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 at Seattle
The Honorable Ricardo Martinez, United States District Court Judge
Case. No. 2:17-sp-00003-RSM

ANSWERING BRIEF OF UPPER SKAGIT INDIAN TRIBE

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I. INTRODUCTION

This appeal follows an eight-day bench trial in *United States v. Washington*, subproceeding 17-03, in which the Stillaguamish Tribe ("Stillaguamish") failed to present any relevant evidence that it "customarily fished from time to time at and before treaty times"[1] in a broad stretch of marine waters—Saratoga Passage, Penn Cove, Holmes Harbor, Skagit Bay, Port Susan, or Deception Pass (collectively "claimed waters"). The Upper Skagit Indian Tribe ("Upper Skagit") moved pursuant to Federal Rule of Civil Procedure 52(c) for an order denying Stillaguamish's unsupported request. The district court correctly entered judgment in favor of Upper Skagit. The Court should affirm.

II. ISSUES PRESENTED FOR REVIEW

Whether the district court correctly determined that Stillaguamish had failed to show by a preponderance of the evidence that its U&A extended to the claimed waters because Stillaguamish presented no evidence that it, "customarily fished from time to time" in the claimed waters "at and before treaty times" (defined to exclude locations "used infrequently," "at long intervals," on "extraordinary occasions," "occasional[ly]," or "incidental[ly]") *United States v. Washington*, 384

[1] *United States v. Washington*, 384 F.Supp. 312, 332 (W.D. Wash. 1974).

F. Supp 312, 332 & 356 (W.D. Wash. 1974) which are far from its traditional upriver fishing grounds.

III. STATEMENT OF THE CASE

A. The Evidence Judge Boldt Identified Mandates Limiting Stillaguamish's U&A to the Stillaguamish River

In 1974, Judge Boldt determined in paragraph 146 of Final Decision #1 of *United States v. Washington* that the Stillaguamish Tribe's U&A was limited to the Stillaguamish River. 384 F. Supp. at 379 ("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"). Judge Boldt relied upon five sources of evidence, listed in paragraph 146, to limit Stillaguamish's U&A to the river. In the present subproceeding, Judge Martinez correctly found that the Stillaguamish had failed to present any new evidence to prove its claim of U&A in marine waters.

Judge Boldt gave heavy evidentiary value to Dr. Lane's expert opinion finding "that in specific facts, the reports of Dr. Barbara Lane . . . have been exceptionally well researched and reported and are established by a preponderance of the evidence. They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties." *Id.* at 350. Dr. Lane documented Stillaguamish's territory, noting that "references to the Stillaguamish prior to the treaty negotiations [in 1855] merely cite the name, *locate them on the Stillaguamish River*, and estimate their numbers

as about 150 or 200." 6-SER-1241 (emphasis added). Two pre-1855 witness accounts support Dr. Lane's findings. Pioneer settler, Samuel Hancock, found no evidence of a Stillaguamish settlement at the mouth of the river. Instead, in 1850 he (a) noted that he had observed an Indian house approximately five miles from the mouth of the Stillaguamish River and a temporary camp approximately fifteen miles from the mouth of the river (6-SER-1238-1239), and (b) noted that he had come upon a large Stillaguamish village 20 miles upriver. 6-SER-1239. Mr. Hancock observed no Stillaguamish settlement at the mouth of the river. *Id.* In 1851, George Wilson, who traveled up the Stillaguamish River with Hancock, first encountered a village of Indians approximately five miles upriver, with a larger village still farther upriver. 6-SER-1240.

Dr. Lane further reported that, "[f]rom the evidence available it is obvious that the Stillaguamish Indians were skilled fishermen and canoe handlers who relied on the resources *of the river and its tributary creeks* for their staple food." 6-SER-1259 (emphasis added). The Stillaguamish took salmon and steelhead *as those fish ascended* the river system to spawn. *Id.* In the 1950's, Dr. Sally Snyder testified before the Indian Claims Commission (ICC), explaining that the Stillaguamish were "largely hunting people" who "fished in the Stillaguamish River" and were "not oriented to the salt water to any extent whatsoever." 4-SER-638. She offered this testimony on behalf of the Stillaguamish claim, stating that

their "economy was of an up-river sort" that depended neither "upon shell fish, nor upon fish caught in salt water." 4-SER-652.

At the trial in this sub-proceeding, Upper Skagit's expert witness, Dr. Bruce Miller, concurred in Dr. Snyder's conclusion: that all the evidence places Stillaguamish fishing "on the Stillaguamish River" but not in marine waters. 3-SER-268.

B. Stillaguamish Presented No New Evidence At Trial.

During the eight-day bench trial below, Stillaguamish introduced no *new* evidence regarding its customary fishing grounds, leading to the unrefuted conclusion that the Stillaguamish fished singularly *on the Stillaguamish River*, not in the claimed marine waters beyond.

Stillaguamish tried to fill this void with speculation—the testimony of Dr. Chris Friday. Dr. Friday had no prior experience analyzing U&A claims or testifying as an expert witness. 2-ER-186. Importantly, he could not point to any evidence of Stillaguamish *fishing* in the claimed waters at or before treaty times. Instead, he offered as a basis for his speculative "conclusions":

- evidence that the Stillaguamish were infrequently *present* on land near the claimed waters with zero evidence of fishing there;

- one trip of record by Stillaguamish to Victoria, British Columbia, with no indication of the route taken much less whether fishing occurred along the way;
- fishing in the waters at issue based upon exogamy (*i.e.*, due to marriage outside the tribe); and,
- presence of shell middens neither connected to Stillaguamish fishing in marine waters nor shown to have existed at or before treaty time.

On this record, the district court correctly applied the law of the case and decided that Stillaguamish had proffered no evidence to support its claim of U&A in the marine waters at issue.

IV. SUMMARY OF ARGUMENT

Stillaguamish presented no evidence much less a preponderance of evidence that it "customarily fished from time to time" in the waters at issue "at and before treaty times" (defined to exclude locations "used infrequently," "at long intervals," on "extraordinary occasions," "occasional[ly]," or "incidental[ly]") such that the areas should be deemed Stillaguamish "usual and accustomed fishing ground[s] and station[s]." *United States v. Washington*, 384 F. Supp at 332 & 356.

Yet Stillaguamish seeks reversal of the district court's conclusion that it failed to demonstrate by a preponderance of the evidence that Stillaguamish people customarily fished the claimed waters. But just as the record establishes that

Stillaguamish exclusively limited its fishing to the Stillaguamish River, its absence of saltwater fishing evidence demonstrates that there is no basis to find Stillaguamish customarily fished areas extending to the claimed marine waters. More, it was well within the district court's discretion to reject Stillaguamish's expert's speculative opinions, which are contrary to weight of the evidence, rely on assumptions and leaps of logic unsupported by the evidence, and fail to meet the standard of proof for extending Stillaguamish's U&A.

V. ARGUMENT

A. Stillaguamish Misinterprets the Applicable Standard of Review.

FRCP 52(c) authorizes the district court in a nonjury trial to "enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." A court may enter such judgment "at any time that it can appropriately make a dispositive finding of fact on the evidence." Fed. R. Civ. P. 52, Advisory Committee Note to 1991 Amendment. The arguments Stillaguamish has presented ignore this rule. There are two applicable standards of review at issue: (1) the legal conclusions of the district Court are reviewed *de novo*; and (2) the findings of fact are reviewed to determine whether they are *clearly erroneous*.

Stillaguamish argues that the district court misapplied or failed to apply the law of the case. This Court reviews such legal conclusions *de novo*. *Red Lion*

Hotels Franchising, Inc. v. MAK, LLC, 663 F.3d 1080, 1087 (9th Cir. 2011). Judge Martinez—who has "lived with this case longer than any other judge" (3-ER-317) and for nearly two decades has presided over 12 subproceedings and issued over 50 judicial opinions, including those related to new U&A determinations, shellfish rights, and interpretation of Judge Boldt's original order—is conversant with the applicable legal standards and has previously addressed the proof requirements. *See United States v. Washington*, No. 09-01, 2015 WL 12670516, at *10–12 (W.D. Wash. Feb. 18, 2015). He has correctly applied those standards here.

Stillaguamish's challenge to the district court's findings of fact is spurious. Stillaguamish has asked the Court to review the record *de novo*, but the applicable standard is clear error. Fed. R. Civ. P. 52(a)(6) ("[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous[.]"). To be "clearly erroneous, a decision must strike [the Court] as more than just maybe or probably wrong; it must . . . strike [the Court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) (cited with approval, 9C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2585 (3d. ed.)). A "district court's finding of fact is clearly erroneous if it is (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the

facts in the record.'" *Seller Agency Council, Inc. v. Kennedy Ctr. For Real Est. Educ., Inc.*, 612 F.3d 981,986 (9th Cir. 2010) (citing *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)). Under this standard, the court must not consider what it "would have done had [it] been in the trial court's place in the first instance, because that review would be *de novo* and without deference." *Hinkson*, 585 F.3d at 1261. The scope of review is whether the "trial court reached a decision that falls within *any of the permissible choices* the court could have made." *Id.* (emphasis added); *see also Mondaca-Vega v. Lynch*, 808 F.3d 413, 426 (9th Cir. 2015) ("As long as there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (Internal citation and punctuation omitted)). The record—which contains no evidence of Stillaguamish fishing in the claimed waters—compels affirming the district court's findings of fact.

B. The District Court Correctly Identified the Controlling Law Under *United States v. Washington*.

Judge Martinez applied the controlling law of *United States v. Washington*, which defeats Stillaguamish's first assignment of error. App. Br. at 7-9.

Final Decision #1 defines U&A as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times . . . ," specifically excluding locations "used infrequently," "at long intervals," and on "extraordinary occasions," "occasional[ly]," or "incidental[ly]." 384 F. Supp. at

332. And the only relevant events are those "at and before treaty times." *Id.* The burden of proof is "a preponderance of the evidence found credible and inferences reasonably drawn therefrom." *Id.* at 348. A tribe seeking to expand U&A after the initial decision bears the "burden of producing evidence to support their broad claims." *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975).

The only legal issue at trial was whether "the historical evidence and expert testimony, and all reasonable inferences drawn therefrom, demonstrate by a preponderance of the evidence that Stillaguamish customarily fished the Claimed Waters . . . at and before treaty times." 1-ER-2. The district court correctly noted the standard by which the evidence is to be measured: "the law of the case requires that Stillaguamish do more than proffer evidence of (potential) village locations, (infrequent) travel, or (possible) presence in an area." 1-ER-7. Rather, Stillaguamish must show that they "customarily fished" these areas "at and before treaty times," and "travel alone" does not get them there. 1-ER-3 & 7.

The Order incorporates by reference the district court's ruling on summary judgment (1-ER-7) where the district court elaborated upon the standard by which Stillaguamish's claims must be measured, citing (1-SER-10-12) the key treaty terms (1-SER-11), the preponderance of the evidence standard (*id.*), and the impact of the relaxed standards of proof in proceedings pursuant to *United States v.*

Washington. The court explained that these standards still required the district court to "make its findings on a more probable than not basis." *Id.* The district court's analysis in this case satisfies the standard under FRCP 52 requiring that the court apply "the controlling law."

C. The District Court Properly Applied the Controlling Law of *United States v. Washington*.

Judge Martinez noted at the outset of the bench trial, "I've probably lived with this case longer than any other judge I can think of now." 3-ER-317. Since Judge Rafeedie transferred this case to Judge Martinez on July 8, 2004, Judge Martinez has authored over 50 judicial opinions in sub-proceedings. Given his familiarity with the legal standards, Stillaguamish's arguments regarding the legal analysis are unpersuasive.

1. The district court correctly applied a preponderance of the evidence standard.

Stillaguamish groundlessly contends that Judge Martinez incorrectly applied a "substantial evidence" standard rather than a preponderance standard. App. Br. 13-15; 17-19.

Judge Martinez described the legal issue here as whether the historical evidence and expert testimony and all reasonable inferences drawn therefrom "demonstrate by a preponderance of the evidence that Stillaguamish customarily fished the Claimed Waters." 1-ER-2. That was the standard the district court

applied (and the correct standard). Separately, the Order noted that there was substantial evidence "prior to trial" of Stillaguamish river fishing but not "fishing activity in the marine waters now at issue." 1-ER-5. Stillaguamish's feeble effort to conflate these two statements should be rejected.

Stillaguamish also argues that the district court was required to acknowledge that evidence of treaty time marine fishing is likely to be fragmentary and insubstantial. Judge Martinez has vast experience in this realm. Stillaguamish presented nothing but "expert" speculation. Stillaguamish presented *no* direct evidence, *no* indirect evidence, nor any reasonable inference that marine fishing occurred. 1-ER-5. Dr. Friday's speculation that Stillaguamish *must* have fished in marine waters like other Coast Salish tribes is not probative.

2. Presence at or near a body of water does not prove U&A.

Under Stillaguamish's construct, a tribe would not need to present evidence of fishing at all. Instead, fishing could be inferred from potential village locations or even simply by *presence* near a body of water. App. Br. 10-12, 22-24, 39-41. This is not the law.

The court has insisted on evidence of *fishing* to support findings of marine U&A, even when marine waters are adjacent to village locations. *See, e.g.*, 384 F. Supp. at 372 ¶ 108, 374 ¶ 120, ¶ 369 ¶ 86. Any doubt regarding the standard was dispelled when the court held that evidence of village locations does not prove

fishing at those locations. 459 F. Supp. at 1059. There the district court considered testimony from Dr. Lane, testimony from tribal elders about post-treaty fishing locations, and ICC findings about the location of Tulalips' "coastal and river villages." *Id.* The Court held that while ICC findings "of the Indian coastal and river villages" raised a *presumption* of fishing activities, standing alone it was insufficient to prove U&A in the area. *Id.* ("findings of the Claims Commission of the Indian coastal and river villages, from which fishing activities may be presumed, *coincide with* the findings of Dr. Lane and the testimony of Mrs. Dover") (emphasis added).

None of the cases adjudicating U&A that Stillaguamish has cited concludes otherwise. *United States v. Washington*, 873 F. Supp. 1422, 1449-50 (W.D. Wash. 1994) (finding Upper Skagit, successor in interest to Bsigwigwilts and Nuwha'ha, had U&A where the "uncontroverted evidence" from "oral testimony and written reports" indicating these predecessor tribes "took fish, including shellfish," from the disputed waters); *United States v. Washington*, 626 F. Supp. 1405, 1442 (W.D. Wash. 1985) (finding Port Gamble Band of Klallam "regularly" fished a host of waters some of which were adjacent to Port Gamble but many of which were not including Hood Canal and the waters of northern Puget Sound); *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) (concluding that Judge Boldt intended "the waters of Puget Sound" to refer to Elliott Bay because

evidence proved fishing only in Elliott Bay); *United States v. Washington*, 129 F. Supp. 3d 1069, 1080 (W.D. Wash. 2015) (finding based on expert testimony that the Quinault used ocean fisheries adjacent to their territory and "made use of" "a wide range of plants and animals harvested by the tribe for food" including whale, seal, otter, halibut, cod, sea bass, etc.). In every case where U&A was found the court insisted on evidence of actual fishing adjacent to villages.

Stillaguamish stretches the standard further, arguing that mere presence "at or near a body of water" should establish U&A. App. Br. at 10-12; 22-24. Any such standard renders U&As meaningless—it would suffice to show only places that tribes *might* have been present. But, the test is that U&A fishing grounds exist at "every *fishing* location where members of a tribe customarily *fished* from time to time at and before treaty times." *United States v. Washington*, 384 F. Supp. at 332 (emphasis added).[2]

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[2] At trial, Stillaguamish attempted to expand its U&A by presenting "new" evidence. The standard for determining U&A based on new evidence is different than the standard applied to cases where tribes seek to ascertain Judge Boldt's intent. The task at hand, in this case, is markedly different than what the S'Klallam tribes describe in their "Answer" regarding *Lummi I, II*, and *III*. When there is a dispute about whether an area is within a tribe's adjudicated area, the court must employ a "two-step procedure." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010). First, the court must determine

Stillaguamish cannot show U&A without proof of actual fishing. Instead, in each case Stillaguamish cited, there was evidence of fishing. *United States v. Washington*, 384 F. Supp. at 367 (recognizing "at least three groups of important weir sites to intercept returning salmon" with respect to the Muckleshoot tribe's U&A locations); *id.* 360 (Lummi U&A where Lummi placed reefnets in pre-treaty times); *id.* at 364-365 (Makah U&A at "grounds and stations on rivers along the Strait of Juan de Fuca" where there was evidence Makah "took chinook, sockeye, chum, and coho salmon . . . using fishing techniques which included beach seining,

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if the finding "was ambiguous, or that Judge Boldt intended something other than its apparent meaning (*i.e.*, all salt waters of Puget Sound)." *Id*. In the *Lummi* cases, the court grappled with trying to ascertain what Judge Boldt meant when he originally determined Lummi's U&A. Boldt used fairly ambiguous language, *e.g.* "present environs of Seattle" and the district court struggled to harmonize that language with its understanding of the record. In the *Lummi* cases, the court made certain inferences based on travel routes. It was permitted to do so as it was trying to ascertain Judge Boldt's intent. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 449-50 (2000) (*Lummi I*); *United States v. Lummi Nation*, 763 F.3d 1180, 1185-86 (9th Cir. 2014) (*Lummi II*); *United States v. Lummi Nation*, 876 F.3d 1004, 1008-09 (9th Cir. 2017) *(Lummi III*). That is not the Court's exercise here. In this case dealing with a tribe's attempt to claim new territory that lies outside of its adjudicated U&A, the court properly weighed evidence not previously evaluated by Judge Boldt to determine whether Stillaguamish met the evidentiary standard for new U&A. That standard is clear: evidence of travel alone is insufficient to establish U&A. *United States v. Washington*, 384 F. Supp. at 353; *see also United States v. Washington*, 129 F. Supp. 3d 1069, 1111 (W.D. Wash. 2015) *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017).

spearing and trolling"); *id.* at 368 (U&A included saltwater areas at the mouth of the Nisqually River which were fished by local Nisqually residents and by visitors); *id.* at 370 (referencing the Puyallup tribe's documented "variety of techniques" for fishing in both fresh and marine water U&A locations); *id.* at 372 (discussing in detail the Quileute tribe's traditional fishing gear as well as locations of fishing weirs and traps, as well as the tribe's usual catch of salmon, smelt, bass, puggy, halibut, flatfish, bullheads, devilfish shark, herring, sardines, sturgeon, seal, sea lion, porpoise, and whale); *id.* at 374 (referencing both exclusive and shared U&A fishing places as well as the economic importance of fishing in those areas to the Quinault tribe); *id.* at 375-76 (discussing the specific fish procured at Squaxin U&A fishing locations); *id.* at 378 (discussing both the Upper Skagit tribe's "aboriginal area" and its "usual and accustomed fishing places") *id.* at 380 (discussing Yakima Nations use of fisheries on Puget Sound); *United States v. Washington*, 626 F. Supp. at 1442-43 (Klallam [Lower Elwha's predecessor] "regularly" fished northern Puget Sound around the San Juan Islands and Whidbey Island, and in the Haro and Rosario Straits and therefore had U&A); *id.* at 1488-89 ("At and before treaty times, the Twana [Skokomish's predecessor] engaged in a variety of fishing and hunting activities in and around the Hood Canal and the streams flowing into it. These activities included . . . saltwater fishing in the canal by trolling, spearing and other methods . . ."); *id.* at 1529-30 (Tulalip U&A where

intermarriage accompanied by "frequent[]" and "regular[]" travel through marine waters for "harvesting resources").

The district court correctly concluded that evidence suggesting possible villages or a hypothetical Stillaguamish presence near a body of water does not establish that Stillaguamish customarily *fished* in such marine waters much less that such waters were their usual and accustomed *fishing* grounds.

3. The district court is entitled to accept (or reject) expert testimony.

Stillaguamish has argued that, because the district court found Dr. Friday credible, it was clear error for the court to decline to adopt all of his conclusions. App. Br. 25-26 (framing it first as a legal issue); *id.* at 34 (then as incorrect finding of fact). A witness can be credible without being right.

The district court was entitled to consider the evidence underlying Dr. Friday's conclusions and decline to follow his interpretation of those documents. *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273 (9th Cir. 1981) (holding that a district judge "may accept some statistical inferences and reject others based upon his perception of the oral and documentary evidence placed before him"). At trial, Dr. Friday's testimony was inconsistent and fraught with speculation as shown in cross-examination. He admitted:

- the sources he relied on with respect to the purely speculative presence of Stillaguamish at Deception Pass did not explicitly mention fishing (4-ER-

644-645);

- he had no evidence of Stillaguamish fishing in Saratoga Passage at treaty time (4-ER-645);
- he used "the context of Indian agents' reports"—which were made after treaty time—as his basis for asserting that the Stillaguamish regularly fished Holmes Harbor and Penn Cove at or before treaty times (5-ER-678-682); and,
- that the James Dorsey affidavit he relied on regarding Skagit Bay and Port Susan neither identified a Stillaguamish village on the shoreline of Skagit Bay, nor referred to marine fishing at all (5-ER-702-703).

The district court independently asked Dr. Friday additional questions at the close of his testimony. 5-ER-773-778. The district court thoroughly considered, and rejected, Dr. Friday's conclusions.

Stillaguamish has also failed to acknowledge that, after the district court deferred a decision on the FRCP 52(c) motion, two other expert witnesses—anthropologists Dr. Bruce Miller and Dr. Astrid Blukis Onat—testified. On the issues Stillaguamish has identified on appeal, these experts drew materially different conclusions from Dr. Friday's based on the same evidence. *E.g.*, 3-SER-258-259 (Dr. Miller concluded, contrary to Dr. Friday, that tribal elder Sally Oxtein's account of travel to Victoria reflected trade not fishing); 2-SER-91-95

(Dr. Onat refuting Dr. Friday's conclusions regarding Stillaguamish home grounds).] The district court was entitled to "weigh[] contradictory evidence" in order to reach "the ultimate conclusion as to the facts," including deciding to accept the conclusions of one expert over another. *Nardella v. Campbell Mach, Inc.*, 525 F.2d 46, 49 (9th Cir. 1975); *Cont'l Connector Corp. v. Houston Fearless Corp.*, 350 F.2d 183, 188 (9th Cir. 1965) (rejecting an argument that a court improperly accepted the testimony of an opposing expert who had only "theoretical" experience with the subject matter).

Judge Boldt approached competing expert testimony at the outset of this case in the same way 384 F. Supp. 312, 350 (W.D. Wash. 1974) ("where their testimony differs in any significant particular, the testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley and is accepted as such except as otherwise specified"). In this sub-proceeding, Dr. Friday testified that he is an ethnohistorian without formal training in anthropology. 2-ER-177-181; 4-ER-504-506. By contrast, Dr. Miller has worked with Coast Salish people on various projects for over 30 years, including work alongside Dr. Barbara Lane in sub-proceeding 89-3. 3-SER-231-236. Similarly, Dr. Onat testified that she has decades of experience as an archaeologist and ethnographer studying Pacific Northwest peoples, including work with Dr. Sally Snyder. 2-SER-30-34. Given their extensive history and expertise as anthropologists who have dedicated their

professional lives to the study of coast Salish people the district court was well within its bounds as the trier of fact to rely on Dr. Miller's and Dr. Onat's conclusions over Dr. Friday's.

The district court's decision to reject Dr. Friday's conclusions is not a basis for reversal.

D. The District Court's Findings of Fact are Amply Supported By the Record.

The district court correctly held that the evidence presented at trial established that "the Stillaguamish were a river fishing people during treaty times," but did not establish "by a preponderance of the evidence" that the Stillaguamish "fished 'customarily . . . from time to time' in saltwater", or that the claimed waters were their "usual and accustomed" fishing grounds and stations. 1-ER-6. On appeal, Stillaguamish seeks to upend findings of fact supporting that determination. In fact, the record reinforces, rather than undermines, that ruling.

1. A single instance of Stillaguamish travel to Victoria, B.C. does not establish U&A in Deception Pass.

Stillaguamish claim that the district court improperly found that there was evidence of travel north to Victoria, B.C. and south to Olympia, Washington, but no evidence of marine fishing activity. Rather, Stillaguamish assert that *because* of their travel, they must have fished Deception Pass. App. Br. 16-17; 32-33; 54-56. This is not the standard for establishing U&A, and is unsupported by evidence.

Courts have recognized a potential relationship between travel and fishing, but travel alone does not establish U&A—especially where there is more than one way to get from Point A to Point B, only one of which is the treacherous waters of Deception Pass which are a violent rapids except for short periods every six hours. Indeed, Final Decision #1 teaches that although marine waters "were [] used as thoroughfares for travel by Indians who trolled en route," the "occasional and incidental trolling" does not equate to those marine waters being U&A fishing grounds. 384 F. Supp. at 353; *see also United States v. Washington*, 129 F. Supp. at 1111 (W.D. Wash. 2015) *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017).

Stillaguamish would upend these established principles, claiming that the law of the case deviates from this established standard, ushering in a rule that "all Indians in western Washington fished as they travelled [*sic*]." App. Br. at 15-16, 32-33. Stillaguamish points to the *Lummi* cases for support. App. Br. at 16. But in reaching that decision, this Court reiterated Final Decision #1 regarding travel: "Importantly, a U&A cannot be established by 'occasional and incidental trolling' in marine waters 'used as thoroughfares for travel.'" *United States v. Lummi Nation*, 876 F.3d 1004, 1007 (9th Cir. 2017). Considering a nearly identical argument, this Court held that the record had already shown that Lummi's use of marine waters for fishing "was more than mere 'occasional and incidental

trolling.'" *Id.* at 1010. With this factual predicate, which is completely absent here, the Court then considered whether the "tribe fished *or traveled* in the . . . contested waters." *Id.* (emphasis original). This carefully reasoned approach did not override the law of the case under Final Decision #1; in fact, it highlights the deference this Court affords to the standards set therein.

The evidence of Stillaguamish's supposed "travel" would not even meet their own proposed standard for establishing U&A. "Travel" in a general direction one time does not necessarily imply a particular route, nor do the cited sources support the conclusion that the traveled route included Deception Pass. Stillaguamish's expert, Dr. Friday, relied on two references to travel by Stillaguamish to Victoria, British Columbia to infer fishing in Deception Pass. 4-ER-638-639; 6-ER-829-832 & 6-ER-864-869. Apparently, Dr. Friday is unfamiliar with the waters of Deception Pass, where travel can only occur every six hours; otherwise, it is a maelstrom. Dr. Friday has no basis to infer that Deception Pass was the route to Victoria instead of the far less threatening waters to the west.

In any event, neither reference includes *any* reference to trolling or any other kind of fishing. *See United States v. Washington*, 459 F. Supp. at 1059 (noting that even if a tribal elder's testimony is credible, the court may still concern itself with "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 fishing activities"). Nor does either source state that Stillaguamish actually traveled via Deception Pass. Nevertheless, Dr. Friday drew several compounding inferences: (1) that the most accessible route to Victoria was from the mouth of the Stillaguamish River, through Skagit Bay, to Deception Pass; (2) that such a trip would take multiple days; (3) that the Stillaguamish must have taken this route regularly; and (4) that the Stillaguamish would have fished in marine waters in Deception Pass along the way. 4-ER-420-21. But he also admitted that the evidence does not mention Deception Pass, and he agreed that the Stillaguamish "certainly could have gone by other routes." 4-ER-422.

Dr. Friday acknowledged that the sources also do not mention fishing while traveling. 4-ER-640-641. Thus, the Court's determination that there was no evidence of marine fishing in Deception Pass was a permissible inference. In fact, the most specific evidence with respect to this travel—the account of Stillaguamish tribal elder Sally Oxstein—makes no reference to marine fishing even while containing detailed information regarding other food sources. 6-ER 829-30. Ms. Oxstein notes that in their home villages the Stillaguamish would grow potatoes, lay traps for beavers, and catch fish in willow bark. *Id.* When the time came to trade, they would load canoes with hides and trade those hides in Victoria, B.C. for blankets and guns, as well as ducks, geese, and wild birds. *Id.* The tribe would

then go to the "prairies" to get onions, and then pass again through Victoria on the way home. *Id.* Despite Oxstein's rich detail regarding food sources available during their travel, there is not a single mention of marine fishing or of a trip through Deception Pass.

None of the other sources Stillaguamish cites leads to a different result. Stillaguamish points to Dr. Snyder's explanation that Deception pass was used by anyone who wanted to fish there, and evidence showed "upriver people" doing so, but Dr. Snyder says nothing of Stillaguamish's use of those marine waters. In fact, Dr. Snyder's reference to "upriver people," included Upper Skagit groups, Swinomish, and some Snohomish. 6-ER-892, 962. Stillaguamish also relies on ethnographer June Collins' account of Stillaguamish familial affiliations on Guemes Island in the north, suggesting that this leads to the inference that Stillaguamish people likely traveled to this territory regularly through Skagit Bay and out through Deception Pass. But, Ms. Collins noted that it is unclear whether the individual who lived on Guemes Island, Jackson Harvey, was actually affiliated with the Stillaguamish. 6-ER-916-917.

Dr. Friday agreed that routes other than Deception Pass were possible and noted that there was no account of saltwater fishing during the single recorded instance of travel. From this evidence, the district court permissibly declined Stillaguamish's invitation to draw the three inferences necessary to reach

Stillaguamish's preferred hypothesis.

2. Stillaguamish did not customarily fish in Holmes Harbor.

Stillaguamish asks the Court to overturn the district court's findings regarding Holmes Harbor. Its argument is based on a misstatement of the law of the case and on the account of a single man. App. Br. at 28-32.

Stillaguamish argues that the district court erred in failing to find U&A based on a "direct relationship between intermarriage and fishing practices." App. Br. at 28-29. The court has recognized such a "relationship," but it has never found U&A based on intermarriage. The court has consistently required evidence of actual fishing by the tribe. The citations in the Stillaguamish brief highlight this point. With respect to the Quileute Tribe's claim to marine waters around Tatoosh Island and Cape Flattery, the district court acknowledged evidence of "several intermarriages," but still denied the Quileute's claim because evidence of actual fishing was ambiguous, and the Makah had exclusive ownership of the claimed waters at treaty times. *United States v. Washington*, 129 F. Supp. 3d at 1105-6; *see also United States v. Washington*, 384 F. Supp. 312, at 368 (in analyzing marine water U&A for Nisqually, noting evidence that the tribe's fishing techniques included those for saltwater fishing).

Applying its incorrect statement of the law of the case, Stillaguamish argues that the single recorded instance of intermarriage by the individual, Mowich Sam,

is determinative of U&A rights in Holmes Harbor. The district court correctly found that this evidence did not establish such rights.

The trial evidence shows that the Bsigwigwilts, a predecessor in interest to Upper Skagit, owned Holmes Harbor. 6-ER-898; *accord* 3-ER-476. Dr. Snyder's notes explained that Mr. Sam went to Holmes Harbor "to fish" *because* he "had a [bshi] wife," nothing more. 6-ER-898. Dr. Friday opined that Mr. Sam was a Stillaguamish man who was alive at treaty times and gained permission to fish at Holmes Harbor via his Bsigwigwilts wife. 3-ER-475-76. But even Dr. Friday conceded that this showed only that Mr. Sam and his family were *allowed* to fish Holmes Harbor *because* of his marriage—which necessarily shows that no such right or practice existed otherwise.

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

5-ER-678. When pressed, Dr. Friday would not conclude that the rights acquired through the marriage extended to the Stillaguamish tribe:

> Q: And would you agree that, at treaty time, fishing rights acquired by an individual through marriage did not extend to that individual's tribe; correct?
>
> A: It extend to the family of that individual.
>
> Q: Did it extend to the tribe?
>
> A: All I can tell you is that, because of the way bilateral kinship is traced,

> that the rights would go to all the members of his family . . . .

5-ER-678.

Other evidence clarifies that permissive use through marriage is distinct from any right to fish, or general practice of fishing, without such a relationship with the primary tribe. As Dr. Lane explained,

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

7-SER-1535. Dr. Miller testified that during this period, "an individual right was not generalized into a tribal right." 3-SER-264; *accord United States v. Washington*, 476 F. Supp. 1101, 1110 (W.D. Wash. 1979) ("Being communal in nature, [U&A fishing] rights are not inheritable or assignable by the individual member to any person, party or other entity of any kind whatsoever."); *see also United States v. Washington*, 626 F. Supp. 1405, 1490 ¶ 356 (W.D. Wash. Mar. 22, 1984) ("Marriage relatives could also acquire such secondary rights in the natal territories of their spouses. The secondary or permissive fishing rights were ineffective, however, unless holders of the primary fishing right first invited or otherwise permitted persons with secondary rights to fish in the territory."). Dr. Snyder's testimony to which Stillaguamish points is in accord—it says nothing more than that the family of the intermarried couple *may* gain fishing privileges in the wife's areas. 6-ER-971-73 (noting that the privilege extends to the individuals

"and their spouses and children who are old enough to travel").

The district court correctly found that permission of a single Stillaguamish man to fish Holmes Harbor through his wife did not give rise to direct evidence, indirect evidence, or even an inference that the entire Stillaguamish tribe customarily fished Holmes Harbor. This finding is fully supported by the evidence.

3. Evidence of the mere presence of Stillaguamish near Port Susan does not support a finding of U&A there.

Relying on evidence before Judge Boldt in the early stages of *United States v. Washington*, Stillaguamish has argued that expert evidence shows that the tribe customarily fished in Port Susan. App. Br. at 36. Judge Boldt declined to find U&A in Port Susan for Stillaguamish. The district court correctly rejected the same argument in this subproceeding. The evidence does not show that Stillaguamish *fished* these marine waters at and before treaty times.

At trial, Dr. Friday conflated the Stillaguamish and Qwadsak to reach a conclusion regarding Stillaguamish fishing in the waters in Port Susan. But, he agreed that documentation regarding Port Susan, such as the writings of Suzy Peters, distinguished between "the people who lived at Port Susan and lived up the Stillaguamish River." 5-ER-742. Dr. Wayne Suttles, an anthropologist who published oral history with respect to Coast Salish tribes, recorded information from several Indian informants regarding the Qwadsak people, who "had Port

Susan from Warm Beach to Stanwood." 6-SER-1126; *see also* 6-ER-905 (Esther Ross' statement that a member of the "Kikealis (phonetic) Tribe from Swinomish . . . said [to her], 'Don't you dare say that you went any further than Stanwood."); *see also* 2-SER-62-63 (discussing the Qwadsak area and their neighboring tribes to the north, south, and east).

Dr. Friday's opinions are further belied by evidence of where Stillaguamish actually fished—all of which is evidence only of river fishing. *Supra* III.A. The evidence at trial showed that, at treaty time, the Stillaguamish area began, at a minimum, four or five miles upriver (6-SER-1123), and that the majority of the people lived approximately 20 miles upriver (4-ER-559-560; 6-SER-1241). Jackson Harvey relayed copious details of the Stillaguamish use of river resources, including specific river fishing techniques and upriver locations. Mr. Harvey's evidence places Stillaguamish fishing only on the river and its forks. 6-SER-1114, 1117-1119; *see also* 4-SER-607 (James Dorsey's 1926 affidavit explaining the Stillaguamish territory was confined to the river, branches, and tributaries). At trial Dr. Friday admitted that Mr. Harvey made no reference to fishing in marine waters. 5-ER-739.

Contrary to Stillaguamish's assertion that the evidence of their use of Port Susan for marine fishing was uncontroverted, expert testimony at trial directly contradicts this position. Even if the Stillaguamish had lived adjacent to Port

Susan, as Dr. Miller pointed out during trial, "that area is a mud flat. . . . Wayne Suttles reported that there were no fishing sites on the east coast of Camano there. And the problem with this kind of location is that it's just very difficult to take canoes in which one would fish in and out . . . to land on a shore and to launch them." 3-SER-247. Accordingly, Dr. Miller opined that there was no evidence of Stillaguamish fishing in Port Susan. 3-SER-239-240. Likewise, Dr. Onat confirmed that the shoreline at Port Susan was not considered productive for fishing by treaty-time peoples. 2-SER-59.

That the evidence was "inconclusive" regarding Stillaguamish marine fishing activities in Port Susan is well within the permissible conclusions that could be drawn from this record. There is no basis for this Court to reverse.

4. Stillaguamish did not present evidence of fishing in the marine waters of Saratoga Passage.

Stillaguamish has relied almost exclusively on evidence of a presence on Camano Island to support its argument that it established U&A in Saratoga Passage. App. Br. 42-46.

But Dr. Friday failed to point to any evidence of the existence, much less the specific location, of any Stillaguamish village on the shores of Saratoga Passage. 5-ER-656 (explaining that he found only evidence of a presence on the north side of Camano Island—*i.e.* not the side adjacent to Saratoga Passage—and general evidence of presence on the island). He also admitted during trial that he was not

aware of any informant testimony from any member of the Stillaguamish tribe, nor any other direct evidence, regarding regular Stillaguamish fishing activities in Saratoga Passage. 4-ER-645. Rather, he drew his conclusion regarding fishing in these marine waters from the "context of [the Stillaguamish] moving through the area" and *presence* on the western side of the island. *Id.*

After deferring its ruling on the FRCP 52(c) motion, the district court heard testimony from two experts who unequivocally concluded that there is no evidence of Stillaguamish presence at or marine fishing in Saratoga Passage at or before treaty times. Dr. Onat testified that Saratoga Passage was not "home grounds" to the Stillaguamish at treaty time. 3-SER-92. Rather, the Lower Skagit were on the west shore of the Saratoga Passage; the Kikuallus were on the east shore of Saratoga Passage. *Id.* Evaluating Dr. Friday's opinions about this same location, Dr. Miller concluded that the Stillaguamish did not regularly migrate from one fishing location to another in Saratoga Passage and did not regularly fish Saratoga Passage before treaty time. 3-SER-268.

The evidence Stillaguamish points to on appeal to support Stillaguamish fishing in Saratoga Passage consists almost entirely of *post-treaty* accounts of Stillaguamish *presence* on Camano Island, and not on any accounts of Stillaguamish *fishing* while there. *E.g.*, 6-ER-929-931 (a map created in 1890—i.e. after treaty times); 6-ER-866, 6-ER-905 (testimony of tribal elder Esther Ross

from 1973, which Judge Boldt concluded did not establish rights in the marine waters of Saratoga Passage); 6-ER-839-42 (discussing use of Warm Beach by the Snohomish notwithstanding Stillaguamish presence there and failing to mention fishing or Saratoga Passage); 6-ER-892, 897 (stating that one informant, J.J., "believe[d] the Stillaguamish had places on Camano Island, probably because their 'line' is Warm Beach"); 6-ER-890 (discussing use of Camano City for clamming or gathering and but not delineating which activities were performed by which tribes or whether this occurred at or before treaty times); 6-ER-853, 855-56 (discussing "use" of Camano Island but not for a particular purpose); 6-ER-914 (discussing Stillaguamish villages "farther south" from Kikiallus villages but not specifying a location or mentioning fishing); 6-ER-907 (testifying she was not "totally aware" of the "area south of Camano Island State Park" and it could be "Stillaguamish, possibly Snohomish" territory); 6-ER-909-10 (discussing food cycles without specifying whether the food cycles at issue involved fishing); 2-ER-78-79 (citing the Stillaguamish's proposed—but not adopted—findings of fact and stating Mr. Walker had speculated regarding Port Susan, not Saratoga Passage, and that Mr. Walker admitted "I haven't researched" whether the Stillaguamish regularly fished outside Port Susan).

On this record, the district court did not err in ruling that Stillaguamish failed to establish that they customarily fished the marine waters of Saratoga

Passage at or before treaty times.

5. Stillaguamish presented no evidence of fishing in Skagit Bay at or before treaty times.

Having missed the mark in producing evidence of *fishing* in Skagit Bay, Stillaguamish has also failed to show that the district court clearly erred on this point. App. Br. at 47-51.

Stillaguamish argues that the law of the case requires the district court to accept their expert evidence—which, they argue, establishes that Stillaguamish customarily fished in Skagit Bay. App. Br. at 49 (citing *United States v. Washington*, 129 F. Supp. 3d 1069, 1110 (2015)). The cited cases establish only that the district court may rely on expert evidence to the extent it "show[s] the probable location *and extent* of [a tribe's] U&As." 129 F. Supp. 3d at 1110 (emphasis added). That is exactly what the district court did here.

Stillaguamish's own expert conceded on cross examination that he did not have any evidence of Stillaguamish marine fishing in Skagit Bay:

> 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 (emphasis added). Dr. Friday also agreed that Chief James Dorsey's 1926 affidavit (4-SER-607), on which he relied, provides no evidence of Stillaguamish fishing in the marine waters of Skagit Bay, at or before treaty times.

5-ER-702-703. This testimony alone supports the district court's decision to discount Dr. Friday's opinion on this point.

But there is more. Dr. Onat, an expert in anthropology, archaeology, and the ethnography of the Coast Salish Tribes, testified on behalf of the Swinomish with respect to Skagit Bay (2-SER-28, 31, 44, 125), stating that after reviewing evidence compiled by Dr. Lane, Dr. Snyder, and others, she had found no evidence that Skagit Bay was ever "home grounds" to the Stillaguamish at or prior to treaty times. 2-SER-103. Rather, Skagit Bay was "home grounds" to the Swinomish, Lower Skagit, and Kikiallus, and that those resident groups controlled access to the marine waters of Skagit Bay. 2-SER-106. She also confirmed she had not found any mention in Dr. Snyder's field notes of Stillaguamish fishing in or around Skagit Bay at treaty times. 2-SER-108.

Faced with competing expert interpretation of the evidence, the district court made the permissible choice to disagree with one expert's conclusions regarding whether the Stillaguamish customarily fished in Skagit Bay in favor of another expert who testified to the opposite. This was not error. The Court should affirm.

6. Post-treaty federal relocation of the Stillaguamish does not compel a conclusion of U&A in Holmes Harbor and Penn Cove.

Stillaguamish relies heavily on the post-treaty records of Indian agents to support its assertion of U&A in both Holmes Harbor and Penn Cove. App. Br. at 51-53. This evidence is temporally irrelevant and shows no error by the district

court.

The Indian agent accounts exist because during the "so-called Indian Wars, the government response was to move indigenous communities to internment camps[.]" 3-SER-254. Stillaguamish's own expert explained why the district court had a basis to discount those accounts:

> Q: Why were the Indian agents at Penn Cove and Holmes Harbor?
>
> A: They were assigned to this location because Governor Stevens had grouped tribes together that he believed were closely affiliated with each other, that would not be in intense conflict[] with each other, and that were from the same geographic region.

3-ER-361-362. In short, Stillaguamish presence in these areas came about after treaty times and had nothing to do with where they had customarily fished.

With no evidence placing Stillaguamish in the relevant areas, Dr. Friday speculated that "the context that is created" by the agent's accounts is Stillaguamish's "knowledge of the areas, their movement across the areas, and their presence in the areas." 5-ER-682-683. This speculation does not remotely suggest that Stillaguamish were regularly present (let alone regularly fished) in these areas before the government embarked on the relocation camps.

In 1973, Dr. Lane wrote that "the Stillaguamish Indians . . . remained at home on the Stillaguamish River *until they were called in to the Holmes Harbor location in May 1856*." 6-SER-1246 (emphasis added). Even after being settled at Holmes Harbor, the Stillaguamish "all 'bolted'" back to the Stillaguamish River to

"look after their potatoes." *Id.* The Indian agent later indicated that the Stillaguamish were reluctant to remain at Holmes Harbor because they wanted to go "up the river to fish." *Id.* at 10. Dr. Miller explained at trial that before the government relocation program, Penn Cove was Lower Skagit Territory and Holmes Harbor was Bsigwigwilts and Kikiallus territory—*i.e.* territory of tribes that were entirely separate and distinct from the Stillaguamish. 3-SER-255.

Because of the total lack of evidence that the Stillaguamish were present and regularly fished in Penn Cove and Holmes Harbor at or before treaty time, the district court did not err in rejecting Stillaguamish's position.

7. Undated shellfish middens without ties to Stillaguamish do not constitute evidence of marine fishing in the claimed waters.

Throughout its brief, Stillaguamish emphasizes the presence of shell middens in various locations within the Lower Stillaguamish River Delta, or near the claimed waters, arguing that such evidence shows that the district court erred. *E.g.*, App. Br. at 57. These shell middens do not remotely establish Stillaguamish U&A fishing in the claimed marine waters.

The source for the shell midden evidence is Harlan Smith, an archaeologist who conducted investigations on the north Pacific coast in 1899. 4-SER-548. At trial, Dr. Miller and Dr. Onat provided valuable context to Mr. Smith's work. Dr. Miller testified, "archaeologists wouldn't make the assumption of who deposited those middens there. You'd have to show the connection to a present-day tribe or

a treaty-period tribe." 4-SER-371. Further, "archeologists in the last 10 or 15 years are beginning to understand the extent to which middens have been used in various purposes, including creating house platforms, platforms for defensive sites, and so forth." 4-SER-369. Thus, even if middens were the result of Stillaguamish activities, the Stillaguamish could have "used middens that were deposited much earlier." 4-SER-370.

Dr. Onat, having experience performing archaeological work involving shell middens, testified that it is possible to date shell middens through radiocarbon dating. 2-SER-40-41. She further testified that it is possible to determine which beach the shells came from based on an analysis of the composition of the middens. 2-SER-41. But the middens Dr. Smith found were never dated or tested—by Dr. Smith or anyone else. 2-SER-44. Nor did Dr. Smith link the middens to the Stillaguamish in his reports. 2-SER-45.

The expert testimony at trial established that shell middens are capable of being dated and tied to specific marine areas (but no such effort was made here), that tribes could potentially use middens created by others, and that middens can be evidence of other uses beside fishing in marine waters. This evidence shows nothing regarding Stillaguamish U&As in marine waters. The district court's finding that "there was not sufficient evidence in the record to establish when the shell middens were created or who created them" was correct, and well within the

bounds of reason. 1-ER-5.

VI. CONCLUSION

After an eight-day trial, Stillaguamish were unable to produce any evidence of fishing in the claimed waters, at and before treaty times. Instead, Stillaguamish invites this Court to reverse based on irrelevant evidence, expert speculation, and misstatements of the law of the case. The Court can—and should—decline the invitation. The district court's conclusion that Stillaguamish failed to show by a preponderance of the evidence that they customarily fished the claimed waters is a plainly permissible conclusion on this record. The Court should affirm.

DATED this 26th day of June, 2023.

UPPER SKAGIT INDIAN TRIBE

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FOR THE NINTH CIRCUIT

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