HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	Case No. C70-9213 Subproceeding No. 17-3 UPPER SKAGIT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT NOTED ON MOTION CALENDAR: January 29, 2021

Stillaguamish relies on 61 exhibits, consisting of 580 pages, and a 30-page substantive declaration to convince the Court that trial is necessary.[1] Just getting through that evidence is a monumental task. But doing so reveals a truth: trial is not necessary because with the exception of Mowitch Sam (who fished by permission in his wife's tribe's U&A, which is not relevant to establishing Stillaguamish U&A), Stillaguamish has no evidence that even a single Stillaguamish fished in marine waters at and before treaty times. The issue is not whether Stillaguamish were present at the sea but what they were doing there. Stillaguamish were at the sea; there is just no evidence that they were fishing there. In contrast to the evidence of what Stillaguamish did on the river (fished), at and on the sea they potlatched, traveled to trade their hides, and traveled to hunt land animals and birds. The Court should grant summary judgment for Upper Skagit.

[1] 74 exhibits (700 pages) and a second substantive (21-page) declaration, counting additional materials relied on in Stillaguamish's Port Susan motion. *See* Dkt. 170. Stillaguamish chose not to respond to Upper Skagit's motion as to Port Susan, instead directing the Court to its own motion on Port Susan (*see* Opp'n 1 n.1), the filing of which did not obviate the need to oppose Upper Skagit's motion. *Cf.* LCR 7(k).

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I. OPPOSITION TO STILLAGUAMISH'S MOTION TO STRIKE

Stillaguamish's motion to strike its own expert's report from Upper Skagit's filing is without merit. Motions to strike are governed by Rule 56, which allows Stillaguamish to "object that the material cited *to support or dispute a fact* cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2) (emphasis added). Upper Skagit is not using Friday's report to prove or disprove a fact. It is using Friday's report to establish that nothing in Friday's opinions precludes entry of summary judgment in Upper Skagit's favor, exactly the use permitted by the federal rules. *Unterberg v. Corr. Med. Sys., Inc.*, 799 F. Supp. 490, 494 (E.D. Pa. 1992) ("Where expert reports are produced in discovery and represent the anticipated trial testimony of experts, it is appropriate for the Court to consider the reports in determining the existence of genuine issues of material fact.").

The only case Stillaguamish cited in support of its motion holds that a party may not rely on *its own* expert's unsworn report to prove or disprove a fact on summary judgment,[2] as do the cases cited in that case.[3] Stillaguamish failed to cite a case where a party sought to use the other party's expert report (there are many), but even those cases are inapposite because in them the opposing party sought to prove a fact by use of the opposing expert's saying the fact was so.[4]

By producing Friday's report as an expert opinion it would use at trial (*see* Fed. R. Civ. P.

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[2] *See Harris v. Extendicare Homes, Inc.*, 829 F. Supp. 2d 1023, 1027 (W.D. Wash. 2011) ("Defendants also move to strike as hearsay the two expert reports plaintiff filed with his response. Plaintiff's counsel attached both reports to his own declaration . . . ."); *Harris v. Extendicare Homes, Inc.*, No. 10-5752 RBL, Dkt. 37 ¶¶ 2-3 ("Attached . . . is a true and correct copy of the Expert Report of Wendy Thomason . . . who has been retained to serve as Plaintiff's expert witness . . . [and of] Bruce Engstrom . . . who has been retained to serve as Plaintiff's expert witness . . . .").

[3] *See Aecon Bldgs., Inc. v. Zurich N.A.*, 572 F. Supp. 2d 1227, 1236-37 (W.D. Wash. 2008) (defendant sought to use its own expert's report to prove fact in dispute); *Shuffle Master, Inc. v. MP Games LLC*, 553 F. Supp. 2d 1202, 1210 (D. Nev. 2008) (each party sought to use its own expert's report to prove fact in dispute); *King Tuna, Inc. v. Anova Food, Inc.*, No. 07-7451, 2009 WL 650732, at *1 (C.D. Cal. Mar. 10, 2009) (plaintiff sought to use its own expert's report to prove fact in dispute).

[4] As an example, in *Lizotte v. Praxair, Inc.*, 640 F. Supp. 2d 1335, 1339 (W.D. Wash. 2009), Judge Lasnik analyzed each of the Rule 801(d)(2) hearsay exceptions to determine if the defendant could use an expert report prepared by the plaintiff's insurer to prove a fact in dispute. In concluding that the answer was no, he noted that the "report's authors did not testify at a deposition" and that there was no suggestion that the party who hired the expert "intends to offer the . . . report or its authors at trial" and therefore "the report is not admissible . . . as a party admission by someone authorized to make a statement." *Id.* at 1339; *see also Durham v. County of Maui*, 804 F. Supp. 2d 1068, 1071-72 (D. Haw. 2011) (report not statement of party opponent where it was "not sworn under oath, produced as part of the discovery process, or otherwise specifically relied upon by Plaintiffs in some manner").

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26(a)(2)(B)), Stillaguamish represented that the report contained "a complete statement of all opinions the witness will express [at trial] and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). Upper Skagit may rely on the disclosure and the report to explain why those opinions do not raise a genuine dispute of material fact. Upper Skagit authenticated Friday's report by stating that Stillaguamish produced it as an expert report pursuant to Rule 26(a)(2)(B) (Dkt. 175 ¶ 2): *i.e.*, that it was what it purported to be, which Stillaguamish does not dispute. *See Charm Floral v. Wald Imps., Ltd.*, No. 10-1550 RSM, 2012 WL 12882005, at *2 (W.D. Wash. Feb. 10, 2012) ("Documents produced by a party in discovery are deemed authentic when offered by the party-opponent." (citing *Orr v. Bank of America*, 258 F.3d 764, 777 n.20 (9th Cir. 2002)). Indeed, Stillaguamish relies heavily on Friday's opinion to oppose summary judgment, claiming that it alone "precludes summary judgment." Opp'n 12; *see also id.* at 7-8.

Upper Skagit was not required to create the testimony Stillaguamish will use at trial just to demonstrate that there is no genuine issue of material fact. The Court should deny Stillaguamish's motion to strike.

II. UPPER SKAGIT REITERATES ITS MOTIONS TO STRIKE

Upper Skagit has already moved to strike evidence Stillaguamish relies on in its opposition. *See* Opp'n to Port Susan Motion (Dkt. 191), pp. 2-9. Upper Skagit reiterates those motions to strike as to this filing and repeats its arguments only briefly here.

A. The Court Should Strike the Opinions from Dead and Unknown Experts That Stillaguamish Fished in Marine Waters and Which Purport to Identify Stillaguamish "Territory."

Stillaguamish relies on opinions of Carroll Riley (Dkt. 172-13, 196-11), Barbara Lane (Dkt. 172-11, -14, -15, not cited but referred to), and unidentified map illustrators (Dkt. 172-4, -5, -6) which reach various conclusions about where Stillaguamish lived and what food resources they might have used. This evidence purports to be expert opinion (otherwise it would not be admissible, *see* Fed. R. Evid. 701, 702), *i.e.*, each of Lane, Riley, and the map illustrators presumably used specialized knowledge to evaluate and draw conclusions about facts and data.

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These opinions may not be considered: they are expert opinions made in out-of-court statements for which the facts and data underlying the opinions are unknown (*see* Fed. R. Evid. 702, Fed. R. Civ. P. 26(a)(2)(B)(ii)) and the experts (who are dead or unknown to the parties) were either not subject to cross examination or were not cross-examined by anyone with the same motivation as Upper Skagit has now (*see* Fed. R. Evid. 801, 804(b)(1)(B)). This evidence should be stricken as Upper Skagit has detailed in its opposition to Stillaguamish's Port Susan motion. *See* Opp'n (Dkt. 191) at 2-6.

B. The Court Should Strike Evidence the Court Has Already Considered in Determining Stillaguamish's U&A.

Stillaguamish relies on the testimony of its elders James Dorsey (Dkt. 172-8) and Esther Ross (Dkt. 172-16) regarding Stillaguamish village locations at Hat Slough and Warm Beach. The Court considered the testimony of both in 1973, specifically identifying the exhibit containing and closely analyzing the Dorsey affidavit (Ex. USA-28–Lane's report, *see* Dkt. 175-11) and Ross's testimony (Tr. 2714, *see* Dkt. 172-16 (partial transcript); Dkt. 192-1 (complete transcript)) in its Stillaguamish U&A finding. *United States v. Washington*, 384 F. Supp. 312, 379 ¶ 146 (W.D. Wash. 1974). Although that testimony placed Stillaguamish at or near the sea, the Court determined that Stillaguamish U&A was "the Stillaguamish River and its north and south forks." *Id.* The logical corollary to the bar on submitting new evidence in a Paragraph 25(a)(1) proceeding (*Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1182 (9th Cir. 2019)) must be that a tribe cannot submit old evidence in a Paragraph 25(a)(6) proceeding, even if repackaged in the guise of an expert report. Because the Court already considered this evidence and determined Stillaguamish's U&A from it, Stillaguamish should not be permitted to rely on it again to try to convince the Court to reach a different conclusion. The Court should strike it.

C. The Court Should Strike Friday's Opinion That Stillaguamish Fished in Marine Waters.

Upper Skagit's motion to exclude Friday's opinion that Stillaguamish fished in marine waters is pending. *See* Dkt. 173. The Court should not consider that opinion (*e.g.*, Opp'n 12, lines

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16-19) in deciding this motion.

III. REPLY

In table form, Upper Skagit aggregated the specific evidence Stillaguamish's expert identified as bearing on whether Stillaguamish had U&A at each location Stillaguamish claims. Motion 4-9. Far from "arbitrarily isolat[ing] different forms of evidence" (Opp'n 16), Upper Skagit attempted to provide the Court a single, accessible way to determine whether Stillaguamish's evidence warrants a trial. Upper Skagit then bucketed the evidence, just as Stillaguamish has done, to explain that it does not raise a genuine issue for trial.

A. Presence Must Be Coupled with Evidence (However "Scant," "Fragmentary," or "Sketchy") of Stillaguamish Fishing in Marine Waters.

Stillaguamish outlines the evidence it has compiled about Stillaguamish presence at areas adjacent to marine waters. Opp'n 1-4, 13, 16. What is missing is any evidence that Stillaguamish "used" those areas for fishing. Indeed, except for Mowitch Sam who fished in Holmes Harbor by invitation of his wife's family (*see infra* page 11), the evidence Stillaguamish cites about *how* Stillaguamish "used" those areas is that they were "used" for "potlatching" and as a "[v]isiting center" (Warm Beach, Dkt. 172-8, pp. 7, 8; Dkt. 172-9, p. 3); and for hunting (Camano Island, *see* Dkt. 180-46, pp. 32, 40). All other evidence Stillaguamish cites about "use" is from Carroll Riley, whose testimony is subject to a motion to strike (*see supra* pages 3-4), and whose testimony is a unique combination of being both equivocal ("seems to be pretty strong feeling"; "perhaps on clamming expeditions"; "I would think more sea than river oriented"; "seems to have been") and conclusory[5] and is discussed further below (*infra* pages 8-9).

Stillaguamish falsely states that "the Court has held that fishing activity may be presumed in a body of water that bordered a tribe's village." Opp'n 10 (citing *United States v. Washington*,

[5] Dkt. 196-11, pp. 3, 4, 7, 9 ("there seems to be pretty strong feeling that Camano Island was utilized by a number of people including from the Lower Skagit, . . . Kiakiallus villages, . . . Snohomish, . . . and . . . from the mouth of the Stillaguamish River"; "Going down to the ocean perhaps on clamming expeditions."; "Those at the mouth of the Stillaguamish River, the Quadsak-bihu were, I would think more sea than river oriented."; "Camano Island seems to have been very generally utilized. There is indication, for example, of the Stillaguamish utilizing Camano Island . . . .").

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459 F. Supp. 1020, 1059 (W.D. Wash. Sept. 10, 1975)). That is exactly the opposite of the Court's holding in that decision. As Upper Skagit made clear in its motion (and Stillaguamish does not contest), in that decision, the Court held that while "fishing activities may be presumed" based on village locations, that presumption was insufficient for a U&A finding. Motion 14 (quoting 459 F. Supp. at 1059). The Court's *holding* was that only when that "presum[ption]" "coincide[s] with" evidence of marine fishing that "usual and accustomed fishing places" may be "establish[ed]." 459 F. Supp. at 1059.

Nor did the Court find that Muckleshoot fished in Elliott Bay based only on evidence that Muckleshoot travelled to Elliott Bay, as Stillaguamish incorrectly suggests. Opp'n 14 (citing *United States v. Washington*, 19 F. Supp. 3d 1252, 1310-11 (W.D. Wash. Sept. 10, 1999)). That subproceeding, No. 97-1, concerned the extent of the saltwater fishery found by Judge Boldt and thus was not an "expan[sion]" of Muckleshoot's U&A, as Stillaguamish incorrectly states. Opp'n 14. The parties in No. 97-1 "agree[d] that the Muckleshoot have at least some fishing rights in Elliot Bay," 19 F. Supp. 3d at 1307, with the Court noting the evidence at the 1973 trial that Muckleshoot "troll[ed] for salmon in salt water when families descended the rivers to get shell fish supplies on the beaches of the Sound," *id.* at 1308 (quoting USA 27b). The Court concluded: "In light of the evidence before Judge Boldt that the Muckleshoot *did fish* in the open waters of Elliott Bay, the court rejects the Jamestown S'Klallam's argument that the Muckleshoot U & A should be limited to the shoreline." *Id.* at 1311 (emphasis added) (footnote omitted). Stillaguamish has also created a mistaken impression about another decision concerning Muckleshoot: in quoting the Ninth Circuit's quotation of Judge Boldt's finding that "[m]ost groups claimed autumn fishing use rights in the waters near to their winter villages," Stillaguamish appears to suggest (incorrectly) that adjacency is sufficient. Opp'n 13 (quoting *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 436 (9th Cir. 2000)). In both cases (Final Decision #1 and *Muckleshoot*), that statement was used to explain seasonal patterns of fishing, not to suggest that adjacency is sufficient. *See* 235 F.3d at 436 (explaining that quoted language meant that Judge Boldt "recognized" seasonal fishing patterns); 384 F. Supp. at 353 (explaining that whether groups fished nearby or at distant

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locations varied by season). Indeed, the very fact that Judge Boldt said that "*most* groups claimed fishing use rights in the waters near their winter villages," 384 F. Supp. at 353 (emphasis added), means *he recognized that some groups did not*. Whether they did, and thus had U&A in "waters near their winter villages" (or elsewhere), depended on whether there was evidence that they *fished* there.

Stillaguamish's suggestion that the Court found Tulalip's U&A based on general statements about Indian fisheries (Opp'n 14, quoting *United States v. Washington*, 626 F. Supp. 1405, 1528 (W.D. Wash. Dec. 31, 1985)) ignores the "Area by Area Findings" of that decision. 626 F. Supp. at 1530. In those findings, the Court methodically evaluated the evidence, "area by area," to determine if the evidence *of fishing* was sufficient to find U&A there. *Id.* ("There is sufficient specific documentation and evidence to establish usual and accustomed fishing by Tulalip predecessors at the following locations: . . . .").

B. Presence Caused by Post-Treaty Federal Location Is Not Probative of Where Stillaguamish Fished at and before Treaty Times.

Stillaguamish seeks to use evidence of travel after federal relocation of Stillaguamish to Whidbey Island / the signing of the treaty to establish Stillaguamish usual and accustomed fishing locations prior to relocation / the signing of the treaty. Opp'n 18. Upper Skagit never said that the post-relocation federal agents' reports were irrelevant: in the reports cited by Stillaguamish, the federal agents were reporting information about where Indians who had *abandoned* the relocation camps went to fish and which therefore suggested the Indians' usual and accustomed places,[6] just as the federal agents' reporting that Stillaguamish "refused to come down the river in the winter to reside on Whidbey Island and remained upriver" suggested that the river was Stillaguamish's usual and accustomed place. Dkt. 180-2, p. 203. But agents' notes of Stillaguamish marine fishing after the treaty was signed and in the places of federal relocation (*i.e.*, Penn Cove and Holmes Harbor on

[6] *E.g.*, Dkt. 196-29, p. 5 ("It will be impossible for me to get the Indians here again this winter. They are now camped in the neighborhood of the Snohomish or up the Rivers fishing hunting or gathering berries."); Dkt. 196-31, p. 3 ("the Indians were up the rivers fishing").

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Whidbey Island) (if that is even what the evidence Stillaguamish cites shows[7]) and of travel to nearby Utsalady on Camano Island with no mention that Stillaguamish fished while there is not probative of what and where Stillaguamish fished before the treaty was signed. *See* Motion 17-18.

B. Stillaguamish's Proffered Evidence of Stillaguamish "Utilization" of Marine Resources at and before Treaty Times Evidences No Such Thing.

The presence of shell middens near the sea is not evidence that *Stillaguamish* fished in marine waters at and before treaty times. *Cf.* Opp'n 5, 14. Shell middens are evidence that *somebody* exploited the resource, but not evidence of who or when. *See* Motion 2, 5-6. Here, the shell middens are not probative of whether Stillaguamish took even shellfish from the beds, much less fish from the adjacent waters, especially when there is plentiful evidence that *other tribes*, who have already proved U&A by evidence of actual shellfishing in those areas, did so.[8] In the Quileute decision cited by Stillaguamish (Opp'n 14), the Court found that the "[e]thnographic and historical evidence *is broadly consistent* with the archaeological evidence of regular and customary ocean finfish harvest by the Quileute at and before treaty time." *United States v. Washington*, 129 F. Supp. 3d 1069, 1092 (W.D. Wash. 2015) (emphasis added), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017). *I.e.*, the evidence of actual Quileute fishing coincided with the evidence of substantial fish bones to lead to the conclusion that the fishing was not "occasional" or "incidental" but was "regular and customary." *Id.*

Carroll Riley's conclusory and equivocal opinions given in the 1950s that Stillaguamish were "sea . . . oriented," went to the "ocean *perhaps* on clamming expeditions," and "came down to Port Susan and lower Skagit Bay for clamming and fishing" (Dkt. 196-11, pp. 4, 7 (emphasis

[7] Stillaguamish claims that "Indian agents observed Stillaguamish people clamming and fishing around Penn Cove in 1856." Opp'n 4 (citing Smith Decl. Ex. 9, p. 8 (filed at 196-9, p. 8)); *see also* Opp'n 13-14 (citing same and Smith Decl. Ex. 10, p. 3). Those documents were authenticated by Stillaguamish's lawyer, are handwritten, are barely legible, and Stillaguamish has provided no transcription of them. But, as best as can be determined by the undersigned, Exhibit 9, page 8, states in a June 1856 entry, "most of the Indians out of the river, located about the cove and harbor digging clams and fishing." *I.e.*, appears to say nothing about Stillaguamish. Exhibit 10, page 3, is nearly completely illegible but appears to be about "Indians" generally.

[8] *E.g.*, *United States v. Washington*, 873 F. Supp. 1422, 1449 (W.D. Wash. 1994) (predecessor groups of Upper Skagit "took fish, including shellfish" at "marine and tideland locations" including "Deception Pass, Similk Bay, and southward to and including Penn Cove and Utsaladdy").

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added); Dkt. 172-13, p. 5) are subject to Upper Skagit's motion to strike. *See supra* pages 3-4. Even were they opinions given by a current expert (*i.e.*, subject to cross examination), they have nowhere near the indicia of reliability required of an expert opinion (*e.g.*, identification of facts or data considered). If Stillaguamish wanted to rely on Riley's opinions as it does now (Opp'n 5, 13, 16, 17), it should have prosecuted this case once it became financially solvent in 2002 and before Riley died in 2017. *See* Dkt. 191 nn.5-7, evidence cited, & accompanying text.

Finally, Stillaguamish says that "elder Esther Allen testified to the ICC that Stillaguamish 'often went clamming and gathered mussel shells.'" Opp'n 5 (citing Dkt. 180-19, p. 26). But the evidence Stillaguamish cites is not admissible as to Allen's testimony, and it demonstrates that her testimony is not of Stillaguamish fishing at and before treaty times. What Stillaguamish cites is the ICC's *findings* about Stillaguamish which do not purport to even quote Allen's testimony but instead paraphrased it, immediately after which the ICC found that "much of what she said applied to the claimed area during a period of time many years after the Point Elliott Treaty of 1855." Dkt. 180-19, p. 26. Thus, while Upper Skagit does not move to strike this evidence (it can be considered for what it is, *i.e.*, findings of the ICC), it cannot be considered as to the truth of the hearsay within it (Allen's testimony). *See* Fed. R. Evid. 802; Fed. R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."); *see also United States v. Lucas*, 849 F.3d 638, 645 (5th Cir. 2017) ("It was error to permit [witness] to paraphrase the deposition testimony . . . .").

C. Travel without Evidence of Fishing Underway Is Not Probative of U&A.

Upper Skagit already explained how marine travel for trade (and therefore knowledge and ability to travel on the "marine highways") is not probative of U&A without evidence of fishing en route. Motion 18-19. Stillaguamish again cites the Tulalip decision (Opp'n 15), this time as to trading at Fort Langley, but again misses the point of the quotation it cites: the Snohomish were documented to have "*frequently* traveled to the Fraser River for trading *of both salmon* and furs." 626 F. Supp. at 1529 (emphasis added). Stillaguamish also cites *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988) (Opp'n 15), for its holding that "[w]hile travel through an area

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and incidental trolling are not sufficient to establish an area as [U&A], *frequent travel* and visits to trading posts *may support other testimony* that a tribe regularly fished certain waters." 841 F.2d at 320 (citation omitted) (emphasis on "frequent" in original; other emphasis added)).

In contrast to the Snohomish and Lummi examples in the cases Stillaguamish cites, the single documentation of Stillaguamish trading in Victoria was Oxstein's, who said nothing about trading salmon, fishing en route, or fishing while there, and instead said much about trading hides and hunting and gathering while there. Dkt. 180-10, pp. 3-5 ("they were buying hides at Victoria so we would load up our canoe and go there and trade our hides for blankets and guns . . . . Then we would get ducks and geese and other wild birds and our lard we would get from the nice fat bears. Then we would go to the prairie and get 'schusedo' which looks like an onion . . . . Then we would go to this side of Victoria to get 'lackamas' they looked like an onion also . . . ."). Nor do her notes of travelling to Victoria support any "other testimony" that Stillaguamish "regularly fished certain waters." 841 F.2d at 320.

Now Stillaguamish claims that, because Stillaguamish married "throughout the Puget Sound area," it must have travelled by marine waters, and that travel equates to U&A. Opp'n 15; *see also* Opp'n 7. Just as marine travel for trade is not probative of U&A, so is marine travel for marriage not probative of U&A. Stillaguamish again quotes the Court's decision on Tulalip's U&A, again suggesting that general statements in that decision (Opp'n 15, quoting 626 F. Supp. at 1529, 1530) were the basis for the Court's U&A findings, again ignoring the "Area by Area Findings" of that decision. 626 F. Supp. at 1530.

Stillaguamish's claims that "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." Opp'n 6 (citing Smith Decl., Ex. 18 at pp. 26-27 (Dkt. 196-18)); *see also id.* 14, 17 (referencing same evidence). But that is neither what that document says nor a reasonable interpretation of it. Instead, Gibbs describes "the Sinahomish tribe," the "snoqualmoos," and "the Yakimas" and then says that "[t]he tribes living upon the eastern shore possess also territory upon

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the island, and their usual custom is to resort to them at the end of the salmon season" where "they find the greatest supply of shell-fish." Dkt. 196-18, pp. 26-27. It is only *after* that description that Gibbs describes Stillaguamish: "Below the Sinahomish come the Stoluchquamish, (river people) . . . whose country is on a stream bearing their name." Dkt. 196-18, p. 27. Stillaguamish is incorrect that Gibbs's description of tribes seasonally migrating to an island applies to Stillaguamish.

E. The Privilege to Fish in Another Tribe's U&A Granted Because of Marriage is Not Probative of U&A.

Stillaguamish provides no argument to refute Upper Skagit's position: the law of the case is that fishing by permission due to marriage as Mowitch Sam did is not probative of where a tribe fished as a usual and accustomed fishing ground. *Compare* Motion 19-20 *with* Opp'n 19-20.

F. Friday's Expert Testimony Does Not Preclude Summary Judgment.

Stillaguamish claims that, simply because its expert says Stillaguamish regularly fished the waters adjacent to Camano Island, that opinion "precludes summary judgment." Opp'n 7-8, 9, 12, 16 (citing, *inter alia*, Friday Decl. ¶¶ 2, 10, *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985) (per curiam), and *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989)). Setting aside Upper Skagit's pending motions to strike and exclude this opinion, Stillaguamish mischaracterizes the decision in *Bulthuis* and ignores the holding of *In re Apple Computer*.

The point of *Bulthuis* is not that the expert's *ipse dixit* is enough, it is that the party opposing summary judgment need not submit the underlying facts and data on which the expert relied so long as those facts and data are "stated in the affidavit." 789 F.2d at 1318. And in *In re Apple Computer*, the Ninth Circuit held that when "[i]t does not require any special competence to" review the record and determine that there is no genuine issue of material fact, "the court is not required to defer to the contrary opinion of plaintiffs' 'expert.'" 886 F.2d at 1116.

In other words, if the Court determines that the facts and data on which Friday relied to conclude that Stillaguamish fished in marine waters do not create a genuine issue for trial, it is irrelevant that Friday concluded otherwise.

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IV. CONCLUSION

The Court should enter judgment against the Stillaguamish Tribe of Indians.

DATED this 29th day of January, 2021.

UPPER SKAGIT INDIAN TRIBE

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