NO. 23-35066

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner-Appellant,

vs.

STATE OF WASHINGTON; UPPER SKAGIT INDIAN TRIBE,

Respondents-Appellees,

TULALIP TRIBES; NISQUALLY INDIAN TRIBE,

Intervenors-Appellees,

HOH INDIAN TRIBE, et al.

Interested Party-Appellees.

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

APPELLEE'S ANSWERING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Appellee Swinomish Indian Tribal Community is a federally recognized Indian tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

At treaty time, the Stillaguamish Tribe was an isolated upriver tribe which lived and customarily fished along portions of the Stillaguamish River and its tributaries. In a trial intended by Stillaguamish to expand its treaty fishing into broad swaths of marine waters, Stillaguamish did not present *any* evidence to establish or infer that it more likely than not fished in *any* marine water body at treaty time: not Deception Pass, not Skagit Bay, not Saratoga Passage, not Penn Cove or Holmes Harbor, and not even the saltwater nearest the tribe, Port Susan (collectively, the Claimed Waters).

The name "Stillaguamish" means "river people." From as early as 1850, primary and secondary sources, including Stillaguamish leaders and elders, have consistently documented the tribe's close connection with its river and the extent to which its bountiful fish, game, and plant resources provided the tribe with all its subsistence, ceremonial, and economic needs.

But in this case, Stillaguamish firmly turns its back on its name, its identity, and its homeland. It says that all of those primary and secondary sources, the Indian Claims Commission (ICC) in 1965, District Court Judge Boldt in 1974, and District Court Judge Martinez in this case got it wrong. It says it was actually a *saltwater* tribe, which lived not in its documented upriver villages but at the river delta in a place called Qwadsak, whence it occupied the shorelines of the Claimed

Waters and routinely traveled far and wide throughout the Salish Sea, fishing all the while.

There is no evidence to support this theory and significant evidence that disproves it. And so Stillaguamish resorted to pure speculation at trial: "Could have." "Would have." "No reason they would not have." These unsupported phrases from Stillaguamish and its expert are the verse and refrain of its case.

Stillaguamish has a treaty right to take fish at its usual and accustomed grounds and stations (U&A). But it, like every other treaty tribe, must do more than offer unfounded speculation to prove its U&A claims. Because it did not, the district court correctly granted Respondent-Appellee Upper Skagit Indian Tribe's Motion for Judgment on Partial Findings under Fed. R. Civ. P. 52(c). In the half-century since Judge Boldt determined that Stillaguamish's U&A was in the river system that bears its name, the district court gave Stillaguamish ample time and multiple opportunities to prove its claim to marine U&A. And Stillaguamish failed to deliver. The district court's challenged findings of fact are amply supported by the record, and its conclusion that Stillaguamish failed to meet its burden of proof of establishing that it customarily fished in any of the Claimed Waters at treaty time necessarily followed from its findings of fact and is correct. This Court should affirm.

II. COUNTER STATEMENT OF ISSUES

1. Are Findings of Fact 5, 8, and 9 in the district court's Order Granting Rule 52(c) Motion, 1-ER-2-7, clearly erroneous?

2. Did the district court correctly conclude that "although there is ample evidence that the Stillaguamish were a river fishing people during treaty times, 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.

III. COUNTER STATEMENT OF THE CASE

A. At Treaty Time, the Stillaguamish Lived and Fished on the Stillaguamish River Above the Present Day Town of Florence.

Primary and secondary sources, including Stillaguamish leaders and elders, consistently described the Stillaguamish living and fishing on the Stillaguamish River above Florence at treaty time. These same sources place a different tribe, the Qwadsak, in the Stillaguamish River delta and along the shoreline of Port Susan.

Hancock and Wilson

In 1850 and 1851, two mining explorers, Samuel Hancock and George Wilson, collectively made three trips up and down the Stillaguamish River and provided the earliest written accounts of native activities in the area. 4-ER-553:19-24, 555:6-18, 561:18-20; *see* 5-SER-824-856, 861-947. They traveled via one of the Claimed Waters, Port Susan, and a Stillaguamish

River distributary, Hat Slough, and did not encounter any native villages or encampments there. They first came upon a structure about five miles upriver; it was a single-family house. They proceeded and observed a Stillaguamish camp about fifteen miles upriver and a large village of several hundred people near the forks of the river at present day Arlington. 4-ER-554:20-555:2, 561:21-562:6, 556:21-557:1, 563:6-11. In separate accounts of these journeys, neither Hancock nor Wilson reported that the Stillaguamish occupied shoreline territory or fished marine waters. 4-ER-556:15-20, 563:12-14.

Gibbs

In the 1850s, George Gibbs assisted Washington Territorial Governor Isaac Stevens in negotiating the Treaty of Point Elliott and reported on the culture, economies, and demographics of Puget Sound tribes. 4-ER-563:15-564:24. In preparation for treaty negotiations, Gibbs and Stevens toured Puget Sound in an attempt to understand the number and location of Indian tribes in the region. 4-ER-564:25-565:3.

In 1854, Gibbs, who studied native languages and published several dictionaries, reported that the name "Stillaguamish" means "river people" and that their "country is on a stream bearing their name." 4-ER-4-13; 4-SER-723; 4-ER-564:19-24.

In 1855, Gibbs prepared a government map showing the territories of the tribes. 4-ER-565:4-18; 4-SER-546-547. In the map, Gibbs located some tribes, such as the Snohomish, across marine waters and their freshwater drainages, and some, such as the Kikiallus, on the shoreline. 4-ER-566:1-8, 16-21; 4-SER-546-547.[1] Gibbs located the "Stoluchwhamish" on the Stillaguamish River, away from the shoreline and marine waters. 4-ER-567:5-7, 568:13-569:2; 4-SER-546-547. Neither he nor any other member of the United States treaty commission reported that the Stillaguamish occupied shoreline territory or fished marine waters.

Dorsey

In 1926, Stillaguamish elder and chief James Dorsey provided an affidavit to the Court of Claims in *Duwamish et al. vs. United States* listing Stillaguamish villages, camps, potlatch sites, and burial grounds. 6-SER-1261-1264. But for a potlatch site on the bank of Hat Slough and one small village site near Warm Beach on Port Susan, neither of which Hancock or Wilson observed pre-treaty, Dorsey's sites lay only along the Stillaguamish River. He did not identify any sites north or west of present-day Stanwood, which is to the east or south of the shorelines of the Claimed Waters. Dorsey also identified Stillaguamish food sources: fish traps at most, if not all, of the

[1] The Snohomish were a predecessor of Respondent-Appellee Tulalip Tribes. The Kikiallus were a predecessor of Respondent-Appellee Swinomish Indian Tribal Community.

villages he described; deadfalls or traps for catching fur bearing mammals; and wild berries, cherries, and nuts. 6-SER-1264. He did not identify any saltwater species and did not describe any marine fishing.

Bruseth

In the 1880s, Nels Bruseth arrived with his family in the Stillaguamish valley. He knew Dorsey and other Indians living in and around the Stillaguamish valley well and eventually wrote a history of the area. He identified two different tribes of Indians inhabiting the Stillaguamish valley—the Stillaguamish, who lived upriver, and the Qwadsak, who were headquartered near present day Stanwood. 5-SER-789, 793, 818-819. He noted that the Qwadsak people had "quite different" place names than the Stillaguamish and the Sauk, which both lived upriver. 5-ER-736:16-737:25; 5-SER-819. Bruseth observed Stillaguamish's prowess in fishing in the river with spears and noted the importance of canoes to the river Indians. 5-SER-789-790, 794. In testimony before the Indian Claims Commission (ICC), Bruseth maintained this distinction between the Qwadsak who "were down below on that river" and the Stillaguamish who "were up the river." 7-SER-1541. Bruseth did not identify any Stillaguamish sites on the shoreline and did not mention marine fishing.

Harvey

In the early 1950s, Stillaguamish elder Jackson Harvey provided Dr. Wayne Suttles, an anthropologist who spent his career focusing on the Coast Salish, with detailed information regarding Stillaguamish fishing technology and practices. Harvey, born about 1885, provided a list of fish found in the Stillaguamish River. Harvey noted two locations with fishing weirs, both upriver—one above Florence and another four miles above Arlington on the North Fork of the river. Harvey also described various riverine fish traps (which require the river's current to function properly) and the use of harpoons and spears to fish on log jams in the river. 4-SER-678-686. Harvey did not mention any saltwater species or describe marine fishing places or technologies, and Suttles' entire collection of ethnographic field notes regarding the Stillaguamish contains no reference to marine fishing.

Other Suttles' Informants

Native informants from other tribes also described and delineated Stillaguamish and Qwadsak territory for Suttles. Ruth Shelton, born in about 1858, stated that the Quadsak people "had Port Susan from Warm Beach to Stanwood." 6-SER-1126; 5-ER-744:23-745:7, 747:1-13. By contrast, "[t]he Stillaguamish people lived on the Stillaguamish River from a place four or five miles from its mouth on up." 5-ER-745:20-746:5; 6-SER-1123, 1126.

Suzy Peters stated that the Qwadsak people "lived on Port Susan and up the Stillaguamish River" and placed their village at Warm Beach. 5-ER-741:20-742:4; 6-SER-1124. By contrast, she stated that the Stillaguamish Tribe had a potlatch house at Sqabalqo, on the Stillaguamish River above the junction of the north and south forks. 5-ER-740:5-20; 6-SER-1122.

Andrew Joe located the Qwadsak on the north end of Port Susan; he placed the Stillaguamish upriver beginning at Florence. 5-ER-743:17-744:22; 6-SER-1125.

Ross

Longtime Stillaguamish leader and tribal secretary Esther Ross testified in the ICC. She affirmed that the word Stillaguamish means "river Indians" and that the tribe stayed near their river, as it provided them with their game, fish, and firewood. 7-SER-1538-1539. She did not mention any marine fishing.

In a deposition taken for the initial *United States v. Washington* proceeding, discussed below, Ross stated that the Stillaguamish exercised their historical fishing rights on the "north and south fork of the river and its tributaries." 7-SER-1544. She explained that the Stillaguamish were able to fish their river until the state built a hatchery that was "in our original land, in our original place and in our accustomed places of our folks. We never sold that river." 7-SER-1545. Again, Ross did not mention any marine fishing.

Snyder

In the 1950s, Stillaguamish retained Dr. Sally Snyder as an expert witness to assist with its claim in the ICC, and as a result, Snyder studied Stillaguamish treaty time places and practices perhaps more than any other academic. She prepared a map of Stillaguamish treaty time territory, which included but set apart Qwadsak territory at the river delta. 6-SER-851. She testified that the Stillaguamish economy at treaty time was:

> [O]f an up-river sort, based upon fresh water fishing, probably by trapping, and upon hunting. The economy differed from the Skagit, or the Skagit and Kikiallus,[2] in that the Stillaguamish were not dependent upon shell fish, nor upon fish caught in saltwater.

4-SER-652. Although she assumed that the sites Dorsey identified at Hat Slough and Warm Beach were Stillaguamish sites, she still concluded that the Stillaguamish were "largely hunting people" who also fished the Stillaguamish River and "were not oriented to the salt water to any extent whatsoever." 4-SER-638.

B. Stillaguamish's U&A Determination.

United States v. Washington was filed by the United States in 1970 to protect the treaty fishing rights of western Washington tribes. This included determining each tribe's U&A.

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[2] The Skagit, or Lower Skagit, were another of Swinomish's predecessors.

With respect to Stillaguamish, Judge Boldt found that: (1) in 1855 the Stillaguamish Tribe resided on the Stillaguamish River; (2) since at least 1854, the name Stillaguamish has referred to those Indians who lived along the Stillaguamish River and its tributaries; and (3) at treaty time, the Stillaguamish took fish by various devices at various places on the Stillaguamish River system. *Id.* at 378-79 (Finding of Fact (FF) 144, 146). He determined Stillaguamish's U&A as follows:

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

Id. at 379 (FF 146).

In making his determination, Judge Boldt primarily relied upon a report on the Stillaguamish and its treaty-time fisheries written by the renowned anthropologist, Dr. Barbara Lane. *See id*. at 378-79 (citing USA-28; *see* 6-SER-1236-1265). Judge Boldt found Lane's reports to be "exceptionally well researched and reported" and "authoritative and reliable." *Id*. at 350 (FF 2).

In her report, Lane relied on most, if not all, of the primary and secondary sources discussed above. She found that, "[i]n contrast to some of their neighbors like the Snohomish to the south and the Lower Skagit to the north, [the Stillaguamish] remained relatively isolated from white influence until some years after the Treaty…. [Hancock's] description of [his trips to the Stillaguamish]

make[] it clear that the Indians along the Stillaguamish River had at that time very little direct contact with whites." 6-SER-1238. Only one man had a blanket; the others were naked or wore traditional cedar bark clothing. They were curious about western food, had never seen a revolver, and did not understand the use of coal. 6-SER-1238-1239.

Lane concluded that at treaty time, the Stillaguamish lived on the main branch of the river and its north and south forks, 6-SER-1260, and that "from the evidence available it is obvious that the Stillaguamish Indians were skilled fishermen and canoe handlers who relied on the resources of their river and their tributary creeks for their staple food….[A]nadromous fish were taken in quantity as they ascended the river system to spawn and were preserved for later use." 6-SER-1259. Prior to the 1870's when settlers began homesteading the Stillaguamish valley, "there was no reason for the Stillaguamish to leave their own territory where food supplies in the form of fish and game were plentiful." 6-SER-1248. Lane did not identify any Stillaguamish villages or encampments on shorelines or any marine fishing places or technologies.

C. The Present Dispute.

In 2017, Stillaguamish commenced this action seeking to expand its treaty fishing into the Claimed Waters, where Swinomish, Tulalip, and Upper Skagit have important treaty fisheries. Stillaguamish Opening Brief ["OB"] 3-4; *see* 6-

ER-954 (showing Claimed Waters). Following discovery and motions practice, a bench trial in this matter was conducted over eight days from March through June 2022. The only legal issue at trial was whether the historical and anthropological evidence and expert testimony, and all reasonable inferences drawn therefrom, demonstrated by a preponderance of the evidence that Stillaguamish customarily fished the Claimed Waters at and before treaty times. 1-ER-2; OB 4-5.

Stillaguamish presented its case almost entirely through one witness, its expert Dr. Chris Friday, an historian. 4-ER-504. It also relied on several statements from the deposition of Tulalip's expert Dr. Deward Walker. Swinomish presented evidence through Dr. Astrida Blukis Onat, an expert in anthropology, archeology and the ethnography of Coast Salish Indians. 2-SER-30:16-33:17, 43:23-44:3]. Upper Skagit presented evidence through its expert Dr. Bruce Miller, also an anthropologist.

D. The Order Granting Upper Skagit's Rule 52(c) Motion.

Following the close of Stillaguamish's case in chief, Upper Skagit filed a motion for judgment on partial findings against Stillaguamish under Fed. R. Civ. P. 52(c). 2-ER-98-110. Tulalip joined the motion. Swinomish did not oppose it. 5-ER-792. As expressly permitted by Rule 52(c), the district court did not rule immediately and instead heard evidence from the Respondent-Appellees.

On December 30, 2022, the district court entered its Order Granting Rule 52(c) Motion. 1-ER-2-7. The court found that Stillaguamish's evidence of customary fishing in saltwater at treaty time was too speculative and determined that Stillaguamish failed to establish saltwater U&A by a preponderance of the evidence. *See id.* It entered Judgment against Stillaguamish.

This appeal followed.

IV. STANDARD OF REVIEW

This Court reviews the district court's findings of fact under Rule 52(c) for clear error. *USW Local 12-369 v. USW Int'l*, 728 F.3d 1107, 1114 (9th Cir. 2013). Review under the clear error standard "requires considerable deference; the findings of the district court should stand unless the appellate court has the definite and firm conviction that a mistake has been committed." *Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1024 (9th Cir. 1999) (internal quotation marks omitted). This Court may not substitute its own fact finding for that of the district court: "[i]f the [trial court's] account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id*. (internal quotation marks omitted). The burden is on Stillaguamish to establish that the district court findings are clearly erroneous and

warrant reversal. *In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 335 (9th Cir. 1978).

This Court reviews the district court's conclusions of law under Rule 52(c) de novo. *USW Local 12-369*, 728 F.3d at 1114.

V. ARGUMENT

A. The District Court Applied the Correct Standard of Proof.

1. U&A Standard.

In *United States v. Washington*, Judge Boldt defined a tribe's U&A as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." 384 F. Supp. 312, 332 (W.D. Wash. 1974) ("*FD I*"). "[U]sual and accustomed" locations exclude areas of "occasional or incidental" use, "unfamiliar locations[,] and those used infrequently or at long intervals and extraordinary occasions." *Id*. at 332, 356.

Stillaguamish acknowledges that these principles are "[t]he 'controlling law' … applicable to the adjudication of Stillaguamish's U&A" claim, but argues that because the district court did not explicitly cite them in its Order, it failed to meet the basic requirements of Rule 52(c) and left the parties and this Court guessing as to whether the court applied controlling law. OB 7, 9.

This argument lacks merit. Although the district court did not cite to *FD 1*, it stated the U&A standard it was applying no less than four times in a six-page order, often quoting from *FD 1* verbatim. *See e.g.*, 1-ER-3 (addressing Upper Skagit's argument that Stillaguamish did not present any evidence "from which the Court can conclude that Stillaguamish *customarily fished from time to time at and before treaty times* in any of the marine waters at issue") (emphasis added); *see also* 1-ER-2, 5-7.

Stillaguamish criticizes the district court for stating that "'[c]ustomarily fished' … means more than *may* have fished, *could* have fished, or even *definitely* fished on a rare occasion." OB 17 (quoting 1-ER-3) But the court's statement flows directly from *FD 1* and this Court's precedent. *FD 1* states explicitly that the words "usual and accustomed" were used in their restrictive sense and do not "include areas where use was *occasional* or incidental." 312 F. Supp. at 356 (emphasis added). And this Court's precedent holds that fishing must have occurred "with regularity" rather than on an "isolated or infrequent" basis to give rise to U&A. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 434 (9th Cir. 2000) (*Muckleshoot III*).

Stillaguamish also asserts that the court's statements requiring proof of fishing "*at* and before treaty times" "is a gross deviation from the law of the case applied for the first time against Stillaguamish." OB 19; *see* 1-ER-3, 5). In its

view, evidence of fishing *before* treaty time satisfies the U&A standard. But there is no error: the relevant phrase in the U&A standard is "at and before treaty time," which is conjunctive and requires evidence of fishing *at* treaty time. *See* FD 1, 384 F. Supp. at 332 ¶ 8.

Stillaguamish cites a number of cases for the proposition that evidence related to fishing from well before and well after the treaty is relevant and weighty. OB 19. However, at least some of these cases do not say what Stillaguamish claims they do and undercut, rather than support, Stillaguamish's position. For example, Stillaguamish says that the court in *United States v. Washington*, 129 F.Supp.3d 1069, 1087 (W.D. Wash. 2015), relied on Indian agent reports from 1877 and 1882. What the court actually said was that "[t]he minimal familiarity of Indian agents with Quileute practices, coupled with the agency's economic development orientation, render the Indian agent reports of little utility in reconstructing customary Quileute fishing practices at treaty time." *Id*.

The district court applied the correct U&A standard and Stillaguamish has not shown otherwise. But this discussion has been largely academic: as explained in greater detail below, Stillaguamish did not present any evidence that it fished in any of the Claimed Waters *regularly or occasionally* either *before* treaty time or *at* treaty time.

2. Preponderance Standard.

The district court applied a preponderance standard in evaluating Stillaguamish's evidence. 1-ER-2, 6. That is the correct standard of proof. Ever since *FD 1*, a tribe asserting treaty fishing rights bears the burden of proving by "a preponderance of the evidence found credible and inferences reasonably drawn therefrom" that it customarily fished in the claimed area. 384 F.Supp. at 348. This standard may be satisfied by either "direct evidence [or] reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show the probable location and extent of their U&As." *United States v. Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015).

The district court found that the record before Judge Boldt "included substantial evidence of Stillaguamish river fishing but did not include any substantial evidence of fishing activity in the marine waters now at issue." 1-ER-5 (FF 4). From this, Stillaguamish argues that the district court created "some new 'substantial evidence' standard" and applied it unfairly to Stillaguamish. OB 14-15.

This is not true. The order twice states the standard the court applied and it is the preponderance standard, not a substantial evidence standard. 1-ER-2, 6. The court's statement is a correct finding of fact regarding the contents of the record prior to trial. As noted above, Judge Boldt relied upon Lane's Stillaguamish

Report, which incorporated information from Dorsey, Harvey, Hancock and Wilson, and others, all of whom provided evidence of treaty-time river fishing by Stillaguamish. They did not describe, and Lane did not find any evidence of, Stillaguamish marine fisheries. *See* 384 F. Supp. at 379 (FF 146) (citing USA-28 [6-SER-1236-1265]). The court's finding accurately summarizes the record before Judge Boldt and says nothing at all about Stillaguamish's burden of proof in a trial that occurred almost a half-century later.

Stillaguamish also asserts that the district court "failed to acknowledge and apply the relaxed preponderance standard" applicable to U&A determinations. OB 13. Stillaguamish is correct that, in light of the challenges of proving fishing locations at treaty time, the court does not apply the preponderance standard stringently. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W. D. Wash. 1978) (*FD 2*); *accord United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988). But the preponderance standard remains: "In evaluating whether or not the tribes have met their burden, the Court gives due consideration to the fragmentary nature and inherent limitations of the available evidence *while making its findings on a more probable than not basis*." *United States v. Washington*, 129 F. Supp. 3d at 1110 (emphasis added); *accord*, *Upper Skagit Tribe v. Washington*, 576 F.3d 920, 926-928 (9th Cir. 2009) (evaluating whether evidence before Boldt

demonstrated it was "at least as likely as not" that certain waters were included in a tribe's U&A).

Speculation has never been sufficient to establish U&A, even under a relaxed application of the preponderance standard. To be reasonable, an inference "cannot be supported by only threadbare conclusory statements instead of significant probative evidence[,]" i.e., evidence that tends to make the proposition in question probable. *Barnes v. Arden Mayfair Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1985); *see also Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991) (an inference is not reasonable if it is not a valid conclusion grounded in probative evidence – that is, if it is no more than "tenuous speculation").

Stillaguamish goes out of its way to tell this Court that "[t]he opinions [its expert] Dr. [Chris] Friday offered at trial are themselves evidence," OB 34, but unfounded speculation does not become any less speculative simply because it comes from an expert's mouth. As this Court has previously explained, "[Fed. R. Evid. 702] demands that expert testimony relate to … specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs." *Diviero v. Uniroyal Goodrich Tire Co*., 114 F.3d 851, 853 (9th Cir. 1997). And courts may not "infer" new facts without an evidentiary basis. This is especially important where, as here, the inferences Stillaguamish and its expert ask the Court

to draw are inconsistent with the conclusions articulated by acknowledged experts in the field on consideration of the same documentary evidence and ethnographic source materials (of which, more below).

B. The District Applied the Correct Law of the Case Regarding Villages and "Presence."

The district court concluded that the "law of the case requires that Stillaguamish do more than proffer evidence of (potential) village locations…or (possible) presence in an area" and that "the presence of villages…is ultimately insufficient to satisfy the [U&A standard]." 1-ER-7.

Stillaguamish argues that these conclusions are contrary to the law of the case. OB 10-11, 22, 39-41, 44, 46, 48-50, 56. It asserts that the location of a tribe's villages and a tribe's presence in an areas are "determinative" of its U&A and that all prior U&A findings are "overwhelmingly predicated on a finding that the tribe occupied villages or encampments adjacent or subadjacent to a particular body of water." OB 22. This is incorrect.

As noted above, *FD 1* defines U&A as "every fishing location where members of a tribe customarily *fished* from time to time at and before treaty times…." 384 F. Supp. at 332 (emphasis added). This definition requires evidence of fishing and neither states nor implies that a tribe's shoreline village locations or its "presence" are "determinative" of a tribe's U&A. U&A has never been awarded on the basis of village location or "presence" alone.

A recent decision of this Court confirms that the district court was correct to require more than evidence of potential villages and possible presence. In *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766 (9th Cir. 2023), the Sauk argued that testimony from a tribal member that it lived "up and down the Skagit River" and fished "wherever the people were" was sufficient to establish U&A on the Skagit River. *Id*. at 772. This Court rejected that argument because the tribal member did not testify that the tribe *fished* on the Skagit River, but had testified that the tribe fished elsewhere. *Id*. at 772-73. The same rule must apply here. Even if it were true that Stillaguamish had villages along the shorelines of the Claimed Waters at treaty time (and it did not), there is no evidence that Stillaguamish actually *fished* the Claimed Waters (and, in contrast, plenty of evidence that it fished on its river).

Stillaguamish's brief claims that the U&As of 18 tribes were based on village locations or "presence." *See, e.g.*, OB 10-12, 22-24, 39-41. That is false, and Stillaguamish's characterizations of those U&A determinations are demonstrably incorrect and grossly misleading. A few examples will suffice:

Lummi

Stillaguamish claims that Lummi U&A is based on "presence" at reef net locations and historical occupation of Bellingham Bay and freshwater rivers emptying to the Bay. OB 11, 40. Beyond the obvious point that the purpose of

Lummi's "presence" at reef net locations was to operate reef nets, a "highly efficient technique" for harvesting "large quantities of salmon in saltwater," *FD 1*, 384 F. Supp. at 360, the record contains substantial evidence of Lummi fishing in and around Bellingham Bay, the San Juan Islands, and on the west side of Whidbey Island south to Mukilteo. This evidence, cited by Judge Boldt, includes Lane's report on the Lummi and its treaty time fisheries and sworn affidavits from Lummi members in 1895 discussing their fisheries. *Id.* at 360-61 (FF 45-46). In light of this evidence of *fishing*, any suggestion that Lummi's U&A determination was based on "presence" or occupancy is not just incorrect but misleading.

Nisqually

Stillaguamish claims that Nisqually established its U&A based on historical occupation of the Nisqually River system and "presence" at saltwater areas at the mouth of the River and surrounding bay. OB 11-12, 23, 40. But Dr. Lane's report on the Nisqually explained that the Nisqually fished in the mouth of the river and adjacent saltwater and sometimes granted permission for others to do so. 6-SER-1132, 1152. Nisqually informants and the State's expert Dr. Carroll Riley also documented saltwater fishing. 7-SER-1353-55; 3-SER-452-53. In light of this evidence of *fishing* cited by Judge Boldt, 384 F. Supp. at 368-69 (FF 85, 86), any suggestion that Nisqually's saltwater U&A was based on occupation or "presence" is also incorrect and misleading.

Swinomish

Stillaguamish claims that Swinomish proved its U&A based on historical occupation of territories along the Skagit River, on the mainland to its north and south, and on adjacent islands (i.e., some of the very same places that Stillaguamish now baselessly claims it occupied). OB 23. Swinomish's U&A finding says nothing at all about occupation or villages. It is based upon a Lane report that contains detailed ethnographic information about the aboriginal fishing practices, techniques, and species of Swinomish's predecessor bands. 7-SER-1424-1432. 1438-1468. Because Swinomish presented evidence of *fishing*, any suggestion that its U&A is based on historical occupation is, again, misleading.

Upper Skagit

Stillaguamish claims that Upper Skagit won its U&A based on historical occupation of the Sauk and Upper Skagit Rivers and its "presence" in marine waters due to travel and kinship. OB 12, 23, 41. However, among other things, Upper Skagit presented expert testimony, with specific citations to primary sources, that it fished particular saltwater places for specific species using specific technologies. It also presented ethnographic field notes or interviews with Upper Skagit informants describing regular shellfishing practices in particular marine locations. 6-ER-960-962. Because there was evidence of *fishing* in the waters it

claimed, any suggestion that Upper Skagit's U&A is based on occupation or "presence" is incorrect and misleading.

As these examples demonstrate, no tribe has established U&A based solely on shoreline villages or "presence." Evidence of *fishing* has always been required and here Stillaguamish presented no such evidence.

C. Stillaguamish Did Not Establish by a Preponderance of the Evidence that It Occupied Shoreline Villages or had a Marine "Presence" at Treaty Time.

Even if proof of shoreline villages or marine "presence" was sufficient to establish U&A, Stillaguamish's claim would still fail because it did not demonstrate by a preponderance of the evidence that it occupied shoreline villages or had a marine presence at treaty time.

At trial, Stillaguamish did not identify a single Stillaguamish village location anywhere on the shorelines of Deception Pass, Skagit Bay, Saratoga Passage, or Penn Cove and Holmes Harbor. It did present evidence of two potential sites at Hat Slough and Warm Beach on or near Port Susan based on the Dorsey Affidavit, 6-SER-1261-64, but neither of those sites was observed by Hancock and Wilson immediately prior to the treaty and the district court found, and Stillaguamish does not challenge, that the evidence presented at trial was inconclusive as to which tribe actually occupied those sites, as we explain in greater detail below.

In the absence of more definitive evidence that Stillaguamish occupied shoreline villages or had a marine presence at treaty time, Stillaguamish's claim to marine U&A rests almost entirely upon a single proposition: that the heart of Stillaguamish territory was not upriver at its well-documented villages, but actually in the lower Stillaguamish River delta at a place called Qwadsak. 2-ER-236:20-25, 243:19-23; *see also* 2-ER-218:22-219:3 (locating Stillaguamish villages in the Qwadsak area is "a principal part" of Friday's opinion that Stillaguamish customarily fished marine waters). Because Dorsey identified sites in the Qwadsak area and it was bounded on the north by Skagit Bay, on the west by Camano Island, and on the south by Port Susan, Stillaguamish and its expert argue that Stillaguamish occupied each of those shorelines. *See, e.g.,* OB 38-39, 42-44, 47-48.

The term "Qwadsak," spelled variously, refers to both a geographical area and a tribe. 2-SER-64:18-65:2. The area encompasses the river delta from Stanwood east to Florence and south to Warm Beach. 2-SER-62:13-64:10. At treaty time, the Qwadsak area was marshy, with mud flats and channels running through it. 2-SER-62:13-63:11.

Friday's theory that the Stillaguamish occupied the Qwadsak area at treaty time is based on his belief that the Qwadsak people and the Stillaguamish people were one and the same. 5-ER-683:15-685:1. For this, he primarily relied on the Dorsey Affidavit. He also relied on documentary evidence and testimony from

Snyder in Stillaguamish's case before the ICC. Snyder prepared a map of Stillaguamish's treaty time territory which included the Qwadsak area, although she demarcated it separately. *See* 6-ER-851; 2-SER-62:6-12. She also assumed that the sites at Hat Slough and Warm Beach were Stillaguamish sites, likely on the basis of the Dorsey Affidavit. 4-SER-626-627.

But there was significant evidence presented at trial that refuted Friday's claim that the Stillaguamish and Qwadsak people were one and the same.

First, there is the well-developed body of evidence discussed above documenting the overwhelming consensus of lay people, experts, and judicial officials alike that at treaty time, the Stillaguamish lived and fished on the Stillaguamish River above Florence, not in the Qwadsak area.

Then there are the claims and findings in the ICC. The Stillaguamish did not make territorial claims to many of the lands and waters it now insists it occupied, including southern Skagit Bay, northern Camano Island, the eastern shore of Saratoga Passage, and even most of Port Susan. *See* 5-SER-822 (showing Stillaguamish's claim in black dashed line); 6-ER-851. It did claim most of the Qwadsak area. 5-ER-748:20-750:11; 6-ER-876 ¶ 13; *see also* 5-SER-749:8-750:11; 5-SER-822. But the ICC rejected that claim, determining that Stillaguamish territory at treaty time was upriver, far from the mouth of the river and the shoreline. 5-ER-752:9-21 and 750:12-751:2; 5-SER-822 (showing ICC's

territorial determination in red line); 3-SER-432-433 ¶ 18. It further determined that the Stillaguamish "did not actually *occupy* and exclusively possess or use" the lower Stillaguamish River or the Qwadsak area. 5-ER-752:22-753:10 (emphasis added); 3-SER-432-33 ¶ 18.

Next there is a significant body of evidence presented by Swinomish at trial demonstrating that the Qwadsak and Stillaguamish were separate tribes with separate territories. In addition to the primary sources who distinguished between the Stillaguamish and the Qwadsak, documentary evidence and Blukis Onat's testimony also established that the Stillaguamish and Qwadsak were different tribes.

In a journal entry from 1857, Father E. C. Chirouse distinguished the Qwadsak tribe from the Stillaguamish tribe and others. 5-ER-689:20-692:9. Chirouse was a Catholic priest who in 1857 set up a mission at the mouth of the Snohomish River, south of Qwadsak territory. 5-ER-685:11-686:10, 695:8-15. Chirouse was fluent in local native languages and dialects, deeply knowledgeable about Puget Sound tribes, and able to distinguish among them. 5-ER-686:14-687:8, 688:1-689:19.

In 1859, the chiefs of five separate tribes authored and signed a letter to the Indian Superintendent for the Puget Sound region. 4-SER-725-728; 5-ER-693:9-694:11. One of the signatory tribes was the Qwadsak tribe. 4-SER-725-728; 5-ER-

694:20-695:7. The letter was transcribed into English by Father Chirouse. 5-ER-695:8-15; *see* 4-SER-726.

At trial, Blukis Onat testified that at treaty time, the Qwadsak area was occupied by the Qwadsak people, a group distinct from the Stillaguamish. 2-SER-56:11-23, 64:11-65:7, 72:21-73:25. She also testified that the anthropologists Marian Smith, Colin Twedell, and June Collins had also distinguished between the Qwadsak and the Stillaguamish people and territories. 2-SER-65:14-66:20, 69:20-71:19; *see* 4-SER-603-606; 4-SER-696-697.

Finally, there was the evidence that at treaty time, all of the shorelines and villages, encampments, and fisheries Stillaguamish now claims as its own actually belonged to other tribes. Blukis Onat testified that all of the shorelines of Skagit Bay, Deception Pass, Saratoga Passage, Holmes Harbor and Penn Cove were owned and strictly controlled by other tribes at treaty time. 2-SER-106:22-25 (Skagit Bay); 109:19-110:7 (Deception Pass), 91:19-92:2, 92:19-94:14, 97:24-98:20, 94:15-95:20 (Saratoga Passage); 92:10-18, 111:3-112:1 (Holmes Harbor and Penn Cove); *see also* 4-SER-745-761, esp. 747; 4-SER-762-780; 6-ER-954.

Although Swinomish submits that the evidence was sufficient to find that the Qwadsak were a separate group at treaty time and occupied the Qwadsak area, and to find that all of the shorelines Stillaguamish now claims were occupied by other

groups, the district court found that the evidence regarding Stillaguamish occupancy of the Qwadsak area was inconclusive and insufficient:

> 6. Evidence was presented about the distinction between the Stillaguamish and the Qwadsak people, or the Qwadsak area. Ultimately this evidence was inconclusive and insufficient to establish, by a preponderance of the evidence, marine fishing activity by the Stillaguamish in Port Susan.

1-ER-5. And despite all of Stillaguamish's complaints that the district court did not adequately consider its alleged village and presence evidence, *see, e.g.,* OB 22-24, Stillaguamish does not challenge this finding of fact on appeal. *See* OB 27-34 (challenging only FFs 8, 9, and 5). As a result, Stillaguamish has failed to preserve this issue or to demonstrate by a preponderance of the evidence that it occupied the Qwadsak area at treaty time or that, as a result of that occupancy, it occupied, controlled, or had free access to the shorelines of the Claimed Waters.

D. The District Court Applied the Correct Law of the Case Regarding Travel.

The district court concluded that although Stillaguamish presented some evidence of treaty time travel, "travel alone does not satisfy the requirement of evidence of marine fishing under the law of the case. To permit evidence of travel alone to prove U&A could readily unravel all that has been established previously in the lengthy history of this case." 1-ER-7.

Stillaguamish challenges this conclusion, claiming that "travel … is alone sufficient evidence for a U&A determination." OB 17. It asserts that at treaty time all tribes, including Stillaguamish, traveled widely in marine waters and all tribes customarily fished in marine waters while traveling. *See* OB 16-17, 29, 32-33, 56. This is incorrect legally and factually.

In *FD 1*, Judge Boldt determined that "occasional and incidental trolling [while traveling] was not considered to make the marine waters traveled thereon the [U&As] of the transiting Indians." 384 F. Supp. at 353 (FF 14); *see also United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985).

This Court has affirmed time and again that travel alone does not give rise to U&A. It has held that fishing must have occurred "with regularity" rather than on an "isolated or infrequent basis" to give rise to U&A. *Muckleshoot III*, 235 F.3d at 434. And it has held that incidental trolling while traveling for purposes other than fishing does not establish U&A along the travel route absent other evidence of regular fishing activity. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988) ("[w]hile travel through an area and incidental trolling are not sufficient to establish [U&As], *frequent* travel and visits to trading posts may support other testimony that a tribe *regularly fished* certain waters") (internal citation omitted; second emphasis added).

This Court did not change these well-settled principles of law in the *Lummi* trilogy.[3] Stillaguamish says the *Lummi* cases stand for the proposition that "treaty-time travel alone … is sufficient by itself to support a U&A finding…." OB 16. But the cases say no such thing. While the cases discuss a travel path on the west side of Whidbey Island between Lummi's northern and southern customary fisheries, they reaffirmed the principle that "U&A cannot be established by occasional and incidental trolling in marine waters used as thoroughfares for travel," *Lummi III*, 876 F.3d at 1007 (internal quotations omitted), and emphasized that the reason Lummi has U&A along its travel path on the west side of Whidbey is because there was evidence it customarily fished there. *Id*. at 1010; *see also Lummi II*, 763 F.3d at 1187.

To the extent there was any confusion about whether travel alone, or an assertion about the path a tribe likely traveled, is sufficient to establish U&A following the *Lummi* trilogy, this Court recently confirmed that the *Lummi* cases did not change the long-standing law of the case regarding travel. In *Upper Skagit v. Sauk*, Sauk argued that because it has U&A in the Sauk River and in the Cascade River, the court should infer that it traveled and fished along the reach of the Skagit River mainstem that connects those rivers because the most likely way to get between the two was to travel along the mainstem. 66 F.4th at 773. This Court

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[3] *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) (*Lummi I*); *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2017) (*Lummi II*); and *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (*Lummi III)*.

squarely rejected the argument, explaining that Sauk's "path of travel" theory of U&A did not constitute evidence that Judge Boldt intended to include the Skagit River in Sauk's U&A. *Id*. The same is true here. As we explain in greater detail below, and as the district court found, Stillaguamish's expert's speculation about Stillaguamish's hypothetical treaty time travel paths does not constitute "direct evidence, indirect evidence, nor any reasonable inference of usual and accustomed fishing activity by the Stillaguamish." 1-ER-5-6 (FF 5, 9).

No tribe has established U&A based solely on evidence of travel or hypothetical travel routes it or its expert can trace on a map. Evidence of fishing has always been required and Stillaguamish has presented no such evidence.

E. Stillaguamish Did Not Establish by a Preponderance of the Evidence that it Regularly Traveled and Fished in Marine Waters at Treaty Time.

Even if proof or "path" of travel was sufficient to establish U&A, Stillaguamish's claim would still fail because it did not establish by a preponderance of the evidence that it regularly traveled and customarily fished within the Claimed Waters at treaty time.

Although his claims of Stillaguamish treaty time travel were exceptionally broad, Friday presented very little probative evidence of treaty time travel by the Stillaguamish. In all, he testified about four documented trips, two of which were disputed.

In 1833, the Hudson Bay Company (HBC) opened a trading post at Fort Nisqually, near Olympia, Washington approximately 80 miles from the Stillaguamish River. 3-ER-413:24-414:2; 4-ER-510:3-5. Friday's testimony regarding this fort is illustrative of the entirely speculative nature of his treaty time travel opinions. He identified only two references in the voluminous Fort Nisqually trading records which he believed related to the Stillaguamish. The first is an 1834 reference to the "Oh-qua-mishes." Friday interpreted this as a reference to the Stillaguamish, even though another tribe, the Suquamish, was located closer geographically to Fort Nisqually, and even though a prior historian had interpreted the reference to the "Oh-qua-mishes" as a reference to the Suquamish. 4-SER-545; 4-ER-510:6-12, 511:12-521:11. Friday also identified a reference to the Stillaguamish at Fort Nisqually in 1853. 3-ER-412. Based on those two references alone, one of which was contested, Friday opined that that the Stillaguamish regularly traded at Fort Nisqually from 1830 through treaty time. 4-ER-510:3-20.

Even we ignore the weakness of this evidence to support the opinion offered, Friday's opinion is entirely inconsistent with the expert opinions of both Lane and Snyder, who concluded – based on the same primary and secondary sources that Friday presumed to reinterpret – that the treaty time Stillaguamish were an isolated upriver people who had little contact with whites and were not oriented to saltwater whatsoever. *See also Muckleshoot III*, 235 F.3d 429, 435 (9th Cir. 2000) (stating

that Dr. Lane's report on Indian-White culture contact at treaty time, USA-20, omitted the three upriver tribes [Muckleshoot, Sauk, and Stillaguamish] from the list of those tribe she believed fished in saltwater). Had the Stillaguamish actually regularly traveled to Fort Nisqually from 1830 to treaty time to trade with HBC, as Friday speculated they did, they would not have been almost completely unfamiliar with settlers and western clothes, food, and goods and implements when Hancock and Wilson visited in 1850-51. *See* 6-SER-1239.

In addition to speculating as to the time period and frequency of travel to Fort Nisqually, Friday speculated about the travel route Stillaguamish would have used to get there. He could not identify the route or routes actually used by the Stillaguamish during purported regular trips to Fort Nisqually. 4-ER-529:20-530:13. And Friday could not identify any specific location in any of the Claimed Waters where the Stillaguamish purportedly fished on their way to Fort Nisqually:

> Q. Just to clarify, I asked you about Port Susan. You were not able to locate an exact location within Port Susan that the Stillaguamish Tribe would have fished in in traveling to Fort Nisqually; is that correct?
> A. I cannot pinpoint a precise location.
> Q. All right. Same question regarding the route through Skagit Bay and Saratoga Passage. Can you tell us exactly where the Stillaguamish would have fished en route to Fort Nisqually during the years 1830 up to treaty time?
> A. It could be anywhere along that entire route.
> Q. So you can't locate a specific location?
> A. No, I cannot locate a specific location.

4-ER-531:23-532:10. But he nevertheless speculated that the Stillaguamish "would have" customarily fished en route to and from Fort Nisqually:

> Q. Would the Stillaguamish have camped along the way?
> A. Yes. They would have stopped at known locations, where they could shelter in if the weather had shifted or the tides had shifted against them. They would have, as we know from the general records of the time, stopped, gutted shellfish. They would have fished along the way.

3-ER-414:10-16.

Friday provided two bases for his speculation regarding the Stillaguamish customarily fishing on their purported trips to the fort, neither of which holds up. He asserted that the Stillaguamish would have fished while traveling because it was common for certain other Coast Salish tribes to do so, 4-ER-530:14-19, but as the district court found, he failed to provide any direct evidence, sufficient indirect evidence, or reasonable inference to support that assertion. 1-ER-6 (FF 5).

Friday also asserted that there was "open shoreline" in the Claimed Waters at treaty time, meaning it was "available to multiple tribes, families from multiple tribes, where there is not a restrictive access," 4-ER-625:20-626:3, and that the Stillaguamish would have pulled over to this "open shoreline" during their alleged travels to camp, rest, harvest fish, and eat. 4-ER-535:2-4. To support his claim that there was open shoreline in the Claimed Waters that could be freely used, Friday relied on a 1954 report by Snyder. 4-ER-626:24-628:6; *see* 4-SER-699-702. But rather than supporting Friday's claims, the report stated that treaty-time shoreline

fisheries, rather than being open to anyone who happened to pass on by, were under "strict controls" and "governed by principles of bilateral descent, patrilocal residence, paternity, and in-law affiliations." 4-ER-633:5-635:22; 4-SER-699-700. Snyder wrote: "at any [shoreline fishery] some one band or tribe was in control[.]" 4-SER-702. Friday's speculation is also inconsistent with Blukis Onat's testimony that all of the shorelines and fisheries in the Claimed Waters were controlled by other tribes at treaty time. *See* 2-SER-106:22-25, 108:11-13, 109:4-18.

The third documented instance of alleged Stillaguamish travel Friday testified about was very confusing reference to people identified as the "Tochwanish" or "Tokwamish" on the west side or east side of Whidbey Island (he wasn't sure which) who moved 10 French or Roman leagues (he wasn't sure which) toward Nisqually (he wasn't sure in which direction) in 1844. Despite the confusion and uncertainties associated with this historical account, Friday nevertheless concluded that it was describing the Stillaguamish salmon fishing on the west side of Whidbey Island and then moving to a more productive salmon fishery in Elliott Bay or Shilshole Bay (he wasn't sure which) near Seattle when threatened by a hostile tribe. 4-ER-538:19-552:14. Suffice to say, Friday's interpretation of the entire incident was less than persuasive.

The fourth documented instance of Stillaguamish travel Friday testified about was a recollection by a Stillaguamish woman of travel with her family to trade at Fort Victoria at treaty time.

From this limited evidence, Friday also opined that the Stillaguamish "would have" traveled to Fort Langley on the Fraser River in British Columbia, though they are not mentioned in the Fort Langley records, 4-ER-536:3-21, and routinely traveled all about the Salish Sea, fishing along the way. 3-ER-409:6-410:8.

It is important to note that the district court found that this evidence related to travel was the *strongest evidence* Stillaguamish presented to support its claim to marine U&A throughout the Claimed Waters. 1-ER-7. But for the reasons explained above and as the Fort Nisqually example demonstrates, this evidence, especially when considered in light of the contrary evidence in the record, did not provide any reasonable basis from which to infer the Stillaguamish regularly traveled in the Claimed Waters at treaty time or customarily fished while doing so.

F. The District Court Correctly Concluded that Stillaguamish Did not Customarily Fish the Claimed Waters at Treaty Time.

The district court concluded that "although there is ample evidence that the Stillaguamish were a river fishing people during treaty time, 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. This conclusion is correct.

1. Port Susan.

Stillaguamish did not present any evidence of fishing in Port Susan at and before treaty time. *See, e.g.*, 4-ER-531:24-532:3 (Friday cannot identify a location in Port Susan where Stillaguamish fished).

Instead, Stillaguamish argues that the "uncontroverted historical, anthropological, ethnographic, and expert evidence Stillaguamish presented at trial … plainly demonstrates that Stillaguamish maintained permanent winter villages and seasonal encampments on the eastern shore of Port Susan, which supports a presumption of [treaty time fishing in Port Susan]." OB 38.

Setting aside the fact that a potlatch site at Hat Slough and a small village at Warm Beach which Hancock and Wilson did not observe pre-treaty cannot fairly be described as plural "permanent winter villages and seasonal encampments" on Port Susan, Stillaguamish's statement that this evidence is "uncontroverted" makes no sense in light of the district court's unchallenged factual finding that the evidence regarding Stillaguamish treaty-time occupation of the Qwadsak area, including the eastern shore of Port Susan, was inconclusive. As a result, Stillaguamish's theory that the court must presume customary fishing in Port Susan fails factually, as well as legally.

Stillaguamish relies on several other pieces of evidence to support its claim to U&A in Port Susan. First, it relies on post-*FD 1* testimony by Lane that the Stillaguamish likely fished in Port Susan near Hat Slough and Warm Beach. OB 36 (discussing 6-ER-967-68, 6-ER-899-903). But these statements do not establish it was more likely than not Stillaguamish fished Port Susan at treaty time. They were off-the cuff statements offered in passing while testifying about the fisheries of other tribes, not Stillaguamish. There was no meaningful opportunity for cross-examination. Lane did not provide the basis for her statements, but to the extent it was Dorsey's account of Stillaguamish sites at Hat Slough and Warm Beach, which seems likely, the court has found that the evidence to support the claim is inconclusive. And in any event, Lane had the Dorsey Affidavit at the time she submitted her Stillaguamish Report for *FD 1* and nevertheless concluded that Stillaguamish's customary fisheries did not include marine waters, in part because "there was no reason for the Stillaguamish to leave their own territory where food supplies in the form of fish and game were plentiful." 6-SER-1248.

Next, Stillaguamish relies on Snyder's statement in another post-*FD 1* proceeding that Port Susan was presumably fished by the Kikiallus, Snohomish, and Stillaguamish. 6-ER-956. Again, this statement cannot support a finding of Stillaguamish U&A even in Port Susan. It too was offered in passing while testifying about the fisheries of other tribes. And it too is inconsistent with the

opinions she offered when testifying about the Stillaguamish specifically. She assumed, incorrectly as it turned out, that the sites at Hat Slough and Warm Beach were Stillaguamish but still concluded that the Stillaguamish "were not dependent upon shellfish, nor upon and fish caught in saltwater." 4-SER-652. Instead, they were "largely hunting people" who "were not oriented to the salt water to any extent whatsoever." 4-SER638.

Stillaguamish also relies on statements from Riley in the ICC that the Stillaguamish "perhaps" went down to the ocean on clamming expeditions, 6-ER-854, or came down to Port Susan and lower Skagit Bay for clamming and fishing. 6-ER-862. However, Riley does not identify his informant and begins the passage by explaining that he "obtained only a small amount of information on the Stillaguamish Indians." *Id*. More importantly, fishing that "perhaps" happened is insufficient to satisfy the U&A standard. And in any event, these statements are inconsistent with the conclusions in Lane's Stillaguamish Report, and Judge Boldt specifically found that where Lane and Riley disagreed, Lane's testimony was more credible. 384 F. Supp. at 350.

Stillaguamish next relies on general statements made by Lane that upriver people would come down to the mouths of their rivers in the spring and summer to gather shellfish. OB 37 (discussing 6-ER-953, 958). However, in the very same report Stillaguamish relies upon, Lane emphasized that such access to shoreline

sites was based primarily on kinship. 4-SER-521-540. Blukis Onat testified likewise. 2-SER-52:4-16. And Stillaguamish did not establish the existence of any such kinship ties.

The last piece of evidence Stillaguamish relies upon to support its U&A claim in Port Susan are certain statements from Walker. He did not testify at trial due to advanced age and infirmity, but excerpts of his video deposition were admitted. He confirmed that Friday did not have any documentation of Stillaguamish fishing in the Claimed Waters at treaty time, *see* Video Deposition of Deward Walker, October 14, 2020, at 11:45:39-11:46:17, [4] but also opined, without reference to any evidence, that Stillaguamish fished in Port Susan, *id.* at 11:57:30-11:57:51. In a clarifying declaration, Walker explained that his testimony regarding Port Susan applied solely to that portion north of Kayak Point; "[it was] not [his] opinion, nor was it [his] deposition testimony, that the Stillaguamish people regularly fished, throughout the entirety of Port Susan at treaty times." 7-SER-1548.

Based on this record, the district court did not err in concluding that Stillaguamish failed to demonstrate by a preponderance of the evidence that it customarily fished Port Susan at treaty time.

[4] The Respondent-Appellees have filed a motion herewith seeking to add portions of Walker's testimony to the record.

2. Skagit Bay.

Stillaguamish did not present any evidence of fishing in Skagit Bay at and before treaty time:

> Q. Dr. Friday, do you have any specific evidence of Stillaguamish fishing in Skagit Bay at treaty time?
> A. No; only their presence.

5-ER-683:2-5. 5-ER-683:2-5; *see also* 5-ER-702:11-703:5 (Friday conceding that Dorsey did not provide any evidence of Stillaguamish fishing in Skagit Bay or any other marine waters at treaty time).

Stillaguamish argues that there is "uncontroverted" evidence demonstrating that "Stillaguamish territory spanned the lower eastern seaboard of Skagit Bay" and that Stillaguamish maintained permanent winter villages and seasonal encampments there. OB 47.

This is patently false. The three people with the most specific information regarding Stillaguamish treaty time sites and territory are Dorsey, Snyder, and Lane. None of them *ever* claimed or opined that the Stillaguamish occupied the shoreline of Skagit Bay at treaty time, that Stillaguamish territory extended into Skagit Bay, or that the Stillaguamish had permanent winter villages and seasonal encampments on Skagit Bay. The Dorsey Affidavit, which identified every treaty time Stillaguamish site, did not identify a Stillaguamish site north or west of Stanwood, which is to the southeast of Skagit Bay. 6-SER-1261-1264. Snyder,

who mapped Stillaguamish treaty time sites for use in the ICC, did not locate a Stillaguamish site anywhere on Skagit Bay and did not claim that Stillaguamish territory extended into Skagit Bay. *See* 6-ER-851. In her Stillaguamish Report, Lane concluded that the treaty time Stillaguamish lived on the main branch of the Stillaguamish and its north and south forks, not on Skagit Bay. 6-SER-1260.

As discussed above at _, other primary and secondary sources consistently reported that the Stillaguamish lived on the Stillaguamish River above Florence. *See, e.g.* 4-SER-546-547 (Gibbs map showing Stillaguamish territory on the Stillaguamish River away from shorelines and marine waters, including Skagit Bay); 5-SER-789, 796, 799, 818-819; 6-SER-1122-1123, 1125-1126. None of these witnesses or informants said or implied that the Stillaguamish occupied, had territory in, or had villages or camps on Skagit Bay.

Even Friday, who testified that Stillaguamish had "access to" or "presence" in Skagit Bay by virtue of his theory that the Stillaguamish and not the Qwadsak occupied the Qwadsak area, *see e.g.*, 2-ER-236:20-25, 252:17-253:4, acknowledged that Dorsey and Snyder did not identify any Stillaguamish sites in Skagit Bay, 5-ER-718:25-719:20.

At trial, Blukis Onat testified that Stillaguamish home grounds (a anthropological concept roughly equivalent to the concept of territory) were on the Stillaguamish River, away from the mouth, beginning east of

Florence and up the river to about Hazel on the North Fork. 2-SER-52:21-53:4. She testified that Skagit Bay was not home grounds to Stillaguamish at treaty time. 2-SER-92:3-5.

In addition to a significant body of evidence showing that Stillaguamish *did not* occupy Skagit Bay at treaty time, there is a significant body of evidence showing who *did*. In her Swinomish Report, Lane explained that some of Swinomish's predecessor bands occupied the Skagit River drainage and the "mainland north and south of the Skagit River system," which, among other places, includes the shoreline of Skagit Bay between the Skagit and Stillaguamish Rivers. 7-SER-1403; *see also id*. at 1409-1410 (quoting an Indian agent historical essay documenting that the Kikiallus "occupied the territory from Mount Vernon south to Stanwood, where they met the Stillaguamish").

At trial, Blukis Onat testified that Skagit Bay home grounds to the Swinomish, Kikiallus, and Lower Skagit tribes. 2-SER-103:11-13. She identified the grounds of each tribe. 2-SER-92:19-102:22; 6-ER-954. She stated there is no evidence that these tribes shared their home grounds with the Stillaguamish tribe at treaty time. 2-SER-108:11-13.

She identified which tribes fished exactly where in Skagit Bay at treaty time; the tribes fishing in Skagit Bay at treaty time were Kikiallus, Lower Skagit, and Swinomish. 2-SER-106:1-10; 5-SER-966-967. She stated

there is no evidence that Stillaguamish fished in Skagit Bay at treaty time. 2-SER-108:23-109:3. She also stated there was no open shoreline around Skagit Bay at treaty time. 2-SER-106:14-21.

Blukis Onat testified further that access to Skagit Bay fishing resources was "definitely controlled" by Kikiallus, Lower Skagit, and Swinomish. 2-SER-106:22-25. Swinomish and Lower Skagit controlled access through Deception Pass. 2-SER-107:7-17]. Lower Skagit and Kikiallus controlled access through northern Saratoga Passage. 2-SER-107:18-108:1. The Swinomish controlled access through Swinomish Slough. 2-SER-108:2-4. The Kikiallus and possibly Lower Skagit controlled access to Skagit Bay through Davis Slough, a distributary of the Stillaguamish River. 2-SER-108:5-10. Also, several specific campsites straddling the entry of the Stillaguamish River at the southeast corner of Skagit Bay belonged to the Kikiallus, not Stillaguamish. 2-SER-84:16-90:5; 5-SER-982-986; 5-SER-823.

Blukis Onat testified that Stillaguamish would have needed permission from Kikiallus, Swinomish, and Lower Skagit to fish in Skagit Bay at treaty time. 2-SER-109:4-18.

In light of all of this, Stillaguamish's claim that it is "uncontroverted" that it occupied lower Skagit Bay, had territory in Skagit Bay, had multiple

winter villages and seasonal camps in Skagit Bay, and therefore "would have" fished Skagit Bay defies reason.

It appears that Stillaguamish's argument is based on several things. First, the same theory that it advances with respect to Port Susan: that because it occupied the Qwadsak area in the lower Stillaguamish River Basin and the Qwadsak area is near Skagit Bay, that it is entitled to a presumption that it fished in Skagit Bay. OB at 47-48. But because there is an unchallenged factual finding that the evidence regarding Stillaguamish treaty time occupation of the Qwadsak area was inconclusive, 1-ER-5 (FF 6), Stillaguamish's theory fails factually, as well as legally.

Next, it relies on two maps that it claims show Stillaguamish's territory extending into marine waters, including Skagit Bay and Saratoga Passage. OB 47 (citing 6-ER-931). The first is a map from a general historical atlas of Washington prepared in 1988. 6-ER-823. The other is a map included in a manuscript about the Sioux Tribe's Ghost-Dance Religion. Neither was prepared by someone familiar with the territories and practices of the Coast Salish tribes of Western Washington, and neither is sufficient to overcome the more detailed and accurate maps prepared by Gibbs and Snyder showing that Stillaguamish territory and sites did not extend to the Claimed Waters.

It also relies on documents and deposition statements prepared or given by Stillaguamish elders during the *Duwamish*, ICC proceedings, and *FD 1* "agree[ing] that their treaty-time territory encompassed part of the eastern shoreline of Skagit Bay." OB 47 (citing 6-ER-834; 6-ER-828; 6-ER-921-28; 6-ER-871, 876; 6-ER-865; 6-ER-904-5). It is not clear that all of these actually relate to Skagit Bay, and what elders agree or testify to regarding what their territory should encompass for purposes of presenting legal claims are of questionable relevance without underlying probative evidence and without understanding what the courts ultimately ruled. For instance, Ross testified in the ICC and in *FD 1* that Stillaguamish territory included the lower part of Skagit Bay that Stillaguamish claims here, and the ICC rejected the claim. 3-SER-403, 432-433. Moreover, despite Stillaguamish's argument that the district court failed to meet the requirements of Rule 52(c) because it did not appropriately consider elder testimony, OB 26-27, this Court has explained that while tribal testimony may be considered if it is corroborated by other evidence, it "is not the most accurate, documentary evidence of where tribes lived or fished at treaty time. *United States v. Lummi*, 841 F.2d at 319.

Next, Stillaguamish relies on evidence of middens to argue it is more likely than not Stillaguamish customarily fished Skagit Bay. The district

court found that "[t]here was not sufficient evidence in the record to establish when the shell middens were created or who created them." 1-ER-5 (FF 7). This finding is correct. Friday admitted that he could not date the middens, 4-ER-616:18-21, and did not know whether the material placed in the middens came from one tribe or multiple tribes, 4-ER-617:19-618:6. Blukis Onat testified that the Smith middens had never been dated and that not enough information is available to attribute the middens to any particular tribe, whether Stillaguamish or Kikiallus or otherwise. 2-SER-44:5-22, 48:13-49:3.

Finally, Stillaguamish relies on the same statements from Riley and Lane about upriver people coming down to fish discussed above. For the same reasons those statements are not sufficient to establish U&A in Port Susan, they are insufficient to establish U&A in Skagit Bay.

Based on this record, the district court did not err in concluding that Stillaguamish failed to demonstrate by a preponderance of the evidence that it customarily fished Port Susan at treaty time.

3. Saratoga Passage.

Stillaguamish did not present any evidence of fishing in Saratoga Passage at treaty time. Friday testified that:

> Q. And is it correct that you have no direct evidence on the Stillaguamish Tribe fishing in Saratoga Passage at treaty time?

A. The evidence that I have comes from the context of them moving through that area, and the -- and the notations that they were present on the western side of Camano Island, which is on the shoreline of Saratoga Passage.
Q. And, I'm sorry, Friday, is that a "yes," that you do not have direct evidence?
A. I told you that the evidence that I had, and so, for me, evidence is that combination of ethnographic material and building the context to understand why people are in a place. That's the evidence that leads me to my opinion.

4-ER-645:8-23.

Stillaguamish argues that it is uncontroverted that Stillaguamish treaty time territory included Camano Island and that Stillaguamish had villages and seasonal encampments there. OB 42-43. And consistent with that position, Friday opined at trial that the Stillaguamish were likely to have customarily fished waters off Camano Island, including Saratoga Passage, "because of the location of their permanent village sites and their known summer encampments," 2-ER-300:11-302:17, and because of its "presence" on Camano Island. 2-ER-277:18-278:15, 280:2-281:24, 283:3-16, 285:25-286:15, 292:21-293:9; 4-ER-646:11-16. But neither Friday nor the sources on which he relied identified even one specific Stillaguamish site anywhere on Camano Island, let alone on its west side adjacent to Saratoga Passage. 4-ER-646:22-648:14, 652:17-653:24, 656:10-658:19, 664:1-24; 668:2-669:21.

The evidence at trial was actually to the contrary. Blukis Onat testified that Snyder, through her anthropological fieldwork, had identified several specific

Kikiallus village and camp sites along the northern and western shoreline of Camano Island, but none for Stillaguamish. 2-SER-91:19-92:2, 92:19-94:14, 97:24-98:20]; 6-ER-954. Blukis Onat also testified that the anthropologist John Osmundson mapped treaty-time villages and camp sites on Camano Island; he located several Kikiallus sites on the northern and western shoreline and several Snohomish sites on the southwestern shoreline, but none for the Stillaguamish. 4-SER-745-761, esp. -747; 4-SER-762-780; 2-SER-94:15-95:20; 5-ER-722:15-726:19.

Blukis Onat also testified that Saratoga Passage was not home grounds to Stillaguamish at treaty time, 2-SER-92:10-18, that Kikiallus and Lower Skagit owned the fishing grounds in Saratoga Passage north of Rocky Point to Skagit Bay, and that Snohomish had fishing grounds to the south. 2-SER-110:11-24. She testified there is no evidence of Stillaguamish fishing in Saratoga Passage at treaty time. *Id.*

In support of its claim, Stillaguamish relies on Ross's testimony in the ICC and in *FD 1* that Stillaguamish's territory went over to Camano Island, OB 43, but Stillaguamish did not claim territory on Camano Island in the ICC and the ICC determined that its treaty time territory did not include any of Camano Island. [ICC map].

It also relies on a handful of one-off statements from various people it has managed to cull from the historical and anthropological record. While Stillaguamish is correct that some of these statements reference the possible presence of Stillaguamish people on Camano Island, none of them support the proposition that the Stillaguamish were regularly present at specific places on Camano Island, let alone customarily fishing the waters of Saratoga Passage of its west coast. As just one example, Stillaguamish states that Snyder testified in the ICC that Stillaguamish used the northern portion of Camano Island at treaty time. What Snyder actual said was that "probably" used the "northern tip" of Camano Island in common with the Kikiallus, but for hunting, not fishing. 6-ER-839-840.

Stillaguamish also claims that in the ICC and *FD 1*, Ross's statements regarding clams and mussels demonstrate that Stillaguamish customarily fished Saratoga Passage. OB 44-45. In the ICC, Ross testified that:

> Q. Did [the Stillaguamish] go into those forests, or did they stay near the river?
> A. The people were near the river …. They went into the forests to get their meat.
> Q. Was there plenty of game in those days?
> A. There was.
> Q. Could you get your game right near your village?
> A. Yes.
> Q. And your firewood?
> A. Yes.
> Q. And your berries?
> A. And they got their –
> Q. Did they go clamming at all?

> A. Yes, they went clamming, and they had mussel shells. They used to go by Florence, which I don't recall myself, only I hear the Indians tell me they used to step into the water and flounders were around, – they could step in them and get a spear and get them.
> Q. They were that thick?
> A. And mussel shells. They could use for knives, or whatever they wanted to.

6-ER-868:9-869:8. In *FD 1*, she testified that "Sally Oxstein's statement [sic], she lived in [Utsaladdy on the northern coast of Camano Island]. We went for clam digging in that…." 6-ER-905. Far from demonstrating that the Stillaguamish customarily fished Saratoga Pass at treaty time, this testimony demonstrates that the Stillaguamish normally stayed near their river because resources, including mussels and clams which could be taken at Florence] were plentiful, but occasionally may have visited friends nearer the shore and dug some clams.

Stillaguamish also argues that shell middens demonstrate that it customarily fished Saratoga Pass. This argument fails for the reasons explained above.

Based on this record, the district court did not err in concluding that Stillaguamish failed to demonstrate by a preponderance of the evidence that it customarily fished Saratoga Passage at treaty time.

4. Deception Pass.

Stillaguamish did not present any evidence of customary fishing in Deception Pass at treaty time.

Stillaguamish relies upon a single instance of a young Stillaguamish tribal member Sallie Oxstein reported that as a girl she traveled to Fort Victoria on Vancouver Island with her family at treaty time to trade hides. 6-ER-829-832. Based on this single report, Dr. Friday concluded that the entire Stillaguamish tribe would have traveled regularly across Skagit Bay and through Deception Pass to Fort Victoria at treaty time and would have fished along the way. 3-ER-421:7-422:19.

However, there is no reference to the Stillaguamish in Fort Victoria trading records. Critically, Friday acknowledges that Oxstein did not mention Deception Pass at all, did not mention traveling through Skagit Bay, did not mention traveling in Skagit Bay, did not identify the route taken when traveling to Victoria;; did not mention fishing while traveling; did not mention a method of fishing while traveling; did not mention eating fish or cooking fish while traveling to Victoria; did not identify any particular location where her purported party stopped to camp, or stopped for any reason, along the way; did not identify when first or how often her party traveled; did not state how many times she traveled to Victoria; and did not identify the frequency or season of the travel to Victoria.
4-ER-640:15-641:25.

Blukis Onat testified that the Swinomish and Lower Skagit owned the fishing grounds at Deception Pass and controlled access to them. 2-SER-109:19-110:7, 92:10-18]. There is no ethnographic evidence of Stillaguamish fishing at Deception Pass at treaty time. 2-SER-110:8-10. And contrary to Stillaguamish's unsupported claim that Deception Pass was the preferred route for Indians wishing to travel north and open to any tribe for fishing and camping, OB 54, this Court has determined based on the expert opinions of Dr. Lane and Sally Snyder that "the northern exits [from waters south of Skagit Bay] through Deception Pass and Swinomish Slough are narrow and restricted [and] both areas were controlled by Swinomish at treaty times." *Upper Skagit I*, 590 F.3d 1020 (9th Cir. 2010), at 1024 n. 6; *United States v. Lummi*, 626 F. Supp. at 1528 (FF 364); 7-SER-1431, 1437; 4-SER-689-690. And Swinomish presented evidence that all of the shorelines along the purported travel routes were controlled by other tribes.

5. Penn Cove and Holmes Harbor.

Stillaguamish did not present any evidence of customary fishing in Holmes Harbor or Penn Cove at treaty time. Friday testified that he based his opinion that the Stillaguamish customarily fished these waters entirely on (1) the marriage of Mowich Sam and (2) what he called "the context of the Indian agents' reports." 5-ER-678:20-679:2.

Mowich Sam

In 1854, a Stillaguamish man named Mowich Sam married a woman whose family-owned fishing rights in Holmes Harbor. 3-ER-475:17-476:17. Upon his marriage, Sam acquired the right to fish with his in-laws at Holmes Harbor. *Id.*; 5-ER-678:5-7; 2-SER-76:8-77:2. His story is an important story, because it is the only story in this case in which a Stillaguamish person was documented actually fishing in marine waters.

Stillaguamish argues that Friday's explanation of the ethnographic "context" of this marriage establishes that it was more likely than not that Stillaguamish customarily fished Holmes Harbor at treaty time. OB 52-53. However, Friday conceded that fishing rights acquired by an individual through marriage do not extend to that individual's tribe as a whole, 3-ER-453:9-16; 5-ER-8-16, and Blukis Onat testified likewise. 2-SER-52:8-18, 76:8-77:25.

Indian Wars

After the signing of the Stevens Treaties, violent conflict erupted between settlers and the so-called Indian hostiles; the episode continued through 1859 and is known as the "Indian Wars." 5-ER-679:3-21. In response, the Washington Territorial government set up temporary camps and ordered Puget Sound tribes to move into them. 5-ER-679:22-680:4.

Stillaguamish argues that it was ordered to remove to the camps at Penn Cove and Holmes Harbor because it was already familiar with those waters and locations. OB at 51. This is based on Friday's opinion that correspondence and journals of government agents in charge of the relocation camps created "context" that "illustrates [the Indians'] knowledge of the areas, their movement across the areas, and their presence in the areas." 5-ER-682:4-683:1.

Friday's opinion is completely inconsistent with the available evidence and Lane's interpretation of it. Lane reported that even after tribes were ordered down to the camps, the Stillaguamish "preferred remaining on their own grounds [upriver]" and removed reluctantly. 6-SER-1246. She also noted that the Indian agents reported that the Stillaguamish repeatedly "bolted" from the camp at Holmes Harbor to return to their upriver homeland to fish and attend their potato patches. 6-SER-1246-47. These actions are not the actions of a tribe knowledgeable of and comfortable with the areas surrounding the camps and moving through them with ease, as Friday alleges, they are the actions of a people unfamiliar with their new surroundings anxious to get back to their upriver homes and their lives.

This is confirmed by Blukis Onat, who testified that the Stillaguamish Report and its discussion of the camp superintendent journals placed Stillaguamish home grounds on the Stillaguamish River. 2-SER-60:22-61:7. She also testified

that, at treaty time, Lower Skagit and Snohomish owned the fishing grounds in Holmes Harbor, and Lower Skagit owned the fishing grounds in Penn Cove. 2-SER-111:3-112:1]. Neither location was home grounds to Stillaguamish at treaty time. 2-SER-92:10-18. And Dr. Blukis Onat testified there is no evidence of Stillaguamish fishing in either location at treaty time. *Id.*

Based on this record, the district court did not err in concluding that Stillaguamish failed to demonstrate by a preponderance of the evidence that it customarily fished Holmes Harbor or Penn Cove at treaty time.

G. Additional Findings are Not Required.

Stillaguamish argues that a remand is required to make specific findings regarding Stillaguamish village locations, "expert evidence," and tribal elder accounts. OB 20-27. But under Rule 52(a), the district court need not make findings on every fact issue presented at trial. *Rayonier, Inc. v. Polson*, 400 F.2d 909, 923 (9th Cir. 1968). Rather, "[t]he ultimate test as to the adequacy of the findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence." *Id*. (quoting *Carr v. Yokohama Specie Bank, Ltd.*, 200 F.2d 251, 255 (9th Cir. 1952)). The findings must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and enable it to

determine the ground on which the trial court reached its decision." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090 (9th Cir. 2002).

The district court's Findings of Fact satisfy this standard. The Findings make clear the basis for the district court's conclusion that Stillaguamish failed to prove, by a preponderance of the evidence, that it customarily fished in any of the claimed waters at treaty time: It determined that Stillaguamish's expert merely speculated that Stillaguamish "would have" fished in marine waters at treaty time in a manner similar to other Coast Salish tribes, that the evidence of intermarriage and travel included no direct evidence or reasonable inference of marine fishing, and that Stillaguamish's evidence regarding occupation of the Qwadsak area and shell middens was inconclusive. These new findings followed previous findings, incorporated by reference, that Stillaguamish was a river people who fished their river at treaty time.

The three Ninth Circuit cases cited by Stillaguamish, OB 21, do not require findings on every issue of fact. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090 (9th Cir. 2002), concerned findings and conclusions following a bench trial on a discrimination claim under the Americans with Disabilities Act (the "ADA"). The ADA requires, inter alia, that upon a disabled employee's request for accommodation, the employer must engage in an interactive process to determine the reasonable accommodation. 302 F.3d at 1089. The interactive process requires

direct, good faith communication between the employer; consideration of the request; and the offer of a reasonable accommodation. *Id.* The trial court merely concluded that the employer offered an accommodation but that plaintiff declined the offer; it made no findings that would enable the Court of Appeals to determine whether the parties engaged in the interactive process. *Id.* at 1089-90. In *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 973-974 (9th Cir. 2006), this Court remanded for findings under a new standard of review for the district court to apply in examining a plan administrator's decision to deny ERISA benefits under certain circumstances; the district court also had failed to make findings on disputed fact issues determinative on the question whether the administrator abused its discretion and thereby preventing a review of the decision on the merits. And in *FTC v. Enforma Natural Prods.*¸ 362 F.3d 1204, 1215-16 (9th Cir. 2004), this Court remanded because the district court's findings upon the issuance of a preliminary injunction failed to make clear the basis for a determination that plaintiff would likely prevail on the merits. Here, in contrast to those three cases, the findings that Stillaguamish's evidence is speculative and/or inconclusive provide the basis for complete review of the decision on the merits.

Remand is not required "unless a full understanding of the question is not possible without the aid of separate findings." *Davis v. San Francisco*, 890 F.2d 1438, 1451 (9th Cir. 1989). Here, Rule 52(a) has been satisfied, and remand is

neither necessary nor appropriate. *Id.* (holding district court satisfied Rule 52(a) where basis for relief was "plainly apparent").

VI. CONCLUSION

In this subproceeding, the district court gave Stillaguamish "every opportunity to meet its burden of [proof]." 1-ER-3. Stillaguamish failed to do so. It presented only a new expert's reinterpretation of the same old evidence already considered by Dr. Lane and Judge Boldt, and Friday's unfounded speculation that Stillaguamish "could have" or "would have" fished in the Claimed Waters. Now, having failed to sustain its burden, Stillaguamish asks this Court to remand and give it yet another bite at the apple.

Rewriting the law of the case to allow Stillaguamish to establish U&A based not on evidence of customary fishing but on where it "would have" or "could have" had potential village locations, infrequent travel, or possible presence would violate the language of the treaties and be deeply unfair to all of the tribes that came forward with actual evidence of fishing to support their U&A. It would upend the long-settled expectations of the tribes, Washington State, and countless third parties, and open the door to a whole new round of U&A litigation based not on where tribes customarily fished but on unsupported speculation. This Court should affirm.

DATED: June 26, 2023.

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CERTIFICATE OF COMPLIANCE (FORM 8)

9th Cir. Case Number: 23-35066

I am the attorney representing Appellee Swinomish Indian Tribal Community.

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DATED: June 26, 2023.

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CERTIFICATE OF SERVICE

On June 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. Participants in the case who are registered CM/ECF users will be served with notification of this filing by the appellate CM/ECF system.

I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 26th day of June, at Seattle, Washington.

Rondi A. Greer