

THE HONORABLE RICARDO S. MARTINEZ

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner,

v.

STATE OF WASHINGTON

Respondent.

No. C70-9213 RSM

Subproceeding: 17-3

TULALIP MOTION FOR PARTIAL
SUMMARY JUDGMENT.

1. Introduction

In this subproceeding, the Stillaguamish Tribe seeks to expand its usual and accustomed fishing areas. After informal discussions with some affected tribes, Stillaguamish served a written “Meet and confer” notice pursuant to Paragraph 25 of the Permanent Injunction herein on parties to this case. Following that notice discussions were held between some of the parties which yielded no positive results. On September 11, 2017, Stillaguamish filed a formal Request for Determination with the court. Dkt No. 21583. That Request was filed out of time and not in compliance with the terms of Paragraph 25 and the requirement to allow affected parties to demand mediation. On October 10, 2017, after one party demanded a mediation, the parties were directed to mediation by the court. Dkt. No. 21677. Mediation sessions were held by United States District Judge Robert Lasnik.

1 Mediation did not achieve a settlement and on July 16, 2018, Judge Lasnik returned the matter
2 to the court. Dkt. No. 45. On July 20, 2018, the court issued an Order setting a pretrial
3 briefing schedule. Dkt. No. 21805. That schedule calls for opening briefs on “threshold
4 issues” to be filed on or before October 5, 2018.

5 2. Motion for Partial Summary Judgement—Standard of Review

6 Pursuant to FRCP 56 Tulalip moves for Partial Summary Judgement as to the scope and
7 application of the May 1, 1984 Settlement Agreement between Tulalip and Stillaguamish.
8 Tulalip specifically moves for judgment that the Agreement does not pertain to shellfish,
9 applies to only salmon fishing in certain limited areas of the Request for Determination, and
10 contains conditions which must be met before those limited areas may be declared
11 Stillaguamish U & A fishing locations.

12 Summary judgment is appropriate when there is no genuine issue of material fact and
13 the moving party is entitled to judgment as a matter of law.¹ Courts view inferences to be
14 drawn from the underlying facts in the light most favorable to the non-moving party.² Once the
15 moving party meets its burden under Rule 56(c), the adverse party “may not rest upon the mere
16 allegations or denials of the adverse party’s pleading, but the adverse party’s response, by
17 affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there
18 is a genuine issue for trial.”³ The non-moving party must do more than simply show “some
19 metaphysical doubt as to the material facts.”⁴ The mere existence of “a scintilla of evidence”
20 supporting the non-moving party’s position is insufficient; there must be evidence on which the
21 finder of fact could reasonably find for the non-moving party.⁵

22 3. Introduction—Determination of Stillaguamish U & A Grounds and Stations

23 In 1974, the Court found: “The Stillaguamish Tribe is composed of descendants of the
24

25 ¹ FED. R. CIV. P. 56(c).

26 ² *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

³ FED. R. CIV. P. 56(e).

⁴ *Matsushita*, 475 U.S. at 586.

⁵ *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

1 1855 Sto-luch-wa-mish of the Stoluch-wa-mish River. The population in 1855 resided on the
2 main branch of the river as well as the north and south forks.” FF 144, 384 F. Supp. 312, 378
3 (W.D. Wash. 1974).

4 The Stillaguamish were a riverine tribe. The name Stillaguamish, under various
5 spellings, has been used since about 1850 to refer to those Indians who lived along the
6 Stillaguamish River and camped along its tributary creeks. They were a party to the Treaty of
7 Point Elliot. *Id.* During treaty times and for many years following the Treaty of Point Elliott,
8 fishing constituted a means of subsistence for the Indians inhabiting the area embracing the
9 Stillaguamish River and its north and south forks, which river system constituted the usual and
10 accustomed fishing places of the tribe.” 384 F. Supp. 312, 378-379. Stillaguamish was not an
11 original party to *United States v. Washington* and was not a federally recognized Tribe. 348 F.
12 Supp. 312, 379.

13 Despite Stillaguamish Tribe not being federally-recognized until 1976, the Court set out
14 Stillaguamish U & A in Final Decision No. 1. The Court determined that the Stillaguamish
15 U&A was located on the Stillaguamish River. It did not include marine waters in its
16 Stillaguamish U&A finding:

17 “During treaty times and for many years following the Treaty of Point Elliott,
18 fishing constituted a means of subsistence for the Indians inhabiting the area
19 embracing the Stillaguamish River and its north and south forks, which river system
20 constituted the usual and accustomed fishing places of the tribe.” *Id.* at 379 [FF
21 146].

22 In August 1974, Stillaguamish filed Fishing Regulations and Ordinances of the
23 Stillaguamish Tribe that applied to the northern portion of Port Susan, north of a line which
24 runs due west of Kayak Point to Camano Island” (“northern Port Susan”).

25 Tulalip objected to Stillaguamish’s 1974 and 1975 fishing regulations on several
26 grounds, including that Final Decision #1 prohibited Stillaguamish from fishing in northern
Port Susan. 459 F. Supp. 1020, 1068. (W.D. Wash. 1978)

1 On March 1, 1976, the Court issued its Order Re Tulalip Tribes' Objections to
2 Stillaguamish Fishing Regulations. *See United States v. Washington*, 459 F. Supp. 1020, 1068
3 (W.D. Wash. 1978) (the "March 1976 Order"). The Court confirmed Finding of Fact #146
4 from Final Decision #1 holding that:

5 "During treaty times and for many years following the Treaty of Point Elliott,
6 fishing constituted a means of subsistence for the Indians inhabiting the area
7 embracing the Stillaguamish River and its north and south forks, which river system
8 constituted the usual and accustomed fishing places of the tribe." *Id.* at 379 [FF
9 146].

10 The Court further held:

11 "Paragraph 25 of the Court's Injunction in Final Decision #1 establishes the
12 mechanism whereby further usual and accustomed fishing grounds may be
13 established and recognized by the Court. The Stillaguamish Tribe has not sought to
14 expand its fishing places to include the northern portion of Port Susan by following
15 the procedures set forth in paragraph 25 of the Injunction. It is only as a result of
16 the Tulalip objections that the Court has been made fully aware that the
17 Stillaguamish Tribe has, apparently unilaterally, expanded its fishing places beyond
18 those areas recognized and determined in Final Decision #1. For all of the
19 foregoing reasons the Court sustains the objections of the Tulalip Tribes of
20 Washington to the Stillaguamish fishing regulations insofar as they authorize tribal
21 fishing activities at grounds and stations beyond those determined and recognized in
22 Final Decision #1. *Id.*

23 The Court struck Stillaguamish's 1975 and future regulations purporting to open tribal
24 fisheries at places other than set forth in Final Decision #1 Finding of Fact #146. *Id.* at 1069.

25 a. Subproceeding 79-1.

26 After the March 1976 Order, and over objection, Stillaguamish continued issuing
fishing regulations that applied to not only the Stillaguamish River but also (1) northern Port
Susan and (2) lower Skagit Bay.

In October 1976, Stillaguamish filed a Request for Determination seeking to expand its
U&A beyond the Final Decision #1 determination into Port Susan and Skagit Bay. Dkt. # 2584.

1 Stillaguamish, however, failed to prosecute its claim further, and the Court never
2 decided that Judge Boldt had not specifically determined Stillaguamish’s U&A. This court
3 dismissed Subproceeding 79-1 without prejudice. Dkt. # 10646.

4 b. Subproceeding 80-1

5 In 1980, Tulalip filed a new subproceeding to determine expansion of its U & A,
6 considered provisional, in its original case. See 459 F. Supp 1020, 1060. A Stipulation and
7 Agreement between Stillaguamish and Tulalip Tribes, dated May 1, 1984 (“Stipulation”), was
8 approved and entered by Order of this Court dated May 8, 1985 (“May 8, 1985 Order” [Dkt. #
9 10042]; *see* Ex.1).

10 c. Subproceeding 89-3

11 In Subproceeding 89-3, Stillaguamish filed a “Statement of Usual and Accustomed
12 Areas and Species Claimed” on May 3, 1993, to include, at least, “Port Susan and that portion
13 of Skagit Bay south and easterly of a line drawn from Milltown southwesterly to Polnell Point
14 then due south to Rocky Point.” Dkt # 13102. However, the Tribe also moved to voluntarily
15 dismiss that claim without prejudice on August 19, 1993. Dkt. # 13587.

16 On December 8, 1993, the Court granted the Tribe’s motion and ordered “dismiss[al]
17 without prejudice”. Order of December 8, 1993. Dkt. # 13907.

18 Thus, Stillaguamish launched several abortive thrusts at establishing U & A but never
19 followed through until filing this action. This checkered history informs the scope of the
20 agreement at issue here.

21
22 4. Motion for Partial Summary Judgment—Background of the Agreement of May 5, 1984

23 Pursuant to a settlement agreement signed on May 1, 1984 and entered by Order of this
24 Court on May 8, 1985, the Tulalip Tribes agreed to:

25 “affirmatively support the Stillaguamish Tribe’s request for a determination that the
26 Stillaguamish Tribe’s usual and accustomed fishing areas extend throughout
Northern 8A and that portion of Area 8 southerly of a line drawn from Milltown to
Polnell Point and northeasterly of a line drawn from Polnell Point to Rocky Point.”

1 United States v. Washington, 626 F. Supp. 1405, 1480-83 (W.D. Wash. 1985). These waters
2 constitute a portion of the case area. See map Exhibit 4 hereto. “Northern 8A is part of salmon
3 harvest Area 8A defined as “...that portion of Area 8A north of a line from Kayak Point due
4 west to Camano Island...” 626 F. Supp. 1405, 1482 (W.D. Wash. 1985). See Exhibit 5, hereto.

5 In the 1984 Agreement, Tulalip agreed to “recognize” and “affirmatively support”
6 Stillaguamish fishing in areas which were the subject of the 1984 agreement. As to
7 recognition, the Agreement specifically states:

8 “The Tulalip Tribes recognize that portion of Area 8A...as a non-exclusive usual
9 and accustomed fishing area of the Stillaguamish Tribe.”

10 1984 Agreement, Para IV B, Exhibit 1, hereto. *See also U.S. v. Washington, Order Approving*
11 *Settlement Agreement, May 1, 1984.* 626 F. Supp. 1405, 1482 (1985).

12 Interestingly, the 1984 Agreement also provided that Stillaguamish would
13 “affirmatively support” the pending Tulalip request for determination for other areas claimed in
14 that request. 1984 Agreement, Para II-B. See also, U.S. v. Washington, Order Approving
15 Settlement Agreement, May 1, 1984. 626 F. Supp. 1405, 1482 (1985). However, after
16 Stillaguamish withdrew its objection to the Tulalip pending request, it took no further active
17 role in that litigation which continued for some time including a full trial before the District
18 Court and a Ninth Circuit Court of Appeals. See 841 F.2d 317 (9th Cir. 1988).

19 In addition to formally recognizing Stillaguamish interests in Northern 8A, Tulalip
20 admitted, acknowledged and took notice of northern Port Susan as part of Stillaguamish’s usual
21 and accustomed areas. As noted above the 1984 Settlement Agreement provides:

22 “The Tulalip Tribes recognize that portion of Area 8A...as a non-exclusive usual
23 and accustomed fishing area of the Stillaguamish Tribe.”

24 1984 Agreement, Para IV B, Exhibit 1, hereto.

25 Tulalip fisheries staff has always provided assistance to and collaborated with the
26 Stillaguamish Natural Resources Department. Among other activity, Tulalip i) provided access
to sampling Chinook for DNA during the Spee-bi-dah Tulalip Ceremonial and Subsistence

1 fishery in 8A, ii) provided access to sample Chinook from the Tulalip 8D Commercial Fishery
2 for a Human Consumption Advisory Project, iii) provided laboratory methodology for Otolith
3 analysis, and iv) performed pre-season forecasts for the Stillaguamish Chinook and Coho
4 salmon populations for several years. See declaration of Dr. Diego Holmgren, Tulalip Harvest
5 Management Biologist, Exhibit 7 hereto, Para. 6, July 30, 2018. This is critical work which
6 benefits Stillaguamish fishing interests in Northern 8A.

7 In addition, Tulalip has consistently been involved in the preseason fishery processes
8 essential to protecting fisheries in northern Port Susan and other areas. Indeed, until 2010,
9 when the Stillaguamish Tribe became more involved in the Treaty-Non-Treaty preseason
10 fisheries negotiations, Tulalip technical and policy staff were the only Stillaguamish-
11 Snohomish regional tribal representatives actively involved in the preseason fishery planning
12 process (North of Falcon and Pacific Fisheries Management Council). Declaration of Dr.
13 Diego Holmgren, Tulalip harvest Management Biologist, Exhibit 7 hereto, Para. 6, July 30,
14 2018. Thus, Tulalip has affirmatively supported Stillaguamish fisheries in Area Northern 8A
15 and continues to support expansion for salmon fishing in that area.

16 5. The Provisions of the 1984 Agreement

17 An analysis of the provisions of the 1984 Agreement, and the context in which it was
18 negotiated, make it clear that the scope and application of the agreement is very limited. The
19 Agreement provides in paragraph IV B: (Exhibit 1 hereto)

20 “B. The Tulalip Tribes recognize that portion of Area 8A north of a line from Kayak
21 Point due west to Camano Island (hereafter "Northern 8A"), as a non-exclusive
22 usual and accustomed fishing area of the Stillaguamish Tribe and will affirmatively
23 support the Stillaguamish Tribe's request for a determination that the Stillaguamish
24 Tribe's usual and accustomed fishing areas extend throughout Northern 8A and that
25 portion of Area 8 southerly of a line drawn from Milltown to Polnell Point and
26 northeasterly of a line drawn from Polnell Point to Rocky Point..”

Thus, the agreed area recognizing Stillaguamish U & A is confined to the areas stated.
See map Exhibit 5 hereto.

1 Second, the Agreement further recognizes the primacy of Tulalip fishing in all of State
2 Salmon Harvest Area 8A except for Northern Area 8A:

3
4 “D. The Stillaguamish Tribe recognizes that as between the Stillaguamish Tribe and
5 the Tulalip Tribes, the Tulalip Tribes have primary fishing rights in all of Area 8A,
6 other than Northern 8A (as defined in Section IV. (B) above).”

7 Third, the agreement also required that salmon fishing in Northern 8A must proceed
8 according to management provisions of Paragraph IV.(E) in the Agreement which provides:

9 “E. The parties agree that special management concerns for that area must be
10 recognized. To meet these concerns, the parties agree to co-manage the area
11 according to the interim management provisions set out below, pending the
12 development of a comprehensive management, harvest sharing, and enhancement
13 plan for fisheries of mutual concern to which both parties agree.”

14 There are no provisions for shellfish management.

15 The Agreement provides for management and allocation of harvest shares by salmon
16 species. Paragraph IV. (C) of the Agreement (Exhibit 1 herein) provides:

17 “C. Annual Harvest Shares.

18 1. It is agreed that the following harvest shares shall be the interim harvest shares
19 pending the development of a comprehensive plan. This will not preclude, however,
20 the parties from agreeing on different shares annually. The Stillaguamish tribal
21 harvest in Area 8A will count 100% towards their allocation of Stillaguamish River
22 stocks.

<u>Species</u>	<u>Harvest Share</u>
23 Chinook	Stillaguamish Tribe: 33% of “Stillaguamish 24 Harvestable Level1” Tulalip Tribes: 67% of same.
25 Pink	Stillaguamish Tribe: 33% of “Stillaguamish 26 Harvestable Level1” Tulalip Tribes: 67% of same.
Coho	Stillaguamish Tribe: 30% of “Stillaguamish Harvestable Level1” Tulalip Tribes: 70% of same.
Chum	Stillaguamish Tribe: 35% of “Stillaguamish Harvestable Level1” Tulalip Tribes: 65% of same.

1 Summer Steelhead Stillaguamish Tribe: 40% of “Stillaguamish
Harvestable Level” Tulalip Tribes: 60% of same.
2 Winter Steelhead Stillaguamish Tribe: 40% of “Stillaguamish
3 Harvestable Level” Tulalip Tribes: 60% of same.”

4 There are no provisions of any kind for harvest shares of shellfish.

5 Additional provisions provide for determination of total run size entering the strait of
6 Juan de Fuca, escapement goals and prior interceptions in predetermined areas. See Agreement
7 §C.2. Exhibit 1. None of these provisions have any application to shellfish. In short, shellfish
8 were not a subject matter of the agreement.

9 6. The Historic Context of the Agreement

10 In 1984, when the Agreement was signed, there were no adjudicated shellfish treaty
11 rights. The so called “Shellfish Case” was not filed until 1989, five years later and not decided
12 until over ten years later. 873 F. Supp 1422 (W.D. Wash)(1994). The shellfish harvest right was
13 finalized in the Ninth Circuit in 1995.

14 Shellfish were clearly not in anyone’s mind at the time of the agreement. Further,
15 “Northern 8A” and the Polnell Point to Midtown areas are enclosed and constricted waters
16 which do not lend themselves to additional fishing pressure.

17
18 7. Conclusion

19 It is clear that the 1984 agreement was limited to salmon. No adjudicated shell fish
20 rights existed at the time of its negotiation. No terms of the agreement deal with shellfish. The
21 agreement is limited to the specific salmon species and fishing areas discussed and agreed to.
22

23 DATED this 5th day of October 2018.

24 Respectfully Submitted,

25 MORISSET SCHLOSSER JOZWIAK & SOMERVILLE
26

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing Tulalip Motion for Partial Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties registered in the Court CM/ECF system.

DATED: October 5, 2018.

By: /s/ Mason D. Morisset
Mason D. Morisset, WSBA # 00273

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