

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**ROGER WILLIAM, on his own behalf  
and on behalf of all other members of the Xeni Gwet'in First Nations Government  
and on behalf of all other members of the Tsilhqot'in Nation**

PLAINTIFF

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE  
CARIBOO FOREST REGION and  
THE ATTORNEY GENERAL OF CANADA**

DEFENDANTS

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**PLAINTIFF' S REPLY  
APPENDIX 1A**

**PLAINTIFF'S RESPONSE TO THE DEFENDANTS' SUBMISSIONS  
ON DEFINITE TRACTS OF LAND**

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**Exhibit 43**  
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**A. TACHELACH'ED**

**1. A DEFINITE TRACT OF LAND**

1. In terms of physical terrain, the Chilko and Taseko Rivers bound a very definite tract of land on the Chilcotin Plateau. This triangular tract is defined in the northwest by the Chilko River, in the northeast by the Taseko River, and in the north by the Chilko-Taseko confluence. Conservatively, its southern boundary runs southeast from the Chilko Lake outlet, essentially along the Claim Area's mountain-plateau transition zone, to the Taseko River. This triangular tract of land is thus bounded in the south by Tsuniah Mountain, Tsuniah Valley, Nemiah Mountain, Mainguy Lake and Konni Mountain. In the southeast, it includes Chaunigan Lake as well as Elkins Valley and its uplands.<sup>1</sup>

2. This tract of plateau land is largely characterized by lodgepole pine forest with a spruce understory.<sup>2</sup> Its internal hydrology is generally modest - Brittany Creek and its three minor lakes, including Brittany Lake, are in the southwest and drain to the Chilko River, there is but spring water in the central north,<sup>3</sup> the Nuntsi chain of waters is in the central east run to the Taseko River. Elkin Valley in the southeast is home to the twin Vedan and Elkin Lakes that Elkin Creek drains in succession to the Taseko River. The valleys of the Chilko and Taseko Rivers are narrow.<sup>4</sup>

3. Relatively recently, the Crown essentially identified this triangular tract of land for the first time from its point of view, namely, with an eye to timber extraction. In particular, in February 1993 the Chilcotin Forest District of the British Columbia

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<sup>1</sup> Plaintiff's Argument, Volume 3, at paras. 937-938.

<sup>2</sup> Plaintiff's Argument, Volume 3, at para. 939.

<sup>3</sup> Plaintiff's Argument, Appendix 3, at para. 68; Affidavit #1 of Theophile Ubill Lulua, at para. 152.

<sup>4</sup> Exhibit 0183 Expert Report of Dr. Brian Gyu, at 7.

Ministry of Forests drafted the Brittany Lake Forest Management Plan. The objective of the draft plan was to “provided a framework for Operational forest management activities within the plan area”, with an emphasis on “large areas of lodgepole pine killed by mountain pine beetle.” The “plan area” was essentially the triangular tract of land identified above.<sup>5</sup>

4. With regard to aboriginal perspective,<sup>6</sup> the Tsilhqot’in know the lands between the Tsilhqox (Chilko River) and the Dasiqox (Taseko River) as Tachelach’ed.<sup>7</sup> They identify the waters of Tachelach’ed in these terms - in the southwest Natasawed Yeqox (Brittany Creek) runs through Natasawed Biny (Brittany Lake), Tsi Tex Biny (Murray Taylor Lake) and Benchuny Biny to its outlet on the Tsilhqox at Nusay Bighinlin, the spring water of north central Tachelach’ed is at ?Esqi Nintanisdzah (Child Got Lost), in the southeast the Nuntsi chain<sup>8</sup> of waters runs to the Dasiqox. Elkin Valley, named for the first settler in the area and whom Chief ?Achig effectively put at the valley’s southern perimeter, contains ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake). To the valley’s west is Tsanglen Biny (Chaunigan Lake) which drains northeast to Elkin Creek. Tachelach’ed’s substantial eastern and northeastern draws on the Dasiqox are, respectively, Tsintsans Bech’az and Tsiwel Gunchagh (Big Draw).

5. Of note, one can reasonably speak of Tachelach’ed’s southern boundary more generously. For example, elder Mabel William spoke of Tachelach’ed as extending south to Ts’il?os (Mount Tatlow), thus including Xenii (Nemiah Valley), as Ts’il?os stretches eastward to the head of the Dasiqox (Taseko River).<sup>9</sup> Elder Martin Quilt conceived of Tachelach’ed as extending further south to the heads of Tsilhqox Biny (Chilko Lake) and Dasiqox Biny (Taseko Lake).<sup>10</sup> However, elder Francis Setah’s evidence indicates Tachelach’ed’s southern boundary can be more conservatively delineated as discussed at

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<sup>5</sup> Exhibit 0240, Vol. 42, Tab 143: Brittany Lake Forest Management Plan, at 3002136, 3002142-143.

<sup>6</sup> Plaintiff’s Argument, Appendix 6, Map B, Traditional Tsilhqot’in Placenames.

<sup>7</sup> Plaintiff’s Argument, Volume 3, at para. 1002; Plaintiff’s Argument, Appendix 3, at para. 54.

<sup>8</sup> Transcript, January 20, 2005, David Setah Direct-Exam, at 00040, 36 – 00041, 9.

<sup>9</sup> Plaintiff’s Argument, Appendix 3, at para. 54; Exhibit 0174, Affidavit #1 of Mabel William, at paras. 54-55.

<sup>10</sup> Exhibit 1DIG, ‘50’; Exhibit 1LEG.

the outset here.<sup>11</sup> The Tsilhqot'in evidence is unanimous that these lands are within Tachelach'ed. Moreover, this view conceives of Tachelach'ed as a triangular tract of land with a largely uniform character, namely, the plateau dominated forestlands between the Tsilhqox and Dasiqox. The Plaintiff proceeds on this conservative definition of Tachelach'ed in reply.<sup>12</sup>

## **2. PHYSICALLY OCCUPIED BEFORE, AT AND AFTER CROWN SOVEREIGNTY**

6. The Tsilhqot'in constructed dwellings at and in Tachelach'ed and regularly used Tachalech'ed for hunting, fishing and trapping grounds prior to, at and well after Crown sovereignty. A coherent body of evidence from the historical record, expert opinion and oral history establishes this fact on a civil standard of proof.

### **a. Historical Record and Related Expert Opinion**

7. From its outset in 1822, the historical record's 'on the ground' 'lines of sight', per Dr. Brealey,<sup>13</sup> are from the Chilko River and Chilko Lake outlet at the boundary of northwest Tachelach'ed. This record identifies an enduring Tsilhqot'in population here through the winter and spring, located at their food caches that included dried salmon taken from the river during the late summer, and stationed at their favourite hunting grounds for deer as of late autumn, namely, the lands east of the river – Tachealch'ed.<sup>14</sup>

8. In January of 1822, furtrader George McDougall and his party visited Tsilhqot'ins as the first Europeans to enter Tsilhqot'in territory. He records:

[T]hey are certainly a fine, brave looking set of Indian, whose lands are far from being poor either, as to beaver or Large Animals. ... we got much information respecting their Country in general, which they seemed to part as freely & heartily as they appeared cheerful at our first arrival among them, the result of our enquiries were briefly this. The West side

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<sup>11</sup> Plaintiff's Argument, Appendix 3, at para. 66; Transcript, November 26, 2003, Francis Setah Direct Exam, 00043, 12 – 44; Exhibit 93DIG; Transcript, December 4, 2003, Francis Setah Direct Exam, 00030, 12 – 38; Transcript, December 8, 2003, Francis Setah Cross Exam (BC), 00023, 20 to 00024, 44.

<sup>12</sup> Plaintiff's Argument, Appendix 3, at para. 54.

<sup>13</sup> Exhibit 0240, Expert Report of Kenneth Brealey, at 33.

<sup>14</sup> Plaintiff's Argument, Appendix 3, at paras. 54, 65, 77.

of the River abounds with Lakes and Small Rivers where there is a quantity of Beaver & of almost all kinds of Fish in the proper Season, the East side produce [sic] but few fish or Beaver, but is their favourite hunting grounds for Large Animals ... [The] River they say yields them abundance Salmon in its Season. ... By dint of enquiry & with the help of small sticks we made out to get nearly their strength, they say there are 6 Large Ground Lodges, about the Lake, containing 53 Families and from the place where we fall upon the River to the entrance of the Lake 25 & better than 4 others, in all along the River 29 Lodges containing 131 families...<sup>15</sup> [Bold emphasis added.]

9. In mapping the basic patterns of Tsilhqot' in land use and occupancy Dr. Brealey located "their favourite hunting grounds for Large Animals" as Tachelach'ed.<sup>16</sup> Further, Dr. Brealey concluded that McDougall reached and identified Chilko River, "the main salmon-bearing stream in the [Chilocotin] territory..." as well as Tsilhqot'ins with a series of winter lodges thereon and around Chilko Lake.<sup>17</sup> Anthropologist John Dewhirst estimated the reported population on the Chilko River as 890 people, including some below the Chilko-Chilcotin confluence, with another 360 persons about Chilko Lake, a portion of whom resided at the lake's outlet.<sup>18</sup>

10. In December of 1825, William Connolly reached Tsilhqot'ins residing at their salmon caches on the Chilko River and at the entrance to Chilko Lake at its outlet. Connolly recorded, "[t]hey derive part of their subsistence also from the chase, the country being pretty well stocked with Red & Rein Deer...[including by] running them down with their Dogs when the snow is deep & crust upon it sufficiently strong to bear the latter without sinking... No Indians I ever saw appear better adapted for an active life..."<sup>19</sup> The opinion of anthropologist John Dewhirst is that Connolly met with Tsilhqot'ins from the village of "Taze Ley" (i.e. Tachi Lhuy) at the Chilko Lake outlet. Further, "these animals were hunted around Chilko Lake in the Claim Area, as well as

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<sup>15</sup> Plaintiff's Argument, Appendix 3, at paras. 22-24, 58; Exhibit 0156-1822/01/18.001 at 100924-25.

<sup>16</sup> Plaintiff's Argument, Appendix 3, at para. 58; Exhibit 0246, Brealey Map, Land Use and Occupancy.

<sup>17</sup> Plaintiff's Argument, Appendix 3, at paras. 177, 22-24; Exhibit 0240, Brealey Report, at 56, 25-26.

<sup>18</sup> Plaintiff's Argument, Volume 3, at para. 966; Exhibit 0443, Dewhirst Report, at paras. 136-144, 203.

<sup>19</sup> Plaintiff's Argument, Appendix 3, at paras. 60 (fn. 211, paras. 169, 171), 83(a); Exhibit 0156-1825/07/20.001, at 117612-117613; William Connolly, Journal of Occurrences.

other places, because a Tsilhqot'in village ["Taze Ley"] was located at the entrance to the lake."<sup>20</sup> This village is at the southwest corner of Tachelach'ed at Chilko Lake.

11. In 1827, Joseph McGillvary of the Hudson's Bay Company provided a written sketch of "Chilkotin Country." Having described Chilko River and Chilko Lake, McGillvary noted that the Tsilhqot'in regularly exploited their Chilko River fisheries and large animal resources, such as deer, including in especially critical circumstances:

In the Spring they have abundance of Suckers, Trout and White Fish, it abounds in large Animals—such as Rein Deer—Red Deer and Moose Deer—and in the Autumn and Spring Chevreuil are numerous—Salmon however is their principal food, but as this fish does not come up regularly the Chilkotin River their resource is the produce of the Lake, and large Animals.<sup>21</sup>

12. Anthropologist John Dewhirst opined, "McGillvary shows that Chilko Lake and Chilko River fisheries together with big game resources in the surrounding area support the resident Tsilhqot'in population year round."<sup>22</sup> Tachelach'ed is bound by the Chilko River and is the surrounding area to the east.

13. In 1831, furtrader Ross Cox recounted his years in west of the Rocky Mountains and provided a brief sketch of Chilcotin country that described Chilko River and Chilko Lake.<sup>23</sup> Regarding Cox, Dr. Brealey stated, "while he does not specify the extent of 'their hunting grounds' would most certainly include the 'many creeks issuing therefrom' (and into the Chilko and Chilcotin Rivers and Lakes)..."<sup>24</sup> Natasawed Yeqox (Brittany Creek) issues from southwest Tachelach'ed into the Chilko River.

14. In 1838, the Chilcotin Post census identified three Tsilhqot'in winter villages on Chilko River at the boundary of Tachelach'ed. At the Chilko Lake outlet at southwest Tachelach'ed was the village of "Taze Ley" (Tachi Lhuy), lead by Chief "Quill Quall Yaw", and for which the reported population alone was 194 people, including 46 hunters.

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<sup>20</sup> Plaintiff's Argument, Appendix 3, at para. 83(b).

<sup>21</sup> Exhibit 0156-1827/00/00.001, at 215: Joseph McGillvary, Report of Fort Alexandria.

<sup>22</sup> Plaintiff's Argument, Appendix 3, at fn. 211, para. 173-174.

<sup>23</sup> Exhibit 0156-1831/00/00.01: Ross Cox, Adventures of the Columbia River...(1831), at 3000018-20.

<sup>24</sup> Exhibit 0240, Brealey Report, at 9.

On the Chilko River across from mid-west Tachelach'ed was the village of "Tsu Luh" (Tsilangh), with a reported population of 114 persons, including 25 hunters. On the Chilko River at northwest Tachelach'ed was the village of "Tloquotock" (Tl'egwated), with reportedly 25 people, including 4 hunters.<sup>25</sup> Regarding the 1838 Chilcotin Post census, Dewhirst concluded:

The 1838 Hudson's Bay Company Census enumerated Tsilhqot'in groups associated with villages that were located near the Claim Area (Table 3). In my opinion, all of the hunters and their families recorded by the 1838 census under the "Tlo-quot-och Inds," the "Tsu-Luh Inds" and the "Taze Ley Inds" occupied and used the Claim Area. Because these hunters and their families were enumerated before 1846, they were all born before 1846. The total enumerated population of these groups, excluding "Followers [and] Strangers" was 273, however, the total enumerated population including "Followers [and] Strangers" was 329 (Table 3). In my opinion, the population of these groups was greater than what was reported because some known hunters and their families were missed and additional hunters were probably absent. Also in my opinion, the people in the three enumerated groups occupied and used the Claim Area before and after 1838.<sup>26</sup> [Emphasis added.]

15. In November of 1845, Father Giovanni Nobili reportedly visited three areas where Tsilhqot'ins were residing at winter's onset. According to Dr. Brealey, the first was at the former Fort Chilcotin (or Chilcotin Post) around the Chilko – Chilcotin River confluence, the second was likely at Tatla Lake, while the third was a village at or near the outlet of Chilko Lake containing an estimated 150 people lead by Chief "Konkwaglia".<sup>27</sup> In this regard, Dewhirst opined that in November 1845 Father Nobili visited the "Taze Lay" village of recorded in the Chilcotin Post's 1838 census.<sup>28</sup>

16. In 1862-63, two epidemics of smallpox occurred amongst the Tsilhqot'in. According to Father Thomas, these epidemics "killed nearly all the Chilco Lake, Eagle

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<sup>25</sup> Plaintiff's Argument, Appendix 3, at para. 59, 60; Exhibit 0443, Dewhirst Report, at paras. 53-84, 99.

<sup>26</sup> Exhibit 0443, Dewhirst Report, at para. 397.

<sup>27</sup> Exhibit 0240, Brealey Report, at 26-28 re Nobili, 60 re Fort Chilcotin, 74 re Tatla Lake and 56 re Chilko Lake; Exhibit 0156-1845/11/30.001, Father Nobili - Letters from Fort Alexandria, 1845, at 2195816-7.

<sup>28</sup> Exhibit 0443, Dewhirst Report, at paras. 76-79.

Lake and Tatla Lake Indians. Seven or eight families remained at those places but the others joined [Chief] Anaham's Camp." In this regard, Dewhirst stated:<sup>29</sup>

In my opinion, this information came from oral history communicated to Father Thomas, probably in the early 20th century when he was active as a missionary among the Tsilhqot'in. I am also of the opinion, based on this information, that Tsilhqot'ins lived in the Chilco Lake, Eagle Lake and Tatla Lake areas prior to the smallpox epidemics of 1863 and that some families survived the epidemics and continued to live in those areas.

17. On July 22, 1864, as part of a colonial expedition during the Chilcotin War, magistrate William Cox signed a map based on information from Chiefs Alexis and Eulas that is commonly known now as the Chilcotin War Map. This map quite clearly records Anglicized versions of Tsilhqot'in place names for key geographic features that endure today – e.g. T̄silhqox is recorded as the "Chilcho River" (now Chilko River), T̄silhqox Biny, "biny" being the Tsilhqot'in word for lake, is identified as "Chilco. L<sup>ke</sup>," (now Chilko Lake).<sup>30</sup> The map also identifies a trail network that includes a trail connecting to the Chilko Lake outlet and running the west side of the Chilko River of northwest Tahcelach'ed. Dewhirst described these trails as "an extensive trail network that connects the Tatlayoko-Tatla Valley to the Chilko Lake-Chilko River Valley,"<sup>31</sup> and stated, "[i]n my opinion such aboriginal trails formed from regular use over many generations, and were present before 1846."<sup>32</sup>

18. In August of 1872, federal railway surveyor and agent Marcus Smith reportedly camped "by the margin of Tatla Lake not far from the camp of Keogh [Cayough]..."<sup>33</sup> In November of 1872, Smith further reported that "[o]n the northwest side of Tatla lake... are the head quarters of Keogh, the Chief of the Stone Indians... [whom] have also stations by the lakes in the mountains from Tatla to the headwaters of the Chilco river."<sup>34</sup> Significantly, Smith also remarked that the plateau on either side of the Chilko River

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<sup>29</sup> Exhibit 0156-1948/00/00.001 at 38; Plaintiff's Argument, Appendix 3, at para. 93.

<sup>30</sup> Plaintiff's Argument, Volume 3, para. 909; Exhibit 0265-1864/00/00/001; 0265-1864/00/00/002.

<sup>31</sup> Exhibit 0443, Dewhirst Report, at para. 244.

<sup>32</sup> Exhibit 0443, Dewhirst Report, at paras. 200, 246, 249, 251.

<sup>33</sup> Exhibit 0156-1872/06/14.001 at p. 118, Marcus Smith Journey to Bute Inlet from Appendix E of CPR Report; Exhibit 040, Brealey Report, p. 30.

<sup>34</sup> Plaintiff's Argument, Appendix 3, at paras. 91, 134.

were important Tsilhqot'in hunting grounds.<sup>35</sup> Tachelach'ed is plateau on the east side of the Chilko River. Dewhirst agreed that Smith was referring to these lands.<sup>36</sup>

19. In 1890, surveyor A.L. Poudrier was instructed to undertake an exploratory survey of "the Chilcotin country proper." In his lengthy report Poudrier closed noting that "the Chilcotins...have villages on Risk Creek - ... - on Puntzee – Chilco and Cluscus lakes."<sup>37</sup> [Emphasis added.] On his map Poudrier also depicted a trail running from the outlet of Chilko Lake down the west side of the Chilko River to the Chilko-Chilcotin confluence.<sup>38</sup> With respect to this trail, Dewhirst reiterated his conclusion regarding the Chilcotin War Map of 1864, namely, that "[i]n my opinion such aboriginal trails formed from regular use over many generations, and were present before 1846."<sup>39</sup>

20. Based on the historical record 1822-1890 anthropologist John Dewhirst concluded:

The east bank of the Chilko River above its confluence with the Taseko River is within the Claim Area. Archival documents indicate a long, intensive Tsilhqot'in occupation of the Chilko River from before 1822 to the 1890s. Tsilhqot'in villages and trails were located on both sides of the Chilko; families living on the west side undoubtedly used and occupied the east side of the river and the Claim Area.<sup>28</sup> That use and occupation has obviously continued to modern times.<sup>29</sup> A key factor in the use and occupancy of Chilko River is its salmon fishery, which allowed families to dry their fish, and winter at village sites along the river. The 1838 census enumerated four Tsilhqot'in groups who I have located at winter villages on the river from Siwash Bridge about 4 km from its mouth to "Taze Ley" at or near the outlet of Chilko Lake. Three of those groups with a recorded population of 329 people in 1838 were located on the Chilko River, either in the Claim Area or adjacent to it.<sup>30</sup> Archival documents after 1864 indicate a trail system running the length of the Chilko River, which provided access to the adjacent Claim Area along the section of the river above the Chilko-Taseko confluence.<sup>40</sup> [Emphasis added.]

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<sup>35</sup> Plaintiff's Argument, Appendix 3, at para. 63; Exhibit 0156-1872/11/29.002 at 2000322; Exhibit 0240, Brealey Report, at 56.

<sup>36</sup> Exhibit 0443, Dewhirst Report, at 277.

<sup>37</sup> Exhibit 156-1890/12/19.001: Report from A.L.Poudrier, 19, December 1890, at 2000880, 2000891.

<sup>38</sup> Exhibit 0265-1890/00/00.001.

<sup>39</sup> Exhibit 0443, Dewhirst Report, at paras. 202, 200.

<sup>40</sup> Plaintiff's Argument, Appendix 3, at paras. 61, 62; Exhibit 0443, Dewhirst Report, at para. 189.

21. In 1899, A.W. Vowell, Indian Reserve Commissioner, traveled up the west side of the Chilko River, was ferried east across the river at Biny Gwechugh (Canoe Crossing) into southwest Tachelach'ed, then traveled into Tsuniah Valley and over to Nemiah Valley.<sup>41</sup> Of the Tsilhqot'in from Nemiah Valley on Chilko Lake, Vowell noted that "several families had built houses, and established their winter quarters, following hunting, fishing and trapping in the spring, summer and autumn."<sup>42</sup> [Emphasis added, re late summer and late autumn.] Vowell commented that "the trails to Nemaiah Valley were of the roughest kind and being beyond the settled portions of the country they have never been improved by either Government or settlers; remaining in the very primitive condition of "Indian trails".<sup>43</sup> Based on Vowell, Dr. Brealey depicted southwest Tachelach'ed as a Tsilhqot'in hunting and fishing ground continuing into the post-reserve creation period of the 20<sup>th</sup> century.<sup>44</sup>

22. In 1909, James Teit, an early Tsilhqot'in ethnographer, referenced the "Stonie's winter grounds." Dr. Brealey's map of Tsilhqot'in land use and occupancy depicts Teit as referring to the lands of Tachelach'ed, including as hunting grounds pre-European contact to the smallpox of 1862 at a minimum, and as wintering grounds into the post-reserve creation period of the 20<sup>th</sup> century.<sup>45</sup>

## **b. Genealogical Record, Related Expert Opinion & Tsilhqot'in Evidence**

23. Anthropologist John Dewhirst's genealogical research included the descendent family of Chief Keogh, whom the federal surveyor and agent Marcus Smith identified in 1872.<sup>46</sup> Chief Keogh (alt. Kreor) and his wife Kadoulie (Gadulin) had seven children, including their eldest child Annie (Hanlhdzany).<sup>47</sup> Annie married William Bonzing

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<sup>41</sup> Exhibit 0243, Brealey Map, Chilcotin Ethnogeography.

<sup>42</sup> Exhibit 0156-1899/09/04.001, Diary of A.W. Vowell.

<sup>43</sup> Exhibit 0156-1899/10/18.001, Letter from A. Vowell to Secretary, Dept. of Indian Affairs, pp. 2-3.

<sup>44</sup> Exhibit 0245, Brealey Map, Land Use and Occupancy.

<sup>45</sup> Plaintiff's Argument, Appendix 3, at para. 64; Exhibit 0245, Brealey Map, Land Use and Occupancy.

<sup>46</sup> Exhibit 0443, Dewhirst Report, at paras. 366-375.

<sup>47</sup> Exhibit 0443, Dewhirst Report, at paras. 366-367, 370.

(Bendzi) and they begat the William family of the Tsilhqot'in community at Tsi Del Del.<sup>48</sup> In this regard, it was Dewhirst's opinion:<sup>49</sup>

Archival documents, confirmed by oral history, show that the customary use area of the Tsi Del Del William family is in the northwest part of the Claim Area, specifically areas south of Tatla Lake including... Tl'egwated [Kiggie Holes]. In my opinion, archival documents and oral history demonstrate that ancestors of the Tsi Del Del William family, Kréor and Kadoulie, used the Claim Area Ca. 1844 and after. Given the Tsilhqot'in practice of traditional or customary family use areas (Par. 29-41), and the fact that Kréor was chief of the Tatla Lake Indians, the parents of Kréor and Kadoulie, who were probably born ca. 1824, likely occupied and used the same areas before and after 1844.<sup>50</sup> [Underline Emphasis added.]

24. Tsilhqot'in elder Mabel William (b. 1918) is the great-granddaughter of Chief Keogh (Kreor) and his wife Kadoulie (Gadulin).<sup>51</sup> Ms. William is the eldest child of the late Jimmy and Nelly William,<sup>52</sup> Jimmy William being the son of Hanlhdzany (Annie) and Bendzi (William Bonzing),<sup>53</sup> Hanlhdzany in turn being the eldest child of Chief Keogh and Kadoulie.<sup>54</sup> Growing up, Ms. William was imbued with oral history directly from her grandmother Hanlhdzany.<sup>55</sup> Ms. William was a source of genealogical information for Mr. Dewhirst, but also a witness in this case with evidence regarding the Tsilhqox (Chilko River) and Tachelach'ed, the lands between the Tsilhqox and Dasiqox (Taseko River):

(a) Ms William averred as to her traditional education and Tl'egwat'ed (Kiggie Holes) –

My grandmother Hanlhdzany taught me about lhiz qwen yex when we were camped together at Tl'egwated. Tl'egwated is an area along the

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<sup>48</sup> Exhibit 0443, Dewhirst Report, at para. 367.

<sup>49</sup> Plaintiff's Argument, Appendix 3, at para. 93.

<sup>50</sup> Exhibit 0443, Dewhirst Report, at para. 375.

<sup>51</sup> Plaintiff's Argument, Appendix 3, at para. 94.

<sup>52</sup> Exhibit 0173, Affidavit #1 of Mabel William, at para. 7.

<sup>53</sup> Exhibit 0173, Affidavit #1 of Mabel William, at para. 9.

<sup>54</sup> Exhibit 0173, Affidavit #1 of Mabel William, at para. 12; Exhibit 0443, Dewhirst Report, August 2005, at paras. 366-367.

<sup>55</sup> E.g. Exhibit 0173, Affidavit #1 of Mabel William, at paras. 39-42, 44, 47, 27, 29-30.

Tsilhqox (Chilko River). Its between Dan Qi Yex (Bidweli Creek) and ?Elhixidlin - where the Dasiqox (Taseko River) meets the Tsilhqox.

Tl'egwated, on the side across from Tachelach'ed, was a salmon time fishing spot for Tsi Del Del people when I was being raised. Growing up I would camp there with my grandmother Hanlhdzany and my grandfather Bendzi during salmon time. My grandfather would gaffe fish down at the river. My grandmother would henlkh'ansh (prepare the fish to be dried) back at camp. I would pack the fish for them from the river to the camp. There was a trail that was quite steep.

My grandmother Hanlhdzany would take me for walks from our camp at Tl'egwated during salmon time. When we were walking around we could see the holes of lhiz qwen yex. That's when my grandmother taught me that her family had lived in a lhiz qwen yex at Tl'egwated, across from Tachelach'ed, when she was growing up.

Hanlhdzany taught me that her family would stay in a lhiz qwen yex at Tl'egwated during the xi (winter) when it was really cold. She explained that her family lived there because they had a lot of dried salmon stored there and could get the animals like nists'i (deer). She said they would use ?ash (snowshoes) to get the nists'i because nalhiny (horses) were scarce then. My grandmother told me they could go a long ways on the ?ash.<sup>56</sup>

- (b) Ms William gave evidence regarding the Tsilhqot'in village and bridge at Tl'egwat'ed (Kigglic Holes), consistent with the 1838 Chilcotin Post documentation regarding the Tsilhqot'in village of "Tloquotock" -

When we would go for walks during salmon time, my grandmother showed me lhiz qwen yex that Tsilhqot'ins had lived in at Tl'egwated. They were across the river from Tachelach'ed, around where we camped. Some were down at the Tsilhqox near the fishing spots. Some were in the land up on top above the river. Some were in a small area on a ridge above the river but below the land up on top. Hanlhdzany taught me that the ridge is where the binlish (foot bridge) used to be in her time. The binlish went across the Tsilhqox (Chilko River) into Tachelach'ed.

Hanlhdzany told me the story about one time when she crossed the Tsilhqox on the binlish (foot bridge). She was a girl then. Spring time was coming and her family was living in their lhiz qwen yex. There

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<sup>56</sup> Plaintiff's Argument, Appendix 3, at paras. 73, 76; Exhibit 0173, Mabel William Affidavit #1, at paras. 39-42.

was dried salmon stored across the river on the Tachelach'ed side. Hanlhdzany said she used the binlish to get to the dried salmon. When she started across the binlish she got so afraid she had to crawl. She did the same thing when she returned back across the river. The binlish would swing down towards the Tsilhqox when someone was on it. It was made with logs, sticks, spruce roots and rocks.

My grandmother taught me that Tsilhqot'in people camped and fished on both sides of the Tsilhqox during salmon time at Tl'egwated. They would use the binlish (foot bridge) to do that she said. When we were camped at Tl'egwated and I was out walking with Hanlhdzany, we could see the ?eni?ah (drying racks) that people had on the Tachelach'ed side of the Tsilhqox. They looked like the diagram I've seen of ?eni?ah, but without the fish. Our lawyer David Robbins tells me the diagram is a copy of Exhibit 49. The ?eni?ah were up above the ridge where the binlish used to be. That's when grandmother taught me that there were lhiz qwen yex near the drying racks that Tsilhqot'in people used to live in inside Tachelach'ed when she was growing up.<sup>57</sup>

- (c) Ms William's evidence related to Tsilhqot'in winter lodges up the Chilko River from Tl'egwated (Kiggle Holes) to the entrance of Chilko Lake, consistent with McDougall in 1882, the Chilcotin Post records of 1838 regarding the Tsilhqot'in villages on the river at "Tsu Luh" (Tsilangh) and near the lake at "Taze Ley" (Tachi Lhuy), and the reports of Father Nobili in 1845 -

Hanlhdzany taught me that along the Tsilhqox (Chilko River) from Tl'egwated to Gwedats'ish has been a Tsilhqot'in salmon fishing area since the time of the ?esggidam (our ancestors). She also taught me that Tsilhqot'ins have had lhiz qwen yex in this area on both sides of the river from the time of the ?esggidam until her time. Grandmother said this knowledge had come down to her from her mother.

- (i) I've seen a few lhiz qwen yex at Tsilangh. Tsilangh is an area just upriver from where Dan Qi Yex (Bidwell Creek) comes into the Tsilhqox. It's called that after the flat rock that is there above the river. Tsilangh is across the river from Tachelach'ed. That was a Tsilhqot'in salmon fishing place when I was growing up, mostly for Tsi Del Del people. The lhiz qwen yex were the same size as the one's I learned about at Tl'egwated.

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<sup>57</sup> Exhibit 0173, Mabel William Affidavit #1, at paras. 44-46.

- (ii) Not far upriver, over the hill from Tsilangh, is Tsi Lhizbed. I've seen the lhiz qwen yex there too. Tsi Lhizbed is across the river from Tachelach'ed. Tsilhqot'in people would camp there for salmon too when I was growing up. They were mostly Tsi Del Del people. The lhiz qwen yex there were the same size as the ones Hanlhdzany told me about.
- (iii) Nusay Bighilin is upriver from Tsi Lhibed. It's an area where the creek from Natasawed Biny, Tsi Tex Biny and Benchuny Biny comes down to the Tsilhqox (Chilko River). I had a house at Nusay Bighilin with my late husband Eugene and our family. That was our salmon fishing spot then. Nusay Bighilin is in Tachelach'ed. The lhiz qwen yex was down by the river where the creek runs in. It was the size I was taught about.
- (iv) Tsi T'is Gulin is an area upriver from Nusay Bighilin. Tsi Tis Gulin is also just downriver from Henry's Crossing, named after ?Elegesi (Eagle Lake Henry). It's a salmon fishing station too, mostly for Xeni Gwet'in Tsilhqot'ins, including the Luluas. I've seen about two lhiz qwen yex there across from Tachelach'ed. They were the same size as the ones I learned about from grandmother.
- (v) I've seen the lhiz qwen yex on both sides of the water at Biny Gwechugh. My late husband and I used to fish there in the ?eghulhts'en (springtime). They're the same size as the Tsilhqot'in lhiz qwen yex at Tl'egwated.
- (vi) Above Biny Gwechugh, there is a long island just below the entrance to Tsilhqox Biny (Chilko Lake) at the narrows of Gwedats'ish. I can't remember the name of this island. The waters around there are called Lhuy Nilax though. Its named that because of the salmon spawning there. I've been to this island when I was fishing near there. I've seen the lhiz qwen yex on it. My grandmother taught me that the Tsilhqot'ins who lived in the lhiz qwen yex there would use a xenes (raft) to get to the island when they needed one. They didn't always need one though. In ?eghulhts'en (springtime) its shallow and you can walk to the shore towards Ts'uni?ad Dzelh (Tsuniah Mountain). That's what Hanlhdzany said.<sup>58</sup>

(d) Ms William discussed the regular use of Tachelach'ed for deer hunting grounds, corroborated by the historical record including McDougall in

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<sup>58</sup> Exhibit 0173, Mabel William Affidavit #1, at para. 50.

1822 regarding Chilko River's east side being "their favourite hunting grounds for Large Animals" -

Grandmother Hanlhdzany taught me that the Tsilhqot'ins with lhiz qwen yex along the Tsilhqox (Chilko River) would get the nists'i (deer) and sunt'iny (mountain potato) from Tsimol Ch'ed (Potato Mountain) every dan (summer time). She also taught me that these Tsilhqot'ins would use their ?ash (snowshoes) to hunt in Tachelach'ed every year. Grandmother taught that Tsithqot'ins had been living like this from generation to generation since the ?esggidams. Hanlhdzany said this knowledge had been passed down to her from her mother, who had learned it from Hanlhdzany's grandmother.<sup>59</sup> [Emphasis added]

(e) Ms William averred as to the Tsilhqot'in trails along the Chilko River, consistent with Cox (1864) and Poudrier (1890) -

In my first affidavit I talked about how the Tsilhqot'in have harvested the salmon runs along the Tsilhqox (Chilko River) since the time of the ?esggidam (our ancestors). I also talked about how the Tsilhqot'in built lhiz qwen yex (underground lodges) along the Tsilhqox from the time of the ?esggidam until the time my grandmother Hanlhdzany was being raised. As I've said, the ?esggidam are the Tsilhqot'in who lived in the generations before the grandparents of my grandparents. The sadanx, that's the time of the ?esggidam.

Nusay Bighilin is an area along the Tsilhqox (Chilko River). It's where the creek from Natasawed Biny (Brittany Lake), Tsi Tex Biny and Benchuny Biny comes down to the Tsilhqox. When I lived there I traveled the saddle and packhorse trail that came down along the Tsilhqox from Biny Gwechugh (Canoe Crossing) to Nusay Bighilin. That trail ran inside Tachelach'ed.

That trail continued down the Tsilhqox (Chilko River) beyond Nusay Bighilin. I've seen where it left Nusay Bighilin. Both ?Elegesi and my late husband Eugene taught me the trail went all the way down Tachelach'ed to ?Elhixidlin. ?Elhixidlin is where the Dasiqox (Taseko River) meets the Tsilhqox. ?Elegesi and Eugene told me that they would travel that trail for hunting and trapping.

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<sup>59</sup> Plaintiff's Argument, Appendix 3, at paras. 73, 58; Exhibit 0173, Mabel William Affidavit #1, at para. 51.

?Elegesi taught me that this trail inside Tachelach'ed from Biny Gwechugh (Canoe Crossing) to ?Elhixidlin was a Tsilhqot'in trail made by the ?esggidam (our ancestors). It was a footpath, then it became a saddle and packhorse trail. ?Elegesi taught me that this knowledge had come to him from his mother Agnes.

?Elegesi taught me that Tsilhqot'ins would cross the Tsilhqox (Chilko River) and Dasiqox (Taseko River) at ?Elhixidlin. They would cross in the ?eghulhts'en (springtime) and dan ch'iz (fall time) when the water is low. On foot they would use a stick to help them across the river.

My grandmother Hanlhdzany taught me that the Tsilhqot'in trail continued on from the Dasiqox (Taseko River) crossing at ?Elhixidlin. Grandmother taught me that the trail ran down the Tsilhqox (Chilko River) from ?Elhixidlin to Gwetsilh (Siwash). From Gwetsilh it went through Tsiyi (Bull Canyon) and down passed Gex Nats'enaghilht'i (Stone).

There was another trail that ran down the Tsilhqox (Chilko River). It was on the other side of the river. I've traveled it on horse downriver from around the narrows of Gwedats'ish, where the entrance to Tsilhqox Biny (Chilko Lake) is. I've traveled the trail to places like Biny Gwechugh (Canoe Crossing), Tsi T'is Gulin, Tsilangh, and Tl'egwated (Kigglic Holes). My grandmother Hanlhdzany taught me that the trail continued on down the Tsilhqox from Tl'egwated. She taught me it went by ?Elhixidlin, onto Gwetsilh (Siwash), near Lhin Desch'osh, through Tsiyi (Bull Canyon) and beyond Tl'etincox.

My grandmother Hanlhdzany taught me about these trails that ran down both sides of the Tsilhqox (Chilko River) as I camped with her at Tl'egwated (Kigglic Holes) when I was growing up. Hanlhdzany taught me that she had traveled both these trails. She told me that Tsilhqot'in people would use these two trails along the Tsilhqox to follow the jas (spring salmon), ts'eman (sockeye salmon) and dandzex (humpback salmon). Every year people would go downriver a ways to meet the salmon. They would move upriver with the fish and catch and dry salmon to get ready for the xi (winter). Grandfather Bendzi taught me they would catch their fish with spears that had sharp bones or horns at the tip from nists'i (deer) or sebay (mountain goat).

When we were at Tl'egwated my grandmother also taught me that these two trails along the Tsilhqox (Chilko River) were first made by the ?esggidam (our ancestors) when they were walking. She taught me that Tsilhqot'in people had been using the Tsilhqox trails from generation to generation into the time when I was being raised. She

taught me this knowledge came from her mother. That's my great-grandmother Gadulin.<sup>60</sup>

- (f) Ms William's evidence touched upon river crossings into Tachelach'ed, from the southwest, northwest and north, as well as ongoing physical occupation through use as a hunting ground accessed from the northeast along Taseko River -

?Elegesi taught me that Tsilhqot'ins would cross the Tsilhqox (Chilko River) and Dasiqox (Taseko River) at ?Elhixidlin. They would cross in the ?eghulhts'en (springtime) and dan ch'iz (fall time) when the water is low. On foot they would use a stick to help them across the river.

?Elegesi also taught me that Tsilhqot'ins from around Tl'etingox would cross the Tsilhqox (Chilko River) into Tachelach'ed at ?Elhixidlin in the late dan ch'iz (fall time) every year to hunt for nists'i (deer). They would make their camps up the Dasiqox all the way to the basin across the river from Tsintsans Xadalgwenlh. They would do their hunting through Tachelach'ed. They would stay until the snow came. ?Elegesi taught me all this.

As I said in my first affidavit, my grandmother Hanlhdzany also taught me that Tsilhqot'ins had a binlish (foot bridge) crossing the Tsilhqox (Chilko River) at Tl'egwated. The binlish would swing down towards the Tsilhqox when someone was on it. It was made with logs, sticks, spruce roots and rocks. My grandmother told me the story about how the Tl'etgwated binlish fell down:

A Tsilhqot'in man crossed the binlish from Tachelach'ed. He came to the Tsilhqot' in people staying on the other side of the river to ask if he could borrow a horse. He was headed to a white man's store to sell his furs. Someone agreed to lend him a horse so he went back across the Tsilhqox to get his pack of furs. The man was crossing out of Tachelach'ed with his pack of furs when it happened. The binlish fell. A piece came up and hit him in the head. He didn't even react when he fell in the water. He was still wearing his pack when the river carried him away.

Tsilhqot'in people also cross the Tsilhqox (Chilko River) at Biny Gwechugh (Canoe Crossing). There is a ridge of higher ground in the

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<sup>60</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail 25; Exhibit 0174, Mabel William Affidavit #2, at paras. 11-19.

water there. People can ride their horses across the water there when it is low. I've done that in the fall time. If the water is too deep the horses have to swim. Hanlhdzany also taught me that Tsilhqot'ins would make a xenes (raft) to cross Biny Gwechugh. She said this is how Tsilhqot'ins have crossed Biny Gwechugh without horses since the time of the ?esgidam (our ancestors). They would use logs tied together with willow or spruce roots to ferry themselves across the river. Grandmother Hanlhdzany taught me this knowledge came down from her mother. Hanlhdzany said she had crossed Biny Gwechugh on the xenes herself.<sup>61</sup>

(g) Ms William also averred as to Chief ?Achig effectively putting Ed Elkins at the southern perimeter of the valley now known by Elkins' name -

?Achig was a Tsilhoqt'in Nits'il?in (Chief) of the Xeni Gwet'in. My late husband's father Sammy Bulyan taught me this. So did my late husband Eugene. Both Sammy and Eugene taught me the story of Nits'il?in ?Achig dealing with Ed Elkin and his brother when they first came to Xeni. This is the story:

(i) Ed Elkin was trying to settle in Xeni (Nemiah Valley). He was the first white person to try doing that. The land he was claiming was down my Lhiz Bay (Lezbye). Ed Elkin's brother was with him.

(ii) Nits'il?in (Chief) ?Achig went there. He told them Ed Elkin cannot take this land, it is too important to Tsilhqot'ins. He told them that the mountains were our fences. He warned Elkin, "If you move into this area I will fight you every time I come around. If you do not listen I will kill you."

(iii) ?Achig told Ed Elkin that there was a little piece of land where he could stay. It was where the mountains come down at the other end of Xeni (Nemiah Valley). It was just passed a place called ?Elhtilh ?Elhtilh. There's a creek along there that flows down to the lakes at ?Elhghatish. Nits'il?in (Chief) ?Achig told Ed Elkin that he could stay at that place with a cabin and a garden. ?Achig said if Ed Elkin did that he would just shake Elkin's hand when he came around there.

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<sup>61</sup> Plaintiff's Argument, Appendix 3, at paras. 60, 69; Plaintiff's Argument, Volume 3, at para. 923, Crossings 26, 29 and 30; Exhibit 0174, Mabel William Affidavit #2, at paras. 15, 20-22.

(iv) Ed Elkin and his brother didn't listen. Nits'il'in (Chief) ?Achig went to Lhiz Bay (Lezbye) a second time to tell them. They were making coffee for themselves. ?Achig grabbed the coffee pot and threw it at them. That's when he got in a fight. ?Achig bit into Ed Elkin's ear. He got the best of them.

(v) So Ed Elkin moved to that piece of land. He stayed there with a Tsilhqot'in woman named Galtses. That's why people call that creek Elkin Creek.

Elmer and Oliver Purjue later settled where Ed Elkin stayed on that piece of land. They claimed a bigger piece of land though than what Nits'il'in (Chief) ?Achig allowed Ed Elkin to be on.

Elkin Creek flows off of Ts'il'os (Mount Tatlow). It goes down passed ?Elhtilh ?Elhtilh and into ?Elhghatish Biny (Vedan Lake). The creek from that lake goes through ?Elhghatish and into Nabi Tsi Biny (Elkin Lake). From Nabi Tsi Biny the creek goes through Neba?elhnaxnenelh?elqelh (Captain Georgetown) and down to the Dasiqox (Taseko River). The jas (spring salmon) spawn at Neba?elhnaxnenelh?elqelh every summer. It was Elmer Purjue's son Grant who first called that place Captain Georgetown.

All of these places are inside Tachelach'ed. Tachelach'ed is the lands between the Tsilhqox (Chilko River) and Dasiqox (Taseko River). Tachelach'ed is Tsilhqot'in land.<sup>62</sup>

25. Anthropologist John Dewhirst's genealogical research linking modern extended families to intergenerational customary use areas in the Claim Area also included the descendants of Kahkul (or Qaqez) and Elizabeth.<sup>63</sup> Kahkul and Elizabeth were born no later than 1846. They were from around Big Eagle Lake or Choelquoit Lake (Naghatalhchoz), which drains to Chilko River and is located directly west of Tsi Tis Gunlin on the river at southwest Tachelach'ed. Both Kahkul and Elizabeth lived in the Claim Area ca. 1846 and later.<sup>64</sup> They had seven children including their oldest daughter Daldod (Mary Ann; Madiyan) (c. 1866-1950), who's daughter "Sebanie" (c. 1896-1932) married Little George Setah (c. 1897/1899- 1971), their second daughter Agnes (c. 1870),

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<sup>62</sup> Exhibit 0174, Mabel William Affidavit #2, at paras. 52-55; Exhibit 0245, Brealey Map, Geographic Features.

<sup>63</sup> Exhibit 0443, Dewhirst Report, at para. 314, 320, 330.

<sup>64</sup> Exhibit 0443, Dewhirst Report, at para. 318.

who begat Eagle Lake Henry (?Elegesi) (born ca. 1886/1891- 1968), and their youngest daughter Susan English (Sa Yetsen) (c. 1887-1965), who married Tommy Lulua (1901-1978).<sup>65</sup> Kahkul was the younger brother of the Lhats'as'in, born ca. 1826, the famous leader of the Chilcotin War of 1864 in which Kahkul himself was a Tsilhqot'in warrior.<sup>66</sup> Relatedly, Dewhirst concluded:

In my opinion, given that Lhats 'aš'in was born ca. 1826, the parents of Lhats 'asYin and Kahkul were born no later than ca. 1806. Also in my opinion, given that Kahkul came from Naghatlhchš or the Big Eagle Lake area and had a fish trap there and considering that the Tsilhqot'in practice of traditional or customary family use areas continue for generations (Par. 29-41), the parents of Lhats 'as2in and Kahkul most likely used and occupied the Naghatlhcho2 or the Big Eagle Lake area before and after 1826.<sup>67</sup>

26. Tsilhqot'in elder Francis Setah (b. 1929) was raised by his maternal grandmother Daldod (Mary Ann) as his mother died during his early childhood. Daldod was the oldest daughter of the Tsilhqot'ins Kahkul and Elizabeth. Daldod's daughter Mari Madeline was married to Captain George.<sup>68</sup> Mr. Setah's evidence, including oral history sourced to Daldod, and in turn her father, related to Tsilhqot'in land use of Tachelach'ed:

(a) Mr. Setah testified as to his grandmother Daldod's teaching that deer migrate during the fall from the southern mountains north into Tachelach'ed for the winter, as the winter snow becomes too deep for the deer in the mountains. The deer begin to return to the mountains in the spring.<sup>69</sup>

(b) Mr. Setah was taught a story by his grandmother Daldod about a Tsilhqot'in ancestor who had a lhiz qwen yex (underground house) by the

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<sup>65</sup> Exhibit 0443, Dewhirst Report, at para. 329, 332.

<sup>66</sup> Exhibit 0443, Dewhirst Report, at para. 318, 321.

<sup>67</sup> Exhibit 0443, Dewhirst Report, at para. 319.

<sup>68</sup> Exhibit 0441, Dewhirst Report, at 33.

<sup>69</sup> Plaintiff's Argument, Appendix 3, at para. 55; Transcript, November 26, 2003, Francis Setah Direct Exam, 00042, 27 to 00043, 46; Transcript, December 2, 2003, Francis Setah Direct Exam, 00036, 42 to 00037, 1; Transcript, December 4, 2003, Direct Exam, 00028, 32 to 41.

outlet of Lingfield Creek on the Tsihqox (Chilko River) across from southwest Tachelach'ed.<sup>70</sup> The man was able to kill a deer that was chased by a wolf across the house and fell in through the hole in the house.

(c) Consistent with Vowell's ferry ride in 1899, Mr. Setah identified the Tsihqot'in crossing of the Tsihqox (Chilko River) by raft at Biny Gwechugh (Canoe Crossing) on southwest Tachelach'ed near the outlet of Tsihqox Biny (Chilko Lake). Mr. Setah had used this crossing and method with his grandmother Daldod, and was taught by her that the Tsihqot'in had been so crossing Biny Gwechugh since the time of the ?esgidams, including by using poles to propel the raft when the river was low (e.g. in fall).<sup>71</sup>

(d) Mr. Setah also averred as to the Tsihqot'in crossing of the Tsihqox (Chilko River) on southwest Tachelach'ed during the late fall (e.g. November) when the river was low at Tsi Tis Gunlin, located just east of Naghatalhchoz Biny (Big Eagle or Choelquoit Lake), and dating back to the time of the ?esgidams (Tsihqot'in ancestors) per the oral history taught to him by his grandmother Daldod.<sup>72</sup> Further, this crossing is just down river from the crossing known today as Henry's Crossing, named after Eagle Lake Henry who like Daldod was a descendant of Kahkul and Elizabeth.<sup>73</sup>

(e) Corroborated by the historical record, including McDougall's report from January of 1822 that "their favourite hunting grounds for Large Animals" is the lands east of the Chilko River, Mr. Setah identified Tachelach'ed as a Tsihqot'in deer hunting ground starting at the onset of winter, from

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<sup>70</sup> Transcript, December 2, 2003, Francis Setah Direct Examination, 00049, 9 – 00050, 20; December 3, 2003, Francis Setah Direct Examination, 00004, 20-29.

<sup>71</sup> Plaintiff's Argument, Volume 3, at para. 923, Crossing 26.

<sup>72</sup> Plaintiff's Argument, Volume 3, at para. 923, Crossing 27; Transcript, Francis Setah Direct Exam, November 27, 2003, at 00017, 43 – 00019, 16.

<sup>73</sup> Plaintiff's Argument, Volume 3, at para. 923, Crossing 27; Transcript, Francis Setah Direct Exam, November 27, 2003, at 00005, 36 – 00006, 39.

ancient times until approaching the mid-20<sup>th</sup> century, based on the oral history from his maternal grandmother Daldod (Mary Ann), as passed down from her father.<sup>74</sup>

- (f) Mr. Setah went on to identify ?Esqi Nintanisdzah (Child Got Lost) as a Tsilhqot' in base camp in north central Tachelach'ed, used by Daldod and other Tsilhqot'ins from Naghatalhchoz and Xeni while deer hunting.<sup>75</sup> Mr. Setah went on to explain that an incident during his grandmother's life when a child got lost at this hunting camp, the child's bones being found the following year upon Tsilhqot'ins returning to this camp.<sup>76</sup>
- (g) Mr. Setah testified that the spring salmon arrive at Tsi T'is Gunlin on the Tsilhqox in late July and then the sockeye arrive in August. Growing up with his grandmother Daldod, Mr. Setah would stay at Tsi T'is Gunlin for a month taking salmon. Mr. Setah testified that Tsilhqot'ins from Naghatalhchoz, Redstone, Xeni and Tachelach'ed would gather and camp on the west side of the river to fish during the salmon time.<sup>77</sup> Mr. Setah was taught by Daldod that she did this when she was growing up as her father did before her and the ?esggidams before that.<sup>78</sup> Deer would be hunted in Tachelach'ed while staying at the salmon camps.<sup>79</sup>

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<sup>74</sup> Plaintiff's Argument, Appendix 3, at paras. 65, 66.

<sup>75</sup> Plaintiff's Argument, Appendix 3, at para. 67; Transcript, December 4, 2003, Francis Setah Direct Exam, 00029, 21 to 32; 00039, 25 to 37; Transcript, November 26, 2003, Francis Setah Direct Exam, 00043, 21 to 44; Exhibit 0093DIG, Francis Setah Digitized Evidence Map, #50; Exhibit 0093LEG, Map Legend, #50.

<sup>76</sup> Plaintiff's Argument, Appendix 3, at para. 67; Transcript, December 4, 2003, Francis Setah Direct Exam, 00029, 33 to 00030, 6.

<sup>77</sup> Plaintiff's Argument, Appendix 3, at para. 178; Transcript, November 27, 2003, Francis Setah Direct Examination, 00001, 28 – 00005, 35; Exhibit 94DIG, Francis Setah Digitized Map, site "BI"; Exhibit 94LEG, Francis Setah Digitized Map Legend, site "BI".

<sup>78</sup> Plaintiff's Argument, Appendix 3, at para. 178; Transcript, November 27, 2003, Francis Setah Direct Examination, 00008, 27 – 00010, 2.

<sup>79</sup> Plaintiff's Argument, Appendix 3, at para 174; Transcript, November 27, 2003, Francis Setah Direct Examination, 00019, 17-46; Exhibit 0094DIG, Francis Setah Digitized Map, polygon "BL"; Exhibit 0094LEG, Francis Setah Digitized Map Legend, polygon "BL".

- (h) Mr. Setah testified that ?Elegesi (Eagle Lake Henry) and some other Tsilhqot'ins fished for salmon at Ts'u Nintil.<sup>80</sup> His grandmother Daldod also told him stories about Tsilhqot'ins taking salmon at Ts'eman Ts'ezchi using gaffe hooks.<sup>81</sup>
- (i) In addition, Mr. Setah identified Neba?elhnaxnenelh?elqelh (Captain Georgetown) at the north of Elkin Valley, and in the Dasiqox (Taseko River) headwaters, as both salmon spawning grounds and a Tsilhqot'in salmon fishery from ancestral times.<sup>82</sup>
- (j) Mr. Setah further identified ?Elhghatish, located between Vedan Lake Elkin Lake, as a place where he went with his grandmother Daldod to camp with ?Eskish (Captain George) and his family to take advantage of fall fisheries for Dolly Varden in both the lakes.<sup>83</sup>
- (k) Mr. Setah also noted the Tsilhqot'in trail of ancestral origin running the length of Elkin Valley of southeast Tachelach'ed between Neba?elhnaxnenelh?elqelh (Captain Georgetown) in the north, ?Elhghatish in the centre and essentially the valley's southern head about Tsi ?Ezish Dzelh (Cardiff Mountain).<sup>84</sup>

27. Tsilhqot'in elder Theophile Ubill Lulua (b. 1937) was raised practicing a traditional Tsilhqot'in manner of life and in the company of the respected Tsilhqot'in elder ?Elegesi (Eagle Lake Henry).<sup>85</sup> ?Elegesi was the son of Agnes, the second daughter

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<sup>80</sup> Plaintiff's Argument, Appendix 3, at para. 178; Transcript, November 27, 2003, Francis Setah Direct Examination, 00019, 47 – 00020, 34.

<sup>81</sup> Plaintiff's Argument, Appendix 3, at para. 178; Transcript, November 27, 2003, Francis Setah Direct Examination, 00020, 35 – 00021, 44.

<sup>82</sup> Plaintiff's Argument, Appendix 3, at para. 179.

<sup>83</sup> Plaintiff's Argument, Appendix 3, at para. 208; Transcript, December 1, 2003, Francis Setah Direct Examination, 00023, 8 – 00025, 17; Exhibit 0095DIG, Francis Setah Digitized Map, site "CH"; Exhibit 0095DLE, Francis Setah Digitized Map Legend, site "CH".

<sup>84</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail 21.

<sup>85</sup> Exhibit 13, Affidavit #1 of T.Ubill Lulua, at paras. 58-59, 19, 24, 28.

of Kahkul and Elizabeth. Mr. Lulua's evidence, including oral history sourced to ?Elegesi, related to Tsilhqot'in use and occupation of Tachelach'ed as a hunting ground:

- (a) Mr. Lulua averred that he has seen lhiz qwen yex at the outlet of Tsilhqox Biny (Chilko Lake) where Chilko Lake Lodge and the Department of Fisheries and Oceans cabin now stand.<sup>86</sup>
  
- (b) Mr. Lulua averred that he has seen lots of lhiz qwen yex at Gwedelden T'ay on the Tsilhqox (Chilko River) at southwest Tachelach'ed and that there are lhiz qwen yex from Biny Gwechugh, on both sides of the river, all the way along the Tsilhqox past Gwedelden T'ay. Eagle Lake Henry taught Mr. Lulua that there used to be about 40 lhiz qwen yex at Biny Gwechugh and told him stories about Tsilhqot'ins from Biny Gwechugh, including some that had been living there since the early 1800s.<sup>87</sup> Mr. Lulua also identified lhiz qwen yex sites he had seen at Sul Gunlin that were destroyed when an airstrip was put in at that location in 1962.<sup>88</sup>
  
- (c) Elder Ubill Lulua provided oral history evidence that Elegesi (Eagle Lake Henry) would also use this hunting camp, as did Tsilhqot'ins from Xenii (Nemiah), Stone, Redstone, Anaham and Naghalachoz.<sup>89</sup> Mr. Lulua provided oral history from ?Elegesi that generations of Tsilhqotins had used this hunting camp dating back at least to the ?unididanx and yedanx

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<sup>86</sup> Plaintiff's Argument, Appendix 2, at para. 40; Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 49.

<sup>87</sup> Plaintiff's Argument, Appendix 2, at paras. 34-35; Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at paras. 32-35; Transcript, April 1, 2004, Theophile Ubill Lulua Direct Examination, 00048, 47 – 00049, 33; Transcript, April 15, 2004, Theophile Ubill Lulua, Cross Examination, 00008, 43 – 00011, 13; Transcript, April 15, 2004, Theophile Ubill Lulua Redirect-Examination, 00046, 25-34; Exhibit 0144DIG, Theophile Ubill Lulua Digitized Map, sites "W1", "X1", "Y1", "Z1"; Exhibit 0144LEG, Theophile Ubill Lulua Digitized Map Legend, sites "W1", "X1", "Y1", "Z1".

<sup>88</sup> Plaintiff's Argument, Appendix 2, at para. 38; Transcript, April 14, 2004, Theophile Ubill Lulua Cross Examination, 00043, 33-42; 00045, 37 – 00046, 18.

<sup>89</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, para. 155; Transcript, April 2, 2004, Theophile Ubill Lulua, Direct Exam, 00028, 17 to 36. Elder Minnie Charleyboy similarly gave oral history that many Tsilhqot'ins trapped and hunted in Tachelach'ed, including Tommy Lulua, Eagle Lake Henry, Legani, Jack Lulua, Nezulhtsin, ?Esqw'alyan, Nisewhichish and Alec Jack: Transcript, March 4, 2004, Minnie Charleyboy Direct Examination, at 00043, 32 to 00045, 38; Transcript, March 5, 2004, Minnie Charleyboy Direct Examination, at 00025, 40 to 00026, 37

time periods – i.e. pre-contact.<sup>90</sup> Further, ?Elegesi would use a Tsilhqot'in name for this Tachelached hunting camp, located where the only spring water is in north Tachelach'ed, but the Tsilhqot'in had started calling it ?Esqi Nintanisdzah (Child Got Lost), commemorating the tragic event.<sup>91</sup>

- (d) Elder Ubill Lulua also gave oral history evidence that after the events at ?Esqi Nintanisdzah (Child Got Lost), people were reluctant to stay there so moved their continuing annual deer hunting camp to Ts'iwel Gunchagh in northeastern Tachalech'ed. Mr. Lulua was taught by ?Elegesi (Eagle Lake Henry) that Tsilhqot'ins had annually hunted at Ts'iwel Gunchagh during the ?undidanx and yedanx times.<sup>92</sup>

28. Tsilhqot'in elder Minnie Charleyboy is the daughter of the late Emily Lulua, but was raised by Tommy Lulua and his wife Sa Yetsen (Susan English), the youngest daughter of Kahkul and Elizabeth.<sup>93</sup> Mrs. Charleyboy was born and raised at Ts'eman Ts'ezchi on the Tsilhqox (Chilko River).<sup>94</sup> Mrs. Charleyboy also testified:

- (a) Mrs. Charleyboy identified lhiz qwen yex (underground houses) at several locations along the Tsilhqox. She was taught by Sa Yets'en and Madiyan that Tsilhqot'ins built winter residences near fishing stations, as they had done at Gwedats'ish, Biny Gwechugh and Naghelilhchiny.<sup>95</sup>

- (b) She testified as to the presence of lhiz qwen yex on both sides of the Tsilhqox at Gwedats'ish (place #154) and also saw two niyah qungh at this location. Mrs. Charleyboy testified that Sa Yets'en taught her that

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<sup>90</sup> Transcript, April 15, 2004, Theophile Ubill Lulua, Cross Exam, 00022, 36to 00023, 36.

<sup>91</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, paras. 155, 151-152.

<sup>92</sup> Plaintiff's Argument, Appendix 3, at para. 69.

<sup>93</sup> Exhibit 0441. Expert Report of John Dewhirst, at 4.

<sup>94</sup> Plaintiff's Argument, Appendix 3, paragraph 144

<sup>95</sup> Plaintiff's Argument, Appendix 2, at paras. 35, 40; Transcript, March 4, 2004, Minnie Charleyboy Direct Examination, 00016, 11 – 00017, 4.

these were Tsilhqot'in houses.<sup>96</sup> Mrs. Charleyboy explained that she fishes in the Tsilhqox for Dolly Varden, whitefish and rainbow trout in the spring as Tsilhqot'ins have been doing for generations, including her mother, Eagle Lake Henry, Eugene and Madiyan.<sup>97</sup>

(c) Mrs. Charleyboy identified lhiz qwen yex sites in the vicinity of Naghelilhchiny, where a Chilko Lake Lodge airstrip has now been constructed.<sup>98</sup> She testified that Sa Yets'en had taught her those were Tsilhqot'in houses. She also learned from Sa Yets'en that ?Eweniwen (Johnny Setah) and his sister lived in niyah qungh at a big Tsilhqot'in camp at Naghelilhchiny.<sup>99</sup> Mrs. Charleyboy explained that some Tsilhqot'ins used to go there each spring to fish but others stayed there throughout the year. Among those who had used this area were Johnny Setah, Nisewhichish, Madiyan, and Sa Yets'en, who taught Mrs. Charleyboy about it.<sup>100</sup> She also testified that she has fished at an ancestral spring fishing location nearby on the west side of the Tsihqox at Sul Gunlin.<sup>101</sup>

(d) Mrs. Charleyboy was taught by Sa Yets'en that her grandparents (Mrs. Charleyboy's great-great-grandparents) lived at Biny Gwechugh (place #146) in a lhiz qwen yex with Sa Yets'en's father Qaq'ez when he was a child.<sup>102</sup> Sa Yets'en taught Mrs. Charleyboy that the parents of Nezulhtsin

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<sup>96</sup> Plaintiff's Argument, Appendix 2, at para. 40; Transcript, March 9, 2004, Minnie Charleyboy Direct Examination, 00024, 44 – 00025, 34.

<sup>97</sup> Plaintiff's Argument, Appendix 2, at para. 40; Transcript, March 9, 2004, Minnie Charleyboy Direct Examination, 00024, 18-40; March 8, 2004, Minnie Charleyboy Direct Examination, 00023, 4-19.

<sup>98</sup> Plaintiff's Argument, Appendix 2, at para. 38; Transcript, March 9, 2004, Minnie Charleyboy Direct Examination, 00021, 18 – 00022, 34.

<sup>99</sup> Plaintiff's Argument, Appendix 2, at paras. 22-23; Transcript, March 4, 2004, Minnie Charleyboy Direct Examination, 00007, 46 – 00008, 13; Transcript, March 25, 2004, Minnie Charleyboy Direct Examination, 00006, 2 – 00007, 3.

<sup>100</sup> Plaintiff's Argument, Appendix 2, at para. 38; Transcript, March 9, 2004, Minnie Charleyboy Direct Examination, 00021, 18 – 00022, 34.

<sup>101</sup> Plaintiff's Argument, Appendix 2, at para. 38; Transcript, March 9, 2004, Minnie Charleyboy Direct Examination, 00017, 36 – 00018, 23.

<sup>102</sup> Plaintiff's Argument, Appendix 3, footnote 479; Transcript, March 2, 2004, Minnie Charleyboy Direct Examination, 00053, 17 – 00054, 45.

and Nisewhichish also lived in lhiz qwen yex at Biny Gwechugh.<sup>103</sup> Mrs. Charleyboy explained that there is a spring fishery for rainbow trout, Dolly Varden and whitefish on both sides of the Tsilhqox by Biny Gwechugh at a place called Nagwenajes.<sup>104</sup> Mrs. Charleyboy explained that her family fished at Biny Gwechugh and Nagwenajes. Her grandmother Sa Yets'en taught her that she had learned from her parents that the ?esgidams did before them. Mrs. Charleyboy testified that Eagle Lake Henry was also taught oral history about the ?esgidams fishing there by his grandfather Qaq'ez while they fished there.

- (e) Mrs. Charleyboy testified that there were spring fisheries of Dolly Varden, rainbow trout and whitefish and summer runs of spring salmon in the Tsilhqox at Biny Gwetsel (place #186) that were used each year by Mrs. Charleyboy and her family, Tommy Lulua, Eagle Lake Henry and other Tsilhqot'ins. Mrs. Charleyboy was taught that Tsilhqot'ins had been fishing there since the time of the ?esgidams.<sup>105</sup>
- (f) Mrs. Charleyboy testified as to the generations of Tsilhqot'ins who have lived at Tsi T'is Gunlin (place #171 and #67) inside the western trapline:<sup>106</sup> She testified that there are also lhiz qwen yex sites there from the ?esgidams according to oral history taught to her by Sa Yets'en. Mrs. Charleyboy used to fish there with her family each spring for rainbow trout, Dolly Varden and whitefish and explained that Henry Lulua, Tommy Lulua, her grandmother Sa Yets'en, her great-grandmother Annie and Nezultsin had all lived in houses there. Mrs. Charleyboy explained

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<sup>103</sup> Plaintiff's Argument, Appendix 2, at para. 37; Transcript, March 9, 2004, Minnie Charleyboy Direct Examination, 00011, 46 – 00012, 35.

<sup>104</sup> Plaintiff's Argument, Appendix 2, at para. 35; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00023, 4-19; 00043, 17 – 00045, 20.

<sup>105</sup> Plaintiff's Argument, Appendix 2, at para. 33; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00039, 46 – 00042, 6; March 25, 2004, Minnie Charleyboy Direct Examination; 00023, 4-19; 00030, 19 – 00031, 10.

<sup>106</sup> Plaintiff's Argument, Appendix 2, at paras. 26-29; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00016, 45 – 00022, 45; 00023, 4-19; 00032, 3-9.

that Tsi T'is Gunlin Gwenes is the part of Tsi T'is Gunlin located down on the Tsilhqox where people would fish.<sup>107</sup>

- (g) Mrs. Charleyboy testified that her family would camp near Tsi T'is Gunlin in the summer and fish for salmon, both at Tsi T'is Gunlin and at Henry's Crossing (place #77).<sup>108</sup> She remembers her mother, Bidelig, Eugene and Eagle Lake Henry fishing there and was taught by Sa Yets'en, who had learned from her parents, that the ancestors had done this before them. Ts'u Nintil (place #183), adjacent to Henry's Crossing, is another salmon fishing station on the east side of the Tsilhqox that has been used by Tsilhqot'ins since the time of the ?esgidams.<sup>109</sup>
- (h) Mrs. Charleyboy testified as to another fishing location on the west side of the Tsilhqox called Nalch'enz Be'u?iny that her Sa Yest'en taught her was named after an old Tsilhqot'in Nalch'enz, who used to fish there.<sup>110</sup> She learned from Sa Yets'en that the ?esgidams used this spot for spring fishing and in the late summer for salmon.
- (i) Mrs. Charleyboy was born and raised at Ts'eman Ts'ezchi (place #184) on the Tsilhqox and fished there during the spring for Dolly Varden, rainbow trout and whitefish with her family, including her mother and her grandfather Jack Lulua, who used to have a house there.<sup>111</sup> Jack Lulua, Sa Yets'en and Madiyan taught her that the ?esgidams also used this fishery. Mrs. Charleyboy testified as to the presence of lhiz qwen yex here, which

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<sup>107</sup> Plaintiff's Argument, Appendix 2, at para. 29; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00035, 16 – 00036, 1; 00036, 47 – 00037, 8.

<sup>108</sup> Plaintiff's Argument, Appendix 2, at para. 29; Transcript, March 25, 2004, Minnie Charleyboy Direct Examination, 00026, 25 – 00027, 6; 00029, 3-11.

<sup>109</sup> Plaintiff's Argument, Appendix 2, at para. 32; Transcript, March 25, 2004, Minnie Charleyboy Direct Examination, 00029, 40 – 00030, 12.

<sup>110</sup> Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00037, 9 – 00038, 4.

<sup>111</sup> Plaintiff's Argument, Appendix 3, para. 120; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00023, 4-19; 00023, 44 – 00024, 2; 00027, 17 – 00031, 9

her grandmother Sa Yets'en taught her were ancestral Tsilhqot'in winter homes.<sup>112</sup>

- (j) Mrs. Charleyboy testified that Nusay Bighinlin (place #52 and #137), on the east side of the Tsilhqox (Chilko River), is where Tommy Lulua and Eugene William would fish for rainbow trout, Dolly Varden and whitefish in the springtime.<sup>113</sup> She explained that she has also used this fishery and was taught by Sa Yets'en that Tsilhqot'ins have been camping here to hunt and fish ever since the time of the ?esgidams. The area is also used for salmon fishing in the summer and hunting deer in the fall.<sup>114</sup>
- (k) Mrs. Charleyboy testified that Tsilhqot'ins including Henry Kis, Jimmy Squalian, Tommy Jack and Jimmy William would catch salmon at Tsilangh.<sup>115</sup> Tl'egwated was another salmon fishing location that she went to with her husband Patrick.<sup>116</sup>
- (l) Mrs. Charleyboy testified that Tommy Lulua told her stories about hunting deer in Tachelach'ed around areas such as Tsi Tex Biny (Murray Taylor Lake):<sup>117</sup> Mr. Lulua was taught to hunt for deer in Tachelach'ed by his father Nezulhtsin, his mother Annie's second husband. ?Eskw'alyan taught Tommy Lulua, as he had learned from his father Nisewhichish, where to get deer in Tachelach'ed. Nisewhichish had a niyah qungh around Nu Natasa?ax (Mountain House). Mr. Lulua taught Mrs. Charleyboy that Eagle Lake Henry and Legani also hunted in the Tachelach'ed.

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<sup>112</sup> Plaintiff's Argument, Appendix 2, at para. 25; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00028, 9-11; 00029, 37 – 00030, 19.

<sup>113</sup> Plaintiff's Argument, Appendix 3, para. 120; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00023, 4 – 00025, 29.

<sup>114</sup> Plaintiff's Argument, Appendix 3, para. 120; Transcript, March 8, 2004, Minnie Charleyboy Direct Examination, 00023, 4 – 00025, 29; March 25, 2004, Minnie Charleyboy Direct Examination, 00027, 44 – 00028, 8.

<sup>115</sup> Transcript, March 25, 2004, Minnie Charleyboy Direct Examination, 00032, 42 – 00033, 26.

<sup>116</sup> Transcript, March 25, 2004, Minnie Charleyboy Direct Examination, 00033, 43 – 00035, 5.

<sup>117</sup> Plaintiff's Argument, Appendix 3, at para. 65; Transcript, March 4, 2004, Minnie Charleyboy Direct Examination, 00043, 32 – 00045, 38.

(m) Mrs. Charleyboy was told stories about many Tsilhqot'ins trapping in Tachelach'ed by Eagle Lake Henry and Sa Yets'en, both of whom trapped in the area.<sup>118</sup> Alec Jack's trapline was in the Tachelach'ed and ?Esqu'alyan also trapped there.

(n) Mrs. Charleyboy was told stories by Sa Yets'en about a Tsilhqot'in named ?Alequm, who had a niyah qungh above Ts'eman Ts'ezchi and trapped during the winter in Tachelach'ed to the north up past ?Elhixidlin.<sup>119</sup>

29. Anthropologist John Dewhirst's genealogical research linking modern extended families to the Claim Area included the George family descendant of Chief ?Achig, the successor to Chief Nemiah, and his wife Tsoulout.<sup>120</sup> According to Dewhirst:

Use and occupancy of the Claim Area continued after Chief ?Achig through his second son Captain George (ca. 1883-1974), and in turn through Captain George's son, Andy George (1906-1990), who were both members of the Nemiah Valley Indian Band (...).

...

In my opinion, based on the evidence discussed ..., archival documents and oral history show that the customary use area of the Xenigwet'in George family is in the Claim Area, specifically the Twin Lakes-Elkin Creek Valley, .... Considering ?Achig was born ca. 1863, his parents were born no later than ca. 1843, and possibly earlier. Considering that customary use areas are held by families from generation to generation, ?Achig parents and grandparents also likely occupied and used the customary use area and other parts of the Claim Area before and after 1843.<sup>121</sup>

30. The late Tsilhqot'in elder Ubill Hunlin (c. 1929-2005) was the widower of the late Amelia Hunlin (nee George) (c. 1925-2004), daughter of Tselxex (Andy George),<sup>122</sup> granddaughter of ?Eskish (Captain George), and great-granddaughter of Chief ?Achig

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<sup>118</sup> Plaintiff's Argument, Appendix 3, at para 85; Transcript, March 5, 2004, Minnie Charleyboy Direct Examination, 00025, 40 – 00026, 27.

<sup>119</sup> Plaintiff's Argument, Appendix 3, at para 85; Transcript, March 5, 2004, Minnie Charleyboy Direct Examination, 00036, 23 – 00037, 16.

<sup>120</sup> Exhibit 0443, Dewhirst Report, at paras. 343, 344-352.

<sup>121</sup> Exhibit 0443, Dewhirst Report, at paras. 347, 352.

<sup>122</sup> Transcript, December 1, 2003, Francis Setah Direct Examination, 00016, 27.

and Tsolouout.<sup>123</sup> Mr. Hunlin was Tsilhqot'in originally from the Tsi Del Del (Alexis Creek) community, though upon marriage to his wife Amelia (m. approx. 1959) he moved to Xení (Nemíah Valley) and Elkin Valley where they started a family and lived with ?Eskish (Captain George).<sup>124</sup> Mr. Hunlin testified in this case just before he passed away and gave evidence, including oral history evidence from his wife's grandfather ?Eskish (Captain George), relating to Tsilhqot'in land use of southeast Tachelach'ed in Elkin Valley and its uplands:

- (a) Mr. Hunlin described living at Deni Belh Tenalqelh (Captain Georgetown)<sup>125</sup> with his wife and her grandfather ?Eskish (Captain George), who taught Mr. Hunlin that ?Eskish's grandfather lived in that area before him, as did the ?esggidams.<sup>126</sup>
- (b) Mr. Hunlin testified that his wife's grandfather ?Eskish had taught him about the late fall / early winter deer hunting grounds in southeast Tachelach'ed from the highlands of Deni Belh Tenalqelh (Captain Georgetown) in the north, through ?Elghatish to Tsi ?Ezish (Cardiff Mountain) in the south, and east to Delgi Ch'osh (Big Lake). Mr. Hunlin testified that Tsilhqot'ins since the ?esggidams had hunted deer here every year upon the deer migration into this area - including the five generations from his sons back to this wife's greatgrandfather.<sup>127</sup>
- (c) Mr. Hunlin testified that Tsilhqot'ins have trapped nundi (lynx) every winter in an area from around Deni Belh Tenalqelh (Captain Georgetown),

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<sup>123</sup> Exhibit 0441, Dewhirst Report, September 2004, at 37, chart 6; Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-31.

<sup>124</sup> Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-34; 00015, 10 – 00018,2.

<sup>125</sup> Plaintiff's Argument, Appendix 2, para. 116; Transcript, March 9, 2005, Ubill Hunlin Direct Examination, 0002, 12-13.

<sup>126</sup> Plaintiff's Argument, Appendix 2, para. 116; Transcript, March 14, 2005, Ubill Hunlin Direct Examination, 00002, 46 – 00003, 33.

<sup>127</sup> Plaintiff's Argument, Appendix 3, at para. 70; Transcript, March 8, 2005, Ubill Hunlin Direct Exam, 00018, 45 to 00023, 25.

- running south to ?Elghatish and east to the uplands, from Mr. Hunlin's life back through the Tsilhqot'in generations to the ?esggidams.<sup>128</sup>
- (d) Mr. Hunlin reported that Tsilhqot'ins have hunted and trapped gex (rabbit or snowshoe hares) in the winter at Deni Belh Tenalqelh (Captain Georgetown) from the time of the ?esggidams until his life.<sup>129</sup>
- (e) Mr. Hunlin testified that Tsilhqot'ins have been trapping nabi (muskrat) every winter around the lake Delgi Ch'osh from his lifetime back to ancestral Tsilhqot'in times.<sup>130</sup>
- (f) Mr. Hunlin reported that Tsilhqot'ins have been trapping tsa (beaver) every winter at Delgi Ch'osh, ?Elghatish and Deni Belh Tenalqelh (Captain Georgetown) since the time of the ?esggidams (Tsilhqot'in ancestors).<sup>131</sup>
- (g) Mr. Hunlin was taught by Toby that Tsilhqot'ins hunted bears in winter for meat during the time of the ?esggidams (Tsilhqot'in ancestors) and were still doing so when Mr. Hunlin's grandfather was still alive.<sup>132</sup>
- (h) Mr. Hunlin identified a Tsilhqot'in trail through central Tachech'ed between Tsi Tis Gunlin on the Tsilhqox (Chilko River) and Neba?elhnaxnenelh?elqelh (Captain Georgetown) at the north of Elkin Valley. Mr. Hunlin averred to traveling this trail with ?Eskish (Captain George) and in doing so learning of its ancestral origin.<sup>133</sup>

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<sup>128</sup> Plaintiff's Argument, Appendix 3, at para. 86(b); Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00001, 23 – 00003, 42.

<sup>129</sup> Plaintiff's Argument, Appendix 3, at para. 86(a); Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00005, 6 – 00008, 27.

<sup>130</sup> Plaintiff's Argument, Appendix 3, at para. 86(c); Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00013, 13 – 00015, 13.

<sup>131</sup> Plaintiff's Argument, Appendix 3, at para. 86(d); Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00009, 22 – 00013, 3.

<sup>132</sup> Plaintiff's Argument, Appenedix 3, at para. 86(e); Transcript, March 8, 2005, Ubill Hunlin Direct Exam, 00032, 20 – 00033, 8.

<sup>133</sup> Plaintiff's Argument, at para. 923, Trail 23.

- (i) Mr. Hunlin also identified the Tsilhqot'in trail of ancestral origin running the length of Elkin Valley between Neba?elhnaxnenelh?elqelh (Captain Georgetown) in the north, ?Elhghatish in the centre and essentially to the valley's southern head about Tsi ?Ezish Dzelh (Cardiff Mountain), based on the oral history from ?Eskish (Captain George).<sup>134</sup>
- (j) Mr. Hunlin testified as to fish trapping during the spring at ?Elhghatish with his wife and family. His oral history evidence, sourced to ?Eskish (Captain George), was that this practice had been carried on by ?Eskish, ?Eskish's father (i.e. Chief ?Achig), grandfather and great-grandfather dating back to the ?esgidams (Tsilhqot'in ancestors).<sup>135</sup> Mr. Hunlin also gave evidence of the traditional dwelling constructed for camping at spring fisheries such as ?Elhghatish.<sup>136</sup>

31. Tsilhqot'in elder Norman George Setah also testified, giving oral history evidence that related to the Tsilhqot'in use and occupation of Tachelach'ed:

- (a) Mr. Setah identified Tsilhqot'in crossings points on the Tsilhqox (Chilko River) for accessing Tachelach'ed from the southwest at Tsi Tis Gunlin, the mid-west at Nusay Bighilin and the northwest at Tl'egwated (Kiggie Holes). He was taught by Tommy Lulua, Captain George and Henry Kis that these crossings have been used by Tsilhqot'ins since the time of the ?esgidams.<sup>137</sup>
- (b) Norman George Setah testified that his grandfather Little George Setah, Henry Lulua, Tommy Lulua, Eagle Lake Henry and other Tsilhqot'ins would hunt beaver and fish for steelhead trout along the Tsilhqox in the

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<sup>134</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail 21.

<sup>135</sup> Plaintiff's Argument, Appendix 3, at para. 120.

<sup>136</sup> Plaintiff's Argument, Appendix 3, at para. 126.

<sup>137</sup> Plaintiff's Argument, Appendix 3, at para. 60.

spring.<sup>138</sup> He testified that he would camp with his father on the west side of the river but people like Eagle Lake Henry and Eugene William would be on the east side. They used campsites at Ts'u Nintil, Tsi T'is Gunlin and Nusay Bighilin and fished along the Tsilhqox on both sides of the river. Tommy Lulua atugh him that Tsilhqot'ins were doing this back in Hadediny's (Jack Lulua's) time and also before that in the time of the ?esggidams.

(c) Mr. Setah testified that his grandfather Little George Setah, Sam Bulyan, Eagle Lake Henry and many other Tsilhqot'ins would also camp at Ts'u Nintil during the summer to fish for humpback salmon.<sup>139</sup> He testified that his grandfather ?Alekw'ed, ?Eweniwen and Tommy Lulua told him stories about their grandfathers and the ?esggidams doing this.

(d) Mr. Setah identified Tl'egwated as a place where a lot of Tsilhqot'ins would fish for salmon during the summer while the river was deep. He testified that they would camp and fish on both sides of the Tsilhqox and also stay into the fall to hunt deer and pick berries. Qawa Ghili taught Mr. Setah that the ?esggidams also did this.<sup>140</sup>

(e) Mr. Setah testified as to the Tsilhqot'in trail of ancestral origin, connecting to Gwesilh on the Tsilhqox (Chilko River), running along the east side of the Dasiqox (Taseko River) that bounds Tachelach'ed in the northeast (the trail being confirmed by Dr. Brealey).<sup>141</sup> Norman George Setah was taught by his grandfather Alec, ?Eskish (Captain George), Lebusden (Johnny Baptiste) and Sam Bulyan that the ?esggidams used this route. Of note, the Chilcotin Post's census of 1838 identified a Tsilhqot'in winter village at

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<sup>138</sup> Transcript, October 21, 2004, Norman George Setah Direct Examination, 00026, 33 – 00032, 13.

<sup>139</sup> Transcript, November 4, 2004, Norman George Setah Direct Examination, 00051, 39 – 00055, 23.

<sup>140</sup> Transcript, November 1, 2004, Norman George Setah Direct Examination, 00033, 40 – 00037, 10; Exhibit 0210DIG, Norman George Setah Digitized Map, polygons “DS”, “DT”; Exhibit 0210LEG, Norman George Setah Map Legend, polygons “DS”, “DT”.

<sup>141</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail 32; Transcript, November 29, 2004, Norman George Setah Direct Examination, 00008, 17 – 00009, 22.

“Koo Tsil” (Gwetsilh) with a population of 153 persons, including 41 hunters.<sup>142</sup>

(f) Mr. Setah also identified Tsilhqot’in crossing points on the Dasiqox (Taseko River) for accessing Tachelach’ed from the northeast at Chi’ih Nadilin, the mid-east at Tsiqelh Ts’iselin, Dig Nigwenili and Tisht’an Gunlin Xaghinlin, and the southeast at Dasiqox Nanatats’ededilh. Mr. Setah was taught by various elders including his grandfather Alec, ?Eskish (Captain George), Sam William (a.k.a Bulyan) and Nalch’enz (Eddie Quilt) that these crossings were used by the ?esgidams.<sup>143</sup>

(g) Mr. Setah further identified a Tsilhqot’in trail through central Tachelach’ed between Deni Belh Tenalqelh (Captain Georgetown) at the north of Elkin Valley and both Tsi Tis Gunlin and Nusay Bighilin on the Tsilhqox (Chilko River). Mr. Setah averred as to its ancestral Tsilhqot’in origin.<sup>144</sup>

(h) Mr. Setah testified as to hunting deer through the winter and into the spring around Captain Georgetown along with his father, ?Eskish (Captain George) and ?Eweniwen, who taught him the ?esgidams had also done this.<sup>145</sup> Mr. Setah, ?Eweniwen, and other Tsilhqot’ins right back to the ?esgidams also hunted beaver in this area during the spring.<sup>146</sup>

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<sup>142</sup> Plaintiff’s Argument, Appendix 3, at para. 61.

<sup>143</sup> Plaintiff’s Argument, Appendix 3, at para. 61.

<sup>144</sup> Plaintiff’s Argument, Volume 3, at para. 923, Trail 23, 24.

<sup>145</sup> Plaintiff’s Argument, Appendix 3, at para. 65; Transcript, November 9, 2004, Norman George Setah Direct Examination, 00039, 30 – 00040, 36; November 29, 2004, Norman George Setah Direct Examination, 00011, 36 – 00012, 21; Exhibit 214DIG, Norman George Setah Digitized Map, polygon “HA”; Exhibit 214LEG, Norman George Setah Digitized Map Legend, polygon “HA”; Exhibit 215DIG, Norman George Setah Digitized Map, polygon “IC”; Exhibit 215LEG, Norman George Setah Digitized Map Legend, polygon “IC”.

<sup>146</sup> Plaintiff’s Argument, Appendix 3, at 208; Transcript, November 29, 2004, Norman George Setah Direct Examination, 00002, 9 – 00005, 13; Exhibit 215DIG, Norman George Setah Digitized Map, polygon “HZ”; Exhibit 215LEG, Norman George Setah Digitized Map Legend, polygon “HZ”.

- (i) Mr. Setah used to fish for spring salmon during the summer around Captain Georgetown along with other Tsilhqot'ins, including Amelie, who was raised by Captain George and told Mr. Setah stories about her grandfather and the ?esggidams fishing there.<sup>147</sup>
- (j) Mr. Setah identified a large area called Biny Gwedenilah where he had hunted muskrats and squirrels with his father. He testified that Tommy Lulua, ?Eskish (Captain George), Nalch'enz (Eddie Quilt) and ?Eweniwen all told him stories of the ?esggidams doing this each spring, and fall until the snow got too deep.<sup>148</sup> Mr. Setah also hunted muskrats with his father to the southeast around Gwezish Biny.<sup>149</sup>
- (k) Mr. Setah described his family's springtime use of the area around Tsanglen Biny (Chaunigan Lake):<sup>150</sup> He testified that they would camp, fish for trout in Tsanglen Biny and hunt muskrats in the surrounding area. Mr. Setah was taught by Lizzie that Tsilhqot'ins since the time of the ?esggidams had used this area and he confirmed that quite a few were using it at the same time as his family.
- (l) Mr. Setah identified a fall fishery at ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake), explaining that his family would camp between the lakes at ?Elhghatish in a shelter built by ?Eskish.<sup>151</sup> He

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<sup>147</sup> Plaintiff's Argument, Appendix 3, at para. 179; Transcript, November 2, 2004, Norman George Setah Direct Examination, 00038, 7 – 00039, 44; Exhibit 0212DIG, Norman George Setah Digitized Map, polygon "FG"; Exhibit 0212LEG, Norman George Setah Digitized Map Legend, polygon "FG".

<sup>148</sup> Plaintiff's Argument, Appendix 3, at para. 208; Transcript, November 29, 2004, Norman George Setah Direct Examination, 00029, 26 – 00035, 9; Exhibit 0215DIG, Norman George Setah Digitized Map, polygon "IK", #248; Exhibit 0215LEG, Norman George Setah Digitized Map Legend, polygon "IK", #248.

<sup>149</sup> Transcript, November 29, 2004, Norman George Setah Direct Examination, 00043, 17-31; Norman George Setah Digitized Map, polygon "IT"; Exhibit 0215LEG, Norman George Setah Digitized Map Legend, polygon "IT".

<sup>150</sup> Plaintiff's Argument, Appendix 3, at para 120; Transcript, November 29, 2004, Norman George Setah Direct Examination, 00035, 10 – 00040, 9.

<sup>151</sup> Plaintiff's Argument, Appendix 3, at para. 208; Transcript, November 18, 2004, Norman George Setah Direct Examination, 00034, 44 – 00036, 37; Exhibit 0214DIG, Norman George Setah Digitized Map, polygons "HQ", "HR"; Exhibit 0214LEG, Norman George Setah Digitized Map Legend, polygons "HQ", "HR".

testified that his grandfather ?Eweniwen taught him that his grandfather and the ?esgidams before him had camped at this fishery each fall.<sup>152</sup>

32. Tsilhqot'in elder Martin Quilt was raised with his parents and family in southeast Tachelach'ed. Mr. Quilt testified regarding Tachleach'ed thusly:

(a) Mr. Quilt reported that he has hunted through the Tachelach'ed for deer and moose and also testified as to numerous other Tsilhqot'ins, including Eagle Lake Henry, Henry Solomon, Eugene William, Danny William and Johnny Baptiste having hunted in this area.<sup>153</sup>

(b) Martin Quilt testified that he was raised around Captain Georgetown and Upper Place and identified this area as the trapping grounds used by his family and other Tsilhqot'ins for squirrels, mink, lynx, cougar, muskrat, cougars and coyotes.<sup>154</sup> Mr. Quilt also reported hunting deer, moose, cougar, squirrels and weasels on Captain George Mountain while he was growing up.<sup>155</sup>

33. Tsilhqot'in elder Doris Lulua (b. 1930) is the daughter of Eileen Lulua and the granddaughter of Jack Lulua and Jeannie Nemiah, and thus the great-granddaughter of Annie and Nensualian, and her second husband Nezulhtsin, as well Chief Nemiah and Akous.<sup>156</sup> Ms. Lulua gave evidence relating to Tsilhqot'in use and occupation around the Tsilhqox (Chilko River):

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<sup>152</sup> Plaintiff's Argument, Appendix 3, at para. 208; Transcript, November 18, 2004, Norman George Setah Direct Examination, 00038, 38 – 00039, 15.

<sup>153</sup> Transcript, August 12, 2002, Martin Quilt Direct Examination, 00884, 14-16; 00904, 2 – 00910, 24; Exhibit 0003DIG, Martin Quilt Digitized Map, polygon "Q1"; Exhibit 0003LEG, Martin Quilt Digitized Map Legend, polygon "Q1".

<sup>154</sup> Transcript, July 23, 2002, Martin Quilt Direct Examination, 00392, 11 – 00393, 17; 00436, 16 – 00442, 15; Exhibit 0003DIG, Martin Quilt Digitized Map, polygon "A"; Exhibit 0003LEG, Martin Quilt Digitized Map Legend, polygon "A".

<sup>155</sup> Transcript, July 23, 2002, Martin Quilt Direct Examination, 00469, 20 – 00473, 15; Exhibit 0003DIG, Martin Quilt Digitized Map, polygon "C"; Exhibit 0003LEG, Martin Quilt Digitized Map Legend, polygon "C".

<sup>156</sup> Exhibit 0441, Dewhirst Report, September 2004, at 17, chart 1.

- (a) Elder Doris Lulua averred that her great-grandmother Annie taught her that Tsilhqot'ins used to live in lhiz qwen yex all along the Tsilhqox around Biny Gwechugh, Sul Gunlin an Gwedats' ish.<sup>157</sup>
- (b) Ms. Lulua was taught by her mother that she used to camp at Ts'eman Ts'ezchi just as Ms. Lulua's great-grandmother Annie used to do during the summer salmon run.<sup>158</sup>
- (c) Ms. Lulua reported that Henry's Crossing has always been a very popular summer salmon fishing spot, with big camps of Tsilhqot'ins forming each year.<sup>159</sup>
- (d) Doris Lulua reported that she would see ?Elegesi fishing each year on the Tsilhqox at Ts'u Nintil and also hear stories from him about this. Ms. Lulua averred that her mother used have her camp on the other side of the river from ?Elegesi but the Chilko River Lodge is there now.<sup>160</sup>
- (e) Ms. Lulua learned from her uncle Tommy Lulua that Nezulhtsin's fishing place was on the Tsilhqox at Tsi T'is Gunlin across from where Henry Lulua had a cabin.<sup>161</sup> Jack Lulua also fished there.<sup>162</sup> She averred that Tsilhqot'ins would come from all over to fish there in the summer, and

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<sup>157</sup> Plaintiff's Argument, Appendix 2, at para. 35; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at paras. 88-91.

<sup>158</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 58.

<sup>159</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 58.

<sup>160</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para.62

<sup>161</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 60.

<sup>162</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 61.

still do, and recalled camping at Tsi T'is Gunlin with her mother when she was growing up.<sup>163</sup>

(f) While Doris Lulua was growing up, members of the Lulua family would camp all along the west side of the Tsilhqox from Henry's Crossing to Nusay Bighilin, which was Eugene William's fishing spot and is still used by his boys Benny and Boise and Boise's two sons.<sup>164</sup>

(g) Ms. Lulua's brother Edward fished at Xe?ah Nadi?ah about a mile downriver from Nusay Bighilin, as did other Luluas from time to time.<sup>165</sup>

(h) Further along the same trail that leads to Xe?ah Nadi?ah are two more fishing spots called Tsilhibed, near Lava Canyon, and Tl'ugh ?Idinkw'el. Ms. Lulua averred that her mother, her grandmother, Madi?an and Tommy Lulua all used the trail leading to these fishing spots.<sup>166</sup>

(i) Ms. Lulua averred that her family also fished at Yanuwah Natl'el Gwez?ex, further north. She was taught by her mother that Tsilhqot'ins from Tsi Del Del fish at Tl'egwated on the other side of Bidwell Creek.<sup>167</sup>

34. Additional Tsilhqot'in witnesses relating to Tsilhqot'in land uses of Tachelach'ed:

(a) Former Councillor Gilbert Solomon testified as to the presence of many lhiz qwen yex sites on both sides of the Tsilhqox from the head of

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<sup>163</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 58.

<sup>164</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 63.

<sup>165</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 65.

<sup>166</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para.66.

<sup>167</sup> Plaintiff's Argument, Appendix 3, at para. 178; Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para.67.

- Tsilhqox Biny (Chilko Lake)<sup>168</sup> through to Biny Gwechugh<sup>169</sup> and up around Tl'egwated, where he say house sites on the west side of the Tsilhqox and was taught by elders that there were more on the east side of the river.<sup>170</sup>
- (b) Mr. Solomon learned from his parents that ?Elhghatish was named by the ?esggidams.<sup>171</sup>
- (c) Chief William testified that he remembered attending a gathering at Captain Georgetown and traveling with his family between two cabins that Eddie Quilt Sr. had at Captain Georgetown and Upper Place, respectively.<sup>172</sup>
- (d) Chief Roger William also identified lhiz qwen yex sites along the Tsilhqox including a large cluster at the head of Tsilhqox Biny where Chilko Lake Lodge now sits,<sup>173</sup> and also a group of at least 15 pit home sites further along the Tsilhqox at Tl'egwated.<sup>174</sup>
- (e) Chief Roger William testified that he had been taught by his late uncles Dan and Eugene William that there was a Tsilhqot'in pit home at

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<sup>168</sup> Plaintiff's Argument, Appendix 2, at para. 40; Transcript, March 15, 2005, Gilbert Solomon Direct Examination, 00038, 10-26.

<sup>169</sup> Plaintiff's Argument, Appendix 2, at para. 35; Transcript, March 15, 2005, Gilbert Solomon Direct Examination, 00038, 31-45

<sup>170</sup> Plaintiff's Argument, Appendix 2, at para. 12; Transcript, March 15, 2005, Gilbert Solomon Direct Examination, 00040, 4 – 00041, 1.

<sup>171</sup> Plaintiff's Argument, Appendix 3, at para. 208; Transcript, April 5, 2005, Gilbert Solomon Direct Examination, 00016, 4-39.

<sup>172</sup> Plaintiff's Argument, Appendix 2, at para. 119; Transcript, September 17, 2003, Roger William Direct Examination, 00023, 2 – 00024, 7.

<sup>173</sup> Plaintiff's Argument, Appendix 2, at para. 40; Transcript, September 12, 2003, Roger William Direct Examination, 00044, 20-43; 00046, 4-8; 00047, 7 – 00049, 2; Exhibit 0015DIG, Roger William Digitized Map, site "A"; Exhibit 0015LEG, Roger William Digitized Map Legend, site "A".

<sup>174</sup> Plaintiff's Argument, Appendix 2, at para. 12; Transcript, September 12, 2003, Roger William Direct Examination, 00054, 22 – 00055, 24; Exhibit 0015DIG, Roger William Digitized Map, site "D"; Exhibit 0015LEG, Roger William Digitized Map Legend, site "D".

ʔElhghatish.<sup>175</sup> Eddie Quilt Sr. lived at ʔElhghatish. His daughter, Rosie Pierce, then had a cabin and trapline there and currently stays at Upper Place.<sup>176</sup>

(f) Chief Ervin Charleyboy testified that there were kigli holes at Tl'egwated and explained that his father had taught him that the Tsilhqot'ins had a community there and had once driven off ʔEna Tsel from that area.<sup>177</sup>

(g) Councilor David Setah identified an area running along the eastern shores of ʔElhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake) as springtime deer hunting grounds used by both Councilor Setah and his father.<sup>178</sup>

(h) Harry Setah identified Saskatoon and raspberry picking patches used by his family to the west and southwest of Nabi Tsi Biny (Elkin Lake).<sup>179</sup>

### **c. Additional Expert Opinion**

35. Dr. Matson's archaeological work identifies substantial deer consumption at Tsilhqot'in winter village and house sites on the Tsilhqox.<sup>180</sup> His opinion is clear that the Tsilhqot'in most likely occupied Tachelahch'ed as of the early 1700s.<sup>181</sup> Based on Dr. Matson's work, Dr. Brealey, human geographer and cartographer, mapped "the basic patterns of Tsilhqot'in land use and occupancy" as including Tachelach'ed as a

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<sup>175</sup> Plaintiff's Argument, Appendix 2, at para. 128; Transcript, September 12, 2003, Roger William Direct Examination, 00064, 8-15; 00068, 5 – 00069, 9.

<sup>176</sup> Plaintiff's Argument, Appendix 2, at para. 128; Transcript, October 22, 2003, Roger William Direct Examination, 00020, 11-28.

<sup>177</sup> Plaintiff's Argument, Appendix 2, at para. 12; Transcript, April 19, 2005, Ervin Charleyboy Direct Examination, 00018, 2-18.

<sup>178</sup> Plaintiff's Argument, Appendix 3, at para. 130; Transcript, January 17, 2005, David Setah Direct Examination, 00041, 18 – 00042, 13; Exhibit 0258DIG, David Setah Digitized Map, polygon "AE"; Exhibit 0258LEG, David Setah Digitized Map Legend, polygon "AE".

<sup>179</sup> Plaintiff's Argument, Appendix 3, at para. 209; Transcript, October 13, 2004, Harry Setah Direct Examination, 00014, 37 – 00016, 2; 00017, 10-42; Exhibit 0179DIG, Harry Setah Digitized Map, polygons "AF", "AH"; Exhibit 0179LEG, Harry Setah Digitized Map Legend, polygons "AF", "AH".

<sup>180</sup> Plaintiff's Argument, Appendix 3, at para. 57.

<sup>181</sup> Plaintiff's Argument, Volume 3, at paras. 870-872; Plaintiff's Argument, Appendix 3, at para. 9.

Tsilhqot'in hunting ground dating pre-European contact and enduring until at least the smallpox of 1862.<sup>182</sup>

36. Archaeologist Morley Eldridge, British Columbia's witness, agreed with the view of anthropologist Robert Tyhurst that the Tsilhqot'in had a long tradition of building lhiz qwen yex, that is supported by the archaeological evidence and the statements of Tsilhqot'in elders. Mr. Eldridge agreed "that Tsilhqot'in people lived in circular pit houses at least as long ago as 1590 plus or minus 80 years AD." 16 In adopting this opinion Mr. Eldridge, as did Mr. Tyhurst, relied upon the house pit identified with Tsilhqot'in artifacts - on the Chilko River on the edge of the Claim Area - as dating to approximately 1600 A.D.<sup>17</sup> Mr. Eldridge's opinion was also that the Tsilhqot'in built and used lhiz qwen yex well into the 1800s.<sup>18</sup><sup>183</sup>

37. Based on Dr. Lane's work (1953), Dr. Brealey, mapped the basic patterns of Tsilhqot'in land use and occupancy as including southeast Tachelach'ed, in Elkin Valley and its highlands, as Tsilhqot'in hunting and fishing grounds dating pre-European contact and enduring until at least the smallpox of 1862.<sup>184</sup> Further, based on the work English (1994), Dr. Brealey mapped this area as continuing to be an area hunted by the Tsilhqot'in into the post-reserve creation period in the 20<sup>th</sup> century.

#### **d. General Points**

38. The entire body of evidence discussed above regarding Tachelach'ed is consistent with the previously discussed Tsilhqot'in system of occupation through regular use of lands for resource exploitation.

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<sup>182</sup> Ibid.

<sup>183</sup> Plaintiff's Argument, Appendix 3, at para. 9; Transcript, May 25, 2006, Morley Eldridge Cross Exam, 00042, 19 to 22; Transcript, May 25, 2006, Morley Eldridge Cross Exam, 00029, 46 to 21; 00039, 33 to 00042, 28; Transcript, May 25, 2006, Morley Eldridge Cross Exam, 00042, 29 to 44, "Tsilhqot'in did build pithouses prior to the middle of the 1800s."

<sup>184</sup> Plaintiff's Argument, Appendix 3, at para. 57; Exhibit 0240, Brealey Map, Land Use and Occupancy.

39. The Tsilhqot'in annual schedule of land use dating pre-1846 detailed by anthropologist Robert Tyhurst (1984), based in part on Lane (1953), identifies – late summer fishing of salmon runs from the Fraser and Chilcotin Rivers; deer hunting through the late fall and winter, as well as into spring with lesser intensity, including on snowshoes; winter fur trapping, including for snowshoe hares; spring steelhead and trout fisheries.

40. These yearly Tsilhqot'in land use practices reflect exploitation of seasonal variations in local resource abundance. From late July until September, salmon run to their spawning grounds on the Chilko River of northwest Tachelach'ed and in the Taseko River headwaters of Elkin Creek in southeast Tachelach'ed.<sup>185</sup> From fall until spring, migratory deer otherwise from the southern 'snow mountains' winter in Tachelach'ed.<sup>186</sup> Lower elevation furbearers grow plush winter coats.<sup>187</sup> Come late winter, the snow melts then refreezes so as to encrust thus making it possible to run down game such as deer still residing in Tachelach'ed.<sup>188</sup> Come spring, freshwater fish such as steelhead spawn in the Chilko River, while trout spawn in creeks such as Elkin Creek at ?Elhghatish.<sup>189</sup>

41. In terms of Tachelach'ed's significance to Tsilhqot'in culture, broadly understood, the oral history and expert evidence regarding ancient Tsilhqot'in creation narratives or legends indicate that the Tsilhqot'in were and remain deeply connected to Xeni:

- (a) In Lhin Desch'osh, recorded by Farrand as "Lendix'teux" during a visit to the Tsilhqot'ins in 1897,<sup>190</sup> Lhin Descho'sh and his boys decide to leave a Tsilhqot'in village and "go and visit the Chilcotin country."<sup>191</sup> During their tour they come to

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<sup>185</sup> Plaintiff's Appendix 3, at paras. 164, 177-179.

<sup>186</sup> Plaintiff's Appendix 3, at para. 55.

<sup>187</sup> Plaintiff's Appendix 3, at para. 52.

<sup>188</sup> Plaintiff's Appendix 3, at para. 74.

<sup>189</sup> Plaintiff's Appendix 3, at paras. 117, 120.

<sup>190</sup> Exhibit 0167.009.002, Livingston Farrand, "Traditions of the Chilcotin Indians," Chapter 1, The Jesup North Pacific Expedition, Edited by Franz Boas, New York, p. 3. Robert Lane also notes this legend in his 1953 thesis; see Exhibit 0175 at 298-299.

<sup>191</sup> Exhibit 0167.009.002, Livingston Farrand, "Traditions of the Chilcotin Indians," Chapter 1, The Jesup North Pacific Expedition, Edited by Franz Boas, New York, pp. 7-14, at 10.

Chilko Lake (Tsilhqox Biny), the dominant water body of the Claim Area. While there they see “a great beaver dam”, the resident of which pulls Lhin Desch’osh under water and swallows him<sup>192</sup> The boys hunt for him and follow the river (the Chilko, or Tsilhqox ) to Siwash Bridge (at Gwetsilh), a course which defines northwet Tachelach’ed. This legend’s status as a creation story is further reinforced by Tsilhqot’in witness’ testimony that the boys, in looking for their father, actually *created* the rivers by kicking or digging up the earth<sup>193</sup> – in the words of Doris Lulua, “They were kicking up the earth, and it turned into a river, making all the rivers around this area. They made Chilko River and all the small creeks.”<sup>194</sup>

- (b) After backtracking up Chilko River (Tsilhqox ) from Siwash Bridge (Gwetsilh), Farrand recorded Lhin Desch’osh’s boys as searching for him “up the Whitewater” River (Dasiqox)<sup>195</sup> to “its head” (at Nadlin Yex),<sup>196</sup> where they

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<sup>192</sup> Exhibit 167.009.002, Livingston Farrand, “Traditions of the Chilcotin Indians,” Chapter 1, The Jesup North Pacific Expedition, Edited by Franz Boas, New York, pp. 7-14, at 13. Francis Setah is consistent with Farrand in placing the beaver dam in the claim area at the mouth of Chilko River, explaining that the Tsilhqox was created below the hill at Gwedats’ish that resembles a giant beaver house. See Transcript, November 17, 2004, Direct-Exam, at 00013, 6 – 00014, 44; 00024, 47 – 00025, 14; 00026, 18 – 00027, 1. Although he does not know this as part of the Lhin Desch’osh legend, Francis Setah’s evidence on this point, when combined with the evidence of other Tsilhqot’in witnesses that the boys, in looking for their father, *created* the river systems, reinforces the status of Lhin Desch’osh as the legend of the creation of Tsilhqot’in country, and the beaver-swallowing- Lhin Desch’osh element as the explanation of the creation of waterways within Tsilhqot’in country. Several witnesses testified as to a beaver dam as part of this legend, but suggest additional locations. Chief Roger William and Gilbert Solomon locate a legendary beaver dam at Gwedzin (Cochin Lake) – Transcript, September 10, 2003, Chief Roger William Direct-Exam, at 00045, 4 – 00046, 11; Transcript, April 8, 2005, Gilbert Solomon Cross-Exam, at 00063, 40 – 00064, 7; Patricia Guichon locates it at a place near Redstone called Tsa Ch’ighachigwelax – Transcript, May 9, 2006, Direct-Exam, at 00051, 20-26. This discrepancy is best explained by approaching this legend from a functional perspective: fundamentally, this legend explains to Tsilhqot’ins the origin and creation of the Tsilhqot’in landscape, and the way it was made inhabitable by Tsilhqot’in people. All accounts describe how the boys create the river systems in Tsilhqot’in country in the course of their search for their father, and are consistent in describing the purpose of the boys’ mission as to fix the land, make the land better, make the land safe, etc. This interpretation is further supported if one considers Chief Roger William’s testimony that “The beaver was big as a house or a cabin. It was huge. And it made different – my understanding, it had different dams and Gwedzin is one of them.” Transcript, October 23, 2003, Direct-Exam, at 00003, 41-44.

<sup>193</sup> Exhibit 0167, Affidavit #2 of Doris Lulua, March 25, 2004, para 27; Exhibit 0431, Affidavit #1 of Elizabeth Jeff, October 8, 2004, para 33; Transcript, May 9, 2005, Patricia Guichon Direct-Exam, at 00051, 25-47; Transcript, March 9, 2005, Minnie Charleyboy Direct-Exam, at 00035, 8-15.

<sup>194</sup> Exhibit 0167, Affidavit #2 of Doris Lulua, March 25, 2004, para 27.

<sup>195</sup> Chief Roger William gives “White Water” as the English name for the Dasiqox – see Transcript, October 13, 2003, Chief Roger William Direct-Exam, at 00058, 25-31.

eventually find him.<sup>197</sup> The oral history of Patricia Guichon confirms this.<sup>198</sup> This course bounds northeast Tachelach'ed.

(c) According to Farrand, Lhin Desch'osh and his boys then returned down the Whitewater River (Dasiqox). Thereafter they turned to stone at the location where a mythical chipmunk escapes their attempt to catch it.<sup>199</sup> This place, known to the Tsilhqot'in as Lhin Desch'osh, is located on the plateau just north of Tachelach'ed and to the east, as is Siwash Bridge (Gwetsilh).<sup>200</sup> According to elder witness Doris Lulua, this occurred when they were "almost home to Chilko Lake."<sup>201</sup>

(d) In the narrative of Salmon Boy,<sup>202</sup> a Tsilhqot'in boy playing with friends along the bank of the Tsilhqox (Chilko River) jumps onto a piece of ice in the river and floats out to sea. The Tsilhqot'in boy transforms into a salmon, accompanying the others on their long journey. They eventually use Tizlin Dzelh (Tullin Mountain) to find their way back up the Tsilhqox to their spawning grounds near the mouth of Tsilhqox Biny. Salmon Boy is then caught by a Tsilhqot'in family at the river and transforms back to reveal himself as their lost son. This legend is instructive in showing salmon to be inextricably linked with the identity and survival of the Tsilhqot'in and also reveals the importance of the Tsilhqox or northwest

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<sup>196</sup> Nadilin Yex is place name # 31, as identified by Martin Quilt. Please see consolidated place names map, Exhibit 0485.

<sup>197</sup> Exhibit 0167.009.002, Livingston Farrand, "Traditions of the Chilcotin Indians," Chapter 1, The Jesup North Pacific Expedition, Edited by Franz Boas, New York, pp. 7-14, at 13.

<sup>198</sup> Transcript, May 9, 2005, Patricia Guichon Direct-Exam, at 00052, 1-19. Note also that Chief Roger William recounts a story of Billy William, who drowned after throwing a stone located on the Dasiqox into the river. Although he is vague on the details, Chief William testified that the landmark stone is related to "where Lhin Desch'osh was inside the beaver." Transcript, January 6, 2004, Chief Roger William Cross-Exam, at 00059, 17 – 00060, 11.

<sup>199</sup> Exhibit 0167.009.002, Livingston Farrand, "Traditions of the Chilcotin Indians," Chapter 1, The Jesup North Pacific Expedition, Edited by Franz Boas, New York, pp. 7-14, at 14.

<sup>200</sup> The location of Lhin Desch'osh was marked as place name # 86 by Chief Roger William, Francis Setah, and Ervin Charleyboy, as shown on the place name map, Exhibit 485.

<sup>201</sup> Plaintiff's Argument, Volume 3, at paras 887(a)-(c); Transcript, September 8, 2004, Doris Lulua Cross-Exam, at 00052, 7-25.

<sup>202</sup> Plaintiff's Argument, Volume 3, at para. 890.

Tachelach'ed in bringing this important resource right into the heart of the Tsilhqot'in territory.

- (e) Dr. Dinwoodie's evidence is that the nature of Tsilhqot'in occupation of land is best understood by also considering that their cultural relationship to lands went well beyond their utilitarian interests in it. In particular, Tsilhqot'in cultural relationship to land is empirically attested in their geographic place names and associated narratives.<sup>203</sup>

42. The evidence regarding Tsilhqot'in place names also supports the fact of Tsilhqot'in occupation of Tachelach'ed for centuries. British Columbia's archaeologist Morley Eldridge was of the opinion that aboriginal place names, by their nature, tend to be relatively stable over time. Furthermore, an abundance of different types of aboriginal place names justifies a presumption that the aboriginal group with which the names originate has occupied the named area most likely for centuries. This view is consistent with Dr. Dinwoodie's "preliminary research suggests that Tsilhqot'in ethnogeographic terminology (place names, geographical nomenclature and associated narratives is abundant and the nature of that terminology supports the inference that their occupation of the territory has been exclusive and long term." Tsilhqot'in witnesses used Tsilhqot'in ethnogeographic terms to cover the lands between the two rivers:

Tachelach'ed

Tsilhqox

Dasiqox

?Esqi Nintanisdzah

Nusay Bighinlin

Tsi Tex Biny

Natasawed Yeqox

Natasawed Biny

Ts'u Nintil

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<sup>203</sup> Plaintiff's Argument, Volume 3, at para. 885, and more generally paras. 618-634.

Biny Gwetsel  
Gwedelden T'ay  
Nagwanajes  
Biny Gwechugh  
Gwedats'ish  
Benchuny Biny  
Captain Georgetown  
Nuntsi  
Tsanglen Biny  
Nabi Tsi Biny  
?Elhghatish Biny  
Tsi T'is Gunlin  
Tl'egwated  
Chi'ih Nadilin  
Tsiqelh Ts'iselin  
Dig Nigwenili  
Tisht'an Gunlin Xaghinlin  
Dasiqox Nanatats'ededilh  
Deni Belh Tenalgeh  
?Elhghatish

43. The evidence of burial places in Tachelach'ed also indicates the Tsihqot'in connection thereto. While pre-European contact the Tsihqot'in customarily cremated their dead, post-missionizing the Tsihqot'in practiced burials<sup>204</sup> and burials remain visible. There are at least two graveyards at Nu Natasa?ax (Mountain House). Elder Theophile Ubill Lulua averred that ?Elegesi (Eagle Lake Henry) is buried with his first wife, ?Aliyada, and his second wife, Mr. Lulua's grandmother Millie, at Nu Natasa?ax.<sup>205</sup>

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<sup>204</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, at 00056, 16-19; Transcript, March 8, 2004, Minnie Charleyboy Direct-Exam, at 00026, 47 – 00027, 5; Transcript, May 27, 2004, Francis William Cross-Exam, at 00005, 28 – 00006, 2 (not directly supported, only inferentially... maybe check and decide whether to re-phrase).

<sup>205</sup> Plaintiff's Argument, Appendix 2, at para. 112; Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 19(a).

A second graveyard lies below the first on the north side, in which five of Mary Jean Baptiste's children as well as Mr. Lulua's son, Roger are buried.<sup>206</sup> Eliza William averred that her mother, Jeannie Nemiah, is also buried at Nu Natasa?ax.<sup>207</sup>

44. The lay and expert evidence also support the fact that from the Tsilhqot'in perspective Tachelach'ed is Tsilhqot'in nen (land):

(a) In the words of human geographer, Dr. Brealey:

In oral societies, boundaries are recognized, understood and validated not by maps and plans, but from 'inside the collective' – i.e. by where creation narratives fade, where genealogical linkages can no longer be traced, where place names are not recognizable, and where languages become unintelligible.<sup>208</sup>

Application of these factors clearly demonstrates that Tachelach'ed is Tsilhqot'in land from their point of view. As discussed above, Tsilhqot'in creation narratives relate to these lands, including the fundamental legend of Lhin Desch'osh. Genealogies, safeguarded by oral history and corroborated by the archival record and anthropological opinion, link to Tachealch'ed, indeed expressly through the extended families descendant from Chief Keogh (e.g. Mabel William) and Chief ?Achig (e.g. Ubil Hunlin). Tsilhqot'in place names delineate these lands and its features, the name Tachelach'ed not even having a corresponding English name. This trial itself has demonstrated that in Tsilhqot'in country, including Tachelach'ed, if anything it is English that is the foreign language and Tsilhqot'in the mother tongue. In modern, legal terms, these are unmistakably Tsilhqot'in title lands, as echoed in the following words of Tsilhqot'in elders.

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<sup>206</sup> Plaintiff's Argument, Appendix 2, at para, 112; Transcript, April 2, 2004, Theophile Ubill Lulua Direct Examination, 00017, 40 – 00019, 10; Exhibit 0142DIG, Theophile Ubill Lulua Digitized Map, site "E1"; Exhibit 0142LEG, Theophile Ubill Lulua Digitized Map Legend, site "E1".

<sup>207</sup> Plaintiff's Argument, Appendix 2, at para, 112; Exhibit 0105, Affidavit #1 of Eliza William, June 3, 2003, at para. 7.

<sup>208</sup> Exhibit 0240, Brealey Report, September 2004, at 6.

(b) In the words of elder Mabel William, descendant of Chief Keogh, and necessarily speaking through a translator, “Tachelach’ed is Tsilhqot’in land.”<sup>209</sup>

(c) In the terms of the late elder Ubill Hunlin, of the family descendant from Elkins’ ouster Chief ?Achig, and also speaking through a translator in response to cross-examination about his knowledge of the Claim Area: “The land belongs to the Tsilhqot’in. All that land belongs to the Tsilhqot’in.”<sup>210</sup>

### **3. SUMMARY AND CONCLUSION**

45. In summary, the Tsilhqot’in physically occupied Tachelach’ed prior to, at and well after Crown sovereignty, through the construction of dwellings and in Tachelach’ed and regular use of Tachalech’ed as hunting, fishing and trapping grounds. A coherent body of evidence from the historical record, expert opinion and oral history establishes this fact on a civil standard of proof. The Tsilhqot’in have aboriginal title to Tachelach’ed.

## **B. XENI (NEMIAH VALLEY)**

### **1. A DEFINITE TRACT OF LAND**

46. In terms of physical terrain, the Nemiah Valley is a definite tract of land in the central Claim Area. Chilko Lake bounds the valley in the west. Mount Tatlow defines it in the south. Mount Nemiah and Konni Mountain bound it in the north. Cardiff Mountain effectively circumscribes it in the east. These names, of course, comprise the Crown’s point of view on these geographic features.

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<sup>209</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, para. 50; Plaintiff’s Argument, Volume 3, para. 934(c).

<sup>210</sup> Transcript, March 14, 2005, Ubill Hunlin Cross-Examination, 00037, 14-19; Plaintiff’s Argument, Volume 3, para. 934(a).

47. From the Tsilhqot'in perspective this definite tract of land is Xení (Nemíah Valley). Tsilhqox Biny (Chilko Lake) bounds Xení in the west. Ts'il'os (Mount Tatlow) defines it in the south. Gweqez Dzelh (Mount Nemíah, a.k.a. west Xení Dzelh) and Xení Dzelh (Konni Mountain) bound it in the north. Tsi 'Ezish Dzelh (Cardiff Mountain) sits at its eastern margin.

## **2. PHYSICALLY OCCUPIED BEFORE, AT AND AFTER CROWN SOVEREIGNTY**

48. The Tsilhqot'in constructed dwellings, cultivated root fields and regularly used Xení (Nemíah Valley), located on northeast Tsilhqox Biny (Chilko Lake), for hunting, trapping, fishing and gathering prior to, at and well after Crown sovereignty. They have continued to do so through to the present day. A coherent body of evidence from the historical record, expert opinion and oral history establishes this fact on a civil standard of proof.

### **a. General Historical Record and Related Expert Opinion**

49. The historical record regarding the remote Nemíah Valley, located on the rugged east side of Chilko Lake, is relatively late in developing. The 'on the ground' 'sight lines'<sup>211</sup> of the Hudson Bay Company and early missionary records (1822-1845) related largely to the resident Tsilhqot'in population on the Chilko River and the northern outlet of Chilko Lake, both areas being upriver from the location chosen for the Chilcotin Post. Further, the historical record 1845-1875 developed largely in regard to lands about northwest Chilko Lake, based on the interests of road and railway surveyors as well as colonial authorities during the Chilcotin War of 1864. Nonetheless, the belated general historical record indicates a residential Tsilhqot'in population using the Nemíah Valley as resource exploitation grounds since prior to European contact, and particularly so when considered in light of related expert opinion. Moreover, this fact is clearly established on a balance of probabilities when this evidence is weighed in conjunction with the

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<sup>211</sup> Plaintiff's Argument, Appendix 1B, para 111 (and see Exhibit 0240, Expert Report of Ken Brealey Report, September 22, 2004 at p. 33).

historical record regarding Tsilhqot'in genealogy, as well as expert opinion and Tsilhqot'in oral history.

50. Regarding the general historical record, in January of 1822 the Hudson's Bay Company trader George McDougall and his party, lead by an Indian guide,<sup>212</sup> were the first Europeans to visit Tsilhqot'in territory.<sup>213</sup> They met Tsilhqot'ins and obtained "much information from them respecting their Country in general," including as McDougall reported:

By dint of enquiry & with the help of small sticks we made out to get nearly their strength, they say there are 6 Large Ground Lodges, about the Lake, containing 53 Families...<sup>214</sup>

51. As discussed, the expert evidence of Dr. Brealey,<sup>215</sup> John Dewhirst,<sup>216</sup> Dr. Coates<sup>217</sup> and Morley Eldridge<sup>218</sup> all confirm that McDougall met these Tsilhqot'ins on the Chilko River and was referring to Chilko Lake when noting 53 families "about the Lake" in winter lodges. John Dewhirst gave evidence regarding the Tsilhqot'in population and concluded "McDougall's information indicates that in 1822 there was a significant population, which I have estimated at 360 people living around Chilko Lake."<sup>219</sup> Dewhirst added, "[i]n my opinion those families most likely used and occupied

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<sup>212</sup> Exhibit 0156-1822/01/18.001, at 100920, 100924, Letter McDougall to Stuart Jan 18, 1822.

<sup>213</sup> Plaintiff's Argument, Appendix 3, para 22 and Argument Volume 1, para 143 (and see Exhibit 0443, Expert Report of John Dewhirst Report, at para. 164).

<sup>214</sup> Plaintiff's Argument, Appendix 3, para 22 (and see Exhibit 0156-1822/01/18.001, at 100925, Letter McDougall to Stuart Jan 18, 1822).

<sup>215</sup> Plaintiff's Argument, Appendix 1B, para 111, para 240 (and see Exhibit 0240, Expert Report of Ken Brealey, September 22, 2004, at 26, 56; Transcript, January 5, 2005, Dr. Kenneth Brealey Direct Examination, 00011, 20 – 00019, 1).

<sup>216</sup> Plaintiff's Argument, Appendix 1B, paras 175-9 (and see Exhibit 0443, Expert Report of John Dewhirst, at para. 121, 128-132; Transcript, November 10, 2005, John Dewhirst Cross Examination, 00025, 45 – 00027, 42).

<sup>217</sup> Plaintiff's Argument, Appendix 1B, para 145 (and see Exhibit 0407, Expert Report of Ken Coates, February 15, 2005, at 53).

<sup>218</sup> Exhibit 0538, Eldridge Report, March 2006, at para. 20-21; Transcript, May 12, 2006, Morley Eldridge Cross Examination, 00007, 19 – 00008, 25.

<sup>219</sup> Plaintiff's Argument, Volume 3, paras 955, 959 (and see Exhibit 0443, Expert Report of John Dewhirst, at para. 138-139, 163).

the Nemaiah Valley, because it is so accessible from the lake and has its own resources.”<sup>220</sup>

52. In September of 1899, Indian Reserve Commissioner A.W.Vowell and his party, including two Tsilhqot’in packers, traveled by horseback up the Chilko River, through Tsuniah Valley, and up Chilko Lake to Nemaiah Valley.<sup>221</sup> For September 18<sup>th</sup>-20<sup>th</sup>, 1899, Vowell diarized:

... Reached Nemaiah valley at 1.30 pm, and camped near the foot of Connee lake [i.e. Konni Lake, a.k.a. Xenii Biny]. Distance travelled 12 miles. After making camp had a conversation with the Indians and took census.

Accompanied by the Indians rode to Chilco lake, about 11 miles. distant, and defined a reserve of 200 acres on its shores where several families had built houses, and established their winter quarters, following hunting, fishing and trapping in the spring, summer and autumn. Also a reserve of 80 acres on which are some small gardens and the houses and stables of two families.

Nemaiah valley is... valueless for agricultural purposes and the cattle range is limited; there is ample pasture however for the Indian horses of which there are many.

Defined a reserve of 545 acres at the foot of Connee lake; this the Indians requested as a general camping ground and fishing station where all the Indians assemble at certain periods to catch fish in the lake which abounds with a great variety of that food supply.

Moved camp in afternoon to the head of Connee lake, about four miles, where there were several Indian houses, and defined a reserve of 432 acres, including within its confines some meadow land, good bunch grass to a limited extent and some timber.<sup>222</sup> [Emphasis added.]

53. In his October 18, 1899 reporting letter to the Secretary of the Department of Indian Affairs, Ottawa, A.W. Vowell wrote:

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<sup>220</sup> Exhibit 0443, Expert Report of John Dewhirst Report, at para. 203, 208.

<sup>221</sup> Plaintiff’s Argument, Appendix 2, para 48 (and see Exhibit 0240, Expert Report of Ken Brealey, September 22, 2004, at pp. 32-33).

<sup>222</sup> Plaintiff’s Argument, Volume 1, para 209 (and see Exhibit 156-1899/09/04.001, Diary of A.W. Vowell).

... the trails to Nemaiah Valley were of the roughest kind and being beyond the settled portions of the country they have never been improved by either Government or settlers; remaining in the very primitive condition of "Indian trails". The party fortunately got through all right but to my disappointment on my arrival I learned that the greater number of the Indians were absent in the mountains hunting and fishing and putting up their winter supply of dried meat, etc. I also learned that they are generally absent in the Spring and Fall, engaged in trapping, and that the only time when they are all at home is in the dead of winter. Upon close inquiry I learned that some 59 Indians, men, women and children, have for a long time lived in the valley as far as I could learn having been there located before the laying off of other reserves in the Chilcotin country, etc.<sup>223</sup> [Emphasis added.]

54. Noting that on his September arrival Vowell diarized that “the greater number of the Indians were absent in the mountains”, Dewhirst was of the view that Vowell’s census of 59 Tsilhqot’ins living in Nemiah Valley “likely failed to capture all the residents of the valley.”<sup>224</sup> Moreover, with respect to Vowell’s report that Tsilhqot’ins “have for a long time lived in the valley...,” including the several families with established winter houses on Chilko Lake, Dewhirst concluded:

While Vowell’s “a long time” is not specific, the first Tsilhqot’in Indian Reserves were established for the Anaham, Toosey and Stone Indian Bands in 1887 (Vernon 1887), 12 years before Vowell’s visit. However, Vowell’s account suggests a much earlier time, which is supported by archival evidence.

In my opinion, the Tsilhqot’in use and occupation of the Nemiah Valley predates 1846 and continues to the present day. I am of the opinion that a resident population in the early 19th century has continued to use and occupy the Chilko Lake area, including the Nemiah Valley, to the present day. In 1822 the Tsilhqot’in told McDougall that 53 families lived around Chilko Lake (McDougall 1822). In my opinion those families in 1822 represent an estimated population of 360 people (Par 139). The Nemiah Valley opens on Chilko Lake, and that population most likely used and occupied the valley. Genealogical research linked to customary use areas of selected modern extended Xenigwetin families shows that they were present in the Chilko Lake and Nemiah Valley area since at least the early

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<sup>223</sup> Plaintiff’s Argument, Volume 1, para 209 (and see Exhibit 156-1899/10/18.001, Letter from A. Vowell to Secretary, Dept. of Indian Affairs, pp. 2-30).

<sup>224</sup> Plaintiff’s Argument, Volume 3, para 955 (and see Exhibit 0443, Expert Report of John Dewhirst, at para. 206).

19<sup>th</sup> century and have continued to use and occupy those areas to the present day (Section 3.0). Chief Nemiah, reported to have been born in the Nemiah Valley ca. 1827, is an ancestor of the modern Lulua extended family, and in my opinion Nemiah's family was part of that resident population.<sup>225</sup>

55. Dewhirst's genealogical research in support of his conclusion is discussed in the next section. It is noteworthy now, however, that Dewhirst's conclusion regarding a resident Tsilhqot'in population in the Nemiah Valley in the early 19<sup>th</sup> century is consistent with the documentary record he did not rely upon:

- (a) For the year 1835, esteemed provincial anthropologist Wilson Duff, writing in *The Indian History of British Columbia* (1964), analyzed the historical distribution of Indian populations and estimated the population of Nemiah Valley on Chilko Lake as 100 persons.<sup>226</sup> Further, Vowell's 1899 census numbers, as qualified by Dewhirst, are consistent with Duff's 1835 population estimate, particularly when one considers the experience of the Tsilhqot'in on Chilko Lake with the smallpox epidemic starting in 1862.<sup>227</sup>
- (b) In 1872, Father Marchall reportedly wrote of "the Indians of Nemiah Valley and Chilco Lake" attending a feast hosted by a Chief from the Homalco people of the coast.<sup>228</sup>
- (c) In 1890, surveyor A.L Poudrier was instructed to undertake an exploratory survey of "the Chilcotin country proper" and in doing so included "[a] small valley from a creek falling into Chilko Lake... named the Na-a-ma valley..."<sup>229</sup> In his

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<sup>225</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 208.

<sup>226</sup> Plaintiff's Argument, Appendix 2, para 48 (and see Exhibit 0265-1864/00/00.001, Untitled Map (BC Department of Land and Works); Exhibit 0443, Expert Report of John Dewhirst, at para. 204).

<sup>227</sup> Plaintiff's Argument, Volume 3, para 954 (and see Exhibit 0443, Expert Report of John Dewhirst Report, at para. 241 and 254).

<sup>228</sup> Exhibit 0156-1948/00/00.001: Father Thomas, Account of Missionary Work, at 34.

<sup>229</sup> Exhibit 0156-1890/12/19.001: Report from A.L.Poudrier, 19, December 1890, at 2000880, 2000884.

lengthy report Poudrier closed noting that “the Chilcotins...have villages on Risk Creek - ... - on Puntzee – Chilco and Cluscus lakes.”<sup>230</sup> [Emphasis added.]

- (d) In the summer of 1897, Edmond Elkins entered Nemiah Valley with his brother and sought to pre-empt land at Chilko Lake as the first European to settle in the valley. By Elkins’ own account, in a letter dated November 1897 to the Attorney General, he was

intending to pre-empt a piece of land in the Namiah or Beautiful Valley at Chilko Lake...<sup>231</sup> When we arrived there we were met by a number of Siwashes (Indians) who demanded that we immediately left the valley. I should say no white man has occupied land there before. ... One of the Indians then assaulted me, eventually biting a piece of my ear, + also threatening to shoot me if I did not leave the valley. ... The Indians have compelled me under threats of killing + burning my buildings to leave the place I have recorded, + I do not know whether it is safe for me to attempt to occupy the land since the Indians came out best in the last trial.<sup>232</sup> [Emphasis added.]

- (e) In 1922, four years after the lethal 1918 influenza,<sup>233</sup> surveyor R.P. Bishop attended in Nemiah Valley and reported of the remaining ten families headquartered there: “After a few years residence in once place they have a tendency to move on, possibly influenced by the condition of the range and of the hay meadow. At present the main village of the band is near the south boundary of lot 305, but there are several old village sites in the valley.” Lot 305 is at Lhiz

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<sup>230</sup> Exhibit 0156-1890/12/19.001: Report from A.L.Poudrier, 19, December 1890, at 2000891.

<sup>231</sup> Plaintiff’s Argument, Volume 1, para 207, endnote 74 (and see Exhibit 0245, Brealey Map, Geographic Features, re Edmund Elkins Ranch).

<sup>232</sup> Plaintiff’s Argument, Volume 1, para 207, endnote 74 (and see Exhibit 0156-1897/11/18.001: Letter from Edmunds Elkins to the Attorney General of British Columbia).

<sup>233</sup> Plaintiff’s Argument, Volume 3, para 954 (and see Exhibit 0174, Affidavit #2 of Mabel William, at paras. 59-66; Transcript, November 19, 2003, Francis Setah Direct Exam, 00047, 42 - 00049, 11; Transcript, November 20, 2003, Francis Setah Direct Exam, 00002, 13 - 00005, 47); M. Kelm, “British Columbia First Nations and the Influenza Pandemic of 1918-19” Summer 1999, no.122 The British Columbia Quarterly 23.

Bay (Lesbye) in the west end of Nemiah Valley about Chilko Lake. It is where Edmond Elkins attempted his failed pre-emption in 1897.<sup>234</sup>

**b. Genealogical Record, Related Expert Opinion & Tsilhqot'in Evidence**

56. Anthropologist John Dewhirst's genealogical research linking modern extended families to the Nemiah Valley area, used as a basis for his resident population conclusion, identified ...

57. As part of anthropologist John Dewhirst's genealogical research linking modern extended families to the Nemiah Valley area, used as a basis for his resident population conclusion, Dewhirst identified the Tsilhqot'in Chief Nemiah as an ancestor of the modern Lulua family per the uncontroverted affidavit evidence of elder Eliza William (nee Lulua).<sup>235</sup> Ms William, now deceased, was born ca. 1913 to Nemiah's daughter Jeannie.<sup>236</sup> Dewhirst also reviewed the historical record from the 1860s – 1890s with respect to the Chief Nemiah, along with Nemiah's death certificate recording "Old Nemiah" as born in the Nemiah Valley.<sup>237</sup> Dewhirst concluded:

Archival documents demonstrate that Nemiah spent his life in and around the Claim Area, particularly in the Nemiah Valley and Chilko Lake (see below).

...

In my opinion, archival maps and records demonstrate that Nemiah was born in Nemiah Valley ca. 1827. His parents obviously had lived there before him. Nemiah became a leader of prominence by the early 1860s, and likely earlier, and continued to occupy and use the Claim Area until his death in 1927.<sup>238</sup>

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<sup>234</sup> Plaintiff's Argument, Volume 1, para 207, endnote 74 (and see Exhibit 0245, Brealey Map, Geographic Features; Exhibit 0240, Brealey Report, at 58).

<sup>235</sup> Plaintiff's Argument, Appendix 1C, paras 16 and following (and see Exhibit 0443, Expert Report of John Dewhirst, at para. 290; Exhibit 0105, Affidavit #1 of Eliza William, at paras. 3, 6-7, 1).

<sup>236</sup> Plaintiff's Argument, Appendix 1C, paras 16 and following (and see Exhibit 0443, Expert Report of John Dewhirst, at para. 290; Exhibit 0105, Affidavit #1 of Eliza William, at paras. 3, 7).

<sup>237</sup> Plaintiff's Argument, Appendix 1C, para 18 (and see Exhibit 0156-1927/07/31.001: Return of Death of Indian (Old Nemiah) ; Exhibit 0443, Expert Report of John Dewhirst, at para. 290-296).

<sup>238</sup> Exhibit 0443, Expert Report of John Dewhirst Report, at paras. 291, 296.

58. Dewhirst's genealogical evidence also relates to the extended Setah family descendant from the Tsilhqot'in husband and wife Setah (a.k.a. Louis Setah and, in Tsilhqot'in, Sit'ax) and Nancy.<sup>239</sup> The death certificates of Setah (ca. 1827/1849 – 1927) and Nancy (ca. 1845-1938) respectively state they were born in the “Nehemiah Valley” and “Nehemiah Valley”.<sup>240</sup> The Setah family flourished through two lines of descent, namely, through their son Johnny Setah and their daughter Sabatsakai (who begat Sammy William).<sup>241</sup> Based on the historical record and affidavit evidence, Dewhirst concluded:

In my opinion, archival documents and oral history show that the Setah family's customary use area is in the Claim Area, primarily around the Nemiah Valley. Ancestors Setah and Nancy, both born before 1846, lived most of their lives in the Claim Area. Setah's mother, who was born in the early part of the 19<sup>th</sup> century, was also from Nemiah Valley (M.William 2004b: par. 39). This demonstrates that the Setah family has used the Claim Area since at least the early 19<sup>th</sup> century and probably earlier.<sup>242</sup>

59. Relatedly, Dewhirst's genealogical evidence also regarded the extended William family descendant from the Tsilhqot'in husband and wife Sammy (c. 1892-1979) and Annie William (a.k.a. Bulyan) (c.1899-1980).<sup>243</sup> Regarding this William family Dewhirst concluded:

The modern Xeni Gwet'in William family is descended from three lines: Setah and his wife Nancy (Dewhirst 2004:Sec. 5.1, Chart 3), Kawdeh and his unidentified wife (Dewhirst 2004:Sec. 6.0, Chart 4) and Kahkul and Elizabeth (Dewhirst 2004:Sec. 7.1, 7.6, Chart 5). The customary use area of the William family, primarily around the Nemiah Valley, is similar to the Setah family, which is not surprising as Setah and Nancy are common ancestors to both the Setah and William families. Another ancestor of the Xeni Gwet'in William family, Long Jim, also lived in and used the

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<sup>239</sup> Plaintiff's Argument, Appendix 1, para 10 and following (and see Exhibit 0443, Expert Report of John Dewhirst, at paras.304-313).

<sup>240</sup> Plaintiff's Argument, Appendix 1, paras 10, 11 (and see Exhibit 0156-1927/11/15.001: Return of Death of Indian (Louis Setah); Exhibit 0156-1938/11/17.001: Return of Death of Indian (Nancy Setah); Exhibit 0443, Expert Report of John Dewhirst, at paras. 304-305).

<sup>241</sup> Plaintiff's Argument, Appendix 1, para 10 and following (and see Exhibit 0443, Expert Report of John Dewhirst, at paras. 311-312).

<sup>242</sup> Plaintiff's Argument, Appendix 1, para 10 and following (and see Exhibit 0443, Expert Report of John Dewhirst, at para. 313).

<sup>243</sup> Plaintiff's Argument, Appendix 1, para 2 and following, para 10 and following (and see Exhibit 0441, Expert Report of John Dewhirst, at 29-30).

Nemiah Valley for part of his life. The third line of descent, from ancestors Kahkul and Elizabeth, also links the William family to the Naghatlchoz or the Big Eagle Lake area (F. William 2004b:par. 53, 54).

In my opinion, archival documents and oral history explained above, . . . , show that the William family's customary use area is in the Claim Area, primarily around the Nemiah Valley and Chilko Lake. Ancestors of the Xeni Gwet'in William Family used and occupied these customary use areas before 1827, and their descendants have continued to do so to the present.<sup>244</sup>

60. Tsilhqot'in elder Mabel William (b. 1918) is the widow of the late Eugene William (b. 1918), son of Sammy and Annie William (a.k.a. Bulyan) and the great-grandson of Sit'ax (Setah) and Nancy.<sup>245</sup> Ms. William is Tsilhqot'in originally from the Tsi Del Del (Alexis Creek) community, though upon marriage to Eugene William (m. 1936) she became a member of the Xeni Gwet'in (Nemiah) community.<sup>246</sup> Ms. William's evidence in this case, including oral history sourced to Sit'ax and Nancy, related to Tsilhqot'in land use and those of Xeni (Nemiah Valley):<sup>247</sup>

(a) Ms. William averred as to Sit'ax and Nancy –

Nancy was the great-grandmother of my late husband Eugene. She was the grandmother of Eugene's father Sammy Bulyan. Nancy was also the wife of Sammy's grandfather Sit'ax. I remember Nancy. She was Tsilhqot'in. I never knew a Tsilhqot'in name for her though. She died about the time when Eugene and I had two children. Nancy is buried in Xeni (Nemiah Valley) at the Tsilhqot'in graveyard at Xexti Biny (Nemiah Lake). Annie Bulyan taught me that Nancy was born and raised around Xeni. She also taught me that Sit'ax's mother was Tsilhqot'in from Xeni and that Sit'ax was born in Xeni. Nancy and Sit'ax taught her this she said. I don't remember Sit'ax.<sup>248</sup>

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<sup>244</sup> Plaintiff's Argument, Appendix 1, para 2 and following, para 10 and following (and see Exhibit 0443, Expert Report of John Dewhirst, at paras. 341-342).

<sup>245</sup> Plaintiff's Argument, Appendix 1, para 23 and following (and see Exhibit 0441, Expert Report of John Dewhirst, 25, chart 3).

<sup>246</sup> Plaintiff's Argument, Appendix 1, para 23 and following (and see Exhibit 0173, Affidavit #1 of Mabel William, at paras. 5-7, 22).

<sup>247</sup> Plaintiff's Argument, Appendix 3, para 152.

<sup>248</sup> Plaintiff's Argument, Appendix 3, para 152 (and see Exhibit 0174, Affidavit #2 of Mabel William, at para. 39).

(b) Ms. William described Tsilhqot'in land uses by season in Xení through the centuries –

Annie Bulyan taught me that Tsilhqot'ins had been living in Xení (Nemiah Valley) through the seasons since the time of the ?esgidam (our ancestors). People would get their fish in spring and summer from Xení Yeqox (Nemiah Creek). They got sunt'iny (mountain potatoes) from ?Esgany ?Anx, Gughay Ch'ech'ed and Tl'egwezbenz. They would use the trails to hunt nists'i (deer) through Xení in the summer. They'd do that for dry meat in the fall too and get nilhish (kokanee) at ?Etan Ghintil. In the winter, Tsilhqot'ins would get their fish from Xení Biny (Konni Lake) and Tsilhqox Biny (Chilko Lake). Annie taught me this knowledge came down to her from her husband Sammy's grandparents Nancy and Sit'ax.<sup>249</sup>

(c) With respect to using “the trails to hunt nits'i (deer) through Xení in summer” and fall, Ms. William described the main Tsilhqot'in trail network through Xení, entering from the northwest connection to Ts'uni?ad (Tsuniah Valley) –

As I've said, my late husband Eugene was Tsilhqot'in from Xení. He was born and raised around there. I became Xení Gwet'in Tsilhqot'in after I married Eugene. Since then, I have traveled a route that runs between... Ts'uni?ad (Tsuniah Valley) and Xení Biny (Konni Lake) in Xení (Nemiah Valley). When I first traveled this route it was mostly a saddle and packhorse trail. Only one part in Xení was a wagon road and Eugene taught me that it used to be a Tsilhqot'in saddle and packhorse trail too. That route... to Xení Biny went like this:

...

From Ts'uni?ad Yeqox the trail went over to Nenatats'ededilh (Four Mile Lake or Little Lagoon). Nenatats'ededilh is named that way because Tsilhqot'ins used to cross that water by foot.

From Nenatats'ededilh (Four Mile Lake or Little Lagoon) the trail went up Tsilhqox Biny (Chilko Lake) to Tses Nanint'i. Tses Nanint'i is in Xení (Nemiah Valley) down near Tsilhqox Biny. Xení Yeqox (Nemiah Creek) goes through Tses Nanint'i.

At Tses Nanint'i there was a wagon road that came up from Tsilhqox Biny (Chilko Lake). It was on the Ts'uni?ad (Tsuniah Valley) side of Xení

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<sup>249</sup> Plaintiff's Argument, Appendix 3, para 152 (and see Exhibit 0174, Affidavit #2 of Mabel William, at para. 40).

Yeqox (Nemiah Creek). The wagon road crossed Xení Yeqox at Tses Nanint'i. Tsilhqot'ins with wagons would drive their horses right through the creek. There were also a couple of logs together for walking across the creek. That's were the fish trap would be.

From Tses Nanint'i the route split into two. A saddle and pack horse trail went up one side of Xení Yeqox (Nemiah Creek) all the way to Xexti Biny (Nemiah Lake). It went around Xexti Biny too. The wagon road went up Xení Yeqox on other side of the creek. It went around Xexti Biny also. The wagon road was on the Ts'il'os (Mount Tatlow) side of Xení Yeqox.

From Xexti Biny the route continued up both sides of Xení Yeqox (Nemiah Creek) to Tl'ebayi. One side was a trail. The other side was wagon road. Tl'ebayi is an area where Xení Yeqox comes out of Xení Biny (Konni Lake).

The horse trail and wagon road both crossed Xení Yeqox at Tl'ebayi. The trail ran around Xení Biny (Konni Lake) on the Ts'il'os (Mount Tatlow) side of the lake. It went through ?Et'an Ghintil and over to Naghtaneqed (Tanakut). ?Et'an Ghintil is where my daughter Catherine was born. The wagon road went around the other side of Xení Biny. It went to Naghtaneqed too. It dipped into the lake sometimes where it was steep.<sup>250</sup>

This route between [Ts'uni?ad (Tsuniah Valley)] and Xení Biny (Konni Lake) has been a Tsilhqot'in route since the time of the ?essgidam (Tsilhqot'in ancestors). The ?essgidam made these trails by walking Tsilhqot'in nen (land). Tsilhqot'ins later used these footpaths for saddle and packhorse trails. Annie Bulyan taught me all this in the evening when we were staying at her cabin at Naghtaneqed (Tanakut). It was early spring and our husbands were out trapping in the mountains. She taught me that this knowledge had come down to her from Nancy.<sup>251</sup>

- (d) Likewise, Ms. William outlined the Tsilhqot'in trail network of southwest Xení, and connecting to the southern mountains –

One trail left from Xení (Nemiah Valley) around Lhizbay (Lezbye). It went up Tsilhqox Biny (Chilko Lake) and around Tsi Ch'ed Tl'ad. There it turned up into the mountains.... At Naghagat'ax it split in two. One trail went back to Xení. The other went over the mountain....<sup>252</sup>

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<sup>250</sup> Plaintiff's Argument, Volume 3, para 922 (and see Exhibit 0174, Affidavit #2 of Mabel William, at paras. 37, 37(iii) to 37(viii)).

<sup>251</sup> Exhibit 0174, Affidavit #2 of Mabel William, at para. 38.

<sup>252</sup> Plaintiff's Argument, Volume 3, para 922 (and see Exhibit 0174, Affidavit #2 of Mabel William, at para. 69(i)).

Sammy Bulyan taught me that he had used these trails all his life. ... He taught me it was the ?esggidam who first made these trails when they were walking Tsilhqot'in nen (land) for hunting and gathering. Sammy taught me that this knowledge had come down to him from his grandmother Nancy.<sup>253</sup>

- (e) Further, Ms. William described the Tsilhqot'in trail network of southeast Xenii, and connecting to the southern mountains –

I have also traveled trails through the Xenii Biny (Konni Lake) and Gwetsad area of Xenii (Nemiah Valley). One trail runs from Tl'ebayi up to Tlas Tats'aghihghiz, then up to Gwetsad. Another trail goes from ?Etan Ghintil up to Tlas Tats'aghihghiz. That's where it joins the trail between Tl'ebayi and Gwetsad. There is another trail that runs from Naghtaneqed (Tanakut) up to Gwetsad. That's where it joins the trail to Tl'ebayi.<sup>254</sup>

...

The trails between Xenii Biny (Konni Lake) and Gwetsad... have also been Tsilhqot'in trails since the time of the ?esggidam (Tsilhqot'in ancestors). The ?esggidam (our ancestors) walked them. Tsilhqot'ins later made these footpaths into saddle and packhorse trails. It was Sammy Bulyan who taught me this. He said he was passing on his grandmother Nancy's teaching. Sammy would hunt through the Gwetsad... area for nists'i (deer).<sup>255</sup>

- (f) Similarly, Ms. William discussed the Tsilhqot'in trail of north central Xenii, connecting to the mountains in the north and dating back to at least Sit'ax's usage.<sup>256</sup> Ms. William also described the Tsilhqot'in trail to the mountain potato harvesting grounds in northwest Xenii –

There are also trails in Xenii from Tses Nanint'i and Lhizbay (Lezbye) up to Gughay Ch'ech'ed. I've traveled those trails for harvesting sunt'iny (mountain potato) there. I've picked the sunt'iny at ?Esgany ?Anx and Tl'egwezbenz too. You get to those places from Gughay Ch'ech'ed. Annie

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<sup>253</sup> Exhibit 0174, Affidavit #2 of Mabel William, at para. 70.

<sup>254</sup> Plaintiff's Argument, Volume 3, para 922 (and see Exhibit 0174, Affidavit #2 of Mabel William, at para. 42).

<sup>255</sup> Exhibit 0174, Affidavit #2 of Mabel William, at para. 44.

<sup>256</sup> Plaintiff's Argument, Volume 3, para 922 (and see Transcript, Mabel William Direct Exam, October 4, 2004, 00029, 40 to 00031, 32).

Bulyan taught me that the trails to Gughay Ch'ech'ed were trails first made by the ?esggidam (our ancestors). She taught me that this knowledge also came down to her from Nancy.<sup>257</sup>

(g) Ms. William recounted the oral history of Chief ?Achig ousting Ed Elkin, in 1897 the first European to attempt settlement in Xenii,<sup>258</sup> from the valley –

?Achig was a Tsilhqot'in Nits'il?in (Chief) of the Xenii Gwet'in. My late husband's father Sammy Bulyan taught me this. So did my late husband Eugene. Both Sammy and Eugene taught me the story of Nits'il?in ?Achig dealing with Ed Elkin and his brother when they first came to Xenii. This is the story:

Ed Elkin was trying to settle in Xenii (Nemah Valley). He was the first white person to try doing that. The land he was claiming was down my Lhiz Bay (Lezbye). Ed Elkin's brother was with him.

Nits'il?in (Chief) ?Achig went there. He told them Ed Elkin cannot take this land, it is too important to Tsilhqot'ins. He told them that the mountains were our fences. He warned Elkin, "If you move into this area I will fight you every time I come around. If you do not listen I will kill you."

?Achig told Ed Elkin that there was a little piece of land where he could stay. It was where the mountains come down at the other end of Xenii (Nemah Valley). It was just passed a place called ?Elhtilh ?Elhtilh. There's a creek along there that flows down to the lakes at ?Elhghatish. Nits'il?in (Chief) ?Achig told Ed Elkin that he could stay at that place with a cabin and a garden. ?Achig said if Ed Elkin did that he would just shake Elkin's hand when he came around there.

Ed Elkin and his brother didn't listen. Nits'il?in (Chief) ?Achig went to Lhiz Bay (Lezbye) a second time to tell them. They were making coffee for themselves. ?Achig grabbed the coffee pot and threw it at them. That's when he

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<sup>257</sup> Plaintiff's Argument, Volume 3, para 922 (and see Exhibit 0174, Affidavit #2 of Mabel William, at para. 41).

<sup>258</sup> Plaintiff's Argument, Volume 3, para 1141 (and see Exhibit 0443, Expert Report of John Dewhirst, para. 346).

got in a fight. ?Achig bit into Ed Elkin's ear. He got the best of them.

So Ed Elkin moved to that piece of land. He stayed there with a Tsilhqot'in woman named Galtses. That's why people call that creek Elkin Creek.<sup>259</sup>

(h) Ms. William also recounted oral history regarding A.W. Vowell's visit to Xeni in 1899.<sup>260</sup> In addition, Ms. William gave oral history of the devastating impacts brought by the smallpox generally (ca. 1862),<sup>261</sup> as well as the "Big Flu" of 1918 on Tsilhqot'ins with cabins at Naghataneqed in east Xeni.<sup>262</sup>

61. Tsilhqot'in elder Francis Setah (b. 1929) is the son of Little George Setah (June 1899-October 7, 1971)<sup>263</sup>, the paternal grandson of ?Eweniwen (Johnny Setah) (c.1875-1955), and the paternal great-grandson of Sit'ax (Setah) (ca.1827/1849-1927) and Nancy (ca.1845-1938).<sup>264</sup> Mr. Setah had the benefit of his grandfather ?Eweniwen's teachings while growing up. Mr. Setah was, however, raised by his maternal grandmother Daldod (Mary Ann) (b.1866-1950) as his mother died during his infancy. Daldod was the oldest daughter of the Tsilhqot'ins Kahkul (c. 1846 or earlier) and Elizabeth<sup>265</sup>, ancestors of the modern Xeni Gwet'in William family, as discussed above. Kahkul is buried in the mountains direct south of Xeni (Nemiah Valley).<sup>266</sup> Mr. Setah's evidence, including oral history sourced to ?Eweniwen and Daldod, also related to Tsilhqot'in land use of Xeni (Nemiah Valley):

(a) Mr. Setah identified the intimate Tsilhqot'in trail network of Xeni used since its origins in the time of the ?esggidams (Tsilhqot'in ancestors), based on personal

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<sup>259</sup> Plaintiff's Argument, Volume 3, para 1141 (and see Exhibit 0174, Affidavit #2 of Mabel William, at para. 52).

<sup>260</sup> Exhibit 0174, Affidavit #2 of Mabel William, at para. 58.

<sup>261</sup> Exhibit 0174, Affidavit #2 of Mabel William, at para. 33.

<sup>262</sup> Exhibit 0174, Affidavit #2 of Mabel William, at paras. 59-66.

<sup>263</sup> Exhibit 0441, Expert Report of John Dewhirst, at 4.

<sup>264</sup> Plaintiff's Argument, Appendix 1, para 10 and following (and see Exhibit 0441, Expert Report of John Dewhirst, Volume 2, Appendix E(1)); Exhibit 0441, Expert Report of John Dewhirst, at 4; 24; Chart 3.

<sup>265</sup> Exhibit 0443, Expert Report of John Dewhirst, at 329.

<sup>266</sup>; Exhibit 0443, Expert Report of John Dewhirst, at 323; Exhibit 0157, Affidavit #1 of Francis Sammy William, March 10, 2004, at 21. According to Dewhirst, Kahkul died while hunting and gathering on Ts'il?os and he is buried there at Xenadi?an (F. William 2004a:par. 21).

use and oral history from his grandfather ?Eweniwen (Johnny Setah) and/or his grandmother Daldod (Mary Ann) – from southwest Ts’uni?ad (Tsuniah Valley) into northwest Xeni at Tses Nanint’i (as taught to him by ?Eweniwen);<sup>267</sup> twin trails through Xeni from Tses Nanint’i in the west to Naghatanaqed in the east (as taught to him by ?Eweniwen and Daldod);<sup>268</sup> from Lhiz Bay in west Xeni southwest to Tsi Ch’ed Tl’ad and on into the mountains (as taught to him by ?Eweniwen),<sup>269</sup> from Lhiz Bay south into the mountains (to Naghaagant’ax) (as taught to him by ?Eweniwen);<sup>270</sup> from Xeni Biny at Tlebayi in the central valley southeast to Gwetsad (as taught to him by Daldod and ?Eweniwen);<sup>271</sup> from central Xeni southeast into the mountains (to Xenedi?an) (as taught to him by Daldod and ?Eweniwen);<sup>272</sup> from Tl’ebayi north into the mountains about ?Esqi Dzul Tese?an (as taught to him by ?Eweniwen),<sup>273</sup> from Naghatanaqed through the eastern perimeter of Xeni (as taught to him by Daldod);<sup>274</sup> a trail from Tses Nanint’i north to mountain potato harvesting grounds about Gughay Ch’ech’ed (as taught to him by Daldod).<sup>275</sup>

- (b) Mr. Setah identified Xeni itself as a deer hunting ground of the Tsilhqot’in from the valley during the summer dating back through the generations, based on the oral history from his grandfather ?Eweniwen (Johnny Setah) who had so used Xeni, and as taught to ?Eweniwen by his father Sit’ax (Setah). Mr. Setah himself used Xeni as a regular summer deer hunting ground throughout his able adulthood (ca. 1949-1998) upon moving to Xeni at about 20 years of age, and mapped this hunting ground accordingly.<sup>276</sup>

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<sup>267</sup> Plaintiff’s Argument, para. 923, Trail 16.

<sup>268</sup> Plaintiff’s Argument, para. 923, Trail 18.

<sup>269</sup> Plaintiff’s Argument, para. 924, Trail 46.

<sup>270</sup> Plaintiff’s Argument, para. 924, Trail 39.

<sup>271</sup> Plaintiff’s Argument, para. 924, Trail 40.

<sup>272</sup> Plaintiff’s Argument, para. 924, Trail 41.

<sup>273</sup> Plaintiff’s Argument, para. 923, Trail 19.

<sup>274</sup> Plaintiff’s Argument, para. 923, Trail 21.

<sup>275</sup> Plaintiff’s Argument, para. 923, Trail 20.

<sup>276</sup> Plaintiff’s Argument, Appendix 3, at para. 154; Transcript, November 26, 2003, Francis Setah Direct Exam, 00013, 20 to 00015, 15; Transcript, December 8, 2003, Francis Setah Direct-Exam, 00003, 42, 00004, 23.

- (c) Mr. Setah gave evidence of the binlagh (box trap) fishery on Xeni Yeqox (Nemiah Creek) at Tses Nanint'i in west Xeni during spring and summer, popular with Tsilhqot'ins from Xeni and dating back to the time of the ?esggidams (Tsilhqot'in ancestors), per the oral history from his grandmother Daldod.<sup>277</sup> Mr. Setah remembers this fishery being used by Tsilhqot'ins when he was young.<sup>278</sup>
- (d) Mr. Setah also identified three places in western Xeni where Tsilhqot'ins of the valley would go to harvest mountain potatoes: Gughay Ch'ech'ed; ?Esgany ?Anx; and, Tl'egwezbens.<sup>279</sup> Mr. Setah has been harvesting mountain potatoes in this area since he was a child and continues to do so.<sup>280</sup> He also learned from his grandmother Daldod, who learned from her father, that Tsilhqot'ins have been harvesting mountain potatoes at these locations since the time of the ?esggidams.<sup>281</sup>
- (e) Mr. Setah also identified a kokanee fishery at ?Etan Ghintil along the southern shore of Xeni Biny (Konni Lake) where he has camped and fished with his family growing up and other Tsilhqot'in families during the fall.<sup>282</sup> His grandmother Daldod taught him, as her father taught her, that Tsilhqot'ins have been using that fishery since the time of the ?esggidams.<sup>283</sup>
- (f) Mr. Setah was taught by his grandfather ?Eweniwen (Johnny Setah), who in turn had been taught by his father Sit'ax (Setah), that Denish T'an Natl'ebideni?ah in

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<sup>277</sup> Plaintiff's Argument, Appendix 3, at para. 119, 124, 154.

<sup>278</sup> Plaintiff's Argument, Appendix 3, at para. 119.

<sup>279</sup> Transcript, November 26, 2003, Francis Setah Direct Exam, 00005, 18 – 00006, 10; Exhibit 0093DIG, Francis Setah Digitized Map, place numbers 166, 167, 168; Exhibit 0093LEG, Francis Setah Map Legend, place numbers 166, 167, 168.

<sup>280</sup> Transcript, November 26, 2003, Francis Setah Direct Exam, 00006, 2-38; Exhibit 0094DIG, Francis Setah Map Digitized Map, polygon "AY"; Exhibit 0094LEG, Francis Setah Map Legend, polygon "AY".

<sup>281</sup> Transcript, November 26, 2003, Francis Setah Direct Exam, 00008, 24 – 00009, 46.

<sup>282</sup> Plaintiff's Argument, Volume 3, at para. 1029; Plaintiff's Argument, Appendix 3, at para. 205; Transcript, December 1, 2003, Francis Setah Direct Examination, 00015, 8 – 00017, 15; Exhibit 0095DIG, Francis Setah Digitized Map, polygons "CD", "CE"; Exhibit 0095LEG, Francis Setah Map Legend, polygons "CD", "CE".

<sup>283</sup> Transcript, December 1, 2003, Francis Setah Direct Examination, 00018, 5-33.

southwestern Xení was an ancestral Tsilhqot'in fall harvesting ground for kinnick kinnick.<sup>284</sup>

(g) Mr. Setah also described harvesting silverweed with his family and other Tsilhqot'ins during the fall at Chinsdad Gunlin in eastern Xení.<sup>285</sup> Mr. Setah was taught by his grandmother Daldod, who was taught by her father, that Tsilhqot'ins had been harvesting silverweed at this location since the time of the ?esggidams.<sup>286</sup>

(h) Mr. Setah has testified that his primary fall hunting grounds for deer were at the west end of Xení around Dalichiqox and further to the south in the area between Tsintsen Dinlhgwenlh and Tsi Ch'ed Tl'ad.<sup>287</sup> He described these hunting grounds as positioned on the northern migration route that migratory deer take in the fall from the mountains south of Xení down into the plateau lands of the north.<sup>288</sup>

(i) Mr. Setah testified that ancestral winter residences in Xení were stocked with meat and furs from fall hunts in the southern mountains. His grandmother and grandfather, Daldod and ?Eweniwen, taught him that Tsilhqot'in ancestors transported dried meat on Dasiqox Biny (Taseko Lake) by spruce bark canoes from the southern end of the lake at Ts'i Ts'elhts'ig, named after this canoe making, to the northern end of lake, after which the meat and hides were packed to winter residences, including in Xení.<sup>289</sup>

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<sup>284</sup> Plaintiff's Argument, Appendix 3, at para. 203; Transcript, December 1, 2003, Francis Setah Direct Examination, 00012, 41 – 00014, 6; Exhibit 0093DIG, Francis Setah Digitized Map, place number 180; Exhibit 0093LEG, Francis Setah Map Legend, place number 180.

<sup>285</sup> Plaintiff's Argument, Appendix 3, at para. 206; Transcript, December 1, 2003, Francis Setah Direct Examination, 00018, 46 – 00019, 40; 00021, 27 00022, 12; Exhibit 0095DIG, Francis Setah Digitized Map, polygon "CG"; Exhibit 0095LEG, Francis Setah Map Legend, polygon "CG".

<sup>286</sup> Transcript, December 1, 2003, Francis Setah Direct Examination, 00022, 13-21.

<sup>287</sup> Plaintiff's Argument, Appendix 3, at para. 71; Transcript, December 2, 2003, Francis Setah Direct Examination, 00043, 39 – 00047, 24; Exhibit 0095DIG, Francis Setah Digitized Map, polygons "DD", "DE"; Exhibit 0095LEG, Francis Setah Map Legend, polygon "DD", "DE".

<sup>288</sup> Transcript, December 2, 2003, Francis Setah Direct-Exam, at 00044. 21-00047, 24.

<sup>289</sup> Transcript, December 1, 2003, Francis Setah Direct-Exam, at 00042, 2 – 00044, 5; Transcript, December 2, 2003, Francis Setah Direct-Exam, at 00002, 4 – 00003, 44.

- (j) In his testimony, Mr. Setah described a winter that he and his family growing up spent with his maternal uncle ?Eskish (Captain George) and family. They lived at Lhiz Bay in west Xení near Tsilhqox Biny (Chilko Lake), in a traditional above-ground Tsilhqot'in winter lodge.<sup>290</sup> It had a long fire pit in the middle surrounded by pine walls and was adapted so as to be enclosed at either end with tents.<sup>291</sup>
- (l) ?Eskish (Captain George) and Daldod taught Francis Setah about a sickness that came to Naghataneqed in the year, or shortly before, Mr. Setah's oldest brother, Willie Setah was born in 1918. Mr. Setah was taught that two Tsilhqot'in men had gone to Stone and returned with the sickness such that nearly everyone living in the area died. Mr. Setah identified Naghataneqed as the place where Tsilhqot'in people were buried after they died from the sickness.<sup>292</sup> Mr. Setah has also testified about the terrible toll that tuberculosis took on the Tsilhqot'in community at Xení, describing how all of his grandfather ?Eweniwen's children with his first wife, save for William Setah, died of it.<sup>293</sup>
- (m) Mr. Setah has also testified about his long history of trapping in Xení. He started running his own trapline here in 1949 when he was 20 years old and trapped on it every year from October through to March until 1998 when he was 69 years old.<sup>294</sup> Mr. Setah trapped cougar, coyote, beaver, otter, mink, lynx, fisher, weasel, marten, muskrat, and bobcat, and hunted squirrel throughout Xení, making weekly trips to check his traps.<sup>295</sup> Mr. Setah eventually gave his trapline to the band because so many people wanted to trap the valley too.<sup>296</sup>

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<sup>290</sup> Transcript, December 3, 2003, Francis Setah Direct Exam, 00036, 46 - 000040, 10.

<sup>291</sup> Exhibit 0083, Drawing of Niyex Qungh shelter.

<sup>292</sup> Transcript, November 19, 2003, Francis Setah Direct-Exam, at 00048, 70 – 00049, 4; Transcript, November 20, 2003, Francis Setah Direct-Exam, at 00002, 14 – 00004, 5.

<sup>293</sup> Plaintiff's Argument, Volume 3, at para. 954; Transcript, December 1, 2003, Francis Setah Direct Examination, 00029, 43 – 00030, 24, 00030, 39 – 00031, 8.

<sup>294</sup> Transcript, December 4, 2003, Francis Setah Direct Examination, 00010, 13-42.

<sup>295</sup> Transcript, December 4, 2003, Francis Setah Direct Examination, 00010, 43 – 00012, 24; 00020, 34 – 00028, 31; Exhibit 0096DIG, Francis Setah Digitized Map, polygons "ER" through "EZ"; Exhibit 0096LEG, Francis Setah Map Legend, polygons "ER" through "EZ".

<sup>296</sup> Transcript, December 4, 2003, Francis Setah Direct Examination, 00028, 10-23.

62. Tsilhqot'in elder Norman George Setah (b. 1940) is the son of Willie Setah, the paternal grandson of Little George Setah, the paternal great-grandson of ?Eweniwen (Johnny Setah) and the paternal great-great-grandson of Sit'ax (Setah).<sup>297</sup> Norman George Setah's evidence also related to Tsilhqot'in land use of Xení (Nemíah Valley). It included oral history sourced to ?Eweniwen and in turn Sit'ax, but also oral history from Lebusden (Jean Baptiste) the brother of Sammy William, from both Tommy Lulua and Chief Lashaway Lulua the grandsons of Chief Nemíah, and from ?Eskish (Captain George) the son of Chief ?Achig. Per anthropologist John Dewhirst, Nemíah Valley was also in the customary use areas of the extended William family, as well as the families of Chief Nemíah and his successor Chief ?Achig.<sup>298</sup>

- (a) Mr. Setah has testified that numerous Tsilhqot'ins have used Xení (Nemíah Valley), from Xení Biny (Konni Lake) in the east down to Tsilhqox Biny (Chilko Lake), to hunt rabbits, lynx, mink, weasel and beaver starting during the fall.<sup>299</sup> His grandfather George taught him that Tsilhqot'ins have been doing this back through his great-great-grandfather Sit'ax's time and into the time of the ?esgidams.<sup>300</sup>
- (b) Norman George Setah identified fisheries for Dolly Varden, trout and whitefish on Xení Biny (Konni Lake). He has fished at the east end of the lake on Xení Yeqox (Nemíah Creek) at Naghataneqed where Tsilhqot'ins have built numerous cabins.<sup>301</sup> Mr. Setah testified that he had been taught by Lebusden, Chief Lashaway Lulua and Lashaway's father that Tsilhqot'ins had often stayed and fished at this location since the time of the ancestors, both for gillnetting during

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<sup>297</sup> Exhibit 0441, Expert Report of John Dewhirst, chart 3 and appendix E(7).

<sup>298</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 296, 352.

<sup>299</sup> Plaintiff's Argument, Appendix 3, para. 207; Transcript, November 8, 2004, Norman George Setah Direct Examination, 00030, 11 – 00031, 1; Exhibit 0213DIG, Norman George Setah Digitized Map, polygon "GN"; Exhibit 0213LEG, Norman George Setah Map Legend, polygon "GN".

<sup>300</sup> Transcript, November 8, 2004, Norman George Setah Direct Examination, 00030, 41 – 00031, 1.

<sup>301</sup> Plaintiff's Argument, Appendix, para. 120; Transcript, November 30, 2004, Norman George Setah Direct Examination, 00004, 9 – 00006, 29; Exhibit 0216DIG, Norman George Setah Digitized Map, polygon "IV"; Exhibit 0216LEG, Norman George Setah Map Legend, polygon "IV".

- the winters and spring fishing.<sup>302</sup> Mr. Setah identified a second fishery on the west end of the lake at Tl'ebayi Nadilin, which has been used regularly by Tsilhqot'ins since the time of the ?esggidams according to the oral history taught to him by ?Eskish (Captain George), Chief Lashway Lulua, Lebusden (Jean Baptiste) and his great grandfather ?Eweniwen (Johnny Setah).<sup>303</sup>
- (c) Mr. Setah also described taking ?elhtilh (wild chickens) during the rut in April and May by setting snares along trails near Xex Ti.<sup>304</sup> He was taught by Tommy Lulua that the ancestors used to make snares for the ?elhtilh using sinew tied to rocks.<sup>305</sup>
- (d) Mr. Setah testified that Tsilhqot'ins, including his family, have been fishing for Dolly Varden at Jidinlin at the northwest end of Xeni since the time of the ?esggidams, according to the oral history taught to him by his father, his great-grandfather ?Eweniwen (Johnny Setah) and ?Esk'ish (Captain George).<sup>306</sup>
- (e) Mr. Setah has also described camping at Et'an Ghintil in the fall and fishing for whitefish, trout and Dolly Varden with his family and other Tsilhqot'ins.<sup>307</sup> Mr. Setah testified that he was taught by his grandfathers ?Eweniwen and ?Alekw'ed, as well as Lebusden and Tommy Lulua, that Tsilhqot'ins have been using fish traps at this location since the time of the ?esggidams.<sup>308</sup>

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<sup>302</sup> Transcript, November 30, 2004, Norman George Setah Direct Examination, 00006, 30 – 00007, 38.

<sup>303</sup> Plaintiff's Argument, Appendix 3, para. 120; Transcript, November 30, 2004, Norman George Setah Direct Examination, 00007, 39 – 00011, 7; Exhibit 0216DIG, Norman George Setah Digitized Map, polygon "IY"; Exhibit 0216LEG, Norman George Setah Map Legend, polygon "IY".

<sup>304</sup> Plaintiff's Argument, Appendix 3, para. 132; Transcript, October 21, 2004, Norman George Setah Direct Examination, 00042, 21 – 00046, 11; Exhibit 0209DIG, Norman George Setah Digitized Map, polygon "BU"; Exhibit 0209LEG, Norman George Setah Map Legend, polygon "BU".

<sup>305</sup> Transcript, October 21, 2004, Norman George Setah Direct Examination, 00042, 21 – 00046, 11.

<sup>306</sup> Plaintiff's Argument, Appendix 3, para. 205; Transcript, November 8, 2004, Norman George Setah Direct Examination, 00028, 42 – 00030, 10; Exhibit 0213DIG, Norman George Setah Digitized Map, polygon "GM"; Exhibit 0213LEG, Norman George Setah Map Legend, polygon "GM".

<sup>307</sup> Plaintiff's Argument, Volume 3, at para. 1029; Plaintiff's Argument, Appendix 3, para. 205; Transcript, November 30, 2004, Norman George Setah Direct Examination, 00032, 30 – 00034, 7; Exhibit 0217DIG, Norman George Setah Direct Examination, polygons "JM", "JN"; Exhibit 0217LEG, Norman George Setah Direct Examination, polygons "JM", "JN".

<sup>308</sup> Transcript, November 30, 2004, Norman George Setah Direct Examination, 00034, 8-40.

(f) Mr. Setah described harvesting kinnick kinnick with his family in Xeni at Et'an Ghintil, on the south side of Xeni Biny.<sup>309</sup> He was taught by Donald Ekks' mother, Qawa, as well as other elders that Tsilhqot'ins had been harvesting kinnick kinnick in these areas since the time of the ?esgidams.<sup>310</sup>

(g) Mr. Setah testified as to traveling a trail from Naghataneqed through southeast Xeni, connecting to the mountainous south, which his father Willie Setah, and his grandfather Little George Setah taught him was a route developed by their ancestors.<sup>311</sup>

63. In addition, other Tsilhqot'in witnesses descendant of Sit'ax and Nancy, either through the lineage of their son ?Eweniwen (Johnny Setah) or daughter Sabatsakai (who begat Sammy William), testified as to the regular Tsilhqot'in use of Xeni (Nemiah Valley):

(a) Elder Martin Quilt testified that Xeni Gwet'ins hunt deer all through Xeni each summer and fall.<sup>312</sup> He was taught by his grandfather Sammy Bulyan, the grandson of Sit'ax and Nancy, that Tsilhqot'ins have been hunting Xeni for centuries.<sup>313</sup>

(b) Councilor David Setah identified ongoing late fall and winter deer hunting grounds along migration corridors in Xeni used by the deer as they moved down from the southern mountains into the Tachelach'ed to winter on the plateau.<sup>314</sup>

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<sup>309</sup> Plaintiff's Argument, Appendix 3, para. 206; Transcript, November 1, 2004, Norman George Setah Direct Examination, 00020, 15 – 00021, 11; Exhibit 0210DIG, Norman George Setah Digitized Map, polygons "DO", "DP"; Exhibit 0210LEG, Norman George Setah Map Legend, polygons "DO", "DP".

<sup>310</sup> Transcript, November 1, 2004, Norman George Setah Direct Examination, 00021, 44 – 00022, 6

<sup>311</sup> Plaintiff's Argument, Volume 3, at para. 924, trail 42; Transcript, November 4, 2004, Norman George Setah Direct Examination, 00059, 28 – 00060, 4.

<sup>312</sup> Plaintiff's Argument, Appendix 3, para. 199; Transcript, July 26, 2002, Martin Quilt Direct Examination, 829, 23 – 843, 25; Exhibit 003DIG, Martin Quilt Digitized Map, polygon "L1"; Exhibit 003LEG, Martin Quilt Map Legend, polygon "L1".

<sup>313</sup> Transcript, July 26, 2002, Martin Quilt Direct Examination, 835, 25 – 843, 25.

<sup>314</sup> Plaintiff's Argument, Appendix 3, para. 71; Transcript, January 19, 2005, David Setah Direct Examination, 00089, 4 – 00090, 29; Exhibit 0258DIG, David Setah Digitized Map, polygon "AN"; Exhibit 0258LEG, David Setah Map Legend, polygon "AN".

- (c) Councilor David Setah identified a winter fishery on Tsilhqox Biny (Chilko Lake) used by his family.<sup>315</sup> Gilbert Solomon averred that his father and mother, Mabel Solomon (nee William, great granddaughter of Setah and Nancy, and sister of David Setah's late mother Madelaine),<sup>316</sup> had taught him that Tsilhqot'ins have been fishing on Tsilhqox Biny since the time of the ?esggidams (ancestors), before the arrival of white people.<sup>317</sup>
- (d) Theophile Ubill Lulua, son of the late Donald Setah, identified a lhiz qwen yex (underground lodge) located on the east side of Tsilhqox Biny (Chilko Lake) in Xenı near the mouth of Nemiah Creek.<sup>318</sup>
- (e) Councilor David Setah testified that his mother has done lots of fishing with himself and his siblings on Xenı Biny (Konni Lake) during the winter.<sup>319</sup> Gilbert Solomon averred that he has seen many Xenı Gwet'in fishing at Xenı Biny, as well as fished there himself, and has been taught by his mother and many aunts and uncles, including Danny and Eugene William the great-grandsons of Sit'ax and Nancy, that their ancestors have been living and fishing at Xenı Biny since before the arrival of white people.<sup>320</sup>
- (f) Witnesses have identified multiple winter house sites at Tl'ebayi, on the west end of Xenı Biny (Konni Lake). Theophile Ubill Lulua testified that he has seen a lhiz

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<sup>315</sup> Transcript, January 17, 2005, David Setah Direct Examination, 00008, 26, 00009, 21; January 18, 2005, David Setah Direct Examination, 00036, 40 - 00037, 9; Exhibit 0258DIG, David Setah Digitized Map, polygons "AH", "AI"; Exhibit 0258LEG, David Setah Map Legend, polygons "AH", "AI"; Plaintiff's Argument, Appendix 3, para. 114.

<sup>316</sup> Exhibit 0441, Expert Report of John Dewhirst, Vol. 2, App. E(1).

<sup>317</sup> Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, para. 67.

<sup>318</sup> Transcript, April 14, 2004, Theophile Ubill Lulua Cross Examination, 00041, 9 – 00042, 20; Exhibit 0144DIG, Theophile Ubill Lulua Digitized Map, polygon "L1"; Exhibit 0144LEG, Theophile Ubill Lulua Map Legend, polygon "L1".

<sup>319</sup> Transcript, January 17, 2005, David Setah Direct Examination, 00008, 26, 00009, 21; January 18, 2005, David Setah Direct Examination, 00036, 19-39; Exhibit 0258DIG, David Setah Digitized Map, polygon "BP"; Exhibit 0258DIG, David Setah Digitized Map, polygon "BP".

<sup>320</sup> Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, paras. 62-63, 65.

- qwen yex near where he resides.<sup>321</sup> Joseph William testified that he has seen two lhez qwen yez at TI'ebayi, which he was taught by his grandparents Sammy and Annie William, were used by Tsilhqot' in ancestors.<sup>322</sup>
- (g) Gilbert Solomon identified an ancient winter house site at ?Etan Ghintil on south Xeni Biny, which he was taught about by his mother, aunts and uncles, including Danny and Eugene William.<sup>323</sup>
- (h) Ubill Hunlin identified a pit house at the east end of Xeni Biny at Naghataneqed.<sup>324</sup> Chief Roger William also testified that he had been taught by his grandmother about a pit house at Naghataneqed where the elder Lebusden stayed and buried people who died from influenza.<sup>325</sup>
- (i) Theophile Ubill Lulua identified a lhiz qwen yex site TI'etsinged on north Xeni Biny.<sup>326</sup>
- (j) Gilbert Solomon has averred that he has seen binlagh (box fish traps) at Seshghentach'i and was taught by his parents, including Mabel Solomon, nee William, the daughter of Sammy William and great-granddaughter of Setah and Nancy, that Mr. Solomon's ancestors fished with these traps at that location.<sup>327</sup> Seshghentach'i is adjacent to Tses Nanint'i,<sup>328</sup> discussed in the evidence of Mabel William and Francis Setah above.

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<sup>321</sup> Plaintiff's Argument, Appendix 2, para. 77; Transcript, April 14, 2004, Theophile Ubill Lulua Cross Examination, 00040, 22 – 00041, 8; Exhibit 0144DIG, Theophile Ubill Lulua Digitized Map, polygon "K1"; Exhibit 0144LEG, Theophile Ubill Lulua Map Legend, polygon "K1".

<sup>322</sup> Transcript, February 17, 2005, Francis William Direct Examination, 00013, 14 – 00015, 46.

<sup>323</sup> Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, paras. 63-64; Plaintiff's Argument, Appendix 2, para. 83.

<sup>324</sup> Plaintiff's Argument, Appendix 2, para. 87; Transcript, March 15, 2005, 00017, 47 – 00019, 5.

<sup>325</sup> Transcript, September 12, 2003, Roger William Direct Examination, 00062, 11 – 00063, 26.

<sup>326</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at 13; Transcript, April 15, 2004, Theophile Ubill Lulua Re-Exam, at 00043, 28 –47.

<sup>327</sup> Plaintiff's Argument, Appendix 2, para. 52; Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, para. 68(a).

<sup>328</sup> Plaintiff's Argument, Appendix 2, para. 57-58; Transcript, May 25, 2004, Francis William Cross Examination, 00034, 29 – 00035, 1.

- (k) Councilor David Setah identified his family's deer hunting grounds, which surround the spring fisheries on Xeni Biny (Konni Lake) at TI'ebayi and Naghatanaqed and extend west to Tsilhqox Biny (Chilko Lake).<sup>329</sup>
- (l) Councilor David Setah has testified that he and his family also hunt for ducks and geese in the springtime on the lakes and ponds in the same region that they hunt deer and fish, including Xeni Biny and Xex Ti.<sup>330</sup>
- (m) In his second affidavit, Gilbert Solomon described harvesting sunt'iny (mountain potato) with his family in Xeni for "as far back as [he] can remember".<sup>331</sup> Although his father and mother Mabel Solomon (nee William), the daughter of Sammy William and great-granddaughter of Setah and Nancy, stopped harvesting sunt'iny approximately five years ago due to their health, Mr. Solomon continues to harvest potatoes, and has also seen his sisters and Tsilhqot'in students harvesting.<sup>332</sup>
- (n) Numerous witnesses have identified the fall kokanee fishery at ?Etan Ghintil on Xeni Biny (Konni Lake),<sup>333</sup> which has been relied on by Tsilhqot'ins since the time of the ?esggidams, including: Francis William,<sup>334</sup> Roger William,<sup>335</sup> Ubill Lulua,<sup>336</sup> Harry Setah,<sup>337</sup> David Setah,<sup>338</sup> as well as elders Mabel Wililam, Francis

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<sup>329</sup> Plaintiff's Argument, Appendix 3, para. 130; Transcript, January 17, 2005, David Setah Direct Examination, 00037, 38 – 00039, 33; Exhibit 0258DIG, David Setah Digitized Map, polygons "AA", "AB", "AC"; Exhibit 0258LEG, David Setah Map Legend, polygons "AA", "AB", "AC".

<sup>330</sup> Plaintiff's Argument, Appendix 3, para. 132, Transcript, January 17, 2005, David Setah Direct Examination, 00042, 14 – 00043, 19; Exhibit 0258DIG, David Setah Digitized Map, polygon "AA"; Exhibit 0258LEG, David Setah Map Legend, polygon "AA".

<sup>331</sup> Plaintiff's Argument, Appendix 3, para. 154; Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, para. 50.

<sup>332</sup> Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, para. 50.

<sup>333</sup> Plaintiff's Argument, Volume 3, at para. 1029; Plaintiff's Argument, Appendix 3, para. 205.

<sup>334</sup> Exhibit 0157, Affidavit #1 of Francis William, March 10, 2004, para. 6(a); Transcript, May 25, 2004, Francis William Direct Examination, 00020, 16 – 00021, 27.

<sup>335</sup> Transcript, September 19, 2003, Roger William Direct Examination, 00032, 12-23; 00045, 26 - 00048, 45.

<sup>336</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, para. 198.

<sup>337</sup> Transcript, October 13, 2004, Harry Setah Direct Examination, 00012, 2 – 00014, 36.

<sup>338</sup> Transcript, January 17, 2005, David Setah Direct Examination, 00009, 22-42; Transcript, January 18, 2005, David Setah Direct Examination, 00021, 30 – 00023, 21; Transcript, January 20, 2005, David Setah Direct Examination, 00044, 8-16.

Setah and Norman George Setah, as discussed above. Martin Quilt testified that this place is also known as Louie's Fish Trap, after Louie Setah (Sit'ax).<sup>339</sup> Mr. Quilt explained that people would stay at ?Etan Ghintil and fish for kokanee and whitefish from October up until Christmas each year since the time of the ?esggidams, and only stopped there stays at ?Etan Ghintil upon being displaced relatively recently by white people settled in the area.<sup>340</sup>

- (o) In his testimony, Councilor David Setah described trapping with his father, William Setah. Councilor Setah learned how to trap from his father, who was out on his traplines every day each winter.<sup>341</sup> David Setah identified trapping grounds in western and central Xeni where he trapped lynx, bobcat, beaver and fisher with his father each winter.<sup>342</sup> William Setah averred that he had been told by his father, ?Eweniwen (Johnny Setah),<sup>343</sup> and other elders that Tsilhqot'ins had been trapping since before the arrival of the white man and the commercial fur market to obtain the furs and meat they needed to survive.<sup>344</sup>
- (p) In his testimony, Chief Roger William described, based on oral history from his uncle Danny William, his grandmother Annie William, and others, an incident between Chief ?Achig and Elkin, the first white person to try and settle in Xeni. Chief William explained that Chief ?Achig refused to allow Elkins to stay at Lhiz Bay but said he could stay at the end of the valley at what is now known as Elkins Creek, and when Elkins refused to move, Chief ?Achig fought with Elkins, bit his ear and drove him off the land.<sup>345</sup>

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<sup>339</sup> Transcript, July 10, 2002, Martin Quilt Direct Examination, 193, 16 – 195, 20.

<sup>340</sup> Transcript, July 24, 2002, Martin Quilt Direct Examination, 581, 2 – 584, 14.

<sup>341</sup> Plaintiff's Argument, Appendix 3, para. 87; Transcript, January 18, 2005, David Setah Direct Examination, 00024, 32 – 00025, 26.

<sup>342</sup> Transcript, January 18, 2005, David Setah Direct Examination, 00037, 47 – 00040, 41; Exhibit 0259DIG, David Setah Digitized Map, polygons "BQ", "BR", "BS", "BT", "BU", "BV", "BW"; Exhibit 0259LEG, David Setah Map Legend, polygons "BQ", "BR", "BS", "BT", "BU", "BV", "BW".

<sup>343</sup> Exhibit 0441, Expert Report of John Dewhirst, Vol. 2, App. E(1).

<sup>344</sup> Exhibit 0012, Affidavit of William Setah, September 27, 1989, para. 4.

<sup>345</sup> Transcript, September 10, 2003, Roger William Direct Examination, 00027, 13-43; 00030, 43 – 00031, 40.

64. The extended Setah family aside, Mr. John Dewhirst's genealogical research linking modern extended families to the Nemiah Valley area included the George family descendant of Chief ?Achig, the successor to Chief Nemiah, and his wife Tsoulout.<sup>346</sup>

According to Dewhirst:

Use and occupancy of the Claim Area continued after Chief ?Achig through his second son Captain George (ca. 1883-1974), and in turn through Captain George's son, Andy George (1906-1990), who were both members of the Nemiah Valley Indian Band (...).

...

In my opinion, based on the evidence discussed ..., archival documents and oral history show that the customary use area of the Xeni Gwet'in George family is in the Claim Area, specifically ..., as well as the Nemiah Valley. Considering ?Achig was born ca. 1863, his parents were born no later than ca. 1843, and possibly earlier. Considering that customary use areas are held by families from generation to generation, ?Achig parents and grandparents also likely occupied and used the customary use area and other parts of the Claim Area before and after 1843.<sup>347</sup>

65. The late Tsilhqot'in elder Ubill Hunlin (c. 1929-2005) was the widower of the late Amelia Hunlin (nee George) (c. 1925-2004), daughter of Tselxex (Andy George),<sup>348</sup> granddaughter of ?Eskish (Captain George), and great-granddaughter of Chief ?Achig and Tsolouout.<sup>349</sup> Mr. Hunlin was Tsilhqot'in originally from the Tsi Del Del (Alexis Creek) community, though upon marriage to his wife Amelia (m. approx. 1959) he moved to Xeni where they started a family and lived with ?Eskish (Captain George).<sup>350</sup> Mr. Hunlin testified in this case just before he passed away and gave evidence, including oral history evidence from his wife's grandfather ?Eskish (Captain George), relating to Tsilhqot'in land use of Xeni (Nemiah Valley):

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<sup>346</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 343, 344-352.

<sup>347</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 347, 352.

<sup>348</sup> Transcript, December 1, 2003, Francis Setah Direct-Exam, at 00016, 27

<sup>349</sup> Exhibit 0441, Expert Report of John Dewhirst, at 37, chart 6; Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-31.

<sup>350</sup> Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-34; 00015, 10 – 00018,2.

- (a) Mr. Hunlin testified that Tsilhqot'ins have hunted and trapped gex (rabbit or snowshoe hares) in the winter at Lhiz Bay, Xex Ti, and Naghataneqed from the time of the ?esgidams until his life.<sup>351</sup>
- (b) He also testified that Tsilhqot'ins have been trapping nabi (muskrat) every winter around Xex Ti Biny from his lifetime back to ancestral Tsilhqot'in times.<sup>352</sup>
- (c) In addition, Tsilhqot'ins have been trapping tsa (beaver) every winter at Lhiz Bay, Xex Ti, Tlebayi and Naghataneqed since the time of the ?esgidams (ancestors).<sup>353</sup>
- (d) Tsilhqot'ins also hunted bears in winter for meat during the time of the ?esgidams (Tsilhqot'in ancestors) and were still doing so when Mr. Hunlin's grandfather was alive.<sup>354</sup>
- (e) Mr. Hunlin testified that he hunted ducks and geese every fall around Xex Ti, and in turn has taught his sons, Tory and Dennis, to do so.<sup>355</sup> Mr. Hunlin further testified that he had been taught by his wife's grandfather, ?Eskish (Captain George), that Tsilhqot'ins had been doing this continuously since the time of the ?esgidams.<sup>356</sup>
- (f) Mr. Hunlin described the construction of ts'ah ?ets'edilhyah (pine windbreakers), which were used as shelters while at base camps during spring and fall (e.g. at fisheries).<sup>357</sup>

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<sup>351</sup> Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00005, 6 – 00008, 27.

<sup>352</sup> Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00013, 13 – 00015, 13.

<sup>353</sup> Transcript, March 9, 2005, Ubill Hunlin Direct Exam, 00009, 22 – 00013, 3.

<sup>354</sup> Transcript, March 8, 2005, Ubill Hunlin Direct Exam, 00032, 20 – 00033, 8.

<sup>355</sup> Transcript, March 8, 2005, Ubill Hunlin Direct Examination, 00028, 23 – 00030, 29; Plaintiff's Argument, Appendix 3, para. 207.

<sup>356</sup> Transcript, March 8, 2005, Ubill Hunlin Direct Examination, 00030, 30 – 00031, 34.

<sup>357</sup> Transcript, March 9, 2005, Ubill Hunlin Direct Examination, 00026, 35 – 00030, 22; March 14, 2005, Ubill Hunlin Direct Examination, 00005, 46 – 00006, 42; Plaintiff's Argument, Appendix 3, para. 126.

66. Mr. Dewhirst's genealogical research linking modern extended families to the Nemiah Valley area also included that of Kanim, himself a Tsilhqot'in Chief and the father of Chief Seal Canim (ca. 1870/1876 – 1932) who succeeded Chief ?Achig in Xenii (Nemiah Valley).<sup>358</sup> In this regard, Dewhirst opined:

Archival documents and oral history (par. 384-387) demonstrate that Kanim used and occupied the Claim Area in this lifetime. Seal Canim and his family continued to use and occupy the Claim Area. In my opinion, the customary use area of Kanim and his descendants was in the Nemiah Valley and... . Given the Tsilhqot'in cultural pattern of traditional family use areas, Kanim's parents, born ca. 1830, must have used the Claim Area before and after 1846. Kanim, as chief, and his parents must have had deep roots in the Stone Indian community and strong ties to the Claim Area.<sup>359</sup>

67. Finally, while the types of dwellings have evolved from underground houses to wooden cabins, what hasn't changed is that Tsilhqot'ins have continuously lived in and used Xenii through the winters. In his testimony, Chief Roger William listed eight Tsilhqot'ins who lived in houses within Xenii.<sup>360</sup> Tsilhqot'ins, including Francis William's father,<sup>361</sup> have built cabins at Ses Ghen Tach'i.<sup>362</sup> Ronnie Solomon has a house at Tses Nanint'i, next to Ses Ghen Tach'i.<sup>363</sup> Continuity of occupation is well demonstrated at Lhiz Bay, where generation after generation of Tsilhqot'ins have built and occupied houses, including: ?Eweniwen (Johnny Setah); Little George Setah; Norman George Setah, Eileen William, and Harry Setah.<sup>364</sup> Chief Sil Canem built a house at Lhiz Bay, where Francis William, Joseph William, and Jimmy Sammy (Jimmy Bulyan) also stayed.<sup>365</sup> Grace Anne Lulua lives at ?Abalach'ez Biny, to the southwest of Lhiz Bay.<sup>366</sup> Francis William helped his father build a house at Tl'ebayi, at the west end of Xenii Biny.<sup>367</sup> Joseph and Delia William as well as Ubill and Julianna Lulua also have

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<sup>358</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 383, 384, 389, and 376-395 generally .

<sup>359</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 395 .

<sup>360</sup> Plaintiff's Argument, Appendix 2, paras. 49-50.

<sup>361</sup> Plaintiff's Argument, Appendix 2, para. 56.

<sup>362</sup> Plaintiff's Argument, Appendix 2, para. 52.

<sup>363</sup> Plaintiff's Argument, Appendix 2, para. 57.

<sup>364</sup> Plaintiff's Argument, Appendix 2, paras. 60, 62-63.

<sup>365</sup> Plaintiff's Argument, Appendix 2, para. 61.

<sup>366</sup> Plaintiff's Argument, Appendix 2, para. 66.

<sup>367</sup> Plaintiff's Argument, Appendix 2, para. 78.

houses at Tl'ebayi.<sup>368</sup> Harry Setah also used to live in a house at Tl'ebayi.<sup>369</sup> Sammy and Annie Bulyan built a cabin, which was subsequently occupied by Mabel William.<sup>370</sup> Ms. William has also averred that Sitax and Nancy had a cabin at Tats'ust'an on Xeni Biny.<sup>371</sup> Ubill Hunlin and his family lived at Tl'ets'inged on the north side of Xeni Biny for approximately 25 years; Francis William also had a cabin there.<sup>372</sup> Chief Roger William's family also had a cabin at Tl'ets'inged for a fishing camp and have lived there on and off.<sup>373</sup> Chief Roger William was born in a house at Tl'etates at the west end of Xeni Biny at Naghataneqed in cabin that belongs to his mother, Eileen William.<sup>374</sup> Captain George, his wife Lizzie and his son Andy had a cabin at Naghataneqed, as did Nellie Lulua and Lebusden.<sup>375</sup> Francis William's father built a cabin at Naghataneqed out of wood from a previous cabin located there.<sup>376</sup> Joseph William was born in Sammy William's log cabin at Naghataneqed, and had also learned about John Baptiste's cabin there.<sup>377</sup> Mabel William stayed at Sammy and Annie Bulyan's winter cabin at Naghataneqed and then moved to her own house there, where she still lives.<sup>378</sup>

### **c. General Expert Opinion**

68. As noted above, ultimately anthropologist John Dewhirst concluded, based on the historical record as well as affidavit evidence regarding genealogies of the Nemiah, Setah, George and Kanim families, and without having the benefit of the oral history evidence discussed above regarding Tsilhqot'in resource exploitation of Xeni (Nemiah Valley):

In my opinion, the Tsilhqot'in use and occupation of the Nemiah Valley predates 1846 and continues to the present day. I am of the opinion that a

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<sup>368</sup> Plaintiff's Argument, Appendix 2, para. 79.

<sup>369</sup> Plaintiff's Argument, Appendix 2, para. 79.

<sup>370</sup> Plaintiff's Argument, Appendix 2, para. 81.

<sup>371</sup> Plaintiff's Argument, Appendix 2, para. 84.

<sup>372</sup> Plaintiff's Argument, Appendix 2, para. 85.

<sup>373</sup> Plaintiff's Argument, Appendix 2, para. 85.

<sup>374</sup> Plaintiff's Argument, Appendix 2, para. 90.

<sup>375</sup> Plaintiff's Argument, Appendix 2, para. 91.

<sup>376</sup> Plaintiff's Argument, Appendix 2, para. 91.

<sup>377</sup> Plaintiff's Argument, Appendix 2, para. 92.

<sup>378</sup> Plaintiff's Argument, Appendix 2, para. 93.

resident population in the early 19th century has continued to use and occupy the Chilko Lake area, including the Nemiah Valley, to the present day. In 1822 the Tsilhqot'in told McDougall that 53 families lived around Chilko Lake (McDougall 1822). In my opinion those families in 1822 represent an estimated population of 360 people (Par 139). The Nemiah Valley opens on Chilko Lake, and that population most likely used and occupied the valley. Genealogical research linked to customary use areas of selected modern extended Xení Gwetin families shows that they were present in the Chilko Lake and Nemiah Valley area since at least the early 19<sup>th</sup> century and have continued to use and occupy those areas to the present day (Section 3.0). Chief Nemiah, reported to have been born in the Nemiah Valley ca. 1827, is an ancestor of the modern Lulua extended family, and in my opinion Nemiah's family was part of that resident population.<sup>379</sup>

69. Regarding the significance of trail networks Dewhirst also stated:

[T]rail networks, ... in their contexts, indicate long term use and occupancy of areas beyond the trails themselves. The trails themselves are formed as a result of repeated use over generations of occupancy.<sup>380</sup>

...

[A trail network] necessarily indicates use and occupancy of a wider area...<sup>381</sup>

70. Dr. Brealey's opinion is corroborative. His evidence confirms essentially that the Tsilhqot'in trail network through Nemiah Valley, connecting in the northwest to the Tsuniah Valley and in the east to the Elkin Valley, is of pre-contact origin.<sup>382</sup> Based on anthropologist Dr. Robert Lane's work (1953),<sup>383</sup> Dr. Ken Brealey mapped the Nemiah Valley area as Tsilhqot'in hunting (including trapping)<sup>384</sup> and fishing grounds from pre-contact times until at least the smallpox of 1862.<sup>385</sup> Further to Lane and anthropologist Robert Tyhurst (1994),<sup>386</sup> Dr. Brealey mapped these land use and occupancy patterns as including hunting (including trapping) and gathering Nemiah Valley through to the post-

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<sup>379</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 208.

<sup>380</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 158.

<sup>381</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 249.

<sup>382</sup> Plaintiff's Argument, at para. 923, Trail Sections 16, 18, 21.

<sup>383</sup> R. Lane, *Cultural Relations of the Chilcotin Indians of West Central British Columbia*, March 1953 (Exhibit 0175) cited in Exhibit 0240, Expert Report of Ken Brealey.

<sup>384</sup> Plaintiff's Argument, Appendix 3, at para. 14.

<sup>385</sup> Exhibit 0246, Brealey, Land Use and Occupancy Map, October 2003.

<sup>386</sup> R. Tyhurst, "Shuswap and Chilcotin use of Chum Creek: a review of written sources", Environment Canada, Calgary, 1994 cited in Exhibit 0240, Expert Report of Ken Brealey.

reserve creation period.<sup>387</sup> Premised on the work of Dr. Magne (1984),<sup>388</sup> Dr. Brealey mapped the essential patterns of Tsilhqot'in land use and occupancy as encompassing hunting and gathering of the Nemiah Valley area into the post-reserve creation period of the 20<sup>th</sup> century.<sup>389</sup>

71. The expert evidence regarding plant use is corroborative. Dr. Turner concluded that “the Tsilhqot'in have repetitively used and occupied sites in the Claim Area such as ?Esgany ?anx, ..., Chilco Lake and the Nemiah Valley for the purposes of gathering and managing plant resources critical to their survival.”<sup>390</sup> Further, that they have done so in sustainable manner, maintaining and increasing abundance by disseminating plant stems and burning over areas from time to time.<sup>391</sup> In the words of Dr. Dinwoodie, “they maintained an institutionalized schedule of use centred on (proto-agricultural) root-harvest.”<sup>392</sup> Dr. Turner also expressed the opinion that “the Tsilhqot'in and Xeni Gwet'in people have been resident for at least 250-300 years in their claim area,” and likely much longer.<sup>393</sup> Further, “it would not have been possible for the Xeni Gwet'in and other Tsilhqot'in to have acquired their knowledge and developed names and terminology for the connection to the plant resources in their territory within the shorter time frame of the last 150 years.”<sup>394</sup>

#### **d. General Points**

72. The entire body of evidence discussed above regarding Xeni (Nemiah Valley) is consistent with the previously discussed Tsilhqot'in system of occupation through regular use of lands for resource exploitation:

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<sup>387</sup> Exhibit 0246, Brealey, Land Use and Occupancy Map, October 2003.

<sup>388</sup> M. Magne, “Taseko Lakes prehistory project”, unpublished report, British Columbia Heritage Trust and Nemiah Valley Indian Band, 1984, cited in Exhibit 0240, Expert Report of Ken Brealey.

<sup>389</sup> Exhibit 0146, Brealey, Land Use and Occupancy Map, October 2003.

<sup>390</sup> Plaintiff's Argument, Appendix 3, at para. 153; Exhibit 0205, Expert Report of Dr. Nancy Turner, at 4.

<sup>391</sup> Plaintiff's Argument, Volume 3, at para. 1017; Exhibit 0205, Expert Report of Dr. Nancy Turner, at 2, 5, 4; Transcript, November 17, 2004, Dr. Nancy Turner Direct Exam, 0006, 23 to 00067, 29; 00070, 28 to 46; Transcript, November 19, 2004, Dr. Nancy Turner Direct Exam, 00041, 44 to 00042, 13.

<sup>392</sup> Plaintiff's Argument, Volume 3, at paras. 975, 1017.

<sup>393</sup> Exhibit 0205, Expert Report of Dr. Nancy Turner, at 2; 6.

<sup>394</sup> Exhibit 0205, Expert Report of Dr. Nancy Turner, at 2.

- (a) The Tsilhqot'in annual schedule of land use dating pre-1846 detailed by anthropologist Robert Tyhurst (1984), based in part on Lane (1953), identifies – deer hunting through the year at varying intensity, winter ice fishing and fur trapping, including for snowshoe hares, trout fishing in spring and summer, mountain root (e.g. spring beauty) harvesting in early summer, duck and geese hunting into the fall, along with berrying and kokanee fishing.<sup>395</sup>
- (b) Consistent with the evidence of Dr. Dinwoodie,<sup>396</sup> the land uses identified exploit seasonal variations in local resource abundance in Xeni (Nemiah Valley) – deer reside in Xeni, and generally migrate south from the plateau into and through Xeni in the spring, as well north out of and through Xeni from the mountains in the fall; Tsilhqox Biny (Chilko Lake) and Xeni Biny (Konni Lake) are fish bearing lakes, the latter freezing in the winter; there is a range of resident furbearers, which grow long coats for winter; with the spring runoff trout move into the lengthy Xeni Yeqox (Nemiah Creek) to spawn; migratory ducks and geese spend fair-weather times on the lakes; mountain potatoes bloom in west Xeni in early summer; berries ripen at various places in Xeni during the late summer / fall; kokanee fish spawn on the south shore of Xeni Biny (Konni Lake) in the fall.
- (c) Consistent with the evidence of Dr. Dinwoodie and John Dewhirst regarding the socially institutionalized Tsilhqot'in schedule of resource use, encampments (e.g. extended families such as the Setahs and Williams) customarily wintered at Chilko Lake and Konni Lake where fisheries were abundant and hunting (including trapping) could be undertaken. These encampments engaged in spring creek fisheries in Xeni Yeqox (Nemiah Creek), as well as fur trapping and intensified deer hunting in and about Xeni (Nemiah Creek). Band members took mountain potatoes from west Xeni in early summer and continued hunting deer.

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<sup>395</sup> Plaintiff's Argument, Volume 3, at para. 974.

<sup>396</sup> Plaintiff's Argument, Volume 3, at para. 987.

Families engaged in fall kokanee fishing at ?Etan Ghintil on south Xení (Biny), as well as berrying there and other places in Xení along with ongoing hunting.<sup>397</sup>

73. In terms of Xení's (Nemiah Valley's) significance to Tsilhqot'in culture, broadly understood, the oral history and expert evidence regarding ancient Tsilhqot'in creation narratives or legends indicate that the Tsilhqot'in were and remain deeply connected to Xení:

- (a) The core Tsilhqot'in legend of Ts'il?os and ?Eniyud identifies and explains the origins of Xení. According to oral history evidence of elder Elizabeth Jeff, now deceased, in the times of the ?esggidams (Tsilhqot'in ancestors) Ts'il?os and ?Eniyud were Tsilhqot'in husband and wife living with their family in the mountains to the south. When the two decided to separate ?Eniyud left Ts'il?os and returned northwest to the area around Naghatalhchoz (Choelquoit Lake). In so travelling, ?Eniyud sculpted the land and thus created Xení (Nemah Valley) and the mountains there above.<sup>398</sup>
- (b) The Ts'il?os and ?Eniyud creation narrative also identifies and explains the origins of the mountain potato harvesting grounds in Xení. Tsilhqot'in oral history explains that having left Ts'il?os in the southern mountains where sunt'iny (mountain potato) grow, ?Eniyud seeded various other areas with sunt'iny, including ?Esgany ?Anx, Gughay Ch'eche'd and Tl'egwezbenz in Xení.<sup>399</sup>
- (c) The legend of Ts'il?os and ?Eniyud also relates to Xení (Nemiah Valley) in this sense. Having broken their marriage bond by separating, both consequently turned into mountains (an example of ba ts'egudah – having negatively affected one's future). Ts'il?os (Mountain Tatlow) thus bounds Xení in the south. As a person, he must be respected, as must the land. Further, he is the highest peak in

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<sup>397</sup> Plaintiff's Argument, Volume 3, at paras. 975-977.

<sup>398</sup> Plaintiff's Argument, Volume 3, at para. 888, 896.

<sup>399</sup> Plaintiff's Argument, Volume 3, at para. 888, 896-897.

the range, and is charged with the responsibility of protecting and watching over the Tsilhqot'in, including those of Xení at his feet.<sup>400</sup>

- (d) In the Tsilhqot'in legend of Woman Who Turned To Stone, a woman turned to stone in southwest Ts'uni?ad (Tsuniah Valley) when on her way to Naghatalhchoz (Big Eagle Lake) to stay with her family after leaving her husband in Xení.<sup>401</sup> This narrative, which was taught to elder Francis Setah by his grandfather ?Eweniwen (who in turn had heard it from his father),<sup>402</sup> provides further evidence that Xení is part of the ancestral Tsilhqot'in homeland.
- (e) Dr. Dinwoodie's evidence is that the nature of Tsilhqot'in occupation of land is best understood by also considering that their cultural relationship to lands went well beyond their utilitarian interests in it. In particular, Tsilhqot'in cultural relationship to land is empirically attested in their geographic place names and associated narratives.<sup>403</sup>

74. The evidence regarding Tsilhqot'in place names also supports the fact of Tsilhqot'in occupation of Xení (Nemiah Valley) for centuries. British Columbia's archaeologist Morley Eldridge was of the opinion that aboriginal place names, by their nature, tend to be relatively stable over time. Furthermore, an abundance of different types of aboriginal place names justifies a presumption that the aboriginal group with which the names originate has occupied the named area most likely for centuries. This view is consistent with Dr. Dinwoodie's "preliminary research suggests that Tsilhqot'in ethnogeographic terminology (place names, geographical nomenclature and associated narratives is abundant and the nature of that terminology supports the inference that their occupation of the territory has been exclusive and long term." Tsilhqot'in witnesses used a litany of Tsilhqot'in ethnogeographic terms with respect to Xení (Nemiah Valley), spanning west to east:

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<sup>400</sup> Plaintiff's Argument, Volume 3, at para. 898.

<sup>401</sup> Transcript, November 19, 2003, Francis Setah Direct Examination, 00009, 20 – 00011, 43.

<sup>402</sup> Transcript, December 8, 2003, Francis Setah Direct Examination, 00003, 3-19.

<sup>403</sup> Plaintiff's Argument, Volume 3, at para. 885, and more generally paras. 618-634.

Tsilhqox Biny  
Xeni  
Besk'ish Hinu  
Dalichiqox  
Ses Ghen Tach'i  
Tses Nanint'i  
Lhiz Bay  
?Esdilangh  
Tsintsen Dinlhgwenlh  
Lhiz Bay Biny  
Lhiz Bay Tabanx  
?Abalach'ez Biny  
Gwetles Ch'ed Biny  
Nuy Chugh  
Denish T'an Natl'ebideni?ah  
Tl'egwezbentz  
Gughay Ch'ech'ed  
?Esgany ?Anx  
Tl'etsans Xadalgwenlh  
Tsi Natats'ededilh  
Ts'il?os Beyeqox  
Xex Ti  
Xex Ti Biny  
?Elhtilh ?Eghatatl'u  
?Esqi Dzul Tese?an  
Xeni Yeqox  
Tl'ebayi  
Xeni Biny  
Tats'ust'an  
Tl'ets'inged

?Et'an Ghintil  
Tl'etates  
Tisandax  
Naghataneqed  
Tlas Tats'aghillghiz  
Chinsdad Gulin  
?Elhtilh ?Elhtilh

75. The evidence of burial places in Xení (Nemíah Valley) also indicates the Tsílhqot'in connection to the valley. While pre-European contact the Tsílhqot'in customarily cremated their dead, post-missionizing the Tsílhqot'in practiced burials<sup>404</sup> and burials remain visible. Generations of Tsílhqot'in extended families resident in Xení (e.g. Setah, George, Lulua, William) are located through the valley,<sup>405</sup> but especially at the Tsílhqot'in graveyard still in use at Xex Ti and located off-reserve in central Xení.<sup>406</sup>

76. The lay and expert evidence also support the fact that from the Tsílhqot'in perspective Xení (Nemíah Valley) is Tsílhqot'in nen (land):

(a) In the words of human geographer, Dr. Brealey:

In oral societies, boundaries are recognized, understood and validated not by maps and plans, but from 'inside the collective' – i.e. by where creation narratives fade, where genealogical linkages can no longer be traced, where place names are not recognizable, and where languages become unintelligible.<sup>407</sup>

Application of these factors clearly demonstrates that Xení is Tsílhqot'in land from their point of view. As discussed above, Tsílhqot'in creation narratives

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<sup>404</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, at 00056, 16-19; Transcript, March 8, 2004, Minnie Charleyboy Direct-Exam, at 00026, 47 – 00027, 5; Transcript, May 27, 2004, Francis William Cross-Exam, at 00005, 28 – 00006, 2 (not directly supported, only inferentially... maybe check and decide whether to re-phrase).

<sup>405</sup> Plaintiff's Argument, Appendix 2, at paras. 70, 89 and 51; Transcript, December 2, 2003, Francis Setah Direct-Exam, at 00025, 10-39.

<sup>406</sup> Plaintiff's Argument, Appendix 2, at paras. 68-72; Exhibit 0441, Dewhirst Report, September 2004, vo. 2, app E(1), F(1), H(1); Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-31.

<sup>407</sup> Exhibit 0240, Expert Report of Ken Brealey, September 22, 2004, at 6.

reveal these lands as a foundation of Tsilhqot'in culture and survival. Genealogies, safeguarded by oral history and corroborated by the archival record and anthropological opinion, demonstrate that generation after generation of Tsilhqot'ins have been born, lived and ultimately laid to rest in Xeni. The valley is carpeted with Tsilhqot'in place names that richly portray their connection to, and reliance on, the land and its resources. This trial itself has demonstrated that in Xeni, it is English that is the foreign language and Tsilhqot'in the mother tongue. In modern, legal terms, these are unmistakably Tsilhqot'in title lands, as echoed in the following words of Tsilhqot'in elders.

- (b) In the terms of elder Francis Setah, through a translator and on cross-examination regarding range lands of north and south Xeni, these lands are “Indian Land” – i.e. “Tsilhqot'in land”.<sup>408</sup>
- (c) In the words of elder Theophile Ubill Lulua, through a translator and on cross-examination regarding the graveyard at Xex Ti at north central Xeni, these lands are “Indian Land”, which is perhaps self-evident from the generations of Tsilhqot'ins that are buried there, as discussed above.<sup>409</sup>
- (d) In the words of elder Mabel William, through a translator and discussing the intimate network of trails through Xeni, “the ?esgidam made these trails by walking Tsilhqot'in nen (land).”<sup>410</sup>
- (e) Indeed the late elder Ubill Hunlin, through a translator and in response to cross-examination about his knowledge of the Claim Area, and as the great-grandson in law of settler Edmund Elkins' ouster Chief ?Achig stated: “The land belongs to the Tsilhqot'in. All that land belongs to the Tsilhqot'in.”<sup>411</sup>

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<sup>408</sup> Transcript, December 8, 2003, Francis Setah Cross-Examination, at 00012, 40 – 00013, 34.

<sup>409</sup> Plaintiff's Argument, Appendix 2, para. 67.

<sup>410</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, para. 38, also para. 50; Plaintiff's Argument, Volume 3, at para. 934(c).

<sup>411</sup> Transcript, March 14, 2005, Ubill Hunlin Cross-Examination, 00037, 14-19; Plaintiff's Argument, Volume 3, at para. 934(a).

### **3. SUMMARY AND CONCLUSION**

77. Clearly, the Tsilhqot'in constructed dwellings, cultivated root fields and regularly used Xeni (Nemiah Valley), located on northeast Tsilhqox Biny (Chilko Lake), for hunting, trapping, fishing and gathering prior to, at and well after Crown sovereignty. They have continued to do so through to the present day. A coherent body of evidence from the historical record, expert opinion and oral history establishes this fact on a civil standard of proof. The Tsilhqot'in have aboriginal title to the lands of Xeni (Nemiah Valley).

#### **C. GWEQ'EZ DZELH (NEMIAH MOUNTAIN) AND XENI DZELH (KONNI MOUNTAIN)**

##### **1. DEFINITE TRACTS OF LAND**

78. In terms of physical terrain, Nemiah and Konni Mountains are two definite tracts of land in the central Claim Area. They are mountains at the transition zone from the Chilcotin Range to the rolling terrain of the Chilcotin Plateau.<sup>412</sup> They are bounded in the northwest by Tsuniah Valley, in the west by Chilko Lake, in the south by Nemiah Valley, in the east by Elkin Valley and in the north by the leveling Chilcotin Plateau lands between the Taseko and Chilko Rivers.<sup>413</sup> The mountains are oriented on a west-east axis, Nemiah Mountain in the west with Konni Mountain in the east. The two mountains are conjoined at a small tributary valley that drains waters south into central Nemiah Valley. These waters originate from both a basin on east Nemiah Mountain and from small lakes situated on the northwest face of Konni Mountain, including Mainguy Lake and Augers Lake.

79. The Tsilhqot'in identify these mountains and their geographic features in their own terms. Gweqez Dzelh (Nemiah Mountain), a.k.a. west Xeni Dzelh, and Xeni Dzelh (Konni Mountain) are bounded in the northwest by Ts'uni?ad (Tsuniah Valley), in the

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<sup>412</sup> Plaintiff's Argument, Volume 3, at paras. 937-938.

<sup>413</sup> Exhibit 0183, Expert Report of Brian Guy, at 6, 7 (para. 2).

west by Tsilhqox Biny (Chilko Lake), in the south by Xení (Nemíah Valley), in the east by Elkin Valley and in the north by Tachelach'ed (the lands between the Tsilhqox (Chilko River) and Dasiqox (Taseko River)). The two mountains meet at the small tributary valley ?Esqi Dzul Tese?an that drains waters south to central Xení. These waters originate from both Shishan Tl'ad (i.e. 'male sheep basin') on east Gweq'ez Dzelh and from small lakes on northwest Xení Dzelh, namely, Nen Nuy Dilex Biny (Mainguy Lake), Chantl'ex Biny and Ts'itse'ex Biny (Augers Lake).

80. Gweq'ez Dzelh (Nemíah Mountain) and Xení Dzelh (Konni Mountain) are mountain habitat for, in Tsilhqot'in terms, debi (mountain sheep), sebay (mountain goat) and, in season, nits'i (deer).<sup>414</sup>

## **2. PHYSICALLY OCCUPIED BEFORE, AT AND AFTER CROWN SOVEREIGNTY**

81. Located on northeast Tsilhqox Biny (Chilko Lake), the Tsilhqot'in regularly used Gweq'ez Dzelh (Nemíah Mountain) and Xení Dzelh (Konni Mountain) for resource exploitation, particularly hunting grounds for deer, mountain sheep and mountain goat, prior to, at and well after Crown sovereignty. A consistent body of evidence comprised of the archival record, expert opinion and oral history establishes this fact on a balance of probabilities.

### **a. Historical Record and Related Expert Opinion**

82. The historical record (1822 -1899) and associated expert opinion clearly, indeed expressly in 1864, identify Nemíah and Konni Mountains as aged Tsilhqot'in hunting grounds, particularly for large game such as deer and mountain sheep.<sup>415</sup>

83. Again, in January of 1822, George McDougall, the very first European to enter Tsilhqot'in territory, met Tsilhqot'ins on the Chilko River and recorded the Tsilhqot'ins as informing his party of "6 Ground Lodges, about the Lake, containing 53

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<sup>414</sup> Plaintiff's Argument, Appendix 3, at para. 79; Transcript, November 30, 2004, Norman George Setah Direct-Exam, at 00036, 1 – 00038, 9; Exhibit 0368, Expert Report 1 of Mike Demarchi, at 3, 10.

<sup>415</sup> Plaintiff's Argument, Appendix 3, at para. 80.

families...”.<sup>416</sup> Dewhirst estimated this population as 360 Tsilhqot’ins with resident groups at both the village of “Taze Ley” of north Chilko Lake and in the Nemiah Valley on northeast Chilko Lake.<sup>417</sup> Nemiah and Konni Mountains are essentially located in between these two resident Tsilhqot’ in populations, on the northern boundary of Nemiah Valley.

84. Moreover, McDougall note the river’s “East side... is their favourite hunting grounds for Large Animals.”<sup>418</sup> Nemiah and Konni Mountains are, strictly speaking, just southeast of Chilko River rather than east of it. However, McDougall’s note is at least consistent with Nemiah and Konni Mountains being Tsilhqot’ in hunting grounds for deer and mountain sheep. Particularly so when one considers McGillvary’s (1827) comments, *infra*, that McDougall apparently obtained as sample of mountain sheep wool from the Tsilhqot’ in on this trip in 1822.

85. In December of 1825, William Connolly reached Tsilhqot’ins residing at their salmon caches on the Chilko River and at the Chilko Lake outlet. Connolly recorded that the Tsilhqot’ins there “feasted us with the fat of a sheep they lately had killed” [emphasis added] and informed his party that of their subsistence partly based on deer and sheep, of which the country was pretty well stocked.<sup>419</sup> The opinion of anthropologist John Dewhirst is that “these animals were hunted around Chilko Lake in the Claim Area, as well as other places, because a Tsilhqot’ in village was located at the entrance to the lake.”<sup>420</sup> Nemiah Mountain is on northeast Chilko lake near its entrance from Chilko River, while Konni Mountain flanks east Nemiah Mountain.

86. In 1827, Joseph McGillvary of the Hudson’s Bay Company provided a written sketch of “Chilkotin Country” and described Chilko Lake as “surround by lofty Mountains, from which many small Rivers issue therefrom.” McGillvary noted that the

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<sup>416</sup> Exhibit 0156-1822/01/18.001,transcription at HMTQ-0100920 at HMTQ-0100925, at 6.

<sup>417</sup> Exhibit 0443, Expert Report of John Dewhirst, at 6, 139, 161, 163, 167, 203, 208; see also Plaintiff’s Reply Appendix 1, Physical Occupation of Definite Tracts of Land, re Nemiah Valley, “General Historical Record and Related Expert Opinion.

<sup>418</sup> Plaintiff’s Argument, Appendix 3, at para. 58;

<sup>419</sup> Plaintiff’s Argument, Appendix 3, at para. 83(a).

<sup>420</sup> Plaintiff’s Argument, Appendix 3, at para. 83(b).

Tsilhqot'in regularly exploited their Chilko Lake fish products and large animal resources, such as deer and mountain sheep “on their lands”, including in especially critical circumstances:

In the Spring they have abundance of Suckers, Trout and White Fish, it abounds in large Animals—such as Rein Deer—Red Deer and Moose Deer—and in the Autumn and Spring Chevreuil are numerous—Salmon however is their principal food, but as this fish does not come up regularly the Chilcotin River their resource is the produce of the Lake, and large Animals.

...

The Mountain Sheep is common on their Lands, and yields a beautiful Wool – a sample of which was obtained in 1822 – the Yarn is spun with a Kind of distaff.<sup>421</sup>

87. Anthropologist John Dewhirst opined, “McGillvary shows that Chilko Lake and Chilko River fisheries together with big game resources in the surrounding area support the resident Tsilhqot'in population year round.”<sup>422</sup> Nemiah and Konni Mountains are in the area surrounding northeast Chilko Lake.

88. For the year 1835, esteemed provincial anthropologist Wilson Duff, writing in *The Indian History of British Columbia* (1964), analyzed the historical distribution of Indian populations and estimated the population of Nemiah Valley on Chilko Lake as 100 persons.<sup>423</sup>

89. In 1838, the Chilcotin Post census identified the Tsilhqot'in winter village of “Taze Ley” on or near the outlet of Chilko Lake and lead by Chief “Quill Quall Yaw”, as well as three others Tsilhqot'in villages down the Chilko River.<sup>424</sup> The reported population alone for “Taze Ley” (Tachi Lhuy) was 194 people, including 46 hunters,

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<sup>421</sup> Exhibit 0156-1827/00/00.001, at 215-216: Joseph McGillvary, Report of Fort Alexandria.

<sup>422</sup> Plaintiff's Argument, Appendix 3, at fn. 211, para. 173-174.

<sup>423</sup> Exhibit 0265-1964/00/00.001; Exhibit 0443, Expert Report of John Dewhirst, at para. 204.

<sup>424</sup> Plaintiff's Argument, Appendix 3, at para. 59; Exhibit 0443, Expert Report of John Dewhirst, at paras.59, 64-66.

estimates that were assuredly too low.<sup>425</sup> Dewhirst concluded these Tsilhqot'ins "undoubtedly used... hunting grounds... most likely in the Claim Area."<sup>426</sup>

90. In November of 1845, Father Giovanni Nobili reportedly visited three areas where Tsilhqot'ins were residing at winter's onset. According to Dr. Brealey, the third was a village at or near the outlet of Chilko Lake containing an estimated 150 people lead by Chief "Konkwaglia".<sup>427</sup> In this regard, Dewhirst opined that in November 1845 Father Nobili visited the "Taze Lay" village of recorded in the Chilcotin Post's 1838 census.<sup>428</sup> Dr. Brealey concurred.<sup>429</sup>

91. Importantly, in July of 1864, colonial magistrate William Cox signed a map known now as the Chicotin War Map based on information from the Tsilhqot'in Chiefs Alexis and Eulas. This map expressly inscribes the mountains southeast of "Sooneat L." (Tsuniah Lake) – i.e. exactly where Nemiah and Konni Mountains are located – as "Hunting grounds horses cannot pass on this side of Lake"[Emphasis added].<sup>430</sup> The map shows a trail network connecting these "Hunting grounds" with the outlet of Chilko Lake, as well as the length of Chilko River, where the 1838 Chilcotin Post census placed a series of four Tsilhqot'in villages. The opinion of anthropologist John Dewhirst is that these "hunting grounds and trails all indicate long term regular use and occupancy over many generations, which must pre-date 1846."<sup>431</sup>

92. In September of 1899, Indian Reserve Commissioner A.W.Vowell and his party ventured to the Nemiah Valley.<sup>432</sup> Regarding west Nemiah Valley on Chilko Lake Vowell diarized that "several families had built houses, and established their winter quarters, following hunting, fishing and trapping in the spring, summer and autumn."

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<sup>425</sup> Plaintiff's Argument, Appendix 3, at para. 60; Ex. 0443, Expert Report of John Dewhirst, at paras. 99, 397, 84; Exhibit 0173, Affidavit #1 of Mabel William, at para. 50(vi).

<sup>426</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 175-176, 397.

<sup>427</sup> Exhibit 0240, Expert Report of Ken Brealey, at 26-28 re Nobili, 60 re Fort Chilcotin, and 56 re Chilko Lake; Exhibit 0156-1845/11/30.001 at 2195816-7.

<sup>428</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 76-79.

<sup>429</sup> Exhibit 0240, Expert Report of Ken Brealey, at 28.

<sup>430</sup> Plaintiff's Argument, Appendix 3, at para. 83(c); Exhibit 0265-1864/00/00/001; 0265-1864/00/00/002.

<sup>431</sup> Plaintiff's Argument, Appendix 3, at para. 83(d).

<sup>432</sup> Exhibit 0240, Expert Report of Ken Brealey, September 22, 2004, at pp. 32-33.

[Emphasis added.] Reporting to the Department of Indian Affairs in October 1899, Vowell wrote that “on my arrival I learned that the greater number of the Indians were absent in the mountains hunting and fishing and putting up their winter supply of dried meat, etc. I also learned that they are generally absent in the Spring and Fall, engaged in trapping, and that the only time when they are all at home is in the dead of winter.”<sup>433</sup>

[Emphasis added.] With respect to Vowell, and the historical record more generally, anthropologist John Dewhirst stated:

In my opinion, the Tsilhqot'in use and occupation of the Nemiah Valley predates 1846 and continues to the present day. I am of the opinion that a resident population in the early 19th century has continued to use and occupy the Chilko Lake area, including the Nemiah Valley, to the present day. In 1822 the Tsilhqot'in told McDougall that 53 families lived around Chilko Lake (McDougall 1822). In my opinion those families in 1822 represent an estimated population of 360 people (Par 139). The Nemiah Valley opens on Chilko Lake, and that population most likely used and occupied the valley. Genealogical research linked to customary use areas of selected modern extended Xenigwetin families shows that they were present in the Chilko Lake and Nemiah Valley area since at least the early 19<sup>th</sup> century and have continued to use and occupy those areas to the present day (Section 3.0). Chief Nemiah, reported to have been born in the Nemiah Valley ca. 1827, is an ancestor of the modern Lulua extended family, and in my opinion Nemiah's family was part of that resident population.<sup>434</sup> [Emphasis added.]

## **b. Genealogical Record, Related Expert Opinion & Tsilhqot'in Evidence**

93. As part of his genealogical research linking modern extended families to the Chilko Lake and Nemiah Valley area, Dewhirst identified the Tsilhqot'in Chief Nemiah as an ancestor of the modern Lulua family per the uncontroverted affidavit evidence of elder Eliza William (nee Lulua).<sup>435</sup> Ms. William, now deceased, was born ca. 1913 to Nemiah's daughter Jeannie.<sup>436</sup> Dewhirst also reviewed the historical record from the 1860s – 1890s with respect to the Chief Nemiah along with Nemiah's death certificate.<sup>437</sup>

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<sup>433</sup> Exhibit 156-1899/10/18.001, Letter from A. Vowell to Secretary, Dept. of Indian Affairs, pp. 2-3.

<sup>434</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 208.

<sup>435</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 290; Exhibit 0105, Affidavit #1 of Eliza William, at paras. 3, 6-7, 1.

<sup>436</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 290; Exhibit 0105, Affidavit #1 of Eliza William, at paras. 3, 7.

<sup>437</sup> Exhibit 0156-1927/07/31.001; Exhibit 0443, Expert Report of John Dewhirst, at paras. 290-296.

This record and Dewhirst's conclusions support Nemiah and Konni Mountains as being aged Tsilhqot'in hunting grounds of northeast Chilko Lake, and make clear that Chief Nemiah is the namesake not only of Nemiah Valley but also of Nemiah Mountain situated at the valley's northwest quarter:

Archival documents demonstrate that Nemiah spent his life in and around the Claim Area, particularly the Nemiah Valley and Chilko Lake (see below).

...

... [L]etters show Nemiah had an intimate knowledge of the Claim Area, especially of Chilco Lake and the surrounding mountains up to Stone.

In my opinion, archival maps and records demonstrate that Nemiah was born in Nemiah Valley ca. 1827. His parents obviously had lived there before him. Nemiah became a leader of prominence by the early 1860s, and likely earlier, and continued to occupy and use the Claim Area until his death in 1927.

...

... Archival documents demonstrate Nemiah spent his entire life in and around the Claim Area, including the Nemiah Valley, which is named after him.<sup>438</sup> [Emphasis added.]

94. Dewhirst's genealogical evidence also relates to the extended Setah family descendant from the Tsilhqot'in husband and wife Setah (a.k.a. Louis Setah and, in Tsilhqot'in, Sit'ax) and Nancy.<sup>439</sup> The death certificates of Setah (ca. 1827/1849 – 1927) and Nancy (ca. 1845-1938) respectively state they were born in the Nemiah Valley.<sup>440</sup> The Setah family flourished through two lines of descent, namely, through their son Johnny Setah and their daughter Sabatsakai (who begat Sammy William).<sup>441</sup> Based on the historical record and affidavit evidence, Dewhirst concluded:

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<sup>438</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 291, 295, 296, 303.

<sup>439</sup> Exhibit 0443, Expert Report of John Dewhirst Report, at paras.304-313.

<sup>440</sup> Exhibit 156-1927/11/15.001 (Louis Setah); Exhibit 156-1938/11/17.001 (Nancy Setah) Exhibit 0443, Expert Report of John Dewhirst, at paras. 304-305.

<sup>441</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 311-312.

In my opinion, archival documents and oral history show that the Setah family's customary use area is in the Claim Area, primarily around the Nemiah Valley. Ancestors Setah and Nancy, both born before 1846, lived most of their lives in the Claim Area. Setah's mother, who was born in the early part of the 19<sup>th</sup> century, was also from Nemiah Valley (M. William 2004b: par. 39). This demonstrates that the Setah family has used the Claim Area since at least the early 19<sup>th</sup> century and probably earlier.<sup>442</sup>

95. Tsilhqot'in elder Francis Setah (b. 1929) is the son of Little George Setah, the paternal grandson of ?Eweniwen (Johnny Setah) and Sebanie,<sup>443</sup> and the paternal great-grandson of Sit'ax (Setah) and Nancy. Mr. Setah's evidence, including oral history sourced to ?Eweniwen and in turn Sit'ax, also related to Tsilhqot'in land use of Gweq'ez Dzelh (Nemiah Mountain), a.k.a. west Xenii Dzelh:

- (a) Mr. Setah identified horse trails used by himself and Tsilhqot'ins from Xenii (Nemiah) through west Xenii Dzelh (Nemiah Mountain, a.k.a. Gweq'ez Dzelh). From the west a trail enters the mountain at Nenatats'ededi'lh in southwest Ts'uni?ad (Tsuniah Valley). Likewise, from the southwest a trail enters the mountain through Dalichiqox in northwest Xenii. The trails converge in the mountain's west and then traverse the central mountain, running in the east through Shishan Tl'ad. In turn, a trail entered the mountain from the southeast, originating in central Xenii at Tl'ebayi, and extending up into Shishan Tl'ad. Mr. Setah was taught his grandfather ?Eweniwen, who in turn was taught by his father Sit'ax, that this route was originally developed as a footpath by the ?esgidams.<sup>444</sup>
- (b) Mr. Setah identified his deer hunting grounds through west Xenii Dzelh (Nemiah Mountain, a.k.a. Gweq'ez Dzelh) during the summer. He gave oral history that the mountain has been used by Tsilhqot'ins for deer hunting since the time of the ?esgidams, according to oral history passed down from ?Eweniwen and

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<sup>442</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 313.

<sup>443</sup> Exhibit 0441, Expert Report of John Dewhirst, at 26.

<sup>444</sup> Plaintiff's Appendix 6, Map C, Traditional Tsilhqot'in Transportation Network; Plaintiff's Argument, Volume 3, at para. 923, trail 19; Transcript, November 26, 2003, Francis Setah Direct Examination, 00016, 31 – 00018, 23; Exhibit 0093DIG, Francis Setah Digitized Map, trail "BB"; Exhibit 0093LEG, Francis Setah Digitized Map Legend, trail "BB".

Sit'ax.<sup>445</sup> Mr. Setah explained the Tsilhqot'in practice of only hunt male deer in the early summer so as to protect pregnant females and ensure the sustainability of the deer populations they rely on.<sup>446</sup>

(c) In addition, Mr. Setah identified west Xení Dzelh (Nemíah Mountain, a.k.a. Gweq'ez Dzelh) as fall mountain sheep hunting grounds.<sup>447</sup> Mr. Setah testified that he had learned from his grandfather ?Eweníwen, who in turn had learned from his father Sit'ax, that Tsilhqot'in had been hunting sheep in this area, including at Shíshan Tl'ad, which translates to "mountain sheep basin", since the time of the ?esggídams.<sup>448</sup>

(d) Mr. Setah also identified the trail network at the base of west Xení Dzelh (Nemíah Mountain, a.k.a. Gweq'ez Dzelh) along Tsilhqox Biny (Chilko Lake), at the base of the mountains and through Xení (Nemíah Valley), and near the base of east Xení Dzelh through Elkin Valley connecting to Neba?elhnaxnenelh?elqelh (Captain Georgetown), which either his grandfather ?Eweníwen, his grandmother Daldod or both had taught him had been used by Tsilhqot'ins since the time of the ?esggídams.<sup>449</sup>

96. Mr. John Dewhirst's genealogical research linking modern extended families to the Claim Area included the George family descendant of Chief ?Achig, the successor to Chief Nemíah, and his wife Tsolouout.<sup>450</sup> According to Dewhirst:

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<sup>445</sup> Transcript, November 26, 2003, Francis Setah Direct Examination, 00016, 31 – 00018, 23; 00021, 4-42; 00037, 38-47; Exhibit 0094DIG, Francis Setah Digitized Map, polygon "BC"; Exhibit 0094LEG, Francis Setah Digitized Map Legend, polygon "BC".

<sup>446</sup> Plaintiff's Argument, Appendix 3, at para. 136; Transcript, December 1, 2003, Francis Setah Direct Examination, 00004, 43 – 00005, 14.

<sup>447</sup> Plaintiff's Argument, Appendix 3, at para. 204; Transcript, December 2, 2003, Francis Setah Direct Examination, 00003, 24 – 00004, 33;

<sup>448</sup> Plaintiff's Argument, Appendix 3, at para. 82; Transcript, December 2, 2003, Francis Setah Direct Examination, 00026, 41 – 00028, 44; Exhibit 0094DIG, Francis Setah Digitized Map, polygon "BC"; Exhibit 0094LEG, Francis Setah Digitized Map Legend, polygon "BC".

<sup>449</sup> Plaintiff's Argument, Volume 3, at para. 923, re Trails 16, 18 and 21; Transcript, December 1, 2003, Francis Setah Direct Examination, 00025, 28 – 00027, 21; Exhibit 093DIG, Francis Setah Digitized Map, trail "CI"; Exhibit 0093LEG, Francis Setah Digitized Map Legend, trail "CI".

<sup>450</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 343, 344-352.

Use and occupancy of the Claim Area continued after Chief ?Achig through his second son Captain George (ca. 1883-1974), and in turn through Captain George's son, Andy George (1906-1990), who were both members of the Nemiah Valley Indian Band (...).

...

In my opinion, based on the evidence discussed ..., archival documents and oral history show that the customary use area of the Xeni Gwet'in George family is in the Claim Area, specifically the Twin Lakes-Elkin Creek Valley, ..., as well as the Nemiah Valley. Considering ?Achig was born ca. 1863, his parents were born no later than ca. 1843, and possibly earlier. Considering that customary use areas are held by families from generation to generation, ?Achig parents and grandparents also likely occupied and used the customary use area and other parts of the Claim Area before and after 1843.<sup>451</sup> [Emphasis added.]

97. The late Tsilhqot'in elder Ubill Hunlin (c. 1929-2005) was the widower of the late Amelia Hunlin (nee George) (c. 1925-2004), daughter of Tselxex (Andy George), granddaughter of ?Eskish (Captain George), and great-granddaughter of Chief ?Achig and Tsolouout.<sup>452</sup> Mr. Hunlin was Tsilhqot'in originally from the Tsi Del Del (Alexis Creek) community, though upon marriage to his wife Amelia (m. approx. 1959) he moved to Xeni where they started a family and lived with ?Eskish (Captain George).<sup>454</sup> Mr. Hunlin testified in this case just before he passed away and gave evidence, including oral history evidence from his wife's grandfather ?Eskish (Captain George), relating to Tsilhqot'in land use of Xeni (Nemiah Valley). Mr. Hunlin identified the Tsilhqot'in mountain sheep hunting grounds of central and east Xeni Dzelh above Xex Ti, Tl'etsinged and ?Elhtilh ?Elhtilh in Xeni (Nemiah Valley).<sup>455</sup> Mr. Hunlin testified that he had learned from ?Eskish (Captain George), as well as his own grandfather Toby

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<sup>451</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 347, 352.

<sup>452</sup> Exhibit 0441, Expert Report of John Dewhirst, September 2004, at 37, chart 6; Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-31.

<sup>453</sup> Exhibit 0441, Expert Report of John Dewhirst, at 36, 38, 39; Transcript, April 5, 2005, Gilbert Solomon Direct-Exam, at 00017, 1-14.

<sup>454</sup> Transcript, March 7, 2005, Ubill Hunlin Direct Examination, 00012, 25-34; 00015, 10 – 00018, 2.

<sup>455</sup> Plaintiff's Argument, Appendix 3, at paras. 82, 204; Transcript, March 8, 2005, Ubill Hunlin Direct Examination, 00012, 38 – 00013, 24.

Charleyboy, that Tsilhqot'ins had been hunting sheep in these areas regularly since the time of the ?esggidams.<sup>456</sup>

98. Complimenting his research into the Nemiah, Setah and George families, Dewhirst's genealogical evidence also relates to the extended William family descendant from the Tsilhqot'in husband and wife Sammy (892 -1979) and Annie William (a.k.a. Bulyan) (1899 – 1980). Regarding this William family Dewhirst concluded:

The modern Xeni Gwet'in William family is descended from three lines: Setah and his wife Nancy (Dewhirst 2004:Sec. 5.1, Chart 3), Kawdeh and his unidentified wife (Dewhirst 2004:Sec. 6.0, Chart 4) and Kahkul and Elizabeth (Dewhirst 2004:Sec. 7.1, 7.6, Chart 5). The customary use area of the William family, primarily around the Nemiah Valley, is similar to the Setah family, which is not surprising as Setah and Nancy are common ancestors to both the Setah and William families. Another ancestor of the Xeni Gwet'in William family, Long Jim, also lived in and used the Nemiah Valley for part of his life. The third line of descent, from ancestors Kahkul and Elizabeth, also links the William family to the Naghatlhcho2 or the Big Eagle Lake area (F. William 2004b:par. 53, 54).

In my opinion, archival documents and oral history explained above, ..., show that the William family's customary use area is in the Claim Area, primarily around the Nemiah Valley and Chilko Lake. Ancestors of the Xeni Gwet'in William Family used and occupied these customary use areas before 1827, and their descendants have continued to do so to the present.<sup>457</sup> [Emphasis added.]

99. Tsilhqot'in elder Norman George Setah (b. 1940) is the son of Willie Setah, the paternal grandson of Little George Setah, the paternal great-grandson of ?Eweniwen (Johnny Setah) and the paternal great-great-grandson of Sit'ax (Setah).<sup>458</sup> Norman George Setah's evidence also related to Tsilhqot'in land use of Gweq'ez Dzelh (Nemiah Mountain) and Xeni Dzelh (Konni Mountain). It included oral history sourced to ?Eweniwen and in turn Sit'ax, but also oral history from Sammy William himself, from Lebusden (Jean Baptiste) the brother of Sammy William, and from ?Eskish (Captain

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<sup>456</sup> Transcript, March 8, 2005, Ubill Hunlin Direct Examination, 00015, 42 – 00016, 29.

<sup>457</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 341-342.

<sup>458</sup> Exhibit 0441, Expert Report of John Dewhirst, chart 3 and appendix E(7).

George) and Tselxex (Andy George) the son and grandson of Chief ?Achig, respectively<sup>459</sup>:

- (a) Mr. Setah testified that while his family was camped at ?Etan Ghintil on Xeni Biny (Konni Lake) – i.e. in the fall - they would go up on Xeni Dzelh (Konni Mountain) to hunt mountain goat and deer, which the Tsilhqot’ins had been doing since the time of the ?esggidams according to the oral history taught to him by ?Eskish (Captain George) and Lebusden.<sup>460</sup> Mr. Setah described picking mountain potatoes and hunting goat with his father on Xeni Dzelh, as well as seeing quite a few other Tsilhqot’ins hunting in the area, including his grandfather Little George Setah, Eugene William, Andy George, Otto George and Francis Sammy (i.e. William), Danny William, ?Est’anchis and ?Awi.<sup>461</sup>
  
- (b) Mr. Setah also testified that he has hunted mountain goats, deer, squirrel and cougar with his dad in the fall on the west side of Gweqez Dzelh (a.k.a. west Xeni Dzelh) around Nenatats’ededilh (Four Mile Lake).<sup>462</sup> Mr. Setah was taught by his father Willie Setah, his grandfather Little George Setah, his great-grandfather ?Eweniwen, Lebusden and Sam William (or Bulyan) that Tsilhqot’ins had been hunting in this area since the time of the ?esggidams.<sup>463</sup> All these people and also Andy George and ?Esk’ish (Captain George) have hunted in this area.
  
- (c) Mr. Setah identified the northwest face of Xeni Dzelh around Nen Nuy Dilex Biny (Mainguy Lake), Chantl’ex Biny and Ts’itse?ex Biny (Augers Lake),<sup>464</sup> as part of an area where he and other Tsilhqot’ins, including ?Eskish (Captain George), Nik’ehum, Meltsan, Elaine Lulua, Gazemil, William Setah, Xats’ish,

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<sup>459</sup> Exhibit 0441, Expoert Report of John Dewhirst, at 38-39.

<sup>460</sup> Plaintiff’s Argument, Appendix 3, at para. 204; Transcript, November 30, 2004, Norman George Setah Direct Examination, 00036, 1 – 00038, 9; Exhibit 0217DIG, Norman George Setah Digitized Map, site “JO”; Exhibit 0217LEG, Norman George Setah Digitized Map Legend, site “JO”.

<sup>461</sup> Transcript, November 30, 2004, Norman George Setah Direct Examination, 00038, 10 – 00039, 21.

<sup>462</sup> Transcript, November 8, 2004, Norman George Setah Direct Examination, 00026, 26 – 00027, 7; 00028, 7-25; Exhibit 0213DIG, Norman George Setah Digitized Map, polygon “GL”; Exhibit 0213LEG, Norman George Setah Digitized Map Legend, polygon “GL”.

<sup>463</sup> Transcript, November 8, 2004, Norman George Setah Direct Examination, 00028, 26-45.

<sup>464</sup> Plaintiff’s Appendix 6, Map B, Traditional Tsilhqot’in Place Names.

Hadediny (Jack Lulua), Andy George and Lizzie George (nee Lulua), Amelia Hunlin (nee George), Adele George and Otto George, would camp and fish and trap muskrats.<sup>465</sup> Mr. Setah testified that Andy and Lizzie George had taught him that Tsilhqot'ins had been doing this since the time of the ?esggidams.<sup>466</sup>

100. Anthropologist John Dewhirst's research also lead him to conclude that the Tsuniah Lake area was within those customarily used by the extended Lulua family.<sup>467</sup> Elder Minnie Charleyboy (nee Lulua) testified that she had learned from ?Elegesi (Eagle Lake Henry) that he would hunt mountain sheep in the fall around west Gweq'ez Dzelh above Nenatats'ededilh (Four Mile Lake) with Tommy Lulua and Eugene William.<sup>468</sup>

101. In addition, other Tsilhqot'in witnesses descendant of Sit'ax and Nancy or married to a descendant, either through the lineage of their son ?Eweniwen (Johnny Setah) or daughter Sabatsakai (who begat Sammy William), testified as to the regular Tsilhqot'in use of Gweq'ez Dzelh (Nemiah Mountain), including Shishan Tl'ad, and Xeni Dzelh (Nemiah Mountain):

- (a) Elder Mabel William, daughter in law of Sammy and Annie William, testified that Tsilhqot'ins have been harvesting sunt'iny (mountain potatoes) and hunting deer and mountain sheep around Shishan Tl'ad for generations. Ms. William explained that she has camped there herself with her late husband Eugene for these purposes, and was told by Sammy William that he and Sit'ax also hunted at Shishan Tl'ad.<sup>469</sup> Ms. William testified as to the Tsilhqot'in trail from central Xeni at Tl'ebayi north into the mountains to Shishan Tl'ad, and dating back to at least Sit'ax's usage.<sup>470</sup>

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<sup>465</sup> Plaintiff's Argument, Appendix 3, at para. 120; Transcript, November 29, 2004, Norman George Setah Direct Examination, 00035, 10 – 00040, 1; Exhibit 0215DIG, Norman George Setah Digitized Map, polygons "IM", "IP"; Exhibit 0215LEG, Norman George Setah Digitized Map Legend, polygons "IM", "IP".

<sup>466</sup> Plaintiff's Argument, Appendix 3, at para. 120; Transcript, November 29, 2004, Norman George Setah Direct Examination, 00040, 2-9.

<sup>467</sup> Exhibit 0443, Report of John Dewhirst, at para. 265.

<sup>468</sup> Transcript, March 26, 2004, Minnie Charleyboy Direct-Exam, at 00009, 6-44.

<sup>469</sup> Transcript, October 4, 2004, Mabel William Direct Examination, 00029, 41 – 00031, 31.

<sup>470</sup> Transcript, Mabel William Direct Exam, October 4, 2004, 00029, 40 to 00031, 32

- (b) Elder Mabel William averred as to the ancestral Tsilhqot'in trails that she has traveled at the western and southern bases of Gweq'ez Dzelh and Xení Dzelh. These included a route along the west side of Gweq'ez Dzelh at Tsilhqox Biny (Chilko Lake) between Ts'uni?ad (Tsuniah Valley ) and Xení (Nemiah Valley).<sup>471</sup> From west Xení a trail ran east through Xení along the southern base of Gweq'ez Dzelh and Xení Dzelh.<sup>472</sup> Ms. William averred that she had been taught by Annie Bulyan, who in turn had learned from her great-grandmother-in-law Nancy, that this trail system was made by the ?esggidams.<sup>473</sup>
- (c) Elder Joseph William, grandson of Sammy and Annie William, averred that his father Jimmy William went hunting for mountain sheep with John Baptiste (Lebusden, brother of Sammy William), up on Xení Dzelh.<sup>474</sup> Mr. William averred that he has hunted a lot on the sides of Xení Dzelh and has seen mountain sheep up there while hunting deer.<sup>475</sup>
- (d) Elder Martin Quilt, grandson of Sammy and Annie William, identified mountain sheep hunting grounds around Gweq'ez Dzelh, including Shishan TI'ad, and his grandfather's use thereof.<sup>476</sup> Mr. Quilt explained that Tsilhqot'ins only hunt sheep when they really need meat now as mountain sheep is limited by the game warden.<sup>477</sup>

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<sup>471</sup> Plaintiff's Argument, Volume 3, at para. 923, trail 16; Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at paras. 37(iii)-(iv)

<sup>472</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at paras. 37(vi)-(vii).

<sup>473</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at paras. 38-39.

<sup>474</sup> Plaintiff's Argument, Appendix 3, at para. 204; Exhibit 0355, Affidavit #1 of Joseph William, December 17, 2004, at para. 96.

<sup>475</sup> Plaintiff's Argument, Appendix 3, at para. 204; Exhibit 0355, Affidavit #1 of Joseph William, December 17, 2004, at paras. 96, 100.

<sup>476</sup> Plaintiff's Argument, Appendix 3, at para. 204; Transcript, August 13, 2002, Martin Quilt Direct Examination, 961, 18 – 965,1; 966, 21 – 967, 9; 969, 21 – 971, 17; Exhibit 003DIG, Martin Quilt Digitized Map, polygon "V1", "W1"; Exhibit 003LEG, Martin Quilt Digitized Map, polygon "V1", "W1".

<sup>477</sup> Transcript, August 13, 2002, Martin Quilt Direct Examination, 968, 23 – 969, 14.

- (e) Mr. Harry Setah testified that his family used to take a horse trail that ran from Tl'ebayi north between Gweq'ez Dzelh and Xeni Dzelh to Tsanlgen Biny (Chaunigan Lake) to fish for trout during the spring.<sup>478</sup>

**c. Additional Expert Opinion**

102. Dr. Brealey's expert evidence is corroborative:

- (a) His evidence confirms from the historical record that the Tsilhqot'in trail network encircling Nemiah Mountain and Konni Mountain in the west, south and east is of pre-contact origin.<sup>479</sup> In addition, Dr. Brealey noted that the Euro-Canadian record of Tsilhqot'in trails is far from exhaustive, and stated "there would have been countless subsidiary trails, routes, creeks or portages that would have been used by Tsilhqot'ins."<sup>480</sup>
- (b) Based on the 1953 work of Dr. Robert Lane, anthropologist, Dr. Ken Brealey mapped the mountains of Nemiah Mountain and Konni Mountain as Tsilhqot'in hunting grounds from pre-contact times until at least the smallpox of 1862.<sup>481</sup> Indeed, Dr. Brealey mapped this land use and occupancy as enduring into the post-reserve creation period of the 20<sup>th</sup> century.<sup>482</sup>
- (c) Further, Dr. Brealey described Tsilhqot'in resource exploitation patterns thusly: "the Tsilhqot'in would follow the melting snowline into the higher country and by early summer would be hunting, and gathering blossoms and roots on mountain slopes";<sup>483</sup> "[i]n early fall they would return to the high country to hunt big game and gather berries, and as winter approached, moved back to their wintering grounds..."<sup>484</sup>

**d. General Points**

103. The entire body of evidence discussed above regarding Gweq'ez Dzelh (Nemiah Mountain) and Xeni Dzelh (Konni Mountain) is consistent with the previously discussed Tsilhqot'in system of occupation through regular use of lands for resource exploitation:

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<sup>478</sup> Plaintiff's Argument, Appendix 3, at para. 120; Transcript, October 13, 2004, Harry Setah Direct Examination, 00054, 17-31; 00056, 3-14; Exhibit 0179DIG, Harry Setah Digitized Map, polygon "BD"; Exhibit 0179LEG, Harry Setah Digitized Map Legend, polygon "BD".

<sup>479</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail Sections 16, 18, 22.

<sup>480</sup> Plaintiff's Argument, Volume 3, at para. 914.

<sup>481</sup> Exhibit 0146, Brealey, Land Use and Occupancy Map, October 2003.

<sup>482</sup> Ibid.

<sup>483</sup> Plaintiff's Argument, Volume 3, at para. 1031.

<sup>484</sup> Plaintiff's Argument, Volume 3, at para. 1031.

- (a) The Tsilhqot'in yearly schedule of land use dating pre-1846 detailed by anthropologist Robert Tyhurst (1984), based in part on Lane (1953), identifies - mountain goat and mountain sheep hunting starting around June, intensifying for July through October, and dissipating in November; deer hunting intensely June through October; and mountain root harvests of spring beauty (i.e. 'mountain potato') in June, July and early August. Indeed, Tyhurst expressly wrote, "[t]he traditional Chilcoten yearly cycle of activities was governed by two events; the late summer and fall hunts, and the later summer salmon runs."<sup>485</sup>
- (b) Consistent with the evidence of Dr. Dinwoodie,<sup>486</sup> the land uses identified exploit seasonal variations in local resource abundance. In early summer, with the snow's retreat plants such as the spring beauty (mountain potato) mature and migratory deer arrive to join animals such as mountain goats and mountain sheep in nourishing themselves post winter and spring.<sup>487</sup> In fall, mountain goats, mountain sheep, and deer busy themselves in fortifying for winters' early onset. Migratory deer move down the mountains, ready themselves for winter and eventually migrate out to lower elevations. There is a seasonal abundance of meat on these bones, fur on these hides and fat on these bodies. Days are long and dry, nights are cool. Snow and ice have receded to their minimums.<sup>488</sup>
- (c) In accordance with the evidence of anthropologist John Dewhirst, summer prior to salmon harvesting involves social movement into the mountains for root digging and hunting. Post salmon time, in fall, there is a social dispersal to the mountains for "hunting big game" until "[a]t seasons end, move to wintering sites on lakes and rivers." Moreover, "a key aspect of each family's seasonal round was its regular visits to the same main resource gathering areas year after year."<sup>489</sup>

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<sup>485</sup> Plaintiff's Argument, Volume 3, at para. 1030.

<sup>486</sup> Plaintiff's Argument, Volume 3, at para. 987.

<sup>487</sup> Plaintiff's Argument, Volume 3, at para. 1016.

<sup>488</sup> Plaintiff's Argument, Volume 3, at para. 1027.

<sup>489</sup> Plaintiff's Argument, Volume 3, at paras. 976.

104. In terms of the significance of Gweq'ez Dzelh (Nemiah Mountain) and Xení Dzelh (Konni Mountain) to Tsilhqot'in culture, broadly understood, the oral history and expert evidence regarding ancient Tsilhqot'in creation narratives or legends indicate that the Tsilhqot'in were and remain deeply connected to these mountains:

- (a) The core Tsilhqot'in legend of Ts'il?os and ?Eniyud identifies and explains the origins of Gweq'ez Dzelh (Nemiah Mountain) and Xení Dzelh (Konni Mountain). According to oral history evidence of elder Elizabeth Jeff, now deceased, in the times of the ?esgidams (Tsilhqot'in ancestors) Ts'il?os and ?Eniyud were Tsilhqot'in husband and wife living with their family in the mountains to the south. When the two decided to separate ?Eniyud left Ts'il?os and returned northwest to the area around Naghatalhchoz (Choelquoit Lake). In so travelling, ?Eniyud sculpted the land and thus created Xení (Nemah Valley), Ts'uni?ad (Tsuniah Valley), and the mountains there above – e.g. Gweq'ez Dzelh (Nemiah Mountain) and Xení Dzelh (Konni Mountain).<sup>490</sup>
- (b) The Ts'il?os and ?Eniyud creation narrative also identifies and explains the origins of the mountain potato harvesting grounds in the small tributary valley of ?Esqi Dzul Tese?an that joins Gweq'ez Dzelh (Nemiah Mountain) and Xení Dzelh (Konni Mountain). Tsilhqot'in oral history of elder Mabel William, sourced to her late husband's great-grandmother Nancy,<sup>491</sup> explains that having left Ts'il?os in the southern mountains where sunt'iny (mountain potato) grow, ?Eniyud seeded various other areas with sunt'iny, including ?Esqi Dzulh Tese?an and, in Xení (Nemiah Valley) on the south facing slopes descending from Gweq'ez Dzelh (Nemiah Mountain), at ?Esgany ?Anx, Gughay Ch'eche'd and Tl'egwezbentz.<sup>492</sup>
- (c) In the Tsilhqot'in legend of Woman Who Turned To Stone, a woman turned to stone in southwest Ts'uni?ad (Tsuniah Valley) while traveling north after leaving

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<sup>490</sup> Plaintiff's Argument, Volume 3, at para. 888, 896.

<sup>491</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 36.

<sup>492</sup> Plaintiff's Argument, Volume 3, at para. 888, 896-897.

her husband in Xenì.<sup>493</sup> Elder Francis Setah learned this narrative from his grandfather ?Eweniwen, who in turn had heard it from his father.<sup>494</sup> Mr. Setah identified the location of Woman Who Turned To Stone at the northwest corner of Gweq'ez Dzelh (Nemiah Mountain) along the ancestral Tsilhqot'in route at the western base of this mountain.<sup>495</sup>

(d) Dr. Dinwoodie's evidence is that the nature of Tsilhqot'in occupation of land is best understood by also considering that their cultural relationship to lands went well beyond their utilitarian interests in it. In particular, Tsilhqot'in cultural relationship to land is empirically attested in their geographic place names and associated narratives.<sup>496</sup>

105. The evidence regarding Tsilhqot'in place names also supports the fact of Tsilhqot'in occupation through regular use of Gweq'ez Dzelh (Nemiah Mountain) and Xenì Dzelh (Konni Mountain) for resource exploitation over centuries. British Columbia's archaeologist Morley Eldridge was of the opinion that aboriginal place names, by their nature, tend to be relatively stable over time. Furthermore, an abundance of different types of aboriginal place names justifies a presumption that the aboriginal group with which the names originate has occupied the named area most likely for centuries. This view is consistent with Dr. Dinwoodie's "preliminary research suggests that Tsilhqot'in ethnogeographic terminology (place names, geographical nomenclature and associated narratives is abundant and the nature of that terminology supports the inference that their occupation of the territory has been exclusive and long term." Tsilhqot'in witnesses used numerous Tsilhqot'in ethnogeographic terms with respect to Gweq'ez Dzelh (Nemiah Mountain) and Xenì Dzelh (Konni Mountain):

Gweq'ez Dzelh (a.k.a. west Xenì Dzelh) (Nemiah Mountain)  
Xenì Dzelh (Konni Mountain)  
?Esqi Dzulh Tese?an (otherwise unnamed tributary valley)

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<sup>493</sup> Transcript, November 19, 2003, Francis Setah Direct Examination, 00009, 20 – 00011, 43.

<sup>494</sup> Transcript, December 8, 2003, Francis Setah Direct Examination, 00003, 3-19.

<sup>495</sup> Transcript, November 19, 2003, Francis Setah Direct Examination, 00010, 30 – 12, 14.

<sup>496</sup> Plaintiff's Argument, Volume 3, at para. 885.

Shishan Tl'ad (translates as "male sheep basin", naming otherwise unnamed basin)  
Ts'itse'ex Biny (Augers Lake)  
Chantl'ex Biny (othwerwise unnamed small lake)  
Nen Nuy Dilex Biny (Mainguy Lake)  
Natasawed Yeqox (Brittany Creek)  
Nenatatsedidilh (Four Mile Lake, or Little Lagoon)

106. The expert and lay evidence also support the fact that from the Tsilhqot'in perspective Gweq'ez Dzelh (Nemiah Mountain) and Xení Dzelh (Konni Mountain) are Tsilhqot'in nen (land). In the words of human geographer, Dr. Brealey:

In oral societies, boundaries are recognized, understood and validated not by maps and plans, but from 'inside the collective' – i.e. by where creation narratives fade, where genealogical linkages can no longer be traced, where place names are not recognizable, and where languages become unintelligible.<sup>497</sup>

107. Application of these factors clearly demonstrates that these two mountains are Tsilhqot'in land from their perspective. As discussed above, Tsilhqot'in creation narratives identify the origins of these mountains and their spring beauty plant resource. Genealogies, safeguarded by oral history and corroborated by the archival record and anthropological opinion, demonstrate that these mountains are within extended family customary use areas dating back two centuries and more. The mountains are identified and well delineated by Tsilhqot'in place names that reveal Tsilhqot'in reliance on its resources (e.g. Shishan Tl'ad as 'male sheep basin'). Indeed, the namesake of the English name for Gweq'ez Dzelh (Nemiah Mountain) is the Tsilhqot'in Chief Nemiah. This trial itself has demonstrated that in and about Xení (Nemiah Valley), it is English that is the foreign language and Tsilhqot'in the mother tongue. In modern legal terms, or the enduring Tsilhqot'in perspective,<sup>498</sup> these are unmistakably Tsilhqot'in title lands.

### **3. SUMMARY AND CONCLUSION**

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<sup>497</sup> Exhibit 0240, Expert Report of Ken Brealey, September 22, 2004, at 6.

<sup>498</sup> Plaintiff's Argument, Volume 3, para. 934(c); Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, para. 50.

108. The Tsilhqot'in regularly used Gweq'ez Dzelh (Nemiah Mountain) and Xeni Dzelh (Konni Mountain), located on northeast Tsilhqox Biny (Chilko Lake), for resource exploitation, particularly as hunting grounds for deer, mountain sheep and mountain goat, prior to, at and well after Crown sovereignty. A consistent body of evidence comprised of the archival record, expert opinion and oral history establishes this fact on a balance of probabilities. The Tsilhqot'in have aboriginal title to Gweq'ez Dzelh (Nemiah Mountain) and Xeni Dzelh (Konni Mountain).

## **D. TS'UNI?AD (TSUNIAH VALLEY)**

### **1. A DEFINITE TRACT OF LAND**

109. In terms of physical terrain, the Tsuniah Valley on northeast Chilko Lake is a definite tract of land in the central Claim Area. It is home to Tsuniah Lake, a significant valley bottom lake near the Claim Area's mountain-plateau transition zone.<sup>499</sup> The valley includes a small peninsula in the north of Tsuniah Lake. In addition, Tsuniah Creek drains the lake in the southwest and runs a short distance down to Chilko Lake. At the southwest perimeter of the valley is the small Four Mile Lake (a.k.a. Little Lagoon). On the northwest margin is Tsuniah Mountain. These names reflect the European perspective on this tract of land and its internal physical features.

110. Tsuniah Valley and its geographic features are all delineated from the Tsilhqot'in point of view. Ts'uni?ad (Tsuniah) is the valley of Ts'uni?ad Biny (Tsuniah Lake). At the northern end of Ts'uni?ad Biny is the peninsula of Ts'utalh?ad. Ts'un?iad Yeqox (Tsuniah Creek) runs from the western outlet of Ts'uni?ad Biny to Tsilhqox Biny (Chilko Lake). At the southwest margin of Ts'uni?ad is the minor lake Nenatatsededilh (Four Mile Lake, a.k.a. Little Lagoon). Ts'uni?ad Dzehl (Tsuniah Mountain) bounds the valley in the northwest.

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<sup>499</sup> Plaintiff's Argument, Volume 3, at paras. 937-938.

## **2. PHYSICALLY OCCUPIED BEFORE, AT AND AFTER CROWN SOVEREIGNTY**

111. The Tsilhqot'in regularly used Ts'uni?ad (Tsuniah Valley) for the construction of dwellings and as fishing, hunting, gathering, horse grazing and trapping grounds prior to, at and well after Crown sovereignty. A coherent body of evidence from the historical record, expert opinion and oral history attests to this fact.

### **a. Historical Record, Related Expert Opinion & Oral History**

112. With respect to the historical record, in November of 1845, Father Giovanni Nobili reportedly visited three areas where Tsilhqot'ins were resident at winter's onset. According to Dr. Brealey, the second area was likely was at Tatla Lake where Nobili noted "approximately one hundred and thirty people," while the third was at or near the outlet of Chilko Lake about Canoe Crossing (Biny Gwechugh) with an estimated 150 people. At both places Nobili erected crosses, which is an important measuring stick for Tsilhqot'in oral history regarding Tsuniah Valley. Further, in doing so Nobili confirmed that those whom Smith (1872) classified as Stone included groups headquartered at Chilko Lake and Tatla Lake.<sup>500</sup>

113. In 1862-63, two epidemics of smallpox occurred amongst the Tsilhqot'in.<sup>501</sup> According to Father Thomas, these epidemics "killed nearly all the Chilco Lake, Eagle Lake and Tatla Lake Indians. Seven or eight families remained at those places but the others joined [Chief] Anaham's Camp." In this regard, Dewhirst stated:<sup>502</sup>

In my opinion, this information came from oral history communicated to Father Thomas, probably in the early 20th century when he was active as a missionary among the Tsilhqot'in. I am also of the opinion, based on this information, that Tsilhqot'ins lived in the Chilco Lake, Eagle Lake and Tatla Lake areas prior to the smallpox epidemics of 1863 and that some families survived the epidemics and continued to live in those areas.<sup>503</sup>

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<sup>500</sup> Exhibit 0240, Brealey Report, at 26-28 re Nobili, 56 re Canoe Crossing (Chilko Lake); Exhibit 0156-1845/11/30.001 at 2195814, 2195816-7.

<sup>501</sup> Exhibit 0240, Expert Report of Ken Brealey, at 2,7,11,50,55,56,66,70,76.

<sup>502</sup> Exhibit 0156-1948/00/00.001 at 38; Plaintiff's Appendix 3, at para. 93.

<sup>503</sup> Exhibit 0443, Dewhirst Report, at para. 241 and 254.

114. On July 22, 1864, during the Chilcotin War of 1864, colonial magistrate William Cox signed a map based on information originally provided by the Tsilhqot'in Chiefs Alexis and Eulas. The map depicts Tsuniah Valley and locates a Tsilhqot'in "fishery" on the creek flowing from the western outlet of "Sooneat.L" (Tsuniah Lake, or Ts'uni?ad Biny), with the notation "Certain to find Indians at this point early in Spring." The map also plots trails extending through Ts'uni?ad (Tsuniah Valley) on both sides of Ts'uni?ad Biny, converging at either end of the lake. With respect to the trail running on the lake's southeast face, the notation appears "horses cannot pass on this side of the Lake." The trail network is depicted as exiting either end of the valley, connecting to the Tsilhqox (Chilko River) near the Tsilhqox Biny (Chilko Lake) outlet and to Naghatalhchoz Biny (Choelquoit Lake), *inter alia*.<sup>504</sup> Having reviewed the Chilcotin War map of 1864 as part of the historical record, anthropologist John Dewhirst's concluded that the mapped Ts'uni?ad (Tsuniah Valley) fishery and trails recorded both indicate "long term regular use and occupancy over many generations, which must pre-date 1846. The trails especially indicate access to places beyond the trails itself, and denote land use and occupancy of the greater area."<sup>505</sup>

115. In November of 1872, federal railway surveyor and agent Marcus Smith reported, "[o]n the northwest side of Tatla Lake... are the head quarters of Keogh, the Chief of the Stone Indians... They have also stations by the lakes in the mountains from Tatla to the headwaters of the Chilco River - ...."<sup>506</sup> Regarding Smith's report Dewhirst concluded that the lakes referred to would include Big Eagle or Choelquoit Lake (Naghatalhchoz Biny).<sup>507</sup> Of note, Cox's Chilcotin War Map (1864) connected Choelquoit Lake to Tsuniah Lake by way of Tsilhqot'in trails.

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<sup>504</sup> Plaintiff's Argument, Appendix 3, at para. 118.

<sup>505</sup> Plaintiff's Argument, Appendix 3, at para. 118; Exhibit 0443, Dewhirst Report, paras. 266-269, 271, 199-201.

<sup>506</sup> Exhibit 0156-1872/11/29.001 at p. 2000321, Letter from Marcus Smith to Walkem Nov 29, 1872; Exhibit 0240, Expert Report of Kenneth Brealey, at 30. In footnote, pinpoint cite to 2<sup>nd</sup> Smith primary document identified in Brealey, Ex. 240, at p. 30, fn. 45, same as the one cited in Ex. 443, para. 275. Document is presumably in Ex. 156. Having cited the primary document, also cite Exhibit 040, Brealey Report, p. 30, fn. 45.

<sup>507</sup> Exhibit 0443, Expert Report of John Dewhirst, August 8, 2005, at paras. 276.

**b. Genealogical Record, Related Expert Opinion and Tsilhqot'in Evidence**

116. Anthropologist John Dewhirst's genealogical research, linking modern extended families to intergenerational customary use areas in the Claim Area, included the modern Lulua family.<sup>508</sup> Dewhirst identified the Lulua family ancestors Nunsulian (born ca. pre-1849) and his wife Annie (born ca. pre-1849), the parents of Jack Lulua (ca. 1870 – 1949), and a traditional use area of theirs being Naghatalhchoz (Bige Eagle or Choelquoit Lake). In addition, Dewhirst identified Annie's second husband Nezlulhtsin (born ca. 1824-1827).<sup>509</sup> Dewhirst also identified the Lulua family ancestors Chief Nemiah (ca. 1827-1927) and his wife Akous, the parents of Jeannie Nemiah (ca. 1875-1917), who lived in the Xenii (Nemiah Valley) and Tsilhqox Biny (Chilko Lake) area. Tsuniah Valley is situated directly in between Naghatalhchoz and Xenii, on northeast Tsilhqox Biny.

117. The children of Jack Lulua and Jeannie Nemiah were Tommy Lulua, Chief Lashway Lulua, Emily Ekks (nee Lulua), Eileen Lulua, and Eliza William (nee Lulua) who each in turn raised children of their own, some of whom are Tsilhqot'in elders who testified in this case.<sup>510</sup> Based on the archival record regarding genealogies, along with the genealogical evidence from affidavits of elders Doris Lulua and Ubill Lulua, anthropologist John Dewhirst found "Tsuniah Lake... to be in the customary use areas of the Lulua extended family whose descent can be traced back to before 1846." Moreover, having considered this evidence in conjunction with the Chicotin War map of 1864, Dewhirst concluded:

In my opinion, the Tsuniah Lake area was used and occupied both before and after 1846. My opinion is based on a number of land use places and comments on the Chilcotin War map of 1864, together with genealogical

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<sup>508</sup> Exhibit 0443, Dewhirst Report, at paras. 284-302.

<sup>509</sup> Exhibit 0443, Expert Report of John Dewhirst, August 8, 2005, at para. 289.

<sup>510</sup> Exhibit 0441, Expert Report of John Dewhirst, at 19.

research on the Lulua extended family, which shows they used and occupied the Tsuniah Lake area before and after 1846.<sup>511</sup>

118. Elder Doris Lulua (b. 1930) testified in this case. Ms. Lulua is the daughter of Eileen Lulua (ca. 1905-1948), the granddaughter of Jack Lulua and Jeannie Nemiah, and thus the great-granddaughter of Annie and Nensualian, and her second husband Nezulhtsin, as well Chief Nemiah and Akous.<sup>512</sup> Her evidence, including oral history, related to the use and occupation of the areas around Tsuniah Valley.<sup>513</sup>

(a) Ms. Lulua gave oral history evidence, passed down directly from her great-grandmother Annie, the mother of Ms. Lulua's grandfather Jack Lulua:

My great grandma Annie told me that Tsilhqot'in people since before her time relied on fish at Ts'uni?ad in the early springtime. Annie told me that Tsilhqot'in people have been going to Ts'uni?ad every year for springtime fishing since before her time.<sup>514</sup>

...

My great grandma Annie and my grandpa Jack taught me that since before their time Tsilhqot'ins have used biniwed fish traps in Ts'uni?ad Yeqox.<sup>515</sup>

...

Annie told me that she went there for fishing, too, and so did Nezulhtsin.<sup>516</sup>

(b) Ms. Lulua also gave evidence of a Tsilhqot'in trail extending through Ts'uni?ad (Tsuniah Valley) on the northwest side of Ts'uni?ad Biny (Tsuniah Lake). The trail connected the Tsilhqox (Chilko River) at Biny Gwechugh (Canoe Crossing) near Tsilhqox Biny (Chilko Lake), and to Naghatalhchoz (Choelquoit Lake) west of the Tsilhqox. Based on the oral history from her mother Eileen (Elaine) Lulua and other Tsilhqot'ins, Ms. Lulua's evidence is "that Tsilhqot'in people used this

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<sup>511</sup> Exhibit 0443, Expert Report of John Dewhirst, August 8, 2005, at para. 265.

<sup>512</sup> Exhibit 0441, Dewhirst Report, September 2004, at 17, chart 1.

<sup>513</sup> Plaintiff's Argument, Appendix 3, at para. 118, f.n. 347.

<sup>514</sup> Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 15.

<sup>515</sup> Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 16.

<sup>516</sup> Exhibit 0160, Affidavit #1 of Doris Lulua, March 25, 2004, at para. 7.

trail before the big cross was erected at Biny Gwechugh, and that this was a trail used by the ?Asggidam Deni (the Tsilhqot'in ancestors)."<sup>517</sup> As noted, Dr. Brealey's evidence is that this "big cross" was erected by Father Nobili in his November 1845 visit to the Tsilhqot'in at Canoe Crossing (Biny Gwechugh).<sup>518</sup>

(c) Ms. Lulua was born at Ts'uni?ad Biny (Tsuniah Lake), in late spring, on June 1, 1930.<sup>519</sup> She averred that growing up her extended family and other Tsilhqot'ins continued to camp near Ts'uni?ad Yeqox (Tsuniah Creek) and use the spring fishery there every year, starting in April and until the end of May or beginning of June.<sup>520</sup> The traditional Tsilhqot'in biniwed (cone fish trap) continued to be used,<sup>521</sup> as did the Tsilhqot'in trail through Ts'uni?ad and connecting to the Tsilhqox (Chilko River) and Naghatalhchoz Biny (Cheolquoit Lake).<sup>522</sup>

119. Elder Theophile Ubill Lulua (b. 1937) is the son of Emily Lulua (c. 1914-2000) and the grandson of Jack Lulua (ca. 1870 -1949) and Jeannie Nemiah (ca. 1875-1917).<sup>523</sup> He is the great-grandson of Nunsulian and Annie, and Annie's second husband Nezlhutsin, as well Chief Nemiah and his wife Akous.<sup>524</sup> His evidence related to Ts'uni?ad (Tsuniah Valley) and is likewise corroborative.<sup>525</sup>

(a) Mr. Lulua was born in early 1937 just south of Ts'uni?ad (Tsuniah Valley) in Xení (Nemiah Valley).<sup>526</sup> His Tsilhqot'in father Donald Setah died in 1938, after which he was raised with his mother Emily Lulua, a daughter of Jack Lulua, and his maternal uncles Felix, Lashaway and Tommy Lulua.<sup>527</sup> Growing up, Mr.

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<sup>517</sup> Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at paras. 13, 10.

<sup>518</sup> Exhibit 0240, Expert Report of Ken Brealey, at p. 54.

<sup>519</sup> Exhibit 0160, Affidavit #1 of Doris Lulua, March 25, 2004, at para. 4.

<sup>520</sup> Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at paras. 8, 9, 17; Exhibit 0160, Affidavit #1 of Doris Lulua, March 25, 2004, at para. 7.

<sup>521</sup> Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at para. 16.

<sup>522</sup> Exhibit 0162, Affidavit #3 of Doris Lulua, July 23, 2004, at paras. 10, 17.

<sup>523</sup> Exhibit 0441, Dewhirst Report, September 2004, at 17, chart 1.

<sup>524</sup> Exhibit 0441, Dewhirst Report, September 2004, at 17, chart 1.

<sup>525</sup> Plaintiff's Argument, Appendix 3, at para. 118, fn. 347.

<sup>526</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 4.

<sup>527</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at paras. 4, 7, 10, 11, 17 and 58.

Lulua's family largely practiced an annual round of resource exploitation the way that Tsilhqot'in people have lived from the yedanx time period (i.e. from pre-European contact times).<sup>528</sup>

- (b) During his upbringing, Mr. Lulua's family would move to the west end of Ts'uni?ad Biny (Tsuniah Lake) every spring starting in late March / early April and stay until early June.<sup>529</sup> They continued to use the traditional biniwed (cone fish trap) to trap fish in Ts'uni?ad Yeqox (Tsuniah Creek), storing it at the end of each season for use again the following year.<sup>530</sup> The fish caught, also by gaffe hook and net, were both eaten fresh and dried.<sup>531</sup> Spring hunts were undertaken for moose, deer, ducks and other game.<sup>532</sup> Mr. Lulua mapped the fishing and hunting grounds he has used as including Ts'uni?ad Biny (Tsuniah Lake) and all of Tsuni?ad (Tsuniah Valley).<sup>533</sup>
- (c) Mr. Lulua's oral history evidence, from this grandfather Jack Lulua and other Tsilhqot'in elders, was that Tsilhqot'in people had been using Ts'uni?ad (Tsuniah Valley) to procure critical foods starting in early spring essentially since time immemorial.<sup>534</sup>
- (d) Mr. Lulua averred, however, mountain potatoes do not growing in Ts'uni?ad, such that Tsilhoqot'ins there moved elsewhere in early summer to harvest them at bloom in the mountains.<sup>535</sup>

120. The evidence of elder Francis Setah helps illustrate of the nature and extent of Tsilhqot'in resource exploitation of Ts'uni?ad during the spring. Mr. Setah was born

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<sup>528</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at paras. 59; Transcript, April 2, 2004, Ubill Lulua Direct-Exam, 00019, 21-32, 00029, 24 – 00030, 16.

<sup>529</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 108, 130.

<sup>530</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at paras. 110-112.

<sup>531</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at paras. 116, 127.

<sup>532</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at paras. 128.

<sup>533</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at Schedule 1, "A", "G"; Exhibit 13DIG"B", Mapped Evidence of Theophile Ubill Lulua.

<sup>534</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 117.

<sup>535</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 130.

October 6, 1929, and raised by his maternal grandmother Daldod (Maryann) and her husband Tsiqun (Tommy Setah), both of whom had poor eyesight.<sup>536</sup> Daldod's sister Sa Yets'en (Inez) was married to Nimazya (Tommy Lulua).<sup>537</sup> During Francis Setah's upbringing his family would move to Ts'uni?ad (Tsuniah Valley) with the Lulua encampment during the spring for resource harvesting.<sup>538</sup> Mr. Setah mapped his participation therein:

- (a) Year after year after year at Ts'uni?ad, Tsilhqot'in families would camp at the same spots within the customary campground extending around the southwest end of Ts'uni?ad Biny (Tsuniah Lake).<sup>539</sup> In the 20<sup>th</sup> century they used canvas tents slung over log frames. Upon breaking camp these log tent frames were stored to prevent rot and to enable re-use the next year. Prior to canvas tent availability the customary Tsilhqot'in dwelling constructed for spring was the ts'ah ?ets'edilhyah (pine windbreaker).<sup>540</sup>
  
- (b) The Tsilhqot'in families at Ts'uni?ad (Tsuniah Valley) had a fishery on Ts'uni?ad Yeqox (Tsuniah Creek) near the southwest outlet of Ts'uni?ad Biny (Tsuniah Lake).<sup>541</sup> There the traditional Tsilhqot'in wooden fish trap used was a set of biniwed (cone fish trap), immersed side-by-side in the creek in between xestl'un (fencing), and spaced to create a sustainable, size-selective fishery.<sup>542</sup> The fish were both eaten fresh, after roasting by the campfire or boiling in spruce bark baskets, and dried for the future on drying racks made from pine logs lashed with spruce roots. The drying

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<sup>536</sup> Transcript, November 17, 2003, Francis Setah Direct-Exam, 00006, 41 – 00007, 17; 00015, 19-24; 00019, 41 – 00020, 6; November 18, 2003, Francis Setah Direct-Exam, 00050, 2 – 00051, 21.

<sup>537</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, 00029, 30 – 00031, 13.

<sup>538</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, 00003, 28 – 00004, 10.

<sup>539</sup> Exhibit 0094DIG, Francis Setah digitized map, p. 2, polygon "B"; Exhibit 0094LEG, Francis Setah map legend, polygon "B".

<sup>540</sup> Plaintiff's Argument, Appendix 3, at para. 126.

<sup>541</sup> Plaintiff's Argument, Appendix 3, at para. 118; Exhibit 0094DIG, Francis Setah digitized map, p. 2, polygon "A"; Exhibit 0094LEG, Francis Setah map legend, polygon "A"; see also Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, at 70.

<sup>542</sup> Plaintiff's Argument, Appendix 3, at para. 122.

- racks were used over smoky fires and stored at the season's end for re-use the following year.<sup>543</sup>
- (c) The Tsilhqot'in camped at Ts'uni?ad (Tsuniah Valley) used the valley as a hunting ground for deer. Growing up, Mr. Setah would accompany men when they went out deer hunting on horseback.<sup>544</sup> The deer would be packed back to camp where near every deer part was used for food: the meat, heart, lungs, kidney, stomach, intestines, hooves, and bladder. The meat was cut in a variety of manners and roasted by the campfire.<sup>545</sup>
- (d) Tsilhqot'ins would gather the cambium from pine trees southwest of Ts'uni?ad Biny (Tsuniah Lake). The cambium was collected by making a horizontal incision in the tree bark, peeling a lengthy section of bark of the tree, then shaving curled strips of cambium off the tree for eating.<sup>546</sup>
- (e) The Tsilhqot'ins camped at Ts'uni?ad would also set their gillnets in the lake. Mr. Setah's family used lake fishing grounds in the west end of Ts'uni?ad Biny (Tsuniah Lake) and also in the north at the Ts'u Talh?ad area.<sup>547</sup> Indeed, Tsiqun (Tommy Setah) died in 1942 as a result of an accident that occurred when preparing to use a raft for gillnet fishing in the lake.<sup>548</sup>

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<sup>543</sup> Plaintiff's Argument, Appendix 3, at paras. 127-128.

<sup>544</sup> Plaintiff's Argument, Appendix 3, at para. 130; Exhibit 94DIG, Mapping Evidence of Francis Setah, at "C"; Exhibit 94LEG, Legend to Mapping Evidence of Francis Setah, at "C"; Transcript, November 18, 2003, Francis Setah Direct Exam, 00033, 30 – 00035, 25.

<sup>545</sup> Plaintiff's Argument, Appendix 3, at para. 129; see also Transcript, January 18, 2005, David Setah Direct-Exam, 00047, 23-37; 00049, 41-47.

<sup>546</sup> Plaintiff's Argument, Appendix 3, at para. 133.

<sup>547</sup> Plaintiff's Argument, Appendix 3, at para. 123; see also **Transcript**, November 30, 2004, Norman George Setah Direct Exam, 00022, 39 – 00024, 5.

<sup>548</sup> Transcript, November 17, 2003, Francis Setah Direct-Exam, p.21(47) to 22(11), 19(33) to 20(13); Transcript, November 19, 2003, Francis Setah Direct-Exam, 00030, 33 – 00033, 15

- (f) The Tsilhqot'in families at Ts'uni?ad (Tsuniah Valley) would keep their horses on grazing grounds in the west of the valley surrounding the customary campground.<sup>549</sup>
- (g) The Tsilhqot'in had a trail the length of Ts'uni?ad (Tsuniah Valley). It ran the northwest side of the lake, from Ts'u Talh?ad in the north to Ts'uni?ad Yeqox (Tsuniah Creek) in the southwest. From the creek the trail ran to the southwest margins of Ts'uni?ad at Nenatatsededi'lh (Four Mile Lake, a.k.a. Little Lagoon). The trail ran through the heart of the Tsilhqot'in campground, creek fishery, deer hunting ground and cambium gathering grounds identified by Mr. Setah. It connected in the north to Biny Gwechugh (Canoe Crossing) on the Tsilhqox (Chilko River) and in the south to Xenii (Nemiah Valley). The trail was a horse trail that originated as a footpath made by the ?esgidams (Tsilhqot'in ancestors).<sup>550</sup>

121. This entire body of evidence discussed above regarding Ts'uni?ad (Tsuniah Valley) is consistent with the previously discussed Tsilhqot'in system of occupation through regular use of lands for resource exploitation:

- (a) The Tsilhqot'in annual schedule of land use dating pre-1846 detailed by anthropologist Robert Tyhurst (1984), based in part on Lane (1953), identifies – trout fishing beginning in late March / early April and extending into June; deer hunting continuing in March / April while intensifying in May / June; pine cambium gathering in mid-May and June.<sup>551</sup>

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<sup>549</sup> Plaintiff's Argument, Appendix 3, at para. 134; see also Exhibit 0156-1808/05/22.001, Simon Fraser's Journal June 5, 1808. Exhibit 0156-1808/05/22.001, Exhibit 0156-1825/07/20.001, Connolly's Journal Dec. 18, 1825, at p. 117617.

<sup>550</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail Sections 15, 16.

<sup>551</sup> Plaintiff's Argument, Volume 3, at para. 974.

(b) Consistent with the evidence of Dr. Dinwoodie,<sup>552</sup> the land uses identified exploit seasonal variations in local resource abundance in Ts'uni?ad (Ts'uni?ad Valley) – with the spring runoff trout move into Ts'uni?ad Yeqox (Tsuniah Creek) to spawn; deer that wintered on the Chilcotin Plateau move through Ts'uni?ad generally en route as part of the annual deer migration back to the mountainous south.

(c) In accordance with the evidence of Dr. Dinwoodie and John Dewhirst regarding the socially institutionalized Tsilhqot'in schedule of resource use, the Tsilhqot'in family residential group that manifested itself in the spring at Ts'uni?ad (Ts'uni?ad Valley) was essentially an encampment, namely, the extended Lulua encampment of Tsilhqot'ins. Per Dewhirst, they engaged in “fishing in [a] spawning stream for lake fish,” took “[s]ome plant foods” and “[a]s the land dried hunting intensified.”<sup>553</sup> Ts'uni?ad was in the customary use areas of the Lulua extended family.

122. In addition, there is evidence of an enduring Tsilhqot'in presence during winter in Ts'uni?ad (Tsuniah Valley) that included the construction of dwellings. There are lhiz qwen yex (underground houses) sites at both ends of Ts'uni?ad Biny (Tsuniah Lake) that the oral history evidence identifies as occupied by Tsilhqot'ins.<sup>554</sup> This is consistent with the evidence of archaeologists Morley Eldridge and Dr. Matson. Mr. Eldridge testified that the Tsilhqot'in lived in such winter houses as long ago as 1590 A.D., plus or minus 80 years, and well into the 1800s.<sup>555</sup> Dr. Matson's evidence was that the Tsilhqot'in likely occupied the Brittany Triangle lands, which include Tsuniah Valley, shortly after the end of the 17<sup>th</sup> century.<sup>556</sup> Tsilhqot'in witnesses also identified two niyah qungh (above ground lodge) sites in northeast Ts'uni?ad at Ts'u Talh?ad, one of which was the

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<sup>552</sup> Plaintiff's Argument, Volume 3, at para. 987.

<sup>553</sup> Plaintiff's Argument, Volume 3, at paras. 975-977.

<sup>554</sup> Transcript, November 30, 2004, Norman George Setah, at 00017, 29 – 00019, 15.

<sup>555</sup> Plaintiff's Argument, Volume 1, at para. 9.

<sup>556</sup> Plaintiff's Argument, Volume 3, at para. 872.

lodge of Nezultshin and his wife Annie. Elder Ubill Lulua was raised at his mother's winter cabin here for the first 13 years of his life.<sup>557</sup>

123. These winter houses in Ts'uni?ad (Tsuniah Valley) came with a footprint of locale resource exploitation through hunting, trapping, fishing and timber harvesting.<sup>558</sup> Councillor David Setah's testified as to his continued winter deer hunting with others in the Ts'u Talh?ad area that his late father William Setah had so used and taught him about at the margins of the Chilcotin Plateau.<sup>559</sup> Come winter the furbearing animals have grown plush seasonal coats,<sup>560</sup> and the anthropology and oral history evidence make clear that the Tsilhqot'in have exploited this seasonal variation in animal resources through local winter trapping (including hunting) of furbearers, such as bear, rabbit, lynx, beaver, muskrat and squirrels, since ancestral times.<sup>561</sup> Likewise, Tsilhqot'in winter house sites were selected with a view to conveniently located fisheries, including lake fisheries where ice-fishing brought fresh fish.<sup>562</sup> Similarly, each Tsilhqot'in winter house site was nested within timber harvesting grounds as niyah qungh (above-ground lodge) and lhiz qwen yex (pithouse) sites were chosen having considered the proximate supply of firewood, framing logs, insulating bark, etc.<sup>563</sup>

124. Furthermore, the evidence of Tsilhqot'in witnesses points to an ancient Tsilhqot'in cremation site and historic era burial grounds at both ends of Ts'uni?ad Biny (Tsuni?ad Lake). Nezultsin, a warrior in the Chilcotin War of 1864, is buried at the north end at Tsu Talh?ad. Tsilhqot'in ceremonies have been held at this site and a structure was put up over the grave to mark the location. Tsilhqot'ins respect these sites accordingly.<sup>564</sup>

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<sup>557</sup> Plaintiff's Argument, Appendix 2, at para. 123; Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 58.

<sup>558</sup> Plaintiff's Argument, Appendix 3, at paras. 14, 10-11.

<sup>559</sup> Plaintiff's Argument, Volume 1, at para. 71.

<sup>560</sup> Plaintiff's Argument, Volume 3, at para. 998.

<sup>561</sup> Plaintiff's Argument, Volume 3, at para. 1004; Plaintiff's Argument, Appendix 3, at paras. 84 to 89.

<sup>562</sup> Plaintiff's Argument, Appendix 3, at paras. 14, 109-112.

<sup>563</sup> Plaintiff's Argument, Appendix 3, at paras. 11, 8-10.

<sup>564</sup> Plaintiff's Argument, Appendix 2, at para. 125.

**c. Additional Expert Opinion**

125. Dr. Brealey's opinion is corroborative. His evidence confirms that the trail through Tsuniah Valley, connecting in the north to the Chilko River at Canoe Crossing and in the south to the Nemiah Valley, is of pre-contact origin.<sup>565</sup> Based on the work of Dr. Lane (1953),<sup>566</sup> Dr. Brealey mapped the basic patterns of Tsilhqot'in land use and occupancy as including hunting (trapping) and fishing of Tsuniah Valley for the period from pre-European contact to at least the 1862 smallpox. Premised on Lane and Tyhurst (1994),<sup>567</sup> Dr. Brealey mapped these land use and occupancy patterns as including hunting and gathering at Tsuniah through to the post-reserve creation period. Based on the historical record of A.W. Vowell (1899),<sup>568</sup> Indian reserve commissioner, Dr. Brealey mapped the essential patterns of Tsilhqot'in land use and occupancy as encompassing hunting and fishing of the Tsuniah area into the post-reserve creation period of the 20<sup>th</sup> century.<sup>569</sup>

**d. General Points**

126. In terms of the central significance of Ts'uni?ad (Tsuniah Valley) to Tsilhqot'in culture, broadly speaking, the oral history and expert evidence regarding ancient Tsilhqot'in legends or creation narratives indicate that the Tsilhqot'in were and remain deeply connected to Ts'uni?ad:

- (a) The core Tsilhqot'in legend of Ts'il?os and ?Eniyud identifies and explains the origins of Ts'uni?ad. According to oral history in this regard, in the times of the ?esgidams (Tsilhqot'in ancestors) Ts'il?os and ?Eniyud were Tsilhqot'in husband and wife living with their family in the

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<sup>565</sup> Plaintiff's Argument, Volume 3, at para. 923, Trail Sections 15, 16.

<sup>566</sup> R. Lane, *Cultural Relations of the Chilcotin Indians of West Central British Columbia*, March 1953 (Exhibit 0175) cited in Exhibit 0240, Brealey report.

<sup>567</sup> R. Tyhurst, "Shuswap and Chilcotin use of Chum Creek: a review of written sources", Environment Canada, Calgary, 1994 cited in Exhibit 0240, Brealey report.

<sup>568</sup> Canada, *Federal Collection, Minutes of Decision, Correspondence and Sketches* Indian Land Registry B64650, Vol. 15 (held at the Regional Office, Department of Indian Affairs, Vancouver (133-51) cited in Exhibit 0240, Brealey report, at p.32, footnote 60.

<sup>569</sup> Exhibit 0146, Brealey, Land Use and Occupancy Map, October 2003.

mountains south of Xení (Nemiah Valley). When the two decided to separate ?Eniyud left Ts'il?os and returned northwest to the area around Naghatalhchoz (Choelquoit Lake) where her family was from. In so travelling, ?Eniyud sculpted the land and thus created Ts'uni?ad (Tsuniah Valley) and the mountains there above.<sup>570</sup> As discussed above, the extended Lulua family is descendant from ancestors from both Xení and Naghatalhchoz.

- (b) The Tsilhqot'in creation narrative regarding Guli (Skunk), a hunter, identifies and explains geographic features in and above west Ts'uni?ad and is also a cultural means of instruction (e.g. beware of skunks). According to oral history and the ethnographic record, Skunk's woman (or women) are stolen from him and upon searching he spots them in a small and calm lake. He soon discovers, however, that it is merely their reflection. When Skunk looks up he spots his woman/women and the captor(s). So he blows out part of the mountain, splitting the mountain and shredding the people. The tiny lake or pond where Skunk saw the reflection is in southwest Ts'uni?ad and named Guli Tinindenz. The mountain Skunk broke up is Ts'uni?ad Dzelh (Tsuniah Mountain).<sup>571</sup>
- (c) The Tsilhqot'in legend of a Woman Who Turned To Stone also places Ts'uni?ad within the heart of Tsilhqot'in country. In this narrative, a woman turned to stone while traveling north from Xení and into Ts'uni?ad on her way to Naghatalhchoz (Big Eagle Lake) to stay with her family.<sup>572</sup> In his evidence, elder Francis Setah described being taught this story from his grandfather ?Eweniwen (Johnny Setah), who in turn had heard it from his father, while they were passing the woman-turned-to-stone on the road between Ts'uni?ad and Nenatats'ededilh (Four Mile Lake or Little

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<sup>570</sup> Plaintiff's Argument, Volume 3, at para. 888, 896.

<sup>571</sup> Plaintiff's Argument, Volume 3, at para. 894, 896.

<sup>572</sup> Transcript, November 19, 2003, Francis Setah Direct-Exam, 00009, 20 – 00011, 43.

Lagoon).<sup>573</sup> Mr. Setah further testified that this road originated as a footpath by the ?esggidams (Tsilhqot'in ancestors).<sup>574</sup> The spiritual importance of this location was corroborated by the testimony of Chief Roger William, who confirmed that Tsilhqot'ins still go there to leave gifts and pray.<sup>575</sup>

(d) Dr. Dinwoodie's evidence is that the nature of Tsilhqot'in occupation of land is best understood by also considering that their cultural relationship to lands went well beyond their utilitarian interests in it. In particular, Tsilhqot'in cultural relationship to land is empirically attested in their geographic place names and associated narratives.<sup>576</sup>

127. Finally, there is substantial evidence that any discontinuity in Tsilhqot'in land uses in Ts'uni?ad (Tsuniah Valley) from the mid-20<sup>th</sup> century forward are entirely reasonable in all the circumstances, including the disrupting forces at play in the valley itself:

(a) Elder Theophile Ubill Lulua has given evidence on how non-Tsilhqot'in encroachment has interfered with traditional Tsilhqot'in sites and activities around Ts'uni?ad Biny. The Tsuniah Lake Lodge was constructed at the southwest end of the lake in or around 1945 over top of a Tsilhqot'in gravesite, and the associated airstrip was constructed over top of lhiz qwen yex.<sup>577</sup> Francis Setah has also testified that the Tsuniah Lake Lodge was on top of a traditional Tsilhqot'in cremation site.<sup>578</sup> Mr. Setah testified that lots of Tsilhqot'ins had used to camp in this area in the springtime and fish

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<sup>573</sup> Transcript, December 8, 2003, Francis Setah Direct-Exam, 00003, 3-19.

<sup>574</sup> Transcript, November 19, 2003, Francis Setah Direct-Exam, 00010, 30 – 00011, 1.

<sup>575</sup> Transcript, October 22, 2003, Roger William Direct-Exam, 00051, 11-30

<sup>576</sup> Plaintiff's Argument, Volume 3, at para. 885.

<sup>577</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, para. 51; Transcript, April 14, 2004 Theophile Ubill Lulua, Cross-Exam, 00049, 5 – 36; April 15, 2004, Theophile Ubill Lulua, Re-Direct, at 00045, 11-34.

<sup>578</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, 00054, 32 – 00056, 24; November 19, 2003, Francis Setah Direct-Exam, 00032, 11-16.

for trout.<sup>579</sup> After building the lodge, the owners then told Tsilhqot'ins to stop using their traditional fish traps in the creek and complained to the game warden about this activity.<sup>580</sup> In addition, the construction of the lodge and airstrip fragmented and reduced the Tsilhqot'in deer hunting grounds.<sup>581</sup>

- (b) In or around 1950, the non-Tsilhqot'in Johnny Blatchford bought land at the north end of Ts'uni?ad Biny around Ts'u Talh?ad. In his affidavit, Mr. Lulua describes how his family spent each winter there until Mr. Blatchford built his house on the spot where the Lulua family cabin had been, displacing them such that they moved away to Ts'eman Ts'ez Ch'id north of Tsilhqox Biny.<sup>582</sup> Mr. Lulua further testified that the Merritt Ranch and airstrip were similarly built on top of the lhiz qwen yex at Ts'u Talh?ad at the north end of Ts'uni?ad Biny.<sup>583</sup> Mr. Lulua also described how a white man who had moved to Ts'u Talh?ad threatened and harassed Nezultsin by shooting into the lake whenever he put his fishing nets out.<sup>584</sup>
- (c) Elder Francis Setah testified that the Tsilhqot'in families gathering pine cambrium at Ts'uni?ad as a food source were forced to stop this activity by the Ministry of Forests.<sup>585</sup>

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<sup>579</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, 00032, 36 – 00033, 29.

<sup>580</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, paras. 114-115; Transcript, April 15, 2004, Theophile Ubill Lulua Re-Direct, at 00048, 13 – 00049, 5.

<sup>581</sup> Exhibit 0094DIG, Francis Setah Digitized Map, p. 2, polygon "C"; Exhibit 0094LEG, Francis Setah Map Legend, polygon "C"; Transcript, November 18, 2003, Francis Setah Direct-Exam, at 00033, 30 – 00035, 25.

<sup>582</sup> Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, paras. 58-60, 66-67.

<sup>583</sup> Transcript, April 14, 2004 Theophile Ubill Lulua, Cross-Exam, at 00049, 19 – 00051, 21.

<sup>584</sup> Transcript, April 15, 2004, Theophile Ubill Lulua, Cross-Exam, at 00017, 12-35.

<sup>585</sup> Transcript, November 18, 2003, Francis Setah Direct-Exam, 00048, 14 – 00050, 1.

### **3. SUMMARY AND CONCLUSION**

128. The Tsilhqot'in physically occupied Ts'uni?ad (Tsuniah Valley), as is evident from their regular use it for constructing dwellings and as fishing, hunting, gathering, horse grazing and trapping grounds prior to, at and well after Crown sovereignty, and into the mid-20<sup>th</sup> century. This fact is attested to by a coherent body of evidence from the historical record, expert opinion and oral history. The Tsilhqot'in have aboriginal title to Ts'uni?ad.

#### **E. SOUTHEAST TSILHQOX BINY (CHILKO LAKE): WEST TS'IL?OS (MOUNT TATLOW) AND RELEVANT PORTIONS OF THE TL'ECHID GUNAZ (LONG VALLEY), YUHITAH (YOHETTA VALLEY), TS'I TALHL?AD (RAINBOW CREEK), TSI TESE?AN (TCHAIKAZAN VALLEY) AND TSILHQOX TU TL'AZ (EDMONDS RIVER) WATERSHEDS**

##### **1. DEFINITE TRACTS OF LAND**

129. Physiographically, Chilko Lake is a large valley bottom lake ensconced within the Coast or Cascade Mountains in the southern Claim Area.<sup>586</sup> Different tracts of land constitute the mountainous area on Chilko Lake south of Nemiah Valley.

130. Mount Tatlow itself, the highest peak in the region, bounds southern Nemiah Valley and runs west down to Chilko Lake. South of Mount Tatlow are the Long Valley, Yohetta Valley, Rainbow Creek, Tchaikazan Valley and Edmond River watersheds that are etched into this mountainous district. These terms delineate this landscape from an English language perspective.

131. The Tsilhqot'in identify these tracts of land in their own terms. Ts'il?os (Mount Tatlow) dominates the landscape and stretches west to Tsilhqox Biny (Chilko Lake) south of Xení (Nemiah Valley). South of Ts'il?os are the watersheds of Tl'echid Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts'i Talhl?ad (Rainbow Creek), Tsi Tese?an

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<sup>586</sup> Plaintiff's Argument, Volume 3, para. 937-938.

(Tchaikazan Valley) and Tsilhqox Tu Tl'az (Edmond Creek). These mountainous lands are part of the sweep of Coast or Cascade Mountains known to the Tsilhqot'in as Dzelh Ch'ed (Snow Mountains).

132. The Trapline defines the Claim Area as it surrounds Chilko Lake in this region. In the east it essentially parallels Chilko Lake, running from Mount Tatlow in the north due south before largely encompassing the Edmond River headwaters. Thus, the lands of Mount Tatlow and the watersheds identified above which are of interest here are those surrounding southeast Chilko Lake.

133. This area sharply varies in terrain and elevation, and provides habitat for a number of species:<sup>587</sup> Mountain goats and mountain Sheep are found in the rocky, alpine environment. Groundhogs or marmots and marten live at the foot of the alpine. With the snow's retreat in late spring deer, first the does then the bucks, move up into the mountains<sup>588</sup> to feed and stay until the snow's onset in late fall when they migrate back down to wintering grounds on the forested plateau.<sup>589</sup>

## **2. PHYSICALLY OCCUPIED BEFORE, AT AND AFTER CROWN SOVEREIGNTY**

134. Prior to, at and well after Crown sovereignty the Tsilhqot'in regularly used the lands of Ts'il'os (Mount Tatlow), Tl'echid Gunaz (Long Valley), Yuhitah (Yohetta), Ts'i Talhl'ad (Rainbow Creek), Tsi Tese'an (Tchaikazan River) and Tsilhqox Tu Tl'az (Edmond Creek) that surround Tsilhqox Biny (Chilko Lake) as hunting and gathering grounds, as well as for trapping and fishing.<sup>590</sup> This fact is established by a coherent set of evidence from the historical record, expert opinion and oral history.

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<sup>587</sup> Plaintiff's Argument, Volume 3, at para.940-942.

<sup>588</sup> Transcript, July 26, 2002, Martin Quilt Direct-Exam, 832, 5-20; 836, 22 – 837, 13; Exhibit 3DIG, 'L1'.

<sup>589</sup> Plaintiff's Appendix 3, at para. 55; Transcript, November 26, 2003, Francis Setah Direct Exam, 00042, 27 to 00043, 46; Transcript, December 2, 2003, Francis Setah Direct Exam, 00036, 42 to 00037, 1; *Transcript*, December 4, 2003, Direct Exam, 00028, 32 to 41.

<sup>590</sup> Plaintiff's Argument, Appendix 3, at paras. 136, 152, 186.

**a. Historical Record and Related Expert Opinion**

135. The historical record regarding the Tsilhqot'in is limited by its 'on the ground' 'sight lines.'<sup>591</sup> The archival record 1822-1845 from the Hudson Bay Company and the Jesuit missionary Father Nobili identifies relatively early on the resident Tsilhqot'in population on Chilko River and at the northern outlet of Chilko Lake, as well as the fact that Tsilhqot'ins are traveling the length of Chilko Lake by canoe. The historical record regarding the remote Nemiah Valley, located on the rugged northeast side of Chilko Lake, is relatively late in developing. Nonetheless, it belatedly points to a residential Tsilhqot'in population using and occupying the Nemiah Valley and its mountainous setting as resource exploitation grounds since prior to European contact. The general historical record, however, did not penetrate into or survey the mountains extending from southeast Chilko Lake until after the turn of the 20<sup>th</sup> century. Per Dr. Brealey, the historical record thus has an obvious blind spot in this area with respect to the early geography of the Tsilhqot'in.<sup>592</sup> As will be seen, however, the genealogical record, expert opinion and oral history substantiate early Tsilhqot'in use and occupation of the lands surrounding southeast Chilko Lake, including by a Tsilhqot'in population resident at the intersection of Gunn and Yohetta Valleys located just to the east.

136. That said, the historical record in Tsilhqot'in territory begins in January of 1822 with furtrader George McDougall's record of his party's visit to Tsilhqot'ins on the Chilko River. McDougall reported gathering "much information respecting their Country in general," including something of the Tsilhqot'in perspective on and familiarity with the Chilko Lake area:

... I have every reason to think [the trip] will be attended with many salutary advantages at a future period, they are certainly a fine, brave looking set of Indians, whose lands are far from being poor either, as to beaver or Large Animals, if we can judge from what was told us & that part of their lands which fell under our immediate Eye corroborated a part, which their Dress was still a farther proof of what they told us, ... the River, ..., taking its water from a Large Lake which they say is about a

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<sup>591</sup> Exhibit 0240, Expert Report of Ken Brealey, at p. 33.

<sup>592</sup> Exhibit 0240, Expert Report of Ken Brealey, at 2, f.n. 3.

half a mile broad and takes them two days En Canot to go from entrance to extremity, extending in the same direction as the River... ... [o]ne of them had a Gun, it was one of Barnetts 1808, he says he and several others have had Guns from Indians who came from the Sea, at the extremity of this Lake of theirs, they cross over a Mountain, which portage takes them from 5 to 6 days light. By dint of enquiry & with the help of small sticks we made out to get nearly their strength, they say there are 6 Large Ground Lodges, about the Lake, containing 53 Families...<sup>593</sup> [Emphasis added.]

137. As discussed already,<sup>594</sup> Dewhirst estimated this Chilko Lake population as numbering 360 Tsilhqot'in, part of which was a winter resident population in the Nemiah Valley situated at the northern boundary of the lands in question.<sup>595</sup> Further, per Dewhirst "these people used canoes on the lake..."<sup>596</sup>

138. In 1827, Joseph McGillvary of the Hudson's Bay Company provided a written overview of "Chilkotin Country" and described Chilko Lake as "surround by lofty Mountains, from which many small Rivers issue therefrom." McGillvary noted that the Tsilhqot'in regularly exploited their Chilko Lake fish produce and large animal resources, including in especially critical circumstances:

In the Spring they have abundance of Suckers, Trout and White Fish, it abounds in large Animals—such as Rein Deer—Red Deer and Moose Deer—and in the Autumn and Spring Chevreuil are numerous—Salmon however is their principal food, but as this fish does not come up regularly the Chilkotin River their resource is the produce of the Lake, and large Animals. [emphasis added]

139. In this regard, Dewhirst stated:

In my opinion, McGillivray shows that Chilko Lake and Chilko River fisheries together with big game resources in the surrounding area support the resident Tsilhqot'in population year round.<sup>597</sup> [emphasis added]

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<sup>593</sup> Exhibit 0156-1822/01/18.001 at 100924-25.

<sup>594</sup> Plaintiff's Reply Appendix, Physical Occupation of Definite Tracts of Land, re Xenii (Nemiah Valley).

<sup>595</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 136-137, 203, 208.

<sup>596</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 163.

<sup>597</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 174.

140. In 1831, furtrader Ross Cox recounted his years in west of the Rocky Mountains and provided a brief sketch of Chilcotin country that described Chilko River and Chilko Lake.<sup>598</sup> Regarding Cox, Dr. Brealey stated, “while he does not specify the extent of ‘their hunting grounds’ would most certainly include the ‘many creeks issuing therefrom’ (and into the Chilko and Chilcotin Rivers and Lakes)... .”<sup>599</sup> The waters issuing from Mount Tatlow and Long Valley, as well as those of Rainbow Creek and Edmonds River drain into Chilko Lake.

141. For the year 1835, esteemed provincial anthropologist Wilson Duff, writing in *The Indian History of British Columbia* (1964), analyzed the historical distribution of Indian populations and estimated the population of Nemiah Valley as 100 persons.<sup>600</sup>

142. In 1838, the Chilcotin Post census identified the Tsilhqot’ in winter village of “Taze Ley” on or near the outlet of Chilko Lake and lead by Chief “Quill Quall Yaw”.<sup>601</sup> The reported population alone for “Taze Ley” (Tachi Lhuy) was 194 people, including 46 hunters, estimates that were assuredly too low.<sup>602</sup> Dewhirst concluded these Tsilhqot’ins “undoubtedly used... hunting grounds most likely in the Claim Area.”<sup>603</sup>

143. In November of 1845, Father Giovanni Nobili reportedly visited three areas where Tsilhqot’ins were residing at winter’s onset. According to Dr. Brealey, the third was a village at or near the outlet of Chilko Lake containing an estimated 150 people lead by Chief “Konkwaglia”.<sup>604</sup> In this regard, Dewhirst opined that in November 1845 Father Nobili visited the “Taze Lay” village of recorded in the Chilcotin Post’s 1838 census.<sup>605</sup>

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<sup>598</sup> Exhibit 0156-1831/00/00.01: Ross Cox, *Adventures of the Columbia River...*, at 3000018-20.

<sup>599</sup> Exhibit 0240, Expert Report of Ken Brealey, at 9.

<sup>600</sup> Exhibit 0265-1964/00/00.001; Exhibit 0443, Expert Report of John Dewhirst, at para. 204.

<sup>601</sup> Plaintiff’s Argument, Appendix 3, at para. 59; Exhibit 0443, Expert Report of John Dewhirst, at paras.64-66.

<sup>602</sup> Plaintiff’s Argument, Appendix 3, at para. 60; Ex. 0443, Expert Report of John Dewhirst, at paras. 99, 397, 84; Exhibit 0173, Affidavit #1 of Mabel William, at para. 50(vi).

<sup>603</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 175-176, 397.

<sup>604</sup> Exhibit 0240, Expert Report of Ken Brealey, at 26-28 re Nobili, 60 re Fort Chilcotin, and 56 re Chilko Lake; Exhibit 0156-1845/11/30.001 at p. 2195816-7.

<sup>605</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 76-79.

Per Brealey, Nobili thus confirmed that those whom Marcus Smith (1872) classified as Stone Tsilhqot'ins included a group headquartered at Chilko Lake.<sup>606</sup> [emphasis added]

144. In the summer of 1862, Lt. Palmer traveled north of the Claim Area from Bella Coola to Fort Alexandria. Palmer noted:

The Carriers are seen in various stages of life, those round the forts speaking Canadian French fluently, and being well versed in the customs of the whites; others who dwell in the mountains, such as the Chilcotins who occupy the country traversed by the fifth and sixth sections of our journey, are seen in a purely savage state of existence, clothed in furs, armed with bows and arrows, in the use of which they are singularly expert, ...<sup>607</sup>

145. Dewhirst ascertained the “fifth and sixth sections of our journey” and concluded:

In my opinion, the Tsilhqot'in territory described by Palmer and his reference to the Tsilhqot'in dwelling in the mountains includes the Claim Area.<sup>608</sup>

146. On July 22, 1864, colonial magistrate William Cox signed a map prepared based on information from Chiefs Alexis and Eulas and which has become known as the Chilcotin War Map.<sup>609</sup> On this map, the lands under discussion were inscribed with “Favourite resort of Indians in time of danger.” With reference to Chilko Lake, and consistent with McDougall (1822), the map noted, “The Indians take 3 days to pass down the Lake in bark Canoes. There is no trail on either side of the Lake.” With respect to these mapped features Dewhirst opined that they “indicate Tsilhqot'in use and occupancy of the Claim Area for many years prior to 1864.”<sup>610</sup> The Chilcotin War Map also depicts a Tsilhqot'in trail network along the Chilko River to near the head of Chilko Lake and

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<sup>606</sup> Exhibit 0240, Expert Report of Ken Brealey, at 28.

<sup>607</sup> Exhibit 0156-1863/00/00.001.

<sup>608</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 214.

<sup>609</sup> Exhibit 0265-1864/00/00.001.

<sup>610</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 181.

connecting into the mountains territory north off the lands in question at Tsuniah Valley. Dewhirst dates the trails to pre-1846.<sup>611</sup>

147. On September 9, 1864, Governor Seymour reported on the Chilcotin War to the Colonial Office of Great Britain. In his dispatch, Seymour referenced the probable extent of “the Territory occupied by the Chilcotens”, the mountainous region that “their hunting and fishing grounds” were believed to be in, as well as the limited knowledge the Crown had of the area so many years after Crown sovereignty:

The Territory occupied by the Chilcotens extends probably... [f]rom the summits of the Bute Inlet mounts to the West Road River. E to W the Tribe roamed from the Cascade range to the Fraser,..... the Indian trails which traverse the country centre at Benshee Lake...

... We had vaguely heard that a large force under a subordinate officer to Alexis occupied the lodges on the Benshee Lake & that a detachment of Anaheim’s men was in possession of a palisaded fort at Sutleth. All these places lay on the mule trail where the pack trains passed. To the southward the great indentation formed by the sweep of the Cascade mountains it was believed many of the Chilcoatens had their hunting and fishing grounds but the country had escaped the visits of the most adventurous whitemen. Such was the extent of the knowledge of this vast territory we possessed when it became necessary to invade it...<sup>612</sup> [emphasis added]

148. Dewhirst located this reference to “their hunting and fishing grounds” in the Cascade Mountains as including the Claim Area around Chilko Lake, situated as it is inside “the summits of the Bute Inlet mounts” and south of “Benshee Lake” (Puntzi Lake). Moreover, Dewhirst opined that Seymour’s report is based on a “recognition of long use and occupancy of Tsilhqot’in territory that pre-dates 1846 in those areas, unless otherwise stated.”<sup>613</sup> He did not state otherwise.

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<sup>611</sup> Plaintiff’s Argument, Appendix 3, at para. 118; Exhibit 0443, Dewhirst Report, paras. 266-269, 271, 199-201.

<sup>612</sup> Exhibit 156-1864/09/09.001 at para. 4.

<sup>613</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 272-273.

149. In the period of 1868 - 1869, three other maps were made that included the mountainous Chilko Lake area. Waddington's two maps of 1868 identify Chilko Lake as "Memeia" Lake. Likewise, the 1869 map of Milton and Cheadle labels Chilko Lake as "Mimeio L[ake]".<sup>614</sup> Dewhirst noted, "these are likely renderings of "Nemiah" and the choice of his name for Chilko Lake suggests that Nemiah was established as a chief or leader in the Chilko Lake area by the late 1860s and probably earlier."<sup>615</sup> In addition, these maps suggest "that Chief Nemiah occupied the Chilko Lake area in 1868 and earlier."<sup>616</sup>

150. In 1893, Father Morice wrote of the Stone Tsilhqot'in living in the mountains in terms of their "favourite haunts, where they live... constantly shifting from their southern to their northern border..."<sup>617</sup> [Emphasis added.] Dr. Brealey depicted Morice's "favourite haunts" as including the mountainous Claim Area east of Chilko Lake, both in the north about Mount Tatlow and the south about Monmouth Mountain (Tsi Tese?an Lhud Dzelh).<sup>618</sup> Moreover, Dr. Brealey depicted the 'southern border' of Tsilhqot'in territory as encompassing the lands surrounding Chilko Lake.<sup>619</sup>

151. In September of 1899, thirty years later, A.W.Vowell traveled up Chilko River to Nemiah Valley on Chilko Lake. Arriving in the valley roughly two years after the first attempted European settler did so, Vowell diarized:

... Reached Nemaiah valley at 1.30 pm, and camped near the foot of Connee lake [i.e. Konni Lake, a.k.a. Xenii Biny]. ...

Accompanied by the Indians rode to Chilco lake, about 11 miles. distant, and defined a reserve of 200 acres on its shores where several families had built houses, and established their winter quarters, following hunting, fishing and trapping in the spring, summer and autumn. Also a reserve of 80 acres on which are some small gardens and the houses and stables of two families.

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<sup>614</sup> Exhibit 0265-1869/00/00.001.

<sup>615</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 182.

<sup>616</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 185.

<sup>617</sup> Exhibit 0156-1983/11/04.00 at 2001027.

<sup>618</sup> Exhibit 0246, Expert Report of Ken Brealey, October 2003, Land Use and Occupancy Map

<sup>619</sup> Exhibit 0241, Brealey Map, Chilcotin Boundaries; Exhibit 0240, at 12.

152. Importantly, in his October 18, 1899 reporting letter to the Secretary of the Department of Indian Affairs, Ottawa, A.W. Vowell wrote of his September visit to Nemiah Valley:

... the trails to Nemaiah Valley were of the roughest kind and being beyond the settled portions of the country they have never been improved by either Government or settlers; remaining in the very primitive condition of "Indian trails". The party fortunately got through all right but to my disappointment on my arrival I learned that the greater number of the Indians were absent in the mountains hunting and fishing and putting up their winter supply of dried meat, etc. I also learned that they are generally absent in the Spring and Fall, engaged in trapping, and that the only time when they are all at home is in the dead of winter. Upon close inquiry I learned that some 59 Indians, men, women and children, have for a long time lived in the valley as far as I could learn having been there located before the laying off of other reserves in the Chilcotin country, etc.<sup>620</sup>

153. With respect to the historical record spanning 1822 to 1899, including Vowell's visit to the Nemiah Valley on Chilko Lake, Dewhirst concluded:

In my opinion, the Tsilhqot'in use and occupation of the Nemiah Valley predates 1846 and continues to the present day. I am of the opinion that a resident population in the early 19th century has continued to use and occupy the Chilko Lake area, including the Nemiah Valley, to the present day. In 1822 the Tsilhqot'in told McDougall that 53 families lived around Chilko Lake (McDougall 1822). In my opinion those families in 1822 represent an estimated population of 360 people (Par 139). The Nemiah Valley opens on Chilko Lake, and that population most likely used and occupied the valley. Genealogical research linked to customary use areas of selected modern extended Xenigwetin families shows that they were present in the Chilko Lake and Nemiah Valley area since at least the early 19<sup>th</sup> century and have continued to use and occupy those areas to the present day (Section 3.0). Chief Nemiah, reported to have been born in the Nemiah Valley ca. 1827, is an ancestor of the modern Lulua extended family, and in my opinion Nemiah's family was part of that resident population.<sup>621</sup>  
[Emphasis added.]

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<sup>620</sup> Exhibit 0156-1899/10/18.001, Letter from A. Vowell to Secretary, Dept. of Indian Affairs, pp. 2-3.

<sup>621</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 208.

154. Consistent with Vowell, in December 1905 Gold Commissioner Caspar Phair wrote from Lillooet to Provincial Game Warden A. Bryan Williams about the subject of Tsilhqot'in hunters in an area which may well include the lands under discussion around Chilko Lake:

[T]he Chilcotin Indians... traverse, in separate bands, the Mountains from Bridge River to Chilcoten slaughtering all kinds of Big Game. They live on these mountains during the months of June, July, August and September, entirely on game and what roots they gather. They dry a great deal of the meat which they pack on horses to Chilcoten for winter use.<sup>622</sup>

155. Gold Commissioner Phair's letter is also consistent with a Tsilhqot'in intention and capacity to control these lands, including those in question around Chilko Lake, through the creation of a barren territorial buffer zone. Per the evidence of Dr. Brealey, the Tsilhqot'in - Lillooet territorial boundary is substantially southeast of the Claim Area surrounding Chilko Lake,<sup>623</sup> and essentially at the height of land between the Taseko Lake and Bridge River headwaters.<sup>624</sup> Commissioner Phair recorded the Tsilhqot'in practice of crossing over this boundary into Lillooet territory to intentionally deplete the resources of the Bridge River headwaters:

For several years the Chilcotin Indians have come in large numbers, generally in the month of June, to the headwaters of the Bridge River for the purpose of killing big game – including does and fawn. ...

The different bands of Indians in the neighbourhood of Lillooet are strongly opposed to these Indians being allowed to come on their hunting grounds, during the summer months, to kill so much game – especially does and fawns – when they do not require it for their immediate use.<sup>625</sup>

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<sup>622</sup> Exhibit 0156-1905/12/4/001.

<sup>623</sup> Note that the Claim Area under discussion is not only well within Tsilhqot'in territory, per the evidence of Dr. Brealey, it is physically isolated or protected from the Tsilhqot'in – Lillooet boundary by glaciated mountains.

<sup>624</sup> Exhibit 0241, Expert Report of Ken Brealey, Tsilhqot'in Boundaries, October 2003; Exhibit 0243, Tsilhqot'in Conflicts, October 2003.

<sup>625</sup> Exhibit 0156-1905/12/4/001. Remarkably, Canada says Commissioner Phair's letter suggests support for overlapping claims by other aboriginal groups (Canada's Argument, at paras. 1469, 1471). However, there is no overlapping claim by the Lillooet people. Indeed there is no overlapping claim by any aboriginal group with respect to the Tsilhqot'in Claim Area surrounding Chilko Lake. Further, even if there was, Commissioner Phair's letter actually supports the Tsilhqot'in claim to these lands when fairly interpreted or understood in context.

156. In 1909, James Teit documented a protohistoric conflict between the Tsilhqot'in and the Fraser River Secwepemc. Teit discussed this matter in terms of a single retaliatory act of the Fraser River Secwepemc into "the real hunting-ground of the Chilcotin near Chilco Lake."<sup>626</sup>

157. Finally, in the 1990s Ts'il'os Park was created and it includes the lands in question.<sup>627</sup> Prior to the formation of the park, the B.C. Ministry of Environment, Lands and Parks participated as a member of the Chilko Lake Study Team, which studied land use in the proposed park area.<sup>628</sup> Within the resulting park planning documents, British Columbia has in fact explicitly recognized the long history of Tsilhqot'in use and occupation of the mountains surrounding Ts'il'os and their critical role in the Tsilhqot'in system of land use:

The Nemiah people (Xeni Gwet'in) have occupied and used the Park area since before the arrival of European settlers. The Park contains areas important to the Xeni Gwet'in for food gathering, hunting, trapping, archaeological and cultural sites. The Park is also very important to maintaining their lifestyle.<sup>629</sup>

#### **b. Genealogical Record, Related Expert Opinion & Tsilhqot'in Evidence**

158. Anthropologist John Dewhirst's genealogical research linking modern extended families to the Chilko Lake area beyond Nemiah Valley identified the Tsilhqot'in Chief Nemiah as an ancestor of the modern Lulua family of the Xeni Gwet'in. Dewhirst also reviewed the historical record from the 1860s – 1890s with respect to the Chief Nemiah along with Nemiah's death certificate.<sup>630</sup> Dewhirst concluded:

Archival documents demonstrate that Nemiah spent his life in and around the Claim Area, particularly the Nemiah Valley and Chilko Lake (see below).

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<sup>626</sup> Exhibit 0240, Expert Report of Ken Brealey, at 18; Exhibit 0167.006 at 554-555.

<sup>627</sup> Exhibit 0031, Acetate overlay showing Ts'il'os Park.

<sup>628</sup> Exhibit 0037.005, Consensus Report of the Chilko Lake Study Team, Final Report, September 1993, at v, vii.

<sup>629</sup> Plaintiff's Argument, at paras. 1264-1265; Exhibit 0039.009, British Columbia Ministry of Environment, Land and Parks, Annual Park Management Plan Ts'il-os Provincial Park, 1995/1996, at 1.

<sup>630</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 290-296.

... [L]etters show Nemiah had an intimate knowledge of the Claim Area, especially of Chilco Lake and the surrounding mountains up to Stone.

In my opinion, archival maps and records demonstrate that Nemiah was born in Nemiah Valley ca. 1827. His parents obviously had lived there before him. Nemiah became a leader of prominence by the early 1860s, and likely earlier, and continued to occupy and use the Claim Area until his death in 1927.<sup>631</sup> [Emphasis added.]

159. Dewhirst's genealogical work, as discussed previously, also relates to the extended Setah family descendant from the Tsilhqot'in husband and wife Setah (a.k.a. Louis Setah and, in Tsilhqot'in, Sit'ax) and Nancy.<sup>632</sup> The death certificates of Setah (ca. 1827/1849 – 1927) and Nancy (ca. 1845-1938), respectively, likewise state they were born in the Nemiah Valley.<sup>633</sup> The Setah family flourished through two lines of descent, namely, through their son Johnny Setah and their daughter Sabatsakai (who begat Sammy William).<sup>634</sup> Based on the historical record and affidavit evidence, Dewhirst concluded:

In my opinion, archival documents and oral history show that the Setah family's customary use area is in the Claim Area, primarily around the Nemiah Valley. Ancestors Setah and Nancy, both born before 1846, lived most of their lives in the Claim Area. Setah's mother, who was born in the early part of the 19<sup>th</sup> century, was also from Nemiah Valley (M.William 2004b: par. 39). This demonstrates that the Setah family has used the Claim Area since at least the early 19<sup>th</sup> century and probably earlier.<sup>635</sup>

160. Relatedly, Dewhirst's genealogical evidence also relates to the extended William Setah family descendant from the Tsilhqot'in husband and wife Sammy (1892-1979) and Annie William (a.k.a. Bulyan) (1899-1912). Regarding this William family Dewhirst concluded:

The modern Xeni Gwet'in William family is descended from three lines: Setah and his wife Nancy (Dewhirst 2004:Sec. 5.1, Chart 3), Kawdeh and his unidentified wife (Dewhirst 2004:Sec. 6.0, Chart 4) and Kahkul and

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<sup>631</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 291, 295, 296.

<sup>632</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras.304-313.

<sup>633</sup> Exhibit 0156-1927/11/15.001 (Louis Setah); Exhibit 156-1938/11/17.001 (Nancy Setah)Exhibit 0443, Dewhirst Report, at paras. 304-305.

<sup>634</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 311-312.

<sup>635</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 313.

Elizabeth (Dewhirst 2004:Sec. 7.1, 7.6, Chart 5). The customary use area of the William family, primarily around the Nemiah Valley, is similar to the Setah family, which is not surprising as Setah and Nancy are common ancestors to both the Setah and William families. Another ancestor of the Xení Gwet 'in William family, Long Jim, also lived in and used the Nemiah Valley for part of his life. The third line of descent, from ancestors Kahkul and Elizabeth, also links the William family to the Naghatlhcho2 or the Big Eagle Lake area (F. William 2004b:par. 53, 54).

In my opinion, archival documents and oral history explained above, ..., show that the William family's customary use area is in the Claim Area, primarily around the Nemiah Valley and Chilko Lake. Ancestors of the Xení Gwet'in William Family used and occupied these customary use areas before 1827, and their descendants have continued to do so to the present.<sup>636</sup> [Emphasis added.]

161. Tsilhqot'in elder Mabel William (b. 1918) is the widow of the late Eugene William (b. 1918), son of Sammy and Annie William (a.k.a. Bulyan) and the great-grandson of Sit'ax (Setah) and Nancy.<sup>637</sup> Ms. William is Tsilhqot'in originally from the Tsi Del Del (Alexis Creek) community, though upon marriage to Eugene William (m. 1936) she became a member of the Xení Gwet'in (Nemiah) community.<sup>638</sup> Ms. William's evidence in this case, including oral history sourced to Sit'ax and Nancy, related to Tsilhqot'in land use of the mountainous area south of Xení (Nemiah Valley) and surrounding Tsilhqox Biny (Chilko Lake):<sup>639</sup>

(a) Ms. William averred as to Sit'ax and Nancy –

Nancy was the great-grandmother of my late husband Eugene. She was the grandmother of Eugene's father Sammy Bulyan. Nancy was also the wife of Sammy's grandfather Sit'ax. I remember Nancy. She was Tsilhqot'in. I never knew a Tsilhqot'in name for her though. She died about the time when Eugene and I had two children. Nancy is buried in Xení (Nemiah Valley) at the Tsilhqot'in graveyard at Xexti Biny (Nemiah Lake). Annie Bulyan taught me that Nancy was born and raised around Xení. She also taught me that Sit'ax's mother was Tsilhqot'in from Xení and that Sit'ax was born in Xení. Nancy and Sit'ax taught her this she said. I don't remember Sit'ax.<sup>640</sup>

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<sup>636</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 341-342.

<sup>637</sup> Exhibit 0441, Expert Report of John Dewhirst, 25, chart 3, 24, 29.

<sup>638</sup> Exhibit 0173, Affidavit #1 of Mabel William, at paras. 5-7, 22.

<sup>639</sup> Plaintiff's Argument, Appendix 3, at para. 152.

<sup>640</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 39.

(b) Ms. William gave evidence of an entrenched Tsilhqot'in trail network connecting with south Xení (Nemíah Valley)<sup>641</sup> through (i) west Ts'il'os (Mount Tatlow) above Tl'echid Gunaz (Long Valley), (ii) west Tl'echid Gunaz and west Yuhetah (Yohetta Valley), and (iii) west Tsi Tese'an (Tchaikazan Valley) and Tsilhqox Tu Tl'az –<sup>642</sup>

My late husband's father, Sammy Bulyan, taught me that he was raised in the mountains around Xení (Nemíah Valley) by his grandparents Nancy and Sit'ax. Sammy taught me that he had traveled Tsilhqot'in saddle and packhorse trails with his grandparents through the mountains:

(i) One trail left from Xení (Nemíah Valley) around Lhizbay (Lezbye). It went up Tsilhqox Biny (Chilko Lake) and around Tsi Ch'ed Tl'ad. There it turned up into the mountains towards Ts'il'os (Mount Tatlow). It went up to Nighwetizdi, then to a place called Naghagat'ax. At Naghagat'ax it split in two. One trail went back to Xení. The other went over the mountain to Tl'echid Gunaz where it connected to a trail up to Xenedi'an.

Note: I have traveled this trail up Nighwetizdi when I was picking berries. My husband also once told me he got caught in the snow traveling this trail from Xenedi'an over to Naghagat'ax.

(ii) That same trail from Lhizbay (Lezbye) around Tsi Ch'ed Tl'ad also continued up Tsilhqox Biny (Chilko Lake) for a while. Then it turned up into Yuhetah (Yohetta Valley). It went right through Yuhetah and came out the other end around Gex Gulin.

Note: I've traveled that saddle and packhorse trail from Gex Gulin up to the first lake in Yuhetah. I've seen it going on along that lake. My late husband also talked about taking that trail through Yuhetah.

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<sup>641</sup> Exhibit 0265-1864/00/00.001, The Chilcotin War Map (1864), noted that with respect to Chilko Lake, unlike "Sooneat L." [Tsuniyah Lake] and "Ta-tlah-co L." [Tatlayoko Lake] which are depicted thereon as encircled by a Tsilhqot'in trail network at lakeside, "[t]here is no trail on either side of the Lake." Consistently, the Tsilhqot'in trail network established by the evidence of Tsilhqot'in witnesses such as Ms. William does not run along the rugged eastside of Chilko Lake, but rather off of it through the surrounding mountains.

<sup>642</sup> Plaintiff's Argument, Volume 3, at pars. 924, 923, 1020.

- (iii) At Gex Gulin the trails goes down to Nadilin Yex. It also went the other way up through Tsi Tese?an (Tchaikazan Valley). At the top of Tsi Tese?an it went over the mountains and down to Tsilhqox Tu Tl'az.

Note: I've traveled the trail between Gex Gulin and Nadilin Yex. My late husband Eugene talked about traveling that trail through Tsi Tese?an to Tsilhqox Tu Tl'az with his parents when he was growing up.<sup>643</sup>

- (c) Ms. William then described the regular Tsilhqot'in exploitation of the resources from these tracts of land, consistent with the emergent historical record (1822-1909) and expert opinion thereon regarding the Tsilhqot'in regularly exploiting large animal resources of their mountainous hunting grounds about Chilko Lake, including for per Vowell "their winter supply of dried meat:"<sup>644</sup>

Sammy Bulyan taught me that he had used these trails all his life. He taught me that the mountains and valleys of Tl'echid Gunaz, Yuhetah, Tsi Tese?an and Tsilhqox Tu Tl'az are Tsilhqot'in summertime and fall time hunting grounds. He taught me this is where Tsilhqot'ins would get their meat, dry meat and hides from the nists'i (deer), sebay (mountain goat), debi (mountain sheep), dediny (mountain groundhog) and ses (bear). In the summer, people would pick the sunt'iny (mountain potatoes) and ?esghunsh (beartooth) in those areas too. Sammy taught me that this had been going on from generation to generation from the time of the ?esggidam (our ancestors) through his time. He taught me it was the ?esggidam who first made these trails when they were walking Tsilhqto'in nen (land) for hunting and gathering. Sammy taught me that this knowledge had come down to him from his grandmother Nancy.<sup>645</sup>

- (d) Ms. William also averred as to the Tsilhqot'in at Gunn Valley –

My late husband's mother, Annie Bulyan, also taught me that ?Ena Tsel made some lhiz qwen yex (underground houses) at ?Ena Tsel Nadilin. That's why it's named that way. ?Ena Tsel Nadilin is over towards Dasiqox Biny (Taseko Lake). It's near Gex Gulin. I've been there with my late husband and family for hunting. My late husband's father, Sammy Bulyan, taught me that way back in the sadanx the ?esggidam (our ancestors) threatened the ?Ena Tsel there with war and

<sup>643</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 69.

<sup>644</sup> Plaintiff's Argument, Volume 3, at para. 1020.

<sup>645</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 70.

forced them to leave ?Ena Tsel Nadlin. Sammy told me that his grandfather Sit'ax had passed this story down to him.<sup>646</sup>

162. Tsilhqot'in elder Francis Setah (b. 1929) is the grandson of ?Eweniwen (Johnny Setah) and Millie (Amelia) and the great-grandson of Sit'ax (Setah) and Nancy. Mr. Setah's evidence, including oral history sourced to ?Eweniwen and in turn Sit'ax, also related to Tsilhqot'in land use of Ts'il?os (Mount Tatlow) and the mountains Claim Area of southeast Tsilhqox Biny (Chilko Lake):

- (a) Mr. Setah identified the Tsilhqot'in trail he had traveled through west Ts'il?os (Mount Tatlow), starting in west Xení (Nemíah Valley), south around Tsi Ch'ed Tl'ad where Ts'il?os come down to Tsilhqox Biny (Chilko Lake), east into the mountain through Nilhgwetizdi, up to the hunting base camp at Naghagantax, connecting north back to Xení. Mr. Setah testified that his grandfather ?Eweniwen (Johnny Setah) had used this trail and had taught him, based on oral history sourced to Sit'ax (Setah), the trail was one used by the ?esggdians (Tsilhqot'in ancestors).<sup>647</sup> Mr. Setah gave evidence as to his use of this area as a summertime deer hunting ground,<sup>648</sup> that his grandfather ?Eweniwen had as well, and that such usage dates back to the time of the ?esggidams per the oral history of ?Eweniwen.<sup>649</sup> Mr. Setah testified as to also hunting for mountain goat in the fall on west Ts'il?os around Tsi Ch'ed Tl'ad, Nilhgwetizdih and the hunting base camp at Naghagant'ax, Nilhgwetizdih, overlapping the summer deer hunting grounds noted above, and that west Ts'il?os had been a Tsilhqot'in mountain goat hunting ground since the time of the ?esggidams, per the oral history of his grandfather ?Eweniwen and sourced to his father Sit'ax.<sup>650</sup> In addition, Mr. Setah

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<sup>646</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 24.

<sup>647</sup> Plaintiff's Argument, Volume 3, at para. 924, Trail 39; Transcript, November 26, 2003, Francis Setah Direct-Exam, 00029, 40 – 00031, 15, 00033, 5 – 00036, 11; Transcript, December 2, 2003, Francis Setah Direct-Exam, 00018, 29 – 00019, 22; Exhibit 94DIG, 'BD'.

<sup>648</sup> Transcript, November 26, 2003, Francis Setah Direct-Exam, 00031, 15 – 00033, 4; Exhibit 93DIG, 'BD'

<sup>649</sup> Plaintiff's Argument, Appendix 3, para. 154; Transcript, November 26, 2003, Francis Setah Direct-Exam, 00029, 40 – 00030, 36, 00037, 38 – 47; Transcript, December 2, 2003, Francis Setah Direct-Exam, 00018, 29 – 00019, 22.

<sup>650</sup> Transcript, December 2, 2003, Francis Setah Direct-Exam, 00017, 39 – 00026, 40; Exhibit 0095DIG, Francis Setah Digitized Map, polygons "CU", "CV", "CW"; Exhibit 0095LEG, Francis Setah Map Legend, polygons "CU", "CV", "CW"; Exhibit 0094DIG, Francis Setah Digitized Map, polygon "BE"; Exhibit 0094LEG, Francis Setah Digitized Map, polygon "BE".

testified as to a Tsilhqot'in trail on west Ts'il'os, running from essentially Naghagantax southeast down to Tl'echid Gunaz (Long Valley). Mr. Setah had traveled this trail, gave evidence that his grandfather ?Eweniwen had used this trail for deer hunting, and that this trail ran through a deer hunting ground used back since the time of the ?esgidams according to the oral history of ?Ewinewen sourced to Sit'ax.<sup>651</sup>

(b) Mr. Setah identified the Tsilhqot'in trail running from west Xenii (Nemiah Valley) and west Ts'il'os (Mount Tatlow) at Tsi Ch'ed Tlad south and up into west Tl'echid Gunaz (Long Valley) and then Yuhitah (Yohetta Valley) from Tsilhqox Biny (Chilko Lake).<sup>652</sup> Mr. Setah gave evidence of his grandfather ?Eweniwen having taught him about this trail, his use of it and use of it by the ?esgidams.<sup>653</sup> ?Eweniwen's oral history was sourced to his father Sit'ax, including the oral history that the trail was the basis for this area being used as Tsilhqot'in deer hunting grounds.<sup>654</sup>

(c) Mr. Setah also described hunting trips his grandfather ?Eweniwen (Johnny Setah) would take into Tsi Tese'an (Tchaikazan Valley) for hunting deer, mountain goat and mountain sheep, including for dried meat, and following an ancestral trail into the southern reaches of the valley for this purpose from a central base camp. Mr. Setah's oral history evidence, sourced to his grandfather, was of ?Eweniwen, his father Sit'ax and the ?esgidams before them so using those upper elevations of Tsi Tese'an as hunting grounds.<sup>655</sup> Mr. Setah has also traveled much of that route with ?Eskish (Captain George) while trapping marten and hunting mountain goat.<sup>656</sup>

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<sup>651</sup> Transcript, November 26, 2003, Francis Setah Direct-Exam, 00037, 38 - 00039, 35; Exhibit 93DIG, 'BG'.

<sup>652</sup> Plaintiff's Argument, Volume 3, at para. 924, Trail 45.

<sup>653</sup> Transcript, November 25, 2003, Francis Setah Direct-Exam, 00032, 22 - 00033, 2;

<sup>654</sup> Plaintiff's Argument, Appendix 3, para. 154; Transcript, November 26, 2003, Francis Setah Direct-Exam, 00041, 27 - 00042, 26.

<sup>655</sup> Plaintiff's Argument, Appendix 3, para. 201; Transcript, December 2, 2003, Francis Setah Direct-Exam, 00005, 7 - 00007, 37

<sup>656</sup> Transcript, December 2, 2003, Francis Setah Direct-Exam, 00007, 38 - 00011, 45.

- (d) Further, Mr. Setah testified the Tsilhqot'in fall hunts for deer, goats and sheep in the mountains were during August through October.<sup>657</sup> Mr. Setah explained that while hunting in the mountains during the fall Tsilhqot'ins would use drying racks called ?eniah (or tish) to dry meat for the winter, a technology that his grandmother Daldod taught him had been developed and handed down by the ?esggidam.<sup>658</sup>
- (e) Mr. Setah testified about canoe trips he took from Xení (Nemiah Valley) up Tsilhqox Biny (Chilko Lake) initially with his grandfather ?Eweniwen (Johnny Setah) out onto his trapline, explaining that ?Eweniwen would trap beaver at Tsilhqox Tu Tl'az during the spring and fall.<sup>659</sup>
- (f) Mr. Setah gave substantial evidence on where and how Tsilhqot'ins exploit the resources they depend on within their territory, as taught to him by his grandparents, who in turn were taught by their parents and grandparents. This cultural knowledge has developed to the point that it includes teachings designed to ensure the long-term sustainability of Tsilhqot'in resource exploitation across generations: Mr. Setah has testified that they only hunt male deer in the summer because the females are pregnant at that time.<sup>660</sup> Similarly, Tsilhqot'ins have learned to only harvest sunt'iny (mountain potatoes) after they reach a certain size.<sup>661</sup> This demonstrates a long view held by a people that have developed an intimate knowledge of their environment and have learned to sustain it.

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<sup>657</sup> Plaintiff's Argument, Appendix 3, para. 202; Transcript, December 2, 2003, Francis Setah Direct-Exam, 00003, 24 – 00004, 10

<sup>658</sup> Plaintiff's Argument, Appendix 3, para. 187; Exhibit 0149, Sketch of ?Eniah (or Tish); Transcript, November 24, 2003, Francis Setah Direct-Exam, 00015, 29 – 00019, 1.

<sup>659</sup> Plaintiff's Argument, Appendix 3, para. 200; Transcript, December 4, 2003, Francis Setah Direct-Exam, 00001, 28 – 00002, 4; Exhibit 0096DIG, 0096LEG, Mapping Evidence of Francis Setah, 'EE', 'FF', 'EH'.

<sup>660</sup> Plaintiff's Argument, Volume 3, para. 1071; Transcript, December 1, 2003, Francis Setah Direct-Exam, 00004, 43 – 00005, 14.

<sup>661</sup> Transcript, November 20, 2003, Francis Setah Direct-Exam, 00034, 6-15; 00036, 5-41.

(g) Mr. Setah also testified as to oral history from his grandmother Daldod (Mary Ann), sourced to her father the Tsilhqot'in warrior Kahkul, that in the time of the ?esgidams (Tsilhqot'in ancestors) the Tsilhqot'in killed off the ?Ena Tsel staying at ?Ena Ch'ez Nadilin of Gunn Valley. Per the oral history of his grandfather ?Eweniwen, the ?esgidams stayed in camps at ?Ena Tsel Nadilin.<sup>662</sup>

163. Tsilhqot'in elder Martin Quilt (b. 1939) is the grandson of Sammy and Annie William (a.k.a. Bulyan) and the great-great-grandson of Sit'ax (Setah) and Nancy.<sup>663</sup> Mr. Quilt's evidence, including oral history sourced to his grandfather, Sammy William, also related to Tsilhqot'in land use of the mountainous Claim Area surrounding Tsilhqox Biny (Chilko Lake) south of Xenii (Nemiah Valley):

(a) Martin Quilt identified the mountainous lands south of Xenii, including west Ts'il'os (Mount Tatlow) and the higher elevations of the Tl'ech'id Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts'i Talhl'ad (Rainbow Creek) and Tsi Tese'an (Tchaikazan Valley) watersheds as Tsilhqot'in mountain goat hunting grounds, particularly for the Xenii Gwet'in.<sup>664</sup> He testified that these areas had been used by himself, his grandfather Sammy William as well as the Tsilhqot'ins Danny William, Eugene William, Andy George, Otto George, Little George Setah, Mariah William and Christine Lulua.<sup>665</sup> Mr. Quilt explained that Tsilhqot'ins, including from the Stone and Toosey communities, had used these mountain goat hunting grounds through the centuries according to stories told to him by Tsilhqot'in elders, and included trails that had been made into horse trails.<sup>666</sup> The Tsilhqot'in carried on these hunts in the fall as “[t]hat’s when the goats are in good shape. Nice and fat.”<sup>667</sup>

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<sup>662</sup> Transcript, November 27, 2003, Francis Setah Direct-Exam, 00030, 28 to 00032, 8, 00028, 13 to 45.

<sup>663</sup> Exhibit 0441, Dewhurst Report, September 2004, vol. 2, app. E(1)(9).

<sup>664</sup> Plaintiff's Argument, Volume 3, at para. 1032(c); Plaintiff's Argument, Appendix 3, at paras. 199, 201, 202; Transcript, July 25, 2002, Martin Quilt Direct-Exam, 790, 3 – 793, 14; Exhibit 0003DIG, Martin Quilt Digitized Map, polygon “J1”; Exhibit 0003LEG, Martin Quilt Digitized Map Legend, polygon “J1”.

<sup>665</sup> Transcript, July 25, 2002, Martin Quilt Direct-Exam, 794, 3 – 802, 2.

<sup>666</sup> Transcript, July 25, 2002, Martin Quilt Direct-Exam, 802, 3 – 804, 1; 805,15 – 808, 13; Transcript, July 26, 2002, Martin Quilt Direct-Exam, 812, 12-25.

<sup>667</sup> Transcript, July 25, 2002, Martin Quilt Direct-Exam, 812, 12 to 814, 12.

(b) Mr. Quilt also identified as Tsilhqot'in deer hunting grounds the lands south of Xení (Nemíah Valley) on southeast Tsilhqox Biny (Chilko Lake), including west Ts'il'os (Mount Tatlow) and the relevant portions of the Tl'ech'id Gunaz (Long Valley), Yuhitah (Yohetta), Ts'i Talhl'ad (Rainbow Creek) and Tsi Tese'an (Tchaikazan Valley) watersheds. Male deer arrive in these mountains around July, and these hunting grounds were exploited from established base camps every summer and fall for meat, including dry meat for winter, dating back to when the Tsilhqot'in traveled on foot prior to obtaining horses, based on the oral history taught to him by his father.<sup>668</sup>

164. In addition, other Tsilhqot'in witnesses descendant of Sit'ax and Nancy, either through the lineage of their son ?Eweniwen (Johnny Setah) or daughter Sabatsakai (who begat Sammy William), testified as to the regular Tsilhqot'in use of the mountains around and to the south of Ts'il'os, including the ancestral Tsilhqot'in trails that connect the valleys of Tl'ech'id Gunaz (Long Meadow), Yuhitah (Yohetta Valley) and Tsi Tese'an (Tchaikazan Valley):

(a) In his testimony, Mr. Harry Setah, Ts'il'os Park Ranger, described learning and traveling a trail network with William Setah from Xení through Tl'ech'id Gunaz (Long Meadow), Yuhitah (Yohetta) and Ts'i Talhl'ad (Rainbow Creek) watersheds, connecting via Spectrum Pass to the trail through Tsi Tese'an (Tchaikazan) watershed. Mr. Setah's evidence is that he was taught this trail network was developed and used by the ?esggidams according to oral history taught to him by William Setah and Sammy William (a.k.a. Bulyan).<sup>669</sup> Elder Joseph William averred that he was taught of the trails through the mountains, e.g. through Yuhitah (Yohetta), Spectrum Pass and Tsi Tese'and (Tchaikazan), by his

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<sup>668</sup> Transcript, July 26, 2002, Martin Quilt Direct-Exam, 829, 23 to 837, 21; Exhibit 0003DIG, Martin Quilt Digitized Map, polygon "L1"; Exhibit 0003LEG, Martin Quilt Digitized Map Legend, polygon "L1".

<sup>669</sup> Plaintiff's Argument, Volume 3, para. 924, trails 46-49; Transcript, October 14, 2004, Harry Setah Direct-Exam, 00020, 15 to 00022, 11; 00026, 30 to 00028, 23; 00029, 27 to 00030, 27; 00041, 41 to 00042, 38; Exhibit 0180DIG, Harry Setah Digitized Map, trails "CD", "CE", "CG"; Exhibit 0180LEG, Harry Setah Map Legend, trails "CD", "CE", "CG".

father, who also told him that his grandparents, Sammy and Annie William (a.k.a. Bulyan), Seymour, John Baptiste also used these trails.<sup>670</sup>

(c) Elder Francis William identified Ts'il?os as a Tsilhqot'in hunting ground since the sadanx and testified that he had hunted all around Ts'il?os for deer and mountain goat. Mr. William also identified other Tsilhqot'ins who hunted there, including Andy George, Captain George, Lebusden, Johnny Setah, and Mabel and Henry Solomon.<sup>671</sup> Mr. Harry Setah testified that he and his family have often hunted deer around Ts'il?os.<sup>672</sup> Elder Joseph William averred that he has been up hunting at Ts'il?os many times and has hunted deer in that area with his grandfather, Sam Bulyan.<sup>673</sup> In his testimony, Councilor David Setah identified deer migration routes in the mountains around Ts'il?os and described hunting in this area with his father.<sup>674</sup> Elder Norman George Setah testified that he had hunted mountain goat, groundhog and deer with ?Eweniwen around Ts'il?os.<sup>675</sup> Mr. Setah also identified this area as sheep hunting grounds.<sup>676</sup>

(d) Elder Norman George Setah identified TI'ech'id Gunaz (Long Meadow) as deer, sheep, goat and marmot hunting grounds that his great-grandfather ?Eweniwen (Johnny Setah) taught him have been regularly by Tsilhqot'ins dating back to the time of the ancestors, and including such use by ?Eweniwen, Lebusden, Sammy William (a.k.a. Bulyan) and his children (Eugene, Francis, Danny and Qitl'axan (Jimmy William)), ?Est'anchis, Beqi Ts'et'an, as well as Norman George Setah

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<sup>670</sup> Exhibit 0355, Affidavit #1 of Joseph William, December 17, 2004, para. 53.

<sup>671</sup> Transcript, May 25, 2004, Francis William Direct-Exam, 00016, 24 to 00018, 5.

<sup>672</sup> Transcript, October 12, 2004, Harry Setah Direct-Exam, 00031, 22 to 00032, 30; Exhibit 0179DIG, Harry Setah Digitized Map, polygon "D"; Exhibit 0179LEG, Harry Setah Map Legend, polygon "D".

<sup>673</sup> Exhibit 0355, Affidavit #1 of Joseph William, December 17, 2004, paras. 98-100.

<sup>674</sup> Transcript, January 18, 2005, David Setah Direct-Exam, 00048, 20 to 00049, 40.

<sup>675</sup> Transcript, November 4, 2004, Norman George Setah Direct-Exam, 00057, 8-21; Exhibit 0212DIG, Norman George Setah Digitized Map, polygon "FU"; Exhibit 0212LEG, Norman George Setah Digitized Map Legend, polygon "FU".

<sup>676</sup> Transcript, November 30, 2004, Norman George Setah Direct-Exam, 00041, 43 – 00042, 36; Exhibit 0217DIG, Norman George Setah Digitized Map, polygon "JR"; Exhibit 0217LEG, Norman George Setah Digitized Map Legend, polygon "JR".

himself and his father, Willie Setah.<sup>677</sup> Former Councilor Gilbert Solomon averred that his family has harvested sunt'iny (mountain potato) and beartooth in Tl'ech'id Gunaz (Long Meadow) almost every summer since as far back as he can remember.<sup>678</sup>

- (e) Chief Roger William testified that his grandmother Annie William (a.k.a. Bulyan) had taught him that Sammy William (Bulyan) also hunted through Yuhitah (Yohetta).<sup>679</sup> Councilor David Setah, grandson of Sammy and Annie William, testified that his family hunts in Yuhitah during the summer.<sup>680</sup> Mr. Lloyd Myers averred that he hunts in Yuhitah each year and has always seen other Tsilhqot'ins there, including Rocky Quilt, Alex Lulua, Larry Quilt, Wilfred Williams, James Lulua and Denis Lulua.<sup>681</sup> Mr. Myers further averred that he was taught by his parents, who also hunted there, that Tsilhqot'ins have been going into Yuhitah to camp, hunt, and gather roots and berries since the time of the ?esgidams.<sup>682</sup> Mr. Myers averred that the late Willie Setah had also told him that he went into Yuhitah to hunt a lot.<sup>683</sup>
- (f) Councilor David Setah, son of the late William Setah and Madelaine Setah (nee William, Bulyan), identified Tsi Tese?an (Tchaikazan) as summer hunting grounds used by his family.<sup>684</sup> This watershed has been used by generations of Tsilhqot'ins as Chief Roger William testified that his grandmother Annie William (Bulyan) had taught him that Sam William (Bulyan) hunted in Tsi Tese?an.<sup>685</sup>

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<sup>677</sup> Plaintiff's Argument, Appendix 3, para. 201; Transcript, November 30, 2004, Norman George Setah Digitized Map, 00026, 8 – 00027, 28.

<sup>678</sup> Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, para. 50.

<sup>679</sup> Transcript, September 25, 2003, Roger William Direct-Exam, 00013, 32-41.

<sup>680</sup> Plaintiff's Argument, Appendix 3, para. 202; Transcript, January 18, 2005, David Setah Direct-Exam, 00053, 39 – 00054, 47.

<sup>681</sup> Exhibit 0417, Affidavit #1 of Lloyd Myers, May 6, 2005, para. 49.

<sup>682</sup> Exhibit 0417, Affidavit #1 of Lloyd Myers, May 6, 2005, para. 47-48.

<sup>683</sup> Exhibit 0417, Affidavit #1 of Lloyd Myers, May 6, 2005, para. 48.

<sup>684</sup> Plaintiff's Argument, Appendix 3, para. 202; Transcript, January 18, 2005, David Setah Direct-Exam, 00053, 39 – 00054, 47.

<sup>685</sup> Transcript, September 25, 2003, Roger William Direct-Exam, 00013, 32-41.

(g) Elder Norman George Setah testified that his father Willie Setah, his great-grandfather ?Eweniwen (Johnny Setah) and Sam William (Bulyan) used the area of Tsilhqox Tu Tl'az repeatedly.<sup>686</sup> Mr. Setah was taught by elders that have used that area, including ?Eweniwen, Sam William, his brother Lebusden, Chief Lashway Lulua and his father Hadediny (Jack Lulua), that Tsilhqot'ins have been camping and hunting deer, cougar and marten at Tsilhqox Tu Tl'az since the time of the ?esgidams (ancestors).<sup>687</sup>

165. Anthropologist John Dewhirst's genealogical research linking modern extended families to the Claim Area lands also included the George family descendant of Chief ?Achig, the successor to Chief Nemiah, and his wife Tsoulout.<sup>688</sup> According to Dewhirst:

Use and occupancy of the Claim Area continued after Chief ?Achig through his second son Captain George (ca. 1883-1974), and in turn through Captain George's son, Andy George (1906-1990), who were both members of the Nemiah Valley Indian Band (...).

...

In my opinion, based on the evidence discussed ..., archival documents and oral history show that the customary use area of the Xeni Gwet'in George family is in the Claim Area, specifically ..., the Taseko Lakes area, as well as the Nemiah Valley. Considering ?Achig was born ca. 1863, his parents were born no later than ca. 1843, and possibly earlier. Considering that customary use areas are held by families from generation to generation, ?Achig parents and grandparents also likely occupied and used the customary use area and other parts of the Claim Area before and after 1843.<sup>689</sup>

166. The late Tsilhqot'in elder Ubill Hunlin (c. 1929-2005) was the widower of the late Amelia Hunlin (nee George) (c. 1925-2004), daughter of Tselxex (Andy George), granddaughter of ?Eskish (Captain George), and great-granddaughter of Chief ?Achig

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<sup>686</sup> Plaintiff's Argument, Appendix 3, para. 200; Transcript, November 18, 2004, Norman George Setah Direct-Exam, 00005, 8 – 00007, 2.

<sup>687</sup> Plaintiff's Argument, Appendix 3, para. 200; Transcript, November 18, 2004, Norman George Setah Direct-Exam, 00009, 47 – 00010, 27; 00020, 18-33; 00023, 7-24; Exhibit 0214DIG, Norman George Setah Digitized Map, polygon "HF", "HK"; Exhibit 0214LEG, Norman George Setah Digitized Map Legend, polygon "HF", "HK".

<sup>688</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 343, 344-352.

<sup>689</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 347, 352.

and Tsolouout.<sup>690</sup> Mr. Hunlin was Tsilhqot'in originally from the Tsi Del Del (Alexis Creek) community, though upon marriage to his wife Amelia (m. approx. 1959) he moved to Xeni where they started a family and lived with ?Eskish (Captain George).<sup>691</sup> Mr. Hunlin testified in this case just before he passed away and gave evidence, including oral history evidence from his wife's grandfather ?Eskish (Captain George), relating to Tsilhqot'in land use of Ts'il?os (Mount Tatlow) and the mountainous lands to the south:

- (a) Mr. Hunlin identified Ts'il?os (Mount Tatlow) as mountain goat hunting grounds he used every fall.<sup>692</sup> Mr. Hunlin hunted in this area with his grandfather in law ?Eskish (Captain George), his father-in-law Tselxex (Andy George), his son Tory and William Setah, and also learned from ?Eskish that Tsilhqot'ins had been hunting mountain goats in this area regularly since the time of the ?esggidams.<sup>693</sup> Mr. Hunlin also hunted marmot each fall around Ts'il?os with ?Eskish, Tselxex and his own son Tory, which Tsilhqot'ins have been doing since the ?esggidams according to oral history taught to him by ?Eskish.<sup>694</sup>
- (b) Mr. Hunlin testified that ?Eskish (Captain George) hunted mountain goats and marmot in Yuhitah (Yohetta Valley) and Tsi Tese?an (Tchaikazan Valley), and who also taught him that Tsilhqot'ins have been so using these lands every fall since the time of the ?esggidams.<sup>695</sup>
- (c) Mr. Hunlin testified that he had traveled up the eastern shore of Tsilhqox Biny (Chilko Lake) towards Tsilhqox Tu Tl'az – i.e. to the lakeside mountains about Ts'i Talhl?ad (Rainbow Creek) - with ?Eskish (Captain George), who was teaching him that the Tsilhqot'in, including ?Eskish during his life, had regularly

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<sup>690</sup> Exhibit 0441, Expert Report of John Dewhirst, September 2004, at 37, chart 6; Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00012, 25-31; Transcript, April 5, 2005, Gilbert Solomon Direct-Exam, at 00017, 1-14.

<sup>691</sup> Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00012, 25-34.

<sup>692</sup> Plaintiff's Argument, Appendix 3, at para. 202; Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00031, 14 – 00032, 22.

<sup>693</sup> Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00033, 7 – 00034, 46; 00047, 45 – 00048, 15.

<sup>694</sup> Transcript, March 8, 2005, Ubill Hunlin Direct-Exam, 00004, 16 – 00011, 15.

<sup>695</sup> Plaintiff's Argument, Appendix 3, at para. 201; Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00046, 24 – 00047, 44.

hunted mountain goats through this area since the time of the ?esggidams.<sup>696</sup> Mr. Hunlin was taught by ?Eskish that the ancestors would go on foot into the area and also travel up Tsilhqox Biny towards Tu TI'az in spruce bark canoes, as ?Eskish himself had done with his grandfather before Mr. Hunlin's time.<sup>697</sup>

(d) Mr. Hunlin described seeing ts'ah ?ets'edilhyah (pine windbreaker) while on the trip to Tsilhqox Tu TI'az looking for mountain goats with ?Eskish (Captain George), who taught him that it was a traditional Tsilhqot'in shelter that he and his grandfather would use while on hunting trips.<sup>698</sup>

167. Notably, anthropologist John Dewhirst's genealogical research linking Tsilhqot'in families to the Claim Area includes the family of Kanim,<sup>699</sup> born ca. 1850 and a Chief, per Marcus Smith (1872), of the "Stone Indians" "[f]rom Tatla Lake to the Coast and eastward to near Lillooet." Kanim is the namesake of Gunn Valley between Chilko Lake and Taseko Lake, and the father of Chief Sil Kanim (ca. 1870/1876-1932) of the Xenigwet'in who kept a cabin there. Chief Sil Kanim and his ?Et'utsiny (Jeanie), daughter of the Tsilhqot'in warrior Joz from Biny Gwechugh (Canoe Crossing), had but one daughter. Regarding Kanim and his descendants, Dewhirst concluded:

Archival documents and oral history (par. 384-387) demonstrate that Kanim used and occupied the Claim Area in his lifetime. Seal Canim and his family continued to use and occupy the Claim Area. In my opinion, the customary use area of Kanim and his descendants was in the Nemiah Valley and in the mountains to the southeast to near Lillooet. Given the Tsilhqot'in cultural pattern of traditional family use areas, Kanim's parents, born ca. 1830, must have used the Claim Area before and after 1846. Kanim, as chief, and his parents must have had deep roots in the Stone Indian community and strong ties to the Claim Area.<sup>700</sup>

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<sup>696</sup> Plaintiff's Argument, Appendix, at para. 200; Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00043, 20 – 00044, 47.

<sup>697</sup> Plaintiff's Argument, Appendix, at para. 200; Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00045, 1 – 00046, 23.

<sup>698</sup> Plaintiff's Argument, Appendix, at paras. 126, 200; Transcript, March 14, 2005, Ubill Hunlin Direct-Exam, 00005, 40 – 00006, 42.

<sup>699</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 376-395.

<sup>700</sup> Exhibit 0443, Expert Report of John Dewhirst, at para. 395.

168. Anthropologist John Dewhirst’s genealogical research linking modern extended families to the Claim Area lands includes the family of Kanim, born ca. 1850 and a Chief, per Marcus Smith (1872), of the “Stone Indians” “[f]rom Tatla Lake to the Coast and eastward to near Lillooet.”<sup>701</sup> and father of Seal (Sil) Canim, Chief of the “Nemiah Valley Indians.” (born c. 1870 and 1876).<sup>702</sup>

**c. Additional Expert Opinion and Ethnohistorical Work**

169. Dr. Brealey’s opinion corroborates the oral history evidence:<sup>703</sup>

(a) His evidence confirms from the historical record that the Tsilhqot’in trail network through Tl’echid Gunaz (Long Valley) and Yuhitah (Yohetta Valley), is of pre-contact origin.<sup>704</sup> In addition, Dr. Brealey noted that the Euro-Canadian record of Tsilhqot’in trails is far from exhaustive, and stated “there would have been countless subsidiary trails, routes, creeks or portages that would have been used by Tsilhqot’ins.”<sup>705</sup>

(b) Dr. Brealey noted the work of federally employed anthropologist and archaeologist Dr. Martin Magne (1984) as identifying a great density of roasting, cache and house pits at east Yohetta Valley, thus suggesting that the valley “was an exceedingly important hunting, gathering and freshwater fishing area for the Stone Chilcotin.”<sup>706</sup> Based on Magne’s work, Dr. Ken Brealey mapped the lands surrounding southeast Chilko Lake, of west Mount Tatlow and the watersheds of Long Valley, Yohetta Valley, Rainbow Creek, Edmonds Creek and Tchaikazan Valley, as Tsilhqot’in hunting and gathering grounds from pre-contact times through the smallpox onset in 1862. Dr. Brealey mapped these patterns of land

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<sup>701</sup> Exhibit 0443, Expert Report of John Dewhirst, at paras. 376-395.

<sup>702</sup> Exhibit 443, Expert Report of John Dewhirst, para 384

<sup>703</sup> Plaintiff’s Argument, Volume 3, at para. 1019.

<sup>704</sup> Plaintiff’s Argument, Volume 3, at para. 923, Trail Sections 16, 18, 21.

<sup>705</sup> Plaintiff’s Argument, Volume 3, at para. 914.

<sup>706</sup> Exhibit 0240, Expert Report of Ken Brealey, at 78.

use and occupancy as largely continuing through into the post reserve creation period of the 20<sup>th</sup> century.<sup>707</sup>

(c) Dr. Brealey depicted the southern border of Tsilhqot'in territory as encompassing the lands surrounding Chilko Lake.<sup>708</sup> Dr. Brealey opined with respect to Tsilhqot'in territory that "[o]n the southern... frontier, where a greater physiographic relief created a stronger 'sense of place', and where groups on the other side of the watershed divide dealt with quite different resource bases and were from altogether different language families, there was much less" "Tsilhqot'in tolerance' to territorial encroachments..."<sup>709</sup>

(e) Further, Dr. Brealey described the Tsilhqot'in resource exploitation patterns thusly: "the Tsilhqot'in would follow the melting snowline into the higher country and by early summer would be hunting, and gathering blossoms and roots on mountain slopes";<sup>710</sup> "[i]n early fall they would return the high country to hunt big game and gather berries, and as winter approached, moved back to their wintering grounds..."<sup>711</sup>

170. The particular expert evidence regarding plant use is also corroborative. Dr. Turner concluded that "the Tsilhqot'in have repetitively used and occupied sites in the Claim Area such as ... Chilco Lake and the Nemiah Valley for the purposes of gathering and managing plant resources critical to their survival."<sup>712</sup> Further, that they have done so in sustainable manner, maintaining and increasing abundance by disseminating plant stems and burning over areas from time to time.<sup>713</sup> In the words of Dr. Dinwoodie, "they maintained an institutionalized schedule of use centred on (proto-agricultural) root-

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<sup>707</sup> Exhibit 0246, Expert Report of Ken Brealey, Land Use and Occupancy Map, October 2003.

<sup>708</sup> Exhibit 0241, Brealey Map, Chilcotin Boundaries; Exhibit 0240, at 12.

<sup>709</sup> Exhibit 0240, Expert Report of Ken Brealey, at 20.

<sup>710</sup> Plaintiff's Argument, Volume 3, at para. 1031.

<sup>711</sup> Plaintiff's Argument, Volume 3, at para. 1031.

<sup>712</sup> Plaintiff's Argument, Appendix 3, at para. 153; Exhibit 0205, Expert Report of Dr. Nancy Turner, at 4.

<sup>713</sup> Plaintiff's Argument, Volume 3, at para. 1017; Exhibit 0205, Expert Report of Dr. Nancy Turner, at 2, 5, 4; Transcript, November 17, 2004, Dr. Nancy Turner Direct-Exam, 0006, 23 to 00067, 29; 00070, 28 to 46; Transcript, November 19, 2004, Dr. Nancy Turner Direct-Exam, 00041, 44 to 00042, 13.

harvest.”<sup>714</sup> In this regard, it is noteworthy that Dr. Lane (1953) recorded that the Tsilhqot’in harvested “mountain carrots” and “mountain potatoes” in considerable quantities in the mountains.<sup>715</sup>

171. The doctoral work of anthropologist Robert Tyhurst (1984) is corroborative. In particular, Tyhurst stated:

In the recent past (1900-1950), fur trapping parties from Stone and Nemaiah have ranged as far south as Lord River, at the extreme southern end of Taseko Lake; and from Nemaiah and Choelquoit lake, as far south as Franklyn Arm on Chilko Lake, and the mountains and river valleys to the immediate north of Bute Inlet. **This mountainous territory, which extends northwest from the Bridge River- Lillooet area, through Chilko Lake to the Dean River, and which contains the highest mountains in the British Columbia Coast Ranges, was, at the time of contact, an important summer hunting range and food plant gathering area for the Chilcotin population.**

**Chilcotin hunters in earlier times (1800-1900) traversed the same territory, with trapping of beaver, fox, coyote, marten, fisher, and lynx, as an important subsidiary activity.<sup>467</sup> The hunters were accompanied by women and children, who stayed at base camps, digging and drying edible roots and medicinal plants, fishing for trout, suckers and whitefish, trapping muskrat and rabbits, and drying fish and meat, while the trappers or hunters ranged further afield (Tyhurst, fieldnotes.)<sup>716</sup> [Emphasis added.]**

#### d. General Points

172. The entire body of evidence discussed above regarding Ts’il?os (Mount Tatlow) and the Tl’echid Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts’i Talhl?ad (Rainbow Creek), Tsi Tese?an (Tchaikazan Valley) and Tsilhqox Tu Tl’az (Edmond Creek) watersheds is consistent with the previously discussed Tsilhqot’in system of occupation through regular use of lands for resource exploitation:

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<sup>714</sup> Plaintiff’s Argument, Volume 3, at paras. 975, 1017.

<sup>715</sup> Plaintiff’s Argument, Appendix 3, at para. 140.

<sup>716</sup> Plaintiff’s Argument, Appendix 3, para. 136.

- (a) The Tsilhqot'in yearly schedule of land use dating pre-1846 detailed by anthropologist Robert Tyhurst (1984), based in part on Lane (1953), identifies - mountain goat, mountain sheep and marmot hunting starting around June, intensifying for July through October, and dissipating in November; deer hunting intensely June through October; mountain root harvests of spring beauty (i.e. 'mountain potato') and lilies (e.g avalanche lily or 'mountain carrots' / 'beartooth') in June, July and early August; and bear procurement ongoing through the summer and fall.<sup>717</sup> Indeed, Tyhurst expressly wrote, "[t]he traditional Chilcoten yearly cycle of activities was governed by two events; the late summer and fall hunts, and the later summer salmon runs."<sup>718</sup> [emphasis added]
- (b) Consistent with the evidence of Dr. Dinwoodie,<sup>719</sup> the land uses identified exploit seasonal variations in local resource abundance. In early summer, these mountains bloom with the snow's retreat as plants such as the spring beauty and avalanche lily mature. Migratory deer arrive to join animals such as marmots, mountain goats, mountain sheep and bear in nourishing themselves post winter and spring.<sup>720</sup> In fall, mountain goats, mountain sheep, marmots and marten busy themselves in fortifying for winters' early onset. Migratory deer move down the mountains, ready themselves for winter and eventually migrate out to lower elevations. Bears prepare to hibernate. There is a seasonal abundance of meat on these bones, fur on these hides and fat on these bodies. Days are long and dry, nights are cool. Snow and ice have receded to their minimums.<sup>721</sup>
- (d) In accordance with the evidence of anthropologist John Dewhirst, summer prior to salmon harvesting involves social movement into the mountains for root digging and hunting. Post salmon time, in fall, there is a social dispersal to the mountains for marmots and "hunting big game" until "[a]t seasons end, move to wintering

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<sup>717</sup> Plaintiff's Argument, Volume 3, at para. 974; Exhibit 0177, Tyhurst, July 1984 Report, at 52, 53.

<sup>718</sup> Plaintiff's Argument, Volume 3, at para. 1030.

<sup>719</sup> Plaintiff's Argument, Volume 3, at para. 987.

<sup>720</sup> Plaintiff's Argument, Volume 3, at para. 1016.

<sup>721</sup> Plaintiff's Argument, Volume 3, at para. 1027.

sites on lakes and rivers.” Moreover, “a key aspect of each family’s seasonal round was its regular visits to the same main resource gathering areas year after year.”<sup>722</sup>

173. To appreciate the significance of this systematic Tsilhqot’in use of the lands at issue, it is important to remember the material resources taken therefrom were used for critical fur or hide based clothing, bedding, packs and trade products, as well as fresh meats and a winter supply of dried meats:<sup>723</sup>

- (a) Furs obtained during fall hunting trips were used to make the clothing Tsilhqot’ins required to survive the winter. Dr. Lane described the basic Tsilhqot’in clothing as including fur robes and an apron, usually of buckskin, worn over top of leggings.<sup>724</sup> This is corroborated by McDougall, who describes an encounter with Tsilhqot’ins clad in leggings in 1822,<sup>725</sup> and Father Nobili, who described Tsilhqot’in women wearing wraps in 1845.<sup>726</sup> Numerous Tsilhqot’in elders have also given evidence on this: Mabel William averred that her grandmother, Hanlhdzany, had taught her that since the time of the ?esggidams Tsilhqot’ins would hunt deer, mountain goat or mountain sheep in the fall when their fur was the longest and use their hides as clothing, wrapping them around their waste like a skirt or apron.<sup>727</sup> Elizabeth Jeff had also learned from her grandmother that Tsilhqot’ins had been using hides as skirts and aprons since the time of the ?esggidams.<sup>728</sup> Ubill Hunlin testified that Captain George had taught him that Tsilhqot’ins had been using hides of animals such as mountain sheep as wraps since the time of the ?esggidams.<sup>729</sup> Francis Setah instructed an artist to draw examples of the types of wraps that his grandmother Daldod taught him

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<sup>722</sup> Plaintiff’s Argument, Volume 3, at paras. 976.

<sup>723</sup> Plaintiff’s Appendix 3, at pp. 17, 22, 26 and 58.

<sup>724</sup> Plaintiff’s Argument, Appendix 3, at paras. 37, 188; Exhibit 0175, Lane Dissertation, 1953, at 47.

<sup>725</sup> Plaintiff’s Argument, Appendix 3, at para. 40; Exhibit 0156-1822/01/18.001, letter from George McDougall, at 6.

<sup>726</sup> Plaintiff’s Argument, Appendix 3, at para. 40; Exhibit 0156-1845/11/30.001, Father Nobili’s Letters, at 2195801.

<sup>727</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 75

<sup>728</sup> Exhibit 0432, Affidavit #2 of Elizabeth Jeff, November 13, 2004, at para. 28.

<sup>729</sup> Transcript, March 8, 2005, Ubill Hunlin Direct-Exam, 00024, 25 – 00025, 15.

Tsilhqot'ins had been making with deer, goat and sheep hides since the time of the ?esggidams.<sup>730</sup> Mr. Setah explained that Tsilhqot'ins would also make footwear from the hides of deer, sheep and goats.<sup>731</sup>

- (b) Tsilhqot'in elders have also given evidence regarding the traditional use of hides including mountain goat, mountain sheep, deer and marmot to make bedding.<sup>732</sup> Mabel William averred that her grandmother, Hanlhdzany, taught her that Tsilhqot'ins had been making blankets from the hides of the deer, mountain goat, mountain sheep and marmots that they hunted in the fall since the time of the ?esggidams.<sup>733</sup> Francis Setah testified that his grandmother, Daldod, taught him that the Tsilhqot'ins also use the deer, sheep and goat hides as blankets and mattresses since the time of the ?esggidams.<sup>734</sup> Ubill Hunlin testified that Captain George made blankets out of marmot skins and taught Mr. Hunlin that Tsilhqot'ins had been doing this since the time of the ?esggidams; he described using them while hunting with Captain George in the mountains in the fall.<sup>735</sup> Mr. Hunlin also testified that his father-in-law, Andy George, also had a marmot blanket.<sup>736</sup> Francis Setah gave instructions to an artist to draw a marmot blanket like the one used by Captain George.<sup>737</sup> Norman George Setah testified that he was taught by ?Eweniwen that his ancestors had hunted in the mountains around Tsilhqox Biny (Chilko Lake) for marmot, bear, mountain goat and sheep and use the hides to make mattresses and blankets.<sup>738</sup> Elizabeth Jeff averred that her grandmother Elaine taught her that Tsilhqot'ins had been making mattresses from

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<sup>730</sup> Transcript, November 19, 2003, Francis Setah Direct-Exam, 00021, 47 – 00025, 4; Exhibits 0058 – 0060, drawings of traditional Tsilhqot'in clothing; Transcript, December 2, 2003, Francis Setah Direct-Exam, 00001, 37 – 00002, 2.

<sup>731</sup> Transcript, December 1, 2003, Francis Setah Direct-Exam, 00032, 12-29; Exhibit 0057, drawing of traditional Tsilhqot'in footwear.

<sup>732</sup> Plaintiff's Argument, Appendix 3, at paras. 31, 34, 188;

<sup>733</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 76.

<sup>734</sup> Transcript, December 1, 2003, Francis Setah Direct-Exam, 00031, 34 – 00032, 18.

<sup>735</sup> Plaintiff's Argument, Appendix 3, at para. 31; Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00042, 41 – 00043, 45; Transcript, March 8, 2005, Ubill Hunlin Direct-Exam, 00003, 7-9; 00008, 20-25.

<sup>736</sup> Transcript, March 7, 2005, Ubill Hunlin Direct-Exam, 00048, 16-29.

<sup>737</sup> Transcript, December 4, 2003, Francis Setah Direct-Exam, 00003, 18 – 00004, 12; Exhibit 0087, drawing of traditional Tsilhqot'in blanket.

<sup>738</sup> Transcript, November 18, 2004, Norman George Setah Direct-Exam, 00030, 8-34.

the hides of animals including deer, mountain goat, mountain sheep and caribou since the time of the ?esggidams.<sup>739</sup>

- (c) Francis Setah testified that his grandmother Daldod taught him that his ancestors would roll up the deer, goat and sheep hide mattresses and also use them as packs to carry the dried meat from the animals.<sup>740</sup> Mabel William averred that she had been taught by her grandmother Hanlh dzany that since the time of the ?esggidams the hide mattresses and blankets had also traditionally been used as packs to carry dried meat and belongings back to winter residences.<sup>741</sup> Elizabeth Jeff averred that her grandmother Elaine had taught her that before they had horses Tsilhqot'ins would pack their belongings in rolled up animal hides.<sup>742</sup>
- (d) The resources obtained by the Tsilhqot'in during their seasonal land use activities were also traded to obtain additional resources not naturally available within their territory. Robert Tyhurst described a pre-contact Tsilhqot'in economy in which trade in furs and clothing with the Bella Coola and Canyon Shuswap were a significant element.<sup>743</sup> Dr. Nancy Turner opined that the Tsilhqot'in also likely traded plants with other First Nations prior to the 1800s.<sup>744</sup> Norman George Setah testified that he had been taught by ?Eweniwen, ?Esk'ish, and Hadediny that Tsilhqot'ins had been trading animal hides, as well as the clothes and blankets made from them, with the coastal Bella Coola for fish oil.<sup>745</sup> Mr. Setah also described trading with the Lillooet and shared oral history he had learned from ?Eweniwen, Lebusden, Louie Quilt, and his grandfather Alec, that Tsilhqot'ins since the time of the ?esggidams had been traveling to Lillooet, first on foot then

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<sup>739</sup> Exhibit 0432, Affidavit #2 of Elizabeth Jeff, November 13, 2004, at para. 26.

<sup>740</sup> Plaintiff's Argument, Appendix 3, at para. 189; December 1, 2003, Francis Setah Direct-Exam, 00031, 34 – 00032, 29; Transcript, December 2, 2003, Francis Setah Direct-Exam, 00002, 24 – 00003, 21; Exhibit 0056, drawing of Tsilhqot'in animal hide pack.

<sup>741</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 77.

<sup>742</sup> Exhibit 0432, Affidavit #2 of Elizabeth Jeff, November 13, 2004, at para. 30.

<sup>743</sup> Exhibit 0177, Tyhurst Draft Dissertation, July 1984, at 25.

<sup>744</sup> Plaintiff's Argument, Volume 2, at para. 683, Table showing species and products traded with Aboriginal Groups and Europeans; Exhibit 0205, Turner Report, August 2004, at 8.

<sup>745</sup> Plaintiff's Argument, Volume 2, at para. 678, Table showing species and products traded with Aboriginal Groups and Europeans; Transcript, November 18, 2004, Norman George Setah Direct-Exam, 00030, 8 – 00032, 29.

later on horse, to trade hides and meat from mountain animals for salmon and other products.<sup>746</sup> Elder Julie Quilt testified that her grandmother ?Est'ansh and her parents taught her that Tsilhqot'ins since the time of the ?esggidams have been going to Lillooet to trade the dry meat and hides they got from hunting in the mountains.<sup>747</sup>

(e) As well as fulfilling the critical end-uses described above, the meat obtained from fall hunting and fishing are an essential resource for winter survival.

Anthropology on this topic describes dried food storage caches, as noted by Dr. Lane,<sup>748</sup> Robert Tyhurst<sup>749</sup> and Morley Eldridge.<sup>750</sup> Tsilhqot'in elders have given evidence on how dried food was stored for the winter.<sup>751</sup> Martin Quilt explained how Tsilhqot'ins traditionally dried meat obtained during the fall hunts to use during the winter.<sup>752</sup> Elder Elizabeth Jeff averred that she was taught by her grandmother Elaine how Tsilhqot'ins used to store meat, fish and plants in pit caches between layers of bark for use during the winter.<sup>753</sup> Elder Francis Setah outlined how the meat drying process on the ?eniah (or tish) in the mountains during fall hunts.<sup>754</sup>

174. Further, the lands in question are part of Ts'il?os Provincial Park. In terms of the significance that the lands in question have to Tsilhqot'in culture, broadly understood, British Columbia's Ts'il?os Provincial Park signage speaks volumes:

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<sup>746</sup> Plaintiff's Argument, Volume 2, at para. 679, Table showing species and products traded with Aboriginal Groups and Europeans; Transcript, December 1, 2004, Norman George Setah Direct-Exam, 00002, 1 – 00003, 21.

<sup>747</sup> Plaintiff's Argument, Volume 2, at para. 677, Table showing species and products traded with Aboriginal Groups and Europeans; Transcript, November 5, 2004, Julie Quilt Direct-Exam, 00020, 15 – 00021, 34.

<sup>748</sup> Exhibit 0175, Lane Dissertation, 1953, at 45.

<sup>749</sup> Exhibit 0177, Robert Tyhurst Draft Ph.D Dissertation, July 1984, at 50.

<sup>750</sup> Transcript, May 25, 2006, Morley Eldridge Cross Examination, 00049, 9-17.

<sup>751</sup> Plaintiff's Argument, Appendix 3, at para. 115.

<sup>752</sup> Transcript, July 25, 2002, Martin Quilt Direct-Exam, 814, 1 – 816, 8.

<sup>753</sup> Exhibit 0432, Affidavit #2 of Elizabeth Jeff, November 13, 2004, at paras. 13-15

<sup>754</sup> Plaintiff's Argument, Appendix 3, para. 187; Exhibit 0149, Sketch of ?Eniah (or Tish); Transcript, November 24, 2003, Francis Setah Direct-Exam, 00015, 29 – 00019, 1.

Ts'il?os Park is part of the spiritual and economic homeland of the people of the Nemiah Valley – the Xeni gwet'in (pronounce honey-gwe-teen) – who are one of six Tsilhqot'in bands. ...

...

... They are ... part of the land that surrounds them and part of its destiny. Stories told by the elders keep their history, language and culture alive and the Tsilhqot'in language is one of the best preserved native languages in British Columbia.<sup>755</sup>

175. Furthermore, the oral history, ethnographic record and expert evidence regarding ancient Tsilhqot'in creation narratives or legends, the oral history having been largely told by elders who speak only the Tsilhqot'in language, indicate that the Tsilhqot'in were and remain deeply connected to the mountainous lands of southeast Tsilhqox Biny (Chilko Lake):

- (a) Farrand's record of the Tsilhqot'in legend of Lhin Desch'osh and his sons closes noting that "[b]efore turning to stone, they made Indian potatoes, and scattered them all about on the snow mountains."<sup>756</sup> The oral history evidence of Patricia Guichon and Elizabeth Jeff confirms this legend as the genesis of mountain potatoes.<sup>757</sup> "Snow mountains" identified by Tsilhqot'in witnesses as having "Indian potatoes" include those of above Tchaikazan Valley (Tsi Tese?an), Yohetta Valley (Yuhetah) and Long Valley (Ti'ech'id Gunaz), all located directly south of the Nemiah Valley (Xeni) and on or near Chilko Lake (Tsilhqox Biny).<sup>758</sup> Notably, above Long Valley in the north is the "snow mountain"<sup>759</sup> and

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<sup>755</sup> Exhibit 0501, Ts'yl-os Park photographs, Tabs 6-7.

<sup>756</sup> Exhibit 0167.009.002, Livingston Farrand, "Traditions of the Chilcotin Indians," Chapter 1, The Jesup North Pacific Expedition, Edited by Franz Boas, New York, pp. 7-14, at 14.

<sup>757</sup> Transcript, May 9, 2005, Patricia Guichon Direct-Exam, at 00050, 1-19; Exhibit 0431, Affidavit #1 of Elizabeth Jeff, October 8, 2004, para. 27.

<sup>758</sup> These mountains as snow mountains, see, for example, Exhibit 0174, Affidavit # 2 of Mabel William, at para.70; Exhibit 0177, Tyhurst, at p 107; These areas as being Indian, or mountain, potato areas, see for example Exhibit 0174, Mabel William Affidavit #2, at para. 70.

<sup>759</sup> Transcript, October 4, 2004, Mabel William Direct-Exam, at 00025, 40 – 00026, 3.

“Indian potato”<sup>760</sup> spot the Tsilhqot’in call Xenedi’an, located to the southeast of Mount Tatlow (Ts’ilos).<sup>761</sup>

- (b) Various other recorded Tsilhqot’in legends relate to hunting in the ‘snow mountains’ during summer or fall for game, including marmots, deer, mountain sheep and mountain goat – The Gambler Who Received Supernatural Aid,<sup>762</sup> The Man Who Married Eagle’s Daughters, The Boy Who Was Helped by the Wolves and The Men and the Monsters.<sup>763</sup>
- (c) The core Tsilhqot’in legend of Ts’il’os and ?Eniyud records that in the times of the ?esggidams, Ts’il’os and ?Eniyud were Tsilhqot’in husband and wife living with their family in the mountainous area around Xení (Nemiah Valley), where Mount Tatlow is today.<sup>764</sup> When the two decided to separate ?Eniyud left Ts’il’os and, consequently, Ts’ilos? and .Eniyud turned to stone. He now presides over the Claim Area as Ts’ilos (Mount Tatlow),<sup>765</sup> and is charged with the responsibility of protecting and watching over Tsilhqot’in people forever.<sup>766767</sup>

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<sup>760</sup> See Transcript, November 26, 2003, Francis Setah Direct-Exam, at 00005, 17-31; Exhibit 0174, Mabel William Affidavit #2, para. 45.

<sup>761</sup> Plaintiff’s Argument, Volume 3, at para. 887(d).

<sup>762</sup> Plaintiff’s Argument, Volume 3, at para. 889.

<sup>763</sup> Plaintiff’s Argument, Volume 3, at para. 891.

<sup>764</sup> Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 36; Exhibit 0431, Affidavit #1 of Elizabeth Jeff, October 8, 2004, at para. 117; Transcript, March 14, 2005, Ubill Hunlin Direct-Exam, at 0005, 13-16.

<sup>765</sup> For oral history accounts of this legend, please see, for example: Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, at para. 36; Transcript, January 17, 2005, David Setah Direct-Exam, at 00018, 27 – 00019, 11; Transcript, November 5, 2004, Julie Quilt Cross-Exam, atb 00034, 35 – 00035, 7; Exhibit 0431, Affidavit #1 of Elizabeth Jeff, October 8, 2004, paras. 116-118; Transcript, October 14, 2004, Harry Setah Direct-Exam, at 00009, 16 – 00010, 19; Transcript, April 19, 2005, Chief Ervin Charleyboy Direct-Exam, at 00008, 28 – 00009, 9; Transcript, March 14, 2005, Ubill Hunlin Direct-Exam, at 00004, 31 – 00005, 16; Transcript, September 9, 2003, Chief Roger William Direct-Exam, at 00048, 15 – 00049, 14; Transcript, February 17, 2005, Joseph William Direct-Exam, at 00022, 29 – 00023, 21; Exhibit 0437, Affidavit #1 of Patrick Alphonse, April 15, 2005, at para 25; Transcript, March 22, 2004, Minnie Charleyboy Direct-Exam, at 00024, 47 – 00025, 27; Exhibit 0367, Affidavit #2 of Gilbert Solomon, January 19, 2005, at paras. 89-91.

<sup>766</sup> Transcript, February 17, 2004, Chief Roger William Cross-Exam, at 00010, 10-34; Transcript, January 17, 2005, David Setah Direct-Exam, at 00019, 44 – 00020, 11.

<sup>767</sup> Plaintiff’s Argument, Volume 3, at para. 888(a).

(d) Dr. Dinwoodie’s evidence is that the nature of Tsilhqot’in occupation of land is best understood by also considering that their cultural relationship to lands went well beyond their utilitarian interests in it. In particular, Tsilhqot’in cultural relationship to land is empirically attested in their geographic place names and associated narratives.<sup>768</sup>

176. The evidence regarding Tsilhqot’in place names also supports the fact of Tsilhqot’in occupation of the southeast Tsilhqox Biny (Chilko Lake) lands for centuries. British Columbia’s archaeologist Morley Eldridge, on cross-examination based on the work of federal archaeologist Dr. Martin Magne, was of the opinion that aboriginal place names, by their nature, tend to be relatively stable over time. Furthermore, an abundance of different types of aboriginal place names justifies a presumption that the aboriginal group with which the names originate has occupied the named area most likely for centuries. This view is consistent with Dr. Dinwoodie’s “preliminary research suggests that Tsilhqot’in ethnogeographic terminology (place names, geographical nomenclature and associated narratives is abundant and the nature of that terminology supports the inference that their occupation of the territory has been exclusive and long term.” Tsilhqot’in witnesses used a litany of Tsilhqot’in ethnogeographic terms with respect to the area in question:

Ts’il?os  
Ts’i Ch’ed Tl’ad  
Nilhgwetizdi  
Naghaghant’ax  
Tl’echid Gunaz  
Yuhitah  
Yuhitah Biny  
Tu Nelhtseh Biny  
Ts’i Talh?ad Biny  
Ts’i Talh?ad Yeqox  
K’azba Gunlin  
Tsi Tese?an  
Tsi Tese?an Yeqox  
Tsi Tese?an Lhud Dzelh  
Tsilhqox Tu Tl’az

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<sup>768</sup> Plaintiff’s Argument, Volume 3, at para. 885.

### 3. SUMMARY AND CONCLUSION

177. Thus, a coherent body of evidence from the historical record, expert opinion and oral history establish that prior to, at and well after Crown sovereignty the Tsilhqot'in physically occupied the relevant lands of Ts'il'os (Mount Tatlow), and the Tl'echid Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts'i Talhl'ad (Rainbow Creek), Tsi Tese'an (Tchaikazan Valley) and Tsilhqox Tu Tl'az (Edmond Creek) watersheds that surround Tsilhqox Biny (Chilko Lake), as shown by their regular use of these lands for constructing enduring dwellings at base camps and as hunting and gathering grounds, as well as for trapping and fishing.<sup>769</sup> The Tsilhqot'in have Aboriginal title to these lands.

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<sup>769</sup> Plaintiff's Argument, Appendix 3, at paras. 136, 152, 186.