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.	Civil No.: C70-9213 Subproceeding No. 17-3 SQUAXIN ISLAND TRIBE'S POST-TRIAL BRIEF

The Squaxin Island Tribe ("Squaxin") did not present, and does not here present, evidence or argument regarding the existence or extent of various tribes' usual and accustomed fishing areas ("U&A") in the disputed area. For this reason, Squaxin will not be submitting individual answers to the nineteen questions enumerated in the Court's memo on post-trial briefing. (Dkt. #278).

Squaxin does, however, value the opportunity to give input to the Court, and appreciates the additional time made available to the parties to do so. Squaxin's post-trial brief has the following two components:

1. A recommendation that the Court's decision be as limited as possible to the factual questions presented in this subproceeding, and be couched in a manner that will not be

SQUAXIN ISLAND LEGAL DEPARTMENT
3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

perceived as altering the law of the case. Squaxin respectfully asserts that this approach best serves stability and consistency in the case at large, and is least likely to encourage re-litigation of settled matters in the future.

2. Squaxin's limited observations regarding the law of the case pertaining to three issues: (a) travel; (b) judicial estoppel; and (c) primary rights.

I. SQUAXIN REQUESTS THAT THE COURT NOT EXTEND THE IMPACT OF ITS DECISION BEYOND THE CONFINES OF SUBPROCEEDING 17-03.

As noted above, Squaxin takes no position on the various asserted rights to U&A in the disputed area set forth by the Stillaguamish, Swinomish, Tulalip, and Upper Skagit Tribes. Still, Squaxin devoted resources to monitoring, and at limited times participating in, motion practice and trial. As the Court is aware, each new subproceeding opened to establish, reduce, or enlarge any tribe's U&A is steeped in analogy to previous subproceedings aimed at those same ends. The future of any tribe's U&A could be impacted by a ruling in any of these subproceedings. In particular, modifying precedent, or changing the law of the case, could encourage re-litigation of matters that have already been settled. Squaxin asserts that the Court can resolve the instant U&A dispute without disturbing the overall status quo, and urges the Court to do so.

II. SQUAXIN OBSERVATIONS ON TRAVEL, JUDICIAL ESTOPPEL, AND PRIMARY RIGHTS.

In particular, Squaxin draws this Court's attention to three issues that appear in one or more of the Court's post-trial questions: (1) travel; (2) judicial estoppel; and (3) primary rights.

A. Travel.

Multiple determinations of various tribes' U&A have turned, in whole or in part, on the impact that treaty-time travel has on the establishment of an individual tribe's U&A. As a result, this Court and the Ninth Circuit have opined on travel on multiple occasions. The rulings

SQUAXIN ISLAND LEGAL DEPARTMENT
3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

regarding travel have been, accordingly, parsed on multiple occasions by parties seeking either to benefit from, or defend against, evidence of treaty time travel in a U&A dispute.

Despite all of this, the law of the case regarding travel is well-established. The starting point for evaluating the impact of evidence of treaty time travel is that "occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *United States v. Lummi Nation*, 876 F.3d 1004, 1010, (9th Cir. 2017). No court, even when accepting evidence of travel in finding U&A for a given Tribe, has disavowed or altered this principle. Rather, where courts accepted travel as among the bases for establishing U&A, they have found *more* than "occasional and incidental trolling." *See id.* Among these cases are instances where the Court has found geographic indicators in Judge Boldt's original ruling that support the inference that the fishing was more than "occasional and incidental." *Id.* at 1009, 1010; *see also, Tulalip Tribes v. Suquamish Indian Tribe,* 794 F.3d 1129, 1134-5 (9th Cir. 2015). This Court made a finding consistent with these travel principles involving Squaxin in subproceeding 14-02. Dkt. #50, Section B 2, pp. 11-12. In that case, and in others since, this Court has denied motions for reconsideration that questioned the application of these principles. *See* subproceedings 14-02, Dkt. #56; 19-01, Dkt. #85; and 20-01, Dkt. #50.

Not only is the Court bound to adhere to these principles as the law of the case, but any expansion of the travel doctrine runs the risk of encouraging an increased amount of U&A litigation among tribes.

B. Judicial Estoppel

In the order regarding post-trial briefing, the Court raised the issue of a tribe taking "differing positions based on its particular interest" and sought input on a potential judicial

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3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

response. Dkt. #278, Question #9. Squaxin asserts that consistent application of the doctrine of judicial estoppel will foster consistent rulings, and help limit litigation going forward.

Under the judicial estoppel doctrine, when a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, it may not thereafter assume a contrary position simply because its interests have changed. *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001). The following factors inform a court's decision whether to apply the doctrine in a particular case. First, a party's later position must be clearly inconsistent with its earlier position. *Id*. Second, courts ask whether the party 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*. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id*.

This Court has previously recognized that, due to the wide variation in factual scenarios present in *U.S. v. Washington*, the mere appearance of inconsistency in a tribe's position is insufficient for the application of the judicial estoppel doctrine:

> Tulalip may take different positions on the meaning of the term "Puget Sound" when applied to its own U&A as opposed to the Suquamish U&A without running afoul of the doctrine of judicial estoppel, because the underlying factual considerations for the two U&A's are different.

United States v. Washington, 20 F.Supp.3d 986, 1044 (W. Wash. 2013). Thus, there may be instances where the factual circumstances would allow a tribe to advance an argument with an apparent, or facial, inconsistency with its own prior position.

In situations where a tribe has successfully argued a truly inconsistent position in the past, however, the doctrine of judicial estoppel should be applied to parties in *U.S. v.*

SQUAXIN ISLAND LEGAL DEPARTMENT
3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

Washington. Applying the doctrine will promote fairness and consistency, and could help limit re-litigation of settled matters.

Consistent with its statement at the opening of this brief, Squaxin takes no position in the instant subproceeding on whether the doctrine of judicial estoppel is applicable to the parties' current arguments relating to fishing in the disputed area.

C. Primary Rights

In the Court's order on post-trial briefing, numerous questions raise the doctrine of primary rights, either directly or indirectly. Dkt. #278, Questions 4, 5, 6, and 7. Squaxin respectfully suggests that the Court can reach resolution in this subproceeding without further elucidation of the primary rights doctrine.

Stillaguamish's Request for Determination ("RFD") does not seek primary rights in any of the disputed waters. Dkt. #4. The responses to the RFD filed by Swinomish, Tulalip, and Upper Skagit do not contain assertions of primary rights. Dkt. #95, 96, 97. Stillaguamish's trial brief does not mention primary rights. The Swinomish trial brief also does not address primary rights. The Upper Skagit's trial brief makes a brief reference to primary rights in a discussion of intermarriage and Mowitch Sam. Dkt. #257 p. 12-13. Tulalip's trial brief makes a single mention of primary rights in a block quote from a 1985 ruling from this Court in its opposition to Dr. Friday's anticipated testimony.

This Court has previously stated that a determination of a tribe's request for U&A generally includes consideration of the possibility of primary rights claims by other tribes. *United States v. Wash.*, 626 F. Supp. 1405, 1531, (W. Wash. 1985) (considerations include "any treaty-time exercise or recognition of paramount or preemptive fisheries control (primary right control) by a particular tribe."). Squaxin's understanding of the pleadings, however, is that no

SQUAXIN ISLAND LEGAL DEPARTMENT
3711 SE OLD OLYMPIC HWY
SHELTON, WASHINGTON 98584
360.432.1771

Tribe is requesting that it be recognized as holding primary rights in the disputed waters. Squaxin recommends, therefore, that no application of the primary rights doctrine is needed to resolve the matter. Avoiding such application will appropriately serve to limit the impact of the resolution of this matter on the case at large.

To the extent the Court is compelled to address primary rights, the test to be applied is well settled. This Court and the Ninth Circuit have applied "four specific factors to be considered in determining whether a tribe legitimately controlled an area: (1) proximity of the area to tribal population centers; (2) frequency of use and relative importance to the tribe; (3) contemporary conceptions of control or territory; and (4) evidence of behavior consistent with control." *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1143, (9th Cir. 1981).

III. CONCLUSION

Squaxin respectfully urges the Court to rule in a manner that resolves the questions concerning U&A in the disputed area, while having as little impact as possible on any potential future subproceedings.

DATED this 3rd day of June, 2022.

Respectfully submitted,
Attorneys for the Squaxin Island Tribe

/s/David Babcock
David Babcock, WSBA No. 31737
Sharon Haensly, WSBA No. 18158
Kevin Lyon, WSBA No. 15076
3711 SE Old Olympic Hwy
Shelton, WA 98584
Phone: 360.432.1771
Fax: 360.432.3699
E-Mail: dbabcock@squaxin.us
shaensly@squaxin.us
klyon@squaxin.us

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the persons required to be served in this subproceeding whose names appear on the Master Service List.

/s/ Lindsey Harrell
Paralegal
Squaxin Island Legal Department
3711 SE Old Olympia Hwy
Shelton, WA 98584