Superior Court of the State of Washington
For Thurston County

JUN 27 2016

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June 24, 2016

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COURT'S LETTER OPINION

In Re: Schuyler v. Unsworth & Dept. of Fish and Wildlife
Thurston County Cause No. 14-2-02373-9

Dear Parties and Amici:

The court heard oral argument on June 1, 2016 to determine only threshold issues raised in the amicus brief by the Sauk-Suiattle Indian Tribe. Those issues are: 1) justiciability, 2) absence of a necessary party, 3) separation of powers and 4) ripeness. The court will focus its ruling solely on the first two issues, finding no good cause to dismiss on the grounds of separation of powers or ripeness. The court received and reviewed numerous, thoughtful briefs that addressed these issues and heard lengthy oral argument. The court concludes that it must dismiss this case unless the Upper Skagit Tribe voluntarily joins as a plaintiff or intervenor within 90 days of the date of this order.

Procedural History

Sheldon Schuyler filed a petition for declaratory relief in this case, naming the State Department of Fish and Wildlife and its director as defendants. Schuyler seeks a ruling to determine, with certainty, whether his tribal hunting rights afford him the ability to hunt in a particular territory without threat of prosecution from the Department of Fish and Wildlife. Perhaps more importantly, he seeks clarification of the meaning of "use and occupancy" under our Supreme Court's decision in *State v. Buchanan*, 138 Wn.2d 186 (1999).

Schuyler is a member of the Upper Skagit Tribe and his lawyer, Harold Chesnin, has at times represented that tribe. The Upper Skagit Tribe has not joined this lawsuit nor participated as an amicus, and its Chairwoman has filed an unsworn letter stating that the tribe believes this litigation can go forward without its participation, and also that this litigation does not involve interpreting the Treaty of Point Elliot, under which it holds hunting rights. Chesnin Declaration, Exhibit A (filed 5/25/16, docket no. 139). Mr. Chesnin has consistently maintained the position that he is not representing the Upper Skagit Tribe's interests in this litigation and that the tribe's interests are not aligned with Schuyler's interests, in a manner in which the Tribe would be bound by this court's decision.

The Confederated Tribes and Bands of the Yakama Nation was allowed into this lawsuit as an intervenor-defendant. The Yakama Nation claims an exclusive tribal hunting right on the land on which Schuyler seeks to hunt. The following tribes were also permitted to act as amici: the Hoh Tribe, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Quileute Tribe, Quinault Indian Nation, and the Confederated Tribes of the Umatilla Indian Reservation.

This matter was scheduled for a summary judgment hearing when the Sauk-Suiattle Indian Tribe moved to appear as amicus curiae. The court granted the motion to appear. The court also determined that Sauk-Suiattle's arguments are fundamental and important to fully resolve before proceeding with summary judgment. For this reason, the court struck the summary judgment hearing and ordered briefing and argument on these threshold issues. After argument the court took the matter under advisement.

This court is mindful of the fundamental and important issues at stake in this case. Indian hunters face prosecution throughout the State. This case implicates tribal rights, the State's power, and the individual rights of tribal members. Tribal hunting is a matter of cultural, religious, economic, and individual importance. A person such as Schuyler could receive a criminal charge for hunting on this land. Others could similarly be charged, convicted, and perhaps lose their gun rights altogether. It may be inappropriate to require someone to be prosecuted criminally in order to assert their tribal hunting rights. The amici in this case express concern that the Department has changed course in the manner in which it is handling tribal hunting rights, perhaps in a way that circumscribes their traditional hunting territories. Other than Sauk-Suiattle, every party and amicus urge the court to go forward with this case. They want guidance

on how to apply *Buchanan.* The court is also mindful that it is a court, not a legislative body, and it is a state court, not a federal court. There are prudential doctrines that this court must apply.

The issues that the court will resolve today are (1) whether the Upper Skagit Tribe is a necessary party to this lawsuit; and (2) whether this lawsuit is justiciable. This court concludes that the Upper Skagit Tribe is a necessary party and that the lawsuit is not justiciable *unless* it is joined as a party.

Necessary Party

The Sauk-Suiattle Indian Tribe argues that the Upper Skagit Tribe is a necessary party, and its absence requires dismissing this petition. This court agrees.
The parties and amici present various arguments about the necessity of Upper Skagit under both statute and civil rules.

This is a Uniform Declaratory Judgment Act case, however, and the specific authority on this issue is found within that Act. It provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

RCW 7.24.110. This is a mandate: all necessary parties *shall* be made parties. This is a more stringent standard than is presented in Civil Rule 19, which allows a lawsuit to proceed in the absence of a necessary party if that party is not deemed "indispensable."

This court has a duty under RCW 7.24.110 to insist on joining all necessary parties. "The trial court lacks jurisdiction" under the UDJA "if the necessary parties are not joined." *Treyz v. Pierce Co.*, 118 Wn. App. 458 (2003). Moreover, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." RCW 7.24.060. Under this authority, this court finds it appropriate to rule on the issues presented by Sauk-Suiattle even though it is not a party and has not filed a motion to dismiss this lawsuit.

The Court of Appeals explained the doctrine of "necessary party" under the UDJA in *Treyz:*

> A party is necessary if a complete determination of a controversy cannot be had without its presence. Stated another way, a necessary party is one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment. The party must have a sufficient interest such that a judgment cannot be determined without affecting that interest.

Treyz, 118 Wash. App. at 462-63 (internal quotations and citations omitted).

Here, Schuyler argues that this court can issue a final and conclusive determination about (1) his individual hunting rights, rather than tribal rights and (2) the limits of the State's power to regulate hunting. That is an inaccurate characterization of the lawsuit and its impact.

First, the Upper Skagit Tribe is a necessary party to determine Schuyler's individual tribal hunting rights. Schuyler's rights stem solely from his membership in the tribe. The tribal hunting rights belong to the tribe, as memorialized in the Treaty of Point Elliot, and those rights flow down to its members. Any legal decision about Schuyler's rights would therefore have precedential effect on rights held by the government of the Upper Skagit Tribe and all of its members. A complete and final determination cannot be had without the presence of the Upper Skagit Tribe, and a judgment cannot be determined without affecting the tribe's interest.

Second, the Upper Skagit Tribe is a necessary party to determine the scope of the State's power to regulate hunting in this area. In other words, this court cannot finally determine how the *Buchanan* standards apply on this land without interpreting treaty rights that belong to the Upper Skagit Tribe.

Some of the parties and amici argue that *Buchanan* is not a treaty case, either because the key term of "use and occupancy" is not written in the treaty, or because our State Supreme Court does not have political authority to render a treaty decision. *Buchanan* is a treaty case. The *Buchanan* Court defined the issues before it as:

> 1. What is the geographic scope of the Nooksack Indian Tribe's treaty hunting right?
> 2. Is the State-owned Oak Creek Wildlife Area "open and unclaimed lands" within the meaning of the Treaty of Point Elliott?
> 3. Were those provisions of the Treaty of Point Elliott which conflict with the State's right to regulate off-reservation hunting abrogated by Congress when Washington was admitted to the Union upon "equal footing" with the original states?

Buchanan, 138 Wn.2d at 195-96. This court does not have the power to recharacterize our Supreme Court's binding precedent on political or pragmatic grounds. The Upper Skagit Tribe is a necessary party to allow this court to render a final and conclusive declaratory judgment regarding that tribe's treaty rights.

This lawsuit is directly about treaty rights held by the Upper Skagit Tribe. This court cannot issue a final and conclusive judicial determination about one tribal member's hunting rights without affecting his tribe's interests. The Upper Skagit Tribe is a necessary party and this lawsuit cannot go forward without it.

Justiciability

The final issue this court will decide is justiciability. This case is not justiciable without the presence of the Upper Skagit Tribe.

All parties agree that treaty rights cannot be resolved through State Court litigation. The Upper Skagit Tribe is not a party to this case and cannot be bound by this court's ruling on the merits. Schuyler's counsel represents the Upper Skagit Tribe in other contexts, but he and the tribe's Chairwoman clearly express that Upper Skagit does not waive its sovereign immunity and will not be bound by this decision.

A declaratory judgment act case is not justiciable unless 'a judicial determination would be final and conclusive.' *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403 (2001). Stated otherwise, declaratory judgment actions are available only if a judgment or decree "will terminate the controversy or remove an uncertainty." RCW 7.24.050. Where the four justiciability factors are not met, "the court steps into the prohibited area of advisory opinions." *Diversified Indus. Dev. Corp. v. Ripley,* 82 Wn.2d 811, 815 (1973). "Courts exercise their discretion and deliver advisory opinions only on those rare occasions where the interest of the public in the resolution of an issue is overwhelming and where the issue has been adequately briefed and argued." *To-Ro Trade Shows v. Collins*, 144 Wash. 2d 403, 416 (2001) (internal quotations omitted).

As discussed above, this is a lawsuit directly about treaty rights. This court cannot issue a final and conclusive judicial determination about one tribal member's hunting rights unless his tribe is a party or is bound by the ruling.

The parties and amici here are asking for an advisory opinion. That is typically not allowed, but it is acceptable when there is an issue of "broad overriding public import." This doctrine is an exception to the justiciability doctrine. Our Supreme Court reviewed this doctrine very recently in *Lee v. State*, Cause no. 92708-1. In *Lee*, our Supreme Court held that determining the constitutionality of an initiative passed by the voters was a matter of broad overriding public import. It cited *State v. Kinnear*, 80 Wn.2d 175, 178 (1972):

> Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and the other branches of government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

This doctrine is discretionary. This court has discretion to hear the case or not under this doctrine.

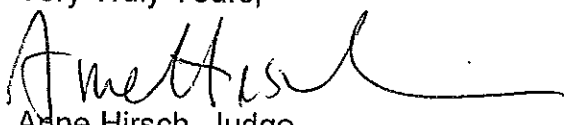
This court finds that it is not appropriate to hear the case under the doctrine of "broad overriding public import." The primary reason is that this court lacks power to bind Upper Skagit Tribe. This court's decision therefore would not necessarily benefit the public, the State, or the tribes because the Upper Skagit Tribe could ignore an unfavorable ruling or could later obtain a different decision in federal court. It seems that the parties are intentionally situating themselves to be able to challenge an unfavorable state court ruling in federal court. This is evidenced by Schuyler's counsel

taking a strong position that he is not representing the Upper Skagit Indian Tribe's interests in any way, and that the Tribe's interests are not aligned with Schuyler's, even though counsel normally represents that tribe and Schuyler is purportedly the tribe's Natural Resources Director. This is also evidenced by the amicus briefs by seven tribes that decline to waive sovereign immunity, which is their right. This court could interpret *Buchanan*, but the State could similarly interpret *Buchanan* through a rule-making process or other intra-governmental agreement that involves the tribes and multiple other interested parties in that process.

This court rules that this case is not justiciable in the absence of the Upper Skagit Tribe and absent the Skagit Tribe, there is not a matter of broad, overriding public import that warrants giving an advisory opinion.

The Upper Skagit Tribe may move to join this lawsuit within 90 days. If it does not do so, the Sauk-Seattle Tribe may present an order of dismissal. This court will enter findings of fact and conclusions of law consistent with this opinion, which shall be noted for presentation on this court's civil motion calendar.

Very Truly Yours,



Anne Hirsch, Judge
Thurston County Superior Court

cc: Thurston County Clerk for Filing