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 REPLY TO RESPONSES TO TULALIP MOTION FOR PARTIAL SUMMARY JUDGMENT.

1. Introduction

In this subproceeding, the Stillaguamish Tribe seeks to expand its usual and accustomed fishing areas. On July 20, 2018, the court issued an Order setting a pretrial briefing schedule. (Dkt. No. 21805) which required opening briefs and motions on "threshold issues" to be filed on or before October 5, 2018. A motion for Partial Summary Judgment was filed by Tulalip on October 5, 2018 (Dkt No. 65). This memorandum is the Tulalip Tribes' reply to the Stillaguamish response to the Tulalip motion. (Dkt. No. 21835), the S'Klallam Response (Dkt no. 21830), and the Muckleshoot Response (Dkt. No. 21832).

2. Motion for Partial Summary Judgement—Reply to Stillaguamish

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Pursuant to FRCP 56 Tulalip moved for Partial Summary Judgement as to the scope and application of the May 1, 1984 Settlement Agreement between Tulalip and Stillaguamish. See Exhibit 1. Tulalip specifically moved for judgment that the agreement did not pertain to shellfish, applied to only salmon fishing in certain limited areas of the Request for Determination, and contains conditions which must be met before those limited areas may be declared Stillaguamish usual and accustomed fishing locations.

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

3. The Determination of Stillaguamish Usual and Accustomed Grounds and Stations

As noted in the original Motion herein, in 1974, the Court found: "The Stillaguamish Tribe is composed of descendants of the 1855 Sto-luch-wa-mish River people. The population in 1855 resided on the main branch of the river as well as the north and south forks." FF 144, 384 F. Supp. 312, 378 (W.D. Wash. 1974)

[1] FED. R. CIV. P. 56(c).
[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).

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The Stillaguamish were a riverine tribe. The name Stillaguamish, under various spellings, has been used since about 1850 to refer to those Indians who lived along the Stillaguamish River and camped along its tributary creeks. While the Stillaguamish were not an original party to *United States v. Washington* case and not a federally recognized Tribe, they were a party to the Treaty of Point Elliot. *Id.* 348 F. Supp. 312, 379.

Despite Stillaguamish Tribe not being federally-recognized until 1976, the Court set out Stillaguamish usual and accustomed fishing grounds in Final Decision No. 1. The Court determined that the Stillaguamish usual and accustomed areas were located on the Stillaguamish River. It did not include marine waters in its Stillaguamish usual and accustomed grounds, finding:

> "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." Id. at 379 [FF 146].

This was, and remains, the only judicial determination of Stillaguamish usual and accustomed fishing areas. They have now asked the court to expand their fishing rights beyond freshwater and into marine areas

4. Motion for Partial Summary Judgment—Background of the Agreement of May 1, 1984

As part of the Tulalip request for establishment of usual and accustomed places, a Stipulation and Agreement between Stillaguamish and Tulalip Tribes, dated May 1, 1984 ("Agreement"), was approved and entered by Order of this Court dated May 8, 1985 ("May 8, 1985 Order" [Dkt. #10042]; *see* Exhibit 1). The issue in this motion is the application of this agreement to this subproceeding. It involves the intent of Tulalip in the Agreement. Pursuant to the Agreement, the Tulalip Tribes agreed to:

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

The Stillaguamish uses the Agreement as support for its expansion request. Not only does it attempt to use the Agreement to expand into new areas, but also it argues that Tulalip is bound by the Agreement to "actively participate" in support of Stillaguamish. See Stillaguamish Request for Determination. (Dkt No. 21583, p. 3.) The Agreement does no such thing.

5. The Provisions of the May 1, 1984 Agreement

Stillaguamish now seeks to utilize the 1984 agreement to establish shellfish rights in the subject area, even though the Agreement by its terms clearly dealt only with salmon and required that fishing in Northern 8A must proceed according to the salmon management provisions of Paragraph IV. (E) in the Agreement, which provides:

> "E. The parties agree that special management concerns for that area must be recognized. To meet these concerns, the parties agree to co-manage the area according to the interim management provisions set out below, pending the development of a comprehensive management, harvest sharing, and enhancement plan for fisheries of mutual concern to which both parties agree." (Exhibit 1.)

There are no provisions for shellfish management.

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

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

Additional provisions provide for determination of total run size entering the strait of Juan de Fuca, escapement goals and prior interceptions in predetermined areas. See Agreement §C.2. Exhibit 1. None of these provisions have any application to shellfish.

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Further, "Northern 8A" and the Polnell Point to Midtown areas are enclosed and constricted waters which do not lend themselves to additional fishing pressure, further supporting the view that the Agreement had limited application

In short, shellfish were not a subject matter of the agreement.

6. The Historic Context of the Agreement

The limited scope of the agreement is also made clear by historical context. In 1984, when the Agreement was signed, there were no adjudicated shellfish treaty rights. The so called "Shellfish Case" was not filed until 1989, five years later and not decided until ten years later. 873 F. Supp. 1422 (W.D. Wash.)(1994)

Shellfish were clearly not the focus of the agreement.

Not only the parties to U.S. v. Washington, but the court presumed that shellfish usual and accustomed fishing areas would have to be independently decided. Indeed, on April 6, 1993, the court ordered that no later than May 1. 1993 each Tribe must set forth: "The specific locations of the usual and accustomed grounds and stations where it contends a right of taking shellfish exists." 18 F. Supp 3d at 1205.

7. The Application of the Court's 1994 Ruling on Usual and Accustomed Areas for All Species.

In its response, Stillaguamish spends substantial time discussing the court's January 5, 1994 ruling that defines a tribe's adjudicated usual and accustomed fishing areas as applying to all species. (19 F. Supp. 3d 1128, 1130 (W.D. Wash. 1994)) There is no dispute about this and is not an issue here.[6]

[6] The January 5, 1994 order was signed by Judge Rafeedi on January 5, 1994. It was filed on January 6, 1994. The order is inexplicably dated January 13, 1994 in reported decisions. 19 F. Supp. 3d1128 (W.D.) Wash.) (1994)

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What is at issue, is the Tulalips' intent and scope of the Agreement. In 1984, when the Agreement was signed, the court's ruling of 1994 obviously did not exist. It cannot retroactively change the intent of Tulalip in 1984. Nor does the 1994 ruling apply yet to Stillaguamish. The Stillaguamish tribe has no adjudicated marine usual and accustomed fishing grounds. Only when those places are determined will the 1994 order have application.

On January 27, 1994, the District Court admonished the Tribes not to jump to the conclusion that the January 5, 1994 order denying the state position on deep water fisheries was a grant of a summary of judgment and reminded the Tribes: "…must still come forward with evidence proving usual and accustomed grounds." 19 F. Supp. 3d 1126, 1131.

Fifteen tribes filed a response to that order, claiming various shellfish usual and accustomed places.

This sequence of events demonstrates that until the court's ruling on January 5, 1994, salmon and shellfish usual and accustomed areas had been dealt with separately. It was only after the 1994 ruling was it clear that it was not necessary to demonstrate usual and accustomed areas on a species-specific basis.[7]

8. Reply to S'Klallam and Muckleshoot Responses.

The Port Gamble S'Kallam and Jamestown S'Kallam Tribes (hereafter "S'Kallam") filed a response to the underlying motion. Response to Tulalip…(Dkt No. 21830) They were partially joined by the Muckleshoot Indian Tribe. Muckleshoot Tribes Response….(Dkt. No. 21832)

The S'Klallam tribes argue that adopting Tulalip's view of the 1984 Agreement will be potentially disruptive of the status quo of numerous agreements. They argue that a number of settled agreements concerning usual and accustomed places which have been reduced to court

[7] In fact, after the 1984 Agreement was strangely silent for over thirty years before activating this subproceeding.

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orders might be adversely affected and that the "impact of Tulalip's argument would be disruptive to this case…" (Klallam response November 14, 2018 Dkt 21830, p. 1)

This is alarmist, overbroad and patently incorrect. The Agreement and court orders enforcing them are clearly matters that have been determined in the case and are final. By the court's order of 1994, the usual and accustomed places determined in those documents are final and apply to all species.

This is not the case, however, with the Stillaguamish. There are no Stillaguamish adjudicated usual and accustomed marine areas. This, in fact, is the subject matter of this subproceeding (Subproceeding 17-3). Thus, there is nothing to apply from the 1994 order. When and if the Stillaguamish establish usual and accustomed places by court action, those places will undoubtedly apply to all species, pursuant to the court's directive of 1994.

At this point we must emphasize, that there are no such places. The question in Tulalip's motion, is what was Tulalip's intent in signing the agreement to support Stillaguamish expansion into marine waters. As explained in the Tulalip motion and memorandum, it was to support expansion for salmon fishing only. The context of the agreement and the history of the usual and accustomed place determinations have been set out above. It is clear that in 1984, the parties, and indeed the court, contemplated salmon fishing usual and accustomed grounds and shellfish usual and accustomed grounds separate matters. As we have noted, in 1993, the district court evidently agreed and ordered the tribes to present their positions on what usual and accustomed places they wanted for shellfish. 18 F. Supp. 3d 1203, 7205. The court repeated this admonition again on February 1, 1994.19 F. Supp. 3d 1131 (W.D. Wash.) (1994) Most tribes filed a joint proposal requesting the location of shellfish usual and accustomed fishing places. In 1994, that the court ruled that the usual and accustomed places would be the same for all species and it would not be necessary to prove individual species' usual and accustomed fishing areas. 873 F. Supp. 1422, 1430 (W.D. Wash.) (1994).

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9. Conclusion

It is clear that the 1984 Agreement was limited to salmon. No adjudicated shellfish rights existed at the time of its negotiation. No terms of the Agreement deal with shellfish. The court and the parties were proceeding to adjudicate shellfish usual and accustomed fishing areas as a separate matter. The Agreement is limited to the specific salmon fishing areas discussed and agreed to and Tulalip is bound to support Stillaguamish extension only to that extent.

DATED this 30th day of November 2018.

Respectfully Submitted,

MORISSET SCHLOSSER JOZWIAK & SOMERVILLE

By: /s/ *Mason D. Morisset*

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 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: November 30, 2018.

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

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