Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. C70-9213 RSM

Subproceeding No. 09-01

MAKAH REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REJECTING EQUITABLE DEFENSES

NOTED ON MOTION CALENDAR: DECEMBER 12, 2014

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I. INTRODUCTION.

Makah submits this reply in support of its motion for partial summary judgment rejecting equitable defenses (Dkt. 248).[1] Quinault and Quileute's opposition (Dkt. 267) misapprehends several key issues. First, it is well established that equitable defenses cannot be invoked to defeat Indian treaty rights. In 1990 Judge Coyle held that this principle is applicable to U&A disputes because fishing by a tribe outside of its U&A impairs the treaty rights of other tribes. That holding is fully applicable here, and has not eroded in the tides of time.

Second, even if equitable defenses could be asserted here, there is no basis for invoking them. Judicial estoppel does not apply because Makah's position in the halibut case was not clearly inconsistent with its position here, was not adopted by the court, and would not result in any unfair advantage to Makah. Laches and acquiescence do not apply because Makah did not delay unreasonably in requesting a determination of Quinault and Quileute's ocean U&A. Moreover, since Quinault and Quileute have always known that the federal regulatory boundaries were interim measures pending an adjudication in this case, any prejudice is a result of their own decision not to seek such an adjudication.

II. ARGUMENT.

A. Equitable Defenses Cannot Be Invoked to Block U&A Determinations.

In 1990, Judge Coyle held that equitable defenses cannot be invoked to prevent U&A determinations in this case. *See* Decision and Order re Cross-Motions for Summary Judgment at 17-19 (Feb. 15, 1990) (Dkt. 11596). This holding rested on the proposition that equitable

[1] Makah's motion seeks dismissal of equitable defenses without limitation. It focused on laches and estoppel because those were the only equitable defenses that had been articulated by Quinault and Quileute at the time Makah filed its motion.

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considerations cannot be invoked to defeat Indian treaty rights or to interpret an Indian treaty, propositions that the Ninth Circuit subsequently reaffirmed in the shellfish subproceeding:

> The Growers ask for new law simply because current law precludes their argument. In *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983), we held that "laches or estoppel is not available to defeat Indian treaty rights." Although the equities do weigh heavily in favor of the Growers' argument – the Tribes waited 135 years to assert their shellfishing rights – the law does not support their claim. *See Board of County Comm'rs v. United States*, 308 U.S. 343, 350–51 … (1939) (defenses based on delay in bringing claims such as laches and estoppel are inapplicable to claims to enforce Indian rights). Once again, we reiterate that we are interpreting a treaty, and that treaties enjoy a unique position in our law.

U.S. v. Washington, 157 F.3d 630, 649 (9th Cir. 1998); *see also id.* at 650-51 (equitable considerations cannot be used to interpret an Indian treaty). Judge Coyle applied these principles to U&A determinations because fishing by a tribe outside of its U&A impairs the treaty rights of other tribes. *See* Dkt. 11596 at 17-19.

Quinault and Quileute seek to avoid this holding in several ways. *See* Q/Q Opp. at 18-21.[2] First, they suggest that Judge Coyle's ruling should be limited to proceedings involving clarification of previous U&A findings, and not be applied to proceedings involving the determination of U&A not previously adjudicated. There is, however, no logical basis for this distinction. In either case, fishing by a tribe outside of its U&A impairs the treaty rights of other tribes and, therefore, cannot be defended through the invocation of equitable defenses.

Second, Quinault and Quileute assert that this Court's more recent rulings have

[2] Quinault and Quileute also argue that Makah's claims should be dismissed based on Judge Coyle's statements that, "if there is an issue that the Lummi (or any other tribe currently fishing for halibut) has no treaty right to do so, the court suggests that a sub-proceeding be commenced to get this issue resolved forthwith," and that the court "must require the tribes which are parties to this action to finally resolve their usual and accustomed fishing places as soon as possible." Dkt. 11596 at 2-3 n.1, 19. The first statement is inapplicable here, because Makah does not contend that either Quinault or Quileute has no treaty right to fish for halibut. The second statement directed *all* tribes, including Quinault and Quileute, to resolve their U&A as soon as possible; in seeking to bar Makah's claims, Quinault and Quileute ignore the burden that this directive placed on them and their own decision not to resolve their U&A in this case.

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superseded Judge Coyle's order. However, the orders on which they rely were either vacated by the Ninth Circuit or state expressly that they should *not* be cited for the proposition that laches is available in a proceeding to clarify U&A grounds. *See* Makah Mot. at 18-19 (Dkt. 248). We are not aware of any decision in which the Court has addressed the rule that equitable defenses cannot be invoked to defeat Indian treaty rights and disagreed with Judge Coyle's conclusion that it prevents the invocation of equitable defenses to block U&A determinations.

Third, Quinault and Quileute argue "Judge Coyle's legal analysis has eroded in the tides of time," claiming the Supreme Court and Ninth Circuit have since recognized certain tribal claims are subject to equitable defenses. Q/Q Opp. at 20. The Ninth Circuit case they cite, *Apache Survival Coalition v. U.S.*, 21 F.3d 895 (9th Cir. 1994), did not address the application of equitable defenses to Indian treaty right claims, and could not have "eroded" the Ninth Circuit's later holding in this case that such defenses cannot be invoked to defeat such claims.

The Supreme Court case, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), is also inapplicable here. In that case a tribe had sold its lands in the early 1800s, did not try to regain possession of them until the 1970s, and did not acquire fee title to the parcels at issue until the 1990s. *Id.* at 216. The Court invoked equitable defenses to prevent the tribe from asserting present and future sovereign authority over the lands because over 200 years had passed since the state began exercising sovereign control over them, and the tribe's claim would upset longstanding observances and settled expectations of the state, local units of governments and numerous private landowners. *Id*. at 214-221. Several courts have since relied on *Sherrill* to bar tribal land claims (including money damage claims) based on alleged wrongs dating to the early 1800s. *See, e.g., Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 164-65 (2nd Cir. 2014); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 277-78 (2nd Cir. 2005).

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However, other courts have refused to extend *Sherrill* to Indian treaty rights claims.[3] For example, in *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2008 WL 4808823 at *1, *23 (E.D. Mich. Oct. 22, 2008), the court held laches could not be invoked to defeat a claim that a reservation established by Executive Order and Treaty in 1855 and affirmed by Treaty in 1864 continued to exist as an Indian reservation. The court reasoned that, because the conduct challenged by the tribe arose sometime after the 1855 and 1864 treaties, it was "not the same sort of distinct ancient wrong arising from the early days of the Republic that was at issue in either *Sherrill* or *Cayuga*." *Id*. at *22. It also noted that, while the claims in *Sherrill* and *Cayuga* arose from violations of the Indian Non-Intercourse Act and required the courts to fashion "a remedy for a two-century old violation of law out of whole cloth," the Saginaw Chippewa sought a remedy "closely tied to the treaties and later congressional action," which was "a decidedly different task." *Id*. For these and other reasons, the court held the "time-based equitable defenses of laches, estoppel, acquiescence, or impossibility" were not available to defeat the tribe's claims. *Id*. at *23.[4]

This case is more like *Saginaw Chippewa* than *Sherrill*. First, even accepting Quinault and Quileute's theory of the case, Makah's claims arose sometime after 1975, not in the early days of the Republic. *See Canadian St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2013 WL 3992830 at *8 (N.D.N.Y July 23, 2013) (*Sherrill* does not bar claim that

[3] We are aware of only one case that has applied *Sherrill* to bar a treaty-rights claim, and in that case that tribe had abandoned the state in which it asserted treaty rights in 1831, 174 years before seeking to enforce its rights. *See Ottawa Tribe of Oklahoma v. Ohio Dep't of Natural Resources*, 541 F. Supp. 2d 971, 976 (N.D. Ohio 2008), *aff'd on other grounds sub nom. Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634 (6th Cir. 2009).

[4] For other cases declining to apply *Sherrill*, *see, e.g.*, *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, No. 5:09-CV-02502 EJD, 2011 WL 5038356 at *7 n.5 (N.D. Cal. Oct. 24, 2011); *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1192 (N.D. Okla. 2009).

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1949 power line right of way agreement was not properly consummated because a 40-year gap between the 1949 agreement and 1989 complaint was not the "extraordinary passage of time that is a prerequisite to application of the extraordinary defense of *Sherrill* laches"). Second, Makah's claim does not require the court to fashion a remedy for a two-century old violation of law out of whole cloth, but only to interpret the treaty language and make the same type of U&A determination that it has made for every other tribe in this case.

In *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114, 127 (2nd Cir. 2010), the court distinguished *Sherrill* laches from traditional laches, stating that the application of *Sherrill* turns on "the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." These factors do not support the application of *Sherrill* here. This case does not arise from "an historical injustice" dating to the early years of the Republic, and the time-frames involved here are not comparable to those in *Sherrill* or in the later cases in which it has been applied. Moreover, as discussed further below, given Quinault and Quileute's knowledge that the federal regulatory boundaries were subject to revision based on an adjudication in this case, it cannot fairly be said that this case will "upset the justifiable expectations of individuals and entities far removed from the events giving rise to [Makah's] injury." To the contrary, the individuals and entities who may be affected by the outcome of this case are the same individuals and entities whose actions have given rise to Makah's injuries.

For these reasons, *Sherrill* provides no basis for departing from the Ninth Circuit's holding that equitable defenses are not available to defeat Indian treaty rights or Judge Coyle's application of that rule to hold that such defenses cannot be invoked to block U&A

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determinations. Moreover, even if *Sherrill* might warrant a new rule, it would be inequitable to apply that rule retroactively to bar Makah's claims. *See* Makah Mot. at 21 (Dkt. 248).

B. Makah's Positions in the Halibut Case Do Not Warrant Judicial Estoppel.

Makah's defense of the federal regulatory boundaries in the halibut case does not give rise to judicial estoppel for three reasons. First, Makah's position in that case was not "clearly inconsistent" with its position here. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). As discussed in Makah's motion, Makah did not seek a ruling on any other tribe's treaty right to take halibut or on any other tribe's U&A. Makah Mot. at 9-10 (Dkt. 248). When Washington argued that Makah had not shown a likelihood of success on its allocation claims because it had not proven that 11 other tribes had treaty rights to harvest halibut or that the regulations correctly depicted their U&A, Makah responded that, because *Mosbacher* was an APA case, Washington had the burden to demonstrate that those aspects of the regulations were erroneous and that it had not met (or even attempted to meet) that burden. *See* Makah Mot. at 10-11. In addition, Makah argued that there was substantial evidence in the record to support the regulations. *Id.* Makah's position here is that a *de novo* determination on a full evidentiary record will establish that Quinault and Quileute's U&A do not extend more than 5 to 10 miles offshore. These positions are reconcilable because both the evidentiary record and the standard of review are different.[5]

[5] Quinault and Quileute's discussion of the halibut litigation (*see, e.g.*, Q/Q Opp. at 7-8, 11-13 (Dkt. 267)) disregards Makah's statements that the federal regulatory boundaries were subject to revision based on U&A adjudications in this case. In particular, Makah "agree[d] fully with Washington that, in a proper judicial proceeding to determine the treaty rights or usual and accustomed grounds of any tribe, or appropriate treaty allocations, the Court must apply the treaty-right principles articulated in United States v. Washington." *See* Makah Mot. at 13 (Dkt. 248) (quoting Third Joner Decl., Exh. V at 9) (Dkt. 248, Att. 5). Makah added that, if the federal regulations were inconsistent with the tribes' rights, as adjudicated previously or "in further proceedings" in this case, they would be invalid. *Id.*

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Second, an essential element of judicial estoppel is judicial acceptance of the allegedly inconsistent prior position. *See New Hampshire*, 532 U.S. at 750-51; *Interstate Fire & Cas. Co. v. Underwriters at Lloyd's, London*, 139 F.3d 1234, 1239 (9th Cir. 1998) (judicial estoppel applies "only if the court has relied on the party's previously inconsistent statement"). That element is missing here, because the court did not adopt Makah's argument that there was substantial evidence to support the federal regulatory boundaries; it held only that the regulatory boundaries governed the halibut fishery until properly challenged. *See* Makah Mot. at 12-14 (Dkt. 248). That holding did not preclude, but rather contemplated, a proceeding such as this one, in which the court can determine Quinault and Quileute's U&A based on a full evidentiary record. Accordingly, there is no risk of inconsistent adjudications and no basis for judicial estoppel. *See New Hampshire*, 532 U.S. at 750-51.[6]

Third, Makah will obtain no unfair advantage as a result of the positions it took in the halibut litigation and now asserts in this subproceeding. *See id.* at 752. Any benefit Makah obtained from a larger overall halibut allocation has always been offset by the need to share that allocation with additional tribes. And, if Makah prevails here, the halibut allocation will necessarily be adjusted to reflect halibut passing through the tribes' combined U&A as determined by this court. The real beneficiaries of the positions Makah took regarding the federal regulations in the halibut litigation have been Quinault and Quileute, not Makah.

C. Laches and Acquiescence Do Not Apply Because Makah Did Not Delay Unreasonably in Seeking a Determination of Quinault and Quileute's U&A.

[6] The only threat to judicial integrity in this case arises from Quinault and Quileute's position. During the course of the halibut litigation, they failed to disclose to Makah and the court that they had previously asserted that there was no factual or legal support for NMFS' designation of their western boundary. *See* Makah Mot. at 4-5 (Dkt. 248). And, since that litigation, they have asserted repeatedly – including in briefs submitted to this court and the Ninth Circuit – that the federal regulations were interim measures pending an adjudication in this court. *Id.* at 6-8. To permit them to hide behind Makah's defense of the regulations in the halibut case to avoid such an adjudication would threaten the integrity of the judicial process and this case.

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In Makah's motion, we showed that, prior to the dispute over the whiting fishery, Makah, Quileute and Quinault had been able to resolve disputes over their respective ocean fisheries through negotiated management plans or other agreements, while preserving the parties' ability to address U&A disputes in the future. *See* Makah Mot. at 14-17 (Dkt. 248). The Court has encouraged the parties to take this approach, and Quinault has agreed that it is the preferred approach. Subp. 09-01, Transcript of Hearing at 31, 53 (May, 22, 2013) (Dkt. 170). It was, therefore, entirely reasonable for Makah to defer researching and seeking an adjudication of Quinault and Quileute's U&A as long as it was able to successfully resolve disputes over ocean fisheries through the negotiation of management plans that protected its core interests.

Quinault and Quileute do not dispute that the coastal tribes had been able to resolve prior disputes through the negotiation of management plans, but argue that Makah had an obligation to seek an adjudication of their U&A if their ocean fisheries had *any* impact on Makah. *See, e.g.*, Q/Q Opp. at 15-17 (Dkt. 267). This argument contradicts their prior standing arguments (in which they asserted that only a "substantial injury" would give Makah standing to seek such an adjudication) and disregards the context and reality of this case and the complex relationships among the tribes. The coastal tribes, in particular, have sought to avoid inter-tribal U&A litigation except where their core interests have been implicated. As Makah's Tribal Chairman explained (and Quinault and Quileute do not dispute), "it has been a longstanding position of tribal leadership … to use those types of challenges carefully and as a last resort once all other avenues have been exhausted to try to come to some sort of mediation over a dispute." Third Joner Decl. Exh. HH at 126-27 (Dkt. 248, Att. 5).

This reticence is illustrated by the blackcod dispute, in which Quileute implored Makah

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not to challenge its western boundary. *See* Makah Mot. at 14 (Dkt. 248). After the court entered preliminary injunctions restricting Quileute's use of pot gear in the fishery, providing the essential relief that Makah and Quinault were seeking, the parties entered into a settlement agreement in which they agreed to defer – *not to abandon* – U&A litigation. *See id.* at 15-17. Having asked for and obtained Makah's agreement to *defer* U&A litigation, Quinault and Quileute cannot now claim that it was unreasonable for Makah to defer such litigation (or that they were prejudiced as a result of that deferral).

The blackcod agreements reflect the deliberate decisions of all three tribes to avoid U&A litigation as long as they could resolve their disputes through the negotiation of management plans that protected their core interests. They also show that all three tribes were aware of potential U&A disputes, and were not waiving their rights to litigate them in the future. It is particularly noteworthy that, in the 1997 blackcod agreement, the parties bargained for a "standstill" on U&A litigation while the agreement remained in effect. *See id.* at 15-16; Third Joner Decl, Exh. BB (Exh. A at 3-4) (Dkt. 248, Att. 5). Quinault and Quileute now ask the court to give them much more than they bargained for: a permanent waiver of any claims by Makah regarding their U&A. Having bargained for a more limited standstill, and having entered into subsequent agreements that preserved the parties' respective positions regarding U&A matters, their attempt to obtain a permanent waiver from the court is inequitable.

D. Quinault and Quileute's Claims of Prejudice Lack Merit.

In Makah's motion (at 4-8), we showed that, at all relevant times, Quileute and Quinault have known that the federal regulatory boundaries were interim measures pending a judicial determination of their U&A in this case. Quinault and Quileute do not address any of the federal statements informing them of this fact (including the provisions of the regulations

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themselves), or their own statements acknowledging it. Instead, they assert that they were not required to obtain an adjudication of their U&A before fishing under the federal regulations, that an adjudication of their U&A can be obtained only through an APA challenge to the federal regulations, and that only they (or the federal government) can seek such an adjudication. *See* Q/Q Opp. at 7-11 (Dkt. 267).

The fact that Quinault and Quileute were not required to adjudicate their U&A before fishing under the federal regulations is not at all inconsistent with the fact those regulations were intended only as an accommodation of their fishing rights pending an adjudication in this case. As the United States has explained, "[s]ince the initial adoption of the western boundary of the tribal fishing areas for halibut described in regulation in 1996, NOAA has consistently stated that this boundary is not intended to represent a formal determination of the western boundary of the Quinault and Quileute usual and accustomed grounds, and that it is subject to change as necessary to comport with future court orders." Makah Mot. at 4 (Dkt. 248) (quoting U.S. Resp. to Motions to Dismiss at 3 (Dkt. 58)). According to the United States, "NOAA has consistently viewed the court as the final arbiter of the location of the western boundary of the Quinault and Quileute U&As." *Id*.

Nor is there merit to the suggestion that a judicial determination of Quinault and Quileute's U&A can be obtained only through an APA challenge to the federal regulations.[7] In the past, Quinault and Quileute have insisted, and the United States has agreed, that the regulations have no effect on U&A determinations in this case. *See id.* at 7-8. For example, in

[7] It is not true that Makah argued that this was the exclusive mechanism to obtain an adjudication of Quinault and Quileute's U&A. In the halibut litigation, Makah expressly recognized that this court retained jurisdiction to adjudicate U&A notwithstanding the federal regulations. *See* Makah Mot. at 11, 13 (Dkt. 248).

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1996, Quinault asserted that it did not object to the regulatory description of its U&A "if and only if, the description is without prejudice to proceedings properly brought under the continuing jurisdiction of the District Court in *United States v. Washington* to clarify or revise tribal usual and accustomed fishing areas …." *Id*. at 6 (quoting Reich to Stelle (Apr. 11, 1996)). In their 2001 Ninth Circuit amicus brief in *Midwater Trawlers*, Quinault and Quileute jointly stated that they agreed with the United States that the regulatory description of their western boundary "is a reasonable accommodation until a judicial determination is made in *U.S. v. Washington.*" *Id*. at 8 (quoting Quileute and Quinault Amicus Br. at 21).

The suggestion that only the United States, Quinault or Quileute can challenge the description of Quinault and Quileute's U&A in the regulations – that is, that no party actually *injured* by that description can challenge it – makes no sense. This court's continuing jurisdiction to determine previously unadjudicated U&A is not limited to a subset of the parties but can be invoked by "any" party to this case. Order Modifying Paragraph 25 of Permanent Injunction at 1-2 (Aug. 23, 1993) (Dkt. 13599). While Quileute may have believed that the State of Washington lacked standing to seek such an adjudication, *see* Quil. Mem. Re Crab Dispute at 6 n.4 (Dkt. 15949), it could not reasonably have believed that a party with standing – *i.e.*, a party injured by its exercise of treaty fishing rights under the federal regulations – could not seek an adjudication of its U&A in this case. Notably, Quileute made no such suggestion when Quinault and Makah challenged its southern and northern boundaries in the blackcod subproceeding, *see* Makah Resp. to Motions to Dismiss at 26-27 (Dkt. 59), and Quileute and Quinault represented to the Ninth Circuit that Midwater Trawlers could obtain an adjudication of their ocean U&A by attempting intervention in this case. *Id.*, Exh. C at 15-16 & n.9.

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These arguments attempt to obfuscate the undisputed fact that Quinault and Quileute have always known that the federal regulatory boundaries were subject to a U&A adjudication in this case. Indeed, Quinault again acknowledged this fact in a letter to NMFS written earlier *this year*. *See* Third Joner Decl., Exh. G (Dkt. 248, Att. 2). Thus, Quinault and Quileute chose to develop and invest in ocean fisheries knowing their U&A (like that of all other tribal parties) was subject to adjudication here. They cannot claim they were prejudiced by Makah's delay when they have always known that the regulatory boundaries were only an accommodation pending such an adjudication, and when they themselves asked for and agreed to such a delay in the context of the blackcod dispute. *See Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1127 (9th Cir. 2006) (noting defendant "had ample incentive to investigate" facts); *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1084 (9th Cir. 2000) (defendant was "on notice that there was a need to preserve evidence in order to defend against possible future legal proceedings"); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 775 (Fed. Cir. 1995) ("Even a considerable investment during a delay period is not a result of the delay if it was a 'deliberate business decision to ignore [a] warning, and then to proceed as if nothing has occurred.'") (quoting *Hemstreet v. Computer Entry Sys. Corp.*, 972 F.2d 1290, 1294 (Fed. Cir. 1992)).

III. CONCLUSION.

For these reasons, the Court should reject all equitable defenses in this subproceeding.

Dated: December 12, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2014, I electronically filed the foregoing Makah Reply in Support of Motion for Partial Summary Judgment Rejecting Equitable Defenses with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter which are registered with the Court's CM/ECF filing system.

Dated: December 12, 2014.

ZIONTZ CHESTNUT

s/ Cara Hazzard
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