

The Honorable Ricardo S. Martinez

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

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

Case No. C70-9213

Subproceeding: 17-03

**STILLAGUAMISH TRIBE OF
INDIANS' RESPONSE IN
OPPOSITION TO UPPER SKAGIT
INDIAN TRIBE'S MOTION FOR
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
JANUARY 29, 2021**

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,

Respondent(s).

1 Stillaguamish has raised genuine issues of material fact that preclude summary judgment
 2 as to Skagit Bay, Deception Pass, Holmes Harbor, Penn Cove and Saratoga Passage (“Claimed
 3 Waters”). The Court should grant summary judgment as to Port Susan based, in part, on Upper
 4 Skagit’s own expert agreeing with other experts that “the evidence appears to show
 5 [Stillaguamish] may have” fished Port Susan at and before treaty times. Dkt. # 172-19 at p. 3.
 6 The Court should therefore deny Upper Skagit Indian Tribe’s (“Upper Skagit”) Motion for
 7 Summary Judgment. Dkt. # 174.¹ Stillaguamish also asks the Court strike the expert report of
 8 Dr. Chris C. Friday (“Friday Report”) offered by Upper Skagit because it is inadmissible and
 9 cannot be considered on summary judgment.

10 I. FACTUAL BACKGROUND

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

19 A. THE EVIDENCE SUPPORTS STILLAGUAMISH’S CLAIM THAT IT FISHERD THE CLAIMED 20 WATERS AT AND BEFORE TREATY TIMES

21 1. Stillaguamish Maintained Villages And Encampments Adjacent To The 22 Claimed Waters

23 The historical and ethnographic evidence demonstrates that Stillaguamish maintained
 24 villages and encampments in the lower Stillaguamish River delta and on Camano Island at and

25 ¹ Stillaguamish’s RFD requested that the Court determine and declare the non-exclusive treaty rights of the Tribe
 26 to harvest all species of fish and shellfish in the Claimed Waters. Dkt. # 1. Upper Skagit moves for summary
 27 judgment as to all the marine waters claimed by Stillaguamish and one that it did not claim—Possession Sound.
 Dkt. # 174 at p. 2. As to Port Susan, the Court should treat Upper Skagit’s motion as a cross-motion for summary
 judgment; Stillaguamish will address Port Susan in the context of the separate motion for summary judgment.

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

9 Stillaguamish Tribal elder testimony associated with the *Duwamish, et al. v. United*
10 *States*, 79 C. Cl. 530 (1934) (“*Duwamish et al.*”), case in the Court of Claims recounted
11 Stillaguamish villages located on or near lower Skagit Bay at and before treaty times. In
12 preparation for litigation in *Duwamish et al.*, James Dorsey swore an affidavit in 1926 on behalf
13 of Stillaguamish regarding “the camping grounds of Indians at time Governor Stevens made the
14 treaty and where Indians were living at time white man ordered them away.” Dkt. # 172-7; Dkt.
15 # 172-8. James Dorsey (Quil-Que-Kadam) was a Stillaguamish elder and chief born in 1850
16 near Florence, Washington, in the lower Stillaguamish River delta. Dkt. # 172-8 at p. 6. In his
17 affidavit, Chief Dorsey identified nearly a dozen Stillaguamish treaty-time sites in the lower
18 Stillaguamish River delta along the river to West Pass into lower Skagit Bay. *Id.* at pp. 6-9.

19 After consulting Tribal elders who were born in treaty-times and reaching an agreement
20 with other tribes regarding Stillaguamish treaty-time territorial borders, Stillaguamish informed
21 the Court of Claims through the testimony of Stillaguamish tribal elders in *Duwamish et al.* that
22 its treaty-time territory included lower Stillaguamish River delta. *See* Dkt. # 180-17; Dkt. # 180-
23 10; Dkt. # 180-11 at pp. 13, 17; Declaration of Rob Roy Smith in Support of Stillaguamish Tribe
24 of Indians’ Response in Opposition to Summary Judgment Motions (“Smith Decl.”), Ex. 1. The
25 Stillaguamish treaty-time territory started “from Marysville around Warm Beach to water section
26 thru Camano Island to [Milltown]” and then to the headwaters of Deer Creek and Pilchuck to
27 the “head water of the Stillaguamish River.” Smith Decl., Ex. 2. The southern boundary began

1 “at [the] north west corner of Tulalip Indian Reservation following to north east point of
2 Reservation to the head waters of sultan from here to head water of [the] Sauk [River].” *Id.* A
3 significant number of Stillaguamish Tribal elders who participated in *Duwamish et al.* were born
4 in the Stillaguamish River delta before or shortly after treaty times, and many remained there
5 throughout their lifetimes. *See, e.g.*, Dkt. # 172-8 at p. 6 (James Dorsey); Smith Decl., Ex. 3
6 (Bob Harvey); *id.*, Ex. 4 (same); Dkt. # 180-11 at p. 28 (Sally Oxstein).

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

15 Expert testimony presented to the Indian Court of Claims (“ICC”) regarding
16 Stillaguamish territory at and before treaty times similarly cataloged Stillaguamish villages
17 located near the shores of lower Skagit Bay. Stillaguamish brought a claim against the United
18 States before the ICC in *Stillaguamish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 1,
19 Dkt. 207 (“Stillaguamish ICC Case”). Dr. Sally Snyder testified as an expert on behalf of
20 Stillaguamish, and Dr. Carrol Riley testified as an expert on behalf of the United States, among
21 other witnesses. In her testimony, Dr. Snyder identified at least sixteen Stillaguamish village
22 sites in the lower Stillaguamish River delta in an area known as “Qwadsak” near the shores of
23 lower Skagit Bay. Dkt. # 172-3 at pp. 13-14; *see also* Dkt. # 172-9 at p. 3; Dkt. # 172-10. Dr.
24 Snyder testified that the people who occupied the Qwadsak area in the lower Stillaguamish River
25 delta were Stillaguamish. Dkt. # 180-49 at pp. 37; Smith Decl., Ex. 5 at pp. 4-5.

26 Both Dr. Snyder and Dr. Riley testified that Stillaguamish occupied and used Camano
27 Island at and before treaty times before the ICC. Dr. Snyder opined that Stillaguamish used the

1 northern tip of Camano Island. Dkt. # 180-46 at pp. 32, 40. Dr. Riley also opined that
2 Stillaguamish were present on and used Camano Island, and did not need permission from
3 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.

4 Although she had no Stillaguamish informants, Dr. Snyder documented in her field notes
5 that Stillaguamish people used and occupied the northern and southern ends of Camano Island,
6 the Skagit River delta as well as Holmes Harbor. *See* Smith Decl., Ex. 6 at p. 3 (“Only the
7 Kikialos and Stillaguamish lived on Camano, the latter [Stillaguamish] from the point south to
8 Camano Head on the outside beach (west) on that end [to Camano Head.]”); Dkt. # 180-13 at p.
9 3 (describing Stillaguamish man fishing in Holmes Harbor); Dkt. # 180-12 at p. 3 (informant J.J.
10 “believes that the Stillaguamish had places on Camano Island, probably because their ‘line’ is at
11 Warm Beach.”). Even Dr. Astrida Blukis-Onat, expert for Swinomish, similarly opined in
12 Subproceeding 93-1 that “[t]he area south of Camano Island State Park” was Stillaguamish
13 territory. Smith Decl., Ex. 8 at p. 4.

14 **2. Stillaguamish Utilized Marine Resources Of The Claimed Waters**

15 The historical and ethnographic evidence shows that Stillaguamish utilized the marine
16 resources of the Claimed Waters at and before treaty times. Treaty-time accounts of Indian
17 agents at Penn Cove and Holmes Harbor detail Indian fishing and clamming activities in the area
18 that included Stillaguamish people. Anthropologists have opined that Stillaguamish utilized the
19 marine resources of the Claimed Waters, and archeologists have documented shell middens at
20 known Stillaguamish villages.

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

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

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

17 Dr. Riley’s testimony in the Stillaguamish ICC Case further evidences Stillaguamish
18 utilization of marine resources from the Claimed Waters. In his testimony, Dr. Riley opined that
19 the people at the village of “Quadsak or Quadsak-bihu” located “at the mouth of the
20 Stillaguamish River” were “more sea than river oriented.” Smith Decl., Ex. 11 at pp. 5-7. Dr.
21 Riley further noted that the Stillaguamish went down the Stillaguamish River “to the ocean
22 perhaps on clamming expeditions.” *Id.* at p. 4. Dr. Riley also prepared a report in 1956 titled
23 “Early History of Western Washington Indians” for consideration by the ICC. Dkt. # 172-13.
24 In this report, Dr. Riley opined that Stillaguamish “came down to Port Susan and lower Skagit
25 Bay for clamming and fishing.” *Id.* at p. 5.

26 Stillaguamish Tribal elder Esther Allen testified to the ICC that Stillaguamish “often
27 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 traveled to Victoria during treaty-times. 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.*, 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, seasonally migrating between the mainland and the islands. *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,

1 and that Ku-kwil-Khaedib “made long journeys on the Sound,” including to Seattle and
2 Nisqually. Dkt. # 172-2 at p. 6.

3 **4. Stillaguamish Engaged In Common Coast Salish Cultural Practices**

4 Dr. Snyder additionally noted in both her ICC testimony and field notes that the
5 Stillaguamish were intermarried with their neighbors and maintained peaceful relations. Smith
6 Decl., Ex. 7 at p. 5 (“The Kikialos married with all the tribes around them; the Skagit,
7 Stillaguamsih [sic], Snohomish, Swinomish and up-river people.”); Dkt. # 180-46 at p. 32 (“I
8 am absolutely unaware of any hostilities between the Stillaguamish and the neighboring tribes.”);
9 Dkt. # 180-49 at p. 44; Smith Decl., Ex. 5 at p. 5 (“As far as I know the Stillaguamish and
10 Kikiallus got along very nicely.”). Dr. Riley similarly acknowledged the extensive kinship ties
11 Stillaguamish maintained throughout the Puget Sound region. Smith Decl., Ex. 11 at p. 13; *id.*
12 at p. 12. Dr. Natalie A. Roberts in her 1975 “A History of the Swinomish Indian Tribal
13 Community” similarly noted ties between Stillaguamish and Kikiallus. *Id.*, Ex. 19 at p. 5.

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

23 **B. THE EXPERT EVIDENCE SUPPORTS STILLAGUAMISH’S CLAIM THAT IT FISHED THE** 24 **CLAIMED WATERS AT AND BEFORE TREATY TIMES**

25 The expert evidence in this case likewise supports Stillaguamish’s claim to the Claimed
26 Waters. Dr. Chris C. Friday opines that Stillaguamish regularly fished marine and estuarine
27 shorelines of Camano and Whidbey Islands, and the open waters of Skagit Bay, Deception Pass,

1 and Saratoga Passage at and before treaty times. Declaration of Chris Friday in Support of
 2 Opposition to All Responding Tribes' Motion for Partial Summary Judgment ("Friday Decl."),
 3 ¶¶ 2, 10. Dr. Friday employed the historical method and Carlson Model to the record in this
 4 case, and offers his opinions to a reasonable degree of historical certainty. *Id.* ¶¶ 8-9, 53. Dr.
 5 Friday bases his opinions on the following: (1) historical and ethnographic evidence
 6 demonstrating that Stillaguamish maintained villages and encampments in the lower
 7 Stillaguamish River delta and occupied Camano Island, *id.* ¶¶ 11, 13-19, 25, 33, 42; (2) historical
 8 and ethnographic evidence indicating Stillaguamish utilized the marine resources of the Claimed
 9 Waters, *id.* ¶¶ 21, 23, 24, 26-27, 29, 32, 34-41, 43; (3) historical and ethnographic evidence
 10 describing Stillaguamish traveling the Claimed Waters and throughout the Puget Sound region,
 11 *id.* ¶¶ 12, 20, 45-53; (4) historical and ethnographic evidence showing Stillaguamish practiced
 12 exogamy on par with other Coast Salish people, *id.* ¶¶ 31, 38; and, (5) historical and ethnographic
 13 evidence regarding general treaty-time Coast Salish cultural practices, *id.* ¶¶ 21, 22, 24, 44.

14 II. LAW AND AUTHORITY

15 A. SUMMARY JUDGMENT

16 The Court may only enter summary judgment "if the pleadings, the discovery and
 17 disclosure materials on file, and any affidavits show that there is no genuine issue as to any
 18 material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
 19 56(c). A genuine material fact issue exists where there is sufficient evidence for a reasonable
 20 factfinder to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
 21 (1986). For the purposes of defeating summary judgment, the nonmoving party need not
 22 establish a material fact issue conclusively in its favor in order to establish the existence of a
 23 factual dispute. *T.W. Elec. Serv., Inc. v. Pax. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th
 24 Cir. 1987). It is sufficient that "the claimed factual dispute be shown to require a jury or judge
 25 to resolve the parties' differing versions of the truth at trial." *Id.* If the moving party meets its
 26 initial burden of showing that there is no evidence which supports an element essential to the
 27

1 nonmovant’s claim, the nonmoving party then must show that there is a genuine issue for trial.
2 *Anderson*, 477 U.S. at 250; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

3 When considering the evidence on a motion for summary judgment, the Court must draw
4 all reasonable inferences on behalf of the non-moving party. *Matsushita Elec. Indus. Co. v.*
5 *Zenith Radio*, 475 U.S. 574, 587 (1986). The Court also must believe the non-moving party’s
6 evidence. *Posey v. Lack Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008).
7 The Court may not, however, weigh conflicting evidence or assess credibility. *In re Barboza*,
8 545 F.3d 702, 707 (9th Cir. 2008) (citing *Agosto v. INS*, 436 U.S. 748, 756 (1978); *Anderson*,
9 477 U.S. at 249). “[W]here divergent ultimate inferences may reasonably be drawn from the
10 undisputed facts, summary judgment is improper.” *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d
11 975, 988 (9th Cir. 2006).

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

17 Expert opinion is admissible and may defeat summary judgment if it
18 appears that the affiant is competent to give an expert opinion and that the
19 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.

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

21 **B. UNITED STATES V. WASHINGTON**

22 Stillaguamish reserved in the Treaty of Point Elliott the right of taking fish at all of its
23 U&A fishing grounds and stations. 12 Stat. 927 (Apr. 11, 1859). Stillaguamish possesses the
24 burden to produce evidence that its U&A fishing grounds at and before treaty times included the
25 Claimed Waters. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978),
26 *aff’d*, 645 F.2d 749 (9th Cir. 1981). U&A fishing grounds include “every fishing location where
27 members of a tribe customarily fished from time to time at and before treaty times, however

1 distant from the then usual habitat of the tribe, and whether or not other tribes then also fished
2 in the same waters.” *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974),
3 *aff’d*, 520 F.2d 676 (9th Cir. 1975) (“*Final Decision No. 1*”).

4 Little documentation of Indian fishing locations in and around 1855 exists today. *United*
5 *States v. Washington*, 459 F. Supp. at 1059 (“In determining usual and accustomed fishing places
6 the court cannot follow stringent proof standards because to do so would likely preclude a finding
7 of any such fishing areas.”). This Court has repeatedly acknowledged that evidence of treaty-
8 time fishing activities is “sketchy and less satisfactory than evidence available in the typical civil
9 proceeding,” and the documentation that does exist is “extremely fragmentary and just
10 happenstance.” *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988).
11 Accordingly, the stringent standard of proof that ordinarily operates in civil proceedings does
12 not apply here. *Id.* at 318. In determining whether Stillaguamish has met its burden, “the Court
13 gives due consideration to the fragmentary nature and inherent limitations of the available
14 evidence,” *United States v. Washington*, 129 F.Supp.3d 1069, 1110 (W.D. Wash. 2015), *aff’d*
15 *sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017), while
16 making its findings “upon a preponderance of the evidence found credible and inferences
17 reasonably drawn therefrom” that an area is U&A on a more probable than not basis. *Final*
18 *Decision No. 1*, 384 F. Supp. at 322.

19 In demonstrating that its U&A includes the Claimed Waters, Stillaguamish “may rely on
20 both direct evidence and reasonable inferences drawn from documentary exhibits, expert
21 testimony, and other relevant sources to show the probable location and extent of [its] U&As.”
22 *United States v. Washington*, 129 F.Supp.3d at 1110. Under this relaxed standard, the Court has
23 held that fishing activity may be presumed in a body of water that bordered a tribe’s village
24 locations, including with some limitations, those villages identified in ICC proceedings. *United*
25 *States v. Washington*, 459 F. Supp. at 1059. The Court also has relied on the testimony of tribal
26 elders and, in particular, expert testimony as evidence “to show the *probable location* and extent
27 of [a tribe’s] U&As.” *United States v. Washington*, 129 F.Supp.3d at 1110 (emphasis added)

1 (citing *United States v. Washington*, 626 F.Supp. 1405, 1431 (W.D. Wash. 1985)
2 (“*Subproceeding 80-1*”); see also *United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984).

3 III. ARGUMENT

4 A. THE COURT MUST STRIKE UPPER SKAGIT’S EXCERPTS OF THE FRIDAY REPORT

5 Upper Skagit relies upon the Friday Report in support of its Motion, which is
6 inadmissible on summary judgment and must be stricken. Dkt. # 175-1; Dkt. # 174 at pp. 2-4,
7 16-17, 20. First, Upper Skagit’s counsel attached the Friday Report to her own declaration, but
8 she is not competent to testify about its contents. *Harris v. Extendicare Homes, Inc.*, 829
9 F.Supp.2d 1023, 1027 (W.D. Wash. 2011) (citing Fed. R. Civ. P. 56(c)(4)). Second, the Friday
10 Report is unsworn and “courts in this circuit have routinely held that unsworn expert reports are
11 inadmissible.” *Id.* Third, the Friday Report is inadmissible because Upper Skagit failed to attach
12 copies of the documents to which it refers. *Id.* (citing Fed. R. Civ. P. 56(c)). The Court may
13 only consider admissible evidence when ruling on summary judgment. *Orr v. Bank of Am. NT*
14 *& SA*, 285 F.3d 764, 773-75 (9th Cir. 2003). The Court must therefore strike the Friday Report
15 pursuant to LCR 7(g) because it constitutes hearsay, lacks foundation, and is otherwise
16 inadmissible on summary judgment. *Harris*, 829 F.Supp.2d at 1027.

17 B. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

18 Summary judgment, except as to Port Susan, is inappropriate in this case. Stillaguamish
19 has produced substantial evidence, including the expert testimony of Dr. Friday, in support of its
20 U&A assertion to the Claimed Waters. If the Court believes Stillaguamish’s evidence, views
21 the evidence in the context of the U&A proof standards as established by the law of this case, in
22 the light most favorable to Stillaguamish, and draws all reasonable inferences in its favor—as
23 the Court must on summary judgment—there exists evidence sufficient for a reasonable
24 factfinder to find that Stillaguamish regularly fished the Claimed Waters at and before treaty
25 times. See *Matsushia Elec. Indus. Co.*, 475 U.S. at 587; *Posey*, 546 F.3d at 1126. Thus,
26 Stillaguamish has met its burden to show that significant material facts preclude summary
27 judgment and the Court must deny Upper Skagit’s Motion. See *Celotex*, 477 U.S. at 324.

1 **1. Stillaguamish’s Expert Testimony Evidence Precludes Summary Judgment**

2 Stillaguamish has presented expert testimony that raises material fact issues and supports
3 its claims to the Claimed Waters, precluding summary judgment as to all waters other than Port
4 Susan. *See In re Apple Computer Sec. Litig.*, 886 F.2d at 1116. Believing Dr. Friday’s testimony
5 and viewing it in the light most favorable to Stillaguamish—as the Court must do on summary
6 judgment—Dr. Friday’s expert opinions provide sufficient evidence for a reasonable trier of fact
7 to find that Stillaguamish regularly fished the Claimed Waters at and before treaty times.
8 *Anderson*, 477 U.S. at 255.

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

20 Where the moving party claims the plaintiff lacks factual support for its claims, as Upper
21 Skagit argues here, and in response the plaintiff produces expert evidence that supports its
22 claims, courts deny summary judgment. *See, e.g., Harris v. Extendicare Homes, Inc.*, No. C10-
23 5752RBL, 2012 WL 1327816, *1-2 (W.D. Wash. Apr. 17, 2012). Failing to find that Dr.
24 Friday’s testimony—evidence that supports Stillaguamish’s claims—precludes summary
25 judgment would constitute reversible error because the Court would have improperly weighed
26 evidence and resolved disputed issues in favor of Upper Skagit. *See Tolan v. Cotton*, 572 U.S.
27 650, 657 (2014). Dr. Friday’s testimony alone serves as a basis for denial of summary judgment.

1 **2. Stillaguamish’s Non-Expert Evidence Precludes Summary Judgment**

2 The entire evidentiary record in this Subproceeding, when viewed in the light most
3 favorable to Stillaguamish and drawing all justifiable inferences in its favor, raises material fact
4 issues and provides sufficient evidence from which a reasonable factfinder could infer and find
5 that Stillaguamish regularly fished the Claimed Waters at and before treaty times. *Anderson*,
6 477 U.S. at 250. The Court must therefore deny summary judgment.

7 Stillaguamish has produced evidence that at and before treaty times, its people occupied
8 villages along the lower Stillaguamish River delta near the shores of Skagit Bay, and utilized the
9 marine resources of lower Skagit Bay. *See* Dkt. # 172-3 at pp. 13-14; Dkt. #172-4; Dkt. # 172-
10 5; Dkt. # 172-6; DKt. # 172-7; Dkt. # 172-8; Dkt. # 172-9 at p. 3; Dkt. # 172-16 at p. 4 Dkt. #
11 172-10; Dkt. # 180-10; Dkt. # 180-11 at pp. 13, 17, 28; Dkt. # 180-17; Dkt. # 180-49 at p. 37;
12 *see also* Smith Decl., Exs. 1-4; *id.*, Ex. 5 at pp. 4-5. Stillaguamish has produced evidence that
13 at and before treaty times, Stillaguamish also occupied Camano Island and utilized resources at
14 that location. *See* Dkt. # 180-12 at p. 3; Dkt. # 180-19 at p. 26; Dkt. # 180-46 at pp. 32, 40; *see*
15 *also* Smith Decl., Ex. 6; *id.*, Ex. 11 at pp. 3, 9-10; *id.*, Ex. 8 at p. 4. When viewed in the light
16 most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the Court may
17 find from this evidence that Stillaguamish regularly fished Skagit Bay and the waters adjacent
18 to Camano Island. *See Subproceeding 80-1*, 626 F.Supp. at 1528 (“Winter villages were located
19 along the salmon streams, at the heads of inlets near the mouth of such streams, and on protected
20 coves and bays. During the winter season, if people went out for fresh food stores, they used the
21 fishing areas in closest proximity to their villages.”); *see also United States v. Muckleshoot*
22 *Indian Tribe*, 235 F.3d 429, 436 (9th Cir. 2000) (“[M]ost groups claimed autumn fishing use
23 rights in the waters near to their winter villages.”).

24 Stillaguamish has presented evidence indicating that the Stillaguamish who lived further
25 upriver from those at the Stillaguamish River delta traveled down the Stillaguamish River to
26 harvest marine resources in Skagit bay. *See* Dkt. # 172-13 at p. 5; Smith Decl., Ex. 11 at p. 4.
27 Stillaguamish also has presented evidence that Stillaguamish utilized marine resources off the

1 east shore of Whidbey Island. Smith Decl., Ex. 9 at p. 8; *id.*, Ex. 10 at p. 3. When viewed in the
2 light most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the Court
3 may find from this evidence that Stillaguamish regularly fished Skagit Bay. *United States v.*
4 *Washington*, 19 F.Supp.3d 1252, 1310-11 (W.D. Wash. 1997) (expanding Muckleshoot marine
5 U&A based on finding that Muckleshoot was an “upriver tribe” that “occasionally” and “from
6 time to time” traveled to the “open waters and shores of Elliott Bay”); *Subproceeding 80-1*, 626
7 F.Supp. at 1528 (“Shallow bays where salmon, flounder, and other fish were speared were often
8 gathering places for people from a wider area. This was especially true if shellfish beds were
9 present... People living upriver on a given drainage system would normally come to the saltwater
10 areas at the mouth of the river to obtain fish and shellfish.”).

11 Stillaguamish has presented evidence of shell middens in and near the villages in the
12 lower Stillaguamish River delta that were occupied by the Stillaguamish. *See* Dkt. # 172-9; Dkt.
13 # 172-10; Dkt. # 180-3; Dkt. # 180-4; Dkt. # 180-5; Dkt. # 180-6; Dkt. # 180-7; Dkt. # 180-8 at
14 p. 3. When viewed in the light most favorable to Stillaguamish and drawing all reasonable
15 inferences in its favor, the Court may find this shell midden evidence indicates the people who
16 resided in these lower Stillaguamish River delta villages “continuously engaged in harvesting”
17 particular marine species over a period of time and such evidence suggests a particular
18 directional orientation, in this case towards the marine waters of Skagit Bay and beyond. *See*
19 *United States v. Washington*, 129 F.Supp.3d at 1091 (shell middens can demonstrate
20 “aboriginal... occupancy evidenc[ing] a community continuously engaged in harvesting”
21 particular species); *id.* (finding that “the types of species found at the Quileute sites suggest a
22 strong oceanic orientation.”).

23 Stillaguamish has presented evidence that at and before treaty times, Stillaguamish
24 people travelled to Fort Victoria and widely throughout the Puget Sound region to trade and visit
25 relations. *See* Dkt. #172-2 at p. 6; Dkt. # 180-10 at pp. 3-5; *see also* Smith Decl., Ex. 9 at pp. 7-
26 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
27 the light most favorable to Stillaguamish and drawing all reasonable inferences in its favor, the

1 Court may find that Stillaguamish regularly fished the Claimed Waters, including upper Skagit
 2 Bay and Deception Pass. *See Subproceeding 80-1*, 626 F.Supp. at 1529 (“The documentation of
 3 the presence of Snohomish Indians at Fort Langley during pre-treaty times is spotty and generally
 4 happenstance, but it would indicate that the Snohomish frequently traveled to the Fraser River
 5 for trading of both salmon and furs.”); *id.* (a round trip to the Fraser River from the mouth of the
 6 Snohomish River would normally have taken from two to four weeks. During such travels they
 7 would have harvested salmon accessible to them); *United States v. Lummi Indian Tribe*, 841 F.2d
 8 at 320 (“While traveling through an area and incidental trolling are not sufficient to establish an
 9 area as [U&A], frequent travel and visits to trading posts may support other testimony that a tribe
 10 regularly fished certain waters.”); *United States v. Lummi Indian Tribe*, 235 F.2d 443, 452 (9th
 11 Cir. 2000) (holding that Admiralty Inlet was within the Lummi’s grounds because it was a
 12 “passage” through which they Lummi would have traveled).

13 Stillaguamish has presented evidence that at and before treaty times, Stillaguamish
 14 intermarried with tribes throughout the Puget Sound region and engaged in exogamy to the same
 15 extent as its neighbors, which indicates that it was customary for Stillaguamish to travel
 16 extensively in the Claimed Waters. *See* Dkt. # 180-14 at pp. 4-6; Dkt. # 180-14 at pp. 4-5; Dkt.
 17 # 180-46 at p. 32; Dkt. # 180-49 at p. 44; Dkt. # 180-11 at pp. 19-20, 22; *see also* Smith Decl.,
 18 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.
 19 5; *id.*, Exs. 20-21; *see also Subproceeding 80-1*, 626 F.Supp. at 1529 (“It was normal for all of
 20 the Indians in western Washington to travel extensively either harvesting resources or visiting
 21 in-laws, because they were intermarried widely among different groups.”); *id.* at 1530 (“The
 22 widespread intermarriage among the tribes surrounding Puget Sound would indicate that travel
 23 through its marine waters occurred frequently and on a regular basis.”).

24 **C. UPPER SKAGIT’S ARGUMENTS DO NOT SUPPORT ENTRY OF SUMMARY JUDGMENT**

25 **1. Evidence of Stillaguamish and Encampments Adjacent To The Claimed**
 26 **Waters Precludes Summary Judgment**

1 Upper Skagit seeks to arbitrarily isolate different forms of evidence from each other to
 2 claim that Stillaguamish’s evidence is insufficient to establish U&A for the Claimed Waters
 3 around Camano Island based on evidence of Stillaguamish villages and occupation of the lower
 4 Stillaguamish River delta and Camano Island. Dkt. # 174 at pp. 15-18.² Upper Skagit argues
 5 that because it believes Stillaguamish’s evidence is “insufficient,” no genuine material fact issue
 6 exists based on the Court’s decision in *Subproceeding 80-1* regarding Tulalip’s marine U&A
 7 expansion. *Id.* at p. 18. This Court’s holding in *Subproceeding 80-1* does not eliminate the
 8 material fact issues present in this case; rather, the Court’s findings in *Subproceeding 80-1*
 9 demonstrate that this Court must deny Upper Skagit’s Motion and resolve Stillaguamish’s claims
 10 at trial. It remains the law of the case that Stillaguamish “may rely on both direct evidence and
 11 reasonable inferences drawn from documentary exhibits, expert testimony, and other relevant
 12 sources to show the probable location and extent of [its] U&As.” *United States v. Washington*,
 13 129 F.Supp.3d at 1110.

14 First, Stillaguamish treaty-time occupation of the lower Stillaguamish River delta and
 15 Camano Island is not the only evidence Stillaguamish has to support its claim to the Claimed
 16 Waters. Stillaguamish also has produced Dr. Friday’s expert testimony that Stillaguamish
 17 regularly fished the waters adjacent to Camano Island—Saratoga Passage, Port Susan and Skagit
 18 Bay—which in itself is evidence that precludes summary judgment. Friday Decl., ¶¶ 2, 10;
 19 *Bulthuis*, 789 F.2d at 1318. Stillaguamish also has produced evidence that Stillaguamish utilized
 20 marine resources from and regularly traveled the Claimed Waters. *See* Dkt. #172-2 at p. 6; Dkt.
 21 # 172-13 at p. 5; Dkt. # 180-10 at pp. 3-5; Dkt. # 172-9; Dkt. # 172-10; Dkt. # 180-3; Dkt. # 180-
 22 4; Dkt. # 180-5; Dkt. # 180-6; Dkt. # 180-7; Dkt. # 180-8 at p. 3; *see also* Smith Decl., Ex. 9 at

23
 24
 25 ² Upper Skagit also attempts to undermine Stillaguamish’s evidence by noting “the evidence establishes that the
 26 Stillaguamish did not merely live along the Stillaguamish River but ‘fished’ there” in *Final Decision No. 1*. *Id.* at
 27 p. 15. In *Subproceeding 80-1*, the Court recognized that while “freshwater fishers were controlled by the locally
 resident population, the situation with regard to saltwater fisheries appears to have been slightly more complicated,”
 and noted “[t]here are greater difficulties in specifying or delineating marine areas used by or another Indian group
 than is the case with river areas,” based largely on Dr. Lane’s testimony. 626 F.Supp. at 1528.

1 pp. 7-19; *id.*, Ex. 10 at pp. 5-6; *id.*, Ex. 11 at p. 4; *id.*, Exs. 13-16; *id.*, Ex. 17; *id.*, Ex. 18 at pp.
2 26-27; *See See* Dkt. # 172-13 at p. 5.

3 Second, Upper Skagit’s claim that in *Subproceeding 80-1* the Court pronounced a three-
4 part test for establishing U&A based on village locations is baseless. Dkt. # 174 at pp. 15-18.
5 In that case, the Court did not hold that a specific combination of expert testimony, tribal elder
6 testimony about post-treaty fishing locations, and ICC findings about the location of costal and
7 river villages is required to establish U&A in marine waters. *Compare* Dkt. # 174 at p. 16 *with*
8 *Subproceeding 80-1*, 626 F.Supp. at 1027-29. Although Tulalip acknowledged in
9 *Subproceeding 80-1* that Dr. Lane did not find any documents “specifically showing regular
10 treaty-time fishing” or “nineteenth century ethnographic accounts in which fishing is
11 mentioned,” Dr. Lane “would not rule out treaty-time fisheries” in open marine waters based on
12 her opinion that “the absence of direct written evidence does not negate the treaty time existence
13 of tribal fisheries.” Smith Decl., Ex. 24 at 6. Arguing that “it is not possible nor required that
14 specific evidence concerning precise locations be given to establish a general marine area as
15 U&A,” *id.* at 28, Tulalip relied heavily on expert testimony, and on inferences that could be
16 drawn from the location of Tulalip villages, evidence of Tulalip exogamy and travel as well as
17 the general practices of Coast Salish people at and before treaty times in *Subproceeding 80-1*.
18 *See id.* at pp. 10-31. The Court subsequently found that Tulalip had produced evidence sufficient
19 to establish a broad marine U&A based on the testimony of Dr. Lane, evidence of travel and
20 exogamy, the locations of Tulalip villages, and the general cultural practices of Coast Salish
21 peoples at and before treaty times. *See Subproceeding 80-1*, 626 F.Supp. at 1527-29. The same
22 standard applies to Stillaguamish today.

23 Similar to the evidence before the Court in *Subproceeding 80-1*, Stillaguamish has
24 presented expert testimony that Stillaguamish fished the Claimed Waters at and before treaty
25 times, evidence of Stillaguamish villages and encampments near the Claimed Waters, evidence
26 of Stillaguamish travel throughout the Claimed Waters, evidence of Stillaguamish use of marine
27 resources, evidence of Stillaguamish exogamy practices, relevant Stillaguamish elder testimony,

1 as well as general evidence of treaty-time Coast Salish cultural practices. This evidence raises
2 numerous material fact issues and is sufficient to preclude summary judgment.

3 **2. The Court May Consider Post-1855 Indian Agent Evidence**

4 Upper Skagit argues that “evidence of presence caused by federal relocation is not
5 probative of U&A” in relation to Stillaguamish’s claims to Penn Cove, Holmes Harbor, Saratoga
6 Passage, and Utsalady, and contends that Dr. Friday cannot use this evidence as a basis for his
7 opinions. Dkt. # 174 at pp. 18-19. Not only does Dr. Lane’s repeated reliance on this same
8 Indian agent evidence show that Upper Skagit’s claim is unfounded, this fact also demonstrates
9 that the Indian agent evidence is probative and admissible. Thus, the Indian agent evidence
10 represents an issue of material fact that precludes summary judgment.

11 The Indian agent evidence is probative of Stillaguamish’s U&A claims. “Probative
12 evidence” is “evidence that tends to prove or disprove a point in issue.” Black’s Law Dictionary
13 639 (9th ed. 2009). This evidence tends to show that Stillaguamish was familiar with clamming
14 and fishing locations in and around Holmes Harbor, Penn Cove and Utsalady, and that
15 Stillaguamish could easily navigate those marine waters, which suggests that Stillaguamish had
16 an established custom of fishing and navigating those waters before the time the Indian agents
17 recorded their activities beginning in 1856. The evidence also shows that the customary fishing
18 practices continued throughout treaty times (up until ratification in 1859).

19 Critically, Dr. Barbara Lane repeatedly cited Indian agent evidence when offering
20 opinions regarding tribal treaty-time fishing practices. *See, e.g.,* Smith Decl., Ex. 29 at p. 5
21 (Tulalip); *id.*, Ex. 30 at pp. 3-4 (Stillaguamish); *id.*, Ex. 31 at pp. 3-4 (Snoqualmie); Dkt. # 180-
22 47 at pp. 25-26, 31 (Swinomish).

23 If the Court adopted Upper Skagit’s (inconsistent) position that post-1855 evidence is not
24 probative of U&A, no tribe would be able to establish U&A because little documentation from
25 in and around 1855 exists. *United States v. Washington*, 459 F.Supp. at 1059. The court should
26 dismiss Upper Skagit’s arguments regarding the Indian agent evidence in its entirety, which
27 ultimately fail to eliminate the two-fold material fact issues regarding the Indian agent evidence:

1 (1) Dr. Friday’s opinions that Stillaguamish customarily fished the marine waters in and around
 2 Holmes Harbor, Penn Cove and Utsalady, preclude summary judgment, *see In re Apple*
 3 *Computer Sec. Litig.*, 886 F.2d at 1116; and, (2) the Indian agent evidence, when viewed in the
 4 light most favorable to Stillaguamish and drawing all justifiable inferences in its favor, supports
 5 the claim that it regularly fished the marine waters in and around Holmes Harbor, Penn Cove
 6 and Utsalady, also precluding summary judgment. *See Anderson*, 477 U.S. at 250, 255.

7 **3. Evidence Of Regular Stillaguamish Treaty-Time Fishing And Travel**
 8 **Preclude Summary Judgment**

9 Upper Skagit argues that there is no genuine fact issue regarding Deception Pass because
 10 evidence of Stillaguamish people traveling to Fort Victoria during treaty times is not “probative”
 11 of U&A, and that Dr. Friday’s conclusion that Stillaguamish has U&A at Deception Pass is
 12 wrong.³ Dkt. # 174 at pp. 19-20. Upper Skagit similarly argues that there is no genuine fact
 13 issue regarding Holmes Harbor because evidence of a Stillaguamish member fishing in Holmes
 14 Harbor during treaty times is not “probative” of U&A and Dr. Friday’s conclusion that
 15 Stillaguamish has U&A at Holmes Harbor. *Id.* at pp. 20-21.

16 Again, Dr. Friday’s expert testimony creates genuine material fact issues regarding U&A
 17 at Holmes Harbor and Deception Pass, which precludes summary judgment. *See In re Apple*
 18 *Computer Sec. Litig.*, 886 F.2d at 1116; *see also Bulthuis*, 789 F.2d at 318. Upper Skagit’s
 19 disputes with the factual basis of Dr. Friday’s opinions and his ultimate conclusions do not serve
 20 as a basis for entry of summary judgment—they are appropriate for cross-examination at trial.

21 Stillaguamish may rely on tribal elder testimony recounting treaty-time travel and
 22 ethnographic evidence of tribal members fishing at particular locations to support its U&A
 23 claims. *See United States v. Washington*, 459 F.Supp. at 1059; *see also Final Decision No. 1*,
 24 384 F. Supp. at 332 (U&A includes “every fishing location where *members* of a tribe customarily

25 _____
 26 ³ Dr. Friday does not conclude that Stillaguamish has U&A at Deception Pass because that is an inadmissible *legal*
 27 conclusion. *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). Rather, Dr. Friday
 opines that Stillaguamish regularly fished Deception Pass at and before treaty times, and has set forth the basis for
 his expert opinion. *See generally* Friday Decl.

1 fished...”). The testimony of Stillaguamish tribal elder Sally Oxstein regarding Stillaguamish
 2 treaty-time travel is probative of a fact at issue in this case: whether Stillaguamish regularly
 3 fished Deception Pass at and before treaty times because, when combined with Dr. Friday’s
 4 testimony and that offered by Dr. Lane and Dr. Snyder, it indicates Stillaguamish people fished
 5 at that location. The ethnographic evidence documenting the Stillaguamish man known as
 6 Mowitch Sam fishing in Holmes Harbor is likewise probative of whether Stillaguamish fished
 7 Holmes Harbor at and before treaty times because it is evidence of a Stillaguamish person fishing
 8 in Holmes Harbor. Upper Skagit argues that the Court should not give any weight to this
 9 evidence, draw no reasonable inferences from it, and determine that it is not credible. Dkt. # 174
 10 at pp. 19-21. But the Court may only weigh and draw inferences, if any, from this evidence and
 11 make credibility determinations in the full context of trial and Stillaguamish’s other evidence—
 12 not on summary judgment. *Anderson*, 477 U.S. at 249, 255.

13 **4. Dr. Friday’s Methodology Is Not Evidence**

14 Upper Skagit argues that Dr. Friday’s use of the “Radiating Tribal Interests” model
 15 employed by Dr. Keith Carlson (“Carlson Model”) is not “evidence” probative of U&A. Dkt. #
 16 174 at p. 21. Upper Skagit is right: the Carlson Model is not evidence; rather, it is a method used
 17 by a historian to help evaluate the evidence. Friday Decl., ¶ 9. Dr. Friday’s application of the
 18 Carlson Model, together with the historical method, will not undo *United States v. Washington*
 19 as Upper Skagit spuriously claims. If Dr. Friday’s methodology produced the results Upper
 20 Skagit claims, then Dr. Friday would opine that Stillaguamish regularly fished all of the waters
 21 of Puget Sound and beyond at and before treaty times, but he has not done so. *See* Dkt. # 174 at
 22 p. 21. Further, Dr. Friday’s methodology does not “establish[] U&A” because Dr. Friday cannot
 23 offer *legal* opinions and he does not determine the law; instead, the Court finds U&A based on
 24 the standards set forth in *Final Decision No. 1* and its progeny based on the evidence presented.

25 Upper Skagit will have the opportunity to challenge Dr. Friday’s methodology and
 26 application of the Carlson Model through cross examination and presentation of contrary
 27 evidence at trial. *Eisenbise v. Crown Equip. Corp.*, 260 F.Supp.3d 1250, 1260 (S.D. Cal. 2017).

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IV. CONCLUSION

Upper Skagit 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 Swinomish and Tulalip, Upper Skagit’s motion is merely an attempt 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.

DATED this 25th day of January, 2021.

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