The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,

Respondent(s).

Case No. C70-9213
Subproceeding: 17-03

STILLAGUAMISH TRIBE OF INDIANS' RESPONSE IN OPPOSITION TO SWINOMISH MOTION FOR PARTIAL SUMMARY JUDGMENT OR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: JANUARY 29, 2021

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I. INTRODUCTION

The Swinomish Indian Tribal Community's ("Swinomish") Motion for Partial Summary Judgment or for Summary Judgment ("Motion") highlights exactly why summary judgment is inappropriate in this case. Dkt. # 179. Numerous issues of material fact, from Dr. Friday's testimony to the reasonable inferences that can be drawn from Stillaguamish's historical and ethnological evidence, preclude summary judgment. Stillaguamish has presented sufficient evidence that, when viewed in the light most favorable to Stillaguamish and drawing all justifiable inferences in its favor, a reasonable factfinder could find that Stillaguamish regularly fished Skagit Bay, Deception Pass, Holmes Harbor, Penn Cove and Saratoga Passage ("Claimed Waters").[1] The Court should therefore deny Swinomish's Motion.

Stillaguamish also asks the Court strike the expert report of Dr. Chris C. Friday ("Friday Report") offered by Swinomish because it is inadmissible and cannot be considered on summary judgment.

II. FACTUAL BACKGROUND

The historical, ethnographic and expert evidence presented by Stillaguamish in this case is sufficient to support a finding that at and before treaty times, Stillaguamish regularly fished the Claimed Waters. Stillaguamish maintained villages and encampments in the lower Stillaguamish River delta, and Stillaguamish occupied Camano Island at and before treaty times. Stillaguamish were familiar with and utilized the marine resources of the Claimed Waters. Stillaguamish navigated and traveled the Claimed Waters. Stillaguamish engaged in exogamy and other traditional Coast Salish cultural practices to the same extent as other Coast Salish tribes at and before treaty times. Expert for Stillaguamish, Dr. Chris C. Friday, opines that Stillaguamish regularly fished the Claimed Waters at and before treaty times.

[1] Swinomish confusingly asserts that it "disputes Stillaguamish's U&A claim to Port Susan, but this motion does not request dismissal of that claim" and presents no evidence concerning Port Susan, but then asks for summary judgment as to the entire case based on its re-imagined jurisdictional argument already rejected by this Court once. Dkt. # 179 at p. 1. Stillaguamish will respond as to Port Susan in the context of its own Motion for Partial Summary Judgment.

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A. THE EVIDENCE SUPPORTS STILLAGUAMISH'S CLAIM THAT IT FISHED THE CLAIMED WATERS AT AND BEFORE TREATY TIMES

1. Stillaguamish Maintained Villages And Encampments Adjacent To The Claimed Waters

The historical and ethnographic evidence demonstrates that Stillaguamish maintained villages and encampments in the lower Stillaguamish River delta and on Camano Island at and before treaty times. Stillaguamish Tribal elders born in treaty times have testified that Stillaguamish territory once included the lower Stillaguamish River delta, where their people occupied permanent villages and encampments. Anthropologists and ethnographers also have opined that Stillaguamish occupied the lower Stillaguamish River delta and Camano Island at and before treaty times. Historical maps of western Washington tribal territories at and before treaty times place the marine waters of Skagit Bay, Saratoga Passage, and in some cases, Deception Pass, Penn Cove, and Holmes Harbor within known Stillaguamish territory. *See* Dkt. #172-4; Dkt. # 172-5; Dkt. # 172-6.

Stillaguamish Tribal elder testimony associated with the *Duwamish, et al. v. United States*, 79 C. Cl. 530 (1934) ("*Duwamish et al.*"), case in the Court of Claims recounted Stillaguamish villages located on or near lower Skagit Bay at and before treaty times. In preparation for litigation in *Duwamish et al*., James Dorsey swore an affidavit in 1926 on behalf of Stillaguamish regarding "the camping grounds of Indians at time Governor Stevens made the treaty and where Indians were living at time white man ordered them away." Dkt. # 172-7; Dkt. # 172-8. James Dorsey (Quil-Que-Kadam) was a Stillaguamish elder and chief born in 1850 near Florence, Washington, in the lower Stillaguamish River delta. Dkt. # 172-8 at p. 6. In his affidavit, Chief Dorsey identified nearly a dozen Stillaguamish villages, encampments and cemeteries in the lower Stillaguamish River delta along the river to West Pass into lower Skagit Bay. *Id.* at pp. 6-9.

After consulting Tribal elders who were born in treaty-times and reaching an agreement with other tribes regarding Stillaguamish treaty-time territorial borders, Stillaguamish informed the Court through the testimony of Stillaguamish Tribal elders in *Duwamish et al.* that its treaty-time territory included lower Stillaguamish River delta. *See* Dkt. # 180-17; Dkt. # 180-10; Dkt.

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180-11 at pp. 13, 17; Declaration of Rob Roy Smith in Support of Stillaguamish Tribe of Indians' Response in Opposition to Summary Judgment Motions ("Smith Decl."), Ex. 1. The Stillaguamish treaty-time territory started "from Marysville around Warm Beach to water section thru Camano Island to [Milltown]" and then to the headwaters of Deer Creek and Pilchuck to the "head water of the Stillaguamish River." Smith Decl., Ex. 2. The southern boundary began "at [the] north west corner of Tulalip Indian Reservation following to north east point of Reservation to the head waters of sultan from here to head water of [the] Sauk [River]." *Id.* A significant number of Stillaguamish Tribal elders who participated in *Duwamish et al.* were born in the Stillaguamish River delta before or shortly after treaty times, and many remained there throughout their lifetimes. *See, e.g.*, Dkt. # 172-8 at p. 6 (James Dorsey); Smith Decl., Ex. 3 (Bob Harvey); *id.*, Ex. 4 (same); Dkt. # 180-11 at p. 28 (Sally Oxstein).

Before Judge Boldt, Stillaguamish Tribal elder Esther Ross confirmed that treaty-time Stillaguamish territory extended "[f]rom Milltown up to McMurray on up to Little Creek, up to the northern part there of the Darrington on over to the Stillaguamish watershed, to Granite Falls on down to the northeast and northwest of the Tulalip Reservation on through to Warren Beach to Stanwood was our territory." Dkt. # 172-16 at p. 4. Ms. Ross further explained that Stillaguamish territory also "[w]ent over halfway to Camano Island down to [Utsaladdy]," noting that Stillaguamish elder Sally Oxstein "lived in that area" and that Stillaguamish "went clam digging" there. *Id.*

Expert testimony presented to the Indian Court of Claims ("ICC") regarding Stillaguamish territory at and before treaty times similarly cataloged Stillaguamish villages located near the shores of lower Skagit Bay. Stillaguamish brought a claim against the United States before the ICC in *Stillaguamish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 1, Dkt. 207 ("Stillaguamish ICC Case"). Dr. Sally Snyder testified as an expert on behalf of Stillaguamish, and Dr. Carrol Riley testified as an expert on behalf of the United States, among other witnesses.

In her testimony, Dr. Snyder identified at least sixteen Stillaguamish village sites in the lower Stillaguamish River delta in an area known as "Qwadsak" near the shores of lower Skagit

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Bay, which she entered on a map and detailed in a chart titled "Stillaguamish Villages, Campsites, Cemeteries, etc." Dkt. # 172-3 at pp. 13-14; *see also* Dkt. # 172-9 at p. 3; Dkt. # 172-10. Dr. Snyder testified that the people who occupied the Qwadsak area in the lower Stillaguamish River delta were Stillaguamish. Dkt. # 180-49 at p. 37; Smith Decl., Ex. 5 at pp. 4-5.

Both Dr. Snyder and Dr. Riley testified that Stillaguamish occupied and used Camano Island at and before treaty times before the ICC. Dr. Snyder opined that Stillaguamish used the northern tip of Camano Island. Dkt. # 180-46 at pp. 32, 40. Dr. Riley also opined that Stillaguamish were present on and used Camano Island, and did not need permission from anyone to do so. *Id.*, Ex. 11 at pp. 3, 9-10; *id.*, Ex. 12 at pp. 4-5; Dkt. # 180-19 at p. 31.

Although she had no Stillaguamish informants, Dr. Snyder documented in her field notes that Stillaguamish people used and occupied the northern and southern ends of Camano Island, the Skagit River delta as well as Holmes Harbor. *See* Smith Decl., Ex. 6 at p. 3 ("Only the Kikialos and Stillaguamish lived on Camano, the latter [Stillaguamish] from the point south to Camano Head on the outside beach (west) on that end [to Camano Head]."); Dkt. # 180-13 at p. 3 (describing Stillaguamish man fishing in Holmes Harbor); Dkt. # 180-12 at p. 3 (informant J.J. "believes that the Stillaguamish had places on Camano Island, probably because their 'line' is at Warm Beach."). Even Dr. Astrida Blukis-Onat, expert for Swinomish, similarly opined in Subproceeding 93-1 that "[t]he area south of Camano Island State Park" was Stillaguamish territory. Smith Decl., Ex. 8 at p. 4.

2. Stillaguamish Utilized Marine Resources Of The Claimed Waters

The historical and ethnographic evidence shows that Stillaguamish utilized the marine resources of the Claimed Waters at and before treaty times. Accounts of Indian agents at Penn Cove and Holmes Harbor during treaty times detail Indian fishing and clamming activities in the area that included Stillaguamish people. Anthropologists have opined that Stillaguamish utilized the marine resources of the Claimed Waters, and archeologists have documented shell middens at known Stillaguamish villages.

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During treaty times, the Indian agents relocated Stillaguamish to reservations on Penn Cove and Holmes Harbor. While there, Stillaguamish were instructed to and did maintain their subsistence fishing and gathering practices in Skagit Bay, along Camano Island and the waters east of Whidbey Island, and on the mainland. The Indian agents observed Stillaguamish people clamming and fishing around Penn Cove in 1856. *Id.*, Ex. 9 at p. 8. The Indian agents also generally observed the Indians at Penn Cove "going and coming, as the tide serves them for digging clam." *Id.*, Ex. 10 at p. 3.

Evidence of shell middens in and around the villages in the lower Stillaguamish River delta Qwadsak area also indicate that Stillaguamish utilized marine resources at and before treaty times. Beginning in 1899, archeologist Harlan Smith excavated shell middens in and around Stanwood in the lower Stillaguamish River delta and on Camano Island. Dkt. # 180-3; Dkt. # 180-4; Dkt. # 180-5; Dkt. # 180-6; Dkt. # 180-7.

The firsthand accounts of Nels Bruseth describe shell middens in and around villages Stillaguamish were known to occupy. Mr. Bruseth, the son of a pioneer Scandinavian family and amateur historian, was born in 1889 in Stanwood, Washington. As a young boy, Mr. Bruseth became acquainted with his neighbors, the Stillaguamish, and learned their history. Dkt. # 172-1 at pp. 3-4. Mr. Bruseth first published "Indian Stories and Legends of the Stillaguamish and Allied Tribes" in 1926 and a second edition entitled "Indian Stories and Legends of the Stillaguamish, Sauk and Allied Tribes" beginning in 1950, which focused on Stillaguamish people and their customs at and before treaty times. Dkt. # 172-1; Dkt. # 172-2. Mr. Bruseth described the remnants of several shell middens near Stanwood, which lie in or near the villages identified by Chief James Dorsey and Dr. Snyder as Stillaguamish. Dkt. # 180-8 at p. 3; *see also* Dkt. # 172-9; Dkt. # 172-10.

Dr. Riley's testimony in the Stillaguamish ICC Case further evidences Stillaguamish utilization of marine resources from the Claimed Waters. In his testimony, Dr. Riley opined that the people at the village of "Quadsak or Quadsak-bihu" located "at the mouth of the Stillaguamish River" were "more sea than river oriented." Smith Decl., Ex. 11 at pp. 5-7. Dr. Riley further

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noted that the Stillaguamish went down the Stillaguamish River "to the ocean perhaps on clamming expeditions." *Id.* at p. 4. Dr. Riley also prepared a report in 1956 titled "Early History of Western Washington Indians" for consideration by the ICC. Dkt. # 172-13. In this report, Dr. Riley opined that Stillaguamish "came down to Port Susan and lower Skagit Bay for clamming and fishing." *Id*. at p. 5.

Stillaguamish Tribal elder Esther Allen testified to the ICC that Stillaguamish "often went clamming and gathered mussel shells." Dkt. # 180-19 at p. 26.

3. Stillaguamish Navigated And Traveled The Claimed Waters

The historical and ethnographic evidence indicates that Stillaguamish had ocean-going canoes, and that Stillaguamish customarily traveled the Claimed Waters at and before treaty times. Documents and testimony of Tribal elders, missionaries, early settlers and Indian agents detail frequent Stillaguamish travel throughout the Claimed Waters and larger Puget Sound region at and before treaty times, as well as Stillaguamish ocean-going canoes.

Sally Oxstein, a Stillaguamish Tribal elder who was born in the lower Stillaguamish River delta before treaty times and who testified in *Duwamish et al.*, gave a history of her family traveling to Fort Victoria on Vancouver Island when she was a young girl. Dkt. # 180-10 at pp. 3-5. Stillaguamish tribal elder Esther Allen also testified before the ICC that Stillaguamish used to travel to Victoria. Dkt. # 180-19 at p. 26. Around the same time, missionaries and early traders also documented Stillaguamish traveling across Puget Sound marine waters to destinations as far as Fort Nisqually and the west side of Whidbey Island. *Id*., Ex. 13 (noting Stillaguamish at Fort Nisqually shortly after 1833); *id.*, Ex. 14 (same 1835); *id*., Ex. 15 (same 1848); *id.*, Ex. 16 (Stillaguamish camped on the west side of Whidbey Island).

Indian agent correspondence and logs from 1856 and 1857 likewise demonstrate that Stillaguamish were both familiar with the Claimed Waters and that Stillaguamish knew how to navigate those waters. In 1856 and 1857, for instance, Indian agents observed Stillaguamish regularly traveling the marine waters off the east shore of Whidbey Island and off the west and north ends of Camano Island, and traveling to and from the mainland. *Id*., Ex. 9 at pp. 7-19; *id*.,

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Ex. 10 at pp. 5-6. These Indian agents also documented Stillaguamish travelling as far as Bellingham Bay in 1856 and 1857. *Id*., Ex. 17. Similarly, in his 1854 report on the tribes of Western Washington, early ethnographer and treaty commission member George Gibbs wrote about Puget Sound tribes, including the "Stoluckwamish" or Stillaguamish,

> living upon the eastern shore possess also territory upon the islands, and their usual custom is to resort to them at the end of the salmon season—that is about the middle of November. It is there that they find the greatest supply of shell-fish, which form a large part of their winter stoke, and which they dry for both their own use and for sale to those of the interior.

Id., Ex. 18 at pp. 26-27.

Early settler Nels Bruseth also observed that a Stillaguamish chief (Ku-kwil-Khaedib) had both shovel nose canoes for the river and "Stie Wathl" canoes for traveling the Puget Sound, and that Ku-kwil-Khaedib "made long journeys on the Sound," including to Seattle and Nisqually. Dkt. # 172-2 at p. 6.

4. Stillaguamish Engaged In Common Coast Salish Cultural Practices

Dr. Snyder additionally noted in both her ICC testimony and field notes that the Stillaguamish were intermarried with their neighbors and maintained peaceful relations. Smith Decl., Ex. 7 at p. 5 ("The Kikialos married with all the tribes around them; the Skagit, Stillaguamsih [sic], Snohomish, Swinomish and up-river people."); Dkt. # 180-46 at p. 32 ("I am absolutely unaware of any hostilities between the Stillaguamish and the neighboring tribes."); Dkt. # 180-49 at p. 44; Smith Decl., Ex. 5 at p. 5 ("As far as I know the Stillaguamish and Kikiallus got along very nicely."). Dr. Riley similarly acknowledged the extensive kinship ties Stillaguamish maintained throughout the Puget Sound region. Smith Decl., Ex. 11 at p. 13 ("There is no question of it… that there were kinship ties between the people in the Stillaguamish River Valley and outside the Stillaguamish River Valley."); *id*. at p. 12 ("I suspect that there were plenty of contacts and intermarriage" between the Kikiallus and Qwadsak villages). Dr. Natalie A. Roberts in her 1975 "A History of the Swinomish Indian Tribal Community" similarly noted extensive ties between Stillaguamish and Kikiallus. *Id*., Ex. 19 at p. 5.

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In his *Duwamish et al.* testimony, Stillaguamish Tribal elder and Chief James Dorsey explained that at treaty-times all the "people here on the Sound," including the Stillaguamish, "consider themselves as relatives" and "the different tribes[] were all related more or less," then referred to Stillaguamish ties with the Duwamish. Dkt. # 180-11 at pp. 19-20, 22. Early settlers, missionaries, and Indian agents likewise documented Stillaguamish kindship ties throughout the Puget Sound area and beyond. *See id.*, Ex. 20 (indicating Stillaguamish ties to Cowichan); Dkt. # 180-14 at pp. 4-6; Dkt. # 180-14 at pp. 4-5 (Indian agent documents record use of shared camps near Penn Cove, Holmes Harbor, and Skagit Head that include Stillaguamish as a result of exogamous bilateral ties); Smith Decl., Ex. 10 at p. 4 (same); *id.*, Ex. 21.

B. THE EXPERT EVIDENCE SUPPORTS STILLAGUAMISH'S CLAIM THAT IT FISHED THE CLAIMED WATERS AT AND BEFORE TREATY TIMES

The expert evidence in this case likewise supports Stillaguamish's claim to the Claimed Waters. Dr. Chris C. Friday opines that Stillaguamish regularly fished marine and estuarine shorelines of Camano and Whidbey, and the open waters of Skagit Bay, Deception Pass, and Saratoga Passage at and before treaty times. Declaration of Chris Friday in Support of Opposition to All Responding Tribes' Motion for Partial Summary Judgment ("Friday Decl."), ¶¶ 2, 10. Dr. Friday employed the historical method and Carlson Model to the record in this case, and offers his opinions to a reasonable degree of historical certainty. *Id.* ¶¶ 8-9, 53. Dr. Friday bases his opinions on the following:

- Historical and ethnographic evidence demonstrating that Stillaguamish maintained villages and encampments in the lower Stillaguamish River delta and occupied Camano Island, *id.* ¶¶ 11, 13-19, 25, 33, 42;
- Historical and ethnographic evidence indicating Stillaguamish utilized the marine resources of the Claimed Waters, *id.* ¶¶ 21, 23, 24, 26-27, 29, 32, 34-41, 43;
- Historical and ethnographic evidence describing Stillaguamish traveling the Claimed Waters and throughout the Puget Sound region, *id.* ¶¶ 12, 20, 45-53;

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- Historical and ethnographic evidence showing Stillaguamish practiced exogamy on par with other Coast Salish people, *id*. ¶¶ 31, 38; and,
- Historical and ethnographic evidence regarding general treaty-time Coast Salish cultural practices, *id*. ¶¶ 21, 22, 24, 44.

III. LAW AND AUTHORITY

A. SUMMARY JUDGMENT

The Court may only enter summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine material fact issue exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For the purposes of defeating summary judgment, the nonmoving party need not establish a material fact issue conclusively in its favor in order to establish the existence of a factual dispute. *T.W. Elec. Serv., Inc. v. Pax. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id*. If the moving party meets its initial burden of showing that there is no evidence which supports an element essential to the non-movant's claim, the nonmoving party then must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When considering the evidence on a motion for summary judgment, the Court must draw all reasonable inferences on behalf of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). The Court also must believe the non-moving party's evidence. *Posey v. Lack Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008). The Court may not, however, weigh conflicting evidence or assess credibility. *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Agosto v. INS*, 436 U.S. 748, 756 (1978); *Anderson*, 477 U.S. at 249). "[W]here divergent ultimate inferences may reasonably be drawn from the undisputed facts,

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summary judgment is improper." *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006).

"[A]n expert's opinion or interpretation of evidence is itself evidence." *Rodriguez v. Olin Corp.*, 780 F.2d 491, 496 (5th Cir. 1986) (citing Fed. R. Evid. 703). "As a general rule, summary judgment is inappropriate where an expert's testimony supports the nonmoving party's case." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989). The Ninth Circuit has explained:

> Expert opinion is admissible and may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and that the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not.

Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985) (per curiam).

B. *UNITED STATES V. WASHINGTON*

Stillaguamish reserved in the Treaty of Point Elliott the right of taking fish at all of its U&A fishing grounds and stations. 12 Stat. 927 (Apr. 11, 1859). Stillaguamish possesses the burden to produce evidence that its U&A fishing grounds at and before treaty times included the Claimed Waters. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981). U&A fishing grounds include "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) ("*Final Decision No. 1*").

Little documentation of Indian fishing locations in and around 1855 exists today. *United States v. Washington*, 459 F. Supp. at 1059 ("In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas."). This Court has repeatedly acknowledged that evidence of treaty-time fishing activities is "sketchy and less satisfactory than evidence available in the typical civil

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proceeding," and the documentation that does exist is "extremely fragmentary and just happenstance." *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988). Accordingly, the stringent standard of proof that ordinarily operates in civil proceedings does not apply here. *Id*. at 318. In determining whether Stillaguamish has met its burden, "the Court gives due consideration to the fragmentary nature and inherent limitations of the available evidence," *United States v. Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017), while making its findings "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom" that an area is U&A on a more probable than not basis. *Final Decision No. 1*, 384 F. Supp. at 322.

In demonstrating that its U&A includes the Claimed Waters, Stillaguamish "may rely on both direct evidence and reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant sources to show the probable location and extent of [its] U&As." *United States v. Washington*, 129 F.Supp.3d at 1110. Under this relaxed standard, the Court has held that fishing activity may be presumed in a body of water that bordered a tribe's village locations, including with some limitations, those villages identified in ICC proceedings. *United States v. Washington*, 459 F. Supp. at 1059. The Court also has relied on the testimony of tribal elders and, in particular, expert testimony as evidence "to show the *probable location* and extent of [a tribe's] U&As." *United States v. Washington*, 129 F.Supp.3d at 1110 (emphasis added) (citing *United States v. Washington*, 626 F.Supp. 1405, 1431 (W.D. Wash. 1985) ("*Subproceeding 80-1*"); *see also United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984).

IV. ARGUMENT

A. THE COURT MUST STRIKE THE FRIDAY REPORT

Swinomish has submitted the entire 294-page Friday Report in support of its Motion, and relies primarily on the Friday Report to support both its factual assertions and legal arguments. Dkt. # 180-2; Dkt. # 179 at pp. 5-11, 13-14, 17-21, 23-26. The Friday Report is, however, inadmissible on summary judgment and must therefore be stricken. First, Swinomish's counsel attached the Friday Report to his own declaration, but he is not competent to testify about its

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contents. *Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023, 1027 (W.D. Wash. 2011) (citing Fed. R. Civ. P. 56(c)(4)). Second, the Friday Report is unsworn and "courts in this circuit have routinely held that unsworn expert reports are inadmissible." *Id.* The Court must therefore strike the Friday Report pursuant to LCR 7(g). *Id.*

B. GENUINE MATERIAL FACT ISSUES PRECLUDE SUMMARY JUDGMENT

Swinomish argues that "Stillaguamish cannot present evidence sufficient to establish marine U&A beyond Port Susan." Dkt. # 179 at p. 15. On summary judgment, however, Stillaguamish does not need to "establish a material issue of fact conclusively in its favor" in order to show a factual dispute exists; instead, all Stillaguamish need only show is that a factfinder must resolve the differing versions of the truth at trial. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. Stillaguamish has made that showing here. Stillaguamish has produced substantial evidence, including the expert testimony of Dr. Friday, in support of its U&A claims to the Claimed Waters. If the Court believes Stillaguamish's evidence, views the evidence in the context of the U&A proof standards as established by the law of this case, in the light most favorable to Stillaguamish, and draws all reasonable inferences in its favor—as the Court must on summary judgment—there exists evidence sufficient for a reasonable trier of fact to find that Stillaguamish regularly fished the Claimed Waters at and before treaty times. *See Matsushia Elec. Indus. Co.*, 475 U.S. at 587; *Posey*, 546 F.3d at 1126. Stillaguamish has thus met its burden to show that significant material facts preclude summary judgment. *See Celotex*, 477 U.S. at 324.

1. Stillaguamish's Expert Testimony Evidence Precludes Summary Judgment

Stillaguamish has presented expert testimony that raises material fact issues and supports its claims to the Claimed Waters, precluding summary judgment. *See In re Apple Computer Sec. Litig.*, 886 F.2d at 1116. Dr. Friday's opinions constitute evidence sufficient for a reasonable factfinder to find that Stillaguamish regularly fished the Claimed Waters at and before treaty times. *Anderson*, 477 U.S. at 255.

Dr. Friday is qualified to offer expert testimony on Stillaguamish treaty-time fishing based on his education, training and experience as a historian, particularly in light of his considerable

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work in the fields of Pacific Northwest, Coast Salish and American Indian history. Friday Decl., ¶¶ 3-8; *United States v. Abonce-Barrera*, 257 F.3d 959, 964-65 (9th Cir. 2001) ("extensive education in a relevant field, along with years of experience working with the applicable subject matter provide more than adequate qualifications."). Dr. Friday is accordingly competent offer expert testimony on summary judgment. Dr. Friday has opined that at and before treaty times, Stillaguamish regularly fished the Claimed Waters, and explained the factual basis for those opinions and the methodology he employed by sworn declaration. *See* Friday Decl. Stillaguamish has therefore presented expert evidence sufficient to preclude summary judgment. *See Bulthuis*, 789 F.2d at 318.

Swinomish's criticisms of the factual basis for Dr. Friday's opinions and his conclusions do not render his testimony inadmissible on summary judgment. *See* Dkt. # 179 at p. 18. Instead, these criticisms alone create triable material fact disputes. *Mullins v. Premier Nutrition Corp.*, 178 F.Supp.3d 867, 895-96 (N.D. Cal. 2016). "In this Circuit, an expert's decision to use one form of scientific methodology over another goes to the expert's credibility rather than the admissibility of the testimony." *Abarca v. Franklin Cnty. Water. Dist.*, 761 F.Supp.2d 1007, 1029-30 (E.D. Cal. 2011) (citing *United States v. Garcia*, 7 F.3d 855, 889-90 (9th Cir. 1993)). Swinomish's attacks are thus best directed at trial.[2]

Further, Dr. Friday's observations about general treaty-time Coast Salish practices will not undo *United States v. Washington* as Swinomish claims because Dr. Friday's opinions on general Coast Salish practices are tied directly to specific treaty-time, Tribal elder or ethnographic evidence of Stillaguamish occupation of land adjacent to the Claimed Waters, travel through the Claimed Waters, and evidence of marine resource gathering from the Claimed Waters. Friday Decl., ¶¶ 15-18, 23, 27-33, 38, 41-43, 45-49, 52. Recall that Dr. Lane frequently relied upon

[2] Like Dr. Friday, Dr. Lane similarly relied on general evidence of travel in support of her opinions regarding Swinomish marine U&A, citing the fact that "open marine areas in the straits and in Puget Sound generally were undoubtedly used by all of the people who lived in the vicinity and who travelled through them" Dkt. # 180-47 at p. 32. Dr. Lane likewise relied on general Coast Salish treaty-time practices in support of her opinions that Swinomish fished particular marine areas. *See id*. at pp. 24, 27-32. It is strange that Swinomish now so fervently criticizes the very type of expert opinion that served as the basis for its own vast marine U&A.

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general Coast Salish cultural practices when rendering her expert opinions, which the Court has in turn relied upon in making U&A findings. *See, e.g., Subproceeding 80-1*, 626 F.Supp. at 1528-30. Notably, Dr. Lane specifically relied upon general Coast Salish practices in support of her opinions regarding Swinomish U&A. *See* Dkt. # 180-47 at pp. 28-30, 32.

2. Stillaguamish's Additional Evidence Precludes Summary Judgment

Swinomish argues that "Stillaguamish's evidence cannot support a reasonable inference for U&A beyond Port Susan" because the evidence "does not *directly* establish fishing by the Stillaguamish tribe in such locations and it cannot support even a reasonable inference to that effect." Dkt. # 179 at p. 16 (emphasis added). Not only is "direct" evidence not the standard, *see* part C.1 *supra*, the extensive evidentiary record in this Subproceeding, when believed, viewed in the light most favorable to Stillaguamish and drawing all justifiable inferences in its favor, supports a reasonable inference that Stillaguamish fished the Claimed Waters at and before treaty times. Moreover, aside from the fact that the Court must draw inferences in favor of Stillaguamish, the different inferences that Swinomish and Stillaguamish argue can be drawn from Stillaguamish's evidence illustrate precisely why summary judgment is inappropriate in this case.[3] *See id*. at pp. 16-18; *Miller*, 454 F.3d at 988 ("where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper."). Stillaguamish has therefore raised material fact issues and provided sufficient evidence from which a reasonable factfinder could find that Stillaguamish regularly fished the Claimed Waters at and before treaty times. *Anderson*, 477 U.S. at 250.

Stillaguamish has produced evidence that at and before treaty times, its people occupied villages along the lower Stillaguamish River delta near the shores of Skagit Bay and utilized the marine resources of lower Skagit Bay. *See* Dkt. # 172-3 at pp. 13-14; Dkt. #172-4; Dkt. # 172-5; Dkt. # 172-6; Dkt. # 172-7; Dkt. # 172-8; Dkt. # 172-9 at p. 3; Dkt. # 172-16 at p. 4; Dkt. # 172-10; Dkt. # 180-10; Dkt. # 180-11 at pp. 13, 17, 28; Dkt. # 180-17; Dkt. # 180-49 at p. 37; *see also*

[3] "[A]t the summary judgment stage, the judge's function is not himself to weigh the evidence but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

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Smith Decl., Exs. 1-4; *id.*, Ex. 5 at pp. 4-5. Stillaguamish has produced evidence that at and before treaty times, Stillaguamish also occupied Camano Island and utilized resources at that location. *See* Dkt. # 180-12 at p. 3; Dkt. # 180-19 at p. 26; Dkt. # 180-46 at pp. 32, 40; *see also* Smith Decl., Ex. 6; *id.*, Ex. 11 at pp. 3, 9-10; *id.*, Ex. 8 at p. 4. When viewed in the light most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the Court may find from this evidence that Stillaguamish regularly fished Skagit Bay and the waters adjacent to Camano Island. *See Subproceeding 80-1*, 626 F.Supp. at 1528 ("Winter villages were located along the salmon streams, at the heads of inlets near the mouth of such streams, and on protected coves and bays. During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages."); *see also United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 436 (9th Cir. 2000) ("[M]ost groups claimed autumn fishing use rights in the waters near to their winter villages.").

Stillaguamish has presented evidence indicating that the Stillaguamish who lived further upriver from those at the Stillaguamish River delta traveled down the Stillaguamish River to harvest marine resources in Skagit Bay. *See* Dkt. # 172-13 at p. 5; Smith Decl., Ex. 11 at p. 4.[4] Stillaguamish also has presented evidence that Stillaguamish utilized marine resources off the east shores of Whidbey Island. Smith Decl., Ex. 9 at p. 8; *id.*, Ex. 10 at p. 3. When viewed in the light most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the Court may find from this evidence that Stillaguamish regularly fished Skagit Bay. *See United States v. Washington*, 19 F.Supp.3d 1252, 1310-11 (W.D. Wash. 1997) (expanding Muckleshoot marine U&A based on finding that Muckleshoot was an "upriver tribe" that "occasionally" and "from time to time" traveled to the "open waters and shores of Elliott Bay"); *see also Subproceeding 80-1*, 626 F.Supp. at 1528 ("Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This was especially true if shellfish beds were

[4] In offering her opinions regarding Swinomish marine U&A, Dr. Lane likewise relied upon the general fact that "many people moved down the rivers to the saltwater in the summer to fish, to collect shellfish, and for other purposes. Similarly, many costal peoples moved out in to the islands for spring and summer fishing." Dkt. # 180-47 at p. 30.

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present… People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish.").

Stillaguamish has presented evidence of shell middens in and near the villages in the lower Stillaguamish River delta that were occupied by the Stillaguamish. *See* Dkt. # 172-9; Dkt. # 172-10; Dkt. # 180-3; Dkt. # 180-4; Dkt. # 180-5; Dkt. # 180-6; Dkt. # 180-7; Dkt. # 180-8 at p. 3. When viewed in the light most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the Court may find this shell midden evidence indicates the people who resided in these lower Stillaguamish River delta villages "continuously engaged in harvesting" particular marine species over a period of time and such evidence suggests a particular directional orientation, in this case towards the marine waters of Skagit Bay and beyond. *See United States v. Washington v. Washington*, 129 F.Supp.3d at 1091 (shell middens can demonstrate "aboriginal… occupancy evidenc[ing] a community continuously engaged in harvesting" particular species); *id.* (finding that "the types of species found at the Quileute sites suggest a strong oceanic orientation.").

Stillaguamish has presented evidence that at and before treaty times, Stillaguamish people travelled to Fort Victoria and widely throughout the Puget Sound region to trade and visit relations. *See* Dkt. #172-2 at p. 6; Dkt. # 180-10 at pp. 3-5; *see also* Smith Decl., Ex. 9 at pp. 7-19; *id.*, Ex. 10 at pp. 5-6; *id.*, Exs. 13-16; *id.*, Ex. 17; *id.*, Ex. 18 at pp. 26-27. When viewed in the light most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the Court may find that Stillaguamish regularly fished the Claimed Waters, including upper Skagit Bay and Deception Pass. *See Subproceeding 80-1*, 626 F.Supp. at 1529 ("The documentation of the presence of Snohomish Indians at Fort Langley during pre-treaty times is spotty and generally happenstance, but it would indicate that the Snohomish frequently traveled to the Fraser River for trading of both salmon and furs."); *id.* (a round trip to the Fraser River from the mouth of the Snohomish River would normally have taken from two to four weeks. During such travels they would have harvested salmon accessible to them); *see also United States v. Lummi Indian Tribe*, 841 F.2d at 320 ("While traveling through an area and incidental trolling are not sufficient to establish an area as [U&A],

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frequent travel and visits to trading posts may support other testimony that a tribe regularly fished certain waters."); *see United States v. Lummi Indian Tribe*, 235 F.2d 443, 452 (9th Cir. 2000) (holding that Admiralty Inlet was within the Lummi's grounds because it was a "passage" through which they Lummi would have traveled).

Stillaguamish has presented evidence that at and before treaty times, Stillaguamish intermarried with tribes throughout the Puget Sound region and engaged in exogamy to the same extent as its neighbors, which indicates that it was customary for Stillaguamish to travel extensively in the Claimed Waters. *See* Dkt. # 180-14 at pp. 4-6; Dkt. # 180-14 at pp. 4-5; Dkt. # 180-46 at p. 32; Dkt. # 180-49 at p. 44; Dkt. # 180-11 at pp. 19-20, 22; *see also* Smith Decl., Ex. 5 at p. 5; *id*., Ex. 7 at p. 5; *id*., Ex. 10 at p. 4; *id*., Ex. 11 at p. 13, *id*., Ex. 12; *id*., Ex. 19 at p. 5; *id.*, Exs. 20-21; *see also Subproceeding 80-1*, 626 F.Supp. at 1529 ("It was normal for all of the Indians in western Washington to travel extensively either harvesting resources or visiting in-laws, because they were intermarried widely among different groups."); *id*. at 1530 ("The widespread intermarriage among the tribes surrounding Puget Sound would indicate that travel through its marine waters occurred frequently and on a regular basis.").

C. SWINOMISH'S ARGUMENTS DO NOT SUPPORT ENTRY OF SUMMARY JUDGMENT

1. The Court Does Not Require Direct Evidence Of U&A Fishing Locations

Swinomish argues this Court should grant summary judgment because "there is no direct evidence that Stillaguamish fished in Skagit Bay or beyond." Dkt. # 179 at pp. 4, 16-17. Swinomish is wrong. Direct evidence is not—and never has been—required to establish U&A. The Court has explained "[e]ither direct evidence or reasonable inferences from documentary exhibits, expert witness reports and other testimony as to the probable location and extent of usual and accustomed treaty fishing areas may be sufficient to support a legal determination of the areas involved." *Subproceeding 80-1*, 626 F.Supp. at 1531; *see also United States v. Washington*, 129 F.Supp.3d at 1110.

Not only is direct evidence not required to support a finding of U&A, the Court has repeatedly declined to follow stringent proof standards that Swinomish now urges the Court to

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adopt. *United States v. Washington*, 459 F.Supp. at 1059; *United States v. Lummi Indian Tribe*, 841 F.2d 317; *Subproceeding 80-1*, 626 F.Supp. at 1531 (citing *United States v. Washington*, 730 F.2d 1314, 1317-18 (9th Cir. 1984)). The Court has explained the reasons for not requiring direct evidence or applying stringent proof standards in U&A adjudication cases:

> Available evidence of treaty-time fishing activities is sketchy and less satisfactory than evidence available in the typical civil proceeding. What documentary evidence does exist is extremely fragmentary and just happenstance. As Judge Boldt observed, in determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Accordingly, the stringent standard of proof that operates in ordinary civil proceedings is relaxed.

United States v. Washington, 129 F.Supp.3d at 1110 (internal quotations and citations omitted).

Even in her report for Swinomish regarding its marine U&A areas, Dr. Lane specifically acknowledged that "[t]here are greater difficulties in specifying marine areas used by one or another Indian group than is the case with river areas," and recognized that "[i]nformation respecting specific areas of use by particular groups at treaty times is incomplete and sometimes conflicting." Dkt. # 180-47 at pp. 30-31. Dr. Lane introduced her opinions regarding Swinomish treaty-time marine fishing by providing context to this Court regarding the "the problems associated with documentation of marine fishing areas," before offering general descriptions of Coast Salish practices. *Id*. at p. 24. The issues with evidence regarding treaty-time marine fishing is no different with Stillaguamish. Thus, because the Court has held for over forty years that direct evidence is not required to establish U&A and Stillaguamish has produced evidence sufficient to support a finding that Stillaguamish regularly fished the Claimed Waters at and before treaty times, the Court must deny summary judgment on the basis of alleged lack of "direct" evidence.

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2. Stillaguamish Has Produced Evidence Sufficient To Support Finding That Stillaguamish Occupied The Lower Stillaguamish River Delta At And Before Treaty Times

Swinomish contends "Stillaguamish cannot establish marine U&A based on occupation of the Qwadsak area during treaty times" because it claims "Stillaguamish cannot establish an intertribal agreement" and collateral estoppel otherwise prevents Stillaguamish from presenting evidence in this proceeding that Stillaguamish occupied the lower Stillaguamish River delta at and before treaty times. Dkt. # 179 at pp. 19-24. As a threshold issue, Stillaguamish does not claim that the intertribal agreement is a binding legal contract, as Swinomish seems to believe, *see id.* at p. 19. Rather, Stillaguamish offers evidence in the form of meeting notes, a signed agreement and attorney correspondence all of which indicate that in preparation for *Duwamish et al.*, Stillaguamish and its neighboring tribes agreed between themselves on what boundaries they would each claim in the *Duwamish et al.* litigation. For Stillaguamish, these boundaries included the lower Stillaguamish River delta and Camano Island, illustrating that at treaty-times Stillaguamish occupied these areas and utilized the marine resources of the adjacent waters.

First, contrary to Swinomish's representation, Stillaguamish does not need to "establish" an intertribal agreement to defeat summary judgment. *T.W. Elec. Serv., Inc.*, 809 F.2d at 631. Stillaguamish has presented evidence indicating that before Stillaguamish and its neighboring tribes participated in *Duwamish et al.*, the tribes met and informally agreed upon their respective boundaries. Smith Decl., Ex. 22 (document signed by representatives of Stillaguamish and Upper Skagit detailing tribal boundaries); Dkt. # 180-18 at p. 2 (letter from attorney to Stillaguamish expressing "I was glad to note that the boundary lines of your tribe have been fitted. I believe practically all of the tribes whom I represent have agreed on their original boundaries and in my judgment this is the proper thing to do at this time, as we do not want to leave anything unsettled which might cause a dispute between the different tribes in the future…"). The Court must view this evidence in the light most favorable to Stillaguamish and draw all reasonable inferences from this evidence in its favor. *Anderson*, 477 U.S. at 249-50. Accordingly, Stillaguamish has produced

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evidence sufficient to show that the dispute regarding the intertribal agreement requires the factfinder to resolve the truth of the issue at trial, which precludes summary judgment. *Id.*

More importantly, even if there was no agreement, the intertribal agreement is not the only evidence Stillaguamish has presented that demonstrates its people occupied the lower Stillaguamish River delta at and before treaty times. Stillaguamish also has presented Tribal elder testimony and ethnographic evidence confirming that Stillaguamish maintained villages in that area at and before treaty times. *See, e.g.*, Dkt. # 172-3 at pp. 13-14; Dkt. # 172-9 at p. 3; Dkt. # 172-10; Dkt. # 180-10; Dkt. # 180-49 at p. 37. This evidence in and of itself is sufficient to support a finding that at and before treaty times, Stillaguamish likely occupied the lower Stillaguamish River delta. *United States v. Washington*, 129 F.Supp.3d at 1110 (the Court bases its finding "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom.").

3. Collateral Estoppel Does Not Prohibit The Court From Considering Evidence That Stillaguamish Occupied Qwadsak At Treaty-Times

Swinomish argues that "collateral estoppel bars Stillaguamish's claim to treaty-time occupation of the Qwadsak area." Dkt. # 179 at p. 20. Not so; the issues in this case and the Stillaguamish ICC Case are not identical, and Stillaguamish's treaty-fishing rights were not actually litigated in the Stillaguamish ICC Case. The Stillaguamish ICC Case involved claims for individual monetary compensation based on the taking of lands. 15 Ind. Cl. Comm. 1, Dkt. 207. In this case, Stillaguamish is not seeking compensation for or title to land it occupied at treaty-times. Dkt. # 4. Neither the ICC factual findings nor conclusion discussed Stillaguamish treaty fishing rights. Dkt. # 180-19. The ICC did not resolve whether Stillaguamish may exercise marine fishing rights based in part on treaty-time occupancy of the lower Stillaguamish River delta. *See* United *States v. Oregon*, 787 F.Supp. 1557, 1561 (D. Or. 1992) (adverse ICC decision did not preclude Colville Tribe from bringing U&A treaty fishing claim because ICC did not determine whether Colville could exercise treaty rights).

The Court has warned that given the different purposes of the ICC, evidence derived from those proceeding and ICC opinions must be scrutinized carefully. *See United States v.*

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Washington, 459 F.Supp. at 1059. As Tulalip correctly observed in *Subproceeding 80-1*, "[ICC] proceedings generally were to determine the home territory occupied aboriginally by a tribe, rather than the tribe's more extensive marine fishing places." Smith Decl., Ex. 24 at p. 3. The Ninth Circuit has indicated that collateral estoppel based on ICC decisions does not bind the Court in *United States v. Washington* treaty fishing rights determinations. In *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), the court explained that because the claims before the ICC involved compensation for individuals and not fishing rights for tribal units, and the causes of faction and factual issues litigated were different, collateral estoppel was inapplicable. *Id*. at 1374.

Stillaguamish also has presented substantial evidence that Frederick Post—its attorney during the ICC Stillaguamish Case and who also served as attorney for Kikiallus (among others)—relinquished the Stillaguamish claim to Qwadsak in favor of Kikiallus without the knowledge or consent of Stillaguamish. Smith Decl., Ex. 11 at p. 8; *id*., Exs. 7, 25-28. The experts in the Stillaguamish case did not agree that Qwadsak fell within Kikiallus treaty-time territory, and the Kikiallus representative also objected when he learned of Mr. Post's actions. *Id*., Ex. 11 at pp. 11-12 ("… I do not feel any justification for including the Quadsakbehu with the Kikiallus village…"); *id*., Ex. 23.

4. This Court Possesses Jurisdiction Over Stillaguamish's RFD

Leaving no argument unmade, however meritless, Swinomish finally appears to contend that this Court lacks jurisdiction because Stillaguamish has purportedly produced no new evidence. Dkt. # 179 at pp. 13, 24-26. Tellingly, Swinomish admits that it makes this argument only to preserve the issue.[5] *Id*. at p. 24. The Court must deny Swinomish's request to grant summary judgment as to jurisdiction, however, because Swinomish has failed to carry its initial burden—

[5] Swinomish need not repeat the jurisdictional argument to preserve it for appeal; rather, by raising it in a motion to dismiss it has already been preserved. *See United States v. Harue Hayashi*, 282 F.2d 599, 601 (9th Cir. 1960) (in federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved for review). Given that the Court's ruling as to jurisdiction was based on its interpretation of the language in Judge Boldt's historic rulings (*see* Dkt. # 91), that finding need not be re-argued on summary judgment as the basis for the finding has not changed. The Court should deny Swinomish's motion for summary judgment requesting dismissal for lack of jurisdiction for the same reasons it relied upon nearly two years ago.

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Swinomish has failed to produce admissible affirmative evidence in support of its argument regarding jurisdiction. *See Nissan Fire & Marine Ins. Co. v. Fritz*, 210 F.3d 1099, 1105-06 (9th Cir. 2000). The only evidence Swinomish produces in support of this argument is the Friday Report. Dkt. # 179 at pp. 24-26. The unsworn Friday Report is inadmissible and cannot be considered by the Court on summary judgment. Fed. R. Civ. P. 56(c)(4); *Harris*, 829 F.Supp.2d at 1027.

Regardless, Dr. Friday's expert opinions constitute new evidence. *Rodriguez*, 780 F.2d at 496 (citing Fed. R. Evid. 703) ("[A]n expert's opinion or interpretation of evidence is itself evidence."). Dr. Friday's research uncovered hundreds of pages of evidence which supports Stillaguamish's U&A claim. Indeed, Swinomish acknowledges the variety of evidence relied upon by Stillaguamish, including records of intermarriage, records of treaty-time trading posts, tribal elder testimony, and the existence of shell middens on territory Stillaguamish claims as U&A—all of which are appropriate forms of evidence to establish U&A that have never been presented by Stillaguamish before. Dkt. # 179 at pp. 25-26. These evidentiary sources support Stillaguamish U&A in the Claimed Waters and meet the standards of Paragraph 25(a)(6).

V. CONCLUSION

Swinomish has failed to make the exceptional showing that no reasonable trier of fact could find that Stillaguamish regularly fished the Claimed Waters at and before treaty times. As with Upper Skagit and Tulalip, Swinomish is merely attempting to create a special "Stillaguamish evidentiary rule" in this case to defeat Stillaguamish treaty rights. This attempt must fail. Stillaguamish has carried its burden on summary judgment by presenting significant probative evidence in the form of expert testimony as well as historical and ethnographic documentation from which a reasonable factfinder could—and has as in the case of *Subproceeding 80-1*—find that Stillaguamish regularly fished the Claimed Waters. Stillaguamish also has raised genuine issues of material fact that preclude summary judgment as to the Claimed Waters. The material fact issues raised by Stillaguamish are sufficient to defeat summary judgment and can only be resolved at trial.

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