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' OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1, the undersigned counsel for Plaintiff-Appellant the Stillaguamish Tribe of Indians, certifies that the Tribe does not have a parent corporation and no publicly-held corporation owns stock in the Stillaguamish Tribe of Indians.

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INTRODUCTION

This appeal asks whether the Stillaguamish Tribe of Indians ("Stillaguamish") is entitled to have the district court apply the same standards applied to every other treaty tribe in more than fifty years of *United States v. Washington* to adjudicate the scope if its reserved treaty right to fish in certain marine waters near the Stillaguamish River. The answer to this question must be yes; instead, the district court profoundly departed from the well-established law of the case as to fundamental points of controlling law, while issuing insufficient and incomplete findings as well as others that are clearly erroneous, to hold in six pages that Stillaguamish failed to prove its claims after a five-day bench trial on its case in chief. The district court's Fed. R. Civ. P. 52 order is clearly erroneous and should be reversed, and the case remanded.

JURISDICTIONAL STATEMENT

Stillaguamish initiated this case as Subproceeding 17-03 under the district court's continuing jurisdiction in *United States v. Washington*. The district court's jurisdiction arises under 28 U.S.C. §§ 1331, 1345, and 1362. The district court entered final judgment on December 30, 2022. Stillaguamish timely filed its notice of appeal on January 26, 2023. 6-ER-974-75. This Court possesses jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court committed legal error by failing to apply the controlling law of *United States v. Washington*?

2. Whether the district court committed legal error by premising its factual findings on an incorrect or erroneous view of the controlling law in *United States v. Washington*?

3. Whether the district court committed legal error by entering factual findings that are clearly erroneous?

4. Whether the district court committed legal error in concluding that Stillaguamish did not establish by a preponderance of the evidence that its usual and accustomed fishing grounds include the Claimed Waters based on the historical, ethnographic, anthropological, archeological, and expert evidence presented at trial, and the inferences that can reasonably be drawn therefrom?

STATEMENT OF THE CASE

A. TREATY BACKGROUND

Stillaguamish is a signatory to the Treaty of Point Elliott of 1855. *United States v. Washington*, 384 F.Supp. 312, 378 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). In the Treaty, Stillaguamish reserved the right to fish at "all usual and accustomed grounds and stations." *Id*. at 332.

B. *FINAL DECISION #1*

In *Final Decision #1*, Judge Boldt determined that Stillaguamish's adjudicated usual and accustomed ("U&A") fishing grounds included "the areas embracing the Stillaguamish River and its north and south forks". *Id*. at 379. The Stillaguamish River drainage system was identified as only one of the areas in which the Tribe might be able to fish. *Id*. at 353. Judge Boldt cited only twenty-six pages of documents for his findings of fact related to Stillaguamish. *Id.* at 378-79. The limited evidence Judge Boldt relied upon related primarily to Stillaguamish's treaty status: its population; Stillaguamish's Constitution; and the United States Department of Interior's list of federally recognized tribes. *See id.* at 378. Recognizing that all of Stillaguamish's U&A had not been adjudicated in *Final Decision #1*, in 1978, the district court expressly permitted Stillaguamish "at any future time [to] apply to this court for hearing or reference to the Master regarding expanded U&A." *United States v. Washington*, 459 F.Supp. 1020, 1068 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981)

C. SUBPROCEEDING 17-03

This matter arises under the district court's continuing jurisdiction to "consider the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by [Judge Boldt] in Final Decision #1." *United States v. Washington,* 384 F.Supp. at 419. In 2017, Stillaguamish filed a request for

determination of its U&A fishing grounds in the interconnected marine waters of Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and Deception Pass (collectively, "Claimed Waters"), depicted on the Google Earth image below. The Stillaguamish River flows into northern Port Susan and southern Skagit Bay.

During the five-day bench trial that encompassed Stillaguamish's case in chief, the district court admitted 357 exhibits, and heard expert testimony from expert ethnohistorian Dr. Chris Friday and expert anthropologist Dr. Deward Walker, Jr. At trial, the only legal issue before the district court was whether the historical, anthropological, ethnographic, archeological, and expert evidence, and all reasonable inferences drawn therefrom, demonstrate by a preponderance of the

evidence that Stillaguamish customarily fished the Claimed Waters from time to time at and before treaty times. *United States v. Washington*, 384 F.Supp. at 332.

The Upper Skagit Indian Tribe filed a motion to dismiss Stillaguamish's claims pursuant to Fed. R. Civ. P. 52(c) following Stillaguamish's presentation of its case-in-chief. 2-ER-98-110. The district court declined ruling on the Rule 52(c) motion until the close of evidence, and orally indicated that the court would not rule without additional briefing. Seven months after trial concluded, and without any additional briefing, the district court issued a scant six-page order granting the Rule 52(c) motion. 1-ER-2-7.

SUMMARY OF ARGUMENT

The district court's scant order represents an apparent first in the long history of this case, casting aside expert testimony and controlling precedent to dismissively waive aside a tribe's reserved treaty right to fish in marine waters. The remarkable deviations from past U&A rulings present numerous errors of law requiring reversal and remand.

The district court's decision to grant Upper Skagit's Rule 52(c) motion completely failed to apply the well-established law of the case, and wrongfully entered factual findings at odds with the evidence presented at trial. First, the district court erred as a matter of law by failing to show that it applied the controlling law of *United States v. Washington* and the legal rules that specifically

govern the adjudication of U&A in resolving the Rule 52(c) motion. Alternatively, the district court erred as a matter of law by premising its factual findings on an erroneous view of the law in *United States v. Washington*. Second, the district court erred as a matter of law by entering factual findings that are insufficient and incomplete in scope and detail. Third, the district court further erred by entering three clearly erroneous factual findings, at odds with the admitted evidence.

And, fourth, the district court's holding ignores the well-established law of the case in *United States v. Washington*. In deviating from over fifty years of precedent, the district court erred as matter of law in holding that Stillaguamish did not establish by a preponderance of the evidence that its U&A includes the Claimed Waters based on the historical, ethnographic, anthropological, archeological, and expert evidence presented at trial, and the inferences that can reasonably be drawn therefrom.

STANDARD OF REVIEW

The Court reviews the district court's findings of fact for clear error, and its conclusions of law *de novo*. *United Steel Workers Local 12-369 v. United Steel Workers Intern.*, 728 F.3d 1107, 1113 (9th Cir. 2013).

ARGUMENT

A. THE DISTRICT COURT ERRED BY FAILING TO SHOW THAT IT APPLIED THE CONTROLLING LAW AND LEGAL RULES OF *UNITED STATES V. WASHINGTON*

The district court's thin order fails to meet the basic requirements of Rule 52. In resolving a Rule 52 motion, the district court must apply the "controlling law," and reference the correct rule that provides the framework for the legal analysis. Fed. R. Civ. P. 52(c); *see also United Steel Workers Local 12-369*, 728 F.3d at 1114. The "controlling law" and legal rules in *United States v. Washington* applicable to the adjudication of Stillaguamish's U&A remains the standard invoked by Judge Boldt in *Final Decision #1* and as elaborated in the ensuing fifty years of subproceedings. *United States v. Washington*, 88 F.Supp.3d 1203, 1219-20 (W.D. Wash. 2015), *aff'd in part and rev'd in part*, 873 F.3d 1157 (9th Cir. 2017); *United States v. Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017). The district court's six-page order is notably bare of legal authority—critically, the order fails to cite to *any* of the relevant legal standards from *United States v. Washington*. *See* 1-ER-2-7. It is, therefore, at best unclear whether the district court even applied the "controlling law" of *United States v. Washington* in determining whether Stillaguamish met its burden of proof to establish the location of its U&A fishing grounds in the

Claimed Waters by a preponderance of the evidence. This error alone warrants reversal and remand with instructions.

The main purposes of Rule 52 are to facilitate meaningful appellate review, and inform the parties of the basis for the district court's decision. *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir. 1986); *Ramos v. Banner Health*, 1 F.4th 769, 777 (10th Cir. 2021). The district court's order on a Rule 52 motion must "furnish this Court with a clear understanding of the ground upon which the district court based its decision," and state the legal basis for the decision or refer to the applicable legal analysis. *Fogarty v. Piper*, 767 F.2d 513, 515 (8th Cir. 1985); *see also Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 415 (5th Cir. 1981); *Kruger v. Pucell*, 300 F.2d 830, 831 (3d Cir. 1962); *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979). Only when the district court applies the correct legal rule to the issues presented at trial can this Court (and the parties) adequately evaluate whether the district court's factual findings are clearly erroneous. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc); *see also Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1269 (7th Cir. 1991) ("[i]f the trial judge correctly states the law, then his findings as to whether the facts meet the legal standard will be disturbed only if they are clearly erroneous.").

As this Court well knows, the determination of Stillaguamish's U&A fishing grounds in a manner consistent with the fifty years of precedent in *United States v. Washington* requires analysis of a complex mixture of facts and legal standards. *See United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) ("We cannot think of a more comprehensive and complex case than this."). The district court's order fails to assure the parties or this Court that it applied the correct legal rules and controlling law to its analysis. Because the parties and the Court are necessarily left guessing as to whether the district court applied the controlling law, this Court must remand to the district court with instructions to clearly set forth the controlling law and applicable legal rules of *United States v. Washington* that informed its analysis of whether the Claimed Waters fall within Stillaguamish's U&A.

If the Court finds, however, that the district court satisfactorily stated the controlling law, the district court still erred by basing its factual findings on an erroneous and incorrect view of the law in *United States v. Washington*.

B. THE DISTRICT COURT ERRED BY PREMISING ITS FACTUAL FINDINGS ON AN ERRONEOUS VIEW OF THE LAW IN *UNITED STATES V. WASHINGTON*

The district court's factual findings are predicated on an erroneous view and misunderstanding of the controlling law in *United States v. Washington*. The Court must set aside the entirety of the district court's findings, and remand to make sufficient findings consistent with the controlling law in *United States v.*

Washington. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984) ("[r]ule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."); *see also Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

1. The District Court's View Of Tribal Village And Presence Evidence Is Contrary To The Law of the Case

The district court's view of the tribal village and presence evidence Stillaguamish presented at trial is contrary to the law of the case as applied to every other tribe's U&A determination. The district court expressed that its view "the law of the case requires that Stillaguamish do more than proffer evidence of (potential) village locations, (infrequent) travel, or (possible) presence in an area," specifically noting that "non-travel evidence" such as the "presence of villages" is ultimately insufficient to satisfy" the "above" standard. 1-ER-7. The district court's new perspective on the evidentiary significance of treaty-time villages and presence is plainly contrary to the law of the case in *United States v. Washington*.

It is the law of the case that the court presumes—or at least draws the reasonable inference—that a tribe customarily fished in water bodies located within their territory and adjacent or subadjacent to their winter villages and summer encampments. *United States v. Washington*, 873 F.Supp. 1422, 1449-50 (W.D. Wash. 1994), *aff'd in part, rev'd in part sub nom*, 157 F.3d 630 (9th Cir.

1998); *United States v. Washington*, 626 F.Supp. 1405, 1442-43, 1527-29 (W.D. Wash. 1985); *United States v. Washington*, 459 F.Supp. at 1049, 1059; *United States v. Muckleshoot Tribe*, 235 F.3d 429, 436 (9th Cir. 2000); *United States v. Washington*, 129 F.Supp. at 1080. As Dr. Barbara Lane explained decades ago, "[p]eople living in a territory had the right to use the resources and locations within it." 6-ER-958. Tellingly, the district court had consistently, until the order below, found in every instance that tribal groups with members living on or near a shoreline at treaty times have U&A fishing rights to those adjacent and subadjacent waters. *See, e.g., United States v. Washington*, 384 F.Supp. at 359-61, 364, 366, 368-70, 372, 374-79; *United States v. Washington*, 459 F.Supp. at 1049, 1059; *United States v. Washington*, 626 F.Supp. at 1442-43, 1527-29; *United States v. Washington*, 129 F.Supp. at 1080.

It also is the law of the case that tribal presence at or near a body of water results in a finding—by reasonable inference, direct or indirect evidence—of U&A. *See United States v. Washington*, 384 F.Supp. at 380-81 (U&A finding as to Puget Sound river systems based on Yakama presence in locations via travel and intermarriage); *id*. at 360-62 (U&A as to marine waters of Northern Puget Sound based on finding of Lummi presence at reefnet locations); *id*. at 364 (U&A finding as to Pacific Ocean and Strait of Juan de Fuca based on finding of Makah presence); *id*. at 368-69 (U&A as to marine waters based on finding of Nisqually

presence in saltwater areas at mouth of Nisqually River and surrounding bay, which were "shared with other Indians" and generally involved kinship ties); *United States v. Washington*, 626 F.Supp. at 1442-43 (U&A finding as to Hood Canal, San Juan and Whidbey Islands, and Haro and Rosario Straits based on regular presence of Lower Elwha at locations); *id.* (U&A finding as to Hood Canal, San Juan and Whidbey Islands, and Haro and Rosario Straits based on presence of Port Gamble S'Klallam at locations; U&A finding as to Sekiu River subject to the control and regulation of Makah); *id*. at 1488 (U&A finding as to Hood Canal based on Skokomish regular seasonal migratory presence); *United States v. Washington*, 626 F.Supp. at 1528-29 (U&A as to marine waters based on regular presence of Tulalip via travel to trading forts, seasonal marine resource migration, and kinship ties); *United States v. Washington*, 873 F.Supp. at 1449-50 (U&A as to marine waters based on regular presence of Upper Skagit via travel and kinship ties). The district court wholly ignored this precedent as well. Because the district court's factual findings fail to note or apply the presumption, conclusion, or reasonable inference that can be drawn based on the location of tribal villages and presence in *United States v. Washington*, the district court's findings are erroneous and incorrect as a matter of law.

2. The District Court Failed To Base Its Factual Findings On The Unique Standard Of Proof That Is The Law Of The Case In *United States v. Washington*

The district court expressed its view that "the law of the case requires that Stillaguamish do more than proffer evidence of (potential) village locations, (infrequent) travel, or (possible) presence in an area." 1-ER-7. The district court also appeared to have applied both a "preponderance of the evidence" and a "substantial evidence" standard to its adjudication of Stillaguamish's marine U&A. *See* 1-ER-5-6. The district court erred in imposing a new, higher burden of proof on Stillaguamish and failing to base its findings on the unique evidentiary standard in *United States v. Washington*.

To begin with, in explaining the evidentiary standards that govern its evaluation of Stillaguamish's evidence, the district court failed to acknowledge and apply the relaxed preponderance standard that governs adjudication of U&A in *United States v. Washington*. As the Court is aware, little documentation of Indian fishing locations in and around 1855 exists today, and the documentation that does exist is "extremely fragmentary and just happenstance." *United States v. Washington*, 459 F.Supp. at 1059. The evidence that is available of treaty-time fishing is "sketchy and less satisfactory than evidence available in the typical civil proceeding." *United States v. Lummi Indian Tribe*, 841 F.2d 317, 321 (9th Cir. 1988). And, information respecting specific areas of use by particular groups at

treaty times is incomplete and sometimes conflicting. *United States v. Washington*, 626 F.Supp. at 1529.

These evidentiary issues associated with establishing U&A are only compounded when marine waters are at issue. The district court has long acknowledged the "greater difficulties in specifying or delineating marine areas used by one or another Indian group than is the case with river areas," and the "more complicated" situation regarding treaty-time saltwater fisheries. *Id*. at 1528. These greater difficulties exist in part because "there is very little treaty-time documentation or direct evidence of fishing in open marine areas, and such occasional references as exist are extremely fragmentary and just happenstance." *Id*.

In light of the evidentiary issues associated with the adjudication of a tribe's marine U&A, "the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." *Id*. at 1059. Accordingly, "the stringent standard of proof that operates in ordinary civil proceedings is relaxed" in adjudications of U&A. *Lummi Indian Tribe*, 841 F.2d at 318. Thus, a relaxed preponderance of the evidence standard applies to the district court's adjudication of Stillaguamish's marine U&A—not an ordinary preponderance standard or some new "substantial evidence" standard as the district court announced in its order. The district court was required—but failed

to—apply the same standard used in every other marine U&A adjudication in the case to Stillaguamish's claims. The district court erred in failing to apply the relaxed preponderance standard, deviating to a never before expressed "substantial evidence" standard that fails to give due consideration to the nature of the evidence available to be presented at trial.

Second, contrary to the district court's perspective, evidence of village locations, travel, and presence in an area—even if "fragmentary," "sketchy and less satisfactory than evidence available in a typical civil proceeding"—are together sufficient to establish that a tribe customarily fished an open marine water body at and before treaty times. When evaluating a tribe's evidence regarding its U&A fishing grounds, the district court must give "due consideration to the fragmentary nature and inherent limitations of the available evidence while making its findings on a more probable than not basis" in its adjudication of Stillaguamish's U&A marine fishing grounds. *United States v. Washington*, 129 F.Supp.3d at 1110. Just as Stillaguamish did, tribes seeking to adjudicate their U&A may properly rely on both direct and indirect evidence as well as reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show the probable location and extent of their U&A. *Id.*

Indeed, it is the law of the case is that all Indians in western Washington fished as they travelled. *See, e.g.*, *United States v. Lummi Nation*, 763 F.3d 1180, 1187 (9th Cir. 2014); *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1135 (9th Cir. 2015) (in Paragraph 25(a)(1) case, holding that Suquamish's fishing grounds included the waters west of Whidbey Island based on statements in Dr. Lane's reports that the Suquamish's territory "possibly" included that area, and that tribes generally used such marine areas for fishing while traveling through them). The *Lummi* line of cases suggest that treaty-time travel alone—because it always involved fishing—is sufficient by itself to support a U&A finding, provided that such travel was regular or frequent. As this Court explained in 2017:

> If to "proceed through Admiralty Inlet" rendered Admiralty Inlet a part of the Lummi U & A, then to proceed from the southern portions of the San Juan Islands to Admiralty Inlet would have the same effect: to render the path a part of the Lummi U & A, just like Admiralty Inlet.' That explanation covers our exact situation and fits within our long-accepted framework, which requires looking at the evidence 'before Judge Boldt that the [tribe] fished *or traveled* in the . . . contested waters.

United States v. Lummi Nation, 876 F.3d 1004, 1009 (9th Cir. 2017) (emphasis in original) (internal quotations and citations omitted). In 2021, this Court in *Lummi IV* again relied on "the general evidence of travel between those two areas" to support fishing rights in the waters east of Trial Island. *Lower Elwha Klallam Indian Tribe, et al. v. Lummi Nation*, No. 19-35610, D.C. No. 2:11-sp-00002-

RSM, at 4 (9th Cir. June 3, 2021) (Memorandum Opinion). The plain language of this Court's rulings is that travel, provided it is not incidental, is alone sufficient evidence for a U&A determination. The district court completely ignored this Court's recent acknowledgement as to travel evidence.

The district court's findings are not predicated on and do not apply the unique standard in *United States v. Washington* to the evidence at trial, and turned a blind eye to this Court's recent jurisprudence on travel evidence. The district court's findings are erroneous and incorrect as a matter of law.

3. The District Court Based Its Factual Findings On A Flawed Interpretation Of U&A Elements As Defined By The Law Of The Case In *United States v. Washington*

The district court seems to believe that the applicable standard for establishment of U&A is either substantial evidence or a preponderance of the evidence "plus" demonstrating that a tribe "'customarily… from time to time' in saltwater," or evidence demonstrating that particular waters constitute a tribe's "'usual and accustomed' grounds and stations." 1-ER-5-6. The district court noted that, in its new view, without citation to legal authority, "customarily fished" means "more than *may* have fished, *could* have fished, or even *definitely* fished on a rare occasion." 1-ER-3 (emphasis in original). The district court also explained that it believed "'at and before treaty times' clearly requires evidence of fishing *at* treaty times," and that "[e]vidence of fishing in the hundreds of years prior to

treaty times, alone, is insufficient," again without citation to legal authority. *Id.* (emphasis in original). The district court erred by basing its findings on this deeply flawed view of the well-established evidentiary standard in *United States v. Washington* for U&A.

It has remained the controlling law of the case since *Final Decision #1* "that every fishing location where members of a tribe customarily fished from time to time at and before treaty times… is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish." 384 F.Supp. at 332. The term "usual and accustomed" grounds and stations encompasses "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 water." *Id*. (emphasis added). Excluded are "unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id*. Fishing that occurred "from time to time" or fishing that "may have occasionally" occurred is sufficient. *United States v. Washington*, 19 F.Supp.3d 1252, 1310-11 (W.D. Wash. 1997) (in a clarification proceeding, affirming evidence of Muckleshoot marine U&A because Muckleshoot "from time to time" "may have occasionally fished in the open waters of Elliott Bay."). In light of this well-settled precedent, the district court's

new explanation of and heightened "customarily fished" standard as "more than *may* have fished, *could* have fished, or even *definitely* fished on a rare occasion" is clearly erroneous and incorrect as a matter of law.

The district court's decision after trial to arbitrarily narrow the scope of evidence to be considered to "at" but no longer "before" treaty times, is a gross deviation from the law of the case applied for the first time against Stillaguamish. The district court has long recognized the relevance and weight of evidence related to fishing activities that dates well from before and well after treaty times. *See, e.g.*, *United States v. Washington*, 384 F.Supp. at 359 (relying on account of Russian sailor who encountered Hoh fishermen in 1808); *United States v. Washington*, 626 F.Supp. at 1487 (relying on information collected from tribal elder informants between 1935 and 1955, and in 1982); *id*. at 1528-29 (relying on Fort Langley records from 1827); *United States v. Washington*, 129 F.Supp.3d at 1086 (relying on 1775 Spanish encounter with Quileute or Quinault whalers); *id*. (relying on British encounter with Quileute and Hoh in 1787); *id*. (relying on 1782 Columbia expedition account of trading with Quileute); *id*. at 1087 (relying on Indian agent documents from 1877 and 1882); *id*. at 1091 (relying on evidence establishing Quileute village occupancy dating back 600 to 1,100 years from the present and occupancy between the years 1650 and 1950). More importantly, there is no requirement in the established law of *United States v. Washington* that

a tribe must only offer evidence of fishing "at" treaty times, which is a timeframe that remains (perhaps purposefully) undefined by the courts. This makes sense, as there is no evidence in the record to suggest that tribal treaty fishing practices deviated in the years leading up to treaty times. Contrary to the district court's pronouncement that evidence of fishing prior to treaty times is now—for the first time—insufficient to establish a U&A, the law of the case since *Final Decision #1* over fifty years ago is that evidence of fishing "at and before treaty times" is the standard. 384 F.Supp. at 332. Once again, the district court moved the goalposts on Stillaguamish after trial. The district court's factual findings are clearly erroneous and incorrect as a matter of law.

C. THE DISTRICT COURT ERRED BY ENTERING FACTUAL FINDINGS THAT ARE INSUFFICIENT AND INCOMPLETE IN SCOPE AND DETAIL

Although the district court did not need to make a finding on every piece of evidence presented at trial, Rule 52 "contemplates more than that a court state only its ultimate conclusion as to the key issues[.]" *Thermo Electron Corp. v. Soniavone Constr. Co.*, 915 F.2d 770, 773 (1st Cir. 1990). The district court's findings must extend beyond the "ultimate facts" to encompass the critical "subsidiary facts" upon which the ultimate fact-finding rests. *See Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 540 F.3d 721, 732 (5th Cir. 2019); *Giles v. Kearney*, 571 F.3d 318, 328 (3d Cir. 2009); *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 622 (2d Cir. 2006); *Freeland v.*

Enodis Corp., 540 F.3d 721, 732 (7th Cir. 2008). In resolving a Rule 52 motion, the district court must make a specific finding on each relevant or principal factual issue present at trial. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 972 (9th Cir. 2006); *see also* Fed. R. Civ. P. 52, Advisory Committee Note (1946); *Thermo Electron Corp.*, 915 F.2d at 773; *Lyles*, 759 F.2d at 944; *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1959); *Hjelle v. Mid-State Consultants, Inc.*, 394 F.3d 873, 880 (10th Cir. 2005).

In this case, the district court failed to address numerous relevant and principal factual matters that are unquestionably germane under the controlling law of *United States v. Washington* to determining whether Stillaguamish met its burden of proof to establish by a preponderance of the evidence that its U&A includes the Claimed Waters. Where, as here, the district court fails to address in its findings the relevant and principal factual matters, the appealing parties cannot appropriately address the legal issues, and more importantly, this Court cannot resolve the legal issues on appeal. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090 (9th Cir. 2002). Thus, because the district court's factual findings are incomplete or inadequate on numerous issues, this Court must remand the matter to the district court to make the necessary findings on the relevant or principal factual issues. *Pullman v. Swint*, 456 U.S. 273, 291 (1982); *see also Fed. Trade Comm'n v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004).

1. Stillaguamish Treaty Time Territory, Villages, And Encampments Are Relevant And Principal Facts In A U&A Adjudication

The district court failed to address in its factual findings the evidence presented at trial by Stillaguamish regarding the relevant and principal issue of Stillaguamish treaty-time territory, villages, and encampments. *See* 1-ER-4-6. A tribe's treaty-time territory, including the location of its permanent winter villages and seasonal encampments, is highly relevant to and determinative of U&A. *United States v. Washington*, 873 F.Supp. at 1449-50; *United States v. Washington*, 626 F.Supp. at 1442-43, 1527-29; *United Sates v. Washington*, 459 F.Supp. at 1049, 1059; *United States v. Muckleshoot Tribe*, 235 F.3d at 436; *United States v. Washington*, 129 F.Supp. at 1080. Indeed, the adjudication of U&A in other subproceedings dating from *Final Decision #1* to the present are overwhelmingly predicated on a finding that the tribe occupied villages or encampments adjacent or subadjacent to a particular body of water. *See, e.g.*, *United States v. Washington*, 384 F.Supp. at 359 (U&A based on finding of Hoh's historical occupation of Hoh and Quileute river systems); *id*. at 360-61 (U&A based on finding of Lummi's historical occupation of areas near Bellingham Bay and freshwater rivers emptying into Bay); *id*. at 364 (U&A based on finding of Makah's winter villages and summer encampments in Pacific Coast area of Olympic Peninsula); *id*. at 366 (U&A based on finding of Muckleshoot's

historical occupation of Green, White, Black, Duwamish, Cedar and Puyallup river systems); *id*. at 368-69 (U&A based on finding of Nisqually's historical occupation of Nisqually River systems); *id*. at 370 (U&A based on finding of Puyallup's historical occupation of Puyallup River system and Vashon Island); *id*. at 372 (U&A based on finding of Quileute's historical occupation of Quileute and Hoh River systems); *id*. at 374-75 (U&A based on finding of Quinault's historical occupation of villages located along Queets and Quinault Rivers); *id*. at 375-76 (U&A based on finding of Sauk's historical occupation and location of winter villages on Skagit and Sauk River systems); *id*. at 376-77 (U&A based on finding of Skokomish's historical occupation and location of winter villages in drainage area of Hood Canal); *id*. at 377-78 (U&A based on finding of Squaxin Island's historical occupation of certain inlets of upper Puget Sound); *id*. at 378 (U&A finding based on Stillaguamish's historical occupation of Stillaguamish River system); *id.* at 379 (U&A finding based on Upper Skagit's historical occupation of villages on Sauk and Upper Skagit River systems); *United States v. Washington*, 459 F.Supp. 1049 (U&A finding based on Swinomish historical occupation of territories along the Skagit River and its tributaries, on the mainland north and south of the Skagit River systems, and on the "islands adjacent"); *United States v. Washington*, 626 F.Supp. at 1442-43 (U&A based on finding of Lower Elwha winter villages located near marine shoreline and

"adjacent marine areas" to "original homes"); *id*. (U&A based on finding of Port Gamble S'Klallam winter villages located near marine shoreline); *United States v. Washington*, 626 F.Supp. at 1527-29 (U&A finding based on Tulalip predecessors' historical occupation of freshwater river systems, "shoreline," and "adjacent islands"); *United States v. Washington*, 129 F.Supp.3d at 1080. The district court wholly ignored this precedent.

Stillaguamish presented substantial historic, tribal elder, anthropological, ethnographic, and expert evidence at trial regarding the location of its treaty-time territory, including the location of Stillaguamish permanent winter villages and seasonal encampments throughout the lower Stillaguamish River delta and on Camano Island, all of which are adjacent or subadjacent to Port Susan, Skagit Bay, and Saratoga Passage. 6-ER-931; 6-ER-823; 6-ER-816-17; 6-ER-946-48; 6-ER-818-820; 6-ER-834; 6-ER-825-827; 6-ER-922-23; 6-ER-925-27; 6-ER-828; 6-ER-871, 876; 6-ER-870; 6-ER-865-66; 6-ER-835-42; 6-ER-851; 6-ER-845-48; 6-ER-892; 6-ER-897; 6-ER-883-85; 6-ER-852-58; 6-ER-862; 890; 6-ER-908-10; 6-ER-914; 6-ER-904-5; 6-ER-899-903; 6-ER-906-7; 2-ER-300-1. The district court failed, however, to make any specific findings regarding Stillaguamish treaty-time territory or the location of Stillaguamish treaty-time villages and encampments. *See* 1-ER-4-6.

2. Expert Evidence Is A Relevant And Principal Fact In An Adjudication Of U&A Fishing Grounds

Although the district court addressed some of the testimony offered by Dr. Chris Friday, the district court's findings inexplicably lack any reference to the expert evidence Stillaguamish presented from Dr. Barbara Lane, Dr. Sally Snyder, Dr. Carroll Riley, Dr. Astrida Blukis Onat, and Dr. Deward Walker, Jr. *See* 1-ER-4-6. Expert evidence is highly relevant to and often determinative of U&A, particularly the expert opinions offered by Dr. Barbara Lane. *United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 384 F.Supp. at 350; *United States v. Washington*, 873 F.Supp. at 1448; *United States v. Lummi Indian Tribe*, 841 F.2d at 318-19; *Tulalip Tribes*, 794 F.3d at 1135. The Ninth Circuit has noted with approval the use of testimony from expert historians and ethnohistorians in *United States v. Washington*. *See Lummi Tribe*, 841 F.2d at 319-20. In fact, this may be the first time in the history of *United States v. Washington* that the expert opinions of the renowned anthropologist Dr. Barbara Lane, including that "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 were inhabited by Stillaguamish people and were called Stillaguamish villages" were not only discounted, but completely ignored by the district court. 6-ER-899-903; *see also* 6-ER-967-68; 6-ER-950.

Stillaguamish presented expert evidence at trial from Dr. Lane, Dr. Snyder, Dr. Riley, Dr. Roberts, and Dr. Blukis Onat that Stillaguamish treaty-time villages and encampments were located adjacent or subadjacent to some of the Claimed Waters. 6-ER-836, 839-42; 6-ER-851; 6-ER-843-50; 6-ER-883-85; 6-ER-954; 6-ER-886-87; 6-ER-853, 855-56; 6-ER-888-90; 6-ER-911-14; 6-ER-899-903; 6-ER-906-7. More importantly, Stillaguamish presented further expert evidence at trial from Dr. Lane, Dr. Snyder, Dr. Riley, and Dr. Walker that Stillaguamish actually fished some of the Claimed Waters at and before treaty times. 6-ER-852-58; 6-ER-862; 6-ER-967-68; 6-ER-949-51; 6-ER-955-56; 2-ER-78-79; *see* Mot. Transmit Evidence at min. 00:00-02:09. The district court—without explanation or a credibility finding—failed to address this expert evidence in its factual findings. This Court must therefore remand the issue to the district court with instruction to specifically address in its findings all of the expert evidence presented at trial by Stillaguamish.

3. Tribal Elder Accounts Are Relevant And Principal Facts In A U&A Adjudication

The district court further failed to address in its factual findings tribal elder testimony presented at trial relevant to Stillaguamish marine U&A. *See* 1-ER-4-6. The testimony of tribal elders is highly relevant to determining the location of U&A. *See United States v. Washington*, 459 F.Supp. at 1059; *Lummi Tribe*, 841 F.32 at 319; *United States v. Washington*, 129 F.Supp.3d at 1096, 1102, 1104-05;

United States v. Washington, 19 F.Supp.3d at 1133. This Court has noted with approval the use of testimony from tribal elders in *United States v. Washington* subproceedings. *See Lummi Tribe*, 841 F.2d at 319-20.

Stillaguamish presented at trial substantial evidence from tribal elders regarding Stillaguamish treaty-time territory, villages and encampments as well as Stillaguamish treaty-time marine fishing activities in the Claimed Waters. 6-ER-825-27; 6-ER-828; 6-ER-833; 6-ER-834; 6-ER-864-69; 6-ER-891-93; 6-ER-896-98; 6-ER-904-5; 6-ER-922-23, 925-28. Again, the district court—without explanation or a credibility finding—failed to address this tribal elder evidence in its findings. This Court must therefore remand the issue to the district court with instruction to specifically address in its factual findings the tribal elder evidence presented at trial by Stillaguamish.

D. THE DISTRICT COURT ERRED BY ENTERING THREE CLEARLY ERRONEOUS FACTUAL FINDINGS

A factual finding is clearly erroneous when, although there is evidence to support a claim, the reviewing court upon consideration of the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 33 U.S. 364, 395 (1948); *see also Mitchell v. Office of L.A. Cnty. Superintendent of Sch.*, 805 F.2d 844, 846 (9th Cir. 1986). Conclusory findings also are insufficient. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001); *see also EEOC v. United Va.*

Bank/Seaboard Nat., 555 F.2d 403, 406 (4th Cir. 1977) ("When the trial court provides only conclusory findings, illuminated by no subsidiary findings or reasoning on all the relevant facts … there is not that 'detail and exactness' on the material issues of fact necessary for understanding by an appellate court of the factual basis for the trial court's findings and conclusions…"). In making this determination, the Court may consult the record for undisputed facts omitted from the district court's factual findings that are material to the outcome of the case. *Lenodard v. Dorsey & Whitney LLP*, 553 F.3d 609, 613 (8th Cir. 2009).

1. The District Court's Finding Of Fact No. 8 Is Clearly Erroneous

The district court found that the evidence presented of Stillaguamish people intermarrying with neighboring tribal groups "did not include direct evidence, indirect evidence, nor any reasonable inference of usual and accustomed marine fishing activity by Stillaguamish." 1-ER-5-6. The district court's finding on this issue is clearly erroneous in light of the law of the case in *United States v. Washington* and the evidence presented by Stillaguamish at trial.

Until the order in this case, the district court has consistently recognized the direct relationship between intermarriage and fishing practices at and before treaty times—and the district court has found U&A based on intermarriage. *See, e.g.*, *United States v. Washington*, 384 F.Supp. at 350-51 ("People moved about to resource areas where they had use patterns based on kinship or marriage. Families

did not necessarily follow the same particular pattern of seasonal movements every year."); *id*. at 368-69 (U&A as to marine waters based on finding of Nisqually presence in saltwater areas at mouth of Nisqually River and surrounding bay, which were "shared with other Indians" and generally involved kinship ties); *id.* at 380-81 (U&A finding as to Puget Sound river systems based on Yakama presence in locations via travel and intermarriage); *United States v. Washington*, 626 F.Supp. at 1529-30 ("It was normal for all of the Indians in western Washington to travel extensively either harvesting resources or visiting in-laws, because they were intermarried widely among different groups. . . . The widespread intermarriage among the tribes surrounding Puget Sound would indicate that travel through its marine waters occurred frequently and on a regular basis."); *id*. at 1488, 1490; *United States v. Washington*, 129 F.Supp.3d at 1103, 1105, 1080.

Predictably, given the district court's previous findings, experts in *United States v. Washington* also have relied upon the direct relationship between intermarriage and fishing rights in offering their opinions on treaty-time fishing. As Stillaguamish noted at trial, in her *Final Decision #1* report to the district court titled "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century," Dr. Barbara Lane explained

> In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived

> more or less on stored foods—dried meat and berries and dried and smoked fish. . . . Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, harvesting camas, berry picking, and other economic pursuits. People moved about to resource areas where they had use rights based on kinship or marriage.

6-ER-965-66. Dr. Lane again opined in her *Subproceeding 89-3* report to the district court titled "Indian Use of Shellfish in Western Washington and the Indian Treaties of 1854-1855," that

> Anyone with kinship ties to residents (owners) of a territory had a right to use the resources of the territory. There were minimal qualifications (limiting conditions) in practice. It helped if the non-resident users were known to the owners. It was expected that non-resident users would abide by local conventions. It was expected that visitors have a currently peaceable relationship with people of the territory.

6-ER-959. Dr. Sally Snyder similarly explained during her deposition testimony in *Subproceeding 80-1* that the parents of a married couple would enjoy visitation rights to fishing locations gained through marriage, and that fishing rights acquired through marriage would be good for a couple of generations. *See* 6-ER-971-73. Dr. Snyder further opined that tribal

> groups were generally patrilocal so that when a man visited his wife's home territory he would take his closest relatives. That usually would be the brothers and the expectation is that they are living the same household so the brothers are very important, a man's brothers are very importantly involved in visitation rights…. The man going to a woman's territory is the one of him and his brothers going… So those males—that woman's brothers-in-law are certainly invited.

6-ER-971. Dr. Snyder added that sisters, in addition to brothers, as well as their spouses and children may accompany their brother who acquired rights to fishing a particular location by marriage. *Id.*

At trial, Stillaguamish presented ethnographic, anthropological, and expert evidence regarding a Stillaguamish tribal member and his family who fished Holmes Harbor through intermarriage at and before treaty times. An ethnographic field note collected by Dr. Wayne Suttles from a tribal informant reported that a Stillaguamish man called "Mowich Sam," who was alive at treaty times, fished Holmes Harbor with his Bsigwigwilts wife. 6-ER-898; 3-ER-475. Dr. Chris Friday opined that the information provided to Dr. Wayne Suttles by the tribal informant indicates that Mowich Sam regularly fished Holmes Harbor at and before treaty times, and that the Stillaguamish relatives of Mowich Sam would have been able to fish with him at Holmes Harbor based on his marriage to a Bsigwigwilts woman. 3-ER-475-76. Based in part on this ethnographic evidence and the anthropological evidence offered by Dr. Lane and Dr. Snyder regarding the direct relationship between intermarriage and fishing rights at treaty times, Dr. Friday opined that Stillaguamish more likely than not regularly fished the marine waters of Holmes Harbor at and before treaty times. 3-ER-471-72; 4-ER-503-4.

The ethnographic, anthropological, and expert evidence offered by Stillaguamish at trial regarding Stillaguamish people fishing in Holmes Harbor at and before treaty times constitutes direct evidence of Stillaguamish customary fishing in Holmes Harbor, or at the least, represents either indirect evidence or evidence that fully supports a reasonable inference of customary marine fishing activity from time to time by Stillaguamish in Holmes Harbor at and before treaty times. The district court's finding that evidence presented of Stillaguamish people intermarrying with neighboring tribal groups "did not include direct evidence, indirect evidence, nor any reasonable inference of usual and accustomed marine fishing activity by Stillaguamish" is clearly erroneous.

2. The District Court's Finding Of Fact No. 9 Is Clearly Erroneous

The district court found that the evidence of Stillaguamish tribal members traveling north to Victoria, B.C. and south to Olympia, Washington, "did not include direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish." 1-ER-5. The district court's finding on this issue is clearly erroneous in light of the law of the case in *United States v. Washington* and the evidence presented by Stillaguamish at trial.

The district court has long recognized the direct relationship between treaty-time travel in marine wasters and U&A. *See United States v. Washington*, 626 F.Supp. at 1528 ("The deeper saltwater areas, the sound, the straits, and the

open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone traveling through such waters."). Accordingly, it is the law of the case that all Indians in western Washington fished as they travelled. *See, e.g.*, *United States v. Lummi Nation*, 763 F.3d at 1187; *Tulalip Tribes*, 794 F.3d at 1135; *United States v. Lummi Nation*, 876 F.3d at 1009.

At trial, Stillaguamish presented substantial historical, tribal elder, ethnographic, anthropological, and expert evidence that Stillaguamish regularly traveled the Claimed Waters by saltwater canoe at and before treaty times. *See* 6-ER-795-98; 6-ER-799; 6-ER-813-14; 6-ER-815-17; 6-ER-831-32; 6-ER-867-68; 6-ER-893; 6-ER-894-95; 6-ER-915-17; 6-ER-960-62; 3-ER-409-14, 418-24, 426, 434-35, 444-45, 449, 451; 4-ER-645; 2-ER-47-48; *see* Mot. Transmit Evidence, at min. 02:09-02:49. In particular, Stillaguamish presented specific evidence establishing regular treaty-time travel by Stillaguamish through Deception Pass. *Id*. Under the law of the case, the reasonable inference that is drawn from this regular treaty-time travel evidence is that Stillaguamish more likely than not fished Deception Pass at and before treaty times. *See, e.g.*, *United States v. Lummi Nation*, 763 F.3d at 1187; *Tulalip Tribes*, 794 F.3d at 1135; *United States v. Lummi Nation*, 876 F.3d at 1009; *Lower Elwha Klallam Indian Tribe*, No. 19-35610, at 4.

3. The District Court's Finding Of Fact No. 5 Is Clearly Erroneous

The district court found that the "report and testimony of Dr. Friday did not provide any direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish *at treaty time*. ER [Dkt. 312 at 4] (emphasis in original). In addition to the erroneous time constraint, the finding makes little sense as the district court never made an adverse credibility finding. *See id.* The opinions Dr. Friday offered at trial are themselves evidence. *Rodriguez v. Olin Corp.*, 780 F.2d 491, 496 (5th Cir. 1986) ("[A]n expert's opinion or interpretation of evidence is itself evidence.") Dr. Friday based his opinions on the same type of historical, tribal elder, ethnographic, anthropological, and expert evidence that experts throughout the history of *United States v. Washington* have consistently relied upon, including Dr. Lane herself. The district court's finding is clearly erroneous.

E. The District Court Erred As A Matter Of Law By Concluding That Stillaguamish's U&A Do Not Include The Claimed Waters

The district court determined "the evidence is insufficient to demonstrate by a preponderance of the evidence that they fished 'customarily… from time to time' in saltwater, or that the marine areas at issue were their 'usual and accustomed' grounds and stations." 1-ER-6. The district court concluded "the law of the case requires that Stillaguamish do more than proffer evidence of

(potential) village locations, (infrequent) travel, or (possible) presence in an area." *Id*. The district court further concluded the "non-travel evidence presented by Stillaguamish, including the presence of villages, is ultimately insufficient to satisfy the above standards." *Id*. The district court's conclusion that Stillaguamish did not demonstrate by a preponderance of evidence that Stillaguamish people more likely than not customarily fished the Claimed Waters from time to time at and before treaty times is incorrect as a matter of law.

Stillaguamish presented extensive historic, archeological, anthropological, ethnographic, and expert evidence at trial that, when viewed consistent with the controlling evidentiary standards and law of the case in *United States v. Washington*, establishes by a preponderance of the evidence that Stillaguamish more likely than not customarily fished the Claimed Waters at and before treaty times. *United States v. Washington*, 384 F.Supp. at 348. Applying the same standard as Judge Boldt in *Final Decision #1* and the law of the case that has developed in the fifty years since that decision, the direct evidence and reasonable inferences drawn from the documentary exhibits, expert testimony, and other relevant sources establish the probable location and extent of Stillaguamish's U&A in the Claimed Waters. *See id*.; *see also United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 129 F.Supp.3d at 1110; *United*

States v. Washington, 626 F.Supp. at 1531. The district court's contrary conclusion is manifestly incorrect as a matter of law.

1. The Preponderance Of The Evidence Establishes That Stillaguamish Customarily Fished Port Susan From Time To Time At And Before Treaty Times

The uncontroverted expert evidence Stillaguamish presented at trial overwhelmingly demonstrates that at and before treaty times, Stillaguamish customarily fished Port Susan. In her 1993 report, which the district court found credible and relied upon, Dr. Barbara Lane explained that "[p]eople living in a territory had the right to use the resources and locations within it." 6-ER-958. Thus, unsurprisingly, Dr. Lane unequivocally testified on multiple occasions in prior subproceedings that Stillaguamish fished Port Susan at and before treaty times based on Stillaguamish villages located on or near the eastern shore of Port Susan. 6-ER-967-68; 6-ER-899-903; *see also* 6-ER-950. Expert anthropologist Dr. Sally Snyder similarly testified in *Subproceeding 80-1* that Stillaguamish fished Port Susan at and before treaty times. 6-ER-956. Expert anthropologist Dr. Carroll Riley opined to the Indian Claims Commission that Stillaguamish went to Port Susan for clamming and fishing expeditions at treaty times. 6-ER-862; 6-ER-852-58. Ethnohistorian Dr. Chris Friday and Tulalip's anthropologist Dr. Deward Walker, Jr. both agreed with Dr. Lane's assessment of Stillaguamish's treaty-time fishing activities, testifying that it was their opinion

that Stillaguamish regularly fished Port Susan at and before treaty times. 2-ER-78-79; *see* Mot. Transmit Evidence, at min. 00:00-02:09; 3-ER-408-9; 4-ER-502-3. Under the law of the case in *United States v. Washington*, this uniform expert evidence establishes by a preponderance of the evidence that Stillaguamish customarily fished Port Susan at and before treaty times. *See United States v. Washington*, 129 F.Supp.3d at 1110; *United States v. Washington*, 626 F.Supp. at 1431; *see also United States v. Washington*, 730 F.2d at 1314.

This expert evidence additionally supports a reasonable inference that the Stillaguamish who lived further upriver from the villages and encampments in the lower Stillaguamish River delta regularly traveled to the mouth of the Stillaguamish River via the South Pass from time to time to fish in the marine waters of Port Susan. In her report to the district court titled "Indian Use of Shellfish in Western Washington and the Indian Treaties of 1854-1855," Dr. Lane explained that "[p]eople living at a distance upriver visited the coast to harvest shellfish primarily in the spring and summer…" 6-ER-958. In *Subproceeding 80-1*, Dr. Lane again opined "people from upriver would come down to the salt water to, for example, harvest shellfish which weren't available to them in the fresh water and to catch fish…" 6-ER-953. Dr. Carrol Riley testified to the Indian Claims Commission that Stillaguamish people living upriver went down to Port Susan for clamming and fishing. 6-ER-862; 6-ER-854. Dr. Friday likewise

testified that Stillaguamish living upriver would have likely traveled downriver to regularly fish Port Susan. 2-ER-195-96. Under the law of the case, the reasonable inference that is properly drawn from this evidence is that Stillaguamish more likely than not customarily fished Port Susan at and before treaty times. *See United States v. Washington*, 626 F.Supp. at 1528 ("People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish. At some of the major fishing locations people from other drainage systems would also come to join in the fishing.").

The uncontroverted historical, anthropological, ethnographic, and expert evidence Stillaguamish presented at trial plainly demonstrates that at and before treaty times, Stillaguamish maintained permanent winter villages and seasonal encampments on the eastern shore of Port Susan, which supports a presumption of Stillaguamish treaty-time fishing in adjacent Port Susan. Stillaguamish elders and early non-Indian settlers recounted several Stillaguamish treaty-time permanent winter villages and seasonal encampments in the lower Stillaguamish River delta, including locations at Warm Beach and Hat Slough on the eastern shore of Port Susan. 6-ER-929-31; 6-ER-821-24; 6-ER-815-17; 6-ER-945-48; 6-ER-818-20; 6-ER-834; 6-ER-825-27; 6-ER-921-28; 6-ER-828; 6-ER-871, 876; 6-ER-870; 6-ER-865-66. Dr. Snyder and Dr. Lane each opined that Stillaguamish people occupied

the treaty-time villages in the lower Stillaguamish River delta, including villages located on the eastern shore of Port Susan at Warm Beach and Hat Slough. 6-ER-835-42; 6-ER-851; 6-ER-845-48; 6-ER-967-68; 6-ER-899-903; 6-ER-949-51; 6-ER-955-56. Dr. Friday likewise testified that Stillaguamish occupied permanent winter villages and seasonal encampments at Warm Beach and Hat Slough on the eastern shore of Port Susan. 2-ER-300-301.

Applying the law of the case, the presumption that is uniformly drawn from this overwhelming evidence of Stillaguamish treaty-time permanent winter villages and encampments adjacent to or on the eastern shore of Port Susan is that Stillaguamish customarily fished Port Susan at and before treaty times. *See United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 873 F.Supp. at 1449-50 (tribes "took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subadjacent" to their territory at and before treaty times); *United States v. Washington*, 626 F.Supp. at 1528 ("Winter villages were located along the salmon streams, at the heads of inlets near the mouth of such streams, and on protected coves and bays. During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages."); *United States v. Washington*, 384 F.Supp. at 353 ("Generally, individual Indians had primary use rights in the territory where they resided… Subject to such individual claims, most groups claimed autumn

fishing use rights in the waters near to their winter villages."); *Muckleshoot Indian Tribe,* 235 F.3d at 436. Indeed, the adjudication of U&A in other subproceedings dating from Judge Boldt's decision in *Final Decision #1* to the present are predicated on a finding that the tribe occupied villages or encampments adjacent or subadjacent to a particular body of water. *See United States v. Washington*, 384 F.Supp. at 359 (U&A based on finding of Hoh's historical occupation of Hoh and Quileute river systems); *id*. at 360-61 (U&A based on finding of Lummi's historical occupation of areas near Bellingham Bay and freshwater rivers emptying into Bay); *id*. at 364 (U&A based on finding of Makah's winter villages and summer encampments in Pacific Coast area of Olympic Peninsula); *id*. at 366 (U&A based on finding of Muckleshoot's historical occupation of Green, White, Black, Duwamish, Cedar and Puyallup river systems); *id*. at 368-69 (U&A based on finding of Nisqually's historical occupation of Nisqually River systems); *id*. at 370 (U&A based on finding of Puyallup's historical occupation of Puyallup River system and Vashon Island); *id*. at 372 (U&A based on finding of Quileute's historical occupation of Quileute and Hoh River systems); *id*. at 374-75 (U&A based on finding of Quinault's historical occupation of villages located along Queets and Quinault Rivers); *id*. at 375-76 (U&A based on finding of Sauk's historical occupation and location of winter villages on Skagit and Sauk River systems); *id*. at 376-77 (U&A based on finding of Skokomish's historical

occupation and location of winter villages in drainage area of Hood Canal); *id*. at 377-78 (U&A based on finding of Squaxin Island's historical occupation of certain inlets of upper Puget Sound); *id*. at 378 (U&A finding based on Stillaguamish's historical occupation of Stillaguamish River system); *id.* at 379 (U&A finding based on Upper Skagit's historical occupation of villages on Sauk and Upper Skagit River systems); *United States v. Washington*, 459 F.Supp. at 1049 (U&A finding based on Swinomish historical occupation of territories along the Skagit River and its tributaries, on the mainland north and south of the Skagit River systems, and on the "islands adjacent," Ex. USA-74 at 3); *United States v. Washington*, 626 F.Supp. at 1442-43 (U&A based on finding of Lower Elwha winter villages located near marine shoreline and "adjacent marine areas" to "original homes"); *id*. (U&A based on finding of Port Gamble S'Klallam winter villages located near marine shoreline); *id*. at 1527-29 (U&A finding based on Tulalip historical occupation of freshwater river systems, "shoreline," and "adjacent islands"); *United States v. Washington*, 129 F.Supp.3d at 1080 ("Quinault occupied the coast of Washington State…The current members of the Quinault Tribe are descendants of the treaty-time occupants of the villages situated in the territory extending roughly between the Queets River system to the north and the north shore of Gray's Harbor to the south.").

The district court erred in concluding as a matter of law that Stillaguamish failed to establish by a preponderance of the evidence that its U&A includes Port Susan. The district court also erred as a matter of law in failing to presume, conclude or at least draw a reasonable inference of Stillaguamish fishing in Port Susan based on the uncontroverted evidence of Stillaguamish permanent winter villages and encampments located on the eastern shore of and adjacent to Port Susan. The district court erred as a matter of law in failing to find the testimony of numerous Stillaguamish tribal elders, non-Indian settlers, and expert witnesses constituted direct evidence, indirect evidence, or a reasonable inference of Stillaguamish treaty-time fishing in Port Susan. The Court must reverse the district court's order on the merits regarding Port Susan, and remand.

2. The Preponderance Of The Evidence Establishes That Stillaguamish Customarily Fished Saratoga Passage From Time To Time At And Before Treaty Times

The uncontroverted evidence Stillaguamish presented at trial establishes that at and before treaty times, Stillaguamish territory included Camano Island and Saratoga Passage, and Stillaguamish occupied Camano Island adjacent to the shoreline of Saratoga Passage, from which it is presumed that Stillaguamish customarily fished Saratoga Passage from time to time at and before treaty times.

Maps of tribal territories in western Washington at and before treaty times drafted by geographers and historians reflect Stillaguamish territory as including

portions of Camano Island. 6-ER-821-24; 6-ER-929-31. Stillaguamish elder Esther Ross testified before the Indian Claims Commission and in *Final Decision #1* that Stillaguamish treaty-time territory included some of Camano Island. 6-ER-866; 6-ER-905. Expert anthropologist Dr. Sally Snyder testified before the Indian Claims Commission that Stillaguamish used the northern portion of Camano Island at and before treaty times. 6-ER-839-40, 842. Ethnographic evidence gathered from tribal informants by Dr. Snyder indicates that Stillaguamish people used and maintained seasonal encampments on Camano Island, in particular the western portion adjacent to Saratoga Passage at treaty times. 6-ER-892; 6-ER-897. Dr. Carrol Riley also repeatedly testified to the Indian Claims Commission that Stillaguamish used Camano Island at and before treaty times. 6-ER-890; 6-ER-853, 855-56. Anthropologist Dr. Natalie Roberts indicated that Stillaguamish maintained village clusters on the southern end of Camano Island. *See* 6-ER-914. Anthropologist Dr. Astrida Blukis-Onat similarly offered deposition testimony in *Subproceeding 93-1* that Stillaguamish territory at treaty times included the southern portion of Camano Island. 6-ER-907. Ethnologist Colin Tweddell testified before the Indian Claims Commission that Stillaguamish people participated in the food cycles on both the north and south ends of Camano Island. 6-ER-909-10. Anthropologist Dr. Deward Walker, Jr. opined at trial that Stillaguamish regularly fished the marine waters of Saratoga

Passage at and before treaty times. 2-ER-78-79; *see* Mot. Transmit Evidence, at min. 00:00-02:09. Expert ethnohistorian Dr. Chris Friday also testified at trial that Stillaguamish regularly fished Saratoga Passage at and before treaty times. 3-ER-408-9; 4-ER-502-3.

Applying the law of the case, the presumption, conclusion, or reasonable inference that is drawn from this uncontroverted evidence of Stillaguamish treaty-time territory and seasonal encampments on Camano Island adjacent and subadjacent to the eastern shoreline of Saratoga Passage is that Stillaguamish customarily fished Saratoga Passage at and before treaty times. *See United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 626 F.Supp. at 1528; *United States v. Washington*, 384 F.Supp. at 353; *Muckleshoot Indian Tribe*, 235 F.3d at 436. The conclusion or reasonable inference that is drawn from the expert evidence Stillaguamish presented at trial also is that at and before treaty times, Stillaguamish customarily fished Saratoga Passage. *See United States v. Washington*, 129 F.Supp.3d at 1110; *see also United States v. Washington*, 730 F.2d at 1314.

The historical and tribal elder evidence Stillaguamish presented at trial also indicates that Stillaguamish regularly fished the marine waters of Saratoga Passage at and before treaty times. Stillaguamish elder Esther Ross testified to the Indian Claims Commission that Stillaguamish people historically went

clamming and had mussel shells. 6-ER-868-69. Stillaguamish elder Esther Ross again testified in *Final Decision #1* that Stillaguamish people went clamming on Camano Island. 6-ER-905. Under the law of the case, the reasonable inference that is drawn from this tribal elder evidence—which stands credible on this record—is that Stillaguamish customarily fished Saratoga Passage at and before treaty times. *See United States v. Washington*, 129 F.Supp.3d at 1110; *United States v. Washington*, 626 F.Supp. at 1531; *United States v. Washington*, 459 F.Supp. at 1059.

The historical, archeological, and expert evidence regarding the shell middens located in the lower Stillaguamish River delta and on Camano Island also support a reasonable inference that Stillaguamish more likely than not customarily fished Saratoga Passage at and before treaty times. These shell middens were created prior to the late nineteenth century, and include only saltwater shellfish species. *See* 6-ER-942-44; 3-ER-331-32, 335-37, 347. The closest productive shellfish grounds to the lower Stillaguamish River delta were located in the marine waters of Skagit Bay and Saratoga Passage. 3-ER-337-38, 347. Stillaguamish elders testified and experts opined that Stillaguamish people historically went clamming, including on Camano Island, and consumed shellfish. 6-ER-868-69; 6-ER-904-5; 2-ER-72; *see* Mot. Transmit Evidence, at min. 1:21-1:43; 3-ER-326, 337, 388-89. Dr. Friday testified that the shell middens in the

lower Stillaguamish River delta and on Camano Island within Stillaguamish treaty-time territory and near Stillaguamish villages and encampments indicate that Stillaguamish regularly harvested shellfish from the marine waters of Saratoga Passage. 3-ER-344, 346-47, 353-54, 357-58, 360; 4-ER-607. Under the law of the case, the reasonable inference drawn from this shell midden evidence is that Stillaguamish regularly gathered shellfish from the adjacent marine waters of Saratoga Passage at and before treaty times. *See United States v. Washington*, 129 F.Supp.3d at 1091, 1110.

The district court erred in concluding as a matter of law that Stillaguamish failed to establish by a preponderance of the evidence that its U&A includes Saratoga Passage. The district court also erred as a matter of law in failing to presume, conclude or at least draw a reasonable inference of Stillaguamish fishing in Saratoga Passage based on the uncontroverted evidence of Stillaguamish villages and encampments located on Camano Island near the eastern shoreline of Saratoga Passage. The district court erred as a matter of law in failing to find that the testimony of Stillaguamish tribal elders, non-Indian settlers, and expert witnesses constituted direct evidence, indirect evidence, or a reasonable inference of Stillaguamish treaty-time fishing in Saratoga Passage. The Court must vacate the district court's order on the merits regarding Saratoga Passage, and remand.

3. The Preponderance Of The Evidence Establishes That Stillaguamish Customarily Fished Skagit Bay From Time To Time At And Before Treaty Times

The uncontroverted evidence Stillaguamish presented at trial overwhelmingly demonstrates that at and before treaty times, Stillaguamish territory spanned the lower eastern shoreline of Skagit Bay, and that Stillaguamish maintained permanent winter villages and seasonal encampments in the lower Stillaguamish River delta adjacent and subadjacent to the shoreline of lower Skagit Bay—all of which supports a presumption that Stillaguamish customarily fished Skagit Bay at and before treaty times.

Historical maps depicting tribal territories at and before treaty times include within Stillaguamish territory the eastern shoreline and marine waters of Skagit Bay. 6-ER-931; 6-ER-823. Stillaguamish elders who were alive at treaty times agreed that their treaty-time territory encompassed part of the eastern shoreline of Skagit Bay. 6-ER-834; 6-ER-828; 6-ER-921-28; 6-ER-871, 876; 6-ER-865; 6-ER-904-5. Stillaguamish elders and early non-Indian settlers recounted numerous Stillaguamish treaty-time permanent winter villages, seasonal encampments, and cemeteries located throughout the lower Stillaguamish River delta near the shoreline of lower Skagit Bay. 6-ER-929-31; 6-ER-821-24; 6-ER-815-17; 6-ER-945-48; 6-ER-818-20; 6-ER-834; 6-ER-825-

27; 6-ER-922-23, 926-28; 6-ER-828; 6-ER-871, 876; 6-ER-870; 6-ER-865-66. Anthropologists Dr. Snyder and Dr. Lane as well as ethnohistorian Dr. Friday each testified that Stillaguamish people occupied permanent winter villages and seasonal encampments in the lower Stillaguamish River delta adjacent or subadjacent to the shoreline of lower Skagit Bay at and before treaty times. 6-ER-835-42; 6-ER-851; 6-ER-845-47; 6-ER-967-68; 6-ER-899-903; 6-ER-950; 6-ER-955-56; 2-ER-300-301.

Applying the law of the case, the presumption from this overwhelming evidence of Stillaguamish treaty-time territory encompassing the eastern shoreline of lower Skagit Bay as well as permanent winter villages and encampments in the lower Stillaguamish River delta near the shoreline of Skagit Bay is that Stillaguamish customarily fished Skagit Bay at and before treaty times. *See United States v. Washington*, 459 F.Supp. at 1059; *United States v. Washington*, 626 F.Supp. at 1528; *United States v. Washington*, 384 F.Supp. at 353; *Muckleshoot Indian Tribe*, 235 F.3d at 436.

The expert evidence Stillaguamish presented at trial further confirms that at and before treaty times, Stillaguamish customarily fished Skagit Bay. Anthropologist Dr. Riley opined that Stillaguamish historically fished the marine waters of lower Skagit Bay. 6-ER-862. Ethnohistorian Dr. Friday testified that Stillaguamish regularly fished Skagit Bay at and before treaty times. 3-ER-408-

9; 4-ER-502-3. Under the law of the case, this expert evidence establishes by a preponderance of the evidence that Stillaguamish customarily fished Skagit Bay at and before treaty times. *United States v. Washington*, 129 F.Supp.3d at 1110 (citing *United States v. Washington*, 626 F.Supp. at 1431); *see also United States v. Washington*, 730 F.2d at 1314.

The expert evidence also supports a reasonable inference that the Stillaguamish who lived further upriver from the villages and encampments in the lower Stillaguamish River delta regularly traveled to the mouth of the Stillaguamish River via the West Pass from time to time to fish in the marine waters of Skagit Bay. Dr. Lane's prior testimony in this case establishes that "[p]eople living at a distance upriver visited the coast to harvest shellfish primarily in the spring and summer…" 6-ER-958; *see also* 6-ER-953 ("people from upriver would come down to the salt water to, for example, harvest shellfish which weren't available to them in the fresh water and to catch fish…"). Dr. Riley testified that Stillaguamish people living upriver went down to Skagit Bay for clamming and fishing. 6-ER-862; 6-ER-853-54. Dr. Friday likewise testified that Stillaguamish would have likely traveled downriver to regularly fish Skagit Bay. 2-ER-195-96. Under the law of the case, the direct or indirect evidence recognized, or the reasonable inference that is properly drawn from this evidence

is that Stillaguamish more likely than customarily fished Skagit Bay at and before treaty times. *See United States v. Washington*, 626 F.Supp. at 1528.

As discussed *supra* with respect to Saratoga Passage, the historical, archeological, and expert evidence regarding the shell middens located in the lower Stillaguamish River delta additionally supports a reasonable inference that Stillaguamish more likely than not customarily fished the marine waters of Skagit Bay at and before treaty times. Under the law of the case, the reasonable inference that can be drawn from this shell midden evidence is that Stillaguamish regularly gathered shellfish from the adjacent marine waters of Skagit Bay at and before treaty times. *See United States v. Washington*, 129 F.Supp.3d at 1091, 1110; *see also United States v. Washington*, 626 F.Supp. at 1531; *United States v. Washington*, 459 F.Supp. at 1059.

The district court erred in concluding as a matter of law that Stillaguamish failed to establish by a preponderance of the evidence that its U&A includes Skagit Bay. The district court also erred as a matter of law in failing to presume, conclude or at least draw a reasonable inference of Stillaguamish fishing in Skagit Bay based on the uncontroverted evidence of Stillaguamish permanent winter villages and encampments located throughout the lower Stillaguamish River delta near and adjacent to the eastern and southern shorelines of Skagit Bay. The district court erred as a matter of law in failing to find the testimony of numerous

Stillaguamish tribal elders, non-Indian settlers, and expert witnesses constituted direct evidence, indirect evidence, or a reasonable inference of Stillaguamish treaty-time fishing in Skagit Bay. The Court must reverse the district court's order on the merits regarding Skagit Bay, and remand.

4. The Preponderance Of The Evidence Establishes That Stillaguamish Customarily Fished Penn Cove And Holmes Harbor From Time To Time At And Before Treaty Times

The reasonable inference that is drawn from the historical and expert evidence Stillaguamish presented at trial is that Stillaguamish more likely than not customarily fished Penn Cove and Holmes Harbor at and before treaty times. At treaty times, Federal officials assigned Stillaguamish to temporary reservations at Penn Cove and Holmes Harbor because Stillaguamish were already familiar with those marine waters and locations. 3-ER-359, 361-63. Federal agents identified Stillaguamish people at treaty times regularly traveling between Penn Cove, Holmes Harbor, Camano Island, and the mouths of the Stillaguamish River. 6-ER-802-7; 6-ER-932-41; 6-ER-808-10. Federal agents also reported that the Indians at the temporary reservations, which included Stillaguamish people, would go clamming and fishing in Holmes Harbor and Penn Cove. 6-ER-801; 6-ER-938. Dr. Friday explained that these Federal agent records indicate that: Stillaguamish people were familiar with the marine waters and resources of Penn Cove and Holmes Harbor at and before treaty times; Stillaguamish people

were familiar with the other tribal peoples who used Penn Cove and Holmes Harbor, and Stillaguamish people joined them as part of an extended network of family kin in marine resource gathering at Penn Cove and Holmes Harbor; and, that Stillaguamish people traveled by saltwater canoe to Penn Cove and Holmes Harbor. 3-ER-384-85. Accordingly, Dr. Friday opined that Stillaguamish more likely than not regularly fished the marine waters of Penn Cove and Holmes Harbor at and before treaty times. 4-ER-503-4. Under the law of the case, the reasonable inference drawn from this evidence of presence, travel, and fishing activities in combination with the expert evidence is that Stillaguamish more likely than not customarily fished the marine waters of Penn Cove and Holmes Harbor at and before treaty times. *See United States v. Washington*, 129 F.Supp.3d at 1110; *see also Lummi Tribe*, 841 F.2d at 319-320 (noting with approval the use of testimony from expert historians and ethnohistorians).

Stillaguamish also presented ethnographic, anthropological, and expert testimony that stands as direct, or at the least, indirect evidence that Stillaguamish more likely than not customarily fished Holmes Harbor at and before treaty times. As discussed *supra*, an ethnographic field note collected by Dr. Wayne Suttles from a tribal informant reported that a Stillaguamish man called "Mowich Sam," who was alive at treaty times, fished Holmes Harbor with his Bsigwigwilts wife. 6-ER-898; 3-ER-475-76. Expert testimony provided context for the significance

of the ethnographic field note regarding Mowich Sam, explaining that Mowich Sam regularly fished Holmes Harbor at and before treaty times, and that the Stillaguamish relatives of Mowich Sam would have been able to fish with him at Holmes Harbor. 6-ER-918-20; 6-ER-963-66; 6-ER-957-59; 6-ER-879-882; 3-ER-478. Thus, Dr. Friday concluded that Stillaguamish more likely than not regularly fished the marine waters of Holmes Harbor at and before treaty times. 4-ER-503-4.

Under the law of the case, the reasonable inference drawn from this historic and ethnographic evidence of presence, travel, intermarriage, and fishing activities in combination with the expert evidence is that Stillaguamish more likely than not customarily fished the marine waters of Penn Cove and Holmes Harbor at and before treaty times. *United States v. Washington*, 384 F.Supp. at 350-51 ("People moved about to resource areas where they had use patterns based on kinship or marriage."); *see also United States v. Washington*, 626 F.Supp. at 1529-30 ("The widespread intermarriage among the tribes surrounding Puget Sound would indicate that travel through its marine waters occurred frequently and on a regular basis."); *United States v. Washington*, 129 F.Supp.3d at 1110; *Lummi Tribe*, 841 F.2d at 319-320 (nothing with approval the use of testimony from expert historians, ethnohistorians, and tribal elders).

5. The Preponderance Of The Evidence Establishes That Stillaguamish Customarily Fished Deception Pass From Time To Time At And Before Treaty Times

The reasonable inference that is drawn from the historical, ethnographic, and expert evidence Stillaguamish presented at trial is that Stillaguamish more likely than not customarily fished Deception Pass at and before treaty times. Ethnographic information gathered by Dr. Snyder from a tribal informant recounted that Deception Pass at treaty times was "open territory to all groups around the Pass," and that Deception Pass was used by "anyone else that wanted to fish there; and that generally included camping on the adjacent shores." 6-ER-894-95. Other ethnographic information gathered by Dr. Snyder recounted that "upriver people" used to go to Deception Pass to troll. 6-ER-893. Shell middens are also present at Deception Pass. 6-ER-960-62. At and before treaty times, Deception Pass was the preferred route for those Indians wishing to travel by canoe to the San Juan Islands or other destinations and was an important thoroughfare. *Id.*

The Cowichan people of the lower Fraser River in British Columbia, Canada, had a specific word in their own language for Stillaguamish people. 6-ER-814. Ethnographer June Collins recorded the familial affiliations of a Stillaguamish tribal member with people who lived on Guemes Island north of

Fidalgo Island, and in Cowichan territory. 6-ER-917. Dr. Friday opined that Stillaguamish kinship relationships with Cowichan people and those who lived on Guemes Island indicate that Stillaguamish people would have frequently visited their Cowichan relatives, and that Stillaguamish people likely traveled to Cowichan territory and to Guemes Island from the mouth of the Stillaguamish River through Skagit Bay and out through Deception Pass by saltwater canoe. 3-ER-445, 449, 451.

Stillaguamish tribal elder Sally Oxstein, who was born in 1848, reported that her family traveled to Fort Victoria on Vancouver Island by canoe when she was a young girl. 6-ER-829-32. Dr. Chris Friday opined that Sally Oxstein's history of her family traveling to Fort Victoria indicates Stillaguamish familiarity with the region, its natural resources, and that the Stillaguamish regularly traveled to Fort Victoria at and before treaty times. 3-ER-418-20, 423-24. Stillaguamish tribal elder Esther Ross similarly testified that Stillaguamish people regularly traveled to Fort Victoria. 6-ER-867-68. Dr. Friday explained that Fort Victoria is located about fifty-five miles from the mouth of the Stillaguamish River, and was most easily accessible from the mouth of the Stillaguamish River through Skagit Bay to Deception Pass. 3-ER-420-23, 426; 4-ER-645. By saltwater canoe, Dr. Friday opined, Stillaguamish people likely regularly made multi-day trips to Fort Victoria through Deception Pass where they would have likely camped, fished,

and gathered shellfish. *Id*. Dr. Friday further opined that while engaged in regular travel through Deception Pass, Stillaguamish people likely would have fished along the way. 3-ER-409-10, 414. Dr. Friday concluded based on the historic, ethnographic and anthropological evidence, Stillaguamish more likely than not regularly fished the marine waters of Deception Pass at and before treaty times. 4-ER-503, 644.

Under the law of the case, the reasonable inference drawn from this historic, anthropological, ethnographic evidence of presence, travel, and fishing activities in combination with the expert evidence is that Stillaguamish more likely than not customarily fished the marine waters of Deception Pass at and before treaty times. *See United States v. Washington*, 626 F.Supp. at 1528 ("The straits and sound were traditional highways used in common by all Indians of the region and most saltwater fisheries traditionally were free access areas."); *id*. at 1529 ("A round trip to the Fraser River from the mouth of the Snohomish River would normally have taken from two to four weeks. During such travels they would have harvested salmon accessible to them.").

In sum, the district court's conclusion that Stillaguamish did not demonstrate by a preponderance of evidence that Stillaguamish people more likely than not customarily fished the Claimed Waters from time to time at and

before treaty times is incorrect as a matter of law, ignoring the evidence at trial summarized by the table below:

	Port Susan	Skagit Bay	Saratoga Passage	Holmes Harbor	Penn Cove	Deception Pass
Villages or Encampments	√	√	√			
Joint Use Areas	√	√	√	√	√	√
Maps	√	√	√		√	
Ethnographic	√	√	√	√		√
Archaeological (middens)	√	√	√			√
Anthropological	√	√	√	√		√
Tribal Voices	√	√	√	√		√
Historical	√	√	√	√	√	√

The Court must reverse the district court's order on the merits regarding the Claimed Waters, and remand.

CONCLUSION

Stillaguamish acknowledges this Court's (and likely the district court's) fatigue with *United States v. Washington.* Until the district court sunsets its continued jurisdiction, however, it is imperative that the same standards used by Judge Boldt to determine U&A be applied consistently to all tribes seeking to establish their treaty-guaranteed U&A rights. The district court's decision to

ignore and depart from the law of the case, coupled with its dismissive consideration of the reams of admitted documentary and expert evidence after an eight-day bench trial, deprived Stillaguamish of its fair opportunity, recognized in 1978, to have its expanded U&A adjudicated. For the reasons explained herein, Stillaguamish respectfully asks that this Court reverse the district court's order and remand with instructions.

DATED: April 26, 2023

Respectfully submitted,

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STATEMENT OF RELATED CASES

None.

DATED: April 26, 2023

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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 12,842 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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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 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.

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