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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 Subproceeding No. 17-3 BRIEF OF INTERESTED PARTY SAUK-SUIATTLE INDIAN TRIBE IN OPPOSITION TO MOTIONS TO DISMISS

INTRODUCTION

In this subproceeding the Stillaguamish Tribe filed a Request for Determination (RFD) of the scope and extent of the Tribe's Usual and Accustomed (U & A) fishing grounds and stations in the marine waters of Puget Sound. The Upper Skagit Indian Tribe moved to dismiss the Stillaguamish RFD on grounds that the Court lacks subject matter jurisdiction to entertain the RFD, on grounds that the Usual and Accustomed fishing areas of the Stillaguamish were specifically and finally determined by Final Decision No. 1. The Swinomish Tribal Community filed a similar motion (docket no. 66) which appears unripe, since it addresses the merits of the Stillaguamish request rather than subject matter jurisdiction.

For the foregoing reasons, the motions to dismiss should be denied.

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PROCEDURAL POSTURE

In 1974, the Honorable George H. Boldt entered the following Finding of Fact regarding the customary fishing grounds of the Stillaguamish Tribe:

> During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe.

Final Decision 1 at 379, ¶ 146. Judge Boldt also enunciated that his Findings were not a complete inventory of each Tribe's fishing grounds:

> Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.

United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974) (Conclusion of Law #26), *affirmed* 520 F.2d 676 (9th Cir. 1975). Notwithstanding such an express Conclusion of Law, movant Upper Skagit Indian Tribe seeks to persuade the Court that the Court lacks authority to entertain the claims of Stillaguamish on grounds that the Tribe's "U & A" was specifically determined by the Court in 1974. Movant premises its argument on the district court's use of the term "constituted" in Finding of Fact No. 146.

ARGUMENT

Contrary to movant's slanted reading of the Fifth Edition of the American Heritage Dictionary, "constituted" does not mean that the enumeration of *one* element of a whole represents the *entirety* of an object. By clever use of italics the movant seeks to emphasize words which are not emphasized in the *actual* dictionary definition. The important term to be emphasized is the word *parts:*

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> Constitute (kon-sti-tut', -ty-tut)
> *Tr.v.* con-sti-tut-ed, con-sti-tut-ing, con-sti-tutes
>
> 1. a. To be the elements *or parts of*[.]

See Upper Skagit Indian Tribe's Motion to Dismiss (docket entry no. 64) p. 2, *citing* American Heritage Dictionary (5th ed. 2015). Whether stylized as motions under Fed. R. Civ. P. 12 or 56, the Court must consider the motions in the light most favorable to the non-moving party and resolve all doubts in its favor. *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013); *Cortez v. Skol*, 776 F. 3d 1046 (2015). The most reasonable interpretation of what Judge Boldt meant was that the Stillaguamish River drainage was an element, or "part", of the customary fishing areas of the Stillaguamish Tribe.

To "constitute" is to found, establish, or provide the *framework* for a greater establishment. *See,* for example, the United States Constitution, in which the "founding fathers" established a *framework* or origin for the government of the nation. However, just as the constitution was not necessarily final, nor specific, as to the determination of the *scope* of just what rights it encompassed, the district court in 1974 saw the folly of attempting to encompass the geographic scope of *all* rights of all of the plaintiff tribes in the case.

Upper Skagit's argument appears to be that, by failing to state that Stillaguamish fishing grounds "included" the Stillaguamish River, there were no others. The duplicity of such argument is that, in attempting to persuade the court that the word constitute has only *one* meaning, the movant purposely omits *two* of the other *three* potential definitions of "constitute" contained in the very American Heritage Dictionary that it cites. The one definition quoted (1.a) does not specifically determine nor constitute the entire dictionary definition of that word. At least two or more other meanings (2 a-c and 3) are included in the

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definition of constitute. For example, constitute can variously mean "to set up or establish" (definition 2.a) or "to found" (definition 2.b). Such lack of candor toward the tribunal by failing to disclose that the term has other contradictory definitions from that espoused by a litigant should not be tolerated.

It cannot so easily even be determined in what sense Judge Boldt used the term. It is indisputable that the Stillaguamish River drainage provided the *foundation* for fisheries engaged in by the Stillaguamish Tribe. However, it cannot be concluded therefrom that the drainage comprised the *entirety* of areas the tribe customarily harvested fish from. In this sense, the meaning of the term in Final Decision No. 1 is ambiguous.

Indeed, Judge Boldt submerged himself deeply in etymology in his decision, noting the tracing of meanings of terms down through the ages from the Age of Solon to 1895 (312 F. Supp. at 335) and citing the 1828 and 1862 editions of Webster's Dictionaries (312 F. Supp. 356). According to Webster, the term "constitute" was first used in Middle English in the mid-15th century and is derived from the Latin term *constitutus*, which meant to set up, launch, introduce or institute. Certainly, as the headwaters of the Stillaguamish River Basin provided the spawning grounds of anadromous fish harvested by the Stillaguamish, it was the foundation, or origin, of their right to harvest these migratory fish.

Under either theory embodied in Final Injunction Paragraph 25 (a) (6), the Court possesses continuing jurisdiction to entertain the Stillaguamish Request for Determination. Either because the geographic scope and extent of the Usual and Accustomed fishing grounds and stations of the Stillaguamish were *not* specifically determined by Final Decision No. 1 because the Court merely noted that the Stillaguamish possessed a reserved right to harvest anadromous fish and that the areas embracing the Stillaguamish River launched, or formed

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the basis for, the Tribe's fishing rights or, alternatively, the RFD must be entertained because of the inherent ambiguity of Judge Boldt's use of the term "constituted". The sense in which he used the term simply cannot be gleaned.

Although denominated a motion to dismiss for lack of subject matter jurisdiction, one cannot tell from the motions what Civil Rules the motions are appropriately based upon. If the basis is Rule 12 (h), the Court has long ago concluded that it maintains continuing jurisdiction to entertain requests seeking additional fishing areas and the motion should be denied. If, on the other hand the grounds are that there is no basis for relief since Stillaguamish rights were "specifically determined" by Final Decision No. 1, the moving party bears the burden of proof and the Court must rule upon the motion in the light most favorable to the non-moving party, *i.e.*, Stillaguamish. Under either scenario, the Stillaguamish RFD should be allowed to proceed on its claim that it has additional Usual and Accustomed fishing areas which were not determined in Final Decision No. 1.

The companion motion of the Swinomish Tribal Community is styled as a 12 (b) (1) motion yet appears to present *factual* evidence regarding the merits of the Stillaguamish claims to harvest fish in marine waters. As such, the consideration of that motion is premature.

CONCLUSION

The intent of Judge Boldt in fashioning Final Decision No. 1 was, *inter alia*, to address the dissension and lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one

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side and tribal representatives and members on the other side[1] by determining what fishing rights were reserved by the tribes and preliminarily, to the extent he admittedly could, identifying some, but not all, of the usual and accustomed fishing areas of each tribe.[2]

In recent years, it is apparent that an *additional* group must be added to those subject to a "lack of meaningful communication on problems of treaty right fishing." Unfortunately, much recent litigation within the court's continuing jurisdiction has devolved into disputes among the plaintiff tribes themselves, a problem exacerbated by the decline of various fish stocks available for harvest. In the absence of Alternative Dispute Resolution, this places the tribes whose fishing areas were not completely determined or whose determinations only referred to upriver freshwater areas in the position of bearing the burden of foregoing or limiting their share of the fisheries harvest in order to provide adequate escapement to upriver spawning grounds for reproduction of this precious resource.

This could not have been intended by Final Decision No. 1 and perhaps best explains why the district court in 1974 left the door open to allow the plaintiffs to seek fishing grounds rather than being limited exclusively to those identified for purposes of the initial decision. For those tribes who historically engaged in marine fisheries but whose homelands were situated some distance away from Puget Sound where they traditionally harvested fish, their right is increasingly reduced to a right to dip one's net in the water and come up empty. *United States v. Washington* (Phase II), 506 F. Supp. 187, 203 (W.D. Wash. 1980).

For the foregoing reasons, the motions to dismiss should be denied.

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[1] 384 F. Supp. at 329.

[2] Id. at 402 (Conclusion of Law No. 26).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record for the Government and the defendants.

/s/ Jack Fiander
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