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.	Case No. C70-9213 Subproceeding No. 17-3 UPPER SKAGIT INDIAN TRIBE'S POST-TRIAL BRIEF

"The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. *The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished*."

Subp. No. 89-3 Memorandum Opinion and Order, Dec. 20, 1994 Docket 13864 at 24 (emphasis added).

"[Stillaguamish] Economy was of an up-river sort, based upon fresh water fishing, probably by trapping, and upon hunting. The economy differed from the Skagit, or the Skagit and Kikiallus, in that the Stillaguamish were not dependent upon shell fish, nor upon fish caught in salt water."

Dr. Sally Snyder, ICC Deposition Testimony, Ex. SG-094 at STOI 030408.

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INTRODUCTION

At trial in March and April 2022, the Stillaguamish Tribe sought to expand the scope of its "usual and accustomed" fishing areas, asserting that jurisdiction arose from Paragraph 25(a)(6) of the Court's injunction of March 22, 1974. Upper Skagit Indian Tribe respectfully renews it objection: the Court lacks jurisdiction because Judge Boldt correctly defined Stillaguamish's U&A as its namesake river system.

At trial, Stillaguamish introduced no evidence suggesting, much less proving, that its "usual and accustomed fishing grounds and stations" ("U&A") included any marine waters. Instead, the evidence presented simply confirmed that the Stillaguamish were a river fishing people for obvious reasons: they enjoyed an abundance of fishing opportunity on their home river and had no need to travel to salt water. There is overwhelming evidence that the Stillaguamish fished very successfully by focusing on salmon moving upstream in the Stillaguamish River. So it is hardly surprising that the historical record contains no evidence that the Stillaguamish fished "customarily . . . from time to time" in saltwater, much less that such marine areas were their "usual and accustomed" grounds and stations. This failure of proof negates Saratoga Passage, Penn Cove, Holmes Harbor, Skagit Bay, Port Susan, and Deception Pass as Stillaguamish U&A. There is no evidence of actual fishing by the Stillaguamish at and before treaty time at any of these locations. The Court should enter judgment against each and every element of the Stillaguamish request for determination.

RESPONSES TO THE COURT'S QUESTIONS

Pursuant to the Court's April 20, 2022 Order, the Upper Skagit submits the following responses to the Court's questions. To avoid repetition, Upper Skagit has limited some of its responses and incorporates by reference the responses of the Tulalip Tribes for question nos. 1, 2(a) and 2(b), 3, 4(a), 5, 7 (a) (except for any reference to the impact of the 1984 settlement agreement), 11(a)(ii), 11(b), 12(a)-(d), and 14 – 19.

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Question No. 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?

Response: U&A must be determined based on evidence of fishing in specific areas. Dr. Friday's assertion that saltwater fishing is characteristic of *all* Coast Salish tribes is not supported by evidence. There is clear evidence of Stillaguamish river fishing; there is no evidence of Stillaguamish saltwater fishing at or before treaty times. The evidence of other tribes' saltwater fishing practices at or before treaty times confirms that anthropologists are able to determine whether a specific tribe (or its predecessor) fished in particular location(s) at or before treaty time. The law of the case is clear: village locations in an area or travel through an area are inadequate - absent evidence of specific fishing activities- to establish U&A.

To establish marine U&A, a tribe must show actual marine fishing. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975) (village location must coincide with evidence of marine fishing); *United States v. Washington*, 19 F. Supp. 3d 1252, 1310-11 (W.D. Wash. Sept. 10, 1999) ("In light of the evidence before Judge Boldt that the Muckleshoot *did fish* in the open waters of Elliott Bay, the court rejects the Jamestown S'Klallam's argument that the Muckleshoot U & A should be limited to the shoreline.")

To determine a specific tribe's U&A, the Court must evaluate evidence of that specific tribe's actual fishing activities, not travel or presence alone. There is no support in the law of the case for accepting the Stillaguamish approach: i.e., Dr. Friday's bald assertion that Stillaguamish "must" have fished in marine waters since they were sometimes there. Two highly qualified experts who have devoted their professional lives to studying the cultures and customs of indigenous people and previously testified before this Court appeared at trial and testified unequivocally that they are unaware of any evidence of Stillaguamish fishing in the marine areas at issue. March 28, 2022 Tr. 86:8-89:18; 90:8-90:22; 91:8-92:1; Ex. SW-172; April 11, 2022 Tr. 14:10-15:25.

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Question No. 2: Does any tribe claim to be a successor tribe to the Quadsak people? Does it matter whether Quadsak was a treaty tribe?

Response: Upper Skagit understands the Quadsak people to have been enveloped by the Snohomish tribe pursuant to an ICC determination. The Tulalip Tribes are the successors in interest to the Snohomish. Through Dr. Friday's testimony and this RFD, Stillaguamish is apparently asking the Court to assume that it is Quadsak's successor-in-interest and can therefore stand in Qudsak's shoes. But this bald assertion falls far short of the evidentiary burden required to establish U&A under *U.S. v. Washington*. Among many shortcomings, Stillaguamish's expert, Dr. Friday, has not even attempted to adduce evidence that Stillaguamish tribal members are even of the same lineage as Quadsak people. Quadsak was not a treaty tribe. But even if it had been, Stillaguamish presented no evidence that any of its members are in fact descendants of the Quadsak people.

If Quadsak had been a treaty tribe, Stillaguamish has not begun to show that it can meet the Washington test: that a tribe claiming successor rights must demonstrate that (1) the requisite percentage of its members descended from the earlier group and (2) it has maintained an organized tribal structure, including some defining characteristics of the original group. *See, e.g.,* Subp. No. 89-3, Docket No. 13684 (analyzing Upper Skagit's evidence proving that it is successor to Nuwha'ha, including that as many as 200 of the current tribe members trace their direct ancestry back to Nuwha'ha).

Question No. 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?

Response: Quadsak appears to have been absorbed into the Snohomish over time. This is similar to how Bisigwigwits enveloped and ultimately absorbed some of the Kikiallus people over time on parts of Camano Island. See Ex. UPS – 31 ("In one instance almost the entire Kikiallus

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band was being enveloped by the Upper Skagit Bsi'gwi'gwi'lc, so that several former villages on Camono Island became known as Bsi'gwi'gwi'lc . . ."). Ex. UPS – 31 at p. 22.

Question No. 4: What effect, if any, should the Court give the continual distinction drawn by various experts as to primary and secondary rights? Should any such distinction apply in the context of the underlying case? To the extent the distinction should and does apply, has the Court addressed the distinction consistently in the past?

Response: The Court has consistently ruled that fishing access obtained via permission does not establish U&A. An individual Indian who fishes in another tribe's U&A after marriage into that tribe does not thereby expand the U&A of the individual Indian's tribe. *See United States v. Washington*, 626 F. Supp. 1405, 1490 ¶ 356 (W.D. Wash. Mar. 22, 1984) ("Marriage relatives could also acquire such secondary rights in the natal territories of their spouses. The secondary or permissive fishing rights were ineffective, however, unless holders of the primary fishing right first invited or otherwise permitted persons with secondary rights to fish in the territory. The holders of the primary fishing right exercised the prerogative to exclude some or all secondary users from their territorial fishing grounds for any reason they deemed adequate.")

In this case, this distinction is irrelevant but for one instance, Mowich Sam, which carries no weight. Even if one assumes that Mowich Sam was Stillaguamish, his fishing at Holmes Harbor was incident to his marriage with a Bisigwigwits woman. Mowich Sam's fishing at Holmes Harbor did not occur because Stillaguamish fished there at and before treaty times, but because his wife was a member of a different tribe that has U&A in Holmes Harbor. Stillaguamish's expert Dr. Friday ultimately conceded this point during cross-examination:

> Q. And Mowich Sam gained access to the right to fish in Holmes Harbor by way of marriage; correct?
>
> A. That appears to be so, yes.

March 24, 2022 Tr. 6:5-7; *accord United States v. Washington*, 476 F. Supp. 1011, 1110 (W.D.

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Wash. 1979) ("Being communal in nature, [U&A fishing] rights are not inheritable or assignable by the individual member to any person, party or other entity of any kind whatsoever.").

Question No. 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)?

Response: The evidence demonstrates that the concept of territorial boundaries that gave rise to the primary / secondary right scheme was always operative at or before treaty times. As Dr. Sally Snyder observed "[w]hile one may identify a fishing site as 'belonging to' one or another tribe or band, others directly profited from its use on the basis of privileged invitation. Territorial rights were usually respected, trespass was rare, and punishable by death." Ex. SG-157 at STOI 030351. Similarly, Dr. Lane testified that

> It wasn't just that everybody went everywhere without any regard for everyone else. People recognized territories and generally fished in usual and accustomed places unless they were invited or had some reason to be fishing with other people. Ex. UT-17 at STOI 046491

At trial, both Dr. Astrida Onat and Dr. Bruce Granville Miller testified consistently with Dr. Snyder and Dr. Lane's views. See, e.g., April 11, 2022 Tr. 54:23-55:10. Dr. Friday is the outlier and his assumption that Stillaguamish would have fished wherever they might have paddled (for whatever reason) is unsupported by any evidence and is contrary to the law of the case.

Question No. 6: Could a tribe ever have usual and accustomed fishing grounds or stations at locations it was permitted to use by another tribe?

Response: It is important to note that this question addresses whether a tribal group's grant of permission to another tribe (i.e., not individual to individual) could result in a fishing at or before treaty time. The law of the case is clear - to hold U&A rights a tribe must establish that

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they customarily fished, at and before treaty times, not infrequently or incidental to travel, in the area at issue. The permissive use of an area granted by the holder of U&A for the area does not unilaterally create a U&A to the Grantor. U&A's can only be established under the construct of *U.S. v. WA* in accordance with the legal standards applicable to all parties.

Question No. 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?

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

Response: Stillaguamish cannot establish U&A in Port Susan because there is no evidence of Stillaguamish fishing in Port Susan. Even if there were evidence that Quadsak invited Stillaguamish to fish, that permissive fishing would not establish U&A. But there is no evidence of any such invitation, let alone that Stillaguamish customarily fished the saltwater in Port Susan. Instead, the evidence shows that Stillaguamish's fishing territory extended only to the mouth of its river. The adjacent saltwater was fished by the Kikiallus and there is no evidence that either Kikiallus or Quadsak peoples permitted Stillaguamish to fish there. *See, e.g.,* April 11, 2022 Tr. 33:2-8 (Dr. Miller testifying that no new evidence had come to light that could lead to the conclusion that Stillaguamish customarily fished Port Susan at or before treaty time).

Question No.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

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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.

Response: Mere presence – whether regular or temporary / infrequent – does not establish U&A. Accordingly, the Court should not draw any distinction based on the frequency of a member's presence unless such presence is coupled with evidence of fishing.

Stillaguamish has the burden to prove by a preponderance of the evidence that the existence of tribal villages or their presence in an area "coincide[d] with" evidence of fishing. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975) (holding evidence of village locations not enough to prove fishing at those locations). I.e., "evidence" of fishing in an area means more than inferring that if they were there, they must have actually and usually fished.

In the 1975 subproceeding, the Court considered three types of evidence in determining the Tulalip Tribes' U&A: testimony by Dr. Barbara Lane, testimony from a tribal elder about post-treaty fishing locations, and ICC findings about the location of Tulalip's "coastal and river villages." *Id.* The Court held that the ICC findings "of the Indian coastal and river villages," although raising the "presum[ption]" of fishing activities, was not enough. *Id.* The Court held:

> In the present case, the findings of the Claims Commission of the Indian coastal and river villages, from which fishing activities may be presumed, *coincide with the findings of Dr. Lane and the testimony of Mrs. Dover*. Future utilization of Indian Claims Commission decisions and findings for the purpose of establishing the usual and accustomed fishing places *shall be given consideration consistent with the above stated limitations*.

Id. (emphasis added). Even though the Tulalip Tribes had proven "coastal and river villages, by which fishing activities may be presumed," that presumption was not enough to support a "reasonable inference[]" that fishing activities had occurred there. *Id.* Instead, to support a U&A finding, the Court required evidence of *fishing* to accompany evidence of coastal and river villages. *Id.*

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Question No. 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).

Response: The Court should apply the legal standards that have been developed over four decades. In subproceeding 89-3, the tribes addressed shellfish industry arguments that each tribe had to make a U&A showing for each species of fish. In their Joint Tribal Trial Brief re: Usual and Accustomed Fishing Locations, the tribes correctly argued that the law of the case is to determine usual and accustomed grounds and stations based on "general areas used for fishing purposes, without limitation to particular species." Docket 14181 at 6. The briefing describes the applicable standards for determining U&A and provides a comprehensive overview of the detailed expert, elder, and documentary evidence regarding the participating tribe's specific saltwater fishing practices and locations at or before treaty time.

Because "evidence of treaty-time fishing activities is 'sketchy and less satisfactory than evidence available in the typical civil proceeding,'" and the documentation is "extremely fragmentary," "the stringent standard of proof that operates in ordinary civil proceedings in relaxed." *Id.* (quoting *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988)). Nevertheless, Stillaguamish, as the tribe seeking to expand its U&A, "bear[s] the burden to establish the location of" its U&A, which it must prove by "a preponderance of the evidence found credible and inferences reasonably drawn therefrom." *Id.* (citing 384 F. Supp. at 348); *see also United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975) ("In determining usual and accustomed fishing places the court cannot follow stringent proof standards

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because to do so would likely preclude a finding of any such fishing areas. . . . Notwithstanding the court's prior acknowledgement of the difficulty of proof, the Tulalips have the burden of producing evidence to support their broad claims."). As reflected over the course of this trial, the relaxed evidentiary standards allow the Court to consider evidence (e.g., hearsay) that may have been inadmissible in a typical civil trial. But whether the evidence is an informant's report to an anthropologist, a family's oral history passed down through tribal elders, or contemporaneous reports from frontiersmen, there must be evidence of fishing – not mere speculation.

All of the standards set forth in the Joint Brief or ordered throughout the history of this case are inconsistent with Stillaguamish's position here, which is essentially pure speculation regarding actual fishing, for any species. Stillaguamish had presented no evidence of actual fishing in saltwater. This failure is highlighted by Dr. Friday's effort to create the false impression that at treaty time Stillaguamish had saltwater fishing techniques and tools. Ex. SW-169 at 141.[1] Such implements are not a) evidence of fishing or b) evidence of fishing in any specific location and c) do not solve fundamental problem that is fatal to Stillaguamish's case: it lacks even a shred of evidence that was not available and considered when Judge Boldt previously determined its U&A.

Question No. 10: Why was Stillaguamish included as a bound party in the Shellfish Implementation Plan if Stillaguamish did not have any interest in marine waters?

Response: Stillaguamish has a legal interest in marine waters through its 1984 settlement agreement with the Tulalip Tribe. Moreover, Stillaguamish is a treaty tribe and is therefore bound by the orders and determinations made in sub-proceeding 89-3 as a party in *U.S. v. Washington*. Further, at the time of the Shellfish Implementation Plan discussions, Upper Skagit objected to Stillaguamish's involvement precisely because its only marine interest derives from Tulalip's U&A. Judge Boldt correctly determined Stillaguamish's U&A and confined it to its river system.

[1] April 11, 2022 Tr. 43:18-44:23 (Dr. Miller describing misleading nature of Dr. Friday's summary because none of the sources quoted were discussing Stillaguamish marine resource technologies.).

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Question No. 11: Hasn't the Court previously concluded, in earlier subproceedings, that tribes "took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent" to their established sites/villages? *See United States v. Washington*, 873 F. Supp. 1422, 1448 (W.D. Wash. 1994), *aff'd in part, rev'd in part sub nom*, 157 F.3d 630 (9th Cir. 1998) (as amended).

a. Are there any examples where:

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

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

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?

Response: At trial, Dr. Bruce Granville Miller testified unequivocally regarding the people of Brunswick Point, a Coast Salish tribe that lived "right on the edge of the saltwater" but exclusively fished the freshwater resources within its territory. April 11, 2022 Tr. 67:19-68:3. Upper Skagit is not aware of any case where a tribe established U&A based on sustained and regular presence on the shoreline of a body of water. The law of the case is that presence and access alone do not establish U&A. They must coincide with evidence of fishing.

Dr. Miller also testified at trial in *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994). In that case, his report (Ex. UPS – 31) included numerous historical and informant sources identifying specific locations, species, and techniques of shell fishing by Upper Skagit's predecessor groups. *See, e.g.,* Ex. UPS – 31 at 23-24 (summarizing Gaspar Dan's description that his people "used to go to Deception Pass to troll"); 26 (quoting Sally Snyder's fieldnotes: "Saltwater fish on Nuwhaha shores were small native oysters, horse clams, butter clams, cockles and dogfish."); 29-30 (summarizing Alice Williams' account of her husband's father fishing for

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salmon and taking oysters at Chuckanut Bay). As Dr. Miller explained during cross examination on April 11:

> I would have to see that information because, you see, when I did 89-3, I based it on actual information about actual people fishing - - shellfishing in actual locations with actual tools and so forth. And that's the way in which I think this is best done, rather than hypotheticals.

April 11, 2022 Tr. 138:6-11.

Question No. 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?

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"?

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

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

Response: A tribe seeking to establish U&A must prove actual fishing by a preponderance of evidence, i.e., that the evidence shows that it is more probable than not that the tribe regularly

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actually fished in the claimed water at or before treaty time. For each of the waters at issue, Stillaguamish must prove that it was a "usual and accustomed" fishing place (U&A): i.e., a "fishing location where members of" Stillaguamish "customarily fished from time to time at and before treaty times." 384 F. Supp. at 332. "[E]xclu[ded]" from Stillaguamish's U&A are locations "used infrequently," "at long intervals," on "extraordinary occasions," "occasional[ly]," or "incidental[ly]," such as "troll[ing]" when "en route" on "[m]arine waters . . . used as thoroughfares for travel." *Id.* at 332, 353.

Evidence of the probable distances to which a tribe had the capability to travel at treaty-time is insufficient on its own to establish U&A." *United States v. Washington*, 129 F. Supp. 3d 1069, 1111 (W.D. Wash. 2015) (citing *United States v. Washington*, 730 F.2d 1314, 1318 (9th Cir. 1984)), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017). "So too is evidence that a tribe occasionally trolled incidental to traveling through an area." *Id.* (citing 384 F. Supp. at 353 and *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010)).

Stillaguamish must prove its claim by a preponderance of the evidence. *See id.* at 348, 350 ("Based . . . upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom, the court now makes the following Findings of Fact and Conclusions of Law: . . . Based upon these and other factors, the court finds that in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence.").

Presence, access, and ability are not the test. Proximity is not the test. Distance is not the test. There must be evidence of actual **fishing**. The record in this case includes specific evidence of Stillaguamish river fishing (Ex. SW-176, Ex. SG-071) and no evidence of its saltwater fishing. In other words, four decades later, the evidence remains entirely consistent with Stillaguamish's U&A, as Judge Boldt found:

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> During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe.

United States v. Washington, 384 F. Supp. 312, 379 ¶ 146 (1984).

It is important to note that there is a difference as between marine and riverine U&A's; rivers and their tributaries are typically within a tribe's landed territories which can be the basis for a Tribe's U&A. Upper Skagit's river U&A rest in large part on its ICC findings which establish specific landed territory encompassing the Skagit river, as the exclusive use area of the Upper Skagit Tribe, the Court relied upon the ICC determination in its findings of facts as to the Upper Skagit's riverine U&A. The law of the case is clear that findings of tribe controlled land territory do not provide the same evidentiary proof in relation to marine U&A given that marine U&As are not bounded within a land mass.

Question No. 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

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

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

Response: Putting aside the evidentiary requirements discussed above, the Mariners would have U&A at T-Mobile Field and U&A at their "home away from home" at the Peoria Sports Complex, which they share with the San Diego Padres. The Mariners' occasional visits to the other locations, even including the AL West ballparks, would not establish U&A because those visits are exclusively at the invitation of the teams controlling those sites.

Question No. 14: Do the parties contend that any other tribes—other than Quadsak or Stillaguamish—fished in the northern part of Port Susan?

Response: There is no evidence that Stillaguamish fished the northern part of Port Susan. The evidence at trial establishes that at treaty time the Stillaguamish area began, at a minimum, four or five miles upriver (Ex. SW-176 at LANEST_000482), and that the large majority of the people lived approximately twenty miles upriver. March 23, 2022 Tr. 67:20-70:1; Ex. USA-28 (Barbara Lane relying on Hancock's account of 1850 trip; village with approximately 300 people "some 20 miles up the river"). The northern part of Port Susan was fished by predecessors of the Tulalip Tribe and by the Kikiallus. The former obtained adjudicated U&A in 1986.

Question No. 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?

Response: No – the distance between a potential location and a tribal village is not relevant to evaluating a U&A claim. The relevant inquiry is whether there is evidence of fishing. While one may speculate that a multiple day trip could entail fishing during the journey it is

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equally (or more) likely that the traveling tribe packed provisions (e.g., dried meat, nuts) and/or traded for food upon arriving at the visited location. In this case, Stillaguamish's own evidence refers to a canoe filled with hides to trade for guns and blankets, not with fishing gear. There is no reference to fishing, and there was little or no room for fish or fishing gear. Ex. SG-100 ("My people said they traded. They went in canoes to Victoria, and traded their hides for groceries."); Ex. SG-79 ("Then we found out they were buying hides at Victoria so we would load up our canoe and go there and trade our hides for blankets and guns . . . .").

Question No. 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?

Response: No – to the contrary, the Lummi cases confirm that travel alone cannot establish U&A.

Question No. 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?

Response: Yes – evidence of traveling for the purpose of fishing can be evidence supporting a determination of U&A while evidence of traveling alone cannot establish U&A especially where accompanied by evidence that the travel was for other reasons, mainly trading.

Question No. 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*?

Response: Yes, evidence of fishing at or before treaty time, not just presence on nearby or adjacent land, is the Ninth Circuit's and this Court's standard in determining Judge Boldt's intent

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in a proceeding under Paragraph 26(a)(6) where "the Court sits in the same position as Judge Boldt and applies the law of the case established in his initial U&A determinations." March 15, 2022 Order (Dkt. 252). An area is not within a tribe's U&A if there is no evidence of fishing in that area.

Thus, in *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000), Muckleshoot's U&A included "the waters of Puget Sound," but the Court held that Judge Boldt intended by that language only Elliott Bay because the evidence proved fishing only in Elliott Bay. *Id.* at 432, 434 ("These documents indicate that the Muckleshoot's ancestors were almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods. Insofar as they conducted saltwater fishing, the referenced documents contain no evidence indicating that such fishing occurred with regularity anywhere beyond Elliott Bay." (citing evidence that said that the tribe "occasionally made the trip down river to Elliott Bay on fishing and clamming expeditions" and "there was some trolling for salmon in salt waters when families descended the rivers to get shell fish supplies on the beaches of the Sound")).

Question No. 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?

Response: The law of the case is clear that obtaining access to fishing grounds based on intermarriage does not extend those rights to an entire tribe. Fishing rights are "communal rights which belong to the Indians with whom the treaties were made in their collective sovereign capacity. Being communal in nature these rights are not inheritable or assignable by the individual member to any person, party or other entity of any kind whatsoever." *United States v. Washington*, 476 F. Supp. 1101, 1110 (W.D. Wash. 1979). Individual family arrangements cannot provide the basis for a tribe's claim that it customarily fished a location at or before treaty time.

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CONCLUSION

The freshwater Stillaguamish River system constituted the usual and accustomed fishing places of the tribe. There is no evidence supporting its attempt to claim U&A in any of the marine waters of Puget Sound.

DATED this 3rd day of June, 2022.

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