The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	No. C70-9213 Subproceeding 17-3 RESPONSE TO THE TULALIP, SWINOMISH, AND UPPER SKAGIT MOTIONS Note on Motion Calendar: November 30, 2018

RESPONSE TO MOTIONS

The Port Gamble S'Klallam and Jamestown S'Klallam Tribes respond in opposition to the Tulalip's Motion for Partial Summary Judgment (Dkt. 65) and respond with greater detail to the arguments in the Swinomish Motion to Dismiss Stillaguamish's Request for Determination for additional usual and accustomed grounds and stations (Dkt. 66). The S'Klallam support the outcome requested by Upper Skagit's Motion to Dismiss, but do not fully adopt the rationale argued by the Tribe in support of the motion. Dkt. 64.

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As a procedural matter, the moving parties incorrectly filed the stipulated motion to modify the schedule under LCR 10(g), and the deadline for supportive pleadings appears to have lapsed. However, the S'Klallam object to this deadline being imposed on any non-signatory party and assert that the deadline should properly be the Monday prior to the noting date per LCR 7(d)(3). The S'Klallam (and potentially other interested parties) were not consulted about the proposed schedule changes. Dkt. 62. As far as the S'Klallam are aware no inquiry was made. The stipulation was filed on September 11, 2018, as an agreed upon "same day" motion (Dkt. 62) and adopted by the Court on September 13, 2018. The parties have already been admonished in this subproceeding for failure to correctly note a stipulated motion, where this Court declared:

> By unilaterally noting the motion as a stipulation on the same day it was filed, Petitioner denied any of these parties the right to respond or inform the Court as to their own positions on the matter.

Order Re-Noting Stipulated Motion, Subproc. 17-3, Dkt. 23, p. 2. The motion clearly indicates it is only the moving parties, Upper Skagit, Stillaguamish, Tulalip, and Swinomish, who stipulated, among themselves, that any supportive "Joinders" or "brief in support" must be filed by October 17, 2018. It purports to give non-signatory parties a truncated schedule to respond to the motions, with a due date of October 17, 2018 - far less than the minimum time required by the federal rules, which would typically be four Fridays from the date of filing per LCR 7(d)(3).

The S'Klallam object that another party can waive their rights with an agreement regarding the rights of non-signatories to the stipulation. The relevant court rule states that if the "stipulated motion would alter dates . . . the parties shall clearly state the reasons justifying the proposed change." LCR 10(g). However, the stipulating parties' motion does not provide any justification for truncating the interested parties' response time as set for in LCR 7(d). The

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S'Klallam object to this truncated scheduling purporting to indirectly alter their response time as well as limit the number of pages without consent.

In so far as any of the arguments herein are deemed "supportive responses[,]" the S'Klallam believe that the best interpretation of the stipulation is that the Interested Parties be allowed the full time period in LCR 7, which is a due date of November 26, 2018. The S'Klallam request that if it was intended to be applicable to non-signatories, the Court relieve them from the October 17, 2018 deadline, which was improperly obtained. Dkt. 62. This is a protective request because it is unclear if the stipulation was ever intended to bind non-signatories and because the S'Klallam response is a hybrid, including matters of disagreement as well as support.

INTRODUCTION

This response has two main parts. The first part is a response to the Tulalip motion for partial summary judgment. The second part responds to the Swinomish and Upper Skagit motions, emphasizing that consistency with the law of the case is essential. The S'Klallam support the law of the case, as outlined in the Swinomish's motion.

The Tulalip assert that the "Stillaguamish Agreement" does not apply to shellfish—and the S'Klallam oppose this motion. The reason for the opposition is the S'Klallam also have an agreement and Court order regarding Tulalip's U&A. The S'Klallam disagree that the Tulalip can, decades after the shellfish decision, attempt to argue that this series of U&A agreements (or any other formal or informal agreement), does not apply equally to shellfish: U&A is U&A; it does not vary by species of fish.

This case is the third attempt in recent years by a Tribe to expand their previously adjudicated U&A using Paragraph 25(a)(6). These actions, as seen by the sheer volume of them in recent years, are clearly a movement, with potential to vastly alter the *status quo*. Maintenance

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of the *status quo* of informal and formal agreements is critical, though, as is the expectations of fishers. Deviations from prior areas of fishing, leads to an increase in disputes. Resources are limited. Tribes that are displaced will seek other places to fish and be forced to travel further from their homes.

At this time, significant expansion of one Tribe's fishing area would severely upset another Tribe's ability to fish and has great potential to generate a secondary phase of primary rights litigation. Tribes will struggle to simply maintain the *status quo*. Allowing a Tribe to expand into another's fishing areas creates a domino effect with displacement and movement in search of scarce resources. There are strong policy reasons to quell such expansion when a Tribe's U&A is already specifically determined, rendering Paragraph 26(a)(6) inapplicable, and where no extraordinary circumstances exist to relieve the Tribe from fishing according to its U&A description set forth in a prior adjudication.

PART I: RESPONSE TO TULALIP MOTION TO DISMISS

The Tulalip argue in their motion that "[n]o adjudicated shell fish rights existed at the time of its negotiation. No terms of the agreement deal with shellfish." Tulalip Motion for Partial Summary Judgment, Dkt. 65, p. 9. The S'Klallam urge the Court to deny Tulalip's motion and the assertion that the Agreement does not apply equally to shellfish and finfish. This is a revisionist theory with potential for disastrous consequences.

If Tulalip's position is that none of the terms of the 1984 agreement with the Stillaguamish, especially certain elements that are more broadly applicable (such as withdrawing U&A objections), are applicable to shellfish, the S'Klallam strongly oppose this position. See Ex. 1, p. 3 (Doc. 65-1) (withdrawal of objections on Tulalip U&A). If this is the position, the implications of this argument have broader implications. The S'Klallam assert that Tulalip's

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theory with respect to the agreements on primary rights and U&A are erroneous for several reasons. First, shellfish were always considered fish under the Treaty. Second, Tulalip specifically agreed in 1994 to apply all formal and informal agreements to shellfish. Third, Tulalip has numerous other formal and informal agreements, including a settlement with the S'Klallam that it is potentially seeking to avoid with this new argument. This fact alone should caution against the Tulalip's position.

Tulalip's argument that the courts had not adjudicated shellfish rights and therefore that absolves them of responsibility under the Agreement, fails to capture the actual understanding of Tribal entities at the time. Tribes always *asserted* a right to shellfish as part of their fisheries rights, and the fact that the right was not adjudicated *by a court* until a later time, does not make it something that was forgotten or not well-known by the parties. *United States v. Washington*, 873 F. Supp. 1422, 1428 (1994) (recognizing the ruling that shellfish are fish). The Treaty itself refers to shellfish that are "staked and cultivated" as being unavailable. *See, e.g.*, Treaty of Point No Point, 12 Stat. 933 (Treaty of Point No Point referring to the *shellfish proviso*). Any Tribe negotiating a U&A agreement would be aware of this fact when negotiating the agreement. Tribal U&A simply did not vary by species of fish, a position strongly held by the Tribes themselves. The fact that an agreement did not attempt to manage shellfish is explained by the fact that the right had yet to be adjudicated by a court; however, it does not exempt shellfish from the mutually-applicable terms of the agreement in so far as it impacts U&A boundaries, management areas, or other promises about primary rights or other types of stipulations.

Second, the Tulalip agreed that all formal and informal agreements pertaining to fisheries would remain in effect when the Tribes filed for confirmation of their shellfish rights. More specifically, in the "Stipulation Re Presentation of Tribal Usual and Accustomed Claims and

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Evidence," Dkt. 14233 (April 18, 1994), the Tulalip agree that the "Status Quo of Formal and Informal Agreements" is maintained. Attached to Rasmussen Decl. as Exhibit A. This agreement is critical, as it states that it is "the intent of the parties" to "maintain the presently existing status quo established by formal and informal agreement(s) between and among Tribes . . . ."; Tulalip Tribes agreed to its terms (Ex. A at p. 7), making it unambiguous that Tulalip agreed to apply all formal and informal agreements to shellfish. There is no good reason for exception now.

Similarly, this Court has instructed Tulalip in subproceeding 80-1, filed on January 22, 1991:

> Underlying this entire matter is an important matter that needs to be reinforced by the court. That consideration is the permanence and enforceability of agreements between the tribes and the necessity of proceeding in accordance with the terms of those agreement. The Tulalips received a very valuable consideration for the execution of this Settlement Agreement…. That the Tulalips seven years later do not like it is simply not relevant. It is especially not relevant given the critical importance of these types of agreements.

Order Adopting Report and Recommendation, Subproceeding 80-1, Attached to Rasmussen Declaration as Exhibit B. This is especially critical given that Tulalip has several formal U&A agreements filed with the Court. It is unknown how many additional informal agreements exist. The following are the citations to formal agreements, found at the beginning of *United States v. Washington*, 626 F. Supp. 1405, 1471 (1985), that the Tulalip has with other case parties, merely one of which is the Stillaguamish settlement:

- July 8, 1983 Approval of the Tulalip Settlement with Nisqually and Puyallup. *Id*. at 1472.
- July 8, 1983 Approval of the Tulalip Settlement with Swinomish. *Id*. at 1474.
- July 8, 1983 Approval of the Tulalip Settlement with Muckleshoot and Suquamish. *Id*. at 1476.
- August 12, 1983 Approval of the Tulalip Settlement with the Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam and Skokomish Tribes. *Id*. at 1478.

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- May 1, 1984 Summary of Tulalip Settlement with the Stillaguamish. *Id*. at 1480 (also found in Dkt. 65-1).

The impact of Tulalip's argument would be disruptive to this case, as well as completely contrary to the stipulation(s) listed above and this Court's order in subproceeding 80-1. These types of agreements are critical and must be followed. The S'Klallam respectfully request that the Court deny the Tulalip motion for partial summary judgment on this issue if there is any implication that agreements signed before the Shellfish Decision do not apply to Shellfish when the terms would be equally applicable. The S'Klallam are not suggesting that a chum salmon agreement apply to crab, but merely where the terms are applicable; for example, a promise that one party has primary rights over the other, that type of term must remain because of its equal application to fish and shellfish.

PART II: RESPONSE TO SWINOMISH AND UPPER SKAGIT MOTIONS

A. Response to Swinomish

The S'Klallam support the arguments made by the Swinomish Tribe; in particular, Swinomish's recognition that travel alone does not establish U&A. In recent years, the question of the viability of Finding of Fact 14 (FF 14) has repeatedly emerged in arguments to and rulings by this Court and the 9th Circuit. As this Court knows, the original source of the quote is found in *United States v. Washington*, 384 F. Supp. 312, 353 (1974):

> Marine waters were also used as thoroughfares for travel by Indians who trolled en route [Ex. PL-75; Tr. 2847, l. 13 to 2850, l. 23]. Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians. [Tr. 2177, l. 24 to 2180, l. 4]

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A review of the citations relied on by Judge Boldt demonstrates that the Court understood that Indians traveled for different reasons, and that such travel for familial or other reasons could not equate with U&A. This is simply because all Tribes traveled.

Equating travel with U&A dilutes the legitimate claims of local Tribes who inhabited an area surrounding a body of water, and in effect, it means special occasions, such as familial visits, could establish U&A for an entire Tribe that existed in a more remote community—one far from the disputed waters. This was not the language of the Treaty nor its intent. This interpretation is supported by the transcripts from *U.S. v. Washington*. For instance, the Court relied on questioning experts regarding the hypothetical of a Lummi who married a Nisqually Indian and traveled back and forth, and the testimony elicited, and cited above, indicated that the area "in between" would not establish U&A for the transiting Indians. *See* Tr. 2177, l.24 to 2180, l.4, attached to the Rasmussen Declaration as Exhibit D. The S'Klallam think it is critical—although there appears to be panel conflict of the importance of this limit on U&A—that the law of the case on this issue be preserved. The S'Klallam specifically object that the Stillaguamish's RFD ¶¶ 18, 19, 21 and 26 on the grounds that travel alone is contrary to FF 14.

With respect to the equities of the Stillaguamish request, at first blush, it is a different type of request than those of the Muckleshoot or the Skokomish, where no excuse was proffered for the long delay. However, here, the S'Klallam position is that the Stillaguamish waited too long and far beyond the time the Court contemplated for the Tribes to return and request additional U&A. The Stillaguamish have had over 40 years to bring an expansion claim, and for many of those years have had the means to hire a lawyer. In addition, there was no attempt to claim any other grounds for a right to reopen the prior judgment listed in Stillaguamish's Request for Determination (RFD). Dkt. 4. In that RFD, Stillaguamish does not attempt to qualify

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for an exception per Fed. R. Civ. P. 60(b), nor do they attempt to make any showing of extraordinary circumstances—beyond stating that previously they did not have the funds for counsel and in 1993, their counsel had conflicts of interest. RFD, ¶ 12. No attempt, though, or reason is given for why U&A expansion was not claimed from 1993 to 2018. Whether there are some other equitable grounds to relieve Stillaguamish from the original determination is unknown. Thus, it does appear Stillaguamish simply waited too long and during that time period other Tribes relied on the resources that the Stillaguamish now claim; this became more significant, especially when one considers the expansion into commercial shellfish fishing after the Shellfish Decision.

The Stillaguamish relies on an earlier statement by the Court that the Tribe could come back at "any time" and request relief "so long as application is in accordance with paragraph 25 of the court's injunction." RFD ¶ 10 citing, *United States v. Washington*, 459 F. Supp. 1020, 1068 (1978). Again, Stillaguamish is in a better position than Muckleshoot or Skokomish were in terms of having something to hang their hat on. Swinomish responds, essentially, that the statement does not confer jurisdiction or indicate that such jurisdiction will be granted when the request is made, and the S'Klallam are inclined to agree. Swinomish Motion at 24. The Court cannot purport to bind all future courts and have pre-ruled on the issue, especially where the law of the case may be modified or clarified, as it was when the Court in *Muckleshoot v. Lummi Indian Tribe* ("*Muckleshoot I*") 141 F.3d 1355 (1998), held that for the first time that a Tribe's U&A may have been "specifically determined" in Final Decision No. 1 and not enlarged thereafter. *Muckleshoot I* at 1360.

Now, the law of the case is that Paragraph 25(a)(6) is not available when a Tribes' U&A has been unambiguously and specifically determined in accordance with *Muckleshoot I*, above.

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In order to reopen a claim, a Tribe that has waited that long must show extraordinary circumstances or run afoul of the mandates of a court of equity. As the Supreme Court has said, the Court has a tradition where it attempts to "relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity[.]" *Holland v. Florida*, 560 U.S. 631, 650, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130, 146 (2010) (internal quotes omitted) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (discussing how and when extraordinary circumstances may result in equitable relief from strict rules). But to do so, there must be an actual hardship that still exists in 2018, when the claim is filed, not one that previously existed in 1993.

It is true that the circumstances surrounding the Stillaguamish's voluntary dismissal for lack of funds in 1993 might have been equitable grounds at *some earlier* point in time, to allow for a reopening of the decree on equitable grounds. Such a result now, though, would be inconsistent with applicable law. For example, the application of Fed. R. 60(b) in *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1964), is instructive. In that case the Petitioner, Mr. Klapprott, was granted relief from his conviction due to the fact that he did not have funds to hire a lawyer. The Court struggled with understanding what constituted "neglect" versus what constituted an 'extraordinary basis' and noted that lack of funds was definitely a factor. But that case is vastly different than the Stillaguamish's. There is no proof that the Stillaguamish were "denied any reasonable opportunity to make a defense[,]" such as Mr. Klapprott who had no money, was in jail, and had relied on secondhand information from a U.S. agency to his detriment. *Id*. at 613-614.

Here, the defendant was represented by counsel and made litigation choices, choices to not pursue the claims it had. Thus, the Stillaguamish cannot meet the extraordinary test set forth

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in *Klapprott*, and fall more into the category of *Ackermann v. United States*, where the Supreme Court stated:

> The comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. Subsection 6 of Rule 60 (b) has no application to the situation of petitioner.

Ackermann v. United States, 340 U.S. 193, 202, 71 S. Ct. 209, 213 (1950). In this case, though, Stillaguamish has had funds and an attorney for many years. There simply is no extraordinary basis to relieve it from the delay. Compare this case to the case of the Samish Tribe, where the Tribe was denied claims of 'extraordinary basis' for far more compelling reasons than those presented here. *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) (subproceeding 01-2; affirming denial of Fed. R. Civ. P. 60(b)(6) motion). As this Court may recall, it expressed concern in the *Samish* subproceeding regarding the delay and inquired whether there was good cause:

> These arguments fail to demonstrate good cause for the delay. First, the Samish nowhere assert that they tried to secure *pro bono* representation for their pursuit of treat [sic] rights, as they did for tribal recognition proceedings, nor have they demonstrated why they could not do so. The Court finds, under the circumstances presented here, that neither lack of counsel nor lack of funds to pay counsel is an adequate excuse for the delay in filing.

United States v. Washington, 20 F. Supp. 3d 899, 923 (2008). Similarly, the Stillaguamish have not asserted even enough facts—arguably even fewer than Samish—such as prior attempts to pursue their Treaty rights from 1993 to 2018, to establish good cause for delay.

B. Response to Upper Skagit

The Upper Skagit's argument in favor of dismissal is less persuasive. One of Upper Skagit's main arguments is regarding the use of the word "constituted" in the Stillaguamish's U&A, as opposed to "included" in other Tribes' U&A. Upper Skagit Motion to Dismiss, Dkt.

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64, pp. 2-4. This argument, though, completely fails to address this Court's precedent in subproceedings nos. 11-2, 17-1, and 17-2: that a party may not invoke Paragraph 25(a)(6) absent a finding or a stipulation that the Tribe's U&A is not already specifically determined. Thus, the presence or absence of the word "constituted" is certainly of interest in construing Judge Boldt's intent—but it is not determinative of the jurisdictional issue presented here. The S'Klallam urge the Court to ignore this reasoning and dismiss in a manner consistent with prior rulings—one that maintains certainty regarding the Court's jurisdictional interpretation of Paragraph 25(a)(6).

CONCLUSION

The Port Gamble S'Klallam and Jamestown S'Klallam urge this Court to deny the Tulalip's Motion for Partial Summary Judgment and grant the Swinomish's Motion to Dismiss for the reasons stated above.

Respectfully submitted this 14th day of November, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONSE TO THE TULALIP, SWINOMISH, AND UPPER SKAGIT MOTIONS using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 14th day of November, 2018.

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