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' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT NOTED ON MOTION CALENDAR: January 29, 2021

I. INTRODUCTION

The Tulalip Tribes hereby reply in support of their motion for partial summary judgment filed January 7, 2021 (Dkt. #176). The arguments raised in the Stillaguamish Tribe's Response in Opposition dated January 25, 2021 (Dkt. #194) are without merit and fail to provide any valid reason why this Court should deny Tulalip's motion for partial summary judgment. Despite having the burden of proof at trial, Stillaguamish has no factual evidence to support its claims to usual and accustomed fishing areas in the claimed marine waters – notwithstanding having lengthy and extensive opportunity to develop such required evidence both prior to and during this litigation. Stillaguamish relies solely on the unmoored speculation

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of its purported expert, Dr. Friday, while failing to provide any actual evidence whatsoever of fishing by Stillaguamish people at treaty time in claimed marine waters. Lacking any specific facts to support its claims, summary judgment must be entered against Stillaguamish and in favor of Tulalip.

II. REPLY ARGUMENT

A. The Stillaguamish Response Misstates the Applicable Summary Judgment Standard – Tulalip Carried Its Burden on Summary Judgment by Pointing Out the Absence of Any Evidence to Support Stillaguamish's Claims.

Stillaguamish concedes that it would have the burden of proof at trial to prove its claims of usual and accustomed fishing areas in marine waters. Dkt. #194, p. 4. Tulalip, in its motion for partial summary judgment, explained to the Court that Stillaguamish has wholly failed to produce or provide any factual evidence to support its claims in this case. Tulalip's showing of an absence of evidence to support Stillaguamish's claims is sufficient to satisfy Tulalip's initial summary judgment burden and to shift the burden to Stillaguamish to show specific material facts that support its claims and that create a genuine issue of fact for trial. *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). Tulalip need not provide any affidavits or affirmative evidence of any kind to support its motion for summary judgment. *Id.; see also Warren v. Horne*, 2020 U.S. Dist. LEXIS 179327 (W.D. Wash., July 23, 2020) at *29 (moving party need not introduce any affirmative evidence but may simply point out the absence of evidence to support nonmoving party's case).

In *Celotex*, the Supreme Court directly rejected the legal argument made by Stillaguamish in its response brief regarding the required burdens on summary judgment. In

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Celotex, a plaintiff sued for wrongful death. The defendant, Celotex, moved for summary judgment arguing that the plaintiff could not show any evidence that the decedent had been exposed to Celotex' asbestos products. While the District Court granted summary judgment in Celotex' favor, a divided Court of Appeals reversed on grounds that Celotex had failed to support its motion with affirmative evidence to *negate* the plaintiff's allegations of asbestos exposure. 477 U.S. at 319.[1]

The Supreme Court reversed the Court of Appeals (and directly rejected the argument made by Stillaguamish here) – holding that in a case (like this one) where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment satisfies its burden "by 'showing' - - that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 324-25. The Supreme Court held that a party in Tulalip's position (moving for summary judgment, but not carrying the burden of proof at trial) need not file any affidavits or evidence of any kind to carry its burden on summary judgment. *Id.* at 323-324. So long as there has been adequate opportunity to develop the record through discovery, etc., a party in Tulalip's position need do nothing more than point out that the non-moving party lacks the evidence necessary to support its claims. *Id.* at 325. That is what Tulalip properly did in this case and Tulalip is entitled to summary judgment.

[1] The dissenting judge in the Court of Appeals argued the majority's decision requiring a party moving for summary judgment to make an affirmative evidentiary showing even where the plaintiff lacked any evidence to support its case "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Celotex*, 477 U.S. at 322. The dissenting judge's view was vindicated by the Supreme Court's subsequent reversal and supports granting Tulalip's motion for partial summary judgment here where Stillaguamish has no specific factual evidence to support its claims.

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The Ninth Circuit has repeatedly applied the rule of *Celotex* confirming that a party in Tulalip's position may, to support a motion for summary judgment, rely solely on the non-moving party's lack of evidence to support their claims. In *Devereaux*, the Ninth Circuit sitting *en banc* explained that: "When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'" *Devereaux*, 263 F.3d 1076, *quoting Celotex*, 477 U.S. at 325. In *Devereaux*, summary judgment for the defendant was affirmed where, as here, the plaintiff lacked and was unable to provide specific factual evidence to support their claims. *See also Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (holding that the *Celotex* "showing" can be made by "pointing out through argument –the absence of evidence to support plaintiff's claim"). Recent Ninth Circuit cases also reject Stillaguamish's argument and favor Tulalip's motion for summary judgment. *Oliver v. Baca*, 913 F.3d 852, 857 (9th Cir. 2019) ("Where, as here, the opposing party will have the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'"); *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 589-90 (9th Cir. 2018) (the Tribes and State (moving parties) carried their burden on summary judgment by pointing to an absence of evidence to support non-moving party's affirmative defense, to which non-moving party would have had burden of proof at trial).[2]

[2] Stillaguamish relies substantially on but quotes selectively from the Ninth Circuit panel decision in *Nissan Fire & Marine Ins. Co. v. Fritz Cos*., 210 F.3d 1099 (9th Cir. 2000). That case does not support Stillaguamish's argument as there, the Ninth Circuit also agreed that the moving party may carry its burden of production on summary judgment by showing that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial. *Id.* at 1102, 1106. Where a moving party is attempting to affirmatively negate an element

Likewise, this Court faithfully follows the *Celotex* standard. *Warren v. Horne*, 2020 U.S. Dist. LEXIS 179327 (W.D. Wash., July 23, 2020) at *29 ("The moving party has the initial burden of production to demonstrate the absence of any genuine issue of material fact. [citing *Devereaux*]. To carry this burden, the moving party need not introduce any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the nonmoving party's case. [citing *Fairbank*]").

Here, there is no question that Tulalip met its initial burden. Tulalip pointed out to the Court in its motion that the only "evidence" relied upon by Stillaguamish to support its claims was the speculations contained within the Dr. Friday report. Tulalip's motion explained why the information in the Friday report does not create any genuine issue of fact for trial – as the information provides no adequate basis for Stillaguamish to claim usual and accustomed fishing areas in marine waters. Again, Tulalip has no duty to provide any affirmative evidence to support its motion – it can and properly does rely on Stillaguamish' total lack of evidence.

B. Dr. Friday's Speculative and Factually Unsupported Opinions Are Not Sufficient to Withstand Summary Judgment.

The fact that a nonmoving party has retained an expert in support of its case is not, standing alone, sufficient to bar summary judgment. While Stillaguamish cites *In re Apple*

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of a plaintiff's claim, a more affirmative evidentiary showing may be required to attain summary judgment. That is not the case here where Tulalip is arguing a total lack of factual evidence to support Stillaguamish's claims and its burden of proof at trial. The *Nissan Fire* court was also concerned with premature motions for summary judgment, filed without sufficient opportunity for discovery. *Id.* at 1105-06. That also is not a concern here given the extensive discovery that has occurred to date here. Although the *Nissan Fire* case does not support Stillaguamish here, it has in any event been superseded by the *en banc* decision in *Devereaux*, which is the relevant governing law here.

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Computer Sec. Litig., 886 F.2d 1109, 1116 (9th Cir. 1989) for a "general rule" that "summary judgment is inappropriate where an expert's testimony supports the nonmoving party's case," the Ninth Circuit in that case actually affirmed summary judgment and held that "where the evidence is clear as that in this record, the court is not required to defer to the contrary opinions of plaintiffs' 'expert'". *Id.* Likewise, in *Pakootas*, the Ninth Circuit affirmed summary judgment against the non-moving party despite that party's reliance on an expert report and testimony that it claimed established genuine issues for trial. *Pakootas*, 905 F.3d at 587-595 (reviewing expert evidence and finding that it failed to create genuine issue of material fact).

Expert opinion is insufficient, standing alone, to create a genuine issue of fact for trial because an expert is not called to testify to or establish specific facts – rather, an expert is called to provide his opinions. Rule 56(c)(4) provides that: "An affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." There is no exception for expert witnesses. Although expert testimony may be introduced in summary judgment proceedings through an affidavit or declaration, "[t]he affidavit or declaration must satisfy the requirements for summary judgment affidavits and declarations as well as the requirements for expert testimony. In other words, in addition to qualifying as expert testimony, it must be made on personal knowledge, set out facts that would be admissible at trial, and show the expert's competence to testify on matters stated." Moore's Federal Practice, Third Edition, Section 56.94[4][a].

Dr. Friday's declaration (the sole basis for Stillaguamish opposition) fails to meet the standard required by Rule 56(c)(4) as it merely consists of his opinion, without adequate factual

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basis, and fails to establish any specific facts showing that Stillaguamish people fished in marine waters at treaty time. Dr. Friday's declaration fails to make any representation that his statements are based on personal knowledge.[3] Without proper specific factual evidence to support Stillaguamish's claims, summary judgment must be granted to Tulalip.

Stillaguamish relies on *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985) where summary judgment was denied due to the affidavits submitted by medical doctors who had personally examined the plaintiff (thus satisfying the personal knowledge requirement) and who disclosed the first-hand factual basis for their opinions in their affidavits. Here, however, despite providing a report in excess of 200 pages and sitting for deposition, Dr. Friday has yet to produce or provide any historical or other evidence of Stillaguamish people regularly fishing in marine waters sufficient to establish usual and accustomed areas. In other words, here, Dr. Friday lacks any relevant personal knowledge that is required to support a summary judgment affidavit and has not offered any specific facts (nor has any other Stillaguamish witness) that creates a genuine issue as to whether Stillaguamish people regularly fished in marine waters, with the possible exception of northern Port Susan. Summary judgment is appropriate because Dr. Friday's testimony and opinions, untethered to any personal knowledge or actual evidence

[3] This is not to suggest that Dr. Friday would have to have personally seen a Stillaguamish person fishing at treaty-time, which would of course be impossible – but here, Dr. Friday has not established any personal knowledge of any factual evidence of any kind of Stillaguamish people fishing in marine waters. Rather, he has relied solely on inferences and speculation based on the kinds of evidence (village locations, travel, etc.) that have previously been held insufficient to establish usual and accustomed fishing areas. Such inadequate evidence is insufficient to create a genuine issue for trial here.

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of fishing by Stillaguamish people, are not sufficient for Stillaguamish to establish the presence of a genuine issue of disputed fact for trial in this case.

Dr. Friday's January 25, 2021 declaration submitted in opposition to the respective Tulalip, Upper Skagit, and Swinomish motions for summary judgment takes a noticeably more affirmative opinion on Stillaguamish treaty-time fishing in marine waters than is found in his expert report or that was expressed in his deposition. While he now asserts in his recent declaration that the "historical and ethnographic evidence demonstrates that at and before treaty times, the Stillaguamish Tribe customarily fished the marine and estuarine shorelines of Camano and Whidbey Islands, and the open waters of Skagit Bay, Port Susan, Deception Pass and Saratoga Passage" (Dkt. #197, para. 2), his expert report did not make any such definitive opinions. *See* Dkt. 175-1, pp. 3-5 (stating conclusions of Friday report). And at deposition, Dr. Friday could likewise offer no affirmative evidence of Stillaguamish fishing in marine waters at treaty time. *See* Dkt. #174, pp. 4-9 (summarizing relevant deposition testimony). This late change in testimony is simply a naked opinion and remains untethered to any actual evidence of Stillaguamish people fishing in marine waters at treaty time and fails to establish any genuine issue of material fact for trial.

Stillaguamish asserts that a dispute regarding credibility of an expert witness requires denial of summary judgment and proceeding to trial. Not so. Here, while Tulalip does challenge Dr. Friday's credibility and his opinions, that is not the only reason why summary judgment should be granted in Tulalip's favor here. Rather, summary judgment is proper because Stillaguamish has not established necessary underlying facts to support its claims or the basis for Dr. Friday's expert testimony. Expert testimony must be grounded in a proper

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factual basis and here it is not. Neither Dr. Friday's report, nor his deposition testimony, nor his new declaration provides any affirmative evidence of Stillaguamish people fishing in marine waters at treaty-time. For that reason, summary judgment is appropriate.

Stillaguamish spends much of its response arguing that Dr. Friday is qualified and that his testimony is admissible. Tulalip does dispute the admissibility of Dr. Friday's opinions because all expert testimony must be "properly grounded, well-reasoned and not speculative before it can be admitted". Fed. R. Evid. 702 advisory committee notes to 2000 amendment. Dr. Friday's testimony fails this test. Nor is his methodology, including his application of a "radiating interests" test, useful to the fact-finder as it is wholly inconsistent with the legal standards used to determine usual and accustomed areas in this case. While Tulalip reserves all rights to further challenge Dr. Friday, his qualifications, and his opinions to the extent this case proceeds, Stillaguamish's arguments on credibility or underlying admissibility of Dr. Friday's opinions are not sufficient to withstand Tulalip's pending motion for summary judgment. The principal basis for Tulalip's motion is that Stillaguamish has not put forward and does not have any specific facts or evidence that would support its claim of regular treaty-time fishing in the disputed waters. Tulalip also concurs in the arguments of Swinomish and Upper Skagit as to why the Stillaguamish citations of information not properly before the court should not be considered. Dr. Friday's opinions, admissible or otherwise, are not sufficient to create a dispute of fact given that Dr. Friday has not presented, and has no personal knowledge of, any Stillaguamish fishing in claimed waters at treaty-time.

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C. Tulalip Has Not Misstated the Applicable Burden of Proof In This Case; Stillaguamish Lacks the Evidence Necessary to Prevail on its Claims or to Create A Genuine Issue of Material Fact for Trial.

Stillaguamish lacks the evidence necessary to prevail on its claims or to create a genuine issue of material fact for trial. First, this Court has made it clear that evidence of village locations is not enough to prove fishing at those locations. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1978). In determining the Tulalip Tribes U&A in that sub-proceeding, the Court required actual evidence of fishing in addition to other more circumstantial evidence from which inferences could be drawn. *Id.* ("Notwithstanding the court's prior acknowledgement of the difficulty of proof, the Tulalips have the burden of producing evidence to support their broad claims"). Second, the Ninth Circuit has also focused on the importance of evidence of fishing to support usual and accustomed area claims. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432, 434 (9th Cir. 2000) (Muckleshoot marine U&A limited to Elliott Bay and not to broader waters of Puget Sound because the record contained no evidence of fishing beyond Elliott Bay). Here, there is simply no evidence of Stillaguamish treaty-time marine fishing. Third, general evidence of travel is not sufficient to establish usual and accustomed areas. *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844, 850 (9th Cir. 2017) (noting that general evidence of travel near or through claimed waters is not sufficient to show that a tribe fished those waters).

III. CONCLUSION

Stillaguamish has failed to demonstrate the presence of any genuine issue of material fact for trial. This Court should grant Tulalip's motion for partial summary judgment.

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DATED this 29th day of January, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2021, I electronically filed the foregoing *Tulalip Tribes Reply in Support of 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: January 29, 2021.

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