The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, vs. STATE OF WASHINGTON, *et al.*, Defendants.	No. C70-9213 Subproceeding no. 17-03 RSM S'KLALLAM POST-TRIAL BRIEFING: RESPONSE TO COURT'S INQUIRY Note for Calendar: June 3, 2022

I. INTRODUCTION

Interested Parties Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe (together "S'Klallam") hereby submit this response to the Court's inquiries. Dkt. # 278 at 2-6. Given the nature of this proceeding, the complexity of *United States v. Washington*, and the instructions from the Court (24 page limit), this response is limited to the most relevant questions and is in no way intended to be the S'Klallam's complete position on all the matters herein but is merely intended

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to aid the Court in this subproceeding.[1] The S'Klallam actively sought to coordinate with other parties to the extent that it was possible. Joinder with another Tribe's position is noted below.

II. DISCUSSION

STANDARD FOR NEW U&A DETERMINATIONS

Given the Court's request for briefing on "additional legal issues," the S'Klallam find it necessary to address the basic legal standards that distinguish this subproceeding from others in *U.S. v. Washington*. Dkt. # 278 at 2. The Court's analysis for this subproceeding must be limited to the standards for subproceedings brought under Paragraph 25(a)(6) to obtain *new* U&A, matters that have "not [been] specifically determined."[2] When a tribe has previously adjudicated their U&A, but as here, later brings an (a)(6) proceeding asserting that a portion of their U&A was *never* adjudicated, it is often described as "expansion."

The only truly comparable case of a riverine tribe expanding into marine waters long-after their original U&A decision, involves Upper Skagit, one of the tribes opposing Stillaguamish's claim here. Upper Skagit settled their U&A claims in Subproceeding no. 89-3 *vis-a-vis* the most impacted tribes, rather than by an adversarial adjudication. *See, e.g., U.S. v. Washington*, 19 F. Supp. 3d 1252, 1297-1304 (W.D. Wash. order Jan. 29, 1999) (stipulation between Upper Skagit and Tulalip); (order Feb. 16, 1999) (settlement between Lummi and Upper Skagit); (order Feb. 16, 1999) (approving settlement between Upper Skagit and Swinomish); (order Feb. 16, 1999)

[1] To that end the S'Klallam request the opportunity to participate in post-trial arguments that address these issues.

[2] Stillaguamish's RFD only alleges a Para. (a)(6) claim. Dkt. # 4 at 2, 8; Paragraph 25(a) jurisdiction is derived from *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) ("*Boldt Decision*") and later modified in *United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1991) (order Aug. 24, 1993).

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(approving settlement between Upper Skagit and Tulalip).[3] As a result, Upper Skagit is in the best position to describe why their case is distinguishable from this one. What can be said, though, is that Sauk-Suiattle and Yakima are the *only* other treaty tribes with *no* adjudicated shellfish grounds.

Many of the Court's questions here ask about the status of the law of the case on "travel" as establishing U&A. There is significant case law where this Court has examined the *U.S. v. Washington* record pursuant to Paragraph (a)(1) and interpreted the confines of a tribe's existing U&A based on the established facts.[4] Cases, though, where a tribe *returns* to the Court for an additional U&A determination for *new* territory are related to (a)(1) cases, but these are infrequent because many of the tribes likely would be restricted by the fact that their U&A has already been "specifically determined" and perhaps not subject to expansion.[5] As the Stillaguamish seek to apply the newly minted travel standard from recent case law involving the Lummi U&A, Subproceeding no. 11-2, it is worth noting that the Court's review in 11-2 was of the record and *not* as factfinder. There, the Ninth Circuit's latest decision did not follow prior decisions: that transitory use of a waterway is not U&A for the transiting tribe,[6] but instead minted a new standard

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[3] No other party appears to have stipulated to the Upper Skagit U&A, raising questions regarding finality with respect to the remaining parties in *U.S. v. Washington*.

[4] For more than two decades, the Ninth Circuit has issued several relevant decisions regarding U&A and how to interpret it. *See Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*"); *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) ("*Muckleshoot II*"); *U.S. v. Muckleshoot*, 235 F.3d 429 (9th Cir. *2000) ("Muckleshoot III"); Upper Skagit Indian Tribe v. Washington,* 590 F.3d 2010 (9th Cir. 2010) ("*Upper Skagit"*); *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015) ("*Tulalip*").

[5] *Muckleshoot I*, 141 F.3d at 1359 citing *Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988).

[6] *See, e.g., Tulalip*, 794 F.3d at 1135 (Suquamish showed via Dr. Lane's reports evidence that they "travelled to Whidbey Island to fish"); *Upper Skagit*, 590 F.3d 2010; *Upper Skagit Indian*

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allowing Lummi to infer usual, customary fishing when it claimed a right to connect waterways plausibly, but not determinatively, within their U&A. *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) ("*Lummi III"), rev'd in-part, aff'd in-part sub. nom. Lower Elwha Klallam v. Lummi Nation*, 849 Fed. Appx. 216, 218 (9th Cir. June 3, 2021) (unpublished), *cert. denied* 2022 U.S. LEXIS 1128. In Subproc. 11-2, the Ninth Circuit equated vague, fragmentary evidence of Lummi's historical travel with U&A fishing.[7] However, applying that reasoning to original U&A cases, such as this one, is not straightforward, particularly because the Court found Lummi's U&A ambiguous, and the record was devoid of evidence of their use. Yet, the Court had to resolve the ambiguity, nevertheless, leaving it with a "likely" standard that never fully aligned with prior rulings of the Court.

The only recent case that has dealt with "expansion" of U&A is Subproceeding no. 09-1, where the Court described in specific detail the types of evidence Quileute and Quinault presented to demonstrate that they traveled extensively to procure "fish," which included—according to the findings of the Court—fur seals and whales. In that particular case, somewhat telling, is that no party contended that travel for 'other purposes' was equated with fishing rights. Indeed, the Court specifically ruled that travel alone could not be used to establish U&A. For instance, in Conclusion of Law (CL) 1.6, the Court holds unequivocally that "[e]vidence of the probable distances to which a tribe had the capability to travel at treaty-time is insufficient on its own to establish U&A." *U.S. v. Washington*, 129 F. Supp. 3d 1069, 1111 (W.D. Wash. 2015) [8]

Tribe v. Suquamish Indian Tribe, 871 F.3d 844 (9th 2017) (adjacency and general evidence of travel not enough to establish U&A).

[7] The S'Klallam, as main parties to that long-running proceeding, are obviously familiar.

[8] *Aff'd in-part, rev'd in-part*, 873 F.3d 1157 (9th Cir. 2017) (Court's standard and analysis on this affirmed; reversed as to remedy) (subsequent history truncated).

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citing 730 F.2d 1314, 1318 (9th Cir. 1984). The Court also found it particularly instructive, for the standard, to turn to the parties' own briefs in the shellfish proceeding, Subproc. no. 89-3:

> The type of fishing activities this Court has considered in determining the boundaries of usual and accustomed grounds and stations also shows that all fishing activities should be taken into account. This Court has frequently considered more than just salmon fishing in establishing usual and accustomed areas. For example, in adjudicating the Quileute Tribe's usual and accustomed areas, the Court noted that in portions of its area the Quileutes caught smelt, bass…seal, sea lion, porpoise, and whale. 384 F. Supp. at 372, FF 108…. The Makah usual and accustomed areas were originally determined with reference to salmon, halibut, whale, and seal. 384 F. Supp. at 363, FF 61.

Id. at 1116 citing Dkt. # 13696 (Subproc. 89-3) at 8 (Joint Tribal Trial Br. Mar. 21, 1994); *see also* Dkt. # 13744 (Subproc. 89-3) (Mar. 31, 1993) (memorandum arguing that the common understanding of "fish" as an animal that lives in the water should control). It should be particularly noted, though, that all parties in 09-1 agreed that it was evidence of "fishing activities" that were determinative of the U&A boundaries, not evidence of other tribal activities such as trade. Therefore, the findings and CL from 09-1 provide the best statement of the current actual standard for U&A expansion cases, such as this one.

Q.1: COAST SALISH EVIDENCE

The S'Klallam join the Tulalip Tribe's answer to question 1. Further, the S'Klallam add that this Court recently denied Lummi's claim to U&A at the mouth of the Skagit River based on their arguments regarding evidence of their trade with Upper Skagit. *United States v. Washington*, no. C70-9213 RSM, 2021 U.S. Dist. LEXIS 179117, at *40-41 (W.D. Wash. Sep. 20, 2021). There, this Court denied Lummi's citation to Dr. Lane's general report at USA-20, concerning tribal activities and behaviors, as enough proof, absent a specific reference to Lummi.

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USA-20 at 17. However, a statement from a report, such as USA-20, could be used alongside other concrete evidence to establish a tribe's range of travel for purposes of fishing. Again, the more general the evidence, the more additional and consistent indicia of regular use would be needed to bolster a general assertion in order to demonstrate use. The Court must also be careful to balance such general assertions with contraindications, such as the location of permanent villages of other tribes, or evidence of hostilities or exclusion.

Q.2-3: QUADSAK ISSUE

The S'Klallam generally join the Tulalip Tribe's answer to question 2, subsection (B), as well as question 3. The main exception, though, is the S'Klallam do not have sufficient evidence to form an opinion on Tulalip's answer to subsection (A) of question 2 or any of Tulalip's assertions regarding successorship of the Quadsak.

At trial, the experts discussed "Quadsak" (or "Qwadsak") at length, giving it a heightened appearance of relevance, but *no* party effectively linked Quadsak to any relevant issue, such as successorship, treaty status, extinction, or even definitely established whether Quadsak was a separate people or simply a village or location; therefore, this issue is not properly before the Court. Neither the Plaintiff nor the Defendant has pleaded successorship nor even demonstrated clearly that the Quadsak were a people or a place. The Quadsak issue also appears to be muddled with the primary rights issue—a separate issue, addressed below. Therefore, whatever happened to [the] Quadsak, requires too many assumptions and too much speculation.

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Q.4-6: PRIMARY RIGHTS ISSUES

A. **Q.4 -** Primary Rights Should Not Apply Here

The Court need not address primary rights here. The Stillaguamish's Request for Determination (RFD) does not mention primary rights as an issue, Dkt. # 4 at 8-9. No Tribe filed a cross-RFD alleging primary rights.[9] *See, e.g.,* Answers, Dkt # 26 (Muckleshoot); Dkt # 27 (S'Klallam); Dkt # 95 (Upper Skagit); Dkt # 96 (Swinomish); Dkt # 97 (Tulalip); Dkt. # 98 (Sauk-Suiattle).

It is easy, though, to understand how, given the testimony in the case, concepts of U&A fishing and primary rights can be muddled, especially since a goal is to preserve tribal treaty-time relationships. The evidentiary basis and historical background are both grounded in the Stevens Treaties and involve similar types of scrutiny regarding the historical, customary fishing practices as well as tribal territorial control within a particular area. Upon closer examination of these rights and case law, though, it is clear that U&A and primary rights are *legally* distinct. *See U.S. v. Lower Elwha Tribe*, 642 F.2d 1141, 1143-44 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 320 (1981) ("*Lower Elwha*"). At its core, a tribe's U&A is the right to fish within a particular territory based on proof of its regular and accustomed fishing, as reserved by the treaty, *Boldt Decision,* 384 F. Supp. at 332; a primary rights claim, though, while also derived from a treaty right, is a right to control territory based on historical *practices and relationships* among the tribes; it necessarily requires a *comparison*. *Lower Elwha*, 642 F.2d at 1143; *U.S. v. Washington*,

[9] This includes the attempts by Upper Skagit to back-door a "prior finding" of primary rights in Deception Pass and attribute it to Swinomish. Dkt. # 257 at 11 (Upper Skagit Tribal Brief). While the Court in that case refers to Swinomish's control of the area, no primary rights claim was officially pleaded or adjudicated, and the case cited by Upper Skagit was regarding the Suquamish Tribe's U&A. *See Upper Skagit*, 590 F.3d 1020.

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764 F.2d 670 (9th Cir. 1985) ("*Skokomish Case*"). Ultimately, a primary rights determination is whether a tribe has regulatory control *vis-a-vis* another or the right to exclude others within common U&A territory.[10] *Lower Elwha*, 642 F.2d at 1143-44.

B. **Q.5.** - Power to Regulate

While the two rights could theoretically be determined in the same case, the general confines of a tribe's U&A must be first established before deciding if primary rights exist or need to be addressed at all. *See* 642 F.2d at 1142. Typically, for a primary rights analysis, a court will look at Dr. Lane's four factors: (1) the proximity of the waterway to a tribe's population centers; (2) frequency of use and importance of the waterway to the tribe; (3) examination of contemporary concepts of control; and (4) evidence of a tribe's behavior that would be considered consistent with control of a territory. 642 F.2d at 1143 n.4. However, at this stage such an analysis is unnecessary as a primary rights claim has not been invoked.

C. **Q.6-7**. - Lower Elwha Klallam and Skokomish Cases Instructive

The S'Klallam join the Tulalip's answer to question 7, and provide the following additional response to questions 6 and 7 about shared U&A and primary rights:

In the *Lower Elwha* case, discussed above, both tribes were found to have possessed U&A in the disputed waters, but the Elwha was found to have 'home territory' there, as they were able to demonstrate--through the credible testimony of Dr. Lane--that at treaty-times (1855) the Klallam people both occupied *and* controlled the territory east of the Hoko River, such that any Makah fishing was *likely* only with express permission or by virtue of intermarriage. *Lower*

[10] If these claims were thought of as concentric circles, the U&A claim would be the broader circle with the primary rights claim a subset within.

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Elwha at 1143 (evidence of tribal custom enough). Again, in that case the Court had evidence of hostile interactions to make a primary rights determination.

Rather than risk adjudication, in the past tribes have separately forged settlements regarding primary rights and U&A claims, sometimes recognizing primary control by another tribe. In addition, the S'Klallam and Skokomish both possess U&A in Hood Canal, but these tribes have separately settled their dispute over regulatory control of Hood Canal through the Hood Canal Agreement, approved by this Court at *United States v. Washington*, 626 F. Supp. 1405, 1468-70 (W.D. Wash. 1985). Numerous other tribes have similarly settled claims, determining in some cases, who has primary rights to regulate fishing in certain territories or who has U&A in certain territory. *See, e.g.*, 626 F. Supp. at 1473 (order June 13, 1983) (settlement between Tulalip, Nisqually, Puyallup); 1474-76 (order July 8, 1983) (settlement between Tulalip and Swinomish); 1476 (order July 8, 1983) (settlement between Tulalip, Muckleshoot, and Suquamish); 1478 (order Aug. 12, 1983) (primary rights and U&A settlement between Tulalip, Lower Elwha, Port Gamble S'Klallam, Jamestown S'Klallam, and Skokomish).[11] Not only has the Court accepted these settlements, but it has upheld efforts to enforce their terms. *See, e.g., U.S. v. Washington*, 20 F. Supp. 3d 777, 825-26 (W.D. Wash. order Nov. 21, 2006). In prior cases, substantial evidence of actions taken by the primary tribe to deter others through actions such as social disapproval or magical retaliation, or even force, was

[11] The Tulalip has, at times, characterized their pre-shellfish settlement with Stillaguamish as not applying to shellfish. The S'Klallam contest that claim, as it would completely unhinge the multitude of U&A settlements the Tulalip signed with other parties. This would effectively require Tulalip to now adjudicate their U&A for shellfish if the prior agreements do not apply. *See* Dkt. # 255 at 5 (Tulalip Trial Br.) (stating that "Tulalip agreed to affirmatively support a Stillaguamish RFD regarding the taking of anadromous fish . . . .").

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specifically recognized as evidence that indicated which tribe possessed aboriginal control. *See United States v. Washington*, 393 F. Supp. 2d 1089, 1094 (W.D. Wash. 2005) (enforcement of Hood Canal Agreement), citing *United States v. Washington*, 626 F. Supp. at 1490 (Skokomish).

Q.8: DIRECT AND INDIRECT EVIDENCE

The S'Klallam join the Tulalip's answer to question 8(b). With respect to question 8(a), the S'Klallam's answer is that it depends factually on what a tribe's "use of marine resources" entails, the extent and duration of the tribal presence, as well as whether there is evidence that a tribe regularly used an area or its surroundings; such evidence includes placenames, stories, or Indian fishing and hunting trails. For instance, if a tribe demonstrates that is possessed a village near or adjacent to a waterway, that would be strong evidence of their use of the resources surrounding that village. The S'Klallam, for example, were specifically recorded as having erected villages near fishing sites. Proximity of a village location to a waterway is proof with a strong presumption that the tribe engaged in consumptive use of a vicinity's resources. *See, e.g.,* Skokomish's answer to question 11.

Q.9-10: SHELLFISH PROCEEDINGS, AND THE IMPACT OF ESTOPPEL

In question 9 the Court asks about the varying positions of tribes, depending on whether they are a plaintiff or defendant on a particular issue. In some instances, the different tribal positions have to do with the natural progression of the law of the case. In the particular example of the joint brief from Subproceeding no. 89-3, the issue was whether tribes had to prove U&A on a species-by-species basis. There is consistency of position within that brief in that the proof required was for "fishing purposes." Dkt. # 13696 (Subproc. 89-3) at 2.

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Here, the joint brief from Subproceeding no. 89-3 should be viewed in the context that the tribes (*except* Upper Skagit) had agreed to not seek U&A expansion. Dkts. # 13696, # 13744 (Subproc. 89-03). Stillaguamish did not join the stipulation. *See, e.g., United States v. Washington*, 873 F. Supp. 1422, 1427 (W.D. Wash. 1994) ("*Shellfish I*"). But estoppel does not operate when there are *unsuccessful prior* arguments that *did not modify* the law of the case. *See Hamilton v. State Farm Fire & Cas. Co*., 270 F.3d 778, 782 (9th Cir. 2001) (judicial estoppel *requires* the party to have succeeded in persuading the court to accept a prior, clearly inconsistent position).[12]

The answer to question 10 regarding why Stillaguamish was bound to the Shellfish Implementation Plan (SIP) is simply that *United States v. Washington* remains a single case with each treaty tribe possessing both overlapping and individual rights and responsibilities. Since this remains a single case, all parties to *U.S. v. Washington* are bound by all orders of this Court. *See, e.g., United States v. Washington*, 20 F. Supp. 3d 899, 959-960 (W.D. Wash. order Nov. 9, 2011) (outlining system due to case management with ECF but still "main case"); Dkt. # 20722 (main case) at 4-5 (order Nov. 14, 2014) (Court in Subproc. no. 09-1 discussing *U.S. v. Washington* as a "single case" with due process rights). In the Shellfish decision itself, the Stillaguamish was not discussed in the final order, given its lack of marine U&A, nor was it not an active participant, *Shellfish I*, 873 F. Supp. at 1427; however, they *are* named as represented in the RFD and presumably did not want to waive any future claim. Dkt. # 11305 at 11.

[12] For example, it is fair to say that Tulalip should be judicially estopped from denying that its U&A settlements apply equally to shellfish, as they have argued that the tribes understood the term "fish" to include "shellfish," and they were successful in that argument.

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Q.11: ESTABLISHED VILLAGE SITES, TRIBAL PRESENCE, AND ACCESS

The S'Klallam join the Tulalip's answer to question 11. Similar to the evidence presented by Upper Skagit, and those discussed in Skokomish Tribe's response to question 11, the S'Klallam had numerous villages and placenames along the Strait of Juan de Fuca and in the San Juan Islands, as depicted in Dr. Lane's reports, including the Port Gamble Report, a previously admitted exhibit in *U.S. v. Washington* at USA-M19.[13] Dr. Lane clearly documented that the S'Klallam were a large Tribe who fished widely and built villages near their fishing areas:

> The Klallam, like other Northwest Coast tribes, depend for their subsistence principally on sea food. The villages are always situated near some fishing grounds; still most people find it necessary to move several times each year to follow the various runs of salmon or to gather vegetable products. Although a village in this way may have several definite abodes during the year, the one where the permanent houses are built is considered the real home of the group.

USA-M19 (Port Gamble Report). There are numerous references supporting the extent of S'Klallam travel as well as evidence of their interconnected village locations in the northern and southern parts of their U&A. Information from ethnologists, such as Edward Curtis, described S'Klallam frequent and broad fishing practices within the region that ultimately became part of their U&A:

> The most powerful and warlike of all the Salish tribes on the coast of Washington were the Clallam, a group compromising about a dozen populous villages on the southern shore of the Strait of Juan de Fuca from Port Discovery on the east to Hoko creek on the west, as well as some settlements on the upper west coast of Whidbey island [sic] and the southern shores of the San Juan and Orcas islands.

[13] The S'Klallam move for this exhibit, USA-M19, from *U.S. v. Washington* to be added to the agreed exhibits in this subproceeding, as it could not have been foreseen that this topic would be presented in this manner and all other previously admitted exhibits have been agreed to by the parties.

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Id. at 16. Other references explicitly document the S'Klallam's use of areas such as Smith and Lummi Island. *Id*. at 17. Further, Dr. Lane's report included maps, such as the following, depicting numerous S'Klallam villages and placenames:

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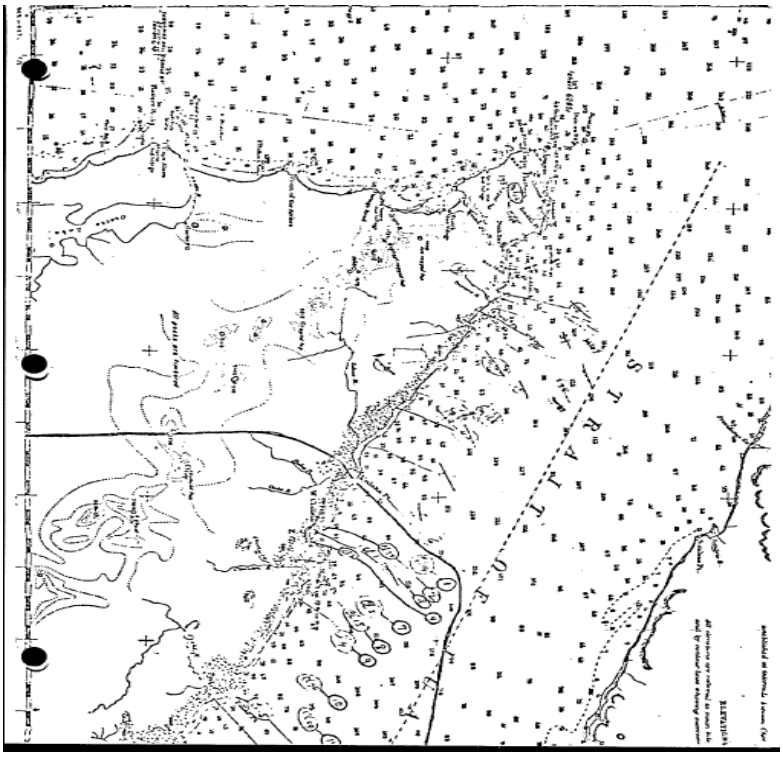

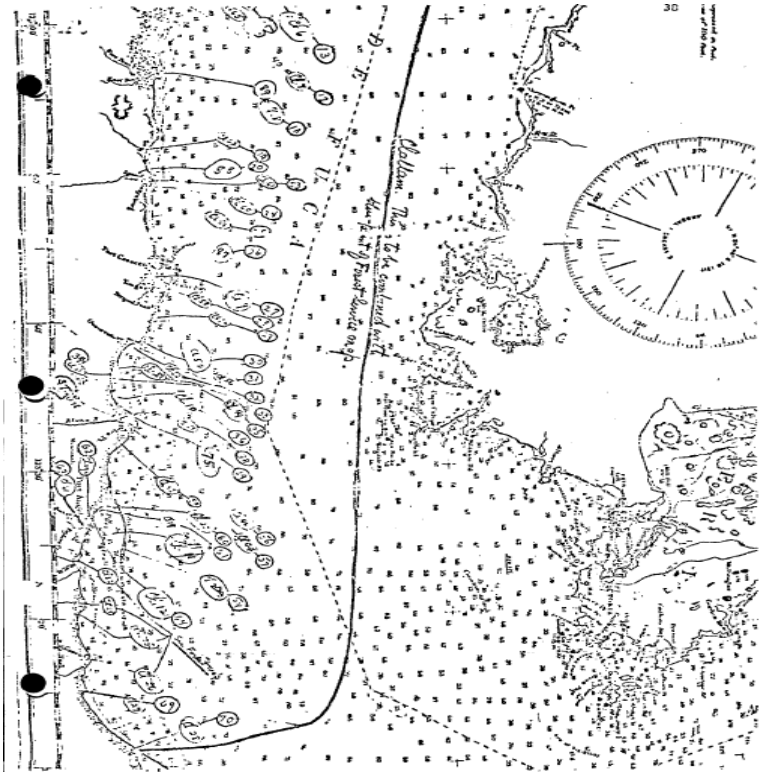

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The sheer number of the placenames clearly indicates that the S'Klallam's inhabitance and use was extensive and regular. In question 11(b) the Court asks about examples of "home territory" and "presence" that establish U&A. The S'Klallam U&A is an instructive example of extensive tribal presence, evidence of placenames, fishing and other indicia of regular fishing in waterways, such as the Strait of Juan de Fuca, the San Juan Islands, Lummi and Smith Island, and Hood Canal, which established unequivocal U&A. *See* USA-M19 (Port Gamble Report); *United States v. Washington*, 626 F. Supp. at 1442-43; *see also United States v. Washington*, 459 F. Supp. 1020, 1048-49 (W.D. Wash. 1978) (orders issued March 28, 1975, April 18, 1975). The frequency, extent, and duration of tribal travel is a factor, as is proof of interactions with other tribes in the locations claimed. However, if, fifty years into this case, tribal fishing incidental to travel were considered enough evidence to establish original U&A, the S'Klallam U&A certainly would extend much further into the South Sound and to the eastside of Whidbey Island. The point is, tribes, such as the S'Klallam, have extensive records of trade, raiding, and transit in areas much greater than the scope of their current U&A.

Q.12: LIMITED RECORD

The S'Klallam join the Tulalip's answer to question 12. However, the S'Klallam also add that Subproceeding no. 09-1 provides the most instructive standard for the Court to apply to the limited record in this case. *See* discussion, *supra*, Part I at 4-5. In 09-1, the presence of marine mammals alone was insufficient to establish U&A for the Quileute and Quinault far out in the open ocean, but there were other facts establishing their use and consumption of the whales and seals combined with the simple geographic fact that in the open ocean, it would be difficult to document a tribe's use. In this case, though, the geography is vastly different: the area is tightly

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inhabited, and there is evidence that a large number of different tribes (even the S'Klallam were documented in the area) used the disputed waters, including meeting Indian Agents at Penn Cove. Thus, regular tribal presence should be easier to document in this case than in 09-1. However, what is missing here, by comparison, is sufficient evidence linking the general to the specific evidence—general evidence of Indian shellfish use to the customs and habits of the Stillaguamish people which, it appears, would likely be present if Stillaguamish's use was regular enough and part of a regular pattern of resource procurement. Conversely, it is not entirely obvious that Stillaguamish should be denied all or any shellfish rights at least at the mouth of the river that bears their name.

Q.13: BASEBALL ANALOGY

The S'Klallam generally concur with the Tulalip's answer to question 13, but also provide the following recommendation:

The treaty was intended to preserve the pre-treaty relationships of the tribes. Therefore, in the Court's example of the Mariners use of Peoria and T-Mobile, these would be places where the Mariners would expect to continue to be able to play *considering* their use is commensurate with ownership rights or "home territory." None of the visitation sites, however regular, should grant them regular use of those sites, unless the Mariners have an explicit agreement in place establishing their use, or there are more facts establishing that the Mariners should be entitled to use the visited locations (rather than a mere license that can be withdrawn at any time; e.g., rental agreements, evidence of frequent use consistent with ownership, joint tenancy). The S'Klallam prefer to analogize the concept to one of property rights, such as adverse possession and

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permissive use or licensee rights.[14] When the boundaries between two landowners do not have a fence, each owner might use an area of the land belonging to the other without the other's knowledge. However, when a person's house is built on the land or when conflict ensues, such as an alleged trespassing, the parties are not likely to later be mistaken about ownership nor gain any permanent expectation of continued rights without some concession about ownership or other factors at play.

Q.14: PORT SUSAN

The S'Klallam generally concur with the Tulalip's answer to question 14, with the exception that the S'Klallam are uncertain about the successorship status of the Quadsak as it is not pleaded in this case.

Q.15: DISTANCE AND PROOF

Proximity cannot be the *only* factor. As seen in the Quileute and Quinault proceeding in 09-1, the Court concluded that both tribes traveled very far to procure resources based on the record evidence regarding ocean canoes, the location of the whales and seals, coupled with their use of mammals. *See* 129 F. Supp. 3d at 1079-80, 1082-86, 1089, 1091, 1117. In this case, however, one expert noted that a tribe traveled all day for one berry. After establishing the tribe used the area for fishing, the Court should consider other contraindications of regular use, such as existence of hostile neighboring tribes, encountering tribal villages, availability of similar resources closer to home, as well as the existence of other important resources.

[14] The S'Klallam are not suggesting adverse possession can acquire treaty rights, but that permission defeats this claim in property cases.

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Q.16: THE IMPACT OF THE LUMMI U&A DECISION ON THE STANDARD

With respect to question 16, the Ninth Circuit's recent Lummi decision has created insecurity for all tribes in their home territories, and it has severely harmed the S'Klallam who must compete for resources with a large tribe who was merely found to have likely transited to southern waters. The lasting impact of the *Lummi* case remains unknown. It is one of three Paragraph 25(a)(1) cases where the Court examined the record to determine what Judge Boldt meant by the "to" and "from" U&A description; the courts were left to interpret the confines of Lummi's U&A territory in their "connector" U&A. *Lummi III*, 876 F.3d at 1008-09. That standard is arguably not one to be strictly applied, particularly in a case where a tribe is attempting to establish new, Paragraph (a)(6) U&A in new territory. *See* discussion regarding standards, *supra*, Part I; *see also, e.g., United States v. Washington*, 193 F. Supp. 3d 1190, 1196 (W.D. Wash. 2016) (interpreting the "record" evidence from Dr. Lane regarding where Squaxin fished to understand what J. Boldt meant by "southern … Puget Sound.") ("*Squaxin*"). The *Lummi* ruling is an outlier: the Ninth Circuit decision appears to establish facts and simultaneously sidestep FF 14 as well as prior case law regarding travel. On that issue, there are also contrary decisions, leaving this Court with a conflict in how to address it. *Compare Lummi III*, 876 F.3d 1004 *with Upper Skagit,* 590 F.3d 2010; 871 F.3d 844 (adjacency and general travel evidence insufficient to support U&A); *Squaxin*, 193 F. Supp. 3d at 1196 (finding sufficient record evidence from Dr. Lane regarding fishing in South Puget Sound); 2021 U.S. Dist. LEXIS 179117, at *40-41 (finding vague evidence of trade insufficient to establish U&A).

Q.17: WEIGHT OF INCIDENTAL FISHING WHILE TRAVELING

The S'Klallam join Tulalip's answer to question 17.

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Q.18: ETHNOGRAPHIC OR ANTHROPOLOGICAL EVIDENCE

It is too hypothetical to try to ascertain if such evidence is required here, but it would be helpful to have multiple sources or different types of evidence with consistent information from different experts. Most, if not all, tribes presented several types of evidence, such as elder reports and placenames. It is case specific, though, whether sufficient evidence from other types of sources would be compelling.

Q.19: FAMILIAL RELATIONSHIPS

The S'Klallam generally concur with the Nisqually Tribe's answer to question 19. However, there are examples, such as the Hood Canal Agreement, where evidence indicated that tribal familial ties and relationships were so extensive, combined with close geographic proximity, such that the separate tribes recognized that there was no historical exclusion among these close-knit communities. *See* 626 F. Supp. at 1468-70. These tribes also recognized, themselves, that their pre-treaty relationship should be preserved.

III. CONCLUSION

For courts to help maintain treaty rights for all Indians, it requires that there be concerted effort by all parties to interpret U&A as existing at historical tribal fishing boundaries in 1855. When a tribe, such as Stillaguamish, requests expansion into territories fished by others for over fifty years (and indeed since time immemorial), there is inherent tension. More fishing territory for Stillaguamish, means fewer fish for those local tribes in their home territory. This pushes the expansion by other Tribes into the Strait of Juan de Fuca to make up their losses—creating a domino effect on the other tribes. The farther away a tribe's home territory is located from the particular waters at issue and the more expansive the territorial claim, the more the claim

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effectively dilutes the rights of those who possess permanent villages in the disputed area or the rights those tribes who concretely demonstrated with substantial evidence their frequent fishing there. As a result, the finding of additional U&A, after so much time has passed, severely impacts other tribes as well, like the S'Klallam.

Worse, though, would be for the Court to relax Judge Boldt 'customarily fished' standard necessary for U&A, such that it would encourage tribes to expand their claimed territory based on mere evidence of travel, with the result being dilution of every treaty right and the treaty terms themselves. *See Boldt Decision,* 384 F. Supp. at 356 (declaring that "usual" means "customary," "common," or "frequent," and that "accustomed" meant "often practiced"). Thus, while the *sheer duration of occupation* of the disputed area by all Indians, in general, might and probably should require the Court to find Stillaguamish had some shellfish U&A, based on logic or simple likelihood, this must be balanced against the already adjudicated village locations of the home tribes. Given the testimony and historical practices, it is all but impossible to find that at treaty times the Stillaguamish did not venture to the bottom of the river to eat shellfish, but how far they travelled and how often they actually fished at the permanent village locations of local tribes must be weighed when deciding if Stillaguamish's use was consistent with "customary" U&A fishing. Using property concepts, the Court should examine whether the Stillaguamish established enough facts to support a permanent and reasonable expectation that their use would continue after the treaty, such that their rights equitably would become the same as the rights of tribes who had permanent villages in the area. To put it plainly, the Court must decide where the area is in *between* the fences—what beaches did Stillaguamish regularly use or

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what resources were scarce enough nearby that it would compel them to regularly leave their homes to procure them elsewhere.

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