THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, vs. STATE OF WASHINGTON, et al. Defendant	CIVIL NO. 70-9213 Sub-Proceeding No. 17-3 **TULALIP TRIBES' POST-TRIAL BRIEF**

I. INTRODUCTION AND SUMMARY

In this sub-proceeding, the Stillaguamish Tribe seeks to expand its usual and accustomed fishing areas, alleging jurisdiction pursuant to Paragraph 25(a)(6) of the Court's injunction of March 22, 1974. *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974). Pursuant to a Stipulation and Agreement entered into between the Tulalip Tribes and Stillaguamish Tribe on May 1, 1984, Tulalip affirmatively supports "Stillaguamish Tribe's request for a determination ["RFD"] that the Stillaguamish Tribe's usual and accustomed fishing areas extend throughout Northern 8A and that portion of Area 8 southerly of a line drawn from Milltown to Polnell Point and northeasterly of a line drawn from Polnell Point to Rocky Point." 1984 Agreement, Paragraph IV(B); *United States v. Washington*, 626 F. Supp. 1405, 1482 (W.D. Wash. 1985). In addition to the limited geographic scope of Paragraph IV(B), the

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scope of Tulalip's support as expressed in the 1984 Agreement is further limited to anadromous fish (salmon and steelhead) and does not include shellfish.

But the current Stillaguamish RFD overreaches, extending far beyond the areas and species that are within the scope of the 1984 Agreement. Because this Court lacks jurisdiction to adjudicate the Stillaguamish RFD as broadly framed by Stillaguamish, and because Stillaguamish has failed to produce evidence to support usual and accustomed treaty-time fishing in the disputed marine waters, Stillaguamish's claims as alleged here must fail. To the extent that this Court has jurisdiction, Tulalip continues to affirmatively support claims of the Stillaguamish to the extent such claims are limited to anadromous fish within the limited geographic areas described in Paragraph IV(B) of the 1984 Agreement.

Tulalip incorporates by reference its legal arguments found in its Pre-Trial Brief (ECF Dkt. #255) as well as its Findings of Fact and Conclusions of Law filed herewith on June 3, 2022. Tulalip maintains its objection that this Court lacks subject matter jurisdiction under Paragraph 25(a)(6) to adjudicate the Stillaguamish RFD. To the extent that this Court does have jurisdiction, the evidence presented at trial does not establish that the Stillaguamish had treaty-time usual and accustomed fishing areas beyond the limited marine areas specifically identified in Paragraph IV(B) of the 1984 Agreement.

Stillaguamish relies primarily on the testimony of Dr. Chris Friday, a historian. However, the report and testimony of Dr. Chris Friday did not provide any direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish at treaty time. While Dr. Friday speculates that the Stillaguamish would have broadly fished in all the claimed marine waters in a means or fashion similar to other Coast Salish tribes, there is not any direct evidence nor sufficient indirect evidence, nor any reasonable inference to support that assertion. *Compare United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988) (affirming determination of Tulalip U&A based on "evidence of frequent fishing [by Tulalip predecessors] in the disputed areas" derived from testimony of Tulalip elders, documentary evidence of Tulalip predecessors trading and fishing at distant locations, and expert testimony based on interviews of Tulalip informants, all of which showed actual evidence of fishing in disputed waters). Whatever Dr. Friday thinks that the Stillaguamish "would" have done at treaty-time,

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there is no evidence that they actually "did" fish in the subject waters. Opining that they "would" have fished is conjecture and speculation. There is no evidence to support Dr. Friday's opinion.

The Court heard testimony from Dr. Astrida Blukis-Onat, a long-time expert on anthropology, archaeology, and the ethnography of the Coast Salish Tribes. Her experience and qualifications greatly exceed those of Dr. Friday. Dr. Blukis-Onat testified that the treaty-time home grounds of the Stillaguamish were located to the east of Florence, Washington along the north fork of the Stillaguamish River to approximately Hazel, Washington. Trial Transcript (3/28/22) (Blukis-Onat), pp. 32:19 – 33:4; 40:10 – 40:21. Dr. Blukis-Onat testified that Stillaguamish did not have home grounds in any of Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, or Deception Pass. Trial Transcript (3/28/22) (Blukis Onat, p. 72:3 – 72:18; 72:19 – 89:18; Ex. SW-172. Dr. Blukis Onat testified that she is not aware of any evidence of Stillaguamish marine fishing activity in any of Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and Deception Pass at treaty time. Trial Transcript (3/28/22) (Blukis Onat, pp. 86:8 – 89:18; 90:8 – 90:22; 91:8 – 92:1; Ex. SW-172.

The Court also received testimony from Dr. Bruce Miller, a long-time expert in the field of anthropology, archaeology, and ethnography. Based on his review of oral historical, ethnohistorical, historical, and anthropological materials, Dr. Miller testified, in his expert opinion, that there is no evidence of Stillaguamish fishing in the marine areas he analyzed, which were from Deception Pass in the north and down to Saratoga Passage and including Port Susan. Trial Transcript (4/11/22) (Miller), pp. 14:10 – 15:25.

The parties also introduced evidence and reports from previously retained experts in *United States v. Washington* and ICC proceedings, as well as tribal informants, who consistently identified the Stillaguamish as a river people and did not identify treaty-time marine fishing activities by Stillaguamish people. *See* Tulalip Proposed Findings of Fact and Conclusions of Law. This evidence includes the testimony of Dr. Barbara Lane, the recognized authority concerning tribal fishing by the tribes in this area. Her expert testimony in this case places the treaty-time Stillaguamish people on the Stillaguamish River. *See* Ex. USA-28. None of the evidence presented at trial showed actual usual and accustomed treaty-time fishing in marine waters by Stillaguamish treaty-time Indians.

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To the extent that this Court continues to find that it has subject matter jurisdiction, the Court should find that Stillaguamish has failed to establish usual and accustomed fishing areas in the waters claimed in the Stillaguamish RFD, with the exception that Tulalip continues to support, pursuant to the 1984 Agreement, a finding of non-exclusive Stillaguamish U&A for purposes of anadromous fishing in the marine waters specifically described in Paragraph IV(B) of the 1984 Agreement.

II. RESPONSES TO THE COURT'S QUESTIONS

Tulalip provides the following responses to the questions contained in the Court's order of April 20, 2022 (ECF Dkt. #278):

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

Each tribe is and was different. Each tribe had different population sizes, different geographic locations, different needs, and different technological capabilities. Thus, evidence of practices that were characteristic of all Coast Salish tribes is relevant evidence, but is not sufficient evidence to establish a specific tribe's specific U&A. The Court has always required a tribal claimant to prove, by a preponderance of the evidence, that their tribal predecessors (not just Coast Salish people in general) regularly and customarily fished in specific claimed waters. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978) ("Notwithstanding the court's prior acknowledgement of the difficulty of proof, the Tulalips have the burden of producing evidence to support their broad claims"); *United States v. Washington*, 626 F. Supp. 1405, 1530 (W.D. Wash. 1985) (finding "sufficient specific documentation and evidence to establish usual and accustomed fishing by Tulalip predecessors [in certain claimed waters]"); *see also United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988) (affirming Tulalip U&A based on "evidence of frequent fishing [by Tulalip predecessors] in the disputed areas").

Evidence that tribal people traveled on marine waters, in the same manner as other Coast Salish people, does not establish U&A in such waters. *United States v. Washington*, 384 F. Supp. 312, 353 (W.D. Wash. 1974). Nor is the mere presence of an Indian coastal or river village sufficient to establish a tribe's U&A. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1985). "The determination of any areas as a usual and accustomed fishing ground or station of a particular tribe must

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consider all of the factors relevant to: (1) use of that area as a usual or regular fishing area, (2) any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe, and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty-time use of that area for fishing purposes." *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985).

Even where a tribe's U&A is broadly described to encompass "Puget Sound," the Court has still required evidence of specific treaty-time fishing activities in specific areas in order to establish U&A. For example, although the Muckleshoot Tribe's U&A is described as "secondarily in Puget Sound" and despite the general treaty-time practice of Coast Salish people of fishing broadly in Puget Sound, the Court found that Muckleshoot saltwater U&A was limited to Elliott Bay due to evidence that the Muckleshoot were "upriver Indians with fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay." *United States v. Washington*, 19 F. Supp. 3d. 1252, 1310 (W.D. Wash. 1999). There was "no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay [and there was] no evidence that the Muckleshoot possessed the technology to fish on the open waters of Puget Sound." *Id.*

Similarly, here, the evidence in the record shows that the Stillaguamish were an upriver people. Absent specific evidence of their predecessors fishing in marine waters, the fact that other Coast Salish tribes fished in marine waters does not establish that Stillaguamish has U&A in claimed marine waters.

2. **A. Does any tribe claim to be a successor tribe to the Quadsak people**?

There is evidence in the record that, at treaty time, the Quadsak were considered a member band of the Snohomish Indians. In "Coast Salish and Western Washington Indians II" (1974), the anthropologist Colin E. Tweddell wrote about the Quadsak, as follows:

> Mrs. William Shelton said the name means 'yellow tribe.'
> Mrs. Shelton had seen their village and houses north of Warm Beach by the Stillaguamish River – probably at Hat Slough. She said these people were related to the Snohomish, and the Warm Beach folk near to (akin to) the Snohomish, but that to the north of the Kwatsakwbixw were the Kikialos.
>
> She stated that their territory was the flats around the head of Camano Island and on the mainland around Stanwood. As she also said there was no village at Stanwood, and there was on the river (Hat Slough), it is inferred that the Port Susan flats were included in their location. (sic)

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> The Stillaguamish have traditionally, and by the meaning of their name, been described and considered a river people, not a salt water people as were, for instance, the Kikialos and the Snohomish of the Sound. Hence, the Kwatsakwbixw are considered to be neither Kikialos nor Stillaguamish, but to be a member band of the Snohomish, as stated by Mrs. Shelton.

Ex. SG-143, p. 61. The Tulalip Tribes are political successors in interest to the rights of the treaty-time Snohomish. *Evans v. DOI*, 604 F.3d 1120, 1123 (9th Cir. 2010); *United States v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985); *United States v. Washington*, 476 F. Supp. 1101, 1107 (W.D. Wash. 1979) ("a majority of the members of the Tulalip Tribes are of Snohomish ancestry"). However, "a large number of Snohomish descendants did not become members of the Tulalip Reservation community." *Id.* The Department of the Interior has declined to recognize the modern-day Snohomish Tribe as an Indian Tribe. 68 Fed. Reg. 68,942-01 (Dec. 10, 2003).

2. B. **Does it matter whether Quadsak was a treaty tribe?**

No, a more relevant question would be whether any treaty-tribe (i.e., Stillaguamish, Tulalip, Swinomish, etc.,) is the political successor in interest to the treaty-time Quadsak people. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979). As noted above, there is evidence in the record that the Quadsak were a member band of the Snohomish. Ex. SG-143, p. 61. Tulalip is established as political successor in interest to the Snohomish. Nothing in the record, past or present, supports a finding that the Stillaguamish are political successors in interest to the Quadsak; nor is that a question presented in this proceeding.

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

Tulalip does not contest that the Quadsak, to the extent it was ever a separate tribe, ceased to be a separate organized tribe at some time. Member bands of the Snohomish, presumably including the Quadsak, were absorbed by Tulalip. The Tulalip Tribes are political successors in interest to the rights of the treaty-time Snohomish. *Evans v. DOI*, 604 F.3d 1120, 1123 (9th Cir. 2010); *United States v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985); *United States v. Washington*, 476 F. Supp. 1101, 1107 (W.D. Wash. 1979) ("a majority of the members of the Tulalip Tribes are of Snohomish ancestry").

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4. **A. What effect, if any, should the Court give to the continual distinction drawn by various experts as to primary and secondary rights?**

The distinction between primary and secondary rights is not relevant if a tribe fails to establish that it had usual and accustomed fishing areas in a given location or water body. Assuming that a tribe has U&A in a certain area, it is possible that such U&A may be subject to a superior, primary, right of another tribe. *See United States v. Skokomish Indian Tribe*, 764 F.2d 670, 672 (9th Cir. 1985). In this case, the Court is being asked to determine whether the Stillaguamish Tribe has non-exclusive U&A in various marine waters. Even if the Court finds Stillaguamish U&A, another Indian tribe may have primary rights in one or more of the disputed water bodies. At treaty time, the Stillaguamish would likely have required permission from one or more other tribes to fish in the marine salt water.

B. Should any such distinction apply in the context of the underlying case?

The sub-proceeding before the Court only addresses the question of whether the Stillaguamish Tribe has any U&A in any of the disputed areas before the Court. Thus, the primary-secondary distinction is not directly at issue. However, Tulalip notes that in the 1984 Settlement Agreement, which remains in effect, "[t]he Stillaguamish Tribe recognizes that as between the Stillaguamish Tribe and the Tulalip Tribes, the Tulalip Tribes have primary fishing rights in all of Area 8A, other than Northern 8A (as defined in Section IV(B) [of the 1984 Settlement Agreement])" which Tulalip recognized as a non-exclusive usual and accustomed fishing area of the Stillaguamish Tribe.

C. To the extent the distinction should and does apply, has the Court addressed the distinction consistently in the past?

The Ninth Circuit has consistently held that "a primary right is the power to regulate or prohibit fishing by members of other treaty tribes." *United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (2010); *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 671 (9th Cir. 1981). Where two tribes have usual and accustomed fishing rights in the same location, a tribe may establish primary rights if it controlled the fishing ground and could exclude others at treaty time. *Id.; United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1143 (9th Cir. 1981). In *Lower Elwha*, the Court noted that Dr. Lane identified four specific factors to consider in determining whether a tribe legitimately controlled an area: (1) proximity of the area to tribal population centers; (2) frequency of

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use and relative importance to the tribe; (3) contemporary conceptions of control or territory; and (4) evidence of behavior consistent with control. *Id.* at 1143, fn. 4. The question of control and primary rights is distinct from the question of whether a tribe has usual and accustomed fishing areas at all. *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 672 (9th Cir. 1985) (primary right claim distinct from claims adjudicating usual and accustomed areas).

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

Past cases show that the primary/secondary right scheme was always operative, at least in certain controlled areas; that is, an Indian tribe could not and generally would not fish in an area controlled by another Indian tribe absent a grant of permission. In *United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. 1985), the Court found that the Hood Canal was Twana territory and that the Twana Tribe held the recognized prerogative to exclude others from its territory. *Id.* at 673. The Court further found that this primary fishing right of the Twana in Hood Canal was acknowledged and respected by neighboring tribes at treaty time. "The customary behavior of treaty-time Indians generally reflected these common understandings through restraint from intrusion on or unauthorized use of others' territories." *Id.* at 674. *See also United States v. Washington*, 626 F. Supp. 1405, 1530 (W.D. Wash. 1985) (explaining that territorial control of a given area "would limit any other tribe's use of those areas to an invitational or permissive use" and that the rights stemming from such territorial control are referred to as primary rights).

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

It is possible that a tribe could have usual and accustomed fishing grounds or stations at locations that it proves that it was permitted to use at treaty time by another tribe with primary rights. However, this does not mean that a tribe could establish U&A at trial by showing that another tribe (primary rights holder), at present day or subsequent to treaty time, permitted fishing in an area by invitation. Disputes regarding primary rights have in some cases been resolved via settlement between one or more parties.

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In *United States v. Lower Elwha Tribe*, 642 F.2d 1141 (9th Cir. 1981), the Court found certain disputed areas were the usual and accustomed fishing grounds of both the Makah and the Lower Elwha Tribe, but that the Makah's rights to disputed areas east of the Hoko River were subject to the primary rights of the Lower Elwha Tribe and thus required the permission of the Lower Elwha Tribe. In *United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. 1985), the Court recognized that although both the Suquamish and Skokomish had usual and accustomed fishing areas in Hood Canal, the Skokomish had the primary right and the Suquamish had secondary rights – that is, rights that were subject to the permission and regulation of the Skokomish as primary rights holder. This concept is also recognized in the 1984 Settlement Agreement between the Tulalip and Stillaguamish where the Stillaguamish recognized Tulalip U&A in the Stillaguamish River, but Tulalips' rights were subject to the permission and regulation of the Stillaguamish as primary rights holder. In this case, however, there is no actual evidence of Stillaguamish fishing in marine waters.

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

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

The question of whether a tribe has U&A in a specific water body is separate from the question of whether a current treaty tribe has a primary right. Only the former question (whether the Stillaguamish Tribe has any U&A in any claimed marine waters) is at issue in this proceeding. In addition, in the 1984 Settlement Agreement, the Stillaguamish Tribe agreed that Tulalip has primary rights in Port Susan, except for the area north of a line from Kayak Point due west to Camano Island which Tulalip recognized through the agreement as a non-exclusive U&A of the Stillaguamish Tribe. The "Quadsak's presumably extinct primary right" does not impact Stillaguamish's claims to U&A in Port Susan one way or the other.

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

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No, if the Court finds that Stillaguamish has U&A in Port Susan, that U&A is non-exclusive and shared with Tulalip north of a line from Kayak Point due west to Camano Island and is subservient to Tulalip's primary right south of that line, per the 1984 Agreement.

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

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

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

There is a basic factual distinction between the two examples. In (a), there is regular presence on the shores and the use of marine resources, while in (b) there is only a temporary or infrequent presence on the shores of a marine water body. However, standing alone, neither example is sufficient to establish U&A in an area because neither example provides any direct historical evidence of any fishing. *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988) (affirming Tulalip U&A based on multiple sources evidencing treaty-time fishing activity by Tulalip predecessors).

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

Tulalip is not taking a position in this proceeding that is inconsistent with the law of the case nor inconsistent with the arguments made in the 89-3 trial brief (Dkt. #14181). In 89-3, the Defendants (State of Washington et al) argued that the tribes' usual and accustomed grounds and stations varied by

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species and that the tribes were required to establish that their predecessors harvested specific types of fish at specific locations. The District Court and the Ninth Circuit rejected the Defendants' arguments and found that the Tribes' usual and accustomed grounds for shellfish are co-extensive with the Tribes' usual and accustomed grounds previously adjudicated. *United States v. Washington*, 157 F.3d 630, 644 (9th Cir. 1998). A principal focus of the trial brief at (Dkt. #14181) was to rebut the Defendants' argument that tribes must show treaty-time harvest of specific species at specific locations. While the tribes brief recited the applicable standards used by the Court to analyze U&A claims, the tribes did not argue that U&A could be established without actual evidence of treaty-time fishing. A large portion of the brief at Dkt. #14181 provides preliminary offerings of proof that the tribes would submit at trial to establish their shellfishing rights. For example, Tulalip stated that it would present expert testimony that "anthropological and ethnohistorical dated documents that Tulalip Tribes' predecessors harvested shellfish in WDF Areas 6, 6A, 6B, 7, 7A, 8, 8A, 8D, 9, 10" in addition to other evidence establishing that Tulalip predecessors actually engaged in shellfish harvesting at treaty time. *Id.* Tulalip does not suggest that a different standard of review applies to this sub-proceeding; rather, Tulalip suggests that the evidence presented by Stillaguamish fails to meet even the relaxed standards previously utilized by the Court, beyond the areas within the scope of Section IV(B) of the 1984 Settlement Agreement.

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

Stillaguamish was included as a party in the Shellfish Implementation Plan because it is a treaty tribe and because it is bound to the determinations made in sub-proceeding 89-3 as a party in *U.S. v. Washington*. In sub-proceeding 89-3, Stillaguamish filed a "Statement of Usual and Accustomed Areas and Species Claimed" on May 3, 1993, to include, at least "Port Susan and that portion of Skagit Bay south and easterly of a line drawn from Milltown southwesterly to Polnell Point then due south to Rocky Point." Dkt. #13102. On August 19, 1993, Stillaguamish moved to dismiss its U&A claims without prejudice because "it has not found the resources to obtain the services of an expert, or an attorney without conflicts of interest, regarding the extent of its usual and accustomed grounds." Dkt. #13588. In its motion, Stillaguamish asserted that "it came into [the 89-3 subproceeding] based upon the belief that no determination of usual and accustomed fishing areas would be necessary." *Id.* The Court found

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that dismissal of Stillaguamish's U&A claims would not prejudice any party because, even if future litigation regarding Stillaguamish U&A occurred, "the sum total of usual and accustomed areas will most likely be the same whether or not the Stillaguamish and Sauk-Suiattle Tribes are involved in the proceeding, because of the overlapping claims of other tribes [i.e., Tulalip]." *Id.* Despite dismissing its specific U&A claims, Stillaguamish remained bound by orders emanating from that sub-proceeding. *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998) (identifying Stillaguamish Tribe as an appellee in appeal emanating from 89-3). For similar reasons, the Sauk-Suiattle Tribe is also a named party in the Shellfish Implementation Plan even though that Tribe also lacks any adjudicated marine U&A.

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

The cited language comes from the determination of usual and accustomed fishing areas of the Upper Skagit Tribe, which were established through:

> uncontroverted evidence presented at trial through oral testimony and written reports . . . that these predecessor groups, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the areas along the Saratoga passage on the east coast of Whidbey Island from Sneatlum Point in the vicinity of Penn Cove and Harrington's Lagoon to Holmes Harbor, and on Camano Island from Utsaladdy to what is now the vicinity of Camano Island State Park and Elger Bay. In addition, these predecessor groups of the Upper Skagit also fished at the following marine and tideland locations: Deception Pass, Similk Bay, and southward to and including Penn Cove and Utsaladdy.

United States v. Washington, 873 F. Supp. 1422, 1449-1450 (W.D. Wash. 1994). The Court's determination of usual and accustomed areas was not based on generalizations concerning the location of villages but on specific evidence that the Upper Skagits' predecessors took fish from the marine areas identified. *Id.*

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a. Are there any examples where:

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

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

Tulalip is not aware of a situation where tribal members were found to have lived on a shoreline but their Tribe was found to not have U&A extending into adjacent or subjacent waters; however, Tulalip is also not aware of a situation where a Tribe's U&A was found based solely on sustained and regular presence on the shoreline of a water body, as opposed to evidence related to fishing.

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

It is not correct that "most U&A determinations are premised primarily on a tribe's presence and access." In 1986, this Court explained that: "The determination of any area as a usual and accustomed fishing ground or station of a particular tribe must consider all of the factors relevant to (1) use of that area as a usual or regular fishing area, (2) any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe, and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty-time use of that area for fishing purposes." *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1986). While an Indian tribe would certainly require presence and access to establish U&A, presence and access is not enough, by itself, to establish U&A. For example, although Judge Boldt's description of Muckleshoot U&A referenced "Puget Sound" and although Muckleshoot ancestors had access to Puget Sound, like other Coast Salish Tribes, this Court limited Muckleshoot marine U&A to Elliott Bay because "there is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay." *United States v. Washington*, 19 F. Supp. 3d 1252, 1310 (W.D. Wash. 1999). *See also United States v. Lummi Indian Tribe*, 841 F.2d 317, 319-320 (9th Cir. 1988) (affirming Tulalip U&A based on "evidence of frequent fishing in the disputed areas.").

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12. 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?

This Court has stated: "In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Little documentation of Indian fishing locations in and around 1855 exists today. . . . Notwithstanding the . . . difficulty of proof, the Tulalips have the burden of producing evidence to support their broad claims." *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978); *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988) (affirming that Tulalip met its burden to produce evidence that disputed waters were U&A). Here, Stillaguamish has produced no evidence of actual and regular fishing to support their claims.

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

Tulalip agrees that an Indian tribe need not provide evidence of actual treaty-time fishing in each and every specific location that would be covered by a claim of U&A, as such an effort would likely be impossible. However, it is difficult in the abstract to state that an Indian tribe would always be able to claim U&A in every tributary that connects with a river passing through its home territory. For example, the Snake River is a tributary to the Columbia but not every Indian tribe with fishing rights on the banks of the Columbia necessarily has U&A on the banks of the entirety of the Snake River. Even for smaller river systems, it may be incorrect to presume in all instances that an Indian tribe has U&A on every tributary where a main river is located within that tribe's "home territory."

b. Should presence, access, and ability, combined with the general presumption that tribes used the resources that were available to them, be sufficient in the

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absence of another tribe having a primary or superior claim to a specific area?

The evidentiary and legal standards applicable to determination of Stillaguamish U&A are established by the law of the case. The "test" described in Question 11(b) above has not been utilized to determine a tribe's U&A in the past. Evidence of presence, ability, and access is relevant to the Court's determination. But absent any evidence of fishing, the Court should not presume it.

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

Mere proximity to an area has not, to date, been sufficient to establish U&A; though it is a factor that is relevant and can be considered in conjunction with other evidence.

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

The burden is on the claimant tribe to establish their claimed U&A by a preponderance of the evidence. The standard of proof does not change for each fishing location; but a claim that a tribe was fishing in far flung territories should be less likely to succeed absent more concrete evidence of regular fishing in those distant areas.

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

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

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a time. Finally, the Mariners visit, in any given year, the stadiums of five of the fifteen National League teams.

The Court has ruled that "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish. *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974). Unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions are excluded. *Id.* With this definition in mind, the baseball analogy could potentially be somewhat apt given that the Mariners repeatedly play most of their games in one place while traveling less frequently to others.

But on the other hand, the analogy is not apt because there are records of where the Mariners visit. There are records of what they do (play baseball). There are records of what happens (win or lose). There are records as to whether they return to that place again or not. There is nothing analogous in alleged visits of Stillaguamish to alleged fishing locations. There is nothing "usual and accustomed" about alleged visits to unnamed places.

Regardless of whether the baseball analogy is apt in any respect, Tulalip urges the Court to refrain from incorporating this analogy into its analysis of U&A here or in other cases. The circumstances of treaty-time fishing and modern professional baseball travel are very different, rendering reliance on this analogy unhelpful and inappropriate in Tulalips' view.

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

If the analogy is applied, games at T-Mobile and Peoria are usual and accustomed areas for the playing of baseball by the Mariners; everything else is infrequent or occasional.

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

Yes, the Tulalip Tribes have adjudicated U&A in northern Port Susan. *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1986). Tulalip predecessors fished in northern Port Susan, i.e., Snohomish Indians. *Id.* There is evidence in the record that the Quadsak were a member

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band of the Snohomish. The Kikialos also likely fished in northern Port Susan, but this has not been adjudicated.

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

General evidence of travel through a marine area, without more specific evidence of fishing, is not sufficient to establish U&A. *United States v. Washington*, 384 F. Supp. 312, 353 (W.D. Wash. 1974); *United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014). Thus, without more evidence or context, the fact that a treaty-time Indian traveled somewhere in close proximity versus somewhere far away tells nothing about their fishing activities. For example, it may be less likely that a treaty-time Indian engaged in fishing on marine waters if they traveled only a short distance because they brought food or had food stored at their destination. On the other hand, the treaty-time Indian may be more likely to fish while traveling a far distance but the destination may be one far less frequently traveled to. In sum, the general evidence of travel to either type of location (close or far) is not sufficient, standing alone, to establish U&A.

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

The *Lummi* cases do not establish that travel alone can establish U&A; in fact, those cases confirm that travel alone cannot establish U&A. The *Lummi* cases involve an interpretation of Judge Boldt's finding that "the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay." *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1988). Thus, the focus of the Lummi cases was not to determine, in the first instance, the Lummi U&A but rather to interpret Judge Boldt's ambiguous description of the Lummi U&A and to

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determine "what Judge Boldt meant in precise geographic terms by his use of the phrase 'the present environs of Seattle'" and "Northern Puget Sound." *Id.* at 1359.

A primary dispute in the *Lummi* cases was whether Judge Boldt's description of Lummi U&A included Admiralty Inlet and other waters just to the west of Whidbey Island. *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). The Court found that, as a matter of geography, Judge Boldt must have intended to include Admiralty Inlet in Lummi U&A because it is the most likely and natural passage from "the Fraser River south to the present environs of Seattle." *Id.* The Court described its interpretation of Judge Boldt's determination of Lummi U&A as based in geography. *United States v. Lummi Nation*, 876 F.3d 1004, 1009-1010 (9th Cir. 2017).

The *Lummi* cases do not alter the law of the case that holds that "general evidence of travel cannot by itself establish U&As." *United States v. Lummi Nation*, 876 F.3d 1004, 1010 (9th Cir. 2017). Judge Boldt ruled that: "Marine waters were also used as thoroughfares for travel by Indians who trolled en route. Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id., quoting* 384 F. Supp. 312, 353 (W.D. Wash. 1974). In the Lummi context, while reaffirming that travel alone is not sufficient to establish U&A, the Ninth Circuit has held that Lummi's use of Admiralty Inlet "was more than mere 'occasional and incidental trolling.'" *Id.; United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014). *See also United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988) (reaffirming that "travel through an area and incidental trolling are not sufficient to establish an area as a usual and accustomed fishing ground").

As the above discussion makes clear, the *Lummi* cases are specific to the Lummi Tribe's situation and the interpretation of Judge Boldt's original determination of Lummi U&A. Further, the present case is distinguishable from *Lummi* because Stillaguamish asserts that this proceeding arises under Paragraph 25(a)(6) of the Permanent Injunction, rather than Paragraph 25(a)(1). While *Lummi* required the Court to determine what Judge Boldt meant when he described Lummi U&A as including "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle," the Court in this case is being asked by Stillaguamish to evaluate their U&A claims in the first instance. The Court in *Lummi* did not rule (and specifically rejected the argument) that travel alone is

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enough to prove U&A in the first instance. While the Court in *Lummi* was tasked with determining the geographic scope of an existing description of Lummi U&A, here, Stillaguamish asks the Court to declare broad new areas of Stillaguamish U&A. Even if Stillaguamish can prove that Stillaguamish people used marine waters as thoroughfares for travel and trolled en route, such occasional and incidental trolling does not make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians. *United States v. Lummi Nation*, 876 F.3d 1004, 1010 (9th Cir. 2017).

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

Yes, evidence of traveling to a location for the specific purpose of engaging in fishing is more supportive of determining usual and accustomed fishing areas in that location that traveling to a location for other purposes. As discussed throughout, general evidence of travel to a location (without evidence of fishing) is not, standing alone, sufficient to establish U&A.

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

Yes. "The determination of any area as a usual and accustomed fishing ground or station of a particular tribe must consider all of the factors relevant to (1) use of that area as a usual or regular fishing area, (2) any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe, and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty-time use of that area for fishing purposes." *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1986). Due to the limited documentation of Indian fishing locations in and around 1855, the Court has always relied upon ethnographic and anthropological expertise to assist the Court in "determining by direct evidence or reasonable inferences the probable location and extent of usual and accustomed treaty fishing areas." *United States v. Washington*, 459 F. Supp. 1020, 1530 (W.D. Wash. 1978); *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318-319 (9th Cir. 1988) ("Dr. Snyder, an anthropologist who had interviewed between 25 and 30 Tulalip 'informants' in 1950 . . . testified that the Tulalips traveled to the San Juan Islands to fish in order to add to their winter stores"). Absent such ethnographic/anthropological evidence, it is not likely that a tribe could prove its U&A

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locations by a preponderance of the evidence. Thus, absent the existence of direct evidence of treaty-time fishing in a specific location, Tulalip believes that ethnographic or anthropological evidence is required to establish U&A by a preponderance of the evidence.

19. Is it fair to conclude from the expert testimony in this subproceeding, that, to a certain extent, shifting familial relationships had a larger bearing on access to shared resources than did tribal relationships? How should the Court attribute smaller shifts at the family level to tribes as a whole?

In this subproceeding, the Court is asked to determine whether the treaty-time usual and accustomed fishing areas of the Stillaguamish Tribe included certain disputed marine areas. It is not being asked to determine where individual tribal members may have fished based on rights gained through intermarriage. Those intermarriage rights do not establish tribal U&A. The Court may not base a finding of Stillaguamish U&A on the fishing activities of individual treaty-time Stillaguamish who fished in certain locations based on rights gained through intermarriage.

CONCLUSION

Adopting new loose standards suggested by these questions guarantees a large spate of new or modified U & A requests as tribes attempt to apply new and vague standards to U & A disputes. The focused inquiries required under the law of the case should not change.

DATED this 3rd day of June, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 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: June 3, 2022.

s/Thane D. Somerville

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