

The Honorable Ricardo S. Martinez

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,
Defendants.

**Case No. C70-9213
Subproceeding: 17-03**

**STILLAGUAMISH TRIBE OF
INDIANS' TRIAL BRIEF**

**TRIAL DATES: MARCH 21-29,
APRIL 11-14**

STILLAGUAMISH TRIBE OF INDIANS,
Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,
Respondent(s).

I. INTRODUCTION

This is a treaty rights case 167 years in the making. The Stillaguamish Tribe of Indians (“Stillaguamish”) did more at treaty times than just fish their namesake River. Stillaguamish—like every other Coast Salish group in western Washington at and before treaty times—engaged in

1 strategic intermarriage with their neighbors, participated in trade, and travelled widely in their own
 2 salt water canoes to access a variety of marine resources throughout the Puget Sound region. And,
 3 Stillaguamish, like every other Coast Salish group in western Washington at and before treaty
 4 times, fished for all available species in the interconnected marine waters adjacent to their winter
 5 villages and seasonal encampments on the salt water.

6 Applying the same evidentiary standards as Judge Boldt¹ in *United States v. Washington*,
 7 384 F.Supp. 312 (W.D. Wash. 1974) (“*Final Decision I*”), this Court must draw reasonable
 8 inferences from: Stillaguamish’s evidence of treaty-time territory that extended from the lower
 9 Stillaguamish River delta across Port Susan, Skagit Bay, and Camano Island to Saratoga Passage;
 10 anthropological, ethnographic, historical, and archaeological evidence of Stillaguamish use of
 11 marine resources; and documented Stillaguamish treaty-time travel, intermarriage, and regular
 12 seasonal migration for marine resources throughout Saratoga Passage, Holmes Harbor, Penn Cove,
 13 and Deception Pass to conclude that it is more likely than not that Stillaguamish’s usual and
 14 accustomed fishing areas at treaty times encompassed the interconnected marine waters of the
 15 entirety of Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and Deception
 16 Pass (collectively, “Claimed Waters”).

17 II. LEGAL ISSUE IN THE PROCEEDING

18 A. STILLAGUAMISH’S MARINE USUAL AND ACCUSTOMED FISHING AREAS

19 The only legal issue² at trial is the whether the historical, ethnographic, archeological
 20 evidence and expert testimony, and all reasonable inferences drawn therefrom, demonstrate by a
 21 preponderance of the evidence that Stillaguamish customarily fished the Claimed Waters at and
 22 before treaty times.

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 25 ¹ See also Dkt. #252 at 11.

26 ² Respondent Tribes—Swinomish, Tulalip, and Upper Skagit—have repeatedly argued that: (1) this Court lacks
 27 subject matter jurisdiction; and,(2) Stillaguamish’s claims are barred by collateral estoppel, equitable estoppel, and
 res judicata. This Court has now rejected the jurisdictional arguments twice: first, three years ago on March 21, 2019,
 Dkt. #91, and again yesterday on March 15, 2022, Dkt. #252.

III. WITNESSES

Stillaguamish will call two witnesses in its case-in-chief, and reserves the right to recall them on rebuttal.

A. DR. CHRIS FRIDAY

Dr. Friday will testify as an expert ethnohistorian on behalf of Stillaguamish regarding the usual and accustomed marine fishing grounds of Stillaguamish at and before treaty times.

Dr. Friday is a historian with a specialization in ethnohistory and Indigenous peoples, and a tenured professor at Western Washington University. He will testify that he considered ethnographic materials generated by scholars, field notes, depositions and testimony in twentieth-century cases involving Coast Salish peoples, tribal statements, and historical records to reach his opinions concerning the claimed interconnected waters. Dr. Friday will testify that Stillaguamish maintained villages and encampments in the lower Stillaguamish River delta in Port Susan and Skagit Bay, and that Stillaguamish occupied portions of Camano Island at and before treaty times. Dr. Friday will testify that shell middens located on Camano Island and in the lower Stillaguamish River delta, along with the historical and ethnographic evidence documenting Stillaguamish clamming and fishing activities in the Claimed Waters indicate that Stillaguamish utilized the marine resources of the Claimed Waters at and before treaty times. Dr. Friday will testify that the historical and ethnographic evidence shows Stillaguamish regularly traveled the Claimed Waters as well as the larger Puget Sound and Salish Sea at and before treaty times. The historical and ethnographic evidence will demonstrate that Stillaguamish engaged in customary Coast Salish cultural practices at and before treaty times, including exogamy and seasonal resource migration throughout the Claimed Waters. From this historical, archeological, and ethnographic evidence, Dr. Friday will offer his expert opinion that Stillaguamish more likely than not regularly fished the Claimed Waters at and before treaty times. Dr. Friday will testify in person.

B. DR. DEWARD E. WALKER, JR.

Dr. Walker is the expert witness retained by the Respondent Tulalip Tribes. Nevertheless, Stillaguamish will call him to testify regarding his opinions as to Stillaguamish treaty-time fishing

1 in Port Susan and other marine waters. Dr. Walker is expected to testify that, at and before treaty
2 times, Stillaguamish was part of Coast Salish culture. Dr. Walker is expected to further state his
3 opinion that Stillaguamish fished for all available species of finfish and shellfish in the entirety of
4 Port Susan, and beyond, at and before treaty times. Dr. Walker is expected to testify that
5 Stillaguamish regularly used Port Susan at treaty times for fishing activities to the extent fish or
6 shellfish were available. Dr. Walker is expected to testify remotely via Zoom from at or near his
7 home in Colorado.

8 Tulalip filed a “Motion for Protective Order and To Quash Subpoena” on March 16, 2022
9 in an 11th hour attempt to conceal Dr. Walker’s testimony. Dkt. #253. Recognizing the nearness
10 to trial, Stillaguamish will endeavor to separately respond to the issues raised in Tulalip’s Motion
11 tomorrow.

12 IV. APPLICABLE LAW

13 A. THE STANDARD OF PROOF

14 Stillaguamish has the burden of proof in this case to establish the location of its usual and
15 accustomed areas in marine waters by a preponderance of the evidence. Importantly, the
16 applicable evidentiary standard must be no different than that applied in earlier proceedings by
17 Judge Boldt to establish any other tribe’s usual and accustomed fishing grounds. *See* Dkt. #252 at
18 10-12 (Order Denying Motions for Summary Judgment and Motion to Exclude Expert Testimony).

19 This case arises under the Court’s continuing jurisdiction, retained under the Permanent
20 Injunction set forth in *Final Decision 1*, to consider “the location of any of a tribe’s usual and
21 accustomed fishing grounds not specifically determined by Final Decision #1.” *United States v.*
22 *Washington*, 384 F. Supp. at 419. In making this determination, the Court steps into the place
23 occupied by Judge Boldt when he set forth the usual and accustomed fishing places for fourteen
24 tribes within the original case area. As recognized by this Court seven years ago after the trial in
25 Subproceeding 09-1, and again in the Court’s Order Denying Motions for Summary Judgment and
26 Motion to Exclude Expert Testimony dated March 16, 2015, in this Subproceeding, the Court
27 applies the same evidentiary standards applied by Judge Boldt in *Final Decision 1* and elaborated

1 upon in the nearly fifty years of ensuing subproceedings. *United States v. Washington*, 88 F. Supp.
2 3d 1203, 1219-20 (W.D. Wash. 2015), *aff'd in part and rev'd in part*, 873 F.3d 1157 (9th Cir.
3 2017); Dkt. #252 at 10-12.

4 An adjudication of treaty-time fishing activity is not a typical civil case. Courts have
5 recognized that considering the inherent difficulty in proving treaty-time fishing activity, the
6 preponderance standard is “relaxed.” *United States v. Washington*, 730 F.2d 1314, 1317 (9th Cir.
7 1984). As the Ninth Circuit has explained: “Documentation of Indian fishing during treaty times
8 is scarce. Dr. Lane, an acknowledged authority in the field, has testified that what little
9 documentation does exist is ‘extremely fragmentary and just happenstance.’” *United States v.*
10 *Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988). Evidence concerning Indian fishing in
11 treaty times is sketchy and less satisfactory than evidence available in the typical civil proceeding.
12 As Judge Boldt noted, “[i]n determining usual and accustomed fishing places the court cannot
13 follow stringent proof standards because to do so would likely preclude a finding of any such
14 fishing areas.” *United States v. Washington*, 459 F. Supp. at 1059. “Accordingly, the stringent
15 standard of proof that operates in ordinary civil proceedings is relaxed.” *Lummi*, 841 F.2d at 318.

16 In determining whether Stillaguamish has met its burden, the Court bases its findings “upon
17 a preponderance of the evidence found credible and inferences reasonably drawn therefrom.” *Id.*
18 at 348. It is the law of the case that Stillaguamish may rely on both direct evidence and reasonable
19 inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show
20 the probable location and extent of their usual and accustomed fishing areas. *United States v.*
21 *Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015) (citing *United States v. Washington*,
22 626 F.Supp. 1404, 1531 (W.D. Wash. 1985)); *see also United States v. Washington*, 459 F. Supp.
23 1020, 1059 (W.D. Wash. 1978) (“The anthropological reports of Dr. Barbara Lane, which this
24 court finds highly credible, have been very helpful in determining by direct evidence or reasonable
25 inferences the probable location and extent of usual and accustomed fishing areas.”). For example,
26 in *Lummi*, the Ninth Circuit affirmed this Court’s ruling that Tulalip fished off the west coast of
27 Whidbey Island based entirely upon reasonable inference, rather than direct evidence:

1 Given 1) evidence of Tulalip fishing on Whidbey Island, 2) the communal nature of Indian
2 marine fishing, and 3) documentary evidence that the Tulalips fished the San Juan Islands
3 and as far north as Point Roberts, it is reasonable to conclude that the Tulalips also fished
4 the nearby waters off the west coast of Whidbey Island.

5 *Lummi*, 841 F.2d at 319-20; *see also United States v. Washington*, 730 F.2d 1314, 1318 (9th Cir.
6 1984) (making a reasonable inference based on post-treaty material as follows: “About 1900,
7 [Makah] fished regularly at areas about 40 miles out, and probably did so in the 1850’s.”). Thus,
8 in evaluating whether Stillaguamish has met its burden, the Court gives due consideration to the
9 fragmentary nature and inherent limitations of the available evidence while making its findings on
10 a more probable than not basis.

11 This is especially true in a case like this where open marine waters are at issue. There are
12 greater difficulties in specifying or delineating marine areas used by one or another Coast Salish
13 group than is the case with river areas. *United States v. Washington*, 626 F.Supp. at 1528.
14 Similarly, it is easier to specify relatively stable locations in marine waters, such as reef net
15 locations or halibut banks, than it is to delineate general marine areas fished 167 years ago. Under
16 the relaxed standard consistently applied in this case, the Court has accordingly held that fishing
17 activity may be “presumed” in a body of water that bordered a tribe’s village locations, including
18 with some limitations, those villages and territories identified in Indian Claims Commission
19 proceedings. *United States v. Washington*, 459 F. Supp. at 1059. The Court also has relied upon
20 the testimony of tribal elders and, in particular, expert testimony as evidence “to show the probable
21 location and extent of [a tribe’s] U&As.” *United States v. Washington*, 129 F.Supp.3d at 1110
22 (citing *United States v. Washington*, 626 F.Supp. at 1431); *United States v. Washington*, 459 F.
23 Supp. at 1059; *see also United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984). In the same
24 way, shell middens can demonstrate “aboriginal... occupancy evidenc[ing] a community
25 continuously engaged in harvesting” particular species. *United States v. Washington*, 129
26 F.Supp.3d at 1091.
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1 **B. THE STANDARD FOR USUAL AND ACCUSTOMED FISHING AREAS**

2 It is the law of the case that every fishing location where members of a tribe customarily
3 fished from time to time at and before treaty times, however distant from the then usual habitat of
4 the tribe, and whether or not other tribes then also fished in the same waters, is a usual and
5 accustomed ground or station at which the treaty tribe reserved, and its members presently have,
6 the right to take fish. *United States v. Washington*, 384 F. Supp. at 332; *see also United States v.*
7 *Washington*, 18 F.Supp.3d 1123, 1138-39 (W.D. Wash. 1987) (same); *United States v.*
8 *Washington*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (same).

9 A tribe also does not have to prove it often or continuously fished an area for it to be a
10 usual and accustomed fishing ground. Rather, the relevant inquiry under the law of the case in
11 *United States v. Washington* is whether a tribe “regularly” engaged in a treaty practice at treaty
12 time, even if only on a seasonal basis, in a manner that was more than ‘incidental’ or ‘occasional.’”
13 *See e.g., United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 435 (9th Cir. 2000); *United*
14 *States v. Washington*, 20 F.Supp.2d 828, 838 (W.D. Wash. 2007).

15 This standard is well-established. In 1974, Judge Boldt described the standard in *United*
16 *States v. Washington* this way:

17 ‘Usual and accustomed,’ being closely synonymous words, indicate the exclusion
18 of unfamiliar locations and those used infrequently or at long intervals and
19 extraordinary occasions. Therefore, the court finds and holds that every fishing
20 location where members of a tribe customarily fished from time to time at and
21 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, is a usual and
accustomed ground or station at which the treaty tribe reserved, and its members
presently have, the right to take fish.

22 *Final Decision 1*, 384 F. Supp. at 332. This standard affords treaty protection to those areas
23 regularly fished by members of a given tribe. Put differently, the words “usual and accustomed,”
24 as contemplated by the Treaty, have been defined to “indicate the exclusion of unfamiliar locations
25 and those used infrequently or at long intervals and extraordinary occasions.” *Id.* at 332.
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1 Once the Court declares a usual and accustomed ground, under law of the case, the tribe
 2 has the right to take every aquatic animal to be found within a tribe’s treaty fishing area, including
 3 finfish, shellfish and marine mammals. This Court has previously ruled that the term “fish” “is a
 4 word which fairly encompasses every form of aquatic animal life.” *United States v. Washington*,
 5 873 F. Supp. 1422, 1430 (W.D. Wash. 1994), *aff’d in relevant part and rev’d in part on other*
 6 *grounds*, 157 F.3d 630 (9th Cir. 1998).

7 **V. SUMMARY OF BACKGROUND FACTS**

8 **A. THE CLAIMED WATERS**



23 The Claimed Waters lie within the Whidbey Basin of Puget Sound. Port Susan is bounded
 24 on the west by Camano Island and on the east by the mainland. The Stillaguamish River empties
 25 into Port Susan via Hat Slough and South Pass, near Stanwood, Washington. To the south, Port
 26 Susan connects with Puget Sound by way of Possession Sound and Saratoga Passage. To the
 27

1 north, a swampy isthmus running between the mainland and Camano Island separates Port Susan
2 from Skagit Bay. Warm Beach is located on the east shore of Port Susan, approximately two miles
3 south of Hat Slough and about five miles south of Stanwood.

4 Saratoga Passage is bounded on the west by Whidbey Island and on the east by Camano
5 Island. The bays of Holmes Harbor and Penn Cove bordered on the west by Whidbey Island and
6 are connected to the marine waters of Saratoga Passage on the east. Utsalady is located on the
7 northern end of Camano Island on Utsalady Bay. Saratoga Passage connects with Puget Sound by
8 way of Possession Sound and Port Susan to the south, and via Skagit Bay to the north.

9 Skagit Bay is bounded on the west by Whidbey Island, on the south by Camano Island and
10 on the east by the mainland. The Stillaguamish River empties into Skagit Bay via West Pass, near
11 Stanwood, Washington. Approximately fifteen miles to the north of the mouth of the
12 Stillaguamish River, Skagit Bay connects with the Salish Sea by way of Deception Pass.

13 **B. STILLAGUAMISH TREATY-TIME TERRITORY WAS ADJACENT TO THE CLAIMED**
14 **WATERS**

15 The historical and ethnographic evidence will demonstrate that Stillaguamish maintained
16 permanent winter villages and seasonal encampments in the lower Stillaguamish River delta and
17 on Camano Island at and before treaty times. The testimony of Stillaguamish tribal elders born in
18 treaty times and accounts of early settlers establish that Stillaguamish once occupied the lower
19 Stillaguamish River delta, where Stillaguamish people lived in permanent winter villages, and
20 Camano Island, where Stillaguamish people maintained seasonal encampments. Anthropologists
21 and ethnographers also have opined that Stillaguamish occupied the lower Stillaguamish River
22 delta and Camano Island at and before treaty times. Historical maps of western Washington tribal
23 territories at and before treaty times place the marine waters of Skagit Bay, Saratoga Passage, and
24 in some cases, Deception Pass, Penn Cove, and Holmes Harbor within known Stillaguamish
25 territory. Under the law of the case, the Court “presume[s]” regular Stillaguamish fishing activity
26 at and before treaty times in the adjacent Claimed Waters of Port Susan, Skagit Bay, and Saratoga
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1 Passage based on these historical Stillaguamish villages and encampments. *United States v.*
2 *Washington*, 459 F. Supp. at 1059.

3 **1. Historical Maps of Stillaguamish Treaty-Time Territory In The Lower**
4 **Stillaguamish River Delta And Camano Island**

5 Historical maps of western Washington tribal territories place the lower Stillaguamish
6 River delta and portions of Camano and Whidbey Islands within Stillaguamish territory at and
7 before treaty times. Ex. SW-020 at 98; Ex. SG-068 at 3. These historical maps also place within
8 Stillaguamish treaty-time territory the marine waters of Port Susan, lower Skagit Bay, as well as
9 portions of Saratoga Passage, including Penn Cove and Holmes Harbor. *Id.*

10 **2. Early Settler Accounts of Stillaguamish Treaty-Time Territory In The Lower**
11 **Stillaguamish River Delta**

12 The firsthand accounts of Nels Bruseth describe historic Stillaguamish occupation of
13 permanent winter villages on or near the eastern shore of Port Susan and the shoreline of lower
14 Skagit Bay. Mr. Bruseth, the son of a pioneer Scandinavian family and amateur historian, was
15 born in 1889 in Stanwood, Washington. As a young boy, Mr. Bruseth became acquainted with his
16 neighbors, the Stillaguamish, and learned their history. Mr. Bruseth first published “Indian Stories
17 and Legends of the Stillaguamish and Allied Tribes” in 1926, and a second edition entitled “Indian
18 Stories and Legends of the Stillaguamish, Sauk and Allied Tribes” beginning in 1950, which
19 focused on the Stillaguamish people and their customs at and before treaty times. Ex. SG-057;
20 Ex. SW-031. Mr. Bruseth’s books included several descriptions of Stillaguamish permanent
21 winter villages and seasonal encampments near Stanwood, Hat Slough, and Warm Beach in the
22 lower Stillaguamish River delta on or near the eastern shore of Port Susan and shoreline of lower
23 Skagit Bay. Ex. SG-057 at 5-6; Ex. SW-031 at 12, 14.

24 The reports of early settler Gustav Joergenson likewise describe Stillaguamish permanent
25 winter villages and seasonal encampments in the lower Stillaguamish River delta by Stanwood
26 near the eastern shore of Port Susan and the shoreline of lower Skagit Bay. Gustav Joergenson, a
27 local historian and antiquarian, was born in 1883 and lived his entire life in Stanwood, Washington,

1 where he chronicled the history of Stanwood, including that of the Stillaguamish. In 1948, Mr.
 2 Joergenson published “History of the Twin Cities” in the Stanwood Tidings newspaper, in which
 3 he described remnants of old Stillaguamish camping places and villages. Ex. SG-067. Mr.
 4 Joergenson identified “the oldest and largest” of the seasonal encampments and villages as the
 5 Stillaguamish village north of Stanwood, Washington, near the shoreline of lower Skagit Bay. *Id.*

6 **3. Stillaguamish Tribal Member Testimony Recounts Stillaguamish Treaty-Time**
 7 **Territory As Including The Lower Stillaguamish River Delta And Camano Island**

8 The testimony and records of Stillaguamish tribal leaders recount Stillaguamish permanent
 9 winter villages and seasonal encampments throughout the lower Stillaguamish River delta and
 10 Camano Island at and before treaty times. Stillaguamish tribal members, many of whom were
 11 born at treaty times, consistently testified in legal proceedings spanning the twentieth century that
 12 Stillaguamish treaty-time territory spanned from Warm Beach on the eastern shore of Port Susan
 13 to Milltown on the eastern shore of Skagit Bay to Camano Island, which is bounded by Port Susan,
 14 Skagit Bay, and Saratoga Passage.

15 **a. *Duwamish et al. v. United States***

16 Stillaguamish tribal member testimony presented to the Court of Claims in *Duwamish et*
 17 *al. v. United States*, 79 C. Cl. 530 (1934) (“*Duwamish et al.*”), recounted Stillaguamish treaty-time
 18 territory as spanning Snohomish and Skagit Counties from Warm Beach to Milltown, Washington,
 19 including the lower Stillaguamish River delta, the shoreline of Skagit Bay as well as Camano
 20 Island. Stillaguamish tribal member testimony also detailed numerous treaty-time permanent
 21 winter villages and seasonal encampments in the lower Stillaguamish River delta located on or
 22 near the eastern shore of Port Susan and lower Skagit Bay.

23 In preparation for litigation in *Duwamish et al.*, the Stillaguamish met to discuss its
 24 territorial claim. Records from Stillaguamish tribal meetings indicate the treaty-time “[b]oundary
 25 lines of Stillaguamish tribe start[ed] from Marysville around Warm Beach to water section thru
 26 Camano Island to Milltown,” then to the headwaters of Deer Creek and Pilchuck to the “head water
 27 of Stillaguamish River,” and the southern boundary began “[a]t the north west corner of Tulalip

1 Indian Reservations following to north east point of Reservation to head waters of sultan from here
2 to head waters of Sauk [River].” Ex. SG-085.

3 Stillaguamish tribal member James Dorsey also swore an affidavit in 1926 (“Dorsey
4 Affidavit”) on behalf of Stillaguamish regarding the treaty-time locations of Stillaguamish
5 permanent winter villages and encampments in the lower Stillaguamish River delta. James Dorsey
6 (Quil-Que-Kadam) was a Stillaguamish elder and chief born in 1850 near Florence, Washington.
7 In his affidavit, Chief Dorsey identified over a dozen Stillaguamish winter villages, encampments
8 and burial grounds in the lower Stillaguamish River delta, including locations at Warm Beach, Hat
9 Slough, Florence and in the Stanwood area on or near the eastern shore of Port Susan and shoreline
10 of lower Skagit Bay. Ex. SG-071; Ex. SG-072; Ex. USA-28 at 26-29. Stillaguamish entered the
11 Dorsey Affidavit into evidence as Claimants’ Ex. E in *Duwamish et al.* Ex. SW-014 at 109. James
12 Dorsey also assisted in preparing a map on behalf of Stillaguamish that depicting its treaty-time
13 territorial boundaries, which was also entered into evidence as Claimants’ Ex. D. *Id.* at 108.



22 Ex. SG-073. Other Stillaguamish tribal members affirmed in their corresponding *Duwamish et al.*
23 testimony that the villages identified in the Dorsey Affidavit were accurate, and that the boundaries
24 depicted on the map entered as Claimants’ Ex. D depicted Stillaguamish treaty-time territory. SW-
25 014 at 118, 121.

1 **b. *Stillaguamish Tribe of Indians v. United States***

2 Stillaguamish tribal member testimony presented to the Indian Court of Claims (“ICC”) in
 3 *Stillaguamish v. United States*, Dkt. No. 207 (Ind. Cl. Comm’n), likewise described Stillaguamish
 4 treaty-time territory as encompassing the lower Stillaguamish River delta, the shoreline of lower
 5 Skagit Bay as well as Camano Island. Before the ICC, Stillaguamish claimed the entirety of the
 6 Stillaguamish River watershed from its headwaters to its mouth in Snohomish and Skagit Counties,
 7 including the areas of Warm Beach and Stanwood in the lower Stillaguamish River delta. Ex. SG-
 8 107 at 1, 6. Stillaguamish elder Esther Ross testified to the ICC that Stillaguamish territory at
 9 treaty times included Warm Beach and Stanwood in the lower Stillaguamish River delta. Ex. SG-
 10 100 at 16, 20. Even the opposing party—the United States—conceded that Stillaguamish treaty-
 11 time territory included the lower Stillaguamish River delta including the eastern shore of Port
 12 Susan and the shoreline of lower Skagit Bay. Ex. SG-104.

13 **c. *United States v. Washington***

14 Before Judge Boldt in *Final Decision 1*, Stillaguamish elder Esther Ross again testified
 15 that Stillaguamish treaty-time territory extended south from Milltown near the shore of Skagit Bay
 16 south to the northern border of the Tulalip Reservation, including the eastern shore of Port Susan
 17 and the shoreline of lower Skagit Bay. Ex. SG-137 at 247. Esther Ross also testified that
 18 Stillaguamish territory at and before treaty times extended over halfway to Camano Island at
 19 Utsalady. *Id.*

20 **4. Ethnographic Sources Confirm Stillaguamish Treaty-Time Territory Included**
 21 **The Lower Stillaguamish River Delta And Camano Island**

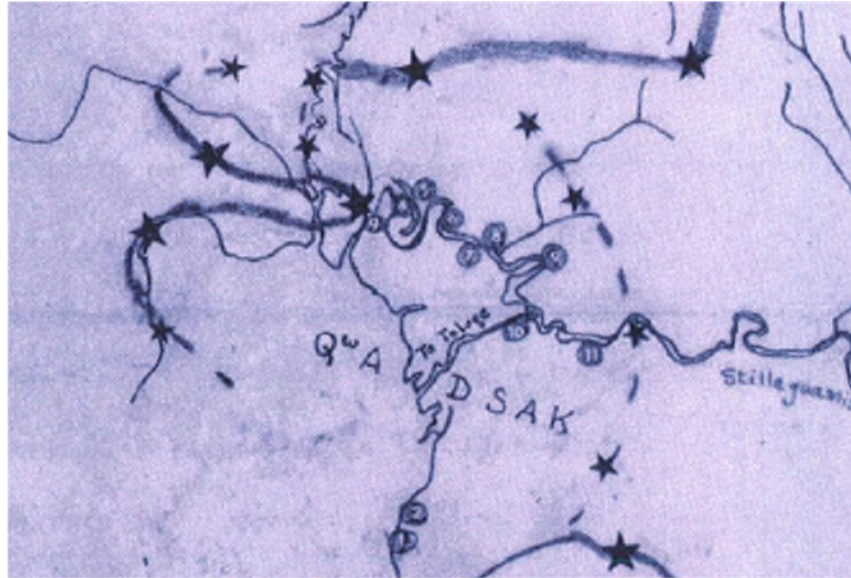
22 Ethnographic sources confirm historic Stillaguamish tribal member testimony that at and
 23 before treaty times, Stillaguamish maintained permanent winter villages throughout the lower
 24 Stillaguamish River delta and seasonal encampments on Camano Island.

25 **a. *Stillaguamish Tribe of Indians v. United States***

26 Expert testimony presented to the ICC regarding Stillaguamish territory at and before treaty
 27 times cataloged Stillaguamish winter villages and seasonal encampments throughout the lower

1 Stillaguamish River delta on or near the eastern shore of Port Susan and the shoreline of lower
2 Skagit Bay, and on Camano Island.

3 In her testimony to the ICC, Dr. Snyder identified over a dozen Stillaguamish treaty-time
4 winter villages, seasonal encampments and cemeteries in the lower Stillaguamish River delta near
5 Stanwood, Florence, Hat Slough and Warm Beach. Ex. SG-095; Ex. SG-096.



16 Ex. SG-096. In forming her opinions about Stillaguamish treaty-time winter villages and seasonal
17 encampments, Dr. Snyder relied on the Dorsey Affidavit and the accounts of Nels Bruseth, among
18 others. Ex. SG-095. Dr. Snyder also testified that Stillaguamish used the northern part of Camano
19 Island at and before treaty times. Ex. SG-094 at 30-31, 39. During her testimony on behalf of the
20 Kikiallus Tribe to the ICC, Dr. Snyder reiterated her opinion that Stillaguamish occupied the lower
21 Stillaguamish River delta at and before treaty times and that she “found them at Port Susan.” Ex.
22 SG-110 at 20-21, 83.

23 Dr. Snyder’s ethnographic field notes provide further evidence of Stillaguamish occupation
24 of Camano Island and the lower Stillaguamish River delta at and before treaty times. Dr. Snyder’s
25 ethnographic sources informed her that Stillaguamish had treaty-time places on Camano Island,
26
27

1 and that Stillaguamish lived on the west side of Camano Island on or near the shoreline of Saratoga
2 Passage. Ex. SG-119 at 17; Ex. SG-121 at 3.

3 Dr. Carrol Riley testified in Stillaguamish's ICC case that at and before treaty times, the
4 people from the Stillaguamish River used the Warm Beach area and the delta of the Skagit and
5 Snohomish Rivers adjacent to Port Susan and Skagit Bay. Ex. SG-097 at 13. Dr. Riley also opined
6 that Stillaguamish used Camano Island at and before treaty times. Ex. SG-097 at 12, 71-72. In
7 his report on the Stillaguamish to the ICC, Dr. Riley identified Stillaguamish villages in the lower
8 Stillaguamish River delta, including a village at the mouth of the Stillaguamish River. Ex. SG-
9 098 at 4. In his 1956 ethnographic work for the ICC titled "Early History of Western Washington
10 Indians," Dr. Riley explained that at and before treaty times, the areas around a village were used
11 by the people who occupied those villages, and that each village had its own major fishing region
12 and thus concentrated on the economic potentialities surrounding the village. Ex. SG-099 at 29-
13 30. In other words, Stillaguamish would have use the areas proximate to its winter villages and
14 seasonal encampments at treaty times, including the fishing regions of Port Susan, Skagit Bay and
15 Saratoga Passage.

16 Colin Tweddell in his ethnographic report to the ICC titled "A Historical and Ethnological
17 Study of the Snohomish Indian People," reported that at and before treaty times, Stillaguamish
18 participated in the food cycles of Camano Island, the Tulalip Coast and in the lower Stillaguamish
19 River delta. Ex. SG-143 at 51-52.

20 **b. *United States v. Washington***

21 During *Subproceeding 80-1*, Dr. Lane opined that Stillaguamish people lived in the villages
22 at Hat Slough and Warm Beach in the lower Stillaguamish River delta on the eastern shore of Port
23 Susan at and before treaty times. Ex. SG-134 at 9-10, 80-81. In her 1973 ethnographic work
24 "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the
25 Mid-19th Century," which has been previously admitted in *United States v. Washington* and found
26 highly credible by the Court, Dr. Lane explained that winter villages were situated on protected
27 bays and inlets and along rivers and streams. Ex. USA-20 at 9. In her 1993 "Indian Use of

1 Shellfish in Western Washington and the Indian Treaties of 1854-1855,” which also has been
2 previously admitted in *United States v. Washington* and found highly credible by the Court, Dr.
3 Lane explained that the “[p]eople living in a territory had the right to use the resources and
4 locations within it.” Ex. PL-590 at 16. The ethnographic work of Dr. Barbara Lane, like that of
5 Dr. Snyder, Dr. Riley and Mr. Tweddell, all confirm that Stillaguamish maintained permanent
6 winter villages in the lower Stillaguamish River delta, and under the well-established practices of
7 all Coast Salish people in western Washington at treaty-times, had the right to and did use the
8 marine resources proximate to those winter villages located in the waters of Port Susan, Skagit
9 Bay and Saratoga Passage.

10 **C. STILLAGUAMISH UTILIZED THE MARINE RESOURCES OF THE CLAIMED WATERS AT**
11 **TREATY TIMES**

12 The archeological, historic, and ethnographic evidence will show that Stillaguamish
13 regularly utilized the marine resources of the Claimed Waters at and before treaty times. Treaty-
14 time accounts of Indian agents at Penn Cove and Holmes Harbor detail Indian fishing and
15 clamming activities in the area that included Stillaguamish people. Stillaguamish elders repeatedly
16 testified and recounted Stillaguamish people clamming in the Claimed Waters. Anthropologists
17 and ethnographers have opined that Stillaguamish people regularly fished the marine waters of
18 Port Susan and Skagit Bay as well as around Camano Island. Ethnographers also have documented
19 Stillaguamish people fishing Holmes Harbor. Archeological documentation of shell middens on
20 Camano Island and in the lower Stillaguamish River delta confirm consistent treaty-time use of
21 marine resources from the Claimed Waters by the people who occupied those territories, which
22 included Stillaguamish. The Court may draw the reasonable inference from this historic and
23 ethnographic evidence of Stillaguamish use of marine resources that Stillaguamish regularly fished
24 the Claimed Waters at and before treaty times. *United States v. Washington*, 459 F. Supp. at 1059;
25 *see also United States v. Washington*, 19 F.Supp.3d at 1310-11 (W.D. Wash. 1997); *United States*
26 *v. Washington*, 626 F.Supp. at 1528. And, under the law of the case, the Court may find the historic
27 and archeological shell midden evidence indicates the people who resided in these lower

1 Stillaguamish River delta villages and seasonal encampments on Camano Island “continuously
 2 engaged in harvesting” particular marine species over a period of time and such evidence suggests
 3 a particular directional orientation, in this case towards the marine waters of Port Susan, Skagit
 4 Bay, Saratoga Passage and beyond. *See United States v. Washington*, 129 F.Supp.3d at 1091 (shell
 5 middens can demonstrate “aboriginal... occupancy evidenc[ing] a community continuously
 6 engaged in harvesting” particular species); *id.* (finding that “the types of species found at the
 7 Quileute sites suggest a strong oceanic orientation.”).

8 **1. Shell Midden Evidence In Stillaguamish Treaty-Time Territory Indicates**
 9 **Stillaguamish Regularly Used The Marine Resources Of The Claimed Waters**

10 Archeological and historical evidence of shell middens in and around the Stillaguamish
 11 villages in the lower Stillaguamish River delta and encampments on Camano Island indicate
 12 Stillaguamish utilized the marine resources of the Claimed Waters at and before treaty times.
 13 Beginning in 1899, archeologist Harlan Smith excavated shell middens in and around Stanwood
 14 in the lower Stillaguamish River delta, near Port Susan, as well as on the northern portion of
 15 Camano Island at Utsalady. Ex. SW-027 at 81-82. The shell middens near Stanwood contained a
 16 variety of saltwater shellfish species. *Id.* at 82. Mr. Smith observed that the shell middens located
 17 in the delta region of the Stillaguamish and Skagit River deltas resembles the shell middens found
 18 on the lower Fraser River in British Columbia, Canada. Ex. SG-047 at 4.

19 The firsthand accounts of early settler Nels Bruseth describe shell middens in and around
 20 villages Stillaguamish were known to occupy. Mr. Bruseth described the remnants of several large
 21 shell middens near Stanwood, Hat Slough, and Warm Beach in the lower Stillaguamish River
 22 delta, which lie in or near known Stillaguamish villages. Ex. SG-057 at 6; Ex. SW-031 at 12.
 23 Early settler Gustav Joergenson in his “History of the Twin Cities” likewise associated shell
 24 middens with Stillaguamish villages near Stanwood in the lower Stillaguamish River delta. Ex.
 25 SG-067. Stillaguamish tribal elder Esther Ross explained in *Duwaimsh et al.* that she “found shells
 26 at different places” throughout the lower Stillaguamish River delta at known Stillaguamish villages
 27 and encampments. Ex. SW-014 at 120.

1 The evidence will demonstrate that the shellfish found in the shell middens in the lower
2 Stillaguamish River delta and on Camano Island as well as the shellfish described by Esther Ross
3 were most likely gathered by Stillaguamish people from the Claimed Waters. The evidence will
4 show that the shellfish found in the shell middens in the lower Stillaguamish River delta and on
5 Camano Island as well as the shellfish described by Esther Ross were not likely retrieved from
6 freshwater or traded for by Stillaguamish people. Ex. SG-142 at 16, 18.

7 In her “Indian Use of Shellfish in Western Washington and the Indian Treaties of 1854-
8 1855,” Dr. Barbara Lane opined “[t]he ethnographic evidence of use of shellfish by upriver people
9 is corroborated by widespread presence of shells in archeological sites at upriver locations.” Ex.
10 PL-590 at 29. Dr. Lane inferred “the shell [middens] indicate that fresh as well as dried clams
11 were brought up stream” by Coast Salish people who lived further upriver from marine waters. *Id.*
12 Confirming shell middens indicate Coast Salish people harvested marine resources at and before
13 treaty times, Dr. Lane explained:

14 If there were adequate firewood nearby, shellfish were often dried on the beach
15 where they were collected. If the shellfish could be easily and quickly transported,
16 they might be taken home for curing. The fact that all villages near the coast were
17 associated with shell mounds is probably evidence that is practice was common.
Of course, the shells are also evidence that shellfish were brought home to be eaten
fresh.

18 *Id.* at 33. The inferences Dr. Lane drew from documentation of shell middens about the
19 shellfishing practices of all Coast Salish people in western Washington at treaty time further
20 substantiate Stillaguamish use of marine resources from the Claimed Waters.

21 **2. Indian Agent Sources Document Stillaguamish Use of Marine Resources In The** 22 **Claimed Waters At Treaty Times**

23 During treaty times, Indian agents relocated Stillaguamish to temporary reservations on
24 Penn Cove and Holmes Harbor. Ex. SG-012 at 1; Ex. SW-021 at 463, 465, 458, 468, 589, 593,
25 661, 665, 667-68, 671, 674; SG-043 at 8; Ex. SG-017 at 20- 22, 25-26, 28; Ex. SG-032 at 3-5.
26 While at Penn Cove and Holmes Harbor, Stillaguamish were instructed to and did maintain their
27 subsistence fishing practices in the waters the Indian agent documentation demonstrates

1 Stillaguamish knew well in Skagit Bay, along Camano Island and the waters east of Whidbey
 2 Island, including Penn Cove and Homes Harbor, and on the mainland. Indian agents repeatedly
 3 observed Stillaguamish people clamming and fishing around Penn Cove, and engaging in their
 4 seasonal migrations for marine resources around the Claimed Waters. Ex. SG-017 at 8; Ex. SW-
 5 021 at 677.

6 **3. Stillaguamish Tribal Member Sources Describe Stillaguamish Use of Marine**
 7 **Resources In The Claimed Waters**

8 Stillaguamish tribal elder Esther Ross repeatedly testified that Stillaguamish people
 9 utilized marine resources at and before treaty times. Before the ICC, Esther Ross explained that
 10 Stillaguamish people “went clamming, and they had mussel shells.” Ex. SG-100 at 27-28. Before
 11 Judge Bolt in *Final Decision #1*, Esther Ross again noted that Stillaguamish people “went for clam
 12 digging” in the Utsalady area of Camano Island:

13 THE WITNESS: I want to tell you.
 14 Something should go down in the record. From
 15 Milltown up to McMurray on up to Little Creek,
 16 up to the northern part there of the Darrington
 17 on over to the Stillaguamish watershed, to
 18 Granite Falls on down to the northeast and northwest
 19 of the Tulalip Reservation on through to Warren
 20 Beach to Stanwood was our territory. I want to
 21 also say that my territory went over halfway to
 22 Camano, on down to Wilsillati (phonetic). Sally
 23 Oxtein's statement, she lived in that area. We
 24 went for clam digging in that, but in 1926, John
 25 Lyons came to me from Kikealis (phonetic) Tribe
 26 from Swinomish. He said, "Don't you dare say
 27 that you went any further than Stanwood, " so it
 went that way in the Court of Claims. We lost
 that other area just to give those people that
 area, but it is still on record with me.

Ex. SG-137 at 247.

1 **4. Ethnographic Sources Confirm Stillaguamish Utilized Marine Resources From**
2 **The Claimed Waters**

3 During his testimony to the ICC, Dr. Carrol Riley opined that Stillaguamish people went
4 down the Stillaguamish River “to the ocean perhaps on clamming expeditions.” Ex. SG-097 at
5 13. Dr. Riley also testified that Stillaguamish people who lived in the lower Stillaguamish River
6 delta “utilized clamming and the like” at Warm Beach on the eastern shore of Port Susan. *Id.* at
7 74. In his report on the Stillaguamish to the ICC, Dr. Riley reiterated that Stillaguamish “came
8 down to Port Susan and lower Skagit Bay for clamming and fishing.” Ex. SG-098 at 4.

9 Dr. Riley’s other ethnographic work confirms his opinion that Stillaguamish fished Port
10 Susan and Skagit Bay at treaty-times. In his 1956 ethnographic work for the ICC titled “Early
11 History of Western Washington Indians,” Dr. Riley explained that “[m]ost of the villages were at
12 strategic points on rivers, on the ocean, or along the bays of the Sound. Considerable economic
13 activity, fishing, clamming, gathering, and the like centered near the villages in the village
14 territory.” Ex. SG-099 at 12. He further noted that “[a]long the coast and on the mouths of the
15 rivers, the great emphases were on diversified fishing and on clam gathering.” *Id.* at 15.

16 Following *Final Decision 1*, Dr. Lane wrote the attorney for Stillaguamish, David Getches
17 about Stillaguamish usual and accustomed fishing grounds in marine waters:

18 In his affidavit Dorsey mentions a village at what is now the town of Warm Beach
19 (p.2) and another at Hat Slough near the present town of Stanwood (p.3). Both of
20 these villages are situated so as to enable easy access to marine fisheries. In my
 opinion it is inconceivable that villages would have been located on the waters of
 Port Susan and the inhabitants would not have fished those waters.

21 Ex. SW-041 at 2. In her letter to Mr. Getches, Dr. Lane also referred to Dr. Riley’s ICC testimony
22 that “[t]he Stillaguamish River Indians hunted in the up-river areas and came down to Port Susan
23 and lower Skagit Bay for clamming and fishing” in support of her opinion that Stillaguamish fished
24 marine waters at and before treaty times. *Id.*

25 In *Final Decision 2*, Dr. Barbara Lane considered the location of permanent winter villages,
26 and offered her expert opinion that “areas like Port Susan and areas close to the mouth of the
27

1 Stillaguamish River. I think were primarily fished by Kikiellis and Stillaguamish.” Ex. UT-17 at
 2 80. Later, during *Subproceeding 80-1*, Dr. Lane reiterated her expert opinion that Stillaguamish
 3 primarily fished Port Susan based on the fact that Stillaguamish occupied adjacent villages in the
 4 lower Stillaguamish River delta at Warm Beach and Hat Slough. Ex. SG-134 at 9-11, 80-81. Also
 5 in her *Subproceeding 80-1* testimony, Dr. Lane explained that:

6 [G]enerally speaking, people like to use resources along a given drainage system,
 7 both salt water, lower reaches of the system and upper tributaries and beyond.
 8 There was a good deal of traffic up and down the river and people from upriver
 9 would come down to the salt water to, for example, harvest shellfish which weren’t
 available to them in the fresh water and to catch fish sometimes at the estuary or
 lower reaches of the system.

10 Ex. SW-113 at 54.

11 In her 1993 “Indian Use of Shellfish in Western Washington and the Indian Treaties of
 12 1854-1855,” which applies to Stillaguamish as a western Washington Coast Salish tribe, Dr. Lane
 13 stated that “[a]ll Indians in Western Washington, regardless of where they lived, used shellfish...
 14 People living at a distance upriver visited the coast to harvest shellfish primarily in the spring and
 15 summer.” Ex. PL-590 at 16. She also noted that Coast Salish people “travelled widely to harvest
 16 shellfish... Upriver people came down to the coast to dig clams.” *Id.* “While there were
 17 differences in ease of access to shellfish,” Dr. Lane opined “it appears that most Indian people in
 18 western Washington, including upriver groups, relied on shellfish as a staple food.” *Id.* Both Dr.
 19 Lane’s expert opinion that Stillaguamish fished marine waters at and before treaty times as well
 20 as her opinion that all Coast Salish people—both upriver and those living adjacent to marine
 21 waters—in western Washington relied upon and harvested shellfish validate the historic accounts
 22 of Indian agents and Stillaguamish elders regarding Stillaguamish treaty-time utilization of marine
 23 resources from the Claimed Waters.

24 **D. STILLAGUAMISH TREATY-TIME TRAVEL THROUGH THE CLAIMED WATERS**

25 The historical and ethnographic evidence will show that at and before treaty times,
 26 Stillaguamish had saltwater canoes, and that Stillaguamish frequently traveled the Claimed
 27 Waters, as far south as Fort Nisqually and as far north as Fort Victoria. Stillaguamish tribal elders,

1 pre-treaty time missionaries and traders, Indian agents and early settlers detail regular
2 Stillaguamish travel throughout the Claimed Waters, greater Puget Sound and beyond at and
3 before treaty times. Under the law of the case, the Court may draw the reasonable inference from
4 this historic evidence that Stillaguamish regularly fished the Claimed Waters at and before treaty
5 times based upon evidence of customary Stillaguamish travel throughout the Claimed Waters.
6 *United States v. Washington*, 626 F.Supp. at 1529-30; *United States v. Washington*, 459 F. Supp.
7 at 1059; *United States v. Lummi Indian Tribe*, 841 F.2d at 320; *United States v. Lummi Indian*
8 *Tribe*, 235 F.2d 443, 452 (9th Cir. 2000).

9 The records of traders and missionaries from before treaty times will demonstrate that
10 Stillaguamish were both familiar with the Claimed Waters, and that Stillaguamish knew how to
11 navigate those waters. Employees of Hudson Bay Company recorded contacts with Stillaguamish
12 people at Fort Nisqually before treaty times, which is located over 80 miles from the mouth of the
13 Stillaguamish River. Ex. SG-001 at 51; Ex. SG-009. Missionaries likewise documented
14 encounters with Stillaguamish people on the western shore of Whidbey Island and in Olympia,
15 Washington before treaty times. Ex. SG-002 at 17; SG-003 at 1-2.

16 The records of Indian agents at treaty times likewise illustrate that Stillaguamish were both
17 familiar with the Claimed Waters, and that Stillaguamish knew how to navigate those waters.
18 Indian agents observed Stillaguamish people regularly traveling the marine waters off the east
19 shore of Whidbey Island and off the west and north ends of Camano Island at Utsalady, traveling
20 to and from the mainland through Penn Cove, Holmes Harbor, and Saratoga Passage. Ex. SW-
21 021 at 458, 463, 468, 677; Ex. SG-017 at 21-22, 25-26, 28. Indian agents also documented
22 Stillaguamish people traveling as far as Bellingham Bay at treaty times from Penn Cove. Ex. SG-
23 013 at 66; Ex. SW-021 at 593, 753.

24 Sally Oxstein, a Stillaguamish tribal elder who was born in the lower Stillaguamish River
25 delta before treaty times and who testified in *Duwamish et al.*, gave a history of her family traveling
26 to Fort Victoria on Vancouver Island when she was a young girl. Ex. SG-079. Fort Victoria is
27

1 located over forty miles from the mouth of the Stillaguamish River, and was most easily accessible
2 by Stillaguamish salt water canoe through Deception Pass.

3 Stillaguamish tribal elder Esther Ross similarly testified before the ICC that Stillaguamish
4 people regularly visited Fort Victoria to trade, and that Stillaguamish went to Port Gamble and
5 Seattle at and before treaty times. Ex. SG-100 at 26-27.

6 Early settler Nels Bruseth also observed that a Stillaguamish chief (Ku-kwil-Khaedib) had
7 both shovel nose canoes for the river and “Stie Wathl” canoes for traveling marine waters, and that
8 Ki-kwil-Khaedib “[m]ade long journeys on the Sound,” including to Seattle and Nisqually. Ex.
9 SG-057 at 5. Mr. Bruseth also described Stillaguamish saltwater canoes further up the
10 Stillaguamish River on the Pilchuck. *Id.* at 6.

11 Edward Curtis, in his 1913 “The North American Indian, The Indians of the United States,
12 the Dominion of Canada, and Alaska,” noted that the Cowichan people of the lower Fraser River
13 in British Columbia, Canada, had a word for Stillaguamish people in their language. Ex. SG-051
14 at 80; Ex. SW-053.

15 Dr. Sally Snyder testified to the ICC that the central portions of Saratoga Passage and
16 Skagit Bay were used extensively for travel and for trolling at and before treaty times. Ex. SG-
17 110 at 63-64.

18 **E. STILLAGUAMISH TREATY-TIME CULTURAL PRACTICES THROUGHOUT THE CLAIMED**
19 **WATERS**

20 The historical and ethnographic evidence will demonstrate that Stillaguamish engaged in
21 customary Coast Salish cultural practices at and before treaty times, including exogamy and
22 seasonal resource migration throughout the Claimed Waters based on kinship ties. The historic
23 and ethnographic evidence will show that Stillaguamish engaged in exogamy throughout northern
24 Puget Sound at and before treaty times, which resulted in extensive kinship ties and seasonal
25 migrations all over the Claimed Waters for marine resources. The ethnographic evidence will also
26 illustrate that Stillaguamish’s extensive kinship ties throughout the Claimed Waters more likely
27 than not resulted in regular Stillaguamish fishing activities in the Claimed Waters at and before

1 treaty times. Under the law of the case, the Court may draw the reasonable inference that
2 Stillaguamish regularly fished the Claimed Waters at and before treaty times based upon this
3 extensive evidence of Stillaguamish practice of exogamy with other tribal groups throughout the
4 Claimed Waters and seasonal geographic migration for marine resources based on historic Coast
5 Salish cultural practices. *United States v. Washington*, 626 F. Supp. at 1529 (finding Tulalip
6 marine U&A on, among other things, reasonable inferences drawn from intermarriage and general
7 Indian “travel for harvesting resources or visiting relatives”).

8 **1. Stillaguamish Exogamy and Marine Fishing Practices In The Claimed Waters**

9 The historic and ethnographic evidence demonstrates that Stillaguamish people practiced
10 exogamy with their neighbors throughout the Claimed Waters and beyond at and before treaty
11 times. Stillaguamish elder James Dorsey testified in *Duwamish et al.* that Stillaguamish frequently
12 intermarried with other Coast Salish tribal groups, consistent with the cultural practices of Coast
13 Salish people at and before treaty times. Ex. SW-014 at 115. Esther Ross testified to the ICC that
14 Stillaguamish were intermarried with their neighbors the Skagits and Snohomish peoples. Ex. SG-
15 100 at 10, 15.

16 In his testimony before the ICC, Dr. Carrol Riley acknowledged the extensive kinship ties
17 Stillaguamish maintained throughout the Puget Sound region, and the common cultural practices
18 Stillaguamish shared with its neighboring Coast Salish peoples. Ex. SG-097 at 92. In
19 *Subproceeding 80-1*, Dr. Lane explained that “the village at Hat Slough had people, so far as we
20 known, people who were of mixed Stillaguamish, Snohomish, Skagit, and other ancestry. This
21 was true of every village everywhere in Puget Sound.” Ex. SG-134 at 11-12. Dr. Sally Snyder
22 noted in both her ICC testimony and ethnographic field notes that the Stillaguamish were
23 intermarried with their neighbors and maintained peaceful relations. Ex. SG-110 at 21; Ex. SG-
24 094 at 31. In particular, Dr. Snyder’s field notes document an example of this intermarriage and
25 the customary rights associated with exogamy. Dr. Snyder’s informant told her of a Stillaguamish
26 man—Mowitch Sam—at and before treaty times fishing in Holmes Harbor with his Skagit wife
27 as a result of kinship relations. Ex. SG-121 at 17.

1 The ethnographic evidence also will show that not only was exogamy the general rule in
2 Coast Salish culture at and before treaty times, but that the resulting kinship ties would have
3 ensured Stillaguamish customarily fished the Claimed Waters. Dr. Riley’s “Early History of
4 Western Washington Indians” explains that Coast Salish villages at and before treaty times “were
5 predominately exogamous,” and “[b]ecause of the flexibility of residence, particularly in the upper
6 Sound, kinship ties were prevalently bilateral... A person would change village affiliation (and
7 often did) by joining kinsman in another settlement.” Ex. SG-099 at 12-13. Dr. Riley also noted
8 that at and before treaty times, “[t]he right to use the fishing areas of other villages probably
9 necessitated asking permission but, because families were linked by kinship and friendship ties,
10 and because of the culture pattern of economic generosity, this would seldom be refused.”
11 *Id.* at 29.

12 Dr. Lane offered similar opinions in “Southern Coast Salish” from the “Handbook of North
13 American Indians,” which she published with Dr. Wayne Suttles. Dr. Lane and Dr. Suttles opined
14 in “Southern Coast Salish” that at and before treaty times, “[n]eighboring groups were linked by
15 ties of marriage, joint feasting and ceremonial activities, and use of common territory.” Ex. SG-
16 167 at 55. They noted that “[t]hese ties were especially strong within the same waterway or
17 drainage system, but there were no breaks in the social network, which extended throughout the
18 Southern Coast Salish region and beyond.” *Id.* Dr. Lane and Dr. Suttles listed the Stillaguamish
19 among the Southern Coast Salish tribes alongside Swinomish, Skagit, and Kikiallus to which these
20 common cultural practices applied. *Id.* at 56.

21 In her 1954 ethnographic work “Aboriginal Salt-Water Fisheries: Swinomish, Lower
22 Skagit, Kikiallus and Samish Tribes of Indians,” Dr. Sally Snyder noted the importance of kinship
23 relations among Coast Salish people in northern Puget Sound, explaining that “village exogamy
24 was a general rule for everyone” because “marriages were contracted between families with an
25 important economic motive: to gain privileged access to in-laws’ resource areas, especially in their
26 fishing grounds.” Ex. SG-157 at 2-3.

27

2. Stillaguamish Seasonal Resource Migration And Fishing Practices In The Claimed Waters

The historical and ethnographic evidence will demonstrate that Stillaguamish people engaged in seasonal resource migrations throughout the Claimed Waters based on their treaty-time territories in the lower Stillaguamish River delta and Camano Island as well as extensive kinship relations throughout the Claimed Waters. In his 1854 report on the Coast Salish tribes of western Washington, early ethnographer and treaty commission member George Gibbs wrote about Puget Sound tribes, including the “Stoluckwamish” or Stillaguamish, seasonally migrating between the mainland and the islands. Ex. SG-CH-M-271. George Gibbs again noted the widespread seasonal migrations of Coast Salish people of western Washington, which included the Stillaguamish, throughout the Puget Sound region in his 1877 publication “Tribes of Western Washington and Northwestern Oregon, 1845-1927.” Ex. SW-062 at 235-236. Consistent with the general observations of George Gibbs, the Indian agents stationed at Penn Cove and Holmes Harbor witnessed Stillaguamish people engaging in the Coast Salish practice of seasonal migration for marine resources throughout the Claimed Waters at treaty times. Ex. SW-021 at 458, 463, 468, 677; Ex. SG-017 at 21-22, 25-26, 28.

In “Aboriginal Salt-Water Fisheries: Swinomish, Lower Skagit, Kikiallus and Samish Tribes of Indians,” Dr. Snyder explained that the seasonal round of cultural activities in Northern Puget Sound was determined by the availability of fish in large quantities. Ex. SG-157 at 2-3. Moving from seasonal encampments or permanent winter villages “conveniently located near fishing-grounds,” Dr. Snyder noted “was the life-style of the greater part of the year—from March... into October. For more than seven months of the year, time and energy were devoted to almost exclusively to fishing.” *Id.* at 4. Dr. Riley expressed similar opinions in his “Early History of Western Washington Indians,” remarking that “[i]n the summer individual families drifted away to join other families from other villages with whom they had kinship or friendship ties.” Ex. SG-099 at 12. Ethnographers Hermann Haerberlin and Erna Gunther also noted the seasonal migrations of the Coast Salish people of the Puget Sound from permanent villages to seasonal encampments

1 for marine resources in their 1930 publication “Indians of the Puget Sound.” Ex. SW-017 at 13,
2 16, 24.

3 Dr. Lane expressed opinions consistent with that of Dr. Snyder, Dr. Riley, and Hermann
4 Haeberlin and Erna Gunther in her 1973 ethnographic work “Political and Economic Aspects of
5 Indian-White Culture Contact in Western Washington in the Mid-19th Century.” In that report,
6 Dr. Lane explained that at various seasons of the year Coast Salish people in western Washington
7 ranged over a wider area outside of their winter villages and set up temporary camps at fishing and
8 shellfish harvesting locations, and were able to access resources not available in the immediate
9 vicinity of their winter villages based on kinship relations. Ex. USA-20 at 10, 16.

10 VI. EVIDENTIARY ISSUES

11 Stillaguamish, Swinomish, Upper Skagit and Tulalip have stipulated to the admissibility
12 of all exhibits proposed on the revised master exhibit list with the exception of four: SG-071,³
13 SG-072,⁴ SG-137,⁵ SW-169,⁶ and SW-170.⁷ Upper Skagit remains opposed to the admission of
14 these exhibits based on the arguments raised in its Motion in Limine No. 4. *See* Dkt. #250; Dkt.
15 #236 at 9-11. In light of the Parties’ stipulation, Stillaguamish has withdrawn its motions in limine
16 that pertain to the admissibility of proposed trial exhibits. *See* Dkt. #254.

17 The Parties have stipulated that demonstrative PowerPoint slides used by witnesses, if any,
18 will be shared by 6 p.m. the calendar day before usage at trial. The Parties have also stipulated
19 that any PowerPoint slides used in opening statements need not be shared in advance.

20 VII. CONCLUSION

21 Based on the evidence to be introduced at trial, Stillaguamish respectfully requests that this
22 Court conclude that it is more likely than not that Stillaguamish’s usual and accustomed fishing

23 ³ Affidavit of James Dorsey, Claimant’s Ex. E, *Duwamish, et al. v. U.S.*, No. F-275 (Ct. Cl. Oct. 3, 1927).

24 ⁴ Affidavit of James Dorsey, Claimant’s Ex. E, *Duwamish, et al. v. U.S.*, No. F-275 (Ct. Cl. Oct. 3, 1927) (negative).
25 Irrespective of Upper Skagit’s challenges to the admissibility of the Dorsey Affidavit, Dr. Barbara Lane appended the
26 Dorsey Affidavit to Ex. USA-28 at 26-29, which remains previously admitted evidence in this case.

⁵ Transcript of Proceedings, Esther Ross, *U.S. v. WA*, No. 9213 (W.D. Wash. Sept. 10, 1973).

⁶ Friday, Chris. 2020. Stillaguamish Tribe of Indians – Marine Fisheries Report: Aboriginal, Historic, and Treaty Eras.
26 Prepared for Kilpatrick Townsend, Seattle, Washington.

⁷ Friday, Chris. Supplemental Report to Stillaguamish Tribe of Indians— Marine Fisheries Report: Aboriginal,
27 Historic, and Treaty Eras. June 2021.

1 areas at treaty times include the interconnected marine waters of the entirety of Port Susan, Skagit
2 Bay, Deception Pass, Saratoga Passage, Penn Cove, and Holmes Harbor.

3 DATED this 16th day of March, 2022.

4 By: /s/ Rob Roy Smith

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