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 TULALIP TRIBES' MOTION FOR PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: JANUARY 29, 2021

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I. INTRODUCTION

The Tulalip Tribes ("Tulalip") seek partial summary judgment as to all marine waters claimed by Stillaguamish in this case except northern Port Susan and lower Skagit Bay—waters which Tulalip is bound to "affirmatively support" Stillaguamish and, as to northern Port Susan, water which Tulalip has already recognized as "a non-exclusive usual and accustomed fishing area of the Stillaguamish Tribe." *United States v. Washington*, 626 F. Supp. 1405, 1480-83 (W.D. Wash. 1985) ("*Subproceeding 80-1*"). Tulalip has, however, failed to carry its initial burden on summary judgment because it has not offered *any* affirmative evidence negating an essential element of Stillaguamish's claim. Simply saying Stillaguamish has no direct evidence, again and again, without more is not enough. Even if Tulalip had carried its initial burden on summary judgment, Stillaguamish has nonetheless produced evidence in the form of admissible expert opinion sufficient to preclude summary judgment. The Court should therefore deny Tulalip's Motion for Partial Summary Judgment ("Motion"). Dkt. # 176.

II. FACTUAL BACKGROUND

Dr. Chris C. Friday has offered testimony on behalf of Stillaguamish that, at and before treaty times, Stillaguamish regularly fished the marine and estuarine shorelines of Camano and Whidbey Islands, and the open waters of Skagit Bay, Deception Pass, and Saratoga Passage ("Claimed Waters"). Declaration of Chris Friday in Support of Opposition to All Responding Tribes' Motion for Partial Summary Judgment ("Friday Decl."), ¶¶ 2, 10.

A. DR. FRIDAY'S QUALIFICATIONS

Dr. Friday is a Professor of History at Western Washington University ("WWU"). *Id.* ¶ 3. His teaching, research and writing address issues of race, indigeneity, and class in the Pacific Northwest and the North American West. *Id.* Dr. Friday earned a Ph.D. and M.A. in History from University of California, Los Angeles, and a B.A. in History with honors from Lewis and Clark College. *Id.* Dr. Friday served as Chair of the WWU History Department from 2002 to 2006, and he also worked as Director of the WWU Center for Pacific Northwest Studies from 1998 to 2008. *Id.*

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Dr. Friday has taught the survey of American Indian History at WWU for over twenty-six years, and the upper-division survey of Pacific Northwest History for over twenty-eight years. *Id.* ¶ 4. Dr. Friday also has taught the upper-division history course "Tribal Sovereignty and Washington History" since 2016. *Id.* Additionally, Dr. Friday instructs undergraduate and graduate seminars, as well as capstone thesis courses in Coast Salish History at WWU. *Id.*

Renowned institutions and peers of Dr. Friday have formally acknowledged his academic achievements and contributions to their field through awards and other honors, including those recognizing his work about Coast Salish history. *Id.* ¶ 5. Dr. Friday has presented a dozen keynote addresses, formal public lectures, and academic conference papers on Northwest Coast and Coast Salish topics. *Id.*

Dr. Friday has authored two academic history research monographs, one of which addressed Northwest Coast Indians in British Columbia and their relationship to Indians in Washington State. *Id.* ¶ 6. Dr. Friday also has written two invited and peer reviewed book chapters on Coast Salish history topics, and three peer-reviewed works on American Indian and Native Alaskan topics. *Id.* Moreover, Dr. Friday edited a reprint of a seven-volume series related to Pacific Northwest history, the history of the Puget Sound, and the relationships between Indigenous Peoples and American missionaries on the Columbia River Plateau, wherein he authored a new introduction addressing the fisheries of a Coast Salish tribe. *Id.*

B. DR. FRIDAY'S METHODOLOGY AND OPINIONS

Dr. Friday bases his opinions upon the principles and methodology acquired during his education, training and experience as a historian, which he applied in this case to his investigation and evaluation of the evidence, and in drawing conclusions from that evidence. *Id.* ¶ 8. In assessing Stillaguamish treaty-time marine fishing, Dr. Friday examined archival records and museum holdings, ranging from national to local institutions, and considered ethnographic materials generated by scholars in their publications, field notes, and in their depositions and testimony in twentieth-century cases involving Coast Salish Peoples, including the Stillaguamish. *Id.* As a component of his analysis of the record in this case, Dr. Friday applied

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Keith Carlson's "Radiating Tribal Interests" model ("Carlson Model"). *Id.* ¶ 9. The Carlson Model is not evidence; rather, it is a method used to evaluate the evidence. *Id.*

Dr. Friday's expert opinions support Stillaguamish U&A in the Claimed Waters. Dr. Friday opines that Stillaguamish regularly fished the Claimed Waters. *Id.* ¶¶ 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, 54. 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 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;
- 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 ARGUMENT

Tulalip has produced no affirmative evidence in support of its Motion. Tulalip has therefore failed to carry its burden on summary judgment, and the Court should deny Tulalip's Motion on this ground alone. Although Tulalip has failed to carry its initial burden, Stillaguamish has nonetheless shown that genuine disputes of material fact preclude summary judgment. Dr. Friday is qualified to offer an opinion on Stillaguamish treaty-time marine fishing and his testimony is admissible. As is relevant to this Motion, Dr. Friday opines that Stillaguamish regularly fished the Claimed Waters at and before treaty times. *Id.* ¶¶ 2, 10. Dr. Friday's expert opinions raise material fact issues that preclude summary judgment.

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A. TULALIP HAS FAILED TO CARRY ITS BURDEN ON SUMMARY JUDGMENT

Tulalip argues that because it believes there is no direct evidence of Stillaguamish treaty-time fishing in marine waters and Dr. Friday's expert report ("Friday Report") "contains no direct evidence of fishing by Stillaguamish in marine waters," the Court should grant summary judgment dismissing Stillaguamish's U&A claim to marine waters other than Port Susan and lower Skagit Bay. Dkt. # 176 at pp. 2-3, 6-8. In support of its assertion, Tulalip just inaccurately summarizes a few sections of the Friday Report and attacks Dr. Friday's methodology. *Id*. at pp. 6-9. Tulalip's argument can, however, go no further than these conclusory words because Tulalip failed to provide *any* evidence in support of its Motion.

Tulalip has failed to carry its burden as the moving party. Fed. R. Civ. P. 56(c)(1)(A). When a defendant moves for summary judgment on a plaintiff's claim "on the ground that the nonmoving party has no evidence," as Tulalip has done, the moving party "must affirmatively show the absence of evidence in the record." *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986) (internal citations omitted). Here, Tulalip's bare conclusion that "Stillaguamish fails to meet the burden of proof" is wholly unsupported. Dkt. # 176 at p. 9. Although at trial Tulalip would not bear the burden of proof on Stillaguamish's U&A claims, as the moving party on summary judgment Tulalip must "produce affirmative evidence… negating an essential element of [Stillaguamish's] case." *Nissan Fire & Marine Ins. Co. v. Fritz*, 210 F.3d 1099, 1105-06 (9th Cir. 2000). Tulalip has offered no affirmative evidence. Tulalip's citation to the Friday Report in a footnote and vague references to the Responding Tribes' experts opinions prove insufficient.[1] *See* Dkt. # 176 at p. 7. Simply saying Stillaguamish has no direct evidence, again

[1] Even if Tulalip submitted the Friday Report in support of its Motion, which Tulalip references in a footnote, Dkt. # 176 at p. 7, the Court must still deny Tulalip's Motion for failure to produce affirmative evidence. *Celotex Corp.*, 477 U.S. at 322. The Court may consider only admissible evidence in ruling on a summary judgment motion. *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). The unsworn Friday Report is inadmissible on summary judgment because it is hearsay and lacks foundation. Fed. R. Civ. P. 56(c)(4); *Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023, 1027 (W.D. Wash. 2011).

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and again, is not enough and also ignores the standard of proof in this case. *Nissan Fire & Marine Ins.*, 210 F.3d at 1106; *see also Subproceeding 80-1*, 626 F.Supp. at 1531 ("Either 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."). Rather, "[w]hat is required is evidence that the opposing party has no evidence, for example, attaching the non-moving party's answer to interrogatories admitting that [it] has no witnesses or other evidence in support of its summary judgment motion." *Kurin, Inc. v. Magnolia Med. Tech., Inc.*, 473 F.Supp.3d 1117, 1150 (C.D. Cal. 2020). Tulalip also has failed to offer this kind of evidence. Dkt. # 176.

"If a moving party fails to carry its initial burden of production," like Tulalip has done here, "the nonmoving party has no obligation to produce anything even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins.*, 210 F.3d at 1102-03; *see also Adickes v. SH Kress & Co.*, 398 U.S. 144, 160 (1970). Stillaguamish may thus defeat Tulalip's motion without producing anything in opposition. *Nissan Fire & Marine Ins.*, 210 F.3d at 1103. Accordingly, the Court should deny Tulalip's Motion for failure to meet its initial burden of proof. *Celotex Corp.*, 477 U.S. at 322; Fed. R. Civ. P. 56(c)(1)(A).

B. GENUINE DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

If, however, the Court construes Tulalip's unsupported Motion to somehow satisfy its initial burden, Stillaguamish has nonetheless demonstrated that genuine issues of material fact preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Dr. Friday's opinions support Stillaguamish's U&A claims as to Skagit Bay, Saratoga Passage, Deception Pass, Penn Cove and Holmes Harbor. Summary judgment is therefore inappropriate.

"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:

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> 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).

For the purposes of defeating summary judgment, the nonmoving party "need not establish a material issue of fact conclusively in its favor" in order to establish the existence of a factual dispute. *Herrick v. GoDaddy.com LLC*, 312 F.Supp.3d 792, 794-95 (D. Ariz. 2018). 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." *T.W. Elec. Serv., Inc. v. Pax. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

Dr. Friday opines that Stillaguamish regularly fished Skagit Bay, Deception Pass, Saratoga Passage, Penn Cove and Holmes Harbor.[2] Friday Decl., ¶¶ 2, 10. Dr. Friday formed his opinions by employing the historical method and the Carlson Model to his analysis of the extensive record in this case, which includes, but is not limited to: treaty-time documents from Indian agents, traders, settlers and missionaries; tribal elder and other primary accounts; evidence submitted in *Duwamish et al.*; the field notes and expert opinions of Dr. Sally Snyder, Dr. Carrol Riley and others involved in the Indian Claims Commission litigation; ethnographic materials and reports; and, Tribal elder and expert testimony offered in prior *United States v. Washington* subproceedings. *Id.* ¶¶ 8, 13-53. Dr. Friday also has offered his opinions to a reasonable degree of historical certainty. *Id.* ¶ 54.

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[2] Even Tulalip's own expert in deposition offered opinions not entirely contrary to those of Dr. Friday:

> … I think [Stillaguamish] fished throughout the region. And you could say that about almost any region where they fish. And it would be beyond Port Susan. Not just Port Susan, which I would agree, but there are ways in which they have fished well beyond that.

Dkt. # 172-18 at p. 3.

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Dr. Friday's opinion is admissible and defeats summary judgment in this case. *Bulthuis*, 789 F.2d at 1318. Dr. Friday's "opinions create a genuine issue of material fact" as to whether Stillaguamish regularly fished the Claimed Waters at and before treaty times. *Harris v. Extendicare Homes, Inc.*, No. C10-5752RBL, 2012 WL 1327816, *1 (W.D. Wash. Apr. 17, 2012). Stillaguamish has therefore shown that genuine issues exists for trial and met its burden to preclude summary judgment. *Anderson*, 477 U.S. at 250.

Even Tulalip's criticisms of Dr. Friday—that he is not qualified and his testimony is unreliable and irrelevant—create triable material fact disputes. *See* Dkt. # 176 at p. 7; *Mullins v. Premier Nutrition Corp.*, 178 F.Supp.3d 867, 895-96 (N.D. Cal. 2016). Without citing legal authority or admissible evidence, Tulalip criticizes Dr. Friday's use of the Carlson Model because "[n]one of the very learned and experienced anthropologists and ethnohistorians in this case have ever alluded to this concept." Dkt. # 176 at p. 7. "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)). Tulalip's attacks are thus best directed at trial.

Summary judgment is inappropriate where, as here, a case may ultimately turn on the credibility of expert witnesses and the weight given to their testimony. *Anderson*, 477 U.S. at 255; *see also Crown Packaging Tech., Inc. v. Ball Metal Beverage Container Corp.*, 635 F.3d 1373, 1384 ("Where there is a material dispute as to the credibility and weight that should be afforded to conflicting expert reports, summary judgment is usually inappropriate."). The Court should decline Tulalip's invitation to impermissibly weigh and make credibility determinations as to Dr. Friday's testimony. *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). The Court should therefore deny Tulalip's motion because genuine issues of material fact exist as to whether Stillaguamish regularly fished marine waters (aside from northern Port Susan and lower Skagit Bay) at and

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before treaty times, as well as the credibility of expert witnesses and the weight that should be accorded to their testimony.

C. DR. FRIDAY IS QUALIFIED AND HIS TESTIMONY IS ADMISSIBLE

Although Tulalip fails to produce any cognizable evidence or legal authority in support of its position, Tulalip appears to argue that Dr. Friday is not qualified to offer opinions in this case and that his testimony is inadmissible. Dkt. # 176 at pp. 6-7. Stillaguamish construes Tulalip's arguments as a *Daubert* attack on the admissibility of Dr. Friday's testimony even though Tulalip has filed no motion specifically asking for this relief. *Id.*; *see also id*. at p. 9 ("As to the relevance or evidentiary value of Dr. Friday's report, Tulalip concurs in and joins into the views of the Upper Skagit Tribe in their motion for summary judgment[.]"). Contrary to Tulalip's representations, Dr. Friday is both qualified to offer an opinion on Stillaguamish treaty-time fishing in marine waters and his testimony is admissible.

1. Dr. Friday Is Qualified To Opine On Stillaguamish Treaty-Time Fishing

Tulalip claims that Dr. Friday "[a]s a historian [] lacks anthropological training and knowledge necessary to properly evaluate the Stillaguamish claims." *Id.* at pp. 6-7. Tulalip cites no legal authority in support of its assertion. Regardless, Tulalip takes an overly narrow view of the degree of expertise necessary to offer an opinion on whether a tribe regularly fished particular waters at or before treaty times. *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266, 1269 (9th Cir. 1994) (Rule 702 "contemplates a broad conception of expert qualifications."); *see also In re ConAgra Foods Inc.*, 302 F.R.D. 537, 550 (C.D. Cal. 2014) ("The threshold qualification is low for purposes of admissibility; minimal foundation of knowledge, skill, and experience suffices."). Rule 702 requires only that an expert possess "knowledge, skill, experience, training, or education" sufficient to "assist" the trier of fact, which is "satisfied where expert testimony advances the trier of fact's understanding to any degree." *Abarca*, 761 F.Supp.2d at 1029-30; *see also United States v. Newmount USA Ltd.*, No. CV-05-020-JLQ, 20047 WL 4856859, *2 (E.D. Wash. Nov. 16, 2007) ("That [expert] is a historian, as opposed to an expert in the specific

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areas of 'corporate organization' is not disqualifying in this case, as his background appears to provide sufficient expertise upon which his opinions, as a general matter, are based.").

Dr. Friday is qualified to offer testimony about Stillaguamish treaty-time marine fishing based on his skill, experience, training, and education as a historian. Friday Decl., ¶¶ 3-9. Dr. Friday's extensive education in the field of history and decades of experience working with the specific subjects of Coast Salish and Pacific Northwest history provide more than adequate qualifications to offer an opinion in this case. *United States v. Abonce-Barrera*, 257 F.3d 959, 964-65 (9th Cir. 2001). By education and experience, Dr. Friday satisfies Rule 702's foundation standards and he is qualified to testify about Stillaguamish treaty-time marine fishing.

Further, contrary to Tulalip's representations, historians regularly testify in cases involving Indian treaty rights and aboriginal use of tribal territory. *See, e.g., Pueblo of Jemez v. United States*, 430 F.Supp.3d 943, 1000 n. 94 (D.N.M. 2019), *amended on reconsideration*, No. CV 12-0800 JB\JFR, 2020 WL 5238734 (D.N.M. Sept. 2, 2020) ("a historian can make a credible, educated inference that Jemez Pueblo's Valles Caldera use continued based on past uses and present uses."); *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 690 F.Supp.2d 622 (E.D. Mich. 2010) (historians offered testimony on treaty interpretation); *Keweenaw Bay Indian Cmty. v. Naftaly*, 370 F.Supp.2d 620, 627-28 (W.D. Mich. 2005) (same); *Confederated Tribes and Bands of the Yakama Nation v. Klickitat Cnty.*, No. 1:17-cv-3192-TOR, ECF. No. 112 (E.D. Wash. Aug. 28, 2019) (historians offered opinions interpreting treaty and reservation boundaries). And like Stillaguamish, Respondent Tribe Swinomish also has retained a historian—Dr. Anthony Gulig—to offer an opinion in this case. *See* Dkt. # 172-21 at pp. 3, 11-12.

2. Dr. Friday's Conclusions And Methodology Are Issues For the Trier Of Fact To Weigh At Trial

Tulalip takes issue with Dr. Friday's methodology in that he offers opinions based on his training and knowledge as a historian and his use of the Carlson Model. Dkt. # 176 at pp. 6-7. The fact that Dr. Friday's opinions are founded on the historical method and that he employed the Carlson Model do not render him unqualified and it does not suggest that his methods are

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invalid. *Abarca*, 761 F.Supp.2d at 1031 (citing *Garcia*, 7 F.3d at 889-90). Tulalip may challenge Dr. Friday's methodology and application of the Carlson Model through cross examination and presentation of contrary evidence at trial—not through a motion for partial summary judgment. *Eisenbise v. Crown Equip. Corp.*, 260 F.Supp.3d 1250, 1260 (S.D. Cal. 2017) (citing *Daubert*, 509 U.S. 579, 596 (1993)).

Tulalip also strangely critiques Dr. Friday's use of the Carlson Model by arguing that its application somehow "destroy[s] and negate[s]" the *legal* U&A standard this Court employs in making its ultimate factual findings and legal conclusions, and that the Carlson Model does not meet the *United States v. Washington* U&A standard. Dkt. # 176 at pp. 7-8. This is both wrong and impossible. It is well-established that experts may not offer legal conclusions, as Tulalip seems to expect. *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). More importantly, the Court would expressly disallow the opinion Tulalip mistakenly believes Dr. Friday will offer because experts cannot determine the applicable law or apply the law to the facts. *See McDevitt v. Guenther*, 522 F.Supp.2d 1272, 1292 (D. Haw. 2007) ("courts have prohibited expert opinion that applies the law to the facts, as this usurps the role of the jury."); *see also French v. Providence Everett Med. Ctr.*, No. C07-0217RSL, 2009 WL 10676665, at *1 (W.D. Wash. Mar. 19, 2009).

3. Tulalip's Criticisms Of Dr. Friday's Testimony Are Premature

Tulalip's issues with Dr. Friday's qualifications and testimony are premature given this case will, with the possible exception of Port Susan, proceed to a bench trial. Summary judgment is not the appropriate time to address Tulalip's concerns because "[p]articularly in the context of a bench trial, there is a presumption in favor of permitting expert testimony." *D.T. by and through K.T. v. NECA/IBEW Family Med. Care Plan*, No. 2:17-cv-00004-RAJ, 2020 WL 59647 (W.D. Wash. Jan. 6, 2020) (slip copy) (citing *F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014)). The Court should follow the approach consistently taken in this District by making its own conclusions about the credibility and weight to accord the expert testimony in this case within the full context of trial. *See, e.g., United States v. RSR Corp.*, No. C00-890JLR, 2005

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WL 5977799 (W.D. Wash. Oct. 4, 2005); *Cadena v. United States*, No. C15-5610RBL, 2017 WL 7360410 (W.D. Wash. June 2, 2017); *F.T.C. v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 1221654 (W.D. Wash. Mar. 29, 2016); *Kasper v. Jubilee Fisheries, Inc.*, No. C07-2012-JCC, 2009 WL 10675669 (W.D. Wash. June 1, 2009).

D. TULALIP MISREPRESENTS THE BURDEN OF PROOF

Tulalip contends the Friday Report "contains no direct evidence of fishing by Stillaguamish in marine waters" and that "[t]here is no direct evidence of any such fishing." Dkt. # 176 at pp. 7-9. Tulalip also claims that "[t]he Court was not explicit in Final Decision #1 that evidence of fishing was required to prove fishing in waters adjacent to villages," erroneously implying that the Court held direct evidence of fishing in waters adjacent to villages is required to establish U&A. *Id*. at p. 8. The Court should reject Tulalip's blatant attempt to disregard the law of the case and heighten the established burden of proof in this Subproceeding.

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 1069, 1110 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017).

Not only is direct evidence not required to support a finding of U&A, the Court has repeatedly declined to follow stringent proof standards Tulalip now urges the Court to adopt. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981); *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988); *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:

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> 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).

In determining Stillaguamish's U&A, this "Court steps into the place occupied by Judge Boldt when he set forth U&As" in *Final Decision No. 1*. *United States v. Washington*, 129 F.Supp.3d at 1110. "The Court accordingly applies the same evidentiary standards applied by Judge Boldt in" *Final Decision No. 1* "and elaborated in the ensuing forty years of subproceedings." *Id.* Thus, Stillaguamish "may rely on both direct evidence *and reasonable inferences* drawn from documentary exhibits, expert testimony, and other relevant sources to show to the probable location and extent of [its] U&As." *Id.* (citing *Subproceeding 80-1*, 626 F.Supp. at 1431) (emphasis added).

That Tulalip would try to move the goalposts on Stillaguamish is particularly egregious given that Tulalip's own U&A adjudication was premised on such reasonable inferences. *Subproceeding 80-1*, 626 F.Supp. at 1527-32; *see also* Smith Decl., Ex. 24.[3] In *Subproceeding 80-1*, Tulalip admitted that Dr. Barbara Lane did not find any documents "specifically showing regular treaty-time fishing" or "nineteenth century ethnographic accounts in which fishing is mentioned" for Tulalip. *Id*. at p. 6. As to itself, Tulalip was not concerned about the absence of direct evidence. Tulalip explained that Dr. Lane specifically noted "that the lack of documentation for open marine areas was true for other tribes" and that she "would not rule out

[3] In *Subproceeding 80-1*, Tulalip submitted "that the standards for determining [U&A] fishing places for the tribes should be consistent" after noting that "the Suquamish Tribe was granted vast [U&A] fishing places extending from their reservation west of Seattle to the Canadian border," *United States v. Washington*, 459 F.Supp. at 1049, based solely on "evidence that the Suquamish traveled in the marine waters between their home territory and the Fraser River in Canada, and Dr. Lane's testimony that the "Suquamish undoubtedly would have fished in the marine waters along the way to as they traveled." *Id.* at pp. 15-16 (emphasis in original). The Court should likewise maintain that consistent standard in this Subproceeding.

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treaty-time fisheries in such areas" based solely on the lack of direct evidence. *Id.* Rather, Tulalip argued: (1) "[s]tringent proof standards cannot be followed"; (2) "[f]ishing grounds, particularly in open marine areas, cannot be determined with particularly"; (3) "[r]egular visitation or travel to an open marine area can support a finding as a [U&A] fishing place"; (4) "[t]he absence of 'hard' documentary data does not preclude finding that an area is the [U&A] fishing place for a particular tribe"; and, (5) "[t]he open marine waters of the Straits and Sound were free access areas to all tribes." *Id.* at p.4- 5. Reasoning that "it is not possible nor required that specific evidence concerning precise locations be given to establish a general marine area as U&A," *id.* at 28, Tulalip therefore relied heavily on expert testimony, and on inferences that could be drawn from the location of Tulalip villages, instances of single tribal members in a geographic location, evidence of Tulalip travel and exogamy as well as the general practices of Coast Salish people at and before treaty times. *See id.* at pp. 10-31.

The Court subsequently found that Tulalip had produced evidence sufficient to establish a broad marine U&A based on the testimony of Dr. Lane, evidence of travel and exogamy, the locations of Tulalip villages, and the general cultural practices of Coast Salish peoples at and before treaty times. *See Subproceeding 80-1*, 626 F.Supp. at 1527-29. The same standard applies to Stillaguamish today.

IV. CONCLUSION

Tulalip has failed to carry its initial burden on summary judgment because it has not offered *any* affirmative evidence negating an essential element of Stillaguamish's claim. The law is clear that simply saying Stillaguamish has no evidence, again and again, without more is not enough to satisfy Tulalip's initial burden on summary judgment. Even if Tulalip had carried its initial burden on summary judgment, Stillaguamish has nonetheless produced evidence in the form of expert opinion sufficient to preclude summary judgment. Dr. Friday's opinions create triable material fact issues regarding whether Stillaguamish regularly fished Skagit Bay, Deception Pass, Saratoga Passage, Holmes Harbor and Penn Cove. The Court should therefore deny Tulalip's Motion because it failed to carry its initial burden by producing no affirmative

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evidence; alternatively, the Court should deny Tulalip's Motion because Stillaguamish has shown that genuine issues of material fact preclude summary judgment.

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