The 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.	No. 70-9213 Subproceeding No. 17-3 **SWINOMISH INDIAN TRIBAL COMMUNITY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT OR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: Friday, January 29, 2021 **ORAL ARGUMENT REQUESTED**

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A. Introduction.

The central relief sought by Swinomish's Motion for Partial Summary Judgment or Summary Judgment is dismissal of Stillaguamish's U&A claim to marine waters beyond Port Susan. In response, Stillaguamish concedes that it has no direct evidence of treaty-time fishing in Skagit Bay, Deception Pass, Saratoga Passage, Holmes Harbor or Penn Cove.

Stillaguamish relies primarily on a declaration in which its expert opines that Stillaguamish, an upriver tribe, customarily fished in a wide range of marine waters beyond Port Susan. But the purported facts on which he relies for that opinion are broad generalizations about Coast Salish culture and other information that cannot support a finding of U&A in those waters. To escape that problem, Stillaguamish also claims that its expert's declaration compares favorably with the expert opinions of Dr. Barbara Lane, the anthropologist on whom Judge Boldt relied in Final Decision 1. There are two problems with this claim: First, Barbara Lane, on the same core evidence, never opined that Stillaguamish fished in marine waters beyond Port Susan. Further, Barbara Lane's expert reports in which she identified treaty-time marine water fisheries for a given tribe were supported by tribal witnesses and other direct evidence of fishing in specific locations. The Stillaguamish expert declaration identifies no such evidentiary support.

Other evidence Stillaguamish relies on cannot support a reasonable inference of Stillaguamish U&A beyond Port Susan. For example, it cites eighteen documents that, it claims, establish that it (i) occupied villages near the shores of Skagit Bay and (ii) utilized marine resources of Skagit Bay. But a careful inspection of the cited evidence makes clear that it establishes no such thing.

Stillaguamish also does not dispute that there was no intertribal agreement in or about 1925 as to tribal boundaries, including Stillaguamish's. Consequently it should not be allowed to base its marine fisheries U&A claims on that non-existent agreement.

Finally, Stillaguamish does not dispute that, in proceedings before the Indian Claims Commission in the 1950s and 1960s, it made a territorial claim to the Qwadsak area, the claim

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was litigated, the claim was finally adjudicated against Stillaguamish, and the determination that Qwadsak was not occupied and possessed by Stillaguamish at treaty time was essential to the judgment by the ICC. In other words, Stillaguamish does not dispute any of the elements of collateral estoppel. Accordingly, Stillaguamish should be precluded from claiming that it occupied the Qwadsak area at treaty time and from asserting customary fishing in marine waters anywhere based on such occupation.

B. Stillaguamish Does Not Dispute That There Was No Intertribal Agreement.

Both Stillaguamish's Rule 30(b)(6) representative and its expert testified unambiguously in deposition that there was an intertribal agreement reached in the 1920s in preparation for the *Duwamish* proceedings that *inter alia* established Stillaguamish territorial boundaries. (*See* Declaration of N. Garberich [Dkt. 180] Ex. P at 73-14-18, 79:14-17; Ex. A at 22:7-19, 44:18-45:13.) Stillaguamish claims—that is, hypothesizes—that the Stillaguamish territory allegedly agreed upon includes the Qwadsak area. Stillaguamish then bases its claim of treaty-time possession of the Qwadsak area, in part, on this purported agreement. But, as detailed in Swinomish's Motion (Dkt. 179), Stillaguamish has not produced the agreement, cannot say whether it was written or oral, cannot identify the parties to it or any of its material terms, and cannot explain how it was negotiated or ratified. (*See* Mtn at 7-8 and Garberich Exs. cited therein.)

Swinomish has moved for partial summary judgment dismissing Stillaguamish's claim that there was an intertribal agreement. (*See* Mtn. at 7-8 and 17-18.) And Stillaguamish should be precluded from relying on the purported agreement to support its claim to treaty-time possession and occupation of the Qwadsak area. (*Id.*) In response, Stillaguamish first backs away from the claim that there actually was an agreement, directly contradicting the testimony of its 30(b)(6) representative and its expert. Stillaguamish now states that it "does not claim that the intertribal agreement is a binding legal contract," but only that there was an "informal" agreement. (*See* Response at 19:7-9, 19:16-18.) Exactly what Stillaguamish means by that is left unclear.

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Second, Stillaguamish now misleadingly points to Smith Declaration Exhibit 22 as evidence of the purported 1920s *Duwamish* intertribal agreement. (*See* Response at 19:9, 19:16-20.) But Smith Exhibit 22 cannot be the purported intertribal agreement: it is dated, on its face, December 13, 1950. It also makes no reference to a 1920s agreement. Further, Smith Exhibit 22 appears to describe a roughly west-to-east line that cannot reasonably be said to identify or encompass Stillaguamish territory, let alone to constitute or describe any alleged agreement that the Qwadsak area lies within Stillaguamish territory.

Finally, Stillaguamish points to a letter from its attorney dated July 17, 1926, that makes a passing reference to tribal agreements re boundaries. (*See* Mtn. at 7:26-8:8; Garberich Ex. R.) But that letter is not an agreement and does not identify any parties or terms of an agreement; further, it is ambiguous as to whether it refers to Stillaguamish's and other unspecified tribes' *internal* agreements as to their respective territorial boundary claims or to an intertribal agreement among tribes. And the 1926 letter in no way establishes that the agreement, if there was one, clearly included the Qwadsak area in Stillaguamish territory.

There is no evidence that there is or ever was a 1920s intertribal agreement to tribal territories, including an agreement that Stillaguamish territory includes the Qwadsak area. Swinomish's motion for partial summary judgment on this issue should be granted.

C. Stillaguamish Does Not Dispute That the ICC Determined That Stillaguamish Treaty-Time Territory Did Not Include the Qwadsak Area.

Swinomish moves for partial summary judgment dismissing Stillaguamish's claim that it possessed and occupied the Qwadsak area at treaty time. Collateral estoppel precludes that territorial claim, because it was fully litigated before, and finally determined by, the Indian Claims Commission. (*See* Mtn. at 8-11, 18-22.) And, as a result, Stillaguamish should not be allowed to base its claim to marine U&A on its territorial claim to the Qwadsak area. (*See id.*)

In response, Stillaguamish avoids the critical issue. Stillaguamish argues that collateral estoppel based on ICC determinations should not apply because the ICC did not determine Stillaguamish' fishing rights. (Response at 20-21.) But Swinomish's Motion does not argue

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that the ICC determined Stillaguamish fishing rights. It argues, and provides ample evidence in support, that the ICC determined Stillaguamish treaty-time territory and that such treaty territory did not include the Qwadsak area, and that such determination was essential—indeed, was the foundation of—the amount of the settlement for Stillaguamish's ICC claim. (*See* Mtn. at 18-22.) Crucially, in the Response, Stillaguamish does not dispute that Stillaguamish asserted a claim to the Qwadsak area in the ICC proceedings, that whether Stillaguamish possessed and occupied the Qwadsak area at treaty time was fully litigated before the ICC, that the ICC determined Stillaguamish treaty time territory, that it determined the Stillaguamish treaty-time territory did not include the Qwadsak area, or that such determination was essential to the judgment in that case. For that reason alone, Swinomish's motion should be granted. Collateral estoppel is clearly established. *McCoy v. Foss Mar. Co.*, 442 F. Supp. 2d 1103, 1107 (W.D. Wash. 2006). (*See* Mtn at 18-22.)

Stillaguamish relies on *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981). (*See* Response at 21:3-8.) That case concerned post-Final Decision 1 treaty fishing rights claims by certain Puget Sound-area Indian groups; the Ninth Circuit affirmed this Court's denial of the claims. The Ninth Circuit *inter alia* rejected the appellant Indian groups' offensive collateral estoppel arguments – that this Court was bound to allow those groups' fishing claims to proceed because of ICC decisions that had allowed those same groups to pursue claims with the ICC. *See* 641 F.2d at 1374. The Ninth Circuit explained that the ICC claims involved "compensation for individuals, not fishing rights for tribal units," and that "[t]he causes of action and *factual issues litigated* were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable." *Id.* (emphasis added). But the present case is distinguishable from that Ninth Circuit case exactly on that point: Here the ICC *did* make a final adjudication on the very issue that Stillaguamish is re-asserting and attempting to re-litigate. The ICC determined Stillaguamish's treaty-time territory and specifically and expressly determined that it did not include the contested Qwadsak area. (*See* Garberich Ex. S

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[Indian Land Claims Commission Dkt. No. 207 (Stillaguamish) Findings of Fact, February 26, 1965]; *see esp. id.* at Findings 2, 18.)

This distinction is made clear in another case cited by Stillaguamish, *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1978). Stillaguamish cites that case for the proposition that "evidence derived from those proceeding [sic] and ICC opinions must be scrutinized carefully" (Response at 20:26-27) apparently in order to suggest that this Court should disregard, or at minimum regard very skeptically, the ICC's adverse judgment as to Stillaguamish's territorial claim to the Qwadsak area. But the import of this Court's ruling in that case was quite to the contrary: it concluded that while ICC findings of fact need to be scrutinized carefully, they "shall be given consideration" when presented for the purpose of establishing the territory held by a tribe at treaty time in order to support an inference that the tribe customarily fished in nearby waters. *Id*. at 1059. There, the ICC's favorable findings as to Tulalip's predecessors' treaty-time territories were admissible as support for Tulalip's marine U&A claim; here, the ICC's adverse findings as to Stillaguamish's treaty-time territories are not only admissible to refute Stillaguamish's marine U&A claim, but preclusive.

D. Stillaguamish Does Not Dispute That It Has No Direct Evidence of Fishing Beyond Port Susan.

Swinomish's motion for partial summary judgment dismissing Stillaguamish marine U&A claims beyond Port Susan is based, in part, on the fact that Stillaguamish offers no direct evidence of Stillaguamish fishing anywhere in Skagit Bay, Deception Pass, Saratoga Passage, Holmes Harbor, or Penn Cove. As noted in the Motion, the Court's relaxed standard of proof in *United States v. Washington* U&A determinations does not mean that there is no standard of proof. (*See* Mtn. at 13-14 and cases cited therein.)

In response, Stillaguamish does not dispute that it has no direct evidence of fishing in marine waters beyond Port Susan. (*See* Response at 14:6-20.) Its expert witness admitted in deposition that Stillaguamish has no direct evidence of fishing in Skagit Bay, Deception Pass, or Saratoga Passage. (*See* Mtn. at 2-6.)

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E. Stillaguamish Does Not Present Sufficient Evidence to Support a Reasonable Inference of Marine Fishing beyond Port Susan.

Stillaguamish's only response to the Motion is that reasonable inferences could be drawn from available evidence that Stillaguamish regularly fished in marine waters beyond Port Susan. But the evidence on which Stillaguamish relies does not even come close to supporting a reasonable inference of Stillaguamish U&A in such places.

Stillaguamish misleadingly states that "Stillaguamish has produced evidence that at and before treaty times, its people occupied villages along the lower Stillaguamish River delta near the shores of Skagit Bay and utilized the marine resources of lower Skagit Bay," citing eighteen exhibits. (Response at 14:21-15:1.) But a review of those eighteen exhibits makes clear that not a single one of them could establish that Stillaguamish "utilized the marine resources of lower Skagit Bay." The only villages that a few of the cited exhibits address concern a location at Warm Beach—which is on Port Susan and far from Skagit Bay—and in the contested Qwadsak area which the ICC determined was not Stillaguamish territory at treaty time. And those cited exhibits include such material as maps that the authors themselves cautioned were unreliable. (*See* Swinomish Opposition to Stillaguamish Summary Judgment re Port Susan [Dkt. 198] at 4-5; Declaration of A. Siefert [Dkt. 199] at Exs. 8-9.)

Beyond that, Stillaguamish relies on evidence that cannot support the claim to Stillaguamish customary fishing locations beyond Port Susan. (Response at 15-17.) The undated and unattributed shell middens in the Stanwood area cannot support a finding of customary Stillaguamish fishing in Skagit Bay or anywhere else. (*See* Motion at 3-4, 15.) If intermarriage extends fishing rights at all, it only does so as to certain close family members, not to an entire tribe. In any event, Stillaguamish provides no evidence of a broad practice of intermarriage between Stillaguamish people and their marine-oriented neighbors at treaty time other than Dr. Friday's unsubstantiated assertion that such marriages may have occurred. And it is well-established that fishing incidental to travel cannot establish U&A. *See* Final Decision 1, 384 F. Supp. at 353.

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Stillaguamish also has submitted with its Response a declaration from its expert witness, Dr. Chris Friday. (Dkt. 197; the "Friday Declaration".) In the declaration Dr. Friday avers that "[t]he historical and ethnographic evidence demonstrates that at and before treaty times, the Stillaguamish Tribe customarily fished the marine and estuarine shorelines of Camano and Whidbey Islands, and the open waters of Skagit Bay, Port Susan, Deception Pass and Saratoga Passage." (*See id.* at ¶ 2.) The Friday Declaration then proceeds to re-hash evidence already considered by Stillaguamish expert Barbara Lane, and by Judge Boldt, in the original *United States v. Washington* trial. (*Compare* Siefert Ex. 19 [Lane Stillaguamish Report, discussing Dorsey, Bruseth, ICC proceedings (which included the testimony of experts Sally Snyder and Carroll Riley), and Indian Wars internment camp government journals] with Friday Declaration ¶¶ 15, 17-19, 23, 27, 33-35, 37-38, 43, 48 [discussing same].) It also advances broad and familiar generalizations about Coast Salish culture – that they occasionally traveled on marine waters about the Sound; that members of one tribe often intermarried with members of other tribes; that tribal members might travel seasonally to gather resources or visit friends. (*See* Friday Declaration ¶¶ 20-23, 44, 50-52.) From these broad generalizations, Dr. Friday offers conclusions based on speculative leaps. For example, he presumes that a report by one Stillaguamish person, that she traveled as a child with her family to Fort Victoria, means that "Stillaguamish people traveled through and beyond the marine and estuarine shorelines of Camano and Whidbey Islands and the open waters of Skagit Bay, Deception Pass, and Saratoga Passage." (*Id.* at ¶ 49.) And he presumes that Stillaguamish individuals and families would have traveled widely on marine waters because they are Coast Salish, then further presumes that the Stillaguamish *Tribe* therefore "would have" fished in the marine areas beyond Port Susan. (*See, e.g., id.* at ¶ 44 ["There is no evidence to suggest Stillaguamish, as a group of people within these exact same waters, would not have engaged in similar marine resource harvesting practices."], 52 ["Such travel would have involved multi-day travel and was likely to have included the utilization of marine resources along the way."].)

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Stillaguamish relies on *Bultheis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985) (per curiam), for the proposition that the Friday Declaration is sufficient to survive summary judgment. (Response at 13:5-9.) *Bultheis* held that a declaration of expert opinion submitted in that case, which entailed physician expert opinion as to cause of cancer based on observation of changes in the plaintiff's tissue, was sufficient to create a disputed issue of material fact to preclude summary judgment. *Id.* at 1317. But *Bultheis* cannot rescue Stillaguamish on this issue, because the purported facts on which Dr. Friday relies—fishing while traveling, intermarriage, shell middens, transient appearance at internment camps, and purported village locations that are either far from Skagit Bay or have been adjudicated not to be within Stillaguamish territory, as well as facts sourced from Bruseth, the ICC proceedings, and other information considered by Barbara Lane and Judge Boldt for the original *United States v. Washington* trial—are not facts that can support a reasonable inference of fishing in marine waters beyond Port Susan. *Cf. id.* at 1317 (expert's statement, that changes actually observed in plaintiff's tissue were "commonly seen in DES exposed offspring," was statement of fact that supported inference "that plaintiff's mother had taken DES during her pregnancy with plaintiff").

Stillaguamish also tries to buttress the Friday Declaration by likening it to the expert opinions of Dr. Barbara Lane. (*See* Response at 13:18-14:4 & n.2.) But, first, Stillaguamish overlooks a critical fact: As Stillaguamish knows, Barbara Lane issued an expert report on Stillaguamish fisheries for Final Decision 1, in which she opined that Stillaguamish's customary fisheries were limited to the Stillaguamish River. And after Final Decision 1, in U&A proceedings for another tribe, she made an off-hand, unsupported, and unexplained remark that Stillaguamish likely fished in Port Susan. And Barbara Lane knew, considered, and relied on the same source material that Dr. Friday now relies on—Dorsey, Bruseth, the ICC proceedings, and the Indian War internment records, as well as cultural practices of Coast Salish people. (*See* Mtn. at 12:25-13:2; Siefert Ex. 19.) But for all the opportunity Barbara Lane had, and for all her knowledge and expertise, including specifically about the

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Stillaguamish Tribe, and on the same evidence that Stillaguamish's expert now relies, *Barbara Lane never opined or suggested that Stillaguamish may have fished, let alone had customary fishing locations, beyond Port Susan*.

Second, the substantive gap between Dr. Lane's factual basis for finding a tribe's accustomed marine fisheries and that which Dr. Friday offers is vast:

- Dr. Lane's assertions of marine fisheries were supported by actual evidence that the tribe fished in that location. For example, her report on the Swinomish noted that her assertions were supported by "[d]etailed ethnographic data on specific harvest, taking techniques, fishing devices, and fishing sites specific to each of the constituent groups" of the present-day Swinomish community, provided in her appendices. (Dkt. 180-47 at 24). Those appendices contain reports from Sally Snyder and Wayne Suttles, who documented the informants that supported their conclusions. In her report on the Swinomish, Dr. Lane listed specific fishing locations of Swinomish's predecessor tribes and bands, noting, for example, that the aboriginal Swinomish "moved out into the San Juan Islands to troll for Chinook and Coho in the spring and early summer" (*id.* at 22), "used a unique fishing device in Swinomish Slough which Suttles has called a 'weir net'" (*id*. at 23), and "trolled for Chinook and Coho in Skagit Bay and around Deception Pass" (*id*. at 25). Dr. Lane also relied upon evidence of specific fishing techniques and the importance of particular marine fish specifies to individual tribes: "Halibut, for example, probably were not fished by the upriver groups who, so far as present evidence goes, lacked the special equipment used in this fishery." (*id.* at 29). Herring were important to all of the groups who trolled for salmon, and "important herring locations within territories used by [Swinomish's ancestor tribes and bands] included the waters off the southeastern part of Eliza Island, Bellingham Channel, off Cypress and Guemes Islands, inside Deception Pass, off the north end of Camano Island, off Greenbank, at Holmes Harbor and in Skagit Bay between Holmes Harbor and the mainland." (*Id.* at 27.)

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- Further, the appendices to the Lane Swinomish report, containing reports by Snyder and Suttles, contain specific information and refer to the informants who provided that information. Ms. Snyder described a type of salt-water fish trap that relies upon high and low tides, and noted that the remains of one such trap was still observable in Dugualla Bay in 1953. Ms. Snyder's report includes several pages of different salt-water fish and the locations and techniques utilized by Swinomish. (Dkt. 180-47 at 50-57). For example, Ms. Snyder noted salmon fishing grounds with examples such as "All along the west coasts of Fidalgo and Whidby Islands, spring trolling" and "Dugualla Bay, speared from canoes in shallow waters." *(Id.* at 50-51). Wayne Suttles noted fishing locations for different pre-treaty tribes and the informant that provided that information, such as "In giving place names Andrew Joe volunteered that Blower Bluff was a good place for catching herrings and Susan Peter that Greenbank and a beach near Camano City were good places for herrings and smelt. *(Id.* at 68).

Dr. Lane's marine U&A opinions were built on the firm foundation of specific practices in specific marine waters. The Friday Declaration, in contrast, is just argument built on the shifting sands of broad generalizations.

F. The Stillaguamish Expert Report Should Not Be Stricken.

Stillaguamish's first argument in response to the Motion is that its expert's report (Garberich Ex. B; the "Friday Report") should be stricken on grounds that it is inadmissible on summary judgment. (Response at 11-12.) That is incorrect.

Swinomish offers the Friday Report in support of its summary judgment motion against Stillaguamish. Thus the Friday Report is admissible as an admission of a party opponent. *Samaritan Health Ctr. v. Simplicity Health Care Plan*, 459 F. Supp. 2d 786 (E.D. Wis. March 31, 2006), addressed the issue and supports inclusion of the Friday Report in the record for consideration on summary judgment:

> Generally, expert reports would be hearsay, as they are prior statements offered in evidence to prove the truth of the matter asserted. Fed. R. Evid.

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> 801(c). To get an expert's opinion into the record for summary judgment usually involves use of an affidavit or deposition testimony. However, because First Health proffers its opponent's expert report against that opponent, the report can be considered an admission by a party-opponent, which falls outside the hearsay definition. Fed. R. Evid. 801(d). The statement is offered against a party and, by virtue of the party's proffering of the expert's opinion as part of its case, is either "a statement of which the party has manifested an adoption or belief in its truth," "a statement by a person authorized by the party to make a statement concerning the subject," or "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(B), (C), (D).

See also Collins v. Wayne Corp., 621 F.2d 777, 782 (5th Cir. 1980) (finding an expert report admissible as a statement by a party opponent); *Marceau v. Int'l Broth. of Elec. Workers*, 618 F. Supp. 2d 1127, 1142-43 (D. Ariz. 200) (same). By contrast, *Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023, 1027 (W.D. Wash. 2011), relied on by Stillaguamish, determined that a party's expert reports submitted by that party in opposition to a summary judgment motion would be stricken from the record on a summary judgment motion. Swinomish respectfully submits that the fact that Stillaguamish's expert report, produced pursuant to Fed. R. Civ. P. Rule 26(a)(2), is unsigned should not be held against Swinomish as a basis for striking the Friday Report.

The Friday Report is also admissible under the residual hearsay exception, Fed. R. Evid. 807. *Televisa, S.A. de C.V. v. Univision Comms., Inc.*, 635 F. Supp. 2d 1106, 1109-1110 (C.D. Cal. 2009) (admitting expert report; finding that "classic hearsay risks, such as faulty perception, faulty memory, and faulty narration" are ameliorated where opposing party had opportunity to depose expert and evidentiary item in question is "a report prepared by a designated expert witness, rather than a remark or statement"); *see also Holt v. Davis*, 2020 U.S. Dist. LEXIS 94568, at *17, 2020 WL 2792981 (E.D. Cal. May 29, 2020) (admitting expert reports as substantive evidence under residual hearsay exception).

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G. Stillaguamish Does Not Meet the Summary Judgment Standard Regarding Jurisdiction.

One thing is certain: *If* Stillaguamish actually had new evidence that could establish Stillaguamish customary marine fishing beyond Port Susan at treaty-time, Stillaguamish would be pointing to it now, front and center, in its Response. Instead, Stillaguamish opposes Swinomish's motion by seeking to strike its own expert's report; by doubling down on an imaginary 1920s intertribal agreement; by seeking to relitigate the exact same territorial claim that it lost before the ICC, using the exact same evidence; by relying on the same evidence (Dorsey, Bruseth, the ICC proceedings, the internment camp journals) that Barbara Lane considered for her Stillaguamish fisheries report in the original trial and that Judge Boldt considered for Final Decision 1, Finding of Fact 146; and by relying on generalizations about Coast Salish culture, from which Stillaguamish extrapolates sweeping claims to entire bodies of marine water across the eastern Puget Sound.

The only "new" evidence that Stillaguamish offers is a Declaration by its expert opining that Stillaguamish customarily fished at treaty times in marine waters beyond Port Susan. But that Declaration, like the Friday Report, is nothing more than a repackaging of the evidence in the record for Final Decision 1 that reaches a conclusion contrary to the one that Judge Boldt reached on the same record.

Swinomish respectfully submits that the continuing jurisdiction of this Court is not properly invoked by the re-argument of the evidence presented to Judge Boldt, and that Stillaguamish has failed to satisfy the *United States v. Washington* and summary judgment evidentiary standards to show that Judge Boldt did not specifically determine that Stillaguamish U&A was limited to the Stillaguamish River and its tributaries. "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (granting cross-motion for summary judgment).

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DATED: January 29, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 29, 2021 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 29th day of January, 2021 at Seattle, Washington.

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