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.	Case No. C70-9213 SUBPROCEEDING: 17-0003 **INTERESTED PARTY NISQUALLY INDIAN TRIBE'S POST-TRIAL BRIEF**
STILLAGUAMISH TRIBE OF INDIANS, Petitioner, v. STATE OF WASHINGTON, *et al.*, Respondents.	

THIS MATTER involves Plaintiff Stillaguamish Indian Tribe's attempt to expand its usual and accustomed fishing grounds and stations into the interconnected marine waters of Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and Deception Pass in northern Puget Sound pursuant to the Court's continuing jurisdiction and its injunction of March 22, 1974, *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974)

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("Final Decision I"), as modified on August 24, 1993, November 9, 2011, and November 20, 2012. After a bench trial, the Court invited all parties to this sub-proceeding of *United States v. Washington* to submit post-trial briefing responsive to the Court's inquiries. *See* Dkt. #278 (listing 19 questions). Interested Party Nisqually Indian Tribe respectfully submits the following summaries of the law of the case.[1]

I. RESPONSES

The treaty tribes reserved the right to fish at their treaty-time usual and accustomed fishing grounds and stations (U&A). The establishment of these areas is fact dependent. Judge Boldt reasoned that U&A should be understood in terms of frequency of fishing, as it would be "by the Indian parties to the Stevens' treaties." Final Decision I, 384 F. Supp. at 332, 406. He held that a treaty tribe's U&A is comprised of "*every fishing location where members of [the] 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[.]" *Id*. at 332 (emphasis added). He reasoned fishing grounds and stations unfamiliar to tribal members; used infrequently, occasionally, or at long intervals, or only for extraordinary occasions; or for incidental reasons or by happenstance, such as waters trolled during transit, do not rise to waters "customarily" fished. *Id.* at 332, 353, 356.

The Court also considers whether a tribe has authority to manage or control fisheries when determining U&A. Besides a tribe's regular and frequent treaty-time use of an area for "fishing purposes," "[t]he determination of any area as [U&A] of a particular tribe *must consider all of the factors relevant to … any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe*." *United States v.*

[1] This post-trial brief is offered in the context of this sub-proceeding and its geographic scope. Nisqually in no way intends to suggest or argue that a tribe's already adjudicated claims of usual and accustomed fishing grounds and stations were wrongly decided or should be overturned.

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Washington, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) (emphasis added). A tribe with authority to manage or control certain fisheries—to invite or exclude others from fishing—has U&A in those waters.

These long-held judicial standards recognize that a tribe's U&A is grounded in treaty-time customs and authorities. Within this framework, Nisqually responds to certain of the Court's inquiries to ensure the Court is fully briefed on its past decisions pertinent to this dispute.

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

The Court has found instances where two or more tribes share overlapping U&A, and, in that circumstance, one tribe may have a primary right over their common fisheries such that it has authority to regulate the others' fishing. *See, e.g., United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698, 714 (9th Cir. 2010) (explaining that where two tribes claim U&A "fishing rights at the same location under two separate treaties signed with the United States …[,] the tribe that controlled the fishing ground at treaty time—to the exclusion of other tribes—enjoys primary rights there") (citations omitted); *see also United States v. Washington*, 626 F. Supp. at 1530 (Finding of Fact #379).

Notwithstanding, where multiple tribes do not share U&A and a tribe with U&A fishing rights permitted another tribe without U&A fishing rights to fish in the former tribe's U&A, that permission did not constitute a waiver of any rights or cessation of any U&A. Such permission did not establish co-located or joint U&A. For example, Judge Boldt in Final Decision I concluded the Yakama Nation has no U&A in Puget Sound despite historically fishing there with permission. *See* Final Decision I, 384 F. Supp. at 379–82, 412. He found that the Yakama used "fisheries located in the Puget Sound area for the purpose of obtaining

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salmon and steelhead for their subsistence and trade with other Indians.… They took these fish there by the consent of the tribes in that region." *Id.*, at 380–81, 412 (Finding of Fact #154 as amended). He continued, the Yakama's "treaty right to fish within the case area *is subject to the consent of other treaty tribes in whose usual and accustomed fishing places the Yak[a]ma Tribe also fished* at treaty times." *Id.* at 412 (emphasis added). A tribe cannot have U&A fishing rights simply because it was previously permitted to fish in the area.

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

The Court is tasked with evaluating credible evidence to determine whether, and, if so, how frequently and with what authority or permission, a tribe fished a specific water body at and before treaty times. *See, e.g., U.S. v. Washington*, 626 F. Supp. at 1531. When making this assessment, the Court should follow certain principles: "Each of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed … [by] the United States Supreme Court." Final Decision I, 384 F. Supp. at 331. That is, the treaty language must be construed as it was understood by the tribes and never to their prejudice. *See id.* (quoting *Jones v. Meehan*, 175 U.S. 1, 11–12, 20 S. Ct. 1 (1899)). Given that "[l]ittle documentation of Indian fishing locations in and around 1855 exists today," the Court "cannot follow stringent proof standards" when determining U&A "because to do so would likely preclude a finding of any such fishing areas," which would be inaccurate and unjust. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978).

"Indian fishing practices at treaty times were largely unrestricted in geographic scope." Final Decision I, 384 F. Supp. at 353. The treaty tribes reserved the right to fish

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wherever they customarily and regularly did so, regardless of distance from their "then usual habitat" or "home territory." *Id.* at 332. The proper question when bounding U&A, therefore, is not how far a tribe could travel, but how far it traveled regularly and customarily. *See, e.g.*, *United States v. Washington*, 730 F.2d 1314, 1318 (9th Cir. 1984) (concluding that although the Makah could and sometimes did fish 100 miles offshore, because the tribe customarily fished only 40 miles offshore, its U&A stops there).

The distance between a tribe's "home territory" and waters it claims as U&A can be best understood as a proxy for the likelihood that the plaintiff tribe had/has managerial authority and control over others' fishing the claimed waters. The closer a tribe was to a water body, the more likely that tribe not only had U&A there but also controlled others' access and ability to fish.

13b. Does professional baseball provide an apt analogy for thinking about a tribe's U&A? Where on this continuum do the Mariners switch from visiting usual and accustomed locations to visiting locations which are infrequent or occasional?

Nisqually appreciates the Court's effort to approach its U&A determinations in a logical, ordered, consistent, and fair manner; however, with respect, Nisqually does not believe an analogy to major league baseball, even our beloved Mariners, lends itself well to the complexity of treaty tribes, their sovereign nation status, and their unique, individual cultures built on customs and traditions existing since time immemorial.

Nisqually submits that "[b]ecause historical analogies can often be simplistic and misleading, the [C]ourt must evaluate the evidence in each successive case on its own merits." *See United States v. Washington*, 1989 U.S. Dist. LEXIS 19282, at *52 (W.D. Wash. Feb. 23, 1989) (citation omitted). The Court thus should continue making its U&A determinations based on a tribe's unique fishing practices at and before treaty times understood in the context of its familiarity with and regularity of fishing the claimed waters and the customs of any

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surrounding tribe(s) that could have restricted the former from fishing there. *See U.S. v. Washington*, 626 F. Supp. at 1531.

The Court's inquiry ponders when the frequency of a tribe's fishing rises to the level of a customary practice—an ultimate decision with which Nisqually understands the Court has much experience. "Isolated or infrequent excursions … do not meet the 'usual and accustomed' standard." *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 434–35 (9th Cir. 2000). Nor do "incidental" or "occasional" fishing trips or those taken for extraordinary circumstances, such as a lack of catch closer to home. *See id.*; *see also* Final Decision I, 384 F. Supp. at 332, 353, 356; *United States v. Washington*, 730 F.2d at 1318. Furthermore, the Court recently noted that "the Ninth Circuit has not held that evidence of travel for trade alone is sufficient to support a finding" of U&A. *United States v. Washington*, 2021 U.S. Dist. LEXIS 179117, at *40 n.13 (W.D. Wash. Sep. 20, 2021) (explaining evidence of trade does not prove regular and customary use for fishing purposes of waters claimed as U&A). More is needed to establish U&A.

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?

Significantly, U&A cannot be established in waters used by a tribe unless a purpose of the tribe's treaty-time use of those waters was regular and customary fishing. *See United States v. Washington*, 626 F. Supp. at 1531. "It was normal for all of the Indians in western Washington to travel extensively either harvesting resources or visiting in-laws[.]" *Id.* at 1529. Both fishing while traveling and for trade, without more, are insufficient to establish

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U&A. *See, e.g.*, Final Decision I, 384 F. Supp. at 353; *United States v. Washington*, 2021 U.S. Dist. LEXIS 179117, at *40 n.13.[2]

19. How should the Court attribute smaller shifts at the family level to tribes as a whole?

Judge Boldt made his U&A determinations with an understanding of tribal family dynamics at treaty time. *See* Final Decision I, 384 F. Supp. at 351. He found generally that, during non-winter months, "individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, hunting, gathering roots and berries, and agricultural pursuits. 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." *Id*. He understood that an individual tribal member's access to resources could be improved through inter-tribal marriage, but such marriages would not have affected the U&A of the natal tribe of either spouse. For example, the Yakama Nation "intermarried as far north as the Skokomish," but the Yakama have no U&A in Puget Sound. *Id*. at 412. The Court therefore should not extrapolate from evidence of a family's shifting dynamics or seasonal movements at treaty-time to a conclusion of where an entire tribal community regularly and customarily fished.

I. CONCLUSION

The Nisqually Indian Tribe appreciates the Court's invitation to answer these critical questions, which have arisen during this sub-proceeding but could have lasting implications.

[2] In rare circumstances, the Court has found U&A in part based on evidence of travel where the waters transited were thoroughfares connecting established U&A, indicating the thoroughfares, too, were customarily fished. *Compare Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1135 (9th Cir. 2015) (holding Judge Boldt did not intend to exclude certain waters, which were public marine thoroughfares, from the Suquamish Indian Tribe's U&A where there was evidence Squamish fished there), and *United States v. Washington*, 2021 U.S. Dist. LEXIS 179117, at *37–39, 43 (concluding the Lummi Nation lacks U&A in waters that provide an illogical route between its U&A).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties registered in the Court CM/ECF system.

DATED this 3rd day of June, 2022, at Seattle, Washington.

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