The 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 QUILEUTE AND QUINAULT REPLY TO S'KLALLAM, SWINOMISH, AND TULALIP RESPONSE RE QUINAULT AND QUILEUTE MOTION FOR SUMMARY JUDGMENT

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The Response of the Tulalip, Swinomish, Port Gamble S'Klallam and Jamestown S'Klallam ("Tribes") is limited to Quinault and Quileute's laches defense and does not oppose Quinault and Quileute's judicial estoppel and acquiescence defenses.[1]

Recycling nearly verbatim Tulalip's argument in 05-4, the Tribes claim that laches should not be applied in a continuing jurisdiction case such as this. This Court rejected that argument in Subproceeding 05-4 and should do so again.

> [T]he Tulalip assert that laches should not be applied in a 'continuing jurisdiction' case such as this. No legal authority is offered for this proposition, and the Court rejects it. While the Court did and does retain jurisdiction to hear and determine certain claims in this case, as set forth in Paragraph 25 of the Permanent Injunction, all applicable legal and equitable doctrines still apply to claims within that jurisdiction.

U.S. v. Wash., 2005 WL 2898132, at *4 (W.D. Wash. Oct. 27, 2005). Although the Ninth Circuit vacated this order on other grounds, there is ample support for this Court's reasoning. Numerous other courts have applied laches to continuing jurisdiction cases. *See, e.g., Adcor Indus. v. Bevcorp,* 411 F. Supp. 2d 778, 803 (N.D. Ohio 2005) ("While there is no statute of limitations on the commencement of civil contempt claims, the equitable defense of laches may apply" to a "permanent injunction subject to continued judicial enforcement"); *Cook v. City of Chi.*, 192 F.3d 693, 695 (7th Cir. 1999) (ongoing consent decree "is, we emphasize, an equitable order, and therefore subject to the usual equitable defenses. One of these is the defense of laches.") (citations omitted); *Brennan v. Nassau Cnty.*, 352 F.3d 60, 63 (2d Cir. 2003) ("the court below should have applied the equitable doctrine of laches to her claims because consent decrees are subject to equitable defenses").[2]

Not only is there no rule that laches is inapplicable to continuing jurisdiction cases, no law of the case prevents application of laches in this subproceeding. Although Judge Coyle framed the question in 89-2 as whether a "tribe can be prevented by another tribe from litigating or challenging usual and accustomed fishing places by invocation of the equitable defenses of

[1] Quinault and Quileute also incorporate their Opposition to Makah's Motion and their Reply to Makah's Response.
[2] "A consent decree is essentially a settlement agreement subject to continued judicial policing." *U.S. v. Or.*, 913 F.2d 576, 580 (9th Cir. 1990) (quotation omitted).

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laches, waiver or equitable estoppel," the only issue before him was whether laches could apply to a claim for *clarification* of Judge Boldt's ruling. Dkt. 11596. Judge Coyle went on to require that the tribes resolve their U&A issues "as soon as possible":

> This has nothing to do with equitable defenses. It has to do with the expeditious utilization of a mechanism that has been in place since the Boldt decision was issued. Otherwise, it is possible for tribes to essentially mislead other tribes and then slam the door.

Dkt. 11596 at 19-20. Despite stating his concern had "nothing to do with equitable defenses," preventing "slam[ming] the door" on defendants is the precise rationale for laches. A central concern underlying the laches doctrine is "the cost to the defendant of uncertainty about his legal rights and duties." *Cook v. City of Chi.*, 192 F.3d 693, 696 (7th Cir. 1999) (citing *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980)). The doctrine serves "to force parties to litigate claims while the evidence is still fresh, and to grant the prospective defendant relative security and stability by allowing it better to estimate its outstanding legal obligations." *Id* at 693.

Importantly, in 2000, the Ninth Circuit held that Judge Coyle's 1990 order was not final because no separate judgment was entered. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 447-48 (9th Cir. 2000). Moreover, Judge Coyle's order has been superseded by this Court's more recent correct rulings that equitable defenses are available, but cannot be resolved in the dismissal phase. *See* Quinault and Quileute Opposition, Dkt. 267 at 17-21.

The Tribes also misapprehend the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), where the Court ruled laches applies to aboriginal rights claims without limiting its ruling to only land claims. The Tribes instead rely on the Ninth Circuit's ruling in the shellfish case that laches cannot be used to "defeat treaty rights." *U.S. v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998). [3] The Ninth Circuit relied on *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983) to support its ruling. *Id.* However, not only did *Swim* only hold

[3] "That rule does not apply here." No tribe has asserted a treaty right which could be "defeated by the application of laches. Instead, [Makah] has advanced a claim that the [defendants] have been fishing or attempting to fish outside the boundaries of their U & A." *See U.S. v. Wash.*, 20 F. Supp. 3d 777, 816 (W.D. Wash. 2004) (citation omitted). *See also* discussion at Dkt 267 at 17-18; Quinault and Quileute Reply to Makah Response at 6.

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laches could not be used to *defeat* treaty rights, which is not at issue here, "*Swim* applied the **then-applicable** rule that neither Laches nor estoppel are available to defeat Indian treaty rights, **a rule that has since been rejected by the Supreme Court in *Sherrill***." *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of L.A.*, 2007 WL 521403, at 25 (E.D. Cal. Feb. 15, 2007), *aff'd*, 637 F.3d 993 (9th Cir. 2011) (emphasis added). Since *Sherrill*, several courts have applied laches to treaty right claims. *See, e.g.*, *Ottawa Tribe v. Ohio Dep't of Natural Res.*, 541 F. Supp. 2d 971 (N.D. Ohio 2008) (laches barred tribe's action to enforce treaty hunting and fishing rights); *N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, 2010 WL 2674565, at *20-21 (D.N.J. June 30, 2010); *Stockbridge-Munsee Cmty. v. N.Y.*, 756 F.3d 163 (2d Cir. 2014).

Even if this Court's orders do not permit application of laches in *clarification* claims under Paragraph 25(a)(1), it should not summarily bar laches in *adjudication* claims under Paragraph 25(a)(6). In clarification claims, evidence cannot be lost because the evidence is limited to what was before Judge Boldt. In contrast, crucial sources of evidence in *adjudication* claims, such as tribal elders and anthropologists who have done field work with tribes, are lost over time. The prospect of such loss makes it important that a plaintiff who believes it has a claim to adjudicate another tribe's U&A bring the claim as soon as possible.

As Quileute and Quinault discussed in their Response to Makah's Motion, it is absurd to claim that *fishery* disputes are "solved" by threats to sue not over the *fishery*, but over a tribe's entire fishing *area*. In fact, the Tribes admit that such "resolutions" of U&A disputes through fishery management agreements are actually only "temporary" and "tenuous peace agreements." Dkt. 275 at 5. That tribes are willing to manufacture or sit on U&A disputes as a perpetual bargaining chip to force other tribes to agree to unfair terms in fishery management plans is even more reason to apply equitable defenses to prevent them from doing so.

The Tribes' contention that Quinault and Quileute somehow misled other tribes by fishing *legally* within their federal-water fishing areas (which boundaries were long-ago subject

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to public notice and comment) is ludicrous. There is no case where a court has held that a plaintiff's delay was excused because it simply hoped the *defendant* would at some point comply with the plaintiff's own view of what the law required. Quileute, Quinault, and the federal government have made it abundantly clear the law does not require adjudication of federal-water fisheries. *See* Dkt. 267 at 7-11. If other parties disagreed, it was incumbent upon them to timely bring their claim.

The Tribes' implication that Quinault and Quileute "aggressively opened new [fishing] areas" (Dkt. 275 at 5), is also absurd. Instead, since the Boldt Decision they have been fishing the same distance offshore as they have always fished, and unambiguous federal regulations have specifically defined those areas since 1986, well before Judge Coyle's 1990 order put the parties on notice to resolve U&A disputes as soon as possible.

This Court has held that equitable defenses *are* available in this case, but are more appropriately evaluated at the summary judgment (or trial) stage. Equitable defenses are particularly merited here, where one tribe has invoked this Court's continuing jurisdiction to adjudicate (not clarify) the customary fishing area of another tribe outside state waters. There is no inflexible "law of the case" that precludes a laches defense in this unprecedented subproceeding.

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Respectfully submitted this 2nd day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2015, I electronically filed the foregoing document using the CM/ECF system, which will notify all parties in this matter who are registered with the Court's CM/ECF filing system of such filing.

DATED this 2nd day of January, 2015.

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