Appeal No. 23-35066

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Appellant,

STATE OF WASHINGTON, *et al.*

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE
The Honorable Ricardo Martinez, United States District Court Judge
Case No. 2:17-sp-00003-RSM

APPELLANT STILLAGUAMISH TRIBE OF INDIANS' REPLY BRIEF

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INTRODUCTION

The Boldt Decision in *United States v. Washington* turns 50 next year; unfortunately, that civil rights victory for tribes over the state of Washington has not aged well. This Court is now presented with the latest in decades of tribal in-fighting over the dwindling fishery resource. Here, the Swinomish, Tulalip, and Upper Skagit tribes ("Responding Tribes") that oppose the Stillaguamish Tribe of Indians' ("Stillaguamish") effort to obtain marine water fishing rights have sunk to new lows, vigorously defending a terse six-page order devoid of citations and replete with misstatements of the law of the case to maintain their monopoly on the fishery in the waters at issue. Stillaguamish, joined by several interested party tribes, asks this Court to vacate the District Court's Rule 52 Order and remand this case to remain true to the 50 years of law in *United States v. Washington* setting the burden of proof and factual requirements for the establishment of treaty fishing rights. Judge Boldt's legacy deserves nothing less.

Contrary to Swinomish's offensive mischaracterization of Stillaguamish's efforts to fish its ancestral marine waters, Stillaguamish in this case does not "turn its back on its name, identity, and its homeland," Dkt. #35 at 7; rather, in this subproceeding, Stillaguamish seeks to finally adjudicate the entirety of the fisheries its ancestors fished at and before treaty times and reserved in the Treaty of Point Elliott nearly two centuries ago.

SUMMARY OF ARGUMENT

The simple fact remains that the district court erred by failing to demonstrate that it applied the controlling law and legal rules of *United States v. Washington*, and by premising its findings and conclusions on a flawed view of the law of the case firmly established in *United States v. Washington*. This Court should vacate the judgment and remand on these bases alone. If the Court examines the factual findings the district court entered based on the evidence presented in Stillaguamish's case-in-chief, vacatur and remand are necessary because these findings are incomplete and insufficient in scope and detail under the law of the case in *United States v. Washington* U&A adjudications.

If the Court examines the district court's conclusions of law, it is apparent that the district court erred as a matter of law in the legal conclusions it reached. The historic, anthropological, ethnographic, archeological, expert, and tribal elder evidence Stillaguamish presented at trial clearly demonstrate that at and before treaty times, Stillaguamish people regularly fished the marine waters of Port Susan, Skagit Bay, Saratoga Passage, Holmes Harbor, Penn Cove, and Deception Pass ("Claimed Waters") as well as the previously adjudicated freshwater Stillaguamish River drainage.

ARGUMENT

A. THIS COURT SHOULD VACATE AND REMAND BECAUSE THE DISTRICT COURT FAILED TO DEMONSTRATE IT APPLIED THE CONTROLLING LAW AND LEGAL RULES

The Responding Tribes attempt to rehabilitate the district court's Order by explaining at length the controlling law of the case in *United States v. Washington.* Although this effort is understandable given the obvious deficits in the Order, nothing they say now can change the fact that the district court failed to show that it applied the controlling law of the case. *See* ER-1-2-7. The Responding Tribes' ultimately highlight one of the threshold issues on appeal: no one knowns whether the district court applied the correct legal rules and controlling law that govern U&A adjudications from the face of the Order.

Upper Skagit and Tulalip try to defend the Order by reiterating the controlling law and legal rules Judge Boldt established. Dkt. #33 at 13-14; Dkt #30 at 13-17. No matter how many times Upper Skagit and Tulalip explain the law of the case, this Court cannot retroactively import into the Order the summary of the controlling law and legal rules Tulalip and Upper Skagit provide in their briefs. All Responding Tribes' recitation of some of the controlling law of the case does is highlight the errors fatal to the Order on appeal. Had the district court set forth in its Order the relevant *United States v. Washington* standards, thereby making unquestionably clear that it applied the law to the evidence, this Court

would not find itself in the position of speculating as to whether the district court applied the correct legal rules and controlling law of *United States v. Washington* in deciding the Rule 52(c) motion. This is particularly the case here because the standard the district court seems to have applied is contrary to the law of the case in *United States v. Washington*.

Upper Skagit claims that no error exists in the Order because it "incorporates by reference" the order on summary judgment, in which the "district court elaborated upon the standard by which Stillaguamish's claims must be measured." Dkt. #33 at 13-14. This is simply untrue. The district court did not "incorporate[] by reference" or otherwise refer to its prior summary judgment decision in the Order. *See* 1-ER-2-7.

Swinomish's efforts to preserve the Order are similarly unavailing. Swinomish acknowledges that the district court failed to cite the controlling law and legal rules in the Order; Swinomish nonetheless contends that the district court's cursory paraphrasing of *some* of the applicable standards in *United States v. Washington* satisfies Rule 52(c). Dkt. #35 at 21. Not so. For instance, in support of its position, Swinomish relies upon the district court's definition of "customarily fished"—"more than *may* have fished, *could* have fished, or even *definitely* fished on a rare occasion." Dkt. #35 at 21 (citing 1-ER-3) (emphasis in original). Despite Swinomish's efforts to mask this error by reciting the customarily fished

precedent, what matters is that the Order's definition of "customarily fished" is found nowhere in the long history of *United States v. Washington*. Not only is the district court's "more than *may* have fished, *could* have fished, or even *definitely* fished on a rare occasion" a brand-new and unsupported standard, its characterization of "customarily fished" is wholly inconsistent with the controlling law of the case. *Compare* 1-ER-3 *with United States v. Washington*, 384 F.Supp. at 332 (customarily fished means "every fishing location where members of a tribe customarily fished from time to time at and before treaty times…").

The Responding Tribes' attempts to rehabilitate the district court's Order by reading in absent citations are futile. The fact remains that the district court's failure to accurately cite any of the controlling law of the case or legal rules from *United States v. Washington*, particularly when combined with the district court's misstatement of the law, deprives this Court of any assurance that the district court actually applied the correct legal standard. Vacatur and remand are appropriate.

B. THIS COURT SHOULD VACATE AND REMAND BECAUSE THE DISTRICT COURT PREMISED ITS FACTUAL FINDINGS ON AN ERRONEOUS VIEW OF THE CONTROLLING LAW

1. Evidence of "Actual Fishing" Is Not Required In *United States v. Washington* U&A Adjudications

The Court must reject the Responding Tribes' invitation to adopt and retroactively apply a brand-new and unsupported "actual fishing" evidentiary requirement in U&A adjudications. Upper Skagit maintains that "Stillaguamish

cannot show U&A without proof of *actual fishing*," Dkt. #33 at 19 (emphasis added); Swinomish contends "there is no evidence that Stillaguamish *actually fished* the Claimed Waters," Dkt. #35 at 27 (emphasis added); and, Tulalip argues "*[a]ctual* evidence of fishing is required," Dkt. #30 at 18 (emphasis added). Although it remains unclear what exactly the Responding Tribes mean by *actual fishing* evidence, this Court must remember that evidence of *actual fishing* is not and never has been the standard in U&A adjudications.

For decades, the trial court could have adopted the Responding Tribes' rigorous *actual fishing* evidentiary standard, but rejected this approach for good reason. Judge Boldt intentionally skewed the other direction, adopting and applying a relaxed preponderance standard because the evidence documenting treaty-time Indian fishing grounds and stations is sketchy, incomplete, conflicting, and fragmentary. *United States v. Washington*, 459 F.Supp. 1020, 1059 (W.D. Wash. 1978); *United States v. Washington*, 626 F.Supp. 1405, 1529 (W.D. Wash. 1985). In fact, Judge Boldt reasoned "the court cannot follow stringent proof standards" like the Responding Tribes' *actual fishing* standard "because to do so would likely preclude a finding of any such fishing areas." *United States v. Washington*, 459 F.Supp. at 1059. Indeed, it probably would have precluded their own. The Court must therefore reject the Responding Tribes' invitation to adopt a new *actual fishing* standard that runs contrary to both the controlling law of the

case and to Judge Boldt's intent. The Court should vacate and remand because it appears the district court applied an evidentiary standard more demanding than the relaxed preponderance standard similar to the Responding Tribes' *actual fishing* standard, or at the least an evidentiary standard inconsistent with the law of the case, as explained further below.

2. The District Court's View Of The Controlling Law In *United States v. Washington* U&A Adjudications Regarding Treaty-Time Villages Demands Vacatur And Remand

The Responding Tribes all contend that evidence of treaty-time villages does not give rise to a presumption or reasonable inference of U&A in adjacent and sub-adjacent waters, arguing essentially about the weight the district court should give to a tribe's territory in conjunction with other types of evidence common in U&A adjudications. Dkt. #33 at 16-21; Dkt. #35 at 26-30; Dkt. #30 at 17-19. The Responding Tribes completely miss or intentionally avoid the error Stillaguamish, Hoh, Jamestown S'Klallam, and Port Gamble S'Klallam Tribes all identify with the Order in light of the established law of the case: that is, the district court failed to apply or even note for the record the presumption, conclusion, or reasonable inference that it must draw from the location villages adjacent or subadjacent to marine waters, which is contrary to the established law of the case in *United States v. Washington*. Dkt. #16 at 19-21; Dkt. #32 at 13-17; Dkt. #27 at 18-19. As the Hoh Tribe correctly notes, "ocean U&As are

established by the location of villages and fishing sites along the coast. The identification of villages sites infers fishing off those village sites as well as adjacent areas alone the coast[.]". Dkt. #32 at 17.

Upper Skagit and Swinomish cite numerous U&A adjudications in defense of their position regarding the weight the district court should give to village locations in determining U&A. Dkt. #33 at 17-18; Dkt. #35 at 26-30. At first glance, the light in which Upper Skagit and Swinomish discuss these U&A adjudications may appear compelling, but in each case cited it remains an undeniable fact that the district court considered the location of each tribe's treaty-time territory. *See United States v. Washington*, 626 F.Supp. 1405, 1442-43 (W.D. Wash. 1985) (U&A finding based in part on Port Gamble S'Klallam winter villages located near marine shoreline); *United States v. Muckleshoot Indian Tribe*, 253 F.3d 429, 436-37 (9th Cir. 2000) (clarifying marine U&A based in part on location of Muckleshoot villages); *United States v. Washington*, 129 F.Supp.3d 1069, 1080 (W.D. Wash. 2015) (U&A finding based in part on Quinault occupation of Washington coast and villages situated between the Queets River system to the north and the north shore of Grays Harbor to the south). This is the law of the case the district court did not follow when it failed to even consider Stillaguamish's marine-adjacent treaty-time villages and territory, and when it failed to find a presumption or reasonable inference in this

case. *See e.g.*, Dkt. #32 at 17 ("The district court's ruling that identification of villages by itself does not provide a reasonable inference of ocean fishing off those villages [s]ites is contrary to the law of the case and should be reversed.").

Tulalip and Upper Skagit also attempt to misrepresent Judge Boldt's decision regarding Tulalip's marine U&A in *United States v. Washington*, 459 F.Supp. 1020 (W.D. Wash. 1975). Tulalip proposes that Judge Boldt "explicitly held that evidence of village locations is not enough to prove fishing occurred or to establish U&A at those locations," Dkt. #30 at 17; Upper Skagit similarly opines that Judge Boldt "held that evidence of village locations does not prove fishing at those locations," Dkt. #33 at 16-47. A review of Judge Boldt's decision regarding Tulalip's marine U&A shows that, contrary to the modern-day representations of Tulalip and Upper Skagit, Judge Boldt never "explicitly" declared that village locations is not evidence of fishing; rather, Judge Boldt concluded that "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[,]" a Tulalip tribal elder. *United States v. Washington*, 459 F.Supp. at 1059. In other words, Judge Boldt, consistent with Dr. Lane's opinion that Indian tribes "living in a territory had the right to use the resources and locations within it," 6-ER-958, held that the locations of a tribe's villages lead to a *presumption* of treaty-time fishing in

adjacent waters that, when coupled with tribal elder, expert, and other documentary evidence, can serve as the basis for establishing U&A.

Here, the district court deviated from the well-settled law of the case in completely disregarding the substantial evidence Stillaguamish presented regarding its treaty-time villages adjacent and subadjacent to the Claimed Waters, which under the law of the case, gives rise to a presumption or reasonable inference that Stillaguamish customarily fished those waters at and before treaty times. *See* Dkt. #16 at 19-21.

Swinomish further claims this Court's recent decision in *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766 (9th Cir. 2023), stands for the proposition that evidence of treaty time villages does not support a U&A finding. Dkt. #35 at 27. As the Port Gamble S'Klallam and Jamestown S'Klallam Tribes correctly point out, however, *Upper Skagit* involved examination of a travel route theory—not U&A premised on the location of treaty-time villages. *See* Dkt. #27 at 13-14. More importantly, the dispute in *Upper Skagit* involved a Paragraph 25(a)(1) clarification sub-proceeding. 66 F.4th at 769. This Court affirmed the district court's determination that Judge Boldt's Finding of Fact 131 "does not include the Skagit River" because the expert evidence that Judge Boldt relied "did not include the Skagit River as one of the Sauk tribe's fishing grounds," which this Court concluded "strongly

suggests that the Sauk tribe did not fish the Skagit river itself" and that Judge Boldt did not intend to include it in Sauk's U&A. *Id*. at 771-72. The *Upper Skagit* Paragraph 25(a)(1) clarification proceeding is wholly inapplicable to this Paragraph 25(a)(6) subproceeding—here, the district court was not interpreting what Judge Boldt intended to include within Stillaguamish's U&A as set forth in *Final Decision #1*; rather, the district court needed to apply the standard Judge Boldt articulated in *Final Decision #1* and the law of the case as shaped in further Paragraph 25(a)(6) sub-proceedings, which requires consideration of the location of Stillaguamish's marine-adjacent treaty time villages and territory.

3. The District Court's View Of The Controlling Law In *United States v. Washington* U&A Adjudications Regarding The Evidentiary Standard Requires Vacatur And Remand

Upper Skagit and Swinomish argue that the district court acceptably employed the preponderance of evidence standard, urging this Court to completely disregard the district court's repeated application of a "substantial evidence" standard. Dkt. #33 at 15; Dkt. #35 at 23. The fact that the district court applied, or at least referenced, two different evidentiary standards in the Order, making it unclear which standard the district court actually applied, justifies vacatur and remand. The district court's failure to acknowledge the relaxed preponderance standard and the evidentiary issues with marine waters in particular compounds this issue further.

Upper Skagit attempts to mask the district court's failure to apply the relaxed preponderance standard that controls U&A determinations by merely stating that "Judge Martinez has vast experience in this realm." Dkt. #33 at 16. This Court cannot, however, infer the district court got it right just because a particular judge has presided over a case for an extended period of time. Indeed, despite his long tenure with *United States v. Washington*, this Court has held on numerous occasions that Judge Martinez did not get it right the first time, which is exactly the case here. *See, e.g., Upper Skagit Indian Tribe v. Washington*, 576 F.3d 920 (9th Cir. 2009) (reversing and remanding); *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014) (reversing and remanding); *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (reversing and remanding); *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017) (affirmed in part, reversed in part, and remanded); *Lower Elwah Klallam Indian Tribe v. Lummi Nation*, 849 Fed.Appx. 216 (9th Cir. 2021) (affirmed in part, reversed in part, and remanded).

Swinomish likewise endeavors to compensate for the district court's failure to apply the relaxed preponderance standard in the Order by itself reciting the standard. Dkt. #35 at 24. Stillaguamish agrees that a relaxed preponderance standard applies in U&A adjudications; the issue here, however, is that the Order indicates that the district court failed to apply that correct evidentiary standard.

Neither Swinomish nor Upper Skagit address Stillaguamish's point that the district court additionally failed to acknowledge or apply the *United States v. Washington* evidentiary standard applicable to open marine waters. *See* Dkt. #16 at 23.

C. THIS COURT SHOULD VACATE AND REMAND BECAUSE THE DISTRICT COURT ENTERED INSUFFICIENT AND INCOMPLETE FACTUAL FINDINGS

1. The Location of Treaty-Time Villages, Expert Evidence, And Tribal Elder Accounts Constitute Relevant Intermediary and Principal Issues The Trial Court Must Address In An U&A Adjudication

In their defense of the district court's Order, Swinomish and Tulalip completely avoid addressing the fundamental issue with the factual findings: the district court failed to make specific findings on the relevant intermediary and principal issues presented at trial that are determinative of U&A adjudications under the controlling law of the case. *See* Dkt. #35 at 63-66; Dkt. #30 at 23-26. Tulalip and Swinomish's omissions are understandable given that the location of their treaty-time villages, expert evidence, and tribal elder accounts were critical to establishing their marine U&As. *See e.g., United States v. Washington*, 459 F.Supp. at 1058-59. Tellingly, neither Tulalip nor Swinomish outright deny the importance of the location of treaty-time villages, expert evidence, and tribal elder accounts in U&A adjudications.

The Responding Tribes provide no justification for the district court's failure to enter findings on the evidence regarding Stillaguamish treaty-time marine adjacent villages, evidence presented by experts other than Dr. Friday—Dr. Barbara Lane, Dr. Sally Snyder, Dr. Carrol Riley, and Dr. Deward Walker, Jr.—and the tribal elder accounts relevant to Stillaguamish treaty-time marine fishing. That is because none exists. The location of treaty-time villages, expert evidence, and tribal elder accounts are all unquestionably key evidentiary issues under the controlling law of the case that must be, but were not, addressed in factual findings when such evidence is presented at trial in order to satisfy Rule 52(c).

2. The District Court Failed To Enter Findings On The Relevant Intermediary And Principal Intermediary Issues In U&A Adjudications

The efforts of Tulalip and Swinomish to distinguish the appellate authority cited by Stillaguamish only further highlight one of the many fundamental flaws with the district court's factual findings: the district court failed to enter findings on the principal relevant and intermediary issues present at trial under the controlling law of the case, the location of villages, expert evidence, and tribal accounts all constitute relevant intermediary and principal issues the district court must address in factual findings in order to satisfy Rule 52(c).

This Court could only affirm the district court without the need for further findings on the relevant intermediary and principal issues of the marine-adjacent location of treaty-time Stillaguamish villages, evidence presented by experts in addition to Dr. Friday, and Stillaguamish tribal elder accounts relevant to treaty-time fishing activities if Stillaguamish could not prevail under any possible interpretation of the evidence. *Sumner v. San Diego Urban League, Inc.*, 681 F.2d 1140, 1143 (9th Cir. 1982). Thus, the lack of reference to Stillaguamish treaty-time marine-adjacent villages, opinions of five experts in addition to Dr. Friday, and tribal elder accounts would not adversely affect this Court's ability to review this case if the evidence was insufficient, as a matter of law, to create a prime facie case. *Id*. There exists in this case, however, ample evidence that would support a finding that Stillaguamish proved a prima facie case. The trial record contains evidence that Stillaguamish occupied villages and encampments adjacent and sub-adjacent to the Claimed Waters, numerous experts testified that Stillaguamish fished some of the Claimed Waters, tribal elder, historical, anthropological, and archeological evidence that Stillaguamish utilized marine resources and traveled through the Claimed Waters, and intermarried with tribal groups in the northern Puget Sound for the purposes of accessing fishing locations outside the lower Stillaguamish River delta region. *See* Dkt. #16 at 45-65. This evidence, when viewed as a whole (not piecemeal) and taking all

reasonable inferences drawn therefrom, is sufficient to establish Stillaguamish U&A to the Claimed Waters. The issue here is that this Court cannot readily tell how the trier of fact evaluated any of the evidence about Stillaguamish treaty-time marine-adjacent villages, opinions of five experts in addition to Dr. Friday, and tribal elder accounts relevant to Stillaguamish treaty-time fishing activities, which in turn leaves this Court unable to fully evaluate the issue of whether Stillaguamish established by a preponderance of evidence that members of the Stillaguamish customarily fished the Claimed Waters at and before treaty times. *United States v. Washington*, 384 F.Supp. at 332.

This Court should therefore vacate the judgment and remand the case to the district court to make sufficient factual findings on the relevant intermediary and principal issues of the marine-adjacent location of treaty-time Stillaguamish villages, evidence presented by experts in addition to Dr. Friday, and Stillaguamish tribal elder accounts relevant to treaty-time fishing activities.

D. THIS COURT SHOULD VACATE AND REMAND BECAUSE THE DISTRICT COURT ENTERED THREE CLEARLY ERRONEOUS FACTUAL FINDINGS

1. This Court Cannot Analyze The Evidence Presented At Trial In Isolation From The Remainder Of The Record

The Responding Tribes all encourage the Court to evaluate the evidence Stillaguamish presented at trial in isolation, separate and apart from the totality of the record, while arguing that certain evidence Stillaguamish presented is alone

insufficient to establish U&A. The Court should reject the Responding Tribes' piecemeal approach to the evidence Stillaguamish presented because it is contrary to the law of the case. Indeed, the new evidentiary analysis standard the Responding Tribes ask this Court to employ is the anthesis of the holistic approach Judge Boldt took in evaluating the evidence that ultimately served to establish the marine U&A of the Responding Tribes.

In U&A adjudications, the district court must evaluate evidence of each tribe's U&A as a whole given the "fragmentary," "sketchy and less satisfactory" nature of the evidence available in U&A adjudications than what is available in a typical civil proceeding. *United States v. Washington*, 841 F.2d 317, 321 (9th Cir. 1988); *see also United States v. Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015). Judge Boldt consistently considered as a whole (and gave great weight to) evidence of tribal treaty-time villages, historical documentation, tribal elder testimony, and expert evidence, and drew reasonable inferences from the body of evidence as a whole. *See e.g., United States v. Washington*, 459 F.Supp. at 1059. The Hoh Tribe makes this point well in explaining that the district court "took an extreme isolationist approach in determining the Stillaguamish Tribe's potential ocean fishing U&A, meaning the district court looked at each treaty factor in isolation rather than looking at the evidence as a whole and reasonable inferences from the totality of the evidence." Dkt. #32 at

14. As Hoh notes and Stillaguamish agrees, "[t]his approach by the district court is inconsistent with the law of the case." *Id.*; *see also* Dkt. #16 at 22-26.

2. The District Court's Finding Of Fact Regarding The Role Of Intermarriage In U&A Adjudications Is Clearly Erroneous

Upper Skagit concedes that there exists a direct relationship between intermarriage and treaty-time fishing activities in *United States v. Washington* U&A adjudications, but nonetheless maintains that the district court "has never found U&A based on intermarriage." Dkt. #33 at 29. As the controlling law of the case in *United States v. Washington* demonstrates, evidence of intermarriage is a factor that is routinely considered in U&A adjudications along with evidence from expert, anthropological, archeological, ethnographic, historical, and tribal elder sources. *See* Dkt. #16 at 37-41 (citing cases). As Judge Boldt noted, "[i]t was normal for all the Indians of western Washington to travel extensively either harvesting resources or visiting in-laws, because they were intermarried widely among different groups," "there was widespread intermarriage among the tribes surrounding Puget Sound," and that there was a "great deal of exogamy" at treaty times. *United States v. Washington*, 459 F.Supp.at 1530. Judge Boldt concluded from such findings that "[i]t seems reasonable [Indians] would have joined with neighboring people, especially if they were intermarried with them, to harvest fish." *Id*.

Upper Skagit also claims that the evidence of a Stillaguamish man—Mowich Sam—fishing in Holmes Harbor at treaty times based on intermarriage does not constitute direct evidence, indirect evidence, nor serves as the basis for a reasonable inference of Stillaguamish customary fishing in Holmes Harbor. Dkt. #33 at 29-30. The standard in *United States v. Washington* has, however, always been that a tribe's U&A includes "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 also fished in the same waters." *United States v. Washington*, 384 F.Supp. at 332. Stillaguamish presented uncontroverted evidence at trial of a Stillaguamish tribal member fishing from time to time at and before treaty times in Holmes Harbor, which is undiminished by the facts that Holmes Harbor lies beyond the lower Stillaguamish River delta and was also fished at treaty times by Upper Skagit predecessor groups.[1]

The Court should likewise disregard the efforts of Upper Skagit and Tulalip to downplay the evidence of Mowich Sam fishing in Holmes Harbor at treaty times merely because that fishing activity is predicated on intermarriage. Dkt. #33 at 29-32; Dkt. #30 at 27-28. Upper Skagit and Tulalip advance the issue

[1] The Responding Tribes want to have it both ways. In one breadth, they complain Stillaguamish failed to present *actual fishing* evidence. In the next, they complain that evidence of a Stillaguamish man actually fishing is not acceptable.

of primary right control, which is not at issue in this case. *See, e.g., United States v. Washington*, 928 F.3d 783, 790-91 (9th Cir. 2019); *see also United States v. Washington*, 626 F.Supp. at 1486. Whether a tribe possesses primary or secondary fishing rights in a particular area is an issue reserved for a sub-proceeding subsequent to an initial U&A determination case. *See, e.g., United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. 1985).

Tulalip similarly argues that Mowich Sam evidence at treaty times does not establish U&A because treaty rights are "communal rights" not "inheritable or assignable by the individual [tribal] member." Dkt. #30 at 27. Although Tulalip is correct that treaty rights are vested in the signatory tribe, the standard that has always governed *United States v. Washington* is that a tribe's U&A includes "every fishing location where ***members of a tribe*** customarily fished from time to time at and before treaty times...." *United States v. Washington*, 384 F.Supp. at 332 (emphasis added). Thus, as the law of the case in *United States v. Washington* illustrates, U&A is based on where tribal members fished at and before treaty times, irrespective of who legally holds that treaty right. The evidence presented at trial about a Stillaguamish man fishing Holmes Harbor at treaty times satisfies the controlling law of the case that intermarriage is one of many factors to be considered by the court.

E. THIS COURT SHOULD VACATE AND REMAND BECAUSE THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT STILLAGUAMISH HAS NO U&A IN THE CLAIMED WATERS

As explained in Section III(B) and (C), *supra*, the key issue on appeal is that the district court failed entirely to enter any factual findings on the principal and intermediary evidence Stillaguamish presented and vacatur and remand is appropriate. The following Section explains the ample availability of such evidence in the record from trial.

1. The District Court Erred In Concluding That Stillaguamish U&A Does Not Include Port Susan

Swinomish's efforts to undermine the opinions offered previously to the district court by Dr. Lane and Dr. Snyder confirming Stillaguamish treaty-time fishing in Port Susan are ineffectual and counter to the law of the case. Dkt. #35 at 45-46. Characterizing Dr. Lane's statements as "off the cuff" or as lacking sufficient explanation is wholly contrary to Judge Boldt's conclusion that her expert opinions were "highly credible" and "exceptionally well-researched." *United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 384 F.Supp. at 350. Swinomish's gross mischaracterization of Dr. Lane's testimony does not change the fact that Dr. Lane unequivocally opined on multiple occasions, subject to cross examination, to the district court that Stillaguamish fished Port Susan at treaty times. 6-ER-899-903 ("Port Susan was a salt water area used by the people who lived in the village at Hat Slough and the

village at Warm Beach, and there is documentation from the earlier part of this century that says that those villages were inhabited by Stillaguamish people and were called Stillaguamish villages."); 6-ER-976-68 ("I would say, generally speaking, the areas that you have mentioned except areas like Port Susan and areas close to the mouth of the Stillaguamish River. I think they were primarily fished by Kikiellis and Stillaguamish."); *see also* 6-ER-950. Swinomish likewise attempts to undercut Dr. Snyder's expert opinion that Stillaguamish fished Port Susan at treaty times by speculating that she offered the opinion "in passing while testifying about the fisheries of other tribes." Dkt. #35 at 45. Again, this does not change the fact that Dr. Snyder, who had at the time she testified conducted extensive research on the treaty-time fishing activities in the northern Puget Sound and was subject to cross examination, opined that Stillaguamish fished Port Susan at and before treaty times. 6-ER-956 ("Port Susan was faced by Kikiallus, Snohomish and Stillaguamish and it was fished presumably by the three groups."). The same principles apply to the Responding Tribes' efforts to undercut the opinions offered by Dr. Riley and Dr. Walker at trial.

Upper Skagit tries a different tack, ignoring Stillaguamish's expert evidence from Dr. Barbara Lane, Dr. Sally Snyder, Dr. Carrol Riley, and Dr. Deward Walker, Jr. as well as other historical, anthropological, archeological, and ethnographic evidence Stillaguamish presented at trial that, at a minimum,

indisputably gives rise to a reasonable inference that Stillaguamish more likely than not fished Port Susan at and before treaty times. *Compare* Dkt. #33 at 32-34 *with* Dkt. #16 at 45-47. Instead, Upper Skagit homes in on a field note from Wayne Suttles recounting information provided by Jackson Harvey. *Id*. However, because Jackson Harvey resided upriver his entire life—not in the lower Stillaguamish River delta like other Stillaguamish tribal elders James Dorsey and Sally Oxstein—the note does not undermine the weight of the other evidence regarding Stillaguamish treaty-time fishing in Port Susan. That Stillaguamish did maintain an upriver treaty fishery is not in dispute.

2. The District Court Erred In Concluding That Stillaguamish U&A Does Not Include Saratoga Passage

Upper Skagit does not dispute the opinion evidence Stillaguamish presented in its case in chief from experts other than Dr. Friday on Stillaguamish treaty-time fishing in Saratoga Passage from Dr. Sally Snyder, Dr. Carrol Riley, Dr. Natalie Roberts, Dr. Astrida Blukis Onat, Colin Tweddell, Dr. Deward Walker, Jr. *Compare* Dkt. #33 at 34-37 *with* Dkt. #16 at 51-55. Instead, it again attempts to distract the Court by relying upon the testimony Dr. Astrida Blukis Onat presented at trial in this subproceeding. Dkt. #33 at 35.

The Court should not consider the trial testimony of Dr. Astrida Blukis Onat or Dr. Bruce Miller, which the Responding Tribes offered after the close of Stillaguamish case-in-chief, because the district court's order makes clear that it

relied only upon the evidence presented in Stillaguamish's case-in-chief. *See* 1-ER-2-7. The Order makes no reference whatsoever to any of the evidence the Responding Tribes presented at trial. *Id*. If this Court were to look at the trial testimony of Dr. Blukis Onat or Dr. Miller, it would necessarily have to assume the role of the trial court in making credibility determinations and find facts. This is not the role of the appellate court, and it would be inappropriate to do so in this case. *See Myers v. United States*, 652 F.3d 2021, 1040 (9th Cir. 2011); *Mancuso v. Olivarez*, 292 F.3d 939, 944 n. 1 (9th Cir. 2002).

Upper Skagit does, however, attempt to challenge the historical, anthropological, ethnographic, and tribal elder evidence Stillaguamish presented at trial by implying that post-treaty evidence cannot be considered in determining a tribe's U&A. Dkt. #33 at 35-36. This must fail as, under the controlling law of the case, the district court customarily considers post-treaty evidence in determining a tribe's U&A. *See, e.g. United States v. Washington*, 626 F.Supp. at 1467, 1487-88; *United States v. Washington*, 384 F.Supp. at 372, 379; *United States v. Washington*, 129 F.Supp.3d at 1087-88.

3. The District Court Erred In Concluding That Stillaguamish U&A Does Not Include Skagit Bay

Upper Skagit does not contest the validity of the historic, anthropological, ethnographic, archeological, and tribal elder evidence presented by Stillaguamish regarding its treaty-time fishing activities in Skagit Bay. *Compare* Dkt. #33 at

37-38 *with* Dkt. #16 at 56-60. Instead, Upper Skagit attacks only Dr. Friday's expert opinions and otherwise attempts to undermine Stillaguamish treaty-time fishing activities in Skagit Bay by relying on the trial testimony of Dr. Astrida Blukis Onat. Dkt. #33 at 38. Swinomish similarly relies upon the testimony of Dr. Blukis Onat. Dkt. #35 at 49-51. As explained above, this Court should not consider the opinions of Dr. Blukis Onat because the district court relied solely on the evidence presented during Stillaguamish's case-in-chief, and otherwise entered no findings regarding Dr. Blukis Onat.

4. The District Court Erred In Concluding That Stillaguamish U&A Does Not Include Holmes Harbor and Penn Cove

Upper Skagit does not meaningfully dispute the ethnographic and anthropological evidence Stillaguamish presented about its treaty-time fishing activities in Holmes Harbor and Penn Cove. *Compare* Dkt. #33 at 38-40 *with* Dkt. #16 at 60-62. Upper Skagit claims the treaty-time records of Indian agents stationed at Penn Cove and Holmes Harbor "is temporally irrelevant." Dkt. #33 at 38. This argument is without merit. Again, contrary to Upper Skagit's representations, the district court routinely considers evidence from after 1855 in U&A adjudications, including in Upper Skagit's own marine U&A adjudication. That the late 1850s Indian agent records from Holmes Harbor and Penn Cove document Stillaguamish people utilizing marine resources and traveling extensively throughout the Claimed Waters strengthens, rather than diminishes,

their relevance. Contrary to Upper Skagit's position, Indian fishing practices established over millennia did not change in two years post-Treaty.

Swinomish also attempts to undermine the evidence Stillaguamish presented regarding Mowich Sam fishing at treaty times in Holmes Harbor based on intermarriage. Dkt. #35 at 61. Like Upper Skagit, Swinomish advances a primary rights control argument. The fact remains that Stillaguamish presented evidence at trial of a Stillaguamish member fishing in Holmes Harbor at treaty times. *United States v. Washington*, 384 F.Supp. at 332. The circumstances under which Mowich Sam engaged in those treaty fishing activities is subject to a future subproceeding focused on whether Stillaguamish's fishing rights are primary or secondary in nature.

Upper Skagit and Swinomish further interject the trial testimony of Dr. Miller and Dr. Blukis Onat in its attempt to undercut Stillaguamish treaty-time fishing in Holmes Harbor and Penn Cove. Dkt. #33 at 30, 40; Dkt. #35 at 62-63. As explained above, this Court should not consider the opinions of Dr. Blukis Onat or Dr. Miller because the district court relied solely on the evidence presented during Stillaguamish's case-in-chief, and otherwise entered no findings regarding the trial testimony offered by Dr. Blukis Onat or Dr. Miller.

5. The District Court Erred In Concluding That Stillaguamish U&A Does Not Include Deception Pass

Although Upper Skagit concedes a relationship exists between treaty time travel and treaty time fishing for the purposes of establishing U&A, it nevertheless argues that Stillaguamish's travel evidence cannot establish U&A based on the law of the case for Deception Pass. Dkt. #33 at 19-29. Swinomish makes a similar argument and then relies on the testimony of Dr. Blukis Onat. Dkt. #35 at 58-60. First, Stillaguamish did not present evidence of a "single" trip by a Stillaguamish member through Deception Pass at treaty times; rather, Stillaguamish presented historical, ethnographic, and anthropological evidence in support of its claim to Deception Pass, which support a conclusion that Stillaguamish customarily fished Deception Pass at and before treaty times. Dkt. #16 at 63-65. Second, as explained above, this Court should not consider the opinions of Dr. Blukis Onat because the district court relied solely on the evidence presented during Stillaguamish's case-in-chief, and otherwise entered no findings regarding Dr. Blukis Onat.

F. THIS COURT POSSESSES JURISDICTION

Tulalip argues that this appeal should be dismissed for lack of subject matter jurisdiction. Dkt. #30 at 9-13. In particular, Tulalip argues that Stillaguamish cannot use Paragraph 25(a)(6) to adjudicate new U&A because Stillaguamish's U&A was "specifically determined" in *Final Decision #1*.[2]

[2] Stillaguamish continues to marvel at Tulalip's audacity in claiming compliance

Rejecting the same jurisdiction arguments when made below by Swinomish and Upper Skagit, the district court relied on the language of Judge Boldt to correctly hold that it had subject matter jurisdiction. FER-1-2-9. First, the district court concluded that, in *Final Decision #I*, the court determined only some of the Stillaguamish U&A as "the area embracing the Stillaguamish River and its north and south forks, which river system constituted the U&A of the tribe." *United States v. Washington*, 384 F. Supp. at 379. The district court expressly noted that "the Stillaguamish river system may have constituted only one part of the tribe's U&A"; thus, "the entirety of Stillaguamish U&A was not specifically determined by FD #I ." FER-1-6-7

Second, the district court relied on Judge Boldt's words when he ruled in 1978 that Stillaguamish could not unilaterally expand its U&A into marine waters but could avail itself to paragraph 25, which is "the mechanism whereby further usual and accustomed fishing grounds may be established and recognized by the court." *United States v. Washington*, 459 F. Supp. at 1068–69 (citation omitted). The district court correctly construed this as "strong evidence that Judge Boldt himself did not believe that FD #I had specifically determined the entirety of

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with the 1984 Settlement Agreement which required it to "affirmatively support" Stillaguamish's case while at the same time vigorously opposing it below and before this Court. In fact, Tulalip previously supported the Court's jurisdiction to maintain compliance with the Agreement. *See* FER-1-2-9.

Stillaguamish's U&A." *Id*. at 6. There is no reason for this Court to reach a different conclusion.

Like Upper Skagit and Swinomish before it, Tulalip cannot find a credible argument around the law of the case, which permits later expansion of U&A, or the Court's 1978 unequivocal permission for Stillaguamish to file "at any future time" to expand its U&A. The preliminary nature of the court's 1974 designation of U&A is bolstered by the Judge Boldt's finding that "[f]or each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, ***and some, but by no means all,*** of their principal U&A." *United States v. Washington*, 384 F. Supp. at 333 (emphasis added). In the compilation of many of the major post-trial orders in these decisions, the court further noted that the additional fishing areas "in no way limits" that tribe "or any other party from seeking further determination of other usual and accustomed grounds and stations." *United States v. Washington*, 626 F. Supp. at 1442, 1468. Indeed, the courts have exercised continuing jurisdiction over no less than ten tribes' proceedings to expand their U&As that were originally determined, including for Tulalip. *See, e.g., United States v. Washington*, 626 F. Supp. at 1441-42 (expanding Nisqually, Puyallup, and Squaxin Island fishing areas); *Id*. at 1467 (Makah); *Id.* at 1443 (Lower Elwha); *Id*. at 1530 (Tulalip); *United States v. Washington*, 873 F. Supp. at 1449-50 (Upper Skagit); *United States v. Washington*,

18 F.Supp.3d at 1143 (Suquamish, although denied on the merits); *United States v. Washington*, 129 F.Supp.3d at 1072 (affirming decision below by equally divided court).

In fact, before opposing jurisdiction now and calling Stillaguamish's first adjudication a "complete, specific and unambiguous determination of Stillaguamish U&A," Dkt. #30 at 11, Tulalip had consistently argued that "[t]his Court has recognized that it would be impossible to list all areas customarily used by tribes for fishing purposes." FER-1-20 (internal citation omitted). Tulalip had also previously characterized the process of determining U&A as "an Ongoing Task" and has argued that Judge Boldt's U&A determinations in *Final Decision #I* were not final: "Although it was important to establish geographical locations for the exercise of treaty rights, the history of this case makes it clear that such rights were, by and large, not established with any particular precision at the initial stages"—hence the need for subsequent orders determining "places in addition to the original findings" *Id*. (internal citations omitted). Tulalip was right.

CONCLUSION

The district court's decision to ignore and depart from the law of the case, coupled with its dismissive consideration of treaty fishing evidence, cannot be salvaged by Responding Tribes. For the foregoing reasons, Stillaguamish

respectfully asks that this Court reverse the district court's order and remand with instructions.

DATED: August 16, 2023. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2023 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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