The 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.

STILLAGUAMISH TRIBE OF INDIANS,

Petitioner(s),

v.

STATE OF WASHINGTON, *et al.*,

Respondent(s).

Case No. C70-9213
Subproceeding: 17-03

STILLAGUAMISH TRIBE OF INDIANS' RESPONSE IN OPPOSITION TO TULALIP TRIBES' MOTION FOR PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: NOVEMBER 30, 2018

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Stillaguamish Tribe of Indians ("Stillaguamish") provides this response in opposition to the Tulalip Tribes' Motion for Partial Summary Judgment (Dkt. #65, filed Oct. 5, 2018). Stillaguamish responds in opposition to the Swinomish Indian Tribal Community's and Upper Skagit Tribe's motions separately.

In 1984, Stillaguamish and Tulalip entered into a Stipulation and Agreement Re Usual and Accustomed Fishing Areas ("U&A") ("Agreement"), entered as an order of this Court, to forever resolve Tulalip's U&A in certain waters in exchange for Tulalip's "affirmative[] support" for a portion of the waters Stillaguamish now claims in its Request for Determination ("RFD"). Dkt. # 4 at ¶ 1; Ex. 1 to Dkt. # 65. Tulalip does not dispute that the Agreement requires them to support the RFD as to northern Port Susan and lower Skagit Bay as to salmon. Tulalip seeks to rewrite the Agreement to exclude shellfish. However, doing so would ignore the plain language of the Agreement which focused on "fishing area" and would be inimical to the law of the case, which makes clear that "[t]he right secured by the treaties to the Plaintiff Tribes ***is not limited as to species*** of fish". *United States v. Washington*, 157 F.3d 630, 643-644 (9th Cir. 1998) (emphasis added) [hereinafter *Shellfish*] (quoting *United States v. Washington*, 384 F.Supp. 312, 401 (W.D. Wash. 1974).

This Court has rejected the species-specific U&A determination now sought by Tulalip, and it should reject Tulalip's effort to escape its 1984 commitment by requiring Stillaguamish to uniquely bear the burden of proving a species-specific U&A that has never before been imposed on any tribe. Tulalip is not entitled to judgment as a matter of law and the Court should *sua sponte* rule in Stillaguamish's favor that the Agreement is not species-specific. Alternatively, Stillaguamish's evidence demonstrates the parties' intent to establish general U&A without regard to any species limitation, creating a genuine issue of material fact sufficient to defeat summary judgment.

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STANDARD OF REVIEW

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "must demonstrate that, even viewing the evidence in the light most favorable to the [non-movant], the [non-movant] cannot satisfy its burden to prove its claims." *JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1105 (9th Cir. 2016). If this burden is met, Stillaguamish must establish a "genuine" factual dispute, which involves "more than ... some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (internal citations omitted). A court may *sua sponte* grant summary judgment to a non-moving party after full consideration if it appears that a trial would be useless. *Bulchis v. City of Edmonds*, 671 F. Supp. 1270, 1271 n.1 (W.D. Wash. 1987) (internal citation omitted).

ARGUMENT

Tulalip's contention that "[i]t is clear that the 1984 agreement was limited to salmon" (Dkt. #65 at 9) rests on a single erroneous assumption – that the Agreement's discussion of "fishing" and "fish" does not encompass shellfish because *Shellfish* had not yet been decided. This contention fails for three reasons: (1) the unambiguous language of the Agreement precludes Tulalip's argument and rewriting the Agreement to add an exclusion controverts basic principles of contract interpretation; (2) that "fish" includes shellfish is the law of the case; and (3) *Shellfish* does not represent a "change in the law".

A. The Agreement Focuses on Geography, Not Species

At issue here is Section IV.B of the Agreement which contractually obligates Tulalip to:

> recognize that portion of Area 8A north of a line from Kayak Point due west to Camano Island (hereinafter "Northern 8A"), as a non-exclusive usual and accustomed fishing area of the Stillaguamish Tribe and will affirmatively support the Stillaguamish Tribe's request for a determination that the 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.

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Dkt. # 65-1 at 5. This section of the Agreement discusses geography, not species; plainly references "fishing areas", not "fish"; and, does not place any condition on Tulalip's recognition or support. Yet, Tulalip argues it is "clear that the 1984 agreement was limited to salmon" and that "'Northern 8A' . . . do[es] not lend [itself] to additional fishing pressure" and, therefore, Tulalip is not obligated to support the portion of Stillaguamish's RFD that covers northern Port Susan and lower Skagit Bay as to shellfish. Dkt. # 65 at 9. Tulalip is dead wrong.

Settlement agreements are governed by principles of law which apply to the interpretation of contracts generally. *Air Line Stewards v. Trans World Airlines*, 713 F.2d 319, 321 (7th Cir. 1983). Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc*., 896 F.2d 1542, 1549 (9th Cir. 1989). Whenever possible, the plain language of the contract should be considered first. *See Leicht v. Bateman Eichler, Hill Richards, Inc.,* 848 F.2d 130, 133 (9th Cir. 1988).

Here, the Agreement was not about a particular species of fish; rather, it was about establishing where fishing could take place. As Tulalip acknowledges in its motion, the Agreement was tied to Tulalip's 1980 subproceeding seeking to expand its own U&A. Dkt. #65 at 5; Dkt. #65-1 at 1-2 (purpose to "resolve the issues raised by Tulalip" as to its U&A). This purpose is reflected in the clear and unambiguous language of Section IV of the Agreement which resolves Tulalip's U&A by recognizing all of Area 8A as Tulalip U&A in exchange for receiving Tulalip's commitment to "recognize" and "affirmatively support" Stillaguamish's own U&A claim in northern Port Susan and lower Skagit Bay. *Id.* at 4-5. This unrestricted commitment had nothing to do with what type of fish was caught, but it had everything to do with the geographic scope of where each tribe could exercise all of its treaty fishing rights. Indeed, the language the tribes used was consistent with every U&A determination made by the Court to-date, which focused on determining the general location of fishing without limitation to

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a particular species.[1] *See generally United States v. Washington,* 384 F. Supp at 359-82; *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D Wash. 1985) (holding that a determination of U&A is made by showing evidence of "use of that area for fishing purposes.").

In addition, courts typically reject after-the-fact contract limitations that are inconsistent with the expressed intent of the parties. *See Richmond, F. & P.R. Co. v. Louisa R. Co.*, 54 U.S. 71 (1851) ("A court may not, by interpretation or construction, engraft on a contract a limitation or restriction that is inconsistent with the expressed or apparent object of the parties."); *Beijing Zhongyi Zhongbiao Elec. Info. Tech. Co. v. Microsoft Corp.*, 655 F. App'x 564, 566 (9th Cir. 2016) ("Washington law does not permit a contracting party to . . . add a new extra-contractual limitation to a contract."). Here, the parties used the broad, generic term "fishing" in Section IV.B to establish U&A and "fish" in Section IV.C concerning a specific invitation to fish. Dkt. #65-1 at 5. As this Court has previously recognized, the term "fish" has the "widest sweep of any words the drafters could have chosen." *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1162 (9th Cir. 2017). It would be inconsistent with the Agreement to modify and limit "fish" with "salmon", a fact this Court has addressed in the context of a settlement agreement between Upper Skagit and Swinomish over the meaning of the term "shellfish". There, the Court held, "[k]nowing that the question of fishing rights between the two tribes was seriously contested, Upper Skagit had to state its meaning very precisely and clearly . . . Upper Skagit could not rely on a unilateral intent to give the term 'shellfish' an unexpectedly narrow meaning not explained in the specific language of the agreement." *United States v. Washington*, 19 F.

[1] Other settlement agreements regarding Tulalip's U&A, all of which were negotiated contemporaneously with Tulalip's agreement with Stillaguamish, reveals that none of the others expressly or impliedly exclude shellfish either. *See United States v. Washington.*, 626 F.Supp. 1405, 1471-1483 (1985) (tribes settling their claims with Tulalip as Suquamish, Muckleshoot, Swinomish, Lower Elwha Clallam, Jamestown Clallam, Port Gamble Clallam, Skokomish Tribes and Stillaguamish Tribe). Tulalip's Agreement with Stillaguamish is no exception. There is no reason that Tulalip and Stillaguamish would have negotiated their Agreement using meanings for essential terms that were different than those used in similar agreements with other tribes, at least not without explicitly saying so.

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Supp. 3d 1252, 1268-69 (W.D. Wash. 1997). The same holds true here, albeit with the term "fishing".[2]

Tulalip's unilateral effort to inject a single species limitation into "fishing" in Section IV.B must be rejected as a matter of contract law. The Agreement applies to all species found in the U&A areas agreed to by the parties.

B. That "Fishing" and "Fish" Includes Shellfish is the Law of the Case

Tulalip's restrictive, revisionist argument has been rejected by this Court since Final Decision #I. Dkt. #65 at 9. "The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Id.*

This Court has repeatedly made clear that the treaty right reserved to all tribes is not species specific. In 1974, Judge Boldt noted: "The right secured by the treaties to the Plaintiff Tribes is not limited as to species of fish". *United States v. Washington*, 384 F.Supp. at 401; *see also United States v. Washington*, 459 F. Supp, 1120, 1122 (concluding that the right applied wherever herring are found). The Ninth Circuit adopted this rule, holding that "'***usual and accustomed grounds and stations' do not vary by species of fish***". *United States v. Washington,* 157 F.3d 630, 644 (9th Cir. 1998) (emphasis added). And, the rule was most recently applied in 2017. *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1167 (9th Cir. 2017), *cert. denied*, 2018 WL 2364652 (U.S. Oct. 1, 2018) (applying the law of the case regarding shellfish to embrace sea mammals within the meaning of the term "fish").

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[2] As a matter of law, Tulalip should also be foreclosed from changing the meaning of the 1984 Agreement 34 years later. This Court previously admonished Tulalip for attempting to re-litigate a key phrase in its U&A settlement agreement with the Suquamish Tribe negotiated in 1983. The Court found that Tulalip should have clarified a phrase designating U&A when it negotiated the settlement agreement, and that it had not since pled or attempted to enforce the agreement according to its new interpretation. *United States v. Washington*, 20 F. Supp.3d 777, 817 (W.D. Wash. 2004). As a result, it was too late for Tulalip to re-litigate the U&A designation and doing so now would "threaten[] the integrity of that carefully crafted agreement." *Id.* So too here.

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Numerous tribes, including Tulalip on a brief filed on Mr. Morisset's pleading paper, have argued to this Court that "as a matter of law[ ] ***usual and accustomed grounds and stations do not vary with the species of fish***, and that the usual and accustomed grounds and stations for non-anadromous fish are ***co-extensive*** with those of anadromous fish." Ex. A at 11 to Smith Decl. (emphasis added). In 1994, Tulalip believed strongly that U&A areas were not "set aside as exclusive fishing locations for particular species of fish" and that "it would make no sense to insist upon separate determinations of where each of scores of species of fish were taken." *Id*. at 4-5, 6. "Whether a particular species can be found everywhere within a particular tribe's [U&A] is irrelevant; what matters is whether the tribe customarily used an area for fishing purposes." *Id.* at 9.

The reasons underpinning the law of the case still hold true today. The Ninth Circuit twice reiterated that it would be "extremely burdensome and perhaps impossible for the Tribes to prove their usual and accustomed grounds on a species-specific basis." *United States v. Washington,* 157 F.3d. at 644. "If each Tribe were required to prove its usual and accustomed grounds for every species of fish and shellfish, the time and cost to the court and parties would be unreasonably burdensome." *Id.* Tulalip has echoed this concern in rejecting the call for species-by-species U&A, stating, "It is also impossible as a practical matter because of the huge number of species for which separate determinations would need to be made." Ex. A at 11 to Smith Decl. Tulalip was right then, and Stillaguamish is correct now.

The Agreement dealt with the geographic scope of fishing places – consistent with the law of the case supporting the designation of places for fishing generally – not fishing for any particular species. The Court should interpret the Agreement consistent with the law of the case and deny Tulalip's motion as a matter of law. The Agreement encompasses all fish within the agreed U&A, without limitation as to species.[3]

[3] Tulalip suggests that because the Agreement designates harvest shares for salmon, but not for shellfish, the parties did not intend to include shellfish. Dkt. #65 at 9. This argument is a red herring. That the Agreement would discuss the shares of fish that migrate between marine and

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C. *Shellfish* Did Not Change the Treaty; "Fish" Has Always Included Shellfish

Tulalip next argues that the term "fishing" and "fish" excludes shellfish because "[i]n 1984, when the Agreement was signed, there was no adjudicated shellfish treaty rights". Dkt. #65 at 9. By this argument, Tulalip implies that shellfish were not encompassed within the term "fish" prior to *Shellfish* and, therefore, *Shellfish* represents a change in the law. It does not. Under Ninth Circuit precedent governing contract interpretation, in the context of the Stevens Treaties and this Agreement arising therefrom, the term "fish" has always had a broad sweep to include shellfish because this was the right reserved by the Indians in 1855. *See, e.g., United States v. Winans,* 198 U.S. 371, 38081 (1905).

In *Pauma Band of Mission Indians v. California,* the Ninth Circuit held that "[w]hen dealing with interpretation of a contract there is no such thing as a 'change in the law'—once a final judicial decision determines what the contested language supports, that is it." 813 F.3d 1155, 1165 (9th Cir. 2015). At issue in that case was a claim by the Pauma Band that California had misrepresented a key provision within a gaming compact. *Id.* at 1162-63. The State argued that it could not have misrepresented this key provision because its meaning was only determined years later through litigation. The court rejected California's argument in no unmistaken terms, holding that "a contract provision has only one true meaning—what it meant when written—even though the parties may later dispute the correct interpretation." *Id.* at 1165. Therefore, the meaning of the compact provision never actually changed. *Id.*

Pauma Band directly applies here. The Agreement arises directly from the parties' treaty rights pursuant to Article V of the Treaty of Point Elliot. Construing Article V and the shellfish proviso in *Shellfish*, the Ninth Circuit affirmed this Court's holding that that "fish" included shellfish. *United States v. Washington*, 157 F.3d at 644. Applying *Pauma Band*, despite the tribes' dispute with the State over the meaning of "fish", that term has only ever had one true

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freshwater, and between Tulalip's and Stillaguamish's U&A, is unremarkable. This was devised to avoid overharvest of the mixed stock fishery in marine waters that would adversely impact the terminal river fishery. No such issue exists with sedentary shellfish harvest.

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meaning, which was fixed at the time of the Treaty in 1855. *Pauma Band*, 813 F.3d at 1165. The Treaty did not change when this Court ruled that the right of taking fish included the right to take shellfish, as Tulalip suggests. The date of the Agreement is irrelevant because what is at issue is a treaty right which has always encompassed shellfish and that was "already possessed by the Indians" at the time of the treaty. *United States v. Washington*, 18 F. Supp.3d 1172, 1218 (W.D. Wash. 1991). To hold otherwise for the sole purpose of forcing Stillaguamish to prove a separate U&A for shellfish would diminish the integrity of *Shellfish* and the Treaty itself. Tulalip's motion should be denied as a matter of law.

D. Alternatively, Genuine Issues of Facts Exists as to Intent

Finally, Tulalip makes a wholly unsupported factual assertion that the Agreement is limited to salmon because "[s]hellfish were clearly not in anyone's mind at the time of the agreement." Dkt. #65 at 9.[4] In addition to running counter to the law of the case, the bare statement of Tulalip's counsel[5] is contradicted by evidence from before, contemporaneous with, and after the execution of the Agreement. At the very least, Stillaguamish's evidence creates a genuine issue of material of fact as to whether the parties intended to exclude shellfish from the Agreement barred summary judgment.

"[T]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting." *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*,

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[4] Tulalip makes this factual assertion without any declaration or document to support it. In fact, there is no declaration accompanying any of seven exhibits offered as part of Dkt. #65-1. The exhibits are inadmissible and Tulalip has failed to carry its burden on summary judgment. *See Beyene v. Coleman Sec. Servs.*, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988) (court can only consider admissible evidence in ruling on a motion for summary judgment); *Cristobal v. Siegel*, 26 F.3d 1488, 1494 (9th Cir. 1994) (unauthenticated documents cannot be considered in a motion for summary judgment).

[5] Counsel for Tulalip has made himself a fact witness for trial regarding the parties' understanding of the Agreement contrary to RPC 3.7(a), which provides: "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness". Under certain circumstances, counsel's testimony as a witness can result in disqualification. *See Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wash. App. 461, 466, 220 P.3d 1283, 1285 (2009).

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281 F.3d 929, 934 (9th Cir. 2002). Extrinsic evidence is admissible as an aid in ascertaining the parties' intent, even in the absence of ambiguity. *DP Aviation v. Smith's Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 838 (9th Cir. 2001) (internal quotation and citation omitted). Here, there is ample evidence suggesting that the parties were concerned with the geographic scope of the U&A, and that shellfish was absolutely on people's mind before 1984. Post-Agreement actions of the parties also suggest that the Agreement was not limited to salmon.

First, contemporaneous writings reflect that Stillaguamish understood the Agreement to be about the geographic scope of Tulalip and Stillaguamish's U&A, not about any particular species. On April 2, 1984, the Stillaguamish Board of Directors held an emergency meeting with its lawyer, Cynthia Davenport, to discuss "the U&A Tulalip/ Stillaguamish proposal." Ex. D to Connolly Decl. On April 3, 1984, Ms. Davenport wrote the Stillaguamish Chairwoman about the Agreement wherein she discussed Section IV of the Agreement, explaining that this Section deals with "U&A" and that "the Tulalips agree to invite the Stillaguamish into Northern Port Susan until you establish U&A there." Ex. E to Connolly Decl. At no time does Ms. Davenport advise her client that this was a species-specific Agreement or that it only applied to salmon. Her discussion of "U&A" more broadly indicates her understanding that the Agreement resolved geographic boundaries, rather than placing limits on what fish might be caught within that area.

Second, as of 1984, there had been plenty of talk about shellfish. As early as September 1974, Judge Boldt specifically noted that tribes must present prima facie evidence supporting a claim to treaty entitlements of "non-anadromous fish ***and shellfish.***." *United States v. Washington,* 459 U.S. 1020, 1037 (W.D. Wash. 1978) (emphasis added). On January 21, 1980, Dr. Lane signed an affidavit as part of the Phase II proceedings discussing treaty shellfish harvest and noting that "there is no evidence that either the United States or Indian negotiators intended that shellfish eights be any more limited that finfish rights." Ex. O at p. 9 to Smith Decl. It follows that, in the Agreement, Stillaguamish and Tulalip employed the terms "fishing" and "fish" according to the meaning and usage that the tribes were already advancing in the case.

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Third, post-Agreement conduct reflects both parties' understanding that shellfish were not excluded from the U&A established in 1984. In 1994, the parties entered into a *Memorandum of Understanding Between the Stillaguamish Tribe and the Tulalip Tribes* to establish a joint shellfish management program supported by federal appropriations. Ex. C at 16-19 to Connolly Decl. In 1994, both Tulalip and Stillaguamish enacted shellfishing regulations relating to Tulalip's invitation for Stillaguamish to participate in subsistence shellfish harvest. Ex. C at p. 40 to Connolly Decl. (Stillaguamish Tribal Fishing Reg. No. 89-CL-02 (Apr. 18, 1989) Preseason Claim Regulation) and p. 65 (Tulalip Tribes Fishing Reg. No. 94-0057-17 (Aug. 8, 1994)). Yearly reports were submitted by the two tribes. *See* Ex. C to Connolly Decl. The cooperative agreement, regulations, annual harvest and management all demonstrate the parties' understanding that shellfish harvest was necessarily included within the U&A established through the Agreement.

Given the foregoing, in the event summary judgment is not warranted for Stillaguamish a as a matter of law, a genuine factual dispute precludes summary judgment in favor of Tulalip.

CONCLUSION

For the foregoing reasons, the Court should reject the broad after-the-fact limitation on the terms "fishing" and "fish" that Tulalip urges which are contrary to the plain language of the Agreement, the law of the case, and the parties' intent 34 years ago. Stillaguamish respectfully requests that the Court deny Tulalip's motion for summary judgment and *sua sponte* grant summary judgment in its favor to declare that the Agreement includes shellfish.

DATED this 14th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I electronically filed the foregoing **STILLAGUAMISH TRIBE OF INDIANS' RESPONSE IN OPPOSITION TO TULALIP TRIBES' 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's ECF system for the above-captioned case.

DATED this 14th day of November, 2018.

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