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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

UNITED STATES OF AMERICA, et al.,

Civil No. 68-513-KI

v.

**YAKAMA NATION'S REPLY
MEMORANDUM IN SUPPORT
OF MOTION FOR ORDER GRANTING
PARTIAL SUMMARY JUDGMENT**

STATE OF OREGON, et. al.,

Defendants.

INTRODUCTION

Colville makes an impassioned cleverly-worded, subtle but wrong headed attempt to revise both the factual and legal history of this case in hopes of convincing this Court that prior Courts really didn't hold what the clear language of these decisions state.

While doing so, however, it in no manner raises a genuine issue of material fact as to the two dispositive factual elements of the issue here – that the Wenatchees, in 1855, had “usual and accustomed fishing places as that term is used in the Treaty of 1855, at Icicle Creek and the Wenatchee Basin, and that the Wenatchee were “full signatories to the Treaty. The application to the undisputed facts of the actual holdings of Judge Marsh in 1992, and the Ninth Circuit in both 1994 and 2006, not the smoke-screen dicta cited by Colville – can only result in the granting of Yakama’s Motion.

ARGUMENT

1. Colville Does Not Deny That It Held Icicle Creek and the Wenatchee Basin as “Usual and Accustomed” Fishing Places in 1855, Nor That They Signed the Yakama Treaty.

As is noted in the following arguments, the sole issue before the Court is whether, under prior holdings of this court and the Ninth Circuit, Wenatchee’s usual and accustomed places vested with the Yakama Nation upon the signing of the Treaty on June 9, 1855.

While arguing that the Court did not hold that there was a vesting of such rights in Yakama, Colville does not dispute either the existence of the Wenatchee right or that Wenatchee signed the Treaty as at least one of the possessors of that interest.¹

¹ Colville does not appear to contest the conclusive effect of the prior rulings, but rather disputes the nature of these rulings. Accordingly, no issue or claim preclusion arguments have been asserted by Yakama. If there are such issues, Yakama relies on its prior briefing on that subject in this case.

Rule 56(e) could not be more clear – a party defending a motion for summary judgment, must “set forth specific facts showing there is a genuine issue of fact for trial.” Here, allegations by Colville, based upon holdings of the Indian Claims Commission or the Court of Claims, that Yakama today is not the tribe contemplated in 1855, or that the Yakama Tribe of 1855 no longer exists, fails to raise an issue of fact as to the vesting of Wenatchee rights in Yakama in 1855. None of the courts involved with this process have ever held that these rulings in any manner effected the issues of who held the fishing rights. For instance, Judge Marsh specifically held that those rulings had no impact upon the issue of Treaty fishing rights that were before him. *United States v. Oregon*, 787 F. Supp. 1557, 1561 (D. Or. 1992) (full cite supplied *infra*, argument 3).

Accordingly, the citation of and reliance on those rulings has no impact on the existence of a genuine issue of fact for trial on this subject. As is discussed *infra*, the issue of the 1894 agreement and its potential impact upon Yakama Treaty rights held at that time is a separate and distinct issue from the issue here – what rights did Yakama obtain in 1855 – regardless of what may or may not have happened 40 years later. Accordingly, the 1894 argument made by Colville is irrelevant to this motion.

As there is no genuine issue of fact to be determined here, the issue of the rights vested in Yakama on June 9, 1855 (treaty signing date) is ripe for a determination on the law.

2. Colville Mischaracterizes The Issue Of Treaty Fishing Rights That Was Before The District Court And The 9th Circuit In The Original Proceeding Here, As Well As The 9th Circuit In 2006.

In its response, Colville asserts that the Court's ruling in the early 1990's did not determine who held the Wenatchee Treaty right extant in 1855. They do so by arguing that those courts held that the Yakama Nation that arose out of the Treaty was not the same as contemplated by Gov. Stevens, that because many of the Wenatchee went to Colville rather than to the Yakama Reservation, and that the Yakama Nation of 1855 does not exist today. They make no argument as to how, legally, those decisions have any impact on the determination of Treaty fishing rights. Yakama submits that whatever the Courts may have intended by those dicta statements, they were clearly not dispositive on the issue of Treaty rights.

Instead, the sole issue before the trial and appellate courts was precisely as Yakama's opening memorandum states – who holds the Treaty rights of the signatories of the Treaty of 1855. As Exhibits 1 and 2 to Yakama's opening memorandum clearly set forth, the Colville, on behalf of the Wenatchee, specifically sought a declaration that they, not Yakama, was the holder of these rights:

WHEREFORE, Intervenor Colville Tribes prays for judgment as follows:

1. That the Court allow the Colville Tribes to enter this litigation on a continuous and equal basis as a plaintiff-intervenor in order to protect, manage, and implement the treaty fishing rights relating to fish runs destined to return to the usual and accustomed fishing places of the Wenatchee,

Ex. 2, Page 2.

Colville placed the issue of who had the right to “protect, manage, and implement” Treaty rights under the Yakama Treaty squarely before the Court. Judge Marsh, based upon the pleadings, succinctly stated the issue before him:

I find that the issue before me is whether The Confederated Tribes of Colville Reservation may exercise authority, as a separate Treaty Tribe, to administer or regulate off-reservation treaty fishing rights based upon the fact that some of its members can trace their ancestry to parties to the Yakima or the Nez Perce Treaties of 1855.

United States v. Oregon, 787 F. Supp. 1557, 1566 (D. Or. 1992).

Based upon that issue – not one involving how many Wenatchee went to Colville (Judge Marsh also ruled on that issue, finding it not before him – *id.* at 1566), or what was the nature of the Yakama Nation following the signing of the Treaty – Judge Marsh made a number of specific holdings, as to the nature of the right, and to whom it flowed on June 9, 1855, as a result of signing the Treaty:

I conclude that the Nez Perce Tribe and Confederated Tribes and Bands of the Yakima Nation are the only duly recognized “tribal” organizations that may administer or regulate the exercise of fishing rights by Treaty tribe members. . . .

Id. at 1570, 1571.

Thus, although many current members of the Colville Confederacy are descendants of groups identified as belonging to part of the Yakima Nation within the 1855 treaty, Colville has failed to establish that those descendants are entitled to exercise rights reserved to the Wenatchi, Entiat, Chelan and Columbia who signed the Treaty as part of the “Yakima Nation”.

Id. at 1571 (emphasis added).

And, finally:

I find that the administrators of those rights, as reflected in the 1855 treaties, are The Confederated Tribes and Bands of the Yakima Indian Nation and The Nez Perce Tribe of Idaho.

Based on the foregoing, I find that the Colville Confederated Tribes has failed to establish that it is the successor Indian government and the present day holder of treaty rights reserved to the Wenatchi, Entiat, Chelan, Columbia, Palus, or Chief Joseph Band of Nez Perce in the treaties of 1855 with the Yakima Nation or with the Nez Perce. Accordingly, the Colville complaint in intervention is dismissed.

Id. at 1512 (emphasis added).

His ruling could not be clearer – on June 9, 1855, Yakama received and held all Wenatchee fishing rights at all of the Wenatchee’s usual and accustomed fishing sites.

On appeal, the 9th Circuit was also crystal clear in its holding that Yakama held all Wenatchee rights as a result of their signature on the Treaty on June 9, 1855:

The parties have stipulated that the Wenatchi, Entiat, Chelan, Columbia, and Palus tribes were each parties to the Yakima Treaty of June 9, 1855. . .

United States v. Oregon, 29 F. 3d 481, 485 (9th Cir. 1994).

Rights under a treaty vest with the tribe at the signing of the treaty, *Washington I*, 520 F.2d at 692.

Id. at 29 F.3d 481, 484.

The present Yakima Nation was recomposed in 1974 and has exercised treaty rights as a successor to the entities that signed the original 1855 Yakima Treaty. As Judge Boldt explained in *United States v. Washington*, 384 F. Supp. 381, “the Yakima Indians have continued to assert their off-reservation fishing rights, including

fisheries in the case area.” The Yakima Nation has thus continually exercised the off-reservation fishing rights and continued the fishing culture of the original signatories to the 1855 treaty. . . .

We therefore agree with the result reached by the district court that the descendants of the Wenatchi, Entiat, Columbia, Chelan, and Palus tribes now living on the Colville Reservation are not entitled to exercise treaty fishing rights.

Id. at 486. (Emphasis added).

Finally, the most recent ruling, *United States v. Oregon*, 470 F.3rd, 809, 814, 815 (9th Cir. 2006), reiterates who holds the Wenatchee Treaty right:

We went on, however, to affirm Judge Marsh’s decision that neither Colville nor the Wenatchi had off-reservation fishing rights flowing from the 1855 Treaty. *Id.* at 486—87. In doing so, we also noted that the parties agreed that the Wenatchi, Entiat, Chelan, Columbia and Palous Tribes were all signatories to the 1855 Treaty, but that “[t]he Yakima Treaty of 1855 envisioned the creation of a successor tribe, a ‘Yakima Nation’ composed of all of the people represented by the signatories to the Treaty.” *Id.* at 485. The five tribes never moved to the reservation created for the Yakama Nation, which was the entity in which the treaty rights vested. *Id.*

We further observed that the present Yakama Nation was recomposed in 1974 and has exercised treaty rights as a successor to the entities that signed the original 1855 Treaty. . . . We concluded that, ‘by deliberately separating from the Yakima Nation, these tribes failed to maintain political cohesion with the tribal entity in which the *treaty fishing rights are vested.*’ *Id.* at 486 (emphasis added).

(Emphasis added).

To argue that these courts did not hold that Wenatchee rights vested in the Yakama Nation upon the signing of the Treaty simply defies logic. The issue was the only one before the Court, was ruled upon and affirmed. There is simply no question, under the undisputed facts here, that the law mandates a holding in Yakama’s favor.

3. Colville's Arguments Citing Claims Court Decision Ignores and is in Direct Conflict With Prior Specific Rulings On This Issue.

Again Colville attempts to revise factual and legal history. Colville argued on summary judgment before Judge Marsh in the original case that these rulings had preclusive effect on the issue of fishing rights. He specifically rejected these arguments, holding that those decisions did not impact the issue as to who held the fishing right:

I further found that the ICC's conclusion that Colville represented these tribes for the purpose of allocating the damage award did not answer the question presented in this case as to whether Colville may exercise treaty fishing rights.

United States v. Oregon, 787 F. Supp. 1557, 1561 (D. Or. 1992)

Colville appealed and the Ninth Circuit ruled as noted above, and upheld Judge Marsh's ruling. It discussed the Court of Claims holdings, 29 F.3d 481, 485, and as noted above, specifically found that regardless of those ICC conclusions, Yakama was and is the holder of Wenatchee Treaty rights.

Colville either was unaware of Judge Marsh's ruling or consciously chose to ignore its consequences in its' argument. In either event, an argument that the ICC rulings were in any way dispositive to the determination of Treaty rights is without merit. The issue was raised by Colville and ruled upon by the Courts contrary to Colville's position here. Colville's implication that the ICC rulings create a factual dispute requiring trial are simply without merit. Judge Marsh specifically ruled those issues had no impact on the issue of treaty fishing rights, and was upheld. Those

rulings are dispositive on this issue –the ICC rulings had nothing to do with Yakama Treaty fishing rights. According they may not create a factual issue here on that subject

4. The Determination Of Yakama’s Treaty Rights In 1855, And The Impact, If Any, Of The 1894 Legislation On Those Treaty Rights Are Separate And Distinct Issues.

There are two distinct issues before the Court in this proceeding. The first is, as a result of the Treaty, what rights to fish at Icicle Creek were vested in Yakama in 1855, 40 years prior to the 1894 legislation. The second is, what impacts, if any, did that legislation have upon rights already held by Yakama *vis a vis* fishing at Icicle following 1894. Yakama, as it has done in the past, will argue that regardless of the 1894 legislation’s impact on Article X of the Treaty, that Yakama retained its’ Article III usual and accustomed fishing rights, which were established in 1855. Despite Colville’s argument to the contrary, Yakama has established its right to prevail on the issue that it held Article III rights at Icicle Creek in 1894. What happened next is not before the court on this motion. ²

Colville has previously asserted that Yakama has failed to prove that Icicle Creek is a usual and accustomed fishing place, and accordingly, regardless of what may or may not have happed in 1894, has no standing

² Of course the issue of what rights, if any, Colville got from the 1894 legislation is the primary issue before the court. Yakama agrees that there are factual issues that may impact the Court’s decision on the 1894 questions, although it reserves the right to argue that the decision may be made as a matter of law. Conversely, there are none regarding the first issue noted above.

to challenge Colville's fishing there. Colville then asserts, and argues in its response here, that Yakama lost all of its rights in 1894, including those dealing with usual and accustomed places. It then argues here that those two issues are somehow one and the same and should be tried together. It fails to explain the logic of its argument.

The net effect of Colville's argument would be to force Yakama to both prove, at trial, that it had Article III usual and accustomed rights prior to 1894, and that the legislation had no impact on those rights. Requiring proof on the Article III rights is unjustified under the facts of this case, and the prior legal rulings of this Court and the Ninth Circuit.

Yakama is entitled to the legal benefits of its success in the prior cases. As is argued above, there is no question that on June 9, 1855, Wenatchee rights to fish at Icicle Creek as an Article III usual and accustomed fishing area vested in the Yakama Nation. The status of Yakama's rights prior to 1894 is a separate, independent legal issue from which may or may not have happened regarding those vested rights following 1894. Yakama has prevailed on the former issue throughout the prior litigation; Colville does not dispute the controlling facts here. Depriving Yakama of the benefit of its prior successes would force it to trial on issues it has already proven, giving Colville an unfair advantage to which it is not entitled. Yakama is entitled to judgment as a matter of law declaring its Article III usual and accustomed rights at Icicle Creek.

Colville's argument that the future impact of the 1894 legislation creates an issue of fact as to what rights Yakama held prior to that time again defies logic. The net effect of its argument would require Yakama to reprove its already established 1855 vested rights, while allowing Colville a second opportunity to attack Yakama's proof. Obviously Colville is barred from having such a "second bite at this apple", despite its cleverly disguised argument that would allow it to do so.

Finally, agreeing with Colville's argument would defeat CR 56's purpose of providing a "just, speedy and efficient disposition of lawsuit: and "eliminates the waste of time and money in unnecessary trials". *Zweig v. Hearst Corporation*, 521 F.2d 1129 (9th Cir. 1975). Here Yakama has proven its rights in the prior litigation. Colville fails to establish an issue of fact left to be resolved by trial. Granting of this motion will allow Yakama to strike at least two and possibly three of its witnesses. It will greatly reduce the expert testimony on this issue, and will facilitate a more speedy resolution of the trial, while upholding Yakama's firmly established right from a second unjustified attack by Colville.

CONCLUSION

There is no dispute as to the seminal facts here. The law is absolutely clear and unambiguous. Yakama is entitled to a declaration of its Article III usual and accustomed rights at Icicle Creek and the Wenatchee Basin as requested in its motion.

Respectfully submitted this 24th day of March, 2008.

/s/ Tim Weaver
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2008, a copy of the foregoing document is being electronically filed with the Court's electronic filing system, which will generate automatic service upon all parties enrolled to receive such service. In addition, a true and correct copy of the foregoing document is being served this date upon the persons listed below by first-class U.S. Mail, postage prepaid:

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