HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	Case No.: C70-9213 Subproceeding No. 17-3 **REPLY IN SUPPORT OF UPPER SKAGIT INDIAN TRIBE'S MOTION TO DISMISS** NOTE ON MOTION CALENDAR: November 30, 2018

Because the Court "specifically determined" Stillaguamish's U&A in 1974, Stillaguamish improperly "invoked the continuing jurisdiction of this court in order to determine . . . [t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I." 384 F. Supp. 312, 419 (Final Decision 1) (W.D. Wash. 1974), as modified by Order Modifying Paragraph 25 of Permanent Injunction, Dkt. 13599 at 1-2, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. Aug. 11, 1993).

The Court should grant Upper Skagit Indian Tribe's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) because Stillaguamish has failed to meet its burden of establishing the Court's jurisdiction over this dispute. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (plaintiff bears the burden of establishing jurisdiction).

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I. REPLY RE LAW OF THE CASE (STILLAGUAMISH, MUCKLESHOOT, HOH)

Stillaguamish claims that the "law of the case" unequivocally establishes this Court's jurisdiction over any claim brought to expand its U&A. The asserted basis for this procedural presumption is that tribes have returned to Court to expand their U&As. But the law of the case doctrine does not operate that way.

The doctrine "provides that when a court *decides upon a rule of law*, that decision should continue to govern the same issues in subsequent stages in the same case." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018) (emphasis added). Citing an earlier Ninth Circuit decision in this case, the court in *Askins* stated, "A court may also decline to revisit its own rulings where the issue *has been previously decided* and is binding on the parties." *Id.* (emphasis added) (citing *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000)). The rationale for the doctrine is that "courts are understandably reluctant to *reopen a ruling once made*." 18B Wright & Miller, *Federal Practice & Procedure* § 4478 (2d ed.) (emphasis added).

Embedded in each of these descriptions of the doctrine is the (perhaps obvious) idea that the court must have *actually decided* the issue:

> Actual decision of an issue is required to establish the law of the case. Law of the case does not reach a matter that was not decided. As compared to claim preclusion, it is not enough that the matter could have been decided in earlier proceedings. . . . A position that has been *assumed without decision* for purposes of resolving another issue is not the law of the case, a rule that may extend to *an issue that was assumed because it was not contested*.

Id. (emphasis added).

Never in the earlier subproceedings cited by Stillaguamish, Muckleshoot, and Hoh did the Court rule that its jurisdiction had been properly invoked. Stillaguamish, Muckleshoot, and Hoh do not cite a jurisdictional *decision*, only the fact that the case proceeded with no party contesting jurisdiction. There is no "law of the case"—explicit or implicit—in Stillaguamish's favor. But, in subsequent subproceedings, the Court *repeatedly held* that the Court lacks jurisdiction to expand

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U&A for a tribe whose U&A has been determined. *See* cases cited *infra* notes 3-7 and in Dkt. # 64 at 3-4. That is the "law of the case" that controls here.[1]

Stillaguamish's argument that the Court previously determined it had jurisdiction over Stillaguamish's claim to expanded U&A is also fallacious. In reprimanding Stillaguamish for fishing despite a lack of U&A in the subject area, the Court ruled in 1976:

> The Stillaguamish Tribe has not sought to expand its fishing places to include the northern portion of Port Susan by following the procedures set forth in [Paragraph 25]. It is only as a result of the Tulalip objections that the court has been made fully aware that the Stillaguamish Tribe has, apparently unilaterally, expanded its fishing places beyond those areas recognized and determined in Final Decision # I. For all of the foregoing reasons the court sustains the objections of the Tulalip Tribes to the Stillaguamish fishing regulations insofar as they authorize tribal fishing activities at grounds and stations beyond those determined and recognized in Final Decision # I. The Stillaguamish Tribe may at any future time apply to this court for hearing, or reference to the Master, regarding expanded usual and accustomed fishing places *so long as such application is in accordance with paragraph 25 of the court's injunction.*

459 F. Supp. at 1068 (emphasis added). Stillaguamish seeks to have the Court read into this statement an implied decision in favor of Stillaguamish on subject matter jurisdiction. Not only was that issue not litigated (and therefore not decided),[2] the Court's statement is to the contrary.

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[1] The law of the case is consistent with the concern for finality expressed by the Court over 10 years ago:

> The Court now renews its concerns regarding respect for the finality of this judgment. . . . [A]s of today the docket in *Washington I* runs to 19,053 entries. . . . The Court has retained jurisdiction in this case for limited purposes only, as set out in the Order Modifying Paragraph 25 of the Permanent Injunction dated August 23, 1993.[11] [FN11: . . . The Court does not have jurisdiction to consider matters outside those set forth in the Order Modifying Paragraph 25.]

Sub. No. 01-2 at 24-25 (Sept. 2, 2008), *reported at* 20 F. Supp. 3d 899, 912 (as of the date of this filing, the docket in *Washington I* runs to 21,847 entries). This notion of finality is buttressed by the relative infrequency with which tribes have even attempted to return to court to invoke the Court's continuing jurisdiction under paragraph 25(f) (renumbered 25(a)(6)) to expand their own U&A: two times in the 1970s (Makah, Lower Elwah), five in the 1980s (Puyallup, Squaxin Island, Tulalip, Nisqually, Suquamish), and one in 1993 (Upper Skagit). The three filings decades later in 2017 (Skokomish, Muckleshoot, Stillaguamish) are anomalous, yet portend years of future litigation if allowed.

[2] Elsewhere in its brief, Stillaguamish appears to agree:

> Swinomish's argument that Stillaguamish did not establish subject matter jurisdiction in Subproceedings 79-1 or 89-3 and therefore, Stillaguamish must do so now, is a strawman. Dkt. #66 at 2-6. *The issue was never adjudicated previously.* And, even if it was, *the Court's jurisdiction over prior Subproceedings is irrelevant* as to whether it has jurisdiction over this Subproceeding now.

Dkt. 75 at 8 n.3 (emphasis added).

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Stillaguamish omits the crucial last words qualifying the Court's invitation: "so long as such application is in accordance with paragraph 25 of the court's injunction," *id.*, i.e., so long as Stillaguamish establishes the Court's jurisdiction.

Likewise, the later dismissals without prejudice placed Stillaguamish "in the same procedural posture that it would have occupied had it never brought a claim" and did "not confer upon" Stillaguamish "any rights" it did "not otherwise possess"; the dismissal left Stillaguamish "in the same position *as if the action had never been filed*." *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1061 (9th Cir. 2002) (emphasis added) (quoting the Congressional Record). That the Court in 1976, 1987, and 1993 did not foreclose Stillaguamish from returning to Court is not surprising: no party asked it to. Moreover, as discussed previously, *after* Stillaguamish's three aborted attempts to expand its U&A, the Court issued a series of orders *actually deciding* the jurisdictional issue, holding that once a tribe's U&A has been determined, that tribe may not return to Court asking for more.

In their briefs, Muckleshoot and Hoh also fail to address Court rulings in 2005,[3] 2006,[4] 2015,[5] and 2018[6] (each cited by Upper Skagit, *see* Dkt. # 64 at 3-4) that Paragraph 25(a)(6) means that once a tribe's U&A has been determined, the tribe may not return to Court to expand its U&A.[7] That the Court in dicta and without briefing said something in 1975 that could be construed otherwise (*see* Dkt. 73 at 2) is not relevant now. Muckleshoot litigated this issue, quoting this very statement, with the same bold and underlined emphasis, in 2017.[8] In a lengthy

[3] Sub. 05-3, Dkt. 71 at 2 n.1 & 3, 20 F. Supp. 3d 777, 806 n.1 & 807 (W.D. Wash. Dec. 19, 2005).

[4] Sub. 05-4, Dkt. 43 at 3-4, 20 F. Supp. 3d 777, 816-17 (W.D. Wash. Jan. 26, 2006).

[5] Sub. 11-2, Dkt. 210 at 24, 2015 WL 4405591, at *14 (W.D. Wash. July 17, 2015), *rev'd sub nom. United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017) (holding that the U&A determination was ambiguous).

[6] Sub. 17-2, Dkt. 40 at 10, 2018 WL 1933718, at *6 (Apr. 24, 2018).

[7] S'Klallam also identifies the Court's order in 17-1, Dkt. 42 (Aug. 30, 2017) as including this decision. *See* Dkt. 70 at 12.

[8] *Compare* Sub. 17-2, Dkt. 31 at 16, *with* Sub. 17-3, Dkt. 73 at 2.

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and reasoned opinion, the Court rejected Muckleshoot's argument in 2018.[9] Muckleshoot has taken an appeal, and has made the same arguments, quoting this same language, to the Ninth Circuit.[10] If Muckleshoot is right, the Ninth Circuit will reverse the Court's decision in Sub. No. 17-2. But unless that happens, the law of the case is otherwise.

Because Stillaguamish's U&A was determined in 1974, the Court has no jurisdiction to hear this request for determination.

II. REPLY RE GRAMMATICAL ARGUMENT (SAUK-SUIATTLE)

Stillaguamish does not attempt to explain why Judge Boldt used the word "constituted" in defining Stillaguamish U&A when he used the word "included" with respect to nearly every other tribe. *Compare* Final Decision 1 ¶ 146 ("which river system constituted the usual and accustomed fishing places of the tribe"), *with, e.g., id.* ¶ 120 ("The usual and accustomed fishing places . . . included the following rivers and streams . . . ."), and *id.* ¶¶ 39, 46, 65, 86, 99, 108, 131, 137, 148. Words matter, and Stillaguamish has no answer for why Judge Boldt would use different words with very different meanings in ruling on parallel questions.

Sauk-Suiattle proposes a strained reading of the word "constitutes," suggesting that it means "includes." But this imputes to Judge Boldt a degree of imprecision that has no basis in his jurisprudence. Judge Boldt chose his words carefully, and, for Stillaguamish alone, chose to use "constitutes" rather than "includes." Sauk-Suiattle cites to other definitions of the word, but those are non-sensical in this context. Yes, "constitutes" also means "to set up or establish" and "to found" but those definitions do not make sense here. The entire definition reads:[11]

[9] Sub. 17-2, Dkt. 40, 2018 WL 1933718.

[10] Ninth Circuit Case No. 18-35441, Dkt. 16 at 19, available at https://ecf.ca9.uscourts.gov/n/beam/servlet/TransportRoom?servlet=ShowDoc/009030411756.

[11] This screenshot of the American Heritage Dictionary is at https://ahdictionary.com/word/search html?q=constitute.

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con·sti·tute (kŏn′stĭ-to͞ot′, -tyo͞ot′)

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tr.v. **con·sti·tut·ed**, **con·sti·tut·ing**, **con·sti·tutes**

1.
a. To be the elements or parts of; compose: *Copper and tin constitute bronze.*
b. To amount to; equal: *"Rabies is transmitted through a bite; ... patting a rabid animal in itself does not constitute exposure" (Malcolm W. Browne).*

2.
a. To set up or establish according to law or provision: *a body that is duly constituted under the charter.*
b. To found (an institution, for example).
c. To enact (a law or regulation).

3. To appoint to an office, dignity, function, or task; designate.

The definitions cited by Sauk-Suiattle (in the second group) describe an action taken to accomplish a result. That is not what Judge Boldt was describing. In contrast, the definition cited by Upper Skagit (from the first group), describe the relationship between a whole and its parts or elements, exactly how Judge Boldt used the word. Crucially, "constitute" is defined as "to be *the* elements or parts of" not "to be *some of the* parts or elements." *Id.*

The difference between "constitute" (and other like words) and "include" is whether the list of elements/parts is exhaustive or non-exhaustive. *See Garner's Modern English Usage* at 500 (4th ed. 2016) ("include . . . has traditionally introduced a non-exhaustive list but is now coming to be widely misused for consists of"), and *id.* at 191 (describing consist, constitute, comprise, and compose as used to describe the relationship between the parts and the whole). While "[c]omprise . . . compose, consist, and constitute . . . are used to describe *how parts make up a whole*," and "include," like comprise,

> has the whole as its subject and its parts as the object[,] [t]he *difference is that comprise generally denotes the whole set of parts whereas include can be selective* . . . . Include is often used to single out a particular item or subset, in which case comprise is again inappropriate.

Fowler's Concise Dictionary of Modern English Usage at 134, 339 (3d ed. 2016) (emphasis added). Nor is this a newfangled distinction. *See* H.W. Fowler, *A Dictionary of Modern English*

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Usage at 265-66 (1950) ("With *include*, there is no presumption (though it is often a fact) that all or even most of the components are mentioned; with *comprise*, the whole of them are understood to be in the list." (emphasis added)).

Sauk-Suiattle apparently misinterpreted the dictionary definition of "constitutes" and, based on that misinterpretation, accused the undersigned of lack of candor to the Court.

III. REPLY RE S'KLALLAM'S OVERSIGHT (S'KLALLAM)

S'Klallam believes that Upper Skagit "fail[ed] 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." Dkt. 70 at 12. But Upper Skagit addressed that precedent and agrees with S'Klallam. Upper Skagit quoted language from two of those subproceedings (and three others) to make that precise point.[12]

IV. REPLY RE PROCEDURAL ARGUMENT (S'KLALLAM)

S'Klallam complains that the stipulated order that provided *more* time than allowed by the rules to respond to the motions to dismiss was improperly lodged because it created an *additional* filing opportunity (to file joinders). The deadline to file joinders was not intended to create a burden, but instead to provide order to what is often a disorderly filing of joinders in the days following the filing of a motion. The stipulated order provided S'Klallam additional time (40 days instead of 24) and plenty of pages (38) to respond to the motions. Nothing in the stipulated order precluded (or precludes) S'Klallam from filing its own motion to dismiss. S'Klallam has no basis to complain.

V. CONCLUSION

The Court should dismiss this subproceeding because Stillaguamish cannot meet its burden of proving the Court has subject matter jurisdiction.

[12] Dkt. # 64 at 3-4 ("[I]n recent years, the Court has concluded that tribes whose U&A has been determined may not return to court to expand that U&A into new areas. . . . This Court has so held in many instances [quoting Sub. Nos. 05-3, 05-4, 11-2 and 17-2].").

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DATED this 30th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties registered with the Court's ECF system for the above-captioned case.

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