

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Petitioner,

v.

STATE OF WASHINGTON, et. al.,

Defendant.

No. C70-9213 RSM

Subproceeding: 17-3

THE TULALIP TRIBES’ OPPOSITION TO
STILLAGUAMISH’S PORT SUSAN
SUMMARY JUDGMENT MOTION

NOTED ON MOTION CALENDAR:
January 29, 2021

Tulalip responds to the Stillaguamish Motion for Partial Summary Judgment of January 7, 2021, Dkt No. 170 & 22336. Stillaguamish makes numerous errors in its motion.

1. Stillaguamish States That There is “Undisputed Evidence of Village Locations and Encampments.”

This is incorrect, as village locations and encampments continue to be disputed particularly as to who occupied those places. Further, it is well settled that the mere existence of villages does not establish an area as a usual and accustomed fishing place of a tribe. See 459 F. Supp. 1020, at 1059.

2. Stillaguamish Erroneously States that the Expert Testimony of Anthropologist Dr. Barbara Lane “Established That Stillaguamish Fished Port Susan At and Before Pre-

1 Treaty Times.” Stillaguamish Motion of January 7, 2021, Page 1.

2 However, Dr. Lane testified that Stillaguamish was a riverine tribe and this Court so
3 confirmed. F.F. 146, 384 F. Supp. 312 (1974).

4 3. Stillaguamish Erroneously States That the Marine Waters of Port Susan is a Fishing
5 Ground of Stillaguamish “In Common With” the Tulalip Tribes. Stillaguamish
6 Motion, January 7, 2021, Dkt 170 & 22336, Page 2.

7 This is incorrect. There is no “in common” area. The 1984 Settlement Agreement
8 between the Stillaguamish and Tulalip makes clear that in the area of Port Susan south of the
9 Kayak Point line “the Tulalip Tribes have primary fishing rights in all of area 8A,” other than,
10 of course, the northern part of that area north of Kayak Point. See Agreement of 1984, page 4,
11 Ex. 1 hereto. This agreement was confirmed by the Court’s order of May 8, 1985, 626 F. Supp.
12 1405, 1481 (1985). Thus, there is no “in common with” fishing ground in Port Susan south of
13 Kayak Point. The agreement concerning the agreement between Stillaguamish and Tulalip
14 “shall continue to bind those two tribes consistent with” the terms of the Court order
15 concerning the places in the order of May 3, 1985. Order Approving Settlement Agreement
16 Between the Stillaguamish and Tulalip Tribes Regarding Puget Sound Fishing Area Claims
17 (626 F. Supp. 1405, 1480 (1985)).

18 The Court has often noted the importance of “primary rights” determining usual and
19 accustomed grounds and stations. For example, usual and accustomed grounds and stations
20 were determined for the Port Gamble Band of Clallam Indians to include the Sekiu River but
21 were noted to be “subject to the control and regulation of the Makah Indian Tribe.” 626 F.
22 Supp. 1405, 1442 (1981) (The court has held that any treaty time exercise or recognition of
23 paramount or preemptive fisheries control (primary right control) by a particular tribe
24
25

1 constitutes the primary right of that tribe to control fisheries). See Finding of Fact number 97,
2 626 F. Supp 1405, 1531 (1985).

3 4. Stillaguamish States That it is Incumbent upon Tulalip to “Produce Evidence Upon
4 Which the Trier of Fact Could Reasonably Find That Stillaguamish Did Not Regularly
5 Fish Port Susan At and Before Pre-Treaty Times Period.”

6 There is no such “prove the negative” rule in this case. Stillaguamish has the burden to
7 affirmatively prove where its usual and accustomed grounds and stations are. It is not up to the
8 Tulalip or any other tribe to prove a negative and demonstrate where Stillaguamish did not fish.
9 The Stillaguamish, as the tribe seeking to expand its usual and accustomed fishing areas,
10 “bear[s] the burden to establish the location of its ‘usual and accustomed places,’” which it
11 must prove by “a preponderance of the evidence found credible and an inference is reasonably
12 drawn there from.” *US v. Washington*, 384 F. Supp. 312, 348 (1978); see also *US v.*
13 *Washington*, 459 F. Supp. 1020, 2059 (W.D. Wash Sep 10, 1975). “In determining usual and
14 accustomed fishing places, the court cannot follow stringent proof standards because to do so
15 would likely preclude a finding of any such fishing areas. Notwithstanding the court’s prior
16 acknowledgment of the difficulty of proof, the Tulalips have the burden of producing evidence
17 to support their broad claims.” See also *United States v. Lummi Tribe*, 841 F. Supp. 317, 231
18 (9th Cir. 1988).

20 5. Stillaguamish Suggests That the 1984 Agreement Between Stillaguamish and
21 Tulalip Actually Establishes Stillaguamish Usual and Accustomed Ground and Stations.

22 However, the Court’s order approving the Agreement does no such thing and merely
23 notes that “it is hereby held that invitee rights to fish in the Stillaguamish River are irrevocably
24

1 extended to the Tulalip Tribes . . .” Order of May 8, 1985, page 3, 626 F. Sup. 1405, 1481
2 (1985).

3 The Court’s order further provides that “The Tulalip Tribes, as of the date of this order,
4 shall irrevocably extend an invitation to the Stillaguamish to fish in northern 8A without
5 prejudice to the latter’s right to establish its independent right to fish in that area.” Order of
6 May 8, 1985 (id). This order does not establish the subject areas as Stillaguamish usual and
7 accustomed places. Stillaguamish has the burden to affirmatively prove its fishing places by a
8 preponderance of the evidence.¹
9

10 6. Stillaguamish Relies on Proceedings Before the Court of Claims and the Indian Claims
11 Commission.

12 The Court has disfavored using ICC proceedings in the treaty fishing rights context. In
13 1978, the Court held:

14 “Proceedings before the Court of Claims . . . dealt with compensation claims
15 for tribal lands taken by the United States and in no way dealt with
16 asserted Indian treaty fishing rights.” 459 F. Supp. 1020, 1042 (1978).

17 It is clear that these were land claims cases and were not intended to adjudicate treaty
18 fishing rights. In most cases, the focus was on compensable land takings. Such claims, as
19 fishing rights, were generally severed from land claims dockets.

20 The Commission had limited authority and “had jurisdiction only to award damages.”
21 Cohen’s Handbook of Federal Indian Law (2005 Edition), § 5.06[3]. The work of the
22 Commission is often referred to as dealing with Indian “Estate and Land Claims” Cohen supra.

23
24 ¹ Tulalip continues to support Stillaguamish expansion into the waters north of Kayak
25 Point as agreed to in 1984.

1 § 5.06[3], fn 396. Most if not all claims for treaty fishing rights were voluntarily dismissed.
2 Materials from proceedings focused on land claims is inappropriate and not helpful in
3 determining usual and accustomed areas involving fishing rights.

4 7. Stillaguamish Relies Partially on Evidence Given by Dr. Carroll Riley.

5 Dr. Riley was an anthropologist procured by the State of Washington in the original
6 trial. However, this Court discounted his testimony as follows:

7 “In summary, the Court finds that where their testimony differs in any
8 significant particular, the testimony of Dr. Lane is more credible and satisfactory
9 than that of Dr. Riley and is accepted as such except as otherwise specified.”
10 384 F. Supp. 312, 350 (1974).

11 Material referencing Dr. Riley is not helpful in determining fishing rights in this case.

12 8. Stillaguamish Also Uses Speculative and Ambiguous Questions and Answers from Dr.
13 Deward Walker’s Deposition as Support for Their Case.

14 Dr. Walker was not engaged to prove where Stillaguamish did or did not fish in a
15 particular area. Rather, he was engaged to rebut the inferences or claims in Dr. Friday’s report,
16 which he did in an expert report exchanged with all the parties. Ex. 2 hereto. A speculative
17 question as to whether Stillaguamish might have fished in Port Susan is no basis for finding
18 usual and accustomed fishing areas in that location. Dr. Walker indicates that due to the
19 ambiguity of just where and under what conditions fishing might be taking place, his answer is
20 being used far beyond his intention. See Declaration of Dr. Deward Walker, January 25, 2021.

21 Dr. Walker’s statements in his deposition do not support the Stillaguamish motion to
22 have all of Port Susan declared Stillaguamish usual and accustomed area. Tulalip is not
23 contesting that Stillaguamish fished to some degree in the very northern part of Port Susan
24 north of Kayak Point (as described in the 1984 Settlement Agreement, Ex. 1 hereto). Dr.
25

1 Walker's statements are consistent with the 1984 Settlement Agreement, but no more than that.
2 In other words, although Dr. Walker says that Stillaguamish "fished in Port Susan" (Transcript,
3 p. 57, line 19), that should be interpreted as referring to only the area subject to the Settlement
4 Agreement – or at least as being ambiguous on that point – and not proof of any kind that
5 Stillaguamish fished in parts of Port Susan not covered by the 1984 Settlement Agreement.²
6 See Walker Declaration.

7
8 Dr. Walker's position on Stillaguamish fishing in Port Susan was clearly stated in his
9 expert rebuttal report exchanged with the parties on July 31, 2020.

10 In that report he states:

11 Again, what matters is if these "river people" regularly fished in Port Susan.
12 They did not; they relied on the river and only occasionally came to the coast.
13 There is no information that they even entered the marine waters, and given their
14 canoes, which were built for river use, it is unlikely that they could have fished
the deep water without help from tribes such as the Snohomish who regularly
used Port Susan and Puget Sound."

15 Review of Chris Friday Stillaguamish Report, July 31, 2020, page 17, Ex. No. 2
16 hereto.

17 Stillaguamish failed to meet its burden of proof and cannot rely on Dr. Walker's
18 ambiguous statements as proof of usual and accustomed places – especially on summary
19 judgment where all inferences must favor the non-moving party. *Dominguez-Curry v. Nev.*
20 *Transp. Dep't*, 424 F.3d 1027, 1039 (9th Cir. 2005) (when evaluating motion for summary
21 judgment, all inferences must be drawn in favor of non-moving party).

22 Ambiguous testimony in depositions or declarations preclude summary judgment.
23

24 ² And of course, Stillaguamish agreed that Tulalip possess primary rights in most of
25 Port Susan. See Paragraph No. 3 above.

1 *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at *59 (C.D. Cal. 2014) (on
 2 motion for summary judgment, ambiguous expert testimony is to be construed in light most
 3 favorable to non-moving party), citing *Smith v. Jackson*, 84 F.3d 1213, 1230, fn. 8 (9th Cir.
 4 1996). *Charm Floral v. Wald Imps., Ltd.*, 2012 U.S. Dist. LEXIS 16012, at *20 (W.D. Wash.,
 5 Feb. 9, 2012) (denying summary judgment, in part, where deposition testimony was ambiguous
 6 on material issue). *Columbia Cmty. Credit Union v. Chi. Title ins. Co.*, 2010 U.S. Dist. LEXIS
 7 12624, at *19 (W.D. Wash., Feb. 12, 2010) (denying summary judgment where deposition
 8 testimony was ambiguous; finder of fact is to weigh testimony and resolve ambiguities at trial).
 9 See also *Reid v. Google, Inc.*, 50 Cal. 4th 512, 541 (2010) (“the task of disambiguating
 10 ambiguous utterances is for trial, not for summary judgment” . . . “On a motion for summary
 11 judgment the ambiguities . . . must be resolved against the moving party”).

12
 13 The Stillaguamish summary judgment motion notes that the Swinomish expert, Dr.
 14 Gulig, opines that Stillaguamish did not regularly fish Port Susan at treaty times. Stillaguamish
 15 Motion for Partial Summary Judgment, pp. 16-18. That testimony also makes it clear that there
 16 may be a genuine issue of material fact for trial.

17
 18 9. Joinder and Concurrence in Upper Skagit Arguments in subparagraphs B through F of
 19 Section III Argument Contained in That Tribe’s Motion for Summary Judgment, Filed
 20 January 7, 2021, Dkt No. 174 & 22340

21 Tulalip Joins and Concurs in Upper Skagit arguments in subparagraphs B through F of
 22 Section III Argument contained in that Tribe’s Motion for Summary Judgment filed January
 23 7, 2021, Dkt. No. 174 & 22340, for the reasons stated therein.

24 10. Joinder and Concurrence in Upper Skagit Motion to Exclude Certain Expert Testimony
 25 Filed by the Upper Skagit Tribe on January 7, 2021, Dkt No. 173 & 22339.

1 Tulalip joins in the views expressed by Upper Skagit for the reasons noted by them in
2 their motion.

3 11. Conclusion

4 In the final analysis, we are left with little, if any, probative evidence that Stillaguamish
5 regularly fished in marine waters. Dr. Friday's report is essentially useless on this point as it
6 covers pre-treaty times, a catalog and review of species available in waters that Stillaguamish
7 claims (but without clear documentary evidence of them actually fishing in the claimed waters),
8 pre-history of the Pacific Northwest (irrelevant to treaty times), and a discredited theory of
9 "radiating Tribal Interests" as the basis for just "where" Stillaguamish supposedly exercised
10 fishing at treaty times. There is a paucity of evidence to support the Stillaguamish claim and it
11 should be dismissed.
12

13 DATED this 25th day of January, 2021.

14
15 Respectfully Submitted,

16 MORISSET SCHLOSSER JOZWIAK & SOMERVILLE

17 By: /s/ Mason D. Morisset
18 Mason D. Morisset, WSBA # 00273
19 E-mail: m.morisset@msaj.com
20 218 Colman Building, 811 First Avenue
21 Seattle, Washington 98104
22 Tel: 206-386-5200
23 Attorneys for the Tulalip Tribes
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, I electronically filed the foregoing *The Tulalip Tribes' Opposition to Stillaguamish's Port Susan Summary Judgment Motion* 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: January 25, 2021.

MORISSET SCHLOSSER JOZWIAK & SOMERVILLE

By: /s/ Mason D. Morisset
Mason D. Morisset, WSBA # 00273
E-mail: m.morisset@msaj.com
218 Colman Building, 811 First Avenue
Seattle, Washington 98104
Tel: 206-386-5200
Attorneys for the Tulalip Tribes

<https://morissetschlosser.sharepoint.com/sites/CompanyShare/Shared Documents/T-Drive/WPDOCS/0075/98804 Subp 17-3/Pleadings/17-3 Tulalip Response to Stillaguamish Motion for Partial SJ dft. 10 1-25-21.docx>