

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendant.

NO. 70-9213

Subproceeding NO. 17-3

**SWINOMISH INDIAN TRIBAL
COMMUNITY'S RESPONSE TO
STILLAGUAMISH MOTION TO
HOLD TULALIP IN CONTEMPT**

NOTED ON MOTION CALENDAR:
August 3, 2018

I. INTRODUCTION

Swinomish Indian Tribal Community ("Swinomish") respectfully offers this brief response to clarify certain issues related to the Stillaguamish Tribe of Indians' ("Stillaguamish") Motion to hold the Tulalip Tribes ("Tulalip") in contempt.

II. ARGUMENT

To obtain an order of contempt and sanctions, Stillaguamish must establish by clear and convincing evidence that (1) Tulalip violated this Court's order, (2) the violation was more than technical or *de minimis*, and (3) Tulalip's conduct was not the product of good faith or a reasonable interpretation of a violated order. *Go-Video v. Motion Picture Ass'n. of America*, 10 F.3d 693, 695 (9th Cir. 1993). Stillaguamish has not satisfied the high standard for establishing contempt set by the Ninth Circuit.

Further, and in any event, the record is more complex than Stillaguamish's motion suggests. Contrary to Stillaguamish's suggestion, the agreement between Stillaguamish and Tulalip cannot be interpreted in isolation. As Stillaguamish notes, "Tulalip entered into settlement agreements with various Puget Sound tribes," and in fact Tulalip entered into many such agreements in the early-to-mid 1980s. Stillaguamish Motion at 1; *see generally United States v. Washington*, 626 F. Supp. 1405, 1471-83 (W.D. Wash. 1985) (approving and summarizing Tulalip agreements with Nisqually, Puyallup, Swinomish, Muckleshoot, Suquamish, Lower Elwha, Port Gamble and Jamestown Bands of S'Klallam, Skokomish Tribe, and Stillaguamish). Tulalip is thus subject to a patchwork scheme of agreements and decisions of this Court relating to its fisheries. This creates complexity in the interpretation of Tulalip's obligations, which undercuts Stillaguamish's contempt argument. *Cf. Reno Air Racing Ass'n. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006) (reversing contempt sanctions because incorporation by reference of other documents into decree caused confusion).

Swinomish notes in particular that Tulalip is subject to a *prior* Agreement and Order between Swinomish and Tulalip that carries force and dignity at least equal to Tulalip's agreement with Stillaguamish. Indeed, because the Swinomish-Tulalip Agreement preceded the Stillaguamish-Tulalip Agreement, the latter must be interpreted in light of the former. Among other things, the Swinomish-Tulalip Agreement provides that "[a]s between the Tulalip Tribes and the Swinomish Tribal Community, it is agreed that the Swinomish Tribal Community has primary fishing rights in Area 8 north of a line drawn due west from Camano City." *United States v. Washington*, 626 F. Supp. at 1476. Thus, with regard to that portion of Skagit Bay that Stillaguamish labels "lower Skagit Bay" (Stillaguamish motion at, *e.g.*, 1:12) and argues is addressed by the Stillaguamish-Tulalip agreement, Tulalip already had recognized a primary right held by Swinomish that would prevent Stillaguamish, any other tribe, or even Tulalip from fishing in those waters without Swinomish's permission. Whatever duty Tulalip may owe to Stillaguamish therefore is subject to and conditioned by Tulalip's

1 prior agreement with Swinomish, which controverts the sweeping scope of the Stillaguamish-
2 Tulalip agreement advanced in Stillaguamish's motion.

3 Finally, Swinomish is skeptical that Stillaguamish's allegations about Tulalip positions
4 in settlement negotiations, or about Tulalip's participation in scheduling motions, ever could
5 provide the basis for a contempt finding. Particularly given the complex jurisprudence of this
6 case and the patchwork scheme of agreements between Tulalip and various tribes, it is difficult,
7 if not impossible, to discern how Tulalip could be adjudged to be in bad faith violation of one
8 of its many agreements before even learning what position Tulalip takes on the merits (if any).

9 III. CONCLUSION

10 For the reasons stated above, Swinomish respectfully submits that Stillaguamish's
11 motion is premature and substantively deficient, and therefore should be denied.

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1 DATED: July 30, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 30, 2018 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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

Dated this 30th day of July, 2018 at Seattle, Washington.


Gabriella Sanders