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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF OREGON, *et al.*,

Defendants.

Civil No. 68-513-KI

MEMORANDUM OF THE COLVILLE DEFENDANTS IN OPPOSITION TO YAKAMA NATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Federal Rules:

Other Authorities:

INTRODUCTION

This case is set for trial commencing on May 6, 2008. The Yakama Nation has nevertheless filed a motion for partial summary judgment, seeking a ruling that its members are entitled to fish at the Wenatshapam fishery at Icicle Creek, near Leavenworth, Washington, as a matter of law under Article III of the Treaty of 1855, regardless of the disputed facts surrounding Yakama's use of that site, and the disputed facts about the meaning of the 1894 Agreement in which Yakama ceded the fishery. The motion should be denied.

First, and without any apparent sense of irony, Yakama predicates its claim that Icicle Creek is a "usual and accustomed" Yakama fishing location entirely on the admittedly undisputed fact that Wenatshapam is the aboriginal home and center of ancestry for the Wenatchi Tribe, now represented by Colville. In short, Yakama claims that the 1855 Treaty vested Yakama with all of the fishing rights of the Wenatchi people, while it now deprives the Wenatchis of those same rights.

This is wrong as a matter of historical fact and as a matter of law. This Court, the Ninth Circuit and the Indian Claims Commission all have recognized that the "Yakama Nation" that exists today is not the same entity contemplated by the Treaty, and thus it is incorrect to assume, as Yakama does, that today's Yakama Nation acquired the rights of the Wenatchi Tribe and the other original Treaty signatory tribes which were subsequently separated from the tribal entity contemplated by the Treaty.

Second, the Yakama motion also misconstrues the 1855 Treaty, under which the Wenatshapam fishery was not a "usual and accustomed" off-reservation fishing site, but a specific on-reservation fishery for the Wenatchis under Article X of the Treaty. Thus, prior to the time when the Wenatchis were separated from Yakama, and from the rights conferred by the

Treaty, the Wenatshapam fishery was not encompassed in the Article III grant of off-reservation fishing rights that could be exercised by Yakama today.

Finally, the motion entirely ignores the 1894 Agreement under which we submit, based on the facts of the negotiation, Yakama ceded all rights it has to the Wenatshapam fishery, including any Article III rights. The 1894 Agreement is the subject of this litigation, and of substantial disputes of fact as to its meaning as understood by the parties to it. Indeed, the two tribes are about to submit to the Court lengthy, conflicting expert reports on this very issue. The Ninth Circuit specifically pointed out the different positions of the parties as to the meaning of the 1894 Agreement – including a dispute as to the scope of the fishing rights Yakama ceded in article I of the Agreement. The Ninth Circuit deemed the Agreement facially "ambiguous" and said it could be interpreted only on the basis of a full factual exposition:

> Both provisions [articles I and II of the 1894 Agreement] appear to be ambiguous in light of the context in which the agreement took place, the statements of the parties concerning the meaning of the terms of the agreement, and the recognition that this was an agreement drafted by the Government to reflect the understanding of the Indians, who had a lesser familiarity with the legal technicalities involved.
>
> This, of course, is a matter to be determined on the merits . . . .

U.S. v. Oregon, 470 F.3d 809, 817 (9th Cir. 2006). The Ninth Circuit then "remand[ed] the case for trial on the merits." *Id.* at 818. Yakama's request in this motion to be granted fishing rights at Wenatshapam cannot be resolved without resolving the factual dispute as to whether the 1894 Agreement should be interpreted as a cession by Yakama of the fishing rights it claims here.

For all these reasons, Yakama's motion for partial summary judgment should be denied. The disputed question of whether Wenatshapam is a "usual and accustomed" fishing place for Yakama, and the impact of the 1894 Agreement on Yakama and Colville Wenatchi fishing rights there, should be determined only after a trial on the merits.

A. Procedural Background.

The Court is familiar with the background of this litigation, and we recount it here only briefly.

In 1989, the Colville Tribes sought to intervene in *U.S. v. Oregon* on behalf of five of its constituent tribes, including the Wenatchi Tribe, in order to assert fishing rights for those tribes arising under the 1855 Treaty.[1] Those constituent Colville tribes had been original signatories to the Treaty with the Yakima, but four of them failed to move to the newly created Yakima Reservation, as the Treaty required. Although the Ninth Circuit did not specifically acknowledge the point in its 1994 decision, the fifth tribe – the Wenatchi Tribe – was not required by the Treaty to move to the Yakama Reservation. Instead, Article X was included in the Treaty in order to create a small, separate reservation at Wenatshapam for the Wenatchis, precisely so that they could stay at their ancestral homeland and maintain their fishery. *See U.S. v. Oregon*, 470 F.3d at 811 ("The Wenatchi remained at this Wenatshapam Fishery Reservation and fished there [in the forty years after the Treaty], firmly believing that a survey would be made and they would be secure in this reservation."). But the United States failed to survey the Article X reservation, non-Indians moved in, and the Yakama sold the Article X reservation in the 1894 Agreement. After that sale, the Wenatchi Tribe was not part of the Yakama Nation.

The Ninth Circuit has held that the five Colville constituent tribes that sought intervention in this case in 1989 were "not entitled to exercise treaty fishing rights." *United States v. Oregon*, 29 F.3d 481, 486 (9th Cir. 1994) (emphasis added).[2] The different question to

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[1] *See United States v. Oregon*, 787 F. Supp. 1557 (D. Or. 1992), *aff'd*, 29 F.3d 481 (9th Cir. 1994), *modified*, 43 F.3d 1284 (9th Cir. 1994).

[2] The Court made no ruling on the rights conferred by the 1894 Agreement. *See id.* at 814-18.

be decided at trial in this case is whether the Wenatchi Tribe can exercise rights granted to it by the 1894 Agreement, an issue that turns largely on the intent of the Indians and the United States in negotiating that Agreement. The same factual determination on the intent of the parties also underlies the related question of whether the Yakamas in the 1894 Agreement ceded all of their fishing rights at Wenatshapam.

As we will show at trial, Wenatchi tribal members, in expression of their culture and ancestry, and in exercise of the rights they received under the 1894 Agreement, have long fished at the Wenatshapam fishery, located in the center of their aboriginal homeland. *See also U.S. v. Oregon*, 470 F.3d at 812 (referring to Wenatshapam as "aboriginal territory and fishery" of the Wenatchi). Beginning sometime after 1987, the Yakama unilaterally established their own fishery at Wenatshapam, and then sought to exclude the Wenatchi from it. In 2002, the Yakama Nation sought a temporary restraining order and a preliminary injunction to enjoin the Colville Wenatchi from fishing at Wenatshapam. In part because the fishing season was already underway, this Court did not grant Yakama's motion for a TRO and Yakama ultimately withdrew its motion for a preliminary injunction. Yakama rebuffed efforts by the Colville defendants to settle the dispute.

During the 2003 fishing season, Yakama again sought to enjoin the Colville Wenatchi from fishing at their traditional location. Yakama argued, among other things, that res judicata barred the Colville defendants from asserting Wenatchi rights under the 1894 Agreement. The Court accepted this claim preclusion argument and, without considering the effect of the 1894 Agreement on the two parties, granted a permanent injunction against Colville Wenatchi fishing at Wenatshapam. *United States v. Oregon*, No. 68-513-KI, slip op. (D. Or. Aug. 18, 2003).

The Colville defendants appealed, and after a delay for an unsuccessful mediation, the

Ninth Circuit held unanimously that the issue of the 1894 Agreement was not, and could not have been, decided in the prior litigation, *U.S. v. Oregon*, 470 F.3d at 816, and that "the claim of the Wenatchi Tribe to fishing rights at the Wenatshapam Fishery based on the 1894 Agreement" therefore was not barred by claim preclusion. *Id.* at 818. The Ninth Circuit remanded the case "for trial on the merits." 470 F.3d at 818.[3]

In its 2006 opinion, the Ninth Circuit observed about the Wenatshapam fishery that "the members of the Wenatchi and Yakama Tribes have fished there peacefully." *Id.* at 813. That was again true in 2007 after this Court denied Yakama's renewed motion for a temporary restraining order: there were again no disturbances between the Yakama and Wenatchi fishermen. The Court has set this case for an expedited trial on the merits.

B. Standard for Summary Judgment.

Summary judgment is only appropriate when the pleadings, depositions, affidavits, and other material permitted by Rule 56(c) show that there is no disputed issue of material fact, and on the agreed facts, the moving party is entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). Summary judgment is not warranted if a material issue of fact exists for trial. *Ribitzki v. Canmar Reading & Bates, Ltd. P'ship*, 111 F.3d 658, 661-62 (9th Cir. 1997). The burden of demonstrating the absence of a material fact is on the moving party, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), here, the Yakama Nation.

[3] On February 28, 2007, the Ninth Circuit denied Yakama's petition for rehearing and suggestion for rehearing *en banc*. The Supreme Court denied cert. on October 1, 2007. *Confederated Tribes and Bands of Yakama Nation v. Confederated Tribes of Colville Indian Reservation*, 128 S.Ct. 356 (2007).

ARGUMENT

I. The present-day Yakama Nation is not the successor in interest to the rights of the Wenatchi Tribe.

The Yakama Nation here argues that Wenatshapam was a "usual and accustomed" fishing place of the Wenatchi Tribe, which was an original signatory of the 1855 Treaty. Yakama contends that because Article III of that Treaty grants it continuing off-reservation fishing rights to all "usual and accustomed" locations of the signatory tribes at the time of the Treaty, it thus has an Article III right to fish at Wenatshapam.

The fallacy of this argument is that it fails to take account of the history of the 1855 Treaty or the impact of the 1894 Agreement. As the Ninth Circuit has held, five tribes that were signatories to the Treaty "did not move to the Yakama Reservation." *U.S. v. Oregon*, 29 F.3d at 485. They thus "disengaged from the Yakima Nation by refusing to locate to the reservation established by the 1855 treaty," and were subsequently "subsumed in the Colville Confederacy." *Id.* at 486.

The consequence of this was twofold. First, the Ninth Circuit concluded that by failing to move to the Yakama reservation, those five signatory tribes, in effect, waived their rights under the 1855 Treaty, and thus those tribes "are not entitled to exercise treaty fishing rights." *Id.*

But second, and for the same reason, the Ninth Circuit held that the Yakama Nation that exists today is not the entity contemplated by the Treaty as the embodiment (and holder of rights) of those signatory tribes. According to the Ninth Circuit, "The Yakima Treaty of 1855 envisioned the creation of a successor tribe, a 'Yakama Nation' composed of all of the people represented by the signatories to the Treaty. . . . The 'Yakama Nation' that actually came into

existence, however, was not the same as that originally envisioned. It was composed solely of the Indians who moved to the reservation established by the 1855 Yakama Treaty." *Id.* at 485.[4]

Yakama can hardly contest this description; indeed, it stipulated to it. In the underlying intervention action, the Yakama Nation and the Colville Tribes set forth "Agreed Facts" that were adopted by the district court. The second such fact stated, "The Yakima Nation which was created by and named in the preamble to the Treaty of 1855 is not synonymous with the Yakima Tribe and does not exist as an entity today." *U.S. v. Oregon*, 787 F. Supp. at 1579 (App. 2) (emphasis added); *see also id.* at 1562 (adopting agreed facts).

In its motion here, Yakama contends this history results in a harsh one-way street: that today's Yakama Nation "that actually came into existence," 29 F.3d at 485, can claim as its own the "usual and accustomed" fishing locations of those original signatory tribes that did not become part of the present-day Yakama Nation, yet those tribes themselves cannot exercise any rights under the Treaty – not even to their own historical sites. In short, under Yakama's theory, those non-joining tribes, in effect, irrevocably contributed their fishing locations to a new entity "envisioned" by the Treaty but which never "came into existence," *id.*, and which "does not exist as an entity today," 787 F. Supp. at 1579, but the present-day Yakama Nation – which is "not the same" entity as the one envisioned by the Treaty – can nonetheless still claim as its own the benefit of those sites. 29 F.3d at 485. While the Ninth Circuit has held that the Wenatchi lost

[4] As we point out above, the Ninth Circuit in its 2006 opinion acknowledged that, in light of the promises made in Article X of the Treaty to create a reservation for the Wenatchi, the Wenatchi Tribe "remained and fished on their aboriginal lands at the Wenatshapam Fishery…." *U.S. v. Oregon*, 470 F.3d at 811. Whatever discrepancy there is between the Ninth Circuit's 1994 opinion, which implies that the Wenatchi should have moved to the Yakama reservation along with the four other signatory tribes, and its 2006 opinion, which implies that the Wenatchi were instead entitled to stay at the Article X reservation created for them on their aboriginal lands, becomes unimportant after the 1894 Agreement, at which time the Article X reservation was sold, and the Wenatchi were formally separated from the 1855 Treaty.

their treaty right by not becoming part of the Yakama Nation, it certainly did not hold, nor would it, that Yakama thereby acquired the rights of the Wenatchi Tribe.[5]

The patent inequity of Yakama's position is best illustrated by the Indian Claims Commission's rejection of a parallel argument made by Yakama in the course of seeking additional compensation for loss of all of the aboriginal lands ceded by the 1855 Treaty. The Colville Tribes intervened in this ICC docket, claiming that compensation for the lands ceded by the Wenatchi Tribe, and by the other Colville constituent tribes who were original signatories to the 1855 Treaty but who then settled on the Colville Reservation, should be awarded to Colville on behalf of those constituent tribes, and not to the Yakama Nation.

As the ICC pointed out, the Yakama Nation "maintain[ed] that it is the full successor in interest of the aboriginal bands which comprised the Yakima Nation which aboriginal bands, it alleges, included the Wenatchee, Entiat, Chelan and Columbia Indians." *The Yakima Tribe of Indians v. U.S.*, 7 Ind.Cl.Com. 805, 807 (1959).[6] In other words, Yakama claimed that it alone held the right to all additional compensation for the ceded lands, even those lands ceded by the Wenatchi Tribe as an original signatory to the Treaty, and even though the Wenatchi Tribe was no longer a part of the Yakama Nation. In short, Yakama argued that the Wenatchi Tribe should receive no compensation for the cession of the Wenatchi's aboriginal land – all that money should go to Yakama.

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[5] Yakama's quotation here of the district court's holding that the Yakama Nation is the "administrator" of the 1855 treaty rights, Yakama Mem. at 12, does not address the very different question as to the scope of the rights it is administering. Nothing in the district court's opinion states that Yakama acquired and still "administers" off-reservation fishing rights to the fishing stations of the signatory tribes that did not remain a part of the Yakama Nation.

[6] For the Court's convenience we attach a copy of this opinion as Exhibit A.

The Commission repeatedly rejected Yakama's argument. After recounting the history of the Treaty, and the fact that some of the original Treaty signatories did not move to the Yakima Reservation, the Commission concluded that today's Yakama Nation is not "the full successor to the Yakima Nation as it was created and existed pursuant to the Yakima Treaty." *Id.* at 804; *see also id.* at 813.

In a second opinion, the Commission reached the same conclusion – the conclusion that also was subsequently stated by this Court and by the Ninth Circuit. The Commission said: "[T]he Yakima Tribe (of the Indians of the Yakima Reservation in the State of Washington) is not synonymous with nor the successor to the Yakima Nation which was created in 1855 and which Nation was wronged by the Treaty of 1855. … That Yakima Nation which was created in 1855 does not exist as an entity today." *The Yakima Tribe v. U.S.*, 12 Ind.Cl.Com. 362, 368 (1963) (emphasis added).[7] Compare *id*. with *U.S. v. Oregon*, 787 F. Supp. at 1579 (Yakama Nation named in the Treaty "does not exist as an entity today") *and U.S. v. Oregon*, 29 F.3d at 485 ("The 'Yakama Nation' that actually came into existence, however, was not the same as that originally envisioned.").

And in a third opinion, the Commission repeated the same finding:

> The Yakama Nation which was wronged by the 1855 Treaty does not exist today. The Yakima Tribe (of the Indians of the Yakima Reservation in the State of Washington) is not synonymous with nor the successor to the Yakima Nation which was created in 1855. In fact, as we have previously found, neither the petitioning Yakima Tribe nor the Confederated Tribes of the Colville Reservation is the full successor to the Yakima Nation. The Indians who were, in 1855, members of that Nation subsequently became located at and associated with various Indian reservations at other localities. … The Yakima Tribe petitioner (Docket No. 161) does not represent those Indians and in fact sought specifically to exclude such Indians from participation in this case.

[7] A copy of this opinion is attached as Exhibit B.

The Yakima Tribe v. United States, 15 Ind.Cl.Com. 225, 230 (1965) (emphasis added).[8] Instead, the Commission held that the Colville Tribes represents and speaks for the Wenatchi and other signatory tribes that moved to the Colville Reservation. *See id.* (interests of Colville signatory tribes "are represented" by docket filed by Colville Tribes). The Ninth Circuit reached the same conclusion. *See U.S. v. Oregon,* 29 F.3d at 483 ("It is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes…"); *see also* 470 F.3d at 811 (Colville Tribes acting "on behalf of the Wenatchi Tribe").

For the same reasons that the Indian Claims Commission rejected Yakama's argument in the context of its effort to receive the compensation for loss of the Wenatchi Tribe's aboriginal land, this Court should reject Yakama's identical argument in the context of its effort to exercise the fishing right to the Wenatchi's aboriginal fishing stations. In both contexts, as both the ICC and the Ninth Circuit have recognized, today's Yakama Nation is not the same entity as, nor a full successor to, the tribal entity "envisioned" by the Treaty, which initially received those rights, but which never "came into existence." That Yakama Nation "does not exist today." *The Yakima Tribe,* 15 Ind.Cl.Com. at 230; *U.S. v. Oregon,* 787 F. Supp. at 1579.

The comments of the district court and of the Ninth Circuit cited here by Yakama, Yakama Mem. at 11-13, are not to the contrary. . When the Ninth Circuit said that the present Yakama Nation exercises treaty rights "as a successor to the entities that signed" the 1855 Treaty, and that it has "continued the fishing culture of the original signatories" to the Treaty, *U.S. v. Oregon,* 29 F.3d at 486, the court was speaking in the context of determining whether Colville, on behalf of the Wenatchi constituent tribe, had the right to affirmatively exercise fishing rights granted by the 1855 Treaty. The Ninth Circuit held that it did not – because the

[8] A copy of this opinion is attached as Exhibit C.

Wenatchi Tribe had failed to maintain "political cohesion" with the tribal entity in which those treaty rights are vested. *Id.* That is a very different question than the issue presented here as to the scope of the treaty rights vested in Yakama, and whether its Article III treaty rights include access to the aboriginal fishing location of the Wenatchi. That issue was not before the Ninth Circuit in the 1994 appeal, and its opinion should not be read to have decided it.[9]

II. The fishing rights at Wenatshapam created by the 1855 Treaty were "on reservation" rights, as part of the Article X Wenatshapam Reservation, and not "off reservation" rights, and thus did not create a "usual and accustomed" fishery for the Yakama.

Yakama claims that at the moment the 1855 Treaty was signed, the new tribal entity created by the Treaty succeeded to the rights of the original Treaty signatories, including the Wenatchi Tribe, and that the new tribal entity retained those rights even after the Wenatchi Tribe separated itself from that Treaty entity. Yakama argues that whatever rights were granted to the new entity under the Treaty can today be exercised by the present day Yakama Nation.

But the 1855 Treaty did not establish the Article X fishery as a "usual and accustomed" Yakama fishery. Article III of the 1855 Treaty granted the newly created Yakama Nation the "exclusive right" of taking fish on its new reservation, as well as "the right of taking fish at all usual and accustomed places" off-reservation. *See* Art. III of the 1855 Treaty, *reprinted in U. S. v. Oregon at* 470 F.3d. at 811. Separately, in Article X, the Treaty "also set aside an additional reservation" at Wenatshapam, which included the Icicle Creek fishery there. *U.S. v. Oregon,* 470 F.3d at 811.

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[9] The State of Washington has filed a short memorandum in support of Yakama's summary judgment motion, asserting that Yakama has Article III rights to fish at Wenatshapam. But simply saying it is so does not make it so. The State offers no explanation or justification – legal or factual – as to why Yakama has the Article III rights it claims.

Thus, at the time of the Treaty, the fishing rights at Wenatshapam were on-reservation rights, not off-reservation "usual and accustomed" rights. Yakama stresses in its argument here that the Wenatshapam fishery was a "usual and accustomed" fishing site for the Wenatchi in 1855 (and not for the Kittitas or for any other Yakama signatory tribes). But that fact is irrelevant – in 1855 and continuing until 1894, the Wenatchi held treaty fishing rights at Wenatshapam because it was an on-reservation site under Article X, not an off-reservation site under Article III.

In 1894, of course, Yakama sold the Article X reservation. As we will show at trial, the 1894 Agreement expressly provided for land to be allotted to the Wenatchi at their fishing site, and also provided for a continuation of their fishing rights there. But it did not do so for the Yakama who had other fishing places that mattered to them and who, indeed, showed no interest in the Wenatshapam fishery. Once the Article X reservation was sold, the Wenatshapam fishery could be claimed only as an off-reservation site for the Yakamas, and any continuing Yakama fishing rights at that site can be established only through a two-fold independent showing: first, that Yakama, under the 1894 Agreement, retained the possibility of off-reservation rights to the Wenatshapam fishery, and second, that the site remained a "usual and accustomed" fishing place for Yakama, without relying on Wenatchi use of the site. Yakama does not even attempt to make that showing here and admits that doing so would raise multiple issues of contested facts. *See* Yakama Nation's Motion In Support of Order Granting Partial Summary Judgment at 2 n.1 (reserving right to assert "usual and accustomed" status based on "other Bands of Yakama, particularly the Kittitas."). Absent any such showing, the motion for partial summary judgment should be denied.

III. Whether the Yakama retained any Article III fishing rights at the Wenatshapam fishery after the 1894 Agreement is a question of fact to be decided at trial.

Finally, there are disputed issues of fact as to what rights to fish at Wenatshapam, if any, Yakama retained after it ceded "all their right of fishery" there in the 1894 Agreement.

In broad language in the 1894 Agreement, the Yakama Nation "cede[d] and relinquish[ed] to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of, in, and to all their right of fishery, as set forth in article 10 of said treaty aforesaid, and also all their right, title, interest, claim or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery." 1894 Agreement, art. I *reprinted in U.S. v. Oregon*, 470 F.3d at 812 (emphasis added).

The record of the 1894 negotiations, held at Fort Simcoe on the Yakama Reservation over 100 miles distant from the Wenatchi homeland at Wenatshapam, shows that both the Yakama of the time and the United States considered Wenatshapam a specifically Wenatchi fishery for the people who lived there, not a fishery of any importance whatsoever to the Yakama Nation.

In October, 1893, the Commissioner of Indian Affairs sent a letter to federal agents Erwin and Lane containing their instructions for the negotiations they were to conduct for sale of the Article X reservation. He specifically stated that the "fishing privileges" held or claimed by the "Indians other than the Yakimas living in the neighborhood of [the Article X] reservation" "should be taken into consideration and protected." S. Exec. Doc. No. 67 at 16 (emphasis added).[10] The Commissioner goes on to say that he has no doubt that investigation and inquiry will disclose that the local Indians to whom he refers are "Pisquouses" and/or

[10] For the Court's convenience, a copy of S. Exec. Doc. No. 67, 53rd Cong., 2d. Sess. (1894) is attached as Exhibit D.

"Wenatshapams."[11] *Id.* Note how clearly this history shows that it was the Wenatchi fishing privileges that were to be protected. The Commissioner then reiterates that it is not a purpose of the proposed cession to deprive any local Indians, whether treaty signatories or not, of "the lawful use of the fisheries in common with the white people of the State." *Id.* It is quite clear from this that the Commissioner did not believe that the Yakama had any rights at Wenatshapam.

The record of the negotiations also shows that the Yakama Indians were of the same view. Those Yakama who were present at the cession council insisted that the government agents should deal directly with the Wenatchi about the sale of Wenatshapam. As Yakama elder Captain Eneas explained to federal agents Erwin and Lane, the Yakama were concerned with protecting their fishery on the Columbia River, and disclaimed any interest in the Wenatshapam fishery:

> The treaty for that piece of land was not made with all this tribe. The chief that belonged to the Wenatchee is the one that picked that land for his own tribe, 8 miles long, 8 miles wide….
>
> We are looking out for our part on the Columbia River. All the whites that come here to be agents don't know anything about the treaty between the Government and the Indians. Of course, we, the Yakimas, are doing well. We improve our lands and we live well. It is for the Government to treat these Wenatchee Indians right. They want the Government to protect them and hold their reservation. You talk to these Wenatchee Indians and ask them what they want for that land, but not the Yakimas.

S. Exec. Doc. No. 67 (Exh. D) at 25 (emphasis added). Thomas Simpson, who identified himself as living on the Yakama Reservation and therefore "not fit to talk about the Wenatchee lands," also stated emphatically that it was not his desire to throw the Wenatchi out of their land, saying "[y]ou will not see me move to that place to-morrow nor any other day." *Id.* at 28. Another Yakama, Charley Skummit, later reiterated, "I will not sell this piece of land away from the

[11] These were both contemporary names for the Wenatchi.

Wenatchee Indians that owns the land. . . . [T]hey are the right owners of it." *Id.* at 33. The Yakama Wellayup considered it out of the question that he would even visit the Wenatshapam area. *Id.* at 30.

Wenatchi leader John Harmelt (spelled "Hamilk" in the record of the negotiation) concurred with this view, and said that his people, who lived at Wenatshapam – and not the Yakama – were the interested parties:

> Many of these here people never saw that land, and you are asking them to sell it. They all understand what you said to them, but the Indians over at Wenatchee did not hear your statements here to-day. I myself alone have heard what you said; and if all the Indians over at Wenatchee would hear what you said, then they would decide on this land. I think those people out [ought] to know about this matter, then let the decision come afterwards.

S. Exec. Doc. No. 67 (Exh. D) at 30 (brackets in original) (emphasis added). Old Captain Eneas stated that he could recall the words said at the 1855 treaty council, that the Article X reservation was set aside to provide for the Wenatchis' homes and to protect their fishery. He said he could not vote to take away their reservation: "I am not going over to my friend's house and throw him off his place and tell him I would get rich and fat off his place." *Id.* at 25.

Agent Lane understood that the Yakama Indians were – in practical terms – disinterested bystanders to the Wenatshapam fishery: after the Wenatchi representatives had departed, Lane extolled the virtues of the ready cash he was offering to pay the Yakamas in exchange for their agreement to sell the distant fishery reservation. He asked the Yakama rhetorically, "Will you people go to that fishery for the purpose of catching fish or of making any use of it?" S. Exec. Doc. No. 67 (Exh. D) at 33. Thus, all three parties to the 1894 negotiations agreed that the Yakama did not usually fish at Wenatshapam, and that, in practical and traditional terms, the Wenatchi were the sole owners of the fishery and surrounding territory.

This also was the conclusion of the Indian Claims Commission which, in the docket discussed above, considered exhaustive expert testimony to determine the aboriginal lands of each of the signatory tribes to the 1855 Treaty. Referring to the Wenatshapam area near Leavenworth, the Commission said it was "the principal fishing grounds of the Wenatchee." *The Yakima Tribe v. U.S.*, 12 Ind.Cl.Com. at 378 (Exh. B). The Commission further said that it was "satisfied that this location was well within the territory which was under the exclusive use and occupation of the Wenatchee Tribe…" *Id.* To the extent other Indians were present at the fishery, the Commission said they were "visitors" who "were not using and occupying territory in Indian fashion but were merely present during the height of the fishing season as visitors and for the purpose of trading and bartering for salmon which the Wenatchee Indians trapped in their weirs." *Id.* at 378-79.

Given this context, and given the broad cession language in article I of the 1894 Agreement, it is clear that Yakama gave up not just a right to land at Wenatshapam, but also any and all rights to fish there: the Yakama Nation relinquished any "right, title, interest, claim, and demand of whatsoever name or nature of, in, and to all their right of fishery, as set forth in article 10 of said treaty . . . ." 1894 Agreement, art. I (emphasis added).

In light of the Yakamas' contemporaneous view of Wenatshapam – that it was not one of their "usual and accustomed" locations – it is likely that they understood the emphatic cession language of the Agreement as ceding all Yakama fishing rights at Wenatshapam, not that they were secretly relying upon the Agreement's silence in order to preserve Article III fishing rights

there. This, however, as the Ninth Circuit recognized, is all a matter of fact to be resolved at the trial on the merits.[12]

The need to resolve these questions at trial is further illustrated by the expert reports prepared in this case. The two expert reports for the Colville Defendants written by Richard Hart examine the context of the 1894 Agreement and the cession proceedings to demonstrate in detail the lack of interest that the Yakamas had in the Wenatshapam fishery. He states with reference to the 1894 Agreement, "The act of Congress clearly and plainly explains that the Yakima, as they said during the negotiations, had little use for either a Wenatshapam fishing right or for the physical fishery. … To suggest, as [Yakama expert Dr. Deward] Walker does, that the Yakima ceded no rights to the Wenatshapam Fishery Reservation is in complete variance with the transcript of the negotiations and the agreement, itself. The whole purpose of the negotiations, agreement, and statute, was to gain a Yakima cession of the fishery." Hart Rebuttal Report at

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[12] By contrast, and as we will show at trial, article II of the Agreement, which promised land for the Wenatchis where they lived at Wenatshapam, intended to preserve Wenatchi fishing rights at Wenatshapam, as well as their land. Article II states:

> . . .the Indians known as the Wenatshapam Indians. . . shall have land allotted to them in severalty in the vicinity of where they now reside or elsewhere as they may select. . .

1894 Agreement, art. II, *reprinted in U.S. v. Oregon,* 470 F.3d at 813. This language was the product of repeated statements by federal agents made to the Wenatchis that their fishing rights would be protected. *E.g.*, S. Exec. Doc. No. 67 (Exh. D) at 30 (Erwin: "There is one thing I want to impress on these Indians from Wenatchee, and that is that they are not to be robbed of an acre of land, but, on the contrary the Government proposes to give them land where they are now. The selling of this fishery does not interfere with their rights at all.") (emphasis added); *id.* at 28 (Erwin: "I have something further that I want to say about the fishery privilege and that is that even if you should agree to sell, the Department says that you shall have the lawful use of the fisheries in common with the white people."); *id.* at 27 (Erwin: "Now the Government at Washington wants to fix it so that you and your people will be satisfied…"). These statements are all consistent with the Commissioner's instructions to Lane and Erwin that the fishing rights of "Indians other than the Yakamas" at Wenatshapam "should be taken into consideration and protected." *Id.* at 16.

45-46 (Exh. E). As Hart indicates, the expert report submitted by Dr. Walker for Yakama reaches dramatically different conclusions. These differences between experts must be resolved at trial, not on summary judgment.

As to whether the Yakama established an Article III fishery at Wenatshapam after the sale of the Reservation in 1894, Mr. Hart concludes that "there is no evidence to support the notion that the Wenatshapam Fishery was a usual and accustomed place of fishing for the Yakama. In fact, the Yakama have provided no documentary evidence to show any Yakima fishing at the Wenatshapam Fishery in the 20th century until the late 1980s…." Hart Rebuttal Report at 6 (Exh. F); *see generally id.* at 2-7 (Exh. G); *see also* Williams Dep. at 10-11 ("I was fishing up there all my life so I didn't see any Yakamas until 1987….") (Exh. H).

Yakama's own fishery director, Steven Parker, a non-Indian, testified in his deposition that it was he who established the modern Icicle fishery for Yakama in 1987 on his own initiative:

> A. When I came to work for the tribe, this was in 1986, at that time we had two subsistence fisheries, one in the Klickitat River for Spring Chinook and one in the Yakima River.
>
> It became apparent to me pretty quickly that there were opportunities at Icicle Creek, because in some years, when the hatchery had fish in excess of its broodstock needs, it would make that surplus fish available to the tribe.
>
> And we would go up with staff and actually collect the fish out of the holding ponds, the adult fish out of the holding ponds, bring it back and distribute it to tribal members.
>
> And I understood that our purpose and goal was to provide fishing opportunities for the tribal members, not a handout of fish. So I undertook to develop the information that would be needed, such as being able to predict the run size of a given year, being able to develop a set of these time, area, and gear regulations that would achieve a certain catch level.

Q. So that was done at your initiative, no one told you to go look at Icicle Creek?

A. I would say that's correct, yeah.

Parker Dep. at 9 (Exh. I). He further elaborated, "It was not from any direct requirement by the policy, by the tribal council, that we developed that fishery, it was more on the basis of opportunity than direction." *Id.* at 19 (Exh. J). Parker said that prior to 1987, the Leavenworth hatchery simply handed out carcasses of surplus fish. Asked whether the Yakama fishermen were satisfied with that, he said, "Well, they were satisfied prior to 1987." *Id.*[13]

Thus, even if Yakama is correct that it had Article III fishing rights at Wenatshapam before the 1894 Agreement, there is a considerable dispute of facts as to (1) whether those rights were ceded as part of the 1894 Agreement, and (2) whether, at any time after 1894, Wenatshapam really became a usual and accustomed Yakama fishery.

CONCLUSION

The Ninth Circuit specifically remanded the case "for trial on the merits." *U.S. v. Oregon*, 470 F.3d at 818. While the remand does not preclude this Court from deciding an issue on summary judgment, it certainly counsels against doing so when the case is so close to a trial date, when so much depends on the meaning of the 1894 Agreement, which the Ninth Circuit has said is "ambiguous" on its face, and when there is substantial conflicting testimony on whether, since 1894, the Wenatshapam fishery at Icicle Creek can be declared a "usual and accustomed" fishery of the Yakama Nation.

Yakama's motion for summary judgment should be denied.

[13] In addition, Mr. Parker in his deposition stated that he agreed with a statement made in Yakama's response to Interrogatories that Yakama "has numerous usual and accustomed subsistence sites throughout the Columbia Basin, including a number of tributaries," as well as "several hundred commercial gill net sites registered." Parker Dep. at 17 (Exh. K).

Dated this 17th day of March, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2008, a copy of the foregoing Memorandum of The Colville Defendants in Opposition to the Yakama Nation's Motion for Partial Summary Judgment, Response of the Colville Defendants to Yakama Nation's Statement of Facts in Support of Motion for Partial Summary Judgment, and Declaration of Harry R. Sachse are being electronically filed with the Court's electronic filing system, which will generate automatic service upon all parties enrolled to receive such service. In addition, a true and correct copy of the foregoing is being served this same date upon the persons listed below by first-class U.S. Mail, postage-prepaid:

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