marine waters?**

The Court is correct that Stillaguamish has been a party to the original Shellfish Implementation Plan ("Plan") and all revisions thereto, reflecting a general understanding among the parties that Stillaguamish reserved fishing rights in marine waters for shellfish. In a 2007 amendment to the Plan, Stillaguamish remains listed as a bound party, along with Tulalip, Upper Skagit and Swinomish. *United States v. Washington*, 20 F.Supp.3d 828, 845, 863 (W.D. Wash. 2007) (Section 1 of Amendment). Exhibit A to the 2007 amendment provides that: "The Tribes hereby ***represent that they are intimately acquainted with the Puget Sound area and with all tribes, or their successors, who are or were party to the treaties*** listed in section 1 and that, ***to the best of their knowledge, there are presently no tribes or persons, other than the signatories to this Settlement Agreement, who have a right to take shellfish under the treaties listed in section 1***." *Id.* at 847 (emphasis added) (no Qwadsak listed). Therefore, as of 2007, Tulalip, Upper Skagit and Swinomish again expressly acknowledged that Stillaguamish reserved a right to take shellfish under the Treaty.

Exhibit D to the 2007 amendment addresses distribution of certain settlement funds under the Plan and the nature of rights acquired should a tribe purchase tidelands. With respect to these



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

limited issues, Exhibit D notes: "The Sauk-Suiattle and Stillaguamish Tribes are each holders of the right of taking fish under the Treaty of Point Elliott and as signatories to this agreement are not precluded from participation to the extent applicable upon establishing their respective usual and accustomed fishing areas." *Id.*

Reading these two provisions together to harmonize the terms, the 2007 amendments make clear that Stillaguamish reserved treaty fishing rights that encompass shellfish in marine waters (and Tulalip, Upper Skagit and Swinomish so agreed). The only legal issue in this Subproceeding is *where* Stillaguamish holds those treaty fishing rights in marine waters.

**11. Hasn't the Court previously concluded, in earlier subproceedings, that tribes "took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent" to their established sites/villages? *See United States v. Washington*, 873 F. Supp. 1422, 1448 (W.D. Wash. 1994*), aff'd in part, rev'd in part sub nom,* 157 F.3d 630 (9th Cir. 1998) (as amended).**

Yes, this is the law of the case and applies with equal force to Stillaguamish. Dr. Barbara Lane has made clear that "[p]eople living in a territory had the right to use the resources and locations within it." Ex. PL-590 at 16.

**a. Are there any examples where:**

**i. tribal members lived on a shoreline but did not have U&A extending into adjacent and subjacent waters; or**

No. The Court has found in every instance that tribal groups with members living on a shoreline at treaty times have usual and accustomed fishing rights to the adjacent and subjacent waters. *See* Answer to Question No. 11(a)(ii), *infra.*

**ii. where U&A was found based on sustained and regular presence on the shoreline of a water body.**

Yes. *See Final Decision No. #1*, 384 F.Supp. at 359 (FF##36, 39) (U&A based on finding of Hoh's historical occupation of Hoh and Quileute river systems); *id.* at 360-61 (FF#46) (U&A based on finding of Lummi's historical occupation of areas near Bellingham Bay and freshwater rivers emptying into Bay); *id.* at 364 (FF##63, 65) (U&A based on finding of Makah's winter villages and summer encampments in Pacific Coast area of Olympic Peninsula); *id.* at 366



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 (FF##72, 76, 78) (U&A based on finding of Muckleshoot's historical occupation of Green, White,
2 Black, Duwamish, Cedar and Puyallup river systems); *id*. at 368-69 (FF##85, 86) (U&A based
3 on finding of Nisqually's historical occupation of Nisqually River systems); *id*. at 370 (FF##95,
4 99) (U&A based on finding of Puyallup's historical occupation of Puyallup River system and
5 Vashon Island); *id*. at 372 (FF##108, 109) (U&A based on finding of Quileute's historical
6 occupation of Quileute and Hoh River systems); *id*. at 374-75 (FF#120, 121) (U&A based on
7 finding of Quinault's historical occupation of villages located along Queets and Quinault Rivers);
8 *id*. at 375-76 (FF##129, 131) (U&A based on finding of Sauk's historical occupation and location
9 of winter villages on Skagit and Sauk River systems); *id*. at 376-77 (FF##134, 136, 137) (U&A
10 based on finding of Skokomish's historical occupation and location of winter villages in drainage
11 area of Hood Canal); *id*. at 377-78 (FF#140) (U&A based on finding of Squaxin Island's historical
12 occupation of certain inlets of upper Puget Sound); *id*. at 378 (FF#140) (U&A finding based on
13 Stillaguamish's historical occupation of Stillaguamish River system); *id.* at 379 (FF#147) (U&A
14 finding based on Upper Skagit's historical occupation of villages on Sauk and Upper Skagit River
15 systems); *United States v. Washington*, 459 F. Supp. 1049 (U&A finding based on Swinomish
16 historical occupation of territories along the Skagit River and its tributaries, on the mainland north
17 and south of the Skagit River systems, and on the "islands adjacent," Ex. USA-74 at 3); *United*
18 *States v. Washington*, 626 F. Supp. at 1442-43 (FF##339, 342) (U&A based on finding of Lower
19 Elwha winter villages located near marine shoreline and "adjacent marine areas" to "original
20 homes"); *id*. (FF##339, 341) (U&A based on finding of Port Gamble S'Klallam winter villages
21 located near marine shoreline); *United States v. Washington*, 626 F.Supp. at 1527-29 (FF##359,
22 372) (U&A finding based on Tulalip predecessors' historical occupation of freshwater river
23 systems, "shoreline," and "adjacent islands"); *United States v. Washington*, 129 F.Supp. 1069,
24 1080 (W.D. Wash. 2015) ("The Quinault occupied the coast of Washington State…The current
25 members of the Quinault Tribe are descendants of the treaty-time occupants of the villages
26 situated in the territory extending roughly between the Queets River system to the north and the
27 north shore of Gray's Harbor to the south."); *see also id*. ("the position of the Quinault on the



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 Olympic Peninsula coast played an undeniable role in shaping and orienting the tribe's culture,
2 trade, and economic activities.”).

3 **b. Is it correct that, outside of specific grounds that may be some distance from**
4 **a tribe’s “home territory,” most U&A determinations are premised primarily on a tribe’s presence and access? Are any prior U&A determinations**
5 **instructive?**

6 Yes. *See Final Decision #1*, 384 F.Supp. at 380-81 (FF##153, 154) (U&A finding as to
7 Puget Sound river systems based on Yakama presence in locations via travel and intermarriage);
8 *id*. at 360-62 (FF##46-56) (U&A as to marine waters of Northern Puget Sound based on finding
9 of Lummi presence at reefnet locations); *id*. at 364 (FF#65) (U&A finding as to Pacific Ocean
10 and Strait of Juan de Fuca based on finding of Makah presence); *id*. at 368-69 (FF##85-86) (U&A
11 as to marine waters based on finding of Nisqually presence in saltwater areas at the mouth of
12 Nisqually River and surrounding bay, which were “shared with other Indians” and generally
13 involved kinship ties); *United States v. Washington*, 626 F.Supp. at 1442-43 (FF#340) (U&A
14 finding as to Hood Canal, San Juan and Whidbey Islands, and Haro and Rosario Straits based on
15 regular presence of Lower Elwha at locations); *id.* (FF##339-341) (U&A finding as to Hood
16 Canal, San Juan and Whidbey Islands, and Haro and Rosario Straits based on presence of Port
17 Gamble S’Klallam at locations; U&A finding as to Sekiu River subject to the control and
18 regulation of Makah); *id*. at 1488 (FF##351) (U&A finding as to Hood Canal based on Skokomish
19 regular seasonal migratory presence); *United States v. Washington*, 626 F.Supp. at 1528-29
20 (FF##360, 371-74) (U&A as to marine waters based on regular presence of Tulalip via travel to
21 trading forts, seasonal marine resource migration, and kinship ties); *United States v. Washington*,
22 873 F.Supp. at 1449-50 (U&A as to marine waters based on regular presence of Upper Skagit via
23 travel and kinship ties, Ex. UPS-31).

24 **12. Is it fair to say that the spotty historical record means that the Court is most often**
25 **weighing the probability that a specific tribe fished in a specific water body on a limited evidentiary record?**

26 Yes. The Court has found “spotty documentation,” in the words of Dr. Barbara Lane,
27 sufficient to support a finding of U&A over a vast marine area. Subp. 89-3 Joint Tribal Trial



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Brief at 16. This Court recognizes that it would be impossible to list all areas customarily used by tribes for fishing purposes. *Final Decision #1*, 384 F.Supp. at 353. This Court elaborated on this point regarding Tulalip's usual and accustomed fishing areas: "In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Little documentation of Indian fishing locations in and around 1855 exists today." *United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 730 F.2d 1314, 1316 (9th Cir. 1984) (same). This Court reiterated these findings several times in a later proceeding involving a further determination of Tulalip U&A, which were awarded despite the absence of specific evidence of fishing:

> As a general matter, there is very little treaty-time documentation or direct evidence or [sic] fishing in open marine areas, and such occasional references as exist are extremely fragmentary and just happenstance. [citation omitted.] It is only by chance that documents dating from treaty times note the presence of specific Indians at a given freshwater site.

*United States v. Washington*, 626 F.Supp. at 1528 (FF#368); *see also id*. at 1529 (FF#375) ("It is difficult to establish the range and extent of the usual and accustomed marine fisheries engaged in by Snoqualmie fishermen at treaty times and to ascertain the regularity with which the Snoqualmie may have visited freshwater sites adjacent to their territory for fishing purposes."); *id*. at 1528-1529 (FF##367, 371, 373).

As part of *Subproceeding 89-3*, Tulalip, Swinomish, Upper Skagit and other tribes argued that the courts "have refused to let the lack of a historical record limit the scope of tribal fishing." Subp. 89-3 Joint Tribal Trial Brief at 16; *see also United States v. Washington*, 19 F.Supp.3d at 1310-11 (in a clarification Subproceeding, affirming evidence of Muckleshoot marine U&A because Muckleshoot "from time to time" "may have occasionally fished in the open waters of Elliott Bay").

In *Subproceeding 80-1*, Tulalip relied on the well-established fact that "[a]ll tribes fished not only in their villages and home territories, but also in areas beyond their home territories." Ex. SG-160 at 55. Although Dr. Barbara Lane did not find any documents "specifically showing



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

regular treaty-time fishing" or "nineteenth century ethnographic accounts in which fishing is mentioned," Tulalip noted that Dr. Lane "would not rule out treaty-time fisheries" in open marine waters based on her opinion that "the absence of direct written evidence does not negate the treaty time existence of tribal fisheries." Ex. SG-160 at 12, 17. Tulalip relied heavily on expert testimony and on inferences that could be drawn from the location of Tulalip villages, evidence of Tulalip exogamy and travel as well as the general practices of Coast Salish people at and before treaty times in *Subproceeding 80-1*. For further example, Dr. Lane was not willing to draw a conclusion concerning the precise location of Tulalip fishing in the open waters off Whidbey Island because of the lack of specific documentation. *Lummi Indian Tribe*, 841 F.2d at 319. Dr. Lane noted that records of marine fishing are almost nonexistent and that, with the exception of specific salmon and halibut banks, the open waters of Puget Sound were available to any tribe for fishing, resulting in a finding of U&A for Tulalip despite the lack of specific documentation. *Id.*

**a. For instance, can the Court assume that no tribe believes that another tribe would be required to present evidence of fishing in every tributary where a main river is located mainly within that tribe's "home territory"? Similarly, can the Court assume that no tribe believes that another tribe would be required to present evidence of fishing in every bay, harbor, or passage adjacent to its "home territory"?**

Yes to both questions; however, there is no case law requiring such specific and exhaustive evidence as that set forth in this question. In fact, the law of the case, with its repeated acknowledgement of the spotty and happenstance historical records, points precisely in the opposite direction. Here, the preponderance of the evidence shows that Stillaguamish's "home territory" includes the shores of Port Susan, Skagit Bay and Saratoga Passage. The "adjacent to" waters are Holmes Harbor, Penn Cove and Deception Pass, the first two of which the court has noted are "extensions of Saratoga Passage." *United States v. Washington*, 20 F.Supp.3d at 1048.

**b. Should presence, access, and ability, combined with the general presumption that tribes used the resources that were available to them, be sufficient in the absence of another tribe having a primary or superior claim to a specific area?**



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27

Yes; presence, access, and ability, combined with the law of the case as to evidentiary standards, are sufficient for a usual and accustomed fishing place determination. This is true even if there was a claim of primary use by another tribe or tribes. Primary use does not eliminate the area as a usual and accustomed fishing place of another tribe. There are no adjudicated primary rights held by tribes in the claimed interconnected waters in this Subproceeding.

**c. Is proximity a reasonable measure of probability in the absence of contrary evidence?**

Yes, at least with respect to proximity to territory. *See United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 873 F.Supp. 1422, 1448 (W.D. Wash. 1994), *aff'd in part, rev'd in part sub nom*, 157 F.3d 630 (9th Cir. 1998). The Court should draw reasonable inferences of fishing based on evidence of regular proximity to marine waters. Stillaguamish has presented evidence of more than just proximity, further supporting a determination of U&A in the claimed interconnected waters based on a preponderance of the evidence and reasonable inferences therefrom.

**d. As the distance between a claimed water body and a tribe's "home territory" increases, should the measure of proof increase (specifically regarding frequency or regularity)?**

No, the relaxed measure of proof under the law of the case remains the same, but the type of evidence changes—shifting away from territory (villages and encampments) to evidence of presence, including regular travel while fishing along the way and kinship ties. No tribe has ever offered documentary evidence which expressly indicates regular fishing activities in marine waters far from their homeland. The reasons for that are obvious. First, there were no places to talk about in the middle of waters. Second, fishing in marine waters was such a ubiquitous activity that it would not be remarked upon by early pioneers and traders or others who left records. All fishing places where a tribe "customarily" fished from "time to time" were a regular part of a tribe's lifeways at treaty times and should be recognized today, no matter how far from their home territory. *See Final Decision #1*, 384 F.Supp. at 332 ("however distant").



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

**13. Does professional baseball provide an apt analogy for thinking about a tribe's U&A?**

**a. If the Mariners are playing baseball, the most likely location is at T-Mobile Field, in Seattle, where they play close to half of their regular season games (akin to a "home territory"). For spring training, approximately half of February and most of March, they primarily play at a home away from home in Peoria, Arizona (akin to an annually used "seasonal camp"), and occasionally travel to surrounding cities in Arizona to play preseason games against other teams (akin to "seasonal camps" which are not used every year). Outside of these most common locations, they visit the stadiums of their four American League West rivals three to four times a year for approximately half a week at a time. Less frequently, about once a year, they visit the ten teams in the American League's East and Central Divisions, again for approximately half a week at a time. Finally, the Mariners visit, in any given year, the stadiums of five of the fifteen National League teams.**

**b. Where on this continuum do the Mariners switch from visiting usual and accustomed locations to visiting locations which are infrequent or occasional.**

A baseball sports analogy is an apt one. *See* John Sexton, *Baseball as a Road to God: Seeing Beyond the Game* at 6 (2013) ("Baseball, it turns out, can help us develop the capacity to see through to another, sacred space."). U&A places are similar to a place a sports team calls home; however, not all home stadiums are exclusive, and exclusivity is not a requirement for a U&A determination.

Rather than T-Mobile Park, the better example here might be the Kingdome, which was a shared home by both the Mariners and the Seahawks. Or, Lumen Field is a good example. There are three teams that now call Lumen Field home: the Sounders, the Seahawks, and the OL Reign. Lumen Field is home to each of those three teams. U&A areas are like Lumen Field and the Kingdome—home territory jointly shared and used at treaty times.

For Stillaguamish, the home stadium includes the interconnected waters of Port Susan and Skagit Bay—right next to the territory and permanent villages of Stillaguamish, replete with Stillaguamish place names within the lower Stillaguamish River delta in Stanwood and at Warm Beach on Port Susan—as well as Saratoga Passage next to Camano Island, where Stillaguamish had treaty time villages on the southern end from Camano State Park south to the tip, and also joint shared use in the north at Utsalady. Numerous tribal groups, including Stillaguamish,



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Kikiallus and Snohomish, used Camano Island and its adjacent marine waters at treaty times. The shared "stadium" is still Stillaguamish home territory, and the waters and tidelands surrounding it are a U&A area for Stillaguamish.

The analogy to baseball also mentioned spring training for the Mariners in Peoria—the seasonal place of regular visit which can also establish usual and accustomed fishing areas. Such seasonal places used for subsistence resource cycles would also include division rivals (neighboring tribes) where there is regular and frequent travel. Well, for Stillaguamish, those regular seasonal places of visits would be the adjacent waters to their home territory of Holmes Harbor and Penn Cove, and Deception Pass on Stillaguamish's way to Victoria, Guemes Island, or Cowichan territory.

Infrequent trips to other ballparks of teams outside the American League West or in the National League—other tribe's homes that are only infrequently visited—should not be sufficient evidence, without more, to provide U&A by a preponderance of the evidence.

**14. Do the parties contend that any other tribes—other than Quadsak or Stillaguamish—fished in the northern part of Port Susan?**

The only tribe with presently adjudicated treaty fishing rights in Port Susan is Tulalip, "except close to the mouths of the Stillaguamish River." *United States v. Washington*, 626 F.Supp. at 1530. There was no Qwadsak tribe.

**15. Should any distinction be drawn between locations that can be reached quickly and with minimal travel and supplies (perhaps within a day of a tribal village/camp) and more distant locations requiring multiple days of travel and procurement of provisions in route?**

Not necessarily, as both may be evidence of usual and accustomed fishing locations.

**16. Should the Court interpret the *Lummi* cases as establishing that travel alone can establish U&A? Why or why not? Are there alternative interpretations of the *Lummi* cases? Are the *Lummi* cases "tribe-specific" rulings? How is this case distinguishable from the *Lummi* cases?**

The law of the case is that all Indians in western Washington fished as they travelled. *See, e.g., United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014) ("*Lummi II*"); *Tulalip*



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

1 *Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1135 (9th Cir. 2015) (in Paragraph 25(a)(1)
2 case, holding that Suquamish's fishing grounds included the waters west of Whidbey Island based
3 on statements in Dr. Lane's reports that the Suquamish's territory "possibly" included that area,
4 and that tribes generally used such marine areas for fishing while traveling through them).

5 The *Lummi* line of cases, although clarification proceedings under Paragraph 25(a)(1),
6 each suggest that treaty-time travel alone—because it always involved fishing—is sufficient by
7 itself to support a U&A finding, provided that such travel was regular or frequent. As the Ninth
8 Circuit explained in 2017:

9 If to "proceed through Admiralty Inlet" rendered Admiralty Inlet a part of the
10 Lummi U & A, then to proceed from the southern portions of the San Juan Islands
11 to Admiralty Inlet would have the same effect: to render the path a part of the
Lummi U & A, just like Admiralty Inlet.' That explanation covers our exact
12 situation and fits within our long-accepted framework, which requires looking at
the evidence 'before Judge Boldt that the [tribe] fished *or traveled* in the . . .
13 contested waters.

14 *United States v. Lummi Nation*, 876 F.3d 1004, 1009 (9th Cir. 2017) (citing *Lummi II*, 763 F.3d
15 at 1187; *Tulalip Tribes*, 794 F.3d at 1135 (emphasis in original) (internal quotations and citations
16 omitted)). Just last year, the Ninth Circuit in *Lummi IV* again relied on "the general evidence of
17 travel between those two areas" to support fishing rights in the waters east of Trial Island. *Lower*
18 *Elwha Klallam Indian Tribe, et al. v. Lummi Nation*, No. 19-35610, D.C. No. 2:11-sp-00002-
19 RSM, at 4 (9th Cir. June 3, 2021) (Memorandum Opinion). The plain language of the Ninth
20 Circuit's rulings is that travel, provided it is not incidental, is sufficient evidence by itself for a
21 U&A determination. This rule is not limited to the *Lummi* cases. *See, e.g., Upper Skagit*, 590
22 F.3d 1020, 1024 (9th Cir. 2010) ("nothing in the record showed the Suquamish fished on the east
23 side of Whidbey Island, ***or traveled*** through there") (emphasis added); Subp. 19-1, Main Case
24 Dkt. #22413 at 5 (Order on Pending Motions) ("summary judgment in favor of the responding
25 party is appropriate if it can establish that it fished in ***or traveled*** through the disputed waters")
26 (emphasis added); Subp. 20-1, Main Case Dkt. #22440 at 9 (Order on Pending Motions) (same).
27 In *Subproceeding 20-1*, Tulalip challenged this sentence in the Court's Order, which had also



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

appeared in *Subproceeding 19-1*. In denying Tulalip's motion for reconsideration, the Court noted: "Tulalip does not establish that the sentence directly conflicts with any prior orders of this Court or binding decisions by the Ninth Circuit Court of Appeals." Subp. 20-1, Main Case Dkt. #22443 at 2 (Order Denying Motion for Reconsideration).

The fact that the *Lummi* cases are clarification proceedings under Paragraph 25(a)(1) rather than Paragraph 25(a)(6) proceedings is of no moment here. As this Court has rightly noted, in evaluating claims under Paragraph 25(a)(6), "the Court sits in the same position as Judge Boldt and applies the law of the case as established in his initial U&A determinations." *United States v. Washington*, 129 F.Supp.3d at 1110; Subp. 17-3, Dkt. #252 at 10-11. The standard of proof identical to that used by Judge Boldt in *Final Decision #1* would apply when the Court is asked to adjudicate a U&A not specifically determined by Judge Boldt. In such an instance, the Court is merely standing in for what Judge Boldt would himself have done had the evidence been before him. *Id.*

At least factually, this case is not distinguishable from the *Lummi* cases, and there exists no special "Lummi Rule" in *United States v. Washington*. Here, Stillaguamish has met the legal standard for U&A. Stillaguamish has provided ample evidence of extensive travel throughout Puget Sound, but it only seeks a modest U&A fishing adjudication in the more limited interconnected waters closely connected to Stillaguamish villages and encampments and adjacent thereto. Within the claimed interconnected waters, Dr. Friday testified that Stillaguamish would have regularly migrated from their villages and encampments to various places within the interconnected waters for seasonal resource gathering, none of which were more than fifteen miles one-way. *See* Friday Testimony, 3/22 Tr. p. 146:12-25. Such travel evidence, under *Lummi*, taken by itself and also when taken in conjunction with the other anthropological, ethnographic and historical evidence in this case, supports a U&A determination in all of the claimed interconnected waters. As explained further in answer to Question No. 17 *infra*, travel evidence has supported U&A determinations in this case before.



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

**17. Is there any distinction to be drawn, as regards establishing U&A, between traveling to a location (or locations) to engage in fishing and traveling to a location (or locations) for other purposes? Should this change with the length of the travel or other factors?**

No. The Court has found U&A based on travel regardless of whether it was travel to fish or travel for some other purpose with fishing along the way. In her original report on the Tulalip Tribes, Dr. Lane stated: "While it is not feasible to document the marine fisheries of the Snohomish at treaty time, it is clear that in common with other coastal people, they were accustomed to traveling widely in their canoes and to harvest such fish as were accessible to them." Ex. USA-92 at 32. The Court ultimately awarded Tulalip U&A throughout open marine waters. *United States v. Washington*, 626 F. Supp. at 1529 ("The documentation of the presence of Snohomish Indians at Fort Langley during pre-treaty times is spotty and generally happenstance, but it would indicate that the Snohomish frequently traveled to the Fraser River for trading of both salmon and furs."); *id.* ("a round trip to the Fraser River from the mouth of the Snohomish River would normally have taken from two to four weeks. ***During such travels they would have harvested salmon accessible to them***"); (emphasis added); *Lummi Indian Tribe*, 235 F.2d at 452 (holding that Admiralty Inlet was within the Lummi's grounds because it was a "passage" through which the Lummi would have traveled); *see also Lummi Indian Tribe*, 841 F.2d at 320 ("While traveling through an area and incidental trolling are not sufficient to establish an area as [U&A], frequent travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters….it is clear that in common with the other coastal people [the Tulalips] were accustomed to travel widely in their canoes and to harvest such fish as were accessible to them.") (bracketed material in original). There is no indication from these prior rulings that the length of the travel bears on the analysis in any material way.

**18. Are there any "true" evidentiary standards that must be satisfied in the underlying case to establish U&A? Is ethnographic or anthropological evidence required?**

There is no one type of expert or one type of evidence supporting usual and accustomed fishing areas that prevails over others. The Court has noted that its "concern and objective is to



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

act upon the most accurate and authoritative data concerning usual and accustomed fishing places that can be developed by thorough investigation and research." *United States v. Washington*, 459 F. Supp. at 1059. The Court was careful not to elevate one form of evidence over another, and has never required "direct evidence" or "actual evidence" of fishing for U&A. The Ninth Circuit has noted with approval the use of testimony from expert historians and ethnohistorians, ancient documents, and tribal elder testimony. *See, e.g., Lummi Tribe*, 841 F.2d at 319-320. This Court has noted the "credible testimony of tribal elders who speak from personal experience or data acquire from other sources," particularly when corroborated with other evidence. *United States v. Washington*, 459 F. Supp at 1059. And, the Ninth Circuit has specifically noted the value of tribal customs: "Historical evidence of tribal customs is a proper basis for judicial conclusions about the present effect of Indian treaty provisions." *Lower Elwha Tribe*, 642 F.2d at 1143. In addition, the Court has held that evidence from the Indian Claims Commission is relevant insofar as it can presume fishing activity took place from coastal areas used by a tribe. *United States v. Washington*, 459 F.Supp. at 1059.

Finally, Upper Skagit, Tulalip and Swinomish, along with numerous other tribes, have specifically noted the value of historical evidence and the use of historians as experts: "Proof of historical use has served in this litigation to provide the background and circumstances against which the treaty is interpreted and applied. It is the starting point in understanding a way of life and requirements which were to be protected but which might change in response to changing circumstances." Subp. 89-3 Joint Tribal Trial Brief at 6. These same tribes have reminded the Court that a variety of sources may be used to support usual and accustomed fishing findings, including the expert testimony of historians and ethnohistorians as one of these sources. *Id.* at 16 ("In virtually all cases where the 9th Circuit has upheld the district court's determination of usual and accustomed places, it has noted with approval the use of testimony from expert historians and ethnohistorians, ancient documents, and tribal elder testimony").

**19. Is it fair to conclude from the expert testimony in this subproceeding, that, to a certain extent, shifting familial relationships had a larger bearing on access to shared**



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

**resources than did tribal relationships? How should the Court attribute smaller shifts at the family level to tribes as a whole?**

Familial relationships at treaty times are important because "tribal relationships" and "tribes," in the modern, political sense, did not really exist at treaty times. *Final Decision #1*, 384 F.Supp. at 355-56; *see also* Ex. USA-20 at 36; Ex. SG-167 at 55-56. Although treaty fishing rights belong to a tribe and are not the property of any individual tribal member, only tribal members may, as a practical matter, exercise treaty fishing rights, and fishing locations themselves are premised on those member activities at treaty times. *Final Decision #1*, 384 F.Supp. at 332 (U&A includes "every fishing location where *members* of a tribe customarily fished...") (emphasis added); *id.* at 407 ("The treaties reserved rights, however, to every individual Indian…."). The fishing locations awarded in this case are ultimately based on where the members themselves regularly fished at treaty times and proof of that fishing may be, *inter alia* through expert testimony, elder testimony, evidence of mariner resource use, historical records, and reasonable inferences therefrom on a more probable than not basis, applying the well-established law of the case that the proof standard is more relaxed than in a typical civil case.

Stillaguamish disagrees, however, that the expert testimony strongly suggests that all fishing rights were always controlled on a familial level at treaty times. Rather, throughout the entirety of *US v. WA*, expert testimony strongly suggests that fishing rights in marine waters were controlled on a familial level only in certain limited locations, such as at specific fishing stations like reef net sites, constructed weir or trap sites, and halibut banks. The Court has not recognized private or familial control beyond these limited locations in marine waters, none of which have been documented to exist in the claimed interconnected waters. For example, Tulalip's case (like many others attempting to adjudicate fishing rights in marine areas) was built upon the concept that marine waters in Puget Sound were open, commonly transited (and fished) by multiple groups, and subject to shared use. *United States v. Washington*, 626 F.Supp. at 1529-30 (FF##361-63, 366, 372, 377 & 379).



KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Whether there are shifts in familial relationships after treaty times is not relevant. Usual and accustomed fishing areas were not expanding or shrinking in any dramatic fashion at treaty times because the family relationships for resource access had been established over substantial time through intermarriage. As the Court has already noted "[i]t was normal for all the Indians of western Washington to travel extensively either harvesting resources or visiting in-laws, because they were intermarried widely among different groups", there was "widespread intermarriage among the tribes surrounding Puget Sound", and that there was a "great deal of exogamy." *United States v. Washington*, 459 F.Supp. at 1530 (FF##377, 378). The Court has concluded from such findings that "[i]t seems reasonable [Indians] would have joined with neighboring people, especially if they were intermarried with them, to harvest fish." *Id.* (FF#375). People moved about to resource areas where they had use patterns based on kinship or marriage. Families did not necessarily follow the same particular pattern of seasonal movements every year. Thus, an element of family level shifts through intermarriage is already woven it the fabric of the case and accounted for within the treaty rights reserved by tribes in the treaty and the usual and accustomed fishing areas recognized by the Court.

**CONCLUSION**

Stillaguamish appreciates the opportunity to answer these questions. Stillaguamish respectfully requests that this Court conclude that it is more likely than not that Stillaguamish's usual and accustomed fishing areas at treaty times include the interconnected marine waters of the entirety of Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and Deception Pass.

DATED this 3rd day of June, 2022.

By: */s/ Rob Roy Smith*
Rob Roy Smith, WSBA #33798
Email: rrsmith@kilpatricktownsend.com
Bree R. Black Horse, WSBA #47803
Email: brblackHorse@kilpatricktownsend.com
Kilpatrick Townsend & Stockton, LLP
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101

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

Scott Owen Mannakee, WSBA #19454
Email: smannakee@stillaguamish.com
Tribal Attorney
Stillaguamish Tribe of Indians
3322 236th Street NE
Arlington, WA 98223
Tel: (360) 572-3028

*Attorneys for the Stillaguamish Tribe of Indians*