No. 24-5511

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents,

and

SAUK-SUIATTLE INDIAN TRIBE, et al.,

Real-Parties-in-Interest.

On Appeal From the United States District Court
For the Western District of Washington, Case No. 2:17-sp-00003-RSM,
Honorable Ricardo S. Martinez, District Judge

UPPER SKAGIT INDIAN TRIBE'S ANSWER TO SAUK-SUIATTLE INDIAN TRIBE'S AMICUS CURIAE BRIEF

Tyler L. Farmer, WSBA #39912
Ariel A. Martinez, WSBA #54869
BRYAN CAVE LEIGHTON PAISNER LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104
Telephone: 206-623-1700
Facsimile: 206-623-8717
E: tyler.farmer@bclplaw.com
E: ariel.martinez@bclplaw.com

David S. Hawkins, WSBA #35370
UPPER SKAGIT INDIAN TRIBE
25911 Community Plaza Way
Sedro Wooley, WA 98284
E: dhawkins@upperskagit.com

Attorneys for Upper Skagit Indian Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules/Statutes

I. RESPONSE TO AMICUS

Interested Party Sauk-Suiattle Indian Tribe's ("Sauk") Amicus Curiae Brief (Dkt. #15.1) presents arguments that are neither correct nor helpful to this Court in reviewing Stillaguamish Tribe of Indians' ("Stillaguamish") second appeal. Sauk urges two law of the case arguments (Questions Presented 1 & 3) that the Ninth Circuit already has reviewed and decided in the negative. Sauk further argues two procedural issues that it purports required the district court to find a "presumption or *prima facie* case" of Stillaguamish's U&A in the claimed waters (Question Presented 2) or this Court to reverse the district court (Question Presented 4). Rule 52(c) squarely addresses these questions and resolves them in favor of Upper Skagit.

The Ninth Circuit should affirm the district court's amended order.

A. The Ninth Circuit Already Determined that the District Court Applied the Correct Legal Standard (Questions Presented 1 & 3).

In *United States v. Washington* ("Final Decision #1), Judge Boldt determined that "every fishing location where members of a tribe customarily fished from time to time at and before treaty times . . . is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish." 384 F. Supp. 312, 332 (W.D. Wash. 1974) (Final Decision #1), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). This has been the law of the case for determining a tribe's U&A for over fifty years.

Sauk argues that a tribe need only prove that it fished in the claimed waters *before* treaty times and not "at and before treaty times." This is contrary to the plain language of Final Decision #1, which requires both. *Id.* Had Judge Boldt intended the requirements to be disjunctive he would have indicated that fishing was required at *or* before treaty times. That both are required is evidenced in Judge Boldt's findings. *E.g.*, *id.* at 375-76 (Findings 129-132 identifying Sauk's usual and accustomed fishing grounds based on evidence "[p]rior to and during treaty times"); *id.* at 379 (Finding 146 "during treaty times" Stillaguamish's usual and accustomed fishing places were "Stillaguamish River and its north and south forks"). Sauk's effort to undo this clear language based on Judge Boldt's discussion of the pre-treaty role of fishing among Northwest Indians, *id.* at 350-53, is unpersuasive. That discussion refers extensively to fishing "at *and* prior to the time of the treaties" and "[a]t the time of the treaties *and* prior thereto." *Id.* (emphasis added). Sauk's argument is contrary to the law of the case and Judge's clear intent.

But this Court need not, and should not, revisit any argument that the district court failed to identify and apply the law of the case. Stillaguamish previously appealed this question, and this Court affirmed the district court's inquiry into "where the Tribe 'customarily fished' 'at and before treaty times.'" *Stillaguamish Tribe of Indians v. Washington*, 102 F.4th 955, 960 (9th Cir. 2024). Specific to

whether there needed to be evidence of fishing at treaty times, the Ninth Circuit held that requirement is "perfectly consistent with Final Decision #1" which requires "proof of fishing 'at *and* before treaty times.'" *Id.* (emphasis original). This Court also found that "the district court has handled numerous proceedings brought under Paragraph 25. We therefore do not doubt that the district court was very familiar with and applied the U&As test set forth in *Final Decision #1*." *Id.*

Sauk next urges that the district court erroneously required "substantial evidence" of fishing and therefore imposed a higher burden of proof on Stillaguamish without any notice to the parties. The Amended Order refers to "substantial evidence" in a single paragraph, 1-ER-5, to compare the extensive evidence of Stillaguamish's riverine fishing with the lack of evidence of its marine fishing, not to articulate the burden of proof. The district court did not apply a "substantial evidence" burden of proof; rather, it repeatedly applied a preponderance of the evidence standard. *See* 1-ER-3, 5, 11. As with the law of the case, the Ninth Circuit already found that the district court applied the correct standard of proof. 102 F.4th at 960 ("The court repeatedly noted that the Tribe had to establish U&As by a preponderance of the evidence as *Final Decision #1* dictated.").

Because this Court previously approved Judge Martinez's identification of the law of the case and the trial court did not amend that portion of the Order (1-

ER-2) no further review is necessary or appropriate. *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995) (as a "general rule" appellate court will not "reconsider questions which another panel has decided on a prior appeal in the same case").

B. Sauk Misunderstands the Procedural Posture of this Subproceeding and This Court's Role on Review.

Upper Skagit moved for judgment on partial findings under Federal Rule of Civil Procedure 52(c). Under this rule, "the court may enter judgment as a matter of law . . . with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Fed. R. Civ. P. 52(c); *Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Circuit 2006). Contrary to Sauk's assertion, Upper Skagit did not move for partial summary judgment and Rule 52(c) does not require the court to draw any inferences in favor of the non-moving party. *Compare* Amicus Br. at 4 *with Ritchie*, 451 F.3d at 1023. Sauk argues that Stillaguamish's evidence in total should have been sufficient to raise a presumption or *prima facie* case of U&A but it provides nothing more than conclusory argument (Question Presented 2), which directly conflicts with the posture of this subproceeding.

On appeal, this Court reviews the district court's findings of fact for 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 the extent Sauk urges that this Court should employ a *de novo* review, the applicable rules provide

otherwise. Sauk's additional complaint that the district court did not "state in detail" citations to the record (Amicus Br. at 4) is baseless. The district court is not obligated to provide line-by-line citations to the transcript or exhibits, and Sauk cites no authority for that proposition. Rather, the district court must find facts and state its conclusions of law consistent with Federal Rule of Civil Procedure 52(a), and its findings need only be sufficient to allow the appellate court to review them. *Alpha Distrib. Co. of Cal. v. Jack Daniel Distillery*, 454 F.2d 442, 453 (9th Cir. 1972). Sauk provides no reason why the amended order fails this threshold inquiry.

II. CONCLUSION

The Court should affirm the amended order.

DATED this 20th day of February, 2025.

UPPER SKAGIT INDIAN TRIBE

By *s/David S. Hawkins*
David S. Hawkins, WSBA #35370

BRYAN CAVE LEIGHTON PAISNER LLP

By *s/Tyler L. Farmer*
By *s/Ariel A. Martinez*
Tyler L. Farmer, WSBA #39912
Ariel A. Martinez, WSBA #54869

Attorneys for Upper Skagit Indian Tribe

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature *s/ Tyler L. Farmer* **Date** **2/20/2025**