

2020 FEB -5 PM 1:48
DISTRICT COURT

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR COUNTY OF WHATCOM

STATE OF WASHINGTON,
Plaintiff,

v.

LISA MARIE RABANG,
Defendant.

NO. C00094696

CrRLJ 8.3(c) MOTION TO DISMISS

Co-Defendants:

FRANCISCO J. RABANG, C00094699
JAMES VICTOREO RABANG, C0094697
MICHAEL J. RABANG, C00094698

Defendant Lisa Marie Rabang, a Nooksack Tribal member, is charged with violating RCW 77.15.380, for subsistence clamming on the Semiahmoo Spit without a state recreational shellfish license. Declaration of Gabriel S. Galanda (“Galanda Decl.”), Ex. A. The State appears to charge her with violation of RCW 77.15.380(1), which requires that a non-Indian “purchase[] the appropriate fishing or shellfishing license and catch record card issued to Washington residents,” in order to harvest shellfish. Because Defendant is a Nooksack Tribal member, however, federal law makes clear that she does not need a state-issued recreational shellfish license to harvest clams at Semiahmoo—a usual and accustomed Nooksack fishing place pursuant to the Point Elliott Treaty. 12 Stat. 927 (Jan. 22, 1855), Art. V; *U.S. v. Washington*, 384 F. Supp. 312, 333 (W.D. Wash. 1974); *id.*, Ex. B.

CrRLJ 8.3(c) MOTION TO DISMISS - 1

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1 I. STATEMENT OF FACTS

2 In 1855, the Nooksack Tribe signed the Point Elliott Treaty, which guaranteed Nooksack
3 Indians “the right of taking fish at usual and accustomed grounds.” 12 Stat. 927, Art. V.
4 Washington State recognizes Semiahmoo Spit as one of several usual and accustomed Nooksack
5 fishing areas. Galanda Decl., Ex. B, Attachment 1 at 4.

6 Defendant Lisa Marie Rabang was enrolled as a member of the Nooksack Tribe on
7 October 25, 1990. Galanda Decl., Ex. C. She has been continuously enrolled ever since; she has
8 never been disenrolled.

9 On May 10, 2019, at 4:30 PM, Defendant was exercising her Nooksack Treaty fishing
10 right along with three relatives, as “subsistence clam harvesters.” *Id.*, Ex. A. According to a
11 Washington State Fish and Wildlife Arrest Report:

12 On 5/10/2019 Lummi Natural Resource Officer Aaron Hillaire contacted four clam harvesters in
13 the Semiahmoo Spit area of Whatcom County. All four subject did not have the proper license to
14 conduct such an activity. Officer Hillaire identified the four subjects as James Rabang, Lisa
15 Rabang, Francisco Rabang and Michael Rabang. After a brief investigation, Officer Hillaire was
16 able to determine that the four subjects were disenrolled Nooksack Tribal members, thus
17 requiring them to have a state fishing license.

18 *Id.* Defendant produced her “Nooksack Tribal enrollment card[]” to a Lummi officer; her
19 relative “stated ‘no’ they do not have any permits to harvest for subsistence”¹; and the officer
20 “thanked them for their cooperation and cleared the area” without incident. *Id.*

21 The State waited six months to charge Defendant; she was cited with a single,
22 unspecified violation of “RCW 77.15.380” on November 6, 2019. *Id.*, Ex. A. The State alleges
23 Defendant “Did clam w/o license.” *Id.* The State offers no evidence that Defendant actually
24 harvested any shellfish on May 10, 2019. *See id.*

25 ¹ It is immaterial for purposes of RCW 77.15.380(1) whether Defendant possessed a “permit issued by the Lummi
Natural Resource office” or by the Nooksack Tribe for “to harvest for subsistence.” What matters is whether
Defendant needed to have “purchased the appropriate fishing or shellfishing license.” RCW 77.15.380(1)—she
needn’t have. There are other state shellfishing laws that make an alleged “violation of any tribal law” a basis to
charge a state crime, *see* RCW 77.15.630(2)(c), but not RCW 77.15.380(1).

1 **II. ISSUES & BRIEF ANSWERS**

2 **A.** Is Defendant a Nooksack Tribal member? **Yes.**

3 **B.** Was Defendant fishing for shellfish in a usual and accustomed Nooksack fishing
4 place? **Yes.**

5 **C.** Should the charge for violating RCW 77.15.380(1) be dismissed? **Yes.**

6 **III. EVIDENCE RELIED UPON**

7 Defendant's Motion relies upon the Declaration of Gabriel S. Galanda, the exhibits
8 attached thereto, and the pleadings on file in this case.

9 **IV. LAW AND ARGUMENT**

10 The Point Elliott Treaty of 1855 guarantees Nooksack Indians "the right of taking fish at
11 usual and accustomed grounds." 12 Stat. 927, Art. V. Washington State agrees that the
12 Semiahmoo Spit is a usual and accustomed Nooksack fishing area under federal law. Galanda
13 Decl., Ex. B, Attachment 1 at 4.

14 That Nooksack Treaty fishing right was affirmed in the Boldt Decision, *U.S. v.*
15 *Washington*, 384 F. Supp. 312, and later held to include the right to harvest shellfish. *U.S. v.*
16 *Washington*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376.

17 In 1942, the U.S. Supreme Court held that Point Elliott Treaty fisherpersons could not be
18 required to purchase a state fishing license. *Tulee v. Washington*, 315 U.S. 681 (1942). State
19 law reflects that a "Treaty Indian fisher" . . . may exercise treaty Indian fishing rights as
20 determined under *United States v. Washington*," without being subject to those fishing
21 prohibitions or restrictions that the State imposes upon "non-Indians." *U.S. v. Washington*, 384
22 F. Supp. at 333; RCW 77.15.570; RCW 77.15.570(4)(a).

23 Defendant is a Nooksack Tribal member and, therefore, a Treaty Indian fisher under
24 federal Treaty and common law and state statute. *Id.*; Galanda Decl., Ex. C. On May 10, 2019,
25 she was seeking to harvest subsistence clams on the Semiahmoo Spit, which constitutes

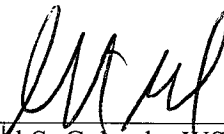
1 Nooksack usual and accustomed fishing grounds. 12 Stat. 927, Art. V; Galanda Decl., Ex. B,
2 Attachment 1 at 4.

3 Defendant is not a non-Indian Washington resident who is required by RCW
4 77.15.380(1) to have purchased a state recreational shellfishing license in order to fish for clams.
5 *U.S. v. Washington*, 384 F. Supp. at 333; *Tulee*, 315 U.S. 681. The Court should dismiss this
6 case pursuant to CrRLJ 8.1 because the State cannot establish a prima facie case that Defendant
7 violated of RCW 77.15.380(1) for want of a state shellfishing license.

8 A proposed Order of dismissal accompanies this Motion.

9 DATED this 5th day of February 2020.

10 GALANDA BROADMAN, PLLC

11 

12 _____
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17 Attorneys for Lisa Marie Rabang
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1 **CERTIFICATE OF SERVICE**

2 I, Wendy Foster, declare as follows:

3 1. I am now and at all times herein mentioned a legal and permanent resident of the
4 United States and the State of Washington, over the age of eighteen, not a party to the above-
5 entitled action, and competent to testify as a witness.

6 2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue
7 NE Suite L1, Seattle, WA 98115.

8 3. Today, I served the foregoing document via email and USPS on the following:

9
10 Jesse Corkern
11 Whatcom County Prosecutor's Office
12 311 Grand Avenue, Suite 201
13 Bellingham, WA 98225
14 JCorkern@co.whatcom.wa.us

15 The foregoing statement is made under penalty of perjury under the laws of the State of
16 Washington is true and correct.

17 DATED this 5th day of February 2020.

18 
19 _____
20 WENDY FOSTER