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Docket Entry 96 - Filed Memorandum of Plaintiffs and Authority in support of motion to strike, etc

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, MUCKLESHOOT INDIAN TRIBE; SQUAXIN ISLAND TRIBE OF INDIANS; SAUK-SUIATTLE INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; STILLAGUAMISH TRIBE; QUINAULT TRIBE OF INDIANS on its own behalf and on behalf of the QUEETS BAND OF INDIANS; MAKAH INDIAN TRIBE; LUMMI INDIAN TRIBE; QUILEUTE INDIAN TRIBE; UPPER SKAGIT RIVER TRIBE; HOH TRIBE OF INDIANS; and CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; Plaintiff-Intervenors, v. STATE OF WASHINGTON, Defendant, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries; CARL CROUSE, Director, Washington Department of Game; and WASHINGTON STATE GAME COMMISSION, Defendant-Intervenors.	Civil No. 9213 FILED IN THE UNITED STATES DISTICT COURT Western District of Washington OCT 13 1971 CHARLES A. SCHAAF, Clerk By _____, Deputy MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES AND TO DISMISS COUNTERCLAIM

THE MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiff-Intervenors offer this motion in order to remove specious defenses from the Answer and to expedite the resolution of this controversy. Under Rule 12(f) of the Federal Rules of Civil Procedure this court "may order stricken from any pleading any insufficient defense." A motion to strike will be granted where the legal insufficiency of a defense is clearly apparent. Occidental Life Insurance Company v. Fried, 245 F. Supp. 211 (D. Conn. 1965). In Occidental the court struck both of the defenses raised by the defendant after a careful review of case law, statutes, public policy, and legislative intent indicated they were without legal merit. In Marth v. Industrial Incomes, Inc., 290 F. Supp. 755, (S.D.N.Y. 1968) six defenses were raised including estoppel, waiver, laches, and statute of limitations. The court struck three of the defenses from the answer after examining the law alleged to support each of them and finding them to be "wholly without merit."

Federal courts have used Rule 12(f) as a means of eliminating frivolous issues from the pleadings and expediting the litigation. Hanes Dye and Finishing Co. v. Caisson Corp., 309 F. Supp. 237, 242 (M.D.N.C. 1970) (Five defenses stricken as insufficient on court's own motion); Marth v. Industrial Incomes, Inc., supra. "The purpose of plaintiff's motion to strike is to gain an early adjudication by the court as to the legal sufficiency of defenses set forth in the answers of the defendants. That purpose is among those contemplated for the use of the motion." United States v. Southerly Portion of Bodie Island, 114 F. Supp. 427, 428 (E.D.N.C. 1953). In this case, elimination of the three defenses raised by Defendant and Defendant-Intervenors will remove from the case matters which will only complicate the litigation and which, as shown in this memorandum, are without any legal merit.

A. First Affirmative Defense-Indian Claims Commission Jurisdiction

In its first affirmative defense Defendant State of Washington and Defendant-Intervenors Crouse and the Game Commiccion assert that this court lacks jurisdiction to grant declaratory and injunctive relief to Plaintiff United States and the intervening tribes because "sole, exclusive and original jurisdiction to entertain off reservation claims based upon Indian treaties or 'aboriginal title' [lies] in the Indian Claims Commission." This defense is wholly without merit.

Congress established the Indian Claims Commission to provide a forum for the adjudication of the liability of the United States to Indian tribes or groups. The statute clearly provides, "[t]he Commission shall hear and determine...claims against the United States." 25 U.S.C. §70a. The Commission thus would have no jurisdiction to adjudicate the responsibilities of the State of Washington to the Indian tribes under the relevant treaties. Under no circumstances could the State of Washington be a party to a matter before the Indian Claims Commission.

The Act of Congress establishing the Indian Claims Commission vests jurisdiction in the Commission to hear only those claims arising prior to the effective date of Indian Claims Commission Act (August 13, 1946) and which are presented to the Commission within five years of that date. 25 U.S.C. §§70a and 70k. By the terms of the Act it would not apply to this case. Furthermore, the Act limits the relief which the Commission may grant to damages. See, e.g., 25 U.S.C. §§70a, 70r, and 70u. Plaintiff-Intervenors here seek declaratory and injunctive relief against the Defendants.

The purported defense that "exclusive and original jurisdiction" over the claims urged by Plaintiff and Plaintiff-

Intervenors is in the Indian Claims Commission must be based upon a lack of knowledge of the Act setting up the Commission (25 U.S.C. §§70a-70w) and a misapprehension of what the Commission is. It is not a court, but an administrative agency set up to perform a specific task.[1] Adjudication of claims such as those asserted by Plaintiff and Plaintiff-Intervenors in this case is clearly not within the purview of the Commission's jurisdiction or authority. The "plain language" of the Act strips the defense of any legal merit. Occidental Life Insurance Company v. Fried, supra.

This question of whether or not the Commission has jurisdiction over claims of tribes seeking a declaration recognizing their right to hunt has been considered by the Ninth Circuit Court of Appeals. In Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013 (9th Cir. 1967) the court held that the claim was not for compensation such that it was within the jurisdiction of the Indian Claims Commission.

B. Second Affirmative Defense--"Equal Footing"

In the second affirmative defense Defendant and Defendant-Intervenors assert that any treaty fishing rights that may have been conferred on Plaintiff-Intervenors by the Treaties of 1855 have been abrogated by the admission of Washington into the federal Union in 1889 on an "equal footing" with the other states of the Union.

Article IV, Section 3 of the United States Constitution provides that "New States may be admitted by the Congress into this Union." Although the Constitution does not expressly compel

[1] For background on Congress's intent and a discussion of the purposes of the Indian Claims Commission, See John Vance, The Congressional Mandate and the Indian Claims Commission, 45 N.D.L. Rev. 325 (1969). Mr. Vance, Chairman of the Commission, explains that the concept of a court rather than a commission was carefully considered and rejected by Congress.

Congress to respect the right, as it were, of each new state to admission on an equal footing with the existing states, the Court has read into the admission clause this limitation on Congressional power to admit new states. See, e.g., Escanaba and Lake Michigan Trans. Co. v. Chicago, 107 U.S. 678,688-89 (1882). The "equal footing" doctrine has protected new states from having to surrender to Congress, as a condition of their admission, legislative power that Congress would not otherwise have been able to exercise. See Coyle v. Smith, 221 U.S. 559, 570 (1911) where the Court invalidated the provision of the Act of Congress admitting Oklahoma to the Union requiring the State of Oklahoma to maintain its state capital at Guthrie until 1913, six years after statehood. Thus, the thrust of the "equal footing" doctrine was the protection of state political rights and sovereignty from invasion by Congressional action which would not otherwise be constitutional.

The United States Supreme Court has consistently held that the equal footing doctrine is inapplicable to questions of state power and Indian treaty rights. Johnson v. Gearlds, 234 U.S. 422, 438-40 (1914); Coyle v. Smith, 221 U.S. 559, 570 (1911); United States v. Winans, 198 U.S. 371, 382-84 (1905). The Court in Johnson v. Gearlds, supra, stated at p. 440, "[T]here is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established." Numerous lower federal court decisions, see, e.g., Holcomb v. Confederated Tribes of the Umatilla Indian Reservation, supra at 1014, n3, and state supreme court decisions, Miles v. Veatch, 189 Ore. 533, 534, 221 P.2d 905, 906 (1950); State v. Arthur, 74 Ida. 252, 258-59, 261 P.2d 135, 138-39 (1953), cert. denied 347 U.S. 937 (1954) are in agreement.(2) Recent United States Supreme Court decisions on state power to regulate treaty-secured off reservation fishing in the Northwest have not found the

"equal footing" doctrine worthy of discussion, although state officials have persistently urged the Court to revive the doctrine. Comment, State Power and Indian Treaty Right to Fish, 59 Calif. L. Rev. 485, 495 n65 (1971).

The reason the Supreme Court in the Twentieth Century has stoutly refused to apply the "equal footing" doctrine to protect state sovereignty from diminution through the exercise of treaty rights by Indians within its borders is that Congressional power to legislate in the field of Indian affairs and confer such rights is beyond question of a plenary nature. There never has been any sphere of state power over Indian resources or rights for the "equal footing" doctrine to protect. The Court has emphasized the plenary nature of this federal power in decisions involving original members of the federal Union, such as Georgia, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and in decisions involving states subsequently admitted, such as California, see United States v. Kagama, 118 U.S. 375 (1886). Since federal power to confer such treaty rights is so clearly and undeniably established, the existence of treaty rights in Plaintiff-Intervenors does not invade any sphere of state power otherwise guaranteed to states by the federal constitution. Cf. Missouri v. Holland, 252 U.S. 416 (1920).

The test for the legal sufficiency of a defense in ruling on a motion to strike is whether there is a substantial question of law presented. See, e.g., Occidental Life Insurance

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[2] The only decision embracing the "equal footing" doctrine as a limitation on the exercise of Indian treaty rights after statehood was Ward v. Race Horse, 163 U.S. 504 (1896). At the time it was rendered, Race Horse was out of harmony with a prior Supreme Court ruling on the effect of statehood acts on pre-existing Indian rights, Blue Jacket v. Board of Commissioners of Johnson County (The Kansas Indians). 72 U.S. (5 Wall.) 737, 755-56 (1867). Any doubts about the vitality of the doctrine were laid to rest with the overuling of the "equal footing" holding of Race Horse less than a decade later in United States v. Winans, supra at 382-84.

Co. v. Fried, supra, at 213. Courts have referred to applicable case law in order to determine whether the controversy has been settled by prior decisions. See, Occidental Life Insurance Co. v. Fried, supra, at 217. United States v. Pennsalt Chemicals Corp., 262 F. Supp. 101 (E.D. Pa. 1967).

The Court should strike the purported "equal footing" defense asserted by Defendants as wholly lacking in merit. There is no doubt on the law and this court should not permit the raising of such non-issues in this very complex and important case.

C. Third Affirmative Defense-Abrogation by International Treaties

Defendant Department of Game for its third affirmative defense asserts that there are international treaties and agreements which have superseded or modified the treaties Plaintiff-Intervenors rely upon. Defendants do not cite any treaties or other authorities in support of this allegation. In fact there are none. The only international agreement which relates to the species of fish and geographical areas involved in this litigation is the Convention for the Protection, Preservation, and Extention of the Sockeye Salmon Fisheries in the Fraser System (Sockeye Salmon Convention) between the United States and Canada. T.S. 918; 50 Stat. 1355. The Sockeye Convention was amended to include pink salmon by a protocol between the two countries. (Pink Protocol) 8 U.S.T. 1057, TIAS 3867.

Any responsibility for regulation of sockeye and pink salmon by the state, to the extent there is such power, lies with the Department of Fisheries and not with the Department of Game. Rev. Code Wash. Chap. 75.12. The Department of Fisheries is authorized to regulate the taking of salmon, and the word salmon "... includes the sockeye, silver, chinook, chum, humpback salmon and so called salmon trout, and each and every

species of the genus oncorhynchus, commonly known as salmon." Rev. Code Wash. 75.04.110.

Thus, the Department of Game has no authority over the species of fish governed by the International Sockeye Convention and Pink Protocol which amends it. The jurisdiction of the Department of Game extends only to game fish, defined as"... salmo gairdnerii commonly known as steelhead...". Rev. Code Wash. 77.12.030. Thus by their very terms the Sockeye Salmon Convention and Pink Protocol have no application to fish within the regulatory authority of the Department of Game.

The Sockeye Salmon Convention makes no reference to Indian treaties and in no way affects or limits or abrogates the rights of Indians to take fish with regard to other citizens of the State of Washington.

The Sockeye Convention only indicates that each of the high contracting parties (i.e., Canada and the United States) should"... share equally in the fishery." Sockeye Convention, Article VII. The Convention further states that the fishery should be regulated"...with a view to allowing, as nearly as may be practicable, an equal portion of the fish that may be caught each year to be taken by the fishermen of each high contracting party." Article VII. Thus the Convention by its express terms does not affect the rights of Plaintiff-Intervenors to continue to fish in their usual and accustomed places.

The only other major international agreement relating to the conservation of fish in the north Pacific area is the International Convention for the High Seas Fisheries of the North Pacific Ocean, concluded between Canada, Japan and the United States of America, May 9, 1952 (4 U.S.T. 380, T.I.A.S. 2786). This Convention relates to waters within the "Convention Area" which is defined as embracing all seas outside the territorial waters of the contracting parties. Article I, 1.

This Convention therefore clearly relates to geographical areas which are not involved in the present litigation. No international treaty or agreement relates to the type of fish and geographical area with which the Department of Game is concerned. Even if there was such a treaty or agreement, it would be contrary to usual rules of treaty construction to find that a later international treaty abrogates an Indian treaty without a clear expression of congressional intent to do so.

Repeal of earlier treaty rights by implication is not favored. United States v. Lee Yen Tai, 185 U.S. 213 (1902). And it is also the general rule that treaty rights will not be deemed to have been abrogated or modified by a later act unless such purpose on the part of Congress has been clearly expressed. Cook v. U.S., 288 U.S. 102 (1933). Of course, Indian treaties are the supreme law of the land on an equal plane with other treaties. The Cherokee Tobacco, 78 U.S. (11 Wall.) 618,621 (1870); Worcester v. Georgia, 31 U.S. (6 Pet.) 515,556,558-60 (1832).

The United States Supreme Court has held that it should never be assumed that subsequent treaties or Congressional acts abrogate or destroy the rights created by earlier Indian treaties. United States v. Payne, 264 U.S. 446 (1924). In Payne the Court noted that Indian treaties must be liberally construed in favor of the rights claimed by the Indians under them. Payne at 448. In Menominee Tribe v. United States, 391 U.S. 404 (1968) the Supreme Court stated at p. 413 that "The intention to abrogate or modify a ~~treaty is~~ not to be lighty imputed to Congress."

In view of the fact that the plain language of the treaties clearly does not involve the waters nor the fish which relate to this action, the third affirmative defense of Defendants and Defendant Intervenors lacks merit and should be stricken. Cf. Occidental Life Insurance v. Fried, supra.

All three defenses serve no purpose but to cloud the issues which are central to this action. At best they demonstrate the adamance and unreasonableness with which Indians are often faced in attempting to assert their treaty protected fishing rights. There is no place for such matters in this litigation and the three defenses raised by Defendant and Defendant-Intervenors should be stricken.

THE MOTION TO DISMISS THE COUNTERCLAIM

Defendants Carl Crouse, the Washington State Game Commission, and the State of Washington have asserted, along with their answer and defenses to the various complaints on file in this case, a counterclaim against the plaintiff United States. The counterclaim has been incorporated in the answers to the complaints of each of the plaintiff intervenor tribes, and thus might be construed to be against them. Plaintiff intervenors have moved the Court for an order dismissing in its entirety the counterclaim under Rule 12(b). The motion is based upon: (1) failure to state a claim upon which relief can be granted, (2) lack of subject matter jurisdiction, and (3) lack of personal jurisdiction. A dismissal would be appropriate under any one of these grounds.

A. Failure to State a Claim Upon Which Relief Can Be Granted.

The counterclaim is pleaded against "officers, agents, and representatives" of the United States and alleges that they "actively encouraged, aided and abetted Indian citizens of the State of Washington" to violate state conservation laws and regulations. These acts of officers, agents, and representatives of the United States, according to the counterclaim, harm the conservation and management programs for fish, birds, and animals in the State of Washington, jeopardize the investment of millions of dollars, create conditions favorable to civil unrest and conservation law enforcement problems, and constitute attempts of the United States to usurp state jurisdiction and regulatory power.

The counterclaim which is incorporated in the answers to the complaints of these plaintiff intervenors neither names them nor seeks any relief against them. Under the circumstances, the court should not hesitate to dismiss the counterclaim as

against these plaintiff-intervenors for failure to state any claim at all against them.

Even if the counterclaim named and sought relief against them it would be subject to dismissal for failure to state a claim upon which relief can be granted.

It is difficult to imagine, let alone discern with any precision, what causes of action the counterclaiming defendants are attempting to assert. The language of the counterclaim sounds vaguely like a claim for conspiracy, but it does not fall into any of the established categories of conspiracy.

1. It is not a claim for conspiracy to deprive one of his civil rights under the Civil Rights Act (42 U.S.C. § 1985). That Act is applicable only to claims of individuals, not states.

2. No violation of federal (or state) criminal conspiracy laws is alleged. Defendants ask not criminal prosecution, but the equitable relief common to a civil case.

3. It does not qualify as an action for civil conspiracy. These actions are generally in the area of anti-trust and unfair competition. In those cases more detail than a few naked allegations of conspiracy is necessary. See 2A Moore's Federal Practice, paragraph 8.17 [5].

If defendants are trying to plead conspiracy, they have failed. If they are not, it is impossible to tell just what the theory of the counterclaim is. Plaintiff-intervenors submit that the counterclaim is totally without merit and that the facts pleaded simply are not actionable against them or the plaintiff United States. There is no conceivable basis for liability assuming every word of the counterclaim were admitted as true. The counterclaim should be dismissed.

B. Lack of Personal Jurisdiction.

The law is clear that an Indian tribe or band is immune from suit as a sovereign and that, unless Congress has

specifically waived this immunity, a suit against the tribe must be dismissed. United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940); Turner v. United States, 248 U.S. 354 (1919); Twin Cities Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Green v. Wilson, 331 F.2d 769 (9th Cir. 1964); U.S. Department of the Interior, Federal Indian Law (1958 Edition) at 492, 494.

Just as in the case of a direct suit, unless Congress consents to a counterclaim, it may not be asserted against the sovereign United States or Indian tribes. E.g., Nassau Smelting and Refining Works v. United States, 266 U.S. 101 (1924); United States v. Finn, 229 F.2d 679 (9th Cir. 1956). The Supreme Court in United States Fidelity and Guaranty Co. held that

> these Indian Nations are exempt from suit without congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. [309 U.S. at 512-513]

The principle enunciated in United States Fidelity and Guaranty Co. has been followed by many courts and it is clear that there is no distinction between counterclaims and original suits. Rule 13(d) incorporates the principle of sovereign immunity as to counterclaims specifically into the Federal Rules of Civil Procedure.

This court has no personal jurisdiction over either the United States or the Indian tribes as none of them has consented to asserting a counterclaim against them by the defendants.[3]

[3]The comments in this memorandum have been directed to the sovereign immunity of the United States and the tribes. However, it is not the United States or the tribes against which the counterclaim seems to be stated. It speaks only of the "officers, agents and representatives" of the United States and the "Indian citizens of the State of Washington." Such persons are not parties to this lawsuit, and thus it is not necessary at this point to discuss the applicability of the principles of sovereign immunity to them as parties.

C. Lack of Subject Matter Jurisdiction.

When a counterclaim is permissive, rather than compulsory, in nature, an independent basis for federal court jurisdiction must be shown by the pleader. It is not sufficient to rely upon the jurisdictional basis set up by plaintiff. Autographic Register Co. v. Phillip Hano Co., 198 F.2d 208, 211-212 (1st Cir. 1952). The counterclaim in this case cannot be classified as compulsory since it does not arise out of the "transaction or occurrence that is the subject matter of the opposing party's claim" as required by Rule 13(a) of the Federal Rules of Civil Procedure. Because defendants Crouse and the State Department of Game raise issues of law and fact which are unrelated to the subject matter of the claims of the plaintiff and plaintiff-intervenors, the counterclaim at best can only be labeled as permissive.

The counterclaim alleges in the most general terms certain activities of federal officials and individual members of Indian tribes, none of whom are parties to this action, which have caused and threatened to cause certain harm to the State of Washington such as inability to protect game, fish, animal and bird resources, damage to conservation and management programs, a threat to the investment of millions of public dollars as well as tending to cause the creation of conditions favorable to extensive civil unrest and law enforcement problems.

The claims of "aiding and abetting" violation of state conservation laws by persons not even parties to the case clearly has little or nothing to do with factual issues relating to Indian treaties and exercise of Indian treaty fishing rights under them which is the subject matter of the complaints of the plaintiffs and plaintiff-intervenors. The counterclaim relates also to game animals and birds--not just the fish to which the main action relates.

Certainly, no basis for jurisdiction emerges from the matters which have been pleaded about the parties involved or the alleged acts of these unnamed parties. As demonstrated in section "A" above, the counterclaim states no claim upon which relief can be granted.

There is no allegation of any specific jurisdictional statute. The counterclaim, standing alone as a complaint, would be dismissed for lack of subject matter jurisdiction and thus should not be permitted to stand as a permissive counterclaim.

CONCLUSION

Each defense raised in the answers to Plaintiff's and Plaintiff-Intervenors' complaints is totally without legal merit. All of the defenses may be stricken from the answers for this reason.

Plaintiff-Intervenors have no way to respond to the counterclaim that is pleaded; it does not seem to involve them, and even if it did, it is impossible to ascertain upon what legal theory it is based. Even if it were based on sound legal theory and pleaded against Plaintiff and Plaintiff-Intervenors, it cannot clear the hurdle of sovereign immunity of the United States and the tribes. Nor does a basis for federal jurisdiction to determine the counterclaim exist.

The Court should strike each of the defenses and dismiss the counterclaim of Defendant-Intervenors Crouse and the Washington State Game Commission and of Defendant State of Washington.

Respectfully submitted,

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