The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	No. 70-9213 Subproceeding No. 17-3 **SWINOMISH'S POST-TRIAL BRIEF**

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I. INTRODUCTION

Stillaguamish's claim to saltwater U&A is unsupported by evidence of actual fishing in saltwater, and the claim should be denied because such evidence is required. Stillaguamish relies on the testimony of an expert who offers only a speculative re-interpretation of the evidence Barbara Lane opined on fifty years ago. This Court should reject the claim because the inferences Stillaguamish asks the Court to draw do not rise above speculation, and because finality is important to the fair management of this litigation for all parties.

In this brief we address all of the Court's 19 Questions, many of which arise from the unsupported inferences Stillaguamish asks the Court to make. We have taken the liberty of re-ordering our answers to the Court's questions, but the Table of Questions above at p. ii identifies the page(s) at which each question is addressed.

II. STILLAGUAMISH'S QWADSAK TERRITORY CLAIM

A. Stillaguamish's renewed claim to Qwadsak territory (Q2 & Q3).

At and before treaty time, Stillaguamish was an upriver tribe. At trial Stillaguamish disregarded its upriver identity and insisted that the Qwadsak area was the center of its territory. *See, e.g.*, SW-169 at pdf 41, 96 [pp. 39, 94]; SW-170 at pdf 2, 6 [pp.1, 5]; Tr. 3/21 at 96:8-11. But the evidence presented at trial proves that at treaty time the inhabitants of the Qwadsak area were their own tribe, the Qwadsak, and not Stillaguamish. *See, e.g.*, SW-11; SW-169 at pdf 188 [p.186] & n.236; SW-176 at pdf 12-14 [LANEST 000483-83].

To our knowledge, no party contests that the Qwadsak ceased to be an organized tribe at some time (**Q2**). No tribe claims to be a successor to the Qwadsak tribe: Certainly Stillaguamish does not do so; it denies the existence of the Qwadsak tribe.[1] And it does not matter whether the Qwadsak tribe was a treaty tribe (**Q3**).

[1] Regardless, Stillaguamish has not pled and cannot argue that it succeeds to the Qwadsak tribe's rights; a merger claim would require Stillaguamish to "show that the two tribes or cohesive bands thereof consolidated or merged and demonstrate also that together they maintain an organized tribal structure." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990). There is no such evidence.

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What matters is that Stillaguamish cannot establish by a preponderance of the evidence that it occupied the Qwadsak area at treaty time. The existence of the Qwadsak tribe refutes the premise of the Stillaguamish U&A claim, which is that at treaty time the Qwadsak area was home to Stillaguamish's permanent winter villages and the base of its alleged marine fishing activities. *See, e.g.*, SW-169 at pdf 41, 96 [pp.39, 94]; SW-170 at pdf 2, 6 [pp.1, 5]; Tr. 3/21 at 111:11-17 (Dr. Friday: locating Stillaguamish villages in the Qwadsak area is "a principal part" of his opinion that the Stillaguamish fished marine waters at treaty time). The Court need not determine what became of the Qwadsak tribe to determine that Stillaguamish has not proven that it occupied the Qwadak area.

B. Other evidence presented.

As the Court noted during trial of this subproceeding, U&A claims must be supported not only by evidence of presence on a regular, routine basis, "but also evidence of actual fishing, because that's kind of what's developed over the years in this particular case." Tr. 03/24 at 98:18-21. But at trial Stillaguamish did not present *any* evidence of actual fishing. There were no accounts by Stillaguamish informants or witnesses describing fishing practices or fishing locations in marine waters; no eyewitness accounts of Stillaguamish fishing in marine waters; no evidence of fishing infrastructure such as weirs or traps in marine waters; no evidence of actual use of marine fishing technologies in an identified place; and no anthropological or ethnographic accounts of Stillaguamish fishing in marine waters. Notably absent from the record in this case is any evidence of Stillaguamish actually fishing in marine waters at or before treaty times, let alone doing so on a regular basis, a point Stillaguamish's expert repeatedly conceded at trial. See below at n.8. Nor is there evidence of Stillaguamish traveling in marine waters for purposes of fishing (other than Dr. Friday's unsupported opinion, contrary to the expert opinions of Dr. Lane and Dr. Snyder). Dr. Friday did not document even a single instance of Stillaguamish people traveling in marine waters for the purpose of fishing.

What Stillaguamish offers instead of evidence of actual fishing, and stripped of the hundreds of pages of story spun by Dr. Friday, is fairly summarized as follows:

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- Stillaguamish claims the Qwadsak area as its territory and, based on this territorial claim, argues the Court should infer that it fished the nearby waters of Port Susan (notwithstanding Sally Snyder's clear opinions to the contrary), the more distant waters of Skagit Bay, and still more distant marine waters beyond.
- Esther Ross made expansive mainland territorial claims for Stillaguamish. Ms. Ross was born well after treaty time, was raised in California, made her statements in the course of various legal proceedings, and never identified a Stillaguamish marine fishery.
- Stillaguamish were Coast Salish and so "could have" fished marine waters, and therefore, according to Stillaguamish, the Court should infer that Stillaguamish "would have" fished marine waters.
- Stillaguamish were Coast Salish and so "would have" from time-to-time traveled on the Salish Sea, engaged in seasonal rounds, and married exogamously, which "would have" given Stillaguamish access to marine resources.
- Two Swinomish predecessor informants briefly speculated about Stillaguamish persons or places on Camano Island (without identifying place names or mentioning fish or fisheries), and from this it can be inferred that Stillaguamish fished the claimed waters.
- Barbara Lane speculated off-the-cuff, in the course of a subproceeding concerning the U&A of another tribe, and without reference to anything other than the Stillaguamish claim to Warm Beach, that Stillaguamish fished in Port Susan.

None of this is evidence of actual fishing, and though stringent standards of proof do not apply in these proceedings, *some* evidence of fishing always has been required.

III. STANDARD OF PROOF, EVIDENTIARY ISSUES, AND INFERENCES

The discussion below begins by discussing evidentiary standards and inferences of various kinds, and then turns to the Court's questions on travel and primary rights. We conclude this section by addressing the Court's baseball analogy.

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A. "True" Standards (Q18).

A tribe's usual and accustomed fishing grounds are "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." *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) ("Final Decision 1"). The treaty term "usual and accustomed" locations excludes areas of "occasional or incidental" use, "unfamiliar locations[,] and those used infrequently or at long intervals and extraordinary occasions." *Id*. at 332, 356.

Although "the stringent standard of proof that operates in ordinary civil proceedings is relaxed," *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988), the tribe asserting treaty fishing rights bears the burden of proving by "a preponderance of the evidence found credible and inferences reasonably drawn therefrom" that a particular area was U&A for the tribe at or before treaty times. Final Decision 1 at 348; *see also United States v. Washington*, 88 F. Supp. 3d 1203, 1217 (W.D. Wash. 2015) ("settled law of this case [is] that each tribe bears the burden to produce evidence to support its U&A claims"). "While remaining mindful of the practical difficulties, the Court is still to make 'its findings on a more probable than not basis.'" Order Denying Motions for Summary Judgment and Motion to Exclude Testimony, Subp. 17-3, Dkt. 252 at 12 (quoting *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015)).

Thus, by a preponderance of the evidence, the tribe asserting U&A must prove (i) regular or customary (ii) actual fishing (iii) at an identified location (iv) at treaty time. This is a "true" evidentiary standard (**Q18 pt.1**).

The preponderance standard is also a "true" standard. It must be satisfied by either "direct evidence [or] reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show the *probable* location and extent of their U&As." *United States v. Washington*, 129 F. Supp. 3d at 1110 (emphasis added). To be reasonable, an inference requires supporting probative evidence – some *evidence* that tends to make the

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proposition in question probable. *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1982) (the proposition that "an inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on the evidence but is pure conjecture and speculation" is "undoubtedly sound"). For a reasonable inference here, it is not enough to show only the *possibility* of fishing or location ("could have" or a conclusory "would have") at treaty time. Rather, there must be a preponderance of evidence of *probable, regular fishing* at an identified location. The bare speculation of an expert is not sufficient, without more, *Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC*, 331 F. Supp. 3d 1131, 1148 (D. Idaho 2018) ("[m]ere speculation is insufficient to support an expert opinion"); *Pierson v. Ford Motor Co.*, 445 Fed. Appx. 966, 968 (9th Cir. 2011) (same), particularly when that speculation is inconsistent with Barbara Lane's opinions about the same old evidence.[2]

In answer to **Q18 pt. 2**, although ethnographic or anthropological evidence has never been strictly *required* (emphasis in question), the Court never has awarded U&A in the absence of at least some evidence of actual fishing in the form of ethnographic or anthropological evidence. Over the course of this case, Barbara Lane prepared at least one detailed anthropological report for every tribe (including Stillaguamish), and she relied upon historical documentation, ethnography and other sources documenting actual fishing. In later U&A proceedings, other experts prepared detailed anthropological and/or ethnographic work that included evidence of actual fishing in specific marine waters. We submit that the reason anthropological and ethnographic data has played such a prominent evidentiary role in U&A cases is that anthropologists and ethnographers are expertly trained in gathering, collating, and interpreting precisely the type of information (information relating to treaty-time fisheries locations, technologies, terminology, species harvested, and ownership, obtained directly from native informants and/or field research, including archeological work) directly relevant to proving U&A, and are best-positioned, long after treaty-time, to do so.

[2] The law of fishing while traveling fits within this framework. We have addressed fishing while traveling (**Q16**) below at pp.13-15.

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In any event the Court has never awarded U&A simply because a tribe "could have" fished in a particular area.[3] To adopt that rule would be to re-make the law of *United States v. Washington*.

B. Inferences, presumptions and inversion of the burden of proof.

This subproceeding is an outlier. For the first time in the 50-year history of *United States v. Washington*, a party has proceeded to trial with no evidence of actual fishing to support contested U&A in the specific waters claimed in its RFD. Because Stillaguamish has no direct evidence, it purports to rely on reasonable inferences.

But to repeat, an inference is not reasonable if it is not a valid conclusion grounded in probative evidence – that is, if it is no more than "tenuous speculation." *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991); *see also Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1985) (reasonable inference "cannot be supported by only threadbare conclusory statements instead of significant probative evidence"). In other words, the Court may not "infer" new facts. *Intel*, 952 F.2d at 1559 n.4. Upholding this principle is especially important where, as here, the inferences Stillaguamish asks the Court to draw are inconsistent with the conclusions articulated by acknowledged experts in the field on consideration of the same documentary evidence and ethnographic source materials.

1. Presumptions and inversion of the burden of proof

One of Stillaguamish's responses to its lack of evidence of actual fishing is to assert that "there is no reason it would not have" fished the claimed waters. This rhetorical fallback seeks to invert the burden of proof.

By way of illustration: At trial Dr. Friday was confronted with his Figure 36 (*see* SW-169 at pdf 143, text p. 141), which conflates the Jackson Harvey informant testimony

[3] Indeed, the Court has disparaged anthropological evidence considerably more robust than Dr. Friday's "could have fished" claims. *See United States v. Washington*, 19 F. Supp. 3d 1126, 1133-34 (W.D. Wash. 1994) (Subproceeding 89-2). On cross-motions for summary judgment, Lummi offered an affidavit from Wayne Suttles to prove its asserted U&A in the eastern waters of the Strait of Juan de Fuca. Despite Suttles' eminent standing in the field, Judge Rothstein found Suttles' affidavit "plagued by fundamental weaknesses" and "remarkably devoid of any reference to specific evidence on which he relied in reaching [his] opinion[.]" *Id.*

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about *Stillaguamish* freshwater fishing techniques with evidence about *Swinomish* saltwater fishing techniques. After this mischaracterization was unmasked, when asked whether it was still his opinion that Stillaguamish used freshwater fishing technologies to fish in saltwater, Dr. Friday said he saw "no reason to expect that they would not have." Tr. 3/23 at 93:8-21 (Friday).

The Court must reject this threadbare argument. To authorize an inference on such grounds would place on the responding tribes the burden of establishing why the conduct asserted did not happen. Such an inversion of the burden of proof would be an extraordinary and unprecedented departure. It also would undo the settled expectations in tribal and non-tribal fisheries throughout the Puget Sound.

2. Inferences from Coast Salish practice (Q1 & Q12.a)

"[E]vidence of practices that were characteristic of all Coast Salish tribes" (**Q1**) may be relevant to this Court's determination of the U&A of a specific tribe in specific waters, but by itself is of little determinative value and is not sufficient. There must be some evidence that the specific tribe actually engaged in fishing in the location in question.

To be clear: evidence of the cultural, economic, and fishing practices of a given tribe at treaty time are relevant to the Court's determinations as to whether that tribe "customarily fished" particular grounds or stations at and before treaty times; Barbara Lane's reports are full of this sort of information. *See, e.g.*, USA-74 (detailed ethnographic information about Swinomish, Lower Skagit and Kikiallus fishing practices, techniques, and species taken provides evidence of actual fishing in Skagit Bay and other waters); USA-28 at pdf 23-25 [pp.21-23] (detailed ethnographic information about Stillaguamish fishing practices, techniques, and species taken provides evidence of actual fishing in Stillaguamish river). But evidence of Coast Salish practices generally, without probative evidence that a specific tribe engaged in fishing in the waters in question, cannot support a finding of U&A for that tribe in those waters.

The Stillaguamish argument is:

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Stillaguamish Tribe = Coast Salish = Characteristic cultural practices (travel, exogamy, seasonal rounds) = Unlimited U&A.

This argument proves too much, gives the Court no way to draw lines, and would likely lead to re-litigation of the many lines drawn over the past 50 years. Virtually all of the tribes subject to this Court's continuing jurisdiction in *United States v. Washington* are Coast Salish tribes (and those that are not had similar characteristic practices). If being Coast Salish is enough to establish U&A, then all treaty tribes would have U&A in all waters. This approach would lay waste to the last 50 years of jurisprudence. The result would be unjust and unprecedented.

The law of the case does not require a result so extreme as that anticipated by the Court's question (**Q12.a**) about whether exacting proof as to every tributary or harbor is required. Some U&A determinations are based on very specific evidence of species taken or technologies used at specific locations. *E.g.*, USA-74 (detailed proof of fishing locations supplied in support of Swinomish U&A); USA-30 (detailed evidence regarding Lummi's traditional reef net fishery). Other U&A determinations are based on less specific evidence about species taken or technologies used at specific locations. *See, e.g.*, USA-28 (general proof of riverine fisheries accepted to establish Stillaguamish U&A on Stillaguamish river "system"). The Court's precedents do not state a rule as to the degree of precision required in geographic proof. But something more than what Stillaguamish presented at trial has always been required: evidence that Stillaguamish "could have" fished the saltwater east of Whidbey Island at treaty times is not sufficient to establish U&A. For example, in litigation regarding Makah's offshore boundary, this Court determined that "[the magistrate was] clearly erroneous in concluding that capability of travel was the test for [U&A]. Tr. 1/1/83 at 6:23-7:2. The Ninth Circuit agreed, holding that even though the Makahs were capable of traveling up to 100 miles from shore at treaty time and would do so if the catch was insufficient closer to shore, "[t]here is no basis for an inference that [the Makahs] customarily fished as far as 100 miles from shore at treaty time." *United States v. Washington*, 730 F.2d 1314, 1318 (9th Cir. 1984). Also, even where there was record evidence that Quileute actually traveled to Tatoosh Island to visit and to

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fish, this Court found that Quileute's northern boundary was at Cape Alava because "the evidence, and inferences drawn from it, [did] not support the claim" to customary fishing at Tatoosh Island. Subp. 09-1, Dkt. 369 at 57 (FF 2.1). Makah controlled Tatoosh Island at treaty time, the Quileute fishing evidence was post-treaty, and a single ambiguous statement Quileute relied upon did not give rise to a reasonable inference. *Id*. at 58-63 (FF 12.2-12.11). The evidence here surely is insufficient as well given that there is no evidence of fishing at all.

Like all factfinders in all cases, this Court in making its U&A determinations is weighing probabilities (**Q12**) and attempting as best it can to reconstruct the past from the available record. As the Court's standards in this case acknowledge, the standard of proof is somewhat relaxed here: neither photographic evidence, nor eyewitness testimony, nor even exacting proof is required. But there still must be *some* evidence of *actual*, *regular* fishing. It is not enough to show the *possible* location of U&A. Stillaguamish must establish that it is more probable than not that it *did* fish on a customary basis in each of the claimed waters. It always has been and remains the case that a tribe seeking to establish U&A must "show the probable location and extent of their U&As." *United States v. Washington*, 129 F. Supp. 3d at 1110.

3. Inferences from presence or proximity (Q8, Q10, Q11, Q12.b-d, Q15)

The Court's questions about inferring fishing from "presence" or "proximity" illustrate the need for probative evidence, as opposed to speculation cloaked as "inference." **Question 11** asks whether the Court has previously concluded that "tribes 'took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent'" to their established villages, citing *United States v. Washington*, 873 F. Supp. 1422, 1449, 1450 (W.D. Wash. 1994), *aff'd in part, rev'd in part sub nom* 157 F.3d 630 (9th Cir. 1998) (as amended) ("Shellfish Subproceeding"). The answer is No. In the Shellfish Subproceeding, the Court found that a specific tribe took fish from specific waters based on evidence of actual fishing, not based on adjacency. The Court neither generalized about U&A in waters adjacent to established villages nor made any inference about fishing in adjacent waters. Rather, the Court

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made specific findings about Upper Skagit's U&A based on the evidence presented. *See* 873 F. Supp. at 1449-50. **Question 11.b** asks whether most U&A decisions are premised primarily on presence and access. The answer is No: Most U&A decisions are based on a preponderance of evidence of actual fishing in a particular place on a regular and frequent basis.

Further details from the Shellfish Subproceeding and also from the Tulalip supplementary U&A proceeding (Subp. 80-1) are instructive:

In the Shellfish Subproceeding, in contrast to the argument advanced here by Stillaguamish, the Court's U&A determination was based on substantial and specific evidence of actual fishing on a regular and frequent basis. As documented by Dr. Bruce Miller's 1994 Upper Skagit Shellfishing Report (UPS-31, re-admitted herein) and trial testimony: (1) with specific citations to primary sources, Collins documented that Upper Skagit groups gathered for subsistence purposes at specific places on marine shorelines, *e.g.*, Utsaladdy on Camano and in the vicinity of Penn Cove, and described specific saltwater species and techniques used, UPS-31 at pdf 12, 14 [pp.9, 11]; (2) numerous Collins, Snyder, and Miller field notes or interviews with Upper Skagit informants described regular Upper Skagit shellfishing practices, including specific locations, species taken, practices and technologies, and frequency, *id.* at pdf 18-21, 23-25, 29, 32-36 [pp.15-18, 20-22, 26, 29-33]; (3) with specific citations to primary sources, Suttles placed an Upper Skagit predecessor in southwestern Skagit Bay, listed place names, and discussed species taken at specific locations, *id.* at pdf 21-22 [pp.18-19]; (4) Osmundson identified specific places where Upper Skagit clammed, *id.* at pdf 23 [p.20]; and (5) Dr. Miller relied on statements from several informants identifying specific locations and species taken in and around Deception Pass to support a reasonable inference that Upper Skagit regularly fished there. Stillaguamish did not present anything like that in this trial.

In Tulalip's supplementary U&A proceeding, this Court determined that Tulalip had U&A in certain waters to the north, west, and south of Whidbey Island and in Port Susan and the Stillaguamish River. While the Court noted that identifying specific marine fishing locations may be difficult, it did not rest its findings on the fact that Tulalip "used and occupied

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territories" adjacent to the claimed waters. Instead, among other things it found that: (1) Tulalip had specific named places in that territory; (2) it was "well-documented," including by affidavits from tribal informants from different tribes, that Tulalip traveled annually from its home grounds in Puget Sound to the San Juan Islands and the Fraser River "to engage in the salmon fisheries"; and (3) there was evidence that Tulalip frequently traded at Fort Langley near the Fraser River, that these trips took 2-4 weeks, and that *Tulalip actually fished* along the way. *United States v. Washington*, 626 F. Supp. 1405, 1527-32 (W.D. Wash. 1985), *aff'd United States v. Lummi Indian Tribe*, 841 F.2d 317, 318-20 (9th Cir. 1988). None of this is true with respect to Stillaguamish.

We have carefully reviewed the record and, with an important caveat, have not found an example where a tribe had a shoreline village but was not awarded U&A in adjacent waters (**Q11.a.i**). We also have found no example where U&A was found based on sustained and regular presence on the shoreline of a water body (**Q11.a.ii**). The caveat here – and the common thread in these two answers – is that U&A awards in waters adjacent to shoreline villages have always been based on evidence of actual fishing in the adjacent waters on a regular and frequent basis – never on proximity alone. The U&A determination for Nisqually in Final Decision 1 provides a useful example. Lane's Report on the Nisqually notes a village location at the mouth of the Nisqually River. USA-25 at pdf 6, 26 [pp. 4, 23] (citing, separately, Waterman and Smith). There was also evidence of *actual fishing* in the adjacent saltwater from both Nisqually informants (USA-31e at pp. 200-202) and Carroll Riley (G-23 at II-18-19). Final Decision 1 determined that Nisqually U&A included "the saltwater areas at the mouth of the Nisqually River and the surrounding bay," citing *inter alia* Lane's Report and the exhibits containing the evidence of actual marine waters fishing by Nisqually in that location. *See* Final Decision 1 at 369 (FF 86).

We do not mean to suggest that proximity and distance are wholly irrelevant. (**Q12.c.**) The Court has, for example, stated that Western Washington Indians at treaty times "used the fishing areas in closest proximity" to their winter villages. *United States v. Washington*, 626 F.

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Supp. at 1528. Even if applicable in this case, that general statement about proximity means only that Stillaguamish used the freshwater fishing areas near their upriver winter villages. And even if the Court were to ignore Suttles' informants Ruth Shelton and Suzy Peters that Qwadsak was not occupied by Stillaguamish at treaty time and accept the Stillaguamish argument that the potlatch site at Warm Beach was theirs, there is still no basis to infer customary fisheries in Port Susan, near Warm Beach, because there is no evidence in this record that northern Port Susan, a mud flat, was an aboriginal fishing area.[4] Sally Snyder believed that Warm Beach was a Stillaguamish site, but nonetheless testified that the Stillaguamish did not fish in saltwater. Further, the only evidence about actual Stillaguamish fishing is in Wayne Suttles' notes on information received from Jackson Harvey, which squarely locates Stillaguamish, its villages, and its fisheries upriver. This is the information that Barbara Lane relied on in providing her opinions on the Stillaguamish fisheries, and this is the information that Dr. Friday called a "critical source". Proximity may be considered – together with evidence of actual fishing, like the Jackson Harvey informant testimony – in determining whether a tribe customarily fished specific waters. But it is just one factor. The Court never has stated that proximity is a proxy for evidence of actual fishing, and the Court should not now create new law of the case so holding, in effect changing the standard of proof.

The required proof does not vary, and no distinction should be drawn, according to distance (**Q12.d**; **Q15**). We submit this is made clear in the Court's definition of U&A, which entails "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*[.]" Final Decision 1 at 332 (emphasis in original).[5]

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[4] Dr. Friday testified that oysters from the northern part of Port Susan were undesirable. Tr. 03/22 at 49:1-9 (Friday).

[5] **Question 15** appears to assume that travel to more distant locations requires procurement of provisions en route. There is no evidentiary basis for that assumption, at least as to Stillaguamish. There was no evidence presented at trial of fishing while traveling other than Dr. Friday's speculation, and Upper Skagit's expert testified that in his opinion the Sallie Oxstein party ate food they brought with them while en route to Fort Victoria. Tr. 4/11 at 64:11-19, 65:12-18 (Miller).

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Presence, access, and ability, combined with the general presumption that tribes used the resources available to them, never has been, and should not be, sufficient to establish U&A—evidence of actual fishing is required (**Q11.a.i**; **Q12.b**). As noted at pp. 16-17 below, whether another tribe has a primary right in a given area is immaterial to the determination of U&A.

In answer to **Question 8**: There must be evidence of actual fishing on a regular basis at an identified location, whether shoreline or a body of water. Presence on the shoreline of a marine water body, regardless of frequency, is neither determinative nor a proxy.

C. Travel (Q16, Q17)

In Final Decision 1, Judge Boldt determined that "occasional and incidental trolling [while traveling] was not considered to make the marine waters traveled thereon the [U&As] of the transiting Indians." Final Decision 1 at 353 (FF 14); *see also United States v. Washington*, 626 F. Supp. at 1531. This Court has continued to apply this rule ever since Final Decision 1. *See, e.g., United States v. Washington*, 20 F. Supp. 3d 986, 1039-54 (W.D. Wash. 2013), *aff'd*, *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015); *United States v. Washington*, 20 F. Supp. 3d 828, 831-41 (W.D. Wash. 2007), *aff'd*, *Upper Skagit*, 590 F.3d 1020. The Ninth Circuit has affirmed this principle. It has held that fishing must have occurred "with regularity" rather than on an "isolated or infrequent basis" to give rise to U&As. *Muckleshoot III*, 235 F.3d at 434. And it has held that incidental trolling while travelling for purposes other than fishing does not establish U&As along the travel route absent other evidence of fishing activity. *United States v. Lummi Indian Tribe*, 841 F.2d at 320 ("[w]hile travel through an area and incidental trolling are not sufficient to establish [U&As], *frequent* travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters" [internal citation omitted] [emphasis in original]). (**Q17**)

The Ninth Circuit did not change these well-settled principles of law in *Lummi I*, 235 F.3d 443, *Lummi II*, 763 F.3d 1180, or *Lummi III*, 876 F.3d 1004 (**Q16**). As this Court noted last year, "the Ninth Circuit has not held that evidence of travel for trade alone is sufficient to

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support a finding that Judge Boldt intended for the traveled waters to be included in a tribe's U&A." Order on Pending Motions, Subp. 19-1, Dkt. 79 (Sept. 20, 2021) at 18. The *Lummi* trilogy did discuss geography and a travel path on the west side of Whidbey Island between Lummi's northern and southern customary fisheries, but reaffirmed the principle that "U&A cannot be established by occasional and incidental trolling in marine waters used as thoroughfares for travel." *Lummi III*, 876 F.3d at 1007-1010 (internal quotations omitted); *see also Lummi II*, 763 F.3d at 1187. They emphasized that the reason Lummi has U&A along its travel path on the west side of Whidbey is because there was evidence before Judge Boldt that its travel was accompanied by customary fishing. *Id.* But no such evidence exists in this case.

In this subproceeding, Stillaguamish makes breathtaking and expansive claims of treaty-time travels throughout the Salish Sea and of fishing along the way. Dr. Friday testified that the Stillaguamish traveled to and from Holmes Harbor, Penn Cove, and Utsaladdy during internment and traveled to Bellingham Bay, Port Townsend, and the Olympic Peninsula for ceremonial purposes; Camano Island to gather berries; Fort Victoria, Fort Langley, and Fort Nisqually to trade; the southern portion of Vancouver Island to gather camas; Port Gamble and Seattle to trade and visit family; Olympia to get baptized; and Cowichan territory on southern Vancouver Island and to Guemes Island to visit relatives. Tr. 3/22 at 60:16-20; 65:14-66:1; 66:2-20; 66:23-67:4; 70:12-73:2; 76:2-10; 79:5-17; 105:14-15; 114:4-24; 121:20-25; 128:25-129:1; 139:16-141:1 (Friday). But the evidence at trial did *not* establish that the Stillaguamish tribe actually traveled to all of these places at or before treaty time, let alone that they did so on a regular or customary basis.[6] As a result, "[i]t would be pure speculation to conclude that

[6] *See, e.g.,* Tr. 3/23 at 25:15-39:12 (demonstrating that Dr. Friday's opinion that Stillaguamish people traded at Fort Nisqually in 1834 is unreasonable for several reasons, not least that he knowingly misreads the term "Oh-qua-mishes" to refer to the Stillaguamish tribe rather than the Suquamish, *see* SG-001 at pdf 51 [STOI 005501]); Tr. 3/23 at 49:3-19 (Dr. Friday's opinion that Stillaguamish traded at Fort Langley is not based on any evidence); Tr. 3/23 at 51-56 (Dr. Friday's opinion that Stillaguamish were present on west side of Whidbey Island and, when threatened, moved to Elliott Bay to fish is based on a knowing misreading of the terms "Tochwamish" to refer to Stillaguamish rather than Suquamish); Tr. 3/23 at 153:16-154:25 (Sallie Oxstein's account of family trip to Fort Victoria does not mention route taken, number or frequency of any other such trip, or fishing while traveling); Tr. 3/24 at 7:15-9:13 (Indian Wars internment camps were an extraordinary event).

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[Stillaguamish's] travels must…have included the [disputed waters]." *United States v. Washington*, 20 F. Supp. 3d 828, 839 (W.D. Wash. 2007), *aff'd*, *Upper Skagit*, 590 F.3d 1020.

Even if the Stillaguamish tribe had traveled all about, as Dr. Friday asserts,[7] travel alone is not sufficient to establish Stillaguamish U&A in any of the disputed waters. Notably absent from the record in this case is any evidence of Stillaguamish actually fishing in marine waters at or before treaty times, while traveling or otherwise, let alone doing so on a regular basis – a point Stillaguamish's expert repeatedly conceded.[8] Further, Dr. Friday did not document a single instance of Stillaguamish people traveling in marine waters for the purpose of fishing, and there is no evidence of Stillaguamish traveling in marine waters for purposes of fishing (other than Dr. Friday's unsupported opinion).

Ever since Final Decision 1, this Court and the Ninth Circuit have ruled repeatedly that a tribe must present evidence of regular and customary fishing or travel for the purpose of fishing in an area in order to establish U&A in that area. The law has *never* been that a tribe has a treaty right to fish along any hypothetical route it can sketch out between two or more spots on a map without any evidence of actually fishing those waters or traveling those waters for the purpose of fishing at treaty time.

D. Primary Rights (Q4 – Q7 & Q14)

First, and in an abundance of caution: The distinction between primary and secondary rights is irrelevant in this subproceeding (**Q4**). No party to this subproceeding has pled or tried a primary right claim, and no question of primary vs. secondary rights is ripe for determination.

In some cases in which more than one tribe has U&As in certain waters, the Court has determined that one of those tribes has the right to control and permit use by others. A U&A

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[7] Dr. Friday's assertion conflicts with Dr. Lane's opinion that the Stillaguamish had very little contact with settlers, USA-28 at pdf 3 [p.1], and with Dr. Snyder's opinion that the Stillaguamish were not oriented to the saltwater whatsoever, SG-094 at pdf 24 [STOI 030394] lines 1-6.

[8] *See, e.g.,* Tr. 3/23 at 41:20-48:1, 44:24-45:10 (no evidence of Stillaguamish fishing *en route* to or at Fort Nisqually, whether via Port Susan or via Skagit Bay / Saratoga Passage); Tr. 3/23 at 86:8-11 (no evidence of any Stillaguamish fish traps in marine waters); Tr. 3/23 at 151:10-158:4 (no evidence of Stillaguamish fishing in Deception Pass); Tr. 3/23 at 158:5-159:16 (no evidence of fishing in Saratoga Passage); Tr. 3/24 at 6:20-7:2 (other than Mowich Sam's alleged rights through marriage, no evidence of Stillaguamish fishing in Penn Cove or Holmes Harbor at treaty time); Tr. 3/24 at 11:2-4 (no evidence of Stillaguamish fishing in Skagit Bay).

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right, "[l]ike many other rights…is not unlimited in that it may be subject to a superior, in this case, primary, right." *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 672 (9th Cir. 1985). According to Barbara Lane, "the prevailing conception of tribal territory among Northwest Indians comprised the right to exclude members of other tribes." *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1143 (9th Cir. 1981). In *Lower Elwha*, Dr. Lane "conceded that Makahs fished [in Lower Elwha-controlled territory], but maintained that this fishing, to be consistent with the Indian conception of tribal territory, had to be with the express permission of the Elwha or by virtue of [permission through] intermarriage." *Id*. The Ninth Circuit affirmed, based on Dr. Lane's articulation and application of this principle. *Id.* Thus, not only could a tribe have U&A in a location it was permitted to use by another tribe, it is the very essence of a primary vs. secondary right (**Q6**).

Question 5 asks whether primary rights only were operative "if two groups happened upon the same location at the same time." The answer is No: Treaty-time Indians generally restrained from intrusion on or unauthorized use of others' home grounds, including marine home grounds, and the tribe holding a primary right "had readily available means of deterring unauthorized use of their territory, such as social disapproval, magical retaliation, and possibly physical force." *Skokomish*, 764 F.2d at 674; *see also* SG-157 at pdf 5 (Snyder Ethnographic Report on Aboriginal Salt-Water Fisheries of the Swinomish, etc.; "[t]erritorial rights were usually respected, trespass was rare, and punishable by death"). Treaty-time Indians of the Pacific Northwest generally respected the rules – even when no one was looking.

A primary right claim is not the same as a U&A claim and need not be pled or adjudicated in a U&A case. *Skokomish*, 764 F.2d 670. In the *Skokomish* case, the Skokomish Indian Tribe claimed that it had a primary right to the Hood Canal fishery, in which several other tribes had U&As. Suquamish, an opposing tribe, argued that res judicata barred Skokomish's primary rights claim because Skokomish had not raised it as a defense in the Suquamish U&A proceedings. *Id*. at 672. The Court rejected this argument, noting in part:

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> [E]ntertaining the primary right claim of the Skokomish is not relitigation of the same cause of action because it would not serve 'to sustain or defeat' the court's determination of the usual and accustomed fishing places of the Suquamish[.] The rights attendant to a determination of the usual and accustomed places of the Suquamish would remain intact.

Id.

And so to answer **Question 7.a**: Stillaguamish either has U&A in Port Susan or it does not; any Qwadsak tribe primary right in Port Susan does not affect whether Stillaguamish had U&A there. To answer **7.b**: Stillaguamish must establish that it has U&A before the role of any subordinate right can be evaluated.

But Swinomish respectfully submits that **Questions 7.a and 7.b**, which assume Qwadsak's primary rights, are beside the point in light of the evidence. Preliminarily, there is no evidence that the Qwadsak people or the Stillaguamish people fished in Port Susan, so the assumption of Question 7 is purely hypothetical. Sally Snyder, who looked harder at Stillaguamish places and practices than anyone, assumed the Qwadsak people were Stillaguamish and *still* testified that Stillaguamish were not oriented to the saltwater at all. Further, all are agreed that northern Port Susan was an unproductive mud flat. There is no evidence that anyone fished there, and certainly no evidence that Stillaguamish did so. Stillaguamish cannot establish U&A in saltwater, and so the Court need not speculate about the import of a wholly-notional Qwadsak primary right in the unproductive waters of Port Susan.

Regarding **Question 14**: We note that portions of Port Susan are included within Tulalip's adjudicated U&As. But, again, it does not matter whether anyone else fished in Port Susan at treaty time – Stillaguamish's claim requires Stillaguamish to establish by a preponderance of the evidence that it regularly did so.

E. Frequency & analogy (Q13)

Like the Court, Swinomish enjoys the game of baseball and the annual cycle of hope it brings. But, with all respect to the Court, Major League Baseball does not provide a helpful analogy for determining U&A at treaty time.

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Generally it is problematic to attempt to explain one culture in terms of another. Here, specifically, the practices of a modern, Western-culture, commercial, professional sports league are not a good framework for analysis of cultural practices developed organically by native people over centuries and centered on family and profound respect for natural resources. It is significantly misleading to compare a baseball team's home and away schedule to a tribe's customary fishing practices:

- The analogy fails immediately in relation to the purpose of travel or the activity upon travel. When a baseball team goes to spring training or travels to an away stadium, it does so only, and by definition, to play baseball. But it is not necessarily correct that, when members of a tribe travel away from home, fishing takes place. At treaty-time, depending on the group and the circumstances, Indians may have travelled for a ceremonial event, for trade, for family visits or, indeed, for fishing or other resources. Fishing upon travel cannot be presumed, and U&A requires regular fishing at an identified location.

- A baseball team's travel for away games is highly regularized (x number of times/year to limited and specified locations, for specified durations) and is imposed by a central office, whereas travel by Indians away from permanent winter villages was determined by need or choice and/or especially by family, not dictated from without, and destination(s), frequency and duration of visits could vary greatly.

- The baseball analogy does not accommodate the role of family in Coast Salish culture at treaty time. Access through exogamy to fishing grounds away from a tribe's permanent grounds did not result in the transfer of fishing rights to the entire tribe of the person marrying in. So, for example, no matter how frequently or how many years Mowich Sam fished in Holmes Harbor as a result of his marriage, the entire Stillaguamish tribe cannot have U&A there by way of Mowich Sam's activity.

Analogy's reach exceeds its grasp. It pretends to explain more than it can. Analogy allows us to substitute the familiar for the unfamiliar, to take shelter from thorny analytical challenges. Analogies are inherently artificial and often cause more problems than they solve.

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For thinking about U&A, far better than analogizing to Major League Baseball is to examine carefully the evidence presented and measure it against the well-established standard of proof.

U&A requires evidence of (i) regular (ii) actual fishing (iii) at an identified location (iv) at treaty time. Stillaguamish has failed to submit evidence that meets these requirements to establish U&A anywhere in marine waters. Neither argument by analogy nor proof by proxy suffices to establish the marine waters U&A it seeks.

IV. POLICY AND CASE MANAGEMENT ISSUES

A. Fairness

Stillaguamish argues fairness requires that "like every other Coast Salish people in Western Washington" (a slogan used over and over in its case), Stillaguamish must be awarded saltwater U&A. Stillaguamish pretends that preferential standards have unfairly favored other tribes, and claims that it has unfairly been subject to an order from which it could not benefit. These claims are unfounded.

In fact it is Stillaguamish that seeks special treatment. At treaty time, Stillaguamish was not "like every other Coast Salish people." As Barbara Lane concluded – based on the same evidence and material that Dr. Friday presumes to reinterpret – the treaty time Stillaguamish "[i]n contrast to some of their neighbors" were relatively isolated by the time Hancock visited and "had . . . very little direct contact with whites." Lane describes an isolated upriver people and says that "there was no reason for the Stillaguamish to leave their own territory where food supplies in the form of fish and game were plentiful." USA-28 at pdf 13 [p.11]. Sally Snyder effectively said the same, describing the Stillaguamish tribe as "not oriented to the saltwater whatsoever" and as "largely a hunting people." SG-94 at pdf 24 [STOI 030394] lines 1-6. The Stillaguamish were a relatively isolated upriver tribe and were not enmeshed in a saltwater culture (as distinct from, for example, the Snohomish, Lower Skagit, Kikiallus and Swinomish). Thus it is unsurprising that (i) the only evidence of actual Stillaguamish fishing is the description of upriver fisheries that Barbara Lane relied upon and (ii) Judge Boldt determined Stillaguamish's U&A to be on the river. Fair application of objective standards

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placed Stillaguamish U&A on its river, and it is Stillaguamish that seeks special treatment by asking the Court to radically change the standard of proof to sustain its saltwater U&A claim.

The issues and advocacy advanced in the Shellfish Subproceeding, almost 30 years ago, do not in any way suggest that it is unfair to hold Stillaguamish to the established standard of proof and other law of the case in this subproceeding. The brief cited in **Question 9** was filed on behalf of sixteen tribes in the Shellfish Subproceeding. With the exception of Upper Skagit, the geographic extent of each tribe's U&A was not at issue. *See* Dkt. 14181, n.1 (all tribes agreed to limit claims in the subproceeding to previously adjudicated U&As). The fundamental question in the case was whether the tribes had a federal treaty right to take shellfish in addition to finfish. The State took the extreme position that *if* the tribes had a right to shellfish, they needed to reprove their U&A species by species. In response, the tribes argued that the Court's existing jurisprudence did not support such a draconian reading of the treaties. This Court agreed with the tribes, holding that "as a matter of treaty interpretation, the Tribes' [U&As] cannot vary with species of fish." *Shellfish I*, 873 F. Supp. at 1431. As a result, the tribes could shellfish in their previously adjudicated U&As. But since Stillaguamish had no previously adjudicated marine U&As, the decision gave them no rights.

The whole point of the arguments made by the tribes collectively to confirm the geographic scope of their treaty rights in the face of the State's efforts to severely limit those rights was to *avoid* relitigation of their U&As since they had already met their burdens under the standard of proof established by Judge Boldt. To use those arguments 30 years later to justify relitigation of Stillaguamish's U&A or to justify changing the law of the case regarding the standard of proof because Stillaguamish has not and cannot meet its burden of proof in the waters it now wants to fish would indeed be deeply unfair – not to Stillaguamish, but to all of the other tribes and the State.

Stillaguamish was not unfairly bound by an order from which it could not benefit (**Q10**): Prior to the Court's ruling on whether the tribes had to re-prove their U&As, the tribes, including the three tribes without marine U&A at the time (Stillaguamish, Sauk and Upper

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Skagit), sought to bifurcate the case asking that "delineation of the boundaries of the individual tribes' [U&As]" be held until the second phase of the litigation, which the Court denied. Mot. for Bifurcation, Dkt. 11400 (Oct. 29, 1989); Order, Dkt. 12419 (Jan. 25, 1991).

After the denial but again prior to the Court's ruling on whether the tribes had to re-prove their U&As, a number of the plaintiff tribes, including Stillaguamish, were informed by Evergreen Legal Services, their joint counsel, that it could not continue to represent them due to conflicts. Greger Declaration, Dkt. 13589 (Aug. 19, 1993). Stillaguamish then moved for a voluntary dismissal of its claims without prejudice, which the Court granted. Motion, Dkt. 13589 (Aug. 19, 1993); Order, Dkt. 13733 (Oct. 8, 1993). Thereafter, Stillaguamish did not appear or participate in the proceedings that culminated in *Shellfish I*.

That should have ended the matter, at least as to Stillaguamish, but for some reason the record does not reveal, it reappeared as one of Evergreen's clients in a pleading following *Shellfish I*. *See* Dkt. 16362 (Feb. 4, 1997). It is also listed as signatory to the Shellfish Implementation Plan in Section 1.5. *United States v. Washington*, 898 F. Supp. 1453, 1463 (W.D. Wash. 1995) (*Shellfish II*). But there is nothing in the record of *Shellfish I* or *II* to suggest that Stillaguamish's reappearance gave it any marine U&As or that other parties to the Shellfish proceedings or signatories to the SIP conceded that Stillaguamish has marine U&As (and in fact, the inter-tribal stipulation referenced above says the opposite). Given that Stillaguamish does not have marine U&A and does not exercise treaty shellfishing rights, it has not been prejudiced in any way by being a signatory to the SIP.

In sum: Stillaguamish's arguments that it has been treated unfairly are incorrect and based on a distortion of the record. Stillaguamish asks the Court to bend the rules to fit its claim. The Court should decline to do so. While changing the rules late in the game might benefit Stillaguamish, it would be gravely unfair to the rest of the parties to this litigation.

B. Finality

The Western District of Washington has been guardian of the native fisheries of the Puget Sound for almost half a century. As the Court recognized at trial, the Ninth Circuit has

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expressed its concerns a number of times about this Court's continuing jurisdiction, especially with respect to intertribal claims. *See, e.g., United States v. Washington*, 573 F.3d 701, 709-711 (9th Cir. 2009). Whether or not the Ninth Circuit is correct in saying that the point of this case is "not to sort out competing tribal claims," *id*., surely the admonitions of the Court of Appeals highlight the importance of finality. Factual findings made by Judge Boldt and the law of the case as developed over the last fifty years should not be relitigated, and certainly should not be overturned lightly to grant the desires of one tribe at the expense of many.

Finality concerns also derive from reliance on the complex and detailed regime that has developed over the decades in this case. *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) (en banc). The "complex regime" created by this Court and the Ninth Circuit includes over 90 separate subproceedings; hundreds of district court decisions; four dozen or so Ninth Circuit opinions; hundreds of agreements, many of them entered as consent decrees, on all manner of fisheries-related topics; annual state-tribal management agreements covering each of the types of fishing in each of the management areas; state and tribal regulations governing their respective fishers; unwritten practices and modes of interaction among the parties; and tribal fisher reliance upon livelihoods derived from the fisheries. The intricacy of this regime, and the interests of those who have come to depend on it, suggest that the Court should be especially careful not to relitigate old issues or change the rules. "[P]articipants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments," and the complex regime of *United States v. Washington* similarly "cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based." *Id.*

This Court has given Stillaguamish a fair opportunity to present its marine U&A claim, and now it is clear that Stillaguamish has no new evidence. Stillaguamish offers only Dr. Friday's speculative and unfounded re-interpretation of the evidence Barbara Lane and Judge Boldt considered in determining that Stillaguamish's customary fisheries were along its river. With all due respect, Swinomish therefore continues to maintain that this Court did not retain

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subject matter jurisdiction to revisit – on substantially the same evidence – its prior determination of Stillaguamish's U&A. *See* Dkt. 64 & Dkt. 179 at pp. 22-24. This Court evaluates that evidence standing in the shoes of Judge Boldt,[9] and here the Court need not wonder what Judge Boldt would have done with the evidence Stillaguamish has presented. The evidence remains fundamentally unchanged from that presented 50 years ago, and we know the factual findings that Judge Boldt made.

Similarly, Stillaguamish should not be permitted to re-litigate its territorial claim in this subproceeding. More than 50 years ago the ICC expressly determined that the aboriginal territory of the Stillaguamish Tribe did not include the Qwadsak area. *See* G-17(k) at Findings 2, 18; SW-44; Tr. 3/24 at 76:24-81:10 (Friday). Dr. Friday's argument relies on the same evidence previously considered by the ICC. We respectfully submit that issue preclusion forecloses Stillaguamish's Qwadsak territorial claim. *See* Dkt. 179, pp. 18-22.

C. Family & the rules of the game (Q19)

The Court's deep concern for the fair treatment of the tribes of Western Washington will stand as an enduring achievement. But the Court should take care not to elevate the current claims of one tribe above fairness and finality for the rest of the treaty tribes and other parties to this case. All of the parties and the courts will confront years and years of still more inter-tribal U&A disputes if the Court changes the burden or standard of proof now.

The Court has asked whether "shifting familial relationships had a larger bearing on access to shared resources than did tribal relationships," and if so, how the Court should attribute family shifts to tribes as a whole (**Q19**). From the beginning the Court has recognized that "[n]o formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government," and that Stevens "deliberately created political entities" to serve the United States' purposes. Final Decision 1 at

[9] *See* Stillaguamish Tribe of Indians' Trial Brief, Mar. 16, 2022 [Dkt. 258] at 4:15-18 (applicable evidentiary standards for establishing U&A must be no different than that applied by Judge Boldt).

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355. And from an anthropological point of view, as Dr. Blukis Onat testified, "It's always about family." Tr. 3/28 at 108:18 (Blukis Onat).

But the United States created political entities nearly 170 years ago, and for 50 years the United States District Court has made law regulating native fisheries based on the notion that treaty rights were held on a tribal level. The Court will do more harm than good if it changes the rules yet again, for example, by trying to weave family groups into the analysis of tribal rights – or, more drastically, by adopting the "everybody could have fished everywhere" rule that Stillaguamish advocates. The Court's observation about the importance of family is correct, but having made the rules, the Court should not change the standards it applies.

During the trial the Court lamented the deterioration of the cooperative spirit that allowed the aboriginal people of Western Washington to work through resource allocation issues. Tr. 3/24 at 105:12-14. The Court is not alone in this sentiment. But it is too late to turn back the clock, and we respectfully suggest that the Court must take care not to encourage the very internecine fighting it deplores. Changing the burden or standard of proof or allowing re-litigation of issues previously decided will only encourage more inter-tribal U&A litigation.

V. CONCLUSION

Umpires don't change the rules in the 9th inning. If they did, the game would have to start over. Fair application of the existing rules that this Court has established over the previous 50 years to the evidence presented at trial requires denial of Stillaguamish's RFD in its entirety.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 3, 2022 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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

Nate Garberich

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