1 *The Honorable Ricardo S. Martinez*
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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
AT SEATTLE

9 UNITED STATES OF AMERICA, *et al.*,
10 Plaintiffs,
11 v.
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13 STATE OF WASHINGTON, *et al.*,
14 Defendants.
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17 STILLAGUAMISH TRIBE OF INDIANS,
18 Petitioner(s),
19 v.
20
21 STATE OF WASHINGTON, *et al.*,
22 Respondent(s).

Case No. C70-9213
Subproceeding: 17-03

STILLAGUAMISH TRIBE OF INDIANS' CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: TREATY TIME USUAL AND ACCUSTOMED FISHING IN PORT SUSAN

NOTE ON MOTION CALENDAR: JANUARY 29, 2021

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Partial summary judgment as to Stillaguamish usual and accustomed ("U&A") fishing rights in Port Susan is appropriate in this case. The Upper Skagit, Swinomish and Tulalip Tribes ("Responding Tribes") have failed to present substantial evidence that contradicts Stillaguamish's historical and ethnographic evidence, and they have failed to meaningfully dispute the facts upon which Stillaguamish relies in support of its claim to Port Susan. The Responding Tribes are entitled only to reasonable inferences on summary judgment, and the only reasonable inference that the Court can draw from Stillaguamish's historical and ethnographic evidence in the context of *United States v. Washington* precedent is that Stillaguamish regularly fished Port Susan at and before treaty times. Because the record taken as a whole could not lead a rational trier of fact to find that Stillaguamish likely did not regularly fish Port Susan at and before treaty times, there is no genuine issue for trial regarding Port Susan, and the Court must therefore grant Stillaguamish's partial summary judgment motion as to Port Susan.

The Responding Tribes also have submitted expert reports in support of their opposition and continue to rely on the expert report of Dr. Chris C. Friday ("Friday Report"). The Court must strike the expert reports pursuant to LCR 7(g) because the expert reports constitute inadmissible hearsay and lack proper foundation. The Court therefore may not be consider the expert reports on summary judgment. The Court also must strike the sham affidavit of Tulalip's expert.

I. AUTHORITY AND ARGUMENT

In order to carry their burden on summary judgment, the Responding Tribes must set forth specific facts showing that there is a genuine dispute for trial, which requires doing "more than simply show that there is some metaphysical doubt as to the material facts." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). To preclude summary judgment, the Responding Tribes must designate specific facts that would allow a reasonable fact finder to return a verdict against Stillaguamish regarding it U&A claim to Port Susan. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Responding Tribes must identify those facts that contradict the facts identified by Stillaguamish. *Am. Student Fin. Grp., Inc. v. Dade Med. Coll., Inc.*, 180

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F.Supp.3d 671, 678 (S.D. Cal. 2015). The Responding Tribes cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

A. THE COURT MUST STRIKE THE EXPERT REPORTS SUBMITTED IN SUPPORT OF THE RESPONDING TRIBES' OPPOSITION

Swinomish has submitted the expert reports of Dr. Astrida Blukis-Onat and Dr. Anthony Gulig ("Swinomish Expert Reports") in support of its opposition, which are inadmissible on summary judgment and must be stricken.[1] Dkt. # 199-5; Dkt. # 199-7; *see also* Dkt. # 198 at pp. 2-6, 19. First, counsel for Swinomish attached the Swinomish Expert Reports to her own declaration, but she is not competent to testify about their contents. *Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023, 1027 (W.D. Wash. 2011) (citing Fed. R. Civ. P. 56(c)(4)). Second, the Swinomish Expert Reports are unsworn and "courts in this circuit have routinely held that unsworn expert reports are inadmissible." *Id.* Third, the Swinomish Expert Reports are inadmissible because Swinomish failed to attach copies of the documents to which the Swinomish Expert Reports refer. *Id.* (citing Fed. R. Civ. P. 56(c)). The Court may only consider admissible evidence when ruling on summary judgment. *Orr v. Bank of Am. NT & SA*, 285 F.3d 764, 773-75 (9th Cir. 2003). The Court must therefore strike the Swinomish Expert Reports pursuant to LCR 7(g) because they constitute inadmissible hearsay, lack foundation, and are otherwise inadmissible on summary judgment. *Harris*, 829 F.Supp.2d at 1027.

Because the Court cannot consider the Swinomish Expert Reports on summary judgment, Swinomish's factual assertions regarding the alleged contrary evidence that can be drawn from the Gibbs map, Dkt. # 199-7 at p. 32, and the statements of Dr. Astrida-Onat and Dr. Anthony Gulig in their reports, are unsupported. Dkt. # 198 at pp. 5-6. Unsupported factual assertions cannot

[1] Swinomish and Upper Skagit also rely on the expert report of Dr. Chris C. Friday in its opposition to Stillaguamish's partial summary judgment motion. *See* Dkt. # 198 at p. 14 (citing Dkt. # 180-2); Dkt. # 191 at pp. 8, 18 (citing Dkt. # 180-2). Stillaguamish has moved to strike the unsworn and inadmissible Friday Report on the same grounds as the Swinomish Expert Reports and the Walker Report. Dkt. # 193 at pp. 12-13; Dkt. # 195 at p. 12; *Harris*, 829 F.Supp.2d at 1027.

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1 defeat summary judgment. *See Cal. Expanded Metal Prod. Co. v. Klein*, 426 F.Supp.3d 730, 742
2 (W.D. Wash. 2019).
3 Tulalip also has appended the expert report of Dr. Deward Walker ("Walker Report") as
4 "Exhibit 2" to its Response in Opposition. Dkt. # 200-2. The Walker Report was not appended to
5 any declaration, is unsworn and the documents to which it refers are not attached. *Id*. Thus, the
6 Court therefore also must strike the Walker Report pursuant to LCR 7(g) because it constitutes
7 inadmissible hearsay and lacks foundation. *Harris*, 829 F.Supp.2d at 1027; Fed. R. Civ. P.
8 56(c)(4).
9 **B. PARTIAL SUMMARY JUDGMENT AS TO PORT SUSAN IS APPROPRIATE**
10 The evidence is overwhelming that Stillaguamish regularly fished Port Susan at and before
11 treaty times. No triable disputes of material fact preclude summary judgment. Upper Skagit and
12 Swinomish do not directly challenge the facts that Stillaguamish relies upon; they merely express
13 conjectural doubts as to the immaterial circumstances surrounding the historical and ethnographic
14 evidence. Rather than produce contradictory evidence, however, Upper Skagit and Swinomish
15 incorrectly claim that "direct" evidence is required to establish U&A. Thus, no material fact
16 dispute exists. Upper Skagit and Swinomish further claim that the Court may draw from
17 Stillaguamish's ethnographic and historical evidence an inference that Stillaguamish likely did not
18 fish Port Susan at treaty times. This is not a reasonable inference in light of the record and in the
19 context of *United States v. Washington* precedent. Because the Responding Tribes are entitled to
20 only reasonable inferences and have failed to produce significant contradictory evidence, the Court
21 may grant Stillaguamish's partial summary judgment motion as to its Port Susan U&A claim.
22 **1. No Triable Disputes Of Material Fact Preclude Summary Judgment**
23 Swinomish, whose adjudicated U&A does not include Port Susan, argues that material fact
24 disputes preclude summary judgment. Dkt. # 198 at p. 17. In contrast, Upper Skagit, whose
25 adjudicated U&A does not include Port Susan, recognizes that there are no material fact issues in
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this case. Dkt. # 191 at pp. 9-20. It also appears that Tulalip does not claim that material fact issues preclude summary judgment. Dkt. # 200.

Swinomish has failed to raise a material fact issue sufficient to preclude summary judgment as to Port Susan. Swinomish's inability to dispute or present contrary admissible evidence challenging the basic facts Stillaguamish relies upon is dispositive. The absence of a material fact issue is made clear by Swinomish's admission or failure to dispute that: the Dorsey Affidavit identified two Stillaguamish encampments on or near the east shore of Port Susan, Dkt. # 198 at pp. 9, 17; Dr. Snyder opined that Stillaguamish maintained a village and home sites on or near Port Susan near Warm Beach, *id*. at p. 18; Dr. Lane concluded that Stillaguamish fished Port Susan, *id*.; Tribal elder Esther Ross testified that Stillaguamish treaty-time territory included the east shore of Port Susan, *id*.; Nels Bruseth described Stillaguamish encampments near Port Susan, *id*. at pp. 8-9; Dr. Riley opined that "Stillaguamish utilized Warm Beach and the marine resources of Port Susan" and "came down to Port Susan and lower Skagit Bay for clamming and fishing," *id*. at pp. 9-10. Instead, Swinomish mostly takes issue with all of this evidence on the basis that it does not, in its opinion, "directly" or "specifically" mention Stillaguamish fishing in marine waters. *Id*. at pp. 17-19. This is inadequate to preclude summary judgment, particularly when Swinomish does not dispute or present evidence that directly contradicts the basic facts upon which Stillaguamish relies, including the expert testimony that Stillaguamish fished Port Susan.

Rather than offering facts, Swinomish provides legal argument that a material fact dispute exists based on the purported absence of "direct evidence of actual fishing" and "substantial evidence of Stillaguamish people present on and using the saltwater[.]" *Id*. at pp. 17-18. Aside from the fact that Swinomish fails to define exactly what in its mind represents "direct" or "substantial" evidence, Swinomish's contention that Stillaguamish lacks "direct" or "substantial" evidence of fishing does not create a material fact dispute because the Court does not require "direct" or "substantial evidence" to establish U&A. *United States v. Washington*, 626 F.Supp. 1405, 1531 (W.D. Wash. 1985) ("[e]ither direct evidence or reasonable inferences from

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documentary exhibits, expert witness reports and other testimony as to the probably location and extent of [U&A] treaty fishing areas may be sufficient to support a legal determination of the areas involved."); *see also British Airways Bd. v. The Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (legal memoranda are not evidence and cannot "by themselves create a factual dispute sufficient to defeat a summary judgment motion…").

Because a purported lack of "direct" evidence does not itself affect the outcome of a Paragraph 25(a)(6) U&A adjudication in *United States v. Washington*, in that "direct" evidence is not required, Swinomish's bald assertion that Stillaguamish lacks direct evidence does not preclude summary judgment as to Port Susan. Stillaguamish's historical and ethnographic evidence that Stillaguamish maintained treaty-time villages on or near the east shore of Port Susan and regularly fished Port Susan at and before treaty times remains uncontroverted. Swinomish has therefore failed to meet its burden to set forth significant, probative facts upon which the trier of fact could reasonably find that Stillaguamish did not fish Port Susan at and before treaty times. *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

2. The Only Reasonable Inference Is That It Stillaguamish Regularly Fished Port Susan At And Before Treaty Times

Swinomish claims "Stillaguamish wants an inference that it fished in Port Susan at treaty times based on its claim that it occupied villages located in the Qwadsak area." Dkt. # 198 at p. 20. Not true. Stillaguamish does not rely on the Qwadsak village sites in its motion regarding Port Susan. *See* Dkt. # 170.

Upper Skagit argues that the Court could draw an inference from the evidence that Stillaguamish did not likely fish Port Susan at and before treaty times, thus summary judgment is inappropriate. Dkt. # 191 at pp. 12-20; Dkt. # 198 at pp. 16-20. There is, however, only one reasonable inference the Court can reach based on the extensive historical and ethnographic evidence in this case and applicable case standards from *Final Decision No. 1* to today—that Stillaguamish more likely than not regularly fished Port Susan at and before treaty times.

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"The Court must resolve any factual issues of controversy in favor of the non-moving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party." *Estate of Lovelett v. United States*, No. C16-5922-BHS, 2018 WL 2849852, at *2 (W.D. Wash. June 11, 2018). Swinomish and Upper Skagit are entitled only to the benefit of *reasonable* inferences that may be drawn from the evidence. *Barnes v. Arden Mayfair, Inc.*, 759 F.3d 676, 680-81 (9th Cir. 1985). Inferences that resemble tenuous speculation and allegation, "rather than potentially valid conclusions that could be grounded in evidence in the record," are not sufficient to overcome a well-founded summary judgment motion. *Intel Corp.*, 952 F.2d at 1558-59. As the Ninth Circuit has explained:

> A party opposing summary judgment is entitled to the benefit of only *reasonable* inferences that may be drawn from the evidence put forth. The district court must therefore undertake some initial scrutiny of the inferences that could be reasonably drawn from the evidence. A reasonable inference is one which supports a viable legal theory, which by necessary implication cannot be supported by only threadbare conclusory statements instead of significant probative evidence.
>
> In determining whether an inference may be reasonable, the district court should not weigh competing inferences against each other. When there is substantial factual evidence supporting both inferences… summary judgment is inappropriate. But when there is a failure to produce such substantial factual evidence to combat judgment and there is overwhelming evidence favoring the moving party, it may be unreasonable to draw an inference contrary to the movant's interpretation of the facts, and therefore a summary judgment would be appropriate…
>
> Thus, the object of this scrutiny is to determine whether there remains sufficient probative evidence which would permit a finding in favor of the opposing party based on more than mere speculation, conjecture, or fantasy.

Barnes, 759 F.2d 680-81 (internal citations and quotations omitted). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Swinomish seems to argue that an inference could be drawn from the evidence that there were no treaty-time villages on the east shore of Port Susan, that the villages on or near the shores of Port Susan were not occupied by Stillaguamish, and that the Stillaguamish who lived at those

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villages did not fish Port Susan. *See* Dkt. # 198 at pp. 16-20. Upper Skagit similarly contends that a reasonable inference can be drawn that Stillaguamish did not occupy the villages on the east shore of Port Susan, that Stillaguamish did not use the villages for fishing, and that the Dorsey Affidavit is unreliable. Dkt. # 191 at p. 13. The inferences proposed by Swinomish and Upper Skagit are not reasonable in light of the historical and ethnographic evidence, consistent multiple expert testimony that Stillaguamish fished Port Susan, and in the context of *United States v. Washington*. *See Barnes*, 759 F.2d at 680-81 (defining "reasonable inference" as on that is supported by "significant probative evidence" rather than "threadbare conclusory statements.").

The only reasonable inference that can be drawn from the evidence is that Stillaguamish maintained treaty-time villages on and near the east shore of Port Susan and likely fished Port Susan. Stillaguamish Tribal elder and chief James Dorsey identified a treaty-time Stillaguamish village at Warm Beach on the east shore of Port Susan, which was one of the Stillaguamish villages "at time Governor Stevens made the treaty and where Indians were living at time white man ordered them away"—i.e., treaty times. Dkt. # 172-7; Dkt. # 172-8 at p. 6. Dr. Barbara Lane and Dr. Sally Snyder each relied on the Dorsey Affidavit in rendering their expert opinions; thus the only reasonable inference that can be drawn is that the Dorsey Affidavit is reliable. Dkt. # 172-11 at p. 3; Dkt. # 172-24 at pp. 3-11; Dkt. # 3 at pp. 9-10; Dkt. # 172-9 at p. 3; Dkt. # 172-10. Dr. Snyder testified that Stillaguamish maintained a village and a home site on or near the shores of Port Susan. Dkt. # 172-3 at pp. 13-14; Dkt. # 172-9 at p. 3; Dkt. # 172-10. Dr. Riley testified that Stillaguamish utilized Warm Beach and that Stillaguamish went to Port Susan "for clamming and fishing." Dkt. # 172-12 at pp. 5, 7; Dkt. # 172-13 at p. 5. Dr. Lane also opined that Stillaguamish occupied the villages at Hat Slough and Warm Beach, and fished Port Susan at and before treaty times. Dkt. # 172-15 at pp. 4, 6-8; Dkt. # 172-11 at p. 3. In this Subproceeding, Dr. Friday has testified that Stillaguamish regularly fished Port Susan at and before treaty times, which none of the Responding Tribes' experts meaningfully dispute. Dkt. # 171; Dkt. # 172-18; Dkt. # 172-19.

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The ethnographic evidence Upper Skagit and Swinomish cite that also places Stillaguamish on the river does not contradict Stillaguamish's evidence supporting its treaty-time fishing in Port Susan. Dkt. # 191 at pp. 16, 18-19; Dkt. # 198 at pp. 9-14. Since the inception of this case over forty years ago, this Court has repeatedly recognized and found that many tribes maintained both salt and freshwater fisheries—and this Court has never found that maintaining a river fishery precludes finding a U&A marine fishery, as Upper Skagit seems to suggest. *See, e.g.*, *United States v. Washington*, 384 F. Supp. 312, 360-61 (W.D. Wash. 1974) (Lummi river and marine fisheries); *id*. at 364 (Makah river and marine fisheries); *id*. at 367 (Muckleshoot river and marine fisheries); *id*. at 369 (Nisqually river and marine fisheries); *id*. at 371 (Puyallup river and marine fisheries); *id*. at 372 (Quileute river and marine fisheries); *id*. at 375-76 (Quinault river and marine fisheries); *id*. at 377 (Skokomish river and marine fisheries); *United States v. Washington*, 626 F.Supp. at 1528 (Tulalip saltwater); *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash. 1978) (Swinomish river and marine fisheries); *id*. at 1059-60 (Tulalip river and marine fisheries). Upper Skagit and Swinomish offer no evidence that directly contradicts Stillaguamish's evidence of treaty-time fishing in Port Susan—only metaphysical doubts and conjecture as to precise dating, parsing of immaterial details, and belabored claims of unrequired "direct" evidence. *See* Dkt. # 191 at pp. 13-18; Dkt. # 198 at pp. 16-17. Given the lack of contradictory evidence, the only reasonable inference the Court can draw is that Stillaguamish likely maintained treaty-time villages on or near the east shore of Port Susan, and regularly fished Port Susan at treaty times. *Am. Student Fin. Grp., Inc.*, 180 F.Supp.3d at 678.

The "reasonable inferences" Swinomish and Upper Skagit urge this Court to find are also contrary to reasonable inferences this Court routinely draws in *United States v Washington*. The reasonable inference the Court draws from villages on the shores of a particular body of water is that the people who lived at that village regularly fished that body of water. *See, e.g., United States v. Washington*, 626 F.Supp. at 1528 ("Winter villages were located along the salmon streams, at the heads of inlets near the mouth of such streams, and on protected coves and bays. During the

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winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages."); *see also United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 436 (9th Cir. 2000) ("[M]ost groups claimed autumn fishing use rights in the waters near to their winter villages."). The reasonable inference the Court draws from a village like that at Hat Slough, which is slightly upriver from Port Susan, is that the Stillaguamish who resided at Hat Slough and further upriver would travel downriver to Port Susan. *See United States v. Washington*, 19 F.Supp.3d 1252, 1310-11 (W.D. Wash. 1997) (expanding Muckleshoot marine U&A based on finding that Muckleshoot was an "upriver tribe" that "occasionally" and "from time to time" traveled to the "open waters and shores of Elliott Bay"); *see also Subproceeding 80-1*, 626 F.Supp. at 1528 ("Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This was especially true if shellfish beds were present… People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish."). The reasonable inference the Court draws from the shell middens Nels Bruseth observed at the Warm Beach village is that the people who resided at that village "continuously engaged in harvesting" particular marine species over a period of time and such evidence suggests a particular directional orientation, in this case towards the marine waters of Skagit Bay and beyond. *See United States v. Washington*, 129 F.Supp.3d 1069, 1091 (W.D. Wash. 2015) (shell middens can demonstrate "aboriginal… occupancy evidenc[ing] a community continuously engaged in harvesting" particular species); *id.* (finding that "the types of species found at the Quileute sites suggest a strong oceanic orientation.").

Although Swinomish and Upper Skagit are entitled to the benefit of all *reasonable* inferences, the Court does not have to draw inferences in favor of the Responding Tribes because they failed to contradict Stillaguamish's historical and ethnographic evidence, and the evidence is otherwise overwhelming that Stillaguamish likely fished Port Susan at and before treaty times. *See Estate of Lovelett*, 2018 WL 2849852, at *2. Summary judgment is therefore appropriate.

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3. The Expert Evidence Does Not Preclude Summary Judgment

The largely undisputed expert evidence in this Subproceeding also does not preclude summary judgment, and more importantly, the expert evidence makes clear that the only reasonable inference that can be drawn from the record as a whole in this case is that Stillaguamish more likely than not fished Port Susan at and before treaty times. *See United States v. Washington*, 384 F. Supp. at 322 (court makes findings "upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom" that an area is U&A on a more probable than not basis). In its Motion, Stillaguamish asserted that the testimony of Dr. Anthony Gulig, expert for Swinomish, did not raise a material fact issue precluding summary judgment as to Port Susan. Dkt. # 170 at pp. 18-19. Swinomish has failed to respond to this argument and therefore concedes that Dr. Guilg's testimony does not preclude summary judgment. *Stitching Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F.Supp.2d 1125, 1132 (C.D. Cal. 2011) ("failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver of abandonment in regard to the uncontested issue.") (citing *Jenkins v. Cty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005)). Swinomish also does not dispute that its other expert, Dr. Astrida Blukis-Onat, offers no opinion on Stillaguamish treaty time fishing in Port Susan. *Compare* Dkt. # 170 at p. 17 *with* Dkt. # 198. Upper Skagit likewise does not dispute that its sole expert, Dr. Bruce Miller, opines that Stillaguamish "may have" fished Port Susan and "appeared" to have a presence on the saltwater of Port Susan. *Compare* Dkt. # 170 at p. 17 *with* Dkt. # 191 at p. 13.

Even with its attempt to rehabilitate Dr. Walker's sworn deposition testimony, Tulalip still fails to create a material fact issue based on Dr. Walker's opinions as to Port Susan because the Declaration of Deward Walker, Jr., Dkt. # 201, violates the sham affidavit rule and must be stricken. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."). There is a clear and unambiguous contradiction between Dr. Walker's

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deposition testimony and his subsequent affidavit. *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012). In his deposition, Dr. Walker clearly testified:

> I think [Stillaguamish] have 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; *id*. at pp. 4-6.[2] Dr. Walker also unambiguously testified that Stillaguamish traveled in marine waters at treaty times. *Id*. at p. 6. Now, in opposition to summary judgment, Dr. Walker has completely and conveniently changed his prior testimony given under oath:

> Again, what matters is if these "river people" regularly fished in Port Susan. They did not; they relied on the river and only occasionally came to the coast. There is no information that they even entered the marine waters, and given their canoes, which were built for river use, it is unlikely that they could have fished the deep water without help from tribes such as the Snohomish who regularly used Port Susan and Puget Sound.… It is not my opinion, nor was it my deposition testimony, that the Stillaguamish people regularly fished, throughout the entirety of Port Susan at treaty times.

Dkt. # 201 at p. 2. Dr. Walker submitted no correction sheets to his sworn deposition testimony, and counsel for Tulalip did not object to the deposition questions on the record. Dkt. # 172-18 at pp. 3-6; *see also* Dkt. # 200 at p. 5. The Court must therefore reject Tulalip's attempt to create a material fact issue from his later affidavit testimony. Alternatively, even if the Court declines to strike Dr. Walker's sham affidavit, Dr. Walker's new testimony does not create a material fact issue sufficient to preclude summary judgment as to at least northern Port Susan. Dr. Walker still admits that Stillaguamish fished Port Susan north of Kayak Point at and before treaty times, which just happens to fall within the scope of Tulalip's settlement agreement. *See* Dkt. # 201 at p. 3.

C. TULALIP'S OPPOSITION IS INSUFFICIENT TO PRECLUDE SUMMARY JUDGMENT

Tulalip walks down a very troubling and precarious path in its opposition. Although it is true that Stillaguamish possesses the ultimate burden at trial to establish U&A in Port Susan,

[2] *See also* Dkt. # 172-18 at p. 6 ("Q. Would it—would it be your opinion that the Stillaguamish people regularly used Port Susan at treaty times for fishing activities? A. To the extent the fish were available—or shellfish were available at that time, yes, but I don't know a schedule again.").

Tulalip still has the burden as the non-moving party to offer more than assertions and allegations from its pleadings and set forth specific facts by producing competent or admissible evidence that shows a genuine issue for trial. *Celotex*, 477 U.S. at 324. Tulalip has failed to produce any competent evidence showing there is a genuine issue for trial. *See* Dkt. # 200. Tulalip offers only argument, conclusory allegations and speculation, which are wholly inadequate to oppose summary judgment. *Forsberg v. Pac. Nw. Bell Tell. Co.*, 840 F.2d 1409, 1419 (9th Cir. 1988) ("purely conclusory allegations" do not raise a genuine material issue of fact); *Nelson v. Pima Cmty. Coll*., 83 F.3d 1075, 1081-82 (9th Cir. 1996) ("Likewise, mere allegation and speculation do not create a factual dispute for purposes of summary judgment."); *Long v. Bureau of Econ. Analysis*, 646 F.2d 1310, 1321 (9th Cir. 1981), *judgment vacated on other grounds*, 454 U.S. 934 (1981) (legal memoranda are not evidence and do not create issues of fact capable of defeating an otherwise proper motion for summary judgment). Tulalip's unsupported contentions that Stillaguamish's motion "contains numerous errors," is "unhelpful" and that the Friday Report is "useless" are all insufficient to preclude summary judgment. *See* Dkt. # 200.

Without specifically identifying the evidence, Tulalip seems to dispute Stillaguamish's evidence regarding: (1) village locations and encampments because they "continue to be disputed particularly as to who occupied those places," Dkt. # 200 at p. 1; (2) ICC proceedings on the basis that this evidence "is inappropriate and not helpful," *id*. at pp. 4-9; and, (3) former sworn testimony of Dr. Carrol Riley as "not helpful," *id*. at p. 5. First, Tulalip's opposition is wholly inconsistent with its 1984 Settlement Agreement that Stillaguamish's U&A already includes at least northern Port Susan and commitment to *affirmatively support* Stillaguamish's RFD regarding northern Port Susan. Dkt. # 65-1; *United States v. Washington*, 626 F.Supp. at 1480-83. Tulalip cannot say it supports this effort, but file a brief sneeringly and perfunctorily objecting to Stillaguamish's evidence. This is a far cry from the Court ordered "affirmative support" of the RFD that Tulalip pledged years ago and it is contemptable. Second, and critically, Tulalip offers no evidence in support of its contentions—just arguments that mostly lack even citation to legal authority. Rule

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56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers, interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." *Id.* Arguments of counsel are not evidence enough. Partial summary judgment for Stillaguamish is therefore appropriate.

D. THE COURT SHOULD DENY UPPER SKAGIT'S MOTIONS TO STRIKE

1. Stillaguamish's Limited Evidence From 1974 Is Admissible

Upper Skagit argues that the Court should strike evidence the Court already considered in determining Stillaguamish's U&A in 1974. Dkt. # 191 at p. 6. This appears to only apply to the Dorsey Affidavit and Ross testimony. Upper Skagit claims that the "logical corollary to the bar on submitting new evidence in a Paragraph 25(a)(1) proceeding (*Muckleshoot*, 944 F.3d at 1182) must be that a tribe cannot submit old evidence in a Paragraph 25(a)(6) proceeding," even if that evidence serves as the basis for an expert's new opinion. *Id.* at p. 7. The Court should reject Upper Skagit's invitation to adopt a new rule that would limit the scope of evidence that can be considered by a Tribe's expert under Paragraph 25(a)(6), and which runs counter to the Court's repeated acknowledgement about the scope of treaty-time evidence available. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318, 321 (9th Cir. 1988) (evidence of treaty-time fishing activities is "sketchy and less satisfactory than evidence available in the typical civil proceeding," and the documentation that does exist is "extremely fragmentary and just happenstance."). At best, Upper Skagit's concern goes to the weight given to Dr. Friday's reliance on the Dorsey Affidavit and Ross testimony, not admissibility, and serves only to try to distract the Court from the new expert testimony supporting summary judgment for Stillaguamish in Port Susan, including the testimony of their own expert. Dkt. # 170 at pp. 17.

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2. There Is No Undisclosed Expert Opinion

Upper Skagit asks the Court to strike Dr. Friday's opinion that Stillaguamish maintained a village at Warm Beach on the basis that it was not properly disclosed in the Friday Report. Dkt. # 191 at p. 8. In his report, however, Dr. Friday specifically described a village at Warm Beach that was identified by James Dorsey. Dkt. # 180-2 at p. 95.[3] Dr. Friday cited the Dorsey Affidavit. *Id*. at pp. 38, 64-67, 69-70, 87-89, 93-95, 98, 219. He also cited Dr. Riley's testimony numerous times throughout his report. *Id*. at pp. 45, 87-89, 90. Dr. Friday repeatedly opined that Stillaguamish treaty-time territory included Warm Beach. *Id*. at pp. 10, 42-46, 50, 64-67, 77-78, 82, 84, 90, 92, 96, 106-108, 116-17, 161, 165. Upper Skagit's claim that it is now "unfairly surprised" is without a basis in fact and is completely unjustified. *See* Dkt. # 191.

3. The Maps Are Admissible

Upper Skagit has asked the Court to strike the map drafted by James Mooney in 1894 for the Bureau of Ethnology, Dkt. # 172-4, a map drafted in 1936 by Leslie Spier, Dkt. # 172-5, and a map by geographer James W. Scott and historian Ronald L. DeLorme from 1968, Dkt. # 172-6, ("Historical Maps") on the basis that the Historical Maps constitute inadmissible hearsay offered by now-deceased experts. Dkt. # 198 at p. 2-3. The Historical Maps, which date from 1894 to 1968, are plainly admissible as ancient documents. Fed. R. Evid. 803(16). All that is required for the Historical Maps to be admissible as ancient records is that they were "prepared before January 1, 1998, and whose authenticity is established." Fed. R. Evid. 901(b)(8). Authenticity is established by evidence that it "(A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered." *Id*. Each of the maps are contained in books, excerpts of which have been provided to this Court, which satisfies the authenticity requirement for admissibility. Dkt. # 172-4, Dkt. # 172-5; Dkt. # 172-5; Dkt. # 199-8; Dkt. # 199-9; Dkt. # 199-6.

[3] Stillaguamish construes Upper Skagit's motion to strike as a premature motion in limine or Rule 26 motion to exclude, thus the Court may consider Dr. Friday's expert report for this limited purpose.

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Although Rule 901(b)(8) requires that ancient documents must be in a condition that creates no suspicion about their authenticity, that suspicion "does not go to the content of the document but rather to whether the document is what it purports to be." *United States v. Kairys*, 782 F.2d 1374, 1379 (7th Cir. 1986). Whether the Historical Maps' contents are trustworthy, accurate, or complete does not bear upon their admissibility, but "upon the weight to be accorded the evidence." *Id.* at 1379; *see also United States v. Demjanjuk*, 367 F.3d 623, 631 (6th Cir. 2004); *United States v. Stelmokas*, 100 F.3d 302, 312 (3d Cir. 1996). Thus, Upper Skagit's contentions regarding the trustworthiness or accuracy of the Historical Maps do not preclude their admissibility as ancient documents.

4. Ethnographic Testimony Documents Are Admissible

Upper Skagit also has asked the Court to strike the former testimony of Dr. Barbara Lane, Dr. Carrol Riley and Dr. Sally Snyder ("Ethnographic Testimony Documents"). To the extent Upper Skagit claims the Ethnographic Testimony Documents contain hearsay, the hearsay is admissible under Fed. R. Evid. 803(16), which sets forth as a specific exception to the hearsay rule statements contained in ancient documents.

Under the circumstances of this case—where former expert testimony has consistently played a large and critical role over the last forty years—the use of the former testimony is in substantial compliance with Fed. R. Evid. 804(b)(1), which allows for the use of former trial or deposition testimony of an unavailable witness if a "predecessor in interest"[4] of the party against whom the testimony is offered had similar opportunity and motive to develop the testimony. Here, Dr. Snyder and Dr. Lane are unavailable. Dkt. # 191 at p. 3. The United States in the ICC proceeding can be considered a predecessor in interest with similar motives and opportunities to develop Dr. Snyder's testimony as those of Upper Skagit in this case. Upper Skagit, like the United States before it, seeks to undermine Stillaguamish's claim that its people occupied the Warm Beach

[4] Courts do not require parties to separately demonstrate that the prior party was a "predecessor in interest," because parties who are found to have an "opportunity and similar motive" like that of the current party are deemed to be predecessor in interest. *See Hynix Semiconductor Inc. v. Rambus, Inc.*, 250 F.R.D. 452, 458 (N.D. Cal. 2008).

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area at and before treaty times. The State of Washington and opposing treaty tribes in Subproceeding 80-1 also can be considered predecessors in interest with similar motives and opportunities to develop Dr. Lane's testimony as those of Upper Skagit in this case. Alternatively, even if the United States, the State of Washington and opposing treaty tribes cannot be considered a "predecessor in interest" to Upper Skagit, because the motives of the two parties are so aligned, the former testimony of Dr. Snyder and Dr. Lane fall under the catch-all exception. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456, 462 (5th Cir. 1985) ("Even if the Smith deposition is not admissible under the former testimony exception, it is encompassed within the residual exception to the rule against hearsay.").

The Ethnographic Testimony Documents are likewise admissible under Fed. R. Evid. 807, which provides that a hearsay statement is not excluded by the rule against hearsay where the statement has circumstantial guarantees of trustworthiness, is offered as evidence of a material fact, is more probative on the point for which it is offered than other evidence that the proponent can obtain, and admitting the statement will best serve the purposes of the Rules of Evidence. The Ethnographic Testimony Documents are transcripts of court and deposition testimony taken under oath and submitted to the Indian Claims Commission and this Court. The Ethnographic Testimony Documents bear a sufficient guarantee of trustworthiness to be admissible under the residual exception to the hearsay rule.

The Ethnographic Evidence is further admissible because it serves as a basis for Dr. Friday's opinions regarding Port Susan. Dkt. # 171 at pp. 5-12. Rule 703 permits Courts to admit otherwise inadmissible evidence and hearsay upon which an expert relies "to be admitted to explain the basis of the expert's opinion." *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984). At the least, the Ethnographic Testimony Documents are admissible on this basis.

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E. THIS COURT POSSESSES JURISDICTION OVER STILLAGUAMISH'S RFD

Swinomish and Upper Skagit each argue the Court should deny Stillaguamish's partial summary judgment motion regarding Port Susan for lack of jurisdiction because Stillaguamish has purportedly presented no new evidence.[5] *See* Dkt. # 191 at pp. 10-12; Dkt. #198 at p. 21; *see also* Dkt. # 179 at pp. 13, 24-26. This is simply untrue.

Dr. Friday's expert opinion that Stillaguamish regularly fished Port Susan at and before treaty times constitutes new evidence. *Rodriguez v. Olin Corp.*, 780 F.2d 491, 496 (5th Cir. 1986). So too are the expert opinions offered via deposition testimony of Dr. Walker and Dr. Miller supporting Stillaguamish treaty time fishing in Port Susan.

Moreover, regardless of whether some of the evidence Dr. Friday relies upon previously existed or was available in some form, it has never before been presented to the Court by or on behalf of Stillaguamish in its efforts to establish its own marine U&A. Thus, it has never been squarely before the Court for the purpose of establishing Stillaguamish's U&A in Port Susan and could not have been so considered before without the RFD. As Stillaguamish has previously explained, the record in front of Judge Boldt with respect to Stillaguamish's U&A was extremely limited, as illustrated by the fact that he cited only 26 pages of documents for all of his findings of fact related to Stillaguamish. *See United States v. Washington*, 384 F.Supp. at 378-79 (FF #144-46); Dkt. # 80, ¶ 3. Further, the evidence to which the Court cited shows that it was largely focused on Stillaguamish's treaty status (*see* Dkt. # 80-7; Dkt. # 67-1 at p. 258), its population (*see* Dkt. # 67-1 at p. 395); Tribal Constitution (*see* Dkt. # 80-8), and the United States Department of Interior's lists of federally recognized tribes (*see* Dkt. #80-9; Dkt. # 80-10). Only three of the 26 pages of documents relate to Stillaguamish fishing. *See* Dkt. # 67-1 at pp. 266, 373; Dkt. # 80-11 at p. 3. The contrast to the available evidence here is beyond credible dispute.

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[5] Paragraph 25(a)(6) jurisdiction is "contingent on the Court's finding… that the disputed waters in question were not specifically determined by Judge Boldt." *United States v. Washington*, No. 17-SP-01, 2017 WL 3726774, at *5 (W.D. Wash. Aug. 30, 2017), *aff'd*, 928 F.3d 783 (9th Cir. 2019). This Court has already "conclude[d] that the entirety of Stillaguamish U&A was not specifically determined by [*Final Decision No. 1*]." Dkt. # 9 at p. 6.

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II. CONCLUSION

Applying the same evidentiary standards as Judge Boldt in *Final Decision No. 1*, Stillaguamish's undisputed evidence of village locations and encampments at Warm Beach and Hat Slough on the eastern shore of Port Susan, ***supported by the testimony of six experts that Stillaguamish fished in Port Susan (three from this Subproceeding)***, is sufficient to establish that, at and before treaty times, Stillaguamish regularly fished Port Susan. No genuine issues of material fact are in dispute regarding Stillaguamish's treaty-time fishing in Port Susan, and Stillaguamish is entitled as a matter of law to a judgment that its U&A grounds include Port Susan. Partial summary judgment is therefore appropriate.

DATED this 29th day of January, 2021.

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