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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 280799

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

84716-9

STATE OF WASHINGTON, Respondent,

v.

LESTER RAY JIM, Petitioner.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

The State in its response brief fails to persuasively argue that it has criminal jurisdiction to cite the Petitioner in this case under the provisions of P.L. 280 and RCW 37.12.010. Questions regarding whether the Legislature may permit the State to regulate Indian treaty fishing activity within Indian Country cannot be answered without reference to both the savings provisions in P.L. 280 and the broad construction that federal courts have given to the terms within the state statute. Based on these considerations, the Court should conclude that the State does not have jurisdiction under RCW 37.12.010 to regulate Indian treaty fishing activity within the Maryhill Treaty Fishing Access Site ("TFAS"). This includes the fishing activity by the Petitioner in this case, which was conducted under the Yakama Treaty of 1855 at that particular site. The Court should therefore reverse the decision of the court below, and remand for an order affirming the ruling by the trial court dismissing this case for lack of jurisdiction.

II. SUMMARY OF ARGUMENT

The savings clauses in P.L. 280 and RCW 37.12.060 do not merely affirm the right of the State of Washington to regulate Indian treaty fishing in the interest of conservation, as the State suggests. These provisions prevent the State from assuming jurisdiction over Indian treaty fishing within Indian country, of which the Maryhill TFAS is a part. In addition, the State's contention that both the Legislature and the court in *State v. Cooper* intended a narrow interpretation of "established reservation" in RCW 37.12.010 is not supportable under either the state law canons of construction or federal court precedents. The State's dire forecast of an "enforcement vacuum" within the TFAS is similarly unsupported either in the record or the case law, and does not provide a rationale for accepting the State's jurisdictional assumptions. For these reasons, the Court should conclude that the State does not have criminal jurisdiction over the Petitioner in this case.

III. ARGUMENT

A. UNDER 18 U.S.C. § 1162 AND RCW 37.12.060, THE STATE DOES NOT HAVE AUTHORITY TO ASSERT CRIMINAL JURISDICTION OVER INDIAN TREATY FISHING WITHIN INDIAN COUNTRY, INCLUDING THE MARYHILL TREATY FISHING ACCESS SITE

It is well established that under federal common law, any abrogation or diminishment of Indian treaty rights must be expressed clearly and explicitly by Congress. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). In the context of P.L. 280, it is quite clear that Congress did not intend the statute to have any effect on Indian treaty fishing hunting, or the regulation thereof. *Id.*, 391 U.S. at 411, 88 S.Ct. at 1710; 18 U.S.C. § 1162(b). However, contrary to the State's contentions, this does not mean that P.L. 280 simply preserves federal case law regarding state regulation of Indian treaty fishing. The State's position ignores the geographical component that is the very heart of the issue in this case. Virtually all of the federal court cases regarding the State's authority to regulate Columbia River Indian treaty fishing have been decided in the context of fishing activities at "usual and accustomed places" that are outside of

Indian country. See *Tulee v. State of Washington*, 315 U.S. 681, 683, 62 S.Ct. 862, 864, 86 L.Ed. 1115, 1120 (1942); *Sohappy v. Smith*, 302 F.Supp. 899, 907-908 (D.Or. 1969). Conversely, pursuant to RCW 37.12.010 the State has assumed jurisdiction to enforce its criminal laws over large areas inside Indian country, including fee lands within Indian reservations. See, e.g., *State v. Flett*, 40 Wash.App. 277, 283, 699 P.2d 774 (1985). This includes efforts to enforce state fishing laws against non-treaty Indians within their executive order reservations. *State v. Cayenne*, 165 Wn.2d 10, 14, 195 P.3d 521 (2008). However, the facts of the case before the Court have shown that the State is now attempting to establish a very different toehold within Indian country – enforcing state laws against treaty Indian fishing at Treaty Fishing Access Sites.

This new assertion of P.L. 280 jurisdiction by the State has potential effects on Yakama treaty rights that go far beyond the Maryhill TFAS, and which Congress has expressly forbidden in the authorizing statute. An example illustrates the possible impacts to Yakama fishing. Under the Treaty of 1855, the Yakama Nation reserved the exclusive right to fish within

the Yakama Reservation. Treaty of Walla Walla (June 9, 1855), Article III, 12 Stat. 951. In 1963, the same year that the Legislature enacted the statute that is now codified at RCW 37.12.010, the Washington Attorney General issued an opinion concluding that the Article III language preempted all state regulation of fisheries within the Yakama Reservation, including fishing by non-Indians. AGO 63-64, No. 32 (June 16, 1963) at 1. Although this opinion is legally correct, it clearly clashes with the position the State is taking in this case, which is that the Washington Department of Fish and Wildlife (“WDFW”) can enter any portion of Indian country that is not trust land or an allotment and regulate Indian treaty fishing. If the Court concludes that the State has authority to do this under RCW 37.12.010, it would be a short step to also conclude that WDFW may enter fee lands within the Yakama (or any) Reservation and begin enforcing state fishing laws against Yakama enrolled members.

However, Congress has explicitly stated its intention that P.L. 280 does not “deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded

under federal treaty” with respect to fishing. 18 U.S.C. § 1162(b). The Legislature also included a similar provision in the state statute implementing P.L. 280. RCW 37.12.060. A number of courts have persuasively held that the savings provision in P.L. 280 prohibits state regulation of fishing within Indian reservations. See *Quechan Tribe of Indians v. Rowe*, 350 F.Supp. 106, 109 (S.D.Cal. 1972); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980). Also, significantly for purposes of this case, the U.S. Supreme Court has held that the same clause prohibits state regulation of treaty fishing within Indian country outside of any established reservation. *Menominee Tribe*, 391 U.S. at 411, 88 S.Ct. at 1710 (State of Wisconsin has no jurisdiction to regulate tribal treaty fishing even after termination of reservation).

As the Petitioner pointed out in his opening brief, the Yakama Nation normally has exclusive jurisdiction to regulate treaty fishing by its enrolled members wherever they may be conducting that activity. *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974). The State for its part has never previously

assumed any jurisdiction over Indian treaty fishing within an Indian reservation. *Tulee*, 315 U.S. at 683 (“The state does not claim power to regulate fishing by the Indians in their own reservations”). Although the State may regulate treaty fishing in the interest of conservation, there is a geographical limitation on its authority that Congress clearly contemplated in its enactment of P.L. 280 (and which the Washington Legislature recognized as well). The very fact that treaty fishing was singled out for exclusion by the federal statute is a legislative acknowledgement, even in 1953, of the special role that Indian treaties play in ensuring that states do not interfere with tribal authority.

As a result, the State’s argument that the savings clause has no effect on its assertion of criminal jurisdiction in this case is without merit, and enforcement of state law within any TFAS is preempted by federal law. The State therefore has no jurisdictional authority under either federal or state law to cite the Petitioner for state fishing violations at the Maryhill Treaty Fishing Access Site.

B. THE MARYHILL TREATY ACCESS FISHING SITE IS WITHIN AN “ESTABLISHED RESERVATION,” AND THE LEGISLATURE INTENDED THAT FEDERALLY OWNED INDIAN LANDS BE EXCLUDED FROM STATE JURISDICTION

Despite the Washington Supreme Court’s decision in *State v. Sohapp*, the State attempts to argue that the Maryhill Treaty Fishing Access Site is not an “established reservation” as the Legislature understood that term when it enacted RCW 37.12.010. This position ignores the principle that the legislature is presumed to know the federal common law definition of “reservation,” which the court in *State v. Cooper* correctly concluded is not the same as “Indian country.” Based on weak authority, the State also argues that the Legislature intended to create a very narrow and precise exception to P.L. 280 criminal jurisdiction that would not include federally owned TFAS. However, applying the narrow interpretation requested by the State would produce results that are not reasonable and which interfere with federal/tribal authority. Although the State claims that without WDFW control over the TFAS there would be an “enforcement gap” with the implicit specter of lawlessness, it provides no evidence

that tribal and federal enforcement is not adequate to regulate Yakama treaty fishing.

1. The Maryhill TFAS is within an “established reservation” as that term is understood under federal law and the intent of the Legislature

The canons of construction of state statutes are well known to this Court and should be applied to its interpretation of RCW 37.12.010. Under these canons, the Legislature is presumed to be familiar with judicial interpretations of statutes, including those enacted by Congress. *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610, 619 (2000). Courts may resort to the common law for definitions of terms not defined by statute. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007, 1010 (2009). When a statute has been construed by the highest court of the state, that construction is as much a part of the statute as if it were originally written into it. *State v. Regan*, 97 Wn.2d 47, 51-52, 640 P.2d 725, 727 (1982).

When examined in light of these principles, the State’s crabbed interpretation of RCW 37.12.010 is not persuasive and should be rejected by the Court. Because the Legislature has

not defined “established reservation” in the statute, state courts should look to federal court decisions defining that term, and that is exactly what the Supreme Court has done in *State v. Sohappy*. Although the federal decisions that *Sohappy* uses in its analysis involved whether certain Indian lands were “Indian country” for purposes of federal criminal jurisdiction, the court focuses on the definition of “reservation” because the term has no legal reference point under state law – it is a concept rooted only in federal law. *State v. Sohappy*, 110 Wn.2d 907, 910-911, 757 P.2d 509, 511 (1988); *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986). Federal decisions from almost a century ago were clear that the term embraces not only those aboriginal lands reserved by treaty or executive order, but also lands “set apart as an Indian reservation out of the public domain, and not previously occupied by Indians.” *Donnelly v. United States*, 228 U.S. 243, 268-269, 33 S.Ct. 449, 457-458, 57 L.Ed. 820 (1913); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914). In fact, one of the decisions relied upon by *State v. Sohappy* involved essentially the same type of

Congressionally authorized purchase of lands for exclusive Indian use that was the origin of the Treaty Fishing Access Sites. *United States v. John*, 437 U.S. 644-646, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); Pub. L. No. 100-581, § 401(a), 102 Stat. 2944 (1988). Contrary to what the State implies in its brief, there was never any formally designated “Choctaw Indian Reservation” at issue in *John* – the definition of “reservation” under federal law is broad enough to include those lands “set apart for the exclusive use” of Indians; the Legislature is presumed to have understood this at the time it enacted Chapter 36 in 1963, fifty years after *Donnelly* and *Pelican*. See *John*, 437 at 649 (“There is no apparent reason why these lands, which had been purchased in previous years for the aid of these Indians, did not become a ‘reservation’”); *Donnelly*, 228 U.S. at 268-269.

Although the State has argued that federal law “is not helpful” in determining whether the Maryhill site is a reservation, the State’s reliance on *State v. Cooper* for this proposition is misplaced because the facts are obviously distinguishable. *State v. Cooper*, 130 Wn.2d 770, 778, 928

P.2d 406, 410 (1996). The court correctly recognized in *Cooper* that the terms “Indian country” and “reservation” are not the same thing, and although the trust land in that case was indeed Indian country, it was geographically not within the Nooksack Reservation (which was proclaimed by the Secretary of the Interior in 1973). *Id.*, 130 Wn.2d at 775. Importantly, the *Cooper* allotment was not established by Congress in the same fashion as either the in-lieu site in *State v. Sohappy* or the TFAS in the case of the Petitioner before the Court. The State’s insistence that the *Sohappy* cases are not controlling is therefore not persuasive.

2. The Legislature intended a broad reading of RCW 37.12.010 that encompasses all lands owned by the United States for the benefit of Indians including TFAS, and law enforcement at the Maryhill site may be accomplished through tribal and federal courts

The State argues that “the Washington Legislature intended to create a limited rather than a broadly applied exception to state jurisdiction.” State’s Response Brief at 34. Because the Maryhill site “was not acquired under federal legislation designating it as tribal trust land” and “is not a restricted Indian allotment,” the State goes on to conclude that

it has full criminal jurisdiction over the TFAS. *Id.* at 25. This argument assumes far too much regarding the legislative intent and therefore must fail.

The only evidence that the State cites for determining the Legislature's intent is the U.S. Supreme Court case holding that, *inter alia*, the partial criminal jurisdiction assumed under RCW 37.12.010 was not a violation of the Equal Protection Clause of the U.S. Constitution. State's Response Brief at 27; *Washington, et. al. v. Confederated Tribes and Bands of the Yakima Indian Nation*, 439 U.S. 463, 502, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). In the *Yakima* case the court held that the State's interest in limiting its geographical jurisdiction was "providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing for tribal self-government on trust or restricted lands." *Yakima Indian Nation*, 439 U.S. at 502. The issue of a possible Equal Protection violation was prompted by the checkerboard nature of the Yakama Reservation, which has both tribal and federal lands as well as significant non-Indian fee ownership. *Id.* The court held that "the land tenure classification made by the State

is neither an irrational nor an arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power.” *Id.*

Based on this constitutionally valid intent, the fact that the Maryhill TFAS is neither formally designated as “held in trust” nor as a “restricted allotment” is a distinction without a difference. A reading that produces absurd results should be avoided, if possible, because there is a presumption that the Legislature does not intend them. *Engel*, 166 Wn.2d at 579. Applying this canon of construction, the Legislature would not have intended that the State have criminal jurisdiction over an area where the federal government has ownership of lands for the purpose of treaty fishing, over which the Yakama Nation and other tribes have “the greatest interest in being free of state police power.” *Yakima Indian Nation*, 439 U.S. at 502; *Settler*, 507 F.2d at 237. Congress intended that the TFAS be owned by the United States for exclusive benefit of the Yakamas and three other tribes, and for all intents and purposes that is a “trust” even though there is no explicit statutory directive for such status. Pub. L. No. 100-581, § 401. All of the necessary

elements of a common-law trust are present: a trustee (the United States), a beneficiary (the four Columbia River treaty tribes), and a trust corpus (treaty Indian fishing sites, *i.e.*, “trust property”). See *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). The U.S. Supreme Court has expressed this principle as follows:

Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorization or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. (citing *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

In a situation as here, where the “reservation” is a federally owned fishing site where only Indians are permitted access under federal law, any state criminal jurisdiction over Indian activity would be an intrusion upon federal and tribal jurisdiction that the Legislature could not possibly have intended when it enacted RCW 37.12.010. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (“P.L. 280 specifically confirms the power

of tribes to regulate on-reservation hunting and fishing”); *Settler*, 507 F.2d at 237. If the State is claiming that the purpose of the statute is to affirm the ability of tribes to govern themselves on their own lands within reservations, then the Court should interpret the legislature’s intent broadly to include the Treaty Fishing Access Site at issue in this case.

Although the State claims that there will be an “enforcement gap” at the Maryhill and other TFAS if the WDFW and other state law enforcement do not have criminal jurisdiction, the State provides no evidence that tribal and federal enforcement would be inadequate, and there is none in the record in the trial court below. State’s Response Brief at 26-27. Tribal members are subject to the laws of the Indian tribes in which they are enrolled as well as federal laws and regulations. 25 CFR § 247.5(a) (“You may not use any of the sites for any activity that is contrary to the provisions of your tribe or contrary to federal law or regulation”). The State also claims that non-tribal members may be allowed at the sites, but even if they are present they are subject to prosecution in federal court. 25 CFR § 247.3(b); 18 U.S.C. § 1165; see *United*

States v. Pollmann, 364 F.Supp. 995 (D.Mont. 1973). The State's warning of a jurisdictional "vacuum" is therefore not supportable either factually or legally.

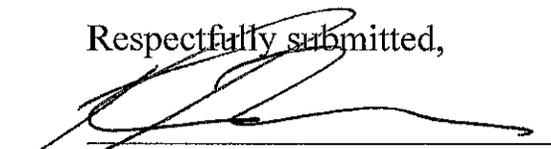
The State's reliance on a very narrow interpretation of a federal Indian law concept such as "tribal lands held in trust" does not comport with the federal case law interpretation, and should therefore be rejected as following the intent of the Legislature. In addition, the State's assertions that there will be a complete lack of law enforcement at the Maryhill TFAS absent state jurisdiction are without merit.

IV. CONCLUSION

The Court should reverse the decision of the court below and remand the case for an order affirming the trial court's decision dismissing the citation.

DATED this 9th day of February, 2010.

Respectfully submitted,



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