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TULALIP TRIBAL COURT

CLERK

IN THE TULALIP TRIBAL COURT
TULALIP INDIAN RESERVATION
TULALIP, WASHINGTON

HAZEN GRAHAM SHOPBELL, enrolled
Tulalip Tribal member, et ux,

Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT
OF FISH AND WILDLIFE, JIM UNSWORTH,
Director, State of Washington Department of
Fish and Wildlife, WENDY WILLETTE,
Detective, State of Washington Department of
Fish and Wildlife, JOHN DOES 1-6, law
enforcement officers, State of Washington
Department of Fish and Wildlife,

Defendants.

NO. TUL-CV-GC-2016-0278

PLAINTIFF'S CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: PROBABLE CAUSE

I. INTRODUCTION

Plaintiff seeks a declaratory judgment that there existed no probable cause based on Washington Department of Fish and Wildlife's ("WDFW") allegations of theft under Tulalip Tribal law—the lone alleged criminal violation under Tribal law. Astonishingly, (1) WDFW has recanted allegations of underpayment as "theft." And (2) according to the Tribe, Puget Sound Seafood Distributors, LLC's ("PSSD") purchase of the 444 pounds of Dungeness crab was *legal*. Absent any other alleged violations of Tribal law to support probable cause, no lawful authority existed for

1 WDFW to search and seize Plaintiff's property. *See* Complaint, ¶ 6.2. Partial summary judgment
2 should be granted.

3 II. STATEMENT OF FACTS

4 Plaintiff alleges in his Complaint that "WDFW lacked probable cause that a crime had been
5 committed" and "the search warrants issued to Defendant WDFW were illegal and invalid as a result."
6 Complaint, ¶ 3.11. As part of his replevin claim, which this Court has sustained, Plaintiff alleges that
7 WDFW "conducted unlawful searches of Plaintiff's persons and property." *Id.* at ¶ 6.2.

8
9 On June 9, 2016, the Tribal Court issued a Search Warrant based on a sworn Affidavit for
10 Search Warrant presented by WDFW Detective Wendy Willette, in which she alleged that Hazen
11 Shopbell vis-à-vis PSSD, violated three provisions of the Revised Code of Washington—which state
12 regulations are wholly inapplicable as discussed *infra*—and one provision of the Tulalip Tribal Code
13 ("TTC"), Section 3.30.060 Theft. Declaration of Gabriel S. Galanda ("Galanda Decl."), Exs. A
14 (Affidavit), E (Warrant).¹ Therein Det. Wendy Willette alleged that (1) PSSD's "underpayments" to
15 Plaintiff's fellow Tulalip Tribal member fisherpersons constituted theft under Section 3.30.060; and (2)
16 without citing any TTC provision, seems to allege that the PSSD's single purchase of the 444 pounds of
17 Dungeness crab also constituted theft or otherwise violated Tulalip Tribal law.

18
19 WDFW is wrong, on both counts.

20 A. Defendants Recant Originally Alleged Probable Cause Basis For Tribal Theft.

21 First, with regard to the alleged theft under Tribal law, Det. Wendy Willette represented to Pro
22 Tem Judge Leona Colegrove through her Affidavit that:
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24
25 ¹ WDFW admits that it took at least two bites of the apple to establish probable cause before the Tribal Court. Galanda Decl.,
26 Ex. B, at 11 (Interrogatory Response No 8). A comparison of two search warrant affidavits revealed that on the first bite, WDFW cited only the RCW as the basis for probable cause. *See id.*, Ex. C, at 1, 6. It was only on the second bite, presumably at Judge Colegrove's behest, did WDFW even see fit to allege—even sloppily handwrite—Tribal law as a basis for probable cause, specifically TTC 3.30.060 Theft. *Compare id.*, Ex. A, at 1, 6, , with Ex. C, at 1, 6.

1 Puget Sound Seafood Dist. LLC underpaid Tulalip fishermen, harvesting their treaty-
2 granted species in their usual and accustomed areas, \$188,232.09 between January
3 2015 and February 2016, according to fish receiving ticket data and financial data.
4 This constitutes theft under TCC 3.30.060. There were 647 individual counts of
5 underpayments recorded in the data.²

6 Galanda Decl., Ex. A at 6 (emphasis added). Det. Willette's allegations were based on hearsay from an
7 anonymous "state-licensed wholesale dealer" in competition with PSSD, and a purported "fish receiving
8 ticket audit" that Det. Willette undertook. *Id.* at 7-8. 10-14. **Defendants now recant Det. Willette's**
9 **"discussion of the apparent underpayments discussed at pages 7-8 and 10-14 of the Affidavit,"**
10 **explaining it is "inconclusive":**

11 [T]he information on the underpayments is not sufficient to allow any conclusion
12 that these underpayments represent criminal violations. WDFW has indicated that it
13 does not intend to rely on the apparent underpayments generally, or information
14 provided by the confidential informant in particular, in defending the existence of
15 probable cause for the warrant at issue in this case.

16 Defendants' Motion For Protective Order (Apr. 11, 2017), at 3 (emphasis added).

17 Astonishingly, despite Det. Willette signing the Affidavit before Judge Colegrove "[b]ased
18 upon the above facts and information" that she believed established probable cause—including that at
19 pages 7-8 and 10-14 of the Affidavit, under the bolded caption "**Circumstances Supporting Probable**
20 **Cause**"—she now testifies to this Court that: "**The anonymous source was not the source of probable**
21 **cause in this investigation.**" *Id.* at 3, 22 (emphasis in original); Declaration of Wendy Willette (Apr. 6,
22 2017), at 2 (emphasis added). In other words, there was not any basis for probable cause for the warrant
23 to issue regarding the alleged underpayments to begin with. *Id.*

24 On partial summary judgment, therefore, a declaration that Defendant WDFW lacked probable
25 cause that Plaintiff had committed any "theft under TCC 3.30.060," is warranted.

26 ² As it turns out, Det. Willette's math was wrong. Defendants now admit to "a slightly different total underpayment amount"
and "an updated number of transactions, than what she alleged in her Affidavit. Galanda Decl., Ex. B.

1 **B. Defendants Also Lacked Probable Cause Regarding The 444 Pounds of Crab.**

2 Second, the information professed by Det. Willette is also insufficient to allow any conclusion
3 that the PSSD's purchase of the 444 pounds of Dungeness crab represents criminal violations under
4 Tribal law. Indeed, Det. Willette did not allege "theft under TCC 3.30.060" or *any* other Tribal
5 criminal violation relative to that crab. Galanda Decl., Ex. A, at 5-7; *see also id.*, Ex. C, at 4-5.³

6 Det. Willette alleged that PSSD illegally bought the 444 pounds of crab in May 2015, according
7 to Fish Receiving Ticket JK794138. Galanda Decl., Ex. A, at 7. On May 22, 2015, Tulalip fisherman
8 Joey Hatch contacted PSSD owner Anthony Paul and informed him that his boat had broken down and
9 asked if PSSD wanted to purchase those 444 pounds. Declaration of Anthony Paul ("Paul Decl."), ¶ 2.
10 "That same day," Mr. Paul in turn "called Rocky Brisbois with Tulalip Tribal fisheries and asked if
11 Puget Sound Seafood Distributors could purchase the Dungeness crab from Joey Hatch that day with it
12 being delivered to our facility the next day." *Id.* at ¶ 3. Tulalip Tribal Shellfish Technician "Brisbois
13 said it was okay for Puget Sound Seafoods to purchase the Dungeness crab from Joey Hatch." *Id.* at ¶ 4.

14 Defendant WDFW's investigation reports corroborate as much. According to a WDFW
15 Officer's Report dated November 3, 2015, and issued seven months before Det. Willette entered this
16 Court in search of a warrant:

17 I asked if he knew about Hatch Sr.'s boat breaking down on the last day of the crab
18 fishery (22nd). Rocky said that he did remember getting a call from his boss, Mike
19 McHugh, about how Hatch's boat broke down and that their crab were "hung". **Rocky**
20 **then said he did remember talking to someone from Puget Sound Seafood about**
21 **how it was okay if they purchased Hatch's crab because their boat broke down on**
22 **the day of the fishery closure.**

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25 ³ In her Declaration filed with this Court on March 23, 2017 in support of Defendants' summary judgment motion, Det.
26 Willette continues to allege criminal violation of provisions of the Revised Code of Washington vis-à-vis PSSD's purchase of
the 444 pounds of Dungeness crab, even though those laws do not apply in this Court as discussed *infra*. Declaration of
Wendy Willette ("Willette Decl."), at 3.

Galanda Decl., Ex. D, at 2 (emphasis added). PSSD did buy 444 pounds of Dungeness crab from Mr. Hatch as reflected on Fish Receiving Ticket JK794138—and it was “okay”—it was legal—for PSSD to do so under Tulalip Tribal law. Paul Decl., Ex. A.

The Tulalip Tribes have since officially confirmed as much. *Id.* In January 2007, Paul “asked Mr. McHugh if Puget Sound Seafoods had any illegal Fish Receiving Tickets on file with the Tulalip Tribes for the company’s purchase of 444 pounds of Dungeness crab from Joey Hatch in May 2015.” Paul Decl., ¶ 5. On behalf of the Tulalip Tribes, McHugh responded on January 31, 2017, proclaiming that the purchase was a “legal and agreed transaction.” *Id.*, Ex. A, at 1.

To reach that conclusion, McHugh reviewed PSSD’s Treaty Fish Receiving Tickets through the Northwest Indian Fisheries Commission Tribal Online Accounting System (“TOCAS”), as well as “landings” Tulalip Tribes considered “illegal.” *Id.* McHugh more specifically concluded:

We have no record of any illegal sales between Tulalip fishers and Puget Sound Seafood as per your request. You asked if any of your company’s Dungeness crab sales are currently identified as illegal transactions – Tulalip records do not identify any transactions as illegal. At this time, no sales of Dungeness crab by your company are coded as illegal between Tulalip Tribes and Puget Sound Seafood. . . .

All Region 2 East . . . have been reconciled by State and treaty managers. This is for the dates between April 1, 2015 and March 31, 2016 (for Region 2 East) . . . Prior to the 2016/2017 seasons for Regions 2E and 2W all State and tribal managers have reviewed all fishery related mortalities and fishery landings, legal as well as illegal, and agreed on final catches for the 2015/2016 seasons. **There are no illegal Puget Sound Seafood landings associated with these management periods and all State and treaty managers and governments have agreed landing estimates are final and no longer open for negotiations.**

Id. (emphasis added). At page 5 of the Tribes’ Table 1, the fifth row from the bottom, reads:

125688	5/22/2015	COMM	268		JK794138		444	4
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Id., Table 1 at 5. Further, on the Tribes’ Table 2, reflecting “Tulalip Landings Codes as Illegal” through January 30, 2017, Fish Receiving Ticket JK794138 is not reflected. *Id.*, Table 2, at 25.

1 In all, Defendant WDFW also lacked probable cause that PSSD's purchase of the 444 pounds of
2 Dungeness crab was criminal under Tribal law. Therefore, a declaration on partial summary judgment
3 that Defendant WDFW lacked probable cause in that regard, too, is warranted.

4 III. ARGUMENT

5 A. Tulalip Summary Judgment And Probable Cause Standards.

6 Tulalip Civil Rules provide that "[a] party against whom a claim . . . is asserted may, at any
7 time, move with or without supporting affidavits for a summary judgment in his favor as to all or any
8 part of the claim" TTC 2.10.100(5)(b). The Court may grant summary judgment where "the
9 pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no
10 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
11 law." TTC 2.10.100(5)(c).⁴

12
13 Tulalip law further provides that "[n]o search warrant shall issue except upon a written or oral
14 sworn statement of a law enforcement officer or prosecutor that establishes probable cause to search for
15 and seize a person or property" for, i.e., evidence of a crime or contraband, fruits of crime, or other
16 items illegally possessed. TTC 2.25.020(2). A warrant should be reversed on probable cause grounds
17 where it is clearly erroneous. *Tulalip v. Cuellar and Looks Twice*, 6 NICS App. 148, 149 (Tulalip App.
18 Ct. 2004) (citing *United States v. Stannert*, 762 F.2d 775, 779 (9th Cir. 1985)). The issuing judge must
19 have possessed a "substantial basis for concluding that probable cause existed." *Id.* (citing *Jones v.*
20 *United States*, 362 U.S. 257, 261 (1960)).
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25 ⁴ The Court also is required to apply the laws and ordinances of the Tulalip Tribes, including the custom laws of the Tribes.
26 TTC 2.05.030(2). Where no applicable Tulalip Tribal law, ordinance or custom exists, the Court "may utilize, in the
following order, the procedural laws of the other Federally-recognized Indian tribes, Federal statute, Federal common law,
State common law, and State statutes as guides to decisions of the Courts." *Id.*

1 **B. The Revised Code Of Washington Is Inapplicable At Tulalip.**

2 As the Tulalip Court of Appeals explains: “It is long established that federally-recognized tribes
3 are separate sovereign governments with ‘distinct political [societies], separated from others, ca[pa]ble
4 of managing [their] own affairs and governing” *Jackson v. Tulalip Tribes*, No. TUL-CV-PI-
5 2014-0083 (Tulalip Tribal Ct. Jan. 13, 2015) (Order Granting Defendant’s Motion for Summary
6 Judgment) (citing *United States v. Lara*, 541 U.S. 193, 204-05 (2004)). “It is clear that absent federal
7 legislation making a state statute applicable to a tribe, any application of that statute must be agreed to
8 by the tribal government.” *Id.*

9
10 Here, federal law does not apply RCW §§ 77.15.260, 77.15.630, and 69.30.110 to the Tulalip
11 Tribes or Plaintiff, and the Tulalip Tribes have not in any way adopted those state statutes as binding
12 law upon this Court. *Id.* Accordingly, only Defendant WDFW’s single allegation of Theft in violation
13 of TTC 3.30.060, in both the Affidavit and Warrant that Det. Willette both prepared and presented to
14 Judge Colegrove, is even relevant here.⁵ Galanda Decl., Exs. A at 1, 20; Ex. E, at 1. And at least as to
15 the alleged “underpayments,” Defendants have completely recanted, as discussed above and further
16 below. In any event, the existence of those three provisions of the RCW in the Warrant renders it
17 reversible as clearly erroneous under Tulalip common law disclaiming the applicability of such state
18 law. *Cuellar and Looks Twice*, 6 NICS App. at 149; *Jackson*, No. TUL-CV-PI-2014-0083.

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20
21 ⁵ The Tulalip Tribal Code provides:

22 A person commits the offense of theft by knowingly and purposely obtaining or exerting unauthorized
23 control, including by threat or deception, over the property of the owner or by obtaining control over
24 stolen property knowing the property to have been stolen by another, and the person:

- 24 (a) Has the purpose of depriving the owner of the property;
25 (b) Uses, conceals, or abandons the property in such a manner as to deprive the owner of the
26 property; or
(c) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment
probably will deprive the owner of the property.

TTC 3.30.060(1). Query whether any shellfish “theft” alleged by Det. Willette fits within this definition.

1 **C. No Probable Cause Existed To Support WDFW's Claim Of Theft Per Tribal Law;**
2 **WDFW's Search And Seizure Lacked Authority Of Law.**

3 No probable cause existed in support of the Warrant because no violation of TTC 3.30.060 or
4 other Tribal law occurred here; not as to (1) the alleged underpayments, and not as to (2) the purchase
5 of 444 pounds of Dungeness crab. "[A] finding of probable cause must be grounded in fact." *State v.*
6 *Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). "Probable cause cannot be made out by conclusory
7 affidavits." *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975). As it turns out, Det. Willette's
8 Affidavit was not grounded in fact, and was instead conclusory in nature, rendering the issuance of the
9 Warrant upon a finding that TTC 3.30.060 was violated clearly erroneous. In other words, because no
10 Tulalip tribal crime existed, for theft or anything else, there was not any "substantial basis for
11 concluding that probable cause existed." *Cuellar and Looks Twice*, 6 NICS at 149.

12 As to (1) the alleged underpayments, Det. Willette *now* admits that the allegations in her
13 Affidavit were based on "purely anecdotal" hearsay and "only . . . a potential explanation for the
14 discrepancies in payments" made by PSSD to Plaintiffs' fellow Tulalip Tribal member fisherpersons.
15 Willette Decl., at 3. What's more, Det. Willette now confesses: "The source did not provide names of
16 the fisherman he spoke to, dates when those conversations occurred, or any direct evidence of his
17 claims." *Id.*⁶ In all, Det. Willette presented only conclusory allegations and mistaken mathematics,
18 which were not grounded in fact. It is now appropriate for this Court "to reevaluate probable cause
19 after [Det. Willette's] striking the misrepresentation from the affidavit." *State v. Maddox*, 152 Wn.2d
20 499, 508, 98 P.3d 1199 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).
21
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25 ⁶ Det. Willette then confesses that "[a]s a law enforcement officer" she must "substantive evidence" based upon
26 information she receives from citizens. *Id.* She did not do so here, and having since recanted the underpayment allegations
and now received information that negates probable cause as to the 444-pound crab purchase, Det. Willette "must return to
the magistrate for reevaluation of probable cause." *State v. Maddox*, 152 Wn.2d 499, 508, 98 P.3d 1199 (2004); *see*
generally TTC 2.25.030(7) (Tulalip Tribes Res. 2016-371) (imposing Tribal warrant requirements upon state officers).

1 Since “the affidavit failed to support probable cause without the misrepresentation, the warrant was
2 void” *Id.*

3 As to (2) the 444 pounds of Dungeness crab, Det. Willette knew, by November 2015,
4 according to a WDFW Officer’s Report, that “it was okay if [PSSD] purchased Hatch’s crab” as far as
5 the Tulalip Tribes were concerned Galanda Decl., Ex. D. She made no mention of this fact
6 whatsoever, in her sworn Affidavit to this Court come June 2016. *See id.*, Ex. A, at 6-7. And she failed
7 to “verify [or] attempt to verify the legality of the sale of 444 pounds of Dungeness . . . with the Tulalip
8 Tribes or the Northwest Indian Fisheries Commission” (“NIFC”). *Id.*, Ex. B, at 19. Instead, Det.
9 Willette unilaterally “determined that the sale was illegal,” in complete disregard for the truth of that
10 transaction—truth that could and should have been known to her and WDFW via the Tulalip Tribes.
11 *Id.*; *see also id.*, Ex. A, at 6-7; Paul Dec., Ex. A.⁷

13 “[M]aterial factual inaccuracies which were . . . made in ‘reckless disregard for the truth’ [can]
14 result in the voiding of a warrant” *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981)
15 (citation omitted). Indeed, “the police proceed at their peril in executing a warrant. The ultimate
16 determination remains with the magistrate or reviewing court. If the reviewing court decides that the
17 newly acquired information negates probable cause, the evidence will be suppressed,” or, here, the
18 search and seizure declared unlawful. *Maddox*, 152 Wn.2d at 508.

20 Det. Willette knew or should have known that the 444-pound crab purchase was legal. *See*
21 Paul Decl., Ex. A. WDFW was told as much in November 2015. Galanda Decl., Ex. D. Had Det.
22 Willette reached out to the Tulalip Tribes or NIFC at any point prior to today, to review PSSD’s Treaty
23 Fish Receiving Tickets through TOCAS, like McHugh did in January 2017, or to otherwise attempt to
24

25 ⁷ Det. Willette alleges that PSSD “back-dated” Fish Receiving Ticket JK794138 to May 23, 2016, Galanda Decl., Ex. A, at 5,
26 but the Tulalip Tribes say otherwise, showing the transaction on May 22, 2015, and that transaction is “final and no longer
open for negotiation” between the Tribes and WDFW as co-regulators. Paul Decl., Ex. A, Table 2, at 25.

1 verify the legality of that transaction, she would have learned definitively that the purchase was legal.

2 *See* Paul Decl., Ex. A.

3 Det. Willette was reckless, in search of her own truth, i.e., that Plaintiff, as well as his company
4 PSSD and partner Paul, are “criminals.” She contends, two years later, that “Messrs. Shopbell and
5 Paul, owners of PSSD, are the subject on [sic] an ongoing criminal investigation by WDFW.” Galanda
6 Decl., Ex. B, at 13. But, there was never probable cause that they committed any crime under Tulalip
7 Tribal law; there was never probable cause for the Warrant to have been issued in the first place.
8 Complaint, ¶ 3.11. As such, WDFW “conducted unlawful searches of Plaintiff’s persons and
9 property,” including but not limited to the missing tablet. *Id.* at ¶ 6.2. Because no issue of material
10 fact exists regarding any violation of Tribal law, Plaintiff is entitled to partial judgment as a matter of
11 law, specifically a declaration that WDFW lacked probable cause in the first instance. TTC
12 2.10.100(5)(c). Plaintiff will in turn try the balance of his replevin claim as to his missing property.
13

14 A proposed Order accompanies this Motion.

15 DATED this 21st day of April, 2017.

16
17 GALANDA BROADMAN PLLC

18
19 By 

20 Gabriel S. Galanda, WSBA #30331
21 Bree Black Horse, WSBA #47803
22 Tulalip Tribal Bar Members
23 Attorneys for Plaintiff Hazen Graham
24 Shopbell
25
26

CERTIFICATE OF SERVICE

I, Alice Hall, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with Galanda Broadman, PLLC, counsel of record for Plaintiff.

2. Today, I filed and emailed the following documents,

- PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PROBABLE CAUSE
- DECLARATION OF ANTHONY PAUL IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PROBABLE CAUSE
- DECLARATION OF GABRIEL S. GALANDA IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PROBABLE CAUSE
- PROPOSED ORDER GRANTING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PROBABLE CAUSE

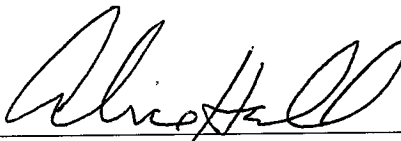
with or to the following:

Tulalip Tribal Court
3103 31st Ave. NE
Tulalip, WA 98271

Michael M. Young
Assistant Attorney General
PO Box 40100
Olympia, WA 98504-0100

The foregoing statement is made under penalty of perjury under the laws of the State of Washington and Tulalip Tribes is true and correct.

DATED this 21st day of April, 2017.


ALICE HALL