No. 23-35066

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Appellant,

v.

STATE OF WASHINGTON, *et al.*,

Appellees

Appeal from the United States District Court for the Western District of Washington, Seattle, No. 2:17-sp-00003-RSM,
Hon. Ricardo S. Martinez, C.J.

ANSWERING BRIEF OF TULALIP TRIBES

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Statement of the Case

In September 2017, the Stillaguamish Tribe of Indians filed a Request for Determination for Marine Usual and Accustomed Fishing Areas ("RFD") principally relating to marine waters on the eastern side of Whidbey Island. In the RFD, Stillaguamish sought to expand its usual and accustomed fishing areas, alleging jurisdiction pursuant to Paragraph 25(a)(6) of the March 22, 1974 Permanent Injunction[1] entered by the District Court in *United States v. Washington*. After the District Court denied motions to dismiss the Stillaguamish RFD for lack of jurisdiction, the Tulalip Tribes, Upper Skagit Indian Tribe, and Swinomish Indian Tribal Community filed responses to the RFD in April 2019.[2] The Sauk-Suiattle Tribe also filed an answer.

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[1] "Permanent Injunction" and "Final Decision # 1" herein refer to the decision and injunction entered by Judge Boldt in *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974) and as subsequently modified in *United States v. Washington*, 18 F. Supp. 3d 1172, 1213-1216 (W.D. Wash. 1993).

[2] Pursuant to a Stipulation and Agreement entered into between the Tulalip Tribes and Stillaguamish Tribe on May 1, 1984, Tulalip agreed to affirmatively support "Stillaguamish Tribe's request for a determination that the Stillaguamish Tribe's usual and accustomed fishing areas extend throughout Northern 8A and that portion of Area 8 southerly of a line drawn from Milltown to Polnell Point and northeasterly of a line drawn from Polnell Point to Rocky Point." 1984 Agreement, Paragraph IV(B); *United States v. Washington*, 626 F. Supp. 1405, 1482 (W.D. Wash. 1985). In addition to the limited geographic scope of Paragraph IV(B), the scope of Tulalip's support as expressed in the 1984 Agreement is further limited to anadromous fish (salmon and steelhead) and does not include shellfish. In any event, the current Stillaguamish RFD overreaches, extending far beyond the areas and species that are within the scope of the 1984 Agreement.

Following pre-trial proceedings, the District Court held an eight-day bench trial on the Stillaguamish RFD commencing on March 21, 2022 and ending on June 7, 2022. Following the conclusion of Stillaguamish's case-in-chief, the Upper Skagit Indian Tribe moved for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c). ER-98. Tulalip filed a partial joinder in the motion. The Court deferred ruling on the motion until after trial, hearing from multiple witnesses and receiving numerous exhibits into evidence during trial.

On December 30, 2022, the District Court granted the Rule 52(c) motion in full and closed the sub-proceeding. ER-2. To the extent this Court finds that jurisdiction exists, this Court should affirm the District Court.

Summary of Argument

In 1974, the District Court found: "The Stillaguamish Tribe is composed of descendants of the 1855 Stoluch-wa-mish of the Stoluch-wa-mish River. The population in 1855 resided on the main branch of the river as well as the north and south forks." *United States v. Washington*, 384 F. Supp. 312, 378 (W.D. Wash. 1974) (Finding of Fact 144). In 1974, the District Court determined that the usual and accustomed fishing areas (U&A) of the Stillaguamish Tribe are located on the Stillaguamish River. *Id.* at 379. The Court did not include marine waters in its Stillaguamish U&A finding:

> 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 (Finding of Fact 146).

In the present appeal, Stillaguamish challenges the District Court's order granting the Upper Skagit Indian Tribe's Rule 52(c) motion (joined in part by Tulalip) filed following the presentation of Stillaguamish's case-in-chief at trial. Before proceeding to the merits of Stillaguamish's appeal of the District Court's substantive order, this Court must assure that the District Court had subject matter jurisdiction. It did not. In order to bring an action under Paragraph 25(a)(6) of the Permanent Injunction, as Stillaguamish attempts to do here, the U&A at issue must not have been "specifically determined" in Final Decision #1. *Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1183 (9th Cir. 2019). Alternatively, an action may proceed pursuant to Paragraph 25(a)(6) by the agreement of the parties that certain areas have not been specifically determined. *United States v. Washington*, No. C70-9213RSM, 2015 WL 4405591, at *6 (W.D. Wash., July 17, 2015), *reversed, remanded on other grounds*, *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (stating: "Paragraph 25(a)(6) jurisdiction is thus contingent on the Court's finding, or the parties agreeing, that the disputed waters in question were not specifically determined by Judge Boldt."). Subject matter jurisdiction is lacking here.

To the extent that subject matter jurisdiction exists, this Court should affirm the District Court's Rule 52(c) order.[3] The District Court properly applied the law of the case and properly found that Stillaguamish failed to meet its burden to establish that it possessed usual and accustomed grounds and stations in the claimed marine waters.

Following review of the evidence presented by Stillaguamish, the District Court determined that Stillaguamish had failed to demonstrate by a preponderance of the evidence that the Stillaguamish U&A encompassed the marine areas at issue here. The District Court's findings and conclusions were consistent with the law of the case. Specifically, the District Court correctly found that the possible presence of an Indian tribe in an area is not sufficient to establish U&A; rather, evidence that the treaty-time Indians engaged in usual and accustomed fishing in those areas is required. Nor is general evidence of infrequent travel adequate evidence to establish U&A. Nor can an Indian tribe establish U&A by showing that certain individual members possibly fished in areas due to inter-tribal marriage. And nor is evidence from ICC proceedings, which did not deal with Indian fishing rights, sufficient to establish U&A. Evidence of treaty-time fishing

[3] Consistent with the 1984 Agreement, Tulalip's arguments in support of affirmance in this brief apply only to those broader geographic areas that are outside the areas described in Paragraph IV(B) of the 1984 Settlement Agreement.

is required. Here, Stillaguamish lacked sufficient evidence of actual treaty-time fishing in the claimed marine waters.

This Court should affirm the District Court's order granting the Rule 52(c) motion and closing the sub-proceeding.

Argument

A. The District Court Lacked Subject Matter Jurisdiction Over the RFD, Which Is Not in Conformance With the 1984 Agreement, nor in Compliance with the Requirements of Paragraph 25(a)(6) of the Permanent Injunction.

In order for an Indian tribe to bring an action under Paragraph 25(a)(6) of the Permanent Injunction, the U&A at issue must not have been "specifically determined" by Final Decision #1. *Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1183 (9th Cir. 2019). Alternatively, an action may proceed pursuant to Paragraph 25(a)(6) by the agreement of the parties that certain areas have not been specifically determined. *United States v. Washington*, No. C70-9213RSM, 2015 WL 4405591, at *6 (W.D. Wash., July 17, 2015) (stating: "Paragraph 25(a)(6) jurisdiction is thus contingent on the Court's finding, or the parties agreeing, that the disputed waters in question were not specifically determined by Judge Boldt."). The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction. *Bishop Paiute Tribe v. Inyo County*, 863

F.3d 1144, 1151 (9th Cir. 2017). If the court determines at any time that it lacks subject matter jurisdiction, it must dismiss the action. Fed. R. Civ. Pro. 12(h)(3).

In Final Decision #1, 384 F. Supp. 312, the Court unambiguously determined Stillaguamish U&A in Finding of Fact 146:

> 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.

384 F. Supp. at 379. While Judge Boldt stated that "fishing constituted a means of subsistence for the [Stillaguamish] Indians", he unambiguously specified that the Stillaguamish River system "constituted the usual and accustomed fishing places of the tribe." *Id*. (emphasis added). This determination of U&A does not include marine areas. "That Judge Boldt neglected to include [certain areas] in the [tribe's] U&A supports our conclusion that he did not intend for them to be included." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1025 (9th Cir. 2010).[4]

[4] Where Judge Boldt intended to recognize both freshwater and marine waters within a tribe's U&A, he did so expressly. For example, the Court determined the Nisqually Tribe's U&A as follows: "The usual and accustomed fishing places of the Nisqually Indians included at least the saltwater areas at the mouth of the Nisqually River and the surrounding bay, and freshwater courses of the Nisqually River and its tributaries, McAllister (Medicine or Shenahnam) Creek, Sequalitcu Creek, Chambers Creek and the lakes between Steilacoom and McAllister Creeks." *United States v. Washington*, 384 F. Supp. at 369 [Finding of Fact (FF) 86]. *See also id.* at 360 [FF 46] (Lummi Tribe U&A), 364 [FF 65] (Makah Tribe U&A), 366-67 [FF 76] (Muckleshoot Tribe U&A), 371 [FF 99] (Puyallup Tribe U&A),

Thus, because Stillaguamish U&A is specifically determined in Final Decision #1, Paragraph 25(a)(6) is not a viable jurisdictional basis for the Stillaguamish RFD at issue here.[5]

Nor has anything occurred since Final Decision #1 to support Stillaguamish's claim of jurisdiction here. Finding of Fact 146 remains a complete, specific, and unambiguous determination of Stillaguamish U&A. After Final Decision #1, Stillaguamish unilaterally issued regulations in an attempt to

372 [FF 108] (Quileute Tribe U&A), 374 [FF 120] (Quinault Tribe U&A), 377 [FF 137] (Skokomish U&A), 378 [FF 141] (Squaxin Island Tribe U&A). In contrast, where Judge Boldt intended to include only freshwater systems within a tribe's U&A, he did so. *See, e.g., id.* at 376 [FF 131] (Sauk-Suiattle Tribe U&A).

[5] In FF 146 of Final Decision #1, Judge Boldt cited to, among other evidence, the 1973 report of Dr. Barbara Lane entitled "Archaeological Report on the Identity, Treaty Status, and Fisheries of the Stillaguamish Indians," in which Dr. Lane reported that: In contrast to some of their neighbors like the Snohomish to the south and the Lower Skagit to the north, the Stillaguamish people remained relatively isolated from white influence until some years after the Treaty of Point Elliott." SER-1238. Dr. Lane reported that references to the Stillaguamish prior to the treaty locate the Stillaguamish people on the Stillaguamish River. SER-1241. She reported that: "Prior to the period beginning in the 1870's when settlers began to take up land, there was no reason for the Stillaguamish to leave their own territory where food supplies in the form of fish and game were plentiful." SER-1248. In considering Dr. Lane's report, in addition to other evidence regarding the identity and territorial area of the pre-contact Stillaguamish tribe; Indian travel away from home villages and about the Puget Sound region, including on and adjacent to marine waters; the brief relocation of Stillaguamish people to southern Whidbey Island during the Indian Wars of 1855-1856; and intermarriage among tribes around Puget Sound, Judge Boldt did not find Stillaguamish U&A in the claimed marine waters. 384 F. Supp. at 379 [FF 146].

expand its fishing places into marine waters – specifically into northern Port Susan. *United States v. Washington*, 459 F. Supp. 1020, 1068 (W.D. Wash. 1978). In March 1976, upon Tulalip's objection, the Court struck down Stillaguamish regulations purporting to open Stillaguamish fisheries in areas outside those recognized in Final Decision #1. *Id.* at 1068-69. The Court reaffirmed its original determination of Stillaguamish U&A and further found that Stillaguamish "ha[d] not sought to expand its fishing places to include the northern portion of Port Susan by following the procedures set forth in paragraph 25 of the Injunction." *Id.* at 1068.

The March 1976 Order further stated that Stillaguamish "may at any future time apply to this Court for hearing, or reference to the Master, regarding expanded usual and accustomed fishing places *so long as such application is in accordance with paragraph 25 of the court's injunction*." *Id.* (emphasis added). The Court's statement was not a determination that Stillaguamish had satisfied jurisdictional prerequisites to seek expansion of its U&A. Nor was it an open invitation for Stillaguamish to assert claims of expanded U&A at any future time regardless of jurisdictional requirements of Paragraph 25. Rather, the Court admonished Stillaguamish that it could not act unilaterally, and that Stillaguamish was and is bound by and required to satisfy all requirements of Paragraph 25.

The Court's March 1976 order confirms that Stillaguamish cannot seek to expand its U&A without satisfying the requirements of Paragraph 25 of the Permanent Injunction, which establishes the basis of the District Court's continuing jurisdiction in this proceeding. The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction, here, Stillaguamish. *Bishop Paiute Tribe*, 863 F.3d at 1151. Stillaguamish fails to meet its burden here.

Nor is there agreement of the parties that the disputed waters at issue have not been specifically determined. In the above-referenced 1984 Agreement, Tulalip agreed to affirmatively support a Stillaguamish RFD regarding the taking of anadromous fish in specific limited geographic areas. Pursuant to that Agreement, Tulalip continues to support such a properly framed RFD; however, the Stillaguamish RFD at issue here bears no resemblance to the RFD envisioned by the parties in the 1984 Agreement. Regardless of Tulalip's position, the other parties including the Upper Skagit Indian Tribe and Swinomish Indian Tribal Community have not stipulated to jurisdiction over any portion of the RFD. Thus, for the reasons above, the District Court lacked subject matter jurisdiction to address the Stillaguamish RFD.

B. The District Court's Order Is Not Contrary to the Law of the Case.

A tribe's usual and accustomed fishing grounds are "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." *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974). "The determination of any area as a usual and accustomed fishing ground or station of a particular tribe must consider all of the factors relevant to: (1) use of that area as a usual or regular fishing area, (2) any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe, and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty-time use of that area for fishing purposes." *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985). Here, Stillaguamish bears the burden of establishing the location of its usual and accustomed grounds and stations under the Treaty of Point Elliott. *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015).

In making a determination under Paragraph 25(a)(6), "the Court steps into the place occupied by Judge Boldt when he set forth U&As" and "applies the same evidentiary standards applied by Judge Boldt in Final Decision #1 and elaborated in the ensuing 40 years of subproceedings." *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015). Evidence of customary, regular, and frequent fishing activity in a particular location is required to establish U&A. *See, e.g., United States v. Washington*, 384 F. Supp. 312, 332, 356 (W.D. Wash. 1974); *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988); *United States v.*

Washington, 2013 WL 3897783 (W.D. Wash., July 29, 2013), *aff'd, Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015); *United States v. Washington*, 2007 WL 30869 (W.D. Wash., Jan. 4, 2007), *aff'd Upper Skagit Indian Tribe v. Washington,* 590 F.3d 1020 (9th Cir. 2010).

In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Nevertheless, the proponent (here, Stillaguamish) must prove its claims as to treaty time U&A by a preponderance of the evidence found credible and inferences reasonably drawn therefrom. *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015); *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1975). Despite the relaxed standards of proof, the Court must carefully evaluate the evidence, considering the "source(s) of the witnesses' information, the knowledgeability of the witnesses with respect to fishing places, means and methods, the identity of the user group(s) and the frequency of the fishing activities." *United States v. Washington,* 459 F. Supp. 1020, 1059 (W.D. Wash. 1978). The Court has always required a tribal claimant to prove, by a preponderance of the evidence, that their tribal predecessors regularly and customarily fished in specific claimed waters. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978) ("Notwithstanding the court's prior acknowledgement of the difficulty of proof, the Tulalips have the burden of

producing evidence to support their broad claims"); *United States v. Washington*, 626 F. Supp. 1405, 1530 (W.D. Wash. 1985) (finding "sufficient specific documentation and evidence to establish usual and accustomed fishing by Tulalip predecessors [in certain claimed waters]"); *see also United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988) (affirming Tulalip U&A based on "evidence of frequent fishing [by Tulalip predecessors] in the disputed areas").

"Excluded from a tribe's U&A are 'unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (W.D. Wash. 2015). "In other words, the term 'usual and accustomed' was 'probably used in [its] restrictive sense, not intending to include areas where use was occasional or incidental." *Id.* For example, occasional and incidental trolling while traveling on marine waters does not establish U&A in such waters. *United States v. Washington*, 384 F. Supp. 312, 353 (W.D. Wash. 1974). And while "evidence found credible and inferences reasonably drawn therefrom" may be used to prove that a particular location is within a tribe's usual and accustomed fishing area, *United States v. Washington*, 384 F. Supp. at 348, the *presence* of a tribe – even of a tribal village – is not enough to infer fishing in adjacent waters. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1975) (relying on multiple sources of evidence of fishing).

Here, the Court properly applied these standards in determining that Stillaguamish failed to present sufficient evidence to demonstrate by a preponderance of the evidence that the claimed marine waters were Stillaguamish U&A at treaty time. Stillaguamish's arguments to the contrary lack merit.

1. A Mere Showing of Presence and Access Is Not Sufficient to Establish U&A.

Tribal presence in proximity to marine waters is not adequate to establish the existence of U&A near that location. It is not the presence of a tribe in a given area or access to marine waters that establishes usual and accustomed fishing areas; rather, it is evidence that the treaty-time Indians engaged in usual and accustomed fishing in those areas. For example, in 1975, the District Court explicitly held that evidence of village locations is not enough to prove fishing occurred or to establish U&A at those locations. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1975). In that subproceeding, the Court considered three types of evidence in determining the Tulalip Tribes' usual and accustomed fishing areas: testimony by Dr. Barbara Lane, testimony from a tribal elder about post-treaty fishing locations ("tribal fishing locations subsequent to entering into treaties"), and ICC findings about the location of Tulalips' "coastal and river villages." *Id.* The Court held that the ICC findings "of the Indian coastal and river villages" although raising the "presum[ption]" of fishing activities, was

not enough. *Id.* Evidence of actual treaty-time fishing in marine waters is required.

Similarly, in *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd in part, rev'd in part sub nom,* 157 F.3d .630 (9th Cir. 1998), the Court made a finding of U&A not based on generalizations concerning the location of villages but on specific evidence that the Upper Skagits' predecessors took fish from the marine areas identified. *Id.* at 1449-1450. In that case, the determination of U&A was based not on the mere presence of villages, but on:

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

Id. Thus, it was not mere presence, but rather evidence of fishing that supported the U&A determination in that case.

Other cases confirm that mere presence and access to particular waters is not sufficient to establish U&A. Actual evidence of fishing is required. For example, although Judge Boldt's description of Muckleshoot U&A referenced "Puget Sound" and although Muckleshoot ancestors had access to Puget Sound, like other

Coast Salish Tribes, the Court found that Muckleshoot U&A was limited to Elliott Bay because "there is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay." *United States v. Washington*, 19 F. Supp. 3d 1252, 1310 (W.D. Wash. 1999). *See also United States v. Lummi Indian Tribe*, 841 F.2d 317, 319-20 (9th Cir. 1988) (affirming Tulalip U&A based on "evidence of frequent fishing in the disputed areas"). In sum, evidence of presence near a water body is not sufficient to establish U&A.

2. General Evidence of Infrequent Travel Is Not Sufficient to Establish U&A.

In Final Decision #1, Judge Boldt defined U&A as "every fishing location where members of a tribe customarily fished from time to time at or before treaty times . . . ." 384 F. Supp. at 332. But these are areas that a tribe fished on a "usual and accustomed" basis, not an "occasional or incidental" basis. *Id.* at 356. Trolling incident to travel does not establish U&A along the travel route absent evidence of other fishing activity. *Id.* at 353 ("Occasional and incidental trolling was not considered to make the marine waters traveled thereon [U&A] of transiting Indians."); *see also, e.g., United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) ("[o]pen marine waters that were not transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use are not [U&A]"); *United States v. Lummi Nation*, 876 F.3d 1004, 1010 (9th Cir. 2017); *Upper Skagit*, 590 F.3d at 1022 (customary fishing

activity "does not include 'occasional and incidental' fishing or trolling incidental to travel"); *Muckleshoot III*, 235 F.3d at 434 (fishing must occur "with regularity" and not just on an "isolated or infrequent" basis to establish U&As). Stillaguamish's assertion that the Indians have U&A anywhere that they traveled is plainly not the law of the case.

In its brief, Stillaguamish ultimately concedes that, even if travel can be used to support a finding of U&A, there must be evidence that such travel was regular or frequent. Stillaguamish Opening Brief, Page 16. But here, although evidence was presented that Stillaguamish tribal members traveled north to Victoria, B.C. and south to Olympia, Washington, there was not evidence that such travel was regular or frequent. Even if it is assumed that tribal members would have fished on these occasional trips, that is not sufficient to establish U&A.

Accepting Stillaguamish's argument that Indian tribes have U&A at any place where they ever traveled, no matter how infrequently, would effectively mean that all Coast Salish tribes have U&A everywhere (or nearly everywhere) in Puget Sound. As the District Court correctly noted: "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." ER-7. The question, to establish U&A, is not whether an Indian tribe or its members ever fished in an area, but rather it is whether they customarily and regularly fished in certain areas – in a manner

sufficient to show that they are usual and accustomed fishing areas of the Indian tribe. General evidence of infrequent travel is not adequate to establish U&A and the District Court should be affirmed.

3. Evidence from ICC Proceedings Is Not Adequate to Establish U&A.

Throughout its brief, Stillaguamish cites to prior testimony submitted to the Indian Claims Commission and Court of Claims in support of its U&A claims. But proceedings "before the Court of Claims . . . dealt with compensation claims for tribal lands taken by the United States and in no way dealt with asserted Indian treaty fishing rights." *United States v. Washington,* 459 F. Supp. 1020, 1042 (W.D. Wash. 1975). These proceedings addressed land claims cases and were not intended to adjudicate or determine treaty fishing rights. The focus was principally on compensable land takings. Claims of fishing rights were generally severed from land claims dockets.

Similarly, the Indian Claims Commission had limited authority and "had jurisdiction only to award damages." Cohen's Handbook of Federal Indian Law (2005 edition), Section 5.06[3]. The work of the Commission is often referred to as dealing with Indian "Estate and Land Claims." *Id.* Evidence and materials from proceedings focused on land claims is irrelevant and unhelpful in determining usual and accustomed areas involving fishing rights.

C. The District Court Applied the Correct Legal Standard.

While Stillaguamish disagrees with the ultimate decision reached by the District Court, they fail to show that the Court applied an incorrect legal standard. The Court expressly applied the 'preponderance of the evidence' standard that Stillaguamish maintains is appropriate. The Court stated that it "carefully considered the testimony of [Stillaguamish expert] Dr. Friday and the other evidence presented and concludes that . . . the evidence is insufficient to demonstrate by a preponderance of the evidence that [Stillaguamish] fished 'customarily . . . from time to time' in saltwater, or that the marine areas at issue were their 'usual and accustomed' grounds and stations." ER-6. The Court found that the evidence offered by Stillaguamish of "potential" village locations, "infrequent" travel, and "possible" presence in an area was insufficient to satisfy Stillaguamish's burden of proof. ER-7. While Stillaguamish disagrees with the Court's resolution, it fails to show any legal error.

Nor is there any merit to Stillaguamish's claim that the District Court changed or mis-applied the "at and before treaty time" standard. The District Court clearly stated that legal issue at trial was whether Stillaguamish could prove by a preponderance of the evidence that it customarily fished in the claimed waters "at and before treaty times." ER-2. Stillaguamish, however, complains that the District Court clarified that "at and before treaty times" simply means what it says.

A claimant must not only show that its tribal members fished in claimed waters before treaty times, but also that its members were still fishing in such areas at treaty times. There is no error in such analysis; to the contrary, Stillaguamish's argument would have the court replace the "and" with an "or." It is Stillaguamish that now wants to "move the goalposts" to ease its own burdens in proving additional U&A at this late date. The District Court did not err, and this Court should affirm.

D. The District Court Properly Applied Rule 52(c).

Stillaguamish incorrectly argues that the District Court erred by entering incomplete factual findings. There is no merit to this argument. The District Court entered multiple factual findings as to why the District Court did not believe that Stillaguamish met its burden of proving U&A in the claimed marine waters.

The cases cited by Stillaguamish in support of its argument that the District Court erred in its application of Rule 52(c) are distinguishable. In *Thermo Electron Corp. v. Soniavone Constr. Co.*, 915 F.2d 770 (1st Cir. 1990), the District Court made no specific factual findings and instead simply answered a series of "yes" or "no" questions submitted by the parties. While the Court of Appeals stated that "district courts have wide leeway in determining what facts to include, and while we would not second-guess any reasonable application of the Rule's mandate," the Court's cursory answering of yes/no questions did not meet the

mark. *Id.* at 773. That bears no resemblance to this case where the District Court did make multiple specific findings of fact on the evidence presented at trial.

The Court in *Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.,* 540 F.3d 721, 732 (5th Cir. 2019) simply confirmed that a Court must clearly state the factual basis for its ultimate conclusion, which the District Court clearly did here. That court also noted that the trial court need not discuss the relevance or importance of each piece of evidence, as Stillaguamish suggests.

In *Henry v. Champlain Enters., Inc.,* 445 F.3d 610 (2d Cir. 2006), the District Court entered a damages award of $145 million but did so without "any explanation of the facts or methodology used to reach this figure." *Id.* at 622. Thus, the appellate court was deprived of any ability to determine whether the damages award was justified. *Id.* Similarly, the Court in *Freeland v. Enodis Corp.,* 540 F.3d 721, 732 (7th Cir. 2008) failed to provide factual analysis in support of its valuation of contingent liabilities in a bankruptcy proceeding. Such cases involving the factual support for a damages award, or other valuation, are distinguishable. Also in contrast, here, the District Court did provide specific factual findings that disclose the basis for its order and its conclusion that Stillaguamish failed to prove U&A in the claimed waters by a preponderance of the evidence.

The Court in *Giles v. Kearney*, 571 F.3d 318 (3d Cir. 2009) highlighted the deferential review that an appellate court must give to a trial court's factual findings under the applicable clear error standard. "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Id.* at 322. The Court further explained: "On clear error review, [an appellate] Court has limited power to disturb the decision below. The District Court's findings need only be 'sufficient to indicate the factual basis for the ultimate conclusion." *Id.* at 329. In *Giles*, although "a more particularized analysis might have been helpful," the Court of Appeals determined the District Court's findings were "sufficient for a clear understanding of the basis of the decision." *Id.* The same is true here and this Court should affirm.

Stillaguamish argues that "in resolving a Rule 52 motion, the district court must make a specific finding on each relevant or principal factual issue presented at trial." Stillaguamish Opening Brief, p. 21. But that is not what the cited case, *Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955 (9th Cir. 2006), says. Rather, that case simply says that factual findings must be made on all "contested issues." *Id.* at 973. In the present case, the only contested issue is whether Stillaguamish could establish that it customarily fished the claimed marine waters at and before

treaty time. ER-2. The Court made factual findings in support of its determination that Stillaguamish failed to support its claims by a preponderance of the evidence.

Stillaguamish's argument boils down to a complaint that the District Court did not specifically address or enter a factual finding on every independent piece of evidence or factual contention raised by Stillaguamish. But the cases above make clear that the District Court need not do so. Rather, the District Court's decision simply must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *Abatie*, 458 F.3d at 973, quoting *Unt v. Aerospace Corp.,* 765 F.2d 1440, 1444 (9th Cir. 1985). Here, the Court provided factual findings regarding the evidence presented by Stillaguamish and reached the conclusion that Stillaguamish failed meet its burden of proving treaty-time U&A by a preponderance of the evidence. There is no clear error that warrants reversal or remand to the District Court. The District Court should be affirmed.

E. The District Court's Factual Findings Are Not Clearly Erroneous.

Stillaguamish argues that the District Court's eighth finding of fact is clearly erroneous. That finding of fact reads: "Evidence was presented of Stillaguamish people intermarrying with neighboring tribal groups, and it seems every other Salish tribe did the same. This did not include direct evidence, indirect evidence, nor any reasonable inference of usual and accustomed marine fishing activity by

the Stillaguamish." ER 5-6. Stillaguamish fails to show that finding is clearly erroneous. In its brief, Stillaguamish recites citations to past general statements about how Coast Salish people inter-married with people from neighboring tribes and accordingly were entitled to share in resources from such tribes based on inter-marriage. But then Stillaguamish concedes that, at trial, it presented evidence of only one single Stillaguamish tribal member who allegedly fished in Holmes Harbor based on intermarriage. Even if this is true, such fishing by one individual member based on his intermarriage does not show that the Stillaguamish Tribe as a whole had U&A in Holmes Harbor or any of the claimed waters.

While exogamous marriage; that is, marriage between individuals of different tribes, was common practice at treaty-times, and while such marriage may have provided the marrying person the right to fish in their in-laws' usual and accustomed fishing grounds, any such marriage-based fishing rights did not extend to the individual's tribe. Fishing rights are "communal rights which belong to the Indians with whom the treaties were made in their collective sovereign capacity. Being communal in nature these rights are not inheritable or assignable by the individual member to any person, party or other entity of any kind whatsoever." *United States v. Washington*, 476 F. Supp. 1101, 1110 (W.D. Wash. 1979).

Stillaguamish also challenges the ninth finding of fact that evidence of travel alone did not include direct evidence, indirect evidence, nor any reasonable

inference of marine fishing activity by the Stillaguamish. There is no clear error here. As discussed above, evidence of travel alone is not sufficient to establish U&A. If it were otherwise, then all Coast Salish tribes would likely have or be able to establish U&A in nearly all of Puget Sound. Even if all Indian tribes fished as they traveled, this Court has confirmed that travel alone is not sufficient to establish U&A. Occasional and incidental trolling in marine waters used as thoroughfares for travel is not, standing alone, sufficient to establish U&A. *United States v. Lummi Nation*, 876 F.3d 1004, 1007 (9th Cir. 2017).

Stillaguamish's challenge to the fifth finding of fact, regarding the District Court's evaluation of the opinions of Dr. Chris Friday, also fails. After hearing Dr. Dr. Friday's testimony, the Court found his opinions of Stillaguamish treaty-time fishing activity to be nothing more than speculation. ER-5. This Court cannot supplant the District Court's evaluation of the expert testimony. There is no clear error.

"The determination of any areas as a usual and accustomed fishing ground or station of a particular tribe must consider all of the factors relevant to: (1) use of that area as a usual or regular *fishing area*, (2) any treaty-time exercise or recognition of paramount or preemptive *fisheries control* (primary right control) by a particular tribe, and (3) the petitioning tribe's (or its predecessors') regular and frequent treaty-time *use of that area for fishing purposes*." *United States v.*

Washington, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) (emphasis added). Neither Dr. Friday nor Stillaguamish produced any such evidence regarding the claimed waters. Rather, they relied on speculation based on the kinds of evidence (mere presence and general travel) that has been found insufficient to establish U&A. The District Court should be affirmed.

F. The District Court's Legal Conclusion That Stillaguamish Failed to Establish U&A In the Claimed Waters Should Be Affirmed.

Stillaguamish challenges the District Court's conclusion that Stillaguamish failed to present sufficient evidence to establish U&A in the claimed marine waters. But Stillaguamish's argument simply rehashes its prior contentions that possible presence near or travel in marine waters is sufficient to establish U&A. As discussed above, that is incorrect. At trial, Stillaguamish offered no evidence that its members customarily fished in the claimed marine waters. Stillaguamish offered speculation of Dr. Chris Friday that the District Court found unpersuasive. While Stillaguamish disagrees with the ultimate decision reached by the District Court, it can show no legal error that warrants reversal or remand.

The recent District Court determination, challenged here, is not the first time that the Court has considered Stillaguamish U&A. Previously, Judge Boldt "thoroughly studied and considered" the anthropological reports and testimony of Dr. Barbara Lane and found Dr. Lane's reports "exceptionally well researched,"

"authoritative," and "reliable" and found her testimony highly credible. *United States v. Washington*, 384 F. Supp. at 350. Dr. Lane's work reviewed the historical information regarding the Stillaguamish treaty-time fishing practices and did not include or reference marine waters in her description of Stillaguamish fisheries.

In her 1973 report entitled "Archaeological Report on the Identity, Treaty Status, and Fisheries of the Stillaguamish Indians," Dr. Lane reported that: In contrast to some of their neighbors like the Snohomish to the south and the Lower Skagit to the north, the Stillaguamish people remained relatively isolated from white influence until some years after the Treaty of Point Elliott." SER-1238. She reported that references to the Stillaguamish prior to the treaty locate the Stillaguamish people on the Stillaguamish River. SER-1241. She reported that: "Prior to the period beginning in the 1870's when settlers began to take up land, there was no reason for the Stillaguamish to leave their own territory where food supplies in the form of fish and game were plentiful." SER-1248. In considering Dr. Lane's report, in addition to other evidence regarding the identity and territorial area of the pre-contact Stillaguamish tribe; Indian travel away from home villages and about the Puget Sound region, including on and adjacent to marine waters; the brief relocation of Stillaguamish people to southern Whidbey Island during the Indian Wars of 1855-1856; and intermarriage among tribes

around Puget Sound, Judge Boldt did not find Stillaguamish U&A in the claimed marine waters.

In the present proceeding, Stillaguamish presented no new factual evidence to support its claims but simply added the speculative opinions of Dr. Friday, which the District Court found unpersuasive and insufficient to establish Stillaguamish's marine U&A claims. Absent legal error, which does not exist here, it is not for this Court to re-weigh the District Court's evaluation of the testimony and evidence. The District Court should be affirmed.

Conclusion

In addition to the arguments raised above, Tulalip joins in the answering briefs of the Swinomish Indian Tribal Community and the Upper Skagit Indian Tribe. This Court should affirm the District Court in full.

Respectfully submitted this 26th day of June 2023,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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