73893-3

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Court of Appeals
Division I
State of Washington

NO. 73893-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Petitioner,

v.

BRUCE M. SNYDER
GREGG B. SNYDER

Respondents.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

The RALJ court erred when it reversed the district court decision and found that the Snyders established they had a federal Indian treaty right preempting state wildlife laws. The RALJ court's error was relying on the scant evidence that their modern-day group calling itself the "Snoqualmoo Tribe" was a continually existing distinct political entity that has governed a community of Indians continuously since an 1855 treaty. This Court should reverse and hold, as the district court held, that inadequate evidence established the Snoqualmoo group meets the test for continual political existence and successorship needed to claim federal treaty rights.

The Snyders concede the modern Snoqualmoo Tribe does not govern a federally-created Indian reservation. Thus this is not a case where a community moved to a reservation and continued in that fashion, as done by the known treaty tribes of Washington State. Instead, the meager evidence is similar to cases where federal courts have rejected treaty right claims, where ancestry and cultural affiliation was insufficient to establish continual political existence.

To avoid the rejection of similar claims by other courtS, and to avoid the lack of evidence, the Snyders argue this Court's role is to examine the RALJ court's de novo reweighing of the meager

evidence. This fails to give deference to the trial court. It also avoids the weakness of their showing and suggests that a court can find a treaty right to excuse this crime, and reject it in the next trial. Bruce Snyder Br. at 9. Their argument loses sight of the defense. The defense raises a question of law: what must be shown to establish political successorship and treaty rights in a modern-day group? Such political successorship is not like a fact-specific claim of self-defense, that a jury may believe and is reviewed for substantial evidence. To preempt state law, an unrecognized group claiming a treaty right must make a specific, rigorous showing. The burden is the same for individuals trying to avoid state hunting laws, or when the Snoqualmoo Tribe intervened in the long-running *United States v. Washington* fishing case. Appellant's Brief at 18-23 (reviewing failed modern tribes assertions of political successorship to treaty tribes).

As shown by relevant cases in the Appellant's Brief and below, general evidence of ancestry or culture of the modern Snoqualmoo tribe does not provide the showing required by law. It was insufficient in this case, just as it has been insufficient in other cases where similarly situated unrecognized groups failed to show successorship to treaty rights. Therefore, the RALJ court must be reversed and the convictions reinstated.

II. ARGUMENT

1. The Parties Agree Generally About the Showing that a Modern Group Must Make to Be the Political Successor to a Treaty-Time Indian Tribe and its Treaty Rights

"Indians later asserting treaty rights must establish that their group has preserved its tribal status." *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981) (*Washington II*), *cert. denied*, 454 U.S. 1143, 71 L.Ed.2d 294, 102 S. Ct. 1001 (1982). The standard for a modern Indian group seeking to show for the first time that it is the successor to treaty hunting or fishing rights under the Stevens Treaties of the Washington Territory are therefore not in dispute. The person asserting that a tribe has rights as a successor in interest to a signatory tribe bears the burden of demonstrating successorship. *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990). A successor tribe must establish the "actual merger or combination of tribal or political structure." *Id*. It must trace a continuous and defining political or cultural characteristic to the entity that was granted treaty rights." *Id*. at 485.

This burden applies because treaty rights arise from agreements with an Indian tribe acting as a self-governing sovereign over its members. *United States v. Oregon*, 29 F.3d 481, 484 (9th Cir.

1994) (Tribes as they existed at treaty councils were "the entities receiving treaty rights."). Individuals associated with a tribe do not take rights with them if the tribe ceases, and individual descendants cannot reclaim a former tribe's rights because such rights are not personal property of individuals. *Whitefoot v. United States*, 155 Ct. Cl. 127, 293 F.2d 658, 663 (1961). The rights will cease to exist if the people of a tribe assimilate into the general public and there is "abandonment of distinct Indian communities." *Washington*, 641 F.2d at 1373. This rule "is required by the communal nature of tribal rights. To warrant special treatment, tribes must survive as distinct communities." *Id,* (citations omitted). *See generally* Appellant's Brief at 13-24.

Thus, a claim that the modern Snoqualmoo Tribe has treaty rights depends on a showing that it is the same self-governing tribal community from 1855 that has continued to exist as a political entity and community, governing its members, from treaty-time until the present—without gaps. The defendants concede that they must make this showing about the Snoqualmoo tribe, from treaty-time to the present. Bruce Snyder Br. at 6, 13. The record here falls short.[1]

[1] It is undisputed that the Snoqualmoo Tribe is not recognized by the federal government to have governing status over any people or lands. Nothing in any public record suggests otherwise. While federal recognition is not a prerequisite for

2. The Record Does Not Show that the Modern Snoqualmoo Tribe Is the Continually Functioning Political Community that Signed the Treaty or That Has Functioned as a Self-Governing Community Since 1855

The Snyders agree that in *State v. Posenjak*, 127 Wn. App. 41, 111 P.3d 1206 (2005), Division III concluded that the Snoqualmoo lacked proof of successorship. This case should have controlled the RALJ court given the district court decision that the Snyders failed to meet their burden. RALJ 9.1(b), *State v. Basson*, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986). But the Snyders distinguish *Posenjak* by claiming they offered slightly more evidence than *Posenjak*. However *Posenjak* does not set a standard. The showing required for political successorship is described above and in the Appellant's Brief. Doing better than Mr. Posenjak's failed case is not relevant.

The Snyders also contend that *Posenjak* creates different paths if an individual claims his tribe is "direct beneficiaries" versus a successor in interest. *Posenjak* does not imply any such distinction. Rather, every tribe today that exercises treaty rights does so because

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proving continual existence as a tribe for purposes of treaty rights, the absence of any federal recognition of this Snoquamoo Tribe during the 160 years since the treaty can be considered when evaluating whether the Snyders have made an adequate showing of successorship.

they have demonstrated the rigorous standards of continuity set forth by the federal decisions referenced in *Posenjak* and reviewed in the Appellant's Brief at 23-24.

Turning to the Snyders' evidence, they claim this case included a copy of the treaty of Point Elliott in 1855 and the treaty references the "Snoqualmoo." They point to evidence that a Snoqualmoo Indian named "Pat Ka-Nam" was a signer. They argue that Snoqualmoo requires its members to be descendants of Pat Ka-Nam or his brother.

This is insufficient. As shown by the cases rejecting claims by the Snoqualmie, Snohomish, Samish, Duwamish, and Steilacoom, the ancestry of individuals today is insufficient. Appellant's Brief at 19-23. It does not demonstrate anything about the 1855 group or its continued existence as a self-governed Indian community across the decades. *See Washington*, 641 F.2d at 1373 (rejecting claim because "the [tribal] governments have not controlled the lives of the members.). Ancestry and the general fact that there was once a treaty-time tribe cannot meet their burden because there is no evidence tracing that 1855 tribe as a self-governing tribal group that has operated continually since the treaty.

Moreover, the ancestry evidence is not compelling evidence that this group could be fairly considered the Snoqualmoo Tribe—it actually cuts the other way. The historic record shows that "[f]ourteen signers [of the Treaty] were identified as Snoqualmoo." *United States v. Washington,* 476 F.Supp. 1101, 1108 (W.D. Wa. 1979). It is illogical to assume that a large tribe, represented by fourteen men at the treaty council, somehow became a group that is defined solely as descendants of two brothers.

Turning to the present day, the Snyders argue that the modern Snoqualmoo Tribe has a yearly meeting on a regular basis, and that it has a "hunting and fishing coordinator." Bruce Synder's Br. at 4. These facts are insufficient, too. Modern events do not show that this group is the actual political continuation of the tribe that existed in 1855. These modern events show nothing about the 1855 tribe's existence as continually governing and functioning tribe in the 1880s, the 1920s, or anytime over the intervening years.

Finally, the Snyders rely on highly-generalized statements from the chairman of the Snoqualmoo group. For example, he stated that his group has "always lived by the Treaty." Bruce Snyder's Br. at 4. This conclusory assertion does not show how the Snoqualmoo Tribe continually functioned over the years since 1855. It is not

sufficient for this Court to conclude that federal law preempts state sovereign powers over hunting. Similarly, Chairman Sandstrom stated that the modern group follows some traditions for naming and burial, and that members grow a type of potato reputedly from the 1800s. But this is not evidence of a "continuous separate, distinct and cohesive Indian cultural or political community" and does not show a "common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with" the modern Snoqualmoo group. *United States v Washington,* 476 F.Supp. 1101, 1106 (W.D. Wa. 1979) (denying Samish claim of political successorship since most Samish moved to Lummi and Swinomish reservations and maintained no acts of sovereignty). Indeed, if this were sufficient evidence, then every failed claim described in the Appellant's Brief probably would have come out differently.

On review, the State pointed to the RALJ court's statement that it didn't matter that "a tribe didn't exist at a point" (Transcript on RALJ, p. 21, ll 3-5), which the Snyders claim mischaracterizes the court's reasoning. They also correct a quotation regarding how Snoqualmoo "have been reorganized" and are "actively participating as a tribe or a group." They disclaim trial counsel's recognition of the

lack of tribal structure. *See* Trial Transcript, p. 12, ll 22-24. None of this undercuts the State's point: the RALJ court failed to require the showing required of the Snyders, particularly when it concluded that the potato testimony showed an "ongoing persisting characteristic of the tribe." Transcript on RALJ, p. 24, ll 3-7. A cultural link to a potato species does not address the intervening 160 years, and show that the 1855 tribe has lived together as a self-governing, distinct political entity since treaty-time.[2]

Finally, the Snyders have no good answer to the legal rulings about related tribes. For example, the federal court found that treaty-time Snoqualmoo people "settled on the Tulalip Reservation and many of their descendants are members of the Tulalip Tribes" and some "enrolled as members of other Indian reservation communities." *United States v. Washington*, 476 F.Supp. 1101, 1108-9 (W.D. Wa 1979). The courts that evaluated and rejected "Snoqualmie Tribe" treaty claims recognized that it was made up of Snoqualmoo people. These prior legal decisions deeply undermine the Snyders' claim that

[2] This was also a reweighing of the evidence presented at trial in district court. The Superior Court as the RALJ court was to review the decision for errors of law. RALJ 9.1(a). Factual determines were required to be accepted if expressly made or which could be reasonably inferred. RAP 9.1(b). The Superior Court failed to give proper deference to the trial court as the trier of fact and improperly gave a trial de novo on the Snyder factual claim. *State v. Weber*, 159 Wn. App. 779, 786,

the Snoqualmoo Tribe of 2016 is the treaty-time tribe. Given this legal and historic context, the RALJ court should have required a far more detailed showing to find the district court erred in finding the Snyders failed to establish political successorship.

For all these reasons, this Court should hold that the Snyders' legal defense fails. This case involves insufficient evidence of political existence of a treaty-time tribe becoming the recently organized Snoqualmoo Tribe. Given this record, the relevant rule of law is that the descendants of people who "abandon[ed] distinct Indian communities" cannot resurrect treaty rights by forming a new group. *See United States v Washington II,* 641 F.2d at 1173.

3. The Snyders' Misinterpret Case Law Regarding Claims of a Treaty Right

The Snyders argue that in *State v. Courville*, 36 Wn.App. 615, 676 P.2d 1011(1983), a member of a recognized treaty-tribe was allowed to raise a treaty rights as a defense to taking of shellfish, before any court had addressed if shellfish could be taken under the treaty. But in that case, the members were enrolled members of the Muckleshoot Indian tribe who possessed treaty rights. The case does not deal with political successorship, and therefore it offers no support

247 P.3d 782 (2011) *citing* State v. Basson, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986).

for the claim that the modern Snoqualmoo Tribe has treaty rights. At best, it indicates that the Snyders should have a right to offer their legal defense to the application of state law. They have done so.

The Snyders then cite *State v. Posenjak*, supra, and ask this Court to allow the State to continue to prosecute Snoqualmoo members while dismissing charges against the Snyders. Bruce Snyder Br. at 10. This would put an unwieldy burden on the State, law enforcement, and the courts for future prosecution. In any event, that approach is not needed. This Court should instead hold that the legal burden described above applies, the same as for an individual defendant as when a tribal group makes a claim. With a clear explanation of the rigorous showing required, district courts can dispose of unsupportable claims of political successorship. In contrast, if the showing about what is required to preempt state law is left vague, it will invite defendants to violate state law and roll the dice with marginal evidence of political successorship. The trial courts will benefit from a detailed explanation of the showing required under the federal cases and, when that showing is considered it will dispose of the Snyders' defense in this case.

III. CONCLUSION

The RALJ court's error cannot be fixed by claiming a preponderance of evidence supports it. This fails to give proper deference to the district court as the trier of fact finding the evidence supporting the tribal rights was insufficient.

Furthermore, this Court must recognize the defense raised by the Snyders seeks an extraordinary result. The defense claims the State's sovereign power to regulate fish and wildlife is preempted by a federal treaty and by operation of constitutional supremacy where they are not members of a federally recognized tribe with treaty rights. This is not about reviewing evidence of when, where, or how an individual hunted.

As shown above, the well-established federal and state case law set a rigorous bar if a person or group claims that a modern group has treaty rights. That rigorous bar weeds out groups of individuals who claim rights solely on ancestry or cultural affiliation, where the political community from treaty-time has ceased to exist. It ensures that the treaty rights held by the recognized and established treaty-right tribes are not unwittingly diluted by claims based on groups that lack the required continual political existence as a tribe.

Therefore, this Court should reject the claim made by the Snyders. The evidence shows little about the tribe that existed at treaty time, and nothing about how it existed and functioned during all the years since then. As a result, it does not establish political successorship in the modern Snoqualmoo Tribe. The evidence here, like the evidence in so many cases cited in the Appellant's Brief, does not show a distinct, self-governing Indian community.

The RALJ court's decision reversing the district court must be reversed. The district court properly determined the defendant failed to establish his treaty rights.

The convictions must be reinstated.

DATED this 12th day of October, 2016.

Respectfully Submitted,

By: _____
Erik Pedersen, WSBA#20015
Senior Deputy Prosecutor
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 12th day of October, 2016.

Karen R Wallace

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