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' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LACHES AFFIRMATIVE DEFENSE[1]

NOTE ON MOTION CALENDAR: JANUARY 29, 2021

[1] This motion is filed separately from the Motion for Partial Summary Judgment Re: Port Susan (Dkt. # 170) for the Court's ease and for that of the numerous respondent parties and interested parties in this case, so that there is no confusion as to which motion the parties might be responding. To avoid potential confusion, the two motions together comply with the page limitations of LCR 7(e)(3).

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The Swinomish Indian Tribal Community ("Swinomish"), the Tulalip Tribes ("Tulalip"), and the Upper Skagit Indian Tribe ("Upper Skagit") (collectively "Responding Tribes") ask this Court for extraordinary relief, never applied in the fifty years of *United States v. Washington*—to equitably bar a Paragraph 26(a)(6) claim because of laches. Dkt. # 95 at 5; Dkt. # 96 at 5; Dkt. # 97 at p. 5. Laches is not available in this case.

The equitable defense of laches should not bar Stillaguamish's RFD based on long-standing policy considerations this Court has recognized for decades. *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) ("*Final Decision No. 1*"). There is no reason for this Court to depart from its ruling only five years ago reiterating "the long-held understanding" that equitable defenses such as laches "do not apply in the typical fashion in this case." *United States v. Washington*, 88 F.Supp.3d 1203, 1214 (W.D. Wash. 2015) ("*Subproceeding 09-1*"). This should end the inquiry. Stillaguamish therefore is entitled to a judgment as a matter of law dismissing the Responding Tribes' laches defense.[2]

A. LACHES DOES NOT BAR ADJUDICATION OF TREATY RIGHTS UNDER THESE CIRCUMSTANCES

1. Laches Is Inapplicable to Treaty Right Claims

Stillaguamish's RFD asserts a treaty right claim for fishing in marine waters. It has long been the law that laches is not available to defeat such Indian treaty rights. *See, e.g., Bd. of Comm'rs v. United States*, 308 U.S. 343 (1939) (defenses based on delay in bringing claims such as laches and estoppel are inapplicable to claims to enforce Indian rights); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983). It has also long been the rule in this case. *United States v. Washington*, 157 F.3d 630,

[2] The Court must grant a motion for summary judgment when "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). When a defendant asserts an affirmative defense on which it will bear the burden of proof, a plaintiff's summary judgment motion requires that the defendant to identify a genuine dispute of fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). If the defendant fails to meet this burden, summary judgment must be granted to the plaintiff on the affirmative defense.

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649 (9th Cir. 1998) (rejecting non-Indian growers' affirmative defense and refusing to apply laches against treaty-based fishing-rights claim even though tribes "waited 135 years to assert their shellfishing right"). Now, instead of non-Indians asking this Court "for new law simply because current law precludes their argument," it is the Responding Tribes that refuse to recognize that "treaties enjoy a unique position in our law" that precludes the application of laches. *Id.* The 1998 decision of the Ninth Circuit rejecting laches despite a 135-year delay remains controlling law, and the Responding Tribes' affirmative defense should be dismissed as a matter of law. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (discussing law of the circuit)).

2. Significant Policy Considerations Prevent Application of Laches to Bar Stillaguamish's RFD

This Court should also grant summary judgment dismissing the Responding Tribes' laches defense because significant policy considerations continue to favor the rule that equitable defenses generally do not bar adjudication of a tribe's U&A grounds and stations under the procedures prescribed in *Final Decision No. 1*.

This Court recently addressed the applicability of equitable defenses in U&A adjudications in *Subproceeding 09-1*. 88 F.Supp.3d at 1212-13. In that oceanic U&A adjudication case, the Court repeated its concern "that allowing for equitable defenses would promote circumvention of the procedures set forth in Paragraph 25 for adjudicating U&A's and encourage tribes to expand their established fishing areas through the exercise of prescriptive rights." *Id.* at 1212 (citing *United States v. Washington*, 18 F.Supp.3d 1123, 1164 (W.D. Wash. 1990)). The Court found that "it remains the case that allowing for equitable defenses" could have the "unfortunate consequence" of compelling tribes to flood the court with RFDs based on fears of losing treaty rights, and discouraging tribes from making efforts to informally resolve intertribal grievances without court intervention, including in Paragraph 25(a)(6) adjudications. *Id.* at 1212-13. Although the Court declined to explicitly hold that equitable defenses could never apply to bar Paragraph 25(a)(6) subproceedings, it "reiterate[ed] the long-held understanding that they do not

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apply in the typical fashion in [*United States v. Washington*]." *Id.* This decision rejecting application of equitable defenses as a general rule stands as the law of the case. *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.").

The same long-held concerns cited by the Court in *Subproceeding 09-1* are present in this case. As was the case in *Subproceeding 09-1*, the Responding Tribes' laches defense remains unavailing. In *Subproceeding 09-01*, the Court found on summary judgment that a thirty-five-year delay in the adjudication of Quinault's and Quileute's oceanic U&A did not constitute an "extraordinary lengthy delay" sufficient to invoke laches. 88 F.Supp.3d at 1214-15. Stillaguamish has sought to adjudicate its marine waters twenty-three years after it voluntarily dismissed its marine waters RFD in *Subproceeding 89-3*, twelve years less than the time period found to not constitute an unreasonable delay in *Subproceeding 09-1*. As this Court noted in *Subproceeding 09-1*, thirty-five years is not an extraordinarily lengthy period of delay in the context of *United States v. Washington*. *See id.* at 1212; *see also United States v. Washington*, 157 F.3d at 649 (refusing to apply laches against treaty-based fishing-rights claim even though tribes "waited 135 years to assert their shellfishing right"). That Stillaguamish's wait was only two-thirds of that found to be acceptable by this Court previously should also end the laches inquiry without further analysis. *See also United States v. Washington*, 459 F.Supp. 1020, 1068–69 (W.D. Wash. 1978) ("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…") (emphasis added).

If the Court departed from its own practice (and that of the Ninth Circuit) by allowing laches to bar Stillaguamish's RFD, it would prompt other tribes to immediately seek adjudication of all outstanding U&As while discouraging tribes from taking the time and effort to attempt to resolve U&A issues intertribally without court intervention. This would punish Stillaguamish for having done the very thing this Court has long counseled tribal parties to do, *e.g.*, make every

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effort to settle intertribal disputes outside of court. Dkt. # 76 at p. 2. Further, as convincingly argued by Tulalip and Swinomish previously—who now conveniently argue a different position as to Stillaguamish—it makes no sense to apply laches to a continuing jurisdiction case. *See* Response to Motion for Summ. J. and Joinder in Makah Reply to Response, *United States v. Washington*, No. 2:09-sp-00001-RMS, Dkt. # 275 (W.D. Wash., Dec. 23, 2014). As the Court noted in *Subproceeding 09-1*, the procedure set forth in Paragraph 25(a)(6) "has nothing to do with equitable defenses," rather "[i]t has to do with the expeditious utilization of a mechanism that has been in place since the Boldt decision was issued." 88 F.Supp. at 1215 (citing *United States v. Washington*, 18 F.Supp.3d at 1165). As a matter of law, equitable defenses should remain inapplicable to *United States v. Washington*.

3. Tulalip and Swinomish Previously, and Correctly, Took The Position That Laches Cannot Bar U&A Adjudications Under Paragraph 25(a)(6)

Two of the Responding Tribes that now seek to apply laches—Tulalip and Swinomish—have previously argued that laches is not a defense available in *United States v. Washington* U&A adjudications. *United States v. Washington*, 88 F.Supp.3d at 1211 (citing Response to Motion for Summ. J. and Joinder in Makah Reply to Response, *United States v. Washington*, No. 2:09-sp-00001-RMS, Dkt. # 275 (W.D. Wash., Dec. 23, 2014)). In answering whether "laches is applicable to defeat a Paragraph 25(a)(6) claim," Tulalip and Swinomish argued that position "is not supported by the law of this case, is not good policy for *U.S. v. Washington* and is flatly contradicted by the Order on Paragraph 25." Response to Motion for Summ. J. and Joinder in Makah Reply to Response, *United States v. Washington*, No. 2:09-sp-00001-RMS, Dkt. # 275 at p. 2 (W.D. Wash., Dec. 23, 2014).

Correctly contending laches is inapplicable to treaty rights claims, Tulalip and Swinomish noted in *Subproceeding 09-1* that the doctrine of laches does not apply in *United States v. Washington*. *Id*. (citing *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998); Order of Feb. 13, 1990 at 17-20, Subp. 89-2)). Tulalip and Swinomish further argued that "[t]here is no justification for applying laches to a continuing jurisdiction case… where the Court has expressly

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reserved jurisdiction to hear claims to discern" tribal U&A claims and where a U&A request for determination "is not barred by any statute of limitations." *Id.* Most importantly, Tulalip and Swinomish reasoned "that the creation of laches defense will force disputes to be filed rather than resolved informally," explaining the Court would get "a flood of claims" because "the parties would have to bring all disputes immediately to the Court's attention for fear that passage of time would erode their ability to seek relief." *Id.* at 5.

Stillaguamish agrees with the correct legal position argued by Tulalip and Swinomish in *Subproceeding 09-1*, and Tulalip and Swinomish should be judicially estopped from arguing to the contrary now.[3] The legal reasoning and policy considerations articulated by Tulalip and Swinomish six years ago remain equally persuasive in this case. The Court should therefore continue to consider Tulalip and Swinomish's prior position that laches does not apply to bar RFDs made pursuant to Paragraph 26(a)(6) of *Final Decision No. 1*. As a matter of law, the Court should continue to hold that laches does not apply in Paragraph 26(a)(6) proceeding.

CONCLUSION

The Responding Tribes cannot change the law and show that laches is applicable to Stillaguamish's treaty rights claim. Stillaguamish respectfully requests that this Court determine as a matter of law that the affirmative defense of laches does not apply to bar Stillaguamish's RFD.

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[3] Tulalip and Swinomish should be judicially estopped from making a 180-degree turn on laches so as to argue for its applicability to Stillaguamish now. The doctrine of judicial estoppel codifies the rule that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation omitted). The *New Hampshire* Court identified three factors that typically inform the decision whether to apply judicial estoppel. First, "a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* at 750 (internal quotation omitted). Second, the party must have "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quotation omitted). Finally, the Court considers whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair determinant on the opposing party if not estopped." *Id.* at 751. All three of the *New Hampshire* factors are clearly met here: Tulalip and Swinomish seek to assert a defense they argued could never apply previously; the Court ultimately agreed with the arguments advanced by Tulalip and Swinomish in *Subproceeding 09-1*; and, Tulalip and Swinomish would certainly derive an unfair advantage from shifting legal positions now.

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